

LEGAL PERSONALITY IN NATIVE LAW

7

STATUS

The legal status of an individual in Native Law depends upon a number of factors which affect his status in different ways. These may be said to elements in the legal personality of the individual. In our South African (European) law the word person is to be found in its fullest and most complete form in a human being of the male sex who is in possession of his freedom, legitimate by birth or adoption, of full age, and in possession of all his faculties, and it might be added, unmarried. The sum total of all these qualities is what is spoken of as his status, and any defect or alteration in any of these particulars would at once bring about an alteration in his status. Although a number of these factors mentioned in connection with the determination of status in European law are also to be found in operation in Native Law there are interpreted somewhat differently and their effect on the status of the individual is not the same as in European law.

SEX

Thus whereas European law does not a general rule draw any great distinction between a man and a woman as far as legal rights status is concerned, in Native Law sex plays an important part in determining the ^{legal} rights and duties of individual. In European law the differences between men and women are confined to such minor matters as the age of puberty (14 for boys & 12 for girls), the inability of a woman to become a surety either for her husband or for a third party except under strictly limited circumstances. "Institute of S.A Law" Vol 1. (5th ed.) p. 2.

conditions, and the limitations upon the contractual capacity of married women, especially women married in community of property. Apart from this a woman in European Law has the same legal capacity as a man.

In Native law the legal effect of sex is quite different. A woman in Bantus society was a perpetual minor, invariably under the guardianship of some male. A woman was unable to own property in her own right, except for minor things such as her personal effects; she could enter into contracts unassisted by her guardian, nor could she sue or be sued without the intervention of her guardian. ~~whatever her age~~
Before her marriage a woman fell under the guardianship of her father, if alive; if her father were deceased a woman came under the guardianship of her father's heir, who might be a son of her father if old enough to discharge the duties of guardianship or some other male relative of her father who is entitled to succeed to his rights and duties. After marriage a woman ~~comes~~ ^{falls} under the immediate guardianship of her husband who although he might himself be subject to the authority of another male, i.e. the head of the household to which he belongs, is regarded as the guardian of his immediate family i.e. of his wife or wives and their children. If the marriage to which she is a party is dissolved by divorce the woman reverted to the guardianship of her father or his heir. On the other hand if the marriage is dissolved by the death of her husband, a woman did not automatically revert to the guardianship

of her father or his heir. As long as she the individual entitled to be her guardian was her husband's heir, and as long as she remained at her husband's boma as a widow she was subject to the guardianship of her husband's heir. Even if she left her husband's boma and returned to her own father's boma, as long as she remained unmarried her lawful guardian was her husband's heir. On the other hand if she remarried, ~~she is~~^{in which case} her husband's heir so received the second lobola given by her second husband she ceased to be under the guardianship of her first husband's heir and came under the guardianship of her second husband. From this it will be clear that in Native Law no provision under no circumstances could a woman become sui juris; she was always alieni juris.

Since the advent of European law various legislative measures have been adopted with the object idea of bringing about the ^{legal} emancipation of women in Native Law. It must be remembered that whenever Native Law has been recognised and applied by European governments in Southern Africa, this has been subject to the condition that recognition will not accorded to those aspects of it not which are regarded as "repugnant to justice and equity" (uninherent with principles of civilisation recognised throughout the civilised world so that "when native custom is repugnant to justice and equity it must give way" (Ndumo vs Mankwane, 6 E.A.C. 62; Ndantsi vs Sintentene, 1 N.A.C. 43; Nsacihi vs Xangati, 1 N.A.C. 50; Ndema vs Ndema (1936) N.R.C. (C.S.O.) 15. The position of women in Native Law

European European

These governments and their courts have found several aspects of the position of women in Native Law, which they have condemned as inequitable and ^{which} they have consequently either ^{been} repealed by legislation or been refused recognition by the Courts.

Thus as far back as 1879, proclamation 112 of that year applicable to the Transkeian Territories provided in s. 39 that "all persons, male or female, when they shall attain or who have attained, the full age of twenty-one years, shall be deemed to have attained the legal age of majority". This means that upon reaching the age of 21 in the Territories concerned a woman becomes of full legal capacity... able to acquire rights and incur obligations, to sue and be sued ^{as in} in the same way as a man. In the rest of the Cape ~~excluding~~ the Transkeian Territories the age of majority for both males & females has been fixed at 21 ^{Cape Advance 62 of 1925.}

In Natal under the ^{although} ~~Revised~~ Code of Native Law ^{in 1932} ~~also makes~~ the provision age of 21 has not been adopted as the age of majority for women provision ^{was} made for granting women relief from the perpetual minority to which they are subject under pure Native Law. Section 28 of the Code provides

(1) Any unmarried female, widow or divorced woman who is the owner of immovable property or who by virtue of good character, education, thrifty habits or any other good and sufficient reason is deemed fit to be emancipated, may be freed from the control of her father or guardian by order of the Native Commissioner's Court and vested with the full powers of a married

or with the full rights of ownership in respect of any property she may have acquired, and with full power to contract or to sue or be sued in her own name. Any such widow or divorced woman may in the discretion of the Court be given control over the property of her minor children.

(2) Application by a woman for emancipation as in sub-section (1) provided, shall be upon affidavit and motion to the Court of the Native Commissioner having jurisdiction and upon notice to the applicants' father or guardian, and the Court shall grant its order thereon". It will be noted

(1), that it is only since 1932 when the revised Code of Native Law in Natal was promulgated (See Proc. 168 of 1932) that it has been possible for this relief to be granted to women in Natal. "Until ~~was indicated in that~~ the promulgation of the Code of 1932 it was ^{Natal} law that a female could not own property in her own right. She could acquire property by her labour or by way of gift but such property was held for the benefit of her husband".

(*Maserku vs Kunene (1940) N.A.C. (CIV) 79 + cases quoted therein*)
~~In those words prior to 1932 by a woman~~
 The property as acquired became the property of the owner of the house to which the ^{she} woman belonged, the owner being, of course, a male. Since 1932 the position has become as stated in section 28.

(2) It is only women who are not married - either unmarried women, divorced women or widows - who can obtain the relief contemplated under section 28. Married women cannot obtain even this limited degree of emancipation from the control of some male relative or other.

(3) The relief can only be granted to a woman where she is "the owner of immovable property or where on account of her good character, education, ^{any} thrifty habits or other good

and sufficient reason she is deemed fit to be emancipated

(iv) The possession of the qualities referred to above does not automatically entitle the woman in question to emancipation. She must apply for the ~~same~~ relief by way of affidavit and notice to the Native Commissioner's Court having jurisdiction, due notice being given to her father or guardian who is of course entitled to oppose the application. It is in the discretion of the Native Commissioner's Court to grant or refuse the order.

- (v) The effect of a successful application is
- (1) to free the woman from the control of her father or guardian
 - (2) to vest in her the full powers of head of household
 - (3) to give her "full rights of ownership in respect of any property she may have acquired"
 - (4) to grant her "full power to contract or to sue or be sued in her own name"

(vi) At the discretion of the court such a woman, if a widow or divorced woman, ~~but~~ may be given control over the property of her minor children. This naturally does not apply to an unmarried woman.

Apart from the provisions of section 28 it is still part of native law in Natal that women cannot own property. The principle of women not being capable of owning property is such a fundamental part of Native law and social structure that it will not lightly be presumed to have been abrogated or repealed in the absence of the clearest indication to the contrary. As stated previously, however, women are allowed to own their personal effects. The dresses, blankets etc of a Native woman are her personal property and to this extent she may own property on the terms of the Code (Yumba vs Yumba (1940) N.A.C. (S.S.N) 35).

Apart from perpetual minority and inability to own property, inability to contract or to sue or be sued without the assistance of a male guardian.

Another legal disability from which women suffer in Native Law which modern European law has endeavoured to remove is the inability to become head of a household i.e. a kraalhead.

In pure Native Law only a male could become a kraalhead although not every male was a kraalhead at any one time. ~~Women cannot~~ Unlike the position in ^{Cyberia} Native Law where a married woman upon the dissolution of the marital union to which she was a party becomes *sui juris*, in Native Law, as previously indicated, a woman, whether married or unmarried was always *alien juris* and therefore incapable of becoming a kraalhead.

In Natal ^{a woman} may be appointed a kraalhead under either section 28 or section 42. Section 28 of the Natal Code of Native Law read together with section 42 empowers the ^{the} Native Commissioner's Court by order to vest a woman with the powers and privileges of a kraalhead. This, where it occurs, is a more or less permanent appointment. Under section 43 during the absence of a kraalhead, a woman may with the written authority of the native commissioner first had and obtained take all such steps, including the institution of legal proceedings without the assistance of her guardian as may be necessary to protect the property of the absent kraalhead or of minor inmates. Here a woman is ~~only~~ ^{and} not appointed kraalhead but is permitted to exercise some of the functions of a kraalhead during the absence of the latter from his kraal. These provisions under which a woman may be appointed a kraalhead either permanently or temporarily do not appear to apply only in Natal.

Age.

Under European law a person reaches the age of majority at 21 i.e. when he has attained the age of 21 he becomes of full legal capacity, able to acquire rights and incur obligations, to sue or be sued unassisted. Until he has reached that the individual is subject to certain disabilities or incapacities in the eyes of the law; his ability to make contracts or to incur obligations, to sue or be sued, his personal rights — all these are in varying degrees limited during the individual's minority i.e. while he is under 21. These limitations upon the legal capacity of a minor are in the main intended to protect the minor against acting to his own detriment owing to his immaturity or to protect him against being taken advantage of by others. Minors are not all treated in the same way in European law. They are divided into different categories with different disabilities. Thus children under seven are regarded as infants who are for example, ^{presumed to be} absolutely incapable of committing a crime. This presumption is an irrebuttable presumption i.e. one which cannot be rebutted by evidence to the contrary. Between the ages of 7 and 14 a child is also presumed to be incapable of committing a crime, but this is a rebuttable presumption i.e. evidence can be brought forward to show that a particular child, though between the ages of 7 and 14, is able to distinguish between right and wrong and is therefore capable of committing a crime. A boy under 14, however, is regarded as incapable of committing the crime of rape. After 14 a child is regarded as capable of committing a crime, although such a child, if under 21, is naturally not treated in the same way as a person who has reached the age of majority. A child

over 14 is for example regarded as fully capable of giving evidence in a case or making or witnessing a will. Children under the age of puberty (which in European law is 14 for girls 12 for boys, are not allowed to marry.

When we pass to Native Law we find that the factor of age is treated quite differently as far as the legal rights and duties of individuals are concerned. In the first place Africans did not have an exact method of determining the age of an individual. The age of an individual was determined by reference to some event or events which occurred in the life of the family or of the community of or of the tribe at the time of his birth such as a severe drought or a famine, or a ~~strength~~ war or an epidemic. Obviously such a method of reckoning age can only give a rough approximation of the actual age of the persons concerned. Often the naming of name given to the child is related to the events which surrounded his birth. Thus many African children born during World War I were given names such as Kaiser or Samani (Germany) or Rasputin (Russia) while names such as Nomabulu indicates suggests birth during the Boer War.

Although Africans did not have an accurate method of determining the age of an individual, they also divided the life of the individual into different stages with different degrees of legal capacity. Among Africans, as among Europeans, what they regarded as an infant was looked upon for events useful used by Africans to determine the approximate age of individuals see Sabau, S.T. "Izeganebo"

as incapable of doing wrong. The period of infancy was roughly from birth to about seven or eight years of age. A child of this age was regarded as incapable of doing ^{such} wrong as would entitle the sufferer to sue. This does not mean that such children were not punished for their misdeeds. Such an infant wrongdoer might be given a hiding either by the person wronged or by ^{its} parent on the complaint of the person wronged, but no action at law was taken in such cases.