The Ethics of Inclusion in Rugby: the Case of Trans Athletes

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Chair: British Philosophy Of Sport Association

Disclaimer: My views do not directly or indirectly represent those of my employer or the BPSA
How to make these ethical judgements

➢ The Ethical Duties of International Federations
➢ Balancing or Lexical Priority?
➢ The Male Advantage Argument
➢ The Anti-Sexism Argument
➢ Conflicting Rights?
➢ A Possible Solution
Ethical Duties of IFs

What are the Special Duties of World Rugby?
The Ethical Duties of International Federations

- **Special duties of World Rugby:**
  Look after Rugby, Rugby players, ex-players, potential players, clubs, spectators and potential spectators, etc:
  - Rugby first: that’s your role

- **General duties of World Rugby:**
  Pay your taxes, keep good accounts, be a decent example of an International Federation, *like every other IF*

Distinguish **Special duties** from **General duties**  
(Ronald Dworkin 1986)
Special Duties
Balancing or Lexical Priority?

HOW TO DETERMINE THE RULES OF THE GAME
‘Balancing Values’

The wrong approach
‘Lexical Priority’

The right approach

Instead of ‘balancing’, make decisions through a process of ‘Lexical Priority’ (John Rawls, 1971)

- Lexical Priority
- Filtering
- Decision Tree
Lexical Priority

Sort, in three values in order, (like a dictionary)
Or: filter rules according to three principles
Or: go through three decision stages

- Stage ONE: Safety
- Stage TWO: Fairness
- Stage THREE: Inclusion
The overriding sporting objective is and remains the guarantee of fair competition. Restrictions on participation are appropriate to the extent that they are necessary and proportionate to the achievement of that objective. (my italics)

IOC Consensus Meeting On Sex Reassignment and Hyperandrogenism. 2015
The ‘Male Advantage’ Argument

In what circumstances does Male Advantage make a critical difference?
Exceptions to Male Advantage

... are few but include a couple of sports where there is a female physiological advantage, and some where there is no advantage one way or the other. Here, the argument for unisex competition is clear.
Tall Advantage?

- But not **significant** and **systematic**
- Does not ‘**cut nature at the joints.**’
- Does not reflect significant inequality, social oppression, or other **overlapping, coinciding disadvantages**

So tall advantage does not justify separation
And as a social fact, women have been excluded.
The Anti-Sexism (or ‘social’) argument

WHY DOES SEX MATTER?
Chess club: a case for trophies for girls
Conflicting Rights and Trans Sport

What is the best ethical interpretation?
A Human Right to Sport?

≠

A Human Right to competitive Sport in the gender in which one identifies

Note that the amplifications set up the problem, they don’t resolve it
CAS 2009/A/1948 Appeal by Mr Robert Berger v World Anti-Doping Authority

FINAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Alan Sullivan QC, Sydney, Australia
Arbitrators: Mr Malcolm Holmes QC, Sydney, Australia
           Mr Tim Castle, Barrister, Wellington, New Zealand
CAS Clerk: Ms Sarah Longes, Sydney, Australia

between

MR ROBERT BERGER, New Zealand
represented by Mr Paul David, Barrister, Auckland, New Zealand
Infringement/Violation distinction

Infringements of rights

Violations of rights

Judith Jarvis Thomson (1986)
A Solution
Maximally safe, maximally fair, maximally inclusive
Two new classes

Protected (Female)

(= no male advantage)

for reasons of safety and fairness

Open
to enable maximum inclusivity
Summary

- World Rugby has special duties to the game itself.
- World Rugby ought to consider those responsibilities in terms of lexical priority: safety, fairness, inclusion.
- The combination of the Male Advantage argument and the Anti-sexism arguments is very solid.
- Exclusion of transwomen from women’s rugby infringes the rights of trans athletes. But trans inclusion violates the rights of female bodied athletes to play sport only with athletes who lack male advantage.
- WR should move towards an Open and a Protected category.
THANK YOU

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