


## PRINCIPLE OF EQUALITY AND TRANSEXUALITY OF ATHLETES: CHALLENGES AND LIMITS FOR SPORTS PRACTICE

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### ABSTRACT

This research is based on the need to discuss the topic in light of recent decisions made by the International Olympic Committee (IOC), especially about professional transgender athletes who practice their profession. The controversy involving transgender athletes permeates the identification of parity of strength and physical performance, even taking into account the low hormone levels predominant for each sex of origin undergoing modification, a parameter considered to determine the possibility of these athletes acting as official competitors, by international protocols. The discussion revolves around the development of the individual until he undergoes sexual transition, which in the case of male individuals, may occur late, and there are no scientific findings on the level of muscular and physiological evolution that would place them in a position of advantage about female individuals. The situation will be analyzed in light of international standards, and the existing debate in the field, regarding performance in individual and collective competitions. Furthermore, the parameters adopted in light of the principle of equality will be investigated, the premise of which is to treat everyone equally as a way of mitigating the

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increasingly latent diversity, from the perspective of the dynamics of human relations. The research will be based on bibliographies and will use the deductive method.

**Keywords:** Principle of Equality. Transsexuality. Sports Practice.

## INTRODUCTION

The presence of transgender athletes in sports is not a new phenomenon. For decades, there has been controversy surrounding individuals who present themselves as one sex but have predominant characteristics of the other. Performance, combined with the idea of equality/fairness in sports competitions, raises an alert regarding the possibility of participation by athletes who do not fit the preconceived characteristics and who may, in some way, obtain advantages due to this condition. In other words, the participation of these individuals, even if based on scientific research, still raises a series of discussions that go beyond the medical sphere and inevitably end up creating legal questions.

According to the principle of equality, people cannot suffer distinction of any nature (CF, art. 5, caput). However, this is so-called formal equality, and the legislator cannot enact laws that determine or induce this distinction. In another aspect, equality is materialized, now taking into account the condition of each human being, according to specific situations, to be treated equally or unequally, under the spectrum of Aristotelian affirmation.

In this sense, the discussion becomes broad at the moment in which the International Olympic Committee positions itself in favor of the participation of transgender athletes in sports, with reservations for each category of transsexuals, which often do not resolve the doubts about their performance in high-performance sports.

The issue of the acceptance of these athletes is a socially uncomfortable and doubtful reason in the environment, because sports translate many principles of inclusion and fraternity, and each competitor is responsible for maintaining this team spirit. Imagining that an individual is taking advantage of any type of advantage due to their differentiated physical capacity can provoke repulsive reactions in athletes in the face of another principle that guides sports: loyalty.

In team competitions, this “advantage” may not be decisive for the success of the team; However, in individual competitions, where responsibility for performance is highly personal, there is a high chance that these athletes may be violating, even unintentionally, the ethical rule of loyalty.

It is in this context that the conflict of principles becomes effective: on the one hand, the need to socially welcome the individual who intends to practice sports, under the aegis of the principles that govern sports; and on the other, the principle of equality, which should guarantee unequal individuals asymmetrical treatment.

This exercise is only possible when it is found that the individual did not avail himself of the transsexuality process attracted by the high salaries paid to professional players, or even believing that he could receive any type of reward, because when we are faced with cases like this, in which fair play is violated, the principle of equality is applied from a formal perspective, and therefore there is no conflict between them.

Below, the points of view on the subject will be discussed, as well as analyzed from a legal perspective, with a focus on the application of the principle of equality and the guarantee of the exercise of the principle of human dignity for all athletes, whether transgender or not, so that a balance can be struck between the individual rights of each category and the preservation of the spirit of sportsmanship.

## **ATTEMPTS TO DETERMINE SEX IN SPORTS**

In 1936, during the Berlin Olympics, the exacerbated and intriguing masculinity of two female track and field competitors was discovered, both suspected of being men using their different potentialities to win the competitions. At the time, the athletes were subjected to sex tests, which are considered humiliating even today.

The issue then verified reveals a characteristic that is inherent to human beings: diversity. Everyone is different, each with their characteristics. The human body is a complex of instabilities, and can naturally undergo various changes throughout life.

The femininity of the athletes was confirmed, and one of them became a champion, even achieving a world record. From that moment on, her opponent, defeated, rebelled against her opponent, accusing her of not being a woman. And so it went:<sup>5</sup>:

In humiliating fashion, the Olympic committee carried out a physical examination on Stephens for the first time in history, proving her female genitalia and ending the war between the two. Walsh, who died in 1980, then underwent an autopsy which revealed ambiguous physical sexual characteristics, of a woman and a man, as well as male chromosomes. It was not possible to identify the type of deviation the former athlete had.

In the press, in 1960, it was also reported that oriental male athletes were hiding their sex in order to gain an advantage in competitions, leading the IOC to officially

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5 PROTA, Luiz Felipe. The Science Behind Sex Determination in Sports – Part 1. Disorders of Sexual Development and their impact on the athlete's life. Available at: <https://globoesporte.globo.com/sportv/blogs/o-cientista-do-esporte/post/a-ciencia-por-tras-da-determinacao-do-sexo-no-esporte-parte-1.ghtml>. Accessed on January 20, 2025.

implement the physical examination of women's genitals in order to verify the action of a possible fraudster: the infamous nudity parade.

Over time, it turned out that this was not enough to determine the sex predominance of the athletes, and the following year the IOC decided to carry out a chromosomal or genetic characterization test on the athletes, "as the main criterion of biological gender, placing the physical examination in the background". This test was only carried out on women competitors, since in men's competitions they would initially have no advantage because of their sex.

Despite attempts to contain the gender revolution that was now becoming increasingly pressing in sport, chromosomal verification was no longer enough to determine sex with relative certainty. This mode<sup>6</sup>:

Polish track and field athlete Eva Klobukowska was the first athlete to be disqualified using this method, at the 1964 Tokyo Olympics. She had a disorder called mosaicism, a genetic mutation that causes an individual to have a combination of female and male chromosomes (XX/XXY) in their body cells. This alteration leads to what we now call a Disorder of Sexual Development (DSD), characterized by a group of conditions in which the genital reproductive organs do not develop normally, manifesting as a mixture of male and female sexual characteristics.

From this point on, several other questions arose, considering that the spectrum of the Disorder of Sexual Development (DSD) is multifaceted.

Later<sup>7</sup>:

In 1986, there was a milestone in sport. Spanish athlete Maria José Martínez-Patiño was removed from the national athletics team when it was discovered that her chromosomes were genetically male, being XY and not XX (female), despite having all the physical characteristics of a woman. As a result of this disorder, the only problem was that she produced testosterone above normal female physiological levels, but had an androgen insensitivity syndrome, where her body didn't respond to the hormone. As this was not a factor in her athletic advantage, Martínez-Patiño returned to athletics years later, taking her right to compete among women to court and becoming a symbol in the fight against discrimination in sport. It was the beginning of a changing landscape for athletes with Disorders of Sexual Development.

6 PROTA, Luiz Felipe. The Science Behind Sex Determination in Sports – Part 1. Disorders of Sexual Development and their impact on the athlete's life. Available at: <https://globoesporte.globo.com/sportv/blogs/ocientista-do-esporte/post/a-ciencia-por-tras-da-determinacao-do-sexo-no-esporte-parte-1.ghtml>. Accessed on January 26, 2025.

Ibid.

7 Ibidem

In 1990, it was in athletics that an athlete's sex change was confirmed, a fact that led the Athletics Confederation to be confronted, and from then on, guidelines were established for other cases that followed. Before that, there were no specific rules on the issue, as it was a debate that had been unimaginable until then. In this context, the issue unfolded into two other equally important questions.<sup>8</sup>:

Thus, the first major debate focused on the issue of transitioning from male to female or female to male. While the first did not seem to raise any problems, the second, in turn, raised several. Firstly, because it was not known whether or not female hormones would affect reducing muscle strength, to what extent they would be sufficient to reduce it, and whether they would work. The second issue focused on the age at which someone underwent sex change, whether before puberty or after. If an individual had changed sex before puberty, in principle, they would not be at a hormonal advantage over their opponents because they would not have had a major hormonal influence during puberty, especially if we were dealing with a transsexual woman.

Before this discussion, all eyes were on female track and field competitors, as this was the sport where women with masculine characteristics and performances were most prominent, despite these being sporadic cases. Initially, there should have been an assessment by the Olympic committees of the countries of origin, which were not bound by any specific decision-making rules. In the case of athletes who had undergone sex reassignment, unlike those who genetically had DSD, after the year 2000, the number of cases became exponential, forcing the IOC to make a statement. Not only for this reason but also because of the revolution in values that was taking place around the subject, it was extremely necessary to have specific rules to preserve fair play. Given this<sup>9</sup>:

Before the IOC issued its directives, no interest in ensuring non-discrimination policies could be identified in this specific area. It was mainly from 2004 onwards that a change in mentality began to be seen, in favor of defending minority rights and non-discrimination policies. However, it was not just the change in values alone that led the IOC to speak out on the matter, but rather the exponential increase in cases that were being brought to the attention of the IFs and which were met with a unified and satisfactory response from them. The increase in the number of cases was mainly the result of the approval of numerous national laws in different countries, which made it possible for more people to access this procedure, consequently leading to an increase in the number of cases of athletes who wanted to compete in the Olympic Games after having already completed the sex reassignment procedure.

8 RODRIGUES, Mariana de Oliveira. Mudança (de sexo) no esporte. Trabalho de avaliação final na disciplina de desporto do Curso de Mestrado em Direito Público da Faculdade de Direito da Universidade Nova Lisboa. Lisboa/PT, 2017.

9 Ibidem

The motto of the International Olympic Committee, enshrined in the Olympic Charter, makes it clear that one of the missions of the aforementioned body is to take “measures against all forms of manipulation of competitions and related corruption; (...)”, in free translation. The context is given in item 8 of the mission and role of the IOC<sup>10</sup>:

2 Mission and role of the IOC\*. The mission of the IOC is to promote Olympism throughout the world and to lead the Olympic Movement. The IOC's role is: [...] 8. to protect clean athletes and the integrity of sport, by leading the fight against doping, and by taking action against all forms of manipulation of competitions and related corruption; [...]

The IOC, in this regard, was a pioneer in calling a meeting with experts from various fields to take a more secure position regarding the participation of transsexuals in sports, so that it could more accurately apply parameters that were insufficient until then. It was necessary to apply what we in Brazil call the principle of equality, in its formal aspect, so that similar cases would not be treated unequally.

The Stockholm panel, as it became known, met in May 2004 and produced recommendations that took into account the physiological changes presented by athletes who underwent hormone therapy for 2 years.

After this period, the hormone levels of each sex would be measured and conclusions would be drawn regarding the possibility of participating in official competitions. These recommendations established in the Stockholm Consensus were later adopted by various confederations since these guidelines were not binding. On the subject, Genel details<sup>11</sup>:

In much the same way as clinicians and politicians have struggled with how to integrate transgender individuals, so have competitive sports, especially transwomen athletes. In this regard, the International Olympic Committee (IOC) was a groundbreaker when it convened an expert panel in which I participated. The panel met in Stockholm in October 2003 and developed recommendations — “The Stockholm Consensus” — that were adopted by the IOC's Executive Board in May 2004 (9,13). These recommendations called for the inclusion of male-female (M-F) and female-male athletes so long as they met explicit criteria, including gonadectomy and completion of anatomic changes consistent with their professed gender followed by a 2-year period during which they received hormonal therapy “appropriate for assigned sex” and “in a verifiable manner.” In addition, these

10 INTERNATIONAL OLYMPIC COMMITTEE. Olympic Charter. Available at: [https://stillmed.olympic.org/Documents/olympic\\_charter\\_en.pdf](https://stillmed.olympic.org/Documents/olympic_charter_en.pdf). Accessed on 26 Jan. 2025.

11 GENEL, Myron MD. Transgender Athletes: How Can They Be Accommodated? Disponível em: [https://journals.lww.com/acsm-csmr/fulltext/2017/01000/Transgender\\_Athletes\\_\\_\\_How\\_Can\\_They\\_Be.7.aspx](https://journals.lww.com/acsm-csmr/fulltext/2017/01000/Transgender_Athletes___How_Can_They_Be.7.aspx). Acesso em 26 jan. 2025.

athletes would have to demonstrate that legal recognition of their reassigned gender/sex identity had been received in the appropriate jurisdiction<sup>12</sup>.

According to the same author (in free translation)<sup>13</sup>:

The new guidelines eliminated the requirement for legal recognition as well as the requirement for surgical anatomical changes, replacing it with a requirement for male athletes that serum testosterone levels be maintained below 10 nmol L<sup>-1</sup> (288 ng dL<sup>-1</sup>) for at least 12 months before competition and remain below that level throughout the eligibility period. Female male trans athletes could compete "without restriction" [...] Depending on the method used—mass spectrometry is also considered to be the most sensitive and specific, especially at the lower levels seen in women—10 nmol L<sup>-1</sup> is at the lower limit of normal in men and was based on the same threshold defined a few years earlier for hyperandrogenism in testosterone-sensitive women with various disorders of sex development. A few months before the November meeting, this so-called hyperandrogenism policy was suspended for two years by the International Court of Arbitration for Sport, pending demonstration of levels above this threshold, since a significant performance advantage could be unfair. The case was brought against the Athletics Federation of India and the International Association of Athletics Federations. Although not directly applicable to the IOC, the body subsequently suspended the hyperandrogenism rule for the Rio Olympics, accompanied by a statement of support for Athletics.

The issue has been the subject of extensive debate to this day since the scientific community has not conducted specific studies to determine the level of influence that may be present in the performance of transgender athletes. The discussion is far from over, mainly because it is not known for sure how many sexual disorders exist, nor what the physiological response will be of each individual undergoing hormonal treatment, even with the parameters used taking into account the amount existing in each organism, since each person may have a different response. In this sense, the IOC took an important step towards the social integration of transgender athletes, with the determination that they will not be excluded from official competitions, considering "blood testosterone levels of 10nmol/L for at least one year, excluding the need for sex reassignment surgery"<sup>14</sup>.

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12 Just as clinicians and policymakers have struggled with how to integrate transgender individuals, so have competitive sports, especially female athletes. In this regard, the International Olympic Committee (IOC) was a pioneer when it convened a panel of experts on which I participated. The panel met in Stockholm in October 2003 and developed recommendations—the "Stockholm Consensus"—that were adopted by the IOC Executive Board in May 2004 (9, 13). These recommendations called for the inclusion of male-female (M-F) and female-male athletes as long as they met explicit criteria, including gonadectomy and completion of anatomical changes consistent with their professed gender followed by a 2-year period in which they received hormone therapy "appropriate for their assigned sex" and "in a verifiable manner." In addition, these athletes would have to demonstrate that legal recognition of their reassigned sex/sexual identity had been received in the appropriate jurisdiction..

13 GENEL, Myron MD. Transgender Athletes: How Can They Be Accommodated? Disponível em: [https://journals.lww.com/acsm-csmr/fulltext/2017/01000/Transgender\\_Athletes\\_\\_\\_How\\_Can\\_They\\_Be.7.aspx](https://journals.lww.com/acsm-csmr/fulltext/2017/01000/Transgender_Athletes___How_Can_They_Be.7.aspx). Acesso em 26 jan. 2025.

14 Op. cit. PROTA.

As previously mentioned, and here we see that the recommendation remained, in the case of male transgenders there are no impediments, “since a woman who opts for the male sex does not acquire any physical advantage”.

## **TRANSGENDER ATHLETES AND THE APPLICATION OF THE PRINCIPLES OF EQUALITY AND DIGNITY OF THE HUMAN PERSON**

From the moment the first cases of transgender athletes in sports emerged, women were the main target of supervision by the Olympic Committees, since the physical superiority of transgender women is the cause of possible advantages among competitors.

It should also be noted that athletes in individual sports are the ones who attract the most attention due to their very personal responsibility for their performance, in an environment where physical contact makes a big difference. What is known is that, when confirmed, such an inquiry is handled in such a way that the athletes perform the tests equally, thus demonstrating the application of the principle of equality.

However, currently, transgender athletes from collective teams, including those undergoing hormone treatment, have stood out in official games as high-performance athletes, and, as a result, have drawn attention to their peculiar conditions.

In the not-so-distant past, as mentioned, athletes from individual sports were more commonly confronted, perhaps because there were no cases of transgender athletes in collective sports. At the forefront of collective sports, the International Volleyball Federation (FIVB) reached an understanding after a meeting between members, in which they ratified the organization's position, aligned with that of the International Olympic Committee (IOC), in the sense that transgender athletes should be kept in sports in international competitions and, about national competitions, the decision is at the discretion of each federation.

This sets a precedent for other team sports to take the same initiative, in the understanding that sport must primarily fulfill one of its most important missions, which is the promotion and social integration between individuals. In a note released to the press, Annie Peytavin<sup>15</sup>, who headed the FIVB medical commission meeting, made the following considerations<sup>16</sup>:

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15 INTERNATIONAL VOLLEYBALL FEDERATION. Medical Commission discusses evolution of sports medicine in volleyball. Available at: <http://www.fivb.com/en/about/news/medical-commission-discusses-evolution-of-sports-medicine?id=73441>. Accessed on January 20, 2025.

16 Original text in English, available at <http://www.fivb.com/en/about/news/medical-commission-discusses-evolution-of-sports-medicine?id=73441>. Accessed on: 20 Jan 2025

The Commission reiterated that the objective of volleyball is to establish a system of participation of athletes in indoor and beach volleyball competitions that respects a person's individual choice while ensuring a level playing field. For national club competitions, the participation of transgender athletes is solely the responsibility of the respective national federations.

The international federation wants to avoid complaints and failures regarding the subject. Unreasonable discrimination against transgender athletes could cause a series of discomforts, even more so with the growing demonstration of these professionals throughout the world.

Certainly, excluding them from competitions would demonstrate non-compliance with several international agreements, to which the vast majority of the Western world is a signatory. It should be noted that the very principle of human dignity derives from the principle of equality, and is reflected in many others. Regarding the inclusion of transsexuals in sports, LEITE masterfully comments:

Talking about the inclusion of transgender people (especially women, since no one seems to be very concerned about trans men in the male categories) is mainly talking about: 1) biological determinism (the idea that there are insurmountable biological and physiological differences between men and women); 2) establishing a teleological analysis of the purpose of sports and its social responsibilities; 3) as the creation of a common enemy to divert focus from the main problem, which is and has always been the devaluation of women and, consequently, of the female categories of any sport; [...].

Many issues involving the participation of trans athletes are of various kinds, and the great reality is that, with the development of hormone therapies with an increasingly higher degree of effectiveness, and the possibility of individuals having physical and mental health equal to that of any other, the need to exercise minimum rights also puts them ahead of social acceptance. It is important to mention that, for the majority of trans female athletes, the fact of being in this condition does not translate into any advantage. In this sense, Torjée<sup>17</sup>:

It could also be argued that being trans is a major disadvantage simply because of the discrimination they face. "I've had people laugh at me and try to humiliate me at games," Chloe said, explaining that both spectators and other players have mocked her on the field while she's trying to focus on the game. Chloe's right to use the

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17 TORJÉE, Diana. The uncertain Olympic future of trans and intersex athletes. Translated by Marina Schnoor. Vice Magazine Brazil. São Paulo, August 22, 2016. Available at: [https://www.vice.com/pt\\_br/article/aew9k5/futuro-olimpico-atletas-trans-e-intersexuais](https://www.vice.com/pt_br/article/aew9k5/futuro-olimpico-atletas-trans-e-intersexuais). Accessed on January 22, 2025.

women's locker room is protected by law in California, where she lives, and her teammates are very supportive, so her critics have little power to try to stop her from participating like any other athlete. But it's still an added weight on her shoulders. These issues reveal how fragile an attempt at comparison is — it's bizarre to try to highlight the pros and cons of being trans since any potential advantage or disadvantage depends on the sport and the athlete trying to compete in it.

Regarding teleological analysis, the scientific basis for this statement must be verified. It is known that teleological interpretation is that which considers a certain premise as the end to which the norm is directed. In other words, it is based on analyzing the purpose of sport, whether to train athletes who enrich clubs with glory, or simply to attract sponsorships given the sculptural bodies of men and women.

Sport has the values<sup>18</sup>, as already mentioned, eminently social, and its responsibilities are at the base of this tripod, individual - society - collectivity. Of course, here we are dealing with a premise that starts from another principle, that of good faith<sup>19</sup>. It is believed that all legal relationships must initially be analyzed from the perspective of probity, without, however, disregarding other intentions. As MARTINS-COSTA explains:<sup>20</sup>:

Given the rules of the Civil Code of 2002, objective good faith is expressly set as a yardstick for assessing the lawfulness of the exercise of rights derived from legal transactions (art. 187); as a canon for the interpretation of transactions (art. 113); and as a general clause of contracts, serving their integration (art. 422). In these three provisions it has a general character, spreading its effectiveness across numerous institutes.. [...].

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18 The spirit of sportsmanship is the celebration of the human mind, body and spirit, and is reflected in values found in sport, including the following: 1. Ethics, fair play and honesty 2. Health 3. Excellence in performance 4. Character and education 5. Fun and satisfaction 6. Teamwork 7. Dedication and commitment 8. Respect for rules and laws 9. Respect for oneself and other participants 10. Courage 11. Team spirit and solidarity. (WORLD ANTIDOPING AGENCY. World Anti-Doping Code. Available at: [https://www.wada-ama.org/sites/default/files/resources/files/codigo\\_mundial\\_antidopagem\\_2015.pdf](https://www.wada-ama.org/sites/default/files/resources/files/codigo_mundial_antidopagem_2015.pdf). Accessed on January 14, 2025).

19 The notion of good faith in law comes from the Roman world, with the Law of the Twelve Tables already recording the rule according to which *patronus si clienti fraudem fecerit, sacer esto*. However, historians indicate that it is even older, since the idea expressed in the word *fides* would be linked, according to the tradition collected by Dionysius of Halicarnassus, to the very foundation of Rome, which is equivalent to saying that it is as old as the institution of *clientele*, although it is recorded there by its antinomic value – *fraus*, and not *fides*. Born with the Roman world, the idea of *fides* dominated it, receiving a notable expansion and a wide spectrum of meanings there. A polysemic expression, *fides* is understood broadly as trust, but also as collaboration and mutual assistance (in the relationship between equals) and as support or protection (in the relationship between unequals); as loyalty and respect for the given word; as the foundation of justice and civic virtue;<sup>5</sup> as the bond that unites the members of the *societas inter ipsos*, and also as a technical-legal instrument, especially the *iudicia ex fide bona*, its validity manifesting itself “in a fluid and elastic manner at all legal, political and sociological levels”<sup>8</sup> of Roman culture, constituting its founding ethical value. (MARTINS-COSTA, Judith. A boa-fé no direito particulares. São Paulo: Revista dos Tribunais, 1999. p. 509).

20 Ibidem

In a recent analysis, the Supreme Federal Court took a position on the request made by the Attorney General's Office in Direct Action of Unconstitutionality (ADI) 4275 DF, which discussed the “possibility of changing gender in the civil registration record of a transsexual, even without performing a surgical procedure for sex reassignment”.<sup>21</sup>

In the grounds set out in the initial petition, one of the statements draws attention to the case in question: it is not the surgery that grants the individual the status of transsexual. The exercise of the principle of human dignity encompasses the right to be socially recognized as such, so that the right to change one's first name and sex, corresponding to gender identity, also guarantees compliance with the principles of prohibition of hateful discrimination (art. 3, IV), freedom and privacy (art. 5, caput, and item IX). In his vote, Justice Edson Fachin positioned himself in the sense of pointing out the following constitutional basis:<sup>22</sup>:

[...] the right to dignity (art. 1, III, of the CRFB), the right to privacy, private life, honor and image (art. 5, X, of the CRFB); and conventional basis (art. 5, § 2, of the CRFB): the right to a name (article 18 of the Pact of San José de Costa Rica); the right to recognition of legal personality (article 3 of the Pact); the right to personal freedom (article 7.1 of the Pact); and the right to honor and dignity (article 11.2 of the Pact).

Further, he pointed out the following conclusion:

[...] I consider this direct action to be admissible to interpret Article 58 of Law 6,015/73 by the Constitution and the Pact of San José de Costa Rica, to recognize that transgender people, who so desire, regardless of transgenitalization surgery or hormonal or pathological treatments, have the right to have their first name and sex changed directly in the civil registry.

What was granted, therefore, was the attribution of interpretation by the Constitution of Art. 58 of Law 6.015/1973, as amended by Law 9.708/98, so that the possibility of having personal documents changed to adapt to one's gender identity can be exercised freely, if desired.

In this same vein, and view of international calls for the acceptance of the transgender population, there is a significant inclination for the legislation to evolve in the direction of accepting them.

21 BRAZIL. FEDERAL SUPREME COURT. Plenary resumes trial of ADI on alteration of civil registration without changing sex. Available at: <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=370951>. Accessed on: January 20, 2025.

22 Ibidem.

In Brazil, the issue of femininity certainly bothers viewers and clubs, eager to profit from sporting events. Sponsoring scenes of relative female robustness does not attract an audience, since athletes are always influenced to highlight their characteristics.

As an interesting feature to be observed, we have the normative standards of sport, which, moreover, mark forms of segregation of athletes, through the exploitation of their image, in a context distorted from the initial premise of sport. Otherwise, let's see<sup>23</sup>:

Normative standards in sports prevail not only in matters related to gender, but also in relation to sexual orientation. An example is homosexuality for both men and women. (...) According to the comments in the specialized media, the impression remains that "good sports performance" is that which resembles that of men who participate in the most prestigious competitions, such as the Brazilian Men's Football Championship Series A. The performance standard of excellence is "masculine" and women who try to achieve it are considered "outside the norm" and may suffer prejudiced questions regarding their bodies, their desires and, often, in respect of their sexuality. (...) Plural bodies show the insufficiency of standardizing standards. It is therefore a question of thinking of bodies (with their inscriptions, mannerisms and movements) as discursive modalities, of a body that is not only biological, but also the result of language and power in the dispute for spaces.

From then on, we can see the gradual and historical shift away from the application of the principle of equality, when almost exclusive attention is given to the binary concept of man/woman. When this shift occurs, it does not specifically mean that the principle is no longer being applied, nor is it segregating individuals outside of human dignity.

On the contrary, and from another perspective, the principle that unequals must be treated unequally is being applied more vehemently, and thus, in these cases, the material principle of equality is being fully applied.

It is important to note that it was with the French and American Revolutions of 1776 that the principle of equality became a major exponent, whose ideals of liberty, equality and fraternity inspired the classification of the dimensions of fundamental rights, in which the principle of equality is inserted.

Inspired by the chimerical Enlightenment, the objective of preaching its commandments was that the population could enjoy a society in which everyone had equal rights, far from the contrasts that until then were considered reasons for segregation.

In addition to social status and expression of beliefs, the Enlightenment principles expanded to encompass ethnicities, races, genders, classes, and from there, the creation

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23 CAMARGO, Wagner Xavier; KESLLER, Cláudia Samuel. Beyond Masculine/Feminine: Gender, Sexuality, Technology and Performance in Sports from a Critical Perspective. *Anthropological Horizons*, Porto Alegre, year 23, n. 47, p. 191-225, Jan./Apr. 2017.

of constitutional charters in which a series of previously unimaginable rights were guaranteed. It is interesting to note what Araújo says<sup>24</sup>:

Throughout history, the debate on the difference between the sexes has developed mainly between two perspectives: the essentialist and the culturalist. The essentialist discourse exalts "sexual difference" and defends the existence of a "feminine essence". By psychologizing or biologizing the sociological and cultural findings that have been produced historically, they make universalist statements that imprison femininity in structured models, even if ideologically valued (women as mothers and wives). It assumes a universal feminism and ends up justifying the discrimination of women based on their feminine essence. From the culturalist perspective, sexual differences arise from socialization and culture. From this perspective, overcoming the patriarchal order and laws would eliminate sexual differences..

Under the aegis of freedom, over the years gender changes have given way to the search for increasingly challenging consecrations, such as sexual transition, which men and women undergo in search of personal and social acceptance. The change in the image, voice and psychology of transsexuals raises a question of social imposition and placement in this same society, which still has difficulty understanding so many new things.

The problem that intertwines the relationship between transsexual athletes and their acceptance is not the same as that imposed on society, and therefore goes beyond the nature of material equality that we mentioned, derived from the revolutionary ideals of modern demonstrations.

The big issue is centered on inequality, on the ability to exert a certain advantage over the opponent, on the way in which one's performance is shown to be beyond the opponent's greatest capacity; it is based on the inconstancy of behavior, on the temper of performance. It echoes in the imbalance, in the lack of ethics, in the breaking of fair play.

Transgender athletes have the difficult task of reducing their testosterone levels at the expense of their health and well-being, in order to meet the IOC's requirements, which are generally accepted by national federations, such as Brazil. However, all other rights surrounding sports practice would be diametrically threatened: loyalty, ethics, collectivity, justice.

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24 ARAÚJO, Maria de Fátima. Diferença e igualdade nas relações de gênero: revisitando o debate. *Psicologia Clínica*, v. 17, n. 2, 2005, p. 42-50.

Sex misrepresentation is similar to doping, when in both situations a substance is inserted that alters the individual's physiology. We will discuss this subject in more detail in the context of the next topic.

## **REGULATION: A FINE LINE BETWEEN HORMONE THERAPIES AND DOPING**

In addition to the determinations of the International Olympic Committee, each and every athlete, including transsexuals, are subject to international standards that prohibit them from consuming substances that alter their competitive capacity, which put them in an advantageous position compared to other competitors.

It is known that these rules are present in individual and collective sports, for men and women, so that, in principle, the use of any substance that promotes this result is considered doping. As outlined<sup>25</sup>:

Doping is a constituent element of modern sport and a product of science, directly related to other practices and technologies that expand the limits of human performance, but which are arbitrarily linked to the "pure", "natural" and "authentic", and which do not contravene their rules. This is a highly controversial issue, after all, the use of drugs in high-performance sport seems to be essential for it to continue to exist as a profitable and spectacular spectacle. Furthermore, there is no such thing as "natural" when it comes to the relationship with the body and training. Given the enormous competitive demands and the intense physical and psychological sacrifices to which athletes are subjected during training and competitions, which are clearly harmful to their health, how can one be so peremptory in condemning doping?

During this research, it was said that sports are guided by precepts, which are based on the principles of ethics, equality and honesty. However, behind the playful-philosophical aspect, almost a myth of the social and collective ideal, sports practice maintains relationships of tolerance and overcoming, both on the part of athletes and on the part of sports organizations.

The issue becomes complex when one observes that transsexual athletes use hormone therapies that transform their bodies in such a way that women gain muscle and men lose it. This is just one of the effects caused by the ingestion of hormones and other substances, which, when we analyze them from the perspective of parity, can be considered as a kind of "doping".

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25 SILVEIRA, Viviane Teixeira; VAZ, Alexandre Fernandez. Doping and control of womanliness in sport. Cadernos Pagu, n. 42, 2014. p. 447-475.

The discussion is based on the physiological changes resulting from the use of hormonal substances, which were gradually investigated by committees until the IOC was able to take a position.<sup>26</sup>:

In 2004, the IOC established rules so that transgender athletes could be included in Olympic competitions, provided that they could prove, among other things, that they possessed the bodily characteristics equivalent to the gender they had chosen to live in. The IOC's main concern is that a female transgender athlete might have an advantage over an opponent. According to experts, testosterone levels and muscle mass of female transgender athletes should decrease to levels considered truly feminine after hormone therapy and sex reassignment surgery. The Stockholm Declaration on the Consensus on Sex Reassignment in Sport was formulated on October 28, 2003, by an IOC Commission to discuss and formulate policies for the participation in sport of people who have undergone the process of sex reassignment (from male to female and vice versa).

It is no coincidence that the claim is that inserting any substance into the human body that alters its primary nature could corrupt the spirit of sport and is related to the idea that the act of cheating and obtaining abilities greater than those of other athletes.

The ingestion of illicit substances in the case of doping, in the event of failure to exert natural physical effort and performance, is similar to the use of hormone therapy, which alters the physical and physiological characteristics of female transgender athletes. In other words, doping, according to Silveira and Vaz<sup>27</sup>;

[...] is often condemned in the name of a morality that strives to reaffirm the principle of formal equality of opportunities in sport (...). The argument about the use of "natural" resources to improve athletic performance goes hand in hand with the defense of athletes' health (even considering that they do not seek to improve their health indicators when dedicating themselves to competition), and this is also why doping is condemned.

And Pires completes<sup>28</sup>, 2014, p. 215:

However, it is not only to guarantee equality in sports performances, nor even to maintain a healthy horizon for athletes that these doping practices are prohibited; they also seek to define how sexual bodies should experience these high-level sports activities, that is, they want to demarcate which male and female bodies can be eligible in sports competitions based on criteria that are more moral and social than purely biological meanings about sexual dynamism and their sports performance capabilities..

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26 Ibidem.

27 Ibidem.

28 PIRES, Barbara Gomes. Sex/Gender verification policies in sport: intersexuality, doping, protocols and resolutions. *Sexualidad, Salud y Sociedad* (Rio de Janeiro), n. 24, p. 215-239, 2016.

However, despite all these important details, it is worth remembering that most athletes undergo some type of pharmaceutical or surgical intervention to achieve good levels of performance, even if the substances used are not considered illicit.

In the historical context, these interventions have had more and less incidence, and in relation to transgender athletes, in addition to everything, there was still the obligation to meet other requirements due to their condition. Torjée<sup>29</sup>, pay attention to the following situation:

Both trans and intersex athletes have always been required to undergo pharmaceutical or surgical intervention to qualify for the Olympics, and in recent decades—particularly the past decade—their presence at the Games has been a source of controversy: over the effects of hormones on athletes, equal opportunity in sports, athletic advantage, and the dubious prescribing of unwanted medical treatments to people deemed healthy by sports organizations. So IOC officials and doctors, with specialties ranging from genetics to sports science to women's and transgender health, attended another IOC meeting in November 2015, at which the organization lowered the eligibility requirements for trans and intersex athletes, allowing trans men and women to compete in international sporting events, including the Olympics, with fewer restrictions than ever before: trans athletes can now compete after 12 months of hormone replacement therapy and undergo hormone testing, and trans men face no restrictions at all. They are also no longer required to undergo reconstructive surgery..

The containment barrier acts between the limit of substance use and the tolerance of the regulations originating from the World Anti-Doping Agency. Back in 2009, the IOC's position imposed a much greater series of requirements than those currently in place.

The regulations ranged from sex reassignment before puberty to genital reassignment surgery. Some countries, such as Brazil, do not have regulations for sex reassignment surgery for women, only for men, which would make it impossible for Brazilian transgender athletes to perform, unless they underwent surgery outside the country. These were the determinations at the time.<sup>30</sup>:

According to this regulation, women and men who change sex before puberty are considered to be members of the gender they have changed to, and there are no restrictions on their participation in sporting events. However, if the operation takes place after puberty, there are three conditions for participation in sporting competitions. One is that the anatomical changes (sic) must be complete, which implies the removal of the testicles and penis (sic). The second is that the gender change operation (sic) must be recognized by the official authorities. And the third is that transsexuals must undergo hormone therapy in order to minimize the sporting

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29 Op. cit. TORJÉE.

30 SOUSA, Hugo Daniel. Transsexuals can compete in the events. Available at: <https://www.publico.pt/2009/08/30/jornal/transsexuais-podem-competer-nas-provas-17681390>. Acesso em 20 jan. 2025.

advantages resulting from the sex change. According to the IOC and IAAF, only two years after the gender change operation (sic) is a transsexual authorized to participate in their sporting competitions..

Nowadays, the parameter used to rule out the possibility of doping in athletes is the amount of testosterone in their bodies, taking into account the fact that even originally female bodies can naturally have higher levels of testosterone, and given the complexity that permeates the human body, carrying out periodic tests provides greater security for all competitors, although, on the other hand, it can bring insecurity to those who are considered non-standard. It is important to note that each athlete is responsible for the substance(s) found in their bodies, detected through specific tests for each sport, and those common to all athletes.<sup>31</sup>.

In our country, the World Anti-Doping Code (WAC) is applicable throughout the national territory, after being enacted “without reservations, the International Convention against Doping in Sport (UNESCO), held in Paris on October 19, 2005, after the publication of Decree No. 6,653/08”, and, therefore, has the status of ordinary law.

Some domestic legislation makes reference to the aforementioned code, such as art. 244-A of the Brazilian Code of Sports Justice, when also dealing with preventive measures against doping. The core, however, is based on the doubt as to whether or not hormone therapy is considered doping and to what extent. From this perspective, it is important to emphasize that<sup>32</sup>:

Through their participation in sports, Athletes undertake to respect the competition rules of their sport. Likewise, Athletes and Athlete Support Personnel shall undertake to respect the anti-doping rules under Article 2 of the Code by virtue of their agreement to obtain membership, accreditation, or participation with sports organizations or sporting events subject to the Code. Each Signatory shall, however, take the necessary measures to ensure that all Athletes and Athlete Support Personnel under its authority undertake to respect the anti-doping rules applied by the relevant Anti-Doping Organization..

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31 Anti-doping rules, like competition rules, are sporting rules that govern the conditions under which sport is practiced. Athletes accept these rules as a condition of participation in sporting events. Anti-doping rules are not designed to be subject to, or limited by, legal requirements and standards applicable to criminal proceedings or employment matters. The policies and minimum standards set forth in the Code represent the consensus of a broad spectrum of stakeholders who have a common interest in the fair practice of sport and must be respected by all courts and adjudicating bodies. (WORLD ANTIDOPING AGENCY. World Anti-Doping Code. Available

at: [https://www.wada-ama.org/sites/default/files/resources/files/codigo\\_mundial\\_antidopagem\\_2015.pdf](https://www.wada-ama.org/sites/default/files/resources/files/codigo_mundial_antidopagem_2015.pdf). Acesso em 14 jan. 2025).

32 WORLD ANTIDOPING AGENCY. Código Mundial Antidopagem. Disponível em: [https://www.wada-ama.org/sites/default/files/resources/files/codigo\\_mundial\\_antidopagem\\_2015.pdf](https://www.wada-ama.org/sites/default/files/resources/files/codigo_mundial_antidopagem_2015.pdf). Acesso em 14 jan. 2025.

The competitor is personally responsible for his/her body, so that “athletes shall be responsible for any Prohibited Substance or its Metabolites or Markers found in their Body Samples”. Thus, under our legislation, guilt is ruled out, since “it is not necessary for intent, fault, negligence or knowledge of use by the athlete to be demonstrated in order to establish a violation of the anti-doping rules under Article 2.1”. Therefore, the athlete is attributed strict liability.<sup>33</sup>.

Regarding the characterization of the use of a prohibited substance by a transsexual, in the form of doping, in principle, items 2 and 3 of art. 8 of the Brazilian Code of Sports Justice provide for the following:

2. States Parties shall adopt, or encourage, as appropriate, competent authorities to act within their jurisdictions to adopt measures to prevent and restrict the use and possession by athletes of prohibited substances and methods in sport, unless such use is based on a therapeutic use exemption. 3. No measure taken in accordance with this Convention shall prevent the availability for legitimate purposes of substances and methods otherwise prohibited or controlled in sport..

The wording of item 2 leads us to the understanding that the therapeutic use of any substance to which the athlete submits himself, for health reasons, may be accepted. It should be noted that all athletes must maintain a certain level of testosterone in their bodies.

In addition, “athletes who for medical reasons need to use a prohibited substance or method may request a Therapeutic Use Exemption (TUE) in accordance with the International Standard for Therapeutic Use Exemption (IUSE)”.

Testosterone, the reference anabolic agent for men and women, is included in the list of prohibited substances published by the World Anti-Doping Agency.<sup>34</sup>:

33 Under the principle of strict liability, an anti-doping rule violation occurs whenever a Prohibited Substance is found in an Athlete’s bodily Sample. The violation occurs whether the Athlete intentionally or unintentionally used a Prohibited Substance or was negligent or otherwise remiss. If the positive Sample was produced from an In-Competition test, then the results of that Competition are automatically nullified (Article 9 (Automatic Disqualification of Individual Results)). However, the Athlete will then have the possibility of avoiding or reducing the sanctions if the Athlete can demonstrate that he or she did not commit a mistake or a significant mistake (Article 10.5 (Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances)). The rule of strict liability for the discovery of a Prohibited Substance in an Athlete’s Sample, with the possibility that sanctions may be modified based on specific criteria, provides a reasonable balance between the effective enforcement of anti-doping rules for the benefit of all “clean” Athletes and the application of justice in the exceptional circumstance where a Prohibited Substance has not entered an Athlete’s body system due to a breach or negligence on the part of the Athlete. (...) (WORLD ANTIDOPING AGENCY. World Anti-Doping Code. Disponível em: [https://www.wada-ama.org/sites/default/files/resources/files/codigo\\_mundial\\_antidopagem\\_2015.pdf](https://www.wada-ama.org/sites/default/files/resources/files/codigo_mundial_antidopagem_2015.pdf). Acesso em 14 jan. 2025).

34 Op. cit. WORLD ANTIDOPING AGENCY.

SUBSTANCES & METHODS PROHIBITED AT ALL TIMES - PROHIBITED SUBSTANCES - ANABOLIC AGENTS Anabolic agents are prohibited: 1. ANABOLIC ANDROGENIC STEROIDS (AAS) a. Exogenous\* AAS, including: 1-Androstenediol ( $5\alpha$ -androst-1-ene- $3\beta$ , $17\beta$ -diol); 1-Androstenedione ( $5\alpha$ -androst-1-ene-3, $17$ -dione); 1-Testosterone ( $17\beta$ -hydroxy- $5\alpha$ -androst-1-en-3-one); (...) (grifos do autor)

However, the International Olympic Committee has already expressed its views on the tolerable levels of testosterone in the bodies of female and male athletes, currently disregarding the relationship between the time in which the body developed before hormone therapy, in the case of female transgender athletes.

According to the new parameters adopted in 2015, and still in force, “[...] for the acceptance of transgender women (sic) in sports”, it is required to “[...] control blood testosterone levels below 10nmol/L, for at least one year”, and there is no “need for sex reassignment surgery”.

In relation to female transgender athletes, “there are no impediments, since a woman who opts for the male sex does not acquire any physical advantage”<sup>35</sup>.

Although this is the current rule, the minimum amount mentioned is questionable, considering that in women, the testosterone level is around 2 to 3 nmol/L, that is, a parameter 3 to 4 times lower than the maximum amount required for transsexual athletes. In addition<sup>36</sup>:

Another concern is for transgender women who have had their gonads, the organs that produce testosterone, removed. Their bodies may experience serious problems due to the lack of the hormone, such as depression, bone loss, and significant muscle mass loss. Therefore, exogenous testosterone replacement therapy is now recommended, through a request for a therapeutic use exception (TUE) from the World Anti-Doping Agency (WADA), in compliance with the hormonal limits permitted by the new rule. There is a theory that claims that undergoing sex reassignment in adulthood may confer athletic performance advantages on transgender women. This would be due to differences in the formation of the male body compared to the female body during puberty, mainly due to the action of different hormones..

35 PROTA, Luiz Felipe. A Ciência Por Trás da Determinação do Sexo no Esporte – Parte 2. As Desordens do Desenvolvimento Sexual e seus impactos na vida do atleta. Disponível em: <https://globoesporte.globo.com/sportv/blogs/o-cientista-do-esporte/post/a-ciencia-por-tras-da-determinacao-do-sexo-no-esporte-parte-2.ghml>. Acesso em 20 jan. 2025.

36 Ibidem

From a regulatory perspective, female transgender athletes are subject to only this rule, disregarding, as stated, male development prior to the start of hormone therapy.

Thus<sup>37</sup>:

In boys, testosterone begins to act around the age of 12 and promotes many changes in their bodies compared to girls, such as: the formation of lungs with greater capacity; development of the heart and circulation capable of pumping more blood to the body, and therefore responding to more vigorous physical activities; and a musculoskeletal system with greater bone density, muscle mass and consequently more strength; in addition to a system of hemoglobins, which transport oxygen, that is more efficient due to the activation of testosterone. This development process continues until the age of 30-40, when testosterone begins to decline at a rate of approximately 1% per year..

American doctor and researcher Joanna Harper developed an unprecedented study involving female transgender athletes and their respective performances, analyzing<sup>38</sup>:

[...] the race times for eight transgender women who competed in distance races as men and women using a mathematical model called age grading. Collectively, the age grading scores for these eight runners are the same for both genders. (...) As a group, the eight study participants had very similar age grading scores for both males and females, making it possible to state that transgender women performed at approximately the same level of distance races for their respective genders before and after gender transition. It should also be noted that the publication of this study is unlikely to significantly change the resistance faced by transgender women competing against cisgender women. There will continue to be strong opposition from athletes, parents, and fans to the inclusion of transgender women. It will be many more years before the mainstream sports enthusiast understands that transgender women who have undergone testosterone suppression will not dominate women's sports. (emphasis added)<sup>39</sup>

The aforementioned researcher argues that the hormone dosage test should be performed on all female athletes, and not only on transsexuals, considering that certain female individuals have natural hormonal alterations in testosterone levels, and thus, according to the parameters currently implemented by the IOC, these athletes would also have an advantage over other competitors.

According to the study's conclusion, therefore, the IOC rules follow a certain logic, given that they were also based on scientific data. To clearly state, as the aforementioned researcher did, that female transgender athletes have a superiority due to the time in which

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37 Op. cit. PROTA.

38 HARPER, Joana. Journal of Sporting Cultures and Identities. Volume 6, Issue 1. Illinois/USA. 2015. Disponível em: [jrci.cgpublisher.com/product/pub.301/prod.4/m.2?](http://jrci.cgpublisher.com/product/pub.301/prod.4/m.2?). Acesso em 20 jan. 2025. p. 02.

39 Texto original em inglês. Tradução livre.

they had complete male development, and that these athletes can use this superiority to guarantee extraordinary gains is a very dangerous issue, precisely because each organism is a complex of physiological conditions and can react differently to hormone therapy. What can be said, however, is that sport does not lend itself to exclusion, but, above all, it does not lend itself to cheating.

## CONCLUSION

During the research, it became clear that the conflict of interests involving athletes, doctors, managers, organizations and society is far from being resolved. The adoption of rules seeking to guide these various rights involved does not find solid content to support them, when, however, the International Olympic Committee, the highest body responsible for providing answers, is forced to take a position on the matter. Scarce research, vague cases, prejudice and disastrous precedents permeate all this dynamic involving transgender athletes.

More than a physical or image issue, the performance of these masculine athletes, in both cases, raises doubts about the values involved in sports, among which loyalty, good faith and ethics in sports practice and in the face of opponents are basic foundations that should guide any and all athletes.

Therefore, it is necessary to initially understand that the transgender athlete will not always be a cheater, disloyal, who acts in bad faith. However, it should not be ignored that high-performance professional athletes have salaries that reflect this characteristic, visibility according to their performance and consequently, they face much greater pressure.

Transgender athletes are under everyone's gaze, they are targets; any slip-up is the slightest reason for questions and investigations. Outside the binary male/female standard, trans athletes are subject to all suspicions. The mere fact of being reassigned to another sex already raises suspicions about their intentions, precisely because of facts that have been observed in the past, such as the example of male Asian athletes who were willing to hide their sexes in order to compete among women. Although it cannot be identified as a constant, there is no way to rule out such a situation, given the strong principles on which sports are based.

Therefore, the application of the constitutional principle of equality and its unfolding, of human dignity, is an unwavering axiom for the analysis of each case, under penalty of

practicing injustice in advance. This is a difficult issue from a legal standpoint, even more so when sports also have interaction and inclusion as principles.

If bad faith is proven, the whole story changes and the principles mentioned here must be mitigated and applied based on the infraction, whose liability is independent of intent or fault.

Challenging science, the changing bodies, the dynamism of therapies and the practice of sports as a global activity is much more complicated than simply practicing prejudice. And it was from this perspective that the International Olympic Committee positioned itself when it reached an understanding regarding the participation of transgender athletes, as long as, in the case of trans feminine athletes, they had hormone levels below 10 nmol/L, given the lack of scientific proof that these athletes have physiological superiority. When in doubt, inclusion is the priority.

Contrary to what one might imagine, testosterone is the substance of the moment, which outlines the profile of the trans athlete, given the acceptable levels of this hormone in the blood, and the close similarity with doping. Furthermore, even though testosterone is among the prohibited substances, it must be considered that it is present in all human bodies, to a greater or lesser degree, according to the original sexual determination, and also, as a result of mutations existing in both sexes, which, as has been seen, may contain naturally altered levels. The parameter before this hormone guides the athlete's performance and defines his capacity for more or less muscle and body mass.

But what was demonstrated here was that much worse than accepting minorities is accepting them in the face of the unjust sacrifice of the majority. As stated, in the face of the ill-fated good faith, one cannot prevent the exercise of rights. fundamental acts of anyone.

However, in the face of deliberate intent to deceive or cheat, the situation must be treated more rigorously, aiming to avoid disastrous cases such as those that have left their mark on world history. It is therefore necessary to find a way to welcome all transgender athletes without harming others, and thus promote a welcoming of an issue that is increasingly present in the professional and high-performance sports environment.

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