

Striking a Balance between Inclusion and Exclusion in Competitive Sport

Miss Seema Patel

A thesis submitted in fulfillment of the requirements
of Nottingham Trent University for the Degree of
Doctor of Philosophy.

April 2012

COPYRIGHT STATEMENT

This work is the intellectual property of the author, Miss Seema Patel. You may copy up to 5% of this work for private study, or personal, non-commercial research. Any re-use of the information contained within this document should be fully referenced, quoting the author, title, university, degree level and pagination. Queries or requests for any other use, or if a more substantial copy is required, should be directed in the owner(s) of the Intellectual Property Rights.

TABLE OF CONTENTS

COPYRIGHT STATEMENT.....	1
LIST OF TABLES AND FIGURES	5
LIST OF CASES AND STATUTES.....	6
ABSTRACT	10
ACKNOWLEDGEMENTS	11
INTRODUCTION	12
Context	12
Aims and Objectives	13
Research Questions	14
Methodology	16
Significance of Research.....	21
Limitations	23
Ethical Considerations.....	24
PART I: KEY CONCEPTS.....	25
Chapter 1: Inclusion and Exclusion	26
Inclusion and Exclusion in Human Behaviour.....	26
Human Differences	30
Categorisation and Stereotypes	38
Summary	42
Chapter 2: Physical and Non Physical Differences in Sport	44
Sex.....	45
Gender	49
Disability	50
Race	53
Summary	58
Chapter 3: Constructing Sport Specific Concepts	59
Sporting Exclusion	59
Sporting Inclusion	66
Summary	70
Chapter 4: The Regulation of Inclusion and Exclusion.....	71
Policy Measures	73
Law and Equality Measures	76
Sport Regulation Measures	91
Summary	110

Part I Overview	112
PART II: CURRENT REGULATORY APPROACHES TO INCLUSION AND EXCLUSION IN SPORT	115
Chapter 6: Sex	116
Ski Jumping	119
Running	124
Golf	127
Boxing	129
Sport Exemption Clauses	133
Summary	153
Chapter 7: Gender	156
Sex Testing in Sport	156
Intersex	161
Transgender	172
Summary	188
Chapter 8: Disability	191
Oscar Pistorius	193
Casey Martin	203
Fundamental Alteration Approach	209
The Use of Assisted Devices in Sport	214
Summary	219
Chapter 9: Race	223
Overt Practices: racial abuse	225
Covert practices: over-represented or under-represented?	232
Clashes between Sport and Religion	241
English Only Speaking Rules in Sport	247
Summary	249
Part II Overview	252
PART III: STRIKING THE BALANCE	254
Chapter 10: Exploring Key Themes	255
Analysis of the Sports Rules/Practices Concerning Inclusion and Exclusion	260
Analysis of the Regulatory Approach to Inclusion and Exclusion	274
Summary	287
Chapter 11: Conclusion and Recommendations for Regulatory Reform	290
The Ladder of Sport Regulation	290
Laissez-Faire Approach	291

Internal Audit Approach.....	292
Regulatory Approach	300
Legal Intervention	306
Conclusion.....	314
REFERENCES	318

LIST OF TABLES AND FIGURES

Table I: Summary of Sex Cases	153
Table II: Summary of Gender Cases	188
Table III: Summary of Disability Cases	220
Table IV: Summary of Race Cases.....	249
Table V: Summary of all cases explored in Part Two.....	256
Table VI: Overview of intrinsic and extrinsic sports rules, and their objectives	261
Table VII: The percentage of sex, gender, disability and race cases that fall within the varying categories of inclusion and exclusion.....	277
Table VIII: The percentage of decisions made by sports governing bodies and the law	286
Table IX: The Ladder of Regulation	291
Figure 1: The outcome of cases concerning inclusion and exclusion on the basis of sex.....	155
Figure 2: The outcome of cases concerning inclusion and exclusion on the basis of gender.	189
Figure 3: The outcome of cases concerning inclusion and exclusion on the basis of disability.	221
Figure 4: The outcome of cases concerning inclusion and exclusion on the basis of race.	250
Figure 5: The outcome of all sex, gender, disability and race cases examined.....	277

LIST OF CASES AND STATUTES

Cases

Adams by Adams v Baker, 909 F. 2d. 643 (1990)
Advisory Opinion, CAS 2000/C/267 AOC, 1 May 2000
Agar v Hyde [2000] HCA 41 (3rd August 2000)
Anderson v Professional Footballers Association [2000] ISLR 74 (C. Ct)
Attorney- General v Otahuhu Family Court [1995] 1 NZLR 603
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
Bosman Union Royale Belge Societies de Football Association and others v Bosman and others [1998] ECR I-4921
British Judo Association v Petty [1981] ICR 660, CA
Campbell v MGN [2004] 2 WLR 1232
Carnes v Tennessee Secondary School Athletic Association, 415 F. Supp. 569 (E.D. Tenn. 1976)
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
Deliege v Liege Ligue Francophone de Judo et Disciplines Associees ASBL (Case C-51/96 and C-191/97) judgement 11 April 2000
Dennin v Connecticut Interscholastic Athletic Conference Inc. 913 F. Supp. 3d 663. (D. Ct. 1996)
Dogru v France [2008] ECHR 1579
Dona v Mantero (Case 13/76) [1976] 2 CMLR 578)
Dr Renee Richards v Unites States Tennis Association 93 Misc. 2d 713, 400 NYS 2d 267
Elitt v USA Hockey 922 F. Supp. 217 (E.D. Mo. 1996)
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)
Ganden v National Collegiate Athletics Association, No. 96 C 6953, 1996 U.S. Dist. LEXIS 17368 (N.D. Ill Nov. 19, 1996)
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 Untied States Olympic Committee, 513 F. 3d. 1191 (10th Cir. 2008)
Hoover v Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977)
Hussaney v Chester City FC, 15 January 2011 No. EAT/203/98
Kleezek v Rhode Island Inter School League Inc, 768 F. Supp. 951 (D.R. 1991)
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)
Magill v Avonworth Baseball Conference, 364 F. Supp 1212 (W.D. Pa. 1973)
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
Mendy v Association Internationale de Boxing Amateur CAS OG Atlanta 1996/000
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
Nordenfellt v Maxim Nordenfellt Guns and Ammunition Co. Ltd [1894] AC 535
Norwegian Olympic Committee and Confederation of Sports & Others v International Olympic Committee CAS 2002/O/372
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)
R v Brown [1993] 2 ALL ER 75
R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532
R (on the application of Mullins) v Jockey Club Appeal Board (No.1) [2005] EWHC 2197 (Admin); Times, October 24, 2005 (QBD (Admin))
R. v Disciplinary Committee of the Jockey Club Ex p. Aga Khan [1993] 1 WLR 909 (CA (Civ Div))
Robertson v Australian Ice Hockey Federation [1998] VADT 112 (26 March 1998)
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)
Singh v British Rail Engineering Ltd [1986] ICR 22, EAT
Soering v UK A 161 (1989); 11 EHRR 439
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
Williams v School District of Bethlehem Pa., (1993) 998 F. 2d 168
Wouters Case (Case C-309/99)
Yang Tae Young and Korean Olympic Committee v International Gymnastics Federation CAS 2004/A/704

Statutes

African Charter on Human and Peoples Rights 1986
American Declaration of the Rights and Duties of Man 1970
American Convention on Human Rights 1970
Beijing Platform for Action 1995
Biology Act 1994 (NOR)
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)
Constitution of the United States 1787
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979
Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
Convention on the Rights of Persons with Disabilities (CRPD) 2009
Crime and Disorder Act 1998 (UK)
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 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
Federal Rehabilitation Act 1973 (USA)
Framework Employment Directive 2000/78 (OJ 2000 L303/16)
Football (Offences) Act 1991
Gender Recognition Act (GRA) 2004 (UK)
Gleneagles Agreement on Sporting Contracts with South Africa 1977
Grundgesetz 1949 (GER)
Human Rights Act (HRA) 1998 (UK)
International Convention against Apartheid in Sport 1985
International Convention against Doping in Sport 2005
International Convention on the Elimination of All Forms of Racial Discrimination 1969
International Covenant on Civil and Political Rights (ICCPR) 1976
International Covenant on Economic, Social and Cultural Rights (ICESCR) 1976
Paris Agreement 1994
Public Order Act 1986
Race Equality Directive 2000/42 (OJ 2000 L180/22)
Race Relations Act (RRA) 1976 (UK)
Rehabilitation Act 1973 (USA)
Sex Discrimination Act (SDA) 1984 (AUS)
Sex Discrimination Act (SDA) 1975 (UK)
Sporting Events (Control of Alcohol) Act 1985
The American Declaration of the Rights and Duties of Man and the American Convention on Human Rights (1970)
The Americans with Disabilities Act (ADA) 1990 (USA)

The Lisbon Treaty 2009
The Public Order Act 1986
The Sporting Events (Control of Alcohol) Act 1985
The Treaty of Amsterdam 1997
The Treaty on the Functioning of the European Union (TFEU) 2009
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
United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
Unruh Civil Rights Act 1959 (USA)
Yogyakarta Principles 2006

ABSTRACT

This thesis 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. Where this practice becomes discriminatory, there exists a legal framework in place to protect basic human rights and ensure that people are treated with due respect for their similarities and differences.

In a sporting context, the inclusion and exclusion of athletes based upon their differences is often a necessary part of the essence of competitive sporting activity. The protection of the essence involves the establishment of rules and categories that can have an unequal exclusionary impact on certain classes of individual such as some women, transgender, intersex individuals and those with a physical or intellectual disability. The essence of sport also embodies a dominant sporting culture that dictates who is suitable to sport and this can have an exclusionary effect upon particular racial populations.

This literature based research, 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. A comparative analysis is adopted to examine the consistency and appropriateness of the sport and legal approach to this regulation. It will be shown that whilst a majority of the cases employ a justified inclusive or exclusive approach that is evidence based and in the pursuit of legitimate objectives, there do remain a proportion of cases which are unjustified. This thesis proposes a ladder of regulation, including a sports audit and the establishment of an international anti-discrimination unit, to stimulate improvements in rule making and encourage good governance in this field.

Keywords: Inclusion, Exclusion, Competitive Sport, Discrimination, Sex, Gender, Disability, Race.

ACKNOWLEDGEMENTS

This body of work represents a significant milestone along my journey of self discovery and academic development, from my undergraduate and postgraduate studies as a student, to my current employment as a senior lecturer. This journey would simply not have been possible without the encouragement and support of two respected colleagues and dear friends, Simon Boyes and Austen Garwood-Gowers. They have selflessly guided me throughout my academic pursuits and have always offered me constructive advice. I am truly grateful to have such inspirational individuals in my life and I look forward to our future endeavours.

I would like to thank Austen as my Director of Studies, for his expertise throughout this long process. In addition, thanks to my second supervisor Toni Minniti for her attention to detail and her ability to offer a fresh perspective on my thesis. I am grateful to both of them for pushing me out of my comfort zone and encouraging me to reach beyond my capacities.

I have been lucky enough to rely upon a number of critical friends throughout this research. My thanks extend to Adrian Walters with whom I shared some significant eureka moments with and who spurred me on during tough times, Tom Lewis who was always so willing to help me with human rights queries, Matt Henn for his research degrees knowledge, Angela Donaldson for her library assistance and Steve Mosher for his alternative approaches to studying sport.

Above all, I would like to apologise to my friends and my family Rob, Mum, Dad and Asha for my lack of free time during this PhD. Life has unfortunately thrown many challenges at each of us but their strength and perseverance has motivated me to continue. I am thankful for their patience and continued love.

INTRODUCTION

Context

This thesis seeks to investigate the sport and legal balance between inclusion and exclusion in competitive sport. It will propose how the treatment of physical and non physical human differences in sport can be regulated in a balanced way. This research will reach conclusions about the balance that should be drawn between inclusion and exclusion and critically explore the extent that practice, rule-making and rule enforcement conform to these conclusions.

At a basic human level, we seek attachment and recognition through the formation of relationships and networks with other people or groups. Belonging to, and being with other people is essentially a “fundamental human need” (Abrams, Marques and Hogg, 2004 p. 27). We attempt to obtain membership and access to groups and clubs in order to reap desired benefits which can create a “sense of belonging” and makes us feel accepted for our differences (Abrams, Marques and Hogg, 2004 p. 211). One of the areas that individuals seek integration is within sport, a field that has the potential to foster the recognition of aspects of being human, and override divisions of class, sex or gender, disability, race or religion (Rojek, 2005 p. 50).

However, this inclusion can be restricted by the oppositional force of exclusion. Exclusion concerns the isolation of individuals from access to a particular benefit because of their perceived differences (Rojek, 2005 p. 199). These differences can be physical, non physical, economic or social. It is argued that the “human landscape [is] a landscape of exclusion” because human obsessions with barriers, whether physical or perceptual, exist to divide spaces between people and impose control (Sibley, 1995 p. X).

Inclusion and exclusion exists on a scale from reasonable to unreasonable, arbitrary to justifiable. The legal approach to inclusion and exclusion is the enactment and enforcement of international, regional and domestic equality legislation which aims to protect individuals from discrimination on the grounds of their physical and non physical differences such as sex, gender, disability and race, in circumstances where there is no justification for differential treatment. Many states are

fostering more respect within their respective societies by exhibiting an increasing commitment to this balance.

Within competitive sports participation, these inclusionary and exclusionary forces must be considered in light of the special nature of sport. Sport possesses a degree of “specificity” because of its unique essence and institutional core values. The essence of sport is essentially “where it all starts, a place that serves as symbolic and economic reference point for alternative images and practices” (Messner, 2002 p. XVIII; Raitz, 1995). Without this specificity, sport would lose its identity and value in society.

For athletes the essence of sporting activity is concerned with challenging our physical and non physical differences by creating conditions that separate winners and losers on the basis of these differences. The core of competitive sport is ultimately about being the best athlete but 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, customs, cultures and values that provide it with a degree of social exclusivity and cultural distinctiveness (Brackenridge, Thwaite and Ferguson, 2000 p. 18; Sugden and Tomlinson *in* Coakley and Dunning, 2000 p. 319). The application of these rules can at times exclude athletes based upon their sex, gender, disability and/or race which are potentially incompatible with equality legislation. Messner (2002, p. 165) discusses how the institutional centre of sport may at times seem repellent to challenges but when closely analysed, exposes instability because of a number of internal and external influences which aim to “bring about progressive changes in it and in the wider societal field of gender, race, sexual, and class relations.”

Aims and Objectives

With this in mind, this thesis aims to investigate whether an appropriate regulatory balance can be drawn between inclusion and exclusion in competitive sport, through the enforcement of

sporting systems of regulation and/or through legal mechanisms. It offers a proposal on how the law and regulation in this field ought to apply to sporting issues concerning inclusion and exclusion, whilst paying due attention to the integrity and specificity of sport. The core objectives of this research are to;

1. Introduce the concepts of inclusion, exclusion, sex, gender, disability and race, drawing upon their nature and value in society.
2. Construct a new understanding of the concepts of sporting inclusion and sporting exclusion, drawing upon their impact in competitive sport.
3. 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.
4. 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 that is carried out at an amateur, semi professional or professional level. This thesis recognises and appreciates that sport is conducted for recreational purposes also, thus giving different meaning to the concepts of inclusion and exclusion. The literature has produced extensive coverage of 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; Maxwell, 2008; Elling, De Knop and Knoppers, 2003; Coalter, 2007). However, the purpose of this research 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.

Research Questions

This thesis is being driven by the following research questions;

1. How can inclusion and exclusion be understood as general concepts and phenomena?
2. How may this differ from understanding sport specific inclusion and exclusion?
3. How is inclusion and exclusion regulated in sport and by the law?
4. What are the current practices of inclusion and exclusion and to what extent is the sport

approach compatible with the legal framework?

5. What conclusions can be drawn from the way that cases concerning inclusion and exclusion are approached by sport and the law?
6. What recommendations may be made for future action at sport and legal levels in light of the need to adopt an inclusive agenda in sport whilst affording due scope for legitimate forms of exclusion?

These questions will be examined both in general terms and in more detail, across the areas of sex, gender, disability and race. It is accepted that inclusion and exclusion can take place on the basis of a number of other human differences. For instance Article 2 of the Universal Declaration of Human Rights 1950 (UDHR) broadly states that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” A slightly different approach is taken by the UK Equality Act 2010 (EA) which protects age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation (s.4). The four categories were chosen here because they broadly capture the essence of human differences as will be explored in Chapter 2 and concern specific inherent human characteristics which are the focus of this study. In addition, they represent key dimensions of the inclusion/exclusion debate in sport because they raise important issues about performance enhancement, the integrity of sport, matching ability, safety and the sporting culture. Some high profile cases which will be explored in this work 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.

In selecting these categories, it is consequential that other differences have been omitted. For instance, nationality discrimination in sport is extensively covered in the literature and represents an important form of inclusion and exclusion in sport. Particularly at an EU level this category is instructive and helpful in exploring key sport regulation issues such as the specificity of sport and the sporting exception (Parrish and Miettinen, 2008). The EU commitment to prohibiting nationality discrimination is reflected by their comprehensive audit of the rules of 26 Olympic individual sports. The study examined restrictions to the access of non-nationals to individual sporting competitions in the EU Member States (European Commission, 2010). Given the primacy of nationality discrimination in the literature and particularly in the European sports

policy and law, it is successfully being dealt with and addressed. Furthermore, this thesis is concerned with personal inherent characteristics where as it could be argued that nationality can change since athletes are increasingly making deliberate choices to move and compete for another country (Beloff, 2011 p. 27). Four categories were chosen which could offer more scope for originality.

Methodology

In order to satisfy the objectives outlined, this research exclusively employs a literature based doctrinal approach. Law is studied here as a normative system where the “empirical data” originates from legal texts and court decisions. This method is considered to be “hermeneutic” since the main research objects are texts and documents which are then interpreted (Van Hoecke, 2011 p. 4). Specifically, this thesis conducts what can be classified as socio-legal research or law and society research (Halliday and Schmidt, 2009). A study of this kind of 4 areas of discrimination in sport is innovative and thus provides ample scope for originality without resorting to a programme of empirical work. Equally, however, it is true that a programme of empirical work could usefully be developed in future to build on the framework of thought provided here.

Research Objects

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; 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 study positions itself partly within the law and regulation literature, key research objects include primary and secondary legislation and case law. The key legal jurisdictions include the UK, EU, USA, Australia and Canada. These were chosen because this is primarily where the visible cases of inclusion and exclusion tend to be appearing and where they have been considerably addressed as socio-political issues. These parts of the world also have well developed cultures around rule creation and rule enforcement. In the London 2012 Olympic Games opening ceremony, IOC president Jacques Rogge described

the UK as “the birthplace of modern sport. It was here that the concepts of sportsmanship and fair play were first codified into clear rules and regulations.” 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 which impact upon inclusion and exclusion will also be explored. These include rules laid down by the IOC, the IAAF and FIFA.

In addition, one of the strengths of this research is its multi-disciplinary approach, drawing upon a range of other fields that extend beyond the confines of law and regulation;

- Philosophy- this thesis prompts the philosophical consideration of the nature and role of law and the philosophical analysis and application of a range of concepts such as equality and inclusion on the one side, and exclusion on the other.
- Psychology- evolutionary and humanistic psychology are drawn upon to better understand the purpose and behaviour of human beings and to provide context to differences between us such as sex, gender, disability and race. The analysis of inclusion and exclusion also draws upon social psychology.
- Science (especially medicine) - modern sporting performance is integrally tied to scientific, technological and medical knowledge and progress. Sport science studies are referred to within the discussion of performance advantages, safety and injury. Medical literature and studies concerning hormones, genetics, drugs and doping are utilised in tandem. What is regarded as scientific fact is also evaluated to determine the impact that science has on the balance between inclusion and exclusion in sport, and its regulatory process. In addition, this thesis is essentially about the impact of our physical and non physical differences on our interaction with the world. In order to better understand our differences in appearance and behaviour, it is necessary to consult evolutionary theories such as those by Charles Darwin and Herbert Spencer.
- Sociology- social sciences either complement or conflict with scientific understandings of the world in which we live. Drawing upon both disciplines provides a richer context for this topic. For instance, Pierre Bourdieu’s theory of the Doxa is further developed here and

applied to sport to identify a realm where practices and policies are taken for granted even though they may be arbitrary.

- Sports studies- this thesis draws heavily upon historical literature and sociological discussions of sport in order to locate the position of sport within society.

Interpretation and Argument

Materials from these disciplines will be used to interpret and critically examine the sport and legal regimes. Legal interpretation is a common method used by judges to understand legislative provisions such as statute or legal rules derived from the common law. The courts attribute a legal meaning to the words of legislation, as opposed to grammatical meaning. This means that “the context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning” (*Taylor v Moorabbin Saints Football League & Football Victoria [2004] VCAT 158* Para. 23).

A number of traditional technical rules have been introduced by the courts to ascertain the meaning of the words used in statutes and to give effect to the intention of Parliament (Manchester and Salter, 2011 p. 42). The court may give words their literal meaning unless this conflicts with the intention of Parliament (the literal rule and golden rule). Another approach is to ascertain the underlying purpose of the legislation in order to determine the intention behind the words (the mischief rule and purposive approach). Sport and legal provisions will be critically examined in these ways to identify the correct interpretation of rules and statute by the sports bodies and courts. For instance, the existence of sport exemption clauses in equality legislation, which seeks to limit the participation of females in certain circumstances, has been at the centre of a number of cases in this field. Whereas sports bodies have relied on these provisions exclude females, the courts have been responsible for interpreting their meaning in line with the intention of Parliament.

The interpretation of English legislation is influenced by the UK responsibility to ensure compliance and compatibility with EU legislation and rights under the European Convention of Human Rights 1950 (ECHR). The courts may depart from the traditional approach and display a willingness to narrow the scope of provisions in order to ensure compliance (Manchester and Salter 2011, p. 53). In addition, the Human Rights Act 1998 (HRA) places an “interpretative

obligation” upon the courts under s. 3(1) HRA, which requires them to “read and given effect to” legislation in a way that is compatible with rights under the ECHR “in so far as it is possible to do so.” 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 which are considered necessary for the greater good of sport. This research will also explore the extent to which sport should comply with the legal framework.

During the interpretation process, the courts will use aids to support the application of the technical rules. The aids include references to internal material, such as the other provisions of the statute in question, and external material which may include explanatory notes, comparison to other statutes, common law, parliamentary publications and international instruments. Policy considerations also influence the interpretation of legal rules, such as wider social conditions. This research will adopt a similar position and draw upon a range of extrinsic material to interpret sport and legal rules. The wide collection of disciplines identified above will be consulted to understand the rules and to critically examine them. For instance, sports bodies have created a network of rules to regulate unfair advantage in sport. It is necessary to explore the scientific and medical reasoning behind the classification of an advantage in sport in order to determine the validity of the rules and their consistency with the current state of knowledge. It is also anticipated that this approach will promote truth in some of these areas (McFee, 2011).

Having interpreted the research objects and formed the legal questions, legal inquiries can be addressed from a broader perspective on the basis of accepted views in the field (Van Hoecke, 2011 p. 4). Complementing this process is the “argumentative discipline” of legal doctrine. Interpretation and argument form the main research activity because this study seeks to encourage good governance through the identification of a better sport and legal balance between inclusion and exclusion in sport. This is consistent with the description of legal doctrine as a “normative discipline” in which researchers essentially search for “better law” (Van Hoecke 2011, p.10). This thesis will draw upon the human rights principles of the “margin of appreciation” and the “proportionality principle” to explore how rights can be balanced fairly in a sporting context (Fenwick, 2007; Harris *et al*, 2009).

Research design

The literature will be vigorously analysed and interpreted in a structured and thematic manner that is complementary to the research design. The research design falls into three main parts and is presented sequentially;

1. Part One is introductory and explores the significance of the key concepts of inclusion and exclusion, sex, gender, disability and race. It provides this thesis with a sociological context for the sporting and legal issues that 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 thesis will evaluate the impact of our differences upon our interaction with the world. Differences between us determine how we are treated and how we treat others. 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 One 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 on the basis of sex, gender, disability and race. Part One presents the measures that are currently available to deal with sport specific inclusion and exclusion, drawing upon policy measures, law measures and also sport regulation measures. These can be referred to as the toolkit for managing the balance. In doing so, Part One essentially highlights the problems and gaps in this framework.

2. Part Two then goes on to identify the application of this toolkit to inclusion and exclusion through an evaluation of previous and current legal and non legal case studies of inclusion and exclusion in the areas of sex, gender, disability and race. The cases will be critically examined against social science, physical science, sport science, medicine and evolutionary psychology theories. The compatibility of the sport approach with domestic, regional/transnational and international/global legal mechanisms will be critiqued, drawing upon primary and secondary sources of law (Watt and Johns, 2009). As discussed below, there are a limited number of visible cases in this field and the chosen cases are virtually exhaustive. US case law is extensive because of key legislation such as Title IX of the Education Amendments Act 1972 and the Americans with Disabilities Act 1990.

Consequently US cases were selected where there appear to be important principles arising from the case that explore or contribute towards discussion of the balance between inclusion and exclusion.

The cases will be synthesised summarising the key issues of the case, the sport and legal approach to the issue and the broader socio-cultural trends that have surfaced. The cases studies are compared and contrasted to identify areas of good practice as well as deficiencies in the sport and legal regulatory approaches.

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

The final chapters will fill a gap in the literature by formulating regulatory recommendations for striking the balance between inclusion and exclusion in sport, in order to achieve a level of participatory parity between athletes. A multi-level template for reformative action will be proposed for sports bodies to engage in and adapt within their sports in order to maintain a level of integrity. Underpinning this will be recommendations for effectively regulating the balance through the existing spheres of law and regulation.

Significance of Research

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 (Hills, 2002; Social Exclusion Unit, 1998, 2001; Brackenridge, Howe and Jordan, 2000; Collins, 2004a; Commings, 1993; Snape, Thwaites and Ferguson, 2003). Within this literature there are attempts to apply the resultant conceptual framework of social inclusion and social exclusion to the recreational sporting context. However, whilst doing so is undoubtedly useful, it only presents a partial picture that does not necessarily account for the specificity of sport and the valuable role that certain forms of exclusion in sport can have in defining its essence. This investigation will help to remedy this limitation by offering conceptual thinking around sport specific inclusion and exclusion.

This thesis will also remedy another weakness in the literature. There is a significant body of work concerned with specific forms of discrimination in sport in relation to sex (Patel and Boyes, 2005; 2006; Patel, 2007; 2010a; 2010b; 2010c; Pannick, 1983; Brink, Loenen and Tigchelaar, 2010; Carmichael-Aitchison, 2007; Carr, 2009; Deaner, 2006; Gavora, 2002; Kane 1995; Theberge, 1998; Burke, 2004), gender (Patel, 2006; 2008b; 2009a; Greenberg, 1999, 2000; Larson, 2011; Menon, 2011; Ritchie, Reynard and Lewis, 2008; Cavanagh and Sykes, 2006; Gooren, 2008; Pilgrim, Martin and Binder, 2003; Shy, 2007), disability (Patel, 2009b; De Jong, Vanreusel and Van Driel, 2010; Depauw and Gavron, 2005; Francis, 2005; Roy, 2007; Stone, 2005; Thomas and Smith, 2009; Van Hilvoorde and Landeweerd, 2008, 2010; Weston, 2005; Wild, 2009) and race (Patel, 2008a; Hoberman, 1997; Holland, 1995; Hylton, 2010; Jarvie, 1991; King, 2004; Lewis, 1971; Lusted, 2009; Ismond, 2003; Long, Carrington and Spracklen, 1997; McGuire and Collins, 1998; Burdsey, 2007, 2010; St. Louis, 2004). However, little specifically compares these areas (Scheik and Lawson, 2011), let alone expands into a broader consideration of inclusion and exclusion in competitive sport (Patel, 2009b; Elling and Knoppers, 2005).

This investigation not only explores sex, gender, disability and race in one place but captures links between them, to develop an overall understanding of issues concerning the balance between inclusion and exclusion in sport. That understanding is made more holistic by the fact that it eschews the tendency to take a specific disciplinary approach, in favour of one that interweaves all the key 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.

This thesis will act as a practical tool for sports governing bodies and decision makers. It will provide these parties with a reference for consistently ensuring that their rules and actions pursue legitimate sporting aims and objectives that are focused on matching ability, preserving competition and ensuring safety. In addition, that these are compatible with legal provisions which protect fundamental freedoms. The recommendations in this study will offer sports bodies with a framework for effectively balancing inclusion and exclusion in competitive sport *across* the areas of sex, gender, disability and race. This thesis will offer recommendations for the most appropriate method of regulation within sport and/or law in this area. The recommendations contribute towards existing sport, law and regulation literature by offering potential systems for regulating sport specific inclusion and exclusion. The application of this body of literature to inclusion and exclusion is not yet well developed.

This research will raise general awareness of the underlying issues and themes that appear to be restricting individuals from participating in sport. It is important to break down unnecessary barriers that 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.

Limitations

Although the suitability of the legal doctrine approach to this research has been reinforced above, the legal doctrine method does have its limitations, particularly in the age of empirical research where action research is considered more beneficial than conceptual approaches that are exploratory in nature (Halliday and Schmidt, 2009; Van Hoecke, 2011). In light of this, an investigation into the balance between inclusion and exclusion in competitive sport would benefit from primary data collection in the future. Having drawn out the key themes from current sport and legal approaches to inclusion and exclusion, qualitative methods such as semi-structured interviews could be formulated to question key minority athletes, sports governing bodies and/or law makers about the themes. In addition, the practical and regulatory recommendations proposed in this research could be tested by recruiting sports to adopt the proposals and monitor their effect and impact upon the governance of inclusion and exclusion in their sport. This

investigation provides a solid conceptual basis upon which empirical research can be carried out and developed.

This research draws upon a range of international, regional and domestic legal and non-legal cases in the areas of sex, gender, disability and particularly race. Another limitation to this study is that some of the relevant cases are unreported and some, though reported have been afforded limited attention. One possible partial explanation for this is the often unconscious practice of inclusion and exclusion in sport. Sport as a private sphere may also provide a reason for the lack of public coverage on some cases. In order to overcome this shortfall, the research process has involved a meticulous global search of legal and non legal databases, websites and newspapers.

The cross analysis of cases is limited to the four chosen categories of sex, gender, disability and race. The aim has not been to provide a comprehensive account of all human differences, but rather to explore a number of key ones deeply, both as an end in its own right and with a view to providing to a sufficient platform to understand the inclusion/exclusion debate.

In addition, it is necessary for experts in the field to interrogate data related to the experiences and reflections of minority groups. It is therefore proposed that more exposure and attention should be given to the shared lived experiences of minority athletes (Sangree, 2000, p. 385; Patel, 2008a; 2010a).

Ethical Considerations

In accordance with the Nottingham Trent University, College of Business, Law and Social Sciences Ethics Guidelines, this doctorate does not require the approval of a research ethics committee because it does not involve the collection, storage or processing of primary, unpublished data from, or relating to, living human beings, people who have recently died, animals, the affairs of governments, public services, voluntary sector organisations or businesses. Instead, this research is purely desk based, that is, using published material such as legal cases. Sections one and two of the College ethical approval application form has been completed and signed to confirm this.

PART I: KEY CONCEPTS

Chapter 1: Inclusion and Exclusion

This chapter introduces the key concepts of inclusion and exclusion from a broad sociological perspective. Before we focus on the competitive sport field, it is important to develop an understanding of the purpose and value of inclusion and exclusion in society generally, and in our everyday lives. Upon this, recommendations can be made for the construction of a synthesised way of viewing these concepts in line with the aims of this thesis.

Since the heart of this thesis is concerned with managing physical and non physical human differences, this chapter broadly explores these differences and engages in a sociological discussion of how these influence the processes of inclusion and exclusion. The social elements of these concepts will be used to inform discussion in the forthcoming chapters.

Inclusion and Exclusion in Human Behaviour

At a human, basic level, we seek attachment and individual recognition through the formation of relationships and networks with other people or groups. Belonging to, and being with other people is essentially a “fundamental human need” (Abrams, Marques and Hogg, 2004 p.27). This proposal is reinforced by the work of Maslow (1943) who theorises that humans have an entelechy or drive toward self-actualisation that entails progression through the satisfaction of a hierarchy of needs. He posits that once the psychological and safety needs of an “organism” have been gratified, the person will gravitate toward the fulfilment of belonging and love needs. For instance, the person will “hunger for affectionate relations with people in general, namely, for a place in his group, and he will strive with great intensity to achieve this goal” (p. 381).

This is supportive of evolutionary literature that considers humans to be “an intensely group-living species” (Buss, 1995 p. 22). The groups that we seek to join can either be the dominant social, economical or political group of a particular area, social circles within a community or group, or specific activities such as sport. The nature of the behaviour and activities that take place within those groups largely influences and impacts upon the level of inclusion (Abrams, Marques and Hogg, 2004 p. 162).

There are a number of interconnected reasons why we may seek bonds and attempt to obtain membership and access to groups through collaboration. The central aim is to reap desired benefits, such as protection. Membership to groups can provide protection from perceived external dangers, as well as from our own internal fears and insecurities. Another benefit is the feeling of recognition and acceptance of our differences. Throughout history, many individuals within diverse groups including “indigenous people, national minorities, ethno-cultural nations, old and new immigrants, feminists, gay men and lesbians” have sought acceptance and “public affirmation of their differences” (Parekh, 2006 p. 1). In particular, minority groups located within the western countries attempt to achieve “accommodation of their cultural differences” (Kymlicka, 1995, p. 3). We will explore these differences in detail shortly.

Human survival is considerably dependent upon our ability to collaborate with others around us. There are truly no activities that can be described as individual and co-operation is almost a necessity. For example, it is suggested that “small, co-operative groups have been the primary survival strategy characteristics of the human species” (Brewer and Caporael, 1990 p. 240).

However, it is argued that actions such as co-operation, mutualism, altruism and self sacrifice are overlooked within the evolutionary process, by competitive traits (Buss and Kendrick *in* Gilbert, Fiske and Lindzey, 1998 p. 984). Within group living exists an “intensification of competition, risks of communicable diseases, and aggression from other group members” (Buss, 1995 p. 22). Another way of measuring inclusion is by exploring and assessing the value of exclusion instead (Hague, Thomas and Williams *in* Brackenridge, Howe and Jordan, 2000 p. 19). To exclude or to be excluded is a natural part of existence that is not exclusive to human beings. For example, ecologists have shown that exclusionary practices are common within or amongst species as a means of competing for survival and existence. When two or more species live in the same areas with the same ecological requirements, they struggle to co-exist and tend to compete for a common resource. This is referred to as “Inter-specific Competition” or “Gausse Law” of competitive exclusion (Smith and Smith, 2008 p. 261). Of more significance is the competitive exclusion of individuals of the same species, known as “Intra-specific Competition” (Shanahan, 2004 p. 23). In ecology, intra-specific competition is expressed through social behaviour whereby many species, including human beings, live by some kind of social organisation that involves “aggressiveness, intolerance, and the dominance of one individual over another” (Smith and

Smith, 2008 p. 232). This creates a social hierarchy and could also provoke conflict within a species.

Charles Darwin's theory of natural selection refers to the "preservation of favourable variations and the rejection of injurious variations" (Darwin, 2008 p. 63). Darwin advocates that those individuals who were best adapted to their particular environmental conditions would have a better chance of surviving and thriving. This theory has been used as a mechanism for evolution and alludes to the well known phrase, "survival of the fittest" whereby the fittest will survive and the weakest will not, or the fittest will be able to breed first and appear higher on the breeding hierarchy. It is fair to assume that many organisms have evolved to ensure that they can survive, with traits such as "food preferences, eye blink reflexes, shivering mechanisms, and prepared fears of snakes, spiders, heights, darkness, and strangers" (Buss and Kendrick, 1998 p. 984).

It is worth clarifying the phrase "survival of the fittest" since it has powerful meaning in a social and sporting context. The ideology of a struggle for existence was introduced by early writings of T.R. Malthus in 1859 (See Claeys, 2000). The formal term was first coined by Herbert Spencer, a philosopher and founder of sociology (Spencer, 1868). He used this term to explore how intra-specific struggle has resulted in progress. In 1866 Darwin used the term as a synonym for "natural selection" and a metaphor for the natural world, which appeared in the 1869 edition of his famous works *On the Origin of the Species* (Darwin, 2008). Spencer, Darwin and A.R Wallace (co-discoverer of natural selection) added that this struggle improved species as well as generating new ones. Striving for improvement and competing for survival is significant to this discussion since it essentially underpins the essence of sport as we will see. The theory of natural selection assists in the understanding of our human differences and behaviours. This will become critical to the analysis of inclusion and exclusion in sport.

In addition to giving meaning to the natural world, the term has also been applied to human beings and human society, often being used to describe and promote sporting activity. For instance Darwin redefined "fitness" as "intelligence" and accepted the application of natural selection to humanity by others (Claeys, 2000 p. 240). Spencer used the term to explain social and political processes, arguing that a process of natural selection was evident in society also (Heywood, 2003 p. 54). This is referred to today as "Social Darwinism". To be fit for purpose is to be self actualised in Maslow's words (1943). It could be suggested that the Darwin perspective

focuses on self interest over and above the human traits of co-operation, collaboration and love (Midgley, 2002 p. 7).

It follows that certain individuals or groups are likely to be, and have been excluded or become extinct due to their lack of ability to survive in a social sense. It could be argued that the “human landscape [is] a landscape of exclusion,” (Sibley, 1995 p.x) for it seems that “there is a natural or socialised tendency for us to categorise objects into “good” or “bad” as a basic condition for survival” (Kitchen, 1998 p. 344). Exclusionary practices usually involve the isolation of an individual or group from a larger entity, whether in size, power or influence. The common theme throughout most references to exclusion is that it represents a barrier to inclusion because of a perceived judgement made about individual, socio-cultural or socio-economic differences (Hayes and Slater *in* Snape, Thwaites and Ferguson, 2003 p. 74; Long and Welch *in* Snape, Thwaites and Ferguson, 2003 p. 56). This can result in the exclusion of individuals from the desired benefits found within society, social groups, personal relationships, leisure and for our purposes, sport.

Throughout aspects of our lives we tend to experience inclusion and exclusion in one sense or another. Whether in a playground at school, in the work place during employment or when we encounter personal and emotional ties with others, we can be included or excluded. In each of these areas, we also exercise the inclusion or exclusion of others. The key players within this “process” are therefore those who include/exclude and those who are being included/excluded (Hague, Thomas and Williams *in* Brackenridge, Howe and Jordan, 2000 p. 24).

Overall, it would be fair to say that inclusion and exclusion are both part of our natural instincts but are exercised in different ways and at different levels. The survival of the fittest phrase may have distorted our view of the world when struggle for existence can also be described as mutual dependence (Darwin, 2008; Midgley, 2002 p. 7). Inclusion is concerned with membership into a group or community in order to seek acceptance of differences whereas exclusion is based upon a judgement made about a person or group’s differences that is used to separate them and treat them in a different way. Human differences therefore play an important role in the processes of inclusion and exclusion.

Human Differences

There are a range of human differences between people and it would be misleading to suggest that all of them can be explored here. Instead, there are three predominant overarching categories of differences that tend to be consistent in the literature explored in this area. Differences can be understood as “individual” based upon physical and non physical appearance, ability and character, “socio-cultural” based upon geographical and historical background, and religious beliefs, values and customs and/or “socio-economic” based upon status, wealth and class. Traditionally, formal and informal groups and communities have formed according to these differences or commonalities.

Individual Differences

Individual differences tend to drive our categorisation in society such as colour of hair (Maslow, 1943 p. 390). Throughout this thesis references will be made to key individual differences based upon sex, gender, disability and race. These will be defined in Chapter 3. These appear to be common markers for our personal or group identity and can encompass physical or non physical attributes. It is suggested that our identity has two dimensions; ontological, which refers to who are, and epistemological, which refers to who we think we are (Parekh *in* Anwar, Roach and Sondhi, 2000 p. 197). We are defined by our attributes and qualities that are “the products of countless influences” (p. 197). A benefit to inclusion or membership into a group or community is that we are able to make sense of our own existence (Parekh, 2006 p. 142). Membership to groups provides a sense of fulfilment for an individual and can contribute towards defining ones personal identity (Rheker, 2000 p. 51). Personal identity and status can be viewed in two ways. Firstly, it can be an inherent, inward strength of a character that is shaped and formed by the individual themselves. Secondly, inclusion into a group can promote the internal character of an individual by providing us with a range of resources, perspectives and identities that allow us to expand and develop as a person. Personal identity is, to some extent, shaped and moulded by the way in which others assess and evaluate our identity (Spaemann, 2006 p. 35).

If we are included into a group or community, this can lead to the validation of a human being as a “person” both internally and externally. Spaemaan (2006 p. 2) explores the status of an individual as a person and argues that this personal status is dependent upon a “communicative

event.” In other words, a person is not regarded as a person if they are debarred access to social recognition and interaction. It is here where we see inclusion operating and on a personal and social level collectively. Personal status increases when one is accepted into a larger group, club or society. That is not to say that inclusion will always assist in the development of the inward self and the inherent personal identity as it may be viewed. This can be achieved without the interaction of others and through the development of individual confidence. However, within Maslow’s hierarchy of needs, esteem is ranked fourth and involves not only independence and freedom but also reputation, prestige, recognition, attention, importance or appreciation by others. A lack of these can lead to a feeling of inferiority (Maslow, 1943 p. 382).

Personal identity provides people with a “moral anchor, a sense of direction and a body of ideals and values” (May, Modood and Squires, 2004 p. 207). The anchor enables individuals to identify with a familiar space and contributes towards their sense of belonging. Inclusion can also establish a rooted “sense of belonging” rather than just a perfunctory one. Inclusion promotes a sense of collaboration, working together to achieve something and positively operating as one unit. When inclusion is achieved it can be a powerful tool for the promotion of self identity and cohesion amongst groups and communities. The unconscious nature of this “sense” is highlighted by May, Modood and Squires (2004 p. 216) who claim that belonging to something only becomes prominent when ones “safe and stable connection to the collectivity, the homeland, the state, becomes threatened”. Whilst this refers to a national state of belonging on a political level, it does imply that the sense of belonging is more apparent when identity is threatened in some way. This threat may present itself in the form of exclusion.

When we are excluded, this can lead to vulnerability and isolation, aggression, pro-social behaviour, self defeating behaviour, moods and emotions (Abrams, Marques and Hogg, 2004 p. 48). The practice of exclusion can lead to a sense of empowerment and authority over others. This empowerment may be false depending on the nature of the exclusion being exercised. For instance, bullying of any kind creates a sense of false power and dominance over another.

Exclusion on the basis of individual differences is evidenced by the civil rights era in the USA where individuals of black origin were treated as inferior to white people. Skin colour was used to restrict individuals in all aspects of their lives, such as the right to vote, and resulted in the segregation of black and white people on buses in schools and in most other public places

including sporting activity. This exclusion from society was premised upon individual characteristics of a race, with the majority creating a misguided stereotypical belief system that black individuals were somehow less significant. Adolf Hitler's Nazi regime in Germany, the Apartheid era in South Africa and the slavery of Indians during the British rule also illustrate such large scale individual exclusion founded upon "geographical, religious or ethnic differences-where the humanity or rights of entire sections of the global community are diminished or ignored" (Abrams, Marques and Hogg, 2004 p.17).

There is a clear human obsession with the creation of divisions between differences as a means of managing inclusion and exclusion. Barriers can form a necessary part of one's life. In fact, they are needed as a "point of reference with which to define ourselves and decide what differences to cultivate and why" (Parekh, 2006 p.150). Essentially, barriers, whether physical or perceptual, visible or hidden, exist to divide spaces between people and impose control or authority on upon a particular area. Within society, there may exist structural barriers which affect specific characteristics such as proximity, resources, life stage and responsibilities. Perceptual barriers encompass social attitudes and behaviours that have developed over a period of time (Hayes and Slater in Snape, Thwaites and Ferguson, 2003 p. 75).

For instance, perceptions of disability are thought to be "rooted in specific socio-spatial and temporal structures" (Kitchen, 1998 p. 352). Disabled individuals may be excluded at times because they remind "normal" people of their vulnerability and because those who are perceived to be "normal" have not given them visibility in the social spatial and temporal structures of society (Abrams, Marques and Hogg, 2004 p.68).

Barriers also influence the development of one's self identity, not only through the boundaries that it can set, but through the experience of being restricted. Exclusion, whilst not always a positive experience, can also assist in the development of an individual's character by forcing them to be autonomous and upon reflection, can draw constructive lessons from that experience, which results in the development of personal identity and strength of character. Without negative encounters of rejection from which to overcome, it could be implied that individuals may develop sheltered lives. Exclusionary barriers can encourage individuals to accept their own differences without the need to be accepted by others. This can be more powerful in some circumstances.

Socio-Cultural Differences

Closely linked to individual differences is the impact of culture upon the processes of inclusion and exclusion. It is suggested that whilst “every society must cater for individuals needs...culture also determines how individuals expressed their needs” (Loy and Booth *in* Coakley and Dunning, 2000 p. 9). Cultural values are therefore functional responses to the needs of an individual. Within the process of inclusion, culture plays an integral role in the formation of identity. Culture is a concept that underpins much of the discussion in this thesis as a result of its power, force and influence over human activity and human differences. There is no activity that is without cultural influence and the processes of inclusion and exclusion is no exception. Culture can be described as a “historically created system of meaning and significance ...of which a group of human beings understand, regulate and structure their individual and collective lives” (Parekh 2006 p.143).

Given the human nature to survive, the core values of a culture have educated individuals how best to survive (Trompenaars and Hampden-Turner, 1998). It is articulated that “like water being the context in which a fish swims, culture is our context. Like water too, culture is not just ‘out there’ as context, milieu, and ecological niche. It is literally also in our biology” (Ellison and Goodman, 2006 p. 226).

Culture influences and impacts upon the way in which a society is governed and regulated as well as the values that it carries. It is suggested that culture can transform the natural environment, and the environment is heavily influenced by society and culture (Creswell, 2006 p. 17). Indeed, culture has a system of regulation within in it because it can open up and also close options for that cultural community. In other words it can create “the conditions of choice but also demands conformity” (Parekh, 2006 p. 156).

Inclusion and culture share a reciprocal influential relationship. Inclusion can lead to a collaborative culture, a co-operative culture and a diverse cultural population. Within most settings there exists a more dominant culture that individuals tend to live within. The dominant culture of a particular social setting can either support and develop personal identity, or seek to control us, particularly for minority individuals and groups. Human reaction to culture is to either conform to it in order to achieve inclusion, or challenge it and live outside of the normal societal trends. Fashion trends and popular culture illustrates the ways in which individuals may wish to

conform, or rebel against the norm and engage in self expression. An inclusive “kaleidoscope of culture” is one that embraces that expression and enables variations to co-exist naturally (Per Waldron, J in Kymlicka, 1995).

On the other hand there may be barriers between different cultures which can lead to culture clashes. Space is used in society to express authority and division. Where barriers have created groups that are strong and well established, they are more difficult to access by those who do not usually conform to that space. Space becomes more rigid and structured, allowing for less movement and autonomy. Conversely, barriers that are more open and inviting are free and loose, without any restraint and easily accessible, to a wider range of individuals (Sibley, 1995 p. 80). Where there may have been barriers in place between different cultures, inclusion can break these down and expand this kaleidoscope.

Goffman (1961 p. 15) speaks of “total institutions” which are social establishments whether physical or spatial, that are restricted from the outside social intercourse through “locked doors, high walls, barbed wire, cliffs, water, forests or moors.” He identifies these as being prisons, asylums, mental institutions, religious places. Buildings, open spaces, roads and walkways are all “cultural signifiers” that inform us whether we fit in (Kitchen, 1998 p. 349). Cultural norms force us to “know our place” and know when we are out of place.

Consider the historical treatment of new age travellers in England. Despite their “eclectic” way of life, travelling from one dwelling to another, their integration within society has been subject to difficulty. New age travellers challenge what is known as the “Englishness” of the landscape as well as living. This culture clash has led to a number legal disputes concerning land. It also resulted in the enactment of legislation that governs the movement of those with moveable dwellings. This is a good example of space being controlled, not only by the law, but by socio-cultural perceptions of how “space” in both the physical and metaphorical sense, ought to be used. The consequence of this obsession with division is often the social exclusion of individuals from society.

Socio-Economic Differences

Social inclusion and social exclusion are common political terms in the literature that are used to understand the relationship between people and the political, economical, legal and cultural functions of the state. Socio-economic differences are not central to this thesis. Nevertheless it is important to appreciate these terms since they feed into our broader knowledge of inclusion and exclusion. Social inclusion moves away from the inner self and is concerned with possessing the key to the political, economical and legal benefits as a citizen of a particular society, in other words, their civil rights (McArdle and Giulianotti, 2006 p.2). The feeling of belonging still exists but the focus is on the tangible benefits for an individual to survive and live under the same freedoms and restrictions as any other. Social inclusion is defined as “extending civil rights and responsibilities to all members of society, by developing a framework of citizenship” (Rojek, 2005 p.52; Coalter, 2007 p. 8). Citizenship is achieved through “meaningful participation (rights and duties) with national political space, especially the enjoyment of civil and political rights (freedom), the opportunity to participate in an open political process that is framed by constitutional document (rule of law), subsidised opportunities for education and health, the assured protection of private property and national and transnational entrepreneurial rights (trade and investment), and some measure of support in circumstances of material need” (Falk, 2009 p. 18-19).

Social inclusion is also focused on ensuring that individuals within a society, share equality of opportunity. Identities are valued and recognised if they meet a society’s particular criteria of success. This criterion includes the assessment of economic and political worth for the benefit of the wider community.

Conversely, social exclusion has been coined as a political expression of the divisions and disparities within society as a whole. Generally, the concept of exclusion is often problematic and contested within literature (Hills, 2002 p.1). However, it is suggested that it is an idea which poses the right kind of questions from a policy perspective (Donnison, 1998 p. 5). Where individuals are contributing to society and seeking social inclusion, they are doing so for some kind of recognition. This recognition may be accessing the key to the benefits of living in a particular society. If society is not rewarding individuals for their contributions then this lack of recognition can have the effect of “imprison[ing] people into a reduced mode of being and gives rise to deep unhappiness and a sense of powerlessness” (May, Modood and Squires, 2004 p. 203).

Originating from France to describe “les exclus” who were deprived of social protection (Hills, 2002 p. 2), social exclusion describes the separation of the individual, from the “political, economic and frequently socio-cultural processes of society” (Long and Welch in Snape, Thwaites and Ferguson, 2003 p. 57). This definition is consistent with other sources such as Rojek (2005 p. 199) who defines exclusion as the “systematic isolation of individuals from access to the material and cultural benefits produced by society.” The material benefits would concern the political and economic aspects of society whereas cultural benefits refer to socio-cultural integration. Similarly, Commins (1993) perceives social exclusion to be a process that results in a restriction of access to one or more of four basic social systems. These are;

1. The democratic and legal system, which promotes civic integration
2. The labour market, which promotes economic integration
3. The welfare system, which promotes social integration
4. The family and community system, which promotes interpersonal integration, and includes sport, arts and culture.

Hague, Thomas and Williams (*in* Brackenridge, Howe and Jordan, 2000 p. 22) identify a number of different non exhaustive “processes” of exclusion. These include legal, accessibility, financial, technological, identity and cultural exclusion. Certain groups of people are found to be excluded within all of these processes in order to justify social, political and economic systems or barriers already in place in a society or culture.

The commonalities across these definitions is that an individual’s exclusion may be a consequence of political and economic progress in society, a consequence of socio-cultural divisions within society, or a consequence of an individual’s behaviour and actions that deliberately go against integration into the systems above. Social exclusion is not necessarily always negative if an individual chooses not to “participate in key activities of the society in which he or she lives” (Hills, 2002 p. 30; Long and Welch in Snape, Thwaites and Ferguson, 2003 p. 57). This implies that the nature and extent of exclusion and separation, varies according to who is being excluded, what they are being excluded from and why they may be excluded.

For instance, those who do not live by the laws of any given land are separated from the rest of society. Those who commit offences have usually done so voluntarily and therefore lose many

political benefits when they are punished. There is continual debate surrounding the prisoner's right to vote in the UK. Social exclusion can therefore concern the confinement of individuals or groups in an attempt to uphold broader governmental policies and practices (Hylton & Bramham, 2008).

It is evident that the economic status of an individual will significantly effect their position within society. Social exclusion is a product of economic divisions which arguably form a necessary and inherent part of unequal capitalism. Poverty is in fact considered to be at the centre of social exclusion (Collins, 2004a, p. 727). Those with less disposable income are unable to engage with society as easily as richer individuals. The placement or displacement of economic groups in towns and cities leads to pocket of socially excluded communities.

Social standing and class has historically been a key determinant of whether one is permitted access to the benefits of society. Charles Dickens in his novel *Little Dorrit* highlights the realities of Victorian England where those who owed debt were imprisoned by the government and excluded from society until they re-paid their money. Class and division were used in colonial times to heighten the power and authority of the white British male and separate them from "others".

A historic example of economic exclusion is the caste system in India. Caste can be translated into the "varna" and the "jati." The varna system was occupation specific, dividing the ancient Hindu population according to their jobs, from the highest Brahmins to the lowest "untouchables". The jati system refers to the "contemporary social code" of India, of which there can be up to 3000 categories. To explain simply, the varna's are "a fluid scale over which the jati's try to align themselves" (Deshpande *in* Davis and Dolfsma, 2008 p. 171). These caste systems share an overlap with class and inevitably link with exclusion and poverty, with the lower castes often having the lower paid jobs, with less of a social standing in society. The representation and division of caste as well as colonialism in the cricket film "*Lagaan: once upon a time in India*" highlights this tension very well. Of course there exist millions of people in India who do not live by these systems and instead have their own communities. Generally speaking the boundary of society is slowly shifting, embracing more of the population, with the class divide in particular becoming more elusive as a boundary marker (Sibley, 1995 p. 69). However, instead, it is believed that class is being replaced by values and behaviours which are centred on

consumption particularly as globalisation expands (Beck, 1992). This development brings with it exclusionary practices based upon economic status.

Categorisation and Stereotypes

To include or to exclude on the basis of individual, socio-cultural and/or socio-economic differences is essentially a categorisation process. Categorisation of species and human groups has existed throughout history but has also raised serious scientific and sociological debate (Sibley, 1995 p.26). For example, reliance on such taxonomic schemes has exaggerated the difference between the “self” and “other” and encouraged divisions between people based upon their individual differences which include a person’s age, sex, social class, disability and ethnicity (Abrams, Marques and Hogg, 2004 p. 213). Excluded individuals are usually minorities who deviate from what is considered to be the norm of that society or activity.

Systems of categorisation which are based upon superficial differences to some extent reinforce stereotypical assumptions about individuals or groups. Stereotypes are essentially consequences of human attitude which are made up of an “intricate mixture of interest and fear, reverence and abhorrence, impulsion and repulsion” (Sibley 1995 p. 15). Originally stereotypes were understood as being prejudicial but are not necessarily negative and exist amongst all of us (Archer and Lloyd, 2002 p. 26). This is how we form bonds and relationships with particular people and how we make judgements about particular issues.

Stereotypes are now understood “in terms of the probability that a member of a particular group will behave in a particular way. These probabilities are useful because they simplify the complex social world we inhabit” (Archer and Lloyd, 2002 p. 26). Through “cultural practice” we are taught to “pigeon-hole” similarities rather than accept difference (Kitchen, 1998 p. 344). The process of stereotyping can involve the following stages (Nugent and King *in* Miles and Phizacklea, 1979 p. 28):

1. The identification of a category
2. The attribution of traits to the category
3. The application of traits to anyone who belongs to that category

The danger with stereotyping is that the attributions of categories can be exaggerated, misguided, and inaccurate or even false (Nugent and King *in* Miles and Phizacklea, 1979 p. 29). Stereotypes can distort our vision of the world by producing an over-simplified and unbalanced view (Midgley, 2002 p. 6). This may occur because a stereotype has evolved over a long period of time and may no longer apply in a modern setting or because it is based upon flawed non evidential reasoning that can lead to harmful stereotyping. Standards of proof become lost within the process of stereotyping and conventional wisdom can often thrive.

For instance, deviance, both physical deviances such as body features, and personal deviances such as non conformity to cultures, is a word that is associated with “abnormality” and something that is far from the average or normal (Creswell, 1996 p. 24). The “Object Relations Theory” explored by Sibley (1995 p.5) explains the “ways in which boundaries emerge, separating the good and the bad, the stereotypical representations of others which inform social practices of exclusion and inclusion but which, at the same time, define the self.” A person is considered normal when they possess the average ability relative to the expectation of their role in society- they are able to fit into the existing system of norms and values. Certain identities or projections about individuals are deemed far different than the “norm” and therefore are socially distanced. These departures from what are considered the norm or acceptable, is usually regarded as inferior and thus treated in an exclusionary way (Rheker, 2000. p.17). Stereotyping tends to “emphasize the status quo and not allow for change” (DePauw and Gavron, 2005 p. 13).

It is argued that “from an evolutionary perspective, we humans have good reason to be wary of things that seem to be ‘unnatural’” (Nature, 2008 p. 665). We are conditioned to be cautious of something if it is unknown to us because it may pose a danger or threat to us. However such a reaction is considered to be borne out of emotion rather than by reason.

Abrams, Marques and Hogg (2004 p. 68) identify how exclusion can be stigma based. This is a consensual agreement within a particular culture that certain types of people can legitimately be excluded. Members of society make attributions about the positive and negative characteristics and deservingness of members of different social groups on the basis of the current social structure with which they live by. For instance, the widely contested medical definition of disability, such as those introduced by the World Health Organisation in 1980 (Thomas and Smith, 2009 p. 9), has contributed to the stigmatization of disabled individuals, presenting them

as deviant, abnormal and hindered by impairment. Individuals such as disabled people historically, are socially excluded as a result of their personal, physical or cultural characteristics. Going back to Darwinian principles of the “survival of the fittest,” it was argued that disabled individuals threaten social progress (Barnes and Mercer, 2003 p. 31).

Another example is the stereotyping of South Asians as “backward” and “fundamentalist” with a “hyper-religious culture” that can conflict with an English society (Long, Carrington and Spracklen, 1997 p. 254). The imprecise collective treatment of South Asians has been described as “the fallacy of the single factor” and a “false universalism” that fails to recognise the existence of a heterogeneous group with varying lifestyles and cultures (Fleming, 1994).

Human attitude towards difference is also shaped by the individual’s socio-economic status and education (Nugent and King *in* Miles and Phizacklea, 1979 p. 29-30). This is illustrated by the racism row surrounding the UK Channel 4 reality show “Celebrity Big Brother” (CBB) in 2007. An Indian actress, Shilpa Shetty was the victim of insults and perceived bullying by three young British “celebrities.” One of the key debates surrounding this event was whether the treatment of the Indian actress can be categorised as “cultural ignorance” or “racism?” The incident arguably held a “mirror up” to British contemporary society, reflecting a “microcosm of what is going on in our country” (Seymour, 2007). It raised the question of whether this perceived bullying was simply a lack of educational understanding of different cultures on the part of the British celebrities. This could provide an explanation for some of the stereotypes that exist today.

Because categories and stereotypes can evolve and develop, it often becomes the case that exclusion occurs naturally, without any thought or consideration. This has been theoretically underpinned by the Pierre Bourdieu principle of the “Doxa” (Bourdieu, 1977 p. 164; Hague, Thomas and Williams *in* Brackenridge, Howe and Jordan, 2000 p. 20). Doxa, as opposed to orthodoxy refers to a societal realm that is never discussed or even contested, instead “the tradition is silent, not least about itself as a tradition” (Bourdieu, 1977 p. 167). Individuals tend to unknowingly accept and take for granted, certain customs within this realm, even if they are repressive (Bourdieu and Eagleton, 1992 p. 114). When stereotypes become so embedded, even the stereotyped begin to believe it. For instance, the institutionalisation of disabled groups has led to them often accepting the inflicted image of themselves (Thomas and Smith, 2009 p. 8).

Bourdieu (1977 p. 169) mentions how “the dominant classes have an interest in pushing back the limits of doxa and exposing arbitrariness of the taken for granted; the dominant classes have an interest in defending the integrity of doxa or...of establishing in its place the necessarily imperfect substitute, orthodoxy.” When doxa is revealed, it can cause boundaries to be re-assessed. It is advocated that Bourdieu’s theory is restrictive as it only relates to class (Creswell 1996 p. 21). However, there is potential to apply it to sport which is a realm where arbitrary treatment of minority athletes often becomes naturalised as we shall see (Bourdieu, 1977 p. 164).

In an attempt to form a framework of exclusion, Hague, Thomas and Williams (in Brackenridge, Howe and Jordan, 2000) propose that in addition to Doxa, or the “embedded exclusions” that are never consciously identified, are the “evident exclusions” which are openly recognised and debated, and the “episodic exclusions” which essentially constitute a grey area and involve short term exclusion that are produced by minor shifts. If this were simplified, it could be viewed that exclusion operates on two levels- the seen and the unseen. The latter more “opaque” (Sibley, 1995 p. X) instances of exclusion are those that form a grey area because they are more difficult to identify and overcome where they are unjust. Similar distinctions are made by Elling and Knoppers (2005 p. 258) who identify a difference between a) structural inclusion and exclusion referring to (non) participation; b) cultural or symbolic inclusion and exclusion through social (normative) images; and, c) affective inclusion and exclusion through friendship networks.

From these theories it can be drawn that there “are clear polarities of inclusion and exclusion that are either never challenged or are regularly contested” (Hague, Thomas and Williams in Brackenridge, Howe and Jordan, 2000 p.20). The seen and unseen elements of exclusion are influenced by society, for it is society that determines what these stigmas or stereotypes may be. Globally, immigration and the movement of people from one country to another, is creating multicultural and diverse communities within countries whose traditional values and beliefs are being challenged. This indicates that the issue of difference, division, inclusion and exclusion, is therefore becoming much more pronounced (Rojek, 2005 p.20).

Summary

This chapter has introduced the key concepts of inclusion and exclusion from a sociological perspective. Inclusion and exclusion appear to be natural human processes that exist as a means of managing and understanding the world in which we live and the many differences between us. Whilst sociologists disagree on whether collaboration or competition defines our purpose and behaviour, there is evidence of both attributes co-existing and operating.

From this evaluation it can be drawn that whilst there are clear overlaps between both, there does appear to be a tension between the two concepts. This is something that we experience and play out daily in our lives. Inclusion and exclusion operate individually and collectively, internally and externally, formally and informally, positively and negatively. Minority groups tend to be caught in the middle of the tensions between the two concepts.

On any level, inclusion is an important and valuable component of human existence as it confirms and often justifies the rationale for our behaviour and actions. Inclusion presents itself as a complex web of personal, cultural and collaborative relationships and influences. Inclusion is mostly presented as a liberal ideal in the literature that engages a very personal agenda and contributes toward self identity and self fulfilment. Social inclusion leads to a stronger relationship between the individual and the state.

Inclusion is constantly challenged by strong exclusionary forces which place conditions upon inclusion. Exclusion is based upon a judgement made about a person or group's differences that is used to separate them and treat them in a different way. Exclusion can lead to vulnerability, isolation, aggression, pro-social behaviour, self defeating behaviour, moods and emotions of an individual. The formal term of social exclusion refers to the exclusion of an individual from the political, economic, legal and cultural benefits of society.

Physical and non physical human differences play a pivotal role in the process of inclusion and exclusion. In an attempt to understand differences we tend to categorise and stereotype people according to their individual, socio-cultural or socio-economic traits and attributes, using scientific or conventional wisdom knowledge to underpin our reasoning. Although stereotyping is a natural and formidable process in which we understand the world, over time it can be

exaggerated, misguided or inaccurate or even false. Stereotypes become part of a Doxa and can distort our vision of the world by producing an over-simplified and unbalanced view. Inclusionary and exclusionary practices may also become imbalanced by this.

Chapter 2: Physical and Non Physical Differences in Sport

This thesis proposes that inclusion and exclusion take on quite a different meaning in competitive sport because the inclusionary and exclusionary forces explored so far, must be considered in light of the special nature of sport. The essence of sport is to directly challenge our physical and non physical differences particularly attributes connected to our sex, gender, disability and race. It seeks to separate winners and losers on the basis of these differences. In order to protect this essence, rules and regulations concerning eligibility and selection are imposed to match ability, preserve competition and ensure safety. Implicitly these rules also maintain the complex network of traditions, customs, cultures, rules, and values.

As a result of this special nature, individuals and groups are treated on the basis of their physical and non physical differences. Some athletes within the areas of sex, gender, disability and race are considered to be minorities in sport because they share the characteristics of being “numerically inferior” and in a “non dominant position” to the rest of the named population in sporting activity (Rehman, 2010 p. 434).

The political use of sport as a social vehicle is not entirely consistent with competitive sport because of its exclusive nature. Furthermore, the political agenda is aimed at overcoming socio-economic differences which are not the focus of this thesis even though it is accepted that the power and influence of money is considered to be the driver behind modern sport with those at the centre being the “biggest, wealthiest, and most visible sports programs and athletes...It is a site of domination and privilege” (Messner, 2002 p. XVIII). Instead we are focusing on individual and socio-cultural differences between humans that impact upon inclusion and exclusion in sport. This chapter will define sex, gender, disability and race and identify the minorities amongst them. It will also seek to understand why these differences exist and how the minorities within them are treated by society generally. This will enable us to form a detailed definition of sport specific inclusion and exclusion.

Sex

The term “sex” refers to the inherent biological characteristics that are determined at birth. Sex tends to be determined by a number of factors such as genetic or chromosomal sex, gonadal sex (reproductive glands), internal and external morphological sex (genitalia), hormonal sex, phenotypic sex (secondary sexual features) and sexual identity (Cooper, 2010 p. 238). Assigning an individual’s sex is an important feature of regulation and governance of populations, particularly recording procedures such as birth certificates.

An interchangeable term is “gender” which derives from the ongoing social consequences for the individual. Gender was first used by Greek Sophists in the fifth century BC to describe the threefold classification of the names as masculine, feminine and intermediate (Archer and Lloyd, 2002 p. 17). Gender has now appeared to have replaced the term sex in politically correct speech. It is suggested that this shift was developed to highlight that distinctions between men and women arise mostly from cultural rather than biological sources. It is debatable whether or not sex does imply a biological origin (Humberstone *in* Laker, 2002 p. 58).

Biological differences versus socio-cultural differences of the sexes

The binary categories of sex are reflected in some western views of creationism and premised upon the Old Testament which posits that God created Eve from Adam’s rib (Archer and Lloyd, 2002 p. 99; Buss and Kendrick *in* Gilbert Fiske and Lindzey, 1998 p. 984). This model of interpretation is one where men and women were compared to a single perfect form (one-sex), with men being considered closer to that perfect form. Laqueur (1990 p. 4) refers to writing of Greek philosopher Galen who, in the second century, contends that women are actually men “in whom a lack of vital heat- of perfection- had resulted in the retention, inside of structures that in the male are visible without”. His work related to the identity of male and female reproductive organs but reinforces this idea that women are somehow inferior to men. These views have been influenced by religion, conventional wisdom (common sense as the literature refers) and scientific knowledge at the time.

There are clear differences between men and women and these can be traced back to evolutionary principles. Evolutionary Psychology explores the science of human behaviour. It proposes that a historic natural division of labour increased the inherent psychological differences between males

and females during primeval times. Men and women are expected to differ in areas where they experienced adaptive problems over human evolutionary history, during their development, or over different environments inhabited (Buss, 1995 p. 19; Buss and Kendrick *in* Gilbert, Fiske and Lindzey, 1998 p. 994). As they faced problems during their evolution (it must be noted here that both sexes have also faced similar adaptive problems such as both creating mechanisms to deal with changes in body temperature, skin friction and also long term mating issues), the two sexes adopted varying strategies to ensure their survival and reproduction. The resolutions they created are specific to each problem and differ between men and women (Eagly and Wood, 1999 p. 409). For instance, the division of labour between male hunter's and female gatherers of plant food presented a range of challenges that caused men and women to adapt. These roles act as a possible reason for men's greater upper body strength and spatial rotation ability, and women's greater spatial location memory (Buss, 1995 p. 19). In addition, from adolescence onwards, biological and hormonal differences tend to have the effect of making boys taller, faster and physically stronger on average than girls (Capel and Piotrowski, 2000 p. 27-28; Gavora, 2000 p. 140).

Darwin's evolutionary theory of sexual selection has frequently been applied to sex differences to explain the "struggle between the males for possession of the females; the result is not death to the unsuccessful competitor, but few or no offspring" (Darwin, 2008 p. 68). Following on from this, it is opined that sex differences derive from differing fitness related goals. Due to man's competition with other men for sexual access to women, as well as protective instincts, they developed dispositions such as violence, competition and risk taking (Eagly and Wood, 1999 p. 410). Women on the other hand favoured attributes more akin to nurture.

The evolutionary theory has been criticised for lacking an appreciation of the influence of culture upon adaptive mechanisms. Culture reflects both the "biological endowment of humans", as well as the "constraints of their social and physical environments" (Eagly and Wood, 1999 p. 414). It is argued that culture cannot be viewed separately from the individual as they are dynamic systems that operate beyond a context (Eckes and Trautner, 2000 p. 390). A further limitation to this theory is that it is premised upon hypotheses alone that remain under scientific debate amongst anthropologists (Eagly and Wood, 1999 p. 411). Feminist perspectives also conflict with this idea on the basis that male dominance within science has arguably influenced research in human sciences (Archer and Lloyd, 2002 p. 6).

On the other hand therefore, the social structural theory asserts that the origins of sex behavioural differences are situated in the contrasting social positions of women and men (Eagly and Wood, 1999 p. 412; Eckes and Trautner, 2000 p. 160). This theory views sex differences in social behaviour as arising from the widespread division of labour between men and women in most societies, as a consequence of differences in socialization patterns and through situational influences during adulthood. Supporting this is the “social roles theory” which “emphasizes the numerous ways in which the social behaviours that differ between the sexes are embedded in social roles- in gender roles as well as in many other roles pertaining to work and family life” (Eagley, 1987 p. 9). The division of labour between men and women affects not only societal expectations of the traits and behaviours of men and women, but also the self beliefs and perceptions that men and women have about their own capacities and skills (Deaux and LaFrance in Gilbert, Fiske and Lindzey, 1998 p. 790). These characteristics “provide rich and well differentiated sets of concepts and terms to categorize and characterize boys and girls, men and women, to separate between female and male roles, rights and responsibilities” (Eckes and Trautner, 2000 p. 3).

Social structuralists accept that biological differences between men and women have influenced these roles, such as men’s greater size and strength that prioritises their positioning within manual jobs, compared to women’s focus on children and caring for the young. In turn, these interact with “shared cultural beliefs, social organisation, and the demands of the economy to influence the role assignments that constitute the sexual division of labour within a society and produce psychological sex differences (Eagly and Wood, 1999 p. 409). In many societies it is often the case that women have been given less power and status than men. Women perform different employment functions to men and experience little representation in many senior levels of organisations. These differing roles are referred to as gender hierarchy and are considered to be the underlying cause for sex differences under this theory.

One of the criticisms to this theory is that culture and social structure are not a causal force of sex differences, only that they reflect an underlying logic of evolved dispositions (Eagly and Wood p. 414). Whereas biologists have used Darwin’s principles of sexual selection to explore sex differences, social scientists have used the perspective of gender roles (Geary, 1998 p. 3). Gender roles are defined as those shared expectations (about appropriate qualities and behaviours) that apply to individuals on the basis of their socially identified gender (Eagly, 1987 p. 12). It is

doubtful that we can think about people at all without thinking about their gender because gender is considered to be a prominent category of human social life (Eckes and Trautner, 2000 p. 3). Gender ideology varies in different cultures. For instance, where men control a disproportionate share of power and resources, gender ideology is based on what is referred to as a “simple binary classification model” (Coakley and Pike, 2009 p. 258). According to this model, all people are classified into the categories of male or female. Such a model is central to the way people see the world. However, it is noted that it takes dedication to maintain these ideas because the model is inconsistent with biological evidence showing that anatomy, hormones, chromosomes and secondary sex characteristics vary in complex ways that cannot be divided into two distinct, overlapping sex categories (Coakley and Pike, 2009 p. 259).

That is not to say that categories are not important as differences are clearly present between sex and gender. Both theories are not so opposed to each other since both agree that there are differences. Both models suggest that the sexes adjust to environmental conditions. The theories conflict in their evaluation of the timing and nature of these adjustments. Using the “biosocial” model that combines these conflicting standpoints, it is suggested that biological and environmental influences are both important during the development of sex differences between boys and girls (Archer and Lloyd, 2002 p. 76). One of the most consistently found features of the social behaviour of children is the formation of same-sex play and social groups (Geary, 1998 p. 241).

For both of these theories, it is agreed that the future will reveal how accurate they are. There are notable changes in the inclusionary and exclusionary behaviours of men and women, with women, who have historically been the minority, increasingly taking up employment positions in formerly male dominated areas. It is argued that changes in social structures and processes will assist in the elimination of gender differences (Lueptow, Garovich-Szabo and Lueptow, 2001 p. 4). Societal shifts towards equal opportunities in work and leisure are much more prominent. In parallel it is documented that attitudes appear to be changing towards women- with more liberal and egalitarian trends emerging (Lueptow, Garovich-Szabo and Lueptow, 2001 p. 5). However, some research suggests that stereotypes are intensifying and even though we see social changes, these are not being followed by change in sex typing. Recent literature proposes that women in management are still under-represented and sex segregation is still overtly present in areas such as sport (Carter and Silva, 2010; Glaister, 1974 p. 48).

Gender

Gender is the societal dominant view on how a man or woman should aesthetically look and behave. The term gender also refers to a person's lived experiences that have come to form their identity. Whereas sex considers what is biologically male and female, gender considers what is masculine and what is feminine. Whereas biological sex appears to be fixed, the concepts of masculinity and femininity are "constructs of a particular culture or society and may therefore be open to change" (Humberstone *in* Laker, 2002 p. 59). It seems to be agreed that "gender is a complex construct with different dimensions ranging from genetic sex to sexual orientation, gender roles and images, and gendered display" (Hartmann-Tews and Pfister, 2003 p. 7). These concepts are "continually created, recreated, delineated, acted out and policed through social interaction" (Shy, 2007 p. 110). Because sex and gender exist so closely together it may be that they are essentially the same thing (Cowan, 2005).

The paradigms of two genders founded on two biological sexes evolved in the early 18th Century and is considered a western view (Herdt, 1994 p. 111). Minorities tend to be those who do not conform to the typical male/female structure, such as transgender and intersex individuals. Whereas western civilisation attempts to suppress and ignore any sexual contradictions and ambiguities within this binary, the divisions of men and women in other civilisations are not so distinct or important, with gender blending being a more accepted process (Waldemar, 1988; Whittle, 2002 p. 4). For instance, in the Arab country of the Omani, the Xanith constitute an accepted third gender. Biologically they are men who sell themselves as homosexuals (Archer and Lloyd, 2002 p. 102). A number of Native American tribal Indian groups from Mexico to Alaska, such as the "Bedarche Tribe" and the "two spirit people" also constitute third and fourth gender categories (Archer and Lloyd, 2002 p. 103; Camporesi and Maugeri, 2010 p. 378). These can be male or female individuals.

Consider also the "she males" in Singapore, the "kushra" in Pakistan, the gender non conformist "acaults" in Burma, the ancient hijras of India and also the chuckchi of Siberia who from 1890-1908 identified seven categories of gender. Mythical bodies such as Goddess Venus Castina of Ancient Greece also exist. These examples are non exhaustive and are a strong testimony for the proposition that western sex and gender categories are certainly not universal.

At the heart of this obsession with categorisation of sex and gender, or classification anxiety, is power (Pearlman, 1995 p. 844). Foucault suggests that sex and sexuality are the product of power relations, with women assuming more subordinate roles historically (Cowan, 2005 p. 71). This classification anxiety also shapes the law relating to the identification of sex and gender. As with sex, classification provides structure to regulatory institutions and is a useful means of identification. However, it is argued that the western categorisation of individuals on the basis of their sex, gender or sexuality, influences our own views and perceptions of those individuals (Archer and Lloyd, 2002 p. 105). The law has traditionally strictly viewed sex and gender as identified at birth upon the basis of anatomical features. At times, the reluctance of the law to expand the categories of sex and gender can reflect the “exclusionary power of law” (Sharpe, 1997 p. 45). Gender differences have therefore been a significant marker of our inclusion or exclusion into society and groups such as sport.

Disability

Humans differ in their physical and intellectual abilities. Historically, disability was associated with images of deviance and individuals who are hindered by impairment, as demonstrated earlier (Thomas and Smith, 2009 p. 8). Deviance is a word that is associated with “abnormality” and something that is considered far from the average or normal (Creswell, 1996 p. 24). The debate surrounding the distinctions between impairment, disability and handicap escape the scope of this discussion and instead disability will be used as a generic term (Van Hilvoorde and Landeweerd, 2008 p. 98). Originally, the definition of disability was based upon a medical approach as introduced by the WHO in 1980 (Thomas and Smith, 2009 p. 9). It was premised upon the concept of a “broken body” and reads;

“Any restriction or lack of ability (resulting from impairment) to perform an activity in the manner or within the range considered normal for a human being” (WHO, 1980).

The medical model or personal tragedy theory of disability dominated discussion about disability for most of the twentieth century, with its roots in the historical discrimination of disabled people during the rise of industrialism. The model suggests that disability is a result of a loss or limitation of function or some other defect. This historic medical approach served to separate

individuals with disabilities from society and “institutionalise” them apparently for their “own benefit and to prevent disabled people from being a burden on others in the wider society” (Thomas & Smith, 2009 p.8). The treatment of disability has typically been that they “ought” to be non disabled and should be “physically whole”. This suggests that disabled people possess an “undesired differentness” to those considered non-disabled. Research relating to the human body and sport has traditionally been found in the sciences such as anatomy, kinesiology, biomechanics and physiology (Promis, Erevelles and Matthews, 2001 p. 39). Within these areas the general view has been that, “any divergence resulting in negative cognitive, physical, or sensory abilities when compared to those of a mundane population norm results in a person who will necessarily be disadvantaged” (Koch, 2005 p. 123).

As a result of the growing dissatisfaction amongst political campaigners with the medical definition the social model was introduced which focuses more on the increasing barriers that exclude disabled people from mainstream society (Thomas and Smith, 2009 p. 9). Professor Jacobus tenBroek made early significant contributions to the development of the social model of disability (Stein and Lord, 2007 p. 170). He argued that physical limitations of a disabled individual have far less to do with their ability to participate in society than did issues concerning public attitude, most of which were misconceived (Stein and Lord, 2007 p. 170). The social model of disability has both an environmental and a social aspect to it (Medland and Ellis-Hill 2008 p. 107).

The shift from medical to social symbolises “the many factors exogenous to a disabled persons own limitations are really what determine the extent to which that individual will be able to function in a given society” (Lord and Stein, 2009 p. 255). Disability is now viewed as something that one may become as a result of the environmental issues that surround them, as opposed to something that someone is by definition. It is now a “socio-cultural construction rather than natural kinds or given states of being” (Van Hilvoorde and Landeweerd, 2010 p. 3).

It is suggested that a new model should be formed that combines the impairment (medical) and the disability (social) experience of these individuals (Condry, 2008). Perhaps it may be appropriate to “fracture” the models of disability, taking into account different models for different circumstances (Condry, 2008 p. 61). In relation to sport, both models may be useful to

adopt. Disability should be viewed on a spectrum rather than being forced to understand it in the narrow constraints of either model.

Nevertheless, this shift aided the development of significant policy changes by governments. For instance in the UK the former British Council of Disabled People (now the UK Disabled People's Council) assisted in the introduction of the DDA (now EA). The US ADA became a benchmark for these campaign groups and will be discussed in more depth later. The CRPD marks a significant shift away from the medical model by defining a person with disabilities as "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others" (Article 1). This definition overtly rejects the medical model and focuses much more on barriers to participation in society.

Despite formal political and legislative changes to the definition of disability, the social problems that disabled individuals face are not solved and there still remain disparities in areas of human activity. Human differences in ability can cause practical problems of integration which has been accounted for by making reasonable accommodations or adjustments to society. What is consistent throughout these definitions of disability is the strength of focus on the concept of normality and a disabled individual's lack of ability to carry out "normal" activities. Individuals with disabilities are evaluated in relation to their "functional ability to carry out the routine tasks of everyday life" (Nixon, 2007 p. 419). It would appear that any individual with a perceived disability is forced to find their place within an overriding existing societal structure that is based upon traditional and evolved norms and expectations of what a human should look like and what they should be capable of doing. It is fair to say that we live in a world that is "primarily built around standards of normality" (Van Hilvoorde and Landeweerd, 2008 p. 98). Within that world, we typically design life for the average human being. Society and evolution is framed around the ideology of "normalcy" (Koch, 2005 p. 128).

Normalcy is achieved through cultural hegemony, where "a capitalist culture's most powerful economic groups obtain consent for their leadership through the use of ideological norms. Social structures and relationships that help the powerful but disadvantage those on margins are presented as 'natural'" (Hardin and Hardin *in* Gilbert and Schantz, 2008 p. 25). The concept of normalcy is further exaggerated in elite sports where the process of normalisation greatly differs

from everyday life. For instance, in our daily lives, “there is little reason to qualify people who integrate their prostheses into their lived bodies as impaired” (Van Hilvoorde and Landeweerd, 2010 p. 2). In sport however, there is clear demarcation which has been brought about through the cultural evolution of the segregation of sporting competitions, such as the Olympic Games, the Paralympic Games and the Special Olympics.

Race

All human groups belong to the same species of *Homo sapiens*. That said there are undeniable physical and non physical differences between our appearance and character. Amongst many, the primary differences between us are;

- Physical appearance and colour of skin
- Geographical positions and environments
- Religion and culture, different belief systems and practices, language
- Behaviour

Some of these differences arose naturally as a result of mutations or random changes in genes that can alter a characteristic which can then be inherited. Such differences occur in all species, such as bacteria, plants and animals, and they are all subject to change. Most mutations are not beneficial, since any change in the suitability of an organism to its environment that makes it less likely to survive is not likely to persist in the population. However, over time or distance, environmental conditions change which means that mutations which improve the survival of any animal, including humans, will be selected for if they are now beneficial. Since environmental changes are unlikely to be the same in all areas of a species’ range, selection pressures will be different, leading to a gradual divergence in behaviour or appearance in semi-isolated populations.

For humans specifically, it is speculated that in the last ice age approximately 70-80,000 years ago, modern humans went through a “genetic bottleneck” process where only the best survived. Those that did survive spread out around the world. Through our encounters with diverse environments, our minds and bodies adapted to suit our surroundings. For instance, it is

suggested that light skin tones assisted Europeans to easily absorb sunlight to make vitamin D and prevent rickets, in a climate that was heavily foggy and cloudy. In East Asia, inhabitants developed eye modifications to allow them to squint better in the cold and snowy conditions.

Race has been conceptualised, over time and through different cultures, as a means of explaining how these differences have been formed. The Darwinist biological position asserts that race is not fixed by these differences and instead species adapt to their surroundings through natural selection. For instance, our genetic make up, skeletal frame and skin colour has been determined by our evolutionary adaptation to geographical environment, climate and circumstances. Our cultural values may also be influenced by this process of adaptation. The biological position also stresses that our likeness is greater than our differences (Bois *in* Back and Solomos, 2000 p. 105).

Populations have lived together in a number of ways on earth, collectively or diversely. Differences between us are most pronounced by the examples of homogenous groups who live interdependently without breeding. Examples of such large homogenous groups are gypsies located within Western Europe and the wild tribes located in India and South America (Park *in* Back and Solomos, 2000 p. 167).

Comparatively other groups have lived more closely resulting in the dissipation of racial differences. Categories are more blurred through the movement of inter-mixing. Particularly in the last 400 years the movement of individuals resulting from migration, colonisation, globalisation, industrialisation, commerce and slavery has increased racial amalgamation (Spracklen, 2008 p. 225). In the UK for instance, population trends indicate that the mixed race population has grown from 672,000 in 2001 to 986,600 in 2009 (Rogers, 2011).

In this sense, it has been considered more accurate to use the concept “population” rather than race, with race being used as a synonym for subspecies instead. The use of the word race in science is subject to continued debate because of the transient nature of our differences. Other propositions are offered to explain differences between us, which have either extended from the biological reasoning, or which have transcended scientific definition and been based upon other interpretations;

- Many religions contest the biological explanation and instead attribute our existence as descent from a higher power or the Creator. In some cases physical differences between us as species were then explained as a by product of an arbitrary action or punishment by the higher power. This created a sense of hierarchy amongst different people such as white supremacy and black inferiority.
- Species as typologies of people, fixed in common characteristics such as the Europeans or the Africans.
- Differences have been explained by the “story of man’s progress to superior modes of living” (Banton *in* Back and Solomos, 2000 p. 61) which has led to the inequality of treatment between different groups in society.
- Leading on from this, social scientists contest the biological meaning of differences arguing that it is instead brought about by culture, consistent with sex and gender. A significant debate that surrounds the construction of race is whether it based upon biological or cultural meaning (Gunaratnam, 2003, p. 4; Chappell *in* Laker, 2002 p. 92). Race demonstrates the conflict between physical and social sciences. Social scientists are often reluctant to accept evolutionary theory as a means of interpreting human affairs and refer to it as “racist” at times (Midgley, 2002 p. 8). It is evident that race can incorporate both when the actuality of the concept is considered.

Explanations for our racial differences are often entangled which can lead to the use of race being confused at times and posing “conceptual dilemmas” (Gunaratnam, 2003 p. 3). It is a way to understand the people around us through the formation of categories based upon perceived personal, socio-cultural and socio-economic differences. Race is particularly interesting to this thesis because it invokes a consideration of our physical characteristics just as sport does. In addition, in modern times, race is used for understanding populations and demographics through a Census and gathering equal opportunities data for employment purposes. The accuracy of this analysis is contested since racial diversity in populations has arguably “made racial categories impossible to sustain in any useful or meaningful sense (Spracklen, 2008 p. 225). On this point, it was not until 2001 when the UK Census added the category of mixed race. It is suggested that mixed race individuals are “erased in British history and in sports” because they are continuously referred to as “black.” Sports icons such as Tiger Woods, Lewis Hamilton and Kelly Holmes are representative of this classification fallacy since they share a mixed race identity. The general grouping of mixed race identities reveals the complexities of the concept of race particularly as a

typology. The suggestion that racial categories lack real meaning is true if this refers to the use of race as a fixed typology. However, when race is used to reflect population differences as explored above, it is a useful identification marker of our species.

The use of the concept becomes problematic when the differences between us are stretched and over generalised to apply unequally to entire civilisations. This leads to misguided or false assumptions about groups that can result in unequal treatment. Purely false assumptions can lead to the production of harmful stereotypes, unequal treatment and have also contributed to the concept of race becoming vulnerable. As a result, many contend that “race is a biological myth based on socially created ideas about variations in human potential and abilities that are assumed to be biological” (Coakley and Pike, 2009 p. 317). It would appear that biology and cultural explanations of our differences become blurred and prejudice leads to the creation of racial categories that are justified by stretched biological notions. For instance, historically it was claimed that these categories were connected to varying levels of intellect and ability, thus suggesting that different races are superior (Bell, 2008 p. 8). The term was used to dictate class and order, usually through white supremacy (Long and McNamee, 2004 p. 407).

Problems emerge when people do not accept the changing nature of the term race and attempt to explain difference in a linear fashion, in the sense that physical differences explain cultural, value and behavioural differences (Todorov *in* Back and Solomos, 2000 p. 69). The result of this approach is negative at times and can lead to what is termed “racism.” Racism as an act or behaviour uses physical and non physical differences discussed as a reason for treating groups and individuals differently and usually derogatorily, rather than using them to understand and accept differences. It can exist individually, on an everyday level through use of language or behaviour between people, or institutionally, through structures and ideologies (Hylton, 2010 p. 350; Lusted, 2009 p. 735; Bell, 2008 p. 11). Race as an act or behaviour is subjective which can make it very difficult to pin point on some levels.

For legal purposes racism disadvantages another and infringes their individual or economic rights. Flew (1993 p. 100) defines racism as “advantaging or disadvantaging someone, as discriminating in their favour or discriminating against them for no other or better reason than that they belong to one particular racial set and not another.” The UK EA describes race as a

protected characteristic that includes colour, nationality or ethnic or national origins but fails to provide a definition of racism (s. 9(1) EA).

Some argue that racism is an act of “powerism” since it displays an exertion of power through prejudice (Hylton, 2010 p. 524; Marks, 2003). Racism could also be perceived as a “folk-heredity fallacy that pre supposes the existence of such groups and judges individuals by recourse to the properties of the groups to which they are assigned” (Marks, 2003 p. 139). This definition exaggerates the notion that racism is a derogatory act, behaviour or belief against an individual or group that is a product of folklore and cultural perceptions about that individual or group’s physical appearance or cultural background.

However, Long and McNamee (2004 p. 413) attempt to highlight that racism is a spectrum. They play with the idea that someone may exhibit racist behaviour without being a racist. They create a “race register” to attempt to chart behaviour that may or may not be considered racist and inexcusable. This portrays the individual nature of racism and highlights that there may be different instances relating to race that cannot necessarily be classed as purely racist.

Furthermore, consider the term cultural ignorance. Culture encompasses “every kind of acquired preference, loyalty, disposition, social practice...” (Flew, 1993 p. 107). Whether ignorance to these components is justifiable or, in the alternative, whether ignorance is classed as racism, needs ascertainment. Behaviour may not itself be racist but may have racist consequences (Long, 2000 p. 125).

Overall, it is argued that, “contemporary racism cannot be understood simply as prejudice against individuals on the grounds of their colour” (Fredman, 2002 p. 53) because the notion is filled with content from different subject areas such as the sciences, law, history, politics and even individuals in society in general. If used to describe the process of evolutionary and cultural adaptation, then race is a valid construct. However it begins to lack a real objective basis when differences are explained using exaggerated misguided or even false assumptions about entire populations (Winant *in* Back and Solomos, 2000 p. 678).

Summary

This chapter has explored some of the primary human differences between us and has offered some explanation for the possible variations that exist. The common differences between our sex, gender, race and sometimes disability is attributed to biological and evolutionary processes such as adaptation. This is complemented by, or conflictive with the impact of culture and the environment. Consistent across the four areas is the debate surrounding whether biology or culture determines our human identity. It is rational to assume that a combination of both has shaped the way we are.

Understanding our differences enable us to better understand the world in which we live, and the practices of inclusion and exclusion. Differences between us are used as markers for differential treatment and behaviour, notably when our differences tend to move us outside of the usual “norm.” Such treatment can be the product of stretched misguided and sometimes false conceptual understandings of our differences.

In defining our sex, gender, disability and race, there is a tendency to understand people as either one thing or the other. Our world is constructed and regulated in this way. This is perhaps the only logical and consistent way of dealing with some activities. However, this chapter has revealed that differences between us are present but are hard to distinguish accurately in such a linear fashion. Instead differences “actually span a spectrum of natural possibilities” (Cooper, 2010 p. 235). This creates a conflict between the realities of sex, gender disability and race, and the current linear structures in place in society that serve important purposes for the majority but can lead to issues of inclusion and exclusion for the minorities who are more widely spread across the spectrum. The minorities identified tend to be women, disabled individuals, those who transgress from gender norms and also particular racial groups.

Within sport, our differences are much more pronounced when they are considered in light of sport specific inclusion and exclusion. Clear definitions of our differences become important when an athlete is being included or excluded on the basis of biological or cultural markers.

Chapter 3: Constructing Sport Specific Concepts

This chapter seeks to move away from inclusion and exclusion as general phenomena and instead understand them in the context of competitive sport. Within competitive sport discriminating upon differences between sex, gender, disability and race is integral to the essence of sport and viewed as necessary to match ability, preserve a competitive balance and ensure safety. With this in mind, this chapter proposes alternative definitions of inclusion and exclusion in the context of competitive sport, evaluating sport as a separate system within society.

Currently the literature offers little to the specific meaning of inclusion and exclusion in competitive sport, as distinct from recreational sport. Even sports research has tended to focus on sport and social inclusion/exclusion (DCMS, 2010 p. 35). Whilst recreational sport may be a field in which social inclusion values are more likely to evolve, competitive sport is predominantly based upon ability and performance. Tensions have existed between the use of sport to fulfil broader social policy goals as explored, and the demands of competitive sport (Houlihan and White, 2002 p. 80).

Whereas reference to sport within social inclusion and social exclusion is focused primarily on achieving political and social objectives, it will be proposed that we shift the focus of these definitions from social to sporting, in an attempt to uncover their meaning and behaviour in the context of competitive sport. This chapter will draw upon existing sociological definitions laid out in the previous chapters and carve out a specific meaning of what shall be termed “sporting exclusion” and “sporting inclusion”. These definitions will underpin the following chapters of the thesis and will be used as a benchmark for the identification of inclusionary and exclusionary practices in sport.

Sporting Exclusion

The sociological definition of exclusion is the different or derogatory treatment of an individual or group on the basis of their individual, socio-cultural or socio-economic differences. Social exclusion focuses on the exclusion of an individual from the economic, political and legal benefits of society. Whilst sporting exclusion is not dissimilar to these definitions, it is a concept

that gives credence to the nature and specificity of competitive sport, where athletes participate for the primary purpose of differentiating themselves from other competitors on the basis of their physical and non physical differences and attributes which include sex, gender, disability and race.

Reasonable Exclusion

Within the sporting arena, the criterion adopted to evaluate athletes is ideally and typically based upon sporting ability and performance. Returning back to the phrase “survival of the fittest,” sport has been created out of survival and war, with competition and winning at all odds, being a key motivating factor for sporting athletes and/or teams. The very nature of sport, as laid down by the inspirational Olympic slogan, is to be “faster, higher, stronger” and strive to push the limit of human capacity. The potential risk of failure and exclusion comes hand in hand with success in sporting activity. In this sense, sport is one of the few areas where exclusion can almost be in the form of a necessity in order for human ability to progress and develop, as with competitive exclusion in ecology (Patel, 2009b). For instance, a cursory look at the improvement of the men’s 100 metre sprint world record times illustrates the evolution of human ability, with Jamaican sprinter Usain Bolt currently dominating the world records in men’s sprinting.

With this in mind, it could be said that exclusion forms part of the essence of sport itself and is embedded within the core values that sport holds. Sport demands and requires exclusive practice in order to be true to its specific nature and character. It is suggested that participation in sport is not “based upon an ideology of ‘inclusion’ or ‘sameness’, but based upon differences in talent, classified on the basis of relevant inequalities” (Van Hilvoorde and Landeweerd, 2010 p. 4). Sport would be dull if there was absolute equality (Harris and Chan, 2008 p.338). Whilst exclusion is not always a pleasant experience, it is nevertheless an accepted consequence of competing in a sport. Absence of this exclusionary element could leave sport without its integral purpose and function, particularly at an elite level, which is to further human capacity. For athletes themselves exclusion from sport based upon sporting performance may act as a form of encouragement that further motivates them to succeed in their given sport. From a psychological perspective it could be said that without having a desire to win, an athlete will struggle to be successful.

In order to protect this essence of sport, specific rules and regulations are imposed to manage our differences and match ability. These may include sex, gender, disability or race categories, age divisions, rules concerns advantage, the use of equipment and weight divisions. An example of when exclusion may be reasonable is the case of drugs and doping in sport. It seems that exclusion can be reasonable when, as a result of voluntary choices, an athlete acts in a way that puts into danger, the essence and integrity of the sport. Integrity is often treated like the crown jewel of sport, which is particularly apparent when individuals attempt to threaten it. Consider athletes who are found to be taking performance enhancing drugs. In July 2008 the High Court upheld the British Olympic Association ruling to ban British sprinter Dwain Chambers from the Olympics after testing positive to steroids in 2003 (Parsons, 2008). This decision highlights the importance of maintaining a level playing field and deterring those who threaten that field. As we shall see in later chapters, the commitment to tackle drugs in sport has led to a global enforcement of specific rules and regulations to achieve this.

Unreasonable Exclusion

At the other end of the scale is unreasonable exclusion which can be overt or covert, seen or unseen, consistent with the literature (Brackenridge, Howe and Jordan, 2000; Sibley, 1995). Exclusion becomes unreasonable when the rules and regulations in place to manage our differences based upon sex, gender, disability and race, do not match ability or do not directly relate to the objective of protecting the essence of sport.

Sport is a realm that is held together by many of its own structures and frameworks and is soaked in traditional and long standing values and belief systems. It possesses a degree of “social” or “inherent” exclusivity (Brackenridge, Thwaite and Ferguson, 2000 p. 18) and historical “cultural distinctiveness” (Sudgen and Tomlinson *in* Houlihan, 2006 p.70). Raitz (1995 p. 6) provides that;

“The social dimension of human culture involves the human relationship and interaction. Long practiced attitudes and values prescribe appropriate behaviour for a variety of situations in which people come together to raise families, make a living and pursue life. Our social habits may designate subgroups within a larger society that are differentiated by some real or imagined

characteristic: class, race, sex, age, occupation, wealth or talent. Such imposed differences may be reflected in the material landscape of sport.”

In other words, each sport carries with it, its own distinct space and emotional expression, which has evolved and developed to become its recognised heritage and culture. For instance, soccer was originally a sport that was associated with the working class, as opposed to rugby which was attached to the middle class. This would have shaped the sporting space and effected who plays and accesses the sports.

In order to understand a particular sport, “one must locate its position in the space of sports” (Bourdieu, 1988). Sporting spaces are produced by “athletes, fans and many other stakeholders in the system of sport” and can be influenced by the “event location, participant make-up and involvement, politics of sport and the policies that are an outgrowth of those politics” (Muller *in* Carmichael-Aitchison, 2007 p. 39; Roberts, 2009 p. 7). These influences impact upon the behaviour of those who consume sport by determining who can enter that space. This describes the “sporting culture” which can have diverse effects on participation and access to sport. Messner (2002 p. 65), whilst describing the way in which US athletes, coaches and employees in sport may have experienced restrictions within their fields, highlights that “they were bumping up against institutional structures-historically formed, entrenched systems of rules, conventions, allocations of resources and opportunities, and hierarchical authority and status systems”. Exclusionary practices in sport may instead be driven by traditional norms and sporting cultures that serve to maintain divisions between individuals and groups, based upon stereotypes that have formed and developed, as discussed in Chapter 1.

- Overt

Where this takes place, it may do so overtly. This could be referred to as overt exclusion, or evidential exclusion (Hague, Thomas and Williams *in* Brackenridge, Howe and Jordan, 2000). It is widely documented that “women, members of ethnic minorities, and persons with disabilities have been excluded or allowed limited access to sport” (DePauw & Gavron, 2005 p. 9). They have been marginalised as a result of “culture, gender, ethnicity, class or disability affiliation” (DePauw & Gavron, 2005 p.9). This can lead to potential conflicts with the principles set forth in international, regional and domestic equality legislation.

As we shall see in Part Two, an example of overtly unreasonable exclusion is the historical treatment of women in sport. Sport is regarded “one of the last bastions of traditional masculinity where men can prove themselves as real or inferior men and differentiate themselves from women” (Symons *in* Carmichael- Aitcheson, 2007 p. 140). The evolutionary differences between men and women identified in Chapter 3 have led to sport being historically regarded as male space. It was presumed that only men possess physical characteristics suited to sport, such as strength, speed, large muscle mass, aggressiveness and competitiveness (Patel and Boyes, 2006). As a result, women were historically overtly restricted from competing, and certainly not permitted to compete alongside men. Justifications for this are largely underpinned and reinforced by ideological assumptions about femininity, masculinity and biological performance. Whilst male athletes are depicted as being “active, strong and competent,” (Russell *in* Carmichael-Aitchison 2007 p. 108) females have been defined by their “heterosexual attractiveness.” Any deviance from this persona would result in females being considered masculine or “butch lesbians.” This is reinforced by media coverage of sports.

Modern sport has undergone change which has been influenced by wider social movements such as female liberation and the gender regime has certainly shifted in a positive direction. However, the historical overt exclusion of women continues to produce imbalanced participation rates between men and women and typically favour men (Thomas and Smith, 2009 p. 123). Even those in the most powerful positions of sports are largely, male “white, western, middle-class, heterosexual and able-bodied” (Hargreaves, 2000 p. 6).

- *Covert*

Sporting culture can also operate to exclude covertly or invisibly. Developing Bourdieu’s theory (Bourdieu, 1977), a sport Doxa is created where certain existing beliefs are never contested or debated even though they no longer have a place in modern society and in fact act as barriers to participation. This unseen, more covert form of exclusion is largely under researched because the explanations for exclusionary practices can only be speculated. In modern times, it would seem that society has moved away from traditional overtly exclusionary behaviour and instead adopt a more covert form of excluding, discriminating or ostracising minorities in given situations (Swim and Cohen, 1997 p. 104). This is due to the drive behind developing a more egalitarian society.

For instance, Swim and Cohen (1997) evaluate the scaling methods used to typically measure sexism, such as the Attitudes Towards Women Scale and also the Modern Sexism Scale. Drawing upon previous work (Benokraitis and Feagin, 1986) they identify three forms of sexism that exist; overt, covert and subtle. The latter “is characterised by openly unequal and harmful treatment of women that goes unnoticed because it is perceived to be customary or normal behaviour” (p. 104). Their findings suggest that there is a distinction between more traditional and modern forms of sexism “as conceptualised within the framework of overt versus covert or subtle forms of sexism” (p. 115). Further it is suggested that in cultures where sexism is recognized and officially disapproved, it is more likely to emerge in covert or subtle forms (Archer and Lloyd, 2002 p. 28).

To illustrate this, consider the participation of homosexual individuals in sport. Clearly there exist no formal rules or selection criteria that overtly exclude athletes who are homosexual. Any that have existed have been appropriately sanctioned by sports bodies or the law (Hardin and Whiteside *in* Hundley and Billings, 2010 p. 22). Instead symbolically, the masculine basis of sport and its traditional representation of purity conflicts with sexual orientations that may challenge this. Sport is often regarded as having a “homo-negative” climate that idealises masculinity (Brackenridge, Howe and Jordan *in* Carmichael-Atchison, 2007 p. 128). Gay men have stereotypically been regarded as “camp” and pose a threat to the hegemonic masculinity that breeds within sport and for some, is a part of its essence (Anderson, 2002). Failure to succeed in sport, or possess different interests to the “masculine” norm, can result in their exclusion from groups and being subject to the label of being gay. Former England footballer Graeme Le Saux speaks in his autobiography of how he was not interested in the drinking culture attached to football and how he also read broadsheet newspapers. As a result of his different interests, he was taunted for being gay even though he was not homosexual. He talks of the dressing room culture that includes constant name calling and “laddish culture.” He received abuse on the pitch from players and fans, with no support or discipline from the managers or officials. This constant treatment almost led him to quit the sport (Samuel, 2007). This account suggests that homophobia can also form overt exclusion in the form of homophobic bullying against lesbian, gay, bisexual and transgender individuals.

Very few sportsmen have been known to be gay. In his film “The Brighton Bandits” Ian McDonald follows a gay football team, highlighting their experiences, stories and perceived

challenges. The film is framed around Justin Fashanu, the first professional footballer in Britain to “come out” and admit he was gay. He tragically committed suicide in 1998. This reveals how the culture of sport can create a sense of exclusion amongst those who do not feel that they fit in. In February 2011 for example, England cricket wicketkeeper Steven Davies became the first professional cricket to publically announce that he is gay. He expresses how he felt “out of the loop” with the banter on tour and would retreat to his room (Grice, 2011). The subsequent inclusion of Davies in the England cricket squad for 2012 demonstrates inclusionary practice that focuses upon the athletic merit of athletes.

The lack of openness about sexuality in sport could be because of the severity of the “social sanctions” given the climate of homophobia in sport (Anderson, 2002 p. 862). Homosexuality is a concept that institutions such as sport would rather not confront and instead create environments that suppress it. It is suggested that gay men are surrounded by heterosexual space. Their sexual orientation arguably disturbs “the unspoken rules of sexuality” (Creswell, 2006 p. 105). Despite open measures by bodies such as the Football Association (FA) to combat homophobia in sport, a “culture of exclusion often exists, which is mainly based on socio-cultural and affectionate principles” (Elling, De Knop and Knoppers, 2003 p. 452). In November 2010 for example, the head of the Croatian football federation, Vlatko Markovic was criticised for expressing the view that there was no room for gay men in football (Connolly, 2010).

Another example of the covert nature of exclusion is the consumption of alcohol which has shared a long standing relationship with sport. As a result of the increase in alcohol companies sponsoring and promoting many sporting events and stadiums, alcohol almost becomes synonymous with sport spectatorship and team drinking (Messner, 2002 p. 78). It is suggested that “its consumption is oxymoronic with athleticism and synonymous with sport spectating (Wenner *in* Hundley and Billings, 2010 p. 88). Most campaigns are targeted at the younger male audience which tends to contribute to the strength of masculinity within sport. In fact the drinking culture has become so closely linked with sport that it begins to act as a barrier to those who want to enter the space. It is suggested that sporting spaces and landscapes can become “metaphorically contested terrains” when achievements by minority groups within those sports, are restricted by wider social influences as well as historical customs (Muller *in* Carmichael-Aitchison, 2007 p. 40).

Against the backdrop of this drinking culture, it may be the case that an athlete who follows Islam may be covertly excluded from competing in a sport such as rugby where the teams rely on drinking as a form of team bonding and team development. Some who follow the faith interpret Islam as forbidding them to handle alcohol or be around it (Anon 2008a).

Indeed the sporting culture can be so dominant that this can have a destructive impact on ones identity. Tradeoffs between personal and social inclusion often need to be made, in order to achieve inclusion within a group. It is here when the sense of belonging can have negative connotations (Abrams, Marques and Hogg, 2004 p. 107). A Muslim athlete may feel compelled to compromise their religion in order to fit in to a sports setting. This is supported by studies of British Asians where it is revealed that they have felt the need to play down their differences and Eastern cultural background, in order to be “absorbed into the social structure of Britain as equal citizens” (Tomlinson 1986 p. 24). This is damaging because if one has to be absorbed in order to fit in then it means that one is not being accepted or valued for their differences. This leads to a false society instead of an equal or diverse one.

Sporting Inclusion

In Chapter 1, we identified that inclusion is part of a natural inherent need that, once satisfied, can provide us with a deep sense of fulfilment and satisfaction. Collaboration and co operation is a necessary and unavoidable part of our social being. One of the common groups that individuals seek inclusion within is sport. This is because sport is said to possess a number of values that develop and enhance our sense of belonging such as fairness, team spirit, self achievement, determination, know ones limits, appreciation of others, responsibility and solidarity to name a few (Rheker, 2000 p.44-45). Sport is said to lead to a “common citizenship” that “overrides divisions of class, gender, race, status, religion and associated distinctions of class” (Rojek, 2005 p. 50). Although these outcomes of sport are subject to debate, sport can “confirm and/or construct part of people’s social identity or image” (Elling, De Knop and Knoppers, 2003 p. 429).

However, sporting inclusion can be distinguished from social inclusion. Social inclusion uses sport to overcome exclusionary barriers and focuses more on recreational participation in sport. Conversely, sporting inclusion is focused on ensuring that athletes have the access and

opportunity to compete in competitive sport only where they are qualified to do so. They are qualified to do so when they meet the appropriate selection criteria. The athlete is not as central to this concept as meritocratic principles are.

Sporting inclusion reflects a meritocratic society which is one where any “inequalities of wealth or social position solely reflect the unequal distribution of merit or skills amongst human being, or are based upon factors beyond human control, for example luck or chance” (Heywood, 2003 p. 35). This is deemed fair because individuals are not judged by their sex, gender, disability or race, but instead according to their talents and willingness to work. It is fair to say that sporting inclusion values equality of opportunity.

Those with the same level of talent and ability, with the same level of willingness, should have an equal chance of success (Mason, 1998 p.73). Sport and equality, or sports equity is concerned with “fairness in sport, equality of access, recognizing inequalities and taking steps to address them. It is about changing the structure and culture of sport to ensure that it becomes equally accessible to everyone in society, whatever their age, race, gender or level of ability” (Thomas and Smith, 2009 p. 54). As Weiler (2000 p. 24) describes it should be “the quality of each candidate’s talent, not the colour of his skin that determines who will secure the scarce and ever more lucrative positions both on the field and in the dugout.” Sporting inclusion is therefore concerned with addressing the stereotypical assumptions made about differences between individuals and groups and analysing their validity. Those assumptions that are personally driven and based upon misguided predictions can lead to unequal processes and practices that restrict genuine integration in sport (Hylton and Bramham, 2008 p. 54).

Out of the sporting context, demands for equality of opportunity can be traced back to the ancient Greek times. For instance, Greek dramatist Euripedes considered equality of opportunity to mean impartial treatment for everyone (Capel and Piotrowski, 2000 p. 29). The historical premise beneath “equality of opportunity” is that if one works hard then one will succeed, otherwise, one deserves to fail (Mithaug, 1996 p.17). Whilst this may appear to be extreme, it does highlight the fact that individuals need to recognise the distinction between their own capacity to be included and, being provided with the opportunity to be included (Mithaug, 1996 p.69). It is not a concept that encourages a “free for all” for anyone of any background to be given access to groups purely

because of the positive personal and social implications. Rather, it is about providing them with the opportunity to obtain these benefits and achieve their goals individually and deservedly.

Given this definition of inclusion, a very careful balance between the individual and the group interest is required, particularly in sport. If the “boundary separating the rights of the individual and demands of the group drifts too far in one direction or the other, fairness is threatened” (Mithaug, 1996 p.49). The law plays a critical role in ensuring that a balance is struck when applying equality legislation.

Sporting inclusion aims to ensure that athletes are judged according to their ability to compete in sport rather than being measured against extrinsic norms. An example of this is the participation of disabled athletes. As we shall see in Part Two, the participation of disabled athletes such as Oscar Pistorius, into non disabled categories has challenged the traditional structures of sporting activity. Integrating minority groups into sports where they are qualified to compete, would be a positive example of sporting inclusion. Ideally, through sport, there is potential to break down barriers of ignorance between people and groups, and instead embrace the diversities that exist amongst us.

Unreasonable Inclusion

Inclusion should be cautiously applied in sport. If we are to apply broad ethical and moral standards of sporting inclusion then it is likely that the preservation of the specific nature of sport and its own version of a level playing field is challenged and threatened (Weiler, 2000 p. 20). Indeed the aim of this thesis is to strike a balance between inclusion and exclusion rather than advocate for one over the other.

With this in mind, just as there are reasonable and unreasonable instances of exclusion, it follows that there are times when inclusion may also be unreasonable. There are different forms of equality, since equality in one space will differ dramatically to equality in another space. This will be explored in the following chapter. Measuring equality between one person or group and another is difficult as each carries different social circumstances, natural endowments and different choices within their lives. In this regard, true equality is very difficult to achieve (Hylton and Bramham, 2008 p. 45). Mason (2006, p. 90) believes that to level the playing field, is to refer

to “responsibility-sensitive egalitarianism”. Whilst justice requires us to counter act the effects of differences in peoples circumstances and natural endowments on their relative access to advantage, it is assumed that inequalities which are due to different choices people make, are permissible. An example of this would be the justified exclusion of an athlete who consumes performance enhancing drugs to further their career. Sporting inclusion is therefore conditional on the voluntary choices that individuals make and such choices will not be mitigated. Some individuals work hard, some choose not to, some are capable of carrying out a particular task, some are not, some are given opportunities to contribute to society, and some are not. Because of these factors, placing individuals on a level playing field is difficult to do. Inclusionary treatment is a complex application in practice.

Mason (1998; 2006) refers to natural endowments which are taken to mean the inherent physical and psychological makeup of an individual, such as genetic differences. In the sporting context, these circumstances are most difficult to reconcile with each other. For instance, should a non disabled athlete compete with a disabled athlete? Should a male to female transgender athlete be permitted to compete in female competitions? The essence of sport itself is the division of individuals according to their ability. If as a result of their natural circumstances, they are not able to compete at a particular level, then, in order to uphold sporting values, these divisions remain. This is highlighted when we consider the division of men and women in sport. These differences are out of an individual’s control for the most part, and cannot be neutralised. Sporting inclusion advocates for the mitigation of these differences when athletes are qualified to compete in a particular sport by meeting the appropriate selection criteria for a particular sport.

Sporting inclusion is not suggesting that “all groups of people should be represented equally in all sports, but that participatory parity should be the norm” (Fraser, 2001; Elling and Claringbould, 2005 p. 511). The term participatory parity can “justify claims for recognition as normatively binding on all who agree to abide by fair terms of interaction under conditions of value pluralism” (Fraser, 2001 p. 27).

Summary

This chapter has introduced the key definitions of sporting inclusion and sporting exclusion. These terms are built around ensuring that the essence of sport, which includes differentiation upon the basis of sex, gender, disability and race, is balanced against the rights of the athlete to be included in sport where they are qualified to do so and where it is appropriate. These definitions highlight the unique nature of competitive sport and the different ways in which inclusion and exclusion operate within sporting space. Consistent with the literature is the identification of both processes operating on a scale from reasonable to unreasonable, overt to covert.

Sporting exclusion is distinct from social exclusion because it is a concept focused on physical and non physical differences related to sex, gender, disability and race. Sporting exclusion can be reasonable at times to protect the essence of sport, through the imposition of exclusionary rules that seek to match ability, preserve competition and ensure safety. Conversely, it can be unreasonable when these rules are not related to sporting objectives and instead serve to uphold traditional norms and values that can potentially conflict with equality legislation.

The sporting culture can also lead to the covert exclusion of athletes where aspects of the traditional structure and culture of sport has come to limit the involvement of minority groups such as women, intersex, transgender, disabled and particular racial groups. This chapter has revealed that a sport Doxa exists within competitive sport, which sometimes makes it difficult to accurately establish inclusionary and exclusionary practices.

The principles of sporting inclusion are concerned with the athlete achieving an equality of opportunity to access and try out for sport where they are qualified to do so. They are qualified when they meet the appropriate selection criteria and comply with the rules of a sport in question. No other conditions for participation based upon their individual or socio-cultural differences should be placed upon an athlete. Participation in sport should be concerned with ability of the individual rather than external factors based on difference. These definitions will be used in Parts Two and Three to assess the balance between sport specific inclusion and exclusion. Whilst it is quite simple to conceptually describe these terms, this may be less so in practice.

Chapter 4: The Regulation of Inclusion and Exclusion

So far this thesis has examined the sociological meanings of inclusion and exclusion, their relationship and their relevance and application to sport. This chapter aims to take matters a step further by critically examining key measures specifically designed to address inclusion and exclusion in sport as well as the sport specific impact of measures designed to address inclusion and exclusion more generally. These key measures include policy, law and sport regulation.

The chapter will also set these measures against a background of distinct theoretical approaches that can be adapted to regulation in general and, more specifically, the regulation of equality and sport. In doing so, discussion will centre around “mapping law” in order to better understand “what is involved in depicting law in the world as a whole, or single legal orders, or specific legal phenomena. This may be interpreted as one way of rephrasing the central question of tradition jurisprudence: what is law” (Twining, 2000 p. 136; de Sousa Santos, 2002 p. 417)?

The relationship between sport and the law is well documented by experts in the field of sports law particularly (Gardiner *et al*, 2011). Sports governing bodies have a general tendency to regard the involvement of the law as a potential threat to the special essence of sport. Instead they favour internal sports regulation, using a complex network of normative rules such as the rules of the game, administrative rules, unwritten customs, values and cultures that influence the rules of the sport and codes of ethics (Gardiner *et al*, 2012 p. 73). This form of rule making and rules of conduct are not legally binding but have practical effects (Harlow and Rawlings, 2009 p. 192). This emphasis on autonomy has found considerable support in the growing discourse surrounding the regulation of sport as we shall see.

There is an argument, however, that this emphasis on autonomy fails to give sufficient attention to the paramount need to ensure robust protection of the important interests that are often at stake. Foster hints at one dimension of this issue when he states that there is a need to protect the “non commercial values of sport at a time when international governing bodies increasingly appear to act as businesses” (Foster, 2002). However, the interests at stake are not just those of sport but those of society as a whole. What these interests are the extent to which they are compatible and what to do in the event of them conflicting are all highly contested issues. Nonetheless, it is

normatively accepted that some societal values or at least ideals are so important that they ought to be protected absolutely no matter how one construes their relationship with sporting values.

For example, it is fair to suggest that all appropriate measures should be taken to ensure that all human beings are protected as of equal value. This supports the idea that a general presumption in favour of inclusion should trump considerations of the autonomy of sports regulation where this conflicts. More generally, it may be argued that the heavy emphasis that discourse has placed on autonomy has somewhat blinded it to the potential for the law to act in a complementary manner to regulation within sport to provide a coherent balance of interests.

However, the application of law to sport in this area is complex and multifaceted. In certain instances the creation, interpretation and use of law exhibits a lack of appropriate sensitivity to the “essence” of sport. In *Dr Renee Richards v United States Tennis Association* 93 Misc.2d 713, 400 NYS 2d 267 (see Chapter 7), the court did not address the relevance of performance advantage in sport when determining whether a transgender individual was eligible to compete.

At other times it is uncritical of the essence or even mere normative culture of sport where this questionably conflicts with broader societal norms or at least what one might consider value ideals. In the case of *R v Brown* [1993] 2 ALL ER 75 it was expressed that participants of sadomasochistic homosexual activity may have been exempt from criminal liability if their actions has been deemed as properly conducted games or sports such as boxing.

However, equally in many instances it is instrumental in defending important values. Chapter 6 explores a number of US decisions in which the courts protect the fundamental right of girls to compete in male labelled sports and with boys (*Force by Force v. Pierce City R-VI School District*, 570 F. Supp. 1020 (S.W. Mo, 1983); *Hoover v Meiklejohn* 430 F. Supp 164 (D Colo 1977). The role of the law is irreplaceable in some of these instances. Governing bodies on their own cannot, for example, sufficiently sanction the most egregious forms of participant conduct (such as extreme highly damaging gratuitous violence and match fixing). It may also be observed that a philosophy of autonomy can only be taken so far before it impedes appropriate accountability. Some of the equality cases explored in the subsequent chapter illustrate this very point.

Policy Measures

Persistent inequalities and patterns of social exclusion amongst minority groups are being addressed through the enactment of legislation and implementation of government policies that seek to protect those who are marginalised because of their differences. These political strategies and agendas seek to achieve and promote social inclusion. In Britain, social inclusion became significant within social policy following the election of the Labour government in May 1997 (Thomas and Smith, 2009 p. 58). A Social Exclusion Unit (SEU) was created to explore how to achieve inclusion through cross departmental strategies that would lead to a more comprehensive policy across departments and organisations (Houlihan and White, 2002 p. 84). The SEU published a report in September 1998 which raised the need for a National Strategy for Neighbourhood Renewal (SEU, 1998). The report proposed that 18 cross-cutting Policy Action Teams (PAT) should be set up to achieve social inclusion and renew neighbourhoods and communities that experienced exclusion. Of these, PAT 10 proposed how arts and sport could contribute to greater social inclusion. In 2001 the PAT Audit reported that PAT 10 had established a Department for Culture, Media and Sport Social Inclusion Advisory Group and were pursuing long-term research into using sport to encourage better health, more employment, less crime and better educational qualifications (SEU, 2001 p. 130). The report identified that social exclusion agendas were firmly embedded within policies for sport and that PAT 10 were focused on attacking social exclusion by embedding sport and culture within the wider framework of Government policies (SEU, 2001 p. 131). It is suggested that, alongside the English National Lottery Strategy in 1998, PAT 10 “provided the foundation for a focus on social inclusion in future sport policy” (Thomas and Smith, 2009 p. 58).

This is further exemplified by the New Labour the commitment to “Sport for All” which was brought to front of sport policy, and the subsequent publication of Game Plan (DCMS, 2002) which is considered to be a significant milestone in sports policy. Game Plan reinforced the promotion and widening of sports participation to assist in social inclusion benefits and it is explained in detail elsewhere (Thomas and Smith, 2009 p. 59). Sports organisations such as Sport England also developed agendas for increasing sports participation to achieve social inclusion.

The general sport agenda was strengthened in 2008 by the government publication of *Playing to Win* (DCMS, 2008). The report marks a critical shift in direction of the policy on sport in the UK because it recognised the intrinsic value of sport and acknowledged the reasons why most people participate. Particular importance was placed upon enabling people to access and benefit from competitive sport (DCMS, 2010 p. 34).

In terms of achieving social inclusion sport is used by governments to assist in the delivery of key community, health, welfare outcomes particularly for minority groups. It is believed that sport and leisure acts as a way of accessing and integrating poorer communities into British society through its contribution to social and community cohesion (Gratton and Henry, 2001 p. 189). The act of participation is a central theme of citizenship (Coalter, 2007 p.8). It has the potential to promote ethical values and ideals such as “sportsmanship.” This refers to the ethical framework and standards of conduct that define the legitimate pursuit of victory in sporting activities. It can also act as a “temporary escape” from the realities of life (Eitzen *in* Coakley and Dunning, 2000 p. 372). Sport is also perceived as a neutral ground in which individuals can compete equally.

In this political context, sport is arguably part of a wider political agenda. In addition, the use of sport in political initiatives demonstrates the “reciprocal and dialectical” relationship that sport and society enjoy (Willis *in* Glaister, 1974 p. 47). In England, the London Olympics in 2012 will see sport driving political and social agendas and attempting to make the country more active and healthy. Inclusion is becoming a priority, with aims to increase sport participation in the UK to two million by 2012 (Maxwell, 2008 p.16-18). Sport participation objectives in the UK are particularly focused on child mobility and school sport activity as their initial building block to increase participation. It is believed that sport participation should be “attractive to young children, women, and the older generation and disabled participants, who should all have the chance to experience its power” (Per Gerry Suttcliffe *in* Maxwell, 2008 p. 18). Public sporting figures such as Dame Kelly Holmes have begun to play their part in this inclusionary agenda through the introduction of schemes and events that promote fitness and health for everyone. More broadly, physical activity is increasingly becoming a priority for the World Health Organisation (WHO) and the European Union (EU) (Parrish and Miettinen, 2008 p. 257).

When sport is used in this way it is often compared to a “restless battlefield” in which political and ideological conflicts are being fought (Meier, 1985 p. 67). A good example of this is the anti-

apartheid movement in South Africa (Hargreaves, 2000). In 1977, the Commonwealth leaders signed the Gleneagles Agreement on Sporting Contracts with South Africa and in 1985, the International Convention against Apartheid in Sport, agreeing that no country played South Africa in any major sport (Donnelly and Kidd, 2006). This proved to be a significant step towards ending apartheid and demonstrates the reciprocity between sport and society.

The perception of sport as a solution to social concerns is considered to be part of a wider “functionalist perspective” which believes that institutions, such as sport, have a particular function in society (Elling, De Knop and Knoppers, 2003 p. 415). Sport is considered to be an ideal institution for enhancing the inclusion of minority groups. As a consequence, social inclusion and access to sport within this context, is often considered to be a human right which we shall explore below. However, this is contested on some level for the “assumption of the potential for enhancing social integration through sport is predicated on the perception that sport is accessible and open to everyone who wishes to participate and that all participants, regardless of their social group, play under the same rules and structure” (Elling, De Knop and Knoppers, 2003 p. 419). The broad use of the term sport therefore becomes problematic here since the social integrative meaning and function of sport is dependent upon the social group in question, the level of sport, the type of sport and the specific dimension of integration whether this be structural or socio-cultural.

When discussing sport in the context of social inclusion and social exclusion it is presumed that it is being referred to at a recreational level which is more likely to encourage positive cohesion. However, it is strongly contented that these are presumed outcomes of sport participation that are based upon its “mythopoeic” status (Coalter, 2007 p. 9). These presumptions are a mixture of “belief and theory, professional and personal repertoires, political and organizational self interest...” (Coalter, 2007 p. 22). Whilst sport can be all of the things that governmental policies represent it as, at times this image of sport is distorted and in reality, sport often produces negative outcomes that relate to access, behaviour and attitude. Society has undergone the process of “sportification” whereby sporting events have become focal spectacles and a very lucrative part of industry (Collins, 2004a p. 728). Particularly at a competitive level, there are many undesirable consequences that stem from such influential power. For instance, sport, as an act of consumption is arguably limited only to those who can afford it. There appear many imbalances when it comes to sport access and this is said to be closely linked to social exclusion.

The ability of sport to develop favourable attributes such as sportsmanship is contradicted by countless examples of sport promoting undesirable attributes in people such as match fixing, doping, violence on and off the field, behaviour of role models in sport and discriminatory practices. Particularly at a competitive level, the stakes of winning can lead to immoral behaviour such as cheating.

In order to balance these two perceptions of sport, it is fair to say that sport can promote social inclusion but mostly at a recreational level. Social inclusion is largely concerned with overcoming socio-economic differences between individuals or groups through activities such as recreational sport. Once sport becomes competitive the social inclusion agenda shifts and instead inclusion and exclusion begin to take on different personas as explored in Chapter 3.

Law and Equality Measures

In everyday language, the idea of inclusion can be said to be a liberalistic concept, in which priority is given to the “right” of an individual. A right is considered to be a “moral or legal entitlement that others are duty bound to respect” (Donnelly and Kidd, 2006). In this context, social groups or collective bodies should give due consideration and respect to individual rights (Heywood, 2003 p. 30). In order to overcome disproportionate treatment on the basis of human differences, the law incorporates and embraces the idea that people should be treated equally and enjoy fundamental rights. A wide body of liberal theory explores the philosophy of law in greater detail (Dworkin, 2009).

The level or type of equality that should be protected and encouraged by the law is surrounded by philosophical debate. For instance, formal equality, or “symmetrical equality” (Fenwick, 1998 p. 507) is based upon the principle that like should be treated as like to uphold values of formal justice and individualism (Connolly, 2011 p. 5). This has been criticised on the basis that it serves to preserve the status quo within society, rather than taking into account the social contexts within which individuals and groups operate.

Substantive equality then, is a development or revision of this model. It is premised on the idea of equality of opportunity and equality of results and gives more specific meaning to equality by

recognising the social context of imbalances, differences of situations between individuals and groups, differences of market situations, and historical differences (Fenwick, 1998 p. 508). Substantive equality places responsibility upon the dominant group to bear the cost of discriminatory practices.

The principle of equality is found within the rule of law. This is a phrase commonly given to special virtues of a legal system (Finnis, 2011 p. 270). Whilst the rule of law is a globally accepted concept, definitions vary according to culture, geography and values (Heckman, Nelson and Cabatingan, 2010). In countries with no written constitution it can serve as a constraint upon governmental power. In countries where a constitution is present, the rule of law provides enabling features to the operation of that legal system.

The rule of law assists in the promotion of fair decisions and restraining the abuse of power. It contains a number of values such as legality, certainty, accountability, efficiency, due process and access to justice. The central tenets of the rule of law at least include that law must be transparent, clear, stable and applied to everyone according to its terms, and courts should be independent (Tamanaha *in* Palombella and Walker, 2009 p. 3). Finnis (2011 p. 270) adds that rules should be prospective, not retroactive, and reasonable to comply with, and rules should be promulgated. In addition, those who have the authority to create and apply the rules do so in an official capacity, are accountable for their compliance to the rules and administer the law consistently. Dicey (1959 p. 187) interpreted the British rule of law to include three concepts;

1. No man is above the law (absence of arbitrary power on part of the government)
2. Equality before the law (equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts)
3. The principles of the constitution are the consequence of the rights of individuals as defined and enforced by the courts (the British constitution is the result of the ordinary law of the land)

Given the importance of equality as a foundation of law, it is considered a protectable legal right. The principles of equality and non-discrimination form part of the emphasis on human dignity that underpins the entire structure of modern human rights regimes. Human rights refer to “those inalienable rights that all individuals possess according to natural law, and which must not be

removed through any kind of social exchange” (McArdle and Giulianotti, 2006 p. 2). Fundamental rights (human rights or natural rights) refer to rights which human beings hold, prior to their recognition by a legal system, or despite their denial by a legal system (Jackson and Leopold, 2001 p. 13). This supports the unqualified concept of inclusion which is concerned with moving towards a more “humanistic and holistic society” (Wolff, 2009). It is suggested that sport embodies many fundamental human rights including social rights, health and safety rights, employment rights, justice rights, environmental rights, financial rights, the right to movement, the right to rest and leisure, freedom of expression and freedom from discrimination (Roy, 2007; Hums, Wolff and Morris, 2009). The rights of individuals are laid down in equality legislation.

The sources of human rights law and mechanisms for protection are commonly classified or mapped as international (universal non- discrimination principles introduced by the United Nations (UN) and developed through a regime of subsequent conventions, declarations and supporting instruments), regional (Europe, Central and South America, Africa and Asia who operate varying human rights regimes) and domestic (the interpretation of international and regional principles by individual governments and the enactment of human rights legislation by the law makers of each country), since these levels broadly capture the diverse network and operation of equality law across the world (De Schutter, 2010).

International Level

International law is distinct from other national legal systems because there is an absence of sovereign authority that enforces decisions (Rehman, 2010 p. 18). It possesses *sui generis* characteristics because instead, it places obligations upon States which binds them to respect the principles of the law and assume certain duties in order to fulfil the human rights provisions.

The Charter of the United Nations was adopted in 1945 and expressed the protection of human rights and fundamental freedoms as its key organisational objectives. The global human rights movement was strengthened by the adoption of the Universal Declaration of Human Rights 1948 (UDHR) by the UN General Assembly. It is considered to be the foundation of international human rights law because it was the first instrument that set out internationally accepted basic civil, political, economic, social and cultural rights for all human beings. It serves as a framework for the enactment of a wide body of legally enforceable global human rights instruments that have translated the concepts of the document into law through the formation of treaties,

principles, agreements or conventions at a domestic, regional and international level of governance.

The rights covered by the UDHR represent a common standard of achievement for encouraging and promoting respect of particular rights and freedoms that all people should be able to enjoy. The Declaration consists of 30 Articles covering a range of civil, political, economic, social and cultural rights which apply universally to every person “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Article 2 UDHR). Article 1 UDHR confirms that “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. The central principles of the UDHR include universality, interdependence and indivisibility, equality and non-discrimination.

At the time of its creation the UDHR was not intended to be a legally binding document. However, the preamble to the document clearly emphasizes the need to protect human rights through the rule of law. An obvious obligation is to protect individuals and groups from human right breaches and to refrain from interfering in the enjoyment of human rights. Positive actions must be taken to facilitate the enjoyment of basic human rights (United Nations, 2011).

Some of the provisions contained in the instrument have been customarily included into international law and general principles of law. For instance, international courts have referred to and applied the UDHR and domestic courts have relied on the provisions in a number of human rights cases (Baderin and Ssenyonjo, 2010 p. 9).

The objective of using the UDHR as a springboard to treaties was achieved by the introduction of the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which entered into force in 1976. As a three, these documents represent the International Bill of Rights. These have further developed the rights of the UDHR and have made them legally enforceable on the States who have ratified them. The body of provisions which stem from the UDHR promotes the argument that a “transnational *jus commune* of human rights” has been built as a result of the cross references between international, regional and domestic courts who interpret the different provisions which share a common language with the UDHR (De Schutter, 2010 p. 31)

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) is a special branch of the UN and promotes dialogue between civilisations, cultures and people to achieve global visions of sustainable development encompassing observance of human rights, mutual respect and the alleviation of poverty (UNESCO, 2012). They conduct significant work in the “fight against discrimination” and also focus on issues surrounding physical education and sport (UNESCO, 2012).

Many of the human rights articles contain limitation clauses which indicate that a right is not absolute and should be adapted to meet a states interest in protecting public safety, order, health or morals, or national security. Human rights and their exercise are sometimes subject to the “common good” (Finnis, 2011 p. 218) as Article 29 (2) UDHR may be interpreted to mean;

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

Limitations serve to balance inclusion and exclusion in society and ensure that the application of human rights is reasonable and practicable. The application of human rights legislation to sport is rather uncertain at this level because specific references to sport are absent from the provisions. For instance, Article 24 UDHR recognises that everyone has the right to rest and leisure. This does not necessarily encompass competitive sport. Article 27(1) states that “everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancements and its benefits.” Whilst this may be interpreted to apply to sport it is implying recreational rather than competitive sport.

The UDHR has influenced the establishment of a range of human rights instruments in the areas of sex, gender, disability and race. A number of ancillary international instruments support the International Bill of Rights and provide specific protection for minority groups such as women, children, persons with disabilities and racial populations. For instance, the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW), International Convention on the Elimination of All Forms of Racial Discrimination 1969 (ICERD) and the Convention on the Rights of Persons with Disabilities 2009 (CRPD).

The UN has demonstrated a strong commitment to the promotion of women and their empowerment and has become leading advocates for women and equality through its main legislative bodies (Kluka, 2008 p. 25). CEDAW 1979 was adopted to establish an international bill of rights for women as well as an agenda for action by countries to guarantee equality for men and women. Article 10 (g) refers to sport and reads;

“States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women...[g] the same opportunities to participate actively in sports and physical education”.

States who have accepted this Convention are legally bound to undertake a series of measures to eliminate discrimination against women in all forms. They are also committed to submit national reports on measures that they are taken to comply with their treaty obligations. Conventions are binding law and there will be a process of enforcement for those who violate the terms of the Convention.

Supplementing this, the Brighton Declaration on Women and Sport 1994 aims to address how to accelerate the process of change that would redress the imbalances women face in their participation and involvement in sport. The Brighton Declaration “enlarged and coordinated the global debate on women and sport” (Kluka, 2008 p. 50). However, declarations are moral commitments made by signatories, they are not binding law.

The Yogyakarta Principles 2006 are a set of principles on the application of international human rights law in specific relation to sexual orientation and gender identity. The principles aim to ensure that binding international legal standards apply to sex and gender. They affirm the primary obligation of States to implement human rights and provide guidance for each principle on how to achieve this. No specific reference is made to sport but Principle 25 confirms that every citizen has the right to “have equal access to all level of public service and employment in public functions...without discrimination on the basis of sexual orientation or gender identity.” Principle 26 supports the right to cultural participation as introduced in Article 27(1) UDHR.

The CRPD 2006 was the first to specifically protect the rights of persons with disabilities. It aims to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity (Article 1). Section 30(5) specifically protects the rights of people with disabilities to actively participate in sport, recreation, play and leisure;

“With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:

(a) To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;

(b) To ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;

(c) To ensure that persons with disabilities have access to sporting, recreational and tourism venues;

(d) To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;

(e) To ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities.”

State parties are obliged to ensure and promote these freedoms by adopting appropriate measures for the implementation of the rights, including legislation that seeks to modify or abolish existing law, regulations, customs and practices which constitute disability discrimination. Parties are obliged to refrain from engaging in any act or practice that is inconsistent with the Convention and they should ensure that public authorities and institutions conform. This also extends to private enterprises.

In 1966 the ICERD was adopted by the UN to reaffirm that discrimination between human beings on the grounds of race, colour or ethnic origin is inconsistent with the ideals of any human

society. The Convention aims to encourage States to adopt all necessary measures for elimination of racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination. Although no specific reference to sport is made, Article 5(e) seeks to protect the enjoyment of economic, social and cultural rights, with specific reference to the rights to work and the right to equal participation in cultural activities.

Regional Level

Regional structures for the protection of human rights exist within Europe, Central and South America and Africa. Regional systems have assisted in the development and realisation of human rights at a grassroots level. They seek to provide a middle ground between the state and domestic institutions, and the international system which is unable to deal with individual victims of human rights breaches (for a comprehensive overview of regional human rights, see Shelton, 2008). At a regional level the shared legal, political, socio-cultural, economic traditions are more accurately captured. It therefore fills a gap in the global system of human rights and offers a better balance.

Europe was first to gain a comprehensive regional treaty in the form of the European Convention on Human Rights 1950 (ECHR). The effect of the Convention has been underpinned by the fact that members of the Council of Europe are required to be signatories of it and to abide by its rights and protective provisions which are ultimately guarded by The European Court of Human Rights (ECtHR), to whom individuals may take complaints about violations which have not been domestically remedied. The Statute of the Council of Europe was agreed in 1949 and subjected members to accept the general principles of the rule of law and the application of human rights and fundamental freedoms within its jurisdictions. It comprises 47 countries and seeks to develop common and democratic human rights principles throughout Europe (Council of Europe, 2012a).

Substantive Convention rights that are relevant in the context of elite sports participation include the right to private life (Article 8) and the right to possessions (Article 1 of Protocol 1). Article 14 ECHR guarantees freedom from discrimination and can be used in conjunction with such substantive rights to turn what would not normally be a violation of rights into one in cases where unjustifiable discrimination of any kind has occurred;

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Whilst some of the rights are protected absolutely, the State is able to restrict most in certain circumstances. For example, many of the Articles refer to the possibility of the State being able to make such restriction as is “in accordance with law” or “prescribed by law” provided that this restriction is “necessary in a democratic society” for the protection of one of the aims laid out in the Article concerned. Thus, for example, the text of Article 8(2) ECHR refers to allowing the state to make such restrictions on the rights laid out in Article 8(1) ECHR as are “necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Applying the necessity test is very much a case of analysing proportionality (Kumm *in* Pavlakos, 2007 p. 132). The doctrine of proportionality demands that the restriction must not go beyond what is necessary. It is a case of balancing to what extent a limitation on one’s personal rights cross the line from being a necessary action in pursuit of a legitimate aim, to that of a measure which disproportionately infringes one’s right. As the Court highlighted in *Soering v UK* A 161 (1989); 11 EHRR 439, inherent within the Convention is the “search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights” (Case Para. 89). Member States are afforded a margin of appreciation when interpreting that balance since the role of the Convention in protecting human rights, is considered to be “subsidiary” to the roles of national legal systems (Fenwick, 2007 p. 36; Harris *et al*, 2009 p. 350). However, this margin will be relatively small in certain areas.

The ECtHR have not been absolutely clear on the definition of proportionality which is attributed to the “cultural variation” given to the states by the margin of appreciation (Alexy, 2002 p. xxxii). It has been recommended elsewhere that the proportionality principle is used as a “yardstick” for determining whether national authorities may have “overstepped their margin of appreciation” (Arai-Takahashi, 2002 p. 172). Proportionality also has an importance beyond the ECHR to the

more general understanding of the limit to protections of constitutionally guaranteed rights (Kumm *in* Pavlakos, 2007 p. 132).

Complementing the ECHR is the Council of Europe European Social Charter (ESC) adopted in 1961 and “revitalised” in 1996 (De Schutter, 2010 p. 22). It is a tool which guarantees social and economic rights and establishes supervisory mechanisms guaranteeing their respect by the State parties. The European Committee of Social Rights guards the ESC and monitors how compliant countries have been (Council of Europe, 2012b).

In the European Union, human rights provisions were previously absent from Community treaties. However, the European Court of Justice (ECJ) has since elevated the status of the ECHR which is reflected further by Article 6 of the Treaty of Lisbon 2009 (TEU) (Foster, 2011 p. 123). Article 6(2) and 6(3) TEU states that the EU shall accede to the ECHR and that the general principles of the ECHR shall constitute general principles of EU law. Article 6(1) TEU gives full legal status to the Charter of Fundamental Rights of the EU. Established in 2000, this is first formal EU document listing civil, political, economic and social rights to which EU citizens should be entitled to. It also contains additional rights linked to the citizenship of the EU and the economic freedoms receive protection under the European treaties. The Charter enhances the visibility of these rights within the EU and has played a significant part in transforming the culture and practice of the European institutions (De Schutter, 2010 p. 26). Equality law principles are also recognised in Article 2 and 8 TEU.

The principle of non-discrimination is broadly recognised by Article 19 of the Treaty of the Functioning of the European Union (TFEU) which states that the Council may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. A number of Articles specifically cater for the prohibition of discrimination on the grounds of nationality (Article 18 TFEU), sex (Article 157 TFEU) and free movement of workers (Article 45 (2) TFEU). This is supported by a range of secondary legislation such as the Equal Treatment Directive 2006/54, The Framework Employment Directive 2000/78, Equal Treatment between Men and Women in Access to and the Supply of Goods and Services Directive 2004/113 and the Race Equality Directive 2000/43 (Foster, 2011 p. 397).

In other regions, the Organisation of American States (OAS) adopted two similar human rights provisions, The American Declaration of the Rights and Duties of Man (1948) and the American Convention on Human Rights (1970). The Inter American Commission on Human Rights has a quasi judicial function and is the first to hear the cases concerning human rights violations. Cases can then be referred to the Inter American Court of Human Rights for a legally binding judgement.

In Africa, the entry into force of the African Charter on Human and Peoples Rights (1986) led to the establishment of the African Commission on Human and Peoples Rights. The Charter includes in its name the protection of rights of groups as well as individuals. Article 60 explicitly requires bodies to draw inspiration from the UDHR when interpreting the Charter. However, this regime has been criticised for lacking effective intervention and protection mechanisms (Steiner, Alston and Goodman, 2007 p. 1066).

Arab and Asian states vary in their political, cultural and religious ideologies which have resulted in the absence of a developed system of human rights. Generally speaking, human rights are not a universally accepted concept. The UDHR has been criticised as possessing a “liberal bias” as it includes rights that cannot apply to everyone. In addition, it is suggested that it does not take into consideration, the variances of governance in each society’s culture (Parekh, 2006 p.134-135). Of courses, no legal system offering protection, works perfectly. Neither does it operate imperfectly at the same level for everyone (Abrams, Marques and Hogg, 2004 p.213). Although underdeveloped, there is evidence of trends towards formal human rights structures in these regions (Baderin and Ssenyonjo, 2010 p. 12).

At the regional level, little human rights case law relating to sport exists. In the EU one case is currently worth brief consideration, which involved two Belgian tennis players Yanina Wickmayer and Xavier Malisse who in 2009 were suspended from competition for one year for failing to meet the whereabouts filing requirements on three occasions, in breach of Article 2.4 of the WADA Code. This was imposed by the Doping Tribunal of Belgium and based upon national legislation which incorporated the WADA Code.

This ban was then suspended by the national court which the national anti-doping body appealed. At the same time the athletes filed an appeal to CAS against the decision to ban them (CAS,

2009). However, CAS ruled that it would not hear the case until a decision was made in the Belgian courts about their position on the ban of the players (Anon, 2009a).

Beyond this, the athletes challenged the legality of the whereabouts rule at the ECtHR and the European Commission (Anon, 2009b). The whereabouts rules have an impact upon personal privacy yet are considered to be ethically fair in sport in order to ensure safe competition (Kayser, Mauron and Miah, 2007 p. 2). Had the athletes been successful it could have had significant effects on the enforceability of human rights legislation in sport. The challenge was to be brought under Article 8 ECHR which acknowledges the right to respect for private life. The case was however withdrawn on procedural grounds, leaving the relationship between sport and human rights at this level under developed.

Many experts in the field have explored the tensions involved in violating personal privacy for the protection of sport (Kayser, Mauron and Miah, 2007). In fact this does lead to a broader question concern which is to what extent the protection of the essence of sport should “trump” fundamental rights in sport, or even if rights should be viewed in this way. This is reflective of the wider debate on rights in general and to what extent individual and group or policy interests can be balanced proportionately (Dworkin, 2009; Kumm *in* Pavlakos, 2007 p. 131).

Domestic Level

The international system of human rights tends to ensure that domestic states fulfil their obligations by “observing national law (constitutional or statutory) that is consistent with the international norms, or making the international norms themselves part of the national legal and political order” (Steiner, Alston and Goodman, 2007 p. 1087). An example of the domestic internalisation of human rights treaties that seek to protect human rights is the UK Human Rights Act (HRA) which recognized the rights of the ECHR as an integral part of domestic law. The HRA gives effect to the ECHR by imposing an obligation on public authorities to comply with Convention rights. This is not necessarily the case in all domestic states and a number of factors influence how effectively international human rights are absorbed such as the absence of a human rights culture.

The UK courts have also accepted the principle of proportionality when interpreting Convention rights but not without some confusion as to how to apply it (see Hickman, 2010 p. 173; Alexy,

2002 p. xxxiv). A three stage test was introduced in *de Freitas v Permanent Secretary of Ministry of Agriculture* [1999] 1 AC 69 which is consistent with the regional approach of ensuring that the restriction or objective pursues a legitimate aim, the measure designed to meet the objective is rationally connected to it and the restriction does not go beyond what is necessary. In *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, Lord Steyn observed that “context is everything” when analysing Convention rights and whilst this does not mean that there has been a shift to a “merits review,” the proportionality test provides structure and precision to judicial review and also allows for an engagement with the substance of the decision (Case Para. 28; Hickman, 2010 p. 174).

The accountability of sports bodies under the UK HRA has been pursued and explored by scholars and by the courts (Boyes, 2000). Section 6(1) HRA confirms that it is “unlawful for a public authority to act in a way which is incompatible with a Convention right.” Section 6(3)(b) defines a public authority to include a court or tribunal and “any person certain of whose functions are function of a public nature.” If the nature of the act is private then it is likely that this will not fall under the HRA. The compatibility of sport with the HRA has been debated because typically, Convention rights may be relied upon in litigation between private parties, but cannot be the basis for a cause of action (Steiner, Alston and Goodman, 2007 p. 1105). However, sports bodies may be considered to be quasi or hybrid public authorities, that is, private bodies that exercise public functions, as the UK courts have highlighted in a number of cases involving the Jockey Club and the FA (Boyes, 2000). In *R. v Disciplinary Committee of the Jockey Club Ex p. Aga Khan* [1993] 1 WLR 909 (CA (Civ Div)), the Court of Appeal accepted that the Jockey Club “effectively regulates a significant national activity, exercising powers which affect the public and are exercised in the interest of the public” (Case p. 11). Despite the logical approach to this line of inquiry, Stanley Burton J in *Mullins* rejected the proposition that a sports body constituted a public authority under the HRA. The court adopted a very narrow interpretation of s 6(3)(b) which has been criticised (Gardiner *et al*, 2011 p. 136). Few cases have concerned challenges to the discriminatory effects of eligibility rules or selection criteria. The relationship between the law and sport will be explored in more detail below.

Domestic anti discrimination laws are commonly organised by sex, gender, disability and race in countries such as Australia (federal and state laws) and previously in the UK. The enactment of the UK Equality Act 2010 (EA) consolidates and repeals previous legislation in specific areas

including the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995 and the Gender Recognition Act 2004. The protected characteristics under the EA include disability, gender reassignment, race, sex, age, marriage and civil partnership, pregnancy and maternity, religion or belief, sexual orientation. The provisions of the EA are largely the same as previous legislation and include direct and indirect discrimination, harassment and victimisation. In addition, the Act recognises the existence of combined discrimination for those with dual characteristics under s. 14 EA. This is significant to this thesis because the EA appreciates that an individual may be discriminated against because of more than one protected characteristic which is referred to as “intersectionality” (Reaves, 2001 p. 9; Schiek and Lawson, 2011 generally). However, the UK EA contains an exemption clause for sporting activities. Section 195 reads;

(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.

This is consistent with some of the exemption provisions under the Australian anti discrimination laws contained in the Sex Discrimination Act 1984 (s. 42(1)) and the Equal Opportunities Act 1995 (s. 66(1)). The exemption attempts to balance the rights of the individual against the essence of sport.

In the USA the Civil Rights Act 1964 was a landmark piece of legislation that outlawed racial segregation for African Americans. It also protects discrimination on the basis of sex. The Americans with Disabilities Act (ADA) 1990 is an extension of the Federal Rehabilitation Act 1973 into non federal public and private sectors. Their mandate is equal access and inclusion for individuals with disabilities. The ADA has three titles; Title I deals with employment discrimination, Title II prohibits discrimination by public entities, so possibly schools and colleges, Title III prohibits discrimination in public facilities, in places of public accommodation, and is most relevant to the discussion on sport. This prohibition of discrimination requires owners and operators of facilities of public accommodation, to “make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities” (s. 42). The US ADA adopts a different approach to the UK EA and has advanced the social rights of participation in sport and recreation, particularly in the context of opening up public accommodations to meaningful participation (Lord and Stein, 2009 p. 278). It would appear that Congress intended to protect athletes with disability from discrimination since athletes at all levels from recreational to professional level are within the regulation of the legislation (Stone, 2005 p. 381). The ADA is liberally construed to accomplish its purpose of deconstructing

discriminatory barriers to allow disabled individuals with equal access to society (Liguori, 2003 p. 217).

The passing by Congress of the legislation known as section 901 of Title IX of the Education Amendments Act 1972 prohibits sex discrimination in educational institutions. The provision withdraws federal funding from educational institutions if they are found to violate Title IX. By tackling discrimination in education and by enabling boys and girls to compete together and equally in all sports, it has served as a vehicle for women to pursue an equal standing and oppose institutionalized sexism. This law is considered to be the centre piece of US legislation relating to women in sport and equal opportunities.

Sport Regulation Measures

Sports law, that is, the relationship between law and sport, is an area of distinct debate and interest. Closely connected to this are questions centred on the regulation of sport, “why regulate sport? Who is to be regulated? And what is the best strategy for regulation?” (Foster in Greenfield and Osborn, 2000 p. 268) At the one end exists the interventionist model which is based upon the idea that “sport is a public function that the state has the right and the responsibility to deliver” through the enforcement of legislation (Lewis and Taylor, 2008 p. 5). Edward Grayson argues that the “rule of law in sport is as essential for civilisation as the rule of law in society generally. Without it generally anarchy reigns. Without it in sport, chaos exists” (Grayson in Gardiner *et al*, 2012 p. 70). This suggests that the rule of law provides guidance, instruction and order to the field of sport. The law has increasingly played a role in sporting activity and a juridification process is visible in this area (Gardiner *et al*, 2012 p. 73). This is evidenced by the fact that sport as a social activity has been heavily influenced by legal norms since “law is concerned with relations between agents and persons (human, legal, unincorporated and otherwise) at a variety of levels, not just relations within a single nation state or society” (Twining, 2000 p. 139). This has brought with it range of legal, quasi-legal and non-legal regulation and governance which has prompted discussion around the appropriate level of legal intervention in sport (Gardiner *et al*, 2012 p. 76).

In contrast to this, the model of non-intervention and autonomy is one where sport is considered to be a self-regulating private sphere which is immune from government responsibility (Harlow and Rawlings, 2011 p. 235; 239). The sophistication of the internal regulation of sport has begun to blur the boundaries between formal law and normative rules of sport, leading to the suggestion in the literature that a distinct discipline of “sports law” has emerged (Davis *in* Siekmann and Soek, 2012 p. 1).

The models of regulation that are offered in the literature vary across a spectrum and their justifications for autonomy and self-regulation in sport are diverse. In addition each theorist adopts different typologies to describe levels of regulation within sport. For instance, James (2010 p. 5) locates sports law through 5 sources and through the jurisprudence that he contends each is developing;

1. Domestic sports law: refers to the private internal systems of regulation within a national governing body (NGB) which are developing its own set of rules and legal processes.
2. National sports law: relates to the application of law to sport by government and the courts. Sport and the actions of sports governing bodies are regulated through varying models of regulation by particular states.
3. EU sports law: refers to the body of law that is produced by the institutions of the EU and also through the dialogue contained in decisions of the European Court of Justice (ECJ) about the sport and law relationship.
4. Global sports law: encompasses the private systems of regulation by international sports federations (ISFs) that operate on a global sport scale and are developing a *lex sportiva*.
5. International sports law: refers to the general principles of law which are applied to sport.

James broadly categorises these further into 2 groups, with self-regulation and the development of a unique system of rules on the one hand (domestic and global sports law), and the application of general legal principles to sport on the other (national, EU and international sports law).

Given the increasingly global nature of sports issues, sport is being regulated and controlled by international sports bodies and institutions. James (2010 p. 7) contends that global sports law is a “distinctive and unique site for the creation of new norms that have social and legal force.” It can be described as a “separate legal order that is globally autonomous” (Foster, 2003 p. 2). The establishment of the Court of Arbitration for Sport (CAS) and the World Anti Doping Agency

(WADA) is said to reflect this global unique nature of sport. This view is reflective of Beloff, Kerr and Demetriou (1999 p. 256) since they implicitly refer to this classification of sport regulation as creating a *lex sportiva*. The key characteristic of this Latin term is that it refers to a system of private international agreements between bodies which are not just international but also non-governmental. The key to their proposal is the existence of a body such as CAS which is claimed to be truly international and to be developing a distinct jurisprudence (Beloff, Kerr and Demetriou, 1999 p. 7; Foster 2003 p. 10; Mitten and Opie, 2010 p. 283). James adds to this by highlighting that the jurisprudence of sport tribunals has grown to become sophisticated and technically advanced (James, 2010 p. 6). As a result of this they are much more “court-like” in their operation, acting in accordance with natural justice rules and engaging at all levels with legal principles and processes to prevent any possibility of legal challenges. Furthermore this view argues that the impact has been a more a “sport-sympathetic” approach since the tribunal specialists are ensuring the importance of protecting the “specificity of sport” from the application of the law. Another consequence of this growth is that CAS is hearing a number of applications that would otherwise appear in national and/or EU courts, which James accepts may create tensions between sport tribunals and law courts in future (James, 2010 p. 6, 56).

CAS themselves have labelled their jurisprudence as developing a *lex sportiva* (*Norwegian Olympic Committee and Confederation of Sports & Others v International Olympic Committee* Para. 65). Whilst Beloff uses the phrase “international sports law,” Foster (2003) clarifies that this is a characteristic of global sports law, which is therefore consistent with James’ typology.

It may be misleading however, to suggest that because there are examples of private global bodies such as CAS operating in a manner that is compliant and consistent with legal principles, they therefore possess legal authority which justifies self-regulation. Foster (2003) disagrees with the distinction between global and international sports law and perceives the *lex sportiva* concept of global sports law to be a fictitious and “dangerous smoke screen” which justifies self-regulation and potentially gives ISFs the autonomy to conduct themselves in a manner that is immune from the law (p. 17). He describes it as an overly used and imprecise term which covers a range a multiple meanings (Foster, 2006 p. 2; see also Foster in Siekmann and Soek, 2012 p.241). Erbsen (in Siekmann and Soek, 2012 p. 108) supports this by referring to it as an “illusory label” when describing or justifying CAS jurisprudence. Nafziger (in Siekmann and Soek, 2012 p. 66) warns that “a truly effective body of jurisprudence generated by the CAS

awards, however, will require more development before the emerging *lex sportiva* can become a truly effective regime of authority.” The term appears to have been over-stretched at times which further confuses the distinction between law and regulation in the literature.

Instead, Foster offers clarification and defines the regulation of ISFs as international sports law-legal principles which can be drawn from public international law, in addition to the application of the rule of law principles (Foster, 2006 p. 2). Nafziger also identifies international sports law as principles of “foreign and international legal authority” and as the *jus commune* which has evolved (1999 p. 226). Foster offers his own model of sport regulation to describe levels of legal intervention in ISFs matters (Foster, 2003 p. 16);

1. The rules of the game, or the sporting law, form the essence of sport and have been regarded as unchallengeable by law because they are constitutive.
2. The ethical principles of sport are those which cover the spirit of the game such as fairness, integrity, sportsmanship and character of the game. These are also considered to be immune from the law to some extent because they concern customary norms of a sport which are best determined by experts in the field.
3. Finally the “general principles of the rule of law as expressed by international sports law are implied into the governance of international sport.” Underpinning this entire model is essentially the universal principles of law which cannot be ignored and should be enforced.

In earlier work Foster also presents different models for regulating sport, which he entitles, “Models of the Sports Market” (in Greenfield and Osborn, 2000 p. 268). These models range from a “pure market model” which advocates for a “laissez-faire minimum interference to protect commercial interests,” to the “Socio-Cultural Model” which argues for supervised autonomy with constitutional safeguards in place to protect sports values with due process (p. 27).

Having reviewed some of the key models of sport regulation presented, they tend to be focused upon the autonomy of sports governing bodies and the notion of self-regulation particularly in the context of disciplinary processes and commercial issues. Within these models, due attention is not paid to values concerning inclusion, human rights and equality, as we are concerned with in this thesis. Whilst it is accepted that sport models itself on a scale of more or less autonomy, it is arguably more appropriate to adopt a model of regulation on a case by case basis or using a

context specific approach, since there are certain issues which may arise that override the case for self-regulation- equality and the fundamental rights of athletes being one such area.

Societal values such as these may be captured within the notion of autonomy generally, but they are not encapsulated within James or Foster's sport regulation models. Both are only really centred on the protection of sporting values which is defensible but limited. For instance, based upon the sport specific definitions of inclusion and exclusion, Foster's model implies that if exclusionary rules on the basis of sex, gender, disability and race are located within the rules of the game and/or customary norms of a sport, then they are automatic immune from legal challenge. This is not a sufficient approach for the regulation of inclusion and exclusion because equality and human rights principles should be superior to any other interests when an individual may have been unreasonably excluded on the basis of their sex, gender, disability or race. The subversion of equality by self-regulation would be against the rule of law, since equality is a key element of this principle as discussed above. As Grayson argues, the rule of law is essential in sport, particularly as advocated here, when balancing inclusion and exclusion.

As we shall see in the coming chapters, it would be irresponsible to permit sports governing bodies to entirely self-regulate in areas concerning equality and fundamental rights. In Part Three, Table VIII makes tentative but useful observations of the justifiable, arguable/either way, and unjustifiable case decisions of sports governing bodies and the law in the area of inclusion and exclusion. It reveals that there is a case against the self-regulation of sports governing bodies in this area because of the mixed outcome of internal sport decisions particularly by international sports federations (ISFs). When the law is involved particularly at a domestic level, the correct decision is usually reached by the courts. This suggests that the self-regulation of sports governing bodies can in fact have a detrimental effect on the appropriate balance of inclusion and exclusion. Supporting this, Part Two explores a spectre of court decisions that are adversely influenced by the economic power of ISFs, which has led to questionable decisions in cases concerning inclusion and exclusion (see *Sagen v VANOC*; *Martin v IOC*).

The models presented may also be self destructive by the interchangeable use of the terms autonomy and self regulation. One dimension of autonomy is the freedom of the individual, yet self-regulation in this context refers to the freedom of sports bodies to regulate themselves in a

manner that potentially suppresses individual autonomy. This does not sit well with the objectives of this thesis which is to offer an appropriate balance between inclusion and exclusion.

With regards to the use of terminology, as we have seen, the typologies offered are not universally accepted and tend to vary particularly between global and international. That said Foster's position is more persuasive and clear on the distinction between law and regulation. As he points out, principles of law and legal authority are being applied in a sport specific context. The demarcation between the application of legal principles and the creation of unique sets of rules provided by James is not entirely sufficient. What is being described is sport regulation, that is, non-legal rules and structures which have been informed by legal principles. James's typologies may well be regarded as soft law but they are not strictly speaking "law" because they do not involve powers of the state. The interchangeable use of the words law and regulation has contributed towards unnecessary complexity in the debate about sports law.

Out of the sport specific context, Twining (2000 p. 139) offers another way of characterising law through levels which are geographical. These are global, international, regional, transnational, inter-communal, territorial state, sub-state and non state. De Sousa Santos (2002, p. 426) distinguishes local, national and global as 3 major legal spaces. However, Twining admits that the mapping law process can be complex since law cannot necessarily be neatly categorised. Instead in reality the different scales classifications interact in different ways (De Sousa Santos, 2002 p. 427).

Particularly for the purpose of this thesis, whether there is a distinct body of sports law or whether it is instead the application of general legal principles to sport, is not of great importance, and yet not of no importance either (Beloff, 2005 p. 49; Gardiner *et al*, 2012 p. 85). We are concerned with a slightly different issue which is how inclusion and exclusion can be regulated by sport and the law in a way that protects sporting values whilst at the same time giving due respect to societal values and human rights. The position here is that the law can act in a complementary manner to sport regulation in order to promote these values and provide a balance between inclusion and exclusion.

This discussion will inform Part Three when identifying where and how to regulate inclusion and exclusion and what role the law and sport should play. Whilst there are an increasing number of

classifications offered in the literature (Siekman *in* Siekman and Soek, 2012 p. 366), for the purpose of this chapter, we are concerned not so much with the terminology but with adopting a model that best allows us to identify the sport regulation tools available to address inclusion and exclusion issues and exploring their mechanics and relevance to inclusion and exclusion. To achieve this, the logical way would be to adopt 3 classifications akin to human rights law (also used by Smith, 2011);

1. Domestic sports regulation: internal sport regulation at a domestic and national level is weaved into general legal principles and increasingly underpinned by these. It is suggested that there is a “symbiotic relationship” between domestic and national sports regulation when referring to the challenges to the decision-making processes and procedures of NGB’s (James, 2010 p. 41).
2. EU sports regulation: Although other regions must not be ignored (for literature relating to North American models of sport regulation see Nafziger *in* Gardiner, Parrish and Siekman, 2009 Chapter 3; Parrish and Mietinnen, 2008), it is accepted that more focus might be within the EU because of the sophistication of human rights principles and of sport regulation in that particular region (Boyes, 2012 p. 87; Weatherill *in* Siekman and Soek, 2012 p. 299).
3. International sports regulation: the Foster approach to this level of regulation is favoured here to identify the legal sources applicable to sport and used by sports institutions to regulate and deal with sporting disputes. Whilst the body of sports regulation “possesses its own internal peculiarities and unique rhythms,” its connection to the overall legal framework “should never be neglected” (Weatherill *in* Gardiner, Parrish and Siekman, 2009 p. 83).

Domestic Sports Regulation

At this level of regulation there are clear tensions surrounding the public or private nature of sports governing bodies decision making processes and whether they are subject to national law (Ellson and Lohn, 2005). This problem is also raised above in the context of the application of human rights legislation to sport.

For instance, some southern and eastern European states operate a more interventionist role, where sporting activity is considered to be a public responsibility and therefore subject to the rule of law (Parrish and Miettinen, 2008 p. 11). In France the Loi du Sport provides a framework within which sport is regulated (James, 2010 p. 8; Lewis and Taylor, 2008 p.5). In Portugal the

Sports Act 30/2004 consigns the fundamental principles of the most significant aspects of sport (Meirim, 2004).

In comparison, a non interventionist role is taken in the UK where sport is not regarded as a public service and instead considered to be “private” in legal terms (Boyes, 2000). In the UK if an individual wishes to challenge the decisions or actions of a sports governing body, such as those which effect the inclusion or exclusion of an individual, the courts have determined legal intervention on the basis of whether the sporting activity is considered public or private and whether the decision or action concerns a commercial or non commercial right. It is fair to say that the legal avenues available in the UK are rather limited, particularly in relation to a non commercial challenge to eligibility rules and selection criteria.

For commercial rights, the invocation of judicial review proceedings against governing bodies has been largely unsuccessful in the UK courts and the current position, recently upheld in the case of *Mullins v Jockey Club [2005] EWHC 2197*, confirms that a private relationship exists between a national governing body (NGB) and its participants, which means that any rights challenged are not subject to judicial review. This is in contrast to other common law jurisdictions such as Australia, New Zealand, Scotland and South Africa (Anderson, 2010 p. 54).

Instead, the courts appear to adopt a common law supervisory role and are prepared to establish a contractual relationship between the NGB and the participant (*Modahl v British Athletic Federation Ltd (No 2) [2002] 1 WLR 1192*). Anderson (2010 p. 67) posits that “in scrutinising the disciplinary mechanisms of private sports bodies, the courts consider, as they do for bodies subject to public law review, whether, and with due respect to its inherent expertise, that sports disciplinary mechanism acted as a ‘rational decision maker’ should”. In other words, as a result of the courts supervisory role, governing body actions or decisions will be reviewed as a matter of private law, as if their decisions were susceptible to public law.

The courts ensure that sports bodies act in a way that is procedurally fair and in accordance with the principles of natural justice. Whether this will continue to apply in the future has been debated but the application of natural justice principles ensures at least that sports bodies act reasonably instead of applying rules arbitrarily and capriciously. As reflected in *Modahl*, decisions must not be based on errors of fact.

The courts in the UK are also willing to engage the doctrine of restraint of trade to examine the rules and regulations laid down by sports governing bodies (*Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535). This is applicable where the actions or decisions of a sports body have had the effect of restricting the individual's ability to earn a living. Consider the female athlete who has excelled in her female sport and wishes to compete in the equivalent male event to earn a higher living but is restricted from doing so. The *Modahl* case highlights the economic impact that unreasonable exclusion can have on an athlete. Restraint of trade has also been a common method adopted by courts in the US when faced with challenges to age restriction eligibility rules (Mitten and Davis, 2008).

There are limits to these seemingly positive routes. Gardiner *et al*, (2011 p. 114) has succinctly highlighted that the jurisdiction of the contractual option appears “limited to the *decisions* of domestic tribunals of sports governing bodies” rather than the “scrutiny of the rules and regulations of the organisations themselves. The result of this may well be that, while an unjust *decision* affecting a claimant may be subject to judicial scrutiny an unjust *rule* may remain impervious to review.”

In addition, the restraint of trade doctrine is only workable when decisions are made that affect an individual's ability to trade rather than an infringement of fundamental rights as may be the case with inclusion and exclusion issues.

EU Sports Regulation

A widely recognised model of sport regulation is the application of EU law to sporting activity. At this level, the broader relationship between sport and the law has been given detailed consideration. Given sports commercial enterprise and contribution to EU revenue, its rules and regulations must be created and applied in accordance with Community rules which involves “a careful balance between the special characteristics of sport and the imperative of preventing impermissible restrictions on competition” (Lewis and Taylor, 2008 p.383). Sports rules and regulations have become associated with EC Competition Law and Free Movement principles, in addition to a number of EU policy areas including equal opportunities, employment, media and culture. The case law relating to free movement of workers and the provision of services established the application of EU law to sports rules which were of an economic nature, and also

established that discrimination based upon nationality is unlawful unless in respect of national teams. Sporting objectives which were indirectly discriminatory or created a barrier to free movement would be recognised by law if they were legitimate and proportionate restrictions. Given the increasing commercial activity in sport, competition law has become recognised as a platform upon which to scrutinise sporting rules and activities (Gardiner *et al*, 2012 p.196).

The ECJ has previously held that “sport is subject to Community law only in so far as it constitutes an economic activity” (*Walrave and Koch v Association Union Cycliste Internationale* (Case 36/74) [1974] ECR 1405 Para. 4). This position places rules that are of “purely sporting interest” (Case Para. 8) outside the scope of EC law. It has led to the creation of what is regarded as the “sporting exception.” This suggests that the Commission were very mindful of the “special nature” of sport that, as we established, distinguishes sport specific inclusion and exclusion from social inclusion and exclusion (Parrish *et al*, 2010 p. 61). The ECJ position produced uncertainty about what constitutes a purely sporting rule (Weatherill, 2006 p. 645). Lack of clarity is reflective of the absence of EU competence in sport at that time. Despite some references to sport in previous Treaties (Treaty of Amsterdam 1997), any statements made were mostly “expressions of political desire, rather than legally binding instruments” (Lewis and Taylor, 2008 p. 482).

The ECJ applied the same reasoning in *Dona v Mantero* (Case 13/76) [1976] 2 CMLR 578. These cases concerned free movement principles and the compatibility of nationality restriction rules in sport with principles of non-discrimination. This case developed the sporting exception concept by highlighting that even economic activities may fall outside the scope of EC law where they are based upon purely sporting considerations and “provided that such restrictions are appropriate and proportionate to the end pursued” (Case p. 1344). It is suggested that this produced a distinction between purely sporting rules and the objective justification of rules which was solidified in the seminal *Bosman* case (*Union Royale Belge Societies de Football Association and Others v Bosman and Others* [1995] ECR I-4921) (Parrish and Mietinnen, 2008 p. 86; Gardiner *et al*, 2012 p. 150).

In *Deliege v Liege Ligue Francophone de Judo et Disciplines Associees ASBL* (Case C-51/96 and C-191/97) judgement 11 April 2000, the ECJ introduced the dimension of “inherency” to the sporting exception, whereby rules that were inherent to the conduct of the sport could not constitute a restriction (Case Para. 69).

The case of *Meca-Medina and Majcen v Commission* (Case C-519/04 P) [2006] ECR I-699, changed the position of the sporting exception and the ECJ rejected the notion that there is any such sporting exception which places the rules of sport outside law;

“The mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down (Case p. 27).”

The ECJ highlighted that it is difficult to divide the sporting aspect and economic aspect of sporting rules (Weatherill, 2006 p.647). Only a small portion of rules will be devoid of economic effect, such as the offside rule in football. That said the court accepted the special nature of sport by placing the onus on sports governing bodies to prove that the rule in question is necessary to the organisation of the sport, pursued a legitimate aim proportionately and is inherent in the pursuit of that sports objectives (Miettinen and Parrish, 2007). This assessment will be made on a case by case basis and potentially leaves informal and more culturally justified rules subject to challenge (Rincon 2007 p. 236; Parrish *et al*, 2010 p. 61). The ECJ applied the competition law case of *Wouters* (Case C-309/99), to confirm that the nature of the regulation or rule in question will be assessed according to its context and nature (Miettinen and Parrish, 2007).

Some sports rules designed to promote the specificity of sport have not been tested against the requirements of EC law such as doping rules and rules on selection criteria (Parrish *et al*, 2010 p. 29). In *Meca-Medina*, the court took the view that anti-doping measures were necessary to ensure fairness in competition but they should be limited to what is necessary to ensure the proper conduct of competitive sport. In *Deliege* selection criteria was considered to be a matter for the sport governing bodies concerned because they possess the necessary knowledge and experience determine participation.

Although the distinction between economic and non-economic activity may well continue, it is submitted that the sporting exception has now evolved to describe a more sensitive application of EC law to sport (Parrish and Miettinen, 2008 p. 73). Parrish and Miettinen (2008 p. 2) list a set of characters that provide sporting activities and rules with specificity that may justify the need for an element of self-regulation in sport. These include mutual interdependence and the need for

co-ordinated action, competitive balance, ensuring the regularity and proper functioning of competitions, encouraging the training and education of young players, promoting stadium attendance and participation at all levels, the protection of national teams, ensuring the integrity of competitions and connecting with communities. In addition to this they place emphasis on the specificity of the structure of sports organisations. The Independent European Sports Review (Arnaut, 2006) evaluated the specificity of sport under the headings of the regularity and functioning of competitions, the integrity of sport and competitive balance. It emphasised the need to “take into account the legitimate autonomy or degree of discretion to be enjoyed by the sports governing body and also the particular features of sport” when applying legal principles (p. 13).

This approach is aligned with current EU provisions. Following the ratification of the Lisbon Treaty in 2009 and subsequent amendments to the TFEU, Article 6 and Article 165 TFEU provides the EU with competence to act in support of, to coordinate and to supplement the actions of member states in the field of sport (James, 2010 p. 11). The EU will give due attention to whether EU law should apply to a rules operation in a particular context or whether, as a result of the specificity of sport, the rule should be exempted (James, 2010 p. 14). Despite opposition from sport, Article 165 provides only soft law competence for the EU (Gardiner *et al* 2012 p. 203).

This is reinforced by the European Commission publication of the White Paper on Sport in 2007, the most comprehensive and substantial statement to date of the sports policies of the EU. This is not a legally binding document but makes a significant contribution to the discussion of the applicability of law to sport. The White Paper addresses sport through its social, economic and organisational dimension. The Commission believes that it can play a role in encouraging the sharing of best practice in sport governance through the development of a common set of principles for good governance such as transparency, democracy, accountability and representation of stakeholders (European Commission, 2007 p. 12). The implementation of the proposals are through structured dialogue between all sport stakeholders centred around key themes, co-operation between Member States and social dialogue between employers and athletes to agree on employment relations and working conditions through codes of conduct or charters (White Paper...page). The 2011 European Commission Communication Document

entitled “Developing the European Dimension in Sport” builds upon these visions further (European Commission, 2011).

Consistent with the socio-cultural approach taken by the EU, the White Paper and the Communications Document does make specific references to sex, gender, disability and race when discussing the social value of sport. However, these are largely tackled from a “social inclusionary” level. The White Paper proposes that sport should be accessible to all at a recreational level at least. For instance, it aims to “encourage the mainstreaming of gender issues into all its sports-related activities, with a specific focus on access to sport for immigrant women and women from ethnic minorities, women’s access to decision-making positions in sport and media coverage of women in sport” (European Commission, 2007 p. 17). Similarly the Commission is committed to their Action Plan on the European Union Disability Strategy, which includes the successful mainstreaming of disability issues in relevant Community policies.

The organisational dimension is focused on the concept of specificity. The White Paper offers a definition (European Commission, 2007 p. 13);

“The specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions;

The specificity of the sport structure, including notably the autonomy and diversity of sport organisations, a pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national basis, and the principle of a single federation per sport.”

The importance of this definition in the context of inclusion and exclusion will be specifically tackled later on in this thesis. Broadly speaking, the definition provides recognition at the EU level that sporting activity possesses elements of distinctiveness. The Communications Document reinforces the importance of the specificity of sport when evaluating the compliance of sport with EU law (European Commission, 2011 p. 10). It is however clear on its position that “good governance is a condition for the autonomy and self-regulation of sport organisations” (European

Commission, 2011 p. 10). Any derogation from the requirements of EU law must be in the pursuit of legitimate objectives and that any restriction must also be proportionate.

The proportionality principle is increasingly “taking on something of a life of its own in the sporting context” which suggests that such a model could encourage good governance in this area (Segan and Hickman, 2008). Although a balancing technique is not without its complexities conceptually and in practice, on a general scale such as this it does provide opportunity for achieving transparency and justifiability when constructing and applying sports rules (Hickman, 2010 p. 173; Rivers *in* Pavlakos, 2007 p. 167).

The sport specific definitions of inclusion and exclusion also recognise the special nature of sport particularly in relation to its essence which is to separate athletes on the basis of their human capacities and differences in order to promote competition and match ability. How the EU view of specificity balances against the fundamental rights of athletes will be addressed in the forthcoming chapters. The White Paper offers a broader consideration of sports issues beyond economic activities, which may offer scope for inclusion and exclusion. It seeks to commit to better regulation in this area by attempting to balance the special features of sport with key legal principles (Weatherill *in* Gardiner, Parrish and Siekmann, 2009 p.101).

International Sports Regulation

At the international level exists sport tribunals such as CAS and the FIFA Dispute Resolution Chamber, the global anti-doping body WADA and ISF instruments such as the Olympic Charter which each demonstrate the potential capacity to deal with aspects of inclusion and exclusion.

- The Court of Arbitration for Sport

Most of the ISFs now allow appeals from their own disciplinary tribunals or dispute resolution chambers to CAS. CAS was established by the IOC in 1983. Following the Paris Agreement in 1994, CAS became independent from IOC control. It is now an independent and impartial arbitral tribunal that conducts de novo review of the rules, interpretation, and application of the IOC and other international sports federations (ISF) that impact upon an athlete’s eligibility to participate in the Olympics and other international sports competitions (Mitten and Davis, 2008 p. 74). Since CAS is based in Lausanne, Switzerland, it is prescribed that this “ensures uniform procedural rules, provides a stable legal framework, and facilitates efficient dispute resolution in locations

convenient for the parties” (Mitten and Opie, 2010 p. 287). Its creation recognises the need for international sports governance to be uniform and protective of the integrity of athletic competition, while also safeguarding all athletes’ legitimate rights and adhering to fundamental principles of natural justice (Mitten and Davis, 2008 p. 79). It is advocated that only international bodies such as CAS can provide “legal certainty required for the proper functioning of sport” (Parrish and Miettinen, 2008 p. 15).

The CAS code offers broad jurisdiction to hear any dispute or activity related or connect to sport, although most of the disputes tend to be commercial and disciplinary in nature (CAS, 2012; James, 2010 p. 56).

When examining rules of an ISF CAS assess whether they are reasonably being applied, are lawfully interpreted and that any penalties imposed are necessary, reasonable and proportionate (James, 2010 p. 56). The position of CAS on field of play decisions has created interest and in previous cases they have refused to hear “in game” decisions of match officials except in limited circumstances (*Mendy v Association Internationale de Boxing Amateur* (CAS OG Atlanta 1996/006)). It is suggested that by doing this CAS recognises the autonomy of sport and subsidiarity (Lewis and Taylor, 2008 p. 346; Beloff, 2005 p. 3). In the case of *Yang Tae Young and Korean Olympic Committee v International Gymnastics Federation* (CAS 2004/A/704) CAS accepted that their position is not entirely clear. However, they justified their approach not to hear these types of decisions at the same time as highlighting that this was “self-restraint, not absence of jurisdiction” (Lewis and Taylor, 2008 p. 346). CAS therefore do not rule themselves out of interfering with such decisions completely, and will do so if there is evidence of bad faith or arbitrariness since these principles take priority over sports rules.

CAS is not an international court of law but instead an arbitration tribunal whose broad jurisdiction and authority is based upon the agreement of the parties (Mitten and Opie, 2010 p. 285). Through the adoption of the Swiss Federal Code on Private International Law CAS agree to resolve disputes pursuant to the rules of law chosen by the parties, or without this, according to the law with the closest connection to the dispute (Mitten and Opie, 2010 p. 287). Beforehand the appellant must have exhausted all internal legal remedies available to him/her prior to the appeal. Judicial review of a CAS arbitration award under Swiss law is available on very narrow grounds

and very few awards regarding athlete eligibility issues have been reviewed (Mitten and Davis, 2008 p. 86).

CAS, in their decision making, have upheld and applied general legal principles and emphasized the responsibility of governing bodies to act in accordance with the general principles of law which are drawn from the legal systems of all nations. These principles include the legality of rules and application, legal certainty and retrospective application, legitimate expectation and acquisition of rights, good faith (not in bad faith, arbitrarily or capriciously), fairness, non-discrimination, proportionality and fundamental Rules (rules must be construed in accordance with the fundamental rights protected under the ECHR) (Lewis and Taylor, 2008 p. 344).

The awards are considered to be foreign arbitration awards except in Switzerland and therefore need to be globally recognised by national courts in order to be legally enforceable. Those signed up to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) are obliged to legally recognise and enforce an arbitration award which makes CAS a successful regulatory process for managing sport disputes (Mitten and Opie, 2010). In doing so it is also developing the meaning of the special nature or specificity of sport.

Foster (2006 p. 3) assesses the different types of jurisprudence emerging from CAS through 5 main points;

1. Rules of the game and ethical principles of the game are collectively referred to as *lex ludica* because they are rules which are distinctive and unique to the sport in which they are applied. These types of sporting matters are considered to sit outside legal intervention as partly evidenced by their position on “in game” decisions by match officials.
2. Good governance standards are set by CAS through an ombudsmen role, offering clear authority, legal interpretation of rules, correcting poor administrative decisions and applying transparent and objective criteria in decision making.
3. CAS apply procedural fairness in their decisions and use established legal principles such as natural justice to decide what constitutes minimum fairness within private associations when exercising disciplinary power.
4. Foster suggests that the correct use of the term *lex sportiva* is to describe the formulation of global standards for regulating sports by CAS. This harmonisation process and educative role for best practice is transnational and could not be formulated elsewhere.

5. CAS is promoting fairness and equitable treatment in their role as arbiters for sport. Foster identifies that they are offering a final appeal process in matters.

Their function and role in dealing with issues concerning inclusion and exclusion will become more apparent in Part Three and is dependant upon what type of sport rules or practices tend to be challenged in this area and to what extent CAS could offer a resolution. The importance of CAS is that their jurisdiction is dependant upon the parties' agreement to defer disputes to CAS. Without this CAS would have no force or jurisdiction in dealing with sporting issues.

- *World Anti Doping Agency*

The universal agreement to engage with CAS is also reflected in the agreement to collectively tackle doping in sport. This has led to the enforcement of a range of anti-doping policies and legislation that are legally enforced which signifies a private but global system of regulation that is arguably contributing to this international/global system of law (Mestre, 2009 p. 105; Mitten and Opie, 2010 p. 281). Supporting this system is a range of public law instruments such as domestic and regional legislation.

In 1999 the World Anti-doping Agency was established as an independent body tasked with creating and maintaining unified standards for anti-doping testing and the imposition of sanctions for doping violations. In addition, its objectives were to co-ordinate efforts for sports organisations, anti-doping organisations and governments to combat doping in sport (David, 2009 p. 2). The List of Prohibited Substances and the Code collectively form part of the World Anti Doping Program which seeks to achieve the main objective of developing harmonised rules, disciplinary procedures and sanctions that are globally accepted. It is designed to protect the "spirit of sport" or essence, which is characterised by values such as ethics, fair play and honesty, health, excellence in performance, character and education, fun and joy, teamwork, dedication and commitment, respect for rule and law, respect for self and other participants, courage, community and solidarity (WADA, 2009).

The WADA Code is a fundamental and universal document upon which the anti-doping programme is based (Anderson, 2010 p. 120). The Code was the culmination of wide ranging consultation and drafting process, and was unanimously adopted by the World Conference on Doping held in March 2003. It aims to produce international harmony by agreement with

organisations who are signatories to it (David, 2009 p.2). WADA provides a series of documents or models of best practice, to assist organisations with the adoption of the Code. It includes “core” Articles relating mostly to doping violations, the proof of violations and sanctions, which signatories have to implement exactly, in order to accept the Code, as well as “non-core” Articles, which concern matters regarding the handling of anti-doping matters which signatories are permitted to reach in different ways.

Around 570 sports organisations have accepted the Code, mainly comprising of all the international federations of Olympic sports. Full compliance is required which means that they must amend their rules and policies to include the mandatory articles of the Code but also that those articles are enforced in accordance with the Codes principles. This implementation is monitored by WADA. Under the EU White Paper 2007 additional legal enforcement is given to the Code. For athletes, the WADA code rules are a condition of participation.

Those who may have committed violations can be investigated and these would be carried out by the anti-doping organisation which has jurisdiction under the Code over the athlete/person. An investigation can lead to the bringing of allegations by the organisation responsible for managing the results of an investigation, and where proved, the imposition of sanctions by the tribunal which hears the allegation. The tribunal would be the national or international sporting tribunal or CAS, depending on the rules and policies of the particular anti-doping organisation which manages the results (David, 2009). CAS plays a central role in ensuring that there is a consistent process for investigating and hearing doping violations throughout the world of sport.

WADA is a private international organisation which was initially led and influenced by the IOC. Governments cannot be signatories to the Code but have declared their support for it (David 2009 p. 3). Since it has strictly speaking, no regulatory powers, and little legal enforcement by itself, the International Convention against Doping in Sport was adopted by the 33rd UNESCO General Conference in 2005, which came into force on 1st Feb 2007. It aimed to commit States at both domestic and international levels to combat doping in sport. The Convention has been ratified by 130 countries and is designed to support WADA led initiatives by underpinning them with the force of international law. UNESCO’s recognition and support for WADA has suggested that this is an example of global administrative law, given WADA’s hybrid public/private status. The Convention supports a key and sometimes overlooked priority of WADA, which is to co-operate

with international law enforcement agencies, national sports anti-doping authorities and individual governments in efforts to investigate and combat the trafficking of substances that are then abused for sport doping purposes (Anderson, 2010 p. 117; Mitten and Opie, 2010 p. 281).

The legal enforceability of the Code essentially derives from the universal agreement of sports bodies and their member and athletes in the sports to adhere to and apply the Code. In the context of inclusion and exclusion, whilst we are not focused on anti-doping, this model of regulation, by agreement, is very persuasive.

- *The Olympic Movement*

The International Olympic Committee (IOC) is an international, non-governmental not-for-profit organisation, serving as a protector of the Olympic Movement and holding responsibility for the interpretation and enforcement of the Olympic Charter (Brown and Connolly, 2010 p. 5). The IOC is the guardian of the Olympic Charter, to which all bodies involved in the Olympic Movement must comply with, and the IOC also promotes the Fundamental Principles of Olympism as contained in the Charter. The Olympic Charter is akin to a constitution because it is a fundamental document upon which the Olympic movement is based. The concept of Olympism, arguably the ultimate representation of the essence of sport, tells us that “the practice of sport is a human right” that should be free from discrimination, a concept that is “incompatible with belonging to the Olympic Movement” (IOC, 2011 p. 10). One of the fundamental principles of Olympism is the “preservation of human dignity” (IOC Principle 2). Those who submit to the Olympic Movement are obliged to adhere to these principles and have a legal duty to ensure that no athlete is excluded on grounds of discrimination. The IOC also displays an explicit commitment to WADA (Rule 43) and CAS (Rule 61) through the Charter (IOC, 2011; Osborn and James, 2012 p. 82).

The Charter does not derive from any legal authority but is often perceived as a fully fledged treaty (Mestre, 2009 p. 14). Most nations have ratified the Olympic Charter in the international legal system and have acknowledged the supremacy of the IOC rules through the enactment of legislation or case law (Forgues, 2000; Mestre, 2009 p. 21). The treatment of the IOC and its Charter suggests that there is a “general acceptance of the legal primacy of the Olympic Charter, not because it has any actual entrenched force, but rather by virtue of custom and transcendent socio-economic quality the Olympic Games possess...” (Mestre, 2009 p. 15). The legal

endorsement of these sporting values demonstrates an example of regulation that receives global recognition. It is suggested that the Charter is a source of “Olympic Law” in sport regulation (Osborn and James, 2012).

Principles of the Charter are reflective of the UDHR. However, at a closer look, there is no legal right to participate in athletic competition and in fact this right is a conditional right to participate in sport on the proviso that an athlete complies with several eligibility requirements specified in the Charters Eligibility Code (Mitten and Davis, 2008). Nevertheless, the Olympic Charter is certainly a persuasive and powerful document that courts are reluctant to challenge as will be shown in Part Two.

Summary

This chapter has provided a detailed evaluation of the current toolkit available for managing and dealing with inclusion and exclusion in sport. The policy measures in the UK have attempted to overcome and attack social exclusion by achieving social inclusion and developing initiatives that will lead to closer communities. Sport is seen as one potential way in which this can be realised since it can promote cohesion, self identity, community and belonging. The political agendas are mostly focused upon overcoming socio-economic differences through the use of recreational sport.

The legal measures described in the chapter concerns the international human rights regime that protects the civil, political, economic, social and cultural rights of an individual, irrespective of their human right differences. The UDHR introduces the idea that human differences can be legally recognised as protected characteristics when they are used to treat an individual unfairly or unequally. This instrument has led to the enactment of legislation that imposes legally enforceable obligations upon states at an international, regional and domestic level, to protect those rights and ensure that they are not interfered with. The aim of the broad network of equality legislation introduced in this chapter is to ensure that individuals are treated with due respect of their physical and non physical similarities and differences.

There is however, an absence of specific references to competitive sport in international human rights legislation. Although the UDHR, Yogyakarta Principles and the ICERD refer to “cultural

rights” which may encompass sport, it is likely that this would instead concern recreational sport. On the other hand Article 10(g) CEDAW, the Brighton Declaration and Article 30(5) CPRD do mention sport explicitly which suggests that sports bodies may be susceptible to equality legislation if their rules were found to infringe human rights. Exactly how these may be enforced is uncertain at this stage. At a regional and domestic level, the applicability of human rights legislation to sport is also uncertain because of the lack of case law and because of the position of sports bodies as private entities or non-state actors. The exemption clauses contained in some domestic provisions is likely to limit their application to sport.

Within the evaluation of sport regulation measures for addressing inclusion and exclusion, the wider debate surrounding the relationship between law and sport has emerged. The models of regulation presented in the literature will underpin discussion in Part Three to provide a clearer sense of how to strike a regulatory balance between inclusion and exclusion in sport. At the heart of this thesis lies the tension between the protection of the fundamental rights of athletes, and the protection of the specificity of sport. This chapter has revealed that no explicit sport regulation measures exist to deal with inclusion and exclusion on the basis of sex, gender, disability and race. At a domestic sports regulation level, whilst sports governing bodies may operate their own internal systems of regulation, when legal challenges are brought against their decisions and processes, the courts have treated sports bodies with a degree of autonomy, particularly in relation to fundamental rights. That said, the present era of EU law offers wider scope for sporting issues such as inclusion and exclusion, and at the international level there are a number of tools and approaches within sport regulation that are potentially transferable as we have seen.

Part I Overview

Practices of inclusion and exclusion are evident within the natural world, as a means of survival and existence. Within a human society, inclusion and exclusion appear to be powerful social forces that constantly conflict with each other. Both terms involve the interpretation of our physical and non physical individual, socio-cultural and socio-economic differences as a means of identifying and classifying us. There are many obvious differences between us and these are used to understand the world in which we live. We process these differences by categorising and stereotyping based upon scientific or conventional wisdom knowledge. This can then lead to inclusion or exclusion. In general terms, exclusion refers to a judgement made about a particular individual or group, based upon their differences that are used to treat them differently in some way. Exclusion can represent a barrier that is created on the basis of these differences. On the other hand, inclusion is the process of overcoming these barriers and accepting differences between individuals and groups.

In a competitive sporting context where the sporting space is quite unique, inclusion and exclusion take on slightly different meanings as we have seen. The new definitions account for the inherent and specific value of sport that does have exclusionary tendencies on the basis of physical and non physical differences between athletes. Sporting exclusion is reasonable when an individual behaves in a way that threatens the essence of sport or when their participation would genuinely alter the selection criteria or rules of a sport. Exclusion may be unreasonable when rules or actions, which are not directly concerned with the essence of sport, seek to overtly or covertly restrict athletes from participation on the basis of sex, gender, disability or race.

Sporting inclusion is based upon participatory parity and the idea that individuals should have access and opportunity to compete in sport where they are qualified to do so. They are qualified to do so when they meet the appropriate selection criteria or rules of a sport. The tensions lie between identifying when these exclusionary tendencies move beyond what is necessary for the protection of the essence of sport, and instead begin to have discriminatory effects on individuals. In other words, the balance between inclusion and exclusion. The construction of the new concepts of sporting inclusion and sporting exclusion mark a shift of focus from recreational to competitive and from political to sporting.

Part One has introduced the currently regulatory toolkit for dealing with inclusion and exclusion. Supporting inclusion are political measures aimed at eliminating divisions in society. Recreational sport is seen to achieve this because of its perceived potential to encourage favoured values such as collaboration, self identity, teamwork, fair play and sportsmanship. Policies are framed around using sport as a vehicle for achieving social inclusion.

There exists an extensive body of domestic, regional and international equality legislation which aims to protect human rights by ensuring that citizens are treated equally without distinction of their differences. The compatibility of sport specific inclusion and exclusion with the existing legal framework is not entirely clear because of the absence of explicit references to competitive sport and because of the treatment of sports bodies as private entities that are often exempt from equality provisions.

The regulation of sport forms part of a wide field of academic debate, focused upon the degree of intervention by the law and the models of regulation for sport. The current sport regulation of sporting issues provides evidence of successful internal regulation through CAS, WADA and the Olympic Movement. However, the models offered currently are not sufficiently applicable to this thesis between they do not capture the regulation of fundamental rights of athletes such as inclusion, equality and human rights. There has been little application of this theoretical discussion to inclusion and exclusion specifically, thus creating a gap in the literature and in the regulation of inclusion and exclusion.

In order to provide clarity, Part Two seeks to analyse the current practices of inclusion and exclusion by documenting a selection of legal and non legal cases concerning sex, gender, disability and race. It will highlight how these cases are approached by sport and by the law. The compatibility of the sport approach with domestic, regional and international legal mechanisms will be critiqued, drawing upon primary and secondary sources of law (Watt and Johns, 2009). The cases will be measured and analysed against social science, physical science, sport science, medicine and evolutionary psychology theories.

An evaluation of the cases in these four areas will identify instances of best practices as well as inconsistencies of approach by sport and the law. Through an analysis of these cases it is possible to chart and critically analyse the current balance between inclusion and exclusion. In order to

synthesise this material appropriately, Part Two will separately explore sex, gender, disability and race. This format will allow for a clearer identification of the underlying and overlapping themes and practices emerging from these areas. Part Three will then proceed to cross analyse these four areas. Justifications for this method of organisation are that currently, most research relating to inclusion and exclusion focus on “one-dimensional social relations such as gender, ethnicity, age or ability” (Elling and Knoppers, 2001 p. 259). Little focus is given to the “intersecting social relations, social-cultural norms and images, and, the complexity and paradoxical nature of processes and mechanisms of inclusion and exclusion” (p. 259; see Schiek and Lawson, 2011). This thesis aims to achieve this intersection by providing a comparative analysis of inclusion and exclusion across sex, gender, disability and race. A universal approach to balancing participation appropriately in competitive sport can then be compiled.

PART II: CURRENT REGULATORY APPROACHES TO INCLUSION AND EXCLUSION IN SPORT

Chapter 6: Sex

The sporting world is considered to be a “ubiquitous symbolic system of the gendered hierarchy” (Burke, 2004 p. 169). In fact there are clear parallels between the gender hierarchies in sport, society and the law (Bradford, 2005 p. 82). It is widely argued that “mainstream social and cultural practices such as competitive sport, strengthens hegemonic power by giving false representations of social equality” (Elling and Knoppers, 2005 p. 258). Hegemony refers to the “temporary acquiescence by a subordinate group to a set of discourses that maintain and augment their position of subordination” (Burke, 2004 p. 170). This takes place because the subordinate group feel that their position cannot be changed. Sport is an ideal example of this power struggle.

The hegemonic gender ideology (this concept refers to some sort of institutionalised power or ideal that is accepted as common sense by many groups including those minorities) usually places men as “natural, strong and independent leaders,” with women as “natural weak and dependent care givers” (Elling and Knoppers, 2005 p. 258). Sport has historically been regarded as a male space because of this.

The Ancient Olympic Games restricted women from participating or watching sport on the basis that their very presence would reduce the strength of the warriors (Wackwitz, 2003). Women were excluded from competing in most sports during the first half of the twentieth century (Anon, 1999). Such exclusion was as a result of the “assumptions held about women’s bodies in the form of commonsense beliefs which received emphatic backing from medical opinion of the time” (Archer and Lloyd, 2002 p. 4). Historically, researchers documenting gender and sport in the USA were of the opinion that light exercise made women healthy and attractive, but too much exercise made them less feminine (Fields, 2005 p. 3). At the time of the eighteenth and nineteenth century, doctors warned that too much exercise at certain times in the menstrual cycle would make women “unable to fulfil their most feminine capacity” of reproduction (Fields, 2005 p. 3). In some countries such as Brazil in the 1940s, law existed to prohibit women from participating in sports which were incompatible with their “feminine nature” (Hartmann-Tews and Pfister, 2003 p. 267). In 2004, FIFA president Sepp Blatter who, on the face of it appears to treat women’s football as a serious priority, openly urged women footballers to wear skimpier kits in order to increase the popularity of the women’s game (Anon, 2004a). Overall, the restrictions of

women from sport appeared to be based upon biological and social conventional assumptions and attitudes towards females.

In modern times, the landscape of sport is quite different, with women's sport expanding and arguably growing at a faster pace than men's sport (Anon, 2011a p. 48). Studies reveal that there is a shift in the perception of women's sport as the lesser of the two (Anon, 2011a p. 49). It is becoming a lucrative product in an evolving market of commercial opportunity. Marketing campaigns are now specifically targeting women in an attempt to empower them to participate in sport. These influences have arguably shifted the "gender regime" within sport and prompted an evaluation of sporting boundaries. Women are opening up previously male labelled sports. For instance, women's rugby is one of England's fastest growing sports (Anon, 2009c). In Scotland and Wales there are 500 more female rugby clubs than male, with over 20,000 participants. England captain Catherine Spencer expressed that "we don't kick the ball as much as the men do but that means we're running with it more, which adds to the excitement" (p. 6).

However, perhaps because of the delay in the creation and development of women's sports, participation rates between men and women vary considerably and typically favour men in competitive and non competitive positions. Whilst some studies suggest that the gender gap between male and female adult participation in sport is narrowing (White *in* Hartmann-Tews and Pfister, 2003 p. 40), there remain unavoidable disparities. In the UK it would appear that the gap is greater than anywhere else in Europe (Aitchison *in* Ateljevic, Pritchard and Morgan, 2007 p. 78). Current funding of British athletes by UK Sport tends to favour men thus reflecting their potential to win more Olympic medals (White *in* Hartmann-Tews and Pfister, 2003 p. 41). Similarly whilst the introduction of National Lottery funding in 1996 has resulted in major changes for elite sport, the distribution of this is reportedly imbalanced (Carr, 2009 p. 153). Comparatively, in New Zealand, more women than men "are granted a status that ranks them within the top ten of world competition in their sport and makes them eligible for comprehensive support" (Hartmann-Tews and Pfister, 2003 p. 275).

Media coverage of female sport is also typically low and lacks investment. The imbalances of women's sports coverage as compared to men has been researched by organisations such as the Women's Sport Foundation for a number of years, all with mostly the same findings- that despite some exposure of women in sport, they remain under represented at all levels of print and

electronic sports media (Kluka, 2008 p. 36; Women's Sport and Fitness Foundation, 2008). Between 2010 and 2011 it was reported that women's sport received only 0.5% of all UK sports sponsorship, with men's sport receiving 61.1% (Women's Sport and Fitness Foundation, 2011).

In addition to this, casual sexism tends to impact upon female engagement in sport. Casual sexism relates to a sexualised culture that exists in our society, in other words the "relentless, nihilistic meanness that characterises contemporary discourse, which is aimed disproportionately at women" (Turner, 2009). This has become a permanent feature of the sport Doxa as earlier described. The focus on sexy images of women in sport and expectation that they should appear feminine illustrates this. For example, tennis player Anna Kournikova appeared on billboards and the front of magazines because of her attractiveness rather than her successes as an athlete, even though these may have been minimal. This sexism can have a damaging effect on women in sport. In opposition to these images is the masculine representation of Serena Williams with her athletic arms which challenges the notion of women being feminine. The media play a vital role in creating a moral panic about the unnatural bodies of athletic females (Lafferty and McKay, 2004).

However, a vicious loop is created by the role of the media on women's sport. On the one hand, the power of print media is well documented and for sport it appears to be an influential outlet (Kluka, 2008 p. 36). Marketers argue that Kournikova has promoted women's tennis and changed it, just as Gabriella Sabatini and Tatiana Grigorieva have contributed to sport for women. The coverage of women has promoted female sport and the athletes are simply answering to market driven forces. That said the cost of this type of exposure has arguably been at the expense of "establishing epistemic and political authority for women in sport" (Burke, 2004 p. 170). The reality of this situation is that female athletes do have an ultimate choice how they wish to be portrayed in the media. Since they are in a very privileged position in society, they have a choice how they wish to use their power and authority. This vicious loop is capable of being turned into a virtuous one if the status quo is shifted.

Upon this background of the historical and current position of women in sport, the presence of mixed sports participation is rare since this would presumably challenge the biological and social understandings of the differences between men and women. As introduced in Part One, sport remains segregated along the lines of sex since this is considered to be part of the essence of

sport. This chapter will explore the current practices of inclusion and exclusion in relation to sex, drawing upon instances when the divisionary lines between men and women in sport have been brought to challenge by women. Through this analysis an indication of the current balance between inclusion and exclusion can be made.

Ski Jumping

One of the most recent cases involving inclusion and exclusion in relation to sex is the case of *Sagen v Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*[2009] BCSC 942 (*Sup Ct (BC)*) (Patel 2010, p. 11). This case provides an example of the impact of both domestic and international legal mechanisms as well as the impact of soft law approaches on the balance between inclusion and exclusion.

A group of 15 highly ranked female ski jumpers from five countries brought a claim against the Vancouver Organising Committee for the 2010 Winter Games (VANOC) arguing that a female ski jumping event should be included into the Games, just as it is for men. They argued that because VANOC plan, organize, finance and stage the ski jumping events for men, failure to offer an equal event for women violates women's equality rights as guaranteed under Section 15(1) of the Canadian Charter of Rights and Freedoms (1982);

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Essentially they claimed that they were being excluded from participation by virtue of their sex (Lines and Heshka, 2009 p. 92). Without recognition as an Olympic event, funding has been strained for women's ski jumping (Anon, 2010a).

Did VANOC breach the Charter?

Justice Fenlon needed to determine whether the Charter applied to VANOC and whether they had breached their obligations under it (Case p. 9). In order for VANOC to be captured under his

Charter, the claimants needed to show that they were either controlled by government or performing a governmental function.

It was held in the case that there was no “government control” over VANOC and instead they were “like a franchisee of the IOC, than a purchaser of a product” (Case p. 39). However a private entity that is not controlled by government can still be subject to the Charter if they carry out a “government activity” (Case p. 49). In this regard, the court held that whilst the IOC owns the Olympic Games, they do not actually stage the Games. It was found that the staging of the Games is a “rare but uniquely governmental activity” (Case p. 63) that VANOC carry out in their role and are therefore subject to the Charter (Case p. 65).

Despite this finding, in a “grotesque twist of legal logic” (Ellison, 2009) VANOC were not found to be in breach of the Charter as they may be carrying out a government activity by staging the Games but “designating events as “Olympic events” is neither part of that government activity nor within VANOC’s control” (Case p. 123). Essentially they have no control over event selection since this power lies with the IOC. The IOC is a Swiss based organization and cannot be bound by the Canadian Charter for jurisdictional reasons (Case p. 104).

The decision of the claimants to sue VANOC is interesting. They are delegated responsibility to act as the host city and management of the Games through contractual arrangements with the IOC. However, it is the IOC who owns the Olympics Games, and the Federation Internationale de Ski (FIS) who are the international governing body for ski jumping and also who propose new events to the IOC for consideration. These bodies were not brought to challenge by the ski jumpers.

In any case, any direct challenge against the IOC event selection criteria has historically been unsuccessful as demonstrated in the US case of *Martin v International Olympic Committee* (1984) 740 F. 2d 67 detailed below. A number of IOC policies escape the legal fishing net and continue to exist to restrict individuals or groups from participation. Using the indirect approach of suing VANOC seems to solve “the inherent jurisdictional problem involved in suing the IOC while avoiding the need to challenge the mechanics of how the IOC and or FIS reached their decision” (Lines and Heshka, 2009 p.94). However, it is fair to assume that VANOC were not directly responsible for the exclusion of the female athletes, because they have no authority

within the IOC event selection process. VANOC argued that the claimants named the wrong defendant (Case p. 4). The only way that VANOC could comply with the courts decision if the claimants were successful, would be to refuse to host the men's ski jumping event (Case p. 5). It could certainly be suggested that they are condoning discrimination by agreeing to host an event (The Olympics) that has been structured by the IOC upon a set of rules that may be discriminatory against women (Patel, 2010c p. 11). The wording of Section 15 (1) which promotes equality and equal protection, seems incompatible with this behaviour.

The complex relationship between governing bodies is exemplified in the "tightly knit pyramid" Olympic model (Mitten and Opie, 2010 p. 283). The national Olympic committees (NOCs) throughout the world (approximately 200 countries) must comply with the IOC Charter and their by-laws, in addition to the domestic laws in which they are located. NGBs are required to adhere to the domestic laws and regional laws, as well as the regulatory frameworks of their respective ISF. An athlete is not only subject to all of these laws but also controlled by the laws of their home country. Upon this, when a dispute arises, this complex network of regulation causes a complexity of jurisdictional issues due to the varied legal systems in place, as well as the possible lack of expertise at domestic levels.

Is the IOC Selection Criteria Discriminatory?

In May 2006, the FIS voted to recommend women's ski jumping "normal hill" (the 90m jump) be included in the 2010 Winter Games. However, upon recommendation to the IOC, in November 2006 they vetoed this proposal (Chan, 2009). The IOC asserted that this decision was based upon "technical merit." They felt that "female ski jumping had not reached a high enough technical standard or level of development, and that there were not enough qualified women in the sport worldwide" (Chan 2009). According to Rule 47 (3.2) of the Olympic Charter, events must have a recognised international reputation and must have two world championships to be included in the Games. Women's ski jumping only held its first world championship in February 2009 in Liberec, Czech Republic. However, during the FIS congress in Antalya, Turkey in June 2010, members agreed to create a women's ski jumping world cup circuit for 2011-2012 (Anon 2010a).

In addition, only events practiced by men in at least 50 countries and on 3 continents, and by women in at least 35 countries and on 3 continents, can be included into the Games (Case p. 81).

Justice Fenlon deposed that both men's and women's ski jumping fall short of the required "universality" (Case p. 87) under this criteria. However, under rule 47 (4.4) it seems that men's ski jumping remains justified;

Rule 47 (4.4): Sports, disciplines or events included in the programme of the Olympic Games which no longer satisfy the criteria of this rule may nevertheless, in certain exception cases, be maintained therein by decision of the IOC for the sake of the Olympic tradition (Case p. 84).

It is worth noting that the new version of the Olympic Charter in 2006 did not include these criteria, but the IOC continues to apply them (IOC, 2007). Justice Fenlon agreed that this exception rule *was* discriminatory as it amounted to historical stereotyping and prejudice that serves to exclude women and include marginalised men's events in order to maintain Olympic traditions (Case p. 90). Because ski jumping has been a Winter Olympic sport since 1924, it is exempt from an Olympic gender equity policy which requires that since 1991, all new sports wishing to be included on the Olympic programme must include competition for both men and women (Chan, 2009; IOC, 2009). For instance, ski cross was recently admitted into the Olympics based on this gender equality policy even though it is less developed without two world championships.

However this does not apply to ski jumping since it has been an Olympic sport in the Winter Games since it began in 1924 (Ellison, 2009). Fenlon found that the maintenance of a men's event with no female equivalent on the basis of what constitutes a grandfather Olympic tradition, constitutes sex discrimination under the Canadian Charter (Ellison, 2009).

The application of these rules is inconsistent with the true "technical merit" of women's ski jumping, a sport which appears to be more successful than other existing Olympic sports (Laurandeau and Adams, 2010 p. 437). Many of the women ski jumpers have competed against and succeed over their male counterparts in mixed international competitions (Ellison, 2009). American Skier Lindsey Van currently holds the record for the Whistler 90m ski jump having beaten her male competitors in an earlier competition at the facility (Case p. 66). Interestingly her record is "silent" and not recorded as "official" perhaps because she completed this jump at the Canadian Championships, which is not an FIS sanctioned event (Burton, 2010 p. 20). Laurendeau and Adams (2010) highlight how it is equally important to understand what is unsaid as well as

what is said. For instance, the IOC continue to claim that women's ski jumping is still in its infancy. However, little is said about the historic victories of women ski jumpers such as Canadian Isabel Coursier who from 1922 to 1929 held the record for the longest women's ski jump (84 feet). Even prior to this ski jumping has been evidenced in Scandinavian countries in 1862. It has been documented that historically women's ski jumping competitions in North America and Europe were open to both men and women.

Whilst Justice Fenlon accepted these achievements and sympathised that "societal headwinds" have compromised the inclusion of female ski jumpers in the Olympics, at the same time, she appeared to be protecting the IOC by highlighting their policy initiatives aimed at including women in sport (Case p. 100). She subsequently held that any discrimination suffered by the claimants derived from Rule 47 (4.4) and nothing else.

The decision was made that the claimants were successful in proving the inconsistent application of the selection criteria, but not that the selection criteria itself was discriminatory. On both issues, therefore, the claimants were unsuccessful. The Supreme Court later added that it will not hear an appeal by the female ski jumpers. However the athletes argue "this is about human rights and discrimination and it's a wrong that must be righted" (Anon, 2009d).

Case Summary

In *Sagen*, Justice Fenlon delivered a host of contradictory messages that represented a clear legal struggle to intervene in Olympic matters, even though there was an identification of discriminatory practice (Patel, 2010c). Irrespective of who the defendant may be, international commitments to universal policies such as the UDHR, CEDAW and the Brighton Declaration place positive obligations upon the state to avoid and regulate discriminatory behaviour. These mechanisms as introduced in Part One require enforcement if they are to effectively manage the balance. The judgment in this case is difficult to reconcile with these obligations. It has been argued that whilst Canada is a leading participant in international conventions, there have been examples of their failure to implement specific equity laws and policies to promote sports for women (Brown and Connolly, 2010 p. 13).

The reluctance to hold VANOC accountable may have been economically driven- Justice Fenlon could have been concerned that a decision against VANOC may prejudice any future Olympic

opportunities for Canada. This places significant political and economic power with the IOC who has the autonomy to exercise a regulatory function as a private entity, and essentially apply whichever rules they wish. However, they are operating in a manner that is not accountable to fundamental norms such as human rights and equality. To justify this exemption on an economic basis is unacceptable.

Running

Prior to *Sagen* in *Martin v International Olympic Committee* (1984) 740 F. 2d 67 the IOC refused to include the 5,000m and the 10,000m parallel women's races at the Los Angeles 1984 Summer Olympics in accordance with Rule 32 of the 1970 Olympic Charter which provides;

“The IOC in consultation with the IFs [International Federations] concerned shall decide the events which shall be included in each sport, in bearing with the global aspect of the Olympic programme and statistical data referring to the number of participating countries in each event of the Olympic programme, of the world championships, of Regional Games and all other competitions under the patronage of the IOC and the patronage of the IFs for a period of one olympiad (four years)”.

The claimant athletes argued that this amounted to discrimination on the basis of sex and violated their equal protection rights under the Constitution of the United States (1787) and under the Unruh Civil Rights Act (1959) (California state legislation) which reads;

“All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, colour, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever”.

The US Court of Appeals (9th Circuit) held that the Act did not apply here since it was not intended to protect the creation of separate but equal events. Neither did the “facially gender-neutral” IOC Rule 32 constitute “arbitrary discrimination” since it was perceived to apply equally to all events. Although the judges accepted that such an exclusion was likely to cause “irreparable

harm” to the runners (Case p. 675) they advocated firmly that their “short term disappointment should not blind us to the harm which would follow if the courts were now to interpret legislation, enacted to end class based discrimination, to require a business establishment to offer separate accommodations, privileges, advantages, or services. Such an apartheid construction of California’s Civil Rights Act would raise serious constitutional questions under the equal protection clause” (Case p. 680).

The claimants in *Sagen* similarly argued that “the historical hurdles and barriers have been so strong that the number of ski jumpers is likely to decline if the sport is not included in the 2010 Games (*Sagen* p. 96). In *Martin* the court was reluctant to get involved in the Olympic process;

“We find persuasive the argument that a court should be wary of applying a state statute to alter the content of the Olympic Games. The Olympic Games are organized and conducted under the terms of an international agreement- the Olympic Charter. We are extremely hesitant to undertake the application on one state’s statute to alter an event that is staged with competitors from the entire world under the terms of that agreement” (Case p. 677).

Pregerson J offered a dissenting opinion. He highlighted how the historical attitude towards women in sport by the IOC has resulted in disparities between male and female opportunities at the Olympic Games. The IOC refusal to include a female event “postpones indefinitely the equality of athletic opportunity that it could easily achieve this year in Los Angeles. When the Olympics move to other countries, some without America’s commitment to human rights, the opportunity to tip the scales of justice in favor of equality may slip away. Meanwhile, the Olympic flame- which should be a symbol of harmony, equality, and justice- will burn less brightly over the Los Angeles Olympic Games” (Case p. 679)

The approach of both the Canadian and American courts certainly favours and maintains certain Olympic traditions. It is argued that it should be irrelevant to the legal analysis that the event is the Olympic Games, for “to suggest otherwise would be to argue that some activities and events are worth sacrificing human rights for, and this is very steep and slippery slope to proceed down” (Lines and Heshka, 2009 p. 95). It is commonly argued that throughout the history of the Olympic Games, “formal and ideological constraints have effectively placed women as “outsiders” in particular sports, forcing women to fight for their rights to participate in these

events” (Laurendeau and Adams, 2010 p. 432). These invisible cultural traditions operate to control sport and often alienate women in sport. There is no logical rationale for the *Sagen* and *Martin* decision and “while the claimant skiers may have won the discrimination battle, they lost the war of inclusivity” (Lines and Heshka, 2009 p. 95).

There are inherent contradictions within the policies and practices of the IOC, an organisation that is tainted by internal bribery and corruption scandals (Miller *et al*, 2001 p. 24). The IOC’s abilities to ensure fairness in competition whilst generating such profit that it does, has been questioned on many occasions. For instance, the principles of non discrimination and human rights contained in the Olympic Charter (Article 4 and 5 Olympic Charter), sit in opposition to the outcome of the cases. The IOC has been criticised for lacking appropriate enforcement mechanisms for their equality policies. For example, they are yet to apply their gender equity policies to a country for failure to comply (Brown and Connolly, 2010 p. 5).

The cases also highlight the misleading nature of some of the facially neutral policies in place. This is illustrated by Carr (2009 p 156), who uses the example of sailing to explore further discrepancies between the ideals of the Olympic Charter and their application. This event is overtly equal for both men and women, but is covertly restrictive to women because of the physical size of the boats selected by the International Sailing Federation (ISAF). There are 11 sailing events in the Olympics, 4 limited to men, 4 limited to women, 3 are open events that allow men and women to compete against each other. However, out of the 11 events at the 2008 Summer Olympics, with one exception, no women competed in the open events. The reason for this is the type of boats selected by the International Sailing Federation (ISAF). Women are not physically capable of using them at an international level of competition. For example, to use the Finn boat, the sailor must weigh around 200 pounds because the boat has a heavy hull and large sail for its size. So most women are not able to use it (Carr, 2009 p. 157).

In recent times, changes to the Olympic Programme have been made to include women’s boxing and even to consider new events in wrestling, swimming and cycling as well as the consideration of the inclusion of a mixed doubles tennis event. The FIS has also re-submitted its proposal to the IOC, to include women’s ski jumping into the Sochi Winter Games 2014 and with the approval of a new top tier world cup event for women, it is hoped that this will be achieved. These are positive moves towards inclusion for women in sport. However, the dialogue that emerged from

the *Sagen* and *Martin* cases reveals the dangers of the covert operation of selection criteria and rules that threaten the inclusion of minorities in sport. These cases serve as an example of unreasonable exclusion by the sports body and by the law.

Golf

The remainder of cases in this chapter involves regulatory mechanisms which are mostly found in domestic equality legislation. Many cases relating to inclusion and exclusion on the basis of sex have concerned sport exclusion clauses within equality statutes.

Women's inclusion into golf is complex and has been historically tied up with socio-cultural perceptions of men and women. Despite the progress made by women in recent times, it is documented that they continue to experience forms of discrimination within golf, in terms of membership, playing times and access. The establishment of golf clubs as private social clubs essentially restricted access to "white Anglo-Saxon Protestants" and the rich and elderly (Song, 2007 p. 186) with women not permitted at the entrance of a club. Restriction of access into male spaces is not limited to golf and there have been cases reported in football also (*Anderson v Professional Footballers' Association* [2000] ISLR 74 (C Ct)). The age of these traditions has placed pressure on clubs such as Augusta National Golf Club, the Royal and Ancient Club and the Marylebone Cricket Club, to change their exclusive policies in recent times. It could be argued that the reasons for this are largely financial, since in cricket, clubs who refuse to alter their membership policies and constitution are denied Lottery funds for capital development. This may explain why a number of village teams have introduced women's cricket teams into their structure. The regulation of private clubs and their exclusive practices have been the subject of legal debate for a number of years. A detailed analysis of this is not necessary here. Instead, this provides context for the following case study.

In the Ireland case of *Equal Authority v Portmarnock Golf Club & Others* [2005] IEHC 235 (H. Ct. June 10 2005) the issue of access to golf clubs have received more legal attention. Portmarnock, founded in 1884, was registered as a club under licensing legislation that allowed it to sell alcohol to members. Section 8 Equal Status Act 2000 (ESA) provided a general rule that a club which had a drinks licence could not discriminate if it wished to keep its licence. Section 9

ESA provided an exemption to this rule where discrimination was permitted if “its principle purpose is to cater only for the needs of persons of a particular gender, marital status, family status, sexual orientation, religious belief, age, disability, nationality or ethnic or national origin” to the exclusion of other persons.” The club confined its membership to “gentlemen” only and women were not permitted to become members even though they were permitted to play with or without a male member on identical terms applicable to non male members. Women were not sold alcohol since they were not members (Fenelon, 2009).

The Equal Authority successfully won a ruling in the District Court that the club was a “discriminating club” under s. 8 ESA and the court prohibited the club from being registered as a club, and in turn suspended from selling alcohol. The Court held that the purpose of the club was to play golf, and a literal approach was taken in the case. The club appealed to the High Court arguing that s. 9 (1) ESA protected them since they were catering to the needs of men only. This was upheld by the court.

The Equal Authority appealed the decision to the Irish Supreme Court who had to determine whether the club could rely on s. 9 (1) ESA. The case centred around the statutory construction of the exemption clause. The Equal Authority argued that the club are not exempt under s. 9(1) since “the purpose of the club is to play golf or (more correctly) to provide facilities for the playing of golf, which cannot be described as catering for the needs of one gender only, or as a “need” at all” (Case p. 13). They argued that the word “needs” relates solely to “absolute necessities, like air, food and water and not to social, cultural or recreational preferences” (Case p. 6).

The decision of the Supreme Court was split. The overall outcome was to dismiss the appeal and uphold the High Court decision of no discrimination. Hardiman and Geoghegan JJ held that the Equal Authority interpretation of the word “need” was narrow, outdated and unnatural since there are few activities that are a need of all men or all women (Case p. 39). Instead, the ordinary meaning of the word was broad enough to embrace social, cultural and sporting needs, as well as more basic needs (Case p. 33). It was held that the principal purpose of the club is to cater for the “golfing needs of persons of a particular gender only” specifically gentlemen (Case p. 39). The court held that single gender associations and clubs are not outlawed because in ordinary social

life there are many examples of associations which exclusively cater for a particular gender (Case p. 8).

Conversely, Denham and Fennelly JJ dissented, departing from the High Court decision on the grounds that the principal purpose of the club is the playing of golf. In addition, it does not only cater for the needs of men because both men and women can play golf and use facilities and the clubhouse, but only men can be members. Therefore, it caters for men and women but in different ways (Case p. 55). In order to be exempt under s. 9(1) there has to be a logical connection between the objects of the club and the gender. It was argued that there was no logical connection between golf and gender on the facts (Case p. 56). To argue that the principal purpose of a golf club was something other than golf would be considered “preposterous” (Case p. 66).

The divided outcome of this case is similar to *Sagen* and *Martin* where the courts demonstrated a general reluctance to intervene in sporting matters and capture sports bodies within equality legislation. The dissent in *Portmarnock* and *Martin* highlight the courts difficulty of balancing inclusion and exclusion in sport at times.

Boxing

In the UK case of *Couch v BBBC* (1997 unreported, IT no. 2304231/97), Jane Couch, holder of the World Women’s Welterweight title, was refused by the British Boxing Board of Control (BBBC) an application for a professional boxers licence (UK boxing rule 4(2)) which would grant her the right to box against females in Britain (the case transcript is unobtainable, for commentary see Felix, 1998; McArdle, 2008). Couch, known as the “Fleetwood Assassin” applied to the industrial tribunal on the ground that her application had not been given proper consideration by the qualifying body and had therefore contravened s. 13(1) Sex Discrimination Act 1975 (SDA) which makes it unlawful for an authority or body, which Couch claimed the BBBC were, who have the power to confer an authorisation or qualification which is needed for access to facilities or engagement of a particular profession or trade (such as boxing), to discriminate against a woman by refusing, omitting or withdrawing such authorisation or qualification.

In the case, it was reported that the BBBC justified their decision on essentially three arguments. Firstly there appeared to be a notion that boxing posed particular dangers to the health of females if they pursued it. The secretary general of the BBBC, John Morris, argued that health reasons were the sole reason that Couch's application was not considered. The BBBC presented numerous medical arguments presented in the Notice of Appearance (Felix, 1998), to support the contention that special dangers were open to women in boxing. They included, trauma to the breasts, hormonal changes, premenstrual tension, painful periods (dysmenorrhoea), an increased tendency to bruise, problems with fatty necrosis during pregnancy and finally, since drugs and medication is prohibited in the sport, contraceptive pills would not be permitted. These medical arguments seem legitimate if it is proved that boxing does create such female specific risks because they could affect reproduction. Legitimate medical grounds may render exclusion reasonable in this situation.

Secondly but rather unconsciously, that society does not wish to see women engage in acts of brutality. For instance, Morris also confirmed that the Board were not willing to take any steps to encourage the spread of women's boxing (Felix, 1998). This argument can be as an example of misguided paternalism (James, 2010 p. 234; Lafferty and McKay, 2004). The decision to consent to any risk involved in any sport is primarily the competitor's and the dangers that may occur during the game are at the risk of that individual. It is arbitrary to presume that because Couch was female, she lost her right to consent to such dangers. It is suggested that "accepting risk sometimes to a high degree is part of many sports" (*Agar v Hyde* [2000] HCA 41 (3rd August 2000) Para 15). Cultural perceptions of females engaging in physical sports effect and influence the way in which their participation is dealt with.

Finally, the Board argued that female boxing would result in dramatic rule changes to boxing that would presumably alter the essence of the sport. If changes in the rules concerning weight categories and clothing lead to the essence of the sport being threatened then this may be justifiable.

The tribunal rejected each of these arguments and viewed the medical evidence to be a "smokescreen" for the Board to hide its double standards behind (Felix, 1998). Even if there were any truth in the arguments, "a desire to protect women from the consequences of making an informed choice about consent to injury and the voluntary assumption of risk, provided no

defence to a sex discrimination claim” (Felix, 1998). The tribunal concluded that the BBBC “has no evidence that it is more dangerous for women to box than men, or indeed vice versa . . . [Couch’s application for a boxer’s licence] was rejected allegedly on medical grounds although she was never medically examined. The real reason for her refusal was on the ground of sex . . . The ‘medical grounds’ are all gender-based stereotypical assumptions not capable of amounting to valid defences to a claim of discrimination” (Case p. 12 cited in McArdle, 2008 p. 54). The changes to the rules was unanimously rejected as these issues have already been successfully dealt with in countries where women’s boxing is widely accepted (USA, Germany, Belgium, Holland, Hungary.) The tribunal held that this small “inconvenience” was no reason for allowing it to flout the law of the land.

Overall, it was held to be “incontrovertible” that “but for” her sex, Couch would have been treated more favourably. Subsequently, three months after the judgment she was granted a licence to box in Britain and proved it to be little fuss, having still retained the world champion title in 1998. The BBBC has now adapted its regulations to provide for women’s boxing in light of this. More recently, women’s boxing has received further attention when in 2009 the IOC voted to include women’s boxing in the London Olympics in 2012. Every Olympic sport will be represented by women in 2012 (Anon 2009e).

This case is set in a sport that is subject to popular debate. The legality of boxing is contentious because of its inherent dangers and risks to the physical and non physical health of men and/or women. The British Medical Association perceives boxing, regardless of gender to be a dangerous sport and should not be encouraged further (Anon, 2009e). Sport should not be so dangerous so as to cause a competitor *unlawful* injury and there should be sufficient regulations in place to reduce these risks. The broader arguments presented in the case about health risks and societal perceptions about brutality are equally applicable to men also. It follows that if there are suggestions that a sport such as boxing is too dangerous for anyone, regardless of sex, then the legality of boxing as a whole should be questioned. It appears unfair to exclude one sex in order to protect them from dangers that are also applicable to the other sex. The decision of the tribunal does reflect this implicitly.

One criticism of the case is that it did not necessarily consider the realities of the female specific injuries that arise from boxing because medical evidence was rejected. Whilst boxing rules seek

to protect women and men from injuries, there may be reasonable grounds to exclude a female when gender specific injuries cannot be guarded against.

In a very similar case in Australia, the opposite decision to *Couch* was reached. In *Ferneley v Boxing Authority of New South Wales [2001] FCA 1740*, an adult 18 year old female professional boxer, Holly Louise Ferneley, applied to the Boxing Authority of NSW for registration as a boxer. It is a criminal offence under s. 15 of the Boxing and Wrestling Control Act 1986 (NSW Act) for a person to engage in a boxing contest without registration as a boxer. However, her application was denied because according to s. 8(1) of the NSW Act, only a male person over the age of 18 years old can submit an application to the Boxing Authority of NSW to be registered as a boxer. Therefore, it is always a criminal offence for a female to box since there is no provision for female registration. This exclusion appears to be deliberate as is reflected in the parliamentary debates prior to its enactment;

“Part of the reason is that the spectacle of women attacking each other is simply not acceptable to a majority of people in our community” (per Mr MA Cleary MP Case Para. 6).

Mr Cleary emphasizes that “current community standards” do not accept the risk of women “becoming freaks in some sort of roman circus disguised as a sporting contest” (Case Para. 6). He proceeds to highlight the perceived special risks of boxing to women particularly, such as injury to the reproductive organs and particular risks to pregnant women (Case Para. 6). He expresses that any sport which requires women boxers to wear breast plates and abdominal shields “is too much of a risk for the Government to follow” (Case Para. 6).

As a result of this restriction, Ferneley brought a claim to the Federal Court of Australia against the Boxing Authority for its handling of her application, and against the State of NSW in relation to the terms of the NSW Act. She relied on the Sex Discrimination Act 1984 (Aus. SDA) to argue that both respondents had unlawfully discriminated against her on the basis of her sex.

The Court held that the Boxing Authority has not breached the Aus. SDA in their handling of the application because they did not fall within the interpretation of the Aus. SDA provisions concerning the type of authorities or applications covered by the Act. Justice Wilcox stated that his decision does not turn on the desirability or undesirability of permitting female boxing

contests, but instead the proper interpretation of the Aus. SDA (Case Para. 99). In supporting the Boxing Authority the case appears to uphold Mr Cleary's comments which are paternalistic in nature (Burke, 2004 p. 178). Just as in *Couch*, the decision may be legitimate if the female specific health risks are proven. However, this then becomes a wider concern about the legality of boxing. The court failed to hold the sports governing body responsible under equality legislation and interpreted it in a way that made sports bodies exempt.

Sport Exemption Clauses

A subsidiary aspect of *Couch* and *Ferneley* was the reliance by the BBBC and the Boxing Authority on sport exclusion clauses in sex discrimination legislation, to render their actions completely lawful. In the UK, s. 44 SDA previously read;

“Nothing in Parts II-IV shall in relation to any sport, game or other activity of a competitive nature where the physical strength, stamina or physique of the average woman puts her at a disadvantage to the average man, render unlawful any act related to the participation of a person as a competitor in events involving that activity which are confined to competitors of one sex.”

The SDA has now been replaced by the EA but continues to include an identical clause under s. 195 (see Chapter 5). At the time of its passing through Parliament, the exemption clause was given little deliberation about its purpose or impact (Pannick, 1983 p. 9). During the House of Commons parliamentary debate, Sir Ronald Bell MP justified such exemption clauses in the SDA in order to overcome the absolute prohibition of taking into account the difference between the sexes, as he perceived the Act to be. He expressed that just as obvious provisions were needed to support the continuation of separate lavatories for men and women, so too were provisions for the maintenance of all male football teams (HC Deb 26th March 1975).

This is supportive of Lord Somers comments in the House of Lords debates regarding single sex establishments and co-education under the SDA. He stated that “men and women should be equal, most certainly, but I sincerely hope that they will always remain different. Merely to take the rather minor point of the sort of games they play, I cannot think of rugby as a very suitable game for girls; nor do I see boys taking to netball very successfully” (HL Deb 15th July 1975).

Based upon these limited references it would appear that s. 44 existed to maintain knowledge and attitudes towards women that were reflective of the 1970's. The opinion was that men's sporting space has to be protected and kept separate from female activity because of the differences in strength, speed and stamina that would create unequal competition.

It was not clear how the provision should be interpreted and applied but the courts and tribunals have tended to apply it only to mixed sex competitions which are situations where women seek to compete in male teams or events. It would seem that the objective of the exemption was not to encompass female only sports or non competitive aspects of sport. With limited commentary available of the *Couch* case, it is presumed that any reliance on s. 44 by the BBBC would have also been rejected since the case related to female only sport. When sports governing bodies or organisations have attempted to rely on it to support exclusion on the basis of sex, it has been rejected by the courts in areas such as officiating (*British Judo Association v Petty* [1981] ICR 660, CA) and coaching (*Hardwick v FA IT case*, unreported. Case no. 2200651/96, *Saunders v Richmond Borough Council* (1977) IRLR 362, [1978] ICR 75, EAT, *Moore v The Squash Rackets Association Ltd IT case*, case no. 50482/94, May 9th 1995).

Lending support to this is the Employment Appeal Tribunal case of *Greater London Council v Farrar* [1980] 1 W.L.R 608. This case concerned a professional female wrestler who challenged a local authority for prohibiting the issuing of licences of premises for boxing or wrestling to women. In first instance, the tribunal held in favour of *Farrar* and found that the condition which prohibited women's wrestling was unlawful under the SDA. In addition, they held that s. 44 did not operate to exempt women's wrestling from the SDA because it did not include sports where women were matched against other women (Case p. 609). On appeal the prohibitive condition was allowed on procedural grounds concerning the local authority's obligation to comply with a previous requirement (p. 611). However, the meaning of s. 44 was agreed by Slynn J. On interpretation of the provision he explained that "the industrial tribunal said that they found the section was not very easy to construe and we confess that we find ourselves in the same position" (Case p. 613).

He went onto conclude that s. 44 is "dealing with a situation in which men and women might both be playing in the same game or taking part in the same event. It is in that situation that the disadvantage of the woman because of physical strength, stamina or physique would become a

relevant matter. It does not seem to us that this section is dealing with the situation where it is desired that a girl should play a game against a girl, or where teams of girls are to play teams of girls” (Case p. 613). Slyn J is suggesting that if *Farrar* was applying to wrestle against a male, then the s.44 line of defence would succeed and she would have been denied a licence. Only once was it applied as we shall see below. A similar situation has taken place in Australia. Section 42(1) Aus. SDA reads;

“Nothing in Division 1 or 2 renders it unlawful to exclude persons of one sex from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant.”

This is reproduced in legislation for the different states of Australia. The clause justifies exclusion on the basis of “average anatomical characteristics” relating to sex, rather than on the basis of “individual sporting performance” (Burke, 2004 p.169). Its exact meaning and intentions are also very vague and has caused problems of interpretation in the Australian courts.

The Boxing Authority relied on this in *Ferneley* and its interpretation was a subsidiary issue of the case. However, since it was the first time that it had been argued in a court, it was viewed as desirable to address by Justice Wilcox who expressed that the wording was unfortunate since it might be construed to apply to same sex activities. However, it seemed clear to him that the provision was intended to only apply to mixed sex participation (Case Para. 89). He justifies this on the basis that if the provision was not intended to apply to mixed sex participation then it would lead to strange results.

Clearly then such exemption clauses are only intended to apply to mixed sex sports. The balance between inclusion and exclusion in sport on the basis of sex appears to be most precarious in the areas of mixed sex sports since this directly challenges an integral structure of sports which is sex segregation. Exemption clauses which support the segregation of men and women raise important issues about the biological and social construction of men and women in the context of inclusion and exclusion in sport. It is not clear from the wording which sports strength, stamina and physique are relevant to. For instance, are they contact or non contact, team or individual? The difficulty continues to be not so much the individual words of these exemptions but the clarification of what Parliament meant by the inclusion of these words (*Taylor v Moorabbin*

Saints Football League & Football Victoria [2004] VCAT 158). Again it is a question of how broad this is likely to reach. All sports require strength to some extent, even tiddlywinks (Case Para. 17). This uncertainty forces an evaluation of the necessary skills and attributes of particular sports. The scientific truth behind such a proposition also requires clarification for it to be supported.

In the case of *Robertson v Australian Ice Hockey Federation [1998] VADT 112 (26 March 1998)* the AIHF stipulated that females are not permitted to play contact leagues with males over 12 years old. Victorian Ice Hockey competitions are organised into senior grades and junior grades. Robertson was a 15 year old female ice hockey player. She began playing in the lower junior level ranks where non contact ice hockey is played by children of both sexes under the age of 13.

She secured a non contact position as a goal keeper in a higher contact junior grade club. However, because of the AIHF rules concerning mixed sex competition she was restricted from playing with the club. Her only alternative would be to play in a female higher level junior grade club. There were no such clubs in close proximity to Robertson for her to compete in. Robertson therefore brought a claim against the Federation arguing that they had discriminated against her on the basis of her sex. The Federation relied upon an equivalent provision under the Aus. Equal Opportunity Act 1995 (EOA), s. 66(1) which permits discrimination of one sex in competitive sport when the strength, stamina or physique of competitors is relevant.

In the case President McKenzie confirmed that whilst s. 66(1) EOA does apply to contact ice hockey since strength, stamina and physique is relevant, it cannot be sustainable for the exclusion of a female in the non contact position of a goal keeper (Case p. 11). The objective of a sport exemption was explored in the case and McKenzie attempted to provide a clear interpretation of it. In her explanation she attempts to clarify that the section could not apply to all sports since it would lead to uncertain outcomes, but only those competitive sporting activities where, if both sexes were to participate together, the competition would be unequal because of the disparity between strength, stamina or physique (Case p. 9).

This interpretation was upheld in the case of *Emily South v Royal Victorian Bowls Association [2001] VCAT 207 (28 February 2001)*. South was a 19 year old keen player of lawn bowls. She had played for approximately 7 years and was a member of the St Kilda Bowling Club which is

an affiliated member of the Royal Victorian Bowls Association (RVBA). Female competitions ran during weekdays which conflicted with her school and university commitments. Instead, South requested to compete in the weekend higher level RVBA competitions. In order to compete at this level she had to be an affiliated member of the RVBA. Her application to become a member was rejected on the grounds that “an affiliated member is a male member of any affiliated Club” (Case Para. 4). South brought tribunal proceedings against the RVBA arguing that the decision to refuse her membership constituted sex discrimination under the EOA. She was refused selection because she was not male and argued that this contravened s. 65 which prohibits discrimination in sport by refusing to select a person in a sporting team, or by excluding a person from participation in a sport.

The RVBA relied on s. 66 (1) EOA and were responsible for proving the establishment of this exception. The case turned on whether strength, stamina or physique is *relevant* to lawn bowls, which is not made clear in the statute. Deputy President of the tribunal, Coghlan agreed with the interpretation in *Roberston* because it “appears consistent with the objectives of the Act to eliminate, as far as possible, discrimination against people by prohibiting discrimination on the basis of various attributes” (Case Para. 34). The exemption cannot be interpreted to mean any sporting activity which involves strength, stamina and physique since this would “strip the section of any meaning” and stretch is beyond its primary objective.

Having outlined the intended aims of s. 66(1) the Coghlan turned to the objectives and rules of lawn bowls which appeared to be the same for men and women. The RVBA led evidence of a scientific test showing that amongst a range of shots available in lawn bowls, a female would be at a distinct advantage executing a drive shot which is an attacking or defensive shot. The RVBA employed a second investigation to show males to be more accurate at lawn bowls than females (Case Para. 56).

Upon cross examination these tests were criticised and revealed to be flawed. Coghlan held that the RVBA had failed to prove that “women cannot or do not use the drive shot” (Case Para. 74). Whilst there may have been evidence to show that men employ the drive shot more often than women and that it does require more strength than another shot such as a draw shot, the RVBA did not sufficiently prove that “this is related to the difference in strength between men and women or that if it is related to differences in strength, that employing the drive makes

competition uneven” (Case Para. 74). The RVBA were forced to delete the requirement that only men can be affiliated members thus allowing South to re-apply for membership.

In *Taylor v Moorabbin Saints Football League & Football Victoria* Justice Morris interpreted s. 66(1) to hinge upon the meaning of the word relevant. He used three criteria to determine whether such a provision applies;

1. the relative differences between the sexes in strength, stamina and physique;
2. the nature of the competitive sporting activity (not just the sport, but also the age group);
3. and whether the differences between the sexes are significant (in the sense that they matter) in participating in the competitive sporting activity (Case Para. 29).

The decision in *Robertson and South* can be contrasted with the approach taken by the UK courts to s.44 SDA in *Bennett v. Football Association Ltd.*, July 28, 1978; Court of Appeal (Civil Division) Transcript No. 591 of 1978, C.A. Only once has s. 44 been successfully applied in the context of a girl wishing to compete in a boy’s soccer team. Theresa Bennett was a young 11 year old female who enjoyed playing football with her young male friends. Football was the only sport that Bennett enjoyed and “she ran rings around the boys” (Per Lord Denning, Case p. 2). She applied to be registered at a male club, Muskham United FC, which is a member of the Newark Youth Football League. They are a member of the Nottinghamshire Football Association who report into the Football Association (FA). The FA prohibited mixed teams and matches between men and women teams. The local FA claimed that they were bound by the FA and the European Football Union which restricted female players. Bennett, was therefore debarred the chance to compete on grounds of her sex. Similarly, Jo Hughes (Unreported. Judgement of 28th July 1978) who played for her youth team in South London was denied the chance to play for her youth football team in the youth league cup as the FA believed that “girls can’t play in boys games...it would spoil the game”(Pannick, 1981). Previous to this in 1921 the FA announced that football was unsuitable for women, denying teams such as the famous Dick Kerr Ladies Football Club from competing (Newsham, 1997 p. 49).

Bennett took her case to Newark County Court and was supported by the Equal Opportunities Commission (EOC) claiming that the FA and the Nottinghamshire FA had breached s. 1(1) and s.

29(1) of the UK SDA. The court ruled in favour of Bennett stating that s. 44 failed in light of evidence which suggests that boys and girls under the age of 12 are not dissimilar.

However, on appeal Lord Denning reversed this decision. He contended that in the absence of the s. 44 exception, the defendants would have had no justification for their actions and would have clearly been in breach of the SDA. Denning held that upon reading the provision, “it seems to me that football is a game which is excepted from this statute” (Case p. 4). He went on to express that if the law included football within the SDA then it would expose itself to “absurdity” and would be “an ass- a idiot if it tried to make girls into boys so that they could play in a football league” (Case p. 5). He rejected medical evidence which used “graphs and all sorts of things” to show that, below the age of puberty, the strength, stamina and physique of girls and boys is not markedly different (Case p. 4).

Eveleigh LJ also rejected this evidence and dismissed the proposal to divide games for under 12s and over 12s. He interpreted s. 44 to refer to activities of a competitive nature where the physical attributes of “*womankind*” put them at a disadvantage. Sir David Cairns added that “average woman” does not “envisage any arithmetical average at all but mean something like “the ordinary women” and in the context of sport the ordinary woman of the sort of age and the sort of physical characteristics who would be likely to engage in that sport” (Case p. 6). The judgement was predicated on the fixed notion that football was somehow a genetically determined male sport.

The age of the Bennett case is reflective of the previous overall ban on women of all ages playing football. It is suggested that “the damage done by the FA all those years ago may probably never really be undone” (Newsham, 1997 p. 136). The Bennett case is a significant one considering the social landscape at the time of challenge (Griggs and Biscomb, 2010 p. 672).

Whilst football has come a long way since this ban, similar restrictions continue to affect young girls. For instance, in 2007, 11 year old Minnie Crutwell secured the right to continue to play for two boy’s soccer clubs instead of having to switch to move to a single sex team under the FA rules which restrict participation at the age of 12. After lobbying with the support of the British sports minister Tessa Jowell, Crutwell forced the FA to reconsider its age limit for mixed sex teams (Tozer, 2007). In 2010, the FA agreed to extend its age limit to under 13 from the 2010-11 season. This followed an FA commissioned report by Brunel University in 2008 which found that

if girls play with boys they will benefit from opportunities for skill development, challenge, and enjoyment, social interaction, and finally, the report found that there is considerable overlap between boys and girls in relation to size, motor skill development and ability between 11-13 year olds (The FA, 2010).

The approach of the law to prevent *Bennett* can be largely dismissed in light of the FA changes. The age bracket varies in different countries. In the Netherlands, mixed teams are permitted in youth football up until the age of 19 at all levels. This was introduced in 2000/2001. Until the age of 12 mixed teams are a rule. Above 12, girls have the choice to play in a mixed team or join all girls teams (Brink, Loenen and Tigchelaar, 2010 p. 121). As scientific knowledge progresses, it seems that the age limit is increasing but there is not a universal approach.

Contrary to s. 44 SDA, the exemption provisions s. 42(1) Aus. SDA and s. 66(1) Aus. EOA include a statement that makes such clauses inapplicable to children under the age of 12, thus acknowledging that physiological differences between children overlap. In *Ferneley* it was noted that this age boundary existed to eradicate myths relating to strength, stamina and physique in sport (Case Para. 78). McKenzie in *Robertson* also agreed that it does not and cannot logically apply to children under 12 (Case p. 9).

Justice Morris in the Australian case of *Taylor v Moorabbin Saints Football League & Football Victoria [2004] VCAT 158* offered a detailed scientific evidence of the differences in strength, stamina and physique between the age groups of 12-16, focusing on the contact sport of Australian Rules Football. In that case, it was held that 14 year old girls cannot lawfully be excluded from the sport, but that it is lawful to exclude girls over 15 years old since relative differences in strength, stamina and physique were sufficiently significant (Case Para. 82). The decision appeared very balanced as Justice Morris went on to highlight that sport governing bodies should be lawfully allowed to adopt such rules but at the same time the girls themselves should have the right to free choice. It was also noted that children who engage in such sports at a young age, boy or girl are likely to be stronger and fitter than those in that average age group. It was therefore recommended that a wise policy would therefore take self selection into account when making such decisions (Case Para. 84).

In the interests of equal opportunity Justice Morris advocated that given the differences in children between the ages of 10-16, it would be fair to permit children to play in younger age groups where they are smaller and/or weaker. This proposition basically means that age is not necessarily the best form of categorisation.

Upon these case studies, it seems that the continual change of the age boundaries serves to challenge the sex segregated structure of sport. Some of the inaccuracies of organising sport along these lines have been demonstrated. There are also parallels between the social shifts in traditional roles of boys and girls. The previous attitudes of governing bodies and/or representatives of these institutions, including those comments made by Lord Denning and his peers, seem to reflect the socio-cultural perceptions of females in sport, creating situations which act as deterrents for females to compete. Section 44 SDA has received a lot of scrutiny from bodies such as the Women's Sport and Fitness Foundation and the EOC. It is suggested that because of the development of EU discrimination law as well as the achievements of women in sports, we can infer that s. 44 be treated as "dead law" (McArdle, 2008 p. 48; Patel, 2007). However a version of it continues to exist under the UK EA.

Based on the discussion thus far, it seems unreasonable, and potentially discriminatory, to exclude girls or women from competing in sports 1) against each other when health risks specific to women can be reasonably guarded against and 2) against boys, when they are below the approximate age of 13.

The position of mixed sex adult sports is less certain and has fuelled a number of debates. Examples of men and women competing together have historically been a novelty. For instance, in 1973 female tennis player Billie Jean King beat former world champion player Bobby Riggs. Another example was in December 2004 FIFA refused to allow Mexican female soccer star Maribel "Marigoal" Dominguez to sign a two year contract with second division club Celaya, a men's team who were reportedly looking for some publicity (Tuckman, 2005). Whilst the national football association accepted this move, it was referred to FIFA who confirmed that "there must be clear separations between men's and women's football" and "no exceptions." Previous attempts to sign female players were made by Italian club Perugia but were aborted before the FIFA ruling (Anon, 2003). Dominguez had hoped to "pioneer a change" for women entering into men's football. In 2004 at the Athens Olympics Dominguez led the Mexico

women's team to the quarter finals. However, FIFA went on to ban her further from competing in an exhibition match, outside the league with men.

The lack of support for mixed sex sports is overtly and covertly expressed in sport and society. For instance, in cricket in 2005, newly appointed president of the Marylebone Cricket Club (MCC), openly conveyed that it was “absolutely outrageous” that girls played cricket with boys (Harrison, 2005). More covertly, the surrounding culture of sport is expressed as male. Malcolm and Velija (*in* Atkinson and Young, 2008 p. 225) highlight that “for most female cricketers, their initial exposure to the game is mediated by their fathers.” Cricket is therefore “initially presented to girls as a subculture populated by males, access to which is mediated by males”. It is noted that the attitude and atmosphere is very male orientated, with little socialising between men and women.

The current segregation of adult sports informs us that men and women would remain separated if a female adult wished to compete alongside adult males. The rationale behind this segregation in sport seems to rest on two interconnected arguments which are influenced by a range of moral, medical and aesthetic factors and reflected in the sport exemption clauses (Hartmann-Tews and Pfister, 2003 p. 267);

- 1) Men are generally stronger than women and therefore the competition would be unfair and a lower standard;
- 2) That if men and women compete in sport together then it would be dangerous for women. Sport is organised in this way to therefore ensure fairness and uphold safety.

Let us consider whether these arguments are justifiable and legitimate and whether they produce a fair balance between inclusion and exclusion in sport.

The Strength Argument

Female exclusion from sport has been justified on the basis of the physiological differences between men and women that make competition between them imbalanced and therefore contrary to the essence of sport. Section 44 SDA (now s. 195 EA), s. 42 (1) Aus. SDA and s. 66(1) Aus. EOA adopts this approach by positing that average strength, speed and stamina

typically favour the average man and will put him at an advantage over the average woman in sports. The inherent problem with this assertion is its overly broad application.

Part One highlights the fact that men are inherently stronger and more aggressive than women as a result of evolutionary and social adaptive problems and roles throughout history. The strength of a woman's mind cannot therefore overcome the physical differences. Physiological attributes are "naturally unequally distributed between men and women" (Elling and Knoppers, 2005 p.258). From a physiology perspective, VO₂max (oxygen uptake) is closely associated with success in endurance events. A high VO₂max will be associated with high endurance and someone with a high VO₂max will therefore (typically) be able to exercise at higher intensities. It is accepted that women achieve a lower VO₂max score than men which can be due to body composition and haemoglobin concentration (McArdle, Katch and Katch, 2007 p. 244). In terms of body composition, men tend to possess less body fat and more muscle mass than women and therefore are able to generate more total anaerobic energy than women. Although trained athletes possess less body fat, women still possess more than their male counterparts. A greater haemoglobin concentration in men means that they are able to circulate more oxygen during exercise which increases their aerobic capabilities.

When evaluating differences in muscle strength, it is important to look at the cross sectional muscle area as well as the absolute muscle strength. In terms of the muscles cross sectional area, those with the largest muscle cross sections generate the greatest absolute force (McArdle, Katch and Katch, 2007 p. 515). There seems to be little difference when testing the same size muscle of men and women. In terms of absolute muscular strength however, men appear to possess much greater strength. If we consider the sport of weight lifting, where men and women participate in the same categories on the basis of identical body mass, it is found that lighter weight categories produce smaller sex differences whereas larger body mass women tend to lift about 60% of the maximal weight lifted by their male counterparts (p. 516).

It has been suggested that the way in which muscle strength is scientifically calculated can have an effect on the differences rated between men and women (p. 516). In sports which require exceptional muscular strength, power and anaerobic capacity, it is argued that gender equality may emerge one day in middle distance swimming events, where there has been closer male and female times recorded (McArdle, Katch and Katch, 2007 p. 819). From a social perspective,

traditional gender roles and differences in absolute strength have resulted in misconceived approaches to strength training for women (Ebben and Lenson, 1998). Had it not been for the unenlightened medical knowledge and years of being debarred from competitive sport, studies show that women would be on a more level footing with men (Anon, 1999). Physiology perspectives do not ignore the fact that social factors can also account for body fat and haemoglobin differences in men and women (McArdle, Katch and Katch, 2007 p. 244).

From a biological perspective, Darwin (1913 p. 923) argues that “the greater size, strength, courage, pugnacity, and energy of man, in comparison with women, were acquired during primeval times, and have subsequently been augmented, chiefly through the contests of rival males for the possession of the females” (see also Deaner, 2006). He goes on to propose that in “the animal kingdom,- in mammals, birds, reptiles, fishes, insects, and even crustaceans,- the differences between the sexes follow nearly the same rules. The males are almost always the wooers; and they alone are armed with special weapons for fighting with their rivals. They are generally stronger and larger than the females, and are endowed with the requisite qualities of courage and pugnacity” (Darwin, 1913 p. 938).

Physiological differences between men and women in sport are more exposed in activities such as running. In recent times the “gender gap” between male and female running times has caused huge scientific and academic debate (Tatem *et al*, 2004; Anon, 2004b; Constance, 2004; Seiler and Sailer, 1997; Whipp and Ward, 1992). On the one hand it is argued that if current trends continue then a woman may run a faster time in athletics than a man, possibly in the 2156 Olympics (Tatem *et al*, 2004). This has been predicted in a limited study plotting the winning times of men and women Olympic 100metre finals over the past 100 years. Whipp and Ward (1992) hypothesised that marathon world records would be equal by 1998 and women would catch up with men in shorter distances by the early part of the 12th Century. In their study they plotted the world record running speeds at various distances for men and women between 1900 and 1992. Their overarching finding was that women were increasing their speeds to a much greater extent than men (Anderson, 2003).

However, these have been heavily criticised (Anon, 2004b p. 147; Constance, 2004). Those who believe that the gender gap will remain, do so on the basis that the “hormonal gap” between men and women can never be closed (Seiler and Sailor, 1997). This reflects our previous discussion of

the differences between men and women. Suggestions that gender differences decrease as the race distance increases have also been criticised (McArdle, Katch and Katch p. 245). In practical terms Seiler and Sailor (1997) express that the most accurate way to assess this would be to test both sexes under identical conditions in a laboratory rather than compare data from races where many other variables (such as surface, wind speed, temperatures, political boycotts, previous hand timed races) effect performance.

With this brief evaluation of the physiological differences between men and women it is clear that physical strength will favour men on average. In order to provide some level of consistency within sport, it seems reasonable to organise sports along the lines of sex since strength is a dominant factor of many sports that determines the outcome of success or failure in a competition. From a regulatory perspective, there does require some demarcation of physical differences to ensure competitive balance and maintain safety. However, to prohibit the practice of all mixed sex sports because of strength differences ignores the significant variations between sports, since different sports require different skills and abilities that do not always include strength.

Non contact sports such as golf are a good illustration of this. Men's strength allows them to hit the ball further and for this reason the sport adheres to these biological differences by placing the tees further away for men. However, once within 125 yards of the pin, strength is less important and style and technique impact upon performance. Consequently, although strength may make a female less able to hit the ball further, she is still capable of competing due to other factors and attributes that a sportsperson may excel in. Historically, Babe Zaharias, Annika Sorenstam, Laura Davies, Se Ri Pak and Michelle Wie (Lawrenson, 2004), have played in the men's PGA tour events. Hawaiian golfer Wie exceeded women in tournaments early on in her career, and won the Hawaii State Open in 2002 against a host of scratch players and former male professionals, from a set of tees only 10% shorter in yardage. At the Sony Open in Hawaii 2004, although she may have missed the cut by a single shot, upon qualification she finished tied 47th against 96 men and from championship tees. Whilst she has struggled in her professional career, her early success exposed some of the traditional structures of golf.

In team sports, different positions exist which require varied levels of strengths. The decision in *Robertson* emphasises this. In boat racing for example, whilst the average woman would

naturally be at a disadvantage to a male in rowing, the role of coxing a crew has no advantage for a male. Furthermore, every sport does not require strength as a leading factor. The strength argument may therefore fail in certain circumstances.

The restriction of mixed sex sports on the basis of strength also disregards the significant differences between each individual human being and within the sexes. It appears to ignore the fact that there is considerable overlap between men and women's anatomical and physiological characteristics that impact upon sporting performance (Burke, 2004 p. 173). Whilst it is certain the men are naturally stronger than women, so too are individuals naturally stronger than each other within one sex. Consider the differences between Birmingham City FC football player Nikola Zigic who is 6 foot 7 and Tottenham Hotspurs FC player Aaron Lennon who is 5 foot 5. Similarly, the tallest current NBA player is Yao Ming, who stands at 7 feet 6 inches (2.29 m). The shortest player in the NBA (and second shortest ever in the NBA) as of the 2009–10 season is Earl Boykins at 5 feet 5 inches (1.65 m). While shorter players are often less capable at defending against shooting or scoring, they are strongest in their ability to navigate at speed in between players. With variations such as this within the sexes, it is often difficult to justify the strength argument when generally applied.

There is an undeniable truth in the disparities between strength, brought about by evolutionary and cultural adaptations as discussed in Part One. However, its broad application reflects a misguided use of stereotypes that have led to the enforcement of regulatory mechanisms such as the exclusion clauses, reflecting those inaccuracies at times. Whilst it is accepted that men are generally stronger than women, this should only be used to exclude them where strength is a dominant factor of that sport. Where it is not, then this can lead to unreasonable exclusion. What underpins this strength argument is the idea that because women are not as strong as men, it is feared that mixed participation could lead to possible health and safety risks for women.

The Safety Argument

The safety of athletes is a common argument that presents itself when challenges to sports bodies are made. It is argued that females would be at a greater risk of physical harm and injury if they were to compete in sports with men because of the physiological differences between the sexes. Ability would not be matched because of this which would lead to unequal consequences that threaten the safety of the athletes. In order to guard against this, sport has created rules and

selection criteria that aim to match ability and ensure safety. This can be termed the precautionary principle.

The focus on the protection of women is reflective of their wider treatment in society. The historic exclusion of women from physical activity has usually been connected to their perceived role as mother and wife. Although there has been a shift in the medical opinion of women in sport, the paternalistic protection of women still continues to appear in comments and also the rules relating to certain sports and in the enforcement of the exclusion clauses. Women have been considered worthy of more protection because they have traditionally been regarded as “less capable of physical and emotional control, supposedly ruled as they are by their hormones and reproductive organs” (Lupton, 1999 p. 140).

This principle has been misguided at times and has led to unfortunate consequences in female participation. In *Sagen*, part of the claimants supporting evidence was that historically women’s ski jumping, which is non contact, has been considered an inappropriate sport for women because of the perception that there are medical risks associated with their participation and they are more frail than men (Case p. 93). This, combined with social pressures as discussed may have contributed to the lack of participation in the sport until the late 1990’s and early 2000’s.

From a practical perspective, it could be argued that where strength is a determinant factor and where safety may be threatened as a result of the physical make up of a woman, most likely in sports that involve physical contact between men and women, then it is a reasonable justification to exclude women from those activities, unless appropriate modifications could be made to the sport to include them. The US courts have been faced with clarifying the correct application of the precautionary principle when determining the applicability of equality legislation to sport.

Following the passing of Title IX in the USA enforcement regulations were needed to better clarify this piece of legislation. What was later added was the distinction between contact and non contact sports. Contact sport included “boxing, wrestling, rugby, ice hockey, football, basketball and other contact sports the purpose or major activity of which involved bodily contact” (Title IX). Title IX specifically excludes contact sports from its application on the basis of safety, since females are considered to be at risk from bodily contact with males. This is another example of a domestic piece of legislation excluding particular sports from its

application. This exemption permits the existence of all male contact teams in educational establishments in the USA and they are only required to provide all female equivalent teams if a sufficient standard of interest and ability exists to sustain such a team (Sangree, 2000 p. 391). Governing bodies have relied on this to exclude females from competing in sports on the basis that it would be dangerous for them.

The workability of this approach has been difficult because of the lack of clarity between contact and non contact sports. Broadly speaking it would seem that this is a socio-cultural construction that has influenced the legislation. For instance, baseball has produced particular dispute. Whilst, it is not exempt from Title IX under the provision, the court have been influenced by “cultural forces” when making legal decisions and have often refused girls to play the sport in the interests of female safety (*Magill v Avonworth Baseball Conference*, 364 F. Supp. 1212 (W.D. Pa. 1973); *cf Carnes v Tennessee Secondary School Athletic Association*, 415 F. Supp. 569 (E.D. Tenn. 1976)).

Some sports are difficult to classify as contact or non contact. For instance, soccer and basketball (which are included in the exemption) are strictly speaking non contact sport with rules in place to expressly prohibit contact (Sangree, 2000 p. 396). However when properly played, “incidental” contact is inherent in the sport. In *Williams v School District of Bethlehem Pa* (1993) 998 F. 2d 168 which concerned field hockey, Judge Troutman argued that “it defies logic to conclude that bodily contact is a purpose or major activity of field hockey when a team may be penalized not only when its players or a ball hit by one of its players contacts another player, but also when such contact is threatened or likely” (Case p. 516-17). The Third Circuit reversed this, arguing that to define a contact sport, you must not only look at the rules of the game but also “the realities of the situation on the playing field” (Case p. 173). Conversely, in *Kleezek v Rhode Island Inter-school League Inc.* 768 F. Supp. 951 (DR 1991) it was held that field hockey is a contact sport since contact is inevitable.

Even where contact is inevitable in sports such as soccer however, the court in *Hoover v Meiklejohn* 430 F. Supp 164 (D Colo 1977) expressed that “any notion that young women are so inherently weak, delicate or physically inadequate that the State must protect them from the folly of participation in vigorous athletics is a cultural anachronism unrelated to reality” (Case p. 169). The court has ruled on the contact sport exemption that girls should be judged by their ability

instead (*Mercer v Duke University* 181 F. Supp 2d. 525, 531 (MDNC 2001); *Lantz by Lantz v Ambach* 620 F. Supp 663 (1985)).

Despite the contrasting opinions of the courts on what constitutes a contact sport, it appears that contact sports may be defined by something more than the rules and possibly the culture of the sport. Incidental contact can take place in the heat of the moment of a sport, or as part of the nature of the sport. Such sports would therefore fall under the “catch all” element of the exemption- “and other sports the purpose or major activity of which involves bodily contact.” Perhaps the driver behind this could be economic, that is, exempting the sports that produce the highest revenue (Sangree, 2000). A more suitable question to ask is whether bodily contact forms the purpose or essence of the sport, which would create particular risks to females if they were to compete with males.

In purely contact sports, it is undisputable that bodily contact forms the essence of the sport. It is here where the precautionary principle has some legitimacy because of the differences in strength between men and women. However for female children competing in mixed sex sports the US legal approach has largely been to support them because of the effect of puberty on physiological differences as discussed earlier.

In *Clinton v Nagy*, 411 F. Supp. 1396 (N.D. Ohio 1974), a 12 year old girl was refused permission by the US Football Association, to qualify to compete in an American football team simply because it “was the law” (Case p. 1397). Clinton therefore brought a sex discrimination claim against the defendants. The Football Association argued that the City of Cleveland’s rules and regulations which govern sports specifically excludes females from competing in contact sports thus making the exclusion lawful “because it bears a rational relationship to a legitimate state purpose of providing for the safety and welfare of females” (Case p. 1397). The District Judge Lambros held that the defendants had failed to prove that Clinton did not possess the relevant qualifications or physical ability required of male members to compete in the league. Neither did they prove that she is more susceptible to injury than other members because she is female. He also stated that safety equipment given to boys in the league is adequate for the protection of a female in the league also.

On the general point of contact sports, Lambros held that football by its nature is a dangerous game which is a wider societal concern. Regardless, it continues to be played and encouraged even though there are potential dangers (Case p. 1400). Overcoming these potential dangers arguably develops particular characters in boys such as leadership which should also extend to girls. Overall, he asserts that “it is necessary that we begin to focus on the individual rather than thinking in broad generalities which have oftentimes resulted in the imposition of irrational barriers, against one class or another” (Case p. 1400).

The defendants failed to justify why safety arguments only applied to girls and not boys as in the case of *Darrin v Gould*, 540 P.2d 882 (Wash. 1975). Two sisters aged 16 and 14, wished to play contact American football but there were no contact football teams for girls. The high school football team coach viewed that they were qualified and eligible to practice with the boys team. The Washington Interscholastic Activities Association (WIAA) informed the coach that WIAA regulations prohibited girls from participating with boys. The Darrin family brought a claim against this decision which was rejected by the court and an appeal followed. The appeal was upheld by Judge Hamilton who expressed that boys as well as girls run the risk of physical injury in contact football games (Case p. 892). Yet on the same day as the WIAA restricted the girls from competing, they permitted the inclusion of an unqualified boy to play on a high school football team. This privilege was not given to the girls who met the requirements, thus highlighting the inconsistent application of the precautionary principle.

Judge Roberts in the case of *Force by Force v. Pierce City R-VI School District*, 570 F. Supp. 1020 (S.W. Mo, 1983) offered poignant commentary on the trend towards what was regarded as gender based classification. A 13 year old student attempted to compete in the boys school football team because there was no female equivalent. However, she was refused by the School Board on the grounds that since male athletes will outperform female athletes in most athletic endeavours, sports need to be segregated in order to maximise participation and opportunity for each sex. On this point Judge Roberts agreed with the importance of encouraging participation of both sexes but did not accept gender based classification was the way to achieve this. He remarked that each sport is different, “volleyball is not football; baseball is not hockey; and swimming is not tennis” to emphasise the lack of logic behind denying all persons of one sex the opportunity to test their skills at a particular sport (Case p. 1028). The Board also contended that the segregation of females and males in a football team maintains safety standards but could not

provide sufficient evidence to establish such a relationship. Judge Roberts perceived this to a concerning “very sort of well-meaning but overly “paternalistic” attitude” (Case p. 1029).

In *Adams by Adams v Baker* 919 F. Supp 1496 (1996) a school restricted a 15 year old girl from wrestling in the high school team with boys. The school board relied on the Title IX exemption to support their actions since this was a contact sport (Case p. 1501). In addition they referred to moral objections from parents, the possibility of sexual harassment lawsuits, the safety of the athlete and the disruption to the school setting. The athlete claimed that the school district had violated her right to equal protection by refusing to let her try out for the team because of her gender. The court upheld the Title IX exemption (Case p. 1503) and agreed that safety and sexual harassment were important objectives to pursue. However, they held that the policy prohibiting females from wrestling was not substantially related to those objectives. Instead, the defendants evidence that females are at a greater risk was based upon “generalized assumptions” that reflect an over paternalistic attitude as raised in *Force by Force* (Case p. 1504). The court made the point that it is “improper to subject boys to greater danger than girls” (Case p. 1504).

The judgements in these cases reveal that whilst the precautionary principle is a legitimate objective to pursue, there needs to be a direct relationship between the objective and the imposition of sex segregation in sport. It can certainly not just apply to one sex when both are exposed to the same risks. In addition, the scientific evidence presented by the defendants in the cases, to show that girls are more susceptible to serious injury than boys in particular sport, was consistently rejected as unsupported and insufficient by the courts. The court rationale behind these decisions appear to be based upon the evidence that girls and boys share little physiological differences before puberty, as concluded in the FA commissioned UK Brunel study.

In the case of *Fortin v Darlington Little League* 514 F.2d 344 (1975) where a 10 year old girl was restricted by a “boys only” policy from playing baseball in the DLL. The District Court denied the girl inclusion on the grounds of “rational” exclusion (Case p. 346). The court felt that there would be a serious risk if girls played contact sports such as baseball because of the physical differences between men and women. The CA reversed this decision in the absence of any substantial evidence supporting a claim that there were relevant physical differences between boys and girls (Case p. 349). Instead the exclusion was based upon “archaic and over broad generalisations about the difference roles of men and women” (Case p. 348). The CA found that

the previous court decision was unsupported. However they limited their decision to the age group of 8-12 years old and accepted that as children grew up and became adults, differences were likely to emerge which may produce instances of reasonable exclusion.

Where strength is a determinant factor of the sport, and where strength is measurable it is important to maintain segregation of men and women in order to match ability for safety and entertainment reasons and to be true to the fundamental essence of the sport. Mixed sex boxing is a good example of the legitimate application of the precautionary principle. Little coverage of this sport appears in the media or the literature but there are examples of athletes such as Laila Ali, Jackie Frazier Lyde, Irichelle Duran and Freeda Foreman who practice the sport. In the US case of *Lafler v Athletic Board of Control* 536 F. Supp. 104 (WD Mich. 1982) the court held that the inclusion of a 19 year old female novice into a male boxing competition would fundamentally alter the essence of boxing. The rationale is reasonable since safety and anatomy does matter in boxing. It was accepted that the real differences between men and women are relevant in this sport (Case p. 106). Boxing has developed rules and procedures designed for men. It was therefore highlighted in the case that it is unrealistic for women to operate under the same rules since their specific safety needs would be compromised. The claimant admitted to wearing a breast protector to safeguard against gender specific injuries. However, wearing a breast protector would conflict with Rule 6, Article 9 of the Amateur Boxing Federations (US ABF) rules since blows to the chest are permitted in men's boxing and women would be more prone to injury since they have sensitive mammary glands which men do not have. These rule differences could therefore alter the essence of boxing if it is confirmed that punches to the chest are an essential feature of the sport. The ABF rule also requires men to wear a protective cup to safeguard against their unique anatomical characteristics but this does not conflict with the rules.

Similar rule change concerns were also raised in *Couch* but they were rejected by the courts possibly because the case involved same sex boxing. *Lafler* implies that separate competitions are more appropriate because “where the sexes are not situated equally with respect to a particular activity, the state may deal with the sexes differently in regulating the activity” (Case p. 107).

It was also accepted that although in previous cases involving other contact sports, arguments relating to injury to females were rejected, boxing was differentiated because it used “body weight as a proxy for strength in an attempt to equalize the relative physical capabilities of

opposing boxers. The general dissimilarity in body make-up between men as a class and women as a class would jeopardize the use of body weight for this equalising purpose in a unified male and female competition. Therefore, these general class characteristics are relevant to a decision regarding the status of women in boxing, even though they might not be relevant in other sports” (Case p.107). Judge Miles concluded that “boxing is a dangerous enough sport under the best of circumstances” (Case p. 107).

Summary

Evolutionary and cultural adaptations have resulted in inherent physical and non physical differences between men and women. These differences have served to treat the sexes differently by society, sport and the law. Where treatment is unequal, domestic, regional and international equality legislation encourages equal treatment in the work place and in social activities. Such legislation has achieved a better balance in many areas but domestic provisions tend to exclude sport from its application on the grounds of differences in strength, speed, stamina, age, contact/non contact sports and safety. Table I above provides a summary of the main cases that challenge sex segregation in sport. Whilst divisions between men and women are an integral part of the essence of sport, this chapter has sought to establish if there is any truth behind the objectives for this division, and assess the sport and regulatory approach to sex segregation.

Table I: Summary of Sex Cases			
Case	Sport Type	Sport Position	Court/ Decision
Sagen v VANOC	Female only	Unreasonable exclusion	Exclude
Martin v IOC	Female only	Unreasonable exclusion	Exclude
Equal Authority v PGC	Female only	Unreasonable exclusion	Exclude
GLC v Farrar	Female only	Unreasonable exclusion	Exclude
Bennett v FA	Mixed	Unreasonable exclusion	Exclude
South v RVBA	Mixed	Unreasonable exclusion	Include
Roberston v AICH	Mixed	Unreasonable exclusion	Include
Clinton v Nagy	Mixed	Unreasonable exclusion	Include
Darrin v Gould	Mixed	Unreasonable exclusion	Include
Force by Force v Pierce City	Mixed	Unreasonable exclusion	Include
Adams by Adams v Baker	Mixed	Unreasonable exclusion	Include
Minnie Crutwell	Mixed	Unreasonable exclusion	Include
Fortin v DLL	Mixed	Unreasonable exclusion	Include
Taylor v Moorabbin	Mixed	Unreasonable/Reasonable exclusion	Include/Exclude
Maribel Dominguez	Mixed	Unreasonable/Reasonable exclusion	Exclude
Lafler v ABC	Mixed	Reasonable exclusion	Exclude
Ferneley v Boxing Authority	Female only	Unreasonable/Reasonable exclusion	Exclude
Couch v BBBC	Female only	Unreasonable/Reasonable exclusion	Include

Figure 1 (below) visually plots the outcome of the cases to reveal that in *South*, *Robertson*, *Crutwell*, *Clinton*, *Darrin*, *Force by Force*, *Adams by Adams*, and *Fortin* the decision of the cases were positive resulting in justifiable inclusion. The courts have tended to reject arguments by sports bodies or authorities that girls are at risk from physical harm if they compete with boys and they have favoured female athletes under the age of 14 when they have been unreasonably excluded from competing in mixed sex contact or non contact competitions. One exception to this is *Bennett* which can largely be discounted given current social shifts towards increasing the age restrictions on mixed sex participation. The *Taylor* decision establishes reasonable age limits to mixed sex participation but also suggested that such categorisation may not be the most appropriate form of managing inclusion and exclusion. In these cases the courts have interpreted exemption clauses in a way that seeks to identify the most rational meaning.

The *Lafler* case reveals that exclusion can be justifiable in certain situations where the physiological differences will unavoidably impact upon strength and safety. It is necessary to uphold the segregation of the sexes where strength is a determinant factor of the sport and where female safety may be compromised as a result of the imbalance of strength differences between men and women. Upon this, it is difficult to justifiably exclude a qualified female adult from non contact sports such as football, as in the non legal case of *Dominguez*. However, in these types of sports, contact is considered incidental at times which may create problems of integration.

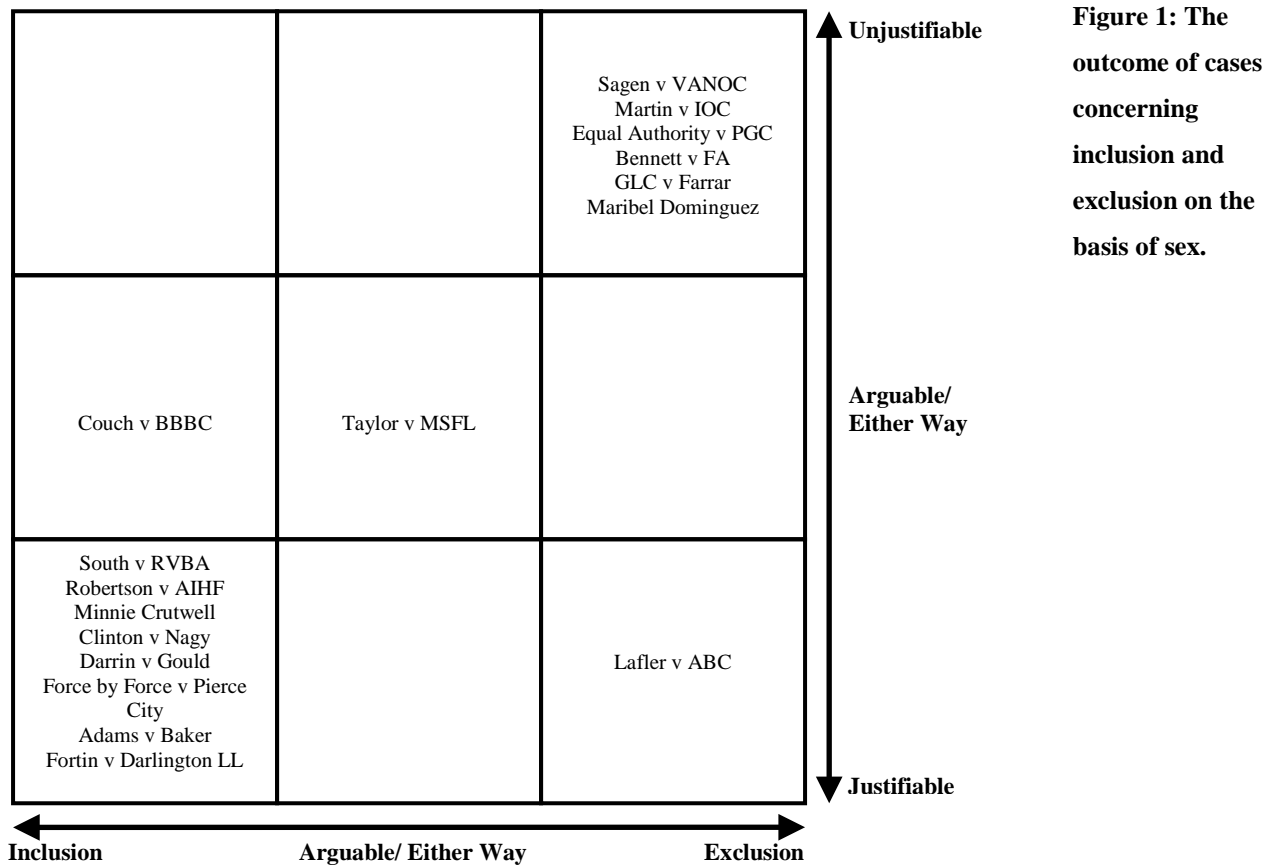


Figure 1 reveals that the areas of most contention have been female only sports and there has been mixed approaches by the courts. Many cases have resulted in unjustified exclusion as reflected in *Sagen*, *Martin*, *Equal Authority* and *Farrar*. Consistent throughout these cases is the courts reluctance to intervene in sporting issues and failure to apply non-discrimination laws. In many of the cases the matters were heard by different courts who have reached contrasting decisions. This is evident in the opposing boxing licence decisions of *Couch* and *Ferneley*. The inconsistency produced in these cases arguably reflects the difficulties that the courts face in balancing inclusion and exclusion in sporting activity.

Chapter 7: Gender

In Part One we established the overlap between the concepts of sex and gender, outlining the reference to sex as the biological identification of a man and woman, and gender as the social performance and roles of these identities. Against the background of the previous chapter, the aim of this chapter is to investigate athletes who do not conform to the traditional gender notions of male or female. Their diversity poses a challenge to the traditional field of sport, which is structured according to binary sex and gender divisions. This chapter will focus on the participation of intersex individuals and transgender individuals. Their inclusion into sport conflicts with the current categorisation of sporting activity and raises important concerns about the impact of performance advantage upon the balance between inclusion and exclusion in sport. What follows is an extension of some of the issues described in Chapter 6 which emphasises the tensions between sex and gender in sport.

The regulatory mechanisms in place to manage the balance, tends to draw the line according to the level of advantage that an athlete possesses. With this in mind, the concept of fair and unfair advantage in sport will also be addressed and evaluated to assess how consistently cases concerning advantage in sport are managed (Patel, 2008b; Patel 2009a; Patel 2009b). This chapter reinforces the realities about human beings, which have over time been mis-interpreted particularly in competitive sport.

Sex Testing in Sport

Since the Ancient Olympic Games in Greece, sports were played by men only, usually naked. The image of the Olympian is typically associated with life, ability and to some extent immortality (Cavanagh and Sykes, 2006). Whilst sport has evolved since then, elements of its purity still remains but is constantly in conflict with the modern athlete, particularly minorities such as women in sport. In modern times, a much more liberal approach is taken to women in sport but the segregation of sport along the lines of sex is maintained. In sport as we have seen, whilst there are legitimate reasons for these divisions, they have become mixed up with conventional wisdom and traditional notions of expected gender roles for men and women. Females entering the male space of sport have generally challenged these roles. On the one hand

they are celebrated for their strength, power and stamina but at the same time viewed with suspicion because these are traits that still remain associated with masculinity and in turn, advantage in sport (Olsen-Acre, 2007 p. 210).

This was particularly pertinent at the time of the Cold War. In order to regulate advantage and ensure the correct balance between inclusion and exclusion within male and female sports, gender testing, or sex testing, was historically introduced. Here we will refer to the tests as sex tests since they aim to ascertain biological identity. It was viewed that sex tests would restore the “natural” order between men and women. Sex testing has evolved with scientific progress and began first as a way of deterring deliberate cheats in the Eastern Bloc. Prior to the dismantling of the Iron Curtain, the nationalisation of sport in the Soviet Bloc not only led to the use of drugs but also the entry into women’s events of persons whose womanhood was questionable (Beloff, 2003). The Cold War brought about increased competition that created many opportunities for female athletes but at the same time began to scrutinise those who did not look feminine (Wamsley, 2008 p. 11). Suspicions around this time were high, with drugs and “uncertain women” threatening the purity of sport. Indeed sports bodies were keen to prevent the re-occurrence of men such as German athlete Hermann Ratjen (or Dora Ratjen) in 1936, masquerading as women in order to triumph in female competitions (Doig *et al*, 1997 p. 2). Ratjen claimed that the Nazis forced him to compete in the female high jump competition.

Attempts to enter female competition were premised upon the idea that men possessed inherent physical characteristics that were superior to women, making them more suited to sport than women. Upon this, participation would lead to unfair outcomes if men competed in women’s events. The tests therefore developed to ensure fair competition in the face of conditions that were thought to produce unfair advantages (Tucker and Collins, 2009 p. 150). In addition to this argument was the rationale that only normal feminine looking women should compete in sport instead of “monstrosities” and the rules of sport should reflect that. Individuals who digressed from the feminine appearance of typical women were viewed as a threat to sport and the traditional sex and gender values.

In order to prevent gender fraud and scandal, sex testing was method of regulating advantage (Menon, 2010). Such testing has been central to a number of conflicting ethical and practical arguments within sport, regulation and society. Sex testing is problematic because the methods

were not necessarily based upon accurate markers and they led to the exclusion of individuals whose gender was naturally uncertain and could not be strictly categorised, yet they were viewed with suspicion, as unnatural and potentially cheats.

For example sprinter Stella Walsh nicknamed “stella the fella” (Ritchie, Reynard and Lewis, 2008 p. 395; Newman, 2002 p. 103) was a Polish emigrant who lived in the USA and won the 100 metre gold medal in 1932. She was later killed in a shooting and in her autopsy it was found that she possessed both male and female genitalia. Also in 1934, Czechoslovakian Zdenka Koubkova twice broke the women’s world 800m record but was later discovered to have ambiguous genitalia and underwent reassignment to become male. These examples began to threaten the typical male and female dyad that existed in sporting competitions as it was increasingly thought that if these individuals possessed male genitalia also, then they were cheating as they had an advantage over other women.

The first method of sex testing was a “peek and poke” examination based upon outward appearance only. Female ambiguity prompted the requirement at the 1966 European Track and Field Championships in Budapest, of female athletes to parade naked in front of a panel of gynaecologists to confirm their identity (Ljungqvist and Simpson, 1992). All passed the test but it proved to be very humiliating. Women themselves however, felt it important to prove their true identity. Irina and Tamara Press from the former Soviet Union were dominant in a number of track and field events during the 1950s and 1960s. They won 26 world records and 6 Olympic gold medals. However they never attended the examinations and their absence sparked controversy over their identity. This test was concerned only with the athlete’s outward appearance to determine sex. From the definition of sex provided earlier, it is clear that outward features are only *one* factor that contributes to the distinction between men and women.

As technology advanced, genetic and hormonal checks such as the “Barr Body Test” was introduced at the 1968 Grenoble Winter Olympic Games and 1968 Mexico Summer Olympics. This was concurrent with the introduction of drugs testing by the IOC. Testing moved away from outward appearance and was instead based upon the chromosomal definition of sex that typically constitutes an XX configuration with a female and an XY configuration with a male. Spectators and competitors in sport feared that if we allow women who naturally possess the chromosomal XY pattern, then they will begin to dominate and make “those shot putters from the Eastern Bloc

look like prom queens” (Newman, 2002). This reinforced the belief that the possession of a male Y chromosome produces superior athletic ability.

Such testing analysed two samples taken from buccal epithelial cells inside the cheek of the athlete. The cells are smeared onto a slide and stained to reveal the presence or absence of the Barr Body (a method that distinguishes sexes), which is caused by the inactivation of one of the two XX chromosomes in female cells. Males do not show this Barr Body since they only have one X chromosome which remains inactive (Doig *et al*, 1997 p. 3). Such testing forced many top athletes quietly out of competition. The confidential nature of the information regarding these tests makes it difficult to confirm exactly how many athletes quietly withdrew. In 1964 Polish sprinter Ewa Klubukowska was the first female athlete not to pass the test upon discovery of an irregular XXY chromosome pattern (Shy, 2007 p. 99). She was disqualified from competing again and her 1964 100 metre sprint record was removed from the record books.

Another widely reported case study concerns Spanish hurdler Maria Martinez Patino who, in 1985, failed a test in the World University Games in Kobe after it was found that she possessed a Y chromosome and male genitalia. She ignored all advice to fake an injury and quietly retire. Instead, she triumphantly won the competition, despite losing her sports scholarship as a consequence. She stands to be the first woman to protest about her disqualification and was eventually reinstated. In fact her legacy opened a Pandora’s box on the concept of who is male or female for the purposes of sport and whether the chromosome tests were an appropriate arbiter of the difference as they were highly inaccurate (Greenberg, 2000; O’Reilly, 2010). Patino was raised as a girl despite her ambiguous genitalia and never personally doubted her femininity as there were many other factors that determined her sexuality. One study has found that 1 in 504 athletes competing in selected events during 1972 and 1990 were disqualified for failing a sex chromatin test (Olsen-Acre, 2007 p. 219).

In 1991, the inaccuracy and illegality of this procedure prompted the International Amateur Athletic Federation (IAAF) to abolish mandatory chromosomal and genetic testing on the grounds that women with “birth defects of the sex chromosomes” have no unfair advantage and should be permitted to compete. In addition, they expressed that chromosomal make up needs to be considered alongside legal and psychological recognition of sex. The primary reason of preventing gender fraud is not necessarily sustainable and instead a case by case approach should

be adopted (Ljungqvist *et al*, 2006). However, the IAAF council continued to give discretionary authority to medical delegates to test the sex of an athlete.

The IOC on the other hand, continued with testing and introduced a new test, the Polymerase Chain Reaction Test (PCR) in Albertville 1992. It was another type of chromosome detector which also failed to consider the wider range of factors that determine sex such as self identification. The PCR analysis was solely based upon the technically preferable SRY gene test which identified ambiguous female athletes upon discovery of a Y male chromosome (Nau, 1992). At that time it was thought that this accurately distinguished men and women. If a woman possessed this chromosome then it was argued that they had an unfair advantage in the field as they were not typically female and instead possessed more strength. Genetic anomalies and other considerations in relation to the determination of sex were simply not considered. Female athletes were required to produce a gender certificate with a photo, weight and height and an athlete accreditation number (Tannsjo and Tamburrini, 2000 p. 117). In 1996, 8 of over 3000 female athletes at the Olympic Games in Atlanta tested positive for evidence of a Y chromosome but were permitted to compete because they were found to have a condition that inhibits the masculinising function of the hormone testosterone. Over 5 Olympic Games, approximately 1 in every 421 female athletes were found to have a Y chromosome (Foddy and Savulescu, 2010 p. 2).

The SRY test was abandoned by the IOC and they banned mass sex testing at the Sydney Games in 2000. The previous inconsistencies with the tests demonstrate that there is no reliable way of distinguishing between a man and woman. In fact, chromosomes remotely affect performance and biology is certainly against such chromosome sex determination as certain individuals have no muscular advantage over females with XX chromosomes (Gooren and Bunck, 2004 p. 425; Samuels, 2004 p. 151; Chappelle, 1986).

In modern times sex testing is referred to as gender verification and has moved to a “suspicion” based model which can still take place on an individual basis. It is further suggested that drugs testing indirectly ensures that sex determinations are made (Olsen-Acre, 2007 p. 216). Current testing takes place at the instruction of the medical director of an international sporting event if a complaint or suspicion has arisen (Cavanagh and Sykes, 2006 p. 76). For instance, during the 1999 Veterans Championship, a 56 year old American athlete, Kathy Jager broke the 100 metre

world record for her age group and was forced to undergo a sex test, even though she had given birth to two children (Shy, 2007 p.104). In the 2008 Olympics in Beijing the organising committee released a state of the art sex verification laboratory to be available throughout the game to run sex tests on “suspicious looking women” (Buzuvis, 2011 p. 37).

Having provided a brief history of the evolution of sex testing it would appear that the underlying rationale for sex testing was to prevent gender fraud, eliminate scandal, ensure fairness and fair performance advantage, and maintenance of the natural order of masculinity and femininity (Cooper, 2010 p. 251). Today, this rationale is not entirely relevant anymore since the existence of men disguising themselves as women seems unrealistic in modern sport. The literature documents no more than two reported instances of this taking place in history, which makes this unsustainable since there has been no concrete evidence to support the claim (Menon, 2010 p. 409; Patino *et al*, 2010 p. 314). Ensuring fairness and fair advantage in sport is a legitimate aim. Sport is categorised along sex and gender lines to uphold competition and safety. However, the consequences of testing and dividing sport along only some of the factors which determine sex can lead to the unreasonable exclusion of innocent women who may naturally vary. Furthermore, the tests are only being carried out on women (Cooper, 2010 p. 248).

These practices have the potential to infringe human rights legislation. Sports bodies are therefore left with the responsibility of integrating an individual into sport when they do not, or are not permitted to sit within the existing categories of sex and gender within sport. Minorities such as intersex and transgender individuals serve to illustrate that sex and gender is not as easily distinguishable as we may wish to think which blurs the lines between the binary categories.

Intersex

The term intersex refers to a subset of variations of sexual differentiation, which can stem from ambiguity in one of the factors that typically determine sex, such as genetics, hormones or genitalia. Intersex refers to a spectrum of conditions as we shall see below (Tucker and Collins, 2009 p. 148). The occurrence of intersex is approximately 1/1000 newborn babies (Qinjie *et al*, 2009). Such conditions have the potential to threaten the life of the individual and also result in difficulties during puberty. Originally these individuals were referred to as hermaphrodite. This

term included *any* individual organism that possesses both male and female reproductive organs during their life span. Hermaphroditism is usually rare in mammals and birds but occurs often in a number of species of fish (Ho, 2002). When this takes place in human beings, it is considered very unnatural due to the strict categorisation of men and women in place. The term has been criticised as derogatory as it tends to place such individuals in the “realm of mythology” rather than within society (Aaronson and Aaronson, 2010 p.1). Some experts replace these terms with the collective name of “disorders of sex development” (DSD) (Aaronson and Aaronson, 2010 p. 2). This name is not necessarily satisfactory because the term “disorder” suggests something that is dysfunctional. In recent literature the use of intersex has been adopted once more and will also be used here.

Performance Advantage

In sport some forms of intersex conflict with sex testing because individuals may possess characteristics that are presumed to provide an unfair advantage rather than proven. The current assumption upon which sex testing methods and sex segregation in sport is based, supposes that the long term androgen exposure of men after puberty, coupled with the male specific Y chromosome widens the physiological gap between men and women (Ballantyne, Kayser and Grootegeod, 2011 p.2). The DNA of humans is made up of 22 pairs of autosomes and one pair of sex chromosomes in most cell types in our bodies (Tucker and Collins, 2009 p. 148). Normally speaking, a female possesses an XX pattern and a male possesses an XY pattern. However, it is possible for different cells in an individual to naturally contain different sex chromosomes. This is referred to as mosaicism, where some cells may present with XX and XXY chromosomes. Other possibilities include XX and XY cell combinations, or X and XY cell combinations (Tucker and Collins, 2009 p. 149). Sex testing methods catch sex variations that are purely biological and do not necessarily amount to physical advantage (Larson, 2011 p. 232). Instead, sex testing methods can lead to the exclusion of innocent athletes.

Little is actually known about the relationship between intersex and an unfair advantage in sport (Tucker and Collins, 2009 p. 150). It may be impossible to ever know whether an unfair advantage exists due to the rarity of these conditions as well as the ethical implications of confidentiality. Individuals may live their lives assuming that they are one sex/gender. It is suggested that there is a high rate of women in sport who, possibly unknowingly, have an intersex condition (Foddy and Savulescu, 2010 p. 2). The results of sex tests may produce a range

of psychological issues for an athlete. Men and women claiming to be “natural” have a naïve view, as elite sports are thought to be filled with women and men who have genetic or congenital conditions. One person in every 100 possesses a body that differs to that of a standard male or female (Middle Sex, 2005).

For instance, Partial or Complete Androgen Insensitivity Syndrome (AIS) occurs in females who possess a Y chromosome resulting in the individual’s chromosomal, gonadal and hormonal sex being male but their secondary characteristics such as musculature being female. As a result, their external genitalia are female and so they develop into and identify with a woman. This can be a result of androgen synthesis or action. Androgens can have a range of effects on the primary and secondary sex characteristics of humans, through the development stage and throughout adulthood. They importantly develop the growth of body hair and male sex organs and also restrict the development of female characteristics such as breasts. In relation to sport, they assist in the growth of skeletal muscle, bones and red blood cells, all of which play an important part in athletic ability (Foddy and Savulescu, 2010 p. 1).

Abnormal androgen receptors result in the development of secondary female characteristics and musculature. In humans, androgen exposure is thought to represent a critical role in the development of gender related behaviours (Yang, Baskin and DiSandro, 2010 p.154). Patino, discussed earlier, suffered from AIS. Although she had a Y chromosome, testes and testosterone secretion at puberty, her body was unable to detect it because of a dysfunctional receptor brought about by a mutation of the Y chromosome. Her body developed as a female and she had no competitive advantage (Patino *et al*, 2010 p. 311). It would be “illogical” to disqualify an individual with AIS from competitions because the typical female in fact has a competitive advantage over them (Dreger, 2010, p. 23).

At the Asian Games in Doha, Qatar in 2006, an Indian woman, Santhi Soundarajin was stripped of her 800 metre silver medal by the IOC after failing a sex test. She was found to possess “abnormal chromosomes” and was diagnosed with a more complex version of AIS. In a later report she expressed that “sports federations should come up with a solution to this rather than ostracising somebody” (Anon, 2009f). She claimed to be treated as a “social outcast” and was so psychologically traumatised by the experience that she stopped competing and allegedly

attempted suicide (Macaulay, Hamidi and Treurnicht-Naylor, 2010 p. 26; Buzuvis, 2011 p. 36; Anon, 2009f).

A similar syndrome is known as Congenital Virilising Adrenal Hyperplasia (CVAH) where XX subjects produce an abnormal amount of androgen which results in an affected XX foetus with ovaries but also with external male genitalia. They are therefore raised as boys. CVAH may occur in 1 in every 16000 births globally but in some areas this may be 1 in 400 (Foddy and Savulescu, 2010 p. 2). In some of these cases the condition produces salt wasting in the body which can hinder growth but can also result in the development of high muscle strength. Under a sex test such women would pass but would possess naturally producing steroids.

Those who are known to have Turners Syndrome are found to be missing an X chromosome. They are subsequently represented as XO instead of XX. It has been reported that even this has prevented female athletes from enjoying life long careers in sports. Some individuals may be neither XX or XY or some may have both XX or XY cells (For more detail see Patino *et al*, 2010 p. 310).

Sex tests fail to consider men who also possess variations such as “super men” who carry the YY chromosomal pattern. Ironically certain types of genetically abnormal males would pass a verification test and could participate as a female under the chromosome method (Fastiff, 1999 p. 944; Tannsjo and Tamburrini, 2000 p. 116). A male with XXY chromosomes (Klinefelter Syndrome), would pass the test, even though the Y chromosome identifies him as male. The same would apply to a male with XX chromosomes. Both of these variations continue to have a normal male body build, male muscle strength and a male psychological and social orientation. Of course, the likelihood of this is very remote yet it reflects the impracticality of only considering one aspect that determines sex.

Overall, our human variation as illustrated above, reveals that the binary categories of sex are not entirely accurate. The case of Caster Semenya has forced governing bodies and the law to give attention to these human variations in the context of balancing inclusion and exclusion in sport. The case brings to question the effectiveness of sex testing.

Caster Semenya

In August 2009, 19 year old South African middle distance runner, Caster Semenya won the women's gold medal in the 800 metre track event at the World Championships in Berlin. She set a world record of 1 minute 55.45 seconds. Her running talent became known when she won the 800 metres gold medal at the Commonwealth Youth Games in Pune, India. In July 2009, she won the senior African title in Mauritius in a time of 1 minute 56.72 seconds. During this time, controversy surrounding her sex began. Following the findings of initial tests, the IAAF asked South Africa to withdraw her from their team for Berlin but Athletics South Africa (ASA) insisted that she runs. Following her victory in Berlin, debate emerged surrounding her sex on the basis of her improvement in performance time and also allegations made on sport websites that she was a hermaphrodite athlete (Levy, 2009).

When she crossed the finish line, it was reported that the crowd began booing her (Marshall, 2009). Such derogatory treatment continued until she returned home to her country. She also received racist and sexist comments by fellow competitors, leading to the resignation of the president of ASA, Leonard Chuene, from the IAAF (Nyong'o, 2010 p. 95). After the race, other competitors reportedly expressed their concerns that "she [Semenya] is not a woman. She's a man..." (Kimmel, 2009). It was also suggested that Semenya was subjected to being accompanied to the bathroom by a member of the competing team so that they could look at her private parts (Levy, 2009). This behaviour is reflective of the original form of sex testing.

Upon this controversy, the IAAF ordered her to undergo a gender verification test. It was claimed that a leaked IAAF fax concerning the sex test, emerged into the public domain. The Australian media broke the story which was confirmed by the IAAF hours before the 800 metre first round heat. The test required a physical medical evaluation, including reports from a gynaecologist, endocrinologist, psychologist an internal medicine specialist and an expert on gender (Smith, 2009). She did not consent to have her sex tested which could raise important legal issues as we will see (Cooper, 2010 p. 254).

It has been widely assumed that Semenya waited 11 months for the results of the test. There were unconfirmed media reports in 2009 that her sex test revealed both male and female characteristics, with a presence of internal testes and testosterone levels that are considered higher than those of the average woman (Buzuvis, 2011 p.36). She was given the all clear to compete and return to competition by the IAAF in July 2010. Semenya returned to running in at a

small athletic event in Lappeenranta, Finland, winning in a time of 2 minutes 4.22 seconds (Kessel, 2010).

The IAAF, the South African government and the legal representative for Semenya have agreed that she will retain her world title and the test results will remain confidential (O'Reilly 2010; Longman 2009; IAAF, 2010). It is speculated that Semenya underwent medical treatment to “resolve her gender issues” (Anon, 2010b; Hart, 2010). This may have involved lowering testosterone levels because the common assumption is made that a reduction in testosterone will have a performance impact, due to the effect that it will have on her training adaptation.

Throughout her ordeal, Semenya was exposed to public scrutiny and scandal (Macaulay, Hamidi and Treurnicht-Naylor, 2010 p. 26) This incident seems to intersect with racism and sexism, with Semenya's failure to conform to “standards of white femininity and to stereotypes about women's inferior athleticism” (Buzuvis, 2011 p. 36). It has raised significant issues about the internal regulation of sex categories in sport and the external legal regulation of protecting human rights in sport.

Sport Regulatory Mechanisms

In January 2010 the IOC sponsored a meeting which took place in Miami and was attended by medical professionals to attempt to revise and clarify the IOC and IAAF gender verification policies. Whilst Semenya was not explicitly on the agenda, she was at the centre of this discussion.

The previous IAAF policy on gender verification 2006 prepared by the IAAF medical and anti-doping commission was not entirely clear on the issue of what the legitimate circumstances are to challenge a competitor's gender (Macaulay, Hamidi and Treurnicht-Naylor, 2010 p. 26; Ljungqvist, 2006; Simpson *et al*, 2000 p. 1569; Dreger 2010, p. 22). The delegates in Miami concluded that;

- Sport authorities, in conjunction with the relevant medical authorities, have a responsibility to follow up on cases of DSD that arise under their jurisdiction
- There be an increase in education and awareness of DSD within the sport community

- Pre-participation health examinations are important for the purpose of identifying athletes with DSD
- Precise diagnosis should be established expeditiously utilizing requisite expertise
- A management plan be drawn up if treatment is necessary (recommended)
- To establish strategically located centres of excellence at which athletes with DSD can, if necessary, be diagnosed and treated
- Rules be put in place to determine eligibility of athletes for sport competition on a case by case basis both prior to and following diagnosis of a DSD, including when an athlete is undergoing treatment for DSD or refuses treatment for a DSD (IOC, 2010)

The response to these recommendations were that there was still a lack of clarity on the criteria required to define female gender, leading to ambiguity around the “case by case basis” approach recommended (O’Reilly, 2010). Michele Veroken, a leading sports integrity and ethical expert summarised that “we are heading into uncharted water here, would athletes be required to receive treatment before they participate in sport? What if they have already competed, would those results be disqualified? And of course the legality of any such proposed plan would no doubt be contested by athletes and human rights groups” (in O’Reilly 2010). This suggests that sex and gender is an almost impossible division to regulate.

In May 2011, the 2006 policies were superseded by the IAAF approval and introduction of new regulations concerning female athletes with hyperandrogenism, a term used to describe those females who produce excess levels of androgen hormones (IAAF, 2011a; IAAF, 2011b). The policy states clearly that these regulations will replace the 2006 policy and all references to “gender verification” and “gender policy” terminology has been abandoned (Rule 1.4 IAAF, 2011b). The principles behind the rules include the maintenance and respect for the essence of male and female segregation in athletics, a respect for fairness in sport, and an acknowledgement that females with hyperandrogenism can compete subject to compliance (IAAF, 2011b).

The female with the condition, who is legally recognised as a female is eligible to compete in female competition provided that “she has androgen levels below the male range (measured by reference to testosterone levels in serum) or, if she has androgen levels within the male range she

also has an androgen resistance which means that she derives no competitive advantage from such levels” (IAAF 2011b). The “normal range” is clarified in the rules.

A panel of international medical experts have been established to review similar cases. They aim to operate independently and will make recommendations to the IAAF over eligibility of athletes (Anon 2011b). To test for eligibility, a multi level medical process has been introduced for the full examination and diagnosis of an athlete with potential hyperandrogenism, upon referral from the panel. The levels include an initial clinical examination, a preliminary endocrine assessment and a full examination and diagnosis (Rule 5.1 IAAF, 2011b). This process will be strictly confidential and anonymous and there appears to be flexibility in the adoption of these procedures for each individual case. Athletes who refuse to comply with this process will be banned from competition (IAAF, 2011b).

Although previously, the IAAF and the IOC had a “deplorable record of defending the rights of female athletes” (Macaulay, Hamidi and Treurnicht-Naylor, 2010 p. 26), the new rules appear to approach this issue in a more balanced way, recognising the interests of the athlete as well as the protection of the essence of sport. The new policies attempt to move away from “sex tests” and instead adopt a hormone based approach. It is yet to be seen how appropriately these will work in practice but one would assume that under these rules there would have been a clearer procedure for Semenya to compete under. At this early stage it is concerning that only hyperandrogenism has been included in these rules, with no references to the variations of the DSD conditions. Furthermore, the new policies seem to follow the previous “suspicion model” (Menon, 2010 p. 415).

Legal Mechanisms

It was reported that Semenya may have launched a legal challenge against the IAAF, claiming that her treatment during this incident has “infringed not only my rights as an athlete but also my fundamental and human rights, including my rights to dignity and privacy” (Anon, 2010c). If the regulations used to determine sex do not appropriately balance inclusion and exclusion for intersex individuals, then they have the potential to be in violation of fundamental human rights legislation, to which sports governing bodies are accountable.

The Coalition of Athletes for Inclusion in Sport (CAIS) group contends that gender policies are a “smokescreen” for behaviour that violates the Olympic Charter and human rights (O’Reilly, 2010; The Coalition of Athletes for Inclusion in Sport, 2010). They are critical of the approach to only subject some individuals to testing since it “may leave some women open to witch hunts and requests to undergo body modification” (The Coalition of Athlete for Inclusion in Sport, 2010).

The law has a duty to protect individuals from infringements of their basic human rights. However, the integration of intersex individuals in equality legislation depends on the interpretation of the word sex (Zaccone, 2010 p. 430). Before we can consider any infringement it is important to note that legislation is not generally worded to encompass intersex individuals. Upon this, recognition of intersex individuals has largely escaped legal attention with basic human rights failing to extend to them (Larson, 2011). Generally, legislation is structured along the binary sex categories of men and women. Recognition would require legal instruments to specify men, women and others. For instance, some developments have been made in Australia where in March 2010 they became the first country in the world to introduce a “Sex Not Specified Recognised Details Certificate” as a substitute for a traditional birth certificate, as well as recognition of intersex in other areas of law (Larson, 2011 p. 228). In September 2011, a third gender option X has been added to Australian and Bangladesh passports (Anon, 2011c). India adopted this option since 2005. This goes some way to accepting the existence of a third gender category.

It is assumed that human rights legislation would be interpreted to encompass intersex individuals because to exclude them would go against the overall objectives of such instruments. For instance the UDHR refer to every person “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Article 2 UDHR). The word “sex” would need to encompass intersex individuals to be applicable.

Assuming legislation is interpreted correctly, there may be a legal responsibility to protect the rights of athletes to participate when they are qualified to compete (Larson, 2011 p. 230). Gender policies specifically challenge legal human rights standards concerning privacy and dignity since it could be argued that they are invasive and intrude on the lives of females.

At the international level Article 1 UDHR confirms that “all human beings are born free and equal in dignity and rights”. This is supported by Article 3 which protects the “security of person.” Dignity and security are values that are reflected in Article 12 which encourages the right to the protection of the law against arbitrary interference with privacy. The Yogyakarta Principles support the application of international human rights law to sex and gender. These values arguably outweigh the justification that sex testing is important for the prevention of gender fraud, which is unsupported by evidence.

The female-only approach to sex testing may be also susceptible to challenge on the grounds that it discriminates on the basis of sex. They “treat men and women differently from one another without demonstrating an acceptable rationale supporting the regulation of androgens in women, but not men” (Crincoli, 2011). As we have seen in the previous chapter, equality legislation places the onus on the regulating body to justify the differential treatment.

In Semenya’s case the South African government, specifically South Africa’s Ministry for Women, Children and Persons with Disabilities reportedly issued a complaint to the United Nations Division for the Advancement of Women (DAW) over the treatment of the case (Anon 2009g). The African National Congress claimed that sex testing violated Article 13 CEDAW which reads that “state parties shall take all appropriate measures to eliminate discrimination against women” to protect “the right to participate in recreational activities, sports and all aspects of cultural life.” Since it is a binding instrument, it could be used by states to pressure the IOC and the IAAF to enforce it and change their policies at the cost of refusing to host events.

Secondly it was claimed that her treatment violated the Beijing Platform for Action 1995 to which the IOC and the IAAF are signatories. The Platform for Action calls for gender sensitive programmes for girls and women of all ages and support in all areas of athletics including coaching and administration at the national, regional and international levels (Cooper, 2010 p. 244). Lastly, it was argued that the incident contradicted the Brighton Declaration which called for a sporting culture that values and enables the full involvement of women in every aspect of sport. The IOC hosted the first international conference on women and sport. Both of these declarations are not binding law but place a duty on international communities to pressure organisations such as the IOC and the IAAF to adhere to their commitments under these principles. Subjecting intersex individuals to sex tests have the potential to violate these

provisions. However, their applicability depends on whether intersex falls within the remit of the term sex under these documents (Adair, 2011 p. 154). Another potential problem is the fact that such instruments do not tend to extend to non state actors or private authorities which may enable the IAAF and the IOC to escape challenge.

At a domestic level, Semenya could have brought a challenge against the IAAF under German law since the alleged discrimination took place in Berlin. In Germany the Constitution protects every citizen's human dignity (Article 1(1) Grundgesetz 1949). This is expansive since it requires all individuals to respect another's claim to dignity (Larson, 2011 p. 236). The IAAF sex tests may well be in breach of such freedoms if they are seen to be intrusive and invasive. Germany is also obliged to act in accordance with the ECHR which protects privacy under Article 8. As discussed however, this would only apply to a public authority which may fall short of capturing the IAAF. There may be potential redress under South African law, against the ASA, an IAAF recognised national federation, since they admitted errors in their handling the Semenya case. As in *Sagen* however, the ASA may be considered to be the wrong defendants.

Another route could be under medical law. The practice of sex testing in sport is inconsistent with the controls placed on genetic testing in a medical setting. These are legally regulated to secure the rights of individual privacy, dignity and self determination (Wiesemann, 2011 p. 216). For instance, at an international level, the UNESCO International Declaration on Human Genetic Data (2003) demands that "prior, free, informed and express consent...should be obtained for the collection of human genetic data...whether through invasive or non-invasive procedures...whether carried out by public or private institutions" (Article 8(a)). It goes on to state that an exception to this should only be prescribed for "compelling reasons by domestic law consistent with the international law of human rights." Article 7(a) requires that every effort is made to prevent the infringement of "human rights, fundamental freedoms or human dignity of an individual or for purposes that lead to the stigmatization of an individual, a family, a group or communities." The UNESCO Universal Declaration on the Human Genome and Human Rights (1997) also states that "no one shall be subjected to discrimination based on genetic characteristics that is intended to or has the effect of infringing human rights, fundamental freedoms and human dignity" (Article 6). It could be argued that this should extend to sport since no compelling reason for sex testing can be offered by sports bodies.

At a regional and domestic level, genetic privacy is legally protected to emphasise the importance of recognising a patient's right to know or not to know. Wiesemann (2011) argues that sport should not be an exception to these legal obligations as it is ethically wrong to disregard the right not to know. Whilst accepting fairness as a justification for sex testing processes in sport, the protection of individuals from harm and discrimination arguably outweigh this.

The sport policies also subject athletes to hormone treatment for intersex conditions, as has been allegedly the case with Semenya. There may be legal issues surrounding whether they are legitimately undergoing this for health and safety reasons or instead, for unsustainable reasons pertaining to sport (Cooper, 2010 p. 263).

Without legitimate justifications for the existence of sex testing, perhaps they should be legally banned. In 1994 the Norwegian parliament passed a law, no. 56 of 5 under the Biology Act making genetic testing for the purposes of gender verification in sport, illegal and forbidden (Macaulay, Hamidi and Treurnicht-Naylor, 2010 p. 26; Tannsjö and Tammburini, 2000 p. 121). During the Lillehammer Olympic Games, the IOC was therefore denied permission to conduct sex tests. This is supported by the Canadian Academy of Sports Medicine (CASM) who wrote a position statement in 1997 and 2010 proposing that sex testing should be eliminated entirely since it does not serve a useful purpose. The statement recommends that individuals who have developed greater than average muscle mass due to training or due to any of the DSD conditions discussed, should be "accepted as part of the normal range of variation" (Doig *et al*, 1997 p. 8). The extent to which intersex individuals are included in sport hinges upon the acceptable range of variation by sports bodies.

Transgender

Where as a DSD condition is concerned with natural physical sex variations in the body, transgender is a self identified psychological condition which is a significant distinction to make because it may warrant a different approach to inclusion and exclusion. It could be argued that there is ultimately a choice with transgender, where as intersex occurs naturally.

The literature uses the term transsexual and transgender interchangeably. This thesis will adopt the term transgender. Transgendered individuals are those who exhibit incongruence between their birth sex and their gender identity (Greenberg, 1999). Extensive studies identified microscopic nerve cells in the brain of transgender individuals that had not developed in agreement with their genitalia (see Pearlman, 1995 p. 867; Middle Sex, 2005). Transgender individuals reject their biological sex through a self identified condition known as “Gender Dysphoria.” The etiology of the condition is thought to be both biological and psychological, but it is subject to theoretical debate largely centred around nature versus nurture arguments (Selvaggi and Bellringer, 2011 p. 275). Those who have this condition are thought to be approximately 1 in 60,000. Male to female transgender is four times more frequent than female to male (Selvaggi and Bellringer, 2011 p. 274). Here we will focus upon male to female transgender individuals although there are examples of female to male athletes elsewhere (Kye Allums Basketball, Chris Mosier, Triathlete).

This disparity is so profound for some that they seek gender reassignment surgery to permanently associate the psychological and anatomical aspects of their sex and gender. The first recorded sex change occurred in the 1960s (The Christine Jorgensen Story, 1970). The reassignment process includes counselling, diagnosis, referral to hormone therapy, consultation with an endocrinologist, electrolysis, cross living and sex reassignment (Griggs, 1999). The treatment itself consists of three phases over a long period of time and involves several doctors with more than one operation (Sharpe, 2002). Even after the full surgery, the transgender individual will face a lifetime of supplemental hormone therapy and monitoring (Whittle, 2004 p. 20). The legitimacy of the condition is often debated with some contesting that it is only due to the wide availability of the treatment to change sex that people even contemplate it. There is also concern surrounding the subjectivity involved in diagnosing someone with a non physical condition.

Just as with intersex, transgender challenges the conventional paradigms of sex and gender and as a result they have historically struggled for legal and social recognition in their new identity, whether or not they have undergone surgery.

Legal Recognition of Transgender

In Britain the leading legal approach taken to transgender individuals emanates from the decision in *Corbett v Corbett* [1970] 2 ALL ER 33, which decided that sex is determined at birth and

therefore transgender individuals cannot be identified under their new sex in any aspects of their lives. In the case, the extensive medical evidence concluded that “we do not determine sex...in medicine we determine the sex in which it is best for the individual to live” (Per Professor Dewhurst in Case p. 44). However, Ormrod J only selected parts of this evidence to reach his conclusion and the decision reinforces the notion that sex was not a choice in the eyes of the law (Cowan, 2005 p. 74).

The practice of sex differentiation at birth is, in itself highly inaccurate as it only takes into account the external genitalia of the newborn. This is particularly problematic for intersex individuals. For transgender, whereas civil registration of birth takes place within a number of days after the birth, “sex differences in the brain only become manifest by the age of 3-4 years postnatally” (Gooren, 1993 p. 135). The likelihood of a contradiction occurring between the genitalia and the brain is slim (1:10,000 males and 1:30,000 females) and external genitalia determination is therefore usually accurate but it does leave transgender individuals in an isolated position.

Corbett was challenged by the ECtHR in *Goodwin v UK* (2002) 35 EHRR 18 who urged the UK courts to reform the law and consider social and psychological traits when determining gender identity. Despite this, the House of Lords decision in *Bellinger v Bellinger* [2003] 2 ALL ER 593 which followed over 30 years after *Corbett*, continued to adhere to “heteronormative and biological binary ideas” about sex and gender by following Ormrod J’s decision (Sharpe, 2002 p. 44). There was an acceptance that social attitudes have changed and evolved but this made no impact on the outcome.

Following *Goodwin*, criticism and pressure from ECtHR prompted the UK Government to introduce legislation allowing legal recognition of a gender change. After a series of consultation, the Gender Recognition Act (GRA) received royal assent in July 2004 giving transgender individuals the right to marry in their new gender, apply for substitute birth certificates and be legally recognised for parenthood by artificial insemination through the process of an application for a gender recognition certificate, which was ultimately determined by a Gender Recognition Panel (s. 1(3) and Schedule 1 GRA). Transgender individuals who have been legally recognised in their acquired gender in another member state of the EU were also recognised in the UK in the absence of a Gender Recognition Certificate. This legislation has now been replaced by the UK

EA (s. 7) but demonstrates a clear attempt to break down social barriers and promote inclusiveness in society (Patel, 2008b).

In a sporting context, sports bodies have also previously adopted the sex determination at birth logic. A number of governing bodies have been forced to amend or accommodate their female at birth requirement to accommodate for transgender athletes. For instance, in 2001 the Canadian Cycling Association (CCA) and the Union Cycliste Internationale (UCI), suspended male to female transgender athlete Michelle Dumaresq's licence to compete. In 2002, they re-issued it to her after accepting that her new birth certificate represented her as female. She represented Canada in the 2002 World Mountain Biking Championship in Austria (Addelman, 2004).

In 2005, the Ladies Golf Union (LGU) for British amateur golf announced that it would allow male to female golfers to compete by changing its sex at birth requirements. 37 year old Mianne Bagger, who was born in Denmark and raised in Australia, became the first golfer who was born a boy to be granted full playing rights on the Ladies' European Tour in October 2004 (Anon, 2005). Having undergone male to female gender reassignment surgery in 1995, Bagger came ninth in the female qualifying school in Italy (Davies, 2004).

Most recently, in October 2010, 57 year old Lana Lawless was a male to female transgender golfer legally recognised under California law. She was denied membership into the Ladies Professional Golf Association (LPGA) because of their "female at birth" player requirements. Lawless brought an action against the LPGA and the Long Driver's of America (LDA) firstly arguing that failure to include her constituted an infringement of Californian civil rights law since the LPGA are a "business establishment" under the legislation (Robson, 2010; *Lana Lawless v the Ladies Professional Golf Association and the Long Driver's of America* United States District Court Case Number CV10 4599 DMR). She also argued that the requirement constituted unfair competition under the legislation and finally she claimed that the defendants interfered with her ability to economically benefit from participation in the events (Dolan Law Firm, 2010).

The Federal Court Action was dismissed following an out of court settlement. The LPGA "expresses its appreciation to Lana Lawless for raising the issue of transgender participation in its tournaments and other professional activities. Both Ms. Lawless and the LPGA are pleased that the litigation initiated by Ms. Lawless has been resolved in a satisfactory way, and applaud the

LPGA members who voted overwhelmingly to remove the “female at birth” provision from its by-laws” (Rodenberg, 2010).

In relation to sex determination at birth, both the law and sport have shifted their attitude and approach to transgender individuals.

Regulation of Transgender in Sport

Yet, one of the most significant challenges to the balance between inclusion and exclusion in sport with regards to transgender individuals is the issue of advantage. The legal and sporting regulation of transgender individuals in sport maintains that male to female transgender individuals sustain physiological advantages in terms of their skeletal features (the average greater height, the size and shape of hand, feet, jaws, and of the male type pelvis) (Gooren, 1999) and in terms of their prior exposure to androgen. These are the masculinising hormones, an example of which is testosterone as earlier described. Feminising hormones include oestrogen and progesterone. Normally speaking, men have higher levels of androgens than females do. Researchers are able to certainly identify that testosterone plays an important part in the development of secondary sex characteristics in males, as well as the promotion of muscle mass and healing and burning fat. This all leads to a lean physique that is associated with male athletes (Teetzel in Scheinder and Hong, 2006 p. 58; Wood and Stanton, 2011).

In the previous chapter we accepted that men tend to possess an inherent performance advantage over women due to their greater average height, muscle mass, power and haemoglobin levels which are brought on by exposure to androgens (Gooren and Bunck, 2004 p. 425). This lends itself well to sports such as sprinting, rowing and swimming and would arguably produce an imbalance of competition and risk of safety if men and women competed together in sports where strength is a determinant factor. There are exceptions such as equestrian sports where male and female athletes perform together in all Olympic events (Tucker and Collins, 2009 p. 148).

Because of these physiological differences, transgender individuals are presumed to possess an unfair advantage in sport. However, just as with intersex individuals, an unfair advantage on the basis of gender is difficult to prove with certainty and instead such treatment could lead to an infringement of fundamental human rights. The tensions between the sporting and individual interest is demonstrated by the debate surrounding the inclusion of sport in the UK GRA. During

the preliminary stages of its passage through Parliament, the UK GRA originally required both domestic and international sporting events to allow transgender individuals to compete in their re-assigned genders, which was in line with the overall purpose of the legislation. This greatly prioritises the interests of the individual and their right to participate in any sport they are qualified to do so.

However, this caused huge debate as to whether or not gender can genuinely be reassigned. Opponents of the Act argued that “neither law nor science can transform the physical substance of a woman into a man, or vice versa” (Myers, 2003). Following discussions between the government and sports governing bodies the GRA was amended include an exemption from sport under s. 19 GRA and to consider the participation of transgender individuals on a case by case basis. This has now been replaced by s. 195 EA. Section 195 (2) and (3) reads;

(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.

Lord Filkin, the British Constitutional Affairs Minister, opined that this regulation ensures “safe and fair competition” and “in the same way as a sporting body [can prohibit] a person taking performance enhancing drugs, for reasons of competitive parity, they would be entitled to exclude a male to female transsexual person if competitive parity or the safety of other competitors was at stake” (Cited in Fairbairn, 2004; For detailed coverage of parliamentary discussion see McArdle, 2008 p. 45).

The objectives of the EA exemption seem reasonable since fair competition and safety are legitimate pursuits. However, the rationale behind the exemption is reflective of the previous s. 44 SDA exemption which assumes that all men are more suited to sport than all women. The exemption and explanation for the term “gender affected” follows the assumption that men are better at sport than women and male to female transgender individuals in sport have an unfair advantage over born females as they retain many of the previous athletically advantageous male characteristics such as a larger heart and lungs, greater muscle mass, lower body fat and narrower hips, despite undergoing surgery (Pilgrim, Martin and Binder, 2003 p. 530).

The sporting position adopted by the IAAF has significantly developed in recent times. Previously, the 2006 policy on transgender sought to ensure that athletes were not enjoying the benefits of natural testosterone predominance normally seen in males (Ljungvist, 2006). The “Stockholm Consensus” in 2003 (attachment B to the 2006 policy) detailed that in order to be eligible for participation post puberty, the athlete must have completed surgical internal and external anatomical changes, legal recognition of their assigned sex by “appropriate official authorities,” and hormonal therapy for a sufficient enough time to reduce and gender related advantages (Ljungvist, 2006). Before the Stockholm Consensus no multi-sport policy on this issue existed.

The Consensus was criticised for being transphobic (Cavanagh and Sykes, 2006 p. 92) and exclusionary for those who cannot afford expensive reassignment surgery or who do not wish to undergo therapy for an extended period of time (Teetzel *in* Scheinder and Hong, 2006 p. 68). In addition, many countries continued to legally exclude transgender individuals, making recognition by appropriate authorities largely difficult. As a result, alongside the introduction of the new rules for athletes with hyperandrogenism, in May 2011 the IAAF introduced new regulations for transgender athletes who have undergone sex reassignment (IAAF, 2011c). An expert medical panel will review cases and offer recommendations to the IAAF on eligibility, based upon a number of factors;

- (i) The age of the athlete;
- (ii) Whether the athlete’s sex reassignment took place pre or post-puberty;
- (iii) The nature of the sex reassignment procedure undertaken;
- (iv) The period of time since the completion of the athlete’s sex reassignment procedure;

- (v) The athlete's androgen levels (the athlete will be required to undergo an Endocrine assessment which will test blood and urine for levels of androgenic hormones); and
- (vi) The nature, duration and results of any treatment and monitoring undertaken following completion of the sex reassignment procedure (Rule 8.3 IAAF, 2001c).

A transgender athlete will be eligible to compete if her medical treatment following reassignment has been administered in a verifiable manner and for a sufficient length of time to minimise any advantage in women's competition (Rule 8.4 IAAF, 2011c). If an athlete does not meet these standards then the panel are required to recommend;

- (i) Conditions under which it would be acceptable for the athlete to compete in women's competition; and
- (ii) A schedule of monitoring of the athlete's prescribed medical treatment with a view to the athlete being eligible to compete once the conditions so determined have been met (Pre-Competition Monitoring) (Rule 8.6 IAAF 2011c).

An athlete will undergo ongoing competition monitoring for specified period of time. Overall, the introduction of these rules is much more stringent than the previous position and offers more detail than the legal provisions presented in the EA. The IAAF appears to create an environment where the participation of transgender individuals will be encouraged where practicable. This is very positive practice and consistent with a number of sports bodies addressing this issue.

However, the legal and sport positions appear to be very vague on the topic of advantage, with no real attention given to what advantage a transgender individual may possess and indeed why they are required to undergo an assessment. The endocrine assessment will test for androgenic hormones but little justification is given for this. Participation should be determined in a manner that is "scientifically well founded and is fair to those who wish to engage in competition" (Gooren and Bunck, 2004 p. 427). In order to justify exclusion on the basis of fair competition and safety, sports governing bodies and the law should explore this with more vigour than these provisions appear to have done so, drawing upon the scientific literature on this topic.

Proving Advantage

In order to justify exclusion, sports governing bodies would need to prove that an unfair advantage exists, and that advantage threatens competition and safety. During reassignment surgery, transgender individuals are placed on hormone regimes which aim to eliminate, in so far as possible, the hormonally induced secondary sex characteristics of their birth sex and secondly to induce those of the new sex (Gooren, 1999). This is achieved by reducing the effects of androgen and increasing oestrogen in the body to suppress testosterone. Oestrogen is produced in the muscle and fat and is an essential part of the sex reassignment process for male to female transgender individuals.

The literature and medical research is marked for its lack of clarification on the exact effects of these hormone regimes upon the athletic performance of a transgender athlete which would confirm whether there is truth in the legal and sporting concerns (Teetzel *in* Schneider and Honh, 2006 p. 57). Little is known because of the variable number of factors such as genetics, hormones, training, diet and differences in sports that make it very difficult to generalise the results of studies that have usually investigated non athlete transgender subjects.

Several studies exist that describe the effects of testosterone and oestrogen, but their exact function and operation in the body is ongoing in the field of science and medicine. Anecdotal evidence of athletes lived experiences also supports research in this field although this is limited (Cohen and Semerjian, 2008). Transgender athletes have publicly expressed how their bodies are weaker post reassignment, arguing that an advantage does not really exist (Cavanagh and Sykes, 2006 p. 95). Bagger claims that “being taller, with longer arms, is an advantage with hitting the ball longer in golf ... but length is not everything” (Mair, 2004).

Based on scientific and medical research available, it is reported that during the reassignment, in some cases testosterone levels may increase and the combined oestrogen and anti-androgen therapy does not necessarily reduce spatial ability, muscle mass, strength and power which are commonly associated with testosterone and desirable attributes in sport (Gooren, 1999; Teetzel *in* Schneider and Hong, 2006 p. 59). The previous anabolic effects of androgen exposure (muscle, bone and haemoglobin) in male to female transgender individuals will diminish after a period of time following oestrogen and anti androgen regime (Gooren, 2008 p. 427). However the pubertal effect of testosterone on skeletal elements such as height and physical dimensions of the human form, including the size of feet and hands, are arguably irreversible and may therefore provide

advantages (Teetzel *in* Schneider and Hong, 2006 p. 59; Gooren and Bunck, 2004 p. 426). Upon this evidence it is fair to assume that an unfair advantage might be exposed in certain sports. Larger hands facilitate a greater grip in sports such as basketball and water polo. Larger feet may enable athletes to excel in sports such as swimming where the foot and leg are an important part of speed. Height is likely to provide advantages in many sports such as volleyball and basketball.

Smaller studies have made distinctions between reassignment surgery before and after puberty. If the transgender individual has undergone sex reassignment surgery before puberty then strength is argued to be irrelevant as they experience none of the masculinising effects of testosterone. If the surgery was performed after puberty then it is argued that each individual should be evaluated case by case. The effects of puberty have framed the IAAF policy approach and impacted upon inclusion and exclusion in mixed sex participation.

A seminal study was conducted on this topic to investigate the effects of androgen deprivation in male to female transgender individuals, and androgen administration in female to male transgender individuals on testosterone levels, muscle mass, haemoglobin and insulin levels (Gooren and Bunck, 2004). They compared the pre-treatment measurements in 17 female to male transgender individuals with the measurements after one year of cross sexual treatment in 19 male to female transgender individuals in the process of sex reassignment surgery, and vice versa (Gooren and Bunck, 2004 p. 426). One of the authors of this study appears as a medical expert for the IAAF panel.

The results reveal that female to male transgender individuals would be able to compete fairly as long as the testosterone levels does not create a surplus of muscle mass over exercise alone and levels are within the acceptable range for men. For male to female transgender athletes there remained an “element of arbitrariness” since there was no conclusive evidence on whether previous exposure to testosterone impacted upon future physical traits (Gooren and Bunck, 2004 p. 428). Whilst androgen deprivation did reveal a loss in muscle area, as mentioned, the mean muscle area remained larger than women.

The study concludes that “there will always be an element of arbitrariness in the drawing of competitive lines,” as the differences in development of every individual coupled with the nature of genetics, determines how nature endows individuals for competition. There is a large spectrum

of males with a very uneven distribution of attributes suitable for sports, just as some born females are better qualified for sports than male to female transgender individuals. In addition, every sport requires expertise in different qualities. For instance, “weight is an asset to a sumo wrestler and a draw back for marathon running; height is an aid in basketball but not on the balance beam” (English in Morgan, 2007 p. 307).

The effect that each body has on the administration of androgen makes it difficult to say either way whether transgender individuals have an unfair advantage. The study suggests that the *average* reassigned male to female has a slight advantage over the *average* born female but certainly not over *all* born females. The requirement of 100 per cent certainty may be unreasonable. The argument for defending the level playing field is objectively reasonable yet it seems that this is pushing the test of reasonableness beyond the constraints of fairness. It is important to highlight that since small differences are critical to the outcome of sport, the data in the study was limited and could not “provide insight into all pertinent aspects” (Gooren and Bunck, 2004 p. 428). Overall, there is no firm evidence to suggest that hormone therapy in transgender athletes provide them with a competitive advantage *beyond* the natural competition level in men and women sports, even though there may be an enhancement in the personal performance of the athlete competing as the opposite sex. Enhanced performance is considered not synonymous with competitive advantage.

Testosterone related physical properties are not relevant in all sporting activities but for those that are, it will depend upon the level of arbitrariness that sport wants to accept that will determine the participation of male to female transgender individuals with other women. As highlighted, the effect of testosterone on the body continues to be investigated.

The legal and sporting approach focuses on the skeletal and hormonal properties of a human body which is entirely legitimate for the maintenance of fair play principles. However, this discussion has revealed that the reliance on these attributes alone can lead to misguided assumptions about the superiority of male characteristics in all sporting activities. This can result in the unreasonable exclusion of athletes on the basis of gender. A case by case approach may be more beneficial here, as the IAAF policy attempts to encourage.

Generally speaking, we tend to selectively focus on advantage in sport with some advantages unchallenged, but others such as those associated with intersex and transgender, magnified. For instance, many athletes in the NBA are known to have acromegaly or gigantism, which is a condition that over produces growth hormone, caused by a tumour in the pituitary gland. Height produced an obvious performance advantage when playing basketball. Sun Ming Ming, a Chinese player who is 7 foot 9 inches tall, reportedly has this condition. In addition to the advantages, the disorder can cause testosterone deficiencies which contribute to his weakness and fatigue (Himmelsbach, 2007). This has affected his ability to continue to play basketball. However, their participation is not questioned in the sport and they are not accused of possessing an unfair advantage.

Michael Phelps has won 14 Olympic gold medals. Nature has given Phelps an advantageous body that is suited to swimming. He has body features that include a long torso and short legs, a long arm span, size 14 feet and extreme flexibility (Levy, 2009). He may have Marfan's Syndrome which is a genetic disease that can pose serious health risks whilst at the same time creating characteristics that are advantageous for swimmers (Cooper, 2010 p. 234). His potential natural advantage has not been challenged by a governing body.

Consider also Australian swimmer Ian Thorpe who has size 17 feet. His exclusion from sport was never considered but instead he was faced with interested media attention, a reflection that this is a rather unique phenomenon. It is also likely that his stature and physique, including training regime also contributed to his athletic success (Teetzel *in* Schneider and Hong, 2006 p. 64). As highlighted earlier, perhaps the differential treatment is accounted for by what is considered a "natural inheritance". Nevertheless, there must be consistency and legitimacy in the criteria used to include or exclude athletes on the basis of gender.

Breach of Human Rights

Another perspective can also be offered to the participation of transgender athletes in sport. Determining an unfair advantage may be entirely irrelevant, and instead outweighed by the broader interest to protect the basic human rights of athletes. This is exemplified in the seminal legal case of *Dr Renee Richards v United States Tennis Association* 93 Misc.2d 713, 400 NYS 2d 267 which was one of the first public cases of transgender. As a male Richard H Raskind was ranked 13th nationally in the men's 35 years and over tennis competition and underwent surgery

to “become female, psychologically, socially and physically” (Case p. 714). After the reassignment she entered 9 women’s tennis competitions and won 2 (Shy, 2007 p. 96; Cole, 1990).

Following this, the United States Tennis Association (USTA) demanded that Richards undertake the Barr body test to determine her chromosomal make up. They claimed that their primary concern was to ensure fairness (Case p. 716). In the absence of an XX female cluster, she was debarred from entering the US Open even though Richard’s surgeon personally testified that her internal organs after the surgery were “anatomically similar to a biological woman who underwent a total hysterectomy and ovariectomy” (Case p. 719).

In 1977 Richards brought a claim against the USTA, the United States Open Committee (USOC) and the Women’s Tennis Association (WTA), claiming that by denying her the right to compete in the women’s division, they had violated s. 290(3) Executive Law of the New York Human Rights Law which declares that the State has the responsibility to act to assure that every individual within this State is afforded an equal opportunity to enjoy a full and productive life.

The WTA had also failed to rank her as a woman tennis professional which is a pre-requisite for qualification and participation in the US Open. The Supreme Court was faced with addressing the appropriateness of the Barr body test and the critical issue of performance advantage. They held that it was grossly unfair, discriminatory and inequitable to make the claimant pass a sex test in order to participate. In doing so, the USTA had contravened s. 290(3). Failure to adhere to human rights legislation not only threatens these rights but also “menaces the institutions and foundation of a free democratic State and threatens the peace, order health, safety and general welfare of the State and its inhabitants” (per Alferd Ascione J Case p. 722).

The USTA were found to have knowingly instituted the test for the primary purpose of preventing Richards from participation (Case p. 721). The court did not wish to criticise the test entirely but highlighted that it should not be the only criteria for determining sex.

The defendant’s primary concern was performance advantage. The case includes a number of opinions from medical experts for each party, each with differing views about the level of advantage Richards may have possessed. No consensus on this issue appeared to have been

reached which is consistent with the discussion in this chapter. In any case, the court judgement was rather short and did not comment on any of the medical evidence. Instead, focus was placed on the breach of human rights. Richards was permitted to compete in the 1977 US Open following the ruling and lost in the first round. She competed at a professional level until retiring in 1981 and went on to coach Martina Navratilova.

Overall, the court followed an inclusive approach to this case, placing the balance in favour of the human right to participate in sport. However, little attention was paid to the determination of advantage. The court could have offered more guidance on determining what criteria may be used to assess fairness and unfairness in sport. From a feminist perspective, another criticism of the case was the over emphasis on the traditional notions of femininity and masculinity (Nyong'o, 2010 p. 97; Shy, 2007 p. 105).

The *Richards* decision was rejected in the New Zealand case of *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603. Ellis J strongly contended that in competitive sports the recognition of the change of sex of a male to female transgender individual is not appropriate as they may have a competitive advantage over other females. The rationale behind this opinion is the perception of sport in relation to other issues such as marriage. Ellis claimed that the male to female transgender athlete has the potential to prevent other female competitors from earnings and prize money where as marriage is a private contract that does not affect anyone other than those in that contract. In some way therefore, transgender athletes are viewed as a public interest matter, whose participation in sporting activity is likely to affect the wider society.

WADA Regulations

The subject of transgender and sport is closely linked with issues concerning drugs in sport (Foddy and Savulescu, 2010). Parallels are made between drug testing and sex testing. However, drug testing is performed on all athletes regardless of gender whereas sex testing is not (Menon, 2010 p. 412). Drugs testing creates a practical problem of integration for transgender individuals in the process of, or who have undergone reassignment surgery. After surgery, transgender individuals undertake a lifetime of hormone therapies to induce and maintain their desired physical changes. The therapy includes either testosterone or oestrogen blocking agents which are necessary for them to function in their desired gender.

Whilst they may be necessary for transgender athletes, they are at the same time, anti-requisites for elite sport competitors (Teetzel *in* Schneider and Hong, 2006 p. 60). Since 2004, WADA has issued a Prohibited List of Drugs (WADA, 2009). This is revised every year and was previously compiled by the IOC. A substance or method is included in the list if it is essentially performance enhancing, poses a danger to athletes' health or if its use is against the spirit of sport. The Code prohibits athletes from administering endogenous sources of testosterone, oestrogen and the majority of their derivatives, exogenously, due to the perceived performance enhancing properties associated with these substances.

As highlighted above, male to female transgender individuals are prescribed with oestrogen, anti androgens and progestin. The amount taken is approximately 2-3 times greater than the amount taken by a menopausal women undergoing hormone replacement therapy (Moore, Wisniewski and Dobbs, 2003 p. 3468). Female to male transgender individuals are prescribed oral testosterone sex steroids (Moore, Wisniewski and Dobbs, 2003) which is reported to be considerably lower levels than the amount of testosterone allegedly consumed by male athletes using anabolic steroids. For this reason it is not thought to have a significant influence on athletic performance. Using testosterone in hormone therapy puts him at a lower normal range for men. However, the hormone therapy that transgender athletes are placed on, conflicts with the WADA code. The cross jurisdictional approach to regulating drugs may also pose a problem for transgender individuals in international competitions (Mackay, 2005).

There is potential for discretion in favour of transgender individuals. WADA propose in Article 4.3 of their mission statement that "legitimate use for therapeutic purposes of substances or methods which could be in conflict with the list," be revised to encompass transgender individuals under gender reassignment. Where a transgender athlete is receiving treatment involving a banned substance or prohibited method, they are eligible to apply for a standard Therapeutic Use Exemption (TUE). A committee will then assess the requirement for the use of that substance or method based on the supporting medical evidence submitted by the athlete. Following the Stockholm Consensus, WADA have now accepted Gender Dysphoria as a legitimate medical condition, thus permitting the use of substances within the hormone therapy treatment (Cavanagh and Sykes, 2006 p. 89).

Comparatively, there is a challenge to differentiate exogenous testosterone use from natural variation in endogenous androgen production in men and women (Wood and Stanton, 2011 p. 2). Some DSD conditions concern autosomal disorders that cause alterations in androgen production or androgen response naturally. TUEs do not extend to DSD conditions as such individuals may not know of their condition before the competition. Under the exemption, athletes are required to notify the medical commission before testing. Despite this it is suggested that current expanding knowledge in the measurement of testosterone can potentially differentiate between misuse of androgens and endogenous androgen production which may naturally vary (Wood and Stanton, 2011 p. 7). A strong point is made that “even if a clear-cut distinction between treatment and enhancement, normal and pathological, could be drawn- which is questionable in itself- the most important question that remains unanswered is the following: who makes these judgements and how?” (Camporesi and Maugeri, 2010 p. 379).

The WADA application of therapeutic use appears a little inconsistent. For instance, men who suffer from Klinefelters Syndrome are permitted to obtain a TUE to justify their medical requirement to boost their testosterone levels to an acceptable “manly” level (Dreger, 2010 p. 23). Finnish skier Eero Mäntyranta has a mutation in the erythropoietin (EPO) receptor gene which causes him to have a naturally raised haematocrit, as if he were taking the banned drug EPO. However he was given an exemption and permitted to compete (Foddy and Savulescu, 2010 p. 4). In addition, suspicion has surrounded substances such as salbutamol which is contained in medication used by asthma sufferers. In announcing its prohibited list for 2010 the WADA Executive Committee held that this substance will not even require a TUE and instead a more simplified “declaration of use” (Anderson, 2010 p. 133).

In response to this, some have argued for safe or acceptable levels of drugs in sport (Foddy and Savulescu, 2010 p. 4). In cycling, the ICU have responded to the issue of natural variation in haematocrit by permitting participation, but by setting limitations to the maximum level of accepted haematocrit, based on a level that is considered to be safe (Foddy and Savulescu, 2010 p. 4). Athletes are not allowed to use drugs to increase their level, rather their current level is tested, whether obtained naturally or through the use of EPO. This approach has been criticised elsewhere (Wood and Stanton, 2011).

Testosterone is more complex, for a “hormonal level playing field” (Foddy and Savulescu, 2010 p. 4) would necessitate a range of determinations about an athlete’s androgen concentrations, as well as the competence of the androgen receptors. Furthermore, not everyone experiences the same performance benefits of testosterone, such as those with AIS. Indeed “in order to truly eliminate unfair testosterone based advantage, we would need to adjust the target level for each athlete in light of their sensitivity to testosterone, and their sex hormone binding globulin levels, and so forth” (Foddy and Savulescu, 2010 p. 4). However science is not as advanced as this yet, leaving this impossible to accomplish. Furthermore, this discounts gender- the inward feeling of being a man or woman. A woman may not want to be labelled in a male sport based on her testosterone level.

Summary

The division of sex in sport is an important feature that enables classification, promotes fairness in competition and ensures safety. It is legitimate to separate the two sexes in particular circumstances as we highlighted in the previous chapter. This chapter has revealed and Table II reiterates that the division of sport and society according to sex is challenged by minorities such as intersex and transgender who do not sit neatly into those categories and who do not conform to the gender attributes associated with man and woman. Such individuals can be represented as a “round peg resolutely resisting the square hole into which society would pound [them]” (Marshall, 2009).

Table II: Summary of Gender Cases			
Case/Example	Issue	Sport Position	Outcome
Maria Martinez Patino	Intersex	Unreasonable exclusion	Include/Exclude
Caster Semenya	Intersex	Unreasonable exclusion	Include/Exclude
Santhi Soundarajin	Intersex	Unreasonable exclusion	Exclude
Mianne Bagger	Transgender	Unreasonable/Reasonable exclusion	Include
Michelle Dumaresq	Transgender	Unreasonable/Reasonable exclusion	Include
Lana Lawless	Transgender	Unreasonable/Reasonable exclusion	Include
Renee Richards v USTA	Transgender	Unreasonable/Reasonable exclusion	Include
Sun Ming Ming	Gigantism	No challenge, inclusion	No challenge
Michael Phelps	Marfan’s Syndrome	No challenge, inclusion	No challenge
Ian Thorpe	Large Feet	No challenge, inclusion	No challenge

Although the classification is defensible, the previous policies in place to manage this such as sex testing, was arbitrary and served no purpose in modern sport. Instead, it excluded innocent athletes and led to the infringement of basic human rights as in the *Semenya* and *Richards* case.

The new IAAF regulations seeks to alleviate this and are generally far more inclusive and detailed than previous gender policies which reflects good practice in this area.

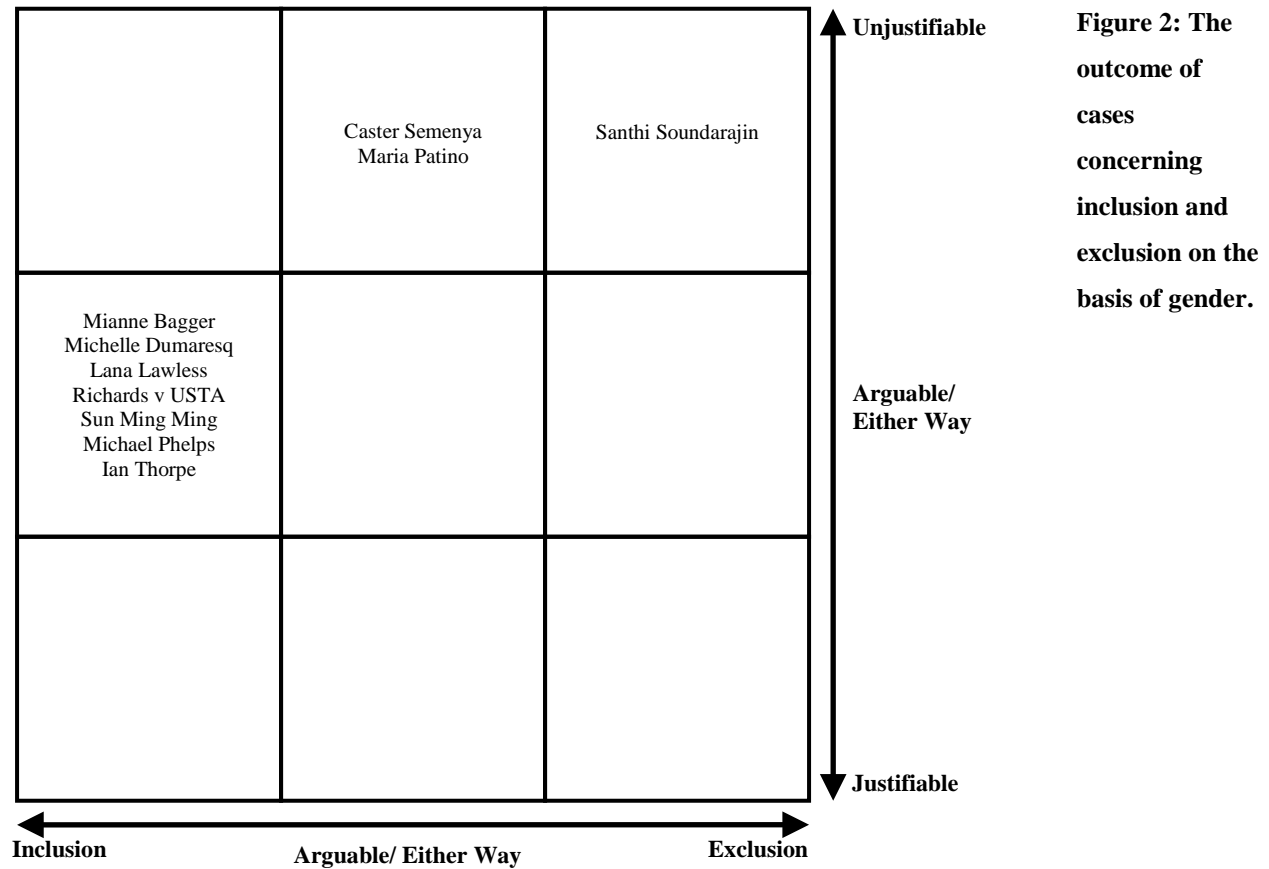


Figure 2: The outcome of cases concerning inclusion and exclusion on the basis of gender.

Figure 2 illustrates how the intersex cases concerning *Patino*, *Semenya* and *Soundarajin* have resulted in unjustifiable absolute exclusion or exclusion that is both inclusive and exclusive because intersex individuals possess natural uncontrollable variations that make them less or more suited to sporting activities. These cases remind us that we exist within a spectrum of natural sex possibilities. One of the biggest challenges to sex and gender based classifications is that there can be no single experience or measurement of what it means to be a woman, since we are all different (Cohen and Semerjian, 2008 p. 133; Dreger, 2010 p. 23). Within the world of biology, gender variations and switching behaviours do not appear to be uncommon (Nature, 2008 p. 666). The playing field of life itself consists of an infinite variation of life, from fish that change sex to male pregnant sea horses. Based upon the evidence provided there are no logical grounds to exclude intersex individuals from sport or even subject them to undergo treatment, unless their health is in danger. Whilst no known case has appeared before a court, this chapter

could find no legitimate argument to excuse sport from being accountable under human rights provisions.

The prevention of gender fraud and scandal seems unsustainable since there are few accounts of this taking place. Instead, such testing has the potential to infringe fundamental international, regional and domestic human rights legislation, specifically concerning dignity, privacy and discrimination on the basis of sex. However these legal mechanisms are limited since they do not explicitly protect intersex individuals in their wording, and neither do they typically extend to non state actors/ private authorities as sports governing bodies are perceived to be.

One of the justifications for sex testing is to regulate advantage in sport which is a legitimate objective that is worthy of regulation because unfair advantage can threaten the essence of sport and fair play principles. However, determining advantage according to chromosomes or hormones produces unfair outcomes for intersex individuals.

The remainder of the cases explored in this chapter represent examples of inclusion that are neither justifiable nor unjustifiable. The transgender cases of *Bagger*, *Dumaresq*, *Lawless* and *Richards* inform us that what is considered natural or unnatural has an important role in determining participation. The protection of sport from the spread of unfair advantages is defensible since the pure aim of sport is to uphold principles of fair play and matching natural ability as accurately as possible. Striving for a natural representation of competitors is a legitimate ideal in principle, but in practice it may be impossible to obtain. Boylan (2008) argues that “the Olympic hosts seem to want to impose a binary order upon the messy continuum of gender. They are searching for concreteness and certainty in a world that contains neither.” Anthropological studies of the gender binary conclude that it is not absolute and universal. Instead, different cultures adopt different approaches to gender (Larson, 2011 p. 224). Nevertheless the inclusion or exclusion of transgender athletes in sport is far less conclusive, particularly given the inconsistent approaches to advantage as evidenced by *Sun Ming Ming*, *Michael Phelps* and *Ian Thorpe*. The balance between the sporting interest of fair competition and safety, and the human right to participate in sport is difficult to strike.

Chapter 8: Disability

Disability sport historically emerged as a method of rehabilitation for patients with muscular impairments and the rehabilitation of personal identity which may have been affected by the transition from non disabled to disabled. In this sense sport has traditionally been viewed as therapeutic for disabled individuals. For instance, the Paralympic Games originated in 1948 in Stoke Mandeville, England and were organised by neurosurgeon Sir Ludwig Guttmann. They were primarily as a means of rehabilitation for war veterans with spinal cord injuries (Guttmann, 1976).

In modern times disability sport has developed into a successful and innovative industry that produces elite level athletes focused on performance instead of participation alone. The Paralympic Games, which is an abbreviation for the parallel Olympics, is designed for those with physical impairments. In the UK Channel 4 were successful in their bid for the broadcasting rights to the 2012 Paralympic Games. For the first time in its history the competition will receive 150 hours of television coverage.

The Special Olympics is designed for athletes with intellectual disabilities and the Deaf Olympics includes athletes with hearing impairments. However, these are not performance based and instead focused on social inclusion and participation.

Paralympic sports rely heavily on new technological developments such as prosthetics, seating throwing chairs and racing wheelchairs (Burkett, 2010 p. 216; Koenen *in* Gilbert and Schantz, 2008 p. 139). Technology therefore comes hand in hand with disability sport for quasi-therapeutic means. The International Paralympic Committee (IPC), the global governing body of the Paralympic movement, advocates that “equipment plays a critical role in many sports. Equipment evolves and it is the responsibility of international federations like the IPC and the IAAF to stay abreast of these developments. Rules, regulations and performance standards must be developed to ensure that equipment is safe, fair and universally accessible for athletes to achieve standards of excellence” (IPC, 2008). Paralympic athletes are a small market but are arguably testing assisted devices under extreme conditions before mass production for the larger rehabilitation market. Just as motor racing produces most of the technological developments and improvements in cars in the wider industry.

Performance and governance of disability sport remains separate from what may be considered “mainstream” or non disabled categories of sport. Essentially two versions of sport exist. This division is viewed as necessary to match ability and ensure the safety of athletes where the physical or intellectual capacity of athletes may be imbalanced. In addition the use of mechanical aids for assisted living may produce practical problems of integration as well as concerns over performance advantage. The Paralympic Games remain a very separate event to the Olympic Games with different governing bodies who promote and protect the two very different movements. The Olympic motto implies exclusivity (faster, higher, stronger) whilst the Paralympic motto is more reflective of its origins (spirit in motion). The rationale for this separation is that mainstream governing bodies lack expertise to deal with disability sport.

At the same time, this division may be covertly maintained to reflect standards of normality in sport. Disabled athletes have historically been considered abnormal and not suited to competitive sport because of their deviation from the norm. As discussed in Part One, within our ableist culture social, political and media driven attitudes have contributed towards the association between disabled individuals and stigma (Cherney and Lindemann *in* Hundley and Billings, 2009 p. 196; Thomas and Smith, 2009 p. 136-137). This may account for the generally low levels of participation in sport, particularly elite sport amongst individuals with disabilities (De Jong, Vanreusel and Van Driel, 2010 p. 18). It has been suggested that disabled individuals are sidelined from physical activity as a result of the traditional stereotype that “perpetuate over generalisation and under-expectation” (DePauw and Gavron, 2005 p. 13). For instance, it was previously believed that individuals who possess visual impairments were unable to downhill ski or run in a marathon.

Whilst these attitudes have shifted somewhat, there is still a clear tendency to focus on the misfortune of disabled individuals. Such institutionalisation has resulted in disabled groups accepting the image of themselves (Nixon *in* Thomas and Smith, 2009 p.8). Athletes with disabilities are often framed as a “supercrip” or a “disabled hero” which is described as the “presentation of a person, affected by a disability or illness, as overcoming to succeed as a meaningful member of society and to live a “normal” life (Hardin and Hardin *in* Gilbert and Schantz, 2008 p. 25). This approach has commonly been adopted by the media.

Based upon these justifications for segregating non disability and disability sport, the aim of this chapter is to assess the legitimacy and fairness of this division, investigating whether this categorisation is a necessary objective of the essence of sport or, whether this can lead to the unreasonable exclusion of disabled athletes. The divisions are challenged by physically and intellectually disabled athletes who attempt to move from the peripheral of sport and challenge the boundaries of elite mainstream sport which was not necessarily designed for disabled athletes to participate within. Such challenges are increasing as technology and science advances, causing these categories to become blurred. This chapter will explore the regulatory approach to dealing with such cases and whether there are appropriate mechanisms in place to balance inclusion and exclusion.

Oscar Pistorius

The case of Oscar Pistorius is “possibly without precedent” (CAS 2008/A/1480 *Pistorius v IAAF* p. 2). His story has challenged our traditional notions of human ability and has at least begun to blur the lines between non disabled and disabled individuals (Longman, 2007; Swartz and Watermeyer, 2008). His participation raises a range of empirical and philosophical questions concerning disability, performance enhancement and fairness in competition (Van Hilvoorde and Landeweerd, 2010 p. 1).

Pistorius is a bilateral trans-tibial amputee who was born without fibulae, the outer leg bones between the knee and ankle. His lower legs were amputated when he was 11 months old, and he began walking with his first prosthetic carbon fibre limbs 6 months later. He played various sports throughout his childhood but began to focus on running as a teenager for rehabilitation after a knee injury in rugby (Zettler, 2009 p. 369; Case p. 2). At the age of 16 he was fitted with a “Cheetah Flex-Foot” prosthesis, designed for sprinting by the Icelandic company Ossur. Each leg is a flat piece of carbon fibre that is shaped into a “J” shape. It is also referred to as a passive elastic running specific prosthesis (RSP) (Grabowski *et al*, 2010 p. 201).

The inclusion of athletes with artificial limbs is not new and as early as 1904 at the Olympic Games in St Louis, American George Eyser won gold medal in gymnastics while competing on a wooden leg. Greely (2004) spoke of Tom Dempsey who holds American Football record for

longest field goal in 1970. He was born with a deformed right hand and right foot (p. 100). He kicked with a heavy shoe with a blunt end because his foot had no toes. Pete Gray was a baseball player who had no right arm. Instead his glove was modified to enable him to play (Stone, 2005).

Much of the history of the advancement within prosthetic limbs has been associated with the military (Bidlack, 2009 p. 618). The flex foot prosthetic used by Pistorius, was first seen in elite sport in 1998 (Nolan, 2008 p. 125). Different sprint foot designs are now available, all with a basic similar shape. The German Otto Bock Company is the world's market leader in prosthetics. They are the official service provider for all Paralympic Games and are considered to be the "backbone" of the Paralympic Games. Whilst they have existed for a long time, even the most advanced versions used today still do not provide a full biological function (Weyand et al, 2009 p. 903).

In 2004 at the Athens Paralympic Games, Pistorius won bronze medal in the 100 metre race, and a gold medal with a world record in the 200 metre race. He holds the sport class T44 world records in the 100, 200 and 400 metres and has also competed in a number of IAAF sanctioned events against non disabled runners.

In early 2007 he finished 2nd in the 400 metre race at the South African non disabled national championships. In March 2007 the IAAF Council decided to introduce an amendment to IAAF competition Rule 144.2 with the intention of regulating and banning the use of technical devices;

'(e) Use of any technical device that incorporates springs, wheels or any other element that provides the user with an advantage over another athlete not using such a device' (IAAF, 2008a).

Whilst the IOC retains power over the IAAF, it is suggested that they rarely overrule the IAAF leaving them to be the international governing body of track and field that regulates the eligibility of athletes, facilities and equipment.

In spring 2007 Pistorius was invited to participate in the Norwich Union Glasgow Grand Prix which was due to take place in June 2007. However the IAAF intervened and withdrew this invitation surrounding the ambiguity of the use of his prostheses. It was disputed whether they were technical devices that were prohibited under Rule 144.2 (e). An initial analysis of video tape

footage of Pistorius' stride length when running proved inconclusive on the issue of whether the prostheses provide an advantage. Instead, an IAAF commissioned study was prepared by Professor Bruggemann and colleagues at the German Sport University in Cologne.

The IAAF Study

The IAAF commissioned a report which tested Oscar's biomechanical movements when he runs (IAAF, 2008b; CAS, 2008). The aim of the IAAF commissioned study was to determine whether the Cheetah legs gave him an advantage over non disabled competitors (Zettler, 2009 p. 372). The tests were prepared to evaluate Pistorius' "spring movement using an inverse dynamic approach" and also his "oxygen intake and blood lactate metabolism over a 400 metre race simulation" (Case p. 4). Published in an IAAF press release, some of the key test results concluded that;

- Pistorius was able to run at the same speed as intact athletes using 25% less energy
- Highly significant differences were found between the below-knee spring mechanics (vertical ground reaction forces and vertical impulses) of an amputee using prosthetics and an athlete with natural legs.
- It was recorded that "the energy loss in the prosthetic blade was measured at 9.3% during the stance phase while the average energy loss in the ankle joint of the non disabled control athletes was measured at 41.4%" (IAAF, 2008b). In other words, the mechanical advantage of the prosthetic limb as compared to the healthy ankle joint of a non disabled athlete is higher than 30%.

The IAAF did not publish the full description of the methods or results of the study, only a study summary on the IAAF website which concluded that "an athlete using the Cheetah prosthetic is able to run at the same speed as non disabled athletes with lower energy consumption. Running with prosthetic blades leads to less vertical motion combined with less mechanical work for lifting the body. As well as this, the energy loss in the blade is significantly lower than in the human ankle joints in sprinting at maximum speed. An athlete using this prosthetic blade has a demonstrable mechanical advantage (more than 30%) when compared to someone not using the blade."

Following this, in January 2008 (Decision 2008/01 of the IAAF Council) the IAAF banned him from further participation on the grounds that his prosthetics constitute a “technical device” that offers him a clear mechanical advantage over other competitors, in discordance with Rule 144.2(e). Oscar contested this decision and took his appeal to CAS who explored the following issues, ultimately seeking to address whether or not the IAAF “met its burden of proof in showing that Pistorius’s prosthetic legs gave him a mechanical or unfair advantage” (Bidlack, 2009 p. 617). The scientific detail presented is significant to the case analysis.

The Process Leading Up to the IAAF Decision

In relation to the study conducted by the IAAF, CAS found that instructions were made to Professor Bruggemann, to test only Pistorius running in a straight line after the acceleration phase, which is his fastest stage. This created a distorted view of advantage and disadvantage by excluding the start and the acceleration phase. It was found that the IAAF deliberately limited the involvement of Dr Robert Gailey who was a scientist nominated by Pistorius for the study. When the study summary was published on the IAAF website, this was not reviewed by Professor Bruggeman and was subsequently found to contain errors. Finally, the IAAF did not seem to follow appropriate procedural rules for voting on an athlete’s eligibility. The details of Pistorius’ eligibility were already released before all votes had been received (Case, p. 8).

This study has been heavily criticised on the basis of its methods and procedure. For instance, Pistorius’ performance may not have been analysed against appropriate measures and controls (Zettler, 2009 p. 375; Youngsteadt, 2008). Secondly, Pistorius was a new runner and had not trained enough to maximise his physical sporting potential. Yet in the study, he was measured against five non disabled athletes. It is suggested that it would have been more appropriate to match with his physical potential for more accurate results. In terms of the mechanical efficiency of the blades, the studies found that the prostheses were efficient, “storing and releasing more than 90% of the energy they absorbed.” However it is again difficult to determine where the energy is going as this transfer of energy cannot be properly measured or understood currently (Case, p. 13).

Overall, opponents of the study highlight the failure to explore this issue in a more “holistic” manner rather than focusing on advantage only. CAS concluded that the study did not address the central question of whether or not the prostheses provided Pistorius with an overall *net* advantage

or disadvantage, which was needed to decide this case. The IAAF failed to ask the team to research this question.

Was the IAAF Decision Wrong in finding a Contravention of Rule 144.2(e)?

Given that the study findings were inconclusive on the subject of finding the prostheses to provide an advantage, the IAAF had no grounds to find Pistorius in contravention of the rule.

CAS concluded that the introduction of the new competition rule was made deliberately to exclude Pistorius, and not, as argued by the IAAF, because they were concerned about spring technology in running shoes (Case, p. 6). Furthermore, the wording of the section was “a masterpiece of ambiguity” (Case, p. 10). For instance, what constitutes a technical device? What constitutes a device that incorporates a spring? What does advantage even mean in this context? (Camporesi, 2008 p. 639; Charlish and Riley, 2008).

Similar confusion was addressed by the Royal and Ancient Golf Club at St. Andrew’s in Scotland who modified its rules for golfers with disabilities (The Royal and Ancient Golf Club, 2011). The rules include an exception provision in which assistive devices such as artificial devices or unusual equipment is permitted if the device alleviated a medical condition, if the player has a legitimate medical reason to rely on the device and if the committee is satisfied that no undue advantage emanates from use of the device (Rule 14 (3) The Royal and Ancient Golf Club, 2008). The rules are suggestions to the committee in charge of competition and do not have automatic application. Although they have come under criticism they do clarify the position of disabled athletes more so than the IAAF rules (Condry, 2008 p. 131). Little guidance continues to be provided on the definition of an “undue advantage.” It would appear that provisions of this nature are loosely worded for flexibility of application.

Unlawful Discrimination

Pistorius claimed that the IAAF had breached its obligations of non discrimination by failing to seek alternative arrangements that might permit him to participate in IAAF sanctioned events on an equal basis with all non disabled athletes. He claimed that his fundamental human rights were breached, including equal access to Olympic principles and values (Case, p. 9). The issue to consider here is whether or not Pistorius is competing on an equal basis with other athletes not

using the Cheetah prostheses, as disability laws only require that an athlete be permitted to compete on the same footing as others (Case, p. 9).

CAS referred to the CRPD to highlight that being a signatory to this place an obligation on a state to refrain from acts that would defeat the object and purpose of the Convention. However, since the IAAF is governed by the laws of Monaco, this is not applicable since Monaco has not enacted the principles of the CRPD.

Article 30 (5) CRPD encourages states to recognise the right of persons with disabilities to take part on an equal basis with others in recreational, leisure and sporting activities. Appropriate measures should be taken to encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels (s.30(5a)), and to ensure that persons with disabilities have access to sporting venues and services (s.30(5c) (5e)). CAS found this to be of little application here since if it is found that Pistorius has no advantage with his prostheses then he will be permitted to compete on an equal basis. If there is evidence of an advantage then the CRPD does not assist. On this basis, CAS found no unlawful discrimination.

Since he was prohibited from competing in an event in the UK, who is a signatory to the CRPD, perhaps the UK could have placed pressure on the IAAF to ensure that they act consistently with the Convention if it was applicable. Furthermore, under the EA 2010 there is a duty to make a reasonable adjustment when the disabled person is at a disadvantage to a non disabled person (s. 20). However CAS highlighted that the applicability of equality legislation is limited here since the case falls on whether Pistorius has an unfair advantage over non disabled athletes.

Pistorius Study

In order to decide the case, CAS considered results of the study commissioned by Pistorius which contradicted the IAAF study results. The study was carried out at Rice University and MIT (Rice University, 2008). The team found fundamental flaws in the IAAF study, stating that “while an athlete’s performance in sprints of very short duration is determined almost entirely by mechanical factors, in races of longer duration, such as the 400m, performance depends on both mechanical and metabolic factors” (Rice University, 2008). Not only did the study test broader elements than the IAAF study, but it found that;

- Pistorius fatigues normally and in the same manner as non disabled sprinters
- He used the same oxygen amounts as able-bodied runners at a sub maximal speed and thus did not have a metabolic advantage.
- The study also claims that “anaerobic energy supply cannot be quantified which invalidates the IAAF finding that Pistorius has a 20% energy advantage at 400 metre race speeds”.

There is a lack of certainty surrounding the issue of advantage through the use of prosthetic limbs in sport. The alleged advantage that Pistorius has, firstly relates to the energy expenditure and loss whilst running, and secondly relates to the advantages gained through the use of the properties of the blades compared to intact limbs (Jones and Wilson, 2009 p. 126). Little is still truly known about the effect of the prosthetics on amputee running, primarily because there is limited scientific research conducted on the biomechanics of amputee runners, particularly with both missing legs (Longman, 2007). It is difficult to test the Cheetahs because an athlete cannot run with and then without them. Brian Frasure, US Paralympic sprinter is one of the only examples. He was training to make his college track team when an accident left him a single leg transtibial amputee. As an amputee he was not able to run as fast as he could before the accident. It is claimed that he had to work 50% harder than other athletes (Thomsen, 1999). He used a shin and foot prosthetic, called the Sprint Flex III. Whilst he is not bilateral amputee like Pistorius, and whilst he does not use the Cheetah models, this example implies that very little advantage may exist.

Independent studies of the Cheetahs and similar prostheses generally reveal a contradiction to the IAAF findings that the Cheetahs confer energy related advantages to users (Zettler, 2009 p. 377). Weyand et al (2009) aimed to determine whether sprint running performance was similar or dissimilar between amputee and intact subjects from a physiological and mechanical perspective. They found that physiological function was similar but mechanical function was dissimilar. They observed that during amputee running the ground reaction forces present a limitation of speed (p. 910; Van Hilvoorde and Landeweerd, 2010 p. 4).

Nolan (2008 p. 128) observed that current running prostheses “do not match the human foot in terms of energy efficiency, and due to having to reduce loading on their residual limb, amputees

cannot compensate enough at the hip to match the total energy generated in a human limb". Grabowski et al (2010 p. 204) found that the use of RSP does not necessarily provide an enhancement to top speed during running. In fact, the ground reaction forces when using such technology may serve as a limitation for top speed.

There are many *disadvantages* to sprinting on carbon fibre legs. Pistorius requires "30 metres to gain his rhythm. His knees do not flex as readily, limiting his power output. His grip can be unsure in the rain. And when he runs into a headwind or grow fatigued, he must fight rotational forces that turn his prosthetic devices sideways" (Per Ampie Louw, Pistorius coach in Longman, 2007). During the start and the acceleration phase of a race, an amputee athlete is restricted to remaining upright as they set out of the blocks. This limits the production of the necessary horizontal force in comparison to non disabled athletes (Jones and Wilson, 2009 p. 127). This argument generally, is also supported by Ossur, the manufacturer of the prosthetic (Bidlack, 2009 p. 620)

Overall, advantage or disadvantage cannot be proved with certainty (Zettler, 2009 p. 378). There is no conclusive evidence that proves an overall net advantage to amputee athletes using the prosthetics. It is worth noting that there are many physiological and biomechanical factors that influence sprint running performance overall (see Grabowski *et al*, 2010 p. 201).

CAS Decision

Taking the Pistorius study into account, CAS upheld the appeal on the grounds that no advantage could be established. CAS held that the IAAF cannot prohibit something without scientific evidence that proves a metabolic or physical advantage. The cheetah device has been used for a decade yet no sprinter using them has run faster than non disabled runners, until Oscar. CAS stated that the tests conducted in Germany were distorted and inaccurate and the IAAF procedures were controversial.

Following eligibility, Oscar did not qualify for the South Africa team travelling to the Beijing Olympics in 2008 and fell just outside the Olympic standard, although he had previously made qualification time. He did compete in the Beijing Paralympics and won the T44 100, 200 and 400 metre races (Bidlack, 2009 p. 618).

At the IAAF World Championships in Daegu 2011, he just missed out on the 400 metre final. He was also a member of the South African 4x400 relay team. The IAAF permitted him to compete in the team only if he ran the first leg. This was imposed to ensure the safety of other athletes. An IAAF official claimed that “Pistorius risked the physical safety for himself and other athletes if he ran in the main pack of the relay, where only the first leg is run in lanes” (Anon, 2008b). It was claimed that “serious damage” may be caused because of the physical contact involved in the relay. However, the final was raced without Pistorius even though he was the second fastest South African runner at the 400 metres in 2011. The SA team manager claimed that the best 4 athletes were chosen. Little commentary has been provided on this issue. Pistorius continues to work towards competing against non disabled athletes in the 2012 Olympics (Jones and Wilson, 2009 p. 125).

The international regulatory approach taken by CAS was to include Pistorius since no advantage could be proved. As discussed in previous chapters it is extremely difficult to draw lines when science cannot provide an accurate determination of the status of performance advantage. The decision appears to be balanced and limited in three ways:

- 1) It specifically only related to Pistorius, and therefore future cases must appear on a case by case basis;
- 2) The decision applied only to the particular model of Cheetah Flex Foot prostheses. This was to restrict the use of future versions which may more clearly show advantage;
- 3) CAS acknowledged that the decision may only be temporary because developments in scientific knowledge or testing technology may allow the IAAF to prove that Cheetah’s confer a net advantage to users in the future.

Although the case has been criticised because of these limitations it is an example of good governance. The IAAF justifications for exclusion are reasonable in principle but unreasonably executed and applied. It may be argued that they were covertly seeking to maintain the standards of normality in sport as earlier described. Robert Gailey asked whether the IAAF “are discriminating because of the purity of the Olympics, because they don’t want to see a disabled man line up against an able-bodied man for fear that if the person who doesn’t have the perfect body wins, what does that say about the image of man?” (*in* Longman, 2007). Even if this were

the case the approach taken by CAS focused on the practical issues concerning inclusion and exclusion rather than these socio-cultural influences.

In order to strike a balance between inclusion and exclusion CAS focused on proving an advantage. Similarly, in 2001, Hunter Scott was a 14 year old boy from Georgia, USA, with a left leg above the knee amputation. He was a swimmer and required a specially designed prosthetic “swim fin” to compete in swimming league competitions. In 2001, the DeKalb- Atlanta Swim and Diving League ruled that this device infringed guidelines prohibiting the use of such devices in competitions but not exhibition events. The Scott family argued that the device simply provided Scott with better balance and threatened to bring legal action under the US ADA. The former president of the League refused to inspect the flipper despite being offered the opportunity and instead acted in accordance with the USA Swimming codes (Lohn, 2002). For instance, a similar rule by the Federation Internationale de Natation (FINA) reads that, “no swimmer shall be permitted to use or wear any device or swimsuit that may aid his/her speed, buoyancy or endurance during a competition (such as webbed gloves, flippers, fins, etc.). Goggles may be worn. Any kind of tape on the body is not permitted unless approved by FINA Sport Medicine Committee” (Rule 10.8).

However the Georgia High School Association which governs high school athletics approved the device since there was no evidence that the fin provided extra propulsion and an advantage over other competitors. In fact the device acts as a hindrance in many way because it create drag that slows Scott down as he pushes off from the wall in competitions. The device provides him with a “necessary balance” to compete (Lohn, 2002). DASL and the Scott family reached a legal agreement to allow him to play which is consistent with CAS.

The advantage approach has also been used in cricket. The bowling action in cricket requires an unnatural rigid arm movement rather than the natural instinct to flex the arm. In fact, if the arm is flexed then this is considered to be throwing the ball or “chucking” which is illegal under the International Cricket Council (ICC) rules because it arguably provides an unfair advantage. The legality of bowling actions has been closely debated as a result of athletes such as successful Sri Lankan cricketer Muttiah Muralitharan. He suffers from a congenital deformity in his elbow that prevents him from fully extending his right arm. He has a unique arm rotation and wrist action which became the subject of global debate. It was reported that he was bending his arm by up to

10 degrees when bowling which contravened the 2004 ICC rules stating that a bowler can only flex their elbow up to 5 degrees.

Following concerns by players and umpires, beginning in 1995 he was forced to undergo a series of biomechanical tests in Perth and Hong Kong to investigate his action further and determine whether he is throwing the ball and therefore possessing an unfair advantage. Experts concluded that his action was within the range of legitimacy and instead his action created an illusion of throwing. The tests revealed that most bowlers flex their elbows at some stage during delivery of a ball. Pakistan fast bowler Shoaib Akhtar possesses hyper mobility in both his shoulder and elbow joints that leads to the hyper extension of his arm which prevents him from bowling with a straight arm. Brett Lee, Harbajhan Singh and Saqlain Mustaq have also been accused of throwing the ball contrary to the 2004 rules.

As a result of these cases and considerable biomechanical research in the area of elbow flexion, in 2005 the ICC changed their rules regarding bowling to accommodate for elbow flexion of up to 15 degrees (Anon, 2004c). This creates a better level of consistency when determining the appropriateness of a bowling action but may also be construed to provide disabled athletes with a competitive advantage.

A slightly alternative approach to inclusion and exclusion was adopted in the seminal case of *Martin v PGA Tour, Inc.*, 994 F. Supp. 1242 (D. Or. 1998). Many authors have compared and contrasted the Martin and Pistorius case (Condry, 2008) because they both raise the question of whether disabled athletes using technology are disabled, able or, *too* able, therefore possessing an unfair advantage and threatening the integrity of sport.

Casey Martin

Casey Martin was born with a rare disabling blood circulatory condition called Klippel-Trenauney-Weber (KTW) syndrome which can cause severe pain in his legs. This restricted his ability to walk and therefore access to athletic activities (Weiler, 2000 p. 18). During college, his syndrome became worse and the condition made it dangerous for him to walk. Not only was the pain associated with walking but there was also a risk of haemorrhaging or fracturing the tibia,

which could result in the amputation of his leg. His condition was recognised as a disability under the ADA.

He played for the golf team at Stanford University with Tiger Woods. The National Collegiate Athletics Association (NCAA) and the Pacific 10 Conference granted him an exception to use a golf cart to compete in the college events and his Stanford 1994 team won the NCAA championship (Liguori, 2003 p. 186).

After college the talented golf player attempted to turn professional by entering the Professional Golf Association (PGA) qualifying tournaments. The PGA is a non-profit organisation that sponsors professional golf tournaments. However, they refused to derogate from the hard card rules of the game (it is a PGA requirement that players walk the course during their qualifying rounds. Players are required to complete qualifying rounds to earn playing privileges on the PGA Tour (Q-School)) so as to allow him to use a golf cart. The PGA Tour Commissioner, Tom Finchem refused to alter the rules claiming that this would be an unacceptable intrusion on the integrity of golf. They were not contesting the physical disability, but that a change to the rule would give him a competitive advantage.

Martin brought a case against the PGA under the ADA in the Federal District Court. He claimed that the golf cart restriction violated Title III of the ADA by denying him a reasonable modification to accommodate his disability. Under Title III an entity is guilty of discrimination if it fails to make reasonable modifications to its policies, practices or procedures when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations (s. 12182 (b) (2) (a) (ii)). This was upheld by the District Court and an appeal was made to the Supreme Court. The court had to consider whether the requested modification was reasonable, whether it was necessary for the disabled individual and whether it would fundamentally alter the nature of the competition (Case p. 660).

Application of US Equality Legislation

As introduced in Chapter 5, the ADA is an extension of the Federal Rehabilitation Act 1973 into non federal public and private sectors. Their mandate is equal access and inclusion for athletes

with disabilities. The ADA has three titles; Title I deals with employment discrimination, Title II prohibits discrimination by public entities, so possibly schools and colleges, Title III prohibits discrimination in public facilities, in places of public accommodation, and is most relevant to the discussion on sport.

The PGA argued that the Act did not apply here since the competing players were not members of class protected by Title II of the Act which protects individuals who are “clients and customers” of public accommodations. The PGA instead claimed that the players were more like “actors or performers” in a theatre production, who are providers rather than a consumer of the entertainment that petitioner sells to the public (Case p. 678). The court rejected this and held that it was appropriate to classify golfers as clients or customers since they pay the PGA a substantial fee to compete in its qualifying tournaments. Upon this, the PGA was not permitted to discriminate against any individual from the full and equal enjoyment of the privileges of those courses (Case p. 681).

The Supreme Court found that the PGA matches took place in places of public accommodation within the meaning of Title III, since the statutory definition of a public accommodation expressly included a golf course under s. 12181 (7) (L) ADA (Case p. 670). The PGA accepted this but there has been variation by the US courts in the interpretation of what falls within places of public accommodation under the ADA. Its application to membership organisations such as sports clubs raises the wider issue of whether sports bodies are public or private in nature and therefore subject to equality legislation. A narrow view was taken in *Elitt v USA Hockey* 922 F. Supp. 217 (E.D. Mo. 1996) where the parents of a child with attention deficit disorder were refused permission by the youth hockey league to supervise the child on the ice during practices. The parents claimed that this violated Title III however the court held that instead of claiming denial of participation in the youth hockey league, they should have claimed denial of access to the ice rink. Furthermore, the court held in *Elitt* that because membership organizations are unlike other places of public accommodation defined by the Act, they do not satisfy the statutory definition.

The courts have tended to conclude that a membership organization must have close connection to a particular facility to constitute a place of public accommodation as in *Ganden v National Collegiate Athletic Association* No. 96 C 6953, 1996 U.S. Dist. LEXIS 17368 (N.D. Ill. Nov. 19,

1996). A 17 year old athlete swimmer possessed a learning disability called “decoding” but was considered very bright. The NCAA claimed that he did not meet the core course requirements to be eligible for NCAA benefits and inclusion, since he completed some of his courses in a learning disability setting. The NCAA felt that these requirements were in the student’s best interest. The court ruled that there would be a fundamental alteration to the requirements of the NCAA but held that in future this determination should be “fact-bound” (Case p. 15).

This position can be contrasted with *Schultz v. Hemet Youth Pony League* 943 F. Supp. 1222 (C.D. Cal. 1996). The PONY baseball programme was divided into seven age brackets on the basis of a players “legal age.” Schultz was 11 years old and suffered from cerebral palsy which affects the body’s muscles. She was able to walk and run with the assistance of crutches. She attempted to “play down” in a division reserved for children aged between 9 and 10 but was refused. The court held that the HYPL is a place of public accommodation since it is “not limited to actual physical structures with defined boundaries” (Case p. 1225). It was held that the exclusion was unsubstantiated and based upon assumed concerns of possible risk or harm. The case offered little commentary on the inclusion of an athlete with crutches.

Another approach of the courts has been to refrain from intervening in private sporting matters. In *Shepherd v United States Olympic Committee* 464 F. Supp. 2d 1072 (D. Colo. 2006) the District Court consolidated two cases involving Paralympic athletes, Mark Shepherd, a wheelchair basketball player, and Scott Hollonbeck, Jose Antonio Inguez and Jacob Heilveil who were elite wheelchair racers. USOC offers Athlete Support Programmes which includes various types of grants, tuition assistance and health insurance benefits. USOC uses criteria to distribute these benefits under its resource allocation policy. The policy states that an applicant must be eligible to represent the USA and must be one who intends to compete, if selected, in the next Olympic or Pan American Games. The athletes in the case argued that this policy was inequitable since it did not offer benefits to Paralympians and was only open to Olympians. They claimed that this violated Title III ADA and s. 504 of the Rehabilitation Act 1973 (Case p. 1076).

The court denied that USOC constituted a place of public accommodation since their training facilities were only accessible to those already selected by the national governing bodies of Olympic, Pan American or Paralympic teams (Case p. 1083). Furthermore, they felt that the Casey Martin case fails to address the question of whether places of public accommodation to

which non disabled athletes do not have “full and equal enjoyment” to, also fall within Title III. The training facilities offered by USOC were considered world class and limited access. Therefore the court essentially claimed that it lacked jurisdiction over USOC because their training facilities were not available to the public to be caught under this legislation (Friedman and Norman, 2009 p. 354). The Court distinguished the case with *Casey Martin* on the basis that golf courses were available to the general public whereas USOC facilities were only available to selected teams.

The court concluded that the plaintiffs were misplaced in their attempts to use judicial branches of government to remedy inequalities since this is a matter for the legislative and executive branches (Case p. 1086). The court also accepted that these matters fall within the exclusive jurisdiction of USOC. This was supported in *Hollonbeck v United States Olympic Committee* 513 F. 3D 1191 (10th Cir. 2008) where the Paralympic athletes in *Shepherd* appealed several of the issues to the Court of Appeals for the Tenth Circuit. The court sympathised but was reluctant to act on an issue that they felt needed to be dealt with by the legislative and executive wings of government.

It can be difficult to hold sports bodies or organisations accountable under equality legislation since the courts often interpret the public/private divide in favour of a sports entity. However, in *Casey Martin* the court accepted that Title III applies to athletic competitions and elite athletes for the purposes of the PGA.

Alteration to Golf

Having established the applicability of the ADA, the court was required to establish whether the PGA had violated the rule. This necessitates a precise interpretation of discrimination under the Act which permits derogation if the entity can establish that making such modifications would fundamentally alter the nature of the game. The Court identified when a reasonable accommodation may well change an activity (Case p. 682);

- 1) Changing an aspect of the game for all competitors that changes the nature of the game
- 2) Making a modification for one competitor that gives that competitor an advantage

The PGA relied on this to argue that using a golf cart would alter the nature of the game. In order to determine what the fundamental nature of golf was, the court looked closely at the history and multi levelled rules of golf. They concluded that the essence of the sport was to play the ball from the tee into a hole using a stroke or a succession of strokes. The Rules of Golf, jointly written by the United States Golf Association (USGA) and the Royal and Ancient Golf Club, apply to all levels of amateur and professional golf but say nothing about the prohibition of use of a golf cart. Instead Appendix 1 to the Rules of Golf list a number of optional conditions, which includes that if desired that players walk in a competition, then a walking rule is suggested.

The Conditions of Competition and Local Rules, known as the hard card rules apply to the PGA, and do force players to walk except in the Senior Tour and in the “open” qualifying events. Carts are also used during two of the three stages of the qualifying rounds. Incidentally, most senior players prefer to walk. The purpose of such a rule is to inject an element of fatigue into the skill of shot making (Case p. 660; 686).

The Notice of Competitors rules cover conditions for particular tournaments and at times may authorise the use of carts to speed up play when the distance is far. In the past, golf carts have been used to speed up play and also account for long distances between the tees (Liguori, 2003 p. 210). In any case, the use of carts has more than likely increased the participation of the game, since they were introduced in the 1950s (Case p. 684).

The court concluded that the walking rule found in the hard card rules, based upon an optional condition that was buried in the appendix to the Rules of Golf, cannot be considered to be an essential attribute of the game itself (Case p. 685). The inconsistent imposition of the walking rule in tournaments further supports this. The court stated that allowing Casey Martin to use a cart is not “inconsistent with the fundamental character of golf” since the essence of the game is shot making (Case p. 663). The walking requirement of golf is on the periphery of golf and the rule is not even an official rule. It was also stated that it is impossible to guarantee in golf that all players can play under exactly the same conditions or even that an individual’s ability will be the sole determinant of the outcome (Case p. 663). Testimony from a professor in physiology was heard identifying that since golf is a low intensity sport, “fatigue from the game is primarily a psychological phenomenon in which stress and motivation are the key ingredients” (Case p. 687).

Further, participation would not fundamentally alter the game because Casey Martin would not receive an advantage. The court accepted that due to the chronic physical pain Casey Martin endured when he walked, he suffered greater fatigue and exhaustion syndrome than a non disabled golfer.

Court Decision

Overall, in a 7-2 decision, the court held that the PGA had violated the provisions of the ADA, and granted a permanent injunction requiring the PGA to allow Martin to use a cart. Justice Stevens wrote the majority opinion whilst Justice Scalia and Justice Thomas filed a dissenting opinion raising some important commentary relevant to the balance between inclusion and exclusion in sport.

In Justice Scalia's dissent, he argued that the Supreme Court will find it difficult to determine which rules of a competitive sport are fundamental when the governing body of the sport contends that they are (Bidlack, 2009 p. 624). He argued that the PGA should have the autonomy to decide what rules they wish to impose in a competition. He claimed that the courts were trespassing in an area where they do not belong as reflected in the *Shepherd* and *Hollenbeck* cases. He closed by warning that the case would lead to a "totally equal world" which was something that George Orwell warned against in his novel *Animal Farm* (Case p. 705). He referred to the court's decision as "Kafkaesque" and "Alice in Wonderland." Although this dissent may appear eccentric, this is reflective of the wider sports regulation debate. It is important that a balance is struck between inclusion and exclusion in sport so that legal intervention does not negatively impact upon the essence of sporting activity.

Fundamental Alteration Approach

The "fundamental alteration" approach adopted in *Casey Martin* has produced some valuable footprints for the determination of inclusion and exclusion in relation to disability and non disability. The US courts have upheld that the ADA does not require entities to change their basic nature, character, or purpose insofar as that purpose is rational, rather than a pretext for discrimination (Olinger Case, p. 1005). For instance, in an interesting twist, the day after the Ninth Circuit ruled in favour of *Casey Martin*, the Seventh Circuit came to a conflicting decision

in *Olinger v United States Golf Association* (USGA) 205 F.3d 1001 (2000). Ford Olinger suffered from bilateral avascular necrosis, a condition that hinders his ability to walk. He brought a claim under the ADA to allow him to ride a golf cart whilst competing for the US Open. The USGA do not allow the use of golf carts during the US Open and require player to walk during a round. The CA affirmed the district court decision and held in favour of the USGA, on the grounds that allowing him to use a cart would alter the nature of the game. Walking in this case was deemed to be an important tradition of the game, according to testimonies of past and present professional golfers in the case. The District Court ruled that the nature of the competition would be fundamentally altered if the walking rule was eliminated because it would remove stamina from the set of qualities designed to be tested in golf. In addition, conditions which affect a golfers performance such as fatigue, heat and humidity, were considered to be important to competition (Case p. 1006). The literature contends that in light of *Casey Martin*, *Olinger* was incorrectly decided.

A fundamental alteration approach has been reasonably applied in cases such as *Kuketz v Petronelli* 821 NE 2d 473 (Mass. 2005) where a wheelchair racquetball player requested to participate in an non disabled league and requested that he be allowed two bounces of the ball as opposed to the single bounce allowed to non disabled players. The official rules of racquetball state that the objective of the case is to win each rally and that the player loses a rally when he is unable to hit the ball before it touches the floor twice (Case p. 356). The defendant general manager of the athletic club refused Kuketz the opportunity to compete in the non disabled league primarily because of safety concerns that non disabled athletes would not be accustomed to the movements and extra equipment of a wheelchair athlete if they were permitted to compete (Case p. 357). Furthermore, the two bounces would fundamental alter the rules of the game. The court supported these arguments and held that the modifications sought by Kuketz would create a new game with new strategies and new rules which would fundamentally alter an essential aspect of the sport (Case p. 365). It was held that the “essence of the game of racquetball, as expressly articulated in the rule is the hitting of a moving ball with a racquet before the second bounce” (Case p. 364). This case was distinguished from *Casey Martin* since the essence of golf was shot making which was not affected by the use of a golf cart.

Another example of reasonable exclusion is in *Knapp v Northwestern University* 101 F.3d 473 (7th Cir. 1996) where the university refused to allow Knapp to play on the schools division 1

basketball team based on the team physicians determination that Knapp was medically ineligible because of his increased risk of cardiac death, even though he was implanted with a cardio defibrillator in his abdomen to regulate his condition. This exclusion took place even though his parents were willing to sign liability releases and had his own team of experts to testify that the level of risk was acceptable. Knapp sued Northwestern arguing that he was discriminated against because of this actual or perceived disability. The Seventh Circuit reversed the District Court decision, and concluded that Knapp should be excluded on the basis that “legitimate physical qualifications may in fact be essential to participation in particular programs” (Case p. 483). Furthermore it was clarified that “a significant risk of personal physical injury can disqualify a person from a position if the risk cannot be eliminated...but more than merely an elevated risk of injury is required before disqualification is appropriate...Any physical qualification based on risk of future injury must be examined with special care if the [law] is to be circumvented, since almost all disabled individuals are at a greater risk of injury” (Case p. 483).

The case raises an important point that the determination of inclusion or exclusion from sport on the basis of sex, gender, disability or race must be based upon justifiable reasoning instead of subjective evaluations or good faith belief (Weston, 2006 p. 151). In this case the court held that the decision must be reasoned and rational “with full regard to possible and reasonable circumstances” (Case p. 484).

Fundamental alterations to essential aspects of sport have also been considered in a number of cases concerning age rules and athletes with intellectual disabilities. Age categories in sport are imposed to balance physical and intellectual ability between athletes for the protection of safety and competitive advantage and to maintain uniformity of standards. They are usually considered essential to sporting regulations. In light of this, it has been held in some of the US decisions that the participation of a student, who has been held back a certain number of years because of an intellectual learning disability, is likely to infringe essential age rules in sport which would constitute a fundamental alteration, modification or waiver. For example, in *Pottgen v. Missouri State High Sch. Activities Association* (MSHSAA), 40 F.3d 926 (8th Cir.1994) a student with learning disabilities had repeated 2 school grades and entered the 4th Grade as a 19 year old. The student was considered ineligible to compete in interscholastic sports (basketball, cross-country and baseball) in accordance with the MSHSAA by-law 232.0 which concerns age standards. The aim of this restriction is to disallow competitive advantage to teams using older athletes, protect

younger athletes from harm and to discourage student athletes from delaying their education to gain athletic maturity and experience (Case p. 658). The MSHSAA refused to permit a waiver of this rule because it would cause administrative burdens and expenses. The District Court held in favour of the athlete since competitive advantage was *de minimis* and neither was there a safety risk (Case p. 661). However the CA reversed this decision and concluded that the by-law was an essential requirement in high school interscholastic programmes (Case p. 929).

This decision was followed in *Sandison v Michigan High School Athletic Association* 64 F. 3d 1026 (6th Circuit. 1995) where two high school students with learning disabilities were held back one year in school as a result of their learning disabilities. The MHSAA regulations forbid students over 19 years playing sports. The aim of the rule was to safeguard athletes against injuries arising from competing against average and oversized athletes, and to prevent average athletes from gaining a competitive advantage. This rule restricted the students from competing in track and cross country. The District Court decision to include the athletes was reversed on appeal where the court held that a waiver of the rule would be unreasonable and fundamentally alter the MHSAA regulations. In addition they held that the exclusion was solely by reason of age and not disability (Case p. 1035).

Similarly in *McPherson v MHSAA Inc* 119 F. 3d. 453 (6th Circuit 1997), the MHSAA handbook stated that a high school athlete cannot compete in any branch of athletics if he has been enrolled in grades 9-12 for more than eight semesters. The claimant was a basketball player with a learning disability who did not comply with this requirement and was therefore ineligible. The purpose of the rule was to “create a fair sense of competition by limiting the level of athletic experience and skill of the players in order to create a more even playing field” (Case Para. 12). In addition the rule sought to prevent age fraud which was referred to as “red shirting.” The MHSAA contended that there were narrow circumstances available for a waiver to this rule. The District Court decision in favour of the athlete was reversed on appeal. Relying on the previous case the court held that the rule was neutral and neutrally applied (Case Para. 47). They compared the 8 semester rule with the over 19’s rule in *Sandison* to conclude that they were the same and therefore considered “necessary” (Case Para. 54).

Interesting commentary concerning administrative and financial burden was raised by the courts in these cases. The athletes asserted that their average athletic skill would not fundamentally alter

the sports programme. However the courts held that placing a responsibility on bodies such as the MHSAA to make individual determinations about competitive advantage would constitute an undue burden because of the range of factors that this would encompass such as “chronological age, physical maturity, athletic experience, athletic skill level, and mental ability to process sports strategy” (Case Para. 57). It was held that it would be “unreasonable to call upon coaches and physicians to make these near-impossible determinations.” The courts highlighted the difficulties of making case by case assessments of student abilities and favoring average age standards.

On the other hand, the dissent judge in *Pottgen* argued that an individual approach should be taken to essential eligibility requirements because this would find that the student was not a threat to safety and not larger than the average 18 year old student (Case p. 931). Broadly speaking about statutory interpretation, the dissenting Judge Arnold accepted that if a requirement is “essential” to a programme or activity, then a waiver or modification cannot be reasonable. However, he advocated that we must determine what is meant by “essential” (Case p. 932). This dissent was persuasively followed and a more individualised approach was supported in cases such as *Cruz v Pennsylvania Interscholastic Athletic Association (PIAA)* 157 F. Supp. 2d 485 (E.D. Pa. 2001) where a 19 year old student with learning difficulties sought a modification to the age rules to be included into interscholastic wrestling, football and track for 2 additional semesters. Section 1(1) of the PIAA by-laws stipulated that students over the age of 19 were restricted from competing in interscholastic sports, known as the “age rule” (Case p. 488). Justifications for this were to protect younger athletes from dangers and unfairness of older athletes who are perhaps larger, stronger, more mature and experienced, and to maintain uniformity of standards. The reasoning in *Casey Martin* was followed and it was held that the student would not fundamentally alter the nature of football and track. Whilst the rule was considered to be essential, a waiver or modification was viewed as reasonable and necessary. The position of wrestling was not so clear but it was agreed that the determination of a fundamental alteration should be made on an individual basis (Case p. 499). The court relied on a number of testimonies to find that the student is not more experienced than other players and is not greater than the average height and weight of other younger participants. Upon this, there is no threat to safety or competitive advantage in this case (Case p. 493).

A similar age rule in *Dennin v Connecticut Interscholastic Athletic Conference Inc* 913 F. Supp 663, 670 (D. Ct. 1996) restricted a 19 year old students with Down’s Syndrome from

participating in intercollegiate swimming on the basis of competitive advantage, safety and red shirting. The CIAC denied him a waiver but allowed him to compete as a non scoring exhibition swimmer. On this basis, his relay team would be unable to earn points if he participated. The court found the dissent in *Pottgen* persuasive (Case p. 668) and it was held that no advantage was present since the student was the slowest swimmer in the pool. Neither was there a safety issue because it was a non contact sport (Case p. 669). The imposition of a waiver would not constitute an undue burden on the CIAC. The court did highlight that in some cases this determination may be more complex “depending on the sport in question, the size, agility, strength and endurance of the individual, and whether the quality of his/her athletic capacity is enhanced by his/her age beyond 18” (Case p. 669).

Two approaches to the constitution of a fundamental alteration to an essential aspect of sport have been revealed by the courts. On the one hand the individual, case by case approach favours the athlete but involves a complex consideration of a range of factors relating to an athlete’s physical and non physical make up. On the other hand the average approach produces a uniformity of standards across sports bodies and organisations but is likely to lead to inaccuracies about advantage as we have seen. It is clear from the contrasting decisions in the different courts that, what is essential to a sport is not a universal concept and can be very subjective. For example, if this were applied to Pistorius, CAS would have had to evaluate the essence of running. Opposers of the decision did contend that his participation negatively impacts upon the “historical continuity of the sport and materially alters the nature of sprinting” (Zettler, 2009 p. 387). Ultimately the aim of running is to pass the line in the fastest time. However, ascertaining the essence of competition can be very difficult because of the multiplicity of this concept (Wild, 2009 p. 1385). For instance, the definition of a foot may be required also (Longman, 2007). There would need to be a break-down of the movement of running in order to define when someone is running which could become tedious.

The Use of Assisted Devices in Sport

The cases concerning athletes with physical disabilities who rely on assisted devices for therapeutic means force us to consider the relationship between sport and technology when determining inclusion and exclusion. The ultimate role of technology in sport is to enhance

efficiency and even remove any “unnecessary obstacles” that may have been part of a specific goal of a sport (Van Hilvoorde, Vos and De Wert, 2007 p. 175). For instance the use of a stopwatch has improved accuracy in competitions. As technology advances, sport is more heavily relying on technological developments to aid and enhance training and performance. Sporting equipment generally continually presses the boundaries of sport performance (Mullins, Hardy and Sutton, 2000 p. 123). The development of new techniques, new training methods, and new enhancements are all focused on making athletes better and re-defining sports. The term “prostheses” could be considered broader than just devices that individuals with disabilities use. It can also extend to equipment used by non disabled athletes (Zettler, 2009 p. 372).

At the same time technology challenges the historical continuity of sport. For instance, Dick Fosbury’s “Fosbury Flop” technique in the high jump event during the 1968 Mexico Olympic Games was originally considered as artificial as it was unknown but soon became the natural high jump technique once it was understood (Van Hilvoorde, Vos and De Wert, 2007 p. 175, 179). The introduction of the klapskate in ice skating led to a re-skilling of the game and was viewed by some as an artificial development of the game (Van Hilvoorde, Vos and De Wert, 2007 p. 183). There was even an attempt to ban the skates by the US international speed skating association. Only some competitors could use these skates which led to inequalities but it was eventually accepted within the sport.

The sport and regulatory approach taken in cases such as *Pistorius*, *Hunter Scott*, *Casey Martin*, *Olinger* and *Kuketz*, needs to be aligned consistently with the approach taken to the general use of assisted devices in sport that are aimed at improving performance and providing athletes with a competitive advantage in sport. Currently it would appear that this is not consistent. For instance, the development of textiles in the sport industry is evidenced by brands such as Nike who have made significant advances in their clothing, such as the introduction of a super strong liquid crystal polymer fibre thread called Vectran which allegedly enhances performance by withstanding high temperatures (Burkett, 2010 p. 215; Lu, 2008 p. 626). The USA track and field team have worked with Nike to test carbon sole shoe implants that harness energy normally lost when a runner’s foot pushes off the ground. American athletes used such shoes in the Sydney Olympics 2000 (Adelson, 2008).

In 2004 Speedo introduced the first “Fastskin” full body swimsuit which was approved by FINA Bureau in November 1999 (Advisory Opinion CAS 2000/C/267 Australian Olympic Committee (AOC), 1 May 2000, p. 5) and debuted at the Sydney Olympic Games in 2000. It consisted of lycra or elastane covering either a part or whole of the body. Using either woven or knitted fabric, it is suggested that this technology reduces friction and pressure drags. Any reduction in drag is beneficial for swimmers as it could result in higher swimming velocity for the same energy as well as reducing energy cost for swimming at a given velocity (Chatard and Wilson, 2008 p. 1149). The energy cost of swimming can be defined as the athlete’s oxygen uptake, swim stroke rate, and swim stroke distance (Zettler, 2009 p. 379). The swimsuit was modelled on the way in which a shark’s skins aid its propulsion through water via tiny ridges and was moulded to streamline the body’s contours (Craik, 2011 p. 73; Advisory Opinion, 2000 p. 4).

Speedo continued to improve the design of the suit and introduced the Fastskin FS II in 2004, the FS-Pro in 2007 and the LZR Racer in 2008. During this time a number of concerns were raised about the legitimacy of these suits and whether they contravened FINA Swimming Rule 10.8.

Controversy surrounded whether they were assistive devices that enhance performance or whether they were simply swimming costumes. In the Beijing Olympics 2008, 94% of all swimming races were won wearing this suit. More than 130 world records had been broken in less than a year after the launch of the LZR (Craik, 2011 p. 77; Zettler, 2009 p. 368). The introduction of rival suits by competitors such as Adidas which were made out of 100% polyurethane and Hydrofoil, contributed towards the controversy surrounding swimming.

Several studies have been conducted to test the drag and energy cost using the suits. Most conclude that the use of the suits provide statistically significant benefits to swimmers in these two areas (Zettler, 2009 p. 379). Chatard and Wilson (2008 p. 1151) found that in terms of performance, a decrease in swim time was found wearing the suits as compared to a normal racing suit. This was related to a significant reduction in drag when wearing the suits, which resulted in a greater distance per stroke and reduced oxygen consumption. Their study also compared full body and half body suits, finding that full body result in a higher performance benefit.

The Australian Olympic Committee (AOC) requested an advisory opinion on the swimsuits from CAS in 2000 (CAS 2000/C/267 Australian Olympic Committee (AOC), 1 May 2000). The AOC sought clarification on whether the swimsuits constituted a “device” according to FINA SW Rule 10.8 (previously 10.7), and whether FINA had the authority to grant an approval for the use of such bodysuits. The AOC claimed that FINA “cannot be the sole and final arbiter as to the proper interpretation of its own rules” (Advisory Opinion, 2000 p. 11). However, in contrast to the CAS approach to *Pistorius*, CAS held that they would not review this since the decision to approve the bodysuits was not contrary to the general principles of law, but instead concerned with “game rules” which CAS would not deal with (Advisory Opinion, 2000 p. 15). CAS held that FINA Bureau is free to develop their own autonomy and from of self-government and take responsibility for their decisions (Advisory Opinion, 2000 p. 17).

Following pressure on FINA to clarify their regulations, FINA’s congress voted to ban full length swimsuits and polyurethane suits in January 2010. The decision was made that “men’s swimsuit shall not extend above the navel nor below the knee and for women shall not cover the neck or extend past the shoulders nor shall extend below the knee” and these should be made from “allowable textiles” (FINA, 2009a). Further clarification on this term was provided which stated that the material can only consist of “natural and/or synthetic, individual and non consolidated yarns used to constitute a fabric by weaving, knitting, and/or braiding” (FINA 2009b; Anon, 2009h; Shipley, 2009). The subsequent decision to tighten regulation is positive but the swimsuits have arguably changed swimming and led to some believing that a technological doping age is taking place (Wood, 2008 p. 1; Randall, 2009 p. 2048).

There has also been some controversy surrounding training devices which may constitute a “device” that produces an unfair advantage. For instance, altitude stimulators, such as hypoxic chambers, hypoxic tents and dedicated training resorts, create controlled environments to help athletes adapt their oxygen efficiency in different altitude locations (Armstrong *in* Mottram, 2011 p. 355; Hard, 2010 p. 547). The legality of these methods have been criticised on the grounds that such facilities provide athletes with a competitive advantage and pose safety risks to the athletes health (Greely, 2004 p. 114). However in January 2007, following detailed consultation on the hypoxic chambers, WADA approved the recommendation of their scientific committee not to add them to the 2007 List of Prohibited Substances and Methods (WADA, 2006). The committee found in their research that the “method was performance enhancing, raised some concerns but

was inconclusive about the method's threat to athlete health, and determined that the method was contrary to the spirit of sport. A substance or method may, but is not required to, be added to the Prohibited List if it meets two of these three criteria" (WADA, 2006). Those who approved this decision felt that "the banning of the hypoxic chambers begins to blur the fair and enforceable line where we can determine whether or not a doping offence has been committed" (UKAD, 2006). Opponents of the rationale for the decision raise concerns about the significant dangers to health that altitude training presents (Armstrong *in* Mottram, 2011 p. 365).

Assisted devices such as these are extending beyond and developing humans who are technologically enhanced (Van Hilvoorde and Landeweerd, 2010 p. 3). Such a movement may be regarded as transhumanism, an idea that seeks to advance technology by altering the human condition to something to which the term human can no longer be appropriate. This may be achieved through methods such as genetic engineering, artificial intelligence, robotics, nanotechnology and virtual reality. When the use of technologies attempts to enhance an individual's performance "beyond normal" a number of scientific, philosophical and economic concerns arise (Randall, 2009 p. 2053). With rapid advances in gene doping for instance it may be difficult for regulatory bodies to keep up with scientific developments (Solomon, Mordkoff, Noll, 2009). Performance related genes and their enhancing effects are being increasingly discovered. It is predicted that in the future we will see the genetic engineering of super elite athletes (Van Hilvoordede, Vos and De Wert, 2007 p. 186).

Consider also athletes who have a pacemaker fitted, a hip prosthesis (Van Hilvoorde and Landeweerd, 2008 p. 108) or the procedure of laser eye surgery (Buzuvis, 2011 p. 39). Tiger Woods underwent two LASIK procedures to improve his vision beyond 20/20. Before surgery, he was considered to be legally blind without glasses or contact lenses. He did not enjoy lenses since they blurred his eyes and negatively impacted upon his performance (Zaccone, 2010 p. 426). This procedure was deemed to be an acceptable enhancement to make to the human body.

Upon these examples, the challenge for the balance between inclusion and exclusion is and will be identifying the match between the technology and the athletes' essential requirements. One important distinction to make here is the disabled athletes using assisted devices are doing so for therapeutic reasons, which could negate issues of advantage, and instead be justified under a similar process to the WADA therapeutic use exemption. In addition, in relation to prostheses for

instance, “the legal system in every country classifies people without legs as impaired making it logical to classify bionic legs in general as therapeutic devices” (Wolbring, 2008 p. 154). If the legs were permanently attached to the body, through the development of Osseointegrated prostheses that enhances integration of the human leg with technology it could be suggested that their use is therapeutic (Wolbring, 2008 p. 151). The medical evidence provided in *Casey Martin* similarly reveals the therapeutic use of the golf cart.

There is no current consistent approach to balancing inclusion and exclusion in relation to the use of technology and instead this determination may be driven by standards of normality and acceptance in sport. Some of the justifications for maintaining the categories of disabled and non disabled sports are based upon protecting these sporting values. However, it is fair to say that neither athletes nor sporting activity can be considered “normal.” Elite athletes possess attributes that give them a super ability which also places them as abnormal, “varying from extreme sized sumo wrestlers to extremely undersized gymnasts” (Van Hilvoorde and Landeweerd, 2008 p. 104). The difference is that elite athletes with abnormal super abilities are celebrated in our society, compared to disabled athletes who are treated with caution because their participation may pose safety concerns or create an unfair advantage. These are legitimate concerns but need to be supported by factual evidence.

Sporting activity is not necessarily “normal” either. In race walking for instance a competitor must have some part of the body in contact with the ground at all times in order to be deemed walking. Interestingly, race walking is not walking as we understand it to be in everyday life. Whilst walking is considered to be a “human activity” race walking within the IAAF rules means “fighting the human instinct of breaking into a run for extra speed...” (IAAF, 2009). The description of bowling actions in cricket also emphasise the unnatural nature of sporting activity.

Summary

This chapter has explored the various sporting and legal approaches taken to disabled athletes with physical impairments who require assisted devices, and those with intellectual disabilities who challenge the age brackets of sports programmes. The cases displayed in Table III concern athletes who wish to participate in non disabled sports.

Table III: Summary of Disability Cases			
Case/Example	Disability	Sport Position	Outcome
Pistorius v IAAF	Assisted device	Unreasonable exclusion	Include
PGA Tour v Casey Martin	Assisted device	Unreasonable exclusion	Include
Hunter Scott	Assisted device	Unreasonable exclusion	Include
Muralitharan	Physical disability	Unreasonable exclusion	Include
Schultz v HYPL	Cerebal Palsy	Unreasonable exclusion	Include
Kuketz v Petronelli	Assisted device	Reasonable exclusion	Exclude
Knapp v NU	Medical Condition	Reasonable exclusion	Exclude
Olinger v USGA	Assisted device	Unreasonable exclusion	Exclude
Hollenbeck v USOC Shepherd v USOC	Physical disability	Unreasonable exclusion	Exclude
Ganden v NCAA	Intellectual disability	Reasonable/Unreasonable exclusion	Exclude
Sandison v MHAA	Intellectual Disability	Reasonable/Unreasonable exclusion	Exclude
McPherson v MHSAA	Intellectual Disability	Reasonable/Unreasonable exclusion	Exclude
Pottgen v MSHSAA	Intellectual Disability	Reasonable/Unreasonable exclusion	Exclude
Dennin v CIAC	Intellectual Disability	Reasonable/Unreasonable exclusion	Include
Cruz v PIAA	Intellectual Disability	Reasonable/Unreasonable exclusion	Include
Training devices	Doping	Inclusion	Include
Speedo swimsuits	Textiles	Inclusion/Exclusion	Include/Exclude
Tiger Woods	Laser Eye Surgery	No challenge, inclusion	No Challenge

The division between disabled and non disabled sport is predominantly based upon issues of safety and competitive advantage. From the commentary in this chapter there is also a desire to protect the standards of normality in sport which is being driven by what is acceptable in sport. The position of *training devices*, *Speedo Swimsuits* and *Tiger Woods* laser surgery suggest that these standards are lacking conformity. Figure 3 charts the outcome of the cases and illustrates an absence of consistency across the decisions.

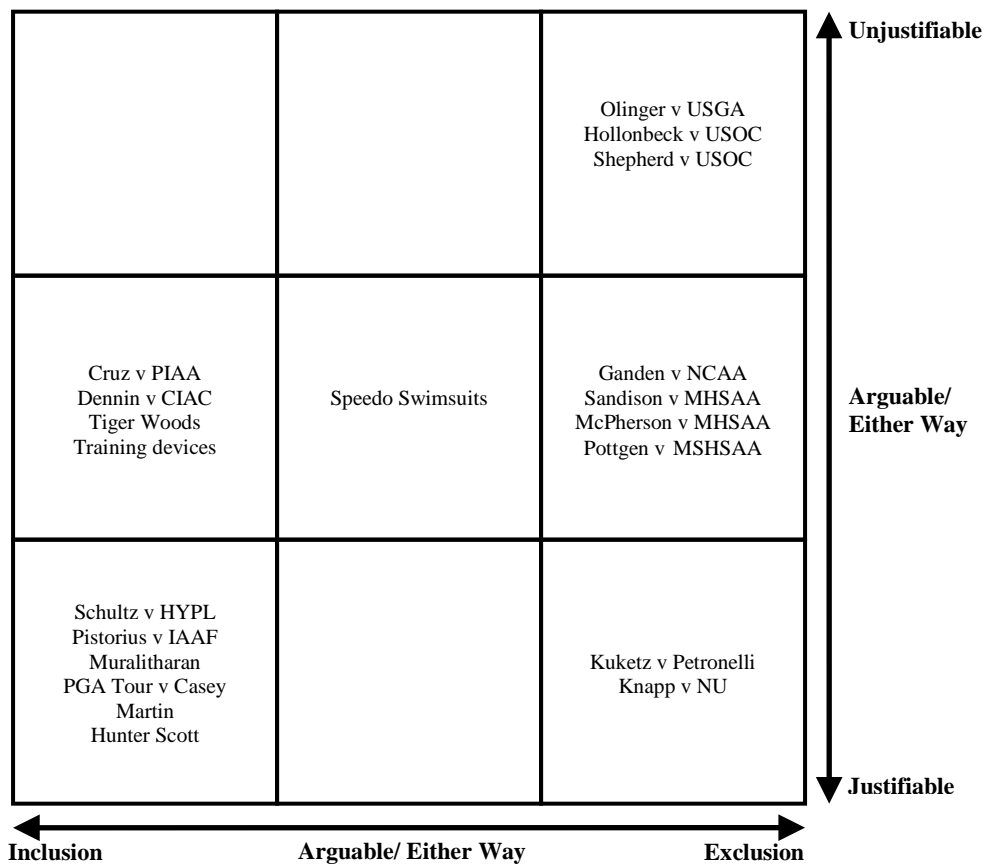


Figure 3: The outcome of cases concerning inclusion and exclusion on the basis of disability.

The cases of *Shepherd* and *Hollonbeck* demonstrate a continued reluctance to intervene in some sport issues. Where intervention has taken place, the courts have tended to adopt either the advantage or fundamental alteration model. It seems justifiable to include athletes when advantage cannot be proved (*Pistorius*, *Hunter Scott*, *Muralitharan*), when exclusion is unsubstantiated (*Schultz*) or where there is no fundamental alteration to the essence of the sport (*Casey Martin*). It follows that where advantage can be proved and there is likely to be a fundamental alteration to the essence of sport, then exclusion is justifiable (*Kuketz*). It is also justifiable to exclude on the basis of legitimate safety concerns (*Knapp*). The balance appears to lie upon the absence or presence of scientific evidence to support a claim.

However, making any of these determinations requires a high degree of subjectivity which leads to a number of inconsistent outcomes and decisions as illustrated by the large placement of arguable/either way cases in Figure 3, and as reflected by the contrasting decision of *Olinger*. Many of the US court decisions concerning age rules were reversed and included dissenting opinions because of the complexity involved in ascertaining whether an athlete with a learning disability is likely to alter the essence of a sport and provide an unfair advantage, and whether an

age rule is a fundamental aspect of a sports programme. Some of the cases have produced interesting discussions concerning the appropriate balance between inclusion and exclusion for disabled individuals.

Chapter 9: Race

In Part One we introduced the complex concept of race highlighting that our human differences between us are largely brought about by evolutionary adaptation and further exaggerated through culture. When the term race is used to describe this process then it is a valid construct. Problems begin to emerge when human differences are explained using misguided or even false assumptions about entire populations (Winant *in* Back and Solomos, 2000 p. 678). This can lead to acts of racism or exclusionary behaviour. There are many historical overt examples of individuals and groups being treated differently because of their “race” which includes physical characteristics, geographical origin, religion and culture and behaviour. These practices extended to sporting activity and in the 1936 Berlin Olympics Adolf Hitler attempted to exert white Nazi superiority over non white athletes. In addition, until the 1990s in the USA, golf clubs enforced exclusionary policies that excluded African Americans from membership (Gable and Johnson *in* Quirk, 1996 p. 251). These examples suggest that performances within sport act as a microcosm of society.

In modern society it is very difficult to execute such practices and we are less tolerant of racial prejudice since our education and knowledge of populations is much more grounded. The protection of race within the international human rights system (UDHR, ICERD), the regional provisions (ECHR, US Civil Rights Act) and domestic legislation (UK EA) has imposed criminal and civil legal consequences of such behaviour. Sport is not exempt from this and has also overtly moved away from discriminating on the basis of race.

Following the entry into force of the Treaty of Lisbon 2009, the EU has a new competence in sport and a commitment to combating discrimination in sport as reinforced by Article 165 TFEU and in the EU White Paper. In relation to race, the White Paper holds that sport “involves all citizens regardless of gender, race, age, disability, religion and belief, sexual orientation and social or economic background” (European Commission, 2007 Para. 2.6). It makes a series of recommendations to ensure that acts of racism are eliminated within sport.

On a domestic platform, the UK EA, replacing the Race Relations Act 1976 prohibits discrimination on the grounds of race which includes colour, nationality, ethnic or national origins (s. 9(1) EA). Sport is exempt from this Act for the purpose of selecting player to represent

a particular country and to limit competitions to particular countries for specific purposes (s. 195(5) EA). This exemption serves to ensure that “genuinely representative sports teams are not acting in a discriminatory fashion when applying their eligibility criteria” (James, 2010 p. 238).

It is documented that ten EU member states have introduced specific legislation on racism in sport (Belgium, Bulgaria, Cyprus, Czech Republic, France, Italy, Luxembourg, Portugal, Romania and Spain) (FRA, 2010). Criminal legislation in the UK governs the control of crowds at football matches (the Public Order Act 1986, the Sporting Events (Control of Alcohol) Act 1985 and the Football (Offences) Act 1991). The effectiveness of these legal measures on inherent attitudes and beliefs are subject to debate but nevertheless represent a positive stance against race discrimination.

Given the legal framework, this chapter sits separately to the areas of sex, gender and disability. Thus far we have focused on contentious cases of inclusion and exclusion in competitive sport. Race is less contentious since any form of exclusion on the basis of race would infringe human rights legislation. The human rights of the athlete in this context outweigh any sporting interest. That is not to say that discriminatory behaviour does not still take place. There are some examples of overt exclusion in sport such as racial abuse which continues to imbalance inclusion and exclusion. There are many examples of more covert expressions of race in sport such as racial stacking and indirect restrictions upon religious and cultural expressions. As a result of misguided stereotypical assumptions about suitability to sporting activity, these have produced pockets of under representation and over representation of minority groups in sport.

Rather than the rules of sport (concerning eligibility or selection) creating restrictions on participation for minority athletes as we have seen in sex, gender and disability, in the context of race, the culture of sport often leads to an imbalance between inclusion and exclusion. Sport tends to be treated as a cultural space where people “formulate or change ideas and beliefs about skin colour, ethnic heritage and national characteristics, and then use them as they think about and live other parts of their lives” (Coakley and Pike, 2009 p. 312). This chapter will demonstrate the limits to regulatory mechanisms in changing cultures and attitudes.

Overt Practices: racial abuse

Racial abuse “works to isolate a particular section of the community and carries with it violent and damaging undertones” (Long, 2000 p. 126). It has the effect of creating an exclusionary culture within sports where athletes may lack a sense of belonging. Holland (1995) reveals that many athletes of minority backgrounds learn to live with any abuse that they may receive and become ignorant to it, as a means of having a successful career in sport. Even more concerning is the growth of racism within banter. Such behaviour is being excused on the basis that no harm is intended and it is inoffensive. This is evidenced in cricket where “sledging” is being used as an excuse for racial abuse towards competitors (Long, 2000 p. 127). Unfortunately racial abuse exists within the permanent structures of sport.

In October 2010 the EU Agency for Fundamental Rights (FRA) published a report which documented findings of research on racism, discrimination and exclusion in amateur and professional sport in Europe (FRA, 2010). It found incidents of racism, anti-semitism and anti-gypsyism in football and basketball across the EU. According to the report, experts warned that right wing extremists are becoming active in amateur leagues in Germany and Italy. The FRA report finds that in most cases the prohibition of discrimination is not adequately enforced in the area of sports. In football, one of the most popular national sports in the EU, fans were found to commonly be the perpetrators of racist incidents in men’s professional and amateur football. Football in England is often time used to explore racism through popular culture (Lusted, 2009 p. 722; Saakov and Sinnott, 2010). A considerable number of racist incidents concerned child and youth football, and amongst players in amateur football, but there has been a tendency to ignore them in amateur sports (Lusted 2009; Holland, 1995). Referees, club officials, representatives of clubs and federations and the media were involved in some racist incidents (FRA, 2010 p. 38).

The current frequency of race incidents in English football reinforces the findings of this report. A high profile incident took place in October 2011 when Chelsea Captain John Terry was accused of aiming a racial slur at Queens Park Rangers player Anton Ferdinand during a football match. The Metropolitan Police and the FA have begun a formal investigation into the allegation. Whilst this behaviour does not directly exclude athletes from sport, it creates an exclusionary environment on the basis of race. The regulatory mechanisms for dealing with such cases are currently being debated in light of this incident. Section 58 of the FIFA disciplinary code reads;

“Anyone who offends the dignity of a person or group of persons through contemptuous, discriminatory or denigratory words or actions concerning race, colour, language, religion or origin shall be suspended for at least five matches. Furthermore, a stadium ban and a fine of at least CHF 20,000 shall be imposed. If the perpetrator is an official, the fine shall be at least CHF 30,000.”

The FA rules stipulate that where a proven offence concerns “ethnic origin, colour, race, nationality, faith, gender, sexual orientation or disability” the recommended punishments for misconduct, which include fines and suspensions shall be increased by the Disciplinary Commission. These punishments can be contrasted with the legal sanctions under which this incident may fall. John Terry will face a criminal charge for allegedly committing a racially aggravated public order offence, contrary to the Crime and Disorder Act 1998. It is reported that the maximum sentence for this is a fine of £2,500.

In December 2011 Liverpool FC striker Luis Suarez received an 8 match ban and a £40,000 fine from the FA for racially abusing Manchester United FC defender Patrice Evra, contrary to FA Rule E3 which states that a participant should always “act in the best interests of the game and shall not act in any manner which is improper or brings the game into disrepute or use any one, or a combination of, violent conduct, serious foul play, threatening, abusive, indecent or insulting words or behavior” (E3 (1)). If there is a breach of this rule including any reference to a person’s “ethnic origin, colour, race, nationality, faith, gender, sexual orientation or disability” then the regulatory commission will consider an increased sanction (E3 (2)). Chief Executive of the Professional Footballers’ Association, Gordon Taylor expressed that just because it is a football pitch it is not a vacuum and the law of the land applies (Anon, 2011d).

The actions of the sports bodies in these recent cases have been under close scrutiny and they appear to have been keen to display a strict approach against racism in sport. Previously there has been a difference between sport and regulatory approach to similar issues. One case that exposes the contrasting punishments is lower league football player Tom Gosling, who in 2007 was charged by the Cambridgeshire FA for racially abusing an opponent during a match. He was issued with a 42 day ban and £50 fine. The incident was reported for Suffolk police where in contrast, the Magistrates court found him guilty of using racially aggravated threatening behaviour and imposed a football banning order for 3 years. The law appears to have appropriate

mechanisms in place to deal with issues of race in sport and perhaps it would be best for sport if the law was left to regulate so that higher penalties can be imposed, setting a more influential precedent. There are few cases that have appeared before the courts concerning racial abuse in sport.

In the case of *Sterling v Leeds Rugby League Club* [2001] ISLR 201 Sterling was near to the end of his rugby league career. In 2000 the team coach Lance, did not select Sterling for the wing position for that season. Sterling claimed that he had been the victim of direct race discrimination by the club in being excluded from the first team squad for a period of approximately 3 weeks and secondly that he had been victimised by the club for their failure to appropriately investigate the allegations of racial discrimination. He was successful in his claim for race discrimination against the club and Lance and was awarded £10,000 for injury to feelings (Hartley, 2009 p. 127). The court highlighted that the victimisation resulted from a failure to appreciate that race discrimination could be unconscious and ill intentioned. The case heard evidence that the team coach had indicated that Afro-Caribbean players were not as well suited to playing rugby league in Australia. During questioning he referred to athletes as “those boys” better suited to basketball.

In *Hussaney v Chester City FC* 15 January 2001 No. EAT/203/98, Hussaney was an apprentice and member of the youth squad at Chester City FC. He was requested to change the boot studs of Kevin Ratcliffe who was the first team manager. He fitted these incorrectly and Ratcliffe was over heard making racist and offence remarks towards Hussaney. Even though the club promised that Ratcliffe would make a formal apology, this was never made. Although disciplinary letter was sent to Ratcliffe by the club, the Tribunal found this attempt to be very mild. At the same time, Hussaney was released by the club and was not offered a professional contract.

Hussaney then brought an action against the club, alleging that the words used amounted to direct racial discrimination. The tribunal found that the abusive language did amount to discrimination on the grounds of race and Hussaney was awarded £2500 for injury to feelings. Furthermore, Hussaney claimed that the failure to offer him a professional contract was because he complained about the racial insult and that this action amounted to victimisation under s. 2 RRA. This was rejected and the tribunal decided that the release was based upon purely footballing grounds. Hussaney appealed to the EAT who found that the ET has erred in law by failing to provide proper and adequate reasons for their decision. The appeal was upheld and reheard.

Whilst not central to this thesis, there is a clear under representation of non white employees in non competitive aspects of sport which could be due to the overt racism that exists but is rarely challenged. In the case of *Singh v The Football League, The Football Association and others* (unreported, December 2001, ET Case No 5203953/99) Mr Singh was a referee for the Football League and appeared the National List of Referees between 1989/90 and 1998/99 seasons. He was withdrawn from the List towards the end of the 1999 season. This left him ineligible to referee professional football teams. His removal was justified on the basis that there had been a marked deterioration in his position on the Merit List (this was a system employed by clubs to assess and score referees based upon average assessor scores of the referee's performance) over the last 3 years. The accuracy of this scoring system was debated. Amongst the organisational changes between the FL and PL during this time, Mr Singh performed exceptionally well in the 1994/95 season. As the only Asian referee he was very visible at the top of the Merit Order List and was considered a "talking point" (Case Para. 17.67). However, during the seasons in which he was not doing so well, he was subject to criticism.

No prescribed disciplinary procedure existed relating to the conduct and performance of referees and there was no form of disciplinary process available to Mr Singh to contest his removal (Case Para. 17.52). The central issues surrounding the case was whether his removal from the list amounted to racial discrimination by the respondents who were the FA and others, whether there was a campaign of continuing racial discrimination against Mr Singh particularly when he was a highly successful referee, and finally whether he was employed under a contract of employment and therefore unfairly dismissed when removed from the list. The ET found that Mr Singh had been directly discriminated against on racial grounds under s. 1 RRA (Case Para. 27.7; see Hartley, 2009 p. 127). They also found evidence of unfair dismissal by the FL (Case Para. 30.2).

Towards the end of the case it was reported that there appeared to be a denial by all the respondents that there was any problem of racial discrimination within football beyond the racist abuse from the terraces (Case Para. 23.5). The tribunal found it inconsistent that they claimed to be colour blind and unaware of any stereotypical judgements made in football, when the existence of "Kick it Out" campaign implemented by some of the respondents, suggested that there was an acute awareness of racial problems in the game. This led the tribunal to believe that

some of the respondents were in fact influenced by the stereotypical assumption that Mr Singh, being of Asian ethnic origin, could never be a top performing referee (Case Para. 23.5).

Interestingly, there are increasing numbers of Asians in the area of Blackburn who appear to be pursuing a route into officiating with a larger number now appearing on the National List (Asians in Football Forum (AFF), 2005 p. 17). This presence, it is hoped, will make Asian individuals in local level football, “feel more confident that their concerns about racism and abuse will be treated seriously” (AFF, 2005 p. 17).

These 3 cases further highlight the legal mechanisms in place to address racial abuse in sport. Whilst the courts successfully identified elements of behaviour that were racially motivated, it is concerning to consider that there may be closed door instances where this takes place without challenge. These cases reveal that despite the existence of legislation to eradicate racial abuse in society, overt expressions of racism in the form of gross racial abuses are evident in sport (Long, 2000 p. 123; Long, Carrington, Spracklen, 1997 p.250).

Sport Approach

It is noted that typically, law tends to be enforced to punish individual acts of racial discrimination whereas policies are focused upon teaching and learning about diversity and culture (Bell, 2008 p. 10). There does appear to be “small pockets of good practice” to identify amongst sports governing bodies and networks within sport (AFF, 2005 p. 6). The FRA Report (2010) highlighted the sport specific initiatives in place to eradicate racism and named UEFA as a model of good practice for combating racism through its partnerships with organisations such as the Football Against Racism in Europe (FARE) network and through its regulations (p. 26).

The “Let’s Kick Racism out of Football” campaign was created in 1994. It was initially sponsored by the Commission for Racial Equality (CRE) and the Professional Footballers Association (PFA), also with support from the Football Trust. As it gained strength, many of the football governing bodies supported the campaign. It attempted to encourage fans to counter racism in the stands and to attempt to challenge its normalisation in the sporting culture of football. The campaign stood as protection for spectators or participants in football from racial abuse or harassment (Carrington and McDonald *in* Houlihan, 2008 p. 237). This was considered a very serious campaign by actors within football at a time when racism was not being appropriately dealt with in Britain more generally (Holland, 1995).

The campaign expanded to cover racism in all areas of the sport and shifted a focus from ethnic minorities in sport, to the perpetrators of racism. In 1997 further developments led to introduction of a new organisation named “Kick it Out” which received financial support from the PFA, the FA, the FAPL, and the Football Trust. The campaign extends beyond football, and beyond professional clubs also (Kick it Out, 2000). In 2000 the Kick it Out campaign commissioned research into racism in grass roots football, exploring the nature and extent of racism at this level of the sport. The report found that little experiences of racism exist at this level, but concluded that it does occur. This seems like a confusing conclusion since in the conclusion of the report it is stated that “all of the African Caribbean and Asian players had experienced racism in physical and verbal forms as well as what they interpreted as institutional forms (Kick it Out, 2000 p. 62). The report switches between discussing black players and then addressing black and Asian players. It is further unclear what the reference to black players encompasses in this report. Many criticise the campaign as limited and coming too late (Holland, 1995 p. 568).

Following the emergence of a number of racist overt and covert incidents in football across Western Europe in 2004, the King Baudouin Foundation and Nike introduced the “Stand Up Speak Up” (SUSU) campaign in 2005. It was highlighted that racist incidents tend to surface and receive a lot of attention, but then disappear until another high profile issue arises. This makes it difficult to keep society aware of the problem of racism in sport (King Baudouin Foundation and Nike, 2009 p. 5). SUSU was therefore launched to empower football fans to voice opposition to racism in football on an international stage. It lasted 3 years and covered East and West Europe. A black and white interlocking wristband formed the symbol of the campaign and these were worn by fans and players across Europe (King Baudouin Foundation and Nike 2009).

In rugby league the Rugby Football League and the CRE launched the “Tackle It- Tackle Racism in Rugby League” campaign in 1996. This was a response to research suggesting that racism was a “small but significant” issue in the sport and included a 13 point action plan to combat racism. (Carrington and McDonald *in* Houlihan, 2008 p. 239).

Cricket has made significant progress in developing policies for the eradication of racism. The England and Wales Cricket Board (ECB) appointed the Racism Study Group in 1998 who

reported on the realities of racism in cricket. The quantitative data was useful and expressed the views of respondents on particular issues but it failed to address significant issues concerning the existence of racism in the sport. Few measures were implemented from the report and it has been disregarded as “an empty cynical document” (Marqusee, 2000). The “Hit Racism for Six” campaign in 1996 and the “Clean Bowl Racism” publication in 1999 appeared to do the same and whilst accepting that race was important, it did little to explicitly accept the presence of any racism in cricket.

Overall, the impact of these campaigns is questioned by many (Kick it Out, 2000). Whilst there seem to be an increase in the number of policies and initiatives in this area, it seems that “all the evidence confirms that change in behaviour at the highest levels of the game still lags lamentably behind any real change in attitude or in stated policy” (AFF, 2005 p. 6). The recent John Terry and Luis Suarez incidents clearly highlight this lack of connection between policy commitments and active shifts in the presence of racial abuse in sport.

The FRA Report (2010 p. 59) suggests that this is due to a general lack of awareness and deniability of these pertinent issues within sport (Long, 2000; Lusted, 2009). For instance, the presence and dominance of black athletes in sports such as basketball and American football leads to the idea that no racial tensions exist in these sports. In reality these demographics raise important issues concerning over representation in sport.

In addition, the very existence of “novel” high profile athletes from minority groups leads many sports to believe that no racism exists in their fields (Long, 2000 p. 124). For instance, rugby league is mostly played in the industrial areas of north England, and associated with working class areas (Long, Carrington and Spracklen, 1997 p. 251). There have been minority athletes from black and Asian origin who participate in the sport (such as Ellery Hanley, Martin Offiah and Ikram Butt) but generally speaking rugby suffers from disproportionate representation as well as overall low representation of Asian and black athletes (Long, Carrington and Spracklen, 1997 p. 252; Arnot, 2009).

The FRA Report (2010) concludes that exclusion on the basis of race in sport is attributed to;

- 1) A lack of awareness of racism in sport amongst some sports governing bodies. There is in fact a defensive rather than proactive attitude.
- 2) Racist incidents which are mostly in the form of racist abuse are a continuing problem as the cases demonstrate, but are being addressed through legislation and policy.
- 3) Under representation of minority athletes is evident, with a clear lack of research into the reasons behind this.

The findings agree that the law is dealing with racial abuse in sport through regulation at a regional and domestic level. However, the conclusions reveal that the balance between inclusion and exclusion is also affected by under representation which is less pronounced (FRA 2010 p. 45). This is a more covert issue surrounding race and sport that operates unconsciously through unwritten laws and specific institutional cultures (FRA 2010 p. 51).

Covert practices: over-represented or under-represented?

Representation in elite level sport is an area of inclusion and exclusion that is difficult to explain. Whilst research conducted on the statistics of sports participation and ethnic minority participation suggests that many groups are under represented (a cursory observation of sports competitions would also tell us this), possible explanations for this can only be speculative as race is an issue that sport tends not to deal with directly or openly. The historical background of sports such as cricket which was heavily influenced by the British Empire, offers some insight into certain practices today, but it is difficult to pinpoint the exact causes of over or under representation in certain sports.

One compelling argument is that minority groups receive disproportionate sporting opportunities which mean that there is a lack of representative role models to encourage youngsters to pursue certain sports (Long, Carrington and Spracklen, 1997 p. 255). Whilst these hold a lot of strength, the further question is why they receive fewer opportunities. In football for instance, few Asian footballers exist in the English Premier League, but there is certainly not a lack of passion for football amongst young British Asians, who can be regularly seen playing at a recreational level (Burdsey, 2007).

Another persuasive explanation is the impact of racial stereotypes in society that has filtered into sport and now become an indistinguishable element of sporting culture. Consistent with the previous chapters, these stereotypes have influenced the landscape of sports participation and affected the balance between inclusion and exclusion in sport on the basis of sex, gender, disability and race. Within modern sport, has evolved more covert behaviour or more contemporary expressions of exclusion. Such behaviour is reflective of the ways in which physical and non physical differences can be applied and often mis-interpreted in particular contexts to treat individuals differently. This is often referred to as racial stereotyping which involves the general judgement of a particular race or group that becomes a part of their identification and influences the way in which they are treated.

Since sport is built around human differences and human performance, stereotypes become an inevitable indicator of athletic performance and suitability to sport. For instance, “the West Indian fast bowler and the Asian batter...”(Long, 2000 p. 126). Hoberman (1997 p. 116) explores the range of stereotypes attached to athletes from the cool and calculating Scandinavian traits, to the German athlete as strong and efficient. These examples may appear harmless but begin to shift when they are used to select athletes for inclusion and/or justify exclusion.

For instance, in the 1990s, it was widely thought that “Afro-Caribbean’s are good sprinters; Asian girls are unable to adopt certain postures; Afro Caribbean’s are sinkers in water; Asian men have double jointed wrists enabling them to play stick sports” (Hoberman, 1997 p. 124). Spike Lee produced a film entitled “White Men Cant Jump” which is understood in a society in which the vast majority of NBA players are black men (Goldberg and Solomos, 2002 p. 261). The latter reveals that whilst it is fact that basketball is dominated by black athletes, it is misguided to assume that it is because non black athletes do not have the necessary skills.

The consequence of these racial stereotypes is the covert or unconscious disproportionate distribution of minority athletes in particular sports. Whereas black athletes have often been celebrated for their athletic abilities and have a prominence in many sports, South Asian individuals are not considered to be athletic and are less visible at an elite level. This is consistent with Alexander (*in* Back and Solomos, 2000 p. 220) who contends that African Caribbeans and Asians have been placed in opposition to each other as objects of “irreconcilable versions of cultural difference.” This means that on the one hand black individuals are moving towards

inclusion in some sports, where as Asians are excluded either voluntarily or involuntarily because of their perceived inward cultural nature.

Black Athletes and Racial Stacking

Following the success of black athletes in a number of sports, it has historically been suggested that they are far superior in certain athletic activities (Entine, 1999). This racial proposition originates from factual evidence contained in the record books- the 18 fastest marathon times in history belong to East Africans, Ethiopians or Kenyans, and the top 10 sprinters ever in the 100 metres are men of West African descent (Epstein, 2010). In 1992, an article was printed in *Runner's World* magazine which was entitled "White men cant run" and cited a number of studies which concluded that there are many physiological differences between racial groups that may explain why black athletes dominate both sprinting and long distance running (Price, 1997).

Prior to this, in the 1970s, American sports writer Martin Kane (1971) proposed that black athletes are inherently superior on three grounds. Firstly he formulates genetically premised arguments to suggest that physical differences in body proportions contribute to their suitability to sport, including lung functions (Kane, 1971; St Louis, 2004 p. 32).

The second argument relates to psychological differences between black and white athletes. Kane advocates that black athletes have a better ability to relax under pressure and "keep out tension" (Kane, 1971). He finds evidence to suggest that the ability to stay limber can be reflected in the way black people dance. Without any true explanation behind this theory, Kane proposes that these differences are linked to the fact that black individuals have lived suppressed lives and have had to express themselves in other ways.

Finally, he posits that "of all the physical and psychological theories about the American black's excellence in sport, none have proved more controversial than one of the least discussed: that slavery weeded out the weak" (Kane, 1971). In other words he contends that black athletes are more suitable to sport physically and psychologically because they had to endure hardship during slavery.

These arguments have to be set within the previous discussion human evolution and adaptation to suit their surroundings and environment. Environmental factors such as behavioural differences

play an important role in the development of one's physical and social identity (Doig *et al*, 1997 p.6; Ritchie, Reynard and Lewis, 2008 p. 398). As a result of these adaptations, groups have produced particular traits and that make them suitable to certain sporting activities. For instance, a study by Pitsiladis, of the demographics of elite East African distance runners, shows that three quarters of all elite international competitors were from a single Kenyan tribe, the Kalenjin, who make up 10% of the Kenyan population. Rather than a genetic explanation for this, it was found that these individuals live and train at altitude in the Rift Valley. They live several miles from their school and travel by foot. Similar results were found in Ethiopia also. Kenyan and Ethiopian tribes are therefore distinct because of their geographical environment.

However, Kane's specific arguments have been the subject of considerable criticism (Cashmore 1982; Price 1997; Epstein 2010). Cashmore's view (1982) that they "suffer from implausible assumptions which belong in the realms of racist folklore rather than scientific inquiry" (p. 55) is borne out by a closer analysis of the facts. There is not one single trait that is present in all black athletes that is responsible for performance. More generally, which genes contribute to athletic success remains unknown despite many scientists attempting to find patterns in elite athletes performances (Epstein, 2010). Furthermore, whilst it is true that most black Americans have descended from slaves taken from Western Africa, 90% have some white ancestry (Price, 1997). And, finally it can be pointed out that there is more genetic variability amongst Africans within a single population than among people from outside Africa.

Kane's arguments are very powerful because they are embedded in conventional wisdom. Common sense has the dangerous power of interconnecting "fact, opinion, belief, myth, impression, analysis and intuition together" in this context, "in a compelling description and explanation of racial formation that appeals to intuitive sentiment" (St. Louis, 2004 p. 43). Whilst black athletes have not been excluded for their alleged black superiority over non black competitors, the distortion of the truth about physical and non physical differences may have led to disproportionate representations in sport. Scientific notions concerning adaptation and evolution is generalised to apply to an entire population in sport which in turn affects perceptions about that groups suitability to sport. This is part of a wider scientific debate surrounding the appropriateness of the concept of race. The focus on biology reinforces a culture that constructs the black male athlete as a distinct racial category (King, 2004 p. 19).

Some refer to the use of science in this way as “scientific racism” which describes the tension between “evidence based knowledge and the desire to explain, predict and improve performance that allow the race controversy to continue” in sport science (Spracklen, 2008). St Louis (2004 p. 35) reveals that the scientific basis for the race argument represents a “naïve understanding of scientific procedure; and secondly, a reformulated common sense that integrate biological and cultural forms of racial description.” The practice of identifying differences in physical ability between humans has also been termed a “corruption of science” (Marks, 2003 p. 93) because these differences cannot be truly known and to make sweeping assertions about relatively insignificant genetic differences is a corruption. Upon this, the ICERD affirms that “any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere.” This is supported by the European Race Directive (2000/43) which declares in its preamble;

“The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term ‘racial origin’ in this Directive does not imply an acceptance of such theories.”

The idea that black athletes possess inherent superiority has been engrained into our understanding of sport and athletic ability. In truth, the evolutionary adaptive process has created obvious differences between us that provide certain populations with attributes and traits suited to sport. However, this is based upon and determined by a range of environmental factors which cannot easily be applied generally to an entire colour group such as black or white. The consequences of this type of stereotyping is the deliberate placement of athletes in positions in sports on the basis of “parroted conventional wisdom such as the belief that black footballers were no good in defence because they lacked any ‘bottle’” (Long, 2000 p. 125; Long and Hylton, 2002 p. 93). This has been referred to as racial stacking (Long, Carrington and Spracklen, 1997 p. 253).

In North American sport, racial stereotyping and “stacking” has resulted in the traditional placement of black (African American) players in non central positions of sport, leaving white athletes in more central positions (Chappell *in* Laker, 2002 p. 96). Research conducted by Maguire (*in* Jarvie, 1991) on the racial composition of all players in the Football League in

1985/6 and 1989/90 seasons, he found that stacking is also present in Britain (Maguire *in* Jarvie, 1991). The disproportionate positioning of black players in certain positions in soccer was due to the perception of managers and coaches that black players possessed certain attributes such as speed that were more conducive to wider positions (Chappell *in* Laker, 2002 p. 101). In comparison, white players have more cognitive attributes such as decision making that made them more suited to central positions. Stacking was also found to be present in rugby union (Chappell *in* Laker, 2002), rugby league (Long and Spracken, 1996) and basketball (Chappell *in* Laker, 2002 p. 102).

It must be noted that there may be many other reasons for the disparate representation of black athletes in particular sport. For instance, representation in sport is attributed to socio-economic factors and social identity (Cashmore, 1982). Consequently, stacking should only be used as a “preliminary tool” to identify the covert social processes at work (Maguire *in* Jarvie, 1991 p. 120). More research is required into this field of inquiry.

South Asian Athletes

At the other end of the spectrum of racial stereotypes in sport are South Asian athletes who are underrepresented in some popular sports because they are considered to be unsuited to sport. Historically they have been labelled as weak and fragile (Patel, 2010a; 2010b). These physical assumptions can be traced back to the British Empire in nineteenth century Europe. Another stereotype of “academic but not sporting” is usually attached to South Asian men and women. It has been documented that coaches perceive Asian parents to be less supportive of their children in sports and more focused on education. Religious practices and beliefs are also said to play a part in under representation. It is further assumed that South Asians prefer to, and have a natural passion for cricket.

South Asian women in sport have typically been regarded as “traditional” and “passive,” (Puwar and Raghuram, 2003 p. 69) experiencing difficulties in physical education because they are “usually small and quite frail” (Lewis, 1979 p. 132). These attitudes, coupled with “the more overt racism that these groups encounter in a sporting setting and wider social life, have combined to limit their potential sporting aspirations” (Ismond, 2003 p. 54). The following quote summarises the stereotype;

“Have you ever seen an Asian woman running to catch a departing bus? Have you ever seen an Asian woman kicking a football, going for a job, riding a bike or taking a swim in the local baths?...One of the rarest sights that is scarcely beheld in this country is that of an Asian female in the throes of physical or sporting activity” (Bains and Joham, 1998 p. 194).

The participation of British Asians in football provides an interesting case study to illustrate the imbalances between inclusion and exclusion in sport on the basis of race (Burdsey, 2006). In contrast to individuals of Afro-Caribbean origin, British Asians are less represented in elite football, with only a handful of players recorded (Cadden, 2010; Rashid, 2009). This appears in contrast to the population of British Asians in the UK today. In the 2001 Census, of the total population in the UK, 92.1% were white. All Asian or British Asians count for 4% (2.3 million) of the total population, with all black or black British 2%. In 2005-06, there were only 5 British Asian players in the English leagues. This is also in contrast to the successes and the popularity of football at an amateur level.

The reasons for this disparity may be attributed to the factors considered above- physicality, culture and religion. These stereotypes may influence the perceptions of key decision makers in the sport as well as the general culture of football. Whilst there is little truth in the perception of Asian groups as weak or physically unsuited to sport, there are certainly cultural differences amongst the Asian communities that may have historically influenced representation in sport.

However, new generations of British Asian individuals have begun to change this trend significantly (Patel, 2010a; 2010b). British Asian individuals are considered to be in conflict with their parent’s ideals and their own religious practices and beliefs which are said to impact upon their inclusion in sport (Valiotis, 2009 p. 1792). This was highlighted in Part One, with British Asians having to manage their parental cultures and their western influenced identity.

At the amateur level Asian football is very successful despite the existence of racism (Burdsey, 2006 p. 487). All Asian local level break away leagues have formed and this model is evident amongst black populations also. This break away is seen as turning “inwards” (Coakley and Pike, 2009 p. 331). An example of a break away league is the Quaid-e-Azam League which began in 1980 in West Yorkshire. The name of the league has political historical connotations. It forms an alternative to official club games and has developed to include teams from Manchester, Sheffield

and Nottingham. It was originally introduced for British Pakistanis on a social informal level but now hosts 30 teams that play over 3 divisions. It is an amateur competition played on Sundays and does not limit itself to British Pakistani players. Some players have broken through into official clubs.

There are positive and negative consequences of this movement away from “mainstream” channels of football. Such leagues offer British Asians a chance to compete in the sport whilst there are no alternative routes elsewhere. They also contribute to a sense of belonging and inclusion on a recreational level. However, since Asian footballers tend to pursue five a side rather than eleven a side, there is an obvious lack of professional representation and role models for younger athletes (Fleming *in* Jarvie, 1991). Few role models exist for British Asian athletes, one being Amir Khan who is a second generation British Pakistani Muslim. He won the lightweight boxing silver medal at the 2004 Olympics and presents a challenge to the notion that Asians are not as strong as White or Black athletes and the idea that they are unsuitable to contact sports (Burdsey, 2007 p. 617).

Another less high profile role model is Ambreen Sadiq, a 15 year old female British Muslim boxer. Ambreen is Britain’s first Muslim female boxer, holding the title of the ABA Female National Champion (Ambreen: the girl boxer, 2009). In a Channel 4 documentary, Ambreen, Bradford, demonstrates how she has had to defy her community to pursue her dream of competing. She has had to contend with criticism of showing her skin, and bringing shame to her culture. The boxer aims to compete at the 2016 Olympics and prove her community wrong. In this interesting mix of sport, religion and culture, Ambreen comments on how she does not want to be the only Muslim girl and would wish more girls generally to compete in boxing. She is referred to as a role model by her Muslim friends and a pioneer by the Amateur Boxing Association (ABA) (Gledhill, 2010). The documentary concludes with her winning a boxing match, observed by many supporters from her community.

The possible reasoning behind the creation of leagues by particular racial groups could be because of a lack of confidence in local FA decision makers to implement effective measures to eliminate racial abuse that is evident in the sport (AFF, 2005 p. 6). In addition, it is suggested that such leagues “remains a way in which the community seeks to fill the gap” (AFF, 2005 p. 6). These initiatives reflect the passion for football amongst British Asians, and serve to break down

stereotypes. However, the existence of separate leagues for separate racial categories is certainly not the solution to under representation (AFF, 2005 p. 7).

In 1996 a study named “Asians Can’t Play Football” was published, exploring the “frustrations and the aspirations of a section of the British community that seemed to be largely alienated by a sport that means so much to them” (AFF, 2005 p. 5). The report set out a number of recommendations to change the structures of football and accelerate opportunities for Asians in all areas of the game. Since 1996, the status of inclusion in football has positively changed. However it could be argued that the issues of under representation remain prominent. Whilst in 1996 the Commission for Racial Equality (CRE) noted that the presence of young Asian players connected to English professional clubs was 0.2%, this rose only to 0.8% in 2004.

In 2005 an inspirational report named “Asians Can Play Football” was published by the Asians in Football Foundation (AFF). This report highlighted that despite development in football, there remains to be the lack of Asian fan base in England; the “closed shop” approach to the appointment of senior positions in the management areas of football; and finally, the under representation of Asian professional footballers at English clubs. The report celebrates the progress that has been made in particular pocket communities in the UK (Albion Sports Juniors in Bradford, Luton United) and whilst a “real Asian revolution in the British game” is called for, there remains to be a considerable lack of connection between enjoying football and pursuing a career in it.

Some argue that with low representation at top level, the game will suffer at an inclusion and business level (AFF, 2005 p. 7). At an international level it is interesting to see that many players represent Pakistan or India instead of England, possibly because that may be the only way they will have the opportunity to compete at an international level. It is predicted that it will take up to 30 years before we see an Asian heritage youngster player represent England at football (McGuire and Collins, 1998 p.76).

Just as is the case with black athletes, South Asian athletes have not been overtly excluded from sport on the basis of their race. However, the lack of representation of this population in sports such as football suggests that the balance between inclusion and exclusion in sport is managed by cultural forces that are influenced by general stereotypes about racial groups.

Clashes between Sport and Religion

The concept of race encompasses non physical differences between us such as cultural and religious beliefs and values which can present challenges to traditional sporting cultures and therefore impact upon participation in sport. For some Asian communities religion is considered to be “the cornerstone of the social and cultural” aspects of their lives (AFF, 2005 p.22). For example, the consumption of alcohol impacts upon sports participation. In cricket, the drinking culture after a game is considered “daunting and unnecessary” for some groups (Valiotis, 2009 p. 1802). For some British Muslims, their devotion to the Quran prohibits the consumption of alcohol and as a result, their exclusion from the drinking culture may marginalise them from social team activities. In rugby Ikram Butt asserts that the heavy drinking culture associated with rugby at an elite level is on the decline (Arnot, 2009) despite other research suggesting otherwise (Long, 2000 p. 125).

Religious beliefs and values are protected under human rights legislation. Article 18 UDHR reads;

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

These manifestations can include wearing religious dress or accessories, particular dietary requirements or restrictions and rituals or customs. Whether these are recommendations or obligations under the faiths are subject to interpretation. At times these manifestations have come into conflict with aspects of the dominant culture and the rules of sport. Article 18 (3) ICCPR and Article 9 (2) ECHR highlights that a human’s right to manifest his religion or belief is not absolute. The ECHR reads;

“Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

A slightly varied approach is taken in the ICCPR;

“Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

In other words, there may be justifiable restrictions under these necessity provisions to limit the right to the manifestation of one’s religious beliefs or values. These limits are not listed and must be prescribed by law, pursue legitimate aims and be necessary in a democratic society.

One recent sport case exploring this has concerned a conflict between the rules of boxing and the participation of a Muslim male with a full beard. The visual marker of a full beard has fuelled incidences of prejudice or discrimination (Burdsey, 2010 p. 326). Beards hold symbolic significance in many religions including Hinduism, Sikhism, Islam and Judaism, as a means of connecting to their god. It is considered by some a mandatory requirement to fulfil their obligations of their faith (Cottrell, 2010). However it arguably contravenes the rules of boxing. The International Boxing Association (IBA) stipulate in their medical handbook that;

“Beards are a potential danger and are therefore prohibited. During clinches the beard can get into the opponent’s eye and can cause corneal abrasions. Facial stubble is likewise dangerous and boxers must be clean shaven with no moustaches” (AIBA, 2009).

Upon this safety concern, all boxers must be clean shaven. However, Sikh individuals have been exempt from this rule when competing in England due to an amendment enforced by the Amateur Boxing Association of England (ABAE);

“Boxers should be clean-shaven with moustaches permissible not extending beyond the upper lip. Long hair is not permissible unless completely covered by the head guard. A fringe in front must not extend below the level of the eyebrows. A boxer practising the Sikh religion will be allowed to compete provided that his facial hair is contained within a thin black net. This must not interfere with the correct fitting of the boxers head guard. Note: - AIBA Rules stipulate that all boxers must be clean shaven” (ABAE, 2009 Section 6 Control of Bout p. 54).

In January 2009, 25 year old Muslim boxer Mohammed Patel, who had a beard, was prevented from competing by the ABAE. This was challenged on the ground that the Sikh exemption within the rules was excluding other faiths. However, at the same time, the ABAE ruled that this exemption is no longer applicable and the rules were now in line with the AIBA rule (AIBA, 2009). The ABAE national child protection and equity manager, Barry Jones, contends that “it has nothing to do with race, only health and safety” (Nye, 2010). In addition to this it is stated that referees need to see the face for cuts during the fight. Little commentary exists on this case.

This row is not new and has appeared in professional boxing when British Danny Williams fought Vitali Klitschko for the World Boxing Council Championship. He refused to trim his beard and was not willing to compromise his religious beliefs (Lawton, 2004). Joe Frazier was ordered to trim his beard before his fight with Joe Bugner, but his refusal was on vanity grounds rather than religious (Lawton, 2004).

In professional boxing specific rules relating to facial hair are negotiated in the contracts for the fights between the parties (Cottrell, 2010). In fact they have been allowed to compete with facial hair for over 20 years (Nye, 2010). Cottrell (2010) highlights the inconsistencies of the amateur rules with the professional rules. In professional boxing it seems an accepted part of the culture that boxers will intend to inflict abrasions on their opponents as an underhand technique, similar to diving in football. It would seem that they are then at greater risk from harm than amateur boxers. To support this is the fact that amateur boxers have to wear head guards.

Cottrell (2010) argues that the essence of boxing is to land a punch in the permitted target areas. The risk of corneal abrasions is an intrinsic risk of the sport, not a risk brought about from a beard. This does not seem to be an isolated event and in 1998 the AIBA refused entry of three Afghan boxers into the world championships because they refused to shave their beards.

There may be potential infringement of Article 18 ICCPR and Article 9. It would firstly need to be established whether the beard is actually a manifestation of a belief and whether that right has been interfered with through a restriction. This restriction may be justified if it can be proved that it is necessary to protect health and safety of competitors. For instance, there have been a number of UK employment cases forbidding beards in factories producing food on the grounds of health and safety and hygiene (*Singh v Rowntree MacKintosh Ltd* [1979] ICR 554; *Panesar v Nestle Co*

Ltd [1980] ICR 144n; Hill, 2005). The balance between inclusion and exclusion here will depend upon the necessity of the rules restricting the use of beards in boxing.

Another manifestation which has conflicted with sports rules is religious clothing and accessories. Religious attire forms the basis of increasing research surrounding identity and stereotyping. The Sikh faith requires wearing a turban. Sikhs enjoy many exemptions from particular rules to accommodate for this manifestation. For instance, they have been exempt from having to wear safety helmets on construction sites. Conversely, in *Singh v British Rail Engineering Ltd* [1986] ICR 22, EAT it was held that the wearing of protective head gear in the place of a turban, was necessary under health and safety laws. Sikhs have not been exempt from wearing steel bangles when operating machinery which may cause accidents. They are required to wear a thin bangle rather than one with a sharp edge.

Long, Carrington and Spracklen (1997 p. 255) entitled their article after a quote recorded in their research which offered a possible reason why Asian athletes are not represented in Rugby League; “Asians cannot wear turbans in the scrum”. Any restrictions on Sikhs wearing turbans in rugby or any other sport would need to be justified with legitimate aims. If there are safety concerns associated with this particular example then a compromise could be made since protective head gear is permitted in the sport so an alternative may be offered.

The protection of the right to wear the religious hijab under Article 9 and Article 18 has produced litigation in many areas including employment and education. The headscarf is worn as an expression of one’s Muslim identity although its obligation under the faith is subject to interpretation. In a sporting context the hijab has created conflict with sporting rules regarding equipment and clothing. In 2007 in Canada, 11 year old Asmahan Mansour refused to remove her hijab during a football tournament. She was requested to do so by the referee who had acted in response to the Quebec Soccer Association ruling which prohibits the wearing of a veil or other religious items. This is in accordance with FIFA Law 4 (the player’s equipments) which stipulates that “a player must not use equipment or wear anything that is dangerous to himself or another player (including any kind of jewellery)”. It was reported that the decision was made on the grounds of the safety of athletes including the possibility of strangulation by wearing the hijab. Mansour left the tournament in protest of this restriction.

FIFA's rule marking strand, The International Football Association Board (IFAB) decided not to take any action on the rule prohibiting veils in competition and favoured the interpretation of Law 4 even though it does not explicitly refer to religious dress. The rules are globally applicable across the world. One FIFA official was reported saying that "there is nothing prohibiting hijabs in the laws of the game....head gear is permitted as long as it is not considered dangerous by the referee" (Ravensberg, Cobb and Corbett, 2007). The coverage of this story is limited to Canadian sources. FIFA Law 4 may fall short of constituting a legitimate aim since no commentary is provided on the claims of safety issues. As a result, FIFA have been accused of being islamophobic and discriminatory.

The issue was raised again in April 2010 when FIFA refused the Iran Women's National Football Team, entry into the 2010 August Youth Olympic Games in Singapore because they wore headscarves (Anon 2010d). The decision was made by the IFAB and based upon FIFA Law 4. The rule states that only protective equipment such as headgear, facemasks, knee and arm protectors are not considered dangerous and therefore permitted.

This appeared to be inconsistent with other athletes such as Ruqaya Al Ghasara of Bahrain who in 2008 wore a "hijood" for track events, a breathable form fitting hood designed for athletes. Following pressure on FIFA from members of the Iran Football Federation, in May 2010 the decision was overruled. In a compromise, the girls wear a cap that covers their heads to the hair line but does not extend below the ears to cover the neck (Fatteh, 2010). However, problems continued in 2011 when the team were banned from playing in their second qualify round of the London Olympics 2012 against Jordan in Amman, by the FIFA official on the grounds that the headgear was inappropriate.

In December 2011 FIFAs ruling Executive Committee agreed to put forward a proposal to lift the ban on the hijab, to the IFAB. One of the FIFA vice presidents, Prince Ali bin Al Hussein has been campaigning for the sanction of a safe, Velcro-opening instead of pin secured headscarf for players and officials. He argued that there had been no cases of injuries incurred by the use of a headscarf, and drew parallels with accepted practices of long hair and Chelsea FC goalkeeper Petr Cech who adorns a protective cap due to a head injury (Warshaw, 2012). Although this proposal received criticism from several French groups, in March 2012 IFAB unanimously

agreed to overturn the ban on the headscarf and were persuaded by Prince Ali's alternative pin-less design.

At the regional level the ECtHR addressed a related issue in the French case of *Dogru v France* [2008] ECHR 1579. A secondary school student in France refused to remove her headscarf during sport classes. The school decided to expel her for failing to actively participate in physical education and sport classes. The school internal rules stipulated that pupils must wear clothing that complies with health and safety rules and they must attend sport classes in the appropriate clothes. The parents of the student failed in their claims against the school in the French courts and appealed the decision to the ECtHR (Steiner, Alston and Goodman, 2007 p. 616).

The government argued that its interference with the manifestation of the religious belief pursue a legitimate aim of protecting the rights and freedoms of others and protecting public order. This was upheld by the EctHR and there was no violation of Article 9 ECHR. The Court highlighted that "the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety" (Case p. 17). They supported this with the example of a Sikh motorcyclist who was refused by the highway authorities the right to wear his turban instead of a helmet to protect health and safety.

Upon this discussion, there may be instances when religious freedoms may be restricted by existing rules in sport. However, in order to avoid contravening equality legislation, it is necessary to ensure that these rules are necessary and pursue a legitimate aim. Outside of the sporting context, the image of a hijab or a Muslim man with a full beard is proving to be controversial amidst the current extremist terrorist activity in the world. The debates surrounding immigration and policies on asylum seekers and the slow rise of political parties such as the British National Party and the English Defence League clearly demonstrate the existence of covert racist undertones (and overtones to some extent) and attitudes that continue to influence people. Extremist terrorist activities such as 9/11 in New York, 7/7 in London and bombings in Madrid and Bali have served to perpetuate dangerous stereotypes of individuals of Muslim faith particularly. Race talk becomes coded and couched in other topics and terms, leaving the distinction between immigration and racism blurred (Bell, 2008 p. 10). These attitudes transcend society and enter the sporting arena.

In research conducted on the experiences of British Muslims in top level cricket, Burdsey (2010) finds that British Muslim cricketers seek to challenge the stereotypical images of British Muslim males as terrorists or extremists and instead provide a more truthful image of what they represent. Islam plays an important part in their lives but does not influence their cricket career (p. 323). He highlights how inclusive sport can be for minority groups such as British Muslims in cricket. Against this backdrop, sports bodies must ensure that their rules exist to protect the essence of sport and are not in place to perpetuate stereotypes about religious faiths or ideals.

English Only Speaking Rules in Sport

Another expression of our non physical differences is language and communication. It is often suggested that sport is the most “universal aspect of popular culture” which “crosses languages and countries...”(Miller *et al*, 2001 p. 1). In recent years women’s professional golf has seen an increase in the number of international players competing in the sport, particularly originating from South Korea. In the 2008 LPGA Tour, 45 players represented South Korea. Si Ri Pak became the first Korean player to join the LPGA and win a major championship. The possible explanations why this increase may have occurred are considered elsewhere (Shin and Nam, 2004). The increase of international players presented new challenges to the traditional LPGA Tour.

In August 2008, the LPGA proposed a new rule that required all players on the tour to speak English when they are speaking publicly with the media and interacting with playing partners during pro-am events. International players would be tested and if they failed to pass an oral English test then they would face indefinite suspension (Claussen, 2010 p. 136). It is suggested that the rule was targeted at Far East Asian players since it was announced at a mandatory meeting of the Korean players.

The rule was never intended to be public but instead was leaked by Golfweek magazine. The LPGA then felt that they needed to respond to the criticism they faced. Their intentions were to require players with at least two years experience on the tour to have sufficient skills in English to manage media interviews, to deliver victory speeches and speak with amateur partners in pro-am competitions (Lloyd, 2009 p. 183). The reasoning behind this rule was reportedly to satisfy

corporate sponsors, to further increase the marketability of the tour itself and to help international players succeed financially.

The LPGA were met with hostility following the foreseeable discriminatory effects of the rule (Claussen, 2010). Since the LPGA are based in the USA, under US law an English- only rule may be justified if it is needed as part of a “business necessity” (Lloyd, 2009). However, the courts have allowed the rule in the work place in only limited instances thus reflecting the narrow scope of this defence. The LPGA rule does not appear to meet this standard in any case. The rule reflects a type of employee control that was “stifling” and “limiting” (Lloyd, 2009 p. 189). When determining business necessity the courts tend to look at the central aspect of the employee’s job. In relation to golf, it seems that the central part of the job is to play the sport, and test athletic ability, rather than speak English.

The sports community described the rule as an unnecessary restriction and over bearing. The LPGA may argue that the rule is necessary given the perceived negative impact that international players have had on the tour. For instance, in 2003, LPGA player Jan Stephenson stated in an interview with Golf Magazine, that “Asian’s are killing our tour” as a result of their “lack of emotion, their refusal to speak English when they can speak English...” (Blauvelt, 2003). These opinions are stereotypical, based upon the assumption that Far East Asian players are unmarketable, dull to watch and fail to provide excitement in the game of golf (Shin and Nam, 2004 p. 224). These assertions are misguided and clearly dangerous. The LPGA departed from these proposals following criticism but a version of the rule remains an option (Associated Press, 2008).

In comparison to other sports, the rule seems even more discriminatory. For instance, in the NBA the influx of players from Eastern European countries and China, has simply led to the introduction of interpreters in the sport. In the National Hockey League in the States, many teams offer international players tutors to assist them with English if they wish. In Major League Baseball many measures are in place to ensure that international players feel comfortable and included into the sport, ensuring that Hispanic players have the necessary support that they may need to communicate with others (Lloyd, 2009 p. 215).

This language rule presents itself as an overt and covert form of unreasonable exclusion. Whilst on the outside the LPGA were concerned about marketability, there is evidence to show that in reality it is based upon the reluctance of women's golf to embrace the globalisation of the sport. It is difficult to see how speaking English is a necessary requirement of a professional sport. The rule has the potential to contravene Article 2 UDHR which protects the rights and freedoms of every individual without distinction of language.

Summary

Table IV: Summary of Race Cases.			
Case/Example	Sport Type	Issue	Court/SGB Decision
John Terry	Football	Suspected Overt Racial abuse	TBC
Luis Suarez	Football	Suspected Overt Racial abuse	SGB Fine and Ban
Tom Gosling	Football	Overt Racial abuse	Inclusion
Sterling v Leeds Rugby League	Rugby	Overt Racial discrimination	Inclusion
Hussaney v Chester City FC	Football	Overt Racial discrimination	Inclusion
Singh v The FL, The FA	Football	Covert Race discrimination	Inclusion
Iran Womens Football Team	Football	Unreasonable Exclusion	Inclusion
Minority Black Athletes	Sport	Covert Inclusion/Exclusion	Include/Exclude
Minority South Asian Athletes	Sport	Covert Exclusion	Exclude
Mohammed Patel	Boxing	Unreasonable Exclusion	Exclude
Asmahan Mansour	Football	Unreasonable Exclusion	Exclude
Dogru v France	School PE	Reasonable Exclusion	Exclude
LPGA Rule	Golf	Overt/Covert Discrimination	Exclude

This chapter has explored instances when human differences based upon evolutionary adaptation and culture can present challenges to the traditional sporting culture and at times the rules of sport. Where an individual is overtly or covertly excluded from sport as a result of these differences, international, regional and domestic equality legislation plays an important role in protecting human rights from discriminatory treatment. A wide variety of examples have been touched upon in this chapter, as reflected in Table IV.

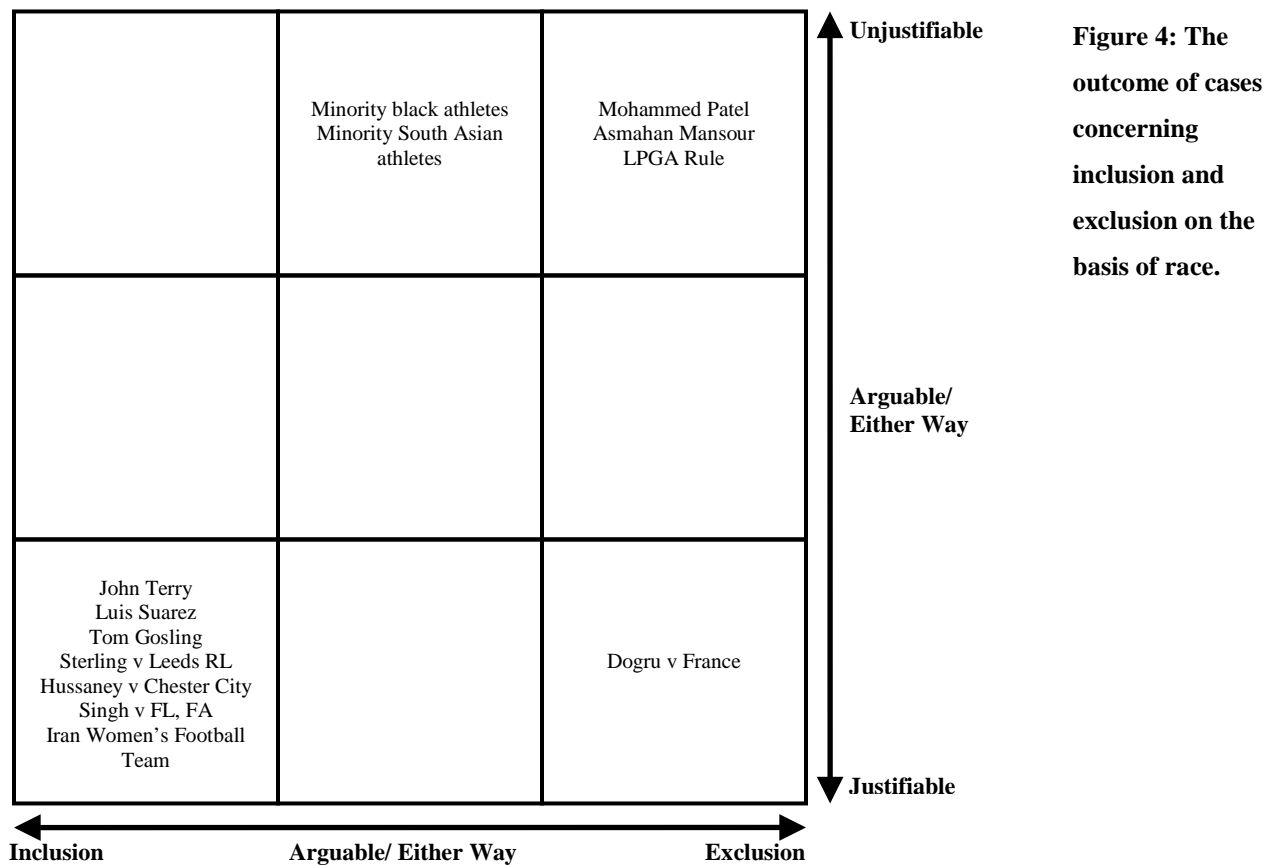


Figure 4 reveals that there are few legitimate reasons to exclude an individual from participating in sport on the basis of their race. The cases of *John Terry*, *Luis Suarez*, *Tom Gosling*, *Sterling*, *Hussaney* and *Singh* demonstrate the justifiable inclusionary agenda that the courts are promoting in situations which involve overt racial abuse. These cases illustrate that overt racial abuse continues to exist in sport. These forms of exclusion are regarded as “structural discrimination” (FRA, 2010 p. 12) which suggests that they are strongly rooted within the foundations of a society. This is contributing to an exclusive sporting culture which impacts upon participation in sport. As the FRA report (2010) highlighted, sports governing bodies and figures within sport appear to be denying the existence of racism in sport making it a difficult issue to confront. This denial “is itself a product of the normalisation of racist attitudes, the inevitable outcome is its continued reproduction” (Long, Carrington and Spracklen, 1997 p. 257). The current sport treatment of the John Terry and Luis Suarez incidents demonstrates a commitment to address racism and accept that sport is not exempt from legal sanctions.

If the LPGA rule were to be implemented, it is likely from the commentary that law makers would have challenged this directly since it would contravene equality legislation. As it stands it is an example of unjustifiable exclusion on the basis of race. Figure 4 also demonstrates that the

non legal cases concerning the exclusion of *Mohammed Patel* and *Asmahan Mansour* are currently unjustifiable and potentially contrary to human rights which protect one's right to manifest their religious beliefs. However, the ECtHR decision in *Dogru v France* implies that exclusion may be reasonable on the grounds of safety. Whilst the safety of athletes is a legitimate objective to pursue, the AIBA, ABAE and FIFA rules lack clarity on the type of safety threats that are presented by religious beards and hijabs. The recent IFAB decision to include *Iran Women's football team* is a positive move forward.

The disproportionate representation of minority black athletes and south Asian athletes reflects a general lack of awareness of the under representation of minority athletes in sports (FRA, 2010 p. 28). This is because it is a topic that is very difficult to provide a true explanation. This chapter has offered some insight into this and revealed that the scientific understanding of our physical differences have often been stretched or mis-used to create perceptions about a populations suitability to sporting activity. This may have resulted in the over or under representation and of minority athletes. In order to counter act the effects of this unconscious practice, eligibility and selection rules in sport need to be transparent and based upon ability alone. The role of the law in regulating the unconscious and covert practices within the sporting culture is difficult since it may be limited in changing attitudes and traditional perceptions. However, as illustrated by the racial abuse cases, the law can create conditions in society with favour the growth of tolerance and education (Howard, 2010 p. 69).

Part II Overview

Part Two has conducted a detailed evaluation of a selection of the legal and non legal cases concerning sport specific inclusion and exclusion in the areas of sex, gender, disability and race. The current sport and regulatory approaches have demonstrated instances of best practice and deficiencies.

Chapter 6 illustrated that the balance between inclusion and exclusion on the basis of sex has been determined by whether the sport is single sex or mixed, contact or non contact, and whether the athlete is above or below the age of 13-14. The sporting approach has been to segregate men and women in sport on the basis of inherent differences between the sexes in order to ensure safety and protect competitive balance. Where this has conflicted with equality legislation that protects the human rights of men and women from discrimination on the basis of sex, the courts approach has generally been to interpret legislation to favour children wishing to participate in mixed sex contact or non contact competitions, and to favour sports bodies when an adult female wishes to compete in mixed contact or non contact sports. A mixed approach has been taken when a female seeks to compete in particular female only sports.

The principles behind sex segregation in sport were further examined and challenged in Chapter 7 through an exploration of intersex and male to female transgender individuals who do not sit neatly into those categories and who do not conform to the gender attributes associated with man and woman. The historical sporting approach to these athletes has been to impose sex tests and exclude them because of perceived unfair advantages that they may possess. Current IAAF policies appear to accept that intersex conditions are a natural part of sex and gender variation. The legal protection of intersex individuals under human rights discrimination is a little vague since most provisions do not explicitly refer to them. For transgender individuals their position is unclear and the IAAF policies adopt a case by case approach since advantage cannot be proved outright. This is consistent with the current legal approach to transgender sports participation.

Chapter 8 explored the key issues that challenged the division between disabled and non disabled sport competitions. This division is in place to protect safety and competitive advantage. Covertly there is also a desire to protect the standards of normality in sport. The sporting approach to a disabled athlete using an assisted device who wishes to participate in non disabled sport, has been

to exclude them on the basis of safety and advantage. However, this approach is inconsistent with the general use of assisted devices and technology in sport. Athletes with intellectual disabilities conflict with age categories in sport. The legal position has been to prove whether an advantage exists or to identify whether the inclusion would constitute a fundamental alteration to the sport. Whilst these models are highly subjective, they appear to produce the right kind of discussions for the participation of disabled athletes in non disabled sports since they encourage scientific evidence to be shown.

Finally, the balance between inclusion and exclusion is also influenced by the sporting culture which was demonstrated in Chapter 9. The ability of the law to regulate unconscious and covert practices within the sporting culture is more of a challenge in race than in previous chapters. Physical and non physical differences between populations have been used or mis used to overtly or covertly exclude individuals from sport. Whilst international, regional and domestic equality legislation seeks to protect human beings from discriminatory treatment on the basis of race or religious beliefs, overt and covert practices continues to exist in sport. This has the effect of creating an exclusionary sporting culture that results in disproportionate representation. The sporting approach has generally been to deny the existence of these issues and lack awareness that they occur, although recent actions illustrate a more inclusive approach.

Part Three will use these cases to broadly focus on the future of the balance between inclusion and exclusion in competitive sport. Chapter 10 will engage in a detailed comparative analysis of all of the cases to identify the key sport, legal and socio-cultural themes that have emerged throughout Part Two. The primary regulatory factors that influence the balance between inclusion and exclusion for minority individuals will be identified. The benefit of a cross analysis is a more universal approach to striking the balance between inclusion and exclusion for athletes in sport.

The final chapters seek to fill a gap in the literature by formulating regulatory recommendations for striking the balance between inclusion and exclusion in sport.

PART III: STRIKING THE BALANCE

Chapter 10: Exploring Key Themes

The aim of this chapter is to conduct a detailed cross analysis of the legal and non legal cases explored throughout Part Two. Key findings will be displayed in a range of tables and figures to extract patterns and trends that have emerged from the regulatory approaches to inclusion and exclusion across the areas of sex, gender, disability and race. Table V synthesises the cases gathered in Part Two, summarising the sport approach, the regulatory approach and the broader socio-cultural trends that have surfaced.

From this, Table IV presents the key sports rules and criteria that have had a restrictive effect upon minority athletes and that conflict with their inclusion in sport. Figure 5 combines Figures 1-4 to graphically illustrate the overall outcome of all of the cases. Table VII supports this with basic statistical analysis. Using these tools, impressionistic conclusions can be drawn about the consistency between the regulatory approaches across the four areas.

The thematic evaluation of the cases will enable us to identify deficiencies and good practice in the approaches to inclusion and exclusion and to establish the factors that tend to impact upon the balance. It is important to note that this thesis has presented only a selection of cases concerning inclusion and exclusion in the areas of sex, gender, disability and race. Any inferences that are drawn from this analysis are limited to the sample of cases studied.

Table V: Summary of all cases explored in Part Two.

Non Legal Cases	Sports Rules/Practices	Outcome	Socio-Cultural Trend
Minnie Crutwell	FA Rule C4 (viii) and J3 prohibits mixed sex teams over the age of 12. Female child excluded from competing in male team.	Included- FA age has been extended to 13.	Sex segregation in sport Age categories
Maribel Dominguez	Female adult prohibited by FIFA from playing in a male football team, because there should be clear separations.	Excluded.	Sex segregation in sport.
Maria Patino	Female intersex hurdler failed a sex test, introduced to prevent gender fraud and exclude “unnatural” women.	Included- Decision challenged and eventually reinstated.	Sex and gender categories. Performance advantage.
Santhi Soundarajin	Female intersex (AIS) runner failed a sex test.	Excluded- Athlete denied of medal.	Sex and gender categories. Performance advantage
Caster Semenya	Female athlete forced to withdraw from competition and undergo a sex test by IAAF on the basis of suspicion.	Included/Excluded- Unconfirmed results of intersex condition, later reinstated. Introduction of new IAAF policies on gender	Sex and gender categories. Performance advantage.
Mianne Bagger	Transgender golfer excluded from women’s events by LPGA sex determined at birth rule.	Included- LPGA eventually agreed to change its requirements to include athlete.	Sex and gender categories. Performance advantage.
Michelle Dumaresq	Transgender cyclist suspended from competing by CCA and the UCI because of complaints from competitors.	Included- Later reissued licence after accepting her new birth certificate.	Sex and gender categories. Performance advantage.
Sun Ming Ming	NBA player has gigantism which over produces growth hormone	Included- No challenge	Natural variations in sport
Michael Phelps	Swimmer with Marfans Syndrome which can create advantageous characteristics.	Included- No challenge	Natural variations in sport.
Ian Thorpe	Swimmer with large feet.	Included- No challenge	Natural variations in sport
Hunter Scott	Amputee swimmer with a fin, prohibited from competing in non disabled category by league, FINA Rule 10.8 restricts the use of aids that may provide advantage.	Included- Threat of legal challenge resulted in inclusion since no advantage could be proved	Disability categories. Use of assisted devices. Performance advantage.
Muttiah Muralitharan	Cricketer with deformity in elbow accused of chucking. ICC imposed biomechanical tests to test arm rotation and wrist action. Rules only allow 5 degrees flexion.	Included- ICC changed laws to 15 degrees flexion.	Performance advantage.
Speedo Swimsuits	Controversial swimsuits using technology that reduces friction and pressure drag approved by FINA.	Included/ Excluded- Following complaints, FINA banned full body suits.	Use of assisted devices. Performance advantage
Tiger Woods	Golfer permitted to undergo laser eye surgery to improve vision.	Included- No challenge.	Use of technology. Performance advantage
Hypoxic Chambers	Training methods to manipulate oxygen and red blood cells.	Included- Some challenges rejected.	Use of technology Performance advantage
Luis Suarez	Footballer racially abused Patrice Evra during a football match.	Excluded- Inclusionary agenda. Contravened FA Rule E3 (conduct) handed ban and fine.	Overt racial abuse.

Minority black athletes	Disproportionately represented in some sports because of perceived suitability to sport	Included/Excluded- No challenge, difficult to identify.	Sporting culture. Suitability to sport.
Minority South Asian athletes	Under represented in some British sports because of perceived suitability to sport.	Excluded- No challenge, difficult to explain.	Sporting culture. Suitability to sport.
Mohammed Patel	Muslim boxer restricted from competing with a religious beard. IBA medical rules suggest beards pose a safety risk.	Excluded- No challenge.	Sporting culture. Safety concerns.
Asmahan Mansour	Female footballer restricted from competing with hijab. FIFA Rule 4 restricts the use of equipment on safety grounds.	Excluded- Rule upheld.	Sporting culture. Safety concerns.
Iran Women's Football Team	Females restricted from wearing hijab during competitions by FIFA Rule 4.	Included- After challenge, IFAB agree to compromise with a Velcro adjustment to headscarf	Sporting culture. Safety concerns.
LPGA rule	LPGA introduction of a rule that requires all golfers to speak English during media activities, as a business necessity.	Included/Excluded- After challenge, rejected but possibly discriminatory.	Sporting culture. Racism.
Legal Cases	Sport Rules/Practices	Legal Decision	Socio-Cultural Trend
Sagen v VANOC	Absence of female ski jumping Olympics category. Female exclusion on the basis of tradition and merit, rules 47 (3.2; 4.4) Olympic Charter.	Excluded- Discrimination but no breach by VANOC.	Accountability of sport. Gender specific sports.
Martin v IOC	Absence of female running Olympics category. Female exclusion on the basis of merit, rule 32 Olympic Charter.	Excluded- No discrimination, separate but equal events.	Accountability of sport. Gender specific sports.
Equal Authority v PGC	Denial of female access to golf club, because club only cater for the needs of men.	Excluded- split and varied decision, overall no discrimination on basis of statutory interpretation.	Accountability of sport. Male sporting space.
Couch v BBBC	Female boxer refused boxing licence, UK Boxing Rule 4(2) excludes females because of safety, health and community concerns.	Included- BBBC had discriminated on the basis of sex.	Gender specific safety concerns.
GLC v Farrar	Female wrestler refused licence to compete by local authority in accordance with legislation.	Excluded- Tribunal held in favour of female but reversed on Appeal on procedural grounds.	Sport exemption clauses. Gender specific sports.
Ferneley v Boxing Authority	Female boxer refused boxing licence under s. 8(1) NSW Act- only a male can be legally registered as a boxer.	Excluded- No discrimination because BA excluded from SDA.	Gender specific sports and safety concerns.
Robertson v AIHF	Female prohibited from mixed sex ice hockey by AIHF rules restricting mixed sex contact participation over the age of 12 for safety and strength reasons.	Included- AIHF are not exempt under s. 66(1) EOA because it applies to contact positions only.	Sex segregation. Sport exemption clauses.
Emily South v RVBA	Female restricted membership to play mixed sex lawn bowls by RVBA on strength grounds	Included- RVBA are not exempt under s. 66(1) because bowls is non contact.	Sex segregation. Sport exemption clauses.
Taylor v MSFL	Females prohibited from playing mixed sex football by MSFL, beyond the age of 12.	Included/Excluded- s. 66 (1) should only apply to girls over the age of 15 years.	Sex segregation. Sport exemption clauses. Age categories.
Bennett v FA	Female prohibited from playing mixed sex football by FA.	Excluded- Tribunal favoured athlete but reversed in HL under s. 44 SDA.	Sex segregation. Sport exemption clauses. Age categories.

Clinton v Nagy	Female refused to compete in American Football team by US FA because of “the law” and safety and welfare.	Included- The FA failed to prove that the female lacked the relevant qualifications or ability.	Sex segregation. Gender specific sports.
Darrin v Gould	Two females restricted from playing American football with boys. WIAA regulations prohibited mixed sex teams on the grounds of safety.	Included- Unjust since boys and girls run the risk of physical injury in contact games.	Sex segregation. Gender specific sports.
Force by Force v Pierce City	Female restricted from playing American football with boys. School Board contends that sport needs to be segregated to maximise participation and opportunity.	Included- Amounted to a gender based classification.	Sex segregation. Gender specific sports.
Adams v Baker	Female restricted from wrestling with boys, on grounds of Title IX exemption and safety.	Included- Title IX exemption applies but equal protection violated because policies were not related to objectives.	Sex segregation. Gender specific sports.
Fortin v Darlington LL	Female restricted from playing baseball with boys under LL “no boys” policy.	Included- DC upheld exclusion on grounds that girls are at more risk from injury. Reversed at CA since decision was unsupported by evidence.	Sex segregation. Gender specific sports. Use/misuse of science.
Lafler v ABC	Adult female restricted from male boxing competition, because of rule changes (ABF Rule 6) and female specific injuries.	Excluded- No discrimination since safety and anatomy does matter in boxing.	Sex segregation. Gender specific sports and safety concerns.
Lana Lawless	Transgender golfer denied membership by LPGA female at birth rule.	Included- LPGA settled and agreed to remove rule.	Sex and gender categories. Performance advantage.
Richards v USTA	Transgender tennis player excluded after failing a sex test by USTA, to ensure fairness.	Included- Discrimination and breach of human rights.	Sex and gender categories. Performance advantage.
Pistorius v IAAF	Amputee runner restricted from competing in non disabled category by IAAF Rule 144.2(e) concerning technical device.	Included- CAS held no advantage can be proved by scientific studies.	Disability categories. Use of assisted devices. Performance advantage.
PGA Tour v Casey Martin	Disabled golfer prohibited from using a golf cart to access course by PGA, to inject fatigue and to prevent advantage.	Included- Discrimination under Title III ADA, failure to provide a reasonable accommodation. No fundamental alteration to golf.	Fundamental alteration. Performance advantage. Use of assisted devices.
Ganden v NCAA	Athlete with learning disabilities failed to meet course requirements for NCAA benefits.	Excluded- Inclusion would fundamentally alter NCAA requirements. NCAA requirements amended after.	Intellectual disabilities. Course requirements.
Schultz v HYPL	Female with cerebral palsy denied participation in lower age bracket baseball by HYPL to prevent risk of harm.	Included- Discrimination under ADA, exclusion unsubstantiated.	Age categories. Performance advantage. Safety concerns.
Shepherd v USOC	Elite wheelchair racers claimed that USOC provided them with inferior benefits compared to Olympic athletes.	Excluded- Court refused to deal with private USOC matters.	Accountability of sport.
Hollonbeck v USOC	Appeal of Shepherd v USOC.	Excluded- Court reluctant to intervene in the issues.	Accountability of sport.
Olinger v USGA	Disabled golfer prohibited from using a golf cart to access course by USGA restriction to preserve tradition and prevent advantages.	Excluded- Fundamental alteration if walking rule eliminated.	Performance advantage. Fundamental alteration. Use of assisted devices.
Kuketz v Petronelli	Wheelchair racquetball player restricted from access to a	Excluded- Fundamental alteration to essential aspect of	Fundamental alteration.

	non disabled league because of rule changes and safety.	sport.	Use of assisted devices. Safety concerns.
Pottgen v MSHSAA	Student with learning disabilities ineligible to compete in school sports because of MSHSAA by-laws concerning age standards, necessary for safety and advantage.	Excluded- DC rejected MSHSAA justifications. Reversed on appeal since age rule considered essential.	Intellectual disabilities. Fundamental alteration.
Sandison v MHSAA	Two high school athletes exceeded maximum age requirement.	Excluded- DC decision reversed, no discrimination since derogation would fundamentally alter the high school system.	Intellectual disabilities. Fundamental alteration.
McPherson v MHSAA	Student with learning disability restricted from competing in basketball because of age rules needed for fairness.	Excluded- DC decision reversed, no discrimination since rule was necessary.	Intellectual disabilities. Fundamental alteration.
Cruz v PIAA	Student with learning disability restricted from competing in football, track and wrestling by age rule.	Included- Waiver held reasonable, an individual approach should be taken.	Intellectual disabilities. Fundamental alteration.
Dennin v CIAC	Student with learning disability restricted from swimming. CIAC age rule necessary to protect younger athletes from dangers and unfair competition. Also prevent red shirting.	Included- No advantage since he was slowest swimmer, and no danger since non contact sport	Intellectual disabilities. Fundamental alteration.
Knapp v NU	Student with high medical risk restricted from basketball because of increased risk of cardiac death.	Excluded- DC decision reversed, significant physical risks.	Safety concerns.
John Terry	Suspected racial abuse of Anton Ferdinand on pitch, offence under Section 58 FIFA Code. FA investigation on hold.	TBC- Formal police investigation, will face a criminal charge over alleged racially aggravated public order offence.	Overt racial abuse.
Tom Gosling	Racially abused a player during a football match. Punished by local FA.	Excluded- Inclusionary agenda. Guilty of racially aggravated threatening behaviour, 3 year football banning order.	Overt racial abuse.
Sterling v LRL	Rugby player not picked by team coach, allegations of racism.	Included- Direct race discrimination and victimisation by the club.	Overt racial abuse.
Hussaney v Chester City FC	Football manager racially abused apprentice and youth squad member.	Included- Direct race discrimination.	Overt racial abuse.
Singh v FL	FL removed Asian referee from official list on grounds of performance.	Included- Direct race discrimination and unfair dismissal.	Overt racial abuse.
Dogru v France	School pupil prohibited from wearing a headscarf during PE on grounds of health and safety.	Excluded- ECtHR ruled no violation of Article 9 ECHR on safety grounds.	Sporting culture. Safety concerns.

Analysis of the Sports Rules/Practices Concerning Inclusion and Exclusion

Table V provides a synthesised overview of the key cases explored in Part Two. Consistent across all of the cases is the exclusion of an athlete as a consequence of a restrictive rule or criteria that has been imposed by a sports body, local authority, sports league or school board. From this it can be drawn that some rules have an exclusionary impact upon minority individuals even though this may not necessarily be their aim. This has produced tensions between inclusion and exclusion on the basis of sex, gender, disability and race.

The formulation and application of sports rules are broad and their purpose is to protect the essence of sporting activity by placing boundaries upon participation and competition (Meier, 1985; Wild, 2009 p.1357; Loland, 2002). Rules are multi levelled and can be intrinsic to the sport, such as “in game” rules concerning the playing of the activity, or extrinsic rules, dealing with matters outside of the “game” itself. Generally speaking, the rules identified throughout Part Two are all underpinned by scientific, evolutionary and cultural understandings of human beings. They provide sports with their identity, value and structure. Governing bodies have a responsibility to protect and guard these rules to ensure that any changes or modifications to the rules do not have the potential to threaten the essence of sporting activity.

Table VI further illustrates the type of rules that have emerged from the cases. Having analysed Table V above, it is clear that sport bodies consistently protest that these rules exist to satisfy a sport specific need. These needs include imposing categories to match ability, regulate advantage in sport, maintain standards of safety and competition and reflect a sporting culture. Table VI indicates which rules seek to achieve these interconnected objectives. Part Two has established that these objectives can be legitimate and contribute towards defining the essence of sporting activity. However, there are instances when the objectives of the rules conflict with the inclusion or exclusion of an athlete on the basis of their physical and non physical differences. The sport approach to this has generally been to defend these objectives and view them as necessary, but by doing this they are not always appropriately balancing inclusion and exclusion.

Table VI: Overview of intrinsic and extrinsic sports rules, and their objectives

		Categories	Advantage	Safety	Sporting Culture
Sports Rules	Rule 47(3.2) (previously 32) Olympic Charter	✓			✓
	Rule 47 (4.4) Olympic Charter				✓
	Mixed sex age rules (FA Rule C4 (viii) and J3; AIHF Rules; MSFL Rules;	✓	✓	✓	✓
	Mixed sex divisions (FIFA Rules; US FA; WIAA Rules; School Boards Regulations; League Rules)	✓	✓	✓	✓
	Sport equipment (ABF Rule 6 Article 9; FIFA Law 4)			✓	
	Technical aids and devices (IAAF Rule 144.2(e); FINA Rule 10.8)		✓		
	ICC Bowling Rules (elbow flexion)		✓		
	Age bracket rules and by-laws (HYPL; MSHSAA; MHSAA; PIAA; CIAC)	✓	✓	✓	
	Racquetball rules (one ball bounce)		✓	✓	
	Male only golf and lawn bowls membership	✓			✓
	Boxing and wrestling licences (BBBC 4(2); s. 8(1) NSW Act; licensing legislation)	✓		✓	✓
	Sex Testing (IOC, IAAF, USTA)	✓	✓	✓	✓
	IAAF Gender Policies		✓		✓
	Female at birth rule (LGU, LPGA, CCA, ICU)		✓		✓
	Biomechanical Tests		✓		
	PGA and USGA golf cart rules		✓		✓
	Course Requirements (NCAA)				✓
	USOC Olympic Athlete Support	✓			✓
	Medical Eligibility Checks (NU)			✓	
	WADA Code		✓	✓	✓
	Player Conduct (s. 58 FIFA Code; FA Rule E3)				✓
	LPGA Rule				✓

Categories

Striking a balance between inclusion and exclusion in sport is essentially concerned with the management of the physical and non physical differences that exist between human beings. The social, legal and sporting approach to this management is the formation of categories which help us better understand the world in which we live. As we have highlighted throughout, categorisation and classification is not a new process and human obsession with divisions in everyday life, has permeated into fields such as sport.

Table VI illustrates that rules which seek to maintain categories are those concerning sex, age and disability. The division of human beings along these superficial lines may be considered discriminatory in any other employment or social context and in contravention of equality legislation. In sport these categories are discriminatory by nature but accepted because the essence of sporting activity is to differentiate winners and losers precisely based upon

differences. The categories also provide structure for the regulation of sport, with separate governing bodies for each category, separate events, and varied rules and regulations.

Consequently, where an individual wishes to compete in a category that was not typically designed for them, or they are not a typical participant, the sporting approach has been to initially exclude them in order to protect the essence of sport. The sporting rationale behind this is to make competition fair by ensuring the safety of competitors (the precautionary principle), matching ability for equal competition (advantage and age), avoiding significant rule changes, providing the best possible entertainment, generating the best economic value (Jones and Howe, 2005 p. 142). The enforcement of these average categories arguably ensures that the outcome of sport is determined by factors such as ability, skill, training and motivation rather than non intrinsic factors to sport (Nixon, 2007 p. 422). A strict approach is therefore taken to the maintenance of these divisions in sport when athletes attempt to move categories or challenge the absence of categories.

Whilst it is reasonable to impose categories in sport, the lines along which these categories are formed have been challenged and the rules that seek to support these categories have been criticised at times. This may be because the categories of sport are formed by making a series of assumptions about populations, which derive from evolutionary, scientific and cultural understandings of human beings. Over time they have become rigid and have become placed within a sport doxa where they are taken for granted. Conventional wisdoms tend to become mixed up within scientific reference and therefore lead to false assumptions about suitability to sport (St Louis, 2004; Marks, 2003). Part Two has revealed that often these assumptions have unconsciously evolved to become the truth (McFee, 2011). As science and culture progresses our understanding of human ability and difference has significantly developed. At times therefore, a gap exists between the traditional categories of sport and the realities of the modern athlete. This has led to imbalances between inclusion and exclusion across the four areas. Comparatively, there are no rules explicitly dividing athletes on the basis of their race which implies that race is viewed differently to sex and gender, disability and age.

Performance Advantage

Table VI reveals a large proportion of the rules which conflict with minority athletes seek to regulate performance advantage and eliminate unfair advantages. From the cases we can infer that an advantage in sport can be grouped as;

1. A “natural” inherent advantage within the body (strength, chromosomes, hormones, genetics)
2. An “artificial” enhancement of the body which can be interventionist (adopting equipment that becomes a permanent part of the human body, such as artificial limbs or laser eye surgery), non interventionist (using equipment such a golf club or a swim suit) or quasi interventionist (technology which becomes or has the effect of becoming interventionist, such as hypoxic chambers).

Within these two types of advantage, there is a wide spectrum of instances where advantage is deemed fair or unfair, permitted or prohibited, “from basic training and diet on one end to the use of synthetic steroids on the other” (Hard, 2010 p. 545). Advantage can be an intentional action taken by an athlete to enhance their performance, or an unintentional by product of an inherent characteristic or an action that is adopted for therapeutic means. Table VI indicates that rules governing these advantages include mixed sex divisions, age rules, rules governing the use of devices and equipment, “in game” rules such as bowling actions and ball bounces, sex and gender verification policies, biomechanical testing and anti-doping policies. Advantage in sport is an essential element of the essence that is legitimate and necessary for competition. The *Lafler* and *Speedo Swimsuit* cases demonstrates that it is reasonable to restrict mixed sex boxing and full body swim suits since ability will not be matched and advantage will be unfair. The *Muralitharan* case supports the position that the enforcement of rules concerning bowling is a necessary and “in game” feature of the sport. Similarly in *Kuketz* the protection of rules relating to allowable bounces in racquetball are intrinsic to the operation of the sport.

However the achievement of this objective across the four areas is often inconsistent and disproportionate because of the subjectivity involved in determining what is fair and what is unfair, acceptable or unacceptable, natural or unnatural. The cases reveal that natural or artificial advantages are often presumed and difficult to prove with 100% certainty, and justification for exclusion on the basis of advantage is often unsubstantiated. This has led to the unreasonable exclusion of innocent minority athletes in sport who appear to be getting caught within the regulatory nets which are cast for catching deliberate cheats.

One of the reasons for this position is the lack of clarity within the regulations themselves. Scientific methods are employed by sport to test the level of advantage that an athlete may possess but these policies have over time been “masterpieces of ambiguity” (Pistorius Case, p. 10). Many of the rules fail to define advantage in their sport which contributes towards this uncertainty. In addition, as science, technology and knowledge develops the cases have emphasised the absence of legitimate scientific underpinning in previous policies regulating advantage which has often resulted in conventional wisdom alone determining eligibility.

For instance, with regards to natural advantages, sex and gender policies, age rules, some biomechanical tests and to some extent the WADA Code, are all premised upon the obvious biological and cultural differences between men and women such as behaviour, physiological make up (skeletal) and genetic make up (hormones and chromosomes). In certain circumstances these have an unavoidable impact on the attributes and skills required for certain sports such as strength, giving men an advantage. However, evidence of average differences has been broadly applied to exclude all women from competing with men and in “male labelled” sports as it is assumed that they may have a disadvantage. The cases of *Sagen*, *Martin*, *Couch*, *Ferneley*, *Robertson*, *South*, *Taylor*, *Bennett*, *Crutwell*, *Dominguez*, *Clinton v Nagy*, *Darrin v Gould*, *Force by Force v Pierce City*, *Adams v Baker* and *Fortin v DLL* illustrate this.

In addition, the assumption that physical and cultural attributes will provide men with an advantage in sport has also influenced the imposition of age requirements in mixed sex competitions so that the physical and non physical attributes of children are accurately matched. It is presumed that average height, weight and maturity will be greater as an athlete gets older. This general approach has impacted upon girls competing with boys, and athletes with learning disabilities competing in lower age brackets. The cases of *Robertson*, *South*, *Taylor*, *Bennett* and *Crutwell* reveal that the age at which physiological and cultural differences begin to separate girls and boys ability, changes as science progresses. The continuous variation in the permitted age implies that average age is not always the most appropriate form of categorisation to regulate advantage. Supporting this is the commentary in *Pottgen*, *Sandison*, *McPherson*, *Cruz* and *Dennin* where athletes with learning disabilities challenged age brackets. The sports bodies

approach has been to apply an “average” standard which has received some debate by the courts in these cases as we will review shortly.

In parallel, the rules based upon sex and gender have encouraged sports bodies to treat some female athletes with suspicion when they may naturally possess male labelled attributes such as a Y chromosome, higher levels of male hormones or typically male skeletal characteristics. We have seen in the cases of *Patino*, *Semenya*, *Soundarajin*, *Richards*, *Bagger*, *Dumaresq* and *Lawless* that such athletes are assumed to possess an unfair advantage in sport. The introduction of sex testing, sex determined at birth rules and gender policies are aimed to protect the natural male/female divide in sport and to catch those men who deliberately attempt to enter female sports competitions. However, the literature only reports 1-2 incidents of this type of cheating taking place over the history of sport. Instead, the consequences of these initiatives have been the exclusion of intersex individuals who naturally vary from the typical male and female human form. Intersex individuals challenge this binary and make sex and gender policies inoperable at times. Their treatment can be contrasted to athletes such as *Sun Ming Ming*, *Michael Phelps* and *Ian Thorpe* who are not challenged for their natural variations and advantages in sport, which suggests that such regulation is unequally applied.

Transgender individuals pose a difficulty for sports bodies because it is difficult to determine whether a psychological condition that results in a choice to undergo reassignment, that may produce residual advantage, constitutes a natural and unavoidable, unintentional advantage. Nevertheless, the revised IAAF policies on athletes with hyperandrogenism and gender reassignment attempt to move away from “sex tests” and instead adopt a hormone based approach to determining participation. This includes an assessment of a range of sex and gender factors including an endocrine assessment (Rule 8.3 IAAF, 2001c).

This shift to a hormone level approach has received criticism when discussed in relation to the regulation of drugs in sport. It is suggested that the over reliance on androgen levels ignores the fact that testosterone is not the only factor that can result in athletic success. Rather, athletes are born with a range of advantageous genes, “some of which affect the expression of testosterone and some of which do not” (Foddy and Savulescu, 2010 p. 3). In addition, the effect of testosterone on the body is not well known and little research has been conducted on the effects of testosterone in women. Despite this, these policies are more stringent than the previous

positions and appear to create an environment where the participation of intersex and transgender individuals will be encouraged where practicable. These rules appear more balanced, recognising the interests and rights of the athlete, as well as the protection of the essence of sport. Sports bodies such as the LPGA, the LGU and the CCU have also altered their female determined at birth rules which reflect positive practice by sport.

Both natural and artificial advantages are regulated by forcing athletes to undergo biomechanical tests to prove or disprove their suspected advantage, as demonstrated in the cases of *Muralitharan* and *Pistorius*. Biomechanical testing is important for the development of sport and necessary in particular cases concerning inclusion and exclusion but there appears to be inconsistency around when testing is imposed. As raised throughout Part Two, the differential and selective treatment of athletes based upon sex, gender, disability and race is accounted for by what is considered a “natural inheritance”.

Rules concerning artificial advantages from the use of devices also seem to be based upon standards of normality. The role of technology in sport is to enhance efficiency and aid its operation. It is also becoming a means of enhancing performance and as technology progresses, athletes are more intrusively relying on technology to further develop their ability and provide them with a competitive edge over their competitors. As a society, our tolerance to the use of technology to enhance performance and provide an advantage is increasing if you consider the use of “sophisticated running spikes, graphite tennis rackets that makes games shorter, and fibre-glass pole vaults to reach new heights” (Hard, 2010 p. 546). These examples demonstrate some of the fair uses of technology for gaining an advantage in sport. Increasingly sports rules are being adapted to better manage the intentional use of technologies in sport such as the IAAF Rule 144.2 (e) and FINA Rule 10.8. This regulation is important to ensure that the essence of sport is not lost or threatened by the replacement of human natural ability with artificial technologies. It touches upon a wider question of who is the winner in modern sport, the athlete or the technology.

However, the regulation of “devices” or “equipment” in sport conflicts with the participation of disabled athletes who wish to compete in non disabled categories of sport. Their reliance on artificial technology is purely therapeutic and any advantage that derives from that use is

unintentional. Nevertheless, since they are attempting to enter categories that were not designed for them, the sporting approach has been to treat these cases as potential challenges to competitive balance and advantage in sport. This is illustrated by the *Pistorius* and *Hunter Scott* cases. The use of prosthetic limbs (cheetah blades and a swim fin) in non disability sports represents an interventionist use of technology. The IAAF and the DeKalb Atlanta Swim and Diving League perceived these devices to provide the athletes with an unfair advantage over other competitors, in contravention with the rules and therefore excluded them from competition. This approach was based upon limited and unsubstantiated scientific justifications and can be contrasted with the lack of scrutiny given to athletes such as Tiger Woods who used an interventionist method to receive laser eye surgery that would improve his vision beyond 20/20 (Norrish, 2010). It would appear that the level of tolerance to advantages is selective in nature.

The *Casey Martin* and *Olinger* cases concerning non interventionist methods also display patterns of inconsistency in the sporting approach to advantage. The PGA and the USGA held that the use of a golf cart infringed an optional walking rule which includes that if desired that players walk in a competition, then a walking rule is suggested. The argument was that the use of the cart provided the athletes with an unfair advantage over competitors who are walking around the course. They were both excluded from competing by the sports bodies. This is in contrast to the acceptance of some assisted non interventionist devices such as footwear, clothing and sports equipment that is being designed to produce performance enhancements. Sport also accepts quasi interventionist technologies which are those that can eventually lead to a permanent enhancement to the body. These include a range of accepted vitamins and altitude training techniques (Hard, 2010 p. 534). This level of intervention is arguably more dangerous because it can become permanent but instruments such as the hypoxic chambers continue to be permitted.

Sport tends to selectively tolerate natural and artificial advantages with some advantages unchallenged, but those associated with the categories of sport such as intersex, transgender or disability magnified. This selection appears to rest on the notion of what is viewed as a “natural” or “unnatural” image in sport. The WADA code defines a person as a “natural person” (World Anti-doping Agency, 2009) but as science and technology progresses is it becoming increasingly unclear what this means.

From this analysis it would appear that one of the biggest challenges in overcoming shortfalls in the rules regulating advantage is whether sports bodies adopt a case by case approach to advantage or whether they formulate rules based upon “average” standards relating to physical and non physical differences. There are clear attempts by sports bodies such as the IAAF, the Royal and Ancient Golf Club and FINA to review rules and provide more clarity when regulating natural and artificial advantages deriving from innocent athletes in sport. Sport is moving towards a case by case approach of these issues since rules need flexibility in some circumstances but this has been criticised as placing large undue burdens and responsibilities upon sports bodies.

Safety: the precautionary principle

Table VI displays that rules which significantly impact upon inclusion and exclusion tend to concern safety matters. Safety rules have been applied to sex and gender, disability, age and religious beliefs cases. Ensuring compliance with safety rules is a valuable part of the essence of sport. Table VI highlights that rules serve to satisfy more than one objective and the categories between physical and non physical human differences in sport are justified on the basis that they protect athletes from any foreseeable risks or harm that may ensue if ability is not matched. These include risks from the activity, the safety of bodily security/health and the safety of other athletes. In addition, the selective nature of fair and unfair advantages is to some extent explained by the level of risk involved in each case (Wild, 2009 p. 1365).

As we have raised throughout, the core of this precautionary principle is paternalism, that is, acting on behalf of an individual or group to protect them from harm or danger. The term literally means “to act in a fatherly fashion” (Heywood, 2003 p. 87). The basis for this theory is that “wisdom and experience are unequally distributed in society: those in authority ‘know best’” (Heywood, 2003 p. 87). This principle can be applied in a hard or soft way and this is determined by the social definition of a risk and the view taken of who is considered to be at risk. The constitution of “risk” or something that is a hazard to us in society is in itself considered to be a “social construction” (Laurendeau and Adams, 2010 p. 437; Lupton, 1999). In that sense, risk discourse can sometimes “operate to authorise and legitimate particular exclusionary practices”. It is suggested that safety arguments excludes athletes by raising a sense of fear that vulnerable adults may get hurt (Fields, 2005 p. 118). At times this application has been unequal because of the subjectivity involved in determining who is at risk. This is usually influenced by assumptions

originating from scientific research and conventional wisdom. In addition, the principle has conflicted with liberalism which is the autonomy of athletes to “trade their liberty or risk their bodily integrity for some other value, possibly economic” (Anderson, 2010 p. 141).

Positive examples of the precautionary principle include *Lafler*, *Knapp* and *Kuketz*. In *Lafler*, a gender specific approach was justified on the grounds that safety would be compromised because of strength differences between men and women. Part Two accepted that where strength is a determinant factor of the sport and where strength can be measured it is necessary to segregate the sexes. Safety and strength come hand in hand here. Matching strength ensures fair play. Physical performance and measurable physical differences are central to sport ideology (Theberge, 1998). It explains the reasoning behind the socio-cultural labelling of sports as masculine and gender specific. The matching of physical traits is an element of sporting essence and it is why categories such as sex, weight and age exist. The core nature of sport would be lost if the competition was one sided because factors such as strength were unequal.

The sports bodies in *Couch* and *Ferneley* argue that female boxing created gender specific risks to injury to the reproductive organs and to pregnant women. Whilst the risk of female specific injuries could be mitigated by the introduction of measures such as a breast protector, and also taking a pregnancy test before a fight, in mixed sex boxing the *Lafler* case explains that this could be inconsistent with the ABF rules since blows to the chest are permitted in men’s boxing and women would be more prone to injury since they have sensitive mammary glands which men do not have. Rule differences could alter the essence of boxing if punches to the chest are an essential element of the sport. As the BBBC feared in *Couch*, female participation could result in a drastic change to the rules if it is believed that punches to the chest are an essential feature of the sport. The case of boxing is unique because there is a wider debate surrounding whether the sport should be banned because of the inherent dangers that it poses to both men and women (Anon, 2009e).

In *Knapp* medical eligibility checks were reasonable to exclude an athlete with high medical risks in order to protect their bodily security. In *Kuketz*, it was reasonable to assume that the use of a wheelchair in non disabled racquetball may pose particular safety risks to other athletes as the athletes would not be accustomed to the movements and extra equipment of a wheel chair athlete.

However, there are a number of instances when such justifications have not been related to the objective of protecting the safety of the athlete and have therefore been disproportionate. Mixed sex age rules, mixed sex divisions, boxing and wrestling licences, sex testing and to some extent the WADA Code are based upon a gender specific approach. Women have been offered more bodily security protection from physical harm or activity, such as sport because sports tend to be considered more “masculine” in nature and more suited to able bodied, physically superior men. Whilst safety concerns may be legitimate, they tend to have been applied selectively, according to the gender of the athlete rather than the realities of the situation.

Whereas mixed sex boxing is a clear example of safety compromised because of gender specific strength differences, this approach has failed when applied to non contact sports such as ski jumping (*Sagen*), lawn bowls (*South*), baseball (*Carnes v TSSAA*; *Fortin v DLL*) and to some extent football (*Bennett, Crutwell, Taylor, Dominguez*). The arguments by sports governing bodies that women are weaker and more frail than men, requires legitimate evidence and context in order to be supported. Courts have stressed that to suggest that we must protect fragile females from injury in sports such as baseball, is “beyond archaic” (*Fortin v DLL*) and an example of “cultural anachronism unrelated to reality” (*Hoover v Meiklejohn* p. 169). Any safety issues concerning the inherent nature of the sport generally should prompt a review of the sport itself.

In mixed sex contact sports played by children, the sport approach to exclude females because of safety has also been rejected in a number of US cases on the grounds that they are gender neutral safety concerns that should also extend to boys (*Clinton v Nagy, Darrin v Gould, Force by Force v Pierce City*). Even in an obvious contact sport such as wrestling the courts have held that it is “improper to subject boys to greater danger than girls” since there is no evidence that girls are more injury prone than boys (*Adams v Baker*). The application of the gender specific approach should be determined by age, single sex or mixed sex, and sporting activity. The inconsistent approach to the precautionary principle may be accounted for by the influence of social change which acts as a driver behind the categorisation of sports as contact or non contact, and in turn, dangerous or not dangerous (*Carnes v TSSAA*). The danger of this approach is the application of well meaning but overly paternalistic and misguided paternalistic attitudes (*Force by Force v Pierce City* p. 1029; James, 2010 p. 234).

This is also evidenced by the justifications for age rules in sport. As we have established, age requirements are in place to match strength and ensure safety. This is based upon the premise that age groups are similar in strength and size. Consistent across the disability cases concerning age rules, sports authorities have justified the exclusion of older athletes from lower age brackets to protect younger athletes from harm by safeguarding them against injuries arising from competing against average and oversized athletes (*Schultz, Pottgen, Sandison, McPherson, Cruz, Dennin*). This approach tends to be based upon “average” age abilities and physiques which have led to assumed concerns of risk or harm that are not always substantiated. As raised above however, adopting a case by case approach may place impossible burdens on sports bodies and may cause difficulties in classifying athletes.

In contrast to *Kuketz*, some safety rules which seek to regulate the use of equipment and clothing such as prosthetic limbs (*Pistorius*), religious beards (*Mohammed Patel*), turbans (*Sikh athletes*) and the religious hijab (*Asmahan Mansour, Iran womens football team, Dogru v France*), appear to be applied inconsistently and are often unrelated to the objective of protecting safety. For instance, the safety issues raised by the participation of *Pistorius* are not sustainable in sports such as athletics where no contact should be made. Furthermore, it would follow that prostheses should then be banned from Paralympic events also if such a safety threat to other competitors existed (Zettler, 2009 p. 404, Bidlack, 2009). At the same time, despite safety concerns surrounding the use of altitude simulators, hypoxic chambers continue to be permitted in sport.

The risk of corneal abrasions by the use of a beard in boxing may be legitimate if it is considered to be an intrinsic risk of the sport. However, the ABAE and IBA medical rules fail to explore this in any detail and neither do they provide any reasoning behind the rules prohibiting beards. FIFA claim that the use of hijabs in football contravenes Rule 4 which restricts particular equipment for safety reasons. Similarly in *Dogru v France* the school rules limited the use of a hijab in sports classes because of the risk of strangulation. Within the rules there is an absence of evidenced based material to support this assertion. The recent IFAB decision to accept an alternative version of the hijab reflects positive and reasonable practice when dealing with participation and safety.

Overall, the precautionary principle is a legitimate rationale upon which to determine inclusion and exclusion as we have seen in the cases presented. The sporting approach to safety is largely fair but requires more neutrality in how it is applied and who it is applied to. Matching ability and

ensuring safety should be the focus of the precautionary principle. Consistent across the safety rules identified in Table VI is the assumed concerns of risk and safety which lack sufficient evidence at times.

Sporting Culture

Navigating between and across intrinsic and extrinsic rules and practices in sport is challenging because of the sporting culture. An implicit objective of some of the rules is to protect the culture or traditions of a sport, and to uphold traditional norms or attitudes, as reflected in Table VI. Traditional cultures and norms contribute towards the special nature of sport and are found within the essence of sport. Whilst their protection is a legitimate objective to pursue, it can have a negative impact upon inclusion and exclusion when the rules seek to protect traditions and norms that are no longer accurate within a modern society and may be discriminatory. As we have seen throughout this thesis, the rules of sport carry with them a set of assumptions about our physical and non physical differences. These have had the effect of creating ideas about a population's suitability or unsuitability to sport. As they develop and strengthen they have created a generic benchmark of what is considered to be "norms" within sport. Sport is comfortable with its norms and traditions as we have seen and these form the historical status quo of sporting activity.

Rules which seek to protect traditions and maintain norms include selection criteria Rule 47 (4.4) Olympic Charter which permits sports events for the sake of the Olympic tradition even though the event may not satisfy equality criteria. Whilst selection criteria rules for Olympic sports are important and necessary. It could be implied from *Sagen* that because of the nature of the criteria this rule seeks to uphold sex and gender norms which are based upon the idea that men are physiologically better suited to sport than women, who are considered to be weaker and need more protection from harm. This norm has also influenced mixed sex age rules, mixed sex divisions, male only memberships, female licences, sex testing, gender policies and female at birth rules. These have impacted upon the participation of female, intersex and transgender athletes.

When rules exist only to maintain a sporting culture that is no longer accurate or appropriate, they are difficult to legitimately justify. Another example is the USGA and PGA walking rule in *Olinger* and *Casey Martin* which was claimed to be an important tradition of the game of golf

even though it was not located in the immediate rules. However, the imposition of this rule has a detrimental effect on the participation of disabled individuals. Disability norms in sport derive from historical medical models of a disabled individual as being incapable, devious and passive (Part One). Norms here are based upon the difference in ability between disabled and non disabled athletes and the operation of sports that were created for non disabled individuals. Society and sport have been built around standards of normality and rules such as core course requirements for sports participation and Olympic athlete-only support programmes are to some extent based upon these norms.

Table VI highlights that the only objective of the LPGA rule is to maintain the tradition of English-only speaking golfers. This is an example of a tradition that is not worthy of protection because it leads to the unreasonable exclusion of athletes on the basis of their race. It is even likely that this rule had the potential to breach Article 2 UDHR which protects the rights and freedoms of every individual without distinction of language. The LPGA rule demonstrates how rules exist to maintain race norms which are based upon physical appearance and colour of skin, geographical positions and environments, religion and culture, different belief systems and practices, language and behaviour (Part One). Aside from the LPGA rule, the influence of race norms can also be invisible as evidenced by the disproportionate representations of racial groups in sport. It is difficult to provide accurate explanations for under and over representation but it is speculated that the sporting culture, which has developed attitudes towards race and racism, impacts upon participation. Stereotypes associated with populations also play a part in the over and under representation of athletes.

This thesis is concerned with challenging some of the traditional cultures and norms of sport to ensure that inclusion and exclusion is based upon legitimate criteria that are focused upon ability and merit. There are positive examples of sport conduct rules (s. 58 FIFA Code; FA Rule E3) prohibiting overt racial abuse in sport. Recent football incidents could significantly shift the attitudes towards race in sport. However a consistent theme across race and sport policies and reports is the lack of awareness or denial by sports bodies that race and sport conflict. For instance, in November 2011 FIFA President Sepp Blatter was criticised for commenting that racial abuse on the football pitch should be settled with a handshake and denying that there is any racism in the sport. In addition, there is a general lack of transparency in the construction and application of rules in sport. This is leading to a failure at an institutional level to provide

appropriate and professional services to people because of taken for granted attitudes and lack of awareness of inclusionary and exclusionary practices (Bell, 2008 p. 12).

Whilst the sport approach has generally been to protect the essence of sport at the cost of the inclusion of minority individuals, when sports bodies have been challenged in the non legal cases, Table V exhibits a positive willingness to make amendments or adaptations to rules and policies to include an individual where qualified to do so.

Analysis of the Regulatory Approach to Inclusion and Exclusion

The regulatory approaches of the law, sports tribunals, sports authorities and sports bodies have been represented in Figure 5 which collectively plots the sex, gender, disability and race cases to identify whether the overall outcomes resulted in inclusion or exclusion, whether this decision was justifiable or unjustifiable, or arguable/either way. When analysing the effectiveness of the balance technique for determining rights, graphical methods have been pursued in the literature also (Rivers *in* Pavlakos, 2007). The cases presented in Figure 5 are colour coded;

Red- sex

Blue- gender

Green- disability

Purple- race

As Table V indicates, not all of the cases in Figure 5 have reached the courts and instead some of them have been privately resolved without the need for legal intervention. The non legal cases of *Crutwell*, *Semenya*, *Bagger*, *Dumaresq*, *Hunter Scott*, *Muralitharan*, *Iran Women's Football Team* and *Speedo Swimsuits* prompted sports bodies to adapt their sports rules. Some cases have forced sports bodies to take a firmer position on issues as in *Luis Suarez* and potentially *John Terry*. On the other hand, in *Patino*, *Soundarajin*, *Dominguez*, *Mohammed Patel*, *Asmahan Mansour*, and the *LPGA rule* the lack of legal intervention has resulted in the existence of rules that continue to produce an imbalance between inclusion and exclusion. Some cases involve no challenges but represent examples of similar/inconsistent or disproportionate treatment of

inclusion and exclusion (*Tiger Woods, training devices, Sun Ming Ming, Ian Thorpe, Michael Phelps, minority black athletes, minority south Asian athletes*).

Where cases appeared before domestic, regional and international courts the ultimate approach of the law has been to evaluate the compatibility of the sports rules, identified in Table VI, with equality legislation, since the parties have relied upon human rights legislation to support their claim. The majority of cases have been dealt with at a domestic level and there is generally little application of regional (*Dogru v France*) and international provisions (*Pistorius*) to sport. However there are cases where this thesis argues that regional and international human rights legislation *should* have been applied by the courts such as *Semenya, Sagen* and *Martin*.

When interpreting legislation the courts have been responsible for making sense of exemption clauses contained in domestic provisions for particular aspects of sporting activity. For instance, s. 195 EA (previously s.44 SDA and s 19(4) GRA), s. 66(1) Aus EOA, s. 42(1) Aus SDA, Title IX contact sports exemption, permit discrimination on the basis of sex when strength, stamina and physique is relevant to the sporting activity. Section 9 ESA permits gender specific membership when catering to the needs of only one group. Section 12182 (b2a) ADA permits derogation from disability requirements where modifications would fundamentally alter the nature of the activity. Sports bodies have assumed that they have legal backing to impose exclusive rules. Assessing compatibility has been achieved by using extrinsic evidence to analyse the validity of the sports rules and by applying legal standards and norms to sports bodies. It would appear that in most cases there have been attempts to apply a standard of proportionality to the situation, which has resulted in differing results.

	<p>Caster Semenya Maria Patino Minority black athletes Minority South Asian athletes</p>	<p>Sagen v Vanoc Martin v IOC Equal Authority v PGC Bennett v FA GLC v Farrar Maribel Dominguez Santhi Soundarajin Olinger v USGA Ganden v NCAA Hollonbeck v USOC Shepherd v USOC Mohammed Patel Asmahan Mansour LPGA Rule</p>	Unjustifiable
<p>Couch v BBBC Mianne Bagger Michelle Dumaresq Lana Lawless Richards v USTA Sun Ming Ming Michael Phelps Ian Thorpe Tiger Woods Training devices</p>		<p>Ferneley v Boxing Authority Sandison v MHSAA McPherson v MHSAA Pottgen v MSHSAA</p>	Arguable/ Either Way
<p>South v RVBA Robertson v AIHF Minnie Crutwell Clinton v Nagy Darrin v Gould Force by Force v Pierce City Adams v Baker Fortin v Darlington LL Pistorius v IAAF Muralitharan PGA Tour v Casey Martin Hunter Scott Schultz v HYPL Cruz v PIAA Dennin v CIAC John Terry Tom Gosling Luis Suarez Sterling v Leeds RL Hussaney v Chester City FC Singh v FL, FA Iran Women's Football team</p>	<p>Taylor v MSFL</p>	<p>Lafler v ABC Kuketz v Petronelli Knapp v NU Speedo Swimsuits Dogru v France</p>	Justifiable
Inclusion	Arguable/ Either Way		Exclusion

Figure 5: The outcome of all sex, gender, disability and race cases examined.

Supporting Figure 5 is Table VII (below) which illustrates the percentage of sex, gender, disability and race cases that appeared within each category of inclusion and exclusion. Omitted from this statistical analysis are those cases which are comparators and not explicitly concerning sex, gender, disability and race, but instead represent body difference generally. These include *Speedo Swimsuits*, *Sun Ming Ming*, *Michael Phelps*, *Ian Thorpe* and *training devices*.

	Sex	Gender	Disability	Race	Total % of Cases	
Justifiable Inclusion	36.3	0	31.8	31.8	40	49
Justifiable Inclusion/Exclusion	5.5	0	0	0	1.8	
Justifiable Exclusion	5.5	0	11.7	7.6	7.2	
Arguable/Either Way Inclusion	5.5	57.1	5.8	0	10.9	18.1
Neutral	0	0	0	0	0	
Arguable/Either Way Exclusion	5.5	0	17.6	0	7.2	
Unjustifiable Inclusion	0	0	0	0	0	32.6
Unjustifiable Inclusion/Exclusion	0	28.5	0	15.3	7.2	
Unjustifiable Exclusion	42.8	7.1	28.5	21.4	25.4	
Total % of Sex, Gender, Disability and Race Cases	32.7	12.7	30.9	23.6	Total number: 54	

Table VII: The percentage of sex, gender, disability and race cases that fall within the varying categories of inclusion and exclusion.

Justifiable Decisions

Of the 54 legal and non legal cases explored, Figure 5 displays a large cluster of sex, disability and race cases that fall within justifiable inclusion. A higher overall percentage of cases are located within the justifiable categories (49%), with 40% of these falling within justifiable inclusion. A generally even distribution of the sex, disability and race cases appear within justifiable inclusion, yet no gender cases are represented within any of the justifiable categories.

These decisions appear to have been reached by interpreting legislation and sports rules in a manner that achieves a balance between the rights of athletes and the specific nature of sport. For instance the Parliamentary intentions and objectives behind sport exemption clauses concerning

sex have been largely vague and unclear. This has left the courts with the task of interpreting the meaning of the legislation. Such exemptions have been relied upon by sports bodies and broadly interpreted by the courts to apply to a range of sporting activities such as female only sport and non contact sports. This has led to generalised assumptions about suitability to sport. In *Bennett* for instance Lord Denning ignored the age of the athlete and firmly rejected the participation of a female into a male sport on the grounds of expected gender roles. In *GLC v Farrar*, whilst the court accepted that s. 44 does not apply to female only sports, they continued to exclude the female wrestler on procedural grounds.

Conversely, in the Australian cases of *Robertson*, *South* and *Taylor* a more balanced and literal approach was taken to the interpretation of such legislation by the judges, to suggest that the exemption cannot be interpreted to mean any sporting activity which involves strength, stamina and physique since this would “strip the section of any meaning” and stretch it beyond its primary objective (*South* Case Para. 34). They must be intended to apply only those competitive sporting activities where, if both sexes were to participate together, the competition would be unequal because of the disparity between strength, stamina or physique (*Robertson* Case p. 9).

In addition, the courts have limited their decisions and promoted the need for an individual or case by case approach to inclusion and exclusion. This is confirmed by the single justifiable arguable/either way case of *Taylor* where the courts set out the boundaries to age rules concerning mixed sex competition. Justice Morris advocated that the courts consider the relative differences in strength between the sexes, the nature of the sport and the age group, and whether the differences bear any significance (Case Para. 29). He went on to highlight that sport governing bodies should be lawfully allowed to adopt such rules but at the same time the girls themselves should have the right to free choice.

Similarly in *Pistorius*, the CAS decision only applied to the particular model of Cheetah Flex Foot prostheses examined in the IAAF study to restrict the use of future versions which may more clearly show advantage and, finally CAS accepted that the decision may only be temporary because developments in scientific knowledge or testing technology may allow the IAAF to prove that Cheetahs confer a net advantage to users in the future. A case by case approach is

consistent with IAAF revised policies on intersex and transgender that seek to determine participation on an individual basis.

Due to the lack of clarity in the Title IX exemption, the courts interpreted the legislation in a way that eradicates generalised cultural assumptions about suitability to sport. In *Clinton v Nagy* the courts sought to protect the athlete and “focus on the individual rather than thinking in broad generalities which have oftentimes resulted in the imposition of irrational barriers, against one class or another” (Case p. 1400). In *Force by Force* Judge Roberts posits that “the idea that one should be allowed to try- to succeed or to fail as one's abilities and fortunes may dictate, but in the process at least to profit by those things which are learned in the trying- is a concept deeply engrained in our way of thinking; and it should indeed require a “substantial” justification to deny that privilege to someone simply because she is a female rather than a male. I find no such justification here” (Case p. 1031). This reaches the heart of the balance between inclusion and exclusion in sport. Indeed in the selection of cases explored the US approach largely appears balanced and reasonable, reflecting good practice.

This is supported by the ADA decisions in *Cruz* and *Dennin* where the judges ruled in favour of the athlete and permitted a waiver of the age rule to include athletes with learning disabilities. The courts accepted evidence to suggest that the athletes were not advantaged by their age and did not pose safety risks. In *Cruz*, the court held that whilst the age rules are essential, a waiver to the rules must be determined on a case by case basis (Case p. 499). Judge Arnold in his dissent in *Pottgen* argued that the court should adopt an individual approach to essential eligibility requirements rather than broad generalities about safety and strength when interpreting statute. He advocated that if a requirement is “essential” to a programme or activity, then a waiver or modification cannot be reasonable but we must determine what is meant by “essential” (Case p. 932).

In the evaluation of the balance between inclusion and exclusion, many courts have applied a proportionality test to determine whether the exclusionary sports rule or policy satisfies an important government objective and is directly related to that objective as reflected in *Adams v Baker* and *Force by Force*. Judge Roberts posits that it would require a “substantial” justification to deny an individual a privilege to try and compete (Case p. 1031). The principles set out in equality legislation have therefore been implicit throughout some of the legal analysis of rules.

Safety for instance, has been considered a legitimate objective to pursue, but the imposition of a gender based classification policy was not related to that objective. This legal approach suggests that eligibility requirements should be made on justifiable reasoning rather than subjective evaluation or good faith belief (Weston, 2005 p. 151). For instance, exclusion is reasonable when legitimate physical qualifications are essential to the participation of the sport as raised by the court in *Knapp* (Case p. 482).

Another consistent approach taken by the courts in these justifiable decisions is the reliance on scientific or medical evidence to determine inclusion or exclusion. Where an exclusionary rule or practice is unsubstantiated, unsupported and cannot be proved, then the courts tend to favour the athlete. This is consistent with the approach by the sport authority in *Hunter Scott* and the CAS approach in *Pistorius*. Similarly, where there is evidence to support the rule then the courts will conclude that the exclusion is justifiable as demonstrated in only 7.2% of the cases explored. The outcome in *Lafler, Kuketz, Knapp* and *Dogru v France* suggests that the courts support sport rules which seek to exclude athletes when physical differences such as sex, disability, medical conditions, and non physical differences relating to religious beliefs, would genuinely alter the rules, producing imbalances in ability and present genuine safety risks to athletes. The approach taken by FINA in the *Speedo Swimsuit* case also demonstrates justifiable exclusion when an unfair advantage can be proved.

Figure 5 also reinforces the fact that race discrimination and racial abuse are unequivocally incompatible with equality legislation. Table VII shows that most of the race cases are justifiable inclusion, with 3 located in the unjustifiable categories. There are no arguable/either way decisions. The cases of *Tom Gosling*, *Sterling*, *Hussaney* and *Singh* demonstrate the justifiable inclusionary agenda that the courts are promoting in situations which involve overt racial abuse. Whilst *Luis Suarez* was settled by the sports body, the outcome of the *John Terry* case could mark a significant shift in policy and attitude towards future racial abuse cases in sport. In February 2012 Prime Minister David Cameron hosted a football racism summit following these high profile incidents (Anon, 2012). The recent IFAB decision to overturn a hijab ban and compromise on a design reflects a positive sport approach to inclusion.

Unjustifiable Decisions

At the other end of the scale, Figure 5 displays a large percentage of outcomes from each area that are unjustifiable and did not adopt a balanced, evidenced based, individual approach (32.6%). Figure 5 and Table VIII reveals that there are no unjustifiable inclusion cases within this sample. In contrast to the inclusion categories, the courts have unjustifiably favoured the sports body and found no breach of human rights legislation in *Sagen*, *Martin*, *Equal Authority*, *Bennett*, *GLC v Farrar*, *Olinger*, *Ganden*, *Hollonbeck* and *Shepherd*. Generally speaking, the accountability of sports bodies under the law has rested upon level of intervention that the courts take in inclusion and exclusion cases. For instance, the application of human rights legislation has been limited by the treatment of sports bodies as private entities or non state actors. A consistent theme across the legal approach to inclusion and exclusion has therefore been the autonomy of sports bodies to make determinations about inclusion and exclusion through self regulation and autonomy. This has been appropriate in some cases where sports rules are legitimate, but has produced uncertain results as this category emphasises.

In *Shepherd* and *Hollenbeck* the court claimed that it lacked jurisdiction over USOC because their training facilities were not available to the public to be caught under this legislation. The court concluded that the plaintiffs were misplaced in their attempts to use judicial branches of government to remedy inequalities since this is a matter for the legislative and executive branches (Case p. 1086). In *Ferneley* Justice Wilcox did not hold the sports body accountable under the Aus SDA because they were not considered to be a type of authority covered by the Act, although he emphasised that his decision rested purely on the interpretation of the legislation and nothing else.

In *Martin* the court was reluctant to use state statute to alter the content of the Olympic Games since it is controlled by the Olympic Charter which is an international agreement (Case p. 677). It was held that the IOC could not be captured under civil rights legislation since they are operating exclusively and privately. It was feared that if the interpretation of legislation extended to sport this would lead to larger harm than the harm caused by the exclusion of females. This is reflective of Lord Denning's judgment in *Bennett* who warned against the inclusion of football into sex discrimination legislation because the law would expose itself to "absurdity" and would be "an ass- an idiot if it tried to make girls into boys so that they could play in a football league" (Case p. 5). This is consistent with the non legal case of *Maribel Dominguez*. Instead, the interpretation of exemption clauses is overly broad as demonstrated in *Equal Authority* where the

word “need” embraced social, cultural and sporting needs, as well as more basic needs to support the exclusion of females from a golf club (Case p. 33).

In *Sagen*, whilst Justice Fenlon accepted that VANOC were conducting a “rare but uniquely governmental activity” (Case p. 63) that made them subject to the Canadian Charter, it was ultimately held that they were not accountable under it since the power to designate events lies with the IOC. However, the IOC is a Swiss based organization and cannot be bound by the Canadian Charter for jurisdictional reasons (Case p. 104). On this point, in *Pistorius*, CAS also held that since the IAAF was based in Monaco, they were not subject to any obligations under international conventions such as the CRPD. In addition, CAS refused to intervene in FINA matters that concerned “in game” rules in the Advisory Opinion.

Justice Scalia’s dissent in *Casey Martin* provides a justification for this legal position of non intervention. He argued that the PGA should have the autonomy to decide what rules they wish to impose in a competition. He claimed that the courts were trespassing in an area where the courts do not belong (Case p. 705). Conversely, Pregerson J in his dissent in *Martin* argued that the Olympic Games are not run as a private club since they adopt policies aimed at encouraging all athletes to participate and they operate under a congressional charter (Case p. 682). They therefore offer a “quasi-public service.” He did not accept that the California legislature would have intended a major public event such as the Olympic Games to be free to discriminate against a class of participants on the basis of protected characteristics. In addition, he was not satisfied that the IOC had presented compelling social justifications for female exclusion. As a result he concluded that the opportunity to tip the scales of justice in favour of equality may have slipped away. Pregerson’s dissent reinforces the idea that sport is not a vacuum and the law of the land applies.

The difficulty of determining the appropriate level of intervention may be responsible for the host of contradictory messages throughout these unjustifiable decisions, which represented a legal struggle to intervene in sporting matters, even though there was an identification of discriminatory practice (Patel, 2010c). In *Sagen* and *Martin*, there was a reluctance to intervene in matters where there is obvious discrimination which arguably contravenes a country’s wider obligation under universal equality policies (Brown and Connolly, 2010 p. 13). However the lack of legal pressure on cases involving the activities of the IOC may be for political and economic

reasons (Patel, 2010c). The courts may have been compelled to maintain strong links for future Olympic opportunities in their respective nations. The Olympic Games as a product provides the IOC with significant power and authority to exercise a regulatory function as a private entity, and essentially apply whichever rules they wish, even if this means that they are operating in a manner that is not accountable to fundamental norms such as human rights and equality. For instance, gender verification policies including sex testing, rules regulating technical devices and drugs testing reveal the power that they have on imposing sanctions upon athletes. The approach of the courts has been to generally delegate power to the governing bodies to deal with sporting issues. However, this responsibility is dependent upon power being exercised in good faith.

In contrast to the evidence based approach in the justifiable categories, in *Bennett* and *Olinger*, medical evidence was ignored by the courts to exclude the athletes. In light of research led developments by cases such as *Crutwell*, it can be assumed that *Bennett* was incorrectly decided. Similarly, following the *Casey Martin* decision, it has been suggested that *Olinger* was also decided incorrectly. As the dissent in *Equal Authority* highlighted, to argue that the principle purpose or essence of golf is something other than golf would be considered “preposterous” (Case p. 66). After the unjustifiable decision in *Ganden*, NCAA core course requirements were altered to ensure that athletes with learning disabilities who met the requirements under special conditions were eligible.

In the absence of justifiable reasoning for exclusionary rules and practices, it could be argued that participation is based only upon cultural and traditional assumptions about suitability to sport as reflected by the disproportionate representation of some minority black and south Asian athletes. This is reinforced by the placement of the non legal intersex cases in the unjustifiable categories (*Soundarajin*, *Semenya* and *Patino*). Although *Semenya* and *Patino* were eventually included, their treatment was unjustifiable because they were forced to undergo sex testing. The general sport and regulatory approach to intersex individuals fails to accept the natural variations to sex and gender as we have highlighted. Whilst no cases have appeared before the courts on this issue, if sex testing were to continue it has the potential to infringe fundamental international, regional and domestic human rights legislation, specifically concerning dignity, privacy and discrimination on the basis of sex. Legal provisions would need to explicitly protect intersex individuals in their wording.

Similarly the non legal race cases of *Mohammed Patel* and *Asmahan Mansour* have the potential to infringe human rights legislation because of the lack of clarity surrounding the relationship between the objective of protecting the safety of the athletes and the practice of limiting the individual's right to manifest their religious beliefs and cultural values. Although the LPGA rule has been retracted, if any version is implemented then it is also likely to face successful legal challenge because of the lack of justifiable reasoning for discriminatory practices.

Table VII and Figure 5 demonstrate that whilst most decisions are acceptable and justifiable, a large majority lack any justifiable reasoning. This indicates that there are serious issues within inclusion and exclusion in sport that need to be addressed.

Arguable/Either Way Decisions

Although no neutral cases exist, the balance between inclusion and exclusion is not entirely simple since 18.1% of the decisions are arguable/either way, which are neither justifiable nor unjustifiable. This suggests that a case by case, individual, evidence based approach is not always workable.

For instance, whilst the court continued to follow an inclusionary, interventionist agenda in *Couch* and *Richards* finding that the sports bodies had infringed discrimination legislation and unlawfully excluded the athletes, the decisions are not entirely justified because the courts disregarded valuable scientific and medical evidence that was used to justify the sports rule excluding them. Instead, the fundamental rights of the athletes were prioritised. In *Ferneley*, although an opposite outcome to *Couch* was reached, there was also little consideration of the safety issues raised by Boxing Authority. As discussed above there may be reasonable grounds to exclude a female specifically from boxing, or a transgender individual from participating as a female and this should be explored in more detail than was provided in these cases.

A balance is also difficult where the unfair advantage of an athlete is very difficult to ascertain. All of the transgender cases (*Richards*, *Bagger*, *Dumaresq*, *Lawless*) fall within arguable/either way inclusion (57.1%). The participation of transgender athletes continues to be a grey area because it is difficult to make a determination about the residual advantage that they may possess

and although the golf and cycling governing bodies have rightly recognised the birth certificates of transgender athletes, their inclusion in sport is difficult to place.

It is difficult to determine whether a case by case or average approach should be taken to advantage issues as raised in some disability cases. In order to determine whether a sports body can be held accountable under the US ADA, the courts interpreted the meaning of discrimination under the Act. Sports bodies would not be held accountable where the entity can establish that making modifications would fundamentally alter the nature of the game. The court in *Casey Martin* identified that in some circumstances a reasonable accommodation may change the nature of the activity or provide the competitor with an advantage. For instance, in *Kuketz* it was held that a two ball bounce is likely to alter an essential aspect of racquetball. The courts have generally approached this by identifying the essence of the sport in question and whether inclusion would alter this essence and constitute a fundamental alteration. Valuable dialogue emanated from these considerations, concerning the intrinsic and extrinsic rules of sport.

However, this has created inconsistencies because a case by case approach demands a high degree of subjectivity, as illustrated by the opposing decisions of *Casey Martin* and *Olinger*. An “average” approach to age rules was instead taken in *Sandison*, *McPherson* and *Pottgen* to exclude athletes with an intellectual disability because it was argued that an individual approach places undue burden on sports bodies to make impossible determinations about an athlete’s ability. *Cruz* and *Dennin* are justifiable decisions because the individual approach revealed that the athletes would not be advantaged by competing in a lower age bracket. However, from a sport perspective it is reasonable to assume that making these determinations accurately are difficult.

Instead, an “advantage approach” which is based upon scientific evidence, may be more suitable where advantage can be proved or disproved or is unsubstantiated as evidenced by the justifiable categories. However, proving or disproving advantage in a consistent manner is complex as reflected by the non challenged cases of *Sun Ming Ming*, *Phelps*, *Thorpe*, *Tiger Woods* and *training devices* such as hypoxic chambers. All are included in sport even though there may be presence of an unfair advantage. However, they are not challenged whereas, rightly or wrongly, other cases such as *Pistorius*, *Muralitharan*, *Casey Martin*, *Hunter Scott*, *Schultz*, *Lafler*, *Kuketz*, *Speedo*, *Olinger*, *Caster Semenya*, *Santhi Soundarajin*, *Patino*, *Ganden*, *Sandison*, *McPherson*

and *Pottgen* have been closely examined. What is viewed as natural and therefore accepted in sport continues to drive this.

Level of Regulation

		Justifiable Decisions	Arguable/ Either Way Decisions	Unjustifiable Decisions	Total (%)
Domestic Level	Sport	6%	0%	0%	6%
	Law	40%	10%	17%	67%
Regional Level	Sport	0%	0%	0%	0%
	Law	2%	0%	0%	2%
International Level	Sport	4%	6%	13%	23%
	Law	2%	0%	0%	2%

Table VIII: The percentage of decisions made by sports governing bodies and the law

Having identified, through Figure 5 and Table VII, the problems and issues that tend to be occurring in this area, Table VIII draws upon these tools to identify the level at which decisions are being made. It locates the percentage of justifiable, arguable/either way and unjustifiable decisions that took place at a domestic, regional and international level of sport or law regulation. Omitted from this analysis are *Speedo Swimsuits*, *Sun Ming Ming*, *Michael Phelps*, *Ian Thorpe* and *training devices*, *minority black athletes* and *minority South Asian athletes*. 52 cases are therefore represented in this table.

The table shows that the majority of cases from the sample were decided in domestic UK, US, Australian and Canadian courts (67%), with 40% of the decisions represented as justifiable. At the international level it would appear that ISFs including FIFA, IOC, IAAF, ICC, LPGA, ICU and the CCU have decided 23% of the cases. However, over half of these have resulted in

unjustifiable decisions (13%). The CAS decision in *Pistorius* is positioned as international law because it operates as a court.

Table VIII reveals that only 1 case has been decided at the regional level and this concerned school PE as opposed to competitive sport (2%). There appears to be little activity at this level of regulation.

Summary

This chapter has analysed the regulatory approaches to inclusion and exclusion by cross analysing the sample of sex, gender, disability and race cases. Using Table V, Table VI, Table VII, Table VIII and Figure 5, this chapter has drawn out the key themes;

Sports Rules and Practices

The construction and application of intrinsic and extrinsic sports rules and practices concerning inclusion and exclusion often seek to protect the essence of sport. These include rules concerning categorisation, performance advantage, safety and the sporting culture. These have evolved over time and become part of the traditional structures of sport. Such rules can be restrictive and differentially treat individuals on the basis of their physical and non physical differences. When challenged, the justification for these restrictions is to achieve the objectives of preserving competition, match ability and ensure safety in competition. In other words, fundamental freedoms are restricted in order to protect the essence of sport. The objectives for restricting athletes on the basis of sex, gender, disability and race do carry some legitimacy. However, legal and non legal cases have arisen partly because of the inconsistency of application of the rules, the ambiguity of the wording of the rules, the lack of certainty of the intention of sports governing bodies and the mis-use of human differences. In addition, not all rules are directly related to the sport objectives. Sport has responded positively in some circumstances, displaying a willingness to adapt or modify their rules to reflect modern sport and to incorporate modern understandings of human difference. Where there has been a threat of legal action by some athletes, sports bodies have also been more willing to make exceptions to their rules to include an athlete.

Regulation and Decisions

Where cases have resulted in legal challenges, the role of the law across the four areas has been to interpret some equality legislation to determine whether sport is compatible with it and to assess the validity of intrinsic and extrinsic sports rules. The compatibility appears to rest upon the interpretation of the provisions of the legislation and the jurisdictional capacity of the court. Consistent with the rather poor construction of sport rules, the construction of sport exemption clauses in equality legislation has similarly been vague. The courts have been responsible for interpreting the wording of the provisions to give effect to the intention of Parliament and to determine when it is appropriate for sports bodies to rely on the exemptions. In most cases, this has been executed in a thoughtful and balanced manner that draws upon intrinsic and extrinsic material and looks at the overall purpose of the legislation.

Table VIII demonstrates that the domestic law courts appear to be dealing with the majority of cases concerning inclusion and exclusion. The domestic courts have gone some way to rectify some of the ambiguous provisions. These cases have produced useful commentary on the appropriate balance between inclusion and exclusion in sport. There is also evidence of ISFs managing cases at the international level but most of these decisions appear to be unjustifiable. Little activity appears to be taking place at the regional level. There is no evidence of an effective toolkit for managing inclusion and exclusion in sport or law regulation.

When analysing intrinsic and extrinsic sports rules, the courts have generally considered whether the restrictive sports rule or policy satisfies an important sport or government objective, is proportionate and is directly related to that objective in order to determine its validity and compatibility with equality legislation. There has been a general trend towards adopting a case by case, evidenced based approach to assessing the rules of sport. Collectively this has led to a complex evaluation of the sports rule, policy or action which reflects a commitment to balancing inclusion and exclusion. However Figure 5 reveals that there are limitations to this approach as evidenced by the small percentage of arguable/either way decisions. Some sex, gender and disability cases of inclusion and exclusion are difficult to place and agree a balance between the sporting interest and fundamental right of the athlete.

A consistent theme across all of the legal cases is the number of reversed decisions by higher courts, dissenting opinions in the judgments and split decisions. Within some of the cases this has led to contradictory judgments. Across the cases this has resulted in a lack of clarity on when it is

appropriate for the law to intervene in sporting matters concerning inclusion and exclusion. Overall, this variation highlights the complexity involved in balancing inclusion and exclusion in competitive sport.

Finally, judgments have tended to limit the extent to which they address issues of inclusion and exclusion beyond the confines of what is strictly necessary to deal with the case at hand. One significant limitation of the law lies in its ability to control the influence of social and sporting attitudes and culture upon the formation and application of sports rules, participation and attitudes in sport.

Chapter 11: Conclusion and Recommendations for Regulatory Reform

Having identified the regulatory toolkit available for dealing with inclusion and exclusion in Part One, evaluated its application through the cases in Part Two and identified the areas of good practices and deficiencies in current practice in the previous chapter, this chapter considers proposal for reform. The final stage of this thesis will fill a gap in the literature by formulating regulatory recommendations for overcoming deficiencies and striking a balance between inclusion and exclusion. A practical template for reformative action will be proposed for sports bodies to engage in and adapt within their sports. Underpinning this will be recommendations for effectively regulating the balance through appropriate levels of governance and with relevant legal instruments. The findings in the previous chapter highlight an absence of an appropriate toolkit for managing inclusion and exclusion. In order to rectify this, a menu of options for engagement and intervention will be offered in the pursuit of better regulation in this area.

As far as possible, a universal approach is proposed to ensure that human similarities and differences are treated with due respect. A universal approach does not advocate for a totally equal world as Justice Scalia feared in *Casey Martin*. This thesis accepts that there will continue to be over representation and under representation in sport because of the essence of sporting activity. The aim of this chapter is to propose recommendations that will provide a case for participatory parity.

The Ladder of Sport Regulation

Taking into consideration the theoretical discussion of law and regulation in Chapter 4, a ladder of regulatory proposals are offered, ranging from a less intrusive autonomous approach to sport, to an interventionist legal regulation of inclusion and exclusion. Table IX presents an overview of this recommendation. This model is referred to as “responsive regulation” where a hierarchy of regulatory strategies are offered, from a least intrusive intervention towards enforcement actions of increasing severity (Harlow and Rawlings, 2009 p. 242). The aim of the model is to improve regulation in this area by protecting sporting interests and exploring ways to avoid legal challenge, whilst at the same time having respect for the values of human rights and equality in sport. Consistent with Foster (*in* Greenfield and Osborn, 2000 p. 269) the model might be

representative of a “Socio-Cultural Model” of sport which stresses the social and cultural significance of sport and seeks to preserve sporting values with due process and good governance. However, it is not purely autonomy orientated and instead seeks to find a balance.

Table IX: The Ladder of Regulation

Level of Regulation/Intervention	Detail and Benefits	Drawbacks
1. Laissez-Faire	Least intrusive, best practice approach through codes of practice, education and awareness within ISFs. Little cost or time required.	Sport bodies unlikely to engage with this. Little understanding of these issues.
2. Internal Audit Approach	Guidance policy approach through the IOC/FIFA. Host conference, workshops to encourage sports bodies to conduct a sports audit, share knowledge, provide support.	No enforcement mechanism if sports bodies refuse to engage. Only succeeds if all bodies agree.
3. Regulatory Approach	Establish the IADSU- focus on rule formulation, monitoring and inspection, enforcement and sanctions in the fight against discrimination in sport. Supported by the IOC, UNESCO, the Council of Europe.	Only succeeds if all bodies agree, could be costly and timely. Balance between equality and specificity of sport.
4. Legal Intervention	Public accountability under domestic, regional and international law. Engagement of equality bodies.	Expertise of balancing sport with equality. Public versus private debate.

Laissez-Faire Approach

Good regulation thinks small scale first in order to minimise costs of compliance (Harlow and Rawlings, 2009 p. 248). As a minimum standard therefore, it is proposed that the balance between inclusion and exclusion is left to the ISFs themselves to manage, since they possess the necessary knowledge and expertise in their sport(s). The findings have demonstrated some good responses to issues of inclusion and exclusion by sports bodies, without the need for any legal intervention. To support this, they could additionally offer guidance within their sports for best practice in this area by formulating local codes of practice or rules of respect and raising awareness of human differences through education and training programmes for staff and athletes. This would be least intrusive, place little burden on sports bodies and would have minimal cost implications.

However, without any monitoring it is unlikely that they would engage with this process since, as we have established throughout this thesis, sport has little understanding of the issues surrounding inclusion and exclusion in sport. They may not have the expertise to deal with this “in-house” and are more likely to refuse to accept that their sports need to balance inclusion and exclusion more effectively. If there was engagement with this level of regulation then it may create positive conditions for participation. However, the previous chapter reinforced that the problem lies with some of the rules of sport.

Internal Audit Approach

Instead, an internal audit approach could be adopted. It is proposed that the IOC, in its capacity as a world governing body for sport, organises and hosts a series of conferences and workshops to encourage sports bodies to conduct a “sports audit.” A sports audit is a process by which sports governing bodies and decision makers in sport review all rules and practices in their sports that concern inclusion and exclusion. The purpose of this process is to identify restrictive rules, ensure they are justified and necessary and amend where appropriate. Sport bodies should be encouraged to be mindful of the cases that have been presented in this thesis to ensure that rules do not unnecessarily exclude women, intersex, transgender, disabled individuals and particular racial populations. The IOC could adopt this role as a commitment to the principles of the Olympic Charter.

Specifically, the audit seeks to provide a clearer sense of how rules concerning categories, advantage, safety and culture should be constructed, applied and regulated. The aim of the audit is to enhance the essence of sport by ensuring that eligibility and selection rules which seek to match ability, preserve competition, ensure safety, provide the best possible entertainment, generate revenue, maintain traditions and sporting cultures, do not unnecessarily exclude minority individuals. The audit is an opportunity for sports to review the foundations of their sports and re-align them with modern sport and society. This may necessitate a number of amendments to rules and regulations to ensure a better balance between inclusion and exclusion. At the series of conferences and workshops, the IOC could assist sport bodies in focusing on specific aspects of their rules and practices;

Categories

The sports audit will encourage a review of sport categories in light of the cases presented, to reflect an informed, modern understanding of human differences. It is proposed that the division of mixed sex participation should be upheld where strength is a determinant factor of the sport that would result in imbalanced outcomes and threaten safety. This would demand a review of the essence of particular sports to determine whether strength plays a crucial role. Sex divisions should certainly not apply to *all* contact and non contact sports. It is proposed that, where possible, a non gendered approach should be taken to categorisation so that human differences between individual athletes can be evaluated more accurately (Reaves, 2001 p. 11). The issue that needs addressing is whether sex and gender is a relevant classification in sport and if it is, it is necessary to closely consider how we determine this. This is supported by Ballantyne, Kayser and Grootegeed (2011) who argue that there is a need to provide an objective and relevant criteria to evaluate what separates men and women in sport.

This thesis reveals that the imposition of age categories in sport may not be an accurate indicator of matching ability and ensuring safety, particularly when there is not always correlation between age and physical ability. It is therefore proposed that an individual approach should be adopted in cases concerning mixed sex participation amongst children, and athletes with intellectual disabilities. However, this needs to be underpinned by scientific evidence and should not place unreasonable burdens upon the sports body to make determinations about physical or intellectual ability.

The rules dividing disabled and non disabled sports concern legitimate practical issues of integration when a disabled athlete attempts to compete in non disabled categories which were not necessarily designed for them. However, these considerations should be evidence based, rather than being driven by broad generalities and applying stereotypical assumptions about the capabilities of disabled athletes. It is likely that the main challenges to these categories will be the acceptance of the use of technology in sports. Athletes such as *Pistorius* and *Hunter Scott*, prompts a new way of thinking about human beings that should be encouraged in the sports audit.

The invisible categories of race are difficult to audit since they occur unconsciously and are embedded within the sport Doxa as we shall discuss further shortly. However, if sports rules are constructed accurately, transparently and achieve legitimate objectives, it is anticipated that this

will lead to a more precise use of human differences when drawing lines in sport. Overcoming inclusion and exclusion on the basis of race is concerned with creating an open environment where populations do not feel restricted from competing in sports because of their background or culture.

A sports audit may draw sports bodies to conclude that human differences should be categorised along alternative lines such as hormone levels and functionality rather than sex and gender, disability, age and race. For instance, consistent throughout the thesis is the reliance on the level of male producing androgens (testosterone) as an indicator of athletic success. Although this assertion is not entirely accepted, the grouping of athletes according to their hormonal balances may create a more suitable arena for the balance between inclusion and exclusion in sport. WADA has introduced the Athlete Biological Passport which aims to monitor selected biological variables which may indirectly reveal the effects of doping (WADA, 2010). This will develop an individual and longitudinal athlete profile. The current variables that are capable of immediate measurement are blood components which are referred to as the “haematological module” (WADA, 2010). It is stated that as future research develops, it may be possible to develop an endocrine module and steroid markers also. It is anticipated that the passport will provide a more accurate measurement of athletes variables, in contrast to the traditional approach of being measured against norms in the population at large (WADA, 2010). Cooper (2010 p. 262) proposes that sports bodies should design and implement policies that address the treatment of athletes, handling of private information and determination of participation. This demands a consideration of a much wider range of factors which determine human differences.

Another approach to categories could be the focus on functionality, as adopted in disability sports. The WHO introduced the International Classification of Functioning, Disability and Health in 2001. This is a multi-purpose classification system aimed at establishing a common language for describing health and health-related states in order to improve communication by providing a scientific basis (WHO, 2001). The ICF classifies using the following;

Part 1: Functioning and Disability

- a) Body functions and structures
- b) Activities and participation

Part 2: Contextual Factors

- c) Environmental factors
- d) Personal factors.

This system shifts the focus of disability by acknowledging that every human being can experience some degree of disability. It mainstreams the experience of disability as a universal experience and compares all health related issues by adopting a common approach. Perhaps this model of classification could be adopted across sport also.

The literature offers other recommendations such as ranking according to height, weight and strength (Capel and Piotrowski, 2000 p. 28; Burke, 2004 p. 178), and also introducing a new category where there is no restriction on the use of technologies to encourage the development of creativity and innovation through the trial of technologies in sport (Burkett, 2010 p. 219). It may be the case that the sports audit will encourage the introduction of new forms of sport (Francis, 2005 p. 128; Lenk, 2007).

Realistically, it is unlikely that these categories will be entirely abandoned in our lifetime. Resolving category issues in sport will have serious implication on the economic value of sport (Francis, 2005). However, re-thinking categories of sport will at least begin to challenge the concept of the human body and the sporting body and acknowledge the existence of changing times (Nixon, 2007 p. 421). The sports audit encourages sports bodies to begin to at least review the categories of sport under modern regimes. From a conceptual point of view, Kane (1995) has led the movement towards overcoming categories within sport by viewing sport as a continuum. Kane argues for the deconstruction of categories that are based upon biological determinism in an effort to reflect how gender relations are instead socially and historically constructed (Theberge, 1998). This is certainly not a call for inclusion since it is accepted that it is important to respect choice and context when defining the balance between inclusion and exclusion (Theberge, 1998 p. 196). Rather, this is a proposal for an alternative way to perceive sport that is applicable across all four areas.

Rules Regulating Advantage

The objective of regulating advantage in sport is integral to the essence of sport as highlighted throughout this study. In response to the findings of this thesis, the audit encourages sport to

construct rules that precisely define the scale of advantage in their sports including the conduct that is to be regulated, as well clear definitions of key terms (adapted from Solomon, Mordkoff and Noll, 2009 p. 256). Definitions of fair, unfair, advantage, natural and artificial are not currently available within the construction of the rules. The sports audit aims to ensure that when these words are used, they are defined in the context of the sports in which they exist. It is proposed that a workable scale is produced which would indicate a fair or unfair advantage. This is constantly changeable but it is necessary to formulate a policy that is capable of producing consistency. A clearer definition will ensure that all potential advantages are reviewed.

The audit will encourage sports bodies to review the scale of natural and artificial advantages in their sports to better reflect significant developments in science and technology. Sports bodies should employ rules that are based upon current scientific knowledge when regulating advantage rather than selectively tolerating particular forms of advantage. Regulatory bodies in sport and the law need to rely on “good science” to determine advantage in sport rather than stereotypes and irrational fears of minority groups such as women, intersex, transgender and disabled athletes (Cooper, 2010 p. 262). Relying on accurate scientific knowledge will at least ensure that rules are consistently applied to natural and artificial advantages and minimise the subjectivity involved in determining what is considered natural or unnatural in sport. Perhaps standards of normality need to change and a revision of the nature of the athlete is required to reflect the natural and technological realities of modern sports participation (Van Hilvoorde and Landeweerde, 2008 p. 98; Reaves, 2001). Dreger (2009) posits that rules are developed which combine genetics, endocrinology, anatomy and psychology. Mestre (2009) proposes that the rules of sport should be clear, uniform, and adapted to modern conditions and priorities.

There is already evidence of good practice from the IAAF, FINA and the Royal and Ancient Golf Club to review rules and provide more clarity in the regulation of inclusion and exclusion for minority individuals. Revised policies have shifted from exclusion to participatory parity, and wider consultation has been made with external experts in the fields of medicine and science when constructing the rules. Sport is moving towards a case by case, instead of an average approach to advantage issues.

For cases such as transgender, which are very difficult to place, the audit will encourage sports bodies to determine the levels of acceptance that are reasonable to pursue. On this point, it is proposed that within the rules a clear distinction is made between intentional and unintentional advantages in sport in order to shift the level of acceptance. Policies regulating advantage tend to be in place to prevent cheaters and intentional acts that threaten the integrity and essence of sport. This thesis has revealed that such policies tend to have a diverse effect on innocent athletes who unintentionally possess an advantage such as some female, intersex, transgender and disabled athletes. Departure from the strict approaches to advantage in sport is necessary in some cases to appreciate the reality of “widespread biological and environmental inequality” (Kayser, Mauron and Miah, 2007 p. 2). The WADA Code permits a TUE for acts that are therapeutic. Although the application of this exemption has been subject to debate, it is a useful starting point for the appreciation of unintentional advantages in sport (WADA, 2011). Sports bodies should consider revising their rules related to the regulation of natural and artificial advantages deriving from innocent athletes. The amended IAAF and Royal and Ancient Golf Club rules provide more clarity and balance in this regard.

It has been suggested in the literature that unintentional advantages may be more accepted if a certain level of intentional advantage was also permitted in sport. Savulescu and Foddy (2010) express that “we have two choices: to vainly try to turn the clock back, or to rethink who we are and what sport is....performance enhancement is not against the spirit of sport, it is the spirit of sport. To choose to be better is to be human.” A number of writers have called for a revision of the WADA Code to accept a certain level of doping. One approach is to construct the Code along the lines of the health and risk of the athlete so that the focus is controlled use of drugs and harm reduction (Hard, 2010; Savulescu and Foddy, 2010; Kayser *in* Anderson, 2010; Kayser, Mauron and Miah, 2007). Having interviewed a number of medical professionals, Dreger (2009) proposes;

- 1) Measuring functional testosterone, so the level of effect of testosterone on the body.
- 2) Use the ratio of androgens to estrogens
- 3) Development of rules that combine genetics, endocrinology, anatomy and psychology.

These recommendations are subject to debate and would require much more thought than is available here, but they do begin to address inconsistencies in the current sport regimes.

Safety

The precautionary principle is a significant sport and society objective. In circumstances where safety is threatened, priority must be given to the protection of sport and exclusion will be deemed justifiable. This exclusion is necessary and legitimate to maintain the essence of sport. The sports audit adopts the legal approach to safety objectives and proposes that any safety rules pursue legitimate aims, are proportionate and are directly related to the aims when constructed and applied. There should be more neutrality in how the rules are applied and who they are applied to. As highlighted, matching ability and ensuring safety should be the focus of the precautionary principle. Sports bodies should be prepared to justify exclusionary rules which will encourage a better connection between the requirements and the purpose of rules (Weston, 2005 p. 163). When the rule is correctly applied, it will lead to justified inclusive or exclusive outcomes as Figure 5 demonstrates.

Managing the Sporting Culture

The sports audit proposes that the implicit norms upon which rules are based are shifted to better reflect modern sport and society. Although traditional cultures and norms form an integral part of the essence of sport, this thesis have revealed that many of these standards unconsciously operate to exclude athletes who are perceived to be unnatural or abnormal and unsuited to sporting activity. With this in mind, the sports audit will ensure that inclusion and exclusion is determined by legitimately justified rules instead of only driven by the sporting culture.

Culture provides a context for sport but should not determine participation by itself. Sport deserves historical continuity as traditional customs certainly forms part of its essence. However, there must be a process of accountability when those traditions are inaccurate and also being used to treat individuals derogatorily. In order to avoid unnecessary under representation and discrimination, extrinsic matters to sport concerning our sex, gender, disability and race should not be used to decide whether or not athletes are eligible to compete. Internal sporting matters concerning human differences should be evidenced based and truthful. A more “intellectually honest approach to sport” is required to manage the sporting culture (Buzuvis, 2011 p. 39).

Regulating and managing culture is very difficult because of the unconscious and invisible nature of some of the issues emerging from the sport culture, as we have seen in cases concerning race. In order to overcome this, the sports audit seeks to encourage sports bodies to take more responsibility for the cultures that surround their sports in order to produce a better balance between inclusion and exclusion in sport. This will ensure that sports bodies are operating with transparency and awareness in their sports.

The ability of sports bodies to change social attitudes and challenge stereotypes about human differences which may no longer be accurate, will take time and require patience as social tides shift. Nevertheless, the sports audit prompts a proactive rather than reactive approach to inclusion and exclusion in sport. In terms of overt racial abuse, the social dimension of the EU White Paper proposes that sports bodies “have procedures for dealing with racist abuse during matches, based on existing initiatives. It also recommends strengthening provisions regarding discrimination in licensing systems for clubs” (European Commission, 2007 p. 8). In sports such as football, a license is required for a club or team to participate in the competition. The primary aim of licensing systems is to raise the standards of good governance in professional sports, increase financial transparency and ensure competitive balance (Hill, 2009 p. 259). In order to gain a license certain criteria needs to be met, relating to safety for instance. It is recommended in the White Paper that amongst others, provisions regarding discrimination are also included in these criteria (European Commission, 2007 p. 53). This is reflective of the idea that the eradication of choice from the process of exclusion may be a way to deal with this and seems to be a fair recommendation to employ.

To briefly summarise, the sports audit advocates that the balance between inclusion and exclusion in sport should be based upon the liberalistic ideology of rationalism, which is associated with behaviour and actions that are based upon reason and principle, rather than a reliance on custom or tradition, or non rational impulses (Heywood, 2003 p. 33). Performing a sports audit of the nature and purpose of sport itself will enable sports bodies to evaluate how appropriate sports rules are in a modern society (Stone, 2005 p. 389). Truth and transparency is required to purify the sporting culture and the essence of sport. The overarching aim of the sports audit is a philosophical one- the re-construction of sports rules that are based upon truth about human differences, and the application of those rules from a truth perspective (Patel, 2011). In order to achieve this truth, sports bodies need to rely on “good science” to determine eligibility

and perhaps broaden its definitions of human beings to accommodate for the wide range of people that are born in society (Cooper, 2010 p. 262; Marshall, 2009).

The conferences and workshops would assist in the co-ordination of efforts to engage with the sports audit as a check and balance of sports rules. There would be some costs associated with this but the sports audit could be attached as an additional agenda item to existing conferences.

However, without any enforcement or monitoring mechanisms at this stage, it seems unlikely that sports bodies will actively participate in this process and agree to undertake an audit of their rules. Furthermore, based on the findings of this thesis, it is possible that ISFs alone may not be equipped to manage this process since they often misunderstand the issues involved. The achievement of a balance between preserving sporting values whilst respecting law and equality principles may be difficult within these first two levels of the ladder because of their internalised self regulatory nature.

Regulatory Approach

The preferred approach to striking a balance to inclusion and exclusion would be the establishment of an International Anti-Discrimination in Sport Unit (IADSU) who would act as an enforcement body for the fight against discrimination in sport. A compliance unit has also been proposed by Carr (2009 p. 175), and the European Commission have made references to engaging in a fight against discrimination in sport (European Commission, 2011). Responsive regulation should involve rule formulation, monitoring and inspection, and at its heart, enforcement and sanctions (Harlow and Rawlings, 2011 p. 238).

The idea of a body specifically designed to focus on inclusion and exclusion is adopted from the successful WADA model. The universal agreement to combat doping in sport has led to the creation of a uniform standard of agreed articles and provisions across sport (David, 2009 p. 3). WADA functions by agreement, which has been described as a body of “soft” international law even though this is not a legal body (David 2009 p. 40). The “by agreement” approach tends to be adopted to bring about a common approach in a particular area of activity. It is proposed that the IADSU would function in this way because it would involve a voluntary agreement under the rules of a private organisation, which could reduce intervention from the law. At the same time,

there is potential for the law to play an important role in the fight against discrimination in sport (see below).

It is proposed that the IADSU follows a similar path to WADA and is initially set up by the IOC since they could earmark necessary funding for the body and also have the power to enforce this type of body upon sport globally. Former WADA president Richard Pound recently announced whilst on the subject of corruption in sport, that the IOC could have the “highest impact, since it is generally recognised that, even though the IOC has had its own failures of governance on occasion, it is nevertheless the world’s leading proponent of ethically-based sport and the important of ethical values as an essential element of the overall social contract” (Pound, 2011 p. 5). The body would be managed by the IOC but comprise of representatives from different sports, and engage with experts in the fields of equality, law and regulation, social sciences, science and medicine and sport.

Currently, 50% of WADA funding is provided by the IOC with the rest split between national governments. WADA president John Fahey has called for the body to diversify funding streams since it has been affected by the economic down turn (Cutler, 2012). He suggested that “the global sports industry is not short of money; perhaps it should now assume greater responsibility for protecting itself against drugs and consider a greater contribution to the fight against them” (Cutler, 2012). It is fair that if sports bodies wish to combat discrimination in sport then they should collectively assume the financial responsibility of setting up a body to deal with this. It is accepted that this will not be a cheap process and WADA has taken a long time to develop and refine its anti-doping programme. However, given the irregularities in the case decisions analysed, there should be a commitment to this movement.

The key objective of the IADSU would be to harmonise sports rules concerning inclusion and exclusion in order to combat discrimination in sport. This could be achieved by the body taking on the responsibility of conducting the sports audit across sports. This inspection of rules would follow five criteria;

1. Identify and clarify legitimate objectives of the essence of the sporting activity.
2. Review the construction of rules so that the wording is clear and unambiguous, the rule directly relates to the objectives, and understandings of human differences are accurately interpreted within the rules.

3. Ensure that the application of the rules are, where appropriate, consistent and fair across the areas of sex, gender, disability and/or race, as well as across other comparable areas.
4. Adopt an evidenced based approach to any inclusion or exclusion of athletes.
5. Justify the rules against legal standards.

The concept of an audit is not new and is also recommended by Anderson (2010) in the context of sports disciplinary processes. He offers general guidelines for national sports bodies to effectively “stress-test” their mechanisms “against the standards of fairness and equity recognised by Article 6 ECHR [right to a fair trial], thus avoiding arbitrary, capricious and challengeable decision-making” (p. 111). With this in mind, the IADSU could audit sports rules to ensure compliance with equality standards such as non-discrimination. These legal principles should underpin the function and purpose of the IADSU.

The principles of the sports audit are similar to the general rule of law. Sports governing bodies should not operate beyond the rule of law when constructing and exercising their eligibility rules and selection criteria for participation. Consistent with Grayson, since sport occupies an important part of social space, it should recognise that it has public responsibilities towards society when drawing up and exercising eligibility rules or selection criteria for participation (Hill, 2009; Grayson *in* Gardiner *et al*, 2012 p. 70). The rule of law can therefore be a helpful tool for governing bodies as highlighted by Finnis (2011 p. 272). He describes the utility of the rule of law in other fields, such as consumer-supplier relations to not only minimise harm or loss for an individual, but providing a quality of clarity, certainty, predictability, trustworthiness, in the human interactions of buying and selling. It is important to use and apply the rule of law in a way that does not damage the essence of sport and the features of sport that we have demonstrated a valuable to its character and existence.

The audit criteria form the basic principles of an IADSU anti-discrimination code of conduct, which would also achieve the key objective of harmonisation (Harlow and Rawlings, 2009 p. 193). Sports organisations could sign up to the code of conduct by agreement. WADA require full compliance with their Code by signatories who are the international federations of Olympic sports. These bodies must amend their rules to accept the Code, which is monitored by WADA. National sports organisations become bound through their membership to other organisations

which are signatories. Individual athletes become bound by the Code when they agree to the terms on which an event is held at international or national level. There may still be a connection to state authorities when enforcing criminal law or customs legislation (David, 2009). For the IADSU, the IOC has the power to enforce agreement to a code of conduct by making it a condition of participation into Olympic events and competitions. Failure to comply could impact upon inclusion to these sporting events.

A second key objective would be enforcement and sanctions, which distinguishes this level of regulation on the ladder. The IADSU would, by agreement, have powers to enforce changes to rules which are unjustifiable, impose penalties on sports bodies for non compliance with the code of conduct, and instruct certain standards of behaviour. In addition, the body could investigate cases of unreasonable exclusion which can then lead to a route to CAS (David, 2009). As mentioned, CAS plays a central role in ensuring that there is a consistent process for investigating and hearing doping violations throughout the world of sport. This could also be possible for discrimination in sport. In the *Pistorius* case, CAS provided a balanced and independent view on rules which impact upon inclusion and exclusion in sport. Despite some decisions not to hear “in game” rules to which issues of inclusion and exclusion might relate to, CAS are prepared to intervene if rules are considered discriminatory or arbitrary. They are willing to hear any dispute or activity related or connected to sport (CAS, 2012 R27).

What makes the WADA model persuasive is its support from governments and the law as highlighted in Chapter 4 (David 2009 p. 3). The UNESCO Doping Convention contains general provisions by which the states commit themselves to take steps to support the principles and regime of the WADA Code. David (2009 p. 52) highlights that “State failure to meet its obligations under the Convention (a matter which might be difficult to establish) could lead to a reference to the conference of the parties to the Convention. Non compliance with the Code by signatories may lead to steps being taken by WADA under the code itself in its role of monitoring compliance with the Code”. Furthermore, the Doping Convention also reconfirms the commitment of governments to fund half of the WADA budget (WADA, 2009). Since UNESCO is also committed to the fight against discrimination (UNESCO, 2012) it would be reasonable to propose that they support the IADSU through the enactment of an anti-discrimination in sport convention. This could be underpinned by the relevant principles of the UDHR. Sport is moving towards this in relation to corruption and match fixing as we shall see below.

It must not be forgotten that despite the public significance of the WADA Code, its legal enforceability derives from the universal agreement to commit to the Code. It functions as a contractual arrangement by which sporting organisations and associations regulate themselves (David, 2009 p. 83). Ensuring this universal commitment to the fight against discrimination will present a challenge to this proposal. It is unlikely that an anti-discrimination movement would take place currently because governing bodies, the law and society generally is unwilling to confront the issues presented in the sports audit with any real transparency. As highlighted, there is a general lack of awareness of any imbalance between inclusion and exclusion in sport amongst governing bodies.

A final objective of the IADSU therefore, is to offer education and training to sports bodies and athletes, about inclusion and exclusion in competitive sport and physical and non-physical human differences. Training could be offered to educate these groups about the importance of equality and how key legislation might apply to their sports.

David (2009 p. 7) highlights a number of challenges that WADA face. These surround the problem of producing harmonised standards, consistent application and interpretation of the Code provisions, and consistent decision making by tribunals around the world. Furthermore, despite significant devotion to education about doping for athletes, coaches and advisors, there continues to be ignorance in this area. It is accepted that the IADSU proposal maybe perceived as ambitious as it is likely to require a significant amount of investment and time from sports bodies. However, equality and non-discrimination are fundamental principles that must be protected regardless of the industry in question.

The Council of Europe- an alternative

Lessons can be learnt from the current approaches taken by the Council of Europe, to tackle corruption and match fixing in sport. At this regional level, much has been done to engage with these agendas since they have become the latest “cardinal sin” in professional sport (Smith, 2011).

With the adoption of two conventions against corruption in 1999, in 2008 the Council of Europe conducted a study exploring why sport is not immune from corruption (Council of Europe, 2008). In that study they proposed how to tackle to corruption (p. 20);

- Acknowledgement of the problem rather than denial
- Discussion and research to specify measures. Governments can facilitate this.
- Education, training and guidance through the creation of ethical guidelines and training manuals
- Strict enforcement of existing international laws
- Promotion of transparency to avoid risk
- Establishment of an independent ethical commission to bridge the gap between the strict autonomy of sport and strong governmental intervention
- Explore the establishment of a permanent forum on corruption in sport, an “anti-corruption WADA”
- Support of concrete measures at different sports.

The recommendation to establish a WADA-like body for corruption is reflective of the IADSU (Council of Europe, 2008 p. 21). However, the recommendations offered in the literature are conceptual at this stage. It has been proposed that WADA should inspire the foundation of “a new world institution to fight corruption in sport” (Anderson, 2008 p. 2). In order to achieve this, the anti-corruption body would;

1. Define minimum standards for transparency, accountability and democratic procedures in sport
2. Monitor that the minimum standards are respected
3. Actively welcome sports officials and other stakeholders to report irregularities
4. Have a mandate to investigate cases of mismanagement and corruption
5. Be equipped with rights to issue bans and suspend those under investigation
6. Be enabled to report supposed violations to national or international legal authorities
7. Regularly communicate its findings to the public.

With regards to match fixing, the Council of Europe have expressed the “urgent” need to specifically combat this through the harmonization of laws (Council of Europe, 2012c).

An alternative proposal for the IADSU could be that the Council of Europe undertakes this role and/or supports the IADSU through networks with the IOC and other ISFs, the UN and various governments. The objectives above broadly follow the sequence of rule formulation, monitoring and inspection, enforcement and sanctions as proposed with the IADSU. The Council of Europe have also shown similar commitments to gender equality and elite sport and following a study in 2011, they offered a number of key recommendations to states within the Council of Europe, to promote female representation in sport (Council of Europe, 2011).

The EU Communications Document promises to support the Council of Europe with this fight against corruption in order to uphold the integrity of sport (European Commission, 2011 p. 12). The European Commission conducted a study to identify and analyse the legal framework applicable to match fixing in the EU Member States, thus reinforcing this commitment (European Commission, 2012). In fact, pressure has been placed on the EU, from groups such as the Sports Rights Owners Coalition (SROC), who are an informal group of representatives of international and national sports bodies with a particular focus on rights issues, to introduce a specific agency to tackle corruption in sport betting (Smith, 2011 Para. 53). The EU competence in sport has a significant role to play in the fight against discrimination in sport, as discussed below.

These commitments to the fight against corruption have filtered down to the domestic level, with the establishment of a Sports Betting Intelligence Unit (SBIU) by the UK Gambling Commission and “memorandums of understandings” between sports bodies and betting organisations (Smith, 2011 Para. 57). In cricket in the UK, the Professional Cricketers Association (PFA) is to visit all counties and enforce anti-corruption training on players. There are also considerations for sanctions to be imposed upon those who do not complete it (Smallwood, 2012).

In light of the approaches to corruption and match fixing in sport, there is a strong argument to be made that the Council of Europe could play a significant role in the establishment of the IADSU.

Legal Intervention

Where sport cannot be protected from legal challenge and is unwilling to engage in a fight against discrimination in sport, the intervention of the law to uphold equality principles will be necessary. It is important to locate a process by which sports governing bodies can be held

publically accountable for their actions, which potentially impinge upon athlete's fundamental rights, and where sport rules and regulations fall within the legal boundaries of intervention and can be appropriately critiqued for compliance and compatibility with legal provisions.

International Level

Firstly, it is proposed that sports bodies comply and are compatible with fundamental human rights legislation. Since the sports rules which impact upon inclusion and exclusion seek to discriminate against human differences, it is inevitable that there will be times when these rules conflict with human rights. We have seen in Part One that there is exists an extensive body of international, regional and domestic equality legislation and provisions that seek to protect individuals from discriminatory practices on the basis of their human differences such as sex, gender, disability and race. These instruments place obligations on the states who are signatories to them, to comply with the provisions and refrain from interfering in the enjoyment of human rights. However, there was little indication of the application of international and regional provisions to sports bodies when there was potential for this in *Sagen, Martin* and *Semenya*.

These obligations should extend to the actions of sports governing bodies particularly ISF's such as the IOC and FIFA. The findings of thesis demonstrate that whilst decisions are being made at an international level by sports bodies, few are justifiable. The IOC is considered to be the most important sports body in the world, with its own distinct legal personality. Similarly, FIFA carries a large amount of dominance in the field of sport. FIFA is governed by its own internal constitution and are controlled according to the FIFA Statutes. These international federations of sport are usually the ultimate source of the laws of the game and have a regulatory function in managing them (Lewis and Taylor, 2008 p. 55). The ISF's require the national governing bodies to implement the rules of the game through its own set of provisions. Where there are clear breaches of human rights, ISF's should be held accountable for discriminatory practices.

Human rights systems seek to bind states through obligations to which only states can become parties. Non discrimination norms are traditionally associated with vertical obligations between the state and the individual. This places third party private entities or non state actors such as sports bodies outside of the legal regime (Forgues, 2000). This has prompted a clear divide between public and private bodies and has created a wider debate about the relationship between human rights, the state and private entities (Rehman, 2010 p. 12).

There is a growing discussion in the literature on how non state private bodies such as sport can be held accountable for human rights violations (Cooper, 2010 p. 259; Hunt, 1998). It is proposed that since ISF's such as the IOC and FIFA behave and function like a state, they should be held accountable under human rights legislation (Cooper, 2010 p. 260). Globalisation has driven the increasing central role of private bodies. Supporting this, increasingly private organisations such as domestic sports bodies are playing an important part in the enjoyment of human rights as we have established in this thesis (Steiner, Alston and Goodman, 2007 p. 1385).

One way of holding private organisations accountable would be to supplement the existing vertical framework by imposing a system of "horizontal obligation" or "diagonal obligation" instead (Hessbruegge, 2005 p. 26). Challenging the vertical application of human rights which seeks to protect the private sphere from legal intervention, horizontal application demands that the state is "constitutive of all legal relations, because law is itself a construct of the state" (Hunt, 1998 p. 424). The horizontal application of human rights norms would subject all law which governs all types of legal relations, to review for compatibility with human rights. Vertical and horizontal application are two extremes and there are degrees of approach that can be achieved in between this. It seems appropriate to ensure that private bodies are susceptible to human rights legislation in an age where public duties are increasingly being carried out by private or quasi private bodies.

In addition to this there is an indirect responsibility on the state to ensure that private bodies do not interfere with human rights. At the international level, international law places responsibilities upon the states rather than individuals. Although the ISFs are not signatories to international law, the states can use legislation to apply pressure on them act fairly and legitimately. If sports bodies fail to do so, a state can retract their willingness to host or participate in sporting events. In order for state pressure to be achieved, international law needs to be more actively enforced. The effectiveness of equality legislation is contested across the literature because of the *sui generis* characteristics of international law (Rehman, 2010; Forgues, 2000 p. 256; Roy, 2007; Fasting in Hartmann-Tews and Pfister, 2003 p. 276; Neumayer, 2005). There appears to be a general trend that although the conceptual commitment to equality is evident, stronger enforceability and compliance is still required. Kluka (2008 p. 39) found little

qualitative evidence of “clear process strategies to be followed by selected signatories of the [Brighton] Declaration on how to manage and institutionalize the process of achieving the desired outcomes”. This supports Moser’s (2005) concept of “evaporation” which occurs when good policy intentions fail to be transferred through sustainable processes into practice.

That said, the positive impact of provisions such as CEDAW upon domestic legislation and practices can be seen in Turkey, Ukraine, Panama and the Netherlands (McPhedran et al, 2000). In Canada, the Canadian Association for the Advancement of Women in Sport (CAAWS) was founded in 1981 and remains the leading organization for women and sports in the country. It is suggested that Canada stand out as a top nation state for the commitment to international conventions (Brown and Connolly, 2010 p. 13). They were a signatory to CEDAW in 1980 and to the Brighton Declaration in 1984. However, they failed to enact specific equity laws that were required by these commitments as they deemed their Charter to be sufficient.

Positive compliance with the CRPD can be seen in Canada also, where in the areas of employment opportunities for disabled individuals Canada did not need to enact any new legislation since they already complied with Article 27 concerning the right to work. This is considered to be an exception and it is typically the case that countries have strong disability laws in place but exercise poor implementation of them (Kanter, 2007 p. 309). Disability laws in Israel are considered to be the most comprehensive in the world today (Kanter, 2007 p. 312). However they still fall short of all of the requirements under the CRPD.

UNESCO’s commitments to tackling discrimination should also be extended to encompass and consider inclusion and exclusion in competitive sport, and their involvement in the IADSU should be encouraged.

Regional Level

The shortfalls in the international system may be fulfilled at the regional level which seeks to provide a middle ground between the state and domestic institutions, and the international system which is unable to deal with individual victims of human rights breaches. The Inter American Convention and the African Charter places a duty upon states to respect and ensure the rights by adopting protective measures. The ECtHR have interpreted the text and spirit of the ECHR to develop the doctrine of placing “positive obligations” on states to ensure that they secure the

rights and freedoms to everyone under their jurisdiction (Spielman *in* Oliver and Fedtke, 2007 p. 427). Additionally it is suggested that it is impossible to differentiate between private and public spheres (Clapham, 2002 p. 94).

Although these instruments do not place direct obligations upon private bodies, the Inter American court has established that this positive duty extends to breaches by non state actors (Nolan, 2009 p. 231). In a number of cases the ECtHR has objected to states failing to address human rights breaches by private bodies highlighting that this can result in engaging the states responsibility under the Convention (Spielmann *in* Oliver and Fedtke, 2007 p. 464; Nolan, 2009 p. 245). In other words, a state may be indirectly liable where they fail to hold sports bodies accountable for human rights breaches. If a state has failed to secure the rights to sports bodies within their jurisdiction, it would be difficult to escape their obligations and duty to protect at the regional level.

In the previous chapter, it was found that only one case was dealt with at a regional level, and this case related to PE. Above, we identified that at the EU Sports Law level the Council of Europe and EU have demonstrated a commitment to tackling corruption in sport. There is great potential at a regional level for striking a balance between inclusion and exclusion in sport. Commentary on the relationship between sport and Community law implies that a balance between individual and sporting interests is possible by encouraging good governance. Current focus on the application of competition law and free movement principles to sport demonstrates this. There is scope for the EU, given its recognition of fundamental rights under the TEU and the Charter of Fundamental Rights, to offer guidance on the application of equality law to sport. For instance, the European Commission conducted an audit of rules restricting the access of non-nationals to individual sporting competitions in EU Member States. 26 Olympic sports were examined to identify which rules were justifiable and unjustifiable under EU law. The study goes on to map the rules and their justifications against the general framework of EU free movement principles in order to uncover rules which are lawful, or unlawful and incompatible. A similar approach could be taken by the Commission, to rules relating to inclusion and exclusion.

At this level, there is also an appreciation of the specificity of sport through a more sensitive application of EC law to sport. The soft competence provided for by the TEU and the TFEU is

reinforced by the White Paper. However, as suggested in Chapter 4, the White Paper offers a definition of the specificity of sport, part of which does not sit comfortably with the findings of this thesis (European Commission, 2007 p. 13);

*“The specificity of sporting activities and of sporting rules, **such as separate competitions for men and women**, limitations on the number of participants in competitions, or the need to ensure uncertainty concerning outcomes and to preserve a competitive balance between clubs taking part in the same competitions....”*

The segregation of men and women’s competition is explicitly referred to as specific to sport, whilst this thesis has provided a detailed evaluation of the limitations to binary categories which divide sex and gender. The White Paper definition fails to approach the complexities and inaccuracies of broadly dividing along sex and gender lines with any real vigour. It is in fact likely that all of the rules we are concerned with are going to be considered to be specific to sport under this current regime. This thesis challenges the very assumption that the White Paper has expressed in its definition of specificity of sport. When it comes to eligibility rules and selection criteria, this definition presents itself as a “cop out” and another example of the law essentially escaping their responsibility to directly address particular norms of sport (Patel, 2011).

The EU approach and the White Paper contribute towards shaping good governance in sport up until the point of defining specificity. Although the concept of purely sporting rules has now been rejected, it could be argued the “specificity of sport” is just a replacement for that concept, after all, “sporting rules embody the very essence of specificity; they respond to the specific challenges thrown up by sport” (Hill, 2009 p. 261). The *Meca Medina* judgement is subject to criticism because whilst it may have withdrawn the sporting exemption or “purely sporting rule,” this is not entirely clear in the wording of the judgement (Rincon, 2007 p. 235). Whilst the EU approach accepts and respects the value of the essence of sport, it fails to accurately identify what rules are part of that essence. To exempt specific rules such as the segregation of men and women’s competition is to ignore the real issues of sport that most require governance, balance and guidance on good sports policy. Recognising that certain aspects of sport are specific and unique in nature is entirely necessary as we have established throughout this thesis. However the approach to treat this in a special way appears to send out a message that discriminatory practices

are accepted so long as they are specific to sport. This is not the case since all practices should pursue legitimate aims which are evidenced based and fit for purpose.

Domestic Level

The findings of this thesis dictate a good level of engagement of the domestic courts with decisions of inclusion and exclusion cases. In fact, most of the decisions were located here. In light of this it is proposed that limitations in the form of sport exemption clauses contained within domestic equality legislation should be revised and given greater thought in their construction by government. The previous chapter reveals that the interpretation and application of these vague provisions by the courts has been mostly balanced and thoughtful. There is a role for sport specific exemptions because they respect the essence of sporting activity and accept that sporting activity operates in a different manner. However, the provisions need to be evidenced based and accurate, consistent with the proposals under the sports audit. The US, Australian and UK courts have reasonably interpreted legislation to determine compatibility with sports rules and they have gone some way to rectify some of the ambiguous provisions. In the absence of references to sport within international and regional provisions as we have identified, the courts should adopt a position that is in line with the overall purpose of the legislation rather than in a way that is inconsistent with human rights.

At a domestic level, a level of horizontality should also be applied to interpret the UK HRA in a way that broadens its application to all law rather than just public law (Hunt, 1998). Similar issues of compatibility and compliance are continuously arising out of the defamation and libel actions concerning the right to free speech and privacy. Section 6 stipulates that the HRA is only binding upon public authorities, under which sports bodies, despite their seemingly quasi-public nature do not currently appear to fall within. However, s. 6(3)(a) HRA includes a court or tribunal which exercises functions in relation to legal proceedings and any person certain of whose functions are functions of a public nature. This definition is open ended but intended to apply to central government, local government, the police, immigration officers, prison service. Section 3(1) instructs courts and tribunals to read and give effect only to legislation in a way that is compatible with Convention rights, so far as it is possible to do so. The HRA is not therefore drafted in a way that seeks to apply to all law. However, it is suggested that by explicitly making courts and tribunal bound by the HRA, it imposes a duty on them to act compatibly with the

Convention when they develop common law, including private disputes between private parties (Hunt, 1998). There is some degree of horizontal application as a result of this. Furthermore, if there is a failure at a domestic level, an individual can seek reference to the regional courts.

At the same time, the aims of this thesis are consistent with the inherent objectives of the Convention, which are to ensure that a correct balance is struck between the individual and group interest. Lessons can be learnt from the way in which the proportionality principle is applied to assess the balance between the protection of privacy and freedom of speech (Fenwick, 2007 p. 964). For instance, it has been suggested that the underlying values of the Articles of the Convention should be used to balance the two interests (Per Lord Hoffman in *Campbell v MGN* [2004] 2 WLR 1232). Upon this analysis, it would then be possible to identify a number of factors that weigh in the balance of one or the other (Fenwick, 2007 p. 968).

Generally speaking the enforcement of equality legislation will be necessary when there are breaches of fundamental rights. At an international, regional or domestic level the focus of enforcing human rights legislation is for the protection of the individual. Since sports bodies play an increasingly public role in the enjoyment of the fundamental rights for athletes they should be subject to equality legislation where they fail to demonstrate that restrictive rules pursue a legitimate aim proportionately. The principles set out in the UDHR seek to protect human rights in any field and this should be given more effect. In addition, from a governance perspective, following the principles set out within equality provisions, such as proportionality, can contribute towards a better execution of the sports audit and can encourage sports bodies to operate in a more transparent manner.

Equality Bodies

The enforcement of equality principles in sport can also be supported by established equality bodies, such as the Equality and Human Rights Commission (EHRC) in the UK. They are a non departmental public body, established under the EA, comprising of experts in the field of sex, gender, disability and race. Their mandate is to challenge discrimination and protect and promote human rights. They have enforcement powers to conduct inquiries about specific matters, conduct assessments to test compliance with the EA, intervene in legal proceedings and serve compliance notice. However, their powers apply only to public authorities which may not currently extend to sport. That said, the EOC (which was replaced by the EHRC) played a significant part in

ensuring that s. 44 SDA was considered dead law. Equality bodies could therefore play a role in ensuring sports bodies are compliant with equality legislation, if their remit was extended.

Overall, the drawbacks to this level of regulation on the ladder are that the specificity of sport might not be recognised or taken into consideration as it might internally within sports bodies and sports tribunals. However, the EU regional level is developing competence in this area even though there are shortfalls in the White Paper definition of specificity. At the same time, fundamental principles are much more important than sporting interests and when they are violated, there should be accountability for those actions, which this level proposes to offer, particularly if sport as a whole is not willing to engage in a fight against discrimination.

Conclusion

This thesis has engaged in a critical evaluation of inclusion and exclusion as concepts, in addition to the practice and process of these terms in a competitive sporting environment. Conceptually inclusion and exclusion naturally exist as powerful and conflicting social forces. In order to understand the world in which we live we tend to interpret our physical and non physical individual, socio-cultural and socio-economic differences. We process these differences by categorising and stereotyping based upon scientific or conventional wisdom knowledge. This then leads to inclusion or exclusion based upon our differences. In a competitive sporting context we identified that these terms adopt slightly different meanings because the essence of sport is to discriminate on the basis of our sex, gender, disability and racial differences. Sporting exclusion is reasonable when an individual behaves in a way that threatens the essence of sport or when their participation would alter the essential rules of a sport. On the other hand sporting exclusion can be unreasonable when rules or actions, which are not directly concerned with the essence of sport, seek to overtly or covertly restrict athletes from participation on the basis of sex, gender, disability or race. Sporting inclusion is based upon the idea that individuals should have access and opportunity to compete in sport where they are qualified to do so. They are qualified to do so when they meet the appropriate selection criteria or rules of a sport.

When assessing the regulatory approach to inclusion and exclusion, tensions lie between identifying when these exclusionary tendencies move beyond what is necessary for the protection

of the essence of sport, and instead begin to have discriminatory effects on individuals. This is demonstrated by the conflict between the self regulatory autonomy of sports bodies and the external intervention of international, regional and domestic law. The detailed analysis of the legal and non legal cases pertaining to sex, gender, disability and race, has reinforced these tensions. Measured against social science, physical science, sport science, medicine and evolutionary psychology theories, the cases reveal a number of instances of best practice and deficiencies in the current sport and regulatory approach.

The policy measures in place to manage inclusion and exclusion tend to use recreational sport as a social vehicle for combating social exclusion and achieving social inclusion. They offer little application in this context.

Legal measures include a body of domestic, regional and international equality instruments which seek to secure the human rights of individuals. References to sport are mostly leisure related and within domestic legislation sport is often exempt. When cases reached the courts, they were dealt with positively at a domestic level through a balanced assessment of the exemption provisions, and the compatibility of sports rules with the law. There were instances where the courts were reluctant to intervene and struggled to agree on appropriate decisions in sporting matters, as evidenced by the varying levels of court decisions and the dissenting opinions in the cases. There were few cases at a regional or international level, despite the existence of equality provisions.

The sport regulation theory centres on varying models of regulation and with different degrees of autonomy and legal intervention. There is an absence of distinct measures to deal with inclusion and exclusion issues within sport regulation, although there have been examples where issues have been dealt with by sports bodies internally at a domestic level, and at an international level. This thesis demonstrates that sports rules relating to categories, advantage, safety and culture can have a restrictive effect on athletes on the basis of their human differences. When challenged, the justification for this restriction is to preserve competition, match ability and ensure safety in competition. In other words, fundamental freedoms are restricted in order to protect the essence of sport. These objectives were identified as being legitimate but the rules in place were not always related to those aims, lacked consistency of application, were ambiguous in their construction and wording, often misused evolutionary, scientific and cultural understandings of human differences, and were at times negatively influenced by the sporting culture. When rules

were challenged the sport response has sometimes been positive and there has been a willingness to adapt rules to adopt an inclusive agenda. However, there are a number of cases that have been dealt with unjustifiably by sports bodies.

The overarching aim of this research has been to strike a balance between inclusion and exclusion in competitive sport by offering regulatory recommendations for reform in the management of human differences in sport. In order to ensure that sports bodies construct and apply rules and carry out practices that preserve the essence of sport whilst at the same time recognising and respecting fundamental values, this thesis proposes a range of recommendations along a ladder of regulation. The options vary on a scale from self regulation of sports bodies through a best practice and internal audit approach, to the establishment of the IADSU who would act as enforcers in the fight against discrimination in sport. Where sport is not willing to engage with this process, there is an argument for the legal regulation of sports bodies through public accountability under equality legislation. This could be conducted in hard or soft way, and there are positive developments at the EU regional level of sports regulation to ensure that the specificity of sport is recognised by the law.

These recommendations theoretically contribute to the existing sport, law and regulation literature by offering potential systems for regulating sport specific inclusion and exclusion. The application of this body of literature to inclusion and exclusion is not currently prominent in the field. There are an increasing number of classifications of sports law regulation being offered in the regulation literature (see Siekmann and Soek, 2012) and one might classify the position of this thesis as “public international sports law” which is described by Wax (*in* Siekmann and Soek, 2012 p. 288) as all norms of public law which apply to legal issues concerning sport. Some of the areas that he identifies for this application are the struggle against apartheid and other forms of discrimination in sport and the “right to sport” as a human right. He argues that sport can play a highly valuable role in combating discrimination and the “role of public international law must not be underestimated” as evidenced by the pressure from the international community to confront apartheid (p. 291).

However, the focus of this thesis is on the balance between inclusion and exclusion in sport and the ladder of regulation seeks to offer a range of options for the mutual engagement of sports

bodies and/or the law in this area. The degree of intervention by the law will depend upon the level of commitment to sport in the fight against discrimination.

REFERENCES

- AARONSON, I.A., and AARONSON, A.J., 2010. How should we classify intersex disorders? *Journal of Pediatric Urology*. XX, pp. 1-4
- ABRAMS, D., MARQUES, J.M., and HOGG, M., 2004. *The Social Psychology of Inclusion and Exclusion*. New York: Hove Psychology
- ABAE., 2009. *Rules of Boxing*. [online]. Available at: http://www.abae.co.uk/aba/assets/File/rules_of_boxing.pdf [Accessed 19/11/2010]
- ADAIR, J.L., 2011. In a league of their own: the case for intersex athletes. *Sports Lawyers Journal* 18, pp. 121-155
- ADDELMAN, R., 2004. All Inclusive Athens. *The Varsity*.CA [online], 22 March. Available at: <http://thevarsity.ca/articles/14488> [Accessed 05/06/10]
- ADELSON, E., 2008. Let 'Em Play. *ESPN* [online], 21 April. Available at: <http://sports.espn.go.com/espnmag/story?id=3357051> [Accessed 25/07/10]
- AIBA., 2009. *Medical Handbook of Olympic Style Boxing Seventh Edition*. [online]. Available at: <http://www.aiba.org/documents/site1/docs/AIBA%20Medical%20Handbook%202009%20final%20with%20foreword.pdf> [Accessed 9/11/2010]
- ALEX, R., 2002. *A Theory of Constitutional Rights (translated by Julian Rivers)*. New York: Oxford University Press.
- Ambreen: The Girl Boxer*, 2009 [Television] Century Films for Channel 4, 22nd January.
- ANDERSON, E., 2002. Openly gay athletes: contesting hegemonic masculinity in a homophobic environment. *Gender and Society*. 16(6), pp. 860-77.
- ANDERSON, O., 2003. The Gender Gap 1: women are getting slower: men are getting faster? *Peak Performance* [online]. 25 November. Available at: http://www.pponline.co.uk/search/apachesolr_search/gender+gap [Accessed 01/02/1]
- ANDERSON, J.S., 2008. Speak Up for the Love of Sport. *Play The Game Magazine* [online], Available at: <http://www.playthegame.org/upload/magazine2007/pdf/pages/playthegamemagazine07pg2.pdf> [Accessed 03/08/12]
- ANDERSON, J., 2010. *Modern Sports Law: A Textbook*. Portland: Hart Publishing.
- ANON., 1999. Sporty women held back by sexist myths. *BBCi Website* [online], 31 March. Available at: <http://news.bbc.co.uk/1/hi/health/307769.stm> [Accessed 14/03/01]

ANON., 2003. Perugia Pursue Female Star. *BBCi Website* [online], 10 December. Available at <http://news.bbc.co.uk/sport1/hi/football/europe/3093147.stm> [Accessed 11/12/03]

ANON., 2004a. Women footballers blast Blatter. *BBCi Website* [online], 16 January. Available at: www.bbc.co.uk/sport/hi/football/3402519.stm [Accessed 18/01/04]

ANON., 2004b. Linear models cant keep up with sport gender gap. *Nature*. 432, 11 November. pp. 147

ANON., 2004c. Chucking rules set to be changed. *BBCi Website*. [online], 10 November. Available at: <http://news.bbc.co.uk/sport1/hi/cricket/3998397.stm> [Accessed 01/05/07]

ANON., 2005. Golf: Transsexual to play in the British Open. *The Independent* [online] 10 February. Available at: <http://www.independent.co.uk/sport/golf-transsexual-to-play-in-the-british-open-1529950.html> [Accessed 11/02/05]

ANON., 2008a. Muslim man sues Tesco for being told to handle alcohol. *The Telegraph* [online], 29 September. Available at: <http://www.telegraph.co.uk/news/uknews/3100303/Muslim-man-sues-Tesco-for-being-told-to-handle-alcohol.html> [Accessed 10/12/08]

ANON., 2008b. Relay safety fears over Pistorius. *BBCi Website* [online], 15 July. Available at: <http://news.bbc.co.uk/sport1/hi/olympics/athletics/7508399.stm> [Accessed 16/07/08].

ANON., 2009a. *CAS may not hear Wickmayer case for year*. *Tennis.com* [online], 15 March. Available at: <http://www.tennis.com/articles/templates/news.aspx?articleid=4597> [Accessed 05/06/09]

ANON., 2009b. Yanina Wickmayer and Xavier Malisse have doping ban suspended by Belgian court. *The Telegraph* [online], 14th December. Available at: <http://www.telegraph.co.uk/sport/tennis/wtatour/6812193/Yanina-Wickmayer-and-Xavier-Malisse-have-doping-ban-suspended-by-Belgian-court.html> [Accessed 05/01/10]

ANON., 2009c. Quick Guide to Women's Rugby. *SkySports Magazine*, November, pp.6-7.

ANON., 2009d. Women fail in ski jump appeal. *BBCi Website* [online], 22 December. Available at http://news.bbc.co.uk/sport1/hi/olympic_games/vancouver_2010/8427216.stm [Accessed 23/12/09]

ANON., 2009e. Women's boxing gains Olympic spot. *BBCi Website* [online], 13 August. Available at http://news.bbc.co.uk/sport1/hi/olympic_games/8196879.stm [Accessed 01/03/10]

ANON., 2009f. Semenya 'must not be humiliated.' *BBCi Website* [online], 11 September. Available at <http://news.bbc.co.uk/sport1/hi/athletics/8250469.stm> [Accessed 12/09/09]

ANON., 2009g. South Africa takes Semenya case to UN. *CNN* [online], 18 September. Available at: <http://edition.cnn.com/2009/SPORT/09/18/athletics.semenya.united.nations.gender/index.html> [Accessed 15/10/11]

ANON., 2009h. Hi-Tech Suits Banned from January. *BBCi Website* [online], 31 July. Available at: http://news.bbc.co.uk/sport1/hi/other_sports/swimming/8161867.stm [Accessed 09/09/11]

ANON., 2010a. *News Release: FIS approves world cup circuit for women's ski jumping. Women's Ski Jumping USA* [online], 9 June. Available at: http://www.wsjusa.com/storage/6.9.10_FIS_worldchamp.pdf [Accessed 18/06/10]

ANON., 2010b. Caster Semenya: anatomy of her case. *The Telegraph* [online], 6 July. Available at: <http://www.telegraph.co.uk/sport/othersports/athletics/7873921/Caster-Semenya-anatomy-of-her-case.html> [Accessed 01/08/10]

ANON., 2010c. Semenya eyes June return in Spain *BBCi Website* [online], 6 April. Available at: <http://news.bbc.co.uk/sport1/hi/athletics/8595361.stm> [Accessed 01/08/10]

ANON., 2010d. FIFA makes its Islamophobia official and ban Iranian women for donning the Hijab *From a Left Wing Website*. [online] 3 April. Available at: <http://fromaleftwing.blogspot.com/2010/04/fifa-makes-its-islamaphobia-official.html> [Accessed 4/05/10]

ANON., 2011a. Closing the Gap. *Sport Business International*. 168, June, pp. 48- 54.

ANON., 2011b. IAAF Introduces new gender rules. *BBCi Website* [online], 12 April. Available at: <http://news.bbc.co.uk/go/pr/fr/-/sport1/hi/athletics/9455486.stm> [Accessed 5/08/2011]

ANON., 2011c. Male, Female or X- third option now on Australian passports. *Travel News* [online], 19 September. Available at: <http://www.travel-news.co.uk/2078/2011/09/male-female-or-x-%E2%80%93-third-option-now-on-australian-passports/> [Accessed 15/10/11]

ANON., 2011d. John Terry to be charged over Anton Ferdinand race row. *BBCi Website* [online], 21 December. Available at: <http://www.bbc.co.uk/news/uk-england-london-16284813> [Accessed 21/12/11]

ANON., 2012. Cameron plan's football racism summit. *BBCi Website* [online], 12 February. Available at: <http://www.bbc.co.uk/news/uk-17001503> [Accessed 12/02/12]

ANWAR, M., ROACH, P., and SONDH, R., 2000. *From Legislation to Integration? Race Relations in Britain*. New York: St Martin's Press.

ARAI-TAKAHASHI, Y., 2002. *The Margin of Appreciation Doctrine and the Principles of Proportionality in the Jurisprudence of the ECHR*. Oxford: Intersentia.

ARCHER, J., and LLOYD, B., 2002. *Sex and Gender*. 2nd Edition. Cambridge: Cambridge University Press.

ARNAUT, J.L., 2006. Independent European Sport Review. [online], Available at: <http://supporters-direct.coop/downloads/pdfs/EU/European%20Sports%20Review.pdf> [Accessed 05/08/12]

- ARNOT, C., 2009. Trying Times. [online] *The Guardian*. [online], 28 October. Available at: <http://www.guardian.co.uk/society/2009/oct/28/ikram-butt-interview-rugby-community> [Accessed 10/09/10]
- ASIAN IN FOOTBALL FORUM (AFF)., 2005. *Asians Can Play Football: another wasted decade*. [online], September. Available at: <http://www.furd.org/resources/Asians%20Can%20play%20football.pdf> [Accessed 03/01/12]
- ASSOCIATED PRESS., 2008. LPGA wont suspend players over English-speaking requirements. *ESPN*. [online], 7 September. Available at: <http://sports.espn.go.com/golf/news/story?id=3570957> [Accessed 12/11/11]
- ATELJEVIC, I, PRITCHARD, A., and MORGAN, N., 2007. *The Critical Turn in Tourism Studies: Innovative Research Methodologies*. Oxford: Elsevier
- ATKINSON, M., and YOUNG, K., 2008. *Tribal Play: subcultural journeys through sport*. Bingley: Emerald Group Publishing.
- BACK, L., and SOLOMOS, J., 2000. *Theories of Race and Racism: a reader*. London: Routledge
- BADERIN, M.A., and SSENIONJO, M., 2010. *International Human Rights Law: Six Decades After the UDHR and Beyond*. Aldershot: Ashgate Publishing
- BAINS, J., and JOHAL, S. 1998. *Corner Flags and Corner Shops: the Asian football experience*. London: Victor Gollancz, 1998.
- BALLANTYNE, K.N, KAYSER, M., and GROOTEGOED, J.A., 2011. Sex and gender issues in competitive sports: investigation of a historical case leads to a new viewpoint. *British Journal of Sports Medicine*. 3 May, pp. 1-4.
- BARNES, C., and MERCER, G., 2003. *Disability*. Cambridge: Blackwell Publishing.
- BECK, U., 1992. *Risk Society: Towards a new modernity*. London: Sage.
- BELL, M., 2008. *Racism and Equality in the European Union*. New York: Oxford University Press.
- BELOFF, M., 2003. Editorial. *International Sports Law Review*. 3, August, pp. 37-38.
- BELOFF, M., 2005. Is There a Lex Sportiva? *International Sports Law Review*. 3, pp. 49-60
- BELOFF, M., 2011. Editorial. *International Sports Law Review*. 2, pp. 27-29
- BELOFF, M, KERR, T., and DEMETRIOU, M., 1999. *Sports Law*. Oxford: Hart Publishing
- BENOKRAITIS, N.V., and FEAGIN, J.R., 1986. *Modern Sexism: blatant, subtle and covert discrimination*. Englewood Cliffs, New Jersey: Prentice Hall.

- BIDLACK, C., 2009. The Prohibition of Prosthetic Limbs in American Sports: the issues and the role of the American with Disabilities Act. *Marquette Sports Law Review*. 19(2), pp. 613- 637.
- BLAUVELT, H., 2003. Stehpenson to play with seniors, says Asians hurt LPGA. *USA Today*. [online], 9 October. Available at: http://www.usatoday.com/sports/golf/champions/2003-10-09-stephenson-champions_x.htm [Accessed 21/02/12]
- BOYLAN, F. J., 2008. The XY Games. *The New York Times* [online] 3 August. Available at: <http://www.nytimes.com/2008/08/03/opinion/03boylan.html?pagewanted=1&r=1> [Accessed 10/08/10]
- BOURDIEU, P., 1977. *Outline of a Theory of Practice*. Cambridge: Cambridge University Press.
- BOURDIEU, P., 1988. Program for a Sociology of Sport. *Sociology of Sport Journal*. 5, pp. 153-161.
- BOURDIEU, P., and EAGLETON, T., 1992. Doxa and Common Life. *New Left Review*. 191(I), pp. 111-121.
- BOYES, S., 2000. The Regulation of Sport and the Impact of the Human Rights Act 1998. *European Public Law*. 6(4), pp. 517-530.
- BOYES, S., 2012. Sports Law: its history and growth and the development of key sources. *Legal Information Management*. 12, pp. 86-91.
- 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
- BRADFORD, M., 2005. Sport, Gender and Law. *International Sports Law Journal* 1(2), pp. 78-83
- BREWER, M.B and CAPORAEL, L.R., 1990. Selfish Genes vs. Selfish People: Socobiology as Origin Myth. *Motivation and Emotion*. 14(4), pp. 237-243.
- BRINK, M, LOENEN, T., and TIGNCHELAAR, J., 2010. Sex segregation and equality in a multicultural society: inferiority as a standard for legal acceptability. *Utrecht Law Review*. 6(2), pp. 115-144.
- BROWN, K.J., and CONNOLLY, C., 2010. The role of law in promoting women in elite athletics: an examination of four nations. *International Review for the Sociology of Sport*. 45(3), pp. 3-21
- BURDSEY, D., 2007. *British Asians and Football*. London: Routledge.
- BURDSEY, D., 2010. British Muslim Experiences in English First-Class Cricket. *International Review for the Sociology of Sport*. 45(3), pp. 315-334.

- BURKE, M., 2004. Radicalising Liberal Feminism by Playing the Games that Men Play. *Australian Feminist Studies* 19(44), pp.169-184
- BURKETT, B., 2010. Technology in Paralympic Sport: performance enhancement or essential for performance? *British Journal of Sports Medicine*. 44, pp. 215-220
- BURTON, R., 2010. A Divisive Strategy. *Sport Business International*. 155, April, pp. 20.
- BUSS, D.M., 1995. Evolutionary Psychology: A new paradigm for psychological science. *Psychological Inquiry*. 6(1), pp. 1-30.
- BUZUVIS, E.E., 2011. Caster Semenya and the Myth of the Level Playing Field. *The Modern American*. 6, pp. 36- 42.
- CADDEN, P., 2010. Cardiff boss Dave Jones gives Michael Chopra the green light to play for India *The Mail Online*. [online], 18 November. Available at: <http://www.dailymail.co.uk/sport/football/article-1330678/Cardiff-boss-Dave-Jones-gives-Michael-Chopra-green-light-play-India.html#ixzz15iWf5fuO> [Accessed 19/11/10]
- CAMPORESI, S., 2008. Oscar Pistorius, Enhancement and Post-Humans. *Journal of Medical Ethics* 34(9), pp. 639
- CAMPORESI, S., and MAUGERI, P., 2010. Caster Semenya: sport, categories and the creative role of ethics. *Journal of Medical Ethics*. 36, pp. 378-379
- CAPEL, S., and PIOTROWSKI, S., 2000. *Issues in Physical Education*. London: Routledge Falmer
- CARMICHAEL-AITCHISON, C., 2007. *Sport & Gender Identities: masculinities, femininities and sexualities*. London: Routledge.
- CARR, S., 2009. Title IX: an opportunity to level the Olympic playing field. *Seton Hall Journal of Sports and Entertainment Law*. 19, pp. 149-180.
- CARTER, N. M., and SILVA, C., 2010. Women in Management: Delusions of Progress. *Harvard Business Review*. March, pp. 19- 21.
- CASHMORE, E., 1982. *Black Sportsmen*. London: Routledge and Kegan Paul.
- CAVANAGH, S.L., and SYKES, H., 2006. Transsexual Bodies at the Olympics: The International Olympic Committee's Policy on Transsexual Athletes at the 2004 Athens Summer Games. *Body and Society*. 12(3), pp. 75-102.
- CHAN, C., 2009. Female ski jumpers seek Olympic inclusion. *Epoch Times* [online], 1 May. Available at: <http://www.theepochtimes.com/n2/content/view/16139/> [Accessed 20/04/10]
- CHAPPELLE., 1986. The Use and Misuse of Sex Chromatin Screening for Gender Identification of Female Athletes. *The Journal of the American Medical Association*. 256, pp. 1922

- CHARLISH, P., and RILEY, S., 2008. Should Oscar Run? *Fordham Intellectual Property, Media and Entertainment Law Journal* 18, pp. 929-957
- CHATARD, J.C., and WILSON, B., 2008. Effect of Fastskin Suits on Performance, Drag and Energy Cost of Swimming. *Medicine and Science in Sports and Exercise*. 40, pp. 1149- 1154.
- CLAPHAM, A., 2002. *Human Rights in the Private Sphere*. Oxford: Clarendon Press.
- CONSTANCE, H., 2004. An Everlasting Gender Gap? *Science*. 305(5684), 30 July. pp. 639-640
- CLAEYS, G., 2000. The “Survival of the Fittest” and the Origins of Social Darwinism. *Journal of the History of Ideas*. 61(2), April, pp. 223-240.
- CLAUSSEN, C.L., 2010. The LPGA’s English Proficiency Rule. *Journal of Legal Aspect of Sport*. 20(2), pp. 136-150.
- COAKLEY, J., and DUNNING, E., 2000. *Handbook of Sports Studies*. London: Sage Publications
- COAKLEY, J., and PIKE, E., 2009. *Sports in Society, Issues and Controversies*. Location: McGraw Hill
- COALTER, F., 2007. *A Wider Social Role for Sport*. London: Routledge
- COHEN, J.H., and SEMERJIAN, T.Z., 2008. The Collision of Trans-Experience and the Politics of Women’s Ice Hockey. *International Journal of Transgenderism* 10(3), pp. 133-145.
- COLE. C.L., 1990. Double Fault: Renee Richards and the Construction and Naturalization of Difference. *Sociology of Sport Journal*. 7, pp. 1-21
- COLLINS, M., 2004a. Sport, physical activity and social exclusion. *Journal of Sport Sciences*. 22(8), pp. 727-740.
- COMMINS, P., 1993. *Combating Social Exclusion in Ireland 1990-94: a midway report*. Brussels: European Commission
- CONDY, S.N., 2008. *Disability, Sport and the Limits of Law*. M. Phil, University of Stirling, School of Law.
- CONNOLLY, K., 2010. Croatia football chief Vlatko Markovic hit by gay group’s backlash *The Observer* [online], 14 November. Available at: <http://www.guardian.co.uk/football/2010/nov/14/gay-backlash-croatia-football-chief> [Accessed 20/11/10]
- CONNOLLY, M., 2011. *Discrimination Law*. 2nd Edition. London: Sweet and Maxwell.
- COOPER, E.J., 2010. Gender testing in athletic competitions-human rights violations: why Michael Phelps is praised and Caster Semenya is chastised. *Journal of Gender, Race and Justice*. 14, pp. 233-264.

COTTRELL, S., 2010. Boxing: Freedom of religion and rules on safety. *World Sports Law Report*. 8(2), February, pp. 12-13.

COUNCIL OF EUROPE., 2008. *Why Sport is Not Immune to Corruption*. [online], Available at: http://www.coe.int/t/dg4/epas/Source/Ressources/EPAS_INFO_Bures_en.pdf [Accessed 01/08/12]

COUNCIL OF EUROPE., 2011. *Gender Equality and (Elite) Sport*. [online]. Available at: <http://www.coe.int/t/dg4/epas/resources/texts/INF25%20Gender%20equality%20and%20elite%20sport.pdf> [Accessed 03/08/12]

COUNCIL OF EUROPE., 2012a. *Who We Are*. [online], Available at: <http://www.coe.int/aboutcoe/index.asp?page=quiSommesNous> [Accessed 02/08/12]

COUNCIL OF EUROPE., 2012b. European Committee of Social Rights. [online], Available at: http://www.coe.int/t/dghl/monitoring/socialcharter/ecs/ecsdefault_EN.asp [Accessed 02/08/12]

COUNCIL OF EUROPE., 2012c. *Press Release: PACE committee says harmonised laws against match fixing now “urgent.”* [online], Available at: <https://wcd.coe.int/ViewDoc.jsp?Ref=AP-PR047%282012%29&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE> [Accessed 01/08/12]

COURT OF ARBITRATION FOR SPORT (CAS)., 2008. *Press Release: Athletics Case Oscar Pistorius v IAAF*. [online], Available at: <http://www.tas-cas.org/d2wfiles/document/1086/5048/0/press%20release%20pistorius%20english.pdf> [Accessed 01/06/08]

COURT OF ARBITRATION FOR SPORT (CAS)., 2009. *Press Release Tennis: Yanina Wickmayar and Xavier Malisse file appeals at the Court of Arbitration for Sport*. Court of Arbitration for Sport [online], 18 November. Available at: <http://www.tas-cas.org/d2wfiles/document/3758/5048/0/2009.11.18%20PR%20Eng.pdf> [Accessed 20/11/09]

COURT OF ARBITRATION OF SPORT (CAS)., 2012. *The Code 2012 Edition* [online], Available at: http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201220_en_2001.01.pdf [Accessed 01/08/12]

COWAN, S., 2005. “Gender is no substitute for sex” A comparative human rights analysis of the legal regulation of sexual identity. *Feminist Legal Studies* 13, pp. 67-96.

CRAIK, J., 2011. The Fastskin Revolution: from human fish to swimming androids. *Culture Unbound: Journal of Current Cultural Research*. 3, pp. 71- 83.

CRESWELL, T., 1996. *In Place/Out of Place: geography, ideology and transgression*. London: University of Minnesota Press.

CRESWELL, T., 2006. *Place: a short introduction*. Cambridge: Blackwell Publishing

- CRINCOLI, S., 2011. Eligibility: The IAAF Hyperandrogenism Regulations and Discrimination. *World Sports Law Report*. 9(6), pp. 3-5.
- CUTLER, M., 2012. WADA chief seeks to diversify funding model. *Sport Business International* [online], 8 February. Available at: <http://www.sportbusiness.com/news/185058/wada-chief-seeks-to-diversify-funding-model> [Accessed 04/08/12]
- DARWIN, C., 1913. *The Descent of Man and Selection in Relation to Sex*. London: John Murray.
- DARWIN, C., 2008. *On the Origin of Species*. New York: Oxford University Press
- DAVID, P., 2009. *Guide to the World Anti-Doping Code: A Fight for the Spirit of Sport*. Cambridge University Press.
- DAVIES, P., 2004. Bagger a step closer to European card. *The Times* [online], 28 October. Available at: <http://www.timesonline.co.uk/tol/sport/golf/article499787.ece> [Accessed 30/10/04]
- DAVIS, J. B., and DOLFSMA, W., 2008. *The Elgar Companion to Social Economics*. Edward Elgar Publishing.
- DCMS., 2002. *Game Plan: a strategy for delivering governments sports and physical activity objectives*. London: Cabinet Office.
- DCMS., 2008. *Playing to Win: a new era for sport*. London: Cabinet Office.
- DCMS, 2010. *Understanding the impact of engagement in culture and sport*. London: Cabinet Office. [online] July. Available at: <http://www.culture.gov.uk/images/research/CASE-systematic-review-July10.pdf> [Accessed 12/07/11]
- DE SCHUTTER, O., 2010. *International Human Rights Law*. Oxford: Oxford University Press
- DE SOUSA SANTOS, B., 2002. *Toward a New Legal Common Sense*. London: Butterworths
- DEANER, R., 2006. More males run fast: a stable sex difference in competitiveness in U.S. distance runners. *Evolution and Human Behaviour*. 27, pp. 63-84
- DE JONG, R, VANREUSEL, B., and VAN DRIEL, R., 2010. Relationships between mainstream participation rates and elite sport success in disability sports. *European Journal of Adapted Physical Activity*. 3(1), pp. 18-29.
- DEPAUW, K.P., and GAVRON, S.J., 2005. *Disability Sport*. Illinois: Human Kinetics.
- DICEY, A.V., 1959. *An Introduction to the Study of the Law of the Constitution*. 10th Edition. London: The Macmillan Press.
- DOIG, P, LLOYD-SMITH, R, PRIOR, J.C., and SINCLAIR, D., 1997. *Position Statement: Sex Testing (gender verification) in Sport*. Canadian Academy of Sport Medicine (CASM).

DOLAN LAW FIRM., 2010. *Complaint for Damages and Demand for Jury Trial. Lana Lawless* [online] Available at: <http://www.lgbt-lawyer.com/CM/Articles/Lawless-v-LPGA-Complaint-Filed-Endorsed.pdf> [Accessed 03/05/11]

DONNELLY, P., and KIDD, B., 2006. Achieving Human Rights in and through Sport. *The Bulletin of the International Council of Sport Science and Physical Education* [online] September, 48. Available at: http://www.icsspe.org/bulletin/drucken_a4b0b689.php.html [Accessed 10/11/11].

DONNISON, D., 1998. *The Policies for a Just Society*. London: Macmillan Press.

DREGER, A., 2009. The sex of athletes: One issue, many variables. *The New York Times* [online] 25 October. Available at: www.nytimes.com/2009/10/25/sports/25intersex.html [Accessed 01/09/10]

DREGER, A., 2010. Sex Typing for Sports. *Hastings Center Report* 40(2), pp. 22-24

DWORKIN, R., 2009. *Taking Rights Seriously*. London: Duckworth.

EAGLY, A.H., 1987. *Sex Differences in Social Behaviour: A social-role interpretation*. Hillsdale New Jersey: Erlbaum Publishers.

EAGLY, A.H., and WOOD. W., 1999. The Origins of Sex Differences in Human Behaviour: evolved dispositions versus social roles. *American Psychologist*. 54(6), June, pp. 408-423.

EBBEN, P.W., and LENSON, R.L., 1998. Debunking Myths that Block Opportunity. *The Physician and Sports Medicine*. 26(5), pp. 86-89.

ECKES, T., and TRAUTNER, H.N., 2000. *The Developmental Social Psychology of Gender*. New Jersey: Lawrence Erlbaum.

ELLING, A., and CLARINGBOULD, I., 2005. Mechanisms of Inclusion and Exclusion in the Dutch Sports Landscape: Who Can and Wants to Belong? *Sociology of Sport Journal*. 22, pp. 498- 515.

ELLING, A., DE KNOP, P., and KNOPPERS, A., 2003. Gay/Lesbian sport clubs and events: places of homo social bonding and cultural resistance? *International Review for the Sociology of Sport*. 38(4), pp. 441-56.

ELLING, A., and KNOPPERS, A., 2005. Sport, Gender and Ethnicity: practices of symbolic in/exclusion. *Journal of Youth and Adolescence*. 34(3), pp. 257-268.

ELLISON, J.G., 2009. Women Cant Jump: Canadian court outsources sexual discrimination in Winter Olympics. *The Faster Times- International Law and Society* [online]. Available at: <http://thefastertimes.com/internationallaw-society/2009/07/27/female-ski-jumpers-vancouver-olympics-canadian-court-allows-sexual-discrimination/> [Accessed 10/04/10]

ELLISON, G.T.H., and GOODMAN, A.H., 2006. *The Nature of Difference: science, society and human biology*. USA: Taylor and Francis Group

ELLSON, S., and LOHN, M., 2006. Whose Rules are we Playing By? *Entertainment and Sports Law Journal*. [online], 3(2). Available at: http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume3/number2/ellson_lohn/ [Accessed 01/08/12]

ENTINE, J., 1999. *Taboo: Why black athletes dominate sports and why we're afraid to talk about it*. Public Affairs.

EPSTEIN, D., 2010. Sports Genes. *Sports Illustrated*. [online], 17 May. Available at: <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1169440/index.htm> [Accessed 10/08/10]

EUROPEAN COMMISSION., 2007. *White Paper on Sport* [online], Available at: http://ec.europa.eu/sport/documents/wp_on_sport_en.pdf [Accessed 01/04/12]

EUROPEAN COMMISSION., 2010. *Study on the Treatment of Non-Nationals in Individual Sports Competitions*. [online], Available at: http://ec.europa.eu/sport/library/doc/f_studies/study_equal_treatment_non_nationals_final_rpt%20_dec_2010.pdf [Accessed 01/08/12]

EUROPEAN COMMISSION., 2011. *Developing the European Dimension in Sport*. [online], Available at: http://ec.europa.eu/sport/news/doc/communication/communication_en.pdf [Accessed 07/06/11]

EUROPEAN COMMISSION., 2012. *Match Fixing in Sport*. [online], Available at: http://ec.europa.eu/sport/news/documents/study-sports-fraud-final-version_en.pdf [Accessed 01/08/12]

FAIRBAIRN, C., 2004. *The Gender Recognition Bill [HL] Bill 56 of 2003-04*. House of Commons Library [online]. Available at: <http://www.parliament.uk/commons/lib/research/rp2004/rp04-015.pdf> [Accessed 05/06/05]

FALK, R., 2009. *Achieving Human Rights*. London: Routledge

FASTIFF, P.B., 1992. Gender Verification Testing: Balancing the Rights of Female Athletes with a Scandal-Free Olympic Games. *Hastings Constitutional Law Quarterly*. 19, pp. 937- 961.

FATTEH, P., 2010. Iranian Girls Soccer Teams no Longer Banned. *The Muslim Observer*. [online] 13 May. Available at: <http://muslimmedianetwork.com/mmn/?p=6183> [Accessed 1/10/10]

FELIX, A., 1998. The Fleetwood Assassin Strikes another Blow for Female Boxing. *Sports Law Bulletin*. 1(3), May/June.

FENELON, L., 2009. Discriminating Tastes. *Law Society Gazette*. December, pp. 16-19.

FENWICK, H., 1998. From Formal to Substantive Equality: the place of affirmative action in European Union sex equality law. *European Public Law*. 4(4), pp. 507-516.

FENWICK, H., 2007. *Civil Liberties and Human Rights*. 4th Edition. London: Routledge.

FIELDS, S. K., 2005. *Female Gladiators; Gender, Law and Contact Sport in America*. Urbana and Chicago: University of Illinois Press.

FINA., 2009a. PR58. *FINA Bureau Meeting*. [online] 28 July. Available at: http://www.fina.org/H2O/index.php?option=com_content&view=article&id=976:pr58-fina-bureau-meeting&catid=197:2009&Itemid=248 [09/09/11]

FINA., 2009b. PR59 *FINA Bureau Meeting*. [online] 31 July. Available at: http://www.fina.org/H2O/index.php?option=com_content&view=article&id=975:pr59-fina-bureau-meeting&catid=197:2009&Itemid=248 [Accessed 09/09/11]

FINNIS, J., 2011. *Natural Law and Natural Rights*. 2nd Edition. New York: Oxford University Press.

FLEMING, S., 1994. Sport and South Asian Youth: the perils of 'false universalism' and stereotyping. *Leisure Studies*. 13(3), pp. 159-177.

FLEW, A., 1993. Three Concepts of Racism. *International Social Science Review*. 68(3), Summer, pp. 99-113.

FODDY, B., and SAVULESCU, J., 2010. Time to re- evaluate gender segregation in athletics? *British Journal of Sports Medicine*. 45, pp. 1184-1188.

FORGUES, C., 2000. A Global Hurdle: the implementation of an international non-discrimination norm protecting women from gender discrimination in international sports. *Boston University International Law Journal*. 18, pp. 247-272.

FOSTER, K., 2002. What is International Sports Law? *Sports Law Bulletin*. November/December, pp. 14-16

FOSTER, K., 2003. Is There a Global Sports Law? *Entertainment Law*. 2(1), pp. 1-18.

FOSTER, K., 2006. Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport jurisprudence. *Entertainment and Sports Law Journal* [online], 3(2). Available at: <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume3/number2/foster/foster.pdf> [Accessed 01/08/12]

FOSTER, N., 2011. *Foster on EU Law*. Oxford: Oxford University Press

FRA (The European Union Agency for Fundamental Rights)., 2010. *Racism, Ethnic Discrimination and Exclusion of Migrants and Minorities in Sport: A Comparative Overview of the Situation in the European Union*. [online], Available at:

http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/pub-racism-in-sport_en.htm [Accessed 11/05/11]

FRANCIS, L.P., 2005. Competitive Sports, Disability, and Problems of Justice in Sports. *Journal of the Philosophy of Sport*. 32, pp. 127-132.

FRASER, N., 2001. Recognition without Ethics. *Theory, Culture and Society*. 18(2-3), pp. 21-42

FREDMAN, S., 2002. *Discrimination Law*. Oxford: Oxford University Press.

FRIEDMAN, J.L., and NORMAN, G.C., 2009. The Paralympics: yet another missed opportunity for social integration. *Boston University International Law Journal*. 27, pp. 345-366.

GARDINER, S. et al., 2011. *Sports Law*. 4th Edition. London: Routledge

GARDINER, S., PARRISH, R., and SIEKMANN, R.C.R., 2009. *EU, Sport, Law and Policy*. The Netherlands: TMC Asser Press.

GAVORA, J., 2002. *Tilting the Playing Field. Schools, sports, sex and Title IX*. San Francisco: Encounter Books.

GEARY, D.C., 1998. *Male, Female: the evolution of human sex differences*. Washington: American Psychological Association.

GILBERT, D.T., FISKE, S.T., and LINDZEY, G., 1998. *The Handbook of Social Psychology*. 4th Edition, Volume 2. New York: McGraw Hill.

GILBERT, K., and SCHANTZ, O.J., 2008. *The Paralympic Games: empowerment or side show?* Maidenhead: Meyer and Meyer Sport

GLAISTER, I.K., 1974. Physical Education: an integrating force? *Report of the ATCDE Physical Education Section Conference*. Held at Chelsea College of Physical Education, Eastbourne.

GLEDHILL, R., 2010. Ambreen Sadiq, Muslim boxer, aims to combat prejudice to succeed in the ring. *The Times*. [online] Available at:

http://www.timesonline.co.uk/tol/sport/more_sport/boxing/article6997531.ece [Accessed 19/11/2010]

GOFFMAN, E., 1961. *Asylums: essays on the social situation of mental patients and other inmates*. Middlesex: Penguin Books.

GOLDBERG, D.T., and SOLOMOS, J., 2002. *A companion to racial and ethnic studies*. Malden: Blackwell.

GOOREN. L.J.G., 1993. *Biological Aspects of Transsexualism and their Relevance to its Legal Aspects*. Memorandum given at the "Council of Europe Proceedings, Transgender Individualism, Medicine and Law, XXIIIrd Colloquy on European Law" hosted in April, 1993.

- GOOREN, L.J.G., 1999. Hormonal Sex Reassignment. *The International Journal of Transgenderism* [online] 3(3), July-September. Available at: <http://www.wpath.org/journal/www.iiav.nl/eazines/web/IJT/97-03/numbers/symposion/ijt990301.htm> Last Accessed 4/08/11 [Accessed 05/12/99]
- GOOREN, L.J.G., 2008. Olympic Sports and Transsexuals. *Asian Journal of Andrology*. 10(3), pp. 427-432
- GOOREN, L.J.G., and BUNCK, M.C., 2004. Transsexuals and Competitive Sports. *European Journal of Endocrinology*. 151, pp. 425-9.
- GRABOWSKI, A. M, MCGOWAN, C.P, MCDERMOTT, W.J, BEALE, M.T, KRAM, R., and HERR, H. M., 2010. Running-specific prostheses limit ground force during sprinting. *Biology Letters*. 6, pp. 201-204.
- GRATTON, C., and HENRY, I.P., 2001. *Sport in the City: the role of sport in economic and social regeneration*. London: Routledge.
- GREENBERG, J., 1999. Defining Male and Female: Intersexuality and the Collision between Law and Biology. *Arizona Law Review*. 41(265), pp. 281-92.
- GREENBERG, J., 2000. When is a man a man and when is a woman a woman? *Florida Law Review* 52, pp. 745-768.
- GREELY, H.T., 2004. Disabilities, Enhancements, and the Meaning of Sports. *Stanford Law and Policy Review*. 15, pp. 99- 132.
- GRICE, E., 2011. Steven Davies: admitting I'm gay was 'tougher than facing Brett Lee.' *The Telegraph* [online], 28 February. Available at: <http://www.telegraph.co.uk/sport/cricket/8351004/Steven-Davies-gay-coming-out-was-tougher-than-facing-Brett-Lee.html> [Accessed 22/03/11]
- GRIGGS, C., 1999. *S/he- Changing Sex and Changing Clothes*. New York: Berg Oxford.
- GRIGGS, G., and BISCOOMB, K., 2010. Theresa Bennett is 42...but what's new? *Soccer and Society*. 11(5), pp. 668-676.
- GROENEVELD, M, HOULIHAN, B., and OHL, F., 2011. *Social Capital and Sport Governance in Europe*. London: Routledge
- GUNARATNAM, Y., 2003. *Researching 'Race' and Ethnicity: methods, knowledge and power*. London: Sage Publications.
- GUTTMANN, L., 1976. *Textbook of Sport for the Disabled*. Aylesbury: HM&M Publishers
- HALLIDAY, S., and SCHMIDT, P., 2009. *Conducting law and society research: reflections on methods and practices*. Cambridge: Cambridge University Press.

- HARD, M., 2010. Caught in the net: athletes' rights and the World Anti-doping Agency. *Southern California Interdisciplinary Law Journal*. 19, pp. 533-563.
- HARGREAVES, J., 2000. *Heroines of Sport: the politics of difference and identity*. London: Routledge.
- HARLOW, C., and RAWLINGS, R., 2009. *Law and Administration*. Cambridge: Cambridge University Press
- HARRIS, D.J. *et al.*, Harris, O'Boyle and Warbrick: *Law of the European Convention on Human Rights*. New York: Oxford University Press.
- HARRIS, J., and CHAN, S., 2008. Understanding the Ethics of Genetic Enhancement. *Gene Therapy*. 15, pp. 338-339.
- HARRISON, D., 2005. Absurd, old fashioned and patronising. *The Daily Telegraph* [online], 2 October. Available at: <http://www.telegraph.co.uk/news/uknews/1499705/Absurd-old-fashioned-and-patronising.html> [Accessed 04/10/05]
- HART., 2010. Caster Semenya given all clear after gender test row. *The Telegraph* [online], 6 July. Available at: <http://www.telegraph.co.uk/sport/othersports/athletics/7873240/Caster-Semenya-given-all-clear-after-gender-test-row.html> [Accessed 6/07/10]
- HARTLEY, H., 2009. *Sport, Physical Recreation and the Law*. London: Routledge.
- HARTMANN-TEWS, I., and PFISTER, G., 2003. *Sport and Women: social issues in international perspective*. London: Routledge.
- HECKMAN, J.J., NELSON, R.L., and CABATINGAN, L., 2010. *Global Perspectives on the Rule of Law*. London: Routledge.
- HERDT, G., 1994. *Third Sex, Third Gender: beyond sexual dimorphism in culture and history*. New York: Zone Books
- HESSBRUEGGE, J. A., 2005. Human Rights Violations Arising from Conduct of Non-State Actors. *Buffalo Human Rights Law Review*. 11, pp. 21- 88.
- HEYWOOD, A., 2003. *Political Ideology: an introduction*. 3rd Edition. New York: Palgrave Macmillan
- HICKMAN, T., 2010. *Public Law After the Human Rights Act*. Oregon: Hart Publishing.
- HILL, M., 2005. The permissible scope of legal limitations on the freedom of religion or belief in the United Kingdom. *Emory International Law Review*. 19(2), pp. 1129-1186.
- HILL, J., 2009. The European Commission's White Paper on Sport: a step backwards for specificity? *International Journal of Sport Policy and Politics* 1(3), pp. 253-266

- HILLS, J., 2002. *Understanding Social Exclusion*. New York: Oxford University Press.
- HIMMELSBACH, A., 2007. Basketball skills come slowly to a 7-foot-9 center from China. *The New York Times* [online], 10 March. Available at: <http://www.nytimes.com/2007/03/10/sports/basketball/10sun.html> [Accessed 12/05/11]
- HOBERMAN, J., 1997. *Darwin's Athletes: how sport has damaged Black America and preserved the myth of race*. New York: Houghton Mifflin Company.
- HO, L., 2002. *Hermaphrodites: a tale of two sexes* [online] Reefscapes.net. Available at: <http://www.reefscapes.net/articles/articles/2002/hermaphroditism.html> [Accessed 05/02/05]
- HOLLAND, B., 1995. 'Kicking racism out of football': an assessment of racial harassment in and around football grounds. *Journal of Ethnic and Migration Studies* 21(4), October, pp. 567-586.
- HOWARD, E., 2010. *The EU Race Directive*. London: Routledge
- HOULIHAN, B., 2008. *Sport & Society: a student introduction*. London: Sage Publications
- HOULIHAN, B., and WHITE, A., 2002. *The Politics of Sports Development: development of sport or development through sport?* London: Routledge.
- HUMS, M, WOLFF, E., and MORRIS, A., 2009. *Ensuring Human Rights in Sport: constructing a human rights in sport monitoring checklist*. 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.
- HUNDLEY, H.L., and BILLINGS, A.C. *Examining Identity in Sports Media*. London: Sage Publications.
- HUNT, M., 1998. The horizontal effect of the human rights act. *Public Law*. pp. 423-443
- HYLTON, K., 2010. How a turn to critical race theory can contribute to our understanding of 'race,' racism and anti racism in sport. *International Review for the Sociology of Sport*. 45(3), pp. 335-354.
- HYLTON, K., and BRAMHAM, P., 2008. *Sports Development: policy, process and practice*. London: Routledge
- INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (IAAF)., 2008a. *IAAF Competition Rules 2008*. [online], Available at: www.iaaf.org/mm/Document/imported/42192.pdf [Accessed 07/07/10]
- INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (IAAF)., 2008b. *Oscar Pistorius- Independent Scientific study concludes that cheetah prosthetics offer clear mechanical advantages*. [online], 14 January. Available at: <http://www.iaaf.org/news/Kind=512/newsId=42896.html> [Accessed 01/07/08]

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (IAAF)., 2009. *Race Walking Introduction*. [online]. Available at: <http://www.iaaf.org/community/athletics/racewalking/index.html> [Accessed 11/02/12]

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (IAAF)., 2010. *Caster Semenya May Compete*. [online] 6 July, Available at: <http://www.iaaf.org/aboutiaaf/news/newsid=57301.html> [Accessed 7/07/10]

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (IAAF)., 2011a. IAAF to introduce eligibility rules for females with hyperandrogenism. [online] available at: <http://www.iaaf.org/aboutiaaf/news/newsid=59746.html> [Accessed 23/06/11]

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (IAAF)., 2011b. *Hyperandrogenism Rules*. [online] Available at: http://www.iaaf.org/mm/Document/AboutIAAF/Publications/05/98/78/20110430054216_httppostedfile_HARegulations%28Final%29-Appendices-AMG-30.04.2011_24299.pdf [Accessed 23/06/11]

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (IAAF)., 2011c. *Transgender Rules*. [online] Available at: http://www.iaaf.org/mm/Document/AboutIAAF/Publications/05/98/75/20110430053236_httppostedfile_SRRegulations%28Final%29-AMG-30.04.2011_24293.pdf [Accessed 23/06/11]

INTERNATIONAL OLYMPIC COMMITTEE (IOC)., 2007. *Olympic Charter*, as in force from 7th July 2007. [online]. Available at: http://multimedia.olympic.org/pdf/en_report_122.pdf [Accessed 07/08/10]

INTERNATIONAL OLYMPIC COMMITTEE (IOC)., 2009. *Factsheet: women in the Olympic Movement*. Olympic.org [online], December. Available at: http://www.olympic.org/Documents/Reference_documents/Factsheets/Women_in_Olympic_Movement.pdf [Accessed 18/06/10]

INTERNATIONAL OLYMPIC COMMITTEE (IOC)., 2010. *Summary of conclusions reached at Gender symposium*. Olympic.Org [online]. Available at: <http://www.olympic.org/media?articleid=76409&articlenewsgroup=-1> [Accessed 06/03/11]

INTERNATIONAL OLYMPIC COMMITTEE (IOC)., 2011. *The Olympic Charter*. IOC.

INTERNATIONAL PARALMPIC COMMITTEE (IPC)., 2008. *IPC Position Statement on IAAF's Commissioned Research on Oscar Pistorius*. [online]. Available at: http://oldwebsite.paralympic.org/release/Main_Sections_Menu/News/Press_Releases/2008_01_14_a.html [Accessed 15/01/08]

ISMOND, P., 2003. *Black and Asian athletes in British sport and society: a sporting chance?* Basingstoke, Palgrave Macmillan.

JACKSON, P., and LEOPOLD P., 2001. *Constitutional and Administrative Law*. New York: Sweet and Maxwell

- JAMES, M., 2010. *Sports Law*. Basingstoke: Palgrave Macmillan.
- JARVIE, G., 1991. *Sport Racism and Ethnicity*. London: The Falmer Press.
- JONES, C., and HOWE, P.D., 2005. The Conceptual Boundaries of Sport and Disabled: Classification and Athletic Performance. *Journal of the Philosophy of Sport*. 32, pp. 133-146
- JONES, C., and WILSON, C., 2009. Defining advantage and athletic performance: The case of Oscar Pistorius. *European Journal of Sport Science*. 9(2), pp. 125-131.
- KANE, M., 1971. An Assessment of 'Black is Best.' *Sports Illustrated* [online], 18 January. Available at: <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1084501/index.htm> [Accessed 10/08/10]
- KANE, M.J., 1995. Resistance/transformation of the oppositional binary: exposing sport as a continuum. *Journal of Sport and Social Issues*. May, pp. 191- 217.
- KANTER, A.S., 2007. The promise and challenge of the United Nations Convention on the Rights of Persons with Disabilities. *Syracuse Journal of International Law and Commerce*. 34, pp. 287- 321.
- KAYSER, B, MAURON, A., and MIAH, A., 2007. Current anti-doping policy: a critical appraisal. *BMC Medical Ethics* [online] 8(2). Available at: <http://www.biomedcentral.com/content/pdf/1472-6939-8-2.pdf> [Accessed 11/08/08]
- KESSEL, A., 2010. Caster Semenya returns to the track in triumph after year in limbo. *The Guardian* [online], 15 July. Available at: <http://www.guardian.co.uk/sport/2010/jul/15/caster-semenya-returns> [Accessed 11/08/10]
- KITCHEN, R., 1998. 'Out of Place,' 'Knowing One's Place:' space, power and the exclusion of disabled people. *Disability and Society*. 13(3), pp. 343-356
- KLUKA, D.A., 2008. *The Brighton Declaration on Women and Sport.: A management audit of process quality*. Ph.D thesis, University of Pretoria, South Africa.
- KICK IT OUT., 2000. *Part of the Game? An examination of racism in grass roots football*. Kick it Out.
- KIMMEL, M., 2009. The bigotry of the binary: the case of Caster Semenya. *The Huffington Post* [online] 24 August. Available at: http://www.huffingtonpost.com/michael-kimmel/the-bigotry-of-the-binary_b_267572.html [Accessed 12/08/10]
- KING, C., 2004. Race and Cultural Identity: playing the race game inside football. *Leisure Studies*. 23(1), January, pp. 19-30.
- KING BAUDOUIN FOUNDATION AND NIKE., 2009. *Stand Up Speak Up The Story 2005-2009*. King Baudouin Foundation.

- KOCH, T., 2005. The Ideology of Normalcy: the ethics of difference. *Journal of Disability Policy Studies*. 16(2), pp. 123-129.
- KYMLICKA, W., 1995. *The Rights of Minority Cultures*. London: Oxford University Press.
- LAFFERTY, Y., and McKAY, J., 2004. Suffragettes in Satin Shorts? Gender and Competitive Boxing. *Qualitative Sociology*. 27(3), pp. 249-276.
- Lagaan: Once upon a time in India*, 2001. [Film]. Bhuj, Gujarat, India. [Directed by Ashutosh Gowariker.]
- LAKER, A., 2002. *The Sociology of Sport and Physical Education*. London: Routledge Falmer.
- LAQUEUR, T. W., 1990. *Making Sex: body and gender from the Greeks to freud*. Cambridge: Harvard University Press.
- LARSON, S., 2011. Intersexuality and gender verification tests: the need to assure human rights and privacy. *Pace International Law Review*. 23(1), pp. 215-248
- LAURENDEAU, J., and ADAMS, C., 2010. 'Jumping like a girl': discursive silences, exclusionary practices and the controversy over women's ski jumping. *Sport in Society*. 13(3) pp. 431-447
- LAWRENSON, D., 2004. Future of Golf. *The Daily Mail*, 15 January.
- LAWTON, J., 2010. Boxing: beard row is a storm in a shaving cup for Williams. *The Independent*. [online], 9 December. Available at: <http://www.independent.co.uk/sport/general/boxing-beard-row-is-a-storm-in-a-shaving-cup-for-williams-680773.html> [Accessed 1/10/10]
- LENK, C., 2007. Is Enhancement in Sport Really Unfair? Arguments on the concept of competition and equality of opportunities. *Sport, Ethics and Philosophy*. 1(2), pp.218-228
- LEWIS, A., and TAYLOR, J., 2008. *Sport: Law and Practice*. 2nd Edition. Sussex: Tottel Publishing.
- LEVY, A., 2009. Either/Or. Sports, sex and the case of Caster Semenya. *The New Yorker* [online] 25 January. Available at: http://www.newyorker.com/reporting/2009/11/30/091130fa_fact_levy?currentPage=1 [Accessed 11/08/10]
- LEWIS, T., 1979. Ethnic Influences on Girls PE. *British Journal of Physical Education*. 10, pp. 132
- LIGUORI, D.J., 2003. Fore! The supreme court tees off a standard to apply the Americans with Disabilities Act to professional sports in PGA Tour, INC, v Martin. *Widener Law Journal*. 12, pp. 185-219.

LINES, K., and HESHKA, J., 2009. Ski jumping through Olympic sized hoops: an analysis of *Sagen & Others v Vancouver Organising Committee (VANOC) for the 2010 Olympic and Paralympic Winter Games*. *International Sports Law Review*. 4, pp. 92-99.

LJUNGQVIST, A., 2006. *IAAF Policy on Gender Verification*. IAAF [online] Available at: <http://www.iaaf.org/mm/document/imported/36983.pdf> [Accessed 10/11/09]

LJUNGQVIST, A, *et al.*, 2006. The history and current policies on gender testing in elite athletes. *International SportMed Journal*. 7(3), pp. 225-230.

LJUNGQVIST, A., and SIMPSON, J., 1992. Medical examination for health of all athletes replacing the need for gender verification in international sports. The International Amateur Athletic Federation Plan. *The Journal of the American Medical Association* 267(6), pp.850-852

LLOYD, A.T., 2009. You're next on the tee, just remember to speak English! Could the LPGA really force players to learn and speak English? *Sports and Entertainment Law Journal*. 9(1), pp.181- 217

LOHN, J., 2002. Standing Tall. *Swimming World and Junior Swimmer*. 11(43), November, pp. 32-34.

LOLAND, S., 2002. *Fair Play in Sport: A moral norm system*. London: Routledge.

LONG, J., 2000. No Racism Here: A preliminary examination of sporting innocence. *Managing Leisure* 5(3), pp. 121-133

LONG J., and HYLTON K., 2002. Shades of White: an examination of whiteness in sport. *Leisure Studies* 21, pp. 87-103.

LONG, J.A., and MCNAMEE, M.J., 2004. On the moral economy of racism and racist rationalisations in sport. *International Review for the Sociology of Sport*. 39(4), pp. 405-420.

LONG, J., CARRINGTON, B., and SPRACKLEN, K., 1997. Asians cannot wear turbans in the scrum: explorations of racist discourse within professional rugby league. *Leisure Studies*. 16. pp. 249-259

LONGMAN, J., 2007. An Amputee Sprinter: Is he disabled or too abled? *The New York Times* [online], 15 May. Available at: <http://www.nytimes.com/2007/05/15/sports/othersports/15runner.html> [Accessed 18/01/08]

LONGMAN, J., 2009. South African runner's sex verification result wont be public. *The New York Times* [online], 19 November. Available at: http://www.nytimes.com/2009/11/20/sports/20runner.html?_r=1&ref=caster_semenya [Accessed 10/08/10]

LORD, J.E., and STEIN, M.A., 2009. Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation and Play. *Boston University International Law Journal* 27, pp. 249- 281.

- LU, A., 2008. Do new materials make the athlete? *In Science*. 321, 1 August. pp. 626-626.
- LUEPTOW, L.B., GAROVICH-SZABO, L., and LUEPTOW, M.B., 2001. Social Change and the Persistence of Sex Typing: 1974-1997. *Social Forces*. September, 80(1), pp. 1-35
- LUPTON, D., 1999. *Risk*. London: Routledge
- LUSTED, J., 2009. Playing games with 'race': understanding resistance to 'race' equality initiatives in English local football governance. *Soccer and Society*. 10(6), November, pp. 722-739.
- MACAULAY, C.M., HAMIDI, M., and TREUNICHT-NAYLOR, K., 2010. Gender verification testing: necessary for the integrity of international athletics, or inexcusable breach of personal privacy? *Medicine and the Law University of Western Ontario Medical Journal*, 79(1), Spring, pp. 25-27
- MACKAY, D., 2005. Italy Stands Firm on Drugs. *The Guardian*, 20 October.
- MAIR, L., 2004. Sex-changer golfer puts the game's rulers in a legal bunker. *The Telegraph* [online], 14 February. Available at: <http://www.telegraph.co.uk/news/worldnews/europe/denmark/1454346/Sex-change-golfer-puts-the-games-rulers-in-a-legal-bunker.html> [Accessed 15/02/04]
- MANCHESTER, C., and SALTER, D., 2011. *Manchester and Salter on Exploring the Law: They Dynamics of Precedent and Statutory Interpretation*. London: Sweet & Maxwell.
- MARKS, J., 2003. *What it means to be 98% Chimpanzee*. London: University of California Press.
- MARQUSEE, M., 1995. *Anyone but England: cricket and the national malaise*. London: Verso
- MARSHALL, C., 2009. The Humiliation of Caster Semenya. *Eureka Street* [online] 31 August. Available at: www.eurekastreet.com.au/article.aspx?aeid=16058 [Accessed 1/08/10]
- MASLOW, A.H., 1943. A Theory of Human Motivation. *Psychological Review*. 50, pp. 370-396
- MASON, A., 1998. *Ideals of Equality*. Oxford: Blackwell.
- MASON, A., 2006. *Levelling the Playing Field*. Oxford: Oxford University Press
- MAXWELL, K., 2008. Interview: Gerry Sutcliffe. *Sport Management*, 12(4), pp.16-18
- MAY, S., MODOOD, T., and SQUIRES, J., 2004. *Ethnicity, Nationalism and Minority Rights*. Cambridge: Cambridge University Press.
- MCARDLE, D., 2008. Swallows and amazons, or the sporting exception to the Gender Recognition Act. *Social and Legal Studies*. 17(1), pp. 39-57.

- MCARDLE, D., and GIULIANOTTI, R., 2006. *Sport, Civil Liberties and Human Rights*. London: Routledge
- MCARDLE, W.D, KATCH, F.I., and KATCH, V.L., 2007. *Exercise Physiology*. Lippincott: Williams & Wilkins.
- MCFEE, G., 2011. *Ethics, Knowledge and Truth in Sports Research*. London: Routledge.
- MCFHEDRAN, M, BAZILLI, S, ERICKSON, M., and BYRNES, A., 2000. *The First CEDAW Impact Study: Final Report*. New York: International Womens Rights Project.
- MCGUIRE, B., and COLLINS, D. 1998. Sport, Ethnicity and Racism: The experience of Asian heritage boys. *Sport, Education and Society*. 3(1), pp. 79-88.
- MEDLAND, J., and ELLIS-HILL, C., 2008. Why do able-bodied people take part in wheelchair sports? *Disability and Society*. 23(2), pp. 107-116.
- MEIER, K.V., 1985. Presidential Address, Philosophic Society for the Study of Sport: Restless Sport. *Journal of the Philosophy of Sport*. XIII, pp. 64-77.
- MEIRIM, J.M., 2004. Portugal: There is a new law in town. *International Sports Law Review*. 4, November, pp. 97-99
- MENON, Y., 2010. Denied the finish line: Sex verification testing for intersex athletes under the International Association of Athletics Federations. *The Dukeminier Awards Best Sexual Orientation and Gender Law Review* 9(1), pp. 389-423.
- MESSNER, A., 2002. *Taking the Field: Women, Men and Sports*. University of Minnesota Press.
- MESTRE, A.M., 2009. *The Law of the Olympic Games*. Den Haag: TMC Asser Instituut.
- Middle Sex*, 2005 [Television] Thomas, A for Channel 4, 26th May.
- MIDGLEY, M., 2002. *Evolution as a religion*. London: Routledge
- MIETTINEN, S., and PARRISH R., 2007. Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (the home grown player rule). *The Entertainment and Sports Law Journal* [online], 5(5). Available at: http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume5/number2/miettinen_parrish/ [Accessed 08/02/08]
- MILES, R., and PHIZACKLEA, A., 1979. *Racism and Political Action in Britain*. London: Routledge and Kegan Paul.
- MILLER, T, et al., 2001. *Globalisation and Sport*. London: Sage Publications
- MITHAUG, D.E., 1996. *Equal Opportunity Theory*. London: Sage Publications

- MITTEN, M.J., and DAVIS, T., 2008. Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities. *Virginia Sports and Entertainment Law Journal*. 8, pp 71-146.
- MITTEN, M.J., and OPIE, H., 2010. "Sports Law:" Implications for the development of International, Comparative and National Law and Global Dispute Resolution. *Tulane Law Review* 85(2), pp. 269-322.
- MOORE, E, WISNIEWSKI, A., and DOBBS, A., 2003. Endocrine Treatment of Transsexual People: a review of treatment regimens, outcomes and adverse effects. *The Journal of Clinical Endocrinology and Metabolism*. 88(8), pp. 3467-3473.
- MORGAN, W.J., 2007. *Ethics in Sport*. Illinois: Human Kinetics
- MOSER, C., 2005. Has Gender Mainstreaming Failed? *International Feminist Journal of Politics*. 7(4), pp. 576-590.
- MOTTRAM, D.R., 2011. *Drugs in Sport*. 5th Edition. London: Routledge.
- MULLINS, B. J, HARDY, S., and SUTTON, W.A., 2000. *Sport Marketing*. Illinois: Human Kinetics
- MYERS, K., 2003. What Next? Martin Johnson to be Martina? *The Daily Telegraph*. [online] 1December. Available at: <http://www.telegraph.co.uk/comment/personal-view/3600558/What-next-Martin-Johnson-to-be-Martina.html> [Accessed 23/02/12]
- NAFZIGER, J.A.R., 1999. Globalising Sports Law. *Marquette Sports Law Journal*. 9(2), pp. 225-238.
- NATURE., 2008. Defining Natural. *Nature*. 10 April, 452(7188), pp. 665-666.
- NAU, J.Y., 1992. France: gender tests for athletes. *The Lancet*. 339(8789), 8 February, pp. 354.
- NEUMAYER, E., 2005. Do International Human Rights Treaties Improve Respect for Human Rights? *Journal of Conflict Resolution*. 49(6), pp. 925-953.
- NEWMAN, J., 2002. Sex Tests: how sexism and bad science have teamed up against athletes. *Trans Harmony, The TG Harmony Newsletter* [online], February, III (2) Available at: <http://www.tgharmony.com/news.htm> [Accessed 05/04/05]
- NEWSHAM, G. J., 1997. *In a league of their own! The Dick Kerr Ladies Football Team*. Chorley UK: Pride of Publishing.
- NIXON, H.L., 2007. Constructing Diverse Sports Opportunities for People with Disabilities. *Journal of Sport and Social Issues*. 31(4), November, pp. 417-433.
- NOLAN, L., 2008. Carbon fibre prostheses and running in amputees: A review. *Foot and Ankle Surgery*. 14, pp. 125-129.

- NOLAN, A., 2009. Addressing economic and social rights violations by non state actors through the role of the state: a comparison of regional approaches to the obligations to protect. *Human Rights Law Review*. 9(2), pp. 225-254.
- NORRISH, M., 2010. Can laser eye surgery improve your golf game? *The Telegraph*. [online], 5 November. Available at: <http://www.telegraph.co.uk/sport/golf/8112677/Can-laser-eye-surgery-improve-your-golf-game.html> [Accessed 13/02/11]
- NYE, C., 2010. Bearded amateur boxers fight ban. *BBCi Website*. [online], 13 January. Available at: <http://news.bbc.co.uk/1/hi/8451615.stm> [Accessed 1/10/10]
- NYONG'O, T., 2010. The unforgivable transgression of being Caster Semenya. *Women and Performance: a journal of feminist theory*. 20(1), pp. 95-100.
- OLIVER, D., and FEDTKE, J., 2007. *Human Rights and the Private Sphere: a comparative study*. London: Routledge.
- OLSEN-ACRE, H.K., 2007. The use of drug testing to police sex and gender in the Olympic Games. *Michigan Journal of Gender and Law*. 13, pp. 207-236.
- O'REILLY, I., 2010. Gender Testing in Sport: a case for treatment? *BBCi Website* [online] 15 February, Available at: http://news.bbc.co.uk/1/hi/in_depth/8511176.stm
- OSBORN, G., and JAMES, M., 2012. The Sources and Interpretation of Olympic Law. *Legal Information Management*. 12, pp. 80-86
- PALOMBELLA, G., and WALKER, N., 2009. *Relocating the Rule of Law*. Portland: Hart Publishing.
- PANNICK, D., 1981. How the FA Kicks Girl Footballers Off the Park. *The Guardian*, 16 November.
- PANNICK, D., 1983. *Sex Discrimination in Sport*. London: Equal Opportunities Commission.
- PAREKH, B., 2006. *Rethinking Multiculturalism: cultural diversity and political theory*. Basingstoke: Palgrave Macmillan.
- PARRISH, R. and MIETTINEN, S., 2008. *The Sporting Exception in European Union Law*. International Sports Law Series, Den Haag: TMC Asser Press
- PARRISH, R *et al.*, 2010. *The Lisbon Treaty and EU Sports Policy*. European Parliament: Directorate Central for Internal Policies.
- PARSONS, A., 2008. *Chambers loses Olympic ban case*. BBCi Website [online], 18 July. Available at: <http://news.bbc.co.uk/sport1/hi/olympics/athletics/7503792.stm> [Accessed 19 July 2008]

PATEL, S and BOYES, S., 2005. *Football and Regulatory Approaches to Women in a 'Men's Game.'* Oral presentation given at the "International Football Institute Conference" hosted by the University of Central Lancashire, Preston, UK in June 2005.

PATEL, S., and BOYES, S., 2006. After Bosman: the rise of the Bos (woman)? *Sport and the Law Journal*. 14(3), pp. 14-16.

PATEL, S., 2006. *The Value of Sport versus Inclusiveness: the legal regulation of transsexuals in sport.* Oral presentation given at the "Socio-Legal Studies Association Conference" hosted by the University of Stirling, Scotland in March 2006.

PATEL, S., 2007. *Women in Sport: an Anglo-American Comparison.* Oral presentation given at the "Girls and Women Rock: Celebrating 35 Years of Sport and Title IX" Academic and Legal Conference hosted by Cleveland University, Cleveland, USA in March 2007.

PATEL, S., 2008a. Creating a Level Playing Field: A study of the admissions and experiences of different groups onto a university sport management course. *Journal of Hospitality, Leisure, Sport and Tourism Education (JoHLSTE)*. 7(2), pp. 24-33.

PATEL, S., 2008b. Transsexuals in sport: inclusiveness and the level playing field. *Anglia Ruskin University- Papers in Law Series* [online]. Available at: http://www.anglia.ac.uk/ruskin/en/home/faculties/alss/deps/law/research/papers_in_law_series.html [Accessed: 1 August 2008].

PATEL, S., 2009a. *Transgender and Sport: A UK perspective.* Oral presentation given at the "Ithaca College Sport, Sexuality, and Culture Conference" hosted by Ithaca College, USA in March 2009.

PATEL, S., 2009b. *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.

PATEL, S., 2010a. *Using Lived Experiences to Explore Inclusion and Exclusion in Sport: the case of the British Indian Female.* Oral presentation given at the "Sport and Society Conference" hosted by the University of British Columbia, Vancouver, Canada in March 2010.

PATEL, S., 2010b. *Inclusion and Exclusion in Sport through Lived Experiences.* Oral presentation given at the "Conference on Law, Policy and the Olympic Movement" hosted by Ithaca College in the Ithaca College London Centre, UK in May 2010.

PATEL, S., 2010c. Women's Ski Jumping and Olympic Programme Inclusion. *World Sports Law Report*. 8(7) July, pp. 11-14.

PATEL, S., 2011. *The European Dimension of Sport as a Medium for Enhancing Participation.* Oral presentation given at the "Sport & EU Conference" hosted by Nottingham Trent University, Nottingham, UK, in July 2011.

- PATINO, M.J.M, ET AL., 2010. An approach to the biological, historical and psychological repercussions of gender verification in top level competitions. *Journal of Human Sport and Exercise*. 5(3), pp. 307-321.
- PAVLAKOS, G., 2007. *Law, Rights and Discourse: the legal philosophy of Robert Alexy*. Oregon: Hart Publishing.
- PEARLMAN, L., 1995. Transsexualism as Metaphor: the collision of sex and gender. *Buffalo Law Review*. 43, pp. 835- 872
- PILGRIM, J, MARTIN, D., and BINDER, W., 2003. Far from the Finish line: Transsexualism and the athletic competition. *Fordham Intellectual Property, Media and Entertainment Law Journal*. 13, pp. 495- 549.
- POUND, R., 2011. *Responses to corruption in sport*. [online], Play the Game Conference, 3rd October, Available at: http://www.playthegame.org/fileadmin/image/PTG2011/Presentation/Richard_Pound_2011.pdf [Accessed 01/08/12]
- PRICE, S.L., 1997. Is it in the Genes? *Sports Illustrated*. [online], 8 December. Available at: <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1011594/index.htm> [Accessed 10/08/10]
- PROMIS, D., EREVELLES, N., and MATTHEWS, J., 2001. Reconceptualising Inclusion: The Politics of University Sports and Recreations Programs for Students with Mobility Impairments. *Sociology of Sport Journal*. 18, pp. 37-50.
- PUWAR, N., and RAGHURAM, P., 2003. *South Asian Women in the Diaspora*. Oxford: Berg
- QINJIE, T, FANGFANG, H, YUANZHENG, Z., and QINSHENG, G., 2009. Gender verification in athletes with disorders of sex development. *Gynecological Endocrinology*. 25(2), pp. 117-121.
- QUIRK, C. E., 1996. *Sports and the Law*. New York: Garland Publishing Inc.
- RAITZ K., 1995. *The Theatre of Sport*. Maryland: The Johns Hopkins University Press
- RANDALL, D.L., 2009. Ethics in Practice. *The Journal of Bone and Joint Surgery*. 91(8), August, pp. 2048-2054
- RASHID, Z., 2009. Asian Football Review. *Eastern Eye*. [online]. Available at: <http://www.easterneye.eu/news.html?groupId=8&newsId=5199> [Accessed 19/11/2010]
- RAVENSBERG, J, COBB, C., and CORBETT, R., 2007. Hijab soccer ban upheld. *The Gazette*. [online] 4 November. Available at: <http://www2.canada.com/montrealgazette/news/story.html?id=0875380c-b5cc-491a-afca-6d4b6229c225&p=1> [Accessed 11/08/11]
- REAVES, R., 2001. "There's no crying in baseball": Sports and the legal and social construction of gender. *Journal of Gender, Race and Justice* 283, Spring, pp.1-24.

- REHMAN, J., 2010. *International Human Rights Law*. Harlow: Pearson Longman
- RHEKER, U., 2000. *Integration through Games and Sports*. Oxford: Meyer & Meyer Sport
- RINCON, A., 2007. EC Competition and Internal Market Law: On the existence of a sporting exemption and its withdrawal. *Journal of Contemporary European Research*. 3(3), pp. 224-237.
- RITCHIE, R, REYNARD, J., and LEWIS, T., 2008. Intersex and the Olympic Games. *Journal of the Royal Society of Medicine*. 101, pp. 395-399
- RICE UNIVERSITY., 2008. *Study Revives Olympic Prospects for Amputee Runner*. [online] Available at: <http://www.rice.edu/nationalmedia/news051608oscar.shtml> [Accessed 11/08/09]
- ROBERTS, K., 2009. Conflict and brinkmanship in sport form part of the narrative which fans find so fascinating and which has lawyers everywhere licking their lips. *Sport Business International* 147, July, p. 7
- ROBSON, D., 2010. Lana Lawless' suit puts gender in sport in spotlight again. *USA Today* [online], 30 November. available at: http://www.usatoday.com/sports/2010-11-29-lana-lawless-lpga-transgender_N.htm [Accessed 02/02/11]
- RODENBERG, R.M., 2010. Gender policies and impact of litigation: Lawless v LPGA. *World Sports Law Report*. 8(12), pp. 6-7.
- ROGERS, S., 2011. Non-White British Population Reaches 9.1 Million. *The Guardian* [online], 19 May. Available at: <http://www.guardian.co.uk/society/2011/may/18/non-white-british-population-ons> [Accessed 10/06/11]
- ROJEK, C., 2005. *Leisure Theory*. Basingstoke: Palgrave Macmillan
- ROY, E.C., 2007. Aiming for Inclusive Sport: the legal and practical implications of the United Nation's Disability Convention for Sport, Recreation and Leisure for People with Disabilities. *Entertainment and Sports Law Journal* [online], 5(1). Available at <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume5/number1/roy> [Accessed 16/07/08].
- SAAKOV, R., and SINNOTT, J., 2010. Russia defends record on racism. *BBCi Website* [online], 2 September. Available at: <http://news.bbc.co.uk/sport1/hi/football/8955148.stm> [Accessed 3/09/10]
- SAMUEL, M., 2007. How gay slurs almost wrecked my career. *Timesonline* [online], 10 September. Available at: http://www.timesonline.co.uk/tol/sport/football/premier_league/article2419068.ece [Accessed 05/01/09]
- SAMUELS, A., 2004. Gender Reassignment. *Medico-Legal Journal* 72(4), pp. 151-152.

- SANGREE, S., 2000. Title IX and the Contact Sports Exemption: gender stereotypes in a civil rights statute. *Connecticut Law Review*, 32(2), pp. 381-449.
- SAVULESCU, J., and FODDY, B. 2010. Le tour and failure of zero tolerance: time to relax doping controls. *Practical Ethics* [online]. Available at: www.practicaethics.ox.ac.uk [Accessed 06/08/11]
- SCHIEK, D., and LAWSON, A. 2011. *European Union Non-Discrimination Law and Intersectionality*. Surrey: Ashgate Publishing
- SCHNEIDER, A.J., and HONG, F., 2006. *Doping in Sport: Global Ethical Issues*. London: Routledge
- SEGAN, J., and HICKMAN, T., 2008. Reaching For the Amber Card: Proportionality of Penalties. [online], 1 June. Available at: http://www.blackstonechambers.com/applications/dynamic/papers.rm?barrister_id=493&id=374 [Accessed 06/02/12]
- SEILER, S., and SAILER, S., 1997. The Gender Gap: Elite women are running further behind. *SportScience News* [online] May-June. Available at: <http://www.sportsci.org/news> [Accessed 01/02/10]
- SELVAGGI, G., and BELLRINGER, J., 2011. Gender Reassignment Surgery: an overview. *Nature Review Urology*. 8 May, pp. 274-281.
- SEYMOUR, D., 2007. The Big Brother row isn't about race. Its about the kind of nation we want to be. *Daily Mail*, 18 January, p. 14.
- SHANAHAN, T., 2004. *Evolution of Darwinism : Selection, Adaptation and Progress in Evolutionary Biology*. New York: Cambridge University Press.
- SHARPE A.N., 1997. *Anglo Australian Judicial Approaches to Transsexuality; discontinuities, continuities and the wider issues at stake. Social and Legal Studies*. 6, pp. 45
- SHARPE, A.N., 2002. *Transgender Jurisprudence: Dysphoric Bodies of Law*. 3rd Edition. London: Cavendish Publishing
- SHELTON, D., 2008. *Regional Protection of Human Rights*. New York: Oxford University Press.
- SHIN, E.H., and NAM, E.A., 2004. Culture, gender roles, and sport: the case of Korean players on the LPGA Tour. *Journal of Sport and Social Issues*. 28(3), August, pp. 223-244.
- SHIPLEY, A., 2009. FINA Opts to Ban All High Tech Swimsuits. *Reachforthewall.com* [online], 24 July. Available at: <http://reachforthewall.com/2009/07/24/suit-story/> [Accessed 11/09/11]
- SHY, Y.L.A., 2007. "Like any other girl": male to female transsexuals and professional sports. *Sports Lawyers Journal*. 14, pp. 95-110.

SIBLEY, D., 1995. *Geographies of Exclusion*. London: Routledge

SIEKMANN, R.C.R., and SOEK, J., 2012. *Lex Sportiva: What is sports law?* The Netherlands: TMC Asser Press.

SIMPSON, J.L, LJUNGQVIST, A, FERUSON-SMITH, M.A, CHAPELLE, A, ELSAS II, L.J, EHRHARDT, A.A, GENEL, M, FERRIS, E.A., and CARLSON, A., 2000. Gender Verification in the Olympics. *Journal of the American Medical Association*. 284(12), pp. 1568-1569

SMALLWOOD, J., (2012). Anti-corruption training to be mandatory for counties. *BBCi*. [online], 22 February. Available at: <http://www.bbc.co.uk/sport/0/cricket/17133632> [Accessed 02/08/12]

SMITH, A., 2011. All Bets Are Off: match fixing in sport- some recent developments. *Entertainment and Sports Law Journal* [online], 9(1). Available at: <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume9/number1/smith/> [Accessed 02/08/12]

SMITH, D., 2009. Caster Semenya row: 'who are white people to question the makeup of an African girl? It is racism' *The Guardian* [online], 23 August. Available at: <http://www.guardian.co.uk/sport/2009/aug/23/caster-semenya-athletics-gender> [Accessed 01/09/09]

SMITH, T.M., and SMITH, R.L., 2008. *Elements of Ecology*. Pearson International Edition; Benjamin Cummings

SNAPE, R., THWAITES, E., and FERGUSON, M., 2003. *Access and Inclusion in Leisure and Tourism*. Eastbourne: Leisure Studies Association

SOCIAL EXCLUSION UNIT (SEU)., 1998. *Bringing Britain Together: a national strategy for neighbourhood renewal*. London: Cabinet Office.

SOCIAL EXCLUSION UNIT (SEU)., 2001. *National Strategy for Neighbourhood Renewal: Policy Action Team Audit*. London: Cabinet Office.

SOLOMON, L.M, MORDKOFF, D.S., and NOLL, R.C., 2009. Physical Enhancement of Human Performance: Is Law Keeping Pace with Science? *Gender Medicine* 6(1), pp. 249-256.

SONG, E., 2007. No Women (and dogs) Allowed: A Comparative Analysis of Discriminating Private Golf Clubs in the United States, Ireland and England. *Washington University Global Studies Law Review*. 6, pp. 181-203.

SPAEMANN, R., 2006. *Persons: the difference between "someone" and "something."* Oxford: Oxford University Press.

SPENCER, H., 1868. *The Principles of Biology*. Vol 1. New York: D Appleton and Company.

SPRACKLEN, K., 2008. The Holy Blood and the Holy Grail: myths of scientific racism and the pursuit of excellence in sport. *Leisure Studies*. 27(2), April, pp. 221-227

STEIN, M.A., and LORD, J.E., 2007. Jacobus TenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities. *Texas Journal on Civil Liberties and Civil Rights*. 167, pp. 167- 185.

STEINER, H.J, ALSTON, P., and GOODMAN, R., 2007. *International Human Rights in Context*. Third Edition. Oxford University Press.

ST. LOUIS, B., 2004. Sport and Common-Sense Racial Science. *Leisure Studies* 23(1), pp. 31-46.

STONE, D. H., 2005. The Game of Pleasant Diversion: can we level the playing field for the disabled athlete and maintain the national pastime in the aftermath of PGA Tour, Inc v Martin: an empirical study of the disabled athlete. *St Johns Law Review*. 79(2), pp. 377- 403.

SWARTZ, L., and WATERMEYER, B. 2008. Cyborg Anxiety: Oscar Pistorius and the boundaries of what it means to be human. *Disability and Society*. 23(2), pp. 187-190

SWIM, J.K., and COHEN, L.L., 1997. Overt, Covert and Subtle Sexism: a comparison between the attitudes toward women and modern sexism scales. *Psychology of Women Quarterly*. 21, pp. 103-118.

TANNSJO, T., and TAMBURRINI, C., 2000. *Values in Sport*. London: E & FN Spon.

TATEM, A.J, GUERRA, C.A, ATKINSON, P.M., and HAY, S.I., 2004. Momentous sprint at the 2156 Olympics? *Nature*. 431, 30 September, pp. 525.

THE FA., 2010. *Mixed football announcement*. [online] TheFA.com. Available at: <http://www.thefa.com/GetIntoFootball/NewsAndFeatures/2010/mixed-football-announcement-180310> [Accessed 24/03/10]

The Christine Jorgensen Story, 1970. [Film]. Edward Small Production, USA. [Directed by Rapper, I]

THE COALITION OF ATHLETES FOR INCLUSION IN SPORT., 2010. *The guiding principles for inclusion in sport*. [online]. Available at: <http://www.playthegame.org/fileadmin/documents/recoinclusivesportcp2.pdf> [Accessed 11/06/11]

THE ROYAL AND ANCIENT GOLF CLUB., 2008. *A Modification of the Rules of Golf for Golfers with Disabilities*. [online], Available at: <http://www.randa.org/~media/RandA/Downloads%20and%20Free%20Publications/A%20Modification%20of%20the%20Rules%20of%20Golf%20for%20Golfers%20with%20Disabilities.ashx> [Accessed 09/08/10]

THEBERGE, N., 1998. Same Sport, Different Gender: A consideration of binary gender logic and the sport continuum in the case of ice hockey. *Journal of Sport & Social Issues*. 22(2), pp. 183-198.

THOMAS, N., and SMITH, A., 2009. *Disability, Sport and Society: an introduction*. London: Routledge.

THOMSEN, I., 1999. Hitting His Stride Again. *Sports Illustrated* [online], 18 October. Available at: <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1017342/index.htm> [Accessed 20/07/10].

TOMLINSON, S., 1986. *Ethnic Minority Achievement and Equality of Opportunity*. Nottingham: University of Nottingham School of Education.

TOZER, J., 2007. 11 year old girl wins landmark right to play football with the big boys. *Mail Online* [online]. Available at: <http://www.dailymail.co.uk/news/article-458021/11-year-old-girl-wins-landmark-right-play-football-big-boys.html> [Accessed 1/03/10]

TROMPENAARS, A., and HAMPDEN-TURNER, C., 1998. *Riding the Waves of Culture*. New York: McGraw-Hill.

TUCKER, R., and COLLINS, M., 2009. The science and management of sex verification in sport. *South African Journal of Sport Medicine* (SAJSM) 21(4), pp. 147-150

TUCKMAN, J., 2005. It's a Man's Game. *The Guardian* [online], 5 January. Available at: <http://www.guardian.co.uk/football/2005/jan/05/womensfootball.sport> [Accessed 06/01/05]

TURNER, J., 2009. It's Time to Challenge Casual Sexism. *The Times Online*. [online]. Available at: http://women.timesonline.co.uk/tol/life_and_style/women/article6849600.ece [Accessed 28/09/09]

TWINING, W., 2000. *Globalisation and Legal Theory*. London: Butterworths

UK ANTI-DOPING IN SPORT (UKAD)., 2006. WADA Decides Against Hypoxic Chamber Ban. [online] 20 September. Available at: http://www.ukad.org.uk/news/article/wada_decides_against_hypoxic_chamber_ban [Accessed 05/01/12]

UNITED NATIONS., 2011. The Universal Declaration of Human Rights [online]. United Nations. Available at: <http://www.un.org/en/documents/udhr/> [Accessed 11/12/2011].

VALIOTIS, C., 2009. Runs in the outfield: The Pakistani diaspora and cricket in England. *The International Journal of the History of Sport*. 26(12), September, pp. 1791-1822

VAN HOECKE, M., 2011. *Methodologies of Legal Research: which kind of method for what kind of discipline?* Oxford: Hart Publishing.

VAN HILVOORDE, I AND LANDEWEERD, L., 2008. Disability or Extraordinary Talent- Francisco Lentini (three legs) Versus Oscar Pistorius (no legs). *Sport, Ethics and Philosophy*. 2(2), pp. 97- 111.

VAN HILVOORDE, I., and LANDEWEERD, L., 2010. Enhancing disabilities: transhumanism under the veil of inclusion? *Disability and Rehabilitation*. pp. 1-6.

VAN HILVOORDE, I, VOS, R., and DE WERT, G., 2007. Flopping, Klapping and Gene Doping: dichotomies between 'natural' and 'artificial' in elite sport. *Social Studies of Science*. 37(2), April, pp 173-200.

WACKWITZ, L.A., 2003. Verifying the Myth: Olympic Sex Testing and the Category "Woman". *Women's Studies International Forum*, 26(6), pp. 553-560.

WALDEMAR, B., 1988. *The spirit and the flesh; sexual diversity in American Indian culture* Boston: Beacon Press

WAMSLEY, K.B., 2008. *Sport and Transitioning/ Transitioned Athletes*. [online] Available at: <http://www.athletescan.com/Images/Publications/Transitioning%20Athlete%20Project/Social%20Science%20Literature%20on%20Sport%20and%20Transitioning-Transitioned%20Athletes.pdf> [01/09/10]

WARSHAW, A., 2012. Velcro's dramatic save leads football to life ban on hijab. *The Independent* [online] 4 March. Available at: <http://www.independent.co.uk/sport/football/news-and-comment/velcros-dramatic-save-leads-football-to-lift-ban-on-hijab-7534753.html> [Accessed 21/03/12]

WATT, R., and JOHNS, F., 2009. *Concise Legal Research*. Sydney: The Federation Press.

WEATHERILL, S., 2006. Anti-doping Revisited- the demise of the rule of 'purely sporting interest'? *European Competition Law Review*. 27(12), pp. 645-657.

WEILER, P., 2000. *Leveling the Playing Field: how the law can make sports better for fans*. London: Harvard University Press

WESTON, M.A., 2005. The Intersection of Sports and Disability: analysing reasonable accommodations for athletes with disabilities. *Saint Louis University Law Journal* 50, pp. 137-163

WEYAND, P.G, BUNDLE, M.V, McGOWAN, C.P, GRABOWSKI, A, BROWN, M.B, KRAM, R., and HERR, H., 2009. The fastest runner on artificial legs: different limbs, similar function? *Journal of Applied Physiology*. 107, pp. 903-911.

WHIPP, B.J., and WARD, S.A., 1992. Will women soon outrun men? *Nature*. 335(6355), 2nd January. pp. 25

WHITTLE, S., 2002. *Respect and Equality- Transsexual and Transgender Rights*. London: Cavendish Publishing.

- WHITTLE, S., 2004. *The Transgender Debate: the crisis surrounding gender equality*. London and New York: Cassell
- WIESEMANN, C., 2011. Is there a right not to know one's sex? The ethics of gender verification in women's sports competition. *Journal of Medical Ethics*. 37, pp. 216-219.
- WILD, S.J., 2009. On Equal Footing: Does Accommodating Athletes with Disability Destroy the Competitive Playing Field or Level it? *Pepperdine Law Review*. 37, pp. 1347-1392.
- WOLBRING, G., 2008. Oscar Pistorius and the future nature of Olympic, Paralympic and other Sports. *Script-ed*. 5(1), April. pp. 139-160.
- WOLFF, E., 2009. *120 Seconds with Eli Woolf- Olympian and Activist* [Video Clip Online] Friendswelove.com. Available at: <http://vimeo.com/4633740> [Accessed 1/2/2010]
- WOMEN'S SPORT AND FITNESS FOUNDATION., 2008. *Women in Sport Audit*. [online] Available at: http://wsff.org.uk/sites/wsff.org.uk/files/Women_in_Sport_Audit_-_2007-08_0.pdf [Accessed 10/08/09]
- WOMEN'S SPORT AND FITNESS FOUNDATION., 2011. *Big Deal? The case for commercial investment in women's sport*. [online] Available at: http://wsff.org.uk/sites/wsff.org.uk/files/Big_Deal_report_2.pdf [Accessed 05/12/11]
- WOOD, J., 2008. Record Breaking or Rule Breaking? *Materials Today*. [online]. 11(6), June, pp. 1-1.
- WOOD, R.I., and STANTON, S.J., 2011. Testosterone and Sport: current perspectives. *Hormones and Behaviour*. 61(1), pp. 147-155
- WORLD ANTI-DOPING AGENCY (WADA)., 2006. *WADA Executive Committee Approves the 2007 Prohibited List*. [online], 16 September. Available at: <http://www.wada-ama.org/en/News-Center/Articles/WADA-Executive-Committee-Approves-the-2007-Prohibited-List/> [Accessed 11/09/10]
- WORLD ANTI-DOPING AGENCY (WADA)., 2009. *The World Anti-doping Code*. [online]. Available at: http://www.wada-ama.org/rtecontent/document/code_v2009_En.pdf [Accessed 12/11/11]
- WORLD ANTI-DOPING AGENCY (WADA)., 2010. *Athlete Biological Passport Operating Guidelines*. [online]. Available at: http://www.wada-ama.org/Documents/Resources/Guidelines/WADA_AB_P_OperatingGuidelines_EN_2.1.pdf [Accessed 05/12/10]
- WORLD ANTI-DOPING AGENCY (WADA)., 2011. *International Standard for Therapeutic Use Exemptions*. [online]. Available at: http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-IS-TUE/2011/WADA_ISTUE_2011_EN.pdf [Accessed 08/09/11]

WORLD HEALTH ORGANISATION (WHO)., 1980. *The International Classification of Impairments, Disability and Handicap*. Geneva: WHO.

WORLD HEALTH ORGANISATION (WHO)., 2001. *International Classification of Functioning Disability and Health*. [online]. Available at: http://www.disabilitaincife.it/documenti/ICF_18.pdf [Accessed 05/12/10]

YANG, J.H, BASKIN, L.S., and DISANDRO, M., 2010. Gender Identity in Disorders of Sex Development: review article. *Pediatric Urology*. 75(1), pp. 153-160.

YOUNGSTEADT, E., 2008. "Blade Runner" Back on Track. *Science Now* [online] 20 May. Available at: <http://news.sciencemag.org/sciencenow/2008/05/20-02.html> [Accessed 20/07/10]

ZACCONE, L.A., 2010. Policing the policing of intersex bodies. *Brooklyn Law Review*. 76(1), pp. 385- 438.

ZETTLER, P. J., 2009. Is it cheating to use Cheetahs? The implications of technologically innovative prostheses for sports values and rules. *Boston University International Law Journal*. 27, pp. 367- 409.

Parliamentary Debates

HC Deb 26 March 1975 vol 889 cc 511- 618 [online] Available at: <http://hansard.millbanksystems.com/commons/1975/mar/26/sex-discrimination-bill> [Accessed 10 July 2011]

HL Deb 15 July 1975 vol 362 cc 1113- 221 [online] Available at: <http://hansard.millbanksystems.com/lords/1975/jul/15/sex-discrimination-bill> [Accessed 10 July 2011]