

Shutdown at Serena



SINCE CHIEF MEDIATOR KOFI ANNAN LEFT THE COUNTRY after the signing of the National Accord and Reconciliation Agreement on February 28, the mediation talks have been slowly losing steam.

For all practical purposes, the National Dialogue and Reconciliation talks that were being held at Nairobi's Serena Hotel have been shut down

For close to three months leading to June, the talks did not produce a single agreement because of the negotiators' loss of interest, manifested in their chronic mass absenteeism from scheduled meetings.

Rising public concern over the fate of the mediation process forced a temporary return to the talks but by the last week of May, the pretence was wearing thin. In what may well be the last serious seating, the parties signed an agreement whose highlight was that, henceforth, the mediators would be engaged on a need-to basis. That agreement has effectively transferred mediation authority to the Government -- and unofficially shut down the Kenya National Dialogue and Reconciliation.

The change of fortunes for the mediation has been expected not even the mediators have bothered to make any protestations. The process had been forced on one of the negotiating parties when it

was established. The agenda, though representing the country's needs at the time, was also a patchwork of political interests.

But it is the fruition of its greatest achievement that gave it the kiss of death. The naming of the Grand Coalition Cabinet and its subsequent swearing in took the momentum away from the mediation process. With all the eight negotiators now serving as Cabinet ministers, the lines in the process became blurred.

The credibility of the process was also undermined by the contradiction inherent in having ministers who subscribe to collective responsibility representing opposite partisan interests at the talks. Within government, there also appeared to be a determination to undermine the authority of the process by setting up parallel structures in the ministries -- such as the inter-ministerial committee on reconciliation -- even before agreement had been reached on matters at issue.

Similarly, new measures to tackle land issues as well as the publication of the National Ethnic Relations Bill and the establishment of the Ministry of Northern Kenya and Arid Lands outside the mediation framework seemed to hijack the talks' agenda and render the process irrelevant as a site for negotiating intractable national issues.

The great unknown is what ramifications the closure of the mediation process will have for the country.

Two areas of uncertainty stand out: the prospects of the three agreements already reached and the fate of the unresolved and highly volatile Agenda 4 issues.

TAKING A CHANCE

Three major agreements are on the table. The first, on ending the violence that had gripped Kenya and claimed over 1,000 lives had been quick to reach. That and the second agreement -- addressing the humanitarian crisis brought about by the displacement of over 300,000 people -- were signed in the first week of talks. The third agreement, over how to share power and resolve

the political crisis was more protracted but took no more than a fortnight to resolve.

Though the mediation talks have achieved the broad objectives of the three agenda items in the agreements on stopping the violence, dealing with the humanitarian crisis and resolving the political stalemate, they have not policed their implementation.

For instance, police excesses in the post-election period appear to have been halted as agreed but new concerns have emerged over the conduct of the military in Mt Elgon.

The negotiators also agreed to disarm and discharge all illegal armed militia but, so far, there have been no visible efforts to honour this agreement. While the joint police-military operation in Mt Elgon District has decapitated the leadership of the Sabaot Land Defence Force, no overt efforts have been recorded in disarming and disbanding other militia. One of the more notorious gangs, the Mungiki, has twice acted on a large scale -- a clear indication that it is still intact. There is disagreement on whether to use strong-arm tactics against the group or to negotiate with it.

Additionally, President Mwai Kibaki and Prime Minister Raila Odinga have held joint peace rallies, presumably as part of the agreement to cultivate reconciliation, but there is still dissonance in the country's leadership about joint meetings.

The agreed humanitarian assistance to those affected by the post-election crisis, although understandably delivered under difficult circumstances, is less than stellar. The camps for the internally displaced are emptying but those that remain are still in deplorable condition. Although the government has appealed for funding to assist internally displaced persons, and has begun returning people to their homes, the internal refugee crisis is evolving daily and requires re-interpretation and renegotiation. Although re-settlement is not forced, government officials are offering it with veiled threats that compensation will only be paid to those who return.

MEDIATION TALKS LIMBO Issues and Perspectives

Moreover, there is no evidence that the agreed steps have been taken to stop hate messages or to prosecute all criminal activities arising from the post-election period. A former MP and a former party official have been charged in court in connection with the violence, but nothing beyond that seems to have happened. In fact, the question of whether to prosecute perpetrators of violence or grant them amnesty is a major bone of contention.

The power sharing agreement, too, has some loose ends, the most portentous being a clash over the authority and powers of the Prime Minister and the Vice President. A draft on the power relations in the coalition has not been debated.

With the mediation talks now effectively shut down, the question is whether the implementation of the three agreements already signed will get easier or harder. The initial expectation had been that the mediation process would remain in place to shepherd the implementation and, where necessary, resolve any interpretation disputes.

The second uncertainty revolved around Agenda 4, under which the mediation talks had identified six issues. These are the issues at the heart of the Kenyan problem and therefore the most important in the larger scheme of things. They were identified as land reform; poverty, inequality and regional imbalance; unemployment – especially for the youth; constitutional and institutional reforms and issues of transparency, accountability, impunity, and national cohesion.

Yet, the mediation talks have been closed before substantive agreements were reached on Agenda 4. In place of a detailed agreement, the parties only managed a general statement on their willingness

to resolve the issues and a roadmap for the review process.

The fear now is that in the absence of an umpire, agreement, let alone action on Agenda 4 – and with it issues of the larger public interest could be compromised.

The premature closure of the Serena talks bodes ill for the country. Without them, the political parties could, for instance, renege on the commitment to end violence and prosecute perpetrators of criminal acts during the post-election period with no negative consequences accruing to them.

This has become a sticking point in the government and there is no guarantee that other issues will not become contentious later. The mediators need to stay on hand to provide the nudge for unwilling parties to honour their obligations.

The establishment of two commissions of inquiry on the election and the violence that followed it raises questions about their supervision to ensure that they deliver on deadline and that their recommendations are implemented.

Additionally, the power struggles in the coalition could easily paralyze government and the implementation of all the agreed actions, especially the long-term Agenda 4 issues. The need for mediation over Agenda 4 remains. The issues -- from land reform, poverty, regional imbalance to constitutional reforms and impunity -- concern all Kenyans, not just ODM and PNU.

An agreement reached by the two protagonists might not satisfy the third and most important constituency – the citizens.

AGENDA 4: OUTSTANDING ISSUES

Specific issues	Steps taken so far	Gaps	Recommendations
1. Undertaking constitutional, legal and institutional reforms;	• Existing work on land from the Njonjo and Ndungu commissions, as well as the Draft National Land Policy;	• Loss of momentum in the mediation talks with negotiators skipping meetings;	• Naming of cabinet has overburdened the negotiators. Restore the credibility of the mediation process by getting negotiators to recommit to it or appoint replacements;
2. Tackling poverty, inequity and combating regional development imbalances;	• Draft Truth, Justice and Reconciliation Bill;	• Poor monitoring of actions already agreed;	• Cease attempts to detract from the authority of mediation process by setting up parallel structures at ministries;
3. Tackling unemployment, particularly among the youth	• Draft Ethnic Relations Bill;	• Confusion about the fate of mediation process once commissions and other institutions and parliament take on specific roles.	• Clarify that supervision of commissions is still with the mediators;
4. Consolidating national cohesion and unity;	• Bomas Draft constitution;		• Clear confusion about what is supposed to happen to recommendations from the various commissions
5. Undertaking land reform	• Formation of Ministry for Northern Kenya and Arid Lands Development;		
6. Addressing transparency, accountability and impunity	• Ministry of Justice/National cohesion inter-ministerial committee		

Extrem

'The views expressed on these pages are of polar positions on the debate and are not necessarily those of the author.'

GOODBYE AND GOOD RIDDANCE? "Although the mediation process has resolved the problems it was meant to. The remaining work can only be done at the pace of, and in tandem with, the evolution of the new political reality. The talks are now subordinate to the Cabinet."

ALTHOUGH THE AGENDA OF THE MEDIATION process has four items -- a cessation of violence; humanitarian assistance and the restoration of basic human rights; the resolution of the political crisis and the resolution of long term underlying issues -- they all fall into just two categories, namely, the immediate steps to restore normalcy and the steps to ensure a similar crisis does not recur.

The decision to consult the mediators, led by Olyemi Adeniji (pictured), on a need-to basis is, therefore, a natural evolution of events. Already the measures to restore normalcy -- Agenda items 1 to 3 -- have been agreed and acted on. Violence has been halted, humanitarian assistance and the restoration of basic human rights have been accomplished and the political crisis has been resolved. Only the underlying issues remain.

The negotiators cannot be replaced just because they have joined Cabinet. The effectiveness of the mediation requires high level representation from the two competing sides, which are now both in government. Moreover, the only reason the mediation process began outside known state institutions was because there was a legitimacy crisis over the government. The mediation process has been -- if also necessarily so -- unconstitutional and extra-legal. There is no legal or constitutional basis for political parties to meet under the guidance of a foreigner and presume to reconfigure the state. It was a case of extra-ordinary times requiring extra-ordinary measures.

That extra-ordinary moment has passed. The mediation process can, therefore, not continue except with the participation of the relevant state institutions, in this case, the Cabinet and Parliament. As in any other governmental business, relevant ministries must be, and are already being, engaged in aspects that were initially under the mediation team. Similarly, properly constituted state commissions, such as the one on the Truth, Justice and Reconciliation and the Independent Review of the 2007 Elections should free the team.

The long term issues are such that agreements cannot be reached quickly. More players outside the mediation process have to be involved. The issues after all relate directly to matters that affect the day-to-day life of the general population as distinct from the wellbeing of

the political class. The issues are also closely tied to history, ethnic animosity and a warped political and economic system. Their resolution will amount to a revolution which must have the participation of the people to counter the possibility of mass rebellion by those adversely affected -- unlike power sharing and portfolio balance where adverse effects fall on sections of a political class that is inured to breaking and mending fences.

Besides, the issues on the table are matters that cannot be rushed. Issues such as poverty eradication, inequality and national cohesion require a series of policies and implementation plans rather than mere legislation -- which appears to be the only solution the mediation, can come up with. Policy making is the preserve of government and, in our situation, time will be required to marry the policies of the different parties, and yet more time for the technocrats to work out the implementation plans.

A period of healing and reconciliation is needed before the hard decisions are made. The alternative would be tantamount to throwing new ammunition to gangs already in the war trenches. The glaring ethnic and political divisions that erupted in December must first be pacified if not healed before any drastic measures are taken.

As it is, the reform calendar has been set at 12 months, leaving only the details of the timelines. Better still; a template of constitution making is in place, thanks to Kenya's matchless experience.

The sum of it all is that there is no reason to have the mediation process in place. The talks have solved the immediate problems they were meant to; they cannot resolve the outstanding issues before the country has settled down. **;**



e Logic

The two pages are representative of the mediation process of KPTJ or its members.



PLEASE DON'T GO: "The short term measures that have been agreed by the mediation process are already coming unstuck because they are linked to the resolution of the long term issues. It is a package deal: All the issues must be tackled simultaneously or the peace will come apart."

F THE MEDIATION TALKS are under siege and may yet collapse under the weight of unresolved issues. While the first three mediation agenda items were ostensibly resolved, all but one -- the Resolution of the Political Crisis -- are proving impossible to conclude in the absence of an agreement on the fourth. In all instances, only the easier aspect of each issue has been dealt with, leaving the difficult dimensions in abeyance.

For instance, violence has been halted and the police are no longer using live bullets on civilians, but the militias have not been disbanded as agreed. The police continue to forcibly break-up peaceful

demonstrations, and torture by the military is rampant in Mt Elgon District. A whistle-stop peace tour by the President and the Prime Minister scarcely amounts to the agreed joint meetings by leaders to preach peaceful co-existence. The agreed civilian oversight on the police and the crossflow of information between the administrative units and the leadership at all levels is not apparent.

Even on power sharing, there are problems. First, the *National Accord and Reconciliation Act* is being interpreted differently by the two protagonists - it is still not clear where the Prime Minister lies hierarchically, particularly in relation to the Vice-President.

The half-hearted implementation of already resolved issues is a direct consequence of the absence of trust and good faith between the two contending sides. This is, in turn, the result of the absence of an agreement on long-term issues that fueled the crisis in the first place. As it is, the dispute was and remains about holding onto or capturing power for purposes of retaining or re-modeling the constitutional order to one's advantage. It is about the system of government, the control of land and other state resources as well as settling old political scores.

The seemingly straight-forward agreement on cessation of violence and disbandment of militias is thus captive to the resolution of heavier issues such as land policy, inequality, regional imbalances and a new power matrix under a reformed constitution. If the mediation was about reverting the country to normalcy so as to pave the way for the resolution of the underlying problems, the new reality is that Kenya will never be normal until the underlying issues are resolved. Until then, the best we can hope for is what we have in place -- an uneasy ceasefire.

The same scenario is unfolding in the antagonistic manner in which the second supposedly agreed mediation agenda -- tackling the humanitarian crisis -- is being implemented. The Internally Displaced Persons (IDPs) are indeed being resettled but the scheme is in shambles. Hostility by host communities against the returnees is high and a large contingent of Rift Valley Members of Parliament, whose area is the epicentre of the exercise, are opposed to the manner of resettlement. Many IDPs have refused to go back home out of fear and there are no plans to settle them elsewhere.

Clearly, the problems assailing the resettlement of IDPs have more to do with the unresolved land question than the absence of prior reconciliation measures. While the immediate trigger for the displacement of so many people was political, it is now generally accepted that the more fundamental reason was, and remains, real and perceived historical grievances over land, inequality, poverty and ethnic prejudice. For closure to be achieved over the IDPs, the underlying issues must be resolved.

Similarly, the heated debate over whether to prosecute or offer amnesty to those who were involved in the post-election violence results from lack of agreement over an important sub-item in the fourth mediation agenda -- how to address transparency, accountability and impunity.

The resolved short term issues, important as they are, are unlikely to bear sustainable success unless they are fortified with long term measures that put to the grave the underlying issues. It is, as it were, a package deal: all the issues must be tackled simultaneously or all issues will come unstuck. **J**

OPPORTUNITIES: The mediation process gave Kenya what it has been missing: an acceptable umpire. The chance should not be lost

FOR A LONG TIME, KENYA HAS BEEN DEADLOCKED over many issues critical to its development into a modern democracy. Debate on the various issues at the heart of national tensions – from land reform to dealing with grand corruption, equity, poverty and unemployment to ethnicity and the development policies the country needs to pursue – has been characterised by extremist take-no-prisoner attitudes. The reason this contest has remained unresolved for so long is that there has been no umpire acceptable to both sides.

Until the crisis that followed the December 2007 elections, political business was conducted in an exclusivist fashion where the group wielding power used it to marginalise positions and interests it did not agree with.

The mediation process established credibility, acceptability and authority. It so far has achieved one feat – it has forced politicians with opposing interests to learn to respect those they do not agree with, tolerate them, and even do business with them.

The give-and-take culture is something of a shock for a society that has been raised on a winner-take-all electoral system. The mediation process, with whatever gravitas it still packs, represents the least expensive way to resolve outstanding issues on which consensus has been elusive.

The issues in Agenda item 4 have been debated



exhaustively over the past 45 years of independence. Although the discourse has been enriched over time, it has not been possible to reach closure on them because of the absence of a mechanism to effect or force compromise. The mediation process represents the first real opportunity.

The mediation talks also present a unique opportunity for the country to tackle the thorny issue of insecurity. For a long time, the Kenyan landscape has been characterised by the presence of armed militia. Some have been hired and maintained by individuals and groups in government or outside it. Others have sprung up as independent, freelance agents that are available for hire. Only a process such as the mediation talks can offer a middle-of-the-road solution based on international practice such as requiring that members of militia groups be disarmed, demobilised and reintegrated into society.

The mediation process additionally presents a chance for the security services to be reformed and re-oriented to protect and promote human rights rather than violate them, while being accountable to civilian authority.

Further, only the mediation talks can safeguard the Grand Coalition by providing continuous leadership on the interpretation of the unique situations that are likely to arise when one side or the other takes a hard line position in the competition for power.

The two sides in the mediation talks have fairly comprehensive policy proposals on the outstanding issues, all of which the coalition government has harmonised into a comprehensive policy. The continued engagement of the mediation team secures public trust in the policies the parties choose to prioritise.

A common denominator for these issues is that they cannot be resolved by the parties to the negotiations alone. Other players outside will need to be involved. That involvement cannot be guaranteed if the mediation process collapses or is transferred to the control of politicians.

MEDIATION TALKS LIMBO

Issues and Perspectives

“OBSTACLES: By a strange twist of fate, the greatest achievement of the mediation process -- the power-sharing deal -- has turned out to be its biggest obstacle”

POWER SHARING DELIVERED a half loaf to both sides – end of violence and the restoration of law and order for PNU, and a slice of power for ODM. These gains have also given the government legitimacy.

With the primary interests of key political actors satisfied, the utility of the mediation process has come into question for both parties. The lesson on the need to negotiate issues that are in contention has been short-lived after resolving the political crisis. It seems that the various interests will muscle in their position without regard to dissenting views.



The extreme positions that each side seems to have taken on each issue will also frustrate action on Agenda 4 items – unless a mediator is on hand to midwife those agreements. The rancour over the interpretation of the National Accord and Reconciliation Agreement, and the apparent poor faith, with which it has been read on both sides, is a harbinger of more difficulties with future deals.

Key political actors are more concerned with their own survival and the battles they will have to fight at the next contest for power than tackling the issues agreed on as part of the mediation.

The international community, which was instrumental in getting the parties to negotiate, seems to have also achieved its short-term goal of halting the violence, restoring peace and stability and having a legitimate government.

Though the unfinished agenda enjoys public sympathy, it is not owned by the political class. They did not generate it.

In fact, it seems that the mediation team – acting in the interests of the wider Kenyan public – fell back on the recommendations of the African Peer Review Mechanism Report of 2006 in framing the agenda of the long-term issues the country needs to deal with.

The intractable issues around land reform; constitutional, legal and institutional reform; dealing with poverty, inequality and imbalances in regional development; youth unemployment; transparency, accountability and impunity; and consolidating national unity -- had been adequately illuminated in the APRM report on Kenya nearly two years before they gave birth to the crisis.

Held in abeyance, they are powerful platforms for the political battles ahead.

These issues are also at the knife's edge of the social transformation that Kenya is undergoing. They define power relations and, therefore, any proposed adjustments to them could invite a fight-back from entrenched interests.

Numerous economic interests would be injured if the six items on the long-term agenda were tackled comprehensively. If the solutions that emerge from the mediation process jeopardize the interests of economic interests that maintain the politicians in power, they will not support them.

Without identifying other interests that will neutralize the political ones, the mediation talks are in jeopardy and might not produce the negotiated outcomes they were meant to.

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FLASHPOINT: THE INDEPENDENT REVIEW COMMITTEE

How will the Commission of Inquiry investigating the 2007 elections navigate the political minefield that is Kenya?



BY SEPTEMBER 30, 2008, AT THE LATEST, the Independent Review Committee investigating the 2007 presidential election will have to publish its report of its findings.

Nearly three months after the Committee was set up under the Commissions of Inquiry Act, it was still headhunting for a researcher and a public information officer. Its highly anticipated public hearings had not begun, and there were murmurs that the Commission was being starved of cash. It is beginning to look increasingly unlikely that the Commission will do its work on time.

The financing for the commission was expected to come from the Kenya Government and the Trust Fund for National Dialogue and Reconciliation, a donor basket for paying the Panel of Eminent African Personalities and underwrite some of the costs of the agreed actions at the talks.

Under its terms of reference, the commission is expected to investigate all aspects of the 2007 presidential election and make findings and recommendations that will improve the electoral

process. The task is daunting in view of the emerging challenges.

In recent times, IREC chairman Justice Johann Kriegler, has said that the commission will not necessarily find out who between Mwai Kibaki and Raila Odinga won the election. In a way, this defunctive statement emphasizes the dilemma the commission faces – if it strictly follows its terms of reference, it will be resisted by those who would be injured by its work.

The signing of the power-sharing deal has complicated the task of the commission. With the two parties to the mediation talks now in a coalition government, a finding by the commission that one candidate or the other won the election would jeopardise the deal, with worrying consequences. If President Kibaki did win the election, would that mean that Prime Minister Raila Odinga would have to leave the government and lead his party into the Opposition? If the reverse were the case, would the President be required to abdicate? Either outcome would dent the legitimacy of the current government, a prospect not many politicians are keen to see become reality.

In setting up the commission, the negotiators had hoped to prove the legitimacy of their claim to power. That purpose will no longer be served by the findings of the Kriegler Commission.

With such little support from the political parties that were part of the mediation process that set up IREC in the first place, the commission is increasingly looking forlorn and orphaned. Questions about who should provide oversight and protection for its mandate and work are beginning to come to the fore as the negotiators shift attention away from the mediation talks.

The next issue of the *T&J Digest* assesses the Kriegler Commission, the tasks it must accomplish, the hurdles it faces, and the opportunities to change Kenya.