

GENDER, ATHLETES'  
RIGHTS, AND THE COURT  
OF ARBITRATION FOR  
SPORT

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# GENDER, ATHLETES' RIGHTS, AND THE COURT OF ARBITRATION FOR SPORT

BY

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## ACKNOWLEDGEMENTS

Thanks to social media, a Twitter post several years ago first drew my attention to the potential shortcomings of the Court of Arbitration for Sport (CAS). Following up on comments praising CAS decisions, this post raised a key question: has justice been sacrificed in the interests of speed and efficiency? And so, when my colleague Stephen Wagg invited me to contribute to the *Journal of Criminological Research Policy and Practice* special issue on sport, crime and deviance, I started researching sport exceptionalism, sports law, and CAS. I soon discovered that these topics warranted deeper investigation, resulting in this book. Coincidentally, around the same time, Stephen Wagg and Philippa Grand, Publisher and Head of Social Sciences, Emerald Group Publishing had been discussing a possible book series on gender and sport. I now have the privilege of editing this series, together with a team of accomplished sport scholars, and I am delighted that this volume is the first publication in the series.

Conversations about these issues, online and/or in person, with colleagues and friends Daryl Adair, Janaka Biyanwila, Andrew Byrnes, Nikki Dryden, Janice Forsyth, Kevin Lindgren, Jason Mazanov, Stephen Wagg, Kristen Worley, and many others were invaluable, as were the comments from anonymous reviewers. I am also grateful to the small but growing number of legal scholars, sports lawyers, sociologists, historians, and scientists who have critically examined

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# LIST OF ABBREVIATIONS

ABP	Athlete Biological Passport
ADR	Alternate Dispute Resolution
AHD	Ad Hoc Division
AIS	androgen insensitivity syndrome
AOC	Australian Olympic Committee
ASADA	Australian Sports Anti-Doping Authority
BOA	British Olympic Association
CAS	Court of Arbitration for Sport
CCES	Canadian Centre for Ethics in Sport
DSD	disorders of sexual development
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
FEI	Fédération Equestre Internationale (equestrian)
FIFA	Fédération Internationale de Football Association
FIG	Fédération Internationale de Gymnastique
FINA	Fédération Internationale de Natation (swimming)
FIS	Fédération Internationale de Ski
FISA	International Rowing Federation
FIVB	Fédération International de Volleyball
HRTO	Human Rights Tribunal of Ontario

IAAF	International Association of Athletics Federations
ICAS	International Council of Arbitration for Sport
ICF	International Canoe Federation
IF	international federation
IOC	International Olympic Committee
IPC	International Paralympic Committee
ISLJ	International Sports Law Centre
ISU	International Skating Union
ITA	Independent Testing Authority
IWF	International Weightlifting Federation
JADCO	Jamaica Anti-Doping Commission
NADO	National Anti-Doping Organizations (Institute of)
NOC	National Olympic Committee
OCA	Ontario Cycling Association
OHA	Ontario Hockey Association
PCOS	polycystic ovary syndrome
PILA	Private International Law Act
ROC	Russian Olympic Committee
RUSADA	Russian Anti-Doping Agency
SFT	Swiss Federal Tribunal
SGB	sports governing body
TAS	Tribunal Arbitral du Sport
T/E	testosterone/epitestosterone ratio
TUE	therapeutic use exemption
UCI	Union Cycliste Internationale
UEFA	Union of European Football Associations
UKAD	United Kingdom Anti-Doping

UN	United Nations
USOC	United States Olympic Committee
VANOC	Vancouver Organizing Committee
WADA	World Anti-Doping Agency
WPA	World Players Association

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# INTRODUCTION

As an activist on gender and sport issues since the early 1980s, I had my first brush with ‘the law’ in 1986 when I participated as an expert witness in the case of Justine Blainey, a 12-year-old ice hockey player in Toronto, Canada. Blainey had tried out for a boys’ team and had qualified, but was barred because the Ontario (men’s) Hockey Association (OHA) prohibited girls from playing with boys. The Ontario Women’s Hockey Association also objected, predicting that mixed gender teams would signify the end of girls’ hockey as we know it. Unfortunately for Blainey, the 1981 Ontario Human Rights Code did not protect the rights of female athletes; Section 19.2 specifically exempted sport/gender complaints.

The legal battles began at the Divisional Court of Ontario, which ruled against Blainey, but in 1986 the Ontario Court of Appeal struck down Section 19.2 on the grounds that it contravened the Canadian Charter of Rights and Freedoms. OHA persevered in an unsuccessful appeal to the Supreme Court of Canada, and, in 1987, the Ontario Human Rights Commission ruled that OHA and Blainey’s club had violated the (revised) Code (Vella, 1989). Despite these changes, the

last 30 years have seen repeated incidents of discrimination of this kind, mostly involving young female players at the local level. Since 1983, athletes have had access to a specialized sport 'court' that promised to resolve disputes efficiently and fairly. The extent to which the Court of Arbitration for Sport (CAS) has achieved its goal, particularly in cases involving women and members of ethnic minorities, is the subject of this book.

### 1.1. THE COURT OF ARBITRATION FOR SPORT

The history and functions of CAS have attracted a considerable volume of discussion and debate in law literature, in contrast to the relatively low level of attention these topics have received in sport history, philosophy, or sociology research. There are two important exceptions to this trend – doping and gender testing – which have been the topics of extensive study and critique across the social sciences, exercise sciences, legal studies, and medical science.

In view of the growth of interdisciplinary studies in the academy and the research community since the 1970s, the relative dearth of critique of 'sports law' outside of legal studies is somewhat surprising. Critical scholars do not generally avoid questions of law. For decades, researchers from a range of academic disciplines who focus on gender, sexualities, disability, culture, and 'race'/ethnicity have been tackling legal issues as they apply to the rights and experiences of disadvantaged individuals and groups. Additionally, in western universities, there is a long history of sociologists, social psychologists, historians, and philosophers who are public intellectuals. These scholars collaborate with activists on social justice issues, work that necessarily involves critical analysis of jurisprudence, legislation and law enforcement. 'Sport' and

'law' are socially constructed, and historically and culturally specific, thereby making the concept of 'sports law' a particularly important focus for critical examination.

There are two basic and often unquestioned assumptions that appear in some form or another in most defenses for sports law and a specialized 'sport court': sport is 'big business' and sport is a 'social good.' 'Business' connotes profit – hence the question: who profits? Similarly, on the question of social impacts, who benefits? These are among the basic issues that I address in this book as a sociologist and feminist scholar, but not, I emphasize, as a legal scholar.

Citing the 'big business' argument, a 2013 commentator noted that sport comprised 'more than 3% of world trade and 3.7% of the combined gross national product of the twenty-eight member states of the European Union, comprising some 505 million people' (Blackshaw, 2013, p. 61). However, with the notable exception of football (soccer), which represents almost half of CAS's published cases, many athletes who bring disputes to CAS play sports that contribute little to world trade or GNPs, and the really 'big business' that is American professional sport is outside CAS's jurisdiction. In fact, a case could be made for renaming CAS the 'Court of Arbitration for Football,' and allowing other sport disputes, except for time-sensitive situations occurring at the Olympic Games, to proceed to domestic courts. Regarding the 'big business' rationale, it seems unlikely that any other multinational corporation would be permitted to bypass traditional courts and to choose 'user-friendly and flexible' procedures simply to meet its *special* needs. Yet as the following discussion demonstrates, proponents of sport exceptionalism have successfully promoted the idea that sport's self-regulation and internal dispute resolution procedures are eminently sensible and justified.

## 1.2. SPORTS LAW: GLOBAL IMPACTS

In my sport-related research and advocacy work since 1980, the focus has mostly been on the 'big picture' – that is, the intersecting impacts of gender, class, 'race'/ethnicity and sexualities on sport and physical activity. It may appear, then, that a narrow focus on the experiences and rights of a relatively small number of high performance athletes should not be my top priority. However, in this book, I will demonstrate that what happens at the highest level of sport has impacts throughout the system. As Mitten and Opie (2012, p. 208) explained in their discussion of evolving sports law, 'the combination of extensive media coverage and strong public interest in sport provides enormous power to convey educational messages to diverse global audiences.' While I continue to identify flaws in 'role model' rhetoric, as I did in my 2012 publication *Gender Politics and the Olympic Industry* and elsewhere, there is no doubt that high performance sport and celebrity athletes have a significant influence, both positive and negative, on children and youth. Mainstream and social media coverage routinely convey idealistic rhetoric aimed at young people – 'follow your dreams... you can be anything you want to be' – but these inspirational messages need to be balanced with realistic warnings that an athlete's life in the fast lane may well prove 'nasty, brutish and short,' as many victims of 'sports law' have experienced.

The consequences of athletes' alleged cheating, misconduct or doping tend to attract as much media attention as their sporting achievements, whether or not these men and women have received fair and just treatment at the hands of sports disciplinary bodies. In fact, with a few recent exceptions – Maria Sharapova and the Russian athletes implicated in doping, for example – CAS itself makes relatively rare appearances in media headlines, but the impacts of CAS



decisions shape the lives and livelihoods of countless numbers of aspiring athletes.

An examination of media and public reaction to controversial CAS cases clearly shows how gender, ‘race’/ethnicity and other social factors intersect to shape the outcomes: who is demonized? Who gets a second chance? Who is labeled a drug cheat? How do racism and misogyny interact? Which women are disqualified for appearing ‘not woman enough’? Which men are excused on the grounds that ‘boys will be boys’? Which ‘experts’ are consulted? Whose voices are silenced? These are among the many ‘big picture’ issues that I will investigate.

One of the most prolific legal commentators on the topic of CAS is Canadian law professor Richard McLaren, who, in 2016 and 2017, conducted extensive investigations into Russian doping. McLaren has been a CAS arbitrator since 1994, a relevant fact that is generally acknowledged in his own publications but not always noted by authors who cite his work (McLaren, 1998, 2001a, 2001b, 2001c, 2010). Most commentators follow the scholarly convention of disclosing their own personal involvement in CAS cases when contributing to academic journals, and, as in other areas of sports studies, male authors greatly outnumber female. Current or former CAS members who have contributed to the largely positive image of CAS in law literature include Jack Anderson (2000), Michael Beloff (2012), Ian Blackshaw (2003, 2006, 2007), Stefan Netzle (1992), Jan Paulsson (2016), and John Wendt (2012). Similarly, experienced sports lawyers who have represented parties in CAS proceedings have added important commentaries to the law literature, with some taking a more critical stance, including Mark Mangan (2009), Louise Reilly (2012), Antonio Rigozzi, Marjolaine Viret, and Emily Wisnosky (Rigozzi, 2010; Rigozzi, Viret & Wisnosky, 2013, WADC, 2017a, 2017b).

None of these trends are surprising or inappropriate, since arbitrators and sports lawyers would probably not continue their association with CAS if they seriously questioned its underlying premise or its judicial functions. Some of the most incisive critiques of CAS come from relative 'outsiders,' most notably legal scholars, including, among many others, Andrew Byrnes (2016), Antoine Duval (2015, 2016), Hilary Findlay (2013), Ken Foster (2005), and David McArdle (2011, 2013, 2015).

### 1.3. METHODOLOGY

In terms of primary sources, I have consulted the decisions of CAS and the Swiss Federal Tribunal (SFT), as well as those of other courts, arbitration and disciplinary panels, for the period 1986–2018, with a focus on those cases in which gender and/or 'race'/ethnicity played a part, whether directly or indirectly. Official Olympic industry sources include publications of the IOC, CAS, International Association of Athletics Federations (IAAF), and World Anti-Doping Agency (WADA). Comprehensive reviews of relevant publications in social sciences, medical research, and law literature are presented. Additionally, analyses of mainstream media treatment of controversial topics, most notably doping, demonstrate how public opinion is influenced by such accounts, including those that perpetuate racist and sexist biases.

The lengthy list of online references indicates one of the benefits of the internet for researchers. Most were accessed in the period February 1, 2017 to February 9, 2018. Since July 2016, the topics of state-sponsored doping in Russia, suspensions of Russian athletes, and their subsequent appeals to CAS have dominated global attention, and will no doubt continue to generate a significant body of research and

commentary in sports law and sports studies. Hunter and Shannon (2017) present a comprehensive review of these developments up to March 2017. Chapters 3 and 4 include discussion of the Russian controversies, including decisions rendered by CAS up to February 9, 2018.

Although many aspects of the CAS website, including earlier versions of the CAS Code, *TAS/CAS Bulletins*, and media releases are informative and comprehensive, its search engine is not always user-friendly. It is possible to identify some general trends by examining the details of decisions published at [jurisprudence.tas-cas.org](http://jurisprudence.tas-cas.org), but these online sources are incomplete because parties have the option of requesting confidentiality. An approximate estimate of the number of confidential decisions can be made by comparing the published decisions to the totals provided on the website under the heading *Statistiques/Statistics* (TAS-CAS, 2016b), and a recent detailed examination found that published CAS awards have, for decades, averaged below 30% of the total (Spera, 2017). As well as confirming the popular sentiment of keeping sport disputes ‘within the family,’ the large percentage of unpublished awards prevents any accurate quantitative analysis. In light of this deficit, I have prefaced my observations about trends by noting that I am commenting on published decisions only. In some instances, it appears that sports lawyers and legal scholars have had access to unpublished awards, and, where relevant, I have referred to unpublished cases mentioned in secondary sources. Similarly, some SFT decisions are published only in German, and again I relied on commentaries rather than original documents. In selecting specific CAS and SFT awards to examine in greater detail, I have been guided in part by experienced legal commentators who have identified these cases as significant.

Appeals involving men’s professional football account for close to half of published CAS decisions, and, although there

are important issues related to male players' nationalities and ethnicities, my current focus on gender required that I establish some limits to the scope of this research. For this reason, I have excluded most football cases, although some key decisions involving FIFA are included. Similarly, I have not examined the controversial 2016 Essendon case, which involved doping charges against 34 Australian Football League (AFL) players. The AFL tribunal had found the players not guilty, but WADA appealed their decision to CAS, which then imposed two-year suspensions. A number of issues in this case, including intent, due diligence, circumstantial evidence, jurisdiction, and the AFL's compulsory contractual powers have been examined in detail by other commentators (see, for example, Adair, 2016; Kanagaratnam, 2016).

The following discussion encompasses a period of approximately 35 years of Olympic industry and CAS history, with the endpoint for my research being February 9, 2018, the first day of the 2018 PyeongChang Winter Olympics. For the most part, the book is organized thematically rather than chronologically in order to focus on specific issues and controversies. In Part I, analyses of general trends in alternative dispute resolution (ADR) and debates over arbitration versus litigation serve to situate CAS in the broader international context. This section critiques historical and contemporary developments in sports law, the influence of sport exceptionalism as a guiding principle, the chronic problems of 'stacked decks' and 'repeat parties' in CAS disputes, and the impacts of gender in all these areas. Numerous examples of cases heard by CAS and the Swiss Federal Tribunal are analyzed in these chapters. Part II focuses on 'the war against doping' and the strict liability principle, as well as investigating the impacts of gender and 'race'/ethnicity on the outcomes of doping-related appeals. Issues of gender policing and gender variance are examined, with detailed critiques of medical

research and media commentary concerning hyperandrogenism and the so-called ‘testosterone advantage.’ CAS decisions on matters of doping and discipline are examined. Throughout these discussions, I analyze how ‘role model’ rhetoric and ‘level playing field’ rationales are employed to justify draconian punishments imposed on athletes, whose basic human rights are often violated in the name of ‘clean sport.’