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Philosophical Counselling and Mediation Theory and Practice: Exploring a Pathway to Justice

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PHILOSOPHICAL COUNSELLING AND MEDIATION. THEORY AND PRACTICE: EXPLORING A PATHWAY TO JUSTICE

ORIENTACIÓN FILOSÓFICA Y MEDITACIÓN. TEORÍA Y PRÁCTICA: EXPLORANDO UN CAMINO HACIA LA JUSTICIA

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Abstract: This paper will demonstrate how philosophical counselling would invaluably contribute to the arena of conflict resolution via mediation and civil justice generally. Mediation is a conflict resolution process that involves a third party who facilitates disputants in arriving at a self-determined resolution. This process is being incorporated into civil justice systems globally, but how mediation should be conducted to achieve truly just outcomes needs immediate and thoughtful attention. At its best, mediation empowers parties to co-create a just and fair resolution to their conflict through a dialogical exploration of their interests, needs, and relevant norms and values.[1] This is dramatically different from the adjudicative process, where parties rely on legal frameworks and authoritative judicial decision-making to resolve conflict. In mediation, parties need to recognize and think critically about their worldviews and values. Philosophical counseling can provide mediators with an empathetic and dialogical method of helping parties think critically and rationally and to

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[1] Cf. Acharya, Nayha: "Mediation, the rule of law, and dialogue" in *Queen's Law Journal, volume 46:1,* 2020, pp. 69-96.

cultivate clarity, depth, and coherence in their worldview and value system.[2] Enabling such deepened self-understanding would best empower participants to engage in authentic and critical dialogue, which, I argue, is essential to legitimate mediation that leads to just outcomes. This paper will demonstrate how several essential principles of philosophical counselling align precisely with the values, goals, and needs of just mediation (including deep self-understanding, critical awareness of worldviews/values, and propensity for rational dialogue). This paper lays an introductory foundation, ultimately calling for an interdisciplinary/interprofessional approach that would use the insights of philosophical counseling to bring significant benefits to the development of mediation programs and civil justice systems world-wide.

Keywords: Mediation, philosophical counseling, conflict resolution, dialogue

Resumen: Este artículo demostrará cómo la orientación filosófica contribuiría valiosamente al campo de la resolución de conflictos a través de la mediación y la justicia civil en general. La mediación es un proceso de resolución de conflictos que involucra a un tercero que facilita a las partes en disputa llegar a una resolución autónoma. Este proceso se está incorporando a los sistemas de justicia civil a nivel mundial, pero la forma en que se debe llevar a cabo la mediación para lograr resultados verdaderamente justos requiere una atención inmediata y reflexiva. En el mejor de los casos, la mediación empodera a las partes para crear conjuntamente una resolución justa de su conflicto a través de una exploración dialógica de los intereses, necesidades y normas y valores

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[2] Cf. Chamberlain, Harriet S: "Philosophical Counselling: A Dialogue in Critical Thinking" in *Fifth International Conference on Philosophy in Practice, Oxford,* 1999, pp. 47-55; Facione, Peter A: "Critical Thinking: What It is and Why It Counts" in *Insight Assessment,* 2011, pp.1-23; Lebon, Tim: *Wise therapy: Philosophy for counsellors,* Sage Publications, London, 2007; Lahav, Ran: "Philosophical counseling as a quest for wisdom", in *Practical Philosophy, volume 4:1*, 2001, pp. 7-19; Ruschmann Eckart: "World-view-coherence" in Barrientos Rastrojo, J, *Philosophical practice. From theory to practice,* Humanistic Studies and Philosophical Practice Association, Seville, 2006; Amir, Lydia B: "More philosophy, less counseling: A method for philosophical counseling", in Barrientos-Rastrojo, J. – Ordóñez García, J. - Macera Garfia, F.: *Philosophy and practice: From theory to practice,* Ediciones, Sevilla, 2006, pp. 33-39; Tukiainen, Arto: "Philosophical counselling as a process of fostering wisdom in the form of virtues", in *Humanistic Studies and Philosophical Practice, volume 10:1,* 2010, pp. 48-57.

relevantes.[3] Esto es radicalmente diferente al proceso judicativo en el que las partes se basan en marcos legales y decisiones judiciales autorizadas para resolver conflictos. En la mediación, las partes deben reconocer y pensar críticamente sobre sus visiones del mundo y sus valores. La orientación filosófica puede proporcionar a los mediadores un método empático y dialógico para ayudar a las partes a pensar crítica y racionalmente y a cultivar la claridad, profundidad y coherencia en su visión del mundo y en su sistema de valores.[4] Permitir una autocomprensión tan profunda permitiría a los participantes integrarse en un diálogo auténtico y crítico que, en mi opinión, es esencial para una mediación legítima que conduzca a resultados justos. Este documento demostrará cómo varios principios esenciales de la orientación filosófica se alinean precisamente con los valores, objetivos y necesidades de la mediación justa (incluyendo una profunda autocomprensión, conciencia crítica de las cosmovisiones/valores y propensión al diálogo racional). Este documento establece una base introductoria, que, en última instancia, exige un enfoque interdisciplinario/interprofesional que utilizaría los conocimientos de la orientación filosófica para brindar beneficios significativos al desarrollo de programas de mediación y a los sistemas de justicia civil en todo el mundo.

Palabras clave: meditación, orientación filosófica, resolución de conflictos, diálogo.

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[3] Cf. Acharya, Nayha: "Mediation, the rule of law, and dialogue" in *Queen's Law Journal, volume 46:1,* 2020, pp. 69-96.

[4] Cf. Chamberlain, Harriet S: "Philosophical Counselling: A Dialogue in Critical Thinking" in *Fifth International Conference on Philosophy in Practice, Oxford,* 1999, pp. 47-55; Facione, Peter A: "Critical Thinking: What It is and Why It Counts" in *Insight Assessment,* 2011, pp.1-23; Lebon, Tim: *Wise therapy: Philosophy for counsellors,* Sage Publications, London, 2007; Lahav, Ran: "Philosophical counseling as a quest for wisdom", in *Practical Philosophy, volume 4:1*, 2001, pp. 7-19; Ruschmann Eckart: "World-view-coherence" in Barrientos Rastrojo, J, *Philosophical practice. From theory to practice,* Humanistic Studies and Philosophical Practice Association, Seville, 2006; Amir, Lydia B: "More philosophy, less counseling: A method for philosophical counseling", in Barrientos-Rastrojo, J. – Ordóñez García, J. - Macera Garfia, F.: *Philosophy and practice: From theory to practice,* Ediciones, Sevilla, 2006, pp. 33-39; Tukiainen, Arto: "Philosophical counselling as a process of fostering wisdom in the form of virtues", in *Humanistic Studies and Philosophical Practice, volume 10:1,* 2010, pp.48-57.

Introduction

This paper explores the invaluable role that philosophical counseling can play in dispute resolution. There is a wide variety of ways that disputes can be approached and resolved in human society. Here, I focus on dispute resolution that is or can be connected to law and legal processes. In the legal context, the primary method of dispute resolution is through adjudication, where parties present arguments based on legal frameworks, and a judge issues an authoritative decree which declares a 'winner' and sets out the appropriate legal response. Another method of dispute resolution that began gaining prominence in the 1970s is mediation. Mediation involves a neutral third party who (ideally) facilitates parties in engaging in cooperative dialogue and reaching a mutually acceptable resolution on their own. This method is flexible in that parties can agree to any resolution that suits them and are not dependent on legal norms and a judicial decree, as in adjudication.

Early in the alternative dispute resolution movement, which included robust advocacy for mediation, the legal community was skeptical and resistant. The idea of non-legal actors taking foundational roles in dispute resolution that traditionally would be controlled by lawyers and judges was considered ill-advised and even dangerous from the perspective of ensuring the protection of legal rights. In the 1980s and 90s, however, a surge of interest in mediation occurred, and the legal community began to recognize the value of mediation as a dispute resolution system – it seemed better for relationships, being less adversarial, and could promote harmony in a way that traditional adjudication could not. And perhaps most importantly, in the eyes of many, it was a more cost-effective way of resolving a dispute compared to the cumbersome, confusing, and costly judicial process. With costs of adjudication rising, mediation began to be seen as a way to respond to the

growing crisis caused by cost barring access to the justice system.[5] The early resistance gave way, and some form of mediation is now incorporated into most civil justice systems world-wide.[6] In a sense, this is a positive trend because the availability of mediation in the justice system provides a choice of process to litigants that prioritize self-determination and autonomous, cooperative dispute resolution. However, the mediation programs that are connected to courts most often slip back into a legalistic approach and fail to truly make space for open, free, dialogue that is not restricted by legal framing. As explained further below, this is in part because mediation programs are embedded into the legal system, so legal norms have seeped into the process.[7] Philosophical counseling can help to develop an approach to mediation that is truer to itself: an authentic dialogic process rooted in self-awareness, understanding of the other, and fulsome communication.

At its best, mediation empowers parties to co-create a just and fair resolution through a dialogical exploration of their interests, needs, and values.[8] As Lon Fuller, one of the first contemporary theorists

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[5] Cf. Folberg, Jay: "A mediation overview: History and dimensions of practice" 1983:1, pp. 3-14; Wall, James A., Stark, J. B., & Standifer, Rhetta L: "Mediation: current review and theory development*", Journal of Conflict Resolution, volume 45:3*, 2001, pp. 370-391; Feinberg, Kenneth R: "Mediation - A Preferred Method of Dispute Resolution", in *Alternative Dispute Resolution, volume 15:5*, 1989, pp. 5-41.

[6] Cf. Hopt, Klaus J., & Steffek, Felix: *Mediation: Principles and Regulation in Comparative Perspective*, Oxford University Press, Oxford, 2013.

[7] Cf. Rundle, Olivia, "Barking Dogs: Lawyer Attitudes towards Direct Disputant Participation in Court Connected Mediation of General Civil Cases", in *QUTLJJ, volume 8:1*, pp. 77-92; Douglas, Kathy & Batagol, Becky: "The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal" *in Monash University Law Review, volume 40:3*, 2014, pp.758-765; Relis, Tamara: *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties,* Cambridge University Press, Cambridge, 2009.

[8] Cf. Acharya, Nayha: "Mediation, the rule of law, and dialogue" in *Queen's Law Journal, volume 46:1,* 2020, pp. 69-96.

of mediation, has noted, "mediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves"[9].

This is dramatically different from the adjudicative process, where parties rely exclusively on legal frameworks and authoritative judicial decisions to resolve conflict. In mediation, parties need to recognize and think critically about their worldviews and values. Philosophical counseling can provide mediators with an empathetic, dialogical method of helping parties think critically and rationally and to cultivate clarity, depth, and coherence in their worldview and value system.[10] Enabling such deepened self-understanding would best empower participants to engage in authentic, critical dialogue, which, I argue, is essential to legitimate mediation that leads to just outcomes.

In Part One, I provide a deeper look at adjudication and mediation and the legitimacy of legal dispute resolution processes. My key point is that any legitimate legal system will prioritize human

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[9] Cf. Fuller, Lon: "Mediation – Its Forms and Function", in Fuller, Lon: *The Principles of Social Order – Selected Essays of Lon L. Fuller,* Duke University Press, Durham, 1981.

[10] Cf. Cf. Chamberlain, Harriet S: "Philosophical Counselling: A Dialogue in Critical Thinking" in *Fifth International Conference on Philosophy in Practice, Oxford,* 1999, pp. 47-55; Facione, Peter A: "Critical Thinking: What It is and Why It Counts" in *Insight Assessment,* 2011, pp.1-23; Lebon, Tim: *Wise therapy: Philosophy for counsellors,* Sage Publications, London, 2007; Lahav, Ran: "Philosophical counseling as a quest for wisdom", in *Practical Philosophy, volume 4:1*, 2001, pp. 7-19; Ruschmann Eckart: "World-view-coherence" in Barrientos Rastrojo, J, *Philosophical practice. From theory to practice,* Humanistic Studies and Philosophical Practice Association, Seville, 2006; Amir, Lydia B: "More philosophy, less counseling: A method for philosophical counseling", in Barrientos-Rastrojo, J. – Ordóñez García, J. - Macera Garfia, F.: *Philosophy and practice: From theory to practice,* Ediciones, Sevilla, 2006, pp. 33-39; Tukiainen, Arto: "Philosophical counselling as a process of fostering wisdom in the form of virtues", in *Humanistic Studies and Philosophical Practice, volume 10:1,* 2010, pp. 48-57.

dignity and that mediation has the potential to enhance this norm, but many current court-connected mediation programs are likely not actualizing that potential. I outline how and why protection and prioritizing of human dignity is best accomplished when legal disputes can be resolved either via a robust adjudicative system or, at the parties' choice, a well-designed, authentic mediation program, which knowledge of philosophical counseling can help to bring about. In Part Two, I offer specific reflections on how learning the theories and practices of philosophical counseling may assist legal players in bringing about effective, transformative, and powerful mediation.

My purpose in this paper is to provide a starting point for thinking about the utility of philosophical counseling (both theory and practice) in the field of mediation. Given this modest goal, I do not engage in internal debates that permeate the philosophical counseling field and make it rich and rigorous. I have tried to focus on those aspects that are likely uncontroversial, though tremendously insightful and valuable to the goal of determining how mediators can give effect to true and authentic self-directed dialogue in a conflict resolution context. For me (and I hope others), this has served as a preliminary starting point to encourage further dialogue between the two fields so that the insights of philosophical counseling can be used to move towards deeper, self-empowered, dignified conflict resolution and civil justice.

Part 1: Conflict resolution through adjudication versus mediation

Understanding adjudication and mediation

Law is a permeating social construct. It regulates our conduct, and it can deeply influence how we think, act, and relate with one

another. When disputes arise, parties often turn to law and legal
processes to determine what the outcome of the conflict should be.
But turning to legal frameworks and processes is not the only (nor
necessarily the best) way to approach conflict. In recognition of
this, the 1970s and onwards have seen a rise in the popularity of
alternative dispute resolution, particularly mediation.[11] Mediation is
a method of conflict resolution that involves a neutral facilitator
who helps parties reach a resolution to their own conflict without
depending on an authoritative judicial decree. This allows parties to
approach their conflict and tailor their outcome in a flexible and
uniquely responsive way beyond what is possible through court-
based resolution. When a mediation process works at its best,
parties are empowered to express their positions, underlying
interests, needs, perceptions, and emotions and to hear those of the
other party.[12] Through such expression and listening, the parties are
positioned to arrive at a self-determined resolution to their conflict.
It is foundational to any legitimate justice system, that it protects
and validates human dignity.[13] This requires a vigorous and

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[11] Cf. Pirie, Andrew: *Alternative dispute resolution: skills, science, and the law*,
Irwin Law, Toronto, 2000; Folberg, Jay: "A mediation overview: History and
dimensions of practice" 1983:1, pp. 3-14; Wall, James A., Stark, J. B., &
Standifer, Rhetta L: "Mediation: current review and theory development*",
Journal of Conflict Resolution, volume 45:3*, 2001, pp. 370-391; Feinberg,
Kenneth R: "Mediation - A Preferred Method of Dispute Resolution", in
Alternative Dispute Resolution, volume 15:5, 1989, pp. 5-41.

[12] Cf. Menkel-Meadow, Carrie: "Whose dispute is it anyway: A philosophical
and democratic defense of settlement (In Some Cases)", in *The Georgetown Law
Journal, volume 83:7*, 1995, pp. 2663; Bush, Robert A. Baruch, & Folger Joseph
P., *The Promise of Mediation: The Transformative Approach to Conflict*, Jossey-
Bass, San Francisco, 2005; Bush, Robert A. Baruch, & Folger Joseph P:
"Mediation and social justice: risks and opportunities", in *Ohio State Journal on
Dispute Resolution, volume 27:1*, 2012, pp. 1-51.

[13] Cf. Joseph, Raz: "The Rule of Law and its Virtue in Joseph Raz" in *The
Authority of Law: Essays on Law and Morality*, Clarendon Press, Oxford, 1979;
Waldron, Jeremy: "The Concept and the Rule of Law", in *Georgia Law Review*

accessible adjudicative system so that laws can be applied in situations where it is appropriate and necessary, and equally requires a process where parties can be free from the confines of the law and can autonomously resolve their dispute. A well-structured and holistic civil justice system would have mediation as an essential complement to the adjudicative dispute resolution system, which is designed to administer laws. Together, this would result in an approach to dispute resolution that truly prioritizes and celebrates human dignity and autonomy.

A Problem with Legalistic Approaches to Mediation

A significant barrier in approaching this ideal (which I believe philosophical counseling can help with) is that court-connected mediation has, in many cases, been reduced to a form of conflict resolution that still depends on law as the primary normative framework rather than being a space where parties can self-create the norms that will guide their resolution.[14] This erases the transformative potential that exists within mediation.

There are several reasons why this happens. One reason is that due to the law's pervasive and authoritative quality, people see themselves primarily as legal entities in the context of a dispute, and as such, they believe that the right outcome will be the one that

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Association Inc, volume 43:1, 2008, pp. 3-61; Acharya, Nayha: "Mediation, the rule of law, and dialogue" in *Queen's Law Journal, volume 46:1,* 2020, pp. 69-96.

[14] Cf. Rundle, Olivia, "Barking Dogs: Lawyer Attitudes towards Direct Disputant Participation in Court Connected Mediation of General Civil Cases", in *QUTLJJ, volume 8:1*, pp. 77-92; Douglas, Kathy & Batagol, Becky: "The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal" *in Monash University Law Review, volume 40:3*, 2014, pp.758-765; Relis, Tamara: *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties,* Cambridge University Press, Cambridge, 2009.

accords with the law. This view is then reinforced by lawyers, who are often present with clients when they undertake mediation. Lawyers are trained in determining what legal framework applies in a given set of facts and arguing for an application of that framework that works best for their client, so they are most comfortable with approaching conflict through that lens.[15] The mediation process then becomes fundamentally a game of guessing how a court is most likely to resolve the conflict and then wrestling with numbers that account for uncertainty and the costs of litigating a case. This approach often does result in settlements that are better for parties than litigation because they are achieved faster and, therefore, more inexpensively. In the context of legal systems that are overburdened, slow, and expensive, this efficacy is understandably seen as valuable.

Still, approaching mediation in this way is a problem because it disavows people of the tremendous transformative opportunity that exists in mediation. This is the opportunity to come together with another person to communally solve their mutual problem through the articulation of one's perspectives and listening to another's perspective. It is the chance to engage in authentic dialogue, become more self-aware and empathetic, and undertake the responsibility of choosing a course of action that aligns well with what one believes is truly right, fair, and just. It is not that that every mediation will always accomplish these ideals, but this is its highest potential. This potential is curtailed if mediation is reduced to law-based adversarial bargaining.

Mediation has the capacity to offer a much deeper and personally engaging approach to conflict and just conflict resolution than the legal system can provide. Resolving a dispute through the legal system does not require parties to think through any justification for the normative framework that is applied to their dispute because

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[15] Douglas & Batagol, *ibid.*

that justificatory work is done in the process of something becoming the law. When something becomes the law, its justification is presumed, which legitimizes our application of that law.[16] Consider how legislators make a law. They debate a bill by exchanging views on various reasons or justifications for why a given rule should become law or not, and ultimately, one side will win the day. The justification that the winning side advocated for becomes the normative grounding for the law. Individuals in society do not necessarily need to agree with the law and its justification, but they know it is justifiably law because it has gone through the democratic process of becoming law, and as such, they know it will be applied to them. Accordingly, when a conflict arises, as legal subjects, we only have to argue that a given law applies to us, we do not have to re-invent the normative justification for the law in the first place – that justificatory exercise happened at the stage of a rule becoming law. By contrast, in a mediation context, parties can arrive at a resolution that may or may not accord with the law, and the parties must do the work of determining what course of action they wish to take *and why*.[17] It follows, then, that a 'just' outcome in a legal context is achieved when the law is appropriately applied; in mediation, a just outcome is one that the parties truly and authentically arrived at.

To understand this difference between traditional legal conflict resolution and mediated conflict resolution more clearly, take the example of the doctor and a patient again. Suppose the patient goes to see the doctor because of stomach pain. The doctor says, "Well, it's probably just acid reflux, try these medications." The patient tries the medications for a month, which do not work. The patient

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[16] Cf. Habermas, Jurgen: *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracym* MIT Pressm Cambridge, 1998; Acharya, Nayha: "Adjudication uncertain facts – the case for procedural legitimacy" in *Advocates' Quarterly, volume 49:1*, 2018, pp. 105-140.
[17] Cf. Fuller, Lon: *Morality of Law,* Yale University Press, New Haven, 1964.

goes back to the doctor. The doctor says, "Try these other medications, maybe you will respond better to those." This experimentation goes on for some time. Finally, several months later, the doctor says, "Let's do some additional diagnostic testing." The doctor sends the patient for bloodwork, and it turns out they have a more serious problem, and in fact, they need surgery. This then gives rise to a conflict between the patient and the doctor because the patient feels that the doctor's earlier misdiagnoses were unfair. If this conflict were to be approached through a legal framework, then the analysis would take the following form. The law is that if Person A treats Person B negligently and causes them injury or damage, then Person B is entitled to be fully compensated by Person A. This is justified based on the general principle that if we cause negligent damage to another person, we are blameworthy and must be held responsible for returning that person to the position they would have been in had the damage not occurred. The same framework applies in the doctor-patient context. As such, if the doctor acted negligently and caused damage to the patient, it is justifiable to hold the doctor to account. Both parties will structure their approach to this conflict around this framework. The patient will try to prove that the doctor's misdiagnoses were negligent and that they resulted in the patient suffering some damage. The doctor will try to show that their diagnoses were not actually negligent and that even if they were, the patient would have needed surgery in any event, so the doctor's actions did not cause any damage to the patient. Both parties have therefore accepted that the legal framework is justified, and they will try to make the best use of it for themselves.

If we take out the legal framework altogether, though, then a different conversation could emerge. The doctor's worldview and value system may make her feel that she owes an apology to the patient. Outside of a legal framework, she has space to offer that, even if she feels that any good doctor could have made the same

misdiagnoses. She may even feel that it is justified for her to find a way to compensate the patient in some way. Similarly, the patient's worldview may lead her to realize that in her attempt to alleviate the pain of her physical ailment, she needed to blame someone, and it was easiest for her to blame the doctor, but deep down, she knows that the doctor had her best interests at heart, and the early misdiagnoses were reasonable, and honestly made mistakes. The patient may arrive at a conclusion that it is not, in fact, justified for her to seek compensation from the doctor. Both parties may decide that they wish to retain the doctor and patient relationship. This may be a best-case scenario, but it demonstrates the limitations of resorting only to legal frameworks to determine resolutions to conflicts.

Problematically, what often happens in a mediation context is that parties fall back into a legalistic mindset. Instead of asking, 'how should we approach this and what should we do?' we ask, 'what is the law'? The first questions are much harder because they call on us to come to an actual understanding of what actions and approaches are justified and why they are justified when it comes to the issue that has arisen between the two people instead of just relying on a pre-determined legal framework. Sorting out what one finds justified means digging into oneself and determining first what you think and second why you think that. A key aspect of mediation is, then, helping parties to do this work.

This can be accomplished, I believe, by taking the help of a 'philosophical counselling' approach to mediation, wherein parties are encouraged to realize that underneath their actions, there exists a worldview and a value system that gives rise to a person's thoughts and actions. Tapping into this foundational fabric of one's self can free parties from the confines and comforts of reliance on legal norms and can empower them to make autonomous, free, self-justified choices. This would be, in my view, the highest form of mediation, and an essential complement to the adjudicative legal

system, resulting in a holistic enterprise of social ordering that includes law but is not limited by it. The combination of a robust adjudication system and a mediation program, as described, leads to the best possibility of enabling individual dignity and freedom.

It could be difficult to convince the legal world that we must see mediation in this light rather than seeing it as a quick way of resolving a dispute and getting a case off the court dockets. Efficient dispute resolution is seen as very desirable, considering the access to justice crises that exist around the world.[18] Mediation programs are seen as effective when they quickly resolve disputes, but what goes on in the process of resolving those disputes is not often scrutinized very deeply. The importance and value of creating a mediation space in which people are given the opportunity to move out of legal frameworks and to go through the work of self-creating norms that may guide their dispute resolution may not be seen as self-evident.

With this backdrop, I suggest that there are two avenues in which discourses within the field of philosophical counselling can be of tremendous value to the project I outline above. First, it can demonstrate, with precision, the value of providing space to unearth, articulate, and critique one's worldview and value system generally, and this can be translated into justifications for a mediation program that is best designed to help parties engage in such a process. Second, philosophical counselling can provide pragmatic guidance on determining how mediators may help parties engage in a deeply reflective approach to conflict and conflict resolution. In the section that follows, I offer some preliminary ideas with respect to both avenues.

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[18] Cf. World Justice Project, "Global Insights on Access to Justice: Findings from the World Justice Project-General Population Poll in 101 Countries" available in https://worldjusticeproject.org/our-work/research-and-data/global-insights-access-justice-2019 (last access September 4th, 2022).

Part 2: Some Helpful Lessons from Philosophical Counseling

Why is philosophical counseling valuable to mediation?

Unsurprisingly, there are as many approaches to philosophical counseling as there are practitioners, but there are some shared underpinnings. Counseling, in general, is fundamentally aimed at improving wellbeing.[19] The unique fundamental assumption of philosophical counseling is that as a person becomes more aware of their thought processes and underlying worldviews and value structures, they become better equipped to notice and correct fallacies in thinking, problematic assumptions, and conflicting values. The goal of a philosophical dialogue, then, is helping the individual conduct an examination of themselves – including exploring what their values and beliefs are and why they may be held.[20] Such examination leads to better integration and strength of character, which aligns with a better sense of wellbeing. The actions that emerge from a well-integrated person are also more likely to be just actions in a broad sense. Put simply, "understanding our own philosophy can help prevent, resolve, or manage many problems".[21]

In this way, the most fundamental goal of philosophical counseling aligns precisely with the broad goal of mediation – to equip people

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[19] Cf. De Botton, Alain: *The consolations of philosophy,* Pantheon Books, New York, 2000; Nussbaum, Martha C: *The therapy of desire: Theory and practice in Hellenistic ethics,* Princeton University Press, Princeton: NJ, 1994.

[20] Cf. Lahav, Ran: "Philosophical Practice – Quo Vadis?", in Costello, Stephen J: *The Philosophy Clinic,* Cambridge Scholars Press, Newcastle, 2016.

[21] Cf. Marinoff, Lou: *Plato, Not Prozac!: Applying Philosophy to Everyday Problems*, Harper, 1999.

to determine and perceive their own worldviews with a willingness to evaluate them, to perceive how those worldviews can influence their approach to a conflict, to come to an integrated understanding of what is just, and to determine what course of action to take. This relates closely to the approach to philosophical counselling offered by L. B. Amir, who holds that autonomy, in the sense of determining and relying on oneself in formulating and acting on particular viewpoints, is a central purpose or aim of philosophical counseling.[22] In this approach, the aim of a philosophical counselor would be to enable clients to come to autonomous conclusions supported by their own well-formed value system. Centralizing autonomy in this sense parallels the fundamental value of mediation – self-determination. As Jacqueline M Nolan-Haley remarks:

> The trend toward court mediation is remarkable because our civil justice system has traditionally promised justice through law. The promise of mediation is different: Justice is derived, not through the operation of law, but through autonomy and self-determination.[23]

As noted above, encouraging individuals to clarify their values and worldviews with the ultimate goal of enabling truly self-determined conflict resolution is a manifestation of prioritizing human dignity, which is a key value in legitimate social ordering: when a person is empowered to make well-reasoned decisions that are rooted in their own philosophy, the inherent dignity of the individual is maximized. Given this alignment in fundamental values between

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[22] Cf. Amir, Lydia B: "More philosophy, less counseling: A method for philosophical counseling", in Barrientos-Rastrojo, J. – Ordóñez García, J. - Macera Garfia, F.: *Philosophy and practice: From theory to practice,* Ediciones, Sevilla, 2006, pp. 33-39.
[23] Nolan-Haley, Jacqueline M: "Court Mediation and the Search for Justice through Law", in *Washington University, volume 74:1*, pp. 47.

the two fields, the skills that philosophical counsellors may have or aspire to have could also be skills that mediators aspire to embody and employ in the course of a mediated dialogue. I turn to a discussion of some basic competencies of philosophical counselling below, focusing on using questioning as a means of helping clients articulate and interrogate their approaches and also to enable empathetic understanding of others.

How can philosophical counseling apply in mediation?

Though there is variance in techniques and approaches adopted by philosophical counselors, any practitioner would see it as their role to help a client bring self-awareness and clarity with respect to their concepts, values, and perceptions. They may do so by engaging a client in the process of verbalizing their concepts, values, and perceptions.[24] Once expressed, one can perceive instances of lack of clarity in concepts or values and possible misperceptions, and these can then be explored at greater depth with the help of the philosophical counsellor.[25] Fundamentally, philosophical counselors enable clients to "inspect the range of choices available to them" and "understand the different points of view on the choices they face".[26]

In the context of a conflict, concepts, values, and perceptions are likely all relevant to varying degrees. For instance, a party could be

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[24] Cf. Lahav, Ran: "Philosophical Practice – Quo Vadis?", in Costello, Stephen J: *The Philosophy Clinic,* Cambridge Scholars Press, Newcastle, 2016.

[25] I witnessed this take place in a workshop conducted by Professor Oscar Brenifer. Readers may find it useful to watch this session. It is available online in three parts: Part 1: https://www.youtube.com/watch?v=HnLfJ4W_5e8 ; Part 2: https://www.youtube.com/watch?v=5yiDsX36a2s ; Part 3: https://www.youtube.com/watch?v=-BGpLyfEOpk

[26] Perring, Christian "*The limits of philosophical knowledge: Implications for philosophical counseling*", in Journal for Philosophical Practice, 2003.

encouraged to dig into their concept of what constitutes 'fairness' or 'justice' or 'success' and to determine how these concepts may be impacting their approach to the dispute. A conflict may have ethical or values-based components. Upon philosophical introspection, a person may find that his or her sense of what is right or wrong could be hazy or internally inconsistent, which can lead to a sense of uneasiness or indecision. Being able to perceive and critically analyze one's ethical underpinnings can result in an improved or better-formulated value set, which can assist in well-reasoned conflict resolution. Faulty or one-sided perceptions may also be at the heart of a conflict, though this may not be apparent to parties at the outset. An assisted examination of what perceptions are influencing the parties can lead to re-evaluation or re-calibration of those perceptions, which can help move parties towards resolution. Ascertaining the underpinning concepts, values, and perceptions can help a party determine why they take the positions they do in a conflict, affecting a movement away from positionality (which usually involves a feeling of "I am right and you are wrong") to a place of exploration of the interests and deeper rooted value commitments that lie beneath a person's adherence to any particular position.[27] This opens the possibility of shifting from adversarial position-based conflict resolution to curiosity about why the parties hold those positions.

Several philosophical counselors use methods like Socratic questioning and critically analyzing or problematizing basic presumptions, which can have significant applicability in mediation contexts. Questioning allows a counselor to avoid imparting any wisdom or knowledge, or principles onto the client and instead opens space for the client to come to their own self-understanding. Questions can serve to nudge a person towards critical thinking,

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[27] Cf. Fisher, Roger & Ury, William L: *Getting to yes: Negotiating agreement without giving in*. Penguin Publishing, New York 2011.

openness to the thinking of others, and even humility.[28] This can bring about a sense of tolerance and genuine appreciation of true pluralism. Socratic questioning typically involves asking several types of questions that create 'productive discomfort.' Discomfort arises naturally when key positions and assumptions are questioned. It urges a person to articulate justifications for the positions they hold or else re-evaluate them.

Such questioning must be undertaken gently and without judgment in order to avoid feelings of embarrassment or mockery and to encourage a trusting and open dialogue. A mediator adopting this approach may ask clarifying questions, like "what do you mean when you say that?" or "Why is that important to you?" or even "In your opinion, is your answer clear to the listeners?" They may ask questions that probe assumptions like, "is it possible that there is another cause?" They may seek articulation of reasons and evidence by posing questions like, "Could you give an example to aid our understanding?" They may ask questions that open the possibility of examining different perspectives, like, "What do you think someone else would think about that?" Or they may ask questions that assist a person in understanding the implications of their viewpoints by asking, "What would that mean in the future?"

Another category of questions is "why" questions, which can help the parties explain their justifications, their rationalizations, and ultimately, the perceived legitimacy of their assertions. Professor Oscar Brenifier has helpfully articulated the value of asking, "why do you say that":

> The why implies genesis, causality, motive, motivation, and to work this dimension we accustom ourselves to justify automatically our arguments, to argue them, in order to grasp their deeper content. It makes us aware of our thought and of our being, for which every particular idea is only the pale

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[28] Cf. Rawson, Glenn: "Socratic Humility" in *Philosophy Now: A Magazine of Ideas, volume 53,* 2005.

reflection or roughness from which we can practice the escalation of mind and being.[29]

Asking "why" corresponds to Fisher and Ury's insistence that negotiators should be prepared to provide objective criteria that justify or legitimize their assertions and offers.[30] Taking a simple example, parties in dispute over a will should be able to answer why they believe that they are entitled to what they claim – is it based on a conversation with the deceased person? An emotional connection with them? Their understanding of testamentary law? Etc. When a mediator is experienced in asking 'why' at the right moments, the objective criteria that a party is resting their assertion on can be articulated and assessed.

Mildly asking questions like those noted above may assist a mediator to engage the parties in a thoughtful and deeper understanding of their conflict, which would enable both parties to gain a fulsome understanding of their own and the other's perspectives and thoughts. This would enliven a more genuine dialogue about the conflict and its eventual resolution compared to a simple back and forth wrangle over who is right or how much money should transfer hands.

Along with enabling an intellectual understanding of oneself and others, some in the philosophical counseling field have also emphasized the idea of empathetic understanding as a central tenet of philosophical counseling. Chamberlain, for instance, suggests that a philosophical dialogue should also enable clients to acknowledge the holistic experiences of others, including

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[29] Cf. Brenifier, Oscar: "The Art of philosophical practice", Independently published, available in http://www.pratiques-philosophiques.fr/en/welcome/ (last access September 3rd, 2022).

[30] Perring, Christian "*The limits of philosophical knowledge: Implications for philosophical counseling*", in Journal for Philosophical Practice, 2003.

perceiving their emotions and ideals.[31] Affecting such empathetic understanding does not mean that parties must agree with each other, but understanding the other in the way that Chamberlain suggests could result in less hostility in the relationships between parties to a dispute, and a sense that although we may not all experience the same emotions in any given situations, we are all susceptible to feeling the same emotions in various circumstances.[32] For instance, we may not be able to justify another person's jealousy in a given instance, but we know that we have felt unjustified jealousy at times too, and that recognition results in the sense of commonality. Similarly, while one situation may not invoke fear for one party, recognizing that another party experiences fear is possible because we have experienced fear ourselves in other instances. This can assist parties in recognizing our basic similarities, and the relationship between parties may begin to feel less antagonistic. This ability to maintain and strengthen relationships is a prime benefit of pursuing conflict resolution through mediation rather than adjudication.[33]

The possibility of seeing what is driving our actions and engaging empathetically with what is driving the words and actions of others has relevance also when it comes to power dynamics, which is a significant issue in mediation. Power imbalances are concerning in mediation contexts because parties can be coerced into accepting outcomes rather than autonomously accepting an outcome that is

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[31] Cf. Chamberlain, Harriet S: "Philosophical Counselling: A Dialogue in Critical Thinking" in *Fifth International Conference on Philosophy in Practice, Oxford,* 1999, pp. 47-55.

[32] Cf. Chamberlain, Harriet S: "Philosophical Counselling: A Dialogue in Critical Thinking" in *Fifth International Conference on Philosophy in Practice, Oxford,* 1999, pp. 47-55.

[33] *Cf.* Chamberlain, Harriet S: "Philosophical Counselling: A Dialogue in Critical Thinking" in *Fifth International Conference on Philosophy in Practice, Oxford,* 1999, pp. 47-55; Delnoij, J: "Short Socratic Dialogue Workshop" in *Fifth International Conference on Philosophy in Practice, Oxford,* 1999, pp. 52-53.

good for them. This coercion can occur between parties or even between the mediator and one or more of the parties. Many tools exist that are designed to help mediators alleviate power imbalances between parties, and to check their own conscious or unconscious exercise of power.[34] But almost every relationship has incidents of power imbalance and sanitizing that completely seems unlikely. The best approach may be to help parties recognize power and its influence. A philosophical counseling approach could help here because it can enable participants to dig into the root of their actions and words and determine how actual or perceived power may be influencing them. This very perception and expression may assist in loosening any grip that power differential has on a mediation.

In short, philosophical counseling shows us that underneath our outward words or actions, there exists a worldview that lies deeper within us. If a mediator can help parties become adept at examining, clarifying, and articulating their deeper commitments, then parties become better at communicating with more depth. They may also be better able to recognize that other people's words and actions are also underpinned by their own sometimes hazy worldviews, leading to a sense of empathy and understanding between parties. Further and more deeply exploring the theory and practice of philosophical counseling and its utility as an approach to mediation can allow both parties to feel more deeply understood and enable empowered dialogical conflict resolution.

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[34] Cf. Davis, Albie M., & Salem, Richard A: "Dealing with power imbalances in the mediation of interpersonal disputes" *in Mediation Quarterly, volume 1984:6,* 1984, pp. 17-26.

Concluding remarks and future directions

Maintaining mediation programs that are empowering to parties is, I believe, a key feature of a legitimate justice system. Such a system would promote self-directed, dialogical problem solving and decision-making, thereby enhancing the fullest expression of human dignity, which is central to legal legitimacy. Philosophical counseling aligns well with ideal mediation because it also aims to enable autonomous, informed, and self-directed thinking by clients. Both mediation and philosophical counseling have the aim of helping clients understand themselves and come to reasoned decisions that they feel they can internally justify. Considering this alignment between the two fields, the theory and methodology of philosophical counseling can be tremendously beneficial in creating and promoting well-functioning mediation that can serve as a viable complement to traditional adjudicative dispute resolution.

The preliminary thoughts that I have presented in this paper have alerted me to the tremendous potential that the field of philosophical counseling has to contribute to the theory and practice of mediation. There is much to explore further and in greater depth. Some topics for future exploration that are at the forefront for me include using the insights of philosophical counseling to determine how best to respond to power imbalances between parties in a conflict resolution context, and determining how to minimize mediator interference, including either conscious or unconscious straying from the neutrality that is essential to maintaining mediation that is as true as possible to its foundational value of self-determined decision-making. It would also be valuable to consider how existing mediation theory may provide insightful benefits to the field of philosophical counseling.

Finally, I would like to offer my thanks for being allowed to participate in the 2022 International Conference on Philosophical

Counseling: Concepts, Methods, and Debates, hosted virtually at the University of Delhi. It was through my participation in that event that I formulated the ideas expressed here and listening to the other speakers broadened my mind significantly. While attending the conference, I was especially struck by learning that philosophical counseling is rooted in an integration of 'Eastern' and 'Western' ideas, forming a truly holistic, inclusive approach. As Dr. Louis Marinoff noted in his comments after his keynote address, philosophical counseling has deep roots in India's rich traditions, philosophies, and spiritual exploration. The thinkers that were invoked by speakers at the conference ranged from Plato to Epicurious to Heidegger to Carl Jaspers to Buddha to Kabir to Aurobindo to Achenbach to J Krishnamurti, and the unauthored ancient Vedic texts of India. The result was an enlivening exchange of ideas of a quality that I had never experienced before, rich and diverse, with intellectual rigor, emotional intelligence, and spiritual insight. I hope that the paper I have offered here will serve as a starting point for an inter-disciplinary and cross-cultural dialogue and exploration among those who see value in authentic and meaningful dialogical conflict resolution as a pathway to enhanced civil justice.

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