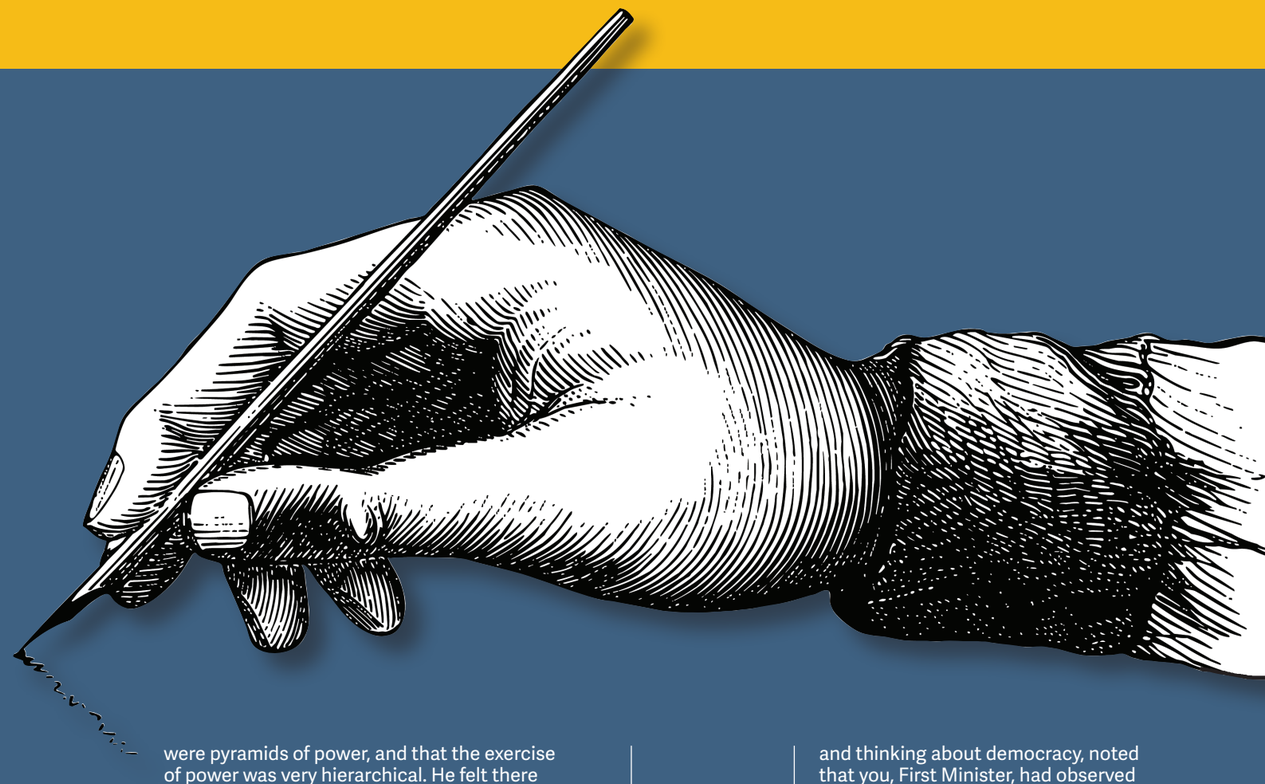
Open letter to Nicola Sturgeon

An open letter to Nicola Sturgeon, First Minister of Scotland on aspects of conflict resolution, negotiation and mediation. By Paul Kirkwood, sometime litigation solicitor turned mediator.



Dear Nicola,

I had the good fortune to be present at the Scottish parliament on Saturday, 12 May 2018 when William Ury, international negotiator and mediator, and co-author of 'Getting to Yes' addressed the International Academy of mediators and members of the public on the subject of 'Common Good Politics: A New Enlightenment: How Can Mediators Lead the Way?'. You responded to him on the same topic.

William's writing over the years has focused on how to negotiate disputes at macro and micro levels; both between states, inside states and between companies and individuals who are in dispute. He has always sought to encourage principled negotiation and negotiation where there can be a win-win outcome rather than a win-lose; where people use cooperative forms of negotiation, rather than purely competitive or adversarial forms of negotiation. At its best mediation is a form of cooperative negotiation. Notwithstanding that, William has also always argued that one should always remain true to one's own values in a negotiation, and that one ought not to give in, or accommodate, just to get to a bad, easy, yes. He describes this as the power of a positive no - or how to say no and still get to yes!

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His most recent success was assisting as a mediator negotiator in the ending of a 54-year-old civil war in Colombia between its government and a revolutionary Marxist group FARC. People said it could not be done. Guns were put down in return for guaranteed safety and participation in the state electoral system for all the protagonists.

You yourself have been involved in a within-state, intergovernmental dispute recently between the Scottish government and the UK government over the repatriation of certain powers from the EU as a result of Brexit. To the 'Adam Smith Observer 'it would appear that you are conducting that negotiation in a principled way. You observe that these returning powers are devolved under the Scotland Act 1998 and should return to Scotland. Notwithstanding that, you accept that some of these powers should perhaps be appropriately managed by the UK government to ensure a common UK wide framework, for the good of the whole of the UK, subject to the UK government seeking agreement and consent from the Scottish government. The UK government response has effectively been - we will consult you, but we call the shots, and we can 'deem' consent; we will not allow you a veto. You in turn have given a positive no and refused to consent to the EU Withdrawal Bill, building a cross-party coalition in doing so, thereby improving your Batna (best alternative to a negotiated agreement). Additionally, you have brought in your own bill with regard to returning powers, which the UK government is now challenging the validity of in the courts. Nevertheless, you continue to hold out olive branches and offer compromise, recognising the importance of the matter to the UK as well as to Scotland. This is classic cooperative negotiation based on principle but seeking to reconcile the interests of both - a genuine attempt to get a win-win solution. It also reaffirms the possibility for genuine negotiation in a situation between parties where there is asymmetric power. I commend you for it.

William also talked, two days later, about there being a problem with democracy. He observed that, in the past, there were pyramids of power, and that the exercise of power was very hierarchical. He felt there was a quiet revolution going on, which accompanied the knowledge/social media/Internet revolution. Now he felt that the pyramids were collapsing into flatter shapes and that organisations were more like networks, where negotiation was horizontal between people, and there was less giving of hierarchical orders. Everyone wants to be consulted and have a say in the decisions that affect them and that therefore we have to think about better ways to enable people to negotiate with each other than the ways that we have followed in the past. When you were present he pointed out that it wasn't just important to get to a win-win between the two parties who were protagonists; but that the solution they reached, had to work for a wider third party, the wider community in which we all lived.

In the Q&A I asked William whether, since governments such as the Scottish government were trying to adopt principled negotiation and mediative ways of dealing with intergovernmental conflict, states should be seeking to encourage their own population, or the people affected by their decisions, to seek to resolve their conflicts in a mediative way; rather than directing people to a state-sponsored and funded adversarial court system where people were not consulted but potentially had decisions imposed on them by a third party judge, in a very hierarchical way? You, I think, had left the room at this point, but your colleague Ben MacPherson MSP was present, and did hear the question and no doubt subsequently relayed its terms to you? William responded by agreeing that states should encourage their people to resolve disputes in a better way by having 'soft mechanisms to enable negotiation to take place' and he gave an example of how the wider community was involved in dispute resolution amongst the San Bush people of the Kalahari Desert.

Two days later William, in further reflection on this point,

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and thinking about democracy, noted that you, First Minister, had observed in your speech that at Westminster the front and opposition benches were separated by two sword lengths and he compared that with Holyrood where the parliament sits in a semicircle and was therefore less adversarial. He observed that when we think about power, rights and interests there is a general malaise and we think about adversarialism and binary choices. We need to reinvent democracy to enable people to have a meaningful voice in a way that they have not in the past, and he observed, that we have the technology to make it happen!

Which brings me to my point Nicola. As a 'state', Scotland publicly supports, with taxpayer money, a win-lose adversarial court system for the purpose of conflict resolution between people or companies when they are in dispute. These disputes can take years to resolve - and cover the panoply of human disputes, including family/divorce/custody/access, personal injury, workplace/employment and commercial cases. People can be damaged psychologically in the process, as well as financially. It often doesn't resolve the conflict trauma but can make it worse. The delay in resolution of such disputes through court does not reflect 'access to justice', it reflects the reverse. Sometimes the only winners are the lawyers!

The Republic of Ireland has recently brought into law a Mediation Act in 2018. This requires parties in most kinds of legal disputes to consider mediation as a means of dispute resolution before proceeding with court action. Even if they reject it - it remains open to the court, after court action has been commenced, to direct parties to consider mediation during the currency of the litigation, and where this is not done properly, it provides sanction for costs.

In England, in Special Educational Needs (SEN) (in Scotland ASN) disputes, parties are obliged to consult with mediators to consider mediation, before they can commence Tribunal court proceedings. More than 50% then opt for mediation, and more than 50% of those disputes are resolved between local education authorities and parents/children, obviating the need for expensive state-supported court action which takes much longer to resolve.

In England, they are currently actively considering, in personal injury claims, whether to make mediation mandatory, with costs sanctions in court actions for failure to engage.

Of course, not all mediations are successful - there is no obligation on anyone to reach a resolution in a mediation - and if parties cannot, they should not be sanctioned in costs and should be able to access a court system.

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What mediation does do, is that it enables the parties, often individuals, to be actively involved in face-to-face discussion and dialogue with the help of a mediator (whose role is not entirely dissimilar to that of the Presiding Officer of the Scottish parliament; and who can see the balcony!). It gives parties/people autonomy, control and involvement in deciding whether to resolve their dispute, without the need for trench warfare. Mediators are able to help both parties 'hear' the other party's point of view - to stand in their shoes, and to see their perspective. At its best mediation is a good form of cooperative negotiation and can enable win-win outcomes. It can also lessen/and or resolve, trauma not make it worse! It is also not about excluding lawyers (I am one). People still need good legal advice in mediation and the Irish Mediation Act specifically provides for that.

Mediation represents a softer, less adversarial, faster and more efficient way of resolving legal disputes, and it provides people with a real involvement and in a way courts do not.

So, Nicola, you and your government have engaged in cooperative negotiation, in a mediative way at a macro level. If it's sauce for the state goose - surely it should be sauce for the state goslings too? Isn't it time Scotland legislated for a Mediation Act, à la the Republic of Ireland?

And, by the way, if you need a mediator for your ongoing negotiations with Westminster - I'm available!

Kind regards

Paul Kirkwood

Solicitor and Mediator