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Parents & children: 'family provision' in civil law systems

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Outline

- I. Introduction
- II. Nature & rationale
- III. Problematic position of child
- IV. Recent & future developments



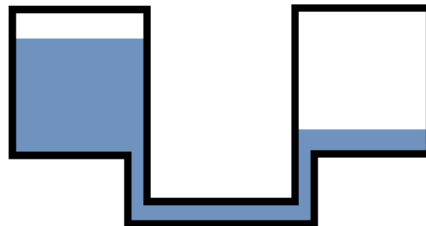
I. Introduction

- › Imperative succession law
 - Child's claim against estate, despite gifts and testamentary dispositions
- › Terminology
 1. Family provision = discretionary powers court
 2. Forced heirship = actual *pars hereditatis*
 3. Compulsory portion = monetary claim
(or: statutory portion)



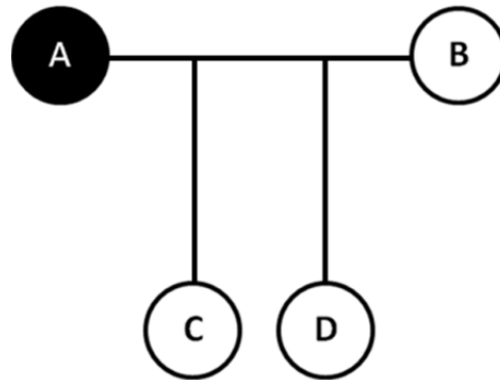
Introduction

- › Twofold communicating vessels
 - Forced share and intestate succession
 - Forced share and surviving spouse →





Intestate succession

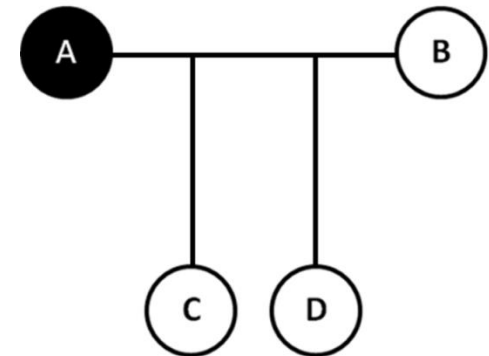


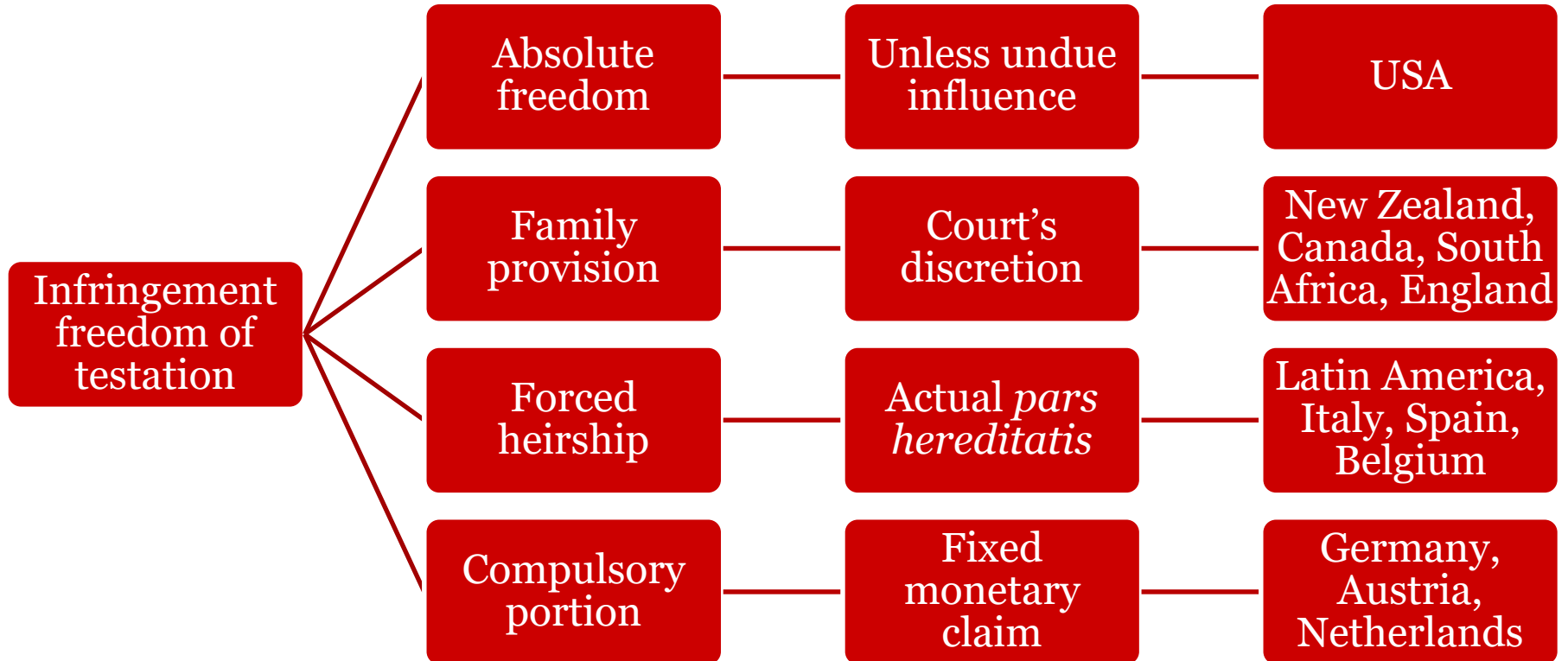
- › Statutory legacy (Eng), usufruct (Fra), co-ownership (Ita), full ownership (Neth)



II. Nature and rationale

1. Nature of claim
2. Rationale







2. Rationale

- › Family solidarity
- › Equality among children
- › Moral duty
- › Maintenance/need
- › Protection against undue influence
- › Tradition



Counter arguments

1. Freedom

- › No legislative nannyng

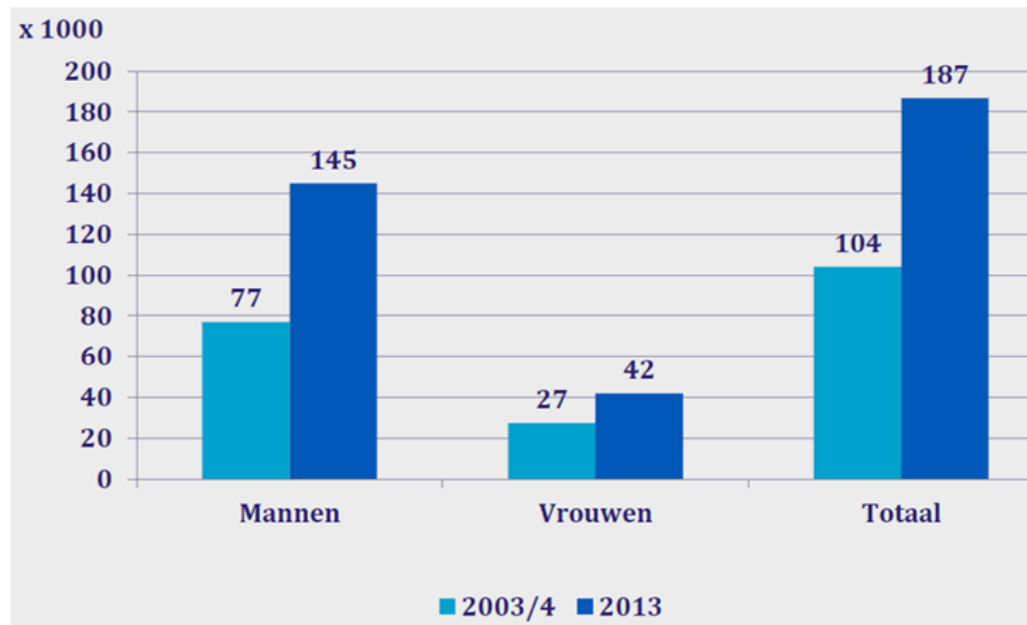
2. Economic and demographic developments

	Estates	Million euro
Total	117 760	13 896
Negative	1 230	-61
> € 0 - 5 000	23 250	44
€ 5 000 - 10 000	10 760	79
€ 10 000 - 25 000	25 000	440
€ 25 000 - 50 000	10 080	364
€ 50 000 - 100 000	11 430	839
€ 100 000 - 200 000	16 690	2 423
€ 200 000 - 500 000	14 940	4 516
€ 500 000 and more	4 370	5 252

CBS 2017 (figures of 2014)



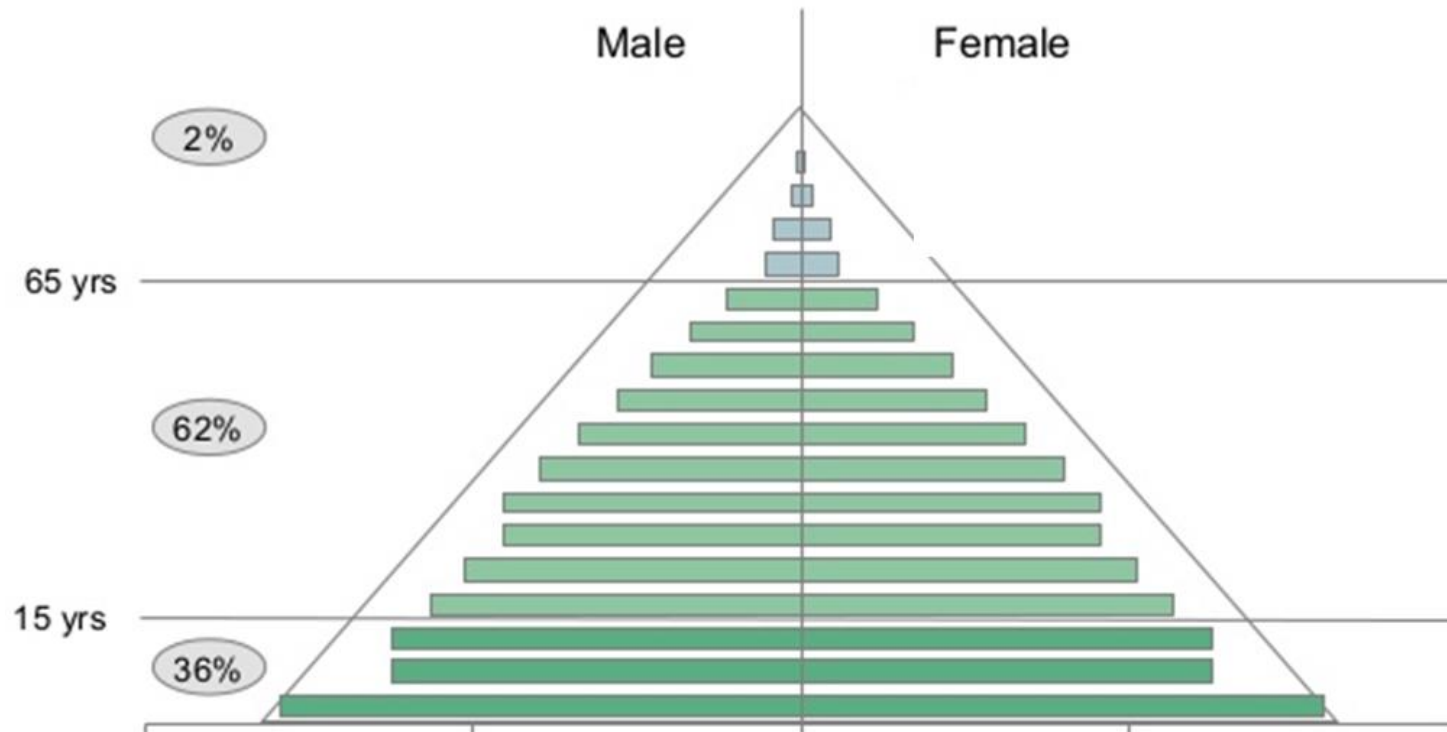
Lives with one or more stepchildren

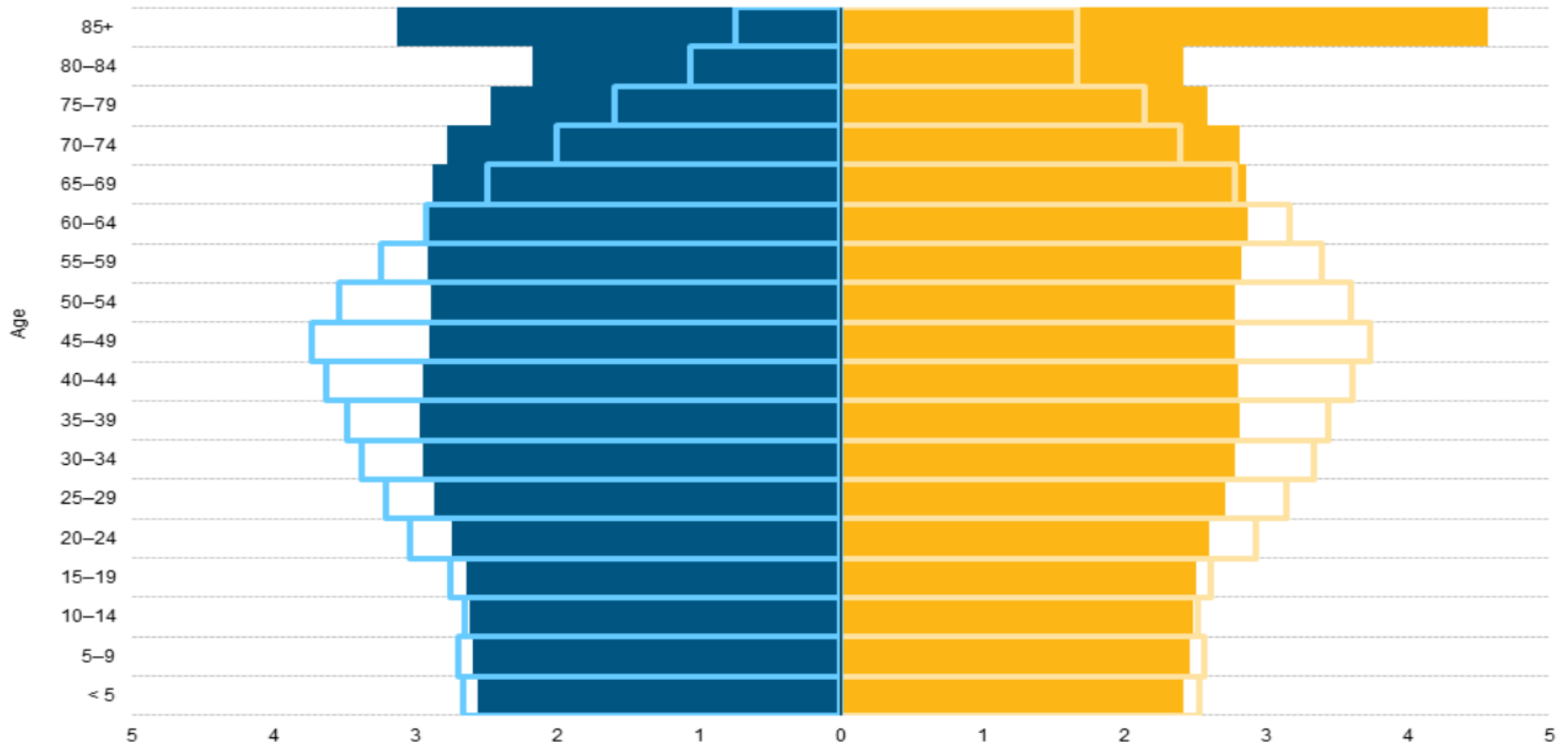


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Roman Empire

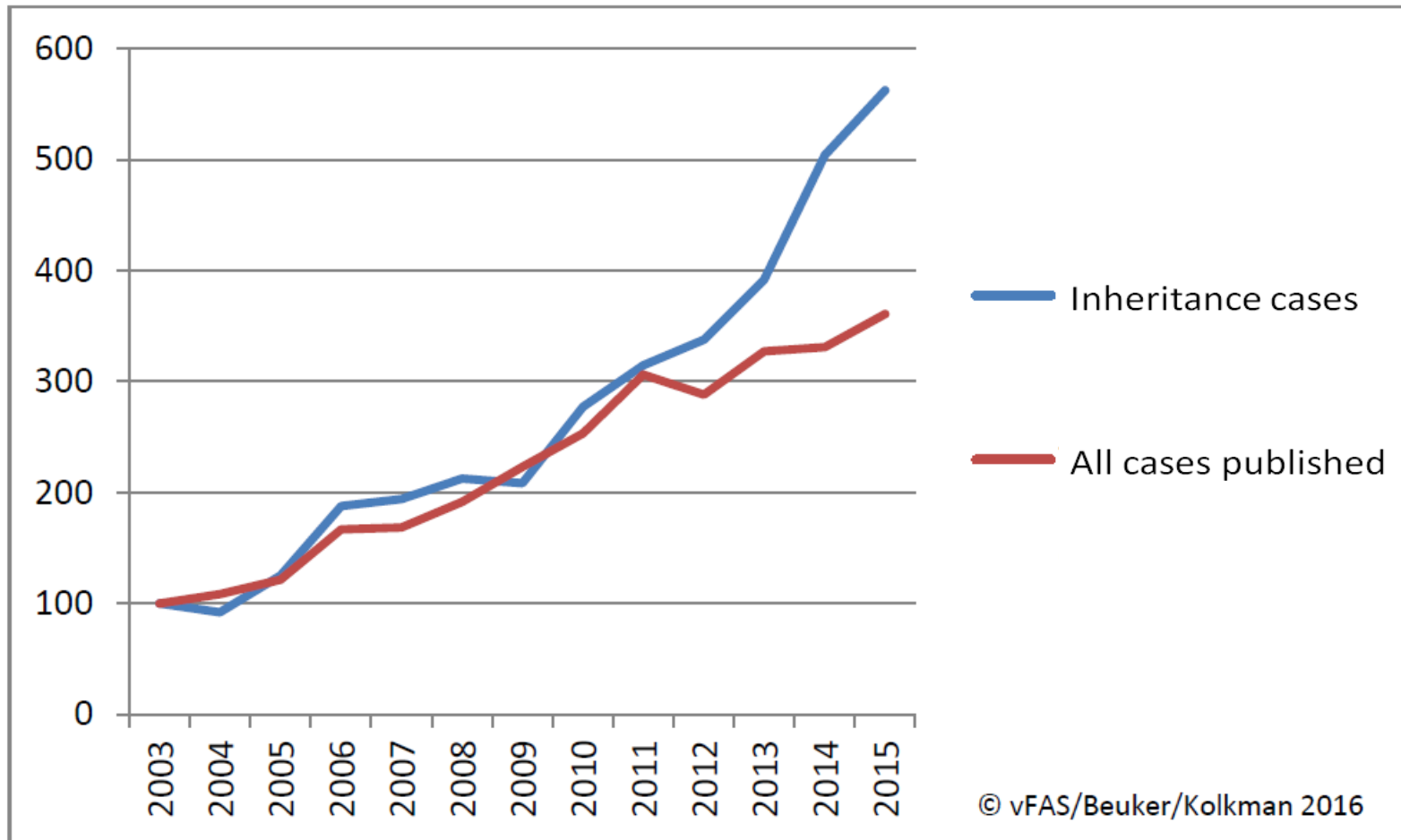






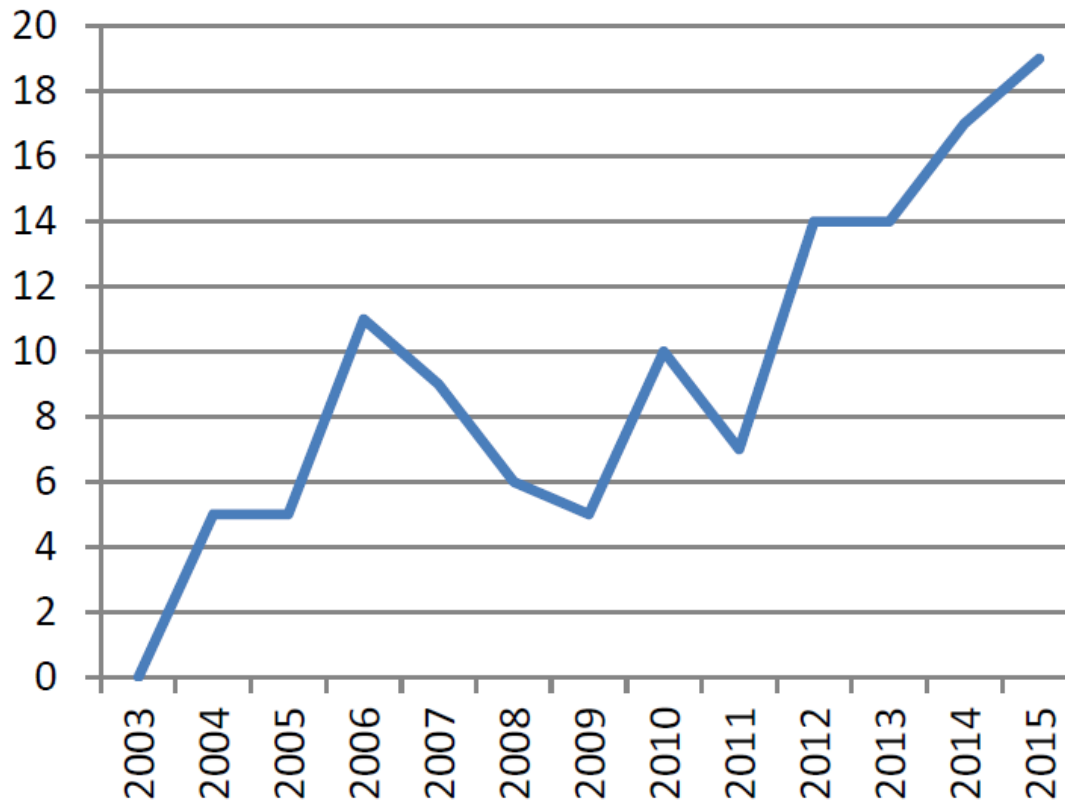
Counter arguments

1. Freedom
 - › No legislative nannyng
2. Economic and demographic developments
3. Procedures





Published cases statutory portion





III. Problematic position of child

1. Calculation
2. Information
3. Deprivation
4. Conflict of interests



Problem 1: calculation

a. civil law systems

Fraction x (Relictum + Donatum) – Deductions

- ‘Notional estate’
 1. Assets
 - Valuation date
 - ‘Deemed assets’ (eg life insurance)
 2. Debts
 3. Gifts →





Gifts

- › Relevance of gifts
 - Recipient
 - Time bars
- › Valuation date
- › Order of abatement (claw back)



b. common law calculation

- › Applicants (Eng)
 1. Spouses and civil partners
 2. Former spouses
 3. Cohabitants*
 4. Children*
 5. Stepchildren (also informal)
 6. Dependants*



Common law calculation

- › Usually, two step test
 1. Reasonable provision made by deceased?
 2. If not, court makes order: discretion
(‘appropriate provision’, ‘just and equitable in the circumstances’ etc.)



Common law calculation

› Costs!

- Ilot v Mitson 2017
 - First instance, High Court, Court of Appeal, High Court, Court of Appeal, House of Lords
- Wooldridge v Wooldridge 2016
 - Estate 7 million

News › London

Tycoon's widow worth £10m loses battle with stepson for extra £3m to fund luxury lifestyle

TRISTAN KIRK | Friday 12 February 2016 | [2 comments](#)





Problem 2: information

- › New battleground
 - right to inspect and receive copies of any documents needed to calculate the *legitime* [...] heirs must provide any relevant information upon request
- › Scope of duty to inform
 - Broad interpretation



Problem 3: share taken away?

1. Unworthiness

- Forgiveness

2. Benevolent disinheritance ('drugs clause')

- Austria par 771 ABGB, Germany par 2338 BGB, Netherlands art. 4:75 BW

3. Deprivation by testator →



Conduct-based disqualification

› Deprivation

- Discretion or statutory enumeration
 - Common law: misconduct taken into account
 - Catalunya: ‘continuous and obvious lack of normal family interaction attributable to the forced heir’
 - Par 2333 BGB: Entziehung des Pflichtteils
 - Until 2010: ‘ehrlose Lebenswandel’



IV. Recent and future developments

- › How many years does it take to change the law of succession?
 - Constitutionality
 - BVerfG April 19 2005 guaranteed economic minimum participation
- › Major reform operations
 - Austria 2017, Hungary 2014, France 2002 & 07
 - compulsory portion remains





Recent and future developments

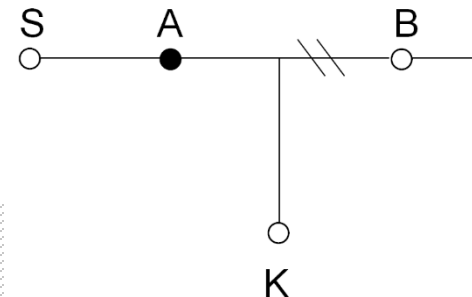
1. Legal nature of the claim

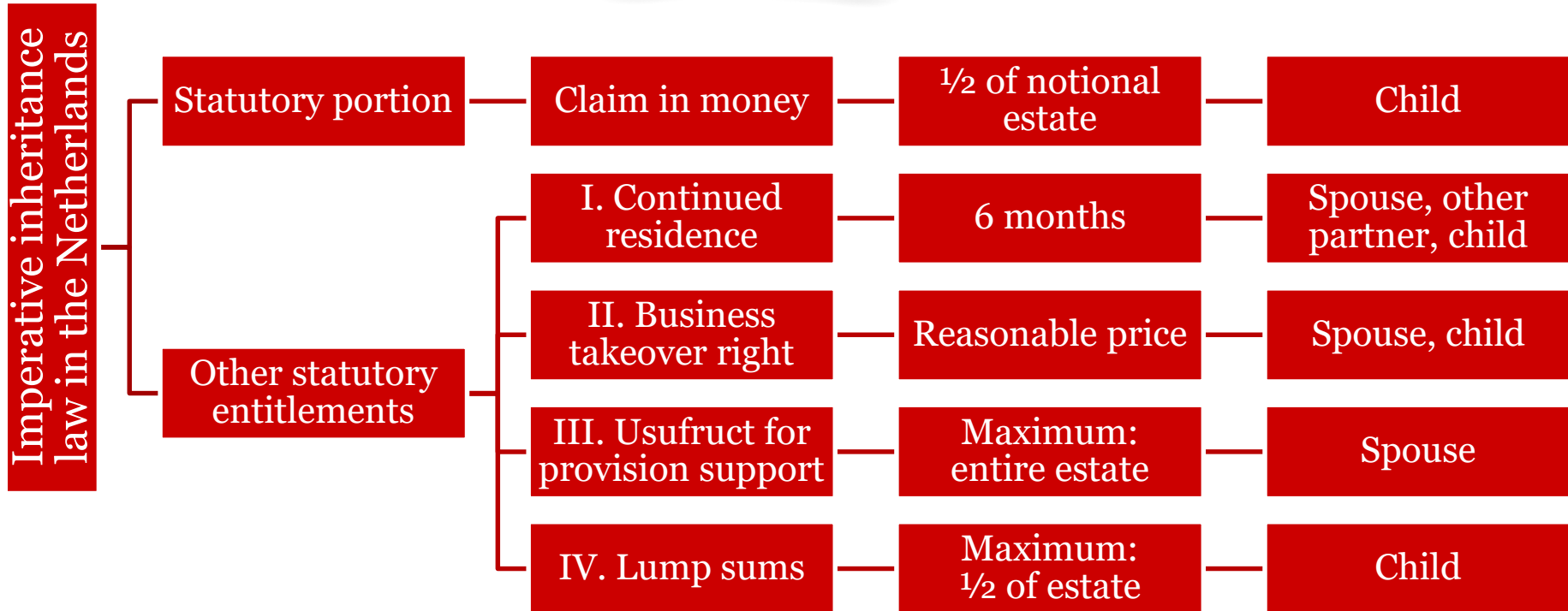
- *In value or in kind?*
- *Provision for support or fixed sum?*
- Some (new) 'mixed' systems



Example mixed system: Netherlands

- › Compulsory portion ($1/2$, in money), and
- › Lump sum
 - A child of the deceased may claim a lump sum, to the extent that this is required:
 - a. for his care and upbringing (until 18)
 - b. for his maintenance and education (until 21)







Dutch lump sums

- › Only ‘safety net’?
- › Short limitation periods
- › Maximum: half the estate
- › Payable after six months
- › Stronger position than ‘legitieme’
- › *Best of both worlds?*



Recent and future developments

2. More focus on surviving spouse, less on descendants, even less on ascendants
 - France 2007 exit ascendants



Recent and future developments

3. Larger role succession agreements

- Erbvertrag (Ger), Patto di famiglia (Ita), la RAAR (Fra), Belgian reform proposal
- Waiving succession rights (Erbverzicht)
 - Germany, Austria, Poland
- Guardian *ad litem* / *ad hoc*?





Conclusion

- › Conflict of interest parent-child
- › Open standards or legal certainty?
- › “Make a will and keep it under review”
 - UK Law Commission, Report on intestacy 2011



“Now read
me the part
again where
I disinherit
everybody.”





Thank you for your attention

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