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Government by men

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Mr. Peter Martin  
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Dear Peter,

Brazil now faces the question of whether or not its new constitution will leave the paper and become what a constitution should be - a more or less steady point of reference for the elaboration of laws and protection of the rights of citizens. There is a tradition in Brazil of "laws that stick" and "laws that don't stick", and given the high social discord about many of its items, the enforcement of the constitution promises to be as hotly-contested a battle as that of its elaboration. Already the attorney general has declared that his task is to "deconstitutionalize the constitution"; whether this means the establishing of legal processes to make it work, or the establishing of those that make its working impossible, remains to be seen.

One of the interesting debates among intellectuals throughout this process has been about the meaning of the concept of "law" in the constitution. The right-wing magazine Visão, for example, complains that principal problem of the document is its lack of a definition of law. "In the classical liberal tradition, a law can only be a norm of individual just conduct, general, abstract, and applicable to an indefinite number of future cases." Because the concept of law remains undefined, the Brazilian constitution becomes a "government of men" rather than a government of laws, or rather, "a government of the humors and wills of majorities formed with the taste of special interests, bargains, and God knows what accords between political parties."

It is certainly true that Brazil's new constitution was not written within a coherent legal and political vision of society. The document was born of a tug-of-war between the conflicting interests that compose modern-day Latin America. Many rather petulant comparisons have been made throughout the constitutional process with the U.S. constitution, in which compactness, austerity, and a basically uniform social vision have helped it survive immense political, economic and ideological changes in the country. Latin American constitutions as a rule tend to be bulky, overly specific and contradictory, and thus have to be rewritten with every shift in political direction. "If only our constitution were more like that of the United States," one hears, "maybe we wouldn't be in such a mess . . ."

To my mind these comparisons miss the point. Buried in the comparison is a failure to understand how modern Latin American reality differs from that of the eighteenth century United States. The U.S. constitution was written by a uniformly middle class constitutional convention, caught up in the first concrete articulations of liberal democratic ideals. The government was genuinely new, without the burden of having to serve as a continuation as well as a beginning, within the conflictual tradition of Latin American governments. And eighteenth century North America did

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not suffer from the violent colonial, and later industrial, exploitation of Latin America, in which class divisions have always been much more violently polarized. In spite of the reference *Visão* makes to the uniform applicability of laws within the "classic liberal tradition", the United States constitution is not "pure", "abstract" or "above class interests". The difference is that the basically middle class interests it represents are historically more homogeneous than can possibly be the case in Latin America.

Brazilian sociologist Florestan Fernandes articulates well what a constitution means in Latin America. Only within a formal and utopian perspective is a constitution "above classes", he writes:

This is a fiction in all societies that need a constitutional order. What turns this order necessary is the existence of divisions in society . . . (The constitutional order) consists of a means to permit a correction of inequalities of wealth, culture and power with a minimum of equity in class relations . . . Without a constitutional order and its observance, the coexistence of classes would turn impossible, because the conflicts and the manifest or latent civil war would turn any peaceful and regulated coexistence unviable.

While one can question whether Brazil is at the edge of a civil war, it is unquestionable that the country's social divisions find clear expression in the new constitution. The document is a composite product, the result of hard-fought negotiation between often opposite interests. It includes concessions to all of the political-ideological interests that brought their pressure to bear on the constitutional process. In fact, what makes it different from Brazil's previous seven constitutions is precisely its extensive social reference. This is the first constitution in which all of the diverse sectors of civil society were invited to present proposals, participate in debates, and mobilize lobbies to influence the voting process. As a result of this procedure, the English word "lobby" has entered the Brazilian vocabulary.

By looking at the various lobbying organizations that influenced the constitution, one begins to understand what class struggle means in Latin America. Such organizations are known here as "entidades de classe" - class entities. The term is not the invention of the marxists - it is used equally by those representing labor unions and popular movements as by those defending national industry and large land-holders. The 3000 members of the newly-formed UDR (Democratic Ruralist Union) who poured into Brasília to block the article on land reform stated clearly that they were "defending our class "; the slogan of these *fazendeiros* (land-holders) was "If you don't defend what's yours, you don't deserve to have it."

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Here I'll give a brief sketch of the different social forces at work in the constitutional process. Although all of these forces are complex and internally contradictory, they can be divided into four major categories: that of the progressive middle class, the socialist left, the conservative block and hovering above it all, the military. These are by no means clear and simple divisions, as a closer look will show.

The tendency most expressive of the renovative mood of Brazil's "transition to democracy" has been that of the reformist sectors of the middle class. Emerging from the opposition to the military government, these "progressives" are concerned with establishing a firm middle class democracy on the western model. In the

constitutional assembly this sector was represented by the progressive wing of the PMDB\*, which had been the old MDB, the only legal opposition party during the military years. The progressive sector of the middle class is primarily responsible for the re-organization of civil society I described in my last newsletter (AEM-10). Its strongest lobbying forces included professional organizations such as the OAB (Organization of Lawyers of Brazil), the SBPC (Brazilian Society for Progress in the Sciences), as well as hundreds of human rights commissions around the country.

Characterized by a radical democratic spirit, a defense of individual rights, a tendency toward nationalism and a desire to humanize capitalism, representatives of this sector fought to modernize the section on individual and collective rights, along with that of popular participation in government. As a result of their efforts, censure is forbidden; freedom of thought and expression is protected along with the inviolability of one's house and private life; torture is made a crime without the possibility of amnesty; and with the introduction of the habeus-data, access is guaranteed to personal information stored in government agencies. The more conservative sectors did succeed in pushing through some restrictive clauses, such as the denial of access to those "secrets indispensable to the security of society and the state." But in general, the section on individual rights is one that those within the "liberal democratic tradition" would approve.

Often, but not always, allied with the "radical bourgeois" was the socialist left, politically composed of a handful of small parties such as the PT, PCdoB, PCB, PSB and PDT. All of these parties refer to themselves as "socialist", although they differ widely on what they mean by this. Since together they had little over 100 votes in a constitutional congress of 559 delegates, they were faced with a challenge - either maintain an ideologically pure, confrontational stance, at the risk of political isolation, or learn to make alliances. Recognizing that the constitution would never bring about "the revolution", but could open important democratic spaces, the left opted to throw itself into alliance-making, becoming a surprisingly mature and effective articulator of the social reforms it advocated.

The civil society represented by these delegates had a different character than the mostly middle class, professional organizations described above. Linked more directly to the ferment of social movements, especially among the poorer populations, the lobbies of the left consisted of union leaders, student organizers, church pastoral workers, and representatives of popular movements such as health, housing, education, black consciousness, Indian rights. Often the people involved in these movements arrived in Brasília by the busloads to hold rallies in front of the legislative assembly on the day of key votes. Imagine the drama of a dona de casa (housewife) from a São Paulo favela arriving in Brazil's ultra-modern capital for the first time to ask the delegates to vote for guarantees of housing or health care. Among the most colorful examples of such popular pressure were the tribes of Amazon Indians that came to Brasília to pressure for protection of Indian lands. Dressed in war paint and native costume, they filled the balconies of the constitutional assembly and sat staring down at the delegates in suit and tie arguing below.

As a result of the mobilization of such groups and the parties that ideologically represented them, the constitution contains certain worker's rights and social reforms that within the classic liberal view don't belong in a constitution. For example, the constitution now guarantees a 44-hour working week (a compromise - the left fought for 40 hours while the right wanted to maintain the current 48 hours.) Over-time pay will now be 50% extra (it had been 25%) and there is a six-hour limit for an uninterrupted work-day. Women are guaranteed 120 days of paid maternity leave (they had received 90 days) while in an innovative move, men will receive five days paid paternity leave. The biggest victory of the left was the

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\* For an explanation fo all the symbols in this newsletter, see the list at the end.

unrestricted right to strike, doing away with the juridical distinction between "legal" and "illegal" strikes, which currently does not eliminate strikes but justifies their repression. In other areas, a unified national health system was approved, as well as the rights of Indians to their traditional lands. The left faced strong opposition from the conservative forces on all of these votes, and only succeeded in having them approved through hard-won alliances with the progressives. In spite of these victories, the left considers itself to have lost more than it won, including its proposal for job stability and the biggest defeat of all, the prohibition of disappropriation of productive lands, making land reform virtually impossible.

The third major force in the constitutional assembly was the conservative block, generally representing the interests of business and industry, of land-holders, of the multi-nationals, and of the traditional social and governmental oligarchies. Early in the process these rather loosely connected sectors became nervous about the strong reformist tendency that was emerging in the subcommittee texts, and in what was characterized as a conservative coup, succeeded in uniting the moderate to conservative delegates of various parties (PFL, PDS, PMDB) to form a multi-partisan force called the "Centrão". Forming a majority, the Centrão succeeded in overturning the rules of the assembly by requiring an absolute majority for both rejection and approval of articles, whereas before majority was needed simply for rejection. This made it considerably harder to pass the progressive proposals of the initial constitutional project. By means of this device, the Centrão defeated many of the more radical proposals of the left and won several key political proposals, such as the extension of the mandate of President José Sarney for five rather than four years (a measure opposed by the progressives and the left), and the approval of a presidential, rather than parliamentary system of government.

But ironically, the Centrão fell apart in precisely the area in which it had the most interest, that of the economic order. The conservative block split between those representatives of business and industry interested in preserving national markets, and those sympathetic to the entrance of foreign technology and capital. The fight is an old one, going back to the 1940's when the nationalistic slogan, "o petróleo é nosso" (the oil is ours) mobilized national opposition to the entrance of Standard Oil, Shell, and other foreign companies into Brazil. These days the strongest nationalist lobbies are not those of oil (Petrobras, the state oil monopoly, opposed proposals to nationalize oil distribution), but rather from the field of information, pharmaceuticals, and some mining sectors. The multiple civil organizations that represented these areas united to form the Frente Parlamentar Nacionalista, which counted on the support of about 150 delegates. When allied to the left, which is traditionally nationalistic for ideological reasons, the defenders of national industry succeeded in mobilizing the majority needed to approve such measures as the nationalization of the sub-soil (and thus of mineral exploitation) and the state protection of national industries (permitting state intervention in the market and the establishment of market reserves.)

The measures were serious defeats for those sectors of Brazilian industry sympathetic to foreign capital, and of course to the lobbies of the multi-nationals themselves, which arrived in Brasília in force during the voting on the economic order. Aside from the multi-nationals, the chief civil organizations involved were the CNI (National Confederation of Industry) and the powerful FIESP (Federation of Industry of the State of São Paulo). The anti-interventionist, free market discourse of these entities was isolated by the united nationalist clamor of the left, the progressives, and certain sectors of national industry. The nationalistic streak of the constitution has been widely criticized by intellectuals of various political tendencies, who argue that the scientific-technological changes in the world economy make the old nationalistic formulas of the 1940's and 1950's obsolete, and that now

Brazil needs a gradual opening to world markets in order to make possible transfer of technology and "know-how", which is sorely lacking particularly in the area of computer products.

On the question of land reform, on the other hand, the Centrão maintained its force, backed by the UDR, one of the most effective lobbies to emerge in the constitutional process. The UDR mobilized tens of thousands of rural landholders around the dynamic figure of Ronald Caído, emergent spokesman of the far right. In a tense and hard-fought series of negotiating sessions, Caído refused to allow the leaders of the Centrão make any sort of accord with the progressive sectors that would allow dispropriation of productive land, combating the concept of "social function" of land, introduced to justify land redistribution. The church allied itself with the left to try to assure land reform, but the 200 leaders of groups representing rural workers, along with the church organ, the CPT (Pastoral Commission on Land), could not compete with the 3000 members of the UDR who invaded Brasilia for the lobbying effort. Included among the 3000 were the members of UDR Jovem, the youth branch of the UDR, also known as the "agro-boys". These youth are sons and daughters of landholders who intend to run their parents' fazendas when they finish their studies. They refer to themselves as members of the "health generation" - they don't smoke, don't take drugs, respect their parents and oppose abortion. They see the UDR Jovem as a type of political formation for the capitalists of the future. They are extremely organized and articulate, and clearly think of themselves as "defenders of their class".

The civilized demeanor of this newly emergent force is in striking juxtaposition to the extreme brutality of the conflict in the rural area, where the frustrated wait for land reform, together with the organizing work of the CPT and other groups, have resulted in violent clashes between land-holders and posseiros\*. There have been repeated accounts of assassinations, including those of religious workers, such as that of Padre Josimo in 1986. The church position on this issue has been a consistent insistence on the necessity of land reform. In fact, the emergence at this time of an ultra-rightist force of the strength of the UDR is probably due to the social explosiveness of the church's position that "a terra é de Deus" - the land is God's. This is one point on which the CNBB (National Conference of Brazilian Bishops) is fairly united, despite its strong tensions between progressive and conservative bishops. On the extreme edge of the progressive side is Dom Pedro Casaldaliga, a key articulator of liberation theology, who is currently resisting an official "silencing" by Rome for his radical work with Indians and posseiros of the rural state of Mato Grosso. According to Dom Pedro, "the fact that the constitution omitted land reform can never be forgiven."

The final major force in the constitutional process resides not in civil society, but in the barracks. The military was a constant presence, even if occasionally one was able to forget about it in the heat of the debates. But while the generals kept silently in the background, they didn't lose a single vote that they considered important. Most notable was the maintenance of the text attributing to the armed forces the role of defense of "law and order". The military lobby managed to defeat the attempts of the left to limit the military to defense only of "the constitutional order", preserving the right to internal intervention (read, "coup") if "invited" by one of the branches of government. The military also had a critical role in the approval of the extension of President Sarney's mandate for five (rather than four) years, a hotly contested battle between the Centrão and the left-progressives, who wanted to see direct presidential elections already in November of 1988. The opinion of the generals was that elections so soon would be

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\* Posseiros are poor rural workers who take possession of plots of land, often in groups of families that invade and attempt to begin farming before the owners or the authorities find out.

politically disruptive and would threaten the "slow, gradual, and safe" transition that they were trying to ensure (in other words, the "leftists" would have a chance of gaining power). When it looked like the congress was turning favorable for the proposal of four years, General Leonidas, chief of the armed forces, lost his invisibility and began grumbling, to the point of backing up Sarney in a threatened upset of the constitutional power if the congress did not grant him five years. The delegates got nervous, Sarney won his five year mandate, and the military returned to its watchful invisibility.

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These then were the forces that shaped the constitution. Given the play of interests and alliances that contributed to the final product, one can understand what the magazine Visão meant when it characterized the constitution as instituting "a government by men" rather than by laws. I'd like to look again at the question of law in the light of the analysis I've just gone through. Visão is certainly right that Brazil lacks a guarantee of the uniform applicability of laws. But it is a contradiction in terms to think that the inclusion of a definition of law in the constitutional text would magically correct this culturally rooted problem. If something approximating, however dubiously, uniform applicability of laws exists in the United States, this is because respect for law exists in a completely different form than in Latin America. In my last newsletter I referred to the Brazilian tradition of the malandro, the schemer who succeeds by going by shady side channels. Laws have never been the primary reference here, but rather, who controls the political and economic cards at a given moment. Previous attempts to establish "justice before law", notably the two prior democratically elaborated constitutions (those of 1934 and 1946), were both too progressive for the rulers of the era and ended up gathering dust on the shelves within a few years. And if, as Florestan Fernandes commented, one of the principal purposes of a constitution is to permit a minimal correction of social inequalities, then historically the effect of these constitutions has been to let steam escape from the social conflicts without resolving them. Jurist Raymund Faoro, one of the principle critics of the new constitution, comments along these lines:

The Brazilian elite has always sought to promote laws that take on the front-line of social conflicts, so as to limit them, or frustrate them. But without any commitment to execute them. A typical example is the profit-sharing in the Constitution of 1946, that proposed to neutralize conflicts without the laws ever becoming a reality.

How then are we to understand the constitution of 1988? On the one hand, it expresses a genuine democratic mood in the country, a ferment of popular participation, and an urge toward an alleviation of the situation of workers in relation to capitalism. It constitutes not a liberal democracy, but rather a clumsy and contradictory tendency toward social democracy (and one can question whether the formulas of liberal democracy are adequate for a modern conflict-filled developing nation.) On the other hand, the constitution can be seen as one more tool by which the privileged classes control the popular animas by feeding the people with promises, in effect throwing the bone ahead of the dog while stepping on its tail. Soon after the voting was completed the delegates en masse joined in the chorus of self-congratulation for the social advances of the constitution, even those who had fought against those "advances" every step of the way. It is, after all, election time, and candidates of all political orientations are pumping the new worker's benefits for all their potential electoral worth.

Demagogy aside, the real test of the constitution will come in its application, which is already turning into an obstacle course due to the lack of complementary legislation needed to implement so many of the constitutional principles. During negotiations, accords were reached on many of the more controversial matters by leaving them to be defined "em termos de lei", in effect throwing the controversy to future congressional battles. An example is the right to strike in essential service sectors, left for determination by law. Until the new laws are written, the old ones remain in effect; in this case, those existing are the extremely restrictive laws of the military period, prohibiting strikes in almost all sectors, from banks to hospitals, transportation to water and energy distribution. As Almir Pazzianotti, the Minister of Labor, warned, "it is not at all recommendable to move toward democracy with the laws of authoritarianism."

Currently there is daily debate about just which articles of the constitution need supplementary legislation and which are "auto-applicable". Again, one can see the clash of class interests in this debate. Unions, business, and the labor ministry take different position according to their interest in compliance. One day one hears that 120 days maternity license goes into effect immediately. The next day someone applies the brake and insists that it can't be applied until it is regulated. Many sectors, particularly the more conservative ones, have strong interests in freezing indefinitely many of the items of the constitution. Leaving them for regulation by law, with a legislature preoccupied with municipal elections, is a good way to do just that. One example is the much contested lid of 12% on interest, which if the finance minister and the business federations have their way will never enter into practice.

Another obstacle to the implementation of the constitution is Brazil's judicial power, which has had its powers considerably expanded as principal defender of the new constitution. Traditionally, the judiciary is ideologically conservative, and in controversial matters such as land disputes and worker's rights tends to opt for strict legalistic interpretations. Since the legal code will take a long time to catch up to the constitution, the enforcement of the more progressive aspects of the constitution may face judicial opposition. The constitution includes an innovative protective device, the Mandate of Injunction, by which a citizen who is not receiving his constitutional rights (for example, during the elaboration of supplementary law) can appeal to the judiciary for enforcement. This expands considerably the jurisdiction of the judiciary, turning it into a sort of interim legislature. But the judiciary's new role as defender of individual and collective rights faces two obstacles: first, the ingrained conservativeness of the current corp of judges; and second, the fact that the Mandate of Injunction itself appears to need regulation by law before it can be put into practice.

Given the legislative and judicial snares, the implementation of the constitution will depend greatly on the energy of civil society in defending its various opposing "conquests". Currently one sees mobilization in various sectors; FIESP, CUT, the OAB and the CNBB, to take four different ideological poles, are all in the process of fine-toothing the text to inform their respective audiences of the relevant sections of the constitution and how to demand compliance. Whether they will be capable of mobilizing forces enough to counter-act the social forces interested in non-compliance remains to be seen.

Presently civil society is mobilized over a different matter, the so-called Pacto Social, an attempt to negotiate an accord between workers, business, and government to find a response to inflation. The "social pact" has replaced the Constituinte in the headlines as the possible cure for the nation's ills. Brazil

always seems to have some major project in capital letters that proposes miraculously to relieve the country of its political and economic crises. In 1986 the savior was the Plano Cruzado, a monetary re-valuation and wage and price freeze that ended disastrously when prices were suddenly unfrozen immediately following the elections. In 1987-88, the constitution occupied this role, and now that it has been signed and sanctified, the Pacto Social has taken its place. There is a strong dose of political demagogy in all of this, feeding on the Brazilian tradition of the eternal wait for a miracle to fall from the sky. But a dose of common sense reminds us that a constitution cannot possibly be all things for all people, nor put an end to the very economic and social conflicts that gave it birth. Laws in themselves resolve nothing aside from the complex play of social forces that give (or don't give) them life. In the end Brazil's new document is "just a constitution", with all the weight this phrase contains in Latin America.

Um abraço,



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**PMDB** - Partido de Movimento Democrática Brasileiro (Party of Brazilian Democratic Movement).

**MDB** - Movimento Democrática Brasileiro (see above)

**OAB** - Organization of Lawyers of Brazil

**SBPC** - Brazilian Society for Progress in the Sciences

**PT** - Partido dos Trabalhadores (Worker's Party).

**PCdoB** - Partido Comunista do Brasil (Communist Party of Brazil)

**PCB** - Partido Comunista Brasileiro (Brazilian Communist Party)

**PSB** - Partido Socialista Brasileiro (Brazilian Socialist Party)

**PDT** - Partido Democrática Trabalhista (Democratic Labor Party)

**PFL** - Partido da Frente Liberal (Party of the Liberal Front)

**PDS** - Partido Democrata Social (Social Democratic Party)

**CNI** - National Council of Industry

**FIEESP** - Federation of Industry of the State of São Paulo

**UDR** - Democratic Ruralist Union

**CPT** - Pastoral Commission on Land

**CNBB** - National Conference of Brazilian Bishops

**CUT** - Central Única dos Trabalhadores (a national federation of labor unions)