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# LÉVINAS'S ETHICS

# IN JUDICIAL DECISION

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# Abstract

Judicial decisions can be informed by Lévinas' ethics. That is to say that, judicial decisions do contain qualities or characteristics of Lévinasian ethics, and should contain qualities or characteristics of Lévinasian ethics if they are to serve justice effectively. However, there is hardly any inquiry into this phenomenon. As much as it may appear that Lévinas' ethics is inconsistent with judicial ethics and judicial decisions, it is contended that this is not the case, so that Lévinas' ethics can be accommodated and represented in judicial decisions, not least because they are dynamic and infinite in nature. In situations where the ethics applicable in judicial decision appears inconsistent with Lévinas' ethics, the inconsistency can be alleviated by invoking Lévinas' principles of responsiveness, responsibility, interruption, and infinity to render the justice required in the particular case. Therefore, if judicial decisions do not live up to Lévinas' ethical standards, that may be due to the totality and rigidity of the judicial ethical standards, not because of the inadequacy of Lévinas' ethics.



*Keywords*: judicial decisions, Lévinas, ethics, judicial ethics

# Chapter 1

# Introduction

## i. Background

Our lives are created, protected, regulated and guided by laws. From the day we are born to the day we die, laws protect us, govern us, and guide us. Indeed, because of the law of the right to life and liberty[1], it can be said that without laws, we would not have been born. As I write, the major trending international news stories are about the Taliban treatment of women and girls in a fallen Afghanistan, the treatment of thousands of refugees mostly from a fallen Haiti, who have been living under a bridge in the US/Mexico border for many months, and are being forcefully returned to their country, the growing number of refugees from developing countries (especially from Africa) to Europe caused by irregular migration, extremely hot temperatures caused by climate change, and climate change/global warming protesters. Despots, who cling to power, and the poverty in developing countries, are hardly ever out of the news. All these are human rights issues, they are fundamentally ethical issues about how we treat each other and our environment, and they are sustained and guided by laws that are applied by judges in judicial decisions.

Ethical standards expected in judicial decisions are the same globally, albeit there might be differences in contexts, enforcement mechanisms, and priorities. This is due largely to the fact that most developing countries were colonised by developed countries with Western legal standards, and so their standards for judicial conduct are based on, or are largely influenced by the Western legal systems of their former colonial masters, so that many developing countries have Western legal systems operating side by side with traditional ones[2], which might have traditional ethical standards. Indeed, Greenstein (2016) explains that judicial ethics are universal and differ only in their priorities and details.

Around the world, the public has high expectations of judges and judicial decisions, and this is confirmed to a large extent by the existence of codes of conduct for judges in the various

[1] Such provisions can be found in Article 3 of the Universal Declaration of Human Rights and in the Constitutions of most countries. It is contained in sections 18 and 19 of the 1997 Constitution of The Gambia

[2] In The Gambia for example, we have the District Courts (Traditional Courts) and Islamic Courts (Cadi Courts) operating side by side with the regular courts applying the common law as provided under section120(1) (a) and (b) of the 1997 Constitution.

jurisdictions around the world, and especially by the most recent Bologna and Milan Global Code of Ethics (2015)[3], adopted by the International Association of Judicial Independence and World Peace, which seeks to make judicial ethical standards enforceable globally. Such high expectations are based on ethical preferences, but, such ethical preferences might be of the highest or lowest standard. Therefore, one should not blindly support the idea of ethics in judicial decisions. Any support for ethics in judicial decisions should be because the application of ethics in judicial decision will ensure that justice is done. But since the concept of justice can be subjective and subject to varying interpretations, I must clarify that in this case, I am not referring to justice being claimed as a result of twisted principles.

### ii. Aims of the study

This study is particularly significant and relevant to The Gambian context, where we are in a transitional process,[4] which is assisted by a National Development Plan, including the current Gambia Judiciary Strategic Plan[5] that aims to secure optimum standards of justice for the public. Hitherto, there were concerns about judicial decisions, because it was widely believed that the Gambian judiciary was under the influence of the executive, and not independent. Now, under a transitional period, there is greater public scrutiny of judges and judicial decisions, and there are high expectations of the judiciary. But, it must be said that there are high expectations for judiciaries, even in countries not going through transitional process. Miner (2003), for example, emphasized that in the U.S. there is increasing demand of greater public scrutiny of judicial conduct and judicial accountability.

The study is also significant because, not only will it demonstrate how law functions, or does not function to achieve justice, it also brings to light the dark realities of judicial decision making, and shows that judicial decisions are subject to human factors such as ethics, meaning that they are not immune from the vulnerabilities present in all other human

[3] The Bologna and Milan Code of Ethics was approved at the International Conference of Judicial Independence held at the University of Bologna and Bocconi University of Milano in June 2015, and is based on standards recognised by various countries around the world as well as International Instruments such as the New Delhi Code of Minimum Standards of Judicial Independence (1982);Universal Declaration of Independence of Judges (1983); and the Bangalore Principles of Judicial Conduct (2002); The Mt. Scopus International Standards of Judicial Independence; and many others

[4] The Gambia has been under what is widely regarded as a dictatorship between 1994 to 2016, when a new transitional government was voted into power

[5] The Gambia Judiciary Strategic Plan 2021-2025

decisions. Conflicts are part of life and inevitable[6]. Therefore, judicial decisions are also inevitable. It is also inevitable that judicial decisions will be subject to controversies since there will be conflicting interests and expectations at play (Silberman Abella,1999). However, there must be steps to mitigate or eliminate controversies caused by judicial decisions if confidence in the justice system is to be maintained.

Judicial decisions do fall short of expected standards (Rachlinski & Wistrich, 2017). Studies such as the present can inspire inquiries into ways that allow judicial decisions to remain within largely expected standards so as to be more acceptable and meaningful. Basset& Perschbacher (2013) report a global perception of injustice caused by lack of adherence to the norm of judicial fairness and impartiality, which are fundamentally ethical issues. They observed that "…a nation's judiciary is measured in terms of fairness and impartiality, both actual and perceived…" p138. This means that the lower a nation's judiciary is perceived, the lower the standing of that nation in the international community. It is therefore, in the best interest of every nation to ensure credible and favourable perceptions of their judiciary. One way of doing this, is to encourage more research into various aspects of judicial decision, and ethics is certainly one fundamental aspect of judicial decisions.

While there is no shortage of literature on judges and the role of judges, there is little inquiry into the intricacies of judging, so that there is prevailing ignorance about how judicial decisions are reached, which can result in misguided criticisms against judges both in developed and undeveloped countries. Grib (2017) underscored the prevailing ignorance in the United States about what judges actually do, and the World Justice Project Report (2019)[7] in disclosing that 1.4 billion people around the world have unmet justice needs, also emphasized that most people, especially those in developing countries, don't really know how their justice systems work, and how to use their justice systems to resolve their problems and achieve justice. Indeed, the World Justice Project Rule of Law Index 2020 and 2021[8], both indicate that deficient justice systems contribute to the decline in rule of law around the world. There is thus a disconnection between judicial decisions and the public, which can

[6] Lederach, J.P. (2003). *The little book of conflict transformation*. Good Books

[7] The report is based on a study of more than 100,000 people and 101 countries regarding legal needs and access to justice

[8] The World Justice Project Rule of Law Index 2021 is scheduled to be launched on the 14th of October 2021- https://worldjustieproject.org/news/wjp-rule-law-index-2021-launch#:~:text=The%202021%20Index%20is%20the,the20glob...

increase lack of confidence in the administration of justice. With adequate knowledge about the intricacies of judicial decision making, the public will be more informed about what to expect from such decisions. They will have better understanding which then allows them to develop a connection with judges, and put their grievances in proper perspective. If grievances are out of perspective, workable solutions cannot be invoked to address them.

Issues concerning the relationship between law and ethics are raised in every country in the world at one time or the other, and in one way or the other[9]. This relationship is therefore important, and is always relevant. But only a few are privileged with knowledge about the philosophy of law and ethics and the complex relationship between law and ethics. So, there is need for constant inquiry into this relationship, and the more the inquiries the better, for that can only yield better understanding, which in turn yields more peace and stability in every country and globally.

This study is specifically about the role of ethics in judicial decisions-decisions made by judges in courts. Barry (2021) explains that judicial decisions are "…all decisions made by judges in their professional capacity that affect the parties before them. For the most part, this will be the judges' end product, so to speak-a judicial outcome…" (p.5). Judges are very important to society, for they play a crucial role in ensuring peace and stability in society. It is therefore necessary that they decide cases that come before them properly so that their decisions are respected. Shaman (1988) was clear that judicial decisions will not be respected if judges are not ethical. However, not very many people know how judicial decisions are reached, and so judicial decisions can be frequent targets of public criticisms.

Tucker (1981), speaking in the American context, and lamenting how judicial decisions are increasingly misunderstood, advised that "…judges should accept as part of their professional and social obligation, the responsibility to educate the public about what they do and why, what the law is, and what it is not" p. 205. Although Tucker admitted that judges educating the public will not end the controversies surrounding their decisions, his view was that the educational role of judges will nonetheless profit the public, who will then be more informed about judicial decisions. He believed that, educating the public will enhance and improve the

[9] Although ethics and justice issues in some countries are given more prominence, and are more recent to be fresher on the memory thanks to worldwide media coverage. For example, the recent US Supreme Court decision in the case of *Whole Woman's Health et al v Austin Reeve Jackson, Judge, et al, 594 U.S.---2021* upholding the abortion restriction law (SB 8) law, which prohibits abortions in Texas after six weeks of pregnancy, even where the pregnancy was caused by rape.

quality of public debates about judicial decisions. Such debates will then be more informed, and apart from that, will yield a heightened appreciation and respect for judicial decisions.

## iii. Why the concern with judicial decisions

### *Dictates of the law*

The Constitution and judicial codes of conduct present in most countries would suggest that judicial decisions are of great concern, and hence the need for more efforts globally to ensure that judicial decisions are of the highest ethical standards. The United Nations Convention against Corruption provides that members of the judiciary must act with integrity if the fight against corruption is to be effective[10]. Ensuring ethical judicial decisions is also part of the right to access the courts for justice and the right to fair hearing as stipulated in the Universal Declaration of Human Rights and in the national constitutions of most countries. It is-or should be, an issue for all lawyers, for if there is no confidence in the justice system they can be out of business. It should also be the concern of all governments because it can discourage potential investors, which can adversely affect their economies. Judicial decisions, and the propriety of judicial decisions should be of concern to people everywhere because life, property, and security can be affected.

### *Resistance by judges*

Although studies such as those by Harris & Sen (2019) are adamant that judicial decisions are ideological and represent the ideologies of judges, judges themselves are divided about the realities that belie their decisions. Such divisions will naturally create more misunderstanding for the public. Rachlinski & Wistrich (2017), note that while some judges are willing to admit emotional influences in their decisions and support the use of emotions in judicial decisions, others vehemently deny emotional influences, and will deny emotional influences even if they are inevitable and are glaring realities in their decisions.

[10] Article 11 of the United Nations Convention against Corruption, which came into force in December 2005

### *Public misunderstandings*

Ignorance and misunderstanding of judicial decisions prevails not least because judicial decisions are not freely and widely available as they should be. In many countries some fees must be paid by members of the public who seek access to court judgments[11]. Rife poverty in many developing countries means that only a few in these countries will have access to judicial decisions. The fact that judges are generally reluctant to explain or defend their decisions and their decision making process, also cause and add to misunderstandings of judicial decisions (Grib, 2017). And only a few judges are willing to discuss about judicial ethics. Edwards (1969) suggested that part of the reasons why some judges are reluctant to discuss about judicial ethics, is because they don't want their discussions about judicial ethics to be used as invitation to criticise them.

The argument is that, ignorance and misunderstanding of judges and judicial decisions are now universal phenomena (Kirby, 1998). Kirby lamented that the silence ordinarily imposed on judges by judicial convention, means that judges generally cannot answer back, and that attempts they make to try to respond to misguided criticisms often compound their problems and demean their office. Judges often rely on the explanations and reasoning in their decisions hoping to garner public understanding. However, the explanations and reasoning in their decisions are not always easily understood by lay persons or the unlettered. In developing countries where the illiteracy rate is high[12], a high percentage of the public will not understand judicial decisions which are often written in the official language (that is former colonial languages-English, French, or Portuguese), not in the local languages, because the rules of court will normally provide that the language of the court should be the official language not the local language[13]. For example, in the Gambia, section 46 of the Courts Act[14], clearly stipulates that "The language of every court established by or under the Constitution or this Act shall be English."

[11] In The Gambia for example, photocopying fees must be paid as there is no budget allocation for free copies of judgments to be made available to the public

[12] UNESCO Fact Sheet No. 45 September 2017 FS/2017/LIT/45 reports that while the global literacy rate is rising, the highest illiteracy rates are still in developing countries including The Gambia

[13] This is the case in Ghana, Nigeria, and The Gambia, where court judgments are written In English because the language of the courts is English.

[14] Cap 6:01 Laws of The Gambia 1990

### *Poverty, illiteracy and complex court procedures*

In poor developing countries where the primary focus for a majority of the population is on finding basic facilities that allow them to be alive and remain alive with some dignity, there is bound to be ignorance and misunderstanding of judicial decisions, because they will naturally be of the least interest and priority. Botero et al (2003), report of judicial systems around the world being in crisis largely due to poverty and the ignorance and inefficiency that comes with poverty. They high light adherence to complex rigid court procedures as one of the reasons for misunderstandings of judicial decisions and feelings of lack of access to justice around the world. Logan (2017), reports that access to justice in African countries is hampered among other things by lack of confidence in the courts and misunderstanding of judicial procedures and processes[15]. And there is no sign of the problem abating. The same World Justice Project report (2019), suggests a general lack of confidence in judicial decisions, it reports that most people around the world (especially in developing countries), do not even approach the courts to resolve their problems, and many of those who approach the courts do not have their problems resolved and simply give up, and continue to live with the unresolved problem, which then adversely affects their lives[16].

### *Lack of law reporting*

There is bound to be much ignorance and misunderstanding of judicial decisions in countries where case law is not widely published, and where there is less law reporting. Law reporting in The Gambia is not robust, certainly not as robust as in neighbouring countries such as Ghana and Nigeria[17]. And Nigeria in particular has a long list of law reports[18]. Which means that, public misperception of judicial decisions might be more prevalent in The Gambia than in those countries. But it must be said that, there is still significant misunderstanding of judicial decisions even in countries with well- established and vigorous law reporting systems such as Australia and the United States for example (Kirby, 1998; Tucker, 1981).

[15] The report is based on 2014/2015 Afrobarometer survey. Afrobarometer is an independent pan-African research network conducting surveys on democracy, governance, economic conditions and related issues in 36 countries across Africa

[16] 43% of those surveyed reported that they were negatively affected by their justice problem

[17] Nigeria for example has weekly law reports, while the latest edition of The Gambia Law Reports is dated 2010-2012, which is nine years behind

[18] See the list of law reports in Nigeria at https://bscholarly.com/list-of-law-reports-in-nigeria/

### *Public cynicism*

There is cynicism and distrust surrounding judges and judicial decisions, and there is general discontent with legal systems (Kaufman, 1977). The discontent persists simply because very little has been done over the years to explain how judicial decisions are reached, meaning that "… Laymen and the initiated alike often equate the decisions of judges with Jovian thunderbolts, which strike mysteriously and inflict wanton destruction…" (p.1). Kaufman recognized that the courts have the primary duty to mobilise public understanding of their decisions, but he argued that lawyers too have a duty to mobilise public understanding of judicial decisions because the public discontent and derision extends to them. Thus, he blames some of the misunderstanding and ignorance surrounding judicial decisions on the fact that lawyers do not see it as part of their role to ensure public understanding of judicial decisions. I think it is safe to say that, if much of the public understood judicial decisions lawyers will soon find themselves out of business.

### *The media*

For Tucker (1981), the media deserves much of the blame for the misunderstandings about judicial decisions. He observed that media reports about judicial decisions tend to be distilled, unschooled, unclear and over dramatized. He also suggests that the public be educated so that they are discouraged from relying on media reports. Silberman Abella (2001) and (2003), also puts much of the blame on the media. She argues that the power of the media lies in its freedom to decide what to report, and so often does not report the reality, or would clumsily report about the reality, so that judicial decisions are portrayed in a negative light, which then results in misunderstandings and negative views about judges and judicial decisions[19]. She however believes that the more the public is educated about judicial decisions, the less likely it can be negatively or wrongly influenced by media reports.

Studies such as the present, are one way of educating both the media and the public about judicial decisions, and could lead to more informed and thus fairer media reports about judicial decisions, which can then yield more confidence in justice systems. The public

[19] A finding by Frye (2015), is also that the media can frame a story for negative perceptions

should not have the media as its only source of information. Therefore, studies about judicial decisions will provide additional sources for the public, for a balanced public perspective.

### *Poorly written judgments*

Poorly reasoned, overly legalistic, badly written or overblown and unnecessary words and sentences in judicial decisions can also cause confusion because they cannot be understood by ordinary members of the public, who might then feel that justice has not been done[20]. Indeed, if the language use is complicated, ungrammatical, and convoluted, it might be impossible to execute the judgment, and the appellate court will not be able to make an informed decision, and so will have to send it back to the High Court, which will cause more delay and more public misunderstanding. In a long running case between a landlord and tenant[21], the Supreme Court of India had to send the High Court judgment back to the High Court due to the overblown and unnecessary words used in the judgment. Some of the wording of the judgment was as follows:

> However, the learned counsel appearing for tenant/JD cannot derive the fullest succour from the aforesaid acquiescence occurring in the testification of the GPA of the decree holder/landlord, given its sinew suffering partial dissipation from an imminent display occurring in the impugned pronouncement hereat where within uravelments are held qua the rendition recorded by the learned rent controller…
>
> Even though, this Court has partially blunted the effect of the aforesaid communication occurring in the testification of the GPA of the decree holder qua the tenant/JD not holding any liability qua the landlord vis-a vis liquidation qua him of rent for the period commencing 1.9.1995 up to the date of payment, whereupon, this Court concludes qua its entailing the effect of the Executing Court ordering for issuance of warrants of possession upon the judgment debtor yet before ordering… (pp. 3-5).

And even where the words and language used are very clear, the judgment can still be incomprehensible, for there might not be enough explanation. Justice Rosalyn Atkinson of the Supreme Court of Queensland in delivering a paper on judgment writing[22], advised against overly precise judgments as follows:

[20] See Lord Neuberger's advice for judges in a 2012 BAILII Lecture: No Justice No Judgment (2012), where he emphasized that a poorly reasoned judgment inevitably leads to perception of injustice
[21] The case of *Shri Pawan Kumar Sharma v Saria Sood and Others*. C.R. No. 184 of 2011 decided on the 5th December 2016
[22] For the Queensland Civil and Administrative Tribunal members

> …perhaps you do not have to be as concise as Judge Murdoch sitting in the US Tax Court. It is reputed that a tax payer testified, 'as God is my judge, I do not owe this tax'. Judge Murdoch replied, 'He is not, I am, you do' (p.7).

As can be noticed, the reported judgement of Judge Murdoch has no reasoning to explain his decision. And the finding by Simon & Scurich (2010) in their study involving over six hundred participants, is that the public does not appreciate monolithic or poor reasoning by judges.

Judicial decisions are criticised rightly or wrongly based on ethical considerations recognised by the law. For example, a complaint that a decision was unexplained, unclear, or was biased, is based on the legal principle of the right to fair hearing and impartiality. A complaint that a punishment is excessive or inadequate, is based on the legal principle that the punishment must be commensurate to the wrong committed and must be reasonable. And a complaint that a trial is delayed and taking too long, is based on the legal principle that cases must be completed within a reasonable time. The connection between law and ethics is therefore obvious in our daily encounters with the judicial system.

Despite the abundant criticism of judicial decisions, there is hardly much academic interest or inquiry in the ethical content of judicial decisions. Without understanding ethics and how ethics works in judicial decisions, some of the criticisms against judicial decisions will be ill-informed and so will be out of perspective and unfair. The present study is part of efforts to facilitate the proper understanding of the role of ethics in judicial decisions and judicial decisions in general. There are calls for ethics in judicial decisions[23], and many of such calls, including those by Snow & Friedland (2021) who advocate for humanism in judging, are based on the belief that ethics is what makes judicial decisions acceptable. It is therefore necessary to explore such belief.

### iv. Method

This is an interdisciplinary study, its cuts across theories and studies about ethics, law, interpretation[24], other fields and subjects such as psychology, human rights, peace and

[23] See for example, Grib (2017) supra, Shaman, J.M. (1988). Judicial ethics. Geo. J. Legal Ethics, 2, 1., Shytov, A.N. (2013). *Conscience and love in making Judicial decisions.* (Vol.54). Springer Science & Business Media, Weisart, J.C. (1970). Judicial Ethics: Foreword. Law & Contemp. Probs., 35,1.

[24] The study is particularly inspired by Betti (2015). *The general Theory of interpretation* Create Space Independent Publishing Platform (Vol.1&2) *;* Ricoeur (1976). *Interpretation.* Texas Christian University Press Fort Worth

conflict studies, literature, spirituality, romanticism, humanism, and humanistic factors such as the moral imagination, empirical studies, and scientific studies. It is an interpretive study, for it aims to interpret and relate the ethics of Lévinas to judicial decisions, and this interpretation stems from a generated consciousness about the essence and spirit of Lévinas' ethics. Indeed, Descartes[25] tells us that consciousness requires thought, reflection, and intention. And De Sousa et al (2013) in their study about consciousness[26], explain that without the required consciousness, one cannot have the intention to take a particular moral stance. Thus, another method used is the simple exercise of choice as encouraged by world-renown psychiatrist William Glasser [27]. Choice is exercised to satisfy the desire to make Lévinas' ethics significant and relevant in real life, in particular to judicial decisions-to show that qualities and characteristics of Lévinas' ethics can be found in ethical judicial decisions, and can guide judicial decisions to be more ethical.

The study focuses mainly on Lévinas' (1961) & (1974)[28] views about ethics, and attempts to relate and apply them to judicial decisions. The aim is to demonstrate that judicial decisions can be accommodated by Lévinas' ethics-that the qualities of Lévinasian ethics can be observed in judicial decisions, not least because the law that creates the office of the judge, the court presided over by the judge, and the law the judge applies, are all inspired by ethics which can fit the Lévinas criteria of ethics. Since ethics then, is an integral part of law, it must also follow that, all judicial decisions are ethical, even if we might not subscribe to the particular ethic engaged, or to the manner a particular ethic is engaged in the judicial decision. It is worth emphasizing that certain so called ethical decisions can be twisted, so as not to serve the justice expected in the case. It is also worth emphasizing that certain judicial decisions will not render the expected justice because the judge will feel constrained by the law. It is contended that, in such cases, the principles of responsibility, responsiveness, and infinity as suggested by Lévinas, can or should be invoked to augment the judicial decision to acceptable standards-that is standards that are not skewed. It is essentially a call for applying the spirit of the law to do justice-that is assuming that the spirit is ethical of course. I am

[25] Jorgensen, L. M. (2020). Seventeenth-century theories of consciousness. In Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2020 Edition), URL = <https://plato.stanford.edu/archives/spr2020/entries/consciousness-17th/>.

[26] Citing Dennett, D.(1976). Conditions of Personhood. In Rorty, A. (Ed.). *The identities of persons*. Berkley: University of California Press

[27] Glasser's(2010) Choice Theory, suggests that rather than follow dictates of others and be miserable, we should exercise choice to make things workable for us

[28] *Total and Infinity* (1961). Kluwer Academic Publishers and *Otherwise than being on beyond essence* (1974). Springer Science and Business Media

cognizant that my thesis can be criticised for being unorthodox, idealistic or a disaster, but being that it is made solely in the pursuit of quality justice, they should not matter. For as Pound said: "…when a judge decides a cause he seeks, first, to attain justice… and second to attain it in accordance with law. Considerations of justice are therefore always prior to law..." (p1). He said further:

> Our chief agency of lawmaking is judicial empiricism-the judge search for the workable legal precept, for the principle which is fruitful of good results in giving satisfactory grounds of decision of actual causes, for the legal conception into which the facts of actual controversies may be fitted with results that accord with justice between the parties to concrete litigation. It is a process of trial and error with all the advantages and disadvantages of such process (p953).

A significant scary fact, which must be borne in mind, is that, a judicial decision based on twisted ethics, or a judicial decision excluding the principles of infinity, responsibility and responsiveness as suggested by Lévinas, so that it does not serve justice, will nonetheless remain valid and enforceable under the law, until set aside on review or appeal by another judicial decision. Moreover, appeal court decisions can come up with their own set of twisted or low ethical standards. Therefore, the calls for ethics in judicial decisions, must be made measuredly.

After an extensive review of the related literature to establish some context, I will examine Levinas's theory of ethics and related theories to demonstrate how they support my thesis while recognizing the voices of their critiques. I will then address the possible challenges to my thesis before concluding and making some recommendations for the future.

### iv. Implications for the study

There is hardly any inquiry about the relationship between Lévinas' ethics and judicial ethics. In fact Baxi (2009) noted that, the legal profession is uniformed about Lévinas' ethics, and attributes this partly to the especially high ethical standards of Lévinas. This study can therefore inspire more interest into this relationship. The findings in this study will facilitate greater understanding and appreciation for judicial decisions and judges. The findings will ensure realistic views and practical expectations about judicial decisions, so that there are fewer complaints about judicial decisions, and more confidence in the administration of justice. This study supports the calls made by Snow & Friedland (2021) in their study about the value of humanism in judging- for more humanistic judges and judicial decisions.

The findings will allow complaints about lack of access to justice based on unacceptable judicial decisions to be placed in their proper perspective for proper resolution, so that there will be fewer complaints about lack of access to justice. The findings can inspire specific guidelines prescribing the manner ethics is to be engaged and employed in judicial decisions so as achieve the most acceptable result. The findings can also inspire thoughts for different definitions of ethics that would exclude low or twisted ethical standards from the definition of the ethical, so that they will be excluded in judicial decisions.

In practical terms, this study aims to contribute to solutions to alleviate dissatisfaction with the administration of justice, for more than anything, it highlights once again that justice cannot be served if people with the highest ethical standards are not appointed to judicial office. It brings to light the fact that the main reason for dissatisfaction with judicial decisions around the world is that people of the right ethical standards are not appointed to judicial office. It can therefore inspire higher standards in judicial appointments. Significantly, there is no suggestion for a framework/model for ethical judicial decision making, as is the case in many other fields. This is because a framework or model for judicial decision making will be against the anti-totality spirit of Lévinas' ethics, for it will be restricting judges. Indeed a framework or model cannot predict all situations. However, the study can inspire debates and inquiries about better options and solutions for the way forward, so that its contribution can be both theoretical and practical. Broader judicial training beyond legal matters and across other disciplines is one of many recommendations.

### v. Possible Challenges

There are bound to be arguments against my thesis. I am a judge, and this might invite questions about my objectivity. But, my interest is mainly to become a better judge and to inspire better judging. Therefore, I am mindful of the need for objectivity throughout the process. And there are some denials of any relationship between law and ethics. Hart (1961) & (1963), is one well known denier. But, I am more convinced by naturalist theorists such as Dworkin (1998) & (2008), and so I see a relationship between law and ethics. Because of the relationship between law and ethics, I reject the possibility of a judge rendering a decision which is unethical, albeit I admit that a judicial decision can be of the lowest principles or ethical standards, and can manipulate ethics to reach an undesirable result. And there are those who see ethics as always connoting the good or the acceptable. I respect their views, but I do not find that ethics always connote the good or the acceptable, and hence the

possibility of invoking Lévinas' principles for more acceptable results. My findings, though not produced through scientific data, are sufficiently supported by credible broad studies using empirical research, and data collection.

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# Chapter 2

## i. Ethics and judicial decision

No decision (be it judicial decision or otherwise), is made in vacuum. Decisions are driven by inherently human factors which are predominantly emotional factors (Dietrich (2010); Ekman (2007); Frigda, 1988; Kelter & Lerner (2010)). In their research on emotion and decision making, Lerner et al (2015) found that across different types of decisions, emotions powerfully, predictably, and pervasively influence decisions. And in a survey created to test whether participants' initial decisions would be changed by additional information, Wray (2020) found that additional information indeed triggered emotions which then influence our ability to look at situations rationally to make optimal decisions. And Garcés & Finkel (2019) also found that decision making is heavily affected by emotions and the particular context. All these studies would tend to confirm what many already know, which is that, judicial decisions are made up of more than just laws (especially where the laws does not live up to expected normal ethical standards), and hence a further justification for the present inquiry about ethics in judicial decision. Although there are some doubts about the reliability of emotions in shaping our ethical values (Flam, 2009; Kraemer, 2009), studies by Greenspan (2010); Neu (2010); and Salmela & Mayer (2009) all view ethics as connected to emotions, suggesting that emotions play a role in our choice of ethics and moral values. Since ethics is closely connected to laws, and tend to be the basis of most laws[29] this will also suggest that, where laws are based on twisted ethics, so that they do not live up to expected standards, ethics will also play a role in the laws judges strive to apply or dis-apply to do justice in the particular case.

Judicial decisions utilizing emotion such as ethics in particular, should not be a surprising event at all, for apart from the fact that the law the judge applies might very well have emerged from fundamentally ethical issues or reasons. Results from Kohlberg's (1981) experiments with children and his theory of moral development, informs us that all human beings go through six stages of moral development-the first three stages apply to children: in stage 1, to be morally right is to be obedient to power to avoid punishment; in stage 2, the

[29] Most countries (including Gambia), tend to have their constitutions in line with the Universal Declaration of Human Rights, which is founded on ethical considerations, and came into being following the atrocities of the second world war to avoid barbarous acts that "outrage the conscience of mankind" (see the preamble to the Universal Declaration of Human Rights), and The US Bill of Rights as contained in the US Constitution aims to guarantee rights and liberties, and sets rules for due process

morally right is to pursue self- interests-to take responsibility for oneself and leaving others to take responsibility for themselves; in stage 3, the emphasis is on being nice and in harmony with society-the morally right is to conform to social norms and being considerate towards peers and adults in society; in stage 4, the morally right is to obey law and order and the morality and social rules of the society one is part of; in stage 5, the morally right involves balancing personal rights and interests with the rules and interests of society based on mutual agreement and in pursuance of democratic ideals; and stage 6, the morally right is to apply general or universal ethical principles in dealing with everyone. Thus, judges are, or should be clothed with ethical standards well before assuming office. The issue however, is that sometimes they might not have reached the required higher stage, so that their ethical standards can fall short of expected standards-their ethical standards might not have matured enough to go far enough to serve the sober type of justice required.

And it must be stated that, ethics is not only relevant in the judging profession. Ethics is also relevant in almost all the professions. For example, it is relevant in medical decisions - including bioethics, nursing, dentistry, and psychology (Cameron et al, 2001; Beemsterboer, 2018; Miller & Davies 2016; Park, 2011). It is also relevant in accounting decisions (Nzorubara, 2020); in teaching decisions; (Meyers, 2010); in journalism (Wulfemeyer (1990); in business decisions; in decisions which might affect the environment or non- human species (Singer, 2011); and generally in organizational structures (Peterson & Ferrell, 2005; Phillips, 2003).

### ii. The three main areas of ethics

The three main areas of ethics are: meta- ethics, which is focused on the theoretical meaning of ethical terms and propositions and how ethical knowledge is obtained. It is concerned with ethical concepts, judgments, statements, and attitudes. Normative ethics focuses on the practical way of determining the right actions-what people ought to do and how moral actions are determined. Applied ethics is about how moral outcomes and judgments are achieved in complex situations people face in life-what people are obliged or allowed to do in such situations (Cavalier, 2002; Gensler, 2017; McCloskey, 2013). My view is that the present discussion about judicial ethics can be an example of all three areas, for it concerns the meaning of ethics, how ethics is to be applied, and how to achieve ethical outcomes in judicial decisions.

And it should be made clear that, it is not only ethical considerations that affect judicial decision making, other factors such as self-esteem can influence judicial decision making (Gibson, 1981). Psychology that has nothing to do with ethics may apply in judicial decision making (Schauer, 2010). Indeed Ballou et al (2001) and Simon (1998) argue for a psychology of judging so that judges are well informed before making decisions that have especially significant impact on people's lives. Personal or public motivations also have a bearing on judicial decisions (Baum, 2010). Pre-existing knowledge can also influence judicial decision (Spellman, 2010), and of course competency and efficiency can influence judicial decision (Stake, 1991). Barry (2021) makes it clear that many factors can influence judicial decisions and the list might be inexhaustible. He identified psychological factors; professional factors (such as collegiality, group dynamics, court processes); personal factors such as judges' biases and interest in promotion and pay raise; institutional factors such political influences; technological advancement; and characteristics of litigants as factors that can affect judicial decisions. But it must be said that ethics will have a lot to do with the various factors identified by Barry and the studies just mentioned, because some psychological and personal factors such as making a decision on a hunch without much thought, making a decision to get a promotion or pay raise, and making a decision based on pre-existing knowledge or any other personal or public motivations, could be fundamentally unethical, especially if used to render lopsided abnormal justice.

And there are different models of judicial decision. Weiler (1968) discussed two models: the adjudication of disputes model- where judges limit themselves to merely settling private disputes, and the policy making model- where judges make policy choices as political actors indistinguishable from other political agencies of society. Segal et al (2012) discuss the legal model, and the policy making model which they refer to as the extra- legal model of judicial decisions making. And Parcelle et al (2012) examined the three models of judicial decision making: the attitudinal model- which is about the substantive preferences of the judge-the beliefs and values of the judge, the legal model-which is about considerations for structure of the law-about the dictates of the law, and the strategic model which is a combination of the attitudinal and legal models. The attitudinal model is a heuristic model of judicial decision making. Heuristics, models are the principal subject of this discussion. According to Gigerenzer & Gaissmaier (2011), heuristics are cognitive processes-conscious or unconscious, which ignore part of the information with the effect of reaching a faster and

accurate or efficient decision. Therefore, a discussion about ethics in judicial decision is also a discussion about the heuristic model of judicial decision making. Indeed, the key finding of a study by Hartman & McLaughlin (2018) is that, ethical problems are processed heuristically. In fact, speaking realistically, because law is an integral part of ethics, even the legal model of judicial decision making can be considered or interpreted as a heuristic model.

### iii. Significance of the judicial decision

All judicial decisions are important in that they set out-or should set out, the rights and responsibilities of the parties to end a dispute. The parties and the public will know what the law requires of them in the particular situation, and will be guided in their future actions. Stake (1991) distinguished between the status effects and incentive effects of judicial decisions. The status effect results from the resolution of the dispute and a definition of the rights and responsibilities of the parties, and the incentive effects are the changes the decision causes in the behaviour of persons who are not yet in the position of the parties, but could be in the position of the parties in the future, so that it serves as guide to future conduct.

The main reason why people go to court and seek a judicial decision is to get justice. The judge is expected to be impartial and independent, so it is assumed that justice will be served. The authority and force of the law is employed to get a desired result. People might not comply when they are required to by ordinary persons. However, if the matter goes to court, they will be compelled to comply because the decision of the court has the force of law and will be enforced. In a functioning judicial system[30], the winning party is certain that the judicial decision will be enforced in their favour, and the losing party will be discouraged or prevented from making the same or similar mistakes. Thus judicial decisions allow for certainty of justice while acting as deterrent.

Judicial decisions are reserved for judges. This means that, people cannot take the law into their own hands and determine their disputes for themselves. It would be chaotic if people are allowed to decide their own disputes themselves and apply the law themselves. Therefore, although litigation can be expensive and beyond the budgets of many, so that many are not privileged to directly benefit from them, and although judicial decisions can sometimes cause

[30] In some judicial systems (The Gambia, for example) enforcing judgments can be a challenge due to varying factors, including lack of resources, inefficiency, reticence of the Sheriff Division and law enforcement officials, and vague or missing judgments, excessive interlocutory applications, and delaying tactics of lawyers etc.

injustice and not live up to expectations, they can be impactful, and can play a great role in ensuring peace and stability.

Keck & Strother (2016) in their study about the impact of judicial decisions, emphasized the importance of judicial decisions not only in relation to their legal force and the degree to which they are complied with, but in their ability to alter politics, democracy and policy in the way they shape law and affect a vast number of people. However, as observed by Smejkalová (2020), not all judicial decisions are created equal. Some judicial decisions are deemed important because of their precedential value in establishing a legal rule or precedent for use in future cases. Under the common law system, the higher the court in the hierarchy of the court system, the more important the decision of the court, because the doctrine of precedent operates so that lower courts are obliged to follow the decisions of higher courts. The higher courts set precedent, and all courts are bound by the decision of the highest court which is normally the Supreme Court-even if the decision of that court is considered morally deficient.

Smejkalova (2020) further explains that the importance of a judicial decision is not tied solely to its precedential value, for it can be tied to how much the decision is mentioned in established text books; how often the decision is cited in other judgments; how much the decision is cited in respect of the subject matter or theme it covers; how much the decision is cited by other significant judgments; and how many important decisions are cited in the decision in supporting its position. But judicial decisions are also important because in a functioning justice system they are tied to ethics, guided by ethics, and set ethical standards of behaviour, and this is what makes them credible and valuable to society.

### iv. Judicial decisions and legal decisions

As Pound (1923) aptly put it:

> In a developed legal system when a judge decides a cause he seeks, first, to attain justice in the particular cause, and second to attain it in accordance with law-that is, on grounds and by process prescribed in or provided by law… The proceedings of our bar associations and the memoirs of our judges written by lawyers are full of proofs of the regard accorded by layman and lawyer alike to the strong judge who knew how to use the precepts of the law to advance justice in the concrete cause…whenever the exigencies of legal theory did not interfere with the expression of our real feeling, we honoured the magistrate who administered justice according to law (p.940)

Wasserstrom (1961), also recognized the judicial duty to apply the law, as much as he emphasized the need for justice despite the dictates of the law stating otherwise. And Dworkin's (1964) examination of Wassertsrom's search for the ideal judicial decision procedure with justice at the centre, started off by saying: "What, in general, is a good reason for decision by a court of law?...it has been asked in an amazing number of forms, of which classic 'What is Law?' is only the briefest…"(p.47).

Thus, while there is recognition that judges do not slavishly follow the law, there is equally a clear admission that judicial decision making fundamentally requires application of the law. The judge applies the law- makes a decision on the facts and the law as it applies to the facts. Which means that judicial decision making is also a legal decision making process, and so the distinction between judicial decision making and legal decision making can be blurred, and might mean one and the same thing as far as the judge is concerned. Lawyers are normally referred to as the legal decision makers, for their role is to give legal advice to their clients. But, they can simulate the judging role when giving legal advice, which means that they can make judicial decisions (albeit unofficially). And one can further deny any distinction between legal and judicial decision making in the sense that they both use the law which has ethics as its foundation, so that both require application of the law as well as application of ethics.

Reynold's (1993) discussion about the ethical foundations of constitutional order, demonstrates that the law applied in judicial decisions (which gains its validity and legitimacy from the constitution), derives from an ethical order. This ethical order according to Reynolds, is the legitimate human expectations regarding mutual human conduct, and the expectations stems from actual or constructive voluntary agreements of members of the community, which then serve as stipulated norms with legal authority to ensure compliance. Pre-empting objections by reference to instances where laws have been used to commit atrocities, Reynolds identified the following principles as constraints on law:

1. The law must function primarily to facilitate the pursuit of chosen goals
2. The law must be a result of negotiation that includes all members of the community
3. The law must be clear, unambiguous, and public
4. The laws must apply equally to all community members
5. There must be means of resolving all disputes about the application of the laws
6. Laws are not suspect merely because they work unforeseen injustice or injuries

7. The laws must be relatively stable and consistent
8. There must be established procedures for changing the laws which equally includes all community members
9. Laws must be general and not particular in their application
10. Laws cannot be applied retrospectively without compensation to those affected or their consent
11. Laws cannot offend the deepest moral beliefs of any part of the community
12. The community must allow the free emigration of persons
13. Rules must protect persons and property from individual or state aggression

For Reynolds, laws that do not meet all or most the above criteria will not be founded on convention (the normal), and so will not be agreed to by members of the community to have any force or authority for compliance by them. Reynolds thus suggests that, there is a relationship between law and ethics-that law is a reflection of the voluntary and agreed ethics of the society in which it subsists. But prior to Reynold's other philosophers such Dworkin (1961) & (1963) Finnis (2011) had already seen the connection between law and ethics, which is denied by Hart (1961), who believes that law is purely law separated from other factors such as ethics.

Gibbs (2001) in his study about ethics, explored the implicit responsibilities in various human relationships, paying particular attention to the signs that people give and receive as they relate to each other with particular focus on the responsibility each sign entails. And he is of the view that, ethics is not principally a matter of thinking about right or wrong and acting according to the dictates of reason. He argues that ethics is primarily concerned with the practice of responsibility- we are all called to action, so that ethics is concerned with attending to the questions of others and bearing responsibility for what others do. There is really no responsibility for the self, because the responsibility for the self is assigned by others and it is to be used for the others and not for the self because the self is a sign for the others. The self exists in a social dimension as a sign to respond to others and has a responsibility to respond to others in the appropriate manner by taking the right action or engaging the proper practices that the responsibility requires. And so for example, practicing the responsibilities of judging, the act of judging, rendering justice, reasoning, mediating, and making law, must be properly discharged, failing which the judge will be called to account. Gibbs' views will find support in Emmanuel Levinas' views about ethics, which will be examined in the next chapter.

# Exploring ethics

## i. Ethics as dynamics

Professor of Christian ethics Heimbach (2015), in his commentary about how the term "ethics" has evolved overtime, aptly expressed the evolving and incompatible nature of ethics thus:

> These days, the term 'ethics' is employed in a range of ways that is often confusing and can be totally incompatible. In part this occurs because people hold different views on moral authority, valuing and criticism. But there is another reason, and that is because many do in fact understand the meaning of the term less clearly than imagined since what 'ethics' means has changed over time. How one uses the term is much affected by what one reads, and those familiar with literature referring to 'ethics' from one age are influenced to think it means something different from those more influenced by literature referring to ethics from other ages. The linguistic reality is that the term 'ethics' is now employed to cver far more than when Aristotle wrote on 'ethics' to instruct his son Nicomachus, oe evn when William Wilberforce sought to reform what he called 'British manners.' And Chriatians know that while the Bible contains God's moral revelation, the biblical text uses phrases like 'paths of rigteousness' or 'ways of the LORD'-not the term 'ethics'… (n.p.).

And as noted by Elliott (1992), ordinary people pay little attention to ethical theories when they make ethical decisions, and are most often guided by their ethical beliefs derived from cultural factors, which can themselves change and evolve. Also, people can choose their ethics despite their cultural directions or dictates. People can choose which ethics they following depending on many other factors, such as their parents, friends, associates place of education, and place of residence.

It is widely believed that the term "ethics" stems for the Greek word etikos which stemmed from the Greek word ethos (character). Thus, Lilllie (2021) divides the history of European ethics into three periods: the Greek period-which is the first period, from around 500 BC, TO A.D. 500, the medieval period-the second period, from A.D. 500 TO A.D. 1500, and the modern period from A.D. 1500 onwards. He explained that:

> …In the Greek period the Greek city state formed the background of the morel life, and the man who performed his duties as a citizen was regarded as a good man. In the medieval period morality was dominated by the Church and, generally speaking, the good life was identified with the holy life or the religious life. In the modern period neither Church nor states are so important in the moral life, and morality is more concerned with the free individual and his rights and duties in relation to other free individuals…(p.102).

Regarding Greek ethics, Lillie explained that ethics developed from conscience:

> When an individual realizes that his conscience shows to him the rightness of some action which other people regard as wrong, his reflection, if at all thorough, is likely to lead him to the fundamental problem of ethics-what it is in an action that makes it right or wrong, or what is the standard or test by which we discriminate good and bad actions. While ethical reflection of this kind occurred in a vague way in many countries, it was in ancient Greece in the fifth century before Christ that European ethics really began…(pp.102-103).

In Greek ethics, ethics was part of politics-the good was the good man. With the spread of Christianity in medieval Europe, emphasis was given to the individual and the inner side of morality. As Lillie explained:

> …more attention was given to the inner aspect of morality; it was a man's inner motives that indicated his true spiritual state and fitted him for the life of heaven, which was the aspiration of every good man…The standard of right and wrong had been given finally beyond dispute in the revelation of God's law in the Bible as it was interpreted by the Church…All that was left for ethics to do was to deduce from the principles and illustrations provided by the Bible and the Church the particular application of these to individual cases…(pp.105-106)

With the rise of individualism and the emphasis on human freedom and human accomplishment in the fifteenth and sixteenth centuries, the Church lost authority leading to the development of modern ethics, so that:

> Individual men were no longer willing to accept the decision of the priest as the final word in moral matters. Many in religious circles tried to find in the words of the Bible itself the moral authority that had formerly been given to priest and Church, and …More reflective people… felt impelled to look for a standard of right and wrong that was intelligible and acceptable to their reason…(p.106)

There is also what Gyekye (2016) terms as African ethics, which he says are the "moral beliefs and suppositions of the people in sub-Saharan Africa, and the philosophical clarification and interpretations of those beliefs and suppositions" (n.p.). He explains that African ethics is founded on humanism, and it comes from a natural duty owed to others in the same community. This duty he says, is neither optional nor extraordinary, it is simply a natural duty emanating from a natural engrained sense of community. Thus, African ethics is duty based. Gyekye further explains that, African ethics is character based in that the quality of the individual's character determines whether or not they are ethical. Therefore, a person without ethics will be regarded as a person of bad character. It is thus clear that African ethics is influenced by or has some similarities with Greek- or more specifically Western ethics. Murove (2020) describes African ethics in three ways: first, as ancestral ethics in the sense that the existence of the present community and all that is regarded as ethical emanates from the ancestors. Second, as relational ethics based on the relationality of human beings-that

human beings are connected by virtue of the fact that they are human, and so must act in each other's interests. Thirdly, relationality is paramount in African ethics-there is nothing that is ethical if it does not concern human relationship. Again, from his description of African ethics, some similarities can be drawn with Western ethics.

Eastern ethics is represented by Indian Bhuddist ethics, Chinese Confucian ethics, and Chinese Taoist ethics (Zeuschner, 2001). Unlike Western ethics and African ethics, Eastern ethics is not imposed from the outside of a person, it is imposed from within the person, and tends to be a discipline such as training of the mind, and the belief that unethical behaviour leads to karmic results (will have a consequence and will be paid back). And Clarke (2012), in his study about judicial ethics in the Lebanese Sharia courts, makes it clear that Islam, like all other major religions, have ethical basis. Indeed, in The Gambia where the majority of the population is Muslim (Darboe, 2004); (Pew-Templeton Project, 2010)[31], ethics is very much related and integrated to the dictates of Islam.

Thus, ethics is present everywhere, and is dynamic, for it can be defined by geographical location, race, religion (or lack thereof, because atheists would justify their non-belief on ethical grounds[32]), and profession. So, there can be (and there are), many definitions of ethics. But, perhaps a good definition that captures the different meanings and descriptions attributed to ethics and the dynamism of ethics, is provided by Velasquez et al (1987), which is that: (a) ethics are developed from well-founded standards of right and wrong that prescribe what humans should do, usually in terms of rights, obligations, benefits to society, fairness, or specific virtues, and (b) ethics also refers to the studying and nurturing of one's ethical standards-the constant and continuous effort of examining and studying our moral beliefs and conduct, and our aims in ensuring that we and our institutions live up to standards that are reasonable and well grounded. However, as Singh (1998) reminds us, there are bound to be disagreements about ethics because there are bound to be conflicting points of view and conflicting principles about standards of right and wrong. What might be ethical to one person or society might not be ethical to another. Ethics might very well be an individualistic, group, or societal thing. And with the development of technology and society, ethical rules and definitions will continue to grow. This being the case, the concept of ethics, and the

[31] Pew-Templeton Project reported over ten years ago that 95.1% of the Gambian population was Muslim. The US State Department report (2019) increases the percentage to 95.7%. https://www.state.gov/reports/2019-report-on-international-religious-freedom/the-gambia/

[32] See Maitzen, S. (2013). Atheism and the basis of morality. In. A.W. Musschenga & Anton Van Harskamp (Eds.). *What makes us moral?* Springer. Pp. 257-268

definitions of ethics will remain dynamic and inexhaustible. Significantly, the applicability of ethics to any particular situation can be decided by the subject, and as long as the subject's choice of ethics is not twisted, it should be generally acceptable. In other words, ethics allows for the freedom of interpretation and application to do the right thing. Ethics should not be a totality unless perhaps if and when it is lopsided and of balance, and that may very well explain why it allows for infinity with its varying and continuous perceptions, definitions, and theories.

### ii. Theories of ethics

We have varying theories of ethics even if they generally (with exceptions[33]), share the goal of achieving the good. These varying theories include Consequentialist /Teleologist theories of ethics- represented mainly by the utilitarian theories of Greek philosopher Epicurus of Samos, English philosophers Jeremy Bentham, and John Stuart Mill. This theory dictates that the most ethical action is that which benefits the greatest number of people. It is objectionable mainly because it can require oppression of the minority, and can be vague in identifying benefits to cause injustice (Sinnott-Armstrong, 2021). The Non- Consequentialist /deontologist theory of ethics has duty as its foundation-and so it is commonly referred to as the duty- based theory of ethics. This theory is attributed to the German philosopher Immanuel Kant, who was the first to define deontological principles (Encyclopaedia Britannica, 2021). By this theory of ethics, being ethical is to discharge the duty imposed by the Categorical Imperatives –moral laws determined by society, which are universal and applicable to all of mankind. As pointed out by Thilly, (1918), this theory has been criticised by those who deny the universality and imperativeness of moral standards as claimed by Kant.

The Rights-based theory of ethics is normally associated with the British empiricist John Locke. It prescribes that the ethical act is that which is done based on the rights established by society and which all members of society are obliged to respect. An objection to rights – based theory of ethics is that, it relies on society to impose rights and duties, so that where no right is determined by society, one could be free to be unethical. Indeed, Simmonds (1992), while supporting Locke's views, pointed out that Locke had many critics who did not take

[33] There are indeed questionable ethics, see Freedman, J.(1973). The questionable ethics of defending the status quo. Psychiatric Services 24 (5), 344-345 Smith, S. (2006).Questionable ethics. *Army Sergeant Major Academy Fort Bliss Tx Fort Bliss United States*

him seriously because they find his explanation of natural rights inadequate. Virtue theory of ethics is associated with Aristotle and Plato (Hursthouse & Pettigrove, 2018). Aquinas, Hume and Nietzsche among others also discuss virtue ethics (Carr et al 2017). In this theory, the ethical person is the person who has ideal character traits which develop internally, before they are nurtured through practice and permanently ingrained as part of character. An obvious objection to this theory is that it seems oblivious to the evolving and changing nature of character-that character is not necessarily stable. And so Fossheim (2014) underscores that this theory faces problems of implementation because it does not relate to the realities of ethical betterment.

Although other theories or approaches may be fitted into the above theories, there are still constant efforts to name more theories or approaches to ethics, which tend to broaden the scope of ethical theories or principles. As a result, other approaches to ethics have been singled out. For example, there is the egoist approach, which is concerned wholly and solely with the self (Shaver, 2019); the common good approach, concerned with the general good in pursuance of common interests (Hussain, 2018); the divine command approach, which is concerned with the religious aspect-the command or will of God (Murphy, 2019); the feminist approach, which concerns the examination and possible correction of how gender functions within moral practices and beliefs to harm girls and women in particular (Norlock, 2019); and the justice approach, which concerns the equal treatment of all humans unless there exists a defensible reason (Velasquez et al, 2015). No doubt the list will keep growing to confirm the dynamism of ethics. Ethics does not allow a limit to answers and inquiries-it considers such limit unethical. Ethics encourages constant and continuous search for answers and inquiry in the pursuit of doing what is good and right-the truth as conceived by sound judgment. Indeed, Ricoeur (1976) pointed out that an assertion can always be contradicted by another assertion. He also noted that Plato said '… names must remain undecided because naming does not exhaust the power or the function of speaking' (p1). And Finnis (1983) explained that in doing ethics:

> …one does seek truth. What one would like to know, or at least to become clearer about, is the truth about the point, the good, the worth, of human action, i.e. of one's living so far as it is constituted and shaped by one's choices. And in ethics, in the full and proper sense identified by Aristotle, one chooses to seek the truth not only for 'its own sake', nor simply for the sake of becoming a person who knows the truth about the subject matter, but rather (and equally primarily) in order that one's choices, actions and whole way of life will be (and be known by oneself to be) good and worthwhile…

> Amongst one's choices is the choice to engage in the activity of pursuing this ethical quest…
>
> Furthermore: ethics, in its object, and the conditions under which that object can be attained, are properly part of the subject-matter of ethical inquiry and reflection. Ethics is genuinely reflexive. It can advance its understanding of the full human good by attending to the sort of good which leads one to engage in the pursuit of ethics. It can refute certain ethical or 'meta-ethical' claims by showing how they refute themselves; for it is explicitly aware of the intellectual commitments one makes by making rational claim at all…(pp4-5).

### iii. Some challenges to ethics

In his lecture on ethics, Wittengenstein (1929) certainly viewed ethics as a dynamic phenomenon depending on the context and the sense in which it is intended to be used. For Wittengenstein, because ethics (absolute values) are directed at predetermined goals, they cannot be absolute, and cannot apply to every circumstance-they are subjective, for they relate to a factual state of affairs which no longer exists, and they are nonsense because they cannot be adapted to the present facts which are different from the facts which gave rise to them. Thus, for Wittengenstein, no one ethical principle can be the fundamental one and a source or yardstick for all the rest. Because an ethical obligation arose in relation to something else that might no longer be, it does not provide us with a definite description of normativity, and so can only have meaning as a result of the particular circumstances in which it is applied. This makes ethics merely a tendency in the human mind-nothing concrete.

Cohen (1951) differs with Wittgenstein for he does not believe that ethics is something off in the clouds, nonsense and subjective. He said if ethics was any of those things then they would not be applied in actual concrete cases as they are being done. But Wittgenstein's views might partly be supported by Singer (2011), who argues that the notion of living according to a set of ethical standards is inextricably tied up to the notion of defending one's way of living- giving reasons for one's way of living and justifying it. Although Singer believes that our decisions about ethics should be well informed by thorough investigations, unlike Wittengentein, he does not believe that the argument for ethics is nonsense. He believes that ethics is not subjective or relative to the society one lives, and he also believes that the whole purpose of ethical judgment is to guide action. He also emphasized that contrary to wide

spread belief, ethics is not only about a set of prohibitions restricting sexual activities and choices, and is not based on religion alone.

Whereas Singer is adamant that we should be more ethical,[34] Rotunda (2005) advises against being overly ethical. He argues that too many ethical rules can invite abuse as well as demean the seriousness of the charge of being unethical. But as stated, there are ethical rules guiding most professions and organizations these days, and this can only mean that there is a genuine and broad demand for ethical standards. And in the case of judges, one can safely say that they are created, sustained and disposed of by ethics (the constitution which was created from the values of the people they serve), and so the decisions they make must be ethical- meaning they must not be lopsided or off-centre. But, as Johnson (1993) underscored, some of us have inadequate sense of ethics, and hence the need in such cases, to invoke the moral imagination to augment our ethics to sound standards. And it should not be hard to invoke the moral imagination, invoking the moral imagination should be natural, automatic, and unpremeditated- almost magically[35], may be just as the way Shakespeare describes the quality of mercy as not strained but mighty and very powerful[36]. And this explains why I believe the principles and standards of Levinas' ethics can be helpful.

[34] Singer advocates for ethical treatment of the environment and none humans, he even insists that there must be a cross species comparison to appreciate the wrongs done to none humans

[35] Perhaps magic as unpredictable but as empowering, as powerfully inspiring, and motivating as the magic described in the poem "It's the magic that makes me fall in love with you" *Amore che illumine*, *https://wwww.amorecheillumina.com/poesie.php*, which I believe (but stand to be corrected), might be the same type of magic described in the title of Fava, S. (2017). *innamorare magicamente*. Unigester

[36] Shakespeare, W.(1889). *The merchant of Venice*. SterlingPublishers Pvt. Ltd.

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# Chapter 3

## The Ethics of Emmanuel Lévinas

The ethics of Emmanuel Lévinas can be traced in most of his works, but for the purposes of the present study, the concern is mainly on his ethics as put forward in what is described as his first major work: *Totality and infinity:an essay on exteriority*[37](Peperzak et al, 1996), which Mensch (2015) describes as a master piece, and which is developed further in its follow up or sequel: *Otherwise than being*[38]. Tomasello (2014) emphasizes that, for Lévinas, the call for justice gives birth to, and is the origin of philosophy. The suggestion then, is that the Lévinasian concept of justice (which is also his concept of ethics) is, or should be relevant in any philosophical inquiry. If this is the case, then Lévinasian ethics is doubly relevant in the present inquiry, which is indeed a philosophical inquiry on the one hand, and an inquiry about justice on the other.

Because Lévinas' ethics concerns a responsive construction which moves from individualism to responsive attentiveness to and regard for others, it is similar to the ethics of Martin Buber[39] (Arnette, 2004). However, because Buber does not recognise Lévinas' concept of non- reciprocity and infinite responsibility for others, that is where the basic similarities between the two will end. For Lévinas, God the infinite, the unreachable, and the transcendent, is the source of all ethics, which is demonstrated in a one-to one relationship, which is unlike Kant[40], who believes ethics emanates from the subject's freedom and according to a priori perceived universal self-given sense of morality developed from reason and as part of society: it is not imposed on the human mind from the outside, it is formed through a priori attribute of the human mind directed at moral commands that are self-imposed. For Kant, freedom precedes any responsibility on the subject, and the subject's responsibility is defined and limited by categorization. The opposite is true for Lévinas. For Lévinas, ethics being from a transcendent source (God), is a concern or responsibility for the Other by the ethical subject (an independent separated self), and it is pre-thematic, pre-conceptual and pre-intentional, it is concern by the separated self for the Other-an original creature, who appears as a unique face that cannot be comprehended or categorised. This

[37] 1969. Duquesne University Press
[38] 1999. Duquesne University Press
[39] Buber, M. (1965). Between man and man. New York: Macmillan
[40] Kant, I. (2008). *Critique of Pure Reason.* Cosimo Classics: New York

happens in an original encounter before the separated self can exercise the choice to be concerned for the Other (Fagge, 2011). The responsibility for the Other is imposed on the separated self by the very fact that the separated self is a human being encountering another human being-the Other, and the fact that the encounter cannot be avoided (Sunshine, 2019). This responsibility for the other does not arise as a result of any rational thought from the self, instead, it is the foundation of the Self's subjectivity. Therefore, responsibility precedes freedom and reason, and it is through this concern and responsibility for the Other, that the separated self- the ethical subject, finds God. What drives the ethical subject towards concern and responsibility for the Other is a transcendent desire for God, and though the desire can never be fulfilled, it deepens as it grows and so can never be satisfied. Lévinas believes this insatiable desire can be explained because there is always a desire in humans that goes beyond what they can reach, and that desire is commanded by its object-God.

God is not visible in the process of the face to face encounter, but the trace of God can be seen in the face of the Other who the ethical subject encounters in an epiphany. In the epiphany, the face with its vulnerability destitution, and suffering, moves the subject to respond-the very presence of the Other moves the subject to respond, and moves the subject to such an extent that there is no limit to how far the subject will go to respond to it. The subject does not know the face, and there is no need to know the face, because if the subject gets to know the face, then the can no longer be blindly and infinitely responsible to it. The ethical subject is bound by the transcendent infinite command from God to be concerned and responsible for the Other more than they do for themselves: asymmetrically and infinitely concerned and responsible for the Other who remains another and a mystery. Alterity and asymmetry marks this relationship, and it is noted that the alterity aspect of Lévinas' conception of the Other is an intentional move away from Husserl's[41] concept of the alter ego, which is that the Other is another human being like the ethical subject or the alter ego of the ethical subject-not another or marked by otherness as such (Friedman, 2014).

Lévinas' ethical command to the ethical subject is received in total passivity because it is a constitutive part of the ethical subject anyway, and the extent of the response to the command determines the degree to which the ethical subject has subjectivity (Fagge, 2011). The ethical subject communicates with the Other in an open welcoming language, the 'saying', and avoids speaking in static, objectifying, categorical language the 'said', which connotes

[41] Husserl, E. (1991). *An introduction to phenomenology*. Translated by Dorion Carnes. Boston: Kluwer Academic Publishers

knowing the Other and is therefore totalising. The idea is to keep the 'said' open and evolving by constantly referring to the 'saying' so as not to totalise the Other while we are being responsible. The said is inevitable and triggers the saying, but it must be constantly evolving to respond to the uniqueness and otherness of the Other. After the initial one-to one relationship, the responsibility of the ethical subject to Others must also be considered since the ethical subject we lives with many others. Therefore, the ethical subject will have to balance his responsibility between the Other and many others in the world the 'third'. For Lévinas, it is at this stage (when the 'third' enters the picture, that justice will inevitably be exercised through institutions-and not limitlessly and asymmetrically (anarchically). However, during this time, the institutions must still be guided by the original responsibility of the ethical subject, so that justice for everyone must always be guided by the desire, drive, compassion, and mercy of the initial one-to-one relationship with the Other even if it is now subject to certain restrictions (Sunshine, 2019).

Now, Lévinas' ethics may sound too surreal. But, Lévinas was aware that this is not what operates in real life-that in real life the other is categorised, and there is a limit to how far one is obliged to be responsible for them, and hence the reason why he suggested ethics as first philosophy-preceding any aspect of the totalising reality of the world. Therefore, his ethics was a reflection of his aspirations-his hopes for real life-it is not a representation of how things actually are, it is a desire of how things can be-that we and our all our institutions, must always temper our actions with responsibility, compassion, and mercy bearing in mind the uniqueness of the other person. Sunshine (2019), suggests that Lévinas uses messianic hope as a strategy to propose his ethics, that Lévinas "wants to consider the meaning of something that cannot appear at all, namely, the infinite… by abandoning all the presuppositions of sociality and then examining an original social encounter" (pp.17-18). Lévinas is understood as specifically using messianism to create a new kind of humanism, hoping for a world without war and mass murder, for a better world with less suffering, and an end to a succession of horribleness (Sunshine, 2019). Although Lévinas' aspiration might be considered impossible or unrealistic, it is a noble one, and it inspires us to have our own ethical aspirations. Like his ethical subject, his ethics leaves us with an insatiable ethical desire, which then drives us to view his ethics and all ethics as dynamic, without borders, and with attributes that are relatable and can be put to practical use-including in judicial decision. Indeed, Hughes (1993) tells us that, Lévinas' ethics commands our response, for it requires a

radical thinking about justice, goodness, and truth among other things, and challenges the reader to develop the necessary ethical responsibility towards others.

However, being Lévinasian ethics is not a strict representation of reality, it requires engaging some moral imagination and interpretation to envisage its use in real life situations. Significantly, and perhaps of primary importance, one must have a developed consciousness and conscience to be open to it, be curious about it, be attracted to it, and be able to relate to it. Otherwise, its spirit, and essence cannot be effectively captured to be recognised in real life situations, or to be envisaged as viable for guidance in real life situations.

### i. The allure and relatability of Lévinasian ethics

Since Lévinas contends that ethics is first philosophy-by which he means that the relationship with the Other precedes ontology[42], that responsibility for the Other was embedded in us long before consciousness (Sulfiah & Mendrofa, 2019); that all positions and systems are preceded by the existing individual and his ethical choice and generosity to welcome a stranger by speaking to the stranger[43]; that all positions and systems are dependent on a precedent ethics (Dahnke, 2001 ); and that without the initial hospitality and openness to the Other-the destitute stranger (a fellow human being), neither language, society, or philosophy would have come about (Manderson, 2006), he takes a radical position, which means that he invites curiosity-he draws every human being, and indeed anyone studying ethics or philosophy to his notion of ethics. The normal view as was proposed by Heidegger[44] (Lévinas' one time teacher and mentor), gives priority to ontology, and asserts that the problem of ethics can only be dealt with in relation to thinking that brings the truth of Being: that Being precedes ethical responsibility. For Heidegger, the problem with ethics is secondary to the need to disclose the meaning of Being as such (Hughes, 1993). The radical, curious, and inviting nature of Lévinas' description of ethics as first philosophy (or first principle[45]) can be discerned in Morgan's (2011) explanation about its meaning:

[42] *Time and infinity* P.48
[43] *Time and infinity* P.14
[44] See Reid, J.D. (2019). *Heidegger's moral ontology*. Cambridge University Press
[45] As Dahnke, M.D. (2001) also describes it

> …One thing that it means is that philosophy is indeed systematic, in the sense that what it points toward is a study of what is fundamental, that upon which everything else depends…
>
> Philosophy discusses all aspects of the human condition, but in so doing there is a philosophical disclosure of the most fundamental things because human existence does have a foundation. In human existence there is something that comes first, so to speak, and for Lévinas that something is ethics…
>
> [it] seems to suggest that at the bottom of any account of human existence lie these matters-about right and wrong, good and bad, just and harmful. We are not fundamentally beings that are rational or beings that have certain desires or emotions or that are systems of physical processes or bundles of atoms and subatomic particles. Rather, we are fundamentally ethical beings…
>
> It says that ethics is first or prima, and part of what this means is that ethics is not grounded in anything that is more primary than it. It is not grounded in something else. This means either that it is not grounded at all or that it is self- grounded. On my reading, Lévinas clearly advocates the later (pp4-5).

Apart from drawing us to the philosophy of ethics and keeping ethics relevant, Lévinas' ethics also speaks to everyone (indeed many of us) who at one time or another has felt dehumanised, devalued, oppressed and totalized, especially for being different or otherwise. And it speaks to anyone who is a potential victim of those things. This means that everyone is a potential victim, even judges. After all, judges are human beings first and foremost. It speaks to everyone who has been ignored, rejected, and disrespected because they look different. Hand (2009) describes Lévinas as "a diligent if hardly famous teacher and administrator' a university professor whose career began very late; and an observant Jew who for most of his life had little recognition or status within the official Jewish community of France…whose major works could be linguistically and intellectually tortuous, he suffered often from the insinuation that it was others who had really developed and popularised these radical ideas…" (p.1). This makes it clear that Lévinas was personally affected by and concerned about rejection of the Other-that Lévinas was affected by psychological violence caused by rejection of the Other's otherness.

The need to be recognised as human-as a valuable human being, to be accepted, to have the freedom to be oneself, and to be able to enjoy basic human rights without fear of persecution and oppression despite being "different", is at the very heart of Lévinas' ethics. Lévinas was certainly an Other. He was part of an ethnic minority (a Jew) in Europe, considered by the Nazis as a different (but feared) race, inferior to the "Aryan" race- a mythical race claimed to be superior to all races[46]. Those who write about Lévinas, underscore how he was traumatised

[46] According to the *Holocaust Encyclopaedia*, the Nazis peddled the false notion that the German people were members of the 'Aryan race'- a superior race, while denigrating Jews, Backs, and Roma people as inferior 'non Aryans' https://encyclopaedia.ushmm.org.org/

by horrific atrocities he witnessed and suffered under Nazi Germany, and how that might have triggered his imagination to challenge the status quo of complacence that allows such horrific atrocities to take place. Morgan (2011) explained that Lévinas' memories of horrific Nazi atrocities and their aftermath, and many years of trying to cope with such memories marked his thinking. He noted that the rise of National Socialism which lasted twelve years, caused Lévinas to lose several members of his family in death camps, that Lévinas' wife and children escaped death only because they could find refuge in a monastery in France, and that Lévinas was a prisoner of war for about five years. In fact, Lévinas himself explained[47] how during that time as a prisoner of war in Nazi Germany, he and his fellow Jewish prisoners felt "stripped" of their "human skin", felt like "subhuman, a gang of apes" felt like "no longer part of the world", and felt condemned to being 'signifiers without a signified'. Lévinas explained that it was thanks to a dog they named Bobby, who showed interest in them that they were able to feel human.

Certainly, all right thinking human beings can appreciate such suffering, and will want to avoid such suffering for themselves and for their fellow human beings. Ethnic minorities and the marginalised everywhere, will understand where Lévinas is coming from. And of course, members of the minority or marginalised community can target members of the majority population through acts of terrorism as we see nowadays all over the world. Thus Morgan (2007) explained that each of us "primordially is a target of all human suffering and all human need. That is what is primary for each of us, what each of us is, first and foremost. We are responsible infinitely and boundlessly…" (p.421).

For Lévinas, the unidentifiable and untouchable face of the other suddenly appears or comes up like an epiphany, and summons us to infinite nonreciprocal responsibility, and holds us hostage infinitely. Morgan (2007) explained the meaning behind the epiphany of the face as follows:

> … As we live, then, we do not begin as selfish magnets; rather, we begin as unlimited selflessness and proceed, as we must, to compromise that selflessness, that hostageship. Each of us, like Leibniz's individual substances or monads, mirrors or expresses the world, but whereas for Leibniz that expression is representational and appetitive, for Lévinas it is responsible and responsive. If this is so however, then at every instant, for every I-Other relationship, I am summoned or called to respond by the face of the infinite others, each one destitute, suffering, in need, and in pain. Hence, whatever pain

[47] In *Difficult Freedom* (1990). Athone Press. (Translated by Hand, S.). pp. 151-153

> or suffering there is in the world is a reason for me and for everyone to respond-to reach out, to be generous and just, to give to each and every other person from what I have (p.421)..

The fact that Lévinas' ethics is relatable, is further demonstrated by the fact that his fundamental ethical message in the encounter with the face of the Other, is being used to guide essential questions about democracy, secularism, state security, asylum rights, religion rationalism, has been used and appropriated in debates about Zionism, post 9/11 political strategy, and extremism (Hand, 2009). And "…most if not all fields of ethical debate have been renewed and tested in recent years by referencing to Lévinas (Hand, 2009, p.3). Thus, we are not duped by Lévinasian ethics-it can be broadly applicable infinitum, and hence it can apply to judges and judicial decisions. Perpich (2008) suggests that as long as we are clear about our reasons for finding normativity in Lévinas' ethics, then Lévinas' ethics can be used for normative purposes such as environmental rights, women's right, and rights of disadvantaged social groups, doctor/ patient relationships, and teacher/ student relationship. Indeed, Joldersma (2002) and Strhan, (2012 explore Lévinas' ethics in the field of teaching; Yost (2011) puts forward a Lévinasian argument for the abolition of capital punishment; Nuyen (2000) engaged Lévinasian ethics in the euthanasia debate and questions whether one can be responsible to the extent of killing another to hasten death. There are also some feminist interpretations of Emmanuel Lévinas (Chanter, 2011), and de Villiers (2020) argues for Lévinasian ethics to be applied in the treatment of animals, and Edelglass et al (2012) argues for Lévinasian ethics to be accessible in environmental issues. The signal is that, Lévinas' ethics can be used for normative ends in any kind of relationship-including lawyer/client relationship, and judge/ litigant relationship, and that the questions about its practicability can be overcome by focusing on its spirit and intent for goodness: to ceaselessly strive for goodness.

Of course, not everyone will want to or will be able to ceaselessly strive for goodness. This can be a challenge for Lévinasian ethics. However, for Lévinas, being ethical fundamentally means caring beyond the self: to be unselfish without limit. Therefore, it could be said that, Lévinasian ethics will only be a challenge for those who don't have the same ethical disposition or hold the same ethical principles that Lévinas was speaking to. Farley (2004) in engaging the works of Lévinas to questions of community and learning, points out that in his

essay about suffering[48] Lévinas explains that suffering and the capacity to suffer is part of the constitution of his ethical subject, " … the suffering of suffering, the suffering for the useless suffering of the other, the just suffering in me for the unjustifiable suffering of the other, opens suffering to the ethical perspective of the inter-human…(Farley, 2004, p.326; Lévinas, 1988, p.94). Suffering, and being prepared to suffer by attending to the useless and avoidable suffering of others is what makes us ethical. Suffering on behalf of the Other is meaningful and not unjust in the face of the useless avoidable suffering of the Other-suffering on behalf of another who should not suffer, is meaningful and not unjustified. This being the case, Lévinas' ethics is really for the brave-it involves having the capacity to bear the weight of the vulnerability and suffering of the Other. The ethical subject according to Lévinas, appears oblivious to their own suffering, and bears their own suffering effortlessly in the face of useless suffering by the Other. What matters in suffering, is not the capacity to understand it or to explain it, but the capacity to bear it in a manner as if not being borne (Farley, 2004). Indeed, apart from the suffering of the ethical subject being helpful in alleviating the immediate needs of the Other, the witnessing by the ethical subject of the wrong done to the Other, can attract wider attention to the wrong done to the Other, and such wider attention can generate wider efforts for better responses to avoid recurrence of the wrong done to the Other. The suffering of the ethical subject can therefore yield positive results to save and benefit many potential victims (Farley, 2004). Indeed, it has already been explained that judicial decisions guide future actions, and so this explanation by Farley demonstrates that judicial decisions guided by Lévinasian ethics can also guide future actions and serve as deterrence.

### ii. Lévinas' ethics is open to interpretation

Strahn (2012) reports that Robert Bernasconi (the acclaimed Lévinas reader), is of the view that Lévinas' work can be read empirically, transcendentally, or otherwise. Meaning that, Lévinas' work can be read in various ways. Balkin (1994) advised that a "stance of openness and interpretive charity is actually essential to the process of understanding" (p.1165). as a matter of fact, Lévinas was opposed to monism, and was passionate about the idea of openness and infinity. Therefore, his philosophy of ethics will undoubtedly welcome interpretation and reinterpretation-even endless interpretation. His mentee Derrida (1999),

[48] *Useless suffering* (1998), also in Kremer, S.L. (2003). *Holocaust Literature: Lerner to Zychlinsky, index*. Routledge

reminds us that he left us with "an immense treatise of *hospitality*", and total rejection of thematization and objectification. (p.21). Derrida notes that as much as Lévinas' work in *Totality and Infinity* is marked by sameness-return and repetition like waves on the beach, "each return infinitely renews and enriches itself"[49]Lévinas himself understood that his work is open for interpretation and reinterpretation. At the concluding stage of the preface in *Totality and Infinity*, he made the following caveat:

> The word by way of preface which seeks to break through the screen stretched between the author and the reader by the book itself does not give itself out as a word of honor. But it belongs to the very essence of language, which consists in continually undoing its phrase by the foreword or exegesis, in unsaying the said, in attempting to restate without ceremonies what has already been ill understood in the inevitable ceremonial in which the said delights (p.30)[50]

Lévinas also noted that his notion of the face "opens other perspectives" and can be interpreted to mean other events not completed by him and independent of his "initiative and power" (p.51). For Lévinas, responsibility connotes substituting myself for the Other to overcome the tragedy of being, which suggests some kind of evolution and perpetuation-of fecundity. Cohen (2014) addressed the role of fecundity in Lévinas' *Time and Infinity* and *Otherwise than being*, and proposed that the Otherwise than being signifies the child of the being- the otherwise of the being who is also able to thrive and reproduce and has characteristics of infinitude. Ketcham (2017) citing Critchley (2015), also observed fecundity in Lévinas' *Otherwise than being*, but because he recognised the mortality and potential death of the child of the Otherwise than being, he preferred to use the idea of fecundity toward deathless and perpetual existence as in Buddhist philosophy. Davidson & Perpich (2012) aptly capture the versatile nature of Lévinas' ethics when they observed how it has been presented in various forms: as metaphysical treatise, as a book on the primacy of ethics over ontology; on ethics as first philosophy and on the Other; as critique of intentionality; as defence of subjectivity; and an essay on hospitality. They emphasize that Lévinas' works "read like layered and interlinear versions of a single text", and calls for a fundamental broadening of philosophy's perspective (p.105).

[49] Derrida, J, (2001). Writing and difference (Bass, A. Transl.) p. 398n7, London and New York: Routledge/L'écriture et la difference 1967. P. 124nl
[50] *Totality and infinity*

Bergo (2019) explains that Lévinas' ethical philosophy was developed by describing and interpreting the event of encountering another person. Thus it is a philosophy that relies on interpretive method. Lévinas' ethics was inspired by, and stemmed from an interpretation or a reinterpretation of the opposite of the hatred, evil, and totalitarianism he experienced during Nazi Germany. Therefore, it will not be wrong to engage some interpretation towards his work: to interpret his work for goodness-for optimum ethical standards in any field.

Ricoeur (1981) observed the method of interpretation as an arc starting from an initial encounter and understanding, to a broader understanding of the interpreter and the world as imagined for ourselves (Pellauer & Dauenhauer, 2021). By this theory, while spoken word might disappear, a written text remains, but has a life separate from its author and original audience, and remains for anyone who knows how to read the language in which it is contained, to read it and interpret it. Therefore, written text is always an object to be analysed. This being the case, the meaning of the text rather than the author's intention or the situation which prompted its writing becomes the object of interpretation by the interpreter.

In Ricoeur's (1981) theory, there are three stages in the interpretive process: at the initial stage, reading by the interpreter might not yield much- the meaning of the words in the text moves from literal to figurative, and connections to an imagined world are created. Images are formed in response to the content of the text. At this stage, the reader merely has a naïve understanding of the text. However, at the second stage, a deeper reading of the text allows the reader to make more sense of the text so that they now have an objective explanation or deeper understanding which allows them to re-describe the world of the text for themselves as imagined by them. The last stage is the appropriation stage, where, following the deeper reading and understanding of the text at the second stage, the reader now becomes part of the imagined world of the text and develops a new self-understanding from the text. The reader sees themself as part of the imagined world they establish from the text, and see their potential within that imagined world, which then inspires them to change from the possible to the actual-meaning they want to see the imagined world in practice.

As explained by Pellauer & Dauenhauer (2021), any interpretation of a form of discourse requires both the objective sort of analysis and an acknowledgement that there is always a surplus meaning that goes beyond what such objective techniques seek to explain. And of course, the interpreter's interpretation of the text can, and will inevitably be challenged by other interpretations which seek to understand the same text (Thompson, 1981). This means

that the same text can be the subject of a variety of interpretations and meanings. Thus, as also explained by Pellauer & Dauenhauer (2021), any interpretation of a form of discourse requires both the objective sort of analysis and an acknowledgement that there is always a surplus meaning that goes beyond what such objective techniques seek to explain. It is also pertinent to note that Ricoeur's discourse about ethics starts from person to person relationships, marked by soliciting the friendship of the other person, befriending the other person, and then to question of justice and living with others who are not familiar to us or whose face we have never seen, at which stage questions about the rights and respect for the faceless other arises (Pellauer & Dauenhauer, 2021). This will appear to suggest some similarities between Ricoeur's ethics and Lévinas' ethics.

What Ricoeur (1981) tells us is that, although a person's experience as experienced cannot be transferred to another, the meaning of a person's experience can be transferred and interpreted, so that anyone can make sense and meaning out of it. This being the case, anyone can interpret and make sense and meaning out of Lévinas' ethics, but perhaps with a caveat that, the sense and meaning made out of Lévinas' ethics will be totally off course if they go against the fundamental spirit of Lévinas' ethics, which is about being open to helping others irrespective who or what they are: about humanising, respecting, and recognising others without compromising their freedom and individuality. Lévinas' ethics does not exclude any culture, race, belief, or profession. And it has no geographical boundary, and not limited to just one way of seeing things, he characterises ethics as optics of the good (Divine), meaning that it encompasses diverse views about the best way to be ethical- diverse views about how to be good to our fellow human beings in any sphere of life. By merely describing ethics as optics, Lévinas confirms the fluid and dynamic nature of his ethics and indeed all ethics.

Certainly, Lévinas recognises that there are diverse good paths to being ethical, for he argues that goodness "consists in going where no clarifying –that is, panoramic-thought precedes, in going without knowing where. An absolute adventure, in a primal imprudence, goodness is transcendence itself"[51]. It is this imprudent adventure of a goodness without certainties that is the hallmark of Lévinasian ethics (Perpich, 2008). Moreover, Ansorge (2020) made it clear that the reality is that for "human beings, reality is inevitably a matter of perception and interpretation"[52]. The acclaimed Nigerian author Chimamanda Ngozie Adiche (2009)[53],

[51] *Totality and infinity*, p. 305
[52] P.136
[53] https://www.ted.com/talks/chimamanda_adichie_the-danger_of_a_single_stor...

warns us about the danger of holding on to a single vision, perception, or story about anything. She believes that because there is never a single story about any person, place, or thing, there is danger in having a single vision, perception, or story, that a single story can lead us to make wrong assumptions and to reach unjustified conclusions about any person, place or thing. Adiche (2009) believes that we must be open to a multitude of perspectives if we are to be fair to others- if we are to humanize and dignify others. Lévinas will agree with her, because as stated, his ethics cuts across cultures, race and nationality. His ethics is about opening up to the Other without preconceptions and without knowing.

The law certainly does not cover every situation, and in such cases Lévinas' ethics can be very useful. For example, in The Gambia, we have section 5 (4) of the Law of England Application Act Cap 5:01 Laws of The Gambia[54] (which retains several pre- colonial laws)[55], and it provides that "In cases where no express rule is applicable to any matter in controversy, the court shall be governed by the principles of justice, equity and good conscience." Such a provision certainly leaves room for judicial decisions to be informed by Levin's ethics. Indeed, good conscience and justice are at the very heart of Lévinas' ethics if we understand it properly. Why would Lévinas want us to be responsive to and responsible for the destitute Other who needs our help if not for the purpose of giving the Other a fair chance to survive in life like everyone else: if not to give the Other justice that accords with good conscience?

Indeed, as highlighted by Critchley (2015), Lévinas avoids finitude by invoking the idea of infinity. And Lévinas himself in so many words, made it clear that his idea of philosophy has less to do with absolutism and certainty and more to do with interpretation. For Lévinas, philosophy is a call beyond the philosopher to others for their critique and interpretation of the philosopher's ideas. If philosophizing is about absolute assurance, then the philosopher will have to engage in a perpetual act of recreating the same thing over and over again, and so nothing new is created, there is no development and there is one side to the argument. As he put it: the philosopher "will have to efface the trace of his own footsteps and unendingly efface the traces of the effacing traces, in an interminable methodological movement staying where it is" (p.20)[56]. Lévinas thus suggests that philosophy be viewed as a drama, which can be interpreted over and over again by dramatists and actors to evoke varying interpretations

[54] *Laws of The Gambia* (1990). Volume 1
[55] Under section 3 of this Act, all laws in force in England at 1888 will continue to be in force in the Gambia unless there is a local Act to the contrary covering the particular situation
[56] *Otherwise than being*

and emotions from audiences. This means that the Philosopher's ideas should grow and evolve in perpetuity, rather than be fixed and unexplored:

> …Philosophy thus arouses a drama between philosophers and an intersubjective movement which does not resemble the dialogue of teamworkers in science, nor even the Platonic dialogue which is the reminiscence of a drama rather than the drama itself. It is sketched out in a different structure; empirically it is realized as the history of philosophy in which new interlocutors always enter who have to restate, but in which the former ones take up the floor to answer in the interpretations they arouse, and in which nonetheless, despite this lack of 'certainty in one's movements' or because of it, no one is allowed a relaxation of attention or a lack of strictness ( p.20)[57]

And Critchley (2015) urges us not to view Lévinas' philosophy in the usual way, but as a drama beyond finitude so that we can make sense of it individually and collectively. And Critchley (2015) agrees with Lévinas' contention that one cannot comprehend philosophy without knowing how to use it. Therefore, to know ethics or the philosophy of ethics, is to know how to use it and make sense of it in real life situations. And any suggestion that Lévinas is dramatic in his writing (which he is, in the scene he sets and in the words he uses, for example, the seemingly utopian world he creates for the Other who holds the subject a perpetually a hostage; giving us a face which is not really a face or an image and cannot be defined; using language not as a form of speech but as ethical address[58]; using extreme words such as 'Thou shalt not kill'[59] instead of merely saying thou shall not do me any wrong, and also using words like 'alterity' and 'height' to describe the Other ), will also suggest that he intends his philosophy of ethics to be interpreted, dramatized, and adapted in real life. Morgan (2011) also notes the drama in Lévinas' ethics when he said that Lévinas appears to be speaking in the narrative –like narrating a philosophical story or a fable.

In fact, the argument by de Villiers (2020) is that, because the face of the Other cannot be defined and totalized, it can mean anyone or anything, and so would not even be limited to human beings. Lévinas indeed explained that the face cannot be contained, encompassed, seen, touched[60]. Also, de Villiers (2020) argues that, because Lévinas' ethics shifts from the traditional philosophy of dealing with something within to dealing with something in the outside-the Other, who is not defined in any totalizing way, it invites interpretation of the Other. Indeed, the fact that the face of the Other is not visible or describable, and is to be seen

[57] *Otherwise than being*
[58] Per de Villiers (2020), p.8
[59] In *Totality and infinity* (p.99)
[60] *Totality and infinity* (p.194)

as an event-a happening, rather than a physical entity, is another indication that Lévinas' ethics is open for interpretation and application beyond situations he specifically contemplated. Apart from what Lévinas makes clear to us about the infinite nature of his ethics, Morgan (2011) advised that reading Lévinas also requires that we are careful and bold at the same time: "careful enough to follow his lines of reasoning and bold enough to imaginatively leap beyond them when he seems to want us to do so" (p.15).

It is also significant to note, that Lévinas in developing his ethics, was influenced by his experience from diverse disciplines. Hand (2009) among many others[61], inform us that Lévinas' ideas about ethics and ethical behaviour comes from his interdisciplinary studies of advanced philosophical cross-examination; the broad cultural practice of exegesis represented by study of the Talmud; critical appreciation of literature and the visual arts; the historical and ethical experience of the Shoah; and his uncompromising stance on political and geopolitical post war developments, which is yet another indication that Lévinas' ethics cannot be static, and must be dynamic and infinite in its interpretation and application. This being the case, de Villiers (2020) extended or applied it to animal rights, and suggested that it can be applied in claiming minority rights or generally rights of the marginalised- including women's rights, even though he notes that, Lévinas has been criticised for not recognising women by not using gender neutral language in his discourse about ethics, and by portraying women as "sexed beings that are determined and differentiated in relation to man" (p.2) .

Being Lévinas' opposition to totality, he would oppose any attempts to limit or totalize his ethics to any particular persons or circumstance. He would emphasize that his ethics is broad, limitless, dynamic, and adaptable to various circumstances- a world of wonder. Derrida (1999) underscores that Lévinas' work cannot be measured in a few words, and "…is so large that one can no longer glimpse its edges"(p.3). Davidson & Perpich (2012) describe Lévinas' work as a work on, of, and by wonder"(p.11). Thus, Lévinas' ethics can be interpreted and extended to judicial decisions,

Lévinas' ethics might not sound too familiar. Indeed, Morgan (2011) says Lévinas sounds extraordinarily demanding, daunting, possibly even incoherent and oppressive with his godly portrayal of the Other. However, his ethics is something yearned for by many (including judges) who wish to be better human beings. The standards are so high that we cannot be complacent, and that is a good thing if ethical standards are to remain high.

[61] Critchely, S. (2015) and Morgan, M.L. (2011) included

### iii. The moral imagination can be invoked

Through imagination, we go beyond ourselves and move towards imagined ideals that improve the quality of experience for us individually and for our communities. We are able to create alternative perspectives and to explore the implications of those alternative perspectives in practice for our wellbeing and the wellbeing of our community (Johnson, 1993). Imagination was certainly a driving force for Lévinas. The transcendent faceless Other that nonetheless still presents a "face" that "comes from a dimension of height"[62], who we are infinitely obliged to without any reciprocity, will sound fanciful to many. Indeed, as mentioned earlier, Buber's idea of ethics is not based on intersubjectivity or asymmetrical responsibility for the Other, it is based on reciprocity. Buber[63] explains the reason for reciprocity thus:

> The 'asymmetry' is only one of the possibilities of the I-Thou relation, nor its rule, just as mutuality in all its gradations cannot be regarded as the rule. Understood in utter seriousness, the asymmetry that wishes to limit the relation to the relationship to a higher would make it completely one sided: love would either be unreciprocated by its nature, or each of the two lovers must miss the reality of the other.
>
> Even as the foundation of an ethic, I cannot acknowledge 'asymmetry'. I live ethically when I confirm and further my Thou in the right of his existence and the goal of his becoming, in all his otherness. I am not ethically bidden to regard him as superior…(p.28).

There is certainly no existing being without a discernable face, and in real life, most of the time we will have to see the face of the being we are dealing with so as be able to identify them, and know them. It is also part of human nature to expect reciprocity, and it is hard to believe that everyone will subscribe to the idea of limitless obligation to another we hardly know, let alone the idea of sacrificing our needs and interests, and even our lives for such person. As much as Lévinas suggests that we are inherently ethical with his idea of ethics as first philosophy, the reality is that we are not all inherently ethical- and at least not to the high level he takes it. His ethics is very high standard indeed-perhaps non-existent. There are rules and regulations that limit rights and responsibilities, and the interest of the state (not the person or the Other) is always given priority under constitutions. We have legislatures and courts that lay down laws which must be followed, and this being the case, we cannot be infinitely and boundlessly be responsive and responsible to others. Therefore, Lévinas' ethics

[62] *Totality and infinity* ( p.215)
[63] 1964

would have stemmed from his imagination, and his imagination had an ethical or moral foundation-the desire for goodness toward our fellow human beings without considerations of differences such as ethnicity or beliefs and values. Lévinas would have supported the use of moral imagination in studying his imaginative ideas about ethics, for he promotes the idea of imagination. Moreover, moral imagination–like all imaginations is limitless and boundless-infinite. It does not allow for totalising of ethical ideas or images. This being the case, Lévinas, an ardent supporter of the idea of ethical infinity, would have considered moral imagination a valid tool for any ethical inquiry.

Moral imagination, in the field of ethics, is the mental capacity to create ideas, images, and metaphors to develop moral responses[64]. For Novogratz (2021), moral imagination allows us to transcend current realities to envision a better future for ourselves and others, it is an immersion in the lives of others, and others includes seeing other people's problems as one's own, discerning how to address those problems, and then addressing them. Johnson (1993) demonstrates the crucial role imagination plays in morality and ethics as follows:

> …they all agree that living morally is principally a matter of *moral insight* into the ultimate moral rules, combined with *strength of will* to 'do the right thing' that is required by those rules.
>
> Something crucial is missing in this widely held conception of morality. What is missing is any recognition of the fundamental role of imagination in our moral reasoning. We human beings are imaginative creatures, from our most mundane, automatic acts of perception all the way up to our most abstract conceptualization and reasoning. Consequently, our moral understanding depends in large measure on various structures of imagination, such as images, image schemas, metaphors, narratives, and so forth. Moral reasoning is thus basically an imaginative activity, because it uses imaginatively structured concepts and requires imagination to discern what is morally relevant in situations, to understand emphatically how others experience things, and to envision the full range of possibilities open to us in a particular case…
>
> Moral principles without moral imagination become trivial, impossible to apply, and even a hindrance to morally constructive action…
>
> …Moral imagination without principles or some form of grounding, on the other hand, is arbitrary , irresponsible and harmful… (Pp. x-x).

Samuelson (2007) recognised that the idea of morality can be limited by definition, and can therefore limit the limitless or infinite nature of imagination. He therefore explained that imagination will become moral when it is used for the wellbeing of our fellow human beings-

[64] *Encyclopaedia Britannica,* https://www.britannica.com/topic/moral-imagination

for justice, peace, equity, and fairness. Bromwich (2014) presents essays which demonstrate how people we generally consider ethical role models (such as Abraham Lincoln, Gandhi, and Martin Luther King), are often motivated or inspired by imagination-moral imagination to pursue justice, not only for themselves, but mainly for others. Therefore, to be ethical in a good sense, one needs both moral principles and moral imagination. Without moral principles one cannot develop moral imagination, and without moral imagination, moral principles may not be constructively utilised for goodness. It is therefore necessary to cultivate moral imagination if one is to become and remain ethical. It is also necessary to cultivate moral imagination to envision the full range of possibilities open to Lévinasian ethics-include the possibility of its use in judicial decisions. In fact, my contention is that, the claims such as those highlighted by Davidson& Perpich (2012), that Lévinas' ethics is of limited use in practice, cannot be absolute, because at the end of the day, it just depends on the interpretation and moral imagination of the subject of ethical behaviour.

### iv. Lévinas' ethics can be relevant for judicial decisions

It is well noted that, Lévinas remained very brief about the relationship between law and ethics (Manderson, 2006; Diamantides, 2007), that he seemed to view law as synonymous with politics, and justice with rules (Manderson, 2006), that his idea of an infinite ethical responsibility can be viewed as unrealistic for it is not accommodated by the laws which judges interpret and apply. Taken strictly, his idea of infinite responsibility does not even accommodate the role of the judge which is defined within certain parameters. Indeed, laws passed by the legislature set standards and limits, and a judicial decision demonstrates the end of responsibility, not only for the judge, but for the parties. For Lévinas, the idea of justice begins when a third person enters the picture[65] so that we now divide our singular responsibility to the Other between the Other and the third person to do justice between them-but even with the appearance of the third person, the responsibility is still infinite and unlimited, and does not require obedience to the law. For Lévinas, there is no law that should stop us from being ethical. This can be problematic for judges, because judges are generally obliged to follow and apply the law. Indeed, Lévinas speaks about justice that summons the

[65] *Otherwise than bei*ng

ethical subject to go beyond the straight line of justice- justice beyond the straight line of the law"[66].

The idea of stretching justice beyond the dictates of the law can be useful for judges who believe that they have ethical responsibility in interpreting and applying laws. Indeed, the ethical subject in Lévinasian ethics is a unique elected individual commanded to respond to and be responsible to the Other. In real life too, judges are not appointed at random, and their appointment is not like any other appointment. They are, or should be intensely vetted prior to their appointment. They are required to be of high moral standards, integrity, and impeccable reputation. And their position is unique in that they have very wide ranging powers, they have the jurisdiction to intervene in private lives and public lives, they determine issues of birth, life, death, and liberty. Like the ethical subject in Lévinasian ethics, the judge is unique and is elected or selected to be responsible for others. The obligation on the judge to be impartial and independent means that there is indeed a separation with the Other, the judge does not subsume the Other because the judge remains outside the arena of the dispute, and does not speak or act for the Other.

Unlike traditional thought, which considered metaphysics or theology as first philosophy (Bergo, 2019), Lévinas argued that ethics is first philosophy, because for him ethical responsibility stems from the epiphany of the face- our first face to face encounter with another person (the Other)-a vulnerable destitute who needs our help- a stranger, who is not an enemy, but infinitely unidentifiable, unknowable, and transcendent. The Other's face has no form, attribute, or category. The requirement for judicial independence and impartiality means that judges should not fully know or be familiar the Other who appear before them, and they don't really know the Other apart from what is revealed before the court as relates to the case. Because everyone is equal under the law, the identity or status of the Other who appears before the judge is immaterial, and should have no bearing on the judge's obligation to deliver justice. When judges hear a case, they do so, not because they know the parties or choose to hear the parties, but because they have jurisdiction. It is jurisdiction that gives the judge the right and obligation to hear the case-not identity of the Other or knowledge about the identity of the Other.

In Lévinasian ethics the face of the Other in the face to face encounter, stirs our response and we open our doors and welcome the face, a stranger (who we know nothing about), with open

[66] *Totality and infinity* (p. 245)

arms, despite that we don't know their intentions and they don't look like us. We must respect the Other's strangeness, we help the Other without any thought or preconceived ideas, and we help them ceaselessly and infinitely without expecting any reciprocation from them. In real life, because of the fundamental right of the Other (as part of the right to fair hearing) to access the court for justice, the doors of the courts are always open and welcoming to the Other without discrimination, and again, because of the right to equality under the law, and the right to freedom from discrimination, the judge must respect the Other's strangeness or uniqueness, and must not be biased against the Other because of their strangeness or uniqueness. And most constitutions (including the constitution of The Gambia), guard against discrimination and strive to ensure equality before the law by including fundamental rights which cannot generally be derogated unless they infringe other fundamental rights. Furthermore, because of the right to fair hearing, which includes the right to the opportunity to be heard, the judge must hear the Other-must be responsive to the Other, and must respond to the Other by rendering a decision to serve justice. In Lévinasian ethics, it is the truth that produces justice. Judges also search for the truth to be able to do justice. Judges don't decide cases at random. They rely on the strength of the evidence to decide cases. In civil cases the standard of proof is on the preponderance of probabilities, and in criminal cases it is beyond reasonable doubt. These standards are imposed to help the judge get as close to the truth as possible.

For Lévinas, the ethical subject must be connected to the Other's need, and that cannot be possible if the ethical subject distinguishes themself from the Other by categorizing themself as an individual 'I'. For Lévinas, 'I' centres on the individual, and it connotes selfishness. The 'I' approaches others under the objective gaze, where others are objectified and measured against it and placed relative to it. The 'I' must always suggest that there is something other than it, and so it has an attitude of separateness from others, and with this attitude develops perceptions about others, and holds unto those perceptions in dealing with them. The result is that others will be reduced to the 'I''s own perception of them, so that they lose their real identity and selfhood. In this situation, the others are absorbed and totalised into the image 'I' attributes to them, which then allows 'I' to own, dominate, and exploit them. Lévinas therefore prefers that there is no 'I'. Although there is separation with the Other, because we don't inquire into the Other to get to know them, there is no physical separation from Others deserving an 'I'-we are of the same image with the Other, so that the Other does not have to be fused into us to be made one with us or the same as us. We move

from subject/object relationship to subject/subject relationship, but we still remain separate from the Other infinitely by virtue of the fact that the Other has interiority that goes beyond what we can fully understand. This means that we never get to know the Other fully- to know the Other would be to put them in a box, which oppresses and totalises them. We are always separate from the Other, and it is this infinite separateness (the infinites distance between us), that makes our relationship infinite. The obligation according to Lévinas, stems from an insatiable desire, and so it has to be infinite[67]. Judges are separate from the Other who appear before them because they are required to be independent and impartial. At the same time, they are not really separate from the Other, because they are human like the Other-they are of the same image as the Other.

And the judge determines each case on its own merits, meaning that the judge does not have any preconceived ideas about the Other to categorize and totalize them-at least not before the conclusion of the case. The obligation on the judge is to hear the Other without fear or favour, without affection or ill will. This can suggest absence of limits to the judge's obligation to serve justice, and so can align with Lévinas' concept of infinite responsibility. In this relationship with the Other (the alterity), the Other is always paramount, has priority over us, and we are never free to walk away from them. Here again, the judicial oath to serve justice without fear or favour can be used to interpreting Lévinas' prioritization of the Other: that the judicial duty and oath of office indeed requires judges to prioritize the Other over their personal needs and interests.

In Lévinasian ethics, what transcends the barrier between the ethical subject and the Other, is communication through use of language. The non-totalising relationship in the face to face encounter is marked by a discourse which proposes the world in a manner that does not suggest a "system, a cosmos, a totality"[68]. Because the essence of language is friendship and hospitality-of goodness, the ethical subject speaks to the Other in responsible ethical language the 'saying' which is a fluid, welcoming language that respects the Other's Otherness, and does not seek to categorize and totalize the Other. The idea is to avoid unethical language 'said', to or about the Other. The 'said' is static language that tries to translate the 'saying' through knowledge, but instead reduces the 'saying' to themes and categories, signifying, representing, objectifying, and establishing the Other absolutely. In the language of the 'said', the Other is no longer unique and unknowable, but is totalized and

[67] *Totality and infinity* (pp.33-34)
[68] *Totality and infinity (*p.96)

wrongly judged as same. This is because the 'said' cannot be perpetually right-or even right in the first instance. The barrier between the ethical subject and the Other must not be kept closed by the 'said'- that would be permanent totalization. There must always be room for reinterpretation on both side, the barrier must be left porous and fluid. Under the circumstances, being ethical involves constantly revisiting the 'said' to maintain the separation between us and the Other-to avoid a permanent totalizing of the Other. This is a humanistic approach to ethics, because it is aimed at promoting the welfare of the Other, stressing the Other's dignity and worth by insisting that the Other maintains their own identity and is not discriminated against even as they rely on the ethical subject for help (Snow& Friedland, 1992).

Levin Asian ethics in sum requires treatment of the Other with understanding, compassion, forgiveness, respect, and dignity. Nothing should stop us from being responsible for the Other. There is the view, that these are the exact qualities that will add to a judge's effectiveness. Snow&Friedland (1992) explain that although the decision making responsibility of a judge restricts a judge's desire or ability to be humanistic at the same time, judges "are expected to be humanists…Numerous other qualities involving compassion and sensitivity are considered prerequisites to good judging by many lawyers and judges alike" (p.714). To buttress their contention that judges must display humanism, Snow& Friedland (1992) point to the fact that in "many a historical setting, the court's role was viewed as that of a healer. They argue that in the Bible, for example, judges were temporary and special deliverers sent by God to deliver the Israelites from their oppressors" (p.716). And Morgan (2012) in his study about ethics in Lebanon's Sharia Courts, emphasized the humanity in judging, and the fact that in Sharia Courts, judges have traditionally engaged both their personal morality and the dictates of legal texts to do justice, and that they serve justice better by engaging personal morality side by side with legal texts. Morgan (2012) encourages judges to engage with the moral difficulties of those who appear before them in an effort to heal them. He believes that it is only by doing this that the judge will be recognised as human and a true representative of justice by those he judge. Watson (1988) also emphasises that the humanism and professionalism of judges go hand in hand.

Judges are human beings first and foremost. Although technology threatens to take over the duties of judges (Sourdin & Cornes, 2018), we are lucky that judging is still mostly done by human beings. Therefore, judges still have the capacity to be sensitive and responsive. Sensitivity and responsiveness are major requirements of Lévinasian ethics. Therefore, as

long as we have human judges, judicial decisions can be informed and guided by Lévinasian ethics.

Apart from being required to be impartial and independent and to invoke equity and good conscience to do justice, judges are required to treat litigants who appear before them respectfully so as to maintain their independence, integrity, and dignity. In this regard, it is inevitable that judges will demonstrate compassion, understanding and forgiveness. In the Gambia for example, the Judges (Supplementary Code of Conduct) Act [69] requires that a judge must treat everyone before the court with appropriate respect and courtesy, and must enforce the same treatment by court officials, including counsel. Also, a judge must avoid unjustified reprimands of counsel, insulting and improper remarks about litigants and witnesses. Furthermore, judges cannot force litigants to testify or give evidence on their own behalf, neither can judges force litigants to admit or deny allegations or facts that they don't want to admit or deny. Although a judge is immune from civil liability, that immunity is operative only for their official functions and as long as they have jurisdiction in respect of the matter[70] for those official functions, and as long as they are acting in good faith. Furthermore, judges are not immune from criminal prosecution irrespective whether or not the criminal act was committed during the course of their functions. Also, judges should not allow litigants to be asked indecent and scandalous questions or questions intended to insult or annoy[71]. Indeed, judges consider mitigating factors when passing sentence, or when considering awards of damages, compensation, or costs. Thus, humanism is a requirement in judging. Humanism is an intrinsic part of judging.

It is true that, the laws applied by judges as passed by the legislature, are in the 'said' language, and so can be totalizing prior to judicial interpretation. Thus, judicial interpretation is one way of revisiting the 'said' to avoid totalising the Other. However, judicial decisions are also in the 'said' language, and can also be totalising. Perhaps the comforting aspect of this is that the Apex Court (the Supreme Court) normally has wide powers. For example, in The Gambia, under section 126(2), of the 1997 Constitution, the Supreme Court may depart from its previous decision "when it appears right to do so". Thus, the Supreme Court can

[69] Section 6(3) and (4) of the Judges (Supplementary Code of Conduct) Act, Cap 7:09 Volume 2 *Laws of The Gambia* (1990).
[70] See, for example section 123 of the 1997 Constitution of The Gambia, which provides that "a judge…shall not be liable to any action or suit for any act or omission by him or her in good faith in the exercise of his or her functions".
[71] See for example, provisions relating to the cross examination of witnesses under the Evidence Act of The Gambia 1994

revisit its 'said'. Indeed, the very existence of appeal processes allows for the constant revisiting of both the legislative and judicial 'said'. The courts capacity to revisit the 'said' in and of itself is a humanistic factor, for it gives the Other the opportunity to maintain their uniqueness, independence, and dignity.

Critchley (1994); Llewelyn (1991); and Thomas (2004) recognise that, justice in the world of Lévinas is served by simply providing an ethical response to the plight and suffering of another. However, there cannot be an ethical response if the subject of ethical behaviour is insensitive to the required ethics. A sensitive ethical subject is a prerequisite. Lévinas' ethical subject is therefore of sensitive character, and that is why they can be moved by the face of the Other. The sensitivity of Lévinas' ethical subject is apparent when Lévinas says that "…For the presence before a face, my orientation toward the other, can lose the avidity proper to the gaze only by turning into generosity, incapable of approaching the other with empty hands…" (p.50). Lévinas also talks about the eyes that "speaks"[72] and appeals to the subject not to let them alone to face death. Before the epiphany of the face, the ethical subject is complacent and not really bothered about any other person, but with the appearance of the face, the ethical subject is moved to help, and is so moved that there is no limit to the extent they we will go to help, and hence the feeling of being obliged to help infinitely. Rial (2012) aptly captures the sensitive disposition required in Lévinasian ethics [73] thus:

> As Lévinas wrote in Humanisme de l'Autre Homme, sensitivity is vulnerability, joy, suffering. 'For the other person to appear as a person, rather than as a thing, one needs to bear one's sensitivity on one's sleeve, to become vulnerable to the other's glance.' For it is through his body that the other may express himself, and in the water of his eyes and in the paper of his skin that I may read his mysterious signs (p.136)

Lévinasian ethics therefore, speaks to those with a morally sensitive disposition in the first place-to those who actually have the capacity to see the Other because they have the sensitivity. If you don't have the sensitivity, you will not even notice the Other let alone feel obliged to help them. In real life, not all of us are moved to help others, but those who are moved to help to others, are moved by sensitivity, sympathy, empathy, and conscience-they are of sensitive character. According to Rial (2012), we develop sensitivity and a sense of morality from a priori morality. A priori morality is man's "capacity to become conscious of norms that rule his existence, the moral quality of all behaviour, be it his own or that of

[72] *Totality and infinity* (p. 66)
[73] In *Humanisme de l'Autre Homme* (1972). [Montpellier]. Fata Morgana

others… the window through which man initially views the world..” (126-127). A priori morality requires experience to fulfil itself as a quality, but its existence does not require a set of universal codes or imperatives that are established a priori in each individual, its existence merely requires “the possibility of configuring existence according to norms, of giving life a moral sense. It is the accessibility of value for the individual, and his ability to regulate his conduct…” (pp.127-128).

For Rial (2012) therefore, moral sense is not innate explicit knowledge of what is good or bad, but rather like all a priori qualities, a pre- knowledge that prepares and makes possible future knowledge- that it is the role of society to facilitate the development of moral sense by establishing conditions which allow moral faculties to develop and mature, that until all our moral faculties are developed, our moral sense will remain undeveloped and immature, and we will be susceptible to “moral infantilism characterized by selfish, private and morally regressive behaviour” (p.141), which he says is caused by society’s failure to offer conditions that nurture morality. He observed that societies often fail to provide the conditions that help develop moral sense to optimum standards, that instead of offering conditions such as cooperation and interpersonal connection which allow morality to flourish, societies offer conditions such as lack of communication, lack of solidarity, and loneliness, which produce individualism and selfish personality to stifle morality, and hence the absence of moral standards. (p141). Rial (2012) asserts that each individual has the right and duty to develop their full moral sense, but that individuals also fail in this regard because:

> Man may blind his own rationality, his common sense, his capacity for aesthetic surprise, his sensitivity to moral values…in the same way that the second nature that man has created is altering the ecological balance of the first, so too is man himself being subjected to an aggression that may alter the equilibrium of the most intimate structure of his personality. This is not an isolated problem. Are there not more and more members of our society whose behaviour exhibits only the barest rudiments of moral sense, who seem incapable of distinguishing good from bad, and who even seem to deny by their deeds that any distinction exists…in whom moral sense has hardly been established display the most absurd wantonness, usually in the form of violence we perhaps call ‘savage’…

The point Rial (2012) makes is that, there are people who don’t have the opportunity to develop moral sense, and that there are people who resist developing moral sense. Therefore, not everybody has a matured sense of morality to act ethically. In fact, as Fagge (2011) points out, in Lévinasian ethics, how much one responds to the command of the infinite transcendent God “determines the degree to which one has subjectivity” (p.164). This being

the case, twisted sense of morality exists side by side with matured sense of morality, so that Lévinasian ethics can only be speaking to those whose sense of morality has matured, because without a matured sense of morality, the sensitivity in Lévinasian ethics cannot operate to interrupt and trigger the response and responsibility of the ethical subject. Therefore, it is true that, not all judges will have the required moral sensitivity or matured sense of morality to make ethical decisions. Judges without the required moral sensitivity are not expected to be guided by Lévinasian ethics in their decisions. However judges with the required moral sensitivity can be, or are being guided by Lévinasian ethics even if they are not aware of this.

While Hamer (2012) in his investigation about the role emotions play in judicial decisions, reminds us that, there are objections to judges being sensitive (being emotionally responsive), he also makes it clear that, judicial sensitivity is in fact a good thing, and does not necessarily interfere with the credibility of judicial decisions. According to Hamer (2012), emotions include thoughts, "they carry cognitive propositional content, and are in that way as much connected with *thought* as with bodily sensation." (p.190). Therefore, emotions actually allow judges to be self-reflective and be critical of their own performance, which then makes it possible for them know their shortcomings, and be able to address their shortcomings. Hamer (2012) argues that although the law must always take precedence over emotions, and although the judge must not rely only on emotions, and must not be as emotional as the litigant (for the judge is an independent entity), emotions can be valuable source of knowledge for judicial decisions. He argues that evaluative judgments that underlie emotions should have a place in judicial deliberation because they can give a judge idea of what is morally relevant in the case, and so can connect the judge with the moral intuitions that are relevant to understanding and applying the law.

Thus, for Hamer (2012), as long as emotions do not interfere with the judge's evaluative capacity and duty to be impartial, they will be valuable resource for judicial decisions. The argument by Reeves (2011) is that, because our legal systems are never perfect, and because law may conflict with morality, and may fail to address certain unforeseen moral issues, moral considerations should inform judicial reasoning. Reeves believes that judges should be able to determine if laws are morally justifiable, and that at times judges cannot really appreciate or understand what is at stake until they invoke their own sense of morality in the issue. Surely, a judge cannot appreciate and understand a litigant's allegation about pain and

suffering for example, if he does not refer back to his own direct or indirect experience of pain and suffering.

It is already admitted that, Lévinasian ethics if taken literally and strictly, might sound generally idealistic, and so it might sound even more idealistic associating it to judicial decisions which must include law and the application of law. However, Lévinas was not too bothered about the pragmatism of his ethics, as he said[74], he was merely interested in finding the meaning of being ethical, and was less bothered about the practicality of his philosophy of ethics because he believed that philosophy is not necessarily practical. Indeed, the nobility of the intention behind Lévinas' ethics, and its vast potential for inspiring goodness in many people around the world, should supersede any criticism about its impracticality. Indeed, as stated, Lévinas' ethics can be interpreted and imagined for use in real life, and so, it can be adapted and adjusted according to the particular circumstances. It all depends on the degree of consciousness, and the interpretive capacity of the ethical subject.

This will suggest that Lévinas' ethical principles of non-complacency in the face of suffering, desperation, and hardship of the Other; of non-discrimination and acceptance of the Other in their Otherness; of recognising and addressing the vulnerability and destitution of the Other; of protection against the succession of suffering, desperation, and hardship by being infinitely responsive and responsible to the Other; and of generally being of compassionate and empathetic disposition, can always inspire goodness in all of us- in any field. And these qualities are already visible in some judicial decisions, and they can inspire and guide judicial decisions to be ethically responsive and responsible. Basically, anyone who wants to do good in the face of what is generally considered bad, or evil, can be inspired and guided by Lévinasian ethics if they are open to it. Perhaps the big hurdle to cross when it comes to judges is that, most judges might not be aware of Lévinas' ethics even if their decisions display characteristics of Lévinas' ethics. Perhaps if judges are more exposed to Lévinas' ethics, they will be more inspired to make deliberate efforts to be informed and guided by it.

The idea of law-even if it is inevitable, would be totalizing in Lévinas' books. This is because law thematizes, categorizes, signifies, represents, objectifies and establishes absolutely. Laws are of general application, and they set standards and establish order to guide conduct and establish certainty. However, the standards and orders Lévinas envisages in our relationship with the Other has no end and no certainty. The idea of a judicial decision will be

[74] In *Ethics and infinity* (Cohen, R.A. Trans.) Pittsburg, PA:Dusquese University Press. (p. 90)

objectionable in Lévinasian ethics, because not only are judicial decisions supposed to be independent and dispassionate, as previously stated, they involve thematization, categorization, signifying, representing, and objectifying the Other, and so will inevitably totalize the Other. Judicial decisions identify and state or establish rights and responsibilities of physically identifiable current and future parties in litigation, and they also apply the law with its own totalizing effect. Of course, there are appeal processes, but there is a final court (the Supreme Court), whose word is final and subject to review only in defined limited circumstances. In such a case the "said" cannot be unsaid. Therefore, generally speaking, judicial decisions cannot avoid having a totalizing effect on another. Nevertheless, despite their totalising effect, judicial decisions often serve justice bearing other qualities of Lévinasian ethics. The point to make is that, Lévinasian rejection of totalization, thematization and categorization, does not necessarily mean that justice is not served in the particular case where other Lévinasian qualities such as compassion, mercy, or forgiveness are also present. All the qualities of Lévinasian ethics need not be present in a judicial decision for justice to be served. Indeed, humanistic and ethical judicial decisions are often saluted despite that they are totalising by their very nature, and are made by applying and interpreting totalising laws. This being the case, when it comes to Lévinasian ethics, one can exercise choice: one can choose a quality or characteristic of Lévinasian ethics that best suit their needs for justice in the particular case, so that if the Other feels that justice is served by compassion or mercy (which are some required qualities in Lévinasian ethics), then that should not be a reason to dismiss Lévinasian ethics as unworkable and unrealistic- even if the Other is categorized, objectified, or totalized by the judicial decision.

Lévinasian ethics can therefore be considered in parts to make it applicable and workable in real life. After all, Choice Theory as developed by Glasser (2010) dictates that we use our personal freedom to choose what works for us: that we don't have to believe what other people say is right. Choice Theory teaches us that we have the power and freedom to control ourselves so that we can choose the path that best works for us- even if that path does not work for others and is condemned by others. Glasser (2010) highlights that, even though we as humans have the same five basic human needs (survival, belonging, power, freedom, and fun), we nonetheless differ in the amounts we need each need. Therefore, if we have a greater need to make Lévinas' ethics applicable and workable for us, then we can exercise our choice to do so by approaching it creatively to satisfy this great need. One way of satisfying this great need, is to be willing to consider some parts or characteristics of Lévinas' ethics

separately from others: not to demand or insist that all the elements of Lévinasian ethics be present at the same time. Indeed, as previously stated, for Lévinas, being ethical involves constantly revisiting and unsaying the 'said'- it involves a rejection of finitude, viewing ethics as optics-as an adventure that has less to do with certainty and more to do with interpretation.

## v. The idea of infinite justice in Lévinasian ethics

Judicial decisions are aimed at delivering justice, which is also the aim of Lévinasian ethics. The aim of justice in Lévinasian ethics is to ensure order, fairness, equality, and a peaceful society. This is also the aim of justice in judicial decisions. Certainly, if one has a limited view about justice: that it is limited to the parties in its effect, application and inspiration, then, surely, Lévinasian ethics might be viewed as inapplicable or useless to judicial decisions. However, if one views justice (especially justice as contained in judicial decisions), as aiming to provide justice for all and sundry-communally and universally without exceptions, then Lévinasian ethics can be useful and can guide judicial decisions. Although judges might occasionally need a reminder that their judgments travel very far beyond their courts and the parties (Neuberger, 2012), judges for the most part already recognise that their decisions are not for the parties only, but for the whole world, and can impact many lives (Keck & Strother, 2016; Popelier et al, 2013). What then comes to mind, is Reverend Martin Luther King's (1963) statement that injustice anywhere "is a threat to justice everywhere, that we are caught in an inescapable network of mutuality, tied in a single garment of destiny-whatever affects one directly, affects all indirectly…"[75]. As Gillick (2004) ably observed in his preface:

> If human existence is to have meaning, that is, if my concrete existence is to be found to be related to an absolute in terms of which I have worth or significance, that meaning has to be valid for every person, for every human existence. If I am to have inherent worth, it must be assignable to every human being. If, to refer to the founding document of the United States, I am to have inalienable rights, it must be because very human being has inalienable rights… (pp i-ii).

[75] Letter from a Birmingham Jail, 16th April 1963.
https://liberalarts.utexas.edu/coretexts/_files/resources/texts/1963_MLK_Letter_Abridged

Although Gillick (2004) highlights the indeterminable nature of the meaning of justice-that the notion of justice has varying definitions, and can be used in the pursuit of both good and evil, he equally underscores that the notion of justice appeals to us because we see it as an ideal, that it stems from an obligation outside of us, an obligation older than and outside any self-interest, which in itself is an ideal that appeals to most people, and hence the reason why some people strive for it. And when people strive for justice being so obliged from this source outside of us, they do so selflessly and limitlessly because they are moved beyond their own control (Gillick, 2004). And Gillick (2004) gives examples of notable people such as Reverend Martin Luther King, Gandhi, and Mother Theresa, who were moved to do justice in exactly such a way- beyond their own self-interests, without fear of consequences, and without limits. Gandhi was always on hunger strikes, and Mother Theresa was not fearful of being in contact with the poor who suffered from contagious diseases. Such people are prepared to die for justice, as demonstrated in the concluding part of Nelson Mandela's (1964)[76] speech before he was sentenced to life imprisonment having been convicted on four counts of sabotage:

> During my lifetime I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and achieve. But if needs be, it is an ideal for which I am prepared to die.

And the concluding part of the speech Martin Luther King Jr. gave the night before he was killed:

> Well, I don't know what will happen now. We've got some difficult days ahead. But it doesn't matter with me now… And I don't mind. Like anybody, I would like to live a long life. Longevity has its place. But I am not concerned about that now. I just want to do God's will…And I've seen the promised land. I may not get there with you… I'm not worried about anything. I'm not fearing any man…[77]

And recently, we hear reports of the Russian opposition leader Alexei Navalny who after having allegedly been poisoned by the Russian government returning to Russia to face imprisonment and possible death, despite having the opportunity not to return to Russia. He

[76] https://www.historyplace.com/speeches/previous.htm
[77] As reported by CNN

has also been on hunger strike[78]. And there must be many more brave people who are willing to die for justice who are not famous.

Because Gillick's (2004) notion of justice stems from a source outside us, beyond us, is limitless, and involves a recognition of others which is not dependent on self-interest, it is similar to Lévinasian notion of justice. Giannopoulos (2017) supports Gillick's (2004) position in many respects. To explain Lévinas' position, Giannopoulos (2017) quotes Lévinas' address in a 1976 lecture course[79]:

> Can we deduce institutions from [Hobbes'] definition of man as 'a wolf for man', rather than the hostage of the other man? What difference is there between institutions arising from a limitation of violence and those arising from a limitation of responsibility? There is, at least, this one, in the second case, one can revolt against institutions in the very name of that which gave birth to them (p.341-DMT 214, GDT 183)

Giannopoulos (2017) then reminds us that for Lévinas, justice is not as we know it, that justice in the Lévinasian sense is much broader, and older than the concept of justice itself, and older than the formal equality attributed to justice. That for Lévinas, the notion of justice "passes justice in my responsibility for the Other, in my inequality in relation to the one whose hostage I am. That the Other is from the start brother of all men…"[80]. From this reminder by Giannopoulos 92017), it is clear that Lévinas' notion of justice is justice for all and sundry including the judge who delivers it. It demands more than the categories that describe it (Giannopoulos, 2017). Certainly, a judge who does not serve justice as expected by the public will suffer questions about his integrity and competence, and might not enjoy security of tenure, and the opposite is true if the judge serves justice as expected by the public. Therefore, the judge in delivering justice for the Other in the Lévinasian ethical sense, is also exercising self-help. Indeed, the truth is that judges have lives and are part of society. Therefore, they can subsequently find themselves in the same position as litigants who appear before them, which then suggest that they are also setting the standard of justice for themselves in their decisions.

Lévinas' asymmetrical relationship means that he shifts from a symmetrical account of justice in which all must be treated equally to an asymmetrical account of justice, where the self does not count when it comes to doing justice. However, even if the self in Lévinasian

[78] As reported by CNN
[79] A lecture course titled "God and Onto-theo-logy"
[80] *Otherwise than being* (p. 158)

ethics does not count, the Other is the brother of the self and the brother of everyone, so that if justice is served for the Other, it is equally and at the same time being served for the self (the brother of the Other). Indeed, Lévinas was clear that even though the 'I' does not absorb the Other who remains separate, the 'I' is not really distinguishable from the Other, the Other *reifies* the temporality to the self (Sunshine, 2019). For Lévinas, the word 'I' is an answer "for everything and for everyone[81]. "The 'I' is conceived as a unique individual only when she is singled out by the Other in … primordial election" (Tomasello, 2014)[82]. Indeed, Lévinas explained that:

> To be I is, over and beyond any individuation that can be derived from a system of references, to have identity as one's content. The I is not a being that always remains the same, but is the being whose existing consists in identifying itself, in recovering its identity throughout all that happens to it. It is primal identity, the primordial work of identification…
>
> The I is identical in its very alterations. It represents them to itself and thinks them. The universal identity in which heterogenous can be embraced has the ossature of a subject, of the first person. Universal thought is an 'I think'…
>
> …But faced with this alterity the I is the same, merges with itself, is incapable of apostasy with regard to this surprising 'self'….
>
> …the difference is not a difference; the I as other, is not an 'other'… (pp.36-37).

In fact, Peters (2014) argues that the ethical subject in Lévinas' ethics is not totally separated from the Other because if there is a total separation from the Other, there is no way the ethical subject can be responsive to the Other to be able to heed to the Other's call for help. Actually, for Lévinas, justice is established only if I am egoless, divested of being, and "always in a non-reciprocal relationship with the Other- "always for the other, can become an other like the others…the turning of the I into 'like the others'… "[83]. Therefore, for Lévinas, if I give the Other justice, I am giving myself justice, and giving justice to everyone who is open to it. The justice I give, is not limited to the person directly affected, it is for the benefit of everyone –including the giver. Justice is weighed in terms of a community relationship. This being the case, there is then no need for the giver to ask for equality or reciprocity from the recipient. Judges require neither equality nor reciprocity from litigants for their decisions and for the justice they serve-that might be considered bribery. Of course judges are

[81] *Otherwise than being* (p. 114)
[82] At p.7
[83] *Otherwise than being* (pp.160-161)

specifically appointed, and they are appointed and paid to do justice, and they have specific codes of conduct that limits their actions, and they are not as separated and independent as Lévinas' ethical subject. Therefore their "goodness" is (strictly speaking), not supposed be at large, and cannot be at large. But, as stated, Lévinas is not speaking about the normal or the status quo. However, it should not be forgotten that, judicial codes of conduct were created specifically to keep judges ethical: to guide their conscience. And as pointed out earlier, they don't prevent judges from being responsive, compassionate, and forgiving (from being humanistic). Therefore, they are not necessarily inconsistent with Lévinasian ethics.

In any event, Lévinas is challenging the normal and the status quo. He wants us to go beyond the normal and the status quo for the highest possible ethical standards. In fact, Lévinas does suggest reciprocity in justice when the 'third' person enters the picture. He explains that "To the extent that someone else's face brings us in relation with a third party, My metaphysical relation to the Other is transformed into a We, and works toward a State, institutions and laws which form the source of universality"[84]. Lévinas says the 'third' appears and interrupts the asymmetrical responsibility of the self to the Other, which interruption then triggers calls for justice-calls for truth and reason, for comparing the incomparable to rationally respond to the ethical demand of the 'third'-in such a case, there is need for reciprocity and equality of individuals before the moral law (Tomasello, 2014). Justice for the 'third' in Lévinasian ethics therefore suggests the recognition of the existence or inevitability of the current structure of justice, which is based on a human order of universal principles and institutions that seeks to assimilate and totalize-such as the Kantian idea of justice[85]. And, as Tomasello (2014) notes, Kantian justice is retributive justice to be applied by the courts. For Kant, retribution is the only way to respect the autonomy, dignity, and personhood of the offender: the response to the offender must be in like manner, for the punishment must fit the crime. This means that (for example), murder must be punished by capital punishment. In contrast, Lévinasian justice even after the appearance of the 'third', is all about responding to the desperate face of the Other, about compassion, mercy, and forgiveness, it does not advocate for reciprocation or retributive justice. Instead, it advocates for an insatiable desire to respond to the Other, no matter how evil the wrong they committed. As Tomasello (2014) aptly puts it:

[84] *Totality and infinity* (p. 300)
[85] *Critique of pure reason* (2008). Penguin Classics; Revised edition.

> To be responsible for the Other is then to feel the infinite resistance to murder in the face of the Other. The principle of retribution, as to that which justifies suffering and murder, nullifies this expression, and in doing so, corrupts one's moral responsibility for the Other…
>
> Rather than approaching the other as 'such and 'such type'-as wrongdoer, or criminal-the Other should be encountered as Other; that is as incomprehensibly different and exposed, an exposure to which wounds the security of the self-in short, as *alterity* (p.31)

Simmons (1999) however believes that Lévinas does recognise the need for retributive justice: that use of force is necessary to punish offenders, because "punishment is necessary or evil will run rampant" (p95). The caveat Simmonds (1999) adds is that for Lévinas, the punishment must be tempered by the ethical relationship with the Other. Wolff (2011) tells us that Lévinas is no Gandhi; that Lévinas supports the actualization of justice and distances himself from the idea of non-resistance to evil. Wolff (2011) underscores that Lévinas in his later work *Entre nous. Thinking –of- the-other*[86]said 'If self-defence is a problem, the "executioner" is the one who threatens my neighbour and, in this sense, calls for violence and doesn't have a face' (p.154). This according to Wolff (2011), means that through justice, someone might be treated as not deserving of responsiveness and responsibility from the ethical subject, so that such a person might even be killed as punishment. This would suggest that, for Lévinas, evil can be resisted with evil, and that even killing can be a valid way of resisting evil, as well as of "obeying the originary imperative [directed at the ethical subject]: 'thou shalt not kill!' (p.154).

However, even those who view Lévinas' sense of justice as impracticable believe that we can make it workable in real life. Levin (1999) for example, advised that if we are concerned about justice, we need to adjust and alter our vision of justice to a vision of justice that recognises the interconnectedness of mankind; that because Lévinas' ideas for the most part appear exaggerated and paradoxical, we are to understand that Lévinas wants us to break through and move away from prevailing habits of thought–to move beyond our current conventional experience to one that recognises the interconnectedness of mankind. Levins (1999) also believes that because we, as humans are by nature self-reflecting and self–interpreting, Lévinas' ethics is bound to motivate us to engage these characteristics to help us break through and move away from prevailing habits of thought and action to better ones envisaged by Lévinas. Levins (1999) however appears oblivious of the fact that there are already some people (including judges), who recognize the interconnected of human beings,

[86] (1998) Smith, M. & Harshav, B. (transl.). Pp.115. Londone: Athione Press

and who believe that they need to engage their sense of ethics and morality to do justice in the particular case. Such judges do not strictly or slavishly follow the law at the expense of justice (Dworkin, 1964;Wasserstrom, 1961). And a significant fact to bear in mind, is that a judge coming across Lévinas' ethics and sense of justice, might be forced to pause, rethink, and self- reflect; to consider whether or not they are doing enough for justice. That in itself is a good thing, for as intended by Lévinas, it invites a re- examination of approach to ensure higher standards-even if those standards cannot go as high as Lévinas might want them to go. Lévinasian ethics can serve as a bench mark for judicial decisions-to inspire and guide judicial conscience. In other words, judges can make use of their moral imagination and their interpretive skills, to use his ethics as guide and bench mark. And indeed, it has already been noted herein (and there will be more examples in the next chapter), that qualities of Lévinasian ethics already penetrates judicial decisions, and does in fact shine through judicial decisions to emphasize the humanism in them.

True, Lévinas' ideas about the Other and the face to face encounter with the Other might sound like a fantasy, we know that there is no faceless Other who we are infinitely and limitlessly obliged to, so it is based on his moral imagination- his dreams and wishes for a better world, his reinterpretation of the world. What then comes to mind is, the lyrics to John Lennon's "Imagine"[87], which envisages all the peoples of the world living in peace, sharing the world as a family. It is no news that Lévinas having been impacted by the horrors of hatred and was fearful of violence –might have been obsessed with tyranny (Wolff, 2011). He yearned for a more peaceful world because he experienced the horrors of hatred and war. His ethics is therefore a suggestion for peaceful coexistence. His ethics demonstrates and confirms that peace and justice go hand in hand, for it suggests (as is also suggested by many peace experts[88]), that ethical behaviour ensures both peace and justice, and that without peace there can be no justice. Lévinasian ethics can therefore serve as inspiration for inquiring into better ways of achieving justice for peaceful co-existence. As stated, Lévinas did not, and would not want to impose limitations on the potential goodness of his ethics. As far as Lévinas' ethics is concerned, the world is our oyster, there is no limit to its potential use-as long as it is used for goodness in the sense he understands it: for respect, understanding, compassion, mercy, and forgiveness of the Other.

[87] Can be found at https://www.azlyrics.com/lyrics/johnlennon/imagine.html
[88] Johan Galtung and John Paul Lederach among them

Nevertheless, Lévinas' ethics is not merely a fanciful desire for interpretation or invocation of the moral imagination. It has already been noted that it does have practical implications. Additionally and significantly, the United Nations Universal Declaration of Human Rights (1948), which is the inspiration for many constitutions around the world-including The Gambia, and indeed the inspiration for justice globally, was driven by compassion and conscience following the complacency that led to millions of deaths in World War II. It was inspired by the recognition of our duty to reach out and help our fellow human beings. Albeit it is totalising in Lévinas' books for it defines rights and responsibilities and sets limits, it notes the "disregard and contempt for human rights" which result in "Barbarous acts which have outraged the conscience of mankind", that if man is not to have recourse to rebellion "human rights should be protected by rule of law", that the peoples of the United Nations have "reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom…". Significantly too, the rights stipulated in the declaration-especially Article1, which also states that "All human beings…are endowed with reason and conscience and should act towards one another in a spirit of brotherhood", aptly captures Lévinas' message of humanism toward our fellow human beings.

In fact, there is the contention that Lévinasian ethics can accommodate all laws that respect human rights and the enforcement of human rights laws as well as the notion of justice based on those rights if there is parallel reconfiguration of the traditionally individualistic and limited understanding of human rights to a broader and more general understanding of human rights, so as to align with Lévinas' idea of absolute responsibility for the Other (Davidson, 2012). Such a scenario envisages a supportive other-centred conception of human rights (Davidson 2012), and indeed an other-centred concept of justice, where the focus will be on the Other not the self, as it is with current state of affairs. Another possible scenario is a situation where no one holds any specific right, but everyone is simply obligated to protect the Other because the focus will be put on responsibility to the Other-not the self, so that the issue of reciprocity and rights or justice in Lévinasian ethics will not arise (Sulfah & Mendrofa, 2020). Both scenarios suggest reinterpretation, use of moral imagination, and exercise of choice to make Lévinasian ethics applicable and workable in real life. However, such scenarios might very well invite criticisms of excessive responsibility to the Other. Moreover, we are reminded by Balkin, (1994) that rights without limits are not infinite rights,

for they have boundaries- we just don't know the location of their boundaries. However, as has been suggested earlier on, one does not need to insist for the presence of all the elements or characteristics of Lévinasian ethics at the same time to conclude that that there is justice in a particular case. It should just depend on whether or not the Other feels that justice has been served regardless the absence of the Other elements or characteristics. It can thus be a matter of choice for the Other. Indeed, Murariu (2016) in his expose about totalism, explains that:

> … Wholeness seems to connote an assembly of parts, even quite diversified parts, that enter into fruitful association and organization… wholeness emphasizes a sound, organic progressive mutuality between diversified functions and parts within an entirety, the boundaries of which are open and fluent…Totality on the contrary evokes a *Gestalt* in which absolute boundary is emphasized: given a certain arbitrary delineation, nothing that belongs inside must be left outside, and nothing that must be outside can be tolerated inside… (p.73).

Bearing in mind Lévinas' opposition to totalism and the above explanation by Murariu (2016), one can safely say that Lévinas would prefer his ethics to be perceived as wholeness constituting of open and fluent diversified parts assembled together.

As a matter of fact, my contention is that, all laws that demonstrate and require responsibility for the Other (which is the majority of laws), will accord with the spirit of Lévinasian concept of ethical responsibility and justice to the Other. And any time judges apply and enforce such laws properly in their decisions, they are being guided by Lévinasian ethics to do justice. In saying this, I am not oblivious of the comment by Diamantides' (2007), that because private law cares for individual suffering only when it is measurable, comparable and attributable to agency, Lévinas' approach to the Other's suffering and the responsibility it occasions are respectively absurd and anarchic, and makes difficult reading for the modern jurist and political theorist; and that Lévinas' ethics might not be capable of responding to social realities marked by regulations and calls to balance and limit responsibilities towards others. Such comments, in my view, will be taking Lévinas' ethics too literally and strictly, which I don't intend to do. They also seem oblivious to the fact that the individual can simply exercise the choice and the intention to decide how and under what conditions to make use and sense of Lévinasian ethics.

The aim in this study is to be constructively creative with Lévinas' ethics so as to recognise its value, sense, and meaning in real life. In fact, Diamantides (2007) also notes that, the rebelliousness of Lévinas' thoughts were to challenge continuing preconceptions of social, legal, and individual responsibilities for a desired alternative. But, what is true however, is

that upon the arrival of Lévinas' 'third' Lévinas recognises justice as administered by the courts and its requirement for equality, reciprocity, and limits to responsibility. Roberts-Cady (2009), notes that Lévinas writes that "…the call to justice is a call to think the abstraction of law together with the uniqueness of every face, the call to think the equality of every citizen together with their inequality" (p.240). This, according to Roberts-Cady (2009) would confirm that Lévinasian ethics recognises the traditional concept of justice. For Roberts-Cady, because Lévinas cannot on the one hand claim that asymmetrical ethical responsibility is the origin of justice, and on the other hand claim that justice itself requires viewing persons and responsibilities as comparable as symmetrical, Lévinas is (by deconstruction) suggesting that a symmetrical relationship is also a requirement for his ethics.

It is not surprising that the Lévinasian concept of justice is an infinite type of justice bearing in mind Lévinas' opposition to totalism. Indeed, his mentee Derrida, holds the same concept of justice (Balkin, 1994). Despite that Lévinas' concept of justice is not the usual concept of justice, it does have support. Slaughter (2007) welcomes Lévinas' notion of justice as a suitable alternative to the legal, but inhumane representation of justice in modernity. In fact, findings are that, the idea of justice is infinitely indeterminate in real life too (D'Amato, 2011; Sadurski, 1985). Lord Denning,[89] while alluding to the fact that there has been no satisfactory answer to the meaning of justice, alludes to the infinite nature of justice when he said that justice is not something that can be seen with the eye-that justice is not temporal but eternal, and that man knows that justice has been done not through his intellect, but through his spirit-that justice is what those who have the right spirit in them believe to be fair. Indeed, although D'Amato (2011) is adamant that justice in judicial decisions cannot exclude legal considerations, he does not deny that it can have far reaching perpetual effects beyond the parties and beyond time and space. And although Balkin (1994) argues that justice must be proportionate and appropriate, he also agrees that the effects of justice can be felt well beyond the person directly concerned, and can be perpetual. Indeed, justice in one part of the world, gives inspiration to many others in other parts of the world, and can motivate action for justice in other parts of the world. As Martin Luther King explained in his 1964 Nobel Peace Prize speech, we are all inevitably brothers because of the "interrelated structure of reality"[90], which is ably explained by the English Poet John Donne[91] thus:

[89] In Denning Barron Denning, A.T. (1988).*The road to justice* (1988). F.B. Rothman.
[90] 1964

> All mankind is of one author, and is one volume; when one man dies, one chapter is not torn out of the book, but translated into a better language; and every chapter must be so translated…
>
> As therefore, the bell that rings to sermon calls not upon the preacher only, but upon the congregation to come, so this bell calls us all…
>
> No man is an Iland, intire of its selfe: every man is a peece of the Continent, a part of the maine; if a clod be washed away by the Sea, Europe is the lesse, as well as if a promontorie were, as well as if a Manor of thy friends or of thine owne were: any mans death diminishes me, because I am involved in Mankinde; and therefore never send to know for whom the bell tolls; it tolls for thee…
>
> Another man may be sick too, and sick to death, and this affliction may lie in his bowels, as gold in a mine, and be of no use to him; but this bell, that tells me of his affliction, digs out and applies that gold to me: if by this consideration of another's danger I take mine own into contemplation, and so secure myself, by making recourse to my God, who is our only security

There is hardly any denial that the effects of justice reverberates, and can be far reaching and perpetual. An obvious example is that, judicial decisions in one country can be relied upon as persuasive authority in another country to serve justice in similar circumstances. In The Gambia for example, United Kingdom case law is often cited in courts. Western concepts of justice, Western concepts of human rights, and human rights standards established in Western Courts, legislatures, or institutions do influence concepts of justice and human rights standards across the world, and particularly in the developing parts of the world to serve justice effectively. In the Gambia, most laws are inspired by United Kingdom laws, or are replicas of United Kingdom laws. One can therefore understand and observe the concept of infinite justice in the Lévinasian sense-both in judicial decisions and in general terms. However, Balkin (1994) asserts that the idea of infinite justice will primarily require the existence of individuals who are "more than products of cultural writing, and who can bear responsibility to others, whether this responsibility is infinite or not" (p.1185). This means that it requires people (including judges) with the right personality, with the required willingness to exercise the choice to be infinitely responsible-people having the courage to

[91] in his poem "Devotions" meditation xvii (1624). https://www.gutenberg.org/files/23772/23772-h.htm#Page_107 , also cited by Martin Luther King in the same speech

change or maintain a position as is appropriately responsive and humanistic to the Other[92]. Moreover, Wolff (2011) argues that even though on the appearance of the 'third' the ethical subject's responsibility to do justice is limited in the sense that there will now be comparisons and considerations of equality amongst others, the overall responsibility of the ethical subject to do justice will remain infinite because the State does not limit the fundamental responsibility of the ethical subject to do justice. Thus, the ethical subject will still have an infinite (though limited) responsibility to actualize or achieve justice among all the others. Wolff's argument certainly confirms Lévinas' idea of infinite justice. Indeed, in the case of judges, national constitutions impose an infinite responsibility on judges to serve justice. In The Gambia for example, section 120 (2) of the 1997 Constitution provides that the "judicial power of The Gambia is vested in the courts and shall be exercised by them according to the respective jurisdictions conferred on them by law". It is clear from the provisions of section 120 (2) that, while the jurisdictions of courts are limited, their fundamental obligation to exercise judicial power (to serve justice) is not-it is infinite.

Lévinas' concept of infinite justice can therefore be observed in practice. Lévinas' ethics does have practical significance despite Rorty's (1998) argument that his concept of the face is based on the myth of the existence of the given, so that his concept of infinite responsibility is not of much practical use in the public sphere, and may only be of use "…to some of us in our individual quests for private perfection. When we take up our public responsibilities… the infinite and the unrepresentable are nothing more than nuisance…" (p.97). As opposed to Lévinas, Rorty (1998) rejects any idea of a universal, ahistoric moral standard to which we can appeal to determine questions of human existence (Simmons & Perpich). This being the case, one might think that Lévinas and Rorty have nothing in common. While it is no news that Lévinas is a humanist, it will be a surprise to many that Rorty is also a humanist bearing in mind the way he rejects Lévinas' ethics. While Višňovský (2020) is aware that Rorty has been described as anti- humanist, he asserts that Rorty is a humanist because of his pragmatic concern for the welfare of the human being. He concludes that:

> Rorty was a dreamer, a philosophical poet. He imagined the face of humanity as saved from all conflicts and confrontations, full of cooperation not competition. He hoped for a human world in which love would be 'pretty much the law'…A world in which there would be no absolutes to worship, in which philosophers would 'stop aping science' and human beings would no longer try to escape the historicity and contingency of their existence…It was truly utopian, but by no means irresponsible

[92] As per Buber, M. (1965). *The knowledge of man: selected essays.* Smith, R., & Friedman, M. ( Trans.). new York: Harper & Row

One can use similar words to describe Lévinas who Rorty (1998) more or less describes as a dreamer. If both Lévinas and a titled pragmatist such as Rorty, are described as humanists and dreamers for their sense of ethics, that may very well suggest that there is no practical difference between them. More significantly, that may be an admission that Lévinas' ethics is not truly impractical. The truth is that Lévinas is not the only ethicist who developed his theory from the existence of a given position-an abstract hypothetical position. Rawls for example also relied on hi original abstract position to develop a theory of justice, which is been used and improved to inform thinking and practice (Douglas, 2015; Ekmekci&Arda, 2015; Vaca, 2013).

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# Chapter 4

## Applying Lévinasian ethics to judicial decisions

With the advent of the internet and social media, judges are nudged to be more responsive and responsible in their decisions. Being aware that within seconds their decisions are available to the whole world for scrutiny, they have to be extra careful, and this inevitably means they are more responsive and responsible. Sourdin & Zariski (2018), in their study on judicial responsiveness, argue that modern methods of communication if used properly, can increase the level of judicial responsiveness:

> Responsive judging in the cyber world of today necessarily involves courts and judges in more, and more direct communication with the public. To the extent that this enhanced engagement in the public sphere demonstrates transparency and a willingness to respond to the needs of society it will bolster the reputations and credibility of judges and courts, thereby enhancing the perceived legitimacy of the legal systems they represent (p.22).

Sourdin& Zariski (2018) emphasize that, judges today have no option but recognize that they are part of a network societies with "multifold intensive intimate connections and extensive global interdependencies", which obliges them to "look beyond the immediate disputes before the courts and consider them in wider contexts of interpersonal conflict and social disruption" p.17). They however observe that judges have always been responsive and responsible, and so have been addressing societal demands for justice in many respects, in particular: judges finalise disputes between members of society, listen to litigants and consider submissions of litigants before making a decision, they explain and justify their decisions to litigants and the public. A judge is obliged to carefully identify the issues, comb through the evidence, analyse the evidence, weigh the evidence, and provide a well-articulated, well-reasoned decision, which is supported by the facts and the law, and which is delivered in a sensitive, serious, and appropriate manner to show respect for the parties, the issues, the court, the judge, and the public (Sourdin&Zariski, 2018).

Indeed, judges' codes of conduct regulate the conduct of judges to ensure that they are both responsive and responsible. The reason why judges are required to be independent and impartial, and are required to treat litigants and the public with courtesy and respect, is for no other reason than to ensure that they serve the needs of the litigants and the public. And there

are other ways judges demonstrate responsiveness and responsibility. These will be addressed after an explanation of the concept of judicial responsiveness. Without knowing what the concept of judicial responsiveness is, one cannot know how and when judges are being responsive.

Sourdin&Zariski (2018) explain that:

> …the concept of responsive judging is multi-faceted, and includes the notion that Judges may consider matters beyond a strict or existing legal rationale in order to determine or resolve a dispute…It requires that as part of this work, a judge may attend to and explore human relationships…and consider the impact of a decision in the context of the development of the whole legal system. A responsive judge may, from time to time, be appropriately engaged in public policy… It requires that a judge consider the perspective of the participants in a legal dispute as well as others when dealing with a dispute, and incorporates the notion that a responsive Judge reshape the processes used within a court by recognising… the dignity, participation and voice of a participant in a legal dispute and that such facts are relevant in determining and resolving disputes. Judicial responsiveness can also be linked to how a Judge supports those who are in dispute…may require understanding of support structures and referral opportunities, collaboration with those who may not necessarily be involved in the dispute…as well as a developed understanding about referral to alternative dispute resolution processes that may enable disputants to achieve better or lasting outcome (pp3-4).

Responsive judges are not only conscious of and bound by the law, they go further to consider how the law is applied, developed (with a conscious consideration of societal wellbeing and operation), and how engagement with litigants and others take place (Sourdin &Zariski, 2018). Responsive judges are multi- talented, in that they may have to use multiple skills to communicate, manage, and determine the dispute. They will have to navigate carefully so that their sensitivity does not negatively impact their other fundamental duties such as their duty to be independent and impartial. They are challenged by "an ongoing tension between satisfying the parties and preserving the integrity of the judicial system…sometimes, a notably responsive judge may acquire a reputation for being 'crusading'… 'entrepreneurial'… 'strategic'…or 'activist' as a result of their non-traditional approach (p.17). Responsive judging will therefore invite criticism and condemnation, meaning that it calls for honest, brave, and tenacious judges.

Sourdin&Zariski (2018) explain that, in addition observing respect for the law and principles of impartiality and integrity, the responsive judge is also a "cost conscious manager of litigation" concerned with securing access to justice for all, must have the patience to be willing to consider the foreseeable consequences of their decisions, must be "a student of human nature" who values building respectful relations with litigants and colleagues and

works at achieving such respectful relations, and must be comfortable in playing "the roles of ambassador of justice and legal educator" (p.2).

Having explained what amounts to judicial responsiveness (and indeed judicial responsibility), and what judicial responsiveness requires, some examples will now be provided.

### i. The common law, customary law, and equitable principles

*Under the common law system*

Edwords (2021) underscores that human laws are the product of human democratic processes; that laws are developed by people for themselves and directed at themselves. He thus reiterates the fact that laws have humanistic foundation. However, despite that laws have humanistic foundation, some laws-especially statute laws can be inflexible, not least because they can take a long time to respond to pressing needs of individuals or society, and they can be dehumanising for they can interfere with human rights (Gervassis, 2012). Under the common law system, laws in general, and statute laws in particular, can be humanised by judges through interpretation, and through the exceptions to the doctrine of precedent. Benas (1929) reminds us that, humanism of the law is nothing new, that it is in fact as old "as Hebrew Scriptures with their fabric strands of narrative, poetry, statute law, judicial decision indissolubly united by the pattern of life" (p.1). Section 7(1) (d) of the 1997 Constitution of The Gambia, ensures humanism in the laws of the Gambia by providing that in addition to statute law, the laws of The Gambia includes the common law, equity, and customary law. Also, as mentioned in chapter 3, under section 5(4) of the Law of England Application Act of The Gambia[93], where no express rule is applicable to any matter in controversy, the court shall be governed by the principles of justice, equity and good conscience. Thus, there is ample opportunity for judicial decisions to be responsive and responsible.

In the common law system, the law is made by judges. Law is developed and established through a body of evolving judicial decisions. Judges create and shape the law to meet the needs and interests of society. Blajer (2013) explains that the common law system allows

[93] Cap 5:01 Laws of The Gambia

judges to be responsible for meeting every day needs of the community by applying a mixture of precedent and common sense to the facts before them. And Pound (1929) explains that the spirit of the common law has always been to respond to the growing needs and interest of society especially with regard to property rights, contractual rights, and children's rights. Because the common law is always evolving to meet new situations in real life, it is more flexible and thus more responsive that statute law. Unlike statute law which can sometimes take years to pass to respond to the needs of society or a specific case, judges can apply the common law by referring to similar cases decided in the past to meet the immediate needs of society or the needs of a specific case.

Judges under the common law system are bound by the doctrine of precedent. The standard under the common law is that like cases should be treated alike, so that cases decided in the past will guide present and future cases to ensure predictability, stability, and fairness of the law. However, there are exceptions to the doctrine of precedent, which allow judges to be decisions to be adequately responsive and responsible. Courts of the same level are not bound by each other's decisions; only a higher court can overrule the decision of a lower court; a lower court will not follow a precedent of a higher court if the facts before it are distinguishable from the facts of the precedent established by the higher court; and a higher court (an appeal court) can reverse its earlier decision if it was mistaken, or if it conflicts with its later decision[94]. And the highest court (Supreme Court), can also over rule or reverse its earlier decision if application of the earlier decision will lead to injustice in the present case or will unduly restrict the proper development of the law[95].

Manderson (2006) argues that, when it comes to application of the common law, there is ample room for Lévinas' ethics to guide judicial decisions. According to Manderson (2006), because the concept of duty of care in the common law of negligence requires that we exercise reasonable care to avoid harming others who we don't know, but ought reasonably to foresee or have in mind as likely to be affected by our action, there is some similarity with the responsibility of the ethical subject in Lévinas' ethics. He argues that when the courts determine proximity to establish duty of care and responsibility for negligence, they are doing something similar to Lévinas' notion of proximity and responsibility, for they don't rely on any formalised criterion, and the responsibility or vulnerability of the parties is attributable to some unconscious phenomenon beyond their control- the parties are connected by a

[94] See Young v Bristol Aeroplane Co. [1944] KB 718
[95] See the UK Practice Statement, [1966] 3 ALL ER 77

phenomenon which recognizes the need to protect an unknown other who is in a vulnerable position. In the law of negligence, like in Lévinasian ethics, proximity is not established through the scope of physical distance, but through humanistic considerations that dictate that we should be sensitive, caring, and considerate toward our fellow human beings. This connection between the law of negligence and Lévinasian ethics Manderson (2006) says, supports Lévinas' claim that proximity and not privity is, or should be the source of ethical behaviour, and that law and justice emerge from ethical behaviour in a proximate relationship with others.

However, while proximity and duty of care in Lévinasian ethics stems from, and is established on the face to face encounter with the Other, in the law of negligence the concept of proximity and duty of care owed to another is not so established, and has not been stable. Because the concept of duty of care and its requirement for proximity in the law of negligence is not codified, it is open for interpretation and very much dependent on the circumstances of the case. Manderson (2006) nevertheless sees this as a good thing. He explains that the evolving nature of the concept of duty of care (in particular the concept of proximity) in the law of negligence, gives judges some room to demonstrate more ethical power when they decide cases of negligence. Thus, in the case of Donoghue v Stevenson[96] (a UK case, which, like all UK cases, is of persuasive authority in common law jurisdictions such as The Gambia), it was held that a duty of care arises only in respect of any person who is so closely and directly affected by my act- someone I ought reasonably to have foreseen as likely to be harmed by my action because of a proximate relationship. And the duty of care owed to such person guarded only against personal harm and damage to property of that person. Liability was however extended in Hedley Byrne & Co v Heller & Partners Ltd[97] to include financial harm suffered as a result of spoken words, only to be restricted again in subsequent cases such as Old Gate Estates Ltd v Toplis & Harding & Russell[98], where it was held that the principle of duty of care in Donoghue v Stevenson is limited to cases where life, limb and health were threatened by negligence, and then broadened again in later cases such as Anns v Merton London Borough [1978] AC 728, where it was held that the concept of duty of care as established in Donoghue v Stevenson is a general duty and so not limited to specific cases or specific class of parties, so that even the government can owe a duty of care.

[96] [1932] AC 562
[97] cite
[98] [1939] 3 ALL ER 209

However, following Caparo Industries PLC v Dickman[99], the test for proximity and foreseeability for establishing duty of care in the law of negligence is now a three stage test, the first two stages are the same as was established in Donoghue v Stevenson (reasonable foreseeability of harm and proximate relationship), and the third stage includes considerations of fairness and justice on public policy grounds, so that a duty of care will exist in the relationship if it is considered unfair and unjust to exclude it. This three stage test was however found to be imprecise and restrictive in the Australian case of Perre v Apand Pty Ltd[100], where the court had to determine duty of care in relation to pure economic loss.[101]In that case, it was recognised that there cannot be a single test to determine the existence of a duty of care in all negligence cases, so that there can be incremental developments depending on the facts of the case. And in Robinson v Chief Constable of West Yorkshire[102], it was made clear that, the third stage test in the Caparo case will apply only where there might be a new ground of liability. No doubt, the concept of duty of care in the law of negligence will keep evolving, so that in such cases, judicial decisions will have some room to be adequately responsive and responsible-to be guided by the humanism.

*Customary law*

Customary law "concerns the laws, practices and customs of indigenous peoples and local communities"[103]. It is not the same as customary law in the international context. It is by definition "intrinsic to the life and customs of indigenous peoples and local communities"[104]. It is not written down. Therefore, it does not normally require reference to "broad generalizations or abstractions, or to carefully constructed analogies from the past"[105]. Customary law is based on the traditions and practices of the community concerned, it is directed at meeting the needs of the people it serves. As stated, in The Gambia, customary law exists side by side with the common law, statue law, equity, and Islamic law. In the

[99] [1990] UKHL 2
[100] (1999) 164 ALR 606
[101] See the Case Note on the case at http://classic.austlii.edu.au/au/journals/SydLawRW/2000/14.pdf
[102] [2018] 2 WLR 595
[103] WIPO (2013). *Customary law, traditional knowledge and intellectual property: an outline of the issues.* author
[104] ibid
[105] Institute for Security Studies Africa (ISS AFRICA)(2009) chapter 6: Customary Justice https://issafrica.org/chapter-6-customary-justice

Gambia customary law is generally administered by District Tribunals[106], but it is not unusual for the regular courts to administer customary law, especially in land ownership matters. This is because the Constitution does not specifically oust the jurisdiction of regular courts when it comes to customary law[107].

Despite the fact that customary law can sometimes infringe human rights, (for example, customary law can be discriminatory against women and youth, and can ignore the principle of fair hearing because of the informality of its procedures), it is subject to fundamental rights guaranteed by the Constitution, which is the Supreme law, which ensures that it maintains its humanistic qualities. Apart from being directed at meeting the needs of the community, the fact that customary law is informal means that it is more accessible to people-especially the poor and vulnerable, it also means that it evolves with the times to meet the fundamental needs and interest of the community (Kane et al, 2005). The doctrine of precedent does not operate in District Tribunals, which means that customary law can be more flexible and more responsive than the common law.

*Equity*

When judges invoke equity, they are demonstrating humanism, and they are being responsive and responsible. Equity, according to Black's Law Dictionary (1968)[108], in its broadest and most general signification:

> …denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men with men, the rule of doing to all others as we desire them to do to us…It is therefore the synonym of natural right or justice. but in this sense its obligation is ethical rather than burial, and its discussion belongs to the sphere of morals. It is grounded in the precepts of the conscience, not in any sanction of positive law (p.634)

Codrington (2019) emphasizes that equity enables judges to prevent hardship that would otherwise ensue from a literal interpretation of a legal instrument, and can be applied under, besides, or against the law regardless the nature of the dispute, and can be used by judges to perform three functions: a) to adapt the law to the facts of individual cases (equity *infra legem*), b) to fill gaps in the law (equity *praeter legem*), and c) as reason for refusing to apply

[106] Under section 3 and 11 of the District Tribunals Act, Cap 6:03 Laws of The Gambia 1990
[107] See section 132 (1) (a) of the 1997 Constitution of The Gambia
[108] Fourth Edition

unjust laws (equity *contra legem*). The maxims of equity, such as equity acts on the conscience; equity looks to the intent and not the form; equity will not suffer a wrong without a remedy, and equality is equity, are examples of the humanism in equity. There is however another equitable maxim, which can restrict equity's responsiveness. That maxim requires that equity must follow the law, meaning that the law prevails over equity, and that equity cannot be invoked where the law does not create room for it.

### ii. Statutory interpretation

Lévinas views anarchy as the ideal even though he accepts the inevitability of laws. But because laws can be vague or incomplete, judges have to interpret them to determine the intention of the legislature. In this task judges also have the opportunity to be responsive and responsible. In Dworkin's theory of interpretation, to engage in legal or judicial interpretation is to engage in constructive interpretation: to interpret the law in such a way as to present it in the best way possible-in the best light, "it is a matter of imposing purpose …in order to make it the best possible form or genre to which it is taken to belong"[109]. Dworkin identifies three stage of interpretation: i. Pre-interpretive stage where the interpreter must be clear about what is to be interpreted and identifies what serves as practice, ii. Interpretive stage where interpretation actually occurs, and iii. Post interpretive stage where the interpreter determines whether or not the justification identified at the second stage is served. At this stage the interpreter will settle on a meaning that that makes the practice appear in the best light before imposing legal obligation. The second stage is particularly significant in the Lévinasian context, for it is at this stage that the interpreter must identify the justification for the practice under consideration-in particular, the interpreter must determine the reasons for the moral appeal of the practice. The justification the interpreter identifies must be "sensitive to the point", meaning that it must be open to reform and be responsive, so that there is the possibility that the existing practices can be changed from time to time to satisfy their goal.

Albeit judges are bound by rules of statutory interpretation such as the literal rule, golden rule, and mischief rule amongst others, judges still have much leeway because statutory

[109] Empire. P.52

interpretation involves judicial creativity (Hodge, 2019)[110]. And because it is for judges to decide which rule of statutory interpretation to use, they can use the rule most responsive in the circumstances. They can adopt a purposive approach to ensure that legislation is compliant with human rights standards established in other legislation. Therefore, in the case of Ghaidan v Godin-Mendoza[111], the United Kingdom House of Lords interpreted the Rent Act of 1977 by rewording it to grant the homosexual partner of a deceased tenant the same rights as a heterosexual partnership even though this was not expressly provided for in the Rent Act of 1977. Maclean (1982) observed that, no matter how complete a statute might seem, there will always be gaps and interstices which require the exercise of judicial interpretation, which means that judges can always be responsive when they perform their interpretive task. And Eskridge (1994) reminds us that, as society evolves and generates new forms of the specific problem a statute was initially enacted to address, there will be gaps and ambiguities which judicial decisions will have to respond to by performing their interpretative task. The suggestion therefore is that, judicial statutory interpretation will remain dynamic, so that there is frequent revisiting and unsaying of the 'said'.

Of course, judicial statutory interpretation and rules of statutory interpretation do not always ensure sensitivity and responsiveness to others to serve justice in a Lévinasian sense. The rules of statutory interpretation can be manipulated to serve injustice as well as justice. Therefore, Lindroos-Hovinheimo (2013) argues that for interpretation of legal text to be ethical: to be respectful of otherness and to be responsible in accordance with Lévinasian demands, the interpreter first and foremost, has to have an ethical attitude towards the text, then there has to be a recognition that there is no particular criteria for a correct interpretation of legal text because each interpretation is based on a specific situation which cannot be the same as the next. She argues that reading of legal text requires sensitivity towards what the text says and what the case demands: an oscillation between respect for the law as contained in the text, and care for the parties in the case. Lindroos-Hovinheimo (2013) calls for interpretation of legal texts to be open to a wide variety of meanings for words. This, she says, will allow for sensitivity and responsiveness to otherness. She suggests that interpretation should be re-thought so that there is more focus on the spectres of meaning than on certainty.

[110] Lord Hodge, Lord Justice of The Supreme Court of the United Kingdom, in a paper "The Scope of judicial law-making in the common law tradition", Max Planck Institute of Comparative and International Private Law Hamburg, Germany
[111] [2004]UKHL 30

## Judicial discretion in sentencing

As mentioned, in chapter 3, Lévinas is against retributive justice even though with the appearance of the 'third' person he accepts the inevitability of traditional justice so that reason, rights and reciprocity are relevant. And sometimes retributive justice is just not possible under the law, for example where defences such as diminished responsibility, provocation, duress, or insanity are successfully raised. And judges can make rehabilitation orders, orders for payment of fines, compensation orders, suspended sentences, and caution and discharge orders rather than impose retributive punishment. First time offenders in particularly, are generally treated less severely. This means that, judges hear mitigating and aggravating factors before imposing punishment, and can exercise their discretion to pass lower or higher sentences based on such factors. The ability of a judge to exercise discretion in sentencing grew out of the constitutional doctrine of separation of powers and is an aspect of judicial independence (Caylor & Beaulne, 2016). Judicial discretion is basically the act of judiciously and judicially deciding what is fair and equitable under the circumstances in the absence of a fixed rule, and where the law is insufficient or silent (Zonay, 2015). Writing for the United States Judicial College, Zonay (2015) offers ten guidelines for the exercise of judicial discretion in sentencing: i. Establish the record, ii. Apply the correct law, iii. Consider the different ways to exercise your legal discretion, iii. Consider doing nothing, iv. Consider the equities of the situation, v. Consider the results of your decision, vi. Take time to think over any decision, vii. Clearly and logically explain your decision, viii. Do not unnecessarily look back, ix. Do not decide just because you can.

The above guidelines are meant to ensure that the judge acts judiciously and responsively. The fifth guideline in particular, allows the judge to consider the fairness of the decision-whether or not it is the right decision in the circumstances. It also allows the judge to consider the particular circumstances of the case. For Lévinas, justice is not:

> …constructed on the basis of an impersonal, universal law, which rationally justifies the need for violence. Instead, justice must be sought as a response to suffering. This requires the judgment of faces, de-faced, the reciprocity of law among individuals as members of a genus, but also the need to repair wrongdoing. It is not a justice that values autonomy as that alone which has dignity, but a humanism of the Other that is grounded in the individual uniqueness demanded by responsibility (Tomasello, 2014, p. 32).

Lévinasian justice requires a balancing of the law with the particular circumstances of each case. Lévinas' view is that justice cannot be done in the absence of the truth- that truth produces justice, that the truth is found by being open to the uniqueness of the Other-the peculiar circumstances of the Other. In Lévinasian justice there must be "separation resistant to synthesis"[112], and without respect for this separation there is no truth. This is drastically different from Heidegger's (1996) concept of justice[113]. Heidegger's (1996) concept of justice prioritizes community and communal relations over the uniqueness of the individual. For Heidegger (1996), justice is an attempt (using universal principles), to efface, nullify and annihilate the external disruption caused by the Other who disrupts the homogeneity of the community (Tomasello, 2014). In Heidegger's concept of justice, the uniqueness of the Other is absorbed into the identity of the community as a whole, so that the personal circumstances or peculiarities of the Other is not considered in doing justice.

In the exercise of judicial discretion, as much as the law is the fundamental basis of the judge's decision, the law can still be tempered, so that its effect will not be as harsh as it could be. Indeed, if justice is to be done, there must be a balancing between the seriousness of the offence and the factors that led to the commission of the offence (the personal circumstances of the offender). The law can be technical and cares very little about the personal circumstances of the offender. Therefore, the exercise of judicial discretion in sentencing allows some humanism into the process. Hence O'Connell (2011) reports that, it is the view of many judges that sentencing guidelines are unconstitutional and unjustified interference with judicial discretion. McKenzie (2005), in her study about the exercise of judicial discretion in sentencing, reported the following statement made by a judge about the importance of judicial discretion:

> There should be some judicial discretion and the reason is because the judge has the flesh and blood of the person in front of him or her, and the full circumstances of that person...There should be individual judge's discretion even if just because of the personality of the judge, as it avoids a certain mechanical dehumanised aspect of the sentence (p.210).

Brown (2017) advocates for wide judicial discretion, which he says can be justified largely because "the sentencing task is essentially one of phronetic synthesis with a premium placed on practical experience, practical wisdom and reasoning of the sentencing judge" (p.11).

[112] Totality and infinity p.293
[113] In *Being and Time* (1996) (Trans. Sein & Zeit), (Trans. Stambaugh, J.). State University of New York Press

Mallet (2015) however, is worried that, the more discretion a judge is given in sentencing, the greater the risk that similar offences will be treated differently, and the public will see the courts as unfair, which will erode confidence in the justice system and question the legitimacy of the justice system. There is clearly some opposition to the exercise of judicial discretion in sentencing in favour of binding guidelines for sentencing. In this regard, in the United Kingdom, the Sentencing Council for England and Wales has been in operation since 2010, and is tasked with issuing guidelines on sentencing to the judiciary and criminal justice professionals. And, the guidelines still leave some room for judges to exercise their discretion. For example, under section A of the sentencing guidelines pertaining to attempted murder at paragraph 10 thereof, it is stated that the guidelines for sentencing on attempted murder will not apply where there was a genuine belief that the murder would have been an act of mercy, which allows the judge to move away from the strict provisions of the sentencing guidelines relating to attempted murder[114].

Thus, it is reported that[115] in the United Kingdom, Denver Beddows, an elderly man of ninety five years old, was sentenced to two year imprisonment for the attempted murder of his wife out of mercy. He and his wife were married for over sixty years, but at the later part of their marriage the wife suffered poor health and persistently asked him to kill her so that she would not have to be taken to a care home to die. He finally complied with her requests but his actions did not succeed in killing her and so he was charged with her attempted murder. He pleaded guilty, and was given a two years suspended sentence bearing in mind the fact that his wife had persistently asked him to kill her, that if he was sent to prison his wife would have been sent to care home -which she did not want, and the fact that he was ninety five years old and was suffering from depression. The attempted killing of his wife was described as an act of mercy. Another man, also in the United Kingdom, Lawrence Franks aged 84, actually succeeded in carrying out his wife's requests to kill her. He was also spared prison and given a two years suspended sentence based on similar considerations. The killing of his wife was also described by the court as an act of mercy[116]. What this suggests is that, sentencing guidelines are not devoid of humanism or humanistic considerations. However, the study by Pina-Sanchez et al (2019) reports an increase in severe sentences following

[114] See the Sentencing Guidelines Council, Attempted Murder: definitive guideline. https://www.sentencingcouncil.org.uk/wp-content/uploads/Attempted-Murder-definitive-guideline-Web.pdf.
[115] https://www.google.com/amp/s/amp.theguardian.com/uk-news/2017/apr/25/denver-beddows-95-mercy-killing , https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/the-power-of-mercy-a-case-of-judicial-discretion
[116] https://www.newsweek.com/elderly-man-beat-wife-dementia-death-iron-bar-mercy-killing-1228492?amp=1

establishment of the England and Wales Sentencing Guidelines, while the study by O'Connell (2011), reports low public confidence in sentencing following the establishment of the Sentencing Guidelines. Following a partnership with the United Kingdom judiciary, Gambia now has its first ever sentencing guidelines, and that is for the offence of theft only [117]. Because some judges have the tendency to pass excessive sentences, one can argue that sentencing guidelines have a humanistic aspect, and are in fact responsive to the needs of offenders who can fall victim to judges who misuse their sentencing powers.

Judges also exercise a lot of discretion in civil matters. For example, they exercise discretion in applications for stay of execution pending appeal, in applications for stay of proceedings pending appeal, in applications for instalment payment of judgment debt, and in granting orders for costs or compensation, and generally where the word "may" is used in a statute. Nevertheless, the words of former U.S. Supreme Court Justice Benjamin Cardozo, that discretion "is not unconfined and vagrant. It is canalized within banks that keep it from overflowing"[118] should be heeded. The exercise of discretion is certainly not at large. Judicial discretion in both civil and criminal matters must be properly exercised having regard to the particular facts, and the principles of fairness and good faith. Judicial discretion cannot be exercised where it is not allowed by law or where it will lead to injustice[119]. However, the point to be made is that, the exercise of judicial discretion ensures humanistic considerations and humanism in judicial decisions.

### iii. Prioritizing justice over law

Lévinas knew very well that the term "ethics" does not always connote what is generally accepted as moral and humane-that "ethics" can be used as motivation and justification to commit wrongs and grave atrocities. He did not want people to be fooled by people who justified their atrocities relying on skewed sense of morality and ethics. He wanted the term "ethics" to be understood as something constructive and meaningful, as something to be used as motivation and justification for being kind and accepting toward our fellow human beings. Hence, his remark that "Everyone will readily agree that it is of the highest importance to

[117] As reported in The Gambia Judiciary website https://judiciary.gov.gm/uk-gambia-judiciary-partnership-results-first-ever-theft-sentencing-guidelines-gambia-role-uk

[118] In the case of Panama Refining Co v Ryan, 293 U.S. 388, 440 (1935) (dissenting)

[119] See for example, the case of IEC & Ors v National Alliance for Democracy and Development & Ors. (2002-2008)GLR, 244 1

know whether we are not duped by morality"[120]. Lévinas envisages a system of justice which goes beyond the justice of universal laws. For Lévinas, doing justice requires placing the Other over the obligation to follow and apply law which will cause injustice to the Other:

> In reality, justice does not include me in the equilibrium of its universality-justice summons me to go beyond the straight line[*ligne droit*] of justice, and consequently nothing marks the limits of this march, behind the straight line [*ligne droit*] of the law the land of the good extends infinite and unexplored necessitating all the resources of a singular presence p.245

Clearly, the principle of judicial independence and impartiality poses a great challenge to Lévinasian ethics for it requires judges to apply the law and be dispassionate in doing so. The requirement for judicial independence and impartiality is contained in the Universal Declaration of Human Rights, and in the constitutions of most if not all countries. Independent and impartial judges ensure the success of democracy and rule of law, and it makes sense because judges should serve the public effectively, and they cannot serve the public effectively if they are not independent and impartial. Judges are therefore generally restricted as to how far they can go in serving justice. The German philosopher Gustav Radbruch (2006) however proposes that, in the case of conflict between serving justice and achieving legal certainty, priority should be given to serving justice-but only in two circumstances: where the law betrays the will of justice, and where the law does not deserve legal character and validity. He puts it thus:

> Law is what benefits the people…
>
> Only what law is benefits the people…law is the will to do justice. Justice means: to judge without regard to the person, to measure everyone by the same standard…
>
> If law deliberately betrays the will to justice-by, for example, arbitrarily granting and withholding human rights-then these laws lack validity, the people owe them no obedience, and jurists, too, must find the courage to deny them legal character…
>
> One thing however must be indelibly impressed on the consciousness of the people as well as of jurists: There can be laws that are so unjust and so socially harmful that validity, indeed legal character itself must be denied them…
>
> There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity. These principles are known as natural law or the law of reason…and they have come to enjoy such far-reaching consensus in the so-called declarations of human rights that only the dogmatic sceptic could still entertain doubts about them… (pp.13-15)

[120] *Totality and Infinity* (p.111).

For Radbruch (2006), if following the law will lead to severe injustice, or where the law in question is so flawed that it does not even deserve the name "law", the judge can ignore it to serve justice. Thus, Radbruch's (2016) principle allows judicial decisions to march beyond the "straight line" of justice to the land of the good. John Finnis (2011)[121] on the other hand believes that unjust laws deserve recognisance and obedience. For Finnis, "the injustice of a law recognised by the courts and officials as intra –symmetrically valid law has no effect on that validity, however intolerable the injustice"[122]. No doubt, Lévinas will prefer Radbruch's view, and it is inevitable that there are judges who share Radbruch's views and decide cases accordingly. Dworkin (1984)[123] holds a similar view to Radbruch. Dworkin's theory of adjudication is based on the premise that judges should use arguments of principle (not only law and rules) to decide cases. For Dworkin, a judge faced with an unjust law has two options: declare the law invalid because it is unjust and partakes of the pervasive injustice of a wholly illegitimate system, or alternatively, hold the particular law unjust as part of a legitimate system or at least not altogether illegitimate, in which case the judge will recognise the law as valid but refuse to apply it. Hart[124] however, rejects Dworkin's and Radbruch's association of law with morals, and argues that laws are laws and must be applied and obeyed despite lacking in moral content, and despite being too evil to be obeyed. Hart, like Finnis, does not deem it permissible for a judge to engage in the retroactive invalidation of an unjust law or to refuse to apply unjust law. Although Hart subsequently[125] revised his position and regarded unjust law as law that is "too iniquitous to be applied or obeyed". His main point that unjust law is still law, suggests that judges can apply and obey unjust laws-which some actually judges do. The main point however, is that not all judges will follow the straight line of the law to apply and obey unjust laws, and that is what Lévinas prefers.

Despite the criticisms that Lévinasian ethics is idealistic, it does resonate and accord with realist theories about judging. As highlighted by Sourdin &Zariski (2018), the great American jurist Oliver Wendell Holmes-a renown realist, who is described by Goldberg (2015) as the "grandfather" or responsive judging, "admonished judges … to be concerned about , and take into consideration, the foreseeable effects on society of their decisions" (p.2).

[121] Finnis, J.M. (2011). Natural law and natural rights (2nd Ed.).Oxford University Press
[122] Finnis, J.M. (2014). Law as fact and as reason for action: a response to Robert Alexy on law's 'Ideal Dimension'. The American Journal of Jurisprudence, 59(1), 85-109
[123] In Dworkin, R. (1984). A reply by Ronald Dworkin. In Cohen, M. (Ed.). *Ronald Dworkin and contemporary jurisprudence.*London : Duckworth
[124] In his 1958 essay "Positivism and the separation of law and morals"
[125] In Hart, HLA. (1994)*The Concept of law.* (second edition.). Oxford: Clarendon Press

So did other American realist Scholars such as Cohen (1935), who admonished judges to "deal frankly with 'the social forces which mold the law and the social ideals by which the law is to be judged' (p.2), and Llewellyn (1950) who "highlighted judges' freedom of action in applying law to achieve social goals, describing what we consider to be a responsive judge as one '… who loves creativeness, who can without loss of sleep combine risk taking with responsibility, who sees and feels institutions as things built and to be built to serve functions, and who sees the functions as vital and law as a tool to be eternally reoriented to justice and the general welfare"(pp2-3), and Frank (1930), who "brought to public awareness the common humanity of judges…" (p.3). Realist legal scholars confirm that Lévinasian ethics and sense of justice inform judicial decisions-that characteristics or qualities of Lévinasian ethics and sense of justice can be found in judicial decisions, and can be helpful in making judicial decisions more responsive, responsible, and humane.

Sourdin & Zariski (2018) suggest a purposive approach to judging which strives "to take into account the purpose of the law and the intent of the lawmakers in dealing with the distinct social problems" (p.16), as opposed to the "more traditional approach to judging …often described as 'formalist' and is primarily concerned with justifying decisions as being consistent with established rules and principles without much regard to the actual impact of the judgments handed down" (p.16). They emphasize that the opportunity for responsive judging is presented in many contexts: in complex multi–party litigation that represent various separate but related interests; in broad constitutional issues affecting many people in different situations; in racial and gender discrimination litigation; in gender issues, in family and children's courts; in problem solving courts; in restorative and rehabilitation orders; by engaging alternate dispute resolution; by engaging traditional/indigenous informal justice mechanisms, by assisting self-represented litigants without becoming their advocate, and by encouraging litigants to settle their disputes amicably among themselves so as to avoid the costs and risks of litigation. I will add that specialist courts such a special criminal courts to try certain complex and serious cases, children's courts commercial courts, rent tribunals, immigration and asylum courts are also meant to respond to public needs even though their processes are formal, for they help reduce the case loads of the regular courts, and ensure that decisions are reached within a shorter time. Another factor that ensures that judges are responsive is imposing time limits within which they are to deliver their decisions. For example, in the case of The Gambia, section 124 of the 1997 provides that:

(1) It shall be the object of every court, to deliver its decision expeditiously and –

(a) In the case of a reference to the Supreme Court as to the interpretation of this Constitution or as to whether or not any person was validly elected to the office of President or was validly elected to, or vacated his or her seat in the National Assembly, not later than thirty days; or

(b) In any other case, not later than three months after the conclusion of the evidence or arguments on appeal, and final address

The above provision no doubt improves upon accessibility of justice. It is based on the principle that justice delayed is justice denied, which naturally invites the opposite view-that swift justice can lead to injustice and is no justice. However, it will appear that most litigants will prefer a speedy disposal of their cases. Backlog of cases around the world and especially in developing countries[126], will mean that the desire for cases to proceed speedily far exceeds any desire for cases to proceed slowly. Sourdin &Zariski (2018) also highlight the fact that courts and judges are increasingly embracing technology (such as online filing systems, video conferencing of hearings, and digitally enhanced trials as responses to demand for cost – effective proceedings, and indeed to avoid backlog of judicial decisions and to ensure more timely judicial decisions. Indeed, judges and courts have been very responsive during the Covid 19 pandemic by hearing both civil and criminal cases virtually, and delivering timely decisions virtually, rather than waiting for the end of the pandemic (which is not yet foreseeable), to hear cases and deliver decisions. Sourdin & Zariski (2018) also explain that, the increasing demands for access to justice have made judges increasingly responsive, so that many judges are now sponsoring programs to assist litigants in navigating the legal system through public legal education, court help desks, improved court designs and signage.

Sourdin & Zariski (2018) suggest that, for judges to be more responsive, court processes and procedures should be simplified and made less formal- to be more public friendly. They emphasize that there must be a shift from the vision of the judge as an austere, unapproachable authority figure, to a vision of the judge as approachable authority figure with strong interpersonal and communication skills such as empathy and active listening. They also suggest that courts must establish a system of constant communication and engagement with the public to demonstrate transparency and to educate the public about the operation of the legal system. However, they also recognise the limitations on the call to responsive judging. They bear in mind that there might be constitutions and legislative

[126] See the study by Dakolias, M. (1999). Court performance around the world: a comparative perspective. *Yale Human Rights and Development Law Journal, 2 (lss.1), 2, 87*

restrictions which limit judicial activity associated with responsive judging (for example, the constitutional requirement to be independent and impartial). They recognise that by being responsive judges can be accused of bias, and that "in less capable hands, bad results may often flow from responsive judging practices" (p.23). They also admit that a majority of judges will not be able to practice responsive judging due to lack of training. To address these limitations, they suggest training judges in the foundations of responsible judging, including:

- Providing judges with information and insight into sectors of society or social institutions of which they have no personal exposure or knowledge
- Training judges in mediation techniques and other settlement practices which expands the judges range beyond decision-making
- Training judges in interpersonal and courtroom management skills to satisfy litigants' need for respect, dignity, and recognition
- Training judges in developing and expressing empathy towards litigants and members of the public-especially when they deal with minorities or victims of discrimination whom they have had little or no contact with
- Training judges in the psychology and behaviour associated with domestic violence and sexual crimes which require insight and understanding for a just decision by the court
- Training in the techniques of monitoring and support associated with problem solving and therapeutic jurisprudence oriented courts

Sourdin & Zariski (2018) recognise that responsive and responsible judging is possible and do in fact occur in many instances. Therefore, although Lévinas' ethics is useful for interrupting the usual business of legalistic and anti-humanistic judging, many judges have already been interrupted by it. Significantly, Sourdin & Zariski (2018) argue that responsive judging does not jeopardize the impartial role of the judge unless the judge is actually impartial in the normal sense. They also argue that demanding judges to be sensitive and responsive does not take away anything from their traditional formal adjudicating role because judges have always had ancillary functions beyond adjudication (for example many judges are also teachers who educate the public about the law and how the legal system works). Moreover, they argue that restrictions on judges will not prevent them from serving society more responsively and responsibly, because judges who value responsiveness will always be willing to find ways to combine their obligation to law and judicial ethics with the

desire to serve society more responsively. Sourdin &Zariski (2018) emphasize that since responsive judging can be guided by opportunity, need, inclination, and methodology, so that it is used only when the opportunity presents itself to the judge who is inclined to use it, and who uses it strategically to achieve justice which would not be available otherwise, then it can be practiced responsibly. Thus, they argue for responsible judicial responsiveness so that judicial excesses cannot be justified by claims of judicial responsiveness.

### iv. Religious values

As alluded to by Sourdin& Zariski (2018), responsive and responsible judges will inevitably and invariably face some backlash-they will have to suffer. Therefore, being a responsive and responsible judge involves suffering. Indeed, Lévinas' ethical subject suffers despite that Lévinas dismisses such suffering as meaningful suffering. A responsive and responsible judge might find help in the study by Bishwajit &O'Sullivan (2020), where a significant aspect of Lévinas' concept of suffering is highlighted: that Lévinas' concept of suffering seems to have a psychological aspect, which is that, it depends on the mind of the suffering subject. They explain as follows:

> For Lévinas, pain and suffering are different, as the latter results from inability or incompliance of its existence. He writes; suffering is suffering because of the 'denial, the refusal of meaning' that attends it… From this it is assumable that the subject holds certain capacities to deal or do away with the negative emotional condition that one is undergoing

If Bishwajit & O'Sullivan (2020) are right, then Lévinas would also share the view of Victor Frankl (also a holocaust survivor), in Frankl (1963), which is that, the suffering subject can develop the right attitude to alleviate their suffering. For Frankl (1963), the kind of person one becomes as a result of unavoidable suffering is determined by the attitude taken to the suffering-that life has meaning even in suffering, and we can choose to see the meaning in our suffering. Frankl (1963) believes that rather than focussing on the negative aspects of suffering, one can focus on the positive aspects and choose to make the best out of the suffering. It is about defining the suffering and not letting the suffering define you. Thus, the responsive judge must have mental strength.

Significantly, the concept of suffering in Lévinasian ethics bears some similarities with the ethics of some religious Christian Scholars such as St. Augustine-also known as Augustine of Hippo (Bishwajit &O'Sullivan, 2020). St. Augustine like Lévinas, suggests that suffering is not necessarily a bad thing. However, while Lévinas believes that suffering of the ethical subject is justified by the useless suffering of the Other, St. Augustine attributes suffering to the will of God whose rationality cannot be understood (Bashwajit & O'Sullivan). St. Augustine believes that, man is free to choose between good and evil, but to make the right choice to follow good, divine intervention and strong faith is necessary (Bishwajit &O'Sullivan, 2020). Lévinas' ethical subject was certainly visited by divine intervention represented by the epiphany of the face-the emergence of the transcendent unavoidable haunting face of the Other. And Thomas Aquinas, who is regarded as "a perennial leader in Christian virtue theory" (Bishwajit & O'Sullivan, 2020)[127], also has a concept of suffering similar to Lévinas. Bishwajit& O'Sullivan (2018) explain that Aquinas also provides justification for human suffering, that Aquinas' view is that God allows human suffering to bring humans closer to their full human potential and the desires of spirit, even if it often does not appear to be so. "In a more theological manner, it is a way of saying that, suffering serves the purpose of rendering the soul holy; for out of the unevenness of the soul is the necessary purification and the strengthening of the virtues that beings it near to God" (p.4).

Lévinas' ethical subject yearns for transcendence- longs for a sublime unknown in the face of plenitude, for a desired ethical path (Altez-Albela, 2011) and to that end rejects complacency and submits to humility under the command of the Other. Without doubt Lévinas' ethical subject seeks purification of the soul through transcendence. Indeed, Lévinas' ethical subject sees the trace of God in the face of the Other. This suggests that Lévinas' ethical subject is religious-he is being motivated and guided by religion.

Judges take Oath of Office before assuming office, and witnesses who appear before them take the witness oath before testifying (of course barring a few judges or witnesses who wish to affirm rather than take oath). This being the case, religion plays a significant role in judicial decisions. That apart, Idleman (1993) argues that religious values can and should enter into the judicial decision-making process, and are helpful, necessary, and appropriate especially in ethically difficult cases or so called 'hard-cases' which concern issues such as where human life begins or ends, what constitutes human life, how humans should treat the

[127] At p.3

environment or other species, or how scarce resources should be distributed within the community. He contends that religious values are already informing judicial decisions in these areas, and that the use of religious values in judicial decisions will remain inevitable as society continues to grow. For Idleman (1993), judicial reference to religious values is not improper and occurs because:

i. history shows that religion plays a significant role in people's lives, so that constitutions (such as the constitution of the United States), and laws which judges interpret and apply are informed by religious values;
ii. society is generally marked by religious tolerance and religious pluralism so that religion is always relevant and significant in judicial decisions;
iii. judicial decisions cannot exclude the religious beliefs of the society in which they are made otherwise they will not be considered legitimate by members of that society; and
iv. if there is no judicial consideration of the religious values of society, the goal of the law and credibility of the justice system as a whole (which are based on religious values),will be undermined.

While Idleman (1993) is cognisant of the objections raised by those who believe that the law should be kept secular, he emphasises that the reality is that judicial decisions do encompass religious values. He advised that rather than deny judicial use of religious values in judicial decisions, judicial use of religious values in judicial decisions should be acknowledged and accepted, so that focus will be on improving the manner judges use religious values in their decisions. Idleman (1993) however admits that judicial use of religious values can be improper. Therefore, he suggests that for judges to properly use religious values, they should ask three questions: i. how did the religious claim come about?-the historical context of the religious claim, ii how is the religious claim construed contemporarily and why? iii. Are there any religious claims which contradict the claim in question? In summary, "a judge's evaluation of a religious value or assertion should conform to a thorough and balanced analysis, not unlike a judge's evaluation of any other source of insight" (p.479).

Like Lévinas, Idleman (1993) associates ethical responsiveness and responsibility with religion or the divine, and like Lévinas he also associates justice with the divine and transcendent. Although Idleman (1993) observed that judges might be freer to express their religious views when sitting alone, he notes that even when judges sit in panels-such as in

appellate courts, there are often dissenting or concurring views based on religious values. He cites cases such as *people v Jagnjic*[128] were the dissenting opinion was that the condemnation of crimes against the young is condemned by the Bible, and *In re S.L. and L.L.*[129] where the dissenting opinion citing numerous passages for the Old and New Testaments, was that children are entrusted to parents as part of God's great plan, so that the law must be cautious not to interfere with this edict; *Chicoine v Chicoine*[130] were the partly concurring and partly dissenting view was that the Bible decries homosexuality, which was the sexual orientation of a mother seeking visitation rights.

Idleman (1993) thus demonstrates that for judges to be responsive and responsible, they may have to refer to religious values, and that judges in fact do refer to religious values to be adequately responsive. More significantly, he demonstrates that responsiveness and responsibility of judging goes both ways-it is for the benefit of all parties-not just one party, so that a responsive judge might reject a person's sexual orientation and thereby infringe upon human rights. This being the case, it must be noted that, the concept of responsiveness and responsibility in Lévinasian ethics and indeed in judicial decisions, can be improperly used to discriminate against minorities and other vulnerable groups, and might therefore occasion injustice in some instances.

[128] 447 N.Y.S. 2d 439 9N.Y.App. Div.1982) per Lupiano J., dissenting
[129] 419 N.W. 2d 689, 697-98 9 9S.D. 1988) per Henderson, J. dissenting)
[130] 479 N.W. 2d 891, 897(S.D. 1992) per Henderson J., concurring in part and dissenting in part

# Chapter 5

## Some challenges for engaging Lévinasian ethics

As alluded to, Lévinasian ethics can indeed be improperly used especially when practiced by someone without self-control, someone who does not understand it fully, or someone who is simply not competent or rational enough. This fact was highlighted by Wolff (2011), who argues that Lévinas does not take into issue the competence of the ethical subject, so that responsibility cannot protect itself against the temptation of attempting to radically undermine a state of affairs judged to be unjust by embracing extreme measures including violence in order to achieve their perception of the just. As he puts it:

> …just like an ethic of principles that temporarily appropriates for itself the means proper to the exercise of the ethic of responsibility, the fanatical Lévinasian subject could place anything and everything at risk, in the name of the calculation of justice, a function for which no expertise or competence is required. Since the competence in responsible calculation of consequence is negligible in importance to the sensitivity to appeals of the others (which, alas, is a cacophony of mutually contradictory claims), the Lévinasian version of the combination of an ethic of principle and an ethic of responsibility resembles less an elevation of the assumption of consequences of responsible action to a principle and more the elevation of principled ethics to the assumption of the means of an ethic of responsibility.

Wolff (2011) therefore underscores that there is the risk of "irresponsible responsibility"[131] with Lévinasian ethics. This being the case, as observed by Sourdin & Zariski (2018), it is crucial that judges who are guided by Lévinasian ethics, and indeed all judges, be trained to be appropriately responsive and responsible. Wolff (2011) points out that the French Philosopher Michelini (2002)[132] criticises the passivity of Lévinas' ethical subject on the basis that in ethical situations, rational decision-making is required and depends on inclusive, critical discourse that aims at consensus seeking, and that the anarchical and non-reciprocal construct of Lévinasian ethical responsibility contradicts a conception of responsibility conceived as awareness and capacity to moral judgment that is socially and historically formed.

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[131] P.148

[132] Dorando Michelini "Etica de la Responsabilidad. Modelos de fondamentación" in *Concordia* 41, 2002 pp. 83-103 (henceforth=EdlR)-French Philosopher

Wolff (2011) argues that as much as Lévinas' ethical subject appears to be in bondage, that is not really the case, for nobody can replace the ethical subject, and it is the ethical subject who gets to decide what is justice irrespective the other's opinion about the demands of justice. Wolff (2011) thus views Lévinas' ethical subject as a potential tyrant. This appears to be a valid concern. However, when it comes to judicial decisions, judges are to be guided by the law, and the principles of independence and impartiality to deliver balanced justice-not skewed justice. Therefore, in such cases, there is the possibility of appealing to a higher court to rectify the wrong. The problem however, is that, appellate courts can endorse tyrannical judicial decisions of lower courts made under the guise of respect for the law and ethics. Indeed, this happens in dictatorial regimes where the judiciary is controlled by the executive and in corrupt judicial systems. Thus, again, it must be made clear that, this study does not speak for skewed justice or judicial ethics.

Wolff (2011) also points out that the Lévinasian ethical subject is only inspired to act by the Other's appearance. So that if the Other does not appear the ethical subject remains complacent and does not act. This appears to be another valid observation. However, judicial decisions set precedent and guide future actions, and they are made by applying laws which are already in existence and available for everyone to be aware of. Therefore, there is some action to help the Other well before the matter reaches the judge for a judicial decision. The laws made by the legislature, and the laws and precedents set by judges under the common law system, invariably ensures that the matter does not have to reach the judge before action is taken to protect the Other. But Wolff (2011) further notes that Lévinas' ethical subject is drawn to action without regard for the situation or the mediations of action-that it appears that Lévinas' ethical subject is not a rational being. However, as Bernasconi (1999) highlights, Lévinas does allude to consciousness and thus the exercise of reason when the 'third' enters the picture, he says:

> If proximity ordered to me only the other alone, there would have not been any problem in even the most general sense of the term. A question would not have been born, nor consciousness, nor self-consciousness. The responsibility for the other is an immediacy antecedent to questions, it is proximity. It is troubled and becomes a problem when the third party enters [133]

Thus, Lévinas' ethical subject shifts from being the passive unconscious entity, to an assertive conscious entity. Wolff's (2011) other criticism of Lévinasian ethics is that

[133] *Otherwise than being* (p.157).

Lévinasian ethics undermines and erodes autonomy, because the root of Lévinasian ethical responsibility is not in the I but in the Other. Surely, anything that arbitrarily erodes autonomy cannot be regarded as ethical, and as stated, judges as supposed to be autonomous. Perhaps, a way out of this criticism is to remind the reader that, although the ethical subject in Lévinasian ethics does not subsume or change the Other, it is in effect the Other, for there is no difference between the ethical subject and the Other apart from the concept of alterity- which is a transcendent concept, and so is nothing concrete. In fact, Lévinas talks about a "calling into question of the Same-which cannot occur within the egoistic spontaneity of the Same…"[134]. This suggests that the ethical subject in effect ceases to exist (is egoless) and sees itself in the Other, which is now the priority. Indeed, Chen & Hung (2012) inform us that Lévinas said that 'The human face is the face of the world itself'[135]. They explain that "Humans, the earth, animals, plants: all life is the face…" (pp. 5-6). This suggests that there is in reality, no difference between the ethical subject and the Other, so that by treating the Other ethically the ethical subject is also acting on its own behalf and treating itself ethically- not only for the present but especially for the future. Indeed, I have already mentioned that because judges are part of the same society with the litigants who appear before them, when they act ethically, they are making an investment for themselves, for they might find themselves in the position of the litigant one day, so that a bad precedent they set might haunt them, while a good precedent they set might greatly benefit them.

Wolff (2011) also observes that, the Lévinasian ethical responsibility is an individual responsibility for the other, which provides no significant contribution to social ethics and thus is not capable of contributing towards a realistic and objective consideration of the problems of power and the systems of auto-affirmation, like the economy, law or politics. Perhaps this observation would have been valid if Lévinas did not explain that the his ethical subject and the Other live in the world with many others whose needs and interests must also be borne in mind, meaning that the dictates of institutions will be considered and taken into account, so that the ethical subject will no longer be acting alone, or acting only for a sole Other, but will be acting together with other entities and institutions to satisfy the competing needs of the many others who appear subsequent to arrival of the initial Other. Thus, Lévinasian ethics can contribute to social ethics, just like judicial decisions do. As stated,

[134] *Totality and Infinity* (p.43)
[135] In Lévinas, E. (1996). Is ontology fundamental? In Peperzak, A.T., Critchley, S., Bernasconi, R. (Eds.). Emmanuel Lévinas: basic philosophical writings (pp. 1-10). Bloomington: Indiana University Press. (Original work published in 1951)

judicial decisions have far reaching impact, and they guide society as a whole, not merely the individual litigants. Furthermore, enforcements and executions of judicial decisions often require the collaboration and cooperation of multiple institutions and entities, so that judicial decisions do not rely only on the judge, but also on other members and institutions of society.

A significant fact highlighted in Wolff (2011) is that, there is no ethical obligation on Lévinas' Other. This suggests that the ethical subject will be bound to the Other even if the Other is evil. This will be refuted by Wolff's (2011) own admission (as mentioned), that Lévinas later proved that he was no Gandhi. Wolff's (2011) apparent suggestion is that, context is very relevant to Lévinasian ethics, meaning that Lévinasian ethics is not of general or random applicability, but depends on the particular situation at hand. This might be true if one decides to insist on the presence of all the elements of Lévinasian ethics at the same time. One can however choose to be satisfied with the presence of only one or some elements of Lévinasian ethics. That would be the most reasonable path to follow if one practices Lévinasian ethics responsibly, because as observed by Wolff (2011), there is no casuistry or system of ethical rules in Lévinasian ethics because Lévinas believes there is no universal rationality that would allow for programming action towards the good, which might be the very reason why he leaves questions about "the calculation of the consequences of action to each particular agent in every particular situation" (p.203), and "implicitly places all of his hope on the spontaneous, unschooled capacity of every ethical agent to obey the imperative from the other and to measure his or her attempts to realise that obedience in sophisticated ways" (p.203).

The radicalism of Lévinasian ethics might be the reason why it is objectionable to some. Wolff (2011) comments that:

> "That this is a philosophical stance of radical responsibility, cannot be questioned. It deals with a radical plurality of values and doesn't count on the rationality of reality for help; it is backed up by no history of philosophy that would guarantee the ultimate success of ethical conduct. But the political responsibility, the real quest for just action, is constantly held hostage or terrorised by the mercilessly infinite and unconditional imperative of others

The response to this comment is that, as much as Lévinas' ethics is radical, it helps push us out of complacency-it interrupts complacency, so that the vulnerable are timeously and adequately protected from falling victim to unnecessary violence and injustice, which brings me to the issue of vulnerability in Lévinasian ethics.

Bernasconi (2018)[136] tells us that the concept of vulnerability in Lévinasian ethics is not to be understood in the abstract, but in terms of relationality- what engages the ethical subject in the vulnerable is not merely to know or see their vulnerability, but to determine how their vulnerability impacts them (the ethical subject). This means that the ethical subject will have to consider how the very existence of the vulnerable threatens their position and the justice of their society. Thus, it requires a responsive and responsible reaction from the ethical subject. And according to Bernasconi, the ethical subject will not be reacting responsively and responsibly if they fail to address the root causes of the vulnerability. Going by Bernasconi's explanation, if a vulnerable low income group goes to court seeking basic housing, the court should be concerned about why this group lack housing in the first place, and should also be concerned about the consequences of the group's lack of housing and the impact that has or may have on the society as a whole. And, the court will certainly not be acting responsively and responsibly if it decides to provide the group with housing without considering the impact of their lack of housing on the society. Moreover, the court should certainly not decide to provide the group housing in low income areas simply because they are low income, for that will be discrimination, and might be perpetuation of their poverty and separation from the affluent members of society to maintain the undesirable status quo. Rather, the court should give the low income group the opportunity to live in better areas of the community like everyone else, so that they can have the opportunity to reach their full potential and will no longer be vulnerable. And if the reverse situation occurs, so that a vulnerable affluent group goes to court seeking safe housing because they live near poor people who commit crimes and threaten their security, the court should consider the issue of the poverty of the poor group and how that presently and potentially impacts society as a whole. And the court should not decide that the rich group be placed in gated or protected isolated communities in the suburbs, as that would further divide the two groups and keep the poor group in their poor area with limited opportunities. Thus, what Bernasconi highlights is that the concept of vulnerability can be used to cause and perpetuate discrimination and indifference.

Bernasconi also suggests that harsh, excessive, inhumane and illegal treatment of suspected violent offenders and terrorists to protect the vulnerable public, does not act as deterrent to stop the recurrence of such crimes, because not only are the root causes of such crimes not

[136] In a lecture: "Lévinas, social vulnerability and responsibility". At Radbound University in Netherlands https://www.ru.nl/radboudreflects@1158845/lecture-robert-bernasconi/ / https://m.youtube.com/watch?v=I-K5cIUQoJU

addressed, the excessive and illegal treatment tend to stir the wrong sentiments, which then leaves the vulnerable public more vulnerable. Thus, the central point Bernasconi makes is that, the responsive and responsible treatment of the vulnerable other should not breed fear and vulnerability; should not result in injustice to another; should be wary of the possibility of injustice to another. Basically, that responsive and responsible ethical action should not be selfish. This brings us back to the point made by Sourdin &Zariski (2018) and Wolff (2011), that the ethical subject must be competent to be adequately responsive and responsible, which in turn highlights the fact that training is a prerequisite for responsive and responsible judging. Nevertheless, the training of judges is only one of many other requirements for responsive and responsible judging.

### i. Recognising the hurdles for the concept of responsive judging

As mentioned, the term "justice" has varying meanings and may be difficult to define in a manner acceptable to all. Some people understand justice as revenge or corrective measures, while others see value in its rehabilitation or restorative aspect. For some, following proper procedure is justice, while for others justice must be in substance and should include the equal distribution of liability and resources (Miller, 2021). Thus, a humanistic judge who is responsive and responsible in the Lévinasian context will not be ideal to everyone, and the acceptance of such a judge may well depend on the facts and circumstances of each case. Without a single acceptable definition of justice (which there is none), there will always be questions about judges' responsiveness and responsibility, and allegations that judges are not responsive and responsible enough.

Poor governance and poverty, especially in developing countries, means the unavailability of resources. Indeed, the result of poor governance is that competent judges and court staff will not be appointed. Under resources invite corruption and hence insensitivity. The reality in developing countries is that, rule of law is often in theory and not in practice, and basic facilities that can make judges perform optimally, are lacking (Vapneck et al, 2016). These might include lack of adequate court structures, court furniture, security for the court premises and court staff, stationery, waiting room and toilet facilities for litigants, witnesses, and lawyers, lack of witness protection programs, lack of facilities for rehabilitation of

offenders who need rehabilitation[137]. Also, facilities for the physically challenged such as braille for the blind, sign language interpretation for the deaf, and wheel chair access facilities, are also not available[138]. Under resourced courts rely on fees and fines for revenue, and the experience is that fees are never reviewed downwards-they are always reviewed upwards, which continually hurts the poor (the majority of the population in developing countries), and denies them access to justice. All these factors invite the impression that the justice system is not responsive.

Another issue in developing countries such as The Gambia for example, is that court proceedings are written in the English language, and so are not accessible to those who cannot read English, which is also a significant portion of the population. The unavailability of court proceedings and court processes in local languages means that judicial decisions cannot effectively guide future actions for proper utilization of court processes to ensure the desired result. Although court interpreters are often available, the experience is that they are not provided adequate training that allows them to effectively translate from the English language to local languages and vice versa. Most of the time court interpreters are not adequately versed in the English language. Another factor that negatively affects the responsiveness and responsibility of judicial decisions is the delays in the availability of records of court proceedings for appeal purposes, which is a major issue in The Gambian judiciary[139].

Another significant fact is that, not all who engage the courts agree with the system of justice administered. Davidheiser (2007) in his study about the Gambian justice system, highlight the fact that some Gambians do not prefer the Western system of justice because it can drive the communities further apart. Quashigah (2016) argues that human rights and justice as perceived by Western standards can vary or clash with cultural practices, and that to align cultural practices in line with universal human rights imbued idea of justice (as some judges do), can result in a situation where traditional societies are forced to conform to standards of justice they don't necessarily want to conform to. Thus, for example, when judicial decisions condemn harmful cultural practices such as female genital mutilation, child marriage, and the subjugation of women, traditional societies will feel that they are not being responsive to

[137] The Gambia Judiciary Strategic Plan 2021-2025 also highlights some of these shortcomings in The Gambia judiciary

[138] See The Gambia Judiciary Strategic Plan 2021-2025

[139] This fact is also highlighted in The Gambia Judiciary Strategic Plan 2021-2025. In The Gambia, it can many years for court records to be available

them. Indeed, justice a sector under-represented in culture, tribe, ethnic group, class, or religion, can result in perception of judicial insensitivity. A justice system should reflect the composition of the population at large, otherwise it will not be perceived as adequately receptive, and will be perceived as discriminatory against certain groups (Dobbs, 2008; Uhrig, 2016). Lack of diversity in judicial appointments will naturally create fear in some groups that they will not and will never get justice from the judiciary.

### ii. Some Inherent biases in the justice system

As was also emphasized by Sourdin&Zariski (2018), the acrimonious nature of the adversarial court system can prevent judges from being as sensitive as they ought to be. In such a system, there is inevitably a winner and a loser, which might leave the losing party feeling that their need for justice was not met. And significantly, some of the enforcement methods under the adversarial system-especially those that include the intervention of uniformed and armed security officials, can leave the parties and their families permanently traumatized and stigmatized.

When judges are overwhelmed with too many cases, they can be stressed and short of sensitivity. Moreover, when judges have too much case load, there will be backlogs, and some cases will inevitably drag on for years. In The Gambia, it is not unusual for a case to take more than a decade to be determined, which can give the impression that the justice system is not sympathetic. And, although the general trend now is that, judges do not allow technicalities to get in the way of substantial justice, the fact remains that cases are still won or lost on technicalities because the law is largely technical even if it has a humanistic foundation.

The ineffective performance of others sectors within the justice system can affect the responsiveness of judges. When other institutions such as the police or prosecution don't do their work properly, it negatively affects the work of the judge. For example, if the police don't carry out thorough investigations, or the prosecution fails to prosecute properly, the judge might have to acquit an accused who is actually guilty. Under such circumstances, when the judge acquits the accused, there might be public outcry. The judge might be accused of being out of touch and insensitive, when there is nothing else they could have

done under the circumstances. Such public outcry can negatively impact the judge's sensitivity in future cases, so that they might be overly insensitive to an accused person who actually deserves sensitivity. And sometimes, when a judge passes a severe sentence to respond to the severity of the charges on the convict and the evidence presented, they are criticised by human rights activists for being too harsh, which can negatively affect their sensitivity next time they deal with similar cases. The finding is that judges are conscious of their duty to the public and they are motivated among other things by the need to meet public demands and expectations of justice (Baum, 2006). However, judges' response to public demands and expectations can be counterproductive and insensitive. This means that, a judge can be accused of being insensitive by being sensitive-that the judge is potentially a tragic hero.

Although Borrows (2016) warns that judicial humility if left unchecked and unbalanced can be harmful, judicial humility is important. Berger (2018) says judicial humility should be encouraged because it helps "to combat excesses: arrogance, self- elevation, and pridefulness" in the judge (p.6), and allows the judge to be attuned to the needs, experiences, and vulnerabilities of others as well as to their own limitations and responsibilities. However, because the position of a judge is so powerful, it can be a struggle for judges to remain humble, and indeed, it is inevitable that some judges will be accused of pridefulness, and some judges will not be able to resist the temptation to be prideful. The absence of humility in judges impedes judicial responsiveness and responsibility, for such judges will be more concerned about satisfying their prides and egos than with serving justice. The absence of judicial humility leads to judicial bullying, which Smith (2017) observes, is increasingly prevalent and exists in various forms.

Ineffective vetting systems will inevitably mean wrong appointments, so that some judges will not have the qualities required for their position. Such judges will abuse their positions, and will serve injustice rather than justice. They will fall into one of Burnett's (2016) categories:

i. The neglecter- demonstrated by the judge, who though was under an obligation to hear the case of a foster child within 120 days, took five months to hear it, and then failed to issues a decision for nine months while the child languished in foster care.

ii. The wrist slapper- demonstrated by the judge who sentenced a man convicted for repeatedly drugging and raping his wife and allied offenses (all felonies), to home detention instead of a single day in prison
iii. The bigot- demonstrated by the judge who insisted that he is not going to hear a devout Sikh until he 'takes that rag of his head'
iv. The victim blamer- demonstrated by the judge who partly justified sentencing a rapist to community service because of the victim's prior sexual history
v. The Enabler- demonstrated by the judge who sentenced to probation, a young man from a wealthy family convicted for the manslaughter of four people while driving under the influence of alcohol

Such judges will certainly be part of the list of 'bad' judges, who Miller (2004) and Williams (2013) say lack the necessary judicial temperament because they are arrogant, unprincipled, inept, self-indulgent, self-aggrandizing, rude, impatient and condescending towards others to the annoyance of lawyers, litigants and the general public. These are also the symptoms of what is often described as "black robe disease", "black robe fever", "black robe syndrome", or "robe-itis", which Harrelson (2008) eloquently explains as follows:

> …the dreaded 'Black Robe Disease.' Its symptoms include an ever-increasing belief in one's infallibility, linked with a declining ability to empathize with people who enter the courtroom. Another manifestation of this illness is the appearance that the judge's sense of humor has been surgically removed.
>
> It should come as no surprise that judges are subject to this malady. New judges are treated with a respect they may never have known before. People stand when they enter and leave the courtroom. A judge's questions are always answered: Yes, your honor, No, your honor.' Everyone tends to agree with the judge. Even old and often repeated jokes rarely fail to get a laugh. Over time, it is easy to confuse the prestige and power of the judge position with a feeling that the judge is smarter and wiser than everyone else. Exposed to sometimes obsequious treatment, a judge can become upset when someone has the effrontery to question a ruling or decision. I am sure that is why an old and truly wise judge told me early on, 'Always remember, ...you were appointed, not anointed.'
>
> Black Robe Disease should not be confused with occasional bouts of judicial frankness, justified indignation, or even righteous anger…
>
> A surefire antidote to the malady of Black Robe disease is periodic doses of humility…(n.p.).

Article 7 of the Universal Declaration of Human Rights (1948), and indeed the provisions of many constitutions (including that of The Gambia), provides that everyone is equal before the

law. However, many studies suggest that judges can be biased and discriminatory. Apart from biases and discrimination on grounds of race, ethnicity, and tribe, a number of studies suggest that an accused person may be discriminated against for other reasons such as physical appearance. Indeed, ugliness, intimidating, fearsome, or chilling looks, even baby face looks, tidiness, size, mannerisms, and style of dressing may influence a judge's decision. The poor appearance of a litigant or witness can be a reason for doubting their credibility, even if they are in fact credible, and a pleasing appearance of a litigant or witness can have the reverse effect (Downs &Lyons, 1991; Gunaydin et al, 2016; Hollier, 2017; Kulka & Kessler 1978; Stewart, 1980; Zebrowitz & McDonald, 1991). There is also the finding that, in many cases, the evidence of law enforcement officers is preferred over the evidence of accused persons and other witnesses (Dorfman, 1999; Mckinley&Baker, 2014; Moran, 2018; Thompson, 2012).

The fact that judges have immunity[140] for anything said or done in the discharge of their functions, will give the impression that they are encouraged to be insensitive. Indeed, judges might abuse this immunity to be insensitive to litigants. The fact that some litigants are not aware of their rights against judges who are guilty of misconduct, and the fact that some lawyers may be unwilling to take action against judges who are guilty of misconduct for fear of repercussions, allows judges to get away with wrong doing against litigants, and leave litigants perpetually vulnerable to insensitive judging.

### iii. The occupational Hazards for the judge

A 'good judgment' lies in the 'well- being' of the judge (European Commission for the Efficiency of Justice, 2019, p.11). Yet, the reality is that judges face certain inherent occupational hazards that hinder their sensitivity. Judges face psychosocial risks (Bornstein et al, 2018; Miller et al 2018), which can affect the quality (responsiveness) of their judgments. Cases involving violence and death, or traumatic issues such as rape, child abuse, child pornography, and discrimination, might leave a judge distressed and traumatized (Bornstein et al, 2018; Miller et al 2018), which might negatively affect their sensitivity. In many developing countries (including The Gambia), there are hardly any mechanisms in place to

[140] The 1997 constitution of the Gambia and most constitutions provide judges judicial immunity

prepare judges emotionally and physically for their tasks. This lack of preparation inevitably means that they can be inadvertently or deliberately insensitive.

The principle of judicial independence and impartiality means that, judicial culture is marked by the isolation of judges. Judges are limited in their extra judicial activities because they have legitimate concerns about their security. It is well known that, judges are susceptible to physical attacks (sometimes fatally), by disgruntled litigants and members of the public who don't like their decisions. Thus, judges can be very lonely and insecure, which is harmful for their mental well-being. Many judges will report, that their isolation makes them feel lonely, alienated, and melancholic, which ultimately affects their performance (Field 2020). Weiss (2021) reports that the results of The National Judicial Stress Resiliency Survey designed by the American Bar Association, suggests that 20% of American judges have at least one depressive symptom, and that many judges are stressed by their decisions.

The demand for judicial services means that judges are overloaded with work[141], for which (especially in developing countries), they are provided very little resources, paid very little, provided little incentives and perks, and placed under very poor working conditions. Judges may also not enjoy freedom from political interference and political pressures even if there are laws to guarantee such freedom. In reality, such judges will feel they don't have security of tenure, and will decide cases to please politicians rather than to be responsive to serve justice.

Significantly, judges are often overburdened by cases that should not have been in their courts in the first place. Some of these cases can drag on for years, wrongly clogging the court's docket, and depriving others of the speedy justice they deserve and causing discontent. And the most worrying thing is that some of such cases are filed by lawyers (or judges) of many years standing, who might be motivated more by personal reasons such as money, pride, anger, or sabre rattling than by justice. Howard (2012) for example, laments about an administrative law judge, who sued his dry cleaners for damages of $54 million (initially claiming ($67 million) for losing a pair of pants, in a case (Roy L.Pearson v Soo Chung et al[142], which dragged on for two years with full discovery, and proceeded to a bench trial where the dry cleaner prevailed. The point Howard (2012) makes, is that the case could have been filed at the small claims which had simpler procedures and would have taken much

[142] CA-4302-05

shorter time to resolve, (or could have been settled amicably out of court) and that by filing the case where it should not have been filed, it delayed other cases, and exposed the justice system to ridicule and claims of judicial insensitivity to the needs of other litigants with more serious cases.

When cases drag on for too long, judges are often blamed. But, it must be borne in mind that, the judge is bound by the rules of fair trial –which requires all the parties to be given adequate opportunity to put forward their case. Sometimes judges are faced with elaborate lengthy procedures, interlocutory applications, appeals, and evidence that hinder the timely progress of the case. Sometimes witnesses might have to come from abroad, lawyers, parties or witnesses may not be able to attend court, and will seek adjournments after adjournments for various reasons. Experts will need time to prepare reports for evidence, and the court might be understaffed and under resourced to be able to proceed. Indeed, lawyers might invoke delaying tactics to stall the case. However, the public will hardly know all this, and will simply blame the judge for the delay and for being insensitive. This makes it necessary for judges to be educating the public about how the justice system works.

## Conclusion and recommendations

I have demonstrated that judicial decisions bear the characteristics and qualities of Lévinasian ethics and are therefore informed by Lévinasian ethics. I have also demonstrated that because the judge's role requires the exercise of humanism, their decisions can, and should be informed by Lévinasian ethics if they are to serve justice effectively. However, I also highlight the many factors that hinder the use of Lévinasian ethics in judicial decisions. These factors can be alleviated by taking certain useful steps. Court processes and procedures must not only be made simpler and more flexible as suggested by Sourdin & Zariski, (2018), they should also be made much cheaper, especially in developing countries where legal fees and court process fees are beyond the affordability of many and legal aid services are very limited. It means appointing the right people as judges, improving vetting procedures for judicial appointments to ensure that the right people are appointed to judicial office. It also means broader training for judges as suggested by Sourdin& Zariski (2018). It means having the right types of lawyers -humanistic lawyers, who are more open to drastically reducing

their fees for people with limited means, and who are more open pro bono services. It means court processes being available in local languages especially in countries were the illiteracy rate is high. It also means having very good court interpreters to interpret court processes properly to illiterate litigants. It means having honest and committed court staff that can be relied upon by the public. And it goes without saying that, it requires honest, humble and committed lawyers and judges. It requires judges having very good relations with lawyers so that proceedings are always smooth and swift, it requires competent judges with the requisite willingness to be responsive and responsible, it requires good governance and the requisite political will, so that the judiciary is allowed to be independent without interference from the executive and legislative branches, and the judiciary will be provided with adequate resources to carry out its functions optimally. It also requires a professional media fraternity who will make accurate reports about court proceedings and judicial decisions. It requires adjusting and improving on the training of lawyers, judges, and law students to be more human oriented than process and procedure oriented, it requires the support of the whole of society, and because being responsive can also lead to allegations or irresponsiveness, it requires a proper understanding or what being responsive entails. Thus it requires research. Significantly, it requires realistic public expectations because not only are judges human beings and so not perfect, but also because judges are doing a very difficult and demanding job-a paradoxical job, which Arendt (1936)[143] aptly describes when she says that judges are neither wholly autonomous nor absolutely limited, that they are both and must be neither. Yes, judges should be humanistic and responsive just as Lévinas would like them to be. However, there should be reciprocity- the public should also be humanistic and responsive toward judges. Indeed, as stated, Lévinas subsequently recognised the inevitability of considerations of principles of traditional justice in ethical relationship.

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