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Commission I

Statut juridique des conjoints et de leurs enfants dans l'entreprise agricole – **Legal status of cohabitees and their children in the agricultural enterprise** – Rechtliche Stellung der Partner und deren Kinder im landwirtschaftlichen Unternehmen

National report for the Netherlands

Professor Meester Tea **MELLEMA-KRANENBURG**

Legal status of cohabitees and their children in the agricultural sector

1. Introduction

In the Netherlands the Civil Code (BW) contains hardly anything about unmarried cohabitees. Book 1 on the law of persons and family includes one provision in section 1:160 of the Civil Code in which unmarried cohabitation is mentioned as ground for termination of alimony. In inheritance law there are two provisions in which the life partner is mentioned but for the rest there are no legally operating provisions[1]. Rent law contains a provision on continuation of the lease by the surviving partner[2]. Since the late nineteen seventies cohabitation contracts have been made that include provisions that are often analogous to arrangements in marital property law. Most cohabitees, however, have regulated nothing, which tends to cause problems when they part ways. The problems that generally affect cohabitees also affect cohabitating agriculturalists. A number of problems that emerge in the case of married persons, for instance in the event of divorce, are equally relevant for unmarried cohabitees. In some respects it may even be more favourable for cohabitees that they can make arrangements whereby they are not bound by the stringent bonds of marriage. In the Netherlands a Report was published in 2010 by scientists of the VU University Amsterdam [*Vrije Universiteit Amsterdam*] and the State University [*Rijksuniversiteit*] of Groningen[3], in which they had made a study, by order of the Scientific Research and Documentation Centre [*Wetenschappelijk Onderzoeks- and Documentatiecentrum*](WODC), about material problems and inequities after divorce by spouses married out of community of property and after break-up of unmarried cohabitating partners and also tools for the government to counter them. In mapping the problems of the unmarried cohabitees I shall gratefully use the results of their study. In that connection I shall fully discuss the questionnaire drawn up for the CEDR – in so far as the problems listed in it are relevant to the Netherlands.

2. Unmarried cohabitees in the Netherlands (general)

In 2011 about the Netherlands had about 835,000 unmarried cohabitees[4], that is to say that about one in every five couples belongs to

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[1] The sections 4:28 and 4:82 of the Civil Code.

[2] Section 7: 268(2) of the Civil Code.

[3] Masha Antokolskaia, Bart Breederveld, Liesbeth Hulst, Wilbert Kolkman, Frits Salomons, Leon Verstappen.

[4] See Out of Community of Property Report [*Rapport Koude uitsluiting*] p. 19.

this category. The expectation is that this percentage will rise to one into three couples in 2050. Although no hard figures are available for this, it may be assumed that couples working in the agricultural sector will not deviate from this or not much. As already indicated above, Dutch civil law attaches hardly any proprietary consequences to the actual behaviour of cohabitation. The absence of a statutory arrangement is partly mitigated by the fact that cohabitees draw up a cohabitation contract in which they include arrangements concerning especially the division and settlement of income and property and sometimes also partner alimony. More than half of all unmarried couples regulate the proprietary consequences of their relationship by means of a notarial cohabitation contract[5]. A smaller number makes a private cohabitation contract for the desired consequences for pension schemes and mutual arrangements about the contributions to the costs of the household or the retention of common goods[6].

A rapid growth of the number of unmarried cohabitees has been a general trend in western countries since the middle of the nineteen sixties. This phenomenon is regarded as part of the so-called "second demographic transition"[7], which is characterized everywhere by declining fertility, declining marriage intensity, a considerable increase in the number of divorces and of extramarital cohabitation and extramarital births. The result of this is that the number of unmarried cohabitees is going to exceed the number of married persons. In the Netherlands that is not yet the case, the number of married persons (and registered partners) is still four times as big.

The reasons for cohabitating without being married differ. In this connection we can distinguish three groups.

Group 1: cohabitation as a trial marriage

This group, which may be considered the largest group by far, views cohabitation as a relatively non-committal experimental phase. Usually there are no children in this phase yet. A large part of the population experiences this phase nowadays: at the turn of the century seven out of

[5] See Out of Community of Property Report p. 19.

[6] See Out of Community of Property Report p. 104.

[7] See Out of Community of Property Report p. 105 and the sources cited there.

ten marriages had been preceded by a cohabitation relationship[8]. cohabitation before marriage has become the rule, marrying without a "trial marriage" has rather become the exception, which is only characteristic for certain orthodox protestants and particular population groups[9].

Group 2: cohabitation as an alternative to marriage

An increasing number of Dutch people choose unmarried cohabitation as (long-term) form of relationship. Often children are also born from these relationships. This group chooses unmarried cohabitation as an alternative to marriage. Partners who choose unmarried cohabitation as final type of relationship more often make a cohabitation contract than the cohabitees found in group 1. In this connection other couples (80%) conclude more cohabitation contracts than younger couples (60%)[10]. In this group of "definitively" unmarried cohabitees this seems different than in the first group, the unwed mothers who have a higher level of education[11].

Group 3: cohabitation as "post marriage":

The twenty-first century has shown an increase in the number of people who have a second or additional relationship. After having had a previous marriage these persons often choose cohabitation. Persons in this group make a cohabitation contract most frequently (in 2004 70%)[12].

3. Problems in the case of unmarried cohabitees

In the three different groups of unmarried cohabitees the problems occur in group 2: the unmarried cohabitees who chose cohabitation as an alternative to marriage. Studies have shown that female cohabitees with children experience material problems after a "break-up" that

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[8] See J. Garssen, A. de Graaf and J. Apperloo (ed.), Relationship and marriage at the beginning of the 21st century [*Relatie en gezin aan het begin van de 21e eeuw*], CBS, The Hague/Heerlen, 2009, p. 56, source derived from the Out of Community of Property Report p. 109.

[9] See E. Wolsma, A. de Graag, "Divorcing and living together again" (*Scheiden and weer samenwonen*), CBS Population Trends, 4th quarter 2009, p. 14-21, source derived from Out of Community of Property Report p. 109.

[10] A. de Graaf, An increasing number of cohabitees have a cohabitation contract [*Steeds meer samenwoners hebben een samenlevingscontract*], CBS Webmagazine, 10 February 2010.

[11] See Out of Community of Property Report p. 110.

[12] See Out of Community of Property Report p. 111.

correspond in nature and causation with the problems that occur in the whole population of divorced women with children. The cause of those problems – relationship-related reduction of earning capacity – is the same[13] with specific factors that affect the gravity of the problems but work in the opposite direction. The first factor lies in the fact that the absence of relationship property law and alimony law aggravate the problems of unmarried partners in comparison with those of married persons. On the other hand the presumed higher level of education of unmarried female cohabitees with children would reduce the problems. Figures of the CBS[14] also show that the buying power of cohabitating women with children after divorce declined considerably less than that of married women (14% versus 21%).

4. Statutory arrangements in Dutch law

In Dutch civil law, as already represented above, there are no statutory provisions that apply direct to the unmarried cohabitees. There are, however, a number of doctrines in the Netherlands that apply – although there is no cohabitation contract – to the relationship of unmarried cohabitees. In this connection I shall describe in particular what possibilities Dutch law now has to counter problems of a material nature and unfair distribution of property after termination of the non-marital relationship and to what extent these possibilities function properly in practice[15]. In that connection in particular the situation is discussed that the unmarried cohabitee has contributed to the accumulation of property (the value of the business/enterprise has risen) that belongs to the other partner but of which the first partner gets nothing on parting.

a. Analogous application of marital property law

It would be conceivable that in some cases of unmarried cohabitation provisions of marital property law would apply by analogy to the married cohabitees. If it is a matter of pure cohabitation, there are no written arrangements and other arrangements cannot be deduced from the circumstances, it is hard to apply provisions from marital property law analogously. The legislator is also very cautious in this[16]. It becomes

[13] See Out of Community of Property Report p. 112.

[14] See for figures Out of Community of Property Report p. 112 et seq., where data of the Central Bureau of Statistics are mentioned.

[15] See Out of Community of Property Report, p. 64.

[16] See for instance Dutch Supreme Court 17 December 2004, LJN AR3636.

different when the parties have agreed between them that certain rules from marital property law apply analogously to their relationship, for instance section 1:85 of the Civil Code. Section 1:85 of the Civil Code provides that spouses are jointly and severally liable for the costs of the ordinary course of the household. The parties may agree, for instance, in a cohabitation contract that this provision is applied to their relationship analogously. It is questionable, however, whether this arrangement also has an external effect[17].

In section 1:81 of the Civil Code it is provided with regard to spouses that they owe each other loyalty, aid and assistance. From this it follows among other things that they must contribute to each other's maintenance. In Dutch case law a maintenance obligation for unmarried cohabitees is rejected. The same applies to partner alimony. Partner alimony exists in the Netherlands to a limited extent but only if that has been provided explicitly in the cohabitation contract. Another possibility is that partner alimony is arranged voluntarily after termination of the cohabitation. This embodies the risk, however, that (disadvantageous) fiscal consequences are attached to it[18]. Furthermore it could be defended that between the former cohabitees a natural obligation (an urgent moral obligation) exists to provide maintenance. On the basis of facts and circumstances, such as nature, duration , fulfilment of the cohabitation, pattern of expenditure, a contribution obligation of one (former) cohabitee to the other (former) cohabitee may be established[19]. Another provision in the Civil Code that could be applied is section 1:84 of the Civil Code. This section provides an arrangement about the financial capacity for the costs of the household. Main rule is that the costs of the household are borne in proportion to the incomes. Analogous application is deemed possible provided that it is based on an agreement between the cohabitees.

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[17] See also Out of Community of Property Report, p. 65.

[18] See on the subject N.C.G. Gubbels, "The fiscal aspects of contribution towards maintenance between (former) unmarried cohabitees" [*De fiscale aspecten van de bijdrage in het levensonderhoud tussen (ex-)ongehuwd samenwonenden*], WPNR 6808 (2009), p. 674-681.

[19] See Out of Community of Property Report, p. 66.

b. Common goods

Another important point, especially for the agricultural enterprise, concerns the question what it to be done on termination of the cohabitation with the goods that belong to one of the cohabitees or both. In this connection a distinction must be made between common goods and other goods.

b1. Common goods

The arrangement about common goods can be found in the Netherlands in title 3.7 of the Civil Code ("Community"). The provisions concerning community do not apply specifically to unmarried cohabitees but to anyone who has something in common ownership with one or more others. Title 3.7 has as starting-point that the relationship of the co-owners (of the community) is governed by reasonableness and fairness (section 3:166(3) of the Civil Code). That means on the one hand that a community cannot simply be divided. A farmer can therefore not automatically be compelled to share (the value of) his agricultural enterprise with his co-owner if the relationship with her has been terminated. On the other hand a co-owner cannot be compelled to remain in the community for ever. In the division, especially of an enterprise, the court will weigh all specific circumstances. In that connection the possibility of being able to continue the enterprise plays an important part in Dutch law. What also often plays a part is that both parties – more than in non-agricultural situations – are inclined to accommodate the continuing entrepreneur.

b2. Pseudo-marital community

In exceptional cases, especially lower case law has considered an almost marital community (in full or in respect of a particular good) present, with as only reasoning the long-term cohabitation. See District Court of Groningen, 5 November 1976, NJ 1977, 407[20]:

'O. that for the legal rules to which such a cohabitation is subject, a link must be sought, in so far as possible, with marital property law;

[20] See on the subject Out of Community of Property Report, p.68.

O. that this means for cohabitation property law that it is necessary to proceed on the basis of the legal presumption of a complete community of property, while the greater or lesser extent of exclusion of that community must be proven as an exception'.

Another judgment that points in this direction is by the Court of Appeal of Amsterdam of 18 December 2003, LJN AR2551, in which the Court of Appeal held that the partner to whom the house belongs is obliged to share the increase in value during the cohabitation with the partner even without an explicit arrangement[21].

The prevailing doctrine, however, is still that analogous application of marital property law and the regime of the statutory community of property is rejected for unmarried cohabitees[22]. If nevertheless a community or claim of the cohabitee, not the owner, is created, the question is on what legal ground this claim is created. As already remarked, there are no specific provisions to be found in Dutch law about unmarried cohabitees and we must find this legal ground in general property law. Shifts in property between the unmarried cohabitees will have to be compensated. On what can the farmer's partner who always collaborated in the farming business base her claim after termination of the cohabitation? Does she have a claim under property law or under contract law? See the following example concerning a savings account of cohabitees[23]:

Bruinsma and Smit were living together unmarried. They each had separate bank accounts. After Smit's death Smit's parents claimed surrender of an amount of €8,600.00 from Bruinsma, which he had taken from Smit's giro account as attorney. On appeal before the Dutch Supreme Court the question was raised whether the giro account, which was only in Smit's name, was

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[21] See furthermore District Court of Rotterdam 14 June 2004, KG 2004, 905; Court of Appeal Arnhem 13 March 2007, LJN BA9509.

[22] The statutory system of marital property law in the Netherlands is the complete community of property (section 1:93 of the Civil Code). By entering into marriage without having made a prenuptial agreement, a community of property is created automatically.

[23] Dutch Supreme Court 16 February 1987, NJ 1987, 912, see on the subject also the Out of Community of Property Report pp. 70-71.

shared between Smit and Bruins. The Dutch Supreme Court answered this question in the affirmative by stating that the mere circumstance that Bruinsma and Smit had separate accounts and each of took certain outlays of their joint costs for their account, does not preclude that by virtue of an agreement between them community of one or more assets may have existed and does not rule out that they may have jointly been entitled as co-owners to the credit in the account in the name of one of them.

This judgment consequently attached proprietary consequences to an arrangement.

c. General property law

In the following it will be mapped what doctrines of general property law could be applicable to bring order to the legal relationship of unmarried cohabitees.

c1. Unjust enrichment

When unmarried cohabitees have carried on a household together, perhaps run an enterprise together and there have been shifts in property between them (reallocation), there may be ground to restore this shift in property at the end of the relationship. If nothing has been arranged between them a claim for unjust enrichment may offer a solution. Unjust enrichment has been regulated in section 6:212 of the Dutch Civil Code. Section 6:212 provides that anyone who has been unjustly enriched at the expense of someone else is obliged, in so far as this is reasonable, to compensate the damage to the amount of his enrichment (sub-section 1)[24]. In so far as the enrichment has been reduced as a result of a circumstance that cannot be attributed to the enriched party, it will not be taken into consideration.

The provision has a number of conditions, namely it must be a matter of impoverishment on the one hand and enrichment on the other hand. In that connection the impoverishment and the enrichment must be unjust. Unjust enrichment between

[24] See also T.J. Mellema-Kranenburg. Is there room for a claim on the basis of unjust enrichment in the case of cohabitees? (*Is er plaats voor een vordering op grond van ongerechtvaardigde verrijking bij samenwoners*) (WPNR 2009) 6785.

cohabitees can be relevant in particular if one of the two owns a good or, for our subject, an enterprise in which the other non-owner has performed work. If owing to this work the value of the enterprise has risen, the owner of the enterprise has been enriched. The question that then presents itself is whether that enrichment is unjust? Or, in other words, is it reasonable that the increase in value is due to the entrepreneur. An example:

A cattle farmer has a farm that is registered in his name. He has run it together with his (unmarried) partner. Together they took care of the cattle, milked the cows. Legally nothing has been arranged. Unfortunately, on 1 January 2013, after 20 years, the couple broke up. In those 20 years the business had risen in value among other things because the livestock had been increased considerably. Is the partner of the cattle farmer entitled to a compensation for the rise in value of the farm business?

If we presume, as the case suggests, that everything is in the name of the cattle farmer and nothing has been regulated, the partner is in a difficult situation. Perhaps the claim based on unjust enrichment may bring relief. The requirements of impoverishment and enrichment clearly appear to have been met. The court will test in particular whether this impoverishment and enrichment are reasonable. However it may be, legally the position of the partner is not easy. The fact is that she will have to prove the unjust enrichment.[25]

c2. Natural obligation

A statutory ground for compensation is the natural obligation, which has been regulated in section 3 of Book 6 of the Dutch Civil Code. This concerns an urgent obligation of morality and decency of one partner to provide goods or render performances for the benefit of the other partner. The drawback of the natural obligation is that it cannot be enforced. Therefore acts must have been performed that may be qualified afterwards as the fulfilment of a natural obligation. An example:

[25] It may, for that matter, be a question of unjust enrichment, even if the efforts of the partner have not actually led to a rise in value of the business, but for instance because the entrepreneur has been able to do without an "outside" worker. See Dutch Supreme Court 5 September 2008, NJ 2008, 81.

The woman performs unpaid work in the greenhouse farm of the man. As consideration – to meet the urgent obligation of morality and decency - the man puts the house to be bought, financed with his capital, in the name of them both.[26]

c3. Compensation claims

If one of the partners has made financial resources available to the other for the enterprise of the other and nothing else has been agreed on the subject, this partner has a compensation claim on the enterprising partner. This compensation claim is in principle nominal. An example:

The woman had inherited €100,000.00 from her parents. She invested the €100,000.00 in the arable farm of her partner. After 5 years the cohabitation is terminated. The arable farm has done amazingly well and has risen considerably in value in the past five years. Still the woman can only be compensated for her nominal claim of €100,000.00. If, on the other hand, the value of the enterprise had not risen but had declined, the woman would still be entitled to her nominal claim.

Naturally another result could have been reached if beforehand, at the time when the money was made available, the parties had made a different arrangement, for instance that the €100,000.00 would share in any rise and reduction in value (investment doctrine, section 1:87 of the Dutch Civil Code).

c4. Beneficial ownership or partnership

Even if the parties have not concluded a cohabitation contract, there may be an agreement that may lead to compensation by one partner to the other partner in the event of a break-up. The existence of beneficial ownership may be considered.

Example: when the parties run a poultry farm together, tacitly do everything together, both have a money loan with the bank in connection with the enterprise, but the business is still in the name of one of the two, it may be a matter of beneficial ownership. Beneficial ownership is nothing else than an

[26] See Dutch Supreme Court 8 June 2012, LJN BV9539.

agreement whereby the economic risk (rise in value, reduction in value) lies with the beneficial owner. In our example, if there is a question of beneficial ownership, both the rise in value and the reduction in value will have to be shared by the parties.

In a number of cases the cohabitees have concluded a partnership agreement in connection with the business. In this case the rules of the partnership will determine what qualifies for division/compensation[27].

5. The cohabitation contract

In the above we assumed that cohabitees have regulated little or nothing in connection with their legal relationship. In the Netherlands, however, more than half of all unmarried couples regulate their relationship by means of a notarial cohabitation contract[28]. Often the reason for drawing up a cohabitation contract is inspired by external factors, such as the pension insurance that requires it or fiscal reasons. Especially for the rate and the exemptions of inheritance tax, the notarial cohabitation contract is a requirement. Drawing up a cohabitation contract has only become prevalent in the Netherlands at the end of the nineteen seventies. Initially it was only a "selective layer of highly educated progressive and non-religious young people" who made a cohabitation contract[29]. At present there is a majority of unmarried cohabitees in all layers of the population. The group of cohabitees is very diverse and there is no significant difference in social demographic characteristics[30]. For the purpose a distinction has been made among the different groups in which cohabitees can be divided. Especially the groups 2 and 3, or the group that chooses cohabitation as an alternative to marriage and the group that chooses cohabitation as post-marriage, will choose a cohabitation contract.

The cohabitation contract is an agreement "sui generis", whose contents may differ for every couple. Civil law does not impose any restriction other than the general principles of property law. Fiscal legislation and pension legislation demand a limited number of conditions, such as the

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[27] See Out of Community of Property Report, p. 107.

[28] See Out of Community of Property Report p. 107.

[29] See J. Latten, "Trends in cohabitation and marriage: informalization and the varnish of the civil status" [*Trends in samenleven en trouwen: informalisering en de schone schijn van burgerlijke staat*]; in Out of Community of Property Report, p. 108.

[30] See Out of Community of Property Report, p. 108.

mutual maintenance obligation. In the contract at any rate the following arrangements are usually included:

- an arrangement concerning the mutual maintenance obligation;
- an arrangement in connection with the proof of ownership of the goods of each partner;
- an arrangement concerning the contribution to the costs of the household;
- an arrangement about possible compensation claims;
- an arrangement about payment of the premiums of death risk insurances (fiscally important);
- an arrangement concerning the partner pension;
- an arrangement concerning the termination of the cohabitation contract;
- an arrangement concerning the retention of goods in the event of death of the common goods;
- an arrangement about the division of common goods, in particular the dwelling, on termination of the cohabitation otherwise than in the case of death.

Besides provisions are sometimes included in the cohabitation contract about the settlement of the unspent incomes that have been earned by both partners during the cohabitation. And - in exceptional cases – a provision about payment of alimony is included. If such a provision is included at all – which happens in a small minority of cases – it will often happen in group 2 of cohabitees, i.e. the group that views cohabitation as an alternative to marriage. Furthermore all kinds of custom-made cohabitee arrangements can be made. If we look at the group 2 cohabitees again, it will especially concern settlement of the value of the dwelling in which an investment has been made and that is in the name of one of the two. If we look at group 3, the group of the "post marriage" this will often concern the costs for the care and raising of the children often on both sides. In most cases it concerns rather standard contracts. The cohabitation contracts that are made in the agricultural sector are based on this standard contract.

In the agricultural sector a specific problem is also found, which for that matter may also be present if no cohabitation contract has been made. If the woman has collaborated in the agricultural business, it is hard, after termination of the cohabitation, to acquire income again. Often she has no great earning capacity herself and she is restricted to lower-paid work. The partner is not able to pay alimony either, because he does

have property, it is true, but no income. He cannot withdraw income from his property either, because that reduces his earning capacity in the enterprise.

Example[31]*. The settlement of a cohabitation may produce real financial problems, such as in a case where the family property concerned the farm in which the woman had collaborated during the marriage Apart from the business there was no other capital at all. The income of the farmer was so low, however, that there was no financial capacity for alimony. The woman briefly fell back on welfare (paid by the authorities).*

In that respect the farmer is better off, by the way, with a cohabitation contract than with a marriage. In the case of a marriage the authorities may possibly reclaim excessive alimony paid. In the case of unmarried cohabitees this is not possible.

Furthermore I believe it is true, I have no hard figures for this, that more and more farmers' partners perform paid work outside the business of their man. Sometimes this is far from the farm in an entirely other branch, sometimes close to the farm: a cheese room, bed & breakfast, a shop with the sale of organic products etc.

6. Cohabitees and inheritance law

Dutch inheritance law has no arrangement in which the position of cohabitees has been regulated. The unmarried cohabitee is not present in intestate law, with an exception in section 28 of Book 4 of the Dutch Civil Code. If it has been a case of a long-term common household, the surviving partner is entitled to continue the residence that they shared, during a six-month period on "the same conditions as before". The surviving partner is also entitled to the continued use of the household effects for the same period, in so far as they are part of the estate or their use was due to the testator. Besides the unmarried partner who has had his principal place of residence in the dwelling and has carried on a common household with the tenant for at least two years, may acquire the position of co-tenant. After the tenant's death, the co-tenant subsequently becomes the tenant[32].

[31] Derived from the Out of Community of Property Report, p. 125.

[32] Sections 7:267 and 268.

The other important provision that is found in inheritance law is a defensive provision that protects the unmarried cohabitees against the children. This concerns section 4:82 of the Dutch Civil Code. The section provides that the testator may attach to a testamentary disposition for the benefit of his partner the condition that the claim of a statutory heir[33] in so far as it should for account of the partner, will only be claimable at the time of the latter's death. As requirements section 4:82 of the Civil Code furthermore provides that the unmarried partners carry on a common household and have concluded a notarial cohabitation contract.

An example: After a marriage of 30 years flower grower A enters into a cohabitation with flower handler B, who is 20 years younger than he. From his marriage he has three children. A makes a last will in which he appoints B as his sole heir. In the last will he includes the provision that the statutory share of his children (half their intestate share in the estate, therefore ½ of 1/3 is 1/6) will only be due on B's death. In this case B is protected against the children, who only acquire a non-claimable claim on B. In the Netherlands, however, it is still often true that agricultural enterprises are passed on to the children. In this sector disinheritance for the benefit of "an outsider" will occur less frequently in my view.

As already remarked above, cohabitees may also regulate something about common goods in a cohabitation contract. In that respect they may provide that they will be retained by the surviving partner. If the retention is "free of charge", it may be challenged by the statutory heirs in certain circumstances[34]. Naturally the cohabitees may make last wills and testaments in which they bequeath matters to each other. No further limitations are attached to this apart from the matters already said about the statutory heirs.

7. The unmarried cohabitees in tax law

While hardly any attention is devoted to the unmarried partner in civil law, fiscal law does do so. For our subject in particular the Income Tax Act 2001 (IB Act) and the Inheritance Tax Act 1956, which have both already been amended several times, are relevant to this subject. Starting-point for both laws is the provision on partnership in the State

[33] An heir according to the law, also descendant, who cannot be disinherited on the strength of section 4:63 of the Civil Code.

[34] See also section 4:126 of the Dutch Civil Code.

Taxes Act (AWR). From section 5(a) of the State Taxes Act and section 1.2 of the IB Act 2001 it follows that partners are:

1. the not legally separated spouses until the request for divorce has been submitted and they are no longer registered in the municipal personal records database;
2. The taxpayer who is registered with another taxpayer at the same address in the municipal personal records database [35] and
   a. they have together concluded a notarial cohabitation contract;
   b. from whose relationship a child has been born;
   c. who has acknowledged a child of the taxpayer/whose child has been acknowledged by the taxpayer;
   d. who has been notified as partner for the application of the pension scheme;
   e. who together with the taxpayer has a dwelling that is available to them as principal place of residence;
   f. while an underage child of one of them is also registered at the residential address;
   g. qualified in the preceding calendar year as partners.

A very elaborate arrangement that will therefore easily lead to fiscal partnership of unmarried cohabitees. In that connection it is always required that the partners are registered at the same address in the municipal personal records database. Only one of the conditions listed under (a) through (g) need be met, by the way.

The Inheritance Tax Act has a definition slightly deviating from this. Unmarried cohabitees qualify as partners for the Inheritance Tax Act if they have been registered at the same address for more than 6 months and have a cohabitation contract with a mutual maintenance obligation. Besides a person qualifies as a partner if that person has been registered at the same address in the municipal personal records database for at least 5 years. Consequently this partner concept is more restricted on the one hand and broader on the other hand than the partner concept in income tax[36]. In both definitions it is therefore required but also enough that there is a joint registration in the municipal personal records database; actual cohabitation is not required. Once a person qualifies as a partner it does not matter for the tax levy whether that person is

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[35] GBA is the Municipal Personal Records Database [*Gemeentelijke Basisadministratie*].

[36] Zie N.C.G. Gubbels, Married and unmarried cohabitees in income tax and gift and inheritance taxes [*Gehuwd and ongehuwd samenwonenden in de inkomstenbelasting en de schenk- en erfbelasting*], 2013/3 FJR Journal for Family and Juvenile Law [*Tijdschrift voor Familie- and Jeugdrecht*].

married or unmarried. There are, however, fiscal differences between the unmarried cohabitee who does not qualify as a partners and the cohabitee who can be qualified as a partner. Furthermore the married partner always qualifies as a fiscal partner but the unmarried partner still has the possibility of ensuring that all the conditions for fiscal partnership are not met. For that matter the unmarried fiscal partner is still at a disadvantage in comparison with the married partner on one point, namely where the buy-out of alimony is concerned. It is tax deductible for the married cohabitees but not for the unmarried partner. For inheritance tax the qualification of fiscal partner is always favourable: there is a low rate, the spouses rate applies and the exemptions that spouses have also apply to the fiscal partner (in 2013 €616,880.00).

8. Bottlenecks

In the Out of Community of Property Report an attempt has been made to map the problems in the Netherlands for unmarried cohabitees. The authors note[37] that women who are cohabitating unmarried with children as well as married women who are living together with children suffer a lasting income and career disadvantage during their relationship but that financially they appear to be less dependent on their partners than married women. The supposition is expressed[38] that this perhaps has to do with their higher level of education. This last aspect does not appear to apply to the agricultural sector. Here the level of education of the unmarried farmer's partner will not be higher than the married farmer's partner. However this may be, according to the report the purchasing power of cohabitating women with children after divorce decreases less (14%) than that of married women (21%). As I supposed above, I believe with regard to the women in the agricultural sector that there is no difference in financial dependence where married and unmarried women are concerned. In this connection a distinction can again be made between the farmer's partner who collaborates on the farm and the farmer's partner who obtains income outside the farm. Especially the farmer's partner who has always collaborated on the farm receives little or no alimony and has young children is a problem case.

[37] See for instance p. 300 of the Report.

[38] See Out of Community of Property Report, p. 300.

9. Solution for the bottlenecks

a. Legislation

In the Out of Community of Property Report cited several times above the question has been asked whether there is need for a special statutory arrangement with regard to "divorce" by unmarried cohabitees. To put it differently, must the non-committal nature that now attaches to unmarried cohabitation in the Netherlands be maintained or must the authorities intervene in the termination of the relationship as is also the case in the termination of marriage. In that connection an important part is played by the reason for choosing unmarried cohabitation instead of entering into a marriage. An argument against a statutory arrangement is that one of the principal reasons not to marry lies in the deliberate and joint free choice of the partners not to come under the statutory arrangement of marriage[39]. Legislation that puts them in that position after all would comprise a direct infringement of the personal autonomy of the persons concerned. The study that has been performed for the Out of Community of Property Report shows the opposite, however. Whether one is a supporter or opponent of a statutory arrangement for unmarried cohabitees, an absolute condition for such an arrangement is a strict qualification of the term of cohabitee (or partner). In so far as this is concerned, civil legislation should look at fiscal (and also social) legislation. In the Out of Community of Property Report it is concluded that there are certainly terms present to introduce a statutory arrangement to counter inequities that may occur in the event of termination of a relationship complying with certain criteria by unmarried cohabitees in view of the position of children, whether underage or of age, who depend on one of the partners because of study or education. In that connection the Report chooses partner alimony as a tool. Differently than in the case of a marriage the unmarried partners must have the possibility of deviating from this statutory regime by agreement. Besides it is proposed to declare a number of provisions from marital property law applicable accordingly: section 1:84 of the Civil Code, (contribution to the costs of the household), section 1:87 of the Civil Code (compensation rights), change of contents of the agreement on the strength of reasonableness and fairness (section 6:258 of the Civil Code).

[39] See Out of Community of Property Report, p. 326 and the authors mentioned there.

b. Cohabitation Contract

More than is now the case unmarried cohabitees would have to conclude cohabitation contracts in which the consequences of termination of their cohabitation is regulated. In the first place more attention/publicity should be given to the possibility of concluding a cohabitation contract. If they proceed to the conclusion of an agreement, more attention should be devoted, for instance by the civil-law notary, to the termination of the agreement and corresponding consequences (for instance discussion of an alimony clause).

c. The agricultural cohabitees

More than is now the case cohabitation contracts should be concluded by farmers who are cohabitating unmarried. In those contracts more attention should be given to the typically agricultural aspects. In that connection consideration could for instance be given to an arrangement for a fair compensation for the farmer's partner who collaborates on the farm. Alongside or instead of this an alimony compensation could be included in case the cohabitation should be terminated. And it should not be forgotten that an agricultural last will and testament is also indispensable for the cohabitee.

10. Conclusion

In Dutch civil law legislation hardly anything has been regulated for unmarried cohabitees. That is the case, however, in fiscal and social legislation. Pension law also assigns certain claims to unmarried persons on certain conditions. Via contract law and by last will and testament it is very well possible to create a good position for unmarried cohabitees. This applies to cohabitees in general but also in particular to agricultural cohabitees. An important bottleneck is the woman with young children after a terminated cohabitation. If nothing has been regulated in a cohabitation contract she is left empty-handed. Especially if her work has always been done within the agricultural enterprise her position deserves more protection than is now the case.

Summary

In the Netherlands there are a large number of unmarried cohabitees. At this time this is an estimated one in five couples. It is expected that this number will only increase in the coming years.

Regulations

In Dutch civil law hardly any proprietary consequences are attached to the behaviour of cohabitation. The absence of a statutory arrangement is partly countered by cohabitees drawing up a cohabitation contract in which they make arrangements about their contribution to the costs of the household, pensions, the jointly occupied dwelling, settlement of income and sometimes also partner alimony. In the Netherlands consequences are attached to unmarried cohabitation in legislation in the fiscal field, but also pension legislation and social legislation.

Categories of Cohabitees

The cohabitation problems differ depending on the reason for cohabitation. Roughly three categories may be distinguished:

1. the group that regards cohabitation as a trial marriage.
2. The group that views cohabitation as an alternative to marriage.
3. The group that cohabitates in the form of a "post marriage".

The problems in the Netherlands occur in in group 2. This especially concerns mothers who are left behind with young children after the cohabitation has ended. Also in the agricultural sector this group constitutes a problem. The unmarried cohabitating farmer's partner sometimes collaborates in the business without receiving a suitable reward for the purpose. After termination of the cohabitation she has trouble providing for herself and her children, also because she has not been highly educated. She cannot claim partner's alimony.

Legal arrangements and the possibilities in practice

Partly the noted problems are countered by notarial cohabitation contracts. They have often been made to qualify as a partner for fiscal and pension legislation. Many of these contracts are standard contracts, however, and leave much unregulated. Subjects that are often absent are: alimony amounts, clauses about settlement of income earned, compensations for making available labour and capital. There is no attention for specific agricultural problems in them. The fiscal legislation on the other hand does devote much attention to unmarried cohabitation and provided that one qualifies for fiscal partnership there is fiscal equalization of the unmarried cohabitees and the married person. Inheritance law also knows no legally operating arrangement for the unmarried partner, but it is possible to make a good last will and testament for unmarried cohabitees.

Solution of bottlenecks

For the time being the position of unmarried cohabitees is not regulated by law. At short notice there will not be any partner's alimony for unmarried cohabitees either. It is therefore advisable for Dutch unmarried farmers and farmer's

partners who live together to conclude a custom-made notarial cohabitation contract and subsequently a last will and testament in which they offer each other protection.

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