

PIETRO COSTA, CARLA DE PASCALE  
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on  
**Gaetano Filangieri's *The Science of Legislation*,**  
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*"The Science of Legislation": Impressions of Readings*

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In recent years we have witnessed a renewed interest in the work of the Neapolitan jurist and philosopher Gaetano Filangieri (1752-1788): the studies that appeared in the 1980s and 1990s<sup>1</sup> were followed by monographs by Vincenzo Ferrone<sup>2</sup> and by Francesco Berti<sup>3</sup> and, then, by the collected essays edited by Antonio Trampus.<sup>4</sup> This rich harvest of studies is, moreover, not fortuitous, and gravitates around the useful initiative, promoted and directed by Vincenzo Ferrone, of launching a philologically reliable and annotated edition of *The Science of Legislation*.<sup>5</sup>

A thoroughgoing presentation of Filangieri's work and of the recent Filangierian historiography would go beyond my province and the space at my disposal. I shall therefore have to limit myself to expressing my impressions of recent readings; impressions that, inevitably, are exposed to the risk of ingenuousness (given my superficial knowledge of the Italian followers of the Enlightenment, and of Neapolitan culture).

A first impression arises from Ferrone's recent book, which reads as an impassioned and stimulating "introduction" to Filangieri's work: the impression, namely, that *The*

<sup>1</sup> P. Becchi, *Vico e Filangieri in Germania*, Naples: Jovene, 1986; R. Feola, *Utopia e prassi, L'opera di Gaetano Filangieri ed il riformismo nelle Sicilie*, Naples: E.S.I., 1989; *Gaetano Filangieri e l'Illuminismo europeo*, Naples: Guida, 1991; A. Andreatta, *Le Americhe di Gaetano Filangieri*, Naples: E.S.I., 1995; E. Lo Sardo, *Il mondo nuovo e le virtù civili. L'epistolario di Gaetano Filangieri*, Naples: Fridericiana Editrice Un., 1999.

<sup>2</sup> V. Ferrone, *La società equa e giusta. Repubblicanesimo e diritti dell'uomo in Gaetano Filangieri*, Rome and Bari: Laterza, 2003.

<sup>3</sup> F. Berti, *La ragione prudente. Gaetano Filangieri e la religione delle riforme*, Florence: Centro Editoriale Toscano, 2003.

<sup>4</sup> A. Trampus (ed.), *Diritti e costituzione. L'opera di Gaetano Filangieri e la sua fortuna europea*, Bologna: il Mulino, 2005.

<sup>5</sup> G. Filangieri, *La scienza della legislazione*, critical edition, directed by V. Ferrone, at the "Centro di Studi sull'Illuminismo europeo 'Giovanni Stiffoni,'" Mariano del Friuli: Edizioni della Laguna, 2003-2004. The volumes are edited by P. Bianchini, M. T. Silvestrini, F. Tocchi Vespasiani, G. Tocchini, A. Trampus.

*Science of Legislation* actually engages in the audacious enterprise of providing a meeting-point – a moment of synthesis – for the most vital and original expressions of eighteenth-century European intellectualism. Such an enterprise is, obviously, both ambitious and arduous, given the variety and complexity of the theoretical proposals that compose the “public discourse” of the eighteenth century; yet, indeed, this is the height attained by Filangieri’s great work, which is thus in itself an eminent reflection of the principal texts and themes of Enlightenment Europe.

From Locke to the Scottish Enlightenment, from Grozio to Pufendorf, from the “English model” to American democracy *in statu nascenti*, not to mention the *philosophes* and (obviously) Neapolitan culture – everything flows back into *The Science of Legislation* and finds its proper place. Whatever may be the immediate causes of the wealth of (implicit or explicit) references woven into the work (the “Masonic sociability,” to which Ferrone rightfully calls our attention, taking his cue from Giarrizzo’s study,<sup>6</sup> or the author’s extraordinary capacity for work, or his cosmopolitan openness), it is certain that Filangieri’s “wager” is his will to offer a comprehensive representation of the socio-political order, sustained less by membership in a specific tradition, in a consolidated and univocal orientation, than by the finding of an *ubi consistam* of his own, of an original “locus” conquered by highlighting the nuclei of truth of differing, if not opposing, doctrines.

*The Science of Legislation*, then, as a mirror of the European Enlightenment: not, however, a faithful mirror – not an inert reproduction of the opinions of others – but rather an attempt at synthesis, which knows and considers various options but is also capable of relativizing and transcending them. The risk that is implicit in such an ambitious project is clear: the risk of eclecticism, the risk of juxtaposing incompatible visions without being able to place oneself at a sufficiently safe distance from them. If we should be obliged to present *The Science of Legislation* as “eclectic,” then we would have to declare Filangieri’s enterprise a failure. In fact, however, the two most recent monographs (Ferrone’s book in particular, but also Berti’s) demonstrate *ad abundantiam* the existence of a strong and tenacious Ariadne’s thread that keeps Filangieri from losing his way in the labyrinth of eighteenth-century “public discourse” and guides him in the formulation of an original proposal.

As a simple reader, I cannot but endorse this interpretative thesis. At the same time, however, I feel that key problematic questions of considerable complexity come together in Filangieri’s work: not contradictions that compromise the comprehensive coherence of his discourse, but moments of tension between themes that appear, simultaneously, to be complementary but not homogeneous. As I see it, precisely these “fields of tension” render his discourse, on the one hand, more unstable and oscillating but, on the other, more vital and fruitful.

I shall continue to express the impressions from my readings by listing some of these “fields of tension.”

I see a certain tension arising between two great theoretical models or schemas (to which Berti rightfully refers<sup>7</sup>), genetically and conceptually different and

<sup>6</sup> G. Giarrizzo, *Massoneria e illuminismo nell’Europa del Settecento*, Venice: Marsilio, 1994.

<sup>7</sup> See Berti, *La ragione prudente*, p. 166 ff.

nonetheless present together in *The Science of Legislation*: a classically natural-law schema, marked by the two moments (be they “logical” or “historical”) of the state of nature and of the social contract, and a schema that, by contrast, puts in brackets the moment of the origin and the (decisionistic, voluntaristic) leap from the pre-political condition to civil society, to insist on the historico-evolutionary character and on the (as we would call them today) sociologico-functional determinations of the politico-juridical order.

The presence of the two schemas together in the same text does not give rise to irremediable contradictions thanks to the different strategic functions ascribed to them. While the natural-law model is made to play the role of grounding and legitimizing the order, the Montesquieuvian lesson is nonetheless kept in mind in enhancing the “realistic” tradition to correct and supplement the picture of the politico-juridical forms, to recall the necessity of realizing them while taking duly into account the variety of times and places. (For that matter, even a “constructivist” such as Rousseau did not fail to submit the “pure” model elaborated in his *Social Contract* to adaptations and mitigations, where a “Great State” such as Poland was concerned.)

While willing to accept the teachings of “realism” (from Machiavelli to Vico, to Montesquieu), Filangieri could not simply write off the natural-law tradition, essential as it is for finding a solid base for the rights of subjects; and assuming such rights – liberty and property, and the inseparable link between them, first of all – as one of the mainstays of the order is an absolute priority for Filangieri. In emphasizing the centrality of the liberty-property link Filangieri’s task is not, in fact, difficult. To be sure, the linked liberty and property that Locke presented as an expression of the subject as such (and at the same time as the fundamental rule of an order already given prior to the existence of civil society and therefore independent of it) is the last link, in Locke, of a chain of arguments different from the one adopted by physiocracy to place property at the center of its *ordre naturel* (not to mention Hume, hostile to the state of nature and the social contract, while resolutely making property the main rule of justice). In the thematization of rights and of linked liberty and property, then, Filangieri’s strategy – his search for a nucleus of truth shared by differing or opposing theories – easily won the day, given the effective convergence of multiple (and even incompatible) orientations in the valorization of private property. The difficulties increase, and an interesting and vital field of tension arises, when liberty and property, the (pre-political) “natural” rights and rules of common life, enter into relation with the sovereign and his irresistible will.

A weak and evanescent sovereignty by no means corresponds to the centrality of rights. The mechanism of natural-law, which on the one hand does make it possible to thematize the liberty and equality of subjects (their original liberty and equality, of course, without precluding the possibility of introducing subsequent mitigations and corrections), on the other leads to the invention of a new sovereignty both in its “artificiality” and in the radicalness of its potestative content.

This is Filangieri’s field of action, in which he valorizes rights but has no intention of weakening the sovereign, whom he recognizes as holding the highest and most incisive capacity of intervention. Whoever the holder of sovereignty may be (whether we place Filangieri, following a tried and tested historiographic tradition, among the advocates of “illuminated despotism,” or whether we take him as the champion of a

new republicanism, as Ferrone does in his recent book<sup>8</sup>), there is no question that the content and breadth of his power have the radicalness and the “absoluteness” that are characteristic of modern sovereignty (beginning with Hobbes).

For Filangieri, moreover, emphasizing the fullness of sovereign powers means not just accepting a widespread opinion but, also, acquiring an essential tool in light of one of the main goals he pursues in his policy of rights, namely, the struggle against feudality. Filangieri’s domain is not the empyrean of pure theory: the civil and political vocation that pervades his discourse (and permeates all Enlightenment philosophy, but that manifests itself with different modalities and intensities according to the contexts and personalities concerned) gives rise to a vital nexus between his theory and his reformist plan (which, in his view, does not diminish the importance of the truth value of the theory itself, i.e., its transformation into a mere rhetorical strategy). Hence we find a spontaneous convergence between the best accredited image of modern sovereignty and the reformist strategies Filangieri cultivated for the Kingdom of Naples: only a strong sovereignty, capable of autonomous and penetrating initiatives, can be the pivot of an order that has been freed at last from the encumbrances of an anarchical multiplicity of intermediate powers.

The force of the sovereign and the equality of the subjects appear to be complementary features of a completely “rationalized” order. It is in this axiom that the root of the distance that separates Filangieri from Montesquieu lies. Montesquieu celebrates liberty (and originally establishes a decisive nexus between liberty and the reform of penal law), but locates it in the wrong places: in the forests of the ancient Germans, which gave birth to “the Gothic government” and even to that government – the English government – which, for Montesquieu, is audacious and somewhat perturbing.<sup>9</sup> What disturbs Filangieri is an excessive proximity (in spite of appearances) between a moderate government of the Continental type and the English government; i.e., the fact that they can be considered (traditionalist or innovative) variants of a “mixed government.” Filangieri does not like the English model either: due to many, specific aspects of its constitutional organization, but perhaps even more to its excessively “nobilary” imprint, to the excess of “continuism” (despite the revolutions of the seventeenth century) that distinguish it, since the components Montesquieu most appreciated – “the civil liberty of the people, the prerogatives of the nobility and of the clergy, and the power of the kings”<sup>10</sup> – persisted in it, as parts of a harmonious

<sup>8</sup> Ferrone’s thesis is called into question by C. Capra, “Repubblicanesimo dei moderni e costituzionalismo illuministico: riflessioni sull’uso di nuove categorie storiografiche,” *Società e Storia*, 100-101 (2003), pp. 355-407; Ferrone replies in his “Risposta a Carlo Capra,” *Società e storia*, 104 (2004), pp. 401-407. On the republican tradition and the problems connected with its “actualization” see M. Geuna, “La tradizione repubblicana e i suoi interpreti: famiglie teoriche e discontinuità concettuali,” *Filosofia politica*, 12 (1998), pp. 101-32; L. Baccelli, *Critica del repubblicanesimo*, Rome and Bari: Laterza, 2003.

<sup>9</sup> It is from the customs of the Germans – Montesquieu writes – “that the English have taken their idea of political government. This fine system was found in the forests.” (Ch.-L. Montesquieu, *The Spirit of the Laws*, trans. A. M. Cohler, B. C. Miller and H. S. Stone, Cambridge: Cambridge University Press, 1989, XI, 6, p. 166).

<sup>10</sup> *Ibid.*, XI, 8, p. 167.

whole. What is more, Filangieri's liking for America (a republican liking, Ferrone would say) can be corroborated by the awareness that America presents itself as the only "civil" place that is historically immune from a feudal past.<sup>11</sup>

A central role in the order must, then, be attributed to the sovereign. But no less central (for the natural-law tradition and for Filangieri) is the role of rights. The "absoluteness" of sovereignty comes to co-exist – indeed, to intertwine – with the different and rival "absoluteness" of the rights of the individual. A field of tension is thereby delineated that, rooted in the history of seventeenth and eighteenth century politico-juridical culture, dominates the revolutionary debates to become the true cape of storms of the dawning liberalism in early nineteenth-century France.

It is a field of tension that comes completely under the rubric of Rousseau's *Social Contract* but, so to speak, that is resolved by Rousseau before it is formulated: resolved, however, not by dramatizing the poles that compose it, but rather by appealing to an optimistic vision of the sovereign and a "corporate" vision of the social body (a body that, as such, as Rousseau writes, can never harm its members).<sup>12</sup> This is the field of tension that concerns Filangieri, who, however, seems more aware of the significance of the dilemma, which for him calls for a constitutional solution capable of reconciling the demiurgical role of the sovereign and the absoluteness of rights.

Filangieri's "constitutionalism," as Ferrone calls it, is the fruit of a diagnosis and, at the same time, is a proposal for therapy. The diagnosis stems from the awareness of the immanent doubleness of sovereignty – its providential incisiveness and pervasiveness and at the same time (and for this very reason) its potential dangerousness and destructiveness. One must have recourse to the full and unfurled power of the sovereign to liberate the subject from dependencies and inequalities – but without ignoring the liberated subject's exposure to risk, his fragility in the face of the omnipotence of the new Leviathan.

The great dilemma of politico-juridical modernity is present in Filangieri's pages (and Ferrone opportunely emphasizes its importance). One will say: it was not only Filangieri, in the late eighteenth century, who grasped the significance of this dilemma (indeed, we recall such figures as Sieyès and Condorcet). It is also true, however, that in the mainstream of eighteenth-century public discourse and of the revolutionary debates themselves an optimistic vision of sovereignty prevailed; namely, the ancient conviction (which, substantially, finds its point of origin in the wars of religion and the thinking of the *politiques*) that sees the sovereign as an ally of the subjects, as the natural protector of their security. To be sure, things will change after the Jacobin storm, which will sweep away any illusion about the spontaneous convergence of interests between the individual and the sovereign. The years that precede the great revolution, however, do not appear to be dominated by the theme of the conflict between subjects and sovereign (provided that the sovereign is duly "illuminated"). It is, rather, in

<sup>11</sup> On Montesquieu's influence on the intellectuals of Naples and on Filangieri and Pagano's anti-feudal strategy see the excellent essay by G. Imbruglia, "Rivoluzione e civilizzazione. Pagano, Montesquieu e il feudalesimo," in D. Felice (ed.), *Poteri, democrazia, virtù. Montesquieu nei movimenti repubblicani all'epoca della Rivoluzione francese*, Milan: Angeli, 2000, pp. 99–122.

<sup>12</sup> Allow me to refer to P. Costa, *Civitas. Storia della cittadinanza in Europa*, 1. *Dalla civiltà comunale al Settecento*, Rome and Bari: Laterza, 1999, p. 493 ff.

the American “laboratory” that we see the first signs of a concern that will bear its fruits in the subsequent constitutional development; and it is not fortuitous that, for Filangieri, the events in America are worthy of the closest attention and consideration. Whatever may be the stimuli that act on Filangieri’s reflections, the result is, clearly, the formulation of a diagnosis (the perception of the field of tension) and the suggestion of a therapy: namely, the opportuneness of thematizing the distinction between constitution and law and of submitting the latter to some form of control (a control that Pagano will express in terms of an “ephorate”).

It is thus possible to imagine a sovereignty *sub lege*. This does not mean, however, that all the tensions have been defused. The relation between the individual and the *civitas* is not exhausted in the mere sum of (protected or threatened) rights, but involves the entire existence of the subject. From this standpoint, Filangieri’s anthropological vision and his political translation or projection come into play: on the one hand, the substantially pessimistic image of an “egotistic” individual, concentrated on self-assertion, dominated by the love of power and, on the other, the necessity that a mass of “interested” and conflictual individuals give rise to a sense of common belonging to a *civitas*, to a common membership in a public sphere whose apex is its sovereign legislator.

Both the formulation of the dilemma (in what way the “interested” individuals can come to compose the unity of the *respublica*, even to the point of sacrificing themselves, if necessary, for its salvation) and the hypothesis of its solution suggested in *The Science of Legislation* refer (I believe, despite authoritative opinions to the contrary) above all to one text and one author: namely, that *De l’homme* of Helvétius’ that offers Filangieri the image of an individual dominated by an overriding passion – “l’amour de la puissance” – but that also suggests, as an intermediary between the *particuliers* and the public sphere, not repression but rather an exploitation of the passion for power, which can be employed to the advantage of the public sphere if it is stimulated to convert itself into the love of glory.

Glory, Helvétius writes, is “a plant of a republican soil.”<sup>13</sup> It can be cultivated by the provident legislator to foster the nation’s force of attraction with respect to its members, to transform a private vice (the passion for power) into a public virtue. Does this mean, then, that we can take as resolved, in *The Science of Legislation*, the field of tension triggered by the relation existing between the sovereign and the subjects, between virtue and interests, between the public dimension and the private sphere?

I believe that, on the contrary, the fields of tension are in fact multiplied. We have, first of all, a tension within that tradition or that republican model which Ferrone’s original interpretation sees at the origin of *The Science of Legislation*. The tension, in this case, expresses itself in two distinct but complementary figures: on the one hand, the clash between “publicness” and “privateness,” and on the other, the opposition between the ancients and the moderns (present in Montesquieu, utilized by Sieyès, and celebrated by Constant), with the ancients privileging the sense of belonging and

<sup>13</sup> C.-A. Helvétius, *De l’homme, de ses facultés intellectuelles, et de son éducation* (1773), Paris: Fayard, 1989, sec. 4, chap. 5, p. 340; [*On Man, His Intellectual Faculties and His Education*, trans. W. Hooper, Albion Press, 1810, p. 292].

of the “public” (esteeming, as Machiavelli put it, “more the homeland than the soul”), while the moderns promote commerce and privilege private interest.

It seems, in fact, that Filangieri seeks to elude this alternative, by proposing (in Ferrone's reading) a “republicanism of the moderns”: a formula by which one safeguards rights and valorizes the liberty-property link celebrated by so many different discursive traditions while, at the same time, presenting the mechanism of political representation as a bridge between the public and the private, thus permitting the “liberty of the moderns” (to use the celebrated formula) to link up with the ethos of political engagement and participation. We have, then, a field of tension between the privateness of subjects and their public and participative dimension (between interest and virtue; between the ancients and the moderns); but we also have political representation, as a middle term between the extremes: the solution of the dilemma, entrusted to the *deus ex machina* of representation (the solution theorized by Sieyès and then by Constant, but circulating in the meanders of the vast discursive production of the eighteenth century and brought out above all in the American experience), finds in Filangieri, too, a significant formulation.

We have, however, a further tension in *The Science of Legislation*: a tension that still lies within the relation between the sovereign and the subjects – not triggered, however, by the dialectic between “private” and “public” but, rather, deriving from the clash between the spontaneity of social interaction and the dirigisme of sovereign intervention. If in fact, on the one hand, the mechanism of representation suggests a spontaneous ascent of subjects towards the public sphere, a meeting of State and society made possible by the free movement of subjects, on the other the transition from love of power to love of glory, the transformation of private passions into public virtues cannot – for Helvétius, or for Filangieri either – be entrusted to the spontaneity of social interaction, but demands the forceful, demiurgical intervention of the legislator.

The sovereign and no one but the sovereign is the force capable of accomplishing the miraculous transubstantiation of private vices into public virtues; and, nevertheless, also the “liberty-representation” link is an indispensable mainstay of the republicanism of the moderns. The further tensions perceivable in *The Science of Legislation* derive from these elements – essential, and difficult to reconcile.

On the one hand, the education and instruction of the citizens is, for Filangieri, of decisive importance: indeed, he devotes the entire fourth volume of his work to this theme. And education means not just literacy and the transmission of knowledge, but is the development of a civil and political consciousness; it is an indispensable instrument for a sovereign engaged in the creation of a republic founded on the active and conscientious participation of his subjects. To be sure, for Filangieri public opinion is important (as it will be for Constant and for all the nineteenth-century liberalisms). But public opinion, in its turn, in Filangieri's view of it, carries traces of the fundamental tension: on the one hand it presupposes liberty, and in particular that freedom of thought and of the press which Filangieri himself celebrates and demands; but, on the other, it is not simply the fruit of the spontaneous dialectic of the orientations and value judgments circulating in a certain society; it is not simply a bulwark of society “against” the sovereign, a tribunal ready to condemn the abuses he may commit (according to a formula that Constant will clearly state), but is also the result of the ruling and illuminating action of the sovereign himself. It is the fruit of a thoroughgoing and demanding

education. It is the expression of an *unum sentire* with respect to which the spontaneous dialectic of opinions entertains a problematic and nonthematized relation.

The interventionism of the sovereign (his willful action, his decisionism, his artificialism) comes into tension with the spontaneity (the “naturalness”) of individual actions. And the dyscrasia between these two elements involves, moreover, others aspects of Filangieri’s edifice: think, on the one hand, of the centrality of the liberty-property link, the crux of an order which is imagined (with Locke, with the physiocrats) to be spontaneous; and, on the other, of the interventionist engagement Filangieri demands of the sovereign in the name of equality.

It is true, then, that the meticulous exegesis Constant devotes to Filangieri’s work boils down (as Ferrone maintains in an interesting chapter of his book) to a tendentious reading of *The Science of Legislation*, making Filangieri into an emulator of Mably, a monotone defender of the republic of the ancients, a theorist of sovereign interventionism. The distorting effect of Constant’s interpretation stems, however, from the fact that it cancels one of the poles of the field of tension to flatten Filangieri’s work on the opposite pole. Constant’s strategy (adopted *pour cause*, to be sure) is misleading because it renders homogenous a text that lives on the co-existence of differing motifs: a text that is original insofar as it moves within a tension that is unresolved and probably irresolvable. That which prevented Filangieri from olympianly contemplating the free and spontaneous movement of opinions, that which induced him to take liberty and sovereignty, spontaneity and interventionism, as complementary terms of his politico-juridical design, was the need to denounce the illegitimacy of what exists. It was not a question of favoring this or that sectorial reform or of describing the island of Utopia, but rather of developing a critique of the present order and excogitating an alternative, of designing a different way of governing and of being governed.

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### *The Justice at the Origin of Laws*

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1. Present in the highest European culture, and particularly in its most advanced part, the construction of knowing in the form of a system was a theme by which Filangieri, too, was attracted; indeed, in southern Italy, in the heart of the second half of the eighteenth century, he successfully attempted an analogous enterprise in the field of law, proudly numbering his *Science of Legislation* among the “systematic works” (“*opere di sistema*”: volume IV, page 223).<sup>14</sup> Having conceived of the idea of systemization in

<sup>14</sup> G. Filangieri, *La scienza della legislazione*, critical edition directed by V. Ferrone, 7 vols, Mariano

the form of a science of juridical knowing, he developed a project of vast proportions and of complex design, whose contents consist first of all in the “principles” laid down by the author as the foundations of this science based on his own vision of the world, accompanied, then, by the full range of the specific arguments subject to legislation. This gave Filangieri the possibility of surveying many aspects of the collective life of a nation, from its economic organization to its form of government, from its fiscal to its penal and its educational system. He thus comes to embrace the entire sector of educational institutions while also touching on those aspects of popular customs that the laws cannot regulate but can, nonetheless, influence, promoting the expression of some of the most powerful “passions” that inspire human behaviors.

Filangieri proposes more or less radical changes in each of these aspects; but, due to the work's systematic thrust, his proposed reforms – cascading in succession and reverberating from one part of the system to the other – end up by permeating it entirely and propagating in all directions. In fact, the final outcome of this work – composed of many, often heterogeneous, parts placed, however, not only in strict relation but, indeed, in a relationship of real coordination, designed to produce an organization that is simultaneously complex and compact – was a program of reform that can truly be defined as global, a project of renewal capable of bringing all spheres of civil life into play and of showing their reciprocal interactions. The features of a project for radical economic, political and social reform thus stand out from the backdrop of the completed exposition of this “science,” which proves to be one of the most advanced results of that conception which in eighteenth-century Europe asserted itself under the label of “enlightened despotism.” In some of its parts, moreover, it also reveals anticipatory elements, if it is true that in the generation active between the eighteenth and nineteenth centuries, and in particular among the Italian “Jacobins,” we find quite a few followers of Filangieri's school, and that the greatest figures of Neapolitan culture of the day shared a clear consonance of intents also through the influences received from the line of thought that led from Genovesi to our author.

The descendant of a family of Norman origin and of ancient nobility, in the course of his juridical studies Filangieri was particularly influenced by the teachings of A. Genovesi, even though he did not have the occasion to study with him personally. Genovesi was a philosopher in the Viconian tradition (in 1743 he published his *Elementa metaphysicae*); he knew and admired Newton's work, and Locke's – and later Hume's – philosophy. He began his career as an economist with the publication of *Discorso sopra il vero fine delle lettere e delle scienze* where, in addition to facing off against eminent figures such as Rousseau and Montesquieu, he engaged in heated debate with mercantilist doctrines, giving rise to a theory that fit well in the panorama of the most recent trends, principally of French origin, from which physiocracy was developing. The first Chair of public economics at the University of Naples was created for Genovesi; his celebrated *Lezioni di commercio* (1765–67) were at the origin of that

del Friuli: Edizioni della Laguna, 2004 (1st ed. 2003); *The Science of Legislation*, trans. R. Clayton, 2 volumes, London: Printed for T. Ostell, by Emery and Adams, 1806. The Clayton translation (CT in the text) comprises only the first two volumes of the seven-volume edition, and does not include the Introduction and the Plan Raisonné much quoted in this text (I, 11–46); the translation has been modified throughout.

full-fledged school of economics that was to bear such great fruit in southern Italy in the course of the late Eighteenth century.

2. At the heart of *The Science of Legislation* we find the theme of public happiness, a notion that is central to the political culture of the European Enlightenment and around which, in particular, the idea of enlightened despotism revolved, with the principal Italian precedent being L. A. Muratori's *Della pubblica felicità oggetto dei buoni principi* (1749). In this current too the notion of public happiness was intimately connected with the concept of the "State of wellbeing": here, the fundamental idea is that the holder of power also has tasks and duties, the first of which is to assure the physical, material, and spiritual wellbeing of his subjects. These themes, and their relative connection, are in the forefront also of Filangieri's work. But, here again, Filangieri appears to go further than his predecessors, insofar as he institutes an immediate connection between the notion of public happiness and the problem of a profound revision of the ways of distributing wealth,<sup>15</sup> and of landed property in particular (with the declared assumption being that "[...] distributive justice has rarely guided the movements of government" [II, 117/ CT II, 60]: we note the entirely modern sense of the adjective, pitted – deliberately, I believe – against the Aristotelian–Classical use). Furthermore – and this is the essential point – it is good laws that produce happiness, but, since the sole object of law must be "the public utility" (another typically Enlightenment theme; cf. II, 38/ CT I, 264–265), good laws are first of all those designed to dismantle a system of privileges – the feudal system – that is structurally affected by iniquity.

The explicit opposition between that which Filangieri calls a "regular monarchy" – the set of institutions he hopes for, as an impending objective of the historical course, unavoidable if humanity is truly to progress – and feudal monarchy – i.e., the current monarchical form, which rests on the feudal system as its foundation and as that which provides it with its essential fabric – is a good illustration of the dual direction in which our author worked: on economic and social organization on one hand, to tear down that system of privileges which prevented the assertion and expansion of the middle class; and on political theory on the other, to contest that claim of the nobility

<sup>15</sup> "If this [wealth] was a sterile object for the politics of several centuries, in which poverty was the first degree of the virtue of man and of the citizen, today it has become the first principle of the happiness of nations," Filangieri writes in the "plan raisonné" (*piano ragionato*) of his work (I, 27). He later goes on to specify that the State sustained by the juridical system he proposes "must be rich": a State where "it is not necessary that every individual should be equally rich, but that riches should be equally diffused, or in other words, riches should not be confined to a few persons, while the rest of society remains in indigence" (II, 241/ CT II, 250–251); such equality – not "of fortune, which is a fanciful chimera, but an equality of happiness in every family, every class, and every order of society" – "should ever be the object of government and laws" (II, 238/ CT II, 245–246). In the following chapter he analyzes the means for obtaining precisely this "equitable diffusion of money and of riches," which "creates that general activity, which is the necessary instrument of the happiness of man"; to attain it "a moderate labor of seven or eight hours per day" is sufficient, not only because "excessive fatigue is incompatible with happiness" but also because this amount of work is sufficient in a society in which the idleness connected with the life of the rentier has been banished (II, 238/ CT II, 246).

– be it secular or ecclesiastic – to be a bulwark against despotism which many thinkers – Montesquieu *compris* – had granted it. The excellent relations our author cultivated with Benjamin Franklin<sup>16</sup> were part of this same strategy, as was his enthusiasm for the American events of the two most recent decades, and his heated opposition to the idea that it was up to the nobility to offset the power of the monarchy. This, as we shall see more clearly later on, is a fundamental perspective with which to establish, first, the principle of the necessary separation of legislative and executive power; then, to deny nobility its role as a full and proper counterweight to the power of monarchy;<sup>17</sup> and finally, to brand feudality as “[...] the most absurd of systems, which combines all the vices of anarchy with the horrors of tyranny” (III, 173).

Apart from its iniquities, the feudal system must be dismantled because the dominant direction taken by the political order in the modern age is towards a unitary power such as that which the monarch concentrates in his own hands.<sup>18</sup> It is obvious that a monarch with such powers has need of the support and – even more – of the efficacious and influential teachings of enlightened culture.<sup>19</sup> Such culture, in its turn, cannot but have a clear idea of the limits within which this work of concentration must be done: well aware of Diderot's<sup>20</sup> interventions regarding the work of codification undertaken by Catherine of Russia, Filangieri brings into play that which is the inspirational heart of his thinking, namely, the idea of the absolute pre-eminence of law, before which the monarch's action must come to a halt: the “public authority” has “the right to decide and determine, as sovereign, what may be useful or prejudicial to society. This is a prerogative that is inseparable from the sovereignty. But the very nature of this prerogative explains its use and end, and shows us that it should be only exercised for the general good of the whole social confederacy. Its exercise ceases to be legitimate in any other case; it degenerates into an act of oppression, of tyranny and despotism” (II, 171-172/ CT II, 136).<sup>21</sup> The indissoluble bond between the pre-

<sup>16</sup> To the point of asking him for hospitality, in 1782, when Filangieri found himself exposed to increasingly ferocious criticism from the feudal side, after the publication, in 1780, of the first two Books of *The Science of Legislation*. There are many passages in this work in which he extols the epic deeds of the American insurgents and the steps they took to win independence.

<sup>17</sup> In monarchies the nobility “must be a luminous, but not powerful, body; it must have some prerogatives of honor, but none of dominion”; “[...] with a hereditary nobility, united with a hereditary power, there is no longer monarchy: two innate powers [...] are not compatible with this sort of constitution” (III, 172).

<sup>18</sup> With a dose of calculated adulation, Filangieri highlights the clash of the co-existence between “the humanity” proper to he who was then seated on the throne and the “tyranny” of the laws in force, fruit of a history of errors and of abuses, for which, primarily, feudal jurisdiction was to blame (IV, 193).

<sup>19</sup> “Under a beneficent prince, to reveal the horrors of which he is the innocent cause is not a crime” (III, 166); “His [the monarch's] vows are aimed at improving your [the subjects'] condition: it is a duty, then, to show him the causes that render it so deplorable” (III, 167). Passages on the “voice” of philosophy that “has reached the thrones of kings” are frequent (see, for example, II, 52/ CT I, 284 or II, 74/ CT I, 292).

<sup>20</sup> Diderot, indeed, was not averse to tackling the theme of the redistribution of wealth, distinguishing himself from other members of his cultural *milieu*.

<sup>21</sup> Early on in his book Filangieri clearly declared: “That the sole will of the legislator is the only

eminence of law (also over the will of the legislator or of the holder of power) and justice<sup>22</sup> will give rise to a “political liberty” “that reassures [...] all the orders of civil society, that curbs the magistracy, that gives the weakest citizen the aggregation of all the forces of the nation; this voice that tells the powerful ‘you are a slave of the law’ and that reminds the rich man that the poor man is his equal; this force, which in the actions of man always strikes a balance between the interest he may have in violating the law with the interest he has in observing it [...]” (I, 31).

3. The first two books of *The Science of Legislation* are of particular importance and continue to be the object of considerable study. Indeed, their original publication in 1780 was met with a warm reception by the scholarly public and, through the many translations into foreign languages, they soon attained widespread renown. The first book discusses the “general rules” of the science of legislation, which is endowed, precisely because it is a science, with “fixed, determinate and immutable principles”; while the second is devoted to an analysis of the means that ensure the preservation of existence through the satisfaction of basic – and not only basic – needs. Such preservation, together with security (the two entities that are at the origin of all societies), is the object of universal legislation.

The first rule is that of the maximum possible generality of the laws (III, 129-130, note): hence the greatest evil that Filangieri’s theoretical work sets out to remedy is the excessive meticulousness, associated with superabundance, of the legislative provisions in force in most countries of Europe in his day. His proposal to institute a special magistrate for the reform of obsolete laws, but also responsible for the application of laws to particular cases not contemplated by them and therefore doubtful, has the precise aim of avoiding the proliferation of laws. The distinction between the “absolute” goodness and the “relative” goodness of laws is the best indicator of a theoretical attitude in which empiricism and utilitarianism constitute the supporting elements. Still, it is reason, that distinctive and superior gift of human beings, that continues to play the central role, both in establishing the principles and in finding their correct application in different circumstances. The absolute goodness of laws is attained when positive law is successfully harmonized with “natural” laws, i.e., with universal principles dictated by reason no less – Filangieri adds – than by the precepts of religion; while the relative goodness of laws is attained where laws are formulated that are capable of taking the “genius” of individual nations and of a series of local particularities into account.<sup>23</sup> We note that, here, not only do absolute goodness and relative goodness

rule of legislation’ has been the language of tyranny and despotism” (I, 55/ CT I, 12-13).

<sup>22</sup> “Justice [...] is “a deity” [...] that “is always united with the true interests of nations and of peoples and that always suggests [...] the rules and the means of erecting the happiness of men and of States not upon the wavering scraps of private interests, but upon the eternal foundations of the common good [...]” (II, 171/ CT II, 135-136).

<sup>23</sup> Inevitable, here, is the reference to Montesquieu, whose work constitutes a sort of canvas for this part of *The Science of Legislation*; from the very first pages (see I, 23) Filangieri proclaims his debt to Montesquieu – while distancing himself at the same time. Apart from the numerous specific points of disagreement, and also from a certain unconcealed acrimony, what he takes pains to emphasize is the substantial difference of method, which necessarily leads to different

not rule one another out but, indeed, that their co-existence is absolutely necessary for sound legislation. It is worth emphasizing, moreover, how in the very part of the book devoted to the “relative” goodness of laws the author takes pains to call our attention to the invariance of some fundamental principles that cannot not continue to remain in force: first among them, the principle by which the main task of laws, even before the establishment of new institutions, consists in removing all the obstacles that in time have come to obstruct and delay the “free course” of nature. We note this nuance that we wish to define as “naturalistic,” thanks to which one never thinks that reason can come into conflict with nature or that the work of science can create impediments to that which nature spontaneously produces; rather, reason and nature are seen here as perennially allied in the pursuit of the common good, threatened, at times, by human intervention – which occurs when men fall prey to the thirst for power (and the task of “destroying” this “love of power” belongs to the government and the laws). This is one of the fundamental precepts of the science of legislation: not only to avoid obstacles to the course of nature, but to eliminate those obstacles that man himself has produced in the course of historical development.

Other principles constantly guide Filangieri's reflections, such as the genuinely physiocratic idea of the supremacy of agriculture over all other branches of activity (since agriculture is the “prime source” of the riches of peoples<sup>24</sup> [II, 126/ CT II, 72], the primary task of industry is, therefore, to compensate for the infertility of the soil); or the conviction that even more important than an extremely important large population is the affluence of its economic conditions; or, finally, the principle of minimum interference by government and administration in the freedom of commerce and the organization of productive activity,<sup>25</sup> the result of which is a liberalism controlled by laws. These principles remain invariably firm, even in the variety of forms of government and in the diverse characteristics of peoples, determined also by the diversity of climates and of geographical locations, in each country's different situation regarding its size, the fertility or infertility of its lands, the presence of a religion and, finally, the degree of maturity attained by individual peoples (the moment of a people's maturity coincides with the moment in which it becomes necessary to rewrite its codes). In this case too there is a heap of obstacles thrown up in the way of an adequate subsistence, which it is up to legislation to remove: from the “ruinous disproportion” (II, 31/ CT I, 255) between the small number of landowners and the immense number of non-landowners, to the large landed properties owned by many compared to the minimal number of small landowners; from the laws on primogeniture, fideicommissum and majorats to the State property not available on the market; from the enormous riches of

results: “my readers” – he tells us – “will realize that the aim I propose is completely different [...] Montesquieu seeks in these relations the spirit of the laws while I look for the rules. His aim is to find in the laws the reason for what one has done while mine is to deduce the rules of what one has to do. My very principles will be, for the most part, different from his” (I, 23).

<sup>24</sup> Riches – let us not forget – that corrupt a people if they are the fruit of conquest, but are beneficial if they are the fruit of labor.

<sup>25</sup> In a well regulated state “[...] the legislator by a prudent management of the private interest of each individual induces him to act in the manner which he wishes, without obliging him to do so, or declaring his intentions [...]” (II, 99/ CT II, 32-33).

the Church and the inalienability of its property<sup>26</sup> to the excessive amount of taxes and the multiplicity of duties unjustly levied (see the “fatal system” of tolls and duties: II, 145/ CT II, 99–100). Filangieri also presents, at great length, his proposals for the revision of a system of taxation that is always too high for people’s means, also because this theme comprises many others: starting from the classical assumption that the “contributions be proportioned to the wants of the state” (II, 197/ CT II, 177) and individuating the prime origin of such “wants” in military spending, which grow in proportion to the spirit of conquest, he can give more cogent reasons for his aversion to war and, thus, for his proposal to eliminate standing armies as an enormous source of expense.

Also the third book, “Of criminal laws” (1783), dedicated to social “tranquility,” has a classical beginning in the assumption that all citizens have a right “not to be disturbed, while acting according to the dictates of law” (I, 31); the book’s central theme is that of the necessary co-existence between the potential criminal’s fear of penalty and guarantees for those who are innocent. But, in the event, the book develops into a full-fledged project for the reform of all aspects of criminal procedure, inspired by the absence in the legislation of the major European nations of those two fundamental elements and of the regulating principle of their co-existence, which consists in a penalty “proportionate” to the “quality” and to the “degree” of the crimes (III, 5; IV, 10). But the reasons for such innovation do not stop here, because the crux of this renewed procedure (consisting in the attempt to minimize the “inquisitorial” procedure [III, 49–50], compatible only with a feudal jurisdiction, while progressively moving on to the “accusatorial” system [III, 38 ff.]) resides in wresting the function of judgment from the nobility and conferring it on (non-hereditary) magistrates, seen as the sole and “true” intermediate body between the sovereign and the people (III, 171 ff.). Apart from the substantial denial of the doctrine of intermediate bodies, what counts most here is the subversion of the feudal system that arises from such denial. Moreover, it appears that this analysis of the role of the magistracy is also designed to further delimit the bounds of the monarch’s power, reaffirming that he is not the absolute owner of sovereignty but, rather, its administrator (with quotations from Locke: III, 181).

As for the book’s specific contents, the author presents a complete revision of that “intricate” part of the procedure which regards proofs and evidence, broaching a doctrine that will find its full systematization in his follower, F. M. Pagano. This leads Filangieri to enter the ongoing debate within the European Enlightenment on the abolition of torture: he recommends a moderation of the penalties coupled with their certainty, the removal of all the useless – and, indeed, injurious and inhuman – violence connected with the sentence, and a reorganization of the prison system. But his constant engagement with the work of C. Beccaria (IV, 18–31) does not lead to an analogous condemnation of the death penalty; on the contrary, it is the occasion for a detailed refutation of the positions of Beccaria and of others. In the section headed “Of crimes and of penalties” Filangieri gives us a complex classification of crimes in five

<sup>26</sup> If the polemic against the nobility is heated throughout the book, Filangieri’s polemic against the higher clergy is positively scorching: he was convinced that the clergy, perhaps, did not produce but certainly did promote ignorance and fanaticism, the prime adversaries of the struggle for modernization.

classes and a discussion of their relative penalties. An analysis of the implicit criteria that guide him in establishing the proportionality of the penalties to the crimes would throw further light on his conception: from his condemnation of the ferociousness with which a crime (such as desertion from the army) considered “minor” is punished, to his rather Byzantine discussion of infamous punishments; from his condemnation of idleness and of the indigence subordinate to the removal of its causes, to the unequal punishment inflicted for certain crimes and belonging to different classes, to, finally, the sophism of the distinction between crimes against the sovereign as a moral person and against the sovereign as a physical person.

The project of a system of “universal” but “not uniform” public education illustrated in the first part of book IV (1785) – and continued in the third part, dedicated to university education, which is also to be radically reformed – aims at the construction of the national character coupled with the spread of Enlightenment culture. Here, Rousseau and Helvétius are the authors of reference of a complex educational system based on the general division into two classes (“talents” and “hands”: the former have access to public scholastic institutes located in the capital, while the latter are educated locally and in small groups). But the method and the type of treatment appear, in my opinion, to reveal his ambition to emulate Plato's *Republic* – once, of course, he has changed everything that needed to be changed. The premise of the second part is, finally, the impotence of laws when not accompanied by customs; hence, the fresco of a virtue as the (positive) product of the great human passions – first of all, *amour propre* and individual interest – reconciled with the interest of society. The fifth book, unfinished and not published by the author, examines the “good things” the legislator can find in religion and the “evils” of religion that he must avoid.

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### *The Absolute and the Relative Goodness of Laws*

Mario Ricciardi

The reprinting of a classic is always something to be greeted with joy. Even when, as in this case, the size and the cost of the volumes will not make it readily accessible to the common reader, it is good that a work that until now could be consulted only with the caution one must have for antique documents can finally be read, studied and photocopied without running the risk of destroying it. Reading Filangieri, as Elena Croce wrote, is “a singular experience. Having worked through the somewhat tiring and unnecessarily complicated preamble we are won over by his eloquence and we read the book all in one breath, enthralled by the splendid exposition, by the skill and concision with which complex connections are limpidly resolved, by the fresh-

ness of the formidable classical doctrine and the beauty of the quotations, by the vivid description of the civil world – all of this enlivened by heated polemic.” Nevertheless, perhaps due precisely to the size of the work, “when we leaf through it again in search of a page that particularly struck us, it has vanished as if by magic.” Lacking a guide one can come to the conclusion that the book “remains silent, it does not leave us with a sentence we can repeat or a thought on which to reflect.”<sup>27</sup> The group of scholars, directed by Vincenzo Ferrone, who are responsible for the new critical edition have given us the instruments to avoid the difficulties of which Elena Croce speaks. Buttressed by explanatory notes and bibliographies, cross references and indexes, the imposing edifice constructed by Filangieri makes its structure clear also to the occasional visitor who, without being an expert on the author, wishes to venture into its interior. If not exactly given back to the common reader, the text has been wrested from the almost exclusive care of the historians, and can now be assessed not only as a document but also as a philosophical contribution.

It is difficult to deny that Filangieri’s ambitions were philosophical. Starting out from the observation that governors “have no time to educate themselves” because, constantly “obliged to act, a great movement stirs them and their soul has no time to dwell upon itself,” he sees in the philosopher, as “minister of truth,” the figure that can “prepare the materials that are useful for those who govern” (vol. I, p. 18). There is no doubt, as many passages in the book attest, that Filangieri saw his contribution as one of those useful materials, an example of what he himself, with a felicitous formula that has rightfully won acclaim, called a “philosophy in aid of governments.”<sup>28</sup>

Unfortunately, as has occurred with other thinkers of our tradition, also Filangieri’s theoretical ambitions fell prey to the excommunication of Benedetto Croce who, mistrustful of the abstract “Masonic mentality,”<sup>29</sup> radically tears down his claims, writing that the “true profundity of thought” was elsewhere, “in the solitary Vico. All the writers of the time (including Filangieri) lifted some of his theories and opinions, but without grasping their real meaning. As an anti-Cartesian, or rather a more-than-Cartesian, Vico conceived of reason as history, the life of nations as the life of the mind or spirit, and mind and spirit itself as a dialectic; hence he scorned and rejected the sort of thinking that was in the process of maturation around him and was to prevail and extend its influence over an entire century.”<sup>30</sup> The writers Croce is alluding to are the other Neapolitan Enlightenment figures, guilty of not being philosophers because not historicists – or perhaps simply not Croceans. In fact Filangieri – who was, moreover, a fervent admirer of Vico, as Goethe attests<sup>31</sup> – was not a historicist because he rejected historicism’s fundamental idea, namely, that there are no other parameters of judgment apart from those of the moment, of the historical epoch in which one lives, and

<sup>27</sup> E. Croce, *La patria napoletana*, Milan: Adelphi, 1999, p. 42.

<sup>28</sup> Filangieri’s phrase was chosen by Giuseppe Galasso as the title for his own collection of studies on eighteenth-century Neapolitan culture. See G. Galasso, *La filosofia in soccorso de’ governi*, Naples: Guida, 1989.

<sup>29</sup> B. Croce, “La mentalità massonica,” in Id., *Cultura e vita morale*, Bari: Laterza, 1926, pp. 143–150.

<sup>30</sup> B. Croce, *Storia del regno di Napoli*, Bari: Laterza, 1966, p. 156; [*History of the Kingdom of Naples*, trans. F. Frenaye, Chicago: The University of Chicago Press, 1970, p. 157]

<sup>31</sup> J.W. Goethe, *Italianische Reise*, Munich: Dtv, 2004, pp. 191–192.

that therefore one cannot distinguish the just from the unjust, the good from the bad, without being totally conditioned by the spirit of the time, by the opinion prevailing in one's own society. Filangieri would reply to those who make this claim that "amidst the revolutions that are perpetually varying the situation of affairs and the aspect of society, it is an error of ignorance to believe that the science of legislation cannot have certain fixed, determinate and immutable principles" (I, 55/ CT I, 12-13). Filangieri's conception of philosophy is the classical one. Philosophy's primary task is to seek to describe the nature of things, in the awareness that such nature is mutable, but also in the conviction that change is not so fast that the attempt to give a not essentially contextual account is vain. By no means a dreamer, he is aware of the danger of appearing to be a "sterile philosopher, who thinks he sees everything in that little vortex of thoughts that surround him" (I, 34). Reason does not operate in a vacuum, abstractness does not indicate a lack of the sense of reality. Moving on from description to proposals for ways of improving people's lives, sensitivity to circumstances becomes important because it helps one recognize the limits the world imposes on our capacity to change it. In his harsh judgment on Machiavelli we clearly see how far Filangieri was from that sort of "Italian ideology" that finds its expression of intellectual awareness in a realism that denies the philosophical legitimacy of all attempts to reflect nonpolitically on politics. However conventional it may be, Filangieri's judgment is nonetheless designed to reveal his staunch commitment to a different way of understanding the role of philosophy. Machiavelli's maxims, if put into practice, compromise the "rights" of men (I, 15). In this criticism we see Filangieri's refusal to accept the elimination of the normative dimension from the reflection on politics. This is of particular interest for the contemporary reader because it attests to the presence, in the Italian tradition, of a way of conceiving the relationship between philosophy and politics that is different from what we find in Croce. If, as Sergio Cotta wrote in what is still one of the philosophically most cogent studies on Filangieri's thought, our author's principal merit is to "have brought the normative demand into all sectors of social life with extreme coherence,"<sup>32</sup> then we must say that Filangieri individuated a far more solid foundation than historicism for a critique of the legal and political institutions of a society. Compared to the weakness of Croce's defense of liberalism – Croce never gives us normative reasons for preferring this institutional system to others – Filangieri's approach has the unquestionable advantage of proposing parameters that are independent of the widespread opinions of a certain historical moment to judge the goodness of a system of government. These, of course, are parameters that can be debated, but criticism of the premises ought to take place in terms of their congruence with the intuitions of a person who reflects on what is good for human beings in general, and not of their harmony with the "spirit of the time." This opens up a space of autonomy for a political philosophy that does not simply consist in the political commitment of philosophers.

In this respect, it cannot be said that Filangieri is an exception. Looking farther afield, and moving from Naples to Milan, we find other examples of the attempt to criticize the existing social institutions on the basis of a philosophical reconstruction

<sup>32</sup> S. Cotta, *Gaetano Filangieri e il problema della legge*, Turin: Giappichelli, 1954, p. 62.

of parameters of normative justification. One year after the publication of *The Science of Legislation*, Pietro Verri licensed a new edition of his *Discorso sulla felicità* that has a number of points of contact with Filangieri's work. In this case the author's purpose is to bring society "to maximum civilization" with "excellent laws" and "excellent customs"<sup>33</sup> to judge on the basis of the "general consensus of men in all times."<sup>34</sup> Once again the approach is that of a cautious mediation between the ideal of a society that is "as perfectly organized as our imagination will allow" and the "reality of our rights."<sup>35</sup> Positive laws must be judged on the basis of a hypothetical pact whose purpose "is the wellbeing of each [individual] who shares in the formation of society, which [wellbeing] is resolved in the public happiness, that is, in the greatest possible happiness shared out with the greatest possible equality."<sup>36</sup> If it is true, as Sergio Cotta emphasized, that the authors in question are to be considered epigones and popularizers "of a thought that is losing its speculative originality"<sup>37</sup> with respect to the tradition of natural law, it can certainly not be said that they are bereft of theoretical awareness.

Those who are accustomed to associating the Enlightenment with utopia are destined to find confirmation of their prejudices in this interpretation of Filangieri. This, for example, was the case with Croce, who stigmatized Filangieri's "rosy dreams of reform," which he contrasted with Vico.<sup>38</sup> I do not intend to deny that this association, on the plane of the history of ideas, does exist. There is a utopian current in Enlightenment thought. Nevertheless, to employ the arguments used against the Enlightenment in order to criticize Filangieri exposes one to the risk of distorting a thought that, even if not entirely original, possesses a complexity that does not lend itself to reduction to historiographic classifications. The habit of labeling is no service to philosophy, and is also a great disservice to historical comprehension.

To read Filangieri's work solely in the light of the notion of "Enlightenment" ends up by overshadowing its theoretical interest.<sup>39</sup> In this way ideas we ought to consider on their merits, judging them on the basis of their intrinsic value, are liquidated as manifestations of one or another trend that have been outstripped by history. Thus it occurs that a critical remark on the voluntaristic conception of law becomes nothing more than a symptom of the "merely utopian" character of Filangieri's work.<sup>40</sup> It is difficult to share this view if one thinks even for a moment of the prominent role that "preservation" and "tranquility" have in the "piano ragionato" and, then, throughout the work. Although Filangieri did, indeed, side with the party of the reforms, we certainly cannot say that this aristocratic Neapolitan was a radical. On the same page as his condemnation of the "servile pedantry of those who do not want to change anything" we also find his condemnation of the "arrogant oddity of those who would

<sup>33</sup> P. Verri, *Discorso sulla felicità*, Milan: Muggini tipografo editore, 1944, p. 84.

<sup>34</sup> *Ibid.*, p. 55.

<sup>35</sup> *Ibid.*, pp. 56-57.

<sup>36</sup> *Ibid.*, p. 58.

<sup>37</sup> Cotta, *Gaetano Filangieri e il problema della legge*, p. 61.

<sup>38</sup> B. Croce, *La filosofia di G.B. Vico*, Bari: Laterza, 1965, p. 287; [*The Philosophy of Giambattista Vico*, trans. R.G. Collingwood, New York: Russell and Russell, 1964, p. 272].

<sup>39</sup> Cotta, *Gaetano Filangieri e il problema della legge*, pp. 88-91.

<sup>40</sup> G. Tarello, *Storia della cultura giuridica moderna*, Bologna: il Mulino, 1976, p. 381.

like to destroy everything” (I, 19). Some pages later, in a passage that seems to echo Aristotle's observations on the method of practical philosophy, Filangieri states that the human disposition “is incompatible with precision and arbitrary perfection” (I, 54/ CT I, 12). It is hard to imagine how an author who speaks out so clearly against perfectionism can be considered an unqualified utopian. For that matter, as Judith N. Shklar has maintained, the history of thought shows that we can distinguish between a number of senses in which a political theory can be utopian. Filangieri's work certainly does not come within the “prophetic” current of utopianism, but rather belongs to that “normative” current which seeks to show the potentialities of improvement of existing forms of government. Antiperfectionism does not necessarily lead to skepticism. For Shklar, the idea that there are nonsubjective parameters to judge what may be the best way of conceiving the institutions of a society is compatible with an attitude that is critical of the first type of utopia. The attempt to develop models of good government, far from being a sign of ingenuousness, as certain realists claim, is an integral part of a reflection on politics that aspires to completeness.<sup>41</sup> In this respect, for a contemporary reader, Filangieri is close to an author such as John Rawls. Like Rawls, on the basis of certain assumptions on how men and the societies in which they live are made, Filangieri proposes a normative model that is useful for those whose task it is to plan and implement institutions. In Rawls's case the interlocutor is not only the governor but the reflective citizen, but this does not substantially change the terms of the question. Filangieri – who in this, as in many other aspects, does not ignore history<sup>42</sup> – has to take into account a reality in which there is no universal suffrage, the art of politics is accessible to the few, and the governing class is still sustained for the most part by aristocratic regimes. Taking Filangieri seriously as a philosopher means discussing his arguments. Let us attempt to enter his edifice, to examine that which, in his intentions, is one of its supporting structures; namely, the distinction between the absolute and the relative goodness of laws.

In the “plan raisonné” of his work, Filangieri writes that it begins “by distinguishing the *absolute goodness* of laws from their *relative goodness*, determining the precise idea of each; distinguishing the harmony law must have with the principles of nature from the relation it must have with the state of the nation to which it is issued, developing the general principles that depend upon this double character of goodness that every law must have; observing the consequences that derive from it; deducing from the errors of the laws, their necessary diversity, the also frequent opposition between legislations, the vicissitudes of the codes, the necessity of correcting them, the obstacles that make these corrections difficult, the precautions that make these obstacles vanish” (I, 22). In this way, he intends “to give a general idea of the theory of the *absolute goodness* of laws,” to then go on to develop the “far more complicated [theory] of their *relative goodness* which is, so to speak, the aggregate of all the general rules of the science of legislation” (I, 22). Before commenting on the way in which Filangieri develops this distinction, let us dwell for a moment on the originality of these ideas.

<sup>41</sup> J. N. Shklar, “What Is the Use of Utopia?,” in Id., *Political Thought & Political Thinkers*, Chicago: The University of Chicago Press, 1999, pp. 187–188.

<sup>42</sup> On this point see Galasso, *La filosofia in soccorso de' governi*, pp. 470–473.

Having completed the exposition of that which we may consider the theme of the work, Filangieri renders homage to Montesquieu, recognizing his debt to the eminent Frenchman. In fact, as Sergio Cotta emphasized, the argumentation in favor of the existence of a criterion of absolute goodness of laws, presented in the first book of *The Science of Legislation*, “is based on examples and observations of Montesquieu’s having the same aim.” The same – again according to Cotta – can be said for the part, also in the first book, that deals with the notion of the relative goodness of laws.<sup>43</sup>

Is this, then, a distinction that Filangieri owes to Montesquieu? The editor of the first volume of the critical edition recalls an opinion, often voiced in the literature, which claims that the distinction between the absolute goodness and the relative goodness of laws had already been made in a treatise, published in 1590, by the Sienese jurisconsult Alessandro Turamini.<sup>44</sup> The origin of this hypothesis on the source of the distinction is usually attributed to Angelo Valdarnini who, allegedly, advanced it in an essay published in 1890. In fact, a reading of this essay shows that Valdarnini does not mention the notion of goodness at all, and limits himself to claiming that Turamini anticipated Montesquieu in distinguishing between “laws that are absolute and immutable in their principles” and “laws that are relative and mutable in their application, according to times, places, and nations.”<sup>45</sup> In so doing, Valdarnini was following a tradition broached in the early nineteenth century by Pietro Borsieri who, at a conference at the University of Pavia in 1808, referred to Turamini as “the precursor of Montesquieu.”<sup>46</sup> The same thesis was repeated by Luigi Rava in 1888, in that which I believe to be the only monographic study of Turamini’s thought.<sup>47</sup> It is not impossible that Filangieri may have read Turamini’s work, which circulated also in an edition by “two Sienese patricians” in 1769. Nevertheless, unless we find in Turamini the same formulation employed by Filangieri, I do not see why any significant role has to be attributed to this hypothetical influence.

As a matter of fact, it is not surprising that the hypothesis of Turamini as a precursor of Montesquieu should have struck Corsieri and Rava’s imagination, since they were fascinated by the idea of finding an “Italian” origin for the ideas of one of the most illustrious philosophers of the liberal tradition. But such an idea was certainly less attractive for one who, having freed himself from the influence of nationalism, cannot fail to recognize in the distinction between the absolute goodness and the relative goodness of laws the imprint of that far more ancient distinction between a natural right in the proper sense (the “*ius naturale simplex*,” which was said to be “absolute”) and natural right that in the tradition was called hypothetical (“*ius ex suppositione*”) or relative (“*ius respectuum*”).<sup>48</sup> This distinction was certainly familiar to Filangieri’s

<sup>43</sup> Cotta, *Gaetano Filangieri e il problema della legge*, pp. 106–107.

<sup>44</sup> Printed by Francesco Tosi, in Florence, the title is *Ad rubricam pandectarum de legibus libri tres, liberque singularis, ad eiusdem tituli leges*. It was republished in Venice in 1605.

<sup>45</sup> A. Valdarnini, “La ragione delle leggi secondo il Montesquieu e il Filangieri,” *Nuova Antologia*, vol. 29 of the collection vol. 113 (1890), p. 150.

<sup>46</sup> P. Borsieri, *Discorso sulla vita e gli scritti di A. Turamini*, Milan: Marelli, 1808, p. 17.

<sup>47</sup> L. Rava, *Alessandro Turamini senese*, Siena: Enrico Torrini, 1888, pp. 121, 140 and 184.

<sup>48</sup> B. Tierney, *The Idea of Natural Rights*, Grand Rapids, MI: Eerdmans, 1997, pp. 178–179.

contemporaries because it was still to be found in Grozio,<sup>49</sup> in Burlamaqui<sup>50</sup> and, as Vincenzo Ferrone emphasizes, in Giambattista Vico.<sup>51</sup> At this point, however, we might ask why in the world we should believe that Filangieri was influenced by the reading of Turamini and not, as it appears more probable, that he was simply taking up – as he does elsewhere – an idea that, however present in the tradition, had been forcefully suggested to him by his reading of Montesquieu.

Montesquieu clearly draws this distinction in the third chapter of Book I of *De l'esprit des lois*. Here, after having characterized law as “human reason” that “governs all the peoples of the earth,” he states that “the political and civil laws of each nation” are nothing other than “the particular cases” to which such reason is applied. He then goes on to say that laws “must relate to the nature and the principle of the government that is established or that one wants to establish, whether those laws form it as do political laws, or maintain it, as do civil laws.”<sup>52</sup> In a different lexicon, there is no doubt that this is the same distinction Filangieri has in mind. If, then, we wish to find an immediate predecessor of the way in which Filangieri advances his thesis, I think the most plausible candidate would be Georg Ludwig Schmid d’Avenstein who, in his *Principes de la législation universelle*, published in Amsterdam in 1776, uses the expression “relative goodness” to express ideas very much like Filangieri’s.<sup>53</sup>

Filangieri appears to see his work as distinct from, even if complementary to, that of Montesquieu. Think, for example, of the pages in which Montesquieu declares his intention to occupy himself with laws understood as “the necessary relations deriving from the nature of things” and – observing these relations – to investigate the “spirit” of the laws themselves.<sup>54</sup> Filangieri, by contrast, states his intention to individuate the “rules” of legislation. The opposition between these two types of investigation is explained by Filangieri himself, when he distinguishes the “reason for what one has done” from “the rules of what one has to do” (I, 23). In specifying the aim of his work in this way, he appears to emphasize the work’s practical intent, as a guide for governors, recognizing its limits on the theoretical plane. Unlike Montesquieu, Filangieri claims to have concentrated “in a few pages a theory that, handled differently, would require many volumes” (I, 23). Such an admission, while sufficient to refute Croce’s judgment on the superficiality of Filangieri the philosopher,<sup>55</sup> does appear to confirm the interpretation of those who consider him a sort of “disciple” of Montesquieu, pri-

<sup>49</sup> *De jure belli ac pacis*, Paris: Apud Nicolaum Buon, 1625, pp. 7–8. See Tierney, *The Idea of Natural Rights*, p. 328.

<sup>50</sup> Of this author’s work I have here the Italian translation, *Principj del diritto naturale e politico*, vol. I, Naples: da’ torchi di Raffaello di Napoli, 1832, p. 139.

<sup>51</sup> V. Ferrone, *La società equa e giusta*, Bari: Laterza, 2005, pp. 116–123.

<sup>52</sup> Montesquieu, *The Spirit of the Laws*, I, 3, p. 8.

<sup>53</sup> It is likely that Filangieri read Schmid d’Avenstein in French, because there is a copy of the work in his personal library. On this point, see F. Venturi, “Gaetano Filangieri,” in Id., *Europe des Lumières. Recherches sur le 18e siècle*, Paris: Mouton, 1971, pp. 206–207. In the Italian translation, *Principj della legislazione universale*, Naples, “a spese di Michele Stasi,” 1791, we find the expression “bontà relativa” (relative goodness) in vol. IV, p. 222.

<sup>54</sup> Montesquieu, *The Spirit of the Laws*, I, 1, p. 3.

<sup>55</sup> Croce, *Storia del regno di Napoli*, pp. 155–156; [*History of the Kingdom of Naples*, pp. 157–158].

marily interesting in developing the implications of a theory to which he contributed little. But as a matter of fact, even when he takes up Montesquieu's ideas Filangieri never lacks a critical sense. Think – to give but one example – of the objections he raises regarding Montesquieu's remarks on the relations between the climate and the character of peoples (I, 145-159/ CT I, 177-198). Then again, also the idea that Montesquieu's work lacks a practical dimension can be called into question, at least if one follows the interpretation proposed by Thomas L. Pangle and by Judith N. Shklar. For these two American scholars, in fact, Montesquieu's work also has a normative intent, which – they claim – takes the form of a “lesson for legislators.” Attending to the “nature of things” is, accordingly, not only the appropriate attitude for description, but is also the premise for employing the instrument of law efficiently.<sup>56</sup> Indeed, Montesquieu and Filangieri may be less distant than they appear to be because the Aristotelian model influences them both.<sup>57</sup> The study of the nature of things is the indispensable premise of the art of government, because only an acute sensibility to differing ways of life can provide those who are responsible for making decisions on the organization of the political community with the parameters by which to orient themselves in differing circumstances. A reflection that fails to take into account the real characteristics of human beings and the ways in which societies present themselves in different places and times runs the risk of falling into one of those errors in legislation that, as Filangieri himself writes, can give rise to “misery for ages of futurity” (I, 56/ CT I, 14). The idea that the difference between Montesquieu's and Filangieri's work is more of emphasis than of substance can also be confirmed by a lexical observation. The use of the word “reason” in the passage in which Filangieri distinguishes his own aim from Montesquieu's could come straight from Vico, who defines the “ratio legis” as “conformatio legis ad factum.”<sup>58</sup> The study of the reason of the laws would thus be the attempt to make explicit the constant element of right [*diritto*, “right” or “law”], which does not change with the changing of the opinions of human beings.<sup>59</sup> Only on the basis of this premise would it be possible to individuate the ways by which to improve the existing laws. There is a continuity between the

<sup>56</sup> T. L. Pangle, *Montesquieu's Philosophy of Liberalism*, Chicago: The University of Chicago Press, 1973, pp. 260-305 and J. N. Shklar, *Montesquieu*, Oxford: Oxford University Press, 1987, p. 69.

<sup>57</sup> This influence does not regard simply the method of classification of the forms of government, as a number of scholars maintain. I believe that Aristotle's observations on the science of legislation in *The Nicomachean Ethics*, 1141b 23-25 are of crucial importance here. On Aristotle's influence on Montesquieu, see S. Goyard-Fabre, *Montesquieu: La nature, les lois, la liberté*, Paris: Presses Universitaires de France, 1993, pp. 2-12 and I. Berlin, “Montesquieu,” in Id., *Against the Current*, London: Pimlico, 1997, pp. 140-141 and 145.

<sup>58</sup> G.B. Vico, *De universi iuris uno principio et fine uno*, in Id., *Universal Right*, trans. G. Pinton and M. Diehl, Amsterdam: Rodopi, 2000, p. 62: “Ratio legis means the conforming of the law to the fact.”

<sup>59</sup> For Vico, “Facta mutari possunt, et mens legis, seu voluntas legislatoris, mutatur: conformatio autem legis ad factum mutari non potest, unde numquam ratio legis mutatur” [Facts can change, and so does the mind of the law, that is the will of the legislator. The conforming, however, of the law to the facts cannot change; thus, the reason of the law would never change.]: Vico, *Universal Right*, p. 62.

normative and the descriptive (but perhaps – again with Vico – one could say “metaphysical”) dimension of the study of right.<sup>60</sup>

Filangieri takes up the distinction between the absolute and the relative goodness of laws at the beginning of the first book, entitled “Of the general rules of legislative science.” Here, the second aspect of the goodness of laws, which “consists in the relation of the laws with the state of the nation to which they are issued,” is submitted to a detailed analysis that examines its various aspects. That which permits us to judge the relative goodness can be found – as Filangieri writes in the work’s “plan raisonné” – “in the nature of the government and, as a result, in the principle that makes it act; in the genius and in the characteristics of peoples; in the climate, a force that is always active and always concealed; in the nature of the terrain; in the local situation; in the country’s greater or lesser size; in the people’s infancy or maturity; and in religion, in this divine force that, influencing the customs of peoples, must be the legislator’s primary concern” (I, 23). The attention to circumstances is not – as some have claimed – a novelty that can be ascribed to Filangieri or to Montesquieu. Rooted in the Aristotelian observation on practical rationality, it had been developed in detail by Thomas Aquinas and by the authors of the Scholastic tradition.<sup>61</sup> In 1742 we still find traces in Ludovico Antonio Muratori, who had recourse to it to explain what he called the “intrinsic defects of jurisprudence and of judgment.” While in Muratori the question was articulated in a skeptical sense with the affirmation that “we do not know the confines of the just and the unjust” because “mortals have different heads and ideas,”<sup>62</sup> in Filangieri it is resolved through the notion of relative goodness: if two legislators issue good laws that appear to be incompatible, this is not attributed to the impossibility of individuating parameters of universal judgment, but rather to the advisability of pursuing a goal with one measure or another according to circumstances (I, 72-73/ CT I, 44-45).

In conclusion, I would like to say a few words about the interest for the contemporary reader of this way of tackling the problem of the relation between the reflection on the nature of right (*diritto*) and the critique of the juridical institutions of a society. The idea that there may be an absolute goodness of laws can be interpreted as an attempt to make explicit the dimensions within which value judgments on positive right are expressed. Taken in the absolute sense, i.e., without considering the circumstances, such dimensions are the characteristics that a juridical order ought to possess if it is to be considered a good example of the type to which it belongs. If there is something like a function of right, there also have to be internal (dependent on the nature of the object) parameters of goodness that can be employed to distinguish between more or less defective orders. We find a confirmation of this reading in what Filangieri himself writes, namely, that the absolute goodness of laws is “their agreement with the universal principles of morality, common to all nations and all governments, and adapted to all climates” (I, 61/ CT I, 23). The study of these dimensions of the assessment of right is nothing other than the consideration of that which is necessary for

<sup>60</sup> I allude to the formula “*Metaphysica iurisprudentiae parens*.” See Vico, *Universal Right*, p. 42.

<sup>61</sup> A. R. Jonsen and S. Toulmin, *The Abuse of Casuistry. A History of Moral Reasoning*, Berkeley: The University of California Press, 1988, pp. 131-136.

<sup>62</sup> L. A. Muratori, *Dei difetti della giurisprudenza*, Milan: Rizzoli, 1958, p. 95.

society to be possible. It is the explication of the “principles of that which is just and equitable in all cases” (I, 61/ CT I, 23). It is thus not surprising that the first example Filangieri discusses in this regard is the classical one of legitimate self-defense (I, 62/ CT I, 24). Unlike authors such as Grozio or Burlamaqui, he finds himself in a historical situation in which the study of principles is no longer sufficient. The reform party of his day that was raising its head throughout Europe and in the Americas demanded a greater commitment to the criticism of existing institutions than the traditional one – a criticism that went into the details of the ways in which such institutions could be improved. As Filangieri writes, “circumstances are changed, and the remedies must also be changed” (II, 40/ CT I, 266). Thus, in the real context in which judgment is pronounced, the goodness of laws becomes “a goodness of relation” (II, 40/ CT I, 266: a relative goodness). The distribution of property or the content of criminal laws cannot be dealt with in terms of reflection on the nature of right, where it is sufficient to affirm the necessity of a system of distribution or of maintenance of the order that safeguards at least some essential goods; now, rather, such questions must be discussed in terms of the normative model that acts as a guide for the criticism and the changing of positive laws.<sup>63</sup> In Filangieri’s theory the study of the absolute goodness of laws plays the same role as the idea of a minimum content of natural right in John Rawls’s theory of justice;<sup>64</sup> namely, as the background that permits us to individuate the characteristics necessary for an order to take on the form of a political community. These characteristics establish the limits within which the theory of justice operates.

*(Translated from the Italian by Giacomo Donis)*

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<sup>63</sup> The expression “relative goodness” returns in the discussion of the distribution of property and of criminal laws (II, 40/ CT I, 266; III, 100; IV, 68).

<sup>64</sup> J. Rawls, *Justice as Fairness*, Cambridge, MA: Harvard University Press, 2001, p. 194.