

COUNSELLING PSYCHOLOGY LEGAL
REGULATORY FRAMEWORK IN
KENYA

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Abstract

Counselling psychology in Kenya as well as everywhere in the world must operate within the established legal and policy framework. Specialised counselling psychologists will be increasingly aware that they are required to acquaint themselves with the existing laws and regulations that govern counselling as well as other professions and fields of specialisation. Other professionals making use of counselling skills in the course of their work will adhere to set standards stipulated in their area of specialisation. Kenya has experienced a period of policy positioning in line with the new Constitution that encompasses democratic changes, health and human rights. These broad policy positions will impact on both the public and private sectors to improve quality and increase efficiency to transform the lives of the people in all aspects. This paper discusses some of the pertinent legal policies in Kenya and their implications in counselling psychology.

Keywords: Counselling Psychology, regulations, standards, legal framework, legal policy.

Introduction

An enabling legal and regulatory environment is desirable for effecting counselling service delivery. The overall objective of the legal and regulatory policy is to ensure that the needs and concerns of males and females, boys and girls, children and adults including the elderly, persons with disability, patients and clients are safeguarded even in the context of health care such as counselling. There are a number of statutes that can be used and apply in professional counselling practice, especially in the context of the existing legal and justice system. Emphasis for psychological care will be confined to our world and must in turn respect personality and behaviour. The counsellor has a responsibility to practice in a professional manner within the

ethical guidelines established by the profession and within the law. Corey (2005:4) summarises it up all so aptly:

This focus on acceptance of personal responsibility does not imply that we can do anything that we want. We need to recognize that social, environment, cultural and biological realities limit or freedom of choice. It is crucial to learn how to cope with the external and internal forces that limit our decisions and behaviour.

Kenya as a sovereign state is also a signatory to several international conventions on health and safety, human rights, labour laws and others. Counselling operationalisation framework will be guided by strategies for implementing individual and community concerns and programmes, sectoral needs such as counselling in the workplace, medical regulations, counselling in other contexts such as school, as well as prescribed implementation mechanisms in various sectors such as: education, environment, health, information communication technology, law and administration of justice.

International Context

The operational framework for professional counselling in Kenya is based on international laws and conventions, so that it upholds the sanctity of human life, does not discriminate against anyone and embraces human rights values. These conventions are supported by enacted laws that protect special groups vulnerable to discrimination such as people living with HIV and AIDS (PLWHA), children, girls, women, people with disabilities, displaced persons and refugees, prisoners of war and other special groups.

They include the following:

- a) *Workers with Family Responsibilities Recommendations, 1981*: This convention encourages provision of vocational guidance and counselling, information and placement services to employees and training of counsellors to respond to the special needs of workers with family responsibilities.
- b) *Code of conduct on HIV /AIDS and the World of Work, 2001*: The code provides for the encouragement of counselling services to assist workers cope with HIV and AIDS. This includes the need to make use of expertise and assistance outside their organisation for counselling, or in workplace programmes, if specialised and further counselling is

required. Counselling psychological services adapted to the different needs and circumstances of females and males should also be made accessible. Workers should further be informed of their rights and benefits in relation to counselling programmes and others, including life skills programmes and occupational schemes that may assist workers with HIV and AIDS.

- c) *Vocational Rehabilitation and Employment (Disabled Persons) Convention 1983*: This convention stipulates that vocational guidance should be offered to persons with disabilities to help them retain and advance in employment. This convention also provides for support, and recognition of people vulnerable to discrimination. It must be accepted that persons with special needs and other exceptional persons too require provision of guidance and counselling and other support services.

Drug abuse and trafficking, rape and child abuse are international concerns. Principles of the counselling profession must be within the legal framework though aligned to promote the rights of all persons. Practitioners must be careful that they and clients do not to violate the Penal Code. For instance, what the law says on suicide, assisted suicide and euthanasia. Psychiatrists may prescribe medication for depression such as anti-depressants drugs. The standard reference book for mental disorders is the Diagnostic and Statistical Manual (DSM) of the American Psychiatric Association (APA) that lists a set of disorders and provides detailed descriptions on what constitutes a disorder. These include major depressive disorder or anxiety disorder. Such standards must be upheld at all times.

Kenyan Context

Counselling should be implemented within the framework of the Constitution, and other relevant legislation as outlined below:

- a) *The Constitution of Kenya, 2010*: The Constitution is the supreme law of Kenya, and other laws must comply with it. The Constitution stipulates the fundamental rights and freedom of the individual. These include: the right to life, liberty, security of person and property, the right to fair trial, freedom of conscience, freedom of movement, freedom of association and assembly, freedom from inhuman treatment, freedom from slavery and

freedom from being treated in any discriminatory manner. In addition, there are the consumer rights.

- b) *Mental Act (Cap 248)*: The Mental Act provides for the care, management and control of persons suffering from mental health illness. A person suffering from mental disorder is a person diagnosed with psychopathic mental illness, and other persons suffering from mental impairment due to alcohol or substance abuse. Persons who may be diagnosed with health problems may be referred for psychological counselling as part of the management of the problem. The counsellor will liaise with relevant authorities for support and referral. In the case of a patient suffering from mental health problems but who may be unwilling to present themselves for treatment as stipulated, the counsellor will liaise with others who may include the police and relatives to ensure the affected person attends and receives treatment under the provision on emergency admission and involuntary treatment.
- c) *HIV and AIDS Prevention and Control Act, 2006*: The HIV and AIDS Prevention and Control Act make specific reference to issues of HIV and AIDS, counselling and confidentiality. It provides measures for the prevention, management and control of HIV and AIDS, the protection and promotion of public health and for the appropriate treatment, counselling, support and care of persons infected or at risk of HIV and AIDS infection, and for connected purposes. The Act makes specific reference to HIV and AIDS in relation to discrimination, privacy, confidentiality and personal rights.

Specifically the Act:

- Provides that no person shall compel another to undergo an HIV test save where a person is charged with an offence of a sexual nature under Sexual Offences Act, 2006;
- Prohibits the disclosure of an HIV test result of another person without written consent; and,
- Makes it an offence for any person to be discriminated against on the grounds of actual, perceived or suspected HIV status, in relation to employment, access to education, credit insurance, healthcare, travel, habitation or seeking public office.

In health, there are programmes including; Voluntary Medically Assisted Adult Male Circumcision (VMMC). It is equally significant that the practitioner make reference to other Health programmes such as the National AIDS Strategic Plan (Republic of Kenya, 2009a) and guidelines for antiretroviral drugs and therapy in Kenya for instance (Republic of Kenya, 2005c; 2005d).

- d) *Public Officer Ethics Act, 2003*: The ethos of the Public Service is to offer services to members of the public and support successful governments of the Republic of Kenya with loyalty, impartiality, honesty and integrity, and to facilitate enhancing peace and social-economic development. The Public Officer Ethics code contains rules of conduct and ethics to be observed by public officers so as to maintain the integrity and neutrality of the public service and that all duties are conducted in accordance with the law. It also prohibits an officer from sexually harassing a member of the public or a fellow officer. This will also apply to the counsellor.

Counsellors working in the public service, or with such officers, would need to be well acquainted with such provisions especially when inducting new officers into the service. For example, the public officers' code provides that a public officer shall ensure that confidential or secret information and documents entrusted in their care are adequately protected from improper and inadvertent disclosure, and where there is a breach of this code, appropriate action will be taken in accordance with the Act and other applicable laws. On professionalism, the code stipulates that an officer will seek to improve the standards of performance and level of professionalism in the organisation and if a member of a professional body, observe the ethical and professional requirements of that body. So will the counsellor. In addition, an officer is expected to avoid situations where personal interests conflict with official duties and in such cases, declare own personal interests and refrain from deliberations with respect to the matter.

- e) *The Proposed Counselling Psychological Bill*: The proposed Kenya Counselling Psychologists Bill will provide for the training, registration and licensing of psychological practitioners, to provide for their practice and standards, and to ensure their effective participation in matters relating to guidance, counselling and the offering of therapeutic services in the community and for connected services. Among the proposals include the registration of psychological practitioners including qualifications, a

certificate of registration, counselling supervision, and other matters to enhance professional conduct. In the same way, there is need for a coherent and comprehensive overall framework for guiding counselling within the different and diverse society.

- f) *Health and Safety*: Government policies aim at improving the health status of all persons including women and men, boys and girls, and health services to groups with special needs such as the youth, rape victims, people with disabilities, and particularly with HIV and AIDs persons engaged in high-risk behaviour such as Commercial Sex Workers (CSW), Injecting Drug Users (IDU) and men have sex with men (MSM). Existing laws in health for instance stipulate that abortion is illegal. However, the law provides for exceptional circumstances, where the life of the mother is at risk. Terrorism poses an international threat and it is crucial that counsellors are aware of such laws on safety that seek to protect others from any waywardness and ill-conceived motives. Health awareness for counsellors must include the incorporation of Provider - Initiated HIV Testing and Counselling (PITC) and Anti Retroviral Therapy (ART) as part of routine health care to all patients and clients. Other essential legal aspects include the Medical Laboratory and Public Health Acts.

Clinical psychologists, psychiatrists, doctors, clinical officers and nurses will be acquainted with health issues, and also harmonize specific policy issues from other health guidelines such as the National guidelines for the Prevention of Mother-to-child HIV/AIDS Transmission (PMCT), National Tuberculosis (TB) and Leprosy Guidelines for TB and HIV collaborative activities, the National Guidelines on Blood Transfusion, and the National Quality Assurance Strategy for Voluntary Counselling and Testing (VCT). These health policies will make reference to international policy documents including the UNAIDS and WHO guidance on provider-initiated HTC in health facilities, WHO and CDC guidelines for assuring the accuracy and reliability of HIV rapid testing, WHO guidance on the early detection of HIV infection in infants and children, and UNAIDS and WHO guidance on encouraging beneficial disclosure, ethical partner counselling and appropriate use of HIV case-reporting. Professional counselling practitioners and others working in several settings must be familiar with some of these regulations in their practice as well as refer clients as appropriate.

- g) *Education*: The Ministry of Education implementation of guidance and counselling services and programmes in educational institutions has been based on recommendations contained in various Education Commission Reports and Government Policy documents (Republic of Kenya, 1964; 1976; 1988; 1999; 2005a; 2005b). In 1971, a guidance and counselling section was set up in the Ministry. This was on the realization that academic work alone is inadequate in producing an all round person useful to the self and to the community s/he serves. The Ministry of Education recognizes guidance and counselling as an essential service that must be provided to every child in the school for personal development as well as career development (Republic of Kenya, 2009b). Notwithstanding, the implementation of guidance and counselling in schools has been hampered by a weak policy as argued by Wango (2006b; 2006c). Wango (2006b) and Wango and Mungai (2007) further propose the need to enhance a more professional approach to counselling in the school. Overall, it is important to understand how certain aspects such as education are applicable in the new constitution.
- h) *Legal and Justice System*: Aspects of the counsellor's role and function are governed by existing judicial and legislative system including the Penal Code (Republic of Kenya, 2009c). Counsellors must understand the law and be aware of the legal implications and restrictions within the professional conscience. These include: child abuse (CA); drug abuse; marriage and family; mental illness and the severely disturbed persons; and, criminal and civil liability. There are several of these that have counselling and legal implications. These are briefly described below:
- i) *The Sexual Offences Act, 2006* (Republic of Kenya, 2006): The Sexual offences Act make provision on sexual offences, their definition, prevention and the protection of all persons from harm, from unlawful sexual acts, and/or for connected purposes.

Counsellors have a responsibility to counsel and safe guard clients from the following:

- *Rape*: Rape occurs when the other person does not consent, or the consent is obtained by force or by means of threats or intimidation of any kind.
- *Defilement*: A person who commits an act, which causes penetration with a child, is guilty of an offence termed defilement.

- *Deliberate transmission of HIV:* Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and wilfully does anything or permits the doing of anything which he or she knows or ought to reasonably know:
 - a) Will infect another person with HIV or any other life threatening sexually transmitted disease;
 - b) Is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease; and,
 - c) Will infect another person with any other sexually transmitted disease, shall be guilty of an offence.
- *Administering a substance with intent:* Any person commits an offence if s/he intentionally administers a substance to, or causes a substance to be administered to or taken by, another person with the intent of:
 - a) Stupefying; or,
 - b) Overpowering that person,So as to enable any person engage in a sexual activity with that person.
- j) *The Children's Act, 2001:* The Children's Act stipulates that every child is entitled to education and puts the responsibility on the government and the parent. 'Education' means the giving of intellectual, moral, spiritual instruction or other training to a child. By a 'child' means any human being under the age of eighteen years, and a 'child of tender age' is a child under the age of ten years. The Act protects children from child abuse and prohibits early marriage. 'Child abuse' includes physical, sexual, psychological and mental injury. 'Early marriage' means marriage or cohabitation with a child or any arrangement made for such marriage or cohabitation. Those working with children will find the Children's Act and others such as the Disabled Persons Act key.
- k) *Drug Act.* The Government has enacted several laws to govern the manufacture, sale and consumption of certain legal drugs. Some of these laws include the Pharmacy and Poison's Act that control the importation, exportation, local manufacturing, trade and safe keeping of drugs and the Dangerous Drugs Act (DDA) on import and/ or export of narcotic drugs.

- l) *Data Protection Act*: The Data Protection Act has significant impact and implications, and this is likely to increase again when the transition period begins to apply to all manual (paper) records as well as computer held data. Personal data includes both facts and opinions about an individual. In that case, processing of data has a much wider definition than before and incorporates the concepts of obtaining, holding and disclosing information in whatever format. Data subject refers to the individual on whom data is held. An *Access to Health Records Act* may stipulate standards that support members of the health care team, such as doctors, nurses, counsellors, care-givers, psychologists and psychiatrists, involved in the care and treatment of an individual to share records or make entries in a single record in accordance with an agreed local protocol. The ability to obtain and share information whilst respecting client confidentiality is essential. The practitioner's contribution to such records must be seen as of equal importance. This reflects the wider value of collaborative work within inter-professional health care team.

The period for which records including client record may be kept depends largely upon legislation including health service policy. Counsellors, psychologists, psychiatrists and psychotherapists need to be acquainted with such legal requirements. For instance, this may require the maintenance of records for at least 8 - 10 years and, in the case of a child, at least to the date of the child's 18th birthday (this depends largely on the definition of a child). Whether the counsellor is self-employed or working in an organisation, s/he should ensure that no record made relating to the client is destroyed within the stipulated period. All persons including counsellors and staff working in records will have a general duty to comply with the Act. The Act includes transmission of data in whatever form, and disclosure. Individuals can face criminal charges under certain conditions, if, without consent, they knowingly or recklessly, obtain or disclose personal data. Whilst the primary responsibility for counselling records lies with the counsellor, all staff inevitably have a duty to comply with record regulations.

- m) *Media, Information and Technology*: The media in Kenya is becoming more diverse, flourishing and competitive. There has been a lot of mushrooming of publications ranging from political and business weekly to social, cultural and health magazines. The electronic media, through the radio and television, and Internet services is increasingly

becoming more competitive particularly with the licensing of more radios and television stations. It is important that the counsellor comprehends laws that deal with the media and information especially when these involve or affect the client.

- n) *Counselling Code of Conduct*: The counselling code of conduct spells out a professional approach to counselling. It is imperative that practitioners be acquitted with a professional conduct of conduct and the services charter which should be displayed prominently in the premises. Professional associations such as Kenya Counsellors Association (KCA), Association of Counsellors in Education (ACE) and Kenya Guidance, Counselling and Psychological Association (KGCPA) should come up with a counselling code of conduct, ethical principles and guidelines. In that case, though a code of ethics is obligatory, counsellors may not strictly adhere to specific regulations but the individual practitioner will make various considerations in unique circumstances.

These and other regulations are outlined in the Table below.

Table 1. Reference to International Conventions, National Laws, Policies, Guidelines and Regulations

<p>The following statutes are key in counselling:</p> <ul style="list-style-type: none"> ▪ The Constitution of Kenya, 2010 ▪ Alcohol and Beverages Act ▪ The Children’s’ Act, 2001 ▪ International Conventions, including: Health and Safety; HIV and AIDS; Convention on Elimination of all forms of Discrimination Against Women (CEDAW); and International Labour Laws ▪ Persons with Disabilities Act ▪ The Employment Act (Labour Laws) ▪ The Marriage Act ▪ Federation of Kenya Employers Policy Documents ▪ The Sexual Offences Act, 2006 (Revised 2007) ▪ Public Officer Ethics Act, 2003 ▪ Public Health Act ▪ Mental Health Act ▪ Persons with Disability Act ▪ Medical Laboratory Act ▪ Counselling Policies (for example, policy on guidance and counselling in the public service, guidance and counselling in schools) ▪ Other existing agencies and regulations. For instance, the Dentist Board, the Pharmacist and Medical Dentist Board and Drugs Acts
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- Policies governing various sectors such as Education (The Education Act, Science and Technology), Health (Medical Training and Nursing, Clinical Officers), Prison (The Prisons Act), Publications and Media (Books and Newspaper and The Copyright Acts), Kenya Revenue Authority and relevant regulations applicable in area of work such as Banking, Accounting and Office Practice.
- Professional regulations set up by various professionals / associations such as Accountants, Bankers, Dentists, Law Society of Kenya (LSK), Architects and Quantity Surveyors, Pharmacists and others relevant at the time / place / issue.

Counselling Psychology and Law: Professionalism Practice and Legal Application

Societies are governed by the rule of law. There will be various legislations on corruption, fraud, drug trafficking, customer protection, stalking, money laundering and other financial improprieties and these will not just be frowned upon, but criminalised and severely punished. The Communications Commission of Kenya (CCK) for example prohibits sending of alarming and hateful messages. Counselling and law is an intersection zone. It is a professional joint meeting for lawyers and counsellors. Counselling psychologist experts are sometimes summoned in court by the bar and the bench to give expert evidence and assist the court in dispensation of justice. Counselling psychology expertise arises in several instances. This includes cases of murder, suicide and self harm, assault and accidents, rape and disputed antics where experts assist the court to reach the right conclusion. Because of the high rate of incidents, the bulk of psychological expert practice concerns assessment of both permanent and temporary disabilities and challenges. This may also include claims of compensation from insurance companies who prefer a condition of psychological nature to be verified by a counselling psychologist, psychiatrist or medical practitioner. The assessment provides insight into human nature. Insurance companies require a fair and honest assessment of the condition of the person.

Counselling psychologist as professionals must establish a reputation for assessing mental illness, depression, trauma and other personality disorders without fear or favour. They must uphold the Constitution and the law and irrespective of who has engaged them effectively make an assessment and report. That way, practitioners will ascertain a common consent on various condition and terms. In addition, counselling is a helping process and practitioners will assist

various clients in need. Consequently, help offered by a therapist must take cognisance of the law. This paper provides few fast examples.

Credit-card debt is increasing and there are new offers of credit cards every week. So how are some people dealing with their debts? Simple, they have adopted the risk practice of rolling over or flipping where they routinely transfer their debts to a new card offering a temporary low interest rate. I have had some clients in the same way borrowing a loan from a bank with a better offer to buy off the loan in the other and then proceed to pay the new loan. This flip-over to a new card or loan does not mean the loan is over, it is a transfer and if the person is not careful, they may end up moving the debt around rather than paying it down. Of course, it is a lot easier to switch banks and credit cards than to pay a loan! How then does the practitioner assist such a client, or better still, a manager in a bank with counselling skills enable the customer-cum-client handle the enormous debt of failure to make minimum payments? Of course, they would require being genuine and empathetic with the client and also realistic about the current economic realities. But refusing to honour debts such as giving a bouncing cheque constitutes a crime.

Some clients will claim that they have a habit of following someone and may attribute this to love and affection, but that may be equivalent to stalking. Stalking is unwanted and obsessive attention such as repeated following, watching, calling someone, emailing, messaging, sending gifts and/ or harassing of another person by an individual or group of people (Wango, In Press). Stalking is a series of actions that occur over a period of time and are thus associated with harassment and intimidation and may include following the victim in person and/or monitoring them and is a criminal offence. Many celebrities are stalked by strangers who are obsessed with them. Stalking is illegal as it is tormenting to the person being watched or followed. However, some of the actions that can contribute to stalking are initially legal, such as gathering information, calling someone on the phone, communication through facebook or twitter, sending gifts, emailing or instant messaging. The action/s become illegal when they breach on the rights of another and are tantamount to harassment. For example, sending an initial text is not usually illegal, but is illicit when frequently repeated to an unwilling recipient. Also, the victim may feel they have been the victim of a stalking after a major incident such as being followed home.

Counsellors too have to assist people who are preoccupied and infatuated with others, often at times in an unhealthy way.

Same sex relations may be shunned in several traditional societies, including in Kenya. The Lesbian, Gay, Bisexual, Trans-gender and Intersexed (LGBTI) may express sentiments that they are routinely unfairly and indirectly punished by being denied access to health care, social services, jobs, housing and general acceptance. The Constitution of Kenya includes the Bill of Rights and Article 27(4) states: “The state shall not discriminate directly or indirectly any person on any good”. But Article 162 (1) of the Penal Code states: “Any person who has carnal knowledge of any person against the order of nature is guilty of a felony and is liable to imprisonment for fourteen year”. However, this violation can be difficult to prove since the ‘order of nature’ may be highly contentious. Further, the LGBTI community may require changing people’s attitude towards the gay community. This includes the law as well as changing people’s perception to avoid backlash. Clients coming for therapy may thus feel estranged and discriminated and the counsellor certainly cannot be part of bigotry.

The community is, and will continue to be increasingly framed by the requirements of among others the Children Act, Sexual Offences Act, Labour Laws and Persons with Disability Act to safeguard and promote children rights, human values and general welfare. There is also the counsellor or psychologist who can be called to act as an intermediary, for example, in a court of law on account of their expertise of experience. In that case, there seems a strong possibility that counsellors will be encouraged, or required, to limit undertakings of confidentiality for instance and to adopt more of a proactive role in assessing and reporting perceived risk and acts of child abuse and sexual exploitation. It is imperative that counselling psychology has a structured policy development. This is to flagship counselling services under the three pillars: client concerns, counsellor professional development and counselling research. To begin with, the alignment of the Constitution with various legal requirements in Kenya for instance will ultimately enable a consolidation of several legislations. For counselling psychology a policy coordination department will, as a matter of course, be created to coordinate the development and harmonization of the procedural regulations in counselling psychology.

Conclusion

Psychological counselling services must be in the context of international and national conventions and legislation. For example, a counsellor who suggests arbitration to a client must be aware that negotiation creates certainty and security which gives confidence to all the participants involved and thus may have a natural healing as it enables sustain and retain the relationship. The arbitration is a relationship as well as a consensus process and parties submit to arbitration only when they have agreed to do so. Arbitration is final, confidential, cost-effective, faster and cost-effective. In addition, arbitration as well as other legal processes must be seen within the global context of increasing human rights and the need to uphold justice, especially for the marginalized and vulnerable groups such as girls and women, refugees, persons with special needs and the aged. A major issue in Kenya and counselling, that is typical of developing countries is policy implementation. Effective implementation of certain policies is a contentious issue in developing countries where several legislation and policies can be, and are developed but functioning is a major challenge. This is because of various factors, including lack of good will, finance, ignorance of general rules and principles, corruption and other factors. Counselling as a profession in turn has to contend with the growing formalised legal environment such as the enactment of a new Constitution in Kenya. This too must see an enhanced move towards policies clearly aligned to national goals that will have operational strategies.

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