

Institutionalisation of African traditional medicine in South Africa: Healing powers of the law?*

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OPSOMMING

Die institusionalisering van Afrika tradisionele geneesmiddels in Suid-Afrika: Helende magte van die reg?

Die meerderheid van mense in ontwikkelende lande kies of is afhanklik van tradisionele gesondheidspraktyke vir primêre gesondheidsorg. Alhoewel die Suid-Afrikaanse regering tot dusver sekere praktyke van tradisionele gesondheidsorg geduld het, is dit nog nie ten volle in alle aspekte van die gesondheidsorg geïntegreer nie. In lyn met ontwikkelings in die res van die wêreld en plaaslike realiteite, het Suid-Afrika begin met 'n integrasieproses deur die promulgering van die Wet op Tradisionele Gesondheidspraktisyns 22 van 2007. Die volgende stap is om 'n regsraamwerk vir tradisionele geneesmiddels te skep. Hierdie bydrae fokus op drie aspekte, naamlik die betekenis van "Afrika tradisionele geneesmiddels", die redes waarom die Suid-Afrikaanse regering besluit het om Afrika tradisionele geneesmiddels te institusionaliseer en laastens die regering se plan van aksie vir die effektiewe integrering van tradisionele geneesmiddels in die Suid-Afrikaanse gesondheidsstelsel. Laastens wissel die outeur 'n paar gedagtes ten opsigte van die simboliese verbintenis tussen die reg en geneesmiddels, 'n verbintenis wat sy die "helende magte van die reg en geneesmiddels" gedoop het.

People have the right of access to traditional practitioners as part of their cultural heritage and belief system.¹

* The article is based on a paper delivered by the author at the 7th Greek Conference "Facing change in law, medicine and science: Rights, justice and the individual" held at Corfu from 26 September to 2 October 2009.

¹ This quotation reflects one of the tenets of the ruling party, the African National Congress (ANC), on traditional practitioners contained in their policy document entitled "A national health plan for South Africa", accessible at <<http://www.anc.org.za>> (accessed 18 February 2010). Furthermore, s 27(1) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") lays down that "[e]veryone has the right to have access to . . . health care services". One could argue that both the conventional and the traditional health care services form part or should form part of the health care system of South Africa, but this contribution does not deal with the question of whether traditional health care services should be recognised and regulated or not but rather with how the South African government intends to institutionalise it, and more particularly how African traditional medicine should be institutionalised. For a discussion of a legal framework for traditional healers in South Africa, see Rautenbach "Review on a new legislative framework for traditional healers in South Africa" 2007 *Obiter* 518–536.

1 INTRODUCTION

In many developing countries,² including South Africa, the majority of people either choose or depend on traditional health practice³ for primary health care.⁴ These reasons for the popularity of traditional health practice are diverse. These include:⁵ traditional health practice is familiar to many, it follows a holistic approach that it is generally affordable, it has therapeutic qualities (a placebo effect), it satisfies spiritual needs⁶ and it is trusted in contrast to conventional

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- 2 There is an ongoing debate on the exact meaning of “developing”. There is no universal definition of what constitutes a developing country but it is generally accepted that a developing country is one which has a relatively low overall standard of living, an underdeveloped industrial base, a medium Human Development Index (HDI) score and a moderate Gross National Income (GNI) per capita. According to the 2007/2008 HDI rankings, South Africa shows medium development and ranks 121st out of 177 countries. See UNDP Human Development Reports <http://bit.ly/auf4v5> (accessed 30 June 2008). South Africa ranks 88th on the GNI scale with an income per capita of 5,760 US dollars. See World Bank GNI <http://bit.ly/bdwEdF> (accessed 30 June 2008). The World Trade Organisation (WTO), of which South Africa has been a member since 1995, does not define developing countries, and members of the WTO themselves announce whether they are “developed” or “developing”. The only category recognised by the WTO is that of the “least developed countries”, which are defined by the United Nations (UN) as such – see <http://bit.ly/aTSDnX> (accessed 18 Feb 2010). South Africa has characteristics of both “developing” and “developed” countries and has been described by the CIA World Fact Book as an “emerging market” with a stock exchange that is the “17th largest in the world” – see <http://bit.ly/9KqZWF> (accessed 30 June 2008). Although South Africa still faces problems such as a high unemployment rate, high poverty levels and the burden of high levels of HIV/AIDS, South Africa’s sustained economic growth and potential over the years have earned it recognition as one of the “emerging and developing economies” of 2008 – see “World Economic Outlook Report: Database – WEO Groups and Aggregates Information” <http://bit.ly/cuhIMQ> (accessed 3 June 2008). Countries (labelled as developed and developing), such as China, Germany, Ghana, India, Indonesia, Pakistan, Mali, Myanmar (Burma), the Republic of Korea, Thailand, the United Kingdom and Vietnam, have already integrated traditional medicine into their national health care systems, whilst others are actively promoting its inclusion. For a summary of comparative international practices with regard to the utilisation and institutionalisation of traditional medicine, see the South African Department of Health’s “Draft Policy on African Traditional Medicine for South Africa” (DAC Draft Policy) Chapter 2 published on 10 July 2008 as GN 906 in GG 31271 of 25 July 2008.
- 3 See para 3 for a definition of “traditional health practice” in a South African context. Extensive research has been done in the context of traditional medicine. See eg Correa *Protection and promotion of traditional medicine: Implications for public health in developing countries* (2002) and Meissner *Traditional medicine and its accommodation in the South African health care system – With special attention to possible statutory regulation* (2003).
- 4 In this contribution “primary health care” has a broad meaning and includes all services with the purpose of delivering health care in a holistic manner. An estimated 70–80% of the South African population consults traditional practitioners on a daily basis. See Rautenbach “Review on a new legislative framework for traditional healers in South Africa” 2007 *Obiter* 518–519 and the sources cited there.
- 5 Beyerstein “Alternative medicine and common errors of reasoning” 2001 *Academic Medicine* 230–237; Truter “African traditional healing: Cultural and religious beliefs intertwined in a holistic way” Sept 2007 *SA Pharmaceutical J* 59; Ingle “An appraisal of the African traditional healing system” 2007 *J for New Generation Sciences* 33–39; Mall “Attitudes of health care professionals in South Africa to the use of traditional medicine by their patients on antiretroviral treatment: A research note” 2005 *Social Dynamics* 118–125; Richter *Traditional medicines and traditional healers in South Africa* (2003) 12–13.
- 6 Truter Sept 2007 *SA Pharmaceutical J* 57 explains that the theory fundamental to traditional medicine has to do with the belief that disease is something with a supernatural

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healing practices⁷ which are looked upon as a remnants of South Africa's colonial past. The popularity of traditional medicine has led increasingly to concerns over its safety, quality and efficacy, especially considering that it is in essence static and inward-looking.⁸ Although South Africa tolerates certain practices of traditional healing, it has not yet wholly integrated it into all aspects of health care.⁹ In general traditional medicine is poorly regulated, unregistered and uncontrolled. Scientific studies on the safety, quality and efficacy of traditional medicine are rare and focus mainly on the negative effects of traditional medicine.¹⁰

Until fairly recently, traditional health practice did not receive the same consideration from the South African government as conventional health practice. The former was regarded as a secret (or even sacred) art which had to be tolerated as one of the peculiarities of the African community.¹¹ On the other hand, conventional health practice has been operating as a structured and generally well-institutionalised system since early times. However, global experiences have been responsible for a resurrection of traditional healing and everything associated with it. Legal and medical practitioners from both hemispheres have been debating the desirability of integrating traditional health practice into the public health care systems of individual countries. Today, it can confidently be contended that the debate is no longer *whether* traditional health practice should be integrated, but *how* it should be integrated. This does not mean that the

source governed by a hierarchy of vital powers starting with the most powerful deity and followed by lesser spiritual entities. The interaction between the physical and spiritual is thus very important and a holistic approach must be followed to cure the patient. As a result, it is not enough to treat the physical symptoms of the patients by merely giving him or her medicine; the whole person and all of his or her different facets (physical and spiritual) must be treated.

- 7 In this context the phrase "conventional health practice" refers to the dominant allopathic model which is essentially still the mainstream model in South Africa.
- 8 See Yangni-angaté "Traditional and modern medicine in the context of globalisation" May 2004 *IK Notes* 3, accessible at <http://bit.ly/aXag8U> (accessed 3 March 2010).
- 9 Summerton "The incorporation of African traditional health practitioners into the South African health care system" 2006 *Acta Academia* 145 points out that the WHO identifies various types of health systems in the world, namely an exclusive one that recognises only allopathic medicine and outlaws or restricts all other forms of healing; a tolerant one that is based on allopathic medicine but with legal recognition of certain practices of traditional healing; and an inclusive one that recognises traditional healing but has not yet integrated it into all aspects of the national health care system; for example as in South Africa. A fourth system, which can be classified as an integrated system, is the one that all countries should strive towards in order to optimise health care for all. Summerton argues (146) that only China, the Democratic People's Republic of Korea, the Republic of Korea and Vietnam have been able to attain fully integrated health systems so far. See also Ingle 2007 *J for New Generation Sciences* 30-43; Van Wyk "Similarities in the meta-paradigm of nursing and traditional healing: An attempt to contribute to the integration of traditional medicine and Western medicine in Africa" 2005 *Health SA* 14-22; Cqaleni "Traditional and complementary medicine" in Harrison, Bhana and Ntuli (eds) *Health Review* (2007) 186, accessible at <http://www.whst.org.za> (accessed 3 March 2010).
- 10 Joubert "Poisoning admissions of black South Africans" 1990 *J Clin Toxicol* 85-94; Joubert "The role of prospective epidemiology in the establishment of a toxicology service for a developing community" 1982 *SA Medical LJ* 853-854.
- 11 Denis "The rise of traditional African religion in post-apartheid South Africa" Aug/Nov 2006 *Missionalia* 316.

integration of traditional medicine into the national health care system would be problem free. In light of the fact that the paradigms and dogmas of Western and traditional health care systems differ considerably it will be a challenge to reach full integration.¹²

In line with global trends in law and domestic realities the South African government has been one of the few “new” nations¹³ to make significant progress in including traditional health practice in the mainstream healthcare system by using the law as a tool for formal integration. The integration process gained momentum with the enactment of the Traditional Health Practitioners Act,¹⁴ which provides a legal framework for traditional health practitioners (also known as traditional healers). The Act gives formal recognition to traditional practitioners and establishes an interim Traditional Health Practitioners’ Council of South Africa with wide powers to ensure that health care services provided by traditional practitioners are efficient, safe and of a high quality.¹⁵

Logically the next step for the South African government, and also the main focus of this contribution, is the creation of a legal framework for traditional medicine. Currently traditional medicine is not regulated although it is used by traditional practitioners on a daily basis. Recently, in its Draft Policy on African Traditional Medicine (the DAC Draft Policy), the Department of Health, the government department responsible for health and related matters, declared as follows:¹⁶

“Most importantly in recognition of the reality that the majority of South African people still use and continue to rely on African Traditional Medicine for their primary healthcare needs, there is a need for a policy to institutionalise and regulate African Traditional Medicine.”

Traditional medicine is generally a contentious subject, not only for the negative publicity it receives from time to time¹⁷ but also for positive reasons, such as its potential to generate income for a country, particular communities and some individuals.¹⁸

12 For a discussion of some of the challenges, see Summerton 2006 *Acta Academia* 144–169.

13 Other countries, such as China, integrated traditional health practice into their health systems a long time ago, albeit in the form of complementary or alternative medicine. See WHO “National policy on traditional medicine and regulation of herbal medicines: Report of a WHO global survey” (May 2005), accessible at <http://bit.ly/aKIVp6> (accessed 18 Feb 2010). The meaning of complementary or alternative medicine in contrast to traditional medicine in a South African context is discussed in para 3 below.

14 22 of 2007. The Act was signed by the President on 7 January 2008, but only ss 7, 10, 11(3), 12–15, 47, 48 and 50 have been in operation since 30 April 2008. These provisions deal mainly with the setting-up of the Interim Traditional Health Practitioners’ Council of South Africa and the power of the Minister of Health to issue regulations in terms of the Act.

15 The wording of this Act is almost verbatim that of its predecessor, the Traditional Health Practitioners Act 35 of 2004, which was declared invalid by the Constitutional Court in *Doctors For Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC). For a discussion of the provisions of the former Act, see Rautenbach 2007 *Obiter* 524–534, and also Summerton 2006 *Acta Academia* 158–162.

16 Draft Policy para 3.1.

17 See Joubert 1990 *J Clin Toxicol* 85–94; Berger “Traditional medicine: A clear and present danger?” May/June 2006 *SA J of Science* 178–179.

18 The South African Traditional Medicines Research Unit, which is a research unit of the Medical Research Council (MRC), published a document entitled *The National Reference*

This contribution deals with two themes, namely law and medicine, and more specifically the interaction between law and medicine in the circumstances where the law is used to provide for the formal regulation of traditional medicine. Three matters are dealt with in this context – and it is by no means implied that these are the only issues involved. Firstly, the meaning of the concept “African traditional medicine” in a South African context is discussed.¹⁹ Secondly, the reasons as to why the South African government is considering institutionalising African traditional medicine are dealt with²⁰ and, lastly, a few comments regarding the government’s plan of action for the effective integration of traditional medicine into the South African health care system receive attention.²¹ The contribution concludes with some thoughts on what the author perceives to be the symbolic link between law and medicine to be, a link which is dubbed the “healing powers of the law and medicine”.²²

2 MEANING OF “AFRICAN TRADITIONAL MEDICINE”

Traditional medicine has become prominent in recent years in developments in international and domestic law. Although no true consensus exists on the meaning of the term “African traditional medicine”, most scholars agree with the definition put forward by the World Health Organization (WHO).²³ Over time this definition has undergone a few metamorphoses. The first definition I could find is rather broad and describes traditional medicine as the sum of²⁴

“diverse health practices, approaches, knowledge and beliefs incorporating *plant, animal and/or mineral based medicines*, spiritual therapies, manual techniques and exercises, applied singularly or in combination to maintain well-being, as well as to treat, diagnose or prevent illness”.²⁵

A later definition of the WHO discarded the reference to “plant, animal and/or mineral based medicines” and became even broader by referring to traditional medicine as the sum total of²⁶

Centre for African traditional medicines: A South African model explaining (34) the strategic importance of the medicinal plant trade in South Africa for economic and social upliftment of South Africa. The document is accessible at <http://bit.ly/cTmi5a> (accessed 19 Feb 2010). The MRC is a statutory body established in terms of the South African Medical Research Council Act 58 of 1991 with the purpose “to promote the improvement of the health and the quality of life of the population” through research (see s 3 of the Act). During 2008 the MRC launched a research programme, namely the MRC Traditional Medicine, Drug Discovery and Development National Collaborative Research Programme (NCRP), which illustrates that traditional medicine is one of the health priorities of the MRC. For more information, see <http://bit.ly/9hqoXk> (accessed 2 March 2010).

19 See para 2.

20 See para 3.

21 See para 4.

22 See para 5.

23 The WHO published numerous documents regarding traditional medicine. Some of the documents are accessible at http://www.who.int/topics/traditional_medicine/en/ (accessed 25 Feb 2010).

24 WHO Policy Perspectives on Medicines of 2 May 2009 – “Traditional medicine – Growing needs and potential” accessible at <http://bit.ly/90Thha> (accessed 1 Sept 2008). Slight variations on this definition have also been supplied by the WHO at <http://bit.ly/b2f4hU> (accessed 1 Sept 2008).

25 Italics added.

26 See <http://bit.ly/bZlvr5> (accessed 17 Sept 2009).

“the knowledge, skills, and practices based on the *theories, beliefs, and experiences* indigenous to different cultures, whether explicable or not, used in the maintenance of health as well as in the prevention, diagnosis, improvement or treatment of physical and mental illness”.²⁷

The reference to “plant, animal and/or mineral based medicines” in the first definition was replaced with something less tangible in the second definition, namely “theories, beliefs, and experiences”. This development is in line with the WHO’s approach to leave the matter of such definition to the member states, whose approaches to traditional medicine may “vary greatly from country to country and from region to region”²⁸ and who may wish to define traditional medicine in their own contexts.

In the South African context, the legislature has a more conservative approach and defines traditional medicine as “an object or substance” used in traditional health practice to (a) diagnose, treat or prevent physical or mental illnesses, or (b) to cure, treat, maintain or restore the physical or mental health or well-being of people.²⁹ To begin with, the terms “object” and “substance” indicate something tangible (animals, plants or minerals) in contrast to something intangible (theories, beliefs, and experiences). Secondly, the “object” or “substance” has to be part and parcel of a “traditional health practice”. In order to determine whether or not the “object” or “substance” qualifies as traditional medicine, one can refer to the meaning of “traditional health practice” in the Traditional Health Practitioners Act, where traditional medicine is defined as³⁰

“the performance of a function, activity, process or service based on a *traditional philosophy* that includes the utilisation of traditional medicine or traditional practice and which has as its object (a) the maintenance or restoration of physical or mental health or function; or (b) the diagnosis, treatment or prevention of a physical or mental illness; or (c) the rehabilitation of a person to enable that person to resume normal functioning within the family or community; or (d) the physical or mental preparation of an individual for puberty, adulthood, pregnancy, childbirth and death . . ., but excludes the professional activities of a person practising any of the professions”.

Traditional health practice is further qualified by the requirement that it must be a practice based on “a traditional philosophy” which, in turn, is defined by the Act as³¹

“indigenous African techniques, principles, theories, ideologies, beliefs, opinions and customs and uses of traditional medicines communicated from ancestors to descendants or from generations to generations, with or without written documentation, whether supported by science or not, and which are generally used in traditional health practice”.

27 My emphasis.

28 8th Plenary Meeting of the 62nd World Health Assembly on Traditional Medicine (WHA62.13 of 22 May 2009).

29 However, dependence-inducing or dangerous substances or drugs are excluded. See s 1 of the Traditional Health Practitioners Act under the lemma “traditional medicine”.

30 See s 1 of the Act under “traditional health practice”. Emphasis added. The activities of persons practising any of the professions contemplated in the Pharmacy Act 53 of 1974, the Health Professions Act 56 of 1974, the Nursing Act 50 of 1974, the Allied Health Professions Act 63 of 1982, or the Dental Technicians Act 19 of 1979, and any other activity not based on traditional philosophy are explicitly excluded and do not form part of traditional health practice.

31 See s 1 of the Act under “traditional philosophy”.

Even though these definitions are more conservative than the almost boundless definition of the WHO, their open-endedness creates a feeling of unease in a lawyer. How does one prove with certainty something that is based on unwritten and unscientific customs and use? It might also be difficult to distinguish between traditional medicine and other medicines also based on spiritual elements.³² Finding the exact meaning of the term “traditional medicine” might sound like a trivial exercise, but a recent case, *Treatment Action Campaign v Rath*,³³ although not dealing with the definition of “traditional medicine” *per se*, illustrates the importance of pinning down the meaning of the words. In this case the court had to determine the meaning of the word “medicine” in terms of the Medicines and Related Substances Act.³⁴ In terms of this Act the word “medicine” is defined, in general terms, as any substance used in the treatment of disease.³⁵ If the substance falls under this definition, it has to be registered as a medicine in terms of the Act. The court found that if the substance is “used” for treatment it is a medicine in terms of the said Act, even if the substance is only a nutritional supplement used for the treatment of AIDS. This case dealt with the meaning of the word “medicine” in the context of conventional health care, but it clearly demonstrates how important legal definitions are. From a legal viewpoint it is thus imperative to advance a clear-cut definition for traditional medicine to avoid uncertainty.

In a South African context, non-allopathic medicines used for example by chiropractors, herbalists, homeopaths, naturopaths and osteopaths who follow alternative forms of health practice, are excluded from the definition of traditional medicine.³⁶ Their medicine is labelled “alternative” or “complementary”, while traditional medicine in South Africa is referred to as “African traditional medicine”. The latter is uniquely African and dissimilar from allopathic medicine and alternative or complementary medicine, which are already integrated into the public health care system.

The approach of the South African government is *not* to integrate African traditional medicine with allopathic or alternative medicine, but to develop a *sui generis* system on a par with the conventional health care system.³⁷ This approach is in accordance with global benchmarks and local realities pertaining to traditional medicine.

32 For example, the Natural Healers Association’s mission statement reads as follows: “To widen the window of opportunity to influence the development of health legislation in South Africa to recognise the spiritual elements of International/African Traditional, Indigenous, Spiritual, Energy and Natural Healing Methods. To monitor and keep members informed of latest developments regarding Traditional, Indigenous, Spiritual, Energy and Natural Healing Methods. By seeking Government Recognition, to ultimately assist our members to provide a more cost effective and efficient healthcare service for all South Africans.” This mission statement is available at <http://bit.ly/apQMwr> (accessed 2 Feb 2006).

33 [2008] 4 All SA 360 (C).

34 101 of 1965.

35 S 1 under “medicine”.

36 Complementary and alternative medicine practitioners are formally recognised in South Africa and operate within a legal framework consisting of the Allied Health Professions Act 63 of 1982. In terms of s 1 of the Act “allied health profession” means: “the profession of ayurveda, Chinese medicine and acupuncture, chiropractic, homeopathy, naturopathy, osteopathy, phytotherapy, therapeutic aromatherapy, therapeutic massage therapy or therapeutic reflexology, or any other profession” declared as such by the Minister of Health.

37 DAC Draft Policy para 1.2.

3 LOCAL NEEDS MEETING GLOBAL PRESSURES

A number of international, regional and local events served, individually and in combination with one another, as catalysts for South Africa's decision to institutionalise African traditional medicine. A number of trendsetting instruments provide a committed framework for the recognition, acceptance, development and integration of traditional health practice in general and African traditional medicine in particular. As well, South Africa's membership of various international,³⁸ regional³⁹ and sub-regional⁴⁰ bodies and organisations played a major role in her decision to develop a legal framework for the institutionalisation of traditional medicine domestically. But global pressures were not the only events setting the stage. South Africa has changed dramatically since apartheid. Socio-economic realities and the stimulation of cultural diversity, especially of African traditions, necessitated a reappraisal of the informal traditional healthcare system.

3.1 International common trends (benchmarks) in traditional medicine

More than 30 years ago the Alma-Ata Declaration on Primary Health Care was adopted at the Conference on Primary Health Care which set forth the goal of "health for all people" through the promotion and strengthening of primary health care systems.⁴¹ In order to meet this objective, the Declaration sets forth an array of things governments could and should do, including recognising the importance of traditional practitioners as actors in achieving health for all.⁴²

38 For example, it is a member of the WHO, which is the directing and coordinating authority for health within the United Nations (UN) system. According to its official website "[i]t is responsible for providing leadership on global health matters, shaping the health research agenda, setting norms and standards, articulating evidence-based policy options, providing technical support to countries and monitoring and assessing health trends"; see <http://bit.ly/cl4jSb> (accessed 19 Feb 2010).

39 For example, South Africa is a member of the African Union (AU), which is the African continent's equivalent to the European Union (EU). The AU is an intergovernmental organisation established in 2002 and consisting of 53 African states including South Africa. The AU's official website is accessible at <http://bit.ly/bcx46j> (accessed 19 Feb 2009). The AU's Plan of Action on the AU Decade of Traditional Medicine and its actions surrounding this plan are well known.

40 For example, South Africa is a member of the Southern African Development Community (SADC), which is an inter-governmental organisation with its headquarters in Botswana. Its goal is to further socio-economic cooperation and integration as well as political and security cooperation among 15 southern African states including South Africa. The SADC's official website is accessible at <http://www.sadc.int/> (accessed 19 Feb 2010). A perusal of the activities of the SADC reveals that it has been actively involved in issues of traditional medicine. For example, a 29(e) of its Protocol on Health encourages cooperation between member states on matters of research on and documentation of traditional medicine and its utilisation, whilst a 29(f) of the same encourages the "establishment of a regional databank of traditional medicine, medicinal plants and procedures in order to ensure their protection in accordance with regimes and related intellectual property rights governing genetic resources, plant varieties and biotechnology".

41 The Declaration was made at the International Conference on Primary Health Care, Alma-Ata, USSR, 6–12 Sept 1978 and is accessible at <http://bit.ly/aHRHAK> (accessed 18 Feb 2010). Before this date there had already been calls from the World Health Assembly to promote and protect traditional medicine in the health care systems of developing countries. For more information see <http://bit.ly/9xkOfr> (accessed 2 March 2010).

42 Para VIII(7) of the Declaration.

Although no mention of traditional medicine is made, it can confidently be argued that traditional medicine inevitably plays a major role in reaching this goal.⁴³ Since then several international instruments and organisations for the promotion and protection of traditional medicine have seen the light of day.

In December 2000, delegates from 92 countries met in Bangladesh for the First People's Health Assembly, which led to the founding of the People's Health Movement (PHM)⁴⁴ and the drafting of the People's Charter for Health. The Charter is probably the most widely endorsed consensus document on health since the Alma-Ata Declaration and echoes many of the principles of the Declaration.⁴⁵ The Charter regards health as a right and, amongst other things, calls on "people of the world to support, recognise and promote *traditional and holistic healing systems* and practitioners and their integration into Primary Health Care".⁴⁶

The campaign became known as the Rights to Health Campaign. In 2003, PHM first started meeting and organising in South Africa (where it is known as PHM-SA) and the Right to Health Campaign gained momentum in South Africa when it was officially launched in Cape Town in September 2007.⁴⁷

The WHO's launching of its strategy on traditional medicine also warrants special mention.⁴⁸ This strategy is designed to assist countries to:

- develop national policies on the evaluation and regulation of traditional medicine;
- create a strong evidence base on the safety, efficacy and quality of traditional medicine;
- ensure the availability and affordability of traditional medicine;
- promote the therapeutic, sound use of traditional medicine; and
- document traditional medicine.

The WHO's strategy has been a major catalyst for the furtherance of traditional medicine in many countries, including South Africa. It describes the current global situation in the use of traditional medicine, lists major challenges and proposes strategies to overcome these challenges. Since then, several WHO

43 This is also the interpretation preferred by the WHO African Region at the 57th session of the WHO of the Regional Committee for Africa; see the Declaration on Traditional Medicine, Brazzaville, 31 Aug 2007, accessible at <http://bit.ly/cdVoLP> (accessed 19 Feb 2010).

44 The People's Health Movement is a global network of civil society groups, researchers, trade unions, activists and workers involved in health.

45 For more information, see <http://bit.ly/dAqMCR> (accessed 18 Feb 2010). Several individuals and organisations have endorsed the campaign – see <http://bit.ly/aiqcXs> (accessed 18 Feb 2010).

46 Own emphasis. The Charter is accessible at <http://bit.ly/cpQSR3> (accessed 18 Feb 2010).

47 For more information on PHM-SA and its activities, see <http://bit.ly/9wFHOD> (accessed 18 Feb 2010).

48 See Fact Sheet 134 (revised May 2003) accessible at <http://bit.ly/b2f4hU> (accessed 1 Sept 2009). The organisation has publically welcomed South Africa's commitment to traditional medicine and has been actively supporting local initiatives regarding the advancement of traditional medicine. See Country Press Release WHO/AFRO dated 30 March 2004, accessible at <http://bit.ly/bKEgZu> (accessed 1 Sept 2009).

governing bodies⁴⁹ have passed resolutions on various aspects of traditional medicine, for example, legislation, budget allocations, research and integration.⁵⁰

The WHO's Regional Committee for Africa has also been involved with the positioning of traditional medicine on the African continent from as early on as 1999, when the Committee requested the Regional Director to develop a comprehensive strategy on traditional medicine. In 2000 in Burkina Faso the Fiftieth Session of the WHO Regional Committee for Africa adopted a strategy for the African region entitled "Promoting the role of traditional medicine in health systems: A strategy for African Countries".⁵¹ This strategy urges member states to take a number of actions, including the development of national policies and legislation on traditional medicine, the improvement of regional and sub-regional collaboration, and the taking of general steps to promote and protect traditional medicine domestically.⁵² In order to assist member states in establishing mechanisms for evaluating traditional medicines for registration purposes, the WHO Regional Office for Africa in collaboration with the Department of Essential Drugs and Medicines Policy organised a series of workshops on the regulation of traditional medicines. The first regional workshop was held in South Africa in 2003, when a set of guidelines for the registration of traditional medicines was developed.⁵³ The guidelines were subsequently used in capacity training of representatives of national drug regulatory authorities from a number of countries.

More recently the WHO reiterated its dedication to traditional medicine by urging member states (in accordance with domestic capacities, priorities, legislation and circumstances) to:⁵⁴

- adopt and implement the Beijing Declaration on Traditional Medicine;⁵⁵
- promote and protect traditional medicine with the qualification that it be safe, efficient and of quality;
- formulate national policies;

49 Such as the World Health Assembly, the Executive Board and WHO Regional Committees for Africa.

50 See, amongst others, the resolutions of the WHO accessible at <http://www.who.int/en/> (accessed 19 Sept 2009), and also the resolutions of the WHO Regional Committee for Africa, accessible at <http://bit.ly/cGe0e5> (accessed 22 Sept 2009).

51 See AFR/RC50/R3 of 31 August 2000, accessible at <http://bit.ly/cGe0e5> (accessed 22 Sept 2009).

52 See para 2 of the Resolution. See also para 4 below for a discussion of the steps the South African government has taken so far in institutionalising traditional medicine in South Africa.

53 See WHO "Guidelines on registration of traditional medicines in WHO African region" (WHO Regional Office for Africa 2004) AFR/TRM/04.1, accessible at <http://bit.ly/cGe0e5> (accessed 19 Feb 2010).

54 WHO62.13 para 1, see fn 28. See also para 4 for a discussion of the initiatives taken by the South African government.

55 To further assess the role of traditional medicine, to review the progress of countries and to help member states integrate traditional medicine into their national health systems, the WHO organised the first WHO Congress on Traditional Medicine in Beijing from 7–9 Nov 2008. During this Congress the "Beijing Declaration" was adopted, promoting the safe and effective use of traditional medicine. It calls on WHO member states and other stakeholders to take steps to integrate traditional medicine, complementary and alternative medicine into national health systems, and it is accessible at <http://bit.ly/apFScO> (accessed 1 March 2010).

- include traditional medicine in their national health systems;
- develop traditional medicine based on research and innovation;
- provide for the regulation of traditional health practitioners;
- strengthen communication between conventional and traditional medicine providers; and
- cooperate with other countries to share knowledge and practices of traditional medicine.

The Declarations and Resolutions of the WHO and other organisations and institutions discussed in this paragraph are only some examples in the area of international traditional medicine and have been instrumental in the promotion and protection of traditional medicine on a global scale.

3.2 Continental common trends (benchmarks) in traditional medicine

On the African continent (regionally and sub-regionally), various governing bodies and member states of the AU⁵⁶ and SADC⁵⁷ have been actively involved in the promotion and protection of traditional medicine since the early 1980s.⁵⁸ Again a discussion of all of the trendsetting events, organisations or documents dealing with traditional medicine on the African continent will be impossible, and I will confine myself to a sample of events worth mentioning.

In July 2001 the Organisation of African Unity (now the African Union (AU)) declared the period 2001–2010 as the “Decade for African traditional medicine” and requested all stakeholders to prepare a Plan of Action for implementation with the main objective of guiding member states to recognise, accept, develop and integrate traditional medicine into their public health care systems.⁵⁹ The Plan of Action was prepared and adopted⁶⁰ and is now in its implementation phase. It recognises eleven strategic priorities, namely, sensitisation, *legislation*,⁶¹ institutional arrangements, information, education and communication, resource mobilisation, research and training, medical knowledge, local

56 The African Union (formerly known as the Organisation of African Unity or OAU). One of the objectives of the AU is to “promote sustainable development at the economic, social and cultural levels as well as the integration of African economies”. See a 3(j) of the Constitutive Act of the AU which entered into force in 2001. South Africa ratified the Constitutive Act on 3 March 2001 and is an active member state of the AU. See <http://bit.ly/b1kswb> (accessed 1 March 2010).

57 The SADC has been in existence since 1980, when it was formed as an informal alliance of nine majority-ruled states in southern Africa known as the Southern African Development Coordination Conference (SADCC). Its main aim was initially to coordinate development projects in order to lessen economic dependence on the then apartheid South Africa. Nowadays South Africa is an active member of the SADC. For more information, see <http://www.sadc.int> (accessed 29 Sept 2009).

58 For example, more than 20 years ago the Scientific Technical Research Commission of the OAU (now the AU) published the two well-known volumes of the *African Pharmacopoeia*.

59 “Decision on the Declaration of the Period 2001-2010 as the OAU Decade for African Traditional Medicine” AHG/Dec 5 XXXVII, accessible at <http://bit.ly/diPpcR> (accessed 22 Sept 2009).

60 The Executive Council is an organ of the AU consisting of the Ministers of the member states. The Council is directly responsible to the Assembly, which consists of the Heads of State and Government and is the supreme organ of the AU.

61 Italics added.

production of commercial quantities of traditional medicine, partnerships, as well as evaluation, monitoring and reporting.

Next, I focus on the second priority as set out in the AU's Plan of Action, namely, putting legislation in place for the integration of traditional medicine into the public health care system of South Africa.

3.3 Local realities and traditional medicine meet

In addition to international standards and trends, local realities have guided the South African government to reconsider the integration of traditional healing practices into the national health care system. There are roughly speaking about 200 000 practitioners of traditional medicine in South Africa.⁶² Considering that approximately 70–80% of the African population⁶³ makes use of the services of traditional practitioners dispensing traditional medicines, it should be clear that traditional medicine is extremely important in South Africa.⁶⁴ In fact, it is said that there are more people employed in the traditional health care system than in the public health care system. Figures published in 2006⁶⁵ show that African traditional medicine contributes an estimated R2.9 billion annually to South Africa's economy. This figure represents 5.6% of the national health budget. The fact that there are at least 133 000 people (mostly rural women) employed in the trade in medicinal plants also illustrates the economic importance of traditional medicine.⁶⁶

The consumption of some 200 000 tons of largely indigenous plant material is of great concern to environmentalists.⁶⁷ Although this aspect will not be explored any further here, it must be borne in mind that integrating traditional medicine into mainstream health care necessitates striking a fine balance between concomitant fundamental rights such as the right to have access to health care,⁶⁸ the right to a healthy environment⁶⁹ and the right to enjoy your culture (individually and collectively).⁷⁰

62 Official statistics do not exist in this regard. In her speech at the official opening of the Conference on Traditional Medicine at Kopaneng on 30 March 2004, the then Minister of Health estimated that there are approximately 200 000 traditional healers in South Africa (available at <http://bit.ly/9qkFgl> (accessed 5 March 2007)). Anon "Healers licensed in South Africa" *BBC News* (08-09-2004) at <http://bbc.in/asA9pz> (accessed 29 Aug 2005); Cartillier "Licensed to heal: South Africa moves to recognize traditional healers" *Agence France-Presse* (08-09-2004), available at <http://bit.ly/bQOeOz> (accessed 29 Aug 2005); Anon "Traditional healers recognised by South African lawmakers" *Afrol News* (29-08-2005) available at <http://bit.ly/dAxGYG> (accessed 29 Aug 2005).

63 The figure is quite high in comparison with that portion of the world's population relying elsewhere on traditional medicines for their health care needs, which is estimated at 60%. See South African Traditional Medicines Research Unit *National Reference Centre for African traditional medicines: A South African model* 1, see fn 18.

64 See Rautenbach 2007 *Obiter* 518–519 and the sources cited there. See also the discussion by Denis Aug/Nov 2006 *Missionalia* 315.

65 Mander *et al* "Economics of the traditional medicine trade in South Africa" in Harrison, Bhana and Ntuli (eds) 189–199, see fn 9.

66 With regard to the economic importance of traditional medicine in South Africa, see Mander *ibid*, see fn 9.

67 McBride "Herbal medicines: Healing allies or environmental devastation?" accessible at <http://bit.ly/aHBqsd> (accessed 3 March 2010).

68 S 27(1)(a) of the Constitution.

69 S 24 of the Constitution.

70 Ss 30 and 31 of the Constitution.

Against this background it is understandable why the government no longer could ignore the existence of traditional medicine in the South African context.

4 SOUTH AFRICAN LEGAL FRAMEWORK IN THE MAKING

In 1994 the topic of traditional medicine appeared on the national health agenda via the ANC's National Health Plan for South Africa, which stated that "traditional healing will become an integral and recognised part of health care in South Africa", and also that "legislation will be changed to facilitate controlled use of traditional practitioners".⁷¹ Nevertheless, traditional medicine remained locked away in the cupboard for quite some time, and three years later the Department of Health,⁷² although recognising the importance of traditional practitioners, indicated that they should not form part of the public health service at that stage. However, the Department did emphasise that the regulation and control of traditional practitioners should be investigated to achieve their legal empowerment and that it was important to develop criteria outlining standards of practice and an ethical code of conduct to facilitate their registration.

Over the last few years a number of initiatives have been taken in South Africa, especially by the Department of Health, to deal with the institutionalisation of traditional medicine. The National Drug Policy for South Africa⁷³ of 1996 is amongst one of the first documents to recognise the potential role and benefits of traditional medicine for the national health system. It is aimed at investigating "the use of effective and safe traditional medicines at primary level" and specifies the following with regard to traditional medicine:⁷⁴

- Traditional medical practices will be investigated for their "efficacy, safety and quality with a view to incorporate their use in the health care system".
- Marketed traditional medicine will be registered and controlled.
- A National Reference Centre for African Traditional Medicine for African Traditional Medicines (NRCATM) will be established.⁷⁵

The NRCATM was established in 2003 and operates independently under the coordination of the Council for Scientific and Industrial Research (CSIR),⁷⁶ the MRC and the Department of Health. The core function of the NRCATM is to research African traditional medicine in order to ensure the health and well being

71 See para 3 under the heading "traditional practitioners". The policy document "A National Health Plan for South Africa" at <http://bit.ly/cMXsvn> (accessed 1 March 2010).

72 White Paper for the Transformation of the Health System in South Africa published by the Department of Health in April 1997 – a copy is available at <http://bit.ly/90w9gJ> (accessed 2 March 2010).

73 Accessible at <http://bit.ly/bt7PEp> (accessed 2 March 2010). Para 1.1 of the Policy explains the processes that preceded the drafting of the Policy. For instance, a Drug Policy Committee was appointed with one of its terms of reference being to investigate traditional medicine.

74 See para 11 of the Policy.

75 The functions of this Reference Centre will be as follows: The development of a national database of indigenous plants that have been screened for efficacy and toxicity; testing for toxicity and efficacy; compiling a national formulary of Medicines Control Council-approved "essential traditional medicines"; and the propagation of medicinal plants. See para 11 of the Policy.

76 The official website of the CSIR is accessible at www.csir.co.za.

of South Africans.⁷⁷ The actions of the NRCATM will be guided by the following principles: its accessibility to all stakeholders; its being a virtual centre conducive to the establishment of a national network of experts and facilities; its environmental responsibility to improve the conservation status of traditional medicinal plants; its protection of the intellectual property rights of indigenous knowledge owners; its protection of international best practices; the promotion of scientifically-validated African traditional medicine; and the transparency of its research activities and the dissemination of validated data.⁷⁸ The objective of the NRCATM has been set out⁷⁹ and it is envisaged that the NRCATM will interact with various partners comprising government departments, non-governmental organisations, universities, research institutions and traditional healers.⁸⁰ The proposed structure of the NRCATM has been set out in full, including its management, operations, outputs and budgets, and it is predicted that the NRCATM, which is being launched as a virtual centre, will eventually enhance trade and alleviate poverty.⁸¹

On another front, the development of a legal framework for traditional healing practices was neglected for quite some time. Various factors played a role in slowing down the process of drafting legislation for traditional healing practices in South Africa, most notably the previous government's lack of interest in institutionalising traditional healing and the overwhelming size of the traditional healing profession.⁸² These factors should instead have spurred the government to act, but there is also another important reason why the traditional healthcare system (including traditional medicine) should be institutionalised in South Africa. The Constitution⁸³ provides the core legal framework for the recognition or accommodation of the traditional health care system. A concurrent reading of sections 15(1),⁸⁴ 27(1)(a),⁸⁵ 30,⁸⁶ 31(1)⁸⁷ and 9(3)⁸⁸ of the Constitution illustrates a new ethos of tolerance when it comes to difference based on cultural affiliations and practices, and it would be difficult to ignore the traditional healing practices that form the very core of these cultural groups. To deny traditional

77 South African Traditional Medicines Research Unit *The National Reference Centre for African Traditional Medicines: A South African Model* 26; see fn 18.

78 *Idem* 27, see fn 18.

79 *Idem* 28, see fn 18.

80 *Idem* 28–29, see fn 18.

81 *Idem* 30–34, see fn 18.

82 Ndaki "Regulating traditional healers" (30-08-2004), available at <http://bit.ly/dmybkK> (accessed 2 March 2010).

83 Constitution of the Republic of South Africa, 1996 (the Constitution).

84 "Everyone has the right to freedom of conscience, religion, thought, belief and opinion."

85 "Everyone has the right to have access to health care services, including reproductive health care."

86 "Everyone has the right to . . . participate in the cultural life of their choice."

87 "Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community – (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society."

88 "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

practitioners the right to practice their profession and to deny individuals the right of access to traditional healing would be to deny the fundamental rights enshrined in the Constitution.

More than 10 years have passed since the ANC's launching of its National Health Plan for South Africa when the Traditional Health Practitioners Act⁸⁹ finally saw the light. This Act provides a legal framework for the integration of traditional practitioners into the public health care system by providing first and foremost for the establishment of an interim Traditional Health Practitioners Council of South Africa. Other aims of the Act are to provide for the registration and training of traditional practitioners, and to provide for structures and procedures to protect against the maltreatment of patients. The advantages and shortcomings of this Act were discussed in Kos.

Although the Traditional Health Practitioners Act defines traditional medicine, it does not institutionalise traditional medicine. This situation is about to change. In line with the requirements of the WHO, South Africa published a Draft Policy on African Traditional Medicine for South Africa (the DAC Draft Policy) in 2008.⁹⁰ Members of the public had until October 2008 to submit comments on it to the Director-General of Health. The DAC Draft Policy provides a policy framework for the institutionalisation of traditional medicine into the public health care system. Couched in less exact terms than the definition provided for in the Traditional Health Practitioners Act,⁹¹ African traditional medicine is described as⁹²

“a body of knowledge that has been developed and accumulated by Africans over tens of thousands of years, which is associated with the examination, diagnosis, therapy, treatment, prevention of, or promotion and rehabilitation of the physical, mental, spiritual or social well-being of humans and animals”.

I foresee a number of difficulties with this definition. For example, pinning down the exact meaning of the phrase “a body of knowledge” could be challenging. An alternative term for the expression “body of knowledge” is *corpus*, which term generally means a collection of all available knowledge on a topic. It definitely does not mean “an object or substance”, a phrase contained in the definition of traditional medicine found in the Traditional Practitioners Act. Though the description in the DAC Draft Policy is in accordance with the broader definition of the WHO,⁹³ establishing the exact limits of the notion of traditional medicine is important to provide clarity and certainty in a legal context. Another possible problem with the definition is the statement that the “body of knowledge” must be older than “tens of thousands of years”. This condition could prove to be a

89 22 of 2007. The forerunner to this Act was the Traditional Health Practitioners Act 35 of 2004 which was ruled to be unconstitutional due to the absence of effective public participation in its making. Following public meetings during 2007 the Act was finally signed by the President and is now partly in operation. The contents of the new Act are essentially the same as those of its predecessor.

90 GN 906 of 2008 published in GG 31271 of 25 July 2008. Members of the public had until 25 October 2008 to comment on the draft policy. To date the final policy has not been published.

91 See para 2 above.

92 Para 1.1 of the DAC Draft Policy.

93 See para 2 above.

hurdle, since there is generally no evidence to prove the age of something one knows. Besides, many allopathic medicines may also be ancient, but they are not regarded as “African traditional medicine”. It should be clear that the workability of this definition still needs to be considered.

Another curious aspect of the DAC Draft Policy is the government’s reference to *ubuntu* which, it is claimed, forms the philosophical underpinning of African traditional medicine.⁹⁴ Although *ubuntu* is often described by the courts and other scholarly writers as a unique African philosophical or religious concept, its exact meaning and influence remain highly contested by some.⁹⁵ Generally, the expression “a human being is a human being through other human beings” is often used to explain the meaning of *ubuntu* with reference to the interconnectedness of the African people and their communities. The government’s explicit reference to *ubuntu* as the philosophical foundation of African traditional medicine, though, could lead to another dilemma which lies at the very heart of our constitutional values and, more specifically, of the equality clause,⁹⁶ which prohibits the government from giving preference to any particular religion. Whether or not the government’s explicit mentioning of *ubuntu* may be interpreted as its endorsement of a specific religion or philosophy for South Africa could become a point of debate in future, which may eventually impel the institutionalisation of traditional medicine into the political arena.

The South African government obviously sees a connection between the regulation of traditional medicine and reaching the objective of “good” traditional health practices. The DAC Draft Policy points out that recognising traditional medicine will not be enough to empower and publicise traditional medicine. For traditional medicine to be accorded a status equal to that of allopathic medicine, a legal framework providing it with structures and a distinct system will have to be developed.⁹⁷ The enactment of legislation is regarded as necessary to provide for⁹⁸

- the regulation and registration of African traditional medicine;
- the protection of African traditional medicine; and
- the protection of the rights of persons involved in the discipline of African traditional medicine.

Progress towards developing regulations for the control of traditional medicine was made when the Minister of Health approved the establishment of the Expert Committee on African Traditional Medicine to advise the Medicines Control

94 Para 1.1 of the DAC Draft Policy.

95 *Ubuntu* has been the subject of many publications, especially since 1994. A useful publication on the topic of is Cornell and Muvangua *Law in the ubuntu of South Africa* 2009 which contains a compilation of articles and decisions dedicated to *ubuntu*, accessible at <http://www.isthisseattaken.co.za>. See also Cornell “A call for a nuanced constitutional jurisprudence: *Ubuntu*, dignity, and reconciliation” 2004 *SAPR/SAPL* 666–674; Praeg “An answer to the question: What is [ubuntu]?” 2008 *S Afr J Philos* 367–385; Mukheibir “*Ubuntu* and the *Amende Honorable* – A marriage between African values and medieval canon law” 2007 *Obiter* 583–589; Keevy “The Constitutional Court and ubuntu’s “inseparable trinity” 2009 *J for Juridical Science* 62–85.

96 S 9 of the Constitution.

97 Para 1.2 of the DAC Draft Policy.

98 DAC Draft Policy “executive summary”.

Council (MCC) in 2000.⁹⁹ However, to date no regulations have been published in this regard, and no legislation has been enacted that specifically deals with traditional medicine. Besides the Traditional Health Practitioners Act, which deals directly with traditional health practitioners, there are a few more general Acts impacting indirectly on traditional medicine. These Acts are not discussed here. They include the Medicines and Related Substances Act,¹⁰⁰ the National Health Act,¹⁰¹ the National Environmental Management: Biodiversity Act¹⁰² and the Patents Act.¹⁰³

The South African government's viewpoint that traditional health practice and everything associated with it (traditional health practitioners and traditional medicine) should be regulated is commendable. Such a move would not only demystify traditional healing but would also provide protection for the practitioner and his or her patients. Besides, regulation would ensure that traditional medicine is subjected to the same rigorous testing as allopathic medicines, making it much safer.

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- 99 The Medicines Control Council (MCC) is a statutory body that was established in terms of the Medicines and Related Substances Control Act 101 of 1965 to oversee the regulation of medicines in South Africa. Its members are appointed by the Minister of Health and its main purpose is to safeguard and protect the public through ensuring that all medicines that are sold and used in South Africa are safe, therapeutically effective and consistently meet acceptable standards of quality. See <http://www.mccza.com> (accessed 2 March 2010).
- 100 101 of 1965. As already explained in para 2 above, s 1 of this Act provides a definition for medicine in the conventional health practice, namely "'medicine' means any substance or mixture of substances used or purporting to be suitable for use or manufactured or sold for use in (a) the diagnosis, treatment, mitigation, modification or prevention of disease, abnormal physical or mental state or the symptoms thereof in man; or (b) restoring, correcting or modifying any somatic or psychic or organic function in man, and includes any veterinary medicine". It is envisaged that any substance (traditional or conventional) that is suitable for any of the possibilities listed here qualifies as a medicine and the possibility of definitional problems between medicine in the conventional sense and traditional sense is not excluded.
- 101 61 of 2003. A few provisions of this Act deal with traditional health practices. For example, in terms of s 43(3) the Minister of Health may prescribe the conditions under which the circumcision of a person as part of an initiation process may be carried out. S 43(4) reads: "The Minister may, subject to the provisions of any other law, prescribe conditions relating to *traditional health practices* to ensure the health and well-being of persons who are subject to such health practices." Emphasis added.
- 102 10 of 2004. According to the long title, the Act deals amongst other things with the management and conservation of South Africa's biodiversity; the protection of species and ecosystems that warrant national protection; the sustainable use of indigenous biological resources; the fair and equitable sharing of benefits arising from bioprospecting involving indigenous biological resources; and the establishment and functions of a South African National Biodiversity Institute. Traditional uses of the indigenous biological resources are also protected in various provisions of the Act, eg s 82 protects these interests before permits for bioprospecting may be issued.
- 103 57 of 1978. In 2005, the main Act was amended so as to insert certain definitions; and to require an applicant for a patent to furnish information relating to any role played by an indigenous biological resource, a genetic resource or traditional knowledge or usage in an invention. Eg in terms of s 30(3A) "[e]very applicant who lodges an application for a patent . . . shall, before acceptance of the application, lodge with the registrar a statement in the prescribed manner stating whether or not the invention for which protection is claimed is based on or derived from an indigenous biological resource, genetic resource, or traditional knowledge or use".

5 CONCLUSION: HEALING POWERS OF THE LAW?

Although traditional and Western health systems have operated concurrently since early times, conventional healing has enjoyed far greater official acceptance. Successive governments have had confidence in the conventional health system because it is based on “scientific and rational knowledge”, whilst the traditional health system was (and sometimes still is) perceived to be based on “mystical religious beliefs”.¹⁰⁴ As a result, the greater part of state and private funding has been invested in developing conventional healing as opposed to its traditional counterpart. Countless investments have made the conventional health system more expensive. This in turn has led to societal divisions where those who can afford it enjoy among the best of medical services one can find, while those who cannot afford it, particularly those in rural areas,¹⁰⁵ are serviced by poorly-resourced unofficial traditional health systems. Conventional healing is too expensive for the majority of the South African rural population,¹⁰⁶ and consequently they still find the traditional healing system more appealing.

The South African government has come to realise that traditional healing is so deeply interwoven with the fabric of the cultural and spiritual life of many South Africans that the time has come to implement international benchmarks concerning traditional medicine domestically by integrating traditional medicine into the public health care system. South Africa has to face certain realities:¹⁰⁷

- Traditional medicine is unlikely to disappear, and the law must be constructive in regulating it by integrating it into the public health care system.
- Traditional medicine can be a novel source of genuine therapeutic efficiency, but the application of the scientific method is necessary to extract the latent value of such medicines.
- Cross-pollination between traditional and conventional health care systems in South Africa could lead to favourable situations where healthcare is provided to all people and not only to those with enough money to afford conventional health care.
- The placebo effect of traditional medicine must not be underestimated and if doctors of conventional health medicine recognise its therapeutic value, they may win the trust of many of their patients.

104 Peltzer “An investigation into the practices of traditional and faith healers in an urban setting in South Africa” 2001:2 *Health SA* 4. There are also reports of a “white” traditional healer – see Clark “The doctor of Port St Johns” *Dispatch Online* (30-03-1998) available at <http://bit.ly/brfWha> (accessed 26 Aug 2005); Van Zyl “Ons eie sangoma” *Publico* (June 1992) 4–6.

105 Research has also established that traditional healers also operate in an urban setting – see Peltzer 2001:2 *Health SA* 3–11; Morgan and Reid “‘I’ve got two men and one woman’: Ancestors, sexuality and identity among same-sex identified women traditional healers in South Africa” 2003 *Culture, Health and Society* 381.

106 Hopa, Simbayi and Du Toit “Perceptions on integration of traditional and Western healing in the new South Africa” 1998 *SA J of Psychology* 8. See also Xaba “Marginalised medical practice. The marginalisation and transformation of indigenous medicines in South Africa” available at <http://bit.ly/aNJLLj> (accessed 30 Aug 2005), which argues that the marginalisation of traditional healing had a socio-cultural impact on African medical practices.

107 See also Grollman “Foreword: Is there wheat among the chaff?” March 2003 *Academic Medicine* 221–223.

In the context of traditional medicine it should be clear by now that legislative intervention is needed to afford traditional medicine its rightful place in the South African national health system. This process can be referred to as the “healing powers of the law”. Metaphorically speaking, there are more commonalities between the law and medicine than one thinks. For example:

- Medicine is used to treat symptoms associated with sickness. Similarly the law can be used to treat inequalities and injustices in society.
- Medicine is not always effective in the treatment of an illness and neither is the law always successful in achieving justice.
- It is not always possible to predict the side-effects of medicine and similarly it is not possible to foresee all the effects of legislation on traditional medicine.
- Law and medicine both may be used to cure something. For example, the regulation of traditional medicine could heal some of the injustices of the past by affording traditional healing practices their rightful place in the national health care system.

“Good” legal regulation of traditional medicine should “heal” some of the injustices of the past and protect the individual and collective interests of the future, namely those of the traditional medical practitioner, his or her clients, and South African society as a whole. Whether or not the institutionalisation of traditional medicine in South Africa will eventually reach this novel goal remains an open question.