

Post-election violence: Kenya's mediation process

Article published in The Nation newspaper: January 2008
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Mediation - the last hope for dialogue?

In any country has mediation ever been so talked about? How is it that so much is expected of the efforts of seemingly uninvited guests? How have we reached a stage when so much hope is pinned to a process that so many of us know so little about, not least perhaps those who are expected to engage in it.

Mediation is an easy word to bandy around, to use both in and out of context, and something to which expectations for the resolution of a seemingly intractable stand-off are being optimistically nailed. But what is a mediator to do, how is he or she expected to work the miracles we are all hoping for? How does mediation usually operate, and how might it succeed in righting the wrongs, calming the tempers, stopping the killing, slowly bringing Kenya back from the brink of the abyss into which we are all staring?

Let's be legalistic first. Mediation is one of many different processes for resolving disputes. It simply entails enlisting a neutral third party to help disputants try to reach a negotiated settlement. It is essentially a voluntary process, and most often a private one.

“Voluntary” - the essence of success lies in the willingness of the parties to embrace the process – not to pontificate and prevaricate about venues, personnel and etiquette. And so far in Kenya, willingness to participate has been sorely lacking, particularly on the part of the government. The moral high ground is there for the claiming, but neither side seems anxious to truly claim it. An unequivocal “we’ll be there, wherever the table, whenever the time” would claim that hilltop territory, forcing the other side into a position of being unable to refuse to participate without bringing universal condemnation down upon its intransigence. With the best will on the continent, without an acceptance of the process of mediation, without a willingness to engage by both sides, no-one can make a mediation even happen, let alone succeed. Desmond Tutu, perhaps the most famous peacemaker on the planet, has disappeared from our television screens and newspaper front pages without having edged either side any closer to a face-to-face encounter. Did either side really want him? Was there any political will to engage? Clearly not. Without it, the process is doomed to fail.

The mediator is a facilitator. He usually facilitates the continuation of negotiations which may have broken down. In this case we have no negotiations to continue, we are asking our mediator to help kick start a process which no-one else has been able to begin. He has a blank slate, no agenda to present to the parties, no existing negotiations on which to improve, to build, to use to discover issues for resolution. Whether he has been invited or

not, his is a blank slate – for him the unenviable task of starting a meeting without an agenda,

What is expected of a mediator? We must realise that it is not for him to make decisions – he is neither arbitrator nor judge, rather the oiler of the wheels of negotiation. Judges and arbitrators make decisions, not mediators. The voluntary essence of mediation is both its strength and weakness. There are no courts to compel attendance, compel the appearance of witnesses, compel abidance by decisions. Unless both parties are committed to the process, it will be impossible to get it to work. Yet the voluntary nature of mediation means that when it happens, the disputants own both the process and the result, and so are likely to be far more committed to honouring any agreement they reach.

Kenya has delivered first class mediation services to warring parties from Somalia and Sudan. But Bethuel Kiplagat and others were not making decisions, they were helping the factions in those multi-factional pits of despair to rise up and reach a decision that they owned themselves, that they had arrived at through their own efforts – their own creation which they were therefore all the more determined to try and make work. Of course not all agreements made at mediations stick, but those that are created by the parties themselves stand a much better chance of doing so, than decisions imposed on disputants by judges and arbiters from on high. Ethiopia and Eritrea could not agree on their own border and so submitted their disagreement to the UN Boundary Commission, stating that they would abide by the Commission's decision. Now Ethiopia is crying foul, refusing to abide by a decision that awarded Badme to Eritrea.

When Nelson Mandela went to Burundi it was not to make a decision, and so when President John Kufuor of Ghana tried to kick start a negotiation process in Kenya, his task was to do just that – and then perhaps to continue to facilitate and preside over such negotiations.

Of course the mediator needs to be neutral and uninvolved, although as he is not making a decision, only helping others do so, just as important as actually being neutral is being perceived to be so. The current, and dubiously elected president of the United States of America, George Bush, is not perceived to be neutral in any aspect of the dispute between Israel and Palestine, and so, whatever his own personal sentiments, he is, like all his predecessors, patently unsuited to helping negotiate peace in the Middle East – nor for that matter is the recently appointed EU envoy to that area, Tony Blair. No-one would suggest that Kufuor was biased in favour of either Kibaki or Odinga, but along with neutrality must go the earning of the respect of the disputants and if the press reports are to be believed, Kufuor failed to gain this of Odinga, who may have resented being patronised by such an elder statesman.

To be unable to reach a decision, even to fail to start to negotiate, can be seen as an admission of failure. To take a dispute to court or to arbitration is tantamount to saying “we have failed, we cannot reach a decision ourselves and so we need someone else to make the decision for us”. Having to ask for help to cross the road, or to find the way,

seems to some, an admission of weakness. So a mediator needs to appreciate this, and always to be aware of the need to allow those who have agreed to accept help to find a way to retain dignity and not lose face either in having asked for help in the first place, or in needing such help to resolve their dispute.

In the course of the negotiations he is helping to facilitate, the mediator may well ask himself how proactive he can be in making suggestions and helping to guide the process. Being too proactive can risk one of more of those involved losing confidence in both the mediator and the process. Yet fundamental to the work of any mediator is the realisation that ways must be found to create solutions which save face and keep dignity intact. If Kofi Annan is asked to take a demand to Kibaki either for his resignation or for an admission that the electoral books were cooked, as a prerequisite to talks, he will have to offer the opinion that such demands are unlikely to succeed and worse, may well do lasting damage to the mediation process.

Mediation styles differ. Where disputants are round the table together, some mediators find that the best chances of settlement come from keeping everyone there together as long as possible. Others find better opportunities in talking with parties separately, quickly reverting to the role of shuttle diplomats. Today in Kenya, there is, as yet, no opportunity to exercise any other than the shuttle style of mediation, there being no table around which to keep the negotiations open. So the mediator has no option but to begin the very difficult, and often frustrating role of moving back and forth with messages, from one camp to the other. Not the least unsatisfactory element of this is that it takes far longer than sitting with everyone together in the same room.

Once at the table, whether with one or both parties, the mediator must ask those present whether they actually have the authority to enter into decisions on behalf of those they purport to represent. There is nothing worse for a mediator than to spend hours or days helping thrash out an agreement, only to be told at the end of the proceedings that one of the representatives just has to go and check that an agreement is acceptable to others in his organisation - which it very often is not. There is little doubt of the answer when a mediator asks Raila Odinga whether he is empowered to make decisions on behalf of ODM, but who is making the decisions in the PNU camp? Whoever may be round a negotiating table on its behalf, will they be able to say at the end, "yes that is acceptable and we are empowered to enter into this agreement". Will the PNU decision makers now have to ensure the approval of ODM Kenya before agreeing to anything? Who exactly does our *de facto* president represent? Which of his coterie of advisers will have to be sitting round the table when any decision is reached?

Now, to our last minute rescue comes Kofi Annan and his Committee of Eminent Helpers. None come with better credentials. Never, barring the end of apartheid, have more presidents and former presidents lurked on the fringes of an African dispute, prepared to assist if wanted. Has there ever in Africa been such a tide of goodwill to help a country resolve its self-made problems? Of course, cliché or otherwise, this is a local problem, and so deserves a local solution. Yet whether through the intransigence or pride of our leaders, or their fear of losing face or electoral rerun, or both, the opportunities to

create local solutions have so far not even been given the chance to wither on the branch. Mediation can be a thankless and lonely task, especially if its interventions seem unasked for, but if there is the remotest possibility of it succeeding, it must be tried – and tried again.

Even the most ardent refuseniks have their bending point, the moment when the combination of international and local opprobrium becomes too great to ignore. We can only hope this moment is nearby, and that the concerted efforts of so many obviously well-intentioned and well-respected individuals can no longer be resisted, and that very, very soon a willingness to embrace, not resist, the process will emerge.

Meanwhile, as State House fiddles, Kibera burns.

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