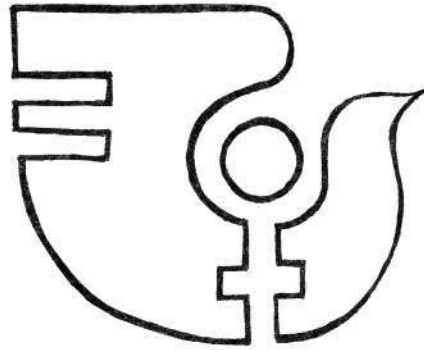


THE LEGAL DISABILITIES OF ZULU WOMEN



by M. L. LUPTON

1. BACKGROUND—The Natal Code of Bantu Law

Women in general in South Africa endure certain legal disabilities, black women more so than white, but undoubtedly the group who bear the heaviest cross of disability are Zulu women.

The reason they are singled out for a heavier dose of disability than their sisters is that all Zulu women are subject to the Natal Code of Bantu Law.

This Code was drafted in 1878 and enshrined in Statute by Natal Law No. 19 of 1891. This Law has been amended since then, but the amendments have been superficial rather than radical, with the result that the most important piece of legislation regulating the personal relationships of the Zulu has been ossified, frozen in the position it was in in 1878. If some latter-day Zulu Rip van Winkle had fallen asleep in 1878 and woken in 1975, nearly 100 years later, he would have discovered a vastly changed society with a totally different pattern of life, but still regulated by the same Laws.

This is entirely foreign to the nature of law, a legal system should be, and normally is, a dynamic organism which grows and develops to keep pace with the society it serves. A legal system which is out of touch with a society is of no use to such a society and only creates friction and hardship instead of alleviating these conditions.

Unless an African in Natal has been granted a letter of exemption by the State President, exempting the recipient from the Natal Code (uncodified Bantu Law in the rest of the Republic) that African is subject to the

Code. Because such exemption is rarely applied for, or granted, the effect in practice is that 99% of all Africans in the Republic are subject to Bantu Law or in Natal, to the Natal Code.

The position of black women in Natal can be distinguished from that of their sisters in the other Provinces who are subject to uncodified Bantu Law. In the other Provinces an African woman becomes a major, with full legal capacity at the age of 21 years, or if she is widowed or divorced (her position in this regard is the same as that of a white woman). Natal, however, is the only Province which enforces, via the Natal Code (which is part of the body of statutory law of South Africa) the rule that an African woman remains a perpetual minor with all its accompanying legal disabilities.

The Natal Code was drafted for and originally applied to a homogeneous agrarian society; it reflected the values and regulated the needs of an elementary tribal society, but it has as little relevance to the conditions of a contemporary modern urbanised population participating in a western economy as an ox-wagon at a Grand-Prix.

An African woman who lives in an urban area in Natal has to compete in an advanced, white dominated, capitalist society in accordance with the same rules and norms, the same standards and requirements as any other citizen, but she has to face this formidable battle with one hand tied behind her back—she is hamstrung by the medieval laws of an agrarian society.

The lynch-pin, the key to the successful operation of the Natal Code's regulations regarding women originally, was the kraalhead. Kraalheadship was a position of great

public esteem and carried heavy responsibilities, but the kraalhead was generally a sound man of high integrity who protected the interests of his womenfolk. Yet today an African woman living in an urban area has often never even met her kraalhead who may be at a remote kraal. But, he retains an awesome power over her. She still has to bow to his authority without benefitting from his protection, she has the unenviable task of competing, as a perpetual minor, in a society which places severe disabilities on her freedom to contract as a result of this lack of legal capacity.

2. SOME LEGAL DISABILITIES OF AFRICAN WOMEN ARISING FROM THE NATAL CODE

(a) Residence and Custody of Unmarried Women

The Code gives the kraalhead wide powers affecting the freedom of movement of unmarried women under his guardianship. If they leave the kraal in defiance of him they are guilty of an offence in terms of sec. 163 (2) of the Code. A woman, whether a major or not may thus not change her place of residence without his permission.

Placing this sort of arbitrary power in the hands of an individual and backing it up with legal authority is nothing short of feudalism.

(b) Corporal Punishment

In terms of section 54 of the Code "Any parent or guardian may inflict reasonable, but not excessive corporal punishment upon any child or ward under his care for the purposes of correction."

In a recent action for assault a father successfully pleaded that he had struck his adult daughter (Aged 40) with a stick so as to maintain order in his kraal.

This is a clear case of legalised assault which is open to abuse by an authoritarian kraalhead. Except in extreme cases however, most women are reluctant to seek redress in Court against her guardian for fear of further retribution and because she is wholly dependant on him for maintenance.

(c) Consent to Marry

Unless an African woman in Natal over the age of 21 years is emancipated she cannot contract a valid marriage, be it civil or customary, without her guardian's consent.

The position for all other races in the other Provinces is that they only require the consent of a parent or guardian to marry if they are below the age of 21.

Bearing in mind the break-up of the family system this requirement can result in hardship and delay in order to trace a distant guardian who may then withhold his consent in order to cash in on lobolo.

Cases like this where women have lost contact with their guardians, or never had contact or where their guardian is a complete stranger is an important

factor driving them into loose relationships which are contributing to the increasing rate of illegitimacy among Africans, which has risen from 36% in 1964 to 58% in 1974.

(d) Divorce

Unlike a European minor, an African woman does not assume majority status upon divorce, but remains a minor and suffers all the attendant disabilities. She has no right of action for damages against her husband's paramour, for adultery, as such an action is unknown in Bantu Law.

A wife who wishes to obtain a divorce must be assisted by her father or protector, and after the divorce she must return to the protection of her father or the person who would have been her guardian had she not married. Another consequence of divorce is that she loses the guardianship of her children which vests in her erst-while husband by virtue of his having paid lobolo.

If the divorce is occasioned by the woman's fault, her father has to forfeit some or all of the lobolo, which if he values the cattle more highly than his daughter's welfare, he is loathe to do. This fact has often given rise to cases where the guardian has refused to assist his daughter to obtain a divorce and forced her to return to a husband who is ill-treating her. The fact that her husband is legally allowed to chastise his wife (sec. 41) has also made it more difficult for her to establish grounds for divorce.

(e) Perpetual Minority

According to sec. 27 (2) of the Code all African women are deemed to be perpetual minors, subject to the authority of their guardian unless exempted from Bantu law or emancipated from guardianship.

The immediate effect of this section of the Code is twofold viz., by relegating an African woman to a position of perpetual minority she suffers all the legal disabilities of a reduced legal capacity e.g., she cannot enter into any contract or litigation, without her guardian's assistance, conversely it places a tremendous power over her well-being in the hands of her guardian.

(f) Guardianship of her Children

In terms of section 31 of the Code when a man married a woman and paid lobolo for her, he became the guardian of all children born to her during the subsistence of the marriage. The effect of this is that an adulterine child born during wedlock belongs to the mother's husband even when the mother is afterwards divorced or remarries.

Take the case of Selena Gumede who was married by customary union to Aaron Gumede. Shortly after their marriage he left for Johannesburg to seek employment. He sent her no money and she did not see him again. Selena in turn obtained

employment near Durban and formed a liaison with a certain John Masing. Two children were born of this relationship and they assumed John's name.

Aaron now reappeared and claimed the children fathered by John, of whom he was the legal guardian. Unless Seleria's daughter by John established contact with Aaron Gumede, her guardian, she would be unable to marry or litigate without his assistance.

(g) Death of an Unmarried Woman's Guardian

A woman's eldest brother is usually her late father's heir, but in an heirless house her new guardian could turn out to be a remote male relative who is not interested in her and refuses to assist her to overcome the disabilities of her minority.

Where a woman has no guardian or is not able to trace one, the State President in terms of section 86 of the Code, in his position as Supreme Chief of all Africans, has delegated powers to Chiefs and Headmen to appoint a suitable person. Any stranger appointed in this fashion would obtain rights to that woman's property.

(h) Property Rights

The law relating to proprietary capacity is also thoroughly unsatisfactory in its application to women. This is not surprising seeing that it was the law of peasant cultivators who practised a subsistence economy in which the woman's role was largely confined to the household and the fields.

In terms of sections 35 and 36 of the Code a kraal-head is entitled to and becomes owner of the earnings of his minor children and to a reasonable share of the earnings of other members of his family and kraal inmates.

In section 128 the Code refers to a medicine woman and a midwife being able to institute an action to recover fees and earnings if assisted by her husband or guardian. No reference is, however, made to a Hospital nurse, clerk, teacher, or factory operative. These classes did not exist in the old society yet, educated, qualified women have no greater legal claim to their earnings than a housewife in a peasant community.

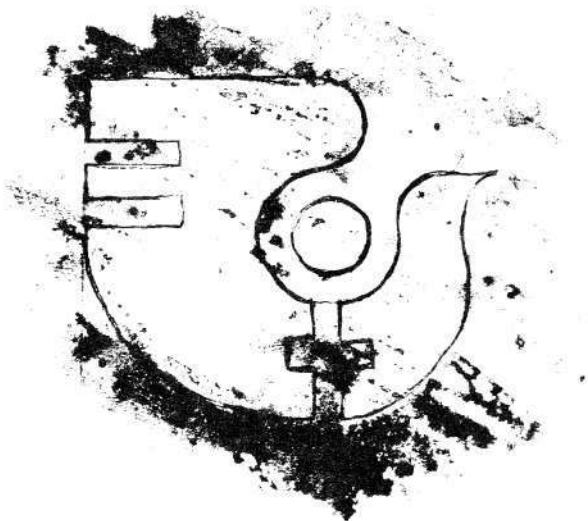
The matrimonial property regime according to Bantu Law does not create a joint partnership or estate and property acquired by the wife belongs to her house and is not regarded as her personal property. Consequently a married woman's personal earnings and any gifts are regarded as belonging to her "house". Due to the fact that she is a minor all "house" property is directly controlled by her husband or guardian and she cannot dispose of this property without his consent. This property can also be attached for her guardian's debts.

(i) A Widow's Right of Inheritance

A widow's position regarding the inheritance of her husband's estate is precarious whether she marries by civil rites or by customary union. The reason is once again that the Natal Code was designed to deal with an agrarian subsistence economy, only involving rights in land and livestock and in which there were stable, unified families.

The matrimonial property regime created by an African couple who marry according to civil rites is automatically out of community unless they appear before a Bantu Affairs Commissioner one month preceding their marriage and by means of affidavit indicate that they wish to be married in community. (The position is exactly the opposite for whites).

In Natal, however, even where a woman's husband has made a will designating her as his heir in terms of Roman-Dutch Law, she still does not become



full owner of the property because unless she is emancipated in terms of section 28 she remains a minor, and her inheritance will be controlled by her new guardian.

Regardless of whether a woman is married according to a customary union or by means of civil rites, if her husband dies intestate his estate will devolve according to Bantu law i.e., by primogeniture or to the eldest surviving male descendant.

Where a widow has a son, the son will inherit the house property and she will have certain well-defined rights in it, if she continues to reside in her "house". Where she has no sons the deceased's

property will be inherited by his nearest male relative in the collateral line, who may be a brother or an uncle. The widow is naturally completely at the mercy of this heir for support.

This is illustrated by the case of Mrs Rose Ndhlovu, whose late husband was a School Principal, while she was a highly qualified nurse. They lived in Kwa-Mashu. They had no sons and her husband died without leaving a will. In terms of the Natal Code their joint property reverted to his brother who lived in a remote kraal at Kranskop and with whom they had had very little contact. The brother refused to support Mrs Ndhlovu and her two daughters unless they took up residence in his kraal.

The present system militates against the wife and is tailor-made for ne'er-do-well heirs who can dissipate the property and then disappear.

(j) **Emancipation of African Women**

In terms of section 28 (1) of the Code an African woman may apply to the Bantu Affairs Commissioner's Court for emancipation from the strictures of perpetual minority imposed by section 27 (2). Emancipation is, however, limited to unmarried females, widows or divorced women. A married woman cannot be emancipated during the subsistence of her marriage.

The effect of emancipation is to free a woman from the power of her guardian, it may further grant her ownership in respect of property she may have acquired, full power to contract and to sue or be sued in her own name. It also gives her control over the property of her minor children.

The grounds for emancipation are rather vague and general, the usual requirements being a job, thrifty and sober habits and a certain level of education. The onus of establishing these requirements to the satisfaction of the Court rests upon the applicant.

The success or failure of an application often depends on the attitude and discretion of the Bantu Affairs Commissioner rather than any established precedents. Research done on applications for emancipation at the Bantu Affairs Commissioner's Court in Durban reveals that during 1971, 1972 and 1973 the Commissioners were fairly liberal in their approach and readily granted applications. Applications by widows who had been married by civil rites resulted in almost automatic emancipation.

However, late in 1973 a certain Mrs Zondi applied for emancipation and the Court inexplicably changed its formerly liberal approach and suddenly became very legalistic, stressing that a change in status is an important legal issue and that the letter of the law in this regard must be upheld. The result has

been a consequent tightening up by the Court in granting applications for emancipation.

The essential problem in cases of emancipation is a difference in outlook between the Court and the social realities of the applicant. The Court examines the application from a legal point of view, viz., the woman must prove factually that she has a job, is educated and is thrifty. The social requirements of the woman who needs to be free to operate successfully in a competitive money economy are ignored.

The Courts should be encouraged to view the case in its wider social context, e.g., that a letter of emancipation is a prerequisite for a woman being entitled to acquire accommodation in her name in a Municipal township. Widows and divorcees find that on the death of their husbands or the dissolution of their marriage they face the grim prospect of being evicted from their homes, as the houses are registered in the name of the man. Yet vital as the need for accommodation is, it is not a ground for emancipation in terms of the Natal Code.

Another vital prerequisite for success is the guardian's consent to the proposed emancipation. If he refuses this consent her application will fail. This is illustrated in the case of Albertina Duma, who was 40 years of age, a spinster, living in Kwa Mashu with her two children. A certain Douglas Toto was cited in her pass book as her guardian. He refused to support her application unless she handed her children over to him. She refused, her application failed.

(k) **Unlicensed Love**

Of all the disabilities which are the lot of the unfortunate African woman in Natal, the piece de resistance is undoubtedly contained in section 163 of the Code, according to which an African woman can be subjected to what amounts to house arrest for leading an immoral life. If ever there was a hypocritical or holier-than-thou approach it is reflected in this section of the Code. Imagine the hue and cry if white women were subjected to such a penalty. To cap it, in terms of section 162 (1) (d), adultery is still an offence in regard to Africans in Natal. The South African Courts proscribed it in 1918.

Apart from outraging privacy why Natal should persist in its attempts to legislate Africans into higher morality by means of sanctions that are offensive to contemporary morality is astounding.

CONCLUSION

Although the outline of the legal position of African women I have sketched is a grim one, the criticism of the Code and the intolerable burden of the African women in Natal has not, fortunately, gone unheeded by the Authorities.

The Code is part of the statutory law of South Africa, and should have been radically amended by our legislators years ago, but this task has now been entrusted to the Legislative Assembly of KwaZulu. They appointed a Select Committee to investigate the position in May, 1974. This Committee presented its report earlier this year.

The amendments to the Code suggested by this Select Committee are radical and enlightened and deal with all the disabilities I have covered. If all these amendments are implemented the long-suffering Zulu women will finally be free of their crushing disabilities and be, legally, at long last, on a par with their white sisters. □

FOUR DITTIES FOR WHITE REGIMES

Composed on June 25th, 1975

by Vortex

1.

White man, look what you have done,
Observe your destiny:
That badge of privilege has become
a badge of infamy.

2

For centuries you were 'one of us',
The blacks you would condemn.
But now your grim pale face proclaims
That you are 'one of them'.

3

You knew you were superior,
With law and gun and cop,
You knew you were the boss, until
Frelimo blew the top.

4

You knew you were superior,
The blacks would make you laugh
With their incompetence, until
Frelimo blew the gaff. □