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**A PRIVATE LEGAL DUTY TO SUPPORT THE VULNERABLE ELDERLY?
RETHINKING MAINTENANCE OBLIGATIONS**

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We will grow old one day – if we have that privilege, that is. Let us therefore look at older persons not as people separate from ourselves, but as our future selves.¹

¹ KOFFI ANNAN, *United Nations World Assembly on Aging*, 2002.

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ABBREVIATIONS

Art. – Article

Arts. – Articles

AZ – Document number (*Aktenzeichen*)

BGB – German Civil Code (*Bürgerliches Gesetzbuch*)

BFH – German Federal Fiscal Court (*Bundesfinanzhof*)

BGH – German Federal Supreme Court (*Bundesgerichtshof*)

BOI-IR-BASE – Official Bulletin of Public Finances-Tax (*Bulletin Officiel des Finances Publiques-Impôts*)

Bull. Civ. – Bulletin of the Civil Court of Cassation (*Bulletin Civil de la Cour de Cassation*)

BVerfG – German Federal Constitutional Court (*Bundesverfassungsgericht*)

BvR – Case Number of BVerfG

CASF – French Social Assistance and Family Code (*Code de l'Action Sociale et des Familles*)

CC – Civil Code

CFR – Charter of Fundamental Rights of the European Union

CGI – French Tax Code (*Code Général des Impôts*)

CIRS – Portuguese Income Tax Code (*Código do Imposto Sobre o Rendimento das Pessoas Singulares*)

Civ. 1^e – First Civil Chamber (*Première chambre civile*)

Const. – Constitution

Const. Court – Constitutional Court

CPC – Civil Procedure Code

DL – Decree-Law

ed. – Edition

Ed. – Editor

EC – European Commission

EStG – German Income Tax Code (*Einkommensteuergesetz*)

EU – European Union

JP – Justices of Peace (*Julgados de Paz*)

L – Law

NJW – German Law Journal (*Neue Juristische Wochenschrift*)

N. – Number

OECD – Organization for Economic Co-operation and Development

OIT – International Labour Organization (*Organização Internacional do Trabalho*)

Para. – Paragraph

PIDESC – International Covenant on Economic Social and Cultural Rights (*Pacto Internacional sobre os Direitos Económicos Sociais e Culturais*)

Proc. – Proceeding (*Processo*)

RC – Court of Appeal of Coimbra (*Tribunal da Relação de Coimbra*)

RJ – Repertoire of Jurisprudence (*Repertorio de Jurisprudencia*)

STS – Judgment of the Spanish Supreme Court (*Sentencia del Tribunal Supremo*)

TC – Portuguese Constitutional Court (*Tribunal Constitucional*)

TCA Norte – Central North Administrative Portuguese Court (*Tribunal Central Administrativo Norte*)

WHO – World Health Organization

UCP – Catholic University of Portugal (*Universidade Católica Portuguesa*)

UDHR – The Universal Declaration of Human Rights

I. INTRODUCTION

*With the courage to be upsetting, in order to
trigger change in light of goodness for all*²

“A fifth of the elderly without money for food”. “Thousands of elderly living alone and below the poverty line”. “Numbers of abandoned elderly increasing”.³ These are just a few of the phrases that the media has used to describe a common fact today. In Portugal, as in virtually every developed country, populations are ageing and presenting new challenges. Limited public funds, looser family units and changing market structures do not seem to cope with the ever-increasing older population.⁴ While the gaps in the system go unfilled, poverty escalates.⁵ However, even if the trivialization of poverty may suggest otherwise, every person in our society, regardless of age, is entitled to live with dignity and in security.⁶ The principle of human dignity is not an empty formula; it is rather a criterion for the validity of laws, setting an imperative for social and legal policy.⁷ Thus, to the extent that not every person in fact enjoys dignity and security, we – as a society, legal policy makers or jurists⁸ – are failing to achieve what we should. Against this background, it is necessary to question how law can adequately play its role in countering such failure.

At the heart of the topic is a complex legal matrix of human dignity, distributive justice and intergenerational solidarity. This matrix can be viewed through various lenses, from social assistance law to insurance law, constitutional law, labor law, fiscal law and family law. A wide-ranging focus is intriguing and useful; yet, this short dissertation cannot feasibly encompass all of that. In its place, departing from the right to dignity and attempting to strike a balance between public and private duties of support, the dissertation will critically

² Following Professor GERMANO MARQUES DA SILVA’s advise on his last bachelor lecture in UCP, May 15th 2014 (“com a coragem de ser incómodo...”).

³ Respectively, Público, article 1671515; Renascença, article 163803; Diário de Notícias, article 1667222.

⁴ JÖNSSON, *Policy Perspectives*, 241-248.

⁵ One out of five of all older people in EU countries are at risk of poverty. ZAIDI, *Poverty Risks for Older People*, *passim*.

⁶ Arts. 1 and 3 UDHR; Arts. 1 and 6 CFR; Arts. 1 and 24 Portuguese Const..

⁷ CORTÊS, *O Princípio da dignidade humana em Kant*, 624-625. MIRANDA/MEDEIROS, *Constituição anotada*, 53.

⁸ “The legal profession should not be merely intellectual; it should also be ethical” - JHERING quoted in GARCIA, Maria da Glória, *O discurso dos direitos no discurso do direito*, 44.

examine the existence and the boundaries of a family maintenance duty towards indigent ascendants.

Maintenance obligations of adult children vis-à-vis ascendants are strikingly common throughout European civil law systems,⁹ where the right to dignity imposes correlative duties on both states and close-knit families.¹⁰ By contrast, in the Scandinavian countries and the United Kingdom, there is no legal duty amongst adult family members; support duties vis-à-vis indigent elderly are exclusively allocated to the state.¹¹ Notwithstanding this divide, there is a growing trend in the civil law countries to withdraw or curtail the maintenance obligation of descendants towards ascendants.¹² If not *de iure, de facto* – it is argued – family has been replaced by the welfare state in supporting indigent elderly and this has rendered obsolete the relevant maintenance obligation.¹³ Legal discourse further claims that the allocation of responsibility on the family spurs prejudicial socio-economic effects, such as gender and class inequalities.¹⁴

At a national level, whilst a great deal of attention has been given to the study of maintenance obligations between spouses, and of parents towards minor/adult children, the doctrine is almost completely silent with regards to maintenance obligations of adult children vis-à-vis parents. On the other side of the spectrum, the filial maintenance duty is gaining momentum in light of changing demographics, societal traditions and limited state resources. Its understanding is of the essence to better fit the changing needs of the elderly and society in general. The *vexata quaestio* is therefore should a family maintenance duty vis-à-vis the elderly exist in the Portuguese legal system? In other words, is the law adequately fulfilling its purpose when it imposes an enforceable duty vis-à-vis ascendants?¹⁵ In view of the present failure to respond to the needs of the elderly, are family maintenance duties towards ascendants part of the problem or part of the solution?

⁹ PERRY, *Family Law in Europe*, 314. OECD, *The Future of Families to 2030*, 201-202.

¹⁰ CHOQUET/SAYN, *Obligation alimentaire*, 103.

¹¹ HABERKERN/SZYDLIK, *State provision in 11 European countries*, 299-323.

¹² HENRICH, *Zur Eröffnung*, 3-4. CHOQUET/SAYN, *op. cit.*, 78.

¹³ KOLLER, *Commentaire Bâlois*, 1691-1694 as cited in MASMEJAN, *Dettes alimentaires*, 4.

¹⁴ OECD, *op. cit.*, 232, 239.

¹⁵ Hereinafter, “the maintenance duty vis-à-vis/towards ascendants” or simply “the maintenance duty”.

Through comparative analysis, the dissertation analytically studies this maintenance obligation within European civil law jurisdictions, with a particular focus on the Portuguese system. The objective is not to describe the French, German, Italian or Spanish laws in juxtaposition to the Portuguese laws, but to explore relevant aspects of such systems in relation to the subject matter. When appropriate and mostly in relation to legal policy issues, certain links are made to common law systems. Hence, the dissertation uses a multidisciplinary approach: it not only questions the black letter law, doctrine and jurisprudence, but further looks into the relevant legal cultures, legal history, philosophy and legal policies, attempting to grasp the broader context of the maintenance duty.

Thus equipped with this methodology, Chapter II begins with an introduction to the maintenance duty vis-à-vis ascendants, outlining the technical aspects of the law that are relevant to interpret the following chapters. The dissertation is then structured in a dialectic manner. As the research paper progresses, the maintenance duty is rethought in light of opposing perspectives. Whilst Chapter III overviews the current criticisms of the maintenance duty, the following Chapter sets out to challenge such claims. As this will show, the legal discourse of critics is relevant to prompt legal reform, but not legal abrogation. Finally, the dissertation concludes with the findings of compromise solutions, offered in Chapter V.

II. UNDERSTANDING THE MAINTENANCE DUTY TOWARDS ASCENDANTS

As previously mentioned, in several European civil law systems such as Portugal,¹⁶ France,¹⁷ Germany,¹⁸ Italy¹⁹ and Spain,²⁰ close-knit family members are bound by mutual obligations of maintenance. The maintenance duty is, thus, not a specific obligation towards indigent ascendants. Instead, it is a reciprocal duty between relatives, whereby any of the prescribed family members is potentially entitled to claim support from the other, provided certain circumstances of hardship and proportionality are met. Below, while establishing comparative links, such characteristics are explained with a particular focus on the Portuguese system.

1. Basis of the legal duty

Traditionally, the basis for such legal duty is the recognition and promotion of family solidarity.²¹ Several legal systems refer to "a moral obligation converted into a legal obligation",²² given the significance and particularity of the nuclear family. Indeed, the

[f]amily is a natural law society, constituted before the state and any other entity. The family holds inalienable rights as its identity, integrity, morality and liberty. It is not only a socio-legal and economic institution but also a community of love and solidarity, irreplaceable to the diffusion of ethical, social, spiritual and religious values – elements which are essential to the community and its well being.²³

Thus, it necessarily has an influence on the legal order.²⁴ In order to uphold family cohesion and to promote its social role, the family has been enshrined with constitutional protection,²⁵ giving rise to "constitutionally protected communities"²⁶ and to special civil

¹⁶ Art. 2003 *et seq.* Portuguese CC.

¹⁷ Art. 205 *et seq.* French CC.

¹⁸ § 1601 *et seq.* BGB.

¹⁹ Art. 433 *et seq.* Italian CC.

²⁰ Art. 142 *et seq.* Spanish CC.

²¹ Spanish Supreme Court ruling STS 1.3.2001 RJ 2562: "First of all, maintenance obligations are based on the principle of familiar solidarity". See as well STS 23.2.2000 RJ 1169 and STS 13.4.1991 RJ 2685.

²² CAPARROS, *L'obligation alimentaire: étude de droit interne comparé*, 287, 464.

²³ MARTINELLI, *O direito de envelhecer num país ainda jovem*, 42.

²⁴ BÉNABENT, *Droit civil*, 479.

²⁵ Art. 67 Portuguese Const.; Preamble of the 1946 French Const. received in the 1958 French Const.; Art. 6 German Const.; Arts. 29, 30 and 31 Italian Const.; Art. 39 n. 1 Spanish Const..

law norms on family status. Amongst such special norms, is the family maintenance obligation.

Accordingly, solidarity with indigent people, which stems from the concept of human dignity, assumes a higher intensity within the family realm.²⁷ As the state is obliged to support the elderly who lack sufficient resources to live with dignity,²⁸ such an obligation is also allocated at the individual level, to the family, reflecting the deeper interdependence and proximity that is considered to exist by the legal order. Here, a shift to distributional analysis on the level of the state-family relationship enables it to be noted that an additional goal of maintenance is to assure distributive justice and allocate on the family the duty to bear the financial burden of its members. In the words of LABRUSSE-RIOU, the socio-legal mandate of family solidarity is an instrument to secure existence. EU regimes play with maintenance rights, laws of succession and matrimonial regimes in order to influence the legal distribution of income, goods and estates within the family, with a view to “safeguard economic security”.²⁹

This difficult alliance between money and love gives rise to a highly peculiar legal duty that distinguishes itself from other obligations. As the maintenance obligation is integrated in a social institution (family), whose specific aims strongly impact its legal regime,³⁰ the general rules regarding obligations only apply when the particularities of family law do not demand a special treatment.³¹

2. Patrimonial right linked with personality rights

In terms of structure, the maintenance duty can be considered to be an obligation in the technical sense.³² There is a legal bond (*vinculum iuris*), by which there is a creditor

²⁶ RIBOT IGUALADA, *El fundamento de la obligación*, 1133. CANOTILHO/MOREIRA, *Constituição anotada*, 856. MIRANDA, *Sobre a relevância constitucional*, 54.

²⁷ ROGEL VIDE, *Alimentos*, 117.

²⁸ CHOQUET/SAYN, *op. cit.*, 103.

²⁹ LABRUSSE-RIOU, *Sécurité d'existence et solidarité familiale*, 834.

³⁰ VARELA, *Das obrigações*, vol. 1, 198-199.

³¹ VARELA, *ibid*, 70-71.

³² COSTA, Almeida, *Direito das Obrigações*, 84-86 and 103-104, contrasting patrimonial family rights with personal family rights. However, for VARELA, *ibid*, 70, only the autonomous legal ties should be considered obligations in the technical sense.

(*alimentista*) with the right to receive maintenance, and a debtor (*alimentante*), bound to act to fulfil the corresponding duty to provide maintenance.³³ However, in terms of function, it is dependent on its *status familiae*. It is thus a non-autonomous obligation (*relação obrigacional não autónoma*), dependent on a kinship link.³⁴

The subject matter, or performance to be tendered, is patrimonial. In contrast with personal family duties, such as the ‘duty to provide care’,³⁵ which deals only with caring duties, the maintenance obligation consists in a pecuniary or in kind payment that can be legally enforced, unlike the former.^{36, 37}

However, notwithstanding its patrimonial performance, the maintenance duty is deeply related with personality rights (*direitos de personalidade*), such as the inalienable right to life and human dignity.³⁸ Given its primary aim to safeguard minimum standards of living (*soddisfare uno stato di bisogno*), the maintenance obligation contains a common interest of public order; it does not only concern the private interests of the creditor. As CASSANO explains, *alimenti* is a private law provision of *assistencial* purpose.³⁹ Consequently, per norm, the maintenance credit is *indisponível*: irrevocable, non-seizable and not subject to set-off.⁴⁰ Moreover, in contrast with the general rule of obligations, according to which the

³³ Parallel to the definition of obligation of Art. 397 Portuguese CC. Likewise, BAUDOUIN/JOBIN/VÉZINA, *Les Obligations*, 19.

³⁴ COSTA, Almeida, *op. cit.*, 103-104.

³⁵ Art. 1874 n. 1 Portuguese CC “*respeito, auxílio e assistência*”. See Art. 371 French CC; § 1618-a BGB; Arts. 315 and 324 Italian CC; Art. 154 and 155 Spanish CC.

³⁶ VÍTOR, T., *Reflections*, 217. PINHEIRO, *O Direito*, 375-376.

³⁷ For the Spanish Supreme Court (STS 9.10.1981 EDJ 1981/1633), the maintenance obligation does not have a patrimonial nature. However, its breach triggers a (legally enforceable) pecuniary obligation.

³⁸ SERRANO ALONSO, *Manual de derecho*, 463.

³⁹ CASSANO, *Manuale del nuovo diritto*, 336. ZURITA MARTÍN, *Protección civil de la ancianidad*, 33-34.

⁴⁰ ALMEIDA, Moitinho de, *Os alimentos*, 19-20. However, the last section of n.1 of Art. 2008 Portuguese CC allows for (i) tacit waivers of the right to receive maintenance, and (ii) waivers of overdue installments. Similarly, see §1614 BGB; Art. 447 Italian CC; Art. 151 Spanish CC. In France, the courts take the view that failure to claim at the time of need constitutes a tacit waiver of the right to receive the payment (BÉNABENT, *op. cit.*, 499; OLDHAM, *Financial*, 148).

creditor may transmit the credit to a third party,⁴¹ the maintenance credit, in view of its personal link and inalienable character, as a rule, cannot be transferred or assigned.⁴²

Indeed, as previously noted, maintenance is set between obligee and obligor in consideration of the special family relationship existent between them.⁴³ The nature is thus *intuitu personae*; the duty is only to be fulfilled by the obligor himself or herself, and the right is only to be granted to the obligee himself or herself. Therefore, as a general principle throughout Portugal,⁴⁴ France,⁴⁵ Germany,⁴⁶ Italy⁴⁷ or Spain,⁴⁸ upon the demise of the creditor or of the debtor, the maintenance rights and obligations are extinguished, for the future.⁴⁹ Neither the benefit nor the burden of the obligation passes to any successor.

3. Content

The English term ‘maintenance’ or ‘alimony’ corresponds to the Portuguese or Spanish *alimentos*, the French *aliment* and the Italian *alimenti*. Alimony comes from the Latin *alimōnia* (nourishment, sustenance),⁵⁰ comprising what is essential to safeguard a life with dignity. It is, however, generally accepted that its scope goes beyond food;⁵¹ it also relates to clothing, housing, healthcare and nursing expenses.⁵² Notably, in Germany, adult

⁴¹ Art. 577 n.1 Portuguese CC; Art. 1689-1701 French CC; §398 BGB; Art. 1406 Italian CC; Art. 1526-1527 Spanish CC.

⁴² There are exceptions to this rule, such as the reimbursement rights of public institutions. For e.g., in Portugal, “*rendimento social de inserção*” (L 13/2003, 21-05 as amended by DL 133/2012, 27-06) and “*complemento solidário para idosos*” (DL 232/2005, 29-12); and in Germany, HARTZ IV, § 94 Chapter XII of the Social Assistance Code (*Sozialgesetzbuch*), even if under different conditions, all establish legal subrogation rights of public institutions: the fulfillment of the maintenance obligation by the public entity triggers its transmission to the same, instead of the extinguishment of the obligation. In contrast, Italian Social Assistance Law expressly excludes the subrogation right of public powers with regard to maintenance claims (Art. 2 n.6 DL 109, 31-03-1998 as amended by DL 30, 03-05-2000). Given the short dissertation word limitation, the thesis will not examine this topic.

⁴³ PADIAL ALBÁS, *Naturaleza jurídica*, 3.

⁴⁴ Art. 2013 n. 1 a) Portuguese CC.

⁴⁵ OLDHAM, *Financial*, 148.

⁴⁶ § 1615 of BGB.

⁴⁷ Art. 448 Italian CC.

⁴⁸ Art. 152 Spanish CC.

⁴⁹ To the extent that it is not directed at (i) performance (or damages for nonperformance) for the past, or (ii) at such performance to be made in advance as is due at the time of the death.

⁵⁰ ROGEL VIDE, *Alimentos*, 11. MENDES, Castro, *L’obligation*, 29.

⁵¹ ALMEIDA, Moitinho de, *op. cit.*, 3. CARBONNIER, *Droit civil*, vol. 2, 331. MARTINY, *Current Developments*, 65. CALGANO, *Commentario*, 600. BELTRAN DE HEREDIA, *De los alimentos*, 5.

⁵² There is resemblance in the “*sustento, habitação e vestuário*” of Art. 2003 Portuguese CC and the “*sustento, habitación, vestido y asistencia médica*” of Art. 142 Spanish CC.

children are usually requested to provide support to their elderly parents, not with the most basic resources, but rather to help face the expenses of costly nursing homes.⁵³

4. Prerequisites for the duty to arise; needs/means proportionality test

In contrast with maintenance obligations originating from agreements,⁵⁴ the maintenance duty is an involuntary obligation, which arises whenever the statutory prerequisites are met. Across the different legal systems, for the obligation to arise *ope legis*, three cumulative prerequisites must be observed: (i) existence of kinship; (ii) state of need of the right holder (*Bedürftigkeit*); and (iii) ability to pay of the duty bearer (*Leistungsfähigkeit*).⁵⁵

4.1 Existence of kinship link between obligee and obligor

The maintenance duty is independent from the domestic household; it is triggered instead by the existence of a kinship link.⁵⁶ There is a direct correlation between degree of kin proximity and degree of duty. By the same token the kinship degree lessens, so do the family obligations; the further the kinship degree, the less relevance provided to the duty. Ultimately it disappears, giving rise to the public obligation of support.

The sociological concept of 'close kin' varies widely. Therefore, there is a considerable disparity between legal systems in relation to the extent of the circle of debtors. In the Netherlands⁵⁷ and Belgium,⁵⁸ it is limited to parents and children, i.e., to first degree lineal relatives. In Germany,⁵⁹ it relates to ascendants and descendants without limitation of degree. Beyond ascendants and descendants, in France⁶⁰ and Italy,⁶¹ the duty extends to in-

⁵³ As an illustration, see the following cases: BGH 12.02.2014 XII ZB 607/12; BGH 21.11.12 XII ZR 150/10.

⁵⁴ Art. 2014 Portuguese CC is parallel to Art. 153 Spanish CC. Further, see CARBONE *et al.*, *Codice Civile annotato*, 433.

⁵⁵ Art. 2004 Portuguese CC; Art. 208 French CC; §§ 1602, 1603 and 1610 BGB; Arts. 438 and 439 Italian CC; Art. 146 Spanish CC.

⁵⁶ HEGNAUER, *Familiäre Solidarität*, 191. BELTRÁN DE HEREDIA, *op. cit.*, 18-19.

⁵⁷ Art. 392, Book 1, Dutch CC.

⁵⁸ Art. 205 Belgian CC.

⁵⁹ § 1601 BGB.

⁶⁰ Art. 206 French CC.

⁶¹ Art. 433 Italian CC.

laws, while in a few countries, such as Portugal,⁶² Italy⁶³ and Spain⁶⁴ it extends to collaterals.

However, the existence of a kinship link does not alone trigger the duty. Across the different legal systems, a duty of maintenance between close kin only arises provided that a ‘needs-ability test’ confirms its adequacy. Throughout Portugal, France, Germany, Italy or Spain,⁶⁵ the common rationale is that the *quantum* must be proportional to the *economic capacity of the obligor* and to the satisfaction of the *needs of the obligee*. On the other hand, the diverging point is the method to assess such *quantum*. Certain systems opt for the individual justice of the discretionary method, whilst others prefer the transparency and certainty of standardization.⁶⁶ Thus, in contrast with the standardized court guidelines of Germany’s Düsseldorf table,⁶⁷ in Portugal,⁶⁸ France,⁶⁹ Italy⁷⁰ and Spain,⁷¹ maintenance is traditionally calculated on a case-by-case basis.⁷²

4.2 State of need of the obligee

Accordingly, the *state of need*, i.e., the insufficiency of basic resources to live with dignity, is not a mathematical notion, but an elastic concept that is to be determined by judicial discretion. Multiple circumstances, such as health conditions, life standards and cultural level, are taken into account and weighed up in the particular context in order to safeguard an adequate and fair assessment.⁷³

⁶² Art. 2009 Portuguese CC.

⁶³ Art. 433 Italian CC.

⁶⁴ Art. 143 Spanish CC.

⁶⁵ LIMA/VARELA, *Código civil anotado*, vol. V, 581; CARBONNIER, *Droit civil*, vol. 2, 329-331; MARTINY, *Family Law*, 266; CASSANO, *op. cit.*, 358; ZURITA MARTÍN, *op. cit.*, 39, respectively.

⁶⁶ MARTINY, *Current Developments*, 70-71.

⁶⁷ SCHWAB, *Familiäre Solidarität*, 44-54.

⁶⁸ MARQUES, R., *Algumas notas*, 186-187.

⁶⁹ MARTINY, *Current Developments*, 71.

⁷⁰ STEWART, *Family law*, 228.

⁷¹ BERROCAL LANZAROT, *Consideraciones generales*, 2356. See STS 5.10.1993 RJ 1993, 7464.

⁷² While being subject to more or less quantified criteria, the decision is left to judicial discretion.

⁷³ SERRA, Vaz, *Obrigaç o de alimentos*, 97. MARQUES, R., *Em torno do estatuto da pessoa idosa*, 191.

Moreover, in Portugal, France, Italy or Spain,⁷⁴ the *negligence* of the creditor is not taken into account in the assessment of the state of need. In other words, if the state of need is attributable to the unintended actions of the obligee (e.g., alcoholism or drug addiction that is not intended to trigger the state of need), he or she is still entitled to support. Legal discourse notes that “it is irrelevant that a claimant's impoverishment may be entirely the result of his or her own fault”,⁷⁵ however, where misconduct does not result in the unfeasibility of the creditor to secure his or her existence, there is, in fact, no state of need and no maintenance credit.⁷⁶ By contrast, where wilful misconduct (e.g., intentional prodigality) triggers a state of need, this dissertation considers that the figure of misuse of right (*abuso do direito*) may be applicable and block the maintenance credit.⁷⁷ Similarly, in Germany, pursuant to § 1611 BGB n. 1 “if the person entitled to maintenance has become indigent as a result of his moral fault”, maintenance is owed “only in the amount that is equitable”.⁷⁸ Ultimately, the existence of fault may extinguish the obligation should it be “grossly inequitable for the person liable for maintenance to be claimed on”.

4.3 Ability to pay of the obligor

An additional prerequisite is the obligor's ability to provide maintenance, taking into consideration his or her own needs and means.⁷⁹ In the assessment of the available resources, first and foremost, one's own existence is to be secured.⁸⁰ Then, other obligations of the so-called *sandwich generation* are valued, especially maintenance duties towards a minor child or spouse, which take priority – throughout Portugal,⁸¹ France,⁸²

⁷⁴ For Portugal, see SERRA, Vaz, *ibid*, 99 and MARQUES, R., *ibid*, 191-192; France, see OLDHAM, *Finacial*, 146; Italy see AULETTA, *Il Diritto*, 93; Spain, see Art. 148.1 CC and BERROCAL LANZAROT, *op. cit.*, 2374.

⁷⁵ OLDHAM, *Finacial*, 146. MARQUES, R., *ibid*, 191-192.

⁷⁶ BERROCAL LANZAROT, *op. cit.*, 2357: “the judge should analyse not only whether or not the subject lacks means of support, but also whether or not he or she has an effective manner to secure those means”.

⁷⁷ Article 334 Portuguese CC. Likewise, MASMEJAN, *op. cit.*, 43.

⁷⁸ The amount that is equitable may be the full amount. See BGH 21.11.12 XII ZR 150/10.

⁷⁹ SERRA, Vaz, *op. cit.*, 97. See para. 1 of BVerfG 1 BvR 1508/96 7.6.2005. See MARTINEZ RODRÍGUEZ, *Los Mayores como Beneficiarios de Prestaciones Familiares*, 115.

⁸⁰ See para. 56 of BVerfG 1 BvR 1508/96 7.6.2005. SERRA, Vaz, *op. cit.*, 92.

⁸¹ Art. 2009 n. 1 and 2 Portuguese CC.

⁸² In France, in the absence of a legal provision, doctrine and jurisprudence distinguish two family circles: a first circle of enhanced obligations (between spouses and of parents towards minor children); and a second circle, with less intense obligations (where maintenance vis-à-vis ascendants is included), which are trumped by the latter circle. BÉNABENT, *op. cit.*, 491.

Germany,⁸³ Italy⁸⁴ and Spain.⁸⁵ All in all, the support provided to ascendants should not only be adequate and necessary, but also proportional in the strict sense. If sacrifice is found to be excessive in light of a cost-benefit analysis, the prerequisite of the available means is not fulfilled and the obligation does not arise.

Therefore, in addition to kinship, there is a two-fold limit: the maintenance should not exceed what is necessary for the creditor to receive, nor what is reasonably possible for the debtor to pay.⁸⁶

In Portugal,⁸⁷ France,⁸⁸ Germany,⁸⁹ Italy⁹⁰ or Spain,⁹¹ should the amount of maintenance that falls on obliged family members not be sufficient to eliminate the state of need, the duty is transferred to the state, given the public responsibility to organise a welfare system capable of protecting citizens in illness and old age.⁹² Thus, to fill-in the gap, at the default of private support, the state intervenes with subsidiary maintenance payments that are primarily a private responsibility.⁹³

Depending upon need on the one hand, and ability to pay on the other, the *quantum* of the statutory right to receive maintenance is flexible, and may be varied from time to time.⁹⁴ In other words, the proportionality should be maintained throughout the term of the maintenance payment: the payment shall be reduced, suppressed or increased according to

⁸³ §1609 BGB.

⁸⁴ Art. 442 Italian CC.

⁸⁵ Art. 152.2 Spanish CC.

⁸⁶ MENDES, Castro, *op. cit.*, 12. ZURITA MARTÍN, *op. cit.*, 39.

⁸⁷ Art. 63 n. 2 Portuguese Const.; LIMA/VARELA, *op. cit.*, vol. V, 581. MIRANDA/MEDEIROS, *op. cit.*, 647.

⁸⁸ CHOQUET/SAYN, *op. cit.*, 103.

⁸⁹ MARTINY, *Current Developments*, 82.

⁹⁰ Art. 38 Italian Const.; CASSANO, *op. cit.*, 336.

⁹¹ Art. 41 Spanish Const.; SERRANO, *op. cit.*, 457.

⁹² In this context, while some social welfare benefits are always available provided certain requirements are met, other social welfare benefits are based on supplementary support systems, which are “dependent on the available income of the welfare recipient and can only be claimed in the event of a default of private support”. See MARTINY, *Current Developments*, 82.

⁹³ MENDES, Castro, *op. cit.*, 6. In France, there is an express provision attributing priority to maintenance: Art. L132-6 CASF.

⁹⁴ PERRY, *op. cit.*, 315.

the increase or reduction in the needs of the elderly and the wealth of the descendant obliged to satisfy it.⁹⁵

5. *Exceptions to reciprocity*

In Portugal,⁹⁶ France,⁹⁷ Germany⁹⁸ and Spain,⁹⁹ the norm is to find an exception or *déchéance* clause that allows the judge to reduce or suppress the obligation, whilst taking into consideration the violation of family duties by the obligee. Thus, those who have failed to fulfil their parental role, or who have committed any of the causes of disinheritance, are not eligible for support from their children.

It is important to note that this exception applies to the *obrigação alimentar* or *dette alimentaire*, i.e., the reciprocal¹⁰⁰ obligations between relatives; it does not apply to the unilateral *dever de sustento*¹⁰¹ or *obligation d'entretien*,¹⁰² which are directed towards the maintenance of minor children and are not the object of this study.

6. *Form of payment*

As a rule, the maintenance obligation is a pecuniary obligation paid monthly. However, in several European legal systems,¹⁰³ the law allows for maintenance to be provided "in the household and in the company" of the debtor, on a voluntary basis,¹⁰⁴ when the latter cannot afford to pay it.

⁹⁵ In Portugal, Art. 2012 CC, Art. 988 CPC. In France, Art. 209 CC. In Germany, §323 CPC. In Italy, Art. 440 CC. In Spain, Art. 147, Art. 152 n. 2 and 3 CC.

⁹⁶ Art. 2013 n. 1 c) Portuguese CC.

⁹⁷ Art. 207 French CC. Further, Civ. 1^e, 18.01.2007, Bull. Civ. I n.25 and CORNU, *Droit civil*, 230.

⁹⁸ § 1611 BGB.

⁹⁹ Art. 152 Spanish CC.

¹⁰⁰ Indeed, there is an element of *reciprocity* that French (Art. 207 French CC) and Spanish (Art. 143 Spanish CC) note as a characteristic of maintenance. In Portugal, "*reciprocity*" was referred in Art. 172 Portuguese CC of 1867; today, it is a distinctive aspect of maintenance only to a certain extent (LIMA/VARELA, *op. cit.*, vol. V, 597), given the unilateral maintenance obligations established in Art. 2009 n. 1 e) and f) Portuguese CC.

¹⁰¹ Art. 1878 and 1885 Portuguese CC. Parents can be exonerated as *per* Art. 1896 and 1879 Portuguese CC.

¹⁰² Art. 203 French CC.

¹⁰³ Art. 2005 n. 1 and 2 Portuguese CC; Art. 210 French CC; § 1612 BGB; Art. 443 Italian CC; Art. 149 Spanish CC.

¹⁰⁴ Indeed, payment in kind, by receiving the parent in the household, for a multitude of socio-psychological factors should only be considered on a voluntary basis. See HEGNAUER, *op. cit.*, 191.

7. *Plurality of debtors*

The Portuguese legal system,¹⁰⁵ in a similar fashion to the German,¹⁰⁶ Italian¹⁰⁷ or Spanish¹⁰⁸ legal systems, establishes a hierarchical classification of liable relatives, comparable to the one contained in the law of succession, where close relatives are liable before more distant family members.¹⁰⁹ Family members are obliged in the following order: first, the spouse or former spouse; next, descendants (without limitation of degree); ascendants (without limitation of degree); and then, subsequently, brothers and sisters.¹¹⁰

Descendants and ascendants are liable in accordance with the priority rank of inheritance rights, i.e., first children, then grandchildren, and afterwards, parents.¹¹¹ The person with the obligation next in line can only be held liable if the previous one did not fulfil the prerequisites for the duty to arise, or if he or she did so without completing the full amount of support needed.

Pursuant to Article 2010 Portuguese CC, in the event of several obliged parties, each party will be liable in proportion to their share as legitimate heirs of the maintenance right holder. If any of the obliged parties cannot fulfil their respective share, the others will be obliged in that remaining amount, to the extent of their possibilities. LIMA/VARELA praise the Portuguese solution in detriment of the Italian one,¹¹² which leaves the assessment open, with no indication of mandatory criteria to follow, besides “in the proportion of the economic resources of each party” to be assessed on a case-by-case basis.

Indeed, the Portuguese CC offers more certainty and the use of inheritance rules gives effect to the principle of reciprocity. However, it is not clear whether it is fairer. Let us consider the example of three brothers: two are middle class with minor children to

¹⁰⁵ Arts. 2009 n. 2, 2133 and 2135 Portuguese CC.

¹⁰⁶ §§ 1606, 1609 n. 1 and 2 BGB.

¹⁰⁷ Arts. 441 and 442 Italian CC.

¹⁰⁸ Art. 144 Spanish CC.

¹⁰⁹ Contrasting with the French legal system, where the *Cour de Cassation* has refused a fixed order of priority by reference to law of succession. See OLDHAM, *Financial*, 144.

¹¹⁰ This analysis only refers to liable relatives of maintenance towards an elderly person/ascendant.

¹¹¹ Arts. 2134 and 2135 Portuguese CC. There is rank preference (descendants are liable before ascendants), and a preference of degree within the rank (children are liable before grandchildren; parents are liable before grandparents).

¹¹² Art. 441 Italian CC.

provide for; the third brother is a multi-millionaire, single, with no children. The two middle class brothers, even after fulfilling the other primary maintenance obligations, are still considered to have enough resources to provide for the indigent elderly parent. Thus, all the three brothers qualify as 'obliged parties' with enough resources to provide for the vulnerable parent. Pursuant to Article 2010 Portuguese CC, the allocation of responsibility between the three obliged brothers will then be judicially assessed with the equal inheritance rights' criteria. Consequently, the three brothers will provide maintenance at the same percentage, which will be disproportional to their respective wealth. In addition, considering that usually an indigent elderly does not have an abundant patrimony to transmit, ultimately, reciprocity does not guarantee distributive justice. Conversely, in the Italian case-by-case method, judicial discretion would assess maintenance "in the proportion of the economic resources of each party", which would take into account the different levels of prosperity and maintenance responsibilities of each brother.

Clearly, the conflict between both solutions underlies a tension amid certainty and fairness. Article 145 Spanish CC and - remarkably¹¹³ - § 1606 n. 3 BGB, which are parallel to Article 441 Italian CC, choose the latter. By the same token, this dissertation proposes that it would be more advantageous for the Portuguese law to include the inheritance portion as one of the possible criteria, but not as the first sole criteria, thus determining a basis of contribution that might not be the fairest.¹¹⁴

Finally, with regard to the plurality of debtors, it should be stressed that, pursuant to Portuguese, German, Italian and Spanish law,¹¹⁵ there is no joint liability system (*solidariedade passiva*), where each party is to be held liable up to the full amount of the obligation.¹¹⁶ Accordingly, relatives are not jointly liable but *pro rata* in accordance with their property and income. This solution finds unanimous support in the Portuguese literature.¹¹⁷ Indeed, as MOITINHO DE ALMEIDA asserts, each party should only be held liable

¹¹³ Considering that German law is traditionally more "certainty" oriented, is the Portuguese law being more papist than the Pope?

¹¹⁴ Similarly, see SERRA, Vaz, *op. cit.*, 82, 85.

¹¹⁵ Pursuant to 2010 n. 2 Portuguese CC, 1606 n. 3 BGB, Art. 441 Italian CC, Art. 145 Spanish CC.

¹¹⁶ Having paid beyond his or her share, the party would then have a *pro rata* claim ("direito de regresso") against the other debtors to be reimbursed.

¹¹⁷ LIMA/VARELA, *op. cit.*, vol. V, 596; SERRA, Vaz, *op. cit.*, 83, 126; MARQUES, R., *Em torno*, 193; ALMEIDA, Moitinho

up to the amount of the respective available means.¹¹⁸ Furthermore, joint liability is exceptional,¹¹⁹ and therefore, if not established, it should not be presumed.

Notwithstanding, in the Portuguese system, relatives are also not 'purely' severally liable (*conjuntamente solidários*):¹²⁰ within the pool of obliged parties and within the limits of the abilities of the given party, one might have to respond for the debt of another party.¹²¹ In this way, between the relationship of obliged parties, there is a peculiar mix of 'joint liability within the limits of the available resources of each party'. This peculiar solution seems to safeguard both the pressing interest of the creditor (right to dignity) and the interest of the debtor (fair allocation of responsibility). Likewise, in modern France, regarding the plurality of debtors towards an ascendant, the majority of legal discourse argues that relatives should be jointly liable "taking into account the respective resources of each (party)".¹²²

de, *op. cit.* 28; MENDES, Castro, *op. cit.*, 75.

¹¹⁸ ALMEIDA, Moitinho de, *op. cit.*, 28.

¹¹⁹ Article 513 Portuguese CC.

¹²⁰ With a opposite view, ALMEIDA, Moitinho de, *op. cit.*, 28.

¹²¹ MARQUES, *Em torno*, 193-194.

¹²² OLDHAM, *Financial*, 145. PADIOL ALBÁS, *Naturaleza jurídica*, 15.

III. A CRITIQUE OF THE MAINTENANCE DUTY

There is a growing trend of legal discourse throughout civil law and common law countries¹²³ which is critical of the maintenance duty vis-à-vis ascendants. At the extreme end, certain authors claim that the legal duty should be abolished *tout court*, while others claim the disempowerment of its coercive nature. Below, the paper explores the various criticisms with a focus on European continental systems.

1. *Law in the books vis-à-vis law in action*

One of the major criticisms of the current maintenance laws towards the elderly is the gap that exists between the 'law in books' ("*le droit tel qu'il devrait être*") and the 'law in action' ("*le droit tel qu'il est*").¹²⁴ Even though maintenance obligations vis-à-vis ascendants are widespread, their practical private enforcement is nearly non-existent.¹²⁵ In fact, maintenance claims of ascendants vis-à-vis descendants are scarce in sharp contrast with maintenance claims of minor/adult children vis-à-vis their parents.¹²⁶

Against this background, some legal authors assert that maintenance laws vis-à-vis ascendants no longer square with social reality.¹²⁷ It is claimed that the law lacks social-psychological guarantee, running counter to expectations of individuals. First, elderly people are unwilling to litigate against their descendants.¹²⁸ In general terms, they do not wish to be a burden on their children; and are usually more concerned about continuing their lineage and family values.¹²⁹ Even if willing to receive spontaneous help, they resent the idea of persecuting their children for maintenance. The adversarial precept is destructive of family relationships and the publicity it entails, bringing into public scrutiny the family's ability and willingness to care for one another, further raises the emotional

¹²³ Filial responsibility laws, existent throughout the U.S.A. and Canada, are widely criticized. See BRITISH COLUMBIA LAW INSTITUTE, *Report on the parental support*, 15-18. WISE, *Caring for our parents*, 562-563, 591. BRITTON, *America's*, 351. NARAYANAN, *The Government's*, 375-385.

¹²⁴ MASMEJAN, *op. cit.*, 1.

¹²⁵ MARTINEZ RODRÍGUEZ, *op. cit.*, Chapter V, 119-120. MARTINY, *Current Developments*, 69.

¹²⁶ RIBOT IGUALADA, *op. cit.*, 1140. ZURITA MARTÍN, *op. cit.*, 38.

¹²⁷ BANZER, *Die Verwandtenunterstützungspflicht* as cited in MASMEJAN, *op. cit.*, 12. LANDFERMANN, *Der kreis der Unterhaltspflichtigen*, 517-523.

¹²⁸ MARTINEZ RODRÍGUEZ, *op. cit.*, 119-120.

¹²⁹ IGUALADA, *op. cit.*, 1141.

cost.¹³⁰ Thus, the indigent elderly look elsewhere – or nowhere – for support, rejecting any measure that would spur family conflicts.

Second, the coming of the welfare state fundamentally contributed to a shift of mentalities.¹³¹ Public pensions and social services have decreased levels of poverty amongst elderly people and thus decreased their state of need,¹³² which, as shown above, is a prerequisite for legal maintenance. Some authors claim that, as a consequence, support for the aged has become a societal responsibility rather than a family obligation.¹³³ As a result, the law is simply disregarding reality when prescribing that an elderly person will claim family support before reaching for social support.¹³⁴

Third, the family has undergone a transition from a family within its widest meaning to a nuclear family and it is claimed that maintenance laws have not followed suit. The law is thus considered to be excessively ambitious, locked in a framework that is much closer to the pioneer agricultural society of our past, than to the typically urban society of the twentieth-century.¹³⁵

2. *Legal policy concerns*

Hence, from a legal policy perspective, litigation is seen as an expensive and inappropriate way to reduce poverty¹³⁶ and its adversarial nature is considered to be destructive of familial ties.¹³⁷ In this sense, certain authors note that enforcing family financial support may eliminate the potential for a wide-ranging scope of voluntary family support. Undeniably, family responsibilities are not confined to legally enforceable obligations.¹³⁸ Expressions of love and care, such as a daily phone call or a weekly visit, are far beyond

¹³⁰ WISE, *op. cit.*, 576.

¹³¹ OLDHAM mentions “a gradual distancing between individuals” in *Finacial*, 135. RIBOT IGUALADA, *op. cit.*, 1142.

¹³² RODRÍGUEZ, *op. cit.*, Chapter V, 119-121. CORDEIRO, M., mentions the lack of relevance of maintenance obligations given the evolution of the welfare state (*Das obrigações naturais*, 521).

¹³³ HENRICH, *op. cit.*, 3-4.

¹³⁴ WIDMER, *Verhaltnis*, 1-2.

¹³⁵ LANDFERMANN, *op. cit.*, 517-523.

¹³⁶ BRITTON, *op. cit.*, 370-371. OLDHAM, *Maintenance of the Elderly*, 230.

¹³⁷ ALLAN, *Will*, 11. WISE, *op. cit.*, 576.

¹³⁸ LIND/KEATING/BRIDGEMAN, *Taking Responsibility, Law and the Changing Family*, as cited in VÍTOR, T., *Reflections*, 216.

legal coerciveness. However, when support is compelled, “the fuller sense of responsibility is lost, for the behaviour, while remaining a responsibility, is now a legal duty”.¹³⁹

Further, it is argued that maintenance laws do not promote the independence and autonomy of elderly people, who are, instead, made to feel as a burden on their families.¹⁴⁰ The advantages of allocating responsibilities to the state thus include safeguarding the independence of seniors and “the redistribution of wealth, via the state, to those in greatest need”.¹⁴¹

Last but not least, an additional concern with filial maintenance laws is related to social and gender inequalities.¹⁴² In this light, OECD recent studies¹⁴³ indicate that excessive family obligations vis-à-vis ascendants prompt prejudicial socio-economic effects. Firstly, maintenance obligations towards ascendants tend to predominantly hit individuals who have low incomes themselves. Thus, when individuals from low-income groups achieve moderate prosperity, they are pushed back to the level of subsistence on account of the financial burden of maintenance.¹⁴⁴ This will be reflected in lower pension incomes in the future and greater dependency on family members in later life. Hence, poverty in old age can result in a family poverty trap, whilst the legal maintenance obligation tends to perpetuate class inequality in society.¹⁴⁵

Secondly, family care and support is highly gendered.¹⁴⁶ The burden of financially supporting elderly parents falls more heavily on some children than others, most commonly on daughters.¹⁴⁷ “The pattern of women taking disproportionate responsibility for care is so well established that it is largely taken for granted, often not noticed, and, when noticed, seen as natural”.¹⁴⁸ In this way, the allocation of responsibility in the family “facilitates the continuation of gendered role divisions and frustrates the egalitarian

¹³⁹ EEKELAAR, *Family law and personal life*, as cited in VÍTOR, T., *Reflections*, 216.

¹⁴⁰ In 2003 Alberta repealed its filial responsibility law with such basis. ALLAN, *op. cit.*, 12.

¹⁴¹ OLDHAM, *Financial*, 163. HERRING, *Together*, 53.

¹⁴² GRAMAIN/WITTEWER, *Obligation Alimentaire*, 209-210. RIBEIRO, *Processos de Envelhecimento*, 211.

¹⁴³ OECD, *op. cit.*, 232, 239.

¹⁴⁴ BRUDERMÜLLER, *Solidarität und Subsidiarität*, 129, 132-134.

¹⁴⁵ OECD, *op. cit.*, 232, 239. GRAMAIN/WITTEWER, *op. cit.*, 209-210.

¹⁴⁶ TOMÉ, *Qualidade*, 55 and *Family Law*, 323.

¹⁴⁷ OECD, *op. cit.*, 232, 239.

¹⁴⁸ GLENN, *Forced to care*, 184.

ideal”.¹⁴⁹ Likewise, the financial responsibility can reinforce gender *economic* inequalities,¹⁵⁰ which may be prolonged into old age, with women having a much higher risk of poverty in old age.¹⁵¹

Strikingly, as demographic changes are notably increasing support responsibilities, “there is a danger that families will continue to be “taken for granted” in the attempt to keep (the public) costs down”.¹⁵² However, in the light of changing patterns, studies show that “families will not be able to continue to support the elderly to the extent that they have historically”.¹⁵³

3. Removing the (enforceability of the) legal duty

In this context, BRUDERMÜLLER,¹⁵⁴ LANDFERMANN,¹⁵⁵ SCHWENZER¹⁵⁶ and RIBOT IGUALADA¹⁵⁷ assert that the maintenance legal duty towards ascendants is an unjustified intrusion of public powers in family life and should therefore be abolished.

In turn, MASMEJAN argues that in view of the symbolic relevance of the law, the maintenance duty should be structured with a new legal shape – as a *natural obligation*,¹⁵⁸ which recognizes its legal basis but does not imply a right to compel performance.¹⁵⁹ That is, the maintenance duty would be converted into an unenforceable obligation. In this way, the psychological and pecuniary costs of judicial claims would be set aside,¹⁶⁰ the space for amicable agreements would increase, and the symbolic function of the legal duty would be maintained.

¹⁴⁹ TOMÉ, *Family Law*, 340.

¹⁵⁰ FOLBRE, *Annual Symposium*.

¹⁵¹ OECD, *op. cit.*, 232, 239.

¹⁵² SALVAGE, *Who will care?*, 61.

¹⁵³ OLDHAM, *Maintenance of the Elderly*, 217.

¹⁵⁴ BRUDERMÜLLER, *op. cit.*, 135.

¹⁵⁵ LANDFERMANN, *op. cit.*, 522.

¹⁵⁶ SCHWENZER, *Verwandtenunterhalt*, 689.

¹⁵⁷ RIBOT IGUALADA, *op. cit.*, 1149, develops an argument in regards to legal subrogation by the public powers, which is not in the scope of the thesis given the word limitation.

¹⁵⁸ Art. 402 Portuguese CC.

¹⁵⁹ MASMEJAN, *op. cit.*, 48-50. VARELA, *Das obrigações*, vol. I., 720. CORDEIRO, M., *op. cit.*, 532-533.

¹⁶⁰ MASMEJAN, *op. cit.*, 49.

Let us consider that possibility and briefly outline the relevant legal regime. In the words of GEORGES RIPERT, we would be entering “in a nether region of the law, between night and day”,¹⁶¹ roaming between the positive law on one side and moral law on the other. The maintenance duty would not be a *stricto sensu* obligation, as it would lack enforceability,¹⁶² but at the same time, it would not be a moral obligation, bereft of legal effects.

To illustrate this, while the obligation to provide support to a feeble homeless person may be morally binding,¹⁶³ if that homeless person was your grandparent the natural obligation of maintenance would not be merely binding in “*le for de la conscience*”;¹⁶⁴ it would correspond to an imperative of justice and have certain secondary effects of an obligation.

A common legal effect throughout civil law systems¹⁶⁵ is that no recovery would be permitted with the voluntarily paid natural obligation; that is, the creditor/grandparent would have the right of *soluti retentio*.¹⁶⁶

Even if the debtor would comply with the natural obligation under the false assumption that he or she was legally bound to comply, the *soluti retentio* would still apply. For instance, French jurisprudence¹⁶⁷ has recognised the existence of a natural obligation of maintenance in the case of a brother who provides support to his sibling, mistakenly believing he was legally bound to do so¹⁶⁸ (since collaterals are not legally obliged to provide maintenance in France). Likewise, in Portugal, Article 403 of the Portuguese CC establishes that the mistake concerning the enforceability of the obligation does not constitute a motive for annulment of the same.¹⁶⁹ Thus, even when a mistake in the

¹⁶¹ RIPERT, *A regra moral nas obrigações civis*, 366.

¹⁶² ZIMMERMANN, *The Law of Obligations*, 7.

¹⁶³ Under Portuguese law it would give effect to a “donation in accordance with mores”, Art. 940 n. 1 and 2 Portuguese CC. See VARELA, *Das obrigações*, vol. I, 724.

¹⁶⁴ POTHIER, *A Treatise*, 2 n.(a). RIPERT, *op. cit.*, 390.

¹⁶⁵ Art. 403 and 476 n. 1 Portuguese CC; Art. 1235 French CC; § 814 BGB; Art. 2034 Italian CC; Art. 1901 Spanish CC.

¹⁶⁶ LEITÃO, Menezes, *Direito*, 111.

¹⁶⁷ In France natural obligations are dictated by jurisprudence (CARBONNIER, *Droit civil*, vol. 4, 33). By contrast, in Germany, natural obligations are exhaustively enumerated in law. In a middle way solution, the enumeration of natural obligations in Portugal is illustrative (given its general character pursuant to Article 402 CC (RC 03.12.2009, Proc. 4371/07 and VARELA, *Das obrigações*, vol. I, 723). Conversely, see CORDEIRO, M., *op. cit.*, 531-532.

¹⁶⁸ Civ. 1^o, 23.01.2001.

¹⁶⁹ VARELA, *Das obrigações*, vol. I., 729.

formation of the intention¹⁷⁰ would occur, the debtor would not be entitled to reclaim the payment, because such support would correspond to a natural obligation.¹⁷¹

Indeed, in civil law, a provision that lacks *cause* can be reclaimed to the patrimony of the one who made it. However, the fulfilment of the natural obligation is considered to be a *just cause* for the transfer of property, since it is in accordance with a duty of justice; therefore, it does not produce an undue enrichment in the creditor's patrimony.¹⁷² Thus, what has been freely performed in compliance with a natural obligation may not be reclaimed.

Lastly, it should be noted that the fulfilment of a natural obligation of maintenance would not be a payment because the correlative credit is not legally owed;¹⁷³ neither would it be a donation¹⁷⁴ since the one who complies with a natural obligation does not do it through mere liberality, through the mere legal consciousness of "*animus donandi*".¹⁷⁵ On the basis of the fulfilment, there would be, instead, the legal consciousness of fulfilling an obligation correspondent to an imperative of justice.¹⁷⁶

¹⁷⁰ Art. 251 Portuguese CC.

¹⁷¹ Assuming that the (in)existence of a legal duty is recognizable by persons of normal diligence, and provided that the creditor did not contribute to the referred mistake. LIMA/VARELA, *op. cit.*, vol. I, 353.

¹⁷² LEITÃO, Menezes, *Direito*, 130.

¹⁷³ RIPERT, *op. cit.*, 390.

¹⁷⁴ LIMA/VARELA, *op. cit.* Vol. I, 352.

¹⁷⁵ ESCOBAR, *Natural*, 312.

¹⁷⁶ RC 03.12.2009, Proc. 4371/07.

IV. A DEFENCE OF THE MAINTENANCE DUTY

On the other side of the spectrum, there is an undeniable shortage of recent legal doctrine analysing the legal validity of the maintenance duty of descendants towards ascendants in light of present socio-demographic changes. This fact greatly contrasts with the widespread survival of the maintenance duty. In view of the practical problems, enforcement issues and legal policy concerns, what explains the endurance of maintenance towards ascendants? Is it simply because of a conservative bias or, perhaps, a *laissez-faire* attitude of jurists?

Indeed, *legal* abrogation often does not coincide with *social* abrogation.¹⁷⁷ It is common for pictures of an ideal social order that come to enter into the law to be “idealized pictures of the social order of the past, undergoing a gradual process of retouching with reference to details of the social order of the present”.¹⁷⁸ However, after deeper analysis, it becomes apparent that there are more pieces to the puzzle. The chapter below will examine several possible reasons for the legal validity of maintenance towards ascendants, in spite of contemporary criticisms.

1. Promoting a valid and just principle of family solidarity, with prudence

To begin with, it is crucial to understand that the fairness of the duty of adult children vis-à-vis indigent ascendants is found in the basis of (a) the principle of human dignity, in relation with (b) the recognition and promotion of family solidarity, which is to be pursued (c) with the reasonability of a needs/means test.¹⁷⁹

The maintenance duty only arises as a mechanism of last resort, to protect the human dignity of close kin, in situations of extreme vulnerability or marginalization, where the proximity of the relationship triggers a special legal status.¹⁸⁰ The respect for every person as an end in itself *in connection* with the proximity of family relationships is what triggers

¹⁷⁷ CARBONNIER, *Droit flexible*, 73-77. “Il arrive qu’une loi nouvelle ne fasse que mettre en texte un changement déjà acquis dans les mœurs depuis belle heurette”.

¹⁷⁸ POUND, *The Ideal Element in Law*, 124.

¹⁷⁹ Pursuant to Art. 2004 Portuguese CC; Art. 208 French CC; §§ 1602, 1603 and 1610 BGB; Arts. 438 and 439 Italian CC; Art. 146 Spanish CC.

¹⁸⁰ ROGEL VIDE, *Alimentos*, 117.

the reciprocal duty for support. In this way, the 'moral goodness'¹⁸¹ of the duty is widely acknowledged and several legal systems consequently refer to "a moral obligation converted into a legal obligation".¹⁸²

Moreover, family solidarity is an important part of the glue that holds society together; close-knit family relations provide enormous benefits to society and to individuals themselves.¹⁸³ They are one of the key determinants of social cohesion and individual well-being, as there is no shortage of studies that prove the significance of family in mental health and general happiness in old age and indeed at all ages.¹⁸⁴ In this context, maintenance laws (that do not demand too much from individuals) do promote desirable legal policies: family cohesion and solidarity. Not only does the existence of maintenance laws reinforce convictions of family solidarity but also, as OLDHAM¹⁸⁵ explains, the existence of economic ties further promotes cohesion:

it is inevitable that we prioritise, and focus most of our attention on, those matters that are our responsibility. It follows, therefore, that the removal of financial responsibility for another person entails as a consequence not only a relaxation of concern, but also a gradual distancing between the two people involved. This loosening of ties is completely natural - it occurs, to a greater or lesser degree, when adult children achieve economic independence.

In other words, the maintenance duty vis-à-vis ascendants is not a Machiavellian intrusion into family life with the mere purpose of saving public funds.¹⁸⁶ On the contrary, it looks to safeguard human dignity and family solidarity, which are valid legal policy ideals to pursue. Obviously, such solidarity should be invoked with prudence.¹⁸⁷ As it will be further analysed, in order for a maintenance legal duty to be justifiable, principles of distributive justice must apply. Moreover, the underlying rationale is never to demand excessive sacrifices from family members, but *only* what one can and should proportionally provide. This is clear from an adequate reading of maintenance, particularly, the 'needs-abilities

¹⁸¹ MARTINEZ RODRÍGUEZ, *op. cit.*, III, 114. CHOQUET/SAYN, *op. cit.*, 61.

¹⁸² CAPARROS, *op.cit.*, 287. HERRING analyses several moral motives for the filial duty (*op. cit.*, 47-51).

¹⁸³ MARTINELLI, *op.cit.*, 42.

¹⁸⁴ BENGTON, *Beyond*, 1-16.

¹⁸⁵ OLDHAM, *Financial*, 135.

¹⁸⁶ As some proponents of the economic legal theory advance. See RIBOT IGUALADA, *op.cit.*, 1148.

¹⁸⁷ HENRICH, *op. cit.*, 1.

test', according to which the maintenance debt cannot exceed what is reasonably possible for the debtor to pay. Thus, when authors condemn the fairness of the maintenance duty by illustrating the case of a 21-year-old child having to support his or her 55-year-old indigent parent,¹⁸⁸ such reasoning does not take into account the proportionality test, which is indispensable. Most likely, a maintenance duty would not arise in those cases. The limits are strict in relation to what can be reasonably demanded from a young adult who is barely starting to gain economic independence.

Therefore, even when considering the legal policy concerns mentioned in Chapter III, the most adequate legal policy is not necessarily to abrogate the maintenance obligation. These principles are beneficial to individuals and to society, regardless of the wealth, gender and age of a given family member.

Logically, the emphasis ought to be on increasing the autonomy of the elderly, promoting active ageing and therefore decreasing the need for support.¹⁸⁹ However, where this fails, intergenerational solidarity is key and should be allocated in a manner that safeguards distributive justice. In this way, depending on the legal and social context, family solidarity duties may be suitable – as long as principles of reasonableness and proportionality are respected. Thus, the best approach to prevent prejudicial socio-economic effects might be instead to develop restrictions in the calculation of maintenance (protecting lower classes), and to provide support to family members (recognising the family members who support the elderly), as further suggested in Chapter V.¹⁹⁰

2. Striking a line between moral and legal boundaries

Notwithstanding the 'moral goodness' of the norm, it cannot alone justify legal recognition.¹⁹¹ Subsequently, one must ask: should the moral duty be converted into a legal

¹⁸⁸ MASMEJAN, *op. cit.*, 34-37.

¹⁸⁹ EUROPEAN COMMISSION, *op. cit.*, *passim*.

¹⁹⁰ While it is true that the burden of support is differentially distributed according to gender and class (TOMÉ, *Family Law*, 340), it is suggested that it is not necessarily by abrogating the maintenance duty that distributive justice would be attained. There are several desirable policies to tackle such inequalities, such as restricting the scope and calculation of maintenance; recognizing family supporters; promoting education and labour policies that encourage egalitarian family roles.

¹⁹¹ HERRING, *op. cit.*, 53.

duty? This gives rise to a difficult question. What is the line between what should be under legal scrutiny and what should be under the moral arena?

In ancient civilizations, there was no such distinction between law and morals. Ethical customs, laws, usages, morals, were all assembled in one, together recognized as “law”.¹⁹² However, with the development of societies, law and morals evolved as autonomous fields. Since then, jurists have sought to determine the criteria for distinction¹⁹³ and to understand the relationship between the two social orders. The topic has been chiefly argued, with JHERING naming it the Cape Horn of jurisprudence.¹⁹⁴

The dynamic boundaries between law and morals can be best understood with the mathematic logic brought to law by CLAUDE DU PASQUIER. Resorting to the image of a Venn diagram, law and morals can be seen as two intersecting circles. There is an area exclusively relevant to law, an area exclusively relevant to morals, and an area of intersection relevant to both law and morals, where the two sets overlap.¹⁹⁵ To illustrate, in this diagram, rules regarding the colour of traffic signals would fall on the exclusively legal area; rules regarding duties of gratitude would fall on the exclusively moral area; while rules such as the prohibition of murder would fall on the overlapping area of both law and morals.¹⁹⁶

The question then becomes: should the moral duty of maintenance vis-à-vis the elderly be placed in the intersection of law and morals, or should it rather be placed in the strictly moral area?

First, it should be noted that the boundaries of each circle are flexible. The Venn diagram of law and morals is not a frozen image. Instead, there is a never-ending combination of possible diagrams, in reflection of a given period of time and place, since law itself is in a

¹⁹² CARBONNIER, *Droit civil: Introduction*, 45.

¹⁹³ To illustrate: (i) morals refers to the motives of conduct, while law has to do with the outward results of conduct; (ii) ethics aim at perfecting individual character, while law seeks only to regulate the relations of individuals with each other and with the state; (iii) the use of enforceability, even though not an essential aspect of law, is an instrument of law and not of morals. See POUND, *The Ideal Element*, 66-108.

¹⁹⁴ JHERING, *Geist des römischen Rechts*, § 26, 48.

¹⁹⁵ Following KANT, the unity amongst morals and law was denied, while the relation amongst them accepted. See CORDEIRO, M., *op. cit.*, 506-513.

¹⁹⁶ Further, see CHORÃO, *Bigotte, Introdução*, 199 *et seq.*

constant evolutionary process.¹⁹⁷ As expressed in CICERO's adage "*ubi societas, ibi jus*" or MONTESQUIEU'S "*théorie des climats*", national legal systems draw their respective diagram, in echo of the spirit and history of the given people.

In this context, the ascendants' right to receive family maintenance is a 'culturally dependant right':¹⁹⁸ it is not inherently natural, but rather a social construction.¹⁹⁹ To clarify, as previously stated, the 'right to minimum standards' is an inherently natural right, which derives from the basic principle of human dignity. However, this universal right does not prescribe a specific means to achieve its end. The allocation of resources is a matter of distributive justice, which differs from society to society. Hence, the *just* allocation of resources - and the resulting framework of the maintenance duty - is not universal, but dependent on cultural, legal and economic backgrounds.²⁰⁰ Indeed, maintenance between relatives is not a *conditio sine qua non* for the dignity of the human person, since such support can be allocated elsewhere; it is also not a prerequisite for material equality, since such equality will depend on the particular organization of the underlying society.

Thus, should the maintenance duty be legally recognized? In abstract, there is no right or wrong answer. The response is, ultimately, local and flexible. Different societies outline different diagrams and all should be valid, provided that the law (attained by a legitimate process of decision-making): (i) safeguards the minimum requisites of a just society such as the respect for human dignity, freedom and equality;²⁰¹ and (ii) is coherent with the legal system and culture of the underlying society.²⁰² In the words of ISIDORE: "law should be possible both according to nature and according to the customs of the country".

Hence, in Sweden there is no family duty to support elderly relatives, as there is, for example, in Portugal, France or Germany. Nonetheless, the right of an elderly parent to be

¹⁹⁷ CARBONNIER, *Sociologie juridique*, 161, 229.

¹⁹⁸ In the sense that it is created by culture (and not in the sense that access to it is mediated by cultural practices). See PENNER, *Legal Reasoning*, 88.

¹⁹⁹ Indeed, family law is deeply related with culture and particularly prone to relativity. See DEWAR, *The Normal Chaos*, 468.

²⁰⁰ OLDHAM, *Maintenance of the Elderly*, 234.

²⁰¹ Taking into account the "axiological foundation" or "intention of validity of Law". See NEVES, Castanheira das, *O papel do jurista*, 42.

²⁰² The "organic conception of the legal system" mentioned by CARBONNIER in *Flexible Droit*, 8.

financially supported by his or her children may be, at the present time, rightfully absent in Sweden, where the welfarist state assumes full responsibility for the support of the indigent elderly, where no inheritance rights (*réserve héréditaire*) protective of descendants are predicted, and where the parallel notion of distributive justice is embedded in the *volkgeist* of the nation.²⁰³ In contrast, in Portugal, France and Germany, the rationale will necessarily differ, as further investigated below.

3. *Legal and social coherence of the Portuguese maintenance duty*

Within the Portuguese context, maintenance vis-à-vis ascendants finds both social and legal guarantee. First, as far as societal values are concerned, “the burdens of economic support... are allocated within the family, based on the perceived family roles”.²⁰⁴ Family members undertake the bulk of elderly support,²⁰⁵ as “family is still the essential setting for intergenerational exchanges”.²⁰⁶ These principles are embedded in everyday mores and internalized as a status obligation.²⁰⁷ Subsequently, from a legal perspective, maintenance is coherent in view of a two-fold rationale: (i) maintenance duties are the flipside of family rights, being coherent with the special legal status provided to the family; and (ii) the maintenance duty is deeply interconnected with the (lack of) support provided by social assistance law, in view of limited public funds. Hence, there are cultural, legal and economic reasons that explain the just allocation of intergenerational support duties on the family.

3.1. *Family duties as the flipside of family rights*

Family duties are intricately connected with family rights.²⁰⁸ Consequently, the repeal of a sole rule – the maintenance duty vis-à-vis ascendants – would challenge the reasoning of the legal system as a whole and result in prejudicial systematic effects.

First of all, the repeal would amount to an *arbitrary dismissal of the principle of reciprocity* that underlies maintenance amongst adults. Only removing one side of the spectrum – the

²⁰³ For an introduction to Sweden's legal system see WHO, *Responsibilities*, 10-17.

²⁰⁴ TOMÉ, *Family law*, 313.

²⁰⁵ BRITO, *Saúde*, 32. RIBEIRO, *Processos de Envelhecimento*, 212.

²⁰⁶ VÍTOR, T., *Reflections*, 214; *Algumas considerações*, 348; *Qualidade*, 52.

²⁰⁷ SILVA, *Quando a Vida Chegar ao Fim*, 49.

²⁰⁸ SCHWAB, *op. cit.*, 521. RIBOT IGUALADA, *op. cit.*, 1137.

obligation of adult children vis-à-vis their parents,²⁰⁹ while sustaining the obligation of parents vis-à-vis their adult children, would be incoherent and arbitrary. Indeed, it could amount to a violation of the constitutional principle of equality,²¹⁰ given the excessive burden upon parents, without a similar right on the flipside or a reasonable justification of public interest.

By the same token, the repeal would be *incoherent with the special legal status of the adult children/parent relationship*, which is well illustrated in the Portuguese system by (i) strong inheritance rights, provided by the *legítima*;²¹¹ (ii) the right to protect family assets by redeeming an ascendant/descendant's sold or awarded assets (*direito de remição*);²¹² and (iii) the right to receive death grants and survivors' pensions for the death of the adult child/parent.²¹³

Furthermore, the adult children/parent relationship is enshrined with constitutional protection within the "flexible notion of family"²¹⁴ and, strikingly, the family duty to support the elderly may have constitutional basis. Some countries, such as Spain,²¹⁵ Croatia²¹⁶ and others,²¹⁷ attribute constitutional grounds to family obligations in old age. In Portugal and Germany, the duty of children towards their indigent parents is not established by the wording of the Constitution,²¹⁸ in contrast with the duty of parents towards their children.²¹⁹ However, unlike the tendency of TÁVORA VÍTOR²²⁰ to conclude that the Portuguese Constitution does not approach a "familial duty to care for the elderly", this dissertation asserts otherwise.

²⁰⁹ Which are vibrant: RC 10.12.2013 Proc. 947/12.1T2OBR.C1; RC 20.06.2012 Proc. 2837/11.6TBVIS.C1; RC 28.04.2010 Proc. 1810/05.

²¹⁰ Art. 13 Portuguese Const..

²¹¹ Art. 2157 Portuguese CC.

²¹² Art. 842 and 845 Portuguese CPC.

²¹³ Decree-law n. 322/90, October 18th, Art. 3 n. 1, Art. 7 para. c).

²¹⁴ MIRANDA/MEDEIROS, *op.cit.*, 690.

²¹⁵ Art. 50 Spanish Const. mentions that public authorities shall promote welfare in old age "without prejudice to the obligations of the families".

²¹⁶ Art. 64 Croatian Const.: "Children shall be obliged to take care of their elderly and infirm parents".

²¹⁷ Art. 229 Brazilian Const.; Art. 51 Ukrainian Const.; Art. 38 n. 3 Russian Const..

²¹⁸ *A contrario*, Art. 6 German Const. and Art. 72 n. 1 Portuguese Const.. In regards to the protection of old age, the Portuguese Const. underlines the importance of family life ("*convívio familiar*"), but no direct reference is made of family responsibilities.

²¹⁹ Arts. 36 n. 5, 67 n. 2 c) and 68 Portuguese Const.; Art. 6 n. 2 German Const..

²²⁰ *Reflections*, 215 and *O dever de cuidar dos mais velhos*, 44.

Indeed, the constitutional body of law is a “living body of law”, “in action” and not solely “in the books”.²²¹ Therefore, it is open to unwritten constitutional rules that find both their origin and limit in the written constitution.²²² On this basis and following such limits, a duty of adult children to provide support to their vulnerable parents may very well be found in the Portuguese Material Constitution, as a corollary of the special protection provided to the family and recognised by Article 67 of the Portuguese Constitution, which, according to MEDEIROS, includes in its *core* the relationship between parents and descendants,²²³ where adult children may be included. Here, the dissertation is inspired by the reasoning of the German Federal Constitutional Court (*Bundesverfassungsgericht*),²²⁴ which clarified that even if the German Constitution does not specifically recognise the solidarity of children vis-à-vis parents, it recognises family solidarity itself. Thus, even though the duty of children to provide support to vulnerable parents is not apparent from the wording of the Constitution, it stems from the special protection which the state grants the family; “as an embodiment of familial responsibility”, it bears constitutional significance and deals with constitutional matters.²²⁵

Notwithstanding the controversy surrounding the constitutional significance of the duty of adult children vis-à-vis vulnerable parents, the constitutional relevance of *family solidarity* is undisputed. Consequently, the validity (and non-repeal) of the maintenance duty is further explained by its strong internal coherence.

3.2. Interconnection with public welfare duties

Moreover, as OLDHAM points out, “legal regimes allocating the burden of responsibility for maintenance of the elderly require that a balance be struck between kinship and State”.²²⁶ In this balancing exercise, parallel to what is noted by MONDÉJAR PEÑA²²⁷ and MARTINEZ

²²¹ CANOTILHO, *Direito Constitucional*, 1139.

²²² MIRANDA, *Manual de Direito Constitucional*, 11-13.

²²³ MIRANDA/MEDEIROS, *op. cit.*, 690.

²²⁴ BVerfG, 1 BvR 1508/96 7.6.2005, para. 51 aa).

²²⁵ See Art. 6 n. 1 German Const..

²²⁶ *Maintenance of the Elderly*, 234.

²²⁷ MONDÉJAR PEÑA, *La obligación de alimentos*, 345.

RODRÍGUEZ²²⁸ in relation to Spain, the existence of a legal maintenance duty of descendants vis-à-vis ascendants is consistent with the current Portuguese welfare system, which does not cover all situations of need and is subject to limited funds. Hence, as further analysed below, in the allocation of intergenerational responsibilities within Portuguese society, either/or options should be dismissed.

3.2.a. *There is a fundamental right to state support...*

The Portuguese Constitution declares in its very first Article: “Portugal shall be a sovereign Republic, based on the dignity of the human person ... committed to building a free, just and solidary society.” Human dignity is thus both the origin and the limit of the power of the state.²²⁹ The maxim is that “the state exists for individuals; the individuals do not exist for the state”.²³⁰ In view of that, the *raison d'être* of the state is to enable the conditions for the human fulfilment of its citizens, adequately undertaking the ever-continuous task of “building a free, just and solidary society”.²³¹

Portugal is therefore a “social state”,²³² whose public task is not merely to respect, but to advance justice. The state must promote social justice; it must intervene to create conditions of equal opportunities of human fulfilment for all. It does so not for reasons of charity,²³³ but rather to fulfil its fundamental duty, in what TAIPA DE CARVALHO calls “*exigência ético-política de intervenção estadual*” (the ethical-political responsibility of state intervention).²³⁴

Against this background, the Portuguese Constitution proclaims the civil and political rights to life²³⁵ and to the development of personality,²³⁶ for the elderly and every other person. From the right to life and the principle of human dignity stems the fundamental

²²⁸ MARTINEZ RODRÍGUEZ, *op. cit.*, 121-123.

²²⁹ CARVALHO, Taipa de, *Pessoa Humana*, 7-9. NEVES, Castanheira das, *op.cit.*, 40.

²³⁰ JOAD, *Guide to the philosophy*, 736. NOVAIS, *Os princípios*, 52.

²³¹ CARVALHO, Taipa de, *op. cit.*, 1991. BERTRAND, *Proposed Roads*, 138.

²³² Art. 2 Portuguese Const.. CANOTILHO, *Direito Constitucional*, 335.

²³³ MARQUES, R., *Algumas notas*, 10.

²³⁴ CARVALHO, Taipa de, *op. cit.*, 18, 31.

²³⁵ Art. 24.

²³⁶ Art. 26 n. 1.

right to an adequate standard of living,²³⁷ which is enshrined in Article 25 of the Universal Declaration of Human Rights and Article 11 of the International Covenant on Economic, Social and Cultural Rights.

The state is thus committed to undertaking tasks in order to safeguard that the elderly person enjoys access to existence rights, by fulfilling a number of economic, social and cultural rights, such as adequate nutrition, clothing, housing and healthcare. The Constitution specifically protects the elderly with the social rights of access to (i) "economic security and to conditions in terms of housing and family and community life that respect their personal autonomy and prevent or surmount their isolation or social marginalization"²³⁸ and (ii) "measures of economic, social and cultural nature" to active ageing.²³⁹

The fundamental rights of the elderly are further enshrined at the European level. Notably, the Lisbon Treaty²⁴⁰ states that the EU "shall promote social justice and protection ... solidarity between generations"; the Charter of Fundamental Rights of the European Union²⁴¹ asserts the rights of the elderly to "lead a life of dignity and independence and to participate in social and cultural life" and to "social security"; the Community Charter of the Fundamental Social Rights of Workers²⁴² proclaims rights of existence upon the retirement age; and the recent European Charter of the Rights and Responsibilities of Older people in Need of Long-term Care and Assistance²⁴³ recognizes the elderly's right to dignity and financial and material security.

3.2.b. *...within the bounds of possibility ("sob reserva do possível")*

Notwithstanding the existence of state responsibility, the fundamental rights to state support/benefits are – *when beyond the cap of the essential minimum* – within the bounds of

²³⁷ TC 509/02.

²³⁸ Art. 72 n. 1.

²³⁹ Art. 72 n. 2.

²⁴⁰ Art. 3 n. 3.

²⁴¹ Art. 25.

²⁴² Art. 24 and 25.

²⁴³ Art. 1.

possibility (“*sob reserva do possível*”).²⁴⁴ This can be better explained by resorting to the distinct categories of fundamental rights.

While certain types of fundamental rights depend only on state will (“*direitos de liberdade*”), other types of fundamental rights depend on a multitude of social and economical factors, which the state cannot control and, consequently, are not exclusively dependent upon it (“*direitos sociais*”).²⁴⁵

By way of illustration, the right to life of the elderly person – in its entirety - is undeniably a fundamental right that fits within the category of *direito de liberdade*. However, such a fundamental right to life entails within it multiple rights and aspirations, as for *e.g.*, (i) the prohibition of the death penalty and (ii) the right to a minimum standards of living (“*mínimo de existência vital*”), all of which are separable (“*autonomizáveis*”), and ought to be individually analysed in order to find their specific category of fundamental rights. The difference between these two sub-rights is that whereas the prohibition of the death penalty is *per se* factually possible, depending solely on state will and being directly applicable, the other is not. The fulfilment of the right to minimum standards is beyond exclusive state control; it is a right to receive a service/benefit (“*prestação*”) that ultimately relies on “financial and material factors that are largely not controlled by the state”.²⁴⁶

Thus, taking into account the limited framework of material and financial resources, the legislator, with its democratic legitimacy, defines, in each historical moment, which minimum benefits ought to be provided by the state.²⁴⁷ Nevertheless, as previously mentioned, the right to minimum standards has in its *core* the fundamental right to life, which gives rise to a judicial claim based on a directly applicable subjective right. Therefore, as asserted by the landmark Constitutional Court decision n. 509/02, the *minimum conditions* of the minimum standards of living should be safeguarded, regardless of the state’s economic conditions. However, as there is no *fixed* content of the minimum of

²⁴⁴ ANDRADE, Vieira de, *O direito ao mínimo de existência condigna*, 23.

²⁴⁵ NOVAIS, *Os princípios*, 293.

²⁴⁶ NOVAIS, *ibid*, 295-296.

²⁴⁷ MIRANDA/MEDEIROS, *op. cit.*, 640, 647.

the minimum, there is still leeway for the legislator to determine it; albeit, subject to further constitutional binding.²⁴⁸

In this context, the stronger the economic background, the wider the potential for the state to provide social services/benefits and the smaller the margin of possible restrictions on social rights. *Mutatis mutandis*, the weaker the economic background, the lower the potential for the state to undertake social tasks, and, proportionately, the wider the margin of possible restrictions on social rights.²⁴⁹ Thus, one cannot compare, without taking into account the fundamental differences in economic and social backgrounds, the welfare provided to the indigent elderly in Portugal, to the one accessible in Denmark or Germany. Currently, the Portuguese social state cannot be expected to live up to these other welfare systems.

In this way, when balancing the private and public allocation of intergenerational responsibilities, it should be noted that the extent of available welfare is not merely dependent upon the social consciousness of the political will; it is also dependent upon a limited framework of material and financial resources. Departing from this background and regardless of a more or less welfarist approach, current public services, subject to stressed economical restraints, cannot suffice to cover all situations of elderly care.²⁵⁰ Consequently, any public policy that excessively allocates the responsibility to the state is bound to perpetuate conditions of impoverishment. At the same time, as previously observed, any public policy that excessively allocates the burden of support on the families is bound to cause prejudicial effects on the individuals, families and society. Thus, both state and family duties are – and should be – limited: the state support is within the bounds of possibility (*sob reserva do possível*) and the family support is within the realms of proportionality (under Article 2004 Portuguese CC).

3.2.c. Combined intervention of individuals, family, state and civil society

²⁴⁸ ANDRADE, Vieira de, *op. cit.*, 27. NOVAIS, *As Restrições*, 86: “the only *prima facie* and general claim is for the legislator to exercise the leeway in an appropriate manner”.

²⁴⁹ NOVAIS, *op. cit.*, 320.

²⁵⁰ In Spain, MONDÉJAR PEÑA, *op. cit.*, 331. BERROCAL LANZAROT, *op. cit.*, 2336. MARTINEZ RODRÍGUEZ, *op. cit.*, 121-123.

MIRANDA further notes that, in light of the Portuguese Constitution, the advancement of economic, social and cultural rights is not merely dependent upon state intervention. It also depends on the communities, groups and stakeholders themselves, and their participation in civil society.²⁵¹ Thus, the Constitution not only recognizes the importance of family support; it calls upon its intervention, together with the state, civil society and individuals themselves.²⁵²

This principled relationship amid state, individuals, family and civil society can be best understood through the lens of the ‘philosophical principle of subsidiarity’. With its roots in the Aristotelian thought, it entails two conflicting sub-principles: on the one hand, the *sub-principle of subsidy*, where the state ought to provide support in case of need of its citizens; on the other hand, the *sub-principle of second resort*, where the state ought to refrain from assuming the responsibilities of the citizens, reducing their capacity for self-reliance and self-control.²⁵³ POPE JOHN PAUL II summarized the idea: “A community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.”²⁵⁴

Accordingly, the state should not substitute families, communities, groups or stakeholders themselves in the fulfilment of their social functions.²⁵⁵ However, the principle of subsidiarity does not imply the dismissal of state action. Indeed, the term “subsidiarity” derives from the Latin verb *subsidio* (to aid or help) and the related noun *subsidium* (aid or assistance). In other words, it means the state shall take action in the form of assistance.²⁵⁶

As TOMÉ asserts, “the redefinition of responsibility of the family, civil society and state ... implies the duty of the state to safeguard fundamental goods”.²⁵⁷ In this way, the challenges

²⁵¹ *Manual de direito constitucional*, 180.

²⁵² MIRANDA/MEDEIROS, *op. cit.*, 694.

²⁵³ RENTTO, *Leisure, Self-reliance, and the Family*, 684-691, 695-711.

²⁵⁴ POPE JOHN PAUL II, *Centesimus Annus*, n. 48, §4.

²⁵⁵ BROWNING, *Practical*, 136.

²⁵⁶ RENTTO, *op. cit.*, 695-711.

²⁵⁷ TOMÉ, *Algumas considerações*, 348.

presented by the demographic changes ought to be addressed with the participation of the individuals, the family, the state and civil society.²⁵⁸ There should be a “mixed system of protection”, whereby diverse means complement one other.

4. The maintenance duty gives effect to relevant functions of law

Finally, certain authors would argue that, notwithstanding the legal and social coherence of the norm, the lack of enforceability renders the maintenance duty unnecessary. Why maintain a legal norm that lacks enforcement, when family solidarity exists regardless of it?

4.1. The character-shaping function of the maintenance law

BREDA and HOUTTE²⁵⁹ rightfully counterpoint that the validity and usefulness of the civil law duty should not be reduced to its coerciveness.²⁶⁰ Law also serves an important symbolic function; the maintenance law, by holding up an ideal of solidarity, encourages people to put it into action. As noted by PEREIRA COELHO and OLIVEIRA, there is a “socio-pedagogical purpose of family law”,²⁶¹ according to which one is more likely to comply with maintenance obligations vis-à-vis vulnerable ascendants if these are backed by an authoritative claim. Indeed, even if there are children who act out of their own will, there are also those children who are influenced by the legal authority of the maintenance rule.²⁶² Consequently, the repeal of the law would probably lead to a greater unwillingness of children to support their vulnerable elderly relatives.

On the other hand, maintenance does not coerce morality, as the law cannot reach the soul, but only external behaviour.²⁶³ Thus, the purpose of maintenance is not to impose solidarity as such, but rather to foster the conditions that facilitate the formation of good

²⁵⁸ TOMÉ, *Qualidade*, 57. VÍTOR, T., *Reflections*, 228.

²⁵⁹ BREDA/HOUTTE, *Maintenance of the Aged*, 253.

²⁶⁰ In contrast with AUSTIN or KELSEN, it is noted that the function of law in society is not reduced to providing sanctions.

²⁶¹ COELHO/OLIVEIRA, *Curso de direito*, 146. See also XAVIER, L., *Da crise*, 836.

²⁶² RHEINSTEIN, *Motivation of Intergenerational*, 112. RIBOT IGUALADA, *op. cit.*, 1147.

²⁶³ KING, Luther, *A Testament*, 124.

habits.²⁶⁴ Ultimately, by instilling habits, the law plays a role in the formation of citizen convictions.

This is well illustrated by the legal history of the maintenance duty.²⁶⁵ Maintenance laws first appeared in Ancient Rome, precisely as an attempt to counteract the crumbling of family solidarity and its adverse effects on subsistence.²⁶⁶ As Roman society experienced a dramatic shift from an agricultural to a mercantile economy, societal developments led to a collapse of the extended family structure.²⁶⁷ Family solidarity was undermined; mores alone no longer possessed enough authority to secure the performance of family obligations and thus no longer counteracted the economic insecurity of family members. As a consequence, the emperor permitted legal claims for maintenance in order to restore family solidarity.²⁶⁸

Hence, maintenance laws help to instil family support convictions. As previously mentioned, existing value orientations in society imply a normative choice. However, there is a reciprocal/dynamic relationship between law and culture, whereby, simultaneously, normative choices play an educational role in the formation of societal convictions. In this context, TOMÉ observes that, on the one hand, family laws change due to changes in mores and people's beliefs, while on the other hand, mores and people's beliefs change because of changes in family laws.²⁶⁹ There is thus a dialectic nature of maintenance law, where the law is both the object (*produto*) and the subject (*produtor*) of cultural changes.²⁷⁰ But to what extent can one change the other? As CARBONNIER notes: “*c’est un très ancien jeu de raquettes: quid mores sine legibus? Quid leges sine moribus?*”²⁷¹ The attempt to change customs through law should be kept from overreaching itself. It cannot completely run

²⁶⁴ PENNER, *Legal Reasoning and the Authority of Law*, 73.

²⁶⁵ Additional illustrations of the socio-pedagogical function of the law and its role in changing mentalities are: (i) the introduction of no gender discrimination in marriage roles in the Portuguese family law reform of 77, or (ii) the USA Civil Rights Act of 1964 prohibition of racial discrimination in public accommodations

²⁶⁶ BREDÁ/HOUTTE, *op. cit.*, 244. CASSANO, *op. cit.*, 330.

²⁶⁷ MARQUES, R., *Algumas notas*, footnote 39.

²⁶⁸ The oldest rescripts date from approximately AD 100, and relate to a son's legal claim against his father. By the time of Ulpianus (third century AD), mutual obligations of maintenance between parents and children were legally predicted. BREDÁ/HOUTTE, *op. cit.*, 245.

²⁶⁹ TOMÉ, *Family Law*, 339.

²⁷⁰ MACHADO, Baptista, *Introdução ao Direito e ao Discurso Legitimador*, 22.

²⁷¹ *Droit Civil*, vol. 2, 23.

counter to the underlying psychological and sociological framework, as will be further analysed in Chapter V.

4.2. The maintenance law solves coordination problems and sets standards of behaviour

The maintenance law does more than promote moral duties, which would exist independently of the legal system. The exact extent, scope and justification of the given moral duties are controversial and uncertain.²⁷² Thus, the legal maintenance duty serves as an overriding authority that solves coordination problems by specifying standards of behaviour.²⁷³ Further, the legal coerciveness helps deal with maintenance debtors who would otherwise disregard the moral norms. As analysed in Chapter II, the boundaries of the duty are established by specific rules regarding content, liable persons, prerequisites for the duty to arise, competing claims, competing debtors, amongst others. As a result, the existence of the maintenance legal duty is paramount to spur certainty, predictability and fairness. To illustrate this, on a forum website a person asked:

*My grandmother is in an old age home, and her savings are coming to an end. My mother and her sisters have not been able to come to an agreement. Is there any legislation that mandates responsibility on children, and, if so, what is the percentage of such responsibility?*²⁷⁴

If the prerequisites of the maintenance duty were observed, the legal duty would operate as a key mediator between competing obligations of adult children,²⁷⁵ setting adequate standards of support. By the contrary, in the event of a merely natural/unenforceable obligation, uncertainty and unfairness would be more likely to occur.

For instance, imagine an adult daughter who financially supports, by herself, the geriatric care of a frail vulnerable parent, with no help from her siblings, who are nonetheless well

²⁷² PENNER, *op. cit.*, 73.

²⁷³ RAZ, *The Morality of Freedom*, 49.

²⁷⁴ *Obrigatoriedade familiar*, Blog Sabias Que Trabalho Família Ambiente, 20.10.2014, <http://sabiasque.pt/forum/23-apoio-ao-idoso/8238-obrigatoriedade-familiar.html>.

²⁷⁵ In Portugal, we could not find any judicial decision regarding the maintenance duty to provide for vulnerable ascendants. However, see the decision of the Justice of Peace of Coimbra 201-2008 JP, of 27-02-2009, which refers to a contractual agreement of maintenance to provide for an infirm parent, where the subject argued is the balance of obligations multiple debtors.

off. In the absence of an enforceable maintenance law, the daughter would be deprived of legal authority to encourage her siblings to fulfil the merely morally-recognized standard; she would also be deprived of important legal mechanisms to enforce compliance or to claim for remedies. In fact, she would not even be entitled to the last resort mechanism of unjust enrichment²⁷⁶ vis-à-vis the other siblings. A basic prerequisite of the legal duty would not be fulfilled; the siblings, obliged only in *le for de la conscience* by a natural/non-enforceable obligation, would not be enriched by her doings.

All in all, the maintenance duty of descendants towards indigent ascendants is rightfully present in the Portuguese legal framework. Not only does the legal duty offer strong structural internal legal coherence and psychological guarantee but it also has an important function to society. It is a mechanism of last resort that looks to safeguard human dignity in circumstances of extreme vulnerability, while both deriving from and promoting family solidarity principles. Furthermore, the legal duty solves coordination problems, sets standards for desirable behaviour and helps to resolve disputes amongst competing debtors. Therefore, it should not be abolished, nor stripped of its coercive nature.

²⁷⁶ Arts. 473 *et seq.* Portuguese CC.

V. RETHINKING THE MAINTENANCE DUTY

Law must be stable and yet it cannot stand still ²⁷⁷

From the analysis of the arguments for and against the maintenance duty vis-à-vis ascendants, there is a twofold conclusion: the Portuguese maintenance duty towards ascendants should exist; yet it must be rethought in order to adapt it to current times. For the reasons previously explained, the abrupt repeal of the maintenance duty vis-à-vis ascendants or the removal of its coerciveness would be erroneous. Still, the criticisms set forth in Chapter III shed light on key aspects – which will be further developed in the present Chapter – in relation to which the duty should be rearranged. It is of vital importance to rethink the duty with a view to prevent prejudicial legal policies and to rightfully acknowledge and support maintenance providers. Policy-makers should see the interests of the young and the old as inextricably intertwined, and develop improved policies that will enable these groups to mutually support each other, since the well-being of one group depends on the well-being of the other. As mentioned by SILECCHIA, “instead of a frame of competition and conflict between young and old”, policy-makers should develop policies that foster mutual support.²⁷⁸

Rethinking maintenance with such guidelines, this Chapter will suggest three proposals: (i) to reduce the circle of liable relatives; (ii) to limit the calculation of maintenance; and (iii) to provide support to maintenance debtors through fiscal measures.²⁷⁹

❖ *Proposal #1 - Reduce the circle of debtors*

The first proposal concerns the scope of the circle of debtors of maintenance. In Portugal, not only descendants but also brothers and sisters are liable to provide maintenance to elderly relatives.²⁸⁰ This duty between collaterals is increasingly rare. It is absent in the

²⁷⁷ POUND, Roscoe, *New paths of the law*, 1.

²⁷⁸ SILECCHIA, *Integrating Catholic Social Thought in Elder Law*, 362.

²⁷⁹ There is however a wide-scope for potential improvement in other areas, such as the promotion amicable agreements, the limitation of sub-rogation rights of the state, education programs to support the civic engagement of older people, the development of family-friendly policies and the encouragement of participation by all members of the family.

²⁸⁰ Art. 2009 n.1 d) Portuguese CC.

German, French, Belgian, Dutch and Swiss Civil Codes, where it was repelled after being critiqued as a social and legal anachronism.²⁸¹ Where it still persists, for example in Spain²⁸² and Italy,²⁸³ it is – in contrast to Portugal – broadly restricted. Should the Portuguese legislator, in a similar manner, restrict or abolish the maintenance duty between siblings? This section will attempt to demonstrate that, indeed, reducing the circle of maintenance duty bearers is the most appropriate answer for Portuguese legal and social settings.

To begin with, from a Portuguese legal perspective, it is coherent to adjust to maintenance law what is established in inheritance law, according to which siblings are not protected by the *reserva hereditária* or *legítima*.²⁸⁴ Indeed, maintenance law often corresponds to succession law. As an illustration, in Portuguese law, (i) descendants and ascendants are liable for maintenance according to a priority order equivalent to the one of succession;²⁸⁵ (ii) in case of plurality of debtors, each responds in proportion to his or her quota as a legitimate heir of the maintenance creditor;²⁸⁶ and (iii) if an adult child, without a legitimate reason, refuses to provide maintenance support to his or her needy parent, such a refusal may result in the forfeiture of succession rights.²⁸⁷ It should however be noted that the maintenance duty is not an *antecipo* of succession;²⁸⁸ inheritance rights are not the correlate counterparts to maintenance duties, as these counterparts to maintenance duties are, instead, the maintenance rights vis-à-vis the same family members. Nevertheless, maintenance law and inheritance law are interconnected, as two family law instruments

²⁸¹ MASMEJAN, *op. cit.*, 1.

²⁸² Pursuant to Art. 143 n. 3 first and second part Spanish CC, siblings shall only be liable for maintenance if the underlying state of need is not attributable to the claimant (unlike the general rule applied to other family members, to whom the fault of the claimant is irrelevant).

²⁸³ According to the special rule of Art. 439 Italian CC, the siblings' duty is restricted to the absolute necessary.

²⁸⁴ The fraction of the estate that is legally reserved to close-kin (and therefore cannot be alienated by the testator) protects widowers, descendants and ascendants. Arts. 2156 and 2157 Portuguese CC. Art. 807 Spanish CC.

²⁸⁵ Arts. 2009, n.2 and 2133 Portuguese CC, according to which relatives with a nearest degree trump those with a farthest degree.

²⁸⁶ Arts. 2010 and 2132 Portuguese CC.

²⁸⁷ Pursuant to Art. 2166 n.1 c) Portuguese CC and Art. 853 n.1 Spanish CC the parent has the right to disinherit the child. Conversely, in France, Italy and Germany, disinheritance can only be based in more extreme cases, such as an attempt of murder.

²⁸⁸ PADIAL ALBÁS, *op. cit.*, 11-14.

and legal expressions of family solidarity, which reflect on each other.²⁸⁹ It is thus coherent to adapt to maintenance a similar framework to the one applied to inheritance, particularly to the *legítima*, considering the level of restrictions that both inflict on private autonomy.

This proposal is furthermore grounded on the slightly tilted ratio that currently exists between the legal status of siblings and the weight of the maintenance duty imposed on them. As previously observed, what prompts the existence of family rights and duties is the unique status of certain family members.²⁹⁰ In this context, the current maintenance right/duty imposed on siblings is far too similar to the one imposed on the spouses, ascendants and descendants,²⁹¹ who have a particularly relevant legal status.²⁹² Certainly, the link between siblings bears some juridical weight.²⁹³ However, its feebler juridical weight²⁹⁴ should translate into an equally feebler maintenance duty.²⁹⁵

Most strikingly, from the standpoint of legal sociology, the existing contrast between the law in the books and the law in action appears to signal that a maintenance duty towards elderly siblings is an excessive regulation of family solidarity. This excessiveness of law is not only unnecessary; it is inefficient and prejudicial to law itself.

First, there are other normative domains of human conduct,²⁹⁶ such as morality, religion, social conventions and etiquette that also guide human behaviour. This is particularly true in the family realm, which is governed primarily by social rules, rather than by legal

²⁸⁹ OLDHAM, *Maintenance*, 228.

²⁹⁰ HEGNAUER, *op. cit.*, 191.

²⁹¹ Here, the thesis compares siblings with the other fully obliged relatives, that is, that are not subject to the restrictions of e) and f) of n. 1 of Art. 2009 or Art. 2016 Portuguese CC.

²⁹² According to constitutional doctrine, there is a manifest prevalence in the legal and constitutional recognition of the marriage relationship and the link between ascendants and descendants. MEDEIROS in MIRANDA/MEDEIROS, *op. cit.*, 399, 690-691.

²⁹³ Notably, siblings are included in the wider notion of “family” protected by the Portuguese Const. - MEDEIROS in MIRANDA/MEDEIROS, *op. cit.*, 690. They are protected by inheritance rights (eg. Arts. 2145 and 2146 Portuguese CC) and by indemnity rights established in n. 2, Art. 496 Portuguese CC.

²⁹⁴ Siblings are granted a feebler protection than the one established between ascendants and descendants and marriage relationship. To illustrate, they are not included (i) in the right to redeem (“direito de remição”) Art. 842 and 845 Civil Procedure Code of Portugal; (ii) in the right to receive death grants and survivors' pensions for the death of their descendants - DL 322/90, October 18th, Art. 3 n.1, Art. 7 c); and (iii) have feebler inheritance rights (2139 to 2144 Portuguese CC).

²⁹⁵ That is, with further restrictions besides the current priority order as per n.1 of Art. 2009 Portuguese CC.

²⁹⁶ MARMOR, *The Nature of Law*, 1-7.

norms.²⁹⁷ In the absence of law, there would thus not be chaos.²⁹⁸ Instead, family solidarity towards elderly siblings would be governed by social rules, and, additionally, a natural duty could subsist, with all the juridical consequences at the level of indemnity and non-restitution.

Moreover, law is tied with the capabilities of human beings, and therefore should refrain from imposing near-impossible standards of conduct.²⁹⁹ For AQUINAS, the scope of law should be held to the minimum possible: "human laws should not forbid all vices, but the more grievous vices, from which is possible for the majority to abstain".³⁰⁰ Indeed, laws which demand too much of the human being can result in a rigidity that in practice can frustrate the attainment of society's sought after goals.³⁰¹ The excessiveness of the maintenance law opens a gap between law and reality, which in turn undermines law; by the scandal of its unenforceability, the excessive law does more harm than good. It is thus better to aim lower and restrict certain vices successfully, rather than try unsuccessfully to obliterate them, and in the process make people despise the law.³⁰²

For the Portuguese law to be socially and legally coherent, it is thus suggested that the maintenance duty of siblings should be restricted. The duty towards elderly siblings should be removed; maintenance should only protect siblings during their minority, parallel to the duty of uncles towards nephews during their minority and taking into account the best interests of the child.³⁰³

While some might view this restriction as a stepping-stone to the complete dismissal of the maintenance duty, it is precisely the opposite. Limiting maintenance to the strictly necessary circle of debtors is a means of strengthening the maintenance duty. It is key to have a socially and legally coherent law with regard to who is responsible for maintenance

²⁹⁷ VARELA, *Direito da família*, 73. XAVIER, L., *Da crise*, 835. TOMÉ, *Family law*, 323.

²⁹⁸ CARBONNIER, *Flexible Droit*, 143.

²⁹⁹ TUCKER, *The Morality of Law*, 271-272. CHOQUET/SAYN, *op. cit.*, 79.

³⁰⁰ AQUINAS, *Summa Theologiae*, Q. 96, Art. 4.

³⁰¹ TUCKER, *op. cit.*, 273. CHOQUET/SAYN, *Obligation alimentaire*, 79.

³⁰² SHAVELL, *Law versus Morality*, 245.

³⁰³ Article 3 Convention on the Rights of the Child.

support.³⁰⁴ By contrast, the allocation of legal obligations in an over wide range of debtors is an open door for inefficacy and inapplicability of the legal duty.³⁰⁵

❖ *Proposal #2 - Limit the calculation of maintenance*

Further considering the legal policy concerns explained in Chapter III, in particular, the prejudicial socio-economic effects of excessive allocation of intergenerational responsibility on family members, the second proposal aims at preventing such excess and therefore restricting the scope of maintenance by establishing a higher threshold in the calculation of the duty towards ascendants.

As previously explained, the maintenance obligation must be proportional to the needs of the right holder and to the economic capacity of the duty bearer. In this balancing exercise, as a general rule, maintenance must not endanger the own *sustainability* of the duty bearer.³⁰⁶ However, in the assessment of the duty towards ascendants, drawing from the jurisprudence of the German Federal Constitutional Court, German Federal Supreme Court and several authors,³⁰⁷ an additional limitation is suggested: the maintenance claim should not “substantially decrease the living standards of the adult child”, unless the lifestyle is characterized by an “overflowing of luxury”.³⁰⁸ Accordingly, there should be a general prohibition of the decline in the *quality of life* of the duty bearer. Still, the limitation should be drafted in such a manner to allow for equitable solutions such as, notably, a reasonable decline of an over-luxurious lifestyle in order to help support an indigent parent.³⁰⁹

This specific limitation was developed in view of the reduced socio-legal relevance of maintenance towards ascendants.³¹⁰ From a juridical standpoint, the ascendant’s maintenance right is a subordinated right; a spouse or children’s maintenance rights

³⁰⁴ According to XAVIER, “the law should provide clear signals, founded upon social values” (*Da crise*, 842).

³⁰⁵ BELTRÁN DE HEREDIA, *op. cit.*, 19.

³⁰⁶ PERRY, *op. cit.*, 315. In Portugal, RC 20.06.2012 Proc. 2837/11.6TBVIS.C1.

³⁰⁷ HENRICH, *op. cit.*, 6. MASMEJAN, *op. cit.*, 17. MARTINY, *Verwandtenunterhalt*, 55-79.

³⁰⁸ BGH 23.10.2002 XII ZR 266/99 para. 3 d). BVerfG 7.6.2005, 1 BvR 1508/96 para. 5

³⁰⁹ MASMEJAN, *op. cit.*, 17.

³¹⁰ SCHWAB, *op. cit.*, 51-54.

have priority, possibly blocking the ascendant's right from arising.³¹¹ Next, from a sociological perspective, the maintenance duty towards ascendants does not share the same significance as it does towards a spouse or descendant. Logically, the threshold should be higher in the assessment of the duty of the former.

Jurisprudence further claims that descendants liable to support ascendants should be safeguarded with sufficient capital to support not only their spouse and children, but also their autonomy after retirement.³¹² As expressed by the German Federal Supreme Court in a landmark decision in June 2005, "adult children are usually in a fundamentally different position in life",³¹³ with financial responsibilities towards their children and spouses, as well as towards their own retirement. Sensibly, this limitation intends to protect adult children from getting entangled in a cycle of poverty and support dependency.

All in all, following such restrictions, the duty only arises should the adult children have sufficient resources to support the indigent parent without (i) unreasonably decreasing their quality of life or (ii) endangering their own retirement plans.

❖ *Proposal #3: Fiscal deductions to assist family maintenance supporters*

The third and final proposal relates to the creation of protection measures to help family members provide maintenance vis-à-vis their ascendants. In every country in continental Europe, the principal means for economic security and elderly support is the family.³¹⁴ The input provided by family supporters has an economic value that translates into savings to the public purse, from the absence of public provision.³¹⁵ However, while the system depends on the family members' intervention, their position "is not sufficiently acknowledged and protected".³¹⁶ In light of the demographic changes and concerns explained in Chapter III, how can law recognize family supporters

³¹¹ Art. 2009 n. 1 and 2 Portuguese CC; § 1609 BGB; Art. 152.2 Spanish CC.

³¹² BGH 28.07.2010 XII ZR 140/07. BVerfG 7.6.2005, 1 BvR 1508/96 para. 53-54.

³¹³ BVerfG 7.6.2005, 1 BvR 1508/96 para 5. BGH 23.10.2002 XII ZR 266/99 para 3 d).

³¹⁴ LABRUSSE-RIOU, *op. cit.*, 829-830. DIDUCK, *Family Law*, 255. BRITO, *op. cit.*, 32. RIBEIRO, *op. cit.*, 212.

³¹⁵ CASEY, *The Value and Costs of Informal Care*, 1, 9.

³¹⁶ VÍTOR. *Reflections*, 213. TOMÉ, *Family law*, 326.

effectively? How to acknowledge and protect those who provide support, whilst promoting family integration and cooperation? One of the areas with room for improvement is the fiscal arena.

In most legal systems the maintenance duty arises independently from the "domestic household". It occurs between the adult child and indigent parent, regardless of cohabitation and rather as a result of a binary combination: (i) kinship link and (ii) state of need of the parent. Such is the case in Portugal, Germany and France.³¹⁷ However, while Germany and France coherently apply the same rule for tax deduction, by contrast Portugal does not. Through comparative analysis, this final proposal will argue that the Portuguese fiscal panorama should also discard the "domestic household" requisite while providing tax relief for the relatives obliged under 2003 *et seq.* CC.

In Germany and France, descendants who provide maintenance support to their ascendants can deduct, respectively, the "*außergewöhnliche Belastungen*" as per § 33a of the Income Tax Act (*Einkommensteuergesetz*),³¹⁸ and the "*pensions alimentaires*" as set out in Articles 156 and 199 *sexdecies* of the Tax Code (*Code Général des Impôts*).³¹⁹ These are voluntarily incurred expenses that may include food, clothing, housing, necessary household equipment and medical expenses. The tax relief is provided regardless of cohabitation and as long as they adequately demonstrate (a) the expenses undertaken and (b) the state of need of the parent.³²⁰

In contrast, according to the Portuguese Income Tax Code (*Código de Imposto sobre o Rendimento Singular*, CIRS),³²¹ only a few maintenance expenses towards indigent

³¹⁷ Art. 2009 Portuguese CC, § 1601 BGB and Art. 208 French CC, respectively.

³¹⁸ All relatives obliged under §§ 1601 et seq BGB are eligible for tax deduction of the "außergewöhnliche Belastungen", *i.e.*, extraordinary expenses, with a maximum limit based on a means test, as *per* § 33a EStG. This regime does not include the expenses of nursing homes, which are deducted under § 33 EStG, according to which the respective limit is determined by the individual income tax rate.

³¹⁹ All relatives obliged under Art. 208 French CC are eligible for tax deduction under Arts. 156 and 199 *sexdecies* CGI. See CASEY/HAUSER, *Code Des Personnes*, 214.

³²⁰ For Germany, see BFH 08.11.2012 AZ: VI B 82/12. For France, see *Direction Générale des Finances Publiques*, *Bulletin Officiel* (2014.05.02), 40.

³²¹ As amended by Law 82-E/2014 of December 31st.

ascendants³²² are deductible regardless of cohabitation, *i.e.*, irrespective of “*comunhão de habitação*” or “*economia comum*”.³²³ These include: (i) nursing homes³²⁴ and, arguably, (ii) cases where the elderly person is deficient.^{325,326} In all other instances, for descendants to deduct maintenance expenses with regard to ascendants, at least one of the following must be observed:³²⁷ (a) the ascendant must incorporate the ‘domestic household’ (“*agregado familiar*”) of the taxpayer;³²⁸ (b) the maintenance pension must be judicially set or judicially ratified.³²⁹

In this way, the Portuguese fiscal law is paradoxical. The first paradox is that judicially set maintenance is always deductible, whereas the large sum of voluntary maintenance is only deductible if the ascendant cohabitates with the taxpayer (that is, is part of the domestic household). This solution is unreasonable, considering the wide-ranging benefits of voluntary support – and the demerits of judicially set support – such as financial costs of judicial procedures or emotional conflicts spurred by judicial scrutiny.

The second paradox is that nursing home expenses are always deductible, whereas, to a large extent, home-based support is only deductible if the ascendant cohabitates with the taxpayer.³³⁰ Again, this solution runs against the widely convergent idea that in

³²² Here, it is analysed the deductions relative to “ascendants”; not ascendants that are “dependants”.

³²³ And always within the deduction limits established in Art. 78 n. 7 CIRS.

³²⁴ Deducted pursuant to Art. 78 n. 1 h) with 84 CIRS.

³²⁵ According to Arts. 78 n. 1 i) with 87 CIRS, if the elderly person has a deficiency *and is not dependent* on the taxpayer, the remission to Art. 79, n.1 e) leads to the requisite of cohabitation. However, considering that Article 79 was revoked by Law 82-E/2014 of December 31st, the prerequisite of cohabitation is debatable pursuant to a corrective interpretation of Article 87 CIRS.

³²⁶ Minor health expenses were included in 82 n.1 d) of the old CIRS (in force until December 31st 2014) but are no longer included in 78-C CIRS.

³²⁷ Obviously, in addition to the general requirements for a maintenance duty to arise, such as the state of need of the ascendant, which in fiscal terms can be translated into the formula “income not greater than the minimum pension rate”; see Art. 78-A n.1 b) CIRS.

³²⁸ The fiscal term “domestic household” (“*agregado familiar*”) does not include ascendants *per se*. For this to happen, the taxpayer and the ascendant must cohabitate, *i.e.*, live in “joint economy” (“*economia comum*”). See Art. 4 DL 70/2010 of June 16th for the concept of “domestic household” (“*agregado familiar*”) and, particularly, n. 2 and 3 of the same Art. for the concept of “joint economy” (“*economia comum*”). See Art. 78 n. 1 a) CIRS.

³²⁹ Arts. 78 n.1 f) with 83-A n.1 CIRS.

³³⁰ Moreover, such system does not allow for the adult children to deduct the expenses undertaken when the elderly parent stays for some months in one house and then the other – as the elderly person cannot be considered to share a common household with multiple children, which in practice commonly happens. Further, old age homes are more expensive than providing care for a parent at home. In this context, there is likely a violation of the principle of equality, in the sense that poorer families are not benefiting from the fiscal

order to address old age issues there should be a shift from institutional care to more community, home-based care.³³¹

An illustration of the unfairness of these paradoxes is the Portuguese Administrative Court decision of 2008,³³² which denied a daughter the right to deduct the maintenance expenses provided to her indigent mother. The elderly mother, not having the means to support herself, resorted to her daughter to safeguard the most basic needs.³³³ Three or four times in the year the mother would stay at the daughter's home and, in a clear example of a rightfully and voluntarily provided maintenance support, the daughter paid for vital surgery the mother had to undergo. However, as the mother and daughter did not fully cohabit, the prerequisite of "common domestic household" was not fulfilled, and thus the daughter was denied the right to deduct the maintenance expenses. Ironically, had the daughter not satisfied her filial duty and the state had allocated funds in arranging a judicial decision of maintenance support, the medical expenses (judicially set maintenance instalment) paid by the daughter, could then have been deducted pursuant to Article 83-A of the Income Tax Code.³³⁴

Thus, it is difficult to understand the Portuguese legislator's choices; why promote judicially set/ratified maintenance and not voluntary provided maintenance? Why benefit nursing home expenses and not home-based support? Why the excessive use of the cohabitation requirement?

deduction that the richer families (that can place their parents in a old age home) are, when they are both fulfilling their legal duty to support their parents. The unequal treatment is not justified and it is prejudicial to families that cannot choose to institutionalize their parents.

³³¹ PICHAUD/THAREAU, *Vivre avec des personnes âgées*, 93.

³³² TCA Norte 23.10. 2008, Proc. 00231/01.

³³³ Excerpt from the decision: "*recorre à sua filha e ao seu genro quando se encontra doente, visto não dispor de meios para se tratar*".

³³⁴ Furthermore, the daughter provided a great relief of a potential public expenditure, which the state ought to encourage by its fiscal policy. In case the elderly indigent woman did not have any other relatives able to provide maintenance, the state would necessarily bear the financial burden of the vital surgery. In Portugal, the positive nature of the social right to health reflects in a *tendential gratuity* and socialization of the medical costs, pursuant to Art. 63 n. 3 c) Portuguese Const.. Consequently, the imposition upon an indigent person to contribute with payments beyond his or her ability to pay is considered to be unconstitutional. See the Portuguese Const. Court decision 731/95 where it is mentioned that "integral gratuity must be assured to the most disadvantaged social groups".

The public cost-saving argument is not a valid reason. First, as mentioned above, promoting this maintenance support is, ultimately, promoting a great relief of potential public expenditure. If descendants do not provide maintenance in a voluntary manner, either the state will provide it (a more costly option than tax deduction), or the state will judicially pursue the obliged relatives (again a more costly option than tax deduction). Second, the cost impact of discarding the cohabitation requirement is likely to be minimal since the legislator can define a ceiling to curb the cost of these tax deductions.

The deterrence of free riders is also not a convincing justification. In a similar manner to what is in place in other jurisdictions,³³⁵ free riders can be prevented without the cohabitation requirement. To avert misuse, tax relief should be contingent on the demonstration of:

1. evidence of the state of need of the ascendant (for e.g., through proof of low income or social security support);³³⁶
2. evidence of the maintenance costs undertaken by the tax payer (for e.g., through receipts).

Hence, provided these two requisites are observed, duties of maintenance under articles 2003 *et seq.* of the Portuguese CC should be deductible – irrespective of the existence of judicial procedures or cohabitation. In this way, Portuguese fiscal law would promote the voluntary fulfilment of the maintenance obligation of descendants vis-à-vis their ascendants, in a coherent manner and while not pressing excessively on public expenditure.³³⁷ This would further be attentive of the principle of equal treatment before the law, as the special status of family members justifies not only the civil duty of maintenance but also the relevant right of tax deduction in a like manner.

³³⁵ For France, see *Direction Générale des Finances Publiques, Bulletin Officiel* (2014.05.02), 40. For Germany, see BFH 08.11.2012 AZ: VI B 82/12.

³³⁶ In Germany, within the request of tax deduction, it is customary to attach a letter addressed to the Fiscal authorities, where the tax payer explains the state of need of the parent.

³³⁷ For fiscal support of caregivers, see MARQUES, R., *Em torno*, 216. ROGEL VIDE, *Crisis*, 594-595. OLDHAM, *Maintenance of the Elderly*, 233.

As previously observed in Chapter IV, to the extent that it is possible, the state should not substitute family members in accomplishing their social tasks, and yet it should provide them with the necessary background, tools and support for them to fulfil such tasks.

In the end, “the family is one of the relevant aims of the fiscal system”³³⁸ and, following on from the constitutional mandate to promote family solidarity and care giving support,³³⁹ the suggested positive discrimination of the family within the fiscal arena is appropriate.³⁴⁰ As GOMES CANOTILHO and VITAL MOREIRA point out, “reconciling family life with work life requests the coordination of various sectoral policies and the possibility, if not the obligation, to establish positive discrimination policies in favor of the family”.³⁴¹

Finally, the interest of the public purse itself should not be miscalculated. The support descendants provide to their needy elderly parents is a relief of a potential public expenditure, which the state ought to encourage by fiscal policy, as it is, undoubtedly, its constitutional mandate. Ultimately, this fiscal protection is significant for the support provider, for the person receiving support, and for the public health/support system.

³³⁸ See Const. Court Decision n. 57/95.

³³⁹ Art. 67 n.2 f) with Art. 104 n.1 Portuguese Const..

³⁴⁰ MIRANDA/MEDEIROS, *op. cit.*, 697.

³⁴¹ CANOTILHO/MOREIRA, *op. cit.*, 860.

VI. CONCLUSION

Recent demographic changes have brought new challenges which must be met with a plurality of legal, socio-economic and cultural measures. No single law reform will do away with the current inadequacy to respond to the social needs of the elderly. Yet, law reform is one of the pieces of the puzzle that, potentially, can better fit the changing demands of society. With this in mind, the dissertation set out to explore the existence and the boundaries of an intergenerational maintenance duty within the family.

First, it was noted that maintenance vis-à-vis ascendants is a 'culturally dependent right'. Whilst the right to live with dignity of the indigent elderly is universal, the just allocation of the correlative responsibility varies across times and nations, since it relies on economic, social and legal factors. Hence, a moral duty of solidarity towards the vulnerable elderly should or should not be converted into a legal duty, depending on the 'organic conception of the underlying legal system'.

In this way, as the research paper progressed, the duty was critically examined with a focus on the Portuguese background, while establishing links with the European civil law systems studied in Chapter II. After Chapter III brought attention to growing concerns in the realms of sociology of law and legal policy, Chapter IV asserted that albeit the legal criticisms, the legal duty should not be abrogated or deprived of its coerciveness. In this analysis, the main features of the duty sketched in Chapter II served as the necessary scientific background.

The dissertation highlighted that, in reality, data shows that family solidarity vis-à-vis the elderly is embedded in everyday mores and internalized as a status obligation. Thus, legal discourse claiming the repeal of the duty in view of a gap between law and reality fails to recognise that a 'lack of coercive enforcement' does not correspond to a 'lack of social application'. Further, the validity of the duty cannot be reduced to its coercive function; maintenance serves relevant symbolic functions. In turn, as shown throughout the research paper, the legitimacy of the duty is related with the principle of human dignity in

connection with the recognition of family solidarity, in light of principles of distributive justice.

Subsequently, from a Portuguese legal perspective, Chapter IV argued that the repeal of the maintenance duty would challenge the reasoning of the legal system as whole. Indeed, it would amount to an arbitrary dismissal of the principle of reciprocity and would be inconsistent with the special status attributed to the link between ascendants/descendants.

Shifting to distributional analysis, the dissertation concluded that there are cultural, legal and economic reasons that explain the just allocation of intergenerational support duties on the family. As demonstrated, not only does the proximity of the relationship create status rights and obligations, but the existence of a family duty is consistent with the current Portuguese welfare system, which does not cover all situations of care and is subject to limited material and financial resources.

Nonetheless, the allocation of responsibility on the family must be sensible; as legal critics emphasize, any public policy that excessively shifts the financial burden on to the family is bound to prejudicial socio-economic effects. In fact, as Chapter V pointed out, in order to strike a better balance between private and public support, it is critical to rethink the maintenance duty. At present, maintenance laws ineffectively allocate obligations to an overly wide scope of liable relatives, without sufficient acknowledgment or protection, in a manner that is prejudicial to individuals, families and society.

With a view to address such concerns, the final Chapter set forth three proposals. First, maintenance should be limited to the strictly necessary circle of debtors and the duty towards elderly siblings thus removed. Second, in contrast with the general rule that maintenance must not endanger the sustainability of the duty bearer, the calculation of maintenance vis-à-vis ascendants should be subject to a higher threshold: the maintenance claim should not “substantially decrease the living standards of the adult child”. Third, maintenance providers should be protected and encouraged by virtue of tax deductions, irrespective of cohabitation with the ascendant and of judicial intervention.

There is however a wide-scope of future research areas yet to be fully explored that are valuable to address the drawbacks of the maintenance duty. Amongst them are (i) the shift from a judicially based-duty to the promotion of amicable agreements, (ii) the development of more family-friendly policies that enable people to balance their working and family lives in the face of demographic change,³⁴² and (iii) the reexamination of sub-rogation rights of public institutions that advance maintenance payments.

Hence, this dissertation aimed to demonstrate the great need for law schools, jurists and legal policy-makers to rethink maintenance duties vis-à-vis ascendants in light of current societal changes. Hopefully, such debate will trigger a legal system that better promotes autonomy of the elderly, self-responsibility and responsibility for others in society.

³⁴² European Commission, *European Year for Active Ageing and Solidarity between Generations*, 13.

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