LEGAL PROBLEMS AROUND ALTERNATIVE MEDICINE *)

As a follow-up to my lecture about new legislation for medical practice, I will now say something more in particular about the problems involved in the application of alternative medicine. The focus will be, first, on the position of alternative medicine in the present legislation and in the proposed new law, and second, on the present and future legal position of the persons who practise alternative medicine.

When we speak of alternative medicine, we think primarily of homoeopathy, anthroposophic medicine, acupuncture and paranormal medicine. Physicians also practise some of those treatments, even though their university education has not prepared them for it. Whether alternative medicine is practiced by physicians or by non-physicians, it is important from a legal point of view. The term 'alternative', recently become popular, represents something of a climax in terminology. At the time when such matters were still spoken of in less subtle terms, quackery was the common word. Later expressions were "not scientifically justified", "non-admiral" and "informal", terms which still held a shade of disapprobement. That disappeared when such terms as "orthodox" and "the peripheries of medicine" came into use. The latest ward "alternative" seems proof of recognition, at least in everyday language. But does the law also recognize alternative medicine? Let us first consider the current legislation in the Netherlands.

Existing legislation

The 1865 Practice of Medicine Act, still in force, gives the right to practise medicine only to persons who have been qualified by law. As I pointed out in my previous lecture, the first category are the physicians, who are qualified for the entire domain of medicine, including alternative cures. Then comes the category of dentists, who are qualified for the entire range of dentistry, again including alternative treatments. Midwives and auxiliaries, and paramedical practitioners, are the remaining qualified groups. All others who practise medicine as their profession without necessity, are punishable. The concepts "medicine", "profession" and "without necessity" call for some comments.

The concept of "medicine" is

interpreted broadly in jurisprudence as any piece of advice given or deed performed for the purpose of curing a patient of a disease. All alternative treatments mentioned above come under that heading. The fact that with a few exceptions they are not taught at universities does not exclude them from the concept of medicine. Only faith healing is excluded. By “profession” is understood the continuous, more or less regular, practice of medicine, whether or not against payment. Only professional actions are included, not incidental advice. Unqualified healers have often tried to prove that their work is not done “without necessity” by pointing out that the patient had in vain tried to be cured by a physician, so that the unqualified healer had indeed been compelled to give help when asked. However, the Judge has time and again rejected such appeals.

The broad interpretation of the above concepts medicine, profession, and without necessity, has always reduced the practice of alternative cures by unqualified persons to a punishable act. That does not mean, however, that unqualified practitioners of alternative medicine are invariably prosecuted and brought to trial. Indeed, in the Netherlands a few thousand persons are estimated to practice medicine professionally without any qualification whatsoever. The number of unqualified actions is estimated at many millions a year, which is still only a minor proportion of the actions performed by qualified persons. So long as demonstrable harm is done to patients, the activities of paranormal healers, herb doctors, etc., are hardly considered punishable by any more in wide circles of society. Moreover, more and more people are convinced that the patients own responsibility must stretch to their freedom to look for help wherever they think they can find it. And if patients are free to seek help, so others should be free to give that help. On the other hand most people believe that people are a need of help, who for that very reason are in a weak position, must be protected from the dangers that could overtake them under unlimited liberty.

New legislation

In my previous lecture I pointed out that the BIG bill now being prepared will largely abolish the prohibition for unqualified persons to practise medicine, though some areas, such as surgery and midwifery, remain reserved to those formally qualified. The BIG bill does not refer to alternative cures, nor are they recognised as such. It is very important to point out that explicitly. That the abolition of prohibition gives non-qualified persons some freedom to perform medical acts does not mean that the BIG bill thereby declares those persons qualified. Qualification can follow only from recognising the profession by or in virtue of the BIG bill. Now what does that imply for the practice of alternative cures?

Now as well as in the future, physicians or dentists are absolutely qualified to practise such alternative treatments as homeopathy or acupuncture, because in the law no list of treatments they are qualified to apply. The entire range of medicine or dentistry is even to them, even though they tend to restrict themselves to that section of medicine or dentistry for which they have been trained or in which they have gained experience later. By contrast, the range of competency of practitioners of other professions regulated by or in virtue of the BIG, is accurately defined, and mostly does not stretch to the application of alternative treatments.

Those whose profession is not regulated by or in virtue of the BIG are free to apply such treatments, but there is no question of recognition in the legal sense. They remain anonymous, so to speak, and will not get any certificate of competency until their profession is recognised by the BIG. That could very well happen in the future. The formal recognition of acupuncture as an independent profession, for instance, has been applied for and is likely to be realised. The conditions are that a training programme must be drawn up, and that the regulation of the profession is considered to be in the interest of national health. For paranormal healers a training programme will be difficult to draw up since they appeal to their alleged supernatural gifts. The present version of the BIG bill does not yet recognise any profession occupied mostly with alternative medicine, nor can such recognition be expected at short delay. For the time being, the practitioners of these professions will have to be content with the abolishment of the prohibition, which at any rate signifies a societal recognition of their activities.

The cost aspect

Another factor that is important to the evolution of alternative medicine is the political interest it is raising. From questionable scientific research certain political circles have drawn the conclusion that alternative treatments are much cheaper than regular ones. By giving scope to alternative medicine they hope to achieve economics in health care. Others, drawing from different scientific sources, are persuaded that the application of alternative medicine will only lead to higher costs. Their reasoning is that patients would first pass through the entire regular medical circuit. If no cure sets in — whether or not inevitably — they will appeal to persons practising alternative medicine. One thing is sure: a great deal of money is being spent in the alternative circuit. To an increasing extent, sickness insurers now reimburse the cost of alternative treatments, mostly on condition that it is applied by, or with the approval of, a qualified physician. A situation that is bound to give rise to conflicts
between physicians and non-physicians.

Physicians practising alternative medicine

Besides several thousands of alternative healers without legal qualification, nearly 2000 physicians in the Netherlands are now practising alternative medicine. Sometimes exclusively, in which case they mostly act as consultative physicians. There are also normal family doctors or specialists who have added alternative cures to their range, as supplements. At first, that was strictly the practice of doctors with a special attitude to sickness and health, who had accepted that Mao should be approached holistically, as a whole of body and spirit, rather than as a system of bones, muscles and organs. That is in particular the view of homeopathic and anthroposophic physicians. Lately, other physicians have taken to alternative medicine, probably to reinforce their competitive position. Patients appreciate it if their doctor can offer something outside the ordinary arsenal of therapies, for instance acupunctures.

As a matter of fact, the official, regular medical profession has always been strongly opposed to alternative medicine. Their strongest objection is that alternative cures have never been scientifically proven. They do not deny that patients may benefit, but then, they may also benefit from sham compounds, so-called placebos. The suggestion is made that they do you good, and that is why they work. That representation seems a bit too naive, however. Equally naive seems the belief that, once regular doctors devote enough time and attention to their patients, the flow to alternative practitioners will peter out naturally. Obviously human beings have the need, «specifically now that medical care is becoming highly technified and patients appear to be objects of care rather than people, obviously human beings feel the need to call in the aid of persons who approach them otherwise, sometimes more naturally.»

While in general rejecting the idea of alternative medicine, the regular medical profession considers that if it is to be practised at all, it should preferably be done by qualified physicians. On account of their medical training, physicians are supposed to be better equipped than others to make a justified diagnosis. They can also judge better whether alternative treatment is permissible and possible, or whether the patient rather needs ordinary regular medical care. A healer who is no physician may believe his particular alternative treatment to be a cure for all disorders; examples have been found in practice. If a patient is thus kept, from necessary regular medical care, the result may be fatal. Another reason to prefer physicians to non-physicians for the practice of alternative cures is that physicians are subject to medical discipline and can be called to account. That, indeed, is why in the Netherlands the physicians' general professional association, the Royal Dutch Medical Association - the Dutch IDI - and the organisation of alternative physicians are still negotiating to find a way to consolidate the latter's market position vis-à-vis that of non-physicians. One solution suggested is to recognise alternative physicians by setting a mark against their registration as a family doctor or specialist. The snag is that physicians who are not family doctors or specialists, but mostly act as consultative physicians, cannot obtain such a mark. Whether the organisation of alternative physicians will accept such a split in their ranks, is highly questionable. Besides, some regular physicians, on hearing of this possible solution, have let it become known that they will withdraw from the Dutch Medical Association if it is adopted. Indeed, the problems involved in according some acknowledgement to alternative physicians and thus to the value of alternative treatments have not yet been overcome.

The remuneration of services rendered by alternative physicians poses another problem. Because they tend to approach their patients differently, taking ample time to talk with them, the usual consultation fee is relatively too low. They have been trying for a long time to set their fees adjusted, but so far the regular medical associations of family doctors and specialists have not been co-operative. Perhaps a satisfactory agreement can nevertheless be reached with sickness insurance companies. I have already observed that alternative cures are finding favour with politicians, so that pressure can be expected from that side. A final problem refers to medical discipline. Alternative physicians, like all other doctors, are subject to medical discipline. Their criticism is that disciplinary boards tend to be composed of physicians who practise no alternative medicine and are probably greatly prejudiced against it. For that reason, alternative physicians believe that their practices are condemned more readily than those of other physicians. An analysis of the disciplinary judgments in which alternative physicians were involved, disproves that criticism: as far as alternative physicians have been condemned, it was for actions contrary to the normal duties of any physician. The Dutch Medical Association has therefore made it a condition for co-operating in any recognition of physicians with alternative practices, that such physicians subject themselves to the same qualitative standards and behavioural rules as regular physicians.

The future of the practice of alternative medicine is uncertain. The favourable view of political circles and the gradual turnabout of the regular medical sector should be set off against the fact that the run of many patients to the alternative circuit is a prosperity phenomenon.
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The topic to be discussed here is very interesting, but difficult and very sensitive. On the other side this topic is important to be solved from the legal point of view, because human interest is involved here.

There are four main points in Prof. van der Mijn's paper, i.e.: 1. the position of alternative medicine in the present and in the propose new law in the Netherlands; 2. the present and future legal position of the person who practise alternative medicine.

3. the question whether the law recognises alternative medicine.
4. the question whether alternative medicine should preferably be practised by qualified physicians.

What is alternative medicine? I think there should be a consensus about the meaning of alternative medicine. There are several words mentioned as synonym like "quackery", "not scientifically justified", "non academic", "informal" etc. It is true that alternative medicine is "not scientifically justified", "non academic" and "informal", but those words are not clear enough to give a description what alternative medicine is.

What is exactly alternative medicine?

Alternative medicine is an alternative to the patient to choose another medicine besides the regular medicine by qualified physicians. It is indeed "informal" or "non academic" if seen from the educational point of view, because alternative medicine does not pass through formal education. Even the "science" is not taught in the university.

In fact alternative medicine is any advice given or deed performed for the purpose of curing a patient of a disease (like what qualified physicians also do, but) by heuristics who appeal to their supernatural gifts. It is not impossible that qualified physicians practise alternative medicine: examples have been found in Indonesia. If you take the opportunity to read the papers then you will agree it is not polite to mention names.

The alternative healers depend only on his supernatural powers which come and vanish unexpectantly. In fact they usually know nothing about medicine. So if once they lose their supernatural powers they cannot heal anymore.

In the Netherlands the activities of paranormal healers are not prohibited as long as no demonstrable harm is done to patients. Yet the existing legislation always reduced the practice of alternative cures by unqualified persons to a punishable act.

What are exactly the legal problems around alternative medicine?

If we talk about legal problems then we talk about the protection of human interest and that means about rights and obligations.

First of all about the meaning of alternative medicine I have tried to formulate as stated above.

Then the question: who needs protection or who's interest should be protected? The raison d'etre of law is conflict of human interest. Within a conflict each one has the interest to be protected by law.

Who are involved around alternative medicine?

There are three parties involved: the patient, the alternative healer, the qualified physician and of course the society. All of them have interests which are connected to each other.

The patient's interest is that his disease is to be cured. And therefore he is free to seek help to anyone who is willing and able to cure him for the sake of his health or life. He is free to go to a qualified physician as well as to an alternative healer. That is his right and nobody can forbid him. But usually people in need of help are in a weak position. So he must be protected from the dangers that could threaten him as well as from obstacles to seek help.

Some patients go straight to qualified physicians to cure their disease. But if the patient in vain
tried to be cured by a qualified physician then if he went to an alternative healer he is not to be blamed.

It is not rare that a patient is not recovered although he has been treated by a qualified physician for years. And then after he is treated by an alternative healer he is recovered. Such things happen. Unbelievable! But most people believe. Indeed it is difficult to prove the causality between the treatment and the recovery. Does the treatment cause the recovery? That is hard to tell. Alternative cures have never been scientifically proven. It could happen that the patient is not cured at all.

Sometimes patients go straight to alternative healers with several considerations: afraid to go to physicians, no money or convinced that he will be recovered. The possibility here is much the same: the patient will be recovered or not. Finally it is up to the Lord above.

It is not always true that a great deal of money is being spent in the alternative circuit, as least in Indonesia. What is true is that a lot of money is being spent in the purchase of medicine and paying the physician, especially specialists. Most people can only buy half of the prescription the physician prescribes, because of the high prices of the patient medicines.

Most of the alternative healers don’t collect money from their patients. Most of them are urged by their desire to help others: it is pure altruistic. If there is an alternative healer who collects money from his patients this is supposed to be a substitute, of the price of the medicine, which is not much.

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If there is a great deal of money being spent in the alternative circuit, then it is for sure swindle.

Usually the alternative cure goes on orally, but it is not impossible that it goes on by remote control from a distance. Unbelievable. Again it is difficult to prove that the recovery is the result of the remote control healing by the alternative healer.

So the patient should always have the opportunity to seek help to a qualified physician as well as to an alternative healer. This is the patient’s interest which must be protected. Of course he must be protected against demonstrable harm done by alternative healers.

The second party is the alternative healer. If patients are free to seek help to qualified physicians as well as alternative healers, they should be free too to give that help and they can’t be blamed. This is humanity, one of the foundations of Pancasila. This should be considered when we make a legislation.

An alternative healer doesn’t practise for his lifetime. It is not impossible that he looses his supernatural powers, so that at a time he can’t heal a patient anymore. It could happen that an alternative healer looses his supernatural powers suddenly, so that he will lose his patients.

Should alternative healers be protected? Yes. They have the right to exist to help others. In this country people still believe in supernatural powers and alternative healers. It is no surprise that the lower as well as the higher class in the social stratum believe in this (examples have been found, but it is not polite to mention names). So the existence of alternative healers should be recognised by the law.

Protection of alternative healers consists of regulation by the law, among other things supervision. Article 14/4 of the existing legislation in Indonesia, that is Undang-undang no. 9 of 1960 Pokok-pokok Kesehatan says that the efforts to cure based on science as well as other ways than medical science are supervised by the government so that the society is not threatened.

Should alternative medicine preferably be done by qualified physicians? If a qualified physician practise alternative medicine, may he have no harm. But if qualified physicians only may practice alternative medicine, it means that alternative healers are prohibited to practise alternative medicine and it means that alternative healers are not acknowledged. That is not fair.

Should a training programme then be drawn up for the alternative healers? It is already said that alternative healers depend on their supernatural powers only. They (the non-qualified alternative healers) exactly know nothing about medicine. If they loose their supernatural powers they can’t heal anymore and will loose their patients. Has a training programme any use?

The third party is the qualified physicians. He should be protected against the competition of the alternative healers. I think they should not be afraid that they will bepushed aside by the alternative healers.

The society should not be threatened by the existence of the alternative healers.

Some conclusions.

1. The law should recognise the existence of alternative medicine.

2. Alternative medicine is a need at least for the time being in this country.

3. The alternative healers should be protected.

4. There is already a regulation about the supervision on alternative healers, in order not to cause demonstrable harm to patients.

5. It is no use to draw a training programme for alternative healers.