



THE CONSTITUTION OF THE EARTH. A WISHFUL COSMOPOLITANISM?

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Luigi Ferrajoli, a legal philosopher and constitutionalist well known especially in the Latin world, proposes the Earth's Constitution as the only true solution to the catastrophes plaguing the planet's future. But his proposal has contradictory aspects that this comment is intended to underline.

It would seem that the so called world order is shattered. We are witnessing a profound crisis of international law and the enormous difficulty faced by the international community in finding acceptable compromises in order to avoid, or at least mitigate, the multiple catastrophes hanging over our heads – large scale wars, environmental disasters, migrations driven by desperation, and abysmal inequalities. The situation appears irreversible, all the more so after Russia's invasion of Ukraine and the military ventures of the United States and Israel. Faced with this upheaval, the legal philosopher and constitutional theorist Luigi Ferrajoli – by no means a marginal figure but rather a highly influential voice, especially in Latin countries – puts forward an extraordinarily ambitious project: a Constitution of the Earth.

Such a Constitution is intended to be the founding pact of a Federation of the Earth, to be understood not as a global federal state but as a form of guarantees based federalism, at the centre of which should be the guarantees and the institutions safeguarding the constitutional principles of justice (peace, equality, protection of nature and fundamental rights), without which these principles remain empty formulas. But – this is my question – aren't the formulas Ferrajoli proposes equally if not more rhetorical, mere declamations full of good intentions but ultimately useless when it comes to seriously addressing the frightening historical transition we are experiencing?

The conceptual tensions of the project

A detailed analysis examining critically the internal coherence of the hundred articles of the Constitution of the Earth would be superfluous and, above all, terribly tedious. It will suffice to dwell on

evident tensions within the text in order to highlight the analytical weakness of the project as a whole. Before illustrating them, I reproduce below, to assist the reader, Articles 14, 31, 32 and 33, in which these unresolved contradictions are clearly felt (Box 1).

Article 14 proclaims the *ius migrandi*, the fundamental right of the person to migrate from any place in order to establish his or her residence, temporarily or permanently, in any other place on Earth. All this without having to justify this choice, according to the dictates of the most demanding cosmopolitanism.

However, in the final paragraph it is stated that "any person who is denied in his or her country the effective enjoyment of the fundamental rights guaranteed by this Constitution has the right of asylum in the territories of the States that have adhered to this Constitution". This entails that the solemn "we, the peoples of the Earth" of the Preamble is nothing more than an aspiration, a formula as appealing as it is empty. Recognising the right of asylum in fact means admitting that not all States will be part of the Federation of the Earth envisaged by Ferrajoli. Total adherence would obvi-

BOX 1. THE CONSTITUTION OF THE EARTH: ARTICLES 14, 31, 32 AND 33

Article 14

Freedom of movement on Earth

Everyone has the right to move freely on Earth, subject to the limitations established by law for reasons of public health.

Every individual has the right to emigrate from any country, including his or her own, and to return to his or her country. This right is guaranteed by the prohibition of any violence or coercion aimed at preventing its exercise and by the obligation of the Federation of the Earth to allow and regulate the consequent immigration.

Any person who is denied, in his or her own country, the effective enjoyment of the fundamental rights guaranteed by this Constitution has the right of asylum in the territories of the States that have adhered to this Constitution.

Article 31

Equality of peoples in dignity and rights

All peoples are equal in dignity and rights.

Every people has the right to existence and subsistence, to respect for its national and cultural identity, to the use of its own language, to the preservation and protection of its natural environment, its historical traditions and its artistic heritage.

Article 32

Rights of minorities

Those who belong to linguistic, cultural, religious, national or political minorities have the right to the protection and affirmation of the identities determined by such affiliations, to the use of their language, and to respect for their cultures and traditions.

Article 33

Popular sovereignty

Sovereignty belongs to the people of the Earth and to no one else. No constituted power may appropriate or usurp it.

It consists in the sum of those fragments of sovereignty represented by the powers and counter powers embodied in the fundamental rights to which all human beings are entitled.

ously render the establishment of the right of asylum unnecessary, because there would be no “rogue states”, or despotic states, from which to flee. The cascading consequences of this admission are as easy to foresee as they are devastating for the theoretical consistency of the project itself.

To whom is the Constitution of the Earth addressed? Are the holders of fundamental rights persons or peoples? For this is by no means the same thing.

Acknowledging that for certain state realities adherence to this project is highly unlikely is an act of wisdom and realism, but at this point – just to take the most obvious case – the articles concerning the abolition of armies and the “right to peace” become a purely rhetorical exercise. The non adhering States will probably remain bound to old logics and will therefore be armed, equipped with a more or less efficient army. They may potentially also be aggressive, knowing that the Federation has no or limited defensive capabilities. The Federation of the Earth would be an earthenware pot among iron pots. Or, if one prefers a more learned reference, it would represent on the international stage the figure of the “unarmed prophet” of Machiavellian memory. That is to say, the Achilles’ heel of the European Union – its scant or non existent strategic and geopolitical relevance, of whose concrete existential risks the Union is today acutely aware in the face of the feared total disengagement of the United States – is abstractly theorised and, as it were, raised to its highest power.

Abstract constitutionalism and the concreteness of cultures

Ferrajoli relies on a purely symbolic and celebratory founding act – one might almost speak of a mythological and religious *fiat* – and appears to devote little attention to the *how*, as well as to the *what*, that is, to the question of the preparatory work, the agreements and compromises necessary or appropriate among the adhering States during the hypothetical

constituent process that must inevitably precede the solemn and rhetorical Preamble, which I reproduce below:

We, the inhabitants of the Earth, who over the course of recent generations have accumulated deadly weapons capable of destroying humanity many times over, have devastated the natural environment and endangered, through our productive activities, the habitability of our planet;

aware of the ecological catastrophe looming over the Earth, of the link connecting the survival of humanity and the safeguarding of the planet, and of the risk that, for the first time in history, the human race, because of our assaults on nature, may be heading towards extinction;

determined to save the Earth and future generations from the scourges of unsustainable development, wars, despotisms, and the growth of poverty and hunger, which have already caused irreversible devastation to our natural environment, millions of deaths every year, extremely grave violations of human dignity and countless unspeakable deprivations and sufferings; determined to live together, with no one excluded, in peace, without deadly weapons, without hunger and without hostile walls, to guarantee a future for the human species and other living species, to realise equality in fundamental rights and solidarity among all human beings and to ensure them the guarantees of life, dignity, freedoms, health, education and minimum subsistence;

promote a constituent process for the Federation of the Earth, open to the adhesion of all existing States and aimed at the conclusion of this pact of peaceful coexistence and solidarity.

Let us now turn to Articles 31 and 32, which are constructed around the right of peoples to preserve their cultural and historical identity, not diverging in this respect from the Universal Declaration of Human Rights of 1948 and from the two Covenants of 1966. Important docu-

ments, once again, but also the product of laborious diplomatic compromises that did not have the ambitious aim of producing a Constitution of the Earth. If this is instead the goal, then decades of reflection on multiculturalism cannot be ignored. To whom is the Constitution of the Earth addressed? Are the holders of fundamental rights persons or peoples? For this is by no means the same thing.

The traditions of peoples, unless the envisaged Federation is merely another way of designating an allegedly better and more coherent West, often include – structurally, and not accidentally – the denial of fundamental rights. In many cases the traditions of peoples are the vehicle of the most blatant obscurantism, producing discrimination against the weakest and inflicting enormous suffering upon them. If one accepts culturalist discourse and the struggle for recognition of language and traditions as essential elements of a community’s identity, of a people, then one must admit that the fundamental rights of the person are subordinated to that identity. They are granted, not attributed, and are guaranteed only if they are compatible with that identity. Countries in which Sharia law applies seem to me to do exactly this. But, I reiterate, the range of examples is very wide.

Article 33 sanctions this principle. Sovereignty belongs exclusively to “the peoples” and no one may usurp it. But once again, from the perspective of a Constitution of the Earth, this term is ambiguous. Which peoples are we referring to? Only those that have already succeeded in constituting themselves as States? And what do we say to those that are still struggling to achieve this objective? Should every people, or every group that considers itself as such, be given a political form?

Moreover, popular sovereignty would consist in the “sum of those fragments of sovereignty” constituted, ultimately, by the fundamental rights of the person and the citizen. Thus, to be rigorously consistent, the only source of legitimacy for sovereignty enabling a State to adhere to the Federation is the recognition of fundamental rights and their guarantees as provided for by Luigi Ferrajoli’s constitutional doctrine. But at the same time peoples must respect their traditions and particular customs. Therefore, one of two things must be the case: either customs



and traditions are to be regarded as mere folklore, or, if they inescapably express the pulsating life of a people, how and to what extent can peoples be sovereign, given such a demanding definition of sovereignty?

Kant, in asking what Enlightenment was, had the intellectual courage to set it in clear opposition to the unreflective beliefs of the past and above all to religious dogmas, which crystallised in the traditional role of ecclesiastical institutions as allies of temporal power – the throne to which the altar provided indispensable ideological legitimacy. Sometimes throne and altar are one and the same, producing theocratic forms of power.

In contemporary forms of despotism, this appeal to religious tradition and/or national pride is entirely evident; indeed, I would say that it is displayed and claimed as an element of the new “Eastern driven” world order. In the irenic ecumenism of the Constitution of the Earth, the secular and austere clarity of Kantian Enlightenment – which nevertheless clearly inspires it – seems to dissolve and vanish. More generally, it is striking that someone who places the salvation of the planet and the realisation of the age of rights in a demand that is at once so exacting, intransigent and rife with contradictions, under the name of “Constitution of the Earth”, does not realise that in this way he is, despite himself, placing the fate of “living freely” directly into the hands of that part of the world which instead more or less openly hopes for the grand return, on the widest possible scale, of that millennial form of descending and maximally brutal power that Montesquieu, opposing it to moderate regimes, characterised as Oriental despotism.

The enlightenment myth of the common good

If we were then to investigate to what extent the Constitution of the Earth is compatible with human nature as we know it through the two thousand year inquiry into passions conducted by the classics of Western political thought, we might be overcome by the suspicion that Ferrajoli's draft is fundamentally affected by a kind of “anthropological negationism”, based, more or less consciously, on the conviction that the majority of human beings, if placed in the conditions to be so, are, so to speak, naturally enlightened – namely

cultured, wise, peaceful and far sighted – and are not instead predominantly dominated by passions and particular interests, generally paltry, as well as by beliefs and prejudices that sediment in that second nature constituted by one's cultural context of belonging.

If there is a recurring theme in all utopian thought, from Plato to Marx, it is ultimately this: the demand for an ethical metamorphosis that takes responsibility towards the whole to be primary, so as to eliminate or at least weaken conflicts of whatever nature that run through every political community.

To avoid this obstacle, which renders highly improbable any prospect of recognising a robust and effective third party above the parts capable of realising the *cosmopolis*, there is no alternative but to imagine the advent – yet another – of the new man, who places the good of the community above his own more or less petty particular and corporate interests, whether that community corresponds to the *polis*, the nation, or the *communitas orbis* no longer matters. If there is a recurring theme in all utopian thought, from Plato to Marx, it is ultimately this: the demand for an ethical metamorphosis that takes responsibility towards the whole to be primary, so as to eliminate or at least weaken conflicts of whatever nature that run through every political community.

In the twentieth century it was Schumpeter who brought the discussion of the common good to an end by showing that real democracies are nothing other than arenas of continuous conflict among particular interests, whose provisional resolution depends on the non violent method of electing representatives through popular vote to whom public decision making is entrusted.

One could immediately object that modern constitutions, inspired by those elaborated during the French Revolution, are

precisely the invention that allows the definition of a framework of fundamental norms of long duration capable of arbitrating – by moderating it and making it compatible with social cohesion – the conflict among multiple particular interests and the plurality of ideas present in a political community. Put differently, modern constitutions, especially as regards the declaration of fundamental rights, appear to express what can reasonably be preserved – without falling back into tribal and organicistic conceptions of the political community as an extension of family bonds – of the venerable classical and medieval tradition of the *bonum commune*.

This observation is defensible, at least within the Western cultural context in which, it seems to me, the proposal for a Constitution of the Earth is also situated, as the maximal extension of modern constitutionalism. It begins, however, to become problematic when the constitutional text shifts from being a set of fundamental rules of the game – that is, a pact of coexistence – into a sort of general outline of a binding political programme, which commits the governing institutions of the Federation of the Earth to bringing it to completion.

Now, let us try to apply this reasoning to the draft Constitution of the Earth. It seems to me to be a paradigmatic case of a document that expresses not only a set of universally attributed rights and procedural conditions useful for imagining solutions “by way of agreement” to the great evils looming over our heads and those of future generations, but also, if not above all, a political programme to be implemented, strongly characterised in a redistributive sense and aimed at realising a globally quasi socialist society in which States see their sovereignty largely reduced, starting with the planned abolition of national armies. This political programme may well be shareable, but that is not the point. The point is that it is predominantly a pre packaged political programme and not an agreement on the procedural conditions and preconditions required to reach, possibly, shared objectives deliberated at the end of a process of dialogue and confrontation.

Let us hypothesise for a moment that one day, not so far off, this Constitution becomes a reality. What would happen if thereafter, in one or more of the mem-

ber States of the Federation of the Earth, political parties whose programmes were radically antithetical to the programme measures provided for in this constitutional document were to win elections?

And yet the case is before our eyes; there is no need to resort even to a hypothetical reasoning. That embryonic form of international law, far less ambitious than the Constitution of the Earth, which refers to the UN Charter, is today little more than waste paper. But this is not even the decisive critical element that renders Ferrajoli's proposal abstract, because against this objection one could still invoke the need for a step forward rather than backward, that is, the improvement of the UN instead of the acknowledgement of its brain death.

The new humanity is a mirage

The element that ultimately reduces this proposal to little more than an exercise in style is that, paradoxically, wherever civil and political rights exist, political alignments whose values refer to a worldview distinct from, if not entirely antithetical to, that of the Constitution of the Earth have been, are and will be present. Here too there is no need for imagination. Our present, which in large parts of actually existing democracies sees the rise of far right parties and movements, should prompt reflection. But even if, under circumstances that are at this stage extremely difficult to imagine, the Constitution of the Earth were one day to be realised, it is instead easy to predict that as soon as parties opposed to implementing such a strongly characterised political programme managed to win elections in their country, they would either leave the Federation or work from within to dismantle or at least weaken the project. The situation in which the European Union finds itself is ultimately this, and it should serve as a warning.

In short, this draft Constitution seems to presuppose a planetary convergence around an idea of the *bonum commune*, that is, around a wide ranging political programme dictated by a sort of state of necessity which may be rationally compelling but does not reckon with that "crooked timber" which, for Kant, is the human being – or, if one prefers, with the dark abyss of evil that Conrad calls our "heart of darkness" – and, all the more so, with the profound, diverse

and conflicting cultural sedimentations that define the "second nature" of each of us and of the political communities to which we belong.

Yet the question of the (in)compatibility of all these utopias of harmonious and irenic societies with the fundamental springs that move human action, with that incurably "crooked" timber, according to the famous metaphor of the very author of *Perpetual Peace* – who is nothing other than humanity as we have known it since time immemorial – is by no means new. It has always arisen, for example, starting with the biblical story whose protagonists are Cain and Abel (Genesis 4), which we may consider foundational for politics and law.

The great evils looming over humanity and the planet, so aptly listed by Ferrajoli, are precisely the final outcome – made possible by the overwhelming power of science and technology – of what "human nature" has been, is and will be.

From the normative and prescriptive perspective, the political order can therefore take very different forms, but it cannot credibly be built on the inclination towards solidarity and fraternity among human beings. Politics is, rather, the response to this lack. The great evils looming over humanity and the planet, so aptly listed by Ferrajoli, are precisely the final outcome – made possible by the overwhelming power of science and technology – of what "human nature" has been, is and will be. Spears and arrows have been replaced by ballistic missiles, but otherwise little or nothing has changed. One can attempt to remedy these evils only by accepting that this is the human condition, without leaps forward, shortcuts or naïve petitions of principle.

Moreover, it must not be forgotten that human beings articulate their nature in relation to the cultural context in which they are immersed and by which they are shaped. Customs and practices differentiate us. This simple observation

raises questions about the cultural distance – prior even to theoretical or political distance – between this project of a Federation of the Earth and the worldview held by those despotic States whose citizens, largely consenting or acquiescent, constitute the majority of the current world population. China, Russia, Iran, India – to refer only to the largest and/or most populous countries – appear to share, albeit in their specificities, a complex of ideas entirely different, or rather a worldview very distant from, I would dare say diametrically opposed to, the Western one.

A return to reality

In conclusion, it does not require great acumen to understand that the explicit desire of Asian empires and their allies to rewrite the global order in their own image and likeness, presenting it as a more balanced multipolarism, entails the end, or at least a profound rethinking, of international institutions – starting with the UN – as well as of that set of documents constituting the lodestar that guides, or should guide, their action: the UN Charter of 1945 and the Universal Declaration of Human Rights of 1948, together with the 1966 Covenants on economic, social and cultural rights and on civil and political rights. That is to say, that sketch – however incomplete – of the conditions for the "perpetual peace" envisioned by Kant. Should this operation succeed, the model to look to in the new era, beyond the rhetoric of multipolarity, would be despotic States steeped in identity based traditionalism and in the interpenetration of throne and altar.

From this perspective, we can reasonably imagine that the substance of Ferrajoli's proposal would be considered less than waste paper and rejected as yet another insidious attempt by the hated "collective West" to further westernise the world, albeit under the guise of solidarity and fraternity. Arrogantly or, on the contrary, more subtly and prudently, this is the interpretation offered by that vast portion of the world that does not recognise itself in Western values. The reactions to the aggression suffered by Ukraine – from the open support for Russia by China and Iran to the widespread, convenient neutrality shared by India and, for the most part, by countries in Africa and Latin America – are emblematic in this respect.



The problem does not consist, as Western cosmopolitans seem to believe, in the gap between the noble ideals of the West and its crude matter, which betrays and sometimes distorts them, in short, which preaches well and practises badly. Do we really believe that a more coherent and scrupulously respectful West in the practice of its founding values would be a model capable of bringing everyone into agreement? Ferrajoli seems to think that this is the problem, and not, rather, the rejection of the Western model – a rejection all the stronger and more obstinate the more consistently and zealously that model is practised in democratic States governed by the rule of law.

From the point of view of a despotic regime, the more coherent a democratic State governed by the rule of law is, the more it represents a dangerous counter model to the tradition of despotism and to its social and anthropological foundations. The spaces of possible accommodation between the two worlds have always – physiologically – been constructed not around the greatest possible correspondence between ideals and political legal practices in Western democracies, but rather in the interstices, or in the chasms, of their corruption and their broad willingness to compromise, in the most trivial sense of the term, with regimes displaying the salient features of “Oriental despotism”.

This time, despotic regimes appear willing to go on the offensive, to change and impose the rules of the game, without conforming themselves to the canon and strategies of Western driven globalisation.

This time, however, the opportunistic accommodation that, for example, until yesterday made Putin's Russia a respectable commercial partner may prove fatal, because the claim no longer confines itself to a request for non interference in internal affairs and recognition of a sphere of geopolitical influence: this time, the aim is to replace the model whose lode-

star is the “age of rights” by asserting the cultural and moral superiority of the various incarnations of “Oriental despotism”, which thereby assigns itself the historical mission of redesigning the world order in its own image and likeness. This time, despotic regimes appear willing to go on the offensive, to change and impose the rules of the game, without conforming themselves to the canon and strategies of Western driven globalisation.

Perhaps this is why, with greater prudence, Kant's philosophical project for perpetual peace was careful to argue that the first step of a global federation or confederation should be the transformation of all its members into “republican” States – that is, non despotic ones – and that the initial impulse and point of reference of the federation should be provided by a powerful State whose constitution was already republican. In this way, Kant reasoned, such a powerful republic could become an indispensable geopolitical actor for the other States and therefore a point of reference and aggregation for the federal union. Only in this way could a state of peace regulated by the principles of cosmopolitan international law be guaranteed, by encouraging still hesitant States to enter and join the federation, which could finally become genuinely global. A consciously bold but reasonable utopia, to which the wishful cosmopolitanism of the Constitution of the Earth would do well to draw inspiration. ●

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