

Never say never



William Ury (right) with John Sturrock QC, chief executive of Core Solutions

Could mediation work for my client? Ask the man who seeks out the world's most intractable disputes and attempts to apply his techniques. The Journal was fortunate to secure an interview with Dr William Ury, on his first visit to Scotland

He trained as a social anthropologist, is a bestselling American author, and has no obvious connection with the Scottish legal profession. Yet it was a rare privilege for the Journal to be offered the opportunity of interviewing Dr William Ury.

The international mediator, whose books include *Getting to Yes*, *Getting Past No: Negotiating with Difficult People*, and *The Power of a Positive No: How to Say No and Still Get to Yes*, was the special guest of Core Solutions at events in Scotland last month, and star attraction at their Edinburgh seminar on key negotiating strategies. (He is, after all, co-founder of Harvard Law School's Program on Negotiation, where he currently directs the Global Negotiation Initiative: www.pon.harvard.edu/.) Even as I caught up with him at his hotel, the *Economist* and *Times* were angling for slots in his packed schedule.

Dr Ury takes it all in his stride, as you would expect from someone who seems equally at home attempting to

resolve a family conflict, an industrial dispute, or a civil war in one of the world's flashpoints. What then is his philosophy?

"I would say it's the search for the answer to the question, how we human beings can deal with our most deep-seated differences. Speaking as an anthropologist now, we're at a juncture where for the first time in the history of humanity, the whole human family, all 15,000 tribes on earth, are coming together in a kind of family reunion. Like most family reunions it's not all peaceful, and the question is how do we deal with our differences in a co-operative, collaborative way. The animating value is peace, is satisfactory dispute resolution."

This means revolution

A potent force for change that he identifies is the flattening of the social hierarchy, the pyramids of power ("Scotland back to the time of the Scottish Enlightenment, and even before that, was a bastion of liberal, democratic ideas which have contributed greatly to this"), into organisational forms that are "networks of negotiation, where essentially the primary way in which we can make decisions is actually together in trying to find ways to reach agreements".

The result is what he terms the "negotiation revolution". Whether we are talking about the exercise of executive or legislative power, or resolving litigious disputes, Ury maintains that over 90% of decisions are reached by negotiation – otherwise "nothing would get done in a democracy". He also believes that clients demand this approach. "People nowadays want to affect and to participate in the decisions that affect them. So you find that our clients, our parties, are no longer willing to say OK, let a judge decide... What negotiation and mediation offer is a way for the parties themselves to really have power, it empowers them to craft solutions that satisfy their deep interests."

A distinctive feature of litigious disputes, he observes, is the existence of a clearly defined alternative if the case does not settle. But "while the

court system is extremely important and negotiations have to take place within its shadow... oftentimes, I've found, the real interests of the parties don't get engaged or addressed by the legal system because that's entirely in terms of the law. Negotiation and mediation offer a way to really address what people honestly care about."

Home-grown solutions

Yet while advocating that we learn what we can from others ("Goethe, I think it was, who said fools learn from their own experience; wise people learn from the experience of others"), he is careful not to be prescriptive. "The thing with the negotiation revolution is that it's happening in different cultures in different societies at a slightly different pace, but it's happening in all of them just like the internet is."

For lawyers, who may have what he accepts are legitimate concerns about whether it will work, whether they have been trained for it, whether we will still have a system of precedent, "I think the best model here is, if you want to go fast, you have to go slow... At the same time I've watched the [US] legal profession go through a sea change around this issue as people become accustomed to it... People are starting to use mediation and similar methods as a tool in everything, commercial disputes, family disputes, even some criminal disputes. There's a wave of innovation taking place. This is the first generation of lawyers who are reinventing the lawyering profession, and what it means to be a lawyer, and a lot of lawyers are actually deriving much greater satisfaction from these new forms because it's what they went into law for in the first place, which was to really serve the cause of justice."

"When I started I must say too, just 30 years ago, it was exceedingly rare to find a course on negotiation given in law schools, and now I would be very surprised if there's a single

law school in the world that doesn't offer courses on negotiation, because of the recognition that negotiation is a good part of what any lawyer does."

So would Ury draw any lines as to what types of dispute might or might not be suitable for mediation? "Let the change take place. Try it out. You're still in an experimental phase, a lot of people are still concerned about it, so try it out on those disputes where parties are most interested in using it. Like for example in commercial situations. For business people time is money, they want to move on, lawsuits are often with people with whom they could have commercial relations. Or families where there's an ongoing relationship. And then explore and see, innovate and see."

"Mediation is not a cure-all, it's an alternative, it's an option, it's a choice that empowers people. Give it a chance, see what works, and see what works here in Scotland... You can learn from the experience of others in other countries where mediation has been more widely used, but ultimately you're going to have to tailor it to what works here in the Scottish experience."

And he observes: "I also see that it's actually in the smaller countries of the world that you have the potential for the most interesting experiments."

Positive choice

He has a straight answer to those who maintain that offering mediation is a sign of weakness. "I think it's a natural concern, but in fact negotiation, mediation is a sign of courage because you have the courage to be able to carry your convictions into speaking with the other side, hearing them out, listening to them, trying to persuade them, and that's what takes genuine courage: it's to engage your differences, freely, with other human beings."

Relevant to Lord Gill's forthcoming review, Ury is not someone who believes there should be any compulsion to try mediation before going to court. "I'm not a big fan of compelling people. Mediation is consensual, the whole idea is consensual decision making, and to compel a consensual decision to me is a little bit of a paradox." He returns to the view of mediation as an extra choice, beyond the cost, delay and uncertainty of going to court. "I can still have



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[the court] option but right now I might have the ability to sit down with a third party and see if we can work out a solution that only I will have to approve of, and see if it works and it might be quicker, cheaper, more satisfactory; give it a shot, it doesn't take that long. So to me the incentive's already there; I do think there ought to be encouragement, but I don't think there's a need for compulsion and I don't think compulsion is the best way to effect this kind of change."

Ancient heritage

Ury's anthropologist training has led him to develop what he terms the Third Side (www.thirdside.org/) – the role of the community in reducing violence and promoting dialogue. "Among some of the more simple societies they use that all the time, and whenever there is a dispute the entire group gets together and they talk it out, they try and reach a collective consensus, and it's not enough just to reach a transactional agreement, what's important is to restore the relationship."

As the website affirms, this is a role that any of us can take any time as we go about our lives. "The lawyers whom I work with, they uniformly realise that they're negotiating all the time with their family, their children, their colleagues, their employees, and they realise that in fact they're negotiating maybe 50% of their time, not even thinking of it as negotiation. And yes, the Third Side is basically I would say our most ancient human heritage for dealing with conflict, which is to realise that in any dispute there are not just two sides, two parties, there is always a third party which is the surrounding community, and engaging that surrounding community can be critical to

resolving that dispute."

He instances as learning from those traditions the restorative justice movement, where you do not simply have a judge handing down a decision, but "a negotiated process where there's an apology, there's compensation, which are some of the most ancient mechanisms for actually restoring relationships, not just arriving at a particular just outcome".

The world stage

But fittingly for someone whose interest in mediation developed at the height of the Cold War, as he wondered why we were putting the whole human race at risk through conflict, it is at international level that Ury's approach is now being particularly applied, and where, when asked, he offers the most remarkable outcomes that show what mediation can achieve. One was in Venezuela, where he helped defuse a confrontation between President Chavez and opposition leaders that many observers believed was headed for civil war. ("Just removing the name calling reduced the amount of emotional intensity... it just struck me again, as a principle, that the cheapest concession you can make in negotiation is to show a little respect to the adversary.") Another was the resolution of the bloody 25-year independence struggle in Aceh, Indonesia, through a devolution settlement which saw the former rebel leaders become elected provincial governors.

Would he negotiate with terrorists, that taboo of governments the world over? "It's a loaded term, would you negotiate with terrorists, because what it implies is, would you make concessions to terrorists... So I would reframe it and say, would you talk with people who have used terrorism, and I mean would you give yourself a chance to influence those people to



change their behaviour? Why deprive yourself of that chance to learn more about them so you can influence them, even if it's influence with armed force? To me it's important to talk and listen to everyone, but it's important not to make concessions of course that can reward the phenomenon."

He admits to many failures, but Dr Ury's mission is simply to try. "My life is, I get attracted to trying to apply these techniques which people say will only work in certain situations; I like to try them out in the hardest situations on the planet. I did some work in the Balkans and right now I'm working in the Middle East... Thirty years ago when I entered this field, people were telling me the Cold War will go on for ever, the Berlin Wall will be there for ever, the conflict in Northern Ireland will go on for ever, it's gone on for hundreds of years and will go on for hundreds of years, the conflict in South Africa will do the same... I visited these places and participated in some of these negotiations and I watched as, I mean who would have imagined that Ian Paisley and Martin McGuinness would be working together in the same government? I do actually believe that it is possible and they used the very same principles of sitting down, engaging in collaborative problem solving.

"I had the occasion to meet Martin McGuinness a few years ago at a conference, and I was amazed – he had just come back from Africa where he was giving talks about how to settle their conflicts using the lessons of Northern Ireland, and he had a copy of *Getting to Yes* with him! So I would say that it's difficult, never underestimate the difficulties, but also never underestimate the possibilities. Even the most difficult conflicts can yield through patient, persistent negotiation to outcomes that benefit both sides." ■

Global democracy: the e-Parliament

William Ury's initiatives extend beyond dispute resolution as such, to collaborative measures designed to facilitate application of the principles of democracy at a global level. The "e-Parliament" (www.e-parl.net/eparliament/welcome.do) uses the internet to link together all 25,000 democratically elected parliamentarians around the world in fora where they can exchange ideas.

"Right now", he explains, "you have essentially 150 or more laboratories of legislation that are each isolated from each

other like silos, and there's no easy way for a legislator say in Scotland to communicate with a legislator in the United States or a legislator in India on the same issue and say, how are you dealing with that issue, what's the legislation, how has it worked, has it been good or not?"

"There's that level, and eventually there's the level of non-binding voting. Let's take the issue of climate change. There is a UN process for trying to deal with this; there's a meeting in Copenhagen in a few months, but

scientists and the experts would all say the processes that are being used are going so glacially slow that there's no way they can adapt in time before the phenomenon gets out of control. And so one of the questions is whether we can kind of reinvent global decision-making a little bit and take advantage of existing parliaments which have much faster ways of dealing with decision-making than UN conferences because they can vote, and actually linking them together and having a global conversation in which they would

through mediation and facilitation reach consensus on certain legislative initiatives in a non-binding way globally.

"Then you can come back and introduce them in your own national parliament so you can have simultaneous co-ordinated legislation to deal with the issue of climate change which would be faster, more connected to the people, because parliamentarians are much more accessible to citizens in a way that could complement what goes on say through a UN system."