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## Post-election violence: Kenya's mediation process

### The mediated talks – from the outside looking in

Kofi Annan has got the ODM and PNU to the table. The proposed seating plan for the table caused nearly an hour's delay to the start of proceedings. But perhaps ODM can be forgiven some posturing when Kibaki was initially placed in the middle chair of three, with Odinga and Annan on either side.

Eventually Annan took the middle seat in this opening session, perhaps by then aware that the seating plan for a mediation is a lot more important than it sounds. His ending up in the middle was probably unavoidable, and often there is little alternative to placing the mediators there with the parties on either side. However this tends to accentuate the existence of the conflict, with the disputants arrayed in front of one another and the neutral in between them, and any alternative configurations is worth considering.

Getting the parties to the same table, however they are seated round it, has been in itself an achievement, owing much to the respect in which Annan is held, and, dare one hope it, the realisation that without dialogue there will be no agreement. Neither side has shown, through its deeds, any real willingness to engage the mediation process, and has continued to pose problems for those trying to devise a modus operandi for it. Nor has either of them sought to claim the empty moral high ground by wholeheartedly embracing the idea of mediated talks right from the start – “yes, we’ll be there, wherever the table, whatever the time”. By so doing they would have earned both national and international acclaim – and incidentally diminished the standing of the less co-operative other side.

What any mediators must do at the outset of proceedings is search for issues for negotiation, for some common positions on which to build. The subjects of these negotiations in Kenya are potentially very wide-ranging, and designing the agenda has been a monumental task. A resolution of the disputed presidential election results must be at the forefront of negotiations as is the workable future for our government; but is it for these negotiations to address the history of land acquisition and the inequity of wealth distribution in Kenya lying behind the horrendous violence of the past month? Is the violence itself something which these proceedings should discuss? And what about constitutional reform? The mediators’ time in Kenya is surely limited and, if nothing else, there must be practical limitations to what their agenda can address.

In their search to find some overlap in the parties’ positions as a basis to begin negotiations, the mediators will initially need to eschew the details and focus the parties

on the larger picture. They could start by getting both sides to confirm that they are anxious to stop the violence, and that they both acknowledge the need to establish a workable government for the Republic of Kenya. These at least are the essentials of something upon which to open negotiations. Slowly, very slowly, discussions can start to edge towards more specific matters.

Unreasonable demands will surely negate any progress made so far, and the mediators must make the parties realise this, firmly but fairly, in such a way that they get their message across without losing the confidence of those that make them. By now ODM will realise that to continue insisting on Kibaki's resignation is doomed to make negotiations fail; but is there room to negotiate a short-term presidency for Kibaki of, say, two years, before a fresh presidential election? Never say never, as Odinga has done to the position of primeminister, and could power sharing during an interregnum before further elections or constitutional reform provide scope for negotiation that leads to an agreement?

Understandably, ODM continues to advocate a retallying of the constituency totals. Even if this were still possible, which is doubtful, it ignores the whole question of trying to aim for a negotiated solution which allows face to be saved, and a modicum of dignity retained. If a retally will reveal the election was rigged, and that those responsible are therefore caught *in flagrante delicto* cheating the electorate, it is unrealistic to expect PNU (by which is actually meant an alliance of PNU, ODM Kenya and KANU MPs) to agree to it. Mediation is not about who is right and who is wrong, either morally or legally, it is about reaching a decision through negotiations, often between people who detest and despise each other.

The discussions must avoid searching the past for blame or admissions of responsibility for the horrendous state of affairs in which we find ourselves. Mediation is all about working out an agreement that will continue to be respected long after the mediators have left the country. In this way energies become positively focused on rebuilding a future, instead of indulging in acrimonious exchanges about the past. Presently, neither party's spokespeople seem capable of making a straight statement which does not contain accusations or innuendos of blame on the other. No-one is expecting ODM to forgive or forget the perceived injustice of the presidential election, but continued reference to this during the course of negotiations will, while it might satisfy the emotional needs of the "losers", be self-defeating. The mediators must keep the parties focused on how to put Kenya back together, not on the reasons and responsibilities for its destruction - not on how we got into this mess, but how we get out of it.

Each side has three negotiators, and this in itself can bring problems. One such is the tendency for team members to feel the need to prove themselves tougher than their peers, thus ratcheting up demands to unreasonable levels for the sake of impressing each other. The voices of the moderate members of the team thus risk being drowned out by the more strident tones of others. Will the negotiations effectively be reduced down to a one on one dialogue between Martha Karua and William Ruto, both seemingly intractable characters, to the exclusion of their fellow team members?

And is it actually wise to include lawyers in the negotiating teams at all? Advocates trained and practised in confrontational litigation often find it very difficult to adopt the co-operative stance. Martha Karua and Mutula Kilonzo may be reluctant, even unable, to shed the adversarial attitudes required of them in the court room - and perhaps expected of them by their peers - in favour of a more compromising and conciliatory approach which is essential if mediated negotiations are to succeed.

Inevitably times will come when negotiations seem to be sticking, when the mediators begin to despair, when deadlock seems intractable. Then it may be time for the mediators to play the “what if we don’t reach agreement” card, to give a reality check to the consequences of walking out of the room with no agreement in place. For PNU, the immediate thought will be to retire behind the curtain of the *status quo ante*, whatever its legitimacy, but doing so ignores the reality of then having to try and govern with a minority in parliament, and the ever-present threat of a vote of no confidence.

The importance of getting one party to see an offer from another’s perspective is expressed in much proverbial wisdom about wearing different hats or shoes, but actually getting those that make offers at the table to do this is not easy. All the PNU and ODM negotiators are seasoned enough politicians to be capable of appreciating the impact of vote rigging on each other’s emotions, but the mediators may need to work hard to get them to take that extra cognitive step that will make them really do this. Sometimes mediators ask parties literally to move into the seats of the others, to try to get them to see how an offer they have just made appears from the other’s point of view. “How would you respond to that suggestion if you were they?” Knowing what she knows about our court system – whether or not she is prepared to admit it in public - it is utterly unreasonable and unrealistic of Ms Karua to suggest ODM lays its grievances before a judge. Would she and her co-negotiators agree to do that if they were the ODM?

Of all the differences between mediation and other forms of dispute resolution, the hardest for the teams to grasp is that they are not there to persuade the mediators of the rightness of their argument, or the justice of their positions. Rather the negotiating teams must be trying to convince the other side to make some concessions, alter its stance, edge a little closer into the middle of that tiny patch of common ground. These are negotiations, and the mediators’ task, having earned the respect of both sides, is to facilitate them, provide an enabling environment, encourage the parties in their progress, however minimal this may sometimes seem. Kofi Annan has not come to Kenya with solutions to our problems, he has come to help our leaders find these themselves.

As Speaker Kenneth Masende said to Mwai Kibaki and Raila Odinga when opening the first session at County Hall, “Kenyans look up to you: do not let them down in this hour of need”.

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