

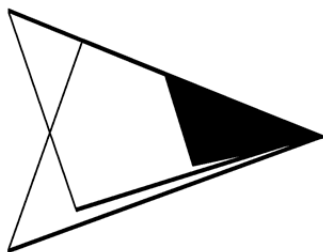


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To Be a Woman in the World of Sport *Global Regulation of the Gender Binary in Elite Athletics*

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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 favour 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 Chand¹

1. Introduction

Last year, 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

* NYU LLM 2016.

¹ In a letter to the Athletics Federation of India, reproduced in part at para. 29 of the Court of Arbitration for Sport (“CAS”)’s Interim Arbitral Award, CAS 2014/A/3759 Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF) [“CAS Award”].

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 will be declared void. Over a year has since passed and no additional evidence or alternative rule has been presented.

Chand's successful appeal illustrates that the IAAF, despite being the duly authorized regulator of international athletics competition, does not operate 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 the particular accountability principles and mechanisms of so-called 'global administrative law' (GAL) required to justify a binary sex classification rule for elite athletics competition. 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 paper begins by considering the underlying purposes of binarily dividing the sexes in athletics (Part 2). It then describes how enforcement of the binary division, as well as common understandings of sex, gender and equality, have evolved, albeit incongruously (Parts 3 and 4). The controversial case of Dutee Chand is then introduced (Part 5), followed by a summary of the landmark ruling on her appeal to the CAS (Part 6). Next, an overview of the broader regime governing international athletics, in which the IAAF operates, is described (Part 7). This provides the basis for an analysis of the GAL constraints on the IAAF's regulatory authority, with respect to the development, implementation and review of a binary sex classification rule (Part 8). Finally, some concluding reflections are offered on the role of these GAL constraints in promoting gender equality in sport (Part 9).

2. The Purpose of the Binary Division of the Sexes in Athletics

Competitive sport, with few exceptions,² 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

² Rare exceptions include the sports of equestrian and sailing.

advantages. While this rationale does not necessarily hold true across all sports, it is largely undisputed with respect to athletics, with its emphasis on speed, power and stamina. Nevertheless, notions about the fairness achieved by binary sex classification must take into account its other functions, as well as its challenges and contradictions.

International athletics competition began as a celebration of (stereotypical) ‘masculinity’ – interpreted as strength, power, aggression and physical dominance – from which women were excluded altogether. In fact, the founder of the modern Olympics, Pierre de Coubertin, envisioned the Games as ‘the solemn and periodic exaltation of the male athleticism with internationalism as a base, loyalty as a means, art for its setting, and female applause as reward.’³ In his outdated and outlandish opinion, ‘Olympics with women would be impractical, uninteresting, unaesthetic and incorrect.’⁴ It is therefore unsurprising that women’s integration was only conceded in response to the threat of separate female sports federations and Games.⁵ Beyond ensuring fair competition, then, binary sex classification functions as a means of maintaining exclusive prestige and generating economic value,⁶ while assuaging concerns about diluting men’s sport with ‘femininity’.⁷

Reliance on binary sex classification as the fundamental means of ensuring fairness in sport also 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 form the 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.’⁸ So too are all biological inequalities besides age, certain recognized disabilities and, of course, sex. Notably,

³ Forgues, ‘A Global Hurdle: The Implementation of an International Nondiscrimination Norm Protecting Women from Gender Discrimination in International Sports’, 18 *Boston University International Law Journal* (2000) 247, at 249.

⁴ Lines and Heshka, ‘Ski Jumping through Olympic-Sized Hoops: An Analysis of Sagen v. Vancouver Organizing Committee (VANOC) for the 2010 Olympic & Paralympic Games’, 4 *International Sports Law Review* (2009) 92, at 97.

⁵ Ferez, ‘From Women’s Exclusion to Gender Institution: A Brief History of the Sexual Categorisation Process within Sport’, 29:2 *International Journal of the History of Sport* (2012) 272, at 272.

⁶ S. Patel, *Inclusion and Exclusion in Competitive Sport* (2015), at 153.

⁷ S. Boyle, ‘The End of an Era? Challenging Sex Verification Testing in Sport’ (2014) (thesis on file with author), at 3.

⁸ Cooky and Dworkin, ‘Policing the Boundaries of Sex: A Critical Examination of Gender Verification and the Caster Semenya Controversy’, 50:2 *Journal of Sex Research* (2013) 103, at 107.

the binary division of the sexes is a uniquely absolute organizational rule in athletics, which permeates all age and ability categories.⁹

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.¹⁰ 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 legitimacy of 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.

3. 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,¹¹ the IAAF introduced a rule in 1948 requiring female competitors to provide a medical certificate to prove their eligibility.¹² 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.’¹³ This changed in the 1960s as a rise in the performance level of elite female athletes¹⁴ and mounting concerns about males posing as female led the IAAF and the International Olympic Committee (IOC) to institute systematic

⁹ While younger or disabled athletes sometimes compete ‘above’ their designated category (with older athletes or able-bodied peers), athletes may never compete outside their designated sex category.

¹⁰ Patel, *supra* note 6, at 153.

¹¹ Ha *et al.*, ‘Hurdling Over Sex? Sport, Science, and Equity’, 43 *Archives of Sexual Behaviour* (2014) 1035, at 1036.

¹² Amy-Chinn, ‘The taxonomy and ontology of sexual difference: implications for sport’, 15:9 *Sport in Society* (2012) 1291, at 1298; Berry, ‘Respect for the Fundamental Notion of Fairness of Competition: The IAAF, Hyperandrogenism, and Women Athletes’, 27:3 *Wisconsin Journal of Law, Gender & Society* (2012) 207, at 210.

¹³ Heggie, ‘Testing sex and gender in sports; reinventing, reimagining and reconstructing histories’, 34:4 *Endeavour* (2010) 157, at 159.

¹⁴ Berry, *supra* note 12, at 209.

biomedical sex testing.¹⁵ 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 demeaning and degrading and, in 1968, were replaced with mandatory chromosomal testing of saliva. While less invasive, the ‘Barr test’, which determined 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 combinations or the ‘array of developmental possibilities where chromosomal, gonadal, hormonal, anatomic, and psychosocial sex may be discordant.’¹⁶ Still, it took the IAAF and the IOC two decades – and an infamous case of unfair disqualification – to make any changes.¹⁷ In the early 1990s, the IAAF briefly instituted comprehensive medical examinations of both male and female athletes. 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.¹⁸ 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.¹⁹

In 2006, the IAAF elaborated this approach in its ‘Policy on Gender Verification.’ The significant shortcomings of this policy were soon made clear, however, in two highly controversial cases. The public fallout from the disqualification of 800-metre runners, Santhi Soundarajan of India (in 2006) and Caster Semenya of South Africa (in 2009), proved 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’). 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

¹⁵ Ha *et al.*, *supra* note 11, at 1036. There is only one documented instance of a man ‘masquerading’ as a woman for the purposes of athletics competition (Donnellan, ‘Gender testing at the Beijing Olympics’, 1:16 *Sport and Law Journal* (2012) 20, at 21).

¹⁶ Ha *et al.*, *supra* note 11, at 1036.

¹⁷ 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 (Berry, *supra* note 12, at 12).

¹⁸ Ha *et al.*, *supra* note 11, at 1037.

¹⁹ *Ibid.*, at 1037, 1039.

“gender verification” and “gender policy” in its Rules.²⁰ 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 functional²¹ endogenous testosterone level in the ‘normal male range’, defined as 10nmol/L or above (i.e. hyperandrogenism).²² The Regulations thus operated as an exception to 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’.²³

The Regulations further set out the circumstances in which, and the processes by which, 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 he or she has ‘reasonable grounds’ for believing, based on ‘any reliable source’, that she may be hyperandrogenic.²⁴ The investigative process involves three stages: an initial clinical examination, a preliminary endocrine assessment and a full examination and diagnosis. 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.²⁵ The Regulations are of ‘mandatory application’ to all female athletes who seek to compete in international athletics competition and ‘recommended as a guide’ for national athletics federations and domestic competitions.²⁶ 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

²⁰ IAAF, *Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women’s Competition* (2011), Reg. 1.4 [‘Hyperandrogenism Regulations’].

²¹ An athlete’s testosterone is considered ‘functional’ unless an androgen resistance prevents her body from deriving a competitive advantage from testosterone.

²² Hyperandrogenism Regulations, *supra* note 20, Reg. 6.5.

²³ IAAF, *Competition Rules 2016-2017*, Rule 141.

²⁴ Hyperandrogenism Regulations, *supra* note 20, Reg. 2.2.

²⁵ *Ibid.*, Reg. 5.24.

²⁶ *Ibid.*, Reg. 1.2.

[hyperandrogenism] shall be eligible to compete in a women's competition if she has functional androgen [testosterone] levels that are in the male range.²⁷

The Regulations, like all past sex verification practices, apply only to female athletes. 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'. This has led many to aptly observe that removing the 'gender verification' or 'sex testing' label is merely a symbolic gesture or semantic change.²⁸ The Hyperandrogenism Regulations are thus merely 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.'²⁹ 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.

4. 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.³⁰ First, there is now wide acknowledgement, despite their significant overlap, that sex – a biological state – is distinct from gender – a social construction.³¹ 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. 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

²⁷ Chand, *supra* note **Error! Bookmark not defined.**, at para. 67.

²⁸ Bohuon, 'Gender Verifications in Sport: From an East/West Antagonism to a North/South Antagonism', 32:7 *International Journal of the History of Sport* (2015) 965, at 966; Hutchinson, 'An Imperfect Dividing Line' (27 March 2015) *The New Yorker*, available at <http://www.newyorker.com/news/sporting-scene/dutee-chand-gender-testing-imperfect-line>.

²⁹ Perez, *supra* note 5, at 272.

³⁰ The description of these trends is a simplification of very complex socio-legal developments, sufficient for the purposes of this paper.

³¹ It has also been argued that sex is as socially constructed as gender, and thus there is actually no distinction between them (Amy-Chinn, *supra* note 12, at 1296, citing J. Butler).

identified: chromosomal sex, gonadal sex, foetal hormonal sex, internal morphological sex, external morphological sex, brain sex, sex of assignment and rearing, pubertal hormonal sex, gender identity and role, and procreative sex.³² 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.

Problematically, however, sex testing in athletics largely ignores these developments by conflating sex, gender and femininity, and enforcing a binary it admits does not exist in reality. For instance, the terms ‘sex testing’, ‘gender verification’ and ‘femininity testing’ are commonly used nearly interchangeably by officials, athletes and reporters.³³ Further, the Hyperandrogenism Regulations themselves, despite recognising 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’.³⁴

Another important development with implications for the legitimacy of binary sex classification is the emergence 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 domestic constitutions and human rights legislation, as well as international declarations and treaties. Although most of these instruments do not explicitly refer to transgender or transsexual individuals, evolving judicial conceptions of human rights broadly interpret gender equality to include gender identity as a prohibited grounds of discrimination.³⁵

Gender equality has also recently gained unprecedented traction in the world of sport. For instance, 2004 saw the establishment of the IOC’s Women and Sport Commission and the addition of a

³² *Ibid.*, at 1897. 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.

³³ Wackwitz, ‘Verifying the Myth: Olympic Sex Testing and the Category ‘Woman’’, 26:6 *Women’s Studies International Forum* (2003) 553, at 554.

³⁴ Ha *et al.*, *supra* note 11, at 1037.

³⁵ E.g.: *Identoba and Others v. Georgia*, Appl. no. 73235/12, Judgment of 12 May 2015 (In this case, the European Court of Human Rights clarified that all trans people are protected against discrimination on grounds of gender identity under art. 14 of the *European Convention on Human Rights*); and *National Legal Services Authority v. Union of India W/P (Civil)*, No 604 (2013) (In this case, the Supreme Court of India declared transgender a ‘third gender’, with which anyone may self-identify, and affirmed that the fundamental rights granted under the Constitution of India apply equally to all three genders).

Fundamental Principle to the Olympic Charter, prohibiting discrimination on a number of grounds including sex.³⁶ 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’.³⁷ 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.’³⁸ 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’.³⁹

Despite these important advances, the administration of international athletics has not fully embraced the contemporary conceptions of sex, gender and equality that challenge traditional binary thinking. These conceptions, which have had substantial impacts in many areas of social life, are poorly reflected in the context of athletics perhaps because ‘few other fields rely so absolutely for their functioning on a clear distinction between male and female bodies.’⁴⁰ Even if a contrived binary division is appropriate and necessary for athletics, however, current understandings of sex, gender and equality cannot be 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.

5. The Case of Dutee Chand

In June 2016, at the age 20, Dutee Chand became the first Indian sprinter to qualify for the women’s 100-metre dash at the Olympics since 1980. Just a 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

³⁶ IOC, *Olympic Charter* (2 August 2015), Fundamental Principle 6.

³⁷ *Ibid.*, Fundamental Principles 2, 4.

³⁸ *Ibid.*, Art. 2.7.

³⁹ IAAF, *Constitution* (1 November 2015), Art. 3.4 [‘IAAF Constitution’].

⁴⁰ Amy-Chinn, *supra* note 12, at 1291.

established by the Government of India's Ministry of Youth Affairs and Sports. In 2013, the Ministry promulgated a 'Standard Operative Procedure to identify circumstances (female Hyperandrogenism) in which a particular sports person will not be eligible to participate in competitions in the female category' (the 'SOP'). The SOP, which was binding on the SAI and the Athletics Federation of India (AFI), provided for a similar, but not identical, process of hyperandrogenism testing as the IAAF's Regulations.⁴¹

In June 2014, several female athletes who attended a training camp with Chand apparently expressed concern to the AFI President about her 'masculine' physique. 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'.⁴² Later that month, under the supervision of the Director of the AFI, Chand underwent an ultrasound examination she believed to be part of a routine doping test.⁴³ Soon after, the AFI sent a letter to the SAI expressing 'definite doubts' regarding Chand's gender. Since it could not identify a suitable female investigative officer, as required by the SOP, the AFI suggested the SAI conduct a gender verification test 'as per the established protocol'. The SAI then subjected Chand to a number of medical examinations, including blood tests, gynaecological tests, karyotyping, an MRI and a further ultrasound.⁴⁴

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. 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,

⁴¹ 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, a test is undertaken 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 (*Chand, supra* note **Error!** **Bookmark not defined.**, at para. 391).

⁴² *Ibid.*, at para. 392.

⁴³ The AFI claimed the examination was carried out in response to Chand's complaints about stomach problems, and not connected to gender or hyperandrogenism testing.

⁴⁴ *Ibid.*, at paras. 12-15. The AFI claimed these examinations were for anti-doping and health monitoring purposes, as well as to identify the cause of Chand's abdominal pain, and, again, were not connected to gender or hyperandrogenism testing.

which was part of ‘SAI protocol’ and ‘stipulated by the IAAF and the IOC’.⁴⁵ The SAI then informed the AFI that Chand had hyperandrogenism and should be excluded from competition, noting that it would assist Chand access the medical assistance necessary to lower her testosterone to permissible levels. Soon after, the AFI notified Chand that she was provisionally suspended from all athletics competitions, based on medical reports received from the SAI, until she came into compliance with the IAAF’s Regulations. Both Chand and the SAI unsuccessfully petitioned the AFI to reconsider its decision.⁴⁶

Rather than undergo the recommended treatment to lower her testosterone, Chand appealed the AFI’s decision to the CAS – an independent tribunal that resolves global sports-related disputes through private arbitration. 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 levels). 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.

6. 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 Chand’s appeal (the ‘*Chand* decision’). Significantly, there was no dispute that the Hyperandrogenism Regulations were – contrary to the Olympic Charter, the IAAF Constitution and the laws of Monaco (where the IAAF is headquartered) – prima facie discriminatory. 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 the fundamental right to compete at all.

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.’⁴⁷ Further, all agreed that it is necessary for the IAAF to formulate a basis for the binary division of the sexes

⁴⁵ *Chand*, *supra* note **Error! Bookmark not defined.**, at para. 20.

⁴⁶ *Ibid.*, at paras. 15-31.

⁴⁷ *Ibid.*, at para. 35(d)-(e).

based on an objective criterion or criteria,⁴⁸ but that ‘gender testing’ is not appropriate in this regard.⁴⁹ 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 is purely ‘a matter of law’.⁵⁰ This tenuous distinction suggests that while Chand is indisputably a woman in law and every other area of social life,⁵¹ 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.⁵²

When it came to 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 of this hormone between men and women.⁵³ 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. Therefore, according to the panel, ‘the Regulations do not police the male/female divide but establish a female/female divide within the female category.’⁵⁴ While this distinction is somewhat dubious, the panel properly focused its analysis not on whether endogenous testosterone is an appropriate means of distinguishing between men and women, but 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

⁴⁸ *Ibid.*, at para. 35(f).

⁴⁹ *Ibid.*, at paras. 35(g), 510. The CAS also deemed mere examination of external genitalia or chromosomal testing inappropriate.

⁵⁰ *Ibid.*, at para. 510.

⁵¹ *Ibid.*, at para. 36.

⁵² *Ibid.*, at para. 504.

⁵³ *Ibid.*, at para. 494.

⁵⁴ *Ibid.*, at para. 501.

purposes of competition, when she exhibits, naturally, the characteristic most closely associated with male competitive advantage?’⁵⁵

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.’⁵⁶ Since no evidence before the panel 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’. 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.’⁵⁷

As a remedy, the panel immediately suspended the Hyperandrogenism Regulations. Chand, and all other legally female athletes, have since been eligible to compete in both domestic and international athletics events. 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 to provide additional evidence to justify its Regulations, failing which they will be declared void. 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,⁵⁸ 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.’⁵⁹ The submission of such evidence by the IAAF will not automatically revalidate the Regulations. Rather, Chand

⁵⁵ *Ibid.*, at paras. 511-512.

⁵⁶ *Ibid.*, at para. 517.

⁵⁷ *Ibid.*, at paras. 531-532.

⁵⁸ *Ibid.*, at para. 535.

⁵⁹ *Ibid.*, at para. 529. The CAS added, at para. 534, that if the degree of advantage were well below 12%, the IAAF would have to consider whether that justified excluding women with that advantage from the female category.

would be granted an opportunity to respond and a further hearing would take place for the panel to consider whether the evidence is sufficient to justify the Regulations in light of all the circumstances.⁶⁰

This landmark ruling – declared ‘a victory for women’s equality in sport’⁶¹ – 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. Despite the IAAF’s vow to ‘meet as soon as possible with its experts and with the IOC and its experts to discuss how best to address this interim ruling by the CAS⁶², and the fast approaching deadline, no progress has been reported.

7. The Global Governance Regime for Athletics

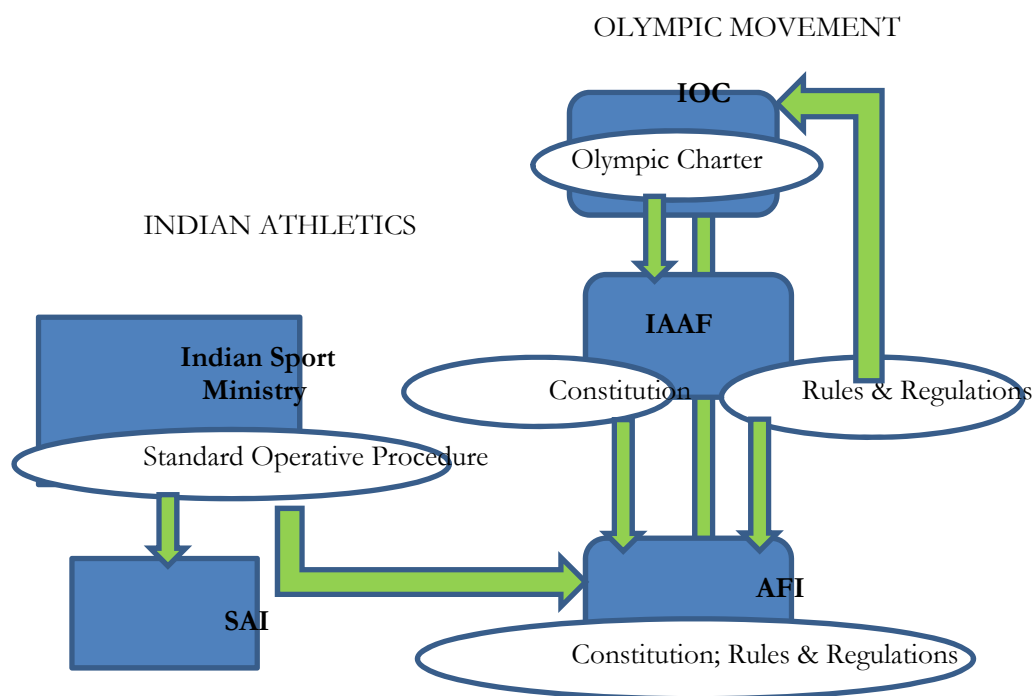
To appreciate the significance of the CAS holding the IAAF to GAL standards, the IAAF’s place within the broader global governance regime for athletics must be understood. Figure 1 provides a simplified diagrammatic representation of this regime complex, highlighting the key institutions and legal instruments involved in the creation and enforcement of global sports law in the particular context of Chand’s case.

⁶⁰ *Ibid.*, at para. 548.

⁶¹ Koshie, ‘Dutee Chand wins the right to compete’ (29 July 2015) *The Indian Express*, quoting K. Karkazis, available at <http://indianexpress.com/article/sports/sport-others/sprinter-dutee-chand-wins-right-to-compete/>.

⁶² ‘IAAF Comments on Interim Award Issued by the CAS on the IAAF’s Hyperandrogenism Regulations’, (27 July 2015), Press Release, available at <http://www.iaaf.org/news/press-release/hyperandrogenism-regulations-cas-dutee-chand> [‘IAAF Press Release’].

Figure 1: Overview of the regime complex governing international athletics



The IAAF's rulemaking power within the above regime complex is best understood within the rubric of the Olympic Movement, which encompasses all organizations, athletes and others who wish to be a part of the Olympic Games. At its peak is the IOC, which exercises 'supreme authority and leadership' over all other components of the Olympic Movement, including international governing bodies, like the IAAF, as well as their national associations, like the AFI. All members of the Olympic Movement are bound by the Olympic Charter and the decisions of the IOC.⁶³ 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'.⁶⁴ Accordingly, the IAAF aims to 'compile and enforce rules and regulations governing Athletics and to

⁶³ Olympic Charter, *supra* note 36, Rule 1.

⁶⁴ *Ibid.*, Rule 26.1.1.

ensure in all competitions, whether sanctioned by the 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.⁶⁵ To this end, the IAAF Constitution requires all national governing bodies to abide by its Rules and Regulations.⁶⁶ The IAAF is therefore the primary regulator of athletics all the way up to Olympic level and all the way down to sub-national level.⁶⁷

National federations are also subject, however, to various domestic rules and regulations, which may differ from those of the IAAF. In Chand's case, for instance, the AFI was directly bound by the Indian Sport Ministry's SOP rather than by the IAAF's Regulations, as the latter were specifically only recommendatory at the national level. Nonetheless, when the AFI found itself unable to comply with the SOP-mandated investigatory procedure, it seemingly advised the SAI, which was also bound only by the SOP, to implement the IAAF Regulations 'so as to avoid any embarrassment to India in the international arena at a later stage.'⁶⁸ 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 competition, which was at the centre of Chand's case. The IAAF was founded in 1912 by 17 national athletic federations to fulfil the need for a global governing authority, for a competition programme, for standardized technical equipment and for a list of official world records. More recently, the IAAF has emphasized 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.'⁶⁹ To this end, in 1982, the IAAF abandoned the traditional concept of amateurism which restricted participation to socially and financially

⁶⁵ IAAF Constitution, *supra* note 39, Art. 3.5.

⁶⁶ *Ibid.*, Art. 4.1.

⁶⁷ 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', available at <http://www.iaaf.org/about-iaaf>).

⁶⁸ *Chand*, *supra* note **Error! Bookmark not defined.**, at paras. 14, 19.

⁶⁹ 'About the IAAF', *supra* note 67.

privileged individuals. By increasing financial incentives, ‘the way to high performance was opened to larger groups of extremely talented athletes.’⁷⁰

The IAAF is a private, or perhaps hybrid public-private, governance institution. An ‘association’ under the laws of Monaco, it derives income from a combination of membership dues and, increasingly, corporate sponsorship.⁷¹ 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. While its members are private national governing bodies rather than governments, there are generally strong links between the two (as was seen in Chand’s case between the Indian Ministry of Sports, the SAI and the AFI). As has been shown, the IAAF’s rules are regulatory in nature and constitute genuine ‘global law’, rather than ‘international law’, because ‘they are spread across the entire world, they involve both international and domestic levels, and they directly affect individuals.’⁷² 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 administrative principles that, as illustrated by the *Chand* decision, have become an essential part of global sports law.

8. 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.⁷³ Thus, as others have noted, ‘[i]f we want a line, we have to draw it on nature.’⁷⁴ While the IAAF is the actor primarily responsible for any such line-drawing, it does not do so in a vacuum. Global legitimacy and accountability are therefore of central concern 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

⁷⁰ IAAF, ‘History’, available at <http://www.iaaf.org/about-iaaf/history>.

⁷¹ *Ibid.*

⁷² Casini, ‘The Making of a *Lex Sportiva*: The Court of Arbitration for Sport “The Provider”’, *IILJ Working Paper 2010/5 (Global Administrative Law Series)* (2010), available at <http://www.iilj.org/publications/documents/2010-5.Casini.pdf>, at 1.

⁷³ *Chand*, *supra* note **Error! Bookmark not defined.**, at para. 35(e).

⁷⁴ Amy-Chinn, *supra* note 12, at 1293, quoting Dreger, ‘Sex Typing for Sport’, 40:2 *Hastings Center Report* (2010) 22, at 23.

athletics.⁷⁵ The *Chand* decision indicates, however, that the prejudicial effects of this tension on individual athletes can and should be minimized, in particular, by applying elements of GAL.

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.’⁷⁶ Such 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 substantive standards of administrative action.⁷⁷ 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. 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 it 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 is a relevant factor in determining whether a binary sex classification rule is justifiable.

⁷⁵ Hutchinson, *supra* note 28.

⁷⁶ B. Kingsbury, N. Krisch and R.B. Stewart, ‘The Emergency of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) 15, at 17.

⁷⁷ *Ibid.*, at 40.

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. In particular, the panel required that the IAAF be transparent about the scientific basis for its binary sex classification rule. 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. 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.⁷⁸ 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 itself stands for transparency in rulemaking as it elucidates, and calls attention to, the purpose, 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’.⁷⁹ 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.’⁸⁰

The *Chand* decision therefore goes some way toward addressing the alleged ‘general lack of transparency in the construction and application of rules in sport.’⁸¹ 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.⁸² In particular, the CAS panel accepted that the

⁷⁸ *Chand*, *supra* note **Error! Bookmark not defined.**, at para. 534.

⁷⁹ Amy-Chinn, *supra* note 12, at 1300.

⁸⁰ *Ibid.*, at 1301.

⁸¹ Patel, *supra* note 6, at 157.

⁸² *Ibid.*, at 157.

Hyperandrogenism Regulations do not constitute sex or gender testing, thereby rejecting valid suggestions to the contrary, such as the following witness testimony:

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.⁸³

Arguably, then, the CAS has not required the IAAF to be completely forthright and transparent about the practical effect (if not the purpose) of its rule. The degree to which the *Chand* decision enhances decisional transparency and access to information is important not only for the sake of transparency itself, but also because it is foundational to the effective exercise of another key element of GAL: participation rights.⁸⁴

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 the basis of a criterion that reflected the significant performance advantage of male athletes over female athletes.⁸⁵

The panel thus seems to have accepted the reasoning of the IAAF's expert witness 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.' 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.'⁸⁶ The CAS did not, however, specifically question whether the IAAF had engaged with a diverse group of female stakeholders or obtained support from the majority of the female athlete

⁸³ *Chand*, *supra* note **Error! Bookmark not defined.**, at para. 352.

⁸⁴ Kingsbury, Kirsch and Stewart, *supra* note 76, at 38.

⁸⁵ *Chand*, *supra* note **Error! Bookmark not defined.**, at para. 506.

⁸⁶ *Ibid.*, at para. 277.

community, nor did it consider how 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. 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.'⁸⁷

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.⁸⁸ Furthermore, the IAAF 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. The resulting legitimacy concerns are particularly acute given the historical governance of international sport by 'powerful men who answer to no one [and] decide whether women can participate.'⁸⁹

3. Proportionality

Beyond implicit references to the procedural protections afforded by transparency and participatory rights, the CAS panel explicitly framed its assessment of the Hyperandrogenism Regulations in terms of substantive GAL standards. In particular, it relied on the general legal principle of

⁸⁷ IAAF Press Release, *supra* note 62.

⁸⁸ 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: IOC, *The Los Angeles Declaration*, 5th IOC World Conference on Women and Sport (18 February 2012), at para. 3, available at http://www.olympic.org/Documents/Commissions_PDFfiles/women_and_sport/Los-Angeles-Declaration-2012.pdf; IOC, 'Factsheet: Women in the Olympic Movement' (October 2013), available at http://www.olympic.org/Documents/Reference_documents/Factsheets/Women_in_Olympic_Movement.pdf.

⁸⁹ Robinson, 'One step forward, two steps back' (17 December 2010) *Toronto Star*, available at https://www.thestar.com/news/insight/2010/12/17/one_step_forward_two_steps_back.html.

proportionality, and its attendant requirements of necessity and reasonableness, as the appropriate legal test for justifying discrimination.⁹⁰ 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, as agreed by the parties, that a rule to define who may compete as female, going beyond legal status, is necessary in athletics, 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.’⁹¹ Such 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. Unlike anti-doping regulations, which respond to the real existential threat to athletics, a binary sex classification rule may not be necessary at all. The complete disregard of this possibility 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’, however, 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’.⁹² This places a burden on the IAAF that will be very difficult, if not impossible, to satisfy, due in large part 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.⁹³ Furthermore, even if science can prove that hyperandrogenism provides a significant competitive

⁹⁰*Chand*, *supra* note **Error! Bookmark not defined.**, at para. 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.’

⁹¹ *Ibid.*, at para. 510.

⁹² *Ibid.*, at paras. 443, 531.

⁹³ *Ibid.*, at para. 148, 189, 530.

advantage (say 6%), it remains difficult to imagine that this advantage could be proven to be greater than that derived from the numerous other variables that affect female athletic performance, as the CAS indicated would be required.⁹⁴ 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.⁹⁵ 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.’⁹⁶

B. Rule Implementation

As illustrated above, the IAAF relies on a 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.’⁹⁷ 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. 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. Even where national and international regulations accord in terms of their substantive content (e.g. the particular biological

⁹⁴ *Ibid.*, at paras. 517, 532.

⁹⁵ Amy-Chinn, *supra* note 12, at 1297.

⁹⁶ Henderson, ‘Davies Ward Wins Big for Female Sprinter Banned for High Testosterone’ (28 July 2015) *The American Lawyer*, available at <http://www.americanlawyer.com/id=1202733339155/Davies-Ward-Wins-Big-for-Female-Sprinter-Banned-for-High-Testosterone?mcode=1202615731542&curindex=0&curpage=ALL>.

⁹⁷ Kingsbury, Krisch and Stewart, *supra* note 76, at 21.

factor and threshold determinative of an athlete's sex classification), the procedural methods of enforcement are far more difficult to harmonize globally.

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.⁹⁸ This is in line with the IAAF Constitution, which provides that CAS decisions are binding on all IAAF members.⁹⁹ 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. With respect to the Hyperandrogenism Regulations, the targeting of test subjects and the specific design of test procedures are of particular concern.

4. Testing Targets

There is proven risk of discriminatory application of the Hyperandrogenism Regulations, based on intersecting sexist and racist stereotypes.¹⁰⁰ 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 Western standards of female beauty.'¹⁰¹ 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'.¹⁰² This implementation defect detracts from the rule's legitimacy and, as seen in Chand's case, opens the door to

⁹⁸ *Chand*, *supra* note **Error! Bookmark not defined.**, at para. 105.

⁹⁹ IAAF Constitution, *supra* note 39, Art. 15.3. Further, CAS awards are enforceable in all 156 countries party to the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.

¹⁰⁰ See generally: Bohuon, *supra* note 28.

¹⁰¹ *Ha et al.*, *supra* note 11, at 1039.

¹⁰² *Chand*, *supra* note **Error! Bookmark not defined.**, at paras. 251, 259. At the London Olympics, four female athletes from rural areas of developing countries were subjected to the *Hyperandrogenism Regulations* (Branch, 'Dutee Chand, Female Sprinter With High Testosterone Level, Wins Right to Compete' (27 July 2015) *The New York Times*, available at http://www.nytimes.com/2015/07/28/sports/international/dutee-chand-female-sprinter-with-high-male-hormone-level-wins-right-to-compete.html?_r=0).

collective resistance from athletes, human rights advocates, national governments and the national governing bodies on which the IAAF relies to implement its rules.

5. Testing Design

The IAAF also relies on distributed administrators to carry out a number of specific procedural steps in implementing the Hyperandrogenism Regulations – from notification processes and confidentiality requirements to the provision of options for achieving compliance. This raises questions about a basic element of GAL: the presence of effective checks for coordinated domestic administration. These checks take the form of norms, promoted by international regulators such as the IAAF, to govern not only the substance of domestic regulation, but also the decisional procedures followed by domestic regulatory agencies when applying a global norm.¹⁰³ The procedural requirements of the Hyperandrogenism Regulations, or any other binary sex classification rule, however, may not result in harmonized implementation at the global level to the extent that developing countries lack the capacity to implement binary sex classification rules and regulations in the same way as more advanced countries.

For instance, in countries where women have less access to obstetric care, and therefore less knowledge about the biological composition of their bodies, the Regulations' self-declaration requirement may have little value. Further, in some sociocultural contexts, a hyperandrogenism diagnosis might be especially shocking or confusing, or put the diagnosed athlete at risk in her community, and appropriate counselling and support may not be available, resulting in great reluctance to self-declare.¹⁰⁴ To provide another example, options for achieving compliance with the Regulations, including treatment and surgery, can be effectively limited by both the capacities of the local healthcare system and the financial means of the 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.¹⁰⁵ 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.

¹⁰³ Kingsbury, Krisch and Stewart, *supra* note 76, at 36.

¹⁰⁴ Berry, *supra* note 12, at 227.

¹⁰⁵ Ha *et al.*, *supra* note 11, at 1037.

The Hyperandrogenism Regulations themselves acknowledge that they ‘merely set out an overall framework for the management of cases that might arise.’¹⁰⁶ This fact, combined with their merely 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.¹⁰⁷ 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.¹⁰⁸ 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 – as an agent caught between two principals, one national and one international. In any case, despite the significant pressure on national bodies to conform with IAAF regulations, complete harmonization of implementation procedures is preconditioned by global legitimacy and capacity. In an effort to achieve these preconditions, the IAAF is held accountable by its distributed administrators.

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,¹⁰⁹ which most certainly enhances the accountability of those subjected to review. More generally, the range of judicial or quasi-judicial fora before which athletes and others may challenge the IAAF’s rules form an integral part of the system of global governance that applies to athletics and constrains the IAAF’s regulatory authority with respect 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.

¹⁰⁶ Hyperandrogenism Regulations, *supra* note 20, Reg. 5.1.

¹⁰⁷ See e.g.: *Chand*, *supra* note **Error! Bookmark not defined.**, at para. 14, noting the AFI’s inability to identify a suitable nodal officer as required by the SOP.

¹⁰⁸ *Ibid.*, at paras. 30-31.

¹⁰⁹ Kingsbury, Krisch and Stewart, *supra* note 76, at 38.

6. 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.¹¹⁰ Although it was technically a decision of the AFI, rather than 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 constituted implicit acceptance of its jurisdiction.¹¹¹

Such willingness to submit sports-related disputes to the CAS enhances its position as the institutional actor 'most prominent in constructing global sports law'.¹¹² 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. 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.¹¹³ The CAS was relaunched in 1994 as an independent and self-funding body, free from any interference from any constituent of the Olympic Movement including the IOC.¹¹⁴ Such independence is, of course, essential when it comes to holding international sport 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:

¹¹⁰ Hyperandrogenism Regulations, *supra* note 20, Art. 7.2.

¹¹¹ *Chand*, *supra* note **Error! Bookmark not defined.**, at paras. 422-436.

¹¹² Casini, *supra* note 7272, at 4.

¹¹³ *Ibid.*, at 18.

¹¹⁴ Osborn and James, 'The Sources and Interpretation of Olympic Law', 12 *Legal Information Management* (2012) 80, at 82.

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.¹¹⁵

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.’¹¹⁶ Although the CAS was unable to grant this request due to objections from the IAAF and the AFI,¹¹⁷ 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.’¹¹⁸

In sum, the CAS is an essential GAL mechanism, which itself abides by certain GAL principles and also holds the IAAF and its distributed administrators accountable to such principles – from reason-

¹¹⁵ Casini, *supra* note 72, at 11.

¹¹⁶ Swamy, ‘My CAS hearing should be in public: Dutee Chand’ (12 February 2015) *The Times of India*, available at <http://timesofindia.indiatimes.com/sports/more-sports/athletics/My-CAS-hearing-should-be-in-public-Dutee-Chand/articleshow/46209929.cms>.

¹¹⁷ The agreement of all parties is a prerequisite to public hearing (CAS, *Code of Sports-Related Arbitration* (2016), Arts. R44.2, R57).

¹¹⁸ *Chand*, *supra* note **Error! Bookmark not defined.**, at para. 5. The decision is 161 pages in length.

giving and transparency to participation and proportionality. The CAS therefore plays a key role within the global governance regime for athletics, holding the IAAF accountable in its regulatory activities. It is not, however, the only review mechanism with such potential.

7. Further Routes of Appeal

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’,¹¹⁹ 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 paper, 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 if called upon to do so.

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.¹²⁰ 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,¹²¹ likely because they are permitted only on very narrow grounds, only one of which is goes beyond blatant procedural defects, namely, incompatibility with public policy.¹²² While no athlete has every successfully argued this ground of appeal before the Swiss Federal Court,¹²³ a speed-skater did so before the Munich Court of Appeals.¹²⁴ The German court overturned a CAS decision to uphold an arbitration agreement between a speed-skater and the international skating federation because it was

¹¹⁹ IAAF Constitution, *supra* note 39, Art. 15.2

¹²⁰ M.J. Mitten, ‘Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations’, 10:1 *Pepperdine Law Review* (2009) 51, at 53.

¹²¹ Casini, *supra* note 72, at 20.

¹²² Mitten, *supra* note 120, 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.

¹²³ *Ibid.*, at 58.

¹²⁴ CAS, ‘Statement of the Court of Arbitration for Sport (CAS) on the decision made by the Oberlandesgericht München in the case between Claudia Pechstein and the International Skating Union (ISU)’ (27 March 2015), available at http://www.tas-cas.org/fileadmin/user_upload/CAS_statement_ENGLISH.pdf.

tainted with constraint. The court held that the federation's monopolistic position, which forces individual athletes to adhere to statutes they have no power to negotiate, violated public policy codified in German competition law.¹²⁵ The same could potentially be said with respect to the IAAF's Regulations.

Other possible means of challenging CAS decisions, with some limited precedent, include launching an appeal before a regional court, such as the European Court of Justice,¹²⁶ or, if an athlete has the support of her home government, lodging a human rights complaint with the United Nations Human Rights Committee. South Africa pursued this latter route in response to the highly publicized and controversial application of the IAAF's former Gender Verification Policy to Caster Semenya.¹²⁷ The availability of these additional review mechanisms is significant not least because, unlike the CAS, they benefit from greater expertise in human rights adjudication, which is presumably a critical qualification when it comes to the judicious and legitimate review of discriminatory binary sex classification rules. Nonetheless, in its decision on Chand's appeal, the CAS proved that what it lacks in human rights expertise, it makes up in GAL know-how.

9. Concluding Reflections

Clearly, 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, and 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 in this regard. In particular, a binary sex classification rule must be necessary, reasonable and proportionate in light of its legitimate objective of ensuring fairness for female competitors. Whatever specific rule formulation might comply with this substantive GAL standard, it will be justifiable only if developed in a transparent way, with the meaningful participation of all relevant stakeholders. Further, 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

¹²⁵ Lukomski, 'Arbitration Clauses in sports governing bodies' statutes: consent or constraint? Analysis from the perspective of Article 6(1) of the European Convention on Human Rights', 13 *International Sports Law Journal* (2013) 60, at 67.

¹²⁶ See e.g.: *Meca-Medina v. Commission of the European Communities* (18 July 2006), Case C-519/04 P (Third Chamber).

¹²⁷ *Ha et al.*, *supra* note 11, at 1037.

of its rule before the CAS, which has proven its ability to provide effective review in the form of globally-binding reasoned decisions. 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 offers an effective means of incorporating – even if indirectly – contemporary legal and social 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; a rule that is not created, implemented and reviewed according to GAL standards is highly unlikely to be fair 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, necessarily either enforces or challenges broader cultural norms in relation to gender identity.¹²⁸ Whether the IAAF can craft a rule that both catches up with and stimulates broader progressive socio-legal developments remains to be seen.

In conclusion, 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,¹²⁹ not of patriarchal tradition. Given its deep roots and fear of the unfamiliar, overcoming patriarchal sporting culture is no easy task.¹³⁰ Until all stakeholders accept the challenge to think differently about the complexity of sex determination, efforts will continue be directed at 'legitimizing what is already known and attempting to bolster the status quo.'¹³¹ 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.¹³² If, indeed, the abolition of sex-based structural barriers

¹²⁸ Dreger, 'Should female athletes have to prove they are women?' (30 July 2015) *Los Angeles Times*, available at <http://www.latimes.com/opinion/op-ed/la-oe-0730-dreger-chand-sport-testosterone-20150730-story.html>.

¹²⁹ Patel, *supra* note 6, at 17.

¹³⁰ *Ibid.*, at 157.

¹³¹ Amy-Chinn, *supra* note 12, at 1292

¹³² 'About the IAAF', *supra* note 67.

for women athletes is ‘only a few court cases away’,¹³³ 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 gruelling marathon toward gender equality in sport.

¹³³ Amy-Chinn, *supra* note 12, at 1301.