

# ***THE REGULATION AND APPLICATION OF TRADITIONAL AFRICAN MEDICINE IN SOUTH AFRICA***

*PA CARSTENS University of Pretoria, South Africa*

***Abstract:*** This presentation will explore the regulation and application of traditional African medicine in South Africa. The nature, scope, legitimacy and recognition of traditional African medicine together with the role of the traditional health practitioner or healer in South Africa will be contrasted to so called western medicine and the role of medical practitioners generally accepted and recognized in South Africa and the Health Professions Council of South Africa. The content of and access to traditional African medicine in South Africa will also be explored. Of particular significance to access to health care and the science of health care in South Africa are constitutional, professional and ethical considerations and these will be explored and canvassed with reference to the recent controversial Traditional Practitioners Act and constitutional challenges to this Act by a group consisting of mainly western-trained doctors called Doctors for Life. It will be argued that the recognition and legitimizing of traditional African medicine and traditional health practitioners will pose significant challenges to the application and regulation of health law/medical law in South Africa.

***Key Words:*** “Health law and the science of Health Law”; “Regulation and application of traditional African medicine”; “contrast to Western medicine”; “legitimacy”; “recognition”; “constitutional challenges”; “content of and access to traditional African medicine”; “Traditional Practitioners Act”; “Health Professions Council of South Africa”

## 1. INTRODUCTION

The South African society at large is a diverse, heterogeneous and cultural society and has been aptly referred to as the “rainbow nation”. Despite such diversity, in terms of culture, language (11 official languages), race, culture and belief, the formal medical profession in South Africa as regulated by The Health Professions Act of 1974 and the Health Professions Council of South Africa (the professional governing body with which all medical practitioners practising in South Africa are obliged to be registered ), one finds that very little formal recognition and legitimacy have been given to so called traditional health practitioners. They have always practised outside the realm of what can be termed “western medicine”

and their activities have somewhat been suspiciously frowned upon by the broader medical fraternity trained at South African medical schools in predominantly western medicine. However, traditional healing is a deep rooted part of African life, and the traditional healers believe, will continue as long as African culture survives. Traditional healers are approximately 200 000 strong in South Africa alone, consulting to 80% of the general population (Campbell SS Called to heal: traditional healing meets modern medicine in southern Africa today (1998) 1-9). It is this reality and apparent discrepancy between traditional health services and the other health services in South Africa that has prompted the South African legislator to formally afford legitimacy and recognition to traditional healers by promulgating the Traditional Health Practitioners Act 35 of 2004. This act was immediately met with opposition from the formal medical profession and the act was subsequently challenged in the Constitutional Court of South Africa. This paper will explore this challenge with reference to the content of the Traditional Health Practitioners Act and the role of traditional healers in the broader South African society.

## 2. UNDERSTANDING THE CONTENT OF TRADITIONAL AFRICAN MEDICINE

African traditional healers diagnose illnesses, prescribe and prepare medicines, provide counselling and offer spiritual support. Still, many people remain puzzled by the sangomas and confuse their work with that of the witchdoctor. The World Health Organisation (WHO) defines traditional medicine as "...compromising therapeutic practices that have been in existence often for hundreds of years before the development and spread of modern scientific medicine and are still in practice today. (Hammond-Tooke D Rituals and Medicines (1989) 103). These practices vary widely. In the social and cultural heritage of Southern Africa, witchcraft has existed side by side with traditional healing throughout time. Witchcraft with its ritual killings, muti-murders and black magic, is embedded in African culture. In South Africa, the practice of witchcraft is strictly outlawed by the Witchcraft Suppression Act 3 of 1957 (as amended by Act 50 of 1970).(Hund J "African Witchcraft and Western law – Psychological and cultural Issues" in Witchcraft Violence and the Law in South Africa (2003) 9; Ralushai NV "Summary of Ralushai Commission Report" in Witchcraft Violence and the Law in South Africa (2003) 124; see also Carstens PA "The Cultural Defence in South African Criminal Case Law" 2004 De Jure 336). In contrast there is the powerful and positive contribution of traditional healers. This creates a dilemma for governments to ensure that traditional

healers practise in a safe and competent way. This calls for a balanced approach. The Traditional Practitioners Act was promulgated to establish an Interim Traditional Health Practitioners Council of South Africa; to provide for a regulatory framework to ensure the efficacy, safety and quality of traditional health care services; to provide for the management and control over the registration, training and conduct of practitioners, students and specified categories in the traditional health practitioners profession; and to provide for matters connected therewith (see Carstens PA and Pearmain DL Foundational Principles of South African Medical Law (2007) 280).

The following definitions in terms of the Traditional Practitioners Act should be noted:

**‘diviner’** means a person who engages in traditional health practice and is registered as diviner under this Act; **‘health services’** includes inpatient or outpatient treatment, diagnostic or therapeutic interventions, nursing and rehabilitative, palliative, convalescent and preventative health services; **‘herbalist’** means a person who engages in traditional health practice and is registered a herbalist under this Act; **‘speciality’**, in relation to any of the categories, includes any particular sphere of extensive knowledge and skill in which a traditional health practitioner specialises; **‘traditional birth attendant’** means a person who engages in traditional health practice and is

registered as a traditional birth attendant under this Act; **‘traditional health practice’** means 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 health professions and any other activity not based on traditional philosophy; **‘traditional health practitioner’** means a person registered under this Act in one or more of the categories of traditional health practitioners; **‘traditional medicine’** means an object or substance used in traditional health practice for- (a) the diagnosis, treatment or prevention of a physical or mental illness; or (b) any curative or therapeutic purpose, including the maintenance or restoration of physical or mental health or well-being in human beings, but does not include a dependence-producing or dangerous substance or drug; **‘traditional philosophy’** means 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; **‘traditional surgeon’** means a person registered as a traditional surgeon under this Act; **‘traditional tutor’** means a person registered under any of the prescribed categories of traditional health practice who has been accredited by the Council to teach traditional health practice or any aspect thereof; **‘unprofessional conduct’** means any act or omission which is improper or disgraceful or dishonourable or unworthy of the traditional health profession.

In South Africa, a much respected sangoma (healer) and spiritual leader, Credo Mutwa, stated that “sangomas are also clairvoyants, diviners and diagnosers of illness. They play the same role that psychiatrists and priests of various religions fulfil in Western and Eastern societies, He explains the sangoma’s creative, curative and psychic powers with reference to the sangoma’s lore of the soul (in context of ena – “the self”); how the sangoma actually go about curing patients, the significance of the casting bones (the bone oracle), and offers an explanation why he found Western education conditions African people to ‘despise Africa’ without realising the tremendous store of knowledge that lies hidden in the minds of those people who are called sangomas

or traditional healers”. (Mutwa C “The sangoma’s story” in Witchcraft Violence and the law in South Africa (2003) 151; also see Hammond-Tooke D Rituals and Medicines (1989) 103).

### 3. TENSION AND CHALLENGES WHEN TRADITIONAL HEALING MEETS MODERN

MODERN MEDICINE IN SOUTH AFRICA In terms of the supreme South African Constitution of 1996, everyone has the right to practice one’s culture, everyone has the right to their own religious beliefs, everyone has the right to bodily integrity, and everyone has the right of access to health care services. These rights are not absolute and may be limited if it is justifiable and reasonable in an open and democratic society. (Currie I and De Waal J Bill of Rights Handbook (2005) 163, 336). It is thus clear that the Constitution in itself gives apparent legitimacy to the practice of traditional medicine and access to traditional medicine in South Africa. This apparent constitutional legitimacy has, however, been challenged by exponents of modern medicine, and came before the Constitutional Court in South Africa on a technical basis in the case of *Doctors for Life v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC). In this case, the validity of the Traditional Practitioners Act 35 of 2004 was challenged (by a concerned non-governmental, non-profit

making organisation that stands for sound science, the sanctity of life and a Christian ethic in the medical profession since 1991, called Doctors for Life) on the basis that the National Council of Provinces (NCOP) had failed, as they were obliged to do in terms of the Constitution to facilitate public involvement/consultation/participation before the enactment of the said Act. The Court found that the NCOP did indeed fail to facilitate public participation and declared the Act invalid, but the declaration of invalidity was suspended for 18 months to enable Parliament to re-enact the Act in a manner consistent with Constitution. It is submitted that the subtext of the challenge is clear: Doctors for Life are opposed to this Act as it will formally legitimize and recognise traditional healing and lead to the erosion of the standards of medical care (in the context of modern medicine) in South Africa. There is then an argument from their side to discredit traditional healing (see *Health and Democracy: A Guide to Human Rights, Health Law and Policy in Post-Apartheid South Africa* (2007)(editors Hassim, Heywood and Berger) 32).

It is submitted that it is only a matter of time before the Traditional Practitioners Act will be re-enacted and will indeed give legislative effect to traditional healing in South Africa, despite the objections and interventions of the exponents of modern medicine. The legitimacy and recognition of traditional healing in South Africa clearly has a

constitutional base. The difficulty and challenge lie in the proper regulation and well-considered limitation of constitutionally offensive traditional healing practices. It is also apparent that there will be certain limitations to the practice of traditional healing such as complicated neurosurgery and the treatment of diseases such as HIV/AIDS, Extreme Resistant Tuberculosis etc (see in this regard the offences created by the Traditional Practitioners Act as per section 49), and that traditional healers will not undertake to administer medical treatment for which they are not qualified (in terms of the doctrine of *imperitia culpa adnumeratur* [ignorance will also amount to negligence – see *S v Mahlalela* 1966 (1) SA 226 (A) where a traditional herbalist prepared a poisonous drink of herbs mixed with traditional beer and administered to a child who subsequently died. The court ruled that the traditional herbalist cannot be compared to a qualified medical practitioner, but his actions will be judged accordingly). Will the test in South Africa for medical negligence in context of traditional healing then in future become the test of the reasonable competent traditional healer in the same circumstances?

#### 4. CONCLUSION

It is submitted that the re-enactment of the Traditional Practitioners Act is to be welcomed as a legitimate effort to ensure the effective regulation (in all its facets)

of traditional healing in South Africa. In this regard the constitution and the Act can play a pivotal role in ensuring efficacy, safety and quality of traditional health care services that in time and with some demystification will exist side-by side with ( or at least complimentary where it is indicated) to modern medicine. In this regard the Interim Traditional Practitioners Council of South Africa will play an important role to ensure that the regulatory framework is upheld and a culture of accountability is fostered. Traditional healers form a crucial link between the community and the western medical professionals and they are a precious resource for the dissemination of basic health care, especially in rural areas where access to information is limited. One would be naïve to think that the possible co-existence of traditional medicine and modern medicine in South Africa today will not be fraught with enormous challenges (also in context of for instance primary health care, the issue of HIV/AIDS, medical aid programmes and the lucrative potential of traditional remedies/medicine for pharmaceutical companies and research institutes)(see Campbell SS Called to Heal (1998) 77- 92). However, doctors and traditional healers are equally important to the patient. They are simply health care practitioners coming from different but complementary perspectives.

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**Prof Pieter Carstens**, male, born on 13/02/1960 holds the degrees BLC, LLB, LLD from the University of Pretoria, South Africa and is presently professor of Criminal and Medical Law in the Department of Public Law, Faculty of Law at the University of Pretoria. He also holds an appointment as extraordinary professor of Forensic Medicine in the Department of Forensic Medicine at the same university. He is a practising advocate and an associate member of the Pretoria Bar. He is also currently the Chairperson of the Unit for Medicine and Law, a joint venture between the University of Pretoria and the University of South Africa (UNISA). He has published widely nationally and internationally, has delivered a variety of papers at various national and international conferences on Medical Law, has been visiting professor in the USA and The Netherlands, and is the co-author of the Foundational Principles of South African Medical Law (Butterworths 2007), a comprehensive textbook on Medical Law.