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The MST and the Rule of Law in Brazil

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Abstract

The paper begins by acknowledging the uncomfortable nature of the MST's relations with prevailing legal orthodoxy, but then go on to briefly examine their nature, origins and extent. In acknowledging the tension between the MST and prevailing legal orthodoxy we ask how much this reveals about the movement's approach to legality, and how much it reveals about the legal system itself and the attitudes of those who operate it. The paper goes on to emphasise the positive interactions between the MST and the rule of law rather than points of friction. It underscores the importance of unpicking these relations, as well as examining the MST's record, which does not conform to the lawless stereotype. The overall picture that emerges, however uneven and localised, is that of an increasingly rich interplay between legal practitioners and the MST. The latter, it turns out, has quite a sophisticated legal discourse and strategy. Similarly, albeit to a more limited extent given that this is a major part of the challenge, we find that the legal sphere is the subject of internal contestation in addition to external social pressure. Finally, the paper draws these threads together in the light of President Luis Inacio Lula da Silva's administration. His 2002 election and 2006 re-election undoubtedly gave a distinctive new slant to the MST's relationship with the State in general and the rule of law in particular. If the rhetoric was to be believed, land questions had acquired a new urgency. Gone was the repressive tension that had underlain relations between the movement and all the post dictatorship administrations. Temperamentally, at least, significant sectors of Lula's government, including the President himself, were favourably disposed towards land reform. This raised the tantalising possibility that, for the first time in decades, a fundamental reorientation of the State - and its corollary, a loosening of the legal regime and decriminalisation of landless struggles, might take place. But it also raised the difficult question of how a government of the left would respond to Rule of Law imperatives on the one hand, and to a social movement known for tactics of direct action, on the other.

Keywords:

Movimento dos Trabalhadores Rurais Sem Terra (MST), Rule of Law, Land Reform, Social Movements, Brazil.

1. Introduction

Few subjects so exercise commentators and politicians in Brazil than the real or imagined relationship between the Movimento dos Trabalhadores Rurais Sem Terra (MST) and the Rule of Law, or *Estado de Direito*. Here is a typical example, an open letter sent by Raul Jungmann, the Minister of Agrarian Reform in President Cardoso's government, to President Luis Inacio Lula da Silva in July 2003:

President, no democrat can sacrifice the Rule of Law in name of the combat against poverty and social exclusion. I am sure you understand this. The MST and the UDR¹, for different reasons, do not. Agrarian reform has been carried out in two contexts; that of rupture or institutional normality. Rupture is in nobody's interests. Normality implies the strict and rigid adherence to the law - whether we like it or not. Mr President, follow the law and make others follow it.²

The implication is clear: firstly, that the MST's restricted worldview means that questions of poverty and social exclusion are invariably set upon a collision with more broadly based Rule of Law imperatives; and secondly, that Brazil's reconnection with 'institutional normality', makes it imperative for the President to uphold the Rule of Law at all times, even if this is to the detriment of allies like the MST. This is powerful language. It strikes an historical chord with Brazilians who recall the military rupture of 1964 and its costly aftermath; and at the same time makes a point of universal significance in terms accessible to all generations. It proposes a highest common denominator by appealing to people's sense of fair play, firmly rejecting the idea that any individual or organisation should be considered above the law, and offering a clear way forward: 'follow the law and make others follow it'. What could be simpler than that?

The present article argues that this is precisely the problem with the way the discussion is framed. The picture presented of both the MST *and* law is deceptively simple, representing little more than a caricature. Of course caricatures have their uses, and public letters must take short cuts in the interest of clarity, but why should someone like Raul Jungmann, one of the sharpest intellects in the Cardoso government, with a deep understanding of the issues involved and the dangers of oversimplification, adopt this type of limiting discourse? Part of the answer is that he remains a politician and the text is a political document and not just a statement of legal orthodoxy. It skilfully takes a sideswipe at the Lula administration by highlighting a vulnerability, namely how a government of the left can reconcile Rule of Law imperatives with direct action tactics deployed by its ally in opposition, the MST. By far the most crucial part of the letter, however, consists in the claims it makes about law in general and the MST in particular. In this respect it offers not so much a distorted caricature as a remarkably faithful and succinct portrayal of dominant legal and political discourses. For this reason it cannot be dismissed lightly and was chosen as our point of departure.

This paper addresses some of the issues raised by orthodox discourses like Jungmann's, but from an entirely different perspective. We begin by acknowledging the uncomfortable nature of the MST's relations with prevailing legal orthodoxy, but then go on to briefly examine their nature, origins and extent. Typically, critics

emphasise the points of friction (of which there are many) and trace (in our view erroneously) their origins exclusively back to the MST and its supposed unilateral failure to 'understand' the rule of law. Constructing the problem thus both raises the stakes to a supposed clash between the MST and law. In fact, Jungmann's letter suggests that it heralds nothing less than an assault upon democracy itself.³ This view invites the conclusion that containment, with repressive measures if necessary, is the best course of action. Indeed, Jungmann has gone on to say that it is high time for 'law's truncheon to be brought down upon the MST'.⁴

The approach of this article differs. In acknowledging the tension between the MST and prevailing legal orthodoxy we ask how much this reveals about the movement's approach to legality, and how much it reveals about the legal system itself and the attitudes of those who operate it. The suggestion is that we are dealing with a multilateral equation. Titanic clashes or assaults upon democracy are not the issue. Indeed, aspects of legality may actually be fortified by the MSTs actions. The second part of this paper emphasises positive interactions between the MST and the rule of law rather than points of friction. It underscores the importance of unpicking these relations, as well as examining the MST's record, which does not conform to the lawless stereotype. The overall picture that emerges, however uneven and localised, is that of an increasingly rich interplay between legal practitioners and the MST. The latter, it turns out, has quite a sophisticated legal discourse and strategy. Similarly, albeit to a more limited extent given that this is a major part of the challenge, we find that the legal sphere is the subject of internal contestation in addition to external social pressure.

The third and final section draws these threads together in the light of President Luis Inacio Lula da Silva's administration. His 2002 election and 2006 re-election undoubtedly gave a distinctive new slant to the MST's relationship with the State in general and the rule of law in particular. If the rhetoric was to be believed, land questions had acquired a new urgency. Gone was the repressive tension that had underlain relations between the movement and all the post dictatorship administrations. Temperamentally, at least, significant sectors of Lula's government, including the President himself, were favourably disposed towards land reform. This raised the tantalising possibility that, for the first time in decades, a fundamental reorientation of the State - and its corollary, a loosening of the legal regime and decriminalisation of landless struggles, might take place. But it also raised the difficult question of how a government of the left would respond to Rule of Law imperatives on the one hand, and to a social movement known for tactics of direct action, on the other.

2. Tensions between the MST and Legal Orthodoxy

2.1. Social and Political Origins

There is an element of inevitability governing the MST's difficulties with the established legal order. While this is partly due to the movement's chosen course of action, methods and self-conception, it also derives from the movement's social origins, i.e., to the fact that the MST was a product of, and not just a response to, circumstances. These circumstances, especially the extent of social polarisation, are well known. Land and income inequality in Brazil are star. According to the latest UNDP Human Development Report, Brazil's Gini coefficient (the most widely used

inequality indicator) was 58.0, lower only than Colombia (58.6), Bolivia (60.1), Namibia (74.3), Botswana (63), Swaziland (60.9), Lesotho (63.2), Central African Republic (61.3) and Sierra Leone (62.9).⁵ Recent data suggest that 56 percent of property land is still concentrated among just 3.5 percent of property holders, while a mere 6.3 percent of land is held by 57.6 percent of property holders, in other words, 144,281 properties have successfully appropriated 183,564,299 hectares of land, leaving 2,441,770 other properties to squeeze into just 26,601,982 hectares.⁶ Absolute poverty is an endemic problem for rural families, of whom more than three million live on a maximum income of three reais (roughly a dollar) per capita per day. It is a grave mistake to imagine that legal conflicts arising from the release of these structural tensions is the product of 'irresponsible leadership'. Time and again, whether in South Africa, Poland or, indeed, Brazil during the 1970's and 1980's, events suggest wider social forces are at work. The MST's supposed failure to 'understand' the Rule of Law simultaneously belittles these tensions and exaggerates leadership volition.

A sense of proportion, then, is needed when considering rural conflicts that occur under the banner of the MST. All too often they are reduced - *ad absurdum* - to the terrain of 'movement or leadership irresponsibility' when in fact something more significant is happening. Consider the marked growth of groups similar to the MST. The numbers speak for themselves.⁷ To be sure the MST is by far the most vocal and powerful of these groups, and exercises a de facto leadership role, but that still begs the question why so many others have followed suit and adopted similar tactics of mass occupation? Whatever the answer, a spontaneous mass outbreak of law breaking is not it. Like the MST these movements should be understood as distinctive responses to and 'products' of circumstances rather than strait jacketed with repressive legal discourses and actions.

Another way to understand the origins of conflict between the MST and legal orthodoxy is by posing the following question: what were and are the alternatives to conflict? In fact, the alternatives had been tried and found wanting. The MST was born of a strong sense of past failures, including the assassinations of rural trade union leaders, the glacial pace of land reform, and the excessively debilitating legalistic culture of existing rural organisations.⁸ Not even the prospect of more radical rural unions, following the upheavals of the late 1970's, could persuade MST organisers to throw in their lot with these groups. The argument, which finally prevailed, was that while unions could only organise individual workers as members, the MST could derive strength from the organisation of families - men, women and children - in mass occupations without the restriction of municipal limits, to which legislation also subjected unions. Mobilising beyond traditional borders - geographic and legal - would give the movement its national characteristic as well as the capacity to concentrate large groups of people in small areas without the usual restrictions. In this sense, leadership did indeed play a vital role in shaping the movement and to this extent is responsible for the path undertaken and its consequences.

But what of the substantive critique offered by orthodox Rule of Law advocates? Is the MST acting beyond the law, thereby 'threatening democracy' itself?⁹ The illegality argument is usually based on two pillars. The first, although less significant, arises from specific cases of law breaking and their depiction as representative of the movement as a whole. Undoubtedly, this is one of the most difficult questions facing

the movement. However, in an organisation of the MST's size, operating under extremely stressful conditions, it is not surprising that laws have been broken. That is one reason why, for instance, the movement has long banned alcohol from encampments, since it often gave rise to fights. Over the years, the process of conflict has seen thefts, damage to property, the killing of landowners, military police and even fellow members. Opponents have been quick to latch on to these events, seeing in them the possibility of tarnishing the movement's image and embarrassing its leadership. Crucially, though, they do not form part of the MST's *modus operandi*. If they did then Rule of Law arguments would hold more weight. Instead, they must be seen for what they are, as episodic exceptions to the rule, no matter how tragic or unwelcome for those directly involved.

The same claim to exceptionality, however, cannot be made for the second target of criticism: land occupations. On the contrary, these form an indispensable part of the MST's whole operation. Without them its survival would either be compromised, or the movement would be institutionalised. To this extent, the allegation that the movement is embarked upon a systematic confrontation with the law itself is far more serious. Before addressing this issue, some reference to the operation of Brazil's legal system is required.

2.2. Failures of the Legal System

In the absence of clarification the impression created so far has been of a fully functional and largely impartial legal order where due process prevails. Like Gandhian notions of Western civilisation, though, it would be a nice idea. Arguably the only consistent feature of Brazil's justice system is its inconsistency, namely its capacity to deviate from many of the basic premises advanced by a range of Rule of Law advocates. The system is notoriously unjust, bureaucratic, cripplingly slow, and saturated with class bias. Because detailed consideration of these points is beyond the scope of this paper, our remarks are confined to a few brief illustrations of this last point, class bias.

Even senior figures working within the system have acknowledged major class divisions. In 2000, for instance, the Deputy Attorney General for Human Rights, Wagner Gonçalves, observed that 'in Brazil there is a very strong complex of formal and informal mechanisms that protect people with political and economic power.' He went on to note that the Brazilian penal system was 'profoundly selective': 'The chances of a poor person succumbing to the long arm of the law are incomparably greater than those of a rich person.'¹⁰ The differences abound. When a college educated person goes to prison, assuming that matters get this far, he or she has the right, *enshrined in law* (article 295 of the penal code), to be held in a separate cell away from less educated and grossly overcrowded countrymen and women. This says a lot for the system. In the case of politicians, the situation remains unequal but is different. For years they attained near untouchable status. In his Oxford speech¹¹, Gonçalves, confirmed that 'in Brazil, if the author of a crime is a parliamentarian there is a 95 percent chance that he will not have to respond for the crime he committed'.¹² An illustrative case took place in September 2003, when Brazil's Attorney General was compelled to halt investigations into the fraudulent emission of hundreds of millions of dollars of land bonds during senator Jader Barbalho's tenureship of the land reform ministry back in the late 1980's. Despite the colossal magnitude of the crime, the passage of time and destruction of crucial evidence had

undermined the prospects of a successful prosecution. At one point in the lengthy proceedings, Barbalho was imprisoned for precisely five hours. The contrast with landless workers is striking. Menial crimes routinely attract custodial sentences. An extreme example occurred in March 1999 when five workers from Pernambuco state were imprisoned for a period of six months. Their crime was the theft of eight goats to feed 70 families encamped near the Santa Rita ranch, in São Bento do Una.

Given the class biases of Brazilian justice, it is no wonder that the MSTs relationship with the law is difficult. The situation is compounded by Kafkaesque absurdities of which the emphasis upon the vindication of procedure to the exclusion of substantive issues is perhaps the most notable. However, any notion that the MST is uniquely disadvantaged, or a 'victim', must be qualified. To a large extent movement members are in exactly the same position as the majority of Brazilians who, according to many studies, have little faith in the system. In a 2003 poll, only 12 percent of the respondents claimed to have 'total confidence' in the judiciary.¹³ Although a blindfolded statue of Themis, the Greek god of justice, sits outside the Supreme Court denoting impartiality, other more negative and powerful representations grip the popular imagination. These include common expressions like: *'A lei é para o ingles ver'* (The law is for appearances); *'Da justiça, o pobre só conhece castigos,'* (From justice the poor only know punishment), and *'Há uma lei para o rico e outra para o pobre'*, (There's one law for the rich and another for the poor.). Arguably the most potent, damning and illuminating aphorism is attributed to Brazil's greatest 20th century statesman and legislator, Getulio Vargas: *'Aos meus amigos tudo, para os inimigos, a lei'*, (For my friends everything, for my enemies the law). The underlying message of these examples is clear: justice is selective.

Thus there is a universal dimension to tensions between the MST and legal orthodoxy. One feature that clearly distinguishes the movement from the vast majority of other victims, though, is the organised nature of its challenge and the equally systematic nature of the legal response. This gives the conflict an eminently political character. For many observers politics and law do not mix. The MST is perceived as intruding upon the tranquil and 'normal' functioning of the legal system. Such an account is one-sided. Historically speaking it was landowners who dominated legal spaces, through imperial and republican arrangements, and gave law its highly sectarian character. That Brazil retains an acutely polarised rural social structure illustrates the adaptability and tenacity of landed interests, and degree to which courts and legislatures sustain those interests. Orthodox rhetoric's substitution of a-historical notions of legal neutrality deliberately overlooks these constitutive social and historical dimensions. Proponents suggest that the line must be drawn somewhere for the common good - 'strict and rigid adherence to the law, whether we like it or not' - but rarely acknowledge how it has been redrawn repeatedly to suit landed interests. Although the acknowledgment of law's historical, and especially contemporary, permeability by social forces would move the debate forwards, this presents real difficulties for orthodox advocates. Legal change resulting from social pressure is inadmissible because it calls into question law's supposed origins and neutrality and raises the prospect that lines will be redrawn by the most aggressive groups, for example, the MST and UDR. And yet, when one looks at the extent of the threat to legal 'neutrality' it becomes clear that any pressure brought to bear upon the system by the MST is nothing compared to that still exercised by landowners - whether by the UDR (a comparatively easy target), or infinitely more powerful mainstream

economic and political groupings like the Agricultural and Livestock Confederation of Brazil (*Confederação da Agricultura e Pecuária do Brasil*, CNA), which still exercises a veto over government policy.

Elective affinities felt by many legal practitioners towards landed interests reinforce these imbalances from within. The Agrarian Ombudsman, a senior judge by profession, acknowledges that fifty per cent of his colleagues believe his more progressive ideas, based upon constitutional notions of the social function of property, are 'not in accordance with the Civil Code, which says that whoever registers land is its absolute owner, and that consequently it is wrong to speak of a social question'.¹⁴ With a starting point like this, the actions of the MST and other rural labour organisations look more like an attempt to rebalance the social and legal order rather than an effort to subvert it or democracy.

2.3. Diverse Legal Currents

In the light of the foregoing discussion we return to the question of whether occupations are lawful. Although we have seen that profound historical and social imbalances structure the legal order, which in turn favours the landed status quo, the legal order is not entirely closed. Indeed, from a strictly legal perspective the status of occupations depends upon the weight attached to various seemingly contradictory legal documents and clauses. Put at its simplest, defenders of the status quo regard the Civil Code as the main bulwark of property rights, while reformers see the 1988 Constitution's concepts of property, especially what is termed its 'social function', as the highest expression of property rights and the overriding qualification upon all prior formulations.

Thus to urge the President to 'follow the law and make other follow it' begs the question: whose law and on whose terms? Matters are further complicated by the Constitution's failure to offer a sufficiently unambiguous programme. Instead, it was marked by immense social and political pressures at the drafting stage. Florestan Fernandes, a deputy on the left of the political spectrum, described the result as a patchwork quilt; while José Sarney, the former right wing Brazilian President (1985-1990), called it a Frankenstein's monster.¹⁵ Whatever the metaphor, the stitching is evident. Faced with the impossibility of resolving underlying social tensions, the Constituent Congress framing the constitution simply farmed out the most contentious issues to other fora for later consideration and, as it would turn out, litigation. Thus although the Constitution asserts the conditions under which the State can and cannot appropriate property for the purposes of agrarian reform, it does so through an elaborate legal, administrative, economic and social web mediated by judges, administrative agencies (for example Instituto Nacional de Colonização e Reforma Agrária [INCRA]) and politicians. Conflict was built in from the start.

A complex battle is now being waged inside the legal establishment for hegemony. However, rather than occurring along a single front it is expressed in terms of multiple skirmishes and sometimes quite fluid and episodic formations. Even those taking part are not necessarily fully aware of the ramifications of their own decisions. Indeed, many would reject the notion that they fall into any kind of 'camp' at all, since their decisions are taken upon a case-by-case basis, often upon extremely narrow legal points.¹⁶ Highly restrictive judicial interpretations of property rights form part of a tradition that goes back centuries. Although the alternatives start from a position of

institutional and cultural weakness, they are neither weak nor new in doctrinal terms. On the contrary, academic studies examining the social function of property can trace their pedigree back to antiquity and to nineteenth century Catholic social teaching amongst others.¹⁷ But just as the Catholic Church developed its immense political and cultural presence in Latin America by ostracising radical alternatives, so too the legal order developed in close proximity with landed classes, while marginalising the alternatives.

The failure to establish the supremacy of the 1988 Constitution illustrates the difficulty of reversing such ingrained patterns of behaviour. As the following section makes clear, that is precisely why the contribution made by groups like the MST to the debate is potentially so important. In sum, most of the tensions between the MST and the legal order can be traced to the latter's fabric and operating dynamics rather than to the MST's supposedly irresponsible or lawless approach. In fact there is more to relations between the MST and legality than tension alone. A variety of reciprocal determinations are at work occasionally with unexpected consequences. Arguably, the MST's very emergence is a prime example of this. Although the movement was the brainchild of the left and progressive religious organisations, it also emerged as a direct response to the huge legal limitations imposed by the military dictatorship and largely retained by the legal establishment immediately following the transition to democracy. A common perception among MST supporters during the early 1980's was that progressive initiatives were hamstrung by these laws, would remain so unless the connection was broken and entirely new methods and structures developed.

3. Developing Alternative Conceptions of Legality

This section develops a number of themes. It argues that although the MST's relationship to law was initially marked by mutual ideological hostility, that situation has long since developed into one where, no matter how fraught relations may be, law's potentialities are recognised. The change was neatly symbolised in June 2000 by a front cover of *Caros Amigos* magazine picturing an MST leader holding up a copy of the Brazilian Constitution under the caption: 'The Weapons of the MST'.¹⁸ Some detailed examples of these 'weapons' are discussed, as well as the shift from what I term a defensive conception of legality to an offensive conception that appreciates law's potentialities. We also examine the increased willingness on the part of legal practitioners (prosecutors, judges and legal theorists) to recognise the contribution and potentialities of the movement itself. Far from equating to Raul Jungmann's description, it turns out that the MST offers a fundamental reference point for interpretations of legality together with the crucially important practical impetus for change so frequently lacking in legal discourses. This last theme is continued into the fourth and final section dealing with the Lula administration.

3.1. Legal Conservatism and the Imperative for Change

Law's class character, and consequent inability to deliver progressive social change, understandably left deep marks upon the MST. In its early days the movement was compelled to develop uncompromising methods, notably the mass occupation of properties, as part of its strategy to propel land reform forwards. Contestation and conflict came to be seen as the primary motor of political change. Perhaps because of its success, this perspective left little scope for fuller consideration of the role that law might play. It came to be viewed either with a mixture of hostility and suspicion, or at

best as an afterthought. A typical example of the latter occurred in October 1987 with the simultaneous occupation of seven locations across the state of Rio Grande do Sul. Although the occupations themselves were meticulously planned and executed, simultaneously shocking the political establishment and capturing the public imagination, there was little evidence of legal planning. Sympathetic lawyers scurried hundreds of kilometres from one occupation to the next and then back to the courts, improvising the best defence they could to legal counter attacks. With relatively minor variations this pattern of neglect would be repeated throughout Brazil. The MST's daring and imaginative political offensive contrasted starkly with its restrictive conception of legality.

Although it would take several years for the MST to overcome its legal conservatism, the case for doing so was present at the outset. The success of mass occupations, their remarkable capacity to establish a progressive social and political agenda and counter many aspects of landowner power, including violence, created a paradox: simultaneously relegating law to the shade and enhancing its significance. After all, occupations not only created victories and landowner defensiveness, but also engendered a backlash, i.e., the reinvigoration of parliamentary and violent extra-parliamentary landowner networks and court based responses. Legal success offered landlords a great prize: the prospect of enlisting the direct support of the State and delegitimising the movement. For if the courts sided with landowners, imposed an injunction and the MST resisted, the military police could then be summoned to arrest MST members and halt occupations in their tracks. Clearly, the MST's underdevelopment of legal expertise, at its simplest, the failure to present an adequate defence in court because lawyers were unavailable, was leaving the movement badly exposed. Either it would have to reconsider the question of law, or risk fighting with one arm tied behind its back.

There was no Damascene conversion to the virtues of the established legal order. Instead the movement gradually moved from defensive conceptions of law to more offensive – proactive – ones. Undoubtedly, the MST's painstaking construction of legal personnel networks and arguments strengthened its hand. But this still left landlords with massive legal firepower (backed by monetary and other advantages). The playing field is anything but level. Representing landowners is so lucrative that some lawyers leave the ranks of INCRA, the land agency, to join those of landowners, and in many cases, litigating, advising and researching on behalf of landless workers represents a costly personal undertaking. Were it not for the dedicated body of lawyers and paralegals willing to offer these services on a voluntary basis, the MST's legal presence would be a fraction of its current size.

According to MST leaders, serious discussion of legal issues, like the possibility of forming an in-house legal team instead of relying upon the good will of the Catholic Church's Pastoral Land Commission (*Comissão Pastoral da Terra*, CPT), began in the early 1990's. This was a direct response to the wave of violence unleashed by President Fernando Collor de Mello's administration (1990-1992). Until then, the approach had been both deliberately and inadvertently piecemeal. On the one hand the MST did not wish to go down the route adopted by other organisations which, it believed, had become so enamoured with individual lawyers and legal niceties that, in effect, political and movement imperatives had been subordinated to legal ones. On the other hand, though, a relationship of convenience had developed with third parties,

like the CPT. 'Why change it?' was the attitude. For radical independent lawyers like Jacques Alfonsin, who provided legal services just as occupations were taking off in Rio Grande do Sul, the movement's arms length approach in the mid 1980's was inadequate and difficult to deal with on a personal level. 'At the beginning I almost felt like an appendage, an excrescence', he said¹⁹. Like many lawyers he would be called in to assist occupations at the last minute, or in their aftermath. A tension clearly existed between the internal political dynamics of a vibrant social movement, still operating under semi-clandestine conditions, and externally constituted legal demands. The MST felt that lawyers could never 'solve' fundamental problems (e.g., accelerate expropriations) on its behalf and that the key to changing social attitudes and pressurising the state into land reform lay with mass mobilisations. If it came down to a choice between who was going to be subordinated, then it would have to be the lawyers, not movement actions.

Whatever the substantive merits of the MST's position, in practical terms the choice was not so stark as this. Legal action could be expanded and enhanced without compromising the movement's strategic objectives. Indeed, over time even leaders like João Pedro Stedile came to recognise that, 'clearing up after the milk was spilt' was not an adequate policy.²⁰ Gradually, therefore, a more sophisticated, expanded and assured concept of militant legal action emerged that was in harmony with the MST's imperative of political autonomy. Evidence of this shift comes in the early 1990s, with the development of in-house legal services that drew directly upon MST resources; and the increased support given by the movement for the National Network of Popular Independent Lawyers (*Rede Nacional de Advogados e Advogadas Populares*, RENAP), officially created in 1996.

The emergence of a more coherent legal strategy, or consciousness, partly arose in response to external shocks like the repression of the Collor administration and the host of court based and paramilitary countermeasures undertaken by landowners in the 1990s. Prior to this legal consciousness was incipient and episodic. Over time, however, the movement's exchanges with the radical legal profession became second nature. Lawyers like Jacques Alfonsin were instrumental in the development of RENAP and legal dialogues in the mid 1990s. Another lawyer, Luis Eduardo Greenhalgh, also provided the movement with assistance during its early struggles, such as the occupation, in 1985, of the Annoni ranch in Rio Grande do Sul. As a radical lawyer and politician of national standing he was used to straddling the contradictory worlds of politics and law in a way that better suited the movement. Although this may have helped cement the closer relationship he enjoyed it hardly constituted an autonomous legal consciousness. Dependence upon the personal characteristics of an individual lawyer, no matter how brilliant, represented a precarious foundation. As if to underline the point it was Greenhalgh himself who took the lead in setting up the MST's in-house legal services.

The Worker's Party (*Partido dos Trabalhadores*, PT) provided yet another support network through sympathetic lawyers and leading figures like Plinio de Arruda Sampaio. Like Greenhalgh, Alfonsin and many others, Sampaio was separate from, but closely linked to, the movement's fortunes from its earliest days. Sampaio's background also straddled the worlds of law and politics. He was a Party heavy weight in the legal sphere (making a notable contribution to those chapters of the 1988 Constitution dealing with the separation of powers and role of the Attorney

General's department), and was deeply involved in agrarian questions (hence his citation as a possible Minister of Agrarian Reform under President Lula da Silva, and his appointment as head of the commission that elaborated the National Programme of Agrarian Reform [PNRA]). Numerous exchanges with such figures aided the development of a more mature and nuanced legal conception. Vigorous exchanges also took place between the MST and the radical legal education network AJUP (*Apoio Juridico Popular*). It organised seminars for lawyers and militants, produced specialised pamphlets, and actively supported the movement, but Miguel Pressburger, one of AJUP's leading figures and a Marxist lawyer, was openly critical of the MST's lack of legal policies, arguing that these failed to exploit its scope for action. Finally, of course, there was the CPT upon which, as noted earlier, the MST greatly depended and whose influence is still felt today. In short, change was more than just the product of external shocks; it was also part of a wider process of critical reflection going back to the mid 1980s.

The development of in-house legal services during the early 1990s, under the official heading of Human Rights Sector, undoubtedly represented a major step forward. At last the movement could systematise its legal policies; offer a point of contact for the agglutination and coordination of external legal support; comment officially upon individual cases; represent the legal plight of landless workers at a national level; and produce legally oriented publications. It should be stressed, however, that this was not a legal service in the usual mould. The connection between movement and lawyers was intended to be organic. Instead of contracting outside professionals, the movement began training its own cadres, like the head of the Human Rights Sector, Juvelino Strozake, the son of landless workers and an MST activist. His university education was sponsored by the movement, and he was given vital practical training by a skilled lawyer, Luiz Eduardo Greenhalgh, whose political and legal judgements the movement respected. These characteristics would help ensure the legal department meshed fully with the movement's wider objectives.²¹

The MST's tightly controlled model of organic legal growth came at a price. It was slow and therefore bound to be limited in scale, a major problem when dealing with social conflicts scattered across a country of Brazil's dimensions. Some attempts were therefore made to break these limits through agreements, established with both the Cardoso and Lula governments, providing federal funds to retain lawyers to work on certain human rights cases.²² In no way did the subcontracting of functions at the periphery imply a loss of control at the centre. An extended division of labour and professionalisation of legal services was perfectly in keeping with the movement's political and legal objectives. Providing the MST with material leverage – enough lawyers in the right place and at the right time – was obviously a vital task, but so too was broadening its range of legal arguments. Intellectual leverage could not be established in isolation or organically: the movement had to reach out. In this context RENAP would prove highly significant. It offered both lawyers that the movement's internal resources could never hope to match and a vital network of information exchange.

RENAP also had repercussions within the MST.²³ Central to RENAP's agenda is what Jacques Alfonsin described as the 'need to bring together and concentrate law professionals, to improve the provision of legal advice, and to debate and clarify legal defence strategies - especially in relation to criminal and civil matters arising from the

struggle for agrarian reform'.²⁴ For RENAP members, steeped in radical legal theory and activist struggles, this meant attempting to consolidate an alternative model of legal action by questioning their role as legal professionals; developing jurisprudence that challenged orthodox interpretations; propagating these concepts through pamphlets, meetings, courses, and information technology networks; and seeking a close working relationship with the MST (amongst others) that stressed not only the latter's autonomy (and in this sense the limited nature of legal action), but RENAP's autonomy too. The constant dialogue with the MST would give RENAP initiatives their vital grounding, but also helped the MST reorient its legal agenda from a conservative/defensive posture to one grounded in more offensive/radical notions of legality.

3.2. From Defensive to Offensive Legality

Although João Pedro Stédile accepts that substantive changes have taken place,²⁵ he is keen to stress that these occurred primarily as a function of politics rather than law. Certainly it is true that the movement never lost strategic control over its legal dealings, or found itself in awe of law or lawyers. No matter how insightful Greenhalgh's legal advice might be, it was overruled on several occasions.²⁶ Thus, offensive legality had its limits. It was developed within constraints imposed by the MST and the wider social struggle. Notwithstanding these limits, legal action did possess its own logic and qualities. Just as Stédile emphasises that movement activities should 'lead society to support us', there can be little doubt that occasionally law constituted a vital bridge in this process. Events in the Pontal do Paranapanema, which first marked the MST in the nation's consciousness, bear this out.²⁷ As Stédile says:

It is obvious that the Pontal was very important from an ideological perspective, because in the Pontal there were 700,000 hectares of public land: the status of the property, which belonged to the State, had already been clearly decided in the courts. It had been illegally seized [*grilhada*²⁸] by large landowners and figures from São Paulo's aristocracy, indeed the ex-governor, Roberto Costa de Abreu Sodré was a *grilheiro* from the region. The fact of having made occupations and organised the movement here acquired greater symbolic value on account of these aspects.²⁹

In other words, the politics of occupation, near the epicentre of landed, industrial and media power, was complemented by the legal situation. Whatever their de facto power, which was immense, in de jure terms landowners found themselves in a vulnerable position, a fact not lost upon the movement and made much of in the course of its public pronouncements. In private negotiations too, with centrist and conservative local town mayors, law exercised a bridge building capacity. According to José Rainha, the MST's chief spokesperson at the time, 'we won over the mayors and isolated the landowners, because there was no way of saying 'no', because the land was public.'³⁰ Thus, no longer was law simply used to defend the movement from attack; it was also used in a wide variety of contexts to put others on the defensive. Consider, for example, the attitude of landless workers themselves, who are said to be reluctant law breakers.³¹ If true, Rainha's affirmation that the Pontal's legal situation made it 'a great deal easier' to organize workers is significant. He could claim 'we're not the illegal ones; you [the landlords] are because the law says that the land belongs to the State.'³² The MST was using a legal claim as an aid to mobilisation.

Although the MST's legal claim was aided by the devolved status of land, activists simultaneously relied upon another prop of wider significance: the idea that the State had failed to accord landless workers fundamental collective rights enshrined in the 1988 Constitution. Thus, struggles over devolved land were part of a much broader process of struggle in the social, political *and* legal fields. Offensive legality's task was to develop the legal imagination and tools capable of undertaking these struggles in all their diversity and universality. Finding a 'trump card', like the 1958 decision confirming the devolved status of land in the Pontal, could not be relied upon elsewhere. Indeed, court victories alone were not enough, as the fact that it took 35 years to *begin* to establish the 1958 court's writ so powerfully illustrates. Instead cards had to be manufactured through painstaking work inside and outside the courts.

3.3. Changing Legal Culture

Judicial conservatism resides at the heart of Brazil's legal system, and nowhere is this more evident than in questions pertaining to property. While the movement has always looked beyond the horizons of law, it has come to recognise that these cultures must be contested head on, rather than written off and accepted as forms of oppression. Contestation here neither constitutes an overestimation of movement power nor a sign of its institutionalisation. Rather, it is viewed simply as a necessary part of the struggle.

Although the uphill nature of that struggle is clear for all to see, favourable shifts do occur sometimes. In March 1996, for example, one of Brazil's highest courts, the *Superior Tribunal de Justiça*, was asked to decide upon the merits of a petition for *habeus corpus* (HC.4.399 SP.) made by six leading MST members preventively imprisoned following a wave of occupations in the Pontal.³³ In a landmark ruling the court concluded that their actions could not be characterised as a crime under the terms of the penal code because the subjective intentions of the petitioners was furtherance of agrarian reform, rather than theft of property. Their intentions were, in the words of the judges, 'substantively distinct' from those alleged by prosecutors. The court also noted the connection between the inaction of the state on land reform, the constitutional imperative for change, and MST activities. The implication was clear. Given the monumental failure on the part of the political class there was a corresponding need to understand the circumstances in which workers felt compelled to occupy land. A comment one often hears from the MST captures this well: 'From the point of view of our legislation, if there was political will, there would be no need for land occupations.'³⁴

The court's decision touches upon many of the themes discussed in this article. The ruling would become an important piece of ammunition in the MST's arsenal. Through networks like RENAP, as well as the MST's own legal service, the precedent was used in countless other legal actions, albeit with varying degrees of success. The case was also used to cement further the legal aspects of movement's claim to legitimacy, both before the public and internally, among members. Finally, the case clearly showed that even within Brazil's conservative legal establishment, there were sectors - at the very highest levels - willing to embrace theses advanced by MST lawyers.

The 1996 ruling by the High Court illustrated other issues. Although the judges failed to detail judicial failures, reserving criticism for politicians instead, they did emphasise the importance of a contextual approach and substantively oriented legal reasoning, rather than the purely formal variety characteristic of prevailing legal orthodoxy.³⁵ This was not a revolution in legal thinking, or the radical kind of reasoning proposed by some legal scholars and judges³⁶, but it did represent a symbolic break with tradition and an implied criticism of colleagues. The presence on the panel of Luiz Vicente Cernicchiaro, a leading intellectual in penal affairs who chaired the committee examining reform of the Penal Code, gave the decision added weight. It could not be written off lightly. As such the MST would keep it in the public and judicial eye over the years to come.³⁷

For the MST the central issue is not to ‘sacrifice the Rule of Law in name of the combat against poverty and social exclusion’, but to regain those aspects of law’s rule that deal favourably with questions of poverty and social exclusion but which have been buried under the immense weight of other institutional, political and class imperatives. Regaining law’s progressive potential and pushing its boundaries is not just a matter of legal archaeology. New precedents have to be set. One example of this occurred in December 1999, near the town of Matão, in São Paulo state. Six hundred landless families occupied an area devoted to the intensive cultivation of sugar cane, land that was deemed productive. In so doing, the MST appeared to have placed itself on a collision course with the 1988 Constitution, which makes a crucial distinction between so-called productive and unproductive property. According to article 185 the expropriation of productive properties is ‘not permitted.’ Closer examination reveals that the movement was not on a collision course with the Constitution, but rather with highly restrictive constitutional interpretations. It was attempting to re-establish the validity, indeed primacy, of other constitutional clauses, notably article 186 which asserts that in order to be accorded legal protection, property must *simultaneously* fulfil its ‘social function’.³⁸

A striking feature of the Matão occupation is that from the outset activists were acutely aware of and drew attention to the legal implications of their actions. This was offensive legality at work. As one leader explained, ‘it is essential that land fulfils its social function, and occupations are one means of carrying out this debate in society.’³⁹ To the surprise of many, the lower court validated the movement’s main argument, namely that the property in question was failing to fulfil its social function because of local pollution and the systematic abuse of labour rights. Thus the occupants were allowed to stay. This ruling established an important new precedent. It seemed the MST had an arguable case after all, a remarkable fact given the greater public, political and judicial hostility towards occupations of productive property.

A shift in legal culture appeared to be taking place. The MST’s arguments even received support from local and state prosecutors. A few days before the occupation began prosecutors and other state officials issued an open letter dealing with the social function of property in much the same terms as those advanced by the MST.⁴⁰ Far from coincidental, the letter was indicative increased cross fertilisation between the movement and various legal practitioners.⁴¹

Though unusual, the Matão case highlights a broader trend: the increasing responsiveness of Brazilian legal professionals towards innovative strategies advanced by the MST. Furthermore, the occupation underlines the movement’s

capacity for creative case construction. Legal issues were woven into the very fabric of this occupation and the MST was more than happy to draw attention to this fact. Throughout, though, the essential driving force remained the unresolved nature of the social and legal contradictions themselves.

3.4. The Lula Administration

The election in November 2002 of Luis Inacio Lula da Silva as President raised tantalising possibilities as well as thorny questions about the relationship between the MST, law and the State. Clearly, the most important issue was the extent to which the presidency would address social contradictions and mark the emergence of a new and radical partnership for agrarian reform, and the beginning of the end of the long cycle of conflict between State and society. Here the role of law was critical since the government could exercise its authority in clearing cultural and legislative obstacles to land reform; could use its constitutional powers in making senior judicial and other appointments, including the Attorney General; and could adopt a more benign tone in its public pronouncements, instead of, as Raul Jungmann suggested, ‘articulate with the security and justice sectors of the states and with the federal police and democratically crack down [*baixar o pau*] in cases of excess by the MST’⁴².

The best that can be said of both Lula administrations is that they did not adopt Jungmann’s advice. To be sure there were rhetorical ambiguities at the heart of the administration in its legal discourse towards the MST. This oscillated between brinkmanship and conciliation. The former largely came from its so-called hard men, José Genoïno and José Dirceu. ‘Do not doubt the authority of the government’, the latter pointedly said at the end of July 2003, following a round of land occupations and tension with the movement. ‘Acts and actions cannot be allowed to prejudice the democratic Rule of Law’, said Genoïno. Almost simultaneously (June 2003) though, other Ministers, like Miguel Rosseto (Agrarian Development), were negotiating with judges in the Pontal do Paranapanema in order to accelerate legal procedures and thereby hasten the acquisition of land that might be used to defuse a volatile situation.

The appointment of key legal personnel also appears to send out mixed messages. On the one hand Claudio Fontelles’ appointment as Attorney General was a positive development. A progressive with a longstanding interest in land issues and a well worked out position, he felt able to criticise the MST when it occupied public buildings and President Cardoso’s ranch, in March 2002, contending that such practices, including the occupation of productive property, were illegal and therefore undermined movement legitimacy. But he also confronted basic tenets of legal orthodoxy. In one article he emphasised the futility of bringing repressive penal policies to bear upon food thefts in the northeast Brazil because their cause essentially lay in the persistence of centuries old structures of injustice.⁴³ On 14th August 2003 he took aim at another target - property, which he contended was ‘not absolute’: ‘you cannot do with an area what you like. Use must be destined towards a social function. The constitution impregnates within the notion of property the notion of solidarity.’ For properties that were underutilised or held for speculative purposes ‘social movements can, in a peaceful and orderly fashion go in plant and produce’.⁴⁴

Although these statements fell well short of claims made by the MST, they represented a clear departure from Fontelles’ predecessor, not to mention the repressive approach adopted by Cardoso’s Minister of Justice, Nelson Jobim.⁴⁵ For

the first time ever, Brazil's most senior prosecutor was publicly endorsing a key argument advanced by the MST: that property was not absolute and could, under certain circumstances, be occupied. Setting the tone in this way would encourage and embolden young prosecutors to question landowner claims instead of taking them at face value. It also strengthened the MST's wider public claims. Fontelles' declarations generated newspaper headlines and predictable criticism from landed interests.⁴⁶

However, when it came to judicial appointments to the Federal Supreme Court (composed of 11 individuals), timidity dominated. A wave of retirements under Lula meant that in contrast to Cardoso, who only appointed three judges during his two terms, the new president was in the privileged position of making five appointments in one term. Instead of leaving an indelible mark, it is arguable that the government's choice quickly came to haunt it when, in August 2003, the Federal Supreme Court rejected the first major expropriation order signed by Lula. The manner of the defeat, on procedural grounds, again seemed to confirm the assertion made to me by one judge that: 'With the Brazilian judiciary, if you have an able lawyer you can almost eternalise the discussion!'⁴⁷ Clearly one should not read too much into one decision, but it is symptomatic of a general malaise. Advancing the cause of land reform within the courts has always been a difficult task. It appears likely to remain so for years to come.⁴⁸ Perhaps in recognition of past failures, the strength of Lula's popular mandate, and the extent to which the courts were now on trial for any policy failures, the High Court judges involved in the São Gabriel case reiterated their support for agrarian reform. However, their rhetorical support sat uncomfortably alongside their rejection of one of the few practical measures capable of achieving it. MST leaders like Mário Lill asked a pertinent question: 'if the judges don't permit agrarian reform within the law, what is left to us?'⁴⁹

As for the law itself, in one of many mixed signals to the MST and right wing sectors, the government refused to reverse the August 2001 measure designed by the Cardoso administration to choke off occupations at source.⁵⁰ The measure forbade INCRA from auditing any ranch for a period of two years subsequent to any occupation. Lula's retention of the measure was the symbolic equivalent of Tony Blair retaining anti-trade union legislation. Substantively, though, it was more complex. Since its passage the MST had, quite literally, worked its way around the measure by occupying properties adjacent to intended targets.

In both symbolic and substantive terms, however, the government's failure to update agricultural productivity indices has been far more significant. Dating back to 1975, these indices take no account whatsoever of massive leaps in productivity and Brazil's newfound status as an agricultural superpower: only the most hopelessly unproductive properties can be expropriated, thereby artificially restricting the supply of land available for redistribution. Thus the problems accumulate. Despite promises made by President Lula on the eve of his second electoral victory, he has refused to take on the agricultural lobby by updating the indices. An unholy alliance of propertied classes—from the most advanced to the most antediluvian—has succeeded in preventing the MST and INCRA from getting their foot in the door for fear that their remit may expand uncontrollably. Such fears are, in my view, exaggerated. But they underline just how ideologically driven landed power remains, in all its forms, at the onset of the twenty first century. While the Lula government has increased public funding for

land reform and family farming, ultimately it has done nothing to undermine those power relations.

4. Conclusion

That this paper could have been renamed *The Devil in the Detail* for the Rule of Law in Brazil depends greatly upon correlations of force at a given moment in time, micro-political arrangements and the willingness of operators of the legal system to use their powers in a particular way. A notion like the Rule of Law fails to capture these dynamics and in Jungmann's hands becomes a highly schematic frame of reference. In fact, the disjuncture between narrowly conceived Rule of Law rhetoric on the one hand, and reality on the other, is exemplified by Jungmann's own conduct. Between 1999 and 2000, as Minister of Agrarian Development he was faced with a major clash involving landowners from Rio Grande do Sul who did not want their properties audited on the one side, and INCRA, the local judiciary and MST, who felt that inspectors should be allowed to audit properties freely as the law prescribed. Far from demanding the Rule of Law Jungmann simply circumvented it. The head of the land agency, a former prosecutor with a declared desire to make the law 'stick', was sacked. Land productivity indices were kept artificially low so that landowners could clear this hurdle and hold on to their land. To be sure, Jungmann had his reasons⁵¹ (as he doubtless has for now urging an authoritarian approach on the part of Lula), but a purist notion of the Rule of Law is clearly not one of them.

Abstract de-contextualised approaches to law and its institutions are unsustainable and unhelpful. Indeed, for all Jungmann's rhetorical inflexibility and emphasis upon 'institutional normality', he recognised just how flawed and perverse that normality was. The punitive approach of many legal practitioners towards landless workers, and glacial speed with which the legal system resolved problems while they accumulated apace, posed a major obstacle to agrarian reform. In order to overcome some of these obstacles Jungmann created the office of the National Agrarian Ombudsman (*Ouvidoria Agrária Nacional*). Its head, a high ranking judge, explained that this was an attempt to 'treat agrarian questions in an informal manner, without bureaucracy, without costs to the various parties, and as close to the events as possible'.⁵² Typically, though, the institution's chances of success depended not upon the formal trappings of office, but upon the ombudsman's own personal authority and skill. Even so judicial culture remained an obstacle. As the Ombudsman freely admitted, his progressive legal theses on land issues were rejected by a substantial part of the Brazilian judiciary.⁵³ Against such profound divisions and institutional contradictions, it seems reasonable to question what Jungmann and others mean by the 'strict and rigid adherence to the law'.

As for the MST's relationship to law, this must be seen as an integral and legitimate part of legal processes that have long been divided. That an organisation of its social expressiveness and stature should at last contribute to reshaping the debate on the nature and function of law, instead of merely accepting the consequences of others' designs, is surely a healthy and long overdue development. Many observers have failed to pick up this point or seem unwilling to do so. They acknowledge the movement's political impact, but seem incapable of recognising its positive legal ramifications, preferring to remain trapped within an artificially restrictive notion of the Rule of Law to which not even they can live up to. To this extent relations with

the Lula administration do mark a significant shift in tone. Despite Genoino's assertion that 'Acts and actions cannot be allowed to prejudice the democratic Rule of Law', it is also clear that this administration is far more at home with the idea of social movement pressure than any of its predecessors. In the same speech, for instance, Genoino referred to the right of social movements to continue to make demands, and the corresponding obligation of the government to manage its alliances in such a way as to bring about reform.

Far from bringing about reform, the government's alliances have only engendered disunity within the PT's own ranks and provoked the emergence of a new more radical party, Party for Socialism and Liberty (PSOL). In the minds of many observers the evident lack of leadership shown by Lula has raised the question of whether the MST might finally turn its back on both the political and legal process in some sort of 'radical' break. A look at the recent past shows why not. The fact remains that over the course of the Sarney, Collor and Cardoso administrations, with all their attendant limitations, the MST strengthened its engagement with the legal field. There is nothing about the Lula administration that would suggest a reversal of this tendency. If anything, the highest echelons of the legal establishment are more receptive now than ever before. To assume that the MST will suddenly become disillusioned with the political process is to make a critical error about the illusions originally held by the organisation. Its history suggests that while change from the top is to be welcomed, it must be pushed for from below. It is in this context that legal action has come-and will continue-to play an indispensable part of the struggle.

Endnotes

¹The União Democrática Ruralista (UDR) is the most militant and visceral of the right wing landowners organisations. It successfully lobbied to defeat land reform legislation in the late 1980s and on subsequent occasions. Throughout its ups and downs it has engaged in violent confrontation with rural groups, including the MST. According to one study, though, it has also sought to integrate its own version of social movement discourse. See Payne, Leigh, (2000).

² Jungmann, (Jungmann, Raul, 2003).

³ Jungmann, (Jungmann, Raul, 2003).

⁴ See 'Jungmann diz ser preciso 'baixar o pau da lei' no MST', *Folha de São Paulo*, 29/07/2003.

⁵ UNDP Human Development Report, 2006.

⁶ Data derived by the author from Ministério Desenvolvimento Agrário figures. A more complete picture should emerge when the last agricultural census, of 1996, upon which many of these figures are based, is finally updated by the Fundação Getulio Vargas in 2008.

⁷ The MST is only one of dozens of organisations active in rural conflicts and land occupations.

⁸ For a more extended discussion of this issue, particularly as it related to the National Confederation of Workers in Agriculture (Confederação Nacional dos Trabalhadores na Agricultura, CONTAG) see Medeiros (Medeiros, Leonilde Sérvolo de, 1989, p 92). She notes that with the emergence of the military dictatorship in the 1960s, and the generalised climate of fear and demobilization of rural workers that resulted, 'the struggle for 'rights', within legal parameters, came to constitute the *basic* directive to action of CONTAG' (my emphasis). She concludes that, '...The point of departure that comes to guide the practise of CONTAG is that rights existed but were not respected....In this way the recourse to legal justice became the framework of action.'

⁹ This is another charge levelled at the MST by Jungmann (Jungmann, Raul, 2003).

¹⁰ Wagner Gonçalves speech delivered to the conference on The Institutional and Political Challenges of Human Rights Reform in Brazil organised by the Oxford Centre for Brazilian Studies, St Antony's College, 13 October 2000. His point was underlined in a special edition of the Brazilian weekly *Veja* (15 August 2007) dealing with 'the plague of impunity' from its ruling classes. One article ('Por que os corruptos não ficam presos' <<http://arquivoetc.blogspot.com/2007/08/por-que-os-corruptos-no-ficam-presos.html>> 11 August 2007) examined 10 high profile corruption investigations (between December

2003 and 2004) of politicians, businessmen and public officials. Legal loopholes and appeals mechanisms were so successfully exploited by lawyers that the initial figure of 245 arrests was distilled into 64 convictions and only two imprisonments. These, it should be emphasised, are instances where the justice system spent considerable sums in the investigative phases.

¹¹ *Ibid.*

¹² Gonçalves, Wagner, *ibid.*

¹³ The same study commissioned by the Brazilian Bar Association (*Ordem dos Advogados do Brasil*, OAB), revealed that 30.9 percent of respondents had ‘no faith whatsoever’ in the judiciary and 26.7 percent only had ‘partial confidence’ in the institution. Among the chief reasons cited for lack of confidence in the justice system as a whole was unequal application of the law, privileging white people and the rich (24.3 percent); and corruption involving judges, prosecutors and lawyers (22 percent). ‘Pesquisa revela falta de credibilidade e conhecimento em relação ao Judiciário’, *Jornal do Brasil Online*,

<<http://jbonline.terra.com.br/jb/papel/brasil/2003/11/10/jorbra20031110005.html>> 11 August 2007.

¹⁴ Desembargador Gercino da Silva, interview by author, Brasília, 25 October 1999.

¹⁵ For a comprehensive guide to the Brazilian Constitution see Silva (Silva, José Alfonso da, 2004).

¹⁶ The August 14th 2003 decision of eight Federal Supreme Court judges to annul Luiz Inácio Lula da Silva’s presidential decree expropriating 13,200 hectares in Rio Grande do Sul carried tremendous political weight. The expropriation was the largest of its kind ever proposed in Rio Grande do Sul and would have allowed 530 families to be settled. However, the key question before the judges was not so much whether the property was productive or not, but whether the landowner in question had been properly served with notice of an impending audit by INCRA. Lawyers for the landowner argued that the agency had failed in its legal duty while lawyers on behalf of the President argued that notification had taken place but that access to the property had been impeded by landowners. The agency had returned later but neglected to serve a new notification. It was the absence of the new notification – and the landowner’s participation in the audit - that formed the basis of the landowner’s case. One of Lula’s own appointees sided with the majority, who on administrative grounds rejected the arguments made on behalf of the President of the Republic. Another Lula appointee, however, suggested that landowner had contributed to the situation through his own reluctance to be notified. For a highly critical analysis of the socio-legal background to the case see Stédile, Miguel, (2003) ‘STF suspende maior desapropriação do RS’ <<http://www.midiaindependente.org.pt/blue/2003/06/256226.shtml>> 10th June 2003. A critical evaluation of the legal background to the case is set out in Sérgio, Frei (2003) ‘Informações jurídicas sobre a desapropriação de terra’, <<http://www.midiaindependente.org.pt/blue/2003/08/260961.shtml>> 13th August 2003. The decision of each judge can be accessed on the Supremo Tribunal Federal’s site (<http://stf.gov.br/>) under mandado de segurança number MS24547.

¹⁷ For a thorough discussion of these issues from a radical perspective by one of Brazil’s leading thinkers and practitioners, see Marés, Carlos Fredrico, 2003.

¹⁸ *Caros Amigos*, Ano IV, No. 39, June 2000.

¹⁹ Jacques Alfonsin, interview by author, Porto Alegre, 24 June 1997.

²⁰ João Pedro Stedile, interview by author, Campinas, 18 March 2000.

²¹ Indeed, once Strozake was qualified, Greenhalgh would note that in dealing with movement affairs, ‘these days I am subordinated to him.’ Luis Eduardo Greenhalgh, interview by author, São Paulo, September 1999.

²² Already under the Cardoso administration some 15 lawyers were contracted in this way. Under Lula this number was expanded to 25 in an agreement made between INCRA on the one hand, the CPT and the MST’s legal representative, ANCA (*Associação Nacional de Cooperação Agrícola*). That agreement expired in March 2005 but others have now taken its place. While detractors see this as a waste of money, proponents argue that such work, which encompasses the defence of all militants in rural areas rather than just those of the MST, is essential given the conflictive nature of the rural sphere and the absence of an effective system of public defenders.

²³ For an extended discussion of RENAP’s early formation and subsequent development, see Gorsdorf, Leandro, Franklin, 2004.

²⁴ Cited Gorsdorf (Gorsdorf, Leandro, Franklin, 2004 p 96).

²⁵ One example is the movement’s use of ‘*manutenção de posse*’, maintenance of possession, as a means of *forestalling* counterattacks. When an area is occupied it is common for landowners to seek the ‘*reintegração de posse*’, literally meaning the reintegration of possession, via the courts. The maintenance of possession, is one means of trying to forestall such a move. The apparent simplicity of possession belies a host of legal complexities with massive social and political ramifications. By way

of introduction consider these comments from Jacques Alfonsin 'In the vast majority of ações possessórias (possession actions) what is of importance is not so much the title of land ownership, but the occupation. The proceedings that the owners undertake generally rely on the title. The judge never asks whether that person is actually *occupying* this area. With a mere glance at the land register the judge grants the injunction. We have a longstanding struggle to get judges to see this otherwise. The *reintegração de posse*, the action they most frequently use, presupposes possession. And yet these people often don't have possession. They may be living in the United States, in England, or elsewhere. They undertake legal proceedings and the judge grants it to them. So even from the point of view of positive law the actions of the judge are highly debatable. In an area where the person does not have possession, they undertake proceedings for the reintegration of possession. Why does he go for a reintegration of possession? Because these proceedings involve an injunction.' Jacques Alfonsin, interview by author, Porto Alegre, 24 June 1997.

²⁶ Luis Eduardo Greenhalgh, interview by author, São Paulo, 3 September 1999.

²⁷ I devote two chapters of my forthcoming book to the Pontal do Paranapanema, see Meszaros (Meszaros, George, 2006). For further background on this region see Leite, José Ferrari (Leite, José Ferrari, 1998) and Fernandes (Fernandes, Bernardo Mançano, 1996), as well the publications by São Paulo's state land agency, Instituto de Terras do Estado de São Paulo (ITESP), *Cadernos ITESP* (ITESP, 1998a, 1998b), and Fernandes and Ramalho (Fernandes, Bernardo Mançano, and Ramalho, Cristiane Barbosa, 2001).

²⁸ The origin of the term is said to lie in the practice of taking '*grilos*' (crickets), and locking them up in a drawer with fictitious deeds. When the crickets died they would secrete liquids that would discolour the paper – prematurely ageing it. A slightly different version has it that the crickets eat the paper thereby ageing its edges, and their excrement discolours it. In both instances, though, authentication of the document would be completed by networks of corrupt notaries.

²⁹ João Pedro Stedile, interview by author, Campinas, 18 March 2000.

³⁰ José Rainha, interview by author, Teodoro Sampaio, 20 March 2000.

³¹ To the best of my knowledge there is no systematic inquiry into this question. The idea that law is a meaningful category of reference in people's lives needs to be treated with caution. Leonilde Sérvolo Medeiros notes that even in situations of extreme violence perpetrated by landowners, rural workers often do not look to law for mediation of conflicts. This may be because of fear of the consequences, unawareness of its provisions, or lack of access. But she also acknowledges that other factors might be in play: 'in many situations, at least apparently, domination is exercised without contestation in a complex imbrication between consent...and coercion'. (Medeiros, Leonilde, Sérvolo 2002 p 186).

³² José Rainha, interview by author, Teodoro Sampaio, 20 March 2000.

³³ I discuss this ruling in Meszaros (Meszaros, George 2000)

³⁴ See MST, 1998, p 3.

³⁵ For a critical analysis of the Brazilian judiciary, see Dallari (Dallari, Dalmo de Abreu 1996).

³⁶ At the beginning of the 1990s the Alternative Law movement emerged with considerable force in Rio Grande do Sul. On both theoretical and practical grounds a group of judges questioned claims that Brazilian justice was in any way value neutral and even whether value neutrality was a workable proposition. For practitioners and academics who came to ally themselves to the group a key issue was how to conceptualise the legal order's failure to address issues of substantive inequality while developing practical alternatives to it. For a useful introduction to the subject see Lédio Rosa de Andrade (1996). For an example of its practical application to the Public Ministry see the work of two public prosecutors, Machado and Goulart (Machado, Antônio Alberto and Marcelo, Pedroso Goulart, 1992).

³⁷ On the back of this decision the MST's in-house legal service produced a pamphlet with the title 'Land Occupations are Constitutional, Legitimate and Necessary'; see MST - Setor de Direitos Humanos (MST - Setor de Direitos Humanos, 1997).

³⁸ It pays to read articles 184, 185 and 186 in their entirety rather than as freestanding objects. Article 184 permits the State to expropriate lands that are not fulfilling their 'social function' and to destine these towards agrarian reform. Article 185 deals with the protection of productive land, while article 186 deals with property's social function. The latter article reads: 'The social function is met when the rural property complies simultaneously with, according to the criteria and standards prescribed by law, the following requirements: I - rational and adequate use; II - adequate use of available natural resources and preservation of the environment; III - compliance with the provisions that regulate labour relations; IV - exploitation that favours the well-being of the owners and labourers.' Source: Vajda, Zimbres and Souza (Vajda, Istvan, Zimbres, Patrícia de Queiroz Carvalho and Souza, Vanira Tavares de, 1998, p 121).

- ³⁹ Gilmar Mauro, interview by author, Brasília, 10 August 2000.
- ⁴⁰ This letter, issued on December 13, 1999, became known as the *Carta de Ribeirão Preto*.
- ⁴¹ The launch of a Manifesto for Agrarian Reform in July 2003 is not specifically directed to the MST but is symptomatic of a broader legal support for agrarian reform. The document, signed by 30 leading practitioners (including judges, prosecutors, lawyers and law professors) outlined the legal case for agrarian reform as well as expressing the hope that progressive case law would at last inform the views of other practitioners. See Manifesto de Juristas Brasileiros pela Reforma Agrária, available at: <http://www.cidadania.org.br/imprimir.asp?conteudo_id=1336&secao_id=98> 23 July 2003.
- ⁴² 'Jungmann propõe que o governo 'baixe o pau'', *Estado de São Paulo*, 29/07/2003.
- ⁴³ The article, entitled 'A fome não faz de famintos criminosos', is cited in 'Procurador-geral diz que invasão é crime intolerável', *Estado de São Paulo*, 04/07/2003.
- ⁴⁴ Idem.
- ⁴⁵ In 1997, Minister Nelson Jobim tried to target more MST activists for prosecution by enlisting the support of the Public Ministry in states where tension was particularly high. In the case of São Paulo his overtures were firmly rejected.
- ⁴⁶ 'Fonteles defende invasão de áreas improdutivas' (*Jornal do Brasil*, 14/08/2003) <<http://jbonline.terra.com.br/jb/papel/brasil/2003/08/13/jorbra20030813014.html>> 14 August 2003; 'Ruralista Crítica Procurador' (*Jornal do Brasil*, 14/08/2003) <<http://jbonline.terra.com.br/jb/papel/brasil/2003/08/13/jorbra20030813017.html>> 14 August 2003; 'Fonteles volta a apoiar invasão de terra improdutiva', *Estado de São Paulo*, 14/08/2003.
- ⁴⁷ Urbano Ruiz, member of the Association of Judges for Democracy, interview by author, São Paulo, 2 September 1999. For details of this case see note 13 above.
- ⁴⁸ In a recent interview the fourth judge appointed by Lula, Eros Roberto Grau, affirmed his view that the figure of the politically neutral judge was a fiction. When asked to comment upon a loaded question, namely whether social movements are in conflict with the spirit of the law, he retreated arguing that it would be 'imprudent to pass comment' and 'the federal constitution must be respected by all sides.' 'Novo ministro do STF defende Estado mais forte na economia', *Folha de São Paulo*, 28/06/2004.
- ⁴⁹ 'Ruralistas eufóricos, sem terra revoltados', *Estado de São Paulo*, 15/08/2003.
- ⁵⁰ The relevant measures, Portaria/ MDA/ nº 62, of 27/03/ 2001 and Medida Provisória nº 2.183-56, of 24/08/2001, are available on INCRA's website at <<http://www.incra.gov.br/estrut/snda/iriv.htm>> 27/03/ 2001 and <<http://www.incra.gov.br/estrut/pj/medidas/2109.htm>> 24/08/2001 respectively.
- ⁵¹ I briefly discuss the motivations in Meszaros (Meszaros, George, 2000).
- ⁵² Author interview with Judge Gersino José da Silva Filho, Agrarian Ombudsman, Brasília, 25/10/99.
- ⁵³ See the Ombudsman's comments on page 10 above.

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