



EUROPA-UNIVERSITÄT  
VIADRINA  
FRANKFURT (ODER)

Band 37

Viadrina-Schriftenreihe zu Mediation und Konfliktmanagement

Ursula Froese

# Levinas, Justice and Mediation



Wolfgang Metzner Verlag



Band 37

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Viadrina-Schriftenreihe zu Mediation und Konfliktmanagement

**Viadrina-Schriftenreihe zu Mediation und Konfliktmanagement**

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Ursula Froese

# Levinas, Justice and Mediation



Wolfgang Metzner Verlag

Master-Studiengang Mediation  
und Konfliktmanagement  
Masterarbeit  
Studiengang 2016/2018



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VIADRINA  
FRANKFURT (ODER)

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Printed in Germany  
ISBN 978-3-96117-118-7  
ISSN 2365-4155

*Bibliografische Information der Deutschen Bibliothek*

Die Deutsche Bibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

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## **Abstract**

Although dispute resolution through mediation has become widely accepted in Western liberal societies as an alternative to litigation, the prevailing idea of justice does not apply. The latter is conceived as the application of a universal principle – “equal freedom for all” –, whereas parties in a mediation process seek a personalized solution to their dispute. This study asks whether the rethinking of freedom by the French phenomenologist Emmanuel Levinas might provide an approach to understanding mediation as a process whereby justice is achieved. Levinas’ exploration of the structures underlying human experience led him to a conception of justice rooted in responsibility for the other and elaborated through dialogue, in light of which mediation can be seen as a privileged context for achieving justice. The study identifies the main characteristics of a mediation process conducive to achieving justice in the Levinasian sense and describes how such a process looks in practice.

## **Keywords**

Mediation, mediator, justice, freedom, Levinas, dialogue, ethics

## **Zusammenfassung**

Obwohl die Streitbeilegung durch Mediation in den westlichen liberalen Gesellschaften als Alternative zum Rechtsstreit weithin akzeptiert ist, erscheint die liberale Auffassung von Gerechtigkeit als kaum zutreffend. Letztere versteht sich als Anwendung eines universalen Prinzips – „gleiche Freiheit für alle“ –, während die Parteien in einem Mediationsverfahren eine individuelle Lösung für ihren Streit suchen. In dieser Studie wird der Frage nachgegangen, ob das Überdenken der Idee der Freiheit durch den französischen Phänomenologen Emmanuel Levinas einen Ansatz bieten könnte für das Verständnis der Mediation als Verfahren, wodurch Gerechtigkeit erzielt wird. Levinas’ Erforschung der Strukturen, die der menschlichen Erfahrung zugrunde liegen, führte ihn zu einer Konzeption von Gerechtigkeit, die in der Verantwortung für den Anderen wurzelt und durch Dialog erarbeitet wird. Aufgrund dieser Konzeption kann die Mediation als privilegierter Kontext für das Erzielen von Gerechtigkeit betrachtet werden. In der Studie werden die

wichtigsten Merkmale eines Mediationsverfahrens, das der Herstellung von Gerechtigkeit förderlich ist, aufgezeigt und beschrieben, wie ein solches Verfahren in der Praxis aussieht.

**Schlagworte**

Mediation, Mediator, Gerechtigkeit, Freiheit, Levinas, Dialog, Ethik

Ursula Froese, October 2021

## 1. Introduction<sup>1</sup>

Is mediation a method of conflict resolution whereby justice can be done? The following study aims to discover whether the theory of justice developed by the French phenomenologist Emmanuel Levinas might be helpful for understanding mediation as a process in which disputants achieve a solution that can be considered just, despite the fact that it does not invoke the universality of the law.

Mediation has in the course of the past half century become firmly established as an alternative to litigation. Defined by the European Union as “a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves on a voluntary basis to reach an agreement on the settlement of their dispute with the assistance of a mediator”,<sup>2</sup> mediation has gained widespread traction and legal recognition. It would therefore seem to go without saying that mediation shares with litigation the property of being a process whereby justice is done. This, however, is not the case, at least not according to the prevailing liberal conception of justice.<sup>3</sup>

The reason for this is as easy to grasp as it seems inescapable. Liberal democratic societies are based on the fundamental value of individual freedom, with justice being understood as the equal opportunity for all to exercise that freedom. Liberal justice is a universalizing principle easily translatable into a legal code that can be applied in a court of law. It is, however, hardly applicable to dispute resolution through mediation. When disputants seek to settle their differences with the help of a mediator, they are not trying to apply a universal rule or regulation, nor are they trying to generate such a rule. Mediated agreements are personalized solutions tailor-made for the particular situation at hand.

Mediation, then, would seem to be incompatible with what we generally accept as the elaboration or delivery of justice. Does this present a problem? Some might say that it does not – that mediation is a method in which disputants try to find a

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<sup>1</sup> This study is a reworked version of the thesis submitted to the European University Viadrina, Masters Studies in Mediation and Conflict Management (LL.M.) in 2018. I would like to thank Lars Kirchhoff and Anne Isabel Kraus for their comments on the original text.

<sup>2</sup> Directive 2008/52/EC of the European Parliament and Council, Article 3a.

<sup>3</sup> This study focuses on the liberal conception of justice, as it forms the backdrop to Levinas' theory that is the object of our inquiry. Other contemporary theories of justice, utilitarian or communitarian theories or those continuing the Aristotelian tradition of realizing the “good life”, are also framed in universal principles difficult to apply to mediation, but will not be specifically addressed here.

practical solution to their differences by talking things through with one another, and that the question of whether or not that solution constitutes justice need not be a matter of concern. “What does it matter how justice is defined if I can find a way to continue working with a colleague who has made life difficult for me,” a disputant may ask.

Historically, a controversy about the incompatibility of justice and mediation did flare up when the latter first gained traction in the United States in the last quarter of the 21st century. Justice Owen Fiss famously dismissed consensual dispute resolution methods as mere peace-making, incapable of determining justice, which, he insisted, required a judge in a court of law administering the will of a community.<sup>4</sup> Mediation scholars and practitioners countered by calling into question the ability of the courts to deliver justice: “Settlement (and its sometimes rejection of law) could just as easily be seen as a democratic expression of individual justice where rules made for the aggregate would either be unjust, or simply irrelevant to the achievement of justice in individual cases,” Carrie Menkel-Meadow argued.<sup>5</sup> Andrew McThenia and Thomas Sheffer spoke of a different kind of justice: “not something people get from the government but [...] something they give to one another.”<sup>6</sup>

That debate was never really resolved, however, and has since given way to a pragmatic approach to conflict management. Already at the Pound Revisited conference in 1976, the idea of a multi-door courthouse was floated, in which disputes would be sorted into different categories, some that should be litigated, and others that might better be resolved through other methods, such as facilitation, mediation, or arbitration.<sup>7</sup> Today, it is this line of thinking that prevails, with the understanding that the quality of justice is improved by giving people a choice as to how they wish to resolve their disputes.

Achieving justice is not commonly considered the top goal of mediation by mediators, nor is it at the centre of discussion when disputants seek the help of a mediator in settling their differences. “In 80 per cent of the cases, justice doesn’t play

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<sup>4</sup> Owen Fiss, “Against Settlement”, *Yale Law Journal* 93 (1984), pp. 1073 ff.

<sup>5</sup> Carrie Menkel-Meadow, “Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)”, *Georgetown Law Journal* 83, p. 2676.

<sup>6</sup> Andrew McThenia and Thomas Sheffer, “For Reconciliation”, *Yale Law Journal* 94, pp. 1660 ff.

<sup>7</sup> Lara Traum and Brian Farkas, “The History and Legacy of the Pound Conferences”, *Cardozo Journal of Conflict Resolution* Vol. 18:67 (2017), <https://www.cardozoicr.com/volume-183-spring-2017/>.

a role. Rather it's a matter of fairness," mediator Blanka Weber remarks.<sup>8</sup> This situation is also reflected in the relative dearth of academic studies on mediation and justice.<sup>9</sup>

From a wider societal perspective, the relative absence of the question of justice in mediation can be seen as part of a more general trend in Western societies. The first half of the 20th century provided examples enough in Europe of dismally misguided state-sanctioned projects of delivering justice – National Socialism and the Holocaust, Stalinism and the Gulag. From this perspective, the very emergence of mediation and other alternative approaches to conflict resolution, which do not presume to impose justice through a ruling authority, can be seen as part of a general move away from justice with a capital "J".

### 1.1. Justice matters

And yet, the pragmatic approach has its limits. People are not making use of mediation to the extent one may have expected. In Germany, the 2017 report of the German Federal Government on the impact of the German mediation law passed in 2012<sup>10</sup> shows that the use of mediation in Germany is low. The ROLAND law report of the same year contains similar results: although sixty-nine per cent of the

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<sup>8</sup> Blanka Weber, "Ist fair wichtiger als gerecht?", Deutschlandfunk, 06.03.2014, [https://www.deutschlandfunk.de/mediation-ist-fair-wichtiger-als-gerecht.1148.de.html?dram:article\\_id=279366](https://www.deutschlandfunk.de/mediation-ist-fair-wichtiger-als-gerecht.1148.de.html?dram:article_id=279366) (accessed 05 July 2021).

<sup>9</sup> In the German-speaking literature, Leo Montada noted the peripheral attention to the question of justice already in 2000 and has since then tried to stimulate debate on the topic. See: "Gerechtigkeit und Rechtsgefühl in der Mediation", in: Anne Dieter, Leo Montada and Annedore Schulze (eds), *Gerechtigkeit in Konfliktmanagement und in der Mediation* (Frankfurt am Main, New York: Campus, 2000); "Die (vergessene) Gerechtigkeit in der Mediation", in: Gerda Mehta, Klaus Rückert (eds), *Mediation und Demokratie*, Carl-Auer-Systeme Verlag, 2003, pp. 156 ff.; "Gerechtigkeit – ein Kernproblem in Konflikten und deren Beilegung", in *Konfliktodynamik*, 1/2014, pp. 26 ff. But apart from discussions of particular aspects such as subjective justice or procedural justice, the question of justice has not received a great deal of attention since then. See: Elke Müller, "Subjektive Ungerechtigkeit und Gerechtigkeitskonflikte in der Mediation", in: *Zeitschrift für Konfliktmanagement* 5/2003, pp. 200 ff.; Markus M. Müller and Stefan Falk, "Verfahrensgerechtigkeit in Konflikten: Chancen und Grenzen" in *Konfliktodynamik* 1/2014, pp. 18 ff. A recent exception is: Monika Pasetti, *Gerechtigkeit durch Mediation: Mediation als praktischer Diskurs zur Herstellung intersubjektiver Gerechtigkeit*, Viadrina-Schriftenreihe zu Mediation und Konfliktmanagement Band 11, Wolfgang Metzner Verlag, 2017.

<sup>10</sup> *Bericht der Bundesregierung über die Auswirkungen des Mediationsgesetzes auf die Entwicklung der Mediation in Deutschland und über die Situation der Aus- und Fortbildung der Mediatoren*, 2017.

German population surveyed claimed to have heard of the possibility of mediation, only four per cent had made use of mediation in the last ten years.<sup>11</sup>

There are many possible reasons for this. These may include financial constraints, concerns about the time investment required, or reticence with regard to engaging directly with the other party to the conflict. But as Bernhard S. Mayer has pointed out in his study *Beyond Neutrality*,<sup>12</sup> one of the sources of people's resistance to making use of mediation is that they do care about justice and are not convinced that mediation will be able to deliver it. The very fact that mediation is a flexible, individualized process may interfere with people's desire for procedural justice, Mayer suggests. Disputants often believe that their conflict is about right and wrong, and not just about reconciling incompatible interests. They tend to be wary of approaches that require a softening of their position in the direction of compromise.<sup>13</sup>

The present study is motivated by the belief that justice matters for the practice of mediation and that there is a need for an answer to the question of whether and how it can be achieved. Finding that answer will require taking a step back from the practical considerations of what works in mediation and engaging in a reflection on whether and how justice can be understood, not as something that requires the subsuming of an individual case under a universal principle or law, but rather as something that, in the words of McThenia and Sheffer, "people give to one another".<sup>14</sup>

The following explores the question of whether the thought of French philosopher Emmanuel Levinas might provide a way to understand mediation as an achievement of justice. A strong subscriber to modern democracy, yet highly critical of the prevailing liberal value of freedom, Levinas developed a theory of justice that is achieved not through the application of a universal principle but rather through dialogue.

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<sup>11</sup> "Einstellung der Bevölkerung zum deutschen Rechtssystem und zur Mediation", *Roland Rechtsreport 2017*, Institut für Demoskopie Allensbach, July 2017.

<sup>12</sup> Bernhard S. Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*, San Francisco: John Wiley & Sons, 2004.

<sup>13</sup> *Ibid.*, p. 25.

<sup>14</sup> Andrew McThenia and Thomas Sheffer, *op. cit.* (Note 6).

## **1.2. An alternative view of justice**

Levinas, a Lithuanian-born Jew, belonged to the generation of philosophers who were deeply and personally affected by the tragic events of 20th century Europe.<sup>15</sup> As a university professor in post-war France, he was intent on looking into the European philosophical tradition to find out how things could have gone so seriously wrong. He did not follow those whose response was to turn away from an occupation with justice towards a more pragmatic approach. Instead, his thinking was driven by the need to discover and promote a new way of thinking justice that would preclude the repetition of the disastrous events witnessed.

Levinas was a phenomenologist, dedicated to exploring the fundamental structures underlying human experience. His search for a new understanding of justice led him to a critique of the whole European philosophical tradition that began with the Ancient Greeks, which he saw rooted in a conception of freedom as pure agency. Levinas' phenomenological research led him to discover something more primordial than agency: ethical relation to the other. The discovery of this ethical relationality, which he called proximity, led him to a conception of justice achieved not through application of a universal law ensuring equal freedom for all, but rather through the integration of ethical responsibility into a shared reality, mutually accepted as just, through a process of dialogue.

Might Levinas' understanding of proximity and dialogue open the door to understanding conflict resolution through mediation as a process conducive to the achievement of justice? This is the question to which we are seeking an answer on the pages that follow.

## **1.3. Overview**

The following study is divided into two parts. The first presents Levinas' theory of justice with a view to answering the question: does it provide a basis for understanding conflict resolution through mediation as a process whereby justice is achieved? A summary of Levinas' critique of the liberal idea of justice as equal freedom for all is followed by an overview of his discovery of ethical relationality as the deeper freedom, followed by a presentation of his conception of justice as

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<sup>15</sup> In the essay "Signature" Levinas sums up his intellectual biography as having been dominated by the presentiment and the memory of the Nazi horror. In *Difficile liberté : Essais sur le judaïsme*, Paris: Albin Michel, 1963.

the elaboration of a shared reality achieved through dialogue. The presentation concludes with the observation that Levinas' theory lends itself well to explaining how justice can be achieved in mediation.

In the second part, the focus is shifted to mediation. We see, on the one hand, how the typical characteristics of a mediation process make it conducive to achieving justice and, on the other, how some widely practiced approaches, while successful in other respects, are unsuited for this purpose. A second chapter provides a phase-by-phase description of how mediating for justice looks in practice. In conclusion, we see how Levinas' theory of justice provides the basis for bringing the role of the judge and judgement back into mediation.

A main challenge for this study has been avoiding the *Skylla* of miring the reader in philosophical theory before arriving at the topic of mediation and the *Charybdis* of oversimplifying Levinas' thought so as to lose the argument for its relevance. I have tried to remedy this by, on the one hand, interrupting the explanation of Levinas' theory of justice in the first section with short inserts on how it will be applicable to mediation and, on the other hand, saving some of the details of Levinas' insights for the chapter describing the practice of mediating for justice step-by-step, where they are directly applicable.

Translations of quotations from Levinas' works into English are mine. Following common practice, the words "Autrui, autrui" are translated as "Other" and the words "Autre, autre" as "other".<sup>16</sup>

Regarding gender references, an effort has been made to use gender-neutral and gender-inclusive language throughout. In those places where, to avoid a cumbersome expression, the feminine or masculine gender only is used in a general reference, it is to be understood that both genders are meant.

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<sup>16</sup> Dino Galetti, "The grammar of Levinas' other, Other, autrui, Autrui: Addressing translation conventions and interpretation in English-language Levinas studies", *South African Journal of Philosophy* 34(2), 2015, pp. 199–213.

## 2. Levinas' Theory of Justice

### 2.1. Introduction

What is justice? We are all familiar with the image of Dike, the Greek goddess of justice, blindfolded, scales held high. Justice has to do with balance, equality, a measure that applies equally to all. But “equality between people, in and of itself, means nothing,” Levinas remarks in his first major philosophical work, *Totalité et infini*.<sup>17</sup> Everything depends on the answer to the question: what is being measured and how?

In our liberal societies we have the answer at hand: what is being measured is freedom, and freedom is understood as the right to further one's interests through the exercise of free will. The goddess is blindfolded to ensure that she applies one universal principle indiscriminately to all. Levinas counters that there is a deeper way to see freedom: as empowerment with responsibility for the other. Consequently, there is a different way to see justice – and the goddess does not need to be blind.

### 2.2. Critique of liberal justice

Levinas traces the understanding of justice that prevails in our present-day democracies back to the 17th century political thinker Thomas Hobbes, who in his treatise *Leviathan* developed a theory of the emergence of the state from an original natural condition that he depicted as a war of all against all.<sup>18</sup> Hobbes, proceeding from the premise that every person is endowed with the natural right to freedom, struggled with the conundrum that the exercise of that freedom was bound to pit every person against every other, resulting in a pre-social state of self-defeating mutual destruction, a chaotic hell of permanent strife.

The solution that he came up with determines the idea of justice that prevails to this day: being not only free but also rational beings, people agreed to enter into a social contract in which they voluntarily abrogated their unconditional right to freedom and submitted to sovereign rule. According to Hobbes, it is only with this

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<sup>17</sup> Emmanuel Levinas, *Totalité et infini*, Martinus Nijhoff, 1971.

<sup>18</sup> Thomas Hobbes, *Leviathan* [1651], Oxford University Press, 1996 (reissued 2008).

social contract that justice was instituted in society: everyone is equal under one universal authority to which all are bound.

Voluntary submission to sovereign rule: Hobbes' idea was taken over by the Enlightenment thinkers Locke and Rousseau and famously interiorized by Kant in his categorical imperative, dictated by the practical law within us: "Act only according to that maxim whereby you can at the same time will that it should become a universal law."<sup>19</sup> It persists in modern theories of justice: in Jürgen Habermas' recasting of the categorical imperative into discourse ethics<sup>20</sup> and in John Rawls' theory of justice as a regime agreed by rational participants from behind a veil of ignorance.<sup>21</sup> In the course of democratization, the sovereign ruler became the rule of law, yet the basic figure of thought remains. Whether the decree of an absolute monarch or the expression of citizens' common interests, the standard of justice since the *Leviathan* has been a universal instance, divested of the personal collisions – anger, aggression, irritation – that made life in the state of nature, in the words of Hobbes, so "solitary, nasty, brutish and short."<sup>22</sup>

The necessity of deferring to a universal authority in matters of justice is firmly entrenched in our contemporary consciousness, a feature of our social existence we accept as a fact of life. "We accept that our legislative bodies decide what norms become law and that our institutions of justice regulate the application of the same," Habermas remarks.<sup>23</sup> It is the price we pay for living in societies that are well-ordered, peaceful and secure, the price of justice.

Too high a price, says Levinas. Hobbes' investiture of the sovereign state as the instance of justice was a historic mistake that set our political thinking on a fateful wrong track, he claims. To Hobbes' legacy he holds up the mirror of the history of Europe since the Enlightenment, centuries of wars and aggression committed in the name of the state and of justice. But he sees danger also in the peaceful Europe of the second half of the last century, in the social quietude of the like-minded, imposed not by force but by persuasion.

The equal submission of all under a unifying rule does not suffice for ensuring a society that is just, Levinas argues. Hobbes' answer to the war of all against all

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<sup>19</sup> Immanuel Kant, *Grundlegung zur Metaphysik der Sitten* [1785], Akademie Textausgabe, Bd. IV, de Gruyter, 1978.

<sup>20</sup> Jürgen Habermas, *Theorie des Kommunikativen Handelns*, Suhrkamp, 1981.

<sup>21</sup> John Rawls, *A Theory of Justice*, Harvard University Press, 1971.

<sup>22</sup> Hobbes, *op. cit.* (Note 18), p. 84.

<sup>23</sup> Habermas, *Faktizität und Geltung*, Suhrkamp, 1998, p. 147.

may have stopped the violence, but pacification is not yet justice. Sovereign rule treats all subjects as the same and can never do justice to their individual concerns. Furthermore, it risks excluding those it does not recognize as its own – Levinas speaks of the European “bourgeois peace behind closed doors”.<sup>24</sup> At worst, if sovereign rule is usurped or perverted (as happened in Nazi Germany) it does injustice to all.<sup>25</sup>

Levinas does not try, as did many others, including the above-named authors, to improve upon Hobbes’ conception of sovereign rule, to make it more inclusive, participatory or fair. Instead, he calls into question the very premise on which it is based.

Hobbes devoted the first part of his *Leviathan*, entitled “On Man”, to an elaboration of that premise: the conception of human nature as defined by the exercise of free will. Hobbes described human beings as endowed with the natural right to freedom, which he defined as the right to “secure one’s livelihood as one sees fit”, and driven by a natural inclination to exercise that right with a “perpetual and restless desire of power after power”.<sup>26</sup> It was human freedom that inevitably pitted one person against every other, making the war of all against all appear inevitable in Hobbes’ eyes.

A younger contemporary of Hobbes frequently cited by Levinas, the French mathematician and theologian Blaise Pascal, shared the former’s assumption about human nature, but framed it in moral terms. The “self is hateful”, he famously declared in his *Pensées*.<sup>27</sup> It makes itself the centre of everything and enemy of all the others.<sup>28</sup> Pascal saw the desolation of the consequences of this view of human nature even more acutely than did Hobbes. He did not allow himself the luxury of seeing an escape from the inherent injustice of the self-assertion of freedom in the institution of sovereign rule. Laws might serve to impose order, but describing them as the implementation of justice is a tale for the ignorant, he declared, anticipating the argument that Levinas was to advance later.<sup>29</sup> The truth, Pascal claimed,

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<sup>24</sup> “Paix et proximité”, *Alterité et transcendance*, Fata Morgana, 1995, p. 141.

<sup>25</sup> *Ibid.*, p. 147.

<sup>26</sup> Hobbes, *op. cit.* (Note 18), p. 66.

<sup>27</sup> Blaise Pascal, *Pensées* [1670], #509.

<sup>28</sup> *Pensées*, #455.

<sup>29</sup> *Pensées*, #295. C.f. Pascal Delhom, “Le Savoir de la Justice. Levinas Lecteur de Pascal”, in: *Recherches Lévinassiennes*, 2012, pp. 15–34.

is that we are trapped in our hateful selves, alone in the universe and ignorant of what justice might be.

Levinas shares Pascal's diagnosis of the impotence of sovereign rule as proposed by Hobbes to overcome the inherent injustice of the self.<sup>30</sup> Channelling the aggression of the many into one unifying rule does not defeat the logic of war, he declares. "The peace of empires emerging from war rests on war," he writes at the beginning of *Totalité et infini*.<sup>31</sup> And at the conclusion of his second major treatise, *Autrement qu'être*, it is still the same question that concerns him: "The real problem for us lies not so much in fighting the violence, but in asking ourselves how we can avoid instituting violence in the very name of this fight."<sup>32</sup>

And yet, Levinas is not content to accept the hopeless vision of Pascal. Is there not a less despairing way to see the human condition? – he asks. A vision that does not entail the inevitability of a war of all against all? "It is not unimportant," he writes in *Autrement qu'être*, "to know whether the egalitarian and just State, in which man realizes himself (and which it is our task to institute and above all to maintain) proceeds from a war of all against all or from the irreducible responsibility of one for all, and whether it can do without friendship and faces."<sup>33</sup>

Levinas' answer is categorically in favour of the second alternative: justice proceeds from the irreducible responsibility of one for all. Ironically, it is Pascal's bleak moral vision that shows him the way.<sup>34</sup> A self that knows itself to be hateful cannot be completely alone, Levinas reasons. Somehow, it will have been imparted with the knowledge of what it means to be just. There has always been a different dynamic at work than the aggression of competitive self-assertion, he claims. There has been friendship and there have been faces, even if their voices are muted, forgotten or perverted.

### A deep-seated prejudice

The idea that the human condition is defined by the freedom of self-assertion is a prejudice deeply entrenched in our Western knowledge-based civilization, Levinas explains in *Totalité et infini*. It goes back to the inauguration of that civilization in the thought of the Ancient Greeks. "Receive nothing from others that is not already

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<sup>30</sup> C.f. the chapter "Verité et Justice" in *Totalité et infini*, pp. 80 ff.

<sup>31</sup> *Totalité et infini*, p. 6.

<sup>32</sup> Emmanuel Levinas, *Autrement qu'être ou au-delà de l'essence*, Martinus Nijhoff, 1978, p. 278.

<sup>33</sup> *Ibid.*, p. 248.

<sup>34</sup> Pascal Delhom, *op. cit.* (Note 29), p. 22.

inside you, as though since all eternity you have already been in possession of what comes to you from outside. Receive nothing – be free”: this is how Levinas summarizes the lesson of Socrates.<sup>35</sup>

He recounts how the Greeks learned to understand the world by seeing everything around them as a function of themselves. This was the basis of their ontology – their science of being. Representing reality meant positing a concept – a projection of one’s self – as the principle of knowledge and subsuming the diverse elements of reality underneath it. This proved a powerful tool for unlocking the world, as demonstrated by the enormous success of Western philosophy and science, and it determines the way we understand reality and organize our social lives to this day. However, Levinas points out, the representational thinking of Western science is not the only way in which to make sense of the world. Neither is it the first – he points to his own Judaic tradition of open-ended question and answer, more ancient than that of the Greeks –, nor is it the full story of how we live our lives today.

There is a latent blindness and a latent violence to seeing the world as a function of one’s own freedom, Levinas explains in *Totalité et infini*. It understands the other exclusively in its own terms, in an endless movement of expansion in which the other is assimilated to the same. “This is the definition of freedom: maintaining oneself against the other, despite all relation to the other, ensuring the autarchy of the self,” he writes.<sup>36</sup>

If self-affirmation, striving to assimilate the other, were the full story of our lives, we should have to conclude with Pascal that there is no justice, Levinas admits. But it is not the full story, he insists. The idea that freedom, understood as self-assertion, is the first principle of being abstracts from fundamental aspects of our experience. It abstracts from the corporality of our existence, and from the fact that we are from the start connected with one another by a relationship of ethical responsibility that determines the formation of the conscious self and precedes the science of being.

### **Critique of liberal justice: What does it mean for mediation?**

Levinas’ critique of the liberal view of justice gives articulation to the retort mediators offered to Justice Owen Fiss in the dispute mentioned above, in which Fiss claimed that mediation, as opposed to litigation,

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<sup>35</sup> *Totalité et infini*, p. 34.

<sup>36</sup> *Ibid.*, p. 37.

was pacification, not justice. We can imagine that Levinas, had he been invited to join in this dispute, would have turned the argument around, imputing that it is the ruling of judges in the courts that risks being mere pacification. The rule of law inherited from Hobbes' idea of submission to sovereign rule is first and foremost a tool for limiting aggression and imposing order onto society, but not for determining justice, he might have argued. The speaking of justice in the courts subsumes individual cases under a general principle. As such, it suffers from the shortcomings that Levinas identifies as characteristic of the Greek approach to the world based on the self-assertion of freedom: it is blind for anything it does not recognize as a function of itself.

Might Levinas' critique apply to mediation as well? Mediation is not exempt from the subsuming way of thinking that Levinas depicts as dominating our Western civilization. A mediator might encourage business partners to look for a solution to their dispute by subsuming their respective concerns under an overarching interest to which they both subscribe, for example, the good financial performance of their company. Such a solution would, however, be blind for other concerns that may be major factors in their conflict – the illness of one of the partner's children, or the ethical issues that one of the partners has with some of the accounts managed by the company. Mediation does not need to be limited to such an approach, however. The dialogue conducted in mediation offers possibilities for different solutions that do not require subsuming concerns under one unifying principle.

### **2.3. Rethinking freedom**

Phenomenology, the philosophical method initiated by Edmund Husserl and practiced by Levinas, is a break with the tradition inaugurated by the Ancient Greeks, of understanding the world as the function of a self-projecting concept declared to be the principle of knowledge. Phenomenology does not abstract from the fact that our existence is corporeal, that we live our lives embedded in the world around us. It seeks to take an observing stance, describing the structures of experience as they present themselves. It asks: how did we get to the concept of the self? What is the process by which we attained it? "Phenomenology sets forth concepts without ever

destroying the scaffolding that has allowed one to climb up to them,” Levinas writes.<sup>37</sup>

Husserl explored the structures underlying the self by focusing on the function of knowledge. He showed how the self as the subject of knowledge is always already directed towards its object and how intentionality is an integral part of the structure of consciousness.<sup>38</sup> His student Martin Heidegger expanded the scope of the inquiry, undertaking to show that knowledge is just one, derivative, way of our “being in the world”, which he considered to be essentially characterized by worry, care (*Sorge*) for our own finite being.<sup>39</sup> Levinas, a student of both, goes a step further still. His own phenomenological inquiry leads him to discover ethical responsibility for a being other than ourselves as the basic fact of our existence. “Life is not the bare will to be; it is not ontological *Sorge* for this life,” he writes in *Totalité et infini*.<sup>40</sup> “Life is *love of life*, a relation to something that is not me, but dearer to me than my being.”<sup>41</sup>

More primordial than the intention of an object of knowledge or the occupation with the finality of our being is the pleasure and the burden of our relation to another, Levinas claims. What sets this relation apart from both Husserl’s “intentionality” and Heidegger’s “being in the world” is that it traverses a chasm unbreachable by any effort of conscious representation.

We can get a sense of what Levinas means if we reflect on a basic fact of our corporeal existence: we can never jump into the skin of another. We cannot ever know, objectively, what it is to see the world from another’s point of view. In many a science fiction scenario, overcoming this limitation has been explored as an enticing and intriguing possibility. For Levinas, by contrast, the irreducible separation between ourselves and the other, as frustrating and even excruciating as it may be, is the condition of what constitutes our very humanity: ethical relation, prior to consciousness and prior to being.

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<sup>37</sup> *Autrement qu’être*, p. 204.

<sup>38</sup> Edmund Husserl, *Ideen zu einer Reinen Phänomenologie und Phänomenologischen Philosophie* [1913], 4th edition, Tübingen: Niemeyer, 1980.

<sup>39</sup> Martin Heidegger, *Sein und Zeit* [1926], 15th edition, Tübingen: Niemeyer, 1979.

<sup>40</sup> *Totalité et infini*, p. 115.

<sup>41</sup> *Ibid.*

### 2.3.1. Ethical relation: Levinas' big idea (part one)

The self as a knowing and acting subject, is not the first fact of existence, Levinas claims. Before we exercise our freedom in a restless and insatiable quest to assimilate the other, there has always already been ethical relation. Human encounter is the source of incessant disturbance: pleasure, joy, irritation, obsession, and above all an infinite call to responsibility. The other is irreducibly separate from me, and precisely for this reason commands my respect. Prior to consciousness and prior to being, I have been invested with responsibility for the other, who forever transcends my cognitive grasp.

Levinas proposes an “ethics as first philosophy, where ethics is understood as a relation of infinite responsibility to the other person”. This, in the words of Levinas scholar Simon Critchley, is Levinas’ “big idea”.<sup>42</sup> The ethical relation, as Levinas understands it, is characterized by a paradoxical conjunction of distance and intimacy. The other is irreducibly separate from me, surpassing my imagination, exceeding my powers of representation. At the same time, the ethical pull that goes out from the other and holds me responsible concerns me and me alone. There is no observer’s perspective, my responsibility for the other is not the object of anyone’s knowledge, there is nobody who could take my place. “The radical separation between the same and the other means precisely that it is impossible to place oneself outside of the correlation between the same and the other in order to note the correspondence or non-correspondence between this going and this coming. Otherwise, the same and the other would find themselves united in a common perspective and the absolute gap that separates them would be filled,” Levinas explains.<sup>43</sup> He employs the word “proximity” to denote the simultaneous farness and nearness of ethical relation.<sup>44</sup>

The ethics that Levinas proposes as first philosophy has sometimes been misunderstood as a prescriptive ethics – a teaching on how, in order to create a just world, we *should* relate to one another. The misunderstanding is not surprising, as ethics in the usual order of hierarchy in Western philosophy comes after ontology – the science of being – and after psychology – the study of the psyche. Levinas’ undertaking, by contrast, is phenomenological. It is a description of the structures underlying experience. He is describing a fundamental humanity that precedes and

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<sup>42</sup> Simon Critchley and Robert Bernasconi (eds), *The Cambridge Companion to Levinas*, Cambridge University Press, 2002, p. 6.

<sup>43</sup> *Totalité et infini*, p. 25.

<sup>44</sup> *Autrement qu'être*, pp. 129 ff.

informs the self and being, an ethical responsibility with which we have always already been saddled.

### 2.3.2. Describing proximity

One of the major challenges Levinas faces, as anyone familiar with the creativity of his vocabulary can attest, is finding the words to portray the ethical dimension that is prior to being – or rather, “otherwise than being”, to use the term he coined for the title of his second major work.

In *Totalité et infini* Levinas describes the primordial ethical relation by showing how it shines through in our everyday lives. We feel it when we cannot pass someone by who is suffering, who is hungry: Levinas names the examples of the stranger, the widow or the orphan.<sup>45</sup> But proximity is not limited to persons who are vulnerable or particularly dear to us. It informs all of our encounters, with any passer-by; it shows itself, according to Levinas, every time we gaze into the face of another. On the one hand, we examine the features before us like one examines any object: we note the angle of the jaw, the shape of the mouth and nose, the colour of the eyes. On the other hand, we perceive the face as expression, and as such it resists possession as an object of my cognition. It is an exhortation and a plea: “do not remain indifferent to me; do not leave me to my own fate!”<sup>46</sup> The expression of the face does not need to be understood literally, Levinas remarks. In the essay “Paix et proximité” he refers to a scene in the novel *Life and Fate* by Vassili Grossman, in which a woman waiting in line to get news of the politically arrested in Moscow describes the tightened shoulder blades of the persons in front of her: “Never could she have thought that the human back could be so expressive and transmit in such a penetrating fashion the states of the soul.”<sup>47</sup>

The challenge of describing primordial ethical relationality is even more acute in *Autrement qu'être*, where Levinas endeavours to describe it, not as it resonates in our everyday lives, but rather as it constitutes the “latent birth of the subject” prior to consciousness and being.<sup>48</sup> He addresses the difficulty by distinguishing between two levels of language. On the one hand, there is the “said”, the description of how things are, which uses words the way they were designed, to describe

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<sup>45</sup> *Totalité et infini*, p. 76.

<sup>46</sup> *Ibid.*, p. 215 f.

<sup>47</sup> “Paix et proximité”, *Altérité et transcendance*, p. 144.

<sup>48</sup> *Autrement qu'être*, p. 218.

being. On the other hand, there is the “saying”, the portrayal of proximity. When we engage in “saying”, we have no choice but to use the words of the “said”, but we do so for the price of a betrayal that shows itself in neologisms and grammatical awkwardness.<sup>49</sup>

The self begins not in the nominative but in the accusative, Levinas explains. I am “accused”, uniquely elected, “inspired” by the other – this is the first breath of my life as a subject, he writes.<sup>50</sup> Inspired, I have already obeyed before receiving the order – and this movement Levinas calls “substitution.”<sup>51</sup>

### 2.3.3. Substitution

The idea of substitution is central to Levinas’ rethinking of the self and of freedom. Substitution takes place before it makes sense to speak of “oneself” and “another” – this is the betrayal to which Levinas refers when he speaks of the difficulty of describing the “saying” in the words of the “said”. When I come to consciousness, I have always already been inspired, put myself in the other’s shoes, I am always already non-indifferent. Paradoxically, it is through substitution that I become who I am, unique. Not by recognizing myself as a particular case of a universal – which always involves duplicity. But rather as me – one of a kind, unique. It is a coming-to-be of the subject that happens over and over again in the course of experience.

The self comes to be, in Levinas’ understanding, not as self-consciousness, but rather as what Levinas calls “recurrence”. “Recurrence [is] not ‘self-consciousness’, where the subject still keeps a distance to itself,” Levinas writes. Self-consciousness, as usually understood in the Western philosophical tradition (Levinas refers to Hegel) is the returning of being to itself as a concrete universality, equal to itself, self-sufficient, resting within itself. In recurrence, by contrast, the self finds itself thrown back behind its point of departure, “outside of any concept, assigned to responsibility and by virtue of this assignment not finding any rest within itself.”<sup>52</sup> In recurrence, the self is “this side of itself, this side of indifference to itself – precisely substitution for the Other [...], the one saying to the other: ‘I’ or ‘I am here’.”<sup>53</sup> The uniqueness of the self consists in responsibility, in kindness for

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<sup>49</sup> *Ibid.*, pp. 16 ff.

<sup>50</sup> *Ibid.*, p. 182.

<sup>51</sup> *Ibid.*, pp. 156 ff.

<sup>52</sup> *Ibid.*, p. 182.

<sup>53</sup> *Ibid.*, p. 228 f.

the other: “Goodness, kindness (*bonté*) is the only attribute that does not introduce multiplicity into the subject. As soon as one becomes conscious of it, it is no longer goodness,” Levinas writes.<sup>54</sup>

Substitution is “a different manner of acceding to the other than by knowing: it is approach of the neighbour”,<sup>55</sup> not a gathering of the many under the one, but direct relation, like a mirroring. The movement of substitution, Levinas emphasizes, is prior to the representation of being through the gathering of multiplicity under a unifying concept, which since the time of the Ancient Greeks has been equated with reason. Before we begin projecting our concepts onto the world, we have always already substituted ourselves for the other.

Contemporary theories of direct embodied cognition confirm the idea of a relation more basic than representation, and their debt to the French phenomenologists, including Levinas, has been acknowledged.<sup>56</sup> Recent advances in neuroscience, the discovery of the role of mirror neurons in empathy, for example, can also be seen as confirmation of the primacy of substitution.<sup>57</sup> What sets Levinas’ idea of proximity apart is that he understands this fundamental relation as pre-ontological and ethical, as investment with responsibility for the other. “Responsibility is the very rationality or the very universality of reason; it is the rationality of peace.”<sup>58</sup>

### 2.3.4. Responsibility: The deeper freedom

The recognition of the primordially of proximity and the assuming of responsibility through substitution makes the idea that the world is my project, the creation of my free will, seem laughable, a delusion, Levinas writes.<sup>59</sup> We have always come late into this world. We have always already been invested with responsibility for our neighbour. The call to non-indifference can be heeded or ignored, but it has always been there: “The will is free to assume this responsibility in the manner it desires, but it is not free to refuse the responsibility itself; it is not free to ignore

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<sup>54</sup> *Ibid.*, p. 187.

<sup>55</sup> *De Dieu qui vient à l'idée*, Vrin, 1982, p. 221.

<sup>56</sup> Cf. Matt Bower, “Radicalizing the Phenomenology of Basic Minds with Levinas and Merleau-Ponty,” in: Miguel Garcia-Valdecasas, José Ignacio Murillo, Nathaniel F. Barrett (eds), *Biology and Subjectivity: Philosophical Contributions to Non-reductive Neuroscience*, Springer, 2016.

<sup>57</sup> Cf. Margaret Steward, “Empathy and the Role of Mirror Neurons”, *All Regis University Theses*, 821, 2017, <https://epublications.regis.edu/theses/820>.

<sup>58</sup> *Autrement qu'être*, p. 249.

<sup>59</sup> *Ibid.*, p. 194.

the sensible world to which it has been introduced by the face of the other. In the reception of the face, the will opens itself to reason.”<sup>60</sup>

Responsibility, and not the self-assertion of freedom, is the absolute human value, according to Levinas: “The only absolute value is the human possibility of asking more of oneself than of others.”<sup>61</sup> It is deeper than freedom; Levinas also calls it the deeper freedom. A freedom “different from that of initiative”.<sup>62</sup> In proximity, the self is not caught up in subsuming and assimilating the world as a function of itself. Responsible for the other, it is not alone, not trapped in the prison of the self which in the Western philosophical tradition has elicited the seemingly unsolvable problem of solipsism. The bubble of the self has always already been burst, in the ethical relation of proximity to the other.

Because responsibility is the deeper freedom, touching base with it can feel not like shouldering a burden, but like empowerment, Levinas observes. Juliet’s declaration in Shakespeare’s *Romeo and Juliet* illustrates the empowerment Levinas means: “My bounty is as boundless as the sea, / My love as deep; the more I give to thee, / The more I have, for both are infinite.” But, as Shakespeare also knew, this is not yet justice.

### **Rethinking freedom: What does it mean for mediation?**

Levinas’ phenomenological research led him to discover proximity, responsibility for the other, as the primordial structure underlying our subjectivity. Might mediation provide a context for touching base with proximity?

In mediation, parties usually meet face-to-face. They size each other up, take note of physical features, scrutinize each other as one examines any object of cognition. But apart from this, their meeting is also an occasion to experience the face of the other as expression. As such, it is an occasion for touching base with proximity, with the ethical call to non-indifference, which, according to Levinas, is the basic humanity underlying all of our interactions.

An important difference between the communication that typically takes place in litigation and the communication in mediation is that

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<sup>60</sup> *Totalité et infini*, p. 241.

<sup>61</sup> “Philosophie, justice et amour : Entretien avec Emmanuel Levinas” in *Esprit*, August/September, 1983, p. 12.

<sup>62</sup> *Autrement qu’être*, p. 181.

the parties engage with one another directly. They are encouraged to develop an understanding for the point of view of the other, to see things from the other's perspective. When they put themselves in the shoes of the other, they typically experience a surge of understanding. This does not leave them indifferent; it can even feel like empowerment. From a Levinasian point of view, this is the activation of substitution, the investment with fundamental responsibility for the other through which the subject is formed – ever and ever again.

We can imagine a landlord and a tenant, in conflict because the tenant, a young migrant, is not participating in the weekly cleaning schedule. The landlord, encountering the tenant, first sizes him up with a seasoned eye: a young man who is thin, badly dressed, not a native speaker. But he also perceives the young man's expression. He feels the distress, he hears the implicit plea – do not leave me to my fate; if I am evicted where will I go? For a moment, he puts himself in the other's shoes. Without knowing the details of the tenant's situation, he gets a sense of his preoccupation with his traumatic past, his obsession with assisting his siblings still left behind, his confusion at having been thrust into a new social environment – and this does not leave him as he was before. He feels the empowerment of responsibility: he, as the landlord, and nobody else, is in a unique position in this moment to make a difference in this person's life. The point of contention – the question of mopping the staircase – still remains, however, and requires a solution, also with a view to both the landlord's and the tenant's responsibility towards the other tenants. Substitution and the shouldering of responsibility are a first step towards justice, but its achievement will require an additional step.

#### **2.4. From proximity to justice**

Levinas' phenomenological research led him to the discovery of proximity, responsibility for the other, as the deeper freedom and the key to the uniqueness of the self. But responsibility is not yet justice. Justice is a matter of balance, of equality, whereas the responsibility that Levinas has identified as constituting our basic humanity has nothing to do with either: "My central idea is what I have called the asymmetry of intersubjectivity, the exceptional situation of the self," Levinas says. "In this regard I always recall Dostoevsky. One of his characters says: 'We are all

responsible for everything and for everyone, and I more than all the others.”<sup>63</sup> However, he says, we do not live in a world where there is just ourselves and the other. There are always a third person, who disturbs the asymmetry of responsibility.

“The third introduces a contradiction into the saying, the sense of which was unidirectional up until then.”<sup>64</sup> With a third person in play, it is not enough to be imbued with responsibility and kindness: “With the entry of the third, I have to make a judgement where I was obliged only to take responsibility.”<sup>65</sup>

My neighbour, for whom I am responsible, may be poor, vulnerable, the object of my infinite pity. However, just as I am responsible for her/him, she/he is also responsible for another, a third, Levinas explains. And in view of our respective responsibilities, we are equals. “The third looks at me in the eyes of the other, and the language he speaks is justice.”<sup>66</sup>

With the entry of the third person – and there has always been a third – there arises the need to weigh and to compare; there arises the question of justice: “The third is other than my neighbour, but also another neighbour, but also a neighbour of the other and not only another of his kind. The other and the third: what are they for one another? Which of the two comes first? The other is in a relationship with the third – for whom I cannot answer entirely, even if I do answer – without any question – for my neighbour alone. The other and the third, my neighbours, contemporaries of each other, distance me from the other and from the third,” Levinas writes.<sup>67</sup>

How is this weighing and comparing accomplished? Through language, says Levinas. Levinas’ theory of justice is a theory of language.<sup>68</sup> Just as he calls into question the premise of Western thought that would have experience begin with the self-assertion of freedom, so he calls into question the theory of language that would have communication begin as an activity of the self. The sending and receiving of messages from one self to another, which takes place on the level of being, on the level of the “said”, presupposes communication on the level of ethical

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<sup>63</sup> “Philosophie, justice et amour”, *op. cit.* (Note 60), p. 9.

<sup>64</sup> *Autrement qu’être*, p. 245.

<sup>65</sup> “Philosophie, justice et amour”, *op. cit.* (Note 60), p. 9.

<sup>66</sup> *Totalité et infini*, p. 234.

<sup>67</sup> *Autrement qu’être*, p. 245.

<sup>68</sup> Cf. Edith Wyschogrod, “Language and alterity in the thought of Levinas”, in: Simon Critchley and Robert Bernasconi, (eds), *op. cit.* (Note 41), pp. 189 ff.

relation, the “saying”. “The unlocking of communication,” Levinas writes, “takes place in the ‘saying’. [...] It happens in the risky disclosure of oneself, in sincerity, in the rupture of interiority and the abandon of all shelter, in exposition to trauma, in vulnerability.”<sup>69</sup> The saying hardly needs words. In the assuming of responsibility for the other, it is enough for the other to know: “I hear you; I am here.” However, with the weighing and comparing required for the elaboration of justice, another dimension of language comes into play. Justice requires words to which one and the other can relate; it requires the integration of the “saying” into the “said”.

#### 2.4.1. Comparing the incomparable: Levinas big idea (part two)

“If there were responsibility for the other alone, there would be no problem,” Levinas writes.<sup>70</sup> He adds that he means this “in the most general sense of the term”. Without the weighing and comparing of justice, he explains, there would be neither consciousness nor self-consciousness; no question of being at all.

We saw above how Levinas understands proximity as the condition for the uniqueness of the self. But the coming-to-be of the self and the world requires more. Being emerges with the elaboration of justice. “The comparing of the incomparable is the latent birth of representation, of logos, of consciousness, of work, of the neutral notion: ‘being’,” Levinas writes.<sup>71</sup>

Being and justice are co-emergent. This is Levinas’ second “big idea” – less widely recognized than the first. With the weighing and comparing of our respective responsibility for the other, each incomparable, each constituting our very uniqueness, we give each other the world, through language.<sup>72</sup> More often than not, justice has been masked, forgotten, or perverted. But that does not derogate from the fact that justice is an integral part of language and an integral part of being.

A possible misunderstanding must be cleared up, which will bring us closer to the crux of Levinas’ understanding of justice. We have described the move from proximity to justice as though it were an empirical progression, as though there were first infinite responsibility for the other and then, in a second step provoked by the entry of the third, the weighing and comparing of justice. It could lead to the false impression that justice in Levinas’ view relativizes and dilutes the infinite responsibility of proximity. But this is a typical example of the pitfalls of trying to

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<sup>69</sup> *Autrement qu’être*, p. 82.

<sup>70</sup> *Ibid.*, p. 245.

<sup>71</sup> *Ibid.*, p. 247. See also: “Philosophie, justice et amour”, *op. cit.* (Note 60), p. 8.

<sup>72</sup> *Ibid.*, p. 246.

describe the “saying” in terms of the “said”. Levinas does not have an empirical progression in mind. It is a tighter knot that ties proximity to justice.

The ethical relation of proximity is a relation to the absolutely other, irreducibly separate from myself. In view of Levinas’ account of justice, we can give a clearer answer to the question of what it is that constitutes this irreducible separation between myself and the other, which is the very condition of our corporeal existence. It is precisely the other’s relation to the third(s), to which I can never be privy, that puts her/him forever out of my cognitive grasp and commands my respect. The third person does not, in fact, come later to disturb proximity, she/he has been there all along. “The beyond from which the face comes is the third person,” Levinas explains in an essay on the origin of meaning.<sup>73</sup> He speaks of “illeity” – derived from the third-person pronoun “il” – “third-person-ness” – to describe this fact. Illeity means that proximity and justice never concern just me and the other alone – they are always nurtured from the fact that there are thirds. “In a certain sense, all the others are present in the face of the radically other.”<sup>74</sup> “Everything that happens here “between us” concerns the whole world, he writes.<sup>75</sup>

At the same time, the fact that proximity always already concerns the third(s) and the question of justice does not diminish the original responsibility for the other: “In no way is justice [...] a degeneration of the *for the other*, a diminution, a limitation of anarchic responsibility,” Levinas writes.<sup>76</sup> The determination of justice is always grounded in the “human possibility of asking more of oneself than of others.”<sup>77</sup>

“But the contemporaneity of the many is knotted around the diachronicity of the two: justice only remains justice in a society where [on the one hand] there is no distinction between the near and the far but where [on the other] the impossibility remains to pass over the nearest; where the equality of all is carried by my inequality, by the surplus of my responsibilities over my rights.”<sup>78</sup>

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<sup>73</sup> “La signification et le sens”, *Humanisme de l’autre homme*, Fata Morgana, 1972, p. 86 f.

<sup>74</sup> “Philosophie, justice et amour”, *op. cit.* (Note 60), p. 10.

<sup>75</sup> *Totalité et infini*, p. 234.

<sup>76</sup> *Autrement qu’être*, p. 248.

<sup>77</sup> “Philosophie, justice et amour”, *op. cit.* (Note 60).

<sup>78</sup> *Autrement qu’être*, p. 248.

#### 2.4.2. A different Leviathan

If we return for a moment to Hobbes' *Leviathan*, we can imagine that Levinas would give quite a different account of the beginnings of human interaction than did Hobbes. His story would begin, not with the self endowed with the right to freedom, but rather with the ethical relation of proximity and the elaboration of justice which it presupposes. Levinas may well consider the picture Hobbes paints of the state of nature as a war of all against all to be a real possibility, as there is always the danger of justice being perverted. But in Levinas' account, the self-asserting ego, confronted with the other, would stop short in its tracks. It would feel the shame of its naïve self-assertion: "The presence of the other, does it not call into question the naïve legitimacy of freedom? Does freedom not perceive itself as shameful? And, in and of itself, as usurpation?"<sup>79</sup>

In Levinas' account, the escape from the war of all against all proposed by Hobbes, the mitigation of the damage of self-asserting freedom through the voluntary submission of all to sovereign rule, would not be considered an option; it would be recognized as a mere channelling of the "naïve legitimacy of freedom" from the individual to the state. Nor would Levinas draw the consequence, as did Pascal, that the self is therefore doomed to subsist its inherent hatefulness. Rather, he would describe the shame elicited by the self-asserting ego's confrontation with the other as an opportunity to reconnect with the primordial ethical relation of proximity. He would emphasize the urgency for freedom, confronted with the unfathomable otherness of the other, to remember its origin in "friendship and faces", and to justify itself, not in the sense of proving itself (as was the case for Hobbes) but in the sense of rendering itself just.<sup>80</sup>

In the liberal view of justice inspired by Hobbes, what is being measured and balanced is the destructive force of the freedom of self-assertion – the freedom of each being limited equally, blindly, without regard for individual differences. In Levinas' view, it is responsibility for the other that is being weighed and compared. Equality arises when my eyes are opened to the unfathomable otherness of the other, when she/he reveals her/himself to me as also responsible. Justice is not blind. "Either equality occurs," Levinas declares, "when the Other commands the Same, and reveals himself to him in responsibility; or equality is nothing but an

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<sup>79</sup> *Totalité et infini*, p. 339.

<sup>80</sup> *Ibid.*, p. 88.

abstract idea, a word. Equality cannot be detached from and is an integral aspect of the welcoming of the face.”<sup>81</sup>

### **From proximity to justice: What does it mean for mediation?**

We saw above how mediation could be seen as an opportunity to touch base with proximity – the infinite responsibility of one for the other that Levinas sees as the pre-condition of the self. But justice, for Levinas, requires more than the shouldering of responsibility for the other. It concerns also (at least) a third person. It requires the weighing and comparing of responsibilities, by myself and the other as equals, through dialogue. In order for mediation to be an achievement of justice, it would need to be an exchange on the basis of equality. And the basis of that equality would have to be the respective responsibilities of the parties – one for the other and the other for a third. An exchange by means of a dialogue in which the parties agree on a common world.

We can take the famous example of two sisters fighting over an orange to see how this might look in practice.<sup>82</sup> Both sisters want the orange, but, as it turns out, for two different purposes – one wants to make juice for a breakfast drink and the other needs the rind for baking a cake. They may reach an accommodation on the basis that these interests are compatible: one takes the rind and the other takes the juice. This is a smart way of splitting the orange, but in order to achieve justice in the sense imagined by Levinas, the discussion would have to go further. The sister wanting to bake the cake may be reminded, seeing the concern in the eyes of the other, that the friend for whose birthday the cake is intended is allergic to orange rind. She may reconsider her intention and decide to use vanilla instead. The other, who particularly loves this type of orange because of its size and high juice yield, may remember that her sister has been reading up on labour exploitation in the production of citrus fruits. The sisters may agree that she go ahead and use this orange for her juice, but that they will pay attention to origin when buying oranges in the future. The

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<sup>81</sup> *Ibid.*, p. 236.

<sup>82</sup> This example has become famous thanks to the discussion in: Roger Fisher and William L. Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, Boston: Houghton Mifflin, 1981.

dialogue has been a disturbance of the sisters' original interests, resulting in agreement on a more just piece of the world for themselves and others.

## 2.5. Justice through dialogue

The world comes to be, according to Levinas, as a realization of justice, rooted in proximity. More often than not, however, proximity and justice are masked or forgotten. "I have no illusions about this and I do not have an optimistic philosophy of the end of history," Levinas states. "It is evident that there is in man the possibility of not opening up to the other, there is the possibility of evil. Evil is the order of being *tout court* – and, by contrast, approaching the other is humanity breaking through into being, an "otherwise than being".<sup>83</sup>

Justice is not achieved once and for all. But it is also not lost once and for all. Justice, for Levinas, is something that can be built again and again, every time two persons open up to one another, reconnect with their fundamental responsibility, for one another and for the others of each other. It requires engaging with one another as equals, weighing responsibilities against one another, reinventing a part of reality where we both say "I can live with that".

The dialogue of justice is not just any dialogue. There is a long Western tradition, Levinas writes in an essay devoted to the subject of dialogue,<sup>84</sup> of engaging with one another with the goal of "bringing the other to reason". Points of view are shared with a view to uniting them into one meta-narrative, deemed to be the reasonable one, the truth. Although such a process can and has been called a dialogue, it is essentially a monologue, Levinas observes: it does not depart from the first-person perspective.<sup>85</sup>

In the same essay, Levinas notes that a new understanding of dialogue emerged in the 20th century, introduced by authors such as Martin Buber.<sup>86</sup> Buber recognized that there is a special quality to the relation between two persons – he called it the "I-thou" relationship –, which cannot be reduced to the first-person perspec-

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<sup>83</sup> "Philosophie, justice et amour", *op. cit.* (Note 60), p. 16.

<sup>84</sup> "Le dialogue", in Levinas, *De Dieu qui vient à l'idée* (Vrin, 1982), pp. 211–230.

<sup>85</sup> *Ibid.*, p. 220.

<sup>86</sup> Martin Buber, *Ich und Du* [1923], (Reclam, 2008).

tive of a subject intending an object. Buber saw the “I-thou” relationship as reciprocal, characterized by the fact that I say “thou” to you, knowing that you say “thou” to me.

Levinas acknowledges his debt to Buber – he, too, considers the relation of one person to another in proximity to be irreducible to objective cognition. But he does not consider the reciprocity that Buber envisages as the essential characteristic of dialogue between two persons to qualify as a dialogue of justice. Encounter with the other is not a reciprocal relation, Levinas insists; responsibility is always asymmetric. There is an urgency to the face-to-face encounter, he writes, that goes beyond complicity between two persons, a cry for justice that requires consideration of the third.<sup>87</sup> “As citizens we are reciprocal, but that is a more complex structure than the face-to-face,” he declares.<sup>88</sup>

For Levinas, achieving justice through dialogue requires the third-person perspective; it requires recognizing the other in his/her responsibility for third parties, in his/her illeity, always out of reach of my cognition. Justice always involves consideration of the third, and the third of the third – it resonates as far as my responsibility and that of the other and other’s other reaches.<sup>89</sup> At the same time, it remains rooted in the intimacy of proximity.

Dialogue for justice, as conceived by Levinas, can involve many interlocutors, but it requires only two in consideration of a third. Achieving justice does not require a universal principle that is applied equally and blindly to all. That marks its essential difference to the elaboration of justice in the liberal understanding.

Achieving justice through dialogue is a difficult process. Levinas calls it “a fine risk”.<sup>90</sup> There is always the risk that the other will reject one’s advance, and there is always the risk of misunderstanding. A comparing of the incomparable, it is by its very nature a challenge which can never come to a conclusive end and which must ever and again be taken up anew.

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<sup>87</sup> “Le dialogue”, *op. cit.* (Note 83), p. 229.

<sup>88</sup> “Philosophie, justice et amour”, *op. cit.* (Note 60), p. 9.

<sup>89</sup> *Ibid.*, p. 235.

<sup>90</sup> *Autrement qu’être*, pp. 190, 259.

## 2.6. Levinas, justice and mediation

Now we are in a position to answer the question with which we began: does Levinas' theory of justice provide us with an approach to understanding mediation as a process whereby justice is done? We can answer in the affirmative.

Levinas developed his theory of justice on the basis of a critique of the idea of freedom that is fundamental to our liberal societies and the discovery of a deeper freedom in the ethical relation of proximity. On the basis of proximity, he developed a conception of justice as the integration of ethical relation into a shared representation of the world. Justice, in this view, does not require the application of a universal principle to an individual case. It is achieved through dialogue – a dialogue that can involve many but does not require more than two.

Levinas' critique of the liberal idea of justice does not discount the usefulness and necessity of laws or state institutions. However, he does dispute that the source of the justice delivered by the law lies in its universality. Justice derives from dialogue, he insists, also in the case of the law, and depends on the quality of consultation and exchange in the legislative process. When the law is applied in the courts, Levinas warns, there needs to be vigilance that its weight does not override the exigencies of the case at hand.<sup>91</sup> There is always the danger that the law and institutions take on a life of their own and serve themselves instead of the persons they were designed for: "Justice, society, the state and its institutions [...], nothing is exempt from the control of responsibility of one for the other," he writes.<sup>92</sup>

Justice, in Levinas view, is not reserved for the courts of law. It can be achieved in many formal and informal contexts – anywhere where two persons encounter one another in their irreducible difference, where they reconnect with their fundamental responsibility one for the other and, in consideration of the third(s) for which they are also responsible, enter into discussion and rebuild a piece of reality they are willing to share.

Conflict is a special situation, where the unfathomable otherness of the other appears in all its intensity. While a dispute between two parties represents a tear in the social fabric, it at the same time represents, from a Levinasian point of view,

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<sup>91</sup> C.f. Jean Paul Grosso, "Ethics and Law in the Thought of Emmanuel Levinas", [https://www.academia.edu/1912153/Ethics\\_and\\_Law\\_in\\_the\\_Thought\\_of\\_Emmanuel\\_Levinas](https://www.academia.edu/1912153/Ethics_and_Law_in_the_Thought_of_Emmanuel_Levinas). See also Manderson, who discusses how Levinas' idea of proximity and responsibility can be relevant for the duty of care. Desmond Manderson, "Proximity: The Law of Ethics and the Ethics of Law" in: *UNSW Law Journal*, Volume 28(3), November, 2005.

<sup>92</sup> *Autrement qu'être*, p. 248.

an opportunity to reconnect with the proximity from which justice can emerge. Conflict provides an occasion to reconnect with proximity, with the otherness of the other, thus opening up the chance for a dialogue of justice.

Mediation is a communicative process in which the situation of conflict is exploited in this sense. Not every mediation touches base with proximity – it is possible for parties to find a way to reconcile their interests without leaving what Levinas calls the “ontological” level of being. In *Autrement qu’être*, Levinas makes a play on the fragment “est” in the word “interest”: the pursuit of interests is always a mode of the striving to persist in one’s being. Achieving justice, however, requires touching base with proximity that is prior to, “otherwise than being”. The face-to-face encounter between the parties in mediation provides an opportunity for reconnecting with the primordial proximity between myself and the party with whom I am in dispute, opening up in frankness to the responsibility that is always there under the surface with respect to every person I meet.

Mediation provides the space for a dialogue in which a party, together with her/his counterpart, can engage in the difficult task of integrating mutual responsibilities into a shared reality, comparing the incomparable, through dialogue. It is a discussion that takes account of the third, the other for whom the other is responsible, and also the others of that other – all of the persons affected by the conflict at hand. Through this discussion, there can be justice, for the other, for the third – and also for the party concerned. We can conclude, therefore, that dispute resolution through mediation is a process suitable for achieving justice.

### **3. How mediation achieves justice**

#### **3.1. Three essential characteristics**

In the last chapter we asked: what is Levinas' understanding of justice and is it applicable to mediation? We saw how, based on his discovery of ethical relation to the other as the pre-condition of the self, Levinas developed a conception of justice that is achieved through dialogue – a dialogue in which interlocutors integrate their respective ethical relations into a shared reality. We concluded that mediation as a method of conflict resolution through dialogue can be seen as a process whereby justice is done.

In this chapter, we reverse the direction of questioning and ask: what are the properties of mediation that make it suitable for achieving justice? We show how three features that typically characterize a mediation process function as essential elements for achieving justice. Firstly, mediation is always an encounter with alterity. As a party, one is usually required to meet face-to-face and communicate directly with one's disputant, as awkward as that may be. Secondly, in the course of a mediation the parties are typically encouraged not only to listen to one another but also to attempt to view the situation from the perspective of the other, to step into the other's shoes. Thirdly, the discussion conducted in the course of a mediation typically goes beyond the original bone of contention between the parties, involving issues that concern third parties as well. Not all mediation processes are the same, and in this chapter we also show how some are more conducive to achieving justice than others.

##### **3.1.1. Encounter with alterity**

Mediation is a method for solving conflicts, not through the use of force, but rather through communication. What sets the communication in mediation apart from that in other dispute resolution methods is that the parties talk directly with one another, answering for themselves. This makes their engagement very different from that in litigation, where it is the lawyers who speak in place of the parties. This direct contact between the parties will usually involve a degree of awkwardness. More often than not, there will be a feeling on both sides that the other's manner, actions, views, way of being are odd, perplexing, even inexplicable.

For achieving justice in the Levinasian sense, the element of strangeness that is a part of every mediation process is in fact essential for achieving justice. The absolute otherness of the other is, as we saw, the core feature of the "proximity" that,

according to Levinas, defines our intersubjectivity. And it is in situations such as conflict (or love)<sup>93</sup> that this otherness makes itself felt most strongly.

Proximity reverberates when the parties to a mediation are disturbed by the other, experience their alterity. This allows them to touch base with the origin of communication, the ethical spark that reaches across the gulf of proximity that separates every person from every other. This, according to Levinas, is a necessary condition for achieving justice. If it happens, the rest is easy; if not, the mediation will never get beyond coming to a mere arrangement.

### **Different from shuttle mediation**

One might ask: does the importance of coming up against the alterity of the other party mean that there can be no justice in online mediation or in mediation by telephone? The answer is probably a “maybe”. It is possible to feel proximity to the other, even when that other’s face is only visible on a screen, as experience during the COVID-19 pandemic has proven. At the same time, it cannot be denied that the experience of the strangeness of the other becomes weaker as the physical connection gets more ephemeral. At the extreme end of the scale, shuttle mediation, in which the parties talk almost exclusively with the mediator who acts as a go-between, is a style of mediation that leaves little chance of connecting with proximity. Shuttle mediation has proven effective in settling disputes where the parties are so embittered that they cannot imagine sitting in the same room. But it will not serve to achieve justice in the sense proposed by Levinas.

#### **3.1.2. Stepping into the other’s shoes**

Of all of the communication techniques practiced in mediation – explaining, asking questions, encouraging, alerting – the most important by far in a mediator’s toolkit is the one that seems the simplest: active listening. As the parties present their case, explain their situation, tell their story, the mediator regularly intervenes to repeat what they have said in her/his own words, asking for confirmation that she/he has understood. Active listening is not a matter of condoning or condemning or even fully comprehending the reasons or motivations for what has been expressed; it is essentially mirroring, giving the other back what she/he has said. The parties, too,

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<sup>93</sup> Cf. *Le temps et l’autre*, Fata Morgana, 1979, p. 89.

are encouraged to engage in this mode of communication. They are invited to exchange perspectives, to attempt to put into words how the situation appears from the point of view of the other.

When a judge in a court of law listens to a lawyer's presentation, she/he will constantly be considering how the case at hand fits under the provisions of the law. She/he is engaging in reasoning as it is classically understood in the Western tradition: subsuming the individual case under a higher principle. Active listening, by contrast, activates the rationality that Levinas identifies as more primordial than subsuming cases under a general rule: the direct connection of ethical relation, which Levinas in *Autrement qu'être* calls substitution.

In terms of mediating for justice, active listening is more than just a way of confirming that the message of the other has come across correctly. It is an enactment of substitution, which invests us with the non-indifference to another person that is an integral part of our makeup. As we saw above, Levinas describes substitution as the movement by which the self becomes unique. In mediating for justice, stepping into the other's shoes does not leave the party as she/he was. There has been a transformation, a renewal: non-indifference for the other party has become a part of her/himself.

### **Different from transformative mediation**

It may seem that this aspect of mediation for justice shows an affinity to a widely practiced approach to mediation known as transformative mediation, first put forward by Robert A. Baruch Bush and Joseph P. Folger in their book, *The Promise of Mediation*.<sup>94</sup> Bush and Folger present mediation as an opportunity, first and foremost, for encouraging an ethical shift in the way parties relate to themselves and others. A successful mediation process, in their view, leaves parties feeling empowered and at the same time able to show recognition of others.

There is an essential difference, however, between transformative mediation and mediating for justice in the Levinasian sense. The ethical approach to mediation taken by Folger and Bush is prescriptive. Parties are encouraged to exercise empathy as a way to reach a balance between self-interest and recognition of the other. Levinas' ethics, by contrast, is descriptive, not prescriptive. Answering the

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<sup>94</sup> Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*, San Francisco: Jossey-Bass Publishers, 1994.

ethical call of proximity is “not something that happens to an empirical self that is already fully formed, leading it to be more conscious of itself, more capable of putting itself in the place of others.”<sup>95</sup> Touching base with substitution means being thrown back to the pre-condition of the self. Empathy, compassion for the other, as Levinas thinks it, is not a modality of the free will that a self can decide to exercise or not to exercise.<sup>96</sup> Proximity, responsibility for the other, is prior to the self. Mediation for justice in the Levinasian sense does not encourage a change of behaviour on the level of the “ought”. Rather, it touches base with and restimulates the responsibility for the other that has always already determined us, that is primordial for each of us.

### 3.1.3. Beyond exclusivity

Mediation is always an adventure. In contrast to a court case, where there is a clearly defined claim to be examined, in mediation the parties are free to discuss whatever matters to them. Any topic is free game. The issues considered may go far beyond the original point of contention; they may involve questions of honour, of identity, of emotional attachment. They will almost certainly include matters that are of concern not to the parties alone but also to others.

In mediating for justice, the consideration of issues that go beyond those of the two conflicting parties alone is not only possible, it is essential. As we saw above, achieving justice, according to Levinas, involves not only feeling responsibility for the other (an asymmetric relationship) but at the same time relating to the other as an equal, as someone who is also responsible for another, a third, as I am for him/her (a symmetric relationship). When Levinas writes that “the third looks at me in the eyes of the other”, he means that doing justice to my responsibility for the other will always involve taking into account the other’s responsibility for a third. Mediating for justice will always take into account what an agreement between two parties would mean for a third party – and other persons beyond that. Mediating for justice goes beyond a conjugation of the interests of the parties directly concerned. The dialogue through which justice is achieved aims, in the words of Levinas scholar Catherine Chalier, for a peace that is oriented at every point on an awakening to the precarity of the third.<sup>97</sup>

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<sup>95</sup> *Autrement qu’être*, p. 182 f.

<sup>96</sup> *Ibid.*, p. 203.

<sup>97</sup> Cf. Catherine Chalier, *Levinas : L’utopie de l’humain*, Albin Michel, 1993, pp. 135 ff.

## Different from interest-based mediation

The concern for the third persons(s) sets mediating for justice apart not only from litigation but from an approach to mediation commonly referred to as “interest-based mediation”. Introduced by Roger Fisher and William L. Ury in their book *Getting to Yes*<sup>98</sup>, interest-based mediation is based on the insight that disputants often become entrenched in their conflicting positions and oversee the fact that the interests underlying those positions may very well be compatible. Mediation is seen as a process of exploring those interests. It “looks for mutual gains wherever possible and where interests conflict, it insists that the results be based on some fair standards independent of the will of either side.”<sup>99</sup> The goal is to allow each of the parties, as far as possible, to pursue their respective interests undisturbed.

Interest-based mediation, while widely practiced with success for the resolution of all manners of conflicts, from family quarrels to business disputes, is not a method conducive to achieving justice in the Levinasian sense. Mediating for justice requires letting go of interests and probing beneath the level of being on which interests collide to touch base with the ethical dimension of proximity that lies below. Proximity is always a disturbance. Mediating for justice requires disturbing each of the parties’ “joyous possession of the world”<sup>100</sup> through the need to shoulder responsibility for the other. Furthermore, it requires troubling the exclusivity of the relationship with the other through the need to consider also the third person, who “looks at me in the eyes of the other”. It is only through this multi-dimensional disturbance that justice can be achieved in mediation.

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<sup>98</sup> Fisher and Ury, *op. cit.* (Note 80).

<sup>99</sup> *Ibid.*

<sup>100</sup> *Totalité et infini*, p. 77.

## **4. Mediating for justice in practice**

In the last chapter we asked: what are the main characteristics of mediation that make it a process for achieving justice in the sense proposed by Levinas? In this chapter we take a closer look at how the individual steps of such a mediation look in practice. We take as a guide the five phases widely used by mediators to structure their process: introduction – determining topics for discussion – exploring deeper interests – finding solutions – coming to agreement. Taken as steps towards achieving justice, the goals and results that typically characterize each phase appear in a new light, as reflected in the headings in this chapter: preparing the ground – leaving safety behind – empowerment through responsibility – determining justice – not a conclusion. For each phase, our discussion will be informed by a brief reference to a relevant insight by Levinas.

### **4.1. Phase one: Preparing the ground**

Whether one is telling a story, starting a relationship, or giving a speech, the beginning determines the success or failure of the whole. This is certainly true of mediation for justice, not only because first impressions are important but also because, from a Levinasian point of view, the justice to be achieved as a result of the mediation process is always already latently there, underlying the relation between a party to a conflict and her or his counterpart, just as it underlies every human encounter.

When the parties arrive and the mediator gives them an overview of what lies ahead, they listen not only to what the mediator is saying; they are also getting a sense of her/his person. In Levinas' terms, they are connecting not only with the content of her/his message but also with the expression of the face. Either they feel trust and a desire to engage, or they decide to discontinue the mediation.

The mediator will invite the parties to agree on a number of rules of behaviour to be adopted in the ensuing dialogue: agreement on confidentiality, for example, and also agreement on following simple rules of courtesy. From a Levinasian perspective, even these simple rules are already significant for the achievement of justice.

### Levinas on rules of courtesy

In an interview he gave in 1986, Levinas provides the following interpretation of the significance of the rules of courtesy that govern our everyday interactions:

“Every encounter begins with a benediction, contained in the expression “good day” (“*bonjour*”). This “good day”, presupposed by every *cogito*, every self-reflection, is the first transcendence, as it were. Addressed to another, the greeting has the quality of an invocation. I insist, therefore, on the primacy of the relation of goodwill towards the Other. Even where there is malice on the part of the other, this gesture of attention, this reception and this recognition of the other, marks the anteriority of good over evil.”<sup>101</sup>

As we saw above, Levinas considers justice, based on the ethical relation of proximity, to be an integral part of our being. Even in a world where justice is masked or perverted, as is often – even usually – the case, the rules of courtesy remain as a last vestige of the humanity that informs our existence: “It is because we are hostage [to responsibility] that there can be in the world pity, compassion, pardon and proximity. Even the little that one finds, even the simple “After you, Sir,” he remarks.<sup>102</sup>

At the start of a mediation, the parties may be so estranged that they are hardly able to look one another in the eye. But they will still be able to agree on rules of courtesy. In mediating for justice, this is important as an indication of the latent force of proximity with which the parties will be encouraged to connect. Insisting that these fundamental conventions be honoured is a first step towards ensuring that the task of mediating for justice will have a chance of success.

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<sup>101</sup> “La proximité de l’autre” in *Altérité et transcendance*, p. 109.

<sup>102</sup> *Ibid.*

## 4.2. Phase two: Leaving safety behind

In the second phase of a mediation process, the parties tell their stories, present their positions, and the others listen. More often than not, they will begin by playing it safe, describing their actions as corresponding to some standard, to the “normal behaviour” of a law-abiding citizen, for example. Generally, phase two is seen as an opportunity for parties to put the topics they wish to discuss on the table. In mediating for justice, the idea is to go beyond the gathering of topics, to venture out from the safe haven of the prefabricated story. In Levinas’ terms, the goal is to move beyond “thematizing” to the condition of all communication, “exposition”.<sup>103</sup>

### Levinas on exposition

In the everyday understanding of language, Levinas explains in *Totalité et infini*, talking is a sort of game, in which a person’s thoughts, coded into signs, are sent out onto the playing field like balloons, while all the while the player remains in the safety of her or his self. But communication, Levinas writes, does not begin with generating thoughts and coding them into signs. It begins in proximity, encounter of the other, which always involves an element of danger. The condition of all communication is “exposition”, he writes.<sup>104</sup>

“Exposition is radically different from thematizing. The one exposes her/himself to the other like a skin exposes itself to the one who wounds it, like a cheek offered to the one who strikes. Beyond (this side of) the ambiguity of beings and being, before the “said”, the “saying” reveals the one who speaks, not at all like an object that is unveiled to theory, but the way one reveals oneself by neglecting one’s defences, by abandoning shelter, by exposing oneself to outrage – to being offended and wounded.”<sup>105</sup>

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<sup>103</sup> *Autrement qu’être*, p. 82.

<sup>104</sup> *Totalité et infini*, p. 37.

<sup>105</sup> *Ibid.*, p. 83.

When a party exposes her/himself through the frankness of her/his expression, the party who is listening cannot help but feeling unsettled, called into question in her/his naïve assurance: “Receiving the other is ipso facto the realization of my own injustice, the shame that freedom feels for itself,” Levinas writes.<sup>106</sup> Levinas’ formulation is strong, yet depicts accurately the experience of being humbled by the words of another exposing her/himself in candour.

How can the mediator encourage the parties to abandon safety, to show themselves in their vulnerability? She/he has already had the opportunity to set an example through the open manner in which she/he has presented her/himself in phase one of the process. And here, in phase two, the parties do not speak into the void. The mediator responds by exercising what we have identified above as the most essential skill of the profession, active listening. She/he mirrors the exposition of the parties – in her/his own words. Thereby the mediator her/himself enters into proximity with the parties, responding to the ethical call that goes out from their expression, demonstrating that they are not being left to their own fate.

#### **4.3. Phase three: Empowerment through responsibility**

Mediation is sometimes compared to a journey from the surface of an iceberg down to the depths of the sea and back up again. In mediating for justice, the third phase of the process is the point at which the parties reconnect with proximity – the fundamental responsibility for the other that Levinas identifies as the most primordial dimension of human existence.

After the parties have told their stories – exposed themselves – and their counterparts have listened, it is time for them to respond. Typically, they are invited to express, in their own words, what the other has said, to put themselves in the other’s shoes. Again, the mediator has already shown them the way. In her/his exercise of active listening throughout phase two, she/he has demonstrated to the parties what is now required of them: leaving behind the subsuming style of thinking which we habitually consider to be “reasonable discourse” (ordering what has been said under overarching concepts), and touching base with what Levinas considers the more “primordial reason” of proximity – substitution.

The exercise of assuming the perspective of the other party is a technique commonly practiced in mediation. Typically, it is regarded as an exercise that permits

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<sup>106</sup> *Ibid.*, p. 85.

the parties to discover points in common, to identify with the deeper interests of their counterpart, to discover that they are not so different after all. In mediating for justice, substitution has a different function. The point of the exercise is precisely not to find common interests. Rather, the parties are being asked to put their interests aside (at least for the moment – they will return in phase four) and to concentrate on their encounter of the other in all their alterity. The astounding thing is that by doing so, they experience a recharging of their unique subjectivity.

### **Levinas on substitution as the birth of meaning**

As we saw above, for Levinas substitution, putting oneself in another's shoes, is a movement that is fundamental to our existence, prior to the formation of the subject, prior to objective knowledge. It is the very beginning of meaning. Touching base with substitution will always be an upheaval of encrusted views of the nature of being:

“Qui pro quo – substitution – extraordinary, neither deception nor truth, the first intelligibility of signification, upheaval of the order of being that can be thematized in the said, of the simultaneity and reciprocity of relations that are said. Meaning that is possible uniquely as incarnation.”<sup>107</sup>

In substitution, according to Levinas, I am inspired and thereby invested with responsibility for the other. And it is through this taking of responsibility that I am unique. This, according to Levinas, is the paradox of the self: through imbuement with responsibility for another I becomes empowered as a unique subject, incomparable and irreplaceable, who can never be subject to generalization:

“Substitution – meaning. Not the referring of one term to another – as in the thematizing of the “said” – but substitution as the very subjectivity of the subject, interruption of the irreversible identity of essence, in the taking of responsibility with no possibility of evasion and where the uniqueness of the self has

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<sup>107</sup> *Ibid.*, p. 111.

only one meaning: where it is no longer about the Self, but about myself.”<sup>108</sup>

“To say that the I is substitution is not to present the universality of a principle, the quiddity of an I, but, on the contrary, it is to give back to the soul its egoity that does not admit of any generalization”.<sup>109</sup>

Levinas calls substitution “extraordinary”, an “upheaval” of the order of being, and what takes place in the third phase of mediating for justice is indeed often experienced as extraordinary. Engaging in the exercise of taking the perspective of their counterpart, the parties experience a remarkable shift. They discover – perhaps surprisingly to themselves – an inclination or even a desire to concern themselves with furthering the ends of the other.

Shouldering responsibility for another is a burden, yet one can observe that parties often experience this shift – particularly after the discomfiting experience of having their naïve self-assurance called into question in phase two – as an empowerment. This is generally explained as evidence of a “bridge of understanding” that has been spanned between them, based on the recognition of the commonality of their basic human needs. From the point of view of mediating for justice, however, the exercise of substitution triggers a connection precisely not with the general condition of mankind, but rather with this particular other, who remains absolutely other for me, but for whom I assume responsibility, thereby becoming myself re-defined in the uniqueness of who I am.

#### **4.4. Phase four: Determining justice**

The fourth phase of a mediation process is typically a shift of pace. It is time for the parties to return to the task at hand, to search for practical solutions to the problem that led them to seek mediation in the first place. Phase three was marked by the parties reconnecting with the primordial relation of proximity and discovering themselves empowered with responsibility for their counterpart. But this is not yet a resolution of their conflict. Responsibility is asymmetric: each of the parties has assumed it for her/himself. If there is to be a solution for the dispute at hand, it needs to be integrated into a shared world where the parties recognize one another

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<sup>108</sup> *Autrement qu'être*, p. 29.

<sup>109</sup> *Ibid.*, p. 202.

as equals. Each of the parties needs to spell out and weigh and compare their respective responsibility for the other, in such a way that there is justice – also for themselves.

This is what happens in phase four. In Levinas' terms, I as a party recognize my counterpart as equal when I see the need to spell out how my responsibility for her/him includes consideration for her/his responsibility for (at least) another, a third person: "The third looks at me in the eyes of the other."<sup>110</sup> The dialogue between the parties becomes expansive in scope, moving from listening and understanding to articulating in words the whole complexity of the parties' respective responsibility for the other's responsibility for a third – and for the other of the third, and so on – reaching as far as the possible impact of the matter under contention. It is a dialogue that seeks to determine justice, for the other party and for the third(s) – among whom is included the first party as well.

### Levinas on the return to being

Near the end of *Autrement qu'être*, after he has explored the ethical relation of proximity that is "otherwise than being", Levinas raises the question of how and why proximity (and his own study of it) should return to concerning itself with being, with the question of how proximity plays into the world of reality, truth and shared social co-existence:

"Why knowledge? Why problem? Why philosophy? It is necessary to observe in signification or in proximity or in the "saying" the latent birth of knowledge and of essence, of the "said", the latent birth of the *question* in responsibility. Proximity, becoming knowledge, signifies like an enigma, the dawn of a light in which proximity is transformed, without, however, the other, the neighbour, being absorbed into the theme where he is revealed."<sup>111</sup>

The question of how proximity, responsibility for the other, translates into the terms of our co-existence on the level of being is for Levinas inherent to proximity itself. My responsibility for the other is always

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<sup>110</sup> *Totalité et infini*, p. 234.

<sup>111</sup> *Autrement qu'être*, p. 244.

also a responsibility for the other's responsibility for a third, and that requires comparison and weighing, the elaboration of justice on the level of being:

“In proximity I am obsessed by the other in the absolute asymmetry of signification of one for the other. [...] The relation with the third is an incessant correction of the asymmetry of proximity [...] There is weighing, thinking, objectifying and consequently a pause, where my anarchic relation with *illeity* betrays itself, but at the same time transforms itself before us. Betrayal of my anarchic relation with *illeity*, but also a new relation to it, [...] precisely the return of the incomparable subject as a member of society [...] where there is justice also for me.”<sup>112</sup>

The hammering out of the terms of mutual co-existence that takes place in the fourth phase of the mediation process may seem like a betrayal of the infinite sense of responsibility that emerged in the third. Seen in Levinasian terms, however, this is not the case. Respecting the unfathomable otherness of the other (her/his “*illeity*”) has always meant respecting the responsibility of the other for his other(s) – as the term “*illeity*” – “third-person-ness” – implies, and this requires “weighing, thinking, objectifying”, spelling things out on the level of being.

The tension, however, is undeniable. The dialogue that is now required of the parties is a comparison of the incomparable – an incompletable project, forever a work in progress. It can only be a risk – one party tries to put into words how they see their counterpart embedded in her/his own context, how she/he is responsible for third persons, all affected by the matter at hand, among whom they themselves also figure. The other party does the same. They accept, reject, correct each other's versions. Together, they rebuild a shared piece of reality, in which there is justice, also for themselves. The scope of the discussion can go to the ends of the earth. At the same time, its touchstone is always, for each of the parties, the fundamental responsibility that means they can always ask more of themselves than of the others.

The justice elaborated in the discussion does not require recourse to a universal authority – it suffices that it is conducted between the two parties to the mediation.

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<sup>112</sup> *Ibid.*, p. 248.

At the same time, a widening of the circle of dialogue is not excluded. The mediator, as third person in the room, serves as a reminder that the dialogue of justice must always take into account the third(s); it must not slip into a celebration of complicity. But the mediator can also do more. As accompanier of the mediation process, who has engaged in active listening, the mediator is also in proximity to the parties. She/he can also contribute to the dialogue for justice that is carried out in phase four, bringing another perspective, a new richness, to the discussion.

#### **4.5. Phase five: Not a conclusion**

Even if the dialogue in phase four has not resulted in a consensual solution, justice has been advanced. As Amit Pinchevski in his discussion of Levinas remarks: “Against the tradition that deems the completion of communication as ethically favourable, Levinas advances a notion of precarious communication, one that involves uncertainty and risk.”<sup>113</sup> In phase five, the parties document the results of their discussion in the form of a written statement. But the document itself is not the source of justice.

#### **Levinas on the need for vigilance**

In “Peace and proximity” Levinas warns that it is important to remember that any fixed agreement, any institution or instrument of the state is always in danger of “finding its centre of gravity within itself”, of weighing down on the destiny of persons as a source of conflict and violence. It is important to recall, he writes, the dialogue of justice that is their origin.

“Nothing can exempt itself from the supervision of the responsibility of “one for the other”, which marks the limit of the state and which never ceases to call those who are not willing to content themselves with the simple subsuming of cases under a

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<sup>113</sup> Amit Pinchevski, “Emmanuel Levinas: The Other”, in Ronald C. Arnett, Anette M. Holbat and Susan Mancino (eds), *An Encyclopedia of Communication Ethics: Goods in Contention* (Peter Lang, 2018), pp. 278 ff., p. 281.

general rule – something of which a computer is capable – to vigilance.”<sup>114</sup>

In mediating for justice, the parties will be made aware that the written agreement they elaborate is but a reminder of their dialogue. There will always be the danger that the letter of the agreement takes on a life of its own. Parties may decide to include in their statement an agreement to reconvene in the future, to reconsider the agreement reached. It is through a regular revival of the dialogue from which their agreement derived that parties will keep justice alive.

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<sup>114</sup> “Paix et proximité”, *Altérité et transcendance*, p. 147.

## 5. Bringing the judge back into mediation

Mediation is often delimited from other methods of conflict resolution by the fact that the mediator is not invested with the authority to judge. That sets it apart from the handing down of a sentence in a court of law, but also from arbitration and even conciliation, where the conciliator's role is to suggest a non-binding solution. In the preceding pages, on the basis of Levinas' theory of justice, we have argued that mediation can be understood as a process for achieving justice. That raises the question, who is passing judgement?

In matters of justice, Levinas stresses, there is no observer's perspective. Justice cannot be spoken from the outside. It cannot be applied like a universal to an individual case. That is why in his view the rule of law alone, although it might ensure social order, cannot be the source of justice.<sup>115</sup> Justice requires proximity – ethical relation to the absolutely other. It can be spoken by a judge in a court, but only insofar she/he is guided by her/his sense of responsibility to the parties. "Justice is impossible unless the one who is speaking justice is her/himself in proximity," Levinas writes in *Autrement qu'être*.<sup>116</sup> Judgement is only possible from the inside. "The judge is not exterior to the conflict. Rather, the law is at the heart of proximity."<sup>117</sup>

Justice in Levinas' sense is justice through dialogue. That makes mediation a privileged context for achieving justice, as we have outlined on the pages above. In mediation, it is the parties themselves, engaging in dialogue with their counterpart in consideration of at least one third person, who are exercising judgement. Where does that leave the mediator?

It might be tempting to assume that in mediating for justice the role of the mediator is that of the "third person" considered in the dialogue, if only because that would make mediation seem all the more tailor-made for achieving justice in Levinas' sense. It is certainly not wrong to include the mediator among the third persons, the others of the other. But there are many other "thirds" in the parties' lives to be considered in the dialogue as well. To be included among them does not yet fully describe the role of the mediator in the process.

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<sup>115</sup> *Autrement qu'être*, p. 248.

<sup>116</sup> *Autrement qu'être*, p. 248.

<sup>117</sup> *Ibid.*

In most understandings of mediation, the role of the mediator is defined as that of leading the parties through the process and facilitating the communication between them. This is also the case in mediating for justice. But the role of the mediator with respect to the achievement of justice can go beyond that of the benevolent observer.

Throughout the mediation process, the mediator participates as an active listener, as one who does not remain indifferent to the parties. The mediator is in proximity to the parties, just as they are to each other. Being in proximity, she/he is also in a position to judge – not alone, not from a higher perspective, but together with the parties, as a participant.

If we look back at our description of the five phases of mediation in the previous chapter, we see that, indeed, the mediator has not remained indifferent to the stories being told and has put her/himself in the shoes of the parties. It is by virtue of this participation that she/he can join difficult dialogue that is the hammering out of justice.

In mediating for justice, not only has the mediator, as leader of the process, stepped down from the role of occupying the judge's bench in a court of law, she/he has also left the observers' gallery and joined the parties in their endeavour to recreate a piece of reality that they can recognize as just.

Defining the role of the mediator as participant and as (co-)judge seems to contravene accepted opinion on the role the mediator in mediation. But in mediating for justice in the Levinasian sense, both participation and judgement are understood differently than is usually the case.

Being in proximity with the parties is not some special position occupied only by the mediator – it is a fundamental characteristic of human encounter and any person being in the vicinity would also be in proximity. Proximity means the impossibility to remain indifferent. The mediator is omni-partial, as is often remarked. From a Levinasian point of view this means that, in her/his interaction with the parties, the mediator is imbued with the responsibility and kindness that constitutes basic humanity.

In the midst of proximity, according to Levinas, there is always the cry for justice. There is the one party, there is the other party, there is the responsibility of one for the other, and there is the responsibility of each for third persons. Each of these is infinite, incomparable, yet all of them need to be compared. The mediator, being in proximity, is also called to weigh and to compare, and he/she does that, joining in the dialogue with the parties. Judging means nothing else but putting into words this weighing and comparing, presenting it to the others for consideration, for them to react, agree, disagree, add, take away. The mediator adds depth to the

discussion between the parties. It is this discussion, not the consensus reached or not reached that constitutes the justice of mediation. Justice is “the right to speak”. It is a role played by the parties and by the mediator.

Many different interpretations have been advanced for the role of the mediator in mediation: we have the mediator as a neutral facilitator, or as the more hands-on provider of proposals and evaluation. We have in transformative mediation the moral guide, and we even have, in the proposal of Bernhard S. Mayer, the calling into question of the neutrality of the mediator and the proposal of a possible role as advocate.<sup>118</sup> But none of the above captures the role of the mediator in mediating for justice: the mediator as non-indifferent participant, the mediator as judge, the mediator, to use the Yiddish expression, as “*mensch*”.

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<sup>118</sup> Mayer, *op. cit.* (Note 12), pp. 271 ff.

## 6. Conclusion

We began by asking: is it possible to understand mediation as a process where justice is done? And we saw that on the basis of Levinas' theory of justice the answer is "yes". Levinas, on the basis of his interpretation of the deeper meaning of freedom, developed a conception of justice, not as the application of a universal principle, but as an integration of responsibilities into a shared reality, through dialogue. This can happen in mediation, where parties use dialogue – assisted by a mediator – to settle their disputes.

But we have shown more. Not only is it possible to achieve justice in mediation, the latter is a privileged context for the purpose. Levinas does not exclude that justice can happen in the courts, but the source of justice does not lie in the universality of the laws. It lies in the kind of dialogue practiced in mediation. It is a dialogue carried by proximity – the primordial ethical responsibility for the other that Levinas in his phenomenological research discovered as the primordial root of human experience.

We have shown that some approaches to mediation, even some popular approaches, are not conducive to justice: shuttle mediation, transformative mediation and also interest-based mediation put their focus on aspects that are other than those essential for creating justice. Also, we have shown, against accepted opinion, that in mediating for justice, the mediator is always participating, together with the parties, in the role of a judge, whereby both participation and judgement are understood in terms of proximity and dialogue.

Does the fact that justice can be achieved through the dialogue practiced in mediation make a difference for society? Levinas argued that what we urgently need in our liberal societies is an attention to justice and to judgement. But not the justice that subsumes citizens as cases under a universal law. Equality that relies on treating citizens as the same under the law (like the warriors that sprouted from the stones thrown by Deucalion in the Greek myth, Levinas observes)<sup>119</sup> makes for a social fabric that is weak and easily broken, as the increasing polarization and weakening civic engagement we are witnessing today attest. Levinas proposes a society of equals – equal in their responsibility for the other. A social network woven from a myriad of dialogues, rooted in the primordial ethical fact that I can tighten my node in the net more tightly, ask of more of myself than the others. Justice is never at its end; it can always be improved, adjusted over and over again.

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<sup>119</sup> *Autrement qu'être*, p. 247.

It is what happens when disputants engage in the fine risk of dialogue that takes place in dispute resolution through mediation.

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