

**THE ROLE OF MEDIATION IN PROMOTION OF KENYANS'
SOVEREIGNTY DURING ELECTION DISPUTES
MANAGEMENT**

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Contents

ACKNOWLEDGMENTS	4
DECLARATION	5
ABSTRACT	6
LIST OF ABBREVIATIONS	7
LIST OF CASES	8
LIST OF LEGAL INSTRUMENTS	9
CHAPTER 1: INTRODUCTION	0
1.1 BACKGROUND	0
1.2 STATEMENT OF THE PROBLEM	2
1.3 RATIONALE OF STUDY	3
1.4 SIGNIFICANCE OF THE STUDY	3
AIMS AND OBJECTIVES	3
1.6 RESEARCH QUESTIONS	4
1.7 HYPOTHESIS	4
1.8 THEORETICAL FRAMEWORK	4
1.9.1 RESEARCH METHODOLOGY	7
1.9.2 LITERATURE REVIEW	8
1.9.3 LIMITATIONS OF THE STUDY	10
1.9.4 OUTLINE OF THE DISSERTATION AND ITS FLOW OF ARGUMENT	10
CHAPTER 2: THE PLACE OF MEDIATION IN ELECTION DISPUTE MANAGEMENT	12
2.1 INTRODUCTION	12
2.2 THE CONCEPT OF SOVEREIGNTY IN ELECTION DISPUTES MANAGEMENT	12
2.3 INADEQUACIES OF THE CURRENT ELECTION DISPUTE MANAGEMENT SYSTEM	14
2.4 ELECTORAL CRISIS MEDIATION	16
2.4.1 CONTEXT AND TIME-FRAME	16
2.4.2 ROLES OF INDIVIDUALS AND INSTITUTIONS IN PROMOTING SOVEREIGNTY OF KENYANS THROUGH MEDIATION	16
2.4.3 METHOD OF APPLICATION	17
2.5 IMPORTANCE OF MEDIATION	17
2.6 CHALLENGES THAT EXIST IN THE ELECTORAL CRISIS MEDIATION PRACTICE	20
2.7 CONCLUSION	20

CHAPTER 3: COMPARATIVE ANALYSIS OF DRC, LESOTHO AND COTE D’IVOIRE TO DETERMINE THE APPROPRIATENESS OF MEDIATION IN PROMOTING KENYANS’ SOVEREIGNTY DURING ELECTION DISPUTES MANAGEMENT	22
3.1 INTRODUCTION	22
3.2 The nature of the post-election dispute	23
3.3 The mediation style employed.	24
3.4 COMPARATIVE ANALYSIS	25
3.4.1 Democratic Republic of Congo (DRC) electoral mediation	26
3.4.2 Lesotho	26
3.4.3 Cote d’Ivoire	27
3.5 CONCLUSION	28
CHAPTER 4: THE CURRENT PRACTICE OF ELECTORAL DISPUTE RESOLUTION AND THE EXTENT TO WHICH IT PROMOTES THE SOVEREIGNTY OF THE PEOPLE	29
4.1 INTRODUCTION	29
4.2 2007/2008 electoral crisis dispute resolution	29
4.3 2013 electoral dispute resolution	32
4.4 2017 electoral dispute resolution	33
4.5 CONCLUSION	34
CHAPTER 5: CONCLUSION AND RECOMMENDATIONS	35
5.1 CONCLUSION	35
5.2 FINDINGS	36
5.3 RECOMMENDATIONS	36
5.4 CONCLUSION	37
APPENDIX 1	38
BIBLIOGRAPHY	38
KENYAN LEGISLATION	38
JOURNAL ARTICLES	38
SELF PUBLISHED ARTICLES	38
REPORTS	39
INTERNET SOURCES	39

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DECLARATION

I, MUHIU MAGDALINE WAIRIMU, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: ... 

Ms Balla Galma

ABSTRACT

Electoral mediation is relatively a new concept in Africa. With the historical and default preference for litigation of electoral disputes, minimal scholarship has been done regarding the role of mediation in election disputes management and its relationship to the promotion of sovereignty of the people. While the complexity of electoral disputes almost demands litigation as a means of settlement, this study contends that this adversarial process is inconsistent to the people's need to exercise their sovereign power. It therefore explores the opportunities in mediation notwithstanding its shortcomings and seeks an amalgamation of mediation and the judicial process with emphasis and priority on the former. Through comparative studies with other African countries and an extensive examination of the current dispute resolution framework in Kenya, this study seeks to establish a locus for the success of mediation.

LIST OF ABBREVIATIONS

1. AU- African Union
2. ADR- Alternative Dispute Resolution
3. BBI- Building Bridges Initiative report
4. COMESA- Common Market for Eastern and Southern Africa
5. DRC- Democratic Republic of Congo
6. SADC- Southern Africa Development Community

LIST OF CASES

1. *John Harun Mwau & 2 others v Independent Electoral Boundaries Commission & 2 others* (2017) eKLR
2. *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and 2 others* (2017) eKLR.
3. *Reverend Dr. Timothy M. Njoya and 6 others v Honourable Attorney General and Another* (2004) eKLR

LIST OF LEGAL INSTRUMENTS

1. The Constitution of Kenya (2010)
2. Elections Act No. 24 of 2011
3. Judiciary Committee on Elections Annual Report of 2017
4. Black's Law Dictionary, 2nd edition
5. The Supreme Court (Presidential Election Petition) Rules, 2013

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND

This dissertation discusses the role of mediation in the promotion of Kenyans' sovereignty during election dispute management. The 2010 Kenyan Constitution envisions the entitlement of the power of governance to its rightful owners, that is, the people of Kenya. This is the principle of sovereignty. It is the power to constitute government, choose those to run the government and to be involved in governing.¹ This power is heavily coveted by individuals seeking their own private interests to the detriment of the citizens' collective sovereign power. Promotion of the sovereignty of Kenyans therefore means the protection, respect and advancement of the latter's governance interests over institutional dictatorship and other such private interests.

In establishing a balance of interests during national elections (when the citizens are actively exercising their sovereignty), conflict is likely to occur. Every five years, the country almost comes to a standstill during elections especially in competing for the presidency.² Political competition often escalates beyond vibrant debate into ethnic polarisation.³ This was evident in the 2008/2009 election dispute crises which saw the employment of the good offices of the United Nations in the dispute resolution process.⁴ As such, the process came to contain and cure the ills occasioned by the crisis that occurred in the form of deaths, destruction of property, lootings, violent protests and ethnic segregation.⁵

'Good offices' is a term used to denote pacific means of dispute settlement where a third party facilitates direct negotiations on the means of pacific settlement between parties to be employed to resolve the dispute. The slight difference between mediation and good offices is that in mediation, the mediator actively participates in the process unlike in

¹ Nwabueze B, 'Presidentialism in Commonwealth Africa' 14(3) *The Journal of modern African Studies*, 1974, 292.

² BBI Kenya website, *Building bridges to a united Kenya: from a nation of blood ties to a nation of ideals*, 2019, 48.

³ BBI Kenya website, *'Building bridges to a united Kenya: from a nation of blood ties to a nation of ideals'*, 2019, 48.

⁴ Juma M, 'African mediation of the Kenyan post-2007 election crisis', 27(3) *Journal of African Contemporary Studies*, 2009, 407.

⁵ Juma M, 'African mediation of the Kenyan post-2007 election crisis', 27(3) *Journal of African Contemporary Studies*, 2009, 407.

good offices.⁶ This study evaluates mediation as a feasible means of dispute resolution by virtue of the success of good offices by raising the argument that, unlike in good offices, the regulated active participation of the mediator is also essential in electoral dispute resolution.

Owing to the current state of divisive election practices in Kenya in the form of organized political and ethnic violence,⁷ the citizens' sovereignty has been compromised necessitating legal and policy reform regarding dispute resolution. Mediation is a conflict management process involving an impartial third party that seeks to change perceptions or behaviour while invoking the authority of law.⁸ It has the potential to resolve electoral dispute complexities as it provides for the proverbial soft words and hard arguments.⁹ In so doing, it recognizes both the citizens' and the government's roles and responsibilities. Mediation harmonizes these roles with a view to promote the power of the citizens in governance.

In view of Article 159 of the Constitution which mandates the Judiciary to promote alternative dispute resolution mechanisms in the administration of justice,¹⁰ it is imperative to examine the extent of mediation promotion by the judicial framework. This is important in promoting the spirit of the Constitution and more importantly, assuring the protection of the sovereignty of the people during elections.

To achieve this feat, this study proposes the composition of a mediation-centred legal framework that recognizes the centrality of the sovereignty principle in management of election disputes. The laws of Kenya should primarily provide for mediation as the primary means of electoral dispute resolution considering its merits to promote the sovereignty of the people.

As such, this study seeks to examine the place of mediation in election dispute management. It further seeks to measure the appropriateness of mediation in promoting

⁶ Sucharitkul S, 'Good Offices as a Peaceful Means of Settling Regional Differences' Golden Gate University School of Law, 1968, 339.

⁷ Elder C, Stigant S and Claes J, 'Elections and violent conflict in Kenya' Peaceworks, 2014, 5.

⁸ Conflict Research Consortium Staff, '*Mediation in international conflict: An overview of theory, a review of practice*', United States Institute of Peace Press, Washington DC, 1997, 125

⁹ Craver C, 'The use of mediation to resolve community disputes' 48 *Washington University Journal of Law and Policy*, 2015, 233.

¹⁰ Article 159, *Constitution of Kenya* (2010).

the sovereignty of the people of Kenya. It further discusses the extent to which the current practice of mediation promotes the sovereignty of the people of Kenya during election dispute management. Finally, it makes the conclusions and recommendations based on its main findings.

1.2 STATEMENT OF THE PROBLEM

The legal gap that this study explores is the absence of a non-inclusive dispute resolution framework that recognises the centrality of the people's sovereignty during the conduct of elections. An inclusive framework would mean that the people have the active capacity to ensure that the constitutional mediation principles are implemented in the judicial system. However, this is not the case as litigation is substantially ruling the dispute resolution agenda hence limiting access to justice.¹¹ This is even though the alternative, mediation, not only ensures peace and cohesion, but also that the disputing parties remain guided rather than directed as it ought to be in a functioning democracy.¹²

The reality is that there is a limitation in the application of alternative dispute resolution, which the Constitution idealizes, in the practice of judicial authority. Lack of further supplementation of statutory provision and policy handicaps the power of the voters and other important stakeholders (such as the mediators and election aspirants) to fully engage in the entire electoral process in which case the same might not have occurred if mediation was used to resolve these disputes.

Further still, the challenges that are posed in the litigation of election disputes overwhelmingly hamper maximum involvement of the citizens in decision making. The high cost of lawsuits, complex legal rules and procedures, slow court processes and competitive spirit of the litigation process secludes and marginalizes the poor, illiterate and the disadvantaged,¹³ a substantive section of the people of Kenya. Hence this population's sovereignty is undermined.

¹¹ Kariuki M and Kariuki F, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' 1(1) *Strathmore Law Journal*, 2015, 9.

¹² The Principles of Democracy--<https://www.sjsu.edu/people/ken.nuger/courses/pols120/Ch-3-Principles-of-Democracy.pdf> on 29th September 2020.

¹³ Kariuki M and Kariuki F, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' 1(1) *Strathmore Law Journal*, 2015, 10.

This study thus explores this legal gap with a view to encouraging mediation as a roadmap to positively impacting the sovereignty of the people.

1.3 RATIONALE OF STUDY

This study is necessary because it identifies the current crisis within the election dispute resolution framework due to the inadequacy of the litigation process and concretely establishes a workable mechanism to offset the challenge. It identifies the centrality of the principle of sovereignty of the people within a democracy as Kenya is¹⁴ and identifies mediation as a mechanism to promote it.

1.4 SIGNIFICANCE OF THE STUDY

This research is necessary for the citizens, mediators, election aspirants, and the government to understand the place of mediation within the framework of constitutional sovereignty for purposes of holistic constitutional implementation.

The study will assist the government to uphold and respect the sovereignty of the citizens as it is set to go in depth into the very interests of governance by succinctly providing for effective measures, as is mediation, in a bid to realize a realistically ideal nation. The mediators will be able to appreciate their place in maintaining peace during the electoral process and elaborating each stakeholder's roles in times of conflict while the election aspirants will be guided on how to rally their supporters to cast their votes without inciting them to violence and even more importantly, be guided in their role to protect and respect the sovereignty of the citizens.

1.5 AIMS AND OBJECTIVES

The aim of this study is to identify the role of mediation in promoting the sovereignty of Kenyans during management of election disputes. The objectives are as follows:

1. To define the place of mediation in election disputes management.
2. To investigate the appropriateness of mediation as a mechanism to promote the sovereignty of the people of Kenya.
3. To discuss the extent to which the current practice of mediation in Kenya promotes the sovereignty of the people during election dispute management.

¹⁴ Preamble, *Constitution of Kenya* (2010).

1.6 RESEARCH QUESTIONS

1. Whether mediation has a place in election disputes management.
2. Whether mediation is an appropriate mechanism to promote the sovereignty of the people of Kenya.
3. The extent to which the current practice of mediation in Kenya promotes the sovereignty of the people during election dispute management.

1.7 HYPOTHESIS

This study is based on the following hypotheses:

1. Mediation is important in safeguarding the sovereignty of Kenyans during management of election disputes.
2. The current practice of mediation in Kenya during election dispute management does not promote the sovereignty of the people.
2. Mediation is an appropriate measure to address the current compromised sovereignty of Kenyans during elections.
3. Both individuals and institutions have a role to play in protecting the sovereignty of the people using mediation.
4. Other jurisdictions have mediation strategies which Kenya can learn from and there are ways in which to overcome the challenges that these strategies present to different stakeholders.

1.8 THEORETICAL FRAMEWORK

This study adopts a three-fold approach to satisfy its questions for research. First is the constitutional sovereignty theory. The second is the conflict mediation theory and the last is the deliberative democracy theory. These theories generally and independently recognize the authority of individuals and communities within a State to conduct themselves in the manner that is agreeable to them.

- i) *Constitutional Sovereignty theory*

The Constitutional sovereignty theory is the hallmark of citizenry by virtue of the sovereign power that is inherently allocated to the people.¹⁵ It is the basis upon which States are so formed, laws gain their validity and legality and interdependent cooperation of classes such as between States and individuals, States and corporations, individuals and corporations and individuals and States is made possible.¹⁶ This theory historically gained legal backing during the age of enlightenment in Europe.¹⁷ It saw the growth of the social contract theory which essentially was an idea of collective submission to a sovereign for the common good of all.¹⁸ In order to safeguard this principle, the question of dispute resolution inevitably came into play since disputes in such cooperation are inevitable.

Thomas Hobbes developed this principle of governance by propounding the idea of an arbitrator to determine if a sovereign had violated the pre-set conditions in exercise of his sovereign authority.¹⁹ This theory relevantly establishes the ideal that the mechanism used to offset disputes that impact the people's sovereignty must also reflect their true power as citizens. According to him, sovereignty is the contractual subject of governance between the ruler and the citizens and this authority originates and belongs to the people hence they make decisions when these rulers fail in respect of new contracts to protect themselves.²⁰

Sovereignty is an inalienable right that is not only indivisible but also absolute and the latter characteristics intersect to achieve balanced power in a State.²¹ It is absolute in the sense that no conditions are imposed in governance subject to the presence of a final authority. It is indivisible in the sense that it cannot be delegated to other entities because the sovereign has the final word in the resolution of a dispute. Centring this principle in the election dispute resolution framework is therefore important in determining the origin and subject of the exercise of power.

ii) *Conflict Mediation Theory*

¹⁵ Article 1, *Constitution of Kenya* (2010).

¹⁶ Nwabueze B, 'Presidentialism in Commonwealth Africa' 14(3) *The Journal of modern African Studies*, 1974,292.

¹⁷ Hourly History, 'The Age of Enlightenment in Europe: A History from Beginning to End', Archive.org, 3 March 2017--<https://web.archive.org/web/20170303123359/http://publishinghau5.com/The-Age-of-Enlightenment--A-History-From-Beginning-to-End-page-3.php> on 29th September 2020.

¹⁸ Hobbes T, 'Leviathan: Or the Matter, Forme and Power of a Common-wealth, Ecclesiasticall and Civill' Andrew Ckooke, 1651.

¹⁹ Hobbes T, 'Leviathan: Or the Matter, Forme and Power of a Common-wealth, Ecclesiasticall and Civill' Andrew Ckooke, 1651.

²⁰ Hobbes T, 'Leviathan', Oxford University Press, London, 1651, 126.

²¹ Hobbes T, 'Leviathan', Oxford University Press, London, 1651, 126.

The second theory is the conflict mediation theory. It builds on the fact that conflict is inevitable in society and puts forward the idea that conflicts at all levels are generally similar and largely a consequence of dissatisfaction and misperceptions of human needs and desires.²² This theory prescribes mediation as a process that can address both issues and still lead to a resolution of conflict. According to Susan Nacey, an International Politics researcher, conflict mediation offers incentive in the dispute resolution process and safeguards the sovereignty of the disputants.²³

It stipulates paths to the desired goal without examining whether the goal desired and the paths recommended can work in the real world where actions and behaviours can have so many unintended effects. Nonetheless, this is a shortcoming that can be cured through definition specificity of these actions and behaviours. For example, realistic measures to ensure that mediation is regulated and tailored to meet the needs of governance can be put in place as opposed to a general approach that pre-exposes unintended effects such as anarchy as an extremity or alternative conflict.²⁴

This theory is in line with the methodological approach that mediation has in ensuring the satisfaction of the parties' interests in the dispute which, even when unstated, are primarily based on the sovereignty of the people.

iii) Deliberative Democracy Theory

The last theory is the deliberative democracy theory which originates from western liberal democracies. It essentially propounds the idea that a democratic decision must have been arrived at through systematic deliberation with the intention to ensure inclusivity in the process.²⁵ This is as opposed to an aggregate conclusion whose focus is procedural voting as an ideal to achieve democracy. In this sense, this theory is substantive and limits bureaucratic interests which tend to emanate from strict procedure as ideas are tabled and appropriately defended.

²² Bercovitch J, ' *Theory and Practice of International Mediation: Selected Essays* ' Taylor and Francis e-library, New York, 2011, 3.

²³ Nacey S, 'The theory of Mediation and the 1976 American involvement in the Rhodesian peace process' Researchgate Publications, 2016,3.

²⁴ Bercovitch J, ' *Theory and Practice of International Mediation: Selected Essays* ' Taylor and Francis e-library, New York, 2011, 3.

²⁵ Gutmann A and Thompson D, ' *Why Deliberative Democracy?* ' Princeton University Press, New Jersey, 2004, 3.

However, there are two competing thoughts under this theory which impact the place of the exercise of sovereign power by the citizens. The first is propounded by Dryzek, an authoritarian deliberative democrat whose idea is deliberations that are followed by a final authoritative decision. The second is a liberal deliberative democracy coined by John Rawls and Ronald Dworkin whose idea is based on collective decision making and development of the civil society.²⁶

Further still, when conflict arises during the policy making process, the citizens approach this conflict by precluding certain moral grounds from the determination of the subject of legislation.²⁷ This is fundamental in the discussion of the place of mediation in election dispute management and its implication on the sovereignty of the people. This is because when the role of the people is well defined and pre-determined in the mediation process, their democratic interests are maintained due to consideration of their ultimate sovereign power.²⁸

1.9.1 RESEARCH METHODOLOGY

In order to ensure elaborate and reliable results, this study will undertake a qualitative research approach. The methodology will involve the review of both primary and secondary sources of information. A critical and comprehensive review of these sources will be employed in a manner that is consistent with accepted practice in this field of study. In order to generate conclusive and adequate findings and alleviate bias based on limited information, this study will draw information from varied sources and jurisdictions.

It will further utilise specific theoretical perspectives and observed behaviours in different countries to support the overall argument, that is, mediation ought to be promoted in management of election disputes to protect the sovereignty of Kenyans. In the adoption of this research methodology, the study will utilize the following primary sources: Statutes and Case law. The secondary sources shall comprise of books, journal articles, newspapers and online internet resources.

²⁶ He B, 'Western Theories of Deliberative Democracy and the Chinese Practice of Complex Deliberative Governance' ResearchGate Publications, 2006, 5.

²⁷ Gutmann A and Thompson D, '*Why Deliberative Democracy?*' Princeton University Press, New Jersey, 2004, 65.

²⁸ Gutmann A and Thompson D, '*Why Deliberative Democracy?*' Princeton University Press, New Jersey, 2004, 65.

1.9.2 LITERATURE REVIEW

Major discussions and in-depth research spanning around methodological resolution of electoral dispute complexities have been undertaken in Kenya²⁹ and beyond with a global gravitation of interest to mediation capacity building as an accepted solution.³⁰ On 31st May 2018, the President appointed the Taskforce on Building Bridges to Unity Advisory to report on the recommendations that were fit to unify the nation. This was as a result of the persistent electoral crises historical trend in Kenya characterised by division and violence.³¹

The executive summary of the report read that Kenyans feel Kenyan when political competition and the use of ethnicity as an organising tool are at rest between elections. To this end, they expressed their desire for more stable and predictable politics which are democratic and produce governance at the National and County levels that is inclusive of their ethnic, religious, and regional diversity.³² This was a cry for restoration of equality status (of different ethnic and political diversity) and unity.

While the report fell short of stipulating measures to deal with the perennial challenge of lack of an appropriate election dispute resolution mechanism, it recognised that lack of inclusivity was the leading contributor to divisive and conflict-causing elections and recommended a system that addressed Kenyans' unique needs.³³ Inclusion and sovereign authority thus seem to form the desire of Kenyans and as such substantially inform the findings of this study. This report will provide the context and basis for inferring mediation as one such measure to offset the challenge recognised by the BBI presidential taskforce.

²⁹ The Judiciary Committee on Elections, *Annual Report, 2017*, 5.

³⁰ International Institute for Democracy and Electoral Assistance, *Electoral Crisis Mediation*, 2016, 1.

³¹ BBI Kenya website, '*Building bridges to a united Kenya: from a nation of blood ties to a nation of ideals*', 2019, 10.

³² BBI Kenya website, '*Building bridges to a united Kenya: from a nation of blood ties to a nation of ideals*', 2019, 2.

³³ BBI Kenya website, '*Building bridges to a united Kenya: from a nation of blood ties to a nation of ideals*', 2019, 10.

The 2012 European Union External Action report on mediation and dialogue in electoral processes to prevent and mitigate electoral related violence primarily focuses on prevention and mitigation of electoral disputes and post-election follow-up through mediation and dialogue which are important tools in the post-election period. This is not only in the case where the results of elections are disputed, but also where it is important to address remaining tensions and complaints and strengthen trust in the democratic process.³⁴ This is very pertinent in answering the question whether mediation is important in safeguarding the sovereignty of Kenyans during management of election disputes.

Melin specifically discusses the criteria that States should use to determine the circumstances in which they should mediate based on the regime type, third party capabilities and conflict costs.³⁵ He urges States to be selective in deciding when and where to mediate. As such, the policymakers tasked with this selection process should be cognizant of the optimal circumstances for state-led mediation. The threshold considerations that he proposes include the characteristics of the state, the nature and characteristics of the conflict, and the characteristics of the disputants.³⁶ This consideration will enhance an effective mechanism that will promote peace and stability. This approach, however, is partly faulty as it limits to a large extent the scope of application of mediation in consideration of trivial criteria as opposed to objective application of mediation in the sovereignty crisis. Mediation is a mutual agreement framework and not necessarily an entire system of governance that requires close confinement and limitation.

Sean Kane and Nicholas Haysom develop a typology for analysing, responding to and helping to resolve electoral crises peacefully and democratically and in so doing, they recommend and promote mediation. They conclude that different features of political agreements to end electoral crises have an impact on local democratic institutions and that inclusivity of the political system should be a priority for interests of further

³⁴ European Union External Action, *Mediation and dialogue in electoral processes to prevent and mitigate electoral related violence*, 2012, 2.

³⁵ Melin M, 'When States mediate' 2(1) *Penn State Journal of Law and International affairs*, 2013, 8.

³⁶ Melin M, 'When States mediate' 2(1) *Penn State Journal of Law and International affairs*, 2013, 14.

investigation.³⁷ They advocate for a structured mediation practice that would incorporate technical and political proposals for confidence building in the process.³⁸

In conclusion, these sources of information illustrate the key point that resolution of electoral crises ought to be handled with care and that mediation is one such peaceable means of settlement. As such, this study undertakes to address the following gaps identified in the above mentioned literature: underscoring the place of mediation in election dispute resolution by trivialising the circumstances under which mediation can be employed and failing to recognise the crucial role of the people in offsetting election disputes.

1.9.3 LIMITATIONS OF THE STUDY

Possible limitations in this study include researcher bias where it unintentionally draws a mediation bias in the overall research design hence giving the reader the gist of the study before the research actualization. Further still, there is limitation in interests of jurisdiction since it is important to relate findings to the practicability of their implementation in Kenya which is a common law jurisdiction. As such, non-common-law jurisdictions are absent from the general intense discussion on strategic approach to mediation implementation during election dispute management.

1.9.4 OUTLINE OF THE DISSERTATION AND ITS FLOW OF ARGUMENT

In Chapter One, the study commences by stating the background to the problem, the objectives, research questions and rationale of the study. It sets out the methodology used, theoretical and conceptual frameworks and the literature review. It also highlights the overall limitations of the study and provides a general overview on the topic of study. This chapter lays the foundation for the discussion of the research questions.

In Chapter Two, a discussion of the place of mediation in election disputes management ensues. This Chapter comprehensively defines the importance of mediation, its context,

³⁷ Kane S and Haysom N, International Institute for Democracy and Electoral Assistance ‘*Electoral Crisis mediation*’, 2016, 9.

³⁸ Kane S and Haysom N, International Institute for Democracy and Electoral Assistance ‘*Electoral Crisis mediation*’, 2016, 20.

time frame, methods of application and the roles of individuals and institutions in promoting the sovereignty of Kenyans through mediation.

Chapter Three explores the appropriateness of mediation as a mechanism to promote the sovereignty of Kenyans during elections. Through case studies, it establishes the lessons to be drawn from the countries that have implemented mediation in the election disputes management process.

In Chapter Four, a discussion of the extent to which the current practice of mediation promotes the sovereignty of the people during election disputes management follows. This Chapter examines the conduct and operations of the 2007, 2013 and 2017 elections in context with an aim to put in place theoretical structures that are applicable in Kenya.

Chapter Five is the last part of the dissertation on conclusion and recommendations. It highlights the findings of the study and makes recommendations to satisfy the legal gap identified in Chapter One.

CHAPTER 2: THE PLACE OF MEDIATION IN ELECTION DISPUTE MANAGEMENT

2.1 INTRODUCTION

In most common law jurisdictions, it is commonplace to find that the election dispute resolution framework in place is fully constituent of the Judiciary or heavily influenced by it in offsetting both the pre-election technicalities and post-election disputes.³⁹ This is so for many socio-legal reasons, with constitutional prerogatives and traditional belief in the litigation system being top of the list. History has had a place in entrenching this practice in the modern world hence litigation has managed to survive many centuries due to its longstanding unmatched advantages in the form of vindication through proclamation of judgement by the court, public empowerment, public hearing which denotes transparency and accountability and legitimacy of a court's decision as a result of it being accepted as capable of promoting justice.⁴⁰

However, one pertinent question arises in litigating election disputes and that is the satisfaction of the sovereign right of citizens to choose their desired government. This evokes the search for a mechanism that can honour the distinct role of citizens in safeguarding their own sovereignty. Hence determining the place of mediation is fundamental in interrogating an alternative means of dispute resolution that fills this legal gap. In order to make this determination, the concept of sovereignty in election disputes management must first be explored and the challenge it imposes on a dispute resolution mechanism measured against possible solutions. This chapter thus endeavours to meet this objective.

2.2 THE CONCEPT OF SOVEREIGNTY IN ELECTION DISPUTES MANAGEMENT

As discussed in the first chapter of this dissertation, the constitutional sovereignty theory is the basis of citizenship. Kenya's legal framework recognizes the centrality of this principle in the affairs of the nation. According to the 2010 Constitution, Kenya is a

³⁹Parselle C, 'The Satisfactions of litigation', Mediate.com-<https://www.mediate.com/articles/parselle10.cfm> on 10thDecember 2020, 2006,1.

⁴⁰Parselle C, 'The Satisfactions of litigation', Mediate.com-<https://www.mediate.com/articles/parselle10.cfm> on 10thDecember 2020, 2006,1.

multi-party representative democracy.⁴¹ This means that the people have the right to determine how they shall be governed and to exercise their sovereign power through their democratically elected representatives.⁴² In order to determine their preferred form of governance and their leaders, they arrive at a democratic decision through a voting process. Voting is to be conducted through free, fair and regular elections and in the form of a secret ballot system. The freedom to participate in political activities including the formation of political parties and conduction of campaigns is provided for under the Constitution in the spirit of universal suffrage.⁴³

The spirit of universal suffrage is the right of every adult citizen to vote.⁴⁴ It denotes a totality of views from everyone from every part of the country, including the Kenyan constituencies, as was argued by the petitioners in the *Presidential Election Petition of 2017*. By excluding Alego-Usonga, Awendo, Bondo, Gem, Ugenya, Homa Bay, Kabondo-Kasipul, Karachuonyo, Kasipul, Kisumu Central, Kisumu East, Kisumu West, Muhoroni, Ndhiwa, Nyakach, Nyando, Nyatike, Rangwe, Rarieda, Rongo, Seme, Suba North, Suba South, Suna East, Suna West, Ugunja, and Uriri constituencies from the exercise of this right, the petitioners argued that this undermined a free and fair election and consequently undermined their sovereignty.⁴⁵

Due to conflicting interests in governance arising from factors such as widely different and diverse ethnic, political, cultural and social approaches and concerns, arriving at a democratic decision in an election is challenging. This is the cause of conflict and election disputes in many democracies in the world.⁴⁶ This conflict has a high likelihood of resulting in a high-level crisis threatening to jeopardize the sovereignty of the people. If the power of the people to choose their leaders is taken from their hands and placed in the hands of the courts or the Executive, the idea of a democracy is bedevilled, and the concept of sovereignty is alienated from discussion.

In the Kenyan case *Reverend Dr. Timothy M. Njoya and 6 Others v Honourable Attorney General and Another [2004] eKLR*, Justice Ringera noted the direct link between democracy and sovereignty. In a democracy, the people are sovereign and such power and

⁴¹ Article 4(2), *Constitution of Kenya* (2010).

⁴² Article 1(2), *Constitution of Kenya* (2010).

⁴³ Article 38, *Constitution of Kenya* (2010).

⁴⁴ Black's Law Dictionary, 2nd ed.

⁴⁵ *John Harun Mwau & 2 others v Independent Electoral Boundaries Commission & 2 others* (2017) Eklr.

⁴⁶ Kane S and Haysom M, 'Electoral crisis mediation' International Institute for Democracy and Electoral Assistance, 2016, 1.

authority exercised by the government is conducted on behalf of the people. Inferring from his finding, the people are the masters of their government and not the vice versa. Rightly so, any such disputes relating to the choice of leadership ought to be deliberated upon by the people as they have the first right of determination which is primary to the government. The onus is on the government to facilitate such deliberations as opposed to influencing the process up to decision making.

The electoral litigation process carried out in the courts manifests itself as a contest, one that is between individuals aspiring for governance.⁴⁷ Often, this is for the sake of their own private interests. Public participation in this calibre of disputes is far from encouraged as the decision-making process is left to the courts. Issues of impartiality, independence and transparency arise from the pursuit of litigation. This is since there lacks substantive election disputes management guidelines and principles steering the process hence implying the discretionary powers of the courts. The Elections Act, for instance, provides for determination of election petitions by the courts and only guides the courts on time frame considerations, guidelines as to costs and other procedural guidelines.⁴⁸ This is similarly so in the Constitution which gives power to the Supreme Court to determine the validity of the election to the office of the President.⁴⁹

The Constitution thus provides for the courts to exercise their delegated sovereign powers in election dispute management. However, the courts are tasked with the responsibility of exalting the citizens' sovereign power over their institutional powers. Currently, this is not the practice hence litigation of electoral disputes poses a challenge to this regard.

2.3 INADEQUACIES OF THE CURRENT ELECTION DISPUTE MANAGEMENT SYSTEM

1. Unfair handling of electoral complaints due to procedural technicalities- Article 140(2) of the Constitution prescribes a reasonable period of determination of the petition of the election of the president of fourteen days⁵⁰ in a bid to ensure timely disposal of these disputes. However, due to the time pressure, the court may rely on legal technicalities to dismiss the petitions. This predisposes the electorate to tension and war as justice is not served.

⁴⁷ Kenya Law website, '*The Presidential Election Petition: The Mwananchi Friendly Version*', 2013, 1.

⁴⁸ Sections 75 and 76, *Elections Act*, No. 24 of 2011.

⁴⁹ Article 163(3), *Constitution of Kenya* (2010).

⁵⁰ Article 140(1), *Constitution of Kenya* (2010).

2. Non-involvement of the public in settling election disputes- Section 80 of the *Elections Act 24 of 2011* prescribes the control of the dispute resolution process by the court.⁵¹ The election court decides upon all the matters before it with no consultations from the public. This presupposes the notion that the power of choice no longer sits with the people but with the court despite the high public interest in the outcome of the election.
3. High chances of partiality and electoral malpractice- The question of judicial independence has been the hindrance towards deterring adjudication of electoral disputes.⁵²This is due to the tendency of the Executive to interfere with the affairs of the Judiciary in a bid to influence the results.
4. Limited partisan approach to dispute resolution in terms of socio-cultural concerns- Since decision making is left to the courts, there is a tendency not to consider the varying public interests in terms of social, cultural, economic and pressing political interests due to the legal implications of such considerations. For instance, in the Presidential election petition of Raila Odinga & The Independent Electoral and Boundaries Commission & 3 others [2013] eKLR , the Supreme Court held that its jurisdiction was not boundless in scope as it was circumscribed in extent and in time in that it relates only to an inquiry into the legal, factual and evidentiary questions relevant to the determination of the validity or invalidity of a presidential election.⁵³ This limitation may work to the detriment of the people as other concerns are left unaddressed.
5. The adversarial approach of litigation scars relationships and advances bitterness as the litigants compete to have their views favoured by the election court. Furthermore, the performance target of lawyers in their firms and the tensions arising from the expectations of different stakeholders tends to create friction which disunites the people. Furthermore, the citizens' choice of those to run government is subjectively based on emotion and other non-objective criteria founded upon litigants' influence in case of an election re-run prescribed by the court.

⁵¹ Section 80, *Elections Act*, No. 24 of 2011.

⁵² IDLO, 'Judicial preparedness for handling electoral disputes in Kenya and beyond', 2017.

⁵³ Awuor L and Achode M, 'Comparative Analysis of Presidential Election Petitions In Kenya and Other Jurisdictions' Kenya Law, 2013,1.

2.4 ELECTORAL CRISIS MEDIATION

2.4.1 CONTEXT AND TIME-FRAME

The practice of mediation in handling election disputes is primarily guided by principles which are indispensable in the arena of election disputes management. Mediation focuses on promoting a suitable environment for dispute resolution which effectively and efficiently moderates the issues of contention in an electoral crisis. It takes a shorter time to resolve the dispute as opposed to litigation processes.⁵⁴

2.4.2 ROLES OF INDIVIDUALS AND INSTITUTIONS IN PROMOTING SOVEREIGNTY OF KENYANS THROUGH MEDIATION

- i) The Government- It ought to come up with a mediation-centred framework that effectively disposes of election disputes. This framework ought to recognise the central role of the citizens in deciding upon all matters of sovereign interests such as the choice of a leader. It should refrain from interfering or exercising its influence on the institution. This is essential in ensuring that the people's power is not interfered with.
- ii) Election aspirants- They should let the people decide instead of inciting them against the other candidates. This means that they allow them to independently exercise their sovereign right to elect their leaders. When disputes are taken to mediations, it means that they support the process and refrain from any interference.
- iii) Mediators- Their role is to oversee the process by facilitating communication between the parties in dispute.⁵⁵ He plays a protective role in the promotion of sovereignty in that he does not impose solutions or force settlement. This is in a bid to protect the power of choice of the parties.
- iv) Citizens- Their role is to respect the mediation process and refrain from interfering with it.
- v) Media- Their role is to report on the election process on and draw opinions from experts regarding various aspects of the elections including the

⁵⁴ Doyle M, 'Why Use ADR?Pros and cons', Advice Services Alliance, London, 2012, 5.

⁵⁵ Doyle M, 'Why Use ADR?Pros and cons', Advice Services Alliance, London, 2012, 5.

legitimacy of the process and its credibility. They can encourage citizens to actively participate in the democratic process and raise awareness on the need to support the mediation process. This is a protective role.

2.4.3 METHOD OF APPLICATION

The success of electoral crisis mediation is hinged on two main factors. These are the nature of the post-election dispute and the mediation style employed in the process.⁵⁶ These shall be discussed in the next chapter of this study which examines whether mediation is an appropriate measure to promote the sovereignty of the people.

Regarding the mediation style, nonetheless, facilitative mediation is more efficient in election disputes management as it offers a platform in which parties can voice their interests directly without the opinion input of the facilitative mediator. The role of the facilitative mediator in this case is to direct the process and enhance communication between the parties in dispute.⁵⁷

2.5 IMPORTANCE OF MEDIATION

Generally, mediation offers more opportunities for settlement in terms of prevention and post-conflict crisis response.⁵⁸ In consideration of the complexity of election disputes, mediation presents itself as a toolbox with the right tools to wholesomely work around restorative justice. It does this in the following ways:

i) Mediation as a tool for peace

Electoral disputes are likely to escalate to large scale conflict and violence in the vibrant quest for power. A case in study is the 2007/2008 post-election violence in Kenya. Mediation processes led by former United Nations Secretary General Kofi Annan succeeded in restoring peace and calm to the nation. Through mediation, it was agreed

⁵⁶ Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' 27(1)*Ohio State Journal on Dispute Resolution*, 2012, 341.

⁵⁷ Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' 27(1)*Ohio State Journal on Dispute Resolution*, 2012, 347.

⁵⁸Fomunyoh C, '*Mediating Election related conflicts*', Centre for Humanitarian Dialogue, 2009, 16.

that a coalition government would appease the nation due to the closeness of the vote tally of each of the presidential candidates.⁵⁹

Mediation is a peaceful means of settlement due to its non-confrontational nature. The mediator facilitates communication and understanding. Each party understands the other's interests and its own and this sets the dispute settlement off to a workable position. The independence, impartial and neutral attributes of the mediator further enhance peaceful outcomes. This is because the disputing parties can trust a third party who is free from any political bias. This conducive environment is important in enhancing peaceable relations between the parties during and after the dispute resolution process. Further still, lack of outside influence and incitement from supporters and other ill-intending parties during the process is essential in ensuring peace. This happens in mediation processes. Private sessions constituting the disputing parties are facilitated by the mediator due to the principle of confidentiality in mediation, hence limiting interference. This attribute of mediation promotes peace not only for the election candidates but also the supporters since they generally follow cues from their leaders. If they agree and call for peace, then the parties' supporters follow.

ii) Mediation as a tool for stability.

Election disputes tend to cause instability in governance. The judicial arm of government which provides the framework for election disputes management, is commonly under attack on claims of partiality and corruption as the courts are prone to direction and influence by the Executive. If the people feel that they cannot trust their government, their hostility towards it is evidenced by the tension and insecurity that is occasioned by strikes, go-slows and demonstrations. These can easily transform into full blown war and rebellion against the incumbent government hence instability in the nation.

Mediation, an alternative means of dispute resolution, restores public confidence in the election dispute management process as it is a non-adversarial process that progressively ensures the smooth democratic transfer of power.⁶⁰ Due to the historical politicisation of

⁵⁹ Shale V and Gerenge R, 'Electoral Mediation in the Democratic Republic of Congo, Lesotho and Kenya', *Accord*, 2016, 1.

⁶⁰ Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' *27(1)Ohio State Journal on Dispute Resolution*, 2012, 335.

the election dispute management framework in Kenya, it is important to introduce a mechanism that will offset the challenge. This will be discussed in depth in Chapter 4 of this study.

The Constitution envisions the principles of transparency, accountability and integrity.⁶¹ These principles are to be promoted across all levels of government. The practice of these values ensures a stable environment for socio-economic wellbeing and development. Mediation employs these principles fully hence promoting development which in turn ensures stability in the country.

iii) Mediation as a tool for democracy

Democracy entails the right to self-determination. In this context, this is the right to define the parameters of the election dispute management process up to the point of the outcome.⁶² In mediation, the disputing parties are acquainted with the substance and procedure and are directly involved hence no questions arise as to the validity of the outcome as often happens in litigation processes. In the litigation process, the courts have the discretionary powers to determine the substance and procedure within the confines of the law. The parties make their submissions and are heard. They are not allowed to influence the process or the outcome. This influence would culminate in an unfair and undermined process that is unacceptable considering democratic interests.

Mediation safeguards the election dispute management process against institutional bureaucratic interests by ensuring the inclusivity of the parties in the process. While in litigation the interested parties and representatives are predefined, mediation affords an allowance for parties to determine within the agreed or prescribed capacity. As such, this allowance ensures that parties have control hence their confidence in the election dispute management process.⁶³

⁶¹ Article 10, *Constitution of Kenya* (2010).

⁶² Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' 27(1)*Ohio State Journal on Dispute Resolution*, 2012, 332.

⁶³ Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' 27(1)*Ohio State Journal on Dispute Resolution*, 2012, 333.

2.6 CHALLENGES THAT EXIST IN THE ELECTORAL CRISIS MEDIATION PRACTICE

- i) Asymmetry of power- Especially where evaluative mediation style is used, there tends to be a challenge as the role of the mediator infringes on the sovereign interests of the people as will be discussed in Chapter 3 of this study. This limits the success of the mediation process and prevents further deliberations where mediation principles are subject to interference and influence by a third party.
- ii) Possibility of misuse of confidentiality element during mediation- This poses a big challenge to the sovereign interests of the people. While it could potentially promote these interests, secrecy as Greene puts it, can cast great doubt on the legitimacy of an electoral outcome.⁶⁴ In a mediation process, it is impossible for all citizens to be involved in deliberations due to realistic demographic logistical issues. Hence the parties in a mediation are likely to be a representation of the public. The public might demand to know how these disputes are being resolved, and indeed have this sovereign right but these interests are incapable of being satisfied due to the overwhelming challenge posed by both direct and indirect interference. This is a challenge requiring a balance of stakes.
- iii) Non-finality of the process- There is no guarantee that the parties will resolve the dispute since in a mediation process, the parties can agree to disagree and not come up with a mutual solution. This tends to lengthen the dispute resolution process as parties must find an alternative means of resolution.⁶⁵
- iv) Uncertainty in decision making because of lack of precedent- Due to the private and confidentiality aspects of mediation processes, the agreements reached do not constitute reliable legal points that can inform future mediation processes.⁶⁶ This might pose a challenge in future mediations as parties struggle to rely on available sources of information to offset the dispute.

2.7 CONCLUSION

Empirical evidence shows that mediation is indeed useful in election dispute management. As a peaceful means of dispute resolution, nations with a history of past

⁶⁴ Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' 27(1)*Ohio State Journal on Dispute Resolution*, 2012, 332.

⁶⁵ Doyle M, 'Why Use ADR? Pros and cons', Advice Services Alliance, London, 2012, 8.

⁶⁶ Doyle M, 'Why Use ADR? Pros and cons', Advice Services Alliance, London, 2012, 8.

conflict and election incapacities can heal and progressively benefit from mediation as they pursue development.

CHAPTER 3: COMPARATIVE ANALYSIS OF DRC, LESOTHO AND COTE D'IVOIRE TO DETERMINE THE APPROPRIATENESS OF MEDIATION IN PROMOTING KENYANS' SOVEREIGNTY DURING ELECTION DISPUTES MANAGEMENT

3.1 INTRODUCTION

As illustrated in Chapter two of this study, mediation has a place in the promotion of sovereignty in election dispute management. Generally, the accepted benefits of mediation must be weighed against the needs of the people to determine their appropriateness in the satisfaction of their sovereign interests. This chapter undertakes comparative studies to determine whether mediation is an ideal practice to promote the sovereignty of Kenyans during elections.

In order to make this determination, this study will consider two factors, as postulated by Rebecca Green, an ADR and election law professor at the William and Mary Law School in her study on the role of mediation in post-election dispute resolution.⁶⁷ She employs these factors to evaluate whether the agreeable benefits of mediation are applicable in the post-election context.⁶⁸ Hence, this study adopts these criteria to measure the appropriateness of mediation as they find a caveat in which mediation can satisfy dispute resolution process without navigating the murky waters of judicial precedent setting. Due to the confidential nature of mediation processes, judicial precedent setting is impossible while this is necessary for consistency in delivering rulings in common law countries.⁶⁹

These factors are:

⁶⁷ Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' 27(1) *Ohio State Journal on Dispute Resolution*, 2012, 325.

⁶⁸ Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' 27(1) *Ohio State Journal on Dispute Resolution*, 2012, 325.

⁶⁹ Richards E, *The Importance of Precedent*, 2009, 1.

3.2 The nature of the post-election dispute ⁷⁰

Regarding the nature of the post-election dispute, it is important to note that there are mainly two types of post-election disputes. These are process disputes and outcome-determinative disputes. The former is capable of being resolved through mediation while the latter is not due to the complexities that the process poses to key stakeholders of the process. These are the people exercising their sovereign rights, that is, the citizens choosing those to run government and be involved in governing and the election aspirants who want to constitute government. These complexities include the need for precedent setting in post-election disputes to inform the management of future election disputes, the occurrence of disputes traversing fundamental rights and the presence of a judicial framework that offers timely and credible decisions. ⁷¹

Sophisticated issues of procedure arise such as in the requirement of a voter's signature. If for legitimate reasons they are unable to sign and the spouse executes on their behalf, debate arises on whether that vote ought to be considered valid or invalid. Such heated and highly contentious issues may evoke the need for a judge to rule on the matter. Hence, for election disputes based on procedure, which is what Green refers to as 'process disputes', ⁷² mediation may be an appropriate mechanism, with the complementarity of judicial input to address this challenge. This is because uncertainty in a wide range of procedural factors concerning an election is usually the source of unending arguments in a mediation process since it is almost impossible to foresee all the technicalities that may arise in making determinations on the validity of cast and absentee votes, for instance, despite the presence of specific procedural rules. ⁷³

Furthermore, the tendency to depart from deliberative democracy in a mediation process is heightened as the outcome merely favours the side which is considered more seasoned than the other. ⁷⁴When deliberations are focussed on making judgment based on which

⁷⁰ Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' 27(1) *Ohio State Journal on Dispute Resolution*, 2012, 341.

⁷¹ Vickery C, 'Guidelines for understanding, adjudicating, and resolving disputes in elections', International Foundation of Election Systems', 254.

⁷² Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' 27(1) *Ohio State Journal on Dispute Resolution*, 2012, 344.

⁷³ Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' 27(1) *Ohio State Journal on Dispute Resolution*, 2012, 341.

⁷⁴ Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' 27(1) *Ohio State Journal on Dispute Resolution*, 2012, 346.

party has a more seasoned point than the other as opposed to coming to a mutually agreeable solution, mediation becomes a dysfunctional means of dispute resolution. The challenge becomes obtaining a determination out of a mediation process. Due to the nature of process disputes, resolution of these disputes necessitates a supplementary court process whose basis is the need for uniform threshold for determination of the dispute.⁷⁵

The nature of the election dispute is important in determining whether mediation is appropriate in a particular case. In other disputes which are based on the substance of the election, for instance in outcome-determinative cases where it is necessary to determine whether a voter intended to vote for a particular candidate or the other, mediation may be an inappropriate mechanism to resolve the dispute as the determination is subject to adversity.

3.3 The mediation style employed.⁷⁶

Since the sovereign interests of the people are paramount in the determination of an outcome, the dispute resolution process must embody and reflect their participation and needs. This is the main argument brought out in this study. As such, the mediation style employed determines whether these sovereign interests have been satisfied.

The role of the mediator in the dispute resolution process is pertinent in ensuring that the parties' sovereign interests have been addressed. They do this by taking on a facilitative role. This means that the mediator directs the process but refrains from interfering with the substance of the dispute.⁷⁷ They organise discussions and decide which issues are to be discussed when and how broadly they should be discussed to enhance communication channels. This is what is termed as facilitative mediation. It is appropriate in promoting the sovereignty of the people. These sovereign interests are promoted through the people's participation and self-determination during mediation processes.

⁷⁵ Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' 27(1) *Ohio State Journal on Dispute Resolution*, 2012, 344.

⁷⁶ Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' 27(1) *Ohio State Journal on Dispute Resolution*, 2012, 341.

⁷⁷ Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' 27(1) *Ohio State Journal on Dispute Resolution*, 2012, 347.

Evaluative mediation, on the other hand, is involving. The mediator's role is active. They tend to give their opinion on the strength of a party's submission or weigh in on the value of the terms of settlement.⁷⁸ This mediation style tends to give sovereign power to the mediator through determination of substantive issues of dispute which is ideally inherent to the parties. However, the parties may decide to employ an evaluative mediator to hasten the mediation process when facilitative mediation becomes unsuccessful.⁷⁹ Facilitative mediation may become unsuccessful when parties persistently disagree and fail to compromise on their stance hence the need for intervention. If this is the case, the parties still retain their sovereign interests in the dispute resolution process. This is so because the mediator in this case functions as a neutral party who offers new perspective and assists the parties to understand the issues differently by means of evaluation. Nevertheless, this study argues that a substantive aspect of their sovereignty is now delegated to the mediator by virtue of the role that they undertake. The issue is competing sovereign rights between the mediator and the parties implied by Article 1(2) of the Constitution.⁸⁰ However, in the best interests of the people, the parties may agree to begin with a facilitative mediation process and if this fails, they may pursue evaluative mediation.

Inferring from the above analysis, evaluative mediation may thus be inappropriate in the promotion of sovereignty during election dispute resolution while facilitative mediation may promote these sovereign interests.

3.4 COMPARATIVE ANALYSIS

Based on the above discussed criteria used to determine whether mediation is appropriate in promoting the sovereignty of the people during elections, a practical approach is necessary to make the case for or against electoral mediation. The following countries illustrate the lessons to be learnt from mediating election disputes.

⁷⁸ Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' 27(1) *Ohio State Journal on Dispute Resolution*, 2012, 347.

⁷⁹ Greene R, 'Mediation and Post-election litigation: A Way Forward 2011 Symposium: Talking the Vote: Facilitating Disputed Election Processes Through ADR' 27(1) *Ohio State Journal on Dispute Resolution*, 2012, 347.

⁸⁰ Article 1(2), Constitution of Kenya (2010).

3.4.1 Democratic Republic of Congo (DRC) electoral mediation

Following the faulted electoral crisis in the Democratic Republic of Congo in November 2011, the National Mediation Commission of the Electoral Process was established under the patronage of the United Nations to resolve the election-related conflicts at the time. The election had been marred by technical, operational, and logistical challenges that resulted in a deadly electoral stand-off and the issues that arose out of these challenges revolved around the credibility of the electoral process. The mediation process was unsuccessful with claims of external influence of the chairman of the Commission. Consequently, there were multilateral efforts by several organisations including the African Union (AU), the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA), the International Conference on the Great Lakes Region and the Economic Community of Central African States which were unsuccessful due to their failure to apply the mediation principles of impartiality and neutrality in the mediation processes. They failed to discredit the election process despite its open flaws.⁸¹

In this case study, mediation was an inappropriate mechanism to resolve the election dispute in view of the partiality and lack of neutrality of the mediator. Given the fact that the mediation process was steered and heavily influenced by external parties whose impartiality was in question, the evaluative type of mediation was inappropriate. This type of conflict, being outcome determinative, could have been resolved in a facilitative mediation process.

3.4.2 Lesotho

Electoral mediation in Lesotho began as a part of electoral crisis mitigation reforms following the history of conflict in the country. After the election dispute of 2007, two dispute resolution processes emerged; the first was the court process which dismissed the petition based on technical grounds and the second was the mediation process led by the Southern African Development Community which also failed due to non-cooperation by the government. The next mediation efforts were instituted by the civil society which was led by the Lesotho Council of Non-governmental Organisations and the Christian Council

⁸¹ Shale V and Gerenge R, 'Electoral mediation in the Democratic Republic of Congo, Lesotho and Kenya', Accord, 2016, 1.

of Lesotho and these were internally driven. The mediators facilitated the dialogue processes between the conflicting parties, recorded their deliberations and made reports of the outcome.⁸² Furthermore, the United Nations Development Program and the Southern African Development Community supported these mediation processes both financially and technically hence boosting them.⁸³ This facilitated the success of the mediation process in 2007.

However, in the 2012 Lesotho electoral crisis, the mediation efforts by the Southern Africa Development Community (SADC) became unsuccessful due to the failure to incorporate the civil society into the mediation processes.⁸⁴ This illustrates the place of sovereign interests in dispute resolution. The people in this case had been able to encourage dialogue and promote reform for future elections through internal drive, which is the exercise of their sovereign power.⁸⁵ Since the previous efforts had a people-centred resolution framework, success of the process was inevitable with all other factors of factual approach constant. In 2012 mediation was conducted by SADC and it failed to provide an opportunity for dialogue and instead recommended another election in 2015. By imposing this decision, this led to the failure of the 2012 mediation.

In this case study, mediation was an appropriate mechanism to resolve the electoral disputes. The structure of the mediation process is essential in ensuring a successful outcome. A people-centred structure is set to promote effective dispute resolution since the people have a high stake as voters in the determination of their will in an election.

3.4.3 Cote d'Ivoire

In the 2010 electoral dispute of Cote d'Ivoire, mediation efforts were instituted by former Burkina Faso's President Compaoré who tried to mediate an agreement between the incumbent president Gbagbo and the opposition candidate, Ouattara after a run-off in

⁸² Shale V and Gerenge R, 'Electoral mediation in the Democratic Republic of Congo, Lesotho and Kenya', Accord, 2016, 1.

⁸³ Maseru A, *'Lessons Learned in Mediation of the Electoral Dispute in Lesotho: The Role of Joint UNDP-DPA Programme on Building National Capacities for Conflict Prevention in Supporting the Resident Coordinator and United Nations Country Team'*, UNDP, 2012, 4.

⁸⁴ Shale V and Gerenge R, 'Electoral mediation in the Democratic Republic of Congo, Lesotho and Kenya', Accord, 2016, 1.

⁸⁵ Shale V and Gerenge R, 'Electoral mediation in the Democratic Republic of Congo, Lesotho and Kenya', Accord, 2016, 1.

November 2010 which saw the Electoral Commission announce Ouattara as the winner and the incumbent refusing to concede. This mediation process failed due to the crafting of an inefficient power-sharing agreement based off selfish political interests and various delegations later chipped in to resolve the dispute.⁸⁶

These included the efforts by the African Union to send Thabo Mbeki to mediate and several other leaders. Later, a High-Level Panel representing all the regions of the African continent attempted to resolve the crisis but was divided on the settlement terms with some favouring a power sharing plan while others settling for the announcement of Ouattara as president. This form of evaluative mediation where the mediators were directly involved in proposition of settlement terms became unsuccessful as President Gbagbo refused to concede. There was lack of political will to concede by both parties evidenced by the consistent conflict that saw Gbagbo taken by force and arrested.⁸⁷

In this case study, evaluative mediation was inappropriate as the active role of the mediators in the evaluative mediation process suppressed the sovereign interests of the people in terms of the determination of their will in the dispute resolution process. The resolution was based on the political interests of the election candidates as opposed to those of the people.

3.5 CONCLUSION

In conclusion, by disaggregating electoral disputes into process disputes versus outcome-determinative disputes, mediation has the potential to create value and help resolve these disputes even more efficiently. It is important for the mediator's role to be defined and the central case of the dispute resolution process to be the electorate. The Lesotho case study is one such instance that illustrates the success of mediation when the place of the civil society is recognised, and its capacity built to protect the sovereign interests of the people. Furthermore, mediation is appropriate as it sets the country up for reconciliation and healing which is essential for a country's growth and development and boosts cooperation with other countries.

⁸⁶ Babbitt E, 'Mediation and the Prevention of Mass Atrocities' the International Politics of Human Rights: Rallying to the R2P Cause, 2014, 8.

⁸⁷ Babbitt E, 'Mediation and the Prevention of Mass Atrocities' the International Politics of Human Rights: Rallying to the R2P Cause, 2014, 11.

CHAPTER 4: THE CURRENT PRACTICE OF ELECTORAL DISPUTE RESOLUTION AND THE EXTENT TO WHICH IT PROMOTES THE SOVEREIGNTY OF THE PEOPLE

4.1 INTRODUCTION

Kenya is one of the African countries that has emerged successful in utilising good offices to resolve electoral disputes.⁸⁸ In recognition of the need for a responsive dispute resolution mechanism that serves the interests of the people, with deliberative democracy being at the heart of these interests, the dispute resolution process in Kenya has had to encompass these interests for the sake of peace and justice.

Despite lacking a comprehensive legal and institutional framework that governs the practice of mediation in Kenya,⁸⁹ the current practice of electoral dispute resolution has had an endearing effect in the history of conflict resolution in Africa in the wake of positive jurisprudence dating back to the 2007/2008 electoral crisis.⁹⁰ It is this practice that has demonstrated the centrality of the need for a framework that recognises the sovereignty of the people. This chapter discusses the methods of election dispute resolution employed since 2008 with a view to determine a framework that best serves the sovereign interests of the people.

4.2 2007/2008 electoral crisis dispute resolution

Prior to the Koffi-Annan led team of mediators coming to Kenya to mediate the election dispute of 2007/8, there were several other attempts by various persons and institutions that proved futile hence the efforts by the good offices of the United Nations. There were attempts by locally driven initiatives such as the Concerned Citizens for Peace and regional attempts by the Archbishop Desmond Tutu under the All-Africa Conference of Churches umbrella which only succeeded in promoting dialogue but fell short of

⁸⁸ African Union and Centre for Humanitarian Dialogue, *Managing Peace Processes*, 2013, 12.

⁸⁹ Muigua K, 'Overview of Mediation and Arbitration in Kenya', Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations in Kenya held at the Kenyatta International Conference Centre, Nairobi, 4th–6th May, 2011, 4.

⁹⁰ African Union and Centre for Humanitarian Dialogue, *Managing Peace Processes: Thematic Questions*, 2013, 12.

resolving the dispute.⁹¹The first local attempts were generally unsuccessful due to mistrust and lack of confidence in local initiatives due to the history of division along ethnic and class lines. Further still, these attempts were faulted for generating unilateral solutions that could not break the stalemate that had engulfed the political scene in the country.⁹²Both warring presidential election candidates lay their claims on legitimacy of the election results hence a localised solution proved an insurmountable task.

The international mediation efforts that ensued were also met by reluctance on claims of sovereignty of the State, but these were counteracted by international outrage and pressure in the form of threatened sanctions and promise of aid for economic recovery.⁹³The United States led by the US Assistant Secretary of State for African Affairs, for instance, threatened forceful action against the State if the political stalemate persisted in the form of an international mechanism.⁹⁴The presence of partial mediators had also marred the mediation scene leading to the antagonization of one of the disputing parties, Raila Odinga, hence impeding the dispute resolution process. The partisan approach by Yoweri Museveni of Uganda in recognising Kibaki as president, for instance, only succeeded in fuelling his dismissal as a possible mediator by the government and further tension as he reportedly sent an army to Western Kenya in support of the government's defences.⁹⁵ The intervention by President Kufuor spearheaded the beginning of effective dialogue by the disputing parties by drawing an unconditional commitment from them to resolve their differences through constitutional means.⁹⁶However, Kufuor's move was faulted for insufficient time dedicated to resolve the conflict despite its complexity.⁹⁷

Annan's entry into the mediation scene provided the sense of credibility and utilisation of the critical mediation skills required to offset the dispute. The parties in dispute accepted Koffi Annan together with the rest of the members inclusive of Graca Machel and

⁹¹ Shale V and Gerenge R, 'Election Mediation in Congo, Lesotho and Kenya: A comparative perspective', *Accord*, 2016,1.

⁹² Khadiagala G, 'Forty days and nights of peace-making in Kenya', 7(2) *Journal of African Elections*, 2020,5.

⁹³ Khadiagala G, 'Forty days and nights of peace-making in Kenya', 7(2) *Journal of African Elections*, 2020,9.

⁹⁴ Lobe J, 'Kenya Seen as Anchor to U.S. Position in the Region'. Inter Press Service (Johannesburg), 8 January 2008.

⁹⁵ Bogere H, 'Uganda maintains it has not deployed troops in Kenya', *The Nation*, 20 January 2008.

⁹⁶ Al Jazeera, 'Kenya Mediation Fails', January 2008.

⁹⁷ Cheboi S, 'When Ghanaian Head of State Flew all the Way "for Tea"', *Daily Nation*, 29 December 2008, 8.

Benjamin Mkapa. This team laid the basis for a successful outcome through establishing three critical elements which were the following:

- i) Ensuring that there was only one mediation process to promote the unity that was essential in achieving mutually acceptable solutions.
- ii) Promoting public dialogue and confidence in the mediation process for the civil society to feel heard and have a stake in the mediation process.
- iii) Holding talks with both the key negotiators from both sides and the principals to draw commitment from them in undertaking participation in major decisions.⁹⁸

Further still, the panel of mediators established four components of the discussions which were the following:

- i) Agenda One: immediate action to stop violence and restore fundamental human rights.
- ii) Agenda Two: addressing the humanitarian crisis and promoting national reconciliation.
- iii) Agenda Three: negotiations on how to overcome the current political crisis.
- iv) Agenda Four: Developing long-term strategies for durable peace.⁹⁹

The first two issues were resolved amicably with the recognition of the need to stop violence and the growing avenue for militia involvement amid the political tension in the country. The disarmament of the militia and the investigation of excessive use of force by the police informed the achievement of the first three agendas and formed the basis for discussion of the fourth contentious agenda.¹⁰⁰

By broadening the constitutional issues for determination and formulating resolutions based on the points of agreement, the panel was able to lay the foundation for achieving a common ground. This was followed by a concession by both parties as to their earlier demands which were premised on the debate of who had won the election. This paved the way for a power sharing agreement that saw the eventual signing of the National Accord and Reconciliation Act on 28th February 2008 by both parties.¹⁰¹

⁹⁸ Khadiagala G, 'Forty days and nights of peace-making in Kenya', 7(2) *Journal of African Elections*, 2020,9.

⁹⁹ Khadiagala G, 'Forty days and nights of peace-making in Kenya', 7(2) *Journal of African Elections*, 2020,13.

¹⁰⁰ Khadiagala G, 'Forty days and nights of peace-making in Kenya', 7(2) *Journal of African Elections*, 2020,14.

¹⁰¹ Khadiagala G, 'Forty days and nights of peace-making in Kenya', 7(2) *Journal of African Elections*, 2020,23.

Mediation of the long-term issues such as dealing with historical injustices took on a different turn as the Koffi-Annan led team left and members of the negotiating team were absorbed into the grand coalition government as Cabinet members. Consistency in the mediation pursuit was underscored with the advent of a power sharing agreement. Nevertheless, the mediation process had not only restored peace to the nation but had also fundamentally restored the people's sovereignty and control over their own affairs as Martha Karua, a previously staunch opponent of the international mediation process conceded.¹⁰²

The 2007/8 electoral mediation illustrated the role of mediation in promoting the sovereignty of the people during election dispute management as it was the final talks between the principals that empowered and informed the adoption of the power coalition agreement.

4.3 2013 electoral dispute resolution

Following the 2007/8 electoral crisis in Kenya, there was a need for serious political reforms in the country and the 2010 Constitution was inaugurated to, among other things, address the concentration of power in the presidency.¹⁰³ However, these constitutional reforms did not alleviate electoral disputes in Kenya as envisaged by the 2013 presidential electoral dispute. The Constitution further incorporated alternative dispute resolution mechanisms such as mediation to assist in the dispensation of justice.¹⁰⁴ These mechanisms have been adopted in various courts such as the employment and labour courts and family law to ease the backlog of cases in courts but are yet to be enacted in the current electoral dispute resolution framework.¹⁰⁵ According to the 2010 Constitution, election petitions and disputes arising from the declaration of election results can only be determined by the courts.¹⁰⁶

¹⁰² Baldauf S, 'After two months of discord, finally a handshake,' *The Christian Science Monitor*, 8 August 2008.

¹⁰³ Human Rights Watch, *High Stakes: Political Violence and the 2013 Elections in Kenya*, 2013,1.

¹⁰⁴ Article 159, *Constitution of Kenya* (2010).

¹⁰⁵ Ater S, 'Strides in Court Annexed Mediation in Kenya', *Mediate.com*, 2019,1.

¹⁰⁶ Article 88(4), *Constitution of Kenya* (2010).

As a result, the 2013 presidential election dispute was litigated at the Supreme Court in what was known as the *Raila Odinga case*.¹⁰⁷ There was increased public confidence in the Judiciary following fulfilment of the institutional reforms proposed in the Kriegler Report.¹⁰⁸ Unlike the 2007/8 dispute resolution process, mediation was not undertaken in 2013. The presidential election petition was heard on merit.¹⁰⁹ The court ruled that the election had been conducted in a free, fair, transparent and credible manner in compliance with the constitution and the law and upheld the election of both the presidential candidate and deputy president-elect, Uhuru Kenyatta, and William Ruto. It also ruled that the rejected votes ought not to have been included in calculating the final tallies in favour of each presidential candidate and that it had no jurisdiction to declare a recomputation of percentages by the Chairman of the Independent Electoral Board and Commission.

While mediation would have cured the shortcoming of lack of jurisdiction in addition to generating mutually agreeable solutions to the dispute by virtue of sovereign power, litigation fell short of wholesome resolution hence resulting in the dissatisfaction of the Supreme Court ruling in 2013.

4.4 2017 electoral dispute resolution

Despite the emerging ground-breaking electoral jurisprudence that saw the nullification of the presidential election results, there were several ills that befell the dispute resolution process in September 2017. Key among these ills and essentially is at the core of this study is the element of lack of effective public participation in the process. While the court recognised that the people exercise their sovereignty during the election process, it fell short of determining itself on their involvement in the dispute resolution process.¹¹⁰

In independently coming up with its decision to annul the presidential election, the Supreme Court failed to rule whether the electoral violations that had occurred had impacted the election results.¹¹¹ This ruling was critical since it would have determined whether these violations had interfered with the credibility of the electoral process and

¹⁰⁷ *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and 2 others* (2017) eKLR.

¹⁰⁸ Kenya Law, *The Presidential Election Petition: The Mwananchi Friendly Version*, 2013,1.

¹⁰⁹ Kenya Law, *The Presidential Election Petition: The Mwananchi Friendly Version*, 2013,1.

¹¹⁰ *Raila Amolo Odinga and another v IEBC and 2 others*, 2017(eKLR).

¹¹¹ The Carter Centre, 'Carter Centre Releases Analysis of Electoral Dispute Resolution in Kenya; Encourages Supreme Court to Clarify Threshold to Annul Election Results' 2019, 1.

ultimately, the sovereign will of the people. Had the dispute resolution process incorporated public participation, the people would have sought the *ratio decidendi*. In a ruling that subverted the will of the people on account of election irregularities, this study argues that it was essential for the people to exercise their sovereign will and power to determine the fate of their cast votes. This would have been the case in a mediation process.

The place of the courts in the exercise of their sovereign power is ensuring that the constitutional judicial principles¹¹² are upheld within the dispute resolution process. They are a secondary governing body to the primary body consisting of the electorate and the election aspirants. While their involvement in the process is not an automatic exclusion of the will of the people, it is important that they exercise their primary sovereign rights.

4.5 CONCLUSION

While the courts have delegated sovereignty, this study argues that it is in the best interests of the people and the fulfilment of this right if the people themselves exercise this sovereign right. It is in the interests of all the election stakeholders inclusive of the independent body concerned with elections, political parties, aspirants, citizens, and the government to cooperate in building capacity through an electoral reform framework that centres mediation as the core electoral dispute resolution mechanism. As such, home grown solutions to all dimensions of an electoral dispute as constructed in mediation ideally promote these sovereign interests as opposed to a court system with limited jurisdiction regarding certain matters as was in the *Raila Odinga case*.¹¹³

¹¹² Article 159, *Constitution of Kenya* (2010).

¹¹³ *Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and 2 others* (2017) Eklr.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

This study sought to establish whether mediation has a role in the promotion of Kenyans' sovereignty during election disputes management. Based on the findings of each chapter, this study concludes that mediation not only has a place in election dispute management but also in promoting the sovereignty of the people.

Chapter One identified the gaps in the current election dispute resolution framework that undermined the sovereignty of the people. Mediation was examined as a plausible dispute resolution mechanism by virtue of its merits and opportunity for amalgamation with the current judicial process. It recognised the need for an inclusive election dispute management system considering these interests.

In determining the place of mediation in election dispute management, Chapter Two of this study answered the first research question in Chapter One by establishing the relationship between the benefits of mediation and the sovereign interests of the people. Despite the challenges likely to be faced in mediation, this chapter concludes that mediation ensures the people's inclusivity in the process, hence promoting their sovereign interests.

Drawing from the case studies discussed in Chapter three of this study, it is evident that the success in the use of mediation is on a State-to-State basis. Mediation may be an appropriate electoral dispute resolution mechanism or fall short of delivering its indirect promise for sovereignty through its indispensable principles of party autonomy. As in all other dispute resolution mechanisms such as litigation, mediation has a win-lose possible outcome.

Hence, this is not necessarily a shortcoming of mediation on its own but a common challenge in the dispute resolution process. Unlike other mechanisms, nevertheless, mediation may be undertaken as a preventive measure to alleviate imminent conflict where there is political tension. This is fundamental in ensuring that the people exercise their sovereign rights in a free and fair manner. As such, this study concludes that mediation has far reaching prospects in as far as justice and peace processes are concerned in election dispute management.

As evident in Chapter 4, the current election dispute resolution framework is lacking in as far as promotion of the primary sovereign interests of the people is concerned. Indeed, more needs to be done in terms of scholarly review, stakeholder participation and research to build legitimacy for its implementation.

Chapter 5 makes a conclusion as to the findings of the study and provides recommendations.

5.2 FINDINGS

Recognition of the role of mediation in the promotion of Kenyans' sovereignty is vital in ensuring the protection of the citizens' interests in governance in aspiration of the essential value of democracy. This study finds that mediation has an indisputable role in the promotion of the people's sovereignty during election dispute management.

5.3 RECOMMENDATIONS

This study recommends the following:

- i) Election stakeholders should support strong civil society organizations that focus on conflict resolution and responsible governance. The civil society can provide internal pressure on their government to foster peace and political problem-solving rather than violence.
- ii) The government should undertake legal and policy reforms that will realize the importance of the people's sovereign will in election disputes management.
- iii) In the implementation of mediation as part of the election dispute resolution framework, the selection of mediators should be considered an important aspect of the mediation process as this is important in ensuring a successful outcome. Parties' acceptability of the mediator is fundamental in steering the mediation process as it ensures the credibility of the process.
- iv) The role of international mediators should be underscored as evidenced by the successful 2008 electoral mediation in Kenya. This is due to less concerns of impartiality and credibility of the process by either of the parties and increased mobilization and support for the mediation process through technical or financial means.

- v) Public commitment to the adoption of this mechanism is essential in ensuring the support of the people whose sovereign interests are paramount and in order to solicit their support in steering the process forward.

5.4 CONCLUSION

In conclusion, the current election dispute resolution framework is insufficient in promoting the sovereign interests of the people. There is need to recognise the role of mediation and make the necessary execution to uphold these interests.

APPENDIX 1

1. Building Bridges to a United Kenya Taskforce Report

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