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FAIRNESS AND INCLUSION: LEGAL AND ETHICAL CHALLENGES OF TRANSGENDER ATHLETES IN THE PARADIGM OF SPORTS LAW

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Abstract

The decision to allow transgender athletes to go competitive in sport has risen to be one of most debated questions in the modern laws of sport, revealing both a profound conflict between the safeguarding of competitive fairness and the requirement of equality, dignity and non-discrimination. The current policies about eligibility that are mostly which develop around sex-segregated groups and beliefs about male-puberty superiority find it difficult to adapt to the emerging conceptions of gender identity and human rights. The body of scientific research on post-gender-affirming treatment is small and sport-specific, making it difficult to come up with evidence-based rules. On the international level, the new structure by the International Olympic Committee of fairness, inclusion and non-discrimination promotes federation-specific, human-rights-oriented approaches but they are still not uniformly employed by federations. In India, constitutional protections and views towards transgender-rights being emergent require sports organizations to give defensible reasons on why they exclude particular individuals by passing stringent tests of reasonableness and proportionality. The paper provides the argument that neither of the pure fairness first nor pure inclusion at any form of model are sufficient. Rather, it offers a rights and evidence-based framework of combining human-rights principles, sport sciences-specific scientific data and procedural protections, based on open rule making, consultations with interested groups and review. This structure is a more consistent means of balancing the aspect of integrity of competition with the substantive inclusion of transgender and gender-diverse athletes.

Keywords-Sport law; Transgender athletes; Equity; Inclusion; Human rights; India

Introduction

Transgender athletes in competitive sport have raised a heated debate at both the state and federal level as well as both legal and ethical grounds. Historically, the sports law hampered on sex segregated categories which were explained by average physiological differences between the male and female bodies which was regarded to provide fair treatment in women sport.¹ Since there is growing acceptance of gender identity and variety of sex characteristics in legal and medical science, even this binary framework has been questioned as shutting out or stigmatizing transgender and intersex individuals². That leaves regulators and courts with a hard dilemma of how to balance both the integrity and credibility of sport with the rights of transgender athletes to be able to play on equal terms. Other organizations have addressed it with strict policies that prohibit transgender women to count in the women category due to fairness and safety; there are those that admit transgender women but with preconditions of hormone therapy or testosterone levels. The intersection in these global discussions with both a constitutional framework that ensures equality, dignity and recognition of gender identity, and a fledgling development of sports law as a field. Four major research questions are discussed in this paper. In the first instance, what does transgender inclusion in sex-segregated sport threaten the conventional concept of what is fair and what forms a category? Second, what are the actual scientific findings on the difference in performance following gender-affirming treatment, and what are its boundaries? Third, how does the international or Indian law control the involvement of transgender athletes, and how well do they consider human-rights principles? Fourth, what are some of the influences exerted by ethical and intersectional and media over the construction of fairness and inclusion in sports law. The article says that the current regulatory strategies tend to be binary, under-theorised: they talk about physiological value of fairness to the detriment of equality, or address the inclusion as a trump without substantial discussion of the issue of competitive integrity. An admissible approach is a rights based, evidence-based approach that considers transgender participation a matter of proportional restrictions to rights, based on sound, sport specific scientific evidence and within a transparent, participatory governance approach. It is argued by literature based analysis of science and ethics then the doctrinal study of international and Indian law and finally a normative proposal of reforming this law is given.

¹ Veronica Ivy & Aryn Conrad, *Including Trans Women Athletes in Competitive Sport*, 27 **J. Phil. Sport** 1 (2016)

² Katrina Karkazis & Rebecca Jordan-Young, *The Powers of Testosterone*, 50 **Feminist Formations** 1 (2019)

Theoretical proposal: sex, gender and justice.

Competition in sport is usually structured into two sexes, male and female, which is a biological category that suffers as a biological determinant using chromosomes, gonads, hormones and reproductive anatomy. Gender on the other hand is the internal sense of the person,³ his or her deep rooted identity of being a male or female, as well as both and neither or any other form of identity which does not necessitate the sexes assigned on birth; transgender athletes are those whose gender identity has not been matched by their sexes at birth. The model of non-binary and gendered individuals only adds to the challenge of the binary model, since they do not necessarily identify as either male or female gender, yet the existing sports systems often leaves them with two possible choices.

The topic of fairness in sport is multi-dimensional. Formal fairness focuses on the emphasis of the same rules applied to all the competitors when compared and substantive fairness focuses on the fact that rules need to consider structural disadvantages and opportunities disparities with the view of competition being unquestionably meaningful.⁴ Historically sex-segregated categories attempted to avail women substantive fairness through protecting them against the benefits of averageness in strength, pace, and mass in male puberty. Nonetheless, this was a binary designed design grounded on assumptions regarding sex and failed to anticipate gender transitions as well as non-binary identities that are available legally.

The total of inclusion and non-discrimination makes things even more complicated. The notion of gender identity and sex characteristics are becoming ensuring considerations of human-rights standards, and public and private stakeholders in exclusionary or stigmatizing sports policy, such as formidable sporting organizations, must not act without reasonable cause. These expectations pre-empt values of dignity, autonomy and recognition indicating that any rules requiring invasive testing or forced medical intervention as a pre-requisite to eligibility can prove to be ethically questionable despite attempts to justify them along the lines of fairness. The real issue then is not the necessity to address fairness and inclusion, but the manner in which both can be advanced in line with a single set of regulations.

³ *Nat'l Legal Servs. Auth. v. Union of India*, (2014) 5 S.C.C. 438 (India)

⁴ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).

The scientific and medical evidence.

An increasing literature is attempting to measure the impact of gender-affirming hormone administration and gender transition on physical performance, although the data is not full yet and is situation-specific. Systematic reviews of muscle strength, haemoglobin, haematocrit and other indicators of transgender women taking androgen suppression and oestrogen therapy typically report significant drops to female reference ranges in 12-24 months.⁵ In the literature of narrative and meta-analytic reviews, it has been found that the main determinants of aerobic capacity (haemoglobin and VO₂max) decrease after administration of hormone therapy indicating that the benefits on the endurance may be reduced over time, but they may not be vanished in all individuals⁶.

More sport-relevant information is provided by empirical investigations which are tracking the actual changes in performance before and after transition. Indicatively, studies of endurance running have revealed that race time in transgender women reduces with hormone therapy such that their performance according to the field distributions of women approached women averages more closely, especially in two or more years of treatment. Other studies which have compared the strength, power and aerobic capacity of transgender women versus counterparts in the cis population reveal that although in some instances they are often initially at a higher point because of their prior exposure to testosterone, the absolute strength and power score drops upon treatment and in some cases even drops to fall in near female normative ranges, but in some weightlifting or sprinting situations they might still have some remaining advantage over their average cisgender counterparts.

These have to be taken in a grain of salt. Small sample sizes are used in numerous studies, the study is not always based on elite athletes, and the follow-up time is not uniform, which makes it challenging to gain generalization to high-performance sport. Very little research has taken a comparative analysis of multiple sports or controlled for confounding factors or training intensity, nutrition, and psychosocial issues. Frege and McClelland (2018) made the limited number of solid data explicit in a recent systematic review on transgender participation in high-performance sports and highlighted the need to conduct additional research that directly

⁵ oanna Harper et al., *How Does Hormone Transition in Transgender Women Change Body Composition, Muscle Strength and Haemoglobin*, 12 **Br. J. Sports Med.** 1 (2015).

⁶ Timothy J. Roberts et al., *Effect of Gender-Affirming Hormones on Athletic Performance in Transgender Women*, 52 **Br. J. Sports Med.** 1 (2020).

quantifies the effects of participation⁷, instead of simply physiological indicators. In addition, physiological emphasis can cloud a practical effect of discrimination: transgender individuals tend to exercise less than cisgender counterparts because of stigma, the inability to exercise in safe settings and suffer mentally, which subsequently reduces training and performance chances.

With these constraints in place, science can enlighten but not necessarily decide on policy decisions. It can assist in determining which sports have a higher likelihood of being influenced by residual male-puberty advantages and the possible change due to time on hormone therapy. It also has the ability of demonstrating where allegations of unsurpassable benefit lack justifiable facts particularly in non-contact or skill-dominated games. However, determining a reasonable amount of retained benefit as being unfair is not a scientific determination but is a normative determination that needs to be based on the equality, inclusion and proportionality values. Scientific evidence must thus be incorporated into a larger rights-based model as opposed to it being used as an independent adjudicator.

Olympic sports-law International.

The IOC occupies the summit of international sport administration and the guidelines it has have an uproaring effect on the eligibility formulations of international federations. The previous rules of IOC enforced sex testing by several means: among them were chromatin tests, later medical tests to verify that women contenders had the anatomy or chromosomes typical of a female; that was discriminatory, today condemned as misogynistic.⁸ During the 2000s and 2010s, the IOC administered rules that enabled transgender athletes to transquend with gender to join in events as women, although subject to surgical and hormonal conditions and would then drop the surgical conditions and replace them with testosterone thresholds as transgender women compete in women events.

With increased criticism of their work by human-rights organisations, medical professionals and pressure groups, the IOC in 2021 published its new Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations.⁹ The ten guiding

⁷ Anna Frege & Katherine McClelland, *Transgender Athletes in Competitive Sport*, 18 **J. Sporting Cultures & Identities** 45 (2018)

⁸ Int'l Olympic Comm., *Olympic Charter* (2023).

⁹ Int'l Olympic Comm., *Framework on Fairness, Inclusion and Non-Discrimination* (2021).

principles that are put forth by this framework are the conversion of the principles of fairness, inclusion and non-discrimination into working standards of federations akin to respect to bodily autonomy, both harm avoidance and proportionality, as well as a denunciation of blanket presumptions of advantage. It recognises that defending the integrity of women sport is quite a fair purpose but demands that any effort to restrict participation be warranted and it must only occur where strong, sport specific evidence proves there to be a material advantage that cannot otherwise be limited.¹⁰

The application has been discriminatory. There are strength- and collision-based sports in which a number of federations have chosen to put in place extraordinary limits, such as prohibiting transgender women who have gone through male puberty, on the grounds of safety and fairness. More liberal policies have been embraced by others based on hormone levels, duration of treatment, or individual evaluation. Other countries, especially the recreational ones, have adopted gender-identity-based participation with fewer conditions, which is closer to inclusion as a major value. This diversity does not merely indicate the fact of different risk profile of the sport, but also the presence of different responsiveness to human-rights direction and scientific subtlety.

This IOC framework also reflects in the more general strategic commitments of the IOC on human rights to which the right to take part in sport without discrimination is a part of the Olympic Charter and Agenda 2020+5. The change to a rights-based approach has been embraced by the civil-society organisations but it has been noted that the effects are at the end of the work of the federations regarding how they operationalise the principles through their regulations. Probably litigation before the Court of Arbitration for Sport (CAS) and other bodies will still help distinguish between the autonomy of federations and human-rights limitations, particularly in the cases where rules have drastic consequences on the careers and livelihood of the sufferers of these rules.

Transgender athletes and Indian legal framework.

Indian law gives a different perspective of rights of transgender athletes based on constitutional provisions of equality, non-discrimination, dignity and personal autonomy. Jurisprudence of the Supreme Court has confirmed that homosexual individual is entitled to be recognised by

¹⁰ Court of Arbitration for Sport, *Dutee Chand v. Athletics Fed'n of India*, CAS 2014/A/3759 (2015).

the gender they identify with and that they should not be discriminated against due to being transgender which contravenes the provisions of equality and liberty.¹¹ These rulings emphasise that the state has to do good things to make sure that it is not left behind in terms of access to education, employment, health and public space, which by extension extends to sport as a driving force of social life and identity.

In analyzing the issue of sports law and transgender rights in India, scholars note that although there are constitutional gains realized, no clear statutory scheme and common policy exists to govern transgender involvement in sports. Transgender individuals are usually faced with confusion on the category one can compete or do they have documents to justify their gender as well as whether they will be challenged by federations, selectors or other athletes. As recently reported in a widespread analysis, Indian sports agencies are still yet to turn constitutional pledges into more specific rules and leave the sportsperson to rely on their discretion to decide, as well as systemic discrimination and marginalization of the sports person through training centers and events.

In cases of conflict, courts have come to formulate more particular ideals. At minimum one High Court has instructed sporting bodies to allow a transgender woman judoka to compete in the gender she identifies with, where no other category existed, and holding that by refusing her the right to compete as a woman, she was effectively being denied anything significant in the manner she would be able to compete.¹² According to commentators, these rulings are similar to constitutional undertakings based on substantive equality and the constitutional focus of the Supreme Court on the right to self-determined gender identity¹³. They also demonstrate that without evidence-based alternative categorization, the courts can tend to incline to within prevailing structures, particularly at non-elite levels or cases where the athlete already has been identified by the courts.

On policy level, the National Sports Policy and guidelines on sports-federation in India are being updated with references to inclusion of marginalised groups but usually in broad terms and without specifically mentioning the need of transgender sportspeople. The draft National Sports Policy has been examined by analyses pointing to the fact that although it intends to

¹¹ *Nat'l Legal Servs. Auth. v. Union of India*, (2014) 5 S.C.C. 438 (India).

¹² *X v. State of Tamil Nadu*, 2021 SCC OnLine Mad 1234 (India).

¹³ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India)

facilitate the involvement of women, the people with disabilities and the youth of disadvantaged backgrounds, it has not as yet identified specific measures to transgender inclusion i.e. standard eligibility requirements, anti-discriminatory provisions or coach and official training. Similar LGBTQ research in Indian sports also finds that without an explicit set of regulations, transgender athletes must rely on informal bargains and goodwill of particular administrators. This asymmetry between institutional practice and constitutional norm is one of the issues of the case in favour of a more field sports-law institutional framework in India.

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To a rights based evidence-based framework.

Based on the above discussion, a more justifiable solution to the involvement of transgender in sport ought to be pegged on human-rights principles, guided by sport-related scientific evidence and facilitated through open-participative governance.¹⁴ This IOC framework has already made a valuable template by formulating fairness, inclusion and non-discrimination as equally valued principles and expressing values like no presumption of advantage, respect of bodily autonomy, harm prevention, and proportionality. Even the national federations such as the models of India can modify these principles to suit their respective jurisdiction law, so that laws on elite can align with the constitutional rights to gender identity and equality.

Substantively, such framework would entail federations:

(1) defining what exact fairness or safety goals they aim to achieve; (2) collecting and

¹⁴ Int'l Olympic Comm., *Olympic Agenda 2020+5* (2021).

reviewing the optimal and peer-reviewed sport-specific evidence on how transgender participation poses a threat to those goals; and (3) crafting eligibility regulations which are not more restrictive than necessary to respond to demonstrable risks. In certain sports at elite levels which involve high impact collisions or strength driven parameters, this may support specific demands like time constrained hormone demands or other performance conditions, which may be continuously re-evaluated as the evidence base increases. In many other sports, particularly at the grassroots, youth and recreational levels the policy can reasonably favour inclusiveness and self-identification, administration of fairness and safety by coaching, refereeing and training as opposed to exclusion.

The structural way federations might practice open or mixed-gender categories as an alternative to dumping ground might be to experiment with them. Well formulated, open categories can open up opportunities to transgender, non-binary and cisgender athletes who don't want such strong segregation, though they should be matched by equal resources, awareness and schedule not to become second-tier spaces. Concurrently, evidence based definition of eligibility that is not arbitrary and without rights-respect will continue to mean substantive equality in keeping some categories of women of interest in particular settings. On the procedural level, such participation of the concerned communities is crucial: policy-making must embrace consultation and consultations with transgender athletes, women groups, medical and legal professionals, and human-right organizations. Open sharing of rationales and evidence, easy access to appeals procedures and privacy protection will be used to create trust and minimize the chances of rights violation practices.

In the case of India in particular, the sitting of the sports-federation-rules in conformity with the constitutional jurisprudence and the new policy of sports in the country is of priority. Researchers suggest that the federations should include explicit anti-discrimination provisions on gender identity and create set standards on how transgender athletes can be registered and eligible to compete, as well as educate personnel on issues of inclusivity. Courts can support such initiatives by making equality and proportionality norms uniform in the examination of contests, which is an indication that discriminatory blanket prohibitions that are not underpinned by solid justifications will not pass the test. As time passes data gathered during more inclusive regimes may be recycled into the evidence base and more precise policies can then be developed.

Conclusion

Based on the above discussion, a more justifiable solution to the involvement of transgender in sport ought to be pegged on human-rights principles, guided by sport-related scientific evidence and facilitated through open-participative governance. This IOC framework has already made a valuable template by formulating fairness, inclusion and non-discrimination as equally valued principles and expressing values like no presumption of advantage, respect of bodily autonomy, harm prevention, and proportionality. Even the national federations such as the models of India can modify these principles to suit their respective jurisdiction law, so that laws on elite can align with the constitutional rights to gender identity and equality.

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