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**Feminist Governance Beyond the State: FIFA as Transnational  
Battleground for Feminist Legal Critique**

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# Feminist Governance Beyond the State: FIFA as Transnational Battleground for Feminist Legal Critique

Antoine Duval (Asser Institute)

In her famous essay *Throwing like a girl*, the feminist philosopher Iris Marion Young looked at the ‘set of structures and conditions that delimit the typical *situation* of being a woman in a particular society’.<sup>1</sup> Specifically, she identified the fact that women are being discouraged to engage in sport as one of the social processes through which ‘bodily timidity’<sup>2</sup> develops and which contributes to women being ‘physically inhibited, confined, positioned, and objectified’.<sup>3</sup> In fact, the governance bodies of football have a long history of discouraging women, through a ‘culture of “active oppression”, exclusion, denigration, and marginalization’,<sup>4</sup> from taking part in the beautiful game. The most infamous episode remains the 1921 decision of the English Football Association (FA) to deny access to all football fields of its affiliates to women wanting to play the game.<sup>5</sup> Tellingly, this decision was grounded in concerns that football ‘was “unsuitable” for women because it was too vigorous’.<sup>6</sup> Scholars argue, however, that it was rather motivated by the growing popular success earned by women football in the immediate aftermath of the First World War.<sup>7</sup> While we are currently assailed by a narrative depicting women football as ‘recently fashionable’<sup>8</sup>, it is important to keep in mind that women were (quite successfully in terms of popular appeal) playing organized football already more than a century ago and that without the intervention of the English FA, at a moment in which football’s future was still very much uncertain, it might even have become the dominant manifestation of this

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<sup>1</sup> I. M. Young, *On Female Body Experience: "Throwing Like a Girl" and Other Essays* (2005), at 31.

<sup>2</sup> *Ibid*, at 43.

<sup>3</sup> *Ibid*, at 42.

<sup>4</sup> Archer and Prange, ‘Equal play, equal pay’: moral grounds for equal pay in football’, 46 *Journal of the Philosophy of Sport* (2019) 416, at 432.

<sup>5</sup> The intricacies of the ban are discussed in Archer and Prange, *supra* note 4, at 427-428 and in J. Williams, *A Game for Rough Girls? A History of Women’s Football in Britain*<sup>[SEP]</sup> (2003), at 33-36.

<sup>6</sup> Williams and Hess, ‘Women, Football and History: International Perspectives’, 32 *The International Journal of the History of Sport* (2015) 2115, at 2117.

<sup>7</sup> *Ibid*, at 2116-2117.

<sup>8</sup> Criticizing the ‘absence of a public memory of a history of women’s football’, see Williams, *supra* note 6, at 183.

sport.<sup>9</sup> How we perceive the relationship between women and football is the result not of nature but of human decisions taken by those (mostly men) who are controlling the governing bodies of football.

Surely, the English FA stands out as the organization that has been most effective in nipping in the bud the women's game, but the Fédération Internationale de Football Association (FIFA) played as well an important part in ensuring that football remains perceived (at least outside of the United States) as primarily a male activity.<sup>10</sup> For example, in 2004, the then FIFA Executive Committee blocked the signing of a Mexican female player – Maribel Dominguez – at a professional Mexican club, stating 'there must be a clear separation between men's and women's football'.<sup>11</sup> In doing so, FIFA aims 'to differentiate not only women from men, but also femininity from masculinity'.<sup>12</sup> This separation is further hierarchized through the language adopted by FIFA, which presents the men's flagship international competition as the FIFA World Cup and the female one as the FIFA Women's World Cup.<sup>13</sup> The fact that FIFA has the capacity to define and assert the boundary between men and women in a particular social context must lead, in line with this symposium's ambition, to turning the feminist critical gaze towards FIFA's regulations and policies in order to contest its position as the transnational gatekeeper of a traditionally male imaginary of football. FIFA is formally a Swiss association only. Hence, in theory, it lacks the legal authority to bind anybody beyond its contractual members. And yet, it is widely portrayed in the transnational public sphere as the ruling authority of the game. FIFA's decisions condition the way the game is played, the way players and clubs contract, and the way the FIFA World Cup is organized and experienced by millions. This formally private transnational governance regime is, at least hypothetically, equally prone to gender bias and discrimination than states or

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<sup>9</sup> Making this point about the hampered development of women's football through the policies of football associations, see Archer and Prange, *supra* note 4, at 427-428.

<sup>10</sup> Driven by its member associations, as demonstrated by a FIFA survey conducted in 1970 of its (then) 139 members, from the 90 responses received only 12 favored endorsing the women's game, see Williams and Hess, *supra* note 6, at 2115.

<sup>11</sup> BBC, *Woman barred from men's football*, 19 December 2004, available at <http://news.bbc.co.uk/2/hi/americas/4110027.stm>.

<sup>12</sup> J Caudwell, 'Gender, feminism and football studies', 12 *Soccer & Society* (2011) 330, at 335.

<sup>13</sup> Pointing out this systematic differentiation and naturalization of the men's game through language, see Williams and Hess, *supra* note 6, at 2117.

international organizations. Nevertheless, as the first part of this paper will show, while feminist legal scholars have engaged in a relentless critique of international law, they have rarely directed their sights towards transnational private regulators such as FIFA. In this paper, I suggest to move the feminist legal critique beyond its traditional battlegrounds and highlight FIFA as a transnational governance site worth a fight for feminists. To illustrate this point, I will briefly chart in the second part of this paper football's transnational governance system and the central position occupied by FIFA within it. Explaining how FIFA, through a variety of administrative mechanisms, is able to initiate policies that define the way football is practiced around the globe and thus shapes our understanding of the gender divide. The final part of the paper will discuss the relevance of various feminist legal critiques in the context of FIFA's governance as well as the potential challenges they might face. The core purpose of this paper is not to advocate for specific feminist policies at FIFA, but to provide a convincing justification and a useful roadmap for concentrating feminist reformist or revolutionary energy towards FIFA.

### **1. Transnationalizing the Feminist Legal Critique**

Feminist legal scholarship has spread rapidly during the 80s and 90s, targeting first the perceived sexual and gender biases operating within the national legal context before turning its attention beyond the state to international law and governance.<sup>14</sup> The feminist movement prides itself of being on the critical side of legal studies, one that challenges established certitudes and doctrines. A core tenet of feminist legal theory is that there is something in 'the very structure or method of modern law which is hierarchically gendered'.<sup>15</sup> Thus, translated at the international level, a 'feminist analysis of international law involves searching for the silences of the discipline'.<sup>16</sup> However, in the extension beyond the state of this critical exploration, feminist legal theory rarely challenges the mostly unspoken law/non law distinction. In particular, as will be discussed in the first sub-section, its critical power has been mainly directed at classical

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<sup>14</sup> For a didactic ride through this journey see N. Levit and R. R. M. Verchick, *Feminist Legal Theory: A Primer* (2016).

<sup>15</sup> N. Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (1998), at 2.

<sup>16</sup> Charlesworth, 'Feminists Critiques of International Law and Their Critics', 13 *Third World Legal Studies* (1995) 1, at 1.

international legal targets: international human rights law, international humanitarian law and international criminal law. While undoubtedly relevant to the feminist agenda, this focus might overlook the emergence of transnational forms of law and governance less directly controlled by states but nonetheless crucial in shaping the lives (and positions) of men and women around the globe.

### ***A. From a Feminist Critique of International Law...***

In the early 90s, feminists started to ‘question the immunity of international law to feminist analysis’ and to denounce the fact that ‘the structures of international lawmaking and the content of the rules of international law privilege men’.<sup>17</sup> The time had come for ‘taking women seriously and describing the silences and fundamentally skewed nature of international law’ in order to ‘identify possibilities for change’.<sup>18</sup> Since Charlesworth, Chinkin and Wright’s pioneering article, the critical work of feminist legal scholars has become a well-known strand of international legal scholarship.<sup>19</sup> Yet, perhaps unsurprisingly, much of the scholarly production has mostly focused on ‘traditional areas of international law’.<sup>20</sup> Even before this foundational piece, feminists had already started to actively engage in shaping international human rights law.<sup>21</sup> One of the main objectives was to advance an interpretation of human rights that would ‘correspond to women’s experiences and needs’.<sup>22</sup> Hence, much of the early feminist critical and reformist energy devoted to international law went into challenging the substantial scope of international human rights and the operation of the public/private distinction defining their scope of application. This first phase of intense feminist activity at the international level was

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<sup>17</sup> Charlesworth, Chinkin and Wright, ‘Feminist Approaches to International Law’, 85 *AJIL* (1991) 613, at 614.

<sup>18</sup> *Ibid.*, at 615.

<sup>19</sup> For a recent *tour d’horizon* of the field see K. Ogg and S. Harris Rimmer (eds), *Research Handbook on Feminist Engagement with International Law* (2020).

<sup>20</sup> Charlesworth, Chinkin and Wright, *supra* note 17, at 643 [‘This paper emphasizes the need for further study of traditional areas of international law from a perspective that regards gender as important.’].

<sup>21</sup> Engle, ‘International Human Rights and Feminism: When Discourses Meet’, 13 *Mich. J. Int’l L.* (1992) 517.

<sup>22</sup> Charlesworth, Chinkin and Wright, *supra* note 17, at 638

followed by a turn towards international criminal law in the mid 90s.<sup>23</sup> This shift toward what would be later referred to as ‘carceral feminism’ was embodied by the intense feminist activity around the adoption of the Rome Statute of the International Criminal Court. Feminist legal scholars fought hard to ensure that certain crimes, which affect primarily women would be integrated in the statute.<sup>24</sup> Later on, the adoption of Resolution 1325 by the U.N. Security Council in October 2000 was widely perceived as a landmark breakthrough of the feminist international legal critique.<sup>25</sup> The resolution urged states and the U.N. Secretary General to increase representation of women in international institutions in the context of processes of conflict resolution and peacemaking and gave way to the ubiquitous practice of gender mainstreaming in international organizations. Furthermore, it called on the parties to armed conflict to take special measures to protect women and girls from gender-based violence and generally urged all parties to have due respect for the ‘special needs’ of women and girls. It has been portrayed as a new ‘entry into the "master's house"’<sup>26</sup> and as opening ‘new spaces for feminist efforts to realise the interdependent projects of peace and achieving women’s equality as fully human subjects of international law’.<sup>27</sup> Finally, feminists have, to a lesser extent, also subjected international economic law to their critical scrutiny.<sup>28</sup>

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<sup>23</sup> See Halley, ‘Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law’, 30 *Mich. J. Int’l L.* (2008) 1 and Grewal, ‘International Criminal Law as a Site for Enhancing Women’s Rights? Challenges, Possibilities, Strategies’, 23 *Fem Leg Stud* (2015) 149.

<sup>24</sup> Engle, ‘Feminist Governance and International Law: From Liberal to Carceral Feminism’, in J. Halley et al (eds) *Governance Feminism: Notes from the Field* (2019) 3.

<sup>25</sup> It was a ‘watershed’, see Otto, ‘The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade’, 10 *Melbourne Journal of International Law* (2009) 11, at 14.

<sup>26</sup> Otto, ‘A Sign of "Weakness"? Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325’, 13 *Mich. J. Gender & L.* (2006) 113, at 116.

<sup>27</sup> Otto, *supra* note 25, at 15. On Resolution 1325, see also O’Rourke, ‘Feminist Strategy in International Law: Understanding Its Legal, Normative and Political Dimensions’, 28 *EJIL* (2017) 1019, at 1041 [‘The value of international law as a site for the advancement of feminist politics is most developed in terms of the organizational platform that international law provides for feminists active in different jurisdictions and also in terms of the political resources it can yield in bringing international scrutiny to recalcitrant states.’].

<sup>28</sup> See Orford, ‘Contesting Globalization: A Feminist Perspective on the Future of Human Rights’, 8 *Transnat’l L & Contemp Probs* (1998) 171 and Pahuja, ‘Trading Spaces: Locating Sites for Challenge within International Trade Law’, 14 *Austl Feminist LJ* (2000) 38. More recently, see Ruiz Fabri, ‘Understanding International Economic Law in Unsettling Times: A Feminist Approach’, 20 *Journal of World Investment & Trade* (2019) 3.

To sum up, the feminist approach to international law spread quickly and consolidated rapidly as a ‘flourishing discourse within the discipline of international law’.<sup>29</sup> Already in 2001, Alvarez could conclude in his review of Charlesworth and Chinkin’s book *The Boundaries of International Law: A Feminist Analysis* that ‘the decade-old feminist critique of international law [...] now seems neither particularly radical nor impracticable’.<sup>30</sup> This rather optimist view is less prevalent today, as a fair amount of skepticism towards the actual transformative effects of the feminist turn in international law predominates. Furthermore, and more importantly for our purposes, in spite of the critical heredity of feminist legal scholars, their work tends to endorse the dominant understanding of (international) law as a byproduct of the state(s). Consequently, attention has been devoted almost exclusively to public international law and even more specifically to matters related to international criminal law.<sup>31</sup> This concentration on international law might be at odds with the growing normative, and for some lawmaking, power and capacity of some private actors in the transnational sphere.

### ***B. ...to a Feminist Critique of Transnational law***

Feminist legal scholars are extremely conscious of the contingent, even to some extent arbitrary, nature of the public-private distinction. Much of their work is devoted to denouncing its arbitrariness and to highlighting its artificiality. Yet, when expanding the feminist critique beyond the state, only few have contested the traditional understanding of what counts as law. In this regard, a traditional interpretation of the public/private distinction seems to hold, as primarily international organizations and international law were deemed legitimate targets of the transposition of the feminist legal critique beyond the state. This leaves many formally private transnational organizations and their lawmaking practices off the critical hook. Arguably, such an ‘approach fails to recognize the important components of economic policymaking, both domestic and international,

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<sup>29</sup> Kouvo and Pearson, ‘Introduction’, in Z. Pearson and S. Kouvo (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (2011) 1, at 1.

<sup>30</sup> Alvarez, ‘Review: The Boundaries of International Law: A Feminist Analysis by Hilary Charlesworth and Christine Chinkin’, 95 *AJIL* (2001) 459, at 461.

<sup>31</sup> This is evidenced empirically in Ogg and Harris Rimmer, ‘Introduction’, in K. Ogg and S. Harris Rimmer (eds), *Research Handbook on Feminist Engagement with International Law* (2020) 1, at 12.

that are no longer (solely) in the hands of state processes'.<sup>32</sup> The rise of private authorities and regulations and the increasing role they play in constituting practices that shape our behavior has been widely documented.<sup>33</sup> For example, a private code of conduct might affect the rights and obligations of (female) workers along the entire supply chain of a garment company much more intensely than national labor laws or ILO Conventions. Similarly, the private standards produced by a standard-setting body, such as Fairtrade International, might have fundamental effects on women engaging in farming around the world. Likewise, policies put in place by Facebook to regulate speech on its social media platforms will have consequences on the way in which women are portrayed or can express themselves in the digital public sphere. All these examples are illustrating the need to direct feminist critical energy and attention towards (formally) private institutions of transnational governance. Indeed, if state-based law is in some domains superseded by (or at least assembled to) transnational legal regimes administered by private associations or corporations, it seems essential that these governance sites do not become a blind spot for feminist critique and hidden places of unchallenged male domination.

In doing so, feminists can rely on the ethos of their critical approach to law, which 'mounts a fundamental challenge to the standard ways of conceptualizing law and the legal, and moves to a broader understanding of legally relevant spheres of practice',<sup>34</sup> in order to look farther than the traditional understanding of what qualifies as law beyond the confines of the state. In this regard, Sassen has been an intellectual trailblazer. In an article dating back to 1996, she asserted that the 'particular form that the feminist critique of international law is taking has the effect of avoiding the question of sovereignty, and the implications of its unbundling for the emergence of new actors in cross-border

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<sup>32</sup> Condon and Philipps, 'Transnational Market Governance and Economic Citizenship: New Frontiers for Feminist Legal Theory', 28 *Thomas Jefferson Law Review* (2005) 105, at 111.

<sup>33</sup> See amongst a fast-growing literature: G. Teubner, *Global Law Without a State* (1997); C. Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (2003); P. Zumbansen and G-P. Calliess, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (2010); C. Scott, F. Cafaggi and L. Senden (eds), *The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates* (2011).

<sup>34</sup> Lacey, *supra* note 15, at 9.

relations and as subjects of international law'.<sup>35</sup> She believed instead that a feminist critique of sovereignty 'matters because globalization is creating new operational and formal openings for the participation of non-State actors and subjects'.<sup>36</sup> Therefore, women ought to work 'outside the State, through non-State groups and networks'.<sup>37</sup> Her call for feminists to take seriously the unbundling of state sovereignty and the emergence of transnational legal regimes in which private actors play a considerable role resonates with this paper.

For some, globalization also poses 'important challenges to feminists by eroding the power of government and, by extension, the power of law'.<sup>38</sup> But it might be less the power of law or government that is being eroded, rather than the state as primary site of expression for these powers. Hence, the quite paradoxical feeling that 'just as women are beginning to demand and exercise political power, politics is coming to be seen as irrelevant and impotent'.<sup>39</sup> In responding to these developments, the feminist legal critique ought to 'search out at the supranational level the informal instruments and quasi-public institutions that are shaping economic law'.<sup>40</sup> While the few authors that have advocated such a shift had mostly corporations and the regulation of transnational markets in mind, this paper aims to show that it also holds beyond the economic sphere in the sporting context. This is a sphere of life in which private associations, like FIFA, play a fundamental governance function at the transnational level.

## **2. FIFA as Transnational Governance Site**

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<sup>35</sup> Sassen, 'Toward a Feminist Analytics of the Global Economy', 4 *Indiana Journal of Global Legal Studies* (1996) 7, at 30.

<sup>36</sup> *Ibid.*, at 31.

<sup>37</sup> *Ibid.*

<sup>38</sup> Levit and Verchick, *supra* note 14, at 225.

<sup>39</sup> Williams, 'Globalization, Privatization, and a Feminist Public', 4 *Indiana Journal of Global Legal Studies* (1996) 97, at 99.

<sup>40</sup> Condon and Philipps, *supra* note 32, at 150.

FIFA is an organization on which, despite its widespread public visibility, relatively little legal, and more broadly social science, scholarship has been produced.<sup>41</sup> Yet, it constitutes arguably a paradigmatic example for the emergence of a private body claiming transnational authority over a particular dimension of social life. In practice, FIFA has become the transnational government of football, which devises policies, resolves disputes and distributes resources. These governance functions are translated through a set of rules (that we will call FIFA law) applied by an array of administrative actors. In other words, it plays a crucial role in constituting the game of football and regulating the way we experience it.

### ***A. FIFA: The Transnational Government of Football***

Created in 1904, FIFA is the global custodian of football. The institution organizes Football's international main event – the FIFA World Cup – and governs from its headquarters in Zurich the way football is experienced and practiced around the globe. In order to do so, it is endowed with the power ‘to draw up regulations and provisions governing the game of football and related matters and to ensure their enforcement’.<sup>42</sup> In principle, FIFA remains a Swiss association registered with the commercial register of the Canton of Zurich, and which employs 800 persons (of which 40% are women).<sup>43</sup> The organization is composed of 211 member associations, which are meeting on a yearly basis during the FIFA Congress, ‘the supreme and legislative body’ of FIFA. The Congress elects every four years a FIFA President, who is heading FIFA's administration. The President is flanked by the FIFA Council, the strategic and oversight body composed of 37 members that disposes of relatively wide competences, ranging from the adoption of FIFA

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<sup>41</sup> Notable exceptions include: Meier and Garcia, ‘Protecting Private Transnational Authority against Public Intervention: FIFA's Power over National Governments’, 93 *Public Admin* (2015) 890; A. Tomlinson, *FIFA (Fédération Internationale de Football Association)* [SEP] *The Men, the Myths and the Money* (2014); Mark Pieth (ed.) *Reforming FIFA* (2014); Tomlinson, ‘The supreme leader sails on: leadership, ethics and governance in FIFA’, 17 *Sport in Society* (2014) 1155; Pielke, ‘How can FIFA be held accountable?’, 16 *Sport Management Review* (2013) 255.

<sup>42</sup> Article 2(c) FIFA Statutes 2019 (if not specified otherwise references to the FIFA Statutes refer to the 2019 edition).

<sup>43</sup> FIFA, *Who We Are*, available at <https://www.fifa.com/about-fifa/who-we-are/home-of-fifa/careers/>.

regulations to key appointments in FIFA's administrative structure.<sup>44</sup> Standing committees entrusted each with specific missions and powers complement the governance infrastructure of the organization.<sup>45</sup> FIFA's income, mainly (75%) constituted of revenue derived from the licensing of the broadcasting rights for the FIFA World Cup and various commercial licensing agreements, reached 4,641 (USD million) in 2018 and 6,421 (USD million) over the 2015-2018 cycle.<sup>46</sup> FIFA uses these resources to consolidate its administrative capacity, finance the organization of its events and fund a variety of development projects linked to football. In particular, it provides funding through its FIFA Forward Programme to support local projects set-up by its national members. It is thus a well-funded institution with considerable resources providing what has been framed as an 'international public service'.<sup>47</sup> However, as recent scandals have shown, FIFA officials have also been diverting a substantial share of this considerable income for their personal profit.<sup>48</sup>

Under the guise of a simple Swiss association, constituted like a local chess club, lies a powerful private institution capable of imposing its will on states.<sup>49</sup> Indeed, FIFA claims a right to protect its autonomy, and the autonomy of its members, in governing football. Thus, it has in the past shown its readiness to threaten national federations with an exclusion, which would lead to the inability of the national team (and clubs) to engage in international or regional football, in order to discourage states from intervening in the operations of their national federations. Similarly, FIFA has also relied on the wide powers conferred by Swiss private law to associations in order to sanction individuals who violate its rules by excluding them temporarily or permanently from the world of football.<sup>50</sup> This is possible because thanks to a governance system grounded in a network

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<sup>44</sup> Article 34 FIFA Statutes.

<sup>45</sup> Article 39 et seq FIFA Statutes.

<sup>46</sup> FIFA Financial Report 2018.

<sup>47</sup> Latty, 'La gestion internationale du football, un service public international ?', in M. Touzeil-Divina and M. Maisonnette (eds), *Droit(s) du football* (2014) 21.

<sup>48</sup> Gill, Adelus and de Abreu Duarte, 'Whose Game? FIFA, Corruption and the Challenge of Global Governance', 30 *EJIL* (2019) 1041.

<sup>49</sup> See Meier and Garcia, *supra* note 41 and Jerabek, Maxwell Ferreira de Andrade and Figueroa, 'FIFA's Hegemony: Examples from World Cup Hosting Countries', 31 *Global Society* (2017) 417.

<sup>50</sup> See for examples the decisions of the Disciplinary Committee available on FIFA's website at <https://www.fifa.com/about-fifa/who-we-are/legal/judicial-bodies/disciplinary-committee/decisions/>.

of private contracts, FIFA can issue sanctions against members of national associations, which are then enforced by the local associations through their control over access to a license or the premises of the clubs.

For the purpose of this article, it is important to understand that FIFA is conceiving of its role as a governmental one. It sees its decisions as grounded in a form of democratic legitimacy embodied by the representation of each one of its member associations at the FIFA Congress.<sup>51</sup> It has, on this basis, developed an ensemble of rules and regulations that others have referred to as '*lex FIFA*'<sup>52</sup>.

### ***B. FIFA Law: the Transnational Law of Football***

FIFA's administrative capacity is translated into an ensemble of regulations, the *lex FIFA* or FIFA law, tackling different aspects of football activity. The production of these regulations is governed by 'secondary rules' enshrined in the FIFA Statutes (and in the FIFA Governance Regulations), which allocate legislative competences to the various FIFA organs. FIFA's primary rules cover different topics, which can be divided for analytical purposes into the following (non-exhaustive) categories:

- The laws of the game;
- The rules governing the organization of FIFA competitions;
- The disciplinary and ethics rules;
- The economic rules governing the transnational movement of players;

The practice of football, like any game, is defined by rules.<sup>53</sup> One of the *raison d'être* of FIFA is to guarantee that the rules of the game be identical worldwide in order to enable international competitions. Yet, it is not directly FIFA that defines those rules but a separate entity, the International Football Association Board (IFAB), composed of five

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<sup>51</sup> For a critical take on this 'democratic legitimacy', see Freeburn, 'The fiction of democracy in FIFA's governance of football and the case of Football Federation Australia' 19 *Int Sports Law J* (2019) 184.

<sup>52</sup> Latty, 'La Lex FIFA', in M. Maisonneuve (ed.) *Droit et Coupe du Monde* (2011) 9.

<sup>53</sup> On the intimate relation between law and game, see Ost and van de Kerchove, 'Le jeu un paradigme fécond pour la théorie du droit?', *Droit et société* (1991) 161.

members: FIFA, and the football associations of England (FA), Scotland (SFA), Northern Ireland (IFA) and Wales (FAW). The rules adopted by the IFAB are then endorsed by FIFA and imposed throughout the entire football pyramid. Interestingly, very few women (currently one out of five members of the board of directors and three out of thirty members of the technical committees) are represented at the executive and technical level in the IFAB.<sup>54</sup>

Furthermore, FIFA's original purpose, beyond stabilizing the laws of the game, was to organize international competitions in which national teams could meet. Thus, it has over the years developed a range of international competitions, the most famous and economically successful of which is the FIFA Men's World Cup. To do so, it has developed a network of regulations aimed at streamlining the organization process and implementation of these competitions. Alongside competition-specific regulations governing specific FIFA events,<sup>55</sup> it introduced the Regulations Governing International Matches. While the former are defining a wide range of rules related to the individual competitions organized by FIFA, the latter are imposing procedural conditions to be respected in order to organize international games between national teams or clubs from different FIFA members. Furthermore, FIFA has also regulated the procurement process for the allocation of the organization of FIFA competitions to its national members associations through a detailed set of conditions for applicants interested in hosting the FIFA Men's World Cup or any other of its competitions.<sup>56</sup> This conditionality entails binding commitments for the national governments hosting the World Cup related to tax law, migration law and intellectual property rules. Thus, the regulatory reach of FIFA's procurement rules extends beyond the national association concerned, the formal applicant, to comprise transformative alterations to the national regulatory environment of the future host country. The higher the demand to host the FIFA Men's World Cup, the greater the capacity of FIFA to push for certain changes in the future host country.

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<sup>54</sup> See the IFAB's website, available at <https://www.theifab.com/>.

<sup>55</sup> See the FIFA Regulations<sup>[1]</sup> FIFA World Cup 2022, available at <https://resources.fifa.com/image/upload/regulations-fifa-world-cup-2022tm-preliminary-competition.pdf?cloudid=r6gcejmanhw27gzaa9xb>.

<sup>56</sup> See the FIFA Regulations for the Selection of the Venue for the Final Competition of the 2026 FIFA World CupTM, available at <https://img.fifa.com/image/upload/stwvxqphxp3o96jxwqor.pdf>.

FIFA has also developed a comprehensive corpus of disciplinary rules with on one side the FIFA Disciplinary Code (FIFA DC) and on the other the FIFA Code of Ethics (FIFA CoE). The FIFA DC ‘describes infringements of the rules in FIFA regulations, determines the sanctions incurred, regulates the organization and function of the FIFA judicial bodies responsible for taking decisions and the procedures to be followed’.<sup>57</sup> The FIFA DC constitutes the core ‘criminal law’ of FIFA, it applies not only to FIFA’s members but to all the main actors involved in organized football.<sup>58</sup> It can lead to a wide range of sanctions, including a temporary or permanent ban on taking part in any football-related activities.<sup>59</sup> The FIFA DC sanctions a wide range of behavior, including a provision sanctioning discrimination.<sup>60</sup> It is enforced by the FIFA Disciplinary Committee, which ‘prosecutes’ the cases and adjudicates them with the support of the FIFA Secretariat. The FIFA CoE imposes a similar range of sanctions than the FIFA DC, but for a different set of conducts by individuals. It is primarily enforced by the Ethics Committee,<sup>61</sup> which for this purpose is divided into an investigatory and adjudicatory chamber. The Disciplinary Committee and the Ethics Committee dealt respectively with 269 cases (and opened 975 investigations) and 16 cases (and 29 investigations) in 2018.<sup>62</sup> This amounts to the functional equivalent to a criminal system of international football, comprising investigators, prosecutors and judges, and which is in a position to effectively ban someone from organized football forever.

Finally, FIFA has also developed rules to regulate the movement of players across borders and the activity of intermediaries on the transfer market.<sup>63</sup> The FIFA Regulations on the Status and Transfer of Players (RSTP) determine the conditions under which a player can move from a club located in one federation to another club located in a different one. In

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<sup>57</sup> Article 1 FIFA Disciplinary Code 2019 (if not specified otherwise references to the FIFA Disciplinary Code refer to the 2019 edition).

<sup>58</sup> Article 3 FIFA Disciplinary Code

<sup>59</sup> Article 6 FIFA Disciplinary Code.

<sup>60</sup> Article 13 FIFA Disciplinary Code.

<sup>61</sup> Article 30 FIFA Code of Ethics 2018 (if not specified otherwise references to the FIFA Code of Ethics refer to the 2018 edition).

<sup>62</sup> FIFA Governance Report 2018, available at <https://resources.fifa.com/image/upload/fifa-governance-report-2018.pdf?cloudid=yrsjcy9fza7xy02pl436>, at 52-53.

<sup>63</sup> See the FIFA Regulations on the Statute and Transfer of Players and FIFA Intermediaries Regulations.

effect, it imposes a set of transnational labor rules applicable only to football players. These rules affect the balance of power between players and clubs and allow for the creation of a transfer market on which the player's license becomes a tradable asset. This market led to the proliferation of intermediaries, or players' agents, charged with the commercial negotiations between the various parties to a particular transfer. Therefore, FIFA has also attempted to regulate the exercise of this profession. The FIFA administration reviews all the international transfers of both male and female players, 18,042 male and 831 female transfers in 2019, and checks their compliance with the FIFA RSTP. Furthermore, players or clubs may bring a complaint to FIFA against another party if she fails to comply with the provisions of the FIFA RSTP.

In short, the way we experience football is largely a byproduct of the way in which FIFA regulates it. Its decisions define to a large extent how football is practiced across the globe, the life and work of professional football players and clubs, and organization of the biggest shared social moment on earth: the FIFA Men's World Cup. Unquestionably, FIFA is taking decisions with distributive and behavioral effects affecting the position of women in football (and beyond). This regulatory – even governmental– role played by FIFA calls for a sustained engagement with FIFA's governance and its subjection to the stringent scrutiny of the feminist legal critique.

### **3. Opportunities and Pitfalls in Transposing the Feminist Legal Critique to FIFA**

The previous section presented FIFA as a powerful governance institution, which shapes through its own laws the world of football. In particular, FIFA determines the opportunities women get as a player, coach, referee or fan. While feminist legal scholars have, as discussed in the first part of this paper, mounted a strong critical challenge to national and international law, they have rarely pushed their critique beyond the (inter-)state. Nevertheless, beneath its official pedigree as a private association, FIFA is unmistakably exercising transnational authority with considerable consequences for women. This justifies turning the feminist critique towards transnational private governance in sports and beyond. This final part of the paper aims at transposing some

lines of feminist legal critique to the context of FIFA's law and governance. As in other contexts, I will also argue that these critiques run the risk of being coopted by FIFA or of turning primarily into a form of 'disciplinary feminism' directed from the center towards the oriental margins.

### ***A. FIFA as a Target of Feminist Legal Critique***

Three different strands of traditional feminist legal critique come to mind when looking at FIFA. The first one, inspired by the liberal tradition looks at formal equality, especially in the distribution of economic resources. The second one is focused on the representation of women inside FIFA's administration and executive bodies. Finally, the third one challenges the public/private distinction adopted by FIFA.

#### *1. 'Leveling the Playing Field for Women and Girls'<sup>64</sup>*

In October 2015, the FIFA Task Force for Women Football published its submission to the Chair of FIFA's Reform Committee. The members of the task force claimed that the reform process was 'the opportunity to correct what is perhaps the most profound, long-standing and systemic injustice in sport— the exclusion of women and girls from the world's most popular game, football'.<sup>65</sup> As illustrated by this strong statement, equal access to football has been at the core of the existing demands voiced by women towards FIFA. These demands are grounded in a feminist critique of FIFA rooted in the idea of equality of male and female football citizens. Its core tenet is that women should have the same opportunities as men, based on the same rights and duties. In other words, women in football have to be provided the same opportunities, rights and obligations than men. Any unequal access to resources, positions or divergence in formal rights is unacceptable. Consequently, no difference of treatment should be tolerated between the female and

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<sup>64</sup> UN Women Executive Director Phumzile Mlambo-Ngcuka as quoted in FIFA and UN Women sign first-ever memorandum of understanding, available at <https://www.fifa.com/womens-football/news/fifa-and-un-women-sign-first-ever-memorandum-of-understanding>.

<sup>65</sup> FIFA, football and women: why reform must specify inclusion and investment, Submission to Mr Francois Carrard, Chair of FIFA Reform Committee October 2015, available at <https://img.fifa.com/image/upload/i2berd89n7syxdjl5fhq.pdf>, at 1.

male members of the ‘football family’. Nowadays, unlike during most of the past century, women have the (almost) universal right to practice organized football (i.e. get a license from an association affiliated to FIFA) worldwide.<sup>66</sup> Where there are still striking differences between male and female football, however, is at the level of the means allocated by FIFA to each.

In practice, there is currently a wide gap in FIFA’s treatment of men and women football. As pointed out by the Task Force, ‘gender discrimination has been systematically and institutionally practiced by football’s own governing bodies, including through bans and institutional neglect, over many decades’.<sup>67</sup> More precisely, for the Task Force the ‘most evident hallmark of the women’s game is its systematic under-resourcing throughout the world’.<sup>68</sup> FIFA’s lopsided allocation of its considerable wealth is reflected in its financial report for 2018. For the last FIFA Women’s World Cup for which data has been published, the Canada 2015 World Cup, FIFA spent 82 USD million. This number pales in comparison to the 1,824 USD million spent on the Russia 2018 Men’s World Cup.<sup>69</sup> Similarly, FIFA provides much smaller financial rewards to the female teams participating in the World Cup than to their male counterparts.<sup>70</sup> Finally, the limited amount of funding invested by FIFA to develop women football is dwarfed by the funds devoted to the FIFA Forward Programme, which does not identify clearly the destination of the resources.<sup>71</sup> While FIFA’s own Women’s Football Strategy recognizes that ‘[y]ears of institutional neglect and a lack of investment have prevented girls and women from playing the game and from assuming roles in technical, administrative and governance functions’,<sup>72</sup> its current commitments in terms of additional resources directed towards fostering women’s football remain quite modest. Hence, FIFA’s continuous discriminatory allocation of its economic resources is likely to remain at the core of a

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<sup>66</sup> However, only 73% of FIFA’s Member Associations have an active senior women team, see FIFA, Women’s Football Member Associations Survey Report 2019, available at <https://img.fifa.com/image/upload/nq3ensohyxpuxovcovj0.pdf>, at 10.

<sup>67</sup> FIFA Task Force for Women Football, *supra* note 65, at 3.

<sup>68</sup> *Ibid.*, at 2.

<sup>69</sup> FIFA Financial Report 2018, at 29.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> FIFA Women’s Football Strategy.

feminist critique of FIFA in the years to come.<sup>73</sup> Such a critique would not so much challenge the economic model of FIFA, but instead insist that a much bigger share of FIFA's revenue be redirected towards the support of women football.<sup>74</sup>

## 2. *Feminizing FIFA Governance*

Another "principal goal" of liberal feminist critique, but also of difference feminism, 'is to increase the participation of women at all levels of existing political and economic structures'.<sup>75</sup> This could also be framed as the issue of the 'invisibility of women'<sup>76</sup> inside FIFA and its affiliates. Here one can easily transpose to FIFA's administration and disciplinary bodies the criticism waged against international organizations, described as 'restricting women to insignificant and subordinate roles',<sup>77</sup> and towards the gender imbalance of international courts.<sup>78</sup> Such '[l]ong-term domination of all bodies wielding political power nationally and internationally means that issues traditionally of concern to men become seen as general human concerns, while "women's concerns" are relegated to a special, limited category'.<sup>79</sup> In other words, 'if [FIFA] law is a "human artifact", is it not relevant that its makers are almost invariably men?'<sup>80</sup> In fact, male administrators have squatted the core executive positions at FIFA since its creation while women have been 'marginal participants'<sup>81</sup> (the exception to the rule being the current FIFA Secretary General, Fatma Samoura).<sup>82</sup> It is thus unsurprising that the words of the FIFA Task Force

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<sup>73</sup> See the article by Katharina Stein in the present symposium.

<sup>74</sup> See Archer and Prange, *supra* note 4.

<sup>75</sup> Wright, 'Women and the Global Economic Order: A Feminist Perspective', 10 *American University International Law Review* (1995) 861, at 885.

<sup>76</sup> Charlesworth, Chinkin and Wright, *supra* note 17, at 621.

<sup>77</sup> *Ibid.*, at 622.

<sup>78</sup> Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?', 12 *Chicago Journal of International Law* (2012) 647.

<sup>79</sup> Charlesworth, Chinkin and Wright, *supra* note 17, at 625.

<sup>80</sup> Charlesworth, 'Feminist Methods in International Law', 93 *AJIL* (1999) 379, at 392.

<sup>81</sup> Charlesworth, *supra* note 17, at 13.

<sup>82</sup> This is characteristic of the broader Olympic Movement, see Lenskyj, 'The Olympic Industry and Women: An Alternative Perspective', in H.J. Lenskyj et al. (eds.), *The Palgrave Handbook of Olympic Studies* (2012) 430, at 430 ['Throughout the 20th century, control of the sporting program and media coverage has been, for the most part, in male hands, with the International Olympic Committee (IOC), international sports federations, national Olympic committees, top Olympic sponsors and Olympic media networks controlled by men with extraordinary power and privilege.']. See also L. Schoch and J. Clausen, 'Women Within International Sports Federations: Contemporary Challenges', in G. Cervin and C. Nicolas (eds) *Histories of*

in its report to the FIFA Reform Committee resonate with the conclusions reached by feminists with regard to international organizations: 'Too few decision-makers in football appreciate the nature and scale of the issue, because the sufferers are barely present to voice it or challenge the existing assumptions'.<sup>83</sup> The landscape painted by the Task Force with regard to the participation of women in the governance of football was dire:

- Women comprise only 8% of ExCo members globally. At Confederation level, only 8 women hold ExCo positions, and some Confederations have none. Within FIFA itself, there are 3 women out of 26 ExCo members; the Standing Committees contain hardly any women (outside the women's football committees) and only one Director is female. Globally, just 2 of 209 MA Presidents are women - less than 1% of the voting population in FIFA Congress - and in the majority of Confederations there are none at all.<sup>84</sup>

Consequently, the Task Force 'respectfully requested to recommend an immediate 20% presence of women on the FIFA Executive Committee, to be mirrored within a reasonable time at all levels (Confederations, MAs, clubs, etc) with a longer-term target of 30% gender balance'.<sup>85</sup> This recommendation was partially reflected in the reforms adopted by the FIFA Congress in 2016, as Article 30 of the FIFA Statutes was amended to include a provision providing:

- The members of each confederation must ensure that they elect at least one female member to the Council. In the event that no female candidate is elected by the members of a confederation for the Council, the seat reserved for a female member of such confederation will be deemed forfeited by all members of such

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*Women's Work in Global Sport: A Man's World?* (2019) and A. Elling, J. Hovden, A. Knoppers (eds.) *Gender Diversity in European Sport Governance* (2019) 299. For a study of the skewed gender distribution on boards of national sport organisations, see J. Adriaanse, 'Gender Diversity in the Governance of Sport Associations: The Sydney Scoreboard Global Index of Participation', 137 *J Bus Ethics* (2016) 149.

<sup>83</sup> FIFA, football and women: why reform must specify inclusion and investment: Submission to Mr Francois Carrard, Chair of FIFA Reform Committee October 2015, p. 1.

<sup>84</sup> *Ibid.* For more recent statistics on the presence of women in football governance see P. Boniface and Carole Gomez, *Quand le football s'accorde au féminin* (2019).

<sup>85</sup> *Ibid.*, p. 4.

confederation and shall remain vacant until the next election of members of the Council.

Currently, the FIFA Council is still composed of an overwhelming majority of men (31 out of 37 members), with the confederations having elected the 6 mandatory female candidates only (none of the six occupies a position of vice president). Furthermore, FIFA did not impose any specific duty onto its member associations to achieve a certain threshold of female representation inside their executive bodies. In fact, the weak female representation inside the executive bodies of FIFA contributed to gender discrimination being recognized by John Ruggie as an 'endemic human rights challenge'<sup>86</sup> for FIFA. Even FIFA's own Women's Football Strategy recognized that 'long-standing lack of women in positions of responsibility in the football community means there have been limited voices to advocate for change'.<sup>87</sup> To respond to this lack it proposes to 'develop leadership training platforms designed to attract women to the upper ranks of the football industry'<sup>88</sup> and aims to attain the following goals in terms of participation of women in decision-making governance bodies:

- 100% of FIFA member associations to have at least one woman present on their executive committee by 2026.
- By 2022, at least one third of FIFA committee members will be women.
- Every member association will dedicate at least one seat on its executive committee to representing the interests of women in football and women's football.

Whether these objectives will be met and are suitable to attain the broader aim of an increase in the participation of women inside FIFA is an open question. Research has shown for example that the introduction of gender quotas by itself is insufficient to

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<sup>86</sup> J. Ruggie, "For the Game. For the World:" *FIFA and Human Rights*, Corporate Responsibility Initiative Report No. 68. (2016), at 24.

<sup>87</sup> FIFA Women's Football Strategy, available at <https://resources.fifa.com/image/upload/women-s-football-strategy.pdf?cloudid=z7w21ghir8jb9tguvbcq>, at 4.

<sup>88</sup> *Ibid.*, p.8.

guarantee gender equality in governance.<sup>89</sup> Thus, it is to be expected that feminists will continue to challenge the legitimacy of FIFA due to the lagging representation of women at the administrative and political level.

### 3. *Challenging FIFA's Private/public Distinction*

Beyond the issues of equality and representation, one could also engage in a deconstruction of FIFA's own private/public distinction. Feminists have a long history of criticizing the way the public/private divide is drawn and its gendered effects in relegating certain practices outside of the public purview.<sup>90</sup> The core point of this critique is to give "a broader conception of the political and a sense of the questions we have to confront".<sup>91</sup> This critique was transposed to the domain of international law, with a particular focus on human rights and the limited state responsibility for "private" human rights violations.<sup>92</sup> In other words, 'a feminist perspective on human rights would require a rethinking of the notions of imputability and state responsibility and in this sense would challenge the most basic assumptions of international law'.<sup>93</sup> Is a similar critique of use in the FIFA context?

In its daily work FIFA operates with a public/private distinction, as it regulates only what it considers as matters of public interest for the good of the game. Relevant "public" issues in the eyes of FIFA include, for example, match-fixing, corruption, aggressive behavior on the pitch, the transnational movement of players and the work of players' intermediaries. That is why some have argued that FIFA is in fact delivering a sort of transnational *service public*. It is this border drawing between public and private, which can be subjected, like in the national or international context, to a feminist review. For example, one could imagine a feminist analysis of FIFA's "criminal law" (e.g. the FIFA Disciplinary Code and

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<sup>89</sup> Adriaanse and Schofield, 'The Impact of Gender Quotas on Gender Equality in Sport Governance', 28 *Journal of Sport Management* (2014) 485.

<sup>90</sup> See Buss, 'Going Global: Feminist Theory, International Law, and the Public/Private Divide', in S. B. Boyd (ed.) *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (1997) 360.

<sup>91</sup> Lacey, *supra* note 15, at 97.

<sup>92</sup> Charlesworth, Chinkin and Wright, *supra* note 17, at 625-629. See also Chinkin, 'A Critique of the Public/Private Dimension', 10 *EJIL* (1999) 387.

<sup>93</sup> *Ibid.*, 629. See also, Buss, *supra* note 90.

Code of Ethics) that would focus on the types of behavior that FIFA deems deserving of a sanction. Similarly, one could scrutinize the FIFA RSTP from a feminist perspective by looking at the economic practices it regulates and the types of protection it offers to players and clubs. Finally, with regard to the organization of its events, FIFA determines the issues that form part of the bidding process and the requirements included in its hosting agreements. The matters that are public in FIFA's eyes are benchmarked by the organization and it imposes specific requirements to be met by the candidates (and their home countries), while others remain private in the sense that they are not subjected to FIFA's control. In this context as well, showing the contingent nature of the (largely invisible) operation of FIFA's public/private distinction would open a space for feminist questioning and reform. In fact, FIFA has recently been urged by FIFPro to introduce "stronger protocols" in order to "fix the gaps... related to sexual abuse and harrasment".<sup>94</sup>

***B. Cautionary Tales of Feminist Legal Critique: Navigating the Scylla of Co-option and the Charybdis of Imperialism***

Feminism is a strong critical tradition of thought, including self-critical. This section reviews the relevance of the difficulties faced by feminist approaches to international law for the FIFA context. It does so by discussing first the risk of feminists being 'turned' by FIFA and integrated institutionally in order to maintain or reinforce the status quo in football governance. Second, it examines the potential emergence of an imperialist FIFA feminism that would be disciplining the periphery with little regard for local contexts and structural root causes.

***1. 'The Master's Tools Will Never Dismantle the Master's House'<sup>95</sup>: FIFA and Lorde's Prophecy of Feminist Impotence***

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<sup>94</sup> The Telegraph, *Fifpro demand 'systemic review' of existing sexual harassment and abuse protocols*, 15 July 2020, available at <https://www.telegraph.co.uk/football/2020/07/15/fifpro-demand-systemic-review-existing-sexual-harassment-abuse/>.

<sup>95</sup> Lorde, 'The Master's Tools Will Never Dismantle the Master's House', in A. Lorde, *1984. Sister Outsider: Essays and Speeches* (2007) 110-114.

*If we were to think of law and theories of law as a species of game of whose structure and substance we are critical, we could think about the debate about feminist jurisprudence as torn between the options of trying to get into the team to have a better chance of changing the structure of the game or of engaging in strategic rule-breaking; of simply withdrawing to create and play a different game altogether; of watching on the sidelines and allowing ourselves the luxury of throwing the occasional rotten tomato from a safe distance; or some combination of these three.<sup>96</sup>*

Lorde's metaphor looms large in the feminist literature as a warning for those that believe exclusively in achieving feminist change from within the institutions they target.<sup>97</sup> Lacey expresses in a more diplomatic way a similar skepticism, by highlighting the strategic tension between getting into the team and playing a different game or throwing rotten tomatoes from the sidelines. Feminists, when they decide to play the game, are at risk of facing Otto's paradox: the 'exile of inclusion'.<sup>98</sup> In other words, 'emancipatory agendas can be turned to the service of global regimes of power by deploying gender as a biological category and reducing its transformative vision to a set of bureaucratic techniques and measurements'.<sup>99</sup> The danger being that 'the category of gender can be used for purposes that are antithetical to feminism; to legitimate the hierarchies and inequalities of the global order, rather than disrupt them'.<sup>100</sup> The difficult question is then 'how to continue to inject progressive politics into (originally) feminist ideas, once they have been turned to the service of the international institutions that have embraced them'.<sup>101</sup> This is a story

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<sup>96</sup> Lacey, *supra* note 15, at 185.

<sup>97</sup> For different skeptical takes on the transformative impact of gender mainstreaming in international law and organizations, see Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' 18 *Harvard Human Rights Journal* (2005) 1, at 14; Otto, *supra* note 25, at 3 [Stripped of its political content, the gender mainstreaming project is a long way from fundamentally challenging women's inequality, let alone the gendered assumptions that underpin the discipline of international law.]; Prügl, 'International Institutions and Feminist Politics', 10 *The Brown Journal of World Affairs* (2004) 69, at 69 ['Are feminist movement actors, including NGOs, academics, and femocrats (feminists in bureaucracies working to advance the cause of women), really influencing global governance or are they being co-opted, ensnared in the hegemonic language of international institutions, moderated in a politics of compromise, and marginalized?']

<sup>98</sup> Otto, *supra* note 25.

<sup>99</sup> Otto, *supra* note 26, at 173.

<sup>100</sup> *Ibid.*

<sup>101</sup> Otto, 'Power and Danger: Feminist Engagement with International Law through the UN Security Council', 32 *The Australian Feminist Law Journal* (2010) 97, at 99.

of pyrrhic victories looking like transformative achievements, which are actually buttressing the status quo. Such a pessimistic take on the effectiveness of the change achieved is relatively widespread in recent assessments by feminist legal scholars of their impact on international law.<sup>102</sup>

It is transposed to the sporting context in the work of Lenskyj on the Olympic industry and women.<sup>103</sup> She believes that ‘the inclusion of greater numbers of women and other underrepresented groups has done little or nothing to change Olympic sporting practices and the dominance of the faster/higher/stronger sport model’.<sup>104</sup> Formulated differently, ‘lobbying the IOC for more Olympic sports and events for women and more women in Olympic governance reflected a liberal preoccupation with simply levelling the playing field, while failing to examine whether it was worthwhile to gain entry to that field, or whether increased female participation would produce unanticipated negative consequences’.<sup>105</sup> The same might be argued in the FIFA context. The core question raised by Lenskyj is whether feminists should aspire to measure FIFA’s feminist credentials using the ‘male yardstick’<sup>106</sup>.

In this regard, the language of the FIFA’s Women’s Football Strategy reflects quite transparently the ambition of leveling up the women’s game to the male (commercial) benchmark. The women’s game is described as presenting ‘vast untapped opportunities to the football community’.<sup>107</sup> In order to tap into these opportunities FIFA commits to ‘optimize existing competitions in order to maximize their quality and commercial benefits and will dedicate the same focus to creating new competitions that will provide additional opportunities for women to play on the world stage’.<sup>108</sup> To do so, it will develop a ‘women’s commercial programme’ including:

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<sup>102</sup> See characteristically, Gardam,<sup>[102]</sup> ‘Feminist Interventions into International law: A Generation On’, 40 *Adelaide Law Review* (2019) 219.

<sup>103</sup> Lenskyj, *supra* note 82 and H. J. Lenskyj, *Gender Politics and the Olympic Industry* (2013).

<sup>104</sup> Lenskyj, *supra* note 102, at 40.

<sup>105</sup> *Ibid*, at 41.

<sup>106</sup> *Ibid*, at 44.

<sup>107</sup> FIFA Women’s Football Strategy, at 2.

<sup>108</sup> *Ibid*.

- Enhancing women’s football engagement with existing commercial partners
- Developing a strategy to sell broadcast, digital and media rights, including an unprecedented breadth of coverage for FIFA women’s football competitions and programmes
- Implementing a distinct brand strategy for the women’s game that inspires players and fans and gives the game a new identity to complement men’s football and enrich the game’s overall image <sup>109</sup>

Women’s football is clearly envisioned through the lens of the commercially successful male football, which operates as the model to aspire to. Put bluntly, it displays FIFA’s eagerness to grow women’s football primarily as a moneymaking enterprise. This strategy highlights the limited disruptive nature of a feminist critique that would seek to model women’s football after the male example without questioning further FIFA’s governance system and its core policies.<sup>110</sup> Such an approach, which might be favored by some women, in particular the top female players, would simply endorse the way FIFA currently operates (and regulates) in return for a better gender redistribution of the game’s economic returns. Such ‘liberal gains’ have been qualified as ‘superficial and failing to challenge the deeply gendered structure and culture of football’.<sup>111</sup> They would not bring radical changes to the organization of football, and to its binarization, such as the development of mixed football.<sup>112</sup> Presently, the commercialization of women’s football is still at its infancy and far from the men’s economic revenue, but FIFA’s Women’s Football Strategy and some of the demands of top professional female players show that male football is being conceived as the guiding star of FIFA’s feminist imagination. This might open up a rift between feminist insider, seeking a seat at FIFA’s table and a share of its

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<sup>109</sup> Ibid, at 15.

<sup>110</sup> For a particularly sharp questioning of both, see M. Krech, *FIFA for Women or Women for FIFA? The Inherent Tensions of FIFA’s Women’s Football Strategy*, 7 July 2019, available at <https://verfassungsblog.de/fifa-for-women-or-women-for-fifa-the-inherent-tensions-of-fifas-womens-football-strategy/>.

<sup>111</sup> Welford, ‘Tokenism, ties and talking too quietly: women’s experiences in non-playing football roles’, 12 *Soccer & Society* (2011) 365, at 366.

<sup>112</sup> Williams, *supra* note 5, at 184

profits, and feminist outsider, seeking to overturn FIFA's table and its purely economic approach to football.

As Otto points out in her work, the tension between insider and outsider feminism can be mutually beneficial 'at the intersections of activism and critique, in the interaction between power and danger'.<sup>113</sup> Nevertheless, it is likely that the 'productive footholds'<sup>114</sup> created by the processes of institutionalization of feminist demands inside FIFA will be subjected to critical scrutiny leading to recurring processes of dynamic overhaul. Moreover, there is undoubtedly the possibility that FIFA, as it has been claimed of the UN, will be perceived as engaging in the "institutional capture"<sup>115</sup> of feminist demands in order to fuel its own economic interests and to grab more oversight powers over its members. Hence, a future rise of "femocrats"<sup>116</sup> inside FIFA might ultimately give way to similar reservations or disappointments than their integration into the UN.

2. *'White Men are Saving Brown Women from Brown Men'<sup>117</sup>: FIFA and Spivak's Indictment of Imperial Feminism*

The second line of self-criticism advanced by feminist legal scholars is the one directed against the temptation of western feminists to 'shift to the Orient'<sup>118</sup> in order to focus, in Spivak's words, on saving brown women from brown men. These 'imperial feminists'<sup>119</sup> ignore 'the role played by 'gender mainstreaming' in the new world order' and are 'simply facilitating the existing projects and priorities of militarised economic globalization in the name of protecting and promoting the interests of women'.<sup>120</sup> The question for Orford is

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<sup>113</sup> Otto, *supra* note 101, at 120.

<sup>114</sup> *Ibid.*

<sup>115</sup> Otto, *supra* note 25, at 11.

<sup>116</sup> Defined as 'feminists in bureaucracies working to advance the cause of women' by Prügl, *supra* note 97, at 69.

<sup>117</sup> G. C. Spivak, 'Can the Subaltern Speak?', in P. Williams and L. Chrisman (eds), *Colonial Discourse and Post-Colonial Theory: A Reader* (1993), at 93.

<sup>118</sup> Documenting the structure and function of this shift see Valverde, 'The Rescaling of Feminist Analyses of Law and State Power: From (Domestic) Subjectivity to (Transnational) Governance Networks', 4 *UC Irvine Law Review* (2014) 325, at 341.

<sup>119</sup> Orford, 'Feminism, Imperialism and the Mission of International Law', 71 *Nordic Journal of International Law* (2002) 275, at 280.

<sup>120</sup> *Ibid.*, 283

then: 'How is it possible to engage with the internationalist discourses [...] without deepening the 'enabling tropes of western ethnocentrism and neo-imperialism'?'<sup>121</sup> She answers it by calling on feminists to quit 'seeing the world in terms of a 'battleground of male and female individualism', in which the goal of feminism would be merely to move women from the female domain of sexual reproduction to the male domain of 'social subject-production' via the sacrifice of the Other Woman'.<sup>122</sup>

Translated to the FIFA context, one could fear that feminist policies coming from the Swiss home base of FIFA could be insensitive to local contexts and used primarily to reinforce the grip of Zürich on the governance of football without sufficient regard for the local experience of women.<sup>123</sup> Thus, it is a possibility that the imposition of FIFA sanctions in cases involving gender discriminations or abuses against women inside the football family will predominantly be targeted at actors from the periphery, such as the *Keramuddin* case involving the former President of the Afghanistan Football Federation<sup>124</sup> and the pending disciplinary procedure involving the President of the Haitian Football Association Yves-Jean Bart.<sup>125</sup> On the one hand, as highlighted by the *Keramuddin* case, it is still quite uncertain whether FIFA (and on appeal the Court of Arbitration for Sport) can legitimately adjudicate a sensitive matter that unfolded at great distance (both geographically and sociologically) from its institution. Does it have the capacity (and legitimacy) to conduct both a context-sensitive investigation and adjudication of allegations of sexual abuse? To reach its conclusion on Mr. Keramuddin's appeal, the CAS panel did not hear him and his witnesses were also unable to attend the hearing. Moreover, FIFA did not conduct any forensic investigation in Afghanistan relying instead only on witness statements. Such a process risks of smacking of imperial

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<sup>121</sup> Ibid, 286.

<sup>122</sup> Ibid. Against this view see Brooks, 'Feminism and International Law: An Opportunity for Transformation', 14 *Yale J.L. & Feminism* (2002) 345.

<sup>123</sup> Hamzeh's virulent denunciation of FIFA's 'hijabophobia' exemplifies the potential difficulties faced when FIFA regulates, without giving a meaningful say to the affected women, their way of practicing football. See Hamzeh, 'FIFA's double hijabophobia: A colonialist and Islamist alliance racializing Muslim women soccer players', 63 *Women's Studies International Forum* (2017) 11.

<sup>124</sup> CAS 2019/A/6388 Karim Keramuddin v. FIFA, 14 July 2020.

<sup>125</sup> FIFA, *Independent Ethics Committee extends provisional ban on Yves Jean-Bart and sanctions other Haitian football officials*, 20 August 2020, available at <https://www.fifa.com/who-we-are/news/independent-ethics-committee-extends-provisional-ban-on-yves-jean-bart-and-sanct>.

expeditious feel-good justice. On the other hand, one can only wonder whether the disciplinary response of FIFA to these allegations, a lifelong ban from all football activities, is sufficient to tackle the underlying structural factors that probably facilitated the abuses. Indeed, it seems that many of the Afghan female players were placed in exceptionally vulnerable positions due to the all-powerful nature of the president of the federation, in particular through his capacity to control the distribution of the funds of the federation. This has been a recurring problem linked to a variety of abuses inside national federations in the past, most notably widespread instances of corruption. Nevertheless, FIFA remains quite reluctant to intervene to ensure that its members adequately manage their funds and regularly compensate their players. Nor is FIFA really concerned about the concentration of power inside its national members. It imposes certain governance criteria but those are vague and enforced with a healthy dose of leniency.<sup>126</sup> Before feminists decide to turn to FIFA to demand that it actively uses its disciplinary power to police gender violence and discriminations, they should carefully assess under which conditions (in terms of resources and diversity of its investigatory staff) FIFA would be well placed to do so and to what extent FIFA itself, through its economic incentives and lack of governance oversight, contributes to the abuses. Indeed, there is a real possibility that FIFA's existing imperialist or hegemonic tendencies might be further reinforced by the accretion of stronger disciplinary competences.

The treacheries of navigating the precarious path between 'the Scylla of essentialism' and 'the Charybdis of relativism'<sup>127</sup> will not evade FIFA and will necessarily involve the 'recognition of the tension between universal theories and local experience'.<sup>128</sup> Football feminists will therefore face calls to be 'answerable to law's others, those who are rendered as outlaws, illegals, material evidence [...]',<sup>129</sup> as 'it cannot be assumed that women from diverse geographic and cultural contexts all share the same goals and priorities in relation to sport'.<sup>130</sup>

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<sup>126</sup> See FIFA Statutes 2019, article 15.

<sup>127</sup> Charlesworth, *supra* note 80, at 10.

<sup>128</sup> *Ibid*, at 12.

<sup>129</sup> Orford, *supra* note 119, at 292.

<sup>130</sup> Lenskyj, *supra* note 82, at 433

## Conclusion

*“Ce que je sais de la morale, c'est au football que je le dois” (Albert Camus)*

Camus reminds us that football is another type of school. Children and adults spend countless hours on the pitch (or watching it), during which they not only improve shooting skills, but also shape their minds and prejudices. Camus' famous quote resonates with Iris Marion Young's observation of sport's essential role in defining how women relate to their bodies and use them.<sup>131</sup> Both support the lasting influence of the way we practice (and regulate) sports, and football in particular, on the place of women in our societies. Hence, those regulating and governing football are not only responsible for the way female football players are treated, they are also having considerable influence over our collective understanding of the gender divide and its implications. However, football is regulated by private associations, which have mostly evaded critical scrutiny of their regulatory choices (be it with regard to women or otherwise). The sacrosanct autonomy of sport remains a cardinal principle of the sporting movement. I have argued that it is high time that legal scholars pose tough feminist questions to private regulators like FIFA. Indeed, the divide between public and private organizations at the transnational level conceals the power and authority of many corporations and associations, enabling them to evade the type of feminist accountability that formally public organizations have faced. FIFA, as this symposium vividly illustrates, must and will be scrutinized for its impact on women. This scrutiny comprises similar demands for equality and participation as those posed to national or international law in the name of feminism. In practice, Female players struggle daily for equal pay, greater investments and more seats at the table in FIFA's boardroom. Whether the feminist challenge will move next towards putting into doubt foundational tenets of FIFA's football doctrine, such as the absolute separation of women and men football, remains an open question for women in football to decide. Furthermore, feminists will probably not escape bouts of introspection and self-criticism over their capacity to change FIFA from inside or the direction taken by this change. They

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<sup>131</sup>For many women as they move in sport, a space surrounds us in imagination that we are not free to move beyond; the space available to our movement is a constricted space.' I. M. Young, *Throwing like a girl and other* (2005), at 33.

will also have to tread with care, in full conscience that FIFA's legal universalism, as well as its Eurocentric personnel and worldview, might fail to fully account for the diversity of contexts it affects. In this regard, FIFA's top-down disciplinary system as it stands might not necessarily be the best vehicle to put an end to sexual abuses and discrimination against women in football. In fine, only a FIFA that guarantees significant political representation to women (along the lines of the 'parity of participation'<sup>132</sup> advocated by Fraser), institutionalizes counter-powers throughout the football pyramid and ensures a fair distribution of its resources, can start to address the historical injustice experienced by women in (and through) football.

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<sup>132</sup> Fraser, 'Feminist Politics in the Age of Recognition: A Two-Dimensional Approach to Gender Justice', 1 *Studies in Social Justice* (2007) 23, at 26.