

Antonio Rosmini on Law and Its Implications for Fundamental Rights

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Abstract

According to Rosmini, the simple interpretation of law and implication of fundamental rights is necessary in civil society in order to establish justice. The individual serves as a starting point for the perception of fundamental rights. The law is an objective entity outside man. Man can only understand law via acts of volition of the intellect. Rosmini alleges that law serves as transition for man to reach perfection. In order for man to achieve perfection, he must comply with the laws in the civil society. Law is therefore a creation by God for the maintenance of justice and order in civil society. The upholding of the law connotes that man must have honest characteristics and know how to pursue good. The human instinct for perfection serves as motive for man to do good. According to this idea, the principle of law can thus be inferred from God. Man will always be obliged by law to act morally good in civil society.

Keywords: South African Constitution, Act 108 of 1996, 8th and 14th Amendment of the United States Constitution, *State v Makwanyane*, *Meredith v The State*, *Rochin v Callifornia*, *Felix v Mc Carthy*, *Schy v State of Vermont*, offensive to human dignity, Antonio Rosmini, fundamental rights, morally reprehensible.

PURPOSE OF THE PAPER

This paper actuates the rationale for the establishment of fundamental rights of the individual in civil society. In order to forge this rationale, Rosmini focuses on his rendition of the law and fuses it with deontological concepts whereby fundamental rights is now couched in divine dynamics. The research forthwith engages with Rosmini's interpretation of the law in civil society and the American and South African judicature on fundamental rights.

INTRODUCTION

Rosmini assumes law (natural law and positive law) to be the normative systems in civil society. Law therefore needs to provide a foundation for the reception of fundamental rights in the society.

The moral prescriptions of natural law, for example, obliges man to perform an action or abstain from doing it. Positive law, on the other hand, provides a framework within which human nature can develop. In this respect, human nature seems to be the norm for law and justice. Man is always encouraged by these two norms to act in accordance with justice. The nature and implication of the law is thus construed on the basis of divine knowledge in which man takes part. Justice for human action is thus grounded on ethical foundation of the law. Such ethical remnants find its offshoot in morality, through which the right and duty of man is expressed in society.

Due to some critics' opinion that natural law offers vague guidelines for the practice of law. One is as a result of such contention, be forced to explain the nature and implications of

positive law. These two fields may, however, not be dealt with in isolation so that a comprehensive view of the nature and implication of the law in civil society can be understood. Rosmini defines positive law as a right of moral governance or authority to act. He says right is a faculty to do what we please, protected by the moral law, which obliges others to respect that faculty.

DISCUSSION

The Positive and Legal Relation between Right and Duty

Rosmini states that duty precedes right. If man through his moral judgement does things which are not prohibited by law, duty will not only precedes right, but it (duty) will also operate separately from right. According to Rosmini, if duty does not precedes right, it will be impossible to form an idea or concept of right. He alleges that the notion of right is necessarily included in that of duty.[1]

Rosmini asserts that every right has a duty as antipode. If I have a right to something, others have a duty not to encroach upon my right. If I as owner have a right to my car, all other people have at the same time a legal duty to respect my right by not damaging or stealing my car. I have a right to my life and others have a legal duty not to take my life or to kill me.[1] The relationship between right and duty is the basis for a study of fundamental rights.

The notion of right and duty has essentially a bearing on each other – one presupposes the other so that the distinction between right and duty is unthinkable. In terms of the philosophy of law, the notion of right and duty belongs to human nature and it is inextricably part of anthropology, in particular the nature of man. On the basis of this contention, man is considered a bearer of fundamental rights.[1]

The notion of “duty” is simpler than that of right (which also includes duty). Duty(ies) cannot exist without corresponding right(s). Man is by nature bound to duty. As intelligent being man’s rights and duties must be respected by others and these rights and duties form part of man’s fundamental human rights. Man also has a duty towards himself and he must thus respect his own dignity.[1] However, man cannot have rights towards himself. No right can exist, unless the duty to respect it also exist in others.[1]

Duty generates rights and is derived from right in two ways: one relative to the person who acquires rights; the other relative to the person who must respect those rights. Duties that are relative to others bind man to respect other people’s personal actions. Duty is raised to a level on which man’s dignity is considered holy and inviolable. Rights relative to the owner thereof are incorruptible and are relatively inviolable by others.[1]

The perception of a negative duty action which precedes right give rise to a perception to do what is wrong. If duty does not precedes rights, a right to do what is wrong, could exist.

The Role of Jural Duty vis-à-vis Fundamental Rights

Jural duty can be described in the following maxim – do not diminish the good of another, or do no harm.[1]

Rights and duties, according to Rosmini, must act together. Duty cannot be split in two, one part moral and the other jural. The jural element of duty is grafted into the moral root where it attaches itself indivisibly. A person’s actions for an effective exercise of fundamental rights is introduced under the rule – do not diminish the good of another. Both right and duty regulate this right. On the basis of this, there exists a duty not to harm others.[1]

Rosmini believes that we must not only envisage rights in the individual, but, it be also expressed in civil society.[1] Fundamental rights express man's existence relative to his own interests and the way in which such interests are promoted. Everyone acts for himself, but social rights and duties must also be maintained. Rosmini asserts that fundamental rights of the individual may change in civil society, but it may never be abolished. The fundamental right of the individual serves eventually as basis and structure for social rights. Social rights cannot be understood if fundamental rights that precede them are not first explained. Fundamental rights are inherent in human nature and arise as soon as human nature exists.[1]

The Limitation of Fundamental Rights

The question must be asked whether our fundamental rights are violated when other persons impede upon the practice of our rights. According to Rosmini fundamental rights do not have unrestricted or absolute control over a matter.[2]

Rosmini, however avers that restricting a fundamental right connotes to a violation of such a right. The following principle holds for the restriction of the fundamental rights of others: "Do not harm another's activity in so far as it is personal... or do not diminish another's ownership." [2] To harm other people means by implication to violate their personal freedom and their property right. This means that we may act lawfully as long as we do not violate other people's natural rights. On the basis of this perception, we must continuously do what is not harmful or in other words, we must do what is lawful.[2]

The Violation of Fundamental Rights

Rosmini believes that fundamental rights are not violated in the case of the exercise of lawful actions, for example, another person's jural freedom is not violated if an object that does not belong to anyone is acquired as property.

Rosmini explains also that fundamental rights are not violated where the victim himself consented to harm. Consenting to harm by an individual is included under the principle, *volenti non fit iniuria* ("That to which a man consents cannot be considered an injury"). Violation of fundamental rights occurs when man withdraws his consent to harm and the violator still continues with his action(s).[2]

The Protection of Fundamental Rights

Rosmini asserts that courts of law must protect fundamental rights in civil society. The use of power by courts of law in the form of sanctions, where fundamental rights are violated, requires special consideration by courts, which delivers sentence. The injured person must not himself redress the injustice suffered. The courts of law and other relevant legal authorities must do this on his behalf.[2]

Rosmini believes also that every person is to use power in protecting his or her fundamental rights. With reference to this sentiment, Rosmini explains that a virgin may kill a person who wants to rape her and in whose power she is already, if she fears that her spiritual life will be harmed by the violation of her fundamental rights. The use of power can, in some cases, prevent the violation of a person's fundamental rights.[2]

According to Rosmini, a person may only protect the violation of his or her fundamental rights provided that this occurs in fairness. A person who unknowingly and in good faith possesses another person's property should not immediately be deprived of his possession by means of

power. The other person should first prove his entitlement to that property before it is transferred to him. The owner must be able to prove that the claimant is not the owner of the property.[2]

Rosmini alleges that a bona fide owner of another person's property ceases being in good faith if he/she finds out that another person has a legal title to this property and he/she still persists in owning the property, after being requested to cede it. The true owner of the property may therefore with violence or legal means deprives the mala fide owner of his/her unlawful property.[2]

Rosmini believes a government ensures the protection of an individual's fundamental rights if it prevents a transgressor by means of deterrents to violate these fundamental rights. The government may only do so if the fundamental rights of the person concerned are threatened or violated. The protection of the individual's natural rights must be honest and the sanction must be fair to the transgressor. Laws and other available methods must also be used to protect the individual's fundamental rights.[2]

Proprietary Rights as Offshoot of Fundamental Rights

Rosmini asserts that the general characteristic of property right consists of the binding of a property to the person. The property is to be used by the person for his/her own purpose or benefit. Property right forms the subject of acquired actions whereby a person acquires an object and uses it for his/her own advantage. Such action occurs if I wish to rest under an oak tree and the place is already taken by another person. My action (to also sit under the tree) is morally prohibited. I cannot take up the room without harming the other person, by for instance, sending him off. However, if the place is vacant, I will be able to use it and my action will be morally fair and thus permissible.[2]

Rosmini proceeds to explain the analogy of proprietary rights further by stating that if someone wants to build a house on an unoccupied piece of land, it will be morally right or fair for him/her to do so. The action for building the house together with the intention to permanently stay there extends into the future. This action will not totally cease. The person acquires a moral-physical relationship with the house. His/her occupation of the open piece of land morally prohibits other persons from occupying this piece of land which was open to all previously. This prohibition against other people may remain until I (and the other persons) have left both the house and the land.[2]

Rosmini exerts that the person's decision to live in the house he/she built morally prohibits other people from using this place. However, the scope of the owner's property right is restricted by the right of use by other people deriving from restricted relevant rights they have on the property, or rights of claim which they have against the owner. Before the owner decided to occupy the house or the land, anyone could have used it earlier, without inconveniencing me. The action whereby the owner acquired the land and the house he built on the land forms the subject of property rights.[2]

Rosmini states that everything in nature is vacant and free. Anyone can lawfully take possession of a property that is free and vacant, or on which there is no property right claim. In the above case scenario, the right to possession is not a problem, but where possession is already established, other people may not establish property rights thereto. The right to possession, however, is relative and not absolute. This right is determined and exists only as long as there is no property rights claim on the property. Other people assign the

establishment of external property rights to civil laws because the penalty clause concerning property rights can only be found in civil society.[2]

Rosmini, in approvingly refers to Cicero, avers that property rights must be respected:

"[...] the consent of the people must be in everything be considered a law of nature. If all peoples agree that the first occupier has the right to the thing occupied, they recognise in occupancy a just title to that right."[2]

The first person who occupies property enjoys a just claim to this property and others must acknowledge and respect his/her property right.[2]

The Transfer of Proprietary Right

Occupatio

Rosmini upholds that there are two ways of transferring proprietary rights, namely occupatio and contract.[2] These ways of transferring culminate under the following examples: with regard to occupation, I free something of my own free will to another and the latter occupies it and making that property his own; with regard to contracts, I free something of my own free will in favour of someone else who, under certain conditions or without conditions, accepts and takes it immediately as his own – that is called in legal parlance a contract.

Rosmini maintains that occupatio is the waiver of possession by the owner of a property and the ensuing ownership of property right by another person. The owner simply waives the property which is later acquired by another person.[2]

Rosmini asserts that the waiving of property right must be proven though. This can be by means of words, facts and other circumstances of the owner which reflects the owner's intention to waive his/her property right to another person.[2] Indicia of waiving are words, facts, and non-facts of the owner, which must clearly indicates his intention, and circumstances, when these are such that human beings must reasonably give up their intention to keep the thing as its own or his persuasion that the property is his.

Rosmini states that in terms of positive prescription, three conditions are stipulated for the transfer of property right. First, the property must be obtained by long use; secondly, the possession of the property must not be disturbed, and thirdly, the current owner of the property must be in good faith. These three prescriptions must be present for a lawful or reasonable transfer of property right from the previous to the present owner.[2]

Rosmini says that the delivery (of movable property) and the registration of (immovable property) must be made with the intention of the owner to transfer the property right and with the intention of the receiver to receive the property right. This approach is analogous to the Roman animus transferendi domini doctrine of the transferor and the animus accipiendi dominie of the receiver, which points to the subjective aspect of the transfer of property. Both parties must consent to the transfer and receipt of property right at the time of the transfer. This agreement must meet all the common law requirements for a valid contract, for example the contractual capacity of the parties, consensus concerning the property, absence of error, and so on. If the transfer of property right is unfair, the common law prescriptions for valid transfer in terms of natural law and positive law have not been met.[2]

Contract

Rosmini assumes that contracts are morally and juridically essential because their purpose implies the achievement of the moral good and avoidance of the moral bad. In terms of a contract between the parties involved, a contract takes the form of rights and duties or obligations. The provisions therefore in a contract must be subject to the prescriptions of natural and positive law.[2]

Rosmini defines a contract as follows:

"[...] the concurrence and jural effect of corresponding acts of two persons, of whom one, an owner of a simple or complete right willingly dissolves the jural bond of the right with or without certain conditions, so that the other may become the owner if he wishes. The second owner brings into effect the act of acceptance and, after meeting any attached conditions, appropriates the right."[2]

A bilateral legal action must take place in terms of which property right is transferred by the owner to the receiver as an act of disappropriation and accepted by the latter as an act of appropriation. The owner must intend to transfer property right in terms of the contract and the receiver must intend to receive the property right. The nature of the contract shows similarities with the nature of the animus transferendi domini of the transferor and the animus accipiendi domini of the receiver. If an owner abandons his/her property right without someone else taking on that right and if the other person simply takes possession of it because the former left it open, without any understanding between them, the rights of the first person will be transferred to the second person by means of two separate and independent actions which will not form a contract.[2]

Rosmini asserts that there must be a subjective intention between the parties that transfer of property rights takes place. A contract is a moral-juridical action with a complete present will. If the conditions of the contract are not accepted, there is no contract. As soon as the conditions of the contract are accepted, there will be a valid contract. There must be some common rights and duties between the parties to the contract so that the rights of one person can be transferred to another contracting party. In terms of the application of the nemo plus iuris ad alium transferre potest quam ipse haberet rule, no person can transfer a greater right than he himself had on a property and all restrictions are transferred to the new owner of the property. The transfer of rights between the parties to the contract must be known.[2]

The person who calls off the property right according to the prescriptions of the contract must understand that the other party is free to take over possession of the property.[2]

Rosmini alleges that it is evident that the obeisance to contractual provisions stipulations would protect basic fundamental rights of the parties indirectly. The contract figure also has fundamental relevance in the private and public sphere.

The Integrity of Fundamental Rights

Rosmini alleges that every right is inviolable due to the prescriptions of natural and positive law. The prescriptions of these two forms of laws confirm the integrity of the individual's right by the enforcement of the maintenance of fundamental rights in civil society. According to these prescriptions, we are prohibited from harming another person. A wrongful action implies a juridical infraction or infringement of an individual's personal and property rights and will be morally reprehensible.[2] If the circumstances exist according to which there is an

infraction of a person's property and personal rights, such infringing action will be morally unjust and such circumstances must cease to exist. Resonant to the foregoing, Rosmini states:

"[...] if a law were found to be unjust, it would no longer be law."[2]

Like Rosmini, Thomas Aquinas already stated that the validity of a right depends on justice. Thomas Aquinas orientated the validity of a right according to the prescriptions of natural law and the latter was of the opinion that any right that contradicts natural law is no longer a law, but rather a distortion thereof. Rosmini joined up with Thomas Aquinas and air his view that the law requires that civil society acts in accordance with the prescriptions of the law. Like its citizens are obliged to do, the government must also obey the prescriptions of the positive and natural law. This is or forms the basis for fundamental rights in civil society.[2]

The individual and the government are both equally subject of rights and subjected to rights. In spite of the aforesaid, problems arise if the integrity of rights are applied to both the individual and the government. These problems are a result of the usurpation of rights by the state or government over the individual. In other words, state's rights are deemed to triumph over that of the individual. Rosmini believes that this should not be the case. He suggests that if an individual becomes part of the state of civil society, the individual only forms part of an additional relationship without his/her individual existence being lost. The individual thus lives an independent existence separate from the civil society or state. Rosmini therefore quashes the notion that the rights of the civil society or state are more important than those of the individual person.[2]

Rosmini asserts that a government must protect the vulnerable person against the powerful person and the individual against the civil society or state. If this mandate is not to be adhered to by governments, then we might have the situation where in certain societies women are considered an instrument for men's pleasure so that her human dignity is to a large extent impaired or even destroyed. For example, in the forests of America women were burdened with heavier tasks for which men did not see their way clear and the women were also subjected to their male children. She is excluded from their table, forced to depend for food upon the scraps, left without assistance in need, even at the moment of childbirth when brute animals take loving care of their females, men in such societies are callous.[3]

Rosmini stresses that governments will benefit from the maintenance of fundamental rights of the citizens. He concedes that private interests need to be subjected to public interests, but then such subjectivity must be used in the correct context. Rosmini explains:

"[...] in this way, it is true that private good has to give way to public good if by private good is meant the good of all the individual members of the society; it is not true if private good is understood as that of a single member of the society."[2]

Rosmini is of the opinion that collective entities and even governments are juridical persons which must be dealt with equally to any other individual. It means that governments must not absorb its members' rights, but must afford its members' the opportunity to live an independent life. This is the guarantee for the recognition of fundamental rights in civil society or the state.[2]

Rosmini states that the civil society or its organs that act on its behalf may not operate unfairly or unlawfully, not even for the sake of the preservation of the state. He reiterates once again that the individual or citizen must exist independently of the state. The individual is not a person because he/she is a member of the state. Rosmini explains the integrity of the individual's rights as follow:

"[...] let civil society [state] perish, therefore, if need be, so that individuals may be saved; individuals must not perish so that civil society may be saved."[2]

Rosmini believes that civil society or the state can be dissolved, but not at the expense of the individual. He avers that the civil society is the middle goal and the individual is the end goal, an approach which finds affinity with Thomas Aquinas. Thomas Aquinas considered the perfection of the state or civil society in the reasonable nature of man and the promotion of man's general well-being.[4]

Rosmini asserts that it would be unfair if the state or civil society is to restrict the freedom of its citizens. The state, however is to restrict the exercise of the rights of its citizens in the same way as is the case with the individual towards others. Rosmini means such relationships establish juridical rights and duties among the citizens towards the state.[2] This approach points to an effective enforcement of individual rights in the state.

Rosmini mentions that the state violates the citizens' rights under the following circumstances: If it hinders the citizen's action to possess certain property, without the state having a lawful claim of property right on the property concerned; if the state or its organ(s) under the pretence of public interest is/are of the opinion that it can do anything and misuses that pretence to disguise its own justice; under the pretence of promoting the general well-being of its citizens, the state can prejudice the freedom and property right of its citizens.[2] The state also violates the rights of its citizens if it does not in the exercise of its rights prevent its citizens' rights from being violated. The state violates its citizens' rights if it allows an individual or social organ or entity to wrong others in the name of the state. Rosmini alleges that the state has a special responsibility to ensure that justice triumphs. The state must ensure that the citizens' rights are not to be violated by ignorance. The state also violates its citizens' rights if it impedes their access to public information. The citizens are prejudiced under the following circumstances: When they are not afforded the opportunity to pass moral sentence on questionable issues by the state; when the state does not divulges to the citizens about what their mutual rights and duties are; and ignorance (which is the result of the state's negligence to provide information to the citizens) plunges the citizens into misery and dejection.[2]

Rosmini asserts that the government acts unfairly if it tries to enforce its own interests on the citizens under the pretence of public welfare. The state must protect itself by complying with its own laws and prescriptions.[2] Where civil authority deprives its citizens of property, full compensation must be provided to the prejudiced persons. Negligence to provide full compensation will cause that the citizens suffer injustice and such action by the civil authority will violate the citizens' rights. Nobody may be deprived of his/her property without the compliance of this condition. Expropriation may only be authorised in terms of a law, if it is to the public benefit and if just and fair compensation is paid without delay. Rosmini provides the following formula with which the citizen and the civil authority must comply with:

"[...] each one must use his own rights in such a way that the minimum disturbance and restriction of advantage is inflicted on others [...]"[2]

Civil authority may not on behalf of the state have the right to take innocent lives, or to physically injure someone. Rosmini alleges that fundamental rights must not be prejudiced at the expense of the state:

“It is expedient [...] that one man should die for the people. This is an impious, deplorable maxim [...]”[2]

This maxim is analogous with the rule “*Salus Reipublicae suprema lex*” (The safety of the state is the highest law) and the rule “*Expedit [...] uti nus moriatur homo pro populo, et non tota gens pereat*” (It is in your interest that one should die and not the whole people). Both these expressions underly the same immoral principles. The application of these principles by the state will undoubtedly violate the fundamental rights of citizens.[5]

Rosmini stresses that the fundamental rights of the individual is very important. He states:

“Not a single right of individual citizens [...] can be sacrificed for the sake of the public good [...]”[5]

According to Rosmini, the individual’s fundamental rights cannot survive if the society in which he exercises that right is doomed. Conversely, society cannot do some good to the individual unless this good come about without any damage or diminution of the public good.[5]

The government also violates the fundamental rights of its citizens when it imposes excessive punishment on transgressors. Rosmini asserts that the extent of punishment must be in accordance with the demands of the time and circumstances. He alleges that the state commits an injustice insofar as it adhered unreasonably to punishments which in the course of time have not changed and are out-dated, despite changes in the tradition (mores) of these communities. Public disapproval and the fear for public unrest have elicited the government’s awareness.[2]

The state or government also violates the fundamental rights of its citizens not only by its own actions, but by those of its officials. Government commits a wrong if it remains quiet when it should speak, or if it condones the injustice of government officials. The ignorance, wrong or negligence of government officials presupposes that the state violates the fundamental rights of its citizens. This happens when the state or government acts unfairly on moral and political grounds.[2]

Rosmini exerts that our actions also violate the rights of others. For example, if we prevent our property from overflowing by making a furrow to another person’s property and that person’s property overflows, we would have therefore violate that person’s property right. The prejudiced person does not have to prove guilt on the part of the transgressor, but he must only prove that an action by the transgressor changed the flow of the water and prejudiced him. This will also be the case if we allow our cattle to graze on another person’s property. Rosmini alleges that our wrong consists of the fact that we did not prevent the situation that caused damage.[2]

Rosmini maintains that other people’s rights are also violated by our negligence to act. In the case of lands or property along a river, which tends to overflow, the common owners or

property along a river must unite in order to protect, subject to proportional expenses. To leave the river without proper precaution means that both the owners of land and the property will be prejudiced. Neighbouring owners have a duty to unite and agree with what will be in the best interest of both. Anyone who neglects to be part of such an agreement will violate the rights of others.[2]

The Right to Protection of Fundamental Rights

Rosmini believes that an innocent person who protects his/her rights and therefore prejudices the transgressor shall be deemed to have acted justly. The individual or transgressor who causes harm deserves to be punished. Self-defence or protection of one's rights, gives the individual the status of maintainer of justice.[2] Rosmini means that an individual is not exceeds the boundaries of justice when he/she protects his/her rights in self-defence. Modern writers have rejected the lex talionis as an excessive and disproportional measure for the protection of rights. It would appear that Rosmini later approved of the lex talionis. He is of the opinion, however, that the prejudice of the transgressor by the protection of the innocent person's rights may not exceed that which is absolutely essential for the protection of the innocent person's rights. The lex talionis rule presupposes that a person who causes damage to his fellow man must suffer the same disadvantage or damage. This rule is in keeping with the prescription of natural law which dictates that one must do to others what one would want done to oneself and the reciprocal to this rule.[2] Rosmini alleges that we do not have a right beyond this prescription of natural law.

The right to the protection of fundamental rights can be aimed against the following actions of the transgressor, namely self-defence and a state of emergency. In self-defence the doer aims at an unjust (human) attack.

Rosmini believes that corporal punishment is unacceptable as punishment for violating the rights of others. The reason for this is that corporal punishment is considered a violation of man's fundamental rights vis-à-vis human dignity. The individual's right to human dignity prohibits the application of corporal punishment and all other forms of degrading punishment.[2]

The right to protection of fundamental rights includes the juridical power for self-protection against prejudice and the compensation for harm done. Rosmini believes that pure material damage suffered does not comprise the violation of rights, for example in the case of disasters for which nobody is to be blamed. Legislators do not prescribe any compensation for damage as a result of natural disasters. The following rule in law holds: si res perit, domino perit (the matter is lost to the owner). These transgressions differ from formal transgressions where man is the cause of harming someone else and on account of which compensation for damage suffered can be claimed by the prejudiced person.[2]

Restrictions on the Right to Protection

Rosmini upholds that the right to protection of rights may not extend further than what is necessary to protect our rights. We must protect our rights ourselves by the minimum possible prejudice to the transgressor, otherwise the right to protection will extend ad infinitum. The right to protection comprises only that which is necessary to prevent the threatening action. This does not include vengeance.[2]

Rosmini asserts that man may protect himself against unlawful attacks (when there are no other ways of protection) by causing harm to the attacker, equal to the value of the right being threatened. He maintains that this warding off does not contradict the rules of natural law. In

terms of natural law, it would be forbidden to kill a person who steals fruit in a garden. Natural law prohibits us from maintaining inferior rights with punishments that are too strict. The exercise of a right to protection which causes harm to others is restricted as far as natural law is concerned:

"[...] which forbids our inflicting supreme harm on another in order to avoid insignificant harm, or no harm at all, to ourselves."[2]

The Right to Meeting Needs and the Different Ways of Meeting Needs

According to Rosmini, the right to meet needs exists in the case of unlawful action and debt to the prejudiced person. Prejudice exists in the case of violation of the rights of others. When a person consents that another person must injure him/her, such prejudice or harm will not be classified as disgraceful due the legal maxim: "[...] no harm is done to the person who knowingly consents." (*volenti non fit iniuria*). This maxim implies that where a person legally capable of expressing his will gives consent to injury or harm, the causing of such harm will be lawful. Consent is a ground of justification: the person suffering harm waives his right to the extent that he permits the defendant to violate his interests. In other words a person is not liable where the injured person has consented to injury or the risk thereof. A willing person is not wronged; he who consents cannot be injured. This maxim was already known in Roman and Roman-Dutch law.[6]

Rosmini mentions that not all forms of prejudice can be met in the same way. If the damage is due to theft of other people's property, and that property is neither damaged nor destroyed, then the damage or prejudice will be redressed by the mere return of the identical property to the owner. This is the first form of meeting the right to needs, namely the return of property.[2]

In the case where a profitable property, for example a cow, is stolen, then the value of the calves and the manure of the cow for the time that the owner was deprived thereof, together with the value of the cow must be paid to the prejudiced person. The only payment that may be excluded is the value of the maintenance of the cow which is borne by the thief during the period of forced keeping. Rosmini means the return of the property (cow) together with compensation of the profit thereof, is the second form of the right to meeting needs.[2]

In the case where the owner is prejudiced as the result of the loss of the usage of his property (cow), the non-usage of the owner's property must be evaluated and redressed. Rosmini explains the matter in the following context. Suppose the cow belongs to a poor farmer who does not have the funds to buy another cow. The farmer will be unable to fertilise his lands and will therefore suffer considerable loss in returns (of his agricultural products), together with the unavoidable loss suffered by his family. Rosmini believes that the thief must compensate this serious damage or prejudice of the farmer. Where the property is destroyed and not returned in its original condition, but its value can still be determined, the prejudiced person must be compensated. Such compensation must be equal to the value of the property before it was stolen.[2]

The Application of Rosmini's Fundamental Rights

Rosmini is of the opinion that law cannot do without justice. With respect to justice, the moral and juridical principles are etched in the heart of man by the Divine Providence. The principle of justice serves as the forerunner of the law of nature and positive law.[1]

The non-maintenance of justice resulted in the decline of moral principles in the 17th century. Man's attention was focused on entities other than justice. Man thus fell into immorality. Anarchy arose resulting in the destruction of the public order. By the end of the 18th century man attempted to redress the principle of justice. During the 19th century, people realised the importance of the principle of justice. Rosmini avers that justice presupposes a return to the simple principles of knowledge, virtue and happiness in human society. These principles indicate human nature, in which all take part on account of the Divine order of creation.[1]

Justice as an outcome of natural law is not of human origin; it has a Divine origin. On account of the application of the law of nature, justice enjoys universal and eternal validity. In light of the characteristics of universality and eternity the endeavour towards justice requires that the law of nature enjoys simple and fair application which can be understood by all. Legal positivists who are ignorant of this, endanger the maintenance of public order. For purposes of maintaining justice in civil society, knowledge of the law of nature and positive law must be taken into consideration. Notwithstanding this exertion, Rosmini expresses his appreciation for some jurists who turn to the law of nature in cases where positive law does not provide clear guidelines.

Rosmini's doctrine of fundamental rights is the result of the Scriptural principle of love for God and one's neighbour. This can be explained with reference to his points of view on human dignity. On the basis of Rosmini's evangelist perspectives every person has a fundamental dignity that may not be violated:

"The State, for example, cannot absorb the inalienable rights proper to persons, nor can it be considered as more than its individual members in such a way that persons can be sacrificed for the sake of society. 'Let civil society perish [...] or be dissolved if this is needed for the salvation of individuals. [...] not a single right of individual citizens [...] can be sacrificed for the sake of the public good.'"[5]

Fundamental rights can be Christian based in the sense that every person is the image of God. Insofar as man is in the image of God, the Christian principle of love applies. Fundamental rights are valid on account of the second part of the central commandment of love: Love your neighbour as you love yourself.[7] This means that you do not do to others what you do not want others to do to you. On the basis of these claims to fundamental rights, a doctrine of human rights can be based on the fact that Christian love "is not rude,"[7] "is not self-seeking"[7] and "keeps no record of wrongs." [7] These Scriptural prescriptions can be summarised in one thought: Do not harm your neighbour.[8]

Basic human rights and fundamental freedoms are thus unalienable. The law of nature played an important role as philosophical basis of Rosmini's doctrine on human rights. He took the law of nature from Scholastics and Thomism and developed it, thus providing an evangelical foundation for the notion of human rights. On the basis of this contention Rosmini can be described as a neo-Thomist.

Rosmini also finds affinity with Cicero who used the term "dignitas" for dignity. According to Cicero, dignitas alludes to the manifestation of dignified behaviour.[9] This term also points to the merits or dignity worthy of reverence of people with good behaviour. Augustine considers dignitas to be an important value in the promotion of virtue and to act rationally and morally. Thomas Aquinas explains dignitas from his Scriptural perspectives as follows:

"[...] it appears that whatever is contained in the notion of dignitas must be attributed to God because creation is universally subject to God, and God has the governance of the whole universe in His hands. Therefore all virtue must finally be attributed to divine intervention."[10]

The Practical Implications of Rosmini's Christian Views of Fundamental Rights (Human Dignity) with regard to American and South African judicature

Rosmini's Christian views of human dignity can be explained with reference to the American courts' interpretation thereof in the 8th and 14th Amendments to the American Constitution.

Sexual integrity is one aspect where values are protected by moral right. In the American court case, *Boxer v Harris* [11], a female prison warden forced a male prisoner to commit acts of masturbation. If the prisoner (Boxer) refused, the warden (Harris) lodged disciplinary complaints against him. On appeal, the majority decision maintained that the abuse suffered by Boxer was not a violation of the 8th Amendment as far as forced masturbation only implies a "de minimus harm." The panel decided that Boxer suffered only minimal sexual abuse "[...] not constituting 'the unnecessary and wanton infliction of pain' as demanded for constituting 'cruel and unusual punishment forbidden by the Eight Amendment.'"[12]

The panel is convinced that the forced masturbation does not presuppose a constitutional violation "objectively 'harmful enough.'" In a minority judgment Chief Judge Barkett alleges that the Appeal Court's decision denied the "broad and idealistic concepts of dignity, civilised standards, humanity, and mercy" entrenched into the 8th Amendment of the American Constitution. Barkett explains that in terms of the 8th Amendment, Boxer's alleged harm will be seated in the violation of his human dignity and in the standards for decency. Barkett is of the opinion that the main cause of Boxer's complaint is the violation of his human dignity. Barkett further alleges that the Supreme Court maintained that sexuality is key to human dignity. Barkett concludes that forced masturbation is sexual abuse and therefore violated a most basic aspect of human dignity.

Barkett's minority judgment tends to be more sensitive on the nature, value and status of sexual integrity. Boxer's moral status as a person and his treatment as moral object (means) for the self-satisfaction of Harris was, according to Barkett, not sufficiently considered by the Supreme Court. Barkett is therefore of the opinion that Harris' breach of Boxer's duty to avoid moral wrong contributed to the seriousness of Harris' denial of Boxer's dignity as a moral person. Because man is a moral being, his inherent dignity is a fundamental inalienable right which should be acknowledged everywhere. In the USA constitutional judicature the moral value of man's physical integrity elicited great interest within the context of the 8th Amendment:

"[...] 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 thought shows similarities with some prescriptions of the South African Constitution, Act 108 of 1996. Section 1 emphasises the seriousness of the right to human dignity, namely that the Republic of South Africa is modelled 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 Charter of Rights is described as an instrument which enshrines the rights of all the people in our country and affirms the democratic values of human dignity, equality and

freedom. With regard to section 10 of the Constitution of South Africa, the right to human dignity is one of the fundamental constitutional rights. On the basis of this contention, Judge Chaskalson maintains in *S v Makwanyane* [13] that the right to human dignity comprises that a person is not to be tortured, or be treated in a cruel, inhumane or degrading manner. In terms of this judgment, Harris' inhumane or degrading actions would have violated Boxer's dignity. It is apparent that the South African case law of *Makwanyane* is more in line with Rosmini's Christian point of view than the American judgment of *Boxer v Harris*.

In the American court case, *Meredith v State of Arizona* [14], a prisoner with a medical history of emphysema was beaten by a prison warden on his belly, resulting in him becoming totally handicapped. Oxygen was administered to the prisoner Meredith for four hours to counteract the damage that had been done. The facts of this case bring Meredith within the scope of the Civil Rights Act [15], which guarantees the rights to dignity to every person:

"[...] 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."

The court decides that a right violated on the basis of an attack and assault presupposes a right to be secure in one's person and is grounded in the due process clause of the Fourteenth Amendment, which is an aspect of the right to freedom. With reference to *Rochin v California* [16] the court maintains that the attack and assault in the Meredith case "shocks the conscience" and leads to behaviour which may include power, which is "brutal" and "offensive to human dignity." The court decides that the prison warden's behaviour towards Meredith is conscious, unfair, brutal and abhorrent with a view to human dignity. The requirement that physical power must be brutal and shocking to the conscience sets the requirement for violation of a person's dignity too high. In this respect, Rosmini's approach appears more acceptable.

In the court case of *Schy v State of Vermont* [17], the court finds that a claimant who was attached to a wall with a chain for more than two hours with his hands behind his back did not provide sufficient facts that handcuffs are brutal and degrading for human dignity. As remarked earlier, such action would, according to Rosmini, be a violation of the victim's human dignity.

Treating persons as moral objects points to the violation of their moral freedom. The case of *Felix v McCarthy* [18] emphasises that the moral context of human dignity must not be undermined. In this case, Felix, a prisoner at San Quentin, brought a citizen's right action against prison wardens who used excessive power against him and thus violated his constitutional rights, for example, the right not to be subjected to cruel and degrading punishment as entrenched in the 8th Amendment of the American Constitution. Prison wardens handcuffed Felix and threw him against a wall, resulting in Felix suffering bruises, injuries and emotional torment. Judge Canby, who relied on the Meredith case declared:

"[...] it is not the degree of injury which makes out a violation of the 8th Amendment, but rather it is the use of official force or authority, that is 'intentional, unjustified, brutal and offensive to human dignity.'" [18]

This point of view appears to correspond with Rosmini's comprehensive approach.

The moral context of fundamental rights calls for an evaluation of justice. Justice is the highest truth in human society and forms the essence of all moral actions. Man's duty to act justly and fairly guarantees him the right to act within the boundaries of justice. His duty to act in accordance with justice imposes on others the duty to respect such action. The right-duty correlation implies that there is no right in a person without 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.

The application of fundamental rights on human dignity requires a serious discourse and understanding concerning morally bad actions. The natural individual right to a moral person is that which is entrenched in terms of moral right. Violation of such rights will be morally reprehensible.

CONCLUSION

The dignity of the person in civil society forms two categories: personality and the right to act honestly. With respect to the first category of rights, the person must be treated as a moral subject and not as an object. With reference to the second category, the person must attempt to reach the highest good. He must consequently enjoy a right to social goodwill on the basis of which moral virtue is promoted in civil society. These values provide the basis for justice in civil society.

Dignity as value for moral virtue serves as moral basis for fundamental human rights. Fundamental rights, which neglect the fundamental moral context within which it figures leave the door open for a relativist and positivist application of natural rights. The unwillingness to treat human dignity in conjunction with the 8th and 14th Amendments of the United States of America Constitution is a typical a-normative contextual handling of human dignity, which tends to relativise the fundamental right to dignity into a cliché in constitutional administration of justice.

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