

Configuring a Model Framework Statute on Traditional Medicine for Kenya: To Be Called “The Traditional Medicine Coordination Act”

Nixon Sifuna

Sifuna & Sifuna Advocates, Eldoret, Kenya
Email: nsifuna@yahoo.com

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Abstract

Despite having an impressive policy framework on traditional medicine, Kenya lacks a specific legislation on the same. All it has currently is a plethora of pieces of legislation that are scattered over several sectors and line ministries and touching on one or other aspect of traditional medicine. Although the effective operation of these scattered and fragmented legislation can to some extent promote or impact positively on traditional medicine, they are bedeviled by lack of coordination and harmonization. This paper sets out and critically appraises this fragmented and disjointed character of the existing pieces of legislation on the subject, as well as the glaring lack of coordination and harmonization among them. To attenuate this undesirable state of affairs, this paper has configured for Kenya, a model framework statute (Act of Parliament) on traditional medicine, to be called “The Traditional Medicine Coordination Act”, whose object should be to coordinate and harmonize the several scattered pieces of legislation as well as the inter-agency efforts and agenda on traditional medicine. Apart from its Preamble and Interpretation parts, the said Act should as of necessity have: provisions establishing or designating an institution responsible for traditional medicine; provisions creating offences related to traditional medicine; provisions establishing a professional association of traditional medicine practitioners; provisions on protection of intellectual property; provisions on emergency health care and essential medicines; provisions expressly prohibiting the malevolent use of traditional medicine; a provision asserting the Act’s supremacy on matters relating to traditional medicine; and a saving clause making reference to other or related Acts that have provisions touching on traditional medicine. The resulting coordination and harmonization will streamline the existing legislation as well as enhance and effectuate Kenya’s traditional medicine sector. This form of legislation (i.e. a framework statute) is most desirable given the in-

ter-disciplinarity and inter-sectoriality of traditional medicine. Admittedly, traditional medicine transcends several disciplines and sectors such as health, intellectual property, cultural anthropology, ecology, etc. There therefore arises need for managing cognate matters, actions, and agenda in these cognate disciplines and sectors. Being a commentary, the paper is based on documented research findings of other researchers and scholars, commentaries by commentators on the subject, archival literature, as well as the views and opinion of the author.

Keywords

Configuring, Model Framework Statute, Traditional Medicine, Kenya, The Traditional Medicine Coordination Act

1. General Introduction and Background

The term “traditional medicine” as used in this paper refers to indigenous medicine based on traditional medicinal knowledge systems and passed down, by word of mouth, from generation to generation within the particular indigenous community and familial lines, and which is largely undocumented. The World Health Organization (WHO) has defined the term as referring to the totality of health practices, approaches, knowledge and beliefs incorporating plant, animal and mineral based medicines, spiritual therapies, manual techniques and exercise, applied singularly or in combination to treat, diagnose and prevent illnesses or maintain well-being (WHO, 2000; Badal & Delgoda, 2017). Apart from these beneficial uses, traditional medicine in the African context is also used for malevolent purposes; for instance in witchcraft, sorcery, black magic, wizardry, traditional oathing, curse ordeals, and many other harmful and malicious uses. Overall, however, this system of medicine is important in the treatment and cure of diseases and illnesses, especially in the rural and peri-urban areas which are characterized by widespread poverty as well as a shortage of health care facilities, health care workers and allopathic medicines. Governmental policy (public policy) comprises statements on what the government intends to do or not to do, on a particular problem, cause or issue (Dye, 1972). Almost two-thirds of the Kenya’s population (especially in the rural and peri-urban areas) rely on traditional medicine for their health care needs. This makes it an integral and invaluable component of Kenya’s health care system; such that the Kenya Government needs to accord ample attention to it. This requires that it be mainstreamed into the country’s health sector, especially given its relative affordability and accessibility compared with allopathic healthcare (Banquar, 1995; Githae, 1995).

In Kenya as many other jurisdictions especially in Asia and Africa, traditional medicine is a subject of policy and legislation—such that there exists a cocktail of policies and legislation on it. This is so because the formulation of policy on

any subject is usually followed by or accompanied with the promulgation of corresponding legislation on the same. Indeed, legislation is an important tool for enforcing government policy; hence a policy always needs to be backed by the enactment of corresponding enabling legislation not only to enforce, but also to validate that policy to enable its implementation. There is thus a horse-rider relationship between policy and legislation, as the two primary functions of legislation in relation to policy, are: 1) To validate policies by giving them legal legitimacy, 2) To enforce policies by converting them into legally enforceable edicts, and 3) To establish or designate the agencies responsible for implementing such policies as well as those for enforcing the legislation.

Legislation validates policies, and also issues edicts and prescribes as well as proscribes certain conducts and actions; and often also creates or designates particular agencies and vests them with the responsibility of implementation—which are in this paper called implementing agencies. Whereas such agencies can be created or designated by those policies themselves, it is better if they are created or designated by law (the Constitution or legislation), rather than administratively or by policy alone, or by executive whim. Unlike a policy, legislation creates legal sanctions for breach of its edicts and non-compliance with it. Ogolla (1992) has argued that law: “...translates policy into specific enforceable norms, standards of social behaviour and compels, by threat of sanctions, their observance by laying down to public officials, basic guidelines for implementation of demands of the normative regime.” A law that criminalizes or characterizes particular actions and conduct as offences, will also usually prescribe penalties and sanctions for non-compliance. By so doing, law unlike policy, insulates itself from indifference and disregard, and also enhances compliance with legal edicts. It spells out punitive sanctions and penalties for those as willfully or negligently break or disobey it, or simply fail to comply with it. These include: imprisonment, fines, surcharge, restitution, restoration, as well as payment of compensatory damages; and are intended as punishment for infraction and non-compliance rather than a reward for obedience and compliance. Admittedly, the legal duty to obey the law has the effect of not only discouraging non-compliance, but also ensuring and even increasing compliance with laws.

Admittedly, without the subsequent enactment of a corresponding legislation, policy is a toothless dog that barks but cannot bite. Hence it is legislation that give policies the required “teeth” to bite. Otherwise, without the enactment of corresponding legislation therefore, policies remain mere “paper tigers” or innocuous empty rhetoric inked on paper. On a lighter note, this could be the reason why some countries call their Governmental policy documents, “Papers”. In some countries they are called “White Papers”, in others they are called “Blue Papers”, while in others they are called “Green Papers”. Admittedly, without the further act of legislation, these Papers remain merely Papers and just Papers. It follows therefore that having policies and political will alone without specific enabling legislation is not enough. They should be followed by the enactment of corresponding legislation to implement them. Otherwise having policies alone

without the laws is not enough; hence there can be no sense in having beautiful policies, without supporting corresponding legislation.

Notably, despite having an impressive policy framework on traditional medicine, Kenya lacks a specific legislation on the same. All it has currently is a plethora of pieces of legislation that are scattered over several sectors and line ministries and touching on one or other aspect of traditional medicine. Although the effective operation of these scattered and fragmented legislation can to some extent promote or impact positively on traditional medicine, they are bedeviled by lack of coordination and harmonization. To attenuate this undesirable state of affairs, this paper has proposed and even configured, for Kenya, a model framework statute (Act of Parliament) on traditional medicine, to be called “The Traditional Medicine Coordination Act”; and gone ahead to also propose the aspects of traditional medicine that the respective provisions of the said statute should address. The paper has conceived the actual structure and content of the statute as well as the particular aspects of traditional medicine that its provisions should address, and even suggested a befitting name for it. It has proposed that the statute be a framework legislation (framework statute) that is not meant to replace the existing fragmented and disjointed sectoral pieces of legislation, but rather, to supplement them and provide a framework for coordinating and harmonizing them in order to enhance their effectiveness. This cognate approach is appropriate, for the reason that traditional medicine is a largely inter-disciplinary and inter-sectoral in nature, transcending various disciplines and sectors such as health, culture, intellectual property, etc.

2. Kenya’s Policy Framework on Traditional Medicine

Although traditional medicine received international and even national recognition many decades ago, its growth and development in many parts of the world including Kenya has been stifled by the skepticism and reluctance by governmental authorities and even the general public to accept it. There has been marked doubt and skepticism on the knowledge and claims made by its practitioners and some segments of the community. This state of affairs has been acknowledged by the Kenya Government, which in the 1989-1993 National Development Plan acknowledged the important role played by traditional medicine in the country’s health care, but blamed its lack of growth on skepticism and lack of information about its contribution and potential (GOK, 1989). Gakuya et al (2020) have observed that owing to its social, economic and cultural significance, traditional medicine is a concept that resonates well with many inhabitants in developing counties such as Kenya. Sindiga (1995) observed that despite the formal over-popularization of conventional medicine (biomedicine, also called allopathic medicine) the bulk of Kenya’s population especially in the traditional rural set up relies on traditional medicine for primary health care in the treatment of diseases and illnesses. It is, as illustrated in this paper, an invaluable and complimentary branch of medicine that should not be considered as inferior to

conventional medicine.

Following the official recognition of traditional medicine by Kenya in the 1990s, the Government later established a task force on it, to craft policies and draft laws on the same. While commentators and researchers such as Kigen *et al.* (2013) lamented Kenya's dearth of a policy and legal framework on traditional medicine, the findings by this author in the study for this paper are different from those earlier findings, partly due to effluxion of time, and also due to sustained lobby effort, that nudged Kenya into adopting new policies and legislation. With the result that many of the then draft policies and draft bills were finally adopted; and are as at now the prevailing regulatory regime in the country. This is because without their subsequent adoption and enactment, they would have remained mere recommendations for future action, as they could neither be implementable nor enforceable.

Notably, the Kenya Government has in several policy documents over the years expressly formally recognized traditional medicine and acknowledged its importance in the country's health care system. These policy documents include: The National Development Plan 1989-1993 (GOK, 1989), the National Drug Policy of 1994 (GOK, 1994), the National Policy on Traditional Medicine and Medicinal Plants of 2005 (GOK, 2005), as well as the National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (GOK, 2009). The major problem with this policy framework has over the years been partly its inadequacy, and partly implementational challenges especially the lack of a supporting corresponding legislation and the lack of total public acceptance by the Kenyan populace for traditional medicine. Admittedly, traditional medicine has until very recently been a kind of clandestine enterprise or underworld, operating in secrecy away from the public eye and meaningful governmental regulation. The part below examines that policy outlay to establish the extent of their support for traditional medicine.

2.1. The National Development Plan 1989-1993

It is in this Development plan (also called the 6th National Development Plan), that the Kenya Government was, for the first time, explicit on the role of traditional medicine, when it stated in part as follows:

“Although for a long time the role of traditional medicine and its potential contribution to health has been viewed with skepticism, a large proportion of people in Kenya still depend on it for their cure. One reason for the continued skepticism lies in the lack of information on its effectiveness, drug quality and safety. During the plan period [1989-1993], Government will encourage the formation of professional associations for traditional medicine practitioners. Such associations will facilitate the gathering of necessary information for use, development and appropriate adaptation of traditional diagnostic, therapeutic and rehabilitative control technologies that will become part and parcel of formal medical research and the Primary Health

Care Programme.” (p.244)

2.2. The Kenya National Drug Policy of 1994

This policy was crafted with the object of ensuring that pharmaceutical services in the country meet the requirements of all Kenyans, for the prevention, diagnosis and treatment of diseases using efficacious, high quality, safe and cost-effective pharmaceutical products. Its part 5.6 was on Traditional Medicine. In it the Kenya Government acknowledged the place of traditional medicine and traditional medicines, and the need of mainstreaming them into the country’s primary health care system. It provided for registration and recognition of traditional medicine practitioners.

2.3. The National Policy on Traditional Medicine and Medicinal Plants of 2005

This Policy was formulated in the year 2005 by the Kenya Government as its policy on traditional medicine and medicinal plants. It proposes the establishment of an institution known as “Traditional Healers’ Council” and vests it with the task of registering, licensing and regulating traditional medicine practice and traditional medicine practitioners. It emphasizes the need to document current availability of plants and to promote nurseries and herb gardens (Okumu et al., 2017). It also proposes to establish an inventory of all medicinal plants in the country; and also provides for establishment of tree nurseries and herb gardens for bio-conservation and research.

2.4. The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009

The policy defines these three terms. It defines “traditional knowledge” as a body of knowledge vital to the day to day life of indigenous and local communities derived through generations of living in close contact with nature. It defines “traditional cultural expressions” as any forms whether tangible and intangible, in which folklore and traditional culture and knowledge are expressed, appear or are manifested; and “genetic resources” as genetic material of actual or potential value. It states that traditional cultural expressions are expressed in tangible forms such as folk art, paintings, carvings, sculptures, pottery, crafts, costumes, musical instruments, as well as architectural forms. Further that it may also be expressed in intangible forms such as verbal expressions (e.g. stories, epics, legends, poetry, riddles and narratives) and musical expressions (e.g. folk songs). Luckily, Kenya is a state party to the 2003 UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage (ICH), having ratified it in October 2007. The treaty recognizes Intangible Cultural Heritage as a mainspring of the cultural diversity and a guarantee to Sustainable Development. The policy is intended to protect, develop and promote all the foregoing aspects of Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions.

It in its preamble states that it was developed in response to the growing need

to address the challenges facing the country today with regard to the three subjects, in terms of accelerating technological development, integration of world economic, ecological, cultural, trading and information systems. It notes that traditional knowledge, genetic resources (biological resources) and traditional cultural expressions (TCEs—especially folklore) are closely intertwined and raise similar concerns with regard to intellectual property rights (IPRs—the term generally refers to the property rights creations of the mind). In this regard, it notes that under the Industrial Property Act of 2001, some aspects of traditional knowledge and genetic resources can be protected as utility. It further acknowledges Kenya's cultural and biological diversity in terms of culture and biodiversity; as well as its richness in traditional knowledge and traditional cultural expressions (especially folklore). It further acknowledges the diversity of Kenya's people in terms of, *inter alia*, traditional literature; traditional arts and crafts; traditional music; traditional visual arts; traditional ceremonies; traditional beliefs; traditional architecture associated with particular sites; as well as traditional knowledge forms related to traditional medicines, traditional medical practices, agriculture, forest management, and sustainable use of biological resources. Further that traditional knowledge is transmitted vertically through generations and laterally through repeated practice as well as apprenticeship with elders and specialists. It further notes that traditional cultural expressions especially oral traditions including folklore is transmitted through oral means such as sayings, proverbs, and metaphors.

The policy however, also identified the following six major challenges that traditional knowledge, genetic resources and traditional cultural expressions continue to face in Kenya, namely: 1) Lack of recognition and mainstreaming into national policies and decision-making processes, 2) Lack of a comprehensive database, 3) High cost of their collation and documentation. 4) Weak community institutional linkages, and 5) Inadequate capacities, 6) Inadequate framework for intellectual property protection. To attenuate these challenges, the policy outlined the actions that the Kenya Government would in collaboration with stakeholders undertake to support, protect, regulate, develop and promote traditional knowledge, genetic resources and traditional cultural expressions in the county. Having set out the Kenya's policy outlay on traditional medicine, it is now necessary to examine her legislation on the subject to see whether it is in tandem with and adequately supports the said policy outlay as there is supposed to be a horse-rider relationship between policy and legislation.

3. Kenya's Legislation on Traditional Medicine

For traditional medicine to meaningfully play its role in Kenya's health sector, it requires legal recognition and protection; and needs to be in the policy instruments and law statutes. In a constitutional democracy such as Kenya, the legal foundation is the national Constitution. For Kenya it is the Constitution of 2010; which in terms of Article 2, is the supreme law of the land, from which all other

laws derive legitimacy, hence any law that contradicts it or is inconsistent with it, is null and void to the extent of such contradiction or inconsistency. For its part, the constitutional basis for the legal recognition and provisioning for traditional medicine is Article 11 of the said Constitution; which recognizes culture as the foundation of the nation and the cumulative civilization of the Kenyan people and nation. It further directs the State (government) to recognize the role of indigenous technologies in national development (Harrington, 2016; Harrington, 2018). Unfortunately, even with all this constitutional foundation, Kenya lacks a specific statute or legislation on traditional medicine. All it has is a plethora of scattered pieces of legislation which although are on other subjects, nevertheless have some provisions whose application has significance and implications for it. These include: The Health Act of 2017 (Act No. 21 of 2017), The Public Health Act (Cap 242), The Pharmacy and Poisons Act (Cap 244), The Industrial Property Act (Act No. 3 of 2001), and The Witchcraft Act (Cap 67), The Protection of Traditional Knowledge and Cultural Expressions Act (Act No. 33 of 2016). These are discussed in detail below in that order.

3.1. The Health Act of 2017 (Act No. 21 of 2017)

This Act in its preamble states that it is an Act of Parliament to establish a unified health system; to co-ordinate the inter-relationship between the national government and county governments health systems; to provide regulation of health care services and health care service providers, health products and health technologies; and for connected purposes. The enactment of this legislation was a milestone in Kenya's health legislative history. With regard to traditional medicine, this fact is in the sense of it being the first legislation in Kenya's legislative history so far, to expressly recognize alternative medicine as a health system in Kenya. It is also Kenya's first legislation to expressly recognize traditional medicine and adopts the World Health Organization's (WHO) definition of traditional medicine already stated in the introductory section of this paper. Part X of the Act is on Traditional and Alternative Medicine. It defines traditional medicine as "including the knowledge, skills and practices based on the theories, beliefs and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health as well as in the prevention, diagnosis, improvement or treatment of physical and mental illness." (Section 2).

In section 74, the Act directs the national government to formulate policies to guide the practice of traditional and alternative medicine. Notably, rather than focusing on the promotion of traditional medicine as a health system and acknowledging traditional medicine as a health system in its own right and embedding it in the mainstream health care of the country, the Act only focuses on regulating its practice. The focus is thus on its practitioners rather than on it as a system of health care; on its practitioners only, rather than holistically on its growth and development. Section 25 states that there shall be established a regulatory body by an Act of Parliament to regulate the practice of traditional medi-

cine and alternative medicine. This is a wide departure from other Acts that in so provisioning expressly name and designate or create such agencies. Why didn't this Act itself not create and name the agency? Why leave that to future legislative action? The mere propositioning instead of creating the organ, is to this author, an escapist approach that is rather evasive and shy, instead of being forthright. On the functions of the proposed institutional outfit, the Act further directs that it (the agency) shall be vested with the responsibility of documentation, standardization, prescribing the charges charged to practitioners for registration and licensing; as well as providing for and regulating referrals from traditional medicine practitioners to conventional health facilities. Why not the vice versa? i.e. referrals from conventional health care facilities and health professionals to traditional medicine practitioners.

3.2. The Public Health Act (Cap 242 Laws of Kenya)

This piece of legislation in its preamble states that it is an Act of Parliament intended to make provision for maintaining health. It is called the Public Health Act because it focuses on public health i.e. the health of the whole population (or as large as possible a proportion of the population) rather than the health of an individual—including those who would benefit from but do not seek medical care (Sifuna & Mogere, 2002). This is unlike clinical medicine that is concerned with individual health, especially of those that seek medical care; which explains why public health is sometimes referred to as population medicine.

The author has identified four reasons why traditional medicine should concern any legislation on public health. First, as already stated in this paper, traditional medicine is concerned with diseases as well as the overall health and well-being rather than just diseases and illnesses. Secondly, just the way public health emphasizes preventive and promotional health, traditional medicine is used for both the treatment and cure of diseases (curative medicine), as well as for the avoidance, avertment and prevention of diseases (preventive medicine). Similarly, traditional medicines are used in curative health care as well as preventive health care (Eddouks et al., 2012). The latter is a key aspect of public health. Thirdly, traditional medicine avoids, averts, prevents, diagnoses and treats several diseases that are of public health importance. Sofowora et al. (2013) have for instance discussed the role of medicinal plants in diseases of public health importance (public health diseases). The fourth reason is that a large segment of the Kenyan population (not less than two thirds) and even the world population (between 70 percent and 80 percent of it), especially in the rural and peri-urban areas rely on traditional medicine for their health care needs.

For the four reasons *inter alia*, traditional medicine can be used to promote public health goals and programmes. It is therefore surprising that despite traditional medicine's implications for public health, Kenya's Public Health Act (Cap 242) which is her primary legislation on public health, neither mentions nor has any specific or any provisions on traditional medicine. This is glaringly ano-

malous! It therefore cannot be gainsaid that this branch of health care has an important place in public health, especially in the prevention and cure of diseases and illnesses, as well as the promotion of overall health and well-being of society. It for instance therefore would be legitimately expected that the parts of a public health legislation (e.g. the Public Health Act) on diseases should have provisions on traditional medicine. Disappointingly, this is not the case as for this Act, the parts on diseases have no provisions on it, and just like the entire Act, do not even mention it. The relevant parts in this regard are: Part IV on Prevention and Suppression of Infectious Diseases, Part V on Venereal Diseases, Part VII on Leprosy, and Part VIII on Smallpox. Apart from these categories of diseases, traditional medicine practitioners and traditional medicines in Kenya are known to treat many other categories of diseases including chronic and even terminal diseases. As already noted in this paper, traditional medicine has been professed to cure virtually all diseases including the chronic and terminal diseases, and even the biomedically incurable ones.

3.3. The Pharmacy and Poisons Act (Cap 244 Laws of Kenya)

This is an Act of Parliament to control the profession of pharmacy and the trade in drugs and poison. It defines a drug as “any medicine, medical preparation or therapeutic substance”. Even though this definition would by interpretation and implication include traditional medicines, the Act has no provision on traditional medicine, and neither does it mention the words “traditional medicine” or “traditional medicines”. This is a glaring omission, that future legislative amendment on this Act should consider, as traditional medicine and medicines are a proper province of the object of this Act. Under the Act, a drug is defined as including any medicine, medicinal preparation or therapeutic substance; while a medicinal substance is defined as any medicine, product, article or substance claimed to be useful in the prevention, diagnosis or treatment of diseases—or alleviation of their symptoms. As already observed in this paper, these definitions cover traditional medicines as well as biomedicines (pharmaceutical drugs).

3.4. The Witchcraft Act (Cap 67 Laws of Kenya)

In the context of this paper, the term “witchcraft” is used to refer to the malevolent invocation of evil spirits to cause harm to others, by bewitchment, black magic, sorcery, and wizardry (Sifuna, 2021). In Kenya, traditional medicine has from colonial times to this date been associated with witchcraft and black magic, which are practices prohibited under the Witchcraft Act (Cap 67), hence illegal. The Act prohibits the practice and promotion of witchcraft as well as the possession of witchcraft articles and paraphernalia. Notably, the only lawful and legally permissible use of traditional medicine is its beneficial use for diagnosis, treatment and cure of diseases and illnesses; and not its harmful use for evil and suffering, such as its employment in witchcraft (witch medicine). In criminalizing the practice of witchcraft, the Act has prohibited and prescribed criminal penal-

ties for the following overt acts: “*holding oneself out as a witchdoctor able to cause fear, annoyance or injury to another in mind, person or property, holding oneself out as being able to exercise any kind of supernatural power, witchcraft sorcery or enchantment calculated to cause such fear, annoyance or injury, a witch-doctor supplying advice or article for witchcraft, using witch medicine with intent to injure others, possession of charms or other article usually used in witchcraft or sorcery, and attempting to discover crime by witchcraft.*” For these acts the Act provides for imprisonment ranging from one year to ten years.

Traditional medicine in Kenya can be stifled by the legal prohibition on witchcraft and witchcraft-related conduct (Sindiga et al., 1995). Thairu (1975) has for instance reported that the decline of folk medicine during the colonial era was due to the colonialists associating it with witchcraft and “black magic”. This explains why in Kenya, folk medicine started declining at the onset of colonial rule. Mutungi (1977) has noted that Kenya’s Witchcraft Act has a definitional problem with regard to the term “witchcraft” which it has not precisely defined. Notably, African communities know what may be described as witchcraft, i.e. the invocation of evil powers. Mbiti defined it as the use of mystical power to harm others in society (Mbiti, 1969). The colonialists associated it with the magic of the black African people—variously referred to as “black magic”. Nevertheless, with an overly positivist judiciary together with an overzealous, corrupt, less literate, and socially insensitive police force such as Kenya’s, there is a higher likelihood of this Act being used (actually misused) to stifle folk medicine (Sifuna, 2021).

This is unlike in the neighbouring country of Uganda, whose Witchcraft Act (Cap 108 Laws of Uganda) is so carefully worded as to avoid such a mischief. The Act in its interpretation section states as ‘For purposes of this Act, witchcraft does not include bona fide spirit worship or the bona fide manufacture, supply or sale of native medicines.’ Luckily, a proposal for a review of Kenya’s Witchcraft Act was already made by the Kenya Law Reform Commission (KLRC) and it is long-overdue. Just like the Ugandan Act, a future amendment to the Kenyan Act should similarly expressly exempt the bona fide practice of traditional medicine, as well as the bona fide manufacture and supply or sale of traditional medicines. Such an amendment will not only harmonize the provisions of Kenya’s Witchcraft Act with those of the traditional medicine legislation proposed in this paper, but will also promote and protect the country’s traditional medicine and its practice.

3.5. The Protection of Traditional Knowledge and Cultural Expressions Act (Act No. 33 of 2016)

This piece of legislation is intended to protect traditional knowledge (TK) and traditional cultural expressions (TCE) from exploitation by third parties. Such expressions are usually in the form of varied media, for instance folklore. It in its preamble states that it is an Act of Parliament to provide a framework for the protection and promotion of traditional knowledge and cultural expressions; to

give effect to Article 11, 40 and 69 (1) of the Constitution (i.e. the Constitution of Kenya, 2010). Article 11 is on culture. It recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation; and enjoins the Government to protect and promote traditional knowledge and cultural expressions by inter alia enacting legislation. It is pursuant to this constitutional edict that the Kenya Government enacted this Act. The Act has definitions of key words and terminology, which include those that are germane to the subject matter of this paper. It defines a community as a homogenous and consciously distinct group of the people who share any of the following attributes: 1) common ancestry, 2) similar culture or unique mode of livelihood, 3) geographical space, 4) ecological space, 5) community interest. It defines the term “customary” as the use of traditional knowledge or cultural expression in accordance with practices of everyday life of the community, such as for instance, usual ways of selling copies of tangible expressions of folklore by local craftsmen. It defines “customary use” as the use of traditional knowledge or cultural expressions in accordance with the customary laws and practices of the holders. It defines “customary laws and practices” as customary laws, norms and practices of local and traditional communities that are legally recognized.

The Act provides for equitable sharing of the benefits accruing from traditional knowledge. It gives the community exclusive use rights over their traditional knowledge, and allows the owners of such knowledge to enter into agreements with others. With regard to traditional medicine and traditional medicinal knowledge, one area in which this may be manifested is negotiation and execution of use agreements between traditional medical practitioners and their counterparts in the conventional medicine system, or even the government and other non-governmental actors such as pharmaceutical companies. Under the Act, the following acts are prohibited, and penalties prescribed for infraction: 1) The derogatory treatment of traditional knowledge and their holders, 2) Misappropriation, misuse, abuse, as well as unfair, inequitable or unlawful access and exploitation (use) of traditional knowledge and cultural expressions, 3) The use of traditional knowledge without the prior informed consent of its owners. For infractions, the Act imposes punishment of imprisonment ranging from 5 to 10 years; and fines of up to Kenya Shillings One Million (Approximately 10,000 US Dollars).

4. Provisions of the Proposed Traditional Medicine Framework Statute for Kenya

The Traditional Medicine Framework Statute that this author has proposed for Kenya and proposed to be called “The Traditional Medicine Coordination Act” should be structured as set out in this part, below.

4.1. It Should Have a Preamble Stating Its Object and Recognizing the Role of Traditional Medicine in Kenya

The Preamble should state the statute’s object as follows: “An Act of Parliament

to provide an appropriate and effective legal framework for promoting, developing and regulating traditional medicine and traditional medicines”. It could also expressly recognize the important role of traditional medicine and traditional medicines in the country’s health care.

4.2. It Should Have an Interpretation Section Defining Key Terms and Concepts

The Act should also have an interpretation section, in which the key terms and key concepts are defined. These terms and concepts should include the following: Traditional medicine, traditional medicines, traditional knowledge, traditional medicinal knowledge, traditional medicine practice, traditional medicine practitioner.

4.3. It Should Have a Provision Establishing or Designating an Institution Responsible for Traditional Medicine

The Act should have a provision establishing or designating an institution or agency responsible for regulating the traditional medicine sector, traditional medicine practice and traditional medicines. It could be a totally new creation or an existing institution or agency. Such an institution will be responsible for: generating and implementing traditional medicine policies; standards, quality control, and registering of traditional medicines; registering traditional medicine practitioners; licensing foreign traditional medicines; etc. The Kenya Government in the National Health Bill of 2014 pledged to establish a Traditional Healers Council to be tasked with: maintaining a register of traditional medicine practitioners, licensing practitioners and quality control of traditional medicine practitioners (Registration, Licensing, and Regulation of traditional medicine practice and practitioners). This outfit was to be located in the Ministry of Health instead of Ministry of Culture and Social Services as has been and is currently the case. Unfortunately, this Bill has to this date never been passed by Parliament, hence has not yet seen the light of day and its provisions are not part of the country’s laws. So it remains just a Bill, unpassed, unenacted and without the force of law.

4.4. It Should Have Provisions Creating Offences Related to Traditional Medicine

The Act should have provisions proscribing certain acts and conduct relating to traditional medicine, creating offences and prescribing penalties for infraction. Such offences should criminalize activities such as: quackery and practicing without licence; prohibition of the bullying of traditional medicine practitioners or using of words/language demeaning them, their practices or their medicines; non-registration; deceit and false pretences; overcharging; practicing and promoting witchcraft; bio-prospecting; adulteration of traditional medicines; lacing of these medicines with prohibited substances and biomedical substances; and even infringement of intellectual property rights such as patents and trademarks. As for

penalties, they should be in the form of fines and imprisonment. Such offences will be in the category of misdemeanor or felony. A felony is a more serious and indictable offence that attracts serious penalties such as imprisonment and heavy fines. A misdemeanor on the other hand is a less serious offence with less penal consequences as compared to a felony. In some jurisdictions such as the US, it is a non-indictable offence that most people will plead guilty to and get away with a light sentence, such as a warning sometimes. The author opines that the fines that should be prescribed in that Act should be reasonable and realistic, ranging from Kenya Shillings 1000 (equivalent to 10 US Dollars) to Kenya Shillings 50,000 (equivalent to 500 US Dollars) depending on factors such as the gravity of the offence, its impact on society, whether it has any economic gain for the offender, etc. However, such penalties should be reasonable and proportionate. Even with the need for deterrence in some cases, heavy penalties such as long periods of imprisonment or even heavy fines such as those running into millions of shillings are unreasonable, unrealistic and to many Kenyans unaffordable given the economic realities of Kenya where almost half of the population live below the poverty line, and earning less than a dollar a day.

4.5. It Should Have a Provision Establishing a Professional Association of Traditional Medicine Practitioners

The Act should have a provision establishing a professional Association of traditional medicine practitioners to regulate traditional medicine practice. The Association when established should be vested with the mandate of: regulating training, accreditation of training institutions; prescribing registration criteria for traditional medicine practitioners and even registering them; licensing of traditional medicine practitioners; prescribing and maintaining ethical standards for these practitioners; and disciplining wayward members. Admittedly, one of the major problems experienced in traditional medicine in Kenya is the lack of a professional body to regulate its practice, its practitioners and its medicines. The Government has in its policies been advocating for the formation of an umbrella professional Association for traditional medicine practitioners. In the author's view, such an Association will not only ensure that these important health care givers are registered, but will also set and superintend their standards and quality, and in the long-run stamp out quackery. It will also uphold competence as well as regulate "professional" conduct and ethics, and discipline wayward members just like the allopathic medical practitioners' and pharmacists' associations—such as The Kenya Medical Practitioners and Dentists Board (KMPDB), The Pharmacy and Poisons Board (PPB), The Nursing Council of Kenya (NCK), The Clinical Officers Council of Kenya, and The Kenya Medical Laboratory Technicians and Technologists Board.

4.6. It Should Have Provisions on Protection of Intellectual Property

The proposed Act should have provisions on intellectual property (IP) rights of

traditional medicine, its practitioners and its medicines. Such provisions should be aimed at and worded to protect traditional medicinal knowledge (TMK), traditional medicinal secrets, and traditional medicines. On the intellectual property aspect, the Act shall complement The Industrial Property Act and The Protection of Traditional Knowledge and Cultural Expressions Act, that have already been discussed in this paper. The latter is more germane to traditional medicine, as it was promulgated to protect traditional knowledge (TK), indigenous property rights, and traditional cultural expressions (TCE) from exploitation by third parties. Such expressions are usually in the form of varied media, for instance folklore. As already observed in this paper, one of the major challenges that traditional medicine faces in Kenya, is inadequate intellectual property protection. For instance, unlike their allopathic medicine counterparts who keep key medical secrets and information, traditional medicine practitioners in Sub-Saharan Africa countries such as Kenya, are less bothered about intellectual property protection, and are in the spirit of African generosity or sheer ignorance, eager and anxious to divulge their traditional knowledge and key medical secrets of their practice and medicines. With regard to intellectual property secrets, the rule is “publicize and perish” rather than “publicize or perish”. The readiness to divulge medical secrets and knowledge, foments infringement of intellectual property of African traditional medicine (ATM). It is proposed that the Act should establish a stringent regulatory regime with regard to intellectual property aspects of traditional medicine.

4.7. It Should Have Provisions on Emergency Health Care and Essential Medicines

The Act should have provisions on emergency health care and essential medicines. Given the importance of emergency health care and essential medicines, as well as the dual nature of Kenya’s health care system (conventional medicine and traditional medicine existing side by side), and the latter’s complementarity and importance, there is need to include traditional medicine, traditional medicine practitioners and traditional medicines in matters relating to emergency health care and essential medicines.

4.7.1. Emergency Health Care

In the context of this paper, “Emergency Health Care” (EHC), or Emergency Medical Care (EMC) as it is also known, is the medical and medicinal attention for illnesses, sicknesses, health problems and medical situations requiring immediate medical attention. It is almost always the initial medical intervention. In many cases, it is in the form of pre-hospital interventions or treatment provided on urgency basis and intended to stabilize the situation, for instance shock, trauma or bodily injuries arising from an incident such as an accident, disaster, calamity or other sudden injurious occurrence. Emergency health care being usually urgent and immediate, needs to be readily available, easily accessible, effective, efficient, accurate, and prompt.

Admittedly, emergency health care is a significantly crucial and important component of any health care system, for reasons that: 1) It is the immediate medical intervention usually intended to stabilize the condition or complication, 2) It provides the right treatment and medical attention at the onset of the problem, hence it is the right intervention at the right time, 3) Where it is applied to a life-threatening situation/occurrence, it will often times save a life, 4) For many patients, emergency health care is the first contact or first medical intervention, hence it is crucial and critical, as often all that begins well will most likely progress well and is likely to end well, 5) In instances and incidents of disaster or casualty, emergency health care is the first response or early intervention, 6) It is also in most cases given by frontline health care providers or medical personnel; who are usually more responsive and proactive than the specialists for instance, 7) It is also in many cases provided by non-medical personnel or lower cadre medical personnel or fringe and peripheral health care providers such as paramedics whose competences unlike those of doctors and nurses do not require complex skills, competences and equipment found largely in health care facilities such as hospitals, 8) Being rendered on urgency basis, it is usually prompt, urgent and in most cases immediate, hence needs to be executed with great care, accuracy, precision, and competence.

4.7.2. Essential Medicines

According to the World Health Organization (WHO), essential medicines are those medicines that satisfy the priority health care needs of the populations. With their necessity, essentialness and importance in the health care conundrum, it is important that essential medicines be readily available, accessible, affordable and in sufficient quantities. Indeed, their litmus test consists of availability and sufficiency. While the WHO has crafted a Model List of Essential Medicines, individual countries are expected to have their Essential Medicines List as well. This is also true for Kenya, as it has a List, called “Kenya Essential Medicines List of 2019 (GOK, 2019). Traditional medicine and its traditional medicine practice possess some traditional medicinal knowledge on response and management of emergency health needs. There are also traditional medicines that traditional medicinal systems and traditional medicine practitioners consider as being essential, and to which the principles of essential allopathic (biomedical) medicines apply *mutatis mutandis*. It is therefore important that in generating pharmacopoeia of traditional medicines, there be a listing of essential traditional medicines as well, to compliment and augment the already existing Kenya Government’s said Essential Medicines List.

4.8. It Should Have a Provision Expressly Prohibiting the Malevolent Use of Traditional Medicine

As already noted in this paper, traditional medicine is known to be put to malevolent as well as beneficial use. Its beneficial or benevolent uses include its use in the prevention, diagnosis and treatment of diseases and illnesses. Its malevolent

uses include: use in witchcraft, sorcery, black magic, wizardry, traditional oath-ing, curse ordeals, and many other harmful and malicious uses. In Kenya, how-ever, only the beneficial uses of traditional medicine are permitted by law (legal-ly permissible use), while some of its known malevolent uses for instance its use in witchcraft and traditional oathing are by law prohibited, hence illegal (Sifuna, 2021). Its malevolent use in witchcraft is, for instance, prohibited under the Witchcraft Act (Cap 67). Other such uses as would offend the Penal Code (Cap 63), which is Kenya’s principal criminal law statute, are similarly prohibited and criminalized. The proposed statute should have a provision expressly prohibiting the malevolent uses of traditional medicine. It could for instance provide that only the beneficial use for promotion of health and cure of diseases and illnesses is permitted; or that all malevolent use such as use for the practice of witchcraft, black magic, and such other nefarious uses are prohibited. It should in the defi-nition/interpretation section define the terms “malevolent use” and “beneficial use”. In the context of this paper, a malevolent use is that which is injurious and calculated to cause harm, suffering or misery. A beneficial use for its part is use that is in good faith and without ulterior motive.

4.9. It Should Have a Saving Clause on the Other or Related Pieces of Legislation

A legislation on traditional medicine should, like many statutes out there, have a saving clause making reference to other or related statutes (Acts of Parliament) that have provisions touching on traditional medicine. This is to ensure consis-tency and avoid contradictions in the law. In the area of traditional medicine, these other Acts include: The Health Act of 2017 (Act No. 21 of 2017), The Pub-lic Health Act (Cap 242 Laws of Kenya), The Pharmacy and Poisons Act (Cap 244 Laws of Kenya), The Witchcraft Act (Cap 67 Laws of Kenya), The Protection of Traditional Knowledge and Cultural Expressions Act (Act No. 33 of 2016), The Industrial Property Act (Act No. 3 of 2001), The Forest Conservation and Management Act (Act No. 34 of 2016); The Wildlife Conservation and Man-agement Act Cap 376, among others.

4.10. It Should Have a Provision Asserting Its Supremacy on Matters Connected with Traditional Medicine

The Act should have a provision stating that this Act is the primary legislation on traditional medicine in the country, and that when there is a conflict between this Act and any other Act or regulation on the same, this Act shall prevail and the other Act or regulation shall be construed (interpreted) in a manner that promotes the objectives and provisions of this Act. These Acts as already stated in this paper, include: The Health Act of 2017 (Act No. 21 of 2017), The Public Health Act (Cap 242 Laws of Kenya), The Pharmacy and Poisons Act (Cap 244 Laws of Kenya), The Witchcraft Act (Cap 67 Laws of Kenya), The Protection of Traditional Knowledge and Cultural Expressions Act (Act No. 33 of 2016), The

Industrial Property Act (Act No. 3 of 2001), The Forest Conservation and Management Act (Act No. 34 of 2016); The Wildlife Conservation and Management Act Cap 376, among others. By virtue of the doctrine of supremacy of the Constitution, encapsulated in Article 2 of the Kenya Constitution of 2010, this Constitution cannot be amended to be aligned by an Act of Parliament, and in case of any conflict between a legislative provision and that of the Constitution, the latter prevails. Luckily enough with regard to traditional medicine in Kenya, there is no conflict or contradiction between any constitutional provision and any legislative provision in the above listed Acts. All that there is, is a lacuna, which the legislation proposed in this paper is to fill.

5. Conclusion

This paper has established that despite having an impressive policy framework on traditional medicine, Kenya lacks a specific legislation on the same; as all it has currently is a plethora of pieces of legislation that are scattered over several sectors and line ministries and touching on one or other aspect of traditional medicine. It has also further established that even though the effective operation of these scattered and fragmented legislation can to some extent promote or impact it positively on traditional medicine, they are bedeviled by lack of coordination and harmonization. To attenuate this undesirable state of affairs, the paper has recommended the urgent enactment of a framework statute (Act of Parliament) to coordinate and harmonize the said existing scattered pieces of legislation. It has also configured the structure and content of the statute and even proposed a tentative name for it (“The Traditional Medicine Coordination Act”). The statute’s object being to provide a legal framework for coordinating and harmonizing not only the several scattered pieces of legislation, but also coordinating and harmonizing the inter-agency efforts and agenda on traditional medicine. This form of legislation is most desirable given the inter-disciplinarity and inter-sectoriality of traditional medicine. Undeniably, traditional medicine transcends several disciplines and sectors such as health, intellectual property, cultural anthropology, ecology, etc. With this unique character, there arises need for managing cognate matters, actions, and agenda in these disciplines and sectors. For this reason, traditional medicine can neither be divorced nor isolated from the cognate sectors and line ministries, as these others have each a pool of experts in the respective sectors.

The paper has also observed that in order to efficaciously coordinate and harmonize the existing pieces of legislation, the enactment of that statute will require amendment of the existing traditional medicine-related pieces of legislation already discussed in this paper. These include: The Health Act of 2017 (Act No. 21 of 2017), The Public Health Act (Cap 242 Laws of Kenya), The Pharmacy and Poisons Act (Cap 244 Laws of Kenya), The Witchcraft Act (Cap 67 Laws of Kenya), The Protection of Traditional Knowledge and Cultural Expressions Act (Act No. 33 of 2016), The Industrial Property Act (Act No. 3 of 2001), The For-

est Conservation and Management Act (Act No. 34 of 2016), as well as The Wildlife Conservation and Management Act Cap 376, among others. These Acts need to be amended to include provisions on traditional medicine and traditional medicines. Such amendments will create harmony between them and also align them with the proposed statute, so as to manage and coordinate matters and actions relating to traditional medicine.

With this statute as well as the cognate legislation, traditional medicine in Kenya will not only continue being an essential part of the nation's culture (cultural embodiment), but will also have been properly legislated and mainstreamed in the country's health care system. With it, traditional medicine will be guaranteed the much-needed support, protection, harmonization, coordination and regulation.

Declaration on Conflicts of Interest

The author declares that there is no conflict of interest regarding the publication of this paper. Further, the research leading to it was his individual scholarly enterprise devoid of any economic gain or prospect thereof, and was not funded by any organization, institution or entity.

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