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The movement of landless rural workers in Brazil and their struggles for access to law and justice

Boaventura de Sousa Santos and Flávia Carlet¹

Introduction

One day Mahatma Gandhi was asked what he thought of Western democracy. He replied: "it would be a good idea". If Gandhi were able to return to earth today to tell us what he thought of the rule of law and access to justice, he would most certainly respond in the same way. In fact, in most countries of the world, if the notions of rule of law and access to justice were taken seriously, there would be social revolution. By privileging the dominant elites to the detriment of the vast majority of citizens, the law, and the judicial system in particular, have often been used to consolidate and legitimize social regimes that are manifestly unjust.

A dispassionate analysis of the policies used by Western nations and multilateral organizations in the last 30 years to promote rule of law and access to justice shows that these policies have done little or nothing to reduce social inequality and exclusion. Whether by coincidence or not, inequality (between rich and poor countries, and also between different social groups in particular countries) has increased significantly over this period.

However, the law and the courts, which naturally reflect society and the various conflicts being played out in it, are themselves full of internal contradictions. This means that, in certain very specific situations, they may be used successfully by oppressed and excluded social groups to further their claims. In these cases, the rule of law and access to justice may in fact play an important role in bringing about greater social justice (conceived as real, rather than merely formal, equality between citizens).

In order to understand the options available to social movements engaged in a struggle for rights, we need to look more closely at the dominant conceptions of access to justice (Cappelletti and Garth 1978). Underlying them is a depoliticized notion of social change according to which societies are based on the primacy of the rule of law and law is conceived as an autonomous normative system, designed to reduce the complexity of social conflicts and ensure the predictability of individual legal relations. Social change is achieved by promoting the operation of an effective, efficient, fair and independent legal

system, which is to be accomplished by dignifying the legal and judicial professions, designing new organizational models for the courts, promoting procedural reforms and training magistrates and administrative staff (Sadek 2001). It is this conception that has presided over judicial reform policies throughout the world in the last 30 years.

If, however, social change is conceived as a political process whose aims are the gradual inclusion of marginalized and vulnerable social groups and the construction of more substantive forms of social justice, then law will be perceived as an important component of a broader political process, and one which reflects the latter's contradictions. It will thus have to be conceived of as a semi-autonomous social system, whose function is not only to resolve disputes but also possibly to create them and will operate as a site for both the reduction of social complexity and the increase of social complexity. This will involve a major change in the ways courts see their role in society. They will be attentive to the vast range of injustices (socio-economic, racial, sexual, ethnocultural, cognitive, environmental, historical, etc.) in our societies and will assume their share of responsibility in solving the problems caused by them. This will also involve new conceptions of judicial efficiency. For instance, swift justice is not always good justice. An innovative interpretation of the law, that goes against routine but is socially more responsible, may require more time for study and reflection. Thus, from the point of view of the democratic revolution for justice, speed is not an end in itself; it has to be associated with a standard of quality of the justice (and not just quantity of justice), with greater social responsibility, so that it can become a citizens' justice.

This means that although the law and judicial systems have traditionally been used by the dominant classes to protect their privileges, they are nevertheless not immune to social struggle. For this reason, they may, in certain circumstances, be used by oppressed or excluded social groups to combat those privileges and struggle for greater social justice. Whenever that happens, access to justice may be an important part of the "democratic revolution of justice", oriented towards the overall democratization of the state and society.²

The research results discussed here illustrate that there are basically two requirements for this to take place. First, the excluded groups need to be organized socially and politically into social movements or non-governmental organizations; and second, innovative legal and judicial strategies are required when dealing with the courts, accompanied by political pressure upon organs of state and upon the courts themselves.

In the study of the landless rural workers in Brazil (which is one of the most unjust countries of the world as regards land distribution, ranking second in the world, with the Gini index registering 8.54 in 2006³), this paper shows how the militants of one of the most powerful social movements in Latin America, the Landless Rural Workers' Movement, have been treated by the courts in the various lawsuits in which they have participated as either defendants or plaintiffs.

The land question: Resistance and struggles for access to law and justice

In Brazil, a very important dimension of social injustice is linked to the issue of land concentration and land distribution, which has become a site of confrontation for different conceptions of human rights and property.

There are three main groups engaged in the struggle for land: the indigenous movement whose struggle for ancestral territories is an expression and condition of cultural and political autonomy; the Quilombola movement of peasants of African descent fighting for collective legal titles over the land occupied by runaway slaves; and the Landless Rural Workers' Movement, struggling for agrarian reform and food sovereignty. Although these movements operate separately and with almost no articulation between them, the three types of struggles represent different dimensions of the same issue, the land question. In order to highlight the broader context in which the struggles of the movement of the landless rural workers occur, the main focus in this article, we shall present a brief description of the other struggles.

The struggle for indigenous land

The indigenous territories (in Portuguese, Territórios Indígenas (TIs)) in Brazil cover about 109,641,76 hectares, which represents only 13% of Brazilian territory. Of that total, 98.6% of all the indigenous lands, are located in "Legal Amazon" states. The remaining hectares are scattered across the regions of the north-east, south-east, south and Mato Grosso do Sul.⁴

The fact that most of the indigenous territories are concentrated in the Legal Amazon is explained by the fact that colonization took place earlier and more thoroughly in the rest of the country, leading to the decimation of many communities and the confinement of survivors to small tracts of land. This was what happened to the Guarani people, for example, who formerly inhabited most of the Mata Atlântica, ranging from the north of Rio de Janeiro State to the north of Argentina, and including most of southern Brazil, the centre-west area and the eastern region of Paraguay.

The resistance put up by all indigenous peoples explains why indigenous rights have gradually been given more attention in successive editions of the Brazilian Constitution. The Constitution of 1988 put an end to the conservative assimilationist political project, according to which the Indians would gradually integrate into national society until they ultimately ceased to exist as indigenous peoples. Instead, a non-integrationist paradigm began to take shape, based on interaction between the various cultures in a society that was markedly plural and multiethnic in nature. Article 231 of the new Constitution recognized the right of the indigenous peoples to have their own social organization, customs, languages, beliefs and traditions, and also their historical rights over the lands that they had traditionally occupied. It

stipulates that indigenous territories shall include not only the permanently inhabited areas (considered equivalent to the dwellings of the non-indigenous population), but also those areas used for productive activities, which are therefore essential for the preservation of the environmental resources necessary for their well-being and physical and cultural reproduction. In the 1990s, and according to the new Constitution, the federal government had the duty to demarcate the indigenous territories within five years. The Executive Power, through the National Indian Foundation (FUNAI), the Ministry of Justice, and the President of the Republic, were the main organs to be pressurized by the indigenous movement, which used a variety of methods (including legal channels) to try to enforce the Constitution.

The new constitutional provisions expressed the victories of the indigenous movement in the constituent process, and legitimized indigenous territories in Amazônia, such as Yanomami,⁵ Alto Rio Negro,⁶ Raposa Serra do Sol⁷ and Trombetas/Mapuera.⁸ However, up to now, almost all the indigenous land demarcation processes have resulted in lawsuits, as private individuals with title deeds to property within the boundaries of the indigenous territories attempted to temporarily paralyze and definitively annul FUNAI's demarcatory procedures. As a result the judiciary plays an important role, and is now the privileged site of struggle for the affirmation of the principles of cultural diversity and access to justice. As we write this paper, one of the most publicized law suits against the demarcation of the indigenous territories, the Territory of Raposa Serra do Sol, is about to be decided by the Federal Supreme Court. Extending across an area of 1.747 million hectares, Raposa Serra do Sol is inhabited by 16,000 Indians of the Macuxi, Tauarepang, Patamona, Ingarikó and Wapixana ethnic groups, distributed across 164 villages. The demarcation of the Territory began in the 1980s, prior to the present Constitution, and has continued for 30 years, until the current President of the Brazil ratified its boundaries in 2005, provoking strong (sometimes violent) reactions from the few agro-businesses operating in the area.

The Quilombola Lands

The Quilombola question, like the indigenous, is also an important and controversial issue. It, too, calls for non-individualistic conceptions of property and of land titling as ways of addressing broader issues of social injustice. In both, the struggles challenge historical injustices caused by colonialism and by slavery. The Quilombolas are powerful icons of black resistance in Brazil and have provided a counterpoint not only to the colonial violence but also to the neocolonialist enterprise, which marginalizes and excludes the black population (Melo 2007).

The Quilombos, the rural communities created by runaway slaves, appeared all over Brazil during the slavery period. Existing in the midst of a society based on slavery, the Quilombos established a relationship with the land based upon common ownership, a situation that has continued to our day (Melo

2007). Despite this, many studies from the 1950s and 1960s assumed that the Quilombos were a phenomenon from the slave-owning past, no longer in existence (Melo 2007). Fortunately, the Quilombola question has recently acquired much greater visibility, having been raised by the black movement in the 1970s as part of the broader struggle against racial discrimination. It was in this context that the Quilombos began to be perceived as icons of black resistance and evidence of the need for a new social order (Melo 2007). Even though the Constitution of 1988 recognized the Quilombola communities as legitimate owners of the land they occupy, a debate about how to define a Quilombola community has been intensified since 1988. Initially, the term was considered by many to refer only to those lands occupied by the descendants of runaway slaves but the ensuing debate revealed that the Quilombola communities were also intimately bound up with an ethnic and territorial identity.

Subsequently, with Decree No. 4.887 of 20 November 2003, the term was redefined. From then on, any ethnic-racial group that *defines itself* as the remains of a Quilombola community is recognized as such. The decree also regulated the procedure for the identification, recognition, delimitation, demarcation and ownership of the lands occupied by remaining Quilombola communities. The black rural communities' demands for land regularization have been important in this process. According to Paula Balduino, the rural black communities where political activism developed first were those that saw their property rights more promptly recognized. In 1996, with the constitution of the National Joint Committee of Quilombola Rural Black Communities (CONAQ), the Quilombola movement gained greater national visibility.

According to data provided by the Ministry of Agricultural Development (MDA), there are 743 remaining Quilombola communities which, together, lay claim to an area of 30 million hectares (Schmitt, Turatti and Carvalho 2002). The MDA admits that these figures may be underestimated and that unofficial estimates suggest more than 2,000 communities (Schmitt, Turatti and Carvalho 2002). CONAQ leaders, for their part, claim that the overall Quilombola communities in existence amount to over 5,000.

The territories of these communities continue to be exposed to constant attempts of expropriation by land grabbers ("grileiros"), as well as by powerful landowners, a situation which not only threatens to put an end to their way of life, but also causes the dispersion of the group and their displacement to shanty towns (Schmitt, Turatti and Carvalho 2002). As the judicial system is slow in deciding the law suits, the Quilombolas often have to wait for years to find out if their lands are to be granted to them or not (Schmitt, Turatti and Carvalho 2002).

The rural workers' struggle

Until the middle of the nineteenth century, the indigenous people and Quilombola communities symbolized the struggle for land rights in the Brazilian countryside. However, since colonial times, many people had been eking out a

living as small farmers, and in doing so, helped ensure the supply of food in the country (for the large-scale producers produced nothing more than sugar cane).

Smallholding family farming intensified during two subsequent periods. The first was during the gold rush of the eighteenth century, when townships sprang up all over the south-east of the country, generating a strong need for supplies. The second occurred after Independence, when Brazil was going through a period that agricultural jurists call the "Ownership Regime": no longer bound by Portuguese legislation, the country was experiencing a legal vacuum, which resulted in land seizures throughout the territory. This situation only came to an end in 1850, with the publication of Law 601.

However, the first major conflicts involving rural workers only started to emerge at the very end of the nineteenth century. In progressive circles, and following the abolition of slavery, the idea of land reform had begun to attract attention.⁹ In the 1930s, with the end of the Old Republic, new social actors appeared in the Brazilian countryside, strongly influenced by the Communist Party. This movement helped to focus the national debate about the countryside on the question of agrarian reform. The issue also gained constitutional protection in the Democratic Constitution of 1946 (Art. 147), which provided the first mechanism for sanctions to be imposed on unproductive properties, which could then be expropriated for agrarian reform. However, it took decades before this mechanism was institutionalized on the infra-constitutional level, and put into effect. In the meantime, another important movement arose in the countryside – the Rural Leagues – which had great influence in the north-eastern region of the country.

With the military coup of April 1964, any rural workers found to have some form of connection with the Rural Leagues were decimated by the dictatorship. Soon there were no rural workers' organizations of significant size left anywhere in Brazil. In 1984, when the military dictatorship came to an end, the Landless Rural Workers' Movement (in Portuguese, *Movimento dos Sem Terra* (MST)) emerged as an autonomous organization dedicated to the struggle for land reform. Since then, the whole of Brazilian rural history strongly reflects the story of this movement, which soon acquired a national scale. Indeed, it radically influenced the 1988 Constitution, which includes a chapter devoted to land reform. Today, after more than 20 years in existence and with a whole series of victories under its belt, the MST has become almost synonymous with the struggle for agrarian reform. Indeed, the movement's political and legal strategies have been shown to be both effective and efficient in the struggle for law and justice with regard to the urgent question of agrarian reform in Brazil.

The MST struggle for land reform in Brazil

The MST appeared at the end of the 1970s with a series of occupations of rural estates. The aim was to resume the struggle for land reform, which had been forcibly repressed during most of the military regime (Singer 2002).

According to Cristiane Reis (2007), the history of the MST may be divided into three distinct periods. The first, from 1979 to 1988, represents the moment when the MST appeared in southern Brazil. This was a period of structuring and definition, organized around the motto “land for those who work it”. The main claim was the long overdue issue of land reform in Brazil. Although the struggle for agrarian reform had got underway in the 1950s, it had disintegrated during the military dictatorship; indeed, it only gained new strength in the 1980s, a decade marked by intensive rural exodus and the consequent increase of poverty in the large cities. Looking for an alternative to this process, the MST began to fight for agrarian reform, claiming for a fairer distribution of land.

In the second period, from 1988 to 1995, the MST began to grow stronger on a national level. It also knew some changes, becoming aware of the need to adopt new political strategies. Its motto became “occupy, resist, produce”, and its claims were extended beyond the question of land redistribution, to include agricultural credit, education, leisure, access to technological and scientific advances, and health, with a view to providing its members with a dignified lifestyle (Reis 2007). In this period, there was a steady increase in the number of associations emerging in rural settlements, as well as the organization of cooperatives to organize production (Singer 2002).

Finally, the third period, which started in 1995, was marked by the proliferation and consolidation of agricultural cooperatives within the settlements. There has also been a growing awareness that there are other obstacles to agrarian reform besides the large estates, such as the transnational agribusinesses, which concentrate on monocultures such as soya, coffee, sugar cane and eucalyptus (Singer 2002). The MST’s response has been to advocate food sovereignty, by encouraging smallholding family farming and by giving priority to national and local markets. Thereby the MST seeks to ensure the sustainability of farmers and of the production of food for the Brazilian population. This policy also sought to generate respect for local communities, whether fishermen, indigenous groups or other rural peoples. With increased deforestation and the risk of global warming, the MST has been giving growing attention to the environment. For this reason, its settlements have promoted the cultivation of local seeds, avoiding agrottoxins, thus practicing sustainable farming methods. Rural workers develop ancient and new techniques, such as natural herbicides, biological pest control,¹⁰ natural insecticides,¹¹ bio-fertilizers¹² and green fertilizers.¹³ More recently, the MST has also opposed the biodiesel program put forward by the Lula government, alleging that sugar cane monocultures will occupy fertile land that could be destined for agrarian reform, and will also damage the environment.

The political strategies used by the MST to gain access to land

The MST’s strategies to gain access to justice and judicial action are tightly bound up with its strategies of political activism. Indeed, as we hope to

demonstrate in this study, the MST's great innovation lies in its combined use of judicial and political action. Let us begin by looking at the latter.

Over time, the MST has developed and refined its political strategies in order to give greater visibility to the Movement and its cause. It has pressurized the authorities to take its cause on board and attempted to sensitize society to the importance of agrarian reform in Brazil. The main political strategies adopted by the MST are as follows.

Collective occupations

This is presently the most important political strategy used by the MST. It consists of occupying rural spaces, such as unproductive ranches that are failing to fulfill their social function. This way the MST seeks to put pressure over the executive, legislative and judicial powers as a means to expropriate areas for agrarian reform, to resettle the landless families and to invest in family agriculture. With the same objective, urban spaces, such as public buildings, courthouses, banks and highways, have also been occupied.

The occupations generally take the form of "*acampamentos*" (encampments) which are raised by the settlers themselves in the form of shacks covered with black tarpaulin. The encampments vary in size, in accordance with the number of families, but may house as many as 3,000 people. The families are organized into groups (or nuclei), each responsible for a particular task, such as food, health, education, finance, etc. Each group has a leadership that controls and plans the activities. The various groups within the camps are overseen by a coordinating body, which not only brings them together, but also engages in dialogue with the government and society. This general coordinating body includes the camp's *general assembly* (supreme decision-taking body), the *group leaders* and the *camp coordination board* (elected by the members).

There are two types of encampment: the temporary and the permanent. The purpose of the temporary camps is to draw the attention of the authorities, public powers and society in general to the MST's claims. When these aims are achieved, the camp is dissolved (Morissawa 2001). The permanent camps, on the other hand, only break up when all members have been definitely settled. Throughout the encampment's existence, the MST also promotes various socio-political activities, such as education for children and adults, and organizes events designed to sensitize public opinion and exert pressure upon the authorities.

Marches

Marches are another political strategy used by the MST to put pressure on the government and win support for its cause. Its aim is also to draw the attention of society and government institutions to the problems faced in the countryside. The marches usually take place along highways or in the cities, and involve not only militants from the MST but also large crowds of sympathizers.

Fasting and hunger strikes

Fasting and hunger strikes are the most extreme forms of political action. The aim is to denounce the lack of food and housing, and draw attention to the hardships endured by the rural workers. They normally take place outside public buildings, with the purpose of alerting the government to the MST's claims. The hunger strike is maintained for an indeterminate period, until the government gives in. It is also an important way of sensitizing the general public to its causes (Morissawa 2001).

Vigils

These are short-term demonstrations, but are maintained 24 hours a day outside the headquarters of some public building, a garrison or a police station, always lobbying for rights (Morissawa 2001). For example, on 8 March 2008 (International Women's Day), the women from the MST held a vigil in front of the Brazilian agrochemical company, Nortox, in Paraná, in protest at the advance of agribusiness, the production of transgenics and agrottoxins.¹⁴ The protest, whose motto was "Landless Women in Defense of Life, Water, Biodiversity and Food Sovereignty", involved more than 700 militants.¹⁵

Public demonstrations in large cities

Public demonstrations are a peaceful way of attracting the public's attention, giving visibility to the MST and its struggle. Usually landless workers travel to the cities, where they hold parades or public demonstrations. All wear MST T-shirts, caps, and carry flags. However, despite the peaceful nature of the demonstrations, there has often been police repression, which has on occasions caused the deaths of landless workers (Morissawa 2001).

Legal strategies: the role of "advogados populares" (people's lawyers)

For more than 20 years of its existence, the political strategies employed by MST members, in addition to causing a strong impact on the state government and administration, society and the media, have almost inevitably ended up involving the Brazilian judicial system. As we shall see below, civil and criminal suits have been used to target the MST's leadership and members in reaction to their strategies of questioning the liberal and individualistic conception of property rights in Brazil.

The Brazilian judiciary has generally taken the side of the plaintiffs in these cases, taking a conservative attitude towards property law and opposing the claims of the MST. However, the law is somewhat contradictory in this respect, for Art. 5, Cl 23 of the 1988 Constitution establishes that ownership

of land is only constitutionally protected provided that it is productive and fulfils its social function. Hence, the MST has generally made use of this constitutional provision in its legal strategies.

The MST is represented by people's lawyers. Their efforts are directed at creating and applying judicial and non-judicial legal strategies to reinforce the MST's political strategies. This involves not only making use of the legal tools available, but also the construction of alternative interpretations of the law in an attempt to generate jurisprudential solutions that are favorable to the struggle for land and social justice.

In the following we outline some of the main judicial and non-judicial strategies used. The latter amount to what we could call the MST's policies concerning the reform of the legal and the judicial systems. We then go on to examine the connection between these and the MST's political strategies, and discuss the positive impacts of this connection in the ambit of judicial decisions.¹⁶

Judicial strategies

The judicial strategies examined here represent those that are most commonly adopted by the MST's legal counselors in the lawsuits in which they are involved, in light of the favorable results they have produced in the past. They include: the Bill of Review appeal; reinterpretations of constitutional and procedural law; arguments based upon the prevalence of human rights over property rights; collective legal action and the extension of the applicability of pertinent legislation; demanding compliance with the social function requirement of property; demanding proof of exercise of possession by the owner; sensitizing and liaising with the judiciary; and taking the case to the upper courts.

The "Recurso de Agravo de Instrumento" (Bill of Review appeal)

This is a civil procedure appeal that has often been used on behalf of the MST in the context of repossession suits. Thus, whenever the judiciary grants a preliminary injunction to the estate owner, to the detriment of landless families, the defense team lodges an appeal to a higher court requesting the suspension of the injunction. This appeal is designed to allow the landless families to remain in the occupied areas and to intensify political pressure for state expropriation of the land, for the subsequent settlement of the families.

It should be pointed out that the MST is not a legal person, which means that it may not file the appeal in its own name. Therefore, the appeal is generally filed by one or two members of the MST, chosen in advance, who will figure as *appellants* during the case. Thus, the legal defense of all the families is ensured with the exposure of only a few of the occupiers.

In addition to attempting to suspend the eviction of the families via the preliminary injunction, the Bill of Review has served as an important instrument

of appeal for the MST's lawyers, allowing them to expound their legal arguments (procedural and non-procedural) in defense of the struggle for agrarian reform. These arguments may also ultimately affect the courts' decisions, which is an important additional function of the *Bill of Review* appeal.

This is what happened in the case of the Primavera Ranch in 1998, in Rio Grande do Sul. Hundreds of landless families occupied the area, calling for its expropriation for the purpose of agrarian reform. The owner filed a repossession suit with a motion for preliminary injunction. The local judge granted the motion and ordered the occupants to be evicted. The MST's counselors appealed against the order. It was argued that the owners had failed to fulfill the social function of their property; that the National Institute for Colonization and Agrarian Reform (INCRA) was interested in expropriating the estate for agrarian reform; that there was a need for a reinterpretation and readjustment of the law (i.e. that this was a conflict of rights, rather than trespassing); and that the case should be tried by the Federal Court, rather than the state court. The arguments were well received by the judge, who ordered the eviction orders to be suspended. When it went to trial, the MST's arguments were sustained.

Reinterpretations of constitutional and procedural law

Another important strategy in the legal defense of the landless workers is the use of arguments based upon a reinterpretation of constitutional and procedural law, an approach which also contributes to the broader debates about agrarian reform and social justice.

Given the paucity of doctrine and jurisprudence in defense of the basic human rights of landless rural workers, in contrast with the abundant legislation in defense of property rights, and the increasing number of lawsuits brought against landless workers, the MST's lawyers have over the years developed arguments designed to offer a more sophisticated legal defense of rural workers. Many of these arguments have been dismissed by magistrates, though some have been well received, and others have even managed to stimulate new arguments within the judiciary itself. In any case, this type of strategy has had an important role in countering the routine legal common sense of legal practitioners and in politicizing the Brazilian judiciary.

The prevalence of human rights over property rights

This argument holds that, whenever there is conflict between basic human rights and property rights, the latter should yield. In the case of the repossession suits involving the MST, this conflict is clear-cut. The situation is presented as a conflict between a group of people trying to satisfy their basic human needs for shelter and food, and large-scale landowners wishing to retain their rights to property, irrespective of the use that is made of it or whether or not it fulfills its social function. This argument was symbolically

sustained in the decision passed by the 19th Civil Chamber of the Rio Grande do Sul Court of Justice in the case of the Primavera Estate, with repercussions on other proceedings in defense of MST occupations. The ruling stated:

In sum, to decide, it is necessary to choose between two alternatives: 1) the material damage that the invasion will certainly cause (or has already caused) to the company leasing the occupied lands; 2) the injury to fundamental rights (or the denial of the social minimum) suffered by the 600 “landless” families who, being evicted from there, have literally nowhere to go. [...] Doctrine states that, if it is necessary to sacrifice the rights of one party, then property rights should be sacrificed in order to guarantee fundamental rights, if that is the option. This solution is not indicated by doctrine alone; common sense also urges such a position. While attempting to remain, as far as possible, within the strict boundaries of the bill of review that examines the preliminary injunction of a repossession suit, there are, in my modest opinion, compelling reasons to dismiss the repossession claim of the respondent (Cadernos Renap 2005).

Compliance with the requirement of the social function of land property

This argument has been used ever since the promulgation of the Federal Constitution in 1988, which enshrined the principle of social function of property (Art. 5, Cl 23). However, many courts have not yet acknowledged this constitutional principle, thereby contributing to the dominance of private property law and to the exacerbation of land-related social conflict. Other courts have been more receptive and have supported the demand to enforce the social function. This is what happened with the Rio Grande do Sul Court of Justice, for example, with the above-mentioned case of the Primavera Ranch, in 1998. One of the judges stated that Brazilian law defends social value over and above individual value, and that the right of possession should therefore only be protected and guaranteed when the social function, as laid down in Art. 5, Cl 23 of the Federal Constitution, had been duly taken into account. The judge claimed that: “it is not enough to assert ownership as ‘legal grounds’ in the initial application, as the social function of ownership is also a legal ground, in accordance with the Federal Constitution”. This position has since been studied and analyzed by various legal specialists, and has been the topic of many articles and publications.¹⁷ The decision has had repercussions in various Brazilian courts, strengthening legal arguments in defense of the struggle for land.

Proof of exercise of possession by the owner

According to the Code of Civil Procedure, Art. 927, the owner is obliged to prove exercise of possession (i.e. its effective use) in order to regain possession

of the land. The title deed is usually presented as proof of ownership, as if this were equivalent to the exercise of possession mentioned above. Thus, the argument based upon the owner's obligation to prove possession is designed to "remind" the judiciary that possession and ownership are not the same thing. That is to say, the owner must prove that he effectively exercises possession by economically developing the land and respecting environmental and labor aspects, rather than merely holding the title deed to the property.

Sensitizing and liaising with the judiciary

This strategy, aimed at strengthening the lawyer's arguments in court, has received great deal of attention from both lawyers and militants of the MST. For one of the lawyers interviewed,¹⁸ the sensitization of judges should always take the form of a legal debate, involving two basic aspects. The first concerns their knowledge of the reality on the ground, their familiarity with the specific situation in hand. A credible person who has the knowledge of the situation may offer to develop that line of argument in conversation with the judge. The personality or authoritative figure in question may be a member of parliament, a priest, a bishop, an academic scholar, a famous artist, a local politician, an arbitrator of agricultural conflicts, or even a lawyer able to provide a complex analysis of the situation which the judge may be willing to consider. The second aspect raised by the same lawyer concerns the importance of alerting the judge to the political and social consequences of his/her decision. A political debate can be brought to bear upon a legal argument in a hearing with the magistrate, and this may help to bring about a decision that is favorable to the movement.

Taking the case to the upper courts

This strategy is used particularly in criminal cases in which MST leaders figure as defendants. The perception has arisen that local judges, like those in the state courts, have close ties with the local elites in the region, not only ideologically, but also socially and economically. Thus, the MST's lawyers use a strategy of procedural appeals in an attempt to overturn the sentence. For this, the lawyers are prepared to take the case to the court of final appeal, that is to the Supreme Court of Justice.

Indeed, there have frequently been important differences between the decisions taken by the higher courts as compared to the lower ones. According to Elmano Freitas¹⁹ this happens because the higher courts have traditionally tried criminal cases involving people from the middle and upper classes. Thus, their decisions have generally been designed to protect the rights of individual (privileged) citizens. As one of the functions of these courts is to standardize jurisprudence, they ultimately try the poor landless workers on the same basis as other citizens, i.e. by granting them their individual rights.

According to Elmano Freitas, the MST has been successful in all cases involving landless workers that have gone to the Supreme Court of Justice and the Supreme Federal Court. For this reason, a common strategy used by people's lawyers for the defense of a criminalized worker is to take the case to the upper courts.

Non-judicial legal strategies

Just as important as the judicial strategies are the non-judicial ones. They operate outside the context of concrete judicial actions involving the MST. They are the MST's policies concerning the reform of the legal and the judicial systems. Their main aim is to foster proximity between the MST and the magistrates, and to sensitize present and future legal practitioners to the MST's claims. It is important to point out that non-judicial strategies are implemented in connection with political and judicial ones.

Of the various non-judicial strategies used, this study focuses upon some of the most innovative experiments adopted by the MST and the people's lawyers. They are: technical and political training for lawyers and collective action; and partnerships with universities and incentives for the creation of University Legal Consultancy Services.

Technical and political training for lawyers, and collective action

One of the extrajudicial strategies used is the technical and political training of lawyers, and their involvement in joint actions in the struggle for land. It should be pointed out that this is not merely a strategy used by the MST; it is actually a broader feature used by popular advocacy: the principle that the legal involvement with the court case and the political involvement with the social struggle of which the case is an instance go together.

Given the intense criminalization of the MST, particularly by the judiciary and the media, and the large number of repossession suits and all kinds of other suits brought by landowners to prevent the expropriation of land, the lawyers who act on behalf of the MST need to be constantly updated and retrained in the legal-procedural sphere.

The training takes various basic forms. The first involves individual professional upgrading, in which the lawyer, of his/her own initiative, takes a post-graduate, or even Master's and Doctorate course, in areas of civil or criminal law. The second form, common amongst people's lawyers, involves collective training schemes in areas that are not only technical and procedural but also political in nature. These take place upon the initiative of the lawyers acting on behalf of the MST, who organize conferences, seminars or courses on specific subjects, particularly in areas of civil or criminal law. The aim is to develop a more in-depth understanding of these issues, while providing an opportunity for an exchange of experiences and a discussion of legal-procedural

strategies for dealing with them. As these lawyers are directly involved in the collective struggle for access to land, they also gain political skills and knowledge in their daily practice, expanding their vision and adopting a critical posture about the political and social situation in the country.

Partnerships with universities and incentives for the creation of University Legal Consultancy Services

Many of the obstacles faced by the MST have resulted from the positivistic training traditionally given to the judiciary at law schools. To counteract this, the MST has fostered partnerships with several Brazilian universities with a view to influencing the training given to legal professionals, in order to make them more sympathetic and understanding of the agrarian question.

Closer relations have been cultivated with the Centers for Popular Legal Consultancy (NAJUP) and the University Legal Consultancy Services (SAJU), as one of the ways of sensitizing future legal professionals. The University Legal Consultancy Services organize training programs involving students, academics and the local community dealing with problems connected with human rights, such as the lack of proper housing for the lower classes, domestic and police violence, disrespect of women's rights, and the disastrous condition of the prison system. Projects have been set up in a number of law schools to bring law students into contact with the agricultural situation of the country. These include cycles of debates about the agrarian question, photo exhibitions and field visits in which students live for a while in settlements and encampments connected to the MST. Students have the chance to live for up to 10 days with rural families. Before and after the experience, they take part in collective activities, workshops, lectures and debates about social issues (particularly the agrarian question) with leaders of the MST and other social movements, as well as with intellectuals and academics.

Another strategy used to train legal practitioners committed to agrarian reform was the creation of a special graduate class in law at the Goiás Federal University (UFG), exclusively for the children of poor rural families. The course has resulted from a joint venture by the MST, other rural movements, the National Institute for Colonization and Land Reform (INCRA), the Ministry for Agrarian Development (MDA) and the Federal University of Goiás (UFG).

Impact of the political and judicial strategies: Analysis of particular court cases

Having analyzed the different legal and political strategies used by the MST and its lawyers, we will now try to identify and explain the impact of these upon the judiciary by briefly describing 34 rulings from cases heard between

1996 and 2005 in five regions of the country, and which were favorable to the MST. Eleven of these were civil suits and 23 criminal suits.²⁰

(a) In 34 of the lawsuits, MST members (mostly leaders) appeared as defendants; that is to say, the MST's contact with the legal system came in proceedings brought against it. The plaintiffs in these cases were private individuals (owners of the occupied lands) in the civil suits and the State Prosecutor's Office in the criminal cases. This explains why the people and families involved in the MST have had to struggle to overcome the entrenched prejudices of a judiciary which, for the 200 years of its existence, was systematically opposed to the struggle for agrarian reform in the country, and whose rulings, in the last two decades of democracy, have been marked by conservatism and traditionalism.

However, over the years, rulings started to be issued that were more favorable to the landless, and with that, the MST began to give more attention to the legal and judicial struggle, though always within the context of the broader political struggle for land. There have now been a number of favorable legal decisions taken in different parts of the country, which reveals that the MST's strategies have had an important impact upon the legal system. In fact, it may be said that the MST has managed to bring about a broad consensus within that most stubbornly conservative of institutions – the judiciary – as to the legitimacy of its strategies to ensure that the Constitution is enforced.

(b) In each of the cases the MST figured as defendant in both a civil repossession suit and in a criminal case; thus, a single fact (occupation of land) often generates two quite different suits: a repossession suit with a motion for preliminary injunction for the immediate eviction of the occupying families, and an application for prison sentence for trespassing. This shows that the suits not only aimed to put an end to the occupation, they also sought to criminalize the MST.

(c) The analysis of the judicial rulings shows that all the judicial legal strategies mentioned above were present in both civil and criminal processes. These strategies were used in combination with the political strategy of occupation, designed to exert pressure and to ensure that the struggle for land and dwelling rights be taken seriously. Thus, both judicial and political strategies were aiming at the same objective ultimately. Although the law suits sought to criminalize the MST, many judges followed the alternative interpretations of the law put forward by the MST lawyers, revealing the court's commitment to a role that goes beyond the classic, conservative function of the judiciary, a role that involves the enforcement of new constitutional demands and values.

(d) The rulings were favorable to the MST, when the magistrates ceased to base their legal arguments solely on the Civil Code and on strict "civilistic" or "privatistic" conceptions of property and started to enter into dialogue with the Federal Constitution and the doctrine of fundamental human rights. Thus, of the 11 civil rulings analyzed, 10 involved arguments based upon the Federal Constitution and fundamental human rights. In criminal suits, this figure is lower, though significant nonetheless: of 23 decisions, over a

third were grounded in the Constitution and human rights. These figures reveal the extent to which the MST's legal and political struggle has led the judiciary to abandon its individualistic and privatistic conceptions of law and property and to open itself up to a broader conception the rule of law, according to which social and collective rights may be effectively realized.

(e) There is full proof of the effectiveness of the strategy of appealing to higher courts in order to overturn criminal rulings and plead for the provisional release of the landless in criminal cases: 14 of the 23 favorable rulings analyzed were issued by the Supreme Court of Justice.

(f) The people's lawyers (particularly the National Network of People's Lawyers, RENAP) contributed decisively to the MST's legal and political struggles and to the creation of a new legal common sense (Santos 2002) concerning the tension between land property and social justice. RENAP, which was created in 1995, advocates a new form of legal mobilization in a political context marked by the deepening of the neoliberal project and by great conflicts in the countryside, particularly involving the MST. In 1995 alone, there were around 440 conflicts in rural areas.

Since its creation, RENAP's aim has been to provide support and legal consultancy services to urban and rural social movements, including the MST (Cadernos RENAP 2005). The political, practical and theoretical experience of the people's lawyers with regard to the MST's demands has, nevertheless gone beyond providing defense of collective actions in the judicial system to enable the emergence of a new legal culture much more committed to the needs and aspirations of socially excluded groups very much in line with the democratic revolution of justice we defended at the outset.

The people's lawyers played a central role in synchronizing the social movements (the MST and others) with the legal field (Houtzager 2003). The MST, in particular, in the first years of its existence, did not believe in the law as a space for emancipation or for the vindication of claims, and interacted with only a few of the more progressive lawyers. Its reasoning went along the following lines: "the law is a tool of the bourgeoisie and the oligarchic classes, and has always operated in favor of them; if the law only sees us as defendants in order to punish us, why should we use it?". The gradual dialogue that the lawyers began to promote between the legal and political fields of action for the MST "contributed particularly to overcome its resistance to enter the legal field and build relationships of trust between the Movement and other protagonists from the legal field, such as the informal networks of judges committed to social justice" (Houtzager 2003). RENAP has been strongly committed to the process of constitutionalization within the legal sphere, helping to propagate new doctrinal bases for arguments used in court to defend the MST.

RENAP has also contributed to the development of liaisons between the MST and the universities, particularly law students. This strategy, also an innovative initiative, is realized jointly by both parties. On the one hand, the lawyers establish the academic contacts in the law schools; then the MST

members open up their camps and settlements to interested students and people curious about the movement and its struggles. This represents an important process in the sensitization of future legal practitioners, and has stimulated a vital debate about the role of law and legal education in counteracting social inequality and injustice. The success of this initiative is demonstrated by the fact that dozens of legal consultancy services have sprung up in universities upon the initiative of the students themselves, often inspired by preliminary contacts with the MST.²¹ Indeed, many of the lawyers presently involved in RENAP were molded by these experiences.

Overview of the legal arguments used by the judiciary for and against the MST

As we have already seen, there are arguments favorable to the MST in both the civil and criminal sphere that are repeatedly used by the Brazilian judiciary and which result from a combination of legal and political strategies adopted by the MST and its lawyers.

In the civil justice field, which is largely concerned with possession suits, the following arguments warrant attention, as they enable the landless families to remain in occupied areas and contribute to the struggle for the implementation of land reform:

- (a) the application of the constitutional principle of the social function of ownership (Art. 5, Cls XXII and XXIII of the Federal Constitution);
- (b) the application of the "Law of Introduction to the Civil Code", which states that in applying a law, the court shall take account of the social purposes for which that law is intended and of any requirements needed to ensure the common good;
- (c) application of the Code of Civil Procedure (Art. 927), which obliges owners to prove exercise of possession;
- (d) application of the International Covenant on Economic, Social and Cultural Rights (Art. 11), ratified by Brazil, which affirms the right of each person to adequate food and accommodation;
- (e) the legitimacy of the occupation with regard to the neediness of a particular group;
- (f) the prevalence of the fundamental human rights of the occupying families over pure property rights;
- (g) the connection between private property rights and social solidarity and responsibility for ensuring a dignified existence; and
- (h) the non-absolute character of private property.

In the criminal justice field, the following arguments are sustained in support of the MST with regard to criminal suits resulting from land occupations with applications for remand in custody for MST leaders:

- (a) the application of Art. 5, Cl LXVI of the Federal Constitution, which states that no one shall be taken to prison or kept there when the law has granted provisional release with or without bail;
- (b) the application of the constitutional principle of presumption of innocence (Art. 5, Cl LVII), which states that no one shall be considered guilty until a sentence has been passed in a court of law;
- (c) the argument that organizing a popular movement seeking to implement land reform does not constitute a crime against property, but instead represents a collective right, the expression of citizenship;
- (d) the argument that occupations by homeless rural workers constitute a state of need and not trespass;
- (e) the lack of concrete binding grounds for remand in custody;
- (f) the exceptional nature of remand in custody as a measure;
- (g) the impossibility of sustaining a decree of remand in custody for general motives, without demonstrating concrete reasons justifying such a rigorous measure; and
- (h) failure to demonstrate the risk that the freedom of the defendant might bring to "public order and social peace".

On the other hand, there are numerous arguments used by magistrates against the MST, in both the civil and criminal spheres. Of these, the most important in the civil justice field are:

- (a) the application of Art. 5, Cl XXII of the Federal Constitution, which states that the right to property is guaranteed;
- (b) the application of Art. 5, Cl LIV of the Federal Constitution, which states that no one shall be deprived of his freedom or his property without due legal process;
- (c) the application of the Code of Civil Procedure (Art. 926), which states that a proprietor has the right to retain ownership of his property in the event of trespass and have it restored to him in the event of disseisin;
- (d) the argument that land occupations are illegal because they seek to use violent and authoritarian methods and coerce the judiciary to promote land reform; and
- (e) the argument that land occupations constitute a violation of property rights and are therefore illegal.

In the criminal justice field, the magistrates sustain:

- (a) the application of Criminal Code, Art. 161, Cl II (disseisin), Art. 288 (gang formation), Art. 163 (crime of damage), and Art. 155 (theft), with the aim of criminalizing the MST leadership;
- (b) the application of the Code of Criminal Procedure (Art. 312), which stipulates remand in custody to guarantee public order or to ensure the application of criminal law, when there is proof that a crime has been committed and sufficient indication of the perpetrator; and

(c) the argument that land occupation constitutes disseisin, which is a crime.

Criminal cases against the MST leadership are usually brought by the Department of Justice. It is notable that in December 2007, the Supreme Council of the Department of Justice of Rio Grande do Sul approved Report No. 1124-100-PM2-2007, prepared by Public Prosecutor Gilberto Thums. Amongst other things, this document recommended “the promotion of a Public Civil Suit with a view to dissolving the MST and declaring the organization illegitimate”, and the adoption of grounded measures aimed at “suspending the marches, processions and other displacements, and at investigating MST members for the practice of organized crime”. This report will certainly contribute to the increased criminalization of the MST by the judiciary.

Conclusions

This study has attempted to describe and analyze the main legal and political strategies used by the MST in its struggle for law and justice in Brazil. It has also sought to explain why these strategies are today pursued in conjunction, and to what extent they may help to contribute to making the law and legal system more sensitive to the claims and social struggles of these workers, particularly those related to the issue of land.

We have seen that access to law and justice presupposes a broad political process of social transformation. This includes the creation of more substantial forms of social justice and a developing awareness that the law contains many internal contradictions that may be used in the interests of the socially disadvantaged as much as of the dominant classes. Social movements fighting for land reform, like the MST, have only become aware of this fact in recent decades; but the knowledge has enabled them to complement their political strategies (such as the mass occupations of land) with innovative judicial and legal strategies. The resulting articulation between legal and political initiatives has considerably strengthened the MST’s objectives, largely thanks to the intervention of the people’s lawyers, who have liaised between the state legal system and the social movement.

In the course of this process, the hegemonic law currently in force has been put to the test. A new legal common sense is starting to develop, with new attitudes being assumed by the judiciary, and the appearance of a new paradigm, within which the law is now interpreted in accordance with the value and quality of the justice meted out.

These observations are supported by an analysis of the rulings issued in civil and criminal cases that have been favorable to the MST, which reveal receptivity towards interpretations based upon the constitutional principles of the prevalence of human rights, the social function of property, and a respect for human dignity and social solidarity.

The creative combination of new legal and political practices has allowed hegemonic institutions (such as the law and the courts) to be used in a non-hegemonic way (Santos 2002: 466). In the light of these experiences, it would seem that a positive response may be given to the question of whether law can be emancipatory (Santos 2002: 439). In certain specific situations, such as those exemplified in this study, it is indeed possible to reinvent law, taking it beyond the liberal model towards a new legal and judicial paradigm. This necessarily involves a conception of access to law and justice that is more firmly committed to the values of social justice, that is, to substantial, rather than merely formal, equality between citizens.

Notes

- ¹ This text was prepared with the help of research assistants Carolina Pereira Tokarski, Luiza de Almeida Bezerra and Raíssa Roussenq, with contributions from Carolina Martins Pinheiro, Livia Gimenes Dias da Fonseca and João Paulo de Faria Santos.
- ² The idea of “*a democratic revolution of justice*” is developed by Santos (2007). For a review in English see Silva (2008). The same topic is analyzed by Santos (2002: 439–97) while answering the question “Can Law be Emancipatory?”.
- ³ Information acquired by the MST from the United Nations Organization (UN), December 2007.
- ⁴ This data is from the databank of the Socioenvironmental Institute, which monitors the demarcation of the Indigenous Territories on a daily basis. Up-to-date information about each of the Indigenous Territories is available on the organization’s website: www.socioambiental.org.
- ⁵ The Decree of 25/05/1992 ratified the demarcation of the Yanomami indigenous territory, with a total area 9,664,980 hectares.
- ⁶ The Decree of 14/04/1998 ratified the Indigenous Territory of Alto Rio Negro, giving it an area of 7,999,380 hectares.
- ⁷ The Decree of 15/04/2005 ratified the boundaries of the Indigenous Territory of Raposa Serra do Sol and defined Monte Roraima National Park as Union public property, with a dual function of conserving the environment and enforcing the constitutional rights of the Indians.
- ⁸ The Ministry of Justice Administrative Rule No. 1806 of 16/09/2005 declared the Indigenous Territory of Trombetas/Mapuara to be under permanent indigenous possession, and established that the territory would be administratively demarcated by FUNAI, with an area of 3,970,420 hectares.
- ⁹ The abolitionist struggle, mostly in the nineteenth century, was linked to a struggle for land reform: “For whosoever studies social phenomena, there is no greater crime than the monopoly of land; this is the main factor underlying slavery and serfdom [...]; this is the satanic producer of misery and all the horrors and despair that today afflict the old and the new worlds”: André Rebouças, Brazilian abolitionist in a letter to Joaquim Nabuco, 12 March 1897.
- ¹⁰ Using an organism (such as a predator, parasite or pathogen) to attack another that is damaging crops. This alternative is much used in sustainable farming systems. Available at www.planetaorganico.com.br/controler.htm. Accessed on 29.01.08.
- ¹¹ These are natural recipes frequently used in organic farming to combat pests. Available at www.jardimdeflores.com.br. Accessed on 29.01.08.
- ¹² Prepared from easily obtained agricultural including sugar cane juice and milk. Biofertilizers do not damage the local ecosystem, which enables the natural water

- sources to be preserved. Available at www.sitiogeranium.com.br/ts/biofertilizantes.php. Accessed on 29.01.08.
- ¹³ Green fertilizer is a special type of organic fertilizer made by cultivating plants which are then broken up, serving as a cover until they decompose. Available at http://wikipedia.org/wiki/Green_fertilizer. Accessed on 29.01.08.
- ¹⁴ “Mulheres realizam vigília em frente à Nortox no Paraná” (“Women hold vigil outside Nortox in Paraná”). Available at www.mst.org.br/mst. Accessed on 29.01.08.
- ¹⁵ Idem.
- ¹⁶ This part of the analysis is based upon extensive semi-structured interviews with four people’s lawyers from the National Network of People’s Lawyers (RENAP).
- ¹⁷ These include: RENAP, *Cadernos Renap* 2001; Alfonsin 2003.
- ¹⁸ Interviewed for this research on 16.01.08.
- ¹⁹ Interviewed for this research on 16.01.08.
- ²⁰ A full table of these cases is available at the end of the original version of this paper at [www.lexisnexis.com/documents/pdf/20080924043058&c_\]large.pdf](http://www.lexisnexis.com/documents/pdf/20080924043058&c_]large.pdf).
- ²¹ This is the case of the People’s Legal Consultancy Nucleus of Rio Grande do Sul (NUJUP/RS), which came into existence in 2002. The group has held diverse activities in MST encampments and marches. Recently, the group received the 2nd Roberto Lyro Filho Award for its project on the right to residence in an urban occupation in Porto Alegre/RS.

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