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# An Analysis of the judicial code of conduct and ethics and the vetting process of judicial officers from a virtue ethics perspective.

Andayi W. Francis  
*School of Humanities and Social Sciences*  
*Strathmore University*

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Judicial Ethics in Kenya:  
An Analysis of the Judicial Code of Conduct and Ethics and  
The Vetting Process of Judicial Officers from a Virtue Ethics Perspective

Andayi W. Francis

Submitted in partial fulfillment of the requirements for the Degree of  
Master of Applied Philosophy and Ethics (MAPE)

School of Humanities and Social Sciences

Strathmore University

Nairobi, Kenya

June, 2015.

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[Name]

  
.....

[Signature]

.....

[Date]

## Approval

The thesis of Andayi W. Francis was reviewed and approved by the following:

DR. LUIS G. FRANCESCHI

Dean, School of Law

Strathmore University

Professor Christine Gichure

Dean, School of Humanities and Social Sciences

Professor Ruth Kiraka

Dean, School of Graduate Studies

## **Abstract**

The Judicial Service Code of Conduct and Ethics (JSCCE) for the Kenyan judges and magistrates collectively referred to here as judicial officers, is an ethical guide for the successful delivery of their judicial duty. Judicial ethics as represented in the JSCCE appears to follow two main ethical approaches, deontology and consequentialism or utilitarianism. Questions abound on the success of these ethical approaches to positively influence the conduct of judicial officers and provide the requisite ethical guidance. Judicial officers continue to receive condemnation from varied quarters for failing to follow the path of rectitude within and outside of their judicial calling. The demand by Kenyans that under the new Constitution of Kenya 2010 all serving judicial officers undergo a vetting process to determine their suitability to continue serving in the judiciary is testimony to the low level of trust the public has in the judicial officers. To address this challenge this study explored how the virtue ethics approach, as an alternative to deontology and utilitarianism, can be utilized as a foundation for judicial ethics. The aim of this study therefore is to determine whether the virtue ethics approach, which is agent centred and opposed to deontology and consequentialism, which are action-focused, can be applied to the JSCCE and the vetting process to make better judicial ethics in Kenya. The virtue ethics approach is appropriate for this study because of its recent resurgence in ethical theory as well as its appeal to beliefs, emotions, thoughts, and values instead of actions and consequences which are influenced by a system of rewards and punishment.

The study applied a content analysis method to analyze the contents of the JSCCE and the vetting process, which are two areas of focus on judicial ethics in Kenya, to uncover the elements of virtue ethics espoused therein.

The study found that there are some 20 elements of virtue ethics found in the JSCCE and the vetting process. These are justice, courage, independence, practical wisdom among others. However, the presence of the elements alone was found not sufficient to make virtue ethics the theoretical base for judicial ethics in Kenya for two reasons. First, the elements are limited in scope in the JSCCE. Second, the elements are not expressed in virtue ethics language but rather they are formulated as rules and principles in line with the deontological and consequentialist ethical frameworks. However, it also emerged that with proper articulation of the JSCCE and the vetting criteria, the principles and rules can be reformulated to take account of a virtue ethics approach and thereby embed it as a sound theoretical base for judicial ethics in Kenya. The study made suggestions and recommendations on the ways through which judicial ethics can take account of virtue ethics and how to align the JSCCE and the vetting process to each other through the virtue ethics approach to improve on judicial ethics and ultimately the conduct of judicial officers in Kenya.

Key words: Virtue ethics, judicial ethics, code of conduct and ethics, vetting process, determinations.

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## List of Abbreviations

AfriCOG:	Africa Center for Open Governance
JSCCE:	Judicial Service Code of Conduct and Ethics
CoE:	Committee of Experts
GSDRC:	Governance and Social Development Research Centre
IBA:	International Bar Association
IBAHRI:	International Bar Association Human Rights Institute
ICJ-K:	International Commission of Jurists, Kenya Chapter
ILAC:	International Legal Assistance Consortium
JMVA:	Judges and Magistrates Vetting Act, 2011
JMVB:	Judges and Magistrates Vetting Board
JTF:	Judiciary Transformation Framework
NE:	Nicomachean Ethics
VE:	Virtue Ethics
VQ:	Vetting Questionnaire
VB:	Vetting Board

## Definitions

The following terms and phrases used in this study require definition for purposes of the study.

**Determination:** The decision reached by the Judges and Magistrates Vetting Board upon vetting a judicial officer on the suitability to continue serving in the judiciary.

**Judicial ethics:** The basic principles of right action of the judges. It consists of or relates to moral action, conduct, motive or character of judges; what is right or befitting for them. It can also be said that judicial ethics consists of such values as belong to the realm of the Judiciary without regard to the time or place and are referable to justice dispensation.

**Judicial officer:** “Judicial officer” is defined under the Constitution of Kenya, 2010 to mean a registrar, deputy registrar, magistrate, Kadhi or the presiding officer of a court established under Article 169(1)(d).

The Judicial Service Code of Conduct and Ethics, (the JSCCE) defines judicial officer thus: “judicial officer” shall mean and include any Judge, Magistrate, Registrar or Kadhi of all grades employed in the Judicial Service of Kenya. This can be called the traditional meaning of the term.

This study adopts the traditional designation of the phrase for purposes of this study.

- Vetting: The process by which the suitability of a judicial officer to continue serving in the judiciary is determined.
- Virtue ethics: Virtue ethics is a normative ethical theory existing since the time of Aristotle and which was revived in mid-20th Century by Elizabeth Anscombe. Its main concern is how an agent can embody virtues and an ethical character. In this respect it is opposed to the other major normative theories namely deontology and consequentialism which are primarily concerned with ethical action or behavior.

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## **Dedication**

This work is dedicated to the memory of my parents, “papa” Andayi and “mama” Anjelinah, the foundation of my character.

# 1 Introduction

## 1.1 Introduction.

The purpose of this study is to investigate the extent to which elements of virtue ethics are embedded within judicial ethics in Kenya and whether the virtue ethical approach can form a foundation for judicial ethics in Kenya. The study focuses on two areas considered essential for judicial ethics in Kenya, the Judicial Service Code of Conduct and Ethics (JSCCE) and the process of vetting judicial officers. The Code is provided for under the Public Officer Ethics Act, 2003 while vetting of judicial officers for suitability to serve in the judiciary is a requirement under the Constitution of Kenya 2010. The Code and the vetting process both address the ethical conduct of judicial officers. The JSCCE provides the framework for regulating judicial conduct while the vetting process evaluates and tests the conduct of a judicial officer against the values provided for in the Constitution. Each of these two areas deals with ethical values for judicial officers and therefore requires an ethical theoretical justification.

Legal ethics in the past has been dominated by deontological and consequentialist ethical approaches (Amaya, 2012) which emphasize duties and rules, giving insufficient consideration or none at all to virtue ethics. Judicial ethics is part of the larger sphere of legal ethics and has therefore tended to follow a similar approach. Consequently, scholarly work undertaken to uncover the virtue ethical approach as a foundation for judicial ethics in Kenya is lacking.

But virtue ethics is one of the three fundamental ethical frameworks and approaches to ethical reasoning besides deontology and consequentialism (New World Encyclopedia, 2012; Cafaro, 2015, p. xxi; Amaya, 2012; Rui, 2011). In virtue ethics, the nature of the agent's character and virtues, rather than actions, is of fundamental importance. As Seeharno (2007, p. 35) points out:

More than consequentialist or deontological ethics virtue ethics focuses on the relation between a complex of ends related to an idea of well-being and the character of an office holder. A consequentialist theory does not look so much to the character of the decision-maker but at the rationale of his decision. A

deontological approach classically perceives the relation between decision-making and the decision-maker as the adherence to norms.

Judicial officers are required to maintain high standards of ethical conduct as an integral part of their professional character. The study takes the virtue ethics approach due to its recent resurgence in ethical theory (Carden, 2006, p. 12; Cafaro, 2015; Oakley & Cocking, 2003, p. 7; MacIntyre A. , 2007). The virtue ethics approach is also appropriate for this study because it requires that in the practice of a profession an individual possesses certain personal characteristics desirable for that profession in order to achieve the ends of that practice.

## **1.2 Background to the Study**

The challenges facing the Kenyan judiciary since independence until the promulgation of the new constitution on 27<sup>th</sup> August, 2010 are now well documented. They are contained in reports of task forces and committees set up initially by the executive and later by the judiciary itself to look into challenges facing the institution and to suggest ways to reform it. The Report of the Integrity and Anti-Corruption Committee of the Judiciary, (2003), among other reports outlined in Appendix F, highlights as among the problems facing the judiciary, want of ethics and rampant corruption among judicial officers. The Final Report of the Task Force on Judicial Reforms, (2010), the last one to the promulgation of the new constitution identified other notable issues like, most court decisions being made in favour of the executive; unethical conduct on the part of some judicial officers; lack of disciplinary mechanisms to effectively deal with complaints and misbehavior amongst judges.

The Kenyan chapter of the International Commission of Jurists (ICJ-Kenya, 2005) has also published numerous studies highlighting these challenges and proposing suggestions for reform. These studies are also outlined in Appendix F.

Some commentators on the Kenyan judiciary have also highlighted these problems, for instance, allegations that some judicial officers conducted themselves unethically or without integrity (Sihanya, 2011, p. 5) and that the judiciary was perceived as opaque and judicial officers as lacking in independence (Africa Centre for Open Governance,

2012, p. 4). Due to these challenges, prior to the promulgation of the new constitution the trust and confidence of the public in the judiciary to dispense justice had significantly waned (Nichols, 2015; Mutunga, 2011; IBAHRI/ILAC, 2010). This was ideally an indictment of the judicial officers' character and suitability to continue discharging their mandate of dispensing justice according to law.

One area of concern consistently noted in the reports and studies was that of unethical conduct or a lack of judicial ethics on the part of judicial officers. In order to address these challenges, the Kenyan judiciary embarked on a transformation aimed at restoring confidence and trust in the institution (Sihanya, 2011). Judicial ethics is an area that must be given prime focus in this transformation. Yuwen Li (2004, p. 13) notes that, "an improvement in judicial ethics has to be and is an inevitable and vital component of any judicial reform."

Unfortunately, there has not been much scholarly work addressing the challenge of judicial ethics in Kenya. This failure by scholars to address how an improvement in judicial ethics can help in reforming the Kenyan judiciary leaves a gap that needs to be filled. This study seeks to make contribution to the subject of judicial ethics in Kenya by examining two of its essential areas namely the JSCCE and the vetting process of judicial officers with a view to determining an appropriate ethical foundation for them.

An interrogation of the ethical foundations upon which the JSCCE and the vetting process could be grounded will help in understanding how effective they can be in entrenching a culture of ethics among judicial officers. This study undertook an assessment of the JSCCE and the vetting process in order to unveil the extent to which the virtue ethics approach is embedded therein. Consequently the research will determine whether this ethical approach can be applied as the foundation for judicial ethics in Kenya within these two subjects of and how it can be applied to address perceived or actual moral deficiency among judicial officers.

### **1.3 Statement of the Problem**

Judicial officers in Kenya have been subjected to various disciplinary mechanisms meant to ensure that those who fall short of societal expectations are removed from service.

In 2003, the Kenyan judiciary underwent what has come to be known as the radical surgery (International Commission of Jurists, 2005) where judicial officers who were alleged to have been implicated in corrupt practices (Mbote & Akech, 2011) were retired from service. This followed a report of the Integrity and Anti-Corruption Committee of the Judiciary in Kenya (Integrity and Anti-Corruption Committee of the Judiciary, 2003) otherwise known as the Ringera Report. The report implicated almost half of the serving judicial officers, that is, 5 out of 9 Court of Appeal judges, 18 out of 36 High Court judges and 82 out of 254 magistrates. Some of the judges challenged the findings of the Report against them. Some were vindicated and reinstated to their positions while others did not succeed (IBAHRI/ILAC, 2010, p. 34).

In spite of this very radical measure, issues of lack of integrity still bedeviled the institution of the judiciary in Kenya. In a recent study the IBAHRI and ILAC (2010) noted unethical behavior and judicial corruption as some of the factors that had caused virtual collapse of public confidence in the judiciary.

In order to address this persistent challenge, the new Constitution of Kenya 2010 in schedule 6 section 23 (1) required all judicial officers who were in office on the date of its promulgation, 27<sup>th</sup> August, 2010, to undergo a vetting process to determine their suitability to continue serving in accordance with the values and principles set out in the new constitution (Constitution of Kenya 2010, 2010). Those found to be unsuitable to continue serving are removed. The Kenyan judiciary is thus undergoing a tremendous reform process following the promulgation of the new Constitution of Kenya, 2010.

Besides, the vetting exercise may be considered as a means of reinforcing ethical conduct among judicial officers because in order to efficiently implement the reform measures the professional quality of judicial officers which includes competence and a high standard of morality and conduct is required of them (Li, 2004, p. 2).

The JSCCE provides judicial officers with guidelines of acceptable moral and ethical behaviour. It provides in the preamble that:

This code is intended to establish standards of ethical conduct of judicial officers and to be applied consistently with constitutional requirements, statutes, court rules and legal authorities and in the context of all relevant circumstances.

The confusion that has been witnessed in the judiciary leading to the radical surgery and the vetting process may be largely attributed to a failure by judicial officers to appropriately observe the ethical guidelines enunciated in the JSCCE.

The approach of the JSCCE, a key source of judicial ethics in Kenya, is that it lays down legal rules to govern the behavior of judicial officers within the judicial service. This approach of judicial ethics through legal rules results from a similar approach to the wider subject of legal ethics which has in the past been dominated by deontological and consequentialist ethics (Amaya, 2012, p. 6). Its greater focus is for judicial officers to comply with rules, regulations and the principles contained in the JSCCE and for that reason the code becomes more legalistic than ethical. This approach is generally geared towards making the individual judicial officer to follow the rules and principles due to social pressure or the fear of punishment. It means that judicial officers as moral agents are not internally motivated to be ethical as such. As Nicolson (2005, p. 611) observes, such duty-based codes of ethics fail to address much of what is psychologically required for moral behavior. Consequently, although the JSCCE is available to provide ethical guidelines for judicial officers they end up not doing so and the code remains ineffective in its intentions.

This calls for an alternative approach to judicial ethics in Kenya. According to Nicolson (2005, p. 611), the increasingly common response is a call for a return to virtue or *aretaic* ethics which has been revived recently in response to the perceived failures of deontic ethics. Virtue ethics emphasizes the importance of traits of character that define a morally good individual and which affects their ethical decision making. Therefore, it may be that the problem in the judiciary in Kenya is not too little attention to rules, but too little attention to character (Cochran, 1996, p. 707).

Scholarly attention has not been paid to the area of grounding judicial ethics in Kenya on the virtue ethics approach. This study is an attempt to fill that gap.

The study applies a content analysis method to explore the elements of virtue ethics embedded within the JSCCE and the vetting process to determine whether judicial

ethics in Kenya can have as its foundation a virtue ethics approach. If a connection can be made between the JSCCE, the vetting process and the virtue ethics approach, these two areas of judicial ethics in Kenya will be given conceptual underpinnings which may strengthen both their ontological and ethical status (Schwartz, 2005).

A study on the ethical foundation upon which the JSCCE and the vetting process may be firm adds value to the subject and also proposes a legitimate basis for judicial ethics in Kenya.

#### **1.4 Objectives of the Study**

The study set out to achieve the following objectives.

1. To explore the extent to which the essential elements of Aristotelian virtue ethics are espoused in the Kenyan JSCCE.
2. To explore the extent to which the essential elements of Aristotelian virtue ethics are espoused in the process of vetting judicial officers in Kenya.
3. To interrogate the link in the ethical theoretical basis between the JSCCE as the guide for judicial conduct and the vetting process as the determinant of a judicial officer's character as relates to judicial ethics from a virtue ethics perspective.
4. Based on the foregoing to succinctly discuss how the JSCCE and the vetting process can be aligned on the basis of virtue ethics to achieve their intended purpose of entrenching ethical character among judicial officers.

#### **1.5 Research Questions**

The main research question is what is the extent of application of virtue ethics to judicial ethics in Kenya through the JSCCE and the vetting process? Minor research questions arise from the main research question as follows:

1. In what respects does the Kenyan JSCCE espouse elements of virtue ethics?
2. In which ways does the process of vetting judicial officers in Kenya espouse elements of virtue ethics?

3. What link exists between the JSCCE as a guide to the ethical conduct of a judicial officer and the vetting process as the determinant of a judicial officer's character?
4. In what respects could the JSCCE and the vetting process or any other mechanism employed to determine the good character of a judicial officer in Kenya be aligned using the virtue ethics approach to enrich judicial ethics?

### **1.6 Significance and Justification of the Study**

The preamble of the JSCCE provides that it was enacted in order to guide judicial officers in their conduct. It was therefore expected that adherence to the code would assist to mould a judicial officer of good character. The vetting process on the other hand can be considered as a measure of the good character of a judicial officer. Both subjects are aimed at entrenching good ethos in the institution of the judiciary by moulding judicial officers of good character. The JSCCE and the vetting process, when well-articulated, are two important areas that can greatly enhance the ethical standing of judicial officers in Kenya.

Any subject that addresses the ethical conduct of an individual or organization will have a bearing on one or several of the moral theories. The JSCCE is concerned with the ethical conduct of judicial officers. Therefore, a rational justification for the rules in the code is necessary. It has been observed that most theories of legal ethics tend to have a deontological or consequentialist approach (Amaya, 2012, p. 6). This means that most if not all codes of judicial ethics as well as criteria for evaluation of the conduct of judicial officers such as the vetting process will have their philosophies based on the deontological and consequentialist approaches. But as Amaya (2012, p. 6) has suggested, virtue theory can have a *locus* in legal justification within a theory of legal ethics. It is therefore also the case that a judicial code of ethics and vetting process could have a beneficial or virtue ethics approach. The literature in this area is however scarce. Certainly, more research in this area is called for in order to give it widespread acceptance. This study takes the virtue ethics approach and applies it to analyze the elements of virtue ethics enshrined in the JSCCE and within the process of vetting

judicial officers with a view to informing the better comprehension of the ethical foundations of judicial ethics in Kenya.

The study contributes to the existing literature on the application of virtue ethics to judicial ethics as a way of reforming the judiciary. The study also provides an insight into how virtue ethics can be applied by other public organizations as a basis for their codes of ethics and the vetting processes so as to achieve appropriate ethical conduct among their members.

### **1.7 Scope of the Study**

The study focused on the extent of the application of virtue ethics in the Kenyan judiciary by exploring how elements of virtue ethics are embedded in two critical areas of judicial ethics in Kenya, that is, the JSCCE and in the vetting process. The whole text of the JSCCE was analyzed. The aspects of the vetting process analyzed were the vetting criteria contained in the vetting questionnaire and the determinations made by the Vetting Board on suitability of a judicial officer to continue serving. This study is conducted by a member of the Kenyan judiciary and some of the observations made shall be from firsthand experience.

### **1.8 Limitations of the Study**

The limitations to this research include first that the process of vetting judicial officers is ongoing and almost half of judicial officers had not been vetted or their determinations had not been released at the time the study was conducted. Second, the process of vetting also involves review of the determinations where a judicial officer is dissatisfied with the determination as provided for under section 23 of the JMVA. The study is confined to first instance determinations and not the ones on review. The study is therefore not representative of all determinations of the vetting process.

Third, the documents to be analyzed are the Kenyan JSCCE, the vetting questionnaire and some determinations made by the Vetting Board. The drafters of the JSCCE may not have had in mind a code that is inclined towards virtue ethics. Likewise the vetting

process may not have explicitly stated virtue ethics as its basis of determining the suitability of a judicial officer to continue serving.

Fourth, the researcher herein is subject to the JSCCE and the vetting process. There is likelihood that the researcher's biases about the code and the vetting process may influence some of the conclusions.

Finally the limited time available for the research may constrain an in-depth analysis of the code and the determinations of the Vetting Board.

However, rather than considering these limitations as reducing the credibility of the study, the findings will be used as an insight to make recommendations on how the code and the vetting process may be improved in future if they are to achieve a culture of ethical conduct among judicial officers.

### **1.9 Outline of the Dissertation**

The dissertation is divided into 5 chapters. Chapter 1 is an Introduction of the study as outlined above. Chapter 2 discusses the literature on virtue ethics theory, judicial ethics and the application of virtue ethics to judicial ethics. Chapter 3 discusses the methodology adopted for this study. Chapter 4 presents the findings of the study and finally, the conclusions and recommendations of the study are captured in Chapter 5.

## 2 Literature Review

### 2.1 Introduction

This chapter reviews the literature that supports this study. Firstly, the general subject of ethics is briefly explored, the main focus being on the three major ethical frameworks namely deontology, consequentialism and virtue ethics. This provides a background on the theoretical foundations for good behavior. This is followed by a brief outline of the concepts of virtue ethics approach to ethical reasoning from an Aristotelian perspective with the aim of identifying its essential elements as the main focus of the study. Some criticisms of the Aristotelian approach and its strengths and shortcomings will be considered. A discussion of the subject of judicial ethics in Kenya is then undertaken considering its general outlook, its sources within the larger ethical theory and its grounding within the Kenyan legal system narrowing down to its application through the JSCCE and the vetting process. A conceptual framework to analyze the JSCCE and the vetting process from a virtue ethics perspective is developed and the chapter ends with a conclusion.

The literature reviewed primarily focuses on how virtue ethics can be applied to judicial ethics in Kenya.

In a master's dissertation, it is not possible to provide a systematic and detailed analysis of any of these subjects where there already is immense literature. Broad observations on the topics, adequate to cover the theoretical basis for this research are provided.

### 2.2 Ethics

This study is guided by theory on virtue ethics and judicial ethics. An introductory note on the wider subject of ethics forms its background.

Ethics can be defined as the systematic study of human actions from the point of view of their rightness or wrongness as a means for the achievement of man's ultimate happiness. (Gichure C. W., 1997).

As Aristotle tells us in the *Politics*, human beings are social animals. They live in communities and are involved in social interactions with one another. In their relationships with one another, certain behavior or conduct may be defined as acceptable

or not acceptable and which might harm or benefit members of the community. Ethics are meant to evaluate the standards of conduct of an individual in society. In determining the rightness or wrongness of a certain course of action, ethics requires that the right course of action be followed.

In a narrower sense, ethics refers to rules of conduct recognized in respect of a particular class of human action, such as the practice of a profession (Sackville, 2009, p. 9). This is commonly referred to as professional ethics. Judicial officers form a particular professional group and are thus bound by professional ethics. Sackville (2009, p. 9) quoting Justice Thomas of Australia says that the concept of ethics is capable of being applied to the conduct of judicial officers because they as a professional group have a distinctive function to perform, that is, the authoritative resolution of disputes by doing justice according to law.

This study explores ethics within the narrower sense of the professional ethics of judicial officers, known as judicial ethics. Judicial officers are expected to uphold the highest standards of right conduct in order to inspire confidence in their work from consumers of justice. A strong ethical foundation for a judicial officer is therefore imperative.

According to Gichure (2008, p. 52) there are three major approaches to ethics in the academic arena namely descriptive ethics, meta-ethics and prescriptive or normative ethics. Descriptive ethics is concerned with how people behave. It simply describes the ethical beliefs, norms and behaviours of an individual or group as they actually exist as opposed to how they ought to exist. Meta-ethics searches for the origins or causes of right and wrong and what they mean in relation to human conduct and behavior. Normative Ethics is concerned with how people ought to act, what sought of a person one ought to be or what sought of policies ought to be implemented. Normative ethics believes that right and wrong are found in an individual's actions or behavior. Normative ethics provides guidelines to decide rationally what is good and what is bad (Gichure C. W., 2008, p. 54). When normative ethics deals with the rightness or wrongness of a specific course of action in particular areas of human activity and interaction it is called applied ethics (Gichure C. W., 2008, p. 54). This study is concerned with normative

ethics and in particular judicial ethics which focuses on ethics within judicial practice and falls within the ambit of applied ethics.

There are three main theoretical frameworks for normative ethics namely consequentialism, deontology and virtue ethics (Hursthouse, 2013).

Consequentialist ethical theories comprise a cluster of theories, the most common among them being the utilitarian approach propounded by the 18<sup>th</sup> Century British philosopher Jeremy Bentham (1748-1832). Bentham created a system in which actions could be described as good or bad depending upon the amount and degree of pleasure and/or pain they would produce. Bentham's student, John Stuart Mill (1806-1873) modified this system by making its standard for the good the more subjective concept of "happiness," as opposed to the more materialist idea of "pleasure." As an approach to making ethical decisions, utilitarianism instructs us to weigh the different amounts of good and bad that will be produced by our actions. The best action would then be the one that produces the best balance of good over harm.

Deontological or the duty-based approach originates from the philosopher Immanuel Kant (1724-1804). According to this approach ethical action is one taken from duty, that is, it is done precisely because it is our obligation to perform the action.

The Virtue ethics approach is expounded by Aristotle in his *Nicomachean Ethics*. This approach proposes that ethical actions should be consistent with ideal human virtues.

Zyl (2011, p. 103) contrasts the virtue ethics approach from the other two approaches thus:

Most modern approaches to normative ethics can be characterized by two features: (1) the focus on evaluating actions (rather than agents), and (2) the focus on evaluating actions in 'deontic' terms, that is, as either morally right (permissible or obligatory) or morally wrong (impermissible or contrary to obligation). By contrast, virtue ethics, in both its ancient and contemporary versions, focuses on evaluating agents, and when it evaluates actions it does so primarily in 'aretic' terms, that is, as morally good or bad, admirable or deplorable, noble or ignoble.

A distinction is thus drawn between consequentialist and deontological theories on the one hand as action-based and virtue ethics on the other as an agent-based approach.

Consequentialism emphasizes the consequences or outcomes of an action while deontology emphasizes duties or rules. In contrast, virtue ethics centers on the virtues or moral character and motive of the agent. Each of these theories proposes a different way of reasoning about right or wrong and sometimes, though not always, may recommend different action.

The central issues that consequentialist and deontological ethics consider respectively are concern for good outcomes and obedience to good rules. The problem with these approaches is that in the context of the new economy there is always uncertainty about outcomes and relativism about values (Volkman, 2013, p. 109).

In the case of consequentialism, it is not always possible to predict the consequences of actions. Actions that may be expected to produce good consequences may end up being harmful. Moreover, good ends might justify bad means, for instance where minority rights are overlooked to satisfy the majority even where the course of achieving the consequences is oppressive to the minority. It overlooks the fact that certain things are always wrong no matter their outcome. For instance, would it be acceptable to kill one individual with good body organs in order to have the organs ‘donated’ to save the lives of several others whose organs are failing?

In the case of deontology, one has to wait for the right rules of conduct in order to behave morally in a given circumstance. Sometimes, circumstances call for acting against established rules. Where two or more duties of equal importance conflict, it is difficult to determine which one to follow. It also fails to take into account the personal circumstances of an individual where the notion of duty is applied universally to everyone.

Most theories of legal ethics are either deontological or consequentialist (Amaya, 2012). These are implicit in the prevailing standards, policies and practices of professional ethics such as laws and regulations on ethics as well as codes of conduct and ethics such as the JSCCE. But these have failed to regulate conduct that appears contrary to societal expectation of judicial officers. Volkman (2013, p. 109) proffers that:

One plausible answer has to do with the impotence of standard utilitarian and deontological styles of reasoning, in the face of prevailing uncertainty about values and outcomes in the context of the new economy....

In general, if one cannot rationally determine the outcomes of action or how to evaluate those outcomes, then utilitarian and deontological reasoning cannot guide action, and this leaves ample room for rationalization, and this undermines the efficacy of these approaches to ... ethics.

In contrast, principles of good character do not derive from statements of eternal, universal values or fortuitous outcomes; a virtue is a trait of character that is good for the person who has it, where the value of good character derives from the agent's own commitments... Virtue helps to flesh out the spirit of the profession, as this stands behind professional codes and other artefacts of professional ethics.

The difficulties for consequentialist and deontological ethics call for the consideration of a non-rationalistic approach and this dissertation looks at how virtue ethics may offer a plausible alternative. There are several advantages of virtue ethics approach to the deontological and consequentialist approaches (Amaya, 2012, p. 5). First, since virtues are not strictly rule-governed judicial ethics need not be understood on a model of rules. There is no set of rules, however complex, which determines what honesty, justice or integrity require. Secondly, a virtue ethics approach does not purport to do away with rules and therefore need not take a skeptical stance towards rules. In fact, a virtuous judicial officer does take rules seriously. Third, the role of emotions in virtue makes it possible for a judicial officer to appreciate the roll emotions play in legal judgment. Fourth, the use of practical wisdom, a central notion in the virtue ethics approach makes it possible for a judicial officer to deal with the conflict of values inherent in law and more so in cases where the conflict is sharp. Finally, by approaching judicial ethics from the agent-point of view, the judicial officer is placed at the center of decision making and thereby takes responsibility for the decisions arrived at thereby making an improvement in judicial practice. For these reasons, virtue ethics approach becomes a suitable candidate to ground judicial ethics. Whereas the deontological and consequentialist approaches are certainly important, the virtue ethics approach may take primary consideration.

Even then, virtue ethics theory is not without criticism from deontological and consequential ethicists. Rosalind Hursthouse (1996; 1991) has examined several of these

objections and she provides plausible responses with detailed discussions to show that the criticisms are misplaced.

The most prominent criticism of virtue ethics is the so called the “action-guiding objection” (Solomon, 2003, p. 74). According to Oakley and Cocking (2003, p. 31) critics “raise doubts about whether the notion of virtue is clear or detailed enough to serve as a basis of a criterion of rightness.” The contention is that it fails to be sufficiently action-guiding to be useful in making every day ethical judgments about actions. The response from virtue ethicists is that it is not the job of ethics to give us rules (Cafaro, 2015, p. 430). Moreover, virtue ethics can be action-guiding through observance the use of moral exemplars, that is, to do what a virtuous agent would do when faced with similar circumstances as well as a persistent process of moral learning which cannot be substituted by quick-fix rules (Hursthouse, 1996, p. 647). Solomon (2003) points out that virtue ethicists find this criticism to be unfair since even for consequentialist and deontological ethics no objective ground for justifying moral action exists to support them. Philip Cafaro (2015, p. 430) further observes that:

The similar failure of deontology or utilitarianism to give us compelling rules with which to handle hard ethical cases shows us that such a goal is beyond our grasp. Cultivating the virtues, especially practical wisdom, will put us in the best position to make good moral decisions in hard cases and to act on those decisions.

The foregoing responses to the criticism that virtue ethics is not action-guiding sufficiently address the objection.

A second criticism of virtue ethics is the “self-centeredness objection” (Solomon, 2003, p. 74). The critics argue that the primary concern of virtue ethics is with the agent’s own good, that is, personal *eudaimonia* whereas morality is supposed to be about other people, and how the agent’s actions affect the good of other people. Solomon (2003, p. 74) puts it thus, “instead of my needing to be good in order to benefit others, I am required to be the sort of person who benefits others in order to be fulfilled myself.” The critics argue that a theory of ethics should require one to consider others for their own sake, and not with the aim of deriving personal benefits. Proponents of virtue ethics have responded that virtues respond both to the agent and to the needs of others because

the good of the others results from the good of the agent and so these are not two separate aims but both result from the exercise of virtue (Hooft, 2014).

Another charge against virtue ethics is that only a small number of people with the luck, who have been privileged to receive a proper upbringing and have thus developed the right kind of habits can be virtuous (Melin, 2013). The criticism is that it is unfair that those people who have been lucky to receive the help and encouragement required to attain the proper moral character will be considered virtuous while the others will not through no fault of their own. Virtue ethics thus leaves us hostage to luck. Julia Driver (2001, pp. 53-54) for instance argues that only a few people have the capacity to live up to the standards of Aristotelian ethics. Melin (2013, p. 23) cites Frans Svensson (2006, p. 62) who has responded to this criticism by proposing that we should take a developmental account of the virtues according to which different people have developed the virtues to a different degree so that the virtuous behavior of morally mature people cannot be demanded of the young adults. The proper way to go is not to demand that people act, think and feel like a fully virtuous person but that they do their best to improve their behavior and their emotional response.

This study does not purport to prescribe any preference amongst the several ethical theories. It is appreciated that no one ethical approach may be sufficient in itself to appropriately resolve all ethical dilemmas a judicial officer may encounter. As Solum (2013) points out, “virtue ethics has hardly vanquished deontology or consequentialism, but there has been a flowering of aretaic approaches in moral philosophy and productive dialog between virtue ethicists, utilitarians and deontologists.” However, virtue ethics has had resurgence in moral philosophy in the recent past and therefore may be an appropriate philosophical foundation for the Kenyan judicial code of ethics and the vetting process. It may also be applied by a judicial officer to resolve any ethical dilemma encountered in judicial practice or private life.

The next section describes in more detail what is meant by a virtue ethics approach and why it would be a preferred approach to judicial ethics in Kenya. While a full discussion of virtue ethics is beyond the scope of this study, a discussion of some of the essential elements of the theory can be undertaken.

### 2.3 Virtue Ethics.

The framework for this study is based on virtue ethics approach. Virtue ethics is a moral theory that makes the notion of virtue of central concern (Swanton, 2003). Virtue ethics emphasizes the centrality of character and the virtues of the agent in ethical reasoning and practice as opposed to the action-focused deontological and consequentialist approaches. According to Rui (2011)

Virtue ethics has two fundamental traits (1) the uncodifiability thesis, or the claim that moral knowledge cannot be reduced to a system of rules and principles; (2) a focus on the agent (on his/her character), in opposition to the deontological focus on duties or actions (considered independently of their consequences) and the consequentialist focus on the outcomes of actions.

Virtue ethics dates back to ancient Greece and continues to the present as a theme in Western philosophy.

The word virtue has its origins in the Greek word *arête* which means excellence (Gichure C. W., 1997; Devettere, 2002). Virtue ethics takes as its goal the achievement of a certain kind of human excellence (Cravens, 2005). We all admire a person who portrays excellence of character and we desire to become like such a person in life. If that person is a judge, we refer to her as a good judge because of the way she conducts herself both in public and private life. We may say then that such a judge possesses the virtues of a good judicial officer. Thus, virtue ethics provides a description of human excellence.

Virtue ethics has many different roots, reaching into a variety of intellectual traditions (Solum, 2013) but Aristotle (384-322 B.C.), one of the greatest and most influential of the Greek philosophers is credited with formulating the first philosophy on virtue ethics. As observed by Solum (2013), "Aristotle's moral philosophy serves as a model for important contemporary versions of virtue ethics and his moral theory provides an excellent starting point for an investigation of virtue ethics" even though some of his conclusions, notably about manual labour, slavery and women have drawn severe criticism and have been rejected by neo-Aristotelians (MacIntyre A. , 2007). Aristotle's

ethical theory is built in his influential work the *Nicomachean Ethics* (NE) (Aristotle, 1984).

For Aristotle, good human activity is analyzed in terms of achieving excellence in performing various functions relevant to characteristically human activity (Oakley & Cocking, 2003). According to Aristotle, the important question is what is the good life (McGinniss, 2011, p. 31) and how can I go about living it? Aristotle says further that the best life for man is a life of happiness and a happy life is a life lived according to virtue or excellence (Lear, 1988).

There are three basic elements of virtue ethics traceable to Aristotle namely virtue itself or *arête*, practical wisdom or *phronesis* and flourishing or *eudaimonia* (Hursthouse, 2013; New World Encyclopedia, 2012). Rosalind Hursthouse explains each of these elements (Obermeyer, 2009).

Virtue is a character trait that is deeply entrenched in the disposition of an individual, reaching to his or her core. As such, virtue transcends intellect, and calls as well on emotions and emotional reactions, choices, values, desires, perceptions, attitudes, interests, expectations and sensibilities. Moreover, virtuous people embrace the concept of virtue as its own reward (Hursthouse, 2013).

Practical wisdom (*phronesis*) is the knowledge or understanding that enables its possessor to 'do the right thing' as through having internalized good intentions that lead to good and appropriate actions. In order to apply practical wisdom to an actual situation, the individual must first develop the capacity to recognize features of situations that are morally salient. This includes recognizing that some features of a situation are more important than others. Life experience itself helps us develop practical wisdom (Hursthouse, 2013).

*Eudaimonia*, is usually translated as 'happiness' or 'flourishing,' but this is a value-laded notion of happiness, a true, deep happiness or feeling of well-being (not to be confused with self-satisfaction) that comes from the knowledge that one is doing his or her best to lead a 'good' life. Consequently, living one's life in accordance with virtue is crucial to achieving a deep feeling of flourishing that defines *eudaimonia* (Hursthouse, 2013).

Therefore, “Virtue ethics is about desire and not about duty, about what we want to do and not about what we ought to do, about personal happiness and not the greatest happiness of all.” (Devettere, 2002). Contemporary virtue ethics seems to stick pretty close to Aristotle’s ethical writings on virtue ethics incorporating these concepts wherever they can ( (Solum, 2004; Athanassoulis, 2013).

The theory is teleological, that is, it focuses on what is the “end” or “goal” or “purpose” of life. The course taken by an individual moral agent in life is directed toward a *telos*, or purpose which is an expression of human nature (MacIntyre A. , 2007). According to Aristotle something is good when it does its function well, for instance a good umbrella is one that keeps the rain off its owner and the function of human beings, what sets them apart from other animals, is our reason (NE 1.7.1097b25-1098a15.). Aristotle says, “Every art and every investigation, and similarly every action and pursuit is considered to aim at some good.”(NE 1.1.1094a 1-3). This good or end that all people and their actions aim at is happiness or *eudaimonia* (variously translated as “flourishing”, well-being”, or the “good life.” (MacIntyre A. C., 1998). Therefore, the *telos* (purpose or goal) of human life is action in accordance with reason, as this will lead to *eudaimonia*, or flourishing. *Eudaimonia* is defined in terms of the virtues as an activity of the soul along with virtue (NE 1.13.1102a5). The virtues are defined as activity of the soul relative to us, and determined by reason. Aristotle says:

We may thus conclude that virtue or excellence is a character involving choice, and that it consists in observing the mean relative to us, a mean which is defined by a rational principle, such as a man of practical wisdom would use to determine it. It is the mean by reference to two vices: the one of excess and the other of deficiency (NE 2.6.1106b36 – 1107a2.).

Aristotle’s moral theory stresses the virtues as forming the core of human excellence according to which the good person within a community cultivates his or her virtues and leads a life of excellence. A person needs to develop the virtues or character traits in order to flourish (Oakley & Cocking, 2003, p. 15). Aristotle described virtues as “qualities the possession of which will enable an individual to achieve *eudaimonia* and the lack of which will frustrate his movement toward that *telos* [or purpose].”(Gichure, 1997; McIntyre, 2007).

Aristotle noted that there are two kinds of virtues: moral virtues are concerned with choice and include courage, justice, temperance, pride, gentleness, agreeableness, truthfulness, wittiness, modesty (NE, Books III and IV) and virtues of the intellect: Theoretical wisdom, science (*epistémê*), intuitive understanding (*nous*), practical wisdom (*Phronesis* or prudence), and craft expertise (NE, Book VI). How then do we acquire these virtues?

According to Aristotle, (NE 1103a 14-18) intellectual virtue requires time and experience to cultivate. Education and socialization play an important role in their acquisition. Moral virtues on their part are as a result of practice. Moral virtues are acquired by performing virtuous acts repeatedly until being virtuous becomes habitual in an individual because it is not something one is naturally born with. For instance, in order to become courageous one must consistently act courageously (NE, 1103a 14).

Aristotle says that each of the moral virtues is the mean between two opposing vices, an excess and a deficiency. For example, courage is a mean between the vices of timidity, a deficiency and recklessness, an excess (NE, 1115a 6-7). In order to determine where the mean lies between the vices, appeal has to be made of the virtue of *Phronesis* or practical reason or prudence. Prudence does not reason about deciding on virtue, it intuitively sees the mean in the here and now. The person who possesses practical reason is able to choose good ends and the means to choose those ends (NE, 1140a 25-28).

St. Thomas Aquinas (1225-1274) perfected the integration of the classical virtue ethics with a Christian perspective during the Middle Ages (Herdt, 2015). Aquinas, following St. Augustine's approach defines virtue as "a good quality of the mind, by which we live righteously, of which no one can make bad use, which God brings about in us without us." (Porter, 2013).

Aquinas synthesized the classical virtues with three theological virtues namely faith, hope and charity. These virtues are theological because they have God as their object. He distinguished three categories of virtue, intellectual moral and theological (Drefcinski, 1998). According to Aquinas men and women are meant to attain happiness in conformity with their highest end, which is to know, love and see God.

Virtue ethics disappeared from the moral philosophy radar from the Enlightenment period to the mid-19<sup>th</sup> century, the landscape being occupied by deontology and consequentialism (Amaya & Lai, 2012, p. 1)

However, since 1958 virtue ethics has had a tremendous renewed interest when Elizabeth Anscombe published her influential paper “Modern Moral Philosophy” (Anscombe, 1958). In that paper, Anscombe confronted the two dominating theories, deontology and consequentialism, dissected them and opened up the persistent problems in their application. For example, on the defects of deontology she says, “That legislation can be ‘for oneself’ I reject as absurd; whatever you do ‘for yourself’ may be admirable; but is not legislating” (Anscombe, 1958, p. 11). Her argument is that laws derived from personal experience are subject to be revised as better laws that take account of the prevailing circumstances appear. She argues further that modern analytic philosophy is unable to account satisfactorily for morality.

In present-day philosophy an explanation is required how an unjust man is a bad man, or an unjust action a bad one; to give such an explanation belongs to ethics; but it cannot even be begun until we are equipped with a sound philosophy of psychology. For the proof that unjust man is a bad man would require a positive account of justice as a “virtue” (Anscombe, 1958, p. 4)

She then made a strong call for a return to the *aretaic* moral theory as propounded by Aristotle. Many contemporary virtue theorists took her lead in criticizing deontological and consequentialist theories and have thereby promoted the development of virtue ethical theories.

The concept of virtue is central to virtue ethics because it runs through all the three basic elements of the virtue ethics approach. Virtues are important in themselves because they make the possessor good. *Phronesis* and *eudaimonia* both have an appeal to virtue and virtue explains each of them. *Phronesis* or practical wisdom is itself the highest virtue (MacIntyre A. , 2007). MacIntyre (2007) notes that “*Phronesis* is an intellectual virtue; but that intellectual virtue without which none of the virtues of character can be exercised. Conversely the exercise of practical intelligence requires the presence of the virtues of character.” Virtues are the constitutive elements of *eudaimonia* or human flourishing, which is good in itself (Athanasoulis, 2013). *Eudaimonia* or means living a

life devoted to virtues. Hursthouse (1999) says that, “a virtue is a character trait that a human being needs for *eudaimonia*, to flourish, or live well.” In sum, virtue is what makes someone good as a human being and allows the person to act well, that is, with wisdom and sound emotion and allows the person to flourish or live well.

In spite of virtues being central to the virtue ethics approach, it has been observed that contemporary virtue ethicists do not agree on one standard list of virtues that any moral agent should exemplify (Wallach & Allen, 2009). However, it is generally accepted that in any standard list of virtues, the following virtues will appear; justice or fairness, courage or bravery, temperance or enjoying life, and wisdom or having good judgment. Alfano (2015) observes that there is a general philosophical consensus about these virtues. He says further that they appear on the lists of virtues generated by Plato, Aristotle, David Hume and much more recently Rosalind Hursthouse and Linda Zagzebski. Beyond these, there are variations in certain respects with some virtues appearing on one list and not the other. Table 2.1 is a list of virtues developed by Plato, Aristotle and most recently Linda Zagzebski adopted from Andrew Aberdein’s (2007) *Virtue Argumentation* article.

Table 2.1 Lists of virtues developed by Plato, Aristotle and Zagzebski

Virtues of Plato:	Courage; temperance; wisdom (or prudence); and justice.
Aristotle’s virtues	<b>Moral virtues:</b> gentleness; courage; modesty; temperance; righteous indignation; the just; liberality; sincerity; friendliness; dignity; hardiness; greatness of spirit; magnificence; and wisdom. <b>Intellectual virtues:</b> knowledge, art; prudence; intuition; resourcefulness; understanding.
Linda Zagzebski’s Virtues	ability to recognize the salient facts; sensitivity to detail; open-mindedness in collecting and appraising evidence; fairness in evaluating the arguments of others, intellectual humility; intellectual perseverance, diligence, care and thoroughness; adaptability of intellect; the detective’s virtues: thinking of coherent explanations of the facts; being able to recognize reliable authority; insight into persons, problems, theories; the teaching virtues: the social virtues of being communicative, including intellectual candour and knowing your audience and how they respond; intellectual courage, autonomy, boldness, creativity, and inventiveness.

Virtue ethics should be able to shape the character of the individual judge and more importantly it is an avenue for reaching a just outcome in dispute resolution (Amaya, 2012). Because virtue ethics takes as its goal the attainment of a certain kind of human excellence, a judicial officer who possesses the requisite virtues of judging should arrive at decisions that advance the desired end of the judging which is the attainment of justice according to law.

With the foregoing sketch of virtue ethics, the next section examines the application of virtue ethics to judicial ethics.

## **2.4 Judicial Ethics**

### **2.4.1 Definition**

The foregoing explication of ethics shows that judicial ethics is a part of the wider subject of ethics. The ethical standards of judicial conduct are what have come to be known in applied ethics as judicial ethics.

Lahoti (2005, p. 5) defines Judicial Ethics as:

the basic principles of right action of the judges. It consists of or relates to moral action, conduct, motive or character of judges; what is right or befitting for them. It can also be said that Judicial Ethics consists of such values as belong to the realm of the Judiciary without regard to the time or place and are referable to justice dispensation.

Judicial ethics are an important tool for ensuring accountability and integrity of the judiciary (Ovcharenko, 2015). In this respect, judicial ethics have to be universal and applicable in all respects with the aim of ensuring that justice is duly served.

Charles Fried (2004, p. 1227) says that Judicial Ethics are different from professional ethics say for lawyers in general, doctors, among others. According to him,

Judicial Ethics are different - deeper more constraining...Judges are supposed to maintain a certain decorum even when not doing their jobs. There is an aura about judges that we do not want them to dissipate, and sustaining that expectation is an important part – perhaps the central part – of judicial ethics.

The subject of judicial ethics has gained increasing worldwide interest in the recent past. Kaufman (1989) commending on the subject says that, "Judicial Ethics is a topic of increasing interest to the public, the bar, and the Judiciary; only recently has the body of substantive law regarding judicial behavior begun to take shape." What shape this increasingly important subject should take in Kenya is an issue that this study attempts to contribute to.

A judicial office is an exalted position of honour and respect. Newman (1995, p. 507) describes a judicial officer thus:

The person who presides over the courtroom ... is in that moment less an individual than a symbol of democratic values and an instrument of state power. In recognition of that power and authority, all rise as the judge enters the courtroom and takes the seat, elevated above everyone else in the room, from which justice will be pronounced. It is the hope of all, and the conviction of most, that this individual will do his or her job well, dispensing what is perhaps our most precious social good-justice.

For this reason judicial officers are expected to uphold the highest standards of integrity in order to maintain public trust and confidence in the judicial institution. Public trust is paramount for the institution of the judiciary because the judicial officers are entrusted with the authority of resolving disputes among members of society. Reeves (2011, p. 319) posits that judicial decisions are occasions for the use of state power and the use of state power requires moral justification. MacKay (A., 1995) notes that, the extraordinary power invested in the judicial office demands a high standard of behavior. Moral justification implies a widened responsibility for judicial officers. According to Domselaar (2015, p. 24) "in order for the practice of adjudication to be legitimate it must possess moral quality, it must be a practice in which judges see to it that citizens who participate in a legal proceeding receive their due."

Society therefore expects that in discharging their mandate judicial officers exhibit certain characteristics of behavior. These ethical standards of conduct are not the same as the ordinary citizen is required to meet (A., 1995). The Honourable Justice Thomas of Australia in his book "*Judicial Ethics in Australia*" cited by Yuwen Li (2004, p. 2) argues that the ethical standards required from judges call for perhaps the highest and

most rigorous standards, sacrifices and disciplines of any profession in the community. It becomes imperative therefore that these ethical standards be formulated and made available to judges as a guide to their conduct in the administration of justice and outside of their work.

The subject of judicial ethics is both relevant and current and as the literature in part 2.4.6 will show there is a steadily growing focus on virtue ethics in the subject. Thus, it is essential to identify and consider ways and means of ensuring that judicial ethics works.

### ***2.4.2 The Sources of Judicial Ethics***

If judicial ethics are different and more constraining than the ethics of the society in general, from whence do they come?

Judicial ethics form part of the wider rubric of ethics. It is part of applied normative ethics. In order to make progress towards a rational and justified system of judicial ethics it must be linked to wider ethical theory (Bagaric & Dimopoulos, 2003, p. 368). Therefore, judicial ethics must be understood within the general ideas and theories of ethics.

Judicial ethics as part of the general idea of ethics must therefore draw its conceptual framework from time honoured ethical norms and theories. The primary source of judicial ethics must be the universally recognized norms of morality (Ovcharenko, 2015). They must therefore be set upon the general ethical principles even as they seek to address particular issues of judicial practice. These norms are derived from the various ethical theories of deontology, consequentialism and virtue ethics. These theories form the basis of moral action across all professional fields. The various ethical theories and approaches will help the judicial officers to discern the general moral issues in the society in which they operate and to strengthen their ethical judgments when they encounter moral dilemmas.

These theories contain widely accepted moral standards or principles for decision making. Reding, et al., (2014, p. 5) provide a working summary of these ethical theories:

The consequentialist position argues that what is 'right' or 'wrong' should be determined by the impact of an act. This is in direct contrast to the deontological position, which argues that what is 'right' or 'wrong' should be determined by the act itself, regardless of its impact; and virtue ethics, which argues that what is 'good' is determined by what an experienced and wise person would do in such an instance.

The application of these moral theories to judicial ethics by judicial officers is an appeal to widely accepted moral standards in order to arrive at acceptable outcomes when confronted with ethical dilemmas. For instance, society in general condemns acts of corruption and a judicial officer is expected to know and understand this and avoid it as a member of that society. However, it is not enough for a judicial officer to know that corruption is bad because the law says it is bad. A judicial officer should understand that to engage in corruption is bad because it is unethical. To appreciate that corruption is unethical, a judicial officer needs to understand that only a good person, a person of good character can appreciate the depth of unethical conduct like engaging in corruption. Virtue ethics speaks to the agent's character and not to the agent's actions. In virtue ethics, character informs action. The actions of a good judicial officer will emanate from her good character.

Judicial ethics form part of the wider legal professional ethics. However, due to the uniqueness of the authority bestowed upon a judicial officer, the authoritative resolution of disputes by doing justice according to law, judicial ethics cannot cover the same territory as legal professional ethics, although there may be some common concepts founded on basic ethical principles. Devlin (1994) quoting Jacobs distinguishes how a moral system for lawyers would be different from that of judges in that while a judge is a guardian (of morals) whose precepts prohibit the sale of judicial services, a lawyer in private practice is free to accept any client she chooses and trade her advice, knowledge and forensic skill for a fee. Sackville (2009, p. 9) provides further justification for a separate judicial ethics by saying:

The functions performed by judges, it should be noted, are fundamentally different from those performed by legal practitioners. The judge, unlike the practitioner, has no client or employer. Accordingly, the judge owes no fiduciary

or other special duties to identifiable individuals, beyond the general duties that are inherent in the exercise of judicial power. Unlike the legal practitioner, the judge must be independent of governments, institutions and individuals and must be impartial in the discharge of his or her adjudicative responsibilities.

Consequently, issues of judicial ethics can be distinguished from broader legal professional issues. The key criteria for the distinction would be that judicial officers are the primary agents in the scenario, and ethical issues are viewed from a judicial rather than a legal practitioner's perspective.

#### ***2.4.3 The Legal Basis for Judicial Ethics in Kenya (National and International Legal Standards for Judicial Ethics.***

Current legislation in Kenya is an important source of judicial ethics. There are various statutory and regulatory measures that have been introduced to govern the ethical conduct of public officials. These statutory and regulatory provisions form the legal basis for the regulation of the ethical conduct of judicial officers and their violation may call in disciplinary, administrative and criminal sanctions.

First, the legal foundation for judicial ethics in Kenya is the Constitution of Kenya, 2010 (Ojwang, 2013). Chapter 6 which deals with Leadership and Integrity underscores the premium value placed on the virtue of integrity for public officers. This chapter provides the guiding beacons for ethics to be adhered to by state officers. Article 260 of the Constitution provides that judicial officers are state officers and as such are bound by these constitutional provisions on leadership and integrity.

Article 73 (1) (a) of the Constitution requires judicial officers as state officers to exhibit respect, honour, dignity and integrity in the exercise of the authority vested in them as a public trust while Articles 73 and 75 of the Constitution require judicial officers as state officers in their service to the public to uphold certain ethical requirements viz:

- i. A responsibility to serve rather than rule the people.
- ii. Objectivity and impartiality in decision making.
- iii. No nepotism, favouritism or other improper or corrupt motives.
- iv. Be selfless, honest, accountable, disciplined and committed.

- v. Selection or election to public office shall be on account of personal integrity, competence and suitability
- vi. The conduct of a state officer shall avoid conflict between personal and public duties, compromise public interest or demean the office.

A state officer who breaches these provisions shall be liable to disciplinary sanctions and may be dismissed from service and disqualified from holding a state office in future as provided under Article 75 (2), (3) of the Constitution.

Chapter 13 of the Constitution sets out the values and principles of public service. The first among these values under Article 232 (1) is high standards of professional ethics. Thus judicial officers, both as state officers and as public servants are constitutionally required to adhere to high standards of professional ethics.

Articles 166 and 168 (1) of the Constitution have specific ethical requirements for judges. Article 166(2)(c) provides that in order to qualify for appointment as a judge a person must have a high moral character, integrity and impartiality. Article 168 on the removal of a judge from office provides that among other grounds a judge of a superior court may be removed from office on the grounds of –

- a) a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament;
- b) incompetence; or
- c) gross misconduct or misbehavior.

Given these constitutional provisions on the appointment and removal of a judge it follows that a judge is liable for unethical action or inaction.

It is apparent from these provisions that the Constitution lays the ground for the regulation of ethical conduct by judicial officers specifically and generally as state officers.

Second, the constitutional imperatives are backed by statutory provisions through various Acts of Parliament all aimed at promoting high standards of ethical behavior among state officers.

The Public Officer Ethics Act, 2003 is the basis of the JSCCE. This Act was enacted before the promulgation of the current constitution. However, given the constitutional

imperatives on ethical conduct by public officers it follows that this statute gives breadth to the constitution.

The Act, in section 5 (1), requires the relevant Commission to establish a specific Code of Conduct and Ethics for officers in respect of which it exercises disciplinary control. The Judicial Service Commission, being the responsible Commission for judges and magistrates established the JSCCE in 2003. The provisions of the JSCCE are set out in Appendix B and analyzed below.

The Leadership and Integrity Act No.19 of 2012 was enacted after the promulgation of the current constitution and it expounds on the general constitutional provisions on ethics. This Act contains the General Leadership Code for all state officers. It also incorporates the provisions of the Public Officer Ethics Act and provides in section 6 (4) that where there is inconsistency between its provisions and those of the Public Officer Ethics Act, its provisions prevail.

The Judicial Service Act, 2011 in Part V makes provision for the appointment and removal of judges and discipline of other judicial officers and staff. An applicant for the position of judge has to satisfy laid down ethical requirements. Among those provided under Schedule 1 Section 13 are:

Integrity, the elements of which shall include-

- i. a demonstrable consistent history of honesty and high moral character in professional and personal life;
- ii. respect for professional duties, arising under the codes of professional and judicial conduct; and
- iii. ability to understand the need to maintain propriety and the appearance of propriety;

Fairness, the elements of which shall include—

- i. a demonstrable ability to be impartial to all persons and commitment to equal justice under the law; and
- ii. open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views.

The ethical requirements for appointment as a magistrate under the Judicial Service Act Section 32(2) (a) are similar to those of judges, that is, high moral character, integrity and impartiality.

The Act in Section 47(2)(a) further provides for the enactment of codes of conduct and ethics specific to various officers serving in the judiciary. These codes are yet to be promulgated and so recourse must be had to the JSCCE enacted in 2003.

The Vetting of Judges and Magistrates Act, 2011 came into force on 22<sup>nd</sup> March, 2011. It actualizes the constitutional requirement that judges and magistrates who were in office at the time of promulgation of the constitution shall undergo vetting by an independent board, the Judges and Magistrates Vetting Board (JMVB) to determine their suitability to continue serving in the judiciary. The Act provides the legal framework for the vetting process.

The Vetting Board has stated that its objective was not to punish, discipline, exonerate or reward the judicial officer but to help to restore public confidence in the judiciary (JMVB, 2013).

Basically, vetting is concerned with examining the past conduct of judicial officers. It is important for this study in two ways, first because evaluating the conduct of an individual requires an ethical theoretical basis and therefore general ethical theories such as deontology, utilitarianism and virtue ethics apply to it. Second this study also seeks to understand how vetting can assist judicial officers to better adhere to the provisions of the JSCCE.

Third, the terms of the respective oaths of office for judges, magistrates and kadhis taken on appointment require them to serve the people and the Republic with diligence, impartiality, without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence, to uphold the dignity and respect for the judiciary and the judicial system and promote fairness, independence, competence and integrity.

At the international level, Article 10 of the Universal Declaration of Human Rights is the first instrument to mention a fundamental principle of judicial ethics – namely judicial independence. It provides that:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

The same principle is elaborated in Article 14 of the International Covenant on Civil and Political Rights adopted in 1966 which provides that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

In 1985 the United Nations adopted the United Nations Basic Principles on the Independence of the Judiciary which expanded this principle and set other standards to guide judicial conduct.

Presently, the best known document on judicial ethics is the Bangalore Principles of Judicial Conduct adopted by the General Assembly of the UN Human Rights Commission in May, 2003. Terhechte (2009) refers to it as the Magna Charta of judicial ethics on the global level. They were adopted by the General Assembly of the United Nations Human Rights Commission in May, 2003. The Bangalore Principles are premised upon six core values: independence, impartiality, integrity, propriety, equality and competence and diligence. It has been stated that these principles are designed to both provide guidance to judges with regard to their conduct, as well as educate the public, lawyers and the other two branches of power about behavioral standards by which judges are expected to abide (Council of Europe).

These principles are formulated for the general guidance of judicial officers. If they are taken as the universal standards for judicial ethics then they can be considered as the six core ethical principles that judicial officers should embody across the world. A call for judicial officers to adhere to these principles is a call for them to pursue excellence in judicial practice. Since these principles may be also aspirational, if emulated by an individual judicial officer they turn out to be virtues to be learnt and practiced and eventually become embedded as the behavioral standards for the judicial officer.

There are several other international and regional instruments that regulate judicial conduct as outlined in Appendix E below.

The provisions in the Constitution of Kenya, the statutory enactments and regulations, the international and regional instruments as well as common law and judicial conventions and traditions on judicial ethics are a call by the public for rectitude and accountability by all persons in positions of leadership. For judicial officers, the call is even louder and more constraining because courts are often the last port of call in an individual's quest for justice. The justice delivered must therefore be with a depth of understanding of the legal intricacies involved, the surrounding circumstances and by a person whose character is beyond reproach. Virtue ethics in judicial practice will help the individual judicial officer to deliver good and sound decisions and to be the best person possible.

### **2.5 Implementing Judicial Ethics in Kenya: The Judicial Service Code of Conduct and Ethics and Vetting of Judicial officers**

There are various strategies used to promote professional ethics within institutions. These include ethical audits, complaints procedures, discipline procedures, compulsory training and education, and regulation (Campbell, 2010). This section looks at two of these methods, regulation by way of a code of ethics and vetting as a form of ethical audit.

The Kenyan judiciary has been undergoing structured reforms for the past fifteen years (Richmond, 2010), part of the objective being to entrench judicial ethics among judicial officers. Part of the reform initiatives were the development of the Judicial Service Code of Conduct and Ethics (JSCCE) in 2003 (ICJ-Kenya, 2005) and the vetting of judicial officers that was provided for under the Constitution of Kenya, 2010. The importance of adherence to judicial ethics as an important object of judicial reform is underscored by Henry Lugulu in his book, "The Role of Ethics in Achieving Justice in Society" where he terms judicial ethics as "the single most important object of judicial reforms" and calls for an urgent development and implementation of a code of ethics for judges and magistrates in Kenya while vetting has been recognized as a tool for institutional reform and transitional justice (Kova, 2007).

Drawing from various publications in the business field, Harrison (2004), while making a case for the institutionalization of ethics in organizations observes that the application of ethics codes and the use of ethics audits has been used to foster ethical behavior in the professions and business.

A judicial code of ethics and vetting of judicial officers are therefore two ways by which ethical conduct can be entrenched within the Kenyan judiciary.

### ***2.5.1 The Kenyan Judicial Service Code of Conduct and Ethics (JSCCE)***

The Kenyan Judicial Service Code of Conduct and Ethics (JSCCE) was promulgated in the year 2003. Its purpose is to ensure ethical conduct by judicial officers. As pointed out by Nicholson (2005, p. 605), the most important function of an ethical code, and the one which underpins many others, is to ensure ethical behavior. The JSCCE an obvious starting point for an understanding of the ethical standards of the Kenyan judiciary because the code is expected to be the central means of inculcating and enforcing ethical behavior among judicial officers. Judicial officers have not only a legal but also moral obligation to conform to the code. Nicholson (2005, p. 604) observes that a code may be regarded as the written manifestation of the bargain between profession and society, under which the former agrees to ensure certain ethical standards in return for the advantages of professional status.

The JSCCE is an important part of the applicable law on judicial ethics in Kenya (Ojwang, 2013). The JSCCE is explicit that judicial officers are expected to not only be conversant with the code but also to be able to apply it appropriately in order to maintain the integrity and independence of the judicial service.

A code of ethics is concerned with ethics (Miller, 2002) and therefore it must be understood within the context of general ideas of ethics and will share characteristics with ethical theory.

The JSCCE follows the deontological ethical framework. It is based on prescriptions and prohibitions as well as general principles under various headings thereby portraying ethical conduct as consisting of ethical rules, duties or responsibilities. It is divided into sections outlining rules and principles dealing with different areas of responsibility. These rules and principles form the standards that should govern judicial officers in their conduct. The focus of the JSCCE is therefore “what should a judicial officer do?” in a certain situation. Anscombe (1958) has called such an approach to ethics “legalistic morality” with its emphasis on obligation and duty with the codes of ethical behavior premised on deontology and utilitarianism being rigid and inflexible and eventually turning to be counterproductive. Similarly, Seebauer, (2013) points out several constraints to code based ethics:

First, no list of guidelines can possibly cover all the complex situations that can arise. Second, code-based or principle based ethics sometimes leads to minimalism, the idea that: “If it’s not specifically forbidden, it must be allowed.” Third, some situations call for on-the-spot decisions, with no time to consult a guidebook.

According to Grodzinsky (1999) such a deontological or utilitarian approach makes the practitioner look at “else” rather than “self” and does little to influence their character. Yet, judicial officers require the possession of the sort of character which regards doing the right moral thing as important and worthy of pursuit. If developed, such moral character represents the most effective and potentially long-term means of improving judicial officers’ morality. Nicolson (2005, p. 605) argues that codes have a considerable potential to influence lawyer and in this case, judicial behavior and therefore deserve a central place in discussions of professional legal and by extension judicial ethics. Therefore, depending on their form, codes have a role to play in helping to develop and sustain moral character and a character-forming theory such as virtue ethics should give more meaning to a judicial code of ethics.

The JSCCE is under revision to determine how it complies with international standards including the Bangalore Principles of Judicial Conduct (Jayawickrama, 2011). The expert undertaking the review has made a comparison of the provisions of the JSCCE and the Bangalore Principles and identified gaps that need to be filled to bring the

JSCCE to international standards. The Bangalore Principles are now the benchmark for regulating judicial conduct. It is hoped that the review should give an opportunity to the drafters of the new code to provide a clear ethical foundation for the code, moving away from being action-focused to being character-centred.

### **2.5.2 The Vetting of Judicial Officers**

The term “vetting” comes from the practice of evaluating a horse’s fitness to compete in an upcoming race (Johnson, 2013). This term has since found meaning in current leadership discourse to refer to the process of evaluating an individual’s worth to serve in a certain public office especially those in the armed forces, police, security forces and intelligence agencies as well as the judicial sector. It entails among others, scrutiny of the officer’s character and behavior, that is, ethical conduct.

Vetting is defined as “the processes for assessing an individual’s integrity as a means of determining his or her suitability for public employment.” (Duthie, 2007). The process of vetting a judicial officer in Kenya involves determining the suitability of the officer to continue serving in office. From this definition it is discernible that the assessment of an individual judicial officer’s integrity is central to the vetting of judicial officers in Kenya.

Elaborating on the aspect of integrity in the context of vetting, Ojielo (2010, p. 5) proffers that:

Individual integrity refers to the person’s compliance with relevant standards of human rights and professional conduct. This also includes the person’s financial propriety. The process seeks to exclude from public service persons with dubious integrity so as to strengthen the legitimacy of the institutions in the eyes of the public.

Vetting of judicial officers will therefore entail examining an individual officer’s record in making decisions to determine whether there were any human rights violations as well as adherence to the professional code of conduct and ethics.

There are two broad forms of vetting persons for public office. The first form is the screening of persons before taking up public appointments for the first time and vetting

persons already in public service in order to determine their suitability to continue serving in the offices they occupy (GSDRC, 2009). In both its forms vetting is a new concept in Kenya having been ushered in by the new Constitution of Kenya, 2010. Both forms of vetting are employed in the Judiciary in Kenya.

Kwaka (2011, p. 236) explains the first form of vetting as applicable to judicial officers where during the hiring of judges by the JSC, “rigorous interviews and vetting are conducted transparently and the media and the public are allowed to submit information on candidates to which the candidates are challenged to respond.” This form of vetting applies to candidates aspiring to take up positions of judicial officers for the first time.

This form of vetting is also applied to key presidential appointments to senior positions in the public service. The presidential appointments must go through vetting by members of the National Assembly before a recommendation is made to the president on their suitability to serve.

The second form of vetting which applies to judicial officers and which is the subject of this study is a mandatory exercise prescribed by the new constitution of Kenya, 2010 under Section 23 of the Sixth Schedule.

The term “vetting” under section 2 of the JMVA on interpretation means the process by which the suitability of a serving judge or magistrate to continue serving in the Judiciary is determined in accordance with this Act. In this context vetting is a transitional mechanism provided for in the constitution in order to reform and build public confidence in the judiciary and promote competency and efficiency. It applies to all judges and magistrates in office at the time of promulgation of the new constitution and is aimed at establishing their suitability before they continue to serve in the restructured judiciary.

This second form of vetting has also been applied to the members of the police service in a different context. There have also been calls to apply this form of vetting to officers serving in other public sectors such as the Ethics and Anti-Corruption Commission (EACC) and the Kenya Revenue Authority. The vetting is aimed at scrutinizing each officer for suitability and competence in order for the officer to continue serving as part of the reform process of the governance structures under the new constitution.

The requirement to vet judicial officers arose from demands by consumers of justice in Kenya that due to its failings in the past the judiciary required to be reformed under the new constitution (Committee of Experts on Constitutional Review (CoE), 2010). The catalyst for sparking interest in judicial reforms was provided by erosion of trust and confidence in the judiciary with allegations of serious misconduct among judicial officers.

Several task forces and committees outlined in Appendix F were set up to look into the issues and recommend ways of restoring the public confidence in the institution. The Task Force on Judicial Reforms was the last of such efforts. After reviewing and analyzing all previous reports and conducting further studies on the operations of the Kenyan judiciary it prepared what is now known as the Report of the Task Force on Judicial reforms, 2010 (The Ouko Report) which was published as efforts to finalize the draft of the new constitution were coming to an end. One of the challenges it identified as facing the Kenyan judiciary was unethical conduct on the part of judicial officers and staff that impedes the fair and impartial dispensation of justice. It was therefore imperative that mechanisms be put in place to address such challenges in order to restore confidence in the administration of justice in the country.

Regular disciplinary procedures are appropriate to address the challenges when the percentage of individuals affected is small; when the institution remains functional and there is no urgent need for wider reform; and there is sufficiently strong political will to implement self-reform (UNDP, 2006, p. 17). However, in situations of institutional reform targeting an entire institution the regular disciplinary procedures would be overstrained and the capacity and will of public institutions to self-reform are particularly limited (UNDP, 2006). In the circumstances, an ad-hoc special process has to be established. In the case of the judiciary in Kenya, this was in the form of a vetting process of judges and magistrates undertaken by the Judges and Magistrates Vetting Board (JMVB). It is suitable for fundamental reforms of the institutional framework (UNDP, 2006) of the judiciary as demanded by Kenyans in the new constitution.

In determining the suitability of a serving judge or magistrate to continue serving in the judiciary, the Vetting Board, under Section 14 (1) (a-c) of the Vetting Act may:

- Gather relevant information, including requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary;
- Interview any individual, group or members of organizations or institutions and, at the Board's discretion, to conduct such interviews; and
- Hold inquiries for the purposes of performing its functions under this Act.

Moreover, the Board must consider the criteria set in Section 18 (1) (a-e) of the Act which stipulates:

- Constitutional criteria for appointment;
- Past work record, including prior judicial pronouncements, competence and diligence;
- Pending or concluded criminal cases or prosecutions against the judge or magistrate concerned; and
- Complaints or other relevant information received from any person or body, including the Law Society of Kenya, the Ethics and Anti-Corruption Commission, the Attorney General, the Judicial Service Commission, Kenya National Human Rights and Equality Commission, National Police Service Commission and other prescribed bodies.

The qualities the Board is directed to consider in a judge or magistrate are: professional competence, written and oral communication skills, integrity, fairness, temperament, good judgment, legal and life experience, and commitment to public and community service (The JMVA, Section 18 (2)).

The vetting of judicial officers incorporates two aspects that are absent from normal disciplinary hearings. First is the aspect akin to being interviewed for the job after which one is confirmed as suitable to continue serving. In other words, one has been re-appointed into the position even though she was serving in it before. The other aspect is the one of the standards required for one to be declared suitable to continue serving. Here, vetting looks into the past conduct of the officer in a holistic manner rather than being confined to a particular complaint(s) presented before the vetting team. It is this second aspect of vetting that would scrutinize the officer's ethical conduct, inquiring into how well an officer understands, appreciates and applies the ethical requirements

under the relevant code of ethics. In this respect therefore, vetting can be viewed as an ethics test for judicial officers as its objective is to determine their suitability to continue serving in the reformed judiciary as persons of good character who are worthy to hold that high office.

These parameters for determining the suitability of a judicial officer to continue serving indicate that vetting of judicial officers is a rigorous process that involves scouring examination, hard-nosed assessment, and unsympathetic evaluation. The vetting process is therefore a more wholesome and comprehensive process than regular disciplinary procedures which consider specific breaches of the code and of ethics or other regulations.

In an analysis of the concept of judicial integrity, from a virtue ethics perspective, Jonathan Soeharno's (2007) thesis is that integrity is definable both in terms of judicial character and conduct. Thus, the character and conduct of judicial officers is under examination in the vetting process. The aim of the vetting process should be to retain in the judiciary persons of integrity and with the professional *phronesis* appropriate to the judicial practice. Possession of the virtue of *phronesis* will also help a judicial officer to determine what the right conduct is in given situations. Moreover, since the observance of rules alone is not sufficient to do justice, it will be achieved if the law is supplemented by equity as a correction of the law in a specific situation according to the exercise of *phronesis* (NE 6. 5. 1-4, 1140 a-b; 6. 8. 9, 1142a; 6. 13. 1-6, 1144b). Suitability in this case would mean persons who can be relied upon as moral exemplars and whose character would be emulated by others joining the profession and thereby provide a standard upon which future recruitment and training should be based.

Though a transitional measure, the vetting process can be considered as an external oversight or ethics audit of the judicial officers. In that respect an officer who fails to demonstrate practical wisdom (*phronesis*), virtue (*arête*) or goodwill will be rooted out of the system (Johnson, 2013).

The literature on vetting individual's for public office generally and judicial officers in particular is very limited (Ojielo, 2010). According to a member of the Kenya JMVB, this is a whole new experience and there was no precedent to work with. The Vetting Board had to establish a modality (Sachs, 2013) and this model would become the

starting off point for any other countries that might be envisaging similar processes (Sachs, 2013).

Academic conceptualization of vetting in terms of a strategy to assess the ethical conduct of individual or institutional conduct is even more limited. There does not seem to be any study so far focused on what ethical theory would underlie the exercise. However, considering that the prime concern of vetting is to determine the conduct or character of the judicial officer, an examination of the underlying philosophy of this process from a virtue ethics approach would give it proper grounding because this can be considered as an ethics test for the judicial officers.

### ***2.5.3 An Outline of the Ethical Elements-of the JSCCE and the Vetting Process***

The detailed elements of the JSCCE and the vetting criteria are set out and critically analyzed in Chapter 4 of this study. Here, a broad outline of the elements comparing the philosophy underlying the JSCCE and the vetting process is undertaken.

The Kenya JSCCE was established in May, 2003 under the Public Officer Ethics Act, 2003 while the vetting of judicial officers is provided for in the new Constitution of Kenya, 2010 and actualized by the JMVA, 2011. The vetting process commenced on 23<sup>rd</sup> February, 2012 and was underway at the time of submission of this dissertation. It would be appropriate for the vetting process to take into account the provisions of the JSCCE in its suitability test.

The Preamble to the JSCCE states that the purpose of the code is to establish standards of ethical conduct of judicial officers and to be applied with constitutional requirements, statutes, court rules and legal authorities and in the context of all relevant circumstances. The JMVA provides in section 3 that its object and purpose is to establish mechanisms and procedures for the vetting of judges and magistrates pursuant to the requirements of section 23 of the Sixth Schedule to the Constitution. Vetting is defined in section 2 of the JMVA to mean the process by which the suitability of a serving judge or magistrate to continue serving in the Judiciary is determined in accordance with the Act.

The JSCCE sets out general rules, that is principles, as well as specific rules outlining duties, obligations, rights and responsibilities to be observed by judicial officers in their conduct. Some of the principles and rules provided for in the code are independence, integrity, impartiality, private interests, fiduciary activities, conflict of interest, disqualification, professionalism and courtesy, standing for political office and participation in political activity, participation in law practice and acceptance of gifts and donations.

The vetting criteria on the other hand is based on principles set out in the Constitution, Article 10 and the JMVA, section 18. Among the principles taken into account in suitability test for the judicial officer are professional competence, diligence, past criminal records, complaints raised against the officer by any person or body, written and oral communication skills, integrity, fairness, temperament, good judgment, legal and life experience and commitment to public and community service (JMVA section 18).

The suitability test under the vetting process for judges and magistrates includes an evaluation of the officer's professional qualifications as well as standards of character and conduct. Here again, like in the JSCCE the criteria for evaluation sets out the principles that one has to satisfy to pass the suitability test. In the later respect, the vetting process should not only capture what the particular conduct of a judicial officer is, it should also indicate what character the judicial officer possesses as well as the affective attitudes that condition and motivate that behavior. This falls in the realm of virtue ethics, the subject of this study since virtue ethics looks at emotions, attitudes and motivations that underlie particular conduct.

The JSCCE gives guidance on the conduct that a judicial officer should uphold while in office whereas the vetting of judicial officers is geared towards evaluating the conduct of a judicial officer for purposes of determining suitability to continue serving on the bench. Whereas the JSCCE is forward looking, the vetting process looks at the past. At the same the purpose of the code and the vetting process can be considered as aiming at the same thing, the ethical conduct of judicial officers.

The principles and rules set out in the JSCCE aim at promoting the achievement of the judiciary's chief goals and concerns of adjudicating disputes in a just manner according

to law. Likewise, the vetting criteria must aim at the same thing. These principles will work together with the general ethical principles to achieve the stated goals. They provide judicial officers with general guidance on how to approach ethical challenges and how to come up with decisions thereon.

The provisions of the JSCCE and the vetting criteria do not articulate the underlying ethical principles but organize the various ethical requirements around various topic areas. According to Judge Kaufman, I. R. (1970) a judicial code of ethics should aim at prompting a dialogue between a judges's own ethical sense and generally recognized ethical standards. Although not explicitly stated, the aim of a vetting exercise for public officers is improvement of ethical leadership in the public sector by "excluding from public service persons with serious integrity deficits" (UNDP, 2006, p. 9).

The JSCCE sets out for judicial officers the society's expectations for their conduct while the vetting process evaluates this behavior to determine how suitable they are to serve in the high office. Ethics provide standards for prescribing and evaluating conduct. Ethical theory provides the basis for saying that people have an obligation to behave in a certain way, or that it is wrong for someone to behave in a certain way". (Johnson 7). It has been argued that the need to define standards for the regulation of practice is a strong motivation to make explicit rules and regulations rather than to develop a theoretical foundation for the articulation of ethical and moral principles (Pettifor, 2001, p. 27).

Establishing a theoretical ethical foundation for the code and the vetting process is worth investigating because in order to evaluate on the goodness of this behavior we have to look to ethical theory to provide the requisite guidelines. For that reason process of vetting judicial officers and the JSCCE need to be based on sound ethical theory. For instance, the Canadian Psychological Association (CPA) has been on the leading edge among professions in defining a philosophical foundation for its code of ethics and in explicitly linking all standards to those ethical principles (Pettifor, 2001, p. 28):

There is a lack of attention on literature covering the subject of the ethical foundations for the JSCCE and the vetting process yet both of them have the aim of ensuring that judicial officers conduct themselves in an ethical manner. Both of them seem to arise out of the need to address emerging ethical issues within the judiciary. In that case, there

is a need to examine and clarify the philosophical assumptions underlying them in order to guide the judicial officers towards intentional decision making.

Virtue ethics has the potential to provide this basis.

## **2.6 The Place of Virtue Ethics in Judicial Ethics**

Legal imperatives by the Constitution, national laws and international standards of judicial practice as well as members of the society in general place expectations and demands upon judicial officers to exhibit the highest standards of ethical conduct in both their public and private lives. In spite of these, judicial officers still have a propensity to stray from the path of rectitude and propriety (Sackville, 2009).

Current ethical standards in judicial ethics can be characterized as principle ethics. Approaches to codes of ethics promulgated within the legal profession in general are based on deontological approaches (Solum, 2003, p. 181). These usually emphasize adherence to rules, duties or obligations and sometimes consequences of actions. But Soeharno (2007, p. 18) proposes that for normative theories on professional behavior, we must turn to virtue ethical theory. Indeed, there are good examples of professional fields where virtue ethics has found acceptance and is applied in practice. An example of a code of ethics that explicitly provides for virtue, from which the judicial practice can borrow is given by Libby and Thorne (2003) as the Institute of Chartered Accountants of Ontario's Code of Conduct.

Commenting on the Institute of Chartered Accountants of Ontario's Code of Conduct Libby and Thorne (2003) say that the code indicates that:

Ethical conduct in its highest sense ... is a product of personal character - an acknowledgement by the individual that the standard to be observed goes beyond that of simply conforming to the letter of a list of prohibitions.

Citing Dezoort et.al and Windsor et.al, Libby and Thorne (2003) say further that research shows that virtuous auditors are more likely to comply with their professional judgment even in the face of sanctions or pressure.

Judicial officers similarly face sanctions or pressure in the discharge of their duties though in a different perspective as auditors.

Courage or fortitude is a cardinal virtue for judicial practice that needs strong expression in the judicial code. In discussing the judicial virtue of courage, Solum (2004) explains that judges are sometimes required to make decisions that are unpopular-that will trigger the disapprobation and even wrath of their fellow citizens in general or the wealthy and the powerful in particular. Yet judges are given the power to make sometimes final and binding decisions as to the rights and obligations of fellow citizens. Such judges need the virtue of courage that will make them not tempted to sacrifice justice on the altar of public opinion but have the disposition to put the regard of one's fellows in proper place and to take into account in the right way on the right occasions for the right reasons.

One of the reasons why a determination of unsuitability was made against the judicial officer in Determination No. 1 was that he could not face up to the pressures of the executive in his decisions at the time. The Vetting Board explained that the judicial officer made decisions that seemed to curry favour with the executive. The Vetting Board observed that the judicial officer conceded that the judiciary had let down people who had stood up for change in the country by calling for the expansion of democratic space.

The Vetting Board had occasion to contrast this case, with one in the Determination No. 4 where the judicial officer had to take a very courageous stand and make a decision against a sitting head of state not fearing the public clamour or what the executive would say for instance that diplomatic relations between Kenya and the other country would suffer. Unfortunately the determination about this same judge was that he was unsuitable to continue serving in the judiciary, based on other grounds. That decision was however set aside on review and the judge was waiting a second vetting as at the time of this dissertation.

Another virtue that the Vetting Board seems to have given much prominence in the vetting process and going by the number of times it was referred to was good temperament. Christou (2009, p. 347) examining the virtues of a good tribunal member, explains that good temperament is essential to justice delivery yet it is overlooked as a requisite personal characteristic. It is perhaps because of this that the Vetting Board has spent a considerable amount of time on it for various judicial officers. Many judicial officers may not even notice that they are not of good temperament to litigants and court

clients. Christou (2009, p. 347) further explains that “when we examine the corollary vice of bad temper, it is easy to imagine how the lack of good temperament might serve to intimidate and otherwise thwart an applicant particularly one who is unrepresented.”

William Jordan (2006) provides an exposition of how to use virtues in ethical decision making in the engineering profession. He gives good examples of how virtue ethics has been applied to engineering codes of conduct as well as applying virtue ethics to various case studies.

Another example is the Canadian Psychological Association (CPA) Code of Ethics referred to in the preceding section. According to Pettifor (2001, p. 29) this code is more proactive than many other codes in that it explicitly requires that extra care must be taken not just to behave right but to behave in ways that actually benefit the consumers of services. The code is based on four principles Respect for the dignity of persons; responsible caring, integrity in relationships and responsibility to society. A value statement describes each of these ethical principles and the standards indicate how each principle may be demonstrated behaviourally (Pettifor, 2001). Such an approach to codes of ethics is no doubt virtue ethics oriented and gives legitimacy to our thesis herein that virtue ethics can be applied to the judicial professional ethics.

In legal practice the application of virtue theory has so far not been extensive (Amaya, 2013) despite the fact that virtue as a source of law is an ancient and respected philosophical concept (Kochan, 2014). Even then, there are now ground-breaking works that one can turn to for an exploration of what virtue ethics can do in the area of legal and judicial ethics. According to Cimino (2010) virtue is a relatively unfamiliar concept to legal academics and the first extended work seeking to place the notion of virtue at the centre of legal theory is “Virtue Jurisprudence,” by Professors Farelly and Solum where the authors assert that the fundamental notions of legal theory should be virtue and excellence. Lawrence B. Solum in a series of articles (2003; 2004; 2005 (1)) and (2005 (2); 2013) advocates for the application of virtue ethics to judicial practice.

Oakley and Cocking (2003) provide a full account of the distinctiveness and plausibility of applying virtue ethics to professional roles, primarily in medicine and law as compared to its consequentialist and Kantian approaches. According to them, in order to generate a good professional ethic for judicial officers, first we have to specify what the

proper goals, that is, a philosophy of judicial practice are and how these ends contribute to human flourishing. The proper goals of judicial practice will then help us determine the character and actions of a good judicial officer, and provide and account of the virtues that are appropriate to judicial practice.

The goal of judicial practice is the dispensation of justice according to law (Oakley & Cocking, 2003; Solum, 2005 (1); Sackville, 2009). Schmitz and Thrasher (2014) observe that the concept of justice resists specification with necessary and sufficient conditions, but on any analysis, just relationships are those in which the parties involved get their due, and just persons are disposed to act so that partners get their due. Parties in disputes come to court with the aim of getting justice. The pursuer and the pursued both have one aim, that justice will be dispensed at the end of the day.

Judicial officers have an obligation to act ethically in all situations, whether in public or private life. Virtue ethics looks at how they can do this by addressing the question of their character rather than actions.

Arguing for an aretaic turn to legal theory and practice as an alternative to deontological and consequentialist approaches Farrelly and Solum (2007) urge that the central notions of legal theory should be virtue, excellence and promotion of human flourishing, the central elements in Aristotle's virtue theory. Amalia Amaya (2013) on her part argues that the proper *locus* of virtue theory in legal adjudication is within a theory of legal ethics. She says further that this area though, is relatively unexplored, most theories of legal ethics being either deontological or consequentialist.

According to Miller (2002) since codes are devices that can be used to reinforce desirable behavior and change undesirable behavior then they need to attend not simply to the behavior (action) itself, but also to the character (habits) and affective attitudes that condition and motivate that behavior.

MacIntyre (2007, p. 194) offers that there are three specific virtues that are prerequisites for all practices namely justice, courage and honesty. These are therefore essential starting points for judicial officers.

For judicial officers, Solum (2005 (1)) posits that possession of certain virtues by a judicial officer will help to reliably achieve the goal of judging. These are generally referred to as judicial virtues.

Explaining what judicial virtues are, Amaya (2013, p. 431) calls them ‘the traits of character that are necessary to excel at the function institutionally assigned to judges.’ Cravens (2005, p. 1641) further points out that they are those active conditions required to render a virtuous or just decision.

These judicial virtues include moral virtues as well as epistemic or intellectual virtues (Amaya, 2013). This classification of virtues as moral and intellectual follows the Aristotelian format.

Among the moral virtues required of a good judge are honesty, magnanimity, courage, prudence and justice while intellectual virtues are practical wisdom, open-mindedness, perseverance, intellectual autonomy and intellectual humility (Amaya, 2013, p. 431). Another one is the virtue of fidelity to law or judicial integrity. Solum (2005 (2)) offers a prospective list of virtues specific to judicial practice as incorruptibility and judicial sobriety; civic courage; judicial temperament and impartiality; diligence and carefulness; judicial intelligence and learnedness; judicial craft and skill; justice; and practical wisdom. He considers these to be uncontested judicial virtues over which there is likely to be widespread consensus. Both Solum (2005 (2)) and Amaya (2013) consider practical wisdom and justice to be the key judicial virtues. This list does not claim to be exhaustive of all judicial virtues but at least it is a first attempt to catalogue the judicial virtues. According to Amaya (2013) an exemplary judicial officer is the one who possesses the judicial virtues.

A good number of writers also make out a case for the application of virtue ethics theory either as a basis for judicial ethics (Truran, 2000) or in arriving at decisions (Wright, 2012).

The attempts to list down judicial virtues cannot be said to be breaking new ground in virtue ethics. It only specifies the content of the traditional virtues that are essential and particular to judicial practice.

A catalogue of judicial virtues reviewed from the literature as proposed by the various authors and which does not claim to be exhaustive, appears in Appendix A. The proposals by the various authors are synthesized into a proposed list of 27 judicial virtues only for the purposes of this study.

These judicial virtues discussed by the various authors are: carefulness; clearness; competence; consistency; judicial courage /fortitude; courtesy; craft and skill/intelligence and learnedness; expedition; fidelity; honesty; humility; impartiality/judicial diligence; incorruptibility; judicial independence; institutional responsibility; integrity; judicial awareness; judicial empathy; judicial respect for plurality; judicial statesmanship; justice; patience; reflectiveness; self-discipline; sobriety; temperance/self-control/proper self-restraint/control of one's emotions/judicial temperament; wisdom/practical wisdom/prudence/judicial wisdom.

There is no comprehensive list of virtues (Devettere, 2002) and it would be preposterous to suppose that the above list of judicial virtues is complete. There has been debate over the issue of a comprehensive list of virtues with some writers on one side, such as Gilliland (2001) feeling that Aristotle seems to provide a comprehensive list of the virtues because he apparently attempts to consider every possible feeling and action that may be virtuous. On the other hand, others such as Hursthouse (1999) differ with him by proposing that we do not restrict ourselves to Aristotle's list of virtues. McGowan's (2007) suggestion seems more apt when he says,

The list of virtues need not be comprehensive. Like the traditional virtues, a virtue is a quality to which we can aspire – often with great difficulty. Virtues need not be carved in stone, but in butter, meant to stimulate our own thinking about virtue rather than to dictate an immutable set of commandment.

What is important then is that the proposed virtue should be close to Aristotle's ethical writings as much as possible.

## **2.7 Conceptual Framework**

The literature on the use of virtue ethics to analyze a code of ethics and a vetting process is scarce, if there is any at all. There is therefore a need to develop a conceptual tool to assess the application of virtue ethics in the JSCCE and the vetting process.

The concepts that were determined as essential to develop the framework from the literature were those accepted by Aristotelian virtue ethics. The literature revealed that there are three elements of virtue ethics that can be used to assess whether or not a

textual document has elements of virtue ethics embedded in it. These are, a term referring to *arête* or virtue, *phronesis* or practical wisdom and *eudaimonia* or flourishing. These form the three major coding categories in this study. The analyses of the texts in this study revealed that a general category is required to cover those terms or phrases commonly used in the virtue ethics vocabulary but which do not fall in any of the three major categories above. This category is referred to as residual. Thus, four categories *arête*, *phronesis*, *eudaimonia* and residual were developed from the literature reviewed and form the four ideal type categories used in the analysis of the documents. The category of *arête* has been substituted by 'judicial virtue' in order to make it relevant to this study and for purposes of ease of using the virtues for analysis. This list of judicial virtues developed in the preceding chapter formed the components of the *arête* category which together with the *phronesis*, *eudaimonia* and residual categories form the framework for the examination of the elements of virtue ethics espoused in the Kenyan JSCCE and the vetting process of judicial officers.

Table 2.2 Categories for Elements of Virtue Ethics and their Components

Category	Elements
<i>Arête</i> /Judicial virtues	carefulness; clearness; competence; consistency; courtesy; integrity; courage/fortitude/judicial courage; craft and skill/intelligence and learnedness; expedition; fidelity; honesty; humility; incorruptibility; impartiality/judicial diligence; independence/judicial independence; institutional responsibility; judicial awareness; judicial empathy; judicial respect for plurality; judicial statesmanship; justice; patience; reflectiveness; self-discipline; sobriety; temperament/temperance/self-control/proper self-restraint/control of one's emotions/judicial temperament;.
<i>Phronesis</i>	wisdom, practical wisdom, prudence, judicial wisdom, wise counsel, common sense.
<i>Eudaimonia</i>	Flourishing, well-being, living well, happiness, good life.
Residual	excellence of character, good character, moral character, vice, excess, deficiency, pleasant, desirable, good behavior, moral agent, community, good sense, disposition, reason, emotion, motive, naturalism, moral exemplar, ethical role model.

The residual category of terms and phrases common in virtue ethics vocabulary (Devettere, 2002) is developed from the literature under review.

The Aristotelian elements of virtue ethics and the residual elements form the ideal type categories that provide a framework that can be applied to analyze the documents for elements of virtue ethics. The context in which the terms and phrases are used is also considered.

The categories that emerge and their constituent components appear in Table 2.2 above.

## **2.8 Conclusion**

The proper goals of judicial practice is the dispensation of justice according to law (Oakley & Cocking, 2003; 2005 (1); Sackville, 2009). However, this should be taken as a minimum that a judicial officer should aim for because at times, mechanical application of the law may lead to undesirable consequences. It is necessary to go beyond this minimum because some outcomes which are legally acceptable may be morally unacceptable. Difficult legal issues such as imposition of the death penalty, abortion, same sex relationships, and rights of minorities among many others are currently topics of heated debates in legal circles. The resolution of conflicts surrounding these issues may require going beyond what the law provides. It may require a consideration of the community's values and ethos at the particular time. Therefore, to paraphrase Robin and Reidenbach (1987), though dispensation of justice *according to law* must remain the goal of judicial practice this must be balanced by other values that will help in attaining that goal and by values describing other important ethical and socially responsible behaviors required of judicial officers. A theory that can guide judicial officers in evaluating difficult ethical issues should be clearly apparent from the guide provided for their conduct, the JSCCE. When their conduct is being evaluated by the general public or under a legally defined mechanism such as the vetting process, it would be easier to assess the extent to which a judicial officer has deviated from the set standards using the parameters of the theory so stated.

The next chapter considers the methodology applied to analyze the extent to which the Kenya JSCCE espouses the theory of virtue ethics and how this theory has been applied in evaluating the conduct of judicial officers in the vetting process.

## **3 Methodology**

### **3.1 Introduction**

This chapter discusses the methodology adopted for this research for the collection and analysis of the data in order to achieve the research objectives. A mixed method approach of both qualitative and quantitative techniques is applied. The method used to analyze the JSCCE and the vetting process is content analysis. The provisions of the JSCCE as well as the contents of the vetting questionnaire and the determinations by the Vetting Board are in textual form and were analyzed for elements of virtue ethics. Content analysis was used to explore the elements of virtue ethics embedded in the documents. This will help to determine whether VE can be applied as a basis for judicial ethics in Kenya and what can be done to ground the subject on a good and sound ethical theory.

### **3.2 Content Analysis**

Ole R Holsti (1969) defines content analysis as any technique for making inferences by objectively and systematically identifying specified characteristics of messages. According to Babbie (2011, p. 356) content analysis is a social research method appropriate for studying human communications, including units of communication such as words and text. Content analysis was chosen for this research in order to determine the virtue ethics vocabulary embedded in the texts under study and then make a determination on the overall articulation of the virtue ethics approach in the texts. A direct examination of the documents for these elements will enable us to describe the extent to which they are applied. Content analysis combines quantitative and qualitative techniques, which are used to supplement each other (Holsti, 1969).

Weber (1990) says that the text is reduced to more relevant manageable bits of data and Krippendorff (2004) adds that the data is analyzed as symbolic entities. Ole Holsti (1969) says further that content analysis is appropriate when the investigator's data are limited to documentary evidence. In this study, the data exclusively comes from documents.

The documents analyzed were the JSCCE, the vetting questionnaire and some determinations of the Vetting Board. The author has a copy of the JSCCE issued to him as a judicial officer. The JSCCE is part of the subsidiary legislation (Legal Notice No. 50/2003) in the Public Officer Ethics Act available from the Government Printer and online at [www.kenyalaw.co.ke](http://www.kenyalaw.co.ke) the website for the National Council for Law Reporting for Kenya (NCLR) the official law reporting agency for the Republic of Kenya. The full text of the JSCCE appears in Appendix B. The JSCCE comprises of the preamble which also incorporates the definitions, the main section comprising the rules and appendices. The appendices were excluded from this study. Although the General Code of Conduct and Ethics for Public Servants is in Appendix A of the JSCCE and forms part of the code, it was excluded all the same because after an initial analysis all the elements of virtue ethics contained in it are also found in the JSCCE. The vetting questionnaire appears at Appendix C while the determinations of the Vetting Board are in Appendix D. The vetting questionnaire and the determinations are available from the Vetting Board website at [www.jmvp.or.ke](http://www.jmvp.or.ke).

### **3.3 Method of Analysis**

Content analysis has in the past been used in sociology and political science; it is now used in the communications field as well (Krippendorff, 2004) researchers can apply content analysis to texts of any kind, including such documents as trial court records, statutes and regulations (Hall & Wright, 2008). Hall & Wright citing Krippendorff (2004) explain that using this method, a scholar collects a set of documents, such as judicial opinions on a particular subject, and systematically reads them, recording consistent features of each and drawing inferences about their use and meaning. The JSCCE are regulations made under a statute, The Public Officer Ethics Act, 2003. The vetting questionnaire is part of the regulations made under section 33 of the JMVA, 2011 while the determinations of the Vetting Board closely resemble a trial court's record. Content analysis was therefore found to be a most appropriate technique for this research.

### 3.4 Sampling

The following texts were analyzed:

- (i) the entire text of the JSCCE, that is, the preamble together with all the rules,
- (ii) the 'criteria for vetting' in the vetting questionnaire, and
- (iii) the determinations of the Vetting Board.

Convenience sampling was applied to each of the sections of the JSCCE and the vetting questionnaire to determine which sections were relevant for analysis and which ones were not.

Stratified random sampling was applied to the determinations of the JMVB. The determinations analyzed here represent a sample of the total determinations made by the Board as at the time of this study. The total number of judicial officers who were to undergo the vetting process was not clear since some of them may have opted not to be vetted. In a speech delivered at the University of Nairobi School of Law, Parklands, the chairman of the JMVB, Mr. Rao said that as at 13<sup>th</sup> May, 2014 all the 53 judges who opted to be vetted and 116 magistrates out of slightly over 300 in service on the effective date had been vetted and determinations made (Rao, 2014). From the chairman's speech, it is estimated that at the end of the exercise about 360 judges and magistrates will have been vetted. Therefore, the determinations under study represent about half that is 169 of the total number of about 360 judicial officers who are to undergo the vetting exercise. This number had not changed at the time of finalizing the study because of various court cases that delayed further proceedings as well as a provision in the JMVA which required that the vetting exercise should have come to an end by end of February, 2013. This provision was to be amended before the process moved forward.

The criteria used in selecting the samples was to divide the population under study into three subgroups representing judges of the Court of Appeal, judges of the High Court and Magistrates and a sample drawn from each subgroup. This ensured that judicial officers from all the cadres were represented in the sample.

All the 9 or 100% Court of Appeal judges and the 44 or 100% High Court judges as well as 116 out of about 307 or 38% magistrates have already undergone the vetting exercise and their determinations were available for this study. In order to ensure that

the number of judicial officers selected for the sample from each sub-group is proportionate to the percentage of the population so far vetted, given that the percentage proportion of the judges of the Court of Appeal and the High Court so far vetted is higher than that of magistrates these two received a higher proportion of the sample.

Therefore, out of the 169 finalized determinations, five samples were drawn, two from the Court of Appeal judges, two from the High Court judges and one from the magistrates. Five samples were selected due to the limited time available and the rigours involved in analyzing the contents of each determination. A random sample for each subgroup was selected from all the determinations which were published on the JMVB website [www.jmvp.or.ke](http://www.jmvp.or.ke). It was therefore not difficult to get the list of judicial officers who had undergone vetting and their determinations made as they were readily available on the website.

The vetting criteria applies uniformly to judicial officers in all the cadres and so every judicial officer has an equal chance of being selected for the sample regardless of the cadre. The samples include determinations on both suitability and unsuitability. These formed the universal sample from which the five were taken.

The sample of determinations are limited in several ways. First the process is ongoing and about half of judicial officers had not been vetted or their determinations had not been published at the time the study was conducted. Second, the process of vetting also involves review of the determinations where a judicial officer is dissatisfied with the determination (Section 23, JMVA). The study is confined to first instance determinations and not the ones on review. The study is therefore not representative of all determinations of the process. Third, the composition of the Board had to be reconstituted as from 31<sup>st</sup> May, 2013 when three members representing non-citizen judges as required under the JMVA (section 7(b) and 9(13)) had to leave (JMVB, 2013). However, all these three limitations are addressed by the fact that the vetting process applies a uniform procedure to all judicial officers as set out in the JMVA. The Act specifies the criteria for vetting (section 18(2), JMVA) and the procedures (section 19, JMVA) to be followed, through a combination of broad principles and detailed operational provisions. A uniform approach is applied by the Board to vetting individual officers (JMVB, 2013) which means that the outcome of all the determinations will

largely be based on common features as outlined in the vetting criteria. Therefore, while representing only a proportion of the determinations of the vetting process, the sample herein is a good representative of the elements found in all determinations even those yet to be made.

### **3.5 Units of Analysis**

Monette et al (2014, p. 205) explain that, “generally there are four units of analysis: a word, a theme, a major character or a sentence or paragraph.” Each of the documents under this study, the JSCCE, the vetting questionnaire and each of the determinations was fragmented into textual units for analysis. The unit of analysis for this study is a word or phrase expressive of a component of an element of virtue ethics as per the four categories. According to Monette et al (2014, p. 205) a single word is often a convenient unit of analysis because of the ease of coding the presence of certain words in a document and with a high degree of reliability. Monette et al (2014, p. 205) further explain that when using single words as the unit of analysis, it often is helpful to make use of a context unit, which is the context in which the single word is found. The words surrounding the word being used as the unit of analysis modify it and further explain its meaning. The contextual information in which the word is used is taken into account when coding the unit of analysis. The JSCCE was fragmented into textual units corresponding to its various rules, the vetting questionnaire into textual units corresponding to statements while for the determinations the paragraphs as they appear in the text were analyzed as textual units. The parameters for measuring the elements of virtue ethics in a textual unit were determined by the appearance of any of the components of an element of virtue ethics in the category. Each textual unit in each text is analyzed to determine whether one or more of the attributes of an element of virtue ethics is present.

Where a textual unit contains a component of an element of virtue ethics then the component (s) is entered in a column and the element corresponding to that unit is entered in the next column. The extent to which virtue ethics is embedded in the code

and espoused in the vetting process will be determined from the prevalence of elements of virtue ethics in the textual units. The prevalence of the elements is captured in a table.

### **3.6 Coding and Reliability**

The four elements of virtue ethics formed the major coding categories used in the coding guide. This approach was adopted after a review of the literature herein. A manifest content coding sheet was developed and outline of it appears in Table 3.1 below. The first column corresponds to the unit of analysis of the particular document being analyzed and the second column contains all the components of the elements of virtue ethics coded from the unit of analysis. First the coder identified every term or phrase appearing to denote a component of an element of virtue ethics that was manifestly present in a textual unit in the first column of a table. The appearance of the component was then coded and the result entered in a row in the second column of the table corresponding to the textual unit in which it appears. In order to determine if a particular component, that is, a term, word or phrase is used as an element of virtue ethics, the context in which it is used in the text was determined. Michael Slote (1992, p. 159) suggests that, “a common-sense ethics of virtue can quite naturally be expressed in terms of precepts (re)commending concern both for oneself and for other people in aretaic context.” This suggestion was applied for analysis of the component in a unit of analysis to determine the context of use whether as an element of virtue ethics or not. If the term or phrase was used as a component of an element of virtue ethics its appearance was marked and entered in the second column and if not, it is marked with an “N” for No and left out. The number of times the component appears in a textual unit emerges by counting the “Y”s corresponding to its appearance. For instance, in a Rule in the JSCCE where the component “conduct” appears three times as “Y Y N” it means the component appears twice as an element of virtue ethics and once in a different context. For instance in the statement, “a judicial officer should exhibit good conduct while in the conduct of his official and private business”. The component “conduct” appears twice in that textual unit. The first time it is used in the context of a component

of an element of virtue ethics while the second time it is not. It will be recorded in the table as having appeared once.

Where a textual unit did not contain any component, it was marked as “Nil.” The textual units in a document were all coded in similar manner from first to last. All textual units marked as “Nil” were left out of the final table.

Table 3.1 Outline of manifest content coding sheet

Textual Unit	Components of an element of virtue ethics present
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All textual units of a particular document containing components of elements of virtue ethics were then further analyzed for all the components of elements of virtue ethics appearing therein and their respective categories. The Textual unit is in the first column, the components of elements of VE in the second column and the category in the third column. Table 3.2 below is a sample table for further analysis.

Table 3.2 Analysis of Textual Unit for Components of Elements of VE

Textual Unit	Component of Element of VE	Category
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Finally, each component identified as an element of virtue ethics is analyzed for the various textual units in which it appears, the frequency it appears in a particular document, and the percentage appearance is calculated. Table 3.3 below is used for this analysis.

Table 3.3 Analysis of a component for frequency of appearance

Component	Textual Unit	Frequency Per Textual Unit	Total frequency
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The coding was done by the author alone and therefore there is no possibility to measure coding reliability which may be limited by the discretion of the author. In order to determine the level of reliability, another person’s content analysis results will have to be considered.

### 3.7 Categories

Weber (1990) defines a category as a group of words with similar meaning or connotation. Categories must be mutually exclusive and exhaustive (United States. General Accounting Office. Program Evaluation and Methodology Division., 1996) According to Stemler (2001) “mutually exclusive categories exist when not unit falls between two data points, and each unit is represented by only one data point. The requirement of exhaustive categories is met when the data language represents all recording units without exception. Hall and Wright (2008) explain that the goal is to maximize the exhaustiveness of coding using mutually exclusive categories to capture all the relevant information, but to avoid having categories that duplicate or overlap each other. The categories in this study are *arete*, *phronesis*, *eudaimonia*, and residual and they were arrived at after the researcher had tested different categorizations. Initially, there were five categories, the first three and “moral exemplars” and “community.” However, after coding the texts severally using the five categories the last two were found not to be adequately applied in the texts to merit attention and were instead placed under the residual category. Hall and Wright (2008) further explain that categories should be used only if they occur frequently enough in the material to merit attention. Rare or unusual factors can be coded simply with a miscellaneous “other” option.

The *arête* category comprises of any judicial virtue identified in the text and is guided by Table 2.2 above; *phronesis* will have any term referring to the attribute of practical judgment and guided by Table 2.2 above; *eudaimonia* will be identified by any term denoting flourishing through the exercise of virtue and guided by Table 2.2 above and residual category refers to any other term or phrase commonly found in virtue ethics vocabulary and which does not fall in the first three categories.

### 3.8 Statistical Analysis

According to Hall and Wright (2008) a credible content analysis does not always need to use complex or sophisticated statistics or in fact any statistics at all. Counts and

frequencies (percent) can be relied upon to show how often a given feature appears in the text under analysis. There were no statistical analyses employed in this study other than the percentage frequencies of the appearances of the components of the elements of virtue ethics and the percentages of the elements themselves.

### **3.9 Limitations of the Methodology**

According to Devi (2008, p. 189) content analysis has its limitations. First, it does not tell us about causal relations between variables under study. For instance, since the JSCCE is under revision, content analysis may be able to tell us the changes in the content of the new code. However, it will not answer why there were such changes. Second, content analysis is still under-utilized research method as it is mainly used as a technique to supplement the findings of main stream research designs such as survey research. Another limitation of content analysis is that data is restricted to what already exists. This has been termed the most significant limitation of content analysis being its ultimate dependence on the documents under study, in this case, the JSCCE and the vetting criteria and determinations. For an analysis of the contents of these documents to yield useful results, it must be the case that the documents meaningfully reveal something about whatever is under study (Oldfather, Bockhorst, & Dimmer, 2012, p. 1200).

However, Woodrum (1984) cited by Devi (2008, p. 189) posits that “the limited application and development of content analysis is due more to unfamiliarity with the method and to its historic isolation from main stream social science than to its inherent limitations.”

### **3.10 Conclusion**

The method of content analysis has been applied in a study to determine whether specific articles of three organizations’ public relations codes of ethics satisfy the requirements of two major ethical theories, that is, the utilitarian Principles of Utility and Immanuel Kant’s Categorical Imperative (Bernal, 1992), to analyze company codes of conduct for their reference to traits and characteristics associated with the ethics of virtue (Wolfe & Dickson, 2002) and lately to evaluate whether company codes of ethics

apply the concepts of virtue theory by identifying the virtues such as honesty and integrity that the companies claim to practice (Nair, 2014)

It is therefore an appropriate methodology for this study which seeks to establish the extent to which the Kenyan JSCCE has elements of virtue ethics.

## 4 Results and Analysis

### 4.1 Introduction

This study set out to investigate the elements of virtue ethics embedded within the JSCCE and the vetting process of judicial officers with a view to establishing a theoretical base for judicial ethics in Kenya. The documents analyzed and explored under these two areas are the JSCCE, the vetting questionnaire and the determinations of the Vetting Board. Each of the documents was content analyzed for the four elements of virtue ethics: *arête* or virtue, *phronesis* or practical wisdom, *eudaimonia* or flourishing and generally some common vocabulary applied in virtue ethics literature. The conceptual framework for these four elements was developed from the literature review in section 2.7.

All the content of this study is published and therefore no permission was required to access and republish it. The identities of judicial officers in the determinations have been, as much as practicable but without distorting the content, been obliterated in order to depersonalize the analyses.

The JSCCE is analyzed first followed by the vetting process. The analysis is presented in the form of tables. Under each subject a summary of the document being analyzed is provided followed by a systematic analysis of its contents to identify the elements of virtue ethics under each of the four categories developed in the conceptual framework. The final analysis on the findings is made against the research questions to determine the extent to which the objectives of the study have been met.

### 4.2 Analysis of the Provisions of the JSCCE

The full text of the code is provided in Appendix A and a summary of the rules is provided in Table 4.1 below.

Table 4.1 Summary of the Rules, Principles, Prescriptions and Prohibitions under the JSCCE.

Principle/Obligation	Rule
Duties	
A duty to obey the law by:	
compliance with the General Code of Conduct and Ethics for Public Servants	Rule 1
abide by the Oath of Allegiance and the Judicial Oath	
declaration of income, assets and liabilities	Rule 2
disciplinary sanctions for breach of the code	Rule 20
	Rule 22
A duty to report on other judicial officers on:	
violation of the code	Rule 4
cases of bankruptcy and of judgment debtors and	Rule 19
cases of criminal proceedings	Rule 21
A duty to report to the Chief Justice ones absence from Kenya	Rule 18
Prescriptions	
disqualification in proceedings where one's impartiality might reasonably be questioned;	Rule 5
engaging in social and recreational activities that adversely affect the dignity of the office or interfere with performance of duty;	
maintain professionalism and courtesy at all times officially and in private	Rule 6
	Rule 12
Independence, integrity and impartiality	Rule 3

Table 4.1 A Summary of the Rules, Principles, Prescriptions and Prohibitions under the JSCCE. (Table 4.1 continued).

Prohibitions	
serving in a fiduciary capacity;	Rule 7
using office to solicit for funds;	Rule 8
engaging in active legal practice;	Rule 9
not to subordinate judicial or administrative duties to private interests;	
asking, accepting, soliciting any property or benefit or gift, gratuity, hospitality, free passages or favours in the performance or intended to influence the discharge of his duties;	Rule 10
engaging in private agencies;	Rule 11
issuing public statements and communication with the press on government policy without the express authority of the Chief Justice;	Rule 13
standing for election in a political office outside of the Judiciary	
public expression of political views;	Rule 14
Canvassing for favours.	Rules 15
	Rule 16
	Rule 17
Disciplinary sanctions for breach of the code.	Rule 22
dismissal; reduction in rank or seniority (demotion); stoppage of increment in rank; withholding of increment; deferment of increment; reprimand (including severe reprimand) ; no recovery of the cost of any or part of the cost of any loss or damage caused by default or negligence.	

The provisions of the JSCCE are divided into a preamble followed by 22 rules each under a title. The preamble and each rule are analyzed for a component of the four elements of virtue ethics. The results showing the rules that had components of the elements of virtue ethics and the particular elements are in Table 4.2 below.

Table 4.2 Analysis of Rules for Elements of VE

Rules divided into sub-rules (sentences)	Components of VE Present
Preamble	
<p>The legal system of the Republic of Kenya is based on the principle that an independent, fair and competent Judicial Service will interpret and apply the laws of the land</p> <p>Intrinsic to all parts of this Code are the precepts that judicial officers individually and collectively, must respect and honour the judicial office they hold as a public trust and strive to enhance and maintain public confidence in the system</p> <p>The Code is intended to establish standards of ethical conduct of judicial officers and to be applied consistently with constitutional requirements, statutes, court rules and legal authorities and in the context of all relevant circumstances</p> <p>The Code is to be construed so as not to impinge on the essential independence of judicial officers in the making of judicial decisions or to limit their legal rights</p> <p>While regulations governing the discipline and general conduct of judicial officers and the procedure to be followed in cases of breach of discipline may be found in the Judicial Service Commission Regulations, this Code contains general rules of conduct and ethics to be observed by judicial officers so as to maintain the integrity and independence of the Judicial Service</p>	<p>Independent, fair, competent</p> <p>Respect, honour</p> <p>Ethical, conduct</p> <p>Independence</p> <p>Conduct, conduct, ethics, integrity, independence</p>
<p>Rule 2</p> <p>A judicial officer shall be true and faithful both to his Oath of Allegiance and the Judicial Oath, taken on appointment</p> <p>He should respect and faithfully apply the laws of the land in the performance of his judicial functions</p>	<p>True, faithful</p> <p>Respect, faithfully</p>

Table 4.2 A Analysis of Rules for Elements of VE (Table 4.2 continued)

Rule 3	
<p>Due to the complexity, sensitivity and vitality of the courts' jurisdiction in both criminal and civil cases, judicial officers shall be free and seen to be free from external influence from any quarter, as everyone is equal before the law</p> <p>(c) pressure from any individual or group of people, claiming to have an interest in a particular case</p> <p>An independent and honourable Judicial Service is indispensable to achieving justice in our society</p> <p>A judicial officer should participate in establishing, maintaining, and enforcing high standards of judicial conduct</p> <p>The provisions of this Code are intended to preserve the integrity and the independence of the Judicial Service; the Code should be construed and applied to further these objectives</p> <p>In all activities, a judicial officer shall exhibit respect for the rule of law, comply with the law, avoid impropriety and the appearance of impropriety, and act in a manner that promotes public confidence in the integrity and the impartiality of the Judicial Service</p> <p>A judicial officer shall not allow family, social, political, or other relationships to influence his conduct or judgment</p> <p>(b) a judicial officer shall maintain professional competence in the law;</p> <p>(c) a judicial officer shall be faithful to the law and shall not deviate from the law to appease public clamour, to avoid criticism, or to advance an improper interest;</p> <p>(e) a judicial officer shall be patient, dignified, and courteous to litigants, assessors, witnesses, lawyers and others with whom he deals in an official capacity, taking reasonable steps to maintain and ensure similar conduct from lawyers and from court staff and others subject to his direction and control; and</p> <p>(f) A judicial officer shall dispose of all judicial matters promptly, efficiently and fairly</p>	<p>be free and seen to be free from external influence from any quarter</p> <p>Not be improperly influenced by pressure from any group or people</p> <p>Independent, honourable</p> <p>Conduct</p> <p>Integrity, independence</p> <p>Respect, impropriety, impropriety, integrity, impartiality</p> <p>Conduct</p> <p>Professional, competence</p> <p>Faithful, (courage)</p> <p>Patient, dignified, courteous, conduct</p> <p>Promptly, efficiently, fairly</p>

Table 4.2B Analysis of Rules for Elements of VE (Table 4.2 continued)

<p>Rule 4</p> <p>A judicial officer having information establishing a likelihood that another judicial officer has violated this Code or reflecting the other judicial officer's lack of fitness to hold judicial office shall inform the Chief Justice unless the judicial officer reasonably believes that the misconduct or lack of fitness has been or will otherwise be reported</p> <p>Conduct reflecting lack of fitness to hold judicial office includes, without limiting the generality of the foregoing, physical or mental infirmity; soliciting or accepting a bribe or otherwise acting dishonestly in reaching a judicial or administrative decision; improperly using or threatening to use the judicial officer's judicial power in a manner adverse to someone else's interests for the purpose of inducing that person to bestow a benefit upon the judicial officer or upon someone else pursuant to the judicial officer's wishes; or commission of a felony</p>	<p>Lack of fitness to hold judicial office, misconduct, lack of fitness</p> <p>Conduct, lack of fitness to hold judicial office, soliciting or accepting a bribe</p> <p>Dishonestly</p>
<p>Rule 5</p> <p>A judicial officer shall disqualify himself in proceedings where his impartiality might reasonably be questioned including but not limited to instances in which-</p> <p>(a) he has a personal bias or prejudice concerning a party or his lawyer, or personal knowledge of facts in the proceedings before him;</p>	<p>Impartiality</p> <p>Bias, prejudice</p>
<p>Rule 6</p> <p>A judicial officer may engage in the arts, sports and other social and recreational activities, if such activities do not adversely affect the dignity of his office or interfere with the performance of his judicial duties</p>	<p>Dignity</p>

Table 4.2 C Analysis of Rules for Elements of VE (Table 4.2 continued)

<p>Rule 8</p> <p>A judicial officer is part and parcel of the society in which he lives</p> <p>Whereas, he should not be isolated, he is expected to remain within dignified limits</p> <p>A judicial officer may only participate in “Harambee” if the same does not reflect adversely upon his impartiality and so long as it does not interfere with the performance of his judicial duties</p>	<p>Part and parcel of the society in which he lives</p> <p>Not be isolated, dignified</p> <p>Impartiality</p>
<p>Rule 10</p> <p>(d) to maintain at all times the professional and ethical standards which the public expects of him in transacting official business with efficiency, integrity and impartiality</p>	<p>Professional, ethical, efficiency, integrity, impartiality</p>
<p>Rule 12</p> <p>A judicial officer and any other officer in the Judicial Service shall ensure that his official and private conduct upholds at all times, the dignity and integrity of the Judicial Service by conducting himself, both officially and in private, in a dignified, honest and impeccable manner</p> <p>(a) maintain a standard of dressing and personal hygiene befitting the dignity and image of the judicial service;</p>	<p>Conduct, dignity</p> <p>Integrity, conducting, dignified, honest</p> <p>Dignity</p>
<p>(b) observe official working hours, be punctual and meet deadlines;</p> <p>(c) not be absent from duty without proper authorization or reasonable cause;</p> <p>(d) perform his duties in an efficient and competent manner;</p> <p>(e) exercise diligence, care and attention and seek to achieve high standards of professionalism in the delivery of services;</p>	<p>Punctual</p> <p>Efficient, competent</p> <p>Diligence, professionalism</p>

Table 4.2 D Analysis of Rules for Elements of VE (Table 4.2 continued)

(g) seek to contribute and enhance the standards of performance and level of professionalism in the Judicial Service	Professionalism
A judicial officer and any other officer in the Judicial Service shall actively and personally promote a culture in the public service that aims at providing fast, friendly, responsive and efficient service and shall be courteous to all persons in the provision of such service	Fast, friendly, courteous
A judicial officer shall not, without the express permission of the Chief Justice-	Justice
A judicial officer, and any officer in the Judicial Service whether on duty or on leave of absence, should not allow himself to be interviewed on questions of public policy affecting Kenya or any other country without the permission of the Chief Justice	Justice

The analysis shows that the preamble and eight rules (R2, R3, R4, R5, R6, R8, R10 and R12) (41%) of the twenty two rules of the JSCCE have some components of VE and so could be perceived to contain elements of virtue ethics. The remaining 14 rules (R1, R7, R9, R11, R13-R22) had no components of elements of virtue ethics.

The preamble, the eight rules and the components of elements of virtue ethics contained in each and the corresponding category under this analysis are in Table 4.3 below.

Table 4.3 Rules of the JSCCE: Elements of virtue ethics, prevalence and category

Rule	Component of Element of VE	Frequency of Occurrence	Category
Preamble	Fair	1	Arête
	Independent	3	Arête
	Competent	1	Arête
	Ethical	1	Residual
	Conduct	3	Residual
	Respect	1	Arête
	Honour	1	Arête
	Integrity	1	Arête

Table 4.3 A Rules of the JSCCE: Elements of virtue ethics, prevalence and category  
(Table 4.3 continued)

Rule 2	Truthfulness	1	Arête
	Faithfulness	2	Arête
	Respect	1	Arête
Rule 3	Independence	3	Arête
	Integrity	1	Arête
	Impartiality	1	Arête
	free from external influence		Arête
	not be influenced by pressure from	3	
	Not to allow influence from (courage)		
	Honour	1	Arête
	Conduct	3	Residual
	Professional	1	Arête
	Competence	1	Arête
	Faithful	1	Arête
	Justice	1	Arête
	In our society	1	Residual
	Patient	1	Arête
	Dignified	1	Arête
	Courteous	1	Arête
	Respect	1	Arête
	Impropriety	2	Lack of arête
	Promptitude	1	Arête
Fairness	1	Arête	
Rule 4	Dishonestly	1	Arête
	Misconduct	3	Residual
	Lack of fitness to hold judicial office	3	Lack of arête
	Soliciting or accepting a bribe	1	Lack of arête
Rule 5	Impartiality	1	Arête
Rule 6	Dignity	1	Arête
Rule 8	Dignified	1	Arête
	Impartiality	1	Arête

Table 4.3 B Rules of the JSCCE: Elements of virtue ethics, prevalence and category  
(Table 4.3 continued).

Rule 10	Ethical	1	Residual
	Integrity	1	Arête
	Impartiality	1	Arête
Rule 11	Conduct	1	Residual
Rule 12	Professionalism	1	Arête
	Courteous	1	Arête
	Dignity	3	Arête
	Integrity	1	Arête
	Discipline	1	Arête
	Honest	1	Arête
	Conduct	1	Residual
	Punctual	1	Arête
	Competent	1	Arête
	Diligence	1	Arête
	Care	1	Residual
	Friendly	1	Arête

There were 71 instances where the components of the elements of virtue ethics appeared in the JSCCE. The components of elements of virtue ethics which emerged from this analysis were those falling under *arete* and residual categories. They appear in the fourth column of Table 4.2.

There were no components of elements of two categories, *phronesis* and *eudaimonia* in the JSCCE.

The most prevalent element of virtue ethics present was *arête*. The components of this element are the judicial virtues discussed by various writers on the subject. These appeared 58 times (81.7%) of the 71 times components of elements of virtue ethics were identified in the document.

The other element present in the JSCCE is the one represented by the residual category. The components of the residual element appeared 7 times (9.9%) out of 71. The components present are conduct, ethical and care. They appeared in the preamble and

four other rules. Two important components of the residual category, character and excellence are however not present in the JSCCE.

A new category of lack of virtue emerged during the analysis where expressions of lack of virtue were identified in the text for instance “lack of fitness to hold judicial office”, “soliciting or accepting a bribe” and “impropriety.” The components of this category appeared 6 times (8.5%) out of the 71 times the components of elements of virtue ethics were coded in the text.

In terms of the categories the most prevalent was *arête*, followed by lack of *arête* and then residual.

It is no surprise that components of the element of *arête* or virtue are heavily applied in the JSCCE. They seem to appear there naturally given that they are values or principles which are common in the deontological ethical framework. However, the fact that two important categories of the virtue ethics approach *phronesis* and *eudaimonia* as well as two essential terms used in virtue ethics language “moral exemplars” and “excellence” are not present readily shows that the JSCEE is not virtue ethics oriented.

The appearance of the category of lack of *arête* is also important because it indicates behavior that is contrary to good character. The components of this category were initially coded under the *arête* category but it was found prudent to separate them in order to stress the importance of exhibiting a lack of virtue by a judicial officer.

The most dominant virtues are independence and dignity each appearing six times (9.7%) in the JSCCE. The third most dominant virtues are impartiality and friendliness each appearing four times. The components of the elements of *arete* are concentrated in rules 3 and 12 where they appear a total of 35 (60%) times out of the 58 times the total number the components appear in the document. Table 4.4 is a summary of the findings.

The component of “courage” in the *arête* category is not explicitly mentioned as courage in the JSCCE but the following expressions were found to refer to it: “free from external influence”, “not be influenced by pressure from”, “not to allow influence from.” These expressions were determined to refer to the virtue of courage and so were marked as such in subsequent analyses of the JSCCE.

The judicial virtues and their prevalence in the JSCCE appear in Table 4.4 below.

Table 4.4 Frequency of an element of VE in a rule

Component	Rule	Frequency per rule	Total frequency
Independence	Preamble	3	6 = 9.7%
	Rule 3	3	
Dignity	Rule 3	1	6 = 9.7%
	Rule 6	1	
	Rule 8	1	
	Rule 12	3	
Impartiality	Rule 3	1	4 = 6.5%
	Rule 5	1	
	Rule 8	1	
	Rule 10	1	
Justice/Fairness	Preamble	1	3 = 4.8%
	Rule 3	2	
Courage	Rule 3	3	3 = 4.8%
Competence	Preamble	1	3 = 4.8%
	Rule 3	1	
	Rule 12	1	
Respect	Preamble	1	3 = 4.8%
	Rule 2	1	
	Rule 3	1	
Integrity	Rule 3	1	3 = 4.8%
	Rule 10	1	
	Rule 12	1	
Friendliness	Rule 2	2	4 = 6.5%
	Rule 3	1	
	Rule 12	1	
Honesty	Rule 4	1	2 = 3.2%
	Rule 12	1	
Honour	Preamble	1	2 = 3.2%
	Rule 3	1	

Table 4.4 A Frequency of an element of VE in a rule (Table 4.4 continued).

Courtesy	Rule 3	1	2 = 3.2%
	Rule 12	1	
promptitude/punctuality	Rule 3	1	2 = 3.2%
	Rule 12	1	
Truthfulness	Rule 2	1	1 = 1.6%
Patience	Rule 3	1	1 = 1.6%
Discipline	Rule 12	1	1 = 1.6%
Professionalism	Rule 12	1	1 = 1.6%
Care	Rule 12	1	1 = 1.6%

It was observed from the analysis that although the rules and guidelines in the JSCCE reflect elements of virtue ethics most of them are largely aimed at the institution rather than the individual judicial officer. Prescriptions are aimed at giving the institution a good name and prohibitions are against conduct that would give the institution a bad name. By way of illustration, the extracts below from the preamble and Rule 3 contain a substantial number of components of the element of virtue namely independence, justice, fairness, competence, integrity and impartiality referring to judicial service rather than a judicial officer. The underlined parts of the rules demonstrate this.

#### Preamble

The legal system of the Republic of Kenya is based on the principle that an independent, fair and competent Judicial Service will interpret and apply the laws of the land.

The role of the Judicial Service is central to the concepts of justice and the rule of law.

...

... this Code contains general rules of conduct and ethics to be observed by judicial officers so as to maintain the integrity and independence of the Judicial Service.

#### Rule 3

Independence, Integrity and Impartiality

4. An independent and honourable Judicial Service is indispensable to achieving justice in our society. ...

The provisions of this Code are intended to preserve the integrity and the independence of the Judicial Service;

5. In all activities, a judicial officer ... act in a manner that promotes public confidence in the integrity and the impartiality of the Judicial Service.

#### **4.3 Analysis of the Vetting Process**

The vetting process comprises of completion and submission of the vetting questionnaire set out in Appendix C by the judicial officer, declarations of personal wealth, responses to complaints from the public, submission of five representative writings and an interview of a judicial officer by the Vetting Board and finally the determinations by the Vetting Board ( JMVA Interim Report, 2014). All information gathered during the vetting process and during the hearing are treated as confidential as provided under section 19(5) of the JMVA. A judicial officer may however opt for a public hearing. So far, only two judicial officers had requested for a public hearing (JMVB, 2013).

The criteria for vetting as contained in the vetting questionnaire and the determinations are the only aspects of the vetting process readily accessible and most relevant for this study. The JMVA in section 21(2) provides that the decision to remove a judicial officer shall be made public. The VB, in order to promote transparency in the vetting process also publishes determinations of suitability (JMVB, 2013). The vetting criteria and the determinations are the subjects of the analyses that follow.

##### ***4.3.1 The Vetting Questionnaire: The Vetting Criteria***

The vetting questionnaire as set out in Appendix C or the vetting tool comprises of three sections namely Section I: Bio-data of the judicial officer; Section II: Criteria for vetting as contained in the JMVA; Section III: Wealth Declaration by the judicial officer. The details completed by the judicial officer in the Bio-data and the Wealth Declarations and the vetting criteria sections are not available to the public as they are

treated as confidential (section 19(5) of the JMVA). Moreover, these details would not contain any material relevant to this study and so they were left out of the study. The relevant section is the vetting criteria, specifically the elements to which the judicial officer is required to respond and this is what was analyzed for elements of virtue ethics and the results appear in Table 4.5 below.

Section II:

The Board in determining the suitability of a judge or magistrate is required to consider the criteria set out in Section 18(1) & (2) of the Judges and Magistrates Vetting Act: Please respond briefly to each of the respective criteria set out below:

Table 4.5 Analysis of elements of VE in the VQ

Statement of the VQ	Components of VE
1. Whether you meet the constitutional criteria for appointment as a Judge/Magistrate.	Integrity, honour, diligence
2 Your past work record, including prior judicial pronouncements, competence and diligence. Please attach five of your past judgments/ pronouncements.	Competence, diligence
6. Your professional and development competence. The elements under these are: b. Legal Judgment, c. Diligence, f. Ability to work well with a variety of people.	Professional, competence Legal judgment Diligence Work with a variety of people
8. Your integrity, the elements of which shall include: a. a demonstrable consistent history of honesty and high moral character in professional and personal life; b. respect for professional duties, arising under the codes of professional and judicial conduct c. the ability to understand the need to maintain propriety and the appearance of propriety.	Integrity Honesty, high moral character, Propriety, propriety

Table 4.5 A Analysis of elements of VE in the VQ (Table 4.5 continued).

<p>9. Your fairness, elements of which include:</p> <p>a. a demonstrable ability to be impartial to all persons and commitment to equal justices under the law;</p> <p>b. open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views.</p>	<p>Fairness</p> <p>Impartial, equal justice</p> <p>Open-mindedness, decide according to law</p>
<p>10. Your temperament whose elements include:</p> <p>a. demonstrable possession of compassion and humility;</p> <p>b. history of courtesy and civility in dealing with others;</p> <p>c. ability to maintain composure under stress,</p> <p>d. ability to control anger and maintain calmness and order.</p>	<p>Temperament</p> <p>Compassion, humility</p> <p>Courtesy, civility</p> <p>Composure</p> <p>Calmness, control anger</p>
<p>11. Good judgment including common sense, elements of which shall include:</p> <p>a. a sound balance between abstract knowledge and practical reality and in particular demonstrable ability to make prompt decisions that resolve difficult problems in a way that makes practical sense within the constraints of any applicable rules or governing principles.</p>	<p>Good judgment, common sense</p> <p>Prompt</p>
<p>13. Commitment to public and community service the elements of which shall include:</p> <p>a. the extent to which a judge or magistrate has demonstrated a commitment to the community generally and to improving access to the justice system in particular.</p>	<p>Community service</p> <p>Commitment to community, justice</p>

There are 13 statements in the vetting criteria section of the vetting questionnaire. All the statements were analyzed for elements of virtue ethics. Eight (61%) of the statements (S1, S2, S6, S8, S9, S10, S11 and S13) contain components of elements of virtue ethics. The remaining five (39%) of the rules had no components of the elements of virtue ethics.

The specific statement and the components of the elements contained therein as well as their frequencies and the category under which they fall are in Table 4.6 below.

Table 4.6 Statements of the Vetting Questionnaire: Composition of Elements of Virtue Ethics, Prevalence and the Category

Statement	Component of element of VE	Frequency of occurrence in Statement	of in Category
S1	Integrity	1	Arête
	Honour	1	Arête
	Diligence	1	Arête
S2	Competence	1	Arête
	Diligence	1	Arête
S6	Competence	1	Arête
	legal judgment	1	Phronesis
	Diligence	1	Arête
	work with a variety of people	1	Residual
S8	Integrity	1	Arête
	Honesty	1	Arête
	moral character	1	Residual
	Respect	1	Arête
S9	Propriety	1	Arête
	Fairness	1	Arête
	Impartial	1	Arête
	Justice	1	Arête
	open-mindedness; capacity to decide issues according to law	1	Arête
S10	Phronesis	1	Phronesis
	Compassion	1	Arête
	Temperament	1	Arête
	Humility	1	Arête
	Courtesy	1	Arête
	Civility	1	Arête
	Composure	1	Arête
	Calmness	1	Arête
Order	1	Arête	
S11	Good judgment	1	Phronesis
S13	Community service	1	Residual

The VQ clearly sets out the principles to be taken into account by the VB in determining the suitability or otherwise of a judicial officer to continue serving. The judicial officer is required to complete the VQ (JMVB, 2013) and this forms part of the interview with the panel of the Board investigating her suitability.

Element of *arête*. The components of this element appear 23 (79.3%) out of 29 times that components of the elements of VE appear in the VQ. This element is therefore the most dominant in the VQ. The components that are mostly referred to under this element are temperament and diligence. Each appears 3 times (13%) out of 23 times the element of *arête* is applied in the VQ. They are followed by competence, integrity and fairness which appear two times (8.7%) each and the rest courtesy, honesty, honour, civility, propriety, orderliness, humility, compassion, impartiality, open-mindedness and respect appear once (4.3%). It is surprising that the principle of independence, the cornerstone of judicial practice is not specifically mentioned in the VQ. Its importance to judicial practice in Kenya is underscored by the fact that it is a constitutional principal of judicial practice and it appears in the preamble and numerous times in the JSCCE. It remains to be seen how the VB applied it in the interviews and determinations.

Element of *phronesis*. The element of *phronesis* appears 3 (10.3%) times out of 29 times that the elements of VE appear in the VQ. It is expressed as “legal judgment”, “capacity to decide cases according to law” and “good judgment.”

Element of Residual. Components of the residual category also appear 3 (10.3%) times. These are ability to work well with a variety of people, moral character and community service.

Element of *eudaimonia*. There were no components of the element of *eudaimonia* in the VQ.

The findings of examination of the specific components and their frequency of appearance in the VQ are in Table 4.7 below.

Table 4.7 Specific Elements of VE and their frequency in the VQ

Component	Statement	Frequency per statement	Total frequency
Diligence	S1	1	3
	S2	1	
	S6	1	
good judgment/legal judgment/capacity to decide cases according to law	S11	1	3
	S6	1	
	S9	1	
Temperament/calmness/composure	S10	1	3
	S10	1	
	S10	1	
Fairness/justice	S9	1	2
	S9	1	
Integrity	S1	1	2
	S8	1	
Competence	S2	1	2
	S6	1	
ability to work with a variety of people	S6	1	1
community service	S13	1	1
Courtesy	S10	1	1
Honesty	S8	1	1
Honour	S1	1	1
Humility	S10	1	1
Impartial	S9	1	1
Civility	S10	1	1
Order	S10	1	1
Propriety	S8	1	1
Compassion	S10	1	1
Moral character	S8	1	1
open-mindedness	S9	1	1
Respect	S8	1	1