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RESEARCH ARTICLE

# Constitutionalizing FIFA: Promises and Challenges

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FIFA's reformation process, which began with the World Cup bid in 2010 and culminated in the explicit inclusion of human rights in FIFA's statutes since April of 2016, exemplifies how transnational sports law (*lex sportiva*) can undergo processes that contribute to the protection of human rights. In fact, when viewed through the lens of societal constitutionalism, FIFA's reformation process can be analyzed as a process of emergent constitutionalization. This paper provides the requisite empirical investigation and applies *Teubner's* theory on societal constitutionalism to study FIFA's reform process. FIFA has effectively formulated limitative rules by introducing human rights to their private ordering. This marks a decisive evolutionary step in the way sport related disputes are settled by the Court of Arbitration for Sport (CAS). Given FIFA's new statutes, human rights no longer just apply subsidiarily (if at all), but directly. Further going re-specialization and regime-specific application of human rights can also be observed in FIFA's reformation process. Human rights are positivized by a process formed like a 'patchwork quilt', entwining pressure from NGOs, private ordering, contracts, CAS decisions, and national courts decisions. Each part represents a valuable contribution to FIFA's 'common law' transnational, social constitution. But this self-evolving constitution can be effective only when coupled to regimes of reflexivity and enforceability. Our case study reveals that FIFA's reformation process already features high levels of reflexivity. Nevertheless, it is lacking in regimes of enforceability. It remains an outstanding question to what extent FIFA can be held accountable for human rights violations. Here, the societal constitutionalist lens draws attention to the normative importance of society for limiting the negative effects which FIFA has on its environment.

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**Keywords:** FIFA; human rights; societal constitutionalism; transnational law; arbitration; self-regulation

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## 1 Constitutionalizing Transnational Regimes

The *Fédération Internationale de Football Association* (FIFA) is currently going through the worst crisis of its history.<sup>1</sup> As a result of allocating the 2018 and 2022 Football World Cups respectively to Russia and Qatar, corruption inquiries were initiated,<sup>2</sup> allegations of human rights violation were voiced,<sup>3</sup> and the geographic suitability of Qatar for hosting a Football World Cup was questioned.<sup>4</sup> As a reaction, a Reform Commission was established. It concluded that recent events in particular have damaged FIFA and that essential changes

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<sup>1</sup> FIFA Reform Committee, '2016 FIFA Reform Committee Report' (2015) 1 <[https://resources.fifa.com/mm/Document/AFFederation/FootballGovernance/02/74/17/54/2015.11.27FinalReport\\_forpublication\\_Neutral.pdf?t=1449142382457](https://resources.fifa.com/mm/Document/AFFederation/FootballGovernance/02/74/17/54/2015.11.27FinalReport_forpublication_Neutral.pdf?t=1449142382457)> accessed 28 August 2019.

<sup>2</sup> Oliver Laughland, 'FIFA official took bribes to back Qatar's 2022 World Cup bid, court hears' (*The Guardian*, 15 November 2017) <<https://www.theguardian.com/football/2017/nov/14/fifa-bribery-corruption-trial-qatar-2022-world-cup>> accessed 28 August 2019.

<sup>3</sup> Amnesty International, 'Qatar World Cup of Shame' <<https://www.amnesty.org/en/latest/campaigns/2016/03/qatar-world-cup-of-shame/>> accessed 28 August 2019.

<sup>4</sup> Investigatory Chamber FIFA Ethics Committee, 'Report on the Inquiry into the 2018/2022 FIFA World Cup Bidding Process' (2017) 289 ff <<https://img.fifa.com/image/upload/wnr43dgn3yysafyquq8r.pdf>> accessed 28 August 2019.

to its culture are needed to affect lasting reform and to restore FIFA's reputation.<sup>5</sup> It was not only a loss in reputation but also a financial crisis: in 13 years, FIFA for the first time reported a loss (USD 122 million) in 2015 due to a continuing corruption case in the United States and a parallel criminal inquiry in Switzerland.<sup>6</sup>

At the same time, FIFA considers the current crisis also as a unique opportunity to renew itself.<sup>7</sup> This renewal correlates with FIFA's reformation in 2016 and its willingness to return full focus on FIFA's genuine primary mission: to promote football throughout the world.<sup>8</sup> This declaration reveals the root of the problem at stake. Even though FIFA is a non-profit association, the maximization of profit (even if it is just the private motive of select individuals) has clashed and overruled the general idea of sport's integrity. This profit-seeking rationality is typical of many transnational regimes and makes them highly vulnerable to structural corruptibility.

The excesses of power and negative externalities generated by monopolistic private orders such as FIFA can be mitigated through careful, strategic interventions by the legislative arm of nation states and supra-national organizations such as the European Union.<sup>9</sup> This perspective holds much strategic promise. But there is an enriching perspective, namely the conceptual framework articulated in *Teubner's* theory of societal constitutionalism.<sup>10</sup> This perspective focuses on the normative potential of societal forces and their influence for the development of social constitutions in a transnational context. This paper provides the requisite empirical investigation and applies *Teubner's* theory of societal constitutionalism to study FIFA's reform process. There are two reasons why this is helpful in analyzing the evolution of transnational legal phenomena.<sup>11</sup>

For one, societal constitutionalism is particularly sophisticated in accurately *describing* the external pressures from civil society, from politics and law that challenge transnational actors to become ecologically sensitive and to include the effects on nature, society and people in their decision-making by forming social constitutions.<sup>12</sup> 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 forces, therefore, do not merely constitute a normative, non-legal space,<sup>13</sup> but they take part in constitutionalizing a (transnational) genuinely legal space; in the case of international sports, a global *lex sportiva*. Societal constitutionalism takes this paradigm shift into account. When transnational regimes develop global normative orders which only include constitutive rules that normatively support the construction of these very regimes, then catastrophes and social conflict may ensue. The transnational regime will only follow their tunnel vision, which focuses them on maximizing their own function.<sup>14</sup> This, in turn, may produce counter-movements that begin to demand limitative rules such as human rights commitments in order to counteract these self-destructive tendencies and limit damage to their social, human and natural environments.<sup>15</sup> In the wake of an existential crisis, a transnational regime such as FIFA may then begin to self-constitutionalize by formulating limitative rules that counteract self-destructive tendencies. Or, to put it into terms of systems theory, a system's effort (system in the sociological sense) of self-constraint is a reaction to the experience of catastrophe and self-destructive tendencies. The proclamation of a commitment to human rights can constitute such self-constraint. In fact, the modern

<sup>5</sup> FIFA Reform Committee 2015 (n 1).

<sup>6</sup> Rebecca R. Ruiz, 'FIFA's Financial Disclosures Show That Scandal Has Affected Its Bottom Line' (The New York Times, 17 March 2016) <<https://www.nytimes.com/2016/03/18/sports/soccer/fifas-financial-disclosures-show-that-scandal-has-affected-its-bottom-line.html>> accessed 28 August 2019.

<sup>7</sup> FIFA Reform Committee 2015 (n 1) 1.

<sup>8</sup> Issa Hayatou, 'Financial and Governance Report 2015' (12 & 13 May 2016) 9 <<https://resources.fifa.com/image/upload/financial-and-governance-report-2015-2770871.pdf?cloudid=asmgcqptmszlmj5quozr>> accessed 28 August 2019; FIFA Reform Committee 2015 (n 1) 1.

<sup>9</sup> On this interrelation of private and public orders, Branislav Hock & Suren Gomtsian, 'Private order building: the state in the role of the civil society and the case of FIFA' (2018) 17 *The International Sports Law Journal* 186 2018.

<sup>10</sup> Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012).

<sup>11</sup> For a critical examination of the applicability of Teubner's societal constitutionalism to *lex sportiva* see Antoine Duval, 'The Olympic Charter: A Transnational Constitution Without a State?' (2018) 45 *J. Law Soc.* S245.

<sup>12</sup> Gunter Teubner, 'From "Economic Constitution I, II" to the "Self-justifying Law of Constitutional Law": On the criticality of Rudolf Wiethölter's Critical Systems Theory (2020) 1 *Ancill Juris* 1 32, 33.

<sup>13</sup> cf Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (HUP 1991); Robert C. Ellickson, 'When Civil Society Uses an Iron Fist: The Roles of Private Associations in Rulemaking and Adjudication' (2018) 18(2) *American Law and Economics Review* 235.

<sup>14</sup> Teubner 2020 (n 12) 32.

<sup>15</sup> Teubner 2012 (n 10) 10.

renaissance of human rights can be seen as limitative rules aimed to counteract the expansionary tendencies of the political system as such. After the particularly devastating and dehumanizing events of political totalitarianism, it was the political system itself that experienced its constitutional moment in 1945 and was prepared to constrain itself by proclaiming human rights at the global level.<sup>16</sup> From the perspective of societal constitutionalism, FIFA's experience of crisis may well have been its 'constitutional moment', which enabled FIFA to structurally implement mechanisms of self-constraint.<sup>17</sup> Like a 'patchwork quilt',<sup>18</sup> human rights are further positivized in transnational regimes through iterative decision-making processes, which occur at the interconnected nodes of arbitration tribunals, national courts, contracts of private actors, social normative standards and the actions of protest movements and NGOs.<sup>19</sup> In the following, this patchwork quilt and the process of positivizing human rights in a transnational regime as part of forming a social constitution will be analyzed by the example of FIFA's reform in 2016.

The second reason why the societal constitutionalist lens is particularly useful is that it allows for precisely targeted *normative* critique. It recognizes that limitative rules need to be institutionalized according to the system's own rationalities. The task to coordinate the functioning of social sub-systems and environmental tasks, and the prevention of human rights violations, can only be tackled effectively through internal regulation.<sup>20</sup> Certainly, it can be prompted from the outside, but only the transnational actor itself has the necessary knowledge for effective change. This required knowledge does not somehow preexist but needs to be internally developed first by the system itself.<sup>21</sup> Limitative rules need to address this specific problem by anticipating the system's own logic, its own ratio. In the specific case of FIFA, this ratio is an interlacing or parallelism of different rationalities:<sup>22</sup> the dissemination and integrity of football as a sport as well as the pronounced economic motive of making profits. And while system-internal rationalities may continuously evolve and adjust, there is the potential conflict that self-constitutionalizing process may encounter resistance, namely when limitative rules cannot be coupled effectively to regimes of reflexivity and enforceability. Following, the limits of the self-constitutionalizing process will be discussed.

## 2 'Common Law Constitution'

Principally, FIFA's reformation 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.

### 2.1 Protest Movements and NGOs

NGOs and protest movements play a crucial role in the process of constitutionalizing transnational regimes. Sufficient media coverage assumed, they not only direct the attention of society to social grievances but also formulate social norms which can be translated into transnational law.<sup>23</sup> For any social system that is under public scrutiny, its reputation is a precious asset. Negative reception in the media acts as an indicator for ongoing crises and typically results in financial damages, which may then trigger self-constraint mechanisms. As sources of external pressure, NGOs and protest movements can transmit learning impulses that then change the internal code of transnational regimes.<sup>24</sup>

In the case of FIFA's crisis, especially with regards to the bidding process for the 2022 Men's World Cup, NGOs maintained pressure on FIFA for over eight years.<sup>25</sup> Major NGOs and trade unions have argued that FIFA should use more of its influence to improve the working conditions on FIFA-related infrastructure

<sup>16</sup> *ibid* 83.

<sup>17</sup> *cf ibid* 81.

<sup>18</sup> Jan Klabbers, 'Setting the Scene' in: Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 1 23.

<sup>19</sup> Teubner 2012 (n 10) 130.

<sup>20</sup> *ibid* 84 f.

<sup>21</sup> *ibid* 85.

<sup>22</sup> *cf* Dan Wielsch, 'Die Ordnungen der Netzwerke. AGB – Code – Community Standards' in Martin Eifert and Tobias Gostomzyk (eds.), *Netzwerkrecht. Die Zukunft des NetzDG und seine Folgen für die Netzwerkkommunikation* (Nomos 2018) 67.

<sup>23</sup> For an empirical analysis of transnational law using *lex sportiva* see Antoine Duval, 'Lex Sportiva: A Playground for Transnational Law' (2013) 19(6) *ELJ* 822.

<sup>24</sup> Teubner 2012 (n 10) 95.

<sup>25</sup> Human Rights Watch, 'Will Qatar World Cup Expansion Meet FIFA Rights Standards?' (14 March 2019) <<https://www.hrw.org/news/2019/03/14/will-qatar-world-cup-expansion-meet-fifa-rights-standards>> accessed 29 August 2019.

projects and to push against the *kafala* system that has been compared to a form of modern slavery.<sup>26</sup> Amnesty International not only alleges human rights violations but also formulates specific recommendations for a possible course of action.<sup>27</sup>

Given FIFA's explicit human rights commitment since April of 2016, NGOs and journalists can now monitor and report on the level of FIFA's compliance with rules and standards FIFA has set for itself. When FIFA proposed to expand the 2022 World Cup in Qatar from 32 to 48 teams and to do so with additional host countries such as Kuwait, Oman, Saudi Arabia or UAE, there was a public response by Amnesty International, Human Rights Watch, and six other unions and groups who drafted an open letter to the FIFA President Gianni Infantino. It contained a call to confirm that any potential co-host of the 2022 World Cup would comply with the organization's new human rights standards.<sup>28</sup> Human Rights Watch reminded FIFA of its commitment to human rights and that this commitment is 'unequivocal and integrated in the hosting requirements of all our future tournaments .... [T]his would not be different in the case of a potential co-host already in 2022'.<sup>29</sup> By referring to FIFA's own statements and statutes, notwithstanding the legal question of whether announcing a tournament co-host afterwards can be subsumed under "future tournament", NGOs monitor FIFA's compliance with its own norms and public statements subsequent to its own self-regulation, thus forming a substantial layer of reflexivity.

## 2.2 Private Ordering

The private order of FIFA qualifies as a transnational *legal order*,<sup>30</sup> which has been further transformed by the societal pressures that ensued in the wake of Qatar's selection as the 2022 Football World Cup host. FIFA has translated the social norms formulated by NGO and protest movements into limitative rules. This transformation notably includes a new Article 3 of the FIFA Statutes and new normative requirements for the World Cup bidding process.

### 2.2.1 Article 3 of the FIFA Statutes

The April 2016 edition of the FIFA Statutes introduced a new Article 3 which now [endnote 1] reads: 'FIFA is committed to respecting all internationally recognized human rights and shall strive to promote the protection of these rights'. This commitment is further defined in FIFA's Human Rights Policy (FIFA HRP). According to Section 1 of the FIFA HRP, FIFA is committed to respect human rights 'in accordance' with the UN Guiding Principles on Business and Human Rights. The human rights are then materially spelled out in Section 2 of the FIFA HRP and include those contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. In Section 2 of the FIFA HRP, FIFA also considers international rights and principles that elaborate on the rights of people belonging to specific groups or populations that require special attention, including in particular 'indigenous peoples, women, national, ethnic, religious and linguistic minorities, children, disabled people, migrant workers and their families and human rights defenders'. Finally, FIFA also states that it will respect the standards of international humanitarian law where FIFA's operations extend to situations of armed conflict.

In Section 3 to 7 of the FIFA HRP, operational principles are concretized. FIFA commits to in-depth due-diligence processes, to avoiding adverse human rights impacts (whether through its own activities or activities directly linked to FIFA's operations, products or services) and to remediating such impacts when they occur. Furthermore, FIFA commits to exercising its leverage in connection with adverse human rights impacts arising through its business relationships. At the same time, FIFA commits to promoting human rights and contributing to their enjoyment. In case of a conflict of national laws with international human rights standards, FIFA commits to following the higher standard 'without infringing upon domestic laws'; and where the latter would undermine FIFA's commitment to internationally recognized human rights, FIFA states that it will make 'every effort' to uphold its commitment by constructively engaging with relevant authorities and stakeholders.

<sup>26</sup> Owen Gibson, 'Fifa faces legal challenge over Qatar migrant workers' (*The Guardian*, 10 October 2016) <<https://www.theguardian.com/football/2016/oct/10/fifa-faces-legal-challenge-over-qatar-migrant-workers-world-cup-2022>> accessed 29 August 2019.

<sup>27</sup> Amnesty International, 'Qatar World Cup of Shame' <<https://www.amnesty.org/en/latest/campaigns/2016/03/qatar-world-cup-of-shame/>> accessed 28 August 2019.

<sup>28</sup> Amnesty International 2019 (n 3).

<sup>29</sup> Human Rights Watch 2019 (n 25).

<sup>30</sup> Suren Gomtsian, Annemarie Balvert, Branislav Hock & Oguz Kirman, 'Between the Green Pitch and the Red Tape: The Private Legal Order of FIFA', (2018) 43 *The Yale Journal of International Law* 85.

Finally, the implementation of FIFA's human rights commitment is explicated in Section 8 through 13 in four 'pillars'. In Pillar I ('commit and embed'), FIFA states that it not only commits to upholding its human rights responsibilities but also to embed respect for human rights within its structures and in all of its relationships, to communicate and promote its FIFA HRP internally and externally, and to set up the necessary internal structures and processes to implement its human rights commitment, including adapting internal codes, policies and guidelines in line with the FIFA HRP.

Pillar II ('identify and address') specifies that FIFA will identify and address adverse human rights impacts through risk assessments and that FIFA will encourage or, where appropriate, require the same from entities tasked with organizing FIFA competitions. Furthermore, FIFA commits to defining and implementing action plans to address salient human rights risks and tracking the effectiveness of measures taken. In particular, FIFA states that it will make human rights commitments part of the requirements for the bidding and hosting of FIFA competitions—notably by including a clause committing to the principles of the FIFA HRP—and that FIFA will take human rights into account in the selection of host countries.

Pillar III ('protect and remedy') commits FIFA to non-interference with respect to 'human rights defenders who voice concerns about adverse human rights impacts relating to FIFA' as well as 'media representatives'. In addition, FIFA commits to taking adequate measures for protecting the latter two groups, including using its leverage with relevant authorities. FIFA then does not commit to, but 'considers, as appropriate, internal and external as well as local and international mechanisms and is guided by the effectiveness criteria for non-judicial grievance mechanisms outlined in principle 31 of the UNGPs'. Nevertheless, FIFA does 'require from those organizing FIFA tournaments that competent and independent bodies are put in place for reviewing human rights issues and complaints in the context of the organization of such tournaments'.

Finally, Pillar IV ('engage and communicate') integrates external stakeholders into the human rights equation. This pillar commits FIFA to public transparency and regular constructive exchange with an independent, expert Human Rights Advisory Board as well as potentially affected groups and individuals. Furthermore, Section 13 states that all of FIFA's bodies and officials are bound by human rights commitments when exercising their powers and competences, including the interpretation and enforcement of FIFA rules. Specifically, it is the FIFA Governance & Review Committee that provides strategic guidance to the FIFA Council (who is responsible for the overall strategic direction) regarding human rights matters and may propose to the Council amendments to FIFA rules. Overall responsibility for the implementation of FIFA's human rights commitment is assigned to the FIFA Secretary General, head of the FIFA administration, and the responsibility for day-to-day management and coordination of FIFA's human rights work is assigned to the Head of the Sustainability & Diversity Department, who reports directly to the FIFA Secretary General.

### 2.2.2 Bidding Process for the 2026 FIFA World Cup

This human rights commitment has prominently materialized within FIFA's Bidding Process for the 2026 World Cup. The FIFA Regulations for The Selection of The Venue for The Final Competition of the 2026 FIFA World Cup (2026 FIFA Regulations) specify in Article 12(7)(2) that FIFA will—albeit at its sole discretion—make the bidding process open to the public, including the bid evaluation reports for each candidate. These reports will be prepared by a dedicated Task Force that is composed of members from within the FIFA administration as specified in 3.5 of Appendix 1 to the 2026 FIFA Regulations (Appendix). The reports themselves will include compliance and risk assessments as well as an assessment of key infrastructural and revenues/costs components.<sup>31</sup> For the first time in FIFA's history, there will also exist an independent Audit Company; though, despite what its name might suggest, the independent audit company is appointed by FIFA according to 3.4 of the Appendix. The Audit Company will produce three written reports on its observations and findings in relation to the Bidding Process, with the final report being made available public.<sup>32</sup> Furthermore, as specified in 3.5.1 (i) of the Appendix, the Audit Company appoints one representative that will act as an observer of the bid evaluation process and of the activities carried out by the Bid Evaluation Task Force. Qualifying bids are then evaluated by the FIFA Council,<sup>33</sup> who—also for the first time in FIFA history—will designate a maximum of three bids for a final vote before the FIFA Congress, the 'supreme and legislative body'<sup>34</sup> that currently comprises representatives of all 211 FIFA member associations.

<sup>31</sup> See 3.5.2 of the Appendix.

<sup>32</sup> See 3.4 (iii) of the Appendix.

<sup>33</sup> See 3.6.4 (ii) of the Appendix.

<sup>34</sup> See Article 24 para. 1 of the FIFA Statutes.

Importantly, as part of FIFA's Bidding Process for the 2026 World Cup, FIFA requires not only that its own bodies fully commit to international human rights and labor standards in accordance with the United Nations' Guiding Principles on Business and Human Rights, but also bidding member associations must *themselves* commit to these standards of FIFA's Bid Book requirements (FIFA's 'Structure, content, presentation, format and delivery of the bid book') and provide a respective human rights strategy. This strategy must state, among other things, how to identify and address the risks of adverse impacts on human rights and labor standards, a comprehensive report on said risks that is informed by an independent expert study, plans for meaningful community and/or stakeholder dialogue, appropriate and effective grievance mechanisms for individuals and communities whose human rights may be impacted, and appropriate and effective processes in place to identify and respond to allegations of human rights abuse by the candidate's business relationships in connection with the staging and hosting of the Competition.<sup>35</sup>

However, this strategy forms only one aspect of a larger set of so-called Selection Criteria in 3.6.2 of the Appendix. Other Selection Criteria include compliance with the Bidding Process and its requirements, hosting vision and strategy, sustainable event management, environmental protection and the characteristics of the host country itself, next to other technical and event-related matters. Furthermore, the Appendix explicitly states in 3.6.3 (ii) that no specific mandatory weight is assigned to any particular Selection Criteria. In other words, members of the FIFA Council and delegates of the FIFA Congress may weigh and apply the Selection Criteria at their sole discretion when it comes to voting for (or rejecting) the host country for the 2026 World Cup.<sup>36</sup> Thus, the requirement of providing a human rights strategy in and of itself does not entail direct enforceability of adverse human rights impacts. Still, given that FIFA commits to publishing—albeit at their discretion—both the candidate's Bid Book and the Task Force's evaluation report, any discrepancy between declared commitments to human rights and actual commitments to human rights will be made transparent.

In summary, these changes—the recognition of human rights in Article 3 of the Statutes and the integration of human rights as Selection Criteria within the private ordering of FIFA—can then be characterized as counter-movements that counteract self-destructive tendencies from within and prevent further scandalization in the public sphere through protest movements. Furthermore, the new Article 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 are more likely to be undertaken. Nonetheless, 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.

### 2.3 Contracts

The transnational regime of sports relies on a complex network of contracts. Athletes, clubs, associations and arbitration courts are all connected through contractual agreements. As a further patch in FIFA's constitutional quilt, contracts contribute to the regime's development of a self-given constitution.

Member associations who wish to apply as potential hosts of the World Cup must produce a Bid Book, declaring not only their commitment to human rights and labor standards, but also how their hosting vision and strategy integrate with both the government's and host cities' strategies and visions.<sup>37</sup> This means that FIFA's human rights commitment strives for external impact even beyond its member associations.<sup>38</sup> As part of its bid, that member association must demonstrate support of government authorities at federal, state and municipal levels in the respective host country.<sup>39</sup> This support is to be secured via several government guarantees, one of which includes the issuing of declarations, namely a Government Declaration and a Host City Declaration for each city. The Government Declaration entails a declaration of support to FIFA and the hosting association 'in their efforts to achieve that the hosting and staging of the Competition and any

<sup>35</sup> See beside Appendix in 3.6.2 also the full requirements for the human rights strategy in Section 23 of 'Structure, content, presentation, format and delivery of the bid book'.

<sup>36</sup> See 3.6.3 (i) of the Appendix.

<sup>37</sup> See Section 1 of FIFA, 'Structure, content, presentation, format and delivery of the bid book', <[https://resources.fifa.com/mm/document/affederation/administration/02/91/61/10/structure.content.and.format.of.bid\\_neutral.pdf](https://resources.fifa.com/mm/document/affederation/administration/02/91/61/10/structure.content.and.format.of.bid_neutral.pdf)> accessed 29 August 2019.

<sup>38</sup> *ibid* Section 23.

<sup>39</sup> See FIFA, 'Overview of Government Guarantees and the Government Declaration' 1 <[https://resources.fifa.com/mm/document/affederation/administration/02/91/59/80/20170914\\_governmentguarantees\\_17-03136\\_101\\_en\\_en\\_neutral.pdf](https://resources.fifa.com/mm/document/affederation/administration/02/91/59/80/20170914_governmentguarantees_17-03136_101_en_en_neutral.pdf)> accessed 29 August 2019.

legacy and post-event related activities do not involve adverse impacts on internationally recognized human rights, including labor rights'.<sup>40</sup>

The same is required for each host city in their Host City Declaration, with the addition that the city must give its support 'with particular attention to the provision of security, potential resettlement and eviction, labor rights (including those of migrant workers), rights of children, gender and other forms of discrimination and freedom of expression and peaceful assembly, and will ensure that access to effective remedies is available where such adverse impacts do occur, including judicial and non-judicial complaint mechanisms with the power to investigate, punish and redress human rights violations'.<sup>41</sup>

Further, guarantees of compliance with international human rights and labor standards are requested from entities responsible for the construction and renovation of stadiums, training sites, hotels, and airports.<sup>42</sup>

The expansion of FIFA's contractual network demonstrates FIFA's explicit commitment to secure human rights in all societal spheres that may be affected by FIFA-related activities. Yet, it remains questionable how these requirements can be enforced. The most severe punishment for the hosting association would be the withdrawal of the hosting position. However, the execution of this punishment is highly unlikely because the concept of the FIFA Men's World Cup is based on a rhythm of four years. This rhythm is tightly coordinated with other sports tournaments, e.g. the continental cups and the Olympic Games. A substitute host would have less time to prepare for the staging of the event, so she may rescind her bid. And a shift or cancellation of the FIFA Men's World Cup is highly unlikely due to the anticipated financial losses. Furthermore, 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. *Prima facie*, then, human rights violations of subcontractors could simply be redressed by sanctioning the hosting association as member of FIFA and as possible addressee of disciplinary actions. *Secunda facie*, a sanction for the hosting association will almost always also imply disadvantages for FIFA itself. Here, the integrity of the sports system with its tightly clocked rhythm of events and the maximization of profit could prevent FIFA from sanctioning human rights violations in connection with preparing and staging the World Cup construction project related to the World Cup. The enforceability of FIFA's self-constitution in the shape of contracts will likely clash with these regime-specific rationalities and interests. Therefore, it is even more important that FIFA remains creative when it comes to sanctioning human rights offenders. Such sanctions could, for instance, include prohibiting 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 mechanisms remain underdetermined in FIFA's current network of contracts.

## 2.4 Arbitration Courts: CAS

According to *Teubner*, the legal sources of fundamental rights (including human rights) in transnational regimes are neither national fundamental rights, nor rules of international private law, nor mere social norms. Rather, the source is to be found in a "social" positivation of fundamental rights through the decision practices of transnational regimes themselves that enact fundamental rights from within.<sup>43</sup> 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 the FIFA Statutes marks an interesting evolutionary step in the way sport-related disputes are settled by the CAS. According to R58 CAS Code, 'the Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties (...)'. Thus, given that the new Article 3 of the FIFA Statutes now admits all internationally recognized human rights into the Statutes, human rights no longer just apply subsidiarily (if at all), but directly.

To put this change into relative perspective: it was well recognized long before April of 2016 that one of the main purposes of FIFA regulations is to create a standard set of rules which binds all football stakeholders across the globe. And even before the new Article 3 of the FIFA Statutes became effective, it was Article 2 that allowed decision-making bodies to be 'in a position to apply general legal principles in the international context'<sup>44</sup> in addition to only national laws. But, on previous occasions, FIFA demonstrated hesitation when

<sup>40</sup> FIFA, 'Government Declaration template' 2 <[https://resources.fifa.com/mm/document/affederation/administration/02/91/61/41/templategovernmentdeclaration%5bsinglebid%5d\\_neutral.pdf](https://resources.fifa.com/mm/document/affederation/administration/02/91/61/41/templategovernmentdeclaration%5bsinglebid%5d_neutral.pdf)> accessed 29 August 2019.

<sup>41</sup> FIFA, 'Host City Declaration template' 2 <[https://resources.fifa.com/mm/document/affederation/administration/02/91/61/59/templatehostcitydeclaration%5bsinglebid%5d\\_neutral.pdf](https://resources.fifa.com/mm/document/affederation/administration/02/91/61/59/templatehostcitydeclaration%5bsinglebid%5d_neutral.pdf)> accessed 29 August 2019.

<sup>42</sup> FIFA, 'Guide to the Bidding Process for the 2026 FIFA World Cup' 32 <[https://resources.fifa.com/mm/document/affederation/administration/02/91/88/61/en\\_guidetothebiddingprocessforthe2026fifaworldcup\\_neutral.pdf](https://resources.fifa.com/mm/document/affederation/administration/02/91/88/61/en_guidetothebiddingprocessforthe2026fifaworldcup_neutral.pdf)> accessed 29 August 2019.

<sup>43</sup> Teubner 2012 (n 10) 128 f.

<sup>44</sup> cf *Jonathan Mensah & Evian Thonon Gaillard FC v. FIFA & Udinese Calcio S.p.A.* (2015) CAS 2014/A/3739 & 3749, para. 132.

it comes to the applicability of human rights. For instance, FIFA insisted that the European Convention of Human Rights (ECHR) is not applicable to proceedings before the CAS because such proceedings are not criminal but disciplinary proceedings governed by civil law.<sup>45</sup> Similarly, FIFA argued that the Charter of Fundamental Rights of the European Union (Charter) should have no legally binding effect for CAS judicature.<sup>46</sup> On occasion, CAS Panels agreed and decided—based on Article R58 of the CAS Code—that provisions such as the Charter are to be considered excluded when not explicitly chosen by the parties.<sup>47</sup> Yet, on many other occasions, CAS Panels recited jurisprudence of the Swiss Federal Tribunal and determined that the ECHR can be applied in arbitration matters to the extent that its articles are applicable to civil law (and not criminal law) proceedings.<sup>48</sup> Even though the ECHR may not apply directly to CAS proceedings, values of the ECHR, such as procedural fairness, are to be taken into consideration.<sup>49</sup> And even when national rules and jurisdiction do not directly apply, CAS Panels still explicitly find it useful to take inspiration from such rules and jurisprudence.<sup>50</sup> This line of argumentation appears to be grounded in the indispensability of certain fundamental legal principles.<sup>51</sup> While CAS judicature acknowledges that international governing bodies such as FIFA have the autonomy to deviate even from mandatory provisions of substantive national laws, such autonomy is nevertheless understood to be limited by a transnational *ordre public*.<sup>52</sup> The CAS may be influenced by different nation state orders, general legal principles, doctrinal models, and even philosophical arguments, nevertheless arbitral courts render decisions themselves by choosing between different standards of fundamental rights and by declaring specific fundamental rights as binding for a particular regime.

Though there does not exist (as of yet) any disclosed CAS jurisprudence on the direct applicability of human rights based on Article 3 of the post-April 2016 FIFA Statutes, there does already exist ample CAS jurisprudence (even specifically on football-related matters) which acknowledges the applicability of human (or fundamental legal) rights. In that sense, the new Article 3 of the FIFA Statutes does not necessitate an entirely new human rights approach by the CAS. It is more likely that the CAS's human rights jurisprudence will continue on the path that it has already carved out for itself. Nonetheless, now that human rights no longer apply just indirectly but directly, appellants are explicitly encouraged to make human rights violations a central topic of discussion during arbitration, thus proliferating the inclusion and discussion of human rights standards in sports-related disputes before the CAS.

Given that it is possible for appeals concerning human rights violations to be brought before the CAS, two questions arise. First, which procedural and substantive human rights have entered into CAS's human rights jurisprudence at this stage? And second, what effect does FIFA's new Bidding Process for the World Cup 2026 have on the possible spectrum of arbitration awards the CAS could render in light of violations that occur?

#### 2.4.1 CAS's Human Rights Jurisprudence

At this stage, human rights have already entered into CAS's jurisprudence. They can be divided into two categories: fundamental procedural rights and fundamental substantive human rights.

A number of fundamental procedural rights have been acknowledged by CAS judicature, chief among which *ne bis in idem*,<sup>53</sup> the *fundamental right of defense* and the *fundamental principle of legal certainty*.<sup>54</sup> Furthermore, CAS recognized the *principle of non-retroactivity*,<sup>55</sup> the *lex mitior* doctrine,<sup>56</sup> a *fundamental right to privacy*<sup>57</sup> and the *contra proferentem* principle.<sup>58</sup>

<sup>45</sup> cf. *Josip Simunic v. FIFA* (2014) CAS 2014/A/3562, para. 40.

<sup>46</sup> *FC Midtjylland A/S v. FIFA* (2009) CAS 2008/A/1485, para. 43.

<sup>47</sup> cf. *ibid.* para. 28.

<sup>48</sup> *Fenerbahçe SK v. UEFA* (2013) CAS 2013/A/3139, para. 88, 91 f.

<sup>49</sup> *ibid.* para. 89, 95.

<sup>50</sup> *KSF, Saud Abdulrahman Ahmad Habeeb, Pourya Mohammadreza Norouziyan & Elham Hossein Harijani v. IOC & ISSF* (2016) CAS 2015/A/4289, para. 133.

<sup>51</sup> On the concept of mandatory transnational law, Moritz Renner, *Zwingendes transnationales Recht* (Nomos 2011).

<sup>52</sup> *IRIFF v. FIFA* (2009) CAS 2008/A/1708, para. 21 f.; *Grasshopper v. Alianza Lima* (2009) CAS 2008/A/1705, para. 23.

<sup>53</sup> i.e. the doctrine that a person may not be tried again for an offence in relation to which that person has already been acquitted by a final decision of another body based on the same regulatory framework.

<sup>54</sup> cf. *Jobson Leandro Pereira de Oliveira v. FIFA* (2016) CAS 2015/A/4184, para. 200 f., 202.

<sup>55</sup> Explicitly categorized as part of international *ordre public*, see *Joseph S. Blatter v. FIFA* (2016) CAS 2016/A/4501 para. 95.

<sup>56</sup> *ibid.* para. 95.

<sup>57</sup> Reg. Anti-doping measures, see *de Oliveira* (n 54) para. 196.

<sup>58</sup> *Ramon Castillo Segura v. FIFA* (2016) CAS 2016/A/4426, para. 81.



Some fundamental rights and principles are not only acknowledged by the CAS, but the scope of their applicability is discussed in substantive detail. For instance, the fundamental principle of *nulla poena sine lege*<sup>59</sup> is, of course, acknowledged by the CAS as a fundamental legal principle and human right;<sup>60</sup> at the same time, the CAS has also ruled that this fundamental principle is not categorically violated by the concept of strict liability often applied to sport clubs, namely that a club bears direct responsibility for actions of their players, officials, members, supporters and any other persons exercising a function on behalf of the club even if the club itself is not at fault.<sup>61</sup>

Furthermore, the *fundamental right to access to the courts* is not considered violated if the appealing athlete is given a time limit of ten days for appealing a decision to the CAS as long as that athlete is not required to file a full brief with specific motions and requests by that time.<sup>62</sup>

It is considered a violation of the *fundamental right of due process* if a judging body bases its decision on a provision or legal consideration that was never discussed (or was even given the opportunity to discuss) during the proceedings and which the parties could not have suspected to be relevant.<sup>63</sup>

The *fundamental right to be heard* is typically violated when facts are based on anonymous witness statements; yet such statements may be admissible under strict conditions such as cross examination via audio-visual protection and an in-depth check of the identity and reputation of the witness by the court.<sup>64</sup> Similarly, *right to the equality of arms* requires that a party must be afforded a reasonable opportunity to present their case under conditions that do not place them at a disadvantage vis-à-vis their opponent. To provide a concrete example: CAS ruled that this right is not violated when a Panel refuses to no longer hear a witness of one party after that party was given twenty days to present its witnesses.<sup>65</sup>

The applicability of some fundamental procedural principles, though, has also been questioned or even denied.<sup>66</sup> Sports-related cases before the CAS are not considered criminal cases. Thus, some fundamental safeguards associated with criminal law do not apply, including the *presumption of innocence* and the doctrine *in dubio pro reo*<sup>67</sup> contained in the ECHR. As a result, facts before the CAS do not have to be proven 'beyond any reasonable doubt'. Rather, the standard of proof has to take into account the seriousness of the allegation and also the nature of the alleged behavior. The very nature of corruption, for instance, involves concealment and evasion. When it comes to match-fixing and doping cases, the CAS has ruled that the standard of proof is 'to the comfortable satisfaction of the Court', which is typically higher than a mere 'balance of probabilities' (more likely to be true than not), but not as high as the criminal standard of *beyond any reasonable doubt*.<sup>68</sup>

Some of the above fundamental procedural rights are also considered part of the wider concept of the *right to a fair trial*, which is a difficult right to spell out in concrete detail. On the one hand, CAS judicature emphasizes its full power of *de novo* review as articulated in Article R57 of the CAS Code. CAS Panels may review and rehearse a case in its entirety, thereby healing all procedural defects that may have occurred along the way, including the lack of independence and impartiality of previous decision-making bodies.<sup>69</sup> On the other hand, the very Article R57 also limits this power somewhat by specifying that a Panel may exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. The implications of the latter do not appear to have been fully resolved. With regards to FIFA, specifically, CAS judicature has argued that decision-making bodies of federations such as FIFA enjoy a certain amount of discretion in the determination of sanctions, such that CAS Panels may review such sanctions only to the extent that they are evidently and grossly disproportionate

<sup>59</sup> i.e. no punishment without a law.

<sup>60</sup> Codified in pivotal legal documents such as the ECHR.

<sup>61</sup> *Eskişehirspor Kulübü v. UEFA* (2014) CAS 2014/A/3628, para. 72 with further ref.; *GNK Dinamo v. UEFA* (2014) CAS 2013/A/3324 & 3369, nr. 9.24.

<sup>62</sup> With explicit ref. to ECtHR judicature, see *Grasshopper* (n 52) para. 23.

<sup>63</sup> *FC Dynamo Kyiv v. Gerson Alencar de Lima Júnior & SC Braga* (2015) CAS 2013/A/3309, para. 87.

<sup>64</sup> With explicit ref. to Article 6 ECHR, see *FK Probeda, Aleksander Zabrcanec, Nikolce Zdraveski v. UEFA* (2009) CAS 2009/A/1920, para. 13.

<sup>65</sup> *Aris FC v. Javier Edgardo Campora & HFF* (2012) CAS 2011/A/2463 para. 12 f.

<sup>66</sup> cf *Vsl Pakruojo FK, Darius Jankauskas, Arnas Mikaitis, Sigitas Olberkis, Valdas Pocevičius, Alfredas Skroblas, Donatas Strockis, Diogo Gouveia Miranda, C.H. Alexandru and Taras Michailiuk v. Lithuanian Football Federation (LFF)* (2016) CAS 2015/A/4351, para. 52, 87 f.

<sup>67</sup> i.e. when in doubt, for the accused.

<sup>68</sup> *Besiktas Jimnastik Kulübü v. UEFA* (2014) CAS 2013/A/3258 para. 120; *O. v. UEFA* (2011) CAS 2010/A/2172, para. 20; *WADA v. Coetzee Wium* (2005) CAS 2005/A/908, para. 5.

<sup>69</sup> *B. v. Fina* (1999) CAS 98/211 para. 8; *KF Skënderbeu v. AFA* (2018) CAS 2017/A/5272, para. 49 f.

to the offense.<sup>70</sup> Yet, with regards to the *Union des Associations Européennes de Football* (UEFA), it has also been argued that the curing effect of a full *de novo* review should not be inhibited by too liberal an application of Article R57.<sup>71</sup>

A third complication arises because the *right to a fair trial* is itself informed by the very practice it governs. In other words, to determine whether a FIFA sanction is disproportionate or not, one also needs to consider FIFA's long-standing disciplinary practice.<sup>72</sup> Anti-doping rules codified by the World Anti-Doping Agency, for instance, are understood as expressions of a legitimate harmonizing aim and, therefore, not in violation of human rights legislation despite imposing rigid sanctions.<sup>73</sup> And, for example, a two-year suspension for a first-time doping offence is considered not a disproportionate sanction.<sup>74</sup>

Substantive human rights have also been subject of CAS jurisprudence. In particular, both *economic freedom* and the *right to private property* have been acknowledged as particular instances of 'applicable international standards of human rights'.<sup>75</sup> Furthermore, the *right to work*, *freedom to provide services*, and *freedom of movement* have been recognized as applicable European law.<sup>76</sup> *Freedom of speech* has also been recognized as a fundamental right. Respective jurisprudence of the European Court of Human Rights is seen as indicative and, in jurisdictions to which it applies, even as compulsive.<sup>77</sup>

Some substantive rights have also been discussed in thorough detail. *Freedom of association*, for instance, was not only recognized as a right enshrined in Article 11 of the ECHR but also concretized insofar as that membership rights and status are subject to a dynamic evolution and that any infringement must be assessed on the basis of a balance of interests.<sup>78</sup> Still, *freedom of association* is violated if, among two competing football associations, only one is granted certain territorial privileges, or if the very existence of one association was called into question, or if the clubs in one association were forced to leave and join the competing association.<sup>79</sup>

It has also been discussed whether there exists such a human right as the *right to train together with one's team*. The CAS Panel in question acknowledged that Article 15 of the Charter lays down the right to engage in work and to pursue a freely chosen or accepted occupation but then also stat that 'it is debatable as to whether it extends to specifically ensure the rights of players to train together'.<sup>80</sup> While reflecting the customs and practices within the sport of football, the Panel specified that while there may be circumstances where it is necessary for a player to train alone (for instance when her fitness levels had dropped or she sustained an injury), such a measure would need to end when circumstances reverted, given that football is a team sport where the majority of training needs to be conducted together with the team. Nevertheless, the Panel concluded that it could not go so far as to declare that there exist a fundamental (or human) right for all players to always train together, but that rather the facts of each case must be considered.<sup>81</sup>

It is also worthwhile to note that *human dignity* is protected in Article 14(1) of the UEFA Disciplinary Regulations (DR) from unacceptable discriminatory behavior, such as insults on grounds of skin color, race or ethnic origin.<sup>82</sup> CAS Panels have clarified that the language of Article 14(1) DR is clear enough to be considered on its own without recourse to definitions provided by the United Nations International Convention on the Elimination of All Forms of Racial Discrimination,<sup>83</sup> a convention equally aimed at protecting the dignity of the human person. Whether *human dignity* is violated or not according to Article 14(1) of the DR, is to be determined from the perspective of an objective, reasonable onlooker, independent of whether she is situated in the stadium (on the pitch or in the stands), behind a screen in any location on the world or in space.<sup>84</sup>

<sup>70</sup> Simunic (n 45) para. 119 with further ref.

<sup>71</sup> cf *FAS v. UEFA* (2015) CAS 2015/A/3875, para. 108 with further ref.; Antonio Rigozzi, Erika Hasler and Brianna Quinn, 'The 2011, 2012 and 2013 revisions to the Code of Sports-related Arbitration' (2013) 3 *Jusletter* 1–18, pp. 13 f.

<sup>72</sup> *RFEF v. FIFA* (2015) CAS 2014/A/3813, para. 285.

<sup>73</sup> *WADA v. FPF & Nuno Assis Lopes de Almeida* (2007) CAS 2006/A/1153, para. 45, 99.

<sup>74</sup> *ibid* para. 40.

<sup>75</sup> *Ion Viorel v. RFF* (2017) CAS 2017/A/4947, para. 111.

<sup>76</sup> *FC Sportul Studentesc SA v. FC Petrolul Ploiesti SA & Mares George Alexandru* (2015) CAS 2015/A/3957, para. 83.

<sup>77</sup> *George Yerolimpos v. WKF* (2014) CAS 2014/A/3516, para. 116.

<sup>78</sup> *Football Association of Serbia v. UEFA* (2017) CAS 2016/A/4602, para.134 f.

<sup>79</sup> *ibid* para. 136.

<sup>80</sup> *I. v. CJSC FC Krylia Sovetov* (2012) CAS 2011/A/2428, para. 26.

<sup>81</sup> *ibid* para. 30.

<sup>82</sup> *Feyenoord Rotterdam N.V v. UEFA* (2016) CAS 2015/A/4256, para. 48; *GNK Dinamo* (n 61) nr. 9.12.

<sup>83</sup> *Feyenoord* (n 82) para. 47.

<sup>84</sup> *ibid* para. 61 ff.; *FAA v. UEFA & FAS* (2015) CAS 2015/A/3874, para. 172.

### 2.4.2 Effects of Introducing Article 3 and the Guide to the Bidding Process for the 2026 FIFA World Cup for the Future

Since the principle of non-retroactivity does apply to rules which govern the requirements for being admitted to a competition,<sup>85</sup> 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. Therefore, *non-retroactivity* of limitative rules can itself be considered as a limit to the very process constitutionalizing the regime.

Still, what will possibly change in relation to CAS jurisprudence when considering the introduction of human rights into the private ordering of FIFA?

As mentioned, due to the new Article 3 of the FIFA Statutes human rights no longer just apply subsidiarily (if at all) but directly in CAS proceedings according to R58 CAS Code. However, jurisdiction requirements and the question of whether the suing party has the required standing to sue, form a bottleneck for the admittance of human rights, interpreted and adjusted by CAS jurisprudence to the systemic rationalities of FIFA.

To this day, victims of externalized human rights violations (for instance, migrant workers in Qatar) have no possibility to sue FIFA in a CAS proceeding for different reasons. CAS's procedural rules, set forth in the CAS Code, apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS.<sup>86</sup>

For the simple reason that migrant workers or their employer have no contract with FIFA containing such arbitration clauses, CAS has no jurisdiction in this matter as part of ordinary arbitration proceedings. Further, in order to file a request in an appeal arbitration proceeding, a copy of the decision appealed against needs to be provided.<sup>87</sup> The only decision rendered by FIFA as a sports-related association is the World Cup bid itself. In this regard migrant workers lack the necessary standing to sue. According to the *Gundel* case decided by the Swiss Federal Tribunal, in certain circumstances even indirect members of an umbrella association had the right to appeal, conferred on them by Article 75 Swiss Civil Code.<sup>88</sup> The same right is also conferred on third parties when they are sanctioned by an association whose regulations they had previously agreed to comply with.<sup>89</sup> But migrant workers are neither indirect members of FIFA nor were they sanctioned by a member association or by the World Cup bid decision as such, and therefore they cannot rely on the *Gundel* jurisprudence.

With regards to member associations who lost the World Cup bids and who (as members) therefore could have had standing to sue against the bid decision made by FIFA, they would have had no legal claim to be selected instead in the past. The discretion of the FIFA Executive Committee to select the host is provided and limited by the internal rules of the bidding process. Given that human rights were not a criterion for the host selection, there was no applicable violation of the internal rules and thus no legal base for an appeal against the decision.

But this assessment may now have changed due to the introduction of Article 3 and the Guide to the Bidding Process for the 2026 FIFA World Cup. Since any applying member association needs to provide FIFA with specific commitments and information on human rights and labor standards as described above, human rights are a selection criterion which has a limiting effect on the selection discretion. This self-limitation may now manifest in other member association's possibility to sue before CAS against FIFA's bid decision in case of human rights violations.

If the contents of a winning applicant's Bid Book regarding human rights standards turn out to be incorrect (potentially the expert study was falsified or the proclaimed stakeholder dialogue or grievance mechanisms never existed), then the losing member associations could have standing to sue before the CAS.<sup>90</sup> This is because, even though members of the FIFA Council and delegates of the FIFA Congress are free to apply

<sup>85</sup> *Clubul Sportiv Municipal Râmnicu Vâlcea v. Romanian Football Federation (RFF) & Romanian Professional Football League (RPFL)* (2015) CAS 2014/A/3855, principle 2.

<sup>86</sup> [appeal arbitration proceedings – R27 CAS Code].

<sup>87</sup> [R48 CAS Code].

<sup>88</sup> *G. v. Fédération Equestre Internationale et Tribunal Arbitral du Sport*, Swiss Federal Tribunal (1993) – BGE 119 II 271, c. 3b; *KSF et al.* (n 50) para. 130 f. with further ref.

<sup>89</sup> *ibid.*

<sup>90</sup> Respective arbitration clause is in 12.17 of the Appendix.

and assign weight to the Selection Criteria at their sole discretion, it can hardly be argued that the submitted human rights strategies ought to have been ascribed no weight at all by the voting members and delegates. Thus, the losing member association could argue that if the winning association had actually provided a truthful (i.e. worse) human rights strategy, that association would never have been shortlisted by the FIFA Council as one of the three final candidates; and that even if it would have been shortlisted under such hypothetical conditions, the voting member associations of the FIFA Congress certainly were not given all the required (truthful) information to properly inform their vote. In order to prove a violation of the necessary Selection Criteria, a significant divergence must be demonstrated.

This raises two pertinent issues for future appeals: first, the CAS will be forced to reflect on what constitutes a significant divergence between a declared human rights strategy and reality, and what such a divergence implies regarding the legitimacy of the votes cast by FIFA Council members and FIFA Congress delegates.

Second, what is the spectrum of possible arbitration awards the CAS could render at the sight of such an appeal? Can the CAS only formally determine that the bidding process was defective? Can it declare the result of the bidding process null and void, and order a new bidding for the World Cup? Could it even annul the winning bid and then declare who won the bidding process instead? At least the latter is rather unlikely. According to legal doctrine and well-established CAS case law, the CAS *de novo* power of review cannot be construed as being wider than that of the appellate body,<sup>91</sup> meaning for the case at hand that declaring a new host is likely impossible due to the binary appeal system which only consists of one appealing association. Here, a second factual problem arises: even though arbitration courts like the CAS render their decisions comparatively fast, an appeal proceeding will still shorten the preparatory possibilities of a new World Cup host. As seen above (under 2.3 Contracts), such factual circumstances could prevent appeals because of the risk of unmanageable time pressure for the appellant. In conclusion, the introduction of human rights as Selection Criteria does have a positive effect on CAS jurisprudence in increasing the spectrum of possibilities for member associations to address human rights violations. Nevertheless, factual circumstances may prevent member associations from exercising these new possibilities to their fullest extent. This shows that, beside the *non-retroactivity principle*, factual circumstances have to be considered once again as potential limitations of a regime's self-given constitution.

#### 2.4.3 The Contribution of Society to the Translation Process

If the source of fundamental rights in transnational regimes is to be found in a "social" positivation of fundamental rights, namely through the decision practices of transnational regimes that enact fundamental rights from within,<sup>92</sup> then arbitration courts are one such societal force. They play the role of translators who instantiate norms into transnational law. In this sense, the societal constitutionalist lens draws attention to the importance of society for limiting the negative effects of FIFA on its environment. But the responsibility for introducing fundamental rights during arbitration proceedings is a shared responsibility between the arbitrators and the parties involved. In accordance with the maxim of *iura novit curia* (the court knows the law), an arbitral tribunal may base its findings on legal principles that were not argued by the parties.

However, the arbitral tribunal may not take any party by surprise and apply legal provisions or principles that neither party could reasonably have expected to apply.<sup>93</sup> If a CAS Panel were to base its decision on fundamental rights without any substantiated claims of the party to whom the respective consideration is advantageous, then it could result in a cassation of the award by the Swiss Supreme Court. Pursuant to Article 190(2)(d) PILA, an arbitral award can be repealed 'if the principle of equal treatment of the parties or the right of the parties to be heard in adversarial proceedings was violated'.<sup>94</sup> Therefore, the co-responsibility of any party to introduce fundamental rights to CAS arbitration proceedings should be taken seriously. To strengthen the enforceability of Article 3 of the FIFA Statutes, human rights need to be substantiated in more CAS proceedings in order to be effectively translated and positivized. Acknowledging the power society wields over transnational regimes can be used to develop regime-specific strategies that coordinate the leveraging effects of society within the human rights context. NGOs and other interdisciplinary societal institutions (such as e.g. the Centre for Sport and Human Rights) could support parties (who are sometimes not even represented by professionals during arbitration proceedings) with formulating their claims and

<sup>91</sup> *Clubul Sportiv Municipal Râmnicu Vâlcea* (n 87) principle 4.

<sup>92</sup> Teubner 2012 (n 10) 128 f.

<sup>93</sup> Antonio Rigozzi, 'Challenging Awards of the Court of Arbitration for Sport' (2010) 1(1) JIDS 250; see also *FIFA v. A. AG* (2018) SSC 4A\_338/2018, para. 5.2.

<sup>94</sup> Rigozzi 2010 (n 93) 247.

reasonings in a substantiated manner such that they can bring strong, effective human rights cases before arbitration courts. This would help trigger the translation process that positivizes fundamental rights into transnational law.

## 2.5 State Courts

Given the new Article 3 of the FIFA Statutes, human rights standards may become subject matter before national courts more frequently, and therefore decisions of state courts may increasingly contribute the evolution of limitative rules. Adhering to the metaphor of constitutionalizing process 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.<sup>95</sup> Thus, while national and supranational courts certainly qualify as public actors, they act 'in the role of civil society'<sup>96</sup> when they recognize, interpret and apply law.

To give a pertinent example: six years after the selection of Qatar for the 2022 FIFA World Cup, the Dutch Trade Union FNV, the Bangladeshi Free Trade Union Congress, the Bangladesh Building and Wood Workers Federation and the Bangladeshi citizen Nadim Shariful Alam filed a lawsuit against FIFA before the Commercial Court of the Canton of Zurich, Switzerland.<sup>97</sup> 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 by pressing responsible Qatari authorities to ensure that human rights and fundamental freedoms of migrant workers are preserved. This time around, the Court ended up rejecting all claims, arguing that essential procedural requirements had not been fulfilled.

The plaintiffs' claim of requiring of FIFA to exert pressure was ruled to be both contradictory, not enforceable and too unspecific.<sup>98</sup> Such a request, the Court ruled, does not redress the underlying ills (namely the concrete personal rights violations) and would be impossible to enforce.

It is worth noting that the Court did not rule on whether FIFA can, in principle, be held accountable for human rights violations or not; it simply determined the corresponding claims to be contradictory, not enforceable, too unspecific and therefore inadmissible.<sup>99</sup> At the same time, the Court's decision 'arguably turns a blind eye to the ever-increasing power of non-State actors in contemporary international relations'.<sup>100</sup> One can justifiably question whether FIFA, by selecting the host for the highly prestigious and sought-after World Cup and thereby exercising immense *de facto* power (which, in the past, resulted in states modifying their existing laws to accommodate demands issued by FIFA), is to be considered mutually responsible when human rights violations occur during the staging and hosting of a World Cup.<sup>101</sup> FIFA now commits in Section 7 of the FIFA HRP to make "every effort" to uphold its human rights commitment, even when such commitments conflict with domestic laws, namely by engaging with relevant authorities and stakeholders. From a legal point of view, "every effort" can sensibly be differentiated from "best efforts" or just "efforts", thus the decision to call respective claims unenforceable or unspecific seems short-sighted.

But while decisions of national courts can, in principle, contribute to the evolution of limitative rules that form part of FIFA's patchwork constitution, such state-generated (global) limitative rules may encounter their own limit when they collide with (local) legal interests of sovereign states. As the Court does state in *obiter dictum*, 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, an association incorporated under Swiss law, to bring about changes to the political organization, judiciary and legal system of a sovereign foreign nation state.<sup>102</sup>

<sup>95</sup> Teubner 2012 (n 10) 129 f.

<sup>96</sup> Hock & Gomtsian 2018 (n 9) 192 ff., 195 ff.

<sup>97</sup> Detailed two-part analysis in: Tomáš Grell, 'FIFA's Responsibility for Human Rights Abuses in Qatar – Part I: The Claims Against FIFA' (*Asser International Sports Law Blog*, 28 February 2017) <<https://www.asser.nl/SportsLaw/Blog/post/fifa-s-responsibility-for-human-rights-abuses-in-qatar-part-i-by-by-tomas-grell>> accessed 28 August 2019; Tomáš Grell, 'FIFA's Responsibility for Human Rights Abuses in Qatar – Part II: The Zurich Court's Ruling' (*Asser International Sports Law Blog*, 6 March 2017) <<https://www.asser.nl/SportsLaw/Blog/post/fifa-s-responsibility-for-human-rights-abuses-in-qatar-part-ii-the-zurich-court-s-ruling-by-tomas-grell>> accessed 28 August 2019.

<sup>98</sup> *The Dutch Trade Union, the Bangladeshi Free Trade Union Congress, the Bangladesh Building and Wood Workers Federation and Nadim Shariful Alam v. FIFA* (2017) Commercial Court of the Canton of Zurich 2017 – HG160261-O 6.

<sup>99</sup> Grell 2017 (n 99) Part II.

<sup>100</sup> *ibid.*

<sup>101</sup> *cf ibid.*

<sup>102</sup> *The Dutch Trade Union* (n 98) 9.

### 3 Conclusion

As demonstrated, FIFA's reformation process, which began with the World Cup bid in 2010, can be analyzed as a constitutionalizing process. Starting from FIFA's crisis as its "constitutional moment", FIFA began to formulate limitative rules by introducing human rights to their private ordering. The necessary re-specialization and regime-specific application of human rights can be observed in FIFA's reformation in 2016. Human rights are positivized by a process formed like a "patchwork quilt", entwining scandalization actions of NGOs and protest movements, private ordering, contracts, CAS decisions, and national courts decisions. Each part represents a valuable contribution to FIFA's "common law" self-constitution: protest movements act as source of external pressure, which results in learning impulses to change the internal code of transnational regimes. This ongoing pressure has transformed—at least at the formal level—the private ordering of FIFA. FIFA has translated the social norms formulated by NGO and protest movements into limitative rules. This transformation notably includes a new Article 3 of the FIFA Statutes and new normative requirements for the World Cup bidding process. As a further patch of the quilt, contracts contribute to the regimes self-given constitution. FIFA expanded its contractual network and introduced human rights requirements to contracts regarding construction projects in connection with the World Cup. The introduction of human rights to the private order of FIFA has effects on CAS jurisprudence. Due to the new Article 3 of the FIFA Statutes human rights no longer just apply subsidiarily (if at all) but directly in CAS proceedings according to R58 CAS Code. Further, if the contents of the winning applicant's Bid Book regarding human rights standards turn out to be incorrect, then the losing member associations could have standing to sue before the CAS as result of incorporating human rights as Selection Criteria. Also, national courts may participate in the gradual development of a common law of transnational fundamental rights by recognizing and enforcing arbitral decisions or invoking *ordre public* and refusing to enforce transnational arbitral rulings because they violate fundamental rights. These processes have increased the self-reflective potential of FIFA when it comes to diagnosing violations of human rights standards.

But such social constitution encounters its own limitations on several issues: while decisions of national courts can, in principle, contribute to the evolution of limitative rules that form part of FIFA's patchwork constitution, such (global) limitative rules will encounter their own limit when they collide with (local) legal interests of sovereign states. Moreover, there exists no uniform global legislator to enact such rules. To the contrary, states are typically in competition with one another to attract powerful private transnational actors. Transnational societal forces, including arbitration courts such as the CAS, suffer less severely from this sovereignty limitation *if* these private orders become increasingly recognized as part of a genuinely transnational *ordre public*. But transnational private orders are not without their own limitations. The enforceability of FIFA's self-evolving constitution in form of contracts will find its limits as it collides with regime specific rationalities and interests, above all financial corruption and corruption of power. But also, the integrity of the sports system with its tightly clocked rhythm of mega-sporting events could prevent FIFA from proportionally sanctioning human rights violations in connection with the preparations for and staging of the World Cup. Finally, private ordering in form of the newly introduced Article 3 of the Statutes and the expansion of the Selection Criteria find their limits in the principle of *non-retroactivity* as far as past violations are concerned. Thus, it remains to be seen whether FIFA's formal inclusion of human rights will lead to a human rights regime that is actually enforceable and therefore effective at reducing negative externalities. Here, the societal constitutionalist lens draws attention to the importance of societal forces such as the CAS, NGOs and other non-state actors *over and above* state actors. Transnational societal forces are less consumed by the territorial logic that governs public actors. By developing global regime-specific strategies that coordinate the leveraging effects of society within the human rights context, system-inherent limitations to self-regulation may be overcome. 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.

#### Note

- <sup>1</sup> The most up-to-date version (June 2019 edition of the FIFA Statutes) has not changed the wording of Article 3.

#### Competing Interests

Lisa Schöddert, Mag. iur., worked from October 2013 until October 2017 as trainee for Court of Arbitration for Sport (CAS) arbitrator Dr. Martin Schimke, LL.M. (Bird&Bird Düsseldorf). The opinions expressed in this publication are solely those of the authors as individuals.

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