

# Intersex/ction in sport: a game of tensions

## 1. At the intersection

The social and political landscape has changed over the past decades and the strict division of boys and girls, men and women is being called into question, on account of EU-Directives (e.g. Directive 2004/113) and (inter)national legislation on gender equality and inclusion. A growing number of institutions and organisations promote and embrace the gender mix, accepting that gender diversity has positive effects on (team) performance processes, and helps people build more meaningful relationships too, which contributes to their wellbeing and quality of life.

The daily practice of the Gender Chamber of the Vlaamse Ombudsdienst (Flemish Ombud service), equality body for gender and sex, on the other hand observes that many organisations struggle to move beyond the binary<sup>1</sup>. Whether one is seeking identity documents, looking for a school uniform or even a toilet, the categorisation of bodies according to “sex” remains central, even if this society has made fundamental shifts regarding who is deemed a man and who is deemed a woman.

Participation in sport and its associated administrative procedures, even down to locker room regulations, are based on the same binary classification that runs deep through society. In earlier days, it was easy to divide sport by sex. People who were raised as women competed as women, and those raised as men, competed as men. But the more science was obtained, and the more competitive (and remunerative) sport became, the more questions arose as to who was considered a ‘real’ man or woman and what was deemed fair in competition terms. A quest for a single and definitive indicator of sex ensued. The social reality of human bodies and minds makes this a tough game.

Equality bodies like the Gender Chamber are today consulted by individual athletes, federations and clubs, seeking advice on how to battle discrimination, and reconcile inclusion with the binary division they know (all too) well. In particular, the voices of those that have remained silent so far are being heard and amplified: the sports players with trans and intersex backgrounds, bystanders or sporting opponents, as well other stakeholders, that want to bridge the gap between the

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<sup>1</sup> Annual Report Vlaamse Ombudsdienst 2020, “Genderkamer: 5 jaar wind in de zeilen” *Parl. St. Vla.* 2020-2021, nr. 41/1-A, 15; Annual Report Vlaamse Ombudsdienst 2019, “De blik vooruit”, *Parl. St. Vla.* 2019-2020, nr. 41/1, 45-46. (in Dutch)

individual and the context and request help in building an all-embracing yet fair policy in the binary world of sport<sup>2</sup>.

In what follows, the Vlaamse Ombudsdienst will shed its light on the questions put forward by the Court. The Ombud service's work operates at the intersection and engages with the current social woes as much as it engages with the individual, and draws on academic knowledge of gender and sex as well as disability, mixed with field experience.

## 2. When two becomes more: questioning of the legal binary norm

Sex as only comprising two categories, men and women, is reflected in the law and in its application by the courts. In cases of potential sex discrimination, courts seek comparators in the opposite group. The comparator for discrimination of women is found in men and vice versa<sup>3</sup>. For example, in labour law, sex equality refers among other qualifiers to equal pay for men and women<sup>4</sup>.

This notion of sex is further substantiated in legislation and by courts by adding more characteristics that are unique to one of the sexes. This Court has for example stated that “*only women can be treated differently on grounds of pregnancy, and for this reason, such a difference in treatment will amount to direct discrimination on grounds of sex if it is not justified*”.<sup>5</sup> (Biological) motherhood is named as another of those additions to the concept sex<sup>6</sup>. The notion of sex may thus be understood to include a number of traits or characteristics specific to one of the sexes.

This understanding suits a majority of the population, but the combination with more refined, more nuanced concepts leads to a better (legal) representation of people for whom this approach does not entirely fit. Growing attention for the gender spectrum, a notion referring to the social attributes of being a man or a woman, has seeped into law at the national level of many member states as well as in the case law of the courts. For the EU this is for example apparent in Recital 3 of the Recast Directive (2006/54/EC) providing that the Directive also applies to discrimination arising from ‘gender reassignment’<sup>7</sup>. Transsexuality<sup>8</sup> and gender identity are also protected under this Convention<sup>9</sup>.

Moreover, there is growing attention for people with bodies that biologically do not conform to typical notions of male and female (such as intersex persons) or persons who don't see themselves belonging to one of the presumed categories (such as non-binary people). In a decision on the so-called transgender law on gender registration, The Belgian Constitutional Court paid special attention to gender-fluid and gender non-binary people and found that “*La circonstance que la*

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<sup>2</sup> A. D'ESPALLIER, *Gender en sport: hink-stap-sprong naar een inclusief beleid*, Vlaamse Ombudsdienst 2019, 91p. (in Dutch)

<sup>3</sup> D. SCHIEK, L. WADDINGTON and M. BELL, *Non-discrimination law – Cases, materials and texts*, Oxford, Hart Publishing, 2007, 214-220.

<sup>4</sup> CJEU, *Defrenne v. Sabena*, 1976, §7-12.

<sup>5</sup> ECtHR, *Jurčić v. Croatia*, 2021, § 69: The Court observes that only women can be treated differently on grounds of pregnancy, and for this reason, such a difference in treatment will amount to direct discrimination on grounds of sex if it is not justified.

<sup>6</sup> ECtHR, *Alexandru Enache v. Romania*, 2017, § 77.

<sup>7</sup> A codification of the CJEU's jurisprudence in the case of *P v S and Cornwall County Council*, 1996, § 20.

<sup>8</sup> ECtHR, *P.V. v. France*, 2010, § 30.

<sup>9</sup> ECtHR, *Identoba and Others v. Georgia*, 2015.

*Constitution accorde, à travers ses articles 10, alinéa 3, et 11bis, une importance particulière à l'égalité des hommes et des femmes n'implique pas que les catégories « homme » ou « femme » puissent être considérées comme un principe de base de l'ordre constitutionnel belge et n'empêche pas davantage de prendre des mesures visant à lutter contre des différences de traitement fondées sur une identité de genre non-binaire*".<sup>10</sup> The German Constitutional Court had previously already rejected the binary understanding of (biological) sex . It held that people who identify neither as male nor female are particularly vulnerable in a society predominantly vested in a binary pattern of male and female<sup>11</sup>. The Court found no reason to interpret the notion 'Geschlecht' (sex) restrictively, thus deciding that protection against discrimination on the basis of sex also extends to those who do not fall into one of the two predetermined categories<sup>12</sup>.

The result of these evolutions is a multidimensional and complex combined concept of sex and gender. In the carefully formulated words of Advocate-General Tesauro: "[...] *it is necessary to go beyond the traditional classification and recognize that, in addition to the man/woman dichotomy, there is a range of characteristics, behaviour and roles shared by men and women, so that sex itself ought rather to be thought of as a continuum.*"<sup>13</sup>

If what we know of sex is its multiplicity, this introduces a conundrum: which factors to use in categorising and defining sex? Policy makers who formulate sex categorisations and definitions overwhelmingly rely on biological features to ground membership. But biological definitions of sex are at odds with the understanding that sex involves multiple biological and social factors. They are also at odds with social scientific work that complicates the idea that sex is biological whereas gender is cultural<sup>14</sup>.

### 3. Rethinking intersex

Amidst the changing concepts of gender and sex, intersex is mostly marked by a lack of knowledge and understanding<sup>15</sup>. Intersex bodies are bodies having a blend of male-typical and female-typical traits. Intersex is an umbrella term that encompasses a number of medically recognized conditions that result from natural and inborn variations of sex characteristics, such as sex chromosomes, sex hormones and/or (internal or external) sex anatomy. In the medical field, these conditions are also referred to as Differences of Sex Development (DSD). Sometimes these variations are clear at birth, while others only surface later in life for example during puberty or when faced with fertility challenges.

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<sup>10</sup> Belgian Constitutional Court, no. 99/2019, § B.6.6.

<sup>11</sup> H. BOTHA, "Beyond Sexual Binaries? The German federal Constitutional Court and the Rights of Intersex People", *PER/PELJ* 2018, Vol. 21, 1-26.

<sup>12</sup> BVerfG 2019/16, judgement 10 October 2017, § 59-60.

<sup>13</sup> Opinion of A.G. Tesauro, C-13/94, CJEU *P. v. S. and Cornwall County Council*, 1995.

<sup>14</sup> K. KARKAZIS, "The misuses of 'biological sex'", *The Lancet- Perspectives | The Art of Medicine*, 2019, Vol. 394, no. 10212, 1898-1899.

<sup>15</sup> A. ABOULAFIA, "Just what the doctor ordered?: an analysis of unnecessary surgeries on intersex children from a human rights perspective", *University of Florida Journal of Law & Public Policy* 2019, Vol. 30, (321) 322-326.

The predominant view, even documented in the case law of this Court, has long been that intersex characteristics are anomalies for example in chromosomes<sup>16</sup>, rather than natural and healthy variations. This perspective may introduce an idea of inadequacy and abnormality, leaving the person in need of ‘curing’ and ‘fixing’, and thereby placing people with intersex conditions at great(er) risk of discrimination<sup>17</sup>. Medical labels have been shown to have profound influences on the lived experiences of intersex people and have led to often unnecessary, coerced or even forced surgery and hormonal treatment, especially in very young children who are unable to consent. Medical interventions and the mere suggestion of them, aimed at ‘normalising’ the deviant intersex body<sup>18</sup> and fitting it into the traditional dichotomy, can sometimes cause lifelong mental or physical damage<sup>19</sup>. It is this most egregious human rights violation concerning dignity, physical and mental integrity that shows the distinct vulnerability of this group.

For a long time, the law remained rather silent on the topic, but recent initiatives have emerged that acknowledge, respect, protect and fulfil the human rights of intersex individuals<sup>20</sup>. The encompassing theme is rightly that intersex individuals may be at risk of discrimination and other human rights violations because they do not fit societal norms or medical definitions of what makes a person typically male or female. Initiatives hold that the law must not create or perpetuate barriers to equality for these individuals<sup>21</sup>. Instead the law should protect them and their right to equality. A small but growing number of countries recognizes intersex persons and their inherent human rights. Malta is a prime example<sup>22</sup>. Furthermore, a recent Resolution of the Council of Europe calls on the member states to either adopt new legislation explicitly introducing sex characteristics as a protected characteristic in all anti-discrimination legislation or to raise awareness that the existing protection also extends to intersex, for example where the protected characteristic ‘sex’ is used<sup>23</sup>. The path of jurisprudence has sometimes also ushered in evolution. Already in 1999 the Constitutional Court of Columbia issued decisions establishing significant human rights protection for intersex individuals<sup>24</sup>. It upheld the rights of intersex children to grow up without medically unnecessary cosmetic surgeries on their intimate area.

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<sup>16</sup> ECtHR, *Christine Goodwin v. the United Kingdom*, 2002, § 82, in which the Court holds: “It is known however that chromosomal anomalies may arise naturally (for example, in cases of intersex conditions where the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual case.”

<sup>17</sup> J. HUNTE, “Housing intersex juvenile offenders”, *Cardozo J. Law & Gender* 2017, Vol. 23, (527) 533-534.

<sup>18</sup> A. ABOULAFIA, “Just what the doctor ordered?: an analysis of unnecessary surgeries on intersex children from a human rights perspective”, *University of Florida Journal of Law & Public Policy* 2019, Vol. 30, (321) 324-326.

<sup>19</sup> G. DAVIS, *Contesting Intersex: The Dubious Diagnosis*, New York, New York University Press, 2015, 240p.

<sup>20</sup> F. GARLAND and M. TRAVIS, “Legislating intersex equality: building the resilience of intersex people through the law”, *Legal Studies* 2018, Vol. 38, 587-606.

<sup>21</sup> Resolution 12 October 2017, Parliamentary Assembly, Council of Europe, no. 2191 (2017), “Promoting the human rights of and eliminating discrimination against intersex people”.

<sup>22</sup> F. GARLAND and M. TRAVIS, “Legislating intersex equality: building the resilience of intersex people through the law”, *Legal Studies* 2018, Vol. 38; (587) 589-593; A. ABOULAFIA, “Just what the doctor ordered?: an analysis of unnecessary surgeries on intersex children from a human rights perspective”, *University of Florida Journal of Law & Public Policy* 2019, Vol. 30, (321) 326-328.

<sup>23</sup> Resolution 12 October 2017, Parliamentary Assembly, Council of Europe, no. 2191 (2017), “Promoting the human rights of and eliminating discrimination against intersex people”, § 7.4.

<sup>24</sup> S. Larson, “Intersexuality and gender verification tests: the need to assure human rights and privacy”, *Pace In'l Law Rec.* 2011, vol. 23, (215) 228.

## 4. More than a game

### A. Sport unites, sport divides

Sport unites people in teams, in clubs, in its benefits for physical and mental health, and in the desire to excel. Sport aims at broad inclusion in order to extend the benefits to as many as possible. The Olympic Charter states: *“The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.”*<sup>25</sup> A Council of Europe Resolution dating back to 1976 proclaims: *“Every individual shall have the right to participate in sport. Sport shall be encouraged as an important factor in human development.”*<sup>26</sup>

But sport also divides. For example, sport sometimes divides people into weight categories for reasons of safety and fairness or, particularly with young people, on the basis of age. The greatest divider in sport is probably sex. With a few exceptions, sex as a classifier runs through each level of practice and almost all disciplines. Even in mixed-sex events, teams consist of a predetermined number of men and a predetermined number of women. This classifier is tightly held on to in sport, as shown in the EU-Directive on equal access to goods and services. It makes explicit mention of the possibility to organise single-sex sporting events<sup>27</sup> after concerns among the negotiating parties<sup>28</sup>.

There are numerous reasons for this categorisation. There is of course the fact that women’s sport, especially professional sport, emerged much later<sup>29</sup>. The more weighty reason and undoubtedly legitimate aim behind today’s categorisation can be found in the desire to build a safe and fair sporting environment in which competition is based on equal opportunities for each of the participating athletes. Because men in general have biological traits that are advantageous over women in sports such as size, speed, strength, lung capacity and bone density, they would in many sporting disciplines disturb the level playing field if allowed to compete in one single category<sup>30</sup>. In some disciplines their participation in an open category could entail a safety risk, mostly for other participants. Interestingly, it is exactly this protection of the level playing field, aimed at safety and at securing sporting success for women that is now the centre of attention for interfering with the rights of a minority.

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<sup>25</sup> Olympic Charter 2020, Fundamental Principle no. 4.

<sup>26</sup> Art. 1 and 2 Resolution 24 September 1976, Committee of Ministers, Council of Europe, no. (76)41 on the Principles for a Policy of Sport for All.

<sup>27</sup> Recital 16 Directive 2004/113.

<sup>28</sup> S.L. CAVANAUGH and H. SYKES, “Transsexual bodies at the Olympics: The International Olympic Committee’s policy on transsexual athletes at the 2004 Athens summer Games”, *Body and Society* 2006, Vol. 12, ed. 3, (75) 89.

<sup>29</sup> J.V. SINISI, “Gender non-conformity as a foundation for sex discrimination: why Title IX may be an appropriate remedy for the NCAA’s transgender student-athletes”, *Villanova Sports & Ent. Law Journal*, 2012, vol. 19, (343) 346.

<sup>30</sup> Already in 1979, it was held by the Supreme Court of Massachusetts that sport performance does not only hinge on these abilities, but also on balance, stability, the ability to retain heat, buoyancy, endurance levels and low injury rates, all of which seem to give women and edge over men. The Supreme Court of Massachusetts added that the division into categories, based purely on sex without taking account of any other factors, was in reality archaic: Supreme Court of Massachusetts, *Attorney General vs. Massachusetts Interscholastic Athletic Association*, 1979, 393 NE2d 284.

## **B. Eligibility criteria not mere administrative rules**

Eligibility criteria determine if and into which sex category an athlete is allowed to participate and they are built on a binary, biological understanding of sex. Strikingly, history shows an evolution in the proxy used to determine eligibility on the basis of sex. Visual (genital) inspections were used until they were proven insufficient and not accurate enough. These were replaced by Y-chromosome tests until these too were considered dissatisfying. Today testosterone levels are used as distinguishing element.

Sometimes these eligibility rules are dismissed as administrative rules, unrelated to human rights. However, they are the gateway to the world of sport. They determine whether professional athletes can measure themselves against other competitors, whether they can pursue their passion and practice their profession, and thus also whether they can earn an income. Moreover, the application of eligibility criteria in top level sports also has an impact on the amateur sporting world<sup>31</sup> with clubs and federations looking for guidance on a topic as controversial as this one. By ricochet they even have an impact at the individual level on young persons who identify with elite athletes acting as a role model. They are therefore most certainly more than mere administrative rules.

## **C. Top level sport caught in the binary**

The biologically inspired and binary eligibility rules in sport contrast with the multidimensionality of sex and gender, both and also together on a continuum, as described above. The rules are sometimes said to target individuals standing out for a uniqueness that is not dissimilar to the unique traits of other top level athletes such as long arms, long legs or excellent oxygen transport characteristics, or even coming from a privileged background giving them a potential advantage. Appealing as this line of thinking may be, it is not quite in accordance with reality since there is no categorisation on the basis of arm length or oxygen consumption. In sports, there is however a categorisation aimed at protecting a fair and meaningful competition that divides into two groups on the basis of sex, especially in strengths and power-based sports. It is undisputed that various aspects related to sex have an impact on performance in sport, but also that no elite athlete's body can be called fully "typical" in a statistical sense, otherwise it wouldn't be able to excel.

The more important question is whether it remains acceptable to use this definition of biological sex in sport while in a considerable number of other domains in society and also more and more in the (human rights) law, this definition seems to have been abandoned and replaced by a more nuanced and more inclusive definition. This is particularly important now that it appears that there is an - albeit small - group that is disadvantaged by the use of this biological approach.

These eligibility rules are not blind to individuals who do not completely conform to the two biologically inspired categories. Instead they contain provisions on how individuals with an intersex background and hyperandrogenism - androgen levels, including testosterone, closer to or in what is considered the male-typical range - may have to adapt to fit into the binary, by hormone-reducing treatments. This is another example of persons with an intersex condition being nudged, perhaps forced towards interference with the natural state of the body.

The common remedy for some intersex athletes who wish to compete as female, is taking a daily pharmacological oral contraceptive, like many non-intersex women. It has been shown that some

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<sup>31</sup> Cfr. ECtHR *National Federation of Sportspersons' Associations and Unions (FNASS) and others v. France*, 2018, § 176.

female athletes already manipulate their hormones through birth control pills, to ensure that they are at the most advantageous part of the menstrual cycle when they compete<sup>32</sup>. Other intersex women who wish to continue elite sport in the female category may feel compelled or coerced to opt for a more radical solution through a gonadectomy -- an operation in which testosterone producing gonads are removed – without the guarantee that this will lead to eligibility. Neither of these treatment options are necessary from a health perspective. It does however translate in a considerable impact on the athletes' daily lives and wellbeing, more so for athletes suffering from side effects of or even intolerance for hormonal treatment<sup>33</sup>. These rules may thus place individuals with variations in sex characteristics - a normal variation in humankind - in a situation where they must or feel they must sacrifice - among other things - their right to be free of medical intervention, their right to be acknowledged as non-defect and thus at least a piece of their dignity<sup>34</sup>. Moreover, meaningful informed consent, as required by basic rights and medical ethics, cannot be obtained under the circumstances of an athlete facing the end of her sports career, should she not comply with the regulations.

It is worth noting that men who naturally make extraordinarily high levels of testosterone are allowed to participate without question. Additionally, the World Anti-Doping Agency allows men who can prove they have naturally low levels of testosterone to take testosterone supplementation without considering it doping. Hence, unlimited testosterone seems an advantage only men get to enjoy, while a natural advantage for women is considered unfair<sup>35</sup>.

Female athletes with hyperandrogenism who decide against medical intervention, may turn to another (sub)discipline with other eligibility rules. If this is not their preferred discipline, this will have an impact on their performance levels. The athlete could also opt for withdrawal from international competition and return to a lower level of competition. This (self-)exclusion from the international level would be a direct result of the eligibility rules and results in an interference with the athlete's right to compete and for some with the possibility of earning an income. Furthermore, many national federations follow the international standards which could mean that competition at a national or lower level is not possible either. Finally, the only remaining option will sometimes be absolute exclusion from all levels of competition on the basis of the intersex condition.

The mechanisms aimed at detecting breaches of fair play and thus also detecting persons with a possible competitive advantage due to a intersex background, are triggered when the athlete stands out, sometimes because of their performance(s), sometimes because of their appearance. The latter is tied to subjective and cultural expectations regarding which bodies and modes of gender expression are appropriate even valorised by adherence to traditional or normative aesthetics of femininity. As such, the bodily fact of higher testosterone levels is mediated through culturally-coded ideas about gender expression and gender stereotypes<sup>36</sup>. Moreover, this mechanism seems to perpetuate the perception of intersex characteristics as abnormal and not natural, and may lead to further stigmatisation. Finally, it falsely reduces success in sport for these athletes to their intersex background, whereas there is a large number of other factors that are at

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<sup>32</sup> M. OXFELDT, L.B. DALGAARD, A.A. JØRGENSEN and M. HANSEN, "Hormonal Contraceptive Use, Menstrual Dysfunctions, and Self-Reported Side Effects in Elite Athletes in Denmark", *Int. J. Sports Physiol. Perform.* 2020, Vol. 15, no. 10, 1377-1384.

<sup>33</sup> As indeed acknowledged by CAS, no. 2018/O/5794 Semenya v. IAAF and CAS 2018/O/5798, Athletics South Africa v. IAAF, 18 June 2019.

<sup>34</sup> H. BOTHA, "Beyond Sexual Binaries? The German federal Constitutional Court and the Rights of Intersex People", *PER/PELJ* 2018, Vol. 21, 1-26.

<sup>35</sup> A. DREGER, "Track's Absurd New Rules for Women", *New York Times*, 27 April 27 2018.

<sup>36</sup> K. KARKAZIS and M. CARPENTER, "Impossible Choices: The Inherent Harms of Regulating Women's Testosterone in Sport", *Bioethical Inquiry* 2018, 15, 579-587.

least as important or even more important in winning a competition, such as training, other forms of aptitude, commitment, perseverance etc<sup>37</sup>.

These mechanisms also raise serious privacy issues<sup>38</sup>. Verification and medical tests and a possible subsequent withdrawal from competition put the athlete in the spotlight because of a characteristic of which the person was sometimes unaware until then (e.g. chromosome variations)<sup>39</sup>. The process and the information imparted can serve both to pathologize and calls into question a lifelong legal and social identity. Regulations that discourage and sanction breaches of privacy in principle do not seem to be able to actually prevent this. It is clear that this infringement on rights does not occur in respect of athletes who are not flagged for suspicion of variations in sex characteristics.

As demonstrated here above, eligibility criteria are not mere administrative rules floating in a vacuum in the world of sport. They have a real impact on the rights and freedoms of persons with intersex variations. It is for the Court to assess whether these rights are outweighed by the need to protect others' rights to fair competition, or to maintain the public order. The Flemish equality body will present some other considerations below.

#### ***D. Ombudsman to the rescue?***

In case of conflict, athletes may be referred to an ombud service (médiateur) for additional clarification of the rules in force. Ombudsmen (or -women, or -persons)/ ombud services are a valuable complaint-handling mechanism, a meaningful way to address injustice through an accessible, free of charge and rather informal procedure, often leading to tailor-made solutions where needed. Ombudsmen are however not by themselves a substitute for the regular paths to justice<sup>40</sup>. Their main instrument is mediation and there is no hard decision-making power. In their complaint-handling, they will sometimes find that the opposed rules apply in full to the individuals with complaints. They will then help clarify these rules. In other cases, they will negotiate leeway, for example when a rule does not envisage all, or when a rule is in breach of for example a human right. Ombudsmen that can only explain and help comprehend the rules can be relevant, but not in the sense that they are a valuable addition, let alone alternative in relation to access to justice.

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<sup>37</sup> S.M. CRINCOLI, "You can only race if you can't win", *Texas Review of Entertainment and Sports Law* 2011, Vol. 12, ed. 2, (133) 180-185.

<sup>38</sup> S. LARSON, "Intersexuality and gender verification tests: the need to assure human rights and privacy", *Pace In'l Law Rec.* 2011, vol. 23, (215) 240-245.

<sup>39</sup> S. LARSON, "Intersexuality and gender verification tests: the need to assure human rights and privacy", *Pace In'l Law Rec.* 2011, vol. 23, (215) 234.

<sup>40</sup> Standards and best practices documented and illustrated by: EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), "Principles on the protection and promotion of the ombudsman institution (the Venice Principles)", March 2019, Opinion No. 897 / 2017.



## 5. Towards a better representation and more inclusion

People with an intersex background challenge the binary classification in sports. As a result, some are in favour of abandoning the categorisation on the basis of sex immediately<sup>41</sup>. Some would like to exchange it for a completely new classification but this time based on values that are less ambiguous and more measurable. Categories could for example be based purely on hormone levels, weight or height<sup>42</sup>.

Even if testosterone continues to play its central role in sport as the closest proxy to determine the borders of each of the sex categories, there are still more inclusive ways to proceed. A counter-intuitive way to reconcile the different rights in the balance would be to raise the testosterone threshold for everyone. This could perhaps blur the distinction with athletes who have naturally elevated (endogenous) levels of testosterone, such as women with PCOS, and athletes with even higher levels, in particular those within the targeted intersex population. It goes without explaining that this could be a breach of another intrinsic value in sport, namely health in sport and the ensuing doping regulations on (exogenous) testosterone levels and is thus not the best way forward.

Creating a third category may seem an attractive option for some. In itself, this distinguishes the majority of athletes who will continue to compete on the binary basis of sex. In addition, a third category could be created for anyone who does not meet the eligibility criteria for the M or F category, including those who do not wish to give insight into their sex characteristics or physical background. Studies show that the addition of an open category X in relation to official gender and sex registration is not an intersex issue<sup>43</sup>. People with intersex conditions usually identify as male or female and adding a third category would thus not be a fitting solution, even in sport. Moreover and more compelling even, it would perpetuate a narrow understanding of sex, in which the sporting world already stands somewhat alone. Finally, it makes intersex individuals even more identifiable and therefore in no way meets privacy concerns. On the contrary, such would potentially expose these individuals to (even more) discrimination.

A more comprehensive way would be to introduce gender mainstreaming and thereby eliminate the binary whenever possible<sup>44</sup>. This would be a useful approach for sporting disciplines that are not largely connected to biological advantages or disadvantages related to sex<sup>45</sup>, or sport disciplines where advantages and disadvantages balance each other out in the end. Equestrian sport proves that gender mainstreaming has great potential.

Inspiration can also be found in and around disability-specific sport. An important difference with the current theme is the popularity and success of the segregated sport opportunities for persons with disabilities, even given the emphasis of the Convention on the Rights of Persons with Disabilities on encouraging and promoting participation in mainstream sporting activities at all

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<sup>41</sup> For example: S. INGLE, "Why calls for athletes to compete as a homogenised group should be resisted", *The Guardian* 10 December 2018.

<sup>42</sup> C.J. ARCHIBALD, "Transgender and intersex sports rights", *Virginia Journal of Social Policy & the Law* 2019, Vol. 26, (246) 249.

<sup>43</sup> F. GARLAND and M. TRAVIS, "Legislating intersex equality: building the resilience of intersex people through the law", *Legal Studies* 2018, Vol. 38; (587) 596.

<sup>44</sup> C.J. ARCHIBALD, "Transgender and intersex sports rights", *Virginia Journal of Social Policy & the Law* 2019, Vol. 26, (246) 265-267.

<sup>45</sup> On the role of testosterone in women's athletics: PH. SÖNKSEN, L.D. BAVINGTON, T. BOEHNING, D. COWAN, N. GUHA, R. HOLT, K. KARKAZIS, M.A. FERGUSON-SMITH, J. MIRCETIC and D. BÖHNING, "Hyperandrogenism controversy in elite women's sport: an examination and critique of recent evidence.", *Br. J. Sports Med.* 2018, Vol. 52, no. 23, 1481-1482.

levels<sup>46</sup>. But like persons with an intersex background, individuals with disabilities challenge the definition of typicality. They too have long been considered to be in need of ‘normalisation’ until more recently a more in depth human rights approach has led to the acknowledgement that it is society that needs adaptation.

One of the challenges for this specific sport setting is exactly creating that level playing field, and preventing an unfair and predictable competition in which the least impaired athlete always wins. For that reason, grouping athletes on the basis of ability is the cornerstone of disability-specific sport. It is undeniably true that that classification sometimes leads to extensive discussion on the correct interpretation of abilities and handicaps and their effect on performance levels.

A small group of world athletes with disabilities participates or has participated in mainstream competition even at an international or Olympic level. It is well possible that some of these athletes participate without ever actually being noticed, for example after gene therapy<sup>47</sup>. But of course they are particularly noted when they use a technical aid as a reasonable accommodation for their disability, for example leg prostheses<sup>48</sup>.

The rules applied to these athletes too can be criticised, for example for placing an excessively high administrative burden on individual athletes who are different<sup>49</sup> or for the financial burden on athletes with disabilities who need to go through the process of proving eligibility<sup>50</sup>. Eligibility of athletes with technical aids often raises discussions, for example, as to whether such aids might give an unfair advantage comparable to doping or mechanical doping. These discussions never really provide a fertile ground for sporting performances and just like the discussions on intersex, these too circle around the uniqueness of individuals who are in no need for adaptation to the standard of persons without (known) disability. This is far from ideal as these are disadvantages that these athletes suffer because of their background, whereas other athletes without this uniqueness will not be hindered by any such controversy.

In order to address the privacy, and discrimination concerns raised above, preference should clearly go to a baseline assumption of presumptive eligibility, thereby preventing all atypical athletes from having to go through lengthy and expensive procedures proving their eligibility and proving that their background is in itself not an unfair advantage<sup>51</sup>. What the approach in disability cases proves however, is that there is room for uniqueness and that it is indeed possible to approach individuals with specific characteristics - where needed - in a case-by-case-manner instead of applying a uniform (testosterone) standard to a larger group, especially when this standard could lead to nudging or forcing athletes into unnecessary and potentially harmful treatment. There is no reason why such cannot be organised for the small group of persons with an intersex background<sup>52</sup>.

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<sup>46</sup> Art. 30 Convention on the Rights of Persons with Disabilities, 2006.

<sup>47</sup> B.H. Moses, “Eligibility of athletes receiving necessary gene therapy: The Oscar Pistorius case as a procedural precedent”, *Jurimetrics* 2009, vol. 49, (343) 368-373.

<sup>48</sup> S.J. WILD, “On equal footing: Does accommodating athletes with disabilities destroy the competitive playing field or level it”, *Pepperdine Law Review* 2010, vol. 37, (1347) 1379-1382.

<sup>49</sup> S.M. CRINCOLI, “You can only race if you can’t win”, *Texas Review of Entertainment and Sports Law* 2011, Vol. 12, ed. 2, (133) 181-187.

<sup>50</sup> A. CHAPPELL, “Running down a dream: Oscar Pistorius, prosthetic devices and the unknown future of athletes with disabilities in the Olympic Games”, *North Carolina Journal of Law and Technology* 2008, vol. 10, ed. 1, (16) 21.

<sup>51</sup> S.M. CRINCOLI, “You can only race if you can’t win”, *Texas Review of Entertainment and Sports Law* 2011, Vol. 12, ed. 2, (133) 184-187.

<sup>52</sup> S. LARSON, “Intersexuality and gender verification tests: the need to assure human rights and privacy”, *Pace In’l Law Rec.* 2011, vol. 23, (215) 242.