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per la storia del pensiero giuridico moderno

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VIRTUAL CITIZENSHIP, ELECTORAL OBSERVATION,
INDIGENOUS PEOPLES, AND HUMAN RIGHTS
BETWEEN EUROPE AND AMERICA, SWEDEN AND PERU

*For Ulrich Fanger, Adolfo Cayuso, Andrea Malnati and
Scipion du Chatenet, hard workers and an easy working
team.*

1. Images and bodies: the European Union on the web. — 2. Elections as human rights events: international standards for European operations. — 3. Observation as virtualisation: unforeseen results in Peru. — 4. More than a mote in a not so alien eye: Peruvian provocation. — 5. The beam in one's own eye: Europe's embarrassment over Swedish zeal. — 6. Nemo dat quod non habet: co-operative relations among the United Nations. — 7. Rights make might: freedoms and elections, citizenships and peoples. — 8. The fact of our existence: the thing and the title for America and Europe. — 9. Fact and right: vicious geographies and virtuous constituencies.

Citizenship of the Union is hereby established. Every person holding the nationality of a Member State will be a citizen of the Union.

Treaty on European Union, 1993.

International instruments recognise specific human rights criteria which electoral processes should abide by for them to be considered valid.

Ombudsman's Office, Peru, 2000

1. *Images and bodies: the European Union on the web.*

At this point in our time and space, all manner of entities and institutions are able to offer a controlled image of themselves, one which can be created in cyberspace on web sites, freely accessible for both transmission and reception. Web sites constitute a source of virtual images on the internet. They are constantly being created,

remodelled and reissued. An institution nowadays is not merely an establishment or an enterprise in the open world. Today it can also be a self-produced image on the virtual screen.

Law-making bodies do not only function through legal mechanisms established by their respective constitutional or statutory, conventional or customary framework. They also recreate or regenerate law in the forum and inorganic fronds of the intricate network of electronic web sites. Because of the medium's virtual nature, some entities take every effort to offer the best possible image of themselves. Moreover, they work continuously on that presentation, on their own virtualised image as if it were the true thing. It may be. Virtuality creates reality, which comes into being from the moment it manifests itself as a very potentiality. The internet can be not only a source of virtuosity but also a virtualising factor when it so publicly commits itself to adopting an image deemed virtuous due to its virtual nature. Virtue may beget reality as much as vice may. With web sites providing access to legal knowledge, the most effective law will not be precisely that which arises from an official paper, or not to the same extent as the one found in the more attractive and informal web version. This is already happening in spite of disclaimers which appear on the web page itself, warning that online versions must not be confused with officially published norms ⁽¹⁾.

The network is a publicity channel in the dual meaning that also implies propaganda. Internet divulges and publicises in both senses at the same time. It is a showcase. You do not put all your files on the world wide web as you do in the corporation archives. There is selection and virtualisation, for there is a public. Between publishing and publicity, the net works much more efficiently than any other procedure hitherto known and used, due to its potential global scope as well as its permanent ability to update. Created and constructed order is now identified and visualised, and rightly so, through its reproduced and remade image on the computer's bright

⁽¹⁾ No need to go any farther, here is an example of a disclaimer from the European Parliament web site, <http://www.europarl.eu.int/guide/disclaimer/default-en.htm>: "It should also be noted that it is not possible to guarantee that a document which is available on-line reproduces exactly a text officially adopted: therefore only the legislation of the European Union as published in the paper editions of the Official Journal of the European Communities is considered to be authentic".

screen. It is useless to resist therefore. At least *law in the books* is becoming *law on the web*; written law, computerised law produced in its virtual workshop and read on our real terminals, law straight from the manufacturer to the consumer without the intervention of markets, professions, papers, libraries or archives.

For practical purposes nowadays, if we wish to obtain information concerning any law-making institution and its structure, a visit to its web page would be worthwhile, with the chance to study its self-portrait. Other sources are no longer likely to offer better or even more practical information. Let us trust computers' glowing screens more than books' dull pages and recreate the spirit of reading and understanding, because the image itself is new and renewable. Our visit should be made with open and ingenuous eyes even though the institutions are known or familiar ones. Let it be to the European Union, as proposed ⁽²⁾. Let us visit its virtual reality, a reality which is after all doubly new, both grown and unripe. As a Union, it is a brand new political entity, gestated towards the end, rather than the middle of the 20th century by means of a still incomplete and already long series of treaties and agreements fol-

(2) Pietro Costa, who has just succeeded Paolo Grossi as editor of the *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno*, summoned a monographic issue on the European Union compared with the States. Without his encouragement and under my sole responsibility, I would not have decided to delve into a study of delicate moments arising from personal work experience and commitment to the Union. I held a post (DHM, *deputy head of mission*) in a European operation of electoral observation in America, specifically in Peru, which I shall deal with in this paper. Some other similar personal experiences are also a source. I do not regard them as extraneous to study and reflection, to the learning process itself that teaching welcomes although in the case of Peru I had decided to concern myself only with group work in benefit of the operation itself. Only when the electoral observation was over, in July 2001, and any commitment to the European Commission had ceased, did I change my mind and commence this essay. I write here exclusively in my role of professor of legal history, past and present, and not in any other more or less transitory capacity. I would like to express my recognition for the opportunity extended and for the professional independence that I enjoyed during the Peruvian operation. I must register also my gratitude to the University of Seville and to colleagues from the area of legal history for their help which enabled me to accept non-teaching engagements. I am grateful to Moira Bryson, linguistic advisor, more than a translator. There will be opportunities in later notes to register other thankfulness, as well as credentials, responsibilities and even a personal disclaimer.

lowing the launching of Maastricht, in force since 1993. It is inexperienced because it is still searching for a framework, for a constituent and constitutional law to call its own, for a constituency or non-borrowed citizenship to support it, as it were.

We are in the middle of a long birth process. Outwardly, the Union appears to be a babbling child, just starting to walk, dragging the umbilical cord that continues to bind it to the still existing body of a common market rather than to any kind of a constitutional community. However, the tables have turned or are capable of doing so. Europe is here and reaching out to a world vastly different from the panorama which initially presided from the mid-twentieth century through the pacts leading up to the Treaty of Rome, and for decades thereafter. Furthermore, since the constitutional gestation of the Member States two or even more centuries ago, the public scenario has changed dramatically. Regarding image-making through normative texts, the States did not even have the means to exploit printing in order to present themselves as duly constitutional. In contrast the Union today has access to the much speedier, more manageable and open medium of computer technology ⁽³⁾. As I hope shall be shown, when saying *constitutional*, I refer to law which concerns the rights of citizenship and even of the whole of humanity. Human rights themselves are becoming constitutional principles. As for States, it is not much more than two hundred years ago, between the 18th and 19th centuries, that the virtual concept and the actual practice of constitutional citizenship emerged in the area in which we shall move — an area which is more American than European, yet embracing both.

The use of computer technology may be a mere sign of a true chronological distinction, revealing unknown legal eventualities. I do not propose to study the tool or its possibilities. It is only a starting point for the journey. The network comprises and develops a mesh of links, gateways and web sites, corridors, directions and

⁽³⁾ BENEDICT ANDERSON offers an inspiring impression of the printer's past bearing on the imagining of Nations and finally the image itself of States, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1983), London 1991. Contrast this with a strict monograph relevant to the evidence of subsequent illusions: MARTA LORENTE, *La voz del Estado. La publicación de las normas, 1810-1889*, Madrid 2002, concerning Spain.

routes that branch off and cross over in continuous expansion. Its capacity and possibility for cloning and proliferating kaleidoscopic images is almost infinite. I shall enter with a previously determined course. It is Europe, the Union at home, and as far away as America. It is also democracy, with the basis of polity or constituency entitled to rights. Constituent citizenships and rights to liberty set our course. The European Union itself will be the virtuous guide and maybe the vicious escort. Exploiting the web, which really permits distant and unforeseen connections, or even ones which would be hard in the event of their being physical, we shall move backwards and forwards between Scandinavian Sweden, Europe, and Andean Peru, America, not all of Sweden or the whole of Peru as we shall see. I shall explain the reasons for the strange itinerary and the specification on identity. We shall take our real time on our virtual journeys (4).

Since we are contemplating virtues and other potentialities, I turn to the apparently virtuous and virtual field of international co-operation, and more specifically to a seemingly even more impartial area — that of electoral observation to safeguard democracy and foster human rights. Personal experience is behind this choice, but together with objective interest which will not be necessary to specify, as shall be seen. I am not alone and by myself in my professor's office and with my research work. I co-operate and observe in company — an activity which is likewise reflective. This question of observation in the area of co-operation could also serve, though incompletely, to tackle the difficult challenge of understanding the European Union in comparison with its individual States. A

(4) This essay on virtual history is a somewhat dissident dialogue with existent literature on citizenship, whose latest outstanding achievement is offered by the scholar who has called us together on this exploration project: PIETRO COSTA, *Civitas. Storia della cittadinanza in Europa*, Bari 1999-2001. This genre is characterised by its European or Euro-American-centred stance not only through conscious accuracy, as in this case, but even when making the impossible attempt to embrace the entire world, as in the quoted *Imagined Communities* by B. ANDERSON (confront, as touchstone, the fourth chapter, the one on Latin America). As long as Europe must still account for colonialism, European past and present may be in compelling need of out-of-Europe specific perception, and not generic information, of local and not global knowledge in brief. This is the commitment of this paper.

contrast can be tried with the constitutive styles they represent as a well-known and most visible term of reference, in history and at present, in Europe and America. The practice of co-operation offers an opportunity ⁽⁵⁾.

Although we have so far research and essays about election observations, and in particular concerning specific operations in America and elsewhere outside the European Union and the United States, hardly any consideration is given to it yet as to the form of political co-operation it comprises or is intended. However, in recent years a remarkable development has been witnessed, showing considerable potential at least while there exist political transitions between dictatorships or corrupted regimes on the one hand and constitutional systems on the other, between situations where rights to freedom are non-existent and positions where efforts are made towards them, this being the usual assumption in electoral observation ⁽⁶⁾.

I shall not compare observations, elections or transitions between or against each other here, or what was apparently observed with what really happened. Instead, I aim to situate us in cyberspace, in order to have a bird's-eye rather than ground level view of a case

⁽⁵⁾ The intergovernmental co-operative field is not the usual or likely one as regards analysis and comprehension, and even less so from a non-economic approach and content of co-operation. This is perfectly understandable since Europe's constituent and constitutional moment is neither more accomplished nor better settled than that which existed in the previous era of Communities and common market rather than Union and citizenship: STELIOS STAVRIDIS, ELIAS MOSSIALOS, ROGER MORGAN and HOWARD MACHIN (eds.), *New Challenges to the European Union: Policies and Policy-making*, Aldershot, 1997; MASSIMO LA TORRE (ed.), *European Citizenship: An Institutional Challenge*, Dordrecht 1998; J.H.H. WEILER, *The Constitution of Europe: "Do the new clothes have an emperor?" and other essays on European integration*, Cambridge 1999; MICHAEL BURGESS, *Federalism and European Union: The Building of Europe, 1950-2000*, London 2000; RICHARD BELLAMY and ALEX WARLEIGH (eds.), *Citizenship and Governance in the European Union*, London 2001.

⁽⁶⁾ YVES BEIGBEDER, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy*, Dordrecht 1994; ARNE TOSTENSEN, DOEKE FABER and KARIJN DE JONG, *Towards an integrated approach to election observation? Professionalising European long-term election observation missions*, Maastricht 1997; KEVIN J. MIDDLEBROOK (ed.), *Election Observation and Democratic Transitions in Latin America*, San Diego 1998; KRISHNA KUMAR (ed.), *Postconflict Elections, Democratization, and International Assistance*, Boulder 1998.

which illustrates the potentiality of not so much the observation task as of the observing agents, Member States and their Union — Europe. In other words, constitutionally speaking, I aim to observe myself and try to make my readers observe a living test of virtual citizenships both American and European. The view from aloft yields not outlines but perspectives, not profiles but frames. From distant America, a close up image of Europe's constitutional heart-beat can be obtained, or so I hope.

Thanks to the non-financial nature of electoral observation as a form of international co-operation, the fostering of democracy and promotion of rights through its performance may offer us mirror images of Europe's and America's respective polities or constituencies. Their subject and agent is citizenship, virtual and who knows if virtuous citizenships in the plural, both American and European, like the Peruvian, the Swedish and, of course, the Union's. Let us enter present history with past dimension and future projection. Here in the introduction, I would not be understood if I announce that we are about to visit the future, the most virtual history. Europe itself will lead us to virtuality. Let us travel through the web. It will give us virtual information for actual reflection.

2. *Elections as human rights events: international standards for European operations.*

Entering the Union's web site, we are greeted in the eleven official languages of the fifteen current Member States. We shall choose the English version, as this is by far the most common language, with the widest range of information and the most complete documents (7). Let us go to the EU, *European Union*. We shall enter through *External Relations*, and by way of a window which opens up *Policies, Programmes and Projects*, reach a matter defined as *Human Rights and Democratisation*. There we come across election co-operation, *Electoral Assistance and Observation*, where one of the largest sections concerns the 2001 operation in Peru, the issue of this particular study (8). Reference documents for introduction

(7) The virtual current doorway into Europe: <http://www.europa.eu.int>.

(8) Direct link: <http://europa.eu.int/comm/external-relations/human-rights/eu->

and explanation are available. In terms that are more general, they deal with democratisation tasks via election observation and other means such as election process direct assistance. Here we have reports and records concerning this external activity carried out by the European Union. Now, as from 2002, there is also immediate access to the site of *Europeaid*, the brand new European office for co-operation ⁽⁹⁾.

Between November 2000 and mid 2001 the European Commission produces reports on election observation and assistance strategies which are working papers concerning the fostering of democracy and human rights to be consulted with other main European institutions, the Council and Parliament. They define the current framework of the pursuit. Furthermore, they coincide with the preparation and execution of the electoral observation in Peru

election-ass-observ/index.htm. The documentation is in *acrobat reader*, which allows page quotes. To begin with I visited the site in July 2001, leaving around this moment, or more correctly with an annual report corresponding to October, the material consulted to reflect the state of the Peruvian electoral observation that will concern us. The European web page design dates from 1995 and it is already overloaded with information. The *eu* key is due to change from subdomain to domain, with a complete overhaul of the web site.

⁽⁹⁾ *Europeaid*: <http://europa.eu.int/comm/europeaid/projects/eidbr/index-en.htm>, with its *disclaimer*: "The Commission accepts no responsibility or liability whatsoever with regard to the material on this site (...). Please note that it cannot be guaranteed that a document available on-line exactly reproduces an officially adopted text. Only European Union legislation published in the paper editions of the Official Journal of the European Communities is deemed authentic (...). This disclaimer is not intended to limit the liability of the Commission in contravention of any requirements laid down in applicable national law nor to exclude its liability for matters which may not be excluded under that law". As for the accountability, the problem lies in the latter, of course. As for the information on electoral observation, *Europeaid* (*European Initiative for Democracy and Human Rights*; director, FRANCESCO DE ANGELIS) does not integrate the previous documentation on its web site. It remains on that of *Human Rights and Democratization* subsidiary (also on the web) to *External Relations* (commissioner, CHRIS PATTEN). In the latter, you can still (mid-2002) find the address for the Peru-2001 operation that we are going to consider (<http://www.moeue-peru.org>), but as a dead-end, linking to nowhere. At least virtually, I mean on the net, there is a lack of co-ordination among European offices that we shall tackle not in cyberspace, but in Peru. In fact, it is the Peruvian side, namely *Perú Virtual*, which has saved the European observation site there: <http://www.peruvirtual.net/moeue> (MOEUE, *Misión de Observación Electoral de la Unión Europea*).

which we are bound to consider. For reasons firstly of importance and secondly of coincidence, we should begin to peruse all this on the screen rather than in any other sources of information such as books. According to its testimony, at the beginning of this millennium we are witnesses to a phase of increase and consolidation in the specific field of external action through observation and assistance for democratisation. “In recent years, European electoral missions have grown in frequency” while co-operation has increased in general, “but up to now the experiences gained have not been compiled systematically” (10).

The European Parliament requests a statement from the Commission on the external performance of electoral observation, to which the latter replies with a clear principle at the end of 2000: “Elections are human rights events”, and an initial legal position vis à vis voting as well as observing procedures, for both the execution and supervising of elections. “The basic international criteria for the validation of observed elections are in Article 21 of the Universal Declaration of Human Rights” (11). Let us recall the complete original tenor of this term of reference: “1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right to equal access to public service in his country. 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures” (12).

Electoral observation and assistance is a form of international co-operation whose common objective is democracy through election processes: “Election observation is the political complement to election assistance”. Guided by the principles of “impartiality, transparency and professionalism”, observation’s goals, always within the

(10) *Communication from the Commission on EU Election Assistance and Observation* (4-XI-2000), p. 3.

(11) *Communication from the Commission* (4-XI-2000), pp. 4-5.

(12) For international documentation on human rights, the best up-to-date collection can be found online at the United Nations High Commissioner for Human Rights web site: <http://www.unhcr.ch>. The Universal Declaration is available in more than three hundred languages, not only state ones.

human rights perspective, are to deter fraud, prevent conflicts, acknowledge legitimisation of an electoral process and enhance domestic and international confidence. To do more would be inappropriate: “Democracy can be supported, but cannot be imposed by foreigners”. Elections constitute one of several key and co-operation scenarios where the goal of democracy cannot be enforced. With these established intentions, European electoral observations have been formally organised for almost a decade⁽¹³⁾.

A working paper previous to this declaration coincides in the placing of electoral observation in the broader context of co-operation in support of democracy with an identical authority and perspective of human rights: “The Human Rights Regulations authorise Community support for the process of democratisation, in particular, for the electoral process and equal participation of the people”. This slant places the issue as one more on the programme for this kind of rightful co-operation. Here is the agenda of the day, or rather the year 2000: “The fight against torture, the death penalty, and racism and xenophobia. Human rights education and freedom of expression. Economic, social, civil and political rights. The protection of vulnerable groups, especially children. The promotion and protection of the rights of women. The promotion of democracy and the rule of law”, and observation finally in this last section. The significance and importance of electoral observation are manifest in the European Union’s global and virtual commitment to human rights and democracy⁽¹⁴⁾.

As well as children and women, the agenda also includes victims of torture, displaced persons and refugees among vulnerable groups. As different and distinct categories, national minorities are deemed

⁽¹³⁾ *Communication from the Commission* (4-XI-2000), pages quoted above, and in Annexe I, pp. 25-31, with an overview of European election observation and assistance operations, from those of the Russian parliamentary elections in December 1993, and from there onwards in almost all parts of the world, except for those of Europe itself or of member States; *Council Conclusions on EU Election Assistance and Observation* (31-V-2001), p. 207, conclusions which repeated as objectives are included as an annexe, the twelfth, in the third *Annual Report on Human Rights* (8-X-2001): <http://europa.eu.int/comm/external-relations/human-rights/doc/report-01-en.pdf>.

⁽¹⁴⁾ *Commission Staff working document. Report on the implementation of the European Initiative for Democracy and Human Rights in 2000* (22-V-2001), pp. 6 and 9.

to be included, as well as indigenous *peoples*, these also in the plural, since the singular form, indigenous *people*, would poorly describe a non-differentiated indigenous *population*. These peoples stand out particularly in accordance with a concept which we shall refer to later, that of the International Labour Organisation Convention on Indigenous and Tribal Peoples in Independent Countries. Take heed, for it will be a sensitive issue in the Peruvian case. Let us also add that, for the sake of interest, this distinction between national minorities and indigenous peoples is not always maintained in the same virtual image of European reference documents ⁽¹⁵⁾.

“Elections are human rights events”, it should always be stressed, as it is constantly by the European Union ⁽¹⁶⁾. If co-operation is specifically concerned with human sharing in equal rights, dialogue is its medium. We have already been warned that assistance is appropriate, but enforcement is unsuitable. “Democracy can be supported, but cannot be imposed by foreigners” nor by fellow citizens, as it should be added. Dialogue to foster democracy and human rights constitutes the channel and conditions for co-operation, even economic: “Since 1992, the EC has included in all its agreements with third countries a clause defining respect for human rights and democracy as *essential elements* in the EU’s relationship”. Within this context, defined at the time of the birth of the Union in 1993, the practice of lawful election observation was commenced, without a continuity solution up to the present and beyond ⁽¹⁷⁾.

⁽¹⁵⁾ *Commission Staff Working Document* (22-V-2001), index and pp. 46-47; *Communication from the Commission to the Council and the European Parliament: The European Union’s role in promoting human rights and democratisation in third Countries* (8-V-2001), p. 17. Now, as from 2002, there is a European page on the web *Promoting and Protecting the Rights of Indigenous Peoples*, under this patronizing approach: <http://europa.eu.int/comm/external-relations/human-rights/ip/index.htm>, the same phrasing for *Promoting and Protecting the Rights of Minorities*: <http://europa.eu.int/comm/external-relations/human-rights/rm/index.htm>.

⁽¹⁶⁾ The emphasis is particularly noticeable right from the start of the *Council Conclusions on EU Election Assistance and Observation* (31-V-2001): “Genuine elections are an essential step in the democratisation process. They pre-suppose the full enjoyment of a wide range of human rights and fundamental freedoms”.

⁽¹⁷⁾ *Commission Communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third Countries* (23-V-1995); *Communication from the Commission to the Council and the European*

Virtuality is not always so clearly defined on European web pages, as we have already noticed with regard to the distinction between indigenous peoples and national minorities. When it comes to defining the terms of reference for election observation or assistance, the authority and perspective of human rights are not so clearly specified. In the guidelines for individual operations, another type of definition tends to appear instead, that of related but rather less demanding *international standards*. They do at least define conditions for co-operation beginning with universal suffrage as a right together with other associated ones. Here are the requirements: “Franchise is genuinely universal; political parties and individual candidates are able to enjoy their legitimate right to take part in the election; there is freedom of expression allowing possible criticism of the incumbent government and the right to free movement and assembly; all contesting parties and candidates have reasonable access to the media” (18).

However, principles defined only as *international standards* could introduce slackness and even relativity into the very heart of human rights. We continue in their terrain, but on a lower level of commitment, which becomes more evident when dealing with transitional elections following military dictatorships or corrupted regimes, the Peruvian case in 2001. Election observations are temporary actions carried out in the face of constitutional transitions. In these circumstances, as *international standards* standing for human rights, less demanding requirements can be assumed and recommended without the slightest hesitation, and easily so as we shall see later regarding the Peruvian case. Let us not anticipate challenges and checks. We are concerned here with the fact that when a more neutral and less expressive term of reference is adopted as measuring stick, in this case *international standards*, the task is not intended to be resolutely and clearly carried out with the more precise and committed *human rights standards*. When specifying criteria for observation reports, standards which are less defined and therefore

Parliament (8-V-2001), p. 4; Council Conclusions on the European Union's role in promoting human rights and democratisation in third Countries (25-VI-2001).

(18) Communication from the Commission to the Council and the European Parliament (8-V-2001), p. 35.

less committed, the so-called international, are the specific measuring stick employed. Thus with this reference to form and content, the election observation concerning Peru has had to issue its report. But let us not anticipate events.

We are concerned here with the fact that when a more neutral and even inexpressive term is adopted, in this case *international standards*, it does not appear that the task is being resolutely and clearly carried out with the more precise and committed *human rights standards*. It would seem that the latter, human rights, are useful only to legitimise the observation, not to constitute its rule. For these, mere *international standards* are deemed sufficient. Is there a difference or are they two ways of understanding the same unique idea? In the latter supposition, why duplicate syntagma? Why this insistence on human rights when operations are conceived, justified, planned and explained only for international standards to appear at the very moment of implementation?

For the evaluating of elections, what can international standards be if they are clearly not the same as human rights, or are not identified exactly with international law as conceived by the United Nations from the Universal Declaration on Human Rights whose article 21 set the first principle? "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives"; "the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures". These words mark the mere beginning of an intensive development that with its ups and downs has continued for just over fifty years. As we shall verify both in America and in Europe, human rights are today not only those of the Universal Declaration resolutely and clearly carried out with the more precise and committed *human rights standards*.

If the present legislative body of the international law of human rights is not what defines and specifies *standards*, what else might it be? There is no clear answer to this, for there is no real alternative. In practice, although bearing some association to human rights, especially to political ones, *international standards* are somewhat elusive and intuitive. With the connection in mind, this reference to

standards can be considered in the light of the lowest rather than highest common denominator taken from the conventions and performances of States which believe themselves to be constitutional and democratic. If the election observation and its staff are European, the standards derived from political experience common to the respective countries might be adopted more or less implicitly or surreptitiously as *international standards*. This of course can be the result of a certain distancing or dubious mediation regarding human rights principles always in the background. Yet this does not mean that the concealing effect is inevitable when, avoiding express reference to human rights, standards are relaxed and may be biased.

In the case of Peru, which we shall now consider, the sensitivity and prudence shown by the observation staff has prevented or at least mitigated the negative consequence. Leaving aside the Swedish syndrome, which I shall discuss later, it was only on the part of European Parliamentary members who participated in the observation that Europe was publicly held up as an example and guide for democracy and rights. This could be a sort of tribute to principles, asserting European instruments and mechanisms to this effect, without brandishing therefore the Union or the Member States' political and legal practices as a universal model⁽¹⁹⁾. The so-called core team, that is the leading group of the observation in the field, played safe by avoiding the European reference among the authorities of their public statements and reports and including a "human rights framework" without European documents on the Peruvian operation's web site. We included instruments from the United Nations: Universal Declaration of Human Rights, Declaration on the Elimination of All Forms of Racial Discrimination, Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights,

⁽¹⁹⁾ This specifically concerned the reference to the European Union's recent Charter of Fundamental Rights as a model. At the time and in those circumstances I did not discuss what I considered to be its serious deficiencies, with regard to Europe itself and also America. I shall not do so now, but later on, when we have cause. I do not know what degree of comparative knowledge some members of the European Parliament possess, concerning declarations of rights, but it is clear that they took for granted that a European instrument is superior to any Latin or Inter-American equivalent, or even pertaining to the United Nations. We shall have a very telling anecdote about this neo-colonialist mentality regarding election rules.

Convention on the Elimination of All Forms of Discrimination against Women, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and finally, in keeping with the view of the United Nations High Commissioner for Human Rights and with the fact of its ratification by Peru, the Convention on Indigenous and Tribal Peoples in Independent Countries of the International Labour Organisation (20). The European Union's criteria were thus complied with: "Elections are human rights events" in America as much as in Europe, in Peru as much as in Sweden. We shall check all of this at a later point.

We are not yet in America. We are still in Europe, on the European Union's web site, which includes a link to the Peruvian electoral observation's own page as long as this remains active (21).

(20) *Marco de derechos humanos*, framework of human rights, in the current container of our web site: <http://www.peruvirtual.net/moeue/humanr.htm>. The one also quoted above from the High Commissioner for Human Rights contains the Convention of the International Labour Organisation on Indigenous and Tribal Peoples in Independent Countries as a human rights instrument. I must say that the field management team itself had doubts concerning the appropriateness of the inclusion of the whole *marco* or framework. This was because functionally we had on the one hand to comply with the Peruvian legal system and on the other, do everything possible to manifest the nature of European observation. Thus, we also included the Peruvian legal framework for the elections as well as a link with the European Union's *human rights and democratisation* site. During the election process, regarding human rights, the Ombudsman's Office distinguished itself and stood out among the other Peruvian institutions. As for the observation web page, a precedent is maybe established, because the one for the elections in Ecuador, 2002, constitutes a good copy, including the *framework on human rights*: <http://www.ue-moe.org> (chief observer, EMMA BONINO; deputy, RAFAEL LÓPEZ-PINTOR).

(21) This is where the most complete information was found regarding European Union electoral observation during the 2001 Peruvian General Elections which concern us now: <http://www.moeue-peru.org>, designed and programmed by MORELLA REYES, saved in <http://www.peruvirtual.net/moeue>. I use the past tense for the reference to the first address because the site has expired, as it was only a twelve-month contract and the European Commission (which is after all its *home*) had not saved it on its own web site, where now (mid-2002), the respective link is a dead-end, as we know. Among other various observations in Peru, there has been one other with its own web site, that of the Organisation of American States, which I shall refer to. This site is however even more short-lived as it closed as soon as the elections were over, not remaining in its respective *home*: <http://www.oas.org>. Anyway, with the help of MORELLA REYES, I have also saved <http://www.moeue-peru.org> on CD — a new element in archives and libraries to solve

For the moment, we stay at home, at the European homepage. We are in virtual Europe on the web, where its self-image seems certainly exemplary. For now, we shall not question this make-believe. I have already warned that I am not intending to make a comparison of virtualities with realities as if they were mutually exclusive dimensions.

From a more elementary viewpoint, an attempt could be made to compare Europe as a virtuality with the States as a reality. It could be maliciously insinuated that the European Union can afford its own construction of a foreign policy especially centred on co-operation in promotion of democracy and rights as the means and condition for economic assistance, for there are Member States with ample experience and a surplus of determination for the more traditional diplomacy which entails interests and pressures. Within the European Union, the co-ordination termed Common Foreign and Security Policy can be considered at both central and local levels, among the States themselves and among their embassies, in such a way that it always tries to emphasise international co-operation's more acceptable dimension, that of human rights even to economic assistance. The Member States' main remaining foreign action according to their own interests and their own co-operation programmes might be what enables the virtuality of the beautiful image of a common façade, the Union's at least on the web ⁽²²⁾.

All this may be true, but it is not our business or commitment now. It is not that I myself deny it, but it is simply not the object of our consideration at this moment. We are not facing a tangible (if it were clearly distinguishable) but rather an intangible reality, which involves committed virtuality. The European Union certainly commits itself with its offer of an image that is very different to the one which States at one time had of themselves and of each other, or to the image which they can in fact continue to maintain even with all the international co-operation they provide, together with all the commitment to human rights from which their politics may also

both the net's transformation and volatility as a source of immediate history. Who will save the present European site when it is redesigned, as scheduled?

⁽²²⁾ *Council Conclusions on EU Election Assistance and Observation (31-V-2001)*, p. 208.

arise. The magic of computer technology now helps everybody, although it is not sufficient of course. It is likely that the States themselves are less able to make the attempt. For verification purposes their web sites can be visited ⁽²³⁾.

Election observation, which is in a stage of marked development, predominates in the field of external action trying to promote democratisation. It is not an exclusive invention of the European Union. Member States have also considered it, but they tend to cede this specific field to the Union itself with a kind of diplomatic role division between virtuality and reality. Abroad, in America itself, there exist institutions which are becoming specialised, and they compete with Europe in the observation task or in direct election assistance ⁽²⁴⁾. Between one and the other, the trend is moving from mere practice to formal action, from political experience to legal institutions regulated particularly by codes of conduct in ethic terms, regarding not only observation but also the more inclusive co-operation for democratisation, which furthermore contemplates direct assistance in the electoral field and thus the elections themselves ⁽²⁵⁾. Each observation task may have its regulations added to

⁽²³⁾ As we are going to deal with Sweden, the test can be made with the case: <http://www.sweden.gov.se>; for a direct entry to *Virtual Sweden*: <http://www.sweden.se/si/67.cs>.

⁽²⁴⁾ In America, as well as the Organisation of American States and the United Nations, the International Foundation for Electoral Systems (<http://www.ifes.org>) and CAPEL, *Centro de Asesoría y Promoción Electoral del Instituto Interamericano de Derechos Humanos* (<http://www.iidh.ed.cr/siii/index-fl.htm>), deal in a more specialised manner with electoral observation and assistance. The tandem formed by NDI-CC, National Democratic Institute for International Affairs - Carter Center (<http://www.ndi.org>; <http://www.cartercenter.org>) also participates, and more directly, on the part of the United States, USAID, United States Agency for International Development (<http://www.usaid.gov>). They are all live presences in the Peruvian 2001 general elections: the Organisation of American States (chief observer, EDUARDO STEIN), the NDI-Carter Center (chief observers, JIMMY CARTER and MADELEINE ALBRIGHT; deputy, LUIS NUNES), and, giving direct assistance (which covers a large part of the Peruvian electoral budget) USAID, IFES and CAPEL.

⁽²⁵⁾ RAFAEL LÓPEZ PINTOR, *Electoral Management Bodies as Institutions of Governance*, New York 2000, pp. 87-117, a UNDP publication. Among its activities in support of development, this UN agency (United Nations Development Programme) includes electoral co-operation and supervision (<http://www.undp.org>). Through a decision taken by the Council in 1998 the European observation's code of conduct was designed and

through inter-government agreements with a minimum basis for the observation's undertaking, and also upon the same background, through conditions set by the co-operating party, the European Union in this case (26).

We have arrived at the most specific question which I wish to consider, the virtual significance and reach of the activity of co-operation in support of democracy and rights between Europe as the active subject and America as the passive object of observation, as we endeavour to observe the resulting display of reflecting images that are not merely ideal but also real in their way — images of States and the Union among the European ones (27). I say America and I should say Peru more specifically. The most documented observa-

defined: *Communication from the Commission* (8-V-2001), pp. 36-37. R. LÓPEZ PINTOR reports on the codes drawn up in 1997-1998 by IDEA (Institute for Democracy and Electoral Assistance whose headquarters are in Sweden, to which I shall refer further on), and also more recently those of the *Electoral Observation Handbook* by the Organisation for Security and Co-operation in Europe, with true electoral observation and assistance experience in the other European arena, external to the Union: <http://www.osce.org/odibr/elections>.

(26) The following is a list of what might be more specifically understood as legal sources or political substitutes for European electoral observation in the Peruvian case which concerns us: a formal letter of invitation from the Peruvian Government; a proposal of agreement “concerning the privileges and immunities of the electoral process observers”; the European Parliament's resolution regarding “active support” for the Peruvian transition; an agreement with the National Electoral Jury, the highest Peruvian authority in this electoral field; precautions contained in Peru's Elections Statute, regarding national electoral observation and extendable to international observation; terms of reference drawn up by the European Commission and which include the code of conduct; accredited practices from preceding observations; resolutions regarding the running of the National Office of the Electoral Processes, the institution in charge of organisation and electoral administration; other decisions proceeding from the Delegation of the European Commission in Lima and from the so-called core team; and other criteria somehow improvised as the need arises, which may be usual when an activity of public character, responsibility and budget is inadequately regulated or deficiently subject to rule of law in its point both of European origin and American destination.

(27) As regards the European approach, <http://europa.eu.int/comm/external-relations/peru/intro/comm-patten.htm>. The following section referring more specifically to Peru was presented and debated in the congress on *Citizenship, Political Culture and State Reform in Latin America* of Michoacan College, Mexico, 24-26 October 2001. I also brought its publication forward in the *Revista de Estudios Políticos*, 114, 2001, pp. 11-39, and previously online: <http://geocities.com/alertanet2/pe-BClavero.htm>.

tion case on the European Union web site is the Peruvian one. Let us journey towards it.

3. *Observation as virtualisation: unforeseen results in Peru.*

The European Union's observation during the parliamentary and presidential elections in Peru 2001 is one that has reached considerable proportions in relation to size and duration compared with the past average in this type of initiative. It was independent, since it was not covered by the United Nations, the Organisation of American States or any other international presence or concurrence, and it relied on its own staff and substantial resources for the virtual satisfaction of its objectives, together with official support (and not just the formal invitation) on the part of the Peruvian executive⁽²⁸⁾.

After the failure of such a corrupt regime as the one presided in Peru by Alberto Fujimori during the nineties and the start of a transition firmly committed to fair elections, the European operation was put in motion and deployed on the spot⁽²⁹⁾. As for observation staff, it consisted fundamentally of five people (six in theory) in the

⁽²⁸⁾ In contrast with the occasional incomprehension and reluctance shown by the electoral institutions, the President of the Republic, VALENTÍN PANIAGUA, and the President of the Government and Foreign Secretary, JAVIER PÉREZ DE CUÉLLAR (ex-General Secretary of the United Nations) were particularly welcoming and receptive. Especially effective support was given by the political institution for promotion and protection of constitutional rights, the Ombudsman's Office, *Defensoría del Pueblo* (chief *defensor*, WALTER ALBÁN; deputy for constitutional matters, SAMUEL ABAD; expert for electoral supervision, WILLIAN LÓPEZ) and by the civil association or NGO *Transparencia* (president, SALVADOR LERNER; general secretary, RAFAEL RONCAGLILO). Other non-governmental organisations also took part. The *Coordinadora Nacional de Derechos Humanos* offered substantiated reports. The *Consejo por la Paz* gave advice and assistance with regard to more problematic areas. The *Instituto Apoyo* was contracted to provide administration assistance, and also offered information service. On a more personal level, DANIEL MARTÍNEZ and MARY LUZ VEGA from the International Labour Organisation Lima headquarters acted as presenters and guides in local, not only trade union spheres. I shall refer to more support cases further on. It is not at all necessary to state that the responsibility for the present report is entirely my own.

⁽²⁹⁾ *Commission Staff Working Document* (22-V-2001), p. 10: "In Peru, € 1.749.000 was allocated for the establishment of a EU election observation mission". Record of the financial allocation may be found in <http://europa.eu.int/comm/europeaid/reports/compendium2001macro.pdf>, p. 165. For reasons explained below, I am avoiding

leading core team, twelve others for process and electoral campaign witnessing and analysing, and a contingent of over fifty to reinforce supervision on the eve of and during election days. All in all the operation lasted practically four months between mid-February with the first briefing meeting for observation personnel while still in Europe, and mid-June on the final withdrawal of the core team following a thirteen week stay in Peru (though with staggered vacation short breaks, not affecting the operation's continuity) together most of the time with the twelve long term observers, leaders usually in Lima and the latter deployed throughout the country⁽³⁰⁾. Real group research work lay behind; ahead lay the writing up of a collective report which, in keeping with the principles of co-operation, was to include recommendations for the Peruvian citizens and authorities concerning the electoral system and practice⁽³¹⁾.

New virtualities appear, one of a vision to obtain an understanding and one of determination to achieve experience. The official report offers the results of the observation as a form of virtualisation in electoral matters. It proves apparent accordance between image

the use of the name *mission*, although long-coined and thus useful in the international field.

⁽³⁰⁾ The core team members in the field were Ulrich Fanger as legal and election advisor, Adolfo Cayuso as observers' co-ordinator, Andrea Malnati as media and research advisor; Scipion du Chatenet as security and logistic advisor (the head of mission was missing, as I shall explain, and I am the fifth man of course). The long term observers were Delphine Blanchet and Nils Meyer in Arequipa, Sonia Franco and Thomas Boserup in Iquitos, Pedro Lacunza and Sikke Bruinsma in Ayacucho, Björne Folke and Jean Leloutre in La Libertad and Lambayeque, Tiina Heino and Miguel Alonso-Majaranzas in Apurimac, Cusco and Puno, and Lars Tollemark and Richard Atwood in Lima. Some employees, namely Leo Cardinaels and Marisol Hernández, collaborated diligently in the very observation work above their administrative tasks. The human factor has been shown to be a crucial key for any history, not only micro.

⁽³¹⁾ The *Final Report* of the Peru-2001 electoral observation can be found on the European Union web site (<http://europa.eu.int/comm/external-relations/human-rights/eu-election-ass-observ/peru/final-report.pdf>) that also houses several of the preparatory pronouncements and public statements, though not the periodical reports classified as reserved. As we know, the documentation is not on the *Europeaid* site, but only on the one of *Human Rights and Democratisation*. The most complete public information, including the official report also in Spanish, *Informe Final*, is to be found on the observation site: <http://www.peruvirtual.net/moeue>.

and evidence. The European observation reported that the elections held in Peru 2001 adhered to *international standards*. Put very briefly, for this external vision, those from Europe who were present witnessed fairly clean elections during a somewhat shady process, not so much due to political contamination at that moment as arising from fundamental institutional problems which could affect *human rights standards*. Let us offer and carefully consider European visions rather than Peruvian realities. I shall make use of assessments made by the foreign observation team and of one observer, myself, pointing out the two sources wherever necessary to avoid any misunderstanding.

From now on, I shall put forward images as if they were realities, as if the limited European observation explained the complex Peruvian system. Its scope certainly does not cover much, for as far as size is concerned, only some four hundred voting stations out of a total of over ninety thousand were covered by the European observation with varying intensity. This number is quite serious: around ninety-five thousand in all if the voting stations set up abroad are included. Of course, group research by means of selection and sampling is a method which can improve results. There is also the supporting testimony, though not in the critical aspect, of other observation operations which, because they are domestic, or run by Peruvian citizens, are supposed to be more competent and authorised⁽³²⁾. In any case, the limitations of the quest are evident. With this warning in mind, let us proceed. It is not a question of explaining an electoral system, still less a chronicle of elections. We are concerned instead with trying to achieve a virtual depiction, provided that we cannot acquire a realistic picture and do not desire an official portrait. We are not interested in the electoral view

⁽³²⁾ I refer to previously mentioned entities, the *Defensor del Pueblo* (DF) or Ombudsman's Office (<http://www.ombudsman.gob.pe>), and the civic association *Transparencia* (<http://www.transparencia.org.pe>), both of which have outstanding experience in electoral supervision. Among other concerned addresses, the already mentioned *Coordinadora Nacional de Derechos Humanos* (<http://www.dhperu.org>), along with the *Comisión Andina de Juristas* (<http://www.cajpe.org.pe/rij>), the *Instituto de Defensa Legal* (<http://www.idl.org.pe>) and *Alertanet* (<http://geocities.com/alertanet/peru.html>) also deserve recommendation.

offered by the State itself through its legal system ⁽³³⁾, but rather in its dynamics and their result.

Let us start at the top just for the sake of itinerary. When the European observation team arrives *in situ*, it is confronted to begin with by a schedule of interviews with higher election institutions. This start could affect visibility somewhat and even seriously influence insight, which in effect occurred to a greater extent as a consequence of the Swedish embassy's initial mediation, acting in its own interests, a matter I shall deal with further on. No great damage was done. We had sufficient time and means for checking. Therefore, I am not going to follow the trail of evidence, but just the route through short cuts. I shall begin at the top in accordance not with early sensations, but with the final proofs, with those particularly concerning *human rights standards*.

With a view now to political neutrality, the Peruvian elections in 2001 are presided by a substantially judiciary body, the so-called National Electoral Jury, and managed by a different autonomous office, the National Office of the Electoral Processes ⁽³⁴⁾. The highest electoral authority, the National Jury, is a body sensitive to political party claims as it is oblivious to public or more general interests, for example the rapid settlement of electoral disputes in a delicate stage of transition. Actually, while the law provides only for

⁽³³⁾ DIETER NOHLEN, SONIA PICADO and DANIEL ZOVATTO (eds.), *Tratado de Derecho Electoral Comparado de América Latina*, México 1998.

⁽³⁴⁾ *Jurado Nacional de Elecciones* (JNE, National Electoral Jury: <http://www.jne.gob.pe>; president, MANUEL SÁNCHEZ PALACIOS; members, FLORA ADELAIDA BOLÍVAR, GASTÓN SOTO, CARLOS VELA Y RAMIRO DE VALDIVIA), escorted by the *Oficina Nacional de Procesos Electorales* (ONPE, National Office of the Electoral Processes: <http://www.onpe.gob.pe>; chief, FERNANDO TUESTA) and also by the *Registro Nacional de Identificación y Estado Civil* (RENIEC, National Record of Identification and Civil Status: <http://www.identidad.gob.pe>; chief, CELEDONIO MÉNDEZ). This trinity forms the *Sistema electoral* of the 1993 Constitution which (as near in time as distant in spirit) still rules over the general elections of 2001. It establishes this institutional tripartite electoral scheme independent from the branches of government. With supreme jurisdiction, ruling power, legislative initiative and supervising empowerment, the National Electoral Jury presides. The National Office of the Electoral Processes organises. The National Record of Identification and Civil Status assists with its own authority for census elaboration and identity accreditation. The principal positions in these electoral institutions are appointed not by the executive branch, but by ordinary judiciary bodies or by ones belonging to constitutional realms.

special and summary electoral remedies, ordinary appeals are accepted in addition ⁽³⁵⁾. This situation causes a considerable delay thereby endangering both internal and foreign confidence in the current process. The Peruvian executive itself, which has no authority concerning the management of the election process for reasons of neutrality, utters warnings about the serious delays caused by jurisdictional deference in face of party claims between the two rounds required for the presidential election, due to the failure to achieve absolute majority in the first. While the parliamentary and presidential elections were held on the eighth of April, the second round for the presidency took place on the third of June.

The supreme electoral body's desire to satisfy the political parties does not mean that it is sensitive to citizens' rights. This is the issue which mainly concerns us. In order to foster women's political participation the law establishes a gender quota in the electoral rolls which the National Electoral Jury has negligently played down. Peru is a country with a strong internal migration, where voting is not voluntary, as we shall see, and postal votes are not allowed except abroad. To avoid costly and difficult journeys in order to vote the law requires the installation of temporary residents' polling stations, yet this stipulation has not been fulfilled. The National Electoral Jury failed to order its compliance. Although the National Office of the Electoral Processes has signed and carried out an agreement with the Ombudsman's Office to set up Ombudsman facilities in its own electoral administration departments, the National Electoral Jury, which is the superior body, has refused to recognise the authority of this other constitutional institution, as is the Ombudsman's Office, to defend electoral rights and participation of the citizenship. The result is that such an important organism, the supreme one in the electoral field, is deferential not to citizens' rights but to political forces ⁽³⁶⁾.

⁽³⁵⁾ The same body, el *Jurado Nacional de Elecciones*, coordinates and publishes, without concern for contradiction, electoral statutes: *Legislación Electoral del Perú*, Lima 2001.

⁽³⁶⁾ The administrative autonomy of the National Office of the Electoral Processes, while under the ruling and supervising control of the National Electoral Jury, allows disparity in relations with the Ombudsman's Office. Regarding the missing temporary residents' polling stations, a biased interpretation of the electoral statutes was

As a final internal jurisdictional resort on electoral issues, except for penal cases, the National Jury is furthermore given to mere discretion. There is no further appeal or remedy according to the Constitution, and the statutes. The same constitutional text strengthens this position, stipulating that this supreme authority in the electoral field appreciates the facts “according to the conscience” of the judges, the members of this so-called Jury. It could hardly be otherwise if votes can be destroyed immediately after counting, as we shall see⁽³⁷⁾. For its part, similarly to its rejection of the

imposed. The law requires these facilities without exceptions, but the electoral institutions understand that they are not viable when the elections are by multiple district, as are the parliamentary. Votes cast abroad, where in addition to polling stations it is possible to vote by post, are all assigned to the district capital, the Department of Lima. There have been no temporary resident votes for presidential elections, for which the district is unique, as it was argued that the single ballot sheet (with two columns, one for parliament and one for presidency) did not allow it in the first round, and so neither in the second round for only the presidency. A parliamentary initiative toward separating the ballot papers failed when faced with drastic opposition from the National Office of the Electoral Processes. After failed attempts the National Electoral Jury withdrew completely from legislative initiatives in election matters. The Ombudsman’s Office has distinguished itself in its scrupulous endeavour to apply the gender quota, meeting with the National Electoral Jury’s utter indifference. This final point is my own appreciation, not that of the European report.

⁽³⁷⁾ There has been at least one apparent case of flagrant injustice without jurisdictional final remedy. The last seat in the Department of Ancash was hard fought by two political groups, the second and fourth of the final result for the parliament. The vote sheets were destroyed, according to the statutory rule. The ballot records, of which there were officially several, differed. The district electoral jury assigns the seat to the fourth force on a second attempt, after a claim for a repeat which is not legally possible, but is practised in this way by the electoral jurisdiction in their flattering behaviour to parties. Through further appeal, the National Electoral Jury allocates it to the second force, declaring the intermediate claim to be inadmissible in this case (not in all). Going into even greater, constitutionally unnecessary detail, provided that the Jury decides “according to conscience”, it adds a supposedly official expert report as proof privately done by clerks of the National Record of Identification and Civil Status. This report is negative for the conflicting electoral record due to a false signature. After the Jury’s decision, the person appearing as the signer proceeds to declare by letter that the signature is not false, since it is hers. Nevertheless, at this point, the National Electoral Jury does not even admit a review due to the appearance of this new evidence which may be decisive. Although the political background to the case shows signs of deliberate favouritism, I shall avoid the delicate and improper area of imagining motives as it goes against a constitutional principle like the presumption of innocence.

Ombudsman's competence, the aforementioned higher electoral body has shown opposition towards any reform in favour of appeals to constitutional justice in the interest of rights. It is also reluctant to accept international jurisdictions' authority in election matters on behalf of political rights. The National Electoral Jury asserts itself as the absolute last resort ⁽³⁸⁾.

At the other extreme, at the foot of an entire institutional pyramid, the polling stations are staffed by citizens themselves, supposedly to guarantee and inspire confidence among them. The process for selecting this personnel is however highly obscure. Moreover, the stations are subject to party intervention beyond mere supervision, which has an undermining effect, above all at the crucial moment of votes counting and results recording, during the whole phase of tally and tabulation. The lack of publicity surrounding these operations and the immediate physical destruction of uncontested ballot sheets renders manipulation all the easier. Previously, in a system of universal suffrage, the selection procedure for polling stations introduces an elitist feature that facilitates manipulability. Its census is specific and more limited than the universal voting type. "Education" is a legal requirement for becoming a member of the polling stations. The very procedure is carried out quite secretly among those who satisfy the educational requirements for the final selection by draw which is held in Lima rather than locally. Citizens also participate as jury members in the electoral body's court of first instance, subsidiary of the National Electoral Jury, but the selection is also effected through a screening process which is by no means transparent. Challenges are possible, but bail demands are prohibitive for most citizens. In the face of such procedures and their results, spontaneous public discontent, that

⁽³⁸⁾ This admissibility of appeal in electoral matters, specifically in the interests of rights, both for the Peruvian Constitutional Court and the American Court of Human Rights or even before the United Nations Human Rights Committee, the jurisdiction corresponding to the Covenant on Civil and Political Rights (since these are international or suprastate authorities recognised by Peru, after an interruption provoked by the Fujimori regime) is the Ombudsman's constant proposal, based on the principle expressed in the second quote from my heading: *Elecciones 2000. Supervisión de la Defensoría del Pueblo*, Lima 2000, p. 16. The Ombudman's discrediting reports, based on human rights grounds, were crucial for the induction of the transition.

which is not channelled by parties or the press, becomes quite evident here and there, though the information gathered by the election observation does not allow for generalisation concerning this very sensitive point ⁽³⁹⁾.

The polling stations carry out the vote counting for the Congress according to the relatively proportional d'Hont system, but with useless and, for the common citizen, almost unintelligible legal requirements in the way of computing and allocating the electoral results. The stations' tasks are further complicated by the multiplication of official records of tally and tabulation for the institutions, including the armed forces and political parties, and also by the electoral authorities' determination, beyond the law, to obtain a first report by means of a selective quick count, without waiting to formalise all the rest. Regarding the Congress, vote counting is also complicated by the existence of preferential votes in favour of individual candidacies in a list system which furthermore attracts attention and interference from the parties themselves at the decisive moment of seat allocation. All these complexities, which seem even partly artificial, constitute a breeding ground for biased party interference in the electoral procedures.

Faced with this combination of factors, it is no indiscretion on my part if I reveal that opinions were divided within the European observation itself, even within its core team. There was division

⁽³⁹⁾ The evidence occurred in Tarapoto, whose department, San Martín, is already quite conflictive, as the electoral institutions do not have their headquarters in Moyobamba, the provincial capital, but in the aforementioned city. This caused tension among the electorship, with road blockades and confiscation of election material. Only a personal visit provides awareness of the dissatisfaction caused by the influence of political parties in selections among citizens and polling stations procedures, not to mention pro-Fujimori presence in the electoral local administration. Likewise, only direct contact highlights the lack of neutrality and even excessive belligerence on the part of some departmental heads of electoral authorities. When asked why no formal challenges had been lodged within the legal deadline against nominations, the citizens pleaded not only the obstacle that bail posed for access to institutional remedies in the electoral field, but also an entire range of political pressure and social retaliations where the law is of no avail. Faced with the risk of legal actions in the opposite direction, in defence of possible election misdemeanours in institutional positions, the television and press dealt with the first question, the open conflict between cities, but not with the second — the evident mistrust among citizens at least in that department.

between those who believe that functional illiterates (meaning those unable to read and write properly in Spanish and thus deemed to be weaker and defenceless only for this reason) should be more systematically excluded from institutional membership, and those who argue that on the contrary, citizens' participation and public confidence in the electoral procedures ought always to be paramount. If the aim of the citizen-staffed electoral stations is not really the latter, the search for participation and confidence, but rather political and administrative inability to form them in any other way, a virtue may be made of necessity. In any case, it should be realised that with all of this, above all with destruction of ballots at the stations after counting and allocating, not just the scope for biased party influence over election results may really extend, but also the directive and adjudicative final powers of the electoral system's higher body, the National Electoral Jury, may really be reinforced. There was greater agreement within the European observation regarding these appraisals which are not usually recognised inside Peru ⁽⁴⁰⁾.

So, between one extreme of the supreme electoral institution's legal discretion and the opposite one of grassroots political intervention in electoral procedures by contending parties, all in all, in spite of everything we have observed, the elections substantially conformed to international standards under the relative view and explicit opinion of the European observation team, coinciding herein with other external as well as domestic observations. This appraisal is understood in the light of what was observed under the rules governing international presence. The European report carefully limits itself to matters of electoral regime and practice under Peruvian constitutional law, which does not signify that the observation did not detect other quite related and highly relevant extremes.

Thus, these Peruvian general elections involved a hundred and twenty-three representative positions from an electoral census of around fifteen million in a population of close to twenty-five million

⁽⁴⁰⁾ Although there are of course treatises that are more systematic and this is a rather overwhelming text, the curious manual and unofficial viewpoint of JUAN CARLOS and RAMIRO VALDIVIA, *Diccionario de Derecho Electoral Peruano*, Lima 2001, is as enlightening in what it says as in what it keeps silent.

according to official statistics ⁽⁴¹⁾. They were held for one president, two vice-presidents and one hundred and twenty single-chamber parliamentary seats. If this indicates a serious problem of under-representation, this is due to not only quantitative but also and above all qualitative reasons. As a country, Peru has an extremely diverse population due to the coexistence of regions with different economies and customs, as well as an abundance of language and cultural communities, such as the indigenous, without political representation or constitutional incorporation as collective bodies under the current constitutional law ⁽⁴²⁾. For the 2001 general elections the only formally parliamentary and politically representative house for the whole of Peru is the Congress of the Republic, with one hundred and twenty seats in Lima, the State capital, and nowhere else.

Serious problems regarding constitutional foundation on citizenship representation are to be found. When the elections are declared to conform to international standards, this means, among other things, that the political agents have had the freedom and wherewithal to render themselves competitively vivid in the eyes of citizens. Indeed, it may be said that in general terms this has shown to be so in the case of the Peruvian 2001 general elections. The political authorities and police and even military forces have guar-

⁽⁴¹⁾ The *Biblioteca Digital del Instituto Nacional de Estadística e Informática de la Presidencia del Consejo de Ministros* provides a useful virtual site to begin with for information which is not only statistical: <http://www.inei.gob.pe/bibliointei>.

⁽⁴²⁾ Concerning this human diversity, I could refer to any introduction to Peru, but I must refrain for I do not know of any that is clear and complete. Regarding the most outstanding aspect of language plurality, there are not only the Quechua and Aymara cultures shared with Bolivia; the first one being also shared with Ecuador and to some extent with Colombia, Argentina and Chile. Furthermore, there are those pertaining to around twenty Amazonian indigenous peoples — not all entirely within the state frontiers. As we shall observe, in the Peruvian constitutional and legal language, this presence is referred to by the expression “peasant and native communities”, the latter deemed to be the Amazonian, as if the former were no longer indigenous. For the international normative phrasing, especially by virtue of the Convention on Indigenous and Tribal Peoples in Independent Countries of the International Labour Organisation, both of them are considered as “indigenous peoples” insofar as they are previous to and have survived colonialism. Until now in Peru no constitutional enactment has led, as we shall confirm, to any reconsideration of the representative system on behalf of the plurality of peoples which it embraces, nor even, so far, to a revision of the legal language itself.

anted these conditions, beginning with their own neutrality vis à vis the electoral offers. However, what is guaranteed to the candidatures or the electoral observations is not extended to the citizen, either as an individual or collectively. With public order under heavy military control, and following a cruel period of terrorism and counter-uprisings, with neither side respecting rights, there is not the same consideration concerning the exercise of liberties on the part of either civil associations or the very citizen, the individual ⁽⁴³⁾. In certain areas, labour unions' activity has been curbed on behalf of voting safety and there have been serious restrictions to personal liberty on the part of the police, for the same pretext of electoral peace, with flaunting of military authority as if it enhanced rather than hindered political free participation ⁽⁴⁴⁾.

⁽⁴³⁾ During the last two decades of the twentieth century in Peru, between terrorism and no less terrorist counter-terrorism, there have been more deaths and disappearances (many of which have remained unsolved) than in Chile, Argentina or Uruguay under military regime. If I were asked why the situation is less well-known abroad, the reason I would give would not be that there were outright dictatorships inciting opposition in the other countries, but that in Peru it is the case of indigenous population causing indifference: Ombudsman's Office, *Las Voces de los desaparecidos. Testimonios de los familiares*, Lima 2001, voices of the missing through relatives' testimony. In the First Encounter of Indigenous Peoples of Peru, to which I shall refer later, a dossier on "Human Rights Violations by the Armed and Police Forces", *Principales violaciones a los derechos humanos por parte de las Fuerzas Armadas y Policiales*, was passed around, in order to break the silence.

⁽⁴⁴⁾ In the long run there were no signs of this particular point in the European report. Some are to be found in the reports, which are of course much more authoritative and expert, published on the Peruvian Ombudsman's web site. Yet above all I rely on my own interviews as deputy head of the European observation with military chiefs of the civil police in terrorist threatened areas. I was able to travel there and meet them thanks to the Defence Ministry service corps — to such an extent was the Peruvian government open to international presence in these elections. My indebtedness is also extended to a previously mentioned non government organisation, the Council for Peace. The government's direct assistance was also due to self-interest, since after the journeys each press conference was summoned and presided by the minister. Yet in the first one, with no other awkwardness apart from the significant silence of the media, I also pointed out my perception of the armed forces' police bias, and not just its electoral neutrality. The latter, not the former, was publicly agreed with by the other observation teams also participating in the journeys under military protection, both international (Organisation of American States and NDI-Carter Center) and domestic (*Transparencia* and *Consejo por la Paz*).

It should also be noted that the distance between political and civil liberties, specifically between the right to vote and other civic capacities, widens and grows worse because of the requirements for the registration of parties or associations for electoral purposes. All the credentials, programs and documents must be presented in Spanish, as if it were the only language alive in Peru, together with a collection of signatures of strict adhesion (not to be repeated in other registration petitions), constituting one per cent of total votes in the previous elections. This puts the figure at over one hundred thousand people, which in turn must be at least five times greater in the polls in order to maintain the registration which confers representative authorisation and electoral guarantees. Add to this that preventive curbing of liberties is under military order and served by a police force whose members lack civil rights, including the right to vote. Contrast all of this with what has already been written concerning the higher electoral authorities' extreme deference to political forces to the detriment of citizens' rights. All in all, it appears that mental attitude and current behaviour of public institutions and authorities pose serious problems, both legal and political, to citizenship foundation of the constitutional system and citizens' participation in the representative procedures. In both their rules and practice, these same general elections may constitute the most eloquent sign.

As a clue, let us shed light on an already mentioned extreme, the mandatory vote. The establishing of universal suffrage, which was the fruit of the 1979 Constitution, goes hand in hand with an obligation dating from the time when voting was limited to literate members of the male sex which is far from the ideals of foundation and participation⁽⁴⁵⁾. Together with obligatory military service which is at present in the process of being abolished, and also with the payment of taxes, political participation through vote is the main responsibility and obligation of citizenship. Now, from 1979, universal suffrage, male and female, is a right from the age of eighteen, and a duty until

(45) MANUEL VICENTE VILLARÁN, *Ante-Proyecto de Constitución de 1931 por la Comisión que él presidiera. Exposición de Motivos*, Lima 1962, ed. Luis Echeopar, (reproduced by César Landa, ed., *Materiales de enseñanza. Historia constitucional del Perú*, Lima 2001), is a historical key text for reasoning in support of literate men's obligation to vote in the actual oligarchy of that period.

the age of seventy. Abstention from voting carries a fine which is severe for the less affluent majority together with another penalty which could be called accessory. As long as the sanction goes unpaid, citizen identification is withheld. The constitutional right to identity, and thus of personal citizenship, is cancelled.

Control used to be achieved by means of an individual voting credential which registered participation. A state-of-the-art national identity card has now been introduced, yet it does not fully represent a constitutional right to identity. A centralised national record of identification and civil status has been set up, taking over what was previously a municipal competence, and it is ordering the electoral roll while issuing documentation. The new identity document still registers election participation so that in cases of unjustified abstention it loses its identification function in individual official or private matters such as judicial and notarial or banking and business. Justification is as easy for affluent urban people as it is difficult for the rest, but paying the fine. Although the statute now declares otherwise, citizens do not find any substantial difference between the old voting credential and the new identity card as regards the effects of electoral abstention. No legal case has been heard of where law prevailed over practice to this effect. Neither in the military, civil, nor private police spheres, nor criminal and penitentiary areas, is an illegal practice judicially challenged, that of withholding documentation even after the completion of a prison sentence, thus doubling the punishment by including loss of identity and impossibility to vote.

Here is a matter that has also seriously divided opinions within the European observation. Can such a severe system of mandatory voting and its grave consequences for common people conform to international standards of democracy and rights? On one hand the democratic objective of political integration for the entire population can be appreciated; on the other hand, the damaging effect on a constitutional right to liberty, such as participation might be, is noticed⁽⁴⁶⁾. Anyway, the Europeans observers agree on the excessive severity.

⁽⁴⁶⁾ For the democratic argument from Peru, J.C. and R. VALDIVIA, *Diccionario de Derecho Electoral Peruano*, entries *Votar es obligatorio (e indispensable)* and *Voto obligatorio*.

This obligatory nature of voting participation, with its characteristic harshness moreover, is reaching or exceeding limits from which other previously mentioned problematic aspects might stem, such as final adjudication at the highest level by the National Electoral Jury, party intervention at the polling stations, or police interference to ends other than the peaceful exercise of rights, or extremely limited political representation with complete disregard for the existing plurality. Might it be that this insistence on mandatory voting, on forcing the democratic foundation of state institutions precisely in this way rather than in one more in keeping with the constitutional principles of rights (insofar as they are rights to freedom before and above all else), is connected to all of this?

We seem to be touching rock bottom. It is not just a question of the voting system conspiring against representation of plural cultures or peoples, and especially indigenous ones, which seems quite evident when it is not overlooked⁽⁴⁷⁾. It also happens that this same system, with all these connected aspects, might be the intended treatment for a deficient constituency, the unstable background of the constituted State, the deceptively solid appearance of the quicksand which provides precarious foundations to Peru as a body politic. The obligatory vote, this alleged sign of democracy, may be a sign of the abyss which yawns at the very feet of the State. With obligation under threat of a fine together with the withholding of identity and so on, abstention reaches around twenty per cent, increasing to over thirty per cent if we add blank and spoiled votes. What citizenship of what cultural description would there be with freedom of active as well as passive participation, with the proper constitutional right to suffrage? What do all these details tell us?

To begin with, according to such evidence, the electoral system is seeking the State's legitimisation rather than citizen representation or citizenship's existence as the proper agent. In addition, at least in the case of peoples with different cultures to that of the State, citizens' chief expectations may be placed not exactly on represen-

⁽⁴⁷⁾ Still within the Amazonian context, for there are no, or I am not aware of, more comprehensive studies, JAVIER ECHEVARRÍA, *Las comunidades nativas y el sistema electoral peruano*, in MILKA CASTRO (ed.), *Derecho consuetudinario y pluralismo legal*, Arica 2000, vol. II, pp. 575-587.

tative but rather on community ways, or on the latter as a primary basis for the former, thus secondary for them. There is even some sign of this in the established electoral system⁽⁴⁸⁾. At all events, the very constituency by all or even most of the citizenship through mandatory universal suffrage is a fake and does not work, except for the benefit of the State, not of the citizens. If this is the case, it is a failure due precisely to the manner in which it is conceived and the way in which the State functions. From the State's perspective, as soon as its constitutional system and political practice is deemed democratic by international opinion through electoral observations and cooperative relations, it may seem a success and not a frustration.

The very idea and practice of democracy as legitimising principle and legitimated objective may not always coincide in the political and civic — I mean somehow popular — sense. Sometimes, there is a deep-rooted conflict which has been clearly detected in other latitudes⁽⁴⁹⁾. Of course, the experience is also European. The constitutional debate concerning virtual representation, that is parliamentary claims of higher regulatory authority lacking a real base of freely integrated citizenship, is well known not only in the case of Great Britain. It can likewise be interpreted in the light of community resistance, which is more difficult to understand now when the progress of representative means for constitutional empowerment has been such that they appear to be irreversible and wide-ranging⁽⁵⁰⁾. As we shall see later, there is still a strong tendency to

(48) I refer especially to the revocation measure through inter-terms elections in municipal areas which is permitted by the Peruvian law. In order to lessen the control of local authorities faced with resistance from communities, among other methods, the measure of repeal votes has been adopted for those municipal posts which by allowing renewals halfway through the term of office are to some extent reminiscent of deep rooted indigenous practices which are short term. At the same time, apart from opposing parliamentary repeals which are consequently proposed, this Peruvian constitutionalism notably fails to appreciate this local electoral option, as I shall relate further on.

(49) FREDERIC C. SCHAFER, *Democracy in Translation: Understanding Politics in an Unfamiliar Culture*, Ithaca 1998, concerning Senegal.

(50) JOHN PHILIP REID, *The Concept of Representation in the Age of the American Revolution*, Chicago 1989. For comparison both constitutional and communitarian, I can refer to my *Happy Constitution. Cultura y lengua constitucionales*, Madrid 1997, pp. 181-268.

impose the dubious image of political democracy as institutional empowerment, as a legitimating arrangement of powers through elections, beyond the conception and exercise of rights to freedom as the very foundation of democratic legitimisation for electoral practice and for the entire system itself. We shall see, I hope.

In the case of Peru, the underlying false or lack of constituency, which may be termed State inconstituency, together with consequently forged legitimisation, are not questions to be confronted head on by its guests (the European observation) in their official report. Although not distorting, the operation would devirtualise or the cooperation would antagonise. It would be tantamount to knocking down the very building one is aiming to support and improve. Here may lie the defence for a reduction of responsibility. There is the charge, but of a different kind now. At the moment, it is only my own and perhaps that of the academic paper which hosts my pages. After months spent speaking and writing on a collective behalf, that of the electoral observation, I may express myself without the burden of representation or the embargo of authority. Let us proceed as if the limited European field research had produced sufficient knowledge about the Peruvian operating system. It is a virtuality which I assume here under my exclusive responsibility.

On the contrary, this is not so for the official observation that must not play down nor create trouble over the evidence. If it were to do so it would face a delicate dilemma between virtualisation and deconstruction, that is, whether the European report on valid Peruvian elections by international standards may have the highly perverse effect of covering up an improper constituency or even inconstituency of Peru itself, the aforesaid collapse amid quicksand if it turned out to be such. As a matter of fact, we shall still see that the international observation is capable of causing interference throughout the electoral process, in the dual and interactive sense in that it distorts evidence and produces alibis. Its presence does not try to be innocuous and neither is it innocent. They are serious questions, but they can only be pointed out and left aside for the moment. We shall inevitably need to face them afterwards when we have more cause. Meanwhile, we shall continue with the search for evidence.

Having expressed my gratitude for invitation and hospitality, assistance and audience, we may proceed if you so wish, non virtual readers. I do not deny responsibility through recognition and participation. I am not searching for support or complicity. Of course I have offered no personal disclaimer and shall not do so ⁽⁵¹⁾. The responsibility will be utterly and solely my own, especially when we finally confront the underlying question of inconstituency. For now, let us leave aside the great dilemma between virtualisation and deconstruction.

It may be better to continue with a different test. If we have come up against the tremendous problem of Peruvian inconstituency, or rather with signs of this, we must, if not ascertain — for it is not possible here — at least support the evidence as far as it is feasible. The matter is prior to the appraisal of an observation (the European) that, under my exclusive responsibility, I am conducting at such a distance, so far away from it. Going much farther, we are going to proceed to another virtual test, that of checking previous Peruvian history, or rather some of its images. Let us contemplate a different reflection in the gallery we are visiting together — observers, readers and accomplices all.

4. *More than a mote in a not so alien eye: Peruvian provocation.*

As a State, Peru is almost two centuries old. As a State with a constitutional vocation since birth, as is the rule in America, it is not much younger than its European congeners. It has an extensive history, a lengthy past which may in part establish it as much as, if not more than, its current constitutional law, above all with regard to background, I mean operating constituency. It is the reason and measure for our interest in a retrospective gaze without losing sight of the present phase where we find ourselves and to which we shall immediately return. History, above all that of constitutional time

⁽⁵¹⁾ For a personal disclaimer, I could paraphrase the aforementioned European ones and even more: “It should be noted that it is not possible to guarantee that a document of civilisation according to European observation might not be a document of barbarism according to Peruvian evidence. Anyway, so to speak, there is no such thing as a hidden and final reality to be revealed and re-enshrined”.

and thus potentially constituent, does not need to imply or provoke any alienation or even distance. The very way of imagining the past in the present is another virtuality that creates reality, or may do so for the constitutional dimension. There are keys for law in history and historiography, in actual history and its present images⁽⁵²⁾.

Let us view again images as realities. Between the second and third decades of the nineteenth century when Peru became a State, conceived in accordance with the European constitutional model directly, or filtered through the experience of the United States of America, it (Peru) was not exactly a European society nor even Euro-American, that is, sharing that ancestry and identifying with the culture of that origin. There was a minority with this specific identity but, in spite of its belligerency or because of it, that smaller group was not at all hegemonic in cultural aspects which are the key concern of political and juridical formation setting the scene and outlining possibilities for constituency. Let us not go into figures which are always debated if not distorted in this regard. A well-founded suspicion is sufficient, not to mention the entire evidence, that a clear and ample majority were indigenous, that is to say people in America with cultures predating the appearance of Europeans, with their own evolution and whose presence continued to characterise the Peruvian geography. The very word *Peruvian* originally meant *Indian*, a European term (due to an error over continents) for natives in these parts. They are signs which should be remembered now for they are important for the question of Peru's constituent formation.

Thus, it was not just a matter of the indigenous peoples internally maintaining their own cultures and laws, but that they could also preserve the vocation of their own constituency, with base and agency to decide for themselves regarding both external policy and internal polity. This was particularly the case of the Quechua people, the most numerous and most identified with the Tawantinsuyu, that

⁽⁵²⁾ For years I have emphasised this motive against both jurists who assume dead history and historians who ignore living law; regarding our present subject, *Ama Llunku, Abya Yala. Constituyencia indígena y código ladino por América*, Madrid 2000. An early version of the second chapter is translated in JULIUS KIRSHNER and LAURENT MAYALI (eds.), *Privileges and Rights of Citizenship: Law and Juridical Construction of Civil Society*, Berkeley 2002, pp. 277-297.

is the large pluricultural community which constituted the Inca empire, the previous political and juridical formation which was still partly contemporary with European presence. During the colonial period, the recuperation of the Tawantinsuyu was a cause never lost which regained strength furthermore on the very eve of independence, of the establishment of Peru, Colombia, Bolivia, Ecuador, Chile and Argentina as newborn States in this area.

In the 1780s, a large sector of the Quechua and Aymara peoples came near to achieving a clear majority pluricultural constituency under its own rule. Had they succeeded, history would certainly have been different, but we are interested now in the result of that moment, a defeat for these peoples, the start there and then of a different future from their very own constituency. Peru was established in the early 19th century as an independent State with that other indigenous alternative in sight, no less culturally alive for having been overcome on the field of colonial fighting and justice under late Spanish rule. It is a scenario where certain initial constituent efforts on the part of the Peruvian State, options that could be important for that future and even up to the present, must be located and may be understood. For Peru, neither an indigenous nor a pluralist image, but a minority and unitary one, was to be created⁽⁵³⁾.

From the start, it was possible to choose federalism even for the non pluralist perspective. Defined and structured from its birth by

(53) After ALBERTO FLORES GALINDO, *Buscando un Inca. Identidad y utopía en los Andes*, Lima 1987, with re-editions and debates, very interesting literature has been written on this subject. Outstanding examples are FLORENCIA E. MALLON, *Peasant and nation: The Making of Postcolonial Mexico and Peru*, Berkeley 1995; MARK THURNER, *From Two Republics to One Divided: Contradictions of Postcolonial Nationmaking in Andean Peru*, Durham 1997; CHARLES F. WALKER, *Smoldering Ashes: Cuzco and the Creation of Republican Peru, 1780-1840*, Durham 1999 (Spanish translation published in the same year); KENNETH J. ANDRIEN, *Andean Worlds: Indigenous History, Culture, and Consciousness under Spanish Rule, 1532-1825*, Albuquerque 2001. Pluricultural constituency was Tupac Amaru's aim (in different terms of course); the usual allegation by historians that it was not even respected by its own troops who indiscriminately slaughtered non indigenous populations, according to Euro-American accounts (let us not forget this detail), is of little value as an argument; as a matter of course, concerning the pluricultural, rather than imperial, recuperation of the Tawantinsuyu, the current characteristic indigenous image of Tupac Amaru's uprising differs greatly.

the United States of America, the first constitutional federal State, the true American formula was a mechanism designed and in fact managed to subdue indigenous presence. It not only consisted of the participation of *States* under private and common constitutional rules, but also the establishment of *Territories* as areas lacking their own constitutional framework and thus under federal powers particularly concerning the subduing and even elimination of that indigenous presence, as a requirement for the definitive establishment of an internal federated state. Under the federal and then state formulas these same powers, this same constitutional empowerment, offered recognition of rights and guarantee of courts to the colonising immigrants. The indigenous peoples, on the contrary, were excluded by the United States and particular States from the former (recognition of rights), while the latter (guarantee of justice) was of course unnecessary, as they possessed their own jurisdictions. These were losing the capacity to defend their own rights as long as they were being thus invaded and harassed⁽⁵⁴⁾.

Evidently, according to our present evidence, Peru did not carry out this option, the federal one. Peru did not create a plural image of itself in spite of being a model of conditions for the establishment of federalism. Peru as a State would never believe itself to be sufficiently secure or strong to attempt such a possibility seriously. Except for a short time together with Bolivia, Peru has never been federal. Federalism has not existed in Peru for reasons which are certainly distinct from not feeling the need for it, or due to a lack of conditions, for both, necessity as much as possibility, have been clearly evident throughout its constitutional history. If evidence of federal potential can be found, it is there in Peru, in a state which has not been by its own means and still is not at all federal. It appears to be a real mystery, but it can be clarified. There was no federalism here originally because more than one territory was actually able to constitute itself as an indigenous state, like the

(54) JEFFREY BURTON, *Indian Territory and the United States, 1866-1906: Courts, Government, and the Movement for Oklahoma Statehood*, Norman 1995; DAVID E. WILKINS, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice*, Austin 1997; VINE DELORIA JR. and D.E. WILKINS, *Tribes, Treaties, and Constitutional Tribulations*, Austin 1999.

predominantly Quechua one in the Cusco department. The Amazonian peoples simply remained independent.

Federalism is from the start a short-lived episode in Peru's constitutional history, and antifederalism a determined option. The same could be said of the capital's location in colonial Lima rather than the pluricultural Cusco, the ancient Inca centre. *Qosco* means umbilicus in Quechua. *Lima* is originally the name of an extinct people, geographical feature or water flow that lent its name to what was established as the *Ciudad de los Reyes*, City of Kings, European kings of course. It is the constitutional capital of the Peruvian State, where the only Congress, the high courts and the executive sit. The State is established and spreads out from there as if the entire territory and its people, or rather peoples in the plural, were under its exclusive responsibility (and not their own) regarding law, justice and government.

A delegate and dependent political and administrative network is indeed created, but never achieving entire operative competence for its respective functions. In fact it loses them, or rather, does not acquire them as it spreads and descends so to say. This does not imply progressive anarchy. More simply it means that some responsibilities to do with law, justice and government continue to lie generally in the hands of community jurisdictions, above all of the indigenous variety. The same municipal administration rules people and territory much more than institutions issuing from the capital. However much it persists, the centralised State is pure fiction, the most complete virtuality, just as federalism is a permanent challenge, an utter virtuality from start to finish⁽⁵⁵⁾. In spite of everything,

(55) The theme of decentralisation, in these such restricting terms, crops up time and time again in Peruvian publishing; recently, PEDRO PLANAS, *La descentralización en el Perú Republicano, 1821-1998*, Lima 1998, and JOHNNY ZAS FRIZ BURGA, *La descentralización ficticia. Perú, 1821-1998*, Lima 1998. The former dwells more on federal approaches and the latter to municipal questions, quite appropriately in a country such as Peru which has a marked community or local plural character. Concerning the issue of *descentralización*, indigenous presence may seem outstanding even in the non indigenous sector: José Destua and JOSÉ LUIS RÉNIQUE, *Intelectuales, indigenismo y descentralismo en el Perú, 1897-1931*, Lima 1984, but can be even more so with the consideration for federalist approaches and even practices on the indigenous side: M. THURNER, *From Two Republics to One Divided*, pp. 127-129.

despite so much virtuality, the real as fictitious, and the possible as latent and even thriving, Peru does not meet the corresponding challenge of constitutionalisation through a federalism which would need to be not only interterritorial but also intercultural, without of course the double standard between *States* and *Territories*, as in the United States, or anything which might be remotely similar.

At the start of the twentieth century, there was some sign of constitutional recognition of hitherto out-of-State reality. Indigenous peoples did not share the law produced by the Peruvian State, or they received and adopted it at their convenience and under their own assumptions. “The people of Peru’s indigenous race do not live according to Peruvian Civil Law”, this was a way of phrasing then the very evidence⁽⁵⁶⁾. Some kind of constitutional recognition stems from 1920. “The State will protect the indigenous race”, “the Nation recognises the legal existence of indigenous communities”, “the Law will declare their corresponding rights”, was the constitutional phrasing. They were pronouncements that shaped an entire section dedicated to *Communities of Indigenous People* in the 1933 Constitution. Recognition is given to “legal existence and legal status”, “safety of property” and competence for the administration of “income and possessions”, all in accordance not with the Constitution directly, but subsequent statutory law: “The State shall dictate the civil, criminal, economic and administrative legislation required by the indigenous people’s specific conditions”, which to a large extent, concerning normative aspects, would be accomplished. The State “protects”; the Nation, meaning the State itself, “recognises”; the Law “declares” indigenous rights⁽⁵⁷⁾. For their own sake and for

⁽⁵⁶⁾ The expression belongs to a jurist, VÍCTOR J. GUEVARA, in 1924, recorded by CARLOS A. RAMOS NÉÑEZ and RENZO HONORES, *Ensayos sobre historiografía jurídica peruana, 1854-1937*, p. 48, in “Cuadernos de Investigación”, I, 1997, pp. 5-63. You may add *Código entre Indígenas*, in “Quaderni Fiorentini”, 29, 2000, pp. 495-509, my prologue precisely for the second volume of the *Historia del Derecho Civil Peruano. Siglos XIX y XX* by C.A. RAMOS NÚÑEZ. Add further DONAYRE, *Napoleón en la floresta*, Iquitos 2002.

⁽⁵⁷⁾ JOSÉ PAREJA PAZ-SOLDÁN (ed.), *Las Constituciones del Perú*, Madrid 1954; on the net: <http://cervantesvirtual.com/portal/constituciones/pais.formato?pais=Peru>; 1920, article 58; 1933, title XI, arts. 208-212. JOSÉ VARALLANOS (ed.), *Legislación indiana republicana. Compilación de leyes, decretos, jurisprudencia judicial, administrativa y demás*

their constitutional nature, here we have virtual texts capable, if not of being immediately real, of begetting some kind of reality, a subordinate one for the indigenous peoples and their rights.

Constitutional terms should not be ignored. Their language is concessive and not reflexive. The constitutional law that proceeds to reckon an out-of-State reality does not reconsider its own background and actual structure as a consequence. Not even the State image is revised. There is no question of federalism, either by devolution or even by decentralisation on behalf of the indigenous presence which is now recognised by the State Constitution. For the State, there is no question of constituency or any need to revise it. What exists is accepted, the indigenous communities, and not with a view to their empowerment, but, on the contrary, to authorise the law in this respect. Apart from specific legislation or even with it, the law still responds to the same previous constitutional establishment with its corresponding exclusion of indigenous communities as such. Considered to be handicapped by their illiteracy, as not fluent in spoken Spanish, much less its written form, indigenous peoples were massively excluded from constitutional participation in state institutions which in fact remained alien to them. It was a genuine Euro-American juridical and political system⁽⁵⁸⁾.

Added together with specific recognition of only customary jurisdiction, without implying communitarian empowerment, with no legal assumption of any kind of federal necessity or possibility, what we find in Peru's present Constitution (the one dating from 1993) concerning "peasant and native communities", is not very different⁽⁵⁹⁾. The same Constitution defines justice as an exclusive

vigentes sobre el indígena y sus comunidades, Lima 1947; MANUEL D. VELASCO (ed.), *Compilación de la legislación indigenista concordada*, Lima 1959; ROQUE ROLDÁN and ANA MARÍA TAMAYO, *Legislación y derechos indígenas en el Perú*, Lima 1999, pp. 50-56. The Congress maintains a site with legislation dating from the independence: <http://www.congreso.gob.pe/index.htm>. FERNANDO TUESTA, *Perú Político en cifras, 1821-2001*, Lima 2001, corrected and enlarged edition, is also useful for normative information.

⁽⁵⁸⁾ M.V. VILLARÁN, *Ante-Proyecto de Constitución de 1931. Exposición de Motivos*, cited above, for a crucial moment, as we know.

⁽⁵⁹⁾ CLETUS GREGOR BARIÉ, *Pueblos indígenas y derechos constitucionales en América Latina. Un panorama*, México 2000, pp. 447-493; MARCO APARICIO, *Los pueblos*

function of the State and thereafter recognises indigenous community jurisdiction with no pondering of the latter with regard to the former. Now constitutional phrasing also refers to “ethnic and cultural plurality” as a title to rights, yet without such a right being reflected in rules concerning personal identity accreditation and exercise. Aside from language variables and other no less important details, all of this represents quite a frequent position nowadays among constitutional practices all over America ⁽⁶⁰⁾.

A more satisfactory acceptance of ‘indigenous’ as a normative qualification is now also in force for Peruvian law by virtue of the aforesaid Convention on Indigenous and Tribal Peoples in Independent Countries from the International Labour Organisation which

indígenas y el Estado. El reconocimiento constitucional de los derechos indígenas en América Latina, Barcelona 2002, pp. 174-177. Regarding the Peruvian Constitution the adjective “present” is relative, because through a report submitted in July 2001 a presidential commission, the *Comisión de Estudio de las Bases de la Reforma Constitucional del Perú*, has cast doubt on the force of the 1993 constitutional text since it did not respect the reform procedure of the preceding one and was ratified by a questionable plebiscite. That previous Constitution, from 1979, may be now taken as the still legitimate one. It was silent over indigenous presence and did not contain valuable institutions such as the Ombudsman. As soon as the new Congress was constituted at the end of July, 2001, some parliamentary motions called for the disqualification of the last Constitution, that of 1993. I shall not go into subsequent proposals of constitutional changes for the same reason that I gave concerning the European reference documents, to abide by the legal situation of the election observation period. The sensitive matter of the current constitutional law was usually treated in an equivocal manner during election campaigns and procedures that were after all carried out according to the 1993 Constitution (except for the date, or rather year, and also the spirit). I have still to return to these normative trials and tribulations. In 2002 the Congress has launched a web page on constitutional reform: <http://www.congreso.gob.pe/comisiones/2002/debate-constitucional/index.htm>.

⁽⁶⁰⁾ Besides the quoted *Pueblos indígenas* by C.G. BARIÉ and by M. APARICIO, WILLEM ASSIES, GEMMA VAN DER HAAR and ANDRÉ HOEKEMA (eds.), *The Challenge of Diversity: Indigenous Peoples and Reform of the State in Latin America*, Amsterdam 1999 (Mexican edition, *El reto de la diversidad*, in the same year); DONNA LEE VAN COTT, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America*, Pittsburgh 2000, pp. 257-280; RAQUEL YRIGOYEN (ed.), *Pluralismo legal y reconocimiento constitucional del derecho indígena en América Latina*, on the quoted Alertanet: <http://geocities.com/alertanet/foros2a.html>. ALISON BRYSK, *From Tribal Village to Global Village: Indian Rights and International Relations in Latin America*, Stanford 2000, is not concerned with legal matters, either constitutional or international.

Peru ratified in 1994. Such is the meaning there for any situation where precolonialist culture, institutions or customs have been preserved in any degree. The wording of the identification is certainly not innocent. While the description of ‘peasant’ contemplates integration into citizenship with no further consideration ⁽⁶¹⁾, that of ‘indigenous’ today assumes a different, more plural and thus complex possibility. In the case of this international covenant, the qualification means the right to community and territory and the right to customs and traditions, but not the right to law, not to their own indigenous law through self-government. Let us notice also that, against sound constitutional ruling, the International Labour Organisation patronizes rights and interests of indigenous peoples without allowing or providing indigenous representation or participation ⁽⁶²⁾.

“Peasant” and “indigenous” are terms which produce virtual images that may generate contrasting realities. In the case of the convention of the International Labour Organisation, the second qualification, that of “indigenous” (or rather the first one chronologically here in Peru since it has previously appeared in constitutional recognitions), presents the virtuality of authorising specific rights obliging the State not to rule on them except after consultation with the entitled peoples, the so-called indigenous. Subordination to unrevised or non-reflexive constitutional law is no longer so clear. Nevertheless, in Peru, until now the endorsing of this convention has not even led to a legislative revision, let alone a constituent reconsideration, in spite of there having been no lack of international claims ⁽⁶³⁾.

⁽⁶¹⁾ DÉBORA URQUIETA, *De Campesino a Ciudadano. Aproximación jurídica*, Cusco 1993; Pedro GERMÁN NÚÑEZ, *Derecho y Comunidades Campesinas en el Perú, 1969-1988*, Cusco 1996.

⁽⁶²⁾ MAGDALENA GÓMEZ (ed.), *Derecho indígena*, México 1997; LUIS RODRÍGUEZ-PIÑERO, *Between Policy and Rights: The International Labour Organization and Indigenous Peoples, 1919-1989*, forthcoming.

⁽⁶³⁾ Ministry of Justice and Ombudsman’s Office, *Compendio de Legislación para los Pueblos Indígenas y Comunidades Nativas*, Lima 1999-2000, with the aforesaid convention in the second volume, as if there had been an oversight in the first. In fact it originally appeared as the only one in 1999, without noticing the existence of international law, which was immediately added with the second volume in 2000. In the

Where are we so far? It could be said virtually before the inconstituency revealed by the 2001 elections. The constitutional recognition of indigenous presence does not redress matters to this, or any other effect. Just the opposite in fact, it reinforces that inconstituency. Through the way in which this takes place, recognising customary tradition with no strict consideration for right to or possibility of self-government, a position rooted in colonialism might even be reproduced.

The very duality between a rightful universe (the strictly legal one) and a lawful space (the one legally subordinated for indigenous peoples) comes from European colonialism directly or via the United States⁽⁶⁴⁾. Given the virtuality of evidence and argument, bear in mind that inconstituencies like that of Peru could be European or Euro-American legacies rather than the effects of their own reflexive determination. There we are so far. If one wishes to spell it out in bold letters, the inheritance has a name. It may be called racism⁽⁶⁵⁾.

frontispiece of this official collection, the term *indigenous peoples* has been adopted, something that is rejected or treated with reserve in Peruvian legal circles for allegedly having nothing to do with the law in force. FERGUS MACKAY, *Los derechos de los pueblos indígenas en el orden internacional. Una fuente instrumental para las organizaciones indígenas*, Lima 1999, pp. 230-232, regarding international claims, through trade union channels, those put forward by the *Confederación General de Trabajadores* before the International Labour Organisation, which is especially feasible not only because of the tripartite nature of this suprastate body (governments, employers, and unions: <http://www.oit.org>), but also because this Peruvian confederation incorporates indigenous organisations through peasant unions, as we shall see further ahead.

⁽⁶⁴⁾ On the case of Peru, M. THURNER, *From Two Republics to One Divided*, quoted above, whose title is telling in itself, for the *two republics* concerned are the non-indigenous and the indigenous from colonialism, and with a chapter bearing in the heading *Unimagined Communities*, pp. 20-53. The argument is not only valid for Hispano but also in general for European — including Anglo-Saxon — colonialism with all its variables and also their continuity after independence in the United States or the Canadian case: ROBERT A. WILLIAMS JR, *The American Indian in Western Legal Thought: The Discourses of Conquest*, New York 1990; JAMES TULLY, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge 1995.

⁽⁶⁵⁾ I may offer a case based on experience which is not just limited to Peru. For the European electoral observation we rented offices from a reputable transnational firm which does not only provide facilities but also a whole range of services. They take such pains to comply with an obvious hidden ruling which requires administrative personnel

With experience and knowledge, life and study, there are people who believe that this duality between a rightful universe, with freedoms and guarantees, and legally subordinated space, with customs and traditions, was and still is the way to reproduce and now to internalise colonialism. In times of international decolonisation and states' independence, the formal and even constitutional recognition of customary jurisdiction and traditional community would entail not only colonial traits, but also colonialism itself⁽⁶⁶⁾. Nonetheless, custom is a powerful legal artefact, and always implies some social or communitarian degree of autonomy or even possibility of self-government⁽⁶⁷⁾.

Let us remember Peruvian electoral practices which can be run like this not just by political institutions and parties, but also by a different dimension of cultures, communities and customs. They represent different kinds of logic which are as really diverse as they are potentially concurrent, and which may cause upheavals in the electoral system's very assumptions. Practices such as collective bargaining for individual votes are legitimate from the indigenous communitarian perspective and criminal from the political and legal point of view, yet this does not prevent them from find acceptable ways (among parties and rallies, visits and gifts) of getting along and working even for representative purposes. So cultures, communities and customs, through their own determination of exchange, may assume a role which is inconceivable for the state ruling regime⁽⁶⁸⁾.

to be European in appearance and of the female sex, while the cleaning staff on the other hand are indigenous employees of both sexes, that it invites thought not only on a sociological reflection of the Peruvian environment but also on the systematic policy which is typical of some multinational companies (*Reggus* in this case) in non European countries. Racism and sexism are not as geographically bound as it is usually presumed.

⁽⁶⁶⁾ MAHMOOD MAMDANI, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton 1996. I am not aware of anything similar regarding America.

⁽⁶⁷⁾ For this contrasting view, with its own excesses and no comparative consideration of Latin America, LEON SHELEFF, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism*, London 1999.

⁽⁶⁸⁾ *La República* (Peruvian newspaper), March 29: "The EU detects vote dealing (...). In a press conference in which the head of the mission, Bartolomé Clavero, presented the mission's second report, he stated that the candidates and electoral districts where this vote dealing was happening had not been identified, but (...) he

In constitutional terms, which even with the observed recognition of indigenous presence are not the general and common conditions, it is still a precarious situation. Still more precarious, even with that constitutional cover, is the present position of indigenous cultures, customs, communities and peoples. Precarious, though lasting, is the very duality. However, there is no need to go to the extreme of condemning all of this as truly colonial phenomena in order to understand the distance that lies between unstable and adversary tolerance for the indigenous presence, and, for the non indigenous, right and law, state and constitution, policy and constituency. Peru's constituted stance appears to be still none other than that of huge duplicity due neither only nor mainly to its own determination, but also to history and legacy, to colonial history and racist legacy.

All of this is not usually faced up to by predominant political and juridical minds and voices in Peru. The electoral campaign of 2001 has been quite symptomatic in this respect. They were both general and special elections following the fall of the Fujimori regime, under the Constitution which was established during that time, under this regime, in 1993. However, in spite of and also due to this transitory circumstance, they were not summoned as formally constituent or for any constitutional reform. They had this potential in fact, although it was avoided in public debates during the campaign and the call to vote. It was only immediately afterwards that the matter was brought into the open ⁽⁶⁹⁾. During the electoral

indicated that the complaints came from La Libertad, Puno and Loreto. Nevertheless he tried to justify this behaviour, pointing out that this was not illegal for some Andean communities, but typical of a sense of reciprocity". The counterproductive effect of this news caused outrage concerning the wrongly termed "dealing" and indifference towards my efforts to put the matter into a context of community culture. The electoral agreements with trade unions and "peasant" federations to which I shall refer can be understood in this context. I know of nothing similar to F. C. SCHAFFER, *Democracy in Translation*, quoted above, either regarding Peru or the rest of America. On June 17, 2002, I attended a meeting of *heads and deputy heads of mission* in Brussels where comparative problems regarding culturally non-European peoples were posed, though not discussed.

⁽⁶⁹⁾ I have already referred to the July-2001 report issued by the *Comisión de Estudio de las Bases de la Reforma Constitucional del Perú* which was appointed by the President of the Republic. It does not tackle the issue of constituency, with this or other

period, Valentín Paniagua, President of the Republic in the transition period, suggested, not in a political but rather in an academic venue, that Peru was in need of a constitutional change or even of a new Constitution. In political debates during the election campaign the issue continued to be avoided. Throughout this period, the constitutional uncertainty was openly approached only on occasions such as that of a more reserved, though political, forum of a university conference where the two main political forces participated (70).

wording, but it gives an opportunity for some commentary which does so: RAQUEL YRIGOYEN, *El carácter pluricultural del Estado y de la Nación y la justicia indígena-campesina*, which is a note addressed to the very members of the said commission. All this documentation can be seen on the aforementioned Alertanet site which is directed by Yrigoyen herself. Through her initiative and with co-ordination from CEAS, the Catholic Episcopal Commission for Social Action, with the *Pontificia Universidad Católica del Perú's* hospitality, during a conference held between March 12th and 13th, on *Special Jurisdiction and Customary Law* (the term "special" comes from the Peruvian constitutional text for indigenous jurisdiction), we shared an opportunity to raise the issue and discuss it. Present on the panel was FRANCISCO EGUIGUREN, one of the constitutionalists who would later form part of the aforesaid commission. Another of them, CÉSAR LANDA, also offered me the opportunity to talk, on May 21st, on indigenous rights during a doctorate session on constitutional law, in the same Catholic University. As well as in my role of professor, I always acted in my capacity as deputy head of the European observation, which apart from being an obligation, served to reinforce the constant connection between an academic theme and a civic challenge.

(70) As I have participated and thus been present during the display of positions, I may refer in particular to the conference on *Governing without a Majority*, which the *Universidad Peruana de Ciencias Aplicadas* organised on May 28th, under the direction of JOSÉ LUIS SARDÓN. The reason for the meeting is in itself a considerable constitutional challenge because of the existence of an extremely hybrid presidentialist and parliamentary regime in Peru: CARLOS HAKANSSON, *La forma de gobierno de la Constitución peruana*, Piura 2001. Of special interest for problems of constituency, I have also attended meetings of the *Mesa Nacional sobre el Pluralismo Jurídico-Cultural*, organised by the department of *Dignidad Humana*, of the CEAS, the aforementioned Catholic Episcopal Commission for Social Action. Apart from the limited possibility of personally attending many other events, it is worthwhile to add that there was abundant television broadcasting of functions and debates in their entirety during an electoral period that with a double round and the previously mentioned delay, has been really long. From early on, at the beginning of March, at a private dinner with heads of the principal international observation teams (OAS, NDI-Carter Center and we, the European), President Paniagua frankly set out before us the constitutional challenge or even that of constituency. But it was not a question that could be publicly raised by us, not even with

On that electoral occasion, important reform plans were proposed. But political parties, those who perform political representation, did not broach the thorniest question concerning constituent dismantling owing to regional and also deeper cultural plurality. The 1993 Constitution was questioned, but without that implication. There was a slight hint of a half-hearted step towards decentralisation. There was also a motion in favour of recuperating, at a central level, bicameralism, which had existed until 1933, yet not for interregional and intercultural representation. The proposal consisted of duplicating the houses instead so as to avoid the parliamentary practice of single majority decisions at one go without previous discussion in commission and with no second chamber to reconsider them. This, together with legislative delegation to an executive that even resorted to secret legislation, has been quite usual in recent times. Reformist proposals added plans for the re-balancing of relations between the parliament and government, which during the Fujimori regime had leaned heavily towards a presidentialist line which was hardly possible to check. During the electoral campaign, there was nothing more in sight that might concern constituency by citizenship, the underlying question for all these constitutional issues⁽⁷¹⁾. Definitively, these conceivable reforms, including regionalisation, continue to move within the frame-

a completely off the record insinuation. The Organisation of American States, functioning as practically the guardian of the Peruvian transition, treating Peru as a minor and ward, was particularly concerned that such a thing (the open debate on constitution and constituency) would not happen, as we shall verify.

⁽⁷¹⁾ Among publications on Fujimori's peculiar regime insofar as the fact that it was not open dictatorship, but obscure corruption instead with a constitutional slant as a basis, a parliamentary chronicle dating from a second final period can be read: HENRY PEASE, *Así se destruyó el Estado de Derecho. Congreso de la República. Perú 1995-2000*, Lima 2000. For a broader perspective on the key of law making, PEDRO PLANAS, *Inseguridad jurídica, imprevisión normativa e ineficiencia legislativa. Efectos de la subordinación del Congreso peruano al Ejecutivo, 1980-2000. Estudio cualitativo de la política legislativa desarrollada en los últimos veinte años, con énfasis en el Congreso unicameral del fujimorato*, an offprint of the journal *Advocatus*, Lima 2001. On the Fujimori regime in more general terms, the same author has an early monograph: P. PLANAS, *El Fujimorato. Estudio político-constitucional*, Lima 1999.

work of the image of Peru as a unitary State, shaped since its own origin ⁽⁷²⁾.

To all appearances, there was a reluctance to broach the unnamed issue of inconstituency, even when the theme was considered to be constituent rather than merely constitutional. Mentioning it would be tantamount to looking and virtualising. No matter how signs are put into words, there is no escaping the question of citizen under-representation as an effect and also cause of the deficiency or lack of state integration, which, if apparently supported, is, for the purpose of legitimisation, thanks to well-lubricated mechanisms such as voting obligation or civic participation under severe penalty. This is not all of course, as we already know. From the police function of military forces to electoral meddling by the parties concerned passing through the arbitrary discretion of high institutions whose ideal aim is to guarantee free voting and whose real function may be to gerrymander suffrage. To all this, add the insistence on party exclusiveness in political representation and the normative monopoly of a central parliament, albeit bicameral, together with government and not with regions and communities. The system seems to conspire towards a closure, blocking the very possibility of questioning its constituency. Are images, at least the political images, really under control? At all events, the constitutional realities are not.

5. *The beam in one's own eye: Europe's embarrassment over Swedish zeal.*

Up to now I may have given the impression that the European observation during the 2001 Peruvian general elections was a harmonious and well tuned activity, but for a few points within the core

⁽⁷²⁾ On the official website of Peru as a state, *Portal del Estado Peruano*: <http://www.perugobierno.gob.pe>, the virtual image of the *Estructura Básica del Estado Peruano* or basic structure of the Peruvian State: <http://www.mef.gob.pe/misc/estado.pdf>, can be seen: the constitutional trinity of powers at the top with the executive in the middle of them, presiding over the main body of the display downwards to the bottom, where municipalities are found, like passive terminals. Pursuit of the constitutional debate can also be observed on the net: <http://geocities.com/alertanet/peru.htm>¹, *aforementioned*, and <http://palestra.pucp.edu.pe>.

team, when this is not the real case for the operation as a whole. Here comes the moment for inside affairs of the Peru-2001 European observation. It was not so peaceful. During the operation, there was an even crossing of opposing images. Furthermore this is so for reasons that perhaps are revealing and may reflect the constituent problems of the European Union itself, of its own deficient articulation, or also of its virtualities above all. The examination of disagreements is not irrelevant therefore.

Taking extreme care not to be guilty of any indiscretion or even gossip, I shall limit myself to occurrences which might be of interest to our present reflective purposes among the kaleidoscope of reflecting images between America and Europe, Peru and Sweden, as we are about to see. I must behave so because of my personal involvement, for my position was actually more than deputy head due to the usual absence of the chief observer. I have already stated that I assume my part of the responsibility, which was greater then, in action, and becomes even greater now as I am going to recapitulate ⁽⁷³⁾.

The European scenario is known. The observation is organised by the European Commission, a stable executive with its Presidency and Commissioner for Foreign Relations. Regulation is supposed to be carried out by the Parliament, a representative assembly through direct universal suffrage, and at a higher level by the Council, an intergovernmental authority with its rotating Presidency of the moment, and with its general secretary, Mr CFSP, in charge of the Common Foreign and Security Policy. All these institutional agents shared the common aim of external action within the area of co-operation, of which electoral observation forms a part. The virtual image is still not complete. One very significant specification

⁽⁷³⁾ I was informed that my responsibilities would in fact be wider than those of *deputy* due to the absence of the *head* (except during the week of arrival and days prior to the elections rounds), but I was not warned about the possible problems which could arise. I imagine they would have been difficult not only to foresee but also to face, given the European Union's institutional structure — or rather present constituent 'non-structure' (Mr CFSP, JAVIER SOLANA). This is precisely the point I want to consider from the perspective of the electoral observation.

for Peru-2001 is missing (74). It is now that Sweden makes its appearance.

The specification concerns rotation in the European Presidency — that of the Council. The Peruvian observation takes place within the first semester of the year in question, 2001, which means that it falls in Sweden's first presidential period since its entry in 1995. At its request, the observation's political leadership is assigned to a relevant member, the vice president of the Swedish parliament. Apart from belonging to a party which is notoriously reluctant (to say the least) towards the European Union, she is quite unavailable and unwilling to remain in situ, yet she displays great interest in deciding and influencing the operation's approach and its progress. In this way, Sweden presides twice over and tries to do so with perseverance and determination, despite these same problems of temporality of presidency and absence of the chief observer. Between the political leadership of the operation and the Swedish embassy in Lima, the latter as local representative for its part of the rota system presidency, Sweden creates its own idea and alternative, for it does not exactly coincide with the European one. Here is the case. It turns out that there was a hidden agenda, and as it was perhaps over-confident, it was somewhat improvised in the field. In face of this, I relied on the close support of the European Commission's Delegation in Lima, and fellow people of the core team in situ. Now the scenario is more compete (75).

(74) Reviewing European Union literature, constituent documents since Maastricht, and the secondary or academic studies, I am unable to use their help in order to bring some coherence to my experience confronting competent and competing authorities' requests, above all in matters and on decisions beyond the scope of the Commission. Regarding the latter, the very position of the observation workers was ambiguous. We depended politically on the Commission, yet although authorised for public functions, a private service company intervened in our contractual position as administrative and budgetary agent. Whether the choice of the Brussels-based *Agrer* agency was a fortunate one, as it turned out to be, is a different matter. Outsourcing for private management of public functions is the significant question for European operations.

(75) When I refer to a different agenda as being Swedish, I rely on the constant and determined behaviour of responsible individuals (ambassador, MIKAEL DAHL, and chief observer, EVA ZETTERBERG) leading me to believe that it was not a question of merely personal or local attitudes. They were not shared by the Swedish field observers, some of whom were added directly by that state as reinforcement for the European

The Swedish embassy's performance in the observation field highlights the alternative agenda. Equipped with leaflets, gadgets and other publicity paraphernalia, the principal aim is to bring the image of the Swedish State into the foreground, in the interest of self-promotion⁽⁷⁶⁾. As the European electoral observation attracts a great deal of attention from the Peruvian information media and demonstrates its ability to summon press conferences and an audience for its public statements, it turns out to be a good opportunity for propaganda for their own country and also, no need to say, for rights, civic liberties and Sweden's parliamentary practices as a model for Peru in this case. There are grounds, of course⁽⁷⁷⁾, but this is not the issue here. Apart from the impertinent form and offensive manners towards those on the receiving end of the Swedish gifts, one assumes that the message is the means — Sweden first and last. A European country of virtual images goes before the constitutional content of citizens' rights. Thus, we leave the suitable field of international standards in the foreground to find just ourselves, not all European citizens but those of a particular State which has taken advantage in this manner of its presidential term.

What I describe as Swedish agenda was to be a complete alternative for electoral observation's very conception and practice. It aroused interest and support among the other European embas-

contingent, and had no problems fitting in. Thus, when I speak of the Swedish agenda, I am aware of being unfair towards them and perhaps others. I held an interview, without the embassy's presence or mediation, with the Swedish director general for Latin American relations and was conscious of esteem for the independence of the observation concerning different agendas such as that of the OAS (Organisation of American States) to which I am going to refer. Yet neither the president of the government nor the Swedish minister for foreign affairs showed anything of the kind. Responsibility is not always to be expected. Due to previously determined budgetary motives, the Swedish embassy in Lima later closed in July 2001 facing the evident dissatisfaction of the Peruvian government and thus interfering with the very observation.

⁽⁷⁶⁾ The corresponding electronic host has been offered: <http://www.eu2001.se>.

⁽⁷⁷⁾ For the most famous Scandinavian extreme, that of the *Ombudsman* now present also in Peru as we already know (<http://www.ombudsman.gob.pe>, with the disseminated Swedish name in the electronic address, not in the Constitution: *Defensor del Pueblo*), HENRI DESFEUILLES, *Le pouvoir de controle des Parlements nordiques*, Paris 1973, pp. 125-147, explaining its originally more limited institutional context of parliamentary creation for executive control.

sies, European parliamentary representatives, and more significantly, the Organisation of American States on the part of its respective observation core team. Once the corrupt and manipulative Fujimori regime had been substituted by a transitional government deserving of international confidence, it should have been a question, from that other perspective, of direct political, financial and technical support for the electoral process rather than observing it in a neutral, transparent and professional manner. The Organisation of American States set the style with a type of observation that was as spectacular as it was inconsequential because of its desire to give support. Peru received both the open and underhand backing as a member itself of the Organisation of American States, which has played a decisive role in Peru's very transition and faces the electoral observation as an extension of the same international help. In contrast, the European counterpart concentrates on its defining purpose of strict electoral observation as a distinct kind of co-operation ⁽⁷⁸⁾.

⁽⁷⁸⁾ In the end, the Organisation of American States did not accept the elections of the year 2000, thrice won by Fujimori (something, the third turn, which was unconstitutional), after the accusations of not only the Peruvian Ombudsman's Office but also the European Union and the NDI-Carter Center. The OAS promoted and coordinated the *Mesa de Diálogo y Concertación para el Fortalecimiento de la Democracia en el Perú*, the round table for dialogue and understanding in search of democracy strengthening in Peru, which agreed to hold the 2001 elections with Fujimori still in the Presidency and under the 1993 Constitution and also the electoral legislation which occurred during that period now, for 2001 general elections, by means of some hasty and limited reforms. Revelations of corruption and Fujimori's defection to Japan were what opened up new possibilities in November 2000, transforming the OAS into the foremost public champion of these previous transition approaches. However, it is also true that at that time the main political and civic forces of Peru were unable to propose any alternative. The European Union supported this transition as the OAS directed it, but without being so involved, which probably marks the difference at the time of the observation. At the beginning of March 2001, public allusions to the shortcomings and hastiness of the electoral regime reforms provoked a loud outcry by the American observation core team in the middle of the first European press conference. When its respective independence was subsequently accepted, in spite of the Swedish agenda to subordinate the European to the American observation (the electoral observation to the underhand support), relations were steered towards co-operation and trust, even in the midst of serious disagreements that I shall recall later on. With ever present distrust towards Peru as well as Europe concerning control of the process, the OAS had

For European perception of the Swedish alternative, that proceeding from the Organisation of American States, several presuppositions were latent and working. In a case such as the Peruvian one, according to the less European perspective, one should act with understanding and indulgence, without applying minimum requirements of equal exigency with other cases — like international standards. The yardstick of human rights was always kept in sight, but this did not imply its constant and serious application. There was not a deep contradiction, that concerning principles, between the two approaches, the European on the one hand and the Swedish on the other. Nevertheless, they designed a very different kind of electoral observation. Let us endeavour to grasp some meaningful nuances.

As for the Swedish perspective, shared with the Organisation of American States, the strictly electoral observation task would have held less importance. It would have been reduced and discreet, like an accompaniment encouraging and supporting the political process rather than a presence subjecting it to any serious scrutiny. This would not have restricted the possibilities of co-operation. It is the emphasis on the kind of operation and its subsequent method that marked the difference. Direct support and aid would have prevailed not just in the longer term, but also on that electoral occasion. The foreign observation itself would have surreptitiously turned into that assistance approach. The Peruvian electoral institutions showed willing to receive this underhand form of backing. Once the European Union stopped giving them direct assistance to perform the observation, they reproached them and demanded that the operation should at least help their image. Confronted by the clear lack of receptivity among the European core team, the Swedish embassy became a constant mouthpiece for Peruvian electoral institutions' expectations and American pressures. The Organisation of American States offered the example. They accomplished the impossible, combining observation and support, neutrality to observe and partiality to support ⁽⁷⁹⁾.

previously (though unsuccessfully) proposed that the European electoral observation should be organised directly as its subsidiary.

⁽⁷⁹⁾ With all of this, the previously mentioned deficiency of rule of law (with its

Not only would the electoral observation have been downgraded for its inability to openly fulfil its specific duty of co-operation or be serious about its own task, but also because in this way longer-term requirements would have gained protagonism. Above all it would concern a supposed need which would be impossible to satisfy in the short term, the civic education activity that Europe itself could offer without facing the question of the cultural gap and the cultural exigencies of a case such as the Peruvian⁽⁸⁰⁾. The new form of co-operation in the interests of democratisation would essentially be reduced, at least for the mo-

peculiar and insufficient normative or only directive sources) for the observation itself becomes really significant. The observation's guidelines, the so-called terms of reference for our task, clearly stated that we were under the direct *authority* of the Commission Delegation in Lima (chief, JEAN MICHEL PÉRILLE), and that we could resort where necessary and always within our sphere of independence to the Swedish Embassy as representative of the Council Presidency of the moment. They also instructed us to co-ordinate with the other observation operations, particularly the Organisation of American States. It is unnecessary to go into details concerning how such precautions might function in such a scenario. This is where what I commented about final sources comes in, about them being incorporated because of improvised decisions regarding unforeseen events, like the hidden agenda, made possible by the very deficiency of the Union's articulation. My improvised reaction was to announce my resignation if any confirmation of the aforesaid alternative agenda were backed by the European Commission. We, core team and observers, had gone to do a job, not to pretend to do so. To be completely honest, I must confess that I also had my own agenda, with the indigenous question, but I said so at the very beginning, at the seminar in Stadtschlaining, Austria, to which I shall refer later. At no time did I ever hide it. Furthermore, it fitted in (though not through any foresight of mine) with the European agenda, not the Swedish one, so there was no merit in my contractual loyalty.

⁽⁸⁰⁾ During the electoral observation period in fact, a European *mission* involved in evaluating civic education programmes visited Lima. We offered them assistance and collaboration and received no worthwhile information from them in turn. They were travelling around several countries as if local knowledge and interactivity were irrelevant for the mere establishing of communication even if it had been in keeping with the proper and more economical principle of non invading with external co-operators but instead fostering internal agency. In any case, communication is always important. This same activity of civic education by local agents can lead to a similarly one-sided plan for teaching on the part of the established electoral system, with its occasionally unwarranted, if not elitist requirements, without any previous operational question of human rights confronting the neo-colonial assumptions. Even *local* only contemplates Euro-Americans, requiring no use of other languages or knowledge of other cultures for the non Euro-American areas.

ment, to a somewhat neo-colonialist aftertaste, through the culturally one-sided European perspective. Depending on biased civic education, the timing for the programme of constitutional rights would be somehow different, with some of them, including political ones, belittled or even belated. The very link between *human rights* and *democratisation* as clearly proposed by the European Union internal documents would be degraded⁽⁸¹⁾.

I have already pointed out that the other approach, the Swedish one, is admitted in the diplomatic circles of foreign representation and external action pertaining to the Union Member States. They understand it much better than that of observation with “impartiality, transparency and professionalism” as the European Union told us. The same independence that this bestows on electoral observation itself is opposed in the field by certain embassies still steeped in the deep-rooted notion and practice of external action run by individual States, or also today’s European ones working in loose co-ordination. How can they accept that those who come barging in on their own terrain, the European observers, are not accountable to them, the States diplomatic representations? There may be a lack of understanding between the Union and its Member States, that puts

(81) To prove that I am not playing the Manichean, a visit to the website of the Swedish International Development Agency (SIDA, *Styrelsen för Internationellt Utvecklingssamarbete*: <http://www.sida.se>), will suffice. This praiseworthy institution stands out among other European agencies, and furthermore collaborated in the preparations for the Peruvian observation (for following collaboration: <http://www.eueop.org>). As part of a more general programme for *human rights*, including observation, it has summoned a seminar for 2002 on parliamentary activity as an instrument of democracy, *Parliamentary Democracy and the Management of Parliaments*, aimed at members of parliaments from other countries and especially from Latin America. For practical purposes its contents are ruled by one particular model, the *Riksdag*, none other than the Swedish parliament itself. This is the sketch of the all Swedish programme as model for the world: “The Parliamentary System and the Political System in Sweden. The Parliament, the *Riksdag*, history, the Parliamentary Act and the Constitution, The Members, The Committees. Study tours and visits. The *Riksdag*, a Parliamentary Committee, Ministries, Central Agencies, Political Parties or organisations, Media”. As for a more specialised institute in Sweden, there is the *International Institute for Democracy and Electoral Assistance* (IDEA: <http://www.idea.int>), with its most substantial contribution of *Codes of Conduct*, for both *Ethical and Professional Observation of Elections* (1997) and *Ethical and Professional Administration of Elections* (1998).

European operations at risk. It could end in hindrance and even boycott⁽⁸²⁾.

Faced with an agenda like the Swedish one, the first thing that could be said is that it is not exclusively Swedish, but also, in spite of the Union, European, for European, prior to American, is its neo-colonial background. Roots are shared. It finds fertile ground here in Europe and has taken hold there in America. Nevertheless, let us not forget that what concerns us now and above almost everything else is virtuality. Take a look at the good side. We must always consider the constitutional dimension in the *human rights* field. It is not only nor mainly a matter of a State such as Sweden or any other European one taking its turn and seizing the opportunity for self-centred promotion of its image in spite of the Union. It is also and always about constitutional rights being taken seriously. During the final period of observation at the beginning of June, the Swedish embassy together with the civil association *Transparency* held a public session centring on the problems for women's political

(82) Local experience is normally symptomatic at the very least. At a local level, the CFSP (Common Foreign and Security Policy) involves periodical co-ordination meetings of the ambassadors of the European States (only men in Lima, like the core team in the field). The electoral observation's core team was summoned to share information, describe initiatives and show accountability. According to our terms of reference, the first request was admissible; the second rather less so; the third was out of order. Under negotiated fictions such as "information exchange meetings", unidirectional in fact, joint sessions were held, which did not fully satisfy certain embassies which, with the political agendas of their respective governments, above all resented the professional neutrality of the observation activity. Abroad, the States, as distinct from the Union, can display party positions, depending on the character of their executives in charge. It would be a hard task to achieve agreement among the different States' representations in this political terrain, but there is no need of this for European co-operation. Electoral observation experience has shown that human rights' common foundation is far from being solid operational ground for external co-ordination (soft Common Foreign Policy) in spite of the Union's *reference documents*. In such conditions (Sweden trying to take credit for the European observation; Swedish ambassador and Swedish chief observer showing concern before the Presidency of the Republic about the bad image of the embassy closure rather than the electoral observation; Swedish ambassador offering personal apologies instead of observation criticism to the National Jury for Elections, as the highest electoral institution; ambassadors summoning us with contradictory political agendas...), the embassies' attempt to participate in the *accountability* of the European operation was plainly transformed into *diplomatic harassment* against it.

presence and representation. It attracted a large audience with considerable participation despite, in a display of European perspective, a lack of indigenous, both peasant and native, interventions. The Swedish party also expressed its serious concern for handicapped persons' effective access to the polling stations, completely in tune with the Peruvian electoral administration itself as regards this last point⁽⁸³⁾.

There is no true problem between agendas in terms of the individual's rights. The Swedish agenda's underlying idea clearly centres on the demand for an equal footing among all Peruvians and all Europeans, especially regardless of sex. The problem does not lie here. The degrading view of the observation task and object, claiming a more indulgent and relaxed observing attitude, regards collective terms, not individuals' rights. It would be Peruvian citizenry as a whole or a majority that, due to its supposed lack of civil preparation, would be unable to bear a requirement based not on a double standard but on an equal footing with other constituencies such as the Swedish or common European ones. Of course no such thing is argued or even thought, expressed or paraphrased. It has a continual bearing on the transitional political period, pointing even to a degree of indulgence that could well become connivance. We are already aware that although not so extended, this is a practice and even an argument which is somehow present in the Union's and States' approach to political co-operation⁽⁸⁴⁾.

⁽⁸³⁾ I say *administration* and not *system* since, as we already know, the former is made up of various institutions which are to a certain extent autonomous. In comparison, the National Office of the Electoral Processes is more sensitive to rights than the National Electoral Jury or the National Record of Identification and Civil Status, although there the former bears no similarity to the Ombudsman's Office which in any case relies on co-operation from it, the National Office of the Electoral Processes, as we know. Regarding the question of the handicapped, the concern showed by the previously mentioned International Foundation for Electoral Systems was also appreciable. The meeting on the gender problem was in fact organised by the European observation by initiative of the chief observer from Sweden, but because it finally took place outside the scheduled time, being held after the second round, and was not restricted to electoral matters, the Swedish embassy ended up by taking charge. Women's participation became relevant in the indigenous conference that I shall talk of later.

⁽⁸⁴⁾ Such a consideration may be a clue not just for political prudence but also legal criteria concerning the operation activity and results. It should be noted that the

The European electoral observation in Peru tried not only to neutralise neo-colonial or unequal approaches, but also to counteract them. It attended the First National Encounter of Indigenous Peoples, which was held at the end of April in Chaclacayo, near Lima ⁽⁸⁵⁾. The aim was to propose to organisation and community representatives the holding of a conference on the problems of their political participation, not for the purpose of civic indoctrination, but exactly the opposite — for them to voice their views, grievances and expectations. That is exactly what took place on 25 May ⁽⁸⁶⁾, a meeting of indigenous people with the electoral observation where the floor was exclusively theirs. Statements were made along the unmistakable lines of what may be termed co-operative autism, an expectation of self-government which, due to the situation to which

sequence of chapters in the index of the observation official report, which is a customary template, responds to such a virtually more indulgent approach with the prime position reserved for the transition circumstances, although the report itself can of course easily avoid a device which implies that the relevant problems are only or chiefly concerned with the final period of corruption or dictatorship, and not with long term inconvenience of constituency. I have not said, indeed there is no need for me to do so, that I assume entire responsibility for the report, for this does not appear in my duties as deputy, and as an effective participant I do not hesitate to sign it as an official statement with my limited share of accountability. If I did not strive to better convince the rest of the core team about much of what I state here, it was not through a lack of conviction, interest, time or possibility, but because of the collegiality and official character of the said report. Through the core team's internal debate, I was able to define and improve my stance. This paper's dedication responds selfishly to my gratefulness.

⁽⁸⁵⁾ *Primer Encuentro de Pueblos Indígenas para la Implementación del Fondo Indígena*, 25-27 April, 2001. The *Fondo Indígena*, Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean, whose headquarters are currently in La Paz, Bolivia, was created in 1992, for direct co-operation with indigenous communities, which gave rise to the very nature of the meeting.

⁽⁸⁶⁾ Among other contributions, the meeting had really decisive collaboration, in all effects, from the Ombudsman's Office, particularly the director of its Special Programme for Native Communities, LILIAM LANDEO. In addition, the Ombudsman's Office took charge of writing and publishing the report of the event. Conclusions and recommendations are included as an appendix in the European report. Other domestic presences included the Department of Indigenous Affairs pertaining to the Ministry for the Promotion of Women and Human Development, in the public sector, the association *Transparency* in the private sector, and on an external level the Spanish Agency for International Co-operation which participates in the Ombudsman programme for native communities.

the indigenous peoples have been led, aims to start by self-training, by receiving foreign or state co-operation and controlling it themselves. This would include financial assistance to the Peruvian electoral bodies for the very purposes of civic education and political participation according to indigenous needs and under indigenous determination, so opposite to the interpretation of unidirectional training and assistance which the state institutions, as much as the external ones, apply. Thus the pending challenge of Peruvian lack of constituency hung over the conference ⁽⁸⁷⁾.

Back home in Europe, Sweden has its own problem of lack of constituency through its reluctance to give proper recognition to an autonomous indigenous people — the Saamis (Lapps in colonial language) who also extend throughout Norway, Finland and Russia ⁽⁸⁸⁾. This is not noticed of course in the Swedish leaflets for promotion of rights according to the Swedish model. Subsequent immigration aside, which has recently included numbers of Latin Americans, not all Sweden is Scandinavian, just as not all of Peru is Euro-American or of mixed culture in the Spanish trend. If this is a matter of constituency for a State, it is equally so for Europe in its case, although the Union tries to ignore it, thinking that it is

⁽⁸⁷⁾ The issue was raised more openly regarding Bolivia in a workshop with Aymara *Mallkus*, indigenous authorities. It was organised in Achocalla, near La Paz, by the *Universidad de la Cordillera*, around mid-August 2000. The first point was linguistic, how to translate into Aymara (for in Spanish they sound alarming and create confusion) terms for an alternative such as constituent empowerment, rule of constituency, community self-government, etcetera. There was help from an expert interpreter, Esteban Ticona, an Aymara anthropologist, a historian of the *Marka* of Jesús de Machaca, whose representatives were the ones who mostly posed the question of constituency. Two years later, in mid-August 2002, I attended a similar meeting with Quiche *Alcaldes*, indigenous authorities, of Totonicapán regarding their respective constituent problems inside Guatemala: EFRAÍN TZAQUITZAL, PEDRO IXCHÍU and ROMEO TIU, *Alcaldes Comunales de Totonicapán*, Guatemala 1998.

⁽⁸⁸⁾ The International Working Group on Indigenous Affairs (IWGIA: <http://www.iwgia.org>), whose headquarters are in Denmark, publishes biannual and bilingual reports in English and Spanish, which usually begin with the “Arctic peoples”, including the Saami: *El Mundo Indígena, 1999-2000*, Copenhagen 2001, pp. 19-42. IWGIA also published *Self-Determination and Indigenous Peoples: Sami Rights and Northern Perspectives*, Copenhagen 1987. Nevertheless, by now, there are homepages both Arctic (<http://www.arcticpeoples.org>) and specifically Saami (<http://www.saamicouncil.org>).

sufficient to constitute itself through a gathering of States and an extremely limited peripheral space for regions and municipalities.

We are not going to declare that there exist similar or equivalent problems concerning a lack of constituency throughout Europe and America, for colonial, not to say racist heritage continues to weigh on the latter — precisely due to the former. Nevertheless it may be said that, all things considered, the European party is not exactly in a position to offer co-operation for democratisation and rights at a fundamental constitutional level, that of constituency. If, with its own deficient lack of constituency, Sweden offers itself as role model for Peru, what it is mainly showing is complete and utter irresponsibility. I witnessed the witty remark of a candidate, the very one who was elected, Alejandro Toledo, on Sweden's umpteenth lesson: "There may be some things that are right for Sweden that may not be so for Peru". Perhaps he was more correct than he thought when he improvised the rejoinder⁽⁸⁹⁾. On the subject, Europe has no

(89) I offer an example. For programme purposes, the one formally presented to the elections by *Perú Posible*, headed by ALEJANDRO TOLEDO, is not the only one that matters, even with the addition of the party agreements before, during or after the campaign. In a country whose articulation is not established and cannot be either in the constitutional field or in the political area, the individual candidate formally made government commitments by reaching agreements with other organisations. Thus, in the midst of the campaign, he signed a *Compromiso Democrático por la Dignificación del Trabajo*, a democratic commitment to dignifying labour with the most important union headquarters, the CGTP, *Confederación General de Trabajadores del Perú*, Peruvian Workers' General Confederation, basically covering an agreement towards the recovery of a labour law in accordance with International Labour Organisation conventions and recommendations. The mostly indigenous organisation, given its constituency, pertaining to the CGTP, the CCP, *Confederación Campesina del Perú*, Peruvian Peasant Confederation, preferred not to sign a central agreement, referring to the autonomy of its federated bodies. So the FDCC, *Federación Departamental de Campesinos de Cusco*, Cusco Peasant District Federation, a member of the CCP, and "Alejandro Toledo Manrique. *Candidato a la Presidencia del Perú*", in these individual or non party terms, signed an agreement which covered not only more general points concerning "defence and strengthening of native and peasant communities" and "fostering of peasant women's rights", but also more detailed aspects covering social and economic needs for regional and community development. In view of these agreements union and indigenous representatives joined the electoral roll of *Perú Posible*. Thus the nature of their representation is not merely constitutional, through political party and citizens' suffrage, that one might suppose at first sight. A broader scenario took shape, in which the European electoral observation was able to stand out by widening its range of connec-

model to offer America and at the same time holds its share of responsibility for lack of constituency there.

If we endeavour to limit ourselves to the more specific matter of electoral observation, it is also possible for Europe to find itself in an embarrassing situation. During the Peruvian election period, at least two elections were held in Europe; in Italy and the Basque Country. They were both extremely problematic due to very different circumstances and motives. The European Union does not believe that its undertaking could be to inspect them, however it assumes this function for external purposes. Even if one admits a transitional situation as a requirement for monitoring, has there not been just such a case during the last few years (though for different reasons and in differing degrees of course) in Italy and the Basque Country? Would Europe or its Member States be willing to allow external agents, say American, to publicly scrutinize its electoral processes for strengthening European democracy and fostering European citizens' rights?

With its natural and legitimate interest in taking part in electoral observations ruling and even heading them, and putting this into practice after Peru by taking effective charge of the political leadership of these very operations ⁽⁹⁰⁾, would the European Parliament reciprocate? The most it will admit to is not any kind of reciprocity by non-Europeans but rather a certain backwards repercussion of unilateral observation by Europeans which, due to its commitment to principles, could help Europe itself in its articulation as a Union ⁽⁹¹⁾. Besides, of course, we could hardly question the United

tions and contacts irrespective of political or institutional spheres. In any case, given this unforeseen social blend, the usual formula for strengthening democracy through empowering parties (more than they already are on paper and in the practice of electoral and political regime) seems questionable.

⁽⁹⁰⁾ *Council Conclusions on EU Election Assistance and Observation* (31-V-2001), appendix already quoted from the *Annual Report on Human Rights* (8-X-2001), p. 211: "The practice of appointing an experienced member of the European Parliament as the Chief Observer of an EU election mission should be encouraged".

⁽⁹¹⁾ This suggestion is illustrated by the *Council Conclusions on EU Election Assistance and Observation* (31-V-2001), p. 207: "The EU itself is a project for democracy, development and peace. The Council stresses that the EU's presence in third countries is a political statement and represents a commitment to these values". As non virtual checking would be more overwhelming than helpful right now I shall limit myself

States' availability concerning foreign inspection in other countries. Their very participation in the Peruvian observation is twofold, through their own foundations for electoral assistance and through the Organisation of American States. Why is there no thought of foreign observation in Europe or even in the United States themselves? There is a clear reason for the fact that reciprocity is not considered. In the context of international co-operation, it is the donor States who inspect the beneficiary States, not the other way round. Economic interest might still hold sway over the principle of democracy ⁽⁹²⁾.

to one noteworthy though lamentable anecdote. A European parliamentary observer, FRANCESCO SPERONI, blurted out to FERNANDO TUESTA, the already mentioned chief of the National Office of the Electoral Processes and academic expert on electoral issues, that the recently held Italian elections had been so badly organised "that they seemed Latin American". The following allegedly amusing comment, during a formal meeting between European parliamentarians (group's heads, IGNACIO SALAFRANCA and JOAQUIM MIRANDA) and Peruvian authorities, touched on the embarrassment caused by the mess of the vote recount in Florida during the US presidential elections at the end of 2000 (George Bush Jr. versus Al Gore). Some members of the European parliament were less informed about the case of the violent front which also resorts to assassination in the Basque elections, held in May 2001 like the Italian ones. It would seem to be of less importance for European interest. Efforts were made in the field to inform the European parliament's observers about the Peruvian case. While it can be justly argued that the parliamentary group and leadership adds democratic legitimacy to the operation's technical professionalism, thus duly incorporating the European presence, this political personnel does not admit the type of training that was given to the rest of the staff, without exemptions. It argues its own parliamentary status in order to publicly hold an opinion independent from the observation it forms a part of, without respect for the common code of conduct. What is more, as if some embassies had not done enough, it added further to the confusion of public opinion in Peru. There is not a presumption of responsible behaviour by representative politicians. In the mentioned meeting of *heads of mission* in Brussels, June 17, 2002, the parliamentary leadership of electoral observations was taken for granted.

⁽⁹²⁾ In practice, this is a very sensitive point for the electoral context itself. During the observation tasks I was able to attend in Lima *Mesas de Donantes*, donors' round tables on electoral needs, meetings between co-operating States where the highest ranking Peruvian respective authorities literally begged for their constitutional functions to be complied with. I did not observe any consternation regarding the reliance on such a practice and its risks of political dependence. What I did detect is that the openness of the Peruvian institutions to external scrutiny contains resignation and an underlying resentment regarding what they quite rightly feel to be the political cost of economic aid rather than a basis for co-operation in the human rights and democracy we must share.

It could be a case of what is termed democratic legal conditionality for economic aid itself, a case of democratisation being an explicit legal condition for economic co-operation, which is not primarily considered as a historic debt concerning unsettled colonial responsibilities — particularly European ones — and thus regarding not exactly the States, but the indigenous peoples instead⁽⁹³⁾. But if we are already assured by the European Union that we are contemplating new forms of co-operation not only for development and welfare, but also and above all for basic elements such as democracy and human rights, why then are these other reciprocal and therefore more democratic monitoring possibilities not even conceived? Why is reciprocity itself not even virtually thinkable? Why is electoral monitoring still viewed as an exceptional and unidirectional formula for transition situations, and not as a normal means of sharing experience for mutual democratic progress? For donor States themselves to be monitored, the invitation to do so could cover expenses

Dependence on aid furthermore increased as things progressed since, on the one hand, the electoral organisation was swindled by a computing firm, and on the other hand, squandering the money of others, controls on and by these same electoral institutions were increased through costly programmes. For these elections, in order not to interfere with observation, the European Union only subsidised supervisory bodies (not administrative or jurisdictional ones) such as the Ombudsman's Office, or also non-government associations like *Transparencia* and *Consejo por la Paz* (allocations in <http://europa.eu.int/comm/europeaid/reports/compendium2001macro.pdf>, pp. 166-168), but several member States (Spain is one of them) which are in fact deeply committed to Peru's economic competition and the country's political conflict, directly defrayed electoral institutions. I have already mentioned the possibility of division of labour, which of course needs no programming or even co-ordinating, between the Union concerning itself with rights, and the member States taking care of interests. The very lack of European constituency evidently creates a breeding ground not just for Peruvian confusion: S. STAVRIDIS stresses this: *The Common Foreign and Security Policy of the European Union. Why Institutional Arrangements Are Not Enough*, in S. STAVRIDIS, E. MOSSIALOS, R. MORGAN and H. MACHIN (eds.) *New Challenges to the European Union*, pp. 87-122.

⁽⁹³⁾ Showing a strong defence of conditionality deemed as democratic for co-operation considered as donation, JENNIFER MCCOY, *Monitoring and Mediating Elections during Latin American Democratisation* in K.J. MIDDLEBROOK (ed.), *Electoral Observation and Democratic Transitions*, pp. 53-90, with an epigraph on "Donor Commitment and Political Conditionality", pp. 85-87, which begins thus: "The international community must follow through with promised carrots and sticks", and reproaching the European Union for not being demanding enough with "democratic conditionality".

always as long as the operation's independence were guaranteed. It would be money well spent if it were used on this type of communication based on an equal footing.

This virtuality is not even conceivable yet. An imbalanced one is being gestated instead. The best future, the reciprocal one, could be spoiled if it does not give birth to viable equal creatures in the plural. In a culturally complex world an only child or even twins, a solitary offspring born late in virtual postcolonial life, can be easily miscarried. Neither Europe (the European Union) nor America (the United States) or both together can set the rule by themselves. With the global challenges of lawful democratisation and rightful cooperation, all is virtually open. The virtual reality we find on the internet is still no more than mostly plain and simple virtuality, a European proposal in this case. Yet it is there, on the glowing screens of countless widespread terminals in cyberspace. It is quite capable of producing possibilities for rights and democracy that are as yet inconceivable. We are going to ponder on postcolonial potentiality, the seed of that unborn vital offspring, on the home ground of the law whose foreseeable performance will save us from falling into pure science fiction.

6. *Nemo dat quod non habet: co-operative relations among the United Nations.*

Let us proceed by returning to the International Labour Organisation's Convention on Indigenous and Tribal Peoples in Independent Countries. This organisation is today one of the United Nations' specialised agencies, yet its origins date back to the second decade of the twentieth century. This Convention not only recognises certain rights, but also previously defines the category of the subjects entitled to them, the aforesaid indigenous and tribal peoples. We are already aware of this, but it would be advisable to consider the matter more closely. The definition is to be found at the beginning, in the first article. The text, as is usual nowadays, is easily available not just in print but also on the web. I shall dispense with the colonial rather than postcolonial concept, of *tribal people* so as not to complicate the matter for constituencies such as the Peruvian and the Swedish. Let us look at indigenous peoples.

There we find a concept. The convention declares that it applies to “peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”. The same section adds, on the one hand, that “self-identification as indigenous... shall be regarded as a fundamental criterion”; on the other, that “the use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law”. A concept exists, that of *indigenous* as the product of colonialism. There is also a requirement, a people’s awareness of their indigenousness. And finally, there is a deception, the refusal to recognize the international rights of peoples for the indigenous. Let us see what importance for constituency lies here. Let us pay attention to the virtuality of texts such as this from the International Labour Organisation among the legal body of the United Nations human rights instruments. It is international law deemed as universal ⁽⁹⁴⁾.

Peru ratifies the Convention on Indigenous Peoples, on an issue of direct concern for its constituency. The gesture is a sign of recognition. Within its frontiers, amidst the citizenship, among those who have not only the right but also the obligation to participate through their votes, there are indigenous peoples, human individuals, whose cultures, or a part of them, pre-date that colonial presence which brought the European one — the one the State still identifies

⁽⁹⁴⁾ The ILO Conventions, such as this one on Indigenous Peoples, are only mandatory, relying on ILO supervision, for the States that ratify them. In America this means (in chronological order up to mid-2002) Mexico, Colombia, Bolivia, Costa Rica, Paraguay, Peru, Honduras, Guatemala, Ecuador, Argentina, Venezuela, Dominica and Brazil; in Europe, only Denmark and the Netherlands; outside the Union, Norway. However, since the United Nations so far lacks its own instrument on indigenous peoples, this ILO Convention also acts as a register for international standards. This is shown by the fact (already mentioned) that the Office of the United Nations High Commissioner for Human Rights includes it on the web among the rulings on human rights.

with. Thus, there are subjects, indigenous, entitled to not just individual, but also collective rights inside the State itself. As a consequence, these peoples are not exactly on the same footing as other human groups. Even the final deception concerning the “use of the term” loudly affirms that not all have the same rights, not the same human rights. The first sections from the principal Covenants in the development of the Universal Declaration on Human Rights, the one concerning Civil and Political Rights, and the other on Economic, Social and Cultural Rights, which are jointly agreed on in 1966, proclaim the right of reference for peoples and contrast for indigenous peoples: “All peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. The individual’s rights follow after, only after.

The phrasing and very concept of this collective right as an equal human right, which all peoples are entitled to, and which even precedes (which is not to say it is superior) individual ones arise from the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, the formal adoption of an anticolonial stance by the United Nations (confront the Universal Declaration of Human Rights practically accepting colonialism in 1948 via its article 2.2: “No distinction shall be made [among persons] on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”). Now, from the two principal Covenants on Human Rights in 1966, a relation may be perceived between the political overcoming of colonialism and human possibility for individuals’ rights. These human rights instruments conceive this link by presenting peoples’ right as a basis and requirement of individuals’ rights. The former is the first article for the latter. “All peoples” however, the subjects entitled to self-determination, turns out to be only certain peoples, for they are not indigenous. Notwithstanding the International Labour Organisation Convention on Indigenous and Tribal Peoples in Independent Countries, the colonial issue of pending constituency that is still hanging over States like Peru (or like Sweden) is still blindfolded.

Is there any sense in the blatant contradiction of identifying as

a people in language something which is not recognised as such by law, as the aforesaid convention does? It may make sense if the text is viewed within the context of other texts, or in successive linked contexts pertaining to the International Labour Organisation itself and to the United Nations as the body or set of bodies genuinely responsible in the production and development of international law. It is no time for digressing and repeating⁽⁹⁵⁾. Let us keep to Peru. For its own constituency, the historical structuring or lack of it is still stronger than present determinations, be they electoral or otherwise. As a matter of fact, we cannot keep to Peru, because there, in Peruvian inconstituency, colonial European responsibility still exists and even functions. This is how we come to view the postcolonial virtuality of an international law which of course does not only concern Peru. We shall consider pending, past and present links between America and Europe in order to situate ourselves and improve our vision.

As its very name indicates, the International Labour Organisation is only a specialized agency in the international field. It was so from its beginnings as a subsidiary body of the *Société des Nations* or League of Nations in the twenties, and it continued to be so when it was incorporated into the United Nations. This means that its authority covers the areas of its nominal topic, that is, labour. Regarding the possible rights of peoples as such, it was and is of itself only able to say what it has already said. This is basically that it lacks the power to innovate regarding these collective subjects, the peoples as such, in the international sphere. What is remarkable is that it has been able to go on to tackle, beyond labour, the rights of indigenous peoples, yet, to start with, it states that they lack the first of all human rights, the one to self-determination (“the use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law”). An entire colonial history is still enclosed here which with respect to indigenous peoples and not others, has led to the International Labour Organisation, rather than the United

⁽⁹⁵⁾ For further lines of argument and references, I can refer to B. CLAVERO, *Ama Llunku, Abya Yala*, particularly its first chapter; or even to a mere introduction: *Diritto della Società Internazionale*, Milan 1995.

Nations themselves, taking charge of more responsibilities other than labour. This has created difficulties, but has not been an obstacle for the whole question to be dealt with in the international scenario ⁽⁹⁶⁾.

If a challenge exists, and it appears to, it is for the United Nations themselves, the source and authority for the Universal Declaration of Human Rights and for the entire body that develops, and sometimes rectifies, the human rights law that has developed the former until today. Although the declaration avoided this challenge more than half a century ago, it has been facing up to it since then. Since the sixties the United Nations have made the aforesaid pronouncement on the right of peoples to self-determination, contained in the portico of the main human rights covenants as a fundamental condition for the full deployment of individuals' rights. Indigenous peoples have been excluded since the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (article 1: "The subjection of peoples to *alien* subjugation, domination and exploitation constitutes a denial of fundamental human rights..."; my italics for "alien", a qualification constructed by the United Nations as if it excluded indigenous peoples located inside state frontiers).

Since the sixties, the United Nations have also been seeking to accommodate those who have no place in this panorama, the cultural and political groups not identified or recognized as States or peoples, such as the indigenous. This is what article 27 of the Covenant on Civil and Political Rights is for: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". Prior to mentioning other peculiarities, observe what occurs later with this text, when in 1989, it is repeated for children and adolescents in the human rights instrument which does away

⁽⁹⁶⁾ L. RODRÍGUEZ PIÑERO, *Between Policy and Rights*, quoted, reconstructs the process of the ILO's assuming worldwide authority in indigenous matters, since its beginnings in what was still an openly colonial period, and for reasons which are of a complex colonial nature, with the Latin American case as actual protagonist.

with the traditional problem of the under-aged child regarding the denial or withdrawal of rights, the Covenant on the Rights of Children in its article 30: "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language".

What is happening at the heart of the United Nations to produce from 1966 to 1989 this shift of language which implies a differentiation between ethnic, religious or linguistic *minorities* (as they are still called) and what are now termed *indigenous*? It is simply that there is now an awareness that there are *peoples* in the meaning given by the International Labour Organisation in the aforementioned convention⁽⁹⁷⁾. But there is still not a full and coherent rectification. It is sufficient to take a look at the 1992 Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities developed from the previously quoted article 27 of the Covenant on Civil and Political Rights. The declaration is clearly even more limited than the extensive interpretation given to the said article within the United Nations by the Human Rights Committee, the jurisdiction for this covenant⁽⁹⁸⁾.

We should also be aware of a more persistent element. Just as in this article and in its version for children, the subject entitled to rights is, strictly speaking, exclusively the individual, the *person belonging to a minority*, although not alone but *in community with the other members of his or her group*, naturally for the exercise of a right such as to one's own culture. With this extreme individuality of the very subject, there is no link here with the right of peoples to self-determination which might form the condition for institutional cover of the cultural environment for the individual's rights themselves, when the latter are unprotected by the State or by any other

⁽⁹⁷⁾ S. JAMES ANAYA, *Indigenous peoples in International Law*, New York 1996; F. MACKAY, *Los derechos de los pueblos indígenas*, adds information, also concerning the European position, pp. 319-322.

⁽⁹⁸⁾ DOMINIC MCGOLDRICK, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights. With an updated Introduction*, Oxford 1994, pp. 14-16 and 247-268.

political body belonging to the same individual's culture. The distinction between individual and collective rights need not be considered as a contradiction when they mutually endorse each other. This is well known by States whose existence, with the empowerment it implies, has no other legitimization and objective than to protect, guarantee and foster the rights of respective individuals, their citizens. The main Human Rights Covenants, those on Civil and Political Rights, and on Economic, Social and Cultural Rights, convey the message with their aforementioned common first article concerning the human right of free determination of peoples as portico for the very deployment of individual human rights. The one concerning people who identify with a culture which is different from that of the State is included here, among the individual's rights, without relation to the premise of the right to self-determination.

An unquestionably new insinuation is to be found in the very name given to the specific charter concerning so-called minorities, the 1992 Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities. Thus, it states that minorities may also be deemed *national*, not just *ethnic*. The same international institution or set of institutions, whose very own name identifies *nation* with *state*, does so; the United Nations which unites States, not exactly peoples. It likewise seems constitutively incapable of offering what it does not possess, a form of constituency which might not necessarily arise from the constituted States. Nevertheless, the decolonisation process that has occurred under the United Nations' authority since the sixties proved for better or worse that there are institutions which may, if not rise above themselves, at least not fall short of their constituent parts. And the unresolved matter concerning indigenous peoples continues to challenge both the United Nations and the constituent States or their Unions, like the European, still as an after-effect of colonialism.

These problems have been discussed by the international organisation since the eighties in a way which is of general interest to peoples who are not recognised and entitled as such⁽⁹⁹⁾. Formal

(99) HURST HANNUM, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, Philadelphia 1990; GIUSEPPE PALMISANO, *Nazioni Unite e autodeterminazione interna. Il principio alla luce degli strumenti rilevanti dell'ONU*,

consideration is now being given to a possible Declaration on the Rights of Indigenous Peoples that would place them on a level with non-indigenous as regards the right to free determination, and would endow them with international guarantees if they opt for autonomy inside the constituted States. There still remain serious doubts as to what degree of equality would be effective, but at least the equation would be virtual. We already know that virtuality can announce reality ⁽¹⁰⁰⁾.

It is a challenge for individual human rights, and the collective human rights which they are in need of. International law, as represented by the United Nations, considers this to be the case, if not yet in practice, at least theoretically and thus virtually. It is post-colonial virtuality. It must always be remembered that, as the United Nations has proclaimed since the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, its foundation is none other than that of individual human rights which, according to what has been established by the main covenants since 1966, require the premise of peoples' rights. There are no (nor should there be any) other international standards for the specification of subjects entitled to human or fundamental rights — citizenships collectively as well as persons individually. The latter can be taken for granted, but the former (the constituent agencies) need shared, international regulations. The same term “international” meaning “supra-state” is nowadays all too ambiguous and leads to confusion. Human rights standards as common standards for all, persons and peoples, are enough — they should be enough.

It should not be assumed that the United Nations are unceasing in their efforts to carry out their supreme ruling, human rights, as the basis for their own legitimization and functioning ⁽¹⁰¹⁾. Without

Milano 1997; THOMAS D. MUSGRAVE, *Self-Determination and National Minorities*, Oxford 1997.

⁽¹⁰⁰⁾ The text of the current project can be found in S.J. ANAYA, *Indigenous Peoples in International Law*; in Spanish, in F. MACKEY, *Los derechos de los pueblos indígenas*. The international instruments in force today which I have quoted are readily available in any compilation of human rights, either in print or on the web.

⁽¹⁰¹⁾ Since I base these thoughts above all on knowledge gained from my own personal experience, I will add a recent example. As an advisor for UNICEF, the United Nations Children's Fund, in mid-January 2001 I took part in a workshop with the

going any further, the strong presence of the United Nations (with its financial and technical assistance) in the Peruvian elections showed no special sign of concern regarding the norms and practice of human rights as a basic element for the organisation itself and the electoral process. “Elections are human rights events”. If any of the international presences distinguished itself in these matters, one could say without fear of contradiction that it was precisely the European observation⁽¹⁰²⁾. Nevertheless, as far as we are concerned, as I have already pointed out, this attention fell short on the problem of lack of constituency not only because it was beyond the electoral supervision’s very authority, but also and above all because it lacked the international standard which might have derived from

various United Nations agencies present in Bolivia for the putting into practice among them of the UNDAF, the United Nations Development and Assistance Framework, with the specific aim of enforcing the very commitment to human rights. The sessions’ progress made clear the extent to which the initiative was not at all unnecessary. On the part of the UNDP (the United Nations Development Programme), whose responsibilities include electoral assistance, there came a request for forms for propagandist introductions on human rights in their economic documents and no more. Their specific argument was that in countries such as Bolivia, it is impossible to go further (i.e. be more demanding) in programmes for assistance and promotion, concerning principles such as the compensatory promotion of female workers or the total eradication of child labour. For these purposes there is no lack of those who question such imperatives, arguing respect towards cultures or societies where children play a role in family or community work, as if there were no room for dialogue and self-management in co-operation, or for means and methods of evolution and change, all the more responsible and determined for their being endogenous and assumed. One-sidedness, either due to bureaucratic inertia or to the impatience of voluntary services, is the main handicap of co-operation itself.

⁽¹⁰²⁾ This does not only concern the already mentioned section of the *Framework of human rights* on the European observation’s website, but also the attention paid throughout the process by means of diverse statements and declarations, together with the chapter on *Rights and electoral discrimination* of the final report, all of which is also present on the web, as we already know. It should also be said that we, European observers, had a certain handicap: the core team in the field did not only project an inevitably European image, but one that was also unnecessarily masculine, which added to the already mentioned fact that all the European ambassadors to Peru were men. During the lengthy electoral period, in the transition situation, there were civic initiatives and meetings on human rights, and above all concerning the as yet unclarified extremely serious infringements committed during the last two decades. From what I saw, no UN or OAS personnel in the field regularly attended or showed interest in these meetings. I shall return to this point.

sufficient awareness of the question of inconstituency as one pertaining to human rights.

Let us generalise, for it is another way to virtualise. States, whether joined together in the United Nations or in any more limited and densely woven complex like the European Union, or taken separately, are not able or willing nowadays to face the human rights question of constituencies, for the fable tells of them, the States. This does not mean to say that it is impossible, just that it is problematic. Constituencies themselves are challenged, in the as yet somewhat virtual citizenships of the respective States, and also beyond their frontiers. This is not a bad thing either. It is the most democratic after all. Europe itself warned us that “democracy cannot be imposed”. This warning should not be necessary. It is obvious, but the European trend has been precisely that of imposing and asserting itself, not respecting and backing foreign constituencies, to the point it reaches in the colonial origin of the American inconstituencies themselves.

However, bearing responsibility and being responsible do not add up to the same thing. You pay for one and shoulder the other. Co-operation is due without compensation and with clear conditions under the common norms of human rights and not of other international standards or another conditionality, be it democratic or otherwise. Today’s more or less virtual citizenships are supposed to uphold their own polity so that they may be effective. The problem lies in the fact that for the party which shoulders responsibility and also the one which is responsible, the question of constituency still embraces states’ fiction more than peoples’ realism. A fair statement on proper elections, such as the European report on 2001-Peru, might create an alibi for an appalling constituency or blatant inconstituency ⁽¹⁰³⁾.

We have virtual rectifications on the move, although they are far from being a common and safe course. First and foremost, there are

⁽¹⁰³⁾ It will by now be no surprise that neither the general or indigenous constituency question is completely imperceptible to the American electoral observation practice. There is proof if necessary in the collection K.J. MIDDLEBROOK (ed.), *Electoral Observation and Democratic Transitions*, despite specific studies of cases such as the Mexican or Nicaraguan.

two evident fundamental principles defining the post-colonial model, this specific virtuality: “Elections are human rights events” and “Democracy cannot be imposed”. *Human right* is also every people’s right to its own constituency, to a democracy that cannot even be imposed by the corresponding State through mandatory suffrage or otherwise, especially when it is in disagreement — as is often the logical case with indigenous peoples. This would harm not only a collective right but also individual’s rights. The way in which Peru’s lack of constituency appears to be supported has offered us a most eloquent example.

There are further examples of connected progress in the making. I shall not insist upon the most relevant one for the present situation of human rights regulations, dealing with the differentiation of category (though not yet categorical), between on the one hand the so-called national minorities, as groups formed through their own migratory movements or through the outlining of state frontiers, and on the other hand, the indigenous peoples, as pre-existing groups with regard to colonialism. The latter, and not the former, face the challenge of constituency. We have observed that the European Union has, at least in theory, assumed the distinction, though not the consequence and not always the principle in either external or internal practice ⁽¹⁰⁴⁾.

The greatest and often underlying internal resistance (with unavoidable external implications) to people’s constituencies still comes from States, including those of the Union itself. They consider themselves to be properly constituted, even for historical

⁽¹⁰⁴⁾ In contrast with the still usual trend towards reducing the distinction which is followed by those who take the matter seriously in America, see RICHARD SPAULDING, *Peoples as National Minorities. A Review of Will Kymlicka’s Arguments for Aboriginal Rights from a Self-Determination Perspective*, in *University of Toronto Law Journal*, 47, 1997, pp. 35-113. Kymlicka is certainly today’s most noted representative of both serious tackling of the issue and of reducing the category, although he allows more and more scope for *indigenous people* regarding *national* minority: W. KYMLICKA, *American Multiculturalism and the “Nations Within”*, in Duncan Ivison, PAUL PATTON Y WILL SANDERS (eds.), *Political Theory and the Rights of Indigenous Peoples*, Cambridge 2000, pp. 216-236. See also his (Kymlicka’s) *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*, Oxford 2001, pp. 241-253 and 275-289, in direct confrontation particularly with THOMAS M. FRANCK, *The Empowered Self: Law and Society in the Age of Individualism*, Oxford 1999, pp. 224-254.

reasons which they nevertheless deny, or cannot even imagine for those peoples who are not politically incorporated among their congeners as States. Sweden is not an exceptional case. In Europe, the same use of the past as an implicit title to exclusive peoples' rights as being constituent of the States themselves is all the more possible for its being imaginable, for the cultivation of each State's unique image of itself as individual polity, and not because its corresponding past is less problematic in itself for purposes of constituency⁽¹⁰⁵⁾.

Imagined history may provide a better or worse virtual constituency, and real history a better or worse positive constitutional law. The actuality of the latter may of course brace the virtuality of the former. An unhealthy inconstituency may become a healthy constituency through its own development of an adequate constitutionalism. Around two hundred years ago when the States were constituted, not one was constituted in the least democratic way or with any concern for rights that were not reserved to a very restricted citizenship. There was not one polity which came close to a majority of the adult population. Women, workers and aliens, even internal ones, were excluded. Those who had been, or were still in servitude, those who were employed, those who did not share in the predominant culture, and also simply because of their sex, women, had no individual credit by constitutional law. They were not entitled to rights, political or otherwise. In America as much as in Europe, the social subject constituting States has been the free male owner with an excluding European culture⁽¹⁰⁶⁾.

Here they are today, the American and European States consti-

⁽¹⁰⁵⁾ In the case of Spain, this question has been the subject of much discussion in recent decades. Let us register only, amidst a profuse and erratic bibliography, JOSÉ RABASA, *Inventing America. Spanish Historiography and the Formation of Eurocentrism*, Norman 1993; IGNACIO PEIRÓ, *Los guardianes de la historia. La historiografía académica de la Restauración*, Zaragoza 1995; CAROLYN P. BOYD, *Historia Patria. Política, historia e identidad nacional en España, 1875-1975*, Barcelona 2000; JUAN SISINIO PÉREZ GARZÓN, EDUARDO MANZANO, RAMÓN LÓPEZ FACAL Y AURORA RIVIÈRE, *La gestión de la memoria. La historia de España al servicio del poder*, Barcelona 2000, and so on at the entrance of the third millennium.

⁽¹⁰⁶⁾ I can refer to my *Happy Constitution*, pp. 11-40; and now also to *Freedom's Law and Oeconomical Status. The Euroamerican Constitutional Moment in the 18th Century*, in these "Quaderni Fiorentini", 30, 2001, pp. 81-135.

tuted in theory on different principles, as the original ones seem nowadays completely inappropriate. They were established on such foundations, but their respective constitutional histories have been able to expand citizenships with no need of constituent enactment or express recognition in all cases and on all occasions ⁽¹⁰⁷⁾. Nevertheless, just as we have observed in Peru concerning the failed effects arising from constitutional awareness of indigenous presence, there is no case which encourages reflection and reconstitution, reconsideration of the entire system in the light of the backgrounds and changes, roots and evolutions, of the respective constituency or rather constituencies, all in the plural ⁽¹⁰⁸⁾. It may be that not only the American States, both Latin and Anglo, need to apply the constitutional fable of post-colonial virtuality to themselves.

In America as in Europe, past history is of course less important than present law. In either of them, just as in other parts, the former may be of interest to the citizenship in as far as it still affects the latter, with its fundamental effect precisely in the field of constituency. The common test nowadays should be not of roots and backgrounds, but of changes and evolutions; not of origins, but of practices; not of history, but of law, or rather of rights. If the result is positive, in the best case, but with no reflection on the constituency, itself limited to a particular history of States as nations in the

⁽¹⁰⁷⁾ In America, the United States' problem concerning constituent exclusion of indigenous, slaves and women has been faced head on by BRUCE ACKERMAN, *We the people*, vol. I, *Foundations*, Cambridge, Massachusetts, 1991, considering it as settled by virtue of its own constitutional history, with abolition and equality, although the latter has not yet been a formal amendment, whence he infers that there remains no question of constituency. From past evident inconstituency to current supposed constituency, he moreover precisely forgets the indigenous case. In order to appreciate the denial of basic constituent rethinking at the crucial moment of the abolition of slavery, EARL M. MATZ, *Civil Rights, the Constitution, and Congress, 1836-1869*, Lawrence 1990. Ackerman argues that re-constituent changes are achieved with no need of constitutional reforms, or for the very amendments to formally go so far, which seems as historically verifiable as it is legally misleading. That which is not explicit cancels what must be reflective, robbing it of its very virtuality. What better proof can there be than that of the Afro-American history of deprivation of constitutional rights following the abolition of slavery, despite the respective constitutional amendments in this case?

⁽¹⁰⁸⁾ I intend to reflect on all of this in *Constituyencia de derechos entre América y Europa: Bill of Rights, We the People, Freedom's Law, American Constitution, Constitution of Europe*, in these "Quaderni Fiorentini", 29, 2000, pp. 87-171.

singular, how can any model be presented or adopted? How can a healthy constituency of proper democracy and human rights (of both peoples and individuals) be shared if one does not even possess this foundation? The extent to which it may be achieved in each case, American or European, is not the issue here. We are dealing with virtualities, not other kinds of reality ⁽¹⁰⁹⁾.

As a requirement for legitimacy, law needs formal and effective constituency, the basis and agency of citizenships entitled to individual's rights with no discrimination, including the fundamental right to one's own culture and thus requiring collective empowerment for the very purpose of protection, guarantee and fostering of the same rights, that is, of peoples' and individuals' liberties. This is not usually considered or imagined in properly constituent, constitutional and legal terms according to our virtually post-colonial contemporariness. The problem is not even seen as a present and fundamental matter for constitutional law, one's own and that of others, common and shared; the law that must be based on the supra-state nature of human rights, to the exclusion of any other more or less refined or selective standard, however internationally proclaimed or constructed, and however national it is presumed to be.

7. *Rights make might: freedoms and elections, citizenships and peoples.*

Unresolved and pending constituencies, responsible citizenships, peoples in a word, may also be virtual in a dual sense which is moreover contrasting: through their constituent non-existence or through their constitutional existence. The former is more evident. Constitutions as not just normative, but also performative and even propagandist texts, create a virtualised image of the State which starts by imagining the no less virtual citizenship, that is, the non-existent constituency. But all this is also a form of reality, as we are well aware, which does not prevent this virtuality from still being

⁽¹⁰⁹⁾ You may confront THOMAS CAROTHERS, *Aiding Democracy Abroad: The Learning Curve*, Washington 1999, or even PHILIP ALSTON (ed.), *Promoting Human Rights through Bill of Rights: Comparative Perspectives*, New York 1999.

unreal, or from being as yet largely no more than wishful thinking. There are States which become impatient when they endeavour to impose the image of citizenship with devices such as mandatory voting accompanied by military monitoring. This is the neither innocent nor harmless virtuality of citizenship as non-existent constituency.

We already know that neither citizenship as the entitled subject, nor suffrage as the democratic method, and constituency as the pillar, are to be imposed. On the contrary, they are supposed to be free, according to rights. Legitimacy is otherwise impossible. So therefore, if such a support has to be credited, such a procedure must be respected, and such a subject is to be held, without civic free agency, with devices such as mandatory voting and military monitoring, with this practical non-existence of citizenship, there is no possible way either for concerned or co-operating States. Complicity among them is all that remains. Electoral observation becomes particularly susceptible to this purpose of collusion. If this particular kind of co-operation does not clearly demand and specify its *human rights standards*, allowing the misuse of less rightful and more political standards, distinct *international standards*, the real tasks of electoral observation may easily turn into leniency before delays or even stoppages under the challenge of a real lack of constituency, with the subsequent harm this would cause for merely virtual citizenship.

Constituency, democracy and citizenship may also be virtual in another sense, contrary to the one I have first stated. In order to exist through legitimising, supporting and setting institutions in motion, virtual constituencies do not always need to perform openly as such, for example through plebiscites or constituent suffrage. There is another way which is also virtual in nature. There are common periodic elections with basis and through procedures by possible constituency, not yet an actual one. This very possibility is the decisive factor. It does not identify completely with the electoral moment. Elections are one of its ways. Citizenship acts as a constituent subject also through the habitual exercise of individual liberties, showing confidence in the existing recognitions, coverage and guarantees, that is, in the given scenario. If this is so, and in no other cases (not in the case of mandatory suffrage and military

monitoring), current constitutionalism is able to improve historical constituency despite its present virtuality. No religion has an unredeemable original sin, just as no law has an untreatable constituent deficiency.

When this civic attitude and constitutional behaviour by virtual constituency do not turn out to be the evidence which is observed, the presumption of improvement is not, or should not be possible. It would in any case be premature and maybe inadmissible. If we encounter a case (such as the Peruvian) of respect for strictly electoral liberties of political agents together with hindrances to the habitual freedoms of common citizenship, we are in all probability facing a sign, and perhaps proof, of the covering up and repression of a true underlying lack of constituency, with no possible virtuality left under these approaches and practices. Furthermore, if this were evidence in any case of deeply pluricultural environment (such as the Peruvian), with the State leaning towards just one single culture, leaving all the rest with serious problems for the exercise of individual liberties under collective coverage, then there would not be the slightest doubt about the lack of both constituency and virtuality. Then, electoral observation can hardly avoid political complicity. It is needless to conclude that such was the case of Peru-2001 despite the efforts of the European observation.

There is a European consciousness. The European Union is growing aware ahead of the constituent members, the States. Its luggage load is lighter. Although all suffer it, the Union, more than the States, is also facing an underlying challenge. It is the ordeal of its own lack of constituency as Union among States, the defiance of inconstituency in brief. With different formulae insofar as they are more complex and less oppressive than those which are the standard fare, even the suggestions of federal recipes accompanied so far by all their known and tried dressings, the European constituency challenge today occupies more of the limelight than the States'. It is a question on the Union's agenda. Thus, while the electoral observation proceeded in Peru, the European Union provided us with a really unstructured or virtually unconstituted image of itself. There is no lack of anecdotes which are really categories. In one's own eye and body, just as in those of both neighbours and aliens, inconstituency is a burdensome beam and a blinding mote.

Even the United Nations, with its constituency of States, with its own citizenships or peoples' inconstituency, is unable to provide formulae, although it can of course recognise rights. It wrongfully attempts both, as occurred with de-colonisation. Yet neither the United Nations as a coming together of States, nor the States themselves, with their upside down virtual images of respective citizenships (the latter depending on the former, the constituencies on the States, and not the other way round) may become exclusive constituent agents. They try to do so at the risk of reproducing and even aggravating the common problems of the lack of constituency, in all its extent and varieties. Only citizenships may identify themselves, expressly through suffrage or implicitly through liberties, as constituencies without burdens or dependencies such as mandatory voting and military monitoring. Citizenships which are merely mirror images of States, individual or forming regional or widespread unions, including the United Nations, can hardly become constituencies. In its limited way, the European Union virtually warned us when it backed up its electoral observation programme in support of democracy and fostering of rights. *Human rights standards* are the best warning.

Since unconsciousness is disabling in its blindness and awareness is the prerequisite to achieve sight, our task here is to identify the disorder and diagnose the disease, not analyse the virus and treat the malaise. It should be observed that in its practice and theory, rules and doctrines, constitutionalism does not usually consider the issue of constituency, even when it recognises (sometimes only paying tribute to) the most suitable foundation, the suprapstate character of human rights. The problem is the weakness or even lack of a constituent thinking as the appropriate first element of constitutional law. The imagined construct of Nations as constituted constituting agents weighs heavily, as does the established and also figurative reality of the States. This is the usual scenario even when constitutionalism faces an explicit question of constituency, whatever the wording.

There is bibliography on so-called minorities described as ethnic or even national, and on their rights regarding constituted States, including occasionally the consideration of a possible title of secession from the given reality of the existing States, the Nations with a

capital letter, in order to add another one. The very terminology in use depends on this state or national scenario, with equivalence between State and Nation. Literature abounds on the subject of people's right to self-determination in the same context and even the same perspective — the constitution of States. De-colonisation is also re-examined as other possibilities of peoples' determination are usually recovered in this same universe, characterised by States' paradigms. Is this all ⁽¹¹⁰⁾? This is as far as my knowledge reaches. Nevertheless, we may have something further yet.

There is now a flourishing area of publishing on pluriculturalism which does not limit itself to contemplating cultures in the plural but also, even above all, devices for establishment and processes for co-ordination both inside and outside the States, although usually in the scenario that they design. Let us leave aside the amateurishness inspired by today's multicultural boom, be it for or against. We should always consider the virtuality. All this clearly affects constitutional matters and continuously borders on the constituent issue, although this has still not been definitely tackled in its entire juridical dimension both procedural and substantial. If this last or rather first point is beginning to come to our notice, nothing more for now, it is precisely thanks to and by way of the inconstituency issue in the case of indigenous peoples ⁽¹¹¹⁾.

More remains to be tackled and it may be the fundamental part. No thought is given, just as practice fails, concerning the self-determination of all subjects entitled to rights, of everyone of them (including as collective subjects both "all peoples" and the so-called minorities in their widely varying conditions, above all regarding

⁽¹¹⁰⁾ The caveat is not a merely stylistic clause. This paper's set of notes, including references to my own work, offers proof of the size or maybe instead the limitations of my knowledge. It is up to the reader's judgment. There would be no point in recording an intentionally exhaustive literature if it had not been consulted or checked, for aside from being of greatly diminished use with today's computer resources also for bibliographical information, it might hold unforeseen surprises. Fortunately this sometimes happens.

⁽¹¹¹⁾ A previously mentioned collective volume, D. IVISON, P. PATTON Y W. SANDERS (eds.), *Political Theory and the Rights of Indigenous Peoples*, provides good testimony, thinking and information, including its references, although it is still excessively (considering the implications of the matter) attached to individual histories and cases among which those of Latin America are strikingly absent.

their identification or disaffection regarding the current respective State), and also or mainly concerning the authorizing of procedures for the credit and exercise of the right to one's own constituency in extremely varying conditions and expectations. They may turn out to be very different prospects without being written down in more or less accredited state formulae for the protection and fostering of rights. In existing literature, there is a particular failure to achieve connection, compatibility and co-ordination between the individual's rights and collective powers as a constituent question. According to foreseeable human rights, not for their current stance, both all peoples and all so-called minorities may legitimately represent virtual constituencies. Here virtuality means a moment which ought to be and is not yet post-colonial, such as the present.

There is a lack of constituency practice and an excess of constitutionalist pretension. There are too many cunning substitute approaches on States' (or Nations') grounds. The endeavour to divide and not relate individuality and community is noteworthy among those who start by detaching the State from all the other collective subjects, as if its very existence exempted it, and only it, among the whole set of human social bodies, from the need for constituent legitimisation. It is not just amateurs who waver between individuals' rights and collective rights, treating them as mutually excluding, as if they did not endorse and need each other, as if humanity were not made up of mutually dependent individuals and cultures, persons and constituencies that improve each other. Where there is no society-making culture, no human can become an individual.

Constitutionalist literature, which should get the message, does not do so. What usually transpires is that it does not even consider these questions of so-called people's self-determination, of the empowerment of what are known as minorities, of identification of cultures with equality of juridical principles among them. Once the scenario and direction are cleared, the problems of practical implementations in its extremely varying conditions are up to the very self-determination, to the responsibility of the respective constituencies. In the constitutionalist context instead, in constitutional literature, the entire matter is deemed and constructed as political facts or cultural circumstances rather than constituent titles to collective rights or powers needed by the individual's rights or

liberties. For State or Nation, right disappears from the constituent scenario in its collective magnitude.

Although not so brutally expressed, it is taken almost for granted at least among constitutionalists that, as the proverb says, “might makes right”, that the politics of States’ (or Nations’) empowerment are the constituent foundation for rights to liberty, instead of *human rights* with democracy as an immediate result, so immediate as to begin by the determination of the constituency⁽¹¹²⁾. “Right makes might”, or rather “rights make powers” in the plural, checked and balanced on behalf of freedom, is what should be understood instead. It is human rights that should occasion and condition constitutional powers, and not the other way round. When rights to liberty do not constitute a binding premise for all law, but instead a reversed determination usually coming from political decisions (even through democratic elections), this simple fact is sufficient to set law, justice and government over the liberties themselves. It can easily do so mostly when political decisions are constituent. Democracy itself offers no remedy if its very practice is not conceived and realised as a requirement and instrument of human rights, both individual and collective. The measure of democracy cannot be Nations’ (or States’) determination.

All this is entirely a constitutional problem which constitutionalism is reluctant to deal with. The thinking and teaching of constitutional law usually begin with virtually constituted powers, with nation (or state) premises in whose image and likeness constituent citizenship itself is conceived and called to vote, which is not quite so clear from democratic requirements. Thus, we have a fictitious anthropology (the conception of the human individual disconnected from cultural community) leading to constitutional ignorance of citizenship’s right to constituency. There is still a considerable amount of constitutional doctrine which maintains and assumes that without this so-called national, politically established basis, the

⁽¹¹²⁾ I confess that the first time I encountered the equation between *might* and *right* was not in any legal or political text, but in real literature, in HERMAN MELVILLE’S *Moby Dick*, in the opening anthology of writings about huge monsters such as the biblical *Leviathan*, also Thomas Hobbes’, in the final poem of the collection, *where might is right*.

possibility of even individual's rights does not exist. This teaching is wont to add that collective rights are inadmissible in this initial constitutional area, the constituent bootstrap. Thus, existing Nations (or States) have been established, and not others as holders of political powers or, in constitutional terms, as agents of collective rights which are really necessary for freedom of the individual, the citizen living in the midst of particular cultures, not a non-existent global society, be it called humanity.

In such a scenario, the international law of human rights does not achieve sufficient recognition of its normative value either. This basic referent for humankind, virtual as plausible and realistic as feasible, is not properly welcomed as a fundamental element, with its current development, for constitutionalism itself. Neither does this international normative body, for its part, take charge of serious and unresolved challenges, among which precisely constituent law is to be found; the right to free determination of citizenships as constituencies, under legal rules rather than discretionary powers, the law being of course that of human rights. If elections are "human rights events", what are constituent determinations but the highest *human rights events*? As documents on electoral observation from the European Union have highlighted, the respective standards are duly phrased since the Universal Declaration of Human Rights through article 21: "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives... The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures". The first shared article of the Covenants on Civil and Political, and on Economic, Social and Cultural Rights, must be added of course: "All peoples have the right of self-determination". It is the aim of democracy linked to human rights, as constituency is supposed to be.

Here we have *human rights standards*, the ones we know as democratic rules for the European Union's co-operative policy. The fable talks of everybody, but constituted democracy usually shows otherwise both in Europe and in America. Among States (or Nations), there exists, if not always a failed response to human rights standards, at least a reluctance to recognise that they are never at

their disposal. They do not approach their own constituency from these suprastate standards which might be true juridical rulings. Human rights are not at the disposal of citizenships' self-determination. Democracy is not constitutionally defined by the political rule of majorities, but by the legal framework of rights, of which this same majority principle for a proper constituency is a determined and limited consequence. There is no other. *Rights rule democracy*. If *human rights standards* must prevail for constituted polity, exactly the same is true for constituent democracy. There are no other legitimating principles, no other constitutional bases.

“Right makes right”. “Rights make powers”. Democracy is not the mere determination of social majorities, neither of cultural minorities, however much they rely on history and its images. It has its rules, it must have them, as regards the very recognition of constituent subjects, and also conditions and procedures of constituent determination, included for the usual case of combination and articulation of more or less densely interrelated peoples as constituencies in the plural. There must also be rules as regards the constituent links between individuals' rights or powers, on the one hand, and collective powers or rights, on the other, so that the former might always be covered and guaranteed by the latter. Furthermore, there must be rules for recognition of virtual citizenships constituting themselves by means of trusting exercise of common liberties, political and personal, without collateral discriminatory effects against differentiated groups, indigenous or other, and so on. All of this is the *constituent law*, under the *human rights standards*, that we are in need of.

Among the problems which may be *constituent* in nature, electoral observation itself, particularly the international kind, is sometimes involved. This usually occurs in situations of transition, and thus potentially constituent, although the elections are not formal as regards this effect, as has been the case of Peru. Moreover, as we already know by now, ordinary elections always contain some form of display of constituency. It may be positive, because of this trusting exercise of freedom of participation among other civic liberties. On the other hand, it may be negative, when it represents a sign or even proof of inconstitency, as the Peruvian case seems to be. Thus, international observation represents a presence which,

even when scrupulous and respectful, affects the process of citizen determination in an alien constituency or maybe inconstituency. This may even be foreseen. We observed it in the European Union's approach. It is not merely a question of observing and submitting a report on an electoral process, but also of discouraging irregularities, lessening conflicts and inspiring trust in its process. Experience has shown that foreign observation affects elections through just putting in an appearance and much more for all further performances. If it does not restrain itself, more serious interference is inevitable.

In the Peruvian case, there was more than the offer of credibility by the foreign presence. In full campaign, between the first and second rounds of the presidential elections, a current of discontent burst onto the scene, proposing blank or spoiled ballots, not only as a way of expressing opposition to what was now the only remaining alternative between two political options not including the right wing, in accordance with the suffrage pronouncement in the first round. It was also an attempt to annul the presidential election, because as Peru has a mandatory voting system, it takes precautions that provide for the invalidity of the suffrage itself if a certain percentage of invalidated votes is reached. Alarmed at this remote possibility, the Organisation of American States observation publicly repeated their opinion that, as voting was obligatory, the clear and valid option between the two electoral final offers for the presidency should also be considered binding — despite the secret nature of voting. The chief American observer (from Guatemala, in fact) openly declared the illegitimacy of the electoral option for blank or spoiled votes in the second round. This did not transform the all-American international presence into a political agent within the Peruvian electoral process, for as we know by now, it was so already.

The European observation publicly adopted the role of defending the right to silence, to blank and even spoiled votes, in general and, more so, whenever voting itself is not free, as in Peru. It agreed that the public show of dissatisfaction with the citizens' decision by rejecting the result of a first round, together with attempting to get the second annulled, might not be very democratic behaviour. It also considered that there may be delicate situations where civic responsibility calls for not only free participation, but also (as the Peruvian transition might be) a real option between electoral offers. If all this,

ranging from the American onslaught to the European devious lightness, is not meddling, what would it take? In fact, public opinion, or a certain part of it, showed signs (through letters to the press and through other means) of interpreting it as interference against the Peruvian citizenship's self-determination ⁽¹¹³⁾.

There were more moments of possible or even evident interference. The electoral administration encountered serious computer program problems in the results processing system that the United Nations and the Organisation of American States decided to handle behind closed doors, while the European observation resolved to make it public. This latter decision was shown to be sound, not only for its transparency, but also because of the aspect of public and political confidence. There was a growing concern among some of

⁽¹¹³⁾ Just to give an idea, letters from MANUEL ALIAGA to the director of the *Expresso* newspaper on May 20 and May 25, concerning the European observation, concluding: "Do us a favour: comply with the observation tasks that you came here for, but do not raise your finger and publicly evaluate the electoral campaigns that we Peruvians decide to perform". As Peru is in need of international assistance, other papers and magazines restrained themselves from reproducing this type of public reaction. Just as I have mentioned regarding institutional distrust, where one never knows if the main feeling is one of appreciation towards international co-operation or resignation at its being the price for economic assistance, these feelings are not easily measured, because informal conversations with transport, cleaning, administration, hotel, cafeteria and corner store staff are not very trustworthy yardsticks. The difference between observations has not gone unnoticed at least among reporters and also in institutions. The electoral administration body, the National Office of the Electoral Processes, showed both latent resentment to the European Union and open enthusiasm for the Organisation of American States. Some examples were quite graphic, like a final video for self-propaganda producing such unease, even within some other observation teams, that it warranted a formal letter of apology to the European Commission's Delegation in Lima from the National Office of the Electoral Processes. Fortunately by the end, the relations between the European Union and the Organisation of American States observation had returned to better terms within their mutual independence, as shown by the final exchange of formal correspondence, which, given its personal implications, is not included in the appendices of the European report. The Swedish party had found — or put — itself offside, but the chief observer and the embassy on behalf the Presidency of the Council demanded their credit. The members of the European Parliament did not spend enough time in the field to inform or even interest themselves. Caught in the cross fire, the patience of the stable core team made it possible to avoid a serious crisis and keep the European disagreements concerning the observation, throughout its performance, from becoming public in Peru or elsewhere.

the parties and candidates concerning the apparent incompetence of the electoral administration body, which was able to be redirected in less confrontational terms when the real problems, that were serious, were aired⁽¹¹⁴⁾. However, the positive result does not repair the negative excess. The European team might have managed to help restore confidence between, on the one hand, some overbearing international co-operation leadership and a daunted electoral administration, and on the other, some maybe oversensitive political forces whose distrust follows from the harassment and corruption suffered under the Fujimori regime. But is this putting to rights a task corresponding to a party such as foreign observation which is supposed not to interfere at all? The awkward mistakes of others do not necessarily imply one's own wise moves.

Between one event and another, both the domestic and international observations not only behaved inevitably as agents involved in the electoral process, but also publicly reflected on our own actions and responsibilities after preparation and training, work and experience⁽¹¹⁵⁾. As for the European observation at least, it was not only particularly independent and especially prepared in compari-

(114) It has to be taken into account that apart from other means of communication, visits to the European observation's website were recorded, where the most frequent visitors were the main parties participating in the campaign, and mainly to the pages holding our periodic statements. Following Peru, the most frequent visits, about sixty-five per cent, counting all three together, came from, in this order, the United States, Spain and Belgium. The latter is logical in that it is the European headquarters. Throughout the electoral period, the daily average of visits was sixty-two. The presence of the European observation in the press reflected in its own website is not all and has already gone past a hundred entries. This works out at more than one news broadcast, article or interview per day.

(115) Towards the end of the operation, there were notable occasions of common reflection among both heads and deputies of domestic and foreign observations at round tables. One took place in an academic environment, in the Law Faculty of the *Universidad de Lima* on May 29, and another among journalists on June 1st, in the International Press Centre organised during the elections by *PromPerú* (the public agency in charge of the promotion of Peru's image abroad: <http://www.peru.org.pe>). Throughout the operation frequent informative and study meetings were held among observation and electoral assistance agencies, thanks to the initiative and hospitality of the civil association *Transparencia*. The Ombudsman's Office was also a courageous supporter and frequent attendant.

son with its previous operations ⁽¹¹⁶⁾, but also remarkably contemplative in itself, both inwardly and outwardly, among its members as well as with other observations, in other forums and regarding the press media and public opinion ⁽¹¹⁷⁾. Dialogue, which is *human rights standards'* own method, as the European Union told us, was continuous, free-flowing and on many different levels, not only among our own people, nor solely with the institutions.

Let us reflect then. We should continue with the dialogue which started with the operation itself. Let us virtualise it. The aforesaid interference, or as least some of it, might not have been meddling as such in a real sense, but this would only be the case if it were genuinely concerned with human rights, with the virtual standards of foreign presence legitimisation and the virtual sources for the code of international observation conduct. Concerning the question of mandatory voting being extended to the obligation to adopt a specific electoral option, the American stance argued in terms of democracy (through a maximised participation), but not rights,

⁽¹¹⁶⁾ While still in Europe, in Stadtschlaining, Austria, in mid-February, the observation personnel had an initial training seminar. It was organised by SIDA, the already mentioned Swedish agency for international co-operation, as part of a programme developed for training in this specific field of electoral observation. There was no presentation on indigenous presence in Peru, except for references to history and myth, not to present and polity. I posed the question and received a reply: "You are confusing Peru with Bolivia". In Peru, we, the core team, were responsible for organising training sessions and appraisal meetings, without ignoring the indigenous factor.

⁽¹¹⁷⁾ Without wishing to enter into any personal comparison of course, my own curriculum regarding electoral observation was quite scanty. I had only participated as a common observer in the double round of the very general (for they were Central-American and municipal together with parliamentary and presidential) elections in Guatemala in 1995-1996. But the Peru core team and also the observation staff represented a really remarkable amount of well earned experience and proven capacity. For my own part, I am not any known or secret expert in electoral matters either. At the start, I resorted to the generous advice of a good specialist like JOSÉ RAMÓN MONTERO. Concerning my initial limitations, I must also admit that, except its frontier in the vicinity of the Titicaca for I often visit Bolivia (as member of the academic board of the *Universidad de la Cordillera* and as a UNICEF consultant), I had never before set foot in Peru. Among people who showed interest were colleagues in legal history from the *Pontificia Universidad Católica del Perú*, mainly FERNANDO DE TRAZEGNIES, last minister for foreign affairs in the Fujimori government. It was the nature of the regime which discouraged me, though being conscious that this refusal was unfair towards people. More than one candidate failed before the European Commission considered my name.

which would have been difficult, in that this would affect and double obligation, not freedom. In contrast, the European position was able to argue in terms of liberties, placing individual determination first and foremost, and consequently democracy. In this manner it would be possible to refer to human rights for a right to abstention and silence, including blank or even spoiled voting, especially the latter when suffrage is mandatory. After all, elections transfer responsibility and bestow power. *Rights* in general and *elections* in particular “make powers”. They empower institutions. If there is citizenship not wanting this empowerment in general or in the specific case ⁽¹¹⁸⁾, will a fundamental right to non participation not be conceivable and admissible?

Yet the difficulty remains. How can one claim that the right to abstention, or in the case of its being forbidden and penalised, to silence or vote spoiling, constitutes (since it is considered as a liberty in the context of participation) a human right to non participation? Such a thing is difficult to deduce from the present normative body of human rights, and not to be inferred, as far as I can see, from any of its jurisdictional or doctrinal developments. This means that it is a matter of mere opinion with no other authority than its own

⁽¹¹⁸⁾ I am not making speculations. It is also a practical question in a case like the Peruvian. I have already referred to the municipal revocations in order to lessen electoral local empowerments attuned in fact to indigenous practices. They were due in 2001, and delayed to avoid coinciding with the general elections when they were brought forward. The electoral institutions immediately proposed that they should be cancelled, claiming that they were an excessive and costly burden as they received no external aid (they were finally held on 25 November). On the part of Peru, it would not appear to be one of the crucial elements for communities’ constitutional incorporation. On the international side, there is no awareness that, for the sake of democracy itself, local elections might be more important than the general state elections. Along these lines, during the aforesaid indigenous conference on May 25 much importance was attached, as a sign of democracy, to revocation procedures, through new elections, which are allowed against local representatives and not permitted regarding either parliamentarians or presidency. As the vote was not obligatory in the Guatemala case, I witnessed the lively influx in general elections due to the coinciding of municipal ones, in contrast with the poor turnout, outside Guatemala City, during a second round which was just presidential. As I explained elsewhere (*Ama Llunka, Abya Yala*, notes 51, 94, 97 and 98 in the second chapter), I was not in a position, despite my efforts, to be able to contribute to the convenient inclusion of the indigenous question in the European programme in the case of the Guatemala observation, 1995-1996.

capacity of conviction, and therefore extremely inappropriate as an international observation's argument on the grounds of human rights standards.

We must realise that what we have is perhaps a negative deficit and not a positive credit of human rights standards. Whatever the answer may be in cases such as this international meddling regarding the Peruvian citizenship, it indicates that there is still no getting to grips with the whole electoral matter, and no clear statement from the already mentioned set of regulations and corresponding jurisprudence and doctrine. We must never forget that "elections are human rights events", rights events that produce powers. Elections, particularly, involve rights and yield power, both things, in all that directly or indirectly affects constituency. Thus, the question is the uncertainty. Here are *human rights*, specific ones concerning non-participation in voting and empowering, imaginable rights that are by now so vague and precarious that they cannot either function or be activated. They are in a state of absolute virtuality, for the moment in limbo.

Here are the questions then. Why is it that all of this concerning suffrage and observation, citizenship constituency and international co-operation in elections and other democratic issues, is not tackled and dealt with as what it is, as a strictly and basic juridical matter, as a human rights branch of law, as constitutional law in brief? Why does conventional constitutionalism not even give serious consideration to the fact that the rights it deals with are not such because they have been granted or recognised in a particular State's constitutional instrument or constituent text, but simply and above all because they constitute human rights, which furthermore have by now their own set of legal written rules thus prior to constitutions themselves? Constitutions have not yet arrived as far as this even when, as is usual today, they recognise, as a principle in the domestic setting, the supremacy and force of the international law of human rights.

It does not seem difficult to diagnose the legal constituent uncertainty, the current insecurity about the law that might rule constituency. The very existence of such a binding constituent regulation is unsettlingly imaginable by States, somewhat strange for their own image, and practically unthinkable for the predominant legal culture, insofar as it entails the relinquishment of the funda-

mental constitutional right to self-determination, the right of rights deemed and practised as the power to determine constituencies and citizenships by States and not the other way around. As a constitutive form of reference which is customary because it is longstanding for virtual memory and present for real sight, the figure of the State or Nation does not only affect the external evidence of what is visible, but also the internal virtuality of what is thinkable, the very possibility of legal thought by learned minds, not for different mentalities of course. The diagnosis is simple. None of what follows is. The approach, analysis and treatment would be an entirely different matter, but we know that we shall not go into this.

The burden may also be more virtual than realist, more real for its being imagined. Maybe images weigh heavier than other kinds of reality for a panorama of possibilities. There are facts that often become abstracted, theoretically ignored and cancelled. They are normally the very ones that are unfavourable for state claim to excluding constituency in the singular. It is of no use searching through common legal treatises and other learned publications on politics for reliable news and accurate knowledge concerning the plurality of peoples covered by States with unresolved inconstitency affecting each other and everyone in the very field of human rights. You will not find any useful information, let alone analysis and treatment. If reference is made to human reality covered by States, it is as a non-legal matter. When constituent questions are concerned, the space is given over to fiction about history and present produced by the existence of the States, by the abducted minds of their legal and learned human resources. What we find is their virtuality as reality in brief.

The problem is not exactly that the figure of State makes an appearance, but that it does so before constituency. State constitutes people and may therefore recognise, guarantee and foster rights, all but the first one, that of the determination of constituency by citizenship. There is no room left. Thus, the problem lies in the fact that the State or Nation makes its appearance as subject of history and subject of present, both the well-known matter and the pre-constituted agent for constituent purposes, all in the singular even when there is less autistic and better-checked information available.

The problem begins with the lack of competition even in the virtual world of ideas and for the potential capacity of words.

The word *constituency* has a more limited meaning in the field of politics, I know. Usually what it means is constituted and not constituent citizenship, the citizenship that empowers institutions via suffrage, but does not extend to freely creating itself as the segment of humanity which authorises the State. Other European languages, such as French, German, Spanish or Italian, lack an equivalent coining of any word even with this limited meaning. *Constituency* in a stronger sense attempts to say something which is indescribable in any language in a world presided over by the institution of States doubling up as Nations⁽¹¹⁹⁾, thus a truly infantile universe, somewhat lacking in words and without the guileless imagination for conceiving other possibilities, even through the most basic human requirement of liberties. Well, in America as in Europe, we are facing *imagined constituencies*, no less functional for being imagined, and it would be advisable to reflect as conclusively as possible on this point. With this little help from historical sources, current literature, world wide web browsing and electoral observation, let us try to do our best⁽¹²⁰⁾.

8. *The fact of our existence: the thing and the title for America and Europe.*

In the mid-nineteenth century Peru was a formless State, with

⁽¹¹⁹⁾ I ponder on this in *Ama Llunka, Abya Yala*, a title containing another play on languages, American this time, Quechua and Kuna, to try to express, at least figuratively, what signifies the most difficult political concept in any current language with European roots, free constituency and especially for indigenous peoples, as in this case. This is not to say that we need the word in order to pose the question, as shown in the meetings with Aymara *Mallkus* and Quiche *Alcaldes*, to which I have previously referred, and where the question was how to say *constituency* and *inconstituency* in Aymara or in Quiche, in Quechua or in Nahuatl. They did not need it to be brought to their attention for reflecting on it because it forms a part of their existence as an everyday experience.

⁽¹²⁰⁾ I intentionally paraphrase a title already cited, *Imagined Communities* by B. ANDERSON, since I use the adjective *imagined*, between imaginary and imaginative, in the same sense as he does, which is not falseness, illusion or trick, but the imagined form of immaterial possibility working as virtuality configuring reality.

most of its boundaries still undefined, and none of them under political control. It attempted to constitute itself as a European-like Nation in a mostly indigenous environment, with reluctant peoples inside, and quite a few others that were simply independent. A prominent jurist and expert on public law, overcome with concern, expressed the non-indigenous stance ⁽¹²¹⁾. He wrote in the middle of the 19th century beside Lake Titicaca in Puno, the most imagined frontier region for the continuity of indigenous peoples, mostly Quechua, Aymara and Uru, between Peru and Bolivia, together with the Spanish or Euro-American non-discontinuity. He wrote from the Peruvian side and angle: “The fact of our existence in the political field is a *fait accompli* and even if it were possible, it would be unwise to try to undo it and oblige us to go back to being under the charge of another”, such as the Spanish colonialism that was still trying to do so ⁽¹²²⁾.

Let us not think that *the fact of our existence* is juridically unimportant. Fact may be most momentous for law. It may be a critical criterion for recognition of States and among themselves as fellow body politics. It may even be the title for its constitution, the right of constituency to obtain something other than bare factual existence. In times when human rights principles were not in effect, it could have certainly been a decisive factor to such an effect. If there were *the fact of our existence in the political field*, we could constitute a State although our constituency were only virtual in the sense of fictitious, such as Peru in the middle of the 19th century.

⁽¹²¹⁾ C.A. RAMOS NÚÑEZ, *Toribio Pacheco, jurista peruano del siglo XIX*, Lima 1993.

⁽¹²²⁾ TORIBIO PACHECO, *Cuestiones Constitucionales*, Arequipa 1854, p 231 (“*el hecho de nuestra existencia política está ya consumado...*”), in part reproduced in the already quoted *Materiales de enseñanza* edited by CÉSAR LANDA. The version of the first bound edition was signed in Puno, since a part was previously published in the newspaper *El Heraldo* of Arequipa during 1853, following new sections throughout 1855 for the *El Heraldo* of Lima. There is a current edition of these *Cuestiones Constitucionales*, Lima 1996, with an introduction from JOSÉ PALOMINO. Since we have already cited the author and his course has only now been published, we can refer, as a halfway witness, to M.V. VILLARÁN, *Lecciones de Derecho Constitucional* (1915-1916), Lima 1998, edited by DOMINGO GARCÍA BELAUNDE. I am grateful to CARLOS RAMOS and CÉSAR LANDA for their advice.

This is something that brings us, as far as States go, almost up to the present, despite human rights ⁽¹²³⁾.

In the case of 19th century Peru, an appeal to Europe was rejected as a colonial arrangement, preferring instead to rely on the State's own capacity, despite another fact, that the jurist's imaginary world, his virtual universe, was European. The same can be said for the State itself. The conceived and therefore conceivable law was European. Europe was the imagined reality also for America ⁽¹²⁴⁾. Neither did our Peruvian jurist suppose that, later on, right would take such precedence over law, authorising even practices bordering on colonial tutelage, for instance the observation of elections by other States, be they overseas or continental, the European Union or the Organisation of American States ⁽¹²⁵⁾.

⁽¹²³⁾ SHARON KORMAN, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*, Oxford 1996; M.J. PETERSON, *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995*, London 1997; FRANCIS A. BOYLE, *Foundation of World Order: The Legalist Approach to International Relations, 1898-1921*, Durham 1999; STEFANO MANNONI, *Potenza e Ragione. La scienza del diritto internazionale nella crisi dell'equilibrio europeo, 1870-1914*, Milano 1999, to which I can add my commentary on the latter: "Positive Morality". *La incógnita decimonónica del derecho internacional*, in these *Quaderni Fiorentini*, 28, 1999, pp. 1127-1140.

⁽¹²⁴⁾ For the most graphic verification in the same case of the Peruvian 19th century jurist, C.A. RAMOS NÚÑEZ, *Toribio Pacheco*, Appendix I, *Catálogo de los libros de la biblioteca de Toribio Pacheco*.

⁽¹²⁵⁾ If our theme had been electoral observation as performed not by the European Union in America, but by the Organisation of American States at home, I would not have described it as bordering on tutelage but downright neo-colonial, with abundant evidence throughout the process. It went so far as a front-page photograph of the National Office of the Electoral Processes, giving a formal account before the OAS rather than the competent constitutional body, the National Electoral Jury. The Peruvian ministers of defence and the interior, both belonging to the military, together with the OAS core team occupied a front line position on the panel of their final press conference. These are eloquent images to say the least. Among some of its members (the beneficiaries of co-operation, not the donors), the Organisation of American States enacts a style of internal inspection that the European Union does not consider regarding its respective States, yet in the case of America, its human rights motivations are nearly reduced to an ideological veneer covering up political control at least as for electoral observation and assistance or as for, in general, non-economical co-operation deemed democratic. I do not refer to other areas such as the jurisdictional dimension of the Organisation of American States itself. This warning is also valid of course for the European Union. If we had explored its jurisdictional branch, we would certainly have a more solid image,

The notion embodies something between co-operation and surveillance, between assistance and intervention, a mixture unheard of until recently by the State, any State, Peruvian or otherwise, performer or receiver. Before its very practice, it could hardly be understood in terms of share and participation in rights, human rights. Even now, when in practice, it is not always easily understood. In fact, America itself has had previous experience of electoral inspection neither proposed or still less carried out on behalf of rights which might be deemed human insofar as they are general and common, a type of observation precedent for the Organisation of American States as a form of political control ⁽¹²⁶⁾.

For basic constitutional purposes as constituent commencements are, this is what may mark the difference between, on the one hand, the moments of birth and early history of European and American States, the history prior to human rights, and, on the other, today's Union in Europe or Organisation in America, as well as other regional States' groupings ⁽¹²⁷⁾. In previous times no jurist or expert on public law would have entertained the idea that certain

in the context of its inconstituency, as J.H.H. WEILER considers in his quoted *The Constitution of Europe*.

⁽¹²⁶⁾ THOMAS J. TODD, *Managing Democracy in Central America: A Case Study. United States Electoral Supervision in Nicaragua, 1927-1933*, Miami 1992.

⁽¹²⁷⁾ To obtain a better picture, different levels of comparison would be very valuable of course, with more regional groupings among both European and American States, such as the Andean Community in Peru's case (<http://www.comunidadandina.org>), and including the United Nations in its global scope. But I can only make the suggestion as far as we restrict ourselves to the comparison between the Union's inexperience and its States' experience, and also because of the limitation of my knowledge. Might I be allowed to add that what is known in academic terms as *Compared Law* (*Droit Comparé, Vergleichendes Recht, Derecho Comparado, Diritto Comparato...*), the comparative study of legal systems, does not usually provide worthwhile information or bases for approach and analysis of past or present legal moments and developments? Relying on second-hand investigation, not on local knowledge, and despite the current American constitutional record, it does not even heed the existence of indigenous rights and still reproduces European colonial images. The most responsible source, both constitutional and legal thinking and teaching in America, does not usually do anything else. In Latin America the first university degree programme on *The Rights of Indigenous Peoples*, of peoples and not only individuals, is as recent as 1998, the one issued by the aforementioned *Universidad de la Cordillera* in Bolivia, the colonial *Alto Perú*, Upper Peru, the pre-colonial *Kollasuyu* — one of the parts constituent of *Tawantinsuyu*.

rights could take precedence over citizenship's self-determination which was furthermore then very limited. Today there is no recognised legitimate possibility of political existence without the principle and objective, the authorisation and the requirement of human rights and thus democracy. Rights are not merely elements of a humanitarian philosophy or the like. They constitute a body of law in a state of determined development also for constituent purposes ⁽¹²⁸⁾.

It is a truly new juridical situation. Not even just over half a century ago, and during a couple of decades when they were drawn up, declared, divulged and expounded did human rights reach or come close to this performative value and normative force. They have acquired it in recent years as it has been developed and also partly corrected ⁽¹²⁹⁾. For the European Union, this inexperienced body or set of bodies, it is neither a luxury nor an adornment. It is

⁽¹²⁸⁾ It is not just a question of an increase in Declarations and Conventions, the latter with their supervision mechanisms, but also their development of a more independent form of jurisprudence with respect to the States which constitute the United Nations. Conventional international law handbooks deal with Declarations and Conventions more than other evolutions. Constitutional manuals often show no specific concern with human rights instruments for normative purposes. For international jurisprudence as an integral source of the legal body of human rights, a pertinent study, as it deals with the principal jurisdiction, is already quoted: D. McGOLDRICK, *The Human Rights Committee*.

⁽¹²⁹⁾ Allow me a domestic note. In the mid-seventies, when the present Spanish Constitution was elaborated, there was a formal proposal to renounce a declaration of rights while recognising the constituent value of the international law of human rights. It came from a sector that was anxious to control a movement in favour of the recognition of peoples, such as the Basques, as subjects of their own constituency. As a method, it was deemed extravagant and was rejected. According to what was assumed, the correct performance was constitutional recognition of human rights as a model of constitutional program and even cannon of legal construction, although not as a juridical body to be enforced above state constitution and law, and much less as substituting its constituent determination. Nevertheless, regarding the aim of neutralising non-state constituencies, there seemed to be no problem in the recognition itself of human rights. Nobody appeared to suspect then (mid-1970s) that in a few short years, from the eighties onwards, amidst the United Nations the issue of peoples' right would be openly dealt with as a premise for individual rights. This point had been already formulated then by the quoted first articles of both the principal United Nations Covenants, which were proclaimed in 1966 and went into force in 1976, when the Spanish Constitution was to be set up.

not a beautifying cloak or a concealing cover, but rather, at least virtually, a constitutive principle and working goal. This is the virtuality that I am dealing with here, one which is or must be both internally and externally post-colonial for Europe itself.

Not only the external image but also and above all the internal identity of the European Union should perhaps avoid becoming especially European beyond other concurrent identities, just as Sweden tries to be Swedish, at the expense of Saami and other peoples, or each Member State endeavours to be national in its own mirror. The shared identity of Europe as a Union can and perhaps should be constituted without its own particular distinctiveness for the specific purpose of maintaining virtuality while remaining regional, so to avoid both repeating constituent States' history and mimicking a common external history, which are damaging in various degrees for European and non-European stateless peoples. European rights are or must be human rights, otherwise they are not true rights, however much a different, distinctive definition is desired. European law is and must be international law in order to someday become law of peoples among peoples or *internationa*l in this acceptance.

Declarative charters concerning what are understood as human and consequently general rights, by means of specific political decisions, are no innocent however much they may or seem to make the latter dependent on the former, human rights on human determinations. Neither is the specification of those presented as almost exclusive of citizenships themselves in scenarios or for regional spheres, like the European Union or each Member State. If the rights arose from European decisions even just for Europe itself, without the misuse of applying them further as international standards regarding America, the European party would be setting an instance of power over right, of institutional powers over citizen rights. Thus, we would easily find ourselves in what has been and can still be the characteristic scenario established by the States, and hence in the very situation that has to be overcome in order to achieve the normative supremacy of human rights without dependency as for entitlement on political belonging. We already know that this community in rights is feasible humanity.

Neither does it seem that European citizenship has its own

identity to hand, among other ones, unless it is founded on a shared commitment to human rights which are not distinctive or exclusive. No better possibility for European constituency is seen to be within reach. Neither the contemplation of present time nor the imagining of past history can provide European identity. Not even European representation through electoral suffrage does. As a proper constituent base, the very Treaty on European Union refers not only to present rights, the ones recognised and guaranteed by both the respective States' systems and the shared regional jurisdiction of the European Convention for the Protection of Human Rights and Fundamental Freedoms (prior to the Union, as it was signed soon after the Universal Declaration and also broader, as it is ratified by States which are not members), but also to an imagined common constitutionality, "the constitutional traditions common to the Member States", all this with a real principle at the very beginning: "The Union shall respect the national identities of its Member States" ⁽¹³⁰⁾.

It is not only Swedish zeal that fights for the latter point or maybe still the first one. As a starting point, it does not appear to be a good one. There is not a straight path, but a long and winding road, to the determination of common constitutionality through national (meaning state) constitutional traditions. These do not even integrate the real histories and virtual constituencies of all the European peoples inside the Union's frontiers. They also constitute traditions which are intrinsically problematic as regards human rights and constitutional guarantees. The same Union Treaty knows better to some extent. It refers in addition to rights and freedoms

⁽¹³⁰⁾ I am quoting from the Treaty on European Union (<http://europa.eu.int/eur-lex/es/treaties/livre1-c.html>), *Common Provisions*, currently, in the consolidated text, article six, previous article F: "1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law (...)". As we shall observe, the Charter of Fundamental Rights of the European Union deals further with "constitutional traditions" and specific rights. For the web page of the jurisdiction corresponding to the European Convention on Human Rights, <http://www.echr.coe.int>.

from the European Convention, but not the United Nations. It does not rely on the international law of human rights. This is Europe, stupid! Here we have an improper answer as to substance and not only style. Why, then, does such an emphasis on common human rights come afterwards, with the purpose of co-operation from Europe? Where does the foundation of Europe lie in the last or rather first instance?

As for this foundation, some learned people try to trace common constituent European tradition back to ancient Roman and Canon law, the latter even on religious Christian grounds. If tradition must be precisely constitutional to found present Europe, the stance seems outrageous in theoretical terms, and in the practical field, highly risky and truly damaging for rights and liberties⁽¹³¹⁾. There are others who follow an undoubtedly better path in their efforts to trace and regain a closer common European constitutionalism, founded on rights to freedom and guarantee for liberties⁽¹³²⁾. It is a challenge caused by the current phrasing of the European Union's constituent approach. It gives rise to invented traditions, to both the Roman-canonist legacy's dislocation and the constitutional heritage's overstating.

The plural nature of the reference to "the constitutional traditions common to the Member States" beyond the States' very

⁽¹³¹⁾ Reference may be made to a collective critical and problematic reflection: PIO CARONI and GERHARD DILCHER (eds.), *Norm und Tradition. Welche Geschitlichkeit für die Rechtsgeschichte?*, Cologne 1998. The recovery of tradition is usually attempted with respect to private law, yet apart from its involvement, it also extends to the public or even constitutional dimension, in terms that implicate religion, Christianity for Europe as any other for elsewhere. It may be even the Roman kind: PAOLO PRODI, *Il sacramento del potere. Il giuramento politico nella storia costituzionale dell'Occidente*, Bologna 2000. It should also be remembered that, without the Catholic slant of course, no other seems to be the initial trend of the *Institut für Europäische Rechtsgeschichte* in Frankfurt am Main with its first impressive and most useful work, the *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* (1973-1988) edited by HELMUT COING.

⁽¹³²⁾ As a fitting example now, with specific reference to the constituent principles registered by the Treaty on European Union, MAURIZIO FIORAVANTI, *Sovranità e Costituzione. Il 'modello Europeo' tra Otto e Novecento*, in his collection on *La Scienza del Diritto Pubblico. Dottrine dello Stato e della Costituzione tra Otto e Novecento*, Milano 2001, vol. II, pp. 889-906.

plurality, acknowledges the fact that, for the purposes of constituency, there is no unmistakable European tradition in the singular. This virtuality cannot come into existence under the rule of “human rights and fundamental liberties”, be they European or also common to the whole of humanity. It is evidence from the debate developed during the nineties, predating the Union’s constituent treaties, on the possibility of a specific and distinctly European constitutionalism which we do not now need to recall. Rather, what we should do is to clean and focus the lens in order to identify and scrutinise the image at its best in the scenario of participation in rights and communication in democracy that is not historical but present, vis-à-vis the future, not the past⁽¹³³⁾.

As for the past vis-à-vis the present, there are of course some predominant States’ traditions in the European constitutional field, but with an adverse tendency towards the subordination of rights to legal norms with no constituent setting and play of freedoms, regardless of however much they could have been considered, although never, in these past times, as potentially and justly human rights⁽¹³⁴⁾. “Human rights and fundamental freedoms” were never a source of constituency or authority of constitutionality, not even in the French or any other European historical revolution. You do not find constitutionalism in historical Europe⁽¹³⁵⁾. All in all, it does not

⁽¹³³⁾ R. BELLAMY and DARIO CASTIGLIONE (eds.), *Constitutionalism in Transformation: European and Theoretical Perspectives*, Oxford 1996. For the current debate, in existence on the net since 1997, the *European Integration Online Portal*: <http://eiop.or.at>. We may also find, offering journals and other publications’ reviews together with European political and legal information, the *Porte d’Europe*: <http://www.portedeurope.org>.

⁽¹³⁴⁾ I can refer to my *Constituyencia de derechos*, pp. 142-171, coinciding for my part with M. FIORAVANTI, *Sovranità e Costituzione*, just quoted, p. 891, in the detail of appreciating that a European constitutional tradition strictly speaking only dates back as far as the mid-twentieth century, that is to say, at practically the same moment of both the gestation of European integration and the United Nation’s Declaration of Human Rights, with all of which the constituent references to characteristic European “constitutional traditions” make still less sense, if not utter nonsense.

⁽¹³⁵⁾ Observing today’s Europe and dealing with its pre-constitutional era, ANGELA DE BENEDICTIS, *Política, governo e istituzioni nell’Europa moderna*, Bologna 2001, highlights the historical existence of communal, even peasant liberties, although correctly situated in a strong social hierarchy based on *status*, with no room moreover for the individual as subject of freedom. However, in my opinion these nuances are not

appear that prior to the mid-twentieth century (i.e. before the United Nation's commitment to human rights) there was a past which is European in character with either strictly individual or suitably collective liberties, including constituency, that might be contemplated for minimally constituent purposes nowadays⁽¹³⁶⁾.

Concerning collective liberties, there is always the traditional presence of internal, not only state identities which among themselves may all be competitive and even conflictive, if Europe persists in not recognising itself except as the gathering of Member States, the constituent subjects⁽¹³⁷⁾. The Union could only achieve a clear identity through sacrifice and relinquishment of basic elements, be they peoples with or without states, these latter such as the Saami or Basques, to name previously mentioned examples. In the face of such needless adversities, it might be said (to make use of a current cliché) that constitutional patriotism with rights of liberty and processes of democracy as its only identity may be the European variety as long as it is not in the slightest degree patriotic. Similarly to the compatibility and complement that exist between individual and collective rights, internal national (or state) identities and the identities of peoples need not oppose each other — something

sufficiently emphasised keys, considering the present strength of a historiographical tendency, self-termed *republican*, which extracts the scenario to reinstate aristocratic virtues in Europe and America, as if they might be democratic virtualities. That same peasant community, or any other, could not be imagined as autonomous, let alone democratic. I may refer to my *Tutela amministrativa o diálogos con Tocqueville*, in these *Quaderni Fiorentini*, 24, 1995, pp. 419-468.

⁽¹³⁶⁾ As for the constituent authority of constitutional revolutions in Europe, I can rely on my own work: *Happy Constitution*, pp. 181-236; *La Paix et la Loi: ¿Absolutismo constitucional?*, en "Anuario de Historia del Derecho Español", 69, 1999, pp. 603-645 (*à propos de* PAOLO GROSSI, *Assolutismo giuridico e diritto privato*, Milan 1998); *Código como fuente de derecho y desajuste de constitución*, en PAOLO CAPPELLINI and BERNARDO SORDI (eds.), *Codici. Una riflessione di fine millennio*, Milan 2002, pp. 69-147.

⁽¹³⁷⁾ Although there is no trace of doubt about this point, it is worthwhile pointing out that the recognition of other political representative constituent subjects, except States, is never implied by the provisions of the Treaty of the Community, amended and consolidated text, in its fifth part, fourth chapter, on *The Committee of the Regions*, in which "representatives of regional and local bodies (...) appointed for four years by the Council acting unanimously on proposals from the respective Member States" participate for consultative purposes, as specified in articles 263 and 265, previous 198 A y C.

which does not just depend on self-determination but also and above all on respect by others. As for the Union itself, without this very basis of clear self-identified nationalisms or patriotisms of European peoples with or without states, it would be quite unfeasible. Even with no other sign of identity, the basis of the Union relies on its peoples, be they states or not. A constitutionalism of liberties and procedures that proposes the cancelling of constitutionalism of cultures and identities may be a remedy for emergencies, but not a basis for constituencies. The cancellation of the latter by the former does not deserve the name of constitutionalism ⁽¹³⁸⁾.

We already know that there can be plural and compound constituencies, with no need for all or even most of them to hold national identities — be they state or mimetic. In other words, the problem does not lie in the fact that European citizenship, even as such without nation or motherland significance, may virtually locate itself over state nationalities as a kind of automatic and thus compatible borrowing: “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State will be a citizen of the Union” ⁽¹³⁹⁾. The problem appears because without an identity, or being weak and furthermore damaging for peoples, it attempts to achieve a specifically European one by means of com-

⁽¹³⁸⁾ Amidst a growing literature, the question of constituency is sometimes posed: ALAIN G. GAGNON and J. TULLY (eds.), *Multinational Democracies*, Cambridge 2001, comparing cases such as Catalonia, Flanders and Scotland, Spain, Belgium and United Kingdom as the comprising States, the European Union itself, Quebec and Canada, and also North American indigenous peoples, but excluding other American ones which are not even visible. To be fair, we could say the same with regard to Europe as about Peru: there are no mappings on either history or present time where States are not dominating at the expense of other collective subjects, stateless peoples. However, there is a difference: what is a general rule in America is an absolute exception as far as Europe is concerned. I refer to the existence of indigenous peoples as peoples subjected to colonialism. The only clear European case seems to be the Saami. There are some surprising rapprochements: HANNU SALMI, *The Indian of the North: Western Traditions and Finnish Indians*, in PETER C. ROLLINS and JOHN E. O’CONNOR (eds.), *Hollywood Indian: The Portrait of the Native American in Film*, Lexington 1998, also of interest for the collective imagination via films, whose strong slant constitutes a prejudicial (not to say racist) mentality, which is active even in scientific circles.

⁽¹³⁹⁾ This is the first heading quote, from the second part, *Citizenship of the Union*, of the Union Treaty respecting the Community, article 17, previously 8, the very first paragraph of the aforesaid part.

mon history and culture, not being so far possible through other elements which might have served the States such as language, religion or law itself. Thus, we would enter an unsuitable nationalist terrain, be it *infra*, *supra* or also state, which is unfavourable towards pluralities and compatibilities, towards co-constitencies and inter-constitencies, if I might be allowed to use such strong language of far-more-than-four-letter words.

Concerning the Union's foreseeable broadening, is the question of its own identity a necessary piece of luggage for Europe on its present journey from a past characterised by its lack of solidarity internally and externally towards a future of co-operation in its externally widest and internally densest sense? Maybe the European Union already possesses a proper identity which is as yet unrecognised⁽¹⁴⁰⁾. Without the need for its own normative and even

⁽¹⁴⁰⁾ Since the parliamentary recommendation concerning its incorporation into the Treaty of the Union through ratifications has not been followed, the Charter of Fundamental Rights of the European Union, drawn up by a special Convention commissioned by the Council, i.e. the States, and signed towards the end of 2000 by the Council, Parliament and Commission presidencies, lacks a definite normative status. But it offers solemn testimony. The Charter "reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of justice of the European Communities and of the European Court of Human Rights". With all its European references, amid the complicated syntax, it even alludes to, but does not rely on the international law of human rights. The allusion is a roundabout way of reference, as quoted, to the "international obligations common to member States", and also to "the indivisible, universal values of human dignity, freedom, equality and solidarity". Having assumed the text as its own, the European Parliament has issued propaganda on the web asserting that it is the "end-result of a special procedure without precedent in the history of the European Union" with no reference of course to the unquestionable originality of placing the recognition of rights itself, at this moment in time, behind the European powers and other institutional devices. I do not know if this is proof that, despite appearances such as the partisan rather than national organisation of parliamentary groups, the Parliament in fact shares the interstate paradigm constitutively represented as intergovernmental by the Council. It also happens that *rights make might*: that the adoption of virtually constitutional texts empowers Parliament, as well as Courts. The declaration itself attempts to warn of this: "This Charter does not establish any new power or task for the Community or the Union, or

democratic determination, general identification with human rights may be the specific European way to citizenship's identity, a definitely more jurisdictional than political constituency. It may be good for Europe not only to forget and dispense with an imitative national image of States ⁽¹⁴¹⁾, but also to maintain credentials more committed to liberties than to politics. If the soft dynamics of parliament and government as European institutions have been convenient or even necessary, it may become a definitive virtue. It is truly virtuality for the benefit of rights and a hindrance for powers, a blessing for the former and a curse for the latter ⁽¹⁴²⁾.

It may be that Europe does not need empowerment on grounds of democracy rather than justice on grounds of human rights stemming from international law and not from the political determination of a constituency of its own. For the Union, it not only happens that strict powers may be unnecessary, but also that rights may be identifiable as such, as European ⁽¹⁴³⁾. We have observed

modify powers and tasks defined by the Treaties" (article 51. 2). For the web source: <http://www.europarl.eu.int/charter/default-en.htm>, with links to the other ten European official languages.

⁽¹⁴¹⁾ Of vital interest now in this matter is the reconstruction and criticism offered by M. Burgess regarding not only Europe's excessively intergovernmental image but also federalism's heavily state-oriented conception, *Federalism and European Union: The Building of Europe, 1950-2000*, already quoted. Furthermore Burgess marks a strong contrast to the scenario and panorama created by ROBERT O. KEOHANE and STANLEY HOFFMANN (eds.), *The New European Community: Decision Making and Institutional Change*, Oxford 1991, and ALAN S. MILWARD, FRANCES M.B. LYNCH, FEDERICO ROMERO, RUGGERO RANIERI and VIBEKE SORENSEN, *The Frontier of National Sovereignty: History and Theory 1945-1992*, London 1993.

⁽¹⁴²⁾ Electoral observation experience has also been very eloquent concerning this matter. For co-operative purposes, and despite the difficulty of providing an image of the European Union which is not reduced to a collection of images of the member States, the former is able to obtain much more widespread confidence from external parties thanks to its relatively political neutrality in comparison with governments or Member States. This approach is not really possible for the latter, given the governmental and party direction of the States' external action in this case. A large number of the European problems in Peru-2001 have had this background of political interests in the party or governmental sense represented on the spot by the embassies which the electoral observation has been reluctant to heed. Any more details are unnecessary.

⁽¹⁴³⁾ MASSIMO LA TORRE, *Citizenship, Constitution and the European Union*, in *European Citizenship*, already quoted, pp. 435-457, points in this precise direction. It can be proved to practical, or not merely theoretical effects how the recent practice

how the European Union, as a project “for democracy, development and peace”, believes that it could strengthen itself internally through identification with the specific fostering of general human rights by means of an external policy⁽¹⁴⁴⁾. Just as legal systems of Member States are supposed to comply with European law, or even to a greater extent, both European law and jurisdiction might heed human rights, that is to say the international normative body in its present and future stance, with no need of distinctive instruments, exclusive declarations or particular statutory rules. The external commitment might constitute internal law⁽¹⁴⁵⁾. The question can be taken right to its final consequences. Does Europe really need its own constituency among states as well as inter-state constituencies on the one hand, and on the other, simply human virtual constituency embodied in the United Nations? One might question the very appropriateness today of a European citizenship which empowers institutions and is thus able to subordinate rights⁽¹⁴⁶⁾.

concerning the Council’s annual reports on human rights tends to adopt higher (insofar as they are more international) standards than those of the Charter of Fundamental Rights itself, even the third version, issued in October 2001, and thus under the reference of the Charter. The address is quoted: <http://europa.eu.int/comm/external-relations/human-rights/doc/report-01-en.pdf>.

⁽¹⁴⁴⁾ *Council Conclusions on EU Election Assistance and Observation* (31-V-2001), p. 207, for a passage previously quoted after this European identification as a project for democracy: “The Council stresses that the EU’s presence in third countries is a political statement and represents a commitment to these values”, those pertaining to human rights.

⁽¹⁴⁵⁾ I have already referred to the fact that the European Union’s present consistency is markedly greater in the jurisdictional rather than political field. Although not pointed out in today’s numerous conventional expositions, the history itself of European integration has, without any exaggeration, proceeded and progressed more through discrete jurisdictional channels than flamboyant political manners. J.H.H. WEILER, *The Constitution of Europe*, already cited to this effect, stands out in his insistence on this point, with the additional factor (as a logical consequence as if legal virtualities were annulled by institutional deficiencies) of a marked scepticism regarding the more politically oriented concept of Europe after Maastricht and following constitutive documents.

⁽¹⁴⁶⁾ Now there are positive approaches on European constituency and citizenship precisely from awareness of not just their present precariousness but also of their problematic advisability, as unnecessary constitutional agencies may authorise and empower institutions, even judiciary, over already guaranteed liberties. Therefore, the emphasis focuses on rights: R. BELLAMY and A. WARLEIGH (eds.), *Citizenship and*

With its actual constituency of States, the United Nations could equally be blamed for subordinating human rights as the outcome of its political agreements, be they declarations, covenants or conventions. Covenants and conventions are also called human rights treaties and even pacts, as if the matter could be negotiated and bargained. Yet practically all the States participate there, or even, nowadays, for rights' declarative and guaranteeing purposes, authorised representatives of indigenous and minorities' organisations and other non-government ones play a part, though without the bargaining power. Nevertheless, despite all its constituent and functional problems, there is today no better forum than the United Nations for the consideration and development of a minimum legal framework for virtually the whole of humanity on the grounds of rights. Experience has borne proof of this potential. Regional areas with their own conventional declarative instruments, together with supervising jurisdictions, are inferior to the United Nations' evolution as regards specifically collective fundamental rights, owing to the more direct and concentrated strength of the respective States. The same specialised and regional international agencies may lag behind. With inferior virtual standards concerning rights of indigenous peoples, the Organisation of American States shows a marked contrast with the United Nations, whose present projects are also more demanding than the standards established by the International Labour Organisation ⁽¹⁴⁷⁾.

Governance in the European Union, cited. Bellamy's chapter, *The "Right to have Rights": Citizenship practice and the political Constitution of the European Union*, is also on the web: <http://www.one-europe.ac.uk/pdf/w25bellamy.pdf>.

⁽¹⁴⁷⁾ F. MACKEY, *Los derechos de los pueblos indígenas*, for the counterpoint of the Organisation of American States; S.J. ANAYA, *Indigenous Peoples in International Law*, also quoted, for the United Nations forum. The OAS of course recognises human rights the same as the European Union, and as accustomed among States i.e. as lofty guidelines rather than binding rules. It avoids relinquishing its own power or that of constituent States as to the determination and regulation of the rights. In this context the European Union's definitive change of a *constituent* paradigm would have great significance, and not just for itself, in recognising the international character of human rights as a strictly legal and also internal framework, thus open to future developments with its own (European) participation and with no European exclusive control, instead of continuing to regard specific instruments which although beginning with recognition of rights, always, as for the States, involve empowerment of particular institutions.

By virtue of a clearly committed belief in human rights on the part of Europe as a Union of States, and under the perspective of due co-operation in order to settle the colonial debt towards indigenous peoples (not States), past responsibilities amid the throng of inconstituencies could be satisfied. In addition, the possibility of its own constituency could be established, to the benefit of these peoples' (not States') rights. European constituency and American constituencies are neither separate nor separable questions. A decisive factor for the European Union's securing of an external image and sound internal reality may clearly be a determined contribution to the assessment and development of peoples' rights that incorporate human rights, always along with individual rights of course. European virtuality may become American reality. It would be a healthy suprastate law succeeding the so-called international one which has been as profitable for States as harmful for peoples. Furthermore, it would be a part-payment of the colonial debt. As a form of international co-operation linked to and owing to human rights, and with no more colonial-style underlying relations, electoral observation itself can take its place among practices capable of contributing to both the Union's external rightful action and internal lawful existence. Europe will be founded on human rights, on rights not exclusively European ⁽¹⁴⁸⁾.

⁽¹⁴⁸⁾ The Charter of Fundamental Rights of the European Union contains no entry with the purpose at least concerning recognition of non-European cultures on human rights' common grounds. It does not even contain any provision similar to article 27 of the United Nation's Covenant on Political and Civil Rights, developed, albeit deficiently, by the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The European Charter's declaration in this respect could not be more discreet, uninvolved and unwarranted: "The Union shall respect the cultural, religious and linguistic diversity" ("La Unión respeta la diversidad cultural, religiosa y lingüística", "L'Union respecte la diversité culturelle, religieuse et linguistique"; "Die Union achtet die Vielfalt der Kulturen, Religionen und Sprachen"; "L'Unione rispetta la diversità culturale, religiosa e linguistica"; etc.), that is all there is, in article 22, the only one of the epigraph *Cultural, religious and linguistic diversity*. I say unwarranted because there is not even the slightest recognition of right by today's standards (or even below them) in this specific declaration of respect for cultures. In the preamble to the Charter we find a hint (only partly quoted) concerning a reducing of cultural diversities to national (i.e. state — and only European ones for that matter) identities: "The Union is founded on the indivisible, universal values of human dignity,

The same might be said concerning both the Latin American and Anglo American States. For two hundred years, they have tried, with differing degrees of success, to create their own identities making room for themselves among trans-state European or Euro-American constituencies varieties on the one hand, and on the other, indigenous ones not only in trans-frontier cases, with several other possible identities in the field such as principally the Afro-American kind. Indigenous peoples and Afro-Americans still hold their own (not States') pending credit towards Europe due to past colonialism with massive slave trade whose consequences are felt even today. There are also these States' debts towards not just individuals and families but also communities and peoples whose own constituencies were and continue to be thwarted and their existence jeopardised. Europe is more than an accomplice⁽¹⁴⁹⁾.

If the Latin American and Anglo American States not only recognised human rights, as they do, but also identified with them to the extent of admitting plural and hitherto unprecedented constituencies within their frontiers, and also external to them, they could achieve the degree of settlement and soundness that even those apparently healthier States in America do not manage to enjoy. With

freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice. The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States". We are taken back to pre-decolonisation (not to mention openly colonial) times, like that of the United Nation before 1960, with a similar show of recognition of peoples neutralised (through identification) by States. Although just for the sake of avoiding becoming discouraged in the task, I believe it has been worthwhile starting off in more virtual areas and with Europe's more virtuous pages on the web. Virtuality is our field.

⁽¹⁴⁹⁾ T.M. FRANCK, *The Empowered Self*, already quoted, emphasises the foremost aspect of debt, the individual side, from the internationalist perspective of human rights, and treats its relation to the second, community aspect, as a no win game, where community's profit would always be liberty's loss for the individual concerned. He sees no possible constitutional settlement for cases such as the indigenous beyond that of immigrant populations in terms of individuals' rights. W. Kymlicka's replies in his *Politics in the Vernacular*, pp. 241-253 and 275-289, also quoted. José María Portillo is currently researching on the issue for the historical moment of Latin American States' (including Peru of course) independence and first constitutionalism.

the 1979 Constitution, Peru was a pioneer in its recognition of human rights as explicit principles for the State. Nevertheless, it has also led the way as the subsequent agent of frustration with the Constitution of 1993 under the Fujimorist regime⁽¹⁵⁰⁾. Because of relaxed and even reluctant recognition of human rights, there may be a hidden vice common to constitutional States. We know that vicious virtuality also exists, as much as the virtuous one. Let us keep virtualising.

The loss or decrease of state or national identity could also mean the gaining or increasing of rights and citizenships for America as well as for Europe. The States and the Unions among States might identify themselves with human rights and not much more in the legal field, so that the peoples would find room for self-determining their own law. For this purpose, the European Union, Peru and other American States, as well as Sweden, Spain and so on, may be similar cases. They had better shrink their state law to leave room for peoples' rule. Between indigenous peoples and American States, on the other hand, the resemblance cannot be drawn. Legally, as regards their respective law, the former need the uppercase letters as much as the latter do the lowercase ones, or without so much final distinction as they may all comply with human rights.

If Peru just allowed itself a glimmer of the real possibility of virtual constituency along those lines, if it just took a brief internal look at the postcolonial present and took a short step, it would be broadening the horizon for the whole of America, the continent with strictly speaking still pending decolonisation, the one between colo-

(150) ARIEL E. DULITZKY, *Los Tratados de Derechos Humanos en el Constitucionalismo Iberoamericano*, p. 153, in THOMAS BUERGENTHAL and ANTÓNIO CANÇADO (eds.), *Estudios Especializados de Derechos Humanos*, vol. I, 1996, pp. 129-166. Peruvian 1979 Constitution, art. 105: "The precepts contained in the treaties concerning human rights have a constitutional hierarchy...". The corollary of the express admission of appeals before international jurisdictions concerning constitutional rights (art. 305) was maintained in the 1993 text (art. 205), but short circuited by the Fujimorist regime. In contrast, the latter modified the terms of reference to human rights, after the awkward example of the 1978 Spanish Constitution (art. 10. 2), in a weaker tone (Final Disposition number four: "The rules concerning the rights and liberties recognised by the Constitution are interpreted in accordance with the Universal Declaration of Human Rights and international treaties and agreements on the same subject that have been ratified by Peru").

nisers and colonised peoples and not between colonialists from European and American sides ⁽¹⁵¹⁾. The resistance is so strong that it creates the appearance of impossibility. There is a blindness regarding the fundamental fact of the existence of stateless peoples with rights as such to collective human rights. The usual identification of Nation with State constitutes a very effective cover-up. There is no constitutional awareness of the challenge. There is no provision for it on the agenda. It is neither recognised nor admitted. Not only past apathy but also today's deceptions prevent blind spots from being completely innocent ⁽¹⁵²⁾.

Beginning with visibility, do we not find ourselves in a terrain for European duty-bound co-operation? However, it is not indispensable for facing American challenges. We know that there is proof of this in Peru through its own initiatives and even its official facilities. A constitutional institution, the Ombudsman's Office clearly provides it: "There exist precise criteria on human rights

⁽¹⁵¹⁾ Though always virtual, language itself is never innocent. It is normally performative and in any case implicative. Except for conventional naming, which is difficult to avoid, or for a need to emphasise, it is clear that I have been reluctant to use highly ambiguous terms such as *Nation* and its collection of derivatives with capital or small letters. Because of its implications, I have even avoided using the most substantive term in the operation's official title, which is not that of bare *observation*. Amidst the various abbreviations or acronyms, I have not made use of our own. Ours was MOE-UE in Spanish, as reflected in the web address, EOM-EU, or EU-EOM in English, i.e. *European Union Election Observation Mission*, thus *mission* as the name, well visible in leading positions such as HM, *Head of Mission*, now to be changed to *Chief Observer* (*Head of Mission* entails similarity with ambassador and we know the related problem). *Observation* will still be *Mission*. Thank heavens the persons involved have always been observers and not missionaries. It is not a joke. Regarding non-European peoples, let us not underestimate the links between religious and state idioms.

⁽¹⁵²⁾ An example to hand may suffice. The Peruvian Congress's web site has no visible traces of indigenous law, instead it provides Spanish colonial law, the so-called *Leyes de Indias* in the sense of European statutes for America: <http://www.congreso.gob.pe/out-of-domain.asp?URL=http%3A//www.leyes.congreso.gob.pe>. These non indigenous "Indian Laws" appear in the main index of the Peruvian electronic legal archive, "Archivo Digital de Legislación", while in order to reach the international instruments of human rights, ratified by Peru, there, it is necessary to enter the generic chapter on *Treaties*, then the sub-chapter *Multilateral*, and make the search. In addition, you do not locate the ILO Convention on Indigenous Peoples through this channel.

recognised in international documents” (153). Let us allow the Quechua language to proclaim the principle of human rights, without the interference of any European tongue: “Pachantin ayllu wawaq allin kausaypi kananta yuyaykuspan, kay kamachikuy paqarin. Runaq kausay qasi kusi kausaypi kananpaq, tukuy llakipi kaspapas *justicia* taripananpaq. Kikin runakayninta runa masinkunawan reqsichispa kausananpaq”. Here is a principle described in an indigenous people’s own language (154).

As a European office, it appears to have no need of any doctrinal duty in America. If communication is the objective, the culture of rights (in that it recognises and does not impose) is the most translatable. There, with or without European mediation, it really exists, or can surely be achieved. The means of connection and the sphere for relationships then, is or must be co-operation, and not in a one-way direction. On behalf of human rights, between Europe and America, as well as between Euro-American and Indo-America, communications cannot be unidirectional (155).

(153) It is the repeatedly mentioned passage from my second heading quote, which constitutes a continuous reference point for the Peruvian Ombudsman’s Office. At the time of the 2001 elections, as I have already said, the acting Ombudsman was WALTER ALBÁN, with SAMUEL ABAD as deputy for constitutional matters and WILLIAM LÓPEZ as expert in electoral supervision. LILIAM LANDEO was in charge of the indigenous or more restricted native programme. I express my gratitude to them in both personal and institutional terms.

(154) It is the first *whereas* or rationale of the Universal Declaration of Human Rights, whose complete version in Cusco Quechua (together with another ten variants of this language spoken by millions of people, and without common institutions at least for avoiding the disintegration of the written language) is available on the web on the aforementioned site belonging to the United Nations High Commissioner for Human Rights. In cases like this of stateless languages, there are no translations by request of the United Nations, but they are taken from the web itself: <http://www.unhcr.ch/udhr/navigate/alpha.htm>. My word processor program’s language corrector tool for Spanish and English describes the quote as a complete error since it is absolutely unprepared for languages like Quechua.

(155) Peru does not of course deserve this hopefully unwitting and transitory internet joke, while the information from an ambitious site is to be included, from *vLex.com* (<http://derecho.org>), where the section on Peruvian *Constitutional Law* leads to the following message which is also repeated for other Latin American cases: “This category is void”. There are others whose emptiness is irreversible. At some point in the year 2000, the web site of the Peruvian constituent process of 1993 (<http://www>.

Despite its immediate bearing, if we deal with equal co-operation, as we should, a definitive settlement of colonial debt is a different matter. It is a problem for the European debtor before the American creditor. In view of the history of colonialism itself, with its serious legacies, in external questions such as co-operation based on an equal footing regarding peoples rather than States through human rights exigencies, the future of the European Union is at stake, and not only because of internal challenges. Europe's *constituent* fate continues to be linked to that of America through a responsibility that has always been as unevenly matched as it is still shared ⁽¹⁵⁶⁾.

Voices will say that this is all mere virtuality. Indeed, I admit this is so. Who could doubt it? I have pointed it out and emphasised it from the start. I am not playing with words or juggling virtues, virtualities and virtualisations. I am taking it all in the utmost seriousness, with all of its implications and possibilities. I have likewise pointed out that for both ordinary normative and extraordinary *constituent* purposes, virtuality itself may be implicated, even operational from the very moment when its correspondence with human rights, and not other standards, is raised, as on the European Union's web site. It is virtuality, nothing more, nothing less.

It is a virtualising virtue. We have begun and we shall finish by assessing and appreciating it as a form of reality in the legal context. In order to foresee a better future, if it is feasible, we must overcome trite understandings such as good legal science is positivist, adjusted

rcp.net.pe/CCD/ccd.html) disappeared, for evidently political motives: "We regret that this page no longer exists", is the message you get for now. Even the *cyber library* is capable of censorship that would be difficult in any other support, such as printed documents. The storage of so much information at risk on the web has yet to be solved. The screen switches off while the paper is filed.

⁽¹⁵⁶⁾ At the start, I referred to a reservation à propos de *Civitas*, the *Storia della cittadinanza in Europa* by PIETRO COSTA. Here is my doubt, consciously unfair with a specific piece of research centred on the European issue. I do not know up to what point we may understand historical and present European stances, without at the same time contemplating the dark shadow cast by its longstanding perseverance on external unidirectional projection. But see now how a collective work under his co-direction tackles precisely this dimension: P. COSTA and DANILO ZOLO (eds.), *Lo Stato di diritto. Storia, teoria, critica*, Milan 2002.

to binding law as determined by the State, and correct historical science is realist, limiting itself to verifiable facts through reliable documented testimony, as if this were possible and moreover sufficient. Legal science belongs to the present; historical science, the past, and neither contribute to the future. In contrast, virtuality may hold the key. The key for all normative order, be it state or stateless, is, must be, the body of human rights as the most virtual law. For law, we could foresee some future history. Human rights can plan and shape it. With *human rights standards*, law is not just uncertainly normative, but also definitely performative. They perform reality. They constitute a new and different actuality, apart from the one it represents in itself, previous to and independent from its specific legal effect. It holds more future than may be supposed for any other kind of law, no matter how binding and forcible today.

The very virtuality of present performative and normative international standards is quite recent. Today's human rights are not even exactly the same as the original ones as declared in international law not much more than half a century ago. The Universal Declaration of Human Rights has not only been spread and developed, but also warned and corrected in some vital points, like the need of peoples' rights for individuals' rights. At present, it is tackling the challenge of specifying, recognising and guaranteeing collective rights as a precise requirement on behalf of individual's liberties. In order to appreciate this, it is sufficient to look at *law on the web*, at web sites on human rights with pending projects, at all these present rules and patterns concerning the future provided online especially by the United Nations and its High Commissioner for Human Rights.

The European Union inhabits the virtual world of potential reality, the universe of possibilities where none of its constituent States or alien ones could even have imagined themselves in their beginnings. We know that history, or rather histories, with their virtual images among other realities (all in the plural form, and all real), contribute to constituency. Sooner rather than later, the future will indeed have to provide additional and different histories, images, realities, and briefly constituencies. It will supply both new historical images and renewed constitutional realities. A significant part of today's investment for the future is settled by the variety of

literature on history that adds more or less imaginative approaches to the past.

9. *Fact and right: vicious geographies and virtuous constituencies.*

Concerning States' identities and their mutual recognition, it may still seem that the mere *fact of our existence*, or *their* existence, was, and continues to be, a good argument. Since their very origins, this has been particularly assumed by an inter-American law as a kind of international rule which stipulates that there are no *res nullius*, i.e. territories outside the reach of inter-State boundaries, and that in addition, these States are demarcated according to the principle of *uti possidetis*, virtual rather than factual possession, as if only they, and not peoples (mainly indigenous in this case concerning the birth of American States), had a territorial existence. Thus, such peoples disappear from the visible map, unable even to argue, in the field of inter-American law, their very evidence, the *fact of our existence*. In this manner, colonial-style claim to dominion is disguised as a regional international law. This is how an imaginary geography is created for imagined constituencies over real ones ⁽¹⁵⁷⁾.

Imaginary geography creates law which is not at all imaginary, or rather, a very effective power, the constituent one, that of the constituency exclusively of States and even over peoples. It is not just an American history, but also that of others. Are we to be surprised by such interactive effects between virtual geography and real law when we Europeans inhabit an Asian peninsula that has imagined itself to be a separate continent since time immemorial? Brazil has also imagined itself to be an island amidst rivers and an ocean, which implies not only a self-distinction but also a taking of possession. Mapping boundaries, geography may be the image of state law and the device of political right. Presumed facts may be

⁽¹⁵⁷⁾ JAMES BROWN SCOTT (ed.), *The International Conferences of American States. 1889-1928*, New York 1931, p. 44, a 1890 resolve: "There is, in America, no territory which can be deemed *res nullius*", with the clearly understood implication that the *res nullius* would in fact concern indigenous territory, and thus, leaving them aside, the *uti possidetis* ("the fact of our existence") would only be applicable among States which mutually recognise each other. Due to a lack of up-to-date, i.e. postcolonial studies on American boundaries, I quote directly from a founding father of an inter-American law.

sources of power. Virtuality is a type of reality. All representation, including the geographic variety, is performative. A map of frontiers may confer even the right to wage war for States' conquest of peoples, the epitome of dominion. It is both European and American history (158).

In America as in Europe, for both geographical and juridical scopes, power to imagination has been the true motto of the State conceiving itself as Nation. The political display of constituent fiction has misled and still confuses, to say the least, jurists and other experts on public law belonging to academia and politics, even the apparently most scientific and most pragmatic. Any handbook or treatise on constitutional law can, with imagination as reality, provide confirmation for all that is unconsciously taken as constituted, beginning with the State itself as Nation. The existent State is considered to be the constituent Nation. People's constituency is identified with constituted state population. This does not only occur in Peru.

This is how imagined constituencies are reproduced. Europe at least knows it is virtual. As such, for purposes of constituency, it functions through treaties among bodies that it considers (with certain illusion) as not imagined, Nations equivalent to States. Insofar as all nations, peoples included, have need of imagination and there is the challenge of concurrence among them, it may be that this form of constituency by means of Treaties is more appropriate today for both Europe and America than Constitutions, these sharing the illusion of correspondence between Nation and State,

(158) DEMÉTRIO MAGNOLI, *O Corpo da Pátria. Imaginação geográfica e política externa no Brasil, 1808-1912*, São Paulo 1997. Dealing with the frequent case of State imposed frontier with fragmentation of peoples, specifically the Mam between Guatemala and Mexico, ROSALVA AIDA HERNÁNDEZ, *La otra frontera. Identidades múltiples en el Chiapas postcolonial*, Mexico 2001. In the same area, and for the Chuj people, JORGE LUIS CRUZ BURGUETE, *Identidades en fronteras, fronteras de identidades. La reconstrucción de la identidad étnica entre los chujes de Chiapas*, Mexico 1998. Studies on other frontiers, such as the Mexican northern frontier are less concerned with their severe effects on indigenous peoples. That is where film stereotypes roam freely. With regard to Peru, to Andean and Amazonic areas, I am not aware of any up-to-date frontier studies concerned with peoples. For the Europe of the past, but with present boundaries that have similarly fragmenting effects, PETER SAHLINS, *Boundaries: The Making of France and Spain in the Pyrenees*, Berkeley 1989.

and thus trailing presumption of constituent powers and consolidation of political institutions. Rights, in that they are fundamental and must be superior to norms as premises for them, are one thing, and institutions, which are conventional, are another. The latter are better controlled by constituencies through Treaties, if these are contracted among Peoples prior to between States. The Constitution, in contrast, is under the power of Nation meaning State's population ⁽¹⁵⁹⁾.

The case of America, not only Peru, is especially meaningful regarding all these effects. A virtual inter-American international law is not and has never been considered. The imaginary demarcation of frontiers itself, even without *res nullius*, and yet with *uti possidetis*, could act in favour of, or be taken seriously by, not exactly States but Peoples; indigenous peoples as effective possessors in their case, and with practice in treaties, not only among themselves but also (with the mutual recognition on an equal footing that this involves in principle) with the very States ⁽¹⁶⁰⁾. Although a clear consequence of the *fact of our existence*, neither has such a feasible inter-American law been taken into consideration, nor does the actual one query the reason why, in the indigenous case, legal logic does not work. Throughout centuries of colonialism and constitutionalism, the protection of possession has not sought to benefit the possessors (the Peoples), but the party who in fact does not possess and presumes

⁽¹⁵⁹⁾ ENRICO SCODITTI, *La Costituzione senza Popolo. Unione Europea e Nazioni*, Bari 2001, pp. 189-208, who goes into precisely the constituent value of treaties in the European case. For the American, the issue was discussed in a seminar on *Indigenous Peoples, State Constitutions and Treaties and Other Constructive Agreements between Peoples and States*, held in Seville between September 10-14, 2001, whose papers are to be published in *Law and Anthropology. International Yearbook for Legal Anthropology*. My paper is included in *Genocidio y Justicia. La Destrucción de Las Indias ayer y hoy*, Madrid 2002. For the historical background, FRANCIS PAUL PRUCHA, *American Indian Treaties: The History of a Political Anomaly*, Berkeley 1994; R.A. WILLIAMS JR., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800*, New York 1997; ABELARDO LEVAGGI, *Diplomacia hispano-indígena en las fronteras de América*, Madrid 2002.

⁽¹⁶⁰⁾ The idea is considered by PABLO GUTIÉRREZ VEGA, *The domestication of the legal status of indigenous peoples: Timelessness or interpolation in modern international law*, to be published in *Law and Anthropology* within the proceedings of the aforementioned seminar on *Indigenous Peoples, State Constitutions and Treaties*.

to do so (the States). This American rule shows no signs of puzzlement at all. It is because of such a make-believe, pretended geography flanking legal fiction, an out-and-out fantasy which could be easily visible otherwise, that the mere fact of existence, even indigenous, can be a right to constituency for States and not for Peoples.

Just like a piece of fiction, though not in the eyes of yesterday's and today's working law, the *fact of our existence* was and is applied, for example, to Peru as a State, just as it may be to all States, including European ones, together with their Unions. From the past, for the present and into the future, in such a way do States preconstitute their own title to constituency over Peoples as if it were moreover a natural, geographic fact, before and more than a conventional, legal one. The virtuality of the former covers the reality of the latter. In fact, if this was and still is the question, let us focus on the touchstone. Although it may not be verifiable for the visible map, in the mid-nineteenth century, indigenous peoples constituted more solid social bodies than the self-empowered American States. Peru's virtual constituency, this presumed Nation, was neither greater nor more self-sustained than the indigenous ones inside state imaginary frontiers. Peru's consistency as a State then was not superior to the current presence of the indigenous peoples that have not suffered extinction. Geographical fantasy, like legal fiction, renders visible what may be insubstantial, and makes invisible what is consistent. Maps record the unfocused vision of *constituent* law ⁽¹⁶¹⁾.

⁽¹⁶¹⁾ It is not surprising that in more academically expert circles, crass ignorance is to be found as regards indigenous peoples. Just review the present debate, already mentioned, between T.M. FRANCK, *The Empowered Self*, pp. 224-254, and W. KYMLICKA, *Politics in the Vernacular*, pp. 241-253 and 275-289, which is of particular interest as it is not about a new version of the row between individualists and communitarians, but rather the crossroads where I also position myself, between individualisms more or less sensitive towards communitarisms on the shared assumptions of human rights. THOMAS FRANCK, an expert on international law, naively confesses that he imagines the situation of America's indigenous people as being practically the same as that of immigrants, and on this presumption (i.e. this ignorance of the existence of communities with compact cultures which have pre-colonial roots), in opposition to WILL KYMLICKA, he argues in favour of the same legal consideration being given to both (the indigenous and the immigration) cases. Yet see also how KYMLICKA himself, *Politics in the Vernacular*, pp. 120-132, in debate here with J. ANAYA, *Indigenous peoples in International Law*, also

So here is another question, which with all of this may already have, if not a solution, an answer; if not a justification, an explanation. As a constituent motive, as the right to claim and recognition of constituency without tutelage, through self-determination, why is it that the aforesaid argument concerning the *fact of our existence*, this synonym of the usual *here we are* from indigenous people, is not so valid or even sound? Why cannot they take responsibility for themselves, beginning with their law on behalf of their rights? States do not fulfil their dues towards indigenous peoples and have even no standing to try, as they, the American States, arise from colonialism. Therefore, indigenous peoples have neither suitable nor sufficient protection nor guarantees concerning their human rights.

Europe agrees with the American States. The European Union and the European States agree on the rightness and virtuosity of concepts and arguments. *International standards*, instead of *human rights*, help towards these purposes. There is nothing new in this complicity with America, namely Euro-America. Between Europe and America, the involvement is part of the historical debt which is not — must not be — among States, but rather with Peoples. States, including American States as far as they are non-indigenous or Afro-American, are debtors, not creditors. The debt is not just financial, but also political. As awareness grows and information increases, as people dare to tread the post-colonial trail, what springs into evidence is the open, hitherto unprecedented and now universal need for plural, diverse, consentient and compound constituencies. With its requirement of liberties, both collective and individual, it appears there is no other legitimate constitutionalism.

For the normative body of human rights, and through their own imperative as sole legitimating principles and ways, we have a need for, and the challenge of, an internal development capable of facing *constituent* law. Complex constituencies, like the European Union itself, may assist no less simple or even more compound States such

quoted, endeavours to characterise indigenous peoples without a clear reference to colonialism in order to avoid distinguishing them from *national minorities*. Nevertheless, Kymlicka champions empowerment for them all, both minorities and peoples, inside States. This literature shares a Canadian or United States' (not even all-American) background and scenario for a truly inter and transcontinental issue.

as the American. This necessary assistance is not achievable via international standards, but through human rights. Through its virtuous commitment to *human rights standards* and vicious involvement with *international* ones, is Europe able to finally escape from the complicity in order to move deeper (in company, not alone of course) into a definitively post-colonial history which is still unresolved, even for the United Nations? In the light of what has been seen, there is still a need to overcome the very culturally biased approach of international standards — not only democracy's political standards but also legal standards for liberties, in other words human rights standards — through their still pending development and improvement ⁽¹⁶²⁾. The present past and the possible future are equally important (though in different ways of course) both to those who benefited themselves and still take advantage, and those who have suffered and are affected by colonialism. The former are not only to be found in latitudes that were openly colonisers. We Europeans and Euro-Americans, the involved parties with still colonising minds, are also in need of decolonisation. Our law, both constitutional and international, requires it.

We European citizens come finally to our point, European people. If, as the Union shows us, human rights are useful for external action, or at least the co-operative variety which is more virtual as regards the issue of pending improvement, then why are they, human rights, not as sufficient as they are necessary for internal constituency, for the determination appropriated by the States or their cloned Nations? On the other hand, what need is there of a specifically European identity in the constituent area of freedom's rights? Imaginary *Europeanness*, an imagined constituency to be proud of, would be the best way for it to be impossible to conceive their necessary improvement and thus lose sight of the pending debts inside as well as outside. The virtue of co-operation has shown other possibilities more in accordance with human rights to be

⁽¹⁶²⁾ Both political utility and literary genre *Aiding Democracy Abroad* will have to bear in mind the questioning of unilateralism in political communication between concurrent cultures which has been raised by F.C. SCHAFFER, *Democracy in Translation*, pp. 86-138, whose research in Senegal includes his participation in the NDI's (the aforementioned National Democratic Institute) electoral observation.

thinkable and feasible. This is the advantage of being born, like the European Union, in times of virtuality which was unimaginable when the very States were created and began to burden themselves. Today they can be reborn and virtualise themselves as Member States. All of them, Europe together with the States, are improving thanks to rights. They may be saved by virtue of human rights. The challenge thus posed consists of responding to the commitment without dissociation or dissonance between some rights and others, be they States', Union's, broader European, constitutional or international, the same ones after all, or in principle. Rights are human, otherwise, they are not rights.

It is a matter of principle, a matter of right, not fact. It is the *right to our human existence* because of the fact of our existence as people. Here are human rights as effective legal rules, and as such, as suprapstate binding norms, open to constituencies not exclusive of the States nor necessarily identified with them. Bearing in mind the development of human rights during the last fifty years and especially after the granting of self-determination to some, not all, colonised peoples, and also what may be foreseen in the new millennium for both suprapstate and state areas, are we, Europeans, in need of a European constitutionalism of rights, European rights differentiated from human rights? In the present situation and facing the foreseeable scenario, let me repeat that the fabrication of a European history that might virtualise “the constitutional traditions common to the Member States”, as an imagined *constituent* heritage of its own, does not seem either necessary nor even appropriate. The argument speaks also of European constitutional law as it may entail empowerment of institutions over rights ⁽¹⁶³⁾.

⁽¹⁶³⁾ For an approach on the behalf of liberties as a European heritage, ALESSANDRO PIZZORUSSO, *Il patrimonio costituzionale europeo*, Bologna 2002. Thus, as we already know, not all the historical founding of the European Union goes in search of Roman and Christian assets more adverse to freedom, but the domain of history always constitutes a terrain mined with excluding traps for alien or even fellow people. We also know the reference to the Union Treaty, current article 6. 2: “constitutional traditions common to the Member States”, “traditions constitutionnelles communes aux États membres”, “gemeinsamen Verfassungsüberlieferungen der Mitgliedstaaten”, “tradiciones constitucionales comunes a los Estados miembros”, “tradizioni costituzionali comuni degli Stati membri”... Here is the literal passage from M. FIORAVANTI, *Sovranità*

Let us compare the bodies politic we have taken into consideration, that is, Peru on the one hand and on the other, Sweden in Europe and Europe, the Union, itself. The former is a characteristic case of State in America. It is unable and often unwilling to guarantee the rights of the whole population existing inside the respective boundaries, as this is partly compounded by peoples not always desirous of belonging to the State. The very State lacks standing for the task. It does not enjoy the confidence of some peoples, namely the indigenous, to recognise, cover and guarantee rights, both individual and collective. Their constituent consent is lacking. In this situation, the trend of political foreign co-operation, like the European Union's as well as the Organisation of American States', is to strengthen Peru as a State through the democratic authorisation of its imagined single constituency, fictitious Peruvian citizenship. This is precisely the meaning of the substitution of *international standards* for *human rights standards*. Electoral observation seeks to strengthen the States irrespective of the character of their constituency. Thus, contrary to the very terms of reference of European political co-operation, democracy is imposed and, accordingly, rights are not always honoured. Is this what you, Peru, truly need from the human rights requirements? Rather, to be democratic, you need the strengthening of indigenous peoples' constituencies through self-determination about their own law, so precisely to identify yourself, Peru, with the rule of human rights. Here we have achieved a conclusion that may be extended to the American continent.

Sweden is not such a different case. As we also know, it lacks standing for recognition, covering and protection of rights, both collective and individual, due to a colonised people, the Saami. In their case, compared with the Swedish population, they are a

e Costituzione, p. 891 already quoted: "Si potrebbe dire che le nostre *tradizioni costituzionali* sono in realtà quelle che si sono venute a formare nei diversi paesi europei nella seconda metà del secolo ventesimo, sulla base di comuni scelte, effettuate a partire dall'ultimo dopoguerra, per un certo tipo di democrazia, per certi modi di garanzia dei diritti". Add now P. COSTA, *Civitas*, vol. IV, pp. 439-473. In short, common European traditions belong to recent times, those of human rights, and represent particular options within the constitutional field during a post-war and post-totalitarianism situation. *Rien va plus*, either for internal constituency or for export purposes.

pronounced minority, but human rights do not depend on arithmetic or statistics, and for peoples' rights, the State cannot be the yardstick. On the other hand, Sweden's law satisfies the coverage of rights for most of its population, the Swedish people (not taking into account either the Aaland Islands, which are part of Finland⁽¹⁶⁴⁾, nor the Swedish migration to America). Here comes the *constituential* question. In this scenario also extendable to the rest of Europe (where state boundaries do not demarcate peoples, where this very demarcation shows itself to be unfeasible and where the national majorities are satisfied by States as regards recognition and protection of rights), who are in need of a Union's constituency formed by the States but the States themselves? Neither citizens nor peoples seem to be in such a need of European Union as States Union. Instead, they, peoples and citizens, may need recognitions and guarantees for the rights insufficiently covered or not considered at all by the States. Here is the virtuality of present and future human rights as the legal identity of the European Union, which is the way traced by its own web page concerning political co-operation, but not by the rest of virtual and actual Europe. It is exactly the reverse scenario of both the current Charter and Convention for a new framework and structure. States, neither peoples nor citizens, are the active constituencies for both the European Charter and Convention⁽¹⁶⁵⁾.

⁽¹⁶⁴⁾ As they, the Aalanders, are European people (and not indigenous, like the Saami), they enjoy a more satisfying settlement on their behalf not just between Sweden and Finland, but also in the international domain before and above the European Union: HURST HANNUM, *Autonomy, Sovereignty, and Self-Determination*, already cited, pp. 29-30, 247-262 and 370-375, on the Saami people too; and in his collection of *Documents on Autonomy and Minority Rights*, Dordrecht 1993, pp. 115-143, where you can hardly find any documentation on indigenous peoples inside American States (for the Nicaragua Atlantic Coast, pp. 381-399). There might be more, although not for the Quechua people; for instance, 1993 *Carta del Pueblo Emberá-Wounaan*, which relies not just on Panamanian law (1983 Statute establishing the *Comarca Emberá de Darién*), but also and above all on the international law of human rights, declaring that "in both the Organisation of the United Nations and the Organisation of American States, drafts on the Human Rights of the Indigenous Peoples are currently being discussed" (*Derechos de los Pueblos Indígenas*, Vitoria 1998, pp. 505-560, which is a more specific collection).

⁽¹⁶⁵⁾ Let us never forget the true touchstone of the meagre reference to the so-called minorities by the European Charter of Fundamental Rights: "The Union shall

All we need is human rights as rule of law for States' performance, relationship and grouping together. As rights, they are currently, on the one hand, quite developed and refined concerning individuals; on the other hand however, they are in a somewhat embryonic and even contaminated condition regarding communities. They are still lacking the necessary basis and branch of collective and compound constituencies for the due protection and fostering of the individual liberties themselves. At this point in time, it should not have to be necessary to insist on the fact that they, one and the other kinds of rights, collective and individual, are mutually needed as far as the latter are covered and may be guaranteed by the former. As for constituency, there is no simple human subject with defined boundaries, and neither is there need of one today, even less the presumed ideal of its existence, as States have presumed and tried. All constituencies are compound and every constitutionalism must be equally complex. We are not even accustomed to thinking about it yet, much less to digesting it, yet the fable says that state is not nation, nation is not people, nor constituency is state, nation or even people in the singular. Peoples are constituencies facing the challenge of plurality itself. Peru suffers identification between State and constituency, but so do both the European Union and its Member States. As a witness, I bear testimony; as a scholar, I have questions; as a professional, I had the privilege of being able to combine civic commitment and constitutional research in an exceptional situation.

respect the cultural, religious and linguistic diversity", and full stop, without any register of rights. It must be added that the jurisdictional European Convention for the Protection of Human Rights, referred to by the European Union as we know, implements policies for the protection of minorities, which do not represent strict recognition of rights either: <http://www.humanrights.coe.int/minorities/index.htm>. We already know the current patronizing approach from the European Commission: <http://europa.eu.int/comm/external-relations/human-rights/rm/index.htm>. As regards the political European Convention for the proposal of the badly needed renewal of Union structures (web site: <http://european-convention.eu.int>), working since early 2002, is composed by States and Union's representatives accountable not before constituencies or citizenships, but Member States and European institutions themselves. Such was also the case of the previous Convention that produced the Charter of Fundamental Rights, presently located in a normative limbo. No wonder that information and public debate are scant and poor.

Both the 2001 Peruvian general elections and Europe's specific electoral observation were normal events, although their implications were extraordinary. Therefore, Peru has gained explicit and hopefully long-lasting re-incorporation into the States' co-operative community under principles of human rights and democracy. In this kind of universal judgment and acquittal of Peru as a State, the Organisation of American States was counsel for the defence and the European Union *amicus curiae* on behalf of Peru as well. Neither Euro-America nor Europe perform their duties aware of or with the slightest suspicion of the fact that they might not be the bar and the bench, but the defendant, because of colonialism and its aftermath. Pending constituencies, such as the Quechua or others of the indigenous sort, may not be such an alien affair to Europe's own challenging constituencies, also and always in the plural. As psychoanalysts and sometimes anthropologists do, before daring to analyse others, self-analysis is advisable and might be mandatory, if only because the pursuit of knowledge about others comes through the awareness of ignorance about oneself. This could facilitate the communication needed for trustworthy and rewarding co-operation ⁽¹⁶⁶⁾.

The exchange of mutual analysis between evenly matched subjects of constituency, not unilateral knowledge, bears its fruits. For every side, American or European, state or stateless, observation experiences may offer a test of human rights and measure of democracy. The resultant gallery of mirrors provides a contrast to

⁽¹⁶⁶⁾ The future is always open. History goes on for Peru, European Union, Quechua people, Sweden, Saami people, and every body state or stateless. As I have pointed out, in providing information concerning the electoral observation which has given us the study case, I closed the documentation (but not the bibliography) in the European summer (and Peruvian winter) of 2001, from July to August, or really October for an annual report, the aforementioned one on human rights, which offers conclusions on electoral operations, including the Peruvian one: <http://europa.eu.int/comm/external-relations/human-rights/doc/report-01-en.pdf>, pp. 77-78 and appendix 12. There have been novelties, presaging constitutional renewal, for both Peru and Europe face constituency challenges in 2002. Regarding constituent reform, as I mentioned, web pages have been launched by both the Peruvian Congress (<http://www.congreso.gob.pe/comisiones/2002/debate-constitucional/index.htm>) and the European Commission (<http://european-convention.eu.int>). As for self-analysis with post-colonial purposes, I may refer to my *Genocidio y Justicia*, already cited.

respective self-portraits, including the constitutional variety, fake or frank images to a greater or lesser degree, but showing reality and maintaining virtuality in any case. Thanks to present virtual rather than actual human rights, the future may look towards less misleading and more promising horizons both for Europe and for America, for Sweden and for Peru, for Saami and for Quechua peoples. These last virtual constituencies stretch out, as we know so far, the former across the Nordic frontiers from Norway to Russia, the latter along the Andean highlands, slopes and valleys together with other indigenous and non-indigenous peoples from Colombia to Argentina through Ecuador, Peru, Bolivia and Chile, so to speak from the vicious standpoint of the established geography.