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The nature and essence of right and duty as the moral-ethical foundation of Rosmini's jural principles fundamental to human rights

Summary

According to Rosmini duty precedes right. Without duty preceding right it would be impossible to form a concept or idea of right. As stated by Rosmini, the concept of right is encapsulated within the idea of duty. Each right thus has a duty that counters it. If a human being loves his fellow man, he will fulfill his obligations towards that person. By carrying out the command of love, a person will not be able to wrong his fellow man. On the grounds hereof the decree of love and social beneficence underwrite, in the context of Rosmini all rights and duties, that of the State and of the individual. With regard to Thomas Aquinas, the rights and duties of the individual would be neglected, while that of the State, under the guise of *Salus reipublicae supreme lex*, would be stressed. The latter pave the way for human rights infringements, that is in contradistinction with the *South African (Bill of Rights) Constitution* and the Eighth and Fourteenth Amendments of the *American Constitution*.

Die aard en essensie van regte en verpligtinge as die moreel-etiese grondslag van Rosmini se geregtelike beginsels fundamenteel vir menseregte

Volgens Rosmini gaan plig reg vooraf. As plig nie reg vooraf gaan nie, sal dit onmoontlik wees om 'n konsep of idee oor die reg te vorm. Elke reg het dus 'n plig as teenpool. Indien 'n mens sy naaste lief het, sal hy sy plig teenoor daardie persoon nakom. Met die uitoefening van die liefdesgebod, sal 'n persoon nie in staat wees om sy naaste te benadeel nie. Uit hoofde hiervan en in die konteks van Rosmini, sal die liefdesgebod en welwillendheid alle regte en pligte, daardie van die individu en van die Staat, onderskryf. Met betrekking tot Thomas Aquinas, sal die regte en verpligtinge van die individu verwaarloos word, terwyl die regte en verpligtinge van die Staat, onder die dekmantel van *Salus reipublicae suprema lex* (die veiligheid van die Staat is die hoogste reg) beklemtoon word. Laasgenoemde baan die weg vir menseregte skendings, wat in teenstelling is met die *Suid-Afrikaanse (Handves van Regte)* en die Agtste en Veertiende Amendement van die *Amerikaanse grondwet*.

1. Introduction

The nature and essence of the right are indicative of the ethical discharge of that right. Human beings are compelled by the moral prescriptions of the natural law either to carry out an action or to deviate from carrying out such an action. The exercising of right and duty is not only applicable to the relationship between one person and another, but also finds expression within the ambit of the state.¹

1.1 Who was Rosmini?

Antonio Rosmini-Serbati was born on the 25th of March, 1797, at Rovereto in the Italian Tyrol. His father was Pier Modesto Rosmini-Serbati and his mother Countess Giovanna dei Formenti, from Riva on the Lake of Garda. They were a cultivated, generous, and a pious people, zealously devoted to the interests of the Church. Rosmini devoting himself to study, contemplation and prayer, but sometimes exercising priestly functions. He read the works of Plato, Aristotle, St. Augustine, St Thomas Aquinas, Locke, Descartes, Leibniz, Kant, Fichte, Schelling and Hegel, to name but a few.²

1.2 Why go back to a relative marginal post-Thomistic thinker of the 19th century?

The purpose of the present article is to introduce the study of modern Italian thought so little known outside of Italy. Rosmini combined ancient with modern thought. He has exerted a wide and most beneficial influence on the thought of right and of duties, an influence equaled in degree only by that of Aristotle, Thomas Aquinas and Kant.

No one can read Rosmini's works without, voluntarily or involuntarily, being impressed by them. I have allowed Rosmini to speak for himself. Only in few cases have I introduced condensations, explanations, and criticisms of my own.

Rosmini's life although noted for application to studies, was also remarkable for spiritual intensity and a desire to love God.³ Rosmini as post-Thomist, resuscitated Scholasticism, which regarded natural law as the pattern of all positive legislation. In natural law the rights and duties of the individual upon which social relations can be secured, is stressed. The doctrine of natural law, which is pivot to Rosmini's treatment of rights and duties, is entirely different from that of Thomas Aquinas. Where Rosmini's doctrine of natural law, has everything to do with the rights and duties of the individual and the State, Thomas Aquinas regards individual rights and duties as indifferent. He stresses the rights and duties of the State rather than that of the individual.⁴

1 Rosmini 1993(a):125-9.

2 Davidson 1882:xxx.

3 Cleary 1992:11.

4 D'Entrevés 1965:xiii-xiv.

Rosmini concurs with Aquinas and Aristotle about the notion of man as a political animal and argues that society would not be possible without authority. With regard to the idea of the social and political nature of man that leads to an emphatic assertion of the full and harmonious integration of individual life in the life of the community, Rosmini would disagree with Aquinas (and Aristotle). What Aquinas (and Aristotle), actually say, is that all men being part of the city, cannot be truly good unless they adapt themselves to the common good. It is upon the ultimate meaning of this "integration" that we must focus our attention. What are the real implications of so much emphasis laid on the common good as being greater, and indeed more divine (*maius et divinius*) than that of the single individual? Does it not imply in some way a belittlement of human personality? Can it not lead to a complete absorption of individual life in that of the State? What Rosmini would like to reveal here is that we are faced with the Aristotelian-Thomistic organic conception of the State, which means that the State, as the whole, is prior to its parts, that the end of the individual is subordinate to that of the community: "*Et ideo sicut bonum unius hominis non est ultimus finis, sed ordinatur ad commune bonum, ita etiam et bonum unius domus ordinatur ad bonum unius civitatis, quae est communitas perfecta.*"⁵ According to Rosmini, such views seem hardly compatible with the Christian conception of the absolute value of human personality. Rosmini states that these Aristotelian-Thomistic conceptions of the State tends to make the State a sort of *Leviathan*, which devours its components, the individual. He means therefore that natural law (and positivist law) must provide a safeguard for the individual. Under the pretext of natural law, the actions of the State, will thus be limited by objective rules of justice which ensure the respect of the fundamental demands of the Christian conception of human personality.

Rosmini is of the opinion that the State is instituted to protect and improve all the rights of its members. He says: "[The State] acts against its natural function, the function for which it exists, if it harms rather than helps a single one of its members for the sake even of benefitting all the others [...]".⁶

The rights and duties of the individual is never stressed so much as with regard to Rosmini. More recent and prominent scholars such as Dworkin, Rawls and Raz for example and historical scholars such as Aristotle, St. Augustine, St. Thomas Aquinas, Kant or Hegel, do not have a clear conception or theory on the rights and duties of the individual as in the case of Rosmini. In this regard Rosmini's thoughts on the rights and duties of the individual surpasses theirs (if they have one). As mentioned before, Thomas Aquinas (the only person that might have a theory of rights) rather stresses the rights of the State to the detriment of the individual and in so doing create an opportunity for human right violations. Herewith Rosmini fills the gaps that were not foreseen by Thomas Aquinas, by restructuring the thoughts of Thomas Aquinas as to be functional to the more recent circumstances of constitutional and democratic environment. Rosmini thus serves as a bridge between Mediaeval Thomistic thoughts and modern day constitutional government.

5 *Summa Theologica* 1-2, q. 90, a. 3ad 3um. "Similarly, as the well-being of one man is not a final end, but is subordinate to the common good, so also the well-being of any household must be subordinate to the interests of the city, which is a perfect community."

6 Rosmini 1996:34.

1.3 Why American case law?

It is with the comparison of case law of both South Africa and the United States of America that the gist of rights and duties can be appreciated. But why American case law and not for example German, Netherlands or Tibetan case law? The constitutional provisions of the USA within the context of the Eighth and Fourteenth Amendment of the *American Constitution* (the particular formulation reads as follows): “[The] right not to be subject to cruel and unusual punishment and the corollary measure in the Fourteenth Amendment due process clause, regarding [rights and duties] containing the right to be secure in one’s person.” This idea is congruent with certain provisions of the *South African Constitution* of 1996, wherein “[Human] dignity, the achievement of equality and the advancement of human rights and freedoms”, is enshrined. In the South African case law of *S v Makwanyane*⁷ the right to human dignity, comprised the right not to be tortured or treated in a cruel, inhuman or degrading way.⁸ This similarity between the SA and the USA case law, is not so transparent in any other jurisdictions.

We must now turn to Rosmini to state his notion on rights and duties and apply them to the individual (and the State).

2. Right

2.1 Definition of right

Rosmini defines right as follows: “[Right] is a moral governance or authority to act, or: right is a faculty to do what we please, protected by the moral law [natural law] which obliges others to respect that faculty.”⁹

2.2 Analysis of right

Human activities that are beneficial to mankind are usually inclined towards pleasure. This notion of Rosmini is congruent with Bentham’s theory of utility, which rests on a basis of psychological hedonism, [the theory] that every human being seeks by nature to attain pleasure and avoid pain.¹⁰ Through his actions the individual person has to guard over this pleasure and defend it. His dominion over his activities enables him to evade any such actions that may diminish this pleasure or cause him to forgo it.¹¹

Personal activity implies that the human being is an intelligent being able to exercise control over his will. In the past Roman law incorrectly ascribed natural rights to animals. Rosmini writes: “[Beasts] are incapable of right because they

7 1995 3 SA 391 (CC), para 166. See De Waal *et al* 2001:239.

8 *S v Makwanyane*, para 269.

9 Rosmini 1993(a):129.

10 Faure 1987:348.

11 Rosmini 1993(a):130.

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are incapable of possessing *de facto* dominion of what they do.”¹² He states: “[Right and duty], were proper to human beings alone[...] It is sufficient for [this] action to belong of its nature to human dominion”.¹³

2.3 Moral outcome of the right

Right is the competence to do that which is intrinsically upright and lawful, in other words, that which is morally beneficial. No right exists to carry out deeds that are morally malevolent. Should one person prevent another person from exercising an honest activity, he would be prejudicing the other person.¹⁴ This conception of Rosmini is also embedded in the natural law maxim of Ulpianus: “*honeste vivere, alterum non laedere, suum cuique tribuere*”.¹⁵ This lawful or upright action is the result of the positive right of the state whereby a citizen may not violate the rights of a fellow man through the activities he carries out: “Others do not have the right to attack me, and in fact are obliged not to do so”.¹⁶ Accordingly, people have a duty to respect the rights of others. A poor person does not have a right to rob an avaricious and wealthy person who is unwilling to give alms. The poor person is not morally free to do so.¹⁷

3. Duty

3.1 Definition of (jural) duty

Rosmini defines jural duty “[As] the moral duty which obliges one person to leave intact and free some activity proper to another person”.¹⁸

3.2 Nature of (jural) duty

Jural duty usually refers to a person different to the one in whom that jural duty is extant. Duties, although moral towards the self, cannot be considered to be jural duties, since nobody has rights toward himself. In the words of Rosmini: “The word ‘jural’ has its root in *jus*, and hence is equivalent to ‘duty corresponding to a right’”.¹⁹

All jural duties are most certainly moral, but not all moral duties are jural. Rosmini claims that moral, jural duties are aimed rather at generating respect between people and excluding the prejudicing of persons.²⁰ The fact that there

12 Rosmini 1993(a):131.

13 Rosmini 1993(a):132.

14 Rosmini 1993(a):138.

15 South African Law Commission 1989:5.

16 Rosmini 1993(a):140.

17 Rosmini 1993(a): 142.

18 Rosmini 1993(a):155.

19 Rosmini 1993(a):157.

20 Rosmini 1993(a):157.

are corresponding rights and jural duties between different persons and not within the same person, creates a possibility on the one hand for conflict between two persons in the instance of usurpation or prejudice, and on the other hand for recovery and compensation. Jural duty is by nature negative. It requires of a person not to wrong another. It entails an external relationship with regard to other persons: "Human beings must associate amongst themselves and offer one another the necessary assistance to prevent the loss and suffering of each individual."²¹ In terms of the moral-jural duty, a human being must respect the life and property of another.²² By virtue of this statement Rosmini connects with Thomas Aquinas: "[quod] *possessio rerum exteriorum est homini naturalis [...]*"²³ and "[Unde] *proprietas possessionum non est contra ius naturale, sed iuri naturali superadditur per adinventionem rationis humanae.*"²⁴

3.3 Relationship between right and duty

Rosmini expresses the relationship between right and duty by means of the following formula: "Duty is first expressed negatively: it prohibits and does not command. On the other hand, the first expression of right has a positive, not a negative form: it permits, it does not prohibit."²⁵ All rights are positive, whereas duties can be either positive or negative. According to Rosmini the relationship between right and duty culminates in the following quotations: "Do not diminish the good of another"²⁶ and "Do no harm".²⁷ Duty involves that which we are obliged to do, while right, on the other hand, extends to the entire sphere of the non-execution of forbidden activities.²⁸

Just as justice both precedes and generates rights, so rights precede and generate moral goodness. In accordance herewith, a person should use his own rights to do good to others. Rosmini considers such rights to be typical of beneficence: "Goodness towards other human beings is called beneficence."²⁹ For this reason morality should be concerned exclusively with the rights and duties of the individual.

3.4 Right and duty in social and communal context

By declaring that it is essential for mankind to be able to live together, Rosmini shows resemblance with Thomas Aquinas:

21 Rosmini 1993(a):159.

22 Rosmini 1993(a):161.

23 *Summa Theologica* 2-2, q. 66, a. 1. "[that] the possession of material things is natural to man [...]"

24 *Summa Theologica* 2-2, q. 66, a. 2ad 1um. "[Thus] private property is not opposed to natural law, but is an addition to it, devised by human reason."

25 Rosmini 1993(a):152.

26 Rosmini 1993(a):152.

27 Rosmini 1993(a):152.

28 Rosmini 1993(a):153.

29 Rosmini 1993(a):153.

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[That] man is naturally a social and political animal, destined more than all other animals to live in community [...] no one man's resources are adequate to the fullness of human life. For this reason the companionship of his fellows is naturally necessary to man.³⁰

According to Rosmini, a person can only co-exist with another if he restricts himself in the exercising of his own freedom. Moral prescriptions regarding co-existence determine that: "Each person has the moral duty to provide for his own and others' personal preservation, and has therefore the duty to restrict the use of his own activity, etc."³¹

Human nature serves as a desirable basis for the exercising of natural rights: "I myself take the dignity of person, or rather the element which gives person its dignity, as the universal reason for rights and, prior to that, even as the source of duties."³² The fulfillment of rights and duties culminates in the co-existence of mankind. The possibility of co-existence requires that each person place a restriction on his own activities.³³ Rosmini writes: "In the light of this equality, others have to accept the limitation willingly."³⁴ If we respect that which belongs to others, we will not threaten the lives of others and infringe on their right of ownership. On the basis hereof human beings are under a universal and moral-ethical decree not to wrong others. As Rosmini states: "Each person's activity, therefore, discovers an unsurpassable, moral limit, in other's ownership."³⁵

Should a society be formed by an individual person, such a person does not forgo any of his rights, with the exception of the right that he entrusts to the state to govern for the benefit of the greater interest of all persons. Thomas Aquinas concurs:

There must be some principle of government within the society [...] For if a great number of people were to live, each intent only upon his own interests, such a community would surely disintegrate unless there were one of its number to have a care for the common good [...].³⁶

Rosmini writes: "[The] exercise of the right of coercion is almost entirely removed from individuals to become the responsibility of civil government."³⁷

30 *De Regimine Principum. Liber Primus, caput 1.* "Naturale autem est homini ut sit animal sociale et politicum, in multitudine vivens, magis etiam quam omnia alia animalia, quod quidem naturalis necessitas declarat [...] Nam unus homo per se sufficienter vitam transigere non posset. Est igitur homini naturale, quod in societate multorum vivat."

31 Rosmini 1993(a):183.

32 Rosmini 1993(a):187.

33 Rosmini 1993(a):190.

34 Rosmini 1993(a):193.

35 Rosmini 1993(a):193.

36 *De Regimine Principum, Liber Primus.* "[Necesse] est in hominibus esse per quod multitudine regatur. Multis enim existentibus hominibus et unoquoque id, quod est sibi congruum, providente, multitudine in diversa dispergeretur, nisi etiam esset aliquis de eo, quod ad bonum multitudinis pertinet [...]."

37 Rosmini 1995(a):5-6.

A civil society or state exists by virtue of the fact that it has been founded by somebody. This society or state thus has a duty of gratitude and not of subordination towards the founder. People in this way elect the founder as their master who in turn has to accept dominion.³⁸ The dominion accorded to the founder culminates in a government before long. Although such government is dependent on its members, this does not imply that it has to be subservient to them: "Dependence of government has its source in the nature of society and dependence on government is relative to every member."³⁹

The founder who is now master, is subject to the jural-moral prescript: "Do not cause pain resented by person."⁴⁰ The right of dominion does not imply a right of personal eminence; master and servant are fully equal.⁴¹ This notion is parallel with the rule of law precept, where both the government and subordinate are regarded as equal and subject to the law of the country.⁴² The authority to govern in no way advantages the governor; rather, it is to be seen as the authority to perform a function that is to the benefit of the state.

The right to govern is extant in the constant exercising of benevolent activities towards the subjects. For the purposes of providing this benefit, there is always a need for governing authority in a state.⁴³

4. Remedies

Jural rights and duties common to individuals and the state are guaranteed by the following three remedies: firstly, the inviolability of rights; secondly, the right to protection; and thirdly, the right to satisfaction of needs.⁴⁴

4.1 The inviolability of rights

The state, just as in the case of the individual, can exercise the right of occupation over any vacant property and can protect lawful occupation against any aggressor.⁴⁵ The state is obliged to adhere in this respect to the general rules of justice. It has no privilege over the citizenry. The state has a right to occupy a property over which nobody has yet exercised right of ownership. It has a duty to do this in such a way that nobody is inconvenienced thereby. The citizens or subjects have the right to claim compensation for losses suffered through the activities of the state or an individual person. The compensation

38 Rosmini 1995(a):35.

39 Rosmini 1995(a):39.

40 Rosmini 1995(a):53.

41 Rosmini 1995(a):53.

42 South African Law Commission 1989:17.

43 Rosmini 1995(a):93.

De Regimine Principum, liber primus, caput 1. "Ubi non est gubernator dissipabitur populus."

44 Rosmini 1993(b):425.

45 Rosmini 1993(b):432-3.

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should, however, be in proportion to the loss suffered.⁴⁶ In terms hereof the state has a duty to see that justice prevails.⁴⁷

Injustice usually occurs in those systems of absolute control/dominion that cede to the state direct right of ownership over all the property of the citizenry. In such a dispensation the perception will develop amongst an ignorant population that public authority is able to do everything, that it both knows everything and sees everything:

[Public authority] not only does whatever it wants but, after deceiving others, deceives itself about its own nature and comes to believe that it can do everything without having any duties of its own.⁴⁸

The welfare of the state involves the welfare of the citizenry. Where the state has the right to deprive its citizens of land, it must be the state's duty to offer full compensation for the land to those citizens: "It is necessary that the person who has been harmed should share in that good sufficiently to receive adequate compensation, otherwise he suffers an injustice."⁴⁹

All restrictions imposed by the state on the freedom of the citizenry are prejudicial to the latter's rights. Rosmini states that patents constitute a protective measure provided by the state to the individual to safeguard the invention made by such individual. The duty of the state is to protect such right of ownership resulting from human ingenuity.⁵⁰

The same applies to the person who has been granted an exclusive right to trade owing to the invention that he has made. Once such a concession has been granted, the natural freedom of other persons will have to be restricted so as to exclude them from enjoying trading benefits in respect of that invention. This concession or privilege prevents competitors from benefiting from the discovery or invention of someone else. As Rosmini writes: "Such excellence provides him with the lawful fact enabling him to occupy available earnings before anyone else."⁵¹

Rosmini states that the state does not have the right to take innocent lives. He accordingly rejects the maxim: "It is expedient ... that one man should die for the people." According to Rosmini this is ungodly and deplorable. The precept, *Salus reipublicae suprema lex*, also involves the same immoral principle, according to Rosmini. He opposes these two principles and is adamant that the possessor of rights may not be deprived of such rights.⁵²

46 Rosmini 1993(b):433.

47 Rosmini 1993(b):437.

48 Rosmini 1993(b):441.

49 Rosmini 1993(b): 442.

50 Rosmini 1993(b): 437.

51 Rosmini 1993(b): 438.

52 Rosmini 1993(b): 444.

4.2 The right to protection

The prejudice caused to a perpetrator of an offence by a person who exercises his right to protection, is justified by criminal law in the following citation: "Whoever willingly causes evil must bear the penalty."⁵³ The innocent victim who is protecting his rights by acting prejudicially towards the transgressor, meets the general requirements of justice which stipulate that an individual who transgresses deserves to be punished. Through the right to protection the victim is able to elevate himself to the position of someone who exercises justice. The transgressor must bear the consequences of his wrong deeds.⁵⁴

In performing his right to protection the victim has a duty not to exceed the boundaries of justice: "Do to others what you would want done to yourself; do not do to others what you would not want done to yourself."⁵⁵

Rosmini feels that it would be unfair to cause harm to an innocent person in order thereby to protect yourself from coming to any harm. He writes: "An innocent person cannot be harmed for our own sake."⁵⁶ The principle preventing the prejudice of an innocent person is absolute and without exception.⁵⁷

The right to protection means that occasionally another party has to be subjected to prejudicial activity. Rosmini nonetheless warns against an unlimited right to protection.⁵⁸ He also believes that human beings have a duty to protect themselves with the least possible prejudicing of the transgressor. He declares that this ideal is sometimes defeated by the human drive for revenge.⁵⁹ Rosmini states that the right to protection does not imply that the life of another person can be taken for having violated a minor right, or that a thief may be killed for having indulged by eating the fruit of our garden. The human being has a duty to refrain from harming another person in exercising his right to protection. In addition to the right to protection, the principles of neighbourly love and rational law prevent any person from protecting minority rights by imposing severe penalties. Rosmini writes as follows: "The exercise of the right to do harm in self-defence is limited by the laws of humanity which forbids our inflicting supreme harm on another."⁶⁰

4.3 The right to satisfaction of needs

The right to satisfaction of needs exists in the instance of the unlawful prejudicing and causing of debt to a person. Rosmini believes that prejudice occurs where the rights of another person have been infringed upon. However, where a person agrees to the infliction of harm by another person, the prejudice or

53 Rosmini 1993(b): 458.

54 Rosmini 1993(b): 458.

55 Rosmini 1993(b): 461.

56 Rosmini 1993(b): 471.

57 Rosmini 1993(b): 473.

58 Rosmini 1993(b): 476.

59 Rosmini 1993(b): 486.

60 Rosmini 1993(b): 490.

damage thus incurred cannot be classified as disgraceful owing to the maxim: "[No] harm is done to the person who knowingly consents."⁶¹

Needs can be satisfied in different ways. Rosmini's point of view is that not all forms of prejudice can be redeemed in the same way. As far as he is concerned, if the prejudice is the result of the theft of the property of another and that property has not been damaged or destroyed, retribution for the damage or prejudice can be made by the mere return of the identical property to the owner. This, believes, Rosmini constitutes the first form of satisfaction of needs, namely the return of the property concerned.⁶²

In the instance of the theft of a lucrative item of property, for example a cow, Rosmini states that the value of the animal's calves and the manorial value of the beast for the period that the owner was deprived thereof, should be paid to the prejudiced person, together with the monetary value of the animal.⁶³ According to Rosmini the only payment that is to be excluded is that pertaining to the value of the beast that was borne by the thief during the period of forced keeping.⁶⁴

In the case where the owner of property has been prejudiced as a result of the loss of the use of his property (cow), the non-usage of the property by the owner must be assessed and remedied. Rosmini explains the latter legal institution within the following context: Supposing that the beast belonged to a poor farmer who did not have the finances to acquire another cow, such person would not be in a position to fertilise his farmlands and would consequently suffer a considerable loss in proceeds (in respect of his agricultural products), along with the unavoidable hardship that his family would be subjected to. Rosmini states that the serious damage or prejudice caused to the aggrieved person (the farmer) should thus be compensated for by the thief.⁶⁵ He believes that where the property has been destroyed and cannot be returned in its original condition, but where its value can still be determined, the prejudiced person should receive compensation. Such compensation should be equivalent to the value of the property prior to its theft.⁶⁶

An injustice occurs when the state believes that it can dispose of anything as it deems it good and that everything should be forfeited for the sake of the state. A further case of injustice on the part of the state occurs when the latter neglects to recognise juridical equality between government and the citizenry. Rosmini considers the maximum *salus reipublicae suprema lex* to entail the refusal of juridical equality between the state and the individual. This maxim is also against the rule of law precept, as mentioned earlier. Rosmini believes that the *salus reipublicae suprema lex* maxim undoubtedly violates the individual rights of the citizen. Where it concerns the maintenance of state security (*salus reipublicae* ...) on the one hand, and the protection of human rights on the other hand, one

61 Rosmini 1993(b):519.

62 Rosmini 1993(b):534.

63 Rosmini 1993(b):534.

64 Rosmini 1993(b):534.

65 Rosmini 1993(b):535.

66 Rosmini 1993(b):535.

has to do with an ostensible clash of principles of law. The law endeavours to provide the greatest possible protection of human rights by entrenching those rights in constitutions or bills of human rights, for example, so that these rights cannot be abrogated or abolished easily. Furthermore, remedies are granted for the unlawful infringement of these rights. In accordance herewith, basic human rights are depicted as being sacrosanct. Nonetheless, this principle acquires that the governing authority may use all means at its disposal to thwart any threat to the safety of the state, even if this should imply the forfeiture of individual human rights. The principle of *Krohn v Minister of Defence and Others*⁶⁷ is expressed strikingly in the following statement of Judge Rose Innes:

[But] there is an inherent right in every state, as in every individual, to use all means at its disposal to defend itself when its existence is at stake; when the force upon which the courts depend and upon which the constitution is based, is itself challenged. Under such circumstances the state may be compelled by necessity to disregard for a time the ordinary safeguards of liberty in defence of liberty itself, and to substitute for the careful and deliberate procedure of the law a machinery more drastic and speedy in order to cope with an urgent danger.

Of course one has to do here with not only a clash of legal principles, but with a weighing up and demarcation of interests. The right of the individual is extremely important and is therefore protected up to the point where the interest of the community becomes dominant in that its continued existence comes under threat. According to Rosmini the individual's right would indeed cease to exist should the community within which he exercises that right succumb. He nevertheless states as follows:

[Society] must prefer not to do harm to a private individual even for the sake of obtaining the safety of all the others. Conversely, it cannot do some good to the individual unless this good comes about without any damage or diminution of public good.⁶⁸

Rosmini holds the assumption that there should be a balanced relationship between human rights and state security. It is the extent to which state security is threatened or endangered that determines to what extent basic human rights should be derogated from. It is only when the continued existence of the state is at risk that extraordinary machinery should be employed, as referred to in the *Krohn* case.

5. Right and duty as ethical derivatives of the decree of love and beneficence

Duties and rights are correlative concepts. The duty to protect life implies the right to life that man has. The duty not to steal, implies the right to property. One man's duty establishes the other man's right. God does not give either

67 1915 ad 191, p. 197.

68 Rosmini 1996:39.

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duties or rights, but indeed both rights and duties. On the grounds hereof, human beings will show respect towards other persons, and the upholding of rights and duties that is constitutive of human rights.⁶⁹

Each person has a legal duty to live to the benefit of his neighbour and not to his own benefit: he should act in a way that furthers the well-being of his neighbour, just as Christ did not live for Himself. The principle of neighbourly love implies love towards God and one's neighbour. In terms of this principle a person has a duty not to harm others. The demands of the decree of love and social beneficence as the essence of the moral-ethical foundation and human rights provide a valuable point of contact for discourse with non-Christians on matters pertaining to ethical issues of society.⁷⁰

6. Application

The principle of neighbourly love as a derivative of right and duty serves as the basis for the (Pauline) ethics applied by Rosmini in practice. In accordance herewith Rosmini lays the foundation for a Christian-ethical view of human rights. In terms hereof it is clear that the love decree and social beneficence underwrite all rights and duties. Beneficence implies virtue or the maintenance of morally benevolent actions. The primary objective of virtuous love is God. Man's ultimate goal should be to honour God. A love for God's created beings also means the honouring of God by means of his creation.⁷¹ Human beings should thus be treated as a moral entity created in the image of God. Any action contrary to the moral right will amount to the violation of the person's dignity.⁷²

The practical implications of Rosmini's Christian view of right and duty and human dignity can be elucidated with reference to the South African Constitutional Court cases (Bill of Rights) and the American Courts' interpretation of the Eighth and Fourteenth Amendments.

The constitutional provisions of the USA dealing with the moral values of a person's physical integrity elicited considerable interest within the context of the Eighth Amendment. The particular formulation reads as follows:

... the right not to be subject to cruel and unusual punishment and the corollary measure in the Fourteenth Amendment due process clause, regarding the right to liberty, containing the right to be secure in one's person.

This notion bears some similarities with certain provisions contained in the *South African Constitution* of 1996. The seriousness of the right to human dignity is emphasised in section 1 which states that the Republic of South Africa is founded on the values of: "... human dignity, the achievement of equality and the advancement of human rights and freedoms". In terms of section 7(1) of the *Constitution*, the Bill of Rights is defined as an instrument "which enshrines

69 Rosmini 1993(b):420; Swartz 2007:265-266.

70 Swartz 2007:265-6.

71 Swartz 2007:269.

72 Swartz 2007:271.

the rights of all the people in our country and affirms the democratic values of human dignity, equality and freedom as the basis of rights and duties.” In accordance with section 10 of the *Constitution of South Africa* the right to human dignity is considered to be one of the fundamental constitutional rights. It was on the basis hereof that Judge Chaskalson (who wrote the leading judgment signed by all the other judges), in the case of *S v Makwanyane*⁷³ held that the right to human dignity comprised the right not to be tortured or treated in a cruel, inhuman or degrading way.⁷⁴ This connects with Rosmini’s Christian legal-ethical point of view, a view that is not shared by Thomas Aquinas, due to his emphasis on the model of the State.

The South African court cases, *Pillay* and *Christian Education* refers to dignity in the context of the permission to wear symbols pertaining to faith and culture. In the case of *MEC for Education, KwaZulu-Natal v Pillay*⁷⁵ a Hindu/Indian learner was not allowed to wear a gold nose-stud to school. The respondent was met with a finding that, although the schools’ conduct was *prima facie* discriminatory, the discrimination was not unfair. On appeal to the High Court it was found that the school’s conduct was both discriminatory and unfair. The case that the respondent wants to make, encompassed that the wearing of a nose-stud by a scholar would negatively impact on the discipline at the school. It held further that the evidence showed that the nose-stud was not a mandatory tenet of the learner’s religion or culture.⁷⁶ The legal team for the learner held that the enquiry was subjective and the evidence showed that the wearing of a nose-stud was important to the learner as an expression of her religion and culture.⁷⁷ They argued that there was no evidence and no reason to believe that a learner who was granted an exemption from the provisions of the school’s code of conduct would be any less disciplined, or that she would negatively affect the discipline of others. They aver that allowing the stud would not have imposed an undue burden on the school. A reasonable accommodation would have been achieved by allowing the learner to wear the nose-stud. The arguments for the learner was accepted and favoured by the Constitution of 1996, section 15 which deals with freedom of religion, belief and opinion. Although the learner has the support of the Constitution, Rosmini would have rather argued that spiritual concerns must tip the scale. Unfortunately, Rosmini’s spiritual concern is confined to a Christian paradigm, where the wearing of a nose-stud is regarded as indifferent. On the strength of this conviction, Rosmini regards the wearing of the nose-stud as a fleeting effect of materialism. It would rather be harm culpably inflicted.⁷⁸ This makes the person who indulged in it rather unworthy.⁷⁹ Rosmini’s decision is based on his Christian religion upbringing and he is a priest. He is not much concerned with politics. This causes him to come into conflict with the *Constitution of the Republic of South Africa* of 1996.

73 1995 3 SA 391 (CC).

74 *S v Makwanyane*, para 166. De Waal *et al* 2001:240.

75 2008 (1) SA 474 (CC).

76 Para 60 AT 495h-496a.

77 Para 88, 90 at 505B and 506B.

78 Rosmini 1993(b):540.

79 Rosmini 1993(b):541.

In the case of *Christian Education South Africa v Minister of Education*,⁸⁰ the appellant (a voluntary association representing independent schools) has sought an order declaring the provisions of section 10 of the *South African Schools Act* 84 of 1996 to be unconstitutional. Section 10 prohibits the administration of corporal punishment to pupils in a school context, and renders such an act an offence that attracts the same sentence as would be for assault. Arguments against corporal punishment is reflected in sections 10⁸¹ and 28 of the 1996 *Constitution of the Republic of South Africa*. Section 28 entails that "every child has the right to be protected from maltreatment, neglect, abuse or degradation." Corporal punishment in schools is contrary to the Bill of Rights enshrined in the 1996 *Constitution*. It is inherently violent, and involves a degrading assault upon the physical, emotional and psychological integrity of the person to whom it is administered. Since corporal punishment at school violates the right to equality and the right to dignity, it forfeits any claim to constitutional regard. Arguments in favour of corporal punishment, contend that corporal punishment is a vital aspect of Christian religion and is applied in the light of its biblical context using biblical guidelines which imposes a responsibility on parents for the training of their children. The following verses in the Bible requiring its community members to use "corporal correction."⁸² Parents have a divinely imposed responsibility for the training and upbringing of their children, the appellant cites Deuteronomy 6: 4-7. It contends that corporal punishment is a vital aspect of Christian religion. Although a Christian, it is not clear whether Rosmini is for or against corporal punishment, but it is certain that he is a supporter for the moderation of corporal punishment: "[This] must be done with the least harm to the offender [...]"⁸³ and "Everyone must use his rights in the least burdensome way possible [...]"⁸⁴ He argues that such moderation was always known even to Gentiles. Rosmini avers thus that corporal punishment has to be practiced, but in a moderate fashion. Such a decision is a reflection of his Christian background. He regards corporal punishment as a "debt innocently incurred".⁸⁵ It means that corporal punishment in schools must not be abrogated. Corporal punishment has taken a political connotation and the prohibition thereof is seen as a scheme to overrule the former sanctioned physical violence which had been enforce by the state.

With regard to the two cases, Rosmini would have applied "harm [done] culpably" in the *Pillay* case, while "debt innocently incurred" in the *Christian Education* case. He would also regard the former as *volenti non fit iniuria*. In the context of *Christian Education*, corporal punishment in schools, would be effective in the promotion of the dignity of humans. It is the underlying bases for rights and duties of the individual in society.

80 2000 (10) BCLR 1051 (CC).

81 "Everyone has inherent dignity and the right to have their dignity respected and protected."

82 Proverbs 22:6. "Train up a child in the way it should go and when he is old he will not depart from it."

Proverbs 22: 15. "Foolishness is bound in the heart of a child, but the rod of correction shall drive it far from him."

83 Rosmini 1993(b):544.

84 Rosmini 1993(b):543.

85 Rosmini 1993(b):541.

Although the two South African cases illustrated the concept of right and duty with regard to human dignity to a great extent, the American model nevertheless requires discussion.

In the American court case of *Meredith v State of Arizona*⁸⁶ a prisoner with a medical history of emphysema was struck on his peritoneum by a prison warden without reason leaving him “totally handicapped” as a result. Oxygen was administered to the prisoner, Meredith, for four hours “... to counteract the damage that had been done”. The facts of this case place Meredith within the ambit of the *Civil Rights Act*⁸⁷ which guarantees each person the right to dignity and appropriate redress:

... under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action of law, suit in equity, or other proper proceeding for redress.

In terms of the American court’s ruling a right violated on the grounds of an attack and assault implies “... the right to be secure in one’s person, and is grounded in the due process clause of the Fourteenth Amendment” which constitutes an aspect of the right to freedom. The court upholds in its judgment with reference to *Rochin v California*⁸⁸ that the attack and assault in the *Meredith* case “shocks the conscience ...”,⁸⁹ and leads to behaviour that may include acts “brutal” and “offensive to human dignity”.⁹⁰ In terms of the court’s ruling the prison warden’s conduct towards Meredith was intentional, unreasonable, brutal and deplorable with a view to human dignity. The requirement that physical power has to be brutal and shocking for the conscience sets too high a requirement for the violation of a person’s dignity. In this regard Rosmini’s approach would appear to be far more acceptable than that of Thomas Aquinas.

In the American court case of *Schy v State of Vermont*⁹¹ the court ruled that a claimant who had been tied to a chain on a wall for more than two hours with his hands behind his back did not sufficiently meet the grounds of conduct brutal and humiliating to human dignity as far as the handcuffs were concerned. As mentioned above, such conduct in terms of Rosmini’s point of view already constitutes a violation of the victim’s human dignity.

The treatment of persons as moral objects also includes the matter of the violation of moral freedom. The case of *Felix v McCarthy*⁹² emphasises that the moral context of human dignity must not be undermined. In this particular instance, Felix, a prisoner at San Quentin, instituted a civil rights action against prison wardens who had used excessive force against him and who had consequently

86 523 F.2d at 481.

87 42 U.S.C. at 1983.

88 342 U.S. at 833.

89 342 U.S. at 172.

90 342 U.S. at 174.

91 2 Fed.Appx. at 101 C.A.2 (N.Y.), 2001.

92 39 F.2d at 699 Jul. 10, 1991.

violated his constitutional rights, for example the right not to be subjected to cruel and unprecedented punishment as entrenched in the Eighth Amendment. Felix was handcuffed by prison wardens and hurled against a wall as a result of which he sustained bruising, other injuries and emotional attrition. Judge Canby, who relied on the *Meredith* case, stated: "It is not the degree of injury which makes out a violation of the Eighth Amendment, but rather it is the use of official force or authority, that is 'intentional, unjustified, brutal and offensive to human dignity.'"⁹³ This opinion would appear to correlate with the comprehensive approach of Rosmini. If the notion of Thomas Aquinas would have been applied, for example the dominion of the State, it would pave a way for human rights violations under the pretext of the maxim *Salus reipublicae suprema lex*.

The moral context of human rights demands an appreciation for the exercising of right and duty as outcome of the notion of justice. Justice is the highest truth in human society and forms the essential right and duty of all moral activity. A human being's duty to act in a just and fair manner guarantees to him the right to act within the boundaries of justice.⁹⁴ His duty to act in accordance with the prescriptions of justice imposes on other persons a legal duty to respect such action. This correlation of right and duty implies that there is no right vested in one person without there being a corresponding duty in another person to respect such right. For example, my duty:

... to worship God gives rise to my right to worship God, a right which others have a duty to respect. On the other hand, the concept of duty is anterior to that of right and as such does not necessarily give rise to rights in others. For example, my duty to worship God does not necessarily imply that others' rights are violated if I do not worship God as I should.⁹⁵

7. Conclusion

The application of fundamental rights to human dignity requires earnest discourse and an understanding of morally harmful actions. The natural individual right to moral personship constitute those rights entrenched in the South African and American Constitutions. An invasion of such rights would, according to Rosmini, be morally reprehensible. Thomas Aquinas would condone invasion of human rights under the pretext of *Salus reipublicae suprema lex* (the safety of the State is the highest law).

Rosmini implies that this absolute law(s) (*Salus reipublicae suprema lex*) that neglect to take into account the fundamental human rights, within which rights and duties reside, would open a door for the relativistic and positivistic application of natural rights. The unwillingness to deal with human dignity (in the case of Thomas Aquinas) within the context of the South African Bill of Rights and the Eighth and Fourteenth Amendments of the *American Constitution*, amounts to a typical a-normative contextual handling of human dignity that tends to relativise the fundamental right to dignity to a mere cliché in the constitutional administration of justice.

93 523 F.2d at 484.

94 Cleary 1992:37-8.

95 Cleary 1992:38.

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