

Political integrity as irrational and hypocritical values: Do the high standards of Chapter Six of the Constitution of Kenya breed a dangerous hypocrisy in the political class?

Golo Bokao*

Hypocrisy has a round-about nature in that the rigid righteousness of the anti-hypocrite, the puritan, is hypocritical in itself.¹

Abstract

The progressive and transformative Constitution of Kenya, 2010 brought with it Chapter Six on leadership and integrity which outlines the integrity standards required of persons holding or intending to hold public office in both elective and appointive positions. The chapter has been deemed a reflection of the aspirations of Kenyans who are desirous to clean the country's politics that has been riddled with corruption and abuse of power. This article particularly focuses on the integrity fitness of those seeking elective offices with the aim of interrogating and attempting to bring out the controversies surrounding political integrity in Kenya. This study is premised on

* The author is an LLB graduate from Kabarak University and is currently a student undertaking her diploma in Law at Kenya School of Law and is a legal assistant at Ngeri Omiti and Bush Advocates LLP.

¹ Judith N Shklar, *Ordinary vices*, The Belknap Press of Harvard University, 1984.

the hypothesis that the integrity definition adopted by the Kenyan courts is too stringent and needs to be moderated to allow for moral frailties necessitated by liberal democracy. This moral stringency is presumed to be the reason why the integrity test is seen as limiting political rights and is not currently applied to qualify or disqualify persons running for elective office as envisaged by the Constitution. This article proceeds to make a contribution in this area of law by defining integrity in politics based on the distinctive character of politics which require ethics unique to politics and how its application need not be seen as infringing political rights by showing how democracy is adapted to a country's unique circumstances and priorities without undermining the fundamentals of the ideal.

Keywords: political integrity, moral integrity, integrity rationality test, liberal democracy, leadership and integrity, Chapter Six of the Constitution of Kenya

1. Introduction

The Constitution of Kenya 2010 was a much-anticipated document after years of a quest to get a new reformative constitution. Although the agitation for reforms and gains can be traced to 1991, when the then ruling political party, Kenya African National Union (KANU) was forced to repeal Section 2A of the then Constitution to restore multiparty democracy, the formal history of the constitutional review process dates back to 1980s.² The people voted for the Constitution of Kenya 2010 in a referendum and promulgated it on 27 August 2010, following a series of amendments and draft constitutions. One of the important new and improved features of the 2010 Constitution are the provisions of Chapter Six on leadership and integrity. For a country plagued by widespread corruption, embezzlement of public funds and ethnically divisive politics, Chapter Six reflects the desire of the people for better governance by persons holding public offices.

The importance of Chapter Six is well captured in the petition *Trusted Society of Human Rights Alliance v Attorney General and 2 others* where the judges opined:

Kenyans were very clear in their intentions when they entrenched Chapter Six and Article 73 in the Constitution. They were singularly aware that the Constitution has other values such as the presumption of innocence until one is proved guilty. Yet, Kenyans were singularly desirous of cleaning up our politics and governance structures by insisting on high standards of personal integrity among those seeking to govern us or hold public office.³

One may argue that the primary concerns of Kenyans are with mismanagement of public funds and service delivery. Moral uprightness beyond reproach may be a little overreaching given the very nature of politics where unethical behaviour is rewarded. An ethical code of conduct for public officers is provided for in the Public Officer Ethics Act

² Kenya Human Rights Commission, 'Wanjiku's journey: Tracing Kenya's quest for a new constitution and reporting on the 2010 national referendum', November 2010.

³ Petition 229 of 2012, Judgment of the High Court at Nairobi (2012) eKLR.

No 4 of 2003⁴ and penal laws are in place for the misappropriation of public funds. Chapter Six therefore comes across as a homage paid to virtue in politics and public service.⁵

2. Legislating Chapter Six

The inclusion of Chapter Six in the Kenyan Constitution is no doubt the aspiration of Kenyans to strive for accountability in public office and these aspirations are intended to have substantive bite.⁶ Article 80⁷ requires Parliament to enact legislation for effective administration of Chapter Six, prescribing penalties for its breach, providing application of the Chapter with necessary applications to public officers and making any other necessary provisions for promotion and enforcement of Chapter Six.⁸

Following this requirement, Parliament enacted the Leadership and Integrity Act No 19 of 2012. However, this Act was insufficient as it did not provide for effective application and enforcement of Chapter Six. This is the argument in *Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others*⁹ where the Commission for the Implementation of the Constitution (CIC) alleged that the Act sets out ethical and moral requirements already provided for in Articles 73 and 74 of the Constitution while failing to provide for mechanisms and procedures for effective administration of Chapter Six.¹⁰ The CIC alleged that parliament watered down the Bill prepared by the CIC and other

⁴ *Public Officer Ethics Act* (No 4 of 2003).

⁵ Rochefoucauld's phrase 'hypocrisy is the homage that vice pays to virtue' quoted in Ruth Weissbourd Grant, *Hypocrisy and integrity: Machiavelli, Rousseau and the ethics of politics*, University Press of Chicago, 1999.

⁶ *Trusted Society of Human Rights Alliance v Attorney General and 2 others*, Petition 229 of 2012, Judgment of the High Court at Nairobi (2012) eKLR.

⁷ Constitution of Kenya (2010), Article 80.

⁸ Constitution of Kenya (2010), Article 80.

⁹ Petition 454 of 2012, Judgment of the High Court at Nairobi (2013) eKLR.

¹⁰ Petition 454 of 2012, Judgment of the High Court at Nairobi (2013) eKLR.

stakeholders in an attempt to subvert the stringent moral and ethical requirements of Chapter Six.¹¹

The CIC asserted that the Constitution envisaged that one of the mechanisms of ensuring compliance with Chapter Six was to ensure that leaders who do not comply with its provisions are either barred from holding public office or are removed from such office and the Leadership and Integrity Act failed to capture this.¹² Article 99(2)(h) stipulates that a person is disqualified from being elected as a member of parliament if the person is found, in accordance with any law, to have misused or abused a state office or public office or in any way to have contravened Chapter Six.¹³ Articles 193(2)(g) and 194(1)(c) make similar provisions in relation to a member of county assembly.¹⁴

Regrettably, for Chapter Six to be used to determine qualifications to run for public office and to bar those who fail the integrity rationality test, adequate enforcement provisions have to be granted by the Leadership and Integrity Act as required by Article 80 of the Constitution. It is not the province of the courts alone to enforce Chapter Six. In fact, the courts' hands are tied despite the best intentions to see to it that the aspirations of Kenyans to clean up politics are kept alive.¹⁵ The doctrine of separation of powers has it so that all the organs of government work together to realise implementation of Chapter Six. In particular, the legislature and other independent institutions such as the Independent Elections and Boundaries Commission (IEBC)¹⁶ and Ethics and Anti-Corruption Commission (EACC)¹⁷ have the mandate to enforce Chapter Six.

¹¹ Petition 454 of 2012, Judgment of the High Court (2013) eKLR.

¹² *Commission for the Implementation of the Constitution v Parliament of Kenya and 5 others* (2013) eKLR.

¹³ Constitution of Kenya (2010), Chapter Six.

¹⁴ Constitution of Kenya (2010), Article 193(2)(g) and 194(1)(c).

¹⁵ *Mumo Matemu v Trusted Society of Human Rights Alliance and 5others*, Civil Appeal No 290 of (2012), Judgment of the Court of Appeal (2013) eKLR.

¹⁶ Constitution of Kenya (2010), Article 73(2)(a).

¹⁷ Ethics and Anti-Corruption Commission Act, Section 11(1).

A look at the interpretation of Chapter Six and definitions of integrity adopted by the Kenyan courts and the complex interplay between the broad provisions of Chapter Six with other provisions of law, particularly those on political rights, shed light on the difficulties of fully and properly legislating Chapter Six, perhaps out of self-preservation by the legislature.

3. Interpreting Chapter Six

3.1 'Integrity' according to Kenyan courts

Integrity is defined as the firm adherence to moral and ethical values in one's behaviour.¹⁸ The High Court of Kenya defines integrity thus:

integrity is therefore not only about an individual's own perception about the correctness or appropriateness of their conduct, but also has a fundamental social and public quality to it. It is our view that as the society also expects certain values to be upheld, the integrity provisions of the Constitution demand that those aspiring to state office be like Caesar's wife: they must be beyond reproach.¹⁹

The integrity standard was also set out in *Trusted Society of Human Rights Alliance v Attorney General and Others* where the High Court observed:

... a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution. In our view, for purposes of the integrity test in our Constitution, there is no requirement that the behaviour, attribute or conduct in question has to rise to the threshold of criminality. It therefore follows that the fact that a person has not been convicted of a criminal offence is not dispositive of the inquiry whether they lack integrity or not... it is enough if there are sufficient serious, plausible allegations which raise substantial unresolved questions about one's integrity.²⁰

¹⁸ Africa Centre for Open Governance 'Implementation of Chapter Six of the Constitution of Kenya 2010', 8 February 2021.

¹⁹ *International Centre for Policy and Conflict and 5 others v Attorney General and 5 others*, Petition 522 of 2012 and Petitions 554,573 and 279 of 2012 (Consolidated), Judgement of the High Court, at Nairobi (2013) eKLR, 131.

²⁰ Petition 229 of 2012, Judgement of the High Court at Nairobi (2012) eKLR, 107 (emphasis added).

Integrity is therefore the public's perception of a politician's character who ideally should be a virtuous leader, which is as a standard, a little more than being ethical. Here, being ethical is in conformity with codified regulations of office. Integrity can also be understood in terms of its opposite; corruption, which is putting personal interests before those of the public.²¹ Integrity includes morality and wholeness or unity and opposes corruption.²² An ideal leader would then be selfless and honourable in all circumstances.

These definitions adopted by the courts are quite unsettling because they are about moral arbitrariness and are rather too stringent. Let he who is without sin run for office. The difficulty presented by these interpretations is that premising integrity on public perception is assuming the universality of moral uprightness. This moral absolutism is what makes a leader with integrity to be one beyond reproach like Caesar's wife. Absolutism, also categorically imperative as advanced by Kant, is based on universal principles that an act is to be judged by the intent forming it, the good will, which is to be of universal application.²³ Moral absolutism has been faulted for its lack of universality considering the sheer diversity of moral standards.²⁴ Therefore, deciding the integrity of a politician or lack thereof, especially one which does not rise to the threshold of criminality, leaves a lot of discretion to the deciding body, be it the court or the electoral regulatory body, making integrity as big as the chancellor's foot.

3.2 Integrity as defined by perceptions: Attitude towards personal morality in politics among students in Kabarak University

In this study, we sampled the perceptions of a sample population, being students of Kabarak University on leadership and integrity. The graphs below show the results of the analysis from responses to close ended questionnaires.

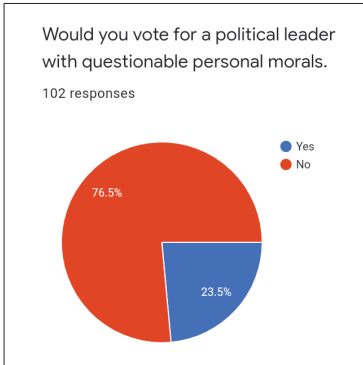
²¹ Richard Mulgan, *Corruption*, ANU Press, 2012, 26.

²² Mulgan, *Corruption*, 26.

²³ Immanuel Kant, *Groundwork for metaphysics of morals* (first published 1785).

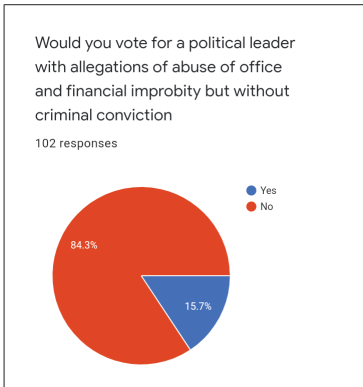
²⁴ 'Moral absolutism: The basics of philosophy', 8 February 2021.

Figure 1



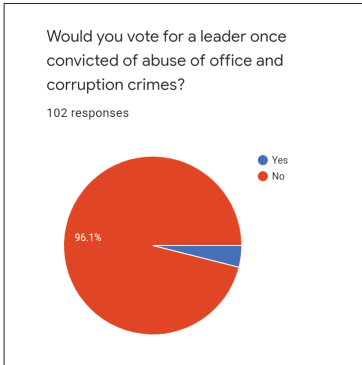
Financial improbity and abuse of office carry more weight in determining choice of leaders with emphasis on criminality threshold. Figure 2 shows this among Kabarak University students.

Figure 2



The impact and importance of criminal threshold in integrity perception is further illustrated by a follow up question in figure 3.

Figure 3



These perceptions are also reflected in application of Chapter Six in appointive positions. For instance, the recommendation by Parliament's Departmental Committee on Justice and Legal Affairs to the National Assembly on the suitability of Mumo Matemu as the chair of the Ethics and Anti-Corruption Commission that he 'lacked the passion, initiative and the drive to lead the fight against corruption' was rejected by the National Assembly and his appointment was approved.²⁵ This perhaps demonstrates the relativism of morality in determining competence to hold public office.

The definitions of integrity adopted by the courts look, not only at the actions of the leaders, but also to the character of the leader. This interpretation is deontological with emphasis on personal virtues. This creates a paradox for elective politics – long been termed 'a dirty game' where unethical behaviour and tricks are rewarded – which is the norm in liberal democracy.

4. Characteristics of liberal democracy

Liberal democracy is a government formed through popular vote and operates under principles of liberalism such as individual rights,

²⁵ *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others*, Civil Appeal No 290 of 2012, Judgment of the Court of Appeal at Nairobi (2013) eKLR.

equality and limited government.²⁶ Its origin can be traced back to the ancient Greek *polis* in the western culture although the idea is believed to have emerged and evolved in different civilisations all over the world in variations.²⁷ For instance, the current systems of democratic governance in countries of northern Europe such as Norway, Denmark, Sweden and later Iceland are said to be influenced by regional assemblies that existed during their Viking era and not the Greek *polis*.²⁸ Liberal democracy is presently the most popular and favourable system of government in the world compared to other alternatives.²⁹

This system is not without its faults and is heavily criticised for creating dependency of the political leaders on the electorate.³⁰ It is this dependency and need to woo the public to gain the majority's favour that is seen to cultivate a culture of hypocrisy, flattery and manipulation.³¹ Adam Smith goes as far as comparing political leaders to beggars because of their dependency on the people to elect them into office every few years, forcing them to fawn like a dog does to please his master in order to be fed.³² Liberal democracy therefore breeds hypocrisy which is one of the worst of ordinary vices.³³

Hypocrisy ranks second after cruelty in Judith Shklar's list of ordinary vices. It is a vice that is most repulsive for its 'double iniquity' where first there is the sin or the lie then second there is the cover up.³⁴ Hypocrisy as a word traces its origin back in the Greek theatres, *hypokrisis*, which means 'taking up a role in a play', acting a part that is not one's true self.³⁵ The word then evolved into religious use where

²⁶ Oxford languages, 8 February 2021.

²⁷ Robert A Dahl, *On democracy*, Yale University Press, 1998, 26.

²⁸ Dahl, *On democracy*, 26.

²⁹ Ian Shapiro, *Democracy's place*, Cornell University, 1996.

³⁰ Grant, *Hypocrisy and integrity*, 17.

³¹ Grant, *Hypocrisy and integrity: Machiavelli, Rousseau and the ethics of politics*, 17.

³² Grant, *Hypocrisy and integrity: Machiavelli, Rousseau and the ethics of politics*, 37-39.

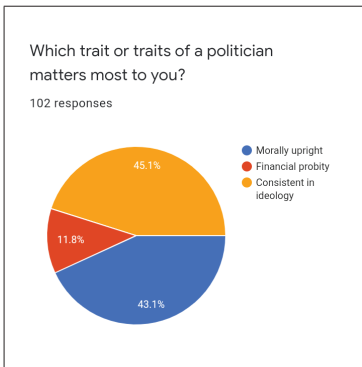
³³ Shklar, *Ordinary vices*, 47.

³⁴ Thomas Hobbes, *De Cive* in David Runciman, *Political hypocrisy: The mask of power from Hobbes to Orwell and beyond*, Princeton University Press 2008.

³⁵ Shklar, *Ordinary vices*, 47.

it meant 'false piety', a trait that was and still is highly repulsive.³⁶ It then became a practice in religious contests: in order to discredit the other, one would 'unmask' their falsehood by showing contradiction in a claim of piety and their actual way of life.³⁷ This practice was the most effective way of defeating one's opponent because of the repulsive nature of hypocrisy as a vice because nobody likes to be taken for a fool.³⁸ Soon after, unmasking became a tool in political use with the adoption of democracy.³⁹

Figure 4 shows a sample of most valued trait in politicians by students in Kabarak University



The prominence of consistency in ideology as a favoured trait in a politician is no surprise as inconsistency in ideology alludes to hypocrisy which is undesirable in a leader.

The practice of unmasking one's political opponents has been made easier in contemporary politics by the availability of 24-hour news channels and permanent digital records that now go several years back.⁴⁰ It has become easier to obtain footage and statements of one's past political positions and show contradictions that will discredit one as being

³⁶ Shklar, *Ordinary vices*, 47.

³⁷ Shklar, *Ordinary vices*, 47.

³⁸ Shklar, *Ordinary vices*, 45.

³⁹ Shklar, *Ordinary vices*, 48.

⁴⁰ David Runciman, *Political hypocrisy: The mask of power from Hobbes to Orwell and beyond*, Princeton University Press, 2008, 12.

untrustworthy. Consistency in one's political ideals has become a good strategy in politics without questioning the correctness of those ideals since, in liberal democracy, different values exist and each group is entitled to their beliefs.⁴¹ The unmasking culture is deep-rooted in liberal politics, so much so that tell-it-all books are a norm when changing political alliances. *Peeling back the mask* is one such book intended to expose Raila Odinga, Kenya's former Prime Minister (2008 to 2013) for who he really is.⁴² The 45th President of the United States, Donald Trump is also controversial with several such books written about him and his political strategies and leaks of recordings of his conversations.⁴³

Negative advertising is one other catchy and effective strategy to bring down one's political opponents where everything else fails.⁴⁴ Politicians appeal to the public's moral ideals and their intolerance of vices (hypocrisy in particular) to win the majority vote. Fake news and conspiracies are effective tools in contemporary politics where dependency on majority votes could force politicians to resort to manipulation. Perhaps one of the biggest 21st century manipulations of democracy is data mining allegations by social media platforms such as Facebook and Cambridge Analytica firm, accused of using private user information to create voter profiles and controlling their news feeds with the goal of feeding them information that will influence their voting decisions.⁴⁵ This manipulation of voters has been met with anger worldwide,⁴⁶ an indication of the public's intolerance of deceit and what Hobbes terms 'double iniquity'⁴⁷ first the false information they were fed and second, passing off as the suitable candidates.

⁴¹ Runciman, *Political hypocrisy*, 12.

⁴² Miguna Miguna, *Peeling back the mask: A quest for justice in Kenya*, Gilgamesh Africa, 2012.

⁴³ See, for instance, Amanda Carpenter, *Gaslighting America: Why we love it when Trump lies to us*, HarperCollins Publishers, 2018; Mark Leibovich, 'Thank you for your servitude: Donald Trump's Washington and the price of submission', Penguin, 2022; Hal Brands, *American grand strategy in the age of Trump*, Brookings Institution Press, 2018.

⁴⁴ Runciman, *Political hypocrisy*, 12-15.

⁴⁵ Nicholas Confessore, 'Cambridge Analytica and Facebook: The scandal and fallout so far' *New York Times* 4 April 2018.

⁴⁶ Confessore, 'Cambridge Analytica and Facebook'.

⁴⁷ Runciman, *Political hypocrisy*, 17.

The internet and social media in particular has been an avenue for disseminating political information to a large number of users. It has become a good way of encouraging young people to participate in politics.⁴⁸ However, it also poses threats to democracies as seen with Facebook and Cambridge Analytica, which was accused of playing a role in Kenya's 2017 elections by manipulating Facebook news feeds of potential voters.⁴⁹ The internet is susceptible to misuse and manipulation as an avenue for uncensored and unregulated flow of misinformation. The perceived anonymity by users also creates a platform for hate and bigotry, causing deep divisions between interest groups.

Caution needs to be exercised so that Chapter Six is not used as a tool for unmasking political opponents in our democracy. This is why the interpretation of integrity adopted by the courts is wanting for being highly subjective and even ironic for such a standard of moral integrity is incompatible with the nature of liberal democracy.

5. The paradox of liberal democracy

The paradox of liberal democracy is that it insists on principles of liberty, justice and equality yet it breeds hypocrisy like a kettle gives off steam.⁵⁰ Liberal democracies are egalitarian in principle but the legitimacy of self-interest is unquestioned in liberal democracies because that will mean doing away with electioneering and lobbying which are accepted practices in populist politics.⁵¹

Self-interest is central in liberal democracy just as it was in monarchies where the king shared loot from conquered cities with his soldiers.⁵² Similarly, political leaders promise and give ministerial offices

⁴⁸ Taufiq Ahmad, Aima Alvi and Muhammad Ittefaq, 'The use of social media on political participation among University students: An analysis of survey results from rural Pakistan' *SAGE Open* (July-September 2019) 1-9 DOI: 10.1177/2158244019864484.

⁴⁹ Jina Moore, 'Cambridge Analytica had a role in Kenya elections too' *New York Times*, 20 March 2018.

⁵⁰ Shklar, *Ordinary vices*, 72.

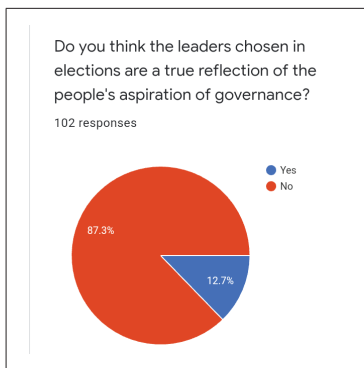
⁵¹ Richard Mulgan, *Corruption*, ANU Press, 2012, 26.

⁵² Max Weber, *Politics as a vocation*, Duncker and Humblodt, 1919.

to their most influential supporters once they get into power.⁵³ Political parties form coalitions and sometimes have to form extra offices to accommodate all the affiliate parties into government as a way of equal representation.⁵⁴ Self-interest is also disguised as affirmative action, it even influences a system of reserved seats for special interest groups. Liberal democracy therefore is hypocritical for insisting on egalitarian values while legitimising some forms of self-interest.

Lawyers in particular often become politicians because their profession is not far placed from the dynamics of liberal politics.⁵⁵ Democracies represent interest groups as lawyers represent the interests of their clients.⁵⁶ Lawyers often make better politicians compared to other professions because lawyers are trained to plead the interest of their clients.⁵⁷ Their craft is to persuade and convince, similar to the task of politicians. Civil servants even with a good cause are likely to fail because they make weak arguments while lawyers make the strongest case for logically weak arguments and are likely to win over the majority.⁵⁸ Manipulation is therefore central to politics.

Figure 5 shows this dynamic among students in Kabarak University



⁵³ Weber, *Politics as a vocation*.

⁵⁴ Weber, *Politics as a vocation*.

⁵⁵ Weber, *Politics as a vocation*.

⁵⁶ Weber, *Politics as a vocation*.

⁵⁷ Weber, *Politics as a vocation*.

⁵⁸ Weber, *Politics as a vocation*.

Joseph Schumpeter insists that ‘democracy does not mean and cannot mean that the people actually rule in any obvious sense of the terms “people” and “rule”. Democracy means, people have the opportunity of accepting or refusing the men who are to rule them’.⁵⁹

Shklar suggests that we should not worry too much about hypocrisy in politics but worry about our intolerance of the frailties of politics in a system that breeds hypocrisy.⁶⁰ Even Kant with his renowned insistence on moral uprightness and adherence to the rule of law poses the reasonability of stealing from a thief.⁶¹ Perhaps this is why the Kenyan legislature failed to provide enforcement mechanisms for an integrity test in qualifications for running for elective office in the Leadership and Integrity Act as required by Article 80 of the Constitution.⁶²

The Kenyan legislature has been accused of watering down the Leadership and Integrity Bill prepared by the Commission for the Implementation of the Constitution and other stakeholders in an attempt to subvert the stringent moral and ethical requirements of Chapter Six.⁶³ The Leadership and Integrity Act No 19 of 2012 is very similar to the Public Officer Ethics Act No 4 of 2003. In fact, the Ethics Code forms part of its General Leadership and Integrity Code.⁶⁴ This gives the impression that ‘integrity’ and ‘ethics’ is one and the same thing. This also gives us a glimpse into law makers’ minds on objectivity of the integrity test and question whether we needed ‘integrity’, or ‘ethics’ alone will suffice.

The Constitution is said to have a vision of among other values, financial probity ‘...and about behaving so carefully that there is no risk of even appearing not to be honest’.⁶⁵ These are the standards envisaged

⁵⁹ Joseph Schumpeter, *Capitalism, socialism and democracy*, Harper and Brothers, 1942.

⁶⁰ Shklar, *Ordinary vices*, 48.

⁶¹ Immanuel Kant, *Groundwork for metaphysics of morals* (first published 1785).

⁶² *Commission for the Implementation of the Constitution v Parliament of Kenya and 5 others* Petition No 469 of 2013, Judgment of the High Court at Nairobi (2013) eKLR.

⁶³ *Commission for the Implementation of the Constitution v Parliament of Kenya and 5 others* Petition No 469 of 2013, Judgment of the High Court at Nairobi.

⁶⁴ Leadership and Integrity Act (No 19 of 2012), Section 6.

⁶⁵ Yash Pal Ghai, ‘The vision of Chapter Six of the 2010 Constitution’ *Katiba Institute*, 20 February 2021.

by Article 99(2)(h), which remains a pipe dream for such standards are unattainable in a democracy, leave alone in the everyday life of a human. These moral sentiments are only desires of people perhaps praying on the mythical philosopher king or leaders in this case.

6. Political integrity

Premising on the argument that liberal democracy breeds hypocrisy and the paradox it creates by its insistence on integrity, Machiavelli and like-minded scholars make a case for a less stringent form of integrity unique to politics; political integrity.

It is not suggested that there be a separate moral code for politicians but rather a flexibility that accommodates the nature of liberal politics.⁶⁶ The root cause of hypocrisy or rather lack of integrity in politics is caused by those who put hypocrisy first; looking outwards instead of reflecting on our own human nature.⁶⁷ Hypocrisy has a round-about nature in that the rigid righteousness of the anti-hypocrite, the puritan, is hypocritical in itself.⁶⁸ To achieve political integrity is a struggle between utopianism and realism. Raw human nature is not always attractive, for instance, power is dressed up in chivalry, an illusion to make power and obedience gentle.⁶⁹ The fact that kings and queens are humans but causing their death is not murder but treason is an illusion that dresses up power as well.⁷⁰ Therefore, hypocrisy is the homage vice pays to virtue.⁷¹ Liberalism is not purely egalitarian since its objective is also the advancement of a specific set of interests from a ray of conflicting ones. Fact-value distinction has to be made in order to achieve political integrity.

⁶⁶ Grant, *Hypocrisy and integrity*.

⁶⁷ Shklar, *Ordinary vices*.

⁶⁸ Shklar, *Ordinary vices*.

⁶⁹ Edmund Burke quoted in Runciman, *Political hypocrisy*.

⁷⁰ Edmund Burke quoted in Runciman, *Political hypocrisy*.

⁷¹ Francois Rochefoucauld, *Reflections or sentences and moral maxims* (JW Willis Bund and J Hain Friswell, trans) Simpson Low, Son, and Marston, 1871.

Political integrity is classified as a type of integrity. Shklar warns us against bundling up hypocrisy as one since there exists different types of hypocrisy such as moral hypocrisy, religious hypocrisy and political hypocrisy.⁷² Similarly, integrity can be unbundled into moral integrity and political integrity. Distinction has to be made between a legitimate compromise and a sell-out, idealism and fanaticism, statesmanship and demagoguery.⁷³ This wide and liberal definition of integrity is made possible by Article 259(1)(d) of the Constitution.⁷⁴

The United States of America is touted as a contemporary example of liberal democracy. A look at its formation as a democracy in the 18th century sheds some light into the separation of politics from morality. America was founded on British ideologies of morals and politics.⁷⁵ The founding fathers were greatly influenced by British and Scottish political thinkers such as John Locke, Bolingbroke, Francis Hutcheson, Lord Kames and Adam Smith.⁷⁶ These were republican thinkers with piety and virtue central to their ideologies.⁷⁷ One influential eighteenth century thinker that stood apart from the prevailing political thinking of the time was Mandeville who was of the view that virtue is a form of self-denial from our natural inclinations.⁷⁸ These views were quite controversial at that point in time and were met by opposition as shown by Benjamin Franklin's writings such as 'On liberty and necessity, pleasure and pain' 1725 and 'Self-denial not the essence of virtue' 1735.⁷⁹ Much later in his life, Benjamin Franklin wrote his autobiography showing duplicity of his character necessitated by politics. This begged questions like 'Who is the real Benjamin Franklin?' for those trying to understand him years later.⁸⁰

⁷² Runciman, *Political hypocrisy*, 7.

⁷³ Grant, *Hypocrisy and integrity*.

⁷⁴ Article 259(1)(d) of the Constitution of Kenya 2010 states that the Constitution shall be interpreted in a manner that promotes good governance.

⁷⁵ Runciman, *Political hypocrisy*, 77.

⁷⁶ Runciman, *Political hypocrisy*, 78.

⁷⁷ Runciman, *Political hypocrisy*, 77.

⁷⁸ Bernard Mandeville, *The fable of the bees* (first published 1714).

⁷⁹ Runciman, *Political hypocrisy*, 82.

⁸⁰ Runciman, *Political hypocrisy*, 81.

Separation of morals from politics in the history of the foundation of the US is best illustrated by the slavery question in the Declaration of Independence. The founding fathers proclaimed the famous words that ‘We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and pursuit of happiness’ yet some, if not all of them, were from the slave holding class like Thomas Jefferson who was the principle author of the Declaration.⁸¹ John Adam’s wife Abigail Adams voiced a similar concern when she wrote in 1774 to her husband the future president saying ‘It always appeared to me to be a most iniquitous scheme... to fight for ourselves for what we are daily robbing and plundering from those who have as good a right to freedom as we have.’⁸²

The slavery question was seen as a political question and not a moral question.⁸³ The founders were aware that consensus could not be reached on slavery but no one questioned the importance and value of freedom, especially their own freedom from the Crown in Britain.⁸⁴ This then is acceptable hypocrisy since after-all democracy is populist.

As expected, this hypocrisy was used as a political arsenal by critics of US democracy at the time, Britain, pointing out the irony of US Americans still owning slaves. Britain was in turn accused of inciting the slaves to revolt against their masters.⁸⁵ Knowing the round-about nature of hypocrisy, the US Americans too were quick to point out the hypocrisy of the Crown which refused to ban slave importation to the US in the first place.⁸⁶ In fact, the hypocrisy of the King was documented in the original Declaration of Independence but was later cut out, a decision opposed by some founders like Thomas Jefferson.⁸⁷ This shows the pitfall of hypocrisy which is a game of unmasking each other with-

⁸¹ Runciman, *Political hypocrisy*, 81.

⁸² Runciman, *Political hypocrisy*, 74.

⁸³ Runciman, *Political hypocrisy*, 76.

⁸⁴ Runciman, *Political hypocrisy*.

⁸⁵ Runciman, *Political hypocrisy*, 75-77.

⁸⁶ Runciman, *Political hypocrisy*, 75-77.

⁸⁷ Runciman, *Political hypocrisy*, 75.

out addressing the real underlying questions as Shklar⁸⁸ cautions would happen when you put hypocrisy first.

US political thought moved away from its British roots of theology and moral political philosophy, questioning the viability of absolute political sincerity.⁸⁹ Jefferson and Franklin were anti-hypocrites who were aware of the trapping of hypocrisy and tried to avoid that pitfall by not over emphasising hypocrisy's role in politics.⁹⁰ Thomas Paine was one such anti-hypocrite of strong conviction. His insistence on political sincerity in his work *The rights of man*⁹¹ was the catalyst for political fallout between Jefferson and John Adams but even Jefferson could not totally embrace the ideologies of Paine.⁹² Jefferson was rather cunning and subtle, reputed as a man of many masks similar to Benjamin Franklin in that aspect.⁹³

Franklin's *Autobiography* showed that he used virtue as a means to an end, using virtue to cultivate relations with people, which is being virtuous for the benefit it gives and not for its inherent value as Mandeville puts it. Yet Franklin was strongly against Mandeville's political thoughts.⁹⁴ This insight into the foundation of the United States of America shows the evolution of the struggle between utopian moralistic views of politics versus the realities of politics.

7. The compromise: Achieving political integrity

Trusted Society of Human Rights Alliance v Attorney General and 2 others defined lack of integrity as:

when there are *serious unresolved questions* about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or

⁸⁸ Shklar, *Ordinary vices*.

⁸⁹ Runciman, *Political hypocrisy*, 80.

⁹⁰ Runciman, *Political hypocrisy*, 80.

⁹¹ Thomas Paine, *Rights of man* (first published 1791).

⁹² Runciman, *Political hypocrisy*.

⁹³ Runciman, *Political hypocrisy*.

⁹⁴ Runciman, *Political hypocrisy*.

his commitment to the national values enumerated in the Constitution... it is enough if there are *sufficient serious, plausible allegations* which raise *substantial unresolved questions* about one's integrity.⁹⁵

The terms '*serious unresolved questions*', '*sufficient serious plausible allegations*' and '*substantial unresolved questions*' are more accommodative compared to '*moral uprightness beyond reproach*' set by the *International Centre for Policy and Conflict and 5 others v Attorney General and 4 others*.⁹⁶ It is this flexibility that should be allowed in politics.

Giving up on integrity in politics all together is defeatist and our goal as humans is to attain and uphold morality even in politics. Rousseau is more optimistic and believes that integrity is the authentic nature of Man.⁹⁷ The need to dress up bad habits in good manners, etiquette and chivalry shows the desirability of morals.⁹⁸ Machiavelli himself is not totally opposed to the virtuous nature of man because he separates relations between enemies, political allies and family.⁹⁹ Machiavelli advocates for the use of hypocrisy only when politically necessary in international diplomacy and domestic politics and even so, for the greater good.¹⁰⁰ This way he distinguishes hypocrisy from sociopathic behaviour.¹⁰¹

The strength of moral impulse in human nature is what informs the need for integrity in politics. An 'honest politician' might not be an oxymoron after all. A plausible compromise needs to be achieved between the hypocritical nature of liberal democracy and the desire for integrity since as highlighted in the *Trusted Society case* '...Kenyans were singularly desirous of cleaning up our politics and governance structures by insisting on high standards of personal integrity among those seeking to govern us or hold public office'.¹⁰²

⁹⁵ Petition 229 of 2012, Judgment of the High Court at Nairobi [2012] eKLR (emphasis added).

⁹⁶ Petition 552 of 2012, Judgment of the High Court at Nairobi (2013) eKLR, 131.

⁹⁷ Grant, *Hypocrisy and integrity*, 35.

⁹⁸ Runciman, *Political hypocrisy*.

⁹⁹ Grant, *Hypocrisy and integrity*, 19-20.

¹⁰⁰ Grant, *Hypocrisy and integrity*, 19-20.

¹⁰¹ Grant, *Hypocrisy and integrity*, 19-20.

¹⁰² *Trusted Society of Human Rights Alliance v Attorney General and 2 others*, Petition 229 of 2012, Judgment of the High Court at Nairobi (2012) eKLR.

However, the reality is that Kenyans still elect persons with questionable character and corruption allegations despite numerous legislation put in place to instil integrity including; the Leadership and Integrity Act of 2012, the Public Finance Management Act of 2012 and the Ethics and Anti-Corruption Commission Act of 2011, alongside Chapter Six of the Constitution. This begs the question as to whether the fundamentals of leadership and integrity have been internalised by leaders and Kenyans alike.¹⁰³

8. Interpreting the law to fit popular rhetoric: Realising Kenyans' aspirations

The enforcement of Chapter Six is a collective duty of all relevant organs of the State and its institutions. The centre-piece of anti-corruption and public integrity reform is Chapter Six of the Constitution, the Anti-Corruption and Economic Crimes Act and the Leadership and Integrity Act, alongside independent offices and commissions, including the Ethics and Anti-Corruption Commission (EACC), the Independent Electoral and Boundaries Commission (IEBC), the National Police Service, and the Office of the Director of Public Prosecutions (ODPP).

8.1 The role of the courts

In 2019, the High Court emerged with jurisprudence setting a high bar with regard to interpretation of Chapter Six of the Constitution.¹⁰⁴ In *Moses Kasaine Lenolkulal v Director of Public Prosecutions*,¹⁰⁵ the High Court barred Governor Lenolkulal from accessing office without prior written authorisation from the investigating authority, the EACC, while investigations into alleged corruption and abuse of office in contravention of the Anti-Corruption and Economic Crimes Act (ACECA) was going on. The Governor challenged this position claiming its illegality

¹⁰³ PLO Lumumba, 'The trial of integrity in Kenya', *Katiba Institute*, 20 February 2021.

¹⁰⁴ Transparency International Kenya, 'Analysis interpretation of Chapter 6 Constitution of Kenya 2010 by Kenyan courts', 2 March 2021.

¹⁰⁵ Criminal Revision No 25 of 2019, Ruling of the High Court at Nairobi (2019) eKLR.

since the law provides for the procedure for removal from office and that suspension of public officers under ACECA should not apply to elective positions. The High Court however determined that such suspension pending investigation is not a violation of rights and is well within the purpose and spirit of Chapter Six of the Constitution.¹⁰⁶

In a similar case of *Ferdinand Ndungu Waititu Babayao & 12 others v Republic*,¹⁰⁷ a then sitting governor charged with conflict of interest and dealing in suspect property contrary to Section 42(3) of ACECA was barred from accessing his office while investigations were going on. The court reasoned that allowing access to office for those accused of 'moral ill-health' would entrench corruption and impunity against the aspiration of Kenyans and spirit of Chapter Six of the Constitution.¹⁰⁸

The High Court once again came to the aid of keeping Chapter Six alive when the legality of investigative powers of the EACC came to question. The EACC is the lead agency in the fight against corruption in Kenya. The Commission has no prosecutorial powers; it only carries out investigations and recommends prosecution through the ODPP.¹⁰⁹

The constitutionality of the investigative role of the Commission given by the EACC Act and ACECA was questioned in *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* as the power to conduct criminal investigations is vested in the National Police and the ODPP.¹¹⁰ The petitioners averred that the role of EACC according to Article 79 is to help build capacity by setting up systems and mechanisms for better functioning of its mandate. This is limited to ensuring compliance with and enforcement of the Code of Conduct for State and Public Officers.¹¹¹

¹⁰⁶ Transparency International Kenya, 'Analysis interpretation of Chapter 6 Constitution of Kenya 2010 by Kenyan courts', 2 March 2021.

¹⁰⁷ High Court (2019) eKLR.

¹⁰⁸ Transparency International Kenya, 'Analysis interpretation of Chapter 6 Constitution of Kenya 2010 by Kenyan courts', 2 March 2021.

¹⁰⁹ EACC, 2 March 2021.

¹¹⁰ *Okiya Omtatah Okoiti and 2 others v Attorney General and 4 others*, Petition 532 of 2017, Judgment of the High Court at Nairobi (2018) eKLR 8.

¹¹¹ *Okiya Omtatah Okoiti and 2 others v Attorney General and 4 others* Petition 532 of 2017, Judgment of the High Court at Nairobi (2018) eKLR.

However, the High Court held that the EACC is the only commission not specifically located in Chapter Fifteen of the Constitution and therefore its composition and mandate are statutory.¹¹² Following this understanding, Section 11(1)(d) of the ACECA mandates the EACC to investigate and recommend prosecution of corruption or violations of ethics to the ODPP.

Further, Section 35 of the ACECA read with Section 11(1) of the EACC Act provide that upon concluding investigations, EACC reports to the DPP who then makes an independent decision to prosecute or not based on the evidence provided.¹¹³

Thus, on the question of the constitutionality of the legislation granting EACC investigative powers reserved for the National Police and the ODPP, the Court pronounced that 'the Constitution grants powers to commissions to perform functions prescribed by the Act of Parliament'. The same Constitution creates the National Police Service and equally vests it with the mandate to prevent corruption and to undertake investigations,¹¹⁴ and the legality or validity of the Constitution is not subject to challenge.¹¹⁵ Where provisions of the Constitution are conflicting as the case might be, the underlying norms and principles must be considered.¹¹⁶ To further give meaning to the intention of the Constitution, the Court resorted to the history that informed the inclusion of Chapter Six in the Constitution where it was of the view that the Constitution was drafted with the intention of dealing with a long legacy of impunity, institutional frailties and embedded corruption.¹¹⁷ Thereby, the Court successfully shaped the functions of the EACC in line with the aspirations of Kenyans.

¹¹² *Okiya Omtatah Okoiti and 2 others v Attorney General and 4 others*, Petition 532 of 2017, Judgment of the High Court at Nairobi (2018) eKLR, 7.

¹¹³ *Okiya Omtatah Okoiti and 2 others v Attorney General and 4 others*, Petition 532 of 2017, Judgment of the High Court at Nairobi (2018) eKLR, 78.

¹¹⁴ *Okiya Omtatah Okoiti and 2 others v Attorney General and 4 others*, Petition 532 of 2017, Judgment of the High Court at Nairobi (2018) eKLR. 91.

¹¹⁵ Constitution of Kenya (2010), Article 2.

¹¹⁶ *Okiya Omtatah Okoiti and 2 others v Attorney General and 4 others*, Petition 532 of 2017, Judgment of the High Court at Nairobi (2018) eKLR. 97.

¹¹⁷ *Okiya Omtatah Okoiti and 2 others v Attorney General and 4 others*, Petition 532 of 2017, Judgment of the High Court at Nairobi (2018) eKLR. 97.

8.2 The role of the Ethics and Anti-Corruption Commission (EACC)

The EACC is an independent commission established by Article 79 (within Chapter Six) of the Constitution, and the Ethics and Anti-Corruption Commission Act, No 22 of 2011, for the purpose of ensuring compliance with and enforcement of the Chapter's provisions.¹¹⁸ EACC is primarily concerned with investigating financial probity of state and public officers, promoting ethical standards, good governance and leadership integrity.¹¹⁹

Following the impeachment of two governors, the Governor of Kiambu County, Ferdinand Waititu on 29 January 2020 and the Governor of Nairobi County, Mike Sonko on 17 December 2020 on charges of abuse of office among others, new regulations were put in place by EACC to qualify candidates hoping to fill those positions. This came about after the impeached governor of Kiambu County expressed interest to run for the office of governor in Nairobi County. The wonder in this is that there is still no law, despite the provisions of Chapter Six, to bar him from exercising his political rights granted by the Bill of Rights in Article 38.¹²⁰ This is the dangerous precedence set by the High Court in the *International Centre for Policy and Conflict case*.¹²¹

However, EACC issued a directive through a press release on 29 December 2020 in exercise of its constitutional mandate to enforce Chapter Six and its constitutional responsibility to advise the IEBC on integrity compliance status of all candidates.¹²² EACC stated that a person is disqualified pursuant to Chapter Six of the Constitution if the person has been dismissed or removed from office for contravention of Chapter Six or its enabling legislation; the Leadership and Integrity Act.¹²³ This directive is pursuant to Article 75(3) which provides that any

¹¹⁸ Constitution of Kenya (2010).

¹¹⁹ EACC, 2 March 2021.

¹²⁰ Constitution of Kenya (2010).

¹²¹ Petition 552 of 2012 and Petition 554,573 and 579 (consolidated), Judgment of the High Court at Nairobi (2013)eKLR

¹²² EACC, 'Press release: Integrity compliance under Chapter Six of the Constitution by persons seeking election into public office' (Nairobi, 29 December 2020), 2 March 2021.

¹²³ EACC, 'Press release', 29 December 2020.

person dismissed from office on account of financial improbity, holding multiple offices while still a full time state officer or turns out to be a non-citizen are disqualified from holding any other state office.¹²⁴ In this light, an impeached governor on account of financial improbity is disqualified as a candidate for any other state office.

EACC also stated that a person is disqualified to run for elective position if found by a court of law or any competent agency mandated by the Constitution, in accordance with any law, to have misused or abused a state office or public office.¹²⁵ The EACC further committed to conduct integrity vetting of all candidates in any up-coming by-election and communicate its determination to IEBC for further action.¹²⁶

A look at the standards or requirements set out by the EACC shows misuse of office to advance personal interests and financial probity at the heart of integrity test. The moral requirement as to one's character as contemplated by the courts seems not to have any practical place. In practice, integrity is not a vague abstract but rather a codified ethical regulation.

EACC has stressed the role citizens play in enforcing Chapter Six by reminding Kenyans that the ultimate and most effective vetting lies with them, and that entrusting the management of public affairs to persons with questionable 'integrity' will only entrench corruption and impunity.¹²⁷

8.3 Reasonable restrictions to political rights

The wording of Article 38(3)(c) 'Every adult citizen has the right *without unreasonable restrictions* to be a candidate for public office... and if elected, to hold office'¹²⁸ suggests that this right is not absolute and there are reasonable restrictions anticipated by the provision.

¹²⁴ EACC, 'Press release', 29 December 2020.

¹²⁵ EACC, 'Press release', 29 December 2020.

¹²⁶ EACC, 'Press release', 29 December 2020.

¹²⁷ EACC, 'Press release', 29 December 2020.

¹²⁸ Constitution of Kenya (2010).

The chapters that follow; Chapter Seven on the Electoral System and Process, Chapter Eight on the Legislature, Chapter Nine on the Executive and Chapter Eleven on Devolved Government, are some of the provisions strongly related to Article 38 and Chapter Six. The restrictions imposed by these Chapters are uncontested because they are regulated by respective legislations and are not a new concept as the integrity test of Chapter Six.

Article 83 of Chapter Seven for instance, limits the registration of voters to the registration of adults of sound mind and those not convicted of an election offence in the preceding five years. These restrictions are reasonable and have been in practice for as long as democracy has been exercised in Kenya. These show that political rights are not absolute.

Another reasonable limitation is in Article 91 of the 2010 Constitution which directs that political parties should not be founded on religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis. Political parties are also prohibited from engaging in violence or intimidation of its members or those of their opponents.¹²⁹ Maintaining paramilitary groups or militias is also prohibited as well as engaging in corruption and use of public resources for own interest unless allowed by law.¹³⁰

Chapter Eight presents additional and essential restrictions concerning eligibility for election into public office. Article 99 requires candidates for Member of Parliament to be a registered voter nominated by a political party or an independent candidate. The candidates must also satisfy educational, moral and ethical requirements prescribed by the Constitution and relevant legislation which is the Elections Act.¹³¹ In this instance, state and other public officers other than the incumbent office holder, officers of the IEBC within five years preceding the election, non-citizens, and those who have been citizens for less than

¹²⁹ Constitution of Kenya 2010), Article 91.

¹³⁰ Constitution of Kenya (2010), Article 91.

¹³¹ Elections Act (No 24 of 2011).

10 years are disqualified from running for office.¹³² Similar provisions are reiterated in Article 137 disqualifying those ineligible for running. Persons of unsound mind, those with undischarged bankruptcy, those serving imprisonment terms of more than six months and those found in accordance with any law, to have misused or abused a state office or public office or in any way to have contravened Chapter Six are also disqualified from running for member of parliament, member of county assembly and for the presidency by virtue of Article 193.

The political rights guaranteed under Article 38(2) of the Constitution touches on the right to run for public office and the rights of the citizens to free, fair and regular elections based on universal suffrage. Barring candidates from running for elective positions on account of Chapter Six will limit the political rights of the candidate vying for public office and limit the rights of citizens to freely elect representatives into office. A delicate balance needs to be observed particularly when enforcing one constitutional right which overrides another fundamental right.¹³³

Article 24 of the Constitution comes in to balance these rights out where it provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law and to the extent that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom. This means that the Leadership and Integrity Act needs to provide for enforcement mechanisms for Chapter Six to be used to bar persons of questionable character from running for public office.

Due process, fairness and justice must be incorporated in applying the integrity rationality test. Article 50 stresses that every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

¹³² Constitution of Kenya (2010), Article 177.

¹³³ *Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission and 16 others*. Advisory opinion Reference 1 of 2017, Ruling of the Supreme Court, (2020) eKLR.

Therefore, for Chapter Six to be used to determine qualifications to run for public office and to bar those who fail the integrity rationality test, adequate enforcement provisions have to be granted by the Leadership and Integrity Act as required by Article 80¹³⁴ of the Constitution. It is not the province of the courts alone to enforce Chapter Six. In fact, the courts hands are tied despite their best intentions to see to it that the aspirations of Kenyans to clean up politics are kept alive.¹³⁵ The doctrine of separation of powers has it so that all the organs of the government work together to realise the implementation of Chapter Six. In particular, the legislature and other independent institutions such as the IEBC and EACC have the mandate to enforce Chapter Six.

9. Kenyans' aspirations in Chapter Six of the Constitution versus the reality; why democracies produce bad government

A good deal of traditional democratic theory leads us to expect more from national elections than they can possibly provide. We expect elections to reveal the 'will' or the preferences of a majority on a set of issues. This is one thing elections rarely do, except in an almost trivial fashion.¹³⁶ The folk theory of democracy poses that governments and government policies are formed by the preferences of ordinary citizens where these citizens choose leaders who advance the majority interests and carry out their will.¹³⁷ Citizens can also directly make policies through referendums¹³⁸ creating an ethically defensible legitimate government.¹³⁹

¹³⁴ Constitution of Kenya (2010), Article 80.

¹³⁵ *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others*, Civil Appeal 290 of 2019, Judgment of the court of Appeal, (2013) eKLR.

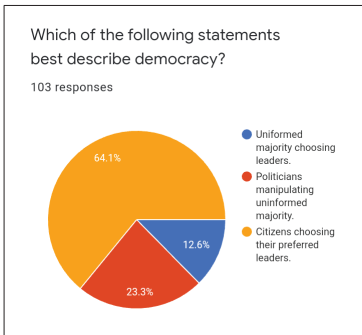
¹³⁶ Robert A Dahl, *A preface to democratic theory*, Yale University Press, 1956, 131.

¹³⁷ Christopher H Achen and Larry M Bartels, *Democracy for realists: Why elections do not produce responsive government*, Princeton University Press, 2016.

¹³⁸ Achen and Bartels, *Democracy for realists*.

¹³⁹ Achen and Bartels, *Democracy for realists*.

Figure 6 shows the perception of democracy by students in Kabarak University



Why then do democracies fail to actualise the peoples' desires and aspirations? The answer to this question is both inward looking and outward looking. One theory advanced by this article is that politicians manipulate the voters by putting up a front, hiding their true intentions and cunningly gaining voters' trust and approval. The second quest to solve this question is inward looking where we investigate the electorates themselves to see why their choices do not reflect their aspirations.

The folk theory presumption of informed ordinary citizens' choices is heavily criticised as surveys have shown that ordinary citizens pay little attention to politics.¹⁴⁰ Very few actually read policies and bills tabled before parliaments but only rely on news bites and phrases repeated by politicians. The danger here is that these politicians may have not internalised the phrases themselves.¹⁴¹ Ordinary people have ordinary everyday struggles. They have families to look after, bills to pay, unemployment to worry about, illness to battle, schools to attend, personal struggles like drug addictions and other myriads of everyday bustle.¹⁴² Many out of these people barely have time for political deliberations unlike professional politicians and political analysts who advance this idea of democratic folk theory.¹⁴³ Sometimes, even for the learned, polit-

¹⁴⁰ Achen and Bartels, *Democracy for realists*.

¹⁴¹ Achen and Bartels, *Democracy for realists*.

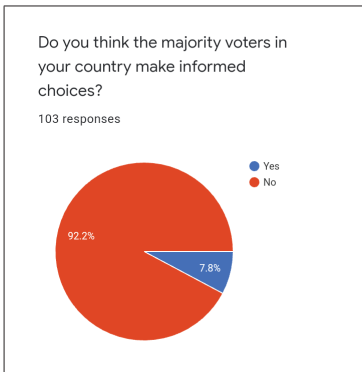
¹⁴² Achen and Bartels, *Democracy for realists*.

¹⁴³ Achen and Bartels, *Democracy for realists*, 44.

ical ideas and judgments are stereotypes and simplifications with little room for adjustments.¹⁴⁴ The democratic ideal could in fact be a smoke screen to serve those who profit from the distortion and biases in the policy-making process of actual democracies.¹⁴⁵

An ordinary citizen's choices are, more often than not, informed by the nature of the times especially the current state of the economy and generational political loyalties.¹⁴⁶ Their social identities in turn shape their policy preferences, political party choices, and the ideologies they subscribe to. These identities are prone to prejudices and aversion.¹⁴⁷ Political choices based on social identity are not a new concept in Kenyan politics. In fact, this ideal is so deep-rooted it goes back to the very foundations of this nation.

Figure 7 shows this perception among students in Kabarak University



9. The marred foundation of liberal democracy in Kenya

Social identities that inform political choices in Kenya have a rather sinister origin going back into the colonial past. History is subversive

¹⁴⁴ Achen and Bartels, *Democracy for realists*, 10.

¹⁴⁵ Achen and Bartels, *Democracy for realists*.

¹⁴⁶ Achen and Bartels, *Democracy for realists*.

¹⁴⁷ Achen and Bartels, *Democracy for realists*.

because it is the result of a struggle showing change which is always perceived as a threat by all the ruling class in oppressive exploitative systems.¹⁴⁸ Democracy in Kenya has a flawed past as it did not go through organic transformation. It was not a home grown ideal. This is not to say that it is entirely foreign and may not have a place in African communities. Democracy as an ideal is a universal concept that developed in civilisations across the world in different variations.¹⁴⁹ Community participation is not unimaginable in Africa even when the political hierarchy was mostly based on chiefdoms and local monarchies. The modern liberal democracy practised in Kenya currently that is so vehemently protected by our court system has faulty foundations and is perhaps why the aspirations of Kenyans are not reflective of their political choices as is.

Kenya's current political system was forged by British forces restructuring the communities in the colonial territory to create new high politics and a hierarchy of self-interest out of the existing network of authorities in the communities.¹⁵⁰ African leaders were used to socially engage and incorporate the colonial system of governance in the region.¹⁵¹ At first the colonialists needed social influence as the native population outnumbered them but this changed to excessive use of force as the railway was being built and more British soldiers were deployed in the territory.¹⁵² The political structures of Kenyan communities were drastically changed when the communities first lost their trust in their leaders who were being used as agents of the colonialists.¹⁵³ The colonialists appointed chiefs on the basis of colonial self-interest.¹⁵⁴ In turn, the chiefs and local leaders got benefits at the expense of their people.¹⁵⁵

¹⁴⁸ Ngugi wa Thiongo, 'Foreword' in Maina wa Kinyatti (ed), *Kenya's freedom struggle: The Dedan Kimathi papers*, London, 1987, xiii.

¹⁴⁹ Robert A Dahl, *On democracy*, Yale University Press, 1998.

¹⁵⁰ Bruce Bernam and John Lonsdale, *Unhappy valley, conflict in Kenya and Africa – Book One: State and class*, Ohio University Press, 1992, 13.

¹⁵¹ Bernam and Lonsdale, *Unhappy valley*, 15.

¹⁵² Bernam and Lonsdale, *Unhappy valley*, 13.

¹⁵³ Bernam and Lonsdale, *Unhappy valley*, 13.

¹⁵⁴ Bernam and Lonsdale, *Unhappy valley*, 13.

¹⁵⁵ Bernam and Lonsdale, *Unhappy valley*, 31.

Social division and corruption of authority became the essential foundation of State power.¹⁵⁶ Young Kenyans were directly employed in farms and into the police force and the army, and no regard was paid to the traditional hierarchies, social status or geographical restrictions.¹⁵⁷ Power was now controlled by markets, capital and labour.¹⁵⁸ Everyone then on was in pursuit of self-interest.

While all these were going on, Kenya was segregated into respective communities for easier control by the colonialists. The white settler farms were located to act as buffer zones between warring tribes.¹⁵⁹ This segregation further divided the people and is still reflected in the present-day Kenyan ethnically based politics.

10. Understanding the voter

A look at one of the earliest forms of democracy shows how contemporary folk theory of democracy has morphed into an entirely different ideal. Socrates is profoundly opposed to this popular ideal that celebrates the wisdom of popular judgment. Popular vote eventually led to his execution.¹⁶⁰ In his rhetoric, Socrates imagines a scenario where the crew on a ship at sea that lost its captain is faced with the task of appointing a new captain.¹⁶¹ Socrates ask then whether everyone on board should have a say on who is to become the captain or whether only those experienced in sea voyage should choose who is to be captain.¹⁶² Using this rather simple scenario, Socrates advances that only the informed and educated, and those who have thought rationally and

¹⁵⁶ Bernam and Lonsdale, *Unhappy valley*.

¹⁵⁷ Bernam and Lonsdale, *Unhappy valley*, 36.

¹⁵⁸ Bernam and Lonsdale, *Unhappy valley*, 36.

¹⁵⁹ Bernam and Lonsdale, *Unhappy valley*, 34.

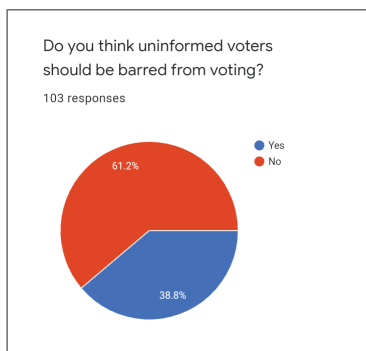
¹⁶⁰ Plato, 'Apology', *Academia*. *Brooklyn.Cuny.edu*, 17 December 2022. Socrates was condemned to death through majority votes.

¹⁶¹ Plato, *Republic*, Penguin, 2007.

¹⁶² Plato, *Republic*.

deeply on the subject should vote.¹⁶³ Socrates preferred intellectual democracy over the current ideal of democracy by birth right.¹⁶⁴ He was conscious to the dangers of manipulation and ignorance of the general public.

Figure 8 shows the difficulty of the idea of intellectual democracy overcoming the contemporary folk theory of democracy among Kabarak University students



This simple faith in popular sovereignty is so prevalent in the 21st century so much so that any frustrations with the government are fixed by more democracy.¹⁶⁵ Political reforms to fix the problems of representative democracy advances the creation of more opportunities for citizens to observe, participate in, and control their government's actions.¹⁶⁶ Democracy is the prescribed cure for government corruption, misrepresentation and incompetence in the rhetoric of folk democracy.¹⁶⁷

The United States in its foundation was conscious to this danger and their democracy was intended to have a fail-safe by the creation of caucus in primaries and presidential elections.¹⁶⁸ However, earlier proponents pushed for direct primaries as the narrative of popular sov-

¹⁶³ 'Why Socrates hated democracy' *The School of life*, 2 March 2021.

¹⁶⁴ 'Why Socrates hated democracy' *The School of life*, 2 March 2021.

¹⁶⁵ Achen and Bartels, *Democracy for realists*, 51.

¹⁶⁶ Achen and Bartels, *Democracy for realists*, 52.

¹⁶⁷ Achen and Bartels, *Democracy for realists*, 53.

¹⁶⁸ Achen and Bartels, *Democracy for realists*, 51.

ereignty took root. The founders believed that direct popular control of government would be undesirable and dangerous.¹⁶⁹ James Madison in *Federalist Papers Number 10* argued that the system of representation through caucus would 'refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love for justice will be least likely to sacrifice it to temporary or partial considerations'.¹⁷⁰ The vision and worries of the founders regarding the frailties of people's judgments seem rather distant in the 21st century folk theory of democracy narrative.¹⁷¹

11. Understanding democracy

There is a prevailing difficulty in separating the understanding of democracy as an ideal and democracy as the actual government. Philosophers refer to this as distinguishing between real things and ideal things; value judgment and empirical judgments.¹⁷² While democracy as a populist choice is easily understood, there is doubt on the democratic nature of the resultant government. Dahl supposes that for a State to be truly democratic it needs political institutions. Large-scale democracy needs institutions that make it possible to have elected officials, free-fair and frequent elections, freedom of expression, alternative sources of information, association autonomy and inclusive citizenship. To reflect these, Lenin one of the founders of the Soviet Union, once asserted 'Proletarian democracy is a million times more democratic than any bourgeois democracy; the Soviet government is a million times more democratic than the most democratic bourgeois republic'.¹⁷³

¹⁶⁹ Runciman, *Political hypocrisy*.

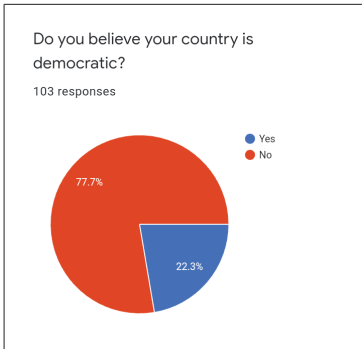
¹⁷⁰ Runciman, *Political hypocrisy*.

¹⁷¹ Runciman, *Political hypocrisy*.

¹⁷² Dahl, *On democracy*, 26.

¹⁷³ Dahl, *On democracy*, 100.

Figure 9 shows this perceptions of level of Kenyan democracy among Kabarak University students



12. Conclusion

The aspirations of Kenyans that informed the creation of Chapter Six of the Constitution are realised and can be realised through the purposive interpretation of the law. However, it is not the province of the courts alone to clean the politics of the country. It would take the cooperation of independent commissions such as the EACC, IEBC, ODPP, National Police, the Parliament and every other state organ, as well as civil society organisations. The biggest and most important task lies with the electorate themselves to vote in people of character.

The stringent moral definition of integrity has proven to be defeatist in a liberal democracy ridden with the hypocrisy of politicians necessitated by the need to win popular vote among groups with varying interests. To realise the aspirations of Kenyans to clean up their politics, a more morally flexible, accommodative definition that can be narrowed down and codified is preferred as a reasonable limit to political rights to run for office.