



OVERVIEW OF LEGAL ISSUES IN THE USE OF INDIGENOUS HERBS FOR THE TREATMENT OF COVID -19 AND OTHER AILMENTS

LATEEFAT ADEOLA BELLO

Department of Commercial Law, ABU, Zaria

ABSTRACT

Medicine is as old as man; the consensus is that nature has a cure for every ailment. In time past life-threatening diseases that defied orthodox medicine were successfully treated in many parts of the world with traditional herbs, some of which have now been converted to drugs and supplements used by patients. Nature in itself is replete in the environment around us. Nigeria is richly blessed with abundance of herbs. The infusions from some of these herbs have been successfully used in the treatments of ailments that have defied orthodox medical treatment. While the COVID-19 pandemic engulfed the world, creating confusion in treatment and applicable remedies in its wake, many countries attempted the application of alternative medicine in the management of the disease. The use of indigenous herbs in this instance should ordinarily be a welcome development, but the possible use of herbs in the instant case has been trailed with controversy and negative publicity that created fear even amongst Nigerians, many of who may, in the past, have used these remedies for one ailment or another. This has raised questions on the effectiveness and reliability of herbs, what impedes the use(s) of herbs? Are there requisite legal and institutional frameworks to regulate the possible use of herbs for the treatment of COVID -19 and other related illnesses? What are the measures that must be put in place to protect this age long indigenous method for treatment of illnesses as a stop gap treatment in future occurrences? To address these questions, this paper adopts a doctrinal approach in its analysis of existing position on herbal cure, gives an overview of attempts to protect the indigenous knowledge of herbs and concludes with recommendations on providing an enabling legal environment to encourage, research and use of herbs as alternative to orthodox medicine as

immediate and preparatory strategies in the fight against pandemics where orthodox treatment may fail to yield the desired results.

Keywords: Herbs, COVID -19 pandemic, Indigenous Knowledge, legal framework

INTRODUCTION

After weeks of denial, the Chinese government admitted the discovery of a novel virus it tagged 'corona virus' in Wuhan Province which, according to the report, can be contacted through sneezing, coughing and bodily contact. Additional information revealed that the disease defied all known orthodox treatment; people were dying in droves and the government could no longer curtail its spread. Like wild fire, the disease spread from community to community and from country to country leaving many dead in its wake. Disturbingly, like China, other countries began to report being medically powerless to curtail the death toll because known treatment methods were not yielding desired results. The President of the World Health Organization (WHO), in a public address, alluded to the fact that the virus is likely to stay dangerously active all over the world for quite a long time and advised that people should be prepared¹. With the increasing death toll and shortage of medical personnel and equipment, and lack of research findings of a possible cure for COVID -19, governments began to look inwards for a likely vaccine or herbal cure for the deadly disease. In a bid to curb the spread and save the lives of their citizenry, many countries have begun the journey of running tests to determine the efficacy of available local herbs for the treatment of the virus.²

The President of Madagascar, Andry Rajoelina led the pack when he, in a widely televised broadcasted press conference, officially proclaimed the formulation of a likely herbal mixture in the management of COVID 19. He explained it was a new use for an old malaria treatment and one that was yielding miraculous results among his country's asymptomatic COVID -19 patients. To buttress his point on the efficacy of the drug, he kicked started the use of the herbal cure when he took a swig of the medicine from a bottle labelled "Covid -Organics", in order

¹ Mike Ryan, Executive Director of WHO health emergencies Program World Health Organization Warns: Coronavirus Remains Extremely Dangerous and will be with us for a long time (22 April 2020) Available at <https://www.cnbc.com>

² Ibid

to encourage public use³. This went viral on different social media platform. The WHO, however did not lend support or recognition to the use of herbs in the treatment of COVID 19.⁴ The reason is not farfetched, because, the position of the WHO was that it was too premature to conclude that the COVID organics of Madagascar will suffice as a cure to COVID - 19 without appropriate clinical trial. The misinformation, especially on social media is the presumed WHO's approved use of many plants which had not met the minimum requirements, evidence of quality, safety and efficacy for use as an herbal cure. The use of untested products can put people in danger, giving a false sense of security and distracting them from hand washing and physical distancing which are cardinal in COVID -19 prevention. The organization added that caution must be taken against such untested use of medicine⁵.

Not to be left behind, Nigeria's Ministry of Health issued a circular referenced TCAM/077/1/65 dated 28th April 2020 and titled "*Formulation Of A Phyto Medical Based Cough Mixture /Syrup For The Management Of Covid 19 Patients By Traditional, Complementary and Alternative Medicine Department of The Ministry*" which approved the use of a locally prepared herbal mixture in the management of COVID -19. This is a welcome development since the ingredients listed are locally sourced and used in many Nigerian homes. Bearing the overwhelming onslaught of the COVID -19 pandemic across Nigeria, the question is, was the Ministry of Health able to subject its approved herbal cure for the treatment of COVID- 19 to requisite regulatory standards before circulating for public consumption? What steps is Nigeria, with its long history of traditional medicine and knowledgeable indigenous practitioners, taking to provide a regulatory framework, now that the WHO recognizes the relevance of traditional, complementary and alternative medicine in Africa. The outbreak and global spread of COVID-19 witnessed large scale use of phytomedicines in African countries. The situation was compounded by a lack of authorized medicines that are effective, affordable and accessible to the population and further coupled with a relatively weak health sector. With approval given in principle for the use of a particular herbal blend for the treatment of the symptoms of COVID -19, there are legal and ethical issues. For instance the circular failed to disclose the proportion of each of the ingredients mentioned and dosage. The inconsistencies

³ Baker, A 'Could it Work as a cure maybe a herbal remedy for coronaviruses in Africa, but experts have their doubts' (22 May 2020 Available at <https://allafrica.com> 17 June 2020

⁴ Ibid, WHO, reiterated there are no medicines that have been shown to prevent or cure Covid 19

⁵ Baker, A, Op. cit

in dosage administration, difficulty in identifying toxicity and drug abuse is some of the problems that have affected the acceptability of herbs in the treatment of illnesses. The cumulative effect of these problems has sometimes led to death or damage of body parts.⁶

An example of misuse of herbs occurred in the 1990s when thousands of women attending a slimming clinic in Belgium were accidentally given a weight loss treatment containing the toxic/adulterant herb *Aristolochic Fang chi* rather than an anti-inflammatory agent *Stephania tetrandrian*. It was one of the worst nightmares by practitioners and adherent of traditional medicines, as more than 100 women suffered kidney failure, and many later developed cancer.⁷ Similar occurrences were witnessed amidst various claims of cures in different countries on the use of herbs in the cure of the COVID- 19 symptoms and ailments.⁸

Claims for use of indigenous herbs for cure of COVID-19

Since the official announcement of the COVID- 19 index case in Nigeria on 23 February, 2020, many persons and groups made unfounded claims of having herbal remedies to cure the virus. The various social media platforms provided cheap publicity to some of these claims. It took the announcement by the President of Madagascar on the use of herbal cure by his country for the treatment of COVID-19 for the Nigerian government to announce its readiness to examine the use of a possibly herbal cure. A ministerial circular approving the use of a certain remedy for this treatment without providing the basis for its new directive was issued. The presumption however is that the afore-referenced remedy was not subjected to the approved regulatory guidelines for such use especially in view of time constraints and the urgency of the situation. To address this problem, the WHO had in time past, put in place guidelines for the use of indigenous herbs/ traditional method in the treatment of diseases, an overview of these guidelines is considered below:

WHO guideline on herbal and traditional medicine

Traditional herbal medicine is naturally occurring plants- derived substances with minimal or no industrial processing that have been used to treat illnesses

⁶ Gilbert, N Regulations: Herbal medicine rule book. Nature 480, S98-S99(2011)
<https://doi.org/10.1038/480S98a>.

⁷ Ibid

⁸ Ibid

within local or regional healing practices. In most developing countries, a large proportion of the population relies on traditional practitioners and their herbarium of medicinal plants in order to meet health care needs. Although modern medicine may exist side by side with such traditional practices, herbal medicines have often maintained their popularity for historical and cultural reasons. Thus in recent times, the importance of herbal medicine has received significant attention in global health debates. In spite of its growing importance, the herbal medicines' market in most countries is poorly regulated and herbal products are often neither registered nor controlled. With the widespread use of traditional medicine (TM) as Complementary Alternative Medicine (CAM) and the rapid expansion of international herbal medicine markets, the development of national policies and regulations on TM and CAM has become an important concern for both health authorities and public. Providers of TM and CAM and other healthcare professionals and consumers alike are calling for regulations that can ensure the safety of TM and CAM therapies and products, promote recognition of these systems and modalities and further define their role in modern healthcare. National policies and regulations on TM and CAM could ensure the safety, quality and efficacy of these therapies and products as well as function as important steps towards integrative healthcare system.

In its bid to encourage and support the integration of herbal medicine for use in the treatment of ailments, the World Health Organization in its 'WHO Strategy on Traditional Medicine 2014-2023' places great emphasis on the integration of TM into healthcare delivery system of member states. Many countries in the world have aligned with these strategies in the management of health challenges⁹. The WHO also published series of technical guidelines and reviewed regulations on herbal medicine¹⁰ specifically providing uniformity of purpose in the use of herbs to address health challenges within reach of vulnerable groups and that have defied the orthodox treatment.

In spite of its importance, the herbal medicines' market in most countries is poorly regulated and herbal products are often neither registered nor controlled. With the widespread use of traditional medicine as Complementary Alternative Medicine and the rapid expansion of international herbal medicine markets, the development of national policies and regulations on TM and CAM

⁹ Onyenucheya . A, ' how to take herbal research from laboratory to markets, by scientists' (10 September, 2019) Available at <http://www.guardian.ng> Accessed 1 May,2020

¹⁰ Regulatory Situation of Herbal Medicines, A World Review (WHO)/trm/98.1 Geneva:1998 Worldwide Available at <[http: www.google scholar.com](http://www.google scholar.com) Accessed 14 April,2020

has become an important concern for both health authorities and public. Providers of TM and CAM, other healthcare professionals and consumers alike are calling for regulations that can ensure the safety of TM and CAM therapies and products, promote recognition of these systems and modalities and further define their role in modern healthcare. National policies and regulations on TM and CAM could ensure the safety, quality and efficacy of these therapies and products as well as function as important steps towards integrative healthcare system.

Addressing Legal and ethical issues that may arise in the adoption of indigenous remedy Even though Africa is rich in generic resources, and traditional knowledge and many indigenous groups in the continent are custodians of this knowledge, a complete inventory of the continent's rich resources is not available. The direct and indirect cost of loss of genetic resource and traditional knowledge is astronomical. African governments are beginning to take steps to protect the continent's genetic resources and traditional knowledge, these efforts are undermined by poor institutional framework, weak and poorly enforced laws, corruption, and limitations imposed by global trade rules particularly rules encapsulated in the Agreement on Trade -related aspects of Intellectual Property Rights (TRIPS Agreement). Although many African countries have ratified the Convention on Biological Diversity (CBD), the Cartagena Protocol on Biosafety, as well as its Nagoya Protocol on Access to Genetic Resources, and the fair and Exquisite Sharing of Benefits arising from their utilization (Nagoya Protocol), few have enacted domestic legislation to implement these treaties. At the continental level, relevant instruments include; the 1968 African Convention for the Conservation of Nature and Natural resources (revised in 2003), the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (African Model Legislation on the Access to Biological Resources)¹¹ and the Swakopmund Protocol on the Protection of Traditional Knowledge and Expression of folklore within the Framework of the

¹¹ OAU Model LAW, Igeria,2000- Rights of Communities, Farmers, Breeders and Access to Biological Resources.

African Regional Intellectual Property (the Swakopmund Protocol)¹² The period 2001- 2010 was declared “ the Decade for African Traditional Medicine”.¹³

Ultimately, only few African countries have developed national laws for the protection of traditional knowledge and cultural expressions. The problem is that many countries already model their domestic laws after the international intellectual laws of western countries with emphasis on exclusivity and private ownerships. South Africa is perhaps, one of the few countries that is making serious effort to find a solution to this dilemma. The Intellectual Property Laws Amendment Act 2013(Act No. 28 of 2013) was approved by the President of South Africa and published in its Government Gazette of 10 December, 2013¹⁴. Of particular interest to this article is the Swakopmund Protocol.

The evolution of Intellectual property law in Nigeria and the extent of its coverage is still unappreciated by individuals and communities due to lack of knowledge of its existence. Intellectual property is an area of law concerned with protection of traditional knowledge. It is a multifaceted concept that encompasses several components. It is of significance in the fields of medicine and healing, biodiversity, conservation, the environment, and food and agriculture¹⁵.

The ownership of knowledge and artistic creations traceable to the world’s indigenous societies emerged as a major social issue in the 1980s. Prior to this, museums, curators, archivists and anthropologists had rarely worried about whether the information they collected should be treated as someone else’s property. This situation is radically different and raises the ethical and economic questions on the worldwide circulation of indigenous art, music, and biological knowledge. Legal examinations have added their questions to the debate. While a few countries have enacted statutes to protect traditional knowledge or - to be more precise - access to biodiversity and genetic resources, the main focus of the debate lies in international and regional fora. This led the World Intellectual Property Organization (WIPO) to conduct a fact-finding mission which led to collation of legal anthropological data to protect traditional knowledge. The general belief is that providing an enabling environment for the development

¹² Adopted by the Diplomatic Conference of AEIPONNat Swakopmund (Namibia) on August,9, 2010. The protocol was initially signed by 9 of the 17bMember States that are members of the Aripo.

¹³ Gabriela. S. & Kiran. K.P, International Food Law and Policy, Springer, 2017 Available <https://books.google.com.ng>

¹⁴ Ibid

¹⁵ Hinz M .O (2011) The Swakopmund Protocol on the Protection of Traditional Know ledged and Expression of Folklore, Namibia Law Journal vol.3. issue 1, www.kas.de.nambia>NLJ p. 101

of traditional knowledge will be an added advantage in the quest to review legislations that will encourage documentation of recipes on herbal remedies¹⁶. Even though Nigeria has ratified the World Trade Organization's Amended Protocol on Intellectual Property Rights which allow Nigeria to produce, drugs and other necessities patented by big companies locally in time of emergency. It is doubtful if the coming into force of the intellectual property law has really taken holistic cognizance of cultural norms and values on the use of herbs passed down from generation to generations as peculiar to the multi-cultural nature of the Nigeria environment. It is probably safe to presume that it was in a bid to address the inadequacy of the intellectual property law, that some African countries within the framework of the African Regional Intellectual Property Organization (ARIPO) adopted¹⁷ the Swakopmund Protocol on the Protection of Traditional knowledge and Expression of Folklore¹⁸. The adoption of the protocol was said to be a significant milestone in the evolution of intellectual property in Africa. The objective of the protocol provided thus:

To protect traditional knowledge holders against any infringement of their rights, as recognized by the protocol, and to protect expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context and same shall be interpreted and enforced taking into account the dynamic and evolving nature of traditional knowledge and the characteristic of traditional knowledge -based systems as frameworks of ongoing innovation.¹⁹

Traditional knowledge is defined in Section 2 of the Protocol as any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how skills, innovations, practice and learning where the knowledge is embodied in the

¹⁶ This is with effect on the number of people and communities who are richly endowed with knowledge of herbs, that has assisted in the prevention and cure of disease and ailments.

¹⁷ On 9 August 2010 at Swakopmund, in the Republic of Namibia and formally came into force on 11 May, 2015

¹⁸ This a regional instrument put in place for the protection of traditional knowledge and expression of folklore popularly tagged ARIPO. And hereinafter referred to as the Protocol.

¹⁹ Section 1 Swakopmund Protocol on the Protection of Traditional Knowledge and Expression of Folklore, ARIPO, Swakopmund, Namibia, 2010. www.wipo.int/trtdocs/trt_ap010 Accessed on 17 November 2016

traditional lifestyle of a community or contained in the codified knowledge systems passed on from one generation another. Thus the Protocol sets out the term and scope of traditional knowledge. It should not be limited to a specific technical field but may include agricultural, environmental, medical knowledge and knowledge associated with grassroots. Emphasizing that protection must be tailored to the specific characteristics of traditional knowledge and expression of folklore including their collective or community context, the intergenerational nature of their development, preservation and transmission, their link to a community's cultural and social identity, integrity, beliefs, spirituality and values, and their constantly evolving character within the community concerned.²⁰ The key components in the definition are local or traditional community, traditional context, traditional lifestyle, and generation to generation, in other words, for a practice to be called traditional knowledge under the protocol these elements are determinants²¹

Although any state that is a member of the African Union or the United Nations Economic Commission of Africa can ratify the protocol, Nigeria is not a member of ARIPO and like most other African State has not ratified the Swakopmund Protocol. The limited response of African states and reluctance of Nigeria to adopt the Swakopmund Protocol raises questions especially in view of abundant traditional knowledge with which the country is richly blessed. What are the possible reasons for the reluctance to ratify a protocol that would have enabled traditional knowledge holders and communities in member states to benefit from the following areas:

- i. Registration of transboundary Traditional Knowledge and expressions of folklore at ARIPO;
- ii. Submission of traditional knowledge and expressions of folklore in their territories, through designated and competent authority for record purposes;
- iii. Licensing of their traditional knowledge lodged at ARIPO and obtaining benefits arising from the commercial use of such knowledge and the folklore and obtaining fees from such licenses;
- iv. Using the alternative dispute settlement procedures at ARIPO to settle disputes that may arise from traditional knowledge and expression of

²⁰ Tshimanga Kongolo, African Contributions in Shaping the Worldwide Intellectual Property System, Routledge Copyright. <https://books.google.com> retrieved, 20 November 2022

²¹ Ibid

folklore shared by different communities across national boundaries as the need arises;

- v. Assisting and enabling ARIPO to establish databases on codified and non-codified traditional knowledge and expressions of folklore. The information in the databases will only be used upon prior consent from the knowledge holders. The consultation of the databases will also generate income for member states.

It is expected that this protocol will assist the documentation of various herbal remedies available in different communities in Nigeria especially in view of section 18 of the Swakopmund Protocol which provides that the owners of the rights in expression of folklore shall be the local and traditional communities to whom the custody and protection of the expressions of folklore are entrusted in accordance with the customary laws and practices of those communities who maintain and use the expressions of folklore as a characteristics of their traditional cultural heritage.

Surfing through the archives on health, it is obvious that Nigeria has no clear-cut legislation on traditional medicine. What is available are pockets of legislations bordering on the activities of traditional birth attendants, acupuncturist etc. which was made possible through a formal interaction of the Nigerian government with traditional medicine practitioners in 1966 when University of Ibadan was directed by the Federal Ministry of Health to conduct research on the efficacy of traditional medicine²² since then development on documentation of traditional medicine in Nigeria is still elusive. In terms of institutions, there is a lacuna. The Federal Ministry of Health has a Traditional, Complementary and Alternative Medicines Department. It was established in 2018 and has the following mandate:

1. To develop, implement, review and monitor compliance of policies and initiate legislation relating to Traditional, Complementary and Alternative Medicines as well as provide related services;
2. To promote the development and commercialization of indigenous Nigerian Traditional Medicine; and
3. To integrate Traditional, Complementary and Alternative Medicines into the National healthcare system.

22

The outbreak of the coronavirus and, in its wake, the growing acceptance of traditional medicine and complementary and alternative medicine is reflected in recent developments. On 14 December 2021 the National Assembly (the Nigerian federal Parliament) passed a Bill titled Federal College of Complementary and Alternative Medicine Bill.²³ The Bill, initially titled Federal College of Traditional, Complementary and Alternative Medicine of Nigeria, was introduced on the floor of the Senate on 19 March 2020.²⁴ The controversy over the merging of Traditional Medicine (TM) with Complementary and Alternative Medicine (CAM) is reflected in the final title of the Bill.²⁵ This raises questions on the future place of TM in the equation. The said Bill is still awaiting Presidential assent almost a year after its passage.

The objectives of the College include the organization of research relevant to training in complementary and alternative medicine;²⁶ catalyze through training, research and innovation for the effective and economic utilization and conservation of complementary and alternative medicine.²⁷ The power of the College to hold exams and award diplomas and certificates in different fields of CAM extends to the field of indigenous medicine.²⁸ This is a tacit recognition of traditional medicine. The College, for the purpose of carrying out its objectives, is also empowered to engage in herbal remedy production.²⁹ The expected assent to the Bill and its coming into force would undoubtedly provide a legal basis for research in the use of indigenous herbs for the treatment of COVID -19 and ailments. The role of the National Agency for Food and Drugs Administration and Control (NAFDAC) in certifying the herbal products made by the proposed College and by other bodies or persons would also come to the fore.

Conclusion and Recommendations

²³ SB 394 and HB 1649. See placbillstrack.org. See also Bill Tracker, National Assembly. Available at nass.gov.ng/documents/bill/11010#. Last accessed 22 November 2022.

²⁴ Passed by the Senate on 29 September 2021. See Bill Tracker, National Assembly. Available at nass.gov.ng/documents/bill/11010#

²⁵ NACAMA of Nigeria Vehement Objection to “A Bill for an Act to Provide for the Establishment of Federal College of Traditional Complementary and Alternative Medicine of Nigeria”. Posted 14 December 2020. Available at medicalworldnigeria.com/post/NACAMA-of-Nigeria-Vehement-Objection-to-A-Bill-for-an-Act-to-Provide-for-the-Establishment-of-Federal-College-of-Traditional-ComplementaCry-and-Alternative-Medicine-of-Nigeria?pid=47893 accessed 22 November 2022.

²⁶ Section 2 (e), Federal College of Complementary and Alternative Medicine Bill.

²⁷ Section 2 (b), *ibid*.

²⁸ Section 4 (b) (iii), *ibid*.

²⁹ Section 4 (n), *ibid*.

It is important to note, that Local communities in Nigeria still have a strong belief in the use of herbal medicines for basic healthcare needs, and it is expected that during an upsurge in pandemic-related ailments like the coronavirus, herbal medicine will remain the first point of treatment in most communities. With this in mind, it is recommended that; herbal medicines be subjected to detailed phytochemical investigations directed towards the production of new natural drugs usage of which should be appropriately regulated and institutionalize for implementation and the grant of incentives to elicit the willing participation of traditionally recognize owners of indigenous knowledge of herbs in communities in the documentation and preservation of these knowledge. Other recommendations are the inclusion of the teaching of use of indigenous herb in early school curriculum to inculcate interest for future research in this area, Government should also encourage and fund more research in this area, establish autonomous regulatory body (aside NAFDAC) for regulation of the use of indigenous herbs and knowledge as well as take requisite steps to ratify the Swakopmund Protocol on the use of indigenous herbs for the benefit of both the owner and users of indigenous herbs and the country too.