

Rethinking Human Rights for Transgender Athletes

A Policy Analysis of Transgender Eligibility Regulations in Competitive Sport

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The number of openly outed trans individuals in society and in sport is increasing and can be expected to keep growing. The sporting domain is singled out as special in terms of trans rights, as it is solely based on physical characteristics. Trans people in sport have become a subject of heated debates. However, the field of human rights has so far neglected the topic.

Analysing 16 transgender eligibility policies of different international sports federations, this article makes the case for a human rights-based approach towards participation in competitive sports in accordance with a person's gender identity. It does so by focussing on specific human rights and utilising feminist theories. The analysis identifies that the policies frame transgender athletes as a "problem". The use of lan-

guage and, in particular concepts, play a crucial role in the policies. Therefore, the argument is made for redefining the concepts of sex and gender in the context of sport. Overall, the article finds the right to non-discrimination, the right to work and the right to sport to be relevant in this area. It argues for a rethinking of human rights to change the strict binary categorisation in sport based on sex.

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Introduction

In her work on transgender equality rights, Catharine MacKinnon writes: ‘Over the last 50 years, humans have changed the weather without even trying, while male dominance, despite massive effort, has barely budged.’¹ Male supremacy is the reason for the hierarchical binary gender system in sport. Women’s sport is still seen as inferior to men’s, which may influence how the women’s category² is discussed. This also affects trans people and people not fitting Western binary gender stereotypes. People considered not fitting either category or those wanting to change categories face many hurdles or possibly exclusion. Especially transwomen athletes represent a threat to the current system. They are scrutinised under the public eye and prompted a vast amount of media coverage and discussions in the last years.³

This study is motivated by the fact that the number of trans individuals in society and in sport is increasing and can be expected to keep growing. The sporting domain is singled out as special in terms of trans rights because it is based on physical characteristics. Trans people in sport are a highly contested topic, which is discussed by scholars from various disciplines like sports science, sociology and philosophy.⁴ Nevertheless, a lack of human rights perspectives on this topic was identified. Additionally, numerous new transgender eligibility regulations were adopted in the last six years. Their content has not been part of the debate so far. The purpose of this article is to argue for a human rights-based approach to gender eligibility in sport. It does so by utilising feminist theories to analyse 16 transgender eligibility policies by international sports federations and dis-

1 C. A. MacKinnon, ‘A Feminist Defense of Transgender Sex Equality Rights’, *Yale Journal of Law and Feminism*, vol. 34, no. 2, 2023, pp. 90-91.

2 I use the terms women’s/men’s category to refer to the binary classification in the sporting system. Although I do not believe that these terms include every athlete, this is how the categories are best described, as they are structured specifically for those genders, while others are having problems fitting in. I believe that these terms still fit better than female/male category, which are the terms used by many of the IFs policies’ in my analysis and in some of the literature. Whenever I describe/analyse their content, I will use the original terms from the policies/literature.

3 See e.g., discussions and reports on the cases of Caster Semenya, Lia Thomas and Laurel Hubbard.

4 See e.g., A. V. Christiansen, ‘The Negligence of Biological Reality’, *Journal of Olympic Studies*, vol. 4, no. 2, 2023; A. D. Greey and H. J. Lenskyj, *Justice for Trans Athletes: Challenges and Struggles*, Bingley, UK, Emerald Publishing, 2022; A. Bianchi, ‘Transgender women in sport’, *Journal of the Philosophy of Sport*, vol. 44, no. 2, 2017; P. R. Sailors, ‘Transgender and Intersex Athletes and the Women’s Category in Sport’, *Sport, Ethics and Philosophy*, vol. 14, no. 4, 2020.

Discussing concepts and their effects. A human rights framework, which was developed from relevant internationally recognised rights, is used to show how human rights could be interpreted as violated in these eligibility regulations. This article aims to encourage rethinking and expanding human rights to an area they were not initially created for.

Literature review

The literature on gender eligibility policies in sport is minimal as the topic only recently started being of concern.⁵ I attempt to reduce this gap by analysing a comparably great number of current policies. The majority of the work on transgender athletes takes a clear stand either for or against the participation of transwomen in the women's category. Eight common arguments against transwomen competing in the women's category have been identified within existing literature.

The physiological argument

Different studies⁶ have shown that transwomen who went through male puberty have competitive advantages (e.g., being stronger) compared to cis women even after 12 months of testosterone suppression due to being exposed to pre-transition endogenous testosterone.⁷ Some parts are downregulated completely (hemoglobin), while others are not affected at all (skeletal morphology).⁸

5 See J. Harper, 'Transgender Athletes and International Sports Policy', *Law and Contemporary Problems*, vol. 85, no. 1, 2022.; B. A. Jones et al., 'Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies', *Sports medicine*, vol. 47, no. 4, 2017.

6 These studies can be criticized for different reasons (e.g., small sample, no trans people as comparison group, studies on non-athletic transgender people, only measuring very specific things) and there is a lack of research in this field generally.

7 T. A. Roberts, J. Smalley and D. Ahrendt, 'Effect of gender affirming hormones on athletic performance in transwomen and transmen: implications for sporting organisations and legislators', *British journal of sports medicine*, 2020, p. 580.; A. Wiik et al., 'Muscle Strength, Size, and Composition Following 12 Months of Gender-affirming Treatment in Transgender Individuals', *The Journal of clinical endocrinology and metabolism*, vol. 105, no. 3, 2020, p. 811.

8 A. V. Christiansen, 'The Negligence of Biological Reality', p. 25.

The fairness argument

The fairness argument rests on the physiological argument. Physiological differences are used to claim that admitting transwomen in the women's category 'would be unfair because they carry a category advantage (i.e., being male-bodied)'.⁹

The sex/gender argument

The sex/gender argument highlights the difference between sport and other social areas. It is claimed that trans people can change their gender, but not their sex, and since sport operates on sex-based categories, these must be upheld.

The category argument

The category argument weighs cis women's rights against transwomen's rights. Christiansen claims that 'exclusion from categories is fundamental to uphold them, make them meaningful, and to secure inclusion.'¹⁰ Including transwomen in the women's category 'threatens the integrity of women's sport'.¹¹

The discrimination argument

The discrimination argument is intertwined with the category argument claiming that 'when categories discriminate, they do so in a logical way that distinguishes X from Y, and not in a normative way that favors X over Y'.¹²

The safety argument

Another argument that is often put forward is the concern for the safety of cisgender women in collision sports. It is argued that transwomen who

9 M. Imbrišević, 'UN Experts Don't Understand Sport (Nor Human Rights)', *idrottsforum.org*, 6 November 2023, <https://idrottsforum.org/feature-imbrisevic231106/>, (accessed 22.03.2024).

10 A. V. Christiansen, 'The Negligence of Biological Reality', p. 23.

11 C. Devine et al., 'When Ideology Trumps Science: A Response to the Canadian Centre for Ethics in Sport's Review on Transwomen Athletes in the Female Category', *idrottsforum.org*, 29 November 2022, <https://idrottsforum.org/devineetal221129/>, (accessed 25.01.2024), p. 2.

12 A. V. Christiansen, 'The Negligence of Biological Reality', p. 24.

experienced male puberty are stronger than biological females¹³ and therefore present a possible source of injuries.¹⁴

The human rights argument

This argument is no line of reasoning itself, but a counterargument towards human rights claims made by scholars and UN experts. The main point is that no human right to sport exists and that sport categories are not protected under International Human Rights Law (IHRL).¹⁵

The burden of proof argument

Lastly, some authors claim the burden of proof ‘lies not with those who say this advantage exists, but with those who claim they have no advantage or that testosterone suppression causes the removal of the advantage.’¹⁶ As long as there is a lack of conclusive evidence and a change of policy could lead to bad outcomes – which they argue is the case here – more evidence needs to be provided before a policy should be implemented.¹⁷ As a result, the burden of proof is shifted to transwomen athletes or their allies.

Feminist perspectives: Sex and gender as a social construction

The feminist perspectives on sex and gender utilised for this study stand in contrast to most of the discussed arguments. Judith Butler has shaped the field of social constructionism and gender significantly. Butler’s central thesis in “Gender Trouble: Feminism and the Subversion of Identity” is that the assumption that a person’s social gender is based on their biological sex is not tenable, as both gender and sex are culturally constructed and therefore inseparable.¹⁸ Society’s perception of bodies determines a person’s gender identity. Individuals are not existent before having a gender label, which makes the body itself a construction. According to Butler,

13 A. V. Christiansen, ‘The Negligence of Biological Reality’, p. 21.

14 C. Devine et al., ‘When Ideology Trumps Science’, p. 16.

15 M. Imbrišević, ‘UN Experts Don’t Understand Sport’.

16 A. V. Christiansen, ‘The Negligence of Biological Reality’, p. 26.

17 C. Devine et al., ‘When Ideology Trumps Science’, p. 7.

18 J. Butler, *Das Unbehagen der Geschlechter*, 20st edn., Frankfurt a.M., Germany, Suhrkamp, 2019, pp. 22-24

one could say that gender identity is the meaning a body takes on. The binary gender construction is represented as set and necessary in dominant discourses and produces a hierarchy placing men over women.¹⁹ This is reflected in the sporting system. Butler argues that biomedical studies claiming to determine a person's anatomical sex also refer to the culturally produced interpretations of gender, as there are no real physical determinants. The scientific discipline of biology thus contributes to the (re) production of discourses and relies on them.²⁰

This discursively constructed incentive of unambiguous determination of gender and the hierarchy it entails also plays a central role in the discrimination against trans people, as Catharine MacKinnon shows. She establishes that 'discrimination against trans people is discrimination on the basis of sex, that is gender, the social meaning of sex.' Recognizing this 'does not, contrary to allegations of anti-trans self-identified feminists, endanger women or feminism, including what some in this group call "women's sex-based rights."' ²¹ In her eyes, 'women's oppression is enforced through gender, specifically gender hierarchy, a social and political, not biological, arrangement.'²² Although gender is socially constructed, it has effects in the real world.²³ She suggests that 'sex can be a sufficient condition for being a woman but has never been a necessary one.'²⁴ Therefore, transwomen are women, too. Following feminist arguments, she establishes that in a patriarchal society, transwomen lose social status, and transmen gain it when transitioning. That way, transwomen are then discriminated against as trans and women while transmen improve their social standing but might still be seen as "lesser men".²⁵

Additionally, Sally Haslanger argues that the fact that nature does not dictate binary sexes is crucial to understanding our concept of sex as socially constructed. Having 'to surgically create a binary is some evidence that the difference is not "purely natural".'²⁶ Concerning gender, she explains that some ideas about gender are fictional, but this does not have an influence on their significance in creating and reinforcing gender reali-

19 J. Butler, *Das Unbehagen der Geschlechter*, pp. 25-28.

20 J. Butler, *Das Unbehagen der Geschlechter*, p. 163.

21 C. A. MacKinnon, 'A Feminist Defense', p. 88.

22 C. A. MacKinnon, 'A Feminist Defense', p. 90.

23 C. A. MacKinnon, 'A Feminist Defense', p. 91.

24 C. A. MacKinnon, 'A Feminist Defense', p. 92.

25 C. A. MacKinnon, 'A Feminist Defense', p. 94.

26 S. Haslanger, 'The Sex/Gender Distinction and the Social Construction of Reality', in A. Garry, S. J. Khader and A. Stone (eds.), *The Routledge Companion to Feminist Philosophy*, New York, Routledge, 2017, p. 160.

ty.²⁷ Haslanger also mentions how these existing concepts can be changed: ‘One feminist hope is that we can become, through the construction of new and different practices, gendered differently and potentially new sorts of beings altogether.’²⁸ The aim of this article is to contribute to this re-construction by providing a framework to consider these concepts from a human rights perspective.

Human rights framework

The interpretation of IHRL is a contested area. Certainly, human rights were not initially intended to protect individuals’ claims to inclusion in a gender category in sport. However, in this article I am presenting arguments to rethink and expand human rights in a way that is appropriate to current developments. The international human rights regime does not include a specific right to sport or to participation in competitions, but I argue that the right to compete in a category aligning with one’s gender could be derived from it. Thereby, I am creating a human rights framework to make my argument. The International Federations (IFs) whose policies are analysed are located in the following countries: Switzerland (11), Monaco (1), USA (1), South Korea (1), Ireland (1), United Kingdom (1). In international law, states are the main actors having to comply, but since many of the treaties are ratified by the countries the IFs are based in, the IFs, as ‘international non-governmental organisations governing one or several sports at the world level’²⁹, must comply with those rights too.³⁰

The non-binding Universal Declaration of Human Rights (UDHR)³¹ plays a major role in the human rights regime and establishes the right to non-discrimination and equality before the law.³² Gender and non-discrimination rights are relevant for this study because the people affected by the policies are part of vulnerable groups who are regularly discriminated against. All six countries hosting IFs that are part of the sample have adopted the UDHR. The European Convention on Human Rights (ECHR)

27 S. Haslanger, ‘The Sex/Gender Distinction’, p. 166.

28 S. Haslanger, ‘The Sex/Gender Distinction’, p. 166.

29 International Olympic Committee, *Olympic Charter*, 15 October 2023, p. 56.

30 A. von Arnould, *Völkerrecht*, 3. edn., Heidelberg, Germany, C. F. Müller, 2016, pp. 22-24.

31 United Nations, *Universal Declaration of Human Rights*, 10 December 1948.

32 UN, *UDHR*, Art. 7.

also includes the right to non-discrimination³³ and is applicable for most of the data as only two (Surfing: US; Taekwondo: South Korea) of the 16 IFs are not located in member states of the Council of Europe. The provision on the right to non-discrimination in the International Covenant on Civil and Political Rights (ICCPR)³⁴ is similar to the formulation in the UDHR. It has been ratified by all six countries. Additionally, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) establishes specific women's rights, as state parties agree 'to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise'³⁵, to ensure 'the same Opportunities to participate actively in sports and physical education'³⁶ and 'the right to participate in recreational activities, sports and all aspects of cultural life.'³⁷ Out of the six countries, only the US has not ratified CEDAW.³⁸ The ECHR, ICCPR and CEDAW are legally binding.

I also identified the right to work as relevant in professional competitive sport. In many sports, people need to have another profession or scholarship to finance themselves, but this does not justify disregarding the protection of their human rights in their job as an athlete. The UDHR includes 'the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.'³⁹ The legally binding International Covenant on Economic and Social Rights (ICESCR) recognises the right to free choice of work⁴⁰, while the International Labour Organization (ILO) Declaration specifically introduces 'the elimination of discrimination in respect of employment and occupation.'⁴¹ CEDAW specifies the right to work in relation to women who have a right 'to the same employment opportunities', 'to free choice of profession and employment', 'to equal remuneration, including benefits, and to equal

33 Council of Europe, *European Convention on Human Rights*, 4 November 1950, Prot. 12, Art. 1.

34 United Nations, *International Covenant on Civil and Political Rights*, 16 December 1966.

35 United Nations, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, Art. 2 (e).

36 UN, *CEDAW*, Art. 10 (g).

37 UN, *CEDAW*, Art. 13 (c).

38 United Nations Human Rights Office of the High Commissioner, 'Ratification Status for CEDAW', *UN Treaty Body Database*, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en, (accessed 13.05.2024).

39 UN, *UDHR*, Art. 23 (1).

40 United Nations, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Art. 6 (1).

41 International Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, 18 June 1998, Art. 2 (d).

treatment in respect of work of equal value' and 'to protection of health and to safety in working conditions.'⁴²

Additionally, business responsibilities regarding human rights are relevant because IFs can be considered as non-governmental actors, which are not businesses, but have a similar status in the human rights regime.⁴³ The United Nations Guiding Principles on Business and Human Rights (UNGPs)⁴⁴ establish human rights duties of businesses:

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.⁴⁵

States are the main responsibility bearers of ensuring compliance and 'must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.'⁴⁶ Gonzalez explains in her work that the due diligence principle in IHRL 'imposes upon states the obligation of protecting all individuals under their jurisdiction from human rights violations committed by non-state actors.'⁴⁷ Although the state is liable, it is the businesses responsibility to respect internationally recognised human rights. She establishes that this includes corporations and also sport organisations.⁴⁸

Although the ILO Declaration and the Guiding Principles are not binding, both documents are internationally recognised.⁴⁹ All of the relevant countries ratified the ICESCR, while only Monaco is not part of the ILO.⁵⁰ The Guiding Principles apply to all UN Member States.

Although there is no internationally recognised human right to sport, charters, resolutions and declarations concerning sport exist. None of them are legally binding. However, they have an effect in terms of international standards and governments have acted on their recommendations

42 UN, *CEDAW*, Art. 11 (b-f).

43 C. P. González, 'The effective application of international human rights law standards to the sporting domain: Should UN monitoring bodies take central stage?', *The International Sports Law Journal*, vol. 22, no. 2, 2022, p. 161.

44 United Nations, *Guiding Principles on Business and Human Rights*, 16 June 2011.

45 UN, *UNGPs*, Art. 11.

46 UN, *UNGPs*, Art. 1.

47 C. P. González, 'The effective application', p. 161.

48 C. P. González, 'The effective application', p. 161.

49 UN, *UNGPs*, pp. 1-2; International Labour Organization, 'Mission and impact of the ILO', *ILO*, <https://www.ilo.org/about-ilo/mission-and-impact-ilo>, (accessed 13.05.2024).

50 International Labour Organization, 'Member States', *ILO*, <https://www.ilo.org/about-ilo/how-ilo-works/member-states>, (accessed 13.05.2024).

to some degree.⁵¹ The United Nations Educational, Scientific and Cultural Organization (UNESCO) Charter of Physical Education, Physical Activity and Sport⁵² states that ‘every human being has a fundamental right to physical education, physical activity and sport without discrimination.’⁵³ Moreover, ‘every human being must have the opportunity to attain a level of achievement through physical education, physical activity and sport which corresponds to their capabilities and interest’⁵⁴, which I interpret to include competitive/professional sports. The UNESCO Charter is similar to a UN document in its applicability, as only the UN member Israel is not part of the UNESCO.⁵⁵ The European Sports Charter⁵⁶ by the Council of Europe additionally establishes the responsibility of all stakeholders to promote and respect human rights within sports, specifically regarding gender equality.⁵⁷

The Olympic Charter is ‘the codification of the Fundamental Principles of Olympism, Rules and Bye-laws adopted by the International Olympic Committee (IOC)’ and ‘governs the organisation, action and operation of the Olympic Movement.’⁵⁸ It includes the ‘respect for internationally recognised human rights’ and establishes that ‘the practice of sport is a human right’.⁵⁹ This is relevant insofar that its fundamental principles determine the Olympic Games and carry weight within the sporting world. Since the IFs in my analysis all oversee the organisation of Olympic sports, they must abide by the charter.⁶⁰ This should suffice to establish sport as a human right and the necessity for IFs to follow internationally recognised human rights.

The fact that the UDHR is not legally binding does not mean it is not internationally recognised and respected. Many of its provisions are considered customary international law today and are reflected in national law.⁶¹ In the case of Switzerland, for example, which is hosting most IFs,

51 B. Kidd and P. Donnelly, ‘Human Rights in Sports’, *International Review for the Sociology of Sport*, vol. 35, no. 2, 2000, p. 144.

52 United Nations Educational, Scientific and Cultural Organization, *International Charter of Physical Education, Physical Activity and Sport*, 18 November 2015.

53 UNESCO, *Charter of Physical Education*, Art 1.1.

54 UNESCO, *Charter of Physical Education*, Art. 1.6.

55 UNESCO, ‘Member States’, UNESCO, <https://www.unesco.org/en/countries>, (accessed 13.05.2023).

56 Council of Europe, *Recommendation CM/Rec(2021)5 of the Committee of Ministers to member States on the Revised European Sports Charter*, 13 October 2021.

57 Council of Europe, *Recommendation CM/Rec(2021)5*, Art. 6.

58 IOC, *Olympic Charter*, p. 6.

59 IOC, *Olympic Charter*, p. 8.

60 IOC, *Olympic Charter*, pp. 56-57.

61 A. von Arnould, *Völkerrecht*, p. 132.

the right to non-discrimination⁶² and the right to work under reasonable conditions are included in the constitution.⁶³

Data and method

The data for this study consists of 16 international sports federations' policies on transgender eligibility.⁶⁴ Of 48 IFs that were found to be relevant generally and on the Olympic level, 24 have no policy, 22 have a publicly available policy and two are special cases. Only Olympic federations were included in the sample since being "Olympic" is a good indicator of the importance of the sport/federation and its weight in setting norms and the agenda for future decisions. Federations were categorised as "Olympic" if the sport was/will be included in the most recent editions (Tokyo 2020/21; Beijing 2022; Paris 2024; Milano Cortina 2026). Restricting the sample to Olympic sports, I ended up with 16 policies. The reason for choosing to conduct the analysis on IFs' policies is that they usually set the agenda in their respective sport(s) for all international and national competitions. IFs have the decision-making power when it comes to eligibility in competitive sports and their rules are often reflected in non-competitive or school sport as well. Especially bigger federations like World Athletics have the power to influence the sport world greatly.

62 *Bundesverfassung der Schweizerischen Eidgenossenschaft*, 1999, Art. 8 (2)

63 *Bundesverfassung der Schweizerischen Eidgenossenschaft*, Art. 41 (1d).

64 Fédération Internationale de Volleyball, *Sports Regulations: Volleyball*, 23 June 2023; International Federation of Sport Climbing, *Policy Statement: Gender Identity & Transsexuality*, 27 November 2018; International Ice Hockey Federation, *IIHF Transgender Policy*, 01 June 2022; International Skating Union, *Communication No. 2595: ISU Transgender Policy*, 11 October 2023; International Surfing Association, *International Surfing Association (ISA) Transgender Policy Rule*, 07 March 2023; International Tennis Federation, *ITF Transgender Policy*, 10 August 2023; Union Cycliste International, *Eligibility Regulations for Transgender Athletes in UCI Cycling Regulations Part 13 Medical Rules*, 17 July 2023; United World Wrestling, *UWW Transgender Policy*, 4 June 2018; World Aquatics, *Policy on the Eligibility for the Men's and Women's Competition Categories*, 24 March 2023; World Archery, *Eligibility rules for transgender athletes*, 1 October 2023; World Athletics, *Eligibility Regulations for Transgender Athletes*, 31 March 2023; World Rowing, *Appendix R1 Bye-Law to Rule 13 – Men's and Women's Events in World Rowing Rule Book*, February 2023 (Change of By-Law); World Rugby, *Transgender Guidelines*, May 2021; World Skate, *Competition Guidelines for Transgender Athletes*, 2019; World Taekwondo, *Eligibility Regulations for Transgender Athletes*, April 2021; World Triathlon, *Eligibility Regulations for Transgender Athletes*, 22 November 2022.

Carol Bacchi’s “What’s the problem represented to be?’ approach” (WPR approach) was utilised to analyse the policies.⁶⁵ It is a form of policy analysis, which leans on discourse analysis and differs from traditional policy analyses by ‘looking beyond the state to understand how governing occurs.’⁶⁶ It focuses not on measuring the outcomes of a policy, but rather on the assumptions and “problems”⁶⁷ represented within it. It assumes we are governed through problematisations – meaning what is commonly viewed as a problem – and to understand how we are governed, the problem representations within policies must be identified.⁶⁸ Policy makers play a productive role in shaping particular understandings of “problems” because ‘if you look at a specific policy, you can see that it understands the ‘problem’ to be a particular sort of ‘problem’⁶⁹. The aim of this approach ‘is to understand policy better than policy makers by probing the unexamined assumptions and deep-seated conceptual logics within implicit problem representations.’⁷⁰

Bacchi’s WPR approach consists of six questions:

1. What’s the ‘problem’ (e.g., of ‘problem gamblers’, ‘drug use/abuse’, domestic violence, global warming, health inequalities, terrorism, etc.) represented to be in a specific policy?
2. What presuppositions or assumptions underlie this representation of the ‘problem’?
3. How has this representation of the ‘problem’ come about?
4. What is left unproblematic in this problem representation? Where are the silences? Can the ‘problem’ be thought about differently?
5. What effects are produced by this representation of the ‘problem’?
6. How/where has this representation of the ‘problem’ been produced, disseminated and defended? How could it be questioned, disrupted and replaced?⁷¹

65 C. Bacchi, *Analysing Policy: What’s the problem represented to be?*, Melbourne, VIC, Pearson, 2009.

66 C. Bacchi, *Analysing Policy*, p. 26.

67 Bacchi uses the word “problem” in quotations in her approach to illustrate that problem in this sense is not used like the common term (something that is difficult to deal with or a challenge that needs to be solved) but rather refers to the kind of change implied in a particular policy proposal.

68 C. Bacchi, *Analysing Policy*, p. xiii.

69 C. Bacchi, *Analysing Policy*, p. 1.

70 C. Bacchi, ‘Introducing the ‘What’s the Problem Represented to be?’ approach’, in A. Bletsas and C. Beasley (eds.), *Engaging with Carol Bacchi*, University of Adelaide Press, 2013, p. 22.

71 C. Bacchi, *Analysing Policy*, p. xii.

Bacchi points out that ‘a WPR approach has an explicitly normative agenda. It presumes that some problem representations benefit the members of some group at the expense of others.’⁷² The approach takes the side of the harmed group by intervening to ‘challenge problem representations that have these deleterious effects, and to suggest that issues could be thought about in ways that might avoid at least some of these effects.’⁷³ For example, ‘appeals to ‘rights’ can be raised in response to a specific practice and thus can be directed at suspending or even altering relations of power’.⁷⁴

Results

The 16 policies were adopted between 2018 and 2023. The policies differ in length and detail. Although not mentioned in the policies, my research shows that some were likely developed in response to a trans athlete participating in the women’s category.⁷⁵ Several of the policies are strikingly similar in their formulation and their used references. Clearly, a snowball effect has set in in international sports. Even though some policies establish stricter regulations than others, 15 focus on testosterone levels and/or time of transition as the decisive factor in determining eligibility for the women’s category.

What’s the “problem” represented to be?

The first question in Bacchi’s manual, ‘What’s the ‘problem’ represented to be in a specific policy?’⁷⁶, is the basis for the analysis. The task is not to identify a real problem but what is perceived to be one by policy makers.⁷⁷ The represented “problem” in the policies can be broadly summarised as transgender athletes wishing to compete in a category that matches their gender identity, which is why the policies exist in the first place. There are small differences in how the “problem” is presented and whether trans-

72 C. Bacchi, *Analysing Policy*, p. 44.

73 C. Bacchi, *Analysing Policy*, p. 44.

74 C. Bacchi, *Analysing Policy*, p. 45.

75 One example is the policy by World Aquatics, which was developed after Lia Thomas, a transwoman, started competing in the NCAA. For more context see D. Close and E. Tucker, ‘Transgender swimmer Lia Thomas begins legal case against swimming’s world governing body’, *CNN*, 26 January 2024, <https://edition.cnn.com/2024/01/26/us/lia-thomas-world-aquatics-transgender-athletes-swimming/index.html>, (accessed 09.04.2024).

76 C. Bacchi, *Analysing Policy*, p. xii.

77 C. Bacchi, *Analysing Policy*, p. 32.

gender athletes in general are perceived as the “problem” or just those who want to compete in the women’s category. Transmen are represented as a smaller “problem” than transwomen.

Presuppositions and assumptions

The aim of question two is ‘to identify the assumptions and/or presuppositions that lodge within problem representations’, meaning what is assumed and how the world is perceived by policy makers.⁷⁸ Binaries and categories implied in the policies play a central role in this part of the analysis, which contains features of a discourse analysis.⁷⁹ The main assumption underlying all policies is that testosterone is the key indicator of physical performance and that higher testosterone levels equate to a performance advantage. For this reason, all policies – except for the one by the Fédération Internationale de Volleyball (FIVB) – determine a specific testosterone threshold for trans athletes wanting to compete in the women’s category.

The analysis focuses on the concepts of sex and gender because they are central in the policies. Based on the belief that there are only two biological sexes and sex being the determining factor in sport, it is assumed that sport is best organised in binary categories. World Aquatics even expresses this by referring to ‘both biological sexes.’⁸⁰ The women’s category is presented as weaker and in need of protection from trans athletes through specific provisions in all policies. The men’s category, on the other hand, is not presumed to require such regulations. Some policies additionally assume that the onset of puberty is a determining factor in “fixing” an athlete’s belonging to the men’s category, as they do not permit transwomen who transitioned after puberty in the women’s category at all. Most policies give a similar definition for transgender:

The term “Transgender” is used in this Policy to refer to individuals whose gender identity (i.e., how they identify themselves) is different from the sex assigned to them at birth (whether they are pre- or post-puberty, and whether or not they have undergone any form of medical intervention).⁸¹

From that definition, it becomes clear that the IFs assume a person can change their gender, whereas sex is somewhat fixed. World Rugby even

⁷⁸ C. Bacchi, *Analysing Policy*, p. 5.

⁷⁹ C. Bacchi, *Analysing Policy*, pp. 7-9.

⁸⁰ World Aquatics, *Policy on the Eligibility*, p. 2.

⁸¹ ISU, *ISU Transgender Policy*, p. 1.

mentions that ‘males are typically significantly heavier, faster, stronger, and more powerful than typical females’.⁸² Transgender persons are consequently represented as “untypical”.

Fairness and equal opportunities to excel are one of the overarching objectives within the policies. The protection of the women’s category is considered most important. Thereby, cis women’s rights are represented as worthier than transwomen’s rights. In Rugby, ‘in the event that a player or Union has a genuine concern about safety or fairness in relation to another player’, they can refer this to higher authorities and possibly spark an investigation.⁸³ This rule confers to stereotypical assumptions about heteronormative bodies.

Origin of the problem representation

Question three asks how this representation of the “problem” has come about.⁸⁴ The identified problem representation is broadly the same in all policies and therefore has the same origin within society. Firstly, for a long time there were only two recognized genders represented and visible in society. This is mirrored in the binary categorisation in sport. The history of sports shaped the system as we know it now. More recently, specific cases of athletes like Caster Semenya and Dutee Chand – two women athletes with “Differences of Sex Development” (DSD)⁸⁵ – sparked debates and triggered investigations and legal negotiations before the Court of Arbitration for Sport (CAS). World Athletics, for example, developed their stricter DSD regulations in reaction to Semenya and her legal appeals, while at the same time pushing similarly strict trans regulations.

The problem representation is produced through the overarching perception in society of women being the weaker gender compared to men. Power relations play a significant role, as sport is an area where men continue to dominate the disciplines themselves, as well as key decision-making and coaching positions. This is accompanied by the stereotypical notion that women must be “protected” in general and specifically from “biological males”, in this case meaning transgender women. Even though trans people are becoming more accepted in many societies, sport is seen

82 World Rugby, *Transgender Guidelines*.

83 World Rugby, *Transgender Guidelines*.

84 C. Bacchi, *Analysing Policy*, p. xii.

85 The term “Differences of Sex Development” is an umbrella term to describe different anatomical conditions that deviate from what has been established as the norm. For lack of alternatives and because this term is used in the official regulations, I am using it too.

as separate from this development. Being so physical, it holds a special position.

Silences and alternatives

Question four considers what is left unproblematic or silenced in a problem representation. At the same time, it asks whether the “problem” can be thought about differently.⁸⁶ Half of the policies invoke scientific studies/evidence to justify their regulations. However, none of them provide reasons for choosing a specific testosterone threshold, despite the fact that they differ from 2.5–10 nmol/L. Interestingly, all policies justify their threshold with the same sources. Thus, it does not become clear why a policy needs to give this threshold and not any other. The same applies to the timeframe for proving lower serum testosterone levels, which is either 12 or 24 months for eligibility to compete in the first place. Furthermore, all policies reduce transgender athletes – and consequently every other athlete – to their physical components rather than focusing partially or exclusively on gender identity and/or societal factors. Non-binary people are only mentioned in World Rugby’s policy but do not have a place in any other. The policies that exclude transwomen who transitioned after puberty from the women’s category do not provide an explanation as to how these transwomen can compete. It can be assumed that they might be eligible in the men’s category, but this is not stated. They also do not discuss the fact that in most countries transitions are either permitted from the age of 16/18 or not permitted at all. One criterion is therefore almost impossible to fulfil.

Most policies give a definition of the term transgender but do not explain how the terms “sex”, “gender”, “women/men” and “female/male” are used. In the scientific literature, the concepts of female/male are often used to describe a person’s sex and women/men (and others) for gender.⁸⁷ The IFs seem to use this categorisation. Although most policies use “female/male category”, which aligns with the idea of sex being the determining factor, the terms are often mixed and not defined properly. United World Wrestling (UWW), for example, speaks of ‘female-to-male Transgender wrestler’.⁸⁸ Similarly, World Triathlon uses ‘Transgender female’ and ‘Transgender women’ interchangeably.⁸⁹

86 C. Bacchi, *Analysing Policy*, p. xii.

87 S. Haslanger, ‘Gender and Social Construction: Who? Where? What? How?’, in E. Hackett and S. Haslanger (eds.), *Theorizing Feminisms*, Oxford University Press, 2006, p. 20.

88 UWW, *UWW Transgender Policy*, p. 2.

89 World Triathlon, *Eligibility Regulations*.

Effects of the problem representation

The fifth question aims to identify the effects a policy has. Bacchi introduces three interrelated effects: discursive, subjectification and lived effects.

Discursive effects follow from the limits imposed on what can be thought and said by representing a “problem” in a specific way.⁹⁰ Since transgender athletes need special regulations to compete or cannot compete at all, they are framed as outside the norm. Cisgender athletes, on the other hand, represent the norm. Phrases like ‘typically associated with their sex’⁹¹ prove this. That leads to the discursive belief of transgender athletes not fully belonging in sport, which in turn affects representation. Additionally, the discourse can have a possible effect (and already has had in some countries) on recreational and school sport, negatively impacting trans kids and adults. Overarchingly, the women’s category is represented as requiring protection, which portrays female athletes as physically inferior to male athletes. This has effects not just in sport, but in society generally, as it reproduces stereotypical ideas of not just sex but also gender. Another discursive effect is that some groups of people do not exist in the sporting world. The policies exclude non-binary individuals, indicating that they have no place in sport unless they assign themselves to the category of their sex assigned at birth. This only works if they have not taken any steps to change their hormonal features. Transmen also do not exist in some policies, which frames athletes classified as “biologically female” as inferior again.

Subjectification effects describe how subjects are constituted within discourses. Problem representations in policies often set groups of people in opposition to each other⁹², which is the case here, too. Trans athletes are targeted as a specific group in opposition to cisgender athletes. They are not perceived as “fully female” or “fully male”, as they must fulfil certain criteria to be eligible to compete in the existing categories and are subjected to a strict testing regime. Opposingly, cisgender athletes as a group occupy the subject position of “the normal”. This affects how trans athletes as individuals, but also as a group, see themselves and which position in sport they occupy.

Lived effects describe the material and social impacts a problem representation has on people’s life.⁹³ One aspect is the possible exclusion, bully-

90 C. Bacchi, *Analysing Policy*, p. 16.

91 World Aquatics, *Policy on the Eligibility*, p. 6.

92 C. Bacchi, *Analysing Policy*, p. 16.

93 C. Bacchi, *Analysing Policy*, p. 17.

ing, stigmatisation and negative media attention trans athletes are facing. Places like bathrooms and changing rooms can become sites of harmful encounters. The identity and/or physical make-up of a person can become a topic of public debate, particularly in sports where athletes wear revealing uniforms. Additionally, trans athletes might face disadvantages compared to cis athletes in terms of positive media attention and sponsoring, which affects their material living situation. This is in addition to the extensive costs they have for treatment, testing and obtaining a Therapeutic Use Exemption (TUE) for transmen. There are other effects, as ‘random or targeted testing’⁹⁴ influences how a person can live their life, while providing ‘a comprehensive medical history’⁹⁵ is an invasion of privacy. A number of trans people can likely not participate in the sport at all or in the category that aligns with their gender identity, which can have a number of negative effects like unhappiness, mental and physical health issues and a lack of social contacts.

Production and replacing of the problem representation

Question six considers how a problem representation is produced and defended, but also how it can be questioned or replaced.⁹⁶ The problem representation of transgender athletes derives from the fact that males have an advantage in sport, which can be proven by objective results (times, distances etc.). Social factors that affect sporting performance, such as funding, socialisation, gender roles and opportunities, are often completely neglected as the discourse focuses only on physical components. The focus on sex- and gender-related questions in sport in the form of sex-testing and gender verification procedures has existed for a long time. Some sports like ice-dancing take heteronormative ideals as a basis and therefore reproduce the discourse on heteronormativity. Additionally, scholars and other people claim that the main objective of sport is fairness and not inclusivity, which justifies the problem representation. It recently achieved dominance through the new policies by IFs and the growing number of publications on this topic, especially in the field of sports science. Social media is another factor in producing and reproducing this problem representation.

The problem representation can be challenged/replaced by more studies that also research trans people who are actually involved in sports and

⁹⁴ UCI, *Eligibility Regulations UCI*, p. 7.

⁹⁵ IIHF, *IHF Transgender Policy*, p. 7.

⁹⁶ C. Bacchi, *Analysing Policy*, p. 2.

by valuing women's sport more and not representing it as "inferior". This could be done by increasing funding, supporting pregnant athletes and emphasising women's sporting achievements. If one compares, for example, the development of the World Record in the marathon, the women's World Record is now where the men's was in the 1960s and times have gotten closer.⁹⁷ This suggests that societal factors also play somewhat of a role and that real gender equality in sport should be enforced for the gender performance gap to shrink. Furthermore, the use of language poses a problem, as sports are usually named "soccer" vs "women's soccer" or "Tour de France" vs "Tour de France Femmes". Women always need an additional word, since sport is immediately associated with men. Language has a power in reconstructing discourses that is often underestimated. Changing language would be a step towards more gender equality.

Another option is to find other solutions than two binary categories to not represent trans athletes as a "problem". World Aquatics, being the first IF, introduced an open category at their Swimming World Cup 2023 but received no entries.⁹⁸ This shows that there is potential in changing the binary sporting system. The heteronormative framework of sports like ice-dancing could also be challenged. Finally, the general perception of trans people in society needs to change to create better conditions for them in sport but also in any other area. Visibility is necessary for this to happen. Sport could be helpful in creating this visibility.

97 World Athletics, 'Marathon Women', *World Athletics*, <https://worldathletics.org/records/all-time-toplists/road-running/marathon/all/women/senior?regionType=world&page=1&bestResultsOnly=true&firstDay=1900-01-01&lastDay=2024-04-25&maxResultsByCountry=all&eventId=10229534&ageCategory=senior>, (accessed 25.04.2024). World Athletics, 'Marathon Men', *World Athletics*, <https://worldathletics.org/records/all-time-toplists/road-running/marathon/all/men/senior?regionType=world&page=1&bestResultsOnly=true&firstDay=1900-01-01&lastDay=2024-04-25&maxResultsByCountry=all&eventId=10229634&ageCategory=senior>, (accessed 25.04.2024).

98 World Aquatics, 'Update on the Open Category competitions at the World Aquatics Swimming World Cup – Berlin 2023', *World Aquatics*, 3 October 2023, <https://www.worldaquatics.com/news/3715191/update-on-the-open-category-competitions-at-the-world-aquatics-swimming-world-cup-berlin-2023>, (accessed 25.04.2024).

Discussion: A human rights-based approach to gender eligibility in sport

As mentioned before, the WPR approach explicitly ‘takes the side of those who are harmed’ with the goal ‘to intervene to challenge problem representations’ by highlighting contradictions in policies and considering discourses as sources of re-problematisations through, for example, raising appeals to rights.⁹⁹ I am taking a human rights friendly approach, assuming that they are universal¹⁰⁰ and can be adapted to protect the field of sport. Thereby, I also address the opposing arguments identified in the literature.

I argue, following the introduced theoretical framework, that the existing understandings of sex and gender in society are socially constructed. I do not deny physical factors playing a role in sport, but the way the sporting system is constructed is a result of heteronormative ideas of binary sexes and genders. I showed that these ideas underlie the examined policies as well. I argue, with Butler, that the existence of a person in the cultural and social sphere presupposes a causal relationship between sex and gender.¹⁰¹ The fact that people exist who do not fit this system and therefore do not exist within it, or only as outliers, proves this. It is no solution to construct them as a “problem” or “untypical”. Following MacKinnon’s legal anti-discrimination approach, trans rights are sex equality rights¹⁰² as much as women’s rights are.

I established that the right to non-discrimination, gender equality rights, the right to work and the right to sport are relevant in this field. On the reasonable assumption that human rights are universal, trans people should have exactly the same rights to compete in sports and to protection of their work as everyone else. The category and discrimination argument identified in the literature weigh transwomen’s rights against cis women’s rights. The argument is that transwomen’s right to participation does not entail them do so in a category of their choice, as this would harm cis women’s rights. Therefore, discrimination in sport is seen as acceptable. It should not be acceptable to place cis women’s rights over transwomen’s rights. By excluding transwomen from the women’s category, they are de facto excluded completely, although some might argue they can compete in the men’s category. Apart from this not being possible in all federations,

99 C. Bacchi, *Analysing Policy*, pp. 44-45.

100 M. Freeman, *Human Rights*, 3rd edn., Cambridge, UK, Polity Press, 2017, p. 120.

101 J. Butler, *Das Unbehagen der Geschlechter*, p. 46.

102 I prefer gender equality rights, but this is the term MacKinnon uses.

it is unrealistic due to physical and social aspects. Balancing the human rights of one person against the human rights of another is a common dilemma. I argue that the chance to compete and work in the first place should be seen as more important than a cis woman who might have won or qualified for the final had it not been for a transperson. The right to free choice of work, as enshrined in the ICESCR¹⁰³, can be interpreted in a way that any person should at least get the chance at pursuing a career in competitive sport and excel at it.

This article does not address physiological aspects, but I want to highlight that more medical studies researching trans athletes in sport are necessary. These would support or contradict the safety argument, which would entail a separate evaluation for collision sports. I outlined that some scholars argue that the burden of proof lies with trans athletes and their allies because they request participation. I, however, argue that in the area of human rights, the burden of proof should not lie with the oppressed group, as they do not have the means to prove anything.

By utilising Bacchi's approach, I challenge the problem representation of transgender athletes and propose the redefinition of the concepts sex/gender in sport to be most beneficial for trans athlete's rights. Framing perceptions of both sex and gender as socially constructed serves as a basis to redefine the use of these concepts. One option would be to eradicate the concept of sex completely and solely focus on gender. I am convinced that this is not a feasible option as I do not want to deny biological realities of, for example, some people having higher testosterone levels than others or being able to bear children. Physical characteristics are not constructed and play a decisive role in sport, which separates it from other societal areas. Denying this would mean to deny existing advantages in sport and real sources of discrimination. However, I argue that the existing gender hierarchy, and with it the discrimination of women and trans people, is purely a social construction. The same goes for the binary categorisation of sex and the categorisation in sport. Athletes not fitting the binary system prove this. Decisive factors in sport like testosterone, height etc. are a continuum.

Therefore, I propose to use sex in a way that acknowledges this, as Haslanger and Butler do. The term sex can be used in sport to describe the social construction of physical characteristics (e.g., the idea of strength and muscle mass being associated with masculinity). It is still relevant in sport but the recognition of it being socially constructed is vital for re-

¹⁰³ UN, ICESCR, Art. 6 (1).

constructing transgender eligibility regulations. Instead of the term sex and its binary assumptions, focusing on specific physical characteristics, but not associating them with sex, could be helpful in reframing gender equality and trans people in sport. Gender needs to be defined in itself and not in relation to sex anymore (as the social aspects of sex). I propose to use gender for the social identity that is ascribed to a person by society or themselves on the basis of discourses. Both concepts are fluid because ideas and perceptions in societies can change over time, and it is possible to not identify with any sex or gender or change them. Nevertheless, it is still necessary to keep these concepts to highlight existing inequalities. Redefining these concepts weakens the sex/gender argument from the literature, since it rests on the assumption that people can only change their gender, not their sex. If we acknowledge the concept of sex as a social construction, this does not hold. The same goes for the fairness argument.

It can be said that the argumentation entails a protection of “elite” rights, for which human rights were not originally intended. However, human rights already fulfil different purposes than they did at their inception. Their scope has been widened tremendously. Protecting human rights in an elite field does not make them elite rights but is as important as protecting them anywhere else. The fact that everyone cannot make it into professional sports should not be an excuse for disregarding human rights. Otherwise, the same argument could be applied to any area, which would make the human rights regime pointless. I believe that the regime’s strength is that it can be adapted to new circumstances. MacKinnon establishes that law ‘can change reality because of the meaning with which people invest in it, including those whom it has not represented.’¹⁰⁴ The policies I analysed are not law, but they have a similar kind of power as they set the agenda in their respective sport(s). Their use of language and construction of trans athletes as a “problem” carries weight in and possibly outside the sporting world.

Following my human rights-based argument, a change of the binary categorisation in sport is necessary. This article does not aim to propose a solution but advocates for rethinking the existing categories. In sports like Archery, testosterone might not be as important as in others, while other sports might have a lot of non-binary athletes. It is interesting that, for example, equestrian sports already have a different system because biological differences are not seen as decisive. This proves that the binary system

¹⁰⁴ C. A. MacKinnon, *Butterfly Politics: Changing the World for Women*, 2nd edn., Cambridge, MA, Harvard University Press, 2019, p. 326.

is not a given. It is of paramount importance to challenge the taken for granted assumptions about what women and trans people can and should do if we are to make the sporting system a safer, fairer, and more inclusive space. Rethinking categories would not just serve transwomen – as some scholars claim – but also cis women as cis women now occupy a disadvantaged position.

Conclusion

The purpose of this article was to argue for a human rights-based approach to gender eligibility in sport and to discuss existing regulations, concepts and their effects by analysing 16 transgender eligibility policies from different international sports federations. By taking a human rights friendly perspective the mentioned rights can be interpreted as being violated to some degree in the policies. The right to non-discrimination can be seen as violated when a difference is made between transwomen and cis women, for example, through targeted testing based on stereotypical assumptions. This could also affect cis women who do not adhere to feminine ideals. Additionally, I have shown that the use of language is discriminatory in some policies. The right to work and the right to sport can be interpreted as violated when a trans athlete is kept from competing. Especially the puberty criterion, but also other obstacles like costs for testing, may present barriers for transpersons. Consequently, it is likely that not every transperson wanting to compete in a category aligning with their gender identity, is able to do so or to compete at all. This can have detrimental effects on all trans people's lives when role models in sport are rare.

I identified language and concepts to play a decisive role in the policies. It seems like some of the IFs have not invested a great amount of time into dealing with the definitions of sex and gender and just copied other policies' formulations or used the concepts in a non-consistent way. I therefore proposed to redefine these concepts in the sporting world and focus on physical characteristics – as they are a decisive factor in performance – but not associate them with a specific sex. I also argued that it is necessary to take social factors influencing sporting performance into account and to support women's and girls' sports more.

Finally, I am aware that this argumentation and proposition for redefining sex and gender is not a solution to the problem of gender categorisation and discrimination in sport. If anything, it makes it even more com-

plicated, as it argues against the current system. However, it is important to consider this topic from a human rights perspective and not just from a physiological one, and that is what I have done. It is time for a redefinition of the current binary categorisation based on sex in sport since it disadvantages trans people, women and anyone not fitting either of the two constructed categories. Human rights need to be taken into account. By adopting even more exclusive regulations (e.g., World Athletics in 2023) and holding on to outdated assumptions about gender, IFs unfortunately seem to move in the opposite direction.

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