



# Hudson Institute

## Filangieri, the Founding Fathers, and the Culture of Human Rights

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## 1. *Filangieri and Franklin, Europe and America*

It is a well known fact that Gaetano Filangieri was an admirer of the American Revolution. In his view — as he wrote in his *Science of Legislation* of 1780 — Pennsylvania was “a nation of heroes, the asylum of liberty, and the admiration of the universe.” (*The Science of Legislation*, Engl. transl., printed for Thomas Ostell by Emery and Adams 1806, I, xi, 150). Of the several posthumous editions of this great work, one was dedicated to George Washington and another to Thomas Jefferson. He corresponded with Benjamin Franklin to whom he asked to be invited “to participate in the great Constitution being prepared in the United Provinces of America, the laws of which are to determine not only their fate, but also the destiny of the whole of this new emisphere.” (Quoted in A. Pace, *Benjamin Franklin and Italy*, American Philosophical Society, Philadelphia 1958, p.151).

Although Franklin never made the invitation (sadly but, I must admit, quite reasonably), he sent Filangieri a collection of the Constitutions of the American States in 1783. Filangieri commented on them, and Franklin wrote back to him with fresh observations. Unfortunately, the comments have never been found, in spite of many efforts by historians. This material would be a valuable source of information for understanding the relationship between the American and the Italian Enlightenment especially on issues such as the regime of division of powers, criminal law, death penalty, the role of the Judiciary, about which Filangieri proved to have far-seeing views. At present, the only thing we know is that a nephew of Filangieri had a chance to see it, and commented on it by observing “the curious fact developed in it by one of the commentators, that all the leading statesman in America seemed chiefly to be concerned in placing restrictions upon the popular will, while the European philosophers or democrats were equally zealous in abolishing all restriction.” (A. Pace, *op. cit.*, p.153)

I believe this is one of the main reasons for reflecting on Filangieri and Franklin today. Their destinies couldn't be more different. Franklin and the Founding Fathers promoted a liberal revolution whose effects are still felt today in the United States and elsewhere; Filangieri and his circle of Neapolitan intellectuals sparked off a Jacobin revolution that terminated in a blood bath. At that time, the two shores of the Atlantic took different paths. Why did this split occur? And is it still underway? If this is the case, who is most in the right, a democratic-oriented Europe or a liberal-leaning America? Or rather, as I fear, are we all in the same boat, running the same risks?

## 2. *Filangieri's “absolute goodness” and human rights*

The point of departure of Filangieri's *Science of Legislation* is easy to formulate: when is a law a good law? Filangieri's answer to this question is: there are two kinds of goodness, "absolute" and "relative."

A law is absolutely good if it is in "agreement with the universal principles of morality, common to all nations and all governments, and adapted to all climates." (I, iv, p.23) A law is relatively good if it agrees with the historical, environmental, cultural, religious, social, et cetera circumstances of the people whom it addresses. In short, a law is relatively good if it reflects "the state of the nation which receives it." (I, v, p.49) Since Filangieri maintains that the principle of absolute goodness is "the first rule of law" (I, iv, p.24), we can say that absolute goodness is the criterion of *legitimacy* of laws, while relative goodness is a criterion of their *utility*. This is why Filangieri maintains that two opposite laws may both be relatively good, because they are useful to two different nations or to the same nation but in different historical periods, but no law in any nation or era is acceptable if it goes against the absolute principles of morality.

Filangieri was not a mere political scientist. Like Machiavelli before him, but without his moral unscrupulousness, Filangieri intended to advance "a philosophy in aid of governments." And precisely like Franklin, he aimed to tear off the sceptre from tyrants. But if philosophy is to aid governments it has to solve two preliminary questions. What are the principles of absolute goodness rulers should abide by? And how can these principles be known?

Filangieri's answer to the first question is the same as that of the natural right tradition as passed down by John Locke and the United States Declaration of Independence. In brief, Filangieri makes the two following statements.

First, there are universal moral principles: "natural right contains the immutable principles of eternal justice in every case." (I, iv, p.23)

Second, these principles have a divine origin: as he remarks, "they are neither the result of the ambiguous maxims of the moralist, nor the useless and unproductive meditations of the philosopher. They are the dictates of universal reason, and of that moral code, which the Author of Nature has imprinted on the heart of every individual of the human race." (*ibid.*)

Filangieri's answer to the second question is also indebted to the same tradition stemming from Locke. He makes two farther statements.

Fourth, the universal moral principles of absolute goodness are understandable by everyone according to his own reason. "The savage of Nova Zembla — he writes — is aware, as well as Locke, that he has no right to the beast killed at a distance in the chase by one of his tribe." (I, iv, p.24)

Fifth, the universal moral principles are knowable by revelation. Besides reason — Filangieri writes — "the next object of absolute goodness is revelation ...The laws should neither endeavour to oppose its progress nor weaken its effect. An attempt at either would be an attempt to shake the foundations of an edifice raised by the Great Being, who has the first rights to our obedience." (I, iv, pp.36-37)

Two consequences worthy of great attention may be drawn from the latter statement.

The first one is historical: if the universal moral principles of absolute goodness are directly or indirectly bound to revelation, i.e. to the Christian Revelation, it can be safely affirmed that, without Christianity, there would be no Europe. Like Franklin, Filangieri was more of a Mason than of a Christian; nonetheless, he wrote:

“If indeed any brilliant instances of benevolence appear amidst the errors and obscurity of the European codes of law, they owe their lustre to a religion, which in the recommendation from the altar of the offices of mutual affection and the tenets of equality, hath strengthened the liberties of man by the prohibition of domestic slavery... The triumph of reason and humanity is certainly our due, and neither the legislative code of Egypt, Greece, nor Rome, can stand a comparison with that of the present times.” (I, iv, pp.37-38)

The second consequence concerns religion’s civil, juridical and political function. If, according to Filangieri, religion is an “expansion and modification of the universal principles of morality,” (I, iv, p.37) it can be said that, without religion, in particular without Christianity, human rights have no moral grounding. Filangieri writes:

“Revelation should be the legislator’s guide. The Decalogue alone contains within a few precepts everything to be collected from an hundred volumes of morality ... The private peace of individuals and families, conjugal virtue, and public tranquillity, are the necessary consequences. Of what inestimable advantage to legislators is not such a perfect model!” (I, iv, p.37)

This is not to say that for Filangieri the State must be confessional. There is a clear distinction between the public and the private sphere. The State attends to the former: personal thoughts, intentions, and what we now call lifestyles, must not be the legislator’s concern. On the other hand, the State can not reach its goal of ensuring the serenity and security of its citizens, if their private lives are not inspired by virtue. Filangieri writes:

“The citizen’s public order and security require that ... authority stop before his doorstep, that it respect the citizen’s peace and liberty ... that it allow due course to his desires. At the same time, they require a further restraint, another tribunal, judge, code of conduct regulating the citizen’s hidden actions, curbing his secret abandons, encouraging his undisclosed virtues, binding him to justice honesty and virtue ... Here is religion’s true action.” (*Piano ragionato*, not printed in the English translation, pp. 57-58 of the original Italian edition)

And here is another point of contact between Filangieri and the Founding Fathers of America. More or less in the same years, in his *Notes on the State of Virginia* (1784), Jefferson raised the following question:

“Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath?” (*Query XVIII*)

Franklin and all the Founding Fathers were of the same opinion. For example, John Adams famously wrote:

“Religion and virtue are the only foundations, not only of republicanism and of all free government, but of social felicity under all governments and in all combinations of human society”.

This is my concern. My question is the following. Today a growing number of intellectuals, as well as politicians (and judges), believe that religion is an obstacle to the peaceful coexistence of people of different nations, that it ought to be kept separate from political life, and that it can not belong to the public sphere. While the Founders thought that our free institutions need a moral and religious basis, philosophers like John Rawls and many others claim instead today that liberalism is “free-standing”, i.e. that it is simply and exclusively political. Franklin and Filangieri would have rejected this idea, and I personally fear its consequences. Let me briefly pay homage to both men by explaining why I do harbour such feelings.

### 3. “Detachment” and the crisis of human rights

Human rights, according to Filangieri, are “innate,” (I, 298) “universal,” (I, 76) “sacred,” (I, 84) “imprescriptible.” (I, 82. As such, they come before the State and are independent from it: people enjoy these rights *qua* persons, not *qua* citizens. As Locke argued, they exist even in the state of nature. The question is then: if people are “endowed” with human rights and if they, in virtue of these rights, are free to pursue their own lifestyles, and if consequently the State is not allowed to interfere with these styles, how can such a State, a quintessential, liberal State in Locke’s sense, preserve a sufficient cohesion among its citizens, retain their loyalty to the institutions, and avoid its own disgregation?

The answer of Filangieri and of the Founding Fathers, as we saw, is: by education to virtue, including the virtue of law abidance, and by religion, the best guide to such an education.

This naturally implies that the State is not entirely neutral with respect to the different life visions, nor entirely independent in regard to the different religions. More precisely, this means that the liberal State is indebted to the morality and religion that engenders and nurtures the culture of human rights. More exactly still, this means that the liberal State is indebted to Christianity and to every “comprehensive doctrine” (to borrow another expression by Rawls) that takes inspiration from Christianity.

But Filangieri’s solution raises a paradox. On one side, the liberal State is a secular State: it requires the separation between Church and State and between politics and religion; on the other side, the liberal State, precisely because it is based on human rights, requires a religious grounding. Is there a way out of this conundrum?

I do not intend here to enter such a complex philosophical question. But I can say how it has been solved *de facto*. Since the Enlightenment, modern political culture has operated what may be termed a process of “detachment” or “emancipation.” It has detached the liberal State and human rights from religion, and has emancipated political reason from all religious morality.

The goal may seem reasonable, because the detachment of free institutions from moral codes and religious tradition promises to bring more tolerance and more

hospitality. Nevertheless, the result is not satisfactory, nor can it be. Not only has tolerance not increased in our countries and the issue of citizenship very often become controversial, the quantity and quality of claims considered as human rights has also exploded, especially in the social and ethical or bioethical fields. Once insurmountable *limits* to the action of the State, human rights are now becoming the State *concessions*.

On such a dramatic turning point we ought particularly to reflect upon. We have certainly become more secular, we have probably become more democratic, and our societies are probably becoming more and more open; but if human rights effectively depend on the State, can we claim we are becoming more free? Our forefathers fought to be free from the tyranny of absolutist and theocratic regimes. Are we not plunging into another absolute regime and another theocracy, a “democratic absolutism” and a “secular theocracy,” if we may call them so?

I leave my audience the burden of comforting me. I conclude by mentioning another phenomenon that worries me in addition to that of detachment. Nowadays the explosion of human rights claims increasingly depends on courts of justice and supreme courts rather than on parliaments. The Judiciary, once a passive body, as in Filangieri’s conception, is now turning *creative*. And this gives rise to a serious problem, because the highest virtue of the judicial system, i.e. its independence, is in danger of becoming its greatest weakness, that is to say, its assimilation to a political body. We expected for a long time the question “who controls the controllers?”, but are so little prepared for the question “who controls the judges?” that we can not even imagine it being raised.

To conclude, human rights require free institutions and these require deep moral virtues and strong religious commitment. I am afraid that if we do not take the latter both seriously, as seems to be the case today, Franklin and Filangieri’s efforts to build a regime of liberty might be destined to fail. It was then their obligation to speak, it is now ours to listen.