FIFA's Eigen-constitutionalization and its limits

Bodo P. Bützler & Lisa Schöddert

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1 Introduction

Due to public pressure triggered by corruption scandals and human rights violations linked to the Qatar 2022 World Cup, FIFA underwent a reformation process starting in 2016 and introduced human rights requirements not only into their statutes but also in their bidding process. We argued that the explicit inclusion of human rights in FIFA´s Statutes since April 2016 exemplifies how transnational sports law (*lex sportiva*) can undergo processes of eigen-constitutionalization that contribute to the protection of human rights. Yet, this protection can be effective only when coupled to regimes of reflexivity and enforceability. The legal-societal analysis of FIFA's reform process contributes to revealing society's impact on transnational regimes and can be used to develop a strategy to coordinate the leverage effects of society.

First, *Teubner*'s theory of societal constitutionalism on transnational regimes will be used to provide a descriptive analysis of the processes of eigen-constitutionalization. According to the theory, human rights as limitative rules need to be positivized through processes forming a "patchwork quilt" constitution that entwines pressure from NGOs, private ordering, contracts, decisions of arbitral tribunals, and decisions of national courts. In a second step, the theory will be empirically compared against FIFA's reformation process. We detect a slowly evolving constitutional "patchwork quilt" that already incorporates high levels of reflexivity but still lacks in effective enforcement mechanisms for all directly affected persons.

2 Eigen-constitutionalization of transnational regimes

FIFA is currently undergoing the worst crisis in its history. As a result of allocating the 2018 and 2022 Football World Cups to Russia and Qatar respectively, corruption inquiries were initiated, allegations of human rights violation were voiced, and the geographic suitability of Qatar for hosting a Football World Cup was questioned. At the same time, this crisis presented the unique opportunity for reform, resulting in explicit human rights commitments that have materialized in FIFA's Statutes as well as in radical changes to the World Cup Bidding Process. In fact, this experience of crisis may well have been FIFA's "constitutional moment" (Teubner, 2012, p.81).

Teubner's theory of societal constitutionalism is particularly sophisticated[1] in accurately *describing* transnational phenomena such as the normative regime of sports at the global institutional level (*lex sportiva*). In the absence of unified global efforts by nation states in regulating transnational non-state actors, the demand for legal rules and compliance is filled by the relevant non-state actors themselves. The principle source of transnational normative regimes, therefore, is the web of normative interactions in and amongst all the relevant transnational actors. Societal constitutionalism takes this paradigm shift into account. In the wake of an existential crisis, a transnational regime such as FIFA may begin to eigen-constitutionalize by formulating limitative rules that counteract self-destructive tendencies and limit damage to its social, human, and natural environment. The proclamation of a commitment to human rights can constitute such self-constraint. Like a "patchwork quilt"[2], human rights are positivized in transnational

[1] For critical examination of the applicability of Teubner's societal constitutionalism to *lex sportiva* see Duval, "The Olympic Charter: A Transnational Constitution Without a State?", *Journal of Law and Society* 45 (2018) pp. S245-S269.

[2] Klabbers, "Setting the Scene", in: Klabbers/Peters/Ulfstein (eds.), *The Constitutionalisation of International Law* (2009), p. 23.

regimes through iterative decision-making processes, which occur at the interconnected nodes of arbitral tribunals, national courts, private contracts, social normative standards and the actions of protest movements and NGOs. But while external pressure can prompt a societal system in crisis to enact limitative rules in the shape of human rights commitments, such rules can be reconstructed system-internally only in alignment with that particular system's *ratio*.[3] This is where societal constitutionalism also allows for targeted normative critique. In the case of FIFA, two central rationalities are the dissemination and integrity of football as a sport as well as the pronounced economic motive of making profits, which is typical of many transnational regimes and makes them highly vulnerable to structural corruptibility. Such system-internal rationalities may continuously evolve and adjust,[4] but it is at this site of potential conflict that the promises of eigen-constitutionalization may encounter resistance, namely when limitative rules cannot be coupled effectively to regimes of reflexivity and enforceability.

3 "Common Law Constitution"

Principally, FIFA's reformation that started in 2016 is a positive contribution to the evolution of a protective global human rights regime. In the following, we delineate the various "patches" that form part of an evolving "common law constitution" of FIFA aimed at protecting human rights while critically examining the normative fortitude of FIFA's human rights commitment through the lens of societal constitutionalism.

3.1 Protest movements and NGOs

Public protest exercised through NGOs and critical journalism may not only force transnational regimes into taking remedial actions on a case-by-case basis but may also trigger learning impulses that generally change the internal code of transnational regimes. Reputation is a precious asset. We detect that sustained public pressure for over eight years by, amongst others, Human Rights Watch and Amnesty International has included not only criticism but specific recommendations for action, thus forming a potential layer of reflexivity. Given FIFA's explicit human rights commitment since April 2016, NGOs and journalists can monitor and report on the level of FIFA's compliance with the rules and standards FIFA has set for itself.

3.2 Private Ordering

The ongoing public pressure has also transformed the private ordering of FIFA. This transformation includes the introduction of a new Art. 3 to the FIFA Statutes in which FIFA commits itself to internationally recognized human rights (further spelled out in FIFA's Human Rights Policy) and new normative requirements for the World Cup Bidding Process, notably the requirement for each bid to include a human rights strategy. We conclude that both the new Art. 3 of the FIFA Statutes and the new World Cup Bidding Process are sufficiently exhaustive in spelling out the exact human rights standards against which FIFA's and all FIFA-related activities ought to be normatively assessed. Transparency is increased via independent observation and reporting institutions such that relevant assessments can likely be undertaken. Nonetheless, we also maintain that the new World Cup bidding requirements are insufficient in spelling out specific secondary rules authorizing FIFA to enforce specific punishments when adverse human rights impacts are caused by bidding members, host countries, or host cities.

3.3 Contracts

The transnational regime of sports relies on a complex network of contracts. This network now includes the requirement that bidders for the World Cup must secure a Government Declaration and Host City Declarations which both include the commitment to avoid-

[3] Regarding *ratio* as the interlacing of different rationalities in the context of social networks cf. Wielsch, "Die Ordnungen der Netzwerke. AGB – Code – Community Standards", in: Martin Eifert/Tobias Gostomzyk (eds.), *Netzwerkrecht. Die Zukunft des NetzDG und seine Folgen für die Netzwerkkommunikation* (2018), p. 67.

[4] Such internal developments then allow for better alignment with system-external demands, cf. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012), p. 85.

ing adverse human rights impacts. The same is requested from entities responsible for the construction and renovation of stadiums, training sites, hotels and airports. Furthermore, human rights commitments made during the bidding phase, including those related to the newly introduced human rights requirements, become binding on the host once the hosting agreement is signed. This demonstrates FIFA's explicit commitment to secure human rights in all societal spheres that may be affected by FIFA-related activities. Still, the question of sanctions and their enforceability remains an open question. The tightly clocked rhythm of global sporting events makes withdrawing the host position highly unattractive to all parties involved (even to the bidder who is awarded the host position instead since she has less time to prepare). Even worse, delaying the World Cup will bring disorder to the global sporting calendar and entail significant financial losses to all. Additionally, FIFA itself becomes highly dependent on the host once preparations are underway, which constitutes a structural incentive to appease the host through symbolic punishment rather than issuing proportionate sanctions. Thus, a host will likely remain the host even when she commits human rights offenses. This does not mean that sanctions are principally impossible or unenforceable. FIFA could, for instance, prohibit teams of offending nation states from competing. But much like it is the case with FIFA's new private ordering, the possibility of such sanctions and their enforcement mechanism remain underdetermined in FIFA's current network of contracts.

3.4 Arbitration Courts - Court of Arbitration for Sport (CAS)

According to *Teubner*, the legal source of fundamental rights in transnational regimes is to be found in a "social" positivization of fundamental rights through the decision practices of transnational regimes themselves that enact fundamental rights from within. Arbitration courts play the role of translators who instantiate norms, specified to maintain the system's *ratio*, into transnational law.

Here, the introduction of Article 3 in the April 2016 edition of FIFA's Statutes marks an interesting evolutionary step in the way sport related disputes are settled by the CAS. Given that the new Article 3 now admits all internationally recognized human rights into the Statutes, human rights no longer only apply subsidiarily (if at all) but directly according to R 58 CAS Code. In this context, we analyzed numerous CAS awards and observe that the existence and applicability of various procedural and substantive human rights have been discussed by the CAS. In that sense, the new Article 3 does not necessitate an entirely new human rights approach. Nonetheless, now appellants are explicitly encouraged to make human rights violations a central topic of discussion during arbitration.

However, enforceability regarding the Bidding Process is limited. Since the principle of *non-retroactivity* does apply to rules, which govern the requirements for being admitted to a competition, the introduction of human rights both in the Statutes and the Bidding Process for 2026 has no legal effect on the selection of Qatar for hosting the FIFA World Cup in 2022. Further, an appeal proceeding will shorten the preparatory possibilities of a new World Cup host. These circumstances could prevent appeals because of the risk of unmanageable time pressure.

3.5 National Courts

Adhering to the metaphor of eigen-constitutionalization as a "patchwork quilt", national courts participate in the gradual development of a common law of transnational fundamental rights by recognizing and enforcing arbitral decisions or by invoking *ordre public* and refusing to enforce transnational arbitral rulings because they violate fundamental rights. To give a pertinent example: the Bangladeshi citizen Nadim Shariful Alam (and others) filed a lawsuit against FIFA at the Commercial Court of the Canton of Zurich, Switzerland. A central claim of the plaintiffs was that FIFA ought to redress ongoing human rights violations during the preparations for the World Cup in Qatar. But the court ended up rejecting all claims, arguing that essential procedural requirements had not been fulfilled. This does raise the question whether it would

be more appropriate for national courts to hold powerful non-state actors responsible proportionate to their complicity in human rights violations (a question that is also asked here). However, while stricter transnational limitative rules set by national courts are theoretically possible, such rules encounter their own practical limits when they collide with (local) legal interests of sovereign states. As the court does state in *obiter dictum* (p.9), it is doubtful whether the plaintiffs' claim can, in the end, carry a legal interest worthy of protection ("schutzwürdiges Interesse"), given that it would effectively require a Swiss Court to issue a ruling – with the threat of punishment – which orders FIFA to influence the political organization, judiciary and legal system of a sovereign foreign nation state.

4 Conclusion

FIFA's reformation process, triggered by the World Cup bid in 2010, can be appropriately analyzed as a process of eigen-constitutionalization. In general, the societal constitutionalist lens draws attention to the fact that when there is no unified global legislator to intermediate transnational political demands, it is the leveraging effects of society and its predominantly private actors that become increasingly important for limiting the negative effects of transnational regimes on their environment. Commitments to human rights standards can fulfill this limitative function by acknowledging destructive and domineering forces, and inscribing appropriate countermeasures into regime specific strategies and self-regulative measures. Human rights now feature in FIFA's "common law constitution" as limitative rules at various levels. The required re-specialization and regime-specific application of human rights can be observed in FIFA's reformation since 2016 and already reveal high levels of reflexivity. But FIFA's eigen-constitutionalization still lacks in enforceability. FIFA has to remain creative when it comes to effectively sanctioning human rights offenders in spite of antagonistic rationalities.

Using the idea of societal constitutionalism in the context of FIFA also draws attention to the potential for societal institutions to counter the described limits of self-regulation. To strengthen the enforceability of Article 3, human rights need to be substantiated in evermore CAS proceedings in order to be effectively translated and positivized. Interdisciplinary societal institutions (such as e. g. the Centre for Sport and Human Rights) can help trigger this translation process by offering legal support to appellants who could then bring effective, substantiated human rights cases before the CAS. Acknowledging the impact of society on transnational regimes can be used to develop regime-specific strategies that coordinate the leveraging effects of society within the human rights context.

ABOUT THE AUTHORS

Bodo P. Bützler
Dr. phil. Bodo P. Bützler M.A. is an attorney with WERNER Attorneys and Computer Scientists.
Lisa Schöddert
Lisa Schöddert (Mag. Iur.) is Research Assistant at the Chair for Private Law and Legal Theory and PhD candidate (Doktorandin) at University of Cologne in Germany and Research Scholar at Fordham Law School in New York, USA.

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