Inclusion and Exclusion in Competitive Sport - Legal Matters

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World Rugby Transgender Working Group
Research: Inclusion and Exclusion in Competitive Sport

Inclusion and Exclusion in Competitive Sport
Socio-legal and regulatory perspectives
Seema Patel

22 February 2021
## Research

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<th>Disability</th>
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<td>Reasonable Exclusion</td>
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<td>Unreasonable Overt/Covert Exclusion</td>
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Key Concepts: what is inclusion and exclusion?

- Fundamental human need to belong
- Search for acceptance of our differences
- Sense of belonging
- Public recognition of our differences
- Exclusion a natural part of existence
- Survival of the fittest
- Exclusion as a barrier
- Exclusion through stereotyping

What is Discrimination?

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Law and Human Rights Principles

The Rule of Law - Equality before the law

*International*

Universal Declaration of Human Rights 1948 (UDHR)


United Nations Human Rights Council (UNHRC) Resolutions 2019

UN Guiding Principles on Business and Human Rights 2011

*Regional*

CoE: European Convention on Human Rights 1950 (ECHR), Article 14 (not a free-standing right, see Protocol No. 12 ECHR)

EU: Community law recognises human rights (TEU; TFEU; Lisbon Treaty)

The Equal Pay and Equal Treatment Directives; Race Directive; Framework Directive

*Domestic*


USA: Americans with Disabilities Act 1990 (ADA), Section 901 of Title IX of Education Amendments Act 1972; Genetic Information Non-Discrimination Act 2008 (GINA)
Discrimination in Sport

“Discrimination, in its positive sense, is at the heart of competitive sport, since the whole purpose of competition is to single out and reward the fastest, strongest and most skilful players.

In order to achieve that object, it is essential that unfair discrimination, in its negative sense, should be eliminated. In one of the great clichés of discrimination law [and of sport], there must be a level playing field”

Per Lewis and Taylor
Sport Human Rights Provisions

Olympic Charter, Fundamental Principle of Olympism (4)

The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.

Olympic Agenda 2020


IOC Host City Contract (HCC) 2024; UEFA Euro 2024 Tournament Requirements (Sector 03); FIFA Human Rights Policy 2017


Centre for Sport and Human Rights (CSHR); The Sport and Rights Alliance (SRA); The World Players Association (Universal Declaration of Player Rights 2017)

Protecting players from human rights breaches in global sport
Where does sport meet the law?
S195 EA 2010
(1) A person does not contravene this Act, so far as relating to sex, only by doing anything in relation to the participation of another as a competitor in a gender-affected activity.
(2) A person does not contravene section 29, 33, 34 or 35, so far as relating to gender reassignment, only by doing anything in relation to the participation of a transsexual person as a competitor in a gender-affected activity if it is necessary to do so to secure in relation to the activity—
   (a) fair competition, or
   (b) the safety of competitors.
(3) A gender-affected activity is a sport, game or other activity of a competitive nature in circumstances in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity.
(4) In considering whether a sport, game or other activity is gender-affected in relation to children, it is appropriate to take account of the age and stage of development of children who are likely to be competitors.
(5) A person who does anything to which subsection (6) applies does not contravene this Act only because of the nationality or place of birth of another or because of the length of time the other has been resident in a particular area or place.
(6) This subsection applies to—
   (a) selecting one or more persons to represent a country, place or area or a related association, in a sport or game or other activity of a competitive nature;
   (b) doing anything in pursuance of the rules of a competition so far as relating to eligibility to compete in a sport or game or other such activity.
Recent Research

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Court of Arbitration for Sport
Recent Research
Dr Renee Richards v United States Tennis Association
Extra: Semenya v IAAF CAS 2018/O/5794
ASA v IAAF CAS 2018/O/5798

- Appealed to the SFT, rules are not currently suspended
- How is sex is determined in sport (biology/identity)?
- Is testosterone is a primary marker for athletic performance?
- Do the testosterone levels of 46XY DSD individuals impact on the body in the same way as men?
- Do the elevated testosterone levels give them an unfair advantage over non DSD female athletes?
- Does that justify their exclusion from the restricted female events?
- The validity of the rules rests upon whether they are discriminatory, necessary, reasonable and proportionate.
- Are they justified for ensuring consistent treatment and preserving fair and meaningful competition within the female category or do they infringe human rights and medical law?
- CAS held that the Regulations are discriminatory, but they are necessary, reasonable and proportionate means of achieving the aim of protecting female athletes in certain events.
- However, CAS expressed “grave concerns” about the future application of the Regulations