

Reciprocal Maintenance Obligations to Ascendants in Ireland: The Contemporary European and the Historical National Context Examined

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Abstract:

The article examines provisions governing reciprocal maintenance obligations in Ireland both from a historical perspective and in comparison with contemporary provisions in the EU28. Ireland is in a minority among EU states in lacking any provision in law for the maintenance of elderly, infirm or indigent parents by adult children. Part I of the article, after some preliminary discussion of filial responsibility laws and select comparisons with other international jurisdictions, sets out first in summary form and then with select commentary the presence or absence of statutory or constitutional provisions for reciprocal maintenance of ascendants in the EU28. Part II examines the case of Ireland in depth, and shows that, historically, some form of such provision was the norm. Examination of indigenous archaic legal traditions, up to the pre-independence Poor Relief Act of 1838, outlines the scope and character of such provision. It further provides an account of the traditional philosophical, historical or religious bases for such claims. Considering the contemporary absence of maintenance obligations to ascendants from statute and the Constitution, it is argued that they could only be derived as an unenumerated right; it is further argued however that there is no stable basis for such derivation, and such obligations would never be compellable by a court. It is noted that, while the state commitment to support of the aged is constitutionally enshrined, correspondence shows that the obligations of descendants were assumed by the framers of the relevant Article. Given the choice not to enshrine these obligations, and the fact that no subsequent entity (most recently the Constitution Review Group) suggested their enshrinement, it is concluded that the Irish view has historically been and remains that filial obligations are a natural societal expectation but ought not to require enshrinement in law. In conclusion, it is suggested that such extralegal regulation may in some areas be more efficacious than formalised law and, on that basis, that Ireland has no pressing need to legislate for obligations to ascendants.

Keywords:

Maintenance Obligations; Obligations to Ascendants; Filial Responsibility; Eldercare; EU Law; Irish Constitution; Unenumerated Rights.

I. Reciprocal Maintenance Obligations in the EU28

1. Introduction.

Maintenance obligations toward parents and other ascendants are a feature of the legislation of the majority of EU states. Ireland is in the minority in this respect, solely enshrining obligations (both constitutionally and statutorily) of parents to children. As one might expect, obligations of maintenance to ascendants tend to be qualified in ways in which those to children are not; children have a necessary period of total dependency during which, in all EU states, provision of the means for their moral as well as physical development is in the first instance the responsibility and the privilege of their begetters. Responsibility for such provision is nonreciprocal and legally enforceable. With obligations to ascendants, on the other hand, even where not expressly stated in law it is clear that in every case the principle of reciprocity applies—meaning, simply, that a parent who has not supported a child can raise no claim against them for maintenance, no matter the need. Similarly, many but not all articulations of these obligations specify in some way the criterion of need; even where it is not specified, however, it is clearly enough implicit: any claim for maintenance must stem from genuine need and be reasonable in its scope; need cannot be recalibrated on the basis of substantial filial wealth, and in fact parents who evidently possess the means for subsistence have no basis for legal claims of maintenance (as adult children whose means barely meet the level of personal subsistence cannot be obliged to maintain others).

In Ireland (in common with Denmark, Finland, Romania, Sweden and the UK), there is no obligation of maintenance in national law, and it is unlikely recourse to extra-jurisdictional courts or EU law would ever result in the compelling of such. The provisions of the Hague Protocol on the Law Applicable to Maintenance Obligations (2007), to which the EU states except for the UK and Denmark are signatories, are focused in the main—almost exclusively—on the enforcement of maintenance obligations to children.¹ While theoretically a habitual resident and citizen of Ireland who was the child of a resident national from an EU state which provided for maintenance obligations could be liable for maintenance—Article 3 of the Protocol states that applicable law will be “governed by the law of the State of the habitual residence of the creditor”—Article 6 gives solid grounds for contesting claims based on any relationship other than that of parent (creditor) and child (debtor).² The specific grounds are the absence of such obligations in the state of habitual residence of the debtor. There is no reason to believe maintenance of ascendants would therefore be deemed enforceable.

As mentioned, some form of provision for such maintenance is a feature of most EU legislation (for example in those Civil Codes of France, Belgium, Luxembourg and the Netherlands, which are all derivative from the Napoleonic Code). Legal provision for such is also common worldwide, as a survey of a few major or representative comparators shows. In the United States, though not backed by any federal law, over half of the states oblige filial responsibility for elderly and indigent parents.³ Between 1922 and 1958,

1 On the Protocol's provisions and background, see P. Beaumont, “International Family Law in Europe – the Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity” *The Rabel Journal of Comparative and International Private Law* 73.3: The Communitarisation of Private International Law (2009), 509–46.

2 Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.
http://www.hcch.net/index_en.php?act=conventions.text&cid=133 (All online citations accessed 9th May 2015).

3 S. Moskowitz “Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective” *Marquette Law Review* 86.3 (2002), 422. See also K. C. Pearson, “Filial Support Laws in the Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents” *The Elder Law Journal* 20.2 (2012).

“all ten Canadian provinces and territories enacted filial responsibility laws”.⁴ Japan, where societal esteem for the elderly has always been significant, had until 1948 provisions in which obligations to ascendants superseded those to one’s second family; reform did not invert the priority but established parity of obligation.⁵ China, with similarly longstanding traditions obliging maintenance of elderly parents, today enforces reciprocal obligations on children which can take the form of cash payments or the more novel threat of reduced inheritance in cases of neglect or abuse.⁶ In 2007, India made it a requirement for children to maintain elderly parents via a monthly stipend.⁷ Singapore introduced laws which accorded courts the power to compel maintenance and prosecute those who failed to maintain elderly parents in need of assistance; though not particularly stringent by objective comparison with other states, they perhaps seemed so for the publicity surrounding their introduction. Under the Maintenance of Parents Act, proposed in 1994 and entering into force in 1996, any person over 60 unable to subsist on their own can claim maintenance from children capable of providing it. Critics dubbed the provision the “Sue Your Son Law” but the framer of the law defended it as “[kicking] in where filial piety fails”, and “providing a safety net where morality proves insufficient”, and expressed a conviction that the prospect of a public trial for failure to maintain needy parents would simply shame any defendant into compliance.⁸

Below we detail the presence or absence of maintenance obligations, statutory or constitutional, in the EU28. A summary of that data is first presented in section two. Section three provides more detail of and some select commentary on the applicable laws for each state. The aim here is simply to position Ireland comparatively within the framework of contemporary European legislation. Part II of the paper provides more in-depth discussion of the Irish position from a national social and historical context; it examines the historical and philosophical basis for such maintenance claims, and the implications and possible intent of their absence from Irish legislation.

4 Moskowitz (2002), 429.

5 *Ibid.*, 440.

6 *Ibid.*, 445–8. Chinese parent-child relationships continue to be regulated by the Confucian concept of *xiao* (filial piety), where deference is extended to elders generally.

7 Maintenance and Welfare of Parents and Senior Citizens Act, 2007 <http://socialjustice.nic.in/oldageact.php>

8 W. Woon, “Honor Thy Father and Mother – or Else” *The Wall Street Journal* 28th June 1994. Cf. Moskowitz (2002), 440 on how societal pressure tends to regulate these matters in Japan, meaning the laws in place seldom require direct invocation or enforcement. Legal action can also be taken under the California Family Code § 4403 <http://law.onecle.com/california/family/4403.html>

2. Summary: Reciprocal Maintenance Obligations to Ascendants in EU28 Countries

Country (EU28)	Obligations (Y/N)	Constitutionally Enshrined (Y/N)
Belgium	Yes	
Bulgaria	Yes	
Croatia	Yes	Yes
Cyprus	Yes	
Czech Republic	Yes	
Denmark	No	Yes (i.e., non-obligation; see below)
Germany	Yes	
Estonia	Yes	Yes
Ireland	No	
Greece	Yes	
Spain	Yes	
France	Yes	
Italy	Yes	
Latvia	Yes	
Lithuania	Yes	Yes
Luxembourg	Yes	
Hungary	Yes	Yes
Malta	Yes	
Netherlands	Yes	
Austria	Yes	
Poland	Yes	
Portugal	Yes	
Romania	No	
Slovenia	Yes	
Slovakia	Yes	
Finland	No	
Sweden	No	
United Kingdom	No	
Gibraltar	Yes (discretionally; see below)	

3. Statutory or Constitutional Sources and Commentary

Belgium: Yes

Belgian Civil Code (Code Civil Belgique): Article 205.⁹

Children have a duty of maintenance to their father and mother and other ascendants who are in need.

Bulgaria: Yes

New Bulgarian Family Code 2009 (Semeen Kodeks): Chapter 10, Article 141.¹⁰

This supersedes the Older Bulgarian Family Code, which also obliged such maintenance under Chapter 7, Articles 69 (2); 70 (1). The latter Code obliged care of elderly, sick or disabled parents, and help and respect of grandparents or other ascendants. The newer determines priority of obligation; parents are second (after equal priority of child and spouse), while last of six categories are grandparents and other ascendants.

Croatia: Yes (constitutionally)

Constitution of the Republic of Croatia (2010, Supersedes 2001) (Ustav Republike Hrvatske): Articles 64 & 65.¹¹

Article 64 states that "Children shall be obliged to take care of their elderly and infirm parents"; Article 65 devolves responsibility for protection of children and the infirm on all citizens.

Cyprus: Yes

The Parents and Children Relations Laws (Law 68(I)/2008; entered into force 25/07/2008) (O peri Sxeseōn Goneōn kai Teknōn Nomos): Part II §§ 34, 35.¹²

Parents must be unable to maintain themselves from income from suitable employment or property; Section 35 decrees that needy parents have a right to income from a property previously given to a child.

Czech Republic: Yes

New Czech Civil Code (Law 89/2012 Coll. Entered into force 01/01/2014) (Nový český občanský zákoník): Articles §§ 855 (1); 910; 915.¹³

Ascendants and descendants have reciprocal maintenance obligations.

Denmark: No Provision (constitutionally)

Uniquely, Denmark explicitly indemnifies descendants against maintenance claims, with the constitutional enshrinement of non-obligation in this respect. The relevant sections states that: "Children have no duty to support their parents. And parents have no duty to support children aged 18 or over. State assistance is established in social legislation." Danish Constitutional Act (Danmarks Riges Grundlov) Chapter 8 Section 75 Subsection 2.¹⁴

9 http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?DETAIL=1804032130%2FF&caller=list&row_id=1&numero=11&rech=14&cn=1804032130&table_name=LOI&nm=1804032150&la=F&dt=CODE+CIVIL&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=loi_all&trier=promulgation&chercher=t&sql=dt+contains++%27CODE%27%26+%27CIVIL%27and+actif+%3D+%27Y%27&tri=dd+A5+RANK+&imgcn.x=34&imgcn.y=10%20-%20Art.204#Art.205

10 <http://kenarova.com/law/Family%20Code.pdf>

11 <http://www.sabor.hr/Default.aspx?art=2405> (with link).

12 [http://www.olc.gov.cy/olc/olc.nsf/all/026CCEE95C0E7ECF422579410034B016/\\$file/The%20Parents%20and%20Children%20Relations%20Laws%201990%20to%202008.pdf?openelement](http://www.olc.gov.cy/olc/olc.nsf/all/026CCEE95C0E7ECF422579410034B016/$file/The%20Parents%20and%20Children%20Relations%20Laws%201990%20to%202008.pdf?openelement)

13 <http://www.czechlegislation.com/en/89-2012-sb> (Note: though a reputable site, this is not an official English translation of the document, and at least some is done by machine translation; the relevant provisions are readily comprehensible however).

14 http://www.thedanishparliament.dk/Publications/My_Constitutional_Act_with_explanations/Chapter%208.aspx

Germany: Yes

German Civil Code (Bürgerliches Gesetzbuch): Section 1601; Section 1605 (1); Section 1606 (1); Section 1609. 6, 7.¹⁵

Lineal relatives are under obligation to provide maintenance and, to the extent that it is necessary to establish an obligation, may be required to provide information on income and assets to one another. Obligation of maintenance falls on descendants (who have reached majority) before ascendants. In the order of priority of obligation (Section 1609), parents and other ascendants are however of low priority—sixth and seventh of seven categories.

Estonia: Yes (constitutionally)

Constitution of Estonia (Eesti Vabariigi põhiseadus) Chapter II § 27

Estonian Family Law Act 2010 (Eesti perekonnaseadus): Chapter 8 Div. I §§ 96, 104, 105 (1); Chapter 9 §§ 113–15; cf. Chapter 6 § 80 (1) (definition of ascendants)¹⁶

Descendants are obliged to provide maintenance before ascendants, and provision of information on assets and income may be compelled by a court. The Constitution of Estonia states simply: “The family has a duty to care for its needy members.”¹⁷

Ireland: No Provision

Greece: Yes

Greek Civil Code (Astikos Kōdikas): Chapter XI Articles 1507 & 1508.¹⁸

Parents and children are under a reciprocal obligation of “assistance, affection and respect”, while a minor child for as long as it lives with and is provided for by its parents owes them what assistance it can provide in facilitating their professional or household work.

Spain: Yes

Spanish Civil Code (Código Civil de España): Articles 68, 143 & 144.¹⁹

Ascendants and descendants are reciprocally obliged to support one another. Descendants precede ascendants in obligation to provide maintenance, but are preceded by a spouse. Article 68 states that care of parents and ascendants as well as children and other dependants will be shared by spouses, indicating obligations to parents-in-law during marriage.

France: Yes

French Civil Code (Le Code civil des Français): Articles 205–8, 367.²⁰

Children owe maintenance to parents and other ascendants who are in need. Similar obligations are owed to parents-in-law, but these cease where the spouse and their common children are dead. Article 367 declares reciprocal obligations between an adoptee and adopter.

15 http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html

16 <http://archive.equal-jus.eu/193/>

17 <http://www.president.ee/en/republic-of-estonia/the-constitution/>

18 <http://ceflonline.net/wp-content/uploads/Greece-Parental-Responsibilities-Legislation.pdf>

19 <http://www.wipo.int/edocs/lexdocs/laws/en/es/es122en.pdf>

20 <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721&dateTexte=20150209>

Italy: Yes

Italian Civil Code (Il Codice Civile Italiano): Book 1, Title XIII, Article 433.²¹

Maintenance obligations are owed to parents by children, natural or adopted, and in their absence, by direct relatives in the descending line.

Latvia: Yes

The Civil Law of Latvia (Latvijas Republikas Civillikums): Article 188.²²

Article 188 states: "The duty to maintain parents and, in cases of necessity, also grandparents, lies upon all of the children equally. If the respective financial state of the children is unequal, a court may determine their duty of maintenance commensurately to the financial state of each child".

Lithuania: Yes (constitutionally)

Constitution of the Republic of Lithuania: Chapter III Article 38

Lithuanian Civil Code (Lietuvos Respublikos civilinis kodeksas; entered into force 01/01/2000): Article 3.162.²³: "Children shall owe respect to their parents and perform their duties by their parents diligently." Cf. Article 1.36: Maintenance obligations (alimony) within the family shall be governed by the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.

The Constitution states that: "The duty of children is to respect their parents, to take care of them in their old age, and to preserve their heritage."²⁴

Luxembourg: Yes

Luxembourg Civil Code (Code Civil de Luxembourg): Articles 205 & 206; Article 368 (adopted children).²⁵

Children, natural or adopted, owe obligations of maintenance to parents; obligations are owed to parents-in-law except where the spouse and common children are dead, or the parent-in-law enters a new marriage.

Hungary: Yes (constitutionally)

The Fundamental Law of Hungary (Magyarország Alaptörvénye), 2013 (= Hungarian Constitution): Chapter XVI (4).²⁶

The relevant law states that: "Adult children shall be obliged to take care of their parents if they are in need".

Malta: Yes

Maltese Civil Code (Kodiċi Ċivili) Chapter XVI Title 1, Subtitle 2, §§ 5(1) 8, 12.²⁷

Under Section 8 of the Code, children are bound to maintain parents or other ascendants who are indigent; Section 12 specifies the priority of obligors, with adult children and descendants first in line for maintenance liabilities. Under Section 5(1), it is noted that as spouse has a prior claim to maintenance over parents and other ascendants.

21 <http://www.ordineavvocatimelfi.it/Documenti/Codice%20Civile.pdf>

22 <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN018388.pdf>

23 http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_e?p_id=370997

24 <http://www3.lrs.lt/home/Konstitucija/Constitution.htm>

25 http://www.legilux.public.lu/leg/textescoordonnes/codes/code_civil/CodeCivil_PageAccueil.pdf

26 <http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426-D2761D10EC7C/0FUNDAMENTALLAWOFHUNGARYmostrecentversion01102013.pdf>

27 <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8580>

Netherlands: Yes

Dutch Civil Code (Wetboek van Burgerlijke Rechtsvordering) Book 1, Title 1.17. *Section 1.17.1* Article 1:392. 1(b), 2.²⁸

Children and children-in-law are liable for maintenance, but the obligation is owed only where real need exists.

Austria: Yes

Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch): §§ 137 (1); 234(1).²⁹

Parents and children owe one another support and must regard one another with respect; a child owes to parents and grandparents maintenance in accord with his or her means.

Poland: Yes

Family and Guardianship Code (Kodeks rodzinny i opiekuńczy) Title II Section III, Articles §§ 128, 129, 132.³⁰

Lineal relatives owe maintenance obligations, which devolve upon descendants before ascendants. It is owed only where the obligee is in real need and cannot produce the means for subsistence.

Portugal: Yes

Portuguese Civil Code (Código Civil português): Article 1874 (1), (2); 2000 [adopted children]; 2009 (1).³¹

Respect, assistance and maintenance are owed reciprocally between parents and children under Section 1874. Under section 2000, an adoptee owes maintenance to an adopter where there is neither spouse nor natural offspring to provide such; it also specifies that an adopter has priority over a natural parent. Section 2009 lays out the order of obligations: only spouses precede descendants as obligors.

Romania: No Provision

Slovenia: Yes

Marriage and Family Relations Act (Zakon o zakonski zvezi in družinskih razmerjih – ZZZDR): Article 124.³²

Adult children are obliged to support parents where the latter cannot provide the means of subsistence; reciprocity is specified in the provision, by clarification that the obligation is not owed to a parent who did not provide subsistence to the child in its minority.

Slovakia: Yes

Act No. 36/2005 Coll., Act on Family and Amendment and Supplementation of Certain Acts (Zákon z 19. januára 2005 o rodine a o zmene a doplnení niektorých zákonov; entry into force 11/02/2005): Articles §§ 66, 67(1).³³

Children who can support themselves owe maintenance to parents who cannot; maintenance will be obliged in accordance with the means of the child(ren).

28 <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/91671/106438/F-1820255430/NLD91671%20Eng%20Book%201.pdf>

29 <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622>

30 <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19640090059> (with links; in Polish).

31 <http://www.wipo.int/edocs/lexdocs/laws/pt/pt/pt134pt.pdf>

32 http://www.mdds.gov.si/fileadmin/mdds.gov.si/pageuploads/dokumenti_pdf/zakonodaja/law_on_marriage_and_family_relations.pdf

33 http://www.uips.sk/sub/uips.sk/images/JE/stipendia/zakon36_2005.pdf (in Slovak) Cf.

<http://www.fifoost.org/slowakei/recht/sfln/2005/node40.php>

Finland: No Provision

Sweden: No Provision

United Kingdom: No Provision

Gibraltar: Yes (at discretion of Magistrates' Court)

Maintenance Act 1961: Art. 31 (1) (d); Art. 37; Art. 39 (c).³⁴

There is generally no obligation, in line with UK law, but maintenance is enforceable in exceptional circumstances by the Magistrates' Court, to which application for maintenance must be made; the conditions for eligibility for maintenance are that a parent must be unable, by reason of old age or mental or physical disability, to maintain themselves.

4. Conclusion

As the foregoing makes clear, Ireland's not legislating for reciprocal maintenance of ascendants places it in a definite minority within the EU. Its fellows in non-legislation are in the main Member States with highly developed welfare and social security systems (though an outlier here is Romania), as well as generally accessible if not optimally functioning healthcare systems. What is worth noting in this respect is that non-enshrinement of maintenance obligations to ascendants is arguably a departure from historical indigenous and imported tradition, from the earliest systems of Irish law and the influence of Christian and especially Catholic teaching, to the nineteenth-century Poor Relief Act. Below we detail such traditions, and draw what conclusions we can in regard to the absence of these obligations from contemporary Irish law.

II. The Social and Historical Context in Ireland

1. Introduction

A survey of the historical situation vis-à-vis maintenance obligations toward ascendants reveals some form of such to have been the norm in recorded law and custom. It was provided for explicitly in the tribal, Brehon laws on the lines of which Irish society was organised at least from the early medieval period up to centuries beyond their official outlawing in the fourteenth century (and which are certainly of far greater antiquity than recorded sources indicate). In the nineteenth century, the Irish Poor Relief Act was passed, which provided for the establishment and administration of workhouses in an attempt to solve or at least to ameliorate the problem of widespread impoverishment (passed in 1838, the system it established was expanded considerably in the crisis years of the famine which followed shortly afterward). The Act enjoined on children with sufficient means the maintenance of destitute parents; the relevant Section of the Act was not repealed until 1939, though one may conclude that it (though not all provisions in the Act) had by then ceased to carry force. Correspondence on the

³⁴ <http://www.gibraltarlaws.gov.gi/articles/1961-25a.pdf>

subject of maintenance of the aged between drafters of the Irish Constitution reveals that the Act and its provisions in this regard were most likely neither taken account of nor even consulted for guidance. These older legal provisions will first be examined below. Afterward, we look at provisions for such maintenance in the Judaeo-Christian tradition, taking account of its influence not only in Irish history and society but directly on the original drafting of the Irish Constitution. The background to that document is then examined, with particular reference to the noted religious influence and to its explicit recognition of natural law as antecedent and superior to positive law. It is argued that, given the absence of explicit provision in the Constitution (or statutory law), maintenance obligations to ascendants could be derived from current legislation on only two grounds: either as an unenumerated right implicit in the Constitution (and modelled on established and recognised unenumerated rights), or as self-evidently derivative from the allegedly natural law which is recognised as governing family relations. We conclude that there are no grounds for such derivation, and that maintenance of ascendants could not be compelled by a court. By way of conclusion, we remind that regulation of a moral matter by cultural norms and societal expectation rather than by formal legislation may be as or more effective a guarantor of its upholding; and that it is unlikely that the legislature in Ireland will see fit to formalise in law the maintenance of ascendants.

2. Earlier Irish Law

Much of the legal framework of the Irish Free State was inherited wholesale from the British imperial system. There is an understandable tendency therefore to examine the latter in order to illuminate the former; given that we have seen above that the United Kingdom secures no guarantee of maintenance for ascendants, one might suppose in this case that the Irish position is ultimately among its legal inheritances from its neighbour. This would however be an error on numerous fronts. First, the fact that the Irish Free State chose to frame a written constitution in 1922 demonstrated its willingness to depart from one of the foundational features of the British system, precisely the lack of such, and therewith from the attendant doctrine and component principles of Parliamentary Sovereignty. This was formalised by the succeeding Constitution of Ireland of 1937; thus the judicial system, but not the legislative structure, remained an inherited one.³⁵ (We mention this fact in particular because, as will be discussed below, the decision to formalise precepts in a constitution—or indeed in statute—need not mean that written law overrides or disqualifies unwritten custom or norms in a nation.) Second, Britain in fact guaranteed such maintenance until 1948 (incidentally the year in which Ireland left the Commonwealth), in laws which had their ultimate origin in the Elizabethan Poor Laws of 1598 and 1601.³⁶ As part of the Union, Ireland indeed had a Poor Relief Act of 1838, modelled on that passed in England in 1834, which made children liable for maintenance of destitute parents, and such relief as was given by the state to the same recoverable by force of law from children with adequate means—a law which

35 For an account of the legislative developments and revisions that by degrees led from the 1922 Constitution of the Irish Free State to the 1937 Constitution of Ireland see V. T. H. Delany, "The Constitution of Ireland: Its Origins and Development" *The University of Toronto Law Journal* 12.1 (1957), 1–26. On the background to the original drafting, including key disputes between representatives of church and state on their intertwinement or rightful separation, see D. Keogh, "The Irish constitutional revolution: an analysis of the making of the constitution" in *The Constitution of Ireland, 1937–1987*, Ed. F. Litton (Dublin: Institute of Public Administration, 1988), 5–81.

36 Cf. Moskowitz (2002), 421–2 on the Poor Laws as "a direct precursor to modern American filial responsibility statutes".

was not repealed until 1939, after the establishment of the Constitution.³⁷ (1948 saw the repeal of the existing Poor Laws in England—part of a raft of post-war statutory amendments—in the passing of the National Assistance Act, which restricted obligations to maintenance of spouses and children.)³⁸ Finally, the absence of obligations of maintenance toward parents is arguably at odds not only with extralegal custom in Ireland but with its indigenous legal traditions.

Early Irish law prescribed to a son “a duty to provide filial service and obedience (*goire*, lit. ‘warmth’) to his father”.³⁹ The son who has fulfilled this obligation is known as a *mac gor*, a dutiful son; Kelly, following the work of D.A. Binchy, equates this with another term from the law texts, *mac té* (lit. “warm son”).⁴⁰ The duty of *goire*⁴¹ could also extend to a daughter,⁴² but was primarily owed by a son to his father. Sometimes gifts from parent to child were considered to be in return for *goire*.⁴³ The son who has failed to fulfil the obligation is a *mac ingor*, which Kelly, again following Binchy, equates with what in other texts is called a *macc úar* (“cold son”).⁴⁴ One proclaimed as such had no legal standing, and it was forbidden even to the highest ranking members of society (*nemed*) to shelter him; to shelter fugitives from justice meant indeed that a *nemed* lost his status.⁴⁵

37 Poor Relief (Ireland) Act 1838 Section 57. <http://www.irishstatutebook.ie/1838/en/act/pub/0056/print.html> Elements of this Act remain on the Irish statute books and, despite the context of the original Act (which provided for the establishment and administration of the notorious workhouses in Ireland), evidently are not simply dead letters; Section 71 was amended as late as 2013: <http://www.oireachtas.ie/documents/bills28/bills/2013/2213/b2213.pdf> The relevant Section 57 which mandated maintenance by children of indigent parents was one of the statutory provisions repealed as part of the passing of the Public Assistance Act, 1939: <http://www.irishstatutebook.ie/1939/en/act/pub/0027/sched1.html>. Its existence on the statute books at the time of the drafting of the Irish Constitution—this is evidenced by correspondence on the matter—does not explain the decision not to enshrine reciprocal maintenance obligations to ascendants there.

38 http://www.legislation.gov.uk/ukpga/1948/29/pdfs/ukpga_19480029_en.pdf

39 F. Kelly, *A Guide to Early Irish Law* (Dublin Institute for Advanced Studies, 1988), 80; cf. the story of Librán, 224.

40 *Ibid.*, 161, 232 n. 19.

41 Modern Irish retains *goire* (generally thought derived from *gor*, “heat”) as a stylised or literary word still meaning “filial piety, dutifulness, care, maintenance”. N. Ó Dónaill *Foclóir Gaeilge-Béarla* (Dublin: An Gúm, 1977) s.v. *Gor* is itself specified by Duinnín as “the heat of incubation”, and has the additional meanings “pleasure, laughter”. P. Ó Duinnín, *Foclóir Gaedhilge agus Béarla: An Irish-English Dictionary* (Dublin: M. H. Gill, 1904) s.v.

42 F. Kelly (1988), 80 n. 97.

43 *Ibid.*, 121.

44 *Ibid.*, 80 n. 95. Though long accepted in the literature, it bears mentioning that this derivation of *macc gor/ingor*, and their synonymy with *macc té/macc úar*, has been challenged by P. Schrijver. Schrijver accepts that *macc gor* means “the son who fulfils the duty of maintaining his parents in old age”. His analysis of the texts however concludes that, against Binchy’s interpretation, “no mention is made of the *macc té* being involved in maintaining his father in old age (rather, it seems, the *macc té* is maintained by his father).” His interpretation of the term is: “the ‘warm’ son, who is sheltered by his father’s legal protection, presumably because he is not yet of age and lives in his father’s house; he cannot conclude a valid contract without the consent of his father”. By the same token the *macc úar* is “undoubtedly the one who absconds from his father’s right to direct the son’s legal actions”. He is thus “the son ‘out in the cold’, who has left his father’s protection and home (either because he refuses to recognize his father’s authority or because his father has thrown him out, but this is not clear); he cannot make a valid contract because his father would (or is entitled to) annul it anyway”. Schrijver further contests the connection between *gor*, “pious, dutiful” and *gor*, “warm”. This is based on the derivation from the reconstructed Proto-Indo-European root *g^wer-, cognate with Greek *thermos*, Latin *formus*, “warm”, and Sanskrit *gharmá*, “heat”, etc. He proposes an alternative PIE root *g^wer- “with the approximate meaning ‘compensate, be worth something’”, adducing in support of the reconstruction cognate terms from Old Friesian, Gothic, Middle Welsh, Old High German and more, and positing a development from reconstructed Proto-Celtic *gwar-o. “Olr. *Gor*, ‘Pious, Dutiful’: Meaning and Etymology” *Ériu* 47 (1996), 193–204.

45 F. Kelly (1988), 9, 27, 223.

The laws state that such children's contracts are not valid, and no one who pledges or offers sureties on their behalf has legal support if a surety is not returned; they are also barred from their inheritance. This lack of status puts the son who fails to fulfil the duty of *goire* in the company of other outcast figures: foreigners and outsiders; those ejected from the kin group; a woman who is 'an absconder from marriage'; the son of a prostitute; and a runaway slave.⁴⁶ If the ungrateful son is killed, his kin receive only a quarter of his ordinarily payable 'honour price'.⁴⁷

The majority of surviving Irish law texts are dated by linguistic analysis to the 7th–8thC. (and were compiled in the main between the 14th and 16th), but many of the laws, even those most obviously overlaid by Christian influence in the preceding three to four centuries, reference social institutions and reflect norms and beliefs which are evidently of far greater antiquity (dating in some cases to the Common Celtic period, c. 1000BCE), and for some of which Indo-European analogues are attested or conjectured.⁴⁸ This remarkable antiquity is matched by their insistence: complaints were still being lodged through the fifteenth and sixteenth centuries in reports by English authorities of adherence (by prominent families) to Brehon Law, which had been outlawed by the 1366 Statute of Kilkenny.⁴⁹

3. Religious Traditions

If this indigenous archaic tradition were not sufficient, one could of course look equally to that Christian tradition which overlaid or usurped it. The preamble to the Constitution of Ireland begins with "In the Name of the Most Holy Trinity", continuing by "humbly acknowledging", on behalf of the Irish people, their "obligations to our Divine Lord, Jesus Christ"; Article 6 asserts that the powers of government derive from the people "under God". This is sufficient to indicate the Christian orientation of the original Constitution (in this of course it is little different from many other existing EU constitutions). The Presidential oath of office (Article 12.8) and that sworn by members of the judiciary (Article 34.5.1°) invoke the presence and request the direction of God; the former invocation is also contained in the oath sworn by members of the Council of State (Article 31.4). Article 44.1 acknowledges the homage due to God and pledges to respect and honour religion.⁵⁰ Again, the fundamentally and originally Christian complexion of the document is clear. (The Fifth Amendment to the Constitution, on January 5th 1973,

46 *Ibid.*, 74, 80 n. 97, 95, 103, 105, 167.

47 *Ibid.*, 11. On honour-price (*lóg n-enech*, lit. "the price of one's face"), see p. 8.

48 *Ibid.*, 231, 241. See also D.A. Binchy, "Celtic Suretyship, A Fossilized Indo-European Institution?" *Indo-European and Indo-Europeans: Papers Presented at the Third Indo-European Conference at the University of Pennsylvania*, Eds. Cardona et al. (Philadelphia, 1970), 355–67; on the use of grains to measure wounds, "the smallest measurement throughout the Indo-European world", *Id.* "Bretha Déin Chécht" *Ériu* 20 (1966), 9. And cf. *Id.* "Sick-Maintenance in Irish Law" *Ériu* 12 (1938), 78–134 with C. Watkins, "Sick-maintenance in Indo-European", *Ériu* 27 (1976), 21–25. A similar custom of sick-maintenance may be conjectured in the ancient Hebrew tradition, from Ex. 21:18. See L. Oliver, *The Beginnings of English Law* (University of Toronto Press, 2002), 104–5.

49 F. Kelly (1988), 218, 254 with n. 71.

50 Constitution at: <http://www.irishstatutebook.ie/en/constitution/>

removed the original 1937 Constitution's reference to the special position of the Catholic Church.)⁵¹ Given this explicit acknowledgement of Christian tradition, and by implication the fundamentals of the Judaeo-Christian inheritance which is its basis, there is another clear tradition enjoining filial responsibility on which the framers of the Constitution might have drawn, a tradition most succinctly and resonantly articulated in the fourth commandment—which as is often observed is the only positive rather than prohibitive exhortation laid down in the Decalogue.⁵² The 'honour' due or enjoined to the mother and father is designated by the Hebrew *kibbud*. Gerald Blidstein, in a monograph on filial responsibility in the Jewish tradition, notes the word "is clearly rooted in *k-b-d*, that which is heavy and weighty. To honour a parent, then, means to make him a person of moment, to express your knowledge of him as a person of worth".⁵³ *Kibbud* is "a response to, recognition of, the weightiness of the person honoured, his worth"; its "fundamental motif" is "personal service"; to feed and clothe "requires, primarily, not the financial expenditure for food and clothing, though it may imply that as well, but the physical deed itself. Thus, the personal responsibilities of a son to his father are analogous to those of a servant to his master."⁵⁴ This indeed meant that some traditions of interpretation not only prioritised personal service and support, but suggested that direct financial support was not necessarily an element of filial rather than social responsibility. Blidstein writes however that in practical terms, "Jewish law always expects a son to

51 It may be noted, against prevailing views, that to characterise the compromises arrived at by the secular state with religious interests in the original framing of the constitution, especially the original accommodation which enshrined the special position of Catholic Church, as an obedient and sectarian cession of authority—a view aided by a popular vision today of John Charles McQuaid as a fusion of Grand Ayatollah and Richelieu—is most likely to misunderstand the popular perception at the time. It is also to disregard the force, scale and resonances of controversies surrounding the advocacy of Ultramontanism in nineteenth century Ireland, and difficulties posed by a considerable level of popular support marshalled for moral subordination to Rome. For the simplest indication of resistance on the part of state authorities to incorporation of Catholic principles, note that Fr. J.C. McQuaid had submitted a qualification of what eventually became Article 43.1.1° on Private Property, guaranteeing a "natural right" to "private possession of external goods", which inserted the word "temporal" before "goods." J.C. McQuaid to É. de Valera 16th February 1937 in G. Hogan, *The Origins of the Irish Constitution, 1928–1941* (Dublin: Royal Irish Academy, 2012), 307. For an account of de Valera's rejection of much of the submission on the Constitution by the Jesuit Order under the direction of Fr. Edward Cahill, see D. Keogh & A. McCarthy *The Making of the Irish Constitution 1937* (Cork: Mercier Press, 2007), 94–105, and further on the Order's influence on its content, 113, 116–7, 157. Cahill's submission is contained in Hogan (2012), 228–38, and cf. further draft suggestions for a Catholic Constitution from the Jesuits, 246–55. Hogan (223–7) also discusses some features of the Constitution commonly assumed Catholic in origin but more likely derived from secular comparators such as German Basic Law (*Bunrecht na hÉireann* is more literally the Basic Law of Ireland), the Weimar Constitution and the Constitution of Poland. He criticises the misperception that it was a fundamentally Catholic document in his "Foreword" to Keogh and McCarthy, 16–25, 33–4.

It might further be noted, however, that McQuaid's qualification arguably found its way into the Irish text of the Constitution. In his exhaustive study of the Irish text, which provides literal translations of each article for comparison with the existing English, M. Ó Cearúil renders *maoin shaolta* as "worldly assets" rather than "external goods", retaining something of the separation of the temporal sphere from the spiritual. M. Ó Cearúil, *Bunrecht na hÉireann: A Study of the Irish Text* (Dublin: Oifig an tSoláthair, 1999), 619. <https://www.constitution.ie/Documents/Bunrecht%20na%20hEireann%20-%20Study%20of%20the%20Irish%20Text.pdf> The Constitution itself establishes the authority of its Irish text over the English (Article 25.5.4°; cf. 25.4.6°). It has often been entertained that Irish supersession of the English might open the door to semantic wrangling of a subversive nature. In practical terms, however, were an interpretation of the Irish text of an article possible which gave it a meaning evidently foreign to the intent of the framers, it is on the English version that determination of that intent would rest (cf. Article 8.1–3). Related issues have recently been addressed in M. de Blacam, "Official Language and Constitutional Interpretation" *The Irish Jurist* (New Series) 52 (2014) (non vidi).

52 Ex. 20:12; Deut. 5:16; on the promise or exhortation contained, Eph. 6:2. This fourth in Catholicism and Lutheranism is the fifth in Calvinist and Reformed Evangelical traditions. One author has argued for the positive potential influence on caregiving roles of the concepts attending or underpinning the original Jewish context of the exhortation. C.K. Goldberg, "The Normative Influence of the Fifth Commandment on Filial Responsibility," *Marquette Elder's Advisor* 10.2, 221–44.

53 G.J. Blidstein, *Honor Thy Father and Mother: Filial Responsibility in Jewish Law and Ethics* (Jersey City: KTAV, 2005), xii.

54 *Ibid.*, 43.

provide for the support of a parent”.⁵⁵ The biblical tradition was evidently not only available to inform the content of the Irish Constitution (or the nation’s statutes), but was emphatically invoked. Within that tradition, service, honour and support are rendered to parents as a matter of course; repudiation of the parents is strongly condemned, and carried to its most extreme form, represented by striking or beating them, is punishable by death.⁵⁶ (There is a parallel Greek abhorrence of filial repudiation of loyal parents, where similarly the striking of a parent figures as the extreme and can at least in proposed or purportedly divine laws incur the death penalty.)⁵⁷

4. Religion, Natural Law and the Background to the Constitution

All of which serves to emphasise that explicit or enshrined obligations to ascendants would have sat comfortably with the historical, legal, religious and political traditions of the country for which the constitution was being framed. The lack of such provision (in the original Constitution, in prior, post-independence or in subsequent statutory law) indicates on the part of those drafting it either oversight or intentional omission. The latter, given the care with which such documents are drafted, and which indeed surviving correspondence between those involved in its drafting evidences went into the Constitution of Ireland, is evidently the case. Despite two apparent nods early in the document to the privileged status of ascendants or ancestors⁵⁸ (expressing the gratitude or affinity in neither case of the State, but of “the people” in the first and “the nation” in the second), the absence of provision for maintenance of the elderly by descendants or inheritors implies the willingness of the state to shoulder the burden of necessary care where the aged, disabled or infirm person endures a state of indigence.

Was this the intention? The matter is debatable, insofar as the fact of exclusion of the provision does not settle the issue without further ado. Article 45.4.1°, dealing with support of the aged, widows and orphans, states: “The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged”. The provision forms part of a section on Directive Principles of Social Policy (which, owing to their broad nature, are within the text of the Constitution explicitly provided for and restricted to guidance of the Oireachtas, and not cognisable by any court), and originated from submissions in response to the original Draft Constitution of 1937, after which Taoiseach Éamon de Valera through Maurice Moynihan communicated revisions to Ministers (the Directive Principles were

55 *Ibid.*, xii.

56 Ex. 21:15; Lev. 20:9; Deut. 21:18–21; Prov. 28:24, 30:11, 30:17; cf. 1 Tim. 5:4.

57 E.g. Hesiod, *Works and Days* 182, 185–9, 331–2; Isaeus, *On the Estate of Ciron* 8.32–4; Plato, *Republic* 465a–b, 574b–c; *Crito* 50c; *Euthyphro* 4a–b; *Laws* 877b, 878e, 879c–d, 880b, e, 881d; cf. *Gorgias* 456d; *Euthydemus* 298d–299a with Aristophanes, *Clouds* 1321ll.; Aristotle, *Nicomachean Ethics* 1163b18–27, 1165a21–24. Herodotus reports that the Persians consider the crimes of matricide and parricide so incomprehensible in their terribleness that Persian custom insists on their impossibility; in any apparent case of such, they maintain, sufficient investigation would reveal the murderer not to have been a natural child but a changeling. *Histories* I.137.2.

58 The Preamble notes the sustenance of “our fathers” by Jesus Christ “through centuries of trial”, in their “heroic and unremitting struggle to regain the rightful independence of our Nation”. Article 2 meanwhile asserts that “the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage”.

originally Article 44).⁵⁹ The basic wording of what became 45.4.1° seems to have been derived from a Memorandum of 24th April 1937 by James J. McElligott.⁶⁰ The original revision which led to its insertion however seems to have stemmed in part from the impetus of Fr. John Charles McQuaid, later Archbishop of Dublin, whose role in the drafting of the Constitution is well known.⁶¹ In a letter to de Valera addressing what would become Article 45.4.1° (evidently then worded somewhat differently) he wrote:

*I beg to enclose the amendment dealing with widows, orphans and the aged. It will be noted that I have retained the word support, qualifying just claims, because it is unfair to expect, as so many do, that the State will do everything. It devolves on the family to support—where it can—its own aged members, in a spirit of charity.*⁶²

McQuaid, who (perhaps first) advocated for insertion of this provision for care and support of the aged, evidently envisioned it as supplementary to responsibilities devolving upon family members, trusting such as guaranteed by the spirit of charity. This was perhaps natural enough for a man apparently satisfied that the recourse to the invocation of natural law or natural right in the Constitution was sufficient guarantee of its Catholicity. By a line of reasoning even his Jesuit rivals might have shrunk from advancing, he informed de Valera: "Of course, once the State acknowledges God's right to public worship, it cannot be secular, even if it be not Catholic. And when the State legislates according to natural law, of necessity, it legislates according to Catholicity, because the latter is the guardian of the natural law."⁶³ Recognition of the family in Article 41.1.1° "as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law" must for McQuaid have drawn the principles governing family relations away from secular deliberation and within the remit of Catholic teaching. The latter is quite clear in these matters. The Catholic Catechism even prescribes the duties of children to their parents before it details those of parents to children. The former are covered by Articles 2214–2220 of the Catechism, and some few extracts indicate their tendency: "Respect for parents (filial piety) derives from gratitude toward those who, by the gift of life, their love and their work, have brought their children into the world and enabled them to grow..." (Art. 2215); "As they grow up, children should continue to respect their parents... Obedience toward parents ceases with the emancipation of the children; not so respect, which is always owed to them" (Art. 2217). And most significantly for the subject under consideration:

59 Hogan (2012), 509–11. The Constitution Review Group had further noted that "the language of the principles...is such as to avoid prescriptive effect". *Report of the Constitution Review Group* (Dublin: Oifig an tSoláthair, 1996), 369 <http://archive.constitution.ie/reports/crg.pdf> McQuaid had recognised while contesting the common perception that the Directive Principles were "but pious aspirations, devoid of effective force". See Draft Memo on the Directive Principles of Social Policy in *His Grace is Displeased: Selected Correspondence of John Charles McQuaid 1940–1972*, Eds. C. Cullen & M. Ó hÓgartaigh (Sallins: Irish Academic Press, 2012), 9.

60 Hogan (2012), 515.

61 The title of a critical biography of McQuaid gives some hint of the stature it is now supposed he once attained in Ireland. The chapter dealing with his role in the drafting of the Constitution calls McQuaid "Co-Maker of the Constitution". See J. Cooney, *John Charles McQuaid: Ruler of Catholic Ireland* (Syracuse University Press, 1999), 94–106.

62 Fr. J.C. McQuaid to É. de Valera, 8th March 1937 in Hogan (2012), 321. The letter is better known and more often quoted for its sequel, where McQuaid addresses the "most potent form of social agitation: the unsettled strike", and the need to neutralise "the venom of Communism". What McQuaid enclosed is not in the archive (see Hogan's footnote).

63 Fr. J.C. McQuaid to É. de Valera, April 1937 in *ibid.*, 459.

"The fourth commandment reminds grown children of their responsibilities toward their parents. As much as they can, they must give them material and moral support in old age and in times of illness, loneliness, or distress" (Art. 2218).⁶⁴

5. Natural and Unenumerated Rights

Of course, just as invocation of natural law as antecedent to, superior to and supportive of the positive law does nothing to guarantee the non-secular, not to say Catholic, nature of the document, so recourse to Catholic teaching or any other external tradition can never impute to or import into the Constitution what is not already in it. That which it is argued implicitly to guarantee must be convincingly shown to be derived from and dependent upon its explicit principles. A right of maintenance by descendants derived from the charitable or any other spirit would, were it to be argued provided for in the Constitution, have to be counted among the demonstrable unenumerated constitutional rights the guarantees of which have been accepted by the Irish courts. This issue of whether the fundamental rights guaranteed under Articles 40–44 entail unenumerated rights, and what these latter might be, is of course notorious. Hogan notes of Article 40.3 in particular that it "is, perhaps, the single most important provision in the entire Constitution", and has "given rise to a colossal volume of litigation".⁶⁵ Some unenumerated rights have been definitively recognised, and even where not incorporated into the Constitution have been consecrated by statute. These include the right to bodily integrity, the right to marry and the right to earn a living.⁶⁶ Its history is too large a subject to rehearse, but the controversial nature of the claim to unenumerated rights is understandable.⁶⁷ The caution he expressed over the extension of personal rights (especially claimed economic, social or medical rights) notwithstanding, the most notorious and oft-cited comment relating to the issue is that of Kenny J who (while establishing the right to bodily integrity) asserted: "I think that the personal rights which may be involved to invalidate legislation are not confined to those specified in Article 40 but include all those rights which result from the Christian and democratic nature of the State."⁶⁸ Citing the examples of the right of free movement and the right to marry, he repeated this unfortunate formula in claiming: "there are many personal rights of the citizen which follow from the Christian and democratic nature of the State which are not mentioned in Article 40".⁶⁹ The formula is unfortunate because the asserted character of a state is at any time debatable and even if acceptably defined is quite obviously changeable. It can legitimately inform equitable adjudication, but

64 See *Catechism of the Catholic Church* (Dublin: Veritas, 1994), 478–9. Online at http://www.vatican.va/archive/ENG0015/_P7U.HTM

65 Hogan (2012), 277.

66 On these rights see J.M. Kelly, G. Hogan & G. Whyte, *The Irish Constitution* (3rd Edn.) (Dublin: Butterworths, 1994), 750, 755–61 (the right to bodily integrity), 778, 996 (right to marry), 761–6, 1062, 1120 (right to earn a livelihood).

67 For a useful recent summary of what the author calls "the rise and fall of unenumerated rights in Ireland" their "[rescue] from obscurity by Hogan J, see D. Kenny, "Recent Developments in the Right of the Person in Article 40.3: *Fleming v. Ireland* and the Spectre of Unenumerated Rights" *Dublin University Law Journal* 36 (2013), 322–41.

68 *Ryan v. Attorney General* [1965] IR 294, 312. Similar caution has traditionally been expressed in judgements and by commentators about establishment of unenumerated economic, social and cultural rights. In the final meeting of Ireland's Convention on the Constitution—a 100-strong body comprising nominated members of the Oireachtas and randomly selected, putatively "representative" citizens—in February of 2014, however, 85% of the Convention's members answered Yes on ballot to the question: "In principle, should the Constitution be amended to strengthen the protection of Economic, Social and Cultural rights?" Of those rights listed in a follow-up poll, the lowest support was for the right to social security (78%) and linguistic and cultural rights (75%), the highest for rights of people with disabilities (90%).
<https://www.constitution.ie/AttachmentDownload.ashx?mid=adc4c56a-a09c-e311-a7ce-005056a32ee4>

69 *Ryan v. Attorney General* [1965] IR 294, 313.

as a principle can hardly serve as a satisfactory foundation or reference-point for extra-constitutional statutes claimed implicit in a constitution.⁷⁰ Little wonder, perhaps, that Hogan and Whyte opined that the “strictly legal justification for the *Ryan* innovation is not very satisfactory”.⁷¹ In an article arguing for application to the Constitution in this area of a “perfectly legitimate process of construction that can elicit from a document that which is implied in it but not explicitly stated”, Gerard Casey wrote of Kenny’s claim: “Whatever (if any) may be the rights that follow from what Kenny J calls ‘the Christian and democratic nature of the state’—whether and to what extent the state is or was either Christian or democratic is a moot point—they will have to derive their legal force from a source other than *Bunreacht na hÉireann*”. Legitimate and defensible, or demonstrable, unenumerated rights must, Casey reasons, be “logically implicit in the text”. The right to marry, for example, passes the test: “In the Constitution there is a right to found a family. Given this right, and the Constitutional definition of the family as being based on marriage, then it necessarily follows that there has to be a corresponding Constitutional right to marry”.⁷²

There is nothing in the Constitution which could form (or inform) premises from which one could logically deduce the obligation of reciprocal maintenance of the elderly. Failing the test proposed by Casey, the reasonableness of which is evident, one must then, if seeking foundation or legal force for an obligation of maintenance to ascendants, search for it, in Casey’s words, in “a source other than *Bunreacht na hÉireann*”. One may suspect from the wording of McQuaid’s letter of 8th March 1937 quoted above that he was of the opinion that such obligation was inherent in the reciprocal bond between parent and child and perhaps that it *ought* not to be stated explicitly. The consequence of its not being made explicit is that to discover it implicitly would require appeal to a vague “spirit”, be that Christian, democratic, natural, charitable or whatever. No such “spirit” can be invoked without tension however. If one were to make recourse to dominant indigenous or imported traditions such as those outlined above (early Irish or Judaeo-Christian law and custom), the objections are obvious: it may fairly be said that such traditional laws mandate for attachments of a tribal nature which a whole array of modern phenomena, from population mobility and liberal individualism to the free market, egalitarian legislation and international peremptory norms, have made obsolete. Invocation of the spirit rather than letter of some traditional legal provision similarly lies open to the objection that the spirit of an individual provision is inseparable from and only comprehensible in the context of the totality of the legal system—which in these cases contain much that is anathema to contemporary sensibilities. The early Irish systems, like many archaic legal traditions, to a greater or lesser degree condone laws and institutions such as slavery, attainder, indentured labour, the non-answerability of nobility to laws and charges, the limited autonomy or even legal nonentity of women and monetary restitution in expiation of a crime.

70 To draw out more fully the precariousness of the principle implied by this claim: whatever rights were asserted by the courts to follow from the allegedly Christian nature of the state or Irish society would, in the hardly unforeseeable event of that society (and so the character of its supporting state apparatus) becoming decidedly unchristian, lose their force and foundation.

71 J.M. Kelly, Hogan & Whyte (1994), 757 n. 63. In a similar vein, meanwhile, the author of the volume long considered “the Irish political bible” cautioned on the uses of Article 40: “Innovative judgements, especially if they flow from seemingly vague or novel principles and are given in politically sensitive matters, might bring the judges who make them to the centre of the political stage with undesirable consequences...[and] this kind of judicial activism can have the effect of allowing politicians to leave politically sensitive issues to the courts to decide and thus relieve themselves of their responsibilities”. B. Chubb, *The Government and Politics of Ireland*, 3rd Ed. (London: Longman, 1993), 49–50.

72 G. Casey, “Are there unenumerated rights in the Irish Constitution?” *Irish Law Times* (New Series) 23.8 (2005), 123–27. Casey in an earlier paper criticised Kenny J’s reasoning as “fundamentally flawed”. “The ‘logically faultless’ argument for unenumerated rights in the Constitution” *Irish Law Times* (New Series) 22.16 (2004), 246–48.

One is left then with recourse to the notion of natural right. The phrase appears only once in the Constitution, in Article 43.1.1° relating to private property in which “The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods”. Outside of this statement, the closest to recourse to the notion or tradition of natural right or natural law are indeed Articles relating to the family. The family is recognised (Article 41.1 1°) as “a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law”.⁷³ McQuaid, as noted above, had made Catholicity the guarantor and safeguard of the natural law; the remark is difficult to defend, but not impossible to argue for, and this points to one of the central problems of theories of natural law. The common anchoring of natural law in religion is not a coincidental aspect of the tradition, but a reflection of the difficulty of establishing any alternative foundation for the doctrine. The supreme advantage of viewing man as existing “under God” (as do the Irish people in the Constitution) is of course that it gives a basis to the position of his natural and fundamental equality, a view alien to much of the classical tradition.⁷⁴ Natural law is in its scope and ambition certainly “catholic” in the root sense of the word, but it has also historically been rather Catholic in its complexion. Even revived natural law theory in the twentieth century has owed much to the impetus of French and later American neothomistic theorists such as Villey, Gilson, Maritain, Félicien Rousseau, Henry Veatch and Russell Hittinger.⁷⁵ The greatest, most influential and also most controversial treatment of natural right in the twentieth century – which distinguished it from natural law – came from Leo Strauss, before whose book *Natural Right and History* (1953), in the words of one of the finest analyses of the book, the question of natural right had fallen into “a mixture of oblivion and fitful restoration”.⁷⁶ For Strauss, classical natural right – which, contrary to the common anchoring of natural law doctrines in Stoic philosophy, was best articulated in the philosophy of Plato and Aristotle – was emphatically political, inseparable from the question of the best possible political regime, and based on a determinable hierarchy of ends in human life which, insofar as some were constitutionally unfitted for the highest pursuits, implied the fundamental inequality of human beings. Of natural law he wrote provocatively: “The notion of natural law presupposes the notion of nature, and the notion of nature is not coeval with human thought; hence there is no natural law teaching, for instance, in the Old Testament. Nature was discovered by the Greeks as in contradistinction to art (the knowledge guiding the making of artifacts) and, above all, to *nomos* (law, custom, convention, agreement, authoritative opinion). In the light of the original meaning of ‘nature,’ the notion of ‘natural law’ (*nomos tēs physeōs*) is a contradiction

73 These rights, along with the references to the “inalienable right and duty of parents” in Article 42.1 and “the natural and imprescriptible” rights of the child in Article 42.5, are clearly enough intended to be portrayed, in issuing from a source superior and external to positive law, as natural law. See Constitution Review Group (1996), 225.

74 Perhaps the most prominent example of the establishment of fundamental equality rooted in the possession of a soul and what a later German tradition would call the “creatural” nature of man (*kreatürliches*, an idea popularised by one of the great books of the last century and one of the greatest ever works of literary criticism, Auerbach’s *Mimesis*) is the outcome of the 1550–51 Valladolid Debate.

75 J.M. Kelly has written that “The only place in the Western world where natural law in the Thomistic sense still survives outside (though certainly due originally to the influence of) the Catholic church is Ireland and the jurisprudence of the Irish courts”. A *Short History of Western Legal Theory* (Oxford University Press, 2001), 424–5. Kelly also provides useful summaries of the Roman precursory of Christian natural law doctrines, and the decline of natural law in the eighteenth century, 57–63, 258–77.

76 R. Kennington, “Strauss’s *Natural Right and History*” *The Review of Metaphysics* 35 (1981), 57. Kennington’s comments may be compared with those of P. Manent, who asserted that “political philosophy as originally understood owes its bare survival – fittingly unobtrusive to the point of secretiveness – to Leo Strauss’ sole and unaided efforts. Without him, the philosophy of history, or historicism of any stripe, would have swallowed political philosophy completely”. “The Return of Political Philosophy” *First Things* May 2000 <http://www.firstthings.com/article/2000/05/the-return-of-political-philosophy>



in terms rather than a matter of course.”⁷⁷ Natural law theories must steer an uncomfortable course between the Scylla of doctrines with a religious basis for human equality and the Charybdis of non-egalitarian classical thought in which the human good is reflected in a hierarchy of ends which ground the doctrine of natural right.

This last possible recourse therefore also fails; no attempt to anchor reciprocal maintenance obligations to ascendants in natural law doctrine or a natural right teaching can work in respect of the Irish Constitution’s articulation and recognition of such. (And incidentally, considering the tradition outside of the document’s specific wording, I would number among those for whom there is no ultimately coherent doctrine of natural, never mind divine, law; I can recognise the former’s assertion and articulation in the Constitution therefore as having only the force of positive law, whatever the intent. It is a convenient and workable legal fiction, the content and intent of which one may admit as broadly comprehensible and acceptable.)

77 L. Strauss, “On Natural Law” in *Studies in Platonic Political Philosophy* (University of Chicago Press, 1985), 137–8. Cf. Id., *Natural Right and History* (University of Chicago Press, 1953), vii, 144–5; “Letter to Helmut Kuhn” *Independent Journal of Philosophy* 2 (1978), 23–26. An excellent summary of Strauss’s thoughts on the distinction between classical natural right and traditions of natural law is provided in D. Tanguay, *Leo Strauss: An Intellectual Biography* (Yale University Press, 2007), 118–22. For general discussion of Strauss’s view of the opposition of philosophy to theology in relation to natural right see P. O’Mahoney, “Jerusalem in Athens: On the Biblical Epigraphs to Leo Strauss’s *Natural Right and History*” *The Heythrop Journal* 53.3 (2012), 418–31.

6 Conclusion

To make an end on't, lest we stray too far from the subject under consideration: the conclusion of all the foregoing is that enforceable obligations of maintenance to ascendants could in Ireland only be derived from positive law; only as a result of a deliberative legislative act could such obligations be compellable. (They could not possibly be derived from the Articles on the family, not only because the obligation to children is specified, by which precedent unspecified obligations might be argued null, but because the subject of those Articles is the family unit and not its individual members.)⁷⁸ Whatever the moral opinion on the matter of those presiding over it, no court would entertain a claim for maintenance against a descendant. The corollary conclusion is that the state commits itself, where necessary, to assumption of the burden of care and support of the elderly. Perhaps this commitment was made implicit already by the inclusion of the aged with the infirm, widows and orphans, categories of person which have traditionally been and were at the time of the Constitution's writing considered to have lost their natural sources of support (a category to which the childless aged traditionally belonged).⁷⁹ The inclusion of widows in particular points to the state's commitment to ensuring that mothers need not undertake economic activity outside of the home to the neglect of maternal and domestic duties.⁸⁰ The aged are of course to be counted among the more vulnerable of a society, but their being grouped with those who in the state's view cannot or ought not to be made to work has its own resonance. The absence or omission of reciprocal maintenance obligations from Irish law at its origin, and of any reference to enforceable filial responsibility, has arguably been granted continued approval on the principle *qui tacet consentire videtur*, or that one can infer from silence on the situation consent to it. Though many submissions to the Constitution Review Group in advance of its report on the family in the Constitution quoted the then-current United Nations definition of the family, including the characteristic that those who are part of a family "together assume responsibility for, *inter alia*, the care and maintenance of group members", nowhere in the document was it suggested that maintenance obligations to ascendants ought to find a place in statute or the Constitution. The conclusion to which one is led is perhaps what was hinted at in McQuaid's letter on the matter to de Valera: that the Irish view is that such obligations ought everywhere to be expected but not explicitly stated in law.

78 This was recognised by the Constitution Review Group in its report on the family, the recommendations in which included the deletion in their entirety of existing Articles 41.1.1°, 41.1.2°, 41.2.1°, 41.2.2° and 41.3.1°, and removal of adjectives such as "inalienable" and "imprescriptible" from Articles 41 and 42. *Tenth Progress Report: The Family* (Dublin: Oifig an tSoláthair, 2006), A293, A300–301 <http://archive.constitution.ie/reports/10th-Report-Family.pdf>

79 The Constitution makes no reference to widowers, but statutorily there has historically been a distinction between the rights of widows and widowers (the Constitution was preceded by The Widows' and Orphans' Pensions Act, 1935). Prior to *O'G v Attorney General* in 1985, a widower was eligible to adopt a child only if another child was already in his custody, while no such restriction was placed on widows. The case ruled the restriction unconstitutional, finding it to be "a denial of human equality and repugnant to Article 40.1". See J.M. Kelly, Hogan and Whyte (1994), 1029. Article 40.1 of the Constitution states that "All citizens shall, as human persons, be held equal before the law", and Article 15.4.1° that the Oireachtas "shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof".

80 Articles 41.2.1° and 41.2.2°, controversial from the first, assert that the State "recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved" and shall therefore "endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home". The Constitution Review Group favoured their deletion as outdated, but felt it important "that there should continue to be constitutional recognition of the significant contribution made to society by the large number of people who provide a caring function within their homes for children, elderly relatives and others." It proposed a reworded Article 42.2: "The State recognises that home and family life gives to society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home". Constitution Review Group (2006), 119. This reformulation dates to the Group's initial report on the Constitution. See Constitution Review Group (1996), 311–12.

A few words on this view: the activities encompassed by the political art in its broadest sense are manifold, but the business of legislation is its highest object and its natural end. For all that, legislation is in general a responsive or a reactive business: it is created and enacted as need arises. Even pre-emptive legislation invariably arises from analogy with precedent. There is little reason to expect that Ireland will, or will need to, enact legislation in this area bringing it into line with the majority of EU Member States. That an area might be governed by a norm, and regulated by societal expectation, need not make it any less effective than regulation through formal legislation; in fact, the efficacious norm might well be regarded as a higher and purer instance of “living law” than statute. (The former may indeed be a good deal more effective: to disobey a law, after all, may be contemptible, but it is merely criminal; to violate or flout a norm, on the other hand, is unbearably vulgar, and is to declare oneself anathema not only to the best-regarded and most productive elements of one’s society, but inevitably also to members of what Weberian sociology would call one’s “status group”.) There is no reason, therefore, to expect (or to advocate) that Ireland revise its laws.

This is as much as one can say on the matter in a study which is in the main intended as potentially preliminary to others; while it has been the purpose of this *précis* of European law in this area and examination of the case of Ireland only to illuminate and contextualise the issue, this descriptive exercise will, it is hoped, be available to inform further analyses, including those more prescriptive in nature.