THE PARADOX OF SELF-AMENDMENT AND THE VALIDITY OF BASIC NORMS

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In *On Law and Justice*,[1] Alf Ross argued that self-referring norms had to be meaningless since self-referring sentences are meaningless. But what then to make of norms like Article 88 of the Danish Constitution and article V of the U.S. Constitution? For Ross, amendments to the amending clause present major conceptual difficulties that can be addressed only by the supposition of an unwritten basic norm that cannot be amended.[2] Ross' position has generated considerable debate.[3] Most commentators reject Ross' analysis of self-referring propositions and, *eo ipso*, of self-referring norms. I believe Ross' critics are correct in their analysis of his treatment of self-referring propositions, but their criticisms miss a crucial and much deeper problem concerning the validity of basic norms. This paper reviews Ross' worries about self-referential norms and the problem of self amendment, presents an overview of responses to Ross, and presents an analysis of the deeper problem concerning the validity of basic norms. Instead of focusing on Article V and the amendment power, I focus on Article VII and what I shall term the problem of self validation. I conclude that Ross' appeal to a presupposed norm is essentially correct but that he erred in attempting to establish a logical, as opposed to a sociological, rule of recognition.

I: Ross' Worries about Self-Reference and Self-Amendment

Modern constitutions regularly contain provisions setting forth the conditions under which the constitution may be changed. Such constitutions are self-referential because they allow for self-amendment.[4] For any amending clause, α, the question arises, "Under what conditions may α be amended?" For Ross, there are two plausible-sounding answers:

1. α may be amended according to the procedures set forth therein and a new amending clause α_1 may be derived from it.
2. α is a basic norm whose validity is accepted but not grounded in any other norm. On this view α can be changed (e.g. through revolution) but it cannot be amended by a legal process as there is no norm to underwrite the legitimacy of the move.

Ross finds both of these proposed solutions unacceptable.

The first solution is unacceptable because problems of self-reference challenge one of Ross' core beliefs about legal validity: one norm can validly be derived from another if, but only if, the logical inference from the first to the second is not both valid and sound.[5] For constitutional clauses other than α, this condition is easily satisfied because α, the empowering norm, remains valid after the amendment. Accordingly, the derivation of β from α is logically sound. The grounding or source of the validity of the new norm is crucial because "the essential task of any constitution is to establish a legislative authority."[6] Ross implicitly embraces Raz's sources thesis: a derived norm is valid if, but only if, it is derived from a *currently valid* norm of competence. But consider an amendment to α producing α_1. If the inference works, then α_1 annuls or invalidates α at the moment it becomes operative. But at that very moment, α_1 does not stand as the conclusion of a sound argument because α, an essential premise in the derivation of *any* derived norm, is no longer valid. So α_1 cannot be derived from α .[7]

Most commentators reject Ross' argument on two different grounds. First, Ross is simply wrong in claiming that self-referential sentences are meaningless. Few logicians hold such a view and examples of non-problematic self-reference are easy to generate. Self-reference can get one into difficulties,[8] but it need not. When it comes to self-referential norms, non-problematic examples abound. In American constitutional law there are numerous examples of individual states successfully amending the amendment clauses in their state constitutions.[9]

The second line of attack depends on temporal sequences. Critics argue that since α and α_1 are not simultaneously valid, there is no contradiction between them. A legal contradiction requires simultaneously valid, inconsistent norms. But no one seriously claims that the 21st amendment contradicts the 18th. It repeals it, and that is not a problem. Such is the relationship between α and α_1; the latter invalidates the former without contradiction. But this solution does not address Ross' worry about the grounding of the new norm. John Finnis argues that α_1 has "transtemporal validation,"[10] or ungrounded validity since there is no source for its validation. This approach avoids Ross' worry, but brings with it even bigger problems. Several commentators seem to take Ross to be claiming that if the basic norm of a system cannot be amended, then that norm cannot be changed.[11] Ross never adopts such a view; he only insists that absent a legally recognized procedure for amending the amending clause any change in the amending clause is extra-legal.

Ross initially argued that second horn of the dilemma— α is a basic norm whose validity cannot be derived from any other norm—amounts to a "magical act" wherein "the amendment of the constitution is conceived as an act of magic in which he who possesses the 'power' conjures its transference to another."[12] Ross resorts to magic because of (a) "the undeniable fact that people think and act as if the basic norm may be amended in accordance with its own rules,"[13] and (b) it is difficult to imagine amending α "except by a process which *looks like* a legal procedure determined by [α] itself."[14] Changes in α " do not follow the procedure set forth in α but rather from something (juridical magic) that has the *appearance* of legal change. Curiously, Hart, in his commentary on Ross, quotes and then ignores the words "looks like" in Ross' analysis.[15] Ultimately Ross rejects the magical interpretation of change in α, and the idea that changes in α " are revolutionary, extralegal changes of α.[16] Applications of α are common, even if self-applications are less so, and people engaged in applications of α make rational appeals to α when explaining or justifying their actions,[17] so Ross rejects appeals to magic.

Ross escapes the horns of this dilemma by *presupposing* a norm higher than α.α is not a basic norm of the system, but is grounded in a higher norm, N_0, that allows for modifications in α.

Guarinoni finds Ross' appeal to N_0 particularly distressing; reliance upon "the presupposed norms which integrate every system are to Law Philosophers as the Deus-ex-machina for the authors of ancient theatre. They bring a solution when the plot was turning out to be too thick, but with the cost of eliminating credibility."[18] Yes, when the plot is artificially thick, but if the plot really is as thick as Ross makes it out to be, an appeal to N_0 may be less objectionable than the alternatives. Guarinoni and most commentators focus on the inference model[19] of legal validity at the expense of the grounding model. While Ross appears to link his grounding or sources thesis to an inferential model, the two are separable; that is, he could embrace a sources thesis that is not wed to logical inference.

II: A Deeper Self-Referential Problem: Self –Validation

Even if the critics are correct and self-referential norms do not pose a general problem, there are specific cases of self-reference which are highly problematic. Understood as a problem of sources, the paradox of self-amendment is one. The paradox of the sunset clause is another.[20] In American constitutional law there are other problematic cases of self-referential norms, some of importance far beyond the confines of academic

law and philosophical analysis. Consider the treaty clause,[21] the supremacy clause,[22] and the 10th amendment[23] to the U.S. constitution taken together. Can a treaty alter a provision in the constitution? Suppose a power that is not granted to the federal government, one that according to the 10th amendment should be reserved to the states, is adversely affected by a treaty provision? This is not an idle worry; there are historical precedents for such debates, and contemporary worries about national sovereignty in the face of international bodies like the World Trade Organization rest precisely on this point. The specific self-referential norm that concerns me here is Article VII of the U.S. Constitution:

> The Ratification of the Conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Clearly this is a self-referential norm, and a purely self-referential one at that.[24] This norm sets forth the conditions of its own validity. The question that I think Ross would have us ask of this norm is "What is the source of the validity of Article VII?" Put another way, which norm authorizes the creation of a norm stating the conditions of its own validity? There are three possibilities:

1. There is an existing, established (and preferably enacted) norm α, which allows for self-amendment and the creation of Article VII.
2. No norm authorizes or legitimates the creation of Article VII. Article VII is either a self-validating norm (Finnis' suggestion) or the establishment of Article VII is not a legal act within a system but rather a revolutionary act.
3. There is an unwritten but presupposed norm, like N_0, that authorizes and accounts for the validity of Article VII.

Each of these solutions is plagued by difficulties, but it appears that the third option, the invocation of the deus-ex-machina, is the least problematic.

Most commentators would embrace the first solution and argue that Article VII is a permissible self-referential norm derived from, or at least grounded in, some now invalid source. But what would that source be? The only plausible candidate, it would seem, is the Articles of Confederation, the normative structure that was replaced by the constitution. But this presents a very serious problem, for there is an amending clause in the Articles of Confederation, Article XIII, which states:

> Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; *nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State* (emphasis added).

Any attempt to ground the validity of Article VII of the Constitution in Article XIII of the Articles of Confederation is doomed to failure. α explicitly requires unanimity for a change in α, but α_1 expressly states that it shall become valid, and thereby invalidate α, with a mere 9/13 majority. Since α_1 does not follow the procedures set forth in α, the validity α_1 of cannot be grounded in α. This presents a serious dilemma.

On the one hand, one could insist upon a grounding requirement and find that Article VII, and the rest of the Constitution that was to be validated by it, are non-valid. On the other hand, since, the procedures set forth in α ultimately were followed, the legislatures of each of the thirteen states ultimately ratified the constitution, but this line of attack quickly leads into difficulties. If α_1 become valid only when the provisions of α had been met, then all acts of the Congress of the United States undertaken between June 21, 1788, the date New Hampshire became the ninth state to ratify the constitution, and January 10, 1791, the date Vermont became the thirteenth state to ratify, have to be extralegal. To be sure, either of the responses would please members of the Michigan militia, the Freemen and the posse commitatus, but that is a result to be avoided.

The second alternative—that Article VII is not a derived norm at all—circumvents the problem of grounding the validity of Article VII, but (a) it is inconsistent with the most rational interpretation of what the framers and ratifiers of the constitution thought they were doing, and (b) it leaves unanswered the most important and most difficult question of legal and political theory: under what conditions is the receiver of the law to accept as valid a norm posited by one claiming to have sovereign authority?[25]

As to the first horn of this dilemma, it is important to look at the actions of the delegates to the Constitutional Convention of 1787 and to the arguments presented in the ratification debates and the Federalist Papers. The delegates to the convention clearly thought that they were enacting a fundamental change within a legal order, not replacing one legal order with another. The difference is crucial, the latter being a revolutionary act, the costs of which were known all too well by the delegates; whereas,the former

is a peaceful and regular, if sometimes difficult, process. The delegates made no attempt to restyle the nation whose fundamental laws were at issue. The Constitution speaks of the same United States of America that is referred to in the Declaration of Independence and established by the Articles of Confederation. What is more, while charges of treason and sedition were common at the Continental Congress that produced the Declaration of Independence, such charges were largely absent at the Convention. There was heated debate about the wisdom and prudence of the proposed changes but little about their *legality*. The change was seen as a framework-internal question, not as a question of which framework to adopt.[26]

What is more, this analysis cannot resolve a dispute between several parties each claiming to be the true sovereign. Absent a principle of acceptance[27] that conveys legitimate authority, the receiver of the law is in a quandary. Consider a citizen in 1790 who believes that since the unanimity clause of the Articles has not been met the Constitution is not a binding document. Accordingly, no act undertaken by Congress, e.g., the Judiciary Act of 1789, is valid, so the decrees of "federal courts" are invalid. What is this citizen to do when faced with what she takes to be an invalid order purporting to be a judicial decree? Supporters of the Constitution will insist "But we changed the law!" to which the supporters of the Articles will reply "But not in the manner prescribed. We bound ourselves to a system." Absent a grounding norm, such disputes defy rational resolution, and there is nothing at all irrational about denying the legitimacy of the federal government.[28] Transtemporal validation or ungrounded validity makes the problem of legitimate authority intractable.

III: Presupposed Norms and the Rule of Recognition

If Article VII can successfully be grounded neither in an established norm nor through a process of ungrounded validation, that leaves only the unhappy prospect of a presupposed norm. There is no way to ground Article VII in an established norm unless one is willing to allow amendments to the amending clause that do not comply with procedures set forth in it. Making Article VII self-validating leaves open the deeper question of the ground of political obligation. So if Article VII is to be grounded at all, there must then be a presupposed Kelsenian *grundnorm*.

In the case of Article VII, likely candidates for N_0 include the Declaration, particularly the passage noting that "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government," or the principles of natural

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law to which the Declaration refers. The well documented problems caused by the Articles of Confederation were arguably "destructive of [the] ends" they were intended to serve, and so, there is a higher order norm N_0 to which an appeal can be made to justify the establishment Article VI. Accordingly, embracing a presupposed *grundnorm* allows one to make sense of the shift from the Articles to the Constitution as an internal, legitimate change, rather than as an external revolutionary act.

Accepting a presupposed norm that holds a legal system together is highly controversial. Peter Suber[29] argues that such assumptions, often cloaked in the language of logic, are really disguised versions of natural law theory. For Suber, the presupposition of a *grundnorm* holds the system together but at too high a cost: immutability. Suber prefers to accept some degree of inconsistency between norms in exchange for mutability, arguing "both descriptively and normatively that law can tolerate paradox but cannot tolerate immutability."[30]

> The requirements of the inference model that every new rule be authorized by a prior, superior rule, and that none be self-authorized, quickly proves its inapplicability to real legal systems. This view entails that no legal rule could validly come into being without an infinite genealogy.[31]

> It implies that no new legal system could get started. None could break off from another lawfully, and all that broke off unlawfully would be eternally barred from becoming lawful themselves.[32]

Suber errs in thinking that a norm that cannot be amended is necessarily immutable. He confuses internal with external change. Within a system one can hold that there are immutable norms and that the inference model accounts for the validity of the norms *of the system*. But the criteria for change *within* a system need not apply to changing the system itself. For Suber, the inference model of validity must apply to both framework internal questions *and* questions about the choice of a framework. But internal and external questions are of different logical types, and the criteria for good answers to one need not be the same as the criteria for good answers to the other. The presupposed *grundnorm*, together with the inference model, accounts for change *within* a legal system and does so without paradox. Suber may well be right to contend that an inference model will be insufficient to account for a change *of* legal systems, but Ross is not committed to such a view. Ross does not address directly questions of change of legal systems, but there an acceptance model works.

Before a norm subject can determine that she has a legal obligation, she must first determine whether the rule issuing authority is legitimate. "Is the receiver of the law to accept as valid the rules made by anyone claiming to be the true prince, so long as he looks like the true prince?"[33] Any answer to this question constitutes a principle of acceptance *for* a legal system. While there is great debate about such principles, one thing is clear: a rational-bureaucratic model of legal authority, focusing on the producer's view of obligation, *cannot* provide such principle. From the rational-bureaucratic point of view, where authority is monopolized and flows in only one direction, the question cannot be intelligibly formulated. But Ross does not look at law from the producer's point of view.

If Ross erred significantly in his analysis of self-referential norms and the paradox of self-amendment, his error was in treating N_0 as a *logical*, rather than a *sociological*, phenomenon. As Guarinoni points out, it is odd for a juridical realist like Ross to apparently worship at the altar of formalism. Hart's analysis of the rule of recognition as a social rule should have put to rest once and for all any attempt derive, a priori, a formal/logical rule for the validity of a legal system. To the extent that N_0 is a legal rule at all, it must be treated as a social rule.

NOTES

[1] Ross, Alf, *On Law and Justice* (London: Stevens, 1958).

[2] Ross, Alf. "On Self-Reference and a Puzzle in Constitutional Law." *Mind* 78 (1969) 1-24, esp. 6.

[3] Hart, H.L.A., "Self-Referring Laws," *Festskrift Tillägnad Karl Olivecrona*, (Stockholm: Kungl. Boktryckeriet, P.A. Norstedt & Söner, 1964) 307-16, reprinted in his *Essays in Jurisprudence and Philosophy* (Oxford: Oxford UP, 1983) 170-178. All references here are to the version appearing in *Essays in Jurisprudence and Philosophy*; Joseph Raz, "Professor Ross and Some Legal Puzzles," *Mind* 81 (1972) 415-21; Ilmar Tammelo, "The Antinomy of Parliamentary Sovereignty," *Archiv für Rechts-und Sozialphilosophie*, 44 (1958) 495-513; Carlos E., Alchourron, and Eugenio Bulygin. *Normative Systems* Springer Verlag, 1971; Peter Suber, *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change* (New York: Peter Lang Publishing, 1990) provides an excellent summary of states that have amended their amendment clauses; Ricardo Guarinoni "Self-Reference, Juridical Norms and Validity" presented to the 19th World Congress of the International Association for the Philosophy of Law and Social Philosophy (IVR) in New York.

[4] I will argue later that self-reference is really a red herring and that Ross damages his case by focusing on it rather than on amendment and problems of sovereign omnipotence.

[5] Here the use of the logician's language of validity and soundness assumes that where the logician would speak of truth of a proposition, the jurist is speaking of *legal validity* of the proposition of law.

[6] Ross 3.

[7] Ross appears to argue that it is impossible for the conclusion of a valid argument to contradict any of the premises of that argument. Surely that is an incorrect interpretation of Ross, for as a logician he knows full well that if the premises themselves are contradictory any conclusion will follow from them. Now, as a theorist of normative systems he may well hold, as do many such theorists, that inconsistency within a normative system is a fatal defect, as it is in a formal mathematical system. I have argued elsewhere (Hill, "A Functional Taxonomy of Normative Conflict, Law and Philosophy", *Law and Philosophy* 6 (1987) 227-256) that this position is not as strong as it appears, but that is a topic for another paper.

[8] And, if we follow Tarski's analysis, it turns out that the Liar paradox does not rest on self-reference at all but upon semantic confusion. While this is not the place to explore it, I believe that Tarski's tool of object and meta languages may very well prove fruitful for philosophers of law as an analytic framework within which to address questions like the one presented here.

[9] Peter Suber's *The Paradox of Self-Amendment* provides an excellent summary of states that have amended their amendment clauses.

[10] John M. Finnis, "Revolutions and Continuity of Law," *Oxford Essays in Jurisprudence, Second Series*, ed. A.W.B. Simpson (Oxford: Oxford UP, 1973).

[11] Peter Suber, supra note 12, often uses "unchangeable" where I think the proper term should be "unamendable."

[12] Ross 6.

[13] Ross, "On Self-Reference and a Puzzle in Constitutional Law." *Mind* 78 (1969) 1-24, esp. 6.

[14] Ross, *On Law and Justice,* 81, emphasis added.

[15] Hart, *Self-Referring Laws*, 175.

[16] It would resolve all worries about the validity of if one were to hold that changes in, despite their surface appearance, are really extra-legal changes of an order. The difficulty with such a move is that the people "amending" do not think they are engaged in revolutionary activity at all.

[17] See, e.g., Moore v. Shanahan, 207 K. 1, 207 K. 645, 486 P.2d 506 (1971) as a clear example of a court expressly justifying a new norm α_1 precisely because α_1 was created in accordance with the provisions of α.

[18] Moore v. Shanahan.

[19] "Ross seems to believe that the only way to derive the validity of one norm from another is logical inference. This is a curious view, coming from a juridical realist." Guarinoni 12.

[20] In modern legislation it is not uncommon to find self-referential passages. Some statutes state the conditions under which they become valid; others state that should some provisions of the statute be held unconstitutional, the remaining provisions are to be considered severable from it; still other clauses, sunset clauses, state that after a certain period of time the law will cease to have any effect. Of course, if the sunset clause is a part of the statute that loses its effectiveness, then does the sunset clause lose its validity too? If so, then why does not the law remain valid? If not, where is the source of the validity of the clause? This problem is rather easily solved by treating the sunset clause as shorthand for a separate act of legislation that repeals the original.

[21] Article II, Section 2, clause 2, on the powers of the President: "He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur."

[22] Article VI, Section 2 states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

[23] The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[24] Many commentators, including Hart and Guarinoni, argue that there is a significant difference between norms like α which refer to themselves and other norms and norms which are purely self-referential, that is, which refer to themselves and no others. Purely self-referential norms are, for Hart, unacceptable. See, e.g., Hart, Self-*referring Laws*, 178 and Guarinoni 9.

[25] See M. Kadish and S. Kadish, *Discretion to Disobey: A Study of Lawful Departures From Legal Rules* (Stanford: University Press, 1973).

[26] R. Carnap, "Empiricism, Semantics and Ontology," *Challenges to Empiricism*, ed. Harold Morick (Indianapolis: Hackett, 1980).

[27] The notion of a principle of acceptance is crucial to Kadish and Kadish's analysis of validity and legitimacy. See, generally, *Discretion to Disobey*, chapter 7.

[28] Once again, this position might give great comfort to the militia movement, but it is one to be avoided.

[29] Suber, *The Paradox of Self-amendment*, sections 3 and 21.

[30] Suber, "Preface to the Printed Edition," 3.

[31] Suber, section 21.

[32] Suber, "Preface to the Printed Edition," 3.

[33] Kadish and Kadish, *Discretion to Disobey*, 186.