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International Institute for Environment and Development

Drylands Programme

Issue Paper no. 70

Land tenure disputes and state, community and local law in Burkina Faso

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May 1997

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Et ainsi, ne pouvant faire que ce qui est juste fut fort, on a fait que ce qui est fort fut juste

Pascal, Pensées

Therefore, Jew,
Though justice be thy plea, consider this,
That in the course of justice none of us
Should see salvation: we pray for mercy,
And that same prayer doth teach us all to render
the deeds of mercy.

Shakespeare, The Merchant of Venice

INTRODUCTION

Land tenure systems are changing throughout the Sahel region at different paces, more or less profoundly and probably not in a single direction. The transformation of tenure systems is not a smooth process but one of conflict and confrontation, and conflicts over land in the Sahel have received increasing political and scholarly attention over the past 15 years. Conflicts are normal social processes and social order does not depend on the absence of conflicts but on society's capacity to deal with them appropriately (le Roy 1991: 165; Thièba et al. 1995). Some scholars have tried to establish models for dispute negotiation where the dispute is processed in phases going from the search for an arena over formulation of the agenda and narrowing of differences and towards final bargaining and ritual confirmation. Such an outline presumes, as noted by Moore (1995:16-17) that a settlement will be reached in the end. It is, however, far from all conflicts and disputes that have 'happy endings'. Some negotiations break down and the dispute is ended by force rather than settled with mutual recognition of the outcome. Others do not really end as such. In persisting relationships there may often be a chronic eruption of conflicts rooted in a structural competition over resources. I shall focus on the institutional capacity to manage land tenure disputes inscribed in such a structural competition, namely between herders and farmers in the Boulgou region in Burkina Faso. These conflicts have social, political and cultural dimensions as well as the more legal ones. This puts serious demands on the societies' capability to resolve or manage disputes.

In Burkina Faso, as in most African societies, the institutional and normative structures for managing disputes is plural and often quite ambiguous. The colonisation and modernisation processes engendered a split in the legal system between state law and more customary regulation of social life. While the two *types of law are not always internally consistent respectively, colonial and* independent government administration inculcated a dichotomy in the legal system over time. This dichotomy has often developed ambiguity and contradictions in terms of which institution is authorised to intervene in a conflict and which principle should be applied.

A central institution responsible for dealing with tenure disputes between herders and farmers in Burkina Faso is the "Tribunal Departemental de Conciliation" (TDC). This tribunal has to deal with conflicts stemming from structural competition over resources in an ambiguous legal environment. I shall attempt to analyse some of the strengths and weaknesses of the TDC in this

endeavour. First, however, I will sketch out two distinct theoretical principles for how collectively binding decisions are defined and enforced; two principles that the TDC in practice has to reconcile somehow.

STATE LAW AND COMMUNITY LAW

Legal philosophy offers two distinct perspectives of how legal settlements come about (Cotterell 1990: 4; Moore 1978: 244). Cotterell argues that the two perspectives are inscribed in two images of "law's social environment". One is the image of a morally cohesive association of a politically autonomous people; a community. The other image is one of individual subjects of a superior political authority; imperium or state. While the image of community symbolises a horizontal relation where the bindingness of the norms is assured by the reciprocal interest in bilateral negotiated agreement among free agents, the image of state symbolises a vertical relation where a central authority's imposition and sanction insures the bindingness of the norm.

Community-as-source-of-law is a broad category. It stretches from a participatory and not overly codified mode to a more institutionalised and professional mode. At one extreme there is a rather immediate connection between community norms and law because it is the community that decides what its customs and hence law should be. At the other, the connection between community norms and law is mediated by a judge who interprets existing customs and hence express them in terms of law.

The community perspective implies a serious problem of identifying unifying norms and values which could form the basis of legal regulation by shared norms. And this begs a second question of who is the community ? Where one community is co-extensive with the jurisdiction of the legal system of the state this will not necessarily pose a problem, but in circumstances (which are the most common in Africa) where several communities and several competing customs exist within the same area of jurisdiction the community perspective is not compatible with the notion of one unrivalled jurisdiction but must deal with pluralist notions of law.

A particular problem concerns the role and legitimacy of the judge or third party. In the community perspective the judge is the primary representative of the community and is therefore allowed some latitude for judicial creativity. The creativity is, however, restricted in the sense that he can only speak for the community in terms of its established principles and rules. In theory, this role of the judge endows him with legitimacy because the rules professed by him

reflect what is generally accepted as right in the community. It is more the substantive content of the rules than his office and the formal procedures that confers legitimacy on the decision. The problem relates to what I just mentioned above. The presence of plural, rival values obliges the judge to give preference to one or the other. This makes it difficult to rely on the legitimacy of the rules alone and the legitimacy of the judge's office and the procedure also plays a role.

In the state law perspective, on the other hand, the judge is the extension of the sovereign and not constrained to interpret and apply community values. In this perspective the judge will apply the law as issued from the government. Any creativity in law making should come from the government as legislators. In this perspective the legitimacy of the decisions made by the judge originates in the legitimacy of his office and, generally in that of the state and the procedures of legislation. If the legitimacy of the state and its agents is questioned, reliance on the legitimacy of legal procedures alone is difficult.

Obviously, both perspectives exhibit some weaknesses in their ideal typical form. Will a mixture of these principles amplify or mitigate the weaknesses inherent in the separate processes? And how have the TDCs been able to reconcile these different principles?

LOCAL LEVEL JUDICIARY AND TENURE LEGISLATION

The Judiciary

While the legal system of Burkina Faso, and more precisely the judiciary, has undergone considerable changes during the past 15 years it has maintained an important element of 'community' since independence in 1960. Before the revolution in 1983 disputes over land which were not settled at village level were dealt with at the "Tribunal de 1er ou 2ème degré de Juridiction de Droit Coutumier". The tribunal was presided by the government representative of the department, the Prefet or Sous-Prefet, who was assisted by lay assessors, namely customary chiefs and notables.

During the revolutionary period (1983-91), the "Tribunaux de Juridiction de Droit Coutumier" were replaced by the "Tribunaux Populaire de la Révolution" (TPR) which at village level were called "Tribunaux Populaire de Conciliation". These tribunals dealt with judicial as well as political

controversies. At an international seminar on the judicial reforms in Burkina Faso held in 1987 it was thus stated that:

> *"[l]'objectif essentiel des TPR est la lutte contre les délinquants à col blanc, alors que les Tribunaux Populaires des Secteurs, Villages, Départements et Provinces sanctionnent les pertubateurs de la vie sociale et ceux qui transgressent les lois revolutionnaires"* (Revue Burkinabé de Droit no. 13 Special, Janvier 1988).[1]

The general drive to oust the traditional chiefs - or "feudal lords" as the revolutionary rhetoric described them - excluded the chiefs and notables from the judiciary which instead was controlled by the new political leaders - the "Comités pour la Défense de la Révolution" (CDR). During the revolution period, the CDR structure controlled the legislative, the executive as well as the judiciary.

From 1991 with the return to constitutional governance the judiciary re-acquired formal independence from the executive. The new "Tribunaux Départementaux de Conciliation" (TDC), which thenceforth have dealt with land disputes were presided by the Prefet and composed by four lay-assessors. The latter are neither chiefs nor political militants but rather "honourable citizens" from the community. Generally, they are retired school teachers, "anciens combattants", older members of the civil service and to some extent younger high school graduates who function as secretaries for the TDC.

While political changes during the past fifteen years are reflected in the composition of the tribunals, a number of common features also characterise them. First, none of them were formally empowered to adjudicate. But the presence of a high profile powerful person as the Prefet or the leading member of the CDR meant in practice that the mandate of the tribunals was ambiguous. The second common feature is the blend of a central government representative and members of the community. Obviously, the notion of representatives of the "relevant community" has changed dramatically over the years from being chiefs, then revolutionary militants and then honourable citizens. But the importance of the "community voice" in tribunal hearings has characterised all periods. And the Prefet or his CDR-equivalent was always "surrounded by community" in the tribunals.

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[1] From "Rapport des questions et des debats du theme concernant la communication sur la ratio legis des reformes judiciaires intervenues au Burkina Faso; Seminaire International "Le Droit Judiciaire au Burkina Faso" Ouagadougou 13-16 Juillet 1987. Revue Burkinabe de Droit no. 13 Special, Janvier 1988.

Legislation

Although "community" features in the local judiciary, the legislative background for deciding disputes over land has changed quite considerably over the past 15 years. Before the revolution there was no clear legislation on rural land ownership and land use. A concept of customary land tenure, covering a wide variety of tenure principles was the basis for dispute settlement - the custodians of custom and tradition and the chiefs and notables - therefore had a privileged position to know, adapt and invent customs as disputes were brought before them in the tribunals. Traditional land owners were allegedly favoured by this system. With the revolution came a first general attempt to regulate land tenure by government legislation. The "Réorganisation Agraire et Foncière" from 1984 (RAF-84) thus declared in its first articles that land was the property of the state. This was an attempted clean break with customary rights.[2] The unintended consequence of this revolutionary declaration was, as described by Faure that the message was:

> *"interpreted as meaning that 'free land belongs to those who cultivate it'. Everywhere, people extended their farmland and took over new areas by clearing forests and grazing lands. ... Emboldened by revolutionary declarations, the spontaneous settlers were no longer afraid of the customary guardians of these lands"* (Faure 1995: 5).

During the revolutionary period the state's control over land was constantly inculcated in propaganda and the tribunals were in a sense political instruments devoted to annihilate the power of the chiefs and their control over land. Consequently, rulings were generally favourable toward those actually exploiting the land and not those non-exploiters who claimed to have an ancestral right to it. Pastoral use of land was secured in theory, but a management plan including measurement of carrying capacity, establishment of wells etc. was a necessary prerequisite for this.[3] Consequently, very few management plans were ever established and pastoral land use was not effectively protected by legislation.

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[2] Meyer, a teacher at the School of Law in Ouagadougou thus echoes a certain legislative optimism of the day when stating: "[La] ... reorganisation agraire et foncière ... a pour consequence de purger les terres detenues en vertu des coutumes des droits coutumiers y afferents au profit des titres d'occupation definis a l'article 17 de ladite ordonnance." However, Meyer shows some measure of reservation when adding: "Il reste cependent a voir si ce triomphe ne sera pas purement 'juridique', la positivite du nouveau texte ne signifiant pas son effectivite." (Meyer 1988: 52-53)

[3] RAF 1984, articles 159-82

In 1991 the RAF-84 was modified. According to the RAF-91 farmers could now obtain title deeds through an administrative procedure.[4] Although the state was the ultimate controller of land, the RAF-91 opened up a period of increasing recognition that decentralised, local management would be a more appropriate and feasible option for the state as well as for farmers. The RAF-91 formally established local village commissions for attribution and retrieval of land. Although the composition and mandate was quite unclear, the coincidence with the post-revolution era made it quite clear that it was no longer the militant CDR's who had monopoly on this institution.

The majority of the articles in the RAF-91 dealing with how people could acquire rights to land meticulously describe the conditions and procedures.[5] But article 123 makes an important exception: village land which is used for habitation or cultivation is not attributed through this procedure whilst the appropriate procedure for such situations is not described. A senior civil servant with intimate knowledge of the consecutive tenure reforms stated to me: "Selon les RAFs, 98 % de la population vive une situation de tolérance". Of course procedures for acquisition of land needs to be precise and detailed, but it is thought-provoking that the tenure legislation does not in all its meticulousness address the problems of tenure security for the overwhelming majority of the population in any meaningful way. In that sense the land laws of Burkina Faso reflect the law-makers eternal dilemma: to what extent should the law reflect reality and to what extent should it change it? The RAF-84 and RAF-91 both reflect the state's overestimation of its capacity to change society through legislation.

More recently, revisions of the RAF operate with the notion of local customary rights and land owners as a means to take account of how land tenure issues are actually dealt with in the rural areas of the country. The exact formulations used are somewhat bland and reflect the difficulties of reconciling the objectives of 1) having a workable land law relevant and understandable to the general population, and 2) not handing "back" complete control in terms of ownership to "traditional authority". In the most recent revision of the RAF, the formulations like "les membres des commissions villageoises de gestion des terroirs élus et/ou désignés suivant les réalites historiques, sociales et culturelles...":[6], reflect a growing recognition of local customs, and possibly,

[4] RAF-91, articles 96-101, specifies that development plans must be established before private title deeds can be issued. This legal requirement was introduced to prevent attempts at accumulating land for speculative ends, but the preparation of development plans involves a high level of investment for the applicant.

[5] RAF-91, Livre II, articles 83-208

[6] Article 46 in RAF-96

customary chiefs. In the decree proposed for the application of the revised RAF-91 reference is furthermore made to proprietors in the terms of "superficières".[7] The recognition of superficières as holders or controllers of use-rights moderates considerably the 4th article of the RAF-96, which states that the government enjoys complete property rights over the land in the country.

Presentation of two cases

Two cases have been played out in the Boulgou province of eastern Burkina Faso. Both cases deal with disputes between a group of pastoral herd owners and a group of farmers. Historically, cohabitation between these groups has characterised the area. Both groups therefore have reasonable expectations of continuing to live in the area and exploit local resources. Both parties are more likely to agree to any judicial decision if they both continue to have access to local resources.

Case-1: Cattle Corridor Annihilated and TDC Appears Powerless

The village of Malanga Nassoré has around 4000 inhabitants and holds 9 wards or "quartiers" of which 8 are the homes of Mossi and Bissa who are predominantly farmers. The last is the quartier of the Peuls who are predominantly cattle rearers. The extension of cultivated fields has recently begun to pose a problem for the mobility of the herders' cattle. In 1993, the last access corridor from the Peul quartier to a village pasture was being encroached upon and blocked by a farmer from the village. The Peul leader, Diallo, addressed the farmer asking him to postpone the extension until the village chief had assigned another corridor for the herders and their cattle. The Mossi/Bissa farmers held a meeting where the proposition was discussed. The outcome was, however, that they would not postpone extension of the fields. It was argued that the extension of the fields merely constituted a re-integration of fallow field into cultivation. And besides, the argument was, "Peuls cannot own land". Diallo went to the chef-lieu of the department, Tenkodogo, to gather information from the Prefet. On his return he explained to the village chief and the villagers that the government had a policy of protecting cattle corridors, and accordingly, the village's cattle corridor should be protected. While the farmers

[7] Projet de Decret de Loi de Reforme Agraire et Fonciere, article 139. These proprietors - superficières - appear from nowhere in the text. The articles deal with the procedures for acquiring title deeds, and that on the one hand, the applicant should get permission from the state, and on the other hand get a written accord from the "superficieres", i.e. the traditional occupants/owners.

in general refused this, the village chief argued in favour of respecting the corridor. The farmers then went to the Prefecture in order to complain about the decision. Due to heavy rains the Prefet and the lay-assessors of the TDC were unable to go to Malanga Nassoré for another 10 days, but on their arrival the Prefet repeated his earlier decision and encouraged the villagers to plant trees to mark a 50 m wide corridor, the lines of which he indicated with the assistance of the agricultural extension agent. Two weeks later all the trees were uprooted, but nobody admitted doing it. The Peuls, once again, addressed the Prefet, but at his and the agricultural extension agent's arrival the millet crop was already 1 m high in the fields and the contested corridor land. After the visit of the Prefet the status of the corridor was formally maintained, but the farmers were allowed to harvest the millet for this year because of the advanced state of the crop. The following year, however, the corridor was to be re-established. The Peuls accepted and transferred their cattle to a pasture some 60 km away.

The following year, in 1994, the pasture to which the corridor led from the village was brought under cultivation. This meant that the corridor was leading "nowhere". When the Peuls brought the case before the Prefet they were dismissed on the grounds that the area in question did not enjoy formal status as pasture and the protection issued the year before was for the corridor alone. The final outcome was that both the corridor and the pasture were cultivated and the Peuls had to transfer their cattle to another area permanently.

This case exhibits a number of weaknesses in the operations of the TDC as a dispute institution. First, while the TDC seemed determined to adjudicate for protection of the corridor, it was not capable of enforcing this. The protection of a cattle corridor involves a mixture of state legislation and community norms. While the mobility of cattle has been a historical fact, most cattle corridors seem not to have enjoyed a particular status amongst local communities. Only with state intervention and government planning did cattle corridors achieve formal status. Such status was unenforceable, however, and gave way, first, to permit farmers to harvest their millet, and later because of farmers' insistence that Peuls cannot own land. Leaving the decision to be worked out by the "community" because of the administration's incapacity meant that the settlement reflected the interests of the stronger party. There was apparently no interest or good will on the part of the farming community to reach a compromise. Instead, it is as if the options for the Prefet and the TDC were either complete control over the outcome, involving rigorous application of state regulation or complete state absence, leaving decisions to be worked out by the parties. The authorities had apparently no influence on the outcome - not only did they not manage to impose their first ruling, they did not even

effectively influence the ensuing social struggle or negotiation over the land in question. The irony is that the Prefet and TDC's insistence on state control provoked the opposite result: the community had the final say within which formal laws did not play their part.

Another case of legal procedure from a neighbouring department brings forth a somewhat less gloomy picture.

Case-2: Increasing Land Pressure due to Bagré Lake

Some twelve years ago, around 1985, the Peul family of Tarko arrived at the Bissa village of Bassindingo in Niaogho department in Boulgou. They had left a neighbouring province because of lack of land. Arriving at Bassindingo they asked for land with the land chief and the CDR-representative, and were assigned some land uphill from where the farmers of the village were cultivating. With the completion of the neighbouring Bagré dam in the late 1980's, the level of the lake rose and permanently flooded major parts of the cultivable land as well as an important mango grove. The Bissa farmers, led by the village chief, approached the Peul herders and asked them to vacate the area allotted to them earlier and move on. The Peuls refused to leave, however, and referred to the earlier allocation. At first, the farmers let the case lie and cultivated the remaining land which was not flooded, but in 1993 the dispute was brought before the TDC of Niaogho by the farmers.

The two parties had not been able to work out a solution by themselves. The Prefet and the TDC were caught in a tricky dilemma; the legal texts did not foresee this type of situation where a large group through *force majeure* had lost their land.

On the one hand they could opt to apply the RAF and argue that the farmers had no right to come back to land they had once abandoned. But the agro-pastoralist Peuls were not using all their land for cultivation and no management plan had been produced. Strict application of the RAF could entitle the farmers to settle on all the un-farmed land of the Peuls. On the other hand, the Prefet and the TDC could opt for a solution more in line with recent political trends. They could argue that the farmers of Bassindingo had a traditional right to village land, and the transfer to the Peuls was of a temporary nature since no written agreement had been produced.

The Prefet chose to do neither. Instead he summoned a meeting of the parties on the banks of the new lake in order to convey the gravity of the farmers' situation to the Peuls. The litigants were then told to negotiate a settlement

agreeable to both within a week. Otherwise the Prefet threatened to apply the law strictly to the letter. This was somewhat of a bluff on his part, because while a copy of the law, RAF-91, was always displayed on his desk when the TDC was in session, he did not have any idea of which paragraph or article he should refer to or apply. Nevertheless, his manoeuvre produced at least a temporary settlement. The Peuls agreed to surrender some of their land to the farmers while the farmers agreed to relinquish any further claims to the land. The following year, in 1994, the farmers attempted to have the Peuls evicted with the assistance of the Prefet. They claimed that the 1993 settlement provided a one year grace period for the Peuls before their complete eviction. This was refused by the Prefet and since then the decision has not been contested further.

Now, why was this settlement found when prior to the intervention of the Prefet and the TDC no agreement seemed possible? It seems that the threat of the strict application of the law meant both parties preferred to have some influence on the outcome and to show good will. Just like the Prefet, none of the parties actually knew what the application of the law to the letter would have implied.

In the light of the theoretical discussion of community or state as source of law, the apparent confusion of this case is not altogether discouraging. First, had the Prefet and the TDC neglected the dispute and simply left it to the parties to sort out their problems, the dispute may very well have had a tragic outcome. On the other hand, had the Prefet and the TDC tried to impose a specific settlement upon the two parties, this would have involved favouring one community over the other. In either case, neither the RAF nor community customs provide an unambiguous solution.

The procedure can be described as a combination of the formalist logic of state law and a radical approach in which the relevant community has to work out its own decision, thereby creating new local customs or even new local law.

EMERGING LOCAL LAW - AN OPPORTUNITY ?

In his analysis of legal reforms in Senegal, le Roy (1985) identifies a specific form of law - *local law*. While local law is an instance of "non-state law" in the sense that it is not issued in written form by the state, it differs from other non-state laws such as customary law or religious laws in the sense that it is not inscribed in a specific normative structure. It is rather a pragmatic adaptation of norms and procedures, often in the wake of administrative or judicial reform. While it exhibits considerable local adaptations of the legal framework, it constitutes law because the authority with which it is exercised is sanctioned by the state.

The adaptation of legal rules to local circumstances implies however that choices be made, such as: where should rules stop and pragmatism begin? If on the one hand there are no principles guiding decisions they will become arbitrary, but on the other hand, if principles and rules are very specific they may prevent adaptation to circumstances. The procedure in case 2. was an attempt to define the line between rules and situational adaptation.

While the TDC and the Prefet were indifferent to the outcome of the negotiation, they were insistent on the politico-legal procedure applied. The norms defined by the TDC were thus few and related more to procedure than substance: solutions must be negotiated by the parties and hence be mutually acceptable. The TDC thereby defined the "community" as including both herders and farmers in spite of the latter's claim that they had been there long before the herders.

However, while the choice of community norms and procedures seems to have produced a more durable settlement of the dispute, the recognised authority of the TDC was more a result of fear of sanction, and ignorance of the law than a belief in the legitimacy of either. It remains to be seen whether the TDCs and the Prefets will be able to develop legitimate authority as umpires in the process of dispute settlement without depending on fear and ignorance, or whether community based local law can only develop in the shadow of fear of state sanction.

A promising way forward would be to encourage state recognition of local agreements and contracts. Then the establishment of workable and respected contracts would not depend entirely on the ingenuity of the individual Prefet and TDC. But this would require firstly, that actual resource users' tenure rights acquire legal recognition by the Burkinabé state; secondly, that communities

get, if not '*personalité juridique et morale*'[18] at least some recognition enabling them to engage in contracts; and thirdly, that the decentralised administration operates within a legal framework which specifies procedures of mediation and adjudication able to accommodate the diversity and contradictions of various cases rather than very detailed rules and regulations which may have little practical bearing on real life. There has been modest movement in this direction with the two latest RAFs (91 and 96). However, such a philosophy goes against the grain of the Burkinabé legislative tradition which has tended to rely on the state as the main source of law, and will probably meet serious obstacles.

[3] Recognised legal status.

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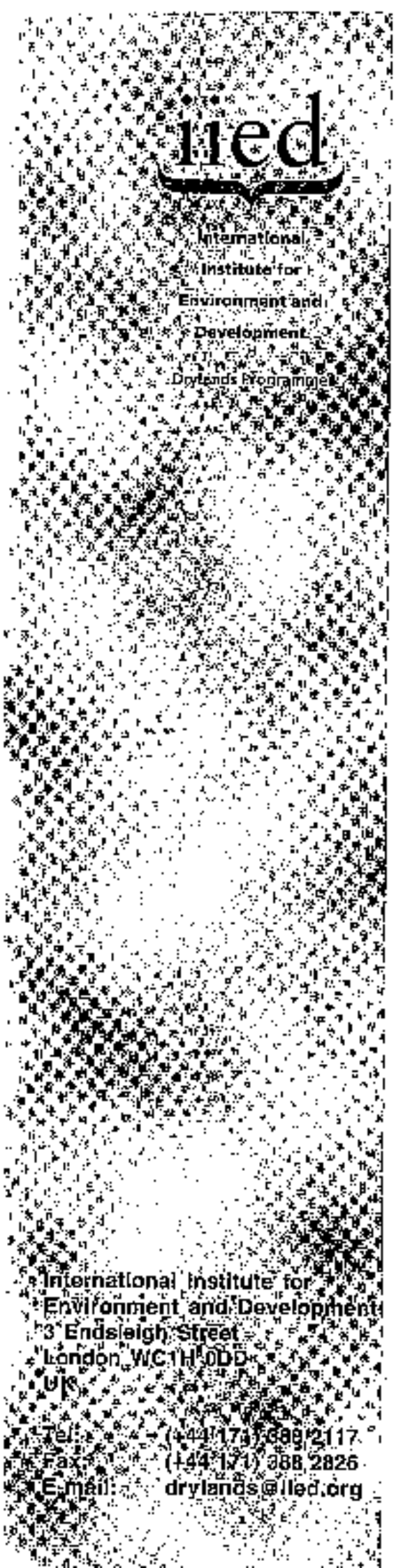

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ISSN 1357 9312