

## **Constitutionality: Constitutionality: Emic Perceptions of Bottom-up Institution Building Processes**

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This paper presents a new approach for analysing bottom-up institution building processes. There is an important gap in the literature on institution building with regard to local perceptions of common pool resource management (Ostrom pers. com in Zurich 2011). Ostrom's work highlights the way successful institutions work and which aspects are important for their success (Ostrom 1990, 2005; Poteete, Jansen and Ostrom 2010). Others such as Ensminger have highlighted the role that the bargaining power of actors and ideology play in the institution-building process (see Ensminger 1992, 1998; Haller ed 2010). However, there is very little research on how local actors themselves view (i.e. emically) an institution-building process in retrospective. Based on four case studies (fisheries in Zambia; pasture and forestry in Mali; forestry in the lowlands and highlands of Bolivia; agricultural land and forestry in Indonesia) we propose a new analytical approach that stems from real cases of recent self-driven institution building, in which emic views become apparent. We label such self-driven processes as constitutionality, which we see as a conscious process of institution building from below which does not suffer from the drawbacks of top-down imposed processes of democratisation, decentralisation and participation, which are often subject to processes of elite capture. Contesting the view that subjects internalise governmentally imposed frames of viewing the world by 'participating' in institutions, as in Agrawal's (2005) model of environmentality for resource governance, inspired by a Foucauldian notion of governmentality, our perspective emphasises instead how local actors construct a sense of ownership in the institution-building process by strategically pursuing local interests through that process, using theory of practice, actor-oriented approaches and a variant of the New Institutionalism approach. This approach incorporates power and heterogeneous group interest, and the theory of social learning.

*Keywords: fisheries, forestry, institutions, participation, decentralisation, customary law, formal law, New Institutionalism*

### **INTRODUCTION**

This paper formulates a new theoretical perspective called constitutionality. Constitutionality refers to an institution-building process in cases that have included successful bottom-up resource management initiatives, analysed in terms of local views regarding their will for participation and the development of a sense of ownership in the institution building process. The approach seeks to move beyond frameworks emphasizing participation in schemes introduced from outside and subjectivity imposed from above to a focus upon local agency and creativity in the construction of novel institutions to deal with environmental issues. It thus moves beyond the view that local peoples in contexts of resource management tend to be restricted in their actions to participating in implementing (and only sometimes forming) collective choice and operational rules to an analytical viewpoint stressing their own active formulation and implementation of constitutional rules for resource governance. Based on case studies from, Zambia, Mali, Bolivia and Indonesia, we are able to show the process of constitutionality, which indicates that it has the potential for long term sustainable use if: a) local actors are empowered to engage in a institution-building process based on their own

perspectives, which can be analysed as emic views; b) they are not restricted, but are recognized by the state due to the existence of laws, regulations and policies that accommodate local action; and c) heterogeneous actors in these contexts were able to discuss first within interest groups what kind of institutions they feel to be of importance before negotiating overall regulations. NGOs and state actors could provide a relatively neutral platform for local debates and thereby reduce transaction costs for organization as well as provided the possibility for social learning processes.

#### *Pitfalls of the participatory approach to common pool resource management*

Although the call for participatory approaches and decentralisation in sustainable development and governance has become paramount in the last fifteen years, there is a growing critique of such approaches both in regard to their basic concepts (Cook and Kothari 2001; Ribot 2002, 1999; Larson and Ribot 2004; Haller 2007), as well as in regard to their strategic applications in concrete contexts, such as in co-management schemes for protected areas (Acciaioli 2008) and in Community Based Natural Resource Management (CBNRM) approaches, especially in Africa (Blaikie 2006; Haller et al. 2008; Haller and Galvin 2008; Brockington, Duffy and Igoe 2008). These critiques argue that the participatory approach is often used as a “Trojan Horse” (Blaikie 2006) by powerful actors, sometimes external but often local, leading to ‘elite capture’ (Iverson et al. 2006, see also Carlsson and Berkes 2005). If we take Ostrom’s differentiation between constitutional, collective and operational choice (Dolšak and Ostrom 2003, Ostrom 2005) we are dealing here with how local people became involved in constitutional choice through collective choice. However, participation and also decentralisation have become buzz-words for strategic actions of powerful users on different scales of governance, many of which fail to incorporate real local involvement in constituting institutions of resource governance. Borrini-Feyerabend et al. (2004) argue that “sharing power” is the key to a sounder participatory management of natural resources. However, so far few studies have actually focused on how local people perceive such processes and how those perceptions inflect local constitutional initiatives seeking to transcend the limited bases of participation they have been offered.

One of the key issues leading to the new approach stemmed from results of the authors in previous research indicating that there are extreme limitations with regard to approaches to participation. Data from three research projects – African Floodplain Wetlands Project (Haller ed 2010), People, Protected Areas and Global Change as a sub-project of the NCCR North-South (see Galvin and Haller (eds) 2008), and the CROSCOG Project (Cross Sectoral Commons Management in Southern Africa, with a floodplain module (Malawi, Zambia and Botswana) (see Hara et al 2009; Haller and Chabwela 2009) showed five major aspects. First, there is a divergence of what government officials and development/conservation planners claim as the „local“ perception. Second, economic cost-benefit analysis and political loss-gain analysis showed no significant gains in these programmes have in the eyes of local actors. Third, development outputs have often been small or disappointing because local actors did not perceive any significant devolution of power providing a basis for participation, which, fourth, has been evaluated as inadequate because of four factors: a) Designs were imposed from outside the community and they had not say in its development. b) Local power relations were not considered, and no measures were taken to create arenas for all stakeholders. c) As local colonial and post-colonial power relations remain unbalanced and the danger of elite capture emerged, trust eroded and stiff opposition to projects by interest groups was the result, undermining the process by these groups. d) Where the relationship of nesting in higher level state organisational structures remained unclear due to decentralisation regulations or if state administrators were regarded merely as predators by local actors, major negative effects on local motivations to engage in new institutions ensued, eroding any hopes for the future.

These research results have revealed the importance of treating local perceptions and attitudes. Arun Agrawal (2005) provides one attempt to consider these, delivering a counter-narrative to this view of the participatory approach with his framework of ‘environmentality’, derived from Foucault’s conceptualization of governmentality (Burchell et al. 1991). He uses this term to examine how a state-driven discourse regarding the protection of the environment in India has created new environmental subjects who have come to embody an attitude of care toward the environment. Agrawal thus derives local environmentalist attitudes from a top-down process of the imposition of values. Specifically, he attempts to demonstrate that members of village forest councils in India have incorporated governmental notions of the protection of forests, and that participation in such councils has led to the internalization of environmentalist attitudes by local people. Through environmentality they become subjects of a conservation ideology defined by the government. However, Acciaoli (2008) presents a major critique of this approach, using the case of the Indigenous To Lindu living in the Lore Lindu National Park in Indonesia to argue that it does not sufficiently consider the strategic actions of individuals and interest groups on different scales. Invoking Bourdieu’s (1977) notion of second-order strategies, rationalisations of actions as in accord with social rules when they are motivated by other reasons, he argues that local indigenous actors use the idiom of conservation discourse to pursue their own purposes of controlling the migration and resource uses of settlers, masking these interests behind the rationale of simply following the Indonesian state’s (and international) guidelines of co-management conservation. Practice theory approach reveals the necessity to examine ethnographically the agency of local actors acting from below in crafting and pursuing initiatives in contexts of conservation rather than assuming the construction of environmental subjects from above.

The focus on the processes of constitutionality in this essay proceeds from just such a theoretical perspective rooted in the New Institutionalism (Ostrom 1990, Ensminger 1992, Haller ed. 2010) as a theoretical approach. However, examining the strategic dimensions of how grassroots participation in the institution-building has actually been accomplished, how actors have been negotiating with each other, and how the process of such negotiations has led to institution building, requires the complementary use looking at power issues and production of legitimacy (Ensminger 1992, Haller 2010) and of a practice approach (Bourdieu 1977; Ortner 2006). These approaches provide analytical frameworks for analyzing the dispositions, interests and strategies of various stakeholders involved in the process of constitutionality, as well as integrating such foci with a concern for the larger structural framework of power in which local-level negotiations take place. The constitutionality framework, emphasizing bottom-up processes and strategic action, thus incorporates local actors’ agency into the processes of negotiating and constituting environmentalist attitudes, actions, and outcomes in a way that environmentality as a theory has inadequately achieved. This approach also considers asymmetries in power relations, across multiple levels of interaction – local, regional, national, and global – in its handling of the effects of ideologies and discourses, as well as the contextualization of narratives (histories) of local actors.

As recognised by both neo-institutionalism and practice theory, the state is not a monolithic entity; rather, state departments and agents engage with local actors in various ways in the process of negotiating resource governance arrangements. Studying the process of constitutionality also can be enriched by invoking some of the conceptual tools of social capital and practice theory (Bourdieu (1977), where it is seen as one of the resources to build trust between actors. These last considerations lead to another issue: How are the local levels directly and indirectly – on the level of bargaining power and ideology – linked to the “outside” legal and constitutional framework of legal pluralism enabling forum shopping (see Benda-Beckmann 1981) and linking cases to the formal and informal ways of nesting within legal-constitutional and political-economic contexts ranging across district, provincial, national and international/global levels.

## METHODS

These aspects will now be looked at in the four example from which partially the idea of constitutionality derived: In all for cases qualitative methods with some quantitative tools (household questionnaires) have been used in the sense of a mixed method approach. This included participant observation of one year or more, open and structured interviews, expert interviews as well as oral history, biographies and focus group discussions. In addition literature and archive research was done. The different cases researched cases Studies. However the case study were not done in a coherent research framework but taken from previous research of the three authors and colleagues in order to illustrate the new approach of constitutionality.

## RESULTS

In this section we present the four case studies starting with Zambia, Mali, Indonesia and Bolivia

### *Case study Zambia: Crafting local by-law for the fisheries in the Kafue Flats floodplain*

One context demonstrating the relevance of such processes is the genesis of conflicts arising over the overuse of fisheries in the Kafue Flats in Zambia due to erosion of local institutions *and* the weakness of state institutions, leading to a *de facto* open-access constellation from which external fishermen and fish traders profit (Haller and Merten 2008, 2010). The process of the erosion of local institutions to manage the fisheries emerged from political, economic and major institutional changes in the Kafue Flats in Zambia. This floodplain is one of the richest resource areas adjacent to mid-sized and larger cities, including the capital Lusaka. It is a seasonally inundated floodplain that covers 6'500 km<sup>2</sup> in an otherwise semi-arid area and harbours a rich variety of fish (tilapia bream, barbal and others), as well as antelopes and other game species. A major resource that attracted the Ila to immigrate her and join the indigenous Batwa fishermen and hunters were the rich grazing grounds that are usually left after the area is flooded on about 5'000 km<sup>2</sup> during and after the rainy season. Although the Ila are considered to be agro-pastoralists on lands that have been very rich during colonial times, fishing has been one of the major sources for protein (see Haller and Merten 2008, 2010; Haller 2012 forthcoming). Interestingly, past regulations on when, where and how to fish were well adapted to seasonal cycles of floods. The Ila big men were the political elite, attracting followers and giving out access to common pool resources managed as common property, including land, pasture and hunting rights. Although there was competition between these big men, cooperation occurred, based on reciprocal access arrangements to resources. These leaders were perceived as the managers of the local resources, which they had received from ancestral spirits to manage it for local followers and they had spiritual masters (*utamba*) who were organizing monitoring and sanctioning resource misuse and governing access to fisheries as a common pool resource managed in a common property system. The institutional arrangements were also adapted do the flooding pattern (see also Haller and Merten 2012). During high floods fisheries were open access, but when the water retreated, the remaining small ponds or lagoons became a regulated common property area. Collective fishing in ponds was organized in a coordinated pattern following invitations and the control by the *utamba*. This master was calling the local people of an area for fishing, and people had to wait for him to perform a ritual appeasing the ancestral spirits who would otherwise attack in the form of crocodiles (often hiding in the ponds) when people sought to fish in a manner not

regulated by the local norms of coordinated use. This institution worked well with the latent function of preserving local fishing resources, even though the manifest intention was not to use the fisheries in a sustainable way but to furthering the prestige of local big men, leaders who were organisers of successful collective fishing events.

Major changes of this institutional framework occurred by a twofold process: First, big men were dismantled during colonial times and replaced by a chief loyal to the government for tax enforcement. Although chiefs would distribute land, fish and wildlife became resources owned by the colonial and, after independence, the national government. The colonial powers were interested to provide the cities and the mining towns with protein sources. By this policy people from other areas were attracted to move to the Kafue Flats, putting pressure first on the indigenous Batwa and later on the Ila as well. However, after too intensive commercial fishing activities in the late 1950s the government had to intervene and crafted a series of national laws for the fisheries, sidelining local regulations and only being focused on gear and zoning as well as on licensing and permits. As the state lost its main income after copper prices crashed because Zambia was heavily dependent on copper export, the state lacked financial means to enforce its institutions. As a consequence, the country experienced push and pull factors during which the state governance was severely undermined. While the local institutions for the fishery management were no longer working, the state institutions proved to be very fragile due to less state money. At the same time as governance by the state weakened, more and more seasonal immigrants, trying to find a livelihood in commercial fisheries and fish trade moved to the Kafue Flats. Local headmen and chiefs – often stemming from the appointment of the colonial administration – were helpless to react. Ultimately, these immigrants argued that they were citizens of the state and as fish were a state resource and they paid for licenses, they were entitled to get access to the national fisheries, while the state was not present to monitor and sanction unruly actions, leading to a de facto open access. This situation exemplifies the paradox labelled the “present absence” of the state (see Haller and Merten 2008, 2010). Today, fishing is taking place all year round with very fine meshed nets and not paying attention to breeding grounds of the fish. Several sources challenge the catch data that speaks of a catch of 6’000 MT per year since the 1990s, and our research revealed that catches have been reduced from 11’000 to between 4 to 2’000 MT. According to local informants, several fish species were said to be no longer present for many years. However, the presence of seasonal immigrants and traders are not the only problem in the views of local people. Increasingly, young men among the Ila themselves are violating collective fishing rules and women are trying to engage in the “business” of selling sex for fish in the commercial fishing camps. The fish are then used for their own businesses in selling (Merten and Haller 2006, 2010).

During our research, locals complained that all the fish are taken away and that particularly (but not only) outsiders do not respect any rules. All of them stated that they wanted to do something to change this situation. The researchers were then able to bring together the people in the Hamusonde Chiefdom with officers from the Fishery Department to discuss the issues. A local interest group was formed based on local interests. This group started to develop its own by-law proposal in 2002/2003. In other chiefdoms and villages, in Bweengwa and Mbeza (Hamusonde Chiefdom and Nalubamba Chiefdom), local people started to take an interest in this process as a result of parallel processes of unsustainable resource harvesting by young men outfishing collective ponds.

To address this problem, local Department of Fisheries staff, a research group, and several local representatives, supported by the WorldFish Centre, collaborated between 2004 and 2006 to draft by-laws as a local constitutional counterpart to already existing national fishery laws. Two aspects became obvious: First, there was a need to understand local power relations and factions. This included not only attention to localized groups, but the problem that local chiefs, as representatives of a colonial political past, did not represent all local

stakeholders and thus always faced opposition. We then identified two major interest group categories comprising different interest groups respectively: A) in villages of four Ila Chiefdoms that had separate groups: Groups living at a tributary river to the Kafue River, women fishing with baskets and representatives of chiefs B) in fishing villages and temporary fishing camps in the floodplain, commercial fishermen, fish traders, female fish traders. Second, it was important to provide a platform and framework in which all these groups could separately discuss among themselves the way the fisheries should be managed. Thereby, they got what we would call a sense of ownership of the institution building process, which we label constitutionality, an instantiation of a bottom-up process of institution building. The participating interest groups came up with different by-law proposals after a meeting phase of two and a half years. The interesting aspect was that the by-laws not only incorporated technical and governance aspects of fisheries, but had two other major elements:

First, all agreed on that regulations are needed. Interestingly, regulations covered not only new techniques, such as shed cloth, mosquito nets (used as draw nets), and small meshed nets with beating sticks, but traditional techniques to be controlled. Another aspect in need of regulation that was addressed was the empowerment of the respective river monitor in an area (*utamba*). Second, various issues of behaviour in the camps or in the chiefdoms were addressed: In the by-laws the use of alcohol, abusive language, fighting and quarrelling, and sex business were prohibited, and measures were called for to solve problems of health and sanitation, especially in the fishing camps. The by-law process has initially been a success, insofar as for the first time different local interest groups could engage in crafting a new institutional design for managing the fisheries, involving both traditional institutions and new forms of monitoring and control, including in the fishing camps.

This case study thus demonstrates how this process of constitutionality has enabled the bringing together of heterogeneous actors with different ideas of fisheries management. All the different interest groups were able to discuss separately and together their ideas and interests for new institutions. It shows as well how the local sections of the Department of Fisheries, along with the researchers, provided a platform for constitutionality. However, the long-run results of this process remain unclear: While local interest groups emphasise that external fishermen now tend to avoid the area or change their fishing gear if they do enter it, the by-laws have not yet been ratified on the District level, a circumstance that might erode their eventual effectiveness (Haller and Merten 2008; Chabwela and Haller 2010).

#### *Case study Mali: Local conventions crafting among villages bordering the Tarabé River*

This case study is based on research undertaken by Benjamin (2008), in which he presents three cases of decentralized national resource management in Mali, demonstrating how decentralization schemes have made possible local conventions on the local level for natural resource management, formalizing some pre-colonial common-pool resource management based on local common property institutions. Benjamin acknowledges, however, that such political changes suffer from a *de facto* failure fully to devolve power to the local level and also from local power asymmetries. Therefore, there is a lack of trust in the state's administration, which has, in fact, tried to block decentralization or use it for its own agenda, as well as the fear of elite capture. Success in mitigating such pressures from above can only be achieved by increasing bargaining power from below and from being able to operate in a context with some degree of being able to self-organize (Benjamin 2008:2258-61). For our purposes, we will illustrate here what we mean by constitutionality by using the example of a village called Snoré, which together with nine other villages is located at the western bank of the Tarabé River and is part of a large commune called Dioptodji (encompassing 61 villages). Like other villages and communities presented in this paper, Bambara, Raimbe and Bella people in Snoré have developed institutions to govern flooded pasture areas (Fimbéré), as

well as an adjacent gallery forest which is intensively monitored by a guard and sanctions exercised if rule-breakers are caught. Neighbours are allowed to use the forest for collecting gum and leaves, and reciprocally people from Senoré are allowed to use other pastures in times of need; fishing communities of the village (Riambé and Bella) also fish collectively with fishermen from other villages (Benjamin 2008:2266).

However, challenges to this system of reciprocity have come from inside and outside interests cutting palm trees (*doum*) in the forest close to the river. Although the Bambara ethnic group could be stopped, outsiders were using the appeals to their shared national citizenship and permits obtained from the government to gain open access to the forest. As a result, the villagers stopped the protection of the forest, which attracted an American NGO to call for the Near East Foundation (hereafter NEF) to launch an initiative for a local convention (called Waldé Nema Tarabé) to protect the forest. Despite the catalyzing role of this NGO, reciprocal rights already present in local common property institutions played an important role in this process of constitutionality. NEF proceeded in a similar way as in the Zambian case: They initiated a discussion in several villages on the way the forest should be managed, also with the aim of being consistent with formal legal frameworks. It became obvious from this consultation process that the forest cannot be protected on its own without considering the management of other resources. As only a small number of villages in the commune had *doum* forests, while others did not but were still dependent on *doum* products, institutional arrangements based on an exchange of other resources or access to fisheries and pastures in return for *doum* products had already been installed in pre-colonial times. Therefore, it was clear that forest protection would entail taking account of all the resources in the area – fisheries, gallery forests, wetland pastures, agricultural land. Based on this insight an association was formed to discuss the joint management of the cultural landscape resources and the preparation of a convention for the management of all common-pool resources in this cultural landscape. NEF facilitated the meetings of this association, as well as meetings with local government and technical agents. On the basis of a rather slow process, the NGO helped the ten communities to reach a consensus for the management of the cultural landscape ecosystem and the regulation of conflicts and put this into a written agreement. This agreement was based on the previously developed institutions of reciprocity among the villagers and different ethnic groups. The agreement, overseen by the Forest Service, included the negotiated and locally accepted closing of some of the *doum* forests for five years and the right of the water shaman to close and open the fisheries, as well as indicating important breeding grounds for fish and banning certain seine net techniques. Flooded pastures were zoned for local cattle and managed by village chiefs, who were, however, controlled by public discussions from the mosque. This convention worked because the diverse local stakeholders were all involved in the negotiation process and could give inputs to the convention. Problems were openly debated, including those concerning the legitimacy of rule-making, for example, in regard to the first-comer rule, meaning that rules referring to ownership are based on the discourse of justification of being the first ones in an area. In regarding to the process we label constitutionality Benjamin writes:

Senoré has maintained customary management institutions for Fimbéré (pastures) and Kountou (*doum* forest) for several decades, in spite of complicated relations with its neighbours. Participation and negotiation in preparing the local convention created a new dynamic among diverse stakeholders and created a sense of legitimacy around it. The outcome has been an enforceable agreement [that] established management rules and principles based on customary institutions and on local social realities and yet compatible with state natural resource policy. While environmental and social outcomes may not become apparent for several years, the convention has nonetheless succeeded in fostering dialog among stakeholders at different levels

and providing a mechanism for managing natural resource-based conflict (Benjamin 2008:2270).

There are several aspects that are of relevance to the notion of constitutionality in this case: The process of negotiating this convention has succeeded in part due to the presence of a mediating body, the NGO the Near East Foundation, which facilitated bringing everybody to the table. However, also crucial to the process was the way in which a larger group of villages, of which Senoré was part, joined forces and increased their bargaining power vis-a-vis the state authorities, which were then forced to participate and listen to local voices. It is also clear that the existence of pre-existing institutional designs based upon reciprocity were helpful in this process of overcoming a complex combination of problems centring upon conflicts regarding outside input and local response. In addition, it seems that despite the hierarchical nature of village societies in Mali, the accountability and transparent nature of the process helped in the process of institution building and creating a sense of ownership of this process. However, it will be seen in future if and how the convention will remain as the basis for further discussions and how the further interaction with more powerful groups and with the state will proceed. In addition, the case study is silent with regard to gender issues and socio-political differences within the villages.

*Case study Indonesia (Sulawesi): Reconstituting fisheries by adat institutions at Lake Lindu*

This case deals with fisheries and other resources in the upland Lindu plain is located about 62 km southeast of Palu, the provincial capital of Central Sulawesi. In the pre-colonial and colonial eras Lindu was relatively isolated, accessible only by foot paths; it formed a single domain ruled by a council of customary (*adat*) functionaries drawn from the local nobles (*maradika*). The ancestors of those people who now identify as Indigenous To Lindu had probably first settled this highland plain by the seventeenth century (Kaudern 1925: 8). Dutch colonial penetration of the western highlands of Central Sulawesi at the beginning of the twentieth century did not initially change Lindu relations with domains outside the plain, but by the 1920s the Dutch, in order to foster wet rice production in the highland valley, had effectively resettled the To Lindu from numerous smaller settlements in the hills surrounding the plain to three villages on the lake's shore. Despite its relative isolation, Lindu had been politically and socially embedded in the larger region of the Palu Valley and the surrounding mountains and it was also economically tied to the region by the provisioning of fish from Lake Lindu for subsistence reasons.

The first migrants to the Lindu plain were internally displaced persons of Bugis and Arab descent fleeing the demands of both the Muslim guerrillas and the national army, perceived as dominated by Javanese (Harvey 1974). Besides this push factor there was the undoubted pull factor of the resources of Lake Lindu, the surrounding plain with its potential for wet-rice cultivation, and the resource rich forests on its periphery in which gardens for cash crops could be opened and fishing could be done for the market in the Palu Valley and neighbouring upland domains (Acciaioli 1999, 2000).

While many of these Bugis engaged in land transactions with To Lindu, acquiring land for wet-rice fields on the basis of what was labelled 'compensation of loss' (*ganti-rugi*), fishing in the lake was the predominant mode of livelihood for many of the Bugis migrants, especially in the early years after arriving. This livelihood choice differentiated them from the indigenous To Lindu, who remained wet-rice farmers, fishing largely for domestic consumption. The Bugis migrants proved to be the primary market oriented beneficiaries, since the Lindu people, not possessing the requisite technology for harvesting, had not been able to take advantage of tilapia fish that had been seeded in the lake. Therefore the two groups were separated and with the imposition of the 1979 national law on village government the Bugis tended to heed only their own 'shore' hamlet headman. Even more

importantly, the Bugis did not consider themselves as bound by Lindu custom (*adat*). When faced with such problems as fish poaching, they resorted to their own notions of community justice, but did not recognize Adat law by the To Lindu. This developed in a way of intensive fishing in the are with gill nets of small size was introduced by the Bugis. In the market it was the number of fish that was of importance as the price for fish was fixed, leading to an increased off-take of even immature fish. In fact, Bugis fishermen were harvesting such immature fish that they had not had a chance to reproduce. Alarmed by the size (and sometime rotten state) of the tilapia being marketed in Palu, the Fisheries Department made razzias with little long-term effects but that the fisheries declined. This situation had been made possible by the erosion under the New Order of *adat* authority and institutions that had earlier regulated access to resources on the Lindu plain as a commons, now leading to a de facto open access system. While the To Lindu were resentful of this situation, the *adat* institutions of the Lindu people and its leaders were powerless to exercise sanctions against such practices.

A number of developments that began to take effect in the 1990s set the scene for countering this situation. The area around the Lindu plain was gazette as the Lore Lindu National Park in 1993, after eleven years of languishing in candidate park status. By the end of that decade, the acknowledgement that unilaterally imposed park regulations were not successfully preventing resource harvesting within the park, the Central Sulawesi Integrated Area Development and Conservation Program (CSIADCP) began brokering Community Conservation Agreements with communities in and around the Lore Lindu National Park (Taman Nasional Lore Lindu or TNLL), followed by a number of NGOs, including the Canadian-based aid agency CARE, the locally based Indigenous rights NGO Yayasan Tanah Merdeka (Foundation for Free Land), and, most importantly, The Nature Conservancy, which had entered into an agreement with the Lore Lindu Park Authority to co-manage the park. One of the aspects shared across all these agreements was the recognition of the authority of local *adat* councils to adjudicate transgression of park regulations, effectively regarding these councils as the primary basis of *adat* as a community-based resource management system and *adat* was reintegrated into village governance.

This had consequences on the fisherers after these were restocked by the government: The Adat Council of the Lindu Plain, as well as those of the three To Lindu-dominated villages, took the initiative to re-assume the authority to declare the *ombo* institution, a specified period of restriction on resource harvesting (in this case, fishing). An institution whose manifest function in the past was to display and reinforce the prerogatives of indigenous high rank was invoked as an expression of indigenous 'environmental wisdom', a local resource-management stipulation to conserve threatened resources. This can be labelled refunctionalisation that involves a foregrounding of what undoubtedly had been latent (ecological) functions of *adat* stipulations related to control of fisheries and other resources whose previous manifest functions could be interpreted as representing and preserving the authority of local elites. This discursive refunctionalisation has been a major factor in the successes achieved by the To Lindu, in cooperation with their NGO allies such as YTM, in gaining recognition as an 'Indigenous people'. Such recognition has fostered reassertion of what To Lindu view as their traditional rights, based on ancestral connection to their land and their ecological wisdom in preserving its resources (Li 2000: 164).

As the *ombo* institution stemmed from discussion on how to manage fisheries again in the lake, the Bugis later on got as well interested in the institution. They agreed to this arrangement, recognizing its benefits as a result of having suffered as well the results of the earlier depletion of tilapia in the lake. They feel that the institution now also serves their interest and they are also incorporated in the new regulations because it is not just addressed to free riders among them but as well to the To Lindu people themselves as cases of transgression by To Lindu men and their finding showed. Acknowledgment indigenous *adat*

authority by immigrated people may be seen as a process of constitutionality by the re-institutionalisation of local control of resources within the Lindu plain.

*Case study Bolivia: Development and formalisation of common forestry management in the Andes (Ayopaya)*

This case deals with a highland context in Bolivia (ranging from 1'400 to 3'400 m) called Ayopaya, where 98% belong to the Quechua ethnic group. They are organized into 150 communities sharing land and natural resources based on a collective property rights regime resulting from the land reform of 1953. The land reform of 1953 abolished an essentially feudal structure from colonial times. The state was redistributing land of the vast haciendas to indigenous people by granting collective land rights if they were organizing themselves into rural syndicate, called *sindicatos*, self-organizing entities that started to regulate land and resources use, political and socio-cultural life, based on the visions and principles they developed since living under the feudal system (Bottazzi and Rist, 2012). Today, *sindicatos* turned into the more open category of “community”, which is conceived as of the basic cell of the 36 indigenous groups (so-called nations), which since the approval of the new political constitution of Bolivia in 2009, are formally recognized as part of the pluri-national state of Bolivia.

Although land titles granted to the *sindicatos* of Ayopaya in 1953 were collective, the land – with exception of small proportions of community land- was not used collectively. The land was used as a quasi-private property of the families organized in the *sindicatos*. At an informal level this led to a duality of a collective land rights - the land in formal terms could not be sold or mortgaged – and informal private property – meaning that land within the community could be sold, mortgaged and passed from one generation to another as heritage. A smaller proportion of the haciendas – which in the case of Ayopaya were often patches of highly valued native pine forests within the new collective properties of the *sindicatos* - was often granted as private property to the sons of the landlords. In case they preferred to move out of the communities they “donated” the usufruct rights of these resources to community members, receiving in turn timber, animals or labor that they should provide for community work, which was often a precondition to get their private property right respected on behalf of the *sindicatos*. This led to threefold institutional arrangement of land and natural resource governance based in a complex and dynamic coexistence of collective property, informal quasi-private property (usufruct rights respected by the *sindicatos*) and formal private property rights of the sons of the former landlords (see Schilling 2010).

Due to population growth, new necessities and new opportunities, represented by increasing transport facilities of the area connecting it with the big cities of Cochabamba and La Paz, the semi-urban center of the village of *Independencia* was steadily growing, making that more and more schools, NGOs, political and religious organizations were established. On the one hand this led to the expansion of the agricultural lands by slashing increasingly large areas of native forests. On the other hand, increasing shares of formerly disperse population started to concentrate in the village, developing trade and other market relations, expanding articulation of local agricultural production, used inputs and labor to the national markets (Schilling, 2012). Therefore prices for goods especially timber were rising and the area became attractive.

A central aspect of how resource management governance has developed in the past can be found in the national political change: Before the new government of Evo Morales the attitude towards NGOs and the Municipality were negative because they were seen as part of the increasingly neo-liberal development model promoted in Bolivia. After a broad alliance of rural and urban social movement of indigenous people and part of the middle class brought

for the first time in history a indigenous leader – Eva Morales – to presidential power, this attitude changed into a positive view of state governance on all levels, fostering trust in state governance (Kohl and Farthing, 2009).

During the neoliberal time before that change, the political strategy of linking self-governance at the level of the communities during was mainly to hedge out the influences from NGOs and the municipal strategies. This was done by creating own institutions, controlled by the communities, serving as legitimate institutional alternatives and links to the wider local society. Due to the dissatisfaction with the NGOs the communities engaged in an initiative proposed by some political activists, critical towards neoliberalism and NGOs, to create a “foundation for self-determination and environment” (FUPAGEMA) organically controlled by the authorities of the *sindicatos*. The main goal of FUPAGEMA was to promote environmental friendly development, mainly by helping to find alternatives for protecting native forests, which were shrinking rapidly. The majority of local Quechua groups agreed that the forest are representing a natural capital that should be maintained for the sake of ecological and economic services these commons were providing for the communities as a unit. However, community groups became aware that even though they had established local institutions aiming to reduce deforestation rates, they were incapable to enforce them (Schilling 2012). This was due to power asymmetries: An alliance of richer and more powerful families that often also had “inherited” or “bought” use rights of private forest patches of the former sons of the landlords, were violating constantly the regulations crafted by the community. In order to sue them, the community would have had to refer to some formal legal norms regarding deforestation. However, as trust in the formal system was low and access to justice was expensive and risky due to widespread corruption, local actors were not considering this alternative. Instead the communities developed a strategy that allowed them to control the process of transgressing their own norms, which an external sanction negotiated by them through FUPAGEMA. As a result in 1995, FUPAGEMA denounces, in the name of the communities affected, four transgressors of their norms at the sub-prefecture, who detained and fined obligating them to plant 1000 pines and eucalyptus in community lands. This example reduced transgressions severely and led to establish a new form of sanctions in the communities that were having forests. As a general rule it was established that for each tree that was cut or burned without permission of the community assembly transgressors have to plant at least 10 new trees (Schilling 2012). This institution was based on a bottom-up process and ways were developed to have more powerful people also to subscribe to these norms.

However, the system was difficult to be enforced and received strongly support after the election of Evo Morales. Before this already a massive popular mobilization, called “Movement Towards Socialism” (MAS), developed that played an important role in filling the gap left by the collapse of classical system of representation established by the political parties promoting neo-liberalism. This system was weakened after the event called “black October” of 2003, when the government in place provoked a general popular rebellion against the privatization and commercialization of the huge gas reserves of Bolivia, leaving more than 60 people dead due to violent repression by army and police. The time between 2003 and taking power Evo Morales in 2006, was then used by many communities for bringing the local branches of their national political instrument, the MAS, into power at the level of their Municipalities. This was done among the Ayopaya Groups as well, and by developing the MAS they could gain more power in the Municipalities and create an autonomous and democratically legitimate systems and fields of self-governance within the communities challenging the bargaining power of the richer families. Thereby the locally crafted forestry institutions were now fully recognized and were established in the a municipal law after

Morales came into power implying that communities can the municipality for help in enforcement in case their own ways of conserving forests would not be effective.

## DISCUSSION

All the case studies show similarities that caused a process, which we call constitutionality. All of them deal with power asymmetries, in some cases provoked by historic developments in others by immigration based on colonial or postcolonial processes. These processes were leading to a high heterogeneity of interests in groups and between groups that make the management of forestry and fisheries difficult. The all the cases also show how forest and fish resources gain in value due to external factors and that they are appropriated by more powerful actors in an unsustainable way. The basis for constitutionality is then the recognition by a larger set of local actors that the resource basis is overused, leading to less resources available for them because others have a higher appropriation rate (immigrant fishermen in Zambia, loggers and charcoal traders in Mali, Bugi fishermen in Indonesia, richer households in Bolivia). Interestingly in all cases institutional concepts as a pre-order for constitutionality are present - partially in customary law or as first ideas in a process - but as a major problem there is a lack of recognition by the more powerful and by the state level taking the process further. One central aspect is that due to legal pluralistic setting and by making reference to the state (ideology of citizenship), more powerful users are able to extract more of the commons. This brings the need for a new deal within and between groups based on common interests (economic or political), levelling different bargaining power of groups and actors. This is easier to be reached when win-win scenarios are to be developed (see the Bugi to Lindu relations). However, this remains challenge. This challenge is met in two of the African cases more clearly in the other two. It is the possibility to device own ideas for rule making first within the different groups separately in order that a sense of ownership can emerge for each of the interest groups. Thereafter, bringing these different ideas together in a more or less neutral setting, a platform organised by someone from outside, often NGOs or political movements, seems to be key. In this setting then there is a structured way of making the new regulations that have been crafted by all actors (or accepted) in a form of constitution binding for all (locals and outsiders or more powerful) and backed up by state organisations. Analysing the case studies it seems to be evident, that all these approach have a link between so called customary, often redefined institutions (see *adat* law, collective fishing institutions in Zambia, customary systems in Mali, Quechua forestry regulations) and modern community institutions, where local initiatives have attempted to overcome actual problems of inadequate participation and imposition of conservationist discourses.

## CONCLUSION

The four cases indicate that constitutionality - a sense of ownership of the institution building process – does not emerge from a vacuum but lies in a context of problem recognition and already existing organisational capacities that could be referred to as social capital. But it only comes into focus by external conditions and market pressures marked by often political changes and governance changes that create challenges and opportunities. Key to success of new institutions that have constitutionality are that local heterogeneous groups are able to develop a shared notion or a problem and are able to develop a cooperative institutional design. Because the groups are heterogeneous, this design must start from the respective groups themselves so that their respective interests can be articulated separately without the involvement of other often more powerful groups. Then a second step on a neutral or fair ground adapted to the national political context a platform for negotiation has to be set with the help from outside actors or in the context of a larger political change with the help of new political leaders. Actors not part of the new institutions might later on join in, when they realise that the institution has a relative fairness and is also applied not just to the outsiders

but also to local actors. Then the new regulations can represent different views and, secondly, results integrally from actors own input in the process, and, thirdly, is formalised in a process of inscription, often, though not necessarily, as a written set of regulations or guidelines that contributes its own characteristics to the resulting design. Constitutionality refers to the institutional design and multi-levelled processes, involving perceptions, attitudes, strategies and other dimensions, based on the principle of real, though differential incorporation of all actors' positions so that most feel a sense of ownership of the process, resulting in a sustainable institutional setting and, finally, an underlying constitutional result. Only by this process can constitutionality be realised – meaning that all actors feel, however differently, that they are part of the constitutional set-up. If these institutions are negotiated and agreed upon, they are more likely to become embodied as part of the subjectivity of the participants and to be deployed for strategic reasons, resulting in more sustainable management than other so-called 'participatory' processes. However the role of the state remains crucial: It is the balance of the principle of subsidiarity that is at stake: Where does the state interfere, where shall it not interfere in the process. The problem is that state administrators are not always interested in such a formalisation because this might put them out of control of certain resources. This is why the Bolivian case merits special interest as the state administrators highly welcomes such steps. Therefore it is crucial what level of accountability local actors can have compared the state and what levelling devices less powerful actors have locally (i.e. women) to be part of the process.

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