

**PROTECTING TRADITIONAL HEALING PRACTICES IN  
MALAWI: ARE THERE LESSONS TO BE LEARNT FROM  
SOUTH AFRICA?**

submitted in partial fulfilment of the requirements of the degree LLM (Human  
Rights and Democratisation in Africa)

by

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For MMP

*Declaration*

I **SARAI EUNICE CHISALA**, do hereby declare that the work submitted for this dissertation is the result of my own efforts and that this work has not been submitted for any degree in any other university. Where any secondary source has been referred to it has been duly acknowledged.

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## Chapter 1

### INTRODUCTION

The aim of this paper is to highlight the human rights dimension in the protection of traditional healing practices (THP) in Malawi. At first glance there might not seem to be considerable human rights issues involved. However, the scourge of the HIV/AIDS pandemic entails that traditional health practitioners have a crucial role to play in ensuring the right to health. Furthermore, THP represent an important component of the cultural tapestry of Malawian life. It is this combined cultural and health import that prompts this study.

Traditional healers are a major health manpower resource for Africa and are often the only source of health services for large population groups throughout the continent.<sup>1</sup> In Africa, where traditional medicine is used by up to 80% of the population as a primary health source; and in Malawi where approximately one-third of the population lacks access to essential medicines, the provision of safe and effective traditional medicine could become a critical tool in increasing the access to health care.<sup>2</sup> More significantly, THP are an important aspect of many cultures. In 1990, reporting on an AIDS and traditional medicine consultation, the World Health Organization (the WHO) stated that traditional medicine should be accepted and recognised as an integral part of the cultural heritage of the people.<sup>3</sup>

This paper explores the relationship between THP and the progressive realisation of the right to health. An investigation is made of the extent to which suppression of THP

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<sup>1</sup> E Gbodossou *et al* 'AIDS in Africa: Scenarios for the future, the role of traditional medicine in Africa's fight against HIV/AIDS' UNAIDS <[www.prometra.org/Documents/UNAIDS%20Scenario%20%20article.pdf](http://www.prometra.org/Documents/UNAIDS%20Scenario%20%20article.pdf)> (accessed 15 August 2005).

<sup>2</sup> World Health Organization (2003) 'Fact Sheet No. 134: Traditional Medicine' <[www.who.int/mediacentre/factsheets/fs134/en/print.html](http://www.who.int/mediacentre/factsheets/fs134/en/print.html)> (accessed on 11 May 2005).

<sup>3</sup> World Health Organization (1990) Traditional Medicine Programmes and Global Programme on AIDS 'Report of the consultation on AIDS and traditional medicine: Prospects for involving traditional health practitioners' Botswana 1990 WHO/TRM/GPA/90.1 3-6.

impacts the right to health in an attempt to discern whether there is a need to regulate and protect these practices. There is some tension between THP, as a cultural right, and the right to health given that THP have the potential to infringe peoples' right to health.<sup>4</sup> However, there is also an intersection between the two rights since health is integrally related to culture and to cultural practices. A person's place in their culture is an essential part of their self-identity, so that if a culture is at risk, that person's psychological and emotional health is also at risk. Consequently this paper will consider the meaning, content and role of the right to culture (is it a collective or individual right?) and whether THP are part of culture, deserving protection as such.

According to Mann, health and human rights are seldom linked in an explicit manner yet both are powerful, modern approaches to defining and advancing human well-being.<sup>5</sup> One intersection between the right to health and the right to culture arises in the form of traditional medicine and THP. Attention to this intersection could well provide practical benefits to those engaged in health or human rights work. This paper is aimed at assisting legislators and policy makers to reorient their thinking about THP and the major health challenges facing Malawi, especially in light of the HIV/AIDS pandemic.

### **Traditional healing practices (THP)**

Part of the misunderstanding regarding the role of African traditional health practitioners emanates from the negative colonial approach to African traditional medicine.<sup>6</sup> In the pre-colonial era the traditional medicine system was the only health system in many African countries. At the onset of colonial rule African traditional medicine was actively suppressed.<sup>7</sup> THP were equated with witchcraft and seen as contrary to the cause and

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<sup>4</sup> 'Due to lack of technical support to traditional medical practitioners, many harmful practices and toxic substances are used widely and the practitioners are unaware of the dangers. The lack of organisational structure and procedures makes it difficult to control malpractice among the practitioners which is reported frequently. For example, clients are lured into paying colossal sums of money for "cures" relating to incurable conditions such as cancer and AIDS. A number of drugs used by traditional practitioners have adverse effects. Moreover, the damage done to patients' health by such drugs is not even known.' See D Nyamwaya 'A case for traditional medicine in official health services: Flogging a dead horse' in I Sindiga, C Nyaigotti-Chacha and M Kanunah (eds) *Traditional medicine in Africa* (1995) 30, 35.

<sup>5</sup> J Mann 'Human rights and public health' in J Mann, S Gruskin, M Grodin and G Annas (eds) *Health and human rights* (1999) 7.

<sup>6</sup> I Sindiga 'African ethnomedicine and other medical systems' in Sindiga (n 4 above) 17.

<sup>7</sup> I Sindiga, M Kanunah, C Nyaigotti-Chacha and E Mwangola 'The future of traditional medicine in Africa' in Sindiga (n 4 above) 176.

ideals of the pre-eminent colonial religion and 'Western' medicine.<sup>8</sup> A lingering impression of that colonial illegality still shrouds traditional medicine and THP.

THP view diseases and illness to be disequilibrium of social groups within the environment.<sup>9</sup> Understanding the social significance of disease and illness is the key to traditional health systems. '[D]isease is not merely something resulting from malfunctioning in this or that organ or a lesion therein, but essentially a rupture of life's harmony, to be imputed either to a material cause instinct with some "intangible force" or directly to that intangible force itself.'<sup>10</sup> Understanding the scope of THP is essential to comprehending the arguments raised in this paper. Consequently, the following section attempts to provide a definition of 'traditional healing practices' as the term is used in this paper.<sup>11</sup>

The WHO defines traditional medicine (or THP) as health practices, approaches, knowledge and beliefs incorporating plant, animal and mineral based medicines, spiritual therapies, manual techniques and exercises, applied singularly or in combination to treat, diagnose and prevent illnesses or maintain well-being.<sup>12</sup> THP has also been described as the sum total of all knowledge and practices used in the prevention, diagnosis, and elimination of physical mental or social imbalance and which rely exclusively on practical experience and observation handed down from generation to generation, whether orally or in writing.<sup>13</sup>

On the other hand, section 1 of the South African Traditional Health Practitioners Act, 2004 identifies THP as 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: the maintenance or restoration of physical or mental health or function; or the diagnosis, treatment or prevention of a physical or mental illness; or the rehabilitation of a person to enable that person to resume normal functioning within

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<sup>8</sup> World Bank Indigenous Knowledge (IK) initiatives in Sub-Saharan Africa - IK Notes No. 67 (2004) 'Traditional medicine practice in Uganda: Historical perspective, challenges and advances' <[www.worldbank.org/afr/ik/default.htm](http://www.worldbank.org/afr/ik/default.htm)> (accessed 18 September 2005).

<sup>9</sup> I Sindiga 'Traditional medicine in Africa, an introduction' in Sindiga (n 4 above) 4-5.

<sup>10</sup> I Sindiga (n 4 above) 20.

<sup>11</sup> There is some debate over the use of the word 'traditional' as it implies some degree of stagnancy or backwardness. However, for purposes of familiarity and understanding the term will be retained in this paper. See IK Notes No. 67 (n 8 above).

<sup>12</sup> WHO (2003) 'Fact Sheet No. 134: Traditional Medicine' (n 2 above).

<sup>13</sup> IK Notes No. 67 (n 8 above).

the family or community; or the physical or mental preparation of an individual for puberty, adulthood, pregnancy, childbirth and death.<sup>14</sup>

THP cover a wide and heterogeneous field of practice. One categorisation based on type of healing divides traditional health practitioners into pure herbalists, ritualists and spiritualists.<sup>15</sup> Categorisation can also be based upon the traditional health practitioner's method of healing or even upon the ailments that they treat; the degree of training or qualification they have undergone; having been initiated or having had a calling; being generalists or specialists. The list is endless; consequently, this paper does not attempt to categorise these practices. Rather, the use of the terms 'traditional medicine' and 'traditional healing practices' should be understood as being limited to the definitions and descriptions outlined above.

### **Objectives of the study**

The primary objective of this study is to demonstrate the need for recognition and regulation of THP in Malawi. The issue of THP and traditional medicines in Malawian society has come to the fore as a direct result of the HIV/AIDS pandemic. In Malawi, there is a lacuna in the law in relation to traditional health practitioners and traditional medicines. This lack of a policy or legislative framework, to deal with what is essentially a primary health source, was only exposed when traditional health practitioners claiming to have discovered the cure for HIV/AIDS confronted the government.<sup>16</sup> Statements made by the government give the impression that there is an intention to legislate on the issue of THP. It is for this reason that the author has chosen to consider the form such legislation ought to take, the role that THP play in our society and the human rights issues that are involved.

The second objective is to establish that THP form part of Malawian (and African) culture protected by national, regional and international human rights instruments. The aim is to clarify the right to culture in general and, more specifically, to establish that THP are a

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<sup>14</sup> Act No. 35 of 2004 Government Gazette No. 27275 (11 February 2005).

<sup>15</sup> IK Notes No. 67 (n 8 above) 2.

<sup>16</sup> On two separate and unforgettable occasions traditional health practitioners have drawn thousands of Malawians desperate for a cure. The two events were almost a decade apart, *Mchape* and *Chambe* being the names of the 'miracle cures' that were being sold by the barrel. Although each occasion attracted a great deal of national interest, mention is made on the basis of the author's personal knowledge of events.

manifestation of this right.

The final objective of the study is to consider whether the South African Traditional Health Practitioners Act, 2004 can be used as a model for policy or legislative construction in Malawi. The aim is to assess whether the South African legislation adequately incorporates the human rights concerns that derive from the regulation of THP; namely, protection of the right to culture and the right to health. The intention of the paper is to determine whether the South African legislation is capable of forming the foundation for Malawi's response to THP.

### **Research questions**

The following questions form the golden thread that runs through the paper. The underpinning objective of the paper is to investigate whether THP form an aspect of the right to culture; and if these practices deserve special recognition and regulation as such. Furthermore, whether non-regulation impedes THP, thus violating the state's obligation to respect the right to health. This is the angle from which every aspect of the research is assessed.

### **Research methodology**

The research for this study has been conducted through a non-empirical literature survey. The narrow capacity of the research is a challenge that has limited this study. The investigation has been accomplished exclusively through the analysis of books, articles, internet articles, surveys, reports, international human rights instruments and comparative legislation concerning THP, culture and health.

In the absence of financial and time constraints, the study may well have benefited from empirical investigation of THP in Malawi and South Africa; as well as contributions from stakeholders in the areas of culture, public health and THP.

### **Literature review**

The WHO 'Traditional Medicine Strategy 2002-2005' (WHO/EDM/TRM/2002.1) is the first

global WHO Traditional Medicine Strategy (TRM Strategy).<sup>17</sup> The TRM Strategy covers issues ranging from policy to promotion of THP. The WHO plan is to integrate THP with national health care systems as appropriate by developing and implementing national THP policies and programmes. The TRM Strategy is a valuable resource for this paper providing a definition of THP; investigating and reporting upon the factors leading to the broad use and appeal of THP; describing strategies for the improved safety, efficacy and quality of THP; and, discussing the challenges for national policies and legal frameworks. However, the TRM Strategy does not approach THP from the explicitly human rights perspective which the paper attempts to adopt.

The WHO (2001) 'Legal status of traditional and complementary/alternative medicine: A worldwide review' provides information on the global legal status of traditional and complementary or alternative medicine.<sup>18</sup> It is intended to facilitate the development of legal frameworks and the sharing of experiences between countries by explaining what various countries have done in terms of regulating traditional and complementary or alternative medicine. The body of work by the WHO provides specific research data concerning THP that is essential background material for the present study.<sup>19</sup> However, the WHO does not investigate the link between health and human rights

Richter's discussion paper, prepared for the Treatment Action Campaign and Aids Law Project, states that traditional health practitioners have a crucial role to play in building the health system in South Africa; and in strengthening and supporting the national response to HIV/AIDS.<sup>20</sup> She outlines the background to THP in South Africa and discusses international policies, guidelines and the South African legal framework on traditional health practitioners. Richter argues for the regulation of traditional health practitioners and traditional medicine, as well as for the application of human rights principles within the

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<sup>17</sup> World Health Organization (2002) 'Traditional Medicine Strategy 2002-2005' WHO/EDM/TRM/2002.1 <[www.who.int/medicines/library/trm/trm\\_strat\\_eng.pdf](http://www.who.int/medicines/library/trm/trm_strat_eng.pdf)> (accessed 19 September 2005).

<sup>18</sup> World Health Organization (2001) 'Legal status of traditional and complementary/alternative medicine: A worldwide review' <[www.who.int/medicines/library/trm/who-edm-trm-2001-2/legalstatus.pdf](http://www.who.int/medicines/library/trm/who-edm-trm-2001-2/legalstatus.pdf)> (accessed 19 September 2005).

<sup>19</sup> World Health Organization (1948) World Health Organization Constitution, Basic Texts <[policy.who.int/cgi-bin/om\\_isapi.dll?infobase=Basicdoc&softpage=Browse\\_frame\\_Pg42](http://policy.who.int/cgi-bin/om_isapi.dll?infobase=Basicdoc&softpage=Browse_frame_Pg42)> (accessed 24 August 2005); WHO (1990) 'Report of the consultation on AIDS and traditional medicine: Prospects for involving traditional health practitioners' (n 3 above); WHO (2003) 'Fact Sheet No. 134: Traditional Medicine' (n 2 above).

<sup>20</sup> M Richter (2003) 'Traditional medicines and traditional healers in South Africa: Discussion paper prepared for the Treatment Action Campaign and Aids Law Project' <[www.tac.org.za/documents/researchpapers/traditional\\_medicine\\_briefing.pdf](http://www.tac.org.za/documents/researchpapers/traditional_medicine_briefing.pdf)> (accessed 20 April 2005).

traditional healing profession. Her human rights approach focuses on the rights of patients and consumers to safe and efficacious medicines. Richter goes so far as to recommend that 'the religious, spiritual or metaphysical elements be separated from the physical matter (for example the plant materials) of traditional medicine in order to facilitate the process of testing and approving these medicines for use by the general public.'<sup>21</sup> Richter does not explore the human rights impact of policy or legislative interventions concerning THP, specifically on the rights to culture and to health. The main thrust of her human rights perspective appears to be consumer based; whereas in this study it is contended that there are many more subtle yet powerful relationships between THP and human rights.

Sindiga's collection on traditional medicine in East Africa has been an invaluable source of information on THP.<sup>22</sup> The various chapters discuss an assortment of matters relating to THP; ranging from its legal history to the future of traditional medicine in Africa. The present discussion builds on this literature by attempting to direct the form that THP policy and legislation ought to take, with detailed emphasis on the human rights issues involved.

Stavenhagen explores different interpretations of the word culture.<sup>23</sup> On one level, culture is identified with the accumulated material heritage of mankind. A second understanding of culture discussed is that of a process of artistic and scientific creation. The third meaning, prominent in anthropological literature, is to understand culture as the sum total of material and spiritual activities and products of a given social group that distinguishes it from other similar groups.<sup>24</sup> Stavenhagen's discussion of culture is based primarily on this third interpretation and is especially helpful for grasping the specialist views expressed by anthropologists. However, this study seeks to discover how cultural rights can be given meaningful content and application in individual circumstances, which is a step beyond merely interpreting the meaning of culture. The paper extends Stavenhagen's discussion of culture and cultural rights to the creation of an enabling environment within which THP can be developed.

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<sup>21</sup> As above, 26.

<sup>22</sup> N 4 above.

<sup>23</sup> R Stavenhagen 'Cultural rights and universal human rights' in A Eide, C Krause and A Rosas (eds) *Economic, social and cultural rights: A textbook* (1995) 63.

<sup>24</sup> As above, 65-67.

The health and human rights reader, compiled by Mann *et al*, is a reader of previously published articles selected to provide an introduction to the field of health and human rights.<sup>25</sup> The chapters incorporate discussions on human rights and public health; the impact of health policies on human rights; the health impacts resulting from the violations of human rights; and, exploration of the inextricable linkage between health and human rights. There are also more specialised chapters in the section on medicine and human rights. The reader provides a comprehensive study of the relationship between health and human rights. While recognising that all rights violations engender important health effects, the reader does not contain an investigation of the intersection between health and the right to culture in the form of THP.

The Committee on Economic, Social and Cultural Rights (CESCR) provided a detailed breakdown of the right to health in their General Comment No. 14 (2000) 'The right to the highest attainable standard of health.'<sup>26</sup> The Committee briefly mentions THP, but does not make a clear link between recognition and regulation of THP and the progressive realisation of the right to health. The Committee places a great deal of emphasis on the harmful effects of traditional practices but neglects to clarify the overall impact of THP on the right to health. This is a significant omission, especially in relation to Africa where the majority of the populace rely on THP as a primary health source.

In general, very little has been written concerning THP and human rights. Despite the challenges faced, this study will contribute to broadening human rights thinking and practice in this area.

## **Chapter layout**

The paper is divided into five chapters. The introductory chapter provides an overview of the objectives of the study and a definition of THP. The chapter also discusses the research methodology employed in the paper and reviews the main literary works consulted by the author.

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<sup>25</sup> J Mann, S Gruskin, M Grodin and G Annas (eds) *Health and human rights* (1999).

<sup>26</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000) 'The right to the highest attainable standard of health' <[www.unhcr.ch/tbs/docs.nsf/\(symbol\)/E.C.12.2000.4.En?OpenDocument](http://www.unhcr.ch/tbs/docs.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument)> (accessed 6 April 2005).

To establish that THP form an aspect of culture, it is necessary to examine the qualities of THP and compare those to the qualities of recognised forms of culture. The second chapter comprises of an investigation of the legal provisions relating to culture and the various concepts of culture in human rights law. An attempt is then made to place THP within the context of the right to culture.

The relationship between THP and the right to health is discussed in the third chapter. In this study it is suggested that the core minimum content of the right to health includes the right to an accessible and acceptable primary health source, and that this implies a right to access THP. The chapter attempts to show that non-regulation impedes THP thus violating the state's obligation to respect the right to health.

In the fourth chapter there is an evaluation of the South African Traditional Health Practitioners Act of 2004 (the TH Act). Essentially, the law in Malawi defines and licenses the 'practice of medicine' in terms that entrench the medical profession and that exclude all other forms of healing as the 'unauthorised' practice of medicine, a crime. This chapter considers whether the South African legislation is a model for the inclusion of THP. More specifically, whether the development of THP as a form of culture is captured by the TH Act and whether Malawi can draw guidance from this legislation.

The fifth and final chapter concludes the paper. The chapter reverts to the original research questions, the concepts propounded in the paper and the various conclusions drawn to establish whether the original problems presented have been resolved. This concluding chapter also contains recommendations to the Government of Malawi ensuing from the study.

## Chapter 2

### TRADITIONAL HEALING PRACTICES AS A CULTURAL RIGHT

This chapter will attempt to make headway in understanding and clarifying the content of cultural rights. The meaning, content, and role of the right to culture, specifically whether THP fall within the realm of cultural rights, are considered. The inalienability and indivisibility of human rights implies that the right to culture must be equated with other rights such as that to life and, in the present paper, the right to health. According to Mann, health impacts are obvious and inherent in the popular understanding of certain severe human rights violations, such as torture, imprisonment under inhumane conditions, summary executions and 'disappearances.' However, beyond these serious problems, it is increasingly evident that violations of many more, if not all, human rights have negative effects on health.<sup>27</sup> Neither the right to culture nor the impact that culture has on the right to health is adequately explored in the body of human rights literature.

As far back as 1975, UNICEF and the WHO started to emphasise the primary health care approach, utilising local human and material support available in a community to provide the undersupplied population.<sup>28</sup> Traditional health practitioners were recognised as competent to provide health care through the use of methods based on their social, *cultural* and religious background.<sup>29</sup> THP were advocated for many reasons, one of which is that these practices are an integral part of every culture developed over many years. Thus, THP are effective in curing certain health problems that are culture specific.<sup>30</sup>

In 1973 the United Nations Educational, Scientific and Cultural Organization (UNESCO)

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<sup>27</sup> J Mann *et al* 'Health and human rights' in Mann (n 25 above) 14-15.

<sup>28</sup> WHO acknowledges that THP are a large factor in the health practices of individuals and communities. And that THP have to be recognised as an integral part of the cultural heritage of the people. WHO (1990) 'Report of the consultation on AIDS and traditional medicine: Prospects for involving traditional health practitioners,' (n 3 above).

<sup>29</sup> IK Notes No. 67 (n 8 above).

<sup>30</sup> I Sindiga (n 4 above) 2 - 5.

started to recognise the need to distinguish and protect intangible cultural heritage.<sup>31</sup> However, it was only in 1982 that UNESCO set up a 'Committee of Experts on the Safeguarding of Folklore' and created a special 'Section for the Non-Tangible Heritage,' resulting in the Recommendation on the Protection of Traditional Culture and Folklore that was adopted in 1989. This set an important precedent for recognising 'traditional culture and folklore.'<sup>32</sup>

The increasing importance and indivisibility of intangible cultural heritage and cultural rights was recently highlighted in the UNESCO Universal Declaration on Cultural Diversity, 2001 (the UNESCO Declaration).<sup>33</sup> The UNESCO Declaration is a legal instrument which recognises, for the first time, cultural diversity as a "common heritage of humanity" and considers its safeguarding to be a concrete and ethical imperative, inseparable from respect for human dignity. Article 5 states that:

Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to ... participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.

This paper joins the growing search for the significance of cultural rights. As elaborated by Bouchenaki:

The quest for the "message" of cultural properties has become more important. It requires us to identify the ethical values, social customs, beliefs or myths of which intangible

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<sup>31</sup> '[T]he safeguarding of intangible heritage remained for a long time rather neglected, although a first step in this direction was made in 1973, when the Permanent Delegation of Bolivia proposed that a Protocol be added to the Universal Copyright Convention in order to protect folklore. This proposal was not successful but it helped to raise awareness of the need to recognize and include intangible aspects within the area of cultural heritage.' M Bouchenaki (2003) 'The interdependency of the tangible and intangible cultural heritage' <[www.international.icomos.org/victoriafalls2003/papers/2%20-%20Allocution%20Bouchenaki.pdf](http://www.international.icomos.org/victoriafalls2003/papers/2%20-%20Allocution%20Bouchenaki.pdf)> (accessed 25 September 2005).

<sup>32</sup> As above.

<sup>33</sup> Adopted by the 31st session of the UNESCO General Conference, Paris, 2 November 2001. The UNESCO Declaration was adopted unanimously in a most unusual context. It came in the wake of the events of 11 September 2001. The UNESCO General Conference, which was meeting for its 31st session, was the first ministerial-level meeting to be held after those terrible events. <[unesdoc.unesco.org/images/0012/001271/127160.pdf](http://unesdoc.unesco.org/images/0012/001271/127160.pdf)> (accessed 24 September 2005).

heritage is the sign and expression. The significance of architectural or urban constructions and the transformation of natural landscapes through human intervention are more and more connected to questions of identity.

... Intangible heritage includes customs and oral traditions, music, languages, poetry, dance, festivities, religious ceremonies as well as systems of healing, traditional knowledge systems and skills connected with the material aspects of culture, such as tools and the habitat.<sup>34</sup>

The present chapter attempts to draw together various understandings of culture and cultural rights (legal and anthropological); and thereby contextualise the argument that THP are part of the cultural heritage of Malawi.

It is important to refer to the tension between cultural relativism and universal human rights. This is a debate that has seen considerable attention in human rights discourse and this paper adopts the view expressed by Hastrup that 'the question of universality is simply a question of how the universal ambition may be implemented locally.'<sup>35</sup> Further, for the purposes of this paper, consideration is given solely to such manifestations of cultural rights as are compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals.

### **The right to culture in international and Malawian law**

There are key legal provisions that relate to the protection of cultural rights. The following legal provisions address culture in general terms. Although later provisions in international law reflect a broader understanding, the direct references to cultural rights in the 1948 Universal Declaration of Human Rights (UDHR) are rather narrow. Article 27 states that:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

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<sup>34</sup> M Bouchenaki (n 31 above).

<sup>35</sup> K Hastrup 'Accommodating diversity in a global culture of rights: An introduction' in K Hastrup (ed) *Legal cultures and human rights: The challenge of diversity* (2001) 1.

Hastrup points out that in the earlier United Nations (UN) conventions, cultural rights have a relatively marginal position. Even when reference is made to the International Covenant on Economic Social and Cultural Rights (ICESCR) as a whole, it is most often only the social and economic rights and their progressive realisation that are actually implied. In her opinion, the cultural rights are seen mainly as instrumental to the social and economic rights in that 'culture' and education provide a gateway to the fulfilment of other rights.<sup>36</sup>

Article 15 of the ICESCR, adopted in 1966, is not much more expansive than the UDHR, rather, the intent of the UDHR is further specified along the same lines. It says in part

1. The States Parties to the present Covenant recognize the right of everyone:
  - (a) To take part in cultural life;
  - (b) To enjoy the benefits of scientific progress and its applications;
  - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

Like Hastrup, Eide also notes that cultural rights appear at the end of the rights listed in the UDHR and ICESCR, appearing almost as a remnant category. This apparent lack of importance placed on cultural rights is reflected in human rights theory as well as in practice. Individual cultural rights have received little attention.<sup>37</sup>

In contrast to these provisions is article 17 of the African Charter on Human and Peoples' Rights (ACHPR) which guarantees the right of individuals to take part in the cultural life of their community:

2. Every individual may freely take part in the cultural life of his community
3. The promotion and protection of morals and traditional values recognised by the community shall be the duty of the State

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<sup>36</sup> K Hastrup 'Collective cultural rights: Part of the solution or part of the problem?' in Hastrup (n 35 above) 169, 173.

<sup>37</sup> A Eide 'Cultural rights and minorities: On human rights and group accommodation' in Hastrup (n 35 above) 25, 27.

Article 29 of the ACHPR makes it a duty to preserve African cultural traditions and article 22 provides for the right to economic, social and cultural development of peoples and the equal enjoyment of the common heritage of mankind. Whilst it does provide a framework of obligations from which state legislation can be developed, the ACHPR's portrayal of 'African culture' conveys an idea of a constant and unchanging pre-modern (or perhaps pre-colonial) state of affairs. According to Ibhawoh this assumption distorts historical reality since culture was never static.<sup>38</sup>

Soon after independence the fledgling African nations placed the preservation and promotion of culture high on their agendas. This commitment to preserving the African cultural heritage is embodied in the 1976 Cultural Charter for Africa (Cultural Charter).<sup>39</sup> The Cultural Charter, which ought to have been a bold step forward in the promotion of culture, is articulated in a manner that almost seeks to freeze 'African cultural heritage,' a concept that has already been pointed out as being fallacious since it leaves no room for the dynamism and development of culture. The Cultural Charter is peppered with lofty notions of throwing off the yoke of colonialism. Its objectives include 'the rehabilitation, restoration, preservation and promotion of the African cultural heritage'<sup>40</sup> and 'the assertion of the dignity of the African and of the popular foundations of his culture.'<sup>41</sup> The entire instrument is underpinned with the encouragement of cultural co-operation among the states with a view to the strengthening of African unity.

The Cultural Charter does provide a brief indication of the place of THP in the realm of culture, however contentious its portrayal of culture is. Article 6(c)(1)(g) of the Charter prioritises the need to develop THP (medicine and pharmacopoeia) as follows:

Each African state recognises that it is the working people who make history and establish the foundations and conditions for the advancement of culture. As culture has an innovating and beneficial influence on the means of production and on man, each African state agrees [t]hat individual states shall be free to establish their priorities and select the methods they consider best suited for attaining their cultural development objectives and to

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<sup>38</sup> B Ibhawoh 'Cultural tradition and national human rights standards in conflict' in Hastrup (n 35 above) 85, 87.

<sup>39</sup> Organization of African Unity, Cultural Charter for Africa 1976 <[www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Cultural\\_Charter\\_for\\_Africa.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Cultural_Charter_for_Africa.pdf)> (accessed 9 April 2005).

<sup>40</sup> Art 1(b).

<sup>41</sup> Art 1(c).

that end individual states regard the following priorities ... [r]esearch, on the basis of modern science, in the field of local African medicine and pharmacopoeia.

However, despite having been ratified by 33 countries the Cultural Charter remains relatively unknown.<sup>42</sup> The Cultural Charter does not provide adequate elaboration on the area of THP, nor does it highlight these practices as being an aspect of culture.

The bill of rights in the Constitution of Malawi provides that every person shall have the right to use the language and to participate in the cultural life of his or her choice.<sup>43</sup> Article 30 of the Constitution links the right to culture to that of development, stipulating that 'all persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development.' These constitutional provisions are disappointingly vague, but at the same time they are open to interpretation of the right to culture as being both individual and collective. Furthermore, the Constitution makes specific reference to the development of culture as an entrenched human right.

### **Culture in human rights law**

Possibly the main obstacle to the full realisation of cultural rights is that the term 'culture' is not clearly defined in human rights law. Generally the protection of culture in human rights law encompasses two concepts. Firstly, the right of peoples to practice and continue shared traditions and activities. Secondly, the protection of culture in international law covers the scientific, literary and artistic pursuits of society. This paper concentrates on the former concept protecting the right of peoples to practice and continue shared traditions, in particular THP. More specifically the present search is for the means of achieving enhanced access to and development of THP. The second concept relating to scientific pursuits (namely the discussion regarding the copyrighting of culture) whilst relevant to THP, is beyond the scope of the present study.

Any definition of culture will merely be part of an ongoing debate about what 'culture' should be taken to mean.<sup>44</sup> Langness confirms that there is no standard commonly

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<sup>42</sup> African Union, List of Countries which have Signed, Ratified/Accessed to Cultural Charter for Africa, <[www.africa-union.org/home/Welcome.htm](http://www.africa-union.org/home/Welcome.htm)> (accessed on 6 April 2005).

<sup>43</sup> Art 26.

<sup>44</sup> 'A baseline definition of culture' <[www.wsu.edu:8001/vcwsu/commons/topics/culture/culture-definition](http://www.wsu.edu:8001/vcwsu/commons/topics/culture/culture-definition)>

accepted definition of culture and goes on to state that the most important criteria are that culture is shared behaviour and ideas which are cumulative, systemic, symbolic and transmitted extragenetically.<sup>45</sup> These criteria are complemented by those outlined in the preamble to the UNESCO Declaration which reaffirms that 'culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.'<sup>46</sup>

In his paper on cultural rights, Stavenhagen analyses three main underlying concepts of culture.<sup>47</sup> These views are not exhaustive but rather are broadly representative of widespread understandings of culture and cultural rights that the author has successfully managed to synthesise into three comprehensive theories. This is especially helpful in understanding the specialist views expressed by anthropologists. It is for this reason that the arguments presented are predominantly drawn from Stavenhagen.

One common view identifies culture with the accumulated material heritage of humankind as a whole or of particular human groups, including monuments and artefacts.<sup>48</sup> According to this position, the right to culture would mean the equal rights of individuals to have access to accumulated cultural capital. An extension of this view is the right to cultural development. Cultural development entails 'more culture' and better access to culture by more categories of people.<sup>49</sup> In line with this view of culture and cultural development, if THP can be demonstrated to be a part of the cultural heritage of Malawi there is a correlative right to better access to THP. More importantly, there is a right to the development of THP.

However, this view does not make a clear distinction between the tangible and intangible heritage. This is problematic for the debate since THP are primarily intangible consisting of practices, approaches, knowledge and beliefs. UNESCO makes a distinction between

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<sup>45</sup> L Langness *The study of culture* (1974) 125.

<sup>46</sup> UNESCO Declaration (n 33 above).

<sup>47</sup> R Stavenhagen (n 23 above) 65.

<sup>48</sup> UNESCO refers specifically to 'cultural heritage' rather than to 'cultural rights.' The author interprets the right to culture as being a right to the tangible and intangible cultural heritage as defined by UNESCO and as understood in the various schools of thought explained within the chapter.

<sup>49</sup> R Stavenhagen (n 23 above) 65.

the tangible and intangible forms of culture (or cultural heritage). 'The tangible cultural heritage, be it a monument, a historic city or a landscape, is easy to catalogue, and its protection consists mainly of conservation and restoration measures. Intangible heritage, on the other hand, consists of *processes and practices* and accordingly requires a different safeguarding approach and methodology to the tangible heritage. It is fragile by its very nature and therefore much more vulnerable than other forms of heritage because it hinges on actors and social and environmental conditions that are not subject to rapid change.'<sup>50</sup> (emphasis added) This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.<sup>51</sup>

Stavenhagen goes on to expound another view of culture. According to this second view, culture is not necessarily an accumulated or existing 'cultural capital,' but is rather the process of artistic or scientific creation. 'Accordingly in every society there are certain individuals who "create" culture (or, alternatively, who "interpret" or "perform" cultural works). Within this perspective, the right to culture, of course, means the right of individuals to freely create their cultural "oeuvres," with no restrictions and the right of people to enjoy free access to these creations.'<sup>52</sup> This second view creates dual protection when placed in the context of THP: protection for the creators, interpreters or performers of THP; but also, recognition of peoples' right to enjoy free access to THP. Further, by focussing attention on the processes of cultural creation, this approach embraces the very intangibility of THP.

The third view of culture is an anthropological one according to which culture is interpreted to mean the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups. This understanding of culture is expressed in the UNESCO Declaration and encompasses the two concepts outlined above. Stavenhagen believes that if culture is understood in this wider anthropological

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<sup>50</sup> M Bouchenaki (n 31 above).

<sup>51</sup> Art 2(1) of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003) MISC/2003/CLT/CH/14 <unesdoc.unesco.org/images/0013/001325/132540e.pdf> (accessed 24 September 2005).

<sup>52</sup> As above, 66.

sense then it can be argued that cultural rights in their collective sense are culture specific that is, every cultural group has the right to maintain and develop its own specific culture. This is now referred to as the right to cultural identity and it closely linked to the right to human dignity.<sup>53</sup> As held by Matarasso, 'it is through culture that we build identity, that essential component of humanity, and community.'<sup>54</sup>

The right to culture, then, must include the tools to own and preserve cultural manifestations and, at the same time, to utilise and exploit the cultural resources of the majority culture.<sup>55</sup> The question then arises whether THP form an aspect of the right to culture? And whether these practices deserve special recognition and regulation as such? To resolve these questions we must return to the definition of THP. There are characteristics of THP that relate directly to the various criteria of culture expounded above. The most notable being the extragenetic transmission of culture; in the definition of THP in first chapter of this paper THP are established as relying exclusively on 'practical experience and observation handed down from generation to generation, whether orally or in writing.'<sup>56</sup> To further substantiate the point, the UNESCO Convention specifies that intangible cultural heritage is manifested in social practices and rituals, as well as knowledge and practices concerning nature and the universe.<sup>57</sup> THP combine all of these factors. Lastly, the Cultural Charter specifically prioritises the need to develop THP, traditional medicines and pharmacopoeia as a part of African culture.<sup>58</sup>

## Conclusion

The right to culture includes a variety of components. The right to take part in cultural life; the right to enjoy the benefits of scientific progress; the right of an individual to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the author; and, the right to freedom from the

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<sup>53</sup> As above, 67.

<sup>54</sup> F Matarasso (2001) 'Recognising culture: A series of briefing papers on culture and development' <[www.unesco.org/culture/en/ev.php-url\\_id=18716&url\\_do=do\\_topic&url\\_section=201.html](http://www.unesco.org/culture/en/ev.php-url_id=18716&url_do=do_topic&url_section=201.html)> (accessed 24 September 2005).

<sup>55</sup> C Steiner 'Intellectual property and the right to culture' <[www.wipo.int/tk/en/hr/paneldiscussion/papers/word/steiner.doc](http://www.wipo.int/tk/en/hr/paneldiscussion/papers/word/steiner.doc)> (accessed 11 May 2005) 14.

<sup>56</sup> IK Notes No. 67 (n 8 above).

<sup>57</sup> Art 2(2) of the UNESCO Convention (n 51 above). The Convention on Intangible Heritage has yet to come into force – only 23 states have ratified so far and in accordance with its art 34, the Convention enters into force after the deposit of the thirtieth ratification. Malawi has not ratified the Convention.

<sup>58</sup> Art 6(1)(g) of the Cultural Charter (n 39 above).

interference of the state in scientific or creative pursuits. States have an obligation to take steps necessary for the conservation, development and diffusion of science and culture in order to ensure the full realisation of this right.

Stavenhagen expresses his doubt that the principle of non-discrimination is adequate to ensure the enjoyment of specific cultural rights. He goes so far as to say that it is necessary to develop procedures and mechanisms for the affirmation and enjoyment of specific cultural rights of peoples. And that unless such mechanisms are developed, cultural rights will never be fully enjoyed notwithstanding the principle of non-discrimination.<sup>59</sup> It is just such a mechanism that is envisioned in the objectives of this discussion. A mechanism that provides for the affirmation (recognition) and enjoyment of the specific cultural right to THP. Moreover, the framework within which to develop such a mechanism is provided by the legal provisions relating to cultural rights.

Stavenhagen further questions whether the concept of cultural rights can be adequately encompassed by a notion of individual rights, or whether it must be complemented by a different approach – that of collective rights. Stavenhagen leans towards that second approach on the basis that cultural rights, like many social and economic rights, require a collective approach since some of them can only be enjoyed in community with others. And the community must have the possibility to preserve, protect and develop what it has in common.<sup>60</sup> In contrast, Hastrup perceives a danger in the emphasis on culture as a collective right. Her view is that the emphasis on distinction of cultural groups manifests itself as a means of excluding specific groups (such as minorities or indigenous peoples), an exclusion that potentially threatens the very foundation of human rights: their claim to universality.<sup>61</sup>

The meeting point of the opposing views of culture as collective or individual rights ought to be the use of the right to culture as an enabling environment for cultural diversity. 'The challenge of diversity is still to allow for a certain freedom of interpretation: human rights must be both general and particular for them to work as a common standard of

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<sup>59</sup> R Stavenhagen (n 23 above) 68.

<sup>60</sup> As above.

<sup>61</sup> K Hastrup 'Collective cultural rights' in Hastrup (n 35 above) 177.

achievement.<sup>62</sup> In the context of THP and the right to health, the critically important question must be whether (and how) economic, social, and cultural rights can be given meaningful content and application in individual circumstances.

In conclusion it is necessary to highlight the specific concerns that have arisen in this chapter. It has been established that there is the need for a mechanism that provides for the affirmation (recognition) and enjoyment of the specific cultural right to THP. There is the call for protection of the creators, interpreters or performers of THP (traditional health practitioners), their knowledge just as much as their practice. Legislation ought to express recognition of peoples' right to enjoy free access to THP. Further, legislation ought to promote the right to cultural development, specifically, a right to the development of THP.

This chapter has attempted to establish that THP constitute a form of culture and as such deserve the protection afforded by the various instruments protecting the right to culture. The aim of identifying THP as a cultural right is to ensure that this human rights aspect is included in any policy or legislative measures relating to THP.

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<sup>62</sup> As above.

## *Chapter 3*

### **TRADITIONAL HEALING PRACTICES AND THE RIGHT TO HEALTH**

The discussion of THP and the right to health in the present chapter is based on the understanding of THP as an aspect of culture and investigates the relationship between the two. The WHO has done a great deal of work in relation to promoting THP as a primary health source, and numerous prominent authors have fully canvassed the right to health. The aim of this chapter is not to review that work. Rather, it is to highlight the role played by THP in the realisation of the right to health. While the WHO takes a health-based approach to THP and health, this paper attempts to introduce a more rights-based approach to the same matter. The point being that there is a nexus between the right to culture and the right to health and in this chapter, that nexus is narrowed down to THP and the right to health. This paper is an investigation of the potential violations of the right to health that may result from non-regulation of THP and the potential violations of the right to culture that can result from regulation of these practices. It is submitted that embedded within the constitutionally guaranteed right to health is a right to accessible and acceptable THP.

The Constitution of Malawi declares the right to health as part of the directive principles of state policy (DPSP). Article 13(c) of the Constitution stipulates that: '[t]he State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals ... [t]o provide adequate health care, commensurate with the health needs of Malawian society and international standards of health care.' However, articles 30(1) and (2) of the Constitution (set in the Bill of Rights) go on to provide that:

All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right.

The State shall take all necessary measures for the realization of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.

It is important to maintain the terminology that is used in the Constitution itself as this may have implications for the interpretation of the right to health as provided thereunder. In the course of this chapter, the terminology relied upon will be that of 'access to health services.' There is a dual justification for this, namely that it is in relation to access to health services that the protection for THP is sought; and secondly because the right of access to health services has an arguably stronger framework of constitutional protection since it falls within the bill of rights and not merely the DPSP.<sup>63</sup>

### **The right to health**

According to Tomaševski, international human rights law establishes two sets of principles relating to health.<sup>64</sup> First, that the promotion of public health constitutes legitimate grounds for restricting human rights. And secondly, that the right to health creates entitlements for individuals and corresponding obligations upon governments. She states that scrutiny of such limiting measures with human rights criteria is a fairly novel development.<sup>65</sup> Nevertheless, that is the precise nature of the scrutiny being conducted herein. An important consequence of placing health in a human rights framework is that it broadens health issues beyond the domain of clinical medicine and places the individual at the centre. So that health is considered not only in terms of needs but also in terms of rights.<sup>66</sup>

Health is a fundamental human right that is indispensable for the exercise of other human rights and every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.<sup>67</sup> Health is widely identified as 'a state of complete physical, mental and social well-being and not merely the absence of

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<sup>63</sup> This is not an attempt to engage the argument that DPSP can or cannot be as justiciable as those rights within the bill of rights; rather it is a reflection of the general school of thought.

<sup>64</sup> K Tomaševski 'Health rights' in Eide (n 23 above) 125, 125.

<sup>65</sup> As above.

<sup>66</sup> J Asher (2004) 'The right to health: A resource manual for NGOs' (Commonwealth Medical Trust) <[www.commat.org/Medical%20Ethics%20and%20Right%20to%20Health/Right%20to%20Health/pdf/Right\\_to\\_health\\_www.pdf](http://www.commat.org/Medical%20Ethics%20and%20Right%20to%20Health/Right%20to%20Health/pdf/Right_to_health_www.pdf)> (accessed 17 September 2005) 2.

<sup>67</sup> General Comment No. 14 (n 26 above) para 1.

disease or infirmity.<sup>68</sup> This is a modern concept of health that includes, yet goes beyond, health services and embraces the broader societal dimensions and context of individual well-being.<sup>69</sup>

This broad understanding of health and human rights is encapsulated in the ICESCR.<sup>70</sup> In accordance with article 12(1) of the ICESCR, States parties recognise ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,’ while article 12(2) specifies, by way of illustration, a number of ‘steps to be taken by the States parties ... to achieve the full realization of this right.’ Most relevant is article 12(2)(d) where the right to *health services* is expressed as the creation of conditions which would assure to all medical service and medical attention in the event of sickness. It is argued here that the creation of enabling legislation for the promotion, development and protection of THP is a step towards the creation of these conditions.

The scope of the right to health reaches far beyond access to health services to include all the factors that underlie determinants of health. This is the holistic approach to health that regards both health care and social conditions as being important determinants of health status.<sup>71</sup> Social conditions such as the cultural structure within which the affected community exists. In line with this view of health, there is a direct and negative impact on the right to health that results from the violation of human rights. At times this impact is more easily discernable, for example the violations of the right to health that arise from being subjected to torture, but not always. Other less obvious entitlements, such as the right to culture, contribute to the very conditions required to realise the highest attainable standard of health.<sup>72</sup>

Freedman conveys the import of the relationship between health and human rights succinctly when she says that:

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<sup>68</sup> World Health Organization (1948) World Health Organization Constitution, Basic Texts <policy.who.int/cgi-bin/om\_isapi.dll?infobase=Basicdoc&softpage=Browse\_frame\_Pg42> (accessed 24 August 2005).

<sup>69</sup> J Mann *et al* ‘Health and human rights’ in Mann (n 25 above) 8.

<sup>70</sup> Malawi acceded to the ICESCR on 22 December 1993, the convention entered into force on 22 March 1994 <www.unhchr.org> (accessed 8 August 2005).

<sup>71</sup> J Asher (n 66 above) 18.

<sup>72</sup> ‘The impacts on health of a human rights violation can be both obvious and subtle... The process of documenting evidence from violations of human rights must therefore be thorough and thoughtful. This is where the work of health professionals and that of human rights professionals comes together... This joint approach is necessary if proper attention is to be given to the health consequences of human rights violations.’ J Mann (n 25 above) 73-74.

[t]o use health and human rights collaboration in this way means rebuilding our understanding of both health and human rights, as well as the vision of human well-being they define and advance, from the ground up. It means taking full account of the very real differences that shape our lives, while giving full respect to our common humanity. It means approaching health and human rights collaboration not as a theoretical puzzle that is worked through in a political vacuum, but rather as a very concrete, contextualized inquiry that begins from the experience of those whose health and human rights are most at stake.<sup>73</sup>

The inference is that the role played by THP in the realisation of the right to health services can only be fully appreciated when considered from the perspective of those whose health and cultural rights are directly affected by any policy or legislative measures concerning THP. As Gostin and Mann establish, implementing public health policies without serious consideration of their human rights dimension may harm the people affected and render the policy ineffective or detrimental.<sup>74</sup>

The right to health in all its forms and at all levels contains several interrelated and essential elements. These essential elements were clarified by the Committee on Economic, Social and Cultural Rights (CESCR) in their General Comment No. 14 on the right to health as follows: availability; accessibility (non-discrimination, physical accessibility, economical accessibility, and information accessibility); acceptability; and, quality.<sup>75</sup>

To establish a strong link between THP and the right to health it is important to measure THP using the yardstick of 'essential elements' outlined above. After all, it is only when health impacts are measured and named as violations that the full extent of this relationship between health and human rights can be realised.<sup>76</sup>

### **THP and the right to health**

'If we are going to have a significant impact upon the trajectory of the AIDS epidemic in

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<sup>73</sup> L Freedman 'Reflections on emerging frameworks of health and human rights' in Mann (n 25 above) 227, 244.

<sup>74</sup> L Gostin and J Mann 'Toward the development of a human rights impact assessment for the formulation and evaluation of public health policies' in Mann (n 25 above) 54, 54.

<sup>75</sup> General Comment No. 14 (n 26 above) para 12.

<sup>76</sup> J Mann (n 25 above) 74.

Africa, it cannot be accomplished without the meaningful involvement of traditional health practitioners and traditional medicine organizations.<sup>77</sup> It is important to keep in mind the very real health and human rights crisis posed by HIV/AIDS in Malawi; this crisis compels health and human rights professionals to seek out alternative means of combating and curbing the spread of AIDS. Development of THP is suggested as an alternative measure to realise the right to health because health services remain inaccessible to the majority of the population. '[This] inadequacy of health services could partly be explained by historical emphasis on costly, hospital-based curative care which put premium on expensive technology and the meeting of international health standards whilst ignoring local disease problems. Even where health facilities exist, these suffer from shortage of trained health workers, inadequate supplies and poor management, all translating into non-availability of services.'<sup>78</sup>

The first yardstick (or essential element) introduced by the CESCRC is availability. Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity. On the other hand, the WHO established that in Africa up to 80% of the population uses THP to help meet their health care needs.<sup>79</sup> In fact, THP have the widest spatial coverage as each community has its own healers.<sup>80</sup> The WHO reported that in Uganda, for instance, the ratio of traditional health practitioners to the population was between 1:200 and 1:400. This contrasted starkly with the availability of allopathic practitioners, for which the ratio was typically 1:20000 or less.<sup>81</sup> Moreover, distribution of such personnel may be uneven, with most being found in cities or other urban areas, and therefore difficult for rural populations to access. THP are sometimes the only affordable source of health care, especially for the country's poorest patients.<sup>82</sup>

In developing countries this broad use of THP is often due to its accessibility and

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<sup>77</sup> E Gbodossou *et al* (n 1 above) 1.

<sup>78</sup> I Sindiga (n 4 above) 1.

<sup>79</sup> TRM Strategy (n 17 above) 1.

<sup>80</sup> I Sindiga (n 4 above) 4-5.

<sup>81</sup> The term *allopathic* medicine, in this paper, refers to the broad category of medical practice that is sometimes called Western medicine, biomedicine, scientific medicine, or modern medicine. This term has been used solely for convenience and does not refer to the treatment principles of any form of medicine described.

<sup>82</sup> TRM Strategy (n 17 above) 2.

affordability, accessibility is the second yardstick identified by the CESCR. The numbers and geographical distribution of traditional health practitioners is not attainable by the limited capacity of allopathic providers and health dispensaries.<sup>83</sup> However, despite the reported reliance of many populations on THP to help meet their health care needs, precise data is lacking. Quantitative research to ascertain levels of existing access (both financial and geographic), and qualitative research to clarify constraints to extending such access, is called for.<sup>84</sup> Physical and financial accessibility is not enough without access to information about the benefits and the possible risks involved in THP. This is one of the main criticisms that can be levelled against THP, and is in fact one of the ways in which THP contribute to the violation of the right to health. As Sindiga explains, the problems with THP are that they do not keep up with scientific and technological advancement and lack measured doses of drugs; sometimes the side effects of a combination of herbal medicines used is not known.<sup>85</sup>

Thirdly, the CESCR stated that all health facilities must be acceptable. Goods and services must be respectful of medical ethics and culturally appropriate. Cultural propriety is explained as being services that are respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.<sup>86</sup> Traditional health practitioners are knowledgeable of the cultural norms (oftentimes they are the arbitrators of norm behaviours), local languages and traditions; their advice sought, believed and acted upon by community members.<sup>87</sup> Baquar describes how THP play a vital role towards the wellbeing and development of the rural population. THP though still an unwritten science is well established in the cultures and traditions and has become a way of life for almost 80% of the people in Africa.<sup>88</sup>

Finally, as well as being culturally acceptable, health services must also be scientifically and medically appropriate and of good quality. THP and modern or allopathic medicine systems have developed separately. Unfortunately, there has been no parallel

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<sup>83</sup> E Gbodossou *et al* (n 1 above) 2.

<sup>84</sup> TRM Strategy (n 17 above) 4.

<sup>85</sup> I Sindiga (n 4 above) 25.

<sup>86</sup> General Comment No. 14 (n 26 above) para 12.

<sup>87</sup> E Gbodossou *et al* (n 1 above) 2.

<sup>88</sup> S Baquar 'The role of traditional medicine in a rural environment' in Sindiga (n 4 above) 140.

development of standards and methods (either national or international) for undertaking evaluation of THP. This has resulted in the lack of sound scientific evidence concerning the efficacy of many of its therapies and an alleged low quality of care because of lack of regulatory mechanism including control and licensing. In Malawi, despite the existence of a national coordination body, an association of traditional practitioners<sup>89</sup> and a training programme in traditional medicine for health workers,<sup>90</sup> there is no legislative framework to regulate THP.

In general increased use of THP has not been accompanied by an increase in the quantity, quality and accessibility of clinical evidence to support THP claims.<sup>91</sup> However, THP have the capacity to meet the four criteria of availability, accessibility, acceptability and quality. This is a powerful reason to push for recognition of the role played by THP in the provision of services.

### **Non-regulation of THP: A violation of the right to health**

According to the CESCR, '[a]s with all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible.'<sup>92</sup> Non-regulation of THP amounts to a retrogressive measure since '[t]he recognition by governments of the importance of traditional medicine for the health of the populations in the Region and the creation of an enabling environment are the basis for the optimization of the use of traditional medicine.'<sup>93</sup>

The right to health, like all human rights, imposes three types or levels of obligations on governments. These are the obligations to *respect*, *protect* and *fulfil*. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote; the obligation to respect a requirement that governments refrain from interfering directly or indirectly with the enjoyment of the right to health; and, the obligation to protect a requirement that governments take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to fulfil requires governments to adopt appropriate

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<sup>89</sup> TRM Strategy (n 17 above) 17.

<sup>90</sup> Legal status (n 18 above) 22.

<sup>91</sup> TRM Strategy (n 17 above) 3.

<sup>92</sup> General Comment No. 14 (n 26 above) para 32.

<sup>93</sup> TRM Strategy (n 17 above) 35.

legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of the right to health.<sup>94</sup>

The CESCR has read within the obligation to protect, a duty upon the State to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.<sup>95</sup> In relation to traditional health practitioners this entails some form of licensing. Traditional health practitioners also need training and support in relation to managing basic disease prevention, hygiene, and also general technology (record keeping, and so on). They need to operate within a clearly defined framework. At present there are no clear guidelines for certification and registration. This lack of organisational structures and procedures makes it difficult to control malpractice among the practitioners which is reported frequently, 'for example, clients are lured into paying colossal sums of money for "cures" relating to incurable conditions such as cancer and AIDS.'<sup>96</sup>

The CESCR confirms that States parties have a core obligation to ensure satisfaction of minimum essential levels of the rights enunciated in the ICESCR. In the CESCR's view, this core obligation includes a duty to ensure the right of access to health services on a non-discriminatory basis, especially for vulnerable or marginalised groups.<sup>97</sup> 'This core content includes those elements without which the right loses its significance; it refers to those elements that encompass the essence of the right.'<sup>98</sup> In Malawi, where THP are essentially the primary health source for more than half of the nation, the right to health services certainly loses its significance if there is a lack of acceptable THP. This core obligation must be considered in the context that national policies are the basis for defining the role of THP in health care programmes. It is the national policy that will ensure that the necessary regulatory and legal mechanisms are created for promoting and maintaining good practice; assuring authenticity, safety and efficacy of THP; and providing equitable access to health care resources and information about those resources.<sup>99</sup>

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<sup>94</sup> General Comment No. 14 (n 26 above) para 33.

<sup>95</sup> As above, para 35.

<sup>96</sup> D Nyamwaya (n 4 above) 35.

<sup>97</sup> General Comment No. 14 (n 26 above) para 43.

<sup>98</sup> B Toebe's 'Towards an improved understanding of the international human right to health' in P van Krieken (ed) *Health, migration and return: A handbook for a multidisciplinary approach* (2001) 30.

<sup>99</sup> Legal status (n 18 above) ix.

Consequently, the core obligation of ensuring access to health services incorporates a duty to recognise and regulate THP.

In their General Comment 14, the CESCR explains how violations of the States obligations occur. Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others.<sup>100</sup> Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realisation of the right to health. Examples include the failure to adopt or implement a national health policy designed to ensure the right to health for everyone.<sup>101</sup> The WHO identified the following prerequisite to ensuring the safety, efficacy and quality of THP at national level: regulation.<sup>102</sup> Based on the foregoing, it follows that non-regulation of THP in Malawi amounts to a violation of the states obligation to protect and fulfil the right to health.

## **Conclusion**

In this chapter an exploration has been made of the relationship between THP and the right to health, and several problem areas have been identified. Generally, the increased use of THP has not been accompanied by an increase in its quantity, quality and accessibility. Further, THP's lack of organisational structures and procedures makes it challenging to monitor misconduct among the practitioners. Despite the various problems with THP, these practices have the capacity to meet the four criteria of availability, accessibility, acceptability and quality. This serves to strengthen the argument that recognition and regulation of THP is a necessity.

Recognition and regulation of THP would be a considerable step forward in the realisation of the right to health in Malawi. Sindiga notes that 'traditional medicine has been retarded since the colonial period. A lot of work requires to be done to salvage and give

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<sup>100</sup> General Comment No. 14 (n 26 above) para 51.

<sup>101</sup> As above, para 52.

<sup>102</sup> TRM Strategy (n 17 above) 24.

respectability to a health resource used by the majority of the African peoples. This is the imperative of traditional medicine.<sup>103</sup>

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<sup>103</sup> | Sindiga (n 4 above) 12.

## Chapter 4

### PROTECTING TRADITIONAL HEALING PRACTICES IN MALAWI: ARE THERE LESSONS TO BE LEARNED FROM SOUTH AFRICA?

The aim of this chapter is to discover whether the South African Traditional Health Practitioners Act, 2004 (the TH Act) can be used as a model for the recognition, regulation and promotion of THP in Malawi. Even though the majority of the African population utilises THP, in many African nations traditional medicine technically remains illegal.<sup>104</sup> In Malawi, the Medical Practitioners and Dentists Act, No. 17 of 1987, makes detailed provisions for the registration, licensing, and training of allopathic physicians and dentists. Meanwhile, the regulation of THP is encompassed in section 61 which stipulates that: '[n]othing contained in this act will be construed to prohibit or prevent the practice of any African system of therapeutics by such persons in Malawi, provided that nothing in this section shall be construed to authorize performance by a person practising any African system of therapeutics of any act which is dangerous to life.'<sup>105</sup> This provision does nothing to address the varied human rights and public health concerns tied into THP and appears to express mere tolerance for so-called African systems of therapeutics.

According to Cohen, laws about medical practice essentially define and license the "practice of medicine" in terms that entrench the medical profession and that exclude all other forms of healing as the "unauthorised" practice of medicine, a crime. He explains that the purported justification is to prevent fraud and protect public health. The regulatory paradigm, however, has two flaws: first, it reflects the private interest of the medical

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<sup>104</sup> The 2001 WHO survey on the legal status of traditional and complementary/alternative medicine uncovered that of the 44 African countries surveyed, 61% had statutes regarding THP; however, none of the countries exemplified an integrative system of collaboration between national health care and THP. The system used in most of the countries surveyed fit the description of *tolerant* systems. 'In this category the national health care system is based entirely on allopathic medicine, but some [THP] are tolerated by law. As a legacy of the long history and remnants of European colonization, antiquated laws remain on the books outlawing the practice of traditional medicine. These laws are often overlooked and the practice of traditional medicine is accepted and tolerated throughout the continent.' E Gbodossou *et al* (n 1 above) 3.

<sup>105</sup> Legal status (n 18 above) 22.

academy as a professional monopoly, an interest that does not coincide with the prevention of fraud; and second, rather than protecting public health, the current framework limits consumer choice, denigrates patient autonomy, and diminishes patient welfare.<sup>106</sup>

In this chapter, an attempt is made to furnish Malawi with comparable legislation upon which to frame the national policy or legislative response to THP. The practice of traditional medicine demands and deserves more than mere tolerance. 'Only clear new legislation, providing for the practice of traditional medicine would create an environment for the development of traditional medicine.'<sup>107</sup>

### **The South African legislation**

South Africa has a history of regulating traditional healing practitioners. Prior to the enactment of the 2004 TH Act, South Africa regulated general traditional health practitioners, herbalists, chiropractors, homeopaths, osteopaths, and naturopaths under the Associated Health Service Professions Act of 1982, as amended.<sup>108</sup> This law set up a registration and licensing scheme for the various professions. Registration entitled medical providers to practise for gain and call themselves members of that profession. Practice for gain by a non-registered person was an offence punishable by a fine or imprisonment of up to one year. To qualify as a traditional health practitioner, one had to serve an apprenticeship of between one and five years and be well known within the community one served as well as amongst other traditional health practitioners. Qualified practitioners registered with the Traditional Healers' Organization and were given a book to certify that they were qualified healers.<sup>109</sup> There is a provision of this legislation that is interesting to note: section 41 of the Associated Health Service Professions Act of 1982 stated that the provisions of the Act shall not be read to 'derogate from the right which a medicine man or herbalist contemplated in the Code of Zulu Law may have to practise his

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<sup>106</sup> M Cohen 'A star in health care reform: The emerging paradigm of holistic healing' (1995) 27 *Arizona State Law Journal* 79, 81. 'Pressure from organized western medicine also helps to sideline traditional medicine; keeping it out of policy discussions and specifically out of national health care strategic plans and official systems.' E Gbodossou *et al* (n 1 above) 3.

<sup>107</sup> I Sindiga *et al* (n 4 above) 176.

<sup>108</sup> Associated Health Service Professions Act, no. 63 of 1982, as amended by the Associated Health Service Professions Amendment Act, no. 108 of 1985 and the Associated Health Service Professions Amendment Act, no. 10 of 1990 South Africa. Legal status (n 18 above) 33.

<sup>109</sup> Legal status (n 18 above) 34.

profession.<sup>110</sup>

In 2004, the TH Act was enacted. The objects of which are to establish the Interim Traditional Health Practitioners Council of South Africa (the Council); to provide for a regulatory framework to ensure the efficacy, safety and quality of traditional health care services; and, 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.<sup>111</sup> In addition, the TH Act was established to 'serve and protect the interests of members of the public who use the services of traditional health practitioners.'<sup>112</sup>

The TH Act was selected for the purposes of this paper because it recognises the unique circumstances of traditional health practitioners; sets professional and ethical norms and standards; and, seeks to empower traditional health practitioners to regulate their practices. To illustrate, in 2001 when the WHO conducted and published its survey, none of the African nations surveyed provided insurance or financial reimbursement for traditional medicine services.<sup>113</sup> Under section 42 of the TH Act, traditional health practitioners are able to apply for registration and to claim fees from the medical aid schemes of their patients; this is just one of the ways in which the TH Act has worked to enhance the recognition of THP in South Africa.

In their discussion of the future of traditional medicine in Africa, Sindiga *et al* describe the requirements for registering and licensing traditional health practitioners.<sup>114</sup> According to them, registration involves the recording of details of traditional health practitioners in a register which is maintained by an official body; and, licensing entails formal written permission (to give traditional health care) from a constituted authority after meeting stipulated requirements and standards of practice. 'The demands of registration and licensing are such that a considerable amount of work must be done to verify who is a bona fide traditional healer for purposes of registration. This calls for a professional organization or association to set minimum required standards for the practice of

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<sup>110</sup> As above.

<sup>111</sup> Preamble to the TH Act (n 14 above) 3.

<sup>112</sup> As above, sec 2(c).

<sup>113</sup> Legal status (n 18 above).

<sup>114</sup> | Sindiga *et al* (n 4 above) 175, 176.

traditional medicine.<sup>115</sup>

The Council established by the TH Act encompasses all of these features. In addition, the TH Act spells out the precise membership of the Council, which is designed to be as inclusive as possible, incorporating the major stakeholders in THP.<sup>116</sup> This is the body that recommends the minimum qualifications required in order for a traditional health practitioner to be registered, amongst its many other tasks.<sup>117</sup> The TH Act sets out the objects of the Council as being to:

- a. promote public health awareness;
- b. ensure the quality of health services within the traditional health practice;
- c. protect and serve the interests of members of the public who use or are affected by the services of traditional health practitioners;
- d. promote and maintain appropriate ethical and professional standards required from traditional health practitioners;
- e. promote and develop interest in traditional health practice by encouraging research, education and training;
- f. promote contact between the various fields of training within traditional health practice in the Republic and to set standards for such training;
- g. compile and maintain a professional code of conduct for traditional health practice; and
- h. ensure that traditional health practice complies with universally accepted health care norms and values.<sup>118</sup>

The TH Act is largely concerned with the establishment of the Council, its powers and its functions. Consequently comprehending the objects and capacity of the Council plays an important function in understanding the scope of the legislation.

### **Protecting the right to culture**

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<sup>115</sup> As above, 177.

<sup>116</sup> Sec 7 of the TH Act (n 14 above) specifies the composition of the 22 member Council. Membership must consist of traditional health practitioners from each of South Africa's nine provinces; an employee from the Department of Health; a legal practitioner; an allopathic medical practitioner; a pharmacist; community representatives; and, representatives from each category of traditional health practitioner defined in the TH Act.

<sup>117</sup> As above, secs 6(1)(b), 6(1)(i) and 22(1).

<sup>118</sup> As above, sec 5.

In chapter two of this paper several reasons for regulating THP were identified, all of which had at their core the objective of recognising, promoting and protecting the right to culture. To reiterate, it was suggested that THP legislation ought to expressly recognise THP as being part of the country's cultural heritage and ensure peoples' right to enjoy free access to THP. Further, legislation ought to promote the right to cultural development, specifically, the right to development of THP. The dynamism of culture must not be stifled in a quest to codify recognisable forms of culture – it is not easy to find a happy medium, a manner of using the law to protect and promote (without preventing) cultural growth and development. Therefore, the yardstick that the TH Act is measured against is whether it provides adequate mechanisms for the conservation, development and diffusion of THP in order to ensure the full realisation of the right to culture.

There is the additional aspect of protection for the creators, interpreters or performers of THP. Safeguarding the intangible heritage involves the collection, documentation and archiving of cultural property and the protection and support of its bearers. While the tangible cultural heritage is designed to outlive those who produce or commission it, the fate of the intangible heritage is far more intimately related to its creators as it depends in most cases on oral transmission. Therefore, the legal and administrative measures traditionally taken to protect material elements of cultural heritage are often inappropriate for safeguarding a heritage whose most significant elements relate to particular systems of knowledge and value and a specific social and cultural context.<sup>119</sup>

The UNESCO Convention provides guidelines on methods that can be employed in the safeguarding of THP. An example is the establishment of a competent body to safeguard and manage THP, such as the South African Traditional Health Practitioners Council. One of the Council's responsibilities is to promote THP by encouraging research, education and training.<sup>120</sup> Furthermore, section 6(2)(f) of the TH Act stipulates that the Council must determine policy and in accordance with policy determinations, make decisions regarding matters relating to the educational framework, fees, funding, registration procedure, code for professional conduct and ethics, disciplinary procedure and scope of traditional health practice.

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<sup>119</sup> M Bouchenaki (n 31 above).

<sup>120</sup> Sec 5(e) of the TH Act (n 14 above).

The TH Act provides adequate structures for the development of THP; however, the legislation falls short of creating a sound environment for the conservation and diffusion of THP. The TH Act does not provide for the establishment of documentation institutes for THP and traditional medicines. In fact, despite creating a comprehensive framework for the development of THP, the TH Act makes absolutely no reference to ‘culture.’

### **Protecting the right to health**

The WHO highlighted priority need areas for increasing the safety, efficacy and quality of THP, thereby increasing the access to health services. These include: national regulation and registration of herbal medicines; safety monitoring for herbal medicines and other THP; support for clinical research into use of THP for treating the country’s common health problems; national standards, technical guidelines and methodology for evaluating safety, efficacy and quality of THP; and, ensuring sustainability of national pharmacopoeia and monographs of medicinal plants.<sup>121</sup>

The TH Act places emphasis on traditional health practitioners and not on the traditional medicines or practices that they employ. In this manner, the TH Act fails to incorporate concerns relating to the registration and regulation of traditional medicines. However, the TH Act empowers the Minister responsible for the national Department of Health (after consultation with the Council) to make regulations relating to traditional medicines in order to protect the public and to ensure safety of use, administration or application.<sup>122</sup> In this manner the TH Act leaves room for developing the type of rules and regulations, envisioned by the WHO, for safety monitoring of traditional medicines and other THP therapies and products.

In chapter three of this paper, it was established that realisation of the right of access to health services places certain obligations upon the government. These include the obligation to enable monitoring and policing of THP since a system of rights without enforcement is merely an illusory right.<sup>123</sup> Under section 49(1)(g) of the TH Act it is an offence punishable by a fine or imprisonment of up to 12 months (or both) if a person who

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<sup>121</sup> TRM Strategy (n 17 above), 24.

<sup>122</sup> Sec 47(1)(j) of the TH Act (n 14 above).

<sup>123</sup> C Steiner (n 55 above) 14.

is not registered as a traditional health practitioner -

- (i) diagnoses, treats or offers to treat, or prescribes treatment or any cure for, cancer, HIV and AIDS or any other prescribed terminal disease;
- (ii) holds himself or herself out to be able to treat or cure cancer, HIV and AIDS or any other prescribed terminal disease or to prescribe treatment therefor; or
- (iii) holds out that any article, compound, traditional medicine or apparatus is or may be of value for the alleviation, curing or treatment of cancer, HIV and AIDS or any other prescribed terminal disease.

‘A number of traditional healers have seen a lucrative opportunity of ‘curing’ people living with HIV/AIDS (PWAs) from HIV/AIDS, in the absence of a cure by biomedicine and where a number of developing countries have not been able to provide anti-retroviral medication or adequate health care to those living with HIV/AIDS.’<sup>124</sup> Just such a situation arose in Malawi and the predominant attitude of government was to get rid of these charlatans. However, the obligation to respect the right to health includes the requirement that government refrains from prohibiting or impeding traditional preventive care, healing practices and medicines.<sup>125</sup> The TH Act provides a solution to this conundrum. By demanding that traditional health practitioners be registered, the TH Act has constructed a framework within which to monitor malpractice amongst traditional health practitioners.<sup>126</sup>

### **Lessons from the TH Act**

On the whole, there are several commendable aspects of the TH Act. The following features make the South African TH Act a worthy model upon which to frame comparable legislation in Malawi:

South Africa has ensured an improved quality of care through the establishment of a regulatory body that controls and licences THP; amongst its numerous other duties, the Council is tasked with setting professional and ethical norms and standards.<sup>127</sup> Generally, the TH Act aims at ensuring that THP comply with universally accepted health care norms

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<sup>124</sup> M Richter (n 20 above) 13.

<sup>125</sup> General Comment No. 14 (n 26 above) para 34.

<sup>126</sup> Sec 21(1) of the TH Act (n 14 above) stipulates that no one can practice as a traditional health practitioner unless they are registered.

<sup>127</sup> As above, sec 4(1) establishes the Interim Traditional Health Practitioners Council.

and values.<sup>128</sup>

The TH Act empowers traditional health practitioners to regulate their own practices.<sup>129</sup>

The TH Act has enabled the development of a regulatory framework to ensure the efficacy, safety and quality of traditional health care services. This includes the recording of details of traditional health practitioners in a register which is maintained by the Council.<sup>130</sup>

The TH Act ensures the development of standards within THP through the institution of training programmes prerequisite to qualifying as a practitioner. It provides for the management and control over the registration, training and conduct of practitioners, students and specified categories in the traditional health practitioners profession. Under the TH Act, traditional health practitioners are required to obtain minimum qualifications by virtue of examinations conducted by an accredited institution.<sup>131</sup> The Act even goes so far as to make provision for the continuing education of the practitioners.<sup>132</sup>

The TH Act makes provision for strong consumer and patient protection. A practitioner found guilty of improper or disgraceful conduct in accordance with the Act, risks being removed from the register.<sup>133</sup> The TH Act also establishes a complaint mechanism; any person can lay a complaint about the manner in which they have been treated by a registered traditional health practitioner or student.<sup>134</sup> Furthermore, under section 34(12), the imposition of a penalty by the Council is equivalent to a civil judgment of the magistrate's court.

The TH Act precludes non-registered traditional health practitioners from diagnosing or treating HIV, AIDS and any other terminal disease.<sup>135</sup> This creation of organisational structures and procedures makes it easier to control malpractice among the practitioners.

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<sup>128</sup> Sec 5(h) of the TH Act (n 14 above).

<sup>129</sup> As above, sec 7.

<sup>130</sup> As above, sec 6 spells out the functions of the Council.

<sup>131</sup> As above, sec 22.

<sup>132</sup> As above, sec 28.

<sup>133</sup> As above, sec 23(1)(g).

<sup>134</sup> As above, sec 29. Under sec 30 of the TH Act, the Council may institute an inquiry into any complaint, allegation or charge of unprofessional conduct against any person registered in terms of the Act and, on finding such person guilty of such conduct, to impose any of the penalties contemplated in sec 34.

<sup>135</sup> As above, sec 49(1)(g).

Lastly, the TH Act requires that there be coverage of THP by the state health insurance. This exemplifies a deliberate move towards an integrative system of collaboration between national health care and THP.<sup>136</sup>

## **Conclusion**

In general, the South African TH Act has made adequate provision for the various mechanisms that are essential to protecting and promoting THP. On the other hand, there are several significant shortcomings to the TH Act. The legislation seeks to enhance the skills of traditional health practitioners but does not make sufficient provision towards gathering scientific evidence concerning the efficacy of THP products and therapies. The only mention made of research into THP is under section 5(e) of the TH Act, where the objects of the Council are outlined.

The TH Act provides strong consumer and patient protection; but without actively facilitating research into THP the legislation fails to improve upon the information accessibility of THP. The CESCR expounded upon information accessibility and the right to health, stating that accessibility includes the right to seek, receive and impart information and ideas concerning health issues.<sup>137</sup> Accessibility and evaluation of THP products is challenging; this is especially true of herbal medicines, the effectiveness and quality of which can be influenced by numerous factors. Research into THP has been inadequate, resulting in paucity of data and inadequate development of methodology. This in turn has slowed development of THP.<sup>138</sup> THP policy or legislation must address the desperate need to research, conserve and diffuse THP.

Further to that, the non-recognition of THP as a cultural right entails that the focus of the legislation is not concerned with development of THP as an aspect of culture (this cultural aspect includes recognition and protection for the creators of THP). As a result the TH Act fails to make adequate provision for the conservation of this cultural heritage.<sup>139</sup>

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<sup>136</sup> Sec 42 of the TH Act (n 14 above).

<sup>137</sup> General Comment No. 14 (n 26 above) para 12(b)(iv).

<sup>138</sup> TRM Strategy (n 17 above) 3.

<sup>139</sup> This paper has not incorporated a discussion of intellectual property rights (IPRs) and traditional health knowledge, the scope of the discussion having been limited. Nevertheless, it is important to note that the right to culture includes IPRs and thus policy or legislative action in relation to THP ought to cover IPRs.

The TH Act has gone a long way towards meeting the legislative needs identified throughout the present discussion. The suggested weaknesses in the legislation do not detract from the giant step South Africa has taken in the recognition and protection of THP. There are definitely lessons Malawi can learn from that.

## *Chapter 5*

### **CONCLUSION**

In outlining the research questions posed by the study it was stated that the underpinning intention of the paper is to investigate whether THP form an aspect of the right to culture and if these practices deserve special recognition and regulation as such. The second task posed was to explore whether non-regulation impedes THP, thus violating the right to health. In the examination of these questions, guided by the asserted objectives of the paper, several conclusions have been reached.

It has been established that the characteristics of THP relate directly to the various accepted criteria of culture. The most notable being the extragenetic transmission of culture. Further substantiation of this point was derived from the various international instruments that specifically make mention of THP as an aspect of culture. The UNESCO Convention indicates that intangible cultural heritage is manifested in social practices and rituals, as well as knowledge and practices concerning nature and the universe.<sup>140</sup> The Cultural Charter prioritises the need to develop THP, traditional medicines and pharmacopoeia.<sup>141</sup> The second chapter also discussed the international, regional and national legal frameworks protecting the right to culture: the UDHR, the ICESCR, the ACHPR, the Cultural Charter and the Malawian Constitution all contain specific provisions on the right to culture. Most significantly, the Constitution of Malawi guarantees the right to development of culture as a facet of the right to development.<sup>142</sup>

In the third chapter, the health impact resulting from non-regulation of THP was assessed. As pointed out by Nyamwaya, 'in order for traditional medicine to have a bigger impact on the health of [Africans] it should have full official recognition by the government and receive appropriate technical and other support. Recognition, support and regulation can

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<sup>140</sup> Art 2 (2) of the UNESCO Convention (n 51 above).

<sup>141</sup> Art 6(1)(g) of the Cultural Charter (n 39 above).

<sup>142</sup> Art 30 of the Constitution of Malawi.

provide additional legitimacy for traditional medicine, a condition for its further development.<sup>143</sup> Therefore it was confirmed that non-regulation of THP amounts to a retrogressive measure in the realisation of the right to health. Especially since the obligation to fulfil requires governments to adopt appropriate legislative and other measures towards the full realisation of the right to health.<sup>144</sup> It was argued that the minimum essential level of ensuring access to health services incorporates a duty to recognise and regulate THP.

Githae, a traditional health practitioner and proprietor of Karati Herbal Clinics based in Naivasha, Kenya observed that: 'herbalists lack a statutory provision to safeguard/protect them ... for herbal therapy to work and be more beneficial to the human race it should have the total support of patients, scientific researchers, university trained clinicians and the government.'<sup>145</sup> His statement sums up the conclusion reached in the present study: that THP cannot develop without the support of the government. If we lose these practices, either through non-regulation or mal-regulation, we risk destroying our cultural identity, that essential component of humanity. Furthermore, the involvement of THP is crucial in the fight against HIV/AIDS. As Gbodossou *et al* point out, allopathic medicine is inadequate to deal with the multiple aspects of the pandemic; 'African traditional medicine is a major part of an African solution for this African epidemic.'<sup>146</sup>

## Recommendations

National policies and legal mechanisms relating to THP must be put in place to promote and maintain good practice; to ensure that access to THP is equitable, and that the authenticity, safety and efficacy of any therapies used is assured. Without such policies, THP is practised exclusive of government oversight and without patient or consumer protection.<sup>147</sup> This official recognition of THP must translate into optimised and upgraded skills of the traditional health practitioners and the protection and preservation of indigenous THP knowledge.

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<sup>143</sup> D Nyamwaya (n 4 above) 36.

<sup>144</sup> General Comment No. 14 (n 26 above) para 33.

<sup>145</sup> J Githae 'Ethnomedical practice in Kenya: The case of the Karati Rural Service Centre' in Sindiga (n 4 above) 55, 63.

<sup>146</sup> E Gbodossou *et al* (n 1 above) 8.

<sup>147</sup> TRM Strategy (n 17 above) 20.

The author advances several recommendations ensuing from this study. These proposals echo those of the myriad of international, regional and national organisations calling for the recognition and development of THP. However, the suggestions put forward build upon the discussion of the right to culture and to health; and result from the analysis of the South African TH Act as a possible model for Malawian policy and legislative responses to THP. These recommendations are addressed to all African nations generally, and to the Government of Malawi (GoM) specifically:

- The GoM should elaborate national policy and a regulatory framework to manage THP. It is necessary to develop procedures and mechanisms for the affirmation and enjoyment of specific cultural rights of peoples. This framework should articulate THP as a specific cultural right, and the constitutionally guaranteed development of the right to culture must underpin any policy or legislative measures relating to THP. To safeguard THP as an intangible cultural heritage the GoM must take measures aimed at ensuring their viability; these include the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, and revitalisation of the various aspects of such heritage.<sup>148</sup>
- The GoM should adopt a general policy aimed at promoting the function of intangible cultural heritage in society, and at integrating the safeguarding of such heritage into planning programmes; designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in the country; foster scientific, technical and artistic studies, as well as research methodologies, with a view to effective safeguarding of the intangible cultural heritage, in particular the intangible cultural heritage in danger; adopt appropriate legal, technical, administrative and financial measures aimed at ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage; and, establish documentation institutions for the intangible cultural heritage and facilitate access to them.<sup>149</sup>
- Using the TH Act for guidance, the GoM should develop a framework with the aim of

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<sup>148</sup> See art 2.3 of the UNESCO Convention defining 'safeguarding' (n 51 above).

<sup>149</sup> As above, art 13.

integrating THP into national healthcare systems. This entails the creation of regulatory and legal mechanisms, such as those dealing with licensing and registration of traditional health practitioners. The development of organisational structures and procedures will facilitate monitoring of misconduct among the practitioners. More specifically, provision must be made for the education and training of traditional health practitioners; coverage of THP by the state health insurance; and, consideration of any IPRs involved. The framework must also ensure allocation of resources for THP development and capacity building.<sup>150</sup>

- It is recommended that the GoM take steps to address the safety, efficacy and quality of THP. This involves research into THP therapies and products; regulation and registration of traditional medicines; and, the development of national standards to ensure the safety, efficacy and quality control of THP therapies and products.<sup>151</sup>

Despite the various problems with THP, these practices have the capacity to meet the four criteria of availability, accessibility, acceptability and quality. 'Our priorities for the provision of health facilities for our people should be to use all the resources available to us.'<sup>152</sup> Access to THP must be increased to help improve the national health status in Malawi. The GoM has explicit obligations to realise the right to health, albeit progressively. THP represent a means of achieving a minimum core essential of the right to access health services, an ideal to which the GoM is constitutionally pledged. Through the recognition, promotion, protection and development of THP the GoM can make the right to culture and the right to health a practical reality to more than half of the nation's peoples.

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<sup>150</sup> TRM Strategy (n 17 above) 20-22.

<sup>151</sup> As above.

<sup>152</sup> S Baquar (n 88 above) 174.

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