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International sports federations as de facto lawmakers: Queer-feminist explorations of the gendered power of sports law

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Abstract

This article analyses the law-making power of international sports federations, with a specific focus on their authority of shaping global norms on gender. It explores a variety of international sporting rules from feminist and queer perspectives. These include the ban of rainbow armbands at the 2022 FIFA (Men's) World Cup, rules on the participation of transgender persons in rugby, gendered and racialized uniform regulations in sports, and the *Semenya* case concerning the sports participation of women with variations in sex characteristics. The analysis asserts that despite being non-state actors, international sports federations are de facto international lawmakers that disseminate hegemonic gender norms reflecting cis-hetero-sexism and white body norms. However, analysing the *Semenya* case and the decision of the Chamber of the European Court of Human Rights in the case shows that the law-making power of international sports federations in shaping gender norms is not absolute but embedded in a transnational network of norms. The article concludes that subjecting international sports federations to a feminist, queer, and anti-racist legal analysis assists in understanding how hegemonic norms on gender circulate transnationally and enhances knowledge on how international law works in practice.

Keywords: 2022 FIFA World Cup; Caster Semenya; Eurocentrism; non-state actors; transgender persons

1. Introduction

Feminist and queer investigations of international law have rarely focused on sports as an arena in which global norms on gender are produced.¹ This is the case even though international sports are highly gendered. Countless women athletes competing internationally have openly talked about the sexism that they experience, often compounded by instances of racism.² Likewise,

*I would like to thank the Editor Julie Fraser and the Managing Editor Bojana Ristić for their incredible support and helpful comments. I further thank the two reviewers for their detailed and insightful comments, which added a lot of nuance and critical reflection to the article.

¹A. Duval, 'Taking Feminism beyond the State: FIFA as a Transnational Battleground for Feminist Legal Critique', (2022) 20 *International Journal of Constitutional Law* 277, at 281–2.

²See, e.g., R. Ali, *Not Without a Fight: Ten Steps to Becoming Your Own Champion* (2021), 402; S. Mirza, *Ace against Odds* (2016); A. Pesta, *The Girls: An All-American Town, a Predatory Doctor, and the Untold Story of the Gymnasts Who Brought Him Down* (2019).

homophobic attacks remain common in many sporting structures, particularly in men's sports,³ and exclusionary politics are increasingly visible in debates on sex segregation in sports.⁴ Gender thus matters in sports – as it matters in any part of life – but *how* gender matters in sports also depends on the rules that govern sports. International sports federations (IFs) are core regulators of gender norms in sports as they usually organize international tournaments in collaboration with host countries. Yet, the power of IFs to influence global gender hierarchies has received limited attention from international lawyers.

This article seeks to fill the research gap by analysing how IFs act as international lawmakers, with a specific focus on their powers to shape global norms on gender. It builds on scholarship that acknowledges the normative power of IFs in international, transnational, and global law, despite their status as non-state actors, primarily private non-profit associations.⁵ Instead of analysing the *formal* status of IFs as subjects of international law, I will explore the material force and discursive power that IFs yield *in practice*. Hence, how do IFs de facto shape gender norms globally?

Asking this question comes at a time when the power of IFs to produce hegemonic gender norms is increasingly debated. The *Semenya* case, as analysed in this article, has made the role of IFs in fostering exclusionary gender norms evident.⁶ Similarly, debates concerning LGBT⁷ rights at the 2022 FIFA (Men's) World Cup in Qatar have surfaced questions on the legal responsibility of IFs to oppose homo- and transphobia.⁸ Several scholars, including Krech and Patel, have started to research the legal authority of IFs to regulate gender and other inequalities,⁹ complementing social science scholarship which has long drawn attention to the power of sports in normalizing gender hierarchies.¹⁰ As Duval argues, 'it is high time that feminist legal scholars engage with private regulators like FIFA'.¹¹ By subjecting IFs to a feminist critique that is both intersectional and queer, I build upon previous research to offer an analysis that takes into account different axes of gender relations shaped by IFs.

Many aspects of international sports are highly gendered, including stark differences in funding and media coverage between men's and women's sports, as well as men's overrepresentation in the

³See, e.g., J. Amaechi and C. Bull, *Man in the Middle* (2007); T. Menzel, B. Braumüller and I. Hartmann-Tews, 'The Relevance of Sexual Orientation and Gender Identity in Sport in Europe. Findings from the Outsport Survey', (2019) *German Sport University Cologne, Institute of Sociology and Gender Studies* 19–22; E. Denison and A. Kitchen, *Out on the Fields* (2015).

⁴See Sections 3 and 5, *infra*.

⁵L. Casini, 'The Making of a Lex Sportiva by the Court of Arbitration for Sport', (2011) 12 *German Law Journal* 1317; M. Krech, 'To Be a Woman in the World of Sport: Global Regulation of the Gender Binary in Elite Athletics', (2017) 35 *Berkeley Journal of International Law* 262; A. Duval, 'Lex Sportiva: A Playground for Transnational Law', (2013) 19 *European Law Journal* 822; F. Latty, 'Transnational Sports Law', in R. C. R. Siekmann and J. Soek (eds.), *Lex Sportiva: What is Sports Law?* (2012).

⁶See Section 5, *infra*.

⁷LGBT stands for lesbian, gay, bisexual and trans(gender) individuals. I decided not to include I, standing for intersex, in the acronym since the respective politics do not specifically pay attention to the human rights struggles of intersex people. I use the acronym intentionally to refer to internationalized politics that aim to increase the protection of the rights of LGBT persons, even though these politics have been criticized for often reflecting interests of specific identity movements that have their roots in the Global North. Thus, as with any acronym, the politics behind the LGBT acronym do not reflect the lived experiences and political priorities of *all* individuals with non-normative sexualities and gender identities. See R. Kapur, 'The Im/Possibility of Queering Human Rights', in D. Otto (ed.), *Queering International Law. Possibilities, Alliances, Complicities, Risks* (2017), 131, at 132.

⁸R. Younes, 'A World Cup of Shame: FIFA Fails LGBT Rights Test in Qatar', *Human Rights Watch*, 7 July 2022, available at www.hrw.org/news/2022/07/07/world-cup-shame-fifa-fails-lgbt-rights-test-qatar.

⁹See Krech, *supra* note 5; S. Patel, *Inclusion and Exclusion in Competitive Sport: Socio-Legal and Regulatory Perspectives* (2016). See also M. Krech and J. H. H. Weiler (eds.), 'Symposium: Football Feminism', (2022) 20(1) *International Journal of Constitutional Law*; A. Duval, A. Krüger and J. Lindholm (eds.), *The European Roots of the Lex Sportiva: How Europe Rules Global Sport* (2024).

¹⁰See, e.g., A. Ratna and S. F. Samie (eds.), *Race, Gender and Sport: The Politics of Ethnic 'Other' Girls and Women* (2019); I. M. Young, *Throwing Like a Girl: A Phenomenology of Feminine Body Comportment, Motility, and Spatiality* (2005); M. A. Messner, *Power at Play: Sports and the Problem of Masculinity* (1995).

¹¹See Duval, *supra* note 1, at 297.

governance and industry of sports.¹² Recent scandals have further highlighted the prevalence of sexual violence and harassment within international sports.¹³ The regulations of IFs play a crucial role in governing these gendered aspects, such as rules covering funding, media representation, employment practices and sexual harassment. While I could therefore apply a queer-feminist analysis to any of these rules, this article focuses specifically on international regulations that directly impact athletes' behaviours and bodies on the pitch. Given the popularity of mega sporting events – the 2022 FIFA Men's World Cup was the most widely watched event in history¹⁴ – these rules can significantly influence public perceptions of appropriate gender behaviour across the globe.

By analysing selected international sporting rules, I will demonstrate that IFs are de facto international lawmakers whose rules have discursive and material force to (re)produce hegemonic gender norms rooted in *cis-hetero-sexism*. They mostly operate on the premise of a binary gender model, wherein women and men are depicted as the only two gender categories, placed in a hierarchical and complementary relationship. The assumption that all people are heterosexual, expressed in the term *heteronormativity*, is part of the gender binary. Some of the examined rules also reflect *cisnormativity*, presupposing that individuals are *cisgender*, which is usually presented as being the opposite of *transgender* and means that people identify with the gender that was assigned to them at birth. Additionally, I will examine how sporting rules reproduce *endosexnormativity*, assuming all people to be *endosex*, a term used to refer to non-*intersex* persons as their sex characteristics align with normative medical definitions of binary sex. The analysis will further draw on intersectionality to highlight how *whiteness* and *Eurocentrism* create racialized exclusions that intersect with gender hierarchies in sports.

I advance my argument by use of four illustrations. The first is the debates surrounding LGBT rights and the politics of location at the 2022 FIFA (Men's) World Cup in Qatar discussed in Section 2. This allows me to establish general principles that guide my analysis of IFs in the following sections. The second example, discussed in Section 3, examines rules on the participation of transgender persons in international rugby competitions and their impact on local policies in England. The third example, in Section 4, investigates IFs' clothing regulations, including bans on Islamic veils and requirements for body-fit attire, revealing gendered and racialized body norms. Section 5, on the *Semenya* case, continues my analysis of the intersection of race and gender norms in sports but also shows that the law-making power of IFs is not unlimited. Finally, in Section 6, I will conclude by discussing the significance of analysing IFs as non-state international lawmakers for advancing queer-feminist scholarship in international law.

¹²See, e.g., International Olympic Committee, 'Factsheet. Women in the Olympic Movement', 2021, at 4–6, available at lmed.olympics.com/media/Documents/Olympic-Movement/Factsheets/Women-in-the-Olympic-Movement.pdf; K. Fasting, 'All In! Towards Gender Balance in European Sport. Analytical Report of the Data Collection Campaign', *Council of Europe*, 2019; J. Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence: An Empirical Inquiry into Lex Sportiva* (2019), 267; '#RespectHerGameReport. Gender & Media Coverage of the Tokyo Summer Olympics', *Representation Project*, 2021; 'Dans le sport professionnel, le long chemin des femmes vers l'égalité salariale', *LVSF - Le Vent Se Lève*, 23 March 2021, available at lvsl.fr/dans-le-sport-professionnel-le-long-chemin-des-femmes-vers-legalite-salariale/; Women's Sport and Fitness Foundation, 'Barriers to Women and Girls' Participation in Sport and Physical Activity', *Sportscotland The National Agency for Sport*, at 1–2.

¹³See, e.g., European Commission, L. Mergaert et al., *Study on Gender-Based Violence in Sport*, Final Report (2016); Pesta, *supra* note 2; *Karim Keramuddin v. FIFA*, Court of Arbitration for Sport 2019/A/6388, 2020; E. Aarons, R. Molina and A. Cizmic, 'Haiti FA President Accused of Sexually Abusing Young Female Footballers', *Guardian*, 30 April 2020, available at <https://www.theguardian.com/football/2020/apr/30/haiti-fa-president-accused-of-sexually-abusing-young-female-footballers>.

¹⁴According to FIFA, five billion people engaged with the 2022 Men's World Cup through different platforms and channels. This makes more than half of the world's population. See 'One Month On: 5 Billion Engaged with the FIFA World Cup Qatar 2022™', *FIFA*, available at <https://inside.fifa.com/tournaments/mens/worldcup/qatar2022/news/one-month-on-5-billion-engaged-with-the-fifa-world-cup-qatar-2022-tm>.

2. The 2022 FIFA (Men's) World Cup: LGBT rights and politics of location

Analysing the debates on LGBT rights in the context of the 2022 FIFA (Men's) World Cup provides an excellent case study to establish general principles that direct my research on international sports. Firstly, it will show how liberal equality strategies prioritizing politics of visibility directed to the outside world have emerged as the predominant approach to address injustices in international sports. Secondly, it will demonstrate how global power inequalities as captured by the concepts of Eurocentrism, homonationalism and homocapitalism have played a role in the mobilization of LGBT rights during the Men's World Cup. These two takeaways form the basis for my subsequent analysis in which I aim to turn the gaze inward on the rules of IFs and practice a critical reflexive feminist politics of location that considers how my own positionality and those of IFs matter for the production of gender norms in sports and knowledge thereof.

In terms of legal personality, FIFA is like many IFs currently registered as a non-commercial association in Switzerland.¹⁵ Despite its non-profit status, FIFA generated USD 7.57 billion in revenue in the cycle of 2019–2022, making it comparable to a large multinational company.¹⁶ This has made critics argue that FIFA, along with other major IFs, should be treated as tax-paying corporations rather than non-profit organizations, but Switzerland has so far rejected this approach.¹⁷ By subjecting IFs to corporate taxes, Switzerland would risk that IFs move elsewhere, such as Gulf states which increasingly lobby IFs.

The 2022 FIFA Men's World Cup was not the first international sports event that stirred up debates on sexual orientation. For example, LGBT rights were also brought up in respect of the 2018 FIFA Men's World Cup in Russia and the 2014 Olympic Games in Russia, due to Russia's so-called gay propaganda laws.¹⁸ In Qatar, the topic of LGBT rights came under scrutiny mainly because Qatar's penal code criminalizes same-sex relations, specifically those between men, with sentences of up to seven years of imprisonment.¹⁹ Laws protecting 'public morals', such as Law No. 17 of 2002 on Protection of Community, are also used to detain persons with non-normative sexual orientations and gender identities, such as trans persons as well as gay and lesbian individuals. Human rights organizations have further reported that detained queer individuals often experience abuse and torture by Qatari security forces.²⁰

The debates regarding FIFA's role in protecting LGBT rights in Qatar emerged quickly after the awarding of hosting rights to Qatar in 2010.²¹ FIFA consequently raised concerns about the criminalization of LGBT persons in negotiations with Qatar before the World Cup. In response, Qatar indicated that laws on homosexuality would not be enforced during the World Cup and confirmed that the display of rainbow flags would be permitted.²²

¹⁵2022 FIFA Statutes, para. 1; T. Zintz and M. Winand, 'Les fédérations sportives', (2013) 2179 *Courrier hebdomadaire du CRISP* 5, at 11–12. Out of a list of 104 IFs drawn up in 2022, 73 IFs were registered as private non-commercial associations in Switzerland. See 'International Sports Organisations', *Think Sport*, available at www.thinksport.org/en/if-wall/.

¹⁶Revenue 2019–2022', *FIFA Publications*, available at publications.fifa.com/en/annual-report-2022/finances/2019-2022-cycle-in-review/2019-2022-revenue/. Private associations in Switzerland can follow commercial activities as long as they do not follow a commercial purpose. See M. Baddeley, 'The Extraordinary Autonomy of Sports Bodies under Swiss Law: Lessons to Be Drawn', (2020) 20 *International Sports Law Journal* 3, at 4; 2014 Swiss Civil Code, Art. 60.

¹⁷The question has been debated several times by Swiss authorities. See, e.g., '14.2011 Petition. Schluss Mit Der Steuerbefreiung Für Die Fifa'; '14.1044 Anfrage. Steuerliche Privilegierung Der Fifa'.

¹⁸E. Edenberg, *Politics of Visibility and Belonging: From Russia's 'Homosexual Propaganda' Laws to the Ukraine War* (2017), 132; M. Worden, 'Russia's Bloody World Cup', *Human Rights Watch*, 13 July 2018, available at www.hrw.org/news/2018/07/13/russias-bloody-world-cup.

¹⁹2004 Penal Code Qatar, Arts. 285, 288, 296.

²⁰Qatar: Security Forces Arrest, Abuse LGBT People', *Human Rights Watch*, 24 October 2022, available at www.hrw.org/news/2022/10/24/qatar-security-forces-arrest-abuse-lgbt-people; Law No. 17 of 2002 on Protection of Community.

²¹O. Gibson, 'Fifa Urged to Pressure Russia and Qatar over Anti-Gay Legislation', *Guardian*, 8 September 2013, available at www.theguardian.com/football/2013/sep/08/fifa-russia-qatar-anti-gay-legislation.

²²Qatar to Allow Rainbow Flags at 2022 World Cup', *ESPN*, 10 December 2020, available at www.espn.com/soccer/story/_/id/37609525/qatar-allow-lgbtq-displays-rainbow-flags-stadiums.

Nevertheless, rainbow flags were one of the most contentious issues debated during the 2022 Men's World Cup. Not only did local security forces confiscate items with rainbow symbols on several instances,²³ but FIFA made headlines when it announced that wearing rainbow armbands during matches would lead to sanctions against the players concerned, such as the receiving of a yellow card. This was directed at the captains of seven European teams who had indicated that they were planning to wear armbands in support of the OneLove campaign, an initiative taking a stance against discrimination in football created by the Dutch Football Association.²⁴ FIFA's decision to sanction the OneLove armbands was based on its Equipment Regulations stating that the captains must wear armbands provided by FIFA.²⁵ In addition, the Regulations hold that playing kits must not include political, religious, or personal slogans.²⁶ Another restriction was imposed by FIFA on the Belgium national team, which needed to remove the word LOVE and rainbow colours from the collar of its uniforms, as these signalled a commercial link with the Tomorrowland festival.²⁷

The banning of rainbow symbols from uniforms led to an outcry by the respective European teams, their football federations, their fans, and some media outlets.²⁸ I find that unpacking these reactions is instructive for understanding different approaches to equality politics in sports. On the one hand, queer Qatari nationals, such as Naser Mohamed currently living in the United States, called on participating football teams to contest homophobic politics in Qatar to potentially improve the lived realities of queer communities in Qatar.²⁹ From this perspective, the captains of the seven European teams – and their fans – showed solidarity by protesting structural gender inequalities that queer communities face. Given that the fight for equality should not fall on the shoulders of those who experience discrimination and exclusion, protest against queerphobia in sports by people in privileged positions, such as the European captains, is a welcome step.

On the other hand, I found it striking that the calls for queer solidarity emerged when the seven European teams played abroad in Qatar and not when playing in their home country or Europe.³⁰ Knowing that homophobia remains deeply enshrined in most men's football structures in Europe such as elsewhere,³¹ I could not help but think about Puar's conceptualization of 'homonationalism'.³² I wondered whether the decision of the seven European national teams to support the OneLove campaign was (solely) a sign of solidarity with queer populations in Qatar and elsewhere, or whether it was also shaped by global power politics.

²³K. Matchett, 'US Journalist "Detained" Entering World Cup Match for Wearing Rainbow T-Shirt', *Independent*, 21 November 2022, available at www.independent.co.uk/sport/football/world-cup/wales-usa-journalist-rainbow-qatar-fifa-b2229840.html.

²⁴The Football Association, 'Statement: One Love Armband', *England Football*, available at www.Englandfootball.com/artic/2022/Nov/21/statement-one-love-aramband-world-cup-2022-2022111.

²⁵2022 FIFA Equipment Regulations, para. 13.8.1.

²⁶*Ibid.*, para. 4.3.1.

²⁷FIFA Rejects Belgium's Away Shirts Due to Word "Love", *Reuters*, 21 November 2022, available at www.reuters.com/life-style/sports/fifa-rejects-belgiums-away-shirts-due-word-love-2022-11-21/.

²⁸J. Duggan, "'Today We Feel Betrayed": England Fans' Anger after Team Backs down on Wearing OneLove Armband', *iNews*, 21 November 2022, available at inews.co.uk/news/betrayed-england-fans-anger-onelove-aramband-world-cup-1984634; 'World Cup: German FA Taking FIFA to Court of Arbitration for Sport over OneLove Armband Ban', *Sky Sports*, 23 November 2022, available at www.skysports.com/football/news/11095/12753559/world-cup-german-fa-taking-fifa-to-court-of-arbitration-for-sport-over-onelove-aramband-ban.

²⁹C. Campbell, 'This Is the Reality of Life for LGBTQ+ People in Qatar', *Time*, 16 November 2022, available at time.com/6234323/naser-mohamed-interview-qatar-lgbt-rights/.

³⁰Some of the seven captains have worn armbands in support of the LGBT communities previously. See J. Tanner, 'Harry Kane and Manuel Neuer to Wear Rainbow Armbands for England vs Germany at Euro 2020', *Sky Sports*, 29 June 2021, available at www.skysports.com/football/news/19692/12344325/harry-kane-and-manuel-neuer-to-wear-rainbow-arambands-for-england-vs-germany-at-euro-2020.

³¹See Menzel, Braumüller and Hartmann-Tews, *supra* note 3.

³²J. Puar, *Terrist Assemblages: Homonationalism in Queer Times* (2007).

According to Puar, homonationalism describes the process by which states from the Global North embrace certain gay and lesbian individuals, notably those with white and class privileges, as a means to present themselves as culturally superior to other states, specifically states from the Global South and Islamic states. This consequently serves as a justification for their nationalist and sometimes Islamophobic politics whereby the exclusion of foreigners, non-white individuals, and people with certain religions is legitimized in the name of protecting the state's 'own' LGB(T) citizens.³³ Sykes has analysed different faces of homonationalism and its entanglement with colonialities in several mega sporting events, such as the 2014 Sochi Olympic Games and the 2010 Vancouver Olympics.³⁴ One issue that Sykes observes is that the 'coming-out' of certain gay and lesbian athletes increasingly brings 'a sense of patriotism or gay pride in the public imagination of a nation as a tolerant, liberal, multicultural or "Western" democracy'.³⁵

My inclination to associate the LGBT protest at the 2020 Men's World Cup with the concept of homonationalism stems from the fact that European teams and their fans raised the issue of queerphobia specifically when playing outside of Europe. This gave the impression that the protest was directed towards external structures, namely Qatar's laws and norms, which can foster a demonization of others instead of leading to an investigation of how homophobia and particularly transphobia are entrenched within the very sporting structures in which European players are invested. It led to an externalization of the issue of queerphobia to the location of the Middle East, reflecting Rao's claim that mainstream LGBT politics often try to locate homophobia in specific places, typically places in the Global South, which become envisioned as static localities disconnected from broader global processes.³⁶

The display of rainbow flags as examples of politics of visibility supports this approach of externalizing the commitment to LGBT rights, instead of turning the gaze on internal structures. Politics of visibility are enshrined in liberal approaches to equality, which presume that once all groups of people are represented within a given system, inequality will vanish. Yet, these approaches have their limits in transforming the system creating inequality in the first place, since the representation of queer individuals, such as through rainbow flags, does not necessarily reduce the relevance of gender and sexual orientation as structuring principle of hierarchy in football.³⁷ As Bury notices in an analysis of equality politics in English football, politics of visibility rarely results in a deep investigation of power inequalities within institutions but the approach mostly 'constitutes a visual response to critical voices from the public'.³⁸

Considering that the FIFA Men's World Cup is the most profitable sporting event worldwide, the display of rainbow colours must also be understood in relation to 'rainbow capitalism' or 'homocapitalism'. These concepts reflect the strategy of companies, banks and other profit-driven institutions like large IFs (despite their formal status as non-commercial organizations) to

³³Ibid. Ammaturo employs the term 'Pink Agenda' and O'Hara the term 'homoregionalism' to describe how European states rely on LGBT rights to paint certain European states as being culturally superior to other regions and states. See F. R. Ammaturo, 'The "Pink Agenda": Questioning and Challenging European Homonationalist Sexual Citizenship', (2015) 49 *Sociology* 1151; C. O'Hara, 'Consensus, Difference and Sexuality: Que(e)rying the European Court of Human Rights' Concept of "European Consensus"', (2021) 32 *Law and Critique* 91, at 110.

³⁴H. Sykes, 'Decolonizing Sporting Homonationalism: From Complicity to Solidarity', in H. Sykes (ed.), *The Sexual and Gender Politics of Sport Mega-Events* (2016), 154.

³⁵H. Sykes, 'Un-Settling Sex: Researcher Self-Reflexivity, Queer Theory and Settler Colonial Studies', (2014) 6 *Qualitative Research in Sport, Exercise and Health* 583, at 585.

³⁶R. Rao, 'The Locations of Homophobia', (2014) 2 *London Review of International Law* 169, at 181.

³⁷Edenborg holds that 'visibility is often idealized in terms of its relation to belonging'. E. Edenborg, *Politics of Visibility and Belonging: From Russia's 'Homosexual Propaganda' Laws to the Ukraine War* (2017), at 7.

³⁸J. Bury, 'Non-Performing Inclusion: A Critique of the English Football Association's Action Plan on Homophobia in Football', (2015) 50 *International Review for the Sociology of Sport* 211, at 218.

embrace LGBT persons as part of their commercial strategy to sell a product, such as football.³⁹ The critique of this strategy is that it flattens the political demands and priorities of queer communities in exchange for a commercialization of their identity, depoliticizing their struggles against real material inequalities.⁴⁰ Furthermore, Rao reveals how homocapitalism enables institutions to deflect from the adverse economic impacts of their neoliberal and exploitative policies on queer individuals and marginalized communities, by attributing queerphobia primarily to cultural stigma rather than economic inequality.⁴¹

Indeed, financial incentives played a role in the protest against FIFA's ban on the OneLove Armband. This is evident from the actions taken by REWE, one of Germany's largest supermarket chains, which terminated its sponsorship agreement with the German football association following FIFA's announcement of the armband's ban. The CEO of REWE justified this decision by holding that 'football means, among other things, fair play, tolerance and solidarity – we also uphold these values. We stand for diversity – and football is diversity too'.⁴² Likewise, Adidas, another sponsor of the German national team, expressed apprehension regarding FIFA's decision.⁴³ The commercialization of LGBT politics was further highlighted by the rainbow colours displayed on Belgium's uniforms, which, as mentioned above, were the result of a sponsorship agreement with the Tomorrowland festival.⁴⁴

The connection between sponsorship deals and rainbow displays at the FIFA Men's World Cup makes me wonder *who* was served by the protest of wearing rainbow armbands by the seven European captains. Was the aim of the protest to improve the lived realities of communities with non-normative sexual orientations and gender identities in Qatar and elsewhere? Or was it (also) aimed at gaining public popularity and sponsorship deals for the teams and individual players by fostering an LGBT-friendly image?

Whereas Naser Mohamed, the Qatari national living in the United States, has called on teams and fans to protest against the criminalization of queer communities in Qatar, there are also queer individuals from Qatar and other Gulf states who have criticized the politics of visibility pushed for by Western football teams, fans, and media outlets.⁴⁵ As discussed by Jain,⁴⁶ the latter group has noted that enhancing discussions on non-normative sexualities and gender behaviour in the region can provoke a social backlash that ends up worsening the situation of concerned communities, especially when the debates are framed in line with the Westernized language of 'LGBT' rights. An anonymous writer underlines the negative repercussions of the politics of visibility exercised during the 2022 FIFA Men's World Cup by stating that '[w]e now have to try to salvage the safe spaces we used to have before Western queer iconography outed our identities'.⁴⁷

The claim that the increased spotlight on queer communities in Qatar has reinforced their surveillance shows that rendering marginalized groups *visible* can increase their experiences of

³⁹R. Rao, 'Global Homocapitalism', (2015) *Radical Philosophy*; L. Duggan, *The Twilight of Equality?: Neoliberalism, Cultural Politics, and the Attack on Democracy* (2004), 50; A. Gluckman and B. Reed, 'The Gay Marketing Moment', in A. Gluckman and B. Reed (eds.), *Homo Economics: Capitalism, Community, and Lesbian and Gay Life* (1997), 3.

⁴⁰A. Pellegrini, 'Consuming Lifestyle: Commodity Capitalism and Transformations in Gay Identity', in A. Cruz-Malavé and M. F. Manalansan (eds.), *Queer Globalizations: Citizenship and the Afterlife of Colonialism* (2002), 134, at 141.

⁴¹See Rao, *supra* note 39; R. Rao, *Out of Time: The Queer Politics of Postcoloniality* (2020), 152–3.

⁴²G. Mahadik, 'Rewe Discontinues Sponsorship Ties with DFB over One Love Armbands', *SportsMint Media*, 24 November 2022, available at sportsmintmedia.com/rewe-discontinues-sponsorship-ties-with-dfb-over-one-love-armsbands.

⁴³*Ibid.*

⁴⁴See 'FIFA Rejects Belgium's Away Shirts Due to Word "Love"', *supra* note 27.

⁴⁵N. Al-Saai cited in S. Jain, 'Resistance and Reform as Responses to Human Rights Criticism: Relativism at FIFA World Cup Qatar 2022', (2023) 24 *German Law Journal* 1691, at 1697.

⁴⁶*Ibid.*, at 1698.

⁴⁷Anonymous, 'Opinion: Think Twice before You Come to Qatar to Protest the World Cup', *Independent*, 7 November 2022, available at www.independent.co.uk/voices/fifa-world-cup-qatar-queer-lgbt-rights-b2219458.html.

violence. The limits of the politics of visibility have been pointed out by many activists and scholars, including Kapur who argues that:

the assertion of queer selfhood through visibility may involve great losses, ranging from familial and social rejection and ostracism, to being deprived of home, livelihood and services, to discrimination and humiliation, to violent assault and, sometimes, even death at the hands of the bigoted and/or ignorant.⁴⁸

Kapur's quote highlights that whether one can bear the costs of becoming visible in the public depends also on how queerphobia intersects with other structural inequalities based on race, class and religion.⁴⁹ By focusing mostly on one identity category, such as sexual orientation, politics of visibility rarely manage to grasp the complexity of social relations that create structural inequalities, which, in Qatar, include relations based on migration status, class and religion. In an analysis of homonationalism at the Sochi Olympics and Vancouver Olympics, Sykes equally found that LGBT politics were mobilized as single-axis issues, unable to include anti-colonial projects, such as by also contesting Islamophobia and supporting indigenous struggles.⁵⁰ The misrepresentation of struggles and political priorities of queer communities in Qatar by European protestors has led a Qatari community member to describe these protests as 'gestural and performative activism produced by the West, for the West'.⁵¹

This quote underscores that 'politics of location' matter in international sports.⁵² As Madhok states, a critical reflexive feminist politics of location interrogates the locations from which knowledge and demands for rights are produced.⁵³ Engaging in a critical reflexive feminist politics of location means for me that my very own social and academic locations as a white queer-feminist international lawyer socialized and residing in 'the West' influence my views on sporting rules in this article. Following Cossman, I consider 'location' not a fixed or static point, but rather a 'temporality of struggle',⁵⁴ in which the voicing of certain perspectives and political priorities is shaped by my personal relations to 'the dominant', epitomized as IFs in this article.

In addition to recognizing my own embeddedness in the hierarchies of knowledge production on gender in sports, practising politics of location also makes me wonder how spatial relations between other sporting actors matter in debates on international sporting rules. My analysis of the 2022 FIFA Men's World Cup precisely showed that international sports are influenced by global politics, as highlighted by the role of homonationalism and homocapitalism in the debates on rainbow armbands. Hence, Madhok's conceptualization of a critical reflexive feminist politics of location prompts me to also interrogate how colonialities, racism and the North/South hierarchy influence the creation of gendered international sporting rules.

Another point that I take away from my analysis of the 2022 FIFA Men's World Cup is that politics of visibility, like the use of rainbow flags, have become the predominant way to show a commitment to equality in international sports. These approaches tend to frame IFs as external benevolent entities and potential 'saviours' of gender-oppressed communities, without generating

⁴⁸R. Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (2018), 67 (emphasis added). See also Edenborg, *supra* note 37, at 353.

⁴⁹J. Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (1993), 227.

⁵⁰See Sykes, *supra* note 35, at 162.

⁵¹Tamim, 'Queer Qataris and the World Cup: A Critique of the Western Media Storm', *My Kali Magazine*, 21 January 2023, available at www.mykalimag.com/en/2023/01/21/queer-qataris-and-the-world-cup-a-critique-of-the-western-media-storm/.

⁵²A. Rich, 'Notes Toward a Politics of Location', in R. Lewis and S. Mills (eds.), *Feminist Postcolonial Theory* (2003), 29.

⁵³S. Madhok, 'A Critical Reflexive Politics of Location, "Feminist Debt" and Thinking from the Global South', (2020) 27 *European Journal of Women's Studies* 394.

⁵⁴B. J. Cossman, 'Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project', (1997) 2 *Utah Law Review* 525, at 530.

a thorough investigation into internal sporting structures that create inequalities. This is why, in the following sections, I will turn the gaze inward on IFs and analyse how their own rules (re)produce cis-hetero-sexism and racialized understandings of femininity and masculinity.

3. Trans-exclusionary regulations in international rugby

After having established basic principles influencing my research on sports, I will analyse how IFs' rules governing the participation of transgender women in sports competitions reinforce dominant gender norms. This will highlight IFs' material force and discursive power in setting societal and legal definitions of who is counted as a woman for specific purposes.

The rules under investigation in this section, namely rules on trans athletes, must be distinguished from those concerning intersex athletes, which are discussed when analysing the *Semenya* case in Section 4. In this section, I will focus on the discipline of rugby and use England as my case study, since living in England provides me with access to local sporting discourses and rugby is a popular game in England. Yet, my narrow focus on England means that the insights gained from this study are not directly transferable to other contexts. The purpose of this analysis is therefore to demonstrate that IFs' rules can shape gender relations in localized settings, without presuming that the ways they shape gender relations are universally the same.

World Rugby, whose headquarters are in Dublin, was one of the first IFs that adopted a quasi-ban of trans women from women's sports competitions.⁵⁵ In 2021, it decided to require trans women and girls to start suppressing their natural testosterone production before the start of puberty or the age of 12 if they wanted to compete in women's tournaments.⁵⁶ These rules seem to have influenced other international and national rules, since the second major international rugby federation, the International Rugby League (IRL) with its headquarters in London, decided in 2022 to ban all trans women categorically from women's competitions until a formal policy is developed.⁵⁷ In turn, the two English rugby federations, the Rugby Football Union and Rugby Football League, equally adopted a full ban of trans women from women's competitions in 2022.⁵⁸

While the World Rugby rules provide *in theory* a possibility for trans women to participate in women's competition, the rules of the IRL and the two English rugby federations categorically deny this possibility to all trans women. However, in practice, the rules of World Rugby also impose a de facto ban on trans women from women's competitions since it is quasi-impossible to start hormone treatment before the onset of puberty. It is rare that trans girls out themselves before puberty, especially due to the severe social repercussions and transphobic reactions that an outing usually entails. Being trans is also criminalized in several countries,⁵⁹ which means that the World Rugby rules create exclusions of all trans persons originating from those countries.

Moreover, trans girls who do come out before 12 years old are unlikely to have access to hormone treatment as trans-specific health care remains highly inaccessible and precarious in

⁵⁵Several IFs have followed the approach taken by World Rugby. These include World Aquatics, World Athletics and the International Cycling Union. See World Aquatics, 'Policy on Eligibility for the Men's and Women's Competition Categories', 2022, at 7–8; World Athletics, 'Eligibility Regulations for Transgender Athletes (Transgender Regulations). Version 2.0 (2023) Union Cycliste Internationale, 'The UCI Adapts Its Rules on the Participation of Transgender Athletes in International Competitions', 14 July 2023, available at www.uci.org/pressrelease/the-uci-adapts-its-rules-on-the-participation-of-transgender-athletes-in/6FnXDizvxtWFOvbOEnKbC.

⁵⁶World Rugby, 'Transgender Guidelines', 2021, available at www.world.rugby/the-game/player-welfare/guidelines/transgender/women.

⁵⁷International Rugby League, 'IRL Statement on Transgender Participation in Women's International Rugby League', 21 June 2022, available at www.intrl.sport/news/statement-on-transgender-participation-in-women-s-international-rugby-league/.

⁵⁸Rugby Football League, 'RFL Board Approves New Gender Participation Policy for Rugby League', 29 July 2022, available at www.rugby-league.com/article/60634/rfl-board-approves-new-gender-participation-policy-for-rugby-league; England Rugby, 'RFU Council Votes in Favour of Change to Gender Participation Policy', 11 February 2024, available at www.englandrugby.com/about-rfu/rfu-policies/gender-participation.

⁵⁹Z. Chiam et al., 'Trans Legal Mapping Report: Recognition before the Law 2019', *ILGA World*, 2020, at 10.

most states around the world, especially for children.⁶⁰ For instance, the National Health Service of England decided to suspend all puberty blockers for children in 2024, arguing that ‘there is not enough evidence to support the safety or clinical effectiveness’.⁶¹ This decision contravenes the guidance of specialized medical associations, such as the World Professional Association for Transgender Health, and the wishes of trans youth and most of their parents.⁶² While more could be said about access to gender affirmation care,⁶³ this example shows how precarious or unavailable access to hormone therapy is for youth.

Hence, if accessing hormone treatment before the age of 12 is in practice mostly impossible, then World Rugby regulations amount to a de facto ban of trans women from women’s competitions, like the rules of the IRL and the English rugby federations. This ban seems to contradict the guidance on trans athletes produced by the International Olympic Committee (IOC) in 2021. The IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations holds that eligibility criteria in sports must not systematically exclude trans athletes due to their gender identity,⁶⁴ but must be based on robust and peer-reviewed research.⁶⁵ Eligibility criteria are only legitimate if they aim to ensure that no athlete has a disproportionate competitive advantage, prevent safety risks or prevent cis men from fraudulently claiming a female gender identity to enter a specific category.⁶⁶ The criteria excluding trans players must not be based on an ‘unverified, alleged or perceived unfair competitive advantage’.⁶⁷

Based on the IOC Framework, it seems rather unjustifiable to categorically ban all trans women from women’s rugby competitions in the name of ‘fairness’ or ‘safety’, no matter their size, weight, or athletic performance. Nevertheless, the IOC has no formal authority over the rules of World Rugby and other IFs within the Olympic movement since IFs are tasked with developing and enforcing rules for each game.⁶⁸ Just as the IOC has no binding authority over the rules applied by IFs, IFs have limited formal control over the rules used by their regional and national member federations. Nevertheless, the rules on trans athletes in rugby are insightful for understanding how IFs and local sporting bodies informally influence each other in their norm-setting.

The fact that both English rugby federations refer to the guidance of World Rugby or the IRL in their rules on trans athletes demonstrates how influential IFs are over their member federations.⁶⁹ National federations have indeed a material incentive to adhere to the rules on trans athletes applied by their respective IF, as this prevents them from investing in athletes who get disqualified once reaching the international level.⁷⁰ This dynamic shows that IFs’ rules often trickle down to

⁶⁰Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, V. Madrigal-Borloz, *The Right to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health of Persons, Communities and Populations Affected by Discrimination and Violence Based on Sexual Orientation and Gender Identity in Relation to the Sustainable Development Goals*, A/HRC/50/27 (2022), paras. 27–30; J. Breckenkamp et al., ‘Trans* People’s Access to Gender-Affirming Health Care: A European Comparison’, (2022) 32 *European Journal of Public Health* 34.

⁶¹NHS England, ‘Puberty Suppressing Hormones (PSH) for Children and Young People Who Have Gender Incongruence/ Gender Dysphoria [1927]’, 12 March 2024.

⁶²WPATH and USPATH, ‘Comment on the CASS Review’ (2024).

⁶³R. Pearce, *Understanding Trans Health: Discourse, Power and Possibility* (2018); S. M. Shuster, *Trans Medicine: The Emergence and Practice of Treating Gender* (2021).

⁶⁴IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations, 2021, para. 3.1.

⁶⁵*Ibid.*, para. 6.1(b). The Framework stresses that the robust and peer-reviewed data must be collected from a demographic group that corresponds to the one affected by the regulations.

⁶⁶*Ibid.*, para. 4.1.

⁶⁷*Ibid.*, para. 5.1.

⁶⁸2023 Olympic Charter, para. 26(1.1).

⁶⁹See Rugby Football League, *supra* note 58; Rugby Football League, ‘RFL Gender Participation Policy - FAQs’, 2022; England Rugby, *supra* note 58; England Rugby, ‘RFU Gender Participation Policy - Frequently Asked Questions’, 2022, at 1, 2, 7.

⁷⁰Interview with Urs Vanessa Sager (InterAction), ‘The Inclusion of Intersex Children in International and Swiss Sports’, 18 March 2022.

their member federations, even though they formally apply only to competitions organized by these international federations or when world records are counted. Member federations often adopt the rules of their respective IF, since IFs are regularly considered the authoritative regulators in their discipline or because regional and national federations lack resources and expertise to develop their own regulations. At times, member federations may even face consequences should they not adhere to decisions made by IFs, such as when failing to enforce doping-related sanctions against athletes.⁷¹ The pyramidal structure of sports governance thus fosters the normative power of IFs to shape sporting norms across the world.

However, the story of international rules on trans athletes in rugby trickling down to England might be too simplistic. When looking at how the rules of World Rugby were created, it seems that the norm dissemination was inverted, with English norms and discourses on trans rights shaping the international rules. English rugby federations continue to yield significant power within the two international rugby federations,⁷² and the consultative workshop that preceded the adoption of World Rugby's transgender policy took place in London. A clear majority of the participants in the workshop came from the United Kingdom and all other participants, except for two persons, were from other states in the Global North.⁷³ The workshop was criticized for not ensuring meaningful participation of trans players and provided a platform to Fair Play for Women, a British civil society organization strongly lobbying against the inclusion of trans women in women's sports.⁷⁴

Hence, it seems that the rules on trans players by World Rugby have been influenced by local English discourses in which a high level of transphobia has become normalized.⁷⁵ This norm dissemination process is in line with the colonial history of rugby, which originated among middle- and upper-class young men during Victorian times in England and was later made popular in the British Empire. My current academic location, the University of Cambridge, was one of the elite educational institutions where official rugby rules were initially developed to be later diffused to British colonies.⁷⁶

The story of rules on trans athletes in rugby thus shows the continuation of colonial legacies in international sports. Exclusionary norms on trans rights moved from the specific location of England to World Rugby to become disseminated globally. The norm dissemination process as infused with Eurocentrism and colonial legacies is not an exception because norms emanating from European contexts get disproportionately reflected in international sports as many IFs are

⁷¹See, e.g., International Weightlifting Association, 'Anti-Doping Rules' (2021), Art. 18.

⁷²The overlap between the English rugby federations and the two rugby IFs becomes clearly visible through the overrepresentation of people from the United Kingdom in the IFs' decision-making bodies.

⁷³World Rugby, 'Landmark World Rugby Transgender Workshop Important Step towards Appropriate Rugby-Specific Policy', 27 February 2020, available at www.world.rugby/news/563437?lang=en. Around 60% of the 31 participants in the workshop were based in the UK and more than 15% in Ireland.

⁷⁴Fair Play For Women Invited to Speak at Landmark World Rugby Transgender Workshop', *Fair Play For Women*, 18 March 2020, available at fairplayforwomen.com/worldrugby/; D. Ennis, 'This man was the only trans rugby player in the room where it happened: A forum to ban trans women athletes', *Outsports*, 27 August 2020, available at www.outsports.com/2020/8/27/21404567/verity-smith-england-trans-player-world-rugby-ban-transgender-women-athletes. Pringle and Denison's research, which I could access only shortly before this article's publication, supports my argument that English trans-exclusionary discourses influenced World Rugby's policies. They show that Danielle Waterman, a former English rugby player, played a key role in World Rugby's decision to ban trans women from women's competitions. The decision was also based on a 2019 survey of 180 elite players, with 51% supporting the ban. However, "a closer look indicates that the majority of Waterman's former UK teammates supported a ban, whereas the majority of players in other countries did not or they were unsure." See: R. Pringle R and E. Denison, 'Examining World Rugby's Transgender Ban and the Perspectives of Cisgender Women Who Play Rugby in England, Canada and Australia' in A. Durham Greey and H. Jefferson Lenskyj (eds), *Justice for Trans Athletes: Challenges and Struggles* (2022), 175, at 80.

⁷⁵S. Hines, 'Sex Wars and (Trans) Gender Panics: Identity and Body Politics in Contemporary UK Feminism', (2020) 68 *Sociological Review* 699.

⁷⁶J. Nauright and T. J. Lindsay Chandler, *Making Men: Rugby and Masculine Identity* (1996); T. J. Lindsay Chandler, 'The Structuring of Manliness and the Development Public Schools and Oxbridge, 1830–1880', in *Ibid.*, 13, at 20.

located in Europe. This underscores once more that politics of locations matter in the dissemination of hegemonic gender norms by IFs.

In addition to showing the inter-relationship between the rules of IFs and those of national federations, the exclusion of trans persons from rugby competitions illustrates that sporting rules can have broader ramifications in sports and beyond. An English civil society organization stresses that rules at the elite level have direct impact on local sporting structures, such as local clubs and public playgrounds. It holds that '[t]hese policies send a message to trans kids that they don't deserve the same opportunities as their friends, and to all kids that they have to present a certain way to be respected for who they are in a sporting environment'.⁷⁷ This statement underscores the discursive power of IFs to reproduce cisnormativity, which normalizes the exclusion of trans adults and children from everyday sporting practices.⁷⁸

This discursive power of international sporting rules, such as put forward by World Rugby, to foster trans-exclusionary practices reaches beyond the realm of sports. In the United Kingdom, they have likely left traces in state laws on the rights of trans persons. This was seen in the debates concerning the Gender Recognition Reform (Scotland) Bill, which aimed to simplify the procedure for trans persons to change the legal gender on official documents in Scotland.⁷⁹ The legislators in charge, the Scottish Parliament, adopted the Bill in 2022, but the Secretary of State for Scotland, who is a member of the UK government, prevented it from proceeding to the last stage of the UK's legislative process, the granting of royal assent. By using Section 35 of the Scotland Act 1998 for the first time in history, the Secretary of State averted the Bill to become binding law.⁸⁰ A judicial review challenging the Secretary of State's order was unsuccessful.⁸¹

Sports played a role in the legal debates regarding the Gender Recognition Reform (Scotland) Bill since the UK government mobilized the possibility that trans women participate in women's sports as a justification to block the Bill. The Secretary of State held in its Order to invoke Section 35 of the Scotland Act 1998 that the Bill could jeopardize the functioning of sex-segregated competitive sports by enhancing the risks that people fraudulently change their legal gender.⁸² This claim is legally doubtful as the Bill would not change any laws that regulate the participation of trans persons in sports. Making it easier for people to change their legal gender marker on official documents does neither affect Section 195 of the Equality Act 2010 nor Section 19 of the Gender Recognition Act 2004, which both allow the exclusion of trans persons from single-sex sports to ensure 'fair competition' or 'the safety of competitors'.⁸³ Yet, these legal technicalities were ignored by the Secretary of State who framed trans women as a 'threat' to women's sports, perpetuating the same narrative as World Rugby.⁸⁴

There is certainly not a clear causal link between the adoption of trans-exclusionary rules like those of World Rugby and state laws, such as the blocking of the Gender Recognition Reform (Scotland) Bill by the UK government. However, IFs' rules on the participation of trans athletes can discursively normalize the exclusion of trans individuals from social activities and spaces, in addition to shaping relevant norms within their national member organizations. Even though IFs' rules formally apply only in international events and when world records are counted, they influence the transnational circulation

⁷⁷ 'Ask the UK's Four National Sporting Bodies to Take a Stand for Trans-Inclusion', *Mermaids*, 23 June 2022, available at mermaidsuk.org.uk/news/ask-the-uks-four-national-sporting-bodies-to-take-a-stand-for-trans-inclusion/.

⁷⁸ S. Bekker et al., 'Gender Inclusive Sport: A Paradigm Shift for Research, Policy, and Practice', (2023) 15 *International Journal of Sport Policy and Politics* 177, at 181.

⁷⁹ Gender Recognition Reform (Scotland) Bill.

⁸⁰ The Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023, SI 2023/41.

⁸¹ Court of Session, Inner House, [2023] CSOH 89.

⁸² The Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023, SI 2023/41, para. 10.

⁸³ Gender Recognition Act 2004, Section 19(2); Equality Act 2010, Section 195(2).

⁸⁴ E. Aarons, 'Coe Warns Transgender Athletes Pose Risk to Integrity of Women's Sport', *Guardian*, 21 March 2022, available at www.theguardian.com/sport/2022/mar/21/coe-warns-transgender-athletes-pose-risk-to-integrity-of-womens-sport.

of norms governing the social and legal acceptance of trans persons, exemplifying that IFs are part of the de facto international lawmakers that shape global gender norms.

4. Uniform rules in sports and hegemonic gender norms

Clothing regulations in international sports competitions are another set of rules that highlight the normative power of IFs to influence hegemonic gender norms. Many examples could be discussed to show the sexualization and objectification of women's bodies as well as the construction of hegemonic masculinity through clothing regulations. These include the US track and field uniforms designed by Nike for the 2024 Olympic Games in Paris which included a high-cut bikini line for women athletes, making them show significantly more skin than men athletes.⁸⁵ Or I could discuss the heteronormativity reflected in ice dancing rules, which prescribe women to wear a 'modest' and 'dignified' skirt and men to wear trousers in pair dances.⁸⁶ Similarly, I could analyse the elitist and white gender norms underpinning tennis regulations by discussing the banning of Serena Williams's 'catsuit', a full-body tennis suit designed to avoid the creation of blood clots, in the 2018 French Open.⁸⁷

Yet, I focus in this article on two forms of clothing regulations, namely Islamic veil bans in sports and bikini requirements for women beach handball players. I selected these examples to illustrate that sporting norms are not only shaped by cis-hetero-sexism but also influenced by whiteness and racialized body norms. They further reveal the limits of replacing sports regulations with state law to advance equality and show how persistent IFs are in enforcing the gender binary by making a categorical difference between women and men athletes.

Until very recently, many of the largest IFs prohibited the wearing of a headcover which often led to the exclusion of Muslim women from sports competitions. For instance, the Iranian women's football team was disqualified from a qualifying game for the 2012 Olympics because players wore hijabs, which violated FIFA's equipment rules that prohibited headgear for safety reasons.⁸⁸ Similarly, at the time of the 2014 Asian Basketball Games, the International Basketball Federation (FIBA) based in Switzerland prohibited the wearing of headgear during its tournaments as this 'may cause injury to other players'.⁸⁹ This headgear rule led to the withdrawal of the Qatari women's national team from the Asian Games, since many of the Qatari players wore a hijab,⁹⁰ and two Sikh men were prevented from wearing their turbans during the tournament.⁹¹

Whilst being neutrally formulated, FIFA's and FIBA's rules prohibiting the wearing of headgear can be seen as indirect discrimination based on religion and gender. By resulting in the exclusion of Muslim women and Sikh men, they reproduced racialized understandings of femininity and masculinity, privileging athletes of other religions, particularly Christians, who have fewer requirements for religious dress, and atheist or agnostic players. They further ignored the fact that

⁸⁵B. Church, 'Nike's US Women's Olympic Team Outfits Criticized for Being "Born of Patriarchal Forces"', *CNN*, 15 April 2024, available at www.cnn.com/2024/04/15/sport/nike-us-olympic-team-outfits-design-spt-intl/index.html.

⁸⁶International Skating Union, *Special Regulations & Technical Rules Single & Pair Skating and Ice Dancing* (2021), Rule 501.

⁸⁷N. Nittle, 'The Serena Williams Catsuit Ban Shows That Tennis Can't Get Past Its Elitist Roots', *Vox*, 28 August 2018, available at www.vox.com/2018/8/28/17791518/serena-williams-catsuit-ban-french-open-tennis-racist-sexist-country-club-spor.

⁸⁸M. Hamzeh, 'FIFA's Double Hijabophobia: A Colonialist and Islamist Alliance Racializing Muslim Women Soccer Players', (2017) 63 *Women's Studies International Forum* 11, at 12; Patel, *supra* note 9, at 142.

⁸⁹FIBA, 2014 Official Basketball Rules, para. 4.4.2.

⁹⁰Qatar Women's Basketball Team Withdraw from Asian Games as Hijab Ban Continues', *LawInSport*, 25 September 2014, available at www.lawinsport.com/topics/blogs/indian-sports-law/item/qatar-women-s-basketball-team-withdraw-from-asian-games-as-hijab-ban-continues.

⁹¹M. Kulkarni, 'Sikh Basketball Players Required to Remove Turbans in Controversial Decision', *LawInSport*, 1 August 2014, available at <https://www.lawinsport.com/topics/blogs/indian-sports-law/item/sikh-basketball-players-required-to-remove-turbans-in-controversial-decision>.

headgears, including hijabs and turbans, are part of the regular sporting attire of many religious communities all around the world without creating any safety risks. As Hamzeh points out, the classification of hijabs as safety hazards in sports reflects a ‘medicalized racial logic deemed the hijab, dangerous and almost indicative of disease’.⁹² It perpetuates a patronizing and colonialist narrative that Muslim women must be protected and saved, which has become even more prevalent since the War on Terror.⁹³

I find the exclusion of the Qatari basketball team and the Iranian football team based on FIFA’s and FIBA’s hijab bans specifically interesting considering the debates surrounding the 2022 FIFA Men’s World Cup in Qatar. As analysed above, in 2022, the public focus rested on understanding the responsibility of FIFA, a Switzerland-based IF, in protecting individuals from state norms and practices in Qatar, such as the criminalization of queer populations. Yet, the prohibition of wearing a veil by FIFA and FIBA shows that it is sometimes the rules of these Europe-based IFs themselves that create gendered, racialized, and religion-based exclusions. Hence, this illustrates the misconception of viewing IFs always as benevolent external entities with a responsibility to ‘save’ certain communities from gender-oppressive state norms, since, in these cases, it was IFs’ rules that led to exclusions.⁹⁴

After extensive athlete activism, FIFA and FIBA have like most other international federations gotten rid of their headgear prohibitions.⁹⁵ However, some national sports federations continue to ban Islamic veils. One example is the French Football Association, which is a member federation of FIFA and which won a case confirming its right to prevent players from wearing a hijab at the French Conseil d’État in 2023.⁹⁶ This case shows that state bodies do not necessarily produce less gendered and racialized norms than sports federations. Instead, French legislators, executive bodies, and courts as well as the ECtHR have all upheld headscarf bans in the context of sports.

For instance, in the name of upholding *laïcité*, the French Ministry for Sports prohibited French athletes from wearing an Islamic veil during the 2024 Olympic Games in Paris, even though athletes from other states were allowed to do so.⁹⁷ Similarly, in 2022, the Conseil d’État relied on the French law of ensuring *laïcité* to uphold an order against the city of Grenoble, which prevented the city from explicitly authorizing the wearing of a burkini in public pools.⁹⁸ Before that, the ECtHR allowed France to prohibit teenage girls from wearing a headscarf during physical education classes in *Dogru v. France* (2008) and *Kervanci v. France* (2008).⁹⁹ As criticized by many

⁹²See Hamzeh, *supra* note 88, at 14.

⁹³*Ibid.*, at 13–14; M. Hamzeh, ‘Jordanian National Football Muslimat Players: Interrupting Islamophobia in FIFA’s Hijab Ban’, (2015) 20 *Physical Education and Sport Pedagogy* 517.

⁹⁴Abu-Lughod discusses the narrative of needing to save Muslim women from the veil employed by ‘Western’ powers. See L. Abu-Lughod, ‘Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others’, (2002) 104 *American Anthropologist* 783, at 785–9.

⁹⁵For instance, World Karate lifted its hijab ban in 2013, FIFA did so in 2014 (after a two-year trial phase), FIBA in 2017 (after a two-year trial phase) and the International Boxing Association in 2019. See T. Degun, ‘World Karate Federation Approves the Hijab for Competition’, *Inside The Games*, 3 January 2013, available at www.insidethegames.biz/articles/1012301/world-karate-federation-approves-the-hijab-for-competition; Hamzeh, *supra* note 88, at 13; ‘FIBA’s Mid-Term Congress Unanimously Ratifies New Headgear Rule’, *FIBA.basketball*, 4 May 2017, available at www.fiba.basketball/news/fiba-s-mid-term-congress-ratifies-new-headgear-rule; L. Morgan, ‘AIBA to Allow Female Boxers to Wear Hijabs after Uniform Changes Approved by Executive Committee’, *Inside The Games*, 12 February 2019, available at www.insidethegames.biz/articles/1075465/aiba-to-allow-female-boxers-to-wear-hijabs-after-uniform-changes-approved-by-executive-committee.

⁹⁶Decisions No. 458088, 459547 and 463408 - Alliance Citoyenne et al., Ligue des Droits de l’Homme (Conseil d’État).
⁹⁷T. King, ‘Paris Olympics 2024: The Controversial Hijab Ban at Sport’s Biggest Party’, *BBC Sport*, 15 April 2024, available at www.bbc.com/sport/olympics/68739487.

⁹⁸N° 464648 (Conseil d’État).

⁹⁹*Dogru v. France*, Judgment of 4 December 2008, [2009] ECHR; *Kervanci v. France*, Judgment of 4 December 2008, [2009] ECHR.

scholars, such as Kapur and Mahmood, this caselaw and the underlying French legislation and executive decrees perpetuate religious and race biases that reflect Christian majoritarianism.¹⁰⁰

The example of Islamic veil bans therefore shows that replacing private sports federations as main regulators of sports with state bodies will not necessarily prevent gender- and race-based exclusions from sports. Instead, state bodies in France continue to implement the exclusionary veil ban in sports while IFs have largely eliminated it. Nevertheless, despite the formal rejection of headgear bans by IFs, many IFs have not formally amended their official rules, which means that their regulations rarely explicitly hold that veils are permitted. Instead, athletes must often go through a special exemption procedure to be allowed to wear them.

For example, a representative of the International Volleyball Federation (FIVB) has pointed out to me that the federation permits several variations of uniforms, including the wearing of headscarves, long-sleeve shirts, and long pants. The representative thus described the federation as ‘culturally and religiously inclusive’,¹⁰¹ a reference that implies that non-veiled individuals are considered as the norm in which others are ‘included’. In addition, the official written FIVB Event Regulations for volleyball hold that players must wear shorts and body-tight short-sleeve shirts or tank tops. They further require women to wear shorts that are shorter than those for men, showing how rules often perpetuate hetero-sexism by sexualizing women’s bodies.¹⁰² If players want to deviate from these standard uniform styles laid out in the FIVB Event Regulations, they have to ask for an exemption, since ‘variations to player uniforms to accommodate religious and/or cultural customs are granted on a case-by-case basis’.¹⁰³

Thus the FIVB rules continue to treat bodyfit shorts and shirts in competitions as the *status quo*, while any other clothing, such as veils, long pants, or loose uniforms, is treated as the exception. The case-by-case procedure through which permission to wear ‘alternative’ clothes is granted continues the ‘othering’ of women who wear a veil or full body coverage, accommodating their uniforms as ‘exception’ to ‘the norm’.

Another example that shows how IFs’ clothing rules create gendered and racialized exclusions was the fine imposed on the Norwegian women’s beach handball team for violating the dress code in 2021. The team was fined 1500 Euro because it had worn shorts instead of bikini bottoms in a match of the European Championship.¹⁰⁴ This violated the rules of the International Handball Federation (IHF) requiring women to wear bikinis in official games, while men were allowed to wear tank tops and shorts.¹⁰⁵ Following the public outcry against the fine and the Norwegian national federation, the IHF revised its clothing regulations in late 2021 and decided to allow women beach handball players to wear ‘body fit tank top, short tight pants and eventual accessories’.¹⁰⁶ However, despite going through the effort to formally revise the clothing rules, the IHF opted for continuing to make a categorical difference between women and men since, unlike men, women cannot wear *loose* clothing. This shows how attached IFs are to upholding the gender binary and the presumption that women and men are categorically different subjects in sports.

Interestingly, in 2021, the IHF Council also decided to extend the equipment rules for indoor handball to beach handball, allowing the wearing of sport hijabs but, paradoxically, still prohibiting long pants (except for goalkeepers).¹⁰⁷ IHF’s clothing rules thus continue to objectify and sexualize

¹⁰⁰See Kapur, *supra* note 48; S. Mahmood, *Religious Difference in a Secular Age: A Minority Report* (2015), 170–4.

¹⁰¹Fédération Internationale de Volleyball, Email, ‘Question on Uniforms’, 4 April 2023.

¹⁰²Fédération Internationale de Volleyball, ‘Event Regulations Volleyball’, 2020, Annex A, A.3.1.

¹⁰³Fédération Internationale de Volleyball, Email, ‘Question on Uniforms’, 6 April 2023. The exceptions to the standard uniform rules are usually granted during a Preliminary Inquiry, which is typically held two days ahead of FIVB competitions.

¹⁰⁴J. Gross, ‘Women’s Handball Players Are Fined for Rejecting Bikini Uniforms’, *New York Times*, 20 July 2021, available at www.nytimes.com/2021/07/20/sports/norway-beach-handball-team.html.

¹⁰⁵International Handball Federation, IX. Rules of the Game. b) Beach Handball (2010), at 88–9, Rule 4.8.

¹⁰⁶International Handball Federation, IX. Rules of the Game b) Beach Handball (2021), Rule 4.8.

¹⁰⁷IHF Council, ‘Council Meeting No. 1’, at 7–8; International Handball Federation, IHF Rules of the Game: Regulations on Protective Equipment and Accessories, para. 10. Clothing.

women's bodies by requiring women players to wear tight clothing and prohibiting full body covers in beach handball. This not only creates exclusions based on gender, religion and body type but can also negatively affect trans and intersex persons, since exposing a lot of body anatomy, such as through tight clothing, can lead to their forced outing.¹⁰⁸ The rules thus reproduce hegemonic femininities – and partly also hegemonic masculinities – which reflect cis-hetero-sexism, whiteness, endosexnormativity, and a slim body type. They show how different axes of gender inequalities intersect with race exclusions in the construction of normative bodies in sports.

5. The *Semenya* case: The autonomy and limitations of international sports federations

The previous sections have highlighted that IFs yield a lot of power to disseminate hegemonic gender norms. As their rules not only apply in international sports competitions, but they often trickle down to national contexts and shape local norms, IFs can be considered as de facto international lawmakers. This section further advances my argument by utilizing the *Semenya* case as a case study to demonstrate how the structure of international sports adjudication supports the law-making power of IFs to set (gendered) rules.

I chose to analyse the *Semenya* case because it once more demonstrates IFs' power to shape hegemonic gender norms, but it also reveals that IFs do not function in a vacuum. Instead, they are embedded in a transnational network of norms, including international human rights law, state law and decisions by arbitration tribunals, which circumscribes their autonomy in adopting cis-hetero-sexist rules. This resonates with Krech's analysis of the efforts of World Athletics to draw a line based on sex in international athletics, arguing that '[w]hile the IAAF is primarily responsible for any such line-drawing, it does not do so in a vacuum'.¹⁰⁹ Indeed, the *Semenya* case draws attention to (European) human rights law as one avenue among several to restrict the autonomy of IFs to draw exclusionary lines. Other avenues include the actions of domestic courts and legislatures, pressures exercised by sponsors, athlete activism (including strikes), and lobbying efforts by athletes' representatives.

The *Semenya* case has so far been decided by three judicial or quasi-judicial bodies: the Court of Arbitration for Sport (CAS), the Swiss Federal Tribunal (SFT) and the Chamber of the European Court of Human Rights (ECtHR). The decision by each of these bodies reveals specific structural elements of international sports law that allow IFs to (re)produce hegemonic gender norms, which is why I will analyse them separately after first exploring the hegemonic gender norms that are at stake in the case.

5.1. The *Semenya* case and hegemonic gender norms

The *Semenya* case involves Mokgadi Caster Semenya, a South African athlete specialized in middle-distance running, challenging the so-called 'DSD Regulations' of World Athletics. These rules affect women with variations in sex characteristics, sometimes also called 'intersex women',¹¹⁰ which must not be confounded with rules on trans athletes discussed in Section 3. Based on the DSD Regulations challenged by Semenya, women with certain variations in sex characteristics are excluded from specific international women's athletic events if their natural

¹⁰⁸A. Fluch, 'Auswirkungen Des Binären Geschlechterkonzepts Auf Das Sportverhalten von Trans- Und Intergeschlechtlichen Personen', (Master thesis), *University of Vienna*, 2017, at 80; A. Barras, 'The Lived Experiences of Transgender and Non-Binary People in Everyday Sport and Physical Exercise in the UK', (PhD thesis), *University of Brighton*, 2021, at 124–5; Interview with Verity Smith, 'The Inclusion of Trans Children in UK Sports', *Mermaids*, 11 March 2022.

¹⁰⁹See Krech, *supra* note 5, at 279.

¹¹⁰I was hesitant to use the term 'intersex' when discussing the *Semenya* case since Semenya does not use the term as a self-description. She says about the term that 'I don't think of myself that way. I want everyone to understand that despite my condition, even though I am built differently than other women, I am a woman.' Hence, the article will mostly refer to women with variations in sex characteristics rather than intersex women. See C. Semenya, *The Race To Be Myself* (2023), 3.

testosterone levels exceed a specific threshold (5 nmol/l in 2019).¹¹¹ If affected women want to continue to participate in relevant competitions, they must undergo hormone treatment to reduce their testosterone levels.¹¹²

As many critics have argued, the DSD Regulations have perpetuated gender stereotypes by excluding women who do not conform to hegemonic femininity, such as by appearing ‘too masculine’, from women’s sports events.¹¹³ For instance, Winkler and Gilleri say succinctly that the DSD Regulations ‘encourage stigmatization of those who look not like the standard(ized) feminine athlete and do not fit gender stereotypes’.¹¹⁴ One main criticism levelled against the DSD Regulations is that they single out testosterone as the sole genetic performance enhancer, while other genetic criteria, such as lung capacity, height or the production of lactic acid, remain unregulated. In addition, socio-economic performance enhancers, such as access to good coaching and training conditions, are, as usual, overlooked in the pursuit of establishing a level-playing-field.¹¹⁵ World Athletics also only regulates natural testosterone among women, since men athletes are not subjected to a maximum threshold of testosterone.¹¹⁶ This difference in treatment between women and men presupposes the wrongful assumption that testosterone is solely a male hormone, which women are not allowed to possess, and was challenged as a form of direct discrimination on the basis of sex by Semenya at the CAS.¹¹⁷

Scholars and activists have further criticized the racialized effects of the DSD Regulations as athletes of colour and those from the Global South have been disproportionately excluded from competitions based on the Regulations.¹¹⁸ One reason for this racialized disparity is attributable to the rules’ so-called ‘suspicion-based model’, where only athletes who are ‘suspicious’ of having high testosterone levels are tested. In practice, athletes with notable athletic achievements or those not conforming to stereotypical (white) norms on femininity have been subjected to scrutiny and testosterone tests. This is also possible since the Medical Manager of World Athletics has wide discretion in initiating an investigation based on the DSD Regulations.¹¹⁹ The implementation of the DSD Regulations thus shows that gender and race norms often intersect in sports, leading in this case to the exclusion of mostly women of colour from the Global South.

¹¹¹World Athletics, ‘Eligibility Regulations for Female Classification (Athletes with Differences of Sexual Development). Version 2.0 (2019)’. In 2023, World Athletics amended its DSD Regulations to lower the threshold of allowed testosterone levels to 2.5 nmol/l and make the regulations applicable to all athletic events in World Ranking Competitions. See World Athletics, ‘Eligibility Regulations for Female Classification (Athletes with Differences of Sexual Development). Version 2.0 (2023)’.

¹¹²World Athletics, ‘Eligibility Regulations for Female Classification (Athletes with Differences of Sexual Development). Version 2.0 (2019)’.

¹¹³See, e.g., M. Krech, ‘The Misplaced Burdens of “Gender Equality” in Caster Semenya v IAAF: The Court of Arbitration for Sport Attempts Human Rights Adjudication’, (2019) *Sweet & Maxwell’s International Sports Law Review*; C. Rudolfo, ‘Caster Semenya: Collapsed by Capitalism. The Intersection of Gender, Race and Influence - Part One’, (2021) *Sports Law and Taxation*; L. Holzer, ‘What Does It Mean to Be a Woman in Sports? An Analysis of the Jurisprudence of the Court of Arbitration for Sport’, (2020) 20 *Human Rights Law Review* 387.

¹¹⁴M. Winkler and G. Gilleri, ‘Of Athletes, Bodies, and Rules: Making Sense of Caster Semenya’, (2021) 49 *Journal of Law, Medicine & Ethics* 644, at 649.

¹¹⁵See Krech, *supra* note 5, at 265.

¹¹⁶See Winkler and Gilleri, *supra* note 114, at 649; E. Buzuvis, ‘Hormone Check: Critique of Olympic Rules on Sex and Gender’, (2016) 31 *Wisconsin Journal of Law, Gender & Society* 29, at 42.

¹¹⁷ *Mokgadi Caster Semenya v International Association of Athletics Federations & CAS Athletics South Africa v International Association of Athletics Federations*, Court of Arbitration for Sport 2018/O/5794, 2019; 2018/O/5798 [para. 51].

¹¹⁸See Winkler and Gilleri, *supra* note 114, at 654–6; Rudolfo, *supra* note 113, at 18; K. Karkazis and R. Jordan-Young, ‘The Powers of Testosterone: Obscuring Race and Regional Bias in the Regulation of Women Athletes’, (2018) 30 *Feminist Formation* 1, at 5; Krech, *supra* note 113, at 70; Holzer, *supra* note 113, at 387, 395, 400.

¹¹⁹See Karkazis and Jordan-Young, *ibid.*, at 5; *Mokgadi Caster Semenya v International Association of Athletics Federations & Athletics South Africa v International Association of Athletics Federations*, *supra* note 117; Buzuvis, *supra* note 116, at 43; *Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)*, Court of Arbitration for Sport 2014/A/3759, 2015, para. 225.

Examining the DSD Regulations also helps to reveal how material the de facto power of IFs can be. By requiring athletes to undertake hormone treatment to continue their profession, the rules of World Athletics leave permanent traces inscribed in the athletes' bodies. They perpetuate the harmful notion that bodies with certain variations of sex characteristics must be 'fixed' through medical treatment, which the intersex rights community has strongly rejected as a violation of the right to bodily integrity.¹²⁰ Reports further indicate that some affected athletes have experienced pressure to undergo gonadectomies to eliminate the main source of their testosterone production, even though the DSD Regulations do not formally require any surgeries.¹²¹ The Regulations have thus clear material effects on bodies, more than certain state laws, despite being rules emitted by non-state actors.

The visible material harms generated by the DSD Regulations contradict World Athletics' claim that athletes are not *forced* to undertake the medical treatment but that it is their free *choice* to undergo hormone treatment or not. This narrative of choice overlooks the financial dependency of athletes and their families on their careers, rendering their decision to undergo hormone treatment far from voluntary. Semenya herself had opted to undergo hormone treatment when it was imposed on her after winning a gold medal at the World Championship in 2009.¹²² Yet, she experienced significant side-effects, such as nausea and mood swings, and her doctor recommended her to stop the treatment after four years.¹²³ She eventually ended the hormone treatment in 2015 when Dutee Chand challenged predecessors to the DSD Regulations, the 'Hyperandrogenism Rules', which the CAS suspended due to insufficient scientific evidence supporting them.¹²⁴ World Athletics finally decided to repeal the Hyperandrogenism Rules, which ended the CAS proceedings in the Chand case, but instead adopted the very similar DSD Regulations.¹²⁵ This made Semenya challenge the new testosterone rules, the DSD Regulations, at the CAS in 2018.

5.2. The Semenya case at the Court of Arbitration for Sport

Semenya's only option to challenge the DSD Regulations was to bring the case to the CAS. Since the Regulations establish the CAS as the relevant dispute settlement mechanism, Semenya could not seek recourse at any domestic courts, such as in South Africa or Monaco (the seat of World Athletics).¹²⁶ The inclusion of arbitration clauses, which transfer jurisdiction over disputes to arbitration tribunals instead of ordinary judicial bodies, has become a common practice in agreements between IFs and athletes or other entities since the 1990s.¹²⁷ The result is the creation

¹²⁰Third International Intersex Forum, 'Malta Declaration', (2013), available at oiiurope.org/malta-declaration/; 'The Yogyakarta Principles plus 10 Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles', Principle 32.

¹²¹R. Jordan-Young, P. H. Sönksen and K. Karkazis, 'Sex, Health, and Athletes', (2014) 348 *British Medical Journal*, 4; A. Negesa, 'The Story in Her Own Words', (2020) 29 *Human Rights Defender* 36.

¹²²S. Patel, 'Gaps in the Protection of Athletes Gender Rights in Sport—a Regulatory Riddle', (2021) 21 *International Sports Law Journal* 257, at 260.

¹²³See Semenya, *supra* note 110, at 188; *Mokgadi Caster Semenya v. International Association of Athletics Federations & Athletics South Africa v. International Association of Athletics Federations*, *supra* note 117, paras. 56, 79.

¹²⁴See *Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)*, *supra* note 119.

¹²⁵Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) (2018), para. 2.2. The main differences between the Hyperandrogenism Regulations (2011) and the DSD Regulations (2018) were that the latter reduced the threshold of allowed testosterone from 10 nmol/l to 5nmol/l and was only applicable to certain athletic races between 400 meters and one mile.

¹²⁶See 'Eligibility Regulations for Female Classification (Athletes with Differences of Sexual Development). Version 2.0 (2019)', *supra* note 111, para. 5.2.

¹²⁷J. Lukomski, 'Arbitration Clauses in Sport Governing Bodies' Statutes: Consent or Constraint? Analysis from the Perspective of Article 6(1) of the European Convention on Human Rights', (2013) 13 *International Sports Law Journal* 60.

of an almost autonomous legal regime, often called *lex sportiva*, in which IFs set their rules and mostly private dispute settlement bodies decide on these rules.¹²⁸ Some IFs have their own arbitration tribunals,¹²⁹ but the vast majority use the CAS, which was set up by the IOC in Switzerland in 1984.¹³⁰

At the CAS, Semenya contested the DSD Regulations on the grounds that they are discriminatory, rely on flawed science, and cause irreparable harm, including violations of bodily integrity.¹³¹ The majority of the CAS arbitrators (two out of three) rejected Semenya's claims by arguing that the DSD Regulations are 'proportionate, necessary, and reasonable'.¹³² This decision legitimated and reproduced several harmful hegemonic gender norms embedded in the DSD Regulations. For instance, it described endosex women as 'real' or 'normal' women, framed intersex women as in need of 'fixing' through medical procedures, and considered the use of 'conventional oral contraceptives' as a normalized and justified interference with women's bodily integrity.¹³³ According to Krech, the CAS panel accepted that 'there should be a cap on women's performance; that women cannot or must not be "too" good and must certainly be far inferior to men when it comes to athletic performance. Otherwise, they must not actually be women'.¹³⁴ The CAS panel further ignored the possibility that the DSD Regulations constitute intersectional forms of indirect discrimination since they disproportionately affect women of colour from the Global South.

By denying Semenya's request for arbitration, the CAS upheld the autonomy of World Athletics to set its eligibility rules based on hegemonic gender norms. The award contradicted the approach taken by the CAS in the *Dutee Chand* case, in which it suspended the Hyperandrogenism Rules based on the lack of scientific evidence which would justify the rules. Krech sees this earlier decision as having been circumscribed by principles of 'global administrative law' through which the CAS set limits to the autonomy of World Athletics.¹³⁵ Yet, in *Semenya*, the CAS revised its own approach, even though the panel members again recognized that there was a paucity of scientific and conclusive studies that support the DSD Regulations.¹³⁶

The deference to World Athletics by the CAS in the *Semenya* case is reflective of broader dynamics at the CAS. In an analysis of 1125 CAS decisions issued between 1983 and 2014,¹³⁷ Lindholm found that sports governing bodies, which include international, regional, and national federations, are more likely than athletes to win a case at the CAS. In only 25 per cent of relevant cases, individuals win an appeal against a sports governing body.¹³⁸ Moreover, even though respondents generally have a better chance of winning at the CAS, this is not the case when the appellants are sports governing bodies, which win their appeals against individuals in 67 per cent of all cases.¹³⁹

While more qualitative research is needed to better explain the discrepancy in the probability of winning between sports governing bodies and athletes at the CAS, the data supports the critique that the CAS structurally advantages IFs. One major criticism raised against the CAS is that IFs have indirect influence over the nomination of CAS arbitrators caused by the

¹²⁸See Duval, *supra* note 5, at 827.

¹²⁹For example, FIBA has its own arbitration tribunal, the Basketball Arbitral Tribunal, which is located in Geneva, Switzerland.

¹³⁰See Baddeley, *supra* note 16, at 9.

¹³¹See *Mokgadi Caster Semenya v. International Association of Athletics Federations & Athletics South Africa v. International Association of Athletics Federations*, *supra* note 117, para. 2.

¹³²*Ibid.*

¹³³See Holzer, *supra* note 113, at 387, 395, 400.

¹³⁴See Krech, *supra* note 113, at 73.

¹³⁵See Krech, *supra* note 5.

¹³⁶See *Mokgadi Caster Semenya v. International Association of Athletics Federations & Athletics South Africa v. International Association of Athletics Federations*, *supra* note 117, para. 583. See also Krech, *supra* note 113, at 71.

¹³⁷See Lindholm, *supra* note 12.

¹³⁸*Ibid.*, at 296.

¹³⁹*Ibid.*, at 294. When converting Lindholm's data collection into percentage data, the cases in which the CAS partially grants the appeal are not considered.

institutional set-up of the CAS, which has called into question the independence of the CAS.¹⁴⁰ While going into detail on this discussion would divert from the focus of this article, the statistics presented above show that the *Semenya* decision reflects the general tendency of the CAS to grant IFs significant autonomy in their norm-setting initiatives, even if they reproduce exclusionary gender norms.¹⁴¹

5.3. The *Semenya* case at the Swiss Federal Tribunal

The next step in the *Semenya* case provides further evidence for my claim that IFs enjoy wide autonomy in adopting their own rules, including rules based on hegemonic gender norms. As the CAS is domiciled in Switzerland, *Semenya* could seek recourse against the CAS award at the highest court in Switzerland, the SFT.¹⁴² Based on Swiss private international law, the SFT can set aside international arbitral awards if they reflect certain procedural shortcomings or are incompatible with Swiss 'public policy'.¹⁴³ *Semenya* invoked the latter ground and argued that the CAS Award violates the principle of non-discrimination, certain personality rights and her human dignity as encompassed by the principle of public policy.¹⁴⁴ It is noteworthy that the *location* of the CAS in Switzerland meant that the only available recourse for *Semenya* was the SFT which applies Swiss law. This further highlights the Eurocentric nature of international sports law and the relevance of politics of location in discussions on sports governance.

In 2020, the SFT rejected *Semenya's* challenge of the CAS Award by holding that the award was not incompatible with the Swiss public order.¹⁴⁵ It argued that it is doubtful whether horizontal discrimination 'is included in the scope of the restrictive notion of public order'.¹⁴⁶ This meant that the SFT questioned its own jurisdiction to interfere with the law-making power of an IF in order to potentially remedy discriminatory treatment exercised by World Athletics against *Semenya*. This reluctance to limit the autonomy of IFs derives from the general approach of Switzerland to grant private non-commercial associations, which include large IFs like FIFA next to local yodelling¹⁴⁷ clubs, a lot of autonomy in governing their internal affairs.¹⁴⁸ Swiss courts have also historically refrained from asserting jurisdiction over sports-related cases, particularly those concerning the 'rules of the game', which encompassed most aspects of organized sports in the past.¹⁴⁹ The underlying approach to this leniency against IFs reflected 'the vision of sports as being purely a leisure activity, with no legally protected interests at stake'.¹⁵⁰ This framing of sports as leisure or hobby, rather than a commercial activity in which sportspeople engage as workers, enabled IFs to avoid extensive state control over their regulations. It further ignored that the right to leisure is also protected under human rights law, such as the International Covenant on Economic, Social and Cultural Rights.¹⁵¹

¹⁴⁰ *Mutu and Pechstein v. Switzerland*, Judgment of 2 October 2018, [2018] ECHR; A. Duval and B. Van Rompuy, 'Protecting Athletes' Right to a Fair Trial Through EU Competition Law: The Pechstein Case', in C. Paulussen et al. (eds.), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (2016), 245, at 266–76; J. Cooper, 'Protecting Human Rights in Sport: Is the Court of Arbitration for Sport up to the Task? A Review of the Decision in *Semenya v IAAF*', (2023) *International Sports Law Journal* 158.

¹⁴¹ J. L. Chappelet, 'Autonomy and Governance: Necessary Bedfellows in the Fight against Corruption in Sport', in R. Souza Vieira de Olivera (ed.), *Global Corruption Report: Sport* (2016), 16.

¹⁴² 2023 Code of Sports-related Arbitration, R45 and R59; 1987 Federal Act on Private International Law, Art. 191.

¹⁴³ See Federal Act on Private International Law, *ibid.*, Art. 190(2).

¹⁴⁴ 4A_248/2019; 4A_398/2019 (Tribunal fédéral), paras. 9.4, 10.1, 11.

¹⁴⁵ *Ibid.*, para. 12.

¹⁴⁶ See *ibid.*, para. 9.4.

¹⁴⁷ Alpine yodelling is a traditional form of singing mostly practiced in the Swiss, Austrian, and German Alps.

¹⁴⁸ See Baddeley, *supra* note 16.

¹⁴⁹ *Ibid.*, at 6.

¹⁵⁰ *Ibid.*

¹⁵¹ 1966 International Covenant on Economic, Social and Cultural Rights, 999 UNTS 171, Art. 7.2(d).

Notwithstanding the initial reluctance to intervene in IFs' matters, Baddeley highlights that Swiss courts have progressively acknowledged the need to safeguard sportspeople's rights and to constrain IFs' decisions since the 1970s.¹⁵² However, this is not reflected in the SFT's decisions when it comes to setting aside CAS awards. The success rate of challenging a CAS award at the SFT is very low, with the Tribunal setting aside only 8 per cent of all challenged CAS awards from 1989 to 2019, none of which were overturned based on the ground of breaching Swiss public policy.¹⁵³ This highlights that challenging CAS Awards at the SFT is an almost impossible endeavour, especially when a breach of public policy is invoked. Semenya's case was thus not an exception but reflects the general tendency of Swiss courts to grant private bodies, including IFs and the CAS, vast autonomy in governing international sports, including rules on gender relations. The next phase in the Semenya case shows, however, that under European human rights law Switzerland has the obligation to limit the legitimization of exclusionary gender norms by IFs and the CAS.

5.4. The Semenya case at the European Court of Human Rights

After the refusal of the SFT to set aside the CAS Award, Semenya brought a case against Switzerland to the ECtHR in February 2021. This was possible because the SFT, which had validated the CAS award, was a judicial body of Switzerland and the subject matter fell within the ambit of the European Convention on Human Rights (ECHR). Once more, the only *location* available for continuing her grievances against World Athletics was the European court, where she claimed that the SFT's validation of the CAS Award, which had upheld the DSD Regulation, violated rights protected by the ECHR, including her right to non-discrimination, bodily integrity and an effective remedy.¹⁵⁴ Even though the access to the ECtHR due to Switzerland's jurisdiction over CAS awards provides fortunately at least some sort of remedy to athletes like Semenya, it underscores again the Eurocentrism enshrined in the sports governance system.

In an unusually expedient process, a Chamber of the ECtHR issued its judgment in the case on 11 July 2023. The Chamber ruled partly in favour of Semenya by finding a violation of the right to non-discrimination (Article 14) taken together with the right to private life (Article 8). It also found a violation of the right to an effective remedy (Article 13) in relation to Article 14 taken together with Article 8. Yet, it declared the complaints made under Article 3 (prohibition of torture and ill-treatment) as inadmissible because of being manifestly ill-founded and refused to provide a separate ruling on the complaints under Article 8 taken alone and under Article 6 (right to fair trial).¹⁵⁵

The Chamber decision constitutes an interim victory for Semenya and shows that IFs can be restricted in the production of harmful gender norms. Yet, the decision has been referred to the Grand Chamber, which means that the outcome of the case is not yet certain. Nevertheless, the Chamber's judgment is illustrative of using (European) human rights law as a means to restrict the autonomy of IFs in disseminating hegemonic gender norms. The Chamber held that the violations of the ECHR occurred due to a lack of 'sufficient institutional and procedural safeguards in Switzerland to allow her to have her complaints examined effectively, especially since her complaints concerned substantiated and credible claims of discrimination'.¹⁵⁶ It thus found a positive obligation of Switzerland to establish mechanisms necessary to remedy horizontal discrimination exercised by IFs and legitimated by the CAS.

¹⁵²Baddeley, *supra* note 16, at 7-9.

¹⁵³F. Dasser and P. Wójciewicz, 'Swiss International Arbitral Awards Before the Federal Supreme Court Statistical Data 1989-2019', (2021) 39 *ASA Bulletin* 13.

¹⁵⁴*Affaire Semenya c. Suisse*, Judgment of 11 July 2023, [2023] ECHR.

¹⁵⁵*Ibid.*, para. 90.

¹⁵⁶See also English Press Release: Registrar of the European Court of Human Rights, 'Press Release. ECHR 219 (2023). Discrimination against International-Level Athlete Who Was Not Afforded Sufficient Procedural Safeguards When Challenging World Athletics Regulations', 11 July 2023.

The Chamber decision is not conclusive on whether the DSD Regulations actually constitute discrimination, as it focuses on Switzerland's obligation to establish procedural mechanisms to remedy (potential) discrimination. Yet, it notes the harmful consequences that IFs' rules can have on athletes by stressing that the DSD Regulations do not provide a real 'choice' to the athletes concerned. They must either undertake hormone treatment, which potentially damages their physical and mental integrity, or they refuse to do the treatment and consequently lose their job and livelihoods.¹⁵⁷ This recognizes the de facto material force of the DSD Regulations over athletes' bodies. The Chamber further emphasizes that the SFT (and the CAS) should have taken the side-effects caused by the hormone treatment prescribed to comply with the DSD Regulations seriously.¹⁵⁸ This acknowledges the fact that IFs' rules have material effects on athletes' bodies and their economic well-being, highlighting the de facto law-making power of IFs.

Despite Semenya's interim victory, she will not be able to return to international athletic competitions in the near future. This is not only because the Grand Chamber still needs to decide on the case, but also because World Athletics has announced that, for now, it will keep its current form of the DSD Regulations, which are even more restrictive than those challenged by Semenya.¹⁵⁹ This makes the difficulties in enforcing the ECtHR's judgment and restricting the actions of World Athletics, a Monacan-based private association, evident. The Chamber's decision means primarily that if the same case or a similar case arrives again at the CAS and is transferred to the SFT, then Switzerland must ensure that the review of the CAS award by the SFT satisfies ECHR standards. In practice, this could mean that the SFT must set limits on the CAS' decision to uphold discriminatory rules, such as the DSD Regulations. The set-up of justice mechanisms in international sports shields IFs from interferences in their de facto lawmaking power and does not provide effective access to justice for athletes like Semenya.

Nevertheless, the Chamber's judgment signals that IFs' autonomy of disseminating hegemonic gender norms can be restricted through human rights instruments, notably the ECtHR. It shows that the *lex sportiva* is not an entirely autonomous legal system, but states have, under certain circumstances, an obligation to set limits on the law-making power of IFs.

6. A feminist case for considering international sports federations as lawmakers

In this article, I have so far demonstrated the de facto lawmaking power of IFs to disseminate hegemonic gender norm by means of discussing LGBT rights at the 2022 FIFA Men's World Cup, rules on the participation of trans athletes, uniform regulations and the DSD Regulations. IFs are indeed de facto international lawmakers even if their power to organize sports may not be absolute. I thus see the analysis of IF's law-making power as advancing queer-feminist and anti-racist critiques of international law by shedding light on global power inequalities that lawyers often ignore. It takes the normative power of a specific type of non-state actors, namely IFs, seriously and thus subverts the traditional approach of positivist lawyers to assume that states are the ultimate top-down regulators of social relations.¹⁶⁰ Shifting the focus to IFs as lawmakers can therefore follow Chinkin's and Charlesworth's claim that it can be a 'feminist strategy' 'to undermine the centrality of the state in international law'.¹⁶¹

¹⁵⁷See *Affaire Semenya c. Suisse*, *supra* note 154, para. 187.

¹⁵⁸*Ibid.*, para. 188.

¹⁵⁹'Press Release: World Athletics Responds to European Court of Human Rights Decision', *World Athletics*, 11 July 2023, available at worldathletics.org/news/press-releases/response-european-court-human-rights-decision-2023.

¹⁶⁰M. Davies, 'Pluralism and Legal Philosophy', (2006) 57 *Northern Ireland Legal Quarterly* 577, at 582; J. Fraser, *Social Institutions and International Human Rights Law Implementation: Every Organ of Society* (2020), 281. The recent efforts to recognize the human rights responsibilities of private companies in international law have weakened the assumption that states are the sole lawmakers in international law. See OEIGWG Chairmanship, Third Revised Draft. Legally Binding Instrument to Regulate, in *International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (2021).

¹⁶¹H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000), 169.

Queer-feminist explorations of IFs' law-making powers also need to engage with the multiple axes of unequal power relations embedded in international sports governance. For instance, an intersectional queer-feminist critique that is attentive to politics of locations cannot ignore the Eurocentric nature of the *lex sportiva*, as highlighted by the location of core sport regulators, such as IFs, the CAS, and the ECtHR, in Europe. The fact that Europe-based entities regulate the everyday realities of athletes across the world highlights democratic deficits and neo-colonial tendencies in international (sports) law, which deserve further exploration. Practising a politics of location also encourages researchers like me to interrogate what is considered authoritative knowledge in international law and how we are ourselves implicated in the erasure of certain knowledges and lived realities in academia.¹⁶²

In this regard, I see potential in shifting the focus to the lived realities of a group that remains under-considered in international law by treating IFs as lawmakers. While athletes are often perceived as wealthy and influential individuals, the truth is that the majority of professional athletes face precarious conditions. A survey published by Global Athlete in 2020 highlights that 58 per cent of 491 athletes from 48 countries do not consider themselves financially stable.¹⁶³ Financial protection in the case of injury and retirement plans are scarce in sports, especially for women and athletes from the Global South.¹⁶⁴ Moreover, the right to collective bargaining and the representation of athletes in decision-making remain significant challenges in sports.¹⁶⁵ Hence, subjecting IFs' law-making power to a queer-feminist and anti-racist critique sheds light on the challenges experienced by a marginalized group of people who often fall through the cracks of human rights and labour rights regimes.

However, my call to subject the lawmaking power of IFs to a queer-feminist and anti-racist critique should not be mistaken for assuming that the regulation of sports by states, rather than IFs, would *necessarily* reduce the gendered and racialized nature of sports. Instead, state law can sometimes be even more exclusionary than the rules of IFs. For example, my discussion on headcovers in sports showed that most IFs have removed their formal veil bans, while French law continues to prevent athletes from wearing hijabs and other Islamic veils. In this context, it is state law and the jurisprudence of the ECtHR that perpetuate the racialized policing of women's bodies through hijab bans in sports.

Thus, states are not necessarily 'better' sports regulators than IFs from the point of view of gender justice. The claim that I make here is not normative but rather empirical, in the sense that since IFs are *de facto* international lawmakers, international lawyers should treat them as such.¹⁶⁶ What athletes can eat or drink, what they can wear, which medicine they can take and in which events they can compete often depends on IFs. Their bodies are often literally governed by these sporting entities. This dependence is especially pronounced for athletes without privileges based on gender, class, race, or geographical location. Taking IFs seriously as lawmakers acknowledges that rules by sports federations impact athletes' lives often more profoundly than state law. Their effects are often 'harder' than those of norms that are traditionally considered as 'hard law', since they can entail, for example, the loss of one's income and material harm conducted on bodies, as demonstrated by the *Semenya* case.

¹⁶²An example of practising reflexivity in research on sports and inequality is provided here: see Sykes, *supra* note 35.

¹⁶³Global Athlete, '2020 Survey Results. Athlete Rights. Athlete Welfare. Athlete Representation', 2020, at 8.

¹⁶⁴*Ibid.*

¹⁶⁵International Labour Organization, 'Report. Global Dialogue Forum on Decent Work in the World of Sport', 2020.

¹⁶⁶Scholars have made similar arguments in relation to other non-state actors, such as multinational corporations and armed groups. See, e.g., J. E. Nijman, 'Non-State Actors and the International Rule of Law: Revisiting the "Realist Theory" of International Legal Personality', in C. Ryngaert and M. Noortmann (eds.), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (2010), 91, at 94; R. Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents* (2021), at 453–4. See also M. Noortmann, 'Towards an Interdisciplinary Approach to Non-State Participation in the Formation of Global Law and Order', *Participants in the International Legal System* (2011).

My approach taken to IFs thus falls under what Brölmann and Radi call the ‘socio-legal landscape’ to international lawmaking, which concentrates on the actual legal capacity of institutions to influence social relations instead of determining their formal standing in terms of being considered a subject of international law.¹⁶⁷ The focus on the de facto lawmaking power of IFs to regulate athletes’ lives helps to understand how lives are governed *in practice*, rather than in the abstract. This reflects the feminist objective to start legal explorations from the lived realities of people instead of abstract, universal entities. According to Davies, feminists have critiqued ‘the detachment of positive law from everyday realities’.¹⁶⁸ Understanding the regulation of everyday realities of athletes, including the governance of their bodies and gender identities, also presents a step to finding ways of dismantling inequalities in sports.

Studying the rules that materially regulate athletes’ lives further deconstructs the binary between the public vs. the private, which feminists have long recognized as being gendered. Feminist legal scholars have critiqued that lawyers tend to focus on the public sphere governed by state laws, which reflects a gender bias as private spaces are often especially relevant for women’s lives.¹⁶⁹ In particular, decolonial and postcolonial feminist legal scholars have pointed out that engaging with non-state norms can assist in understanding how the lives of marginalized groups, such as women, indigenous peoples and colonized peoples, are regulated. As these groups find themselves often far away from elite state institutions, their lives are more likely to be governed by a plurality of state and non-state norms.¹⁷⁰

From this perspective, focusing only on states as ultimate regulators of social relations can bear gender, race and Eurocentric biases, which means that analysing how private entities, such as IFs, shape global norms on gender yields the potential to remedy these biases in international law scholarship. Understanding IFs as core actors in the international governance of gender norms in sports and beyond helps to grasp the complexity of international norm dissemination processes, overcoming the constructed dichotomy between the private and the public.¹⁷¹ Given the popularity of mega sporting events across the world, international lawyers have a lot to gain from considering the power of sports in shaping social norms.

¹⁶⁷C. Brölmann and Y. Radi, ‘Introduction: International Lawmaking in a Global World’, in C. Brölmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (2016), 1, at 5.

¹⁶⁸M. Davies, ‘Feminism and the Flat Law Theory’, (2008) 16 *Feminist Legal Studies* 281, at 284. See also M. Matsuda, ‘Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls’ Theory of Justice’, (1986) 16 *New Mexico Law Review* 613.

¹⁶⁹H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis, with a New Introduction* (2022), 56; S. B. Boyd (ed.), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (1997).

¹⁷⁰A. S. Manji, ‘Imagining Women’s “Legal World”: Towards a Feminist Theory of Legal Pluralism in Africa’, (1999) 8 *Social & Legal Studies* 435; H. A. Hamoudi, ‘Sex Policing in the Arab World’, in P. Schiff Berman (ed.), *The Oxford Handbook of Global Legal Pluralism* (2020), 928, at 932–8; B. Z. Tamanaha, ‘Legal Pluralism across the Global South: Colonial Origins and Contemporary Consequences’, (2021) 53 *Journal of Legal Pluralism and Unofficial Law* 168.

¹⁷¹The prism of transnational law could help to break out of the (gendered) dichotomy of the public vs. the private. As recognized by Ghadery and Kalantry, the emphasis of transnational law on the interrelationship of diverse norms and actors with different formal statuses makes it a promising framework for feminist explorations. See F. Ghadery and S. Kalantry, ‘Introduction – Transnational Legal Feminism’, (2022) 13 *Transnational Legal Theory* 1, at 2.