3 Readings: Setting the scene

Reading 1: Background to the programme

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Reading 1: **Background to the programme**

So much more is expected of a magistrate than of the lay person. Not only must a magistrate exemplify certain morals and norms, but he or she must able to balance them in a way that ensures that his or her conduct both on and off the bench is at all times beyond reproach. In doing so, the magistrate must be able to:

- Identify ethical issues when they arise.
- Engage with and consider the issues.
- Apply the applicable ethical principle and values.
- Account for his or her conduct and at all times exemplify the values required of a magistrate.
- Justify any decisions made.

This is not an easy task, especially when magistrates are faced with the dilemmas of conflicting values and interests. It is therefore necessary for magistrates to receive training in ethics in order to prepare them for the ethical dilemmas that they are certain to face during the course of their careers.

Judicial misconduct is not easy to define and at times even more difficult to detect. It presents itself in different forms ranging from practices which are illegal to behaviour which may not be illegal but which is nonetheless unfitting for a judicial officer. The latter is more subtle as it concerns ethical principles and values required by and for the profession.

In his letter on the duties of a magistrate, Cicero, the great Roman lawyer-politician of the second century BC, identified the following values as essential for a magistrate: affability, dignity, diligence, deliberation, integrity, impartiality, propriety, moderation and self-restraint.[1]

The importance of these values for contemporary judicial officers is not only addressed in South Africa. Recently the international community has focused its attention on judicial ethics, with initiatives such as the Latimer House Principles and Guidelines,[2] the Limassol Conclusions,[3] and the Bangalore Principles of Judicial Conduct[4]. South Africa has been among the countries at the forefront of these initiatives to ensure best practices and accountability, which are entrenched in our own Code of Conduct for Magistrates[5].

Cicero's values are reflected with the actual or similar wording in all the above contemporary codes, as well as the South African Magistrates' Code of Conduct. In order to do justice, the judiciary must act in accordance with the values identified above and ethical principles that have been developed in

written and unwritten codes over centuries. These principles are constantly changing with time and in some situations may be specific to a certain place, but the basic underlying values, as can be seen in Table 1 below, have remained the same since the time of Cicero.

Table 1   Values required according to various codes of conduct

Cicero	Bangalore Principles	Limassol Conclusions	SA Magistrates' Code of Conduct
Accountability	Accountability	Accountability	
Integrity	Integrity	Integrity	Integrity
Affability	Equality	Accessibility	Courtesy
Dignity			Dignity
Diligence	Diligence	Diligence	Diligence
Deliberation	Competence	Deliberation/Competence	Thoroughness/Competence
Impartiality	Impartiality	Impartiality	Impartiality
Propriety	Propriety		Propriety
Moderation			
Self-restraint			Self- control

These values are reflected not only in the modules presented on this course, but also in its overall goals.

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1   Cicero *'de Officius'* at 67.
2   See Chapter: Intoduction for Trainers and Appendix 1.4 at the end of the manual. Pierre Olivier " The Latimer House Principles and Guidelines" (2000) 1 *Advocate* 23.
3   See Chapter: Introduction for Trainers and Appendix 1.6 at the end of the manual.
4   See Chapter: Introduction for Trainers and Appendix 1.5 at the end of the manual; " Developing Judicial Codes of Ethics" (2002) 46 *Journal of African Law* 111; Transparency International "Judges welcome UN endorsement of Judicial Code of Conduct" 25/04/2003, available at < http://www.transparency.org/pressreleases_archive/2…/2003.04.25 >.
5   See Chapter: Introduction for Trainers and Appendix 1.2 at the end of the manual.

Contents of the course

Module 1: Setting the scene
>Self-awareness
>An exploration of individual values
>The importance of values and integrity in the application
>of judicial ethics

Module 2: Corruption: gifts and favours
>Corruption as a criminal offence
>Misconduct in ethical terms

Module 3:   Recusal and disclosure
>Integrity and impartiality
>The test for recusal and bias

Module 4: Extra-judicial activities
>Judicial activism
>Memberships of clubs and organisations
>Holding other positions and receiving remuneration
>Social behaviour

Module 5:   Conduct in court
>Appropriate and inappropriate conduct:
>Controlling proceedings
>Seeing that justice is done
>Adversarial v inquisitorial systems

Module 6: Personal learning and change
>Reflection on learning on the programme
>Process of change
>Plans for the future

Overall goals

Increased knowledge
- The meaning of ethics.
- Ethical behaviour required of magistrates.

Changed attitudes
- Developing self-awareness with regard to personal values and their impact on a magistrate's work
- Acknowledgement of the dilemmas that ethical issues sometimes present
- Taking into account social context when performing adjudicative functions
- Commitment to encouraging discussions of ethical issues amongst colleagues

New skills
- Decision-making guided by an understanding of ethical values and principles
- Ability to identify ethical issues when they arise
- Ability to give reasoned explanations for positions adopted
- Ensuring that impartiality is never compromised through inappropriate affiliations or conduct

Reading 2: Background on self-awareness and values

(Adapted from Developing Management Skills: Developing Self-Awareness by David A. Whetton and Kim S. Cameron, New York: Harper Collins College Publishers, 1993)

Knowledge of the self has been considered by philosophers, writers, psychologists and others to be at the very core of human behaviour. The ancient *dictum* "Know thyself" has been variously attributed to Plato, Pythagoras, Thales and Socrates. Alfred Lord Tennyson said, "Self-reverence, self-knowledge, self-control, these three alone lead to sovereign power". Probably the most quoted passage on the self is Polonius' advice in *Hamlet*: "to thine own self be true, and it must follow as the night the day, thou canst not then be false to any man."

Students of human behaviour have long known that knowledge of oneself - self-awareness, self-insight, self-understanding - is essential to one's productive personal and interpersonal functioning, and in understanding and empathising with other people. This knowledge is vital to making appropriate decisions and also to changing one's behaviour.

There is little question that the knowledge we possess about ourselves, which makes up our self-concept, is central to improving our professional skills. We cannot improve ourselves or develop new capabilities unless and until we know what level of capability we currently possess.

On the other hand, self-knowledge may inhibit personal improvement rather than facilitate it. The reason for this is that individuals frequently avoid personal growth and new self-knowledge. They resist acquiring additional information in order to protect their self-esteem or self-respect. If they acquire new knowledge about themselves, there is always the possibility that it will be negative or that it will lead to feelings of inferiority, weakness or shame. The implication is that personal growth is avoided for fear of finding out that one is not all that one would like to be. [6]

In the light of this defensiveness, one would need to examine how increased self-knowledge and personal growth can occur. There are two possible answers:
1. Information that is verifiable, predictable and controllable is less likely to cause offence than information without those characteristics, i.e. if an individual can test discrepant information, if it is received at an expected time, if it is requested. If there is some control over what, when and how much is received, it is more likely to be heard and accepted.
2. The role played by other people is crucial, as it is almost impossible to increase skill in self-awareness without interacting with and disclosing oneself to others. This is the reason for stressing discussion of experiences with others during training, as by doing so, one is acquiring self-understanding and personal growth.

There are four major areas of self-awareness that are the key to developing successful behaviour improvement:

1.   Personal values - define an individual's basic standards about what is good and bad, worthwhile and worthless, desirable and undesirable, moral and immoral.
2.   Cognitive style - the manner in which individuals gather and process information and which determines individual thought processes and perceptions.
3.   Orientation towards change - the methods one uses to cope with change in one's environment and one's adaptability.
4.   Interpersonal orientation - tendency to interact in certain ways with people and one's behaviour patterns in these interactions.

For the purpose of this training programme, only the first of these areas will be discussed in this and other modules. However, the other areas of self-awareness are implicit in all the training and development associated with this programme.

All attitudes, orientations and behaviours arise out of an individual's values. Furthermore, value development is connected to ethical decision-making which is at the foundation of this programme.

Values
Values are among the most stable and enduring characteristics of individuals. They are the basis upon which attitudes and personal preferences are formed. They are also the basis for crucial decisions, life directions and personal tastes. Research has found that employees who hold values that are congruent with their organisation's values are more productive and satisfied. Holding values that are inconsistent with one's organisation's values, on the other hand, is a major source of frustration, conflict and nonproductivity. Being aware of one's own priorities and values, therefore, is important if one expects to achieve compatibility at work and in a long-term career.

People sometimes lose touch with their values and behave in ways that are inconsistent with those values. They may pursue an immediate reward or a temporary satisfaction, for example, in place of long term happiness and inner peace. Because values are seldom challenged, people tend to forget priorities and behave in an incongruous way.

Two general types of values were identified by Rokeach[7]:
1.   Terminal values which are ends-oriented, prescribe desirable ends or goals for the individual.
2.   Instrumental values which are means-oriented, relate to morality and competence; and

Examples of these are given in Table 2 below.

ETHICAL ISSUES FOR MAGISTRATES

Table 2: Terminal and Instrumental Values

Terminal Values	Instrumental Values
A comfortable life	Ambitious
An exciting life	Broadminded
A sense of accomplishment	Capable
A world at peace	Cheerful
A world of beauty	Clean, tidy
Equality	Courageous
Family security	Forgiving
Freedom, independence	Helpful
Happiness	Honest
Inner harmony	Imaginative
Mature love	Independent
National security	Intellectual
Pleasure	Logical
Salvation	Loving
Self-respect	Obedient, respectful
Social recognition	Polite
True friendship	Responsible
Wisdom	Self-controlled, disciplined

These values were described for American society, but are apt for South Africa too, and in fact, are similar to many reflected in the Judicial Codes of Conduct on which this training programme is based. Further, different groups of people differ in the values that they hold, or the priorities that they give them. Because individuals differ in their maturity, different sets of instrumental values are held at different stages of one's development.

In judicial work it is important to understand the kind of reasoning used to reach a decision about an issue that has value or moral connotations. This is dependant on the values and maturity of the individual. Kohlberg[8] developed a model which is most helpful:

1. The first level of maturity is the **self-centred level**: moral reasoning and instrumental values are based on personal needs or wants and on the consequences of an act.
2. The second level is the **conformity level**: moral reasoning is based on conforming to and upholding the conventions and expectations of society. This is sometimes referred to as the "law and order" level.
3. The third level is the **principled level**: it represents the most mature level of moral reasoning. Right and wrong are

judged on the internalised principles of the individual: it is consistent, comprehensive and universal.

Becoming more mature in values development requires that individuals develop a set of internalised principles by which they govern their behaviour. The development of those principles is enhanced and maturity is increased as values-based issues are confronted, discussed and examined.

Ethical Decision-making and Values
In addition to its benefits for self-understanding, awareness of one's level of values maturity also has important practical implications for ethical decision-making. Making many kinds of decisions effectively is not merely a matter of selecting between right and wrong alternatives or between good or bad choices. (As will be seen in the modules to come) Many of the choices are between right and right or between good and good. Individuals who effectively manage these kinds of ethical trade-offs are those who have clear sense of their own values and who have developed a principled level of moral maturity.

It is not a simple matter of generating a personal set of universal, comprehensive and consistent principles that guide decision-making. These are examples of universal principles upon which moral or ethical choices may be based. They are not comprehensive, nor are they independent of one another.
A decision can be considered right and proper if:
1.   Everyone under the same circumstances would be expected to act in the same way: **Universalism.**
2.   The individual making the decision would be willing to be treated in the same way: **Reversibility.**
3.   It preserves the basic humanity of individuals and provides opportunities for them to have greater freedom: **Dignity and Liberty.**
4.   It generates the greatest amount of good for the most people while producing no harm: **Utilitarianism.**
5.   The least advantaged individuals are benefited: **Distributive Justice.**
6.   It is consistent with a set of guidelines (e.g. religious, family, professional): **Personal Morality.**

All of the above are bases for the making of decisions by magistrates in South Africa in the course of their personal and professional lives. The principles are apparent in the case studies, scenarios and exercises that are presented in this training course on Judicial Ethics.

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[6]   The Change Process Model as described in Module 6 is a helpful way of understanding this phenomenon. People would often rather stay in the first stage of "unconscious incompetence", than risk finding out more about themselves.

[7]   Milton Rokeach *The Nature of Human Values* New York: The Free Press 1973.

[8]   L Kohlberg "Moral Stages and Moralization, the cognitive developmental" in T. Lickona (ed.) *Moral Development and Behavior* New York: Rinehart & Winston, 1976

ETHICAL ISSUES FOR MAGISTRATES

Reading 3:   Making Sense of Ethics

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Should I lie on a job application to spare my children from being thrown in the street? Should I ignore my boss's hypocrisies to keep my position? Making ethical decisions can be difficult. We make most of them in a world of economic, professional and social pressures, which can obscure moral issues. Often we don't know or understand crucial facts. We must rank competing moral claims and must be able to predict the likely consequences of choices.

Ethical decision making requires more than a belief in the importance of ethics. It also requires ethical sensitivity to implications of choices, the ability to evaluate complex, ambiguous and incomplete facts, and the skill to implement ethical decisions effectively. Most of all, it requires a framework of principles that are reliable and a procedure for applying them to problems.

What Is Ethics?
Ethics refers to principles that define behaviour as right, good and proper. Such principles do not always dictate a single "moral" course of action, but provide a means of evaluating and deciding among competing options.

The terms "ethics" and "values" are not interchangeable. Ethics is concerned with how a moral person should behave, whereas values are the inner judgements that determine how a person actually behaves. Values concern ethics when they pertain to beliefs about what is right and wrong. Most values, however, have nothing to do with ethics. For instance, the desire for health and wealth are values, but not ethical values.

The Importance of Universality
Most people have convictions about what is right and wrong based on their religious beliefs, cultural roots, family background, personal experiences, laws, organisational values, professional norms and political habits. These are not the best values to make ethical decisions by — not because they are unimportant, but because they are not universal.

In contrast to consensus ethical values - such basics as trustworthiness, respect, responsibility, fairness, caring and citizenship - personal and professional beliefs may vary over time, among cultures and among members of the same society. They are a source of continuous historical disagreement, even wars. There is nothing wrong with having strong personal and professional moral convictions about right and wrong, but unfortunately, some people are "moral imperialists" who seek to impose their personal moral judgements on others. The

universal ethical value of respect for others dictates honouring the dignity and autonomy of each person and cautions against self-righteousness in areas of legitimate controversy.

When Values Collide
Our values are what we prize and our personal value system is the order in which we prize them. Because they rank our likes and dislikes, our values determine how we will behave in certain situations. Yet values often conflict. For example, the desire for personal independence may run counter to our desire for intimacy. Our desire to be honest may clash with the desire to be rich, prestigious or kind to others. In such cases, we resort to our personal value system. The values we consistently rank higher than others are our core values, which define character and personality.

From Values to Principles
We translate values into principles so that they can guide and motivate ethical conduct. Ethical principles are the rules of conduct that derive from ethical values. For example, honesty is a value that governs behaviour in the form of principles such as: tell the truth, don't deceive, be candid, don't cheat. In this way, values give rise to principles in the form of specific "dos" and "don'ts".

Ethics and Action
Ethics is about putting principles into action. Consistency between what we say we value and what our actions say we value is a matter of integrity.
It is also about self-restraint:
- Not doing what you have the *power* to do. An act isn't proper simply because it is permissible or you can get away with it.
- Not doing what you have the *right* to do. There is a big difference between what you have the right to do and what is right to do.
- Not doing what you *want* to do. In the well-worn turn of phrase, an ethical person often chooses to do more than the law requires and less than the law allows.

Why Be Ethical?
People have lots of reasons for being ethical:
- There is inner benefit. Virtue is its own reward.
- There is personal advantage. It is prudent to be ethical. It's good business.
- There is approval. Being ethical leads to self-esteem, the admiration of loved ones and the respect of peers.
- There is religion. Good behaviour can please or help serve a deity.
- There is habit. Ethical actions can fit in with upbringing or training.

There are obstacles to being ethical, which include:

- <u>The ethics of self-interest</u>. When the motivation for ethical behaviour is self-interest, decision-making is reduced to risk/reward calculations. If the risks from ethical behaviour are high — or the risks from unethical behaviour are low and the reward is high — moral principles succumb to expediency. This is not a small problem: many people cheat on exams, lie on resumes, and distort or falsify facts at work. The real test of our ethics is whether we are willing to do the right thing even when it is not in our self-interest.

- <u>The pursuit of happiness</u>. Enlightenment philosophers and the American Founding Fathers enshrined the pursuit of happiness as a basic right of free men. But is this pursuit a moral end in itself? It depends on how one defines happiness. Our values, what we prize and desire, determine what we think will make us happy. We are free to pursue material goals and physical sensations, but that alone rarely (if ever) leads to enduring happiness. It more often results in a lonely, disconnected, meaningless existence. The morally mature individual finds happiness in grander pursuits than money, status, sex and mood-altering substances. A deeper satisfaction lies in honouring universal ethical values, that is, values that people everywhere believe should inform behaviour. That unity between principled belief and honourable behaviour is the foundation for real happiness.