The IOC's Great Leap Backwards on Genetic Sex Testing

A Policy in Search of Justification

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On 26 March, the International Olympic Committee (IOC) released its Policy on the Protection of the Female (Women's) Category in Olympic Sport, which replaces its previous – and much more sensible – Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations. Now, to be eligible for the women's category in Olympic competitions (including the Youth Olympics), all women and girls will have to undergo a genetic test aimed at determining whether they are what the IOC refers to as "biological females". To determine this, athletes will be subjected to a test that screens for the SRY gene. If an athlete tests negative, she will be allowed to participate in women's competitions; if she tests positive, she will be barred from them (unless she can prove she's completely insensitive to testosterone). It is expected that trans women and the overwhelming majority of women with sex variations will be excluded from Olympic competitions based on this genetic test. Furthermore, this eligibility policy will likely be adopted by many (if not all) International Federations for their own competitions, leading to widespread coerced genetic testing and wholesale exclusion of the athletes concerned from all international sporting competitions, with trickle-down effects to the national and even grassroots levels.

This sharp policy change – a return to a policy that was discarded nearly 30 years ago due to scientific and ethical concerns, along with implementation challenges – has been in the cards since Kirsty Coventry took the helm of the IOC last year. This post provides a first critical analysis of the justifications put forward by the IOC to defend its U-turn on genetic sex testing, revealing the scientific, procedural, and legal shortcomings of the new policy.

A policy grounded in "scientific consensus": the IOC's fairytale

The IOC justifies its new policy primarily by invoking the need to protect the female category from "biological males" due to their alleged performance advantage in sports and events that rely on strength, power, and/or endurance. This claim relies entirely on the scientific review conducted by a working group created by Kirsty Coventry early on in her tenure as IOC President. Here lies a central, and fatal, weakness of the policy. The working group in question operated in total opacity and neither the names of its members nor its purported scientific findings have been made public. You don't need to have a PhD in epistemology to know that this is not what one would expect from a rigorous scientific process, especially if it claims to have achieved a consensus in a particular field. Instead, one would expect, at the very least, a working group with a transparent and diverse membership of reputable scientists, collective processes of deliberation allowing for open debates and disagreements, and publication of its review in a leading peer-reviewed journal. This is the basis of scientific legitimacy, as opposed to a hand-picked anonymous group reaching sweeping conclusions behind closed doors and unwilling to publish its findings or face counterarguments before announcing its discovery of a consensus in a very controversial field. This plainly unscientific process is an indelible stain on the credibility of the IOC policy.

In fact, a quick review of the existing literature would show that whether trans and/or intersex women have a systematic and unfair sporting advantage is the subject of heated debate among scientists of various disciplines. The scientific community is extremely divided on the question, while limited empirical data is

available because there are so few trans and intersex women competing in international sport. As the IOC should know, the state of existing scientific evidence on this subject will play an important role in future court cases, and the IOC's claim of scientific consensus, which is nothing more than a fairytale, will be put to the test.

A policy grounded in "social consensus": the IOC's Potemkin consultation process

The legitimacy of the IOC policy is equally flimsy when it claims the existence of a "broad consensus" among female athletes and other Olympic Movement constituents. This claim is supported only with a vague allusion to an online "Athlete Survey" and "interviews with impacted athletes", as well as discussions with the IOC Athletes Commission. Here as well, the IOC's process and communication are sloppy at best. The survey sample, questions, and results are not published, nor are the findings of the individual interviews. It's hard to believe that the IOC had no influence in putting together the sample for the survey and in the drafting of the questions posed. As qualitative researchers will know, these two dimensions can easily orient a survey in a desired direction and bias its results. The lack of transparency in this regard is telling. Similarly, the interviews are barely mentioned in the policy, which acknowledges "nuances" and therefore, in between the lines, some level of dissensus, but fails to explicate it further.

To think that such a poorly defined consultation process could lend any legitimacy to the IOC policy is to show very little regard for democratic participation, good governance, or qualitative methods. A representative deliberation is never easy to organise in a transnational setting, but what the IOC has offered falls well short of the mark. It might not be surprising that an institution, whose internal political system works primarily through cooptation and in which much of the power is concentrated in the hands of its President, would have little regard for democratic or participatory processes. Nevertheless, it is doubtful that the consultation sketched in the IOC policy will lend it much legitimacy when it is scrutinised by courts; this is not a governance process which deserves to be given any judicial deference or margin of appreciation.

A policy compatible with human rights: the IOC's self-serving reading of the law

Finally, the IOC's rosy assessment of the legality of its embrace of genetic sex testing is wishful thinking that disregards the fact that many legal experts and scholars have expressed strong doubts about it in public forums and academic literature. Moreover, very few legal scholars or human rights experts have been willing to line up in support of this policy so far. The policy faces a range of legal challenges including the illegality (and sometimes criminality) of genetic testing with no health purpose in many countries around the world; the strictures of data protection rules when genetic data is concerned; and the incompatibility of mandatory genetic sex testing with national and international human rights law. Indeed, President Coventry herself acknowledged that athletes might have to seek testing outside their home countries where it is contrary to domestic law.

While the IOC is right to state that "no supranational court has held that defining eligibility for the Female Category by reference to biological sex would constitute an unjustifiable infringement of individual and/or human rights", the main reason for this is that the question has never been raised before one. Nevertheless, a great number of international legal experts (including ourselves), as well as UN human rights experts and rapporteurs, have recently expressed, in two separate statements, their shared view that mandatory genetic sex testing constitutes a disproportionate restriction of a range of human rights, including the rights to privacy, non-discrimination, and bodily and psychological integrity.

From a human rights perspective, the key question will be one of proportionality, as the existence of an interference with the rights of the athletes concerned is not really in doubt. The central legal question is therefore whether this policy is a necessary, reasonable, and proportionate means to achieving the IOC's purported objectives of fairness and safety. This

assessment will hinge in part on the existence, or lack, of scientific consensus regarding the systematic sporting advantage of trans athletes and athletes with sex variations. As already discussed, the IOC's imagined "scientific consensus" advanced in the policy falls short in this regard. Moreover, the IOC policy does not provide any assessment of the necessity, reasonableness, and proportionality of its approach. It does not consider the extent of the harms that could result from its policy for the athletes concerned, and whether these harms are proportionate to the gains made in terms of the fairness or safety of the competitions – despite well over 100 civil society organizations emphasizing these harms.

With respect to women with sex variations, the IOC policy proposes to reassign their sex – on the basis of a genetic test and potentially invasive follow-up examinations – against their will (and the sovereign will of their State of birth) for the purpose of Olympic competitions. Such a consequential decision, which will affect people, including children, who have spent their entire lives as girls and women, will have tremendously adverse psychological, social, and economic impacts (already experienced by young athletes subjected to sex testing regimes), which can hardly be deemed proportionate unless the safety of another person is at a heightened risk. Meanwhile, trans women will be excluded from international sport regardless of their transition process and its effect on their sporting performance. By excluding members of one of the most marginalized groups in global society, the policy only exacerbates the stigma faced by the trans community within and beyond sport. Without going into further details at this point, there is no doubt that such a policy will result in considerable harm being brought upon a small minority of people.

Ultimately, the IOC policy will likely prove even more difficult to implement in practice than it was 30 years ago, due to a range of new legal limitations linked to the use of genetic testing and the storage of genetic data. More fundamentally, its proportionality will be quickly tested before national and European courts, and it will be the IOC's burden to show what it has failed to convincingly argue until now: that its approach is a necessary, reasonable, and proportionate way to protect the fairness and safety of its competitions. Courts will want to see not only evidence to support the IOC's scientific claims, but also a genuine assessment of the extent of the harms inflicted on those subjected to coerced genetic testing and those who stand to be excluded on its basis.

Conclusion

Let us conclude by making clear that we are not opposed in principle to rules regulating access to the women's category (and likewise the men's category) of competition. However, these rules must be devised with great care and through a transparent process open to public contestation. They must be grounded in concrete evidence of a systematic unfair advantage or heightened safety risks. If the sport governing bodies are unable to provide such evidence, then the doubt should benefit the athletes concerned. Indeed, the harms of an exclusionary policy are simply too big to justify the approach promoted by the new IOC policy, which assumes the existence of a general performance advantage and safety risk without demonstrating it. Furthermore, the IOC policy simply ignores its harmful effects on women and girls who, through no fault of their own, were born with an atypical genetic makeup or were assigned a sex at birth that does not match their gender identity. Moreover, genetic testing violates the rights of *all* women and girls, not least by subjecting them to surveillance in violation of legal restrictions on the use of genetic testing and the handling of genetic information. The IOC's new policy is the result of an opaque and arbitrary process leading to a very harmful outcome – it should be tested in court and struck down to the extent that it violates domestic and international laws, including the strict requirements of proportionality.

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