The Olympic Charter: A Transnational Constitution Without a State?

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This article examines various aspects of Teubner’s theory of societal constitutionalism using the *lex sportiva* as an empirical terrain. The case study focuses on the operation of the Olympic Charter as a transnational constitution of the Olympic movement. It shows that recourse to a constitutional vocabulary is not out of place in qualifying the function and authority of the Charter inside and outside the Olympic movement. Yet, the findings of the case study also nuance some of Teubner’s descriptive claims and question his normative strategy.

INTRODUCTION

This article builds on Gunther Teubner’s theory of societal constitutionalism, which he has steadily enriched over the last twenty years.¹ His main claim is that:

> [c]onstitutionalisation beyond the nation state occurs as an evolutionary process going in two different directions: constitutions evolve in transnational political processes outside the nation state and, simultaneously, they evolve outside international politics in the global society’s ‘private’ sectors.

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¹ Culminating with the publication of G. Teubner, *Constitutional Fragments* (2012). See, also, G. Teubner, ‘The Project of Constitutional Sociology: Irritating Nation State Constitutionalism’ (2013) 4 *Transnational Legal Theory* 44; G. Teubner, ‘Fragmented Foundations: Societal Constitutionalism beyond the Nation State’ in *The Twilight of Constitutionalism?*, eds. P. Dobner and M. Loughlin (2010) 327; G. Teubner, ‘Constitutionalising Polycontexturality’ (2011) 20 *Social and Legal Studies* 210. See, also, review by J. Pribañ, ‘Constitutionalism as Fear of the Political? A Comparative Analysis of Teubner’s *Constitutional Fragments* and Thornhill’s *A Sociology of Constitutions*’ (2012) 39 *J. of Law and Society* 441.

² Teubner, id. (2013), p. 45.
Boiled down to its core, Teubner’s theory is structured around two main pillars. One is a descriptive (sociological) claim: we are moving towards a multiplicity of private constitutions of transnational regimes reflecting the irremediable functional differentiation of world society. The other is a normative mission: we need to make sure that the negative externalities triggered by the tunnel vision of the functional regimes do not destroy our world(s). In other words, we need to make sure that the societal constitutions also provide for ways to limit the destructive egoistic tendencies of autonomous transnational regimes and ways to reflect (and respond to) the plight of the affected actors, discourses, systems outside of their systemic boundaries. On both fronts, I share parts of his diagnostic and normative ambitions, but as will be elaborated on in the conclusion, I also have some doubts regarding the accuracy of Teubner’s prophecies and the effectiveness of his strategies. This article will confront various elements of Teubner’s proposal to my experience studying the *lex sportiva*.3 By *lex sportiva* I mean the complex web of rules and institutional practices produced by (formally private) sports governing bodies (SGBs) in order to regulate international sports. Teubner himself has often referred to the transnational regulation of sports as a promising example supporting his theory.4 Yet, he has not conducted a detailed empirical study of the field and the works he cites in support of his claim are not testing or engaging with his theory.

In this article, I focus only on the International Olympic Committee (IOC) and its Olympic Charter (OC)5 as they are often portrayed in the literature as the central actors of the Olympic system (or Olympic regime) and as constituting the central ‘legal order’ of a *lex sportiva*.6 While the IOC’s supreme authority over sports is not absolute and the normative pyramid sometimes morphs into a horizontal network, it is the only institution claiming a universal governing role over sport.

The Olympic Games were revived and the IOC instituted at the Sorbonne under the impetus of Baron de Coubertin in 1894. Its early years were marked by amateurism and a lack of proper administrative structures and processes.7 It is only with the commercialization of sports in the 1970s and its exponential economic growth under the reign of IOC President Juan

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3 See A. Duval, ‘Lex Sportiva: A Playground for Transnational Law’ (2013) 19 European Law J. 822. See, also, K.D. Wolf, ‘The non-existence of private self-regulation in the transnational sphere and its implications for the responsibility to procure legitimacy: The case of the *lex sportiva*’ (2014) 3 Global Constitutionalism 275, at 275.
4 Starting with G. Teubner, ‘“Global Bukowina”: Legal Pluralism in the World Society’ in Global Law Without a State, ed. G. Teubner (1997) 4; Teubner, op. cit. (2012), n. 1, p. 73.
5 Unless stated otherwise, references are to the 2017 version of the OC.
6 F. Latty, La Lex Sportiva: Recherche sur le droit transnational (2007) 251.
7 See J.-L. Chappelet and B. Kübler-Mabbott, The International Olympic Committee and the Olympic System: The Governance of World Sport (2008) ch. 2.
Antonio Samaranch that the IOC became a powerful global institution.\(^8\) Nowadays, the IOC employs more than 500 people and a forecast total revenue of €5.7 billion for the 2013–2016 period.\(^9\) These numbers, however, understate both its staffing and financial might, as the IOC sits atop of the Olympic movement, a powerful network of national and functional vassals: the National Olympic Committees (NOCs) and the International Federations (IFs). The NOCs are the local interface between the IOC and national societies, while the IFs are in charge of a specific sport globally. By leveraging its control over the access to (and the intellectual property rights attached to) the global sporting event par excellence, the Olympic Games, the IOC has become a powerful player in international relations and an influential transnational organization.\(^10\)

The IOC is legally structured along the lines of a fundamental text, which is formally the statute of a Swiss association: the OC. The first Règlement of the IOC was published in 1908 and was two pages long; it became known as the OC only in 1978.\(^11\) The Charter is an evolving document and the IOC’s own website lists many different versions adopted over the years.\(^12\) This article will primarily investigate whether the Olympic system fits Teubner’s idea of a transnational constitution without a state. At first sight, the OC includes many elements mimicking national constitutions such as a motto (\textit{Cittius – Altius – Fortius}), a flag, an anthem, an Olympic liturgy, and the \textit{Fundamental Principles of Olympism}. It even refers to itself as ‘a basic instrument of a constitutional nature’\(^13\) and is regularly described as a document of constitutional quality by academic commentators.\(^14\) This is an important

8 \textit{id.}, p. 42.
9 International Olympic Committee, \textit{IOC Annual Report} (2016), at <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/IOC-Annual-Report/IOC-Annual-Report-2016.pdf?ga=2.55844077.773515535.1521914499-1583760263.1521914499>.
10 V. Postlethwaite and J. Grix, ‘Beyond the Acronyms: Sport Diplomacy and the Classification of the International Olympic Committee’ (2016) 27 \textit{Diplomacy & Statecraft} 295; M.P. Cottrell and T. Nelson, ‘Not just the Games? Power, protest and politics at the Olympics’ (2010) 17 \textit{European J. of International Relations} 729.
11 Chappelet and KuÈbler-Mabbott, \textit{op. cit.}, n. 7, p. 22.
12 <https://www.olympic.org/olympic-studies-centre/collections/official-publications/olympic-charters>.
13 ‘Introduction to the Olympic Charter’, at https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf> 9.
14 Latty calls it a ‘\textit{constitution mondiale du sport}’ (Latty, \textit{op. cit.} (2007), n. 6, pp. 171–2), Tams, a ‘\textit{Verfassungsdokument}’ (C.J. Tams, ‘Olympische Spiele – Herausforderungen und Fragen aus Sicht des internationalen Rechts’ in \textit{Olympische Spiele}, eds. W. Höfling et al. (2013) 59, at 60). Mestre considers it a ‘scripture of olympism’ with ‘similarities with a Constitution’: see A. Mestre, \textit{The Law of the Olympic Games} (2009) 11–12. It serves as ‘a real constitution of the IOC’: see C. Vedder, ‘The International Olympic Committee: An Advanced Non-Governmental Organization and the International Law’ (1984) 27 \textit{German Yearbook of International Law} 233, at 256.
clue, because the ‘emergence of a constitutional self-consciousness on the part of those associated with the polity or political process’ is an ‘indispensable foundation for all constitutional sites and processes’.15 There is thus fertile ground to apply Teubner’s theory. To do so, I will first analyse the constitutive function of the OC (Part I). Thereafter, I will discuss the limitative quality of the OC’s *Fundamental Principles of Olympism* (Part II) and in Part III, I will look at two instances in which the OC has been amended as a response to public criticisms and social mobilization. I will end by examining the reception of the Olympic regime in national and European courts (Part IV).

I. THE CONSTITUTIVE FUNCTION OF THE OLYMPIC CHARTER

Could the OC constitute a transnational constitution? Teubner contends that, analogically to states, ‘private governments are required to establish legitimacy through explicit political configuration of organisational rules and ensure their members’ sphere of freedom through constitutional rights.’16 A societal constitution is to set out the identity of a particular transnational sector of global society and strengthens through legal coupling its autonomization from the outer world. The ‘primary aspect of constitutionalisation is always to self-constitute a social system.’17 Can this dynamic of autonomization through constitutionalization be evidenced in the context of the OC? Teubner also insist that ‘[e]very constitution requires secondary legal norms’,18 in which rules are applied to rules. Referring to Hart, these rules ‘regulate how the identification, setting, amendment, and the distribution of the competence to issue and to delegate primary norms should proceed.’19 Can we find such secondary rules in the OC?

1. The Olympic Charter’s declaration of autonomy

For Teubner a societal constitution is first and foremost a declaration of autonomy and collective identity of a social system.20 This resonates with Walker’s idea that it is indispensable for a constitution that ‘there is the claim to foundational legal authority, or sovereignty’.21 In this regard, ‘sovereignty consists of a plausible claim to ultimate authority made on

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15 N. Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 Modern Law Rev. 317, at 342.
16 Teubner, op. cit (2013), n. 1, p. 52.
17 G. Teubner, ‘A Constitutional Moment? The Logics of “Hitting the Bottom”’ in *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation*, eds. P.F. Kjaer et al. (2011) 25.
18 id., p. 27.
19 id., pp. 27–8.
20 See the developments in Teubner, op. cit. (2012), n. 1, pp. 67–72.
21 Walker, op. cit., n. 15, p. 342.
behalf of a particular polity.’ Moreover, ‘the claim to sovereignty or ultimate authority implies both autonomy and exclusivity.’ Yet, ‘in the emerging post-Westphalian order, it becomes possible to conceive of autonomy without exclusivity – to imagine ultimate authority, or sovereignty, in non-exclusive terms.’ Interestingly, the OC features in its *Fundamental Principles of Olympism* an express claim to autonomy, enshrined in Principle 5, as follows:

Recognising that sport occurs within the framework of society, sports organisations within the Olympic Movement shall have the rights and obligations of autonomy, which include freely establishing and controlling the rules of sport, determining the structure and governance of their organisations, enjoying the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance be applied.

This provision intends to carve out a space for the Olympic Movement to exercise its autonomy free from external interference. This claimed autonomy is reflected in the theories of those who consider that Olympic law constitutes a ‘disnational or transnational legal order, which is subject solely to the jurisdiction of the IOC’, in which the OC ‘serves as a real constitution of the IOC, according to which it legislates autonomously, and has thereby created autonomous federative law.’ Additionally, this declaration of autonomy cannot be wishful thinking; it must be a plausible claim. It is the IOC’s mission ‘to protect [the Olympic Movement’s] independence and to preserve the autonomy of sport.’ In the past, it has threatened to use or has used its power to ban NOCs for government interference on numerous occasions.

The IOC has considered such interference as constituted by the adoption of a specific sports law, a decision of a government to remove individual members of the NOC, an attempt to influence the elections to the NOC, or

22 id., p. 345.
23 id.
24 id., p. 346.
25 Vedder, op. cit., n. 14, p. 242.
26 id., p. 256.
27 Walker, op. cit., n. 15, p. 347.
28 See Rule 2(5) OC.
29 In recent years the NOCs of India, Kuwait, Iraq, Ghana, and Pakistan have all been suspended, or threatened with suspension, by the IOC due to government interference.
30 See IOC, ‘Suspension of the Kuwait Olympic Committee’, 27 October 2015, at <https://www.olympic.org/news/suspension-of-the-kuwait-olympic-committee>; Reuters, ‘IOC suspends Ghanaian Olympic Committee’, 13 January 2011, at <https://af.reuters.com/article/africaSportsNews/idAFLDE70C1AJ20110113>.
31 See IOC, ‘IOC provisionally suspends Iraqi Olympic Committee’, 4 June 2008, at <https://www.olympic.org/news/ioc-provisionally-suspends-iraqi-olympic-committee>.
32 See K. Grohmann, ‘IOC bans Indian Olympic Association, elections void’ Reuters, 4 December 2012, at <https://www.reuters.com/article/us-olympics-india-ban/ioc-bans-indian-olympic-association-elections-void-idUSBRE8B30MY20121204>.
to interfere with the administration of the NOC. The interventions of the IOC have usually led to resolution of the disputes and the backtracking of governments. Moreover, the IOC is not only capable of defending the Olympic Movement’s regulatory autonomy against governmental encroachment, it is also in the position of a transnational rule setter capable of imposing its Olympic law onto national states hosting the Olympics. This political force of the IOC in supporting its claim for autonomy is buoyed by the asymmetry between individual national governments that can hardly afford seeing their national teams missing the Olympics, and the absolute monopoly of the IOC over access to the competition. In this way, the IOC is, without having recourse to any form of physical violence, capable of supporting in practice its claim to autonomy, which is certainly weaker than the classical ideal of territorial sovereignty (even though the instauration of a permanent Olympic territory on which the IOC would rule has been proposed).

2. The Olympic Charter and secondary rules

Teubner considers that the:

defining feature of self-contained regimes is not simply that they create highly specialised primary rules […] but that they also produce their own procedural norms on law-making, law recognition, and legal sanctions, so-called secondary rules.

The question is then whether the OC provides for these secondary rules.

(a) The rule of recognition of the Olympic regime

In Hart’s legal theory, the rule of recognition ‘will specify some feature or features possession of which by a suggested rule is taken as a conclusive

33 See K. Grohmann, ‘Pakistan close to an Olympic ban, says IOC’ Reuters, 12 February 2013, at <https://www.reuters.com/article/olympics-pakistan-ban/olympics-pakistan-close-to-an-olympic-ban-says-ioc-idUSL4N0BC4EU20130212>.
34 See, for example, IOC, ‘IOC holds successful meetings with Indian Sports Minister and representatives of National Federations/members of suspended Indian Olympic Association’, 15 May 2013, at <https://www.olympic.org/news/ioc-holds-successful-meetings-with-indian-sports-minister-and-representatives-of-national-federations/members-of-suspended-indian-olympic-association>. Describing a similar power of the Fédération Internationale de Football Association, see H.E. Meier and B. García, ‘Protecting Private Transnational Authority Against Public Intervention: FIFA’s Power over National Governments (2015) 93 Public Administration 890.
35 M. James and G. Osborn, ‘The Olympics, Transnational Law and Legal Transplants: The International Olympic Committee, Ambush Marketing and Ticket Touting’ (2016) 36 Legal Studies 93.
36 F. Rich, ‘The Legal Regime for a Permanent Olympic Site’ (1982) 15 J. of International Law and Politics 1, at 34.
37 Teubner, op. cit. (2010), n. 1, p. 333.
affirmative indication that it is a rule of the group to be supported by the social pressure it exerts. This rule is not necessarily formulated but is reflected in the practice of courts and officials. While it is impossible to comprehensively investigate here the legal practice prevalent in the Olympic movement, I will draw on the OC and doctrinal works to hint at the existence of a shared rule of recognition providing that the OC is supreme in the Olympic Movement and that valid rules must comply with it. First and foremost, the seventh Fundamental Principle of Olympism proclaims that ‘[b]elonging to the Olympic Movement requires compliance with the Olympic Charter [...]’ and Rule 1 of the OC stipulates that ‘the Olympic Movement encompasses organisations, athletes and other persons who agree to be guided by the Olympic Charter.’ In both, it is notable that the OC is defined as the document to which members of the Olympic movement recognize a superior validity. Moreover, not only is the OC recognized as supreme by the members of the Olympic movement, but the signatories of the host city contract also endorse it. The host city contract is the contract signed between the IOC and the host city of a particular edition of the Olympic Games as well as the NOC of the country in which the city is located. For example, Article 13(1) of the host city contract for the 2024 Olympic Games due to take place in Paris provides that:

The Host City, the Host NOC and the OCOG undertake to abide by the provisions of the Olympic Charter and the IOC Code of Ethics and agree to conduct their activities related to the organisation of the Games in a manner which promotes and enhances the fundamental principles and values of Olympism, as well as the development of the Olympic Movement.

Inside the Olympic Movement the lex olympica, as Latty calls it, is thus asserting its primacy. In other words, ‘the Olympic Charter and the rules derived from it override contradicting norms of recognized organisations.’

(b) Rules on changing rules: constituting the political processes of the Olympic movement

Under the Hartian theory of law, a specific category of rules defines how rules can be amended: the rules of change. For states, these rules are often found in national constitutions and provide legislative or administrative procedures to be followed to validly modify existing legislation or the constitution. In the Olympic context, the OC provides these rules of change. Article 18 OC encapsulates the procedures to amend the OC itself. Such amendments to the OC are reserved for the IOC Session, the general meeting

38 H.L.A. Hart, The Concept of Law (1994) 94.
39 Latty, op. cit., n. 6, pp. 216–21.
40 id., p. 218 [my translation].
41 Hart, op. cit., n. 38, pp. 95–6.
of all IOC members.\textsuperscript{42} Moreover, a two-thirds majority is required at the IOC Session ‘for any modification of the Fundamental Principles of Olympism, [and] of the Rules of the Olympic Charter’.\textsuperscript{43} The OC also introduces a specific procedure to introduce and amend lower-ranking regulations. Thus, Article 19 OC foresees that the IOC Executive Board, composed of the President, the four Vice-President, and ten other members, ‘approves all internal governance regulations relating to [the IOC’s] organisation’.\textsuperscript{44} It is also responsible for establishing and supervising ‘the procedure for accepting and selecting candidatures to organise the Olympic Games’.\textsuperscript{45} Finally, it:

\begin{quote}
\textit{\textbf{t}akes all decisions, and issues regulations of the IOC, which are legally binding, in the form it deems most appropriate, such as, for instance, codes, rulings, norms, guidelines, guides, manuals, instructions, requirements and other decisions, including, in particular, but not limited to, all regulations necessary to ensure the proper implementation of the Olympic Charter and the organisation of the Olympic Games.}\textsuperscript{46}
\end{quote}

For its part, the IOC Ethics Commission ‘is charged with defining and updating a framework of ethical principles, including a Code of Ethics.’\textsuperscript{47} The OC is therefore providing quite a complex system of rules of change involving a variety of procedures empowering different actors to modify the different primary and secondary rules of the Olympic system.

(c) Rules on enforcing rules: the foundation of the judicial system of \textit{lex sportiva}

The last Hartian secondary rules are those ‘empowering individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken.’\textsuperscript{48} The OC foresees that the IOC Session is solely competent ‘to expel IOC members and to withdraw the status of Honorary President, honorary members and honour members’.\textsuperscript{49} While the IOC Executive Board is entrusted with handing out numerous other sanctions in case of violation of the Olympic rules, it can delegate this power to a specific disciplinary commission.\textsuperscript{50} Finally, Rule 61(1) OC provides that disputes related to the application or interpretation of IOC decisions ‘may be resolved solely by the

\begin{itemize}
\item \textsuperscript{42} Rule 18(2)1 OC.
\item \textsuperscript{43} Rule 18(2)3 OC.
\item \textsuperscript{44} Rule 19(3)2 OC.
\item \textsuperscript{45} Rule 19(3)6 OC.
\item \textsuperscript{46} Rule 19(3)10 OC.
\item \textsuperscript{47} Rule 22 OC.
\item \textsuperscript{48} Hart, op. cit., n. 41, p. 96.
\item \textsuperscript{49} Rule 18(2)9 OC.
\item \textsuperscript{50} Rule 59(2)4 OC.
\end{itemize}
IOC Executive Board and, in certain cases, by arbitration before the Court of Arbitration for Sport (CAS)’. The precise nature of these ‘certain cases’ remains unspecified in the OC. Regarding disputes arising on the occasion of, or in connection with, the Olympic Games, they are to be submitted exclusively to the CAS which has created since 1996 a specific CAS ad hoc division for this purpose.51

The OC is truly emitting the constitutional flavour detected by many authors.52 Contrary to Teubner’s own expectation of civil constitutions, the Olympic regime even relies on ‘a single great original text embodied as a codification in a special constitutional document’.53 Yet, as he argues, the function of a constitution is not only constitutive, it is also to limit power or, in his terminology, a particular systemic rationality.

II. THE (LIMITED) LIMITATIVE FUNCTION OF THE FUNDAMENTAL PRINCIPLES OF OLYPISM

Teubner’s constitutional theory is acutely concerned with the ‘limitative function’54 of constitutions. In fact, he considers that ‘[i]t is no longer constitutive constitutional norms, but now limitative constitutional norms that are sought.’55 Inside the Olympic regime, the Fundamental Principles of Olympism impersonate inklings of limitative rules. To flesh out this point, I focus first on the non-discrimination principle and its operationalization in the IOC’s response to the South African apartheid regime, and then analyse the procedural impact of the principle of fair play in the jurisprudence of the CAS.

1. The civilizing force of the non-discrimination principle of the Olympic Charter: the case of the South African apartheid regime

It was only after the atrocities of the Second World War that a non-discrimination principle was introduced in the OC in 1949. Nowadays, principle six of the Fundamental Principles of Olympism provides that:

The enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status.

51 Rule 61(2) OC.
52 See n. 14, above.
53 Teubner, op. cit. (2012), n. 1, p. 18.
54 Teubner, op. cit. (2013), n. 1, pp. 54–5.
55 Teubner, op. cit. (2011), n. 1, p. 223.
This non-discrimination principle is regularly invoked (rather unsuccess-fully) before the CAS against members of the Olympic Movement.\textsuperscript{56} Furthermore, in the past, it led to the high-profile exclusion of South Africa from the Olympics. The South African apartheid regime became extremely controversial in the wake of the decolonization movement. It affected sports as the South African government refused to field mixed teams (including white and black athletes) in international competitions.\textsuperscript{57} As early as October 1959, the New York Times noted that ‘[…] there are strong arguments for excluding South Africa because she might send only white athletes, and racial discrimination is contrary to the Olympic charter.’\textsuperscript{58} The OC (and not, for example, the Universal Declaration of Human Rights) was thus invoked to promote the exclusion of the South African National Olympic Committee (SANOC) from the Olympic Movement due to the apartheid regime. After a long exchange of letters between the IOC and SANOC aimed at finding an acceptable compromise, in October 1963 at its Baden-Baden session, the IOC issued an ultimatum to SANOC.\textsuperscript{59} The IOC Resolution provided:

\begin{quote}
That the South African Olympic Committee be told that it must make a firm declaration of its acceptance of the spirit of the Olympic Code and in particular Principle 1 and Rule 24 read together, and must get from its Government by December 31st 1963 a change in policy regarding racial discrimination in Sports and competitions in its country, failing which the South African National Olympic Committee will be debarred from entering its teams in the Olympic Games.\textsuperscript{60}
\end{quote}

The South African government and SANOC refused to abide by the IOC’s request and the South African team was excluded from the 1964 Olympics. Thereafter, in 1966, SANOC announced the creation of a mixed-race committee to select athletes for the 1968 Olympics in Mexico. Yet, despite the sympathy of the then IOC President Avery Bundage, who pushed through a resolution recognizing the efforts of the SANOC and allowing a South African team to enter the 1968 Olympics at the 1968 IOC session, the other African NOCs threatened to boycott the Olympics if South Africa was allowed to enter a team not fully compliant with the OC. Under pressure, the IOC Executive Committee decided to submit a resolution to the IOC session withdrawing its invitation to the SANOC.\textsuperscript{61}

\textsuperscript{56} See: CAS 2000/A/278, award of 24 October 2000; CAS 2001/A/329, order of 25 May 2001; CAS ad hoc Division (OG Sochi) 14/001, award of 4 February 2014; CAS ad hoc Division (OG Sochi) 14/003, award of 13 February 2014; CAS 2015/A/4018, award of 10 December 2015.
\textsuperscript{57} In general, see A. Krumpholz, \textit{Apartheid und Sport} (1991); K. Mbaye, \textit{The International Olympic Committee and South Africa} (1995).
\textsuperscript{58} C. Chataway, ‘An Olympian Appraises the Olympics’ \textit{New York Times}, 4 October 1959.
\textsuperscript{59} See Krumpholz, op. cit., n. 57, pp. 151–2.
\textsuperscript{60} Resolution cited in Mbaye, op. cit., n. 57, p. 278.
\textsuperscript{61} See Krumpholz, op. cit., n. 57, pp. 153–7.
Finally, in May 1970, the IOC session in Amsterdam decided after a close vote (35 to 28) to withdraw the recognition of SANOC. It was expelled formally from the Olympic movement ‘for violating Rule One of the Olympic charter, which states: ‘no discrimination is allowed against any country or person on grounds of race, religion or political affiliation’’. Again, this decision was taken against the will of the IOC’s leadership, who favoured the status quo (that is, exclusion from the 1972 Olympics instead of a full-blown exclusion from the Olympic movement). This was quickly followed in 1975 by the exclusion of Rhodesia (now Zimbabwe) after an IOC committee issued a report finding that the NOC of Rhodesia had violated the non-discrimination principle of the OC. In the following years, the IOC concentrated its attention on ensuring that NOCs and their affiliates would not participate in competitions involving South Africa. In 1988, it released the Declaration of the International Olympic Committee on Apartheid in Sport stating, in particular: ‘The IOC strongly asserts that the practice of apartheid violates the fundamental principles of the “Olympic Charter”, which governs the entire Olympic Movement.’

Henceforth, the IOC conditioned any reintegration of SANOC in the Olympic Movement to the abolition of the apartheid regime. In fact, it was only with the end of apartheid that the IOC recognized in July 1991 the newly founded NOCSA, with a black man at its head, as a member of the Olympic family. Interestingly, the non-discrimination principle of the OC was also heralded by the United Nations in its policies on apartheid in sports. The General Assembly of the UN systematically harnessed what it referred to as the ‘Olympic principle’ in support of its own policies against apartheid in sports. In doing so, it was at least rhetorically acknowledging its fundamental nature inside the Olympic Movement and in sports in general.

62 M. Katz, ‘South African Teams Expelled From All Olympic Competition’ New York Times, 16 May 1970.
63 id.
64 See D. MacIntosh et al., ‘The IOC and South Africa: A Lesson in Transnational Relations’ (1993) 28 International Rev. for the Sociology of Sport 373, at 383.
65 S. Abt, ‘Olympics Exclude Rhodesia’ New York Times, 23 May 1975.
66 See Krumpholz, op. cit., n. 57, pp. 160–7.
67 Cited in id., p. 167.
68 See Mbaye, op. cit., n. 57.
69 Resolution on the policies of apartheid of the Government of South Africa, United Nations, 1971, 2775 (XXVI), at D, 1 and 3; International Declaration Against Apartheid in Sports Included in Resolution on the policies of apartheid of the Government of South Africa, 1977, A/32/105, at M; International Convention against apartheid in sports. Adopted by the General Assembly of the United Nations 10 December 1985, No. 25822.
2. The limitative function of the Fundamental Principles of Olympism at the Court of Arbitration for Sport: the fair play principle as sporting due process clause

The CAS considers that the OC ‘is founded upon the Fundamental Principles of Olympism and of the Olympic Movement’ and that ‘the principles of Olympism must axiomatically inform an interpretation of the substantive rules and by-laws of the Charter.’ Not unlike the Grundrechte of the German constitution, the Fundamental Principles seem to radiate throughout the whole Olympic system. In fact, their radiating effects go beyond the Olympic rules stricto sensu. In 2009, a CAS Panel ‘having regard to the fundamental principle of fair play and bearing in mind the spirit of the Olympic Charter on which the CAS itself is based’, concluded that the ‘aims of sporting justice shall not be defeated by an overly formalistic interpretation of the FIFA Regulations, which would deviate from their original intended purpose.’ For this Panel, the CAS itself is based on the spirit of the OC and thus of its Fundamental Principles, which constitute the ‘aims of sporting justice’ guiding the interpretation of the regulations of the members of the Olympic movement.

The principle of fair play included in Principle 4 has taken a particular legal life at the CAS, where it supports the procedural rights of claimants (in particular athletes). For example, in a case related to the withdrawal of an accreditation for the Olympic Games, the CAS Panel held that the (then) sixth principle of the OC stresses the importance of ‘fair play’, which was deemed ‘as pertinent to the disciplinary process as it is to competitive sport’ and would therefore justify that ‘any person at risk of withdrawal of accreditation should be notified in advance of the case against him and given the opportunity to dispute it’. Similarly, in a case involving the non-selection of a Japanese swimmer for the 2000 Olympics in Sydney, the Panel considered that the principle of fair play is ‘valid for athletes and sports organizations and must be followed in the process of selecting athletes for the Olympic Games’. Finally, in 2008, the ad hoc CAS division for the Beijing Olympics drew ‘attention to the Fundamental Principles of Olympism of the Olympic Charter, which include at paragraph 4 that “every individual must have the possibility of practising sport … in the Olympic spirit, which requires fair play”’.

The arbitrators noted that

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70 CAS 2002/O/373, award of 18 December 2003, para. 49.
71 CAS ad hoc Division (OG Beijing) 08/007, award of 23 August 2008, para. 19.
72 CAS 2009/A/1757, award of 30 July 2009, para. 31.
73 id.
74 CAS ad hoc Division OG 96/005, award of 1 August 1996, para. 7.
75 id.
76 Arbitration CAS 2000/A/278, award of 24 October 2000, para. 6.
77 Arbitration CAS ad hoc Division (OG Beijing) 08/007, award of 23 August 2008, para. 19.
the ‘concept of fair play has been given a generous interpretation by CAS (see CAS OG 96/005, para. 18) and, in our view, embraces fair play to, as well as by, athletes, and off the field as well as on it.’

The *Fundamental Principles of Olympism* are currently the main limitative rules enshrined in the OC. They are invoked (rarely successfully) at the CAS to challenge the validity of the rules and decisions of the members of the Olympic movement. The CAS is also developing limitative principles for the Olympic Movement, through reference to general principles of law external to the OC. Nonetheless, the limitative bite of the OC remains underdeveloped compared to its constitutive dimension, and it is only under extreme external pressure that provisions dealing with the negative externalities of the Olympic regime have been introduced in recent years.

III. THE POUVOIR CONSTITUANT OF COLÈRE PUBLIQUE: CHANGING THE OLYMPIC CHARTER UNDER PUBLIC PRESSURE

The danger with transnational regimes, as identified by Teubner, is that they suffer from ‘growth compulsions’. They ‘have destructive consequences of such proportions, that the resulting societal conflicts push for drastic change of constitutional politics.’ In recent years, much of Teubner’s attention has turned to this need for democratization. He suggests ‘global colère publique’, ‘counter-movements’, and the ‘civil societal countervailing forces’ as motors of a responsive internal constitutionalization of transnational regimes. In fact, the Olympics are regularly criticized as damaging for the environment, as a threat to the economic and social well-being of local communities, and a source of a variety of human rights violations.

The Olympic Games have become a magnet for transnational protest and contestation. In this section, I rely on two specific examples to show that social movements and public outrage have indeed played a role in steering the constitutionalization of the Olympic regime.

78 id.
79 Latty, op. cit., n. 6, pp. 301–56.
80 Teubner, op. cit. (2013), n. 1, p. 57.
81 Teubner, op. cit. (2011), n. 1, p. 223.
82 See his contribution in this volume.
83 Teubner, op. cit. (2012), n. 1, p. 127.
84 id., p. 10.
85 Teubner, op. cit. (2013), n. 1, p. 51.
86 On anti-Olympic movements, see J. Boykoff, ‘The Anti-Olympics’ (2011) 67 *New Left Rev.* 41; H.J. Lenskyj, *Olympic Industry Resistance* (2008).
87 Cottrell and Nelson, op. cit., n. 10.
1. Greening the games: the constitutional moment of the Albertville backlash

The Olympics have a considerable environmental footprint as significant numbers of people travel to attend the competitions and the organization requires extensive construction activities generally implying a substantial impact on the environment. This is particularly true for the Winter Games, which often take place in fragile and protected ecosystems.88 Until the 1990s, the IOC was not really concerned with the environmental impact of its activities. It was only with the Winter Games of 1992 in France that the environment entered the IOC’s conscience and was progressively integrated in the OC. Indeed, the Albertville Olympics, which took place in the French Alps, were perceived as an ‘environmental disaster’.89 This was highlighted by the protests that took place before the start of the games, which were covered by the national and international media.90 Protesters, mainly local environmentalists, stood up with green flames and carried coffins symbolizing the death of the environment at the hand of the Olympics; this left a profound mark on public opinion and on the minds of IOC members.91 The IOC was aware that it ‘could not afford a repeat of Albertville environmental criticism in subsequent games’.92 Without the damage caused by the Albertville protests to its ‘transnational image’,93 there is little evidence that the IOC would have considered an environmental policy turn. Instead, in 1994, the Olympic Congress proclaimed the environment the third pillar of Olympism and Rule 2 of the OC was amended in 1996 to include the following as part of the IOC’s role:

The IOC sees to it that the Olympic Games are held in conditions which demonstrate a responsible concern for environmental issues and encourages the Olympic Movement to demonstrate a responsible concern for environmental issues, takes measures to reflect such concern in its activities and educates all those connected with the Olympic Movement as to the importance of sustainable development.94

88 See J.-L. Chappelet, ‘Olympic Environmental Concerns as a Legacy of the Winter Games’ (2008) 25 International J. of the History of Sport 1884.
89 H. Cantelon and M. Letters, ‘The Making of the IOC Environmental Policy as the Third Dimension of the Olympic Movement’ (2000) 34 International Rev. for the Sociology of Sports 294, at 300.
90 See ‘Les Jeux Olympiques d’Albertville: Flamme verte’ Le Monde, 12 February 1992.
91 See Cantelon and Letters, op. cit., n. 89, p. 294; J. Weiler and A. Mohan, ‘The Olympic Games and the Triple Bottom Line of Sustainability: Opportunities and Challenges’ (2010) 1 International J. of Sport and Society 187, at 192–3.
92 Chappelet, op. cit., n. 88, p. 1892.
93 Cantelon and Letters, op. cit., n. 89, p. 305.
94 See Chappelet, op. cit., n. 88.
Whether these changes were merely window dressing or a truly transformative change goes beyond the scope of this section. What is relevant for our purposes is that, as a response to external social pressure, the IOC amended the OC and initiated various other legislative and regulatory initiatives dealing with the environment.\textsuperscript{95} Hence the IOC’s constitution is not immune to external pressure, and public criticism can lead to constitutional reforms. In other words, the IOC’s capacity ‘to modify its philosophical position diametrically and in a relatively short period of time typifies the capacity of transnational organizations to respond to perceived (and actual) threats to their global reputation and operations.’\textsuperscript{96} This point is further substantiated by the aftermath of the Salt Lake City corruption scandal.

2. The Salt Lake City corruption scandal: when the IOC hit the bottom and bounced back

A few years after the Albertville environmental fiasco, the IOC faced another round of ‘environmental turbulence’\textsuperscript{97} due to widespread corruption allegations in relation to the awarding of the 2002 Winter Olympics to Salt Lake City. In Teubnerian terms, it was hitting the bottom.\textsuperscript{98} From November 1998 onwards, a corruption scandal started to unfold involving numerous IOC members profiting from a variety of gifts offered by the Salt Lake Olympic Organizing Committee for the Olympic Winter Games of 2002 (SLOC) in what appeared to be a quid pro quo for their votes in favour of Salt Lake City as a host city.\textsuperscript{99} Voices inside the IOC started to denounce publicly the bidding process for Olympic host cities as an object of systematic corruption. The IOC tasked a special commission (the Pound Commission) to investigate the matter, while the United States Olympic Committee and the Federal Bureau of Investigation also initiated separate inquiries. In response to the crisis, an extraordinary IOC session was scheduled in Lausanne in March 1999. The various reports produced by the

\textsuperscript{95} See J. Karamichas, \textit{The Olympic Games and the Environment} (2013); W.J. Ross and B. Leopkey, ‘The adoption and evolution of environmental practices in the Olympic Games’ (2017) 22 \textit{Managing Sport and Leisure} 1. For a critical take, see S. Loland, ‘Olympic Sport and the Ideal of Sustainable Development’ (2000) 33 \textit{J. of the Philosophy of Sport} 144.

\textsuperscript{96} Cantelon and Letters, op. cit., n. 89, p. 305.

\textsuperscript{97} D.H. Zakus and J. Skinner, ‘Modelling Organizational Change in the International Olympic Committee’ (2008) 8 \textit{European Sport Management Q.} 421, at 422.

\textsuperscript{98} Teubner, op. cit., n. 17, pp. 3–42; Teubner, op. cit. (2011), n. 1, p. 224: The similarity with individual drug addiction therapies is obvious: ‘Hit the bottom!’ It must be one minute before midnight. Only then has today’s addiction society a chance of self-correction. Only then is the understanding lucid enough, the suffering sufficiently severe enough, the will to change strong enough, to allow a radical change of course.

\textsuperscript{99} See B. Mallon, ‘The Olympic Bribery Scandal’ (2000) 8(2) \textit{J. of Olympic History} 11.
investigations revealed numerous instances of dubious behaviour by IOC members and advocated profound (constitutional) changes in the way the IOC operated. In this context, the IOC session voted to expel ten members named in the report of the Pound Commission and to create two commissions (the Ethics Commission and the IOC 2000 Commission) to prepare a complete overhaul of the IOC and the Olympic movement.

The IOC 2000 Commission had 82 members, fewer than half of them IOC members, and was charged with providing a blueprint for a comprehensive reform of the Olympic movement. It produced its final report in November 1999 and made 50 recommendations to the IOC. For its part, the Ethics Commission’s main responsibility was to develop a Code of Ethics and related enforcement capabilities. The Commission was composed of three IOC members and five independent members. As early as spring 1999, it had published a first IOC Code of Ethics. This reform process played out in the shadow of a serious threat of intervention from the United States Congress. The Senate Commerce Committee and the House Commerce Subcommittee on Oversight and Investigation held hearings on the scandal and the IOC’s response to it. It was under this steady political pressure that the IOC embarked on a second extraordinary Session on 11–12 December 1999. The Session adopted all the recommendations made by the IOC 2000 Commission, which led to ‘a major re-writing of the Olympic Charter’.

Without entering into the details of the reforms adopted, it is fair to say that they constituted the most significant overhaul of IOC institutional (political and legal) structures since its creation. Thereafter, the IOC President himself decided to testify in front of the House Commerce Subcommittee on Oversight and Investigations to present the reforms adopted. He met with a cold response from the law makers, who were unconvinced of the depth of the changes. Nonetheless, the IOC’s reforms were eventually sufficient to put an end to the scandal. This episode ‘led to the coercive infiltration of new interpretive schemes within the IOC.’

These short case studies support Teubner’s point that external irritations by local and transnational publics can lead to internal changes in the constitution of a transnational regime. In a context in which national states have difficulties exercising a constitutional primacy over transnational regimes, public pressure and a public ‘siege’ of a transnational regime can be powerful drivers of constitutional change. The Albertville and Salt Lake City scandals transformed the constitutional text, institutional structure, and

100 id., p. 21.
101 J.-L. Chappelet, ‘Towards better Olympic accountability’ (2011) 14 Sport in Society: Cultures, Commerce, Media, Politics 319.
102 For video of the hearing, see <https://www.c-span.org/video/?154188-1/olympic-site-selection-process&start=341>.
103 Zakus and Skinner, op. cit., n. 97, p. 434.
104 Teubner, op. cit. (2013), n. 1, p. 46.
values of the Olympic movement. One could even say that as a result of
‘environmental turbulence caused by the ethics scandal, new values
colonized the IOC’.105

IV. THE OLYMPIC CHARTER IN NATIONAL AND EUROPEAN
COURTS: STRONG FUNCTIONAL AUTONOMY VERSUS WEAK
TERRITORIAL SOVEREIGNTY?

Finally, Teubner predicts that ‘collisions between constitutions are a fore-
gone conclusion’,106 and considers that ‘[i]n a world society with neither
apex nor centre, there is just one way remaining to handle inter-constitu-
tional conflicts – a strictly heterarchical conflict resolution.’107 In his
worldview, ‘[,h]eterarchical dispute resolution basically knows only two
forms: internalizing disputes into the decisions of the conflicting regimes
themselves, or externalizing them to inter-regime negotiations.’108 Indeed,
the Olympic regime has collided with national and European law in the past.
In principle, it is not immune to a hierarchical review even though the
competent courts displayed a mix between pragmatic deference and trans-
national comity. This section will scrutinize and nuance Teubner’s claim that
transnational conflict resolution can be only heterarchical.

1. The IOC: a Swiss association in theory subjected to Swiss law

There is a paradox in the fact that while claiming wide regulatory autonomy,
the OC also qualifies the IOC as ‘an international non-governmental not-for-
profit organisation, of unlimited duration, in the form of an association with
the status of a legal person’.109 The OC is, therefore, formally nothing more
than the statute of a Swiss association, in principle subjected to Swiss law.
Hence, interested parties can challenge IOC decisions not subjected to a
CAS arbitration clause in Swiss courts.

In practice, this has happened very rarely. The first such case involved a
Taiwanese IOC member, who challenged in 1979 the decision of the IOC to
require that the Taiwanese NOC change its name and emblem, in order to
allow recognition of the NOC of the People’s Republic of China.110 The case
went to a local court of the Canton de Vaud, which asserted its jurisdic-
tion,111 but was withdrawn by the claimants in 1980. This episode is often

105 Zakus and Skinner, op. cit., n. 97, p. 434.
106 Teubner, op. cit. (2012), n. 1, p. 150.
107 id., p. 152.
108 id., p. 153.
109 Rule 15(1) OC.
110 See J.-L. Chappelet, Autonomy of sport in Europe (2010) 24.
111 Latty, op. cit., n. 6, p. 429.
credited for the IOC’s drive in creating the CAS in the early 1980s. More recently, the Gibraltar Olympic Committee challenged the refusal of the IOC to recognize it. The case went up the judicial ladder in Switzerland and reached the Swiss Federal Tribunal, which rejected the GOC’s demands. Nonetheless, it was a reminder that the Swiss courts are willing to assert jurisdiction over the IOC. Finally, in 2016, the State of Kuwait attempted to challenge the IOC’s suspension of its NOC (and avoid the absence of a Kuwaiti team at the Rio Olympics in 2016) in front of a local court of the Canton de Vaud. The challenge failed but the court conducted a detailed assessment of the compatibility of the IOC’s decision with Swiss competition law and with the right to personality of the State of Kuwait. These few cases illustrate the existing potential for hierarchical control by the Swiss civil courts over the IOC and the OC. This control remains in practice extraordinary. Moreover, the barrier to challenging the IOC’s decisions in Swiss courts has been raised by the ubiquity of CAS arbitration clauses. In theory, CAS awards may also be reviewed by the Swiss Federal Tribunal, but the extremely limited scope of this review is well charted.

Furthermore, since 1981, the Swiss state has entered into agreements with the IOC that have anchored its specific status under Swiss law. While they do not entirely equate to the agreements concluded with international organizations, they come relatively close to them. They reflect the accommodating policy adopted by the Swiss political and judicial institutions towards the IOC and the Olympic movement. In theory, the Swiss government could regulate the IOC more stringently, and the latter’s decisions will always be at the hypothetical mercy of a procedure in front of the Swiss courts, but the Swiss state is benefitting economically and symbolically from hosting many SGBs and is reluctant to intervene to restrict the regulatory autonomy of the Olympic movement. Moreover, if Switzerland were to become a less friendly host, the IOC could always leave for a friendlier jurisdiction, which would not challenge its autonomy. In short, while Swiss law theoretically exercises a measure of control over the

112 G. Simon, ‘L’arbitrage des conflits sportifs’ (1995) Revue de l’Arbitrage 185, at 189.
113 Tribunal Fédéral, Gibraltar Olympic Committee vs. Comité International Olympique, 5A_21/2011, 10.02.2012.
114 Tribunal cantonal de Vaud, 28/2016/PHC, 15 juillet 2016.
115 A. Rigozzi, ‘Challenging Awards of the Court of Arbitration for Sport’ (2010) 1 J. of International Dispute Settlement 217.
116 See F. Latty, Le Comité International Olympique et le droit international (2001).
117 id., p. 52.
118 See AISTS (International Academy of Sports Science and Technology), ‘The economic impact of international sports organisations in Switzerland 2008–2013’ (2015), at <https://www.aists.org/sites/default/files/publication-pdf/aists_economic_impact_study-english-web.pdf>.
119 See the example of the move of the IAAF seat from London to Monaco recalled in Chappelet, op. cit., n. 110, p. 24.
Olympic regime, in practice it hardly affects the IOC’s regulatory autonomy and authority over sport. By holding onto the formal existence of a right to challenge IOC decisions in Swiss courts, one risks not seeing the forest for the trees and losing sight of the tremendous practical obstacles to such a control.

2. The IOC and the OC in other national courts: between deference and powerlessness

If not the Swiss courts, then perhaps other national courts have managed to dampen the autonomy of the IOC? In reality, only a handful of national courts have dealt with a case involving the IOC or the OC.

In this regard, the Martin case is probably the most prominent and illustrative of the deference of national courts vis-à-vis the IOC and the OC. It was lodged in Californian courts by a group of female athletes challenging the allegedly discriminatory decision of the IOC not to hold 5,000-metre and 10,000-metre races for women at the Los Angeles Olympics in 1984. They were seeking an injunction that would require holding these events for women too. In its final judgment, the 9th Circuit held:

In addition, we find persuasive the argument that a court should be wary of applying a state statute to alter the content of the Olympic Games. The Olympic Games are organized and conducted under the terms of an international agreement – the Olympic Charter. We are extremely hesitant to undertake the application of one state’s statute to alter an event that is staged with competitors from the entire world under the terms of that agreement.

This often-cited ruling illustrates the lenient position of national courts vis-à-vis the IOC and the OC. This is actually the only case in which the IOC acted directly as a defendant outside of Switzerland and the fact that the most powerful national courts in the world would show such self-restraint in embarking on a review of the OC (‘an international agreement’) gives a lot of weight to the practical (if not formal) recognition of the autonomy and functional sovereignty of the Olympic regime.

Other cases have aimed to challenge the application of the OC, but targeted local organizing committees of the Olympic Games as defendants. In a ruling involving female ski jumpers challenging the IOC’s decision not to schedule a ski-jumping event for women at the Vancouver Olympics in 2010, the Supreme Court of British Columbia in Canada

120 J.G. Goettel, ‘Is the International Olympic Committee Amenable to Suit in a United States Court?’ (1983) 7 Fordham International Law J. 61.
121 Lisa Martin, et al., Plaintiffs-appellants v. International Olympic Committee, et al., Defendants-appellees, 740 F.2d 670 (9th Cir. 1984).
122 For example, Court of Appeal of New York, Liang Ren-Guey v. Lake Placid 1980 Olympic Games, Inc., 72 A.D. 439, 424 N.Y.S. 2d 535 (1980).
produced telling conclusions. While finding that the decision not to host a women’s ski-jumping event was discriminatory and contrary to the Canadian Charter of Rights and Freedoms, the Court also acknowledged that the Vancouver Organizing Committee (VANOC) should not be held accountable for it, and that it was in no position to force the IOC to change its decisions. It held:

First, the IOC owns and governs the Olympics. If an entity, including a government, tried to stage the ‘Olympic Games’ without the IOC’s permission, no one would actually consider the event to be the Olympics. Similarly, if VANOC attempted to hold additional events during the 2010 Games, contrary to the decision of the IOC, no one would actually consider those events to be Olympic. Those events would always be regarded as something else. The simple fact is that only the IOC may grant the imprimatur of ‘Olympic’.

As illustrated by this paragraph, this paradoxical ruling was framed in extremely pragmatic terms as a consequence of the IOC’s monopoly over the Olympics and, based on this, its power to constrain national actors to comply with its decisions. It encapsulates the fact that national courts feel poorly placed to effectively challenge the autonomy of what is widely perceived as a necessary transnational regime underpinning the organization of the Olympics. While the possibility of vertical control over the Olympic constitution is not excluded, it is extremely unlikely to be exercised by national courts as forecast by Teubner.

3. A European constitution for the Olympic constitution: the transnational force of European Union law

Based on the above, the OC’s autonomy is vast. Nonetheless, it may not be as strong as one might think at this point. The European Union (EU) through its law has mounted a potent challenge to the autonomy of the Olympic

123 Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games [2009] BCSC 942 (Sup Ct (BC)). See K. Lines and J. Heshka, ‘Ski jumping through Olympic-sized hoops: an analysis of Sagen & Others v Vancouver Organizing Committee (VANOC) for the 2010 Olympic & Paralympic Winter Games’ (2009) 4 International Sports Law Rev. 92; M. Young, ‘The IOC Made Me Do it: Women’s Ski Jumping, VANOC, and the 2010 Winter Olympics’ (2010) 18(3) Constitutional Forum 95.
124 Sagen, id., p. 116.
125 id., p. 117:

Further, if VANOC tried to hold a women’s ski jumping event without the IOC’s permission, VANOC could not make that event happen. The actual staging of Olympic events requires not only the local organizing committees’ efforts, but also participation by international sports federations and national Olympic committees, all of whom are part of the Olympic Movement and are under the authority of the IOC.
The EU has the advantage of having 28 federate member states of important symbolic and economic relevance to the IOC, and the benefit of not having a specific NOC that could be banned from the Olympics to force it to abide by the IOC’s rules and decisions. Finally, it disposes of a set of rules, EU Competition law, which is particularly fitted to challenge the rules and decisions of a monopolistic private institution such as the IOC. In fact, the European Commission and the Court of Justice of the European Union have already handled a competition case involving the IOC and concluded that it was to be considered an undertaking in the sense of Article 81 EC (now 101 TFEU) and that its then applicable anti-doping code could potentially constitute a restriction of competition. We are still to witness a case directly involving the OC, but the European Commission has recently again signalled its willingness to take on the Olympic Movement.

In the near future, EU (competition) law could become a powerful tool to submit the OC to a potent transnational constitutional control. Hence the empirical reality is probably blurrier than Teubner’s idea(l) of radically autonomous transnational constitutions colliding only horizontally. He claims that ‘[g]lobal self-foundation and national constitutionalization are irrevocably drifting apart, causing pressure to de-territorialize societal sub-constitutions.’ But national courts (especially the Swiss courts) keep a dormant yet real potential to intervene legally to rein in the Olympic regime. Additionally, EU law constitutes a powerful counter-power to the IOC and a permanent challenge to its autonomy. Yet, while it is probably more fruitful to think in terms of ephemeral hierarchies between territorial and

126 The IOC President Thomas Bach is ‘deeply concerned about certain interpretations of the European treaty and EU competition law with regard to sports’, see IOC, ‘IOC President at the Council of the European Union for meeting on sport in the 21st century’, 22 November 2017, at <https://www.olympic.org/news/ioc-president-at-the-council-of-the-european-union-for-meeting-on-sport-in-the-21st-century>.

127 B. Van Rompuy, ‘The Role of EU Competition Law in Tackling Abuse of Regulatory Power by Sports Associations’ (2015) 22 Maastricht J. of European and Comparative Law 179. See, also, A. Geeraert and E. Drieskens, ‘Normative Market Europe: the EU as a force for good in international sports governance?’ (2016) 39 J. of European Integration 79.

128 Judgment of the Court (Third Chamber) of 18 July 2006, David Meca-Medina and Igor Majcen v. Commission of the European Communities, C-519/04 P, EU:C:2006:492.

129 European Commission, ‘International Skating Union’s restrictive penalties on athletes breach EU competition rules’, 8 December 2017, at <http://europa.eu/rapid/press-release_IP-17-5184_en.htm>.

130 See A. Duval, ‘La Lex Sportiva face au droit de l’Union Européenne: guerre et paix dans l’espace juridique transnational’ (2015) EUI PhD thesis, at <http://dx.doi.org/10.2870/906455>.

131 Teubner, op. cit. (2012), n. 1, p. 44.

132 Challenging Teubner on this basis, see G. Vasconcelos Vilaça, ‘Transnational Law, Functional Differentiation and Evolution’ (2015) 2(3) epublica – Revista Eletrônica de Direito Público 40, at 52.
functional systems rather than absolute closure of fully autonomous functional constitutions, an overemphasis on the potential for the interventions of states could also lead to an inaccurate downplaying of the relative autonomy displayed by the Olympic constitution. In other words:

the assertion of rival plausible claims to have the last judicial word on an overlapping or disputed question of competence, provided these claims are also reasonably institutionally effective on their own terms, confirms rather than denies the interpretive autonomy of each of the polities or putative polities in question.133

CONCLUSION

Over the last twenty years, Teubner has elaborated a sophisticated and convincing descriptive picture of the transformation of law in the wake of globalization. By doing so, he has provided a new metaphorical frame (fragments instead of pyramid) for legal scholars puzzled by the distressing experience of an inherently pluralistic legal practice and the accompanying feeling of the decentring of the state. One of his distinct merits lies in empirically identifying and theoretically accompanying early on the rise of transnational private authorities and constitutions. As hinted at in his work, the sports sector is certainly a good fit for his theory. I have shown in this article that the Olympic movement displays many features supporting the idea of its constituting a transnational regime structured around a constitution: the OC. The Olympic system is grounded in the OC, which is generally recognized internally and externally as enshrining the values and norms of Olympism. Furthermore, it advances a credible (and well respected) claim to autonomy. In short, it looks like a perfect match for Teubner’s theory.

Nonetheless, there is a risk of overstating the autonomy of the Olympic regime. While it is true to say that it has been able to claim relative authority over a narrow functional space and impose its own constitutional mind-set, this space represents a microscopic fragment of social life and is dependent on being embedded in many other constitutional (functional and territorial) regimes in order to exist. Without a functioning and accommodating Switzerland in the background, for example, this regime would take an entirely different shape, which is not to say that Switzerland can easily control it. The Olympic regime’s autonomy is also subjected to the interference of states in Olympic politics, as international sport is sometimes perceived as a ‘forum of international relations’.134 Indeed, despite the OC’s

133 Walker, op. cit., n. 15, p. 349.
134 Vedder, op. cit., n. 14, p. 233. During the Cold War, scholars worried about the intense politicization of the Games: see J.A.R. Nafziger, ‘Diplomatic Fun and the Games: A Commentary on the United States Boycott of the 1980 Summer Olympics’ (1980) 17 Willamette Law Rev. 67.
objective of fending off government interference, many NOCs are in practice controlled by their national governments. Moreover, the Olympic movement is economically dependent on the enforcement of intellectual property rights by national legal systems if it is to be able to collect revenues from TV and commercial rights attached to the Olympics. The Olympic regime might be as powerful and autonomous as ever, but as illustrated by the recent Russian state doping scandal, Espy’s conclusion that ‘politics is not really an intrusion but is very much part of the Games and of sport itself’ is still relevant. In practice, the Olympic regime is not entirely autonomous from territorialized or transnationalized politics, but is often in a relationship of complex interdependence with it. The transnational legal game surrounding the Olympics is played on a confusing board embroiling territorial and functional regimes, and ‘the units are no longer isolated, constitutionally self-sufficient monads’. The idea that we would be facing a refashioned game of functional billiard balls instead of territorial ones fails to capture the complexity and multitude of legal and political entanglements at play in the transnational space.

Teubner’s project is not only sociological or descriptive; it is also emphatically normative and haunted by the necessity to restrain and, in his way, democratize transnational regimes. This ‘autopoiesis with a human face’ can seem contradictory to observers versed in the cold functional logic of systems theory. I have much sympathy for this part of his project and share his sense of urgency to give a voice to those affected by transnational regimes. However, I am less convinced about the main strategy envisaged in Teubner’s work to force transnational regimes to remain reflexive and open to their environments. His is a vision in which there is no particular role for political institutions at whichever level to channel the

135 A survey has shown that 15 per cent of all NOCs are led by individuals connected to a government: see S. Alvad and M. Wickström, Autonomy in National Olympic Committees 2017: An autonomy index (2017), at <http://www.playthegame.org/knowledge-bank/publications/autonomy-in-national-olympic-committees-2017-an-autonomy-index/14ecc367-b607-49a3-915d-a78b00ac8924>.
136 R. Espy, The Politics of the Olympic Games (1979) 164.
137 Walker, op. cit., n. 15, p. 355.
138 H. Brunkhorst, ‘Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism’ (2002) 31 Millennium: J. of International Studies 675, at 684: ‘Both legal orders, the global and the national, are interwoven, interpenetrating, overlapping. The state is still one among other important sources of transnational legislation and jurisdiction.’
139 Příbáň, op. cit., n. 1, p. 454.
140 id., p. 456–7.
141 For similar doubts from a different perspective, see K. Moller, ‘Subalterne Konstitutionalisierung. Zur Verfassung von Evolution und Revolution in der Weltgesellschaft’ in Kritische Systemtheorie – Zur Evolution einer normativen Theorie, eds. M. Amstutz and A. Fischer-Lescano (2013) 173, at 187.
public interest. Instead, he is betting on social movements and faceless and transient public outrage to exert the pressure needed for regimes to internally adapt their constitutions to better respect their environments. As I have shown, this dynamic is certainly at play in the Olympic context. External pressures, in the form of public criticisms expressed by citizens, the media, and national political institutions have led to constitutional changes at OC level in order to tackle major crises. Yet, these changes do not seem to have been very effective in addressing the underlying problems. Environmental damage was more prominent than ever at the 2014 Sochi Olympics and corruption is a recurring problem inside the Olympic movement and the IOC. For many, the Olympics remain a mega-commercial event obsessed with its own economic success and largely ignorant of its negative externalities. There is an inherent risk, of which Teubner is well aware, in putting ‘the fox in charge of the henhouse’. His conviction that colère publique is the ‘only way out’ to democratize transnational regimes fails to account for (or maybe fears) the potential of other alternatives, such as European political integration, to partially rein in autonomous regimes and subject them to some political accountability. It might be too early to proclaim ‘there are no alternatives’, and to give up (in Teubner’s words ‘lasciate ogni speranza’) on the possibility of reviving a politico-legal umbrella fitted to the transnational era. However, if this reconstitution of the political is to occur in the transnational context, it will undoubtedly be in a different fashion from that envisaged by methodological nationalists focusing exclusively on the state as fall-back option to politicize the transnational regimes. In the meantime, I certainly share Teubner’s conviction that the democratization of transnational regimes is an increasingly urgent task.

142 See M. Goldoni, ‘Review of Gunther Teubner, Constitutional Fragments’ (2016) 13 J. of Moral Philosophy 253, at 255; J. Príbaň, ‘Asking the Sovereignty Question in Global Legal Pluralism: From “Weak” Jurisprudence to “Strong” Socio-Legal Theories of Constitutional Power Operations’ (2015) 28 Ratio Juris 31, at 32.

143 See A. Geeraert and R. Gauthier, ‘Out-of-control Olympics: why the IOC is unable to ensure an environmentally sustainable Olympic Games’ (2018) 20 J. of Environmental Policy & Planning 16. On the OC’s general need for accountability, see R. Gauthier, The International Olympic Committee, Law, and Accountability (2016).

144 See J. Boykoff, Celebration Capitalism and the Olympic Games (2014); M. Perelman, Barbaric Sport: A Global Plague (2012).

145 Teubner, op. cit. (2011), n. 1, p. 225.

146 Teubner, op. cit. (2013), n. 1, p. 57.

147 Discussing this fear, see Príbaň, op. cit., n. 1, p. 457.

148 Similarly R. Guski, ‘Autonomy as sovereignty: On Teubner’s constitutionalization of transnational function regimes’ (2013) 11 I-CON 523, at 535.

149 Teubner, op. cit. (2013), n. 1, p. 58.

150 Teubner, op. cit. (2010), n. 1, p. 334.

151 There are many potential alternatives, such as Walker, op. cit., n. 15. For a recent proposal, see Príbaň, op. cit., n. 142, pp. 47–8 and Moller, op. cit., n. 141. On the importance of the ‘language of human rights’, see Brunkhorst, op. cit., n. 138.
which should be advanced through all available means, including the nurturing of public pressure and social critique on a transnational scale. In that regard, the language of constitutionalism mobilized by Teubner ‘expresses an aspiration worth preserving’.152

One does not need to endorse Teubner’s vision of a post-political world of irrevocably fragmented functional systems to appreciate the importance of his insights. Indeed, relying on a constitutional vocabulary with regard to the OC is not absurd, neither in descriptive nor in normative terms. It captures the very real transnational authority bestowed on this text inside and outside of the Olympic regime, as well as the tone of the legitimate demands that must be opposed to it in the name of the public(s).

152 N. Walker, ‘The Antinomies of Constitutional Authority’ in Authority in Transnational Legal Theory, eds. M. Del Mar and R. Cotterrell (2016) 125, at 149.