
LGBTQ IN SPORTS: THE ISSUES OF TRANSGENDER IN INDIAN SPORTS WITH REFERENCE TO OTHER COUNTRIES

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ABSTRACT

The intolerant targeting of binary sex through unlawful violence poses a significant threat to the dignity and reputation of transgender individuals, leaving this minority group exposed to both physical and mental health issues. Having a range of sexual orientations or identities does not restrict one from experiencing fundamental and inherent rights. Suppressing one's sexual orientation and identity as a human is an unjustified infringement on the fundamental right to love with dignity. Streets are witnessing the emergence of 'pride parade' movements that challenge governments and call for the enactment of progressive legislation to combat discrimination, harassment, and degrading treatment. However, the acknowledgment of their constitutional rights and fundamental human rights is still a distant reality. International promises formed at conventions are ineffective due to the prevalence of legal systems that uphold a stigmatised religious mindset and cultural intolerance. Nevertheless, irrespective of differences in traditions, culture, or societal standards, it is incumbent upon nations to ensure the protection of LGBTQ individuals' freedom of expression in order to foster an inclusive society. Instances of voyeurism, trauma, and humiliation have been observed in the context of homosexuality in sports and among athletes, which is regrettable and discouraging. This study focuses on the legal regulations concerning the representation of transgender individuals in India and elsewhere in reference of recognition in sports.

Keywords: Homosexualities, LGBTQ, Identity, Equality, Gender, Discrimination.

INTRODUCTION:

The current social and political situation, along with the existing judicial system, seem to be apathetic and careless towards the suffering of a community that is unjustly subjected to terrible injustice by both its fellow citizens and the government, although being innocent.

The acronym LGBTIQ+ stands for lesbian, gay, bisexual, transgender, gender diverse, intersex, queer, asexual, and questioning. It encompasses a wide range of individuals who vary in terms of their gender, sexual orientation, race/ethnic origin, and socioeconomic status. The populations represented by this commonly used umbrella phrase encounter unique challenges related to gender identity and sexual orientation. The LGBT community encompasses a wide range of gender, sexuality, and romantic orientations, as well as other diverse spectrums. It promotes values such as self-acceptance, courage, and empathy, which are fundamental to being human.¹ India is the native land and original location of the Hijra community, a phrase that denotes those who identify as transgender.

The male-female binary in countries that adhere to heteronormativity has caused significant disruption for the LGBTIQ+ population. Despite being a minority, they also possess a level of sacrosanct rights. Nevertheless, the acts of sexual offences and exploitations perpetrated against the LGBTIQ+ population due to their unique sexual orientation and gender identity deviate significantly from the conventional principle of legal equality.² The presence of diverse gender identities and non-conventional sexual orientations has influenced the relationship between the legal system and society. Therefore, it is essential to provide a concise overview of the various discussions and disputes over the legislation and its connection to gender and sexual identities. These insights aim to clarify the underlying challenges surrounding the law's endeavour to control gender and sexual orientation.

According to Merriam-Webster, transgender refers to a person whose gender identity does not align with the sex they were assigned at birth. The implementation of gender testing originated during the European Athletics Championships in 1966 in response to allegations that certain female athletes were actually male. Consequently, the IOC (Indian Olympic Committee) established a medical committee, thereby pioneering this initiative within the realm of sporting

¹ Petersen, Carole J: Hong Kong and the Unprecedented Transfer of Sovereignty: Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong, 19 Loyola Los Angeles INT'L L.330 337-340 (1997).

² Ashwini Sukthankar, Lesbian Emergence (Campaign for Lesbian Rights, A Citizen's Report, August 1999 New Delhi) 19 (1999).

organisations.³ Female athletes experienced significant impact and underwent rigorous tests such as ocular examination, DNA analysis, and testing of body fluids. The IOC made efforts to prevent any unfair competition advantage by implementing measures such as nude parades in front of the judges, as well as conducting chromosome testing and gene identification. The programme faced criticism starting in 2000 due to its perceived unfairness and unpleasantness. Over the course of more than five decades, the laws and regulations concerning transgender athletes have seen significant changes and advancements. The purpose of this article is to emphasise the legal framework and rules pertaining to transgender athletes in the global sports sector.

The purported sex scandal in 2012 surrounding Pinki Pramanik, an Indian athlete who won a gold medal in the Asian Games, prompted inquiries into issues concerning one's physical characteristics, the right to bodily privacy, and moral standards. Pramanik faced mistreatment and was incarcerated in a male prison after being accused of sexually assaulting her live-in partner.⁴

In 2014, she was disqualified from participating in female competitions due to elevated levels of testosterone in her body, a medical condition known as 'hyperandrogenism'. At the age of 18, Dutee lodged an appeal against the ruling at the Court of Arbitration for Sport (CAS) and emerged victorious in a groundbreaking case, establishing a precedent for subsequent athletes confronted with controversial bans.⁵

The article analyzed the challenges faced by transgender athletes in their representation and how it is impacting growth and development of community.

HISTIRICAL BACKGROUND:

The issue of transgender athletes' rights is intricate and constantly changing, especially within the domain of sports. In order to uphold equity, international regulatory entities such as the International Olympic Committee (IOC) classify athletes according to their physiological distinctions and arrange events based on gender divisions. Nevertheless, this method gives rise

³ Obergefell, et al. v. Hodges, Director, Ohio Department of Health, et al., 576 US (2015).

⁴ id

⁵ National LGBTI Health Alliance. (2013a). LGBTI Cultural Competency Framework: Including LGBTI people in mental health and suicide prevention organisations. Newtown: LGBTI Health Alliance www.lgbtihealth.org.au/sites/default/files/Cultural%20Competency%20Framework.pdf Accessed 02 December 2023

to apprehensions regarding gender deception and the possibility of unjust benefits resulting from hormone discrepancies. The rise of gender neutrality further complicates the matter of transgender inclusion. Sports have been plagued by discrimination for an extended period, leading regulatory organisations to make efforts to ensure fairness and reduce disparities.⁶

The duty to address these difficulties, which go beyond lavatory and wardrobe considerations, lies with the IOC and other international federations. In India, transgender individuals are legally protected and acknowledged as a distinct third gender, ensuring their rights. The Indian Constitution guarantees impartiality and parity for all individuals, encompassing transgender individuals. The government has implemented the Transgender Person (Protection of Rights) Act, 2019, which forbids discrimination in various domains, including employment, education, and healthcare services. In addition, welfare measures have been put in place to protect the rights of transgender individuals.

The United Nations Declaration on Human Rights (1948) provides comprehensive protection against all types of discrimination, as stated in Article 2. This article ensures that every person is entitled to the rights and freedoms outlined in the UN's Declaration, regardless of any form of differentiation. Article 1 ensures that everyone is treated equally under the law and receives equal legal protection. Article 12 defends the right to privacy by preventing unwarranted intervention and any attempts to harm the character and dignity of individuals. The Committee on the Rights of the Child (CRC) emphasises the need of addressing discrimination against vulnerable or marginalised groups of children, including those who identify as lesbian, gay, transgender, or transsexual. This responsibility lies with the States parties.⁷

The primary mandate of the International Covenant on Civil and Political Rights, established in 1966, is to safeguard and defend the fundamental human rights of individuals, ensuring equal treatment for all without any form of discrimination. One of the sections that is important for the purpose of protecting individuals is Article 2(1), which highlights the responsibility of state parties to guarantee all individuals, without any discrimination, the rights acknowledged by the Covenant. Article 26 highlights the principle of 'equality before the law', ensuring that all individuals are entitled to legal protection without any kind of discrimination.

⁶ The United Nations Declaration on Human Rights (1948)

⁷ id

TRANSGENDER ATHELITC AND INDIAN CONSTITUTION:

Every society discriminates against transgender people based on their sexual orientation and gender. International law rights recognition and realisation are hampered by the denial of fundamental human rights and constrained definitions of "freedom." Cross-dressers, bisexuals, and LGBT people are represented. Regional and trans-regional communities such as jogtas, kothis, aravanis, hijras/kinnars, and shiv-shaktis may be visible in India. The Indian Constitution protects people from discrimination on the basis of race, caste, religion, sex, and place of birth, as well as providing equal employment opportunities, protection against human trafficking and forced labour, and the right to a dignified life (Article 21), "freedom of expression" (Article 19), and "equality before the law" (Article 14).

*In Naz Foundation v. Union of India*⁸ is the case's conclusion law enforcement has no business in a consenting adults bedroom when they are indulging in a harmless activity.

***In National Legal Services Authority of India vs. Union of India*⁹**

A person's gender identity determines whether they are eligible to self-identify as transgender, binary sex, or in another category where their orientation reflects their enduring physical characteristics or emotional affinity to other identities. Although the two-judge bench judgement made strong recommendations for transgender persons and the third gender, "transgender." remains ambiguous. Radhakrishnan J. broadly defines "transgender" as an umbrella clause that includes pre- and post-surgery transsexual people, while Justice Sikri strictly defines it based on essentialist criteria. Transgender citizens with various reservations (quotas) are considered "SEBC" for educational and public appointments under the NALSA ruling. This provides meaning to their protracted struggle to access public spaces, per Article 15(4).¹⁰

***In Puttaswamy v. Union of India*¹¹**

The Kharak Singh and M.P. Sharma cases were overturned. The Supreme Court defined privacy broadly. It was considered a right. Critical of the Suresh Koushal case's regressive conduct, the court highlighted that sexual orientation is a fundamental privacy issue. Equal

⁸ (2009) 160 DLT 277 (DB).

⁹ (2014) 5 SCC 438.

¹⁰ id

¹¹ (2018) 1 SCC 809.

protection demands impartial identity protection for all. Individuals with different sexual orientations do not have psychological disabilities or inadequacies that would require a separate law criminalising their sexual acts. This Supreme Court comment raised transgender people's hopes for spatial, decisional, and choice privacy. Delhi High Court corrected the longtime error. The right to privacy now includes consensual, private, and homosexual sexual activity.

***In Navtej Singh Johar and Others V. Union of India*¹²**

The court upheld heterosexual relationships under Section 377. The link between gender roles and anti-homosexual policies promotes bias. The judges ignored cultural differences and saw the LGBT movement as a feminist fight for sexual minority rights and constitutional changes. They favour LGBT rights but not same-sex marriage, adoption, or job discrimination. Sexual offences, which now only apply to women, against the LGBTQA community, whether non-consensual sexual assault is rape under Sections 375 and 376 of the Indian Penal Code or sodomy under Section 377, and the incorporation of transgender people under the Sexual Harassment at Workplace Act, are unknown.

LEGAL STATUS OF TRANSGENDER COMMUNITY INDIA:

The Supreme Court's constitutional bench unanimously pronounced Section 377 of the IPC unconstitutional because it criminalises private consensual sexual activity between two adults regardless of sexual orientation or gender identity. Nonconsensual sexual actions between adults, minors, and bestiality are regulated. As required by Section 377, the Court found consensual sexual conduct between mature people of the same sex inherent and does not contradict nature. I find it arbitrary and unjustified. LGBT people have inherent and inalienable rights, hence they have the same constitutional and fundamental rights as others. Constitutional Articles 14, 15, 19, and 21 conflict with Section 377. Statelessness, lack of compartmentalised identities, and restricted education and employment options make transgender and LGBTQ people more vulnerable to intolerance and exploitation. Laws require specific actions, yet few are met. Despite the landmark NALSA verdict, the Indian transgender advocacy group failed to battle societal stigma, challenge binary laws, and fight rising legislation.¹³

¹² (2018) 1 SCC 791.

¹³ Sadaf Shaikh ,<https://www.vogue.in/culture-and-living/content/indias-first-transgender-football-team-ya-all-is-only-just-getting-started> Accessed 12 Novemebrer2023

STIGMA, DISCRIMINATION AND VIOLENCE FACED BY TRANSGENDER COMMUNITY IN INDIA:

Transgender women are called unfeminine and unfairly favoured in sports.. Transgender athletes transitioning to hormone therapy follow NCAA protocols. FTMs taking testosterone can play on men's teams but not women's. Transgender females (MTF) using testosterone suppression can play on men's teams but not women's unless they play mixed teams. Without hormone therapy, transgender athletes can play gender-segregated sports. Disagreements over equity and competitive benefits persist over legislation, discrimination, and transgender student-athlete integration.¹⁴

REGULATION OF GENDER IN SPORTS AND INTERNATIONAL PRACTICE:

The implementation of sex testing was first adopted during the 1966 European Athletics Championships as a response to allegations that certain female athletes were biologically male. The Indian Olympic Committee (IOC) took action by establishing the inaugural medical panel in the field of sports. Gender testing continued until the year 2000, when it faced allegations of discrimination and invasion of privacy. It was deemed a violation of privacy. Women underwent visual, DNA, and physiological fluid testing.

During the 1967 European Athletics Cup held in Kiev, the International Association of Athletics Federations (IAAF) implemented the sex chromatin test. Gender testing now encompasses women with chromosomal anomalies, who exhibit female characteristics but possess genetic irregularities.

The primary worry revolves around the potential for individuals who identify as men but dress as women to gain an unjust competitive edge in sports, ultimately leading to their dominance in women's sports, particularly in the field of athletics. Nonetheless, the concerns faced by transgender and intersex athletes are separate from the act of deceiving others about one's gender.

Sex tests are not mandatory, but the International Association of Athletics Federations has the authority to request them at any given moment. These tests involve a comprehensive evaluation

¹⁴ Deutsche Welle Transgender athletes and sports: A complex dialogue on fairness and inclusion <https://www.telegraphindia.com/sports/transgender-athletes-and-sports-a-complex-dialogue-on-fairness-and-inclusion/cid/1970598> Accessed 19 November 2023

conducted by a team of experts including a gynaecologist, endocrinologist, psychologist, and internal medicine specialist.

Gender testing was conducted during the 1968 Olympic Games in Mexico City to exclude female athletes with chromosomal defects from competing. Until 2000, women athletes were required to participate in a "gender parade" during international games and Olympics, where they had to march without clothing in front of members of the IOC Medical Commission. The purpose of this parade was to provide evidence of their female sexual characteristics. Numerous individuals, both female and male, may not be aware of their intersex condition or possess a chromosomal composition that deviates from the norm, unless they experience developmental issues, undergo testing while attempting to conceive a child under challenging circumstances, or, in the case of women exclusively, become publicly informed during a prestigious athletic competition such as the Asian Games or Olympics. Paradoxically, men are exempted from this.

The International Olympic Committee (IOC) officially recognised and allowed the participation of transgender athletes in the year 2004. This sparked controversy as some argued that it provided no tangible benefits for transsexual athletes. Transgender female athletes require testosterone therapy in order to align their testosterone levels with those of cisgender women in their age group. IOC's official statement on Sexual Harassment and Abuse in Sport, released in 2007. This press release provides a clear definition of sexual harassment and outlines its specific components.¹⁵

In Santhi Soundarajan Case¹⁶

Santhi Soundarajan illustrates transgender issues in India. In 2006, Tamil Nadu athlete Santhi lost her silver medal in the 2006 Asian Games in Doha, Qatar, after failing a sex verification test. She was disqualified from the women's division because she didn't have female sexual traits. The Indian Olympic Association (IOA) ordered her to stop competing without specifying the exam she failed. In its case against Santhi, the Olympic Council of Asia failed to produce all necessary laboratory testing. This shows their lack of accountability, since they denied an athlete her medal without proof. Thus, her rights were violated, and the government, which is responsible for protecting national athletes, failed to act.

¹⁵ id

¹⁶ <https://thebridge.in/athletics/how-santhi-soundarajan-let-down-india-not-woman> Accessed 02 December 2023

In Richard vs United States Tennis Association¹⁷

Dr. Richard Ruskind had gender transition surgery and played in the 1978 US Open quarterfinals as Renee Richards. Richards received a preliminary injunction in New York because banning her from attending would violate state human rights laws.

Transgender athletes could compete without restrictions in 2016 if they followed a normal protocol after the IOC, WADA, USA Triathlon, and other sporting governing bodies made regulatory changes. The Football Association (FA) in England regulates transgender and transsexual footballers. It emphasises the importance of gender identity not preventing participation in and enjoyment of a country's national sport. FA regulations acknowledge transsexuals who had gender reassignment surgery before puberty as having acquired gender. If surgery occurs beyond adolescence, things get more complicated. Player eligibility requires hormone therapy and surgery at least two years earlier. Gender Recognition Panel clearance is required.

The incident involving Shanti Soundarajan highlighted transsexualism in Indian sports. She failed a gender test and had no feminine sexual features. The IAAF can demand candidates undertake gynaecologist, endocrinologist, psychologist, and internal medicine specialist tests at any time. Currently, no test can reliably detect gender. Asking for someone's gender may violate Article 21 of the Indian Constitution's right to privacy.¹⁸

CURRENT INTERNATIONAL TRENDS:

The Berlin World Aquatics Swimming World Cup will introduce a new category specifically for transgender individuals. World Aquatics has implemented a ban on transgender women participating in women's races at the Olympic and World Championship events in 2022. Pre-puberty gender-affirming care will not be subject to any obligations or restrictions.¹⁹ The organisation has committed to establishing an inclusive division for all participants in the World Cup competition in Berlin on October 6, featuring 50- and 100-metre races in all swimming strokes.

As per the German Football Association (DFB), individuals who identify as trans, intersex, or non-binary and possess civil registration documents indicating "diverse" or "not stated" gender,

¹⁷ Richards v. United States Tennis Ass'n

¹⁸ Avinash Mishra Head- Athlete Partnerships @FairPlay Sports LAWS/REGULATIONS RELATING TO TRANSGENDER IN THE INTERNATIONAL SPORTS INDUSTRY

¹⁹ id

as well as those who have undergone gender-affirming care, will have the autonomy to choose whether to participate in women's or men's football teams. "Transgender athletes are permitted to participate in sports as long as their use of medication does not compromise their personal well-being."

The current regulations of the Women's Tennis Association (WTA) permit transgender women to participate in competitions. Players are required to verify their gender identity as female, and this cannot be altered for a minimum duration of four years. In order to participate in their first WTA tournament, players are required to undergo hormonal treatment for transitioning and maintain a testosterone level of less than 10 nmol/L for a minimum of 12 months.²⁰

The International Association of Athletics Federations (IAAF) has implemented a policy that prohibits transgender women from participating in female competitions.

Starting on March 31, 2023, transgender women who have undergone masculine puberty will be ineligible to participate in female competitions. In order to be eligible for participation, transgender women were required to reduce their testosterone levels to 5 nmol/L and sustain this level for a duration of one year.

A working committee of the World Athletics Council is currently focusing on the issue of transgender inclusivity. The organisation will do a study on the sports-related challenges faced by transgender athletes. In order to ensure equitable and comprehensive decision-making, it is imperative to collect a greater amount of information and perspectives.

The World Athletics Council has revised its transgender inclusivity policy to acknowledge the necessity for more deliberation. The working committee was established with the purpose of acquiring further knowledge and providing equitable opportunities for transgender athletes. This fosters the cultivation of well-informed decision-making, effective communication, and the inclusion of transgender individuals in athletics.²¹

ANALYSIS OF TRANSGENDER PERSON (PROTECTION AND RIGHTS ACT) 2019:

The purpose of this legislation is to eradicate prejudice against transgender individuals in

²⁰ id

²¹ World Athletics Council excludes transgender women from female event <https://www.theguardian.com/sport/2023/mar/23/world-athletics-council-excludes-transgender-women-from-female-events> Accessed 01 December 2023

domains such as education, work, and healthcare.²²

Transgender Persons (Protection of Rights) Rules, 2020: The objective of this act is to eliminate bias and discrimination against transgender individuals in various areas, including education, employment, and healthcare.

National Council for Transgender Persons: The primary function of this council is to provide guidance to the Indian government in the development and oversight of policies pertaining to transgender individuals, while also addressing their concerns and complaints.

LGBTQ ONCE NOBODY, NOW AN INSPIRATION FOR THEIR COMMUNITY:

The Kerala High Court has ruled in favour of transgender athletes, granting them the freedom to participate in sports competitions according to their self-identified gender.²³

The Kerala High Court has issued a notable verdict, stating that transgender athletes should be allowed to participate in their chosen gender category if there is no specific category available. The ruling was issued in relation to a lawsuit brought by a transgender woman who was refused entry to a Judo competition at the district level due to her gender identity.

Justice VG Arun, who is overseeing the case, stressed the need of granting every transgender individual an equal opportunity to engage in sports. The court unequivocally asserted that in the absence of a specific classification for transgender athletes, individuals should be granted the freedom to participate in the category that aligns with their gender identity.

The Kerala High Court, in its verdict, instructed the tournament organisers to acknowledge the petitioner's motion and temporarily authorise her participation in the competition. The ultimate result of the petition will determine whether she will continue to participate in the event.

PRESENT GAP IN IMPLEMENTATION OF POLICY:

While we have policies in place to address various issues, there are still a few policies that exist. However, there is a deficiency in the implementation of these policies. Below, only a few

²² id

²³ Trans Athletes Can Participate In Their Chosen Gender In Absence Of Separate Category: Kerala HC Bobins Abraham https://www.indiatimes.com/news/india/transgender-athletes-can-participate-in-their-chosen-gender-kerala-high-court-576049.html#highlight_108281 Accessed 02 December 2023

are discussed-:²⁴

SMILE (Support for Marginalized Individuals for Livelihood and Enterprise):

Initiated by the Ministry of Social Justice and Empowerment, this programme prioritises counselling, documentation, education, skill enhancement, financial aid for transgender students, healthcare provisions, and the establishment of shelter facilities for deserted and orphaned transgender individuals.

National Education Policy 2020:

The policy acknowledges transgender children as members of Socio-Economically Disadvantaged Groups 4 (SEDGs) and guarantees them fair and equal access to excellent education. An allocation will be made to establish a Gender-Inclusion Fund with the purpose of providing financial support for the advancement of inclusive education specifically targeted towards girls and transgender students.

PM-DAKSH:

The Ministry of Social Justice and Empowerment offers skill development training to transgender individuals who are beneficiaries of the SMILE Scheme. This training, conducted under the PM-DAKSH initiative, aims to improve their capacity to find employment and enhance their prospects for earning a livelihood.

CONCLUSION:

In order to safeguard the fundamental rights of life, liberty, and privacy, India set a precedent by formally endorsing the Yogyakarta Principles in the NALSA case and decriminalising 'unnatural sex' in the Navtej Singh Johar case. Nevertheless, the government still falls behind in ensuring that sexual minorities receive their rightful rights, respect, and representation, not just within the judiciary but also within the public sector. The previous rulings acted as a catalyst in the fight against marginalisation and social exclusion by acknowledging the variety of partnerships and families. In the Navtej Singh Johar case, former Chief Justice Deepak Mishra emphasised the importance of constitutional morality rather than societal morality in safeguarding the rights of the LGBTQIA+ community. Consequently, these rulings showcase

²⁴ Ban on Transgendered female athletes <https://www.nextias.com/ca/current-affairs/25-03-2023/ban-on-transgendered-female-athletes> Accessed 12 Novemeber 2023

the judiciary's capacity to adjust, deviate from conventional interpretations of socio-legal issues, and promote a more comprehensive atmosphere. The judges' demand for societal transformation, which the LGBT movement and its supporters have advocated for and must persist in advocating for, is unquestionably the most potent assurance. The first-ever transgender football team from Manipur, India, is successfully defying the outdated framework of binary categorizations in sports while simultaneously raising awareness for the rights of transgender individuals in the northeastern region of the country. The Indian Constitution, which prioritises the principle of equality, holds great significance in relation to the inclusion of transgender individuals in sports. The constitutional right in question is crucial for our democratic society as it signifies the state's dedication to providing social security and a gratifying existence for every individual. Given this circumstance, it is imperative to contemplate whether transgender individuals should be afforded equitable possibilities in the realm of athletics.

The International Olympic Committee (IOC) has established guidelines for transgender athletes, including the criteria of legal gender recognition and a minimum of two years of hormone therapy following gender reassignment surgery. However, the topics of gender testing and the inclusion of transgender individuals continue to be sources of disagreement. Recent instances, such as the case of Caster Semenya, bring attention to the existence of deficiencies and ambiguities in this particular matter. In order to attain genuine equality, it is imperative to advocate for legal reforms that grant transgender individuals the same rights and advantages as those enjoyed by all other citizens of India. Concurrently, society needs to actively participate in a gender sensitization process, fostering a comprehensive environment in households, enterprises, and organisations. It is the duty of every individual, irrespective of their role, to collaborate in establishing a culture that esteems and commemorates variety, safeguards the rights of transgender individuals, and advances gender inclusivity.