**Is Sport a Human Right (for Transgender Athletes)?**

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Over the last decades we have witnessed a proliferation of new human rights claims (e.g. the ‘human right’ to internet access)[[1]](#footnote-1). But Milan Kundera (1991) reminds us that not all desires are human rights.[[2]](#footnote-2) Trans women athletes (and their supporters) often claim that there is a human right to sport and they derive a further ‘human right’ from this: the right to compete in the sex category with which they identify (i.e. the female category).[[3]](#footnote-3) The purpose of this article is to critically assess these two claims:

1. every person has a human right to compete in sport; 2. trans women have a human right to compete in the female category in sport.

**I. What is a human right?**

It is widely accepted that the body of human rights law is laid down in the Charter of the United Nations (1945) and the Universal Declaration of Human Rights (1948). The UN explain[[4]](#footnote-4): ‘Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination.’

James Nickel and Adam Etinson write in the Stanford Encyclopedia of Philosophy (2024): ‘The most obvious way in which human rights exist is as norms of national and international law. At the international level, human rights norms exist because of treaties that have turned them into international law. For example, the human right not to be held in slavery or servitude in Article 4 of the European Convention on Human Rights and in Article 8 of the International Covenant on Civil and Political Rights exists because these treaties establish it. At the national level, human rights norms exist because they have – through legislative enactment, judicial decision, or custom – become part of a country’s law. For example, the right against slavery exists in the United States because the 13th Amendment to the United States Constitution prohibits slavery and servitude.’

Interestingly, none of the existing international treaties mention sport. Supporters of the human rights view of sport usually refer to the IOC’s Olympic Charter (see McKinnon 2019). The fourth Fundamental Principle of Olympism reads (2020: 11): ‘The practice of sport is a human right.’ However, the IOC’s claim that there is a human right to participate in sport is mere hyperbole; it is not a norm of national or international law, merely an aspiration to get as many people as possible to take up sport. The IOC lacks any authority to make sport into a human right. This is part of the inflationary use of human rights claims in recent years. But let us not ignore the last sentence in this section of the Charter: ‘The Olympic spirit requires mutual understanding with a spirit of friendship, solidarity and fair play.’ Even if sport were a human right it would be constrained by fair play – and letting trans women (i.e. biologically males) compete in the female category is a violation of fair play. And if trans women wanted to compete ‘in the spirit of friendship and solidarity’ with their female ‘sisters’, then they would opt for the male or Open category.[[5]](#footnote-5)

The idea that this assertion (sport is a human right) in the fourth Principle is part of lex sportiva is mistaken. Only the Olympic rules form part of lex sportiva – but the claim that sport is a human right is a mere aspiration, not a rule. As an international sports governing body the IOC has the power to frame and alter its rules and eligibility criteria. This may indirectly affect the development of lex sportiva if the rules or eligibility conditions were to be challenged in a national court or at CAS. Sports law is being developed through CAS decisions and by decisions of national courts – not by hyperbolic IOC declarations in its Charter.

Access to sport is constrained by eligibility rules; there is no absolute right to sport. CAS or national courts – in their decision – do not suspend failed eligibility claims because ‘sport is a human right’, they only do so because the rules were ‘faulty’, were misapplied, or for procedural reasons (see Bützler 2023).

There are many different conceptions of what human rights are.[[6]](#footnote-6) I suggest that we agree on some minimal characteristics: human rights are important, and they are urgent (when violated). The core human rights (e.g. freedom from torture) are non-derogable, meaning, that they cannot be suspended by a government. And the individual cannot give them away, i.e. they are inalienable. This means that even if you agree to be a slave or to be tortured, this does not effect an alienation of these particular human rights.[[7]](#footnote-7) Those who act on your ‘agreement’ and enslave you and torture you are subject to prosecution under international human rights law. Freedom of movement, on the other hand, can be suspended in emergencies (e.g. pandemics).

Many people don’t do sports; they actually hate sports. Neither the individual nor humanity are harmed by this refusal to take up sport. For others the right to sport is redundant. A goat shepherd in the Dolomites gets plenty of exercise, going up and down the mountains; sport is the last thing on her mind. So, in the greater scheme of things, the practice of sport is not important – unlike access to healthcare.

Whenever human rights are violated (like the freedom from torture, enslavement, imprisonment and/or punishment without a trial), then it is urgent (for the victim and for humanity) to put a stop to these violations. Furthermore, is also ‘important’ for people to live without fear of arbitrary arrest, torture or imprisonment. However, if a national federation or an international governing body (like World Rugby or World Athletics) declare that trans women are not eligible to compete in the female category, then rectifying this exclusion has no urgency. The lives of these athletes may still go well without competing in the female category. Secondly, they are free to compete in the male or Open category. Thirdly, they may play non-competitive sports. And they are free to take part in all other areas of public and social life (more on this below).

The right to sport is routinely derogated by governments and sports bodies (think of the US led boycott of the 1980 summer games in Moscow or the exclusion of Russian athlete at the Paris Olympics in 2024). In these instances, is the IOC engaged in human rights violations? Furthermore, individual athletes may alienate (give up) their right to compete under the flag of their home country (e.g. out of protest against a war of aggression that their own country is waging), and instead compete as an independent.

Since the practice of sport is neither important nor urgent, and since the right to sport is both derogable and alienable, it cannot be a human right. It is merely an ordinary right, like the right to buy ice cream, sit on a park bench or join the local amateur dramatic society. In Hohfeldian (Hohfeld 1913) terms it is a ‘privilege’ (also known as a ‘liberty right’). I am free to take up sport and equally free not to do so; I have no duty either way. Others have no positive duty to provide me with sports facilities. If there are no sports facilities in my village, then the village council has no duty to provide these.[[8]](#footnote-8) But if there were a Taekwondo club in the village then others would have a negative duty not to interfere with my joining the club (i.e. it would be wrong to put a sign outside the club: ‘No Croatians allowed!’). Equally, trans women are free to join the Taekwondo club.

Contrast this with a human right: I have an ‘immunity’ from being tortured[[9]](#footnote-9) or arbitrarily arrested. Others lack the power to alter my normative position. Do trans women athletes have an immunity from having their eligibility claims (for the female category) denied? This is highly unlikely, since many federations will not permit trans women to compete in the female category. However, other sports governing bodies are trans-inclusive, but not because they acknowledge any such immunity; they have adapted the eligibility conditions in order to facilitate trans inclusion.[[10]](#footnote-10)

The Convention on the Elimination of All Forms of Discrimination against Women (1981), ratified by 189 countries, does mention sport (A13c)[[11]](#footnote-11): ‘The right to participate in recreational activities, sports and all aspects of cultural life.’ But this is prefaced by: ‘States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights’.

It would be a human rights violation if women were denied the right to participate in public and social life (i.e. consisting of a multitude of liberty and claim rights), something which men enjoy without any restrictions. In this context the denial of taking part in sport would be embedded in the systematic discrimination of women; a denial of eligibility for a particular sex category in sport, on its own, doesn’t constitute a human rights violation.

Athletes’ eligibility claims (with regard to nationality, change of nationality, weight, age, level of disability, etc.) are routinely rejected because they don’t meet the criteria. Nobody considers this to be human rights violations, because the eligibility criteria are normally[[12]](#footnote-12) not arbitrarily imposed.

We are familiar with discriminatory practices against girls and women from theocratic regimes (e.g. no education, no self-determination, constant supervision by male family members, forced marriage, no driving licence, no independent travel – and no sport). The Taliban in Afghanistan do not allow women to practice any sport and this is part of a systematic oppression of women in many other areas (e.g. no speaking or laughing in public, and they must not be heard singing or reading aloud from their houses.) All of this constitutes a human rights violation. In contrast, trans women in the West have not been banned from practicing sport – and they are not systematically excluded from public life. On the contrary, they are celebrated in the media, news, TV, film and in academia. Trans women are lauded as exemplars of womanhood. They are crowned ‘woman of the year’[[13]](#footnote-13), become university women’s officers[[14]](#footnote-14), represent women in political parties[[15]](#footnote-15), or are being nominated for women’s prizes for fiction[[16]](#footnote-16).

The Convention on the Elimination of All Forms of Discrimination against Women aims to prevent a comprehensive exclusion of women from a multitude of rights that are the preserve of men.[[17]](#footnote-17) Such discrimination is similar to the systematic exclusion of Jewish people from public and social life once the Nazis took power in 1933. Jewish people were not allowed to sit on park benches, use bicycles, go to state schools, use public swimming pools, etc. All of this taken together constitutes a human rights violation, because it is an arbitrary and systematic exclusion from social and public life; excluding trans women from the female category is based on non-arbitrary eligibility criteria (i.e. being female) – it is not a systematic exclusion from social and public life.

**II. Do trans women have the right to compete in the female category?**

The Olympic history of trans inclusion is illuminating. In 2004 the IOC permitted transsexuals (as they were known then) for the first time to compete in the Olympics, provided they met certain conditions (IOC Stockholm Consensus 2004): surgical anatomical changes (i.e. gonadectomy), combined with hormonal therapy (and afterwards a two-year ban before they could compete again). These were not merely

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1. Is internet access a human right? See Serf (2012). [↑](#footnote-ref-1)
2. I am paraphrasing from ‘The Gesture of Protest against a Violation of Human Rights’. [↑](#footnote-ref-2)
3. <https://www.cyclingweekly.com/news/emily-bridges-says-british-cycling-violated-her-human-rights-over-trans-participation-rule-change> [↑](#footnote-ref-3)
4. <https://www.un.org/en/global-issues/human-rights> [↑](#footnote-ref-4)
5. See Imbrišević 2021. [↑](#footnote-ref-5)
6. See Nickel and Etinson 2024; also Tasioulas 2009. [↑](#footnote-ref-6)
7. Notwithstanding of what Robert Nozick (1999) claims about selling yourself into slavery. [↑](#footnote-ref-7)
8. Whenever sport is part of children’s education, then the village school would have a (positive) duty to provide sports facilities. [↑](#footnote-ref-8)
9. Framing torture as an ‘enhanced interrogation technique’ doesn’t change this. [↑](#footnote-ref-9)
10. This leads to the unfortunate position that different legislations and different governing bodies will not have uniform transgender policies. Some trans women will be able to compete against women, others will not. Secondly, the trans-inclusive policy results in unfairness and injustice for female competitors. [↑](#footnote-ref-10)
11. <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women> [↑](#footnote-ref-11)
12. At the Tokyo Olympics (2021) Namibian sprinters Beatrice Masilingi and Christine Mboma were banned by the IOC and World Athletics from running in any of the 400m – 1500m events because of their raised testosterone levels (likely related to DSDs) – but permitted to run in the 200m. This was an arbitrary adjustment and application of eligibility criteria. Tucker et al (2024) have recently proposed a sensible solution for athletes with DSDs. [↑](#footnote-ref-12)
13. <https://www.theguardian.com/world/2023/oct/13/us-tiktok-trans-activist-woman-of-the-year-award-bud-light-boycott> [↑](#footnote-ref-13)
14. <https://www.womenarehuman.com/university-womens-officer-a-transgender-student-rebrands-international-womens-day-to-exclude-women/> [↑](#footnote-ref-14)
15. <https://www.thetimes.co.uk/article/trans-teenager-lily-madigan-voted-in-as-a-labour-women-s-officer-mwchkhzq8> [↑](#footnote-ref-15)
16. <https://www.theguardian.com/books/2021/mar/10/first-trans-woman-makes-womens-prize-longlist-alongside-dawn-french-and-ali-smith> [↑](#footnote-ref-16)
17. The IOC and other sports bodies have become enablers of sportswashing. The respective regimes are not ‘decent hierarchical societies’ (see Rawls 1999), but human rights abusers. [↑](#footnote-ref-17)