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## To Be a Woman in the World of Sport: Global Regulation of the Gender Binary in Elite Athletics

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# To Be a Woman in the World of Sport: Global Regulation of the Gender Binary in Elite Athletics

Michele Krech\*

## ABSTRACT

Indian sprinter Dutee Chand made headlines and history when she successfully challenged the validity of an international rule of athletics that disqualified her from competition because of the “masculine” level of naturally-occurring testosterone in her body. The decision of the Court of Arbitration for Sport in Chand’s favor demonstrates that the International Association of Athletics Federations, despite being the duly authorized regulator of international athletics competition, does not operate unconstrained in policing the boundaries of sex and gender, particularly when it does so in a discriminatory manner. Rather, a number of accountability principles and mechanisms of so-called “global administrative law” must be satisfied to justify any rule for dividing elite athletes into binary sex categories. This paper considers the particular administrative law requirements that, pursuant to the landmark decision in Chand’s case, must characterize the development, implementation, and review of international sporting rules, particularly those that discriminate on the basis of sex or gender. In doing so, it illustrates that global administrative law has an important role to play in protecting and promoting gender equality in sport.

I am unable to understand why I am asked to fix my body  
in a certain way simply for participation as a woman.  
I was born a woman, reared up as a woman, I identify as a woman  
and I believe I should be allowed to compete with other women.

Dutee Chand<sup>1</sup>

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1. Letter addressed to the Athletics Federation of India, reproduced in part in *Dutee Chand v.*

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## INTRODUCTION

In 2015, Indian sprinter, Dutee Chand, made headlines and history when she successfully challenged the validity of an international rule of athletics, which had disqualified her from competition based on the “masculine” level of naturally-occurring testosterone in her body. In a landmark decision, the Court of Arbitration for Sport (CAS) suspended the rule, which effectively governed the binary division of the sexes in athletics, concluding that it unjustifiably discriminated against certain female athletes. The Court granted the global rule-maker, the International Association of Athletics Federations (IAAF), two years to provide additional evidence to justify its discriminatory rule, failing which, it would be declared void. A final decision by the CAS based on the additional evidence submitted by the IAAF is still pending at this time.

Chand’s successful appeal illustrates that the IAAF, despite being the duly authorized regulator of international athletics competition, does not operate

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*Athletics Fed’n of India (AFI) & The Int’l Ass’n of Athletics Fed’ns (IAAF)*, Interim Arbitral Award, CAS 2014/A/3759 [Chand], ¶ 29.

unconstrained in policing the boundaries of sex and gender. Rather, its regulatory efforts are subject to various checks and balances to ensure legitimacy and legality. This paper considers some of the particular accountability principles and mechanisms, collectively termed “global administrative law” (GAL)<sup>2</sup> that must be satisfied to justify a binary sex classification rule for elite athletics competition. It contends that, by imposing certain fairness requirements on the development, implementation, and review of sporting rules, GAL plays an important role in protecting and promoting gender equality in athletics and the broader world of sport.

For context, this article begins by considering the underlying purposes of binarily dividing the sexes in athletics (Part I). It then describes how enforcement of the binary division as well as common understandings of sex, gender, and equality have evolved, albeit incongruously (Parts II and III). The controversial case of Dutee Chand is then introduced (Part IV), followed by a summary of the landmark ruling on her appeal to the CAS (Part V). Next, an overview of the broader regime governing international athletics, in which the IAAF operates, is described (Part VI). This provides the basis for an analysis of GAL constraints on the IAAF’s regulatory authority, with respect to the development, implementation, and review of a binary sex classification rule (Part VII). Finally, some concluding reflections are offered on the role of GAL in promoting gender equality in sport (Part VIII).

## I.

### THE PURPOSE OF THE BINARY DIVISION OF THE SEXES IN ATHLETICS

Competitive sport, with few exceptions,<sup>3</sup> is organized into binary sex categories: male and female. This division is purportedly meant to create and maintain a level playing field, to the benefit of female athletes, who could not meaningfully compete against male athletes due to the latter’s natural physical advantages.<sup>4</sup> While this rationale does not necessarily hold true across all sports, it is largely undisputed with respect to athletics, with its emphasis on outright speed and power.<sup>5</sup> Nevertheless, notions about the fairness achieved by binary sex classification must take into account its other functions, as well as its challenges and contradictions.

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2. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS* 15 (2005).

3. For instance, equestrian and luge are the only Olympic sports that include mixed events in which men and women compete against each other without restriction. Certain other sports (e.g., badminton, sailing, tennis, alpine skiing, figure skating) include mixed team events in which each team is composed of an equal number of male and female athletes. See *Sports*, OLYMPICS, <https://www.olympic.org/sports> (last visited Apr. 13, 2017).

4. *Chand*, *supra* note 1, ¶ 36(d).

5. *But see*, Bruce Kidd, *Sports and Masculinity*, 16 *SPORT IN SOCIETY: CULTURES, COMMERCE, MEDIA, POLITICS* 553, 558 (2013).

International athletics competition began as a celebration of hyper-“masculinity” – characterized by attributes such as physical strength, power, aggression and dominance – from which women were excluded altogether.<sup>6</sup> In fact, the founder of the modern Olympics, Pierre de Coubertin, envisioned the Games as “the solemn and periodic exaltation of male athleticism with internationalism as a base, loyalty as a means, art for a setting, and female applause as a reward.”<sup>7</sup> In his outdated and outlandish opinion, Olympics with women would be impractical, uninteresting, unaesthetic and incorrect.<sup>8</sup> The formal, albeit limited, integration of women was only conceded in response to the threat of separate female sports federations and Games.<sup>9</sup> Beyond ensuring fair competition, then, binary sex classification can be seen to function as a means of monopolizing prestige, generating economic value,<sup>10</sup> and preventing “feminization” of the traditional domain of men’s sport.<sup>11</sup>

Not only does binary sex classification serve multiple purposes beyond ensuring fairness, the rationality of this purported primary purpose is not beyond doubt. In particular, reliance on binary sex classification as the fundamental means of ensuring fairness in sport glosses over the fact that innumerable other natural and environmental factors contribute to each athlete’s relative advantages and disadvantages – from height and lung capacity to coaching and training facilities – none of which are used as a formal basis for separate categories of competition. Rather than being a level playing field, athletics is “a site wherein broader forms of social inequality are accepted, tolerated, and ignored.”<sup>12</sup> So too are all biological inequalities besides age, certain recognized disabilities, and, of course, sex. Notably, the binary division of the sexes is a uniquely absolute organizational rule in athletics, permeating all other categories of competition, such as age and ability.<sup>13</sup>

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6. See *id.* at 554–58; Sylvain Ferez, *From Women’s Exclusion to Gender Institution: A Brief History of the Sexual Categorisation Process within Sport*, 29 *INTL. J. HIST. SPORT* 272, 273 (2012).

7. *Revue Olympique* (July 1912) 2<sup>nd</sup> Series, N° 79, at 110–11. The original French text reads: “[N]otre conception des Jeux Olympiques dans lesquels nous estimons qu’on a cherché et qu’on doit continuer de chercher la réalisation de la formule que voici: l’exaltation solennelle et périodique de l’athlétisme mâle avec l’internationalisme pour base, la loyauté pour moyen, l’art pour cadre et l’applaudissement féminin pour récompense.”

8. *Id.* at 110.

9. Ferez, *supra* note 6, at 272.

10. SEEMA PATEL, *INCLUSION AND EXCLUSION IN COMPETITIVE SPORT: SOCIO-LEGAL AND REGULATORY PERSPECTIVES* 153 (2015).

11. See, e.g., Kidd, *supra* note 5, at 558–59.

12. Cheryl Cooky & Shari L. Dworkin, *Policing the Boundaries of Sex: A Critical Examination of Gender Verification and the Caster Semenya Controversy*, 50 *J. SEX RES.* 103, 107 (2013).

13. Though athletes may never compete outside of their designated sex category, younger or disabled athletes are often permitted to compete “above” their designated category with older athletes or able-bodied peers. See, e.g., *Rio 2016 Olympic Games Entry Standards*, IAAF, <https://www.iaaf.org/competition/standards/2016>, at 4 (last visited Apr. 12, 2017); Kharunya Paramaguru, *Before Oscar Pistorius: Athletes Who Have Competed in Both the Olympics and Paralympics*, *TIME*, <http://olympics.time.com/2012/09/03/before-oscar-pistorius-athletes-who-have-competed-in-both-the-olympics-and-paralympics>, Sept. 3, 2012 (last visited Apr. 13, 2017).

In light of the complex array of factors that contribute to athletic performance, binary sex classification provides a simple and standardized structural framework within which sport can operate.<sup>14</sup> It therefore has significant pragmatic value, providing the stability, predictability, and international consistency necessary for elite athletics competition. These benefits come at the risk, however, of perpetuating the patriarchal status quo upon which athletics competition was founded. The binary division of the sexes in athletics must therefore be assessed in relation to its sole legitimate objective: ensuring fairness by maintaining a level playing field for the benefit of female athletes. The question, then, is how to define and enforce the division between sexes in a manner that faithfully achieves this aim.

## II.

### THE EVOLUTION OF BINARY SEX CLASSIFICATION ENFORCEMENT

As soon as women began participating in significant numbers in sanctioned athletics competitions, so too did strict policing of the sex binary. Following a variety of early intermittent sex verification practices,<sup>15</sup> the IAAF introduced a rule in 1948 requiring female competitors to provide a medical certificate to prove their eligibility.<sup>16</sup> The basis and content of the certificate were not standardized, indicating an underlying assumption that “the social or cultural definition [of ‘female’] in any nation was acceptable for sports, and that any nation’s judgement could be trusted.”<sup>17</sup> This changed in the 1960s as a rise in the performance level of elite female athletes<sup>18</sup> and mounting concerns about males posing as female led the IAAF and the International Olympic Committee (IOC) to institute systematic biomedical sex testing.<sup>19</sup> Starting in 1966, all female athletes were required to undergo physical inspections of their breasts and genitalia by a panel of physicians prior to international competitions. Unsurprisingly, these “nude parades” proved to be terribly demeaning and, in 1968, were replaced by mandatory chromosomal testing of saliva.<sup>20</sup> While less invasive, the “Barr test,” which determines female-status based on the presence of a second X chromosome, was found to be scientifically unreliable, as it did not account for atypical chromosomal

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14. PATEL, *supra* note 10, at 153.

15. Nathan Q. Ha et al., *Hurdling Over Sex? Sport, Science, and Equity*, 43 ARCHIVES SEXUAL BEHAV. 1035, 1036 (2014).

16. Dee Amy-Chinn, *The Taxonomy and Ontology of Sexual Difference: Implications for Sport*, 15 SPORT IN SOCIETY 1291, 1298 (2012); Erin Elizabeth Berry, *Respect for The Fundamental Notion of Fairness of Competition: The IAAF, Hyperandrogenism, and Women Athletes*, 27 WIS. J.L. GENDER & SOC’Y 207, 210 (2012).

17. Vanessa Heggie, *Testing Sex and Gender in Sports; Reinventing, Reimagining, and Reconstructing Histories*, 34 ENDEAVOUR 157 (2010).

18. Berry, *supra* note 16, at 208.

19. Ha et al., *supra* note 15, at 1036. There is only one documented instance of a man “masquerading” as a woman for the purposes of athletics competition. See Laura Donnellan, *Gender Testing at The Beijing Olympics*, 1 BRIT. ASS’N SPORT & L. 20, 21 (2008).

20. Ha et al., *supra* note 15, at 1036.

combinations or the “array of developmental possibilities where chromosomal, gonadal, hormonal, anatomic, and psychosocial sex may be discordant.”<sup>21</sup> Still, it took the IAAF and the IOC two decades – and an infamous case of unfair disqualification – to make any changes.<sup>22</sup> In the early 1990s, the IAAF briefly instituted comprehensive medical examinations of both male and female athletes.<sup>23</sup> This costly procedure was quickly replaced, however, with individual medical determinations on an “as needed” basis, where concerns were raised by competitors, anti-doping officials or an athlete herself.<sup>24</sup> Not until 1999 did the IOC, which had continued with chromosomal testing, harmonize its rules with the IAAF’s on-site “inspect if you suspect” policy.<sup>25</sup>

In 2006, the IAAF elaborated this approach in a “Policy on Gender Verification,” which stipulated that in the event of any “suspicion” or a “challenge” concerning an athlete’s gender, she can be asked to attend a medical evaluation before a panel comprised of a range of specialists.<sup>26</sup> The Policy provided only very vague guidance, however, with respect to the steps to be taken in the handling of such cases. The significant shortcomings of the Policy – both practical and ethical – were soon revealed in two highly publicized and controversial cases. The testing and disqualification of Santhi Soundarajan of India in 2006 and of Caster Semenya of South Africa in 2009 each involved a lack of informed consent and leaks to the media, resulting in severe emotional distress for both athletes as well as widespread public outrage.<sup>27</sup> These cases thus made clear that the IAAF’s policy was inadequate to ensure a professional and confidential investigative procedure in “suspicious” cases.

In an attempt to improve its approach, the IAAF consulted with the IOC to develop “Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women’s Competition” (the “Hyperandrogenism Regulations” or “Regulations”).<sup>28</sup> Introduced in 2011, the Regulations purported to “replace the IAAF’s previous Gender Verification Policy” and emphasized that “the IAAF has now abandoned all reference to the terminology ‘gender verification’ and ‘gender

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21. *Id.*

22. In 1985, Maria Jose Martinez Patino of Spain was disqualified from international athletics competition after failing a sex-verification test. Patino became the first woman to publicly protest her disqualification and, after a geneticist proved she had complete androgen insensitivity and therefore derived no competitive advantage from testosterone, she was reinstated in 1988. *See Berry, supra* note 16, at 212.

23. Ha et al., *supra* note 15, at 1037.

24. *Id.*

25. *Id.* at 1037, 1039.

26. IAAF Medical & Anti-Doping Comm’n 2006, *IAAF Policy on Gender Verification*, (Sept. 16, 2009), [https://oii.org.au/wp-content/uploads/2009/01/iaaf\\_policy\\_on\\_gender\\_verification.pdf](https://oii.org.au/wp-content/uploads/2009/01/iaaf_policy_on_gender_verification.pdf).

27. Ha et al., *supra* note 15, at 1037; Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES (June 28, 2016), [https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html?\\_r=0](https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html?_r=0).

28. IAAF, *Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women’s Competition* (2011) [hereinafter *Hyperandrogenism Regulations*].

policy’ in its Rules.”<sup>29</sup> The Regulations restricted the permissible amount of naturally-occurring testosterone female athletes may have in their bodies. More specifically, they deemed women ineligible to compete in international athletics competition if they had a functional endogenous testosterone level in the “normal male range”, defined as 10nmol/L or above (i.e. hyperandrogenism).<sup>30</sup> The Regulations thus instituted a limitation on the IAAF’s general sex categorization rule, which provides that an athlete is eligible to compete in women’s events if she is “recognised as a female in law”.<sup>31</sup>

The Regulations further set out when and how a female athlete may be investigated for hyperandrogenism. In addition to requiring mandatory self-declaration, the Regulations empower the IAAF Medical Manager to investigate an athlete if the Manager has “reasonable grounds” for believing, based on “any reliable source”, that the athlete may be hyperandrogenic.<sup>32</sup> The investigative process involves three stages: an initial clinical examination, a preliminary endocrine assessment and a full examination and diagnosis.<sup>33</sup> An Expert Medical Panel then makes a recommendation, including any conditions that would bring the athlete into compliance, to the IAAF Medical Manager, who makes the final decision.<sup>34</sup> The Regulations are of “mandatory application” to all female athletes who seek to compete in international athletics and “recommended as a guide” for national athletics federations and domestic competitions.<sup>35</sup> The Regulations’ Explanatory Notes describe their underlying rationale:

The IAAF’s role as the international governing body for the sport of Athletics is first and foremost to guarantee the fairness and integrity of the competitions that are organized under its Rules. Men typically achieve better performances in sport because they benefit from higher levels of androgens than women and this is predominantly why, for reasons of fairness, competition in Athletics is divided into separate men’s and women’s classifications. By extension, since it is known today that there are rare cases of females with [hyperandrogenism] competing in women’s competitions, in order to be able to guarantee the fairness of such competitions for all female competitors, the new Regulations stipulate that no female with [hyperandrogenism] shall be eligible to compete in a women’s competition if she has functional androgen [testosterone] levels that are in the male range.<sup>36</sup>

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29. *Id.* at Reg. 1.4.

30. *Id.* at Reg. 6.5 (noting that an athlete’s testosterone is considered “functional” unless an androgen resistance prevents her body from deriving a competitive advantage from testosterone).

31. IAAF, *Competition Rules 2016-2017*, Rule 141 ¶ 5.

32. *Hyperandrogenism Regulations*, *supra* note 29, at Reg. 2.1 – 2.2.

33. *Id.* at Chapter 5.

34. *Id.* at Reg. 5.24.

35. *Id.* at Reg. 1.2.

36. Chand, *supra* note 1, ¶ 67.



The Regulations, like all past sex verification practices, apply only to female athletes.<sup>37</sup> Although the Regulations do not determine an athlete's sex or gender writ large, they effectively do so for the purpose of athletics competition. That is, the Regulations continue to define what it means to be a "female athlete."<sup>38</sup> This has led many to aptly observe that removing the "gender verification" or "sex testing" label is merely a symbolic gesture or semantic change.<sup>39</sup> The Hyperandrogenism Regulations are thus simply the latest incarnation of a nearly century-long tradition of "femininity testing" in athletics, which exhibits a relentless "determination to establish gender bi-categorization biologically, despite the difficulties and dead-ends in the way."<sup>40</sup> These difficulties arise from evolving understandings of sex, gender, and equality, which reveal how the binary division of the sexes – a strategy for ensuring female athletes an equal opportunity to engage in fair and meaningful competition – can be regulated in a manner that, paradoxically, undermines that very aim.

### III.

#### EVOLVING UNDERSTANDINGS OF SEX, GENDER, AND EQUALITY

Since the emergence of international athletics competition, global understandings of sex and gender identity, and associated legal protections, have evolved significantly. While not globally consistent, and subject to constant challenge, several general trends can be identified.<sup>41</sup> First, there is now wide acknowledgement that despite their significant overlap, sex (a biological state) is distinct from gender (a social construction).<sup>42</sup> There is also growing acceptance that both sex and gender exist on a spectrum, which includes a variety of overlapping characteristics and identities beyond the polar opposites of male and female.<sup>43</sup> As a result, there is increasing reluctance to rely on singular, or even multiple, characteristics as determinative of a certain sex or gender. In fact, at least 10 indicators of sex and gender have been identified: chromosomal sex, gonadal sex, foetal hormonal sex, internal morphological sex, external morphological sex, brain sex, sex of assignment and rearing, pubertal hormonal

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37. *Hyperandrogenism Regulations*, *supra* note 28, at Chapter 1.

38. *Id.* at Reg. 1.3 ("No female with hyperandrogenism shall be permitted to compete in the female category of an International Competition until her case has been evaluated by the IAAF in accordance with these Regulations.").

39. See Anaïs Bohuon, *Gender Verifications in Sport: From an East/West Antagonism to a North/South Antagonism* 32 INT'L J. HIST. SPORT 965, 966 (2015); Alex Hutchinson, *An Imperfect Dividing Line*, THE NEW YORKER (March 27, 2015), <http://www.newyorker.com/news/sporting-scene/dutee-chand-gender-testing-imperfect-line/>.

40. *Ferez*, *supra* note 6, at 272.

41. The description of these trends is a simplification of very complex socio-legal developments, sufficient only for the purposes of this article.

42. It has also been argued that sex is as socially constructed as gender, and thus there is actually no such distinction between them. See Amy-Chinn, *supra* note 16, at 1296.

43. See, e.g., *Gender Revolution: Special Issue on the Shifting Landscape of Gender*, NATIONAL GEOGRAPHIC (Jan. 2017), <http://www.nationalgeographic.com/magazine/2017/01/>.

sex, gender identity and role, and procreative sex.<sup>44</sup> The development of such comprehensive and nuanced conceptions of sexual and gender identity has corresponded with a wide range of efforts to overcome prejudicial gender stereotypes, particularly those which define masculinity and femininity in terms of physical dominance and submission, respectively.<sup>45</sup>

Sex testing in athletics largely ignores these developments, however, by conflating sex, gender, and femininity, and enforcing a binary it admits does not exist in reality.<sup>46</sup> For instance, the terms “sex testing,” “gender verification,” and “femininity testing” are commonly used nearly interchangeably by officials, athletes, and reporters.<sup>47</sup> Further, the Hyperandrogenism Regulations themselves, despite recognizing sex as a continuum, effectively reinstate it as a binary in sporting practice. In so doing, they impose a test that reflects “socially inscribed dichotomous sex in the face of evidence to the contrary.”<sup>48</sup>

Another important development with implications for the legitimacy of binary sex classification is the emergence and development of human rights law and its protection of sexual and gender equality. The past half century has seen explicit prohibitions against discrimination on the basis of sex or gender enshrined in a range of legal instruments, including national constitutions and human rights legislation,<sup>49</sup> as well as international declarations and treaties.<sup>50</sup> Although most of these instruments do not explicitly refer to transgender individuals, evolving

44. Amy-Chinn, *supra* note 16, at 1297, (citing Anne Fausto-Sterling, *How to Build a Man*, in CONSTRUCTING MASCULINITY 129 (Maurice Berger et al. eds., 1995)). Further, even the chairman of the IOC’s medical commission has listed eight criteria to be taken into account in determining sex: sex chromosome constitution; sex hormonal patterns; gonadal sex (i.e. testes or ovaries); internal sex organs; external genitalia; secondary sexual characteristics; apparent sex; and psychological sex. *Id.*

45. See, e.g., UN Office of the High Commissioner for Human Rights, *Gender stereotypes/stereotyping* (last visited Apr. 13, 2017), <http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/GenderStereotypes.aspx/>; UN Women, *Countering Gender Discrimination and Negative Gender Stereotypes: Effective Policy Responses* (July 13, 2011), <http://www.unwomen.org/en/news/stories/2011/7/countering-gender-discrimination-and-negative-gender-stereotypes-effective-policy-responses>.

46. See Chand, *supra* note 1, ¶ 35(e).

47. Laura A. Wackwitz, *Verifying the Myth: Olympic Sex Testing and the Category ‘Woman.’* 26 WOMEN’S STUD. INT’L F. 553, 554 (2003).

48. Ha et al., *supra* note 15, at 1037.

49. See UN Women, *Global Gender Equality Constitutional Database* (last visited Apr. 13, 2017), <http://constitutions.unwomen.org/en>.

50. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20 (Sept. 4-15, 1995) and A/CONF.177/20/Add.1 (Sept. 4-15, 1995); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217.

judicial conceptions of human rights broadly interpret gender equality to include gender identity as a prohibited grounds of discrimination.<sup>51</sup>

Gender equality has also recently gained unprecedented traction in the world of sport. For instance, 2004 saw the establishment of the IOC's Women in Sport Commission and the addition of a Fundamental Principle to the Olympic Charter, prohibiting discrimination on a number of grounds including sex.<sup>52</sup> Other relevant Fundamental Principles of Olympism include "the preservation of human dignity" and the assurance that "[e]very individual must have the possibility of practising sport, without discrimination of any kind."<sup>53</sup> The Olympic Charter was further amended in 2007 to explicitly task the IOC "to encourage and support the promotion of women in sport at all levels and in all structures with a view to implementing the principle of equality of men and women."<sup>54</sup> These developments are mirrored within the IAAF, which now has a Women's Committee and, pursuant to its Constitution, the obligation to "strive to ensure that no gender...discrimination exists, continues to exist, or is allowed to develop in Athletics in any form, and that all may participate in Athletics regardless of their gender."<sup>55</sup>

Despite these important advances, the administration of international athletics has not fully embraced contemporary conceptions of sex, gender, and equality that challenge traditional binary thinking. These evolving conceptions, which have had substantial impacts in many areas of social life, are poorly reflected in the context of athletics because "few other fields rely so absolutely for their functioning on a clear distinction between male and female bodies."<sup>56</sup> Even if a contrived binary division is appropriate and necessary for athletics, however, evolving understandings of sex, gender, and equality cannot be easily ignored. Rather, they form the context for assessing the legitimacy of any rule that divides the sexes and provide a basis for challenging such a rule when it unfairly impacts a female athlete, like it did Dutee Chand.

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51. See, e.g., *Identoba and Others v. Georgia*, No. 73235/12, European Court of Human Rights (Fourth Section), ¶ 96 (May 12, 2015), [http://hudoc.echr.coe.int/eng#{"itemid":\["001-154400"\]}](http://hudoc.echr.coe.int/eng#{) (clarifying that all trans people are protected against discrimination on grounds of gender identity under Article 14 of the European Convention on Human Rights); National Legal Services Authority v. Union of India, No. 604, Writ Petition (Civil), Supreme Court of India, ¶¶ 76-77 (2013), <http://supremecourtindia.nic.in/outtoday/wc40012.pdf> (declaring transgender a "third gender" with which anyone may self-identify, and affirming that the fundamental rights granted under the Constitution of India apply equally to all three genders).

52. International Olympic Committee, *Women in Sport Commission*, <https://www.olympic.org/women-in-sport-commission>; International Olympic Committee, Olympic Charter, Aug. 2, 2015, Fundamental Principle 6, at 14.

53. International Olympic Committee, Olympic Charter, Fundamental Principle 2, 4, at 13.

54. *Id.* at 18, Art. 2, ¶ 7.

55. International Association of Athletics Federation, Nov. 1, 2015, art. 3.4 [hereinafter *IAAF Constitution*].

56. Amy-Chinn, *supra* note 16, at 1291.

## IV.

## THE CASE OF DUTEE CHAND

In June 2016, at age 20, Dutee Chand became the first Indian sprinter to qualify for the women's 100-metre dash at the Olympics since 1980.<sup>57</sup> Just one year before that qualifying performance, however, it was unclear whether she would ever race again. The series of events leading to that uncertainty began in 2012, when Chand moved to an elite training facility in India and began a very successful career in junior athletics. The facility was operated by the Sports Authority of India (SAI), a public body established by the Government of India's Ministry of Youth Affairs and Sports.<sup>58</sup> In 2013, the Ministry promulgated a "Standard Operative Procedure to identify circumstances (female Hyperandrogenism) in which a particular sports person [would] not be eligible to participate in competitions in the female category" (the "SOP").<sup>59</sup> The SOP, a binding procedure with which the SAI and the Athletics Federation of India (AFI) are required to comply, provided for a similar, but not identical, process of hyperandrogenism testing as the IAAF's Regulations.<sup>60</sup>

In June 2014, several female athletes attending a training camp with Chand apparently expressed concern to the AFI President about her "masculine" physique.<sup>61</sup> Subsequently, some officials from the Asian Athletics Federation and national coaches present at the Junior Athletics Championships questioned Chand's right to participate in female events based on her "stride and musculature."<sup>62</sup> Later that month, under the supervision of the Director of the AFI, Chand underwent an ultrasound examination which she believed to be part of a routine doping test.<sup>63</sup> Soon after, the AFI sent a letter to the SAI expressing "definite doubts" regarding Chand's gender.<sup>64</sup> Since it could not identify a

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57. Joshua Arpit Nath, *Dutee Chand Becomes First Indian In 36 Years To Qualify For Women's 100m In Olympics*, TIMES OF INDIA (June 25, 2016), <http://www.indiatimes.com/sports/rio-olympics/dutee-chand-finally-qualifies-for-rio-olympics-sprints-to-100m-in-11-30-seconds-257332.html>.

58. Chand, *supra* note 1, ¶ 8.

59. *Id.* ¶ 9.

60. *Id.* Pursuant to the SOP, cases of suspected hyperandrogenism are referred to a "nodal officer" of the national sports federation or SAI, who arranges for a female doctor to conduct a physical examination of the athlete. If that examination raises questions, the athlete is tested to determine the level of testosterone in the athlete's serum. If the concentration exceeds 6.9nmol/L, a medical panel selected by the SAI conducts a detailed medical evaluation that includes determining the level of certain hormones and a chromosomal analysis, and may also include an MRI scan of the pelvis and a psychological evaluation. On the basis of those tests, the panel makes a recommendation to the SAI as to whether the athlete should be allowed to compete in the female category. See Chand, *supra* note 1, ¶ 391.

61. *Id.* ¶ 392.

62. *Id.*

63. *Id.* ¶ 11. The AFI claimed the examination was carried out in response to Chand's complaints about stomach problems, and was not connected to gender or hyperandrogenism testing. See *id.*, ¶ 12.

64. *Id.* ¶ 13.

suitable female investigative officer, as required by the SOP, the AFI suggested the SAI conduct a gender verification test “as per the established protocol.”<sup>65</sup> The SAI then subjected Chand to a number of medical examinations, including blood tests, gynaecological tests, karyotyping, an MRI and a further ultrasound.<sup>66</sup>

In mid-July, the SAI notified Chand that she would be excluded from the upcoming World Junior Championships and would not be eligible for selection to the Commonwealth Games because her “male hormone” levels were too high.<sup>67</sup> The SAI then issued a public statement indicating that an unnamed athlete had been found ineligible to participate in female events based on the results of a hyperandrogenism test, which was part of “SAI protocol” and “stipulated by the IAAF and the IOC.”<sup>68</sup> The SAI then informed the AFI that Chand had hyperandrogenism and should be excluded from competition, noting that it would assist Chand in accessing the medical assistance necessary to lower her testosterone to permissible levels for competition.<sup>69</sup> Soon after, the AFI notified Chand that, based on medical reports received from the SAI, she was provisionally suspended from all athletics competitions until she complied with the IAAF’s Regulations.<sup>70</sup> Both Chand and the SAI unsuccessfully petitioned the AFI to reconsider its decision.<sup>71</sup>

Rather than undergo the recommended treatment to lower her testosterone, Chand appealed the AFI’s decision to the Court of Arbitration for Sport (“CAS”) – an independent tribunal that resolves global sports-related disputes through private arbitration.<sup>72</sup> Chand alleged that the IAAF’s Hyperandrogenism Regulations unlawfully discriminated against certain female athletes on the basis of sex and a natural physical characteristic (testosterone level).<sup>73</sup> Her bold move to publicly challenge the IAAF’s regulatory regime was path-breaking in the world of global sports law, but an even bigger breakthrough was to come.

## V.

### THE LANDMARK CAS DECISION

In July 2015, after a three-day hearing involving detailed submissions from the parties and testimony from 16 witnesses, the CAS released its ruling on

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65. *Id.* ¶ 14.

66. *Id.* ¶ 15.

67. *Id.* ¶ 16.

68. *Id.* ¶ 20.

69. *Id.* ¶ 24.

70. *Id.* ¶ 27.

71. *Id.* ¶¶ 29–31.

72. COURT OF ARBITRATION FOR SPORT, *Frequently Asked Questions: What is the Court of Arbitration for Sport?* <http://www.tas-cas.org/en/general-information/frequently-asked-questions.html>.

73. Chand, *supra* note 1, ¶ 4.

Chand's appeal ("*Chand*").<sup>74</sup> Significantly, there was no dispute that the Hyperandrogenism Regulations were prima facie discriminatory, contrary to the Olympic Charter, the IAAF Constitution, and the laws of Monaco (where the IAAF is headquartered).<sup>75</sup> Thus, the panel's analysis focused on whether the discrimination was justified as a necessary, reasonable, and proportionate means of creating a level playing field for female athletes as whole, despite denying some individuals the fundamental right to compete at all.<sup>76</sup>

At the outset, the parties agreed that, although human sex is "not simply binary" and "there is no single determinant of sex," the binary division of the sexes is "appropriate and is for the benefit of female athletes and their ability to engage in meaningful competition by competing on a level playing field."<sup>77</sup> Further, all agreed that while it is necessary for the IAAF to formulate a basis for the binary division of the sexes based on an objective criterion or criteria,<sup>78</sup> "gender testing" is not an appropriate mechanism in this regard.<sup>79</sup> That is, the basis for dividing the sexes for the purpose of athletics competition cannot be determinative of a person's sex per se, as that determination is purely "a matter of law."<sup>80</sup> This tenuous distinction suggests that while Chand is indisputably a woman in law and every other area of social life,<sup>81</sup> she may not be considered as such in the sports arena. In fact, the panel acknowledged that the IAAF is essentially responsible for crafting a rule that has no bearing off the track:

As the body responsible for regulating the sport of athletics, the IAAF is in the invidious position of having to reconcile the existence of a binary male/female system of athletics categorization with the biological reality that sex in humans is a continuum with no clear or singular boundary between men and women. Devising eligibility rules that respect both of these contrasting realities – while ensuring fairness to individual athletes – is difficult and presents unique scientific, ethical and legal issues. The Panel is conscious of the significant challenges that the IAAF faces in establishing a regulatory framework that achieves the IAAF's goals in this sensitive and complex area.<sup>82</sup>

When assessing the scientific evidence supporting the Hyperandrogenism Regulations, the CAS found the IAAF was reasonably entitled to rely on endogenous functional testosterone levels to differentiate between male and female athlete populations since there is a significant difference in average levels

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74. Chand, *supra* note 1.

75. *Id.* ¶ 117.

76. *Id.* ¶¶ 35(f), 230, 500.

77. *Id.* ¶ 35(d)–(e).

78. *Id.* ¶ 35(f).

79. *Id.* ¶¶ 35(g), 510. The CAS also deemed mere examination of external genitalia or chromosomal testing inappropriate.

80. *Id.* ¶ 510.

81. *Id.* ¶ 36.

82. *Id.* ¶ 504.

of this hormone between men and women.<sup>83</sup> The panel emphasized, however, that women with high levels of endogenous testosterone relative to other females remain female and are not eligible to compete in the male category.<sup>84</sup> Therefore, according to the panel, “the Regulations do not police the male/female divide but establish a female/female divide within the female category.”<sup>85</sup> While this distinction is somewhat dubious, the panel properly focused its analysis not on whether measuring endogenous testosterone is an appropriate means of distinguishing between men and women, but rather on whether it is appropriate for distinguishing between women within the female category. The panel framed the question before it as follows: “[I]s it reasonable and proportionate to impose a test that excludes [a female athlete] from the female athlete category for the purposes of competition, when she exhibits, naturally, the characteristic most closely associated with male competitive advantage?”<sup>86</sup>

In answering this question, the panel brought to light the implicit assumption underlying the Hyperandrogenism Regulations: “that hyperandrogenic females enjoy a significant performance advantage over their nonhyperandrogenic peers, which outranks the influence of any other single genetic or biological factor, and which is of comparable significance (if not identical magnitude) to the performance advantage [of 10 to 12%] that males typically enjoy over females.”<sup>87</sup> However, since no evidence before the panel scientifically established the degree of competitive advantage enjoyed by hyperandrogenic females over other females, the panel found that the Regulations could not be said to achieve their objective of excluding only female athletes with a competitive advantage “of the same order as that of a male athlete.”<sup>88</sup> Accordingly, the panel concluded that excluding hyperandrogenic females from competition (unless they take medication or undergo treatment) is not a “necessary and proportionate means of preserving fairness in athletics competition and/or policing the binary male/female classification.”<sup>89</sup>

As a remedy, the panel immediately suspended the Hyperandrogenism Regulations.<sup>90</sup> Chand and all other legally female athletes have since been eligible to compete in both domestic and international athletics events.<sup>91</sup> The panel’s decision is the first and only time the CAS has invalidated an entire regulatory regime enacted by an international federation – although it did not do so definitively. Rather, the panel granted the IAAF two years, plus a two-month extension – until the end of September 2017 – to provide additional evidence to

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83. *Id.* ¶ 494.

84. *Id.* ¶ 510.

85. *Id.*

86. *Id.* ¶¶ 511–12.

87. *Id.* ¶ 517.

88. *Id.* ¶ 531.

89. *Id.* ¶ 532.

90. *Id.* ¶ 548.

91. *Id.* ¶ 2, at 160.

justify its Regulations, failing which they will be declared void.<sup>92</sup> The panel also provided clear guidance as to the minimum required content of the additional evidence: it must establish that the degree of competitive advantage enjoyed by hyperandrogenic females over other females accords with that which justifies the male/female divide,<sup>93</sup> and is thus so significant that the participation of hyperandrogenic women in the female category “would subvert the very basis for having the separate category and thereby prevent a level playing field.”<sup>94</sup> The submission of such evidence by the IAAF would not automatically revalidate the Regulations. Rather, Chand would be granted an opportunity to respond and the panel would hold a further hearing to consider whether the evidence is sufficient to justify the Regulations in light of all the circumstances.<sup>95</sup>

This landmark ruling – widely declared “a victory for women’s equality in sport”<sup>96</sup> – has resulted in the unprecedented absence of any rule to police the bi-categorization of the sexes in athletics. Historically, the abandonment of ineffective and unethical methods of bi-categorization has been conditional on international governing bodies first finding some other means of verifying sex or gender.<sup>97</sup> The *Chand* decision illustrates, however, that whether the IAAF justifies its suspended rule with new evidence or decides to either develop a new rule or accept the absence of any rule, its efforts to regulate the gender binary in sport will continue to be shaped and constrained by global administrative law (GAL).

## VI.

### THE GLOBAL GOVERNANCE REGIME FOR ATHLETICS

To appreciate the significance of the CAS holding the IAAF to GAL standards, the IAAF’s place within the broader global governance regime for athletics must be understood. Figure 1 provides a simplified diagrammatic representation of this regime, highlighting the key institutions and legal

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92. *Id.* ¶ 548; Court of Arbitration for Sport, *CAS suspends the IAAF Hyperandrogenism Regulations until end of September 2017* (Jul. 28, 2017), [http://www.tas-cas.org/fileadmin/user\\_upload/Media\\_Release\\_3759\\_July\\_2017.pdf](http://www.tas-cas.org/fileadmin/user_upload/Media_Release_3759_July_2017.pdf). The IAAF recently announced that it has been collecting additional evidence, which has presumably now been submitted to the CAS. See IAAF, *Levelling the Playing Field in Female Sport: New Research Published in the British Journal of Sports Medicine* (Jul. 3, 2017), <https://www.iaaf.org/news/press-release/hyperandrogenism-research>.

93. Chand, *supra* note 1; *Id.* ¶ 535.

94. *Id.* ¶ 529. The CAS added that if the degree of advantage were well below 12%, the IAAF would have to consider whether that level justified excluding women with that advantage from the female category. *Id.* ¶ 534.

95. *Id.* ¶ 548.

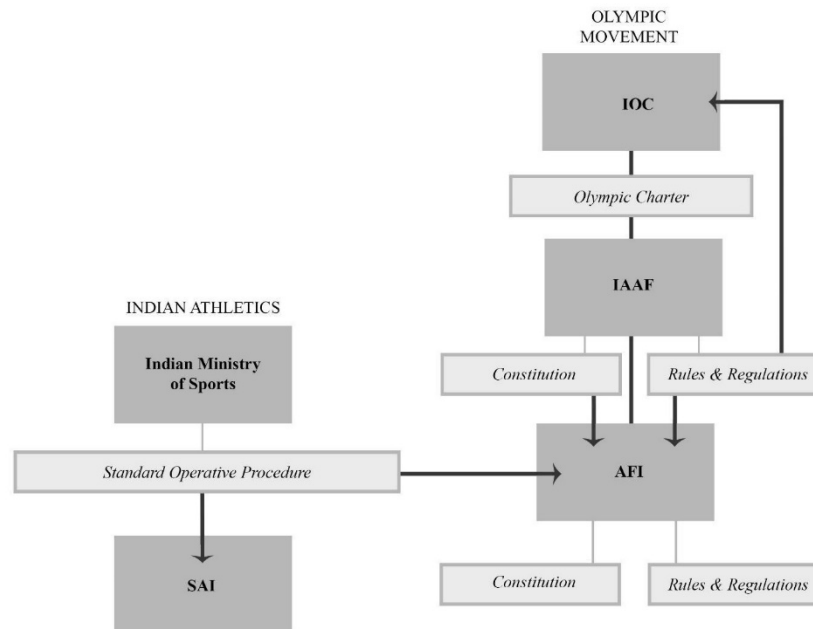
96. Nihal Koshie, *Dutee Chand wins the right to compete*, INDIAN EXPRESS, July 29, 2015 (quoting Katrina Karkazis, <http://indianexpress.com/article/sports/sport-others/sprinter-dutee-chand-wins-right-to-compete/>).

97. See *supra*, Part II.



instruments involved in the creation and enforcement of global sports law in the particular context of Chand's case.

**Figure 1: Overview of the Regime Governing Chand's Participation in International Athletics**



The IAAF's rulemaking power within the above regime is best understood under the rubric of the Olympic Movement, which encompasses all organizations, athletes and others who wish to be a part of the Olympic Games. At the peak of the Olympic Movement is the IOC, which exercises "supreme authority and leadership" over all other components, including international governing bodies, like the IAAF, as well as national associations, like the AFI.<sup>98</sup> All members of the Olympic Movement are bound by the Olympic Charter and the decisions of the IOC.<sup>99</sup> The Charter, however, delegates to international federations the power "to establish and enforce, in accordance with the Olympic spirit, the rules concerning the practice of their respective sports and to ensure their application".<sup>100</sup> Accordingly, the IAAF aims to "compile and enforce rules and regulations governing Athletics and to ensure in all competitions, whether sanctioned by the

98. Olympic Charter, *supra* note 52, at Rule 1.1–1.3.

99. *Id.* at Rule 1.4.

100. *Id.* at Rule 26.1.1.

IAAF, an Area Association or a Member [i.e. national governing body], that such rules and regulations shall be applied in accordance with their terms.”<sup>101</sup> To this end, the IAAF Constitution requires all national governing bodies to abide by its Rules and Regulations.<sup>102</sup> The IAAF is therefore the primary regulator of athletics from the sub-national level all the way up to the Olympic level.<sup>103</sup>

However, national federations are also subject to various domestic rules and regulations, which may differ from those of the IAAF. For instance, the AFI did not, at least initially, handle Chand’s case in accordance with the IAAF’s recommended Hyperandrogenism Regulations, finding itself (along with SAI) bound instead by the Indian Ministry of Sport’s SOP.<sup>104</sup> Nonetheless, when the AFI found itself unable to comply with the SOP-mandated investigatory procedure, it seemingly advised the SAI to implement the IAAF Regulations “so as to avoid any embarrassment to India in the International arena at a later stage.”<sup>105</sup> While it is unclear which investigatory procedure, if either, was actually followed in Chand’s case, this series of events illustrates the challenges that can arise from the overlap of multiple regulatory regimes, as discussed in further detail below.

Within this basic regime structure, it is worth considering the institutional character of the sole authorized rule-maker for international athletics competitions at the center of Chand’s case: the IAAF. This body was founded in 1912 by seventeen national athletic federations with the aim of meeting the needs for a global governing authority, a competition programme, standardized technical equipment and a list of official world records.<sup>106</sup> More recently, the IAAF has expanded its focus, emphasizing that “athletics is no longer just about high performance, gold medals and records, but also about ‘sport for all’ and about ensuring that the maximum number of citizens are able to participate in athletics.”<sup>107</sup> To this end, in 1982, the IAAF abandoned the traditional concept of amateurism, which restricted participation to socially and financially privileged individuals.<sup>108</sup> By increasing financial incentives, “the way to high performance was opened to larger groups of extremely talented athletes.”<sup>109</sup>

An “association” under the laws of Monaco, the IAAF is a private governance institution that derives income from a combination of membership

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101. IAAF Constitution, *supra* note 55, Art. 3.5.

102. *Id.*, Art. 4.1.

103. Nevertheless, as a result of the closely entwined histories of athletics and the Olympics and athletics’ place as the main spectator stadium sport of the Games, the IAAF has a particularly significant institutional relationship with the IOC when it comes to rulemaking, evinced by their close consultation in the crafting of the Hyperandrogenism Regulations. IAAF, *About the IAAF*, IAAF, <http://www.iaaf.org/about-iaaf>.

104. Chand, *supra* note 1, ¶¶ 310, 391, 397.

105. Chand, *supra* note 1, ¶¶ 14, 19.

106. *About the IAAF*, *supra* note 105.

107. *Id.*

108. *History*, IAAF, <http://www.iaaf.org/about-iaaf/history> (last visited Apr. 11, 2017).

109. *Id.*

dues and, increasingly, corporate sponsorship.<sup>110</sup> With over 214 national/territorial member federations, the IAAF is among the world's largest sporting organizations and has more members than the United Nations ("UN").<sup>111</sup> While its members are private national governing bodies rather than national governments, there are generally strong links between the two, thereby introducing a public quality to global sport governance. For instance, in Chand's case, the Indian government imposed gender verification procedures on the AFI, which worked closely with a governmental body, the SAI, in implementing those and other procedures related to the administration of sport in India.<sup>112</sup> Moreover, national governments and federations share an interest in sending their best athletes to compete on the international stage without restriction, as was clearly seen in South Africa's adamant defense of Caster Semenya.<sup>113</sup> Thus, the IAAF might be more precisely classified as a hybrid private-public governance institution, which can create particular accountability challenges.<sup>114</sup>

With its sweeping regulatory power, the IAAF can be seen as creating genuine "global law," as opposed to "international law," insofar as its rules and regulations "are spread across the entire world, . . . involve both international and domestic levels, and . . . directly affect individuals."<sup>115</sup> The remainder of this article will illustrate that, just like regulatory action at the domestic level is subject to administrative review, the IAAF's regulatory activities are subject to scrutiny pursuant to certain global administrative principles that, as illustrated by the *Chand* decision, have become an essential part of global sports law.

## VII.

### ASSESSING THE LEGITIMACY OF A BINARY SEX CLASSIFICATION RULE

As the CAS panel aptly recognized, "nature is not neat"; it offers no clear dividing line between the sexes.<sup>116</sup> Thus, as others have noted, "[i]f we want a line, we have to draw it *on nature*."<sup>117</sup> While the IAAF is primarily responsible for any such line-drawing, it does not do so in a vacuum. Rather, Chand's case illustrates that concerns about legitimacy and accountability are increasingly

110. *Id.*

111. *IAAF Nat'l Member Fed'ns.*, IAAF, <https://www.iaaf.org/about-iaaf/structure/member-federations> (last visited Apr. 11, 2017).

112. *See supra*, Part IV and Figure 1.

113. *See* Media Statement, S. Afr. Parliament, Sport Comm. to Report Int'l Ass'n. of Athletics Ass'ns. (IAAF) to U.N. Human Rights Comm'n (Aug., 22, 2009), <http://www.gov.za/sport-committee-report-international-association-athletics-associations-iaaf-united-nations-un-human>.

114. *See* Kingsbury, Krisch & Stewart, *supra* note 2, at 22.

115. Lorenzo Casini, *The Making of a Lex Sportiva: A Court of Arbitration for Sport 'Der Ernahrer'* (June 3, 2010) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1621335](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1621335).

116. Chand, *supra* note 1, ¶ 35(e).

117. Amy-Chinn, *supra* note 16, at 1293 (quoting Alice Dreger, *Sex Typing for Sport*, 40 HASTINGS CENTER REP. 22, 23 (2010)).

arising within the global community with respect to the IAAF's regulatory activities. Easing these concerns is a difficult task given the likely impossibility of crafting a sex classification rule that eliminates the tension between the reality of continuous sex and gender and its contrived binary division in athletics.<sup>118</sup> The *Chand* decision suggests, however, that the prejudicial effects of this tension on individual athletes can and should be minimized, in particular, by applying elements of GAL. Although the CAS panel did not refer to GAL by name, its ruling is replete with concepts that fall within the meaning of this emerging field.

GAL encompasses the “mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.”<sup>119</sup> Such GAL standards are particularly important in the context of a binary sex classification rule for a number of reasons. First, since the precise substance of the rule will necessarily be somewhat arbitrary, procedural protections may offer the most effective means of ensuring fairness. Second, history has shown that sex classification rules have a serious impact on the human rights of marginalized individuals, thus demanding not only procedural but also substantive standards of administrative action.<sup>120</sup> Finally, any binary sex classification rule must be perceived as legitimate by the web of decentralized administrators responsible for its implementation, which can be achieved, at least in part, through compliance with GAL.<sup>121</sup> The *Chand* decision points, both implicitly and explicitly, to a number of GAL standards that must be satisfied during the (a) development, (b) implementation and (c) review of a binary sex classification rule. These standards constrain the IAAF in its regulatory activities, in a manner that promotes gender equality within the traditionally patriarchal international system of athletics competition.

#### A. Rule Development

The *Chand* decision makes clear that it is not just the substance of the IAAF's sex classification rule that matters, but also the process by which the rule is developed. In particular, the IAAF's rulemaking process must be characterized by certain standards of transparency, participation, and proportionality. While the precise content of each of these GAL elements is not necessarily made explicit in the panel's ruling, there is no doubt that the degree of their presence in the rulemaking process is a relevant factor in determining whether a binary sex classification rule is justifiable.

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118. See Hutchinson, *supra* note 39.

119. Kingsbury, Krisch & Stewart, *supra* note 2, at 17.

120. See *id.* at 40.

121. See *id.* at 21, 36–37.

### 1. *Transparency and Reason-giving*

From the outset, the only way for the IAAF to justify its Hyperandrogenism Regulations to the CAS was to openly articulate clear and compelling reasons for their adoption.<sup>122</sup> In particular, the panel required that the IAAF be transparent about the scientific basis for its binary sex classification rule.<sup>123</sup> Therefore, in order to lift the suspension of the Regulations, the IAAF must publicly offer specific and convincing scientific evidence indicating the degree of competitive advantage enjoyed by hyperandrogenic women, along with its source.<sup>124</sup> It is conceivable that the IAAF might also be required to reveal, as a matter of transparency, any evidence in its exclusive possession to the contrary. In any event, the IAAF will also have to explain why the proven advantage of hyperandrogenic women justifies their disqualification, particularly if the advantage is “well below 12%” – the average advantage of men over women.<sup>125</sup> To this end, the IAAF will likely need to disclose its consultation process and reveal whose views it has taken into consideration, as further discussed below.

Beyond the evidentiary obligations it places on the IAAF, the *Chand* decision stands for transparency in rulemaking insofar as it elucidates, and calls attention to, the existence, content and operation of the binary sex classification rule. In so doing, the CAS holds the IAAF accountable not only directly, as a review mechanism, but also indirectly insofar as “the more information athletes have the more they are likely to object to sex testing.”<sup>126</sup> Indeed, the *Chand* decision has sparked calls for “a *proactive* campaign to provide proper education for *all* those concerned in sport . . . on the inadequacy of the current taxonomy of sexual difference” which might “justify the immediate elimination of attempts to determine (or, worse still, produce) a ‘true’ sex for female athletes whose biology is questioned.”<sup>127</sup>

Therefore, the *Chand* decision goes some way toward addressing the purported “general lack of transparency in the construction and application of rules in sport.”<sup>128</sup> It does not, however, fully address the persistent denial by sports bodies of any conflict between the traditional bi-categorization of the sexes and modern understandings of sex, gender and equality.<sup>129</sup> In particular, the CAS panel accepted that the Hyperandrogenism Regulations do not constitute sex or gender testing,<sup>130</sup> thereby rejecting valid suggestions to the contrary, such as the following witness testimony:

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122. See *Chand*, *supra* note 1, ¶ 501.

123. See *id.* ¶ 493.

124. See *id.* ¶¶ 535, 3.

125. *Id.* ¶ 534.

126. Amy-Chinn, *supra* note 16, at 1300.

127. *Id.* at 1301.

128. PATEL, *supra* note 10, at 157.

129. See *id.*

130. See *Chand*, *supra* note 1, ¶ 510.

The act of drawing a line between the endogenous testosterone levels of male and female athletes, in combination with scrutinising other bodily and behavioural characteristics of women, is unmistakably an attempt to define those who are not women for the purposes of athletic competition, even if they are not explicitly being defined as men...The use of the term 'masculine' in place of 'male' is a semantic strategy that in no way absolves the Regulations of their sex test function.<sup>131</sup>

By overlooking such views, the CAS has not required the IAAF to be completely forthright and transparent about the practical effect (if not the intended purpose) of its rule.<sup>132</sup> The Hyperandrogenism Regulations effectively deem certain women too masculine or insufficiently feminine for participation in athletics competition. Whether or not such an athlete is reclassified as a male athlete, the outcome is the same: She is barred from competition for failing to conform with an imposed standard of femininity.<sup>133</sup>

The IAAF's assertion that the purpose of the Regulations is not sex or gender testing is thus unconvincing and requires further investigation. Such investigation would enhance transparency in the reasoning of both the IAAF and the CAS, leading to greater fairness and accountability in athletics rulemaking. Beyond these outcomes, the degree to which the *Chand* decision increases decisional transparency and access to information is also important because it is foundational to the effective exercise of another key element of GAL: participation rights.<sup>134</sup>

## 2. Participation and Consultation

The CAS panel made clear that it matters who participates in the development of the IAAF's binary classification rule:

The IAAF consulted widely with respect to this issue in order to create a new set of rules that reflect the state of the available science and avoid the shortcomings inherent in the old gender verification policy. While it is apparent to the Panel that there is a range of views within the body of female athletes on this subject, the representatives of those athletes to the IAAF were supportive of the present Regulations. Indeed, their urging was, apparently, a motivating factor in the adoption of a regulation that recognised the need to separate males and females on

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131. *Id.* ¶ 352.

132. For instance, the panel took the view that although endogenous testosterone levels are a key biological indicator of the difference between males and females, "that is not the use to which endogenous testosterone is being put under the Hyperandrogenism Regulations." *Id.* Rather, they are "being used to introduce a new category of ineligible female athletes within the female category." *Id.* ¶ 511.

133. Athletes disqualified under the Hyperandrogenism Regulations are not eligible to compete in the male category of competition, and are therefore excluded from competition altogether. Reclassifying a disqualified athlete as male for the purposes of athletics competition would not realistically alter this outcome given the unlevel playing field between men and women that binary categorization is meant to address in the first place. Thus, exclusion from the female category under the Regulations has the same outcome as previous gender verification/sex testing strategies. *See supra* Part V.

134. *See* Kingsbury, Kirsch & Stewart, *supra* note 2, at 38.

the basis of a criterion that reflected the significant performance advantage of male athletes over female athletes.<sup>135</sup>

The panel thus seems to have accepted the reasoning of one of the IAAF's expert witnesses who argued that the rules of a given sport, while in some sense arbitrary, "must pass muster with the community of those who play and love that sport."<sup>136</sup> As the witness explained, it is these stakeholders who decide what is unfair, such that "[t]he limitations each sport chooses for itself reflect a shared understanding of what that sport is meant to display and reward."<sup>137</sup> It does not appear, however, that the CAS panel specifically questioned whether the IAAF had engaged with a diverse group of female stakeholders, obtained support from the majority of the female athlete community, or attempted to resolve the divergence in the views of female athletes, which are exacerbated by the inherently competitive nature of athletics. Nonetheless, the panel's decision and the IAAF's response together make clear that participation by external actors in the IAAF's rulemaking process is a prerequisite to legitimacy, even if the details of such participation were not thoroughly considered in the panel's reasoning.<sup>138</sup> The IAAF's press release following the *Chand* decision reemphasized that its Regulations "were adopted following a lengthy and comprehensive consultation exercise by the IAAF's Expert Working Group in conjunction with the IOC, involving world-leading experts across various fields, along with numerous other stakeholders."<sup>139</sup>

Little consideration seems to have been given, however, to the identity of the rulemaking actors *within* the IAAF. In this regard, the fact that the membership of the IAAF (like the IOC) is overwhelmingly male can be seen to undermine the legitimacy of a rule that applies only to women. Of the IAAF's 27 Council members, only six – the mandated minimum – are women. Men thus make up over three-quarters of the current Council and hold all six executive positions: President, four Vice-Presidents and Treasurer.<sup>140</sup> Furthermore, the IAAF

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135. *Chand*, *supra* note 1, ¶ 506.

136. *Id.* ¶ 277

137. *Id.*

138. *See id.* ¶¶ 505–06.

139. IAAF, *IAAF Comments on Interim Award Issued by the CAS on the IAAF's Hyperandrogenism Regulations*, (Jul. 27, 2015), <http://www.iaaf.org/news/press-release/hyperandrogenism-regulation-cas-dutee-chand>.

140. *See* Council, IAAF, <https://www.iaaf.org/about-iaaf/structure/council>; *see also* International Olympic Committee, *The Los Angeles Declaration, 5th IOC World Conference on Women and Sport*, Feb. 18, 2012, at 3, available at [http://www.olympic.org/Documents/Commissions\\_PDFfiles/women\\_and\\_sport/Los-Angeles-Declaration-2012.pdf](http://www.olympic.org/Documents/Commissions_PDFfiles/women_and_sport/Los-Angeles-Declaration-2012.pdf) (Women have been similarly excluded from the IOC: The IOC did not accept its first female member and Executive Board member until 1981 and 1990, respectively. Today, only 24 of the 106 active IOC members and 4 of the 15 Executive Board members are women); *see generally* International Olympic Committee, *Factsheet: Women in the Olympic Movement* (Oct. 2013), [http://www.olympic.org/Documents/Reference\\_documents\\_Factsheets/Women\\_in\\_Olympic\\_Move](http://www.olympic.org/Documents/Reference_documents_Factsheets/Women_in_Olympic_Move)

Athletes' Commission, Ethics Commission and Medical and Anti-Doping Commission, which should presumably be involved in crafting a binary sex classification rule, are all chaired and numerically dominated by men. Perhaps predictably, the Women's Committee is the only IAAF body in which women are at least equally represented.<sup>141</sup> It is unclear if and precisely how any of these committees were involved in the development of the Hyperandrogenism Regulations. Regardless, legitimacy concerns resulting from the persistent underrepresentation of women within the IAAF are particularly acute given the historical governance of international sport by "powerful men who answer to no one [and] decide whether women can participate."<sup>142</sup>

### 3. Proportionality

The CAS panel's invocation of GAL (in substance if not in name) went beyond implicit references to the procedural protections afforded by transparency and participatory rights. Indeed, the panel explicitly framed its assessment of the Hyperandrogenism Regulations in terms of substantive standards falling within the realm of GAL. In particular, the panel relied on the general legal principle of proportionality<sup>143</sup> and its attendant requirements of necessity and reasonableness as the appropriate legal test for justifying discrimination.<sup>144</sup> Although these administrative law standards are not mentioned in the antidiscrimination provisions of the IOC Charter, the IAAF Constitution, or the laws of Monaco, the *Chand* decision confirms that they form part of global sports law.

In its proportionality analysis, the CAS panel, took for granted that a rule defining who may compete as female, going beyond legal status, is necessary in athletics. It did not question this proposition, agreed to by the parties, even though there was "no evidence before the Panel that legal recognition as a female varies in most countries other than reference by the parties to the fact that there are a small number of countries where a person's status as a male or female is determined exclusively by a process of self-identification."<sup>145</sup> If there really is a global consensus on the legal binary division of the sexes, then perhaps a rule for enforcing this division through physical testing is entirely unnecessary. If there is no such consensus, it would be worth considering the different approaches between countries rather than glossing over them as both the parties and the CAS

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ment.pdf.

141. See *Committees*, IAAF, <https://www.iaaf.org/about-iaaf/structure/committees>; *Commissions*, IAAF, <https://www.iaaf.org/about-iaaf/structure/commissions>.

142. Laura Robinson, *One step forward, two steps back*, TORONTO STAR (Dec. 17, 2010), [https://www.thestar.com/news/insight/2010/12/17/one\\_step\\_forward\\_two\\_steps\\_back.html](https://www.thestar.com/news/insight/2010/12/17/one_step_forward_two_steps_back.html).

143. Some version of a proportionality test is featured in judicial analyses of human rights throughout the world. See, e.g., PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING (Grant Huscroft, Bradley W. Miller & Grégoire Webber eds.), 2014.

144. *Chand*, *supra* note 1, ¶ 230 ("The detrimental impact of a measure must be proportionate, in that it must not exceed that which is reasonably required in the search of the justifiable aim.").

145. *Id.* ¶ 510.



did in this case. In any event, their reluctance to question the necessity of a rule designed to limit the definition of a “female athlete” based on biology is somewhat puzzling given that no woman has ever reached elite male performance levels in athletics. The complete disregard of the possibility that physical sex testing is futile or redundant indicates that GAL standards, such as the necessity prong of the proportionality analysis, can be diluted when incorporated into certain contexts, particularly when they challenge a long tradition of patriarchy.

The CAS panel compensated for any such dilution to the meaning of “necessity,” by demanding a lot of the IAAF to establish the “reasonableness” of its Regulations. In particular, the CAS panel required scientific evidence that proves “to a level higher than that of the balance of probabilities,” that the Regulations actually achieve their stated objective of excluding – and only excluding – female athletes with a competitive advantage “of the same order as that of a male athlete.”<sup>146</sup> This places a burden on the IAAF that will be very difficult, if not impossible, to satisfy due to the lack of definitive research linking female hyperandrogenism and sporting performance; the challenges of proving causation rather than mere correlation; and the ethical barriers to human hormone experimentation.<sup>147</sup> Furthermore, even if science can prove that hyperandrogenism provides a significant competitive advantage, going on to prove that this advantage is greater than that derived from the numerous other variables that affect female athletic performance, as the CAS indicated would be required,<sup>148</sup> would be a very difficult feat indeed. Moreover, scientific proof that hyperandrogenic women benefit from a competitive advantage comparable to that of men would raise the controversial question of whether such women should fairly compete in the male category, which the Regulations do not permit.

In any event, scientific evidence is necessary, but not sufficient to satisfy the proportionality test. In light of the serious harm that can befall those subjected to the Hyperandrogenism Regulations or similar rules, including severe sex and gender identity crises, demeaning treatment, social isolation, depression and suicide, it is doubtful any sex bifurcation rule could be deemed proportionate, regardless of its scientific backing.<sup>149</sup> This may be especially true when applied to women from certain cultures where a “legal” determination that suggests a woman is not actually female would have serious social consequences due to transphobic attitudes or the prioritization of values such as fertility and sexual purity. Thus, the substantive GAL standards imposed by the CAS panel represent a “very high hurdle for IAAF to clear.”<sup>150</sup>

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146. *Id.* ¶¶ 443, 531.

147. *See id.* ¶¶ 148, 189, 530.

148. *Id.* ¶¶ 517, 532.

149. Amy-Chinn, *supra* note 16, at 1297.

150. Jennifer Henderson, *Davies Ward Wins Big for Female Sprinter Banned for High Testosterone*, THE AMERICAN LAWYER (July 28, 2015), <http://www.americanlawyer.com/id=1202733339155/Davies-Ward-Wins-Big-for-Female-Sprinter-Banned-for-High-Testosterone?mcode=1202615731542&curindex=0&curpage=ALL>.

### B. Rule Implementation

As illustrated above, the IAAF relies on a decentralized system of distributed administrators to implement its rules. In such a system, “domestic regulatory agencies act as part of the global administrative space: they take decisions on issues of foreign or global concern.”<sup>151</sup> In Chand’s case, for instance, the Indian Ministry of Sports, the SAI and the AFI each played a role in enforcing hyperandrogenism regulations in both domestic and international athletics competition.<sup>152</sup> The autonomy or semi-autonomy of such public or private regulatory bodies at the national level creates the potential for pushback against international regulators, and thus another means of subjecting the IAAF to accountability checks.<sup>153</sup> Even where national and international regulations accord in terms of substantive content (e.g., the particular biological factor and threshold determinative of an athlete’s sex classification), the procedural methods of enforcement are far more difficult to harmonize globally.<sup>154</sup>

The parties agreed during Chand’s hearing that if the CAS panel were to invalidate the Hyperandrogenism Regulations, the IAAF would communicate this to all its member federations, who would then be required to amend their national implementation rules accordingly.<sup>155</sup> This is in line with the IAAF Constitution, which provides that CAS decisions are binding on all IAAF members.<sup>156</sup> In this way, a CAS ruling enhances international harmonization of sporting rules, but variation is sure to persist when it comes to rule implementation, particularly when an international rule is merely recommended, rather than mandatory, in domestic competitions. In this regard, the targeting of test subjects and the specific design of test procedures pursuant to the Hyperandrogenism Regulations are of particular concern.

#### 1. Testing Targets

There is proven risk of discriminatory application of the Hyperandrogenism Regulations, based on intersecting sexist and racist stereotypes.<sup>157</sup> The “reasonable suspicion” standard has been said to effectively carry on the previously denounced practice of “inspect if you suspect,” which is “over-reliant on arbitrary visual expectations of normative femininity and masculinity that are culturally and historically specific, and often privilege white, middle-class, and

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151. See Kingsbury, Krisch & Stewart, *supra* note 2, at 21.

152. See *supra* Part IV.

153. See, e.g., AFI did not join IAAF in defending regulations.

154. See, e.g., SOP vs Regulations; issues of capacity, etc. discussed *infra*.

155. Chand, *supra* note 1, ¶ 105.

156. IAAF Constitution, *supra* note 55, art. 15.3. Further, CAS awards are enforceable in all 156 countries party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1959, 330 U.N.T.S. 38.

157. See generally Bohuon, *supra* note 39.

Western standards of female beauty.”<sup>158</sup> Indeed, the CAS panel recognized that the Regulations have disproportionately burdened women from the global south, noting that this “increases the concerns about lack of informed consent, particularly as women from poorer socio-economic backgrounds may be affected by additional pressures which arise from the fact that their families, teams and nations may be particularly reliant on them competing”.<sup>159</sup> This implementation defect detracts from the rule’s legitimacy and, as seen in Chand’s case, opens the door to collective resistance from athletes, human rights advocates, national governments, and the national governing bodies on which the IAAF relies to implement its rules.

## 2. Testing Design

The IAAF also relies on distributed administrators, such as national governing bodies, to themselves carry out testing and related procedures in order to create a globally consistent regulatory system. Such decentralization raises questions about a basic element of GAL: the presence of effective “checks for coordinated domestic administration.”<sup>160</sup> The underlying idea is that a collection of norms, promoted by international regulators such as the IAAF can govern “not only the substance of domestic regulation, but also the decisional procedures followed by domestic regulatory agencies when applying a global norm.”<sup>161</sup> However, the normative procedural steps contained in the Hyperandrogenism Regulations, or any other binary sex classification rule may not result in harmonized implementation at the global level given discrepancies in capacity and development between countries.

For instance, in countries where “women have less access to obstetric care, and therefore, have less awareness about the biological composition of their bodies“ the Regulations’ self-declaration requirement may have little value.<sup>162</sup> Moreover, a hyperandrogenism diagnosis might be especially shocking or confusing and, depending on the particular sociocultural context, might lead to stigmatization, or worse, of hyperandrogenic athletes.<sup>163</sup> In addition, appropriate counselling and support may not be available in some countries or communities, resulting in great reluctance to self-declare and great risk to any athlete that does.

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158. Ha et. al, *supra* note 16, at 1039.

159. Chand, *supra* note 1, ¶¶ 251, 259; see also John Branch, *Dutee Chand, Female Sprinter With High Testosterone Level, Wins Right to Compete*, N.Y. TIMES, July 27, 2015, [http://www.nytimes.com/2015/07/28/sports/international/dutee-chand-female-sprinter-with-high-male-hormone-level-wins-right-to-compete.html?\\_r=](http://www.nytimes.com/2015/07/28/sports/international/dutee-chand-female-sprinter-with-high-male-hormone-level-wins-right-to-compete.html?_r=) (noting that at the London Olympics, four female athletes from rural areas of developing countries were subjected to the Hyperandrogenism Regulations).

160. Kingsbury, Krisch & Stewart, *supra* note 2, at 36.

161. *Id.*

162. Berry, *supra* note 16, at 227.

163. *Id.*

As another example, options for achieving compliance with the Regulations, including treatment and surgery, could be effectively limited by both the capacities of the local healthcare system and the financial means of the particular hyperandrogenic athlete. Further, sociocultural conditions, along with confidentiality concerns, might induce an athlete to withdraw from competition rather than undergo treatment or contest her disqualification in order to avoid public shaming.<sup>164</sup> As a result, it is likely that not all athletes would benefit from the same procedural protections during the implementation phase of binary sex classification rule, despite its intended universality.

The Hyperandrogenism Regulations themselves acknowledge that they “merely set out an overall framework for the management of cases that might arise.”<sup>165</sup> This fact, combined with their purely recommendatory status at the domestic level, leaves significant room for national governing bodies to implement the IAAF’s Regulations differently in terms of the procedural protections provided. In Chand’s case, for instance, it is not clear that the AFI and the SAI followed the testing procedure stipulated by either the IAAF or the Indian Ministry of Sports, seemingly due to a lack of capacity to satisfy all the required steps.<sup>166</sup> In any event, the SAI, an agency of the Indian government, ended up asking the AFI to reconsider Chand’s disqualification, or to at least support her appeal before the CAS, based on national objections to the IAAF’s Regulations.<sup>167</sup> The fact that the AFI neither appeared at the CAS hearing nor filed any written submissions is perhaps a reflection of the difficult position in which it found itself: an agent caught between two principals, one national and one international. Despite the significant pressure on national bodies to conform with IAAF regulations, complete harmonization of implementation procedures is conditional on all distributed administrators (and all who influence them) perceiving those procedures as legitimate and having sufficient capacity to properly carry them out. These conditions represent another means by which the IAAF is held accountable by a wide range of actors the world over.

### C. Rule Review

A final and essential element of GAL, which proved central to Chand’s ability to hold the IAAF accountable, is the availability of review mechanisms. Access to judicial review generally brings with it the crucial GAL-mandated opportunities for those affected by regulations to be heard and to participate in the review proceedings, which most certainly enhances the accountability of those subjected to review.<sup>168</sup> More generally, the range of judicial or quasi-judicial fora

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164. Ha et al., *supra* note 15, at 1037.

165. *Hyperandrogenism Regulations*, *supra* note 28, at Reg. 5.1.

166. *See, e.g., Chand*, *supra* note 1, ¶ 14 (noting the AFI’s inability to identify a suitable Nodal officer as required by the SOP).

167. *Id.* ¶ 30-31.

168. Kingsbury, Krish & Stewart, *supra* note 2, at 38.

before which athletes and others may challenge the IAAF's rules form an integral part of the global governance system that applies to athletics and constrains the IAAF's regulatory authority when it comes to the binary division of the sexes. It is thus worth reflecting on both the forum Chand chose for her appeal, as well as other potential venues for challenging discriminatory sports rules.

### 1. *Court of Arbitration for Sport*

The Hyperandrogenism Regulations provide for an automatic right of appeal to the CAS from a decision by the IAAF to disqualify an athlete pursuant to the Regulations.<sup>169</sup> Although it was technically a decision of the AFI, not the IAAF, that disqualified Chand (arguably situating the appeal within the exclusive jurisdiction of Delhi Courts, in accordance with the AFI's Rules and Regulations), the IAAF agreed to the ad hoc submission of the dispute to the CAS because it wanted the validity of the Regulations to be determined by an independent tribunal with the necessary sport-specific expertise. Further, the AFI's actions in engaging with the CAS proceedings were deemed to constitute implicit acceptance of its jurisdiction.<sup>170</sup>

Such willingness to submit sports-related disputes to the CAS, despite potential challenges to its jurisdiction, enhances its position as the institutional actor "most prominent in constructing global sports law".<sup>171</sup> Indeed, the creation of the CAS in 1983, as part of the IOC, can be seen as a response to the need for a centralized review mechanism for the activities of sports organizations, as well as the need to limit the increasing intervention by domestic courts in sporting matters, which was perceived as a threat to the autonomy of sports organizations and the sports legal system as whole.<sup>172</sup> In order to strengthen the role of the CAS in these respects, the IAAF, like most other international sports federations, dissolved its own dispute resolution body.<sup>173</sup> The CAS was re-launched in 1994 as an independent and self-funding body, purportedly free from any interference from any constituent of the Olympic Movement including the IOC.<sup>174</sup> Despite this transformation, significant concerns with respect to the governance structure, independence, and impartiality of the CAS have been documented elsewhere.<sup>175</sup> For the purposes of the present article, it is sufficient to bear in mind the importance of independent review when it comes to holding international sport

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169. *Hyperandrogenism Regulations*, *supra* note 28, art. 7.2.

170. *Chand*, *supra* note 1, ¶¶ 422-36.

171. Casini, *supra* note 115.

172. *Id.* at 18.

173. *Id.*

174. Mark James & Guy Osborn, *The Sources and Interpretation of Olympic Law*, 12 LEGAL INFO. MGMT. 80, 82 (2012).

175. *See, e.g.*, ANDREW VAITIEKUNAS, *THE COURT OF ARBITRATION FOR SPORT: LAW-MAKING AND THE QUESTION OF INDEPENDENCE* (2014); Rachele Downie, *Improving the Performance of Sport's Ultimate Umpire: Reforming the Governance of the Court of Arbitration for Sport*, 12 MELB. J. INT'L L. 315, 344 (2011).

regulators such as the IAAF accountable for unlawfully discriminating against its member athletes.

The CAS serves a number of overlapping functions relevant to the formation of global sports law, which then operate to constrain the IAAF's regulatory authority and the system of distributed administrators on which it relies for regulation implementation. Lorenzo Casini identifies at least three such functions of the CAS:

First, the CAS has been applying general principles of law to sporting institutions, and it has been also creating specific "principia sportiva". Secondly, the CAS plays a significant role in interpreting sports law, thus influencing and conditioning rulemaking activity by sporting institutions. Thirdly, the CAS greatly contributes to the harmonization of global sports law, also because it represents a supreme court, the apex of a complex set of review mechanisms spread across the world.<sup>176</sup>

All three of these functions are evident in the decision on Chand's appeal. The panel transplanted general legal principles, such as proportionality, from public law into the private realm of sports law. It then interpreted sport-specific non-discrimination rules in light of this general principle, thereby restricting the IAAF's regulatory autonomy. The panel's decision contributed to the harmonization of sports law not only by requiring both the IAAF and all its member federations to amend their regulations, but also by setting a precedent for national and international regulators of other sports, almost all of which also divide competition into binary sex divisions.

In addition to these broad functions that promote substantive fairness in sport, the CAS panel's review of the Hyperandrogenism Regulations epitomizes certain procedural elements of GAL. For instance, simply releasing CAS decisions to the public exemplifies transparency. Notably, Chand requested that the hearing of her appeal also be open to the public "so people can understand what I have gone through. This will help them realise that I have done nothing wrong. Then they can decide for themselves whether the IAAF regulation on hyperandrogenism is right."<sup>177</sup> Although the CAS was unable to grant this request due to objections from the IAAF and the AFI,<sup>178</sup> its decision offers a summary of the proceedings and evidence and thorough reasons for its decision as "a reflection of the complexity of those issues, and the exceptional care and detail in which they were presented to the Panel by the parties' representatives."<sup>179</sup>

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176. Casini, *supra* note 115 at 11.

177. Narain Swamy, *My CAS hearing should be in public: Dutee Chand*, THE TIMES OF INDIA, Feb. 12, 2015, <http://timesofindia.indiatimes.com/sports/more-sports/athletics/My-CAS-hearing-should-be-in-public-Dutee-Chand/articleshow/46209929.cms>.

178. *Chand*, *supra* note 1, ¶ 88. The agreement of all parties is a prerequisite to public hearing. CAS, *Code of Sports-Related Arbitration* (2016), R44.2.

179. *Chand*, *supra* note 1, ¶ 5. The decision is 161 pages in length.

In sum, the CAS is an essential GAL mechanism, which itself abides by certain GAL principles and goes some way toward holding the IAAF and its distributed administrators accountable to such principles – from reason-giving and transparency to participation and proportionality. Despite its various shortcomings, discussed elsewhere, the CAS plays a key role within the global governance regime for athletics by holding the IAAF accountable in its regulatory activities. It is not, however, the only review mechanism with such potential.

## 2. Additional Review Mechanisms

Although the IAAF Constitution states that all decisions of the CAS “shall be final and binding on the parties and no right of appeal will lie from the CAS decision,”<sup>180</sup> there do exist further (and potentially alternative) routes to challenge IAAF rules. A detailed analysis of all these appeal routes within the complex jurisdictional world of sport is beyond the scope of this article. However, a few are worth brief mention to illustrate that additional GAL instruments, in the form of review mechanisms, exist and have the potential to constrain the IAAF’s regulatory activities.

First, the Swiss Federal Court has jurisdiction to hear appeals of arbitral decisions made in Switzerland, where the CAS is located. The policy rationale for this jurisdiction is that athletes, who have no choice but to accept mandatory arbitral clauses if they wish to participate in elite competition, should have the right to judicial review to remedy breaches of fundamental principles and essential procedural guarantees.<sup>181</sup> In other words, this additional appeal route somewhat corrects the imbalance of power between athletes and their regulatory bodies. Athlete appeals to the Swiss Federal Court have been relatively rare,<sup>182</sup> likely because they are permitted on very narrow grounds, namely blatant procedural defects and incompatibility with public policy.<sup>183</sup> While no athlete has ever successfully argued this latter ground of appeal before the Swiss Federal Court,<sup>184</sup> a speed-skater did so before the Munich Court of Appeals. Although the decision has since been overturned,<sup>185</sup> the German court initially reversed a CAS decision that had confirmed the disqualification of a speed-skater based on a doping violation.<sup>186</sup> In particular, the court held that the mandatory CAS arbitration

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180. IAAF Constitution, *supra* note 55, Art. 15.2

181. Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPPERDINE L. REV. 51, 53 (2009).

182. Casini, *supra* note 115, at 20.

183. Mitten, *supra* note 181, at 54. The other grounds of appeal are: the arbitral panel was constituted irregularly; it erroneously held that it did or did not have jurisdiction; it ruled on a matter beyond the submitted claims; it failed to rule on claim; the parties were not treated equally; or the party’s right to be heard was not respected.

184. *Id.* at 58.

185. The decision of the Munich Court of Appeals was overturned by the German Federal Court of Justice. Bundesgerichtshof [BGH] [Federal Court of Justice] June 7, 2016, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2266, 2016.

186. See CAS, *Statement of the Court of Arbitration for Sport (CAS) on the decision made by*

agreement between the athlete and the international skating federation constituted an abuse of the latter's monopolistic position and therefore violated public policy codified in German competition law.<sup>187</sup> The same could be said with respect to the arbitration agreement imposed on athletes by the IAAF, which likewise requires that all disputes concerning the IAAF's Rules and Regulations be resolved by the CAS.<sup>188</sup> Athletes seeking to compete internationally have no choice but to accept this arbitration agreement. Such absence of meaningful consent on the part of athletes might allow them to invoke public policy to challenge CAS rulings, including those upholding discriminatory IAAF binary sex classification rules, before domestic courts.

It is also possible for athletes to challenge sporting regulations before regional courts. There have been a number of relevant cases, for instance, before the European Court of Justice (ECJ).<sup>189</sup> Indeed, the ECJ has specifically held that rules governing sporting activity are not immune from the provisions of European Union law. Rather, "the rules which govern that activity must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition."<sup>190</sup> Moreover, the ECJ requires that sporting rules be limited to ensuring the proper conduct of sporting competition and do not go beyond their stated legitimate objective, such as that of guaranteeing fair competitive sport.<sup>191</sup> A challenge to the Hyperandrogenism Regulations along the same vein is not difficult to imagine. Indeed, this was precisely the type of challenge that succeeded before the CAS in *Chand*.<sup>192</sup>

Another option, although one without precedent, is for an athlete to launch an application with a regional human rights court, such as the European Court of Human Rights, once she has exhausted all national legal remedies.<sup>193</sup> An athlete or her home country might also lodge a complaint with the UN Human Rights Council or a UN treaty body such as the Committee on Elimination of Discrimination against Women (CEDAW), the Committee on the Elimination of

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*the Oberlandesgericht München in the case between Claudia Pechstein and the International Skating Union (ISU)*, (2015), [http://www.tas-cas.org/fileadmin/user\\_upload/CAS\\_statement\\_ENGLISH.pdf](http://www.tas-cas.org/fileadmin/user_upload/CAS_statement_ENGLISH.pdf).

187. Antoine Duval & Ben Van Rompuy, *The Compatibility of Forced CAS arbitration with EU Competition Law: Pechstein Reloaded* (June 23, 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2621983](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621983), at 10-11.

188. See: IAAF Constitution, *supra* note 55, Art. 15.

189. MARIOS PAPALOUKAS, SPORT: JURISPRUDENCE DE LA COUR DE JUSTICE (CJE) DES C.E. (2008); An Vermeersch, *All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport*, 3 J. CONTEMP. EUR. RES. 238 (2007).

190. Case C-519/04 P, *Meca-Medina v. Comm'n*, 2006, E.C.R. I-06991, ¶ 2.

191. *Id.* ¶¶ 42-43.

192. The Panel concluded that the IAAF had "not discharged its onus of establishing that the Hyperandrogenism Regulations are necessary and proportionate to pursue the legitimate objective of organising competitive female athletics to ensure fairness in athletic competition." *Chand*, *supra* note 1, ¶ 547.

193. European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, E.T.S. No. 5, arts. 34-35.



Racial Discrimination (CERD), the Committee on Economic, Social and Cultural Rights (CESCR), or the Human Rights Committee (CCPR).<sup>194</sup> Such complaints, however, must be directed toward a state, rather than toward a private organization such as the IAAF. This is perhaps why South Africa's complaint to the UN High Commissioner of Human Rights, in response to the highly publicized and controversial application of the IAAF's former Gender Verification Policy to Caster Semenya, never progressed.<sup>195</sup>

Put simply, existing routes for challenging the IAAF's rules outside the CAS are limited in many ways. Still, the availability of certain additional review mechanisms is significant not least because, unlike the CAS, they benefit from greater expertise in human rights adjudication. Such expertise could be seen as a critical qualification when it comes to the judicious and legitimate review of discriminatory binary sex classification rules alleged to violate women's equality rights. Nonetheless, in its decision on Chand's appeal, the CAS proved that what it lacks in human rights expertise, it might make up in GAL know-how.

#### CONCLUSION

It has become clear that not just any rule for dividing the sexes for the purposes of elite athletics competition will be tolerated. The abandonment of a string of highly criticized rules, in light of evolving understandings of sex, gender, and equality, capped off with the landmark CAS decision in Chand's case, illustrates that a system of checks and balances constrains the IAAF's regulatory authority to impose binary sex classifications. In particular, any binary sex classification rule must be necessary, reasonable, and proportionate in light of its legitimate objective of ensuring fairness for female competitors. The particular evidentiary requirements stipulated by the CAS, which would allow the Hyperandrogenism Regulations to pass this test, create a high threshold for the IAAF to meet. Further, whatever specific rule formulation might comply with such substantive GAL standards, the rule will be justifiable only if developed using a procedure characterized by transparency and meaningful stakeholder participation. In addition, the rule must be crafted so the entire network of distributed administrators on which the IAAF relies is willing and able to effectively and harmoniously implement it. Finally, the IAAF must be prepared to justify the content and implementation of its rule before the CAS and perhaps certain additional review bodies. This collection of GAL principles and mechanisms constrains the IAAF's regulatory authority, particularly when human rights concerns such as gender discrimination, are involved. In this way, GAL

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194. See UN Office of the High Commissioner, *Human Rights Bodies - Complaints Procedures*, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>.

195. See Parliament of the Republic of South Africa, *Media Statement: Sport committee to report International Association of Athletics Associations (IAAF) to United Nations (UN) Human Rights Commission*, <http://www.gov.za/sport-committee-report-international-association-athletics-associations-iaaf-united-nations-un-human>.

offers a promising means of incorporating—contemporary socio-legal understandings of human rights and gender equality into the sports world.

The *Chand* decision suggests that fairness in competition must be preceded by fairness in rulemaking; that a rule that is not created, implemented, and reviewed in accordance with the largely procedural standards of fairness that make up GAL is at great risk of being unfair in substance. Given the significant GAL constraints on the IAAF, it is difficult to imagine that any rule imposing a ceiling on what it means to be a woman in the world of sport will be justifiable. This holds true whether or not the rule is purported to be a sex or gender verification test. Any rule that determines whether an individual is female, even if only for the purposes of athletics competition, will necessarily either enforce or challenge broader cultural norms in relation to gender identity.<sup>196</sup> Whether the IAAF can craft a rule that both catches up with and stimulates broader normative developments with respect to human rights and gender identity remains to be seen.

In conclusion, it should be acknowledged that exclusionary categorization can be a justifiable means of protecting the essence of sport,—but only when that essence is understood as the furthering of human capacity,<sup>197</sup> not of patriarchal tradition. Given its deep roots and fear of the unfamiliar, overcoming patriarchal sporting culture is no easy task.<sup>198</sup> Until all stakeholders accept the challenge to think differently about the complexity of sex determination, efforts will continue to be directed at “legitimizing what is already known and attempting to bolster the status quo.”<sup>199</sup> Hopefully the IAAF is in the process of engaging in such different thinking, rather than merely searching in vain for unattainable evidence to support its latest binary sex classification regulations. That is the only way for the IAAF to live up to its promise to innovate and respond to the changing demands of sport in modern society.<sup>200</sup> If, indeed, the abolition of sex-based structural barriers for women athletes is “only a few court cases away,”<sup>201</sup> GAL is poised to play a key role. In the meantime, there is a clear opportunity to build on the momentum gained from Dutee Chand’s significant stride forward in the grueling marathon toward gender equality in sport.

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196. Alice Dreger, *Should female athletes have to prove they are women?*, LOS ANGELES TIMES, July 30, 2015, <http://www.latimes.com/opinion/op-ed/la-oe-0730-dreger-chand-sport-testosterone-20150730-story.html>.

197. See PATEL, *supra* note 10, at 17.

198. See *id.* at 157.

199. Amy-Chinn, *supra* note 16, at 1292.

200. See *About the IAAF*, *supra* note 103.

201. Amy-Chinn, *supra* note 16, at 1301.