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**The Movement of the Landless (MST) and the juridical field  
in Brazil**

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## **Summary**

What modalities of legal change can social movements set in motion to diminish systemic and durable forms of social exclusion? This paper focuses on the Movement of the Landless (MST) in Brazil, which through a number of legal strategies has helped produce watershed high court rulings, contributed to the process of constitutionalising law, and made access to land more equitable in parts of Brazil by redefining property rights in practice. The paper explores legal change triggered by the strategic action through what Bourdieu (1987) calls the juridical field. The MST has been successful in pushing forward legal change through this field, I argue, for two broad reasons. First, it has a remarkable ability to concentrate the talents of diverse juridical actors – lawyers, judges, law school professors – on defending its claims. This ability has been built by mobilising across multiple fields, including the political, and not just in the juridical field. Second, the movement’s capacity for strategic legal action, and the impact of such action, has been contingent on substantial changes during the 1990s in both the social movement and juridical fields triggered by the unfolding of the country’s democratic transition and shifts in the transnational Catholic Church.

Keywords: access to justice, social movement, Movement of the Landless (MST), Brazil, property rights



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## **Preface**

Peter P. Houtzager is a Fellow at the Institute of Development Studies (IDS), University of Sussex. An early draft was presented at the workshop ‘Fundamental Rights in the Balance: New Ideas on the Rights to Land, Housing and Property’, 16–18 October 2003, Institute of Development Studies (IDS), Brighton, UK. The paper owes much to discussions with Eugênio Facchini Netto, Jacques Távora Alfonsin, Ipojucan Vecchi, Avelino Strozake, Claudio Pavão, Luís Cristiano and Adrián Gurza Lavalle, Boaventura de Souza Santos and César A. Rodríguez-Garavito. Daniel Guimarães Zveibil provided valuable research assistance.

## 1 Introduction

What juridical modalities of legal change can social movements set in motion to diminish systemic and durable forms of social exclusion? And when are movements successful at doing so? This chapter explores these two questions in the context of the struggle for land waged by the Movement of the Landless (MST) in Brazil, a country which has one of the most unequal land distributions in the world. It focuses in particular on the movement's emergent juridical strategy and that strategy's contribution to legal change. The MST rarely initiates legal action itself, and in fact does not have standing to bring cases to expropriate land, which is the preserve of federal government. In recent years, however, its reactive juridical mobilisation – in civil and criminal cases brought against it – has grown increasingly sophisticated. It has helped produce watershed high court rulings, contributed to the process of constitutionalising law, and made access to land more equitable in parts of Brazil by redefining property rights in practice.<sup>1</sup>

These outcomes have been achieved at a world historic moment when powerful international institutions are committed to globalising a new “classic” interpretation of liberal property rights. The creation of rural and urban land markets, modeled on a mythologised account of western property regimes, has become a pillar of many international programmes of structural reform and to combat poverty.<sup>2</sup> The MST's emergent juridical mobilisation offers some insights into countervailing possibilities – that is, establishing more equitable access to, and forms of, property – and the role movement engagement with juridical actors and institutions can play in realising these possibilities.

Changes in law that reduce deep rooted social exclusion can result from legislative or executive action, shifts in public opinion, civil society monitoring of public or private action, to name only a few sources. This chapter explores legal change that occurs in what Bourdieu (1987) calls the juridical field. The field is constituted by a wide range of actors and institutions, which are socially authorised interpreters of legal code. In addition to judges and judicial institutions, private lawyers and law firms, public prosecutors, law school professors, law reform NGOs, and professional legal associations, many other actors also make up the field and shape its dynamics. Watershed rulings are the most visible changes in law that result from the actions of these juridical protagonists, but more legal change occurs in less visible forms, and like in court cases often involve a multitude of diverse actors, many situated far outside of the court house.

This chapter makes a two step argument. It argues first, that the MST's ability to concentrate the talents of diverse juridical actors on defending its claims has made it an important catalyst for legal change

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<sup>1</sup> The longstanding debate about whether the movements *ought* to engage in rights or legal mobilisation – the myth of rights versus rights without illusions – is not directly addressed in this chapter. In the case of the MST the debate has limited relevance – its struggles for land invariably trigger an array of court cases (see fn.13). The chapter nonetheless shares with Santos (2002: 18) the view that law contains within it a tension between social regulation and social emancipation, and that when movement struggles enter the juridical field they strengthen the latter. On this debate see, Santos (1995: chap. 5 and 2002, chap. 9), Hunt (1993, chap. 10), and Scheingold (1974).

<sup>2</sup> USAID, the World Bank and other international actors have used structural adjustment programmes, a variety of types of loans, poverty reduction programmes, and broader legal reform programmes to spread a “classic” interpretation of property rights in the wake of the collapse of Eastern European political economies and failure of structural adjustment programmes in Africa.

through the juridical field. The movement's ability to mobilise highly skilled legal talent has been built by mobilising across multiple fields, not just the juridical. The MST's strategy is the kind of counter-hegemonic use of law and rights that Santos (1995: chi. 4 and 2002: 467) argues is most likely to succeed: it integrates juridical action into broader political mobilisation, politicising struggles before they become juridified, and mobilising sophisticated legal skills from diverse actors.<sup>3</sup> This strategy enabled the MST to engage in the type of sustained and broad litigation – both geographically and across issues – that Epp (1998: 3) suggests is central to redefining legal terrain.<sup>4</sup>

Second, the chapter argues that the MST in the 1990s had new opportunities to juridical modalities of change in motion because of a set of favourable changes in both the movement and juridical fields. These changes were related to the transition to democracy and the rising prominence of the Workers' Party, and to changes within the transnational religious field in which the diverse institutions of the Catholic Church hold a dominant position. Overall, it argues that the MST has contributed to *substantial legal change* when dynamics in the movement and political fields converged to alter that of the juridical field. In the absence of such convergence, the MST's mobilisation across multiple fields helped to produce important but *small-scale and incremental change*. Such change has been far more common.

The movement and juridical field in contemporary Brazil have a variety of particularities and the chapter does not attempt broad generalisation. Its value is in identifying possible emerging juridical forms of cosmopolitan legal change – that is, change processes in which juridical actors play a prominent role and that alter authoritative legal norms or their application. The chapter examines three particular modalities of change that altered the practices of the juridical field. The MST has worked with or through juridical actors and institutions to (i) compel public authorities to implement or enforce existing legislation and constitutional mandates in ways that alter legality in practice; (ii) create novel interpretations of substantive rights and obligations, and institutionalising these through jurisprudence (i.e. judge made law); and (iii) innovate in the contest over juridical time, by using novel procedural instruments that increase the pace of judicial proceedings to more closely match that of movements.<sup>5</sup>

## 2 The logic of fields

Encounters between movements and judiciaries are complicated and unsettling affairs, for society as well as for the parties involved. It is not that movements are forces of progressive change and judiciaries are guarantors of conservative status quo. There are innumerable reactionary movements and many instances of progressive judicial action. Rather, social movements and judiciaries have profoundly contrasting logics.

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<sup>3</sup> The prior politicisation, Santos (1995: 386, 389) suggests, makes possible the construction of the conflict in ways that neutralise its individualisation by law. See also Hart (1994) and McCann (1994).

<sup>4</sup> Epp (1998: 3) notes that the judicial process is 'costly and slow and produces changes in the law only in small increments'. In the case of Brazil, which has a federal system that grants state judiciaries a high degree of autonomy and which lacks *stare decisis* (binding legal precedent of high court rulings), legal change through litigation is particularly costly and slow.

<sup>5</sup> On the importance of the struggle over juridical time and its "plasticity", see Santos (1995: 338–9). See Meszaros (2000) for more on the legal dimensions of the MST's land struggle in Brazil that are not juridical.

It in fact takes little contact with social movements and judiciaries to intuit that they not only look and feel very different, but function in profoundly different ways. Movements have a quick and sometimes reckless pace, while judiciaries plod cautiously along the path of due process. If movements acquire much of their social and political significance from mass public displays and from collective trespassing of legality, judiciaries obtain theirs from individual, almost private, performances that reinforce those legalities. Movement and juridical discursive styles, and construction of the issues at the heart of social conflict, tend to be worlds apart. Movements' need of media attention is matched only by the judiciaries' ambivalence toward such public scrutiny (witness ongoing debate over the presence of cameras in the courtroom).

It is the contrasting logic of the social movement and juridical fields that sets the broad boundaries within which movements can set juridical modalities of legal changes in motion. These logics reflect a degree of autonomy fields enjoy, the substantial constraints on actors' agency, and therefore point to the need to take "field effects" into account when explaining legal change.<sup>6</sup>

Bourdieu's *sociology of practice* makes visible and open to interpretation the sources and nature of these logics.<sup>7</sup> Bourdieu (1987: 831), for example, suggests that 'the juridical field is a social space organised around the conversion of direct conflict between directly concerned parties into juridically regulated debate between professionals acting by proxy . . . entry into the juridical field implies tacit acceptance of the field's fundamental law . . . conflicts can only be resolved *juridically* – that is, according to the rules and conventions of the field itself'. For the sociologist (1987: 816), the logic of the juridical field has two primary sources: the specific power relations between protagonists in the field, which give the field its structure and order competitive struggles, and the 'internal logic of juridical functioning [according to existing norms and doctrine] which constantly constrains the range of possible actions and, thereby, limits the realm of specifically juridical solutions'. The competitive struggles are, in large measure, over the control of the field's primary source of power *vis-à-vis* the rest of society – 'the technical competence to *interpret* a corpus of texts' (Bourdieu 1987: 817).

The need to reproduce society's perception of the juridical fields' autonomy, neutrality, and universality, is central to this internal logic.<sup>8</sup> The power of judiciaries and other actors in the field in the

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<sup>6</sup> More broadly one can think of law itself as a process that state and societal actors, with differential legal capacities and access to resources, set in motion when they attempt to create, use, and comply with legal rules to negotiate relations with each other. A similar view is taken by Edelman *et al.* (1999).

<sup>7</sup> On the sociology of practice, see Bourdieu and Wacquant (1992); on the juridical field, Bourdieu (1987). See also Garth and Dezalay (1998).

<sup>8</sup> The autonomy and neutrality of the field is reproduced in part through a particular form of legal reasoning – one that is highly formal and rigorously deductive from a body of rules that (in the case of the civil law tradition) purports to be comprehensive and internally coherent. Particularly in the civil law tradition the translation into legal categories pulls conflict from its social moorings and renders it distant and neutralised. The system of legal norms, doctrine and hermeneutics, both requires that social conflicts be translated into juridical categories and 'limits the range of juridical solutions'. Furthermore, in the civil law tradition, jurisprudence is the field's fiction that judges do not make law, but only apply legal norms to fact patterns – it is the body of legal reasoning developed by judges in their rulings which is the equivalent of 'judge made law' in the common law tradition. In the common law tradition judge made law, within the boundaries of precedent and legislation, is widely accepted. In civil law tradition it is absolutely not. Protagonists in the juridical field are to this day called 'legal operators' – that is, operators are people who pull the levers of the legal machinery in what is an essentially technical function (Merryman 1985; Bourdieu 1987).

larger society resides primarily in the symbolic effectiveness of their action – they are *signalers* per excellence (Bourdieu 1987, 839; Galanter 1981). The outcome of court proceedings therefore is the product of interpretative struggles between actors (possessing unequal talents and juridical power) not just inside the court room, but within a larger field of juridical practices.

The logic of the movement field could hardly be more different. It is shaped by the particular types of actors and their competition over the social resources required for disruptive or expressive mobilisation. Accumulating this kind of capital requires a complicating balancing act. Movement action must disrupt the ordinary and routine to build and display its power.<sup>9</sup> Movements' reliance on mass media to communicate with the public and to build its political influence reinforces the need for short and expressive bursts of collective energy, as well as for a degree of risk taking.<sup>10</sup> Yet movements also have to maintain support of broad segments of the general public, or of more powerful actors who may tolerate inconvenient disruptions but not a sustained paralysis of valued institutions. Movements of the poor, because they are short on material resources or specialised knowledge (such as legal knowledge), in particular require access to allies' resources, knowledge, political support and influence. And, movements must keep the costs of collective action to participants as low as possible. To balance disruption, broad support, and acceptable cost, they generally seek to engage in forms of legitimate disruption, on the edges of legality, while developing discourses and set of symbols that are far more radical than their actions and demands are in practice.<sup>11</sup>

Bourdieu's sociology has sought to establish the autonomy of fields, their distinctive forms of power and logics, and how these are reproduced over time, but the task in this chapter is somewhat different. The chapter seeks to identify how movements such as the MST can produce changes in the logic of the juridical field. The juridical mobilisation of the MST points to an important refinement in the sociology of practice if it is to be used to explore the possibilities for purposeful change. It suggests that purposeful action in one field – such as that of social movements – can alter the dynamics of another. Autonomy of the juridical, like that of the movement, is relative and varies over time.

How can movements alter juridical practices, when the juridical field has its own particular forms of capital, rules and institutions, which are relatively resistant to conventional movement tactics such as mass mobilisation or other disruptive practices? The MST therefore has not produced change in the juridical field by directly “occupying” the latter (though occupations of courts have, literally, taken place). It has instead sought to bring the movement and juridical field into contact and redirect the energy of important juridical actors towards its claims. Private and public lawyers, legal scholars, judges and other authorised

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<sup>9</sup> A central function of disruptions is to communicate the importance and righteousness of the movement's cause, and the number, worthiness and commitment of its members. These forms of direct action are also ways to awaken participants' consciousness and a personal, transformative step of empowerment. See McAdam *et al.* (2001, ch. 2).

<sup>10</sup> Similar to other movements, however, the MST does pursue a diversified strategy in which extra-institutional activities were combined with institutional ones, such as participation in electoral politics, lobbying, etc. It is nonetheless the episodic, and spectacular, land occupations that it staged with hundred of landless families that have enabled it to concentrate social energy towards its goals.

<sup>11</sup> See for example, McAdam *et al.* (2001); Houtzager (2001a and 2001b).

interpreters of law have deployed their particular juridical capital *within their field* to alter the dominant interpretations of property rights, legitimate forms of civil disobedience, and so on. Networks of progressive lawyers or judges, as well as political actors, have played a critical *bridging* role between the two fields, helping convert movement energy into juridical energy. In the case of Brazil, the role of the movement field in the creation of a transformative pole within the juridical field is difficult to overstate.

Summarising, changes in the relations between fields can alter their respective internal logics. The movement and juridical fields therefore should not be decontextualised – that is, they need to be understood in relation to each other, as well as in relation to other fields that, in different social contexts, may be prominent.

### 3 MST and modalities of juridical change

The MST's principal agrarian reform strategy has been to pressure *executive* parts of federal and state governments – in particular by large-scale occupations of agricultural land – to expropriate and redistribute privately-held land.<sup>12</sup> Juridical mobilisation has not been a core component of this strategy. A profound distrust of the judiciary runs through much of the MST and, even today, almost two decades since authoritarian rule ended, the movement has yet to acquire a legal identity that would allow it to be either a plaintiff or a defendant. For most leaders and activists, the judiciary is the enforcer of bourgeois property rights and experience has taught us that when social conflict becomes judicialised, the outcome is often the absence of legal change, and the criminalisation of movement activity, or of the movement itself. The MST is also deeply resistant to giving up control of the terms and direction of its struggles to juridical actors such as private lawyers. Its leaders and activists know that the struggle over the translation of social conflict into legal categories, and over tactical procedural matters, inevitably renders parties to a case dependent on their legal proxies.

Nonetheless, MST leaders are acutely aware that its struggle for land takes place in the shadow of the law and have learnt that land occupations become judicialised almost immediately.<sup>13</sup> And while in the first

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<sup>12</sup> The Constitution gives only the Federal government the power to carry out agrarian reform but state governments have reclaimed public lands from large squatters for redistribution in what amounts to state-level agrarian reform. The legal bases of agrarian reform in Brazil are rooted in the principle of the social function of property. The Brazilian Constitution of 1988 places the general principle that property must fulfil a social function among its fundamental rights (article 5). Articles 186 and 182 define when property can be expropriated for agrarian and urban reform. Implementing legislation for agrarian reform includes Law 8,629/93, Complementary Law 76/93, Complementary Law 88/96, and Decree no. 2,250/97.

<sup>13</sup> An “average” occupation produces an array of cases. Those initiated by the landowners targeting the MST include civil cases particular possession orders (*reintegração da posse*), maintenance of possession orders (*manutenção da posse*), or damages (*danos*). A variety of “cases within cases” result, as each actor seeks to manoeuvre within the limits of the law, while not infrequently engaging in extra-legal activity on the side. Landowners also frequently file police complaints that can provoke preventative detention (*prisão preventiva*) and that usually initiate criminal prosecutions for adverse possession (*esbulho possessório*); the constitution of a criminal organisation (*formação de quadrilha*); theft (*roubo*); private imprisonment (*carceraria privada*), and even homicide (*homicídio*). The MST is far less active as a plaintiff. If any of its leaders are imprisoned by local police or the court orders detention, lawyers who work with movements will file *habeas corpus* petitions. In rare cases they might file a police complaint against landowner violence, which can result in a criminal case. In a few instances it has filed abuse of authority cases (*mandado de segurança*) against public officials. The federal or state government (its executive branch that is) will, for its part, bring a case against the landowner or the

decade of its existence (1980–1990)<sup>14</sup> the movement paid little attention to judicial institutions and legal instruments, since the early 1990s it has invested more in what is an increasingly sophisticated juridical strategy. Exactly why this shift occurred is explored in the second half of the chapter.

The movement is not monolithic but its leaders tend to see juridical mobilisation primarily in political terms. Courtroom procedures are political moments in which misdeeds of landowners, including illegal possession of public land, can be made public and the importance and legitimacy of the movement can be reaffirmed. Victories in the courts are measured by their effect on public opinion, on forcing executive branch action, and of course in keeping movement leaders and activists out of prison. The MST therefore has not engaged in public interest litigation to pressure the government to implement a coherent agrarian reform process. The possibilities for such litigation are few and relatively recent creations but the 1988 Constitution does provide for public class action suits.

Nonetheless, the MST's ability to concentrate legal talent and resources in the juridical field is considerable. It reflects the fact that, during the 1990s, the MST became the politically most significant movement in the country, with a substantial and highly organised structure and a far flung network of relations (Navarro 1997; Mançano 1996 and 2000). The tens of thousands of families that have obtained land by participating in MST-led occupations are spread across the country in over a thousand agrarian reform settlements. The movement's allies include prominently situated actors in diverse arenas: religious (through the progressive wing of the Catholic Church and pastoral organisations), political (through the Workers' Party in particular), labour (via the labour organisation *Central Única dos Trabalhadores*), academic, and within international advocacy groups and NGOs.<sup>15</sup> It has dense relations with state actors and receives public funds to run primary and secondary schools on agrarian reform settlements. Its cooperatives have access to public agricultural credit and public agricultural extension.

The two episodes of land conflict examined next show how the movement's land occupation strategy and juridical mobilisation can combine to set in motion different types of modalities of legal change. In the case of the Fazenda Primavera episode, in the southern state of Rio Grande do Sul, the primary modalities were a shift in the source of law and a reinterpretation of substantive legal norms (versus procedural rules). In the case of the Pontal do Paranapanema episode, in the state of São Paulo, three modalities are evident: state enforcement of a *de jure* legality that was ignored in practice, a significant procedural innovation that speeded up the judicial clock, and (once again) a shift in the source of law and

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person/group in possession of the land if it decides to claim the occupied land for the purposes of agrarian reform. In these cases the MST, notwithstanding its direct interest in the case, is not a party to the proceedings. The government's action can provoke the landowner into filing an abuse of authority case (*mandado de segurança*) and almost certainly a series of appeals.

<sup>14</sup> The MST as a national movement was formally established in 1985 but it emerged and began to identify itself as the 'Movement of Landless Rural Workers' as early as 1980.

<sup>15</sup> Attendees of the movement's second national conference, in 1990, for example, included representatives of prominent civil society organisations such as the National Conference of Bishops, Lutheran Church, labour central CUT, Pastoral Land Commission, National Association of Lawyers (OAB), Brazilian Association for Agrarian Reform (ABRA), National Student Union (UNE), congressmen of the Workers' Party, Democratic Labor Party, Brazilian Socialist Party, Brazilian Social Democratic Party, Brazilian Communist Party, Communist Party of Brazil, as well as representatives of peasant and indigenous people's organisations from 11 countries.

a reinterpretation of substantive legal norms. What is recounted here is part of the juridical story. How the outcome in each story was obtained will become apparent in the second half of the chapter.

### **3.1 The social function of property in Rio Grande do Sul**

In early September 1998 approximately 600 families left their encampment on the shoulder of BR-285, a federal highway that cuts through the state of Rio Grande do Sul, and occupied farmland known as Fazenda Primavera. The MST families expelled employees of Merlin Industries and Commerce of Vegetable Oils Inc, which had leased the property and had possession of the land, offices, and silos. As is the case in most occupations, the company immediately filed a possession order (*reintegração de posse*). The construction of its legal claim reflected the juridical field's common sense on such matters: it used the strong individual property rights guaranteed in the civil code to argue that the conflict was between two private parties, that the company had legitimate possession of the property through a lease contract with its titled owner, and that the families were in unlawful possession (*esbulho possessório*), a criminal offense, and hence subject to eviction. The local judge ruled in favour of the company using this dominant legal construction of the conflict. The eviction order gave the families five days to leave the property.

Lawyers working with the occupying MST families filed an injunction (*agravo*) in the state high court, the São Paulo Tribunal of Justice, and constructed the conflict differently. The injunction argued that the conflict: (i) was collective not individual and that adverse possession in the criminal code was not intended to cover such cases; (ii) had broader repercussion than the relation between the two parties, that there was a public interest in the outcome of the case and that it therefore required a social and consequentialist interpretation – the tribunal should consider the social consequences that might accompany the execution of the judge's sentence, in light of recent conflictual agrarian history in the country, which could include a “social convulsion” as the 600 families, with nowhere else to go, were to be forced off the land by a military police brigade; and, (iii) as a matter of conflict between constitutional principles, rather than application of a particular norm in the civil code. The 1988 Constitution, it argued, gave the families a fundamental right to a dignified life and only guaranteed property rights to land that fulfilled its social function. Constitutionally defined fundamental rights and the country's adherence to UN Resolution 2200 (1992), which guarantees the ‘fundamental rights of all people to be protected against hunger’, the petition argues, and leaves little doubt that rather than illegal possession there was a conflict between fundamental rights: dignified life versus private property. Furthermore, it did not fulfil its social function – the owner had failed to pay social security taxes for its employees and had accumulated such a large debt with the national social security administration that the agency had initiated separate proceedings to auction off the land.

A month after the initial occupation of Fazenda Primavera the Tribunal struck down the possession order. In a judicial system where procedural rules are close to sacrosanct, the Tribunal cleared away commonly used procedural grounds for refusing to hear the injunction. Movement lawyers had failed to inform the local judge of the injunction, in violation of article 526 of the Code of Civil Procedure.

Although the Tribunal had in the past refused to hear injunctions on these grounds, a majority found that in cases involving fundamental rights such procedural errors could not provide the basis for refusal.

The ruling on the substance of the case is a small watershed. It accepts the petition's move from the civil code to the constitutional principles and that the state has an obligation to 'guarantee fundamental goods as a social minimum' – that is, clothing, shelter and refuge. It found that 'the fundamental rights of the 600 families encamped prevail in detriment to a company's purely property rights. Notwithstanding that the area is productive, it does not fulfil its social function, circumstance which is demonstrated by the fiscal debts that the proprietor company has with the Union'. Finally, it mentions 'considerations of social conflicts'. The judges were centrally concerned with the collective nature of the occupation, its occurrence in a social context of substantial privation, and the failure of the government to address the profound social problems the families faced. The government's omission, they point out, had shifted the burden of solving social problems from the executive to the judiciary.

Part of the ruling's significance resides in the judges' acceptance of link made in the petition between the social function of property and fundamental rights. This interpretation of social function is considerably broader than those in other rulings favourable to the MST, which have focused narrowly on the land's productivity, and broader than the direct constitutional specification of social function. The ruling argues that fulfilling its social function includes payment of taxes and fulfilling other legal obligations,<sup>16</sup> and it brings in the fundamental rights of third parties. This step links social function to both the fundamental rights and the broader social context in which they have failed to materialise. The opinion observes that 'when there is a need to sacrifice the rights of one of the parties, the property rights should be sacrificed, guaranteeing fundamental rights' (RENAP 2001: 28). Together these two steps significantly expand how the social function of property can be used in litigation.

The ruling allowed the families to remain on the land and created substantial pressure on the company and the owner of the land to negotiate its transfer to the National Institute for Land Reform and Colonisation (INCRA), the federal agency responsible for agrarian reform. Negotiations nonetheless failed and INCRA was forced to bring a new case against the land's owner to obtain possession. Neither the MST nor the families were a direct party to this case. The Institute won the expropriation ruling after 20 months of litigation.

### **3.2 Public land and civil disobedience in São Paulo**

The MST in the state of São Paulo set in motion quite different juridical modalities. The movement played a central role in altering legality on the ground by pushing the state government to re-establish public possession of property that had been illegally occupied by large landowner-squatters, and then redistributing these. Its government proxies in the juridical field also fought the *juridical time* battle and contributed to producing an important procedural innovation that made it possible to accelerate the pace

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<sup>16</sup> Article 186 of the Constitution, which defines social function for agricultural land, only states that land should meet basic productivity criteria, comply with environmental and labour laws, and be exploited to the benefit of both owner and employee.

of judicial process more in line with the pace of the movement. And finally, the movement's *habeas corpus* appeal to free imprisoned leaders in the episode produced a federal high court ruling that took a significant step in decriminalising the movement and in legalising its repertoire of collective action. The *habeas corpus* ruling expanded the breadth of direct action accepted as civil disobedience. In terms of creating new legalities in practice, the Pontal do Paranapanema, a triangular piece of land in the state's relatively poor south-western corner, is the only region in Brazil that analysts agree is experiencing true agrarian reform. Juridically-driven legal change has played an important role in widespread expropriation of illegally held land in parts of the region, and fundamentally remade rural land tenure and social and political relations.

These modalities of legal change were all activated by the judicialisation of social conflict that MST land occupations initiated. In most of the country the MST occupies land that it argues fails to fulfil a social function, and therefore should by law be expropriated for agrarian reform. In Pontal do Paranapanema, however, the strategy was different. Its principal strategy since the early 1990s has been to occupy public land that is held illegally (in adverse possession) by large landowners. The local MST learnt that the São Paulo state government had surveyed the Pontal do Paranapanema back in the 1940s, and established that 444,130 hectares of the region was in fact public land (*terras devolutas*) held illegally by landowner-squatters, and that the legal status of another 519,315 hectares remained to be ascertained (Mançano 1996: 160). The government at the time, however, did not take any further action to re-establish public possession of that land. Fifty years later the MST calculated that the state government could be convinced to repossess and redistribute the lands that had already been declared public.<sup>17</sup> Legally this would not constitute agrarian reform, which is a function reserved for the federal government, but in practice it would be just that.

The movement launched a series of land occupations in 1991 to force the state executive branch to intervene in the region.<sup>18</sup> The state government, fearing a violent confrontation, did enter the fray and brought several types of cases to reclaim the public lands. The MST did not have legal standing and was not a party to these cases, even though its occupations were their immediate cause. Although the occupied areas had already been declared public land, the government had to win possession cases in the regular courts before it could take the land and redistribute it. In legal terms the only uncertainty in such cases was the amount the state would pay for improvements that had been made on the land – that is, for buildings, fences etc. For government lawyers, the cases were primarily a bargaining tool used to pressure the large squatters to settle on the transfer of possession of the property on the government's terms.

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<sup>17</sup> For government to regain possession of such public lands it has to first bring a land discrimination action (*Ação Discriminatória*) which established the veracity of its claim, and then a possession order (*Acões Revindicatórias*) against the people who hold the land. The second and critical step, however, was never taken and the lands remained in private hands.

<sup>18</sup> Among the first targets was one of the largest farms in the region, Fazenda São Bento, in the illegal possession of an aging political boss (known in Brazil as a *coronel*) who had been elected mayor twice in the regional capital and had a municipality named after him.

Between 1990 and 1995 few settlements were reached however. In a small number of cases the combined pressure of movement occupation and government litigation, which depressed land values and led to escalating lawyer fees, forced landowner-squatters to give up possession.<sup>19</sup> The relatively attractive offer made by the state's land institute contributed as well.

One of the principal hurdles the government faced was the gross discrepancy in the *time* operative in the movement and juridical fields. In particular, landowner-squatters were able to keep legal procedures running for many years on end – either in the belief that a newly elected state government would give up and go away (as in the 1940s), or in order to hold out for a better deal. One example suffices to illustrate the depth of the problem. Ironically, it involves a procedural request by the government that would have sped up the pace of legal proceedings. In one of the first possession cases, in 1992, the public attorney asked a local judge to sequester the land in question in public hands until legal proceedings concluded. This would allow families to stay on the land and greatly increase pressure on the landowner to negotiate a settlement. If the courts accepted this procedural move it would set a crucial precedent in the region – one or two quick victories for the government would virtually ensure that the remaining squatters would settle cases before they went to trial. Four years later – an eternity in movement time and an entire electoral cycle for the state governor – the Federal Superior Court ruled in favour of sequestering the land. In the intervening period, however, a new state government was elected and sought to alter juridical time through an entirely different procedural instrument.

What changed between the first and second effort to speed up the juridical field? First, the election of a centre-left state governor, and second, the MST's ability to escalate its land occupations appear as the most important changes. Up until 1994 the public attorney's office in the region, closely tied to local political elites, and also had limited interest in resolving the case juridically. Much like the state government at the time, it was not politically committed to agrarian reform and had a profound distrust of the MST. The Governor elected in 1994, however, was generally sympathetic towards the movement's goals, if not specifically to the movement, and was concerned that collective violence could break out in the confrontation between the landless and landowner-squatters, with substantial human cost and important electoral implications. The governor made a political and social justice decision to mobilise part of the formidable legal-bureaucratic apparatus at his command to resolve the region's land conflicts. An integrated plan – the *Plano de Ação para o Pontal* – that included administrative, political, and juridical components was drawn up for the region (ITESP 2000: 72–80).

To accelerate court proceedings, the state Secretary of Justice tried out a new procedural instrument that had just come into effect, called *tutela antecipada* (anticipated tutelage, Art. 273 – Civil Procedural Code). The instrument allows the judge to accelerate the judicial clock by making a provisional ruling at the beginning of a case. Due process, the alibi of slow judicial proceedings, is tricky in cases where the time consumed by normal procedures substantially reduces the benefits the final ruling may have for the

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<sup>19</sup> Technically the government bought the improvements made on the land, since it was already the legal owner of the land.

plaintiff.<sup>20</sup> Because *tutela antecipada* appeared to invert the longstanding logic of such provisional rulings – that they be made only in cases of **absolute necessity** – there was considerable uncertainty in juridical field about how judges would interpret its use, and especially whether they would relax the restrictive conditions that applied to other provisional measures.<sup>21</sup> In the absence of jurisprudence, lawyers and judges would have to construct interpretations of how and when the instrument could be deployed.<sup>22</sup>

The local judge ruled in favour of *tutela antecipada* late 1995. On appeal the São Paulo Tribunal of Justice reversed the lower court. The case then went on to the Federal Superior Tribunal. The state attorney general and the Secretary for Justice made regular pilgrimages to the Superior Tribunal, their staff set up camp in Brasilia and the governor himself appeared before the court. After 15 days of deliberation the Tribunal upheld the request for *tutela antecipada*.

In this manner the government was able to obtain 73,540 hectares through the judicial system in the four years spanning 1995–1998, enough to create 60 agrarian reform settlements and settle around 3,000 families (ITESP 2000). In contrast, the government had only acquired enough land in the first four years of the decade to settle 151 families.

The process that led to this outcome had two dimensions which should be explicated. One is the importance of the media campaign each of the parties to the conflict pursued. Government officials, MST leaders, and landowner-squatters converged in media strategy and all played up the volatility of the region. Each believed that building the perception that the Pontal do Paranapanema was on the verge of a local class war would bring judicial intervention that was favourable to their interests. The real threat of violence at the time is impossible to ascertain. Headlines in the papers, however, were emphatic. In late 1995 the local *O Imparcial* (18/10/95) screamed ‘Police Chief Fears Social Convulsion’; São Paulo’s leading paper *Folha de São Paulo* (28/10/95) headlined ‘Landowners Have Already Hired Armed Security Forces in the Pontal’; the national *Jornal do Brasil* (24/12/95) ‘Landless Will Ensure Invasions with Bullets’; and the national newsmagazine *IstoÉ* (11/10/95) noted that ‘the Pontal is a barrel of gun powder ready to explode’. Lawyers representing landowner-squatters used such news reports to have MST leaders arrested

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<sup>20</sup> *Time* can be a decisive factor in the utility of the outcome of a case. A patient with a life threatening condition, for example, will gain little from a ruling that guarantees access to needed medication if that ruling comes after the condition has run its full course. In such cases, a provisional ruling (*medida cautelar*) can be requested to accelerate the juridical clock. This shifts the balance between due process and the efficacy of the ruling towards the latter. Provisional rulings, up until 1995, however, could only be obtained under highly restrictive conditions.

<sup>21</sup> The requisites for granting *tutela antecipada* appeared to be present in the possession cases. The legislation (Article 273 – Civil Procedural Code) states that: ‘The judge can, if requested by the party, **anticipate**, all or part, of the effects of the intended judicial remedy in the initial petition, as long as, in the face of unequivocal proof, (s)he is convinced of the truthfulness of the allegation and: I – has a well founded fear of irreparable damage or of difficult repair; II – abuse of the rights to defense occurs or the intent to delay tactics are evident; 1<sup>st</sup> . . . ; 4<sup>th</sup> The anticipated decision can be revoked or modified at any time by a well grounded decision; 5<sup>th</sup> Whether the anticipated decision is granted or not, the case proceeds to its final decision’.

<sup>22</sup> The final outcome of the case was certain: the territory occupied by the MST had already been declared public land and only the level of compensation for improvements made to the land was uncertain. There was a fear of irreparable damage if one waited until the final decision: delaying settlement of the occupying families could lead to collective violence and the families had nowhere else to go. Abuse of the right of defense was well established: large squatters’ use of procedural manoeuvres with the intention of delaying a final ruling in land cases was recurrent in the region.

and in their legal petitions to show how dangerous the MST was, so dangerous it threatened the entire property system of the region. The MST for its part was acutely aware that historically government intervention for agrarian reform occurred primarily in regions of heightened social conflict, and rarely in regions where there was no pressure from below. The state government had its own reasons. It needed to build political support for its intervention in the Pontal, and to secure federal agrarian reform money to cover the cost of such an intervention. In the juridical field it had to convince judges of the need to dramatically speed up legal proceedings that would place the occupied lands into its hands.

The second dimension that should be explicated is the unprecedented and *tout court* campaign by the state government to obtain judicial support for *its* interpretation of *tutela antecipada*. The state Secretary of Justice and state prosecutors visited the local judge who would hear the case, the local public prosecutor who would argue that state's point of view, the chief justice of the São Paulo Tribunal of Justice, and when the case was appealed to the Federal Superior Court, appeared before the President of that body. The Governor of São Paulo, the economic powerhouse of Brazil and indeed of Latin America, would himself appear before the Federal Superior Court. In each instance the state government argued from a procedural and a consequentialist position. It suggested that all the requirements for the provisional measure were present in the case and made clear the Governor's great concern that the region might descend into violence and disorder. One participant called the latter socio-political form of argumentation, *ad terrorem*.<sup>23</sup> That is, the Pontal do Paranapanema was on the verge of large scale collective violence and if the courts denied the state government the legal tools necessary to maintain the landless on the land, a social convulsion was likely to ensue. It added that if the court set a favourable precedent in this first case, it would undo the legal logjam and the other landowners/squatters whose land was occupied would settle quickly.

The MST set in motion a third modality of legal change in the Pontal do Paranapanema region when a different judge in the Pontal issued an arrest warrant for 13 of its leaders. The movement's counter mobilisation in the courts and in the public arena led to the Federal Superior Court to issue a ruling that decriminalised the movement and expanded the notion what constitutes civil disobedience. The ruling is widely cited, not the least because the decision's author, Luiz Vicente Quicchiario, is a leading jurist in penal matters (Meszaros 2000: 532).

The principal charge against the movement leaders was the formation of a criminal gang with intent of illegally taking possession of land. The São Paulo Justice Tribunal denied the *habeas corpus* petition and echoed the view of the movement and its activities that was prevalent in many of the country's courts: 'To allow third parties to violate the property of others, under the pretext of the social question, will be the undoing of the country's entire legal order. Today rural properties are invaded . . . Tomorrow industries,

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<sup>23</sup> The state government also emphasised that it was only asking for possession of a third of the property in order to give families a secure place to stay while the regular court proceeds ran their course and to expedite the process of negotiating a final settlement.

factories and commercial establishments may be invaded, with guaranteed impunity, under the pretext of “social problems”. This is the obituary of the state and of society organised by law. The judiciary cannot accept or tolerate this’.

The Federal Superior Court reversed the state Tribunal. As in the previous cases discussed, the justices moved the definition of the legal issue to constitutional ground, from the penal code this time, and took a consequentialist position. Its ruling juxtaposed right to property and right to claim rights, a political liberty, finding that the movement’s land occupations could not be considered a criminal act because there was no criminal intent. Instead, the MST land occupations should be seen as exercising the rights of citizenship, particularly the civil right to pressure government to guarantee constitutional rights, in this case that of agrarian reform. For the same reasons, the MST should also be considered a popular movement claiming citizenship.<sup>24</sup>

This ruling has been extremely significant, in both political and juridical terms. It has not, however, stopped local judges from granting arrest warrants against MST leaders. Judges in Brazil are not bound by high court precedent and place particularly high value on their autonomy. As recently as 2003 another judge in the Pontal region issued an arrest warrant for local MST leaders. Although the subsequent *habeas corpus* petitions are likely to succeed in the high courts, such legal harassment has substantial costs for the movement and reveals that the MST’s contributions to legal change is uneven and accumulates only slowly.

## **4 Movement and judicial fields in legal change**

Encounters between movements and judiciaries are uneasy affairs in which it is relatively rare that the entire chains of events depicted above are set in motion. This section explores the changes that occurred in the movement and juridical fields that allowed their particular logics to synchronise to produce cosmopolitan legal change. It focuses in on key components of Bourdieu’s theoretical apparatus that produces the unique logics of the movement and juridical fields: the distinctive forms of power that operate in the movement and juridical fields; institutionally situated actors who enjoy variable capacity for action; and finally, struggle over symbolic order.

### **4.1 MST in the movement field**

The contemporary social movement field in Brazil emerged in the late 1970s as part of the country’s democratic transition but in recent years has undergone profound changes. At its foundational moment the field’s protagonists shared an oppositional stance toward the state, an emphasis on transgressive collective action, and a symbolic order structured by a prophetic utopian project. Since the early 1990s there has been a shift towards increased contact with the state, a focus on citizen participation, and a

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<sup>24</sup> For more on this ruling, see Strozake (2000).

discourse built around the construction of citizenship and influencing public policy. Changes in the field have contributed to the MST becoming one of its most prominent actors, a status that has greatly enhanced its ability to concentrate social energy in the juridical field.

An array of actors during the democratic transition (the late 1970s and 1980s) identified themselves as part of “the popular movement”. In her noteworthy analysis of the movement field Diomo (1995: 68) suggests the popular movement was a multi-centric field defined by relations amongst actors who, notwithstanding diverse identities, shared a political commitment and discourse, and involvement in cross-cutting networks. Its symbolic order revolved around a utopian and prophetic discourse that emphasised popular (mass) participation in direct action in the struggle for emancipation from capitalist exploitation and authoritarian social and political institutions.<sup>25</sup> Along with independence from political parties and the struggle against the State (Diomo 1995: 29) these providing a new democratic and transformative project for society. The field’s actors included not only social movements such as the MST, the Housing Movement, and the Movement of the Displaced by Dams, but also umbrella associations such as the Union of Neighborhood Associations of Porto Alegre (UAMPA), which contributed to the creation of the participatory budget in Porto Alegre, and a large variety of popular education institutes and NGOs. For the MST, which grew directly out of the organising work of liberation theology Catholic radicals, the oppositional stance *vis-à-vis* the state, and formal institutions generally, and emphasis on popular engagement in direct action to obtain one’s rights (by forcing state action) were particularly strong. Amongst movements it was, and remains, unique in its commitment to a prophetic mission and attention to reproducing the mystique of *a luta*, the struggle.

Diomo’s analysis suggests that the movement field was shaped in profound ways by the struggle against authoritarian rule and by the role the Catholic Church played in these struggles. The Church – as an institution with remarkable organisational infrastructure and access to international resources, and Catholicism as a symbolic order with deep resonance among “the people” – provided much of the structural and ideational underpinnings of the field. The latter also had strong influence from the Gramscian left, which may help account for the strong (and somewhat paradoxical) emphasis on rights.

In this foundational period, accumulating such capital involved strong ties to the Catholic Church and, in rural areas where the MST functioned, the skilled use of a radical political-religious discourse. As Mançano (2000: 84) observes, struggle for land was a ‘permanent struggle for dignity and for life’, and what bound the movement together were popular religiosity and the ‘mass struggles in which the [landless] families participated’ directly.

In the 1990s a variety of processes came together to alter many core components of the movement field. These processes included the consolidation of democratic institutions, and particularly the Constitution of 1988; the conservative shift within the Catholic Church on the one hand, and growing electoral power of the Workers’ Party and its administration of several important cities on the other;

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<sup>25</sup> Participation in the struggle had a sacred connotation – it was a ‘duty of the “people of God”, because only the power of the popular movement, built with persistence, courage . . . could counter the oppression and exclusionary system’ (Diomo 1995: 144).

changes in international funding as West European agencies shifted agendas and geographic interests; and the state's greater decentralisation and openness to the participation of civil society organisations in policy making and implementation. The latter had, among other things, important resource implications for the field's actors.

The Catholic Church had lost much of its role in providing the field's structural and symbolic bases by the late 1980s, while that of the Worker's Party had grown considerably. New types of actors, with direct access to international funds, as well as government funds, became prominent, in particular civil society coordinating bodies such as the Central of Popular Movements and ABONG (the Brazilian Association of NGOs) and well-funded and professionalised advocacy NGOs like Polis and IBASE. Older actors such as the MST became more institutionalised. The symbolic universe changed as well. The field lost its original utopian and prophetic content as the emphasis shifted to constructing citizenship and "citizenship in action", which included participation in constitutionally mandated policy councils, and influencing public policy and public debate (Diomo 1995: 213–5). Ties between actors in the field and state agencies grew substantially.

Paradoxically, the MST's position in the field grew tremendously during the 1990s and along with it the ability to concentrate social energy. More than any other actor in the field it resisted many of these changes, setting itself apart in striking ways. It maintained close ties to progressive segments of the Catholic Church and kept large transgressive collective action – in the form of land occupations, protest marches, and occupation of government agencies and highways – as its principal strategy. Land occupations in fact spread throughout the country and grew substantially in number. Although the difficulty in compiling data on occupations is considerable, the DATALUTA project at the UNESP Presidente Prudente suggests that both the number of occupations and number of participants in occupations rose more than threefold, from 421 in the 1990–94 period to 1,855 in the 1995–99 period (Mançano 2000: 270–2).

The growth of the movement's visibility and support within the movement field, and more broadly within progressive quarters, gave it access to far greater legal, political and material resources. In the 1990s the MST was *the* nationally recognised movement for land reform, although rural worker unions and other movements also engaged in land occupations and sought redistribution (Navarro 1997). Its combative rhetoric and transgressive action notwithstanding, the movement did follow the new logic of the field by developing pragmatic and extensive relation with sectors of the state and diversifying its resource base. The MST's remained distrustful of the judiciary, the 1990s did see a shift in the MST's definition of "the land question" toward a more secular and juridical one. In the previous period the struggle for land had been constructed in a political-religious form as an issue of social justice and human dignity, and as a basis for liberation from a capitalist system that enslaved the weak to the benefit of the national and

international capital.<sup>26</sup> It had set itself apart from other significant rural movements by rejecting the Land Statute of 1964 and demanding new legislation be created with the participation of rural workers, ‘with a basis in the practices and experiences of these [rural workers]’.<sup>27</sup> In the 1990s the discursive construction included, alongside a broad notion of social justice, the constitutional principle of the social function of land and the constitutionality of agrarian reform.

Within the movement itself two important developments helped push it toward the juridical field. One is the gradual learning process of its leaders as small victories accumulate in the juridical field and encounters with less conservative judges and lawyers become more commonplace. Second, and probably more importantly, out of necessity it has had to develop a concern with human rights. Many of its most important leaders are no longer “first-time offenders” in criminal cases, hence face greater chances of long jail sentences. The growing legal burden and threat forced the movement to create a human rights department and ongoing engagement with allies in the juridical field.

Finally, the Worker’s Party’s growing power, particularly in the state of Rio Grande do Sul, also helped to synchronise the movement and juridical field. The MST and Workers’ Party emerged out of the same process of political mobilisation that helped produce the transition to democracy and have maintained close ties since. PT’s political figures have been invaluable allies to the movement, including in the case of the arrest of MST leaders in the Pontal do Paranapanema prominent, when they helped the case move quickly from a local action in the juridical field to a significant concern of the political field. Some of Brazil’s most distinguished human rights lawyers, including a Workers’ Party congressman, argued the *habeas corpus* petition in the Superior Court. The growing number of Workers’ Party administrations at the municipal and then state levels, helped to shift the MST away from its longstanding state-as-enemy position.

#### **4.2 The Brazilian judiciary and the juridical field**

The juridical field underwent its own set of profound changes during the 1990s, albeit at a slower pace than the movement field. This helped make possible the juridical modalities of change the MST was able to set in motion. In public debate these changes and the tensions that accompanied them have been framed as ‘the crisis of the justice system’. At the centre of these changes is the gradual and highly contested constitutionalisation of law, as members of the field have sought to rebuild the democratic legitimacy of judicial institutions and to adjust to the realities of a new democratic regime. The importance of this process cannot be understated, not only because the civil code that was operative until 2003 was starkly liberal in its conception of property rights and the individual nature of rights in general, but also

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<sup>26</sup> In the MST’s national meeting in 1984 the general objectives of the movement were defined as ‘1- the struggle for agrarian reform; 2-the struggle for a just society, fraternal and to end capitalism; 3-unify the landless: rural workers, renters, sharecroppers, small landholders, etc.; 4- land for those who work on it and need it to live’ (Mançano 2000: 81–3).

<sup>27</sup> *Jornal do Movimento dos Trabalhadores Sem Terra*, III, no.42 (Feb 1985), quoted in Mançano (2000).

because of the array of social and diffuse rights available in the 1988 Constitution.<sup>28</sup> This has made possible the legal definition of social conflicts in ways that were closer to those in the movement field. Perhaps most importantly, the process has opened the door to a substantial expansion of the role of the judiciary and of judicial interpretation. Overall, efforts since the early 1990s to constitutionalise law and reconcile legal norms that vary substantially in normative and substantive disposition have played a critical role in facilitating juridical modalities of legal change.

As in the case of the movement field, the types of actors in the field also changed. In addition to the emergence of the federal and state public prosecutors offices (*Ministério Público*) as important juridical actors, groups of judges and lawyers formed networks concerned with social justice and a new democratic role for the legal profession formed. These networks played a fundamental role in bridging between the juridical and movement fields and helping to produce a new legal common sense in the former on matters related to the MST and land conflict.

The Primavera case illustrates how the lower court's application of legal norms serves to translate social conflicts that enter the juridical field into universal and socially abstracted categories. The Primavera case illustrates how the application of legal norms translates social conflict that enters the juridical field into universal and socially abstracted categories, and the competition within the field over how this translation should occur. The local judge constructed the conflict narrowly as involving individual property rights, using what critics call traditional proceduralist or positivist legal reasoning. The state constructed the same conflict using constitutional principles as involving a balancing between fundamental rights and property rights. For the state the case had important social consequences that extended beyond the immediate parties involved. The former would argue that Constitutional principles are not law, implementing legislation (and hence the mediation of the legislator) is necessary to make them law and justiciable; the latter argue that fundamental rights and other constitutional principles impose immediate legal obligations and do not require further legislation to have binding force.

The two constructions of the case reflect the competing efforts to interpret the 1988 Constitution that led to a profound split within the juridical field, but have also brought it closer to that of the movement field. Constitutions in Latin America, including in Brazil, have been seen primarily as political documents rather than as law. With the Constitution of 1988, however, the trend towards constitutionalisation that accompanied the creation of the welfare state in Europe appears to have reached Brazil. Accepting the Constitution as law greatly expands the competence of judges and – because of the nature of constitutional articles and the Constitution's concern with substantive (and social) outcomes –

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<sup>28</sup> This kind of state legal pluralism, or what Santos (1995: 385) calls interlegality, has resulted from the incorporation of diverse sources of legal norms, with different normative and doctrinal bases and subject to different kinds of hermeneutics or modes of interpretation. The country's civil law framework, which emphasises individual rights and strong liberal property rights, sits alongside a social constitution with strong guarantees of civil, political and collective rights, extensive agrarian reform legislation, remnants of corporatist legislation, as well as international conventions.

requires that they engage in far greater interpretation and construction of law. This also flows directly from the expansion of collective social rights and legal instruments, such as public class action suits, that make it easier to transform individual legal battles into collective ones.<sup>29</sup>

That this interpretative conflict appeared within the judiciary of Rio Grande do Sul is not by chance. The state has a progressive legal tradition and strong professional networks within the juridical field that work with social movements. Within the judiciary a group of young judges created an informal network soon after the military left power in the mid-1980s, which would become known as the Alternative Law Movement. The judges originally came together to question the legitimacy of law created under authoritarian rule, including the constitution of 1967, social justice concerns, and to do their part as judges in the country's democratic transition. They worked through their professional association, the Judges Association of Rio Grande do Sul (AJURIS), to explore new interpretations of the civil and criminal codes that would reverse the conservative bias of the judiciary and allow them during proceedings to take into account, and help address, the country's gross inequalities. The new Constitution of 1988, however, opened up a vast new horizon of legal possibilities for many members of the network. Since the early 1990s these judges have seen the constitutionalising of law as vital to democratising the law and bringing modern social content into the rigidly individualist and de-contextualised codes. They have also seen, correctly, that the process of constitutionalisation entailed an acknowledgement and expansion of judge's interpretative activities.

A similar process has taken place in the state of São Paulo. Judges committed to a constitutionalist view of law and to human rights and the democratisation of the judiciary formed the Association of Judges for Democracy in 1991 and, specifically for criminal matters, the Brazilian Institute of Criminal Sciences (IBCCRIM) in 1992. The decision of the São Paulo judges to create independent and formal organisations paradoxically reflects their tenuous position within the state's magistrate, which is widely seen as one of the most conservative in the country. The formation of these networks on a state-by-state basis reflects the high degree of autonomy state judicial systems enjoy under Brazilian federalism, as well as the judges' strong corporate identities and regional biases.

In Rio Grande do Sul, judges once associated with the Alternative Law Movement, including several members of the state's Superior Tribunal, have over the past decade visited MST agrarian reform settlements. All 22 of the Tribunal's judges would have been keenly aware of the growing popular support for the movement, as well as its political significance in a national context in which extreme social inequality and deprivation was widely perceived to be worsening.

Networks of progressive lawyers are not new in Brazil but during the 1990s the first national network of popular lawyers to work with rural and urban movements emerged. The National Network of Popular Lawyers (RENAP), formally constituted in 1996, played an important role in synchronising the juridical

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<sup>29</sup> The need for juridical rules to govern broader interpretative activities is producing what some call a post-positivist hermeneutics to guide how legal norms can be interpreted through constitutional principles, and how to balance these principles when they come into conflict. Again, see Barroso (2002a and b), as well as Streck (2002) and Facchini (2003).

and movement fields. Reflecting a general trend in progressive lawyering networks, RENAP is national in scope and more specialised – today it has approximately 420 law professionals distributed across 22 of the country's 26 states and focuses primarily on agrarian questions and it is closely tied to the MST.

RENAP has been an important bridge between the movement and juridical fields and links inexperienced lawyers at the local level with nationally recognised jurists. At the time of the Primavera case in 1997, it played the central role in obtaining the high court favourable ruling: the RENAP member who drafted the petition occupied a highly regarded position within both the movement and juridical fields, and detained forms of capital that are valuable in the latter.<sup>30</sup> Its lawyers have also played an important role in overcoming the movement's resistance to entering the juridical field and in building relations of trust between the movement and other juridical protagonists, including the informal networks of judges committed to social justice. Although the MST from its early days in the 1980s drew progressive lawyers into its orbit, it is only from the mid-1990s that it has sought to establish closer and ongoing relations to these. Prior to this, the movement sought out lawyers in piecemeal fashion to free imprisoned leaders and to battle the various forms of legal harassment and criminalisation.

The network has also been deeply committed to the constitutionalisation process within the juridical field and helped propagate new doctrinal bases from which to argue cases involving the MST. Perhaps the strongest evidence of the former is the remarkable campaign to create a new legal common sense on issues that affect the MST.<sup>31</sup> Through its magazine *Cadernos RENAP* and periodic publications it circulates new jurisprudence that is favourable to the struggles for land. Two recent edited volumes give some evidence of the importance the network is acquiring within the juridical field. *Agrarian Question and Justice (A Questão Agrária e a Justiça)* and *Agrarian Questions: Annotated Sentences and Submissions (Questões Agrárias: Julgados comentados e Pareceres)* contain essays by over 30 notable legal jurists on civil and criminal cases that involve the MST.<sup>32</sup> Contributors include members from the São Paulo network of Judges of Democracy, the Rio Grande do Sul network of the Nucleus of Legal Studies and, of course, RENAP itself.

The publications reveal RENAP's impressive reach in the juridical field, and through it that of the MST. The volumes have not only been made available to RENAP members but also to hundreds of judges. This initiative is remarkable because both lawyers sympathetic to the MST and local judges, who may or not be, have very tenuous access to sources containing jurisprudence. As several judges in São Paulo and Rio Grande do Sul observed during interviews, there are judges who still apply parts of the

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<sup>30</sup> On the one hand, the attorney is a retired state attorney and human rights lawyer under military rule; on the other, he commands significant respect within the movement field as a result of personal history of public interest litigation with social movement, also dating back to the 1970s.

<sup>31</sup> See Varella (1997); Strozake (2000 and 2002).

<sup>32</sup> See Strozake (2000 and 2002).

1916 civil code which have long been superseded. Once out of law school, even professionally committed judges find it difficult to keep abreast with emerging jurisprudence, and even with new legislation (which is particularly voluminous in Brazil).<sup>33</sup>

## 5 Conclusion

The MST's sustained engagement with the juridical field has set a number of modalities of legal change in motion that, in the cases discussed in this chapter, redefined important legal terrain on property rights and civil disobedience. It also produced substantial social results. The movement's ability to convert movement energy into juridical energy, and to mobilise across multiple fields, has played a central role in setting these modalities of legal change in motion.

The movement's capacity for this kind of strategic action, and the impact of such action, however, has been contingent on broader dynamics within the movement, party-political, and religious fields over which it has had limited control. Substantial shifts in each of the fields during the 1990s greatly enhanced the movement's ability to redirect and concentrate the energies of highly qualified legal experts towards the civil and criminal issues it confronted. It is also during this period, as a result of shifts in the respective fields, as well as its own strategic action within these shifts, that the MST becomes the most prominent social movement in contemporary Brazil. This particular status within the movement field has enabled the movement to construct a breadth of alliances, in the juridical and other fields, that can be matched by few other social movements in Brazil.

The MST's juridical mobilisation nonetheless sheds light on some of the ways in which social movements can use the law to create countervailing possibilities to the particular "liberal" property regime that is being globalised from above. It has played a substantial role in altering a highly exclusionary legality by compelling public authorities to implement existing agrarian reform legislation and by helping to create and institutionalise novel interpretations of the social function of property.

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<sup>33</sup> The primary source of jurisprudence for lower level judges is the *Journal of the Tribunals (Revista dos Tribunais)*, which state courts are expected to make available for free. Even in the country's wealthiest state, São Paulo, however, judges in the countryside complain of six months or greater delays in receiving the RT, or not receiving it all.

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