

Foucault, justice, and athletes with prosthetics: the 2008 CAS Arbitration Report on Oscar Pistorius

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Abstract The participation of Oscar Pistorius in the 2012 London Olympic Games served as a significant milestone for the inclusion of disabled athletes in major international athletics. An account of the struggle by Pistorius to compete in international competition is presented by the 2008 CAS Arbitration Report released by the CAS arbitration panel that ultimately ruled for his eligibility. Superficially, the Arbitration Report reads as an account of a correction in procedural error, with the CAS Arbitration Panel working to correct the decision of an IAAF hearing that the CAS Arbitration Panel critiqued as lacking transparency and going “off the rails.” This paper, however, goes beyond a superficial reading of the Arbitration Report and instead engages a deeper analysis by applying the theories of Michel Foucault to identify what the report reveals about the nature of justice under the CAS for athletes with prosthetics in international sport.

Keywords Postmodernism · Foucault · Disabled athlete · Sport · Justice · Arbitration

1 Introduction

The participation of Oscar Pistorius in the 2012 London Olympic Games served as a significant milestone for the inclusion of disabled athletes in major international athletics. This achievement, however, was not assured. Pistorius had previously been denied eligibility to compete against able-

bodied athletes by a hearing in 2008 before the International Association of Athletics Federations (“IAAF”) (CAS 2008). Pistorius became eligible only after pursuing a subsequent appeal with the Commission of Arbitration for Sport (“CAS”) that overruled the IAAF decision and decided in his favor (Court of Arbitration for Sport (CAS) 2008).

An account of the struggle by Pistorius to compete in international competition is presented by the CAS Arbitration Report (“Arbitration Report”) released by the CAS arbitration panel that ultimately ruled for his eligibility (“CAS Arbitration Panel”). The report traces the series of events that rendered Pistorius able to participate in international sports events against able-bodied athletes (Court of Arbitration for Sport (CAS) 2008). It identifies the nature of the IAAF proceedings against him, the manner of his appeal to the CAS, and the reasoning behind the CAS Arbitration Panel decision in his case.

Superficially, the Arbitration Report reads as an account of a correction in procedural error, with the CAS Arbitration Panel working to correct the decision of an IAAF hearing that the CAS Arbitration Panel critiqued as lacking transparency and going “off the rails” (Court of Arbitration for Sport (CAS) 2008: 7). As such the Arbitration Report serves as a dry recitation of the arbitration’s reasoning.

This paper, however, goes beyond a superficial reading of the Arbitration Report and instead engages a deeper analysis by applying the theories of Michel Foucault to identify what the report reveals about the nature of justice under the CAS for athletes with prosthetics in international sport. A Foucauldian perspective interprets the report as a revelation of power relationships and the expression of power in those relationships. As a result, justice in the arbitration was not just a matter of procedure but a reflection of underlying power relationships that redirected the outcome in favor of Pistorius.

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The objective of this paper was to employ the theories of Michel Foucault to gather descriptive insights into the nature of the CAS Arbitration for Pistorius and from such insights find prescriptive observations about the factors affecting outcomes of future cases of other athletes facing situations analogous to Pistorius under IAAF-sanctioned sports events. This paper proceeds in sections, beginning with the Sect. 1 introducing the CAS Arbitration Report released by the CAS Arbitration Panel that presents their ruling in the Pistorius-IAAF appeal, Sect. 2 distinguishing this analysis from previous studies on the Pistorius-IAAF dispute over his leg prosthetics, and Sect. 3 constructing a Foucauldian theoretical framework for application in the analysis conducted in the subsequent sections. Sections 4 and 5 apply the Foucauldian theoretical framework from Sect. 3 to, respectively, analyze the initial IAAF hearing on Pistorius' leg prosthetics and the following appellate CAS Arbitration that overruled the IAAF. Section 6 discusses the importance of Foucauldian analysis by drawing upon the descriptive analysis in the previous sections to generate prescriptive insights with cautionary import about the nature of justice in international sport for other athletes with prosthetics, followed by a conclusion that summarizes this paper. The paper refers to the contributions of previous applications of Foucault to sport and social issues (see for example Chapman 1997; Cole et al. 2004; Johns and Johns 2000; Markula 2003; Markula 2004) and sports governance (see for example Molnar and Kelly 2013; Smith Maguire 2002; Shogan and Ford 2000).

It should be noted that while the subsequent events in 2013 of the South African criminal justice system against Pistorius have served to overshadow the earlier controversy over his prosthetics, the proceedings of the CAS Arbitration over his eligibility are still relevant for other athletes with prosthetics seeking to participate in international sports events. This paper does not address the 2013 South African state's prosecution of Pistorius in the death of Reeva Steenkamp, since it is unrelated to the 2008 CAS Arbitration decision on the eligibility of his prosthetics in international competition. This paper focuses exclusively on the question of prosthetics in international sport, with the CAS arbitration of Pistorius being a case study allowing extrapolation to other athletes with prosthetics. This paper sees a Foucauldian reading of the CAS Arbitration as helpful in revealing the nature of justice for athletes with prosthetics and highlighting issues to be addressed in improving their prospects for competition in future international events like the Olympics.

2 CAS Arbitration Report

The CAS Arbitration Report contains the findings of the Arbitration Panel in the dispute between the IAAF and

Pistorius. The CAS, while non-legal in the sense that it operates independent of the legal system of individual states, is legal to the extent that states cede authority over a number of international track and field competitions to the IAAF and the IAAF recognizes the CAS as the forum for appeals from IAAF decisions (Court of Arbitration for Sport (CAS) 2008; IAAF 2013). Hence, an analysis of the CAS Arbitration Report represents a reading of a CAS action in international sports law, suggesting that insights generated from analysis of the report have implications for the nature of justice in international sports.

The report essentially details two stages in the dispute between the IAAF and Pistorius. In the initial stage, the IAAF conducted a scientific evaluation of Pistorius and his prosthetics and using the scientific findings ruled that Pistorius was ineligible for IAAF-sanctioned international competition. In the second stage, the CAS took an appeal from Pistorius and overruled the IAAF decision by finding that his leg prosthetics did not violate IAAF rules, effectively restoring his eligibility in time for South Africa's 2008 Olympic trials (Wild 2012; Zettler 2009). In detailing these two proceedings, the CAS Arbitration Report presents the issues, facts, and reasoning exercised by the Arbitration Panel with respect to the IAAF's initial hearing as well as the evidence and arguments of both sides in the appeal.

The distinction between the initial IAAF evaluation of Pistorius and the subsequent CAS Arbitration findings are of particular concern in this analysis. This paper will demonstrate how such differences between the two highlight not just a contrast in outcomes but also a contrast in the nature of their respective processes. In particular, in the following sections this paper will present how Foucauldian analysis reveals the ways in which changes in the network of relationships between the parties altered the nature of discourse among them and directed justice towards a different outcome.

3 Studies of Oscar Pistorius

A previous study exists of Oscar Pistorius as an exemplar of disabled athletes in international sport. Composed by Moss Norman and Fiona Moola, the study takes a critical studies-based analysis of Pistorius. Applying a sociological approach driven by neo-Marxist social model theory, they find Pistorius to be a reflection of normative discourses regarding able and disabled athletes and call for a "radical cyborg politics" to change the boundaries between ability and disability in sport (Norman and Moola 2011).

This paper, however, differs from Norman and Moola's work by using the theories of Michel Foucault to analyze the legal discourses between Pistorius, the IAAF, and the

CAS. Norman and Moola, perhaps in keeping with the Marxist underpinnings of social model theory, did not employ Foucault's theories regarding discourses and power. Consistent with neo-Marxism, Norman and Moola's analysis revolves around a binary politics between abled versus disabled athletics. Foucault distanced himself from neo-Marxist approaches, finding them reductionist in their concern for large-scale social change and dichotomous conceptions of struggle, and advocated instead for a more pluralist outlook on power relations that focused on "micro-politics" that exist between individuals and groups within networks of social interaction (Best and Kellner 1991: 49, 56–57). Following Foucault, this paper looks to target the micro-politics that occurred in the legal discourses determining Pistorius' eligibility for Olympic competition within IAAF deliberations and the appeals hearing under CAS Arbitration. This is encompassed within the CAS Arbitration Report and involves Pistorius, the IAAF, the respective scientists used as expert testimony by both, and the CAS Arbitration Panel.

A focus on the legal discourses could be construed as calling for a juridical analysis. Foucault, however, criticized juridical modes of study as being focused on simplistic readings of power as a function of law, rights, and a political sovereign. He saw this as susceptible to the same critiques he leveled against Marxism, in that he saw both as being essentializing in promoting structuralist accounts of power between large-scale social forces (Best and Kellner 1991: 48–49). Foucault distanced himself from neo-Marxist and juridical macro-political approaches by adopting a more pluralistic and decentralized perspective, with power situated in the micro-politics of relationships involving individuals independent of a sovereign state (Best and Kellner 1991: 56–57).

In studying micro-politics, Foucault seemed to distance himself from structuralist/post-structuralist debates over the tensions between the constraining structure of relationships versus the empowering agency of individuals, choosing instead to conceive of power relations as being a capillary-like network between individuals whose discourse shaped their epistemes, or perspectives of reality (Best and Kellner 1991: 44, 48–54; Markula and Pringle 2006: 36–38). Each individual in the network is not passive, but instead has the capacity to be "points of resistance" (Markula and Pringle 2006: 36; Foucault 1978: 95). This makes Foucauldian micro-politics not only just about power in domination but also power in resistance, with power relations embedded in social networks exhibiting pluralistic discourses between different entities struggling to control reality.

In applying Foucault, this analysis follows Pirkko Markula and Richard Pringle's superb work on fitness programs entitled *Foucault, Sport, and Exercise* (Markula

and Pringle 2006). In their study, Markula and Pringle generate a Foucauldian method of analysis and apply it to analyze the discourses over bodies and identities associated with societal fitness programs (Markula and Pringle 2006). This paper in the next section adapts Markula and Pringle's method to study Pistorius and extrapolate insights for disabled athletes, specifically targeting the discourses between Pistorius, the IAAF, and the CAS over his leg prosthetics that determined his status to compete in international competition.

4 Foucauldian analysis

Following Markula and Pringle's method, this study draws from their application of Foucault's concepts of archaeology, genealogy, technologies of domination, technologies of the self, and micro-politics of power relations in discourse over the body. As presented by Markula and Pringle, Foucault's perception of power is that it is constituted by the interactions between actors embedded in networks of relationships. Within these relationships, Foucault describes power in terms of "technologies of power" and the "technologies of self." "Technologies of power" (labeled by Markula and Pringle as "technologies of domination") subject individuals to processes of objectification involving measurement and placement in categories that define and control their identities (Foucault 1988: 18; Markula and Pringle 2006: 24–26 and 38). "Technologies of the self" allow individuals to adjust their own identities, enabling them to counter technologies of power and thereby making them less subject to control (Foucault 1988: 19).

To study the power relations between athletes and fitness programs, Markula and Pringle focus on the micro-politics played between technologies of power and technologies of the self through the application of Foucault's notions of "archaeology" and "genealogy" (Markula and Pringle 2006: 54). "Archaeology" reveals how the structure and rules of discourse form knowledge (Markula and Pringle 2006: 52–54). For Foucault, the purpose of archaeology is to show "...how the prohibitions, exclusion, limitations, values, freedoms, and transgressions...all its manifestations, verbal or otherwise, are linked to a particular discursive practice" (Foucault 1972: 193). Archaeology commences with identification of the objects that are the sources of a discourse (Markula and Pringle 2006). This is followed by a revelation of the enunciations of concepts and theories within the discourse (Foucault 1972), which Foucault sees as being prescribed by practices of exclusion and limitation that control the production of concepts and theories constituting knowledge (Markula and Pringle 2006). "Genealogy," in contrast,

examines “how knowledge turns into a form of practising power” (Markula and Pringle 2006: 59). Genealogy describes the micropolitics in terms of “discourse politics” to define norms and “bio-politics” to control a subject’s body (Best and Kellner 1991: 57; Markula and Pringle 2006: 30).

In the case of the Pistorius, this study draws upon the framework developed by Markula and Pringle to employ a Foucauldian analysis of the IAAF and CAS decisions over Pistorius’ eligibility to compete against able-bodied athletes in international competition. In the next sections this study engages a Foucauldian reading of the CAS Arbitration Report and applies Foucault’s archaeology and genealogy to highlight the interplay of technologies of power and technologies of the self exercised between the IAAF, the CAS, and Pistorius. This study then uses such insights to identify why the IAAF ruled Pistorius ineligible while the CAS Arbitration found him eligible.

5 The IAAF hearing

This section identifies the archaeology and genealogy associated with the IAAF’s decision in January 2008 that rendered Pistorius ineligible for competition in international sports against able-bodied athletes. The power dynamic that made Pistorius subject to the power of the IAAF resulted from the organization’s status as a governing body for international track and field, making it a source for international sports law for events like the 400-m race run by Pistorius (Nafziger 1988; Siekman and Soek 1998; Zettler 2009). While the IAAF is composed of member national organizations governing track and field respective to 212 countries, IAAF rules override any conflicting member rules (International Association of Athletics Federations (IAAF) 2013). In addition, even while the International Olympic Committee retains Olympic rules for track and field, it has rarely overruled the IAAF (Charlish and Riley 2007). Furthermore, with respect to track and field athletes like Pistorius who use prosthetics, the IAAF is outside international law on disabilities since it is subject to the laws of Monaco, which has not ratified the international Convention on the Rights of Persons with Disabilities (United Nations 2013). As a result, the IAAF exists as a central authority for track and field and so requires that athletes like Pistorius subject themselves to it to participate in international competition.

The IAAF decision to bar Pistorius from international competition turned on whether his leg prosthetics, relative to athletes who ran without them, constituted an “advantage” in violation of a 2007 amendment to IAAF rules known as Rule 144.2(e), which reads:

“For the Purposes of this Rule, the following shall be considered assistance, and are therefore not allowed...(e) Use of any technical device that incorporates springs, wheels, or any other element that provides the user with an advantage over another athlete not using such a device” (Court of Arbitration for Sport (CAS) 2008: 1).

To determine the existence of an “advantage,” the IAAF utilized a science team from Cologne, Germany, led by Dr. Peter Bruggemann (“Cologne team”) which acted under IAAF instructions to study Pistorius and his leg prosthetics in relation to other track athletes. Referencing the Cologne team’s findings, the IAAF issued its decision that found the prosthetics used by Pistorius provided him with an “advantage” over athletes who ran without them.

Foucault views such use of science with suspicion, seeing science that is organized and linked to an institution as a “technology of power” that coerces individuals and thereby makes them subject to centralized authority (Foucault 1980). A Foucauldian perspective would see the IAAF as conforming to this theory, with the IAAF being a centralized authority regulating and enforcing competition rules for global sport that contracted and organized a scientific team, and then linked itself to that team by dictating its testing protocol and using its findings to make a judgment regarding the use of leg prosthetics in competitive sport. This makes the Cologne team a technology of power used by the IAAF to subject Pistorius to its ruling on his eligibility.

The manner in which such “technologies of power” skewed power relations in favor of the IAAF to the detriment of Pistorius becomes apparent after tracing the archaeology and genealogy between the two. Beginning with the step of archaeology, it is apparent that the IAAF and Pistorius operated as objects in discourse since both entities produced knowledge via their respective arguments on the impact of leg prosthetics in running sports.

Following Foucault, archaeology calls for a search as to how the objects in discourse limited and excluded the production of knowledge produced between them. With respect to the IAAF hearing, the limitation of knowledge occurred in several ways, all of which served to favor the knowledge produced by the IAAF at the expense of the knowledge produced by Pistorius. First, the IAAF constrained the parameters of the Cologne team’s scientific analysis. The IAAF ordered the Cologne team to apply a protocol of both metabolic and biomechanical tests, with the metabolic tests determining if the prosthetics allowed Pistorius to run with less oxygen consumption than able-bodied athletes and the biomechanical tests determining if the prosthetics allowed Pistorius to run with less energy loss per stride than that experienced by able-bodied athletes

(Bruggeman et al. 2008; Court of Arbitration for Sport (CAS) 2008: 1, 4–5). While superficially this gives the appearance of the IAAF employing a comprehensive scientific evaluation, a deeper view shows it as being something otherwise: the IAAF constricted both the metabolic and biomechanical tests by instructing the Cologne team to study Pistorius only when he “was running in a straight line after the acceleration phase,” even though his chosen event of 400 m involved an acceleration phase, two straight lengths, and two curved lengths of track (Court of Arbitration for Sport (CAS) 2008: 7). Professor Bruggemann admitted as much in the subsequent CAS arbitration where he stated that the Cologne team’s findings were limited to measures “he was asked to undertake” by the IAAF (Court of Arbitration for Sport (CAS) 2008: 7). In addition, he indicated that the IAAF had manipulated the scientist’s work, stating that the IAAF had summarized the Cologne team’s findings in a way that “was not wholly accurate” (Court of Arbitration for Sport (CAS) 2008: 8).

The IAAF not only limited its own science, but also acted to exclude alternative science by suppressing the work of a Houston science team that had been contracted by Pistorius (“Houston team”). The Houston team, led by Dr. Robert Gailey, had criticized the Cologne team for only studying Pistorius running on a limited straight line and only evaluating the prosthetics in relation to a human ankle. In contrast, the Houston team’s testing protocol covered Pistorius over a full circumlocution of a 400 m race and compared the prosthetics against an entire human leg. Based on its protocol, the Houston team had found that the leg prosthetics conferred no metabolic advantage and could actually produce a biomechanical disadvantage against able-bodied athletes (Court of Arbitration for Sport (CAS) 2008). Initially, the IAAF had granted Dr. Gailey permission to attend the Cologne team’s analysis of Pistorius, but then restricted Dr. Gailey’s status to that of an observer with no input and ignored his correspondence regarding the Cologne team’s testing protocols. On that basis, Dr. Gailey had withdrawn his attendance (McArdle 2008). The IAAF continued to work against the Houston team to an extent that Professor Bruggemann testified that he had not even been aware of the Houston team’s concerns nor even their relation to the case (Court of Arbitration for Sport (CAS) 2008). The IAAF, in effect, had excluded the production of knowledge from Pistorius’ Houston team from its own evaluation of his prosthetics.

Foucault’s archaeology finds limitations and exclusions in knowledge like these to be significant determinants of discourse, in that they control the concepts and theories driving the “possibilities of discourse” (Foucault 1972: 70). For Pistorius, the efforts of the IAAF to control knowledge narrowed the possibilities of discourse into a

debate over differences defined by the IAAF between him and other athletes.

For Foucault, such a narrowing of the possibilities of discourse has consequences for the outcomes from a relationship, since he perceives it as being transformed into the practice of power—something he asserts can be seen through a genealogy that exposes the bio-politics of a body and the normative politics that then discipline the body (Markula and Pringle 2006). With respect to Foucault’s genealogy, bio-politics are exhibited when “technologies of power” are used to control a subject’s body, with “technologies of power” furthering power through the application of mechanisms of surveillance, measurement, and control over a body (Markula and Pringle 2006: 38). The IAAF fulfilled these conditions by using science to conduct surveillance and measurement of Pistorius to evaluate the impact of his leg prosthetics in running. Initially, in July 2007, the IAAF had Pistorius run in a specially staged race that was videotaped by an Italian sports laboratory using high-definition cameras from multiple angles. In the months subsequent to the video, the IAAF then commissioned its Cologne science team to subject Pistorius to a laboratory environment involving testing equipment comparing him to other athletes who did not need prosthetics (Court of Arbitration for Sport (CAS) 2008). In the laboratory, the scientists had the athletes subjected to anthropomorphic measurements using a 3-D body scanner, with Pistorius’ prosthetics also scanned by a materials analysis machine. In addition, the tests had the athletes ride exercise bicycles, during which time they were monitored for their metabolic aerobic efficiency in terms of $VO_{2\text{ max}}$ (the maximum rate a body can process oxygen) and biomechanical kinesthetics of their limbs and joints (the physics in terms of energy expenditure and forces generated). From a Foucauldian perspective, such actions of surveillance and measurement made Pistorius subject to the power of the IAAF, which manipulated the scientists and their analysis to produce knowledge the IAAF desired in evaluating whether leg prosthetics presented an “advantage” in violation of IAAF Rule 144.2(e) (Court of Arbitration for Sport (CAS) 2008).

Such bio-politics gains significance in Foucault’s genealogy because it is tied to a discourse politics over norms. For Foucault, monitoring of the body is a way of normalizing body in that the process of measurement carries an implicit measurement of comparison to a norm (Foucault 1979). Foucault sees this as serving to define difference and abnormality by indicating the amount of deviation or lack of conformity to the norm (Foucault 1979 [1995]). In particular, he describes a testing protocol as:

“...measures in quantitative terms and hierarchizes in terms of value the abilities, the level, the ‘nature’ of

individuals. It introduces, through this ‘value-giving’ measure, the constraint of a conformity that must be achieved. Lastly, it traces the limit that will define difference...the external frontier of the abnormal...The perpetual penalty that...compares, differentiates, hierarchizes, homogenizes, excludes.” (Foucault 1979: 182–183)

The IAAF and its scientists fulfilled this by using its scientific findings to define Pistorius and his leg prosthetics as fitting a class of “disabled” athletes distinct from “abled” athletes. In the case of Pistorius, the IAAF had its Cologne science team distinguish between the classes by defining how much the latter differed from the metabolic and biomechanical marks of the former. The IAAF and its scientists then manifested normative standards in the formulation of the concepts “abled”, “disabled”, and “advantage” by using a testing protocol that took the metabolic and biomechanical marks of “abled” athletes without prosthetics as a standard against which “disabled” athletes with prosthetics were measured. In essence, the marks of “abled” athletes served to set the norm for what the IAAF viewed as appropriate for athletes in competition. This resulted in a normative judgement, in that Pistorius was measured and compared to this norm and the resulting difference was interpreted by the IAAF as an abnormality. The net effect, phrased in a Foucauldian vocabulary, was that the IAAF used science to engage in surveillance and measurement that quantified and categorized Pistorius’ body as an abnormality—in effect, the IAAF gained control over a human body with leg prosthetics to then gain control over its identity as an athlete (Foucault 1979). Such an association between “abled,” disabled,” and “abnormality” appears to have been an IAAF predisposition, in that the CAS Report observes the IAAF considered Pistorius ineligible *before* it had conducted its evaluation (Court of Arbitration for Sport (CAS) 2008: 8) and it had directed its Cologne science team towards a testing protocol that would lead to such a finding (Court of Arbitration for Sport (CAS) 2008).

This is significant, since Foucault fears that the knowledge accumulated by science can be used by institutions not just to identify deviations from a norm but also used to “discipline the body,” such that the process of measuring a subject would then be the means by which the subject would be “corrected, classified, normalized” (Foucault 1979 [1995]: 191). In other words, abnormality incurs an institution’s deployment of control mechanisms to correct a subject’s perceived abnormality. For “disabled” athletes like Pistorius, this means that the consequence of normative deviation is a loss of eligibility for athletic competition. The IAAF formulated Rule 144.2(e) to prescribe IAAF disciplinary action against athletes perceived as

having an “advantage” against “abled” athletes. As a result, that athletes who are identified by the IAAF as having metabolic and biomechanical marks deviating from a norm representative of “abled” athletes are subject to IAAF sanction—in other words, athletes found to be abnormal are subject to IAAF control and correction. For Pistorius, being evaluated as an abnormality by the IAAF meant being subjected to IAAF control and correction in the form of 1) a ruling that he was in violation of Rule 144.2(e) and 2) a consequent exclusion from IAAF-sanctioned athletic competition.

This section applied Foucault’s theories to study the IAAF’s ruling that rendered Pistorius ineligible to compete in international competition against able-bodied athletes. Following Foucault, the archaeology of the IAAF proceedings shows how the IAAF employed “technologies of power” that limited and excluded the production of knowledge in a way that enabled a genealogy which imposed a IAAF-dominated bio-politics focused on Pistorius’ leg prosthetics and articulated a normative politics over such prosthetics to demarcate a difference between “disabled” athletes versus “abled” athletes—with the IAAF then interpreting that difference as an “advantage” requiring correction. The next section employs such a Foucauldian framework to analyze the CAS arbitration.

6 CAS arbitration

This section identifies the archaeology and genealogy of the CAS arbitration in 2008 that overruled the IAAF proceeding and found Pistorius eligible for competition in international sports against able-bodied athletes. In contrast to the IAAF’s expression of “technologies of power,” this section asserts that the CAS arbitration reflected a theme of “technologies of the self” acting against centralized authority.

In pursuing an appeal, both the IAAF and Pistorius followed IAAF Competition Rule 60.11 which calls for disputes to be appealed to the CAS (International Association of Athletics Federations (IAAF) 2013; McArdle 2008). The power of the CAS is derived from its status as a source of arbitration legally enforceable in courts (Mitten and Opie 2010; Nafziger 1988; Zettler 2009). It is recognized by the IAAF as having jurisdiction over sports-related disputes in track and field (International Association of Athletics Federations (IAAF) 2013). In response to the dispute between the IAAF and Pistorius, the CAS convened an arbitration panel that treated the case *de novo*, meaning that it took the dispute as a fresh case with a full presentation of new arguments from both sides (Court of Arbitration for Sport (CAS) 2008).

From a Foucauldian perspective, the CAS arbitration changed the dispute in several ways. First, it injected the CAS into the relationship, creating a network between three objects interacting over a common issue, with the objects in the network being the CAS Arbitration Panel, the IAAF, and Oscar Pistorius, all of whom were focused on the common issue of the status of Pistorius' leg prosthetics in international competition. Second, among these objects in discourse the CAS arbitration defined a power relationship, with both the IAAF and Pistorius following the IAAF's own Competition Rules in submitting themselves to the appellate jurisdiction of the Panel (Court of Arbitration for Sport (CAS) 2008). Third, the CAS arbitration's *de novo* status opened the scope of evidence, with the CAS Arbitration Panel having the authority to accept new evidence, reconsider issues in dispute, and substitute its own decisions in place of prior IAAF rulings (Court of Arbitration for Sport (CAS) 2008).

These changes were significant, since it meant that the decision-making process included the science from not only the IAAF's Cologne team but also Pistorius' Houston team. As much as the Cologne team represented a "technologies of power" used by the IAAF, the Houston team can be construed as constituting "technologies of the self" since Pistorius had contracted it to generate knowledge that he could use against the IAAF. Foucault described "technologies of the self" as empowering individuals to

"...affect by their own means or with the help of others a certain number of operations on their own bodies and souls, thoughts, conduct, and way of being, so as to transform themselves in order to attain a certain state of happiness, purity, wisdom, perfection, or immortality." (Foucault 1988: 18)

The Houston team fulfilled this by performing operations on Pistorius in support of his efforts to transform his condition from one of being a "disabled" athlete with prosthetics conferring an "advantage" in violation of IAAF rules to one of being a competitor eligible to participate in international sport against able-bodied athletes.

The inclusion of the Houston team's "technologies of the self" in the CAS arbitration altered the archaeology and the genealogy of discourse between the IAAF and Pistorius. In terms of archaeology, the admission into evidence of Pistorius' Houston team served to expand the production of knowledge, since it allowed the inclusion of alternative science that had been excluded from the previous IAAF ruling and so represented the addition of knowledge beyond that used by the IAAF in its prior denial of Pistorius' eligibility.

This additional knowledge was pivotal in transforming the genealogy of discourse, with the expanded information redirecting the bio-politics towards a different

normative outcome. The bio-politics were largely unaltered in that both the IAAF and Pistorius linked themselves to science in contracting their respective science teams and both science teams engaged testing protocols that made Pistorius a subject of surveillance and measurement. There were, however, two major differences in the knowledge produced by the Cologne team and the Houston team: (1) the Cologne team followed IAAF directives to focus on the effect of the leg prosthetics in the two straight-line portions of a standard 400-m race while the Houston team covered the race in total, including the initial acceleration phase, both straight-line portions, and both curved portions of the race (Court of Arbitration for Sport (CAS) 2008); and (2) the Cologne team only considered the role of leg prosthetics in relation to a human ankle while the Houston team evaluated the performance of prosthetics against an entire human leg. Such differences in knowledge meant that within the CAS arbitration the IAAF's technologies of power faced opposition from Pistorius' technologies of the self.

It should be noted that this does not necessarily mean that the CAS arbitration was about the liberation of Pistorius as an athlete from the power of the IAAF as an entity with authority over international sport. Foucault eschews discussion of resistance, saying that interaction with others always places a person within power relations, such that there is no one outside of power relations to work against domination and "resistance is never in a position of exteriority in relations to power..." (Foucault 1978: 95). For Foucault, the relationship between "technologies of the self" and "technologies of power" is not about liberation from domination but about liberty to participate in a dialectic *within* power relations wherein the individual can fashion an identity despite being dominated by the powerful (Best and Kellner 1991).

The CAS arbitration was consistent with this in that it preserved the IAAF's authority to govern sport, including with respect to athletes with prosthetics—it did not dispute the IAAF's dichotomous distinction between "disabled" and "abled" athletes nor did it question the validity of IAAF Rule 144.2(e) that prohibited athletes from using prosthetics that conferred a competitive advantage. Instead, the CAS arbitration focused on the decision-making process the IAAF used in relation to Pistorius' leg prosthetics and did so by admitting into evidence knowledge from both the Cologne and Houston teams. This effectively placed the IAAF's technologies of power into a dialectic with Pistorius' technologies of the self.

Such a dialectic impacted the normative politics in the discourse. While the Panel maintained the IAAF's normative framework of "disabled" versus "abled" athletes, it disagreed with the IAAF's perspective on the concept of an "advantage." In doing so, the Panel referenced the works

of the Cologne and Houston teams. The Panel criticized the Cologne team's limited metabolic testing over a straight line as being an incomplete measure and agreed with the Houston's team's protocol that considered the effect of prosthetics over the totality of an athlete's race—which for Pistorius meant testing him with his prosthetics over the full 400 m of his chosen event (Court of Arbitration for Sport (CAS) 2008). The Panel also criticized the Cologne team's biomechanical evaluation of the leg prosthetics in relation to a human ankle and again agreed with the Houston team's call to compare the prosthetics against an entire human leg (Court of Arbitration for Sport (CAS) 2008). Because of these issues, the Panel noted that while the IAAF's analysis may have sought to determine whether Pistorius' prosthetics conferred an "advantage," it did so using a limited scope of research inappropriate for evaluating athletic performance and that a more suitable approach would have sought to determine if there was an "overall net advantage" based on data covering an entire 400-m race and comparing the prosthetics against an entire human leg (Court of Arbitration for Sport (CAS) 2008: 11–12). In Foucauldian terms, the Panel distanced itself from the IAAF ruling by producing a new normative standard of an "overall net advantage" that was more inclusive of the knowledge produced by Pistorius' Houston team. This was not insignificant, since the presence of the Houston team's alternative perspective on leg prosthetics was sufficient to lead the CAS arbitration to a ruling that overturned the IAAF's denial of eligibility and allowed Pistorius to participate in international competition.

It should be noted that the Panel itself did not produce knowledge nor was it contracted by Pistorius alone, and so it should not be interpreted as "technologies of the self." The Panel, however, did play a significant role by allowing such technology into deliberation. The prior IAAF ruling had drawn solely upon its Cologne team and excluded the study of the Houston team, and so had been able to use its "technologies of power" to dominate its relationship with Pistorius. The CAS Arbitration, in contrast, empowered Pistorius to exercise "technologies of the self" in the form of his Houston team, and this sufficiently altered the power relations with the IAAF to drive the discourse towards a different outcome regarding the status of his leg prosthetics—and a different ruling on the eligibility of athletes who use them in international competition.

7 The importance of Foucauldian analysis

The use of Foucault to study the CAS Arbitration Report is helpful in that Foucault identifies the mechanics that explain the outcome and nature of the arbitration proceedings. Superficially, the Arbitration Report details how

the IAAF denied science that supported Pistorius and explains how the CAS arbitration panel corrected the IAAF's procedural errors by admitting into evidence the findings of Pistorius' Houston team. A Foucauldian analysis, however, takes a deeper reading of the Arbitration Report and finds it to be a reflection of underlying power relationships, with the differences between the IAAF and CAS proceedings arising from a shift in power relations which enabled Pistorius to deploy technologies of the self that empowered him to participate in a discourse over the use of leg prosthetics by disabled athletes in competition against able-bodied ones. In essence, Foucault shows how a change in power relations drove a change from an IAAF discourse of domination to a CAS discourse that was more dialectic and thus led to a change in outcome regarding the eligibility of athletes with prosthetics in international sport.

In doing so, a Foucauldian analysis of the Pistorius arbitration yields prescriptive insights from its descriptive understanding. Following the principle of induction, it provides a case study with lessons for other athletes seeking to use prosthetics in competition against able-bodied athletes. The principle of induction is an analytical method that involves the extrapolation of insights and principles from a select case that can be generalized to other cases and contrasts with the alternative method of deduction which draws upon general observations to find common insights and principles that are applied to a specific situation (Blachowicz 2009; Gimbel 2011).

With Pistorius, this Foucauldian analysis demonstrated the means by which he was able to use the CAS arbitration to counteract a previous unfavorable IAAF ruling and achieve his desire of participating in IAAF-sanctioned international sports events. From a Foucauldian perspective, Pistorius and the IAAF comprised a power relationship, with the IAAF being a dominant institution with centralized authority holding disciplinary power over athletes. Against Pistorius, the IAAF engaged technologies of power that excluded the science that supported Pistorius and included science that supported the IAAF. Under such science, the IAAF measured and monitored Pistorius and thereby objectified him and made him subject to control under IAAF regulations. Through this process the IAAF subjectified Pistorius as a "disabled" athlete with prosthetics that granted him an inappropriate "advantage" in competition against "abled" athletes. In response, Pistorius found a way to deploy his technologies of the self by pursuing an appeal to the CAS that admitted into its deliberations the findings of his science team. Such findings allowed him a way to alter his identity as an athlete with an "advantage" in violation of IAAF rules. Consistent with Foucault, Pistorius did not act to resist the authority of the IAAF but instead acted *within* the power relationship with the IAAF, using an appeals process provided by IAAF

rules to engage in a discourse about the status of his prosthetics in competition.

For other athletes, a Foucauldian reading of the Pistorius case provides a number of insights with cautionary import about the nature of justice in international sport for athletes with prosthetics. First, there is an issue about an athlete's ability to exercise an appeal to the CAS. As much as the outcome of the CAS arbitration for Pistorius may serve as a useful precedent delimiting future IAAF decision-making procedures on prosthetics, a Foucauldian perspective suggests that (1) there is little assurance of such a change so long as the IAAF–athlete power relationship continues with the IAAF in a position of domination over an individual athlete, and (2) the odds for lasting change will only improve through the injection of an additional power entity like the CAS that acts to adjust a given IAAF–athlete power relationship. As reflected by the Pistorius case, under current IAAF rules changes in the IAAF–athlete power relationship can only happen if an athlete exercises the IAAF clause allowing appeals to the CAS. However, for an athlete to pursue an appeal requires that the athlete actually has the means to do so. Phrased in Foucauldian terms, for an athlete to exercise technologies of the self the athlete actually has to possess technologies of the self.

This is an assumption not always assured to be true. In their study of Pistorius, Norman and Moola observe that he is a product of “privilege,” coming from the wealthy neighborhood of Sandton as a member of a racial, gender, education, and class group that continues to hold an elite socio-economic status in post-apartheid South Africa (Norman and Moola 2011). In addition, because of his public profile Pistorius attracted an international law firm that acted pro bono (i.e., without legal fees) on his behalf in the course of the CAS arbitration (Chappell 2008). As a result, in choosing to exercise his appeal Pistorius had resources that enabled him to access technologies of the self in the sense that he had a status sufficient to let him contract his own science team and secure legal representation throughout the multiple stages of his IAAF and CAS arbitration proceedings.

It is not clear that other athletes have resources similar to Pistorius. The amount needed is not trivial: for example, the Cologne team's testing alone cost 30,000 Euros and the CAS requires that appellants pay for their own witnesses, experts, and interpreters in addition to the costs of travel and living in person during arbitration proceedings in Lausanne, Switzerland (Chappell 2008). Given these financial costs it is unclear if other athletes challenging the IAAF's concerns regarding prosthetics would be able to muster the science teams or legal representatives requisite for a successful appeal. Stated in Foucauldian terms, athletes with less privilege than Pistorius may find that while they have the same procedural mechanism of appeal as he

did to work against the IAAF's technologies of power, the reality of such a mechanism will be illusory because they may not have the requisite resources to claim their own technologies of the self. As a result, while Pistorius' background afforded him the capability to work against the IAAF, it is not clear that other athletes with prosthetics could do the same.

This points to a second insight regarding an additional hurdle for athletes seeking a favorable CAS arbitration result: as much as there may be a challenge for athletes to exercise an appeal to the CAS, there is also a challenge in terms of the nature of arbitration provided by the CAS. Because IAAF regulations require appeals to go to the CAS, all athletes under the IAAF are dependent on the benevolence of the CAS, not only in terms of granting an appeal but also in terms of conducting an arbitration receptive to athlete arguments. From a Foucauldian perspective, this means that an athlete pursuing an appeal is dependent on the CAS to host arbitrations with panels sympathetic to the athlete's technologies of the self in the face of the IAAF's technologies of power. With Pistorius, the CAS Arbitration Panel allowed him to present the science of his Houston team against the science of the IAAF's Cologne team, and thereby enabled him to exercise technologies of the self against the IAAF's technologies of power. Unlike the previous IAAF proceedings, the Arbitration Panel fostered a dialectic discourse involving the evidence and arguments of both sides. This indicates the uncertain function played by the CAS Arbitration Panel—while the arbitration viewed the dispute *de novo* and hence as allowing new evidence and arguments not heard in the original IAAF evaluation against Pistorius, this only meant that the panel *could* hear new evidence and arguments and did not automatically obligate the panel to accept them in its ruling. To render a decision in favor of Pistorius, the Arbitration Panel had to (1) allow Pistorius' evidence and arguments to be heard and (2) take them as dispositive over the presentation of the IAAF. Thus, the mere presence of the Arbitration Panel in the power relations between the IAAF and Pistorius was not alone in determining the outcome of the case. Instead, the determining factor was the Arbitration Panel's sympathetic disposition towards Pistorius' arguments. Specifically, in Foucauldian terms, were it not for the panel's acceptance of his arguments, Pistorius would not have been able to exercise the technologies of the self represented by the science of his Houston team, such science would not have empowered him to craft an identity as an athlete in contradiction to the IAAF's notions of “disabled” athletes with an “advantage,” and he thereby would have been left under the domination of the technologies of power applied by the IAAF in its original decision.

While it is possible that the Pistorius case could provide some value as precedent for other athletes pursuing similar

appeals to the CAS, such prospects are dimmed by the nature of CAS arbitration. To begin, the constitution of CAS arbitration panels are unique to each arbitration, with each arbitration involving new members (CAS 2013) who may have different perspectives regarding the aspects of a case. As much as CAS hearings are *de novo* and hence open to the introduction of additional evidence and arguments not heard in IAAF hearings, arbitration panel members are still free to exercise their own discretion in weighing such materials during deliberations (CAS 2013). As a result, there is a possibility that other athletes with similar cases to Pistorius may encounter arbitration panels hosting a decidedly different environment than the one he encountered. While CAS arbitrators have exercised *stare decisis* in terms of following prior arbitration rulings to provide legal certainty, they are not obligated to do so (Blackshaw 2006). In addition, the potential for any precedent arising from the Pistorius arbitration is also circumscribed by the declaration of the CAS Arbitration Panel, which specifically stated that its decision applied only to the prosthetic models tested by the Cologne team and had “absolutely no application to any other athlete” (Court of Arbitration for Sport (CAS) 2008: 104). This explicitly shows that the outcome Pistorius received is not assured for appeals from other athletes with prosthetics.

As a result, the issues posed by the dispute and appeal involving the IAAF, Pistorius, and the CAS are likely to arise again and appellants in future cases should be mindful to take a cautionary approach towards CAS appeals. As found in this study, application of Foucault’s theories reveals power relations whose dynamics influence the outcomes of decisions with consequences for athletics and thus must be addressed by future athletes with prosthetics who seek to obtain IAAF eligibility in international sport.

8 Conclusion

This paper applied the theories of Foucault to study the CAS Arbitration Report in the dispute between the IAAF and Oscar Pistorius. The report reads superficially as a dry recitation of the arbitration’s ruling to overrule a prior IAAF decision that denied Pistorius eligibility for competition in international sport. This paper, however, took a deeper reading of the CAS Arbitration Report by applying the theories of Michel Foucault to identify what the report reveals about the nature of justice under the CAS for disabled athletes. The paper constructed a Foucauldian analysis of the micro-politics between the parties, using Foucault’s concepts of archeology and genealogy to identify (1) the technologies of power that allowed the IAAF to control the body of Pistorius and direct a normative discourse that made him subject to an identity of a “disabled”

athlete with an inappropriate “advantage” over “abled” athletes, and (2) the technologies of the self that empowered Pistorius to counter the IAAF and present an identity of an athlete eligible to compete in international sport. This provided descriptive insight in terms of explaining the differences in outcomes between the initial IAAF hearing and subsequent CAS appeal as a function of differences in the power relations between the two proceedings. From such descriptive insight, this paper drew prescriptive insight for other athletes involved in potential disputes similar to Pistorius: while Pistorius was successful against the IAAF in his appeal to the CAS, he benefited from (1) access to resources that enabled him to pursue technologies of the self and (2) an appeal to an arbitration panel sympathetic to his exercise of such technologies—suggesting that other athletes with prosthetics involved in disputes against the IAAF must address these two challenges to assure themselves of a favorable outcome.

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