The Traditional Health Practitioners Act (No 22 of 2007): A South African Constitutional Mishap?

Author : Louw, Duvenhage

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Gabriel Louw*, Andrè Duvenhage**

* Research Associate, Focus Area Social Transformation, Faculty of Arts, Potchefstroom Campus, North-West University, Potchefstroom, South Africa
** Research Director, Focus Area Social Transformation, Faculty of Arts, Potchefstroom Campus, North-West University, Potchefstroom, South Africa

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Research

Corresponding Author:
Prof Dr Gabriel Louw
Focus Area 7.2 Sustainable Social Development
Faculty of Arts
Potchefstroom Campus, North-West University, Potchefstroom, South Africa
Email profgplouw[at]gmail.com,
Cell +27 83 626 8005, South Africa

Abstract

Background

The Traditional Health Practitioners Act (Act No 22, 2007), which elicits controversy in the South African healthcare and public sector since proclamation, went untested through the legislature, driven inside the post-1994 socio-political dispensation.. No previous in-depth studies have been identified.

Aims

The aim of this study was to determine and to reflect the Act's long term legal implications for the already statutory health professions and the public: specific with the focus on the Constitution and other legislations and possible ways to oppose it

Methods

This is an exploratory and descriptive research, in line with the modern-day history approach of investigation and reviewing research, using contemporary reports, news papers and articles as primary resources to reflect on the situation, thinking, opinions, trends and activities around Act No 22 and its implications on the Constitution and citizen's rights. The focus was also to put Act No 22 in a future in perspective. Findings are represented in narrative form.

Results

Act No 22 (2007) was promulgated without an applicable and appropriate scientific needs-analysis. The Act seems to stand to a great extent in conflict with the Constitution as well as various other Acts, like the Witchcraft Suppression Act (No 3, 1957).

Conclusions

The Act is still today, nearly a decade after promulgation, not fully active. It is a Constitutional mishap. Notwithstanding its constitutional controversy, the Act's political sanction by governmental agencies and political leaders will ensure that it will not vanish easily from the South African law books.

Keywords

Apartheid, constitution, human rights, post-1994 dispensation, traditional healer and religions

What this study adds:

1. What is known about the subject?
Little research was done on the possible transgressing by Act No 22 of the South African Constitution and the possibility in future of misuses by the traditional healing fraternity of Act No 22 to benefit their quackery.
2. What new information is offered by this study?
It clearly described the legal misinterpretations of the Constitution by the traditional healing fraternity to serve their improper interests.
3. What are the implications for research, policy, or practice?
The status of traditional healing as a statutory profession is in doubt; the same can be said of the legal status of Act No 22.

Background

Act no 22 (2007) was shaped by two strategy manifestos of the African National Congress (ANC), namely the Manifesto of the National Democratic Revolution (NDR) of 1969 and the National Health Plan (NHP) of 1994. Never was there over the years deviated an inch from these master-plans in the execution of political and cultural preferences, notwithstanding sound logical, legal and financial argumentation against it. This fixed viewpoint malformed thinking around the true rights of individuals and groups, democracy and the correct interpretation of the various clauses of the Constitution.1-13
The aim of this exploratory and descriptive research was to determine if the impact of Act No 22 (2008) on the Constitution and other South African Acts can makes these laws mal-functioning.

Methods

Books and articles on the South African traditional healing are very limited; it offers mostly trivial, old, and superficial information.14 This lack of sound and in-depth research findings on the traditional healer in the Republic of South Africa (RSA) had necessitated a study that builds a viewpoint and forms a conclusion from the ground, derived directly from the evidence as it appears as the research developed. The exploratory and descriptive research approach, as used in modern-day historical studies of investigation and reviewing information, was the most appropriate. Here-through contemporary news papers, reports and articles were used as primary resources to reflect on the impact of Act No 22 and traditional healing on specific the functioning of the Constitution as well as the present-day life of South Africans.15-16
The findings were offered in narrative form.

Results

Act No 22 (2007) is still untested today

A good indication of the political skim-off and misdirected thinking and doing in general since the early 1960s on the traditional healer's competence, is reflected by the designing and compiling of Act 22. An in-depth study to determine the true needs and applicability of the Act was never done. The problem was side-stepped with two superficial enquiries, supported by various road shows between 1997 and 1998.1-3,17-23

The final decision to construct the Act was based on the outcome of five basic questions, put to the public.1,3,17, 18,23,24,25,26,27

They are:

The desirability of a statutory council for traditional healers;

The recognition of medical certificates, issued by traditional healers;

The recognition of the claims of traditional healers by medical schemes;

The formal legal recognition of traditional healers as a medical source;

The establishment of an interim council for the regulation of traditional healers as a health profession.

Negative indicators about the traditional health practitioner's future statutory recognizing in terms of Act No 22 (2007), as well as the future regulation of traditional healing as a formal healthcare sector, were not thoroughly considered in the proposal of the Act. Specific a lack in need for traditional healers, various non-described-types of traditional healers in practice, a lack of present-day formal training programs, training standards and a functioning system, risks of traditional treatment and concoctions to the public and the health sector, the negative effect of the traditional healer on the practices of the already statutory recognized health practitioners, especially medical doctors, as well as a lack on in-depth research on the possible negative role to play in healthcare, were ignored. Thoughts how to incorporate the traditional healer into the already established allied professions, like homoeopathy, naturopathy, phytotherapy and ethno-medicine, and thus to avoid duplication in training and health practitioner-types, as well the limiting of the immense development costs around the separate recognition of the traditional healer, were also ignored.1-3,5,11,17,18,28-43

This legalizing of traditional healing into the established health sector, was driven under the banner of Section 31(1) of the Constitution of South Africa. This regulation, it was argued, declares that every person, belonging to a cultural community, may not be denied, together with the other members of his community, the right to enjoy their culture. This clause was and is still interpreted by the propagandists of traditional healing as the bestowing of unchallengeable constitutional rights on the traditional healer to practice his trade. It is also argued that it offers the right for the community, to whom the healer belongs, to demand for his services and to use exclusive his services as traditional healer.25,44-46

These beliefs by the traditional healer and his followers in his right to be an official health provider and to may practice freely and fully at all time his trade, were further driven and supported by the Patients Charter 2002 of the Department of Health (DOH). This Charter emphasis the right of patients to be free to choose a particular type of healthcare practitioner for services, notwithstanding the practitioner's risk impact to healthcare or the user's life. It seems in this context as if the Charter itself can be a constitutional mishap, as Act No 22 (2007) seems already is doing.10,18,25,47-51

Present-day law-transgressing by offering official work and training appointments to traditional healers

The above opportunistic and scornful attitudes about the alleged rights and status of the traditional healer, as reflected inside as well as outside the traditional healthcare setup, led thereto that various governmental, semi-governmental and other agencies and bodies had even signed legal agreements with traditional healers to work in an official health team or to formally train traditional healers. Examples of these agreements are with a well-known university and two prominent municipalities. One of these municipalities appointed traditional medicine managers to integrate traditional healing and allopathic medicine in its health system and to promote two-way referrals and collaboration between the municipal's clinics and traditional healers. The University is alleged to have a traditional healer on its staff, working in its counselling and wellness-program. These actions are alarming and irresponsible; it are risky and must

be evaluated against the Constitution's Human Rights Manifesto.10, 24, 25, 31, 44, 45, 47, 51-53
In retrospect, it must be noted, that, all though Act 22 (2007) was promulgated, the Act is not fully activated at this stage (2016) regarding a functioning register for traditional healers. It is thus still illegal, in terms of the various Health Acts, for the already registered health practitioners to work with the unregistered traditional healer. Anybody, municipality, university or individual, doing so, put the health and life of their patients at risk and will not have any indemnity against lawsuits for malpractice with this delinquent behaviour.30,44,54-57
Subtle misuses of legal definitions in self-promotion and reflecting of possession of ability by the traditional healer
Indirect law-transgressing is further well illustrated in the misuses of certain clauses of the Constitution, the Civil Union Act (No 17, 2007), as well as Act No 22 by the traditional fraternity to present themselves to the public as skilled and thus acceptable by the statutory healthcare.
Here it is specific the actions of certain traditional healers organizations which reflect these misuses of the Constitution very well in their public ethic-declarations and practice-rights communications. Specific are those clauses hauled in under the traditional healings umbrella of "exclusive rights to can and may practice", with the misleading prefix in the Constitution that stipulates that "everyone has a right to equality, human dignity, free association, privacy, religion, beliefs and opinions, trade preferences, occupations and professions, preference life-styles, fair labour practices and access to preferred healthcare", notwithstanding that they are knowing very well that these clauses are not fully applicable on the traditional healers unscientific and risky practices. 1,3,11,17,24,44,45
These legal misuses are also very subtle reflected by traditional health fraternity communications in their efforts to drag in Act No 22's description of the representative of the Health Professional Council of South Africa (HPCSA) the formal recognition of traditional healing by the medical and pharmaceutical fraternities. The impression is also subtle left that the HPCSA and SAPC recognize the traditional healer as an independent health practitioner, notwithstanding that traditional healers know very well that these representatives, sitting on the THPCSA, is required by Section 7 of Act No 22 solely to oversee that the THPCSA and its practitioners are not violating the legal rights and privileges of the already statutory recognized health practitioners.44,55,56
Constitutional misuses have limits, even for the traditional healer in New South Africa
Constitutional misuses have limits; it also does not give free-booting to the traditional healer to practice as he feels. First, because he is still an unregulated practitioner, one who is clearly violating many of the country's health laws and as such must be controlled. Second, because other citizens of South Africa also have rights, privileges and freedom, equal to that of the traditional healer, which must be protected. Sections 12(2) and 32(1) (b) of Act No 108 (1992), a pre-1994 version of the Constitution, are clear and loud about this.50
There is great difference between private and public rights, with the last mentioned as favoured. Differences and uniqueness in culture, person, finance and lifestyles between South Africans, as the traditional healer tries to profess about him self since 1994, cannot be addressed or solved by misuses of the Constitution, as the government blindly did with the promulgation of Act No 22 and the official recognition of the traditional healer. Not even the Constitution can bring equality, as the academic and human activist, Dr Danny Titus, clearly point-out when he states that South Africans cannot argue away their true differences with the argument that everyone is equal before the law: South Africans are just too unequal and need another address for individual rights.57
The Nobel-laureate Milton Freedman also warned long ago that a society that considers bluntly equality higher than the individual's freedom [in this case safe medicines versus medical concoctions], will end without any one of the two.58
It seems as if there is confusion in the mind-sets of the post-1994 government about outright equality for every South African and to how to differentiate when conferring such a right. It is ill-considered to give unlimited rights to a specific individual, here the traditional healer, knowing well the person can be a danger to the health of others.5,59-64
Constitution experts, Prof. Marinus Wiechers and Prof. Koos Malan, identified clearly this mind-set, which allows that the law-abiding, good and sound person's rights and claims are sacrificed, to serve a

pretended ideal state of equality. Malan pinpoints this pretended equal-state not as a correction-action-state, but as a consuming-governmental-state, that devastating all justice doings. The intention is the disregard of all the rights and claims of the good as well as the problematic individual. This devastator, it seems, is now inside formal healthcare with the traditional healer and Act No 22.62-64

Act No 22 is political, not cultural orientated

It is argued by the propagandists of traditional healing that traditional healing is an essential cultural demand by the South African society, free of politics. The NDR (1969) contradicts this free of political meddling argument. This political document, which had given birth to Act No 22 and formulated in the Apartheid regime's most notorious time of the suppression of the South African majority, clearly had as an aim and a vision the establishment of pro-African healthcare services and institutes, one that includes traditional healing.1-3,6,8,10-13,17,24,28,29,33-38,49,65,66

The whole 1969-thinking was executed by a small, in exiled political leadership, who empowered themselves to think, right or wrong, on behalf of the voiceless and vote-less majority at home; an autocratic decision-making, possible acceptable by the majority in that time of suffering and uncertainty. But the demolishing of Apartheid in 1994 and the end of barriers on political, economical, educational and healthcare, brought political rights in decision-making direct to the till-then side-lined majority. These changes also brought enormous new mind-sets, more and more away from the 1969 autocratic leadership's thinking, especially on the outdated healthcare, cultural and political thinking of 1969. South Africans, now free to think as they choose, become modern, also in their healthcare use. Traditional healing, together with other pre-modern remnants of healings and religions, disappeared from their mindsets.64,68-75,125?

Hereto it seems that the 1969-leadership, now elders but with some still in political power, failed to change also and hang on to outdated and warped thinking on the supernatural, witches and traditional healing; not only because they believe in it, but primary because they see it as a matter to stay in power and to serve self-interests. Act No 22 is such a political behavioural-upkeep, notwithstanding that these leaders knowingly transgress Article 16 of the Constitution and the Code of Ethics for Members of the Executive, as prescribed by the Ethics Act (No 82, 1990).4,49,51,55,67,76-87

Is Act No 22 (2007): a Constitutional mishap?

Act No 22 was a well-planned legal and promotion exercise which will bring the pre-modern traditional healer inside the formal health sector, equal to the modern-day health practitioner. This all-over-forcing-down of the traditional healer, also shows the official disregard for the poor, uneducated individual, who is not only deprived by the government of medical and life-aids, but is now also left with the unscrupulous traditional healer and his dangerous concoction. 4,49,51,55,67,76-87

Only the post-1994 government's immediate personal and political interests are served with the recognition of the traditional healer: its recognition as a specific healer's type is not equal to the uplifting of the poor or uneducated individual. Uplifting, equality and non-discrimination are three separate entities; to be a sole entity, uplifting and non-discrimination are prerequisites, not ill-considered equality as the government tries to do. To stretch certain clauses of the Constitution, Act No 22 and other legal rules to promote and to establish traditional healing, are dangerous.49,59,62-64,88-90

The present constitutional mishap of the South African political-legal system cuts to the heart of a society still under construction. This mishap forced emeritus-judge Bernard Ngoepe to react on how the Constitution is misunderstood, misused and disrespected, by saying that some South Africans think that the Constitution gives them rights without limitations, an excuse through which they can get everything for nothing. It is clear for Ngoepe that some South Africans, the public as well as politicians, have a problem in the way they understand and apply the Constitution. Act No 22 and traditional healing is surely such an example.91,92

Opposition in the past to Act No 22

Opposition to the Act was so far minimal, notwithstanding the serious consequences it holds for the established health practitioners, especially the medical doctor. This poor reaction to the Act can be described to various obstructions:

First, critic on the government is choked; summarily ignored and executive decisions are taken one-sided, basically of the overpowering majority of the ANC in the Parliament.18,21,49,89

Second, critic from especially journalists and academics, is strong, but with very little positive outcome. In this concern there is always the fear of victimizing. At the moment these objection-actions seem just not strong enough to obtain a turn-around. More organized actions are needed, but the question is what really can be done to nullify Act No 22 (2007).93-96

Possible future actions against Act No 22

Submissions to Parliament

It is doubtful if any sympathy would be found at Parliament and its lawmakers for the repealing of the Act, seeing that it was they who had put the present Act through Parliament in 2003 and did nothing to oppose it. The present ANC-led government's disrespect for the Constitution and basic rights on health safety, as the traditional healer demonstrates, together with rejections of appeal to rectify one-sided decisions, will surely makes any direct appeal by the medical fraternity to Parliament on the Act nil and void. This concern is confirmed by the action of Parliament to ignore the legal presence of the Witchcraft Suppression Act (NO 3, 1957) when promulgation Act No 22 (2007). Also the bluntly ignoring of the rights of the established healthcare professions, when parliamentarians activating the traditional healer as a formal health practitioner, serves as a further reminder of no interest to repeal Act No 22.77,96-108

The fact that the present ANC-government is going to stay in power for at least another 20 years, re-confirms that the Parliament is not an ideal pathway to take.61,109-113

Also the fact that some of the top-members of the government themselves believe in the supernatural and interference by the ancestors, rules out on its own any anti-action in Parliament against the Act.78,114

It must further be remembered that the public had lost trust in the Parliament to solve their problems, like the constitutional mishap Act No 22, long ago. This is confirmed by two research polls, namely the 2014 IPSOS-Poll and 2014 Media 24-Poll. These studies show that between 53% and 89% of the population distrust the Parliament and government. Taken action and taking on the Parliament on Act No 22, seems to be worthless.114-118

Court actions

Another option to take on Act No 22 and against the present-day government, are through direct court actions. So far the Act went unchallenged in court, although there seems a lot of violation of the rights and practices of the already statutory health professions. In this concern is important to note that South African Courts are not very willing to give judgments on controversial political and cultural issues, like Act No 22 and traditional healing. Here, the medical fraternity's own sad experience of the side-kicking of the Doctors for Life (DFL)'s legal action in 2003 with the Traditional Health Practitioners Bill, is still too fresh in their minds to readily re-engage in court-actions.61,84

Similar to the above mentioned negative experience of the DFL, it must be noted that a 2014 Media 24-Poll had found that as so much as 78% of the population does not trust South African Courts fully. This negative inclination surely also effects the medical fraternity to rethink before they decide to take on Act No 22 (2007) in a legal battle. As learn from the DFL-case, the outcome can also be negative for them.30

The hesitation of the medical fraternity to take legal actions must also be seen from the point that Act No 22 is still in limbo and can thus not effectively be taken on in court. The implementation that certain Sections of the Act to commence, was only done on 1 May 2014 and was limited to the establishment of the Interim Traditional Health Practitioners Council and the providing of a regulatory framework to ensure the efficacy and quality of traditional core services. This limits legal reaction. Recourse to courts of law by the medical fraternity is thus difficult at this stage, seeing that there is no real legal and physical endangering at present by Act No 22. As soon as the traditional healer enters physical the health services and establishment, claims from medical aid funds and will make him/her guilty of improper behaviour, organized court-actions from the medical profession can be expected.30,55,56

Informal ways to address Act No 22

The experience of the author to motivate healthcare practitioners to address their professional dilemmas themselves, were disappointing and it is doubted if a well-organized formal reaction against Act No 22 will be ever realized. It is clear that other ways must be found and followed, outside the formal venues to address the Act. For this input not only individual, but also class-actions are needed, like the intensively use of the public and private media, in-depth research on the Act, traditional health and its impact on the healthcare sector. Strikes and walkouts, so commonly and effective to everyday-life in South Africa,

seems a very appropriate and effective alternative for the up till now passive allopathic practitioners to be followed.

Discussion

It is the duty of the South African government to ensure that a specific healthcare or spiritual practitioner, in this case the traditional healer who is at most a spiritual caregiver, does not transgress any established legislations in his practice, either against the individual or a group. It also must be seen that the health practitioner do not endanger the health or the life of the user of his/her services or medicines. These prerequisites failed outright with Act No 22 (2007). Never in South Africa's history was on the priest conferred statutory healer status or religion groups official regulated.

The Act is one of the many inapplicable, inappropriate and unworkable Acts that were put through Parliament since 1994, as Prof Piet Naude, Director of University Stellenbosch Business School (USB), reflects when he alluded that our politicians not always paid respect for Parliament and that they make acts which do not pass the test and must again and again be revised. The fact that Act No 22 is still not fully functioning, although promulgated in 2007, confirms that it did not passes the test of good legislation up to today.118,119

Strength and limitations

Enough information was available to formulate and support a legal stand-point on Act No 22's doubtfully position as a proper healthcare Act and its transgressing of the Constitution.

The post-1994 Political-dispensation's one-sided unscientific opinions and mal-thinking on healthcare practices, that had led to the justification of a so called "African Culture" that promotes specific the quackery traditional healing, makes the successfully outcome of an opposing public standpoint, like this one against Act No 22, minimal.

Conclusions

The Traditional Health Practitioners Act (ACT No 22, 2007) is an improper healthcare Act, a constitutional mishap. In light of its high level political sanctioning, it stands firm and it must be accepted that it will not be comprehensive revised, neither be repealed, in the next 10 to 20 years.

Further misuses of the Constitution with Act No 22 by the traditional healer fraternity, with more and stronger official sanctioning, can be expected.

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