

European Court of Human Rights

Eva Hristova OBESNIKOVA v Bulgaria (Application no. 20839/22)

Third Party Intervention by the Human Rights Centre of Ghent University¹

In this submission, we aim to address several key themes pertinent to the case of *Obesnikova v. Bulgaria*. Firstly, we advocate for the application of Article 14 ECHR in conjunction with Article 8 ECHR. Secondly, we delve into the methodology under Article 14 ECHR in cases concerning gender-based discrimination. Thirdly, we provide a comparative analysis regarding the emerging trends concerning mixed-gender sports teams and insights from case law in other jurisdictions on this matter. Finally, we invite the Court to interpret the ECHR in alignment with the UNCRC principles to effectively protect children's rights in matters concerning them.

Throughout this submission, we respectfully invite the Court to be mindful of the pervasive influence of gender stereotypes on the enjoyment of human rights for women and girls. Even seemingly benign or absent stereotypes can significantly limit women's rights, in the short and long term. Stereotyping extends beyond assigning stigmatising negative traits to certain groups – it can portray individuals belonging to that group as inherently weak and in need of protection. The impact of stereotyping becomes especially problematic when unsolicited protection undermines individual agency, such as hindering participation in chosen sports (teams). In contexts highly susceptible to gender stereotypes, such as amateur and professional sports, we argue that the ECtHR has a particularly crucial role in identifying and unpacking these stereotypes to uphold Convention rights effectively.

1. Girls' participation in amateur sport concerns an essential element of the protection provided by Article 8 ECHR in conjunction with Article 14 ECHR

The ancillary nature of Article 14 ECHR does not entail that the applicability of the prohibition of discrimination is dependent on the existence of a violation of a substantive provision of the ECHR. As recently explained in the case of *Semenya v. Switzerland*, it is necessary but sufficient that the facts of a case fall under the ambit of at least one of the substantive provisions.² We respectfully submit that the case at hand provides a unique opportunity for the Court to clarify that the participation of girls in amateur sports, such as participation in a football team, not only falls within the scope of the right to respect for private life ensured by Article 8 ECHR, but also concerns an essential element of the protection provided by that Convention right. Moreover, we invite the Court to integrate a children's rights perspective in its analysis, by drawing upon and being guided by the principles of the United Nations Convention on the Rights of the Child (UNCRC).³

1.1. Participation in (amateur) sports and the protection of health and personal development

Fundamental Principle 4 of the Olympic Charter proclaims that "*the practice of sport is a human right. Every individual must have access to the practice of sport without discrimination of any kind*".⁴ The

¹ For the Human Rights Centre, the team consists of Eva Brems, Pieter Cannoot, Ingrida Milkaitė, Cathérine Van de Graaf, Marlies Vanhooren.

² ECtHR, *Semenya v. Switzerland*, App. No. 10934/21, § 119-120.

³ ECtHR, *Harroudj v. France*, No. 43631/09, § 42; Ursula Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23 Human Rights Quarterly p. 308-309; Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 2009), p. 54; Trond Helland and Ragnhild Hollekim, 'The Convention on the Rights of the Child's Imprint on Judgments from the European Court of Human Rights: A Negligible Footprint?' (2023) 41 Nordic Journal of Human Rights 213–233.

⁴ [The Olympic Charter](#) (International Olympic Committee, 2023).

benefits of engaging in physical activity are well-documented in literature. Physical activity has proven to have numerous health benefits, such as the prevention of premature mortality, and chronic and cardiovascular diseases. Moreover, engagement in physical activity is positively associated with the psychological and emotional development of young people.⁵ In a recent report on race and gender discrimination in sport, the UN High Commissioner for Human Rights held that “*there is strong evidence of the benefits of sport for health and well-being, and also for building leadership, teamwork, perseverance and other essential skills*”.⁶

Given the beneficial effects of engaging in physical activity for physical health and well-being, and for personal development, we argue that the participation in amateur sports, such as a football team, naturally falls within the generally established principles concerning the ambit of Article 8 ECHR in the Court’s existing case law. Indeed, as the Court held in *National Federation of Sportspersons’ Associations and Unions (FNASS) and Others v. France*, “*Article 8 protects the **right to personal development**, whether in terms of personality or of personal autonomy, which is an important principle underlying the interpretation of the Article 8 guarantees. It encompasses the **right for each individual to approach others in order to establish and develop relationships with them and with the outside world**, that is, the right to a “private social life”, and may include professional activities or **activities taking place in a public context**.”⁷*

In addition, the Grand Chamber has ruled that Contracting States have the positive obligation under Article 8 ECHR to protect the life and health of those within their jurisdiction.⁸ This includes both physical health and mental health.⁹ In its case law, the Court has clarified the scope of this positive obligation in a range of circumstances, such as environmental issues, (forced) medical treatment and compulsory medical procedures, reproductive rights and mental illness.¹⁰ The direct link between engagement in physical activity and physical and mental health is therefore another reason why the protective scope of Article 8 ECHR includes participation in amateur sports.

On account of these high stakes, it may be argued that participation in sports is an essential element of the protection offered by Article 8 ECHR.

1.2 Gendered stereotypes affecting the rights of girls to access sport

The *Obesnikova* case clearly showcases that the participation of women and girls in sport is strongly embedded in gendered stereotypes about the appearance of women’s bodies and their physical capacities.¹¹ The UN High Commissioner for Human Rights has recently argued that broader sociocultural gender norms hinder women and girls from participating in sport.¹² We submit that the presence of these negative stereotypes about women and girls in the world of sport strengthen the arguments for the application of Article 8 *jo.* Article 14 ECHR to cases concerning the participation of women in amateur sport, such as a football team. Indeed, as the Grand Chamber held in *Aksu v. Turkey*, “*any negative*

⁵ S. Messing, M. Krennerich, K. Abu-Omar, S. Ferschl, P. Gelius, ‘Physical Activity as a Human Right?’ (2021) 23 Health and Human Rights Journal 201-211.

⁶ UN High Commissioner for Human Rights, ‘[Intersection of race and gender discrimination in sport](#)’, A/HRC/44/26 (2020), p. 2.

⁷ ECtHR, *National Federation of Sportspersons’ Associations and Unions (FNASS) and Others v. France*, App. No. 48151/11 and 77769/13, § 153 (emphasis added).

⁸ ECtHR, *Vavříčka and Others v. the Czech Republic* [GC], App. No. 47621/13 and 5 others, § 282.

⁹ See e.g. ECtHR, *Bensaid v. United Kingdom*, App. No. 44599/98, §. 47 (mental health) and ECtHR, *Vavříčka and Others v. the Czech Republic* [GC], App. No. 47621/13 and 5 others, § 282 (physical health).

¹⁰ We refer to [the Registry’s Guide on Article 8](#) for all relevant references.

¹¹ We refer to [our intervention in the Chamber case of Semenya v. Switzerland](#) for a detailed discussion of the persistence of structural sex and gender discrimination in sports, which is based on harmful gender stereotypes.

¹² UN High Commissioner for Human Rights, ‘Intersection of race and gender discrimination in sport’, A/HRC/44/26 (2020), p. 3.

stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group".¹³

Protection from the harmful impact of gender stereotypes is moreover central to a UNCRC-based approach to girls' participation in sport.

From a children's rights perspective, gender-based discrimination is strictly prohibited through Article 2 UNCRC, necessitating equal age limits for all genders.¹⁴ Adolescence is a critical period where gender disparities intensify, particularly affecting girls who experience heightened **discrimination, inequality, and stereotyping**.¹⁵ Cultural norms often exacerbate these challenges, leading to limited opportunities for sport as well as disparities in health and life satisfaction indicators compared to boys, a gap that tends to widen with age.¹⁶

Adolescents' right to **freedom of association** (article 15 UNCRC), encompassing recreational and sports activities, must be fully upheld, ensuring safe spaces for both girls and boys of varying ages.¹⁷ Leisure and recreation are essential for adolescents' **best interests and development**, fostering their sense of uniqueness, **identity, dignity, autonomy, participation, and expression** (articles 3, 6, 8, 12, 13 UNCRC).¹⁸ However, these rights are often overlooked during adolescence, especially for girls. Creating inclusive and safe environments is crucial to facilitate girls' involvement in sports, promoting their holistic development.¹⁹

According to the UN Committee on the Rights of the Child, girls also require particular attention to realise their rights to rest, leisure, play, recreational activities, cultural life and the arts (Article 31 UNCRC) as the lack of appropriate facilities as well as cultural and social assumptions and biases that restrict the expectations and behaviour of girls "*can serve to diminish their opportunities to enjoy [their rights]*".²⁰ The Committee has stated in this regard that:

*"Adolescent boys and girls are often discouraged from engaging in joint recreational activities. Furthermore, girls generally have lower participation rates in physical activities and organized games as a consequence of either external cultural or self-imposed exclusion or lack of appropriate provision. This pattern is of concern in the light of the proven physical, psychological, social and intellectual benefits associated with participation in sports activities. Given these widespread and pervasive barriers impeding girls' realization of their rights under article 31, the Committee urges States parties to **take action to challenge gender stereotypes which serve to compound and reinforce patterns of discrimination and inequality of opportunity**."*²¹

¹³ ECtHR, *Aksu v. Turkey* [GC], App. No. 4149/04 and 41029/04, § 58.

¹⁴ UN Committee on the Rights of the Child, [General comment No. 20 \(2016\) on the implementation of the rights of the child during adolescence](#), § 38. All CoE member States must adhere to the UNCRC. The CoE Strategy on the Rights of the Child (2022-2027) emphasises the importance of safeguarding children's rights within its broader mission of human rights protection, highlighting the UNCRC as a key reference for shaping CoE initiatives and actions concerning children. Utilising the UNCRC as an interpretive framework is crucial as it provides comprehensive standards for evaluating adherence with children's rights. [CoE Strategy on the Rights of the Child](#), 2022, § 1 and § 20; Jane Fortin, *Children's Rights and the Developing Law* (CUP 2009), p. 45.

¹⁵ UN Committee on the Rights of the Child, General comment No. 20 (2016), § 27.

¹⁶ UN Committee on the Rights of the Child, General comment No. 20 (2016), § 27.

¹⁷ UN Committee on the Rights of the Child, General comment No. 20 (2016), § 45.

¹⁸ UN Committee on the Rights of the Child, General comment No. 20 (2016), § 75.

¹⁹ UN Committee on the Rights of the Child, General comment No. 20 (2016), § 75.

²⁰ UN Committee on the Rights of the Child, [General comment No. 17 \(2013\) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts \(art. 31\)](#), § 48.

²¹ UN Committee on the Rights of the Child, General comment No. 17 (2013), § 48. Emphasis added.

Preventing interference with children’s rights under Article 31 UNCRC requires non-discriminatory access to all recreational activities, including sports, irrespective of gender or age.²² Establishing an ideal environment for the realisation of Article 31 UNCRC entails ensuring children’s freedom from stress, social exclusion, prejudice, or discrimination, and providing opportunities for children of all genders to engage in sports and recreational activities with their peers.²³

Moreover, the Council of Europe Strategy on the Rights of the Child (2022-2027) highlights the importance of **combating gender discrimination** and **promoting equality** between boys and girls as essential goals.²⁴ Gender equality is viewed as fundamental, especially during childhood, where opportunities must be equitable. **Persistent harmful gender stereotypes** can impede the fulfilment of individual needs, particularly for girls who face heightened barriers and discrimination in accessing and enjoying their human rights compared to boys.²⁵ Therefore, the Council of Europe prioritises a gender-sensitive and anti-discrimination approach to address systemic inequalities and foster inclusivity. This includes **ensuring equal opportunities for all children**, such as engagement in physical activity, which positively impacts their psychological and emotional development.²⁶

Girls’ exclusion from sports affects their lives detrimentally as early engagement in recreational activities can profoundly impact their futures, including potential professional sports careers. The Council of Europe commitment to inclusive policies resonates with the principles of the UNCRC, emphasising the importance of accessible and equal opportunities for all children to participate in sports and recreational activities for their overall well-being and holistic development.²⁷ Therefore, we invite the Court to interpret the ECHR in light of UNCRC principles to uphold children’s rights effectively.²⁸

2. Methodological challenges in addressing gender-based discrimination under Article 14 ECHR

2.1 Balancing abstract with concrete review

We respectfully submit that the *Obesnikova* case deals with a situation in which the application of a general rule that is designed to promote opportunities for women and girls, in fact results in a specific case in denying opportunities to a concrete girl. This is therefore a type of case in which the human rights analysis may yield different results depending on whether it assesses the rule as such, or instead its application in the case at hand.

The European Court of Human Rights has repeatedly stated that its task is to examine the human rights conformity of the concrete situation that is brought before it (concrete review), rather than any rule in the abstract (abstract review).²⁹ Still, there are some cases in which the Court’s assessment of a rule in the abstract – rather than of its application to the concrete facts in the case – was determinative for the outcome. Also, commentators have sometimes expressed an expectation that the Court would assess a rule as such, in addition to its application to the facts of the case; as this would send a clearer message to the defendant state as well as to other states that may have in place or contemplate adopting similar rules.

²² UN Committee on the Rights of the Child, General comment No. 17 (2013), § 57.

²³ UN Committee on the Rights of the Child, General comment No. 17 (2013), § 32.

²⁴ [CoE Strategy on the Rights of the Child](#), 2022, p. 10.

²⁵ [CoE Strategy on the Rights of the Child](#), 2022, p. 10, 19, 22.

²⁶ S. Messing, M. Krennerich, K. Abu-Omar, S. Ferschl, P. Gelius, ‘Physical Activity as a Human Right?’ (2021) 23 Health and Human Rights Journal 201-211.

²⁷ CoE Strategy on the Rights of the Child, 2022.

²⁸ FRA and COE, [Handbook on European law relating to the rights of the child](#), 2022 edition, p. 32.

²⁹ E.g. ECtHR, Grand Chamber, *Perinçek v. Switzerland*, 15 October 2015, § 226.

We submit that the present case invites the Court **to clarify the relationship between abstract and concrete review in its work**. In light of the considerations listed in the previous paragraph, it would seem meaningful for the Court to start from the human rights analysis of a concrete situation. If there is a *prima facie* violation in the case of the applicant while this is the result of the application of a general rule, it would seem meaningful for the Court to also examine the conventionality of that rule as such. If the Court finds that the rule inherently violates the Convention, it is highly relevant to mention this in the judgment. If the Court finds that the rule does not inherently violate the Convention, for example because the large majority of its applications conform with the Convention, the Court would have to address the question whether the absence of an exception to the general rule that would cover the case before it, constitutes a violation of the Convention. We submit that, unless the carving of an exception would undermine the purpose of the rule as such, the human rights conformity of the rule in the abstract cannot overrule any finding that its application in the case at hand lacks a legitimate aim and/or is disproportionate in its negative impact. Moreover, when it is considered that an exception is required, the consideration that the purpose of the rule should not be undermined, can offer guidance to determine the exception's scope.

Applying this to gender segregation in sports competitions, the starting point is that this serves the purpose of giving fair opportunities to female athletes. Yet in any concrete situation, the fulfilment of this purpose depends on the existence of qualitative training, skill development opportunities and competition options for girls and women from childhood. In a situation in which these options are not present, segregation results in the opposite of its purpose, i.e. depriving female athletes of opportunities. It is hard to identify a legitimate aim for denying female athletes in such a situation access to training and competition options that boys and men have. To the extent that a legitimate aim can be identified (e.g. physical protection), a ban would *prima facie* seem disproportionate with regard to that aim (as developed in more detail in section 3).

2.2. The role of the comparator in cases concerning gender-based discrimination

In the Court's case law, when bringing a complaint under Article 14 ECHR, the applicant has to show that they have been treated differently from another person or group of persons placed in a relevantly similar situation, or equally to a group of persons placed in a relevantly different situation. The other person or group of persons to which the applicant is compared to is called the '**comparator**'.

When it comes to discrimination based on sex, such a comparator would be persons of another sex in a relevant similar situation. For example, in a case concerning a girl's right to join a local age-appropriate amateur sports team, the comparator would be boys of the same age group practicing the same sport in the same locality. **It would be erroneous to identify as the comparator other girls of the same age group** who were able to access the local age-appropriate sports team, as not being able to access the team is where the difference in treatment is located.³⁰

Unfortunately, it may occur that a conclusion that no discrimination is taking place follows from the unsuccessful search for an erroneously identified comparator. We argue that **when the Court is faced with an erroneous comparator identification by a domestic body, it is important that it names and corrects this**. For example, if a domestic court reasons that no discrimination took place because no representative of the comparator group of relevance could be found, this should be critically unpacked. When the domestic reasoning is arbitrary (as in the case of reasoning based on misidentification of a

³⁰ The problematic nature of the aforementioned application of the Article 14 ECHR test becomes even clearer when it is transposed onto one of the Court's landmark judgments on discrimination. Such an application would be comparable to the Russian Courts arguing in *Konstantin Markin v. Russia* that, since no other male military personnel could be found that was on parental leave or desired to use it, no representative of the comparator group of relevance could be found. It would be unthinkable that – in this case – this Court would have accepted such an application.

comparator) the margin of appreciation is to be narrowed and the Court should substitute its own reasoning for that of the domestic authorities.³¹

Gerards has found that the Court **rarely pays explicit attention to the comparability in cases that concern ‘suspect’ classifications** (such as sex).³² We argue – in the spirit of positive subsidiarity – that it is desirable for the Court to offer clear guidance to domestic actors on comparator-based reasoning.

2.3 Very weighty reasons-test for gender-based discrimination – and its relation to stereotyping

When it comes to discrimination on grounds of gender, this Court has repeatedly held that the advancement of gender equality is today a major goal in the member States of the CoE.³³ As gender is considered a ‘suspect’ ground of discrimination, ‘very weighty reasons’ have to be put forward before such a difference in treatment could be regarded as compatible with the ECHR.³⁴ The Court has held that traditions, general assumptions or prevailing social attitudes were insufficient justifications for a difference in treatment on the grounds of sex.³⁵ Just like in an army context in *Markin*, which is riddled with ideas about suitability for military service, the sports world relies on stereotypical ideas about what is a suitable body as well as about performance, stamina, safety and sexual integrity concerns.

In this context, it is necessary to mention – in light of the reasoning developed on the presence of a comparator – that the Court has held that in cases where gender stereotypes play a role, finding a comparator is not always necessary. In a concurring opinion to *Carvalho Pinto de Sousa Morais v. Portugal*, Judge Motoc stated in this regard:

*“What is methodologically important (...) is that we are not using a comparator as in other discrimination cases. **The test of comparability is not suited to cases of stereotyping.** Stereotypes affect the autonomy of groups and individuals. For the disadvantage test it is enough to prove that the stereotypes are harmful to the group to which the applicant belongs and that the rule or practice applied by the State is based on such stereotypes.”³⁶*

Gender stereotypes that are present in the world of sports risk being reproduced when judicial authorities address cases of alleged gender discrimination with great restraint. When (legal) classifications express stereotypical and traditional views on the role of men and women in society, they are based on illegitimate and unjustifiable motives. In such cases, **the very weighty reasons test implies that these discriminatory motives can only be outweighed by important, objective and non-discriminatory aims.**³⁷ It is for the Court to identify whether such aims were present in the case at hand. The comparative analysis presented in section 3 shows that the issues raised in *Obesnikova* are not new, and that they have, in jurisdictions that are considered leading on anti-discrimination matters, long been resolved.

³¹ ECtHR, *De Tommaso v. Italy* [GC], app. no. 43395/09, § 170.

³² Janneke Gerards, *Judicial Review in Equal Treatment Cases* (Martinus Nijhoff, 2005) 130-133.

³³ ECtHR, *Abdulaziz, Cabales and Balkandali v. UK*, nos. 9214/80, 9473/81 and 9474/81, § 78.

³⁴ ECtHR, *Staatkundig Gereformeerde Partij v. the Netherlands*, no. 58369/10, § 72-73 and 76-77; ECtHR, *Emel Boyraz v. Turkey*, no. 61960/08, § 51.

³⁵ ECtHR, *Konstantin Markin v. Russia* [GC], app. no. 30078/06, § 127.

³⁶ Concurring opinion Judge Motoc in *Carvalho Pinto de Sousa Morais v. Portugal*, app. no. 17484/15.

³⁷ Janneke Gerards, ‘The margin of appreciation doctrine, the very weighty reasons test and grounds of discrimination’, in *The principle of discrimination and the European Convention of Human Rights*, ed by Editoriale Scientifica (2017), p. 16.

3. Comparative analysis

3.1 Mixed-gender football teams

Mixed gender football teams for players up to 20 years old exist in a number of CoE countries. Contrary to the notion that single-gender teams are the only norm, **a growing trend towards mixed teams in sports, including football, is evident**. Providing options for girls to play on mixed teams demonstrates a commitment to ensuring equal access to sport for all, without marginalising any gender, and this positive transition is ongoing. As demonstrated below, other jurisdictions beyond the CoE (such as Canada and the US) have tackled the issue of mixed-gender teams with a non-discriminatory approach, challenging harmful gender norms and stereotypes, combating gender discrimination, and promoting equality for all.

At the Tokyo 2020 Olympics, **18 mixed-gender events** unfolded across diverse sports such as archery, athletics, badminton, equestrian, judo, sailing, shooting, swimming, table tennis, tennis and triathlon. Four International Federations further embraced gender balance in canoe, rowing, shooting and weightlifting.³⁸ This **trend of promoting mixed-gender teams** extends beyond the Olympics and is exemplified in football by Germany's progressive approach, also reflecting a broader movement.

Before 2022, **German States** implemented innovative measures allowing girls to register concurrently with both girls' and boys' teams. This approach enabled local training with boys' teams, addressing concerns about long-distance travel and its impact on girls' private lives, considering the typical training schedule on multiple school nights.³⁹ Responding to similar concerns, **England** initially raised the age limit for mixed teams and later abolished it for youth teams.⁴⁰ Similarly, **the Netherlands** eliminated the age limit for mixed teams on all levels except the highest male division.⁴¹ By 2022, Germany had started an analogue pilot project.⁴² In doing so, these three countries joined **Denmark, Lithuania and Norway**, which had started the movement even before 2016. Alongside these six countries without age limits for mixed-gender teams, others have set age limits at 20 (Liechtenstein, Switzerland), 19 (Austria), 18 (Belgium), and 17 (Italy, Portugal and Slovenia), **highlighting the evolving landscape towards inclusivity in football**.⁴³

Along the same lines, the US and Canadian jurisdictions consider that **girls should have the opportunity to try out for and participate on the boys' team under equal conditions**, especially where a separate girls' team is unavailable in sports.⁴⁴ This entails undergoing the same try-out process as boys and being assessed based on their abilities and suitability for the team, without any automatic guarantees of selection. Similarly, girls can only be excluded from the team if they fail to meet the same **objective criteria** applied to boys, such as demonstrated lack of **ability, skill, or experience**, ensuring fair and equitable treatment for all athletes, regardless of gender.

³⁸ International Olympic Committee, '[Mixed-Gender Events: A Sign of Innovation and Greater Gender Diversity at Tokyo 2020](#)' (*International Olympic Committee*, 31 July 2021).

³⁹ Fussball.de, '[Mädchen Im Jungs-Team: Wie Lange Geht Das?](#)' (*Fussball.de*).

⁴⁰ '[Girl Tackles FA over Age Ruling](#)' *BBC* (13 March 2006); Laura A. Hills et al., "'It's Not like She's from Another Planet'": Undoing Gender/Redoing Policy in Mixed Football' (2021) 56(5) *Int. Rev. for the Sociology of Sport* 658.

⁴¹ Jan Dirk van der Zee, '[Column Jan Dirk van Der Zee: Historisch Moment Voor Het Voetbal](#)' (*KNVB*, 2021).

⁴² dfb, '[FAQ: Alle Infos Zum Gemischten Spielen](#)' (*Deutsche Fussball-Bund*, 8 March 2022).

⁴³ UEFA, '[Women's Football across the National Associations 2016/2017](#)'.

⁴⁴ US National Federation of State High School Associations, '[Title IX Compliance – Part IV: Frequently Asked Questions](#)' (2022); Sport Law, '[Girls Playing on Boys' Teams](#)', 2010.

In monitoring the Football Association (FA) process of raising the age for mixed teams, research revealed that this adjustment substituted a gender accountability framework with a football accountability framework for individual girls, 'viewing the girls as players first'.⁴⁵ Recently, the Fédération Internationale de Football Association (FIFA), embraced a comprehensive human rights framework, explicitly emphasising gender equality.⁴⁶ Enshrining its commitment in its Statutes, FIFA now requires its member associations to uphold these human rights values, marking a significant step towards promoting gender equality in football.⁴⁷ Furthermore, there is a growing recognition that in football, both men and women participate in the same activities (or perform the same work) and this is underscored by the International Football Association Board's recent revision of the Law of the Game, which affirms that "*women's football is no longer a separate category and now has the same status as men's football.*"⁴⁸

3.2 Boys and girls in football: addressing the rationales for differentiation in treatment

The traditional justifications for segregating sports based on gender – (1) safety concerns and injury risk for girls, (2) physical differences, fair opportunities and 'level playing field' for female athletes – have been **challenged as girls and women proved capable of contributing to mixed teams**, enjoying the experience, and honing their skills.⁴⁹

3.2.1 Safety concerns and injury risk for girls

One rationale often cited for segregating male and female players in sport revolves around **safety** concerns, stating that it might be unsafe for women to compete against men due to potential injury risks, particularly considering the average size difference. This reasoning underpins the Football Association's decision to segregate teams by gender. However, this perspective is **paternalistic**, as it **fails to express similar concerns for injury-prone or lighter male players**, nor does it consider banning male players from sports for those same reasons.⁵⁰

In this regard, courts in the US previously addressed the issue of female participation on male teams in contact sports. In *Carnes v. Tennessee Secondary School Athletic Ass'n*, a preliminary injunction was issued against the enforcement of a rule prohibiting high school women from playing varsity baseball.⁵¹ It was specifically found that "[t]he proof showed that plaintiff was denied the opportunity to play baseball because of her sex and not because she may have been exposed to a risk of harm any greater than that to which the male players would have been exposed [as she] appeared physically suited to play baseball." Therefore, the **safety rationale was found to be insubstantial**, as it allowed injury-prone males to play baseball while preventing females, who posed a lower risk of harm, from participating in the school's baseball program.

⁴⁵ Laura A. Hills et al., "'It's Not like She's from Another Planet': Undoing Gender/Redoing Policy in Mixed Football' (2021) 56(5) International Review for the Sociology of Sport 658.

⁴⁶ Daniel Rietiker, 'The European Court of Human Rights and FIFA: Current Issues and Potential Challenges' (2020) 1 European Convention on Human Rights Law Review 62, 70–74, as cited in Claire Poppelwell-Scevak, 'The gender pay gap: How FIFA dropped the ball' (2022) 20(1) Int. Journal of Constitutional Law p. 326-327.

⁴⁷ Ibid.

⁴⁸ International Football Association Board, '[Law of the Game 2019/20](#)', 26 (2019), as cited in Claire Poppelwell-Scevak, 'The gender pay gap: How FIFA dropped the ball' (2022), p. 328.

⁴⁹ Laura A. Hills et al., "'It's Not like She's from Another Planet': Undoing Gender/Redoing Policy in Mixed Football' (2021) 56(5) International Review for the Sociology of Sport, p. 658;

Paul Davis, Lisa Edwards, and Alison Forbes, 'Separate but equals? A Philosophical Evaluation of mixed-sex football in England' (2019) Núm. 13 FairPlay, Revista de Filosofía, Ética y Derecho del Deporte, 79-90.

⁵⁰ Victoria Turk, '[Why are elite female footballers barred from playing with men?](#)', (2018) Wired.

⁵¹ *Carnes v. Tenn. Secondary School Athletic Ass'n*, 415 F. Supp. 569 (E.D. Tenn. 1976).

The US case-law established that there is **no reason to use sex as a proxy for physical ability** as athletes' capabilities are determined through individual assessments, irrespective of gender.⁵² Moreover, when the **criteria** for the physical condition of male athletes are not clearly established, allowing any male student, regardless of physical condition, to compete, female athletes cannot be excluded from participating without evidence supporting the safety justification.⁵³ Similarly, in *Hoover v. Meiklejohn*, a US court struck down a rule prohibiting high school women from participating in soccer (or football), a contact sport, as the **safety justification was discredited because physical criteria for playing had not been established for men**.⁵⁴ The court noted that the range of physical abilities among individuals of both sexes was greater than the average difference between the sexes, **deeming the rule "patronizing protection" for women**, akin to placing them "*not on a pedestal, but in a cage*", especially bearing in mind that there was no evidence that less restrictive alternatives to total exclusion were even considered.⁵⁵

3.2.2 Physical differences, fair opportunities and level playing field for female athletes

Critics of mixed-gender sports often point to differences in **physical characteristics** and **abilities** between the sexes. However, research reveals that size differences among boys are often greater than those between girls and boys, challenging gender-based expectations.⁵⁶ Evidence relied on by a US Court also indicates that middle school students of both sexes are generally similar in size and skill level, with **greater differences observed within each sex than between them**.⁵⁷ Research comparing (adult) male and female players in the UEFA Champions League revealed that, **on average**, male players do outperform female players in various aspects of the game and physiological tests.⁵⁸ Yet, these findings are averages and **do not rule out** exceptional female athletes matching elite male performance. While the average quality of professional female football may differ from males', **top female players have been shown to excel, even outperforming males** in endurance tests.⁵⁹ A US court also found that while not all female athletes may possess the skills, strength, and stamina that may be required for mixed-gender contact sports, **some women and girls do demonstrate the necessary physical ability**.⁶⁰

It is crucial to consider that the gap in physical performance between genders cannot solely be attributed to innate gender differences but also stems from **unequal opportunities for skill development from an early age**.⁶¹ Boys usually have greater access to football training, leading to discrepancies in skill levels that persist into adulthood,⁶² exacerbated by unequal funding for men's and women's football. Indeed, research conducted with 10- to 11-year-old pupils in London highlights how **gender stereotypes inhibit girls from participating in football from a young age, impacting their training and future potential in the sport**.⁶³ It was found that (imposed) traits like femininity, humility and niceness discourage girls from engaging in football, while their attempts at assertiveness impede their participation and ownership of the game. Inherent association between football and masculinity further side-lines girls. This way, deep-rooted gender norms grant boys priority access to football and allow them to dominate the sport, leaving girls marginalised from a very young age onwards. Consequently, comparing male and female players on

⁵² [Yellow Springs v. Ohio High Sch. Ath. Ass'n](#), 647 F.2d 651 (6th Cir. 1981).

⁵³ Ibid.

⁵⁴ [Hoover v. Meiklejohn](#), 430 F. Supp. 164 (D. Colo. 1977).

⁵⁵ [Frontiero v. Richardson](#), 411 U.S. 677, 93 S. Ct. 1764 (1973).

⁵⁶ Laura A. Hills et al., "'It's Not like She's from Another Planet'": Undoing Gender/Redoing Policy in Mixed Football' (2021) 56(5) International Review for the Sociology of Sport, p. 668.

⁵⁷ [Yellow Springs v. Ohio High Sch. Ath. Ass'n](#), 647 F.2d 651 (6th Cir. 1981).

⁵⁸ Bradley, Dellal, Mohr, Castellano, Wilkie, 'Gender differences in match performance characteristics of soccer players competing in the UEFA Champions League' (2014) 33 Human Movement Science 159-171.

⁵⁹ Ibid.

⁶⁰ [Yellow Springs, v. Ohio High Sch. Ath. Ass'n](#), 647 F.2d 651 (6th Cir. 1981).

⁶¹ Victoria Turk, 'Why are elite female footballers barred from playing with men?', (2018) Wired.

⁶² Sheryl Clark & Carrie Paechter, '[Why can't girls play football? Gender dynamics and the playground](#)' (2007) 12(3) Sport, Education and Society 261-276.

⁶³ Ibid.

an equal basis is very difficult due to **persistent disparities in training standards** and **opportunities for skill development**, even at the professional level. Female players often train part-time, balancing football with other commitments, while male counterparts benefit from more extensive training and competitive schedules, demonstrating the need for increased investment in the women's game to address these discrepancies and level the playing field for male and female athletes.⁶⁴

Advocates for mixed football emphasise its **benefits** for female players, the fostering of friendships between genders (leading to benefits for boys and men as well), and the similarities in footballing abilities between boys and girls. This support for mixed-gender football and subsequent policy changes underscores a shift towards evaluating girls based on their **skills** and **ability** to play football as well as their integration rather than preconceived stereotypical notions of gender differences.⁶⁵ International developments in the context of mixed gender sports also relate to **the need for reliable and compelling evidence** supporting any potential differentiation between boys and girls. For example, in *Clinton v. Nagy*, a US court issued a temporary restraining order against a rule that barred girls from participation in football due to the absence of evidence demonstrating the girls' physical incapacity to compete against boys.⁶⁶ Anecdotal or stereotypical perceptions cannot suffice, and simply citing general safety concerns or the desire to maintain the strength of female programs by retaining top talent is no longer adequate.⁶⁷ According to US case-law in this regard, "*generalizations would not suffice to deny qualified individuals the opportunity to compete*".⁶⁸ Any potential justification for differentiation must be backed by **concrete, empirical evidence**.

Finally, the rationale relating to the protection of female sport from 'male intrusion' has also been disproved. **While separating male and female sports competitions may appear to serve the interest of promoting fair competition and 'level playing field', this is not the case when women's sports teams are not funded equally** with those of men or in cases when the opportunities for women and girls to train and join a certain sports team do not exist in the first place (see, for example, *Carnes v. Tenn. Secondary School Athletic Ass'n*).⁶⁹ As a result, this rationale effectively **prevents women and girls from competing** solely because of their gender, rather than fostering equal and fair competition.

Bearing in mind the above-mentioned considerations addressing the rationales behind excluding women from mixed-gender teams in sports or limiting their opportunities therein, the present case clearly demonstrates how **harmful consequences emerge under the guise of safeguarding**. This is aptly described by Justice Brennan in a 1973 US Supreme Court plurality opinion in *Frontiero v. Richardson*: "*Traditionally, [differential treatment on the basis of sex] was rationalized by an attitude of 'romantic paternalism' which, in practical effect put women, not on a pedestal, but in a cage.*"⁷⁰ In sum, our comparative findings highlight the emphasis on **the need to offer women and girls the opportunity for inclusion in mixed-gender sports, without implying a mandatory requirement** for constant mixed-gender participation.

⁶⁴ Victoria Turk, 'Why are elite female footballers barred from playing with men?', (2018) Wired.

⁶⁵ Laura A. Hills et al., "'It's Not like She's from Another Planet'": Undoing Gender/Redoing Policy in Mixed Football' (2021) 56(5) International Review for the Sociology of Sport, p. 658.

⁶⁶ *Clinton v. Nagy*, 411 F. Supp. 1396 (N.D. Ohio 1974).

⁶⁷ Canadian Association for the Advancement of Women and Sport and Physical Activity, '[Sex Discrimination in Sport. An Update](#)' (2012).

⁶⁸ *Brenden v. Independent School District 742*, 477 F.2d 1292 (8th Cir. 1973).

⁶⁹ *Carnes v. Tenn. Secondary School Athletic Ass'n*, 415 F. Supp. 569 (E.D. Tenn. 1976).

⁷⁰ As mentioned in the speech '[Advocating the Elimination of Gender-Based Discrimination: The 1970s New Look at the Equality Principle](#)' by Ruth Bader Ginsburg.