

Duty, right and social benevolence: An alternative approach to debates about abortion

G.A. Myburgh

**Department of Constitutional Law and Philosophy of Law
University of the Free State
BLOEMFONTEIN**

myburghga@ufs.ac.za

A.W.G. Raath

**Department of Constitutional Law and Philosophy of Law
University of the Free State
BLOEMFONTEIN**

RaathA.RD@ufs.ac.za

Opsomming

Plig, reg en sosiale welwillendheid: 'n Alternatiewe benadering tot debatte oor aborsie

Debatte oor aborsie, en meer spesifiek oor die reprodktiewe gesondheidsregte van die moeder en die reg op lewe van die ongeborene, is gehul in omstredenheid en meningsverskil. Die debat speel by herhaling af vanuit liberale en outonome vertrekpunte tot menseregte. Vanuit dié vertrekpunte word dikwels min aandag geskenk aan die fundamentele grondslae en filosofieë waarop die konsep van menseregte gebaseer is. In dié verband bied die Ciceroniaans-Reformatoriese benadering 'n teoretiese perspektief op menseregte wat die fokus verskuif vanaf die individu se outonomie na die pligte waaruit menseregte voortspruit. Die fokus op sosiale welwillendheid en morele plig slyp en verdiep die metode van argumentering met betrekking tot aborsie. Dit maak ook 'n

bydrae tot 'n meer gebalanseerde benadering tot die beskerming van die ongeborene en die moeder se regte in die algemeen.

Abstract

The abortion debate, and more specifically the reproductive health rights of the mother and the right to life of the unborn, have been clothed in controversy and disagreement. The debate is repeatedly argued from liberalistic and autonomous viewpoints of human rights, with very little consideration given to the fundamental foundations and philosophies underlying the concept of human rights. It is in relation to the fundamental foundations and philosophies that the Ciceronian-Reformational viewpoints present us with a deeper and alternative understanding of human rights. The Ciceronian-Reformational approach presents us with a theory of human rights that shifts the focus from individual autonomy to the duties upon which human rights are grounded. The focus on social benevolence and moral duty sharpens and deepens the basis of argumentation regarding abortion, and also presents a more balanced approach to the protection of the unborn and the mother in general.

1. Introduction

Jurisprudential debate on the unborn and on abortion is extremely complicated and controversial in South Africa, implicating as it does, issues of life and humanity. Amidst these issues, the popular jurisprudential view is that the rights of the pregnant woman are superior when compared to the legal protection of the unborn in South Africa¹. In the case of *Christian² Lawyers Association of SA and Others v Minister of Health and Others³* the court reverted to pre-1994 methods of literal interpretation³ to determine the protection of the unborn during abortion. The court stated that it was not up to them to revert to

1 *Christian Lawyers Association of SA and Others v Minister of Health* 1998 (4) SA 1113 (T): 1114-1115.

2 1998 (4) SA 1113 (T).

3 The literal approach to statutory interpretation means that if the words of a statute are clear, it should be put into effect. No consideration is given to factors outside the legislation itself (external aids). This approach is based on positivism and parliamentary sovereignty, which is outdated in our current constitutional dispensation. See Botha 2005:47-50.

medical, scientific, philosophical or religious grounds in determining the start of life of a human being.⁴ Thus, referring from this that the court did not think it necessary to investigate philosophical foundations of human rights, duties, social benevolence and the effect it has on the reproductive health rights of the mother and sensitivity towards the unborn. The predominant approach by the court was an exclusive and literal approach towards human rights and the right to life (without research as to any philosophical background and other external aids^{5,6}). In light of the court's retreat to pre-1994 textual/literal approaches,⁷ this article aims to give effect to a more purposive/contextual approach⁷ by providing a philosophical approach to the abortion issue, one that is more sensitive to the philosophy of "social benevolence" as supported by duties – thereby providing alternative approaches to the literal and exclusive approach used by the South African court or the mere balancing of reproductive health rights and the right to life.⁸ Furthermore, with regards to the South African context, jurisprudence on the legal status of the unborn has yet to be subjected to substantial

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- 4 *Christian Lawyers Association of SA and Others v Minister of Health*: 1114
- 5 External aids are those factors considered during statutory interpretation that are outside the text of the legislation. Such as medical facts, philosophy and history. See Botha, 2005:75.
- 6 *Christian Lawyers Association of SA and Others v Minister of Health*: 1121-1122.
- 7 An approach that is more Constitutional and in line with section 39(2) of the Constitution of the Republic of South Africa, 1996. Section 39 (2) states that: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." The contextual approach as influenced by the Constitution is an approach that takes into account all factors (external to the legislation and the legislation itself), having a bearing on the legislative provisions to be interpreted. In line with section 39(2), the contextual approach also has to take into account values underlining the Bill of Rights, as well as other factors. Thus, such an approach will support the use of medical, philosophical and historical factors, right from the beginning of the interpretation process. For more on the contextual/ purposive approach, see Botha, 2005:50-58.
- 8 The emphasis on reproductive health rights in the abortion debate is clear from *Christian Lawyers Association v Minister of Health and others (Reproductive Health Alliance as Amicus Curiae)* 2005 (1) SA 509 (T):524 and 527. Also see *Christian Lawyers Association of SA and Others v Minister of Health* 1998 (4) SA 1113 (T):1121-1123.

judicial scrutiny, unlike the case in democratic and constitutional states such as Canada, the USA and Germany, where the legal status of the unborn was addressed by the highest court pertaining to human rights interpretations. For these reasons an analysis of the application of human rights in the abortion debate will be in the form of investigating the concepts of “justice”, “moral duty”, “natural rights” and “social benevolence”, informed by Ciceronian-Reformational views. This approach will present an alternative to the sterility of current mainstream jurisprudential debates on abortion and issues related to the balancing of the human rights of the unborn and the mother.

2. The emphasis on rights

A holistic and inclusive approach concerning human rights and the right to life in South Africa is especially important taking into account the emphasis on rights in Chapter 2 (Bill of rights) of the South African Constitution, 1996. Such an approach is also important due to the status given to human rights universally. Universally, the concept of human rights has been called “the only political-moral idea that has received universal acceptance”. It is also described as the “currency of international moral discourse”, or as the “modern tool of revolution” in “the struggle for ... human dignity in our time” (Gordon, 1998:691). We have come to understand what law means in terms of human rights. Rights tell us what the law is and should be (Ritter, 1999:266). This is also true in South Africa. The rights in the Bill of Rights can only be limited in certain circumstances under section 36 of the Constitution. Thus, these rights are seen as universal, and we understand and measure all South African law in line with the Bill of Rights.⁹ For this reason one can ask: Having come this far legally, why should one still be concerned with the philosophic foundations of such international human rights law (Shestack, 1998:201). Part of the response is that it is necessary to understand some of the underlying philosophical foundations of human rights because of their extensive application; it is even more necessary since legal systems such as South Africa use human rights to determine issues of life, death, privacy and reproduction.

9 section 39 of the *Constitution of the Republic of South Africa*, 1996.

Therefore, the use of rights regarding the legal status of the unborn should also be complemented (amongst other things) by a duty orientated approach (for example, the Ciceronian-Reformational perspectives regarding “moral duty”, “social benevolence” and “natural rights”).

3. Why social benevolence as used by Cicero and the Reformers and what is it?

Social benevolence is not a new concept. The moral duty of social benevolence and its relatedness to law has been widely commented upon and applied by philosophers.¹⁰ However, the concept of social benevolence was not only used by Christian philosophers of the Reformation (Luther and Calvin), but also by non-Christian philosophers prior to the Reformation, such as Cicero. Only a number of authors have been chosen to present this old concept afresh within South African law to present alternative and more sensitive approaches to human rights.

But what is social benevolence? As stated by Cumberland (2005:268), universal benevolence toward all human beings is contained in the care of the common good. This common good can be explained as the greatest benevolence (goodwill, kindness or compassion) of rational agents towards the whole of society forming the happiest state (Cumberland, 2005:298). Thus, benevolence is both the “*intrinsic Cause of present, and the efficient Cause of future Happiness*” (Cumberland, 2005:293). Furthermore, the happiness of the single is not separated from the happiness of all. The whole does not differ from all the parts it is made up of. It is not about the acts of one person to procure his/her own happiness without any regard to others. It is rather about what everyone can do together, in order to be happy and what each may do separately in order to maintain the common happiness of all (Cumberland, 2005:295): “*For universal Benevolence is the Spring and Source of*

10 Benevolence the core moral duty undergirding natural law – Baruch de Spinoza (Tract. Theol. Pol. chapter 16); Wilhelm Leibnitz, *Dissertatio de Actum publicum usu, atque de pirncipiis Juris naturae et gentium*; Richard Cumberland, *De Legibus Naturae*.

every Act of *Innocence* and *Fidelity*, of *Humanity* and *Gratitude* ...” (Cumberland, 2005:394). The desire of each member of society for the good of the whole body is called social benevolence.

The concept of social benevolence as explained above, presents a more sensitive approach to the application of human rights and abortion. The only agreement there is regarding abortion is that very little agreement exists in the abortion jurisprudence of different countries and in international law. Even within countries there is controversy and disagreement as to what the legal status of the unborn is. De Freitas (2005:120) states that we also find competing views between majority and minority judgments, regarding the legal status of the unborn. There is even more disagreement with regards to the balancing of the legal protection of the unborn with the rights of women. What influence will benevolence have in such an uncertain situation? Social benevolence provides a platform for sensitivity, inclusive and alternative jurisprudence where vast uncertainty exists. Social benevolence aims towards the common good of the whole society, not just the happiness of single entities such as the reproductive health rights of women and opposes what is hurtful or potentially hurtful. More sensitivity will be practiced towards the preservation of possible life (in light of uncertainty) rather than running the risk of taking thousands of possible lives (thus being potentially hurtful) when acting for the interests of one party (the mother) only. Thus, benevolence calls for added sensitivity where uncertainty and potential hurt exists.

4. Moral duty, natural rights and the Ciceronian-Reformational perspectives on duty-based rights

4.1 *The corporate nature of society and the dynamics of social benevolence*

Cicero's view that because all men are subject to one moral law and so are fellow-citizens, and therefore that they must be in some sense equal, had vast implications for social life and the political ordering of society in following ages. Cicero's position that equality is a moral requirement rather than a fact particularly served as an ethical axiom undergirding the framework of his political views. The effect of this is that a state cannot exist permanently, or at least cannot exist in any but a crippled condition, unless it depends upon, acknowledges, and gives effect to the consciousness of mutual

obligations and the mutual recognition of rights that bind its citizens together. Cicero's commitment to the ethical foundation of equality has the immediate effect that the state is a moral community, a group of persons who in common possess the law. The other side of the coin is that unless the state is a community for ethical purposes and unless it is held together by moral ties, it is not a state in the true sense of the word. The measure to which the state has the nature of a corporate body, existing to supply its members with the advantages of mutual aid and just government, is described by Cicero (*Rep.* 39) as follows: "The commonwealth, then, is the people's affair; and the people is not every group of men, associated in any manner, but is the coming together of a considerable number of men who are united by a common agreement about law and rights and by the desire to participate in mutual advantages."

The politico-moral impact of Cicero's views had the immediate effect of postulating a natural law paradigm for subjecting the positive law of the state to ethical considerations of a transcendent nature and broadening the people's involvement in the political life of the state.

Particularly Cicero's close association of the participation of individuals in the life of the state with the rights and duties presupposed in the sharing of the common life, and the strong emphasis on the inter-dependence of all human beings in the divine order, provided a platform to the Reformers of the early modern epoch to develop their theoretical perspective on rights, justice and the fundamental duties essential for human intercourse in society. Arguably, Cicero's statements on the fundamental moral law inherent in human personhood and moral duty as the precondition for fundamental rights, serve as the focal points for developing politico-legal views sensitive towards balancing rights and duties in furthering the aims of justice within a broader communitarian framework.

The resurgence of Stoic moral philosophy and its relevance to law and politics in the early modern epoch had an enduring effect on the legal and political theories of the Reformation. Roman authors like Seneca and Cicero, and the interpretations of their views, together with those of the Church Fathers and the Medievalists, contributed towards the development of Reformational views on natural rights based on fundamental moral duties. By stating the moral context of

law and politics, the narrow enclaves of legalism, moral relativism and crude individualism were transcended.

4.2 The moral bonds of benevolence and justice

4.2.1 The moral posture of social benevolence

Ciceronian political philosophy is mainly concerned with establishing the moral preconditions for achieving peace and harmony in the political life of the state. To this end Cicero introduces two important notions: firstly, the idea of the consolidated social body bound together as an organic whole, and, secondly, the notion of moral bonds, providing the common basis for the legal and political life of the citizens in the commonwealth. To Cicero benevolent solidarity provides the platform for the agreement of the multitudes associated by law (*iuris consensus*) and by common expediency (*utilitas*). Implicit in Cicero's statements relating to law and politics there figures the idea that no state can be established through agreements to maintain law and justice unless there is a firm commitment to peace. In a certain sense the need for peace is the cause (*causa*) which gives birth to the state. It is this founding cause to which the governing body of the commonwealth should constantly return in its management of the affairs of the state. The ideals of peace in the state can only be accomplished by a collective will and commitment to preserve social benevolence in social life. Whereas the *civitas* denotes the collective organisation of the body politic in a unity of men associated by law, the *res publica* is the functioning body of the state as well as the requirements for the existence and protection of the organised populace on the basis of social benevolence.

Cicero's application of the terms *civitas* and *res publica* have the following implications: the binding together of the various components of the state into a *civitas* is a necessary precondition for establishing peace in society; the body of the state is composed of various components of the populace whose safety and liberty have to be protected as a whole (*cuncta* or *tota civitas*) as opposed to its constituent parts. For the proper functioning of the state, Cicero commits the state to its foundational moral basis – a thoroughly organised *populus* is dependent not only upon the communal interests of its members but also upon the moral basis of its existence and on a universal sense of justice. Furthermore, the

bonds of the “association of the state” (*rei publicae societas*) can only hold fast where the moral bonds of benevolence and justice prevail. The binding together of the body politic on the foundations of benevolence and justice produce a number of important implications: stable forms of government can only be formed in the absence of greed; harmony in the state is obtainable when all the people have the same interest, since discord arises from conflicting interests, and the base of the political association demands a foundation of equality in terms of which all the citizens can be regarded as equals. In a certain sense the third implication is the most important – the basis of human equality, peaceful co-existence and natural rights is located in the principle of moral worth. All human beings are regarded as having equal moral worth and it is on the basis of this moral equality that state government can maintain the concord and justice needed for maintaining peace and tranquillity in society.

Cicero’s observations to the effect that justice and all other virtues are to be sought and cultured for their own sake because of the inherent obligating nature of these virtues, have to be understood in the light of his statements concerning the inherent obligating nature of moral worth as the end of all virtuous actions. All virtues reflect a moral commitment towards others in terms of which all personal egoism, self-love and gain are excluded. The opposite of self-love and egoism is the moral posture of benevolence and service towards other human beings. The moral duty to serve others and promote the common good emanates from the natural inclination to love our fellow human beings, which inclination is also the foundation of rights (*Leg.* 1.15).

The central idea contained in Cicero’s perspectives on benevolence and right, is to the effect that the rights human beings naturally have, presuppose the existence of moral duty and are intrinsically connected to the moral uprightness of the bearers of such rights.

11 The following abbreviations for the works of Cicero are used: *De Legibus* (*Leg.*); *De Officiis* (*Off.*); *Oratio in Catilinam* (*Cat.*); *De Finibus* (*Fin.*); *Orationes Philippicae* (*Phil.*); *Epistolae ad Familiares* (*Fam.*); *Oratio in Pisonem* (*Pis.*); *Oratio pro Cluentio* (*Clu.*); *De Natura Deorum* (*ND.*); *Epistolae ad Atticum* (*Att.*).

The basic idea is the following: A has duties towards B in terms of the law of moral worth not to do B harm, which duties provide B with natural rights limited by the moral duties B has towards A, C, D and all other human beings in terms of the moral law. The duty to show benevolence towards others in society applies equally to everybody. The equal demands of the moral law to act benevolently produce a form of moral equality of all persons, which acts of benevolence, says Cicero, are “necessary if he is to love another no less than himself” (*Leg.* I.12).

4.2.2 Social benevolence and rights

Cicero’s views on the fundamental moral order underlying natural rights have far-reaching implications for establishing the moral and legal relationships of persons in society: firstly, the benevolence human persons should reflect towards others must proceed according to the order presupposed by the principle of moral worth. Secondly, although human beings should practise benevolence towards others, other persons do not have a right *per se* to claim it as their own, because those who have the duty to practise benevolence are accountable only to the law of moral worth and to the supreme legislator in whom the moral law resides. Thirdly, the equal duty of benevolence towards all persons in society also demands that others not be harmed or despoiled of what belongs to them – others have corresponding rights to the prohibitive duties emanating from the moral law. Fourthly, the duties towards others not to do them harm have their origin in the moral law prohibiting such harm, and not in the rights (or perceived rights) persons may have. Fifthly, the law allows those who have rights to redress the harm done to them, and gives them a right to do so. The effects of the view that moral duties precede rights are twofold: the duties towards human beings in whom there are corresponding rights are duties of justice, whilst other moral duties have the nature only of duties of *charity*.

4.2.3 Social benevolence and justice

According to Cicero (*Fin.* V.23.65-66), the protective nature and role of justice has its roots in the moral disposition which urges that each should be granted his own, and “which munificently and fairly protects this community of the human alliance”. Elsewhere Cicero

(*Inv.* II.53.160) denotes justice as a state of mind which preserves the common good by recognising the dignity of all human beings, its conception proceeding from nature. Selfishness (the opposite of benevolence) is wrongful and unjust, when it is accompanied by a disregard of “divine and human laws” (*jura divina et humana*) (*Off.* I.8.25-26). On the other hand a person is not considered good and just when he/she refrains from wrongfulness to avoid harm (Cicero, *Fin.* I.18.57), because in addition also the virtue of giving each his due should be practised (*Fin.* V.23.65).

The benevolence every person is under a duty to perform towards others has both moral and legal content. Because every person (or subject) is a “master” (or “owner”) of his benevolence, he/she is only accountable to the law and the supreme legislator in whom the law resides. Although people may rightly object to A’s hatred towards B, C and D on moral grounds, nothing is taken from them that is in fact truly theirs; A’s benevolence is not the property of B, C or D, nor does A “belong” to B, C and D. Having a right implies that if A damages what belongs to B, C or D, he injures the persons B, C and D and violates their rights. Although both moral and legal duties emanate from the moral law of benevolence, only the duty not to cause harm to others is the basis (or ground) of natural rights.

Cicero’s view of society entails a blueprint of inter-dependent individuals under the rule of justice, obligated to one another by the moral law, demanding social benevolence as the basis for political life and legal interaction in the commonwealth.

4.3 Cicero’s views on social benevolence and the moral law of worth in the early Reformation

4.3.1 Luther on benevolence and moral duty

Luther’s perspectives on natural rights run parallel to the Ciceronian view that human life is universally subject to moral duties, that no sphere of life, whether private or public, is detached from the pertaining moral duties, that on the discharge of such duties depends what is morally right, and on their neglect all that is morally wrong (*Off.* 1.2.4).

From Luther’s evangelical perspective, this entails that man lives subject to the duties of love – love towards God and towards one’s neighbours. The duties of love are presented in the form of moral

precepts that have universal application in all spheres of human life. In Luther's commentary on Romans 2:14,15 he describes the essence of the duty-basedness of all moral actions as a Biblical principle that one should do unto others what one wants done to oneself. This principle and others like it, which we call the law of nature (or the moral law), are according to Luther the foundations of human laws and all good works (*LW* 26:53 (LGS, Galatians 1)).

Duty-based rights are needed for man to fulfil his calling and duty towards God and to live in peace with his fellow-men. Natural rights, therefore, are divine rights because they are sanctioned by God and enforceable within specific moral limits, to serve God and one's neighbour (cf. *LW* 11:507 (LP, Psalm 119)).

4.3.2 Calvin on moral duties preceding rights

Central to Calvin's arguments is the basic idea that it is in the interest of love that law and its accompanying order is maintained. Where true love is present, human beings will not consider harming their fellow human beings; they would rather strive towards protecting every person's rights and maintaining justice in the state. To Calvin political authority is essential to maintain social benevolence, and political government should maintain peace and fairness. Benevolence in society can only be secured when anarchy and chaos are curbed.

To Calvin the aims of natural law are directed at the harmonious and peaceful co-existence of individuals, and where public honourableness is maintained (*Opera* 52.667). The primary (or *proto*) right which could be extended and "broadened", so to speak, is that of personal liberty. God awarded civil governments the power of the sword in order to protect the rights and liberties of each person and to ensure the free enjoyment thereof (*Opera* 28.214). To secure this basic right laws and authorities are needed. Through the legal protection of the rights to liberty, these rights in effect become subjective public rights. Calvin adds that through the wielding of legal power, state authorities should aim at ensuring liberty and peace for all (*Opera* 2.1107). Because the interests of the individual and those of society are one, it also means that through the protection of individual rights, the rights of the whole social body (*bonum publicum*) are protected (*Opera* 2.1108). Furthermore, the efforts of individuals to protect their rights should not be regarded as

a transgression of the natural law aims of fairness and love, because the protection of rights contributes towards maintaining order in the social body. Therefore, if the rights of individuals are injured, the ground of law also is jeopardised, anarchy promoted, the peace disturbed and benevolence compromised. Individuals should therefore feel themselves free to seek their rights in order that benevolence be promoted and the general well-being of the social body ensured (*Opera* 49.252ff.). In Calvin's works it appears as if the benevolent public good has an even higher status than the law in an objective sense, because without the moral good of benevolent well-being no legal system can maintain order.

5. Social benevolence and a duty-orientated approach to human rights within the context of abortion laws

A Ciceronian-Reformational approach towards social benevolence and duty-orientated rights has vast implications on the abortion debate in South Africa. A holistic, contextual and inclusive approach to the abortion debate requires, as only part of the inclusive approach, a thorough consideration of the above exposition and the influences it might have on abortion laws within South Africa.

Cicero provides for a state subject to law (not any government or ruler), with citizens having moral duties towards each other, emanating from social benevolence. The fundamental moral law inherent in human personhood and moral duty is a precondition for fundamental rights (fundamental rights cannot exist without fundamental moral law), and pivotal in developing views sensitive towards balancing rights and duties in furthering the aims of justice within a broader communitarian framework. However, it is only the duty not to harm others, in terms of which a person will be held accountable. The emphasis on the moral law of benevolence, that the whole of human life is subject to moral duties, that no aspect of human life whether in private or public can be without the accompanying moral duties, that on the discharge of such duties depends all that is morally right, and on their neglect all that is morally wrong, is also to be found in the views of German Reformers.

Furthermore, it is not stated that duties are above human rights, it is merely stated that for human rights to exist, duties, emanating from social benevolence must be present and *vice versa*. They co-exist and both must be given equal weight in order to avoid the abuse of either.

South African law adheres to the Rule of law principle and Constitutionalism. In line with Cicero, South Africa is a state subject to law. However, all South African citizens clearly have the rights in the Bill of Rights of the South African Constitution. What will happen, with respect to South African jurisprudence regarding abortion, if moral duties emanating from social benevolence, is a condition for the existence of the rights in the Bill of Rights?

In many modern societies, including South Africa, a woman can have an abortion without any regard to her community or without any need for consent from the father or any other family member. If we apply the Ciceronian-Reformational approach, this woman has a moral duty towards her community to further the aim of justice within the broader communitarian framework – a necessary condition for her fundamental reproductive health rights. Thus, the rights cannot exist if she does not perform certain duties. Duties and rights must co-exist. These duties are based on social benevolence (kindness). Although the kindness of the woman cannot be judged, the performance of her duties emanating from the moral law can. Thus, one can expect acts of social benevolence and duties from equal citizens who have rights, and therefore also from a woman during her pregnancy. This can be expected because social benevolence provides the platform for the agreement of the multitudes. This is important for peace and peace is important for establishing and managing the affairs of the state. Thus, because women in modern states are equal citizens, they have equal duties (emanating from social benevolence)¹² to maintain peace necessary for the managing of the state, because without common will and peace, the managing of the state will not be possible. If the woman applies social benevolence and realises that she has a duty towards her community and the maintenance of peace, she will, at the very least, have to consider the viewpoints of the father and possibly other parts of the community affected. This is because all virtues reflect a moral commitment towards others and personal egoism, self-love and personal gain are excluded.

In order for a woman to have reproductive health rights, she must submit to the moral duty of social benevolence. She cannot have

12 Also, according to Cicero, the equal demands of the moral law to act benevolently produce a form of moral equality of all persons.

rights independent from duties. Therefore, the woman first has to accept and adhere to the fact that she has certain duties towards her community, as a consequence of which others, including the unborn foetus, have rights. This is different from atomistic views that we first have rights and that, emanating from the rights of another person, certain duties flow. Thus, the duties of Mr A provide Mr B with certain rights and *vice versa*. According to the Ciceronian-Reformational¹³ approach, the duties of Mr A do not emanate from rights. The duties towards others not to do them harm, have their origin in the moral law prohibiting such harm, and not in the rights persons may have. Thus, the duties of the mother towards her community and the unborn have their origin in moral laws prohibiting harm towards the community and the unborn, and not in rights. Calvin further supports this by arguing that the nature of the subjective rights of individuals – whether it is the right to life, to property or to liberty – is limited by 1) the moral duties of the same bearers of such rights towards others, 2) the accompanying rights others have as a consequence of the duties others have towards them, and 3) the right of the political authorities to ensure the welfare of society – which in effect means that the individual does not have absolute rights in the commonwealth. Thus, the rights of the pregnant woman will be limited by the duties she bears towards her community and the unborn, by the rights of the community and the father, and also by the rights of authorities in so far as it ensures the welfare of society. Carter (1998:71) develops the duties of mankind towards community to a more defined idea. According to him, civility creates not merely a negative duty not to do harm, but an affirmative duty to do good. It possibly also forces the laws of the state to take more interests into consideration than just the reproductive health rights of the mother. State laws will consider the rights and the duties of the mother towards the State, the community and the unborn, as well as the duties of the State, the father and the community towards the mother. The mother is not alone in her duties toward the child before birth. Everyone shares that duty, and must help her to provide for the basic needs of the child. Everyone includes fathers, families, grandparents,

13 Although rights and duties do not necessarily emanate from each other, they need to co-exist in order to prevent abuse of one of them.

uncles, aunts, doctors, nurses, neighbours, friends, employers and work colleagues – and also government departments of health, housing, child welfare, employment, etc. (Joseph, 2009:53). With regard to honouring and protecting the child before birth, our “love of freedom” needs to be reconciled with our duties towards the child in keeping with “the sense of one human family for which we all bear a common responsibility” (Joseph, 2009:53) as well as an affirmative duty to do good. Thus, the mother has a duty of care towards her child before birth. Where this duty becomes too difficult for the mother, society is required under the terms of the human rights instruments to assist both mother and child (Joseph, 2009:84-85). This affirmative duty to do good (by the mother, father and society) is the natural consequence of benevolence. Such an affirmative duty based on benevolence will also help the mother, father and community to understand that human duties flow from the relationship itself, not from their feelings about the relationship (Carter, 1998:99). Thus, the inconvenience and the circumstances surrounding the pregnancy will not affect the duties flowing from the relationships created by such pregnancy, and the feelings towards this pregnancy will not cause an unlimited right to end the pregnancy, since certain duties flow from such relationships: human feelings do not automatically result in rights, but are rather restricted by their duties and benevolence.

Furthermore, not only will the pregnant woman have affirmative duties towards the community, but she will also have restricted rights because of the duties she has towards the unborn child. The main argument by the pro-abortion writers is that the unborn does not have the right to life and therefore cannot be the subject of rights and duties. However, according to the Ciceronian-Reformational views, the duties towards others not to do them harm, have their origin in the moral law prohibiting such harm, and not necessarily in the rights (or perceived rights) persons may have. Thus, the duty that the pregnant mother has towards the unborn does not emanate from any rights or right to life that the unborn may have, but rather from the moral law imposed upon the mother and prohibiting any harm or terminating action by the mother – such moral law being independent from whether the unborn holds certain rights or not. This renders the requirement that the unborn must have the right to life irrelevant.

Criticism against this duty-orientated approach, embedded in social benevolence does exist. How can duties be incorporated in the Bill of Rights without giving the opportunity for society or government to abuse the duties that others might have? For example, an immoral construction of the common good by government with the expectation that society must act in accordance with their duty to realize this moral good. Government's actions are restricted by its duties towards society to act benevolently and for the common good. If government presents a distorted construction of the common good, protection is still provided by the Bill of Rights and the Constitution as a whole.¹⁴ Furthermore, priority is not given to duties above rights or *vice versa*. They should be considered as equal partners in obtaining the common good of society. The concepts of rights merely becomes more holistic and of richer content upon consideration of social benevolence and moral duties.

6. Conclusion

For modernity, autonomy is preserved mainly through two fundamental complementary rights: the right to privacy, and the right to self-development (Ritter, 1999:428). Consequently, the complementary rights of privacy and self-development programmatically inform all communal involvements of the abstract autonomous individual: political, economic, legal, religious, and even philosophical (Ritter, 1999:428).¹⁵ Viewing these rights through Ciceronian-Reformational glasses gives a different picture of rights and the modern day approach becomes more dubious.

Benevolent solidarity and duty-based cohesion are important building blocks for establishing a society sensitive to both the individual rights to sustain liberty in society and the communitarian values required for building a South African political order committed to fundamental values for informing the spheres of legal

14 See sections 1, 2 and 8 of the *Constitution of the Republic of South Africa*, 1996.

15 Dellapenna (2006:1091-1092) comments that: "To begin to resolve the controversy, we must escape the language of rights and the atomistic vision of society it entails. We must get past simplistic constitutional claims ... We must balance concern for the dignity of women and the needs of the poor and working mothers with the welfare of unborn children ..."

interaction in the state. By introducing social benevolence as the moral catalyst for organising social life, a community-oriented theory of social and individual life, opposed to the isolationist views of political individualism, is created. In terms of isolationist views moral choices are deemed to be private affairs, with the foundations of society being aimed at supporting individual autonomy and self-seeking choices of the individual members of political society – such as in the case of the woman who wishes to abort the unborn. The Ciceronian-Reformational approach supports the idea of the integration of communal morality embracing a normative conception of law which is grounded in the common good, and the establishment of a duty-oriented culture of moral commitment permeating the whole of social life. Translated into law, social benevolence embraces a normative conception of law in terms of which the individual is accountable to universal standards of duty and rights. Thus, this is not an approach aiming towards communism or communitarianism. The individuals still have rights against other individuals and the state, however, the overemphasis on atomism and rights are just balanced and tempered with a more holistic approach giving equal weight to the duties of individuals, the state and society within the abortion debate and in general. It is usually argued that the community has no say regarding the bodily integrity of the mother and that she owes no duties to the community or the unborn due to the fact that abortion involves *her* body, integrity and human dignity. However, the emphasis on social benevolence and duties does not have the aim of unjustly infringing upon the bodily integrity or human dignity of the mother, but rather aims at tempering the liberal rejection of a public conception of the good as well as the annexation by the state of the public good.

This Ciceronian-Reformational approach requires certain duties from the mother as well as from the community during pregnancy. Also, the rights and duties of the father in matters of abortion will play a greater role, together with the duties of the mother towards the unborn, emanating from moral laws of social benevolence (although these rights and duties will not play the only role).

Persons who see that others have a moral duty to respect some given activity of theirs, claim it as sufficient to produce a right, even if their activity is not morally justified – autonomous individualism sometimes establishes false rights on claims that others have the

duty not to constrain them even though such claims may rest on morally unjustifiable aims. Thus, it is possible that in modern society, because of previous discriminations towards women, the movements (as a result thereof) towards protecting women rightly produced a moral duty to protect women. However, this does not necessarily mean (as claimed by many feminists) that a moral duty is created to do everything to allow women to obtain an abortion, thereby producing a right to abortion, even if the activity of abortion has not yet been proven to be morally justified. Such individualism has possibly established false rights to abortion and promoted the view that no father or community has any right to restrain it, even if, up to now, abortion has not been morally justifiable.

Furthermore, the duty aspect surpasses the rights categorisation as such and should be applied as a principle outside of human rights discussion, a principle that should also play a role in channelling human rights jurisprudence and more important, the role and function of moral duty in the field of law *per se*.

This application confronts the superficial manner in which the South African courts dealt with abortion in the *Christian Lawyers Association of SA and Others v Minister of Health and Others*.¹⁶ In South African law, the unborn is not granted the right to life or any other human rights, mainly because of the woman's right to abortion and reproductive health rights.¹⁷ Firstly, it questions the exclusive approach taken by the court when it refused to take into account philosophy, rationality, religion and other concepts. This will be contrary to the approach followed by South African courts concerning the unborn.¹⁸ Secondly, such an exclusive approach is

16 1998 (4) SA 1113 (T)

17 In this regards see *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T) and the *Choice on Termination of Pregnancy Act* 92 of 1996.

18 The evidence obtained from science regarding the development of the unborn also supports a benevolent and sensitive approach towards the status of the unborn. (For more information regarding science and abortion see De Freitas, 2005). The South African case of *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T):1118 expressly stated that science is not a measure to be used in determining the legal status of the unborn. However, this is a very insensitive approach, as the science of the unborn can help us to be more precise about just what sort of being the unborn is.

not in line with the supported contextual/purposive approach to the interpretation of legislation by the courts. Thirdly, such an exclusive approach has left the abortion debate bare of any vigorous and rich philosophical enquiries that might provide additional insights to the abortion debate. Benevolence, and as a result, sensitivity towards the common good, society and humanity will require South African courts to take an inclusive approach towards abortion. Thus, concepts other than rights will be introduced. Furthermore, instead of a sole focus on demand and freedom, more emphasis will be placed on responsibility and duty. Finally, social benevolence and a duty-orientated approach will transform the question of “does the unborn have the right to life” within section 11¹⁹ of the Constitution of the Republic of South Africa, 1996, from “will the rights granted to the unborn negatively affect the rights of the mother” to including questions such as: “What are the duties of society towards upholding social benevolence?” and “what approach towards the unborn will be the most sensitive, supportive of humanity and the common good?”.

As stated by Cumberland (2005:196), such an approach of benevolence will be a “civil-social kind” which affects and endeavours the good of the public and is opposite to what is hurtful.

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19 “Everyone has the right to life”.

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Key Concepts:

Ciceronian-Reformatational
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Kernbegrippe:

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Morele plig