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Ursula Froese

Levinas, Justice and Mediation



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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. Introduction¹

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”,² 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.³

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

¹ 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.

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

³ 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.⁴ 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.⁵ 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.”⁶

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.⁷ 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

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

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

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

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

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

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 2012¹⁰ 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

⁸ 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 (accessed 05 July 2021).

⁹ 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 *Konfliktdynamik*, 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 *Konfliktdynamik* 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.

¹⁰ *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.¹¹

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*,¹² 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.¹³

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".¹⁴

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.

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

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

¹³ *Ibid.*, p. 25.

¹⁴ 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.¹⁵ 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

¹⁵ 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".¹⁶

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.

¹⁶ 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*.¹⁷ 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.¹⁸ 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

¹⁷ Emmanuel Levinas, *Totalité et infini*, Martinus Nijhoff, 1971.

¹⁸ 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."¹⁹ It persists in modern theories of justice: in Jürgen Habermas' recasting of the categorical imperative into discourse ethics²⁰ and in John Rawls' theory of justice as a regime agreed by rational participants from behind a veil of ignorance.²¹ 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."²²

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.²³ 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

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

²⁰ Jürgen Habermas, *Theorie des Kommunikativen Handelns*, Suhrkamp, 1981.

²¹ John Rawls, *A Theory of Justice*, Harvard University Press, 1971.

²² Hobbes, *op. cit.* (Note 18), p. 84.

²³ 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”.²⁴ At worst, if sovereign rule is usurped or perverted (as happened in Nazi Germany) it does injustice to all.²⁵

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”.²⁶ 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*.²⁷ It makes itself the centre of everything and enemy of all the others.²⁸ 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.²⁹ The truth, Pascal claimed,

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

²⁵ *Ibid.*, p. 147.

²⁶ Hobbes, *op. cit.* (Note 18), p. 66.

²⁷ Blaise Pascal, *Pensées* [1670], #509.

²⁸ *Pensées*, #455.

²⁹ *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.³⁰ 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*.³¹ 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."³²

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."³³

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.³⁴ 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

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

³¹ *Totalité et infini*, p. 6.

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

³³ *Ibid.*, p. 248.

³⁴ 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.³⁵

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.³⁶

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,

³⁵ *Totalité et infini*, p. 34.

³⁶ *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.³⁷

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.³⁸ 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.³⁹ 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*.⁴⁰ “Life is *love of life*, a relation to something that is not me, but dearer to me than my being.”⁴¹

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.

³⁷ *Autrement qu’être*, p. 204.

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

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

⁴⁰ *Totalité et infini*, p. 115.

⁴¹ *Ibid.*