

Conflict Management Mechanisms for Effective Environmental Governance in Kenya

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Abstract

Conflict and conflict management are considered to be a critical part of any environmental governance framework. This is due to the fact that environmental resources come with conflict among user groups due to conflicting needs and abundance or scarcity. As such, any framework designed to achieve effective environmental governance must include conflict management framework. This paper discusses the nature of environmental and natural resource related conflicts and their applicability or suitability in the management of environmental conflicts. The author does this within the context of Kenya's framework on management of environmental and natural resource related conflict, offers suggestions and recommendations on how best to harness and utilise the available conflict management mechanisms for effective environmental governance and sustainable development in Kenya.

1. Introduction

This paper entails a critical examination and analysis of conflict management mechanisms in environmental matters for effective environmental governance. The paper has several parts that address the following: the first part defines and discusses the nature of environmental and natural resource related conflicts; the second part offers an overview of the various conflict management mechanisms and their applicability or suitability in the management of environmental conflicts; the third part offers a critique of Kenya's framework on management of environmental and natural resource related conflicts; and the last part discusses the way forward on environmental conflicts management for effective environmental governance and sustainable development in Kenya.

The Sustainable Development Goals (SDGs) provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.¹

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¹ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

2. Nature of Environmental and Natural Resource Related Conflicts

The role of natural resources in society has been discussed by various authors as including sources of income, industry, and identity, with developing countries being more dependent on natural resources as their primary source of income, as many individuals depend on these resources for their livelihoods, with agriculture, fisheries, minerals, and timber as their main sources of income.² In addition, natural resources also play a prominent cultural role for many local communities and may even be a point of pride for the nation as a whole, a part of the country's patrimony, where resources such as land, water, and timber (forests) usually have historical and cultural significance, serving as the home of ancient civilizations, historical artifacts, and cultural practices.³ This is well reflected in the Constitution of Kenya which recognises the environment in its preamble as the heritage of people of Kenya worthy of respect and sustenance for the benefit of future generations.⁴

Away from the communities, natural resources, both renewable and nonrenewable, are mostly controlled by the state (which is considered to be the case in most developing countries) and are used as exports by the government to attain profit and power.⁵

It has been observed that environmental scarcities have had great adverse effects on populations, including violent conflicts in many parts of the developing world.⁶ These conflicts are especially expected to be more devastating in poor societies since they are less able to buffer themselves from environmental scarcities and the social crises they cause.⁷

² United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, p.6. Available at www.usip.org/sites/default/files/file/08sg.pdf [Accessed on 13/08/2018].

³ United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, p.7.

⁴ Preamble, Constitution of Kenya, 2010.

⁵ United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, pp.6-7; See also Constitution of Kenya, 2010, Article 62 which places some resources under state control, as part of public land including, inter alia:

(f) all minerals and mineral oils as defined by law;(g) government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;(j) the territorial sea, the exclusive economic zone and the sea bed;(k) the continental shelf;(l) all land between the high and low water marks;(2) Public land shall vest in and be held by a county government in trust for the people resident in the county;(3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya;

⁶ Homer-Dixon, T.F., "Environmental scarcities and violent conflict: evidence from cases," *International security* 19, No. 1 (1994): 5-40 at p. 6.

⁷ *Ibid*, p. 6.

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The many groups whose interests in and actions concerning a region's natural resources can lead to or exacerbate conflict may include local communities, governments, rebel groups, and outside actors.⁸

Natural resource conflicts are defined as social conflicts (violent or non-violent) that primarily revolve around how individuals, households, communities and states control or gain access to resources within specific economic and political frameworks.⁹ They are the contests that exist as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests. Natural resource conflicts mainly have to do with the interaction between the use of and access to natural resources and factors of human development factors such as population growth and socio-economic advancement.¹⁰

The role of natural resources in conflict has also been a focus of many authors. The two approaches that have been proposed to explain the role of natural resources in conflict include scarcity (sometimes called the neo-Malthusian view) and abundance.¹¹

Under the scarcity theory, it is argued that rapid population growth, environmental degradation, resource depletion, and unequal resource access combine to exacerbate poverty and income inequality in many of the world's least developed countries, and such deprivations are easily translated into grievances, increasing the risks of rebellion and societal conflict."¹² An example of areas experiencing scarcity problems in Kenya is Turkana County which has been documented as one of the Counties with the highest level of poverty in Kenya¹³, and with the distrust between local communities around the region against each other¹⁴ leading to constant conflicts as well as

⁸ United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, p.7.

⁹ Funder, M., et al, 'Addressing Climate Change and Conflict in Development Cooperation Experiences from Natural Resource Management,' p. 17, (Danish Institute for International Studies, DIIS, 2012), available at <https://www.ciaonet.org/attachments/20068/uploads> [Accessed on 12/08/2018].

¹⁰ Toepfer, K., "Forward", in Schwartz, D. & Singh, A., *Environmental conditions, resources and conflicts: An introductory overview and data collection* (UNEP, New York, 1999). p.4

¹¹ United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, p.8.

¹² Ibid, p.8.

¹³ *Turkana County –United Nations Joint Programme 2015-2018*, (Executive Office, Turkana County Government, Lodwar, Turkana UN Resident Coordinator Office, Nairobi, Kenya), p. 4.

Available at <https://info.undp.org/docs/pdc/Documents/KEN/ProDoc%20Turkana-UN%20Joint%20Programme%20final%205th%20%20March%202015-binder%20%282%29.pdf> [Accessed on 12/08/2018].

¹⁴ Bollig, M., "Ethnic Conflicts in North-West Kenya: Pokot-Turkana Raiding 1969—1984." *Zeitschrift Für Ethnologie* 115 (1990), pp. 73-90. <http://www.jstor.org/stable/25842144>. [Accessed on 12/08/2018].

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cross border conflicts.¹⁵ The conflict is largely attributed to livestock rustling, harsh climate and boundary dispute. A degraded environment leads to a scramble for scarce resources and may culminate in poverty and even conflict.¹⁶

Those who view abundance as a problem argue that it is resource abundance, rather than scarcity, that is the bigger threat to create conflict, often referred to as the “resource curse”—corruption, economic stagnation, and violent conflict over access to revenues.¹⁷ For instance, it has been pointed out that for many resource rich developing countries, there have been cases of low economic growth, environmental degradation, deepening poverty and, in some cases, violent conflict.¹⁸ For instance, extractive industries, particularly in sub-Saharan Africa, have been marked with increasing levels of political, social, technical and environmental risk.¹⁹ This has been the case in countries like Sudan, Democratic Republic of Congo²⁰ and Nigeria where there have been eruption of internal armed conflict as a result of their rich natural resources. Conflict also often produces significant environmental degradation.²¹

Apart from the adverse effect of the conflict on the environment, the illegal trade of minerals bars communities from benefiting from its resources.²² Communities expect that availability of environmental goods and services in their region will improve their livelihoods by

¹⁵ Johannes, E.M., et al, ‘Oil discovery in Turkana County, Kenya: a source of conflict or development?’ *African Geographical Review*, Vol. 34, No.2, 2015, pp.142-164, p. 142.

¹⁶ ‘Wangari Maathai-an excerpt from the Nobel Peace Prize winner’s Acceptance Speech,’ *Earth Island Journal*. Available at http://www.earthisland.org/journal/index.php/eij/article/wangari_maathai_an_excerpt_from_the_nobel_peace_prize_winners_acceptance_sp/ [Accessed on 12/08/2018].

¹⁷ United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, p.8.

¹⁸ Alstine, J.V., et al, Resource Governance Dynamics: The Challenge Of ‘New Oil’ In Uganda, *Resources Policy*, Vol. 40, 2014, pp.48–58, p. 48.

¹⁹ Ibid, p. 48; see also Lohde, L.A., *The Art and Science of Benefit Sharing in the Natural Resource Sector*, (International Finance Corporation, February 2015), p. 55. Available at <https://commdev.org/wp-content/uploads/2015/07/IFC-Art-and-Science-of-Benefits-Sharing-Final.pdf>

²⁰ Samndong, R.A. & Nhantumbo, I., *Natural resources governance in the Democratic Republic of Congo: Breaking sector walls for sustainable land use investments*, (International Institute for Environment and Development Country Report, February 2015), p. 11. Available at <http://pubs.iied.org/pdfs/13578IIED.pdf> [Accessed on 12/08/2018].

²¹ Ballet, J., et al, ‘Social Capital and Natural Resource Management: A Critical Perspective,’ *The Journal of Environment & Development*, Vol. 16, No. 4, December 2007, pp. 355-374, p. 367.

²² See ‘Diamonds in Sierra Leone, A Resource Curse?’ available at <http://erd.eui.eu/media/wilson.pdf> [Accessed on 12/08/2018]; Kinniburgh, C., ‘Beyond “Conflict Minerals”: The Congo’s Resource Curse Lives On,’ *Dissent Magazine*, Spring 2014, available at <https://www.dissentmagazine.org/article/beyond-conflict-minerals-the-congos-resource-curse-lives-on> [Accessed on 12/08/2018]; Free the Slaves, ‘Congo’s Mining Slaves: Enslavement at South Kivu Mining Sites,’ *Investigative Field Report*, June 2013. Available at <https://www.freetheslaves.net/wp-content/uploads/2015/03/Congos-Mining-Slaves-web-130622.pdf> [Accessed on 12/08/2018].

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‘real’ development, which may not always be the case.²³ Poor and low economic development²⁴ and consequently, failed economies result in conflicts,²⁵ as a result of environmental and natural resources’ bad governance or mismanagement.²⁶ Skewed distribution of benefits from natural resources and other environmental goods may fuel social exclusion and conflict, threatening sustainability.²⁷

As far as the abundance theory is concerned, it has been argued that rent-seeking models assume that resource rents can be easily appropriated hence encouraging bribes, distorted public policies and diversion of public towards favour seeking and corruption,²⁸ which is a threat to protected human security.²⁹ Mismanagement of resources is thus associated with corruption, undermining inclusive economic growth, inciting armed conflict and damaging the environment.³⁰

Public policy can also lead to natural resource conflicts. It is argued that specific policies, government programs, and their implementation have, in some areas, generated or aggravated conflicts, even when the intention was to reduce the conflict.³¹ A good example of such policies would be those touching on property ownership, especially land, and where there is need to balance conservation and access to the resources by communities. A government policy to relocate people

²³ Sigam, C. & Garcia, L., *Extractive Industries: Optimizing Value Retention in Host Countries*, (UNCTAD, 2012). Available at http://unctad.xiii.org/en/SessionDocument/suc2012d1_en.pdf [Accessed on 12/08/2018].

²⁴ See Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*, (New York: Columbia University Press, 2012).

²⁵ Maphosa, S.B., *Natural Resources and Conflict: Unlocking the Economic dimension of peace-building in Africa*. ASIA Policy brief Number 74, 2012.

²⁶ Billion, P., *Wars of Plunder: Conflicts, Profits and Politics*. (New York: Columbia University Press, 2012.); See also Wiebelt, M., et al, ‘Managing Future Oil Revenues in Uganda for Agricultural Development and Poverty Reduction: A CGE Analysis of Challenges and Options,’ (Kiel Working Paper No. 1696, May 2011). Available at <https://www.ifw-members.ifw-kiel.de/publications/managing-future-oil-revenues-in-uganda-for-agricultural-development-and-poverty-reduction-a-cge-analysis-of-challenges-and-options/kap-1696.pdf> [Accessed on 12/08/2018].

²⁷ Saboe, N.T., ‘Benefit Sharing Among Local Resource Users: The Role of Property Rights,’ *World Development*, Vol. 72, pp. 408–418, 2015, p. 408.

²⁸ Tsani, S., Natural resources, governance and institutional quality: The role of resource funds,’ *Resources Policy*, 38(2013), pp.181–195, p. 184.

²⁹ Alao, A., *Natural Resource Management and Human Security in Africa*, in Abass, A., *Protecting Human Security in Africa* (ISBN-13: 9780199578986, Oxford University Press, 2010); Lawson, T. R. & Greestein, J., ‘Beating the resource Curse in Africa: A global Effort,’ *Africa in Fact*, August 2012. Available at <http://www.cfr.org/africa-sub-saharan/beating-resource-curse-africa-global-effort/p28780> [Accessed on 12/08/2018].

³⁰ Aled, W., et al, *Corruption in Natural Resource Management: An introduction* (Bergen: Michelsen Institute, 2008). Available at <http://www.cmi.no/publications/file/2936-corruption-in-natural-resource-management-an.pdf> [Accessed on 12/08/2018].

³¹ Tyler, S.R., ‘Policy Implications of Natural Resource Conflict Management,’ available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan022237.pdf> [Accessed on 12/08/2018].

forcefully may degenerate into conflicts as witnessed in Mau forest eviction in Rift Valley Kenya.³²

Based on the foregoing possibilities, some scholars have rightly maintained that regardless of which approach describes the bigger threat, both scarcity and abundance can create environments that are ripe for violent conflict.³³

3. Overview of Conflict Management Mechanisms and their Applicability in the Management of Environmental Conflicts

Natural resource conflicts can, arguably, involve three broad themes: actors (or stakeholders, groups of people, government structures and private entities), resource (land, forests, rights, access, use and ownership) and stakes (economic, political, environmental and socio-cultural).³⁴ As a result, it is contended that conflicts can be addressed with the actor-oriented approach, resource-oriented approach, stake-oriented approach or a combination of the three.³⁵ Despite this, there are key principles such as, inter alia, participatory approaches³⁶, equitable representation, capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.³⁷

Conflict is a process of adjustment, which can be subject to procedures to contain and regularize conflict behaviour and assure a fair outcome³⁸, and the same can be managed, transformed, resolved or settled depending on the approach adopted.

Conflict management has been defined as the practice of identifying and handling conflicts in a sensible, fair and efficient manner that prevents them from escalating out of control and

³² Amnesty International, et al, 'Nowhere to go: Forced Evictions in Mau Forest, Kenya,' *Briefing Paper, April 2007*; Sang J.K., Case study 3-Kenya: The Ogiek in Mau Forest, April 2001.

³³ United States Institute of Peace, *Natural Resources, Conflict, and Conflict Resolution*, A Study Guide Series on Peace and Conflict For Independent Learners and Classroom Instructors, 2007, p.8.

³⁴ Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' *Annex C - Summary of Discussion Papers*, (FAO), available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 12/08/2018].

³⁵ Ibid.

³⁶ Participatory approaches are defined as institutional settings where stakeholders of different types are brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process. (Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' *Land Use Policy*, Vol. 23, Issue 1, January 2006, PP. 10–17.

³⁷ Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

³⁸ Rummel, R.J., 'Principles of Conflict Resolution,' Chapter 10, *Understanding Conflict and war: Vol. 5: The Just Peace*.

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becoming violent.³⁹ It involves action that addresses how people can make better decisions collaboratively, to address the roots of conflict by building upon shared interests and finding points of agreement.⁴⁰

Conflict transformation, on the other hand, aims to overcome revealed forms of direct, cultural and structural violence by transforming unjust social relationships and promoting conditions that can help to create cooperative relationships, by focusing on long-term efforts oriented towards producing outcomes, processes and structural changes.⁴¹

Conflict settlement deals with all the strategies that are oriented towards producing an outcome in the form of an agreement among the conflict parties that might enable them to end an armed conflict, without necessarily addressing the underlying conflict causes.⁴² Settlement is an agreement over the issues(s) of the conflict which often involves a compromise.⁴³ Parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in the relationship. Basically, power is the defining factor for both the process and the outcome.⁴⁴

Settlement may be an effective immediate solution to a violent situation but will not thereof address the factors that instigated the conflict. The unaddressed underlying issues can later flare up when new issues or renewed dissatisfaction over old issues or the third party's guarantee runs out.⁴⁵ Settlement mechanisms may not be very effective in facilitating satisfactory access to justice (which relies more on people's perceptions, personal satisfaction and emotions). Litigation and arbitration are coercive and thus lead to a settlement. They are formal and inflexible in nature and outcome.⁴⁶

³⁹ Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' Prepared in the framework of the Livelihood Support Programme (LSP), An interdepartmental programme for improving support for enhancing livelihoods of the rural poor, (Food And Agriculture Organization Of The United Nations, Rome, 2005), available at

http://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniquesforNaturalResourceManagement_FAO2005.pdf [Accessed on 12/08/2018].

⁴⁰ Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 12/08/2018].

⁴¹ Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' op cit.

⁴² Ibid.

⁴³ Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol. 32, No. 2(May, 1995), P.152.

⁴⁴ Baylis, C., and Carroll, R., "Power Issues in Mediation", *ADR Bulletin*, Vol. 1, No.8 [2005], Art.1, p.135.

⁴⁵ Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit. p. 153; See also Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 42.

⁴⁶ See generally Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

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Conflict resolution deals with process-oriented activities that aim to address and resolve the deep-rooted and underlying causes of a conflict.⁴⁷ Conflict resolution mechanisms include negotiation, mediation and problem solving facilitation.⁴⁸ It has rightly been observed that whereas concerns for justice are universal, views of what is just and what is unjust are not universally shared, and as such, divergent views of justice often cause social conflicts.⁴⁹ This is attributed to the fact that frequently, the parties involved in conflicts are convinced that their own view is the solely valid one.⁵⁰ It is, thus, suggested that since there is no access to an objective truth about justice, conflicts may be reconciled by the judgement of an authority accepted by all parties or by a negotiated agreement between the parties: agreements are just when the parties are equally free in their decision and equally informed about all relevant facts and possible outcomes.⁵¹

Article 33 of the Charter of the United Nations outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to including, *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of parties' own choice* (Emphasis added).⁵² These are captured in the fig. 1 below.

⁴⁷ Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' op cit.

⁴⁸ Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005.

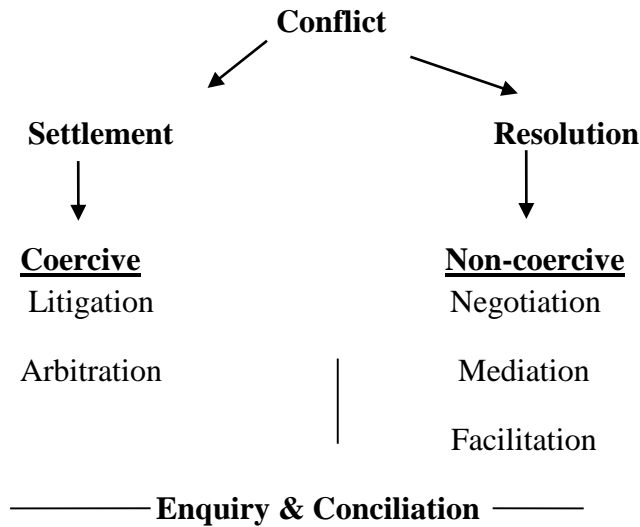
⁴⁹ Montada, L., 'Justice, Conflicts, and the Justice of Conflict Resolution,' *International Encyclopedia of the Social & Behavioral Sciences* (Second Edition, 2015), pp. 937–942.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

Fig. 1: Methods of Conflict Management



***Source: The author.**

From the foregoing figure, it is thus clear that there is a wide range of mechanisms for the avoidance of conflicts, resolution of conflicts, dispute settlement and conflict transformation. Conflict avoidance as a conflict management technique involves the application of a variety of techniques, some used consciously and some unconsciously, to avoid the escalation from normal conflict into a dispute.⁵³ Some require communication between the parties and others involve the intervention of third parties. The appropriate mechanisms depend on the particular stage of the conflict. For instance, where the conflict involves complex underlying issues and relationships have been totally destroyed, dispute settlement processes may not be the appropriate mechanisms to resolve the conflict.⁵⁴

Generally, interest-based or non-coercive processes are timely, cost efficient, provide more satisfaction to the disputing parties and are less destructive to the relationship of the parties than processes like litigation, and often result in more durable solutions to which disputants stay

⁵³ Fenn, P., “Introduction to Civil and Commercial Mediation”, in Chartered Institute of Arbitrators, *Workbook on Mediation*, op.cit.

⁵⁴ Muigwa K. *Resolving Conflicts through Mediation in Kenya*, 2nd Ed., 2017, p. 55.

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committed, therefore lessening the possibility of appeal, future conflict or dishonoring of the agreement.⁵⁵

Both the power- and rights-based processes lead to results in which one side loses and the other side wins. These processes can lead to the issues in disagreement flaring up again. They can lead to resistance, violence and revolt as they are merely settlement mechanisms that do not address the underlying causes of the conflict. Although rights-based dispute resolution feels fairer and less arbitrary than power-based processes, the outcome is zero-sum since one side must win and the other loses. On the other hand, interest-based processes can lead to win-win outcomes, in that they explore the real interests, goals and motivations of disputants and aim to develop a solution which mutually satisfies those needs. Interest-based processes are also more efficient at bringing about participant satisfaction, process fairness, effectiveness, efficiency, fostering of relationships and addressing power-based issues, all of which are important considerations in the conflict resolution process.⁵⁶

Environmental conflicts are perceived as a symptomatic manifestation of global model of economic development based on the exploitation of natural resources, disregard for people's rights and lack of social justice.⁵⁷ Furthermore, it is believed that there are about four key factors that contribute in the creation of environmental conflict: poverty, vulnerable livelihoods, migration and weak state institutions – all problems that are present at the local level.⁵⁸

Some authors also argue that environmental factors often interact with the visible drivers of ethnic tensions, political marginalisation and poor governance to create a causal framework that allows degradation to affect livelihoods, interests and capital – which, in turn, lead to conflict.⁵⁹

⁵⁵ Ury, B. & Goldberg, "Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict" *Program on Negotiation at Harvard Law School Cambridge, Massachusetts* 1993, available at www.williamury.com, [Accessed on 16/08/2018].

⁵⁶ See Serge, L, et al, "Conflict Management Processes for Land-related conflict", *A Consultancy Report by the Pacific Islands Forum Secretariat*, op.cit; Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, op.cit.

⁵⁷ Ibid.

⁵⁸ Barnett, J., & Adger, W. N., 'Climate change, human security and violent conflict,' *Political Geography*, Vol.26, 2007, pp. 639-655, at p.643 (As quoted in Akins, E., "Environmental Conflict: A Misnomer?" *Environment, Climate Change and International Relations*: 99, available at <http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/> [Accessed on 20/08/2018]).

⁵⁹ Akins, E., "Environmental Conflict: A Misnomer?" *Environment, Climate Change and International Relations*: 99, available at <http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/> [Accessed on 20/08/2018]; See also Sosa-Nunez, G. & Atkins, E., *Environment, Climate Change and International Relations*, (E-International Relations, 2016). Available at <http://www.e-ir.info/wp-content/uploads/2016/05/Environment-Climate-Change-and-International-Relations-E-IR.pdf> [Accessed on 20/08/2018].

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For instance, conflicts have been associated with the changing norms, values, and world views about property rights within formerly subsistence-based (or pastoralist) communities.⁶⁰ There has been witnessed violence in areas around Kajiado town with Maasai community seeking to ‘evict foreigners’ in the area.⁶¹ The alleged foreigners were people who have bought land for residential homes and commercial purposes, through real estate land developers. They felt that their land was being taken away. Such incidences require collaborative conflict management techniques considering that there are deep-rooted issues and harboured feelings of alienation and discrimination that need to be adequately addressed. There is need to strike a balance between community interests and national interests on development. Otherwise, without such a balance, erupting conflicts subsequently affect the course of development in the country.

Environmental conflicts thus need to be managed through interactive, participatory and inclusive approaches for the sake of balancing interests, power and adjusting parties’ expectations, in order to avoid the potentially negative effects of conflict in a society. There is a need to strike a balance among the three component parts of a conflict, namely, goal incompatibility, attitudes and behaviour, in order to ensure a peaceful society where groups do not unduly use their power to suppress the perceivably weak groups or individuals.⁶²

Some of the current conflict management mechanisms in Kenya, while they may have helped in tackling some environmental conflicts, they have not done enough in ensuring amicable resolution of environmental conflicts, since some of them are not affordable, while others such as the court have too many and complex procedural requirement. The Kenyan framework on conflict management has for long time preferred litigation as a mechanism for conflict resolution yet courts of law are often inaccessible to the poor, marginalized groups and communities living in remote areas. However, access to justice through litigation is, however, considered a potent remedy when access to environmental information or public participation has been wrongly denied or is

⁶⁰ Armitage, D., ‘Adaptive Capacity and Community-Based Natural Resource Management,’ *Environmental Management*, Vol. 35, No. 6, pp. 703–715, p. 710.

⁶¹ Sayagie, G., ‘Tension as different clans from Narok, Kajiado both claim Nguruman,’ Sunday Nation, November 9, 2014, (Nation media Group, Nairobi, 2014). Available at <http://www.nation.co.ke/counties/Narok-Kajiado-clans-Nguruman/-/1107872/2516170/-/c6b4t5/-/index.html> [Accessed on 12/08/2018]; Daily Nation, ‘Clashes in Kitengela as traders fight over market,’ (Nation media Group, Nairobi, September 8, 2015). Available at <http://www.nation.co.ke/photo/-/1951220/2865112/-/faabnp/-/index.html> [Accessed on 12/08/2018].

⁶² See generally, Bercovitch, J., "Conflict and conflict management in organizations: A framework for analysis." *Hong Kong Journal of Public Administration* 5, no. 2 (1983): 104-123.

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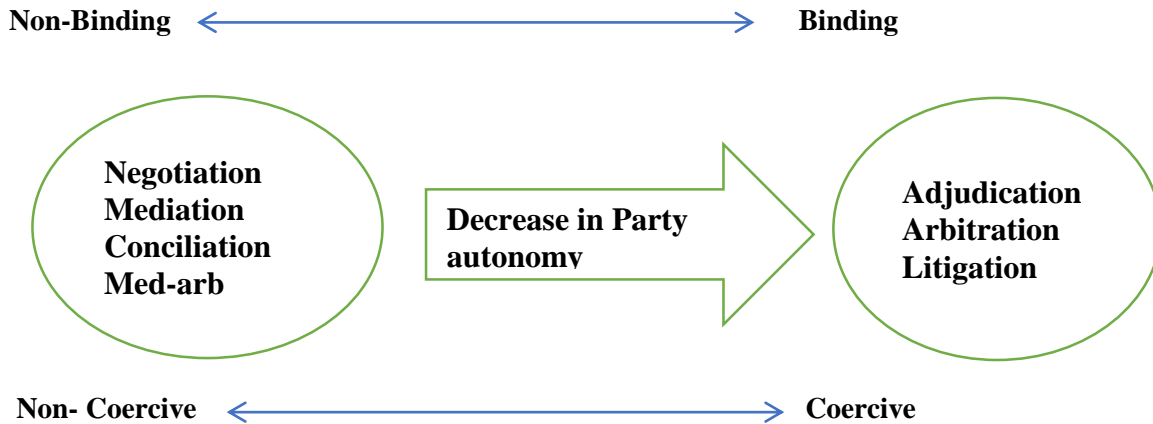
incomplete. It guarantees citizens the right to seek judicial review to remedy such denial and/or deprivation.⁶³

Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution Mechanisms (TDRMs), especially negotiation and mediation, have been effective in managing conflicts where they have been used. (ADR) mechanisms include mediation, conciliation, negotiation and traditional/community based dispute management mechanisms. ADR methods have the advantages of being cost effective, expeditious, informal and participatory. Parties retain a degree of control (as illustrated in fig. 2 below) and relationships can be preserved. Conflict management mechanisms such as mediation encourages “win-win” situations, parties find their own solutions, they pursue interests rather than strict legal rights, are informal, flexible and attempts to bring all parties on board.⁶⁴

⁶³ See Akech, M., “Land, the environment and the courts in Kenya,” *A background paper for The Environment and Land Law Reports*, February 2006, 1 KLR (E&L) xiv-xxxiv. Available at <http://www.kenyalaw.org> [Accessed on 20/08/2018]; *The Fair Administrative Action Act*, 2015 (No. 4 of 2015) which is an Act of Parliament to give effect to Article 47 of the Constitution provides under s. 6(1) that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with s. 5. S. 5(1) provides that in any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall- issue a public notice of the proposed administrative action inviting public views in that regard; consider all views submitted in relation to the matter before taking the administrative action; consider all relevant and material facts; and (d) where the administrator proceeds to take the administrative action proposed in the notice- (i) give reasons for the decision of administrative action as taken; (ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and (iii) specify the manner and period within the which such appeal shall be lodged. In relation to access to information, Art. 35(1) (b) of the Constitution guarantees every person’s right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom. In addition to the foregoing, *Access to Information Act, 2016*, was enacted to give effect to Article 35 of the Constitution; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers. Notably, clause 2 defines “private body” to mean any private entity or non-state actor that, inter alia, is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.

⁶⁴ Fenn, P., “Introduction to Civil and Commercial Mediation”, op. cit, p.10.

Fig. 1 Degree of Party Autonomy



***Source: Author.**

Arguably, negotiation and mediation have more value to the local communities than just being means of conflict management, as they present means of sharing information and participating in decision-making. They have the unique and positive attributes which include their participatory nature that can be used to manage environmental and natural resource conflicts for meaningful participation in the decision making process by enabling communities to present proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.⁶⁵

Community-based approaches to conflict resolution are also deemed to be useful, particularly to promote locally based, indigenous management strategies.⁶⁶ Since indigenous mechanisms of conflict management are based on the very values and tenets of the people, they maintain and protect the customs and traditions of the society. Thus, they are able to solve long standing disputes and promote durable peace.⁶⁷

⁶⁵ Ristanić, A., 'Alternative Dispute Resolution And Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resources,' (Lund University, April 2015), available at

[https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/\\$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf](https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf) [Accessed on 14/08/2018].

⁶⁶ Ibid.

⁶⁷ Azebre, A.I., et al, 'Indigenous Mechanisms of Dispute Resolution among the People of Adaboya Traditional Area,' July 2012, available at

<https://www.modernghana.com/news/534448/1/indigenous-mechanisms-of-dispute-resolution-among-.html> [Accessed on 14/08/2018].

4. Kenya's Framework on Management of Environmental and Natural Resource Related Conflicts: Prospects and Challenges

Most of the sectoral laws governing environmental matters in Kenya mainly provide for conflict management through the national court system based on legislation and policy statements that are administered through regulatory and judicial institutions. Litigation, which is a state-sponsored approach to conflict management, does not afford the affected parties a reasonable and fair opportunity to participate in finding a lasting solution. This is because, apart from the coercive nature of the process, litigation is also subject to other procedural technicalities which may affect its effectiveness.⁶⁸ The Constitution provides for active involvement of communities in sustainable environmental and natural resources matters through seeking court's intervention. Citizens have a role of ensuring that their rights in relation to the environment are not violated, by way of litigation.⁶⁹ This is also captured in various statutes such as the Forest Conservation and Management Act, 2016, which provides that persons can sue for enforcement of environmental rights,⁷⁰ and the Environmental Management and Coordination Act (EMCA), 1999⁷¹, the framework law on environmental management and conservation which provides that a court of competent jurisdiction may, in proceedings brought by any person, issue an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment⁷², amongst others.

The role of courts in environmental governance has also been reaffirmed by courts around the world, including the Kenyan courts in various cases. In the Kenyan case of *Peter K. Waweru*

⁶⁸ Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29, p. 29.

⁶⁹ Art. 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened; Art. 70(1) provides that if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. Furthermore, on application under clause (1), the court may make any order, or give any directions, it considers appropriate— to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment (Art. 70(2)). For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury (Art. 70(3)). The right to seek legal redress is also guaranteed under s. 3(3) of the Environmental Management and Co-ordination Act, No. 8 of 1999.

⁷⁰ Sec. 70, Forest Conservation and Management Act, No. 34 of 2016, Laws of Kenya.

⁷¹ No. 8 of 1999, Laws of Kenya.

⁷² Sec. 111(1), Environmental Management and Coordination Act, 1999.

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v Republic,⁷³ the High Court held that sustainable development has a cost element which must be met by the developers.⁷⁴ The Court went on to state as follows:

*...As regards the township itself this court is concerned on whether or not in the circumstances described the development is ecologically sustainable.... We are also concerned that the situation described to us could be the position in many other towns in Kenya especially as regards uncoordinated approval of development and the absence of sewerage treatment works. As a Court we cannot therefore escape from touching on the law of sustainable development although counsel from both sides chose not to touch on it although it goes to the heart of the matter before us.... Section 3 of EMCA demands that courts take into account certain universal principles when determining environmental cases. Apart from the EMCA it is our view that the principles set out in s 3 do constitute part of international customary law and the courts ought to take cognizance of them in all the relevant situations.*⁷⁵

Thus, courts can step in and protect the environment without necessarily looking for immediate proof of likely violation of the environment. To facilitate the same, the Constitution gives courts the power to make any order, or give any directions, it considers appropriate – to prevent, stop or discontinue any act or omission that is harmful to the environment, or to any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment, or to provide compensation for any victim of a violation of the right to a clean and healthy environment.⁷⁶ An applicant seeking such orders from courts does not have to demonstrate that any person has incurred loss or suffered injury. The Constitution provides that an applicant does not have to demonstrate that any person has incurred loss or suffered injury.⁷⁷ However, to succeed in their plea one must demonstrate that their Right under Art. 42 has been or is likely to be denied, violated, infringed or threatened.⁷⁸

The *suo moto* powers of the Court in environmental matters are also envisaged under provisions of the *Environment and Land Act*.⁷⁹ It is also important to point out that the Courts are

⁷³ *Peter K. Waweru v Republic* [2006] eKLR, Misc. Civil Application No. 118 of 2004.

⁷⁴ *Ibid*, para. 4.

⁷⁵ *Ibid*, p. 7.

⁷⁶ Constitution of Kenya, 2010, Art. 70(2).

⁷⁷ Constitution of Kenya, 2010, Art. 70(3); See also s. 3(1) of Environment (Management and Conservation) Act, 1999 (EMCA)

⁷⁸ *Joseph Owino Muchesia & another v Joseph Owino Muchesia & another* [2014] eKLR, para. 34.

⁷⁹ No 19 of 2011, Laws of Kenya. S. 20(1)-Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate

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under a constitutional obligation under Article 10 to uphold the principles of sustainable development. This includes protecting the environment for the sake of future generations.

In addition to the foregoing provisions on the use of litigation, the promulgation of the 2010 Constitution of Kenya created an opportunity for exploring the use of ADR mechanisms and Traditional Dispute Resolution Mechanisms (TDRMs) in managing natural resource conflicts.⁸⁰ One of the principles of land policy as envisaged in the Constitution of Kenya is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.⁸¹ In addition, one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.⁸² TDRMs include informal mediation, negotiation, problem-solving workshop, council of elders, consensus approaches among others. It has been observed that where traditional community leadership was strong and legitimate it had positive impacts in promoting local people's priorities in natural resource management.⁸³

In the case of *Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR*⁸⁴, the Court observed that: *“quite apart from the special consideration that needs to be given to the Ogiek community as a minority and indigenous group when allocating forest land that this court has enunciated on in the foregoing, this court also recognizes the unique and central role of indigenous forest dwellers in the management of forests. This role is recognized by various international and national laws. The Convention on Biological Diversity which Kenya has ratified and which is now part of Kenyan law by virtue of Art. 2(6) of the Constitution recognizes the importance of traditional knowledge, innovations and practices of indigenous and local communities for the conservation and sustainable use of biodiversity and that such traditional knowledge should be respected, preserved and promoted.”*

means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Art. 159(2) (c) of the Constitution.

(2) Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.

⁸⁰ Constitution of Kenya 2010, Art. 159(2) (c).

⁸¹ Art. 60 (1) (g).

⁸² Art. 67(2) (f).

⁸³ Shackleton, S., et al, 'Devolution And Community-Based Natural Resource Management: Creating Space for Local People to participate and Benefit?' *Overseas Development Institute Natural Resource Perspectives*, No. 76, March 2002, p.4.

⁸⁴ ELC Civil Suit No. 821 of 2012 (OS).

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The traditional and customary systems for managing conflict are associated with a number of strengths which include: they encourage participation by community members, and respect local values and customs; are more accessible because of their low cost, their flexibility in scheduling and procedures, and their use of the local language; they encourage decision-making based on collaboration, with consensus emerging from wide-ranging discussions, often fostering local reconciliation; they contribute to processes of community empowerment; informal and even formal leaders may serve as conciliators, mediators, negotiators or arbitrators; and finally, long-held public legitimacy provides a sense of local ownership of both the process and its outcomes.⁸⁵

5. Way Forward

5.1 Public Participation and Community Empowerment

Article 69(2) of the Constitution of Kenya places a duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. The *Agenda 21*⁸⁶ under chapter 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making.

Meaningful public participation can act to preempt conflicts in environmental matters since all the important stakeholders get to own up the decisions made. Various sectoral laws and policies should be designed in ways that protect the environment from degradation, and also ensures meaningful participation of communities in such measures, first through decision-making, and then encouraging active participation, whether through incentives or otherwise.

A bottom-top approach to natural resource management, including conflict management, creates an opportunity to involve the local people who may have insiders' grasp of the issues at hand and thus positively contribute to addressing them satisfactorily.

There is need for empowerment of communities which helps people gain control over their own lives, through fostering power (that is, the capacity to implement) in people, for use in their own lives, their communities, and in their society, by acting on issues that they define as important.⁸⁷

⁸⁵ FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

⁸⁶ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

⁸⁷Page, N. and Czuba, C.E., "Empowerment: What Is It?" *Journal of Extension*, October 1999, Volume 37, Number 5, Commentary, 5COM1.

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Empowerment promotes participation of people, organizations, and communities towards the goals of increased individual and community control, political efficacy, improved quality of community life, and social justice.⁸⁸ Thus, through empowerment, poor people get the assets and capabilities to participate in, negotiate with, influence, control, and hold accountable institutions that affect their lives.⁸⁹

The basic aspects of empowerment that are considered important especially in the context of this discussion include: *participation, control and critical awareness* (emphasis added) where participation is the individual's actions that contribute to community contexts and processes; control is the effective or the perception of ability to influence decisions; and critical awareness is the ability to analyze and understand the social and political environment.⁹⁰

Kenyan local communities should therefore be empowered to participate more productively in social, political and economic decision-making processes, especially in the areas of natural resources and environmental management, conflicts management and participation in general governance matters. These have a direct impact on the quality of the social, economic and cultural life of the local people and it is therefore important to involve them.

5.2 Concerted Peacebuilding Efforts

Promotion and implementation of peacebuilding efforts in environmental governance matters as an element of sustainable development cannot meaningfully be achieved without the concerted efforts from all stakeholders. The Sustainable Development Goals (SDGs) recognise this connection and provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.⁹¹

The non-Governmental organisations, academia, government institutions and community leaders directly concerned in peacebuilding efforts can collaborate in creating awareness and coming up with creative ways to manage environmental conflicts for peace and sustainable development.

⁸⁸ Wallerstein, N., "Powerlessness, empowerment and health: Implications for health promotion programs." *American Journal of Health Promotion*, 6(3), 197-205 (As quoted in Lord, J. and Hutchison, P., "The Process of Empowerment: Implications for Theory and Practice." *Canadian Journal of Community Mental Health*, 12:1, Spring 1993, Pages 5-22 at p. 4.)

⁸⁹ World Bank, *Chapter 2. What Is Empowerment?* p.11. Available at <http://siteresources.worldbank.org/INTEMPowerment/Resources/486312-1095094954594/draft2.pdf> [Accessed on 19/08/2018].

⁹⁰ Zimmerman, M.A., "Empowerment Theory: Psychological, Organizational and Community Levels of Analysis," in Rappaport, J. and Seidman, E. (Eds.), *Handbook on Community Psychology*, New York: Plenum Press, 2000. p.52.

⁹¹ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

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Religious organisations can also come in to facilitate the actual processes of conflict management and also foster awareness creation efforts. In Kenya, where these conflicts are clan-based or community based, courts offer little help in terms of achieving lasting peace due to the settlement nature of the outcome.⁹² Courts are thus under an obligation to take lead role in promoting the use of traditional and community justice systems in environmental conflict management. They should offer support and uphold the relevant provisions where they are faced with such situations. Their split role in litigation as well as ADR and other alternative justice systems is recognised under the Environment and Land Court Act 2011⁹³.

The need to involve everyone is affirmed in the Constitution which provides that every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁹⁴

5.3 Enhanced Legal and Institutional Framework on Environmental Conflicts Management

Natural resources and environmental conflicts negatively affect Kenyans owing to the many weaknesses of the present legal and institutional framework. Despite the fact that the existing legal and institutional framework in the country is meant to deal with natural resource conflicts, it has not offered much in stemming the natural resource conflicts, due to inadequacies within the structure. It is clear that most of the sectoral laws mainly provide for conflict management through the national court system and specifically litigation. However, the recognition of ADR and TDR mechanisms in the Constitution heralds a new dawn on the use of these mechanisms and other alternative justice systems in managing environmental conflicts. ADR and TDR mechanisms allow public participation in enhancing access to justice as they bring in an element of efficiency, effectiveness, flexibility, cost-effectiveness, autonomy, speed and voluntariness in conflict management

⁹² See generally Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

⁹³ Sec. 20, Environment and Land Court Act, No. 19 of 2011, Laws of Kenya.

⁹⁴ Constitution of Kenya 2010, Art. 69(2).

6. Conclusion

The political and strategic impact of surging populations, spreading disease, deforestation and soil erosion, water depletion, air pollution, and possibly, rising sea levels - developments that will prompt mass migration and, in turn, incite group conflicts – are considered to be some of the most serious problems of the twenty-first century.⁹⁵ It is thus important to deal with environmental conflicts if peace and stability is to be maintained. Natural resource based conflicts are unique, and left to escalate, suffering and death may be the undesirable result. The ADR conflict management mechanisms are considered suitable for use in resolution of natural resource based conflicts. However, litigation also has its own advantages. As such, there is need for synergy in application of coercive and non-coercive mechanisms, deepening on the nature of dispute.

This paper has discussed the nature and methods of conflict management in environmental and natural resources governance and suggested some of the approaches that may be employed to enhance the same for sustainable development.

⁹⁵ Kaplan, R., “The Coming Anarchy,” *Atlantic Monthly*, 1994.

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