

A Fossilised Constitution?

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Abstract. The purpose of this paper is to analyse the limits of constitutional reform. Some constitutions, for example, the German (art. 79, sec. 3), the Italian (art. 139), the Portuguese (art. 288), the French (art. 89, sec. 5), and the Brazilian (art. 60, sec. 4), contain an “essential core” of rights, which is usually understood as being immune to change. The initial focus in the paper is on the discussion on whether and to what extent these “essential cores” are indeed immune to change. A second focus is on Ross’s paradox. Here I analyse and reject Ross’s own solution to the paradox and I show, too, that the paradox admits no solution that does not imply a discontinuity in the legal system.

This paper has as its aim an analysis of the limits of constitutional reform—this by dealing with two of its most problematic aspects: (1) the possibility of overcoming the clauses that protect some rights against constitutional amendments (hereafter: *eternal* or *prohibitory clauses*) and (2) the problem of self-amendment.¹ Although the argumentation will focus primarily on examples from the Brazilian constitution—especially in the case of eternal clauses—it has a universal character, for the problems discussed are, above all, problems of general constitutional theory.

The main *targets* against which my arguments are directed are two papers which—though having almost nothing in common—sum up the arguments in favour of the possibility of changing the constitutional articles that lay down the conditions, procedures and limits of constitutional reform. These papers will serve as the basis for the following discussion. The first paper, by Ferreira Filho, deals with the range of the so-called eternal clauses and

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¹ In order to avoid misunderstandings, it should be said in advance that, although I do deal with examples of a *substantial* nature when I discuss the problem of overcoming the eternal or prohibitory clauses, my approach is essentially of a *procedural* and *logical* nature. At this point I should thank the comments of one of the anonymous referees, who stressed the necessity of differentiating those two kinds of analysis. Hence the necessity of this remark.

defends explicitly the theory of the *double amendment*, which will be explained in section I (Ferreira Filho 1995). The second paper is the well-known work of Alf Ross on self-reference in constitutional law (Ross 1969). It deals with questions related to the reform of the procedure of constitutional amendment and defends the possibility of altering this procedure. The focus on these two works does not exclude, of course, an analysis of other works; indeed, there exist numerous works devoted to this subject.

The paper begins with an exposition of the arguments that support the *double amendment thesis* (section I). There follows an analysis of the limits of the constitutional amending power (section II), in order to demonstrate that, in addition to the limits that the constitution explicitly lays down, logically implicit limits also exist. In the next section, I try to demonstrate that the amending power is a heteronomous power and thus cannot dictate its own regulation. This leads inevitably to an analysis of the paradox presented by Ross (section III, A) and the solution that he proposed (section III, B). I will show that the paradox admits of no solution that does not imply a discontinuity in the legal order (section III, C, 1) and that the solution proposed by Ross is unacceptable (section III, C, 2). Finally, I attempt to refute the thesis that the Brazilian constitution should be considered as a work of the amending power rather than of the constituent power (section IV), and for that purpose I shall employ von Wright's concept of usurpation.

I. The *Double Amendment Thesis*

The Brazilian constitution, like other constitutions in the western world, protects some rights against constitutional amendment. It has therefore an essential core that *trumps* the democratic amendment process. Thus, the Brazilian constitution could be considered a *foundationalist constitution*.² Ferreira Filho (1995, 11) advocates the thesis that the limitations to the amending power, laid down by art. 60, sec. 4 of the Brazilian constitution, cannot be considered an eternal clause, because this would inevitably fossilise the constitution.³ Although this might be considered an unusual thesis for the Brazilian constitutional tradition, it is far from being a new one, and its essence can be found in art. 28 of the French Bill of Rights from 1793, which is based on Condorcet's ideas: "a generation cannot subject future generations to its own laws."⁴

² This category—*foundationalist constitution*—is used by Ackerman 1991, 15 in referring to the German constitution, which, like the Brazilian, also contains a so-called essential core (art. 79, sec. 3). The American constitution is, on the other hand, a *dualist* one. For the concept of *rights as trumps* see above all Dworkin 1984, 153ff.

³ Art. 60, sec. 4 of the Brazilian constitution dictates: "Art. 60 [. . .] sec. 4—No proposal of amendment shall be considered which is aimed at abolishing: I—the federal form of the state; II—the direct, secret, universal and periodic vote; III—the separation of Powers; IV—the individual rights and guarantees."

⁴ In this paper however I will discuss neither the *legitimacy* of the constituent power in prescribing immutable clauses to the future generations, nor the *reasonableness* of such clauses. For

According to Ferreira Filho (1995), the articles protected against constitutional amendments—I call them *eternal clauses*—remain protected solely as long as the present content of art. 60, sec. 4 remains unchanged. This means that art. 60, sec. 4 itself could be amended and one or more of its prohibitory clauses could be eliminated. For instance, if one wanted to abolish the federal form of the state, then merely a *double amendment procedure* would be necessary: The first step would overrule art. 60, sec. 4, section I, which forbids changes in the federal form of the state. Since this obstacle then disappears, a second amendment could serve to introduce a unitary and centralised state. The same procedure could be used to introduce changes in, or even to abolish, some or all basic rights, the separation of powers, and the secret and direct elections.

The arguments used by Ferreira Filho could be summed up in the following syllogism:

Solely the rights expressly protected against amendments, i.e., the rights comprehended in the four sections of art. 60, sec. 4 belong to the unchangeable core of the constitution;
 Art. 60, sec. 4 itself is not comprehended in these four sections;
 ∴ Art. 60, sec. 4 itself can be amended.

In addition to this syllogism, which is at the heart of Ferreira Filho's arguments, there is a parallel argument that could be summarised in another syllogism:

What the *amending power* changes in a constitution may be modified in the future by the same *amending power*;
 The whole Brazilian Constitution is a work of the *amending power*;
 ∴ The whole Brazilian Constitution may be modified by the *amending power*.

From the internal point of view both syllogisms are irrefutable, since the conclusions follow logically from their premises. The problem I will discuss further deals with the external justification, i.e., with the validity of the premises.⁵

The main argument that supports the *double amendment thesis* is the fact that art. 60, sec. 4 is not itself protected against constitutional changes. This

such a discussion see, for instance, Elster (1984), Holmes (1988; 1995) and Waldron (1998). My analysis has a strictly dogmatic character and deals specifically with the problems related to the *analytical* and *normative* dimensions of legal dogmatics. This implies a limitation of the present discussion to a systematic analysis of concepts, in order to make possible a rationally justified answer to the problems discussed. See Alexy 1985, 23ff. for an analysis of these different dimensions of legal dogmatics.

⁵ With regard to internal and external justification of syllogisms see Wróblewski 1974, 43 and Alexy 1989, 221ff.

would result in a constitutional gap that allows the procedure in two stages, the first one being the elimination of the protective clause, and the second, the amending of the articles one wants to alter (individual rights, separation of powers etc.), since after the first amending stage, the articles intended for alteration no longer belong to the unchangeable core of the constitution.

Despite a feeling of insecurity prompted by this thesis in scholars accustomed to an interpretation of the limits of the amending power that grants to individual rights and to the separation of powers a character of immutability, the *double amendment thesis* has many advocates. In 1947, Hans Haug defended exactly the same idea and with a line of thought very similar to Ferreira Filho's. According to Haug (1947, 180), the eternal clauses were an "effective legal restriction, but only as long as these bonds [...] are not eliminated through the ordinary procedure of revision. This elimination of the prohibitory clauses would then open up the way for reforming the basic principles or the form of the state." In Brazil, Ferreira Filho seems to be the only scholar to advocate clearly and coherently the *double amendment thesis*, accepting all of its possible consequences. Other writers are frequently contradictory when accepting the possibility of amending the so-called *eternal clauses*. Machado Horta (1995, 128), for instance, defends this possibility only if it does not imply a reduction of the constitution to a flexible one and only if there is no suggestion of a "fraud to the constitution." As I will show later, these two consequences are inevitable corollaries of the *double amendment thesis*; thus, Machado Horta's restriction is meaningless. Antunes Rocha (1993, 181, 185) does not escape this contradiction either. She affirms that "the constitutional clauses that establish the limits to the amending power cannot be considered as absolutely unchangeable," but asserts on the other hand that a "constitutional reform has its limits defined by the *constituent power* [...]. Failing to respect these limits is invalid, unconstitutional, immoral and undemocratic." It seems that she overlooks that breaking the immutability prescribed by the *constituent power* to some clauses exactly means disrespecting the limits that it has laid down. Following Antunes Rocha's rationale, this should be considered *invalid, unconstitutional, immoral and undemocratic*. Both Machado Horta and Antunes Rocha seem to confuse the judgment about the reasonableness of the so-called eternal clauses with the dogmatic analysis about their *legal meaning* and their *limits*.⁶

Voices against the so-called *fossilised constitution* are heard not only in Brazil. In Portugal, for example, where the constitution also protects some articles against amendments,⁷ Miranda (1987, 181) asserts that the norms restricting the constitutional amending power are "changeable like any

⁶ For these distinctions, see notes 4 and 11, and Kelsen's clear position on them.

⁷ Portuguese Constitution, article 288: "The laws revising the Constitution shall respect: a) the national independence and the unity of the state; b) the republican form of government; c) the separation of the Churches from the state; d) the rights, freedoms, and guarantees of the citizens; [...]."

other norm and may be amended, appended or eliminated through a constitutional revision."⁸ A similar thesis can be found in Italy in the work of Biscaretti di Ruffia (1949, 47). Finally, in Germany, another country whose constitution has an *unchangeable* core,⁹ this thesis finds little resonance among scholars, but the immutability of the subjects listed in art. 79, sec. 3 has already been questioned by the Federal Constitutional Court.¹⁰ What is more, writers like Loewenstein, Anschütz, Duguit and Kelsen could be cited as evidence that both constitutional supremacy and the so-called *eternal clauses* have not always been viewed as natural as they are today.¹¹ But it is certainly Alf Ross's work that is most deserving consideration in the present discussion. Ross—even though he did not deal with the problem of the so-called eternal clauses—supported the possibility of altering the article of the Danish constitution that establishes the constitutional amendment procedure (Ross 1969, 1). Ross's theories will be discussed further in this article (see section III, A).

After this short presentation of the so-called *double amendment thesis*, I am now going to analyse in the next section what I understand as its flaws.

II. Explicit and Implicit Limits to the Amending Power

The Brazilian constitution, like many other constitutions in the western world, defines, in its article 60, sec. 4, the subjects protected against constitutional amendments. In its four sections, this article enumerates the rights that cannot be eliminated by the *amending power*. The text of this article appears to be unambiguous,¹² protecting (I) the federal form of the state, (II)

⁸ See also Brito (2000, especially 430). Brito, however, distinguishes between unchangeable implicit principles and their concrete expression in a constitutional text. The latter may be amended, like any other constitutional norms, but the former must remain unchanged.

⁹ German Constitution, art. 79, sec. 3: "Amendments of this Constitution affecting the division of the Federation into States (*Länder*), the participation on principle of the States (*Länder*) in legislation, or the basic principles laid down in Articles 1 and 20 are inadmissible."

¹⁰ See BVerfGE, 30, 1. This decision was held by 5 votes to 3. For the dissenting votes see BVerfGE, 30, 33. Besides the dissent within the Court, this decision has been almost unanimously rejected by the German legal community. See Stern 1985, 329.

¹¹ Concerning the non-acceptance of constitutional supremacy, Anschütz 1929, 348 stated that the "constitution stands not above the Legislative, but at its disposal." With regard to the so-called eternal clauses, the authors cited occupied themselves more with their reasonableness than with the discussion on the possibility of changing what has been prescribed as unchangeable. Loewenstein 1961, 46–7, for instance, expressed his doubts concerning the effectiveness of such unchangeable clauses against arbitrary power, but did not comment on their immutability. In another work, however, he seems even to accept implicit limits to the amending power, which excludes him from the list of writers who could supply arguments for the *double amendment thesis* (Loewenstein 1954, 386–7). Kelsen 1925, 254 was one of the few authors who did specifically comment upon the subject. Although he was against the so-called eternal clauses, understanding them as incompatible with the necessary constitutional changes time demands, he supported the thesis that, when such clauses exist, they cannot be modified by a legal procedure.

¹² See the text in note 3.

the direct, secret, universal and periodic vote, (III) the separation of powers and (IV) the individual rights and guarantees against amendments that tend to eliminate them. These are called the *explicit limits* to the amending power.

The simplicity of the *double amendment thesis* is basically founded in its positivist premise of not accepting limits to the amending power other than those explicitly prescribed by the constitution, i.e., of not accepting any *implicit limits* (see Ehmke 1981, 99). The reason for this non-acceptance is very simple and can be summed up with the following quotation from Ferreira Filho's paper: "[I]t is hard to admit that the constituent power, by prescribing the immutable core of the Constitution, has done it incompletely, remaining silent about a part of it" (Ferreira Filho 1995, 14). Therefore, if the constituent power did not include among the unchangeable articles of the constitution the article that prescribes the procedure of, and limits to, the amending power, it did not forget anything, but opted to act in this way. This opinion would be supported by the fact that some constitutions include the procedure of changing them in their unchangeable core. Ferreira Filho refers, for example, to the constitution of the German state of Hessen (art. 150, 3); the constitutions of Rheinland-Pfalz (art. 129, sec. 3) and Bremen (art. 20, sec. 3) could also be used as examples.

This kind of argument, however, seems to be very weak, since the non-explicit prohibition of changing art. 60 of the Brazilian Constitution does not necessarily mean that the constituent power had *tacitly opted* for the possibility of amending it—for it can be understood that what is *logically* impossible does not need to be *positively* prescribed (see Canotilho and Moreira 1991, 302). And the existence of constitutions that explicitly include their amendment procedure in their unchangeable core cannot be used as an argument, for, in doing so, these constitutions are *nothing but redundant*, and one cannot accept redundancy as a rule.¹³ Moreover, this argument *a contrario sensu* can be used both for the *double amendment thesis* as well as *against* it, depending on the constitution quoted. There are constitutions that *explicitly forbid*, just as there are also constitutions that *explicitly allow* amendments in the articles that establish the procedure and the limits of their amendment.¹⁴ There are arguments *a contrario sensu* for all tastes.

Having replied to this first argument against the existence of implicit limits to the amending power, I will now try to demonstrate in the follow-

¹³ It is interesting to note that the commentators on the German state constitutions follow this understanding and do not corroborate, therefore, the argument of Ferreira Filho. See, for instance, Neumann 1996, 110: "With the immutability of art. 20 [of the constitution of Bremen] the constituent power repeats the unwritten principle of the logic of norms, according to which the constitutional norm itself that establishes the articles to be protected against amendments cannot be amended or overruled". See also Sampaio 1995, 88.

¹⁴ An example from this second group is the Brazilian Constitution from 1934 (article 178). Similar examples are the German Constitution, prescribing in its article 146 the possibility of a total reform after German Reunification, and the French Constitution from 1875, with the original text of article 8, which also authorised its total reform.

ing sections the reason why the prohibition to change the rules of constitutional amendment should be considered an implicit limit to the amending power. I begin with the examination of the amending power as a heteronomous power.

III. An Heteronomous Power and the Paradox of Alf Ross

The competence to amend the constitution, which the legislative authority usually holds, is a competence that derives from a higher authority, from *the constituent power*. If a competence derives from a higher authority, it seems logical that its limits can be modified only by this higher authority, but *never by the derived authority*. In other words: In a hierarchical system, no authority can dispose of its limits. It is a competence that it does not hold (see Zagrebelsky 1984, 101; Modugno 1998, 620; Dogliani 1996a, 21; 1996b, 65; Mello 1980, 48; Maunz and Zippelius 1994, 35), and this goes without saying. Otherwise we should also grant, for instance, that the president of a country could extend the competence the constitution grants to him. Although the constitution does not forbid this extension, such a prohibition derives nonetheless from the hierarchy that is implicit in the granting of competence from a higher authority. Only the granting authority—the constituent power—or any other authority it points to could proceed to such an extension, but never the derived authority, in this example the president of the country. I think it is clear, then, that an authority cannot extend—or reduce—its own competence, for this very competence—and its limits—are granted by a higher authority which therefore keeps this prerogative.¹⁵ Similar to this concept is the concept of *constitutional reservation*, used by Moreso, by analogy to the *legal reservation*. A disposition of legal reservation could have the following content:

(LR) Only the Parliament, by decision of the absolute majority of its members, has the competence to issue norms of criminal law. (Moreso 1991, 203)

According to Moreso, such a disposition does not mean merely that a norm of criminal law, passed by the vote of the absolute majority of the Parliament, is *valid*, but also that a norm of criminal law should be considered *invalid* if it has been passed by another institution or by the Parliament itself, but through another procedure, after a delegation of competence, even though this delegation has been passed by the absolute majority of the

¹⁵ Some writers (see Sampaio 1995, 95, 107; Silva 1999, 70; 1975, 73, 76) have argued that the implicit limits to the amending procedure are valid only against amendments that reduce the quorum for future constitutional amendments, but not against those that increase it. If the only reason to admit the explained implicit limits is a logical one, based on the hierarchical reasoning according to which no authority has its limits at its disposal, this reasoning should be valid regardless of the content of the amendment; this hierarchical argument would otherwise be meaningless. Questions of content cannot weaken the logical reasoning.

Parliament itself. In other words, in the case of *legal reservation*: (a) “only the competent authority may enact norms on the reserved subject”; (b) “the competent authority cannot delegate this competence,” for this authority would then undermine the very purpose of the reservation (Moreso 1991, 203). In this same way, a *constitutional reservation* could have the following structure:

(CR) A constitutional amendment (CA) can only be considered valid if it was issued by the authority *A*, by the procedure *P*; but if the authority *A*, albeit by the procedure *P*, authorises, through the disposition *L*, another authority *A'* or even the same authority *A*, but with a different procedure *P'*, to issue a constitutional amendment (CA), then the disposition *L* is invalid. (Moreso 1991, 204)

Moreso comes then to the conclusion I reached above when exposing the amending power as a heteronomous power. And, with Moreso’s version of *constitutional reservation* it becomes clear why a change in the procedure of amendment should be considered unconstitutional: This change entails exactly what the second part of *CR* forbids.

This discussion about the implicit hierarchy within competence derivations leads inevitably to the paradox of Alf Ross.

A. Ross’s Paradox

Ross begins with the assertion that every rule is created through an issuance in accordance with other legal rules called *rules of competence* (Ross 1959, 80; 1969, 1). One can say further that every rule of competence constitutes an authority that, according to Ross, is a symbol for the totality of conditions determining the law-making process. Thus, every authority is constituted by a rule of competence that, in turn, is created by another authority. Since the validity of the former derives from the latter, the latter should be considered as of a higher type. And since this procedure cannot be infinite, there must be a highest authority whose competence does not derive from any other authority (Ross 1959, 80; 1969, 1). This can be illustrated as follows (*A* means authority and *C* means rule of competence):

A_1 is constituted by C_1 ; C_1 is issued by A_2 ;
 A_2 is constituted by C_2 ; C_2 is issued by A_3 ;
 A_3 is constituted by C_3 ; C_3 is not issued by any other authority.

According to Ross (1969, 3), A_3 is the highest authority within the system and C_3 is its basic norm. The question Ross asked, and this is the origin of his paradox, refers to the legal existence of C_3 . According to him, there are only two possible answers:

- (1) C_3 is issued law—as it is not issued by any other authority this means that it is issued by A_3 itself.

- (2) C_3 is not issued law—this means that its legal validity cannot be derived from the validity of any other norm, but is an original fact, a presupposition for the validity of any other norm of the system.

Transposing it to constitutional law, Ross defines A_2 as the legislative authority. If the constitution contains rules for its own amendment, these rules (C_3) determine another procedure of law-making and constitute the constituent authority (A_3).¹⁶ Thus, if the constitution does not recognise any higher authority to change the amendment procedure which it lays down, then A_3 is the highest authority in the system and C_3 is its basic norm. For the Brazilian constitution, the higher authority would be the amending power, defined by art. 60, sec. 2 and this same article would be the basic norm of the Brazilian legal system.

The problem that arises from this situation is decisive for the subject of this paper: How can art. 60, sec. 2 of the Brazilian constitution (or article 88 of the Danish constitution, to use the example Ross used), that is C_3 , be itself amended? According to Ross, there are only two possible answers, based on the two possible answers for the question on the legal existence of C_3 (Ross 1969, 4):

- (1) art. 60, sec. 2 may be amended by the process it itself lays down
- (2) there is no legal procedure that may be used to amend this article, because the validity of art. 60, sec. 2, as an original fact, does not derive from any other norm of the system. This does not mean, however, that this article is unchangeable. According to Ross, a basic norm can be supplanted by another basic norm, but this transition is not the outcome of a legal procedure. (Ross 1969, 4)

Ross considered both answers to be unacceptable. Answer (1) he considered unacceptable because it implies a self-referring sentence, which would run contrary to the logical theorem about the meaninglessness of such sentences. In his paper, Ross tried above all to demonstrate that self-referring sentences are devoid of meaning, doing so in order to support his rejection of the first answer. I want to analyse only the main argument against self-reference. The authority constituted by the basic norm—in the Brazilian case 3/5 of the National Congress—could not transfer its competence, for this would constitute a logical absurdity that might be summed up with the help of the following syllogism, adapted to the conditions of the Brazilian constitution:

¹⁶ Ross made no distinction between constituent power and amending power, which renders his pattern incomplete. He argued that C_2 are the constitutional norms that define the legislative authority and that C_2 are created by A_3 . That is the reason why he called A_3 the constituent power or authority. But in Ross's explanation, A_3 is also the authority that could amend the constitution. In this sense A_3 is the amending power, not, as he called it, the constituent power. In Ross's pattern, therefore, A_3 is both the constituent and the amending authority. In his analysis, however, Ross only treated A_3 as the amending power, and in my analysis I do the same.

art. 60—the constitution may be amended if the amendment proposition, after being passed in two readings, obtains, in both readings, three-fifths of the votes within the House of Representatives and within the Senate, and if it is not aimed at abolishing: I—the federal form of the state; II—the direct, secret, universal and periodic vote; III—the separation of powers; IV—the individual rights and guarantees;

art. 60' (stating that the constitution may be amended if the amendment proposition obtains the *absolute majority* of the votes within the House of Representatives and within the Senate, *without any restriction concerning the subjects that are being amended*) has been created following the conditions of art. 60, above;

∴ art. 60' is valid, that means, the constitution may now be amended if the amendment proposition obtains the absolute majority of the votes within the House of Representatives and within the Senate, without any restriction concerning the subjects that are being amended.

Although this syllogism seems to be intuitively plausible, Ross asserted that it is indeed a logical absurdity, for its conclusion contradicts one of its premises (Ross 1969, 5). Another example provided by Ross should make the argument clearer. Suppose the norm of paternal relationship is as follows: Son *S* is in every respect subject to the will of his father *F*. If *F* tells *S* not to obey him anymore, this emancipation could not be based on an inference from the basic norm, because that would imply that the conclusion (the emancipation) contradicts the first premise (the norm of paternal relationship). In other words, if *S* begins to act independently of any paternal order, because *F* has told him to do so, he still accepts the parental authority and is not, in fact, emancipated. A new order from his father could put an end to his independence (Ross 1969, 5).

The second possible justification to a change in article 88 of the Danish constitution (or art. 60, sec. 2 of Brazilian constitution), which is based on a socio-psychological fact, that is, based on the mere acceptance of a new basic norm on the part of the community, is unacceptable, according to Ross, because contrary to obvious fact (Ross 1969, 18).¹⁷

Since Ross believed to have demonstrated the logical impossibility of the first answer, and since nobody defended the second, the paradox remained unsolved.

B. The Solution to the Paradox

In order to demonstrate the possibility of changing the article that lays down the rules for amending the constitution, Ross tried to *save* the first solution

¹⁷ According to Ross 1969, 6, "people think and act as if the basic norm [. . .] may be amended in accordance to its own rules. There is no doubt that any attempt to change art. 88 in any other way would be considered illegal by the people, the leading politicians and the courts."

by changing it. But before he proceeded with the changes, he laid down two premises: (a) the validity of a norm cannot be derived from a norm in conflict with it (this resolves the problem, explained above, concerning the contradiction between premises and conclusion); (b) because of premise (a), the basic norm of a system should remain the same, no matter which amendment procedure is used (Ross 1969, 21).

To respect these premises and, at the same time, to accept the possibility of amending art. 88 of the Danish constitution has only been possible by resorting to the following solution: *No longer considering art. 88 as the basic norm of the Danish legal system.*¹⁸ According to Ross, only by doing so would it be possible to amend art. 88 without getting into logical problems. Ross introduced his suggestion by using another example of parental authority. Within this kind of *micro-system*, the basic norm (N_0) would be: "Obey your parents!" As we have already seen, Ross considered it impossible that the parents *transfer* their authority to others. However, nothing would hinder them from *delegating* their power. The parents could issue norms like: "(N_1) During our absence you shall obey Miss A;" or "(N_2) During our absence you shall obey Miss A; if A leaves, before we are back, you shall obey B." Finally, it would be possible to admit the following norm: "During our absence you shall obey A, until he himself points out B as his successor; from that moment you shall obey B, until he himself points out a successor, and so on indefinitely" (Ross 1969, 22–3). Such a norm is valid, for its validity derives from the basic norm (N_0) without conflicting with it.

Ross suggested, therefore, that a norm such as the following should be considered the basic norm of the Danish legal system:

N_0 : Obey the authority instituted by art. 88, until this authority itself points out a successor; then obey this authority, until it itself points out a successor; and so on indefinitely (Ross 1969, 24).

Then it would be possible

to understand an amendment of art. 88, according to the procedure prescribed by this article itself, as a legal enactment that is valid not in virtue of art. 88 itself, but in virtue of N_0 , the basic norm. N_0 itself remains the legally unchangeable basis of the system. On this hypothesis our interpretation of the amendment rules involves no reflexivity and the derivation of art. 88' from art. 88 no contradiction. (Ross 1969, 24)

C. Critique

Most of the criticism that followed Ross's paper was aimed at demonstrating that his paradox merely appeared to be one, since: (1) self-reference, *per*

¹⁸ One of the few to agree with this strategy is Alarcón Cabrera 1993, 226; 1996, 90.

se, does not entail lack of meaning;¹⁹ and (2) a conclusion that contradicts one of the premises of the syllogism is not necessarily a false conclusion.²⁰ I do not want to pursue this discussion further. For the purposes of this paper, this is not necessary, for my argument against the possibility of changes in the article that lays down the process of constitutional amendment has a different focus. It consists of the following steps: (1) I will resume the discussion about the amending power as a heteronomous power, and the discussion about the constitutional reservation, and using the concept of chains of validity I will try to demonstrate the legal impossibility of this amendment (section 1, *infra*); (2) I will argue that Ross's solution—the creation of a basic norm N_0 —is not as plausible as it may seem (section 2, *infra*); (3) finally, after having shown that Ross's first answer to the paradox should in fact be rejected, and that the solution he suggested is not correct, it will be shown that the only real solution to the paradox is the one he classified as not being a legal one (section IV, *infra*).

1. Chains of Validity

Alchourrón and Bulygin (1974, 120) define *chains of validity* as follows: “[I]f there is a valid statement that permits the authority x to formulate the statement p , and x formulated p , then p is valid.”²¹ So, if the amending power, in the moment t_1 , eliminates one of the articles in the constitution and inserts another in its place, this can be done because there is a valid statement that authorises the amending power to do so by means of a given procedure. In this way, the eliminated article (a) is valid until t_1 and the new article (a') is valid from t_1 on. Such cases are trivial and do not give rise to any problems, but they show very well what is meant by *chain of validity* or *subordination*:

¹⁹ See, for example, Hart 1983, 176ff.; Hoerster 1972, 424; Guibourg 1983, 184; Raz 1972. On self-reference and paradox see also Popper 1954; Hicks 1971, Suber 1990, 3ff., 241ff.

²⁰ This statement is based on the fact that, unlike the case of logical derivations, which are timeless and whose conclusion is implicit in the premises, the derived norm in dynamic normative derivations is only *potentially* contained in the original norm, as a *possibility* that can be realised in a certain moment. And such possibility entails, perhaps necessarily, self-destruction. See Guibourg 1983, 193–4. The same time-based argument is used by Bulygin 1982, 65ff.; 1984, 332. See Hoerster 1972, 422 and Suber 1990, 57, 137. For the opposing position, see Nino 1984, 356. For an analysis on this subject in greater detail see Brito 2000, 262ff., and for a practical application of this discussion see Brito 1999, 1ff.

²¹ This definition clearly expresses the dynamic principle of legal systems and will serve therefore as a basis for the analysis. A similar definition, called *chains of subordination*, is also used by von Wright 1963, 198–9. On the *dynamic principle of legal systems*, see above all Merkl 1931, 254, 272ff. See also Kelsen 1960, 196. The dynamic principle is juxtaposed to the static principle. The latter—characteristic of moral systems—means that the validity of the norms within a given system is to be defined through their content (see Merkl 1931, 253; Kelsen, 1960, 198). According to the dynamic principle, which is characteristic of legal systems, the validity of a norm should be determined by strictly formal criteria. This means that a norm can only be valid if it has been enacted by a competent authority (see Merkl 1931, 275–6; Kelsen 1960, 199–201). See also Paulson (1990, 101), Hart (1961, 90–4), Moreso, (1991, 205). I would like to thank Prof. Paulson for the reference to Merkl's *Stufenbau* theory.

The validity of a legal norm is derived from its issuance by a competent authority.²²

However, if the amending power changed the article that lays down the amendment procedure itself, we would face the following situation: The constitutional amendment, through which the change has been made, has disrespected what has been called *constitutional reservation* above, and which has the following content:

(CR) A constitutional amendment (CA) can only be considered valid if it has been issued by the authority *A*, by the procedure *P*; but if the authority *A*, albeit by the procedure *P*, authorises, through the disposition *L*, another authority *A'* or even the same authority *A*, but with a different procedure *P'*, to issue a constitutional amendment (CA), then the disposition *L* is invalid. (Moreso 1991, 204)

A new article 60, sec. 2 in the Brazilian Constitution would disrespect the constitutional reservation and would be therefore *invalid*, for it would have been issued by an authority without the competence to do so. This does not mean that such an amended art. 60, sec. 2 might not be passed by the Parliament, be accepted and applied by the courts, and, moreover, serve as basis for constitutional amendments in the future. Nonetheless, it will necessarily be *the last norm of a chain of validity* and, simultaneously, the first of a new one. In other words, one can say that a constitutional rupture has taken place, which I will discuss in section IV. In such a case, one might speak of two different constitutions: the one with the original article, and the one with the new one.²³

2. Ross's Basic Norm

As shown above, Ross had a relatively simple solution for the paradox he presented. Since, according to him, article 88 of the Danish constitution, being the basic norm of the system, could not be amended by means of the same procedure that this same article prescribes for amending the other articles of the constitution, it would no longer be sufficient to consider it as the basic norm of the system, and to resort to a hypothetical basic norm that could permit such changes indefinitely.

²² See von Wright 1963, 198: "It is essential to the notion of a chain of subordination [...] that each link in the chain—with the exception of the first link—is a valid norm [...] relative to the next superior link in the chain. A norm is valid when the act of issuing this norm is permitted."

²³ When I speak of two different constitutions, I do not have in mind the same idea as Bulygin (1984, 333) or Valdés (1993, 193). For them, any constitutional amendment implies two different constitutions. Their thesis contains an untenable concept of system identity which presupposes that any change in any norm of the system implies a change in the identity of the system. For more details on this subject, see Nino 1984, 363.

This solution has, however, many weaknesses. First of all, Ross did not supply any justification for his version of the basic norm (N_0). Resorting to such a basic norm opens up infinite possibilities. One could imagine, for instance, a basic norm with the following contents:

N_0 : Obey the authority instituted by art. 88; if this authority points out a successor, every citizen has a right to resist it.

or

N_0 : Obey the authority instituted by art. 88; if this authority wants to point out a successor, this should be passed by the Parliament [or by a group of experts; or by the representative of the Catholic Church; or by the richest person of the country . . .];

or

N_0 : Obey the authority instituted by art. 88, until this authority itself, unless by this time it has instituted itself as continuing, points out a successor; then obey this authority, until this authority itself, unless it had been instituted by its predecessor as continuing or by this time it has instituted itself as continuing, points out a successor; and so on indefinitely. (Hoerster 1972, 425)

Or any other imaginable content that serves the necessities of the one that proposes such a basic norm.²⁴ But the fact that Ross's basic norm (N_0) is lacking justification is only one of its weaknesses.

Another unjustified assertion of Ross's solution is the immutability of the basic norm. As Hoerster (1972, 425) claims, in order to express the immutability of his basic norm in an unambiguous way, Ross should have added to it some clause like "this article may not be changed." By doing this, however, he would have had another self-referring norm that would not be suitable for his purposes. It would also be possible to argue that the immutability of the basic norm is a logical theorem that, therefore, need not be expressed. Nevertheless, the very same could be said then about article 88 of the Danish constitution, which would make resorting to a hypothetical basic norm meaningless.

Hoerster adduces another decisive argument against Ross's basic norm. Supposing a "desert island situation" he describes the following picture:

We arrive and found a political community, giving ourselves a constitution and accepting N_0 as the unchangeable basic norm of our legal system. Now suppose 100 generations pass, approximately each of them instituting, in accordance with N_0 ,

²⁴ Suber 1990, 57, not without irony, stresses that Ross's basic norm authorises exactly what Ross would need to solve his problem. Suber correctly classifies Ross's basic norm as "comical and unscientific." See also Brito 2000, 244ff.

a new authority (in the sense of art. 88 [of the Danish constitution]); i.e., there have been 99 provisions taking in turn the place of art. 88. (Hoerster 1972, 426)

Hoerster then asks whether it would be plausible for the 101st generation still to regard N_0 as the basic norm, according to which the constitution is to be amended? The answer can only be a negative one. Firstly, because any doubt about the political and constitutional evolution of this community could make it impossible to know exactly the content of N_0 and therefore the validity of the constitutional changes could not be checked. And this seems to be the situation in almost every political community today, since it is often difficult to identify precisely the “original fact” that created them. But—as Hoerster argued—even if it were possible to know all about the constitutional history of this community and if it were possible, therefore, to know the exact content of N_0 , this would not change the negative answer, for the political and constitutional history, and the content of an hypothetical basic norm could be considered completely irrelevant. “All that is relevant is merely whether art. 88₁₀₀ in our community is accepted as basic” (Hoerster 1972, 426).

Thus, besides being untenable owing to a lack of justification, Ross’s basic norm does not have any actual significance for the knowledge of the structure and the limits of either the constituent or the amending power.

IV. The Father of the Constitution

Another strategy used by Ferreira Filho to refute the logical argument, as presented in section III, is to argue that the case of Brazil is special, for the Constitution from 1988 consists entirely of the work of the amending power, not of the constituent power. And what the amending power has created could be changed by the amending power itself (Ferreira Filho 1995, 16). The reason for such an argument is as simple as it is wrong: The Constituent Assembly that passed the constitution in 1988 was summoned by an amendment (EC 26/85) to the constitution from 1969 (an authoritarian constitution).

However, this change to the constitution from 1969—by means of which a new constitution was created—cannot be understood as a mere product of a constitutional amendment, but as a *political solution* in order to break with the illegitimate constitutional order of that time. If the same Constituent Assembly had been summoned by any other act—a *revolutionary decree*, for instance—the existence of this constitutional break would be clearer. What I want to stress is this. No matter what act had invoked this Constituent Assembly, it would have been, according to the constitutional order they wanted to abolish, an *invalid act* (see Pace 1997, 99ff.). This is an inevitable conclusion, since one can hardly imagine that a valid constitutional amendment could convene an Assembly to *destroy* the constitution

that should be amended,²⁵ unless the constitution expressly prescribes such a possibility.²⁶

Therefore, there is no alternative but to consider this amendment (EC 26/85) as an act of usurpation, for the authority that passed this amendment did not have the competence to do so.²⁷ Thus, a “revolutionary usurpation of power” took place.²⁸ As Moreso (1991, 208) stresses, all these terms—“usurpation,” “rupture,” “revolution”—mean *simply a break in a chain of validity*, never mind whether the associated social and political events also took place.

I can now return to Ross’s answers to his paradox (see section III) and conclude that not only the process that began with the summoning of the Brazilian Constituent Assembly through an invalid constitutional amendment, but also any successful attempt to change both the so-called eternal clauses and the constitutional amending procedure of *any constitution*, correspond exactly to Ross’s second answer, the one he rejected and did not even try to save by correcting it. As he argued, a basic norm could be supplanted by another basic norm, but this transition would not be the outcome of a legal procedure (Ross 1969, 4). I shall suggest that “not to be the outcome of a legal procedure” means exactly “to be the outcome of an act of usurpation,” as described above. This seems also to be the thesis of von Wright:

The usurper of power is successful. The normative relationships which he has established remain, acquire relative permanence. The authority who was superior to the usurper resigns in his efforts to make the usurper obey. This means that the superior norm, relative to which the usurper’s act was invalid, passes out of existence [. . .]. If this happens the usurper’s norm ceases to be invalid. It is now neither valid nor invalid relatively to any other norm. *It has become a sovereign norm.* (von Wright 1963, 201)²⁹

²⁵ Dogliani (1995, 25ff.; 1998, 309) reaches a similar conclusion when he speaks of the constituent power as an “exhausted power.” He expressively states that a constitution could not regard as legitimate a power that wants to deny the essential core of this very constitution (Dogliani 1996b, 65). However, “to be an exhausted power” can only mean “to be an exhausted power *under a legal perspective*,” for nothing can prevent the constituent power from *emerging* again—as an *unlimited* and *non legal* power—and changing the constitution (see Pace 1997, 120).

²⁶ Dogliani 1995, 24ff. seems to reject even this possibility, since he criticises how the German Constitutional Court uses the concept of constituent power. Since art. 146 of the German constitution, for historical reasons—because of the division of Germany after World War II—regulated, and still regulates, the term of the Constitution’s validity, prescribing the possibility of a new constitution after German reunification, I argue that, *in this case*, a new constitution would not be the product of an invalid act, and, what is more, would not be the product of the amending, but of the constituent power.

²⁷ See von Wright 1963, 200: “Suppose that a chain of subordination terminates in an invalid norm. This means that there exists some norm which prohibits the authority of the invalid norm to issue it. [. . .] In issuing the invalid norm he transgressed the limits of his normative competence [. . .]. Invalid normative acts might therefore also be called acts of *usurpation*.” See also Mortati 1945, 105ff.

²⁸ On “revolution and continuity of the legal order,” see Teles 1991, Harris 1991, Tuori 1991, Bell 1991, Wróblewski 1989.

²⁹ It is important to underline the fact that expressions like “usurper of power” do not refer—at least not necessarily—to any armed revolution, but merely to a norm whose validity does not derive from any superior norm within a given system.

Conclusion

The inadmissibility of both the *double amendment thesis* and the possibility of a legal amendment in the article that lays down the procedure of the amendment itself seem to be unambiguous. Last but not least, a practical argument: What would be the function of the limits to the amending power if these limits could be overruled by the same quorum that is prescribed for all constitutional amendments? If a parliamentary majority wants to modify something in the constitution that is under the protection of the so-called *eternal clauses*, and if this majority has the necessary three-fifths of the votes within the legislature, it would seem as if the obstacle did not exist. This means that the rights the constituent power considered to be the most fundamental rights within the legal system—which for this reason it tried to protect—could be eliminated by the very same quorum that is necessary for normal constitutional amendments. The only difference would be the necessity of two amendments. But this is a meaningless difference, for the first amendment would be aimed exactly at the second one. If a parliamentary group within the legislature has the necessary votes for the first amendment, it is obvious that it has the necessary votes for the second one, too.

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