

CHAPTER 9

Customary law

9.1	The importance of customary law	210
9.2	The meaning and use of customary law	211
9.2.1	What is customary law?.....	211
9.2.2	Where do we find rules of customary law?.....	211
9.2.3	Who uses customary law?.....	211
9.2.4	When is customary law used?	212
9.2.5	Has the Constitution and Bill of Rights changed the way we use customary law?.....	212
9.3	Customary marriages	215
	<i>The Recognition of Customary Marriages Act</i>	215
9.4	Inheritance rights	217
9.4.1	Who is the heir?	217
9.4.2	How does inheritance law make people vulnerable to HIV?.....	218
9.5	Property rights	219
9.6	Customary practices and beliefs	220
9.6.1	Male ritual circumcision	220
9.6.2	Healing scarification.....	221
9.6.3	Virginity testing	221
	Talking points	222
	References and resource materials	223



For many people, **customary law** is the most important law in their lives, controlling areas of their lives like their marriages, their property, and their right to inherit.

But some customary laws **discriminate** and make people **vulnerable** to HIV and AIDS. Customary law:

- Gives women less power than men.
- Has existed without being successfully challenged for a long time.
- Continues to **unfairly discriminate** between family members on the basis of their status in the family and their gender.

CUSTOMARY INHERITANCE LAW

Under customary law rules of inheritance, the oldest son inherits the control of the family property, and makes the decisions about the property. The wife does not inherit the family property, although she may use it.

EXAMPLE



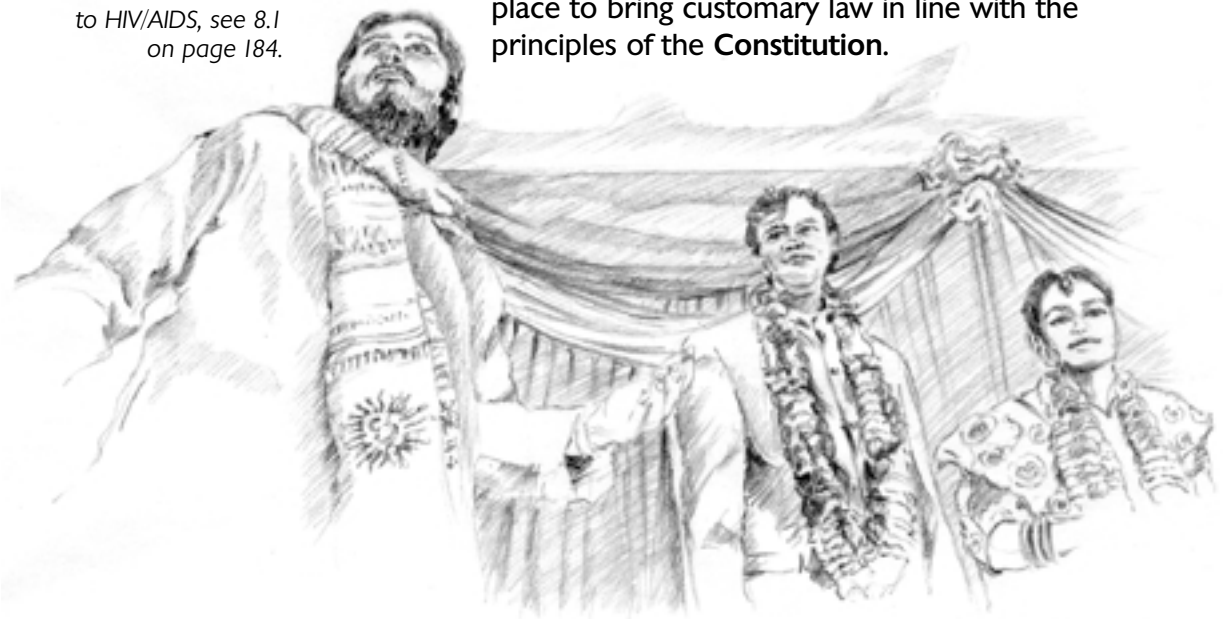
For more on how discrimination affects vulnerability to HIV and AIDS, see 2.5 on page 40.

For more on how gender discrimination makes women vulnerable to HIV/AIDS, see 8.1 on page 184.

Rules of customary law allow for inequality among people to continue, especially for women and girls, who remain economically and socially inferior to men. This makes women dependent upon relationships that may, at the same time, put them at risk for HIV. It also may force them into situations of vulnerability like sex work.

This chapter examines:

- Rules of customary law to show how they make people vulnerable.
- Some of the important reforms of customary law that are taking place to bring customary law in line with the principles of the **Constitution**.



Some cultures still practise the custom of arranged marriages. This gives women less power than men and makes them vulnerable to HIV and AIDS.

9.2.1 WHAT IS CUSTOMARY LAW?

Customary law is the written and unwritten rules which have developed from the customs and traditions of communities.

For customs and traditions to become law, they must be:

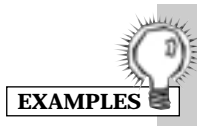
- Known to the community,
- Followed by the community, and
- **Enforceable** (able to be carried out)

9.2.2 WHERE DO WE FIND RULES OF CUSTOMARY LAW?

Customary law is made up of uncodified (unwritten) and also codified (written) laws.

Codified customary law is often criticised for not being accurate because it:

- Confuses the real principles of unwritten customary law.
- Leaves out some of the principles and areas of unwritten customary law.
- Gives the impression that there is only one system of customary law.



EXAMPLES

CODIFIED CUSTOMARY LAW

- The *Black Administration Act* of 1927
- The *Natal Code of Zulu Law*.

9.2.3 WHO USES CUSTOMARY LAW?

Customary law is used by the ordinary courts. The *Law of Evidence Amendment Act* of 1988 says that our courts should use customary law if it is:

- Easily ascertainable (easy to find), and
- Reasonably certain – in other words, has established rules.

But the customary law is used by magistrates and judges, who rely on written customary law and cannot find unwritten customary law unless they know it well. Also, the written customary law doesn't always give a complete picture of the rules of customary law.

For more on the different courts, see 3.4 on page 57.

This means that customary law is often not understood or used properly when it is needed in a situation.

9.2.4 WHEN IS CUSTOMARY LAW USED?

The Law of Evidence Amendment Act says that the use of customary law will depend on where the dispute takes place.

GUIDELINES



USING CUSTOMARY LAW

People are free to choose which law to use if the dispute can be decided by both customary and common law.

If people cannot agree on which law to use, the courts can choose the law for them. In doing this, the courts should consider:

- The type of crime or dispute
- Where it took place
- The law used in that area.

EXAMPLE



CUSTOMARY CRIMES IN A CHIEF'S AREA

If the customary crime of elopement or seduction takes place in the area of a chief, you can use customary law even if one of the people involved does not usually fall under customary law.

9.2.5 HAS THE CONSTITUTION AND BILL OF RIGHTS CHANGED THE WAY WE USE CUSTOMARY LAW?

Yes. The Constitution has had a big effect on customary law. In this section, we look at three important ways that the Constitution and Bill of Rights have changed the way customary law is used.

Customary law must be in line with principles in the Bill of Rights

The Constitution says that customary law is protected, but the rules of customary law must be in line with the principles in the Bill of Rights.

The Bill of Rights protects the right to culture. But it also protects the right to **equality** and **non-discrimination**, and the right to dignity. This means that the courts will have to measure customary law rules which treat people unequally against the right of people to use their customary laws and cultures. Customary rules which limit other rights in a way which is unreasonable and go against the spirit of the Bill of Rights can be declared **unconstitutional**.



EXAMPLE

THE RIGHT TO CULTURE AND THE RIGHT TO EQUALITY

Customary law gives different treatment to family members depending on their status in the family and their gender. It also protects the social position of men. These rules of customary law will need to be measured against the rights of women to equality and dignity, to see if they are constitutional.



KEY
POINTS

IDENTIFYING CULTURAL PRACTICES

If we are all to enjoy the rights and freedoms promised by the Constitution, then our courts should try to develop a standard that identifies:

- *Cultural practices which deserve to be protected because they do not discriminate, and*
- *Cultural practices which should be done away with because they discriminate unfairly.*

In this way, we can protect group interests and at the same time ensure that customary laws are:

- Measured against the rights of all people, and
- Adapted to the changing conditions in South Africa.

Customary laws must be in line with the Constitution

The South African Law Commission has begun to investigate customary laws to recommend changes to bring customary law in line with the Constitution.

The South African Law Commission (SALC) is examining different parts of customary law with the aim of doing away with unfair discrimination – for example: in the customary laws on marriage and succession.

To find the SALC Draft Bill, see References and resource materials on page 223.

Customary law should not be used to discriminate

The Constitution says we must look at when customary law should be used to make sure that it is not used in a way that discriminates.

After investigating the problem of when customary law should be used, the SALC published a draft Bill, called the *Application of Customary Law Bill: Conflict of Personal Laws*, for public comment.

Like the Law of Evidence Amendment Act, the Bill proposes to give courts the power to choose when to use customary and civil law, and recommends that the court consider things like:

- The law chosen by the people involved in the case.
- The kind of dispute or legal action which takes place.
- The place where the dispute or legal action takes place.
- The lifestyles of the people involved.
- Their understanding of customary and **common law**.
- If land is an issue, the place where the land is situated.



CHOOSING THE LAW

The Application of Customary Law Bill is important because it creates more certainty about when customary law will be used in a situation.

If you do not want customary law to be used, you can make this choice even before there is a dispute.



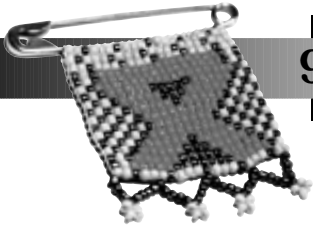
DECIDING TO USE THE COMMON LAW

A girl may not get access to her parents' property if customary law governs the parent's property.

The parents can decide to draw up a will to make sure that she inherits under the common law.

This is very important for parents living with HIV or AIDS, who need to protect their children's property rights against male family members.

For more details on drawing up a will, see 16.2.2 on page 374.



For a long time, customary unions (marriages) did not have the same full legal status as civil marriages (eg magistrate's court marriages) had in South African law. This was unfair discrimination. It also made women in customary marriages vulnerable:

- Women married under customary law had limited legal status. They were either given the status of minors or, for married women in KwaZulu-Natal, they fell under their husband's marital power. This limited women's power.
- Because customary unions were not given full legal status, this created uncertainty about the property and inheritance rights of the marriage.

THE LEGAL STATUS OF WOMEN MARRIED UNDER CUSTOMARY LAW

- No legal rights to own or inherit property in her own name
- No legal right to enter into contracts on her own
- Could not sue (take claims to court) or be sued without her husband's help
- Could not be a guardian and thus could not receive lobola/bohali on behalf of her family.

EXAMPLES



The new Recognition of Customary Marriages Act became law on 15 November 2000, together with Regulations under the Act.

The Recognition of Customary Marriages Act

The new Act:

- Sets down the rules for a proper customary marriage.
- Gives full legal recognition to a customary marriage.
- Makes women and men equal partners in a customary marriage.
- Gives **community of property** to partners in a customary marriage who married after 15 November 2000 – unless they agree not to share property between husband and wife.
- Gives legal recognition to **polygyny** (when a man can have more than one wife).
- Protects a woman's right to end a **polygynous** marriage, and her right to the joint property of her marriage.
- Sets down legal rules for ending a customary marriage, including divorce.
- Allows a woman to claim maintenance when the marriage ends – although the courts will take into account the *lobola/bohali* contribution when deciding on maintenance payments.

HOW THE RECOGNITION OF CUSTOMARY MARRIAGES ACT WILL PROTECT WOMEN FROM BEING VULNERABLE TO HIV

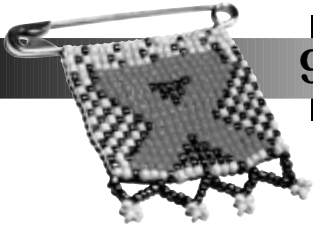
- A woman's consent is needed to marry, and she should be 18 or older to consent. This will help to protect girl children from being forced into marriages which may put them at risk of HIV infection.
- The equal status of women will mean that women will be able to own property in their own name and enter contracts – this economic independence will help women to have the power to leave relationships that put them at risk of HIV infection.
- The community of property will protect women's rights to the property that she and her partner collect during the marriage – this will also help women to be economically independent.
- Setting down the legal rules for a customary marriage will give marriage partners the security of knowing that:
 - The marriage is recognised.
 - They have a right to the common property of the marriage.
 - They have a right to inherit from the marriage under the rules of **intestate** succession.

These rights especially help to reduce the economic vulnerability of women.

- Setting down clear rules for ending a customary marriage, and for maintenance, will also help to reduce the economic vulnerability of women.
- Although the Act recognises polygyny, it protects women by giving them a choice to:
 - End the relationship (which could put them at risk of HIV infection).
 - Protect the common property of their marriage.



To find the new Act and Regulations, see References and resource materials on page 223.



Under the customary law of **succession**, when a woman in a customary marriage dies, her husband carries on controlling the family property:

- When a man in a customary marriage dies, the heir gets control of the family property, and also takes on the legal status (position) of the deceased.
- The wife does not get the right to own the family property, although she may use the property.

9.4.1 WHO IS THE HEIR?

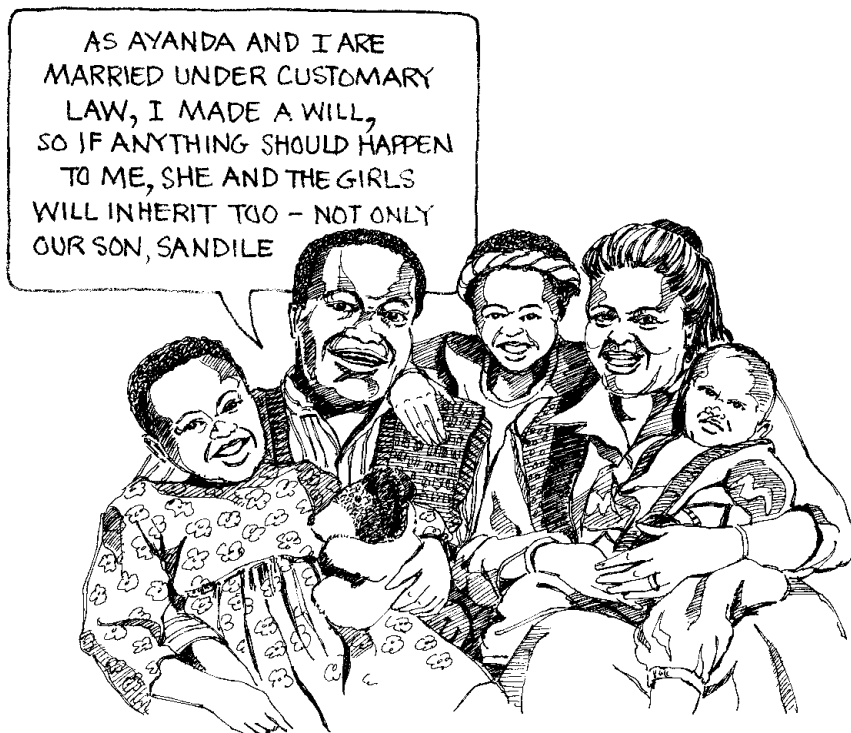
The heir is the first born son in a monogamous marriage (a marriage with one wife and one husband). In a polygynous marriage, there is:

- A general heir, and
- Heirs for the different houses.

Because the heir takes on the family responsibility, he is responsible for:

- Taking care of the family property (which he should do by consulting with the widow).
- Protecting the family members, including the widow.

*For more about
intestate succession, see
16.2.2 on page 374.*



Making a will can ensure that the widow and girl children of a man in a customary marriage can also inherit on his death.

9.4.2 HOW DOES INHERITANCE LAW MAKE PEOPLE VULNERABLE TO HIV?

Customary inheritance law was originally supposed to help and support the family, and not just benefit an heir. For example, the laws said that sick family members should be cared for, and there should be compensation for care-givers.

But written customary inheritance law does not protect sick and needy family members. As women are not economically independent and are usually dependent on the husband's family members for survival, this can make them vulnerable to HIV.

The *Customary Succession Bill* proposes changes to this system, so that Africans in customary marriages (including polygynous marriages) who die without a will should be allowed to have their property divided up under the rules of the Intestate Succession Act.

To find the Discussion Paper and Draft Bill, see References and resource materials on page 223.



NEW CUSTOMARY SUCCESSION LAW

The South African Law Commission (SALC) is busy examining the customary laws of succession. The SALC released a Discussion Paper and a Draft Bill in August 2000 for public comment and is now busy drafting a report for the Minister.

This reform of the law should consider:

- *The needs of women and girl children so that they can also inherit.*
- *Re-introducing the old rules of customary inheritance law that helped to protect sick family members.*



Property under customary law may be divided into:

- Personal property, and
- Family property.

Women under customary law do not have rights to family property. This means that, even though she may contribute to building up the family property, she does not own that property or share in that property when the customary marriage ends. This makes women economically vulnerable, and has been changed by the Recognition of Customary Marriages Act.

WHAT THE RECOGNITION OF CUSTOMARY MARRIAGES ACT SAYS

Customary marriages which take place after the 15 November 2000, when the Act came into force, will be in community of property. This means that the husband and wife each have a right to a half share of the common property if the marriage ends as a result of death or divorce.

Marriages which took place before the Act comes into force will be out of community of property. This means that the husband and wife in this customary marriage can own property individually. Women will have the legal capacity to own and sell their own property.



To find the new Act and Regulations, see References and resource materials on page 223.



The Recognition of Customary Marriages Act now allows women to own and sell their own property.



Various customary practices have been linked to HIV and AIDS, for example:

- Male ritual circumcision
- Healing scarification
- Virginty testing.

9.6.1 MALE RITUAL CIRCUMCISION

Many African communities believe in circumcising their male children. After undergoing an initiation ceremony, young men are usually circumcised as a group, and often one instrument is used. There is concern that the use of one instrument to circumcise a group of young men puts the men at risk of HIV infection.



Initiation into manhood carries the risk of HIV infection when one instrument is used to perform group circumcisions.

9.6.2 HEALING SCARIFICATION

Healing scarification is another customary practice that can also put people at risk of HIV infection. These are done with needles or razor blades with the aim of protecting people against harm and illness.



EXAMPLES

HEALING SCARIFICATION

- Zulu ear-piercing
- Facial scarification among the Bhaca
- The sacrificial cutting off of the little finger among the Thembu.

In these cases, it is not the customary practice itself, but the way in which it is done, which increases the risk of HIV/AIDS. These practices can be changed to decrease the risk of infection.

9.6.3 VIRGINITY TESTING

It is argued that some customary practices, like virginity testing, help stop the spread of HIV.

For more on virginity testing and women's rights, see 8.9 on page 202.

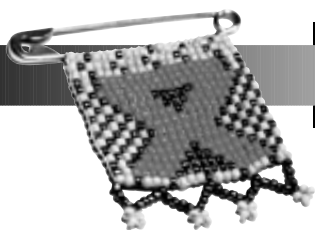
Gender rights activists say that virginity testing not only violates the rights of the girl child, but also will do nothing to stop the spread of HIV. They argue that customary practices like these are unconstitutional and should be prohibited.



KEY POINTS

CONTINUING CUSTOMARY PRACTICES AND BELIEFS

- Every person has a right to continue their customary practices and beliefs.
- But some customary practices put people at risk of HIV infection. These practices should be changed to reduce the risk of HIV infection or, if they are an unreasonable abuse of people's rights, they should be stopped.
- Customary practices which help to stop the spread of HIV should be encouraged (eg ukusoma or thigh sex).



Talking points



1 The customary law of marriage says that a man may have more than one wife (called 'polygyny'). But wives do not have the right to have more than one husband.

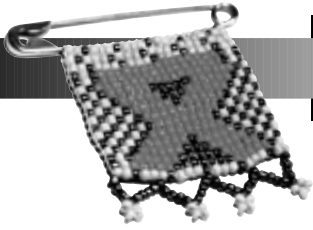
- *Do you think that polygyny goes against the right to equality?*
- *Can you think of a way to bring together the right to live by cultural traditions, such as polygyny, and the right to equality?*

2 The death of a husband or wife does not end a customary law marriage, under customary law. Customary practices like *ukungenwa* or *kenela* allow a widow to have sexual intercourse with her husband's brother (usually the younger one) with the aim of providing the deceased with an heir.

- *How do these customary practices increase a woman's vulnerability to HIV/AIDS?*
- *Do you think our Constitution should protect these cultural practices? Or should these practices be declared unfair discrimination against women, and unconstitutional?*

3 The Recognition of Customary Marriages Act improves a woman's rights to own family property built up during a customary marriage.

- *How will this help women?*
- *Will it have an impact on their vulnerability to HIV/AIDS?*



References & resource materials

LAWS

Amendment of Customary Law of Succession Bill, Draft Bill, August 2000.

Black Administration Act, No 38 of 1927.

Intestate Succession Act, No 81 of 1987.

Law of Evidence Amendment Act, No 45 of 1988.

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Recognition of Customary Marriages Act, No 120 of 1998, and Regulations: Government Gazette 6909, 1 November 2000.

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Mabena v Letsoalo 1998 (2) SA 1068 T.

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Mthembu v Letsela 1997 (2) SA 936 (TPD).

Mthembu v Letsela and Another 2000 (3) SA 867 (SCA).

REPORTS, MANUALS AND OTHER USEFUL MATERIALS

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Gender Manual Consortium: Making Women's Rights Real (Resource and Trainer's Manuals), 1999.

South African Law Commission (SALC): Customary Law and draft Bill for the Amendment of Customary Law of Succession, Discussion Paper 93 (Project 90), August 2000.

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SALC: Customary Law: Administration of Estates, Discussion Paper 95 (Project 90), 2001.

WEBSITES

AIDS Law Project: www.alp.org.za

AIDS Legal Network: www.redribbon.co.za/legal

Commission on Gender Equality: www.cge.org.za

Department of Health resources: www.aidsinfo.co.za

Rape Crisis: www.rapecrisis.org.za

South African Law Commission: www.law.wits.ac.za/salc/salc.html

UNAIDS: www.unaids.org