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Inclusion and Exclusion in Competitive Sport

Socio-legal and regulatory perspectives

Seema Patel



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Figures and tables

Figure

8.1	The outcome of all sex, gender, disability and race cases examined	158
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Tables

8.1	Overview of intrinsic and extrinsic sports rules, and their objectives	152
8.2	The percentage of sex, gender, disability and race cases which fall within inclusion and exclusion	159
8.3	The percentage of decisions made by sports governing bodies and the law	163
9.1	The ladder of regulation	167

Cases

- Adams by Adams v Baker*, 909 F. 2d. 643 (1990)
Bellinger v Bellinger [2003] 2 ALL ER 593
Bennett v The Football Association Ltd, 28 July 1978. Court of Appeal (Civil Division) Transcript No. 591
British Judo Association v Petty [1981] ICR 660, CA
CAS 2008/A/1480 *Pistorius v IAAF*
Clinton v Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974)
Corbett v Corbett [1970] 2 ALL ER 33
Couch v British Boxing Board of Control (1997 unreported, IT no. 2304231/97)
Cruz v Pennsylvania Interscholastic Athletic Association, 157 F. Supp. 2d. 485 (E.D. Pa. 2001)
Darrin v Gould, 540, P. 2d 882 (Wash. 1975)
de Freitas v Permanent Secretary of Ministry of Agriculture [1999] 1 AC 69
Dennin v Connecticut Interscholastic Athletic Conference Inc. 913 F. Supp. 3d 663. (D. Ct. 1996)
Dogru v France [2008] ECHR 1579
Dr Renee Richards v Unites States Tennis Association 93 Misc. 2d 713, 400 NYS 2d 267
Emily South v Royal Victorian Bowls Association [2001] VCAT 207 (28 February 2001)
Equal Authority v Portmarnock Golf Club & Others [2005] IEHC 235 (H. Ct. June 10 2005)
Ferneley v Boxing Authority of New South Wales [2001] FCA 1740
Force by Force v Pierce City R-VI School District, 570 F. Supp. 1020 (S.W. Mo, 1983)
Fortin v Darlington Little League, 514 F. 2d 344 (1975)
Goodwin v UK (2002) 35 EHRR 18
Greater London Council v Farrar [1980] 1 W.L.R 608
Hardwick v FA, IT case, unreported. Case no. 2200651/96
Hollenbock v United States Olympic Committee, 513 F. 3d. 1191 (10th Cir. 2008)
Hussaney v Chester City FC, 15 January 2011 No. EAT/203/98
Knapp v Northwestern University, 101 F. 3d 473 (7th Cir. 1996)
Kuketz v Petronelli, 821 NE 2.d 473 (Mass. 2005)

- Lafler v Athletic Board of Control*, 536 F. Supp. 104 (W.D. Mich. 1982)
- Lana Lawless v the Ladies Professional Golf Association and the Long Driver's of America* United States District Court Case Number CV10 4599 DMR
- Lantz by Lantz v Ambach*, 620 F. Supp 663 (1985)
- Martin v PGA Tour, Inc.*, 994 F. Supp. 1242 (D. Or. 1998)
- Martin v International Olympic Committee* (1984) 740 F. 2d 67
- McPherson v Michigan High School Athletics Association*, 119 F. 3d. 453 (6th Cir. 1997)
- Meca-Medina and Majcen v Commission* (Case C-519/04 P) [2006] ECR I-699
- Mercer v Duke University*, 181 F. Supp. 2d. 525, 531 (M.D.N.C. 2001)
- Modahl v British Athletic Federation Ltd* (No 2) [2002] 1 WLR 1192
- Moore v The Squash Rackets Association Ltd* IT case, case no. 50482/94, May 9th 1995
- Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co. Ltd* [1894] AC 535
- Olinger v United States Golf Association* 205 F. 3d 1001 (2000)
- Panesar v Nestle Co Ltd* [1980] ICR 144n
- Pottgen v Missouri State High School Activities Association*, 40 F 3.d 926 (8th Cir. 1994)
- Robertson v Australian Ice Hockey Federation* [1998] VADT 112 (26 March 1998)
- R v John Terry*, Westminster Magistrate's Court, 13 July 2012, unreported). Available at: www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/r-v-john-terry.pdf
- Sagen v Vancouver Organising Committee for the 2010 Olympic and Paralympic Winter Games* [2009] BCSC 942 (Sup Ct (BC))
- Sandison v Michigan High School Athletics Association*, 64 F 3.d 1026 (6th Cir. 1995)
- Saunders v Richmond Borough Council* (1977) IRLR 362, [1978] ICR 75, EAT
- Schultz v Hemet Youth Pony League*, 943 F. Supp. 1222 (C.D. Cal. 1996)
- Shepherd v United States Olympic Committee*, 464 F. Supp. 2d 1072 (D. Colo. 2006)
- Singh v Rowntree MacKintosh Ltd* [1979] ICR 554
- Singh v The Football League, The Football Association and Others* (unreported, December 2001, ET Case No. 5203953/99)
- Sterling v Leeds Rugby League Club* [2001] ISLR 201
- Taylor v Moorabbin Saints Football League and Football Victoria* [2004] VCAT 158 (17 February 2004)
- Walrave and Koch v Association Union Cycliste Internationale* (Case 36/74) [1974] ECR 1405

Statutes

American Declaration of the Rights and Duties of Man 1948
American Convention on Human Rights 1970
Beijing Platform for Action 1995
Boxing and Wrestling Control Act (NSW Act) 1986 (AUS)
Brighton Declaration on Women and Sport 1994
Canadian Charter of Rights and Freedoms 1982
Charter of the United Nations 1945
Civil Rights Act 1964 (USA)
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979
Convention on the Rights of Persons with Disabilities (CRPD) 2009
Disability Discrimination Act 1995 (UK)
Education Amendments Act 1972 (USA)
Equal Opportunity Act (EOA) 1995 (AUS)
Equal Status Act (ESA) 2000 (IRE)
Equal Treatment Between Men and Women in Access to and the Supply of Goods and Services Directive 2004/113 (OJ 2004 L373/37)
Equal Treatment Directive 2006/54 (OJ L204/23)
Equality Act (EA) 2010 (UK)
European Convention on Human Rights (ECHR) 1950
European Social Charter 1996
Framework Employment Directive 2000/78 (OJ 2000 L303/16)
Gender Recognition Act (GRA) 2004 (UK)
Grundgesetz 1949 (GER)
Human Rights Act (HRA) 1998 (UK)
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1969
International Covenant on Civil and Political Rights (ICCPR) 1976
International Covenant on Economic, Social and Cultural Rights (ICESCR) 1976
Physical Activity and Sport Act 2003 (CAN)
Race Equality Directive 2000/42 (OJ 2000 L180/22)
Race Relations Act (RRA) 1976 (UK)
Sex Discrimination Act (SDA) 1984 (AUS)

Sex Discrimination Act (SDA) 1975 (UK)
Sports Act 30/2004 (PORT)
The Americans with Disabilities Act (ADA) 1990 (USA)
The Lisbon Treaty 2009
The Treaty on the Functioning of the European Union (TFEU) 2009
UNESCO International Convention against Doping in Sport 2005
UNESCO International Declaration on Human Genetic Data 2003
UNESCO Universal Declaration on the Human Genome and Human Rights 1997
Universal Declaration on Human Rights (UDHR) 1948
White Paper on Sport 2007 (EU)
Yogyakarta Principles 2006

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Contents

<i>List of figures and tables</i>	xiii
<i>List of cases</i>	xiv
<i>List of statutes</i>	xvi
<i>Acknowledgements</i>	xviii
Introduction	1
PART I	
Key concepts	7
1 Sport-specific inclusion and exclusion	9
2 Physical and non-physical human differences	25
3 The regulation of inclusion and exclusion	37
PART II	
Cases of inclusion and exclusion in sport	59
4 Sex	61
5 Gender	85
6 Disability	109
7 Race	129

PART III	
Striking the balance	149
8 Exploring key themes	151
9 Conclusion and recommendations for regulatory reform	166
<i>Index</i>	184

Introduction

Context

This book aims to investigate the regulatory balance between inclusion and exclusion in competitive sport. Society is obsessed with categorising and treating individuals and groups according to their physical and non-physical differences, such as sex, gender, disability and race. This treatment can lead to the inclusion or exclusion of an individual from the tangible and intangible benefits of society.

One of the areas which individuals seek inclusion is within sport, a field that has the potential to foster the recognition of aspects of being human, and override divisions (Rojek, 2005: 50). However, the oppositional force of exclusion can limit their inclusion. Inclusion and exclusion exists on a scale from reasonable to unreasonable, arbitrary to justifiable.

This book considers these inclusionary and exclusionary forces, and the existing legal framework in light of the special nature of competitive sports participation. It offers conceptual thinking around sport-specific inclusion and exclusion. Sport possesses a degree of 'specificity' because of its unique essence and institutional core values. The essence of sporting activity is concerned with challenging our physical and non-physical differences by creating conditions which separate winners and losers on the basis of these differences. The core of competitive sport is ultimately about being the best athlete; however, it is a contested realm where positive and negative values continually conflict and contrast with each other.

In order to protect this essence, rules and regulations concerning eligibility and selection are imposed to match ability, preserve competition, ensure safety, provide the best possible entertainment and generate revenue. Rules also exist to maintain its complex network of traditions, cultures and values that provide it with a degree of social exclusivity and cultural distinctiveness (Brackenridge *et al.*, 2000: 18; Sugden and Tomlinson *in* Coakley and Dunning, 2000: 319). The application of these rules can at times have an unequal exclusionary impact on certain classes of individual. The result of this is the potential incompatibility of sport with the existing legal framework of equality legislation in circumstances where there is no justification for differential treatment.

With this in mind, this book critically analyses a range of legal and non-legal cases concerning sex, gender, disability and race to identify when sporting

exclusion is justifiable for the protection of the essence, and when it is unjustifiable and incompatible with equality legislation. For instance, the exclusion of South African female sprinter Caster Semenya by the International Association of Athletics Federations (IAAF) will be evaluated to determine whether the IAAF were justified in their approach. This position will be contrasted with the case of South African runner Oscar Pistorius who was excluded from competing in mainstream competitions on the grounds of his disability. Less well-known examples, such as the Iran women's football team, will also be analysed to evaluate whether a justified, evidence-based, legitimate inclusive or exclusive approach is employed by sport and/or the law.

This book acts as a practical tool for sports governing bodies and decision-makers by offering a framework for effectively balancing inclusion and exclusion in competitive sport *across* the areas of sex, gender, disability and race. It will also propose the most appropriate method of regulation within sport and/or law in this area to stimulate improvements in rule making and encourage good governance in this field. In turn, this will equip these parties with a reference for consistently ensuring that their rules and actions pursue legitimate sporting aims and objectives which are focused on matching ability, preserving competition and ensuring safety and, furthermore, that these are compatible with legal provisions which protect fundamental freedoms.

On a broader level, the book raises general awareness of the underlying issues and themes which appear to be restricting individuals from participating in sport. It is important to break down unnecessary barriers which have thus far prevented many minority groups from competing in competitive sport. At the same time, individuals need to be aware of the legitimate boundaries to their participation based upon justifiable reasoning.

Aims and objectives

The core objectives of this research are to:

- 1 Construct a new understanding of the concepts of sporting inclusion and sporting exclusion, drawing upon their impact in competitive sport.
- 2 Analyse current sport and legal approaches to inclusion and exclusion with reference to sex, gender, disability and race. Identify deficiencies and good practice in the current regulatory mechanisms.
- 3 Propose a regulatory framework for effectively managing inclusion and exclusion in sport and identify how this positions itself within the current models of sport regulation.

Competitive sport refers to activity which is carried out at an amateur, semi-professional or professional level. It is recognised and appreciated that sport is conducted for recreational purposes also, thus giving different meaning to the concepts of inclusion and exclusion. There is a great deal of literature which addresses inclusion and exclusion at a general social level, drawing upon the

impact of economic status, welfare and class on our differences. Within this literature there are attempts to apply the resultant conceptual framework of social inclusion and social exclusion to the recreational sporting context, and the role of recreational sport within social inclusion and social exclusion political agendas (Houlihan and White, 2002; Thomas and Smith, 2009; Gratton and Henry, 2001; Coalter, 2007). However, whilst doing so is undoubtedly useful, it only presents a partial picture which does not necessarily account for the specificity of sport and the valuable role that certain forms of exclusion in sport can have in defending its essence. The purpose here is to shift the focus from political to sporting and gain a deeper understanding of the concepts and their operation in a competitive sporting environment.

It is accepted that inclusion and exclusion can take place because of a number of other human differences. The four categories of sex, gender, disability and race are chosen here because they broadly capture the essence of human differences and concern specific inherent human characteristics, which are the focus of this book. In addition, they represent major dimensions of the inclusion/exclusion debate in sport because they raise important matters about performance enhancement, the integrity of sport, matching ability, safety and the sporting culture. Some high-profile cases such as those involving Caster Semenya, Oscar Pistorius, Casey Martin and John Terry have tended to broadly fall into the categories of sex, gender, disability and race, which suggests that athletes are most often excluded on the basis of these differences.

There is a significant body of work concerned with specific forms of discrimination in sport in relation to sex, gender, disability and race. However, little specifically compares these areas (Schiek and Lawson, 2011), let alone expands into a broader consideration of inclusion and exclusion in competitive sport (Patel, 2009; Elling and Knoppers, 2005). Not only are sex, gender, disability and race explored in one place here but links are captured between them, to develop an overall understanding of factors concerning the balance between inclusion and exclusion in sport. Within sociology, this approach is referred to as intersectionality (Hargreaves and Anderson, 2014). That understanding is made more holistic by the fact that it eschews the tendency to take a specific disciplinary approach, in favour of one which interweaves all the main relevant disciplines. The value of a multi-disciplinary analysis is enhanced by the fact that it is used purposively to identify shortfalls in current practices and make recommendations for the balance between inclusion and exclusion.

Methodology

In order to satisfy the objectives outlined, the research exclusively employs a literature-based doctrinal approach. The research objects consulted here are a variety of computer- and paper-based sources. These include general sources of theoretical literature and empirical research located in text books and journal articles; sports governance and policy material, such as codes of practices and documents concerning the rules of sport and their enforcement; and domestic,

regional and international legal material such as legislation, conventions, declarations and case law. Given the currency of the topics, newspaper materials have also been sourced. Since this book positions itself within the law and regulation literature, major research objects include primary and secondary legislation and case law. The main legal jurisdictions include the UK, EU, USA, Australia and Canada. These are primarily where the visible cases of inclusion and exclusion tend to be appearing and where they have been considerably addressed as socio-political matters. These parts of the world also have well-developed cultures around rule creation and rule enforcement. There are clear attempts by the legal authorities in these countries to deal with inclusion and exclusion and to explore the appropriate relationship between sport and law through legislation and policy.

The relationship between law and sport regulation in this particular field will be analysed. In doing so, the creation, interpretation and application of rules of sport that affect inclusion and exclusion will also be explored. These include rules laid down by the International Olympic Committee (IOC), the IAAF, Fédération Internationale de Natation (FINA) and Fédération Internationale de Football Association (FIFA). The compatibility of sport rules and actions with legal rules will be critiqued such as sports rules which restrict the fundamental freedoms of individuals but that are considered necessary for the greater good of sport. The extent to which sport should comply with the legal framework will also be considered.

One of the strengths of this research is its multi-disciplinary approach, drawing upon a range of other fields which extend beyond the confines of law and regulation. These include philosophy, psychology, science (including medicine and sport science), sociology and sport studies.

Organisation of the book

The book falls into three main parts and is presented sequentially:

Part I explores the significance of the main concepts of inclusion and exclusion, sex, gender, disability and race. It provides a sociological context for the sporting and legal matters which arise throughout. When understanding these concepts in general terms, the literature largely derives from social science disciplines such as philosophy and sociology as well as physical sciences including biology. This book evaluates the impact of our differences upon our interaction with the world. The origins of these differences and explanations for them need to be understood in biological and social contexts before we can consider how they operate in sport and law.

Part I seeks to distinguish these concepts in a competitive sporting environment and construct a new understanding of sporting inclusion and sporting exclusion. These proposed terms emphasise the effect that the essence of sport and the sporting culture has on inclusion and exclusion. Part I outlines the regulatory toolkit currently available to deal with sport-specific inclusion and exclusion, drawing upon policy and law measures, and sport regulation. In doing

so, Part I highlights the current ways in which inclusion and exclusion are regulated, whilst also highlighting the potential gaps in this framework.

Part II follows with an application of this toolkit to inclusion and exclusion through an evaluation of a selection of legal and non-legal case studies of inclusion and exclusion in the areas of sex, gender, disability and race. The compatibility of the sport approach with domestic, regional and international legal mechanisms are critiqued, drawing upon primary and secondary sources of law, to pinpoint areas of good practice as well as deficiencies in the sport and legal regulatory approaches. The cases studies are compared and contrasted to explore how minority athletes are treated across the areas. Part II seeks to establish the legitimacy of the approaches to inclusion and exclusion, and the consistency of the treatment of minority athletes. It draws upon a range of disciplines in order to better understand what drives differential treatment between individuals.

Having distilled the legal and non-legal cases, Part III focuses on the future of the balance between inclusion and exclusion. It offers recommendations for reform of the framework which currently deals with inclusion and exclusion. Part III engages in a detailed comparative analysis of the four specified areas to identify the key themes which have emerged throughout Part II. The main regulatory approaches to inclusion and exclusion are identified, in addition to any socio-cultural trends across the four areas which have played a significant role in the balance. In order to facilitate this analysis, a range of tables and figures graphically illustrate patterns and trends. These tools are evaluated to draw impressionistic conclusions about the consistency of the sport and legal approach across the four areas. They are used as a visual marker to identify the current balance between inclusion and exclusion in sport. Some basic trend analysis also accompanies this to ascertain where the problems of regulation in this field tend to be occurring.

The final chapters offer regulatory recommendations for striking the balance between inclusion and exclusion in sport. A multi-level template for reformative action is proposed for sports bodies to engage in and adapt within their sports in order to maintain a level of integrity. Underpinning this are recommendations for effectively regulating the balance through the existing spheres of law and regulation. These recommendations are also placed within the broader sociological context of sport to highlight their overall importance and significance in society.

References

- Brackenridge, C., Howe, D. and Jordan, F. 2000. *Just Leisure: equity, social exclusion and identity*. Cheltenham & Gloucester College of Higher Education: Leisure Studies Association Publications.
- Coakley, J. and Dunning, E. 2000. *Handbook of Sports Studies*. London: Sage Publications.
- Coalter, F. 2007. *A Wider Social Role for Sport*. London: Routledge.
- Elling, A. and Knoppers, A. 2005. Sport, Gender and Ethnicity: practices of symbolic in/exclusion. *Journal of Youth and Adolescence*. 34(3): 257–268.

- Gratton, C. and Henry, I.P. 2001. *Sport in the City: the role of sport in economic and social regeneration*. London: Routledge.
- Hargreaves, J. and Anderson, E. 2014. *Routledge Handbook of Sport, Gender and Sexuality*. London: Routledge.
- Houlihan, B. and White, A. 2002. *The Politics of Sports Development: development of sport or development through sport?* London: Routledge.
- Patel, S. 2009. *The level playing field: balancing inclusion and exclusion in sport*. Oral presentation given at the 'SRLA 22nd Annual Conference on Sport, Physical Activity, Recreation and Law' hosted by the Sport and Recreation Law Association in San Antonio, Texas, USA, March 2009.
- Rojek, C. 2005. *Leisure Theory*. Basingstoke: Palgrave Macmillan.
- Schiek, D. and Lawson, A. 2011. *European Union Non-Discrimination Law and Intersectionality*. Surrey: Ashgate Publishing.
- Thomas, N. and Smith, A. 2009. *Disability, Sport and Society: an introduction*. London: Routledge.