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Cultural rights in South Africa: the case of an amputated finger in polydactyly

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Submitted to the Faculty of Health Sciences, University of Witwatersrand, Johannesburg, in partial fulfilment of the requirements for the degree of Masters of Science in Medicine in Bioethics and Health Law

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Abstract

In this research report I address the question: should an individual be allowed to take their amputated finger away from a healthcare facility where the amputation would have been performed for a medically justifiable indication in polydactyly, for the sole purpose of performing a cultural ritual called *Ingqithi*?

I navigate the delicate balance between harm and the benefits that could result from cultural rituals. With *Ingqithi* as my springboard, I argue for a weak cultural relativism stance, emphasizing that culture is a prima facie right, with its respect being indispensable for human dignity.

Declaration

I, Monyelele Elias Sethusa, herewith declare that this research report titled:

Cultural rights in South Africa: the case of an amputated finger in polydactyly

is my own, unaided work.

It is being submitted for the degree of Masters of Science in Medicine in Bioethics and Health Law, at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination at any other University.



_____

Signed

On this 15 day of July 2021

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Introduction

Finger amputation for polydactyly is a common practice, generally with good outcomes and it is likely to be practised for as long as the condition exists. Polydactyly is a congenital condition whereby one is born with an extra digit on either the hand or foot. The amputation is performed for the patient's benefit which includes: acceptable cosmetic appearance, preserved self-esteem and ease in activities of daily living requiring fine motor skills, amongst other reasons. However, for some members of the population, there might be more benefits if they are allowed to keep their amputated fingers for use in cultural practices, an example of which is *Ingqithi*. *Ingqithi* is a traditional practice whereby an amputated finger is plastered together with mud onto the wall of the hut for the ancestors(1) with the belief that this ritual will spare the life of the individual who's finger has been used (2). This cultural practise of *Ingqithi* was the basis for this research, which was a desktop and library-based study where literature was sourced, studied, analysed and critiqued. No new data was sourced or analysed and the study did not involve any study participants.

In South Africa currently, amputated fingers are regarded as medical waste despite the general population's perceptions and wishes. According to the National Environmental Management Waste Act No. 59 of 2008; "waste is any substance that is surplus, unwanted, rejected, discarded, abandoned that must be treated or disposed of, which can be generated by medical, mining or other sectors"(3). It is apparent that some individuals want to keep their own or those of family members' amputated fingers to perform cultural rituals. Thus in this normative study, I addressed the question: In cases of polydactyly, where a finger is

surgically removed, should the legal guardians of paediatric patients or adult patients themselves be allowed to take the finger away for use in cultural practices?

Unfortunately, current legislation or its interpretation seems not to allow individuals to be custodians and decide how their extra digits should be handled after they've been amputated, a situation which in this paper I have argued that it is unethical. Handling of these digits is at the discretion of the treating health care facility, where it is commonly regarded as medical waste, wrongfully based on the obsolete Human Tissue Act No. 65 of 1983, which has since been replaced by the National Health Act No.61 of 2003. As these amputated fingers are neither always rejected nor unwanted, as it is the case in those members of the population that would like to use the amputated fingers for *Ingqithi*; they do not meet the 'waste' criteria as it is defined by the National Environmental Management Waste Act at all times.

In this paper I have demonstrated how not allowing individuals to be custodians of their amputated fingers infringes on important ethical principles like Autonomy and Beneficence; furthermore trampling on the right of individuals to choose and practise a culture of their choice, the consequence of which is the undermining of the affected individuals' dignity. This is a state that I have argued is unjust and unsustainable.

The scope of this paper focused only on amputated fingers. I concede that the arguments raised might be applicable for other tissues if similar cultural or religious practices exist with those tissues in other communities. For example; some members of the Sekhukhune district

in Mpumalanga use the placenta for making traditional medicine which they claim cures infertility in women and also ensures strong love bonds between siblings(4).

Polydactyly is the most common digital congenital anomaly affecting the hand and foot(5). Though in itself it is not associated with any grave outcome, it can have a significant psychological and social impact on the individual with this anomaly. The cosmetic appearance of an extra digit has the potential to dent the individual's self-esteem and negatively impact on their quality of life. Untreated individuals can suffer from clinically significant psychiatric illnesses like depression or psychosis later in life(5). It can also hamper optimal functioning of the hands or feet, affecting activities of daily living like wearing well-fitting shoes or activities needing fine motor movement such as drawing and painting. Fortunately surgical excision of the extra digit can be performed with good outcomes, with most individuals having their surgery during childhood(5), thus preventing the long term psycho-social impact of this condition in the affected individuals.

Even though it stands to reason that children should be offered this surgery early on in life, section 56 of the National Health Act No. 61 0f 2003 prohibits tissues to be removed from a person less than 18 years of age if such tissues are not replaceable by natural processes(6). Along with a few other exceptions, hair and nails are the only tissues that are replaceable by natural processes. Definitely most surgical operations in a hospital environment involve removing tissues that won't be replaceable by natural processes. This does not seem to spark much controversy when those tissues are likely to threaten the life of a child like cancers and gangrenous limbs. On the contrary, an extra finger is not life threatening, and in fact some individuals live a fulfilling life with the extra digit; an

example of such a person being Sfiso Ncwane who was a successful South African Gospel singer who saw the extra digit on each on his hands as a unique trait and was never ashamed of(7). Thus as much as amputating an extra finger is important, it is not mandatory. Similar to plastic surgery for prominent noses and ears in minors which is well accepted in the United States(8), amputation for polydactyly is cosmetic surgery.

Consent for surgical operations in minors is governed by the Children's Act 38 of 2005 Section 129 subsection 5(a-b), which allows parents and legal guardians to consent for surgical operations in children under the age of twelve years, or for those between the age of twelve and eighteen years, if they are deemed to be of insufficient maturity or unable to understand the benefits, risks and social implications of the operation(9). Thus the onus is almost exclusively on the parents or legal guardians for this non-reversible operation if it is performed in childhood. Whether the tissue being removed is life threatening or not, it is to some extent concerning that the National Health Act seems somewhat to be ambiguous relating to operations in minors, with specific reference to tissues being replaceable by natural process. As much as these operations are mostly done in childhood and therefore issues surrounding consent for surgeries in minors are important, they are not the focus of this research and will not be dealt with further in this paper. Similarly, I concede that there is probably a debate to be had with regard to cosmetic surgeries and having the fingers amputated at all for polydactyly, but this practise is currently well accepted and this discussion is beyond the scope of this research. This research had focused on what happens to the finger after it had been amputated. With the objective been to defend the claim that culture and its rituals, specifically that of *Ingqithi* which uses amputated fingers, need to be protected and nurtured in instances where their benefits supersedes their harm.

Notwithstanding the legislation for cosmetic surgery and surgical operations in minors, whenever the performed surgery involves removing a tissue from minors or adults; custodianship or ownership of that particular tissue is brought to light. According to the Universal Declaration of Human Rights article 4; no one can have ownership of another individual(10) and this is currently well accepted worldwide. Unfortunately, it becomes more complex with reference to the individuals owning themselves or their own body parts. Some authors such as John Locke have suggested that people own their own bodies while others such as Stephen Munzer, are of the opinion that individuals have limited property rights to their bodies but do not own them(11). Further complexities arise when an individual has demised or their body part has been removed from them such as an amputated finger. Previous international court judgements have suggested that "*there can be no property in a corpse*" and therefore a deceased body cannot be owned(11) probably including removed body parts of alive individuals in keeping with the centuries old common law of the United Kingdom which states that there is 'no property' in a body(12). According to relevant court cases, some form of labour is required to be undertaken on the deceased individual or body part for some form of property value to be attached and consequently be owned by someone or an entity(11, 13), with the cases in point being *Doodeward v Spence*(14) and *John Moore v The Regents of the University of California*(15). The debate has been taken further with the emergence of biobanks and their associated researches, whereby tissues of individuals are held in the biobanks for the purposes of current and future researches but those tissues are not owned by the individuals themselves. The limitations with these arguments are that the values attached to these tissues are only monetary or intellectual with reference to research. These potential gains do not apply with regards to amputated fingers if they are to be used for cultural practices. I'm not of the opinion that the value of human tissues can only be ascribed to these options.

In this research I brought to light and advocated for the values and benefits to the general population that are attained when they are allowed to keep their amputated human tissue, in particular a finger for the sole purpose of performing a cultural ritual. I did not intend, and haven't argued for the general public to have access to their amputated fingers for any other reasons rather than for *Ingqithi*.

The South African legislation falls short in tackling the ownership and custodianship of amputated fingers. According to Section 54 of the National Health Act read together with sections 56 subsection 1, tissues removed from a living person can either be used for medical or dental purposes as described or some form of advancement in medicine like research, training of students and diagnostic purposes(6). This also suggests that there is no other fate of human tissues from living individuals except incineration unless it will be used for those purposes stated in the Act. This is also quite a narrow view of legislating the handling of human tissues considering the different needs of our population, with specific reference to the diverse cultures and their rituals. There are certain cultural rituals and ways of handling human tissues like amputated fingers that are not catered for in the Act. This flies in the face of Section 30 and Section 31 subsection 1 to 2 of the Bill of Rights which are contained in the South African Constitution which state that; "everyone has the right to participate in the cultural life of their choice, and no one should be denied the right to enjoy and maintain their cultural association if exercising these rights is not inconsistent with any provision of the Bill of rights"(16).

As mentioned earlier, some Xhosa tribes practice *Ingqithi* whereby an amputated finger is plastered together with mud onto the wall of the hut for the ancestors with the belief that

this practice spares the life of the individual who's finger has been used(1, 2). There are definitely more cultural rituals, including *Ingqithi*, which could be scorned by others(17), but in keeping with the Bill of Rights, Bogaert *et al* articulates it well when they state; "As long as such rituals do not cause harm, they should be respected for the role that they play and be left alone"(4). I have in the subsequent sections mentioned the potential harms that could potentially arise from *Ingqithi*, and how we can safeguard human beings from them, fully acknowledging that for a cultural ritual to be ethically just, its only if it doesn't cause harm or at a minimum, the gains from the ritual supersedes the harm . With the harm being avoided, I argued for a weak form of cultural relativism in the next cultural section, acknowledging that culture is a prima facie right. Following that, I emphasized beneficence that the government has to its citizens with regards to culture and the liberty that individuals should have to freely choose their preferred culture and its practices in keeping with autonomy in the subsequent ethical section. Finally, I showed the important relationship between human dignity and culture including its practices, with *Ingqithi* as an example in the legal aspects section, before summing up my argument with the conclusion, to defend my thesis statement which states that: in cases of polydactyly, where a finger is surgically removed, the legal guardians of paediatric patients or adult patients themselves should be allowed to take the finger away for use in cultural practices if they so wish.

Cultural aspects

In this chapter I will argue for some form of cultural relativism which I will term weak cultural relativism; a stance which I am convinced is an ethical imperative. I will start off by highlighting the difficulties that are inherent to any discussion that involves culture as a result of differing understandings of what culture is; immediately followed by ideas that are universal in relation to culture including its importance to us as humans. I will briefly mention the possible relations between culture and ethics, and then extensively argue for a weak cultural relativism stance making references to *Ingqithi* and other examples familiar to the philosophical world and contrast this stance to a view which I refer to in this paper as a universalism, also referred to at times as realism, which alludes that what is true and real exists independent from the circumstances that one finds themselves in(18). I will show how we can safeguard ethics despite embracing weak cultural relativism, a necessary phenomenon to avoid abuse of culture by some mischievous cultural relativist. I will then conclude by showing the dangers from recent history of not embracing cultural relativism, furthermore reemphasizing that weak cultural relativism is the appropriate way of dealing with culture with reference to ethics. Accepting weak cultural relativism as a stance will go a long way in cementing *Ingqithi* as a morally acceptable ritual pending the weighing up of its potential harm with its benefits.

Unfortunately, there is no conventionally accepted definition of culture, thus at times making it difficult to discuss aspects that are centred on it. Kroeber and Kluckhohn had gathered 164 definitions of culture already, more than a century ago(19); highlighting one of the difficulties of advocating or discussing it, since there is no consensus of what it is. It is

expected that when advocating or discussing anything, one should at a minimum be able to define it, and this is pointed out by Bracanovic when he states that: "the first constraint of the respect of cultural diversity is that culture as the thing or the aggregate of things that should be respected is extremely difficult to define"(19). One definition that I would like to bring to the reader's attention is by R Prentice who defined culture as "a complex of distinct spiritual, emotional, intellectual and material features that form character to a particular society or group and it's inflict (*impact*) on their way of life"(20). This definition amongst many other definitions does not comprehensively define what culture is. Each cultural group has their own culture and every individual human being within their cultural group have their own understanding of what culture is and what it means to them, this partly ascribing for the difficulty of having one definition that would be accepted worldwide. Despite these stated shortcomings, it is still generally well accepted that culture is of paramount importance in other groups of people. It is further acknowledged that culture is what marks groups of people out distinctively from other human societies in the human race(21).

Though there is no single definition of culture that is accepted globally, it is acknowledged that it includes a group of people's norms, taboos and values; values being understood as beliefs that are held about what is right and wrong, and what is important in life. Thus, rejecting other people's cultures could be equated to rejecting their value systems. It is understood that two different cultural groups might not have the same value systems as much as two individuals might have differing views about an array of things; thus, it is not surprising that some cultural groups would reject other cultural groups' values, but a harmonious existence should be aimed for despite the differences. Unfortunately, in reality it is more than rejecting other people's cultures, it is what could be perceived as an overreaching hand that also prohibits people from practicing their cultures because it is

different from one's own culture, which has assumed an elite position. This perceived overreaching hand is what makes the debate of culture and ethics at times heated and tense with those that perceive their culture to be under threat, refusing any form of debate and reason. Despite the discomfort that comes with debating culture (*and its ethics*), there still is a great need to debate it because its existence cannot only be divided into two extremes where on the one is a noble elite culture that is viewed as being imposed on those in the other extreme of whose is considered a barbaric ancient culture that needs to be abandoned.

One route to take is where culture justifies any practice that falls under the umbrella of that particular culture and thus the practice being considered ethical in that context. This view is what in this paper I refer to as absolute cultural relativism which according to Howson A is understood "as an idea that moral values are relative to a particular culture and that no standpoint is uniquely privileged over others. This idea of relativism is contrasted to universalism which alludes that what is true and real exists independent from the circumstances" that one finds themselves in(18) as mentioned earlier.

Relativism is easy to understand, that the people who decide what is true, noble and moral are the constituents of that particular cultural tribe with the aid of their cultural beliefs, norms and knowledge. The cultural tribe is likely to be constituted by elders, foreseers, healers, thinkers, scholars and other esteemed members amongst the ordinary members of the particular cultural group. In these groups, cultural practices are passed down from generation to generation with their significance being imparted into the younger ones through teachings and observation. Despite the origins of some practices and their associated beliefs, it is my understanding that their significance and existence is always under constant re-evaluation

(*even though it might not be consciously done*) by the esteemed members of the cultural groups with a possibility to abandon, modify or even add other practices. Thus, culture is not static, but rather continuously evolving. This partly explains why some practices that have been practised for centuries are only getting into the spotlight recently.

Amongst those practices that I'll shine the spotlight on in this paper is the practice of *Ingqithi* which is practised by some South African Xhosa cultural tribes whereby they amputate a finger and plaster it to the wall of a hut with the belief that this will spare the life of the individual whose finger has been used(1, 2). There is an expectation that the amputation can be performed in a health care facility, which couldn't have been done previously for a number of reasons, amongst them being the lack of access to health care facilities and the acknowledgement that the current western medicine as we know it wasn't practised by the indigenous South Africans. This I understand as an example of cultural evolution. Another example of cultural evolution is the involvement of western trained medical professionals in the traditional circumcisions of males performed in initiation schools(22, 23). Initiation rituals are a sacred, whereby people who haven't gone through the initiation ritual, people of different cultures and even persons of different gender belonging to the same cultural group would not be allowed to be part of the ritual or allowed access to the venue where this traditional ritual takes place until recently. This cultural evolution is in keeping with the notion that unless culture adapts and evolves it is likely to die as articulated by John Lombard, the founder of the "language of culture," though he mainly refers to the business world(24).

Irrespective of the imperative challenge of evolution that culture needs to adopt, culture is currently still alive and a relativist argument still sound with Howson A in his paper on cultural relativism stating that there is an "acknowledgment by some researchers that one does not need to abandon universal standards and human rights to adopt a cultural relativist stance"(18). This is meant to reassure sceptics of cultural relativism like Bracanovic and Ten Have *et al* who argue that "respect for cultural diversity in matters ethical will lead to a dangerous cultural relativity where vulnerable individuals are harmed"(25). Importantly, Howson A further notes that "cultural relativism is associated with a general tolerance and respect for difference, which refers to the idea that cultural context is critical to an understanding of peoples values, beliefs and practices"(18). Some have actually argued that it is unethical to impose the dominant western socio-cultural-moral construct to the non-western groups(25, 26), which is an impression that those who advocate for universalism are attempting to do.

Somewhat contrary to relativism as stated earlier is universalism. A state whereby what is moral, noble and true is universal and not dependent on the circumstances that one finds themselves in. Chattopadhyay *et al* notes that "Morality is a product of the interplay of values, cultural norms, belief-systems and moral traditions that evolved in a variety of historical settings"(26). Understandably those who follow the work of Michel Foucault *"*who focused his work to understanding how other groups are able to make claims that are regarded as facts argued that what counts as truth is associated with particular forms of social power,"(18) would be sceptical of universalism. Social power could be attained by political, economic and educational standings amongst others. The other weakness in the universalism stance is that it seems to fail when it is applied to daily simple situations that human beings find themselves in. Consider driving at a higher speed than it is recommended on a public

road; most people would agree that it is wrong but similarly will find it morally acceptable to speed if the driver is rushing a labouring woman to hospital for delivery of a child; thus, the moral right of speeding is depended on the circumstances that one finds themselves in not the traffic laws of the particular country. In fact, a traffic law officer would be frowned upon for issuing a speeding ticket and would be hailed as a hero if he or she accompanies the speeding driver and clears the traffic with the resources at his disposal. A couple of more examples could be thought of and that is why there is a difference between pre meditated murder and killing in self-defence even by law, despite that taking someone's life is generally acknowledged to be morally wrong.

Universalism clearly has flaws. Probably the biggest flaw of universalism with regards to morality is who decides what's real and morally right? As stated earlier, Michel Foucault would claim that it is those with social power. In relativism it is clear that the members of a particular group either be cultural, political or social are the ones deciding. With universalism, especially in reference to cultural ethics, there seems like there is an invisible judge, (*whereas people are not even aware that they are on trial*) whom appears when there is a transgression to pass a judgment supposedly from an objective position and only then is evident that he is a white middle class male of Western decent(18, 26), in keeping with Myser when he described the defining feature of mainstream bioethics as a "normativity of whiteness"(25).

There is growing recognition that ethics as assembled in the North American and European cultural context from Western moral philosophy may not be appropriate for all cultures of the world(26). Alexandra Howson on her paper on cultural relativism notes that "As back as in

1788, Immanuel Kant had already acknowledged that the peoples experience of the world is mediated through the knowledge and ideas they hold, thus making it difficult to identify universal experiences that hold true for everyone"(18). Before discarding everything that comes from this Judge who's birthed by western ethics, it is interesting to explore what would he say concerning *Ingqithi* and it is not improbable that he might say: "as long as the cultural practice does not cause any harm it must be respected for the role it plays in a particular community and be left alone" as articulated by Bogaert *et al*(27). The reason that the above statement is probable is because it is already accepted globally that people practice different cultures and this acknowledgement and its respect is in keeping with arguably the noblest principle of ethics which is autonomy, which I'll elaborate further on in the next section.

What about cultural practices which there is almost a global consensus that they are wrong like infanticide which was practised by the Eskimos(28, 29) and female circumcision which is referred to by some as female genital mutilation(30). Surely it would be immoral for the world to turn a blind eye and assume a cultural relativist stance that would say "*it is their culture and therefore morally right in their circumstances*".

Firstly, it needs to be acknowledged that circumstances include the times at which people are living in. A few decades ago, it would have been appropriate to send an important urgent message by mail which could take weeks to reach the recipient. Currently with the advancement of technology one just needs to call and relay the urgent message and it would be inappropriate to opt for trying to relay that kind of a message through mail because there is better, faster and much more reliable ways of achieving the same effect. Thus, without going

into the reasons behind and inquisitively enquiring about the beliefs about those practices, there is a good chance that just based on the times we are living in, there are better ways of achieving the goals that these practices aspired to achieve and unless the constituents of those cultural groups evolve their culture, these practices will meet their welcomed demise to most of us to the detriment of those that would have potentially benefited from them. Taking a closer look into infanticide; the practice was directed at mostly female infants whom were considered the weaker gender then, considering that food was scarce and survival dependent on hunting and relocations to better fertile grounds. The practice was meant to allay their beloved daughters who would not have been able to fend for themselves and their community later on in life during those physically trying times from a slow daunting death resulting from starvation(25, 29). This thinking is still evident today for those advocating for dignified death in terminally ill loved ones by organizations like DignitySA(31). What would at the least make infanticide wrong today is that females have proven that they are not a weaker gender and can do the same job as men and at times even better, and also importantly there is an array of jobs that aid in survival and even flourishing that don't need physical strength and arguably more suited for females. These facts would not have been known then or been a reality in those times.

Similarly, the atrocious ritual of female circumcision was meant to discourage infidelity, amongst other perceived benefits. It is common knowledge that infidelity was frowned upon by most societies at some point in time. Firstly, currently infidelity is not as frowned upon by the same number as it was in the yester years with the pleasure achieved from sexual intercourse being desired, encouraged and appreciated for both genders in these days we are living in; secondly, there is education that can achieve similar goals that the practice had meant to achieve. Educating has been embraced by a Kenyan women's group called

"*Maendeleo Ya Wanawake Organization*"(MYWO) by introducing "*ntanira na mugambo*" meaning circumcision through words, whereby for a week they educate young ladies about sex, sexual health, anatomy and hygiene to mention a few, ending with a celebration and recognition of the passage of those young ladies into adulthood (32, 33). This is just an example of cultural evolution without demonising the whole ritual. More reassuring is that this evolution is spearheaded by the indigenous Kenyan women whom perform and are most affected by this ritual. According to Malik Stan Reaves, "the central defining achievement of "*ntanira na mugambo*" is not that it saves young women from dangers of female genital mutilation, but that it captures the cultural significance of female circumcision while doing away with the dangerous practice itself"(33).

The above two examples highlight at the least time as an important circumstance, and also the need to look into the reason behind the practice for better understanding. Thus, I would argue that infanticide and the ritual of female genital circumcision given a closer look, one might come to a conclusion that they were not immoral at their inception, though they are inappropriate currently.

Coming back to *Ingqithi*, the reason behind its practise is good fortune, protection and favour from the ancestors(1, 2) which is undeniably desired irrespective of the era an individual could be living in. Is there potentially another way of achieving these desired benefits without amputating a finger? There might as well be, but for ease of use why not utilise the finger that would be amputated anyway for other well accepted indications like in polydactyly. Still with reference to an era; this is an era of anaesthesia and analgesia, an era of sterility and it would be expected that unless cultures embrace these advancements that are part of this era they will

die. Thus rather than putting unnecessary hurdles for those that perform amputations in a health care facility in keeping with the standards of this era and using the amputated fingers for other gains in this scenario being good fortune, protection and favour from the ancestors according to their cultural belief, they should actually be applauded for spearheading the necessary evolution that would be in keeping with our times and to some extent guaranteeing the existence of their cultures into the future.

Despite all that could be said, culture and ethics are interdependent. Culture could potentially influence the ethical standards and views or potentially ethics can influence cultural norms & values. There is a point of view that suggests that global ethics as we know them, have already been influenced by culture, but by unfortunately only the western culture thus potentially explaining why the current ethical views seem not to be in keeping or been accepted by other non-western cultures(26). Chattopadhyay *et al* asserts that making "ethics more 'culturally appropriate' amounts to nothing more than adapting western ethics to a varied cultural setting"(26). Chattopadhyay *et al* further notes that a number of scholars like Alora, Lumitao, Myser, Arekapudi, Wynia and Burton believe that current "socio-cultural and moral construct known as ethics does not encompass the belief systems, cultural norms and moral values of people who are located outside the moral tradition of white Western societies"(26).

The reality is people are continuing to practice their cultures without oversight. An issue only being brought to light if there are gross human rights violations or in our specific case where there is an evolvement of culture with the amputation being performed in a hospital setting (*where people whom do not belong to that particular culture can come into realization of that*

particular cultural practice), with the tissue being taken home for a cultural ritual. It is expected that cultures will evolve. It should also be encouraged that people share and practise their cultures openly knowing that it will aid in its evolvement and also in promoting an inclusive community in keeping with the aspirations of the universal declaration on cultural diversity by United Nations Educational, Scientific and Cultural Organization (UNESCO)(34). This will also help in avoiding abuse of power in the name of culture by those in positions of power within the cultural communities.

It should be remembered that female genital mutilation is still being practiced in the name of culture which is currently being universally understood as an injustice and violation of the affected individual's human rights. Slavery was also practised up to as recent times as the 18th century and putatively "justified" by well-reasoned ethical ideas(25). It is evident that the uncritical emphasis on cultural diversity can become detrimental(19) and Chattopadhyay *et al* states that: "it must be understood that respect for cultural diversity does not imply support for wrongdoings as part of culture"(25). Thus, it is clear that communities might be involved in atrocious practices that we all have a responsibility as human species to guard those vulnerable members that find themselves within those communities. Globally there are organizations like UNESCO but regionally in our country above civil organizations groups there is our constitution, and the law should govern every community that finds itself within the boundaries of this country which I'll discuss further in the legal aspects' section.

Thus, as much as it is important to let culture and its practices flourish, it should not be ungoverned. Arguments like "*it is my culture therefore I have a right to practice it whichever and whenever I want should not suffice*". Culture is governed by the laws of the country that

the particular cultural group finds itself in. I will later discuss specific legislative issues related to the practice of *Ingqithi* in the forthcoming legal aspects section. Currently I would like to bring to your attention the laws surrounding initiation schools, a practise that's still being practised by a number of South African cultural groups. Despite a number of issues that surrounds initiation schools, the Customary initiation bill prohibits initiation schools from admitting anyone below the age of 18 years, and anyone between the ages of 16 to 18 years without parental consent which has of recent years had become common practice(22). This bill is meant to protect the physiologically vulnerable minors from the inevitable physiological challenges that the initiates face during the initiation period. I personally would like to reserve my views about initiation schools, what I want to highlight is that the legislation used appropriately could safeguard against some of the potential ill effects of some cultural practices without criminalizing them which would lead to their abandonment or their practise being taken underground. My view in keeping with Bogaert *et al* is that "unless it causes harm it should be left alone"(27). I would like to actually take it further and say the aspects of it that causes harm should be prohibited by law and the onus would be in the constituents of the cultural group to evolve their culture to be in keeping with the law.

It can be clearly understood that people's cultures differ and by extension their values would be different. Thus, an act that's valuable and perceived right in one culture might be invaluable and potentially wrong in another culture. Another reality is we are living in a global inclusive world where there shouldn't be a cultural group of individuals secluded from the rest of the world. Thus, the reality is we need to be able to share this common habitat of earth despite our differing religions and cultures. In fact, it is imperative for us to tolerate each other's cultures to be able to share this habitat together peacefully. In a South African setting we have a history with scores of conflicts between ethnic and cultural groups which

lead to bloodshed, pain, no communication and mistrust, which according to van W Scheepers, “intolerance of cultural and religious diversities between the groups in particular Whites and the indigenous Africans was the main reason for this clashes and conflicts”(35).

Thus, it didn’t come as a surprise that in its 31st session of the general conference which sat shortly after the events of September the 11th 2001, UNESCO unanimously adopted the Universal Declaration on Cultural Diversity, reaffirming that “intercultural dialogue is the best guarantee of peace and to reject outright the theory of the inevitable clash of cultures and civilizations”(34). “They acknowledge cultural diversity as necessary for humankind as biodiversity is for nature and its defence an ethical imperative indissociable from respect for the dignity of the individual”(34). The Xhosa cultural tribe is one of the many that contribute to the cultural diversity which is necessary for humankind, and my defence for the ritual of *Ingqithi* should be seen for what it truly is; which is a defence for the dignity of those members that belong to the Xhosa cultural group that would like to practice this ritual. This defence of *Ingqithi* articulated in this paper, is an ethical imperative.

Ethical aspects

In this section, I will be making ethical arguments for why it should be permissible that fingers amputated in health care facilities for polydactyly can be taken away by patients whose digit has been amputated or their legal guardians in case of minors, for use in a cultural practice of *Ingqithi*. Though there is potentially an argument to be had for the justification of these amputations especially in minors; this is not the aim of this paper; but rather in this paper I acknowledge that these amputations are being practised and generally well accepted. Given this reality, I argue that adult patients or legal guardians in the case of minors should be allowed to take the amputated finger away from the medical facilities where the amputations would have been performed, for use in a cultural practise of *Ingqithi* at their homes if they so wish.

The benefits of *Ingqithi* have been alluded to earlier in the previous sections as good fortune, favour from the ancestors and sparing of the life(1, 2) of an individual whose finger has been used in addition to the general good of cultural practices and belonging to a cultural group which I'll mention later on. Despite the good attained from *Ingqithi*, I acknowledge that for cultural practices and culture to claim morality, they should not cause any harm or at the most, the harm that can result from them should be superseded by their benefits. I will discuss the harms from culture with specific reference to the potential harms from *Ingqithi*; fully acknowledging that my claim for culture will only be valid if these harms can be avoided.

Humans as rational beings tend to have goals and aspirations that would overall lead to a happy flourishing life. After having set clear goals for themselves, they act in a way that

would help them achieve those goals. There are commonly tools or means that needs to be used to achieve those set goals. In most instances, these means and the goals themselves are a subject of morality. The goals set out for *Ingqithi* are unarguably legit; this paper will interrogate the morality of the practice itself.

There are arguably two major ethical theories that have shaped ethics; namely Deontology and Consequentialism, which I'll be discussing briefly in succession. Kantian Deontology is a theory which advocates that a person must be treated as an end, and never just as a means to an end(29). Treating an individual as an end entails identifying their desires and pursuing to achieve them. The means that pursue these desires could be justifiable on the basis that they acknowledge the individual as an end. The theory also acknowledges that a person has an intrinsic worth as they are rational beings(29); further summating the notion that he/she should never just be used as a means to an end, irrespective of how noble the end might be. Thus, it would not be morally right to use a person as a sacrificial lamb to achieve whatever goal. Our case in point there is a person's finger that has been amputated for a medically justifiable indication, in polydactyly. What should be established is; would using this already amputated finger in this scenario be considered as just using a human being as a means to an end and thus unethical?

Despite an amputated finger, another tissue that has been successfully separated from an individual and arguably morally used to achieve a noble cause is the human hair which is sourced from pilgrimages who offer it as a sacred act in the Indian state of Andra Pradesh. This hair is collected and exported all over the world with the proceeds from the sales being reinvested in the local community(36). There is an underworld world which taints the hair

extension business, but for now I would like us to focus on the hair that is sourced from the pilgrims. Just like the hair, the amputated finger is now at the disposal of human beings for it to be used to achieve a cause or potentially be thrown away. In both scenarios, these human tissues are a by-product of another act being a sacred act for the hair and surgical treatment of polydactyly for the finger. Thus, how these tissues are used for afterwards is not the primary reason of the cutting of hair or the amputation of the finger and therefore I argue that using these tissues in this context cannot be seen as just using humans as a means to an end which would not be in keeping with Kantian deontological theory. It should be noted that in other instances, people would amputate a normal finger with no medical indication for the amputation with the aim just being to use the tissue in a cultural practice; thus, in this scenario they would be an argument to be had about whether it is ethical and if either this would not constitute unjustly using a person as a means to an end, especially in minors whom themselves are not of sufficient maturity to decide on surgical operations and cultural practices. It should also be noted that culture is communal, thus members of a cultural group get meaning and benefit from others being part of that particular community, opening room for exploitation in the name of culture.

Allow me to shift my focus to consequentialism, which is mainly concerned about the desired outcome of people being happy. Happiness that human beings aspire for can be defined differently by many; but for the context of this paper, it can be understood as flourishing. I believe that flourishing itself is much more inclusive of the desired goals meant to be achieved by acts, especially in reference to cultural practices. There is no doubt that most practices, whether cultural, spiritual or religious aim to flourish an individual or a group of individuals that believe in the particular practice, though in other instances, some of these practices can lead to undesirable outcomes. Thus, people pray with an overall aim of

flourishing, whatever that means to them. With the practise of *Ingqithi,* the flourishing is known to be the sparing of life, luck, good fortune and recognition by the ancestors(1, 2). Thus, at face value it is moral for those members that believe in the cultural ritual of *Ingqithi* to practise it, since well it will lead to them flourishing or phrased differently, happy, based on consequentialism albeit the limitations which I will mention later on.

Another important aspect of the consequentialist theory is an aspect of utility. Utility can in instances be understood as using the available resources to achieve the happiness that is aspired for(29). The instrument used to achieve this happiness could be acts which might require the involvement or exploitation of humans, animals and objects like cars and so on. Using alive beings like animals in acts or cultural rituals as a means of attaining happiness can spark moral debates(37), but it seems that using any other non-living thing like cars to achieve happiness does not spark those kinds of moral debates. Rather the onus is on the owner of that particular vehicle to use it maximally or preserve it for longevity, or whatever they need to achieve their happiness goal. Using a motor vehicle as an example; the only time that the owner's action with regards to its usage is legitimately questioned, is when use endangers the safety of themselves or others, like when driving beyond the set speed limit. Excluding the above limitation, the owner is expected to use the vehicle at their liberty to maximise their pleasure. It would rather be odd for someone else to impose their views on how one should utilise their own car or belongings. For our case in point; there is a finger which has been amputated from an individual. In itself a finger that has been amputated is not alive and does not have rationing capacity, thus I argue that it does not have a moral worth, and it can be used just like a car by the person that owns or has custodianship over it with the limitation of respect for human tissues which I will elaborate further on, later in this section. Unlike a car which can have a longer value to an individual if its "lifespan" is prolonged, the

amputated finger wouldn't. Provided the finger that has been amputated is not used for *Ingqithi*, it would be regarded as medical waste and treated as such. Thus, using the finger in this cultural practise would actually be giving it a utility value that it wouldn't otherwise have had. This is using resources at our disposal prudently, at least for those who wish to practice *Ingqithi*; resources that would have otherwise been incinerated as medical waste.

The other important aspect that needs to be explored with respect to cultural practices is do they cause any unhappiness or harm? This is important because we need to compare the amount of happiness with the amount of harm that results, as a consequences of a particular cultural practice, fully acknowledging that for an act to be moral, it is only if the happiness attained is more than the harm(17). Harm can result from the handling of human tissues in a form of spreading infections provided the tissue itself is infected; though this is unlikely with amputated fingers from polydactyly because the fingers being amputated are in most instances healthy, unless in exceptional cases. Nevertheless, handling of these tissues is still important because they can still harbour infections even though initially, they were healthy.

Another important aspect in relation to the handling of these fingers as mentioned earlier is the respect of human tissue as a common practise, even though it is dead; because even in death, humans (*and their tissues*) still harbour dignity(38). Anything to the contrary will be repugnant to others, and we all have a duty not to cause harm. I believe that we do not want to live in a world whereby people might stumble upon human tissue like a finger on the streets similar to how they would with a carcass or some bodily part of an animal. Even though this is currently only a hypothetical issue and I wouldn't want to get myself tangled in

a slippery slope argument, it makes sense to me that we need to safeguard against these potential harms if we are to advocate for *Ingqithi*.

Among possible ways to minimize the chances of these advertent events to occur is educating the community and have guidelines that protect that which is deemed important, in this scenario being the proper handling of these human tissues. It is worth mentioning that humans have been handling dead human bodies, tissues like placentas and fingers and I'm not aware of any report suggesting that their final destination has been the street; rather the fingers in a ritual of *Ingqithi* that has been practised for years, will be plastered on to the wall of the hut for the ancestors(1). We should rather strongly encourage the adherence to the cultural practice as it is, after the finger has been amputated, to minimize those potential harms while still cashing in, by a means of flourishing.

Aspiring for flourishing or most happiness for the people, is considered a straightforward principle of beneficence(39). Beneficence is considered by John Stuart Mill as an absolute principle. He has been quoted by Beauchamp as stating that: "it is the one and only supreme or preeminent principle of ethics"(39). Beauchamp further refers to Beneficence as a "normative statement of a moral obligation to act for the benefit of others, helping them to further their important and legitimate interest, often by preventing or removing possible harms"(39). Therefore, advocating and allowing people to practice *Ingqithi* is in keeping with beneficence, which is admirable and expected from those in positions of power like the government.

I would like to contrast beneficence to benevolence which Beauchamp refers to as a "morally valuable character trait or virtue of being disposed to act to benefit others"(39). Consider helping an elderly lady by carrying their heavy grocery in the rain to their car from the supermarket; this is an admirable act carried out by a benevolent person. Now consider that this elderly citizen slips and fractures her hip; the state is obliged to have medical services that will transport her to a medical centre and have her fracture treated. Thus, even though the former scenario is encouraged and applauded; the latter is expected and actually demanded though both are moral acts.

One could ask; how should the state prepare itself to pass these moral tests that it faces daily for the benefit of its citizens? I propose that the only way to pass these tests is if it has its legislation based on moral principles like that of beneficence. Allow me to highlight salient points from the above definition of beneficence. Firstly, that it is a moral obligation. This is best demonstrated by the fact that it is considered non-negotiable that the state should have the necessary medical services that will speedily help the elderly lady with the fractured hip at the supermarket. Thus, they are obliged, though the premise is of morality. Phrased differently; it is morally appalling on the state to have an elderly citizen lying in excruciating pain waiting for an extended period of time for medical help or not getting medical help at all.

Secondly is that this moral act is for the benefit of others, in this scenario, others being the citizens of a country. It should be noted that in the definition, nothing is expected from the recipients of this act but to receive. Not surprising as we already know that an innocent elderly citizen deserves medical treatment as much as a criminal incarcerated for atrocious

acts equally does. Probably being on the receiving end of good deeds might ignite benevolence in individuals and ultimately lead to an overall happy country, but even that is not guaranteed irrespective of the obligation that the state has.

Thirdly is that this moral act is to help others to further their interests. What is required of these interests is that they are important and legitimate. It is easy to acknowledge that something like *Ingqithi* that brings good fortune and spares someone's life(1, 2) is important and legitimate, thus I come to the conclusion that the state has a moral obligation to act in a way that allows citizens to practise *Ingqithi*; with the limitation being that it doesn't cause harm or at a minimum, its harm is superseded by its benefits.

Fourthly, the definition of beneficence acknowledges that this obliged moral act usually involves removing or preventing possible harms. There are hypothetical harms from *Ingqithi* as I have alluded to earlier like possible harbouring of infections by human tissues and the need to preserve their respect; but again, despite these possible harms, the state is still obliged to act in the interest of its citizens if it is having its premise on the principle of beneficence. At a minimum, stated possible harms cannot be labelled as enough to prohibit *Ingqithi* and other cultural practices without a proper effort by individuals and the state to try and prevent these harms. Only if unacceptable harms, when compared to the benefits are unavoidable, then the obligation stops from the state's side.

The issue of harm seems not only to be understood as an obligation to prevent, but also to avoid causing it, as is seen by the definition of beneficence articulated by Munyaradzi

Mawere who defines it as “a principle that asserts an obligation to help others further their important and legitimate interests and abstain from injuring them in any way, that is, psychologically, morally or physically”(40).

With regards to *Ingqithi,* I acknowledge that the benefits are hard to prove since they are faith based believes. Thus, it is not proven that the interests for *Ingqithi* are legitimate. I would like for the reader to be aware that not allowing people to practice their cultural rituals might in actual fact be causing psychological harm to them. Factual or not; a Xhosa believer of *Ingqithi* would not want to leave their life without the potential protection that they would have supposedly gotten from the practice. Consider travelling to a Malaria endemic area and someone prohibits you to take medical prophylaxis that you believe in. You might still not get the Malaria infection even though you hadn’t taken the prophylaxis, either by a stroke of luck or the use of other Malaria preventative measures; but there is a peace of mind that the prophylaxis would have given you that you’re not getting. This is at least one example of psychological harm that could be inflicted by prohibiting *Ingqithi* and it would not be in keeping with beneficence or simply put; immoral, because this will deny the people at least their peace of mind. This is excluding the possibility of *Ingqithi* being real; meaning that to prohibit it would potentially harm the individuals by bringing bad luck and bad fortune to them. Not looking at a specific cultural practice per se; it is important to note that culture and its practices are still important as it is noted by Behrens K that, “Members of these cultures who practice these rituals derive morally significant value in terms of their cultural identification, sense of belonging, *and* or their self-esteem, dignity and so forth, from being able to participate in their culture generally, and in their cultural practices in particular”(37).

Another debated area of beneficence is what others have coined as the "continuum of obligation"; that is, at what expense is one expected to practice beneficence towards others?(39). As seen from the above example of helping out an elderly citizen by a general member of a population being applauded; it seems to suggest that an individual is not obliged, but services that will help the citizen are still expected from the state. Mawere notes that in the medical fraternity, beneficence which is part of medical ethics asserts an obligation on healthcare professionals to help their patients(40). Thus, as much as there is an obligation to beneficence, there is also a duty that is placed on individuals in positions of authority and institutions like hospitals, schools and governments which are to be subjected to moral scrutiny of which *Ingqithi* is just, but an example. This obligation has been recognised more than five decades ago by the International Covenant on Economic, Social and Cultural Rights(ICESCR) when it stated that member states of the United Nations should use available resources to progressively realise cultural rights together with its socio-economic counterparts(41) all of which are indispensable for human dignity(10). Undeniably human dignity is important, what is frequently overlooked is the relationship between culture, cultural rituals like *Ingqithi* and dignity which I'll explore further in the next section. What should be appreciated is that the government would be doing well for to the dignity of Xhosa people if it does all in its powers to enable *Ingqithi*, provided that this practice doesn't cause unacceptable harm. This approach would be in keeping with beneficence.

Culture is already appreciated as an integral part of a persons' identity(21) and furthermore, it distinguishes human beings from other earthly populations(42); thus, it is important and likely to exist for as long as the human race exists. It leads us to question: if culture is so important, then why is it that people are not allowed to freely enjoy it and practice its rituals without interference and scrutiny from others? Unfortunately, culture with its practices is at

times used to perpetuate stereotypes and inflict harm on others like with female genital mutilation(30, 43) and this is the reason why it can't be free for all. There seems to be a middle ground that could be bargained for, whereby people can practice their culture but with limitations and guidelines to avoid harm. There are multitudes of different cultures in this country and definitely even more in the world. It would not be possible to discuss each practice individually to decide if it's worth being practised or prohibited. Thus, the middle ground or the line not to be crossed would have to be applicable to every cultural scenario that could be encountered. My proposal is that the line should be: "*do not harm oneself or others*".

Harm can be elaborated on scenario by scenario but the principle would be the same. We have already highlighted on the potential harm that could result from *Ingqithi*. What's required is that either the authorities safeguard against harm from cultural practices or the constituents that would like to practice the cultural practices would need to provide reassurance that no harm will result from those practices, for them and those around them, or at a minimum, the benefits will supersede the harm.

Another important principle that I would like to briefly discuss is a principle of Justice as stated by J Rawls which states that: "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others"(44). He lists these liberties as "political liberty, freedom of speech and assembly; liberty of conscience and freedom of thought, freedom and right to hold personal property and freedom from arbitrary arrest and seizure"(44), though he acknowledges that the list is not extensive. I would also add the freedom to belong to a cultural group and the right to practice cultural practices of the

one's cultural group as acknowledged by section 30 and 31 of the South African constitution (16). J Rawls further notes that, "These liberties are all required to be equal, since citizens of a just society are to have the same basic rights"(44). Thus, expanding the above principle statement further with relevance to cultural practices in South Africa the statement could be phrased as: "*if Whites, Indians, Zulus, Bapedis and all other ethnic groups are allowed to practice their cultural practices, then also Xhosas should be allowed to practice their culture*". The above statement seems like a no-brainer and generally it can be said that everyone is allowed to practice at least some of their cultural practices. It begs the question of, what it is about *Ingqithi* that makes it fall outside of the liberties that everyone should be enjoying. The hypothetical answer which can be seen as affirming an unjust society that we are living in is that: it is being practised mostly by the vulnerable rural South African indigenous communities that don't have a voice. The other probable answer is because it involves the use of Human tissue.

The other human tissue currently being used for cultural practices as mentioned earlier is the placenta, by the Ndebele tribe(4, 27). They use it to make traditional medicine which cures infertility in women and also ensures strong love bonds between siblings(4). It is also used by the more affluent White and Indian communities in the big Metros of South Africa even though I could not find any legislation that directly allows this tissue to be given to the new parents by the health care facilities. For some unknown reasons which could be the social standing of the communities in the Metros, and the widespread post-birth rituals with the placenta that is regarded as having great powers(4), it does not seem to encounter the hindrances that the practise of *Ingqithi* faces. Nevertheless, a victory for *Ingqithi* and the use of a finger might upgrade the use of the placenta from what currently seems like a mere privilege, to a right. That being said, one might ask if the finger doesn't deserve the same

liberties that are already being awarded to the placenta in keeping with Justice; since both are tissues. With reference to liberty; there is an important discussion to be had about a person's liberty to choose for themselves the practices they would like to be part of. This brings me to the last principle that I would like to discuss in this section, which is a principle of Autonomy.

According to Rachels *et al*, autonomy is understood as an "ability to decide for oneself how to live one's own life according to one's own desires and values"(29), simply put it is "self-governance"(45). Autonomy has been singled out as the most important concept in the contemporary development of bioethics(46) and as a principle it frequently trumps above all other ethical principles. I understand autonomy as having at least two limbs whereby on the one limb there is agency/rationality and on the other, liberty. The rationality of *Ingqithi* has been highlighted in the text already and all that's left is whether the individual believes; which is clearly the case for those who aspire to or are already practising it.

I'm personally persuaded a lot by rationality but I concede that liberty is important, therefore I will elaborate on it as well, albeit briefly. Liberty can be understood as "not being second-guessed by anybody or anything about one's choices or the use that one makes of one's freedom"(47), as articulated by Jennings B. What a morally justifiable action is; is frequently debated. Equally as important or potentially even more important might be who decides what is the morally appropriate act(45, 47). It is potentially true that identifying an individual or an institution that has the legitimate right to decide on an act might close the debate on the need for justification of an act. This debate has been had with regards to abortion, with philosophers like Judith Jarvis Thomson having identified an individual carrying the

pregnancy as the legitimate person to decide with regards to its termination(47). This is despite the full acknowledgement of the moral worth of a foetus; if not at the present time, at least in the future, considering that we expect most foetuses to ultimately mature up to delivery, and then grow up to be adult rational beings with a full moral worth. This is where we are as a country with reference to abortion; whereby a woman can request for termination of pregnancy before 12 weeks of gestation without having to explain to anyone the reasons behind her decision(48).

Juxtapose the pregnant woman and the foetus with an individual and their extra digit that has already been amputated. As we know, autonomy of a pregnant lady has won in the South African setting(48). Without getting into the merits of abortion, this just highlights the respect that legislators are arguably correctly giving to liberty and autonomy as a principle. That being said, the state has a duty to provide the resources for the lady to be given a safe abortion, and failure of the state to provide those resources would be contrary to beneficence as discussed above and also be limiting to an individual's liberty. Some like Daniel Callahan, "would argue that the law should not interfere with a woman's autonomy(liberty) by prohibiting abortion, but that from a moral point of view there should be good reasons(rationality), some account beyond appeal to the woman's subjective will alone, for terminating a pregnancy; good reasons, that is for cashing in one's autonomy"(47).

I am convinced that *Ingqithi* has been able to satisfy these relatively high standards of rationality that have been referred to. Though, as is shown by the current legislation and practice in relation to termination of pregnancy in South Africa and many other countries in the world where abortion is legal, rationality is practically not required to exercise liberty. It

should be acknowledged that too much emphasis on rationality will limit the choices that people have(45). Thus, the Xhosa people who believe in *Ingqithi* do not have to prove its legitimacy to anyone and they should be allowed to practice it if there are adequate safety checks to prevent its potential harm.

What we have gathered in this section is on ethical grounds, *Ingqithi* is not wrong; more than that, there are good ethical grounds to advocate for it including with the principle of autonomy and beneficence. Beneficence is an obligation for authorities in positions of power like the government to fulfil towards its citizens, most importantly with regards to *Ingqithi*, this beneficence will be for the preservation of human dignity for the Xhosa cultural group and its individuals that practice *Ingqithi*.

Legal aspects

In this section I'll scrutinize the South African legislation with specific reference to culture, assessing if either the law is appropriate and just, specifically with reference to *Ingqithi*. To shine the spotlight on legislation, I'll start off with reference to the judgement which had been passed in relation to the legislation that had been enacted as a response to the COVID 19 global pandemic in South Africa, in an attempt to highlight that the law is not always just. I will further look into the concept of dignity and its significance as ascribed by the South African constitution and UNESCO, culminating by showing the important relationship between it and culture, together with its practices which *Ingqithi* it's an example. I will emphasize the significance of allowing *Ingqithi,* for the sake of the affected group of individual's dignity.

Let me start by quoting the former South African Public Protector and social activist Thuli Madonsela in an open letter she wrote to President Matamela Cyril Ramaphosa amid the continued level three lockdown in response to the COVID 19 global pandemic, shortly after the High court judgement by Judge J Davis had declared some aspects of the regulation in respect to both level three and four of the lockdown in terms of Section 27 subsection 2 of the Disaster Management Act to be unconstitutional(49); she said: " people's resistance to colonial and apartheid laws has taught me that when the law is unjust, violating it is not only justified as legitimate, it is exalted as heroic"(50). We are well aware of the South African government's response to the COVID 19 pandemic and also that at its inception it was applauded both here at home and around the world, with the director-general of the World Health Organization Dr Tedros Adhanom Ghebreyesus expressing his admiration in multiple

platforms including virtual conferences and social media posts(51, 52). What the high court judgement is highlighting (*though there is a pending appeal process of the ruling*) is that amid the best intentions, government's legislature can come short of what is just and constitutional, notwithstanding the specific circumstances of a global pandemic which this specific legislation was passed under.

We all know that the apartheid and colonial laws in South Africa fell and ultimately replaced by the Constitution which was enacted in 1996. I am also reminded of the words of the world icon Rolihlahla Mandela who said: "if the ANC (African National Congress) government does to you what the apartheid government did to you, you must do to it what you did to the apartheid government"(53). The South African's apartheid government used law to segregate, oppress, undermine and overall allow atrocious acts against non-white South Africans which can be summed up as crimes against humanity as declared by the general assembly of the United Nations(54). What we can learn about the apartheid system is that the law can be unjust as articulated by Thuli Madonsela, and if the law is unjust, violating it is expected or the extreme which is expected of the citizens is that they should bring that legislative system down as advised by Rolihlahla Mandela. I hope as a country we do not have to get to a point whereby we have to bring the post-apartheid SA government down because of lack of legislation or unjust laws with regards to culture.

Allow me to quote the second democratically elected South African president Thabo Mbeki on his famous speech that he articulated in 1996 when the constitution was being adopted, when he started by saying: "I am an African". The speech brought so much pride in the self-conscious South Africans who were in parliament on that day and the millions who watched

it from the four corners of this country. I will in this chapter refer to some aspects of his speech periodically, in an attempt to state the indigenous African case for cultural allowance and the freedom to practice it. In his speech he acknowledges that "...We could both be at home and be foreign.."(55). The speech itself is open for interpretation and I will do my bit in relation to the plight of indigenous South Africans. Consider a natural African afro hair not being permissible in a South African school with the school policy requiring that either a scholar's hair should be of certain length or straightened using chemicals to resemble those of European decent. The same school prohibited the use of indigenous African languages in the school premises which is located in South Africa. Consider being prohibited to practice *Ingqithi* that had been practised for centuries by your forefathers in your native country. You definitely can't be at home and be foreign; but you can be a South African and feel foreign in South Africa. I argue that this is a marker of an unjust society.

Thabo Mbeki further states that "...human existence itself demanded that freedom was a necessary condition for that human existence..."(55). With regards to freedom, the Universal Declaration of Human Rights states that: "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy their economic, social and cultural rights"(10). Thus, the United Nations firstly acknowledges that the conditions might not be favourable in some situations, and secondly that three rights which are economic, social and cultural rights are indispensable for the enjoyment of freedom by individuals. The onus is on the member states, of which South Africa has been since the year 1945(56), to make the conditions ideal for everyone in their respective country to enjoy these rights with the bigger goal being to have constituents free and enjoying freedom. The International Covenant on Economic, Social and Cultural Rights(ICESCR) which was adopted in the year 1966 acknowledges in its Article 15 the right

of every individual to take part in a cultural life(41). The question that needs to be answered is whether conditions in South Africa are favourable for people to practise their culture or not.

Acknowledging that the conditions in different countries might not be conducive for realization of these three rights, which are: social, economic and cultural rights, the ICESCR states that member states should use available resources to progressively realise them(41). Chenwi correctly asks the degree of obligation or immediate implementation of these rights(57). For socio-economic rights like shelter, there is an acknowledgement that the state can find itself in financial constraints limiting its ability to fulfil these obligations to its citizens as shown by the Constitutional court ruling on the case of *Government of the Republic of South Africa and Others v Grootboom and Others* where the state was not obliged to realise the right to permanent shelter for its citizens immediately(58). Despite the constitutional court ruling, it is evident that some socio-economic rights like the prevention of arbitrary eviction, the children's rights and the right to basic education as contained in Section 26, 28 and 29 of the bill rights respectively, could be implemented immediately and should not employ the progressive realization principle(57, 59). Similarly, Stamatopoulou asserts that cultural rights do not necessarily require financial resources and should be implementable immediately; further cautioning against the view which seems to suggest that cultural rights are a luxury, but rather pleads for us to treat them with similar attention that is given to other human rights(60).

In keeping with the ICESCR; the United Nations in its Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities puts the responsibility

on the Countries “to adopt appropriate legislative and other measures to protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and to further encourage conditions for the promotion of that identity”(61). Minorities in this context are often understood as those vulnerable indigenous communities whose cultures are in danger of being extinct provided there is no active effort to preserve it. A potential contentious issue is whether the Xhosa communities that practise *Ingqithi* fall under the minorities. Understanding the Broad-Based Black Economic Empowerment(BBBEE) Act(62) (*the Act is aimed at giving preferential economic opportunities to people of colour in South Africa because of the unfortunate economic milieu that most of them find themselves in, mainly as a result of the injustices of colonization and apartheid*) would help us understand that those in the numerical majority can at times qualify for special preferential treatment that is commonly reserved for minorities. It is my opinion that there is often a wrong presumption that one needs to be in the numerical minority to be vulnerable. Xhosa’s and all other South African indigenous people might not be a numerical minority but their cultures are at danger of extinction and there needs to be a conscious concerted effort to preserve them; an effort in keeping with BBBEE in the economic front. Probably, we need to look at this scenario in a bigger global scene with the world being westernised to acknowledge that some cultures are at risk of extinction. So how has South Africa done so far for the preservation of, and in making conditions favourable for people to practice their cultures?

Most importantly, the State of the Republic of South Africa is founded on human dignity, the achievement of equality and the advancement of human rights and freedoms and other values which includes non-racialism, supremacy of the constitution and the right to vote(16). According to section 30 and 31 of the bill of rights; “everyone has a right to belong to a

cultural group, participate in the cultural life of their choice, enjoy their culture, to form, join and maintain cultural association and to practice their religion albeit that these rights are not exercised in a manner inconsistent with any provisions of the Bill of rights"(16). Thus, according to the constitution; Cultural life, association and practices are prima facie right. There needs to be another right contained in the bill of rights that culture infringes upon to justly prohibit this prima facie right. There are in actual fact, seven non-derogable rights contained in the South African bill of rights that which is a clear-cut situation that these rights will always supersede other rights provided there is a loggerhead(16). Interestingly, some of these non-derogable rights are meant to protect culture and its practices; an example being the right of everyone to have their dignity respected and protected, which I'll be discussing next.

Amoako *et al* asserts that the United Nations have through the years established that human rights are meant to protect human dignity; thus "human dignity comes first to be protected by human rights"(38). Not surprising that human dignity is one of the values that the South African state is based on, as mentioned earlier. In addition to have dignity as one of the founding values, it is also found as one of the non-derogable rights in the bill of rights which is protected in its entirety(16). Clearly dignity is important; but does it have anything to do with culture? According to article 22 of the United Nations Declaration of Human Rights, it is stated that cultural rights together with economic and social rights are indispensable for human dignity and the free development of a person's personality(10). Thus at least according to the United Nations, trumping on any of these rights has a potential to trump on a person's dignity and the development of their personality. With specific reference to cultural rights, the Special Rapporteur in the field of cultural rights Karima Bennoune states that "they are an expression of and a prerequisite for human dignity"(63).

Dignity is a difficult concept to define, but most people would be aware of what it means to strip a person of their dignity. Having people use a non-sheltered pit latrine is stripping people of their dignity; evicting a naked adult male from their shelter also strips an individual of their dignity. These two examples somehow fit into the socio-economic rights of individuals not being respected leading to their dignity being undermined. I've dealt with what culture is in the prior sections and it denotes an important notion of belonging and identity amongst others. Despite their value, it seems easy to overlook cultural rights since trumping those does not show a spectacle like infringing on its socio-economic counterparts as highlighted in the above examples. Thus, culture could be labelled the "forgotten" right in the pursuit for respect of human dignity. Despite culture being frequently overlooked, it is still indispensable for human dignity.

Cultural rights are clearly mentioned in section 30 and 31 of the bill of rights and denying anyone the freedom to enjoy them, similar to other socio-economic rights, has the potential to strip an individual of their dignity. The problem with culture is that some elite mischievous individuals belonging to cultural groups use culture to try justify and defend the indefensible(64); a case in point being the practise of *ukuthwala* in *Jezile v S and Others* which was heard in the Western Cape High Court, whereby the accused adult male tried to defend the abduction of a 14-year-old girl and repeatedly raping her as part of culture(65). This is just but one example to highlight the dangers of absolute cultural relativism which I'm consciously not advocating for, but rather arguing for a weak form of cultural relativism which it is my opinion that it will allow us to condemn aspects of culture that can harm individuals, especially those vulnerable members of the communities like children. That

being said, we should not abandon culture as a whole and lose the benefits that come with it because of some in our midst who have malicious intents in keeping with the famous phrase of "*don't throw the baby out with the bathwater*". Also, the suffering of one individual somehow related to culture is one too many. Thus, there needs to be a safeguard standard to protect every individual irrespective of age, gender, race and cultural group that they find themselves in. The safeguard standard that has been set by the constitution is: "no one exercising this right may do so in a manner inconsistent with any provision of the Bill of Rights"(16). The problem with this limitation is it always puts the onus on individuals to compare & contrast the value of human rights against each other at a given point and propels the notion that there are universal human rights on the one side against cultural rights at the opposite side.

In a report submitted to the United Nations General Assembly prepared by Karima Bennoune, she states that: "The implementation of human rights must take into consideration respect for cultural rights, even as cultural rights themselves must take into consideration respect for other universal human rights norms"(63). The above statement still does not seem to settle the debate of cultural rights versus human rights, and it still places cultural rights as an entity with the other universal human rights as another entity. As a society, we need to acknowledge that cultural rights are part of universal human rights. At least in a South African setting we have non-derogable rights which will always supersede any other right; but in them too there is a potential problem when two non-derogable rights seem to be at loggerheads. We need to have a universal standard which every right needs to respect. I believe we need to refrain from upholding some rights above others. At any given point, a particular right will be of seemingly more significance to one person than the other as a consequence of the circumstances that one finds themselves in. As I had mentioned in the

prior sections, I reiterate that the standard that every right must comply to is: "*do no harm*," either to self or others.

The right to culture is mostly understood as a negative right (*which are rights that protect individuals from interference from others or state organs*)(66). Just like with social and economic rights which are positive rights(*meaning the state organs have a duty to provide*)(66), cultural rights should also be asserted as positive rights, since all these three rights are indispensable for human dignity. Provisions of housing, water, free healthcare, social grant payments are just some of the examples of the positive socio-economic rights that the South African government is providing to its citizens. The question that governments need to ask themselves is: What can we do to contribute to cultural rights and assert them as positive rights? Article 2 subsection 1 of the ICESCR requires countries "to take steps to the maximum of its resources, with a view to achieving progressively the full realization of social, economic and cultural rights, in particular the adoption of legislative measures"(41). We as a country have not as yet achieved the full realization of these rights. There is legislation in an attempt to realize these rights, but in particular to culture it is legislated as a negative right just prohibiting interference. It is my opinion that South Africa can take more steps in realization of cultural rights and *Ingqithi* presents itself as a good opportunity to take those steps which would be to offer amputations in health care facilities for clinically indicated conditions as a positive right, and ultimately not interfere with the cultural practice that an individual will engage in with their amputated finger as a negative right that is already legislated.

The argument of cultural practices and association has been had and more specifically of *Ingqithi* in this particular paper. What is also important is the limitation clause that is mentioned. In South Africa, the limitation is only if the cultural practice is practised in a manner inconsistent with any provisions of the Bill of rights which includes the right to life, privacy, equality to mention a few(16). There is no provision in the bill of rights that *Ingqithi* is inconsistent with. Thus, any institutional practices or norms and legislations that prohibit *Ingqithi* are unconstitutional.

The former United Nations High Commissioner for Human Rights, and former President of Ireland Mary Robinson asserts that "It is important to understand the social basis of the cultural traditions and how they may be adapted to or integrated with national legislation to promote human rights in a way that does not compromise the cultural integrity of peoples"(43). Thus, in a South African setting, the Bill of rights in section 39 asserts that they do not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill. So yes, we might not find *Ingqithi* or any other cultural practice specifically mentioned in the constitution, but these practices are customs that are well known by the indigenous Constituents of communities, and should be well recognized by customary law. She further states that "A complimentary, if not an absolute congruence of state laws and cultural norms is required if national human rights regimes are to gain grassroots acceptance"(43). Unlike statutory and common law, it is believed that customary law in African states deserves special protection and promotion because of historical discrimination during the colonial and apartheid years(64).

Thus far what I have gathered about the South African legislation is that it does not prohibit *Ingqithi*; there is definitely more that can be done to realise cultural rights like asserting culture as a positive right. Unfortunately, some South Africans are just not yet free to enjoy the freedom that was won in the year 1994. Their minds are still in captivity, both at the level of the ordinary members who are supposed to freely practise their culture acknowledging that it is their right, and also those who wrongfully prohibit people to practice it by misquoting the legislation. This notion is in keeping with what the Zimbabwean freedom fighter Joshua Nkomo had observed already in the year 1984, just a few years after Zimbabwe had gained independence when he said: "The hardest lesson of my life has come to me late. It is that a nation can win freedom without its people becoming free"(67).

The reality is black South African people's culture has been demonised by colonization, apartheid and now westernization, with even the natives themselves embracing western culture as civilization. Culture is a choice, and the society should let those who chose their native African culture to be allowed to do so without discrimination. It was, and it will always be wrong to oppress black people and their way of life. Conscious black people will continue to mourn for those blacks who look down on their culture while adopting the western culture even passing it down to their descendants.

In the words of Thabo Mbeki, "let us not engage in another titanic battle, where the one group aims to redress a wrong that had been caused by one to another and the other, to defend the indefensible"(55) like it happened with apartheid. The injustices that black people's culture has suffered at the hands of colonization and apartheid in South Africa needs to be redressed; what the society should not do is try to defend and perpetuate this injustice using

other universal human rights and civilization as the new tools for the same act. He further notes that he has "seen what happens when one person has superiority over another, when the stronger appropriate to themselves the prerogative"(55). He had seen "the destruction of all sense of self-esteem, the consequent striving to be what one is not, simply to acquire some benefits which those who had improved themselves as masters had ensured that they enjoy"(55). Thus, it does not come as a surprise that some elite blacks are embracing the western culture while frowning upon their ancestral roots and those that are still holding on to the ways of their forefathers.

For centuries now, the human race has been passively and actively taught that whatever that is black is inferior and subhuman. Black people and their culture have been attacked by many formations; in the philosophical world using universal human rights to subvert anything non-western as barbaric and trumping on human rights. Black people's dignity is being chopped off by denying them a fundamental part of it which is their culture. Worldwide there is a "Blacks lives matter" movement trying to affirm black people's position in the globe, sparked by the senseless killings of black Americans in the hands of white police officers, most notably the death of Mr George Floyd. It needs to be understood that black lives can only matter when everyone starts to recognize the indigenous knowledge, wisdom and culture of black people as valid. Thus, reasserting dignity for a black person. Though some things that relate to the black race are different, they are potentially right and even beneficial in the black community. Black lives will only matter completely when black culture matters as well.

Advocating for *Ingqithi* needs to be seen for what it is; which is to advocate for black peoples culture and ultimately for black peoples dignity. Africa is an ideal place to start this

reaffirmation of black people's dignity. Fortunately in a South African setting, the legislation does not prohibit *Ingqithi*. The Xhosa people who choose to practice *Ingqithi* should be allowed to have their extra finger amputated in a hospital setting with them taking home the finger for this cultural ritual for the benefits which they believe in, but more importantly for them to assert this building block of culture in place, for their dignity.

Conclusion

Culture is a fundamental human right as acknowledged by the South African constitution and UNESCO; with its rituals being an expression of that right. Moreover, culture is an important aspect for an individual's dignity which we all have a duty to protect. Despite the importance of culture, it is a fact that culture can inadvertently harm others; or at times, deliberately in the hands of malicious beings. Thus, as much as we have a duty to uphold and preserve human dignity by allowing individuals to belong to a cultural group and practise their cultural rituals as they wish, we also have a duty to prevent harm.

Acknowledging the above facts, there is a middle ground that we can aspire for, whereby culture can be openly practised and enjoyed for the preservation of human dignity and individuals can be protected from potential harm that could result from allowing cultural flourishing. With the arguments advanced in this paper, I propose that the middle ground that can be struck is if we allow a weak form of cultural relativism with the only reason good enough to stop any culture with its rituals being harm that can fall upon self or other human beings. As mentioned earlier, some cultural rituals can potentially harm animals and this discussion is beyond the scope of this paper. Notwithstanding the case for animals, no other reason could be of significance enough to outweigh the value of human dignity. Inclusive of the overall good of cultural belonging and identity, and the debatable good of sparing of life and favour from the ancestors, *Ingqithi* is an example of a cultural ritual of a person's culture which is indispensable for dignity and constituents should be allowed to practice, if they so wish, in keeping with the noble principle of autonomy.

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