

# **FREE, PRIOR AND INFORMED CONSENT IN THE OIL AND GAS SECTOR IN KENYA: AN ANALYSIS IN LIGHT OF HABERMAS THEORY OF COMMUNICATIVE ACTION AND ETHICS**

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## **ABSTRACT**

*This article examines the principle of Free, Prior and Informed Consent in the context of oil and gas sector in Kenya as an emerging principle of international law useful for sustainable utilization of natural resources within the marginalized and indigenous communities' territories. This examination is timely given that Kenya is an emerging oil and gas producer and has no experience with the developments within the extractives industries. There are fears that oil development will lead to both physical and economic displacement as a result of restrictions on land access and/or land use. Pastoralist communities in particular are concerned about how significant change in land access would disrupt their traditional pastoralist way of life, and how it could result in increased conflict between communities left to compete for limited land.*

*A final significant concern relates to the fact of not understanding the current regulatory framework and legislative policies on tenure and acquisition of community land. It is further noted that, in the absence of effective information-sharing about community land rights, community members feel that oil companies did not properly obtain their rights to the land, and in combination with a general lack of trust in government's capability to manage resources responsibly, there is the perception that oil exploration is land-grabbing without consultation or compensation.*

*Indeed, opinion is divided between those who think the oil boom will provide Turkana in particular with an economic lifeline and those who fear production will exacerbate existing conflicts driven by competition over scarce pasture and water resources. It has been witnessed over the recent past, communities saying that their animals have no access to pasture as a result of their grazing field having been taken or fenced off by the oil companies.*

*Therefore, the significance of development of a framework to deal with the new oil finds in Kenya cannot be played down, if it is to meet the interests of the local and indigenous communities.*

*The Principle of Free, Prior and Informed Consent (FPIC) arose as a result of concerns especially from the indigenous communities, with regard to the threats to their rights, territories and livelihoods posed by the extractive industries' quest for natural resources. A widespread lack of respect of their cultures and rights has resulted in many communities being decimated, dispossessed of their lands and forcibly relocated. Thus, the fundamental aim of establishing the principle was to reverse the tendency and make the recognition of their rights and having the principle as a precondition for any activity that affects their ancestral lands, territories and natural resources, as well as equitable exploitation of resources.*

*In the last two or three years, development experts have recognized that FPIC is not only important for indigenous peoples but it is also good practice to undertake with local communities, as involving them in the decision making of any proposed development activity increases their sense of ownership and engagement and, moreover, helps guarantee their right to development as a basic human rights principle.*

*Indeed, the principle of FPIC shows a huge connection with Habermas' philosophy on communication and deliberation. Habermas theory has been chosen in this article because it is an inspiration to deliberative democratic decision-making which is ideal for stakeholders' participation and consultation processes. Communicative action is the means through which rational claims are made and debated, and the means by which agreement is possible. This is important in the context of indigenous communities in Kenya especially in areas where oil and gas explorations are taking place.*

## 1.1 INTRODUCTION, CONTEXT AND BACKGROUND

This article examines the principle of Free, Prior and Informed Consent in the context of oil and gas sector in Kenya as an emerging principle of international law useful for sustainable utilization of natural resources within the marginalized and indigenous communities' territories in the light of Habermas theory of communicative action and ethics. The examination and analysis has been prompted by the common protests from the oil and gas bearing communities regarding the way the oil and gas exploration activities are being conducted without engaging them, thus leading to a feeling of dissatisfaction and despair.

Oil was discovered in Kenya in the year 2012.<sup>i</sup> The Lake Turkana Basin has as a result experienced continued exploration activity. The announcement has led to a change in perception of the people of Turkana County.<sup>ii</sup> At both the national and local level, oil exploration has engendered high expectations of new flows of revenue, employment and business opportunities.<sup>iii</sup> For the marginalized northern parts of Kenya, in particular Turkana County, oil exploration is sometimes referred to as a potential 'game changer' that could bring in much-needed revenue for the delivery of basic services. At the same time, oil exploration has generated anxieties among local communities, about increased competition for (grazing) land and water, the distribution of jobs and resources, and the fact that there is a high risk of speculation and corruption.<sup>iv</sup>

These peoples have lived independently from the state, subsisting on arid or semi arid land considered of little value to the majority, their future now seems uncertain amidst both hopes and fears that those better endowed with wealth and opportunity will succeed in 'pulling the rug' from under their feet.<sup>v</sup>

According to International Monetary Fund (IMF),<sup>vi</sup> Kenya will be an oil producer by 2020. This gives the country several years to develop, prepare the policies, the institutions and the practice, which underpin successful natural resource management<sup>vii</sup>. At least in the African context, oil has been seen as a problem not a solution, with the exception perhaps of Ghana, for many, it has become a dirty byword for waste, degradation, mismanagement and even violence: "curse" its depressingly familiar epithet<sup>viii</sup>. The pillars underpinning natural resource management have long been understood, they are the same basic principles of good governance, accountable institutions, effective legislation, broad-based economic development, respect for the environment, international human rights standards and wide participation in policy and decision-making.<sup>ix</sup>

The growing extractive sector in Kenya means that there is need to give due attention to the social and economic dynamics of the sector<sup>x</sup>. For instance, when Kenya discovered oil in Turkana County in March 2012, the Government was faced with emergent issues such as environmental implications, community obligations and rights, a suitable governance framework, and effective utilization of resources generated from the sector.<sup>xi</sup>

Indeed, these discoveries and ongoing explorations have brought a new significance to the country's socio-economic and political discourse.<sup>xii</sup> On the one hand, the discoveries and ongoing explorations bear enormous economic growth potential if approached carefully, on the other hand there exists potential for irreparable negative social and environmental impacts if the exploration and development of the resources are not handled well.<sup>xiii</sup> Being a fairly new industry in Kenya and a highly technical one, the upstream oil and gas industry found the host communities ill prepared to handle the intricacies of the industry, and the communities continue to grapple with issues of effective community participation; Free, Prior and Informed Consent (FPIC); compensation; social and environmental impacts; land rights; economic opportunities.<sup>xiv</sup>

Experience by most countries producing oil, such as Nigeria, reveals that the oil activities have caused destruction of delicate marine ecology, which is the main source of livelihood in the oil-bearing communities, leading to loss of fish catches, the exacerbation of poverty, social conflicts, population displacement, occupational disorientation, and the violation of human rights.<sup>xv</sup>

The discovery of commercially viable oil and gas in Kenya and especially in the Rift Basin, has opened conversation and consciousness on the extractive developments in Kenya. There is a feeling among the local communities that there has been lack of participation and ownership.

As Kenya begins the journey of becoming an oil producing country, civil society organizations and citizens alike have expressed worry at the haste with which the country is developing its frameworks for the sector.<sup>xvi</sup> There is also unease about the low level of public consultations, the potential for vested interests to be rooted in the frameworks, and the potential for oil to divide the people. Concerns have also been raised about the threat that oil poses to the environment, livelihoods of communities and security.

Already there are emerging conflicts between local communities and various extraction companies in areas where extractive industries operations are ongoing.<sup>xvii</sup> According to Standard Media Group Reporter,<sup>xviii</sup> the announcement of discovery of oil in Turkana, was received by

residents, with joy, but the black gold is slowly turning into a curse, and that the locals are now engrossed in a fight with Tullow Oil over land and oil proceeds. The community says Tullow is operating without involving them. This has led to major conflicts, threatening to put the region into oil insurgency.<sup>xix</sup> The community demanded that Tullow Oil streamlines its operations by involving the community directly. The writer notes that the locals feel that they have been sidelined by the oil exploration companies since they started oil exploration in the region, and therefore they have lost hope in oil, that they have lost a chunk of grazing land to oil exploration in the region, yet they have not been compensated, further, the locals claim that oil exploration activities have caused a lot of harm to the environment.<sup>xx</sup>

Almost all of Turkana's 77,000 square kilometers of land has been allocated for prospecting although in practice drilling is only taking place in a few specified areas.<sup>xxi</sup> In early 2016 Tullow had 32 viable wells in South Lokichar, each occupying around 13 acres.<sup>xxii</sup> However, these had already raised some objections from the surrounding communities who were fearful and angry when they found themselves barred without warning from areas of communally owned land.<sup>xxiii</sup> In May, 2013 Turkana communities demonstrated against an investor, burning and destroying property worth Kenya shillings six million, including huge tents and fencing poles, citing displacement and improper acquisition of their land.<sup>xxiv</sup> In terms of the environment, the familiar accounts of the Niger Delta demonstrate the potential risk of the extractive industry through oil spills, gas flaring, toxic wastes and effluent, and in Turkana, environmental impact assessments (EIAs) may be both inadequate and biased, being funded by the investor.<sup>xxv</sup>

There are fears that oil development will lead to both physical and economic displacement as a result of restrictions on land access and/or land use. Pastoralist communities in particular are concerned about how significant change in land access would disrupt their traditional pastoralist way of life, and how it could result in increased conflict between communities left to compete for limited land.<sup>xxvi</sup>

A final significant concern relates to the fact of not understanding the current regulatory framework and legislative policies on tenure and acquisition of community land.<sup>xxvii</sup> The Author further notes that, in the absence of effective information-sharing about community land rights, community members feel that oil companies did not properly obtain their rights to the land, and in combination with a general lack of trust in government's capability to manage resources

responsibly, there is the perception that oil exploration is land-grabbing without consultation or compensation.

Indeed, opinion is divided between those who think the oil boom will provide Turkana in particular with an economic lifeline and those who fear production will exacerbate existing conflicts driven by competition over scarce pasture and water resources.<sup>xxviii</sup> It has been witnessed over the recent past, communities saying that their animals have no access to pasture as a result of their grazing field having been taken or fenced off by the oil companies.

Therefore, their conclusion is that the exploration activities have brought nothing but a curse, that their goats are now dying and both the County and National governments have not come for their rescues.

The locals also lay blame on the oil companies whom they accuse of having failed to fully take into account local dynamics, for example South Lokichar Basin has long been used as a dry-season grazing reserve. Dry-season grazing areas are critical to pastoralist communities, and once they are fenced for oil exploration, the communities are left to access the wet-season grazing areas, which only generate pasture during the rainy season, or have to move to areas often marred with conflict.<sup>xxix</sup> The Paper further warns that, the stage is already set, if pastoralists feel they are losers from the exploration and will only carry the brunt of the aftermath of the project, while oil revenue benefits go to other people, it is a basis for conflict.<sup>xxx</sup>

Already, violence has occurred on numerous occasions. For example, in June, 2017, Tullow Oil Company's attempts to truck oil to the port of Mombasa were suspended after staff were prevented from accessing drilling sites, and after workers from a separate oil company were attacked while upgrading a road leading to oil fields.

Indeed, there are claims by the locals that a head of the oil operations in the region, no one took an interest in informing them of what was happening, or understanding how they used the land and how the operations would affect them in the end.

Where there is low institutional capacity and where weak legal and governance frameworks fail to protect the rights and interests of affected communities, tensions between investors and communities are more likely to escalate.<sup>xxxi</sup> Therefore, the significance of legal and policy

framework and institutional capacity to deal with the new oil finds in Kenya cannot be played down, if it is to meet the interests of the local and indigenous communities.

The Principle of Free, Prior and Informed Consent (FPIC) arose as a result of concerns especially from the indigenous communities, with regard to the threats to their rights, territories and livelihoods posed by the extractive industries' quest for natural resources. A widespread lack of respect of their cultures and rights has resulted in many communities being decimated, dispossessed of their lands and forcibly relocated.<sup>xxxii</sup> Thus, the fundamental aim of establishing the principle was to reverse the tendency and make the recognition of their rights and having the principle as a precondition for any activity that affects their ancestral lands, territories and natural resources, as well as equitable exploitation of resources.

In the last two or three years, development experts have recognized that FPIC is not only important for indigenous peoples but it is also good practice to undertake with local communities, as involving them in the decision making of any proposed development activity increases their sense of ownership and engagement and, moreover, helps guarantee their right to development as a basic human rights principle.<sup>xxxiii</sup>

Modern entrepreneurship and new politics need to develop a culture of democratic dialogue, of full information, transparency in managing affairs and solidarity in all the initiatives proposed to all the inhabitants of their countries.<sup>xxxiv</sup> This is mainly momentous for local and indigenous communities in oil and gas exploration areas like Turkana given their conditions and fears as mentioned above herein.

## **1.2 HABERMAS THEORY OF COMMUNICATIVE ACTION AND ETHICS**

### ***1.2.1 Introduction***

Habermas theory has been chosen in this article because it is an inspiration to deliberative democratic decision-making which is ideal for stakeholders' participation and consultation processes. Communicative action is the means through which rational claims are made and debated, and the means by which agreement is possible.<sup>xxxv</sup> Indeed, the principle of FPIC shows a huge connection with Habermas' philosophy on communication and deliberation. He introduces

the concept “life-world” composed of values, norms, classifications, perceptions, and skills that we all draw upon in our daily life.<sup>xxxvi</sup> Habermas talks about a democratic society constituted by a social order composed of equal citizens, authoring their own rules through an open process of arguing, a process of communicative and deliberative formation of opinion. Therefore, the agreements that occur represent public opinion and the function of the political system is to convert public opinion into binding political decisions. Lastly, decisions must be implemented through state administration and formal laws, whereby public opinion and communicative action become law. Habermas calls it a ‘democratic cycle of power’ because formal law can match market and bureaucracy, the subsystems that threatens to colonize the life-world.

The FPIC framework seeks to encompass the issue of creating and integrating public opinion by providing sufficient time for local decision making between when consent is sought and when consent is given or withheld.

Further, the principles of equality, reciprocity and inclusion, implicit in communication, are institutionalized by the right to FPIC. Habermas defines rights that specify the status of a participant in deliberation,<sup>xxxvii</sup> including rights to equal liberties as a subject of law, rights defining membership in a political community and rights to assert claims.

Rebeca,<sup>xxxviii</sup> opines that Habermas’ notion of the ideal speech situation presumes equality among the discourse participants because all have the same chance to participate, and they are all capable of doing so. Further, that the idea of equality, is based on the notion of individual freedom, because all individuals are free to enjoy legal rights, they are considered equal and must be treated so. Thus, in Habermas’ theory the law plays an important role by protecting the citizens’ rights to participate equally in deliberations. This requires the existence of a legal background of basic rights to political participation.<sup>xxxix</sup> Among the basic rights that guarantee to a person the status of a legal person are the rights to equal opportunities to participate in processes of opinion and will-formation in which citizens exercise their political autonomy and through which they generate legitimate law.<sup>xl</sup>

Political liberty and political autonomy that guarantee the exercise of individual liberties are the fundamental of the democratic principle.<sup>xli</sup> Therefore, when norms are legitimately created



through individuals' interaction and mutual agreement, one can then justify basic rights of due process that provide all persons with equal protection, an equal claim of hearing, equality in the application of the law and thus equal treatment before the law.<sup>xliii</sup> Furthermore, Rebeca, contends that when decision-making power is distributed equally, participants tend to define the process as fair. The notion of fairness is an important concept in evaluating public participation effectiveness because it creates opportunities for all individuals to attend the deliberation forums, to participate by making claims, challenging other claims, and resolving disagreements.<sup>xliiii</sup>

According to Habermas, the law also plays an important role in decision-making because it mediates between the social complexity of real-life and the ideal norms of democracy by allowing a diversity of discourses, or opinions, about norms, policies and public goals.<sup>xliv</sup> Because interaction through communication is expected to manage this complex and plural society, consensus is required to legitimize laws.<sup>xlv</sup> However, Bohman,<sup>xlvi</sup> provides critiques to Habermas' idea of consensus in the sense that his democratic principle sets the standard too high for democratic decisions. In his critique, the Author proposes an alternative principle; that the participation of all citizens in the decision-making process, in such a way that they would have the possibility to influence agreement and revise decisions, would satisfy the democratic process principle. On his part, Thomassen,<sup>xlvii</sup> contends that Habermas' idea of consensus is an impossible ideal, which would represent the end of communication itself, since, if there are no disagreements, communicative is not needed. Further, it is Thomassen's position that Habermas argues for consensus on the process and not necessarily on the results of the decision-making, and therefore dissenting opinions would be possible, as long as there is *a priori* consensus about the rules of the deliberation.

### ***1.2.3 The Relevance of Habermas' Theory to the Principle of FPIC in Oil and Gas Developments***

This article applies Habermas' theory to consultation within the FPIC framework since it provides a space where will formation occurs through the discourses of different stakeholders. The space created would enable the institutionalization of participation by the indigenous communities affected by the oil and gas developments once legitimate rules are created through democratic deliberative processes. Further, Habermas' theory helps highlight indigenous communities'

concerns and fears about oil and gas projects and offers a space where these issues could be debated and solutions made. The theory enhances the debate on consultation by the stakeholders about the impacts of oil and gas projects on indigenous communities because it proposes an improvement to democratic procedures. It points out that effective public participation takes place when all citizens affected by a decision have the possibility of influencing agreement.<sup>xlviii</sup> For this reason, deliberative democracy is a more appropriate theory than liberal theories, because it is able to “produce policy decisions that are more just and more rational than actual existing mechanisms.<sup>xlix</sup> Rebeca,<sup>l</sup> opines that participation enhances decision-making results by including different voices and interests, and by demanding the use of different types of knowledge for an informed debate. The author further contends that public participation, according to Habermas, requires that participants receive education and information to influence decision – making. Likewise, Barton,<sup>li</sup> shows that education and access to information are part of effective public participation because they help to improve participants’ communicative competence, enabling them to influence decision-making.

It is therefore imperative to note that FPIC as a principle or concept correlates with Habermas’ notion of self-determination, or autonomy which enables individuals to participate in the production of legitimate norms.

#### ***1.2.4 The Notion of Fairness and Communicative Competence in FPIC Processes***

Rebeca,<sup>lii</sup> notes that the argument that public deliberation procedures are most likely to produce fair democratic outcomes is a well accepted one. Cook,<sup>liii</sup> contends that fair decisions are the results of fair processes. On his part, Dietz,<sup>liv</sup> opines that fairness suggests that all those having an interest in or affected by a decision should have a say in that decision. Further, the author contends that fairness does not only contemplate opportunities to voice concerns and interests, but also the assurance that people’s concerns will be heard, respected and considered in the decision-making process. It is the Author’s position that fairness refers to the procedures adopted, as well as to the outcomes produced, and that substantive fairness always requires procedural fairness. According to Webler,<sup>lv</sup> Habermas’ concept of fairness, focuses on the process:

*Fairness refers to what people are permitted to do in a deliberative policy-making process. When people are to come together with the intention of reaching understandings and making public decisions in a fair process, four*

*necessary opportunities for action by individual participants must be available. They are to attend (be present); initiate discourse (make statements); participate in the discussion (ask for clarification, challenge, answer, and argue); and participate in the decision making (resolve disagreements and bring about closure).*

But the author is of the view that the application of this concept depends on the legal protection of the participants' political liberty and autonomy to participate freely in the decision-making process, as well as social welfare conditions that enable the exercise of political rights.

On the second concept of Habermas' Communicative Competence, Habermas,<sup>lvi</sup> posits that for communication to take place effectively in public participation, it is also necessary that the actors involved in the process share a mutual understanding of their cultural context and that they feel free to express their subjective claims. As far as the Author is concerned, the notion of communicative competence relates to the personal skills of listening, communicating, self-reflecting and consensus building. It therefore follows that competence is the result of personal development, and social interaction, helping to produce mutual understanding.

However, according to Webler,<sup>lvii</sup> competence must not focus on the participant's ability to communicate, but on the ability of the public participation process to offer the necessary knowledge for participation. It is the author's view that competence refers to the construction of the best possible understandings and agreements given what is reasonably knowable to the participants at the time the discourse takes place. Foster,<sup>lviii</sup> on her part, forms the view that social disparities result in language barriers in public participation, and thus residents of low income communities, most likely do not have knowledge about technical issues, which inhibits their participation in the discussions.

### ***1.2.5 Habermas on Communication and Law***

In his *Structural Transformation of the Public Sphere*, Habermas,<sup>lix</sup> shows how a democratic perspective emerged in the Post-Reformation Era, through such means as the critical discussion of norms in Europe's salons and coffee houses, unfettered by the rules of Court or the prying eyes

and ears of the Church. He explains that democratic institutions have gained both their effectiveness and their legitimacy out of this historical lineage of non-coercive, truth – seeking and solidarity –promoting communication. By the same token, they have become dysfunctional to the extent that forums, channels or opportunities for such critical, truth-seeking communication have shriveled under the influence of strategic forms of power.

As far as Habermas is concerned, communication is the engine of social evolution, the source of valuation and the spur of critical reflection. But, where linguistics or analytic philosophy primarily invest themselves in the grammatical and semantic functioning of sentences as sufficient to understand the heart of language –based communication, Habermas has elaborated upon the speech-acts theories of **J.L. Austin** and **John Searle** to give priority to the relation-forming function of communication, that is ‘action oriented to reaching understanding.’<sup>lx</sup> He opines that the goal of coming to an understanding is to bring about agreement that terminates in the subjective mutuality of reciprocal understanding, shared knowledge, mutual trust and accord with one another. According to Habermas, the concept of communicative action is key to charting and critiquing all that is not worth preserving, and he holds that without it, one cannot sustain a critique of anything.<sup>lxi</sup>

Habermas distinguishes communicative action from “strategic action,” which might certainly employ language , but arises not concerned to establish un-coerced mutual understanding, rather to calculate and achieve the increasing hold or value of forces such as money or administrative power.<sup>lxii</sup> Indeed, Habermas in the 1980’s characterized the struggles between communicative and strategic action as occurring between the “lifeworld” – a phrase borrowed most directly from Austrian Philosopher Alfred Schutz, and the “system.”<sup>lxiii</sup> The lifeworld refers to all that is interactive, representing the domains of family, tradition and culture, the varied processes of learning; thus the everyday background knowledge that holds both smaller and larger scale societies together.<sup>lxiv</sup> The Author contends that, the lifeworld is all that might be assembled internally and pre-theoretically by an individual, or expressed in terms of values and symbols by a community. Further, that the system, by contrast, is only visible from an external point of view. In modern societies the two have come apart, or as Habermas points, following American social theorist Talcott Parsons, been “differentiated”. Thus:

*Modern societies attain a level of system differentiation at which increasingly autonomous organizations are connected with one another via delinguistified media of communication: these steering mechanisms – for example, money- steer a social intercourse that has been largely disconnected from norms and values, above all in those subsystems of purposive –rational economic and administrative action that, on Weber’s diagnosis, have become independent of their moral – political foundations.<sup>lxv</sup>*

By disconnected, Habermas is making reference to the separation of modern steering media from the kinds of control that various pre-modern forms of society held over economic activity, for instance as described in Karl Polanyi’s *The Great Transformation*.<sup>lxvi</sup> A ready example of this might be seen in the way that capitalism entails the interest power of money, which appears to be a natural force, and no longer the traditionally understood vice of usury.<sup>lxvii</sup>

Habermas, has according to Mathew,<sup>lxviii</sup> revised Weber’s diagnosis of the potential future looming over Europe and other areas of the globe, envisioning the spread of a destructive process that he termed “the colonization of the lifeworld.”

The lifeworld is assimilated to juridified, formally organized domains of action and cut off from the influx of an intact cultural tradition.<sup>lxix</sup> In the deformations of every day practice, symptoms of rigidification combine with symptoms of desolation.<sup>lxx</sup> The former, the one-sided rationalization of everyday communication, goes back to the growing autonomy of the media-steered subsystems, which not only get objectified into a norm-free reality beyond the horizon of the lifeworld , but whose imperatives also penetrate into the core domains of the lifeworld.<sup>lxxi</sup> The latter, the dying out of vital traditions, goes back to a differentiation of science, morality and art, which means not only an increasing autonomy of sectors dealt with by experts, but also a splitting off from traditions; having lost their credibility, these traditions continue along on the basis of everyday hermeneutics as a kind of second nature that has lost its force.<sup>lxxii</sup>

The cornerstone of Habermas’s analysis of communicative action is what he has referred to as the “ideal speech situation.”<sup>lxxiii</sup> Critics have fastened on to this term, and Habermas has offered several revisions over the years to what he maintains the concept indicates about the pragmatic

nature of communication. Much of this back and forth has involved the implications of Habermas's use of such terms such as "ideal," "transcendental" and "a priori" to characterize the ideal speech situation. He seems more recently to have let the term go, or at least to have softened its expression in response to its jarring impact on his critics, though he still refers to an effective but "weak" transcendence which means necessary to its conception.<sup>lxxiv</sup> Nevertheless, in spite of these revisions to its status, the concept itself does remain the driving force behind Habermas' "discourse theory" of law and democracy.

Indeed, Habermas holds the view that any act of communication oriented towards expressing a speaker's perspective on some state of affairs, are certainly necessary, though not necessarily explicit, pragmatic assumptions about the ability to communicate in the first place. Principal among these assumptions is simply our belief that in our own use of language (as competent natural languages speakers) to make claims about the world, we are capable of articulating the truth related to some state of affairs. When challenged about our ability to do so, or our success in doing so, we see ourselves as also capable of providing reasons justifying our original claim. This challenge and response leading to some form of argumentation centered on making a theme of discussion out of our challenged claim, is what Habermas means by "discourse."<sup>lxxv</sup> That is, "discourse" is the communicative activity arising out of a challenge to one's statements, in so far as they are grounded in what he refers to as basic "validity claims". These validity claims can appeal to either empirical (or propositional) truth, normative rightness, or personal sincerity. The third form of validity claim is one that Habermas has been most flexible in articulating. It ranges in focus within his work from sincerity, "truthfulness" or "personal authenticity,"<sup>lxxvi</sup> such as might be associated with statements of emotional or subjective disposition, to statements about aesthetic perceptions, or the "well-formedness of symbolic expressions," and therefore reflective of cultural practices as well as personal beliefs.<sup>lxxvii</sup>

According to Habermas,<sup>lxxviii</sup> anyone who seriously engages in argumentation must presuppose that the context of discussion guarantees in principle freedom of access, equal rights to participate, truthfulness on the part of participants, absence of coercion in adopting positions, and if the participants genuinely want to convince one another, they must make the pragmatic assumption that they allow their "yes" and "no" responses to be influenced solely by the force of their argument.

The attendant assumption to discourse: free access to information, equal ability to speak, acceptance of the integrity of other speakers( in their own intention to speak truthfully), the “absence of coercion,” and the accompanying willingness to engage in “yes” or “no” dialogue, are all efforts to flesh out what Habermas has consistently called the “discourse principle”. The discourse Principle, or “D” summarizes the breadth of his analysis of communicative pragmatics. Its most common formulation is “Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses,”<sup>lxxxix</sup> or with the substitution of “practical discourses” for rational discourses. In his earlier work, Habermas regarded this principle as sufficient to account for moral obligation as well, but eventually developed from it a separate principle, “U” to account for the universal perspective he believes morality requires. This states that: “All affected can accept the consequences and the side effects (a norm’s) general observance can be anticipated to have for the satisfaction of everyone’s interests.”<sup>lxxx</sup>

Although both principles share the focus on an ideal consensus derived through rational argumentation, they differ in their operation. U operates at “a specific form of argumentation which is internally constituted,” since it influences the thinking of all individuals. D operates at the level of “externally institutionalized” argumentation, which is to say that it “steers the production of the legal medium itself”. D is therefore identical to the principle of democracy, grounded in specific action-contexts, and focused on the production of legal norms.<sup>lxxxi</sup>

Given the amount of criticism Habermas has sustained for developing these assumptions, what is remarkable, for this study’s purposes in addressing the adequacy of the Kenya’s legal and policy framework governing oil and gas in the implementation of FPIC of indigenous communities, is the provisional “and so on” with which his detailing of necessary discourse assumptions ends. It is clear from his elaboration of the discourse principle in various works that the specific content of these attendant assumptions is of lesser interest to him than the direction in which they point. For instance, he acknowledges Robert Alexy’s “suggested” articulation of what these necessary assumptions might be. He lays these out as: 1) everyone capable of speaking and acting can participate in discourse, 2) everyone can question any assertion, introduce any assertion, or express their needs and desires, 3) no one can be coerced into violating 1) or 2).<sup>lxxxii</sup>

Much of the criticism targeting Habermas's account of the ideal speech situation, as Habermas has repeatedly noted, seems to mistake its basic purpose within his social theory.<sup>lxxxiii</sup> Further, that many critics, for instance, have objected that it is simply too idealistic. Empirically minded researchers have sought to show that as a model of communicative action, it does not describe much about the behavior of people actually engaged in communication, and seems to require people to function as communicative heroes.<sup>lxxxiv</sup> Some have found its generality to be vacuous. Others have assailed it from post-modern, post-structuralist or anti-foundationalist perspectives. Some of those within the field of deliberative democracy who have been most influenced by Habermas's larger project, have also argued that his account fails to capture how argument may actually function as a mechanism for democratic practice. Others have similarly argued that the ideal speech situation fails because Habermas's basic assumption of a social theoretical distinction between communicative and strategic action, as highlighted above. For some, committed to Kantian or platonic versions of transcendental philosophy, it seems a poor imitation of more classical approaches.

Yet, given its status as an ideal, most of these dismissals of it seem little more than category mistakes, in effect holding it to standards alien to the purpose or properties of ideals as such. Habermas himself has emphasized that it is a regulative and not a constitutive ideal.<sup>lxxxv</sup> Its purpose is to expose the "underside of communicative social relations – an underside that, even to the participants themselves, remains largely hidden in the shadows of the idealizing presuppositions of communicative action."<sup>lxxxvi</sup> He acknowledges that the suspicions of his critics may stem from his terminology, which "tempts one to improperly hypostatize the system of validity claims on which speech is based. Instead, Habermas maintains that while the necessary assumptions of the ideal speech situation enable those communicating about something within the world to "go beyond local justifications and to transcend the provinciality of their spatiotemporal contexts," this does not transform such would-be truthful communicative practitioners: "they are not themselves transported into the beyond of an ideal realm of noumenal beings."<sup>lxxxvii</sup> They are thoroughly situated in particular historical, cultural, social contexts, though they "are not simply at the mercy of their lifeworld."<sup>lxxxviii</sup> What they gain, even if only intuitively, is the ability to suspect those communicative efforts that appear to fall short of the standard made explicit in the discourse principle. They also gain the presumption that their partners in communication can be



expected to share their assumptions that communication oriented towards reaching an understanding is also oriented towards the truth.

Habermas elaborates on the real world use of D:

*Whenever we want to convince one another of something, we always already intuitively rely on a practice in which we presume that we sufficiently approximate the ideal conditions of a speech situation specially immunized against repression and inequality. In this speech situation, persons for and against a problematic validity claim thematize the claim and, relieved of the pressures of action and experience, adopt a hypothetical attitude in order to test with reasons, and reasons alone, whether the proponent's claim stands up. The essential intuition we connect with this practice of argumentation is characterized by the intention of winning the assent of a universal audience to a problematic proposition in a non-coercive but regulated contest for the better arguments based on the best information and reasons. It is easy to see why the discourse principle requires this kind of practice for the justifications of norms and value decisions: whether norms and values could find the rationally motivated assent of all those affected can be judged only from the intersubjectively enlarged perspective of the first-person plural. This perspective integrates the perspectives of each participant's worldview and self-understanding in a manner that is neither coercive nor distorting. The practice of argumentation recommends itself for such a universalized ideal role taking practiced in common.<sup>lxxxix</sup>*

Discourse theory seeks the “institutionalization of the corresponding procedures and conditions of communication,” as well as to maintain “the interplay of institutionalized deliberative processes with informally developed public opinions.”<sup>xc</sup>

For Habermas, the truth-invoking argumentative function of the discourse principle serves as more than just an add-on to the philosophy of language, which he sees having overlooked the social-solidarity function of communication in its concentration on the semantics of assertions. The discourse principle also provides him with the core of an explanation for social interaction, and

for his analysis of law and democracy in *Between Facts and Norms: Contributions to a Discourse Theory of Law and democracy* (1996).

### **1.2.6 Concluding Remarks**

The scope of consent itself is dependent upon a number of factors, and, is dependent upon the impact of the proposed decision and the nature of the affected rights it is concerned with. FPIC may include the option of saying no to a certain project. As has been argued here, FPIC is always important in overarching effective participation processes and it is always the goal of such processes. Therefore, the more fundamental question is not if an FPIC right may block a certain decision, but how to structure the process so that it becomes a fair dialogue based on continuity and recognition of relationships between indigenous peoples and other actors.

FPIC is embedded in the framework of self-determination and the right to effective participation. It is indicated in contemporary international law and studies that effective participation and FPIC are important in realizing the implementation of the set standards. An intercultural dialogue is needed in which indigenous peoples enjoy a large degree of discursive control. When they are in a non-dominated position co-responsible decision-making will be possible. Fair representation and standards that guarantee successful communicative transactions are essential in any FPIC process. This article has surveyed the central principles that need to be taken into account in order to successfully conduct FPIC processes in the framework of Habermas Theory of Communicative Action and Ethics which would be effective in realizing marginalized and indigenous communities' right in decision making in the context of extractives industries' developments in their lands and or territories. This, the article proposes will not only minimize violent conflicts and tensions but will also ensure that the indigenous communities' right to self-determination is recognized and respected. Therefore, Kenya needs to take advantage of FPIC being a new ideal that is emerging at international level and very significant in exploration and exploitation of natural resources within the framework of dialogue.

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