

## **Crafting our own rules! Constitutionality as a bottom up process in Zambia and Mali**

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### **Abstract:**

The paper outlines two institution-building processes in Zambia and in Mali in dryland areas where wetlands play a crucial role. Based on state regulations (by decentralization and participation) and on the negative outcome of legal and institutional pluralism in these two nation states different local actor groups realize that they will lose local common pool resources once managed by common property institutions because outside users now claim to be citizens of the state and therefore entitled to use state property resources accordingly. However, based on the combination of local strategies to mitigate this problem and local institutional opportunities proposed by the state and NGO's new legal forms could be used as a tool to increase local level involvement as to be illustrated in by-laws in the fishery context in Zambia (Kafue Flats wetland, Haller and Merten 2010) and local conventions for forests and pasture in Mali (Tarabé River, Benjamin 2008). The paper explores the processes and the legal tools selected in the interchange between different local interest groups, local level state administration and NGO's involved. In the process of institution building local actors (as heterogeneous they are with regard to bargaining power) were gaining a sense of ownership of the legal tools by being able to define its content based on a combination of already locally developed institutions (customary common property regimes based on local knowledge, reciprocal access between groups and regulations based on local norms and religious worldviews) and new institutions (formalized by-laws, conventions etc) could evolve. The paper argues that this process provided a motivation in common pool resource governance for local people as the outcome represented the local perception of "these are our own rules". The paper also explores the options, process and local perception of this compromise and the limits of such an approach.

Keywords: institutional change, constitutionality, by-laws, conventions, governance, Africa, Zambia, Mali, fisheries, forestry

## **Introduction**

This paper is part of a larger comparative research framework on 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. I argue that bottom up institution building processes illustrated in the two discussed case studies in Mali and Zambia show what might be labelled constitutionality. This term refers to an institution-building process in cases that have included successful bottom-up resource management initiatives, analysed from a perspective that emphasizes community members' views and initiatives with regard to participation and the development of a sense of ownership in the institution-building process. In this concept there is the aim to go beyond what is often labelled as participatory approaches in African contexts and that turn out to be rather narrow, pre-structured and elite as well as state controlled frames of governance of natural resources. As many scholars have highlighted in African contexts co- or participatory management of resources and protected areas or a kind of Trojan Horse for resource appropriation or what is labelled land or green grabbing (see Cook and Kothari ed. 2001, Blaikie 2006, Brockington et al 2008, Haller and Galvin 2008, Haller ed. 2010, Poteete and Ribot 2011).

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 from 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 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. Fourth, such participation has been evaluated as inadequate because of four factors: a) Designs were imposed from outside the community and they had no say in their 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; 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.

However this approach is also to be seen as a critique of the notion of environmentality of Agrawal because environmentality departs from Foucault's the governmentality notion (Foucault 1982, Cepec 2011) in which the state discourse on environmental issues have been embodied by local people. In contrast we focus on local agency and innovation as well as with power relations in order to understand why and how from a emic perspective local institution building processes have resulted in a sense of ownership of the institution building and therefore have reached a constitutional level from a local perspective. The steps toward this process is discussed for two cases studies:

### **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 6500 km<sup>2</sup> in an otherwise semi-arid area and harbours a rich variety of fish (tilapia (also known as African bream), barb and others), as well as antelope and other game species. A major resource that has attracted the Ila to immigrate here and join the indigenous Batwa fishermen and hunters is 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 2013). 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; they had spiritual masters (*utamba*) who organized monitoring, sanctioned resource misuse, and governed access to fisheries as a common pool resource managed in a common property system.

The institutional arrangements were also adapted to the flooding pattern (see also Haller and Merten 2010). 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 called 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 further 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. As a result of 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 became too intensive in the late 1950s the government had to intervene and crafted a series of national laws for the fisheries, which not only sidelined local regulations, but also focused only on gear and zoning, as well as on licensing and permits.

Because of its heavy dependence on copper exports, the Zambian state lacked the financial means to enforce its institutions after it lost its main income when the copper prices crashed. As a consequence, the country experienced push and pull factors (loss of foreign revenues for the state leading to unemployment and lowering state control of natural resources while relative prices for these resources rise) during which the state governance was severely undermined and resources used in an unsustainable way. While the local institutions for the fishery management were no longer working, the state institutions proved to be very fragile due to the decrease in state financing. 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; as fish were a state resource and they paid for licenses, they were entitled to get access to the national fisheries. As the state was not present to monitor and sanction unruly actions, a *de facto* open access situation resulted. 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 a lack of attention to preserving fish breeding grounds. Several sources challenge the catch data, which report a catch of 6'000 MT per year since the 1990s; 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 had no longer been 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. As a result, 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 fishing out 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 (in our sense) 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. As part of this process, we identified two major categories of linked, but different interest groups: A) Groups living at a tributary river to the Kafue River, as well as women fishing with baskets and representatives of chiefs, in villages of four Ila chiefdoms that were composed of separate groups; B), commercial fishermen, fish traders, and female fish traders in fishing villages and temporary fishing camps in the floodplain. 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. Through these discussion they could attain what we would call a sense of ownership of the institution building process, a process that 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.

These by-laws not only incorporated technical and governance aspects of fisheries, but had two other major elements. First, all agreed that regulations were needed. Interestingly, regulations covered the control of not only new techniques, such as shed cloth, mosquito nets (used as draw nets), and small meshed nets with beating sticks, but also of traditional techniques. Another aspect that parties felt was in need of regulation was the empowerment of the respective river monitor in each area (*utamba*). Second, various issues of behavior 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 the importance of two other factors: firstly, the role of outside agents (i.e. how the local sections of the Department of Fisheries, along with the researchers, provided a platform for constitutionality) and the pre-existence of institutions (e.g. river monitoring by *utamba*) that could be harnessed to function in the new regulatory framework. 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, 2010; 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 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 Senoré, 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 Senoré 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, a move 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-come rule, meaning that rules referring to ownership are based on the discourse of justification of claims on the basis of being the first ones in an area (i.e. precedence). In regard 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 parallel, the pre-existing institution of the water shaman also could be invoked for regulation of the opening and closing of fishing. 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.

### **Discussion and conclusion:**

The two case studies indicate that constitutionality is based on already existing institutional designs that have also been changing over the last decades but that still can be used under new conditions if these are combined with new elements in an innovative way in order to adapt to current political and economic changes. A major element is the fact that these old institutional devices still make functionally sense in order to reduce transaction costs from a local point of view in order to solve the new governance resource problems and if these are not compromised elite capture.

This leads to point two of the analysis: The newly developed rules should not have been developed in a way that is perceived unfair and not basically participative. Local actors are very knowledgeable and quickly understand if a participatory approach does not fulfil the promises made. This would lead to withdrawal of local interest groups and fake participation only if attached to short term financial benefits. It seems to be crucial in this context to know the political interest groups and to be able to establish a platform for clear negotiations if outside actors such as an NGO would want to take action. In both cases leaders and other more powerful groups could be levelled in this way by less powerful groups who were able to discuss the basis for new institutional settings by their own before it was discussed in the group. In this way, recognition was paid to different problems different actors had and as actors would perceive this change in taking their interests seriously, the more and more they develop a sense of ownership of the newly develop institutions. In this respect it is important to understand reciprocal arrangements and how these can be still used in a new context which incorporates local knowledge and knowledge of the new administrative world. The development of new ideas has to be done in a creative process that is cleaned as much as possible from power asymmetries and from historical unfavourable contexts in order to be successful. Another issue is that these processes need time and include conflicts as well as results that come out of conflicts and that there are strategies how to deal with them on neutral ground. Last but not, least the legal aspect and recognition of documents produced is important because as the Zambian case indicates, the process itself might be successful but if not ratified on a higher level external groups will not feel obliged to comply to the new institutions after some time. This then is one of the crucial issues because it is in this domain that elites will try to use their bargaining power and the research of cases where this problem could be tackled would be of outstanding importance.

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