

Dr Seema Patel – Written evidence (NPS0041)

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Introduction

[1] I am senior lecturer in sports law at Nottingham Law School. My area of expertise is discrimination in sport and in recent years I have focused on the legal implications of sport gender eligibility regulations and guidelines. My current research examines the protection of athletes' human rights in sport.

[2] My PhD and research monograph examined a regulatory balance between inclusion and exclusion in competitive sport, across the areas of sex, gender, disability and race. I uncovered deficiencies in the framework of sport when dealing with diversity and inclusion issues.¹ In a significant update to this research, I have investigated regulatory gaps in the protection of athletes gender rights in sport, and this forms the basis of my evidence.²

[3] Although the primary emphasis of my research is on human rights and sport, such an inquiry illustrates the way in which sport is regulated or should be regulated by government and the law. Securing and maximising participation in sport at all levels is achieved through effective regulation and appropriate regulatory systems in sport. I am submitting evidence reinforcing this view, on the request of the House of Lords Select Committee (November 2020), as an academic expert on discrimination in sport. I will be offering a legal and regulatory perspective on questions 6, 7, 8 and 10 as outlined in the call for evidence.

Question 8- What are the opportunities and challenges facing elite sports in the UK and what can be done to make national sports governing bodies more accountable? For example, accountability for representing and protecting their membership, promoting their sport and maximising participation.

Opportunities and Challenges

[4] Traditional notions of identity and human difference are increasingly shifting in society. This evolution is providing minority individuals with a voice to contest derogatory treatment based on their characteristics and break down unnecessary barriers to participation in all aspects of life. As this societal transformation takes place, there is a great opportunity for sport to lead and embrace diversity through the application of fairness and transparency in its regulation and its treatment of people involved in sport, including athletes.

[5] However, the current challenge facing sport is its protection of athletes' rights and its compliance with human rights. Having evaluated the recent developments in gender eligibility regulations, there is a discontent with the inadequate protection of minority athletes' human rights in sport. This has

¹ Patel S, *Inclusion and Exclusion in Competitive Sport* (London: Routledge 2015)

² Patel S, 'Gaps in the Protection of Athletes Gender Rights in Sport- A Regulatory Riddle' (2021) *The International Sports Law Journal* (accepted, forthcoming)

created a 'regulatory riddle' when ascertaining how to balance sport interests with athletes' rights.³

[6] The challenge exists because the essence of sporting activity involves testing our human differences by creating conditions which separate athletes according to our traits. Sport has defended that essence by historically arranging competition into binary divisions and categories. Safeguarding those categories are longstanding and evolved eligibility rules that seek to ensure fairness in competition. When in pursuit of this aim, the inclusion or exclusion of athletes or participants based on human traits may be viewed as legitimate.

[7] Yet as society progresses, the rigid application of sport eligibility regulations is conflicting with the rights of the athlete and potentially contravening human rights. As a result, athletes are beginning to challenge such restrictions which has prompted a global debate on diversity and inclusion in sport. The dialogue is mostly fixated on science and performance advantage issues, with less critique of human rights and law. There is a growing body of research that advocates for a closer scrutiny of the accountability of sports bodies under human rights provisions.⁴

[8] A key regulatory challenge for sports bodies at a national and international level, concerns binding sports bodies to commitments under human rights provisions and holding them accountable for breaches through a legal or non-legal framework. Failure to do so is enhancing the power of sports bodies and resulting in barriers to inclusion and diversity for athletes. In order to maximise participation and nurture an effective national plan for sport and recreation, it is important to centre actions on the individual, rather than on the institution of sport. It is timely to view athletes and wider participants in sport as people who equally deserve human rights protection.

Enforceability of Human Rights

[9] The accountability of sports bodies for human rights breaches is difficult because of the vague applicability of human rights law. Generally speaking, rights are secured through several international, regional and domestic human rights provisions, which are underpinned by the Universal Declaration of Human Rights 1948 (UDHR). A wide body of legally enforceable global human rights instruments steer States and stakeholders to promote non-discrimination, acknowledge rights and regulate dutifully. Within those documents, minimum standards are imposed upon States to adopt and implement measures, including legislation, to eliminate discrimination and apply pressure on sports bodies. These standards are also contained within a broad suite of non-legally binding soft law tools which seek to enforce a firmer regulation of non-state actors. For example, some sports bodies have recognised the United Nations Guiding Principles on Business and Human Rights (UNGPs) within their policies. Despite this, there continues to be a lack of accountability for sports bodies under these soft law tools because their impact is limited and because the application of international law tends to position non-state actors such as sport beyond the reach of the law.

³ Patel, 2021

⁴ Patel, 2021; Schwab B, 'Protect, Respect and Remedy. Global Sport and Access to Justice' (2020) *International Sports Law Review* 3, 57-70; West D, 'Revitalising a phantom regime: the adjudication of human rights complaints in sport' (2019) *The International Sports Law Journal* 19, 2-17 <https://doi.org/10.1007/s40318-019-00147-6>

[10] Regional human rights systems vary but at the European level, key legislative tools place obligations to adhere to human rights and consider equality when formulating and implementing laws, regulations, policies and activities.⁵ In terms of the application of these provisions to sport, the European courts are demonstrating an appetite for intervening in sport matters and applying human rights and European Union (EU) law to sport. The EU has demonstrated a competence in sport and offered a view that a balance between individual and sporting interests is realisable through good governance and an acknowledgement of the specificity of sport.

[11] At a domestic level, in the UK, there is a general reluctance to regard sports bodies as fulfilling a public function for the purpose of enforcing human rights law. Although the UK courts have entertained the idea that private sports bodies may exercise public functions, the position is narrow which therefore results in a lack of intervention in sport disputes.⁶ The UK Equality Act 2010 (EA) offers wider protection and shields individuals from discrimination based on their protected characteristics. Yet the enforceability of non-discrimination provisions at the national level is hindered by the adoption of exemption clauses within domestic equality legislation such as the EA, that permit discrimination in the context of a gender affected activity.

[12] Despite the presence of a strong framework for guarding human rights, there is a weakness in its application to sport which has led to the vulnerability of the participation of minority athletes.

Relationship between Sport and the Law

[13] Another drawback to ensuring the engagement of sports bodies with human rights is sports interaction with the law. Given the unique dominant and influential position of sport in society and commerce, the legal accountability of sports bodies and its regulation is an important consideration for government. In terms of a legislative framework, the UK role in the governance and administration of sport is limited, with little legislation in place to govern sport directly, unless enacted for specific issues. Other countries enforce a more interventionist approach, where it is considered that sport serves a public function and the state has a responsibility to regulate this area through the enforcement of legislation.⁷ The preference for either approach to sport depends upon the context of the issue and the aim of what is to be achieved.

[14] Sport favours internal regulation within an autonomous, global environment and this behaviour may be cultivating a *Lex Sportiva*.⁸ This term refers to a body of law being developed by international sports bodies and organisations, rather than by the State. The success of the internal resolution of sport disputes through the Court of Arbitration for Sport (CAS), which has a binding impact upon the participation of athletes, contributes to the acknowledgment of a *Lex Sportiva*. The law adopts a tentative approach to sport matters, and they are

⁵ Treaty on the Functioning of the European Union (TFEU) (Article 10)

⁶ Boyes S, 'The Regulation of Sport and the Impact of the Human Rights Act 1998' (2000) European Public Law 6:4, 517–530

⁷ Lewis A, Taylor J, Sport: Law and Practice (3rd edn. Haywards Heath: Bloomsbury Professional 2014)

⁸ Foster K, 'Lex Sportiva and Lex Ludica: The Court Of Arbitration for Sport's Jurisprudence' (2005) The Entertainment and Sports Law Journal 3:2, 2 <http://doi.org/10.16997/eslj.112>

mindful of the special qualities of sporting activity, instead deferring to the authority of the governing body and CAS in sport disputes.

[15] However, *Lex Sportiva* is a disputed concept and in the context of athletes rights, it could be suggested that it widens the regulatory gaps in the protection of rights because the concept reinforces a separation between private sport regulation and public law, thus representing a legal shield for sport.⁹ Indeed, the treatment of sports bodies as private entities has given them a degree of latitude to function and behave in a way that is often at odds with the societal or legal trends. Furthermore, sports bodies continue to apply eligibility rules that remain untested against human rights standards. This has a negative impact upon the promotion of sport and the participation of minority athletes.

[16] The tension between public and private regulatory spaces, illustrates the complex relationship between sport and the law. The ambiguity of this space and the uncertainty surrounding the appropriate regulation of sport, leaves minority athletes exposed to harm, with limited avenues to seek a remedy for human rights violations.¹⁰

Moving Forward: Ensuring Accountability

[17] Holding sports bodies to account under human rights standards is an ideal that is increasingly supported by organs of the United Nations, as expressed in various reports.¹¹ In order to protect athletes' rights and ensure the accountability of sports bodies in the context of human rights, the following proposals might be considered relevant to the Committee in the pursuit of maximising participation and formulating a national plan for sport;

1. Anti-Discrimination in Sport Unit

[18] I have previously suggested that an International Anti-Discrimination in Sport Unit (IADSU)¹² could be established to act as a watchdog and enforcement body for the fight against discrimination in sport. An independent compliance unit such as the IADSU could be reimagined at a national level, to secure the compliance of sports bodies and their rules/practices with universal human rights standards, and to ensure responsible regulation.¹³

[19] This body would function by voluntary agreement and would comprise of independent experts from a variety of fields such as law and ethics, science and medicine, sport and policy. They would fulfil their role by conducting an audit of sport rules and practices to ensure consistency and compliance with human rights. Sports organisations universally agree to sign up to an 'anti-discrimination code of conduct' which might include obligations to embed human

⁹ Foster, 2005; Patel, 2021

¹⁰ Schwab, 2020

¹¹ United Nations Human Rights Council, 'The Elimination of Discrimination Against Women and Girls in Sport' (2019)

https://ilga.org/downloads/Elimination_of_discrimination_against_women_and_girls_in_sport.pdf

(Accessed 20 January 2021); United Nations Human Rights Council, 'Report of the United Nations High Commissioner for Human Rights, Intersection of Race and Gender Discrimination in Sport' (2020)

https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/_layouts/15/WopiFrame.aspx?sourcedoc=/EN/HRBodies/HRC/RegularSessions/Session44/Documents/A_HRC_44_26_AEV.docx&action=default&DefaultItemOpen=1 (Accessed 20 January 2021)

¹² Patel, 2015

¹³ United Nations Human Rights Council, 2020

rights within their rules, review rules and justify them against legal standards. It is fundamental that such a body has investigatory and sanctioning powers in the enforcement of the code of conduct. Approaching accountability in this way would contribute to securing wider inclusion in sport.

2. Anti- Discrimination in Sport Charter

[20] Augmenting an 'Anti-Discrimination in Sport Unit' could be the enactment of an Anti-Discrimination in Sport Charter, that would provide the body with legal underpinning, bind sport to human rights and establish a necessary legal framework.¹⁴ An Anti-Discrimination in Sport Charter would strengthen the national plan for sport and recreation by demonstrating a formal commitment to diversity and inclusion. The Charter would incorporate a range of common standards that require sports bodies to adopt measures to remove discriminatory practices and recognise broader human rights. Signatories could give effect to the Charter by adopting guidelines or instruments that evidence a firm and active commitment to protecting people involved in their sports. The Charter might also symbolise a more interventionist approach to tackling human rights issues in sport.

3. Independent Tribunal for Sport

[21] My research identified a gap in the judicial process when dealing with sport and human rights disputes, which contributed to the isolation of the athlete.¹⁵ There is an incapacity to deal with sport and human rights issues in both the sport and legal systems, leaving limited support for athletes who seek to challenge unfair treatment. Current models of dispute resolution may exist but are not necessarily working independently or transparently.

[22] In order to resolve this shortfall, it is proposed that the creation of an accessible and independent tribunal for human rights disputes in sport would align the existing sport system with the legal framework. Although this has been sketched out at the international level,¹⁶ it may be a useful consideration for any national plan for sport and recreation to guarantee that appropriate regulatory systems are in place to deal with human rights disputes in sport. The construction of an appropriate judicial space for sport and human rights matters requires further research but is a crucial factor in the accountability of sports bodies.

[23] Overall, the proposals for securing accountability of sports bodies and guaranteeing maximal participation in sport are ambitious and may not be immediately attainable. That said, we are at a critical stage in the regulation of sport and the protection of minority athletes' rights. Action is required to overcome this challenge and to reposition sport as a leader in the anti-discrimination movement. Given the global nature of sport regulation, it is likely that these recommendations may also require a connection to the international sport and legal framework in order to be effective.

¹⁴ Patel, 2021

¹⁵ Patel, 2021

¹⁶ West, 2019; Patel, 2021; Cernic J.L, 'Emerging Fair Trial Guarantees Before the Court of Arbitration for Sport' (2014) European Society of International Law Conference Paper Series https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2546183 (Accessed 10 January 2021)

Question 7- What can be done to improve and implement effective duty of care and safeguarding standards for sports and recreation activities at all levels?

[24] In addition to the suggestions above, my proposals for improving and implementing duty of care and safeguarding standards for sport and recreation are aligned to the 'Duty of Care in Sport' report, conducted by Baroness Tanni Grey-Thompson in 2017.¹⁷ One of the report recommendations was the creation of a Sports Ombudsman. Reinforcing this, my research revealed that athletes face barriers to accessing a remedy for human rights violations and duty of care breaches. They are threatened and drowned in the process, with partial knowledge and understanding of their available options.¹⁸ They require assistance to navigate the regulatory complexities of sport and the law. In order to facilitate this, the establishment of an independent Athlete Advice Service (AAS)¹⁹ may offer some relief and could be a suitable setting for improved and open communication between the representatives.

[25] A consistent view is that any such body should be independent, athlete-centred and accessible with investigatory powers for accountability.²⁰ It is important to develop an organisation that binds sport to upholding its duty of care. The wellbeing of athletes and those involved in sport is of increasing concern and examination.²¹ A strong support system focused on those individuals rather than on sport should be prioritised.

Question 6- How can racism, homophobia, transphobia, misogyny and ableism in sport be tackled?

[26] Conversations about discrimination in sport are emerging from the darkness and finally being explored in an open and evidence-based environment. This progress is forcing sports bodies to recognise and address discrimination issues in sport. Increased dialogue and education should be encouraged in a national plan for sport and recreation to transform attitudes and challenge harmful stereotypes about human differences.

[27] Discrimination is magnified in the context of sport because at its heart is differential treatment based upon human difference. Sport is bound by an exclusive and complex framework that is soaked in traditional values and customs. In earlier research I conceptualised a scale of inclusion and exclusion in sport, and emphasised that exclusion may be reasonable and unreasonable, overt and covert.²² Exclusion becomes unreasonable when the rules and practices in place to manage our differences, do not match ability or protect the essence of sport. Instead, they may be driven by outdated assumptions of differences that are unconsciously embedded within the culture of sport. As a result, there are divergences of inclusion and exclusion in sport where discrimination takes place but is rarely contested or reviewed.

¹⁷ Grey-Thompson T, 'Duty of Care in Sport: Independent Report to the Government' (2017)

¹⁸ Patel, S, Supporting Athletes Through Legal Action In: Campbell N et al. Holistic Athlete Development and Wellbeing: person first, athlete second. (London, Routledge 2021 in press)

¹⁹ Patel, 2021

²⁰ Anderson J, Partington N, 'Duty of Care in Sport: time for a sports ombudsman?' (2018) International Sports Law Review 1: 3-10

²¹ Campbell, 2021

²² Patel, 2015

[28] Reconstructing the regulatory system of sport as discussed throughout this evidence, goes some way to tackling discriminatory behaviour and bringing covert exclusionary practices out of the shadows. Where sports bodies do not recognise and address discrimination, close legal scrutiny is required through a firmer enforcement of human rights standards and accountability for human rights violations.

[29] Previously, I proposed a ladder of regulation for eliminating discrimination in sport, ranging from less-intrusive soft measures to interventionist legal regulation.²³ In the current climate, it is necessary to impose greater measures to tackle discrimination and human rights failures, through the introduction of the Anti-Discrimination in Sport Unit, an Anti-Discrimination in Sport Charter, and a fairer judicial process. For instance, the proposed sports audit by the Anti-Discrimination in Sport Unit encourages implicit norms upon which rules are based, to shift to better reflect current sport and society. Sport matters related to human differences should be evidenced based and truthful, and approached with transparency and awareness of diversity. Sport deserves historical continuity as traditional customs forms part of its essence.²⁴ However, there must be consequences when those conventions are inaccurate and lead to prejudice. Enforcement and accountability are key to defeating discrimination and ensuring compliance with universal human rights standards.

**Question 10- Should there be a national plan for sport and recreation?
Why/why not?**

[30] The non-interventionist approach to sport is under pressure and in the context of athletes rights the current legislative framework is failing to protect athletes. The law and government organisations have a crucial role to play in directly enforcing those rights by scrutinising all aspects of the sport regulatory system. A national plan for sport and recreation, that accounts for athletes' rights and the appropriate accountability of sports bodies could have a significant positive impact on participation and inclusion.

27 January 2021

²³ Patel, 2015

²⁴ Patel, 2015