

# JEAN JACQUES BURLAMAQUI AND THE THEORY OF SOCIAL CONTRACT

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## I. INTRODUCTION

1. Jean Jacques Burlamaqui (1696-1748), a Swiss legal scholar, is one of the most interesting enigmas of political science and the law: while some others recollected undeserved fame, he, deserving at least some, has fallen into oblivion. This, despite having developed an original and revolutionary line of thoughts that comprised not only most of the great institutions of XVIII and XIX century constitutionalism, but also, more contemporary ideas like that of social rights, to give but an example. Scholarship doesn't seem to give much credit to this author, and has concentrated in studying other "more traditional" authors of the time like Hobbes, Locke, Montesquieu or Rousseau, who none of them seem to have had a system of political ideas as complete as Burlamaqui did.

2. And yet, paradoxically, Burlamaqui is a member of that group of natural law thinkers that fascinated constitution makers, not only in continental Europe, but most importantly, in the United States, influencing directly some of the most

prominent framers of the American Constitution.<sup>1</sup> This being so, the understanding of Burlamaqui's ideas, particularly on the social contract, becomes fundamental, since it not only does provide us with a taste of the original understanding of the early texts and debates surrounding the American Constitution, but also, perhaps, how they ought to be interpreted then, and now, if we can show that Burlamaqui's ideas are still at the heart of the debate around contemporary constitutions.<sup>2</sup>

3. This having been said, it is important to realize that Burlamaqui came from a patrician background of protestants that had taken the refuge in Geneva after escaping religious persecutions in Italy and France; his grandfather was a protestant pastor in Grenoble and Geneva, as well as a writer, and his father, who undertook partially the education of his son, was a professor of law, Counselor and Secretary of State in his natal Geneva. Also, the young Jean Jacques studied law in one of the major law schools of his time: the University of Geneva. Founded in 1559 by Jean Calvin, this university became the shelter of every brilliant mind in the continent who suffered from political or religious persecution in catholic countries. This would definitely shape the mind of young Burlamaqui into forming a very particular line of thought, deeply influenced by the political ideas of the Reformation.
4. Let us remember also that Burlamaqui was a very studious person, a habit which led him to read and comment on all the major authors in political theory of his time. Among the ones he mastered with particularity and special interest were Grotius and Pufendorf, which came to his knowledge thanks to the friendship he developed with his contemporary, Jean Barbeyrac, a French

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<sup>1</sup> The inclination of the framers by the political theories resting on natural law concepts can be summarized by the fact that "[t]he history of American constitutional jurisprudence has been marked by a persistent fascination with the idea of natural law." GARY L. MCDOWELL, *THE LIMITS OF NATURAL LAW: THOMAS RUTHERFORTH AND THE AMERICAN LEGAL TRADITION*, 37 *Am. J. Juris.* 57 (1992). The reason for this would seem to be that "[t]his springs first and foremost from the fact that we understand as our constitutional foundation those "laws of Nature and of Nature's God" to which Thomas Jefferson made such eloquent appeal in the Declaration of Independence." *Id.* at 57.

<sup>2</sup> As a mere reference, the words of prof. McDowell while speaking of Thomas Rutherford can be applicable to Jean Jacques Burlamaqui in that "[t]here are two aspects to the significance of ..." Jean Jacques Burlamaqui's ideas in his works "...that justify attention. First, by recovering why those earlier thinkers and lawyers had such an appreciation for ... (his ideas) we can gain a keener appreciation ourselves for how that generation understood themselves. To that degree, we will have a firmer grip on the original understanding of the Constitution and the thinking that went into its creation and ratification as well as into its earliest interpretations.

The second aspect ... has to do with what he still has to say to our generation when it comes to attempting to interpret the Constitution and to understanding the nature and extent of interpretation more generally. There is no reason to presume that ... (his) insights are merely archaic and doomed to the dust of ages past. Like the works of all serious thinkers, his theory of government may contain much that is timeless; by endeavoring to take his work seriously on its own terms, we may be able to glean notions of estimable contemporary value. ... (His) canons of construction are best understood within the broader context of his view of civil society and law more generally." GARY L. MCDOWELL, *THE LIMITS OF NATURAL LAW: THOMAS RUTHERFORTH AND THE AMERICAN LEGAL TRADITION*, 37 *Am. J. Juris.* 61 (1992).

Huguenot living in Holland, highly known in the XVII century for his translations and commentaries on the works of these two authors.<sup>3</sup>

5. Furthermore, as a follow up to being a brilliant student, at the age of twenty five, Burlamaqui followed his father's footsteps and became professor of law at his alma matter, holding the chairs of Civil and Natural Law; positions he held until his health obliged him to withdraw from them. As a consequence of that, and as a reward to his academic merits and achievements, he was appointed to the position of Counselor of State, presumably to do something related to the patronage of the arts to which he was very fond of, until he died in 1748.<sup>4</sup> A sign of undoubted recognition to someone thought to be a highly influential person in the community.
6. Through his classroom, people like Prince Friedrich of Hesse-Cassel and Emmerich de Vattel are believed to have passed, the similarity of their thought, in a certain way acknowledges this circumstance; in addition to these celebrities, Burlamaqui was thought to be a very popular and highly esteemed teacher.<sup>5</sup> This led to the inevitable spread of his class notes and outlines, and out of fear of them being misused or even inappropriately construed, especially after his death, he decided to put them into writing. Burlamaqui, thus, left three works, *The Principles of Natural Law*, published in 1747, *The Principles of Politic Law*, and the *Elements of Natural Law*, published posthumously, the first in 1751 and the second in 1774, all assembled by him from his own notes for lectures delivered at the University of Geneva between 1723 and 1740.<sup>6</sup> His

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<sup>3</sup> As a side commentary we could just say that Barbeyrac was known to be a very intelligent man, and although he did not leave any major written works, his notes and glosses on Grotius' *De Iure Belli ac Pacis* and Pufendorf's *De Iure Naturae et Gentium* account for a whole and original body of thinking. The only thing for which he has been blamed is to have made at some points "free" translations into French of these works, up to the point where in some parts, the translation accounts more for what Barbeyrac had to say than what the author truly intended in his Latin edition. On this regard take into account that "Grotius' book was cited only (in French) through the free work made by Barbeyrac in 1724, a translation, "the most fallacious of all ... most likely." HUGO GROTIUS, *LE DROIT DE LA GUERRE ET DE LA PAIX*, 1 (Presses Universitaires de France, 1999).

<sup>4</sup> A good account of Burlamaqui's biographical data is provided by DANIEL BRUHLMEIER, *NATURAL LAW AND EARLY ECONOMIC THOUGHT IN BARBEYRAC, BURLAMAQUI, AND VATTEL*, in *NEW ESSAYS ON THE POLITICAL THOUGHT OF THE HUGUENOTS OF THE REFUGE*, 61-62 (E.J. Brill, 1995). On this regard, also see, JEAN JACQUES BURLAMAQUI, *ÉLÉMENTS DU DROIT NATUREL*, preface, xxx (Librairie Philosophique J. Vrin, 1981) (facsimile edition of the Lausanne 1783 edition). For a more condensed version of this, see RAUL PEREZ JOHNSTON, *CLÁSICOS DEL DERECHO INTERNACIONAL, THE PRINCIPLES OF NATURAL AND POLITIC LAW DE JEAN JACQUES BURLAMAQUI, NOTA INTRODUCTORIA Y TRADUCCIÓN* [Classics of International Law, The Principles of Natural and Politic Law, by Jean Jacques Burlamaqui, Introductory Note and Partial Translation], in 3, No. 9, *ADE, REVISTA DE LA ASOCIACIÓN DE DIPLOMÁTICOS ESCRITORES* (January, 2004).

<sup>5</sup> On Burlamaqui's history in the University of Geneva, see generally, CHARLES BORGEAUD, *HISTOIRE DE L'UNIVERSITE DE GENEVE, L'ACADEMIE DE CALVIN 1559-1798*, 505-520 (Georg & Cie., 1900).

<sup>6</sup> Someone has suggested that perhaps the notes of some of his students might have served to complete certain passages of the posthumous books; although, this fact, along with that of most of

works propound a theory of law founded on the nature of mankind and regulated by mutual obligations of society. His rational utilitarianism stressed the law of nature as furnishing the doctrine of the common good. In this sense “Burlamaqui ... represents a position on self-love, duty, rights, happiness, freedom, virtue, religion, civil society, civil authority and civil obligation typical of the orthodox, Protestant school of Enlightenment natural law doctrine”.<sup>7</sup>

7. Influence from Grotius, Pufendorf and Barbeyrac are evident in his writings; notwithstanding this fact, his work is not a mere reproduction of the ideas of these authors: it mixes them, simplifies them,<sup>8</sup> and aware of the problems of his time, with a lucid and didactical style, he made important contributions of his own to the fields of political theory, natural law and international law. But the early and inevitable success of his works may not have been due only to the clarity of his style, against the heavy and difficult styles of Grotius and Pufendorf,<sup>9</sup> but to the fact that he was a true academic that sought no

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Burlamaqui's works were published posthumously may lead us to suspect on the authenticity and originality of his thought, no serious claims have been addressed on this regard so far. To think that the originality of Burlamaqui's work relies on the additions made by his students or his editor, seems to us little credible. Regarding the *Elements of Natural Law*, even if the first French edition is of 1774, there was a prior incomplete edition in Latin in the year 1754, under the title of *Elementa juris naturalis*; due to that fact, that it was incomplete, we are taking 1774 as the most reliable date for the *Elements*.

<sup>7</sup> DAVID WILLIAMS, *THE ENLIGHTENMENT*, 10 (Cambridge University Press, 1999); see also, HELENA ROSENBLATT, *ROUSSEAU AND GENEVA*, 96-99 (Cambridge University Press, 1997). On the influence of the protestant thought on Burlamaqui, going back to the Monarchomacs, it would be interesting to explore this path just like professor Hochstrasser has suggested that Barbeyrac and his younger contemporary Burlamaqui are generally discussed in terms of their intellectual engagement with Grotius, Pufendorf, and Locke rather than by reference to their lingering Huguenot affiliations. Here however, it will be argued that one of the keys to understanding the particular trajectory of their thought was the position they occupied in the Huguenot Refuge in relation to the intellectual legacy of that first generation of writers in the Refuge, who had sought to define the social space that could be allocated to rights of conscience under absolutist rule. The role of God as a guarantor of any moral system, the rights of conscience, and the Huguenots' monarchomac inheritance were both important aspects of debates in the early years of the Refuge which centered on the issue or constituted whether there were legitimate justifications for resistance to a duly constituted sovereign in the face of persecution ....

T.J. HOCHSTRASSER, *THE CLAIMS OF CONSCIENCE: NATURAL LAW THEORY, OBLIGATION, AND RESISTANCE IN THE HUGUENOT DIASPORA* in *NEW ESSAYS ON THE POLITICAL THOUGHT OF THE HUGUENOTS OF THE REFUGE*, 16-17 (E.J. Brill, 1995). A deeper analysis and comparison of Burlamaqui and authors like Hotman, Beza or Du Plessis Mornay in the future might prove this point right, since great similarities can indeed be detected in Jean Jacque's thought, as if by an ancient and oral tradition, knowledge was transmitted from generation to generation in the "Refuge".

<sup>8</sup> Burlamaqui would have made his system of laws and government by mixing elements from Grotius, Pufendorf, Locke and Wolff, reshaping and simplifying them. On this regard see T.J. HOCHSTRASSER, *THE CLAIMS OF CONSCIENCE: NATURAL LAW THEORY, OBLIGATION, AND RESISTANCE IN THE HUGUENOT DIASPORA*, in *NEW ESSAYS ON THE POLITICAL THOUGHT OF THE HUGUENOTS OF THE REFUGE*, 47 (E.J. Brill, 1995).

<sup>9</sup> Del Vecchio wrote of Burlamaqui's works that "They are noteworthy ... for their generally healthy, sound criteria, and also for their clarity and order, unusual in the field in question. These qualities explain the very favorable reception of his (Burlamaqui's) writings." GIORGIO DEL VECCHIO,

partisanship nor favor from any political group through his writings, like many others did in the past, and have done ever since.<sup>10</sup>

8. On this matter, we can say that his major work, the *Principles of Natural and Politic Law* accounts for a well balanced system that describes the different stages of men and their relations<sup>11</sup> through different social contracts, all different in nature, content and parties from the others. Within those stages, one can see the existence of a state of nature, of a state of society, i.e. a nation, and finally, of a set of relations between political communities through the law of nations. Each set with its own and particular rules.
9. Despite the existence of three different stages, for the purposes of this work, we will concentrate only in the first two of these stages: the state of nature and the formation of a political community with the consequences of such association, leaving the international component out of the equation.<sup>12</sup> For that purpose, we will analyze in first instance how men are bound by natural law in the state of nature, how the nature and constitution of men leads them towards abandoning this primitive stage to form a society and a government. The abandonment of this “savage” state, to reuse a term minted by Rousseau, is made in Burlamaqui through compacts of different natures. This will lead us to explain his theory of multiple compacts and the different stages they represent. That being done, we will then concentrate on the consequences of this compact structure and how it affects the form and the way in which government ought to be exercised, forwarding principles like popular sovereignty, limited representative government, separation of powers, constitutional supremacy, and even, the review of unconstitutional acts, to finally put Burlamaqui’s contribution into perspective and determine the usefulness of its study in contemporary circumstances.

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BURLAMAQUI AND ROUSSEAU, in 23, No. 3, JOURNAL OF THE HISTORY OF IDEAS, 421 (1962).

<sup>10</sup> John Dow’s opinion is that “Burlamaqui championed no political cause, as did Hobbes. He voiced no popular aspirations, as did Hobbes. He wrote no creed for the spiritually minded, as did Calvin. He pled no governmental rejuvenation, as did Machiavelli. ... Burlamaqui was a teacher, not only by profession, but also by nature. ... Burlamaqui, alone of all these ‘law-of-nature school’ men, was first and foremost an academician.” JOHN DOW, THE POLITICAL THEORY OF JEAN-JACQUES BURLAMAQUI, 1-3 (1927) (unpublished B.A. thesis, Harvard University).

<sup>11</sup> Burlamaqui considered on this regard that “The different stages of man are no other thing that the situation in which it finds himself with regard to the beings he is surrounded by, and the relations that result from it.

We can distinguish these stages into primitive and originary, & in accessory or adventive stages.” JEAN JACQUES BURLAMAQUI, ÉLÉMENTS DU DROIT NATUREL, 9 (Librairie Philosophique J. Vrin, 1981) (facsimile edition of the Lausanne 1783 edition).

<sup>12</sup> The reason for dissecting the work in this manner is to be able to concentrate more effectively on the political and constitutional theory aspects of Burlamaqui’s ideas.

## II. THE STATE OF NATURE. PRIMITIVE SOCIETY BOUND BY NATURAL LAW.

10. The first stage of which Burlamaqui speaks of, is the state of nature. But unlike many of his predecessors and contemporaries, the state of nature is not a state of licentiousness or of perpetual war of every human being against each other in the pursuance of his own and basest interests: it is a state of natural society.
11. Men are born to be sociable, it is their natural state. By natural impulse, man looks for the company of his fellows, and that leads him to interact with members of his own species.<sup>13</sup> To put it in Aristotelian terms, man would be a *Zoon Politikon*.<sup>14</sup> Instead of having fear as a motivation to associate with each other, Burlamaqui sees it as a state of fact and necessity driven by the motivation of assistance for the survival of each member of the human race; sociability is seen as something translating in a common advantage that will procure men with the tools for pursuing their own happiness. In this regard, he establishes:

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<sup>13</sup> Although Burlamaqui does not enter too much in what is that which leads man to seek the company of his fellow men, besides love and convenience, we believe that a very viable explanation to it is that primitive man would need and look for the greatest number of members of his race to protect himself from a hostile environment (not necessarily men). Man, compared to other species is a weak animal. The strength of men to survive in the primitive world relied heavily on their wit and vast numbers; that was the only way to exercise dominion over bigger and stronger beasts. One man against a mammoth is like an ant trying to knock down an elephant, but if you gather one hundred men, their chances rise and the mammoth might now be the one in disadvantage, especially if these men have manufactured spears and similar weapons. Sociability seems therefore to be also at the heart of the survival of the species. Continuing in this line of thinking, sociability between men seems to be linked to an instinct of self-preservation and that might be an explanation why the first kings and sovereigns, more than being merely the stronger of the whole, they might have been those who assured the better protection and food supply for the community. This circumstance might have led to choose as a sovereign or chieftain, the best hunter, the best planner, strategist and the stronger to protect the group, rather than simply to be imposed by the stronger one, as some other authors seem to suggest. Also, take into consideration that Burlamaqui and all other social contract theorists presuppose, in our view, that man is already a rational being, that he has “crossed the Rubicon”; if that is so, regardless of how men might have behaved when they were closer to primates, if we accept the theory of evolution, once they became men, force seems like an awkward sole criterion to choose a leader since strength does certainly not guarantee survival against hostile beasts that surpass it by many times. Consequently, the criterion for such an election must have been a combination of them all. Note that we are using here the term “election” and not imposition, which is coherent with the whole scheme of contractualism Burlamaqui seems to set. These words would seem to be supported by Rousseau, who rules out force as a source for right and legitimate power:

The strongest is never strong enough to be always the master, unless he transforms strength into right, and obedience into duty. Hence the right of the strongest, which, though to all seeming meant ironically, is really laid down as a fundamental principle. But are we never to have an explanation of this phrase? Force is a physical power, and I fail to see what moral effect it can have. To yield to force is an act of necessity, not of will — at the most, an act of prudence. In what sense can it be a duty?

JEAN JACQUES ROUSSEAU, *LE CONTRAT SOCIAL*, (1762) Bk. I, Ch. 3.

<sup>14</sup> On Aristotle's influence or at least compatibility with Burlamaqui's thought on the nature and sociability of man, see RAY FORREST HARVEY, *JEAN JACQUES BURLAMAQUI A LIBERAL TRADITION IN AMERICAN CONSTITUTIONALISM*, 11-16 (The University of North Carolina Press, 1937).

... [T]he natural state of men is a state of society.  
This society is a state of fact & necessity ....<sup>15</sup>

Another primitive & originary stage of man, is that where he finds himself amongst other men, & that stage is a state of society. Society is the union of several persons for their common advantage & for their own happiness.<sup>16</sup>

But it is evident that by the nature of things all men are vis a vis other men in a state of society since ... they all have been placed on Earth, & that they would not be able to survive without the assistance of one another; this natural society is a society of equality and liberty.<sup>17</sup>

12. This state of natural society as Burlamaqui points out, is a state of equality and liberty. By the first of these terms, our Genevan author believes that being men creatures of God, they have a duty to regard each other as equals, not to harm anybody, etc., as part of their absolute and primitive duties established by God and in accordance with natural law.<sup>18</sup> This need to observe equality is derived from the fact that in the state of nature all humans have the same nature, a same reason, the same capacities and the same end.<sup>19</sup> This equality translates itself in the same right every human has to be a part of society and to pursue happiness.<sup>20</sup> As a consequence of that, Burlamaqui declares himself against slavery, asserting that, "Thus the opinion of the ancient Greeks who pretended that there are men naturally born slaves, is directly contrary to the natural state of man and to the principles of the right reason."<sup>21</sup> Consequently, no distinctions between men are conceivable in the state of nature.<sup>22</sup>

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<sup>15</sup> JEAN JACQUES BURLAMAQUI, *ÉLÉMENTS DU DROIT NATUREL*, 101 (Librairie Philosophique J. Vrin, 1981) (facsimile edition of the Lausanne 1783 edition).

<sup>16</sup> Please note that Burlamaqui uses the term "bonheur" which has a slightly different connotation than happiness, but all translations have used this concept in English.

<sup>17</sup> *Id.* at 10.

<sup>18</sup> See in general *Id.* at 110.

<sup>19</sup> See generally *Id.* at 111.

<sup>20</sup> *Cf.*, *Id.* at 112.

<sup>21</sup> *Id.* at 114.

<sup>22</sup> Burlamaqui wrote:

And indeed, upon considering the primitive state of man, it appears most certain, that the appellations of sovereigns and subjects, masters and slaves, are unknown to nature. Nature has made us all of the same species, all equal, all free and independent of each other; in short it was willing that those on whom it has bestowed the same faculties, should have all the same rights. It is therefore beyond all doubt, that, in this primitive state or nature, no man has of himself an original right of commanding others, or any title to sovereignty.

... This liberty and independence is therefore a right naturally belonging to man, of which it would be unjust to deprive him against his will.

2 JEAN JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW*, 33-34 (Harvard University Press, 1807) (1751). One interesting question to be raised here is that, if men cannot be deprived of their liberty against their own will, this is, made slaves, when the political community forms itself, since it has to have the original unanimity of the members entering into the new community, they cannot have this quality unless they expressly agree to it. If a certain group of people are made part of the community, but given the quality of slaves without having their express

13. Being all men equal, the state of nature cannot mean a state of licentiousness. By everybody having the same amount of rights, it would result in an a-social conduct to pretend to deprive someone from his basic characteristics by force or any other means other than consent. Natural liberty would then mean the possibility of acting within a frame that will allow everyman to pursue his own happiness, having as a limit to it the pursuit of the same nature by his fellowmen in order not to abuse from his natural rights.<sup>23</sup>
14. This leads us to the necessity of determining what this limit to natural liberty is, that is: what is for Burlamaqui the law of nature. The law of nature is a set of rules compatible with the natural characteristics and state of man, without which peace and happiness are inconceivable in a state of society. Consequently, they can be attained by men by the simple use of their reason.<sup>24</sup> Natural law is then self-evident and known to all mankind; they are so clear and manifest that no one can claim ignorance over its principles:

It is evident we can discover all their principles (of natural law), and deduce from them our several duties, by that natural light, which to no man has been ever refused. It is in this sense we are to understand what is commonly said, that this law is naturally known to all mankind. ... All, that can be said on this subject, is, that the most general and most important maxims of the law of nature are so clear and manifest, and have such a proportion to our ideas, and such an agreeableness to our nature, that so soon, as they are proposed to us, we instantly approve of them ....

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consent to that effect, that designation would be void, and by natural right, as members of the political community they would be free. Furthermore, Burlamaqui does not seem to acknowledge a tacit consent to leave the state of nature, therefore, slavery seems to be absolutely banned from his theoretical setting, unless one chooses to be a slave.

<sup>23</sup> Burlamaqui framed this idea as follows:

Natural liberty is then a right that every man has by the nature of disposing of their persons, their actions & goods, in a way that seems most convenient to their happiness, under the restriction that they do not violate their duties with regard to God, themselves nor any other man.

To the right of liberty responds a reciprocal obligation that natural law imposes on every man, & that commits them not to bother the others in the exercise of their liberty as long as they do not abuse from it.

This liberty is called a natural right, since it is a prerogative inherent to the nature of man, & that belongs to him as a necessary consequence of its constitution.

JEAN JACQUES BURLAMAQUI, *ÉLÉMENTS DU DROIT NATUREL*, 80-81.

<sup>24</sup> Note that for Burlamaqui "Natural law is that, which so necessarily agrees with the nature and state of man, that without observing its maxims, the peace and happiness of society can never be preserved. As this law has an essential agreeableness with the constitution of human nature, the knowledge thereof may be attained merely by the light of reason; and hence it is called natural." 1 JEAN JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW*, 77 (Harvard University Press, 1807) (1747).

Be this as it will, every thing rightly considered, the law of nature<sup>25</sup> is sufficiently notified to empower us to affirm, that no man, at the age of discretion,<sup>26</sup> and in his right senses, can alledge for a just excuse an invincible ignorance on this article.<sup>27</sup>

15. Consequently, every man is obliged by the content of the law of nature, since from the moment he is a rational being, and reason notifies him the content of natural law according to his own nature and constitution, they have to agree with it for the sake of their own preservation. Thus making this law universal, immutable, eternal.<sup>28</sup>

16. This turns the laws of nature into the measure of liberty for man in the state of nature, obliging him to mold his conduct to the designs of these rules that come from God and his proper constitution as a particular, reasoning animal. Man is not free to do whatever it wants in the state of nature, and therefore a free (allowable) action has to be voluntary, this is, it has to coexist within a reasonable frame set by the law of nature, otherwise it is considered involuntary or constrained:

Every willing action is not subject of liberty, but only those that the soul can steer or suspend however it wishes.

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<sup>25</sup> The author seems to use indifferently the expressions “natural law” and “law of nature”, a distinction that is however present in most of the law of nature scholars of his time.

<sup>26</sup> Interesting though, from this assertion, we could deduce the necessity of rules of custody or tutorship over minors and people unfit to use their reason in the state of nature, since the contrary would lead to social disorder. This could be seen as another justification of the natural right for patriarchal power although Burlamaqui’s theories are far from equating it to the rule of the sovereign, nor to absolute government. As we will see further down, Burlamaqui even states rights for children and limits the custody and authority of the parents until the infants are deemed to be in full use of their reason.

<sup>27</sup> 1 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 126-127.

<sup>28</sup> Burlamaqui wrote:

Another essential characteristic of the laws of nature is, that they be universal, that is, they should oblige all men without exception. For men are not only equally subject to God’s command, but moreover the laws of nature having their foundation in the constitution and state of man, and being notified to him by reason, it is plain they have an essential agreeableness to all mankind, and oblige them without distinction; whatever difference there may be between them in fact, and in whatever state they are supposed. This is what distinguishes natural from positive laws; for a positive law relates only to particular persons or societies.” *Id.* at 131. Furthermore, Burlamaqui continues saying: “We cannot finish this article better than with a beautiful passage of Cicero, preserved by Lactantius.\* Right reason, says this philosopher, is indeed a true law, agreeable to nature, common to all men, constant, immutable, eternal. ... It is not allowed to retrench any part of this law, nor to make any alterations therein, much less to abolish it entirely. Neither the senate nor people can dispense with it; nor does it require any interpretation, being clear of itself and intelligible. It is the same at Rome and Athens; the same today and tomorrow. ... Whosoever violates this law renounces his own nature, divests himself of humanity ....

\* ... Cicero de Republ. Lib. 3. Apud Lacant Instit. Divin. Lib. 6 cap. 8. *Id.* at 133.

We call in general voluntary actions all those that depend on will, & free actions those that come from the resort of liberty; that which is opposed to voluntary is involuntary, and the opposite of free is forced or constrained. It is easy to understand there from that all free actions are voluntary, but that on the contrary, all voluntary actions are not free.<sup>29</sup>

17. This being said, the restraints made by natural law exist for the perfecting of the human being, so that he behaves in accordance to his nature, and with respect to his fellow men, who enjoy the same set of rights, in order to achieve everyone's happiness; in this sense, the rights of one man are the limits of the other in the state of nature, independently of the existence of other constraints directed for man to achieve individually his own happiness, even if by his conduct he does not affect anyone else's rights.<sup>30</sup> It is in that sense that Burlamaqui considers the laws of nature as the rule and measure of liberty.

### III. THE COMPACTS.

18. But being the nature of man that of a social animal who seeks association for the preservation of his self, for a common advantage and to assure himself the pursuit of happiness, the state of nature doesn't seem to be for Burlamaqui the best stage of men, and it is likely for him that they will look for a greater degree of integration, so that the individual goals are better met in a community life. This process of integration is based on consent, and if every consenting party is equal, then this association has to be made through compacts.

19. Before we enter into the discussion of Burlamaqui's social compact scheme, we want to establish briefly why this theory would sound particular and original

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<sup>29</sup> JEAN JACQUES BURLAMAQUI, *ÉLÉMENTS DU DROIT NATUREL*, 6 (Librairie Philosophique J. Vrin, 1981) (facsimile edition of the Lausanne 1783 edition).

<sup>30</sup> On this, Burlamaqui asserted that

This will be still better understood by recollecting what we have already settled, when speaking of natural liberty. We have shown that the restrictions, which the law of nature makes to the liberty of man, far from diminishing or subverting it, on the contrary constitutes its perfection and security. The end of natural laws is not so much to restrain the liberty of man, as to make him act agreeably to his real interests; and moreover, as these very laws are a check to human liberty, in whatever may be of pernicious consequence to others, it secures, by these means, to all mankind the highest and the most advantageous degree of liberty, they can reasonably desire.

2 JEAN JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW*, 19. Furthermore, Burlamaqui concludes on this by saying:

The laws of nature are therefore the rule and measure of liberty; and, in the primitive and natural state, mankind have no liberty but what the laws of nature give them; for which reason it is proper to observe here, that the state of natural liberty is not that of an entire independence. In this state men are indeed independent with regard to one another, but they are all in a state of dependance on God and his laws. Independence, generally speaking, is a state unsuitable to man, because by his very nature he holds it of a superior.

*Id.* at 19. On this regard, see also PHILIP A. HAMBURGER, *NATURAL RIGHTS, NATURAL LAW, AND AMERICAN CONSTITUTIONS*, 102 *Yale L.J.*, 923 and n.47 (1992-1993).

from the orthodox positions on the matter, by first making a couple of reflections on the classical compact doctrine, as well as on Pufendorf's theory.

20. The basic analogy to the classic social contract theory and limited government is that of a ship at sea. In this regard, authors of this orthodox view, to which Locke is definitely an heir, would say:

21. ... [I]t is a thing most evident, that he which is established by another, is accounted under him that hath established him, and he which receives his Authority from another, is less than he from whom he derives his Power. ... [S]o it is, that for the Ships Sail, the Owner appoints a Pilot over her, who sits at the Helm, and looks that she keeps her Course, nor run not upon any dangerous Shelf; the Pilot doing his Duty, is obeyed by the Mariners; yea, and of himself that is Owner of the Vessel, notwithstanding the Pilot is a Servant as well as the least in the Ship, from whom he only differs in this, that he serves in a better place than they do. In a Commonwealth, commonly compared to a Ship, the King holds the Place of Pilot, the People in general are Owners of the Vessel, obeying the Pilot, whilst he is careful of the publick Good ....<sup>31</sup>

22. And although one may think that this construction is flawless, and describes perfectly the celebration of the social contract theory as it is to be understood in most of our modern constitutions, there are a couple of aspects that were left aside. First of all, our author takes for granted that the ship is already at sea, and that it already has a destination to sail to; but before that is possible, first, some people must get together and conceive the voyage, agree on the destination, obtain a ship, hire a crew, name a pilot or captain for the vessel, get provisions for the journey, etc. All of this is done through subsequent agreements that are previous to the ship's sailing. Coming back from our analogy, before the compact celebrated between the owners of the ship and the pilot, it was necessary that a community was formed for the ship, that the end, goals and destinations are set before the voyage; that a medium for such objectives is built and put into place, that a designation of the pilot is made by the ship's community or owners, and finally, that the pilot agrees to take the ship at sea under certain contractual conditions drawn mainly, but not exclusively, from the purpose and destination of the voyage. Putting it in terms of political theory, to the creation of a nation, the people, before celebrating a

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<sup>31</sup> JUNIUS BRUTUS (PHILLIPE DU PLESSIS-MORNAY), VINDICIAE CONTRA TYRANNOS: A DEFENCE OF LIBERTY AGAINST TYRANTS. OF THE LAWFUL POWER OF THE PRINCE OVER THE PEOPLE, AND OF THE PEOPLE OVER THE PRINCE, 64-65 (Richard Baldwin, 1689) (1579).

Although we acknowledge the fact that Du Plessis-Mornay establishes the necessity of a previous covenant between the people, the king and God, for establishing religious tolerance as a premise for government, we don't think this is enough to consider it a multi-covenant theory, like Pufendorf's and Burlamaqui's; nevertheless, one could try to see here a precedent to the first covenant in which the people form themselves as a nation, abandoning the state of nature, to set certain main goals of government.

compact with the people in charge of government, have to celebrate several previous compacts, like Burlamaqui expressly suggests.<sup>32</sup>

23. The doctrine of several social compacts was not initiated by Burlamaqui, but rather, he took it from Pufendorf who foresees the necessity of three social compacts (or one compact and two decrees). One of foundation of the political community, another in which the constitution is created, and a third one where the constitutional government is entrusted to a person or a group of persons bound by it.<sup>33</sup> Despite that, there is a great difference with Burlamaqui, which makes this theory unattractive: Pufendorf's view of man is quite pessimistic (in the lines of Machiavelli and Hobbes) while Burlamaqui, on the contrary is an optimistic, just like Jefferson would turn out to be, who thinks that men unite to be happy, not out of fear of each other.<sup>34</sup>

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<sup>32</sup> In support of what has been said, "Burlamaqui conceives the formation of a social contract ... consisting of two conventions or contracts joined by a general ordinance or constitution." GARY L. BARRETT, A COMPARISON OF THE MORAL AND POLITICAL IDEAS OF JEAN-JACQUES ROUSSEAU AND JEAN-JACQUES BURLAMAQUI, 217 (1970) (unpublished Ph.D. dissertation, University of Arizona).

<sup>33</sup> On this regard, see SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW, bk. II, ch. 6, 136-137 (Cambridge University Press, 1991) (1673) and SAMUEL VON PUFENDORF, DE IURE NATURAE ET GENTIUM LIBRI OCTO, bk. VII, ch. I, 949-966 (The Clarendon Press, 1934) (1672) For a comprehensive explanation of Pufendorf's theory, also, LUIS RECASENS SICHES, HISTORIA DE LAS DOCTRINAS SOBRE EL CONTRATO SOCIAL [History of the Doctrines on Social Contract], 23-24 (Universidad Nacional Autonoma de Mexico, 2003) (1941).

<sup>34</sup> On Pufendorf's conception of man, see ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW, bk. II, ch. 5, at 133-134. On the different approach of the Declaration towards man, see GILBERT CHINARD, THOMAS JEFFERSON, THE APOSTLE OF THE AMERICANISM, 75-76 (Little, Brown and Company, 1944). Also, take into account prof. Morton White's words in the sense that "Burlamaqui's incorporation of the duty to pursue happiness into the body of natural law represented a significant change in the doctrine." MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION, 231 (Oxford University Press, 1978).

Contrary to most of his predecessors, Burlamaqui's optimism is similar to Christian Wolff's. Although there can only be a presumption that Burlamaqui actually read Wolff, due to the comments made in a couple of sources (see *supra* note 7), it cannot be established with certainty that Wolff's influence on Burlamaqui was decisive, since there is no mention to his works in the relevant passages of the *Principles* or the *Elements*. Also, Wolff's major and most decisive work, his *Jus Naturae et Gentium*, where he developed fully his theories on man and happiness within human societies, was started to be published in 1740 (the first part, the other seven volumes of his *Jus Naturae* would appear between then and 1748), when his star was clearly fading, his popularity decreasing and very few people attended his classes anymore; moreover, the ninth volume of such work, his *Jus Gentium*, where his most comprehensive account of government is written, would only appear in 1749, a year later from Burlamaqui's death. Also, take into consideration that Burlamaqui's health had deteriorated to such an extent that in the early 1740s he had been obliged to leave the University of Geneva, and therefore, one may question if Wolff's work was actually read by Burlamaqui, or if it could have had a real impact on him, since by the time he would write his own works, with a declining body, it would only seem that he was eager to rescue the heritage of his own thought, expressed in his years as a professor, that changing his scheme of thought and creating new theories based on some new findings.

Regardless of whether there was an actual influence on Burlamaqui, let it be said, however, that Wolff's theory of association by compact relies precisely on the fact that men and nations associate in order to assure mutual benefits with the ultimate end of assuring the perpetual possibility of

24. Another difference that distinguishes Pufendorf and Burlamaqui on this regard is the fact that the first, in a democracy, excepts from the celebration of a second compact, while Burlamaqui thinks that in every case there is necessity for multiple compacts, since a certain form of government will always exist and needs to be set.<sup>35</sup>

25. This leads us then to determining Burlamaqui's scheme of social compacts, with respect to what he writes:

Tracing the principles here established in regard to the formation of states, &c. were we to suppose, that a multitude of people, who had lived hitherto independent of each other, wanted to establish a civil society, we shall find a necessity for different covenants, and for a general decree.<sup>36</sup>

...

And though we are strangers to the original of most states, yet we must not imagine, that what has been hitherto said concerning the manner, in which civil societies are formed, is a mere fiction. For, since it is certain, that all civil societies had a beginning, it is impossible to conceive how the members, of which they are composed, could agree to live together,

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pursuing their happiness. See generally CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM*, (The Venetian Society, 1764) *prolegomena* and chapters I and II. For a general comment on Wolff's theory, see RAUL PEREZ JOHNSTON, CLÁSICOS DEL DERECHO INTERNACIONAL, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM DE CHRISTIAN WOLFF, NOTA INTRODUCTORIA Y TRADUCCIÓN* [Classics of International Law, *Jus Gentium Methodo Scientifica Pertractatum*, Introductory Note and Partial Translation], in 3, No. 11, ADE, REVISTA DE LA ASOCIACIÓN DE DIPLOMÁTICOS ESCRITORES (June-August, 2004).

<sup>35</sup> On this regard, "Unlike Pufendorf, Burlamaqui did not except democracies from the necessity of having a second covenant. Pufendorf believed that since the same people in a democracy were in different respects sovereigns and subjects, the second covenant (*pactum*) did not so manifestly appear. He would thus have found Rousseau's conception of the identity of the sovereign and of the subjects to his liking, unless he would still have held for a decree after the first convention. Burlamaqui's failure to exempt democracies from the necessity of a second convention was in part explained by his later claim that magistrates were necessary in a democracy for routine duties." JOHN DOW, *THE POLITICAL THEORY OF JEAN-JACQUES BURLAMAQUI*, 42 (1927) (unpublished B.A. thesis, Harvard University).

<sup>36</sup> Note the subtle difference in terms, while in the state of nature men live in a state of "society", in an organized community men are living in a state of "civil society". By "general decree" we understand that Burlamaqui refers most probable to a written constitution in the modern sense of the term, disagreeing on this account with prof. Thomas C. Grey, who affirmed:

But what is important (and difficult) for us to remember is that this idea of an enacted constitution was relatively novel in 1760, while the idea of an ancient and unwritten constitution compounded of custom and reason was comfortable and traditional in the English-speaking world. It was still this traditional idea that sprang to the minds of Americans when they read in Burlamaqui ... of "constitutions" and "fundamental laws" ....

THOMAS C. GREY, *ORIGINS OF THE UNWRITTEN CONSTITUTION: FUNDAMENTAL LAW IN AMERICAN REVOLUTIONARY THOUGHT*, 30 *Stan. L. Rev.*, 864 (1977-1978).

dependant on a supreme authority, without supposing the covenants abovementioned.<sup>37</sup>

26. As we can see, Burlamaqui sees the necessity of compacts upon the agreement and will of a certain number of people deciding to leave the state of nature, but furthermore, as a historical explanation as to why societies have developed and become what they are today, or in his day. This gradual and evolutionary process is then met by a series of agreements: two covenants, and one decree. The first one dealing with the creation of the political community or civil society and the ends of the association, the second creating a constitution and the form of government to meet the ends for the established constitution, and finally, a third compact in which those who are to be entrusted with the exercise of the sovereign power are to be elected and pledged to fulfill the mission that is being put in their hands: guide the ship to safe port in order to procure for the happiness of all the passengers.

### **3.1.- The first compact. Necessity of abandoning the state of nature to evolve to an association, creating the body of the nation and the objectives of the same: the pursuit of happiness.**

27. Burlamaqui, although he was an optimistic viewer of the state of nature, he didn't believe in it as a suitable stage for man, unlike Rousseau, but considered that according to the sociable characteristic of mankind, it was in their nature to perfect the social body by giving themselves a certain legal framework and a ruler in order to achieve in a more efficient way the goals set by the whole community, rather than by trying to achieve them on their own.<sup>38</sup>

28. With respect to this, man, by submitting to the will of the social body, would be entrusting his own happiness to the fulfillment of a general standard of happiness by the whole body.<sup>39</sup> Man sacrifices its individuality or independence

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<sup>37</sup> 2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 26-27 (Harvard University Press, 1807) (1751). For a better comprehension of Burlamaqui's social compact scheme, it is worthy mentioning that the author avoids some of the classical objections made to contractualist theories by saying that the covenant is express between the founding generation, and then becomes tacit with those belonging to future generations, who, when acquiring majority of age, will decide whether they will live under the established rules, or through the mechanisms established in the constitution, change the rules of government if they so decide; or finally, as a last resort, leave to another country. Like most theories of its time, for Burlamaqui, exit is an alternative to complying with the will of the community. This tacit covenant is being renewed with the course of time, generation after generation, since the founding generation has no right *a priori* to bind the will of their children. See *Ibid.* at 30-31.

<sup>38</sup> He would say: "Let us conclude then that we can say that being sociable is an essential characteristic to mankind.

But so being the nature of man, we must recognize that it is in its duty to contribute with all its power to maintaining and perfecting such society." JEAN JACQUES BURLAMAQUI, ÉLÉMENTS DU DROIT NATUREL, 102.

<sup>39</sup> Burlamaqui's words are helpful for better understanding this idea:

Every being, that by its constitution has essential relations to other beings, which it cannot shake off, ought not to be considered merely as to itself, but as constituting a part of the

of the state of nature, to become part of a whole community that will look after what is best not for each and everyone of its components individually, but for the whole of them.<sup>40</sup>

29. But to achieve this, the first step that has to be taken is the formation of the civil society, or political community:

The first covenant is that, by which each individual engages with all the rest to join forever in one body, and to regulate, with one common consent, whatever regards their preservation and their common security. These, who do not enter into this first engagement, remain excluded from the new society.<sup>41</sup>

30. From this description of the first social compact, it is very easy to determine that Burlamaqui is foreseeing in it two things: first, the creation of the national community through the consent of every member; those who do not want to be part of the community can opt out at the moment of celebrating it, not afterwards, since the association is perpetual. And second, the setting of the main objectives of the association, by regulating whatever regards the preservation and common security of the community; in other words, the main guidelines for the pursuit of happiness.

31. This is achieved by a transformation of the whole body of the nation into one unit. Man ceases to be an independent unit and by associating himself with others in creating a political community, he becomes part of a collegiate body from whom sovereignty is born.<sup>42</sup> The whole, acting as a sovereign body, can

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whole, to which it is related. And it is sufficiently manifest, that it is on its situation in regard to the beings that surround it, and on the relations of agreement or opposition it has with them, that its good or bad state, its happiness or misery, must in a great measure depend.

1 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 39.

<sup>40</sup> Burlamaqui continues, and asserts the suitability of organizing a society under certain rules and direction:

But between all the stages produced by human deed, there is none more considerable than the civil state or that of civil society.

The essential character of this society, which distinguishes it from primitive society ... is the subordination to a sovereign authority, which replaces the equality & the independence in which men used to live in the natural society.

JEAN JACQUES BURLAMAQUI, ÉLÉMENTS DU DROIT NATUREL, 11.

<sup>41</sup> 2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 27.

<sup>42</sup> Burlamaqui would say on the matter:

It is from this union of wills and of strength, that the body politic or state results. ...

All this is performed by means of covenants; for this union of wills in one and the same person could never be so effected, as to actually destroy the natural diversity of inclinations and sentiments; but it is done by an engagement, which every man enters into, of submitting his private will to that of a single person, or of an assembly; insomuch that every resolution of this person or assembly, concerning things relative to the public security or advantage, must be considered, as the positive will of all in general, and of each in particular.

With regard to the union of strength, which produces the sovereign power, it is not formed by each man's communicating physically his strength to a single person, so as to remain utterly weak and impotent; but by a covenant or engagement, whereby all in general and each in

now proceed to designate a government and those who are to be entrusted with its exercise in order to better achieve the ends for which the body of the nation was created: the collective pursuit of happiness.

32. This concept of happiness, is consequential and central to the creation of the covenants as considered by Jean Jacques Burlamaqui. On this regard, as we shall see further down, the end of law and the state in general is to pursue true and solid happiness,<sup>43</sup> by establishing that happiness is the possession of good leading to the preservation, perfection, convenience or pleasure of men.<sup>44</sup> But this concept is not to be understood lightly, since it has to be compatible with reason and the natural state of man, otherwise it would lead to evil and prevent man from being happy.<sup>45</sup>
33. This takes us to the concept that if reason is the measure of happiness, man, in a society, has to live under rules that obey reason in order to achieve its goal of assuring the happiness and wellbeing of its members. Therefore, the need for laws that assure men to act in accordance to these principles; rules that, being compatible with the nature of man are to be drawn from natural law to be put into a frame of society as long as it purports to the satisfaction of the general good. For Burlamaqui, the end of natural law is then to take man into a state of individual happiness,<sup>46</sup> while the end of the state would be to take the whole community to a state of collective happiness. Therefore, a state is going to assure the happiness of its members, as long as it acts in respect of natural law and the interests of the whole community. This equilibrium can only be set by

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particular oblige themselves to make no use of their strength, but in such a manner, as shall be prescribed to them by the person, on whom they have, with one common accord, conferred the supreme authority.

By this union of the body politic under one and the same chief, each individual acquires, in some measure, as much strength, as the whole society united.

*Id.* at 24.

<sup>43</sup> Burlamaqui's text is helpful here: "My design is to enquire into those rules, which nature alone prescribes to man, in order to conduct him safely to the end, which every one has, and indeed ought to have, in view, namely, true and solid happiness." 1 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 1.

<sup>44</sup> To define happiness, Burlamaqui affirms: "By *Happiness* we are to understand the internal satisfaction of the mind, arising from the possession of good; and by good, whatever is suitable or agreeable to man for his preservation, perfection, conveniency or pleasure." *Id.* at 10.

<sup>45</sup> Take into consideration that:

True happiness cannot consist in things that are inconsistent with the nature and state of man. This is another principle which naturally flows, from the notion of good and evil. For whatsoever is inconsistent with the nature of a being tends for this very reason to degrade or destroy it, to corrupt or alter its constitution; which, being directly opposite to the preservation, perfection, and good of this being, subverts the foundation of its felicity. Wherefore, reason being the noblest part of man, and constituting its principal essence, whatever is inconsistent with reason cannot form his happiness. To which I add, that whatever is incompatible with the state of man cannot contribute to his felicity ....

*Id.* at 39.

<sup>46</sup> For a comment on this, see BERNARD GAGNEBIN, BURLAMAQUI ET LE DROIT NATUREL, 274 (La Frégate, 1944).

the framing of a constitution, which leads us to the necessity of celebrating a second compact.

### **3.2.- The Fundamental Compact. The creation of the State and the constitution, and establishment of the form of government.**

34. Anarchy is not a solution provided in the scheme of Jean Jacques Burlamaqui, and therefore, a set of rules is needed to establish a government and the form and shape it ought to have in order to maintain the public security and promote the general welfare. On this regard, the second compact is defined by Burlamaqui in the following terms:

2. There must afterwards be a decree made for settling the form of government; otherwise they could never take any fixt measures for prompting effectually, and in concert, the public security and welfare.<sup>47</sup>

35. Although the consequences and principles of this constitutional government are to be analyzed *infra* in point IV, we believe that a precision should be made as to what form of government should be adopted by the people in the exercise of their sovereign power. This precision forwarded by Burlamaqui is that the form of government has to be consistent with the educational development of the people, so that it can work properly. In a likely manner to what Montesquieu would establish a couple of years later, Jean Jacques Burlamaqui thinks also that there has to be a proportion between the level of education of the people and the degree of adequate functioning of a government, since he wrote that “It is not laws and ordinances, but good morals, that properly regulate the state. ... Those, who have had a bad education, make no scruple to violate the best political institutions; whereas they, who have been properly trained up, cheerfully conform to all good institutions.”<sup>48</sup>

36. In this sense, the laws have to be accommodated to the conditions of the people, otherwise the system would fall into a crisis of legitimacy whereby either the law is not observed or its authority is despised.<sup>49</sup> From what we can deduce that if the form of government and the laws of the country are not proportional to the degree of education and needs of the people, it would have to be changed in order to avoid this disproportion, which would lead inevitably for the government not to be able to fulfill duly its ends; and perhaps, even its destruction.

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<sup>47</sup> 2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 27.

<sup>48</sup> *Id.* at 105.

<sup>49</sup> On this idea, Burlamaqui considers that “... [L]aws ought to be accommodated to the condition and genius of the people ... otherwise one of these two inconveniences must happen, either that the laws are not observed, ... or that the authority of the laws is despised, and then the state is on the brink of destruction.” *Id.* at 106.

### 3.1.- The third compact: Designation of the rulers.

37. The third of the compacts relates to the designation of those who are going to exercise government in accordance to the form of government previously established in the constitution, be it a person, an assembly or a group of different bodies, however the people may have deemed proper and better for the fulfillment of the ends of government. On this regard, the third compact is defined in the following manner:

3. In fine, when once the form of government is settled, there must be another covenant, whereby, after having pitched upon one or more persons to be invested with the power of governing, those, on whom this supreme authority is conferred, engage to consult most carefully the common security and advantage, and the others promise fidelity and allegiance to the sovereign. This last covenant includes a submission of the strength and will of each individual to the will of the head of the society, as far as the public good requires; and thus it is, that a regular state and perfect government are formed.<sup>50</sup>

38. Within the last of the covenants, the people elect a certain number of government officials, who have to engage themselves to act in fulfillment of their duty, this is, to guide the whole society in the pursuit of their happiness by governing for the common good, while in exchange they obtain the promise of obedience by the people who are by this act entrusting them with the exercise of their sovereign power.<sup>51</sup> In this regard, once the government is designated, the people loose their sovereign character and owe complete obedience to the designated government and to the laws it issues, unless there would be a breach in the terms of the contract, since acting within the terms of the contract is the condition for the legitimacy of government, like we will explain further down.

39. In this regard, it is worth saying that the rulers are people chosen within the community, they are “one more” before the election, and they are still a part of the people in general after they are “anointed” to their public charge, which follows that acting as particulars, they are like anybody else, but when acting under the authority that has been granted to them, they have to be obeyed. That is why so many precautions have to be established so that the due exercise of government is not abused, since it would be creating an unnatural distinction like the ones forbidden in the state of nature.<sup>52</sup>

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<sup>50</sup> *Id.* at 27.

<sup>51</sup> This can occur before a representative assembly. Therefore the oath can be taken before this assembly acting on behalf of the people, and not necessarily before the whole people that constitute the nation reunited in one place, as it is the case at present in most nations where the high ranked officials normally take their oath of office before a representative of the sovereign power, be it Congress, the Judiciary or the Executive.

<sup>52</sup> See *supra* note 22.

40. An interesting thing about this is that this compact can be celebrated in various ways. The most common is by a ceremony in which the people, or its representatives are present when the sovereign assumes the charge he has been given and in exchange swears to uphold the fundamental laws under which he derives the totality of its power. On this account, Burlamaqui makes a beautiful description of this by explaining the example of the oath of allegiance in the ancient kingdom of Aragon:

... [A] nation may require of a sovereign, that he will engage, by a particular promise, not to make any new laws, nor to levy new imposts, to tax only some particular things, to give places and employments only to a certain set of people, and not to take any foreign troops into his pay, &c. Then indeed the supreme authority is limited in those different respects, insomuch that whatever the king attempts afterwards, contrary to the formal engagement he entered into, shall be void and of no effect. ... But, for a still greater security of the performance of the engagements, into which the sovereign entered, and which limit his power, it is proper to require explicitly of him, that he shall convene a general assembly of the people, or of their representatives, or of the nobility of the country, when any matters happen to fall under debate, which it was thought improper to leave to his decision. Or else the nation may previously establish a council, a senate, or a parliament, without whose consent the prince shall be rendered incapable of acting in regard to things, which the nation did not think fit to submit to his will.

History informs us, that some nations have carried their precautions still further, by inserting in plain terms, in their fundamental laws, a condition or clause, by which the king was declared to have forfeited his crown, if he broke through those laws. Puffendorf gives an example of this, taken from the oath of allegiance, which the people of Aragon formerly made to their kings. *We, who have as much power as you, make you our king, upon condition, that you maintain inviolably our rights and liberties, and not otherwise.*

It is by such precautions as these, that a nation really limits the authority, she confers on the sovereign, and secures her liberty. For, as we have already observed, civil liberty ought to be accompanied not only with a right of insisting on the sovereign's making a due use of his authority, but moreover with a moral certainty, that this right shall have its effect. And the only way to render the people thus certain is to use proper precautions against the abuse of the sovereign power, and in such a manner, that these precautions cannot be easily eluded.<sup>53</sup>

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<sup>53</sup> 2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 47-48. With regard to this, the reference to the oath of allegiance in the kingdom of Aragon can be seen at 2 SAMUEL VON PUFFENDORF, DE JURE NATURAE ET GENTIUM, LIBRI OCTO, 1071 (The Clarendon Press, 1934). Also, the reference on the oath taken by the king before *el Justicia* of Aragon appears in FRANÇOIS HOTMAN, FRANCO-GALLIA: OR, AN ACCOUNT OF THE ANCIENT FREE STATE OF FRANCE, AND MOST OTHER PARTS OF EUROPE, BEFORE THE LOSS OF THEIR LIBERTIES, 71 (Edward Valentine, 1721) (1574), even though the terms of the

41. Once the compact system has been established, and we have moved from the state of nature to one of an organized civil society with a constitution and a government issued there from, it is interesting to see what are the consequences established by Burlamaqui with respect to these compacts and how this structure reflects on the governmental structure and action.

#### IV. THE CONSEQUENCES OF THE SOCIAL CONTRACT. LIMITED GOVERNMENT UNDER CERTAIN PARTICULAR RULES AND PRINCIPLES.

42. As we see it, four are the major principles set by Burlamaqui once the constitutional frame is put into place. The first of them is the definitive abandonment of the state of nature with the creation of a principle of popular sovereignty that can be reassumed by the people in the case of the exercise of

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oath change a little bit, since Hotman accounts that it consisted in: "*Nos qui valemos tanto come vos, y podemos mas que vos, vos eligimos rey, con estas y estas condiciones: intra vos y nos, un que manda mas que vos.*"

A free translation out of Spanish would be: "We who are worth as much as you, and have more power than you, elect you our king, with these and these conditions: between you and us, one that has more command power than you."

Now, if we link this example forwarded by the French Huguenot to the one established by Burlamaqui, some interesting consequences can be drawn with regard to the limitations of the monarch or sovereign body designed by the people, since it establishes in its final part: "*intra vos y nos, un que manda mas que vos*", this represents the signing of a covenant between the king (*vos*) and the people (*nos*), where, at the moment of this act taking place, the monarch recognizes the supremacy of the people over his office (*un que manda mas que vos*), and from there, the principle of original sovereignty invested in the people, delegated through a mandate to a representative (the king), who must, under threat of forfeiture, abide to the terms established in the same.

This last consequence would even be reaffirmed with what Bodin would write originally three years after the publication of *Franco-Gallia*, in his famous work *De la République*, in six books, and reinforced in later editions, with the clear intention to contest the argument established by the professor, historian and lawyer of the Reformation. Nevertheless, Bodin's refutation of this point limits itself to saying that in the Kingdom of Aragon this ancient custom is no longer in force, and that in France, since there is no obligation of the monarch to submit to a certain set of preestablished laws, nor to the ancient customs or traditions, he is under no obligation to abide by them (see Book I, ch. VIII). But despite Bodin's refutation, that leads him to argue in favor of the absolute power of the monarch, the consequences of Hotman's/Burlamaqui's argument remain, in the sense that when the king is under an act that limits his power, his is bound by the terms of his pledge. This is in a certain way recognized by Bodin, later on in the same chapter when he says that should the king make a pledge like that, then he would be bound under those terms due to the principle of natural equity that establishes that all covenants ought to be fulfilled, and by the trust of which he becomes depositary. The interesting thing of this oath of allegiance system, which is why we have brought up the whole point, as will be seen in number IV of the present work, is that the king is bound to govern in favor of the people, recognizing the superiority of the people over the king since the first is the true sovereign and the latter his mandatary or agent, leading to the principles of limited government, constitutional supremacy and inalienable rights. For a further discussion on this subject, refer to RAUL PEREZ JOHNSTON, LOS APORTES DEL DERECHO PÚBLICO MEDIEVAL A LA TEORÍA DEL ESTADO Y DE LA CONSTITUCIÓN (DIÁLOGO CON PAOLO GROSSI) [The Contributions of Medieval Law to the Theory of the State and Constitutional Theory (A Dialogue with Paolo Grossi)], in 5 HISTORIA CONSTITUCIONAL. REVISTA ELECTRÓNICA DE HISTORIA CONSTITUCIONAL, SPAIN (2004) at <http://hc.rediris.es/05/indice.html>.

the right of resistance against oppression; the second consists in the existence of a representative government of delegated and limited powers towards the body of the nation and within itself by embracing a system of separation of powers; the third one, consists in the exercise of government by respecting the natural rights of man and by enforcing also a certain set of social rights through a system of rule of law; and finally, a fourth principle consisting in a safeguard against the possible abuse of legislative or executive power, by establishing the supremacy of the constitution, the need for an institutional guardian of the supremacy of the fundamental law and the possibility of reviewing the unconstitutionality of acts contrary to the constitution.

#### **4.1.- Definitive abandonment of the state of nature, popular sovereignty and the right of resistance.**

43. The first major consequence of the celebration of the social compacts is the definitive abandonment of the state of nature, unless the whole nation disappears.
44. From the way Burlamaqui frames his social compact scheme, there would seem no way, in which, while the nation persists, there might be a return to the state of society. This is so since, if we take a look on how all modern revolutions have occurred, overthrowing governments and establishing a new constitutional setting, this would at most affect the establishment of the second and third compacts, but the first one, the one that creates the political community, the right of sovereignty and sets the great goals under which that society ought to rule itself, would remain intact.<sup>54</sup>
45. One question that one might ask is: how binding is this social contract? Can a nation dissolve itself by making the first contract void? Unless there would be a change in the elements of the new state, it is very unlikely that a nation can dissolve itself unless it decides to separate itself and create several new entities, but even then, one could see it as an amendment, so there was no actual return to the state of nature.
46. As far as the second of the mentioned social compacts is concerned, how is the organization of government binding upon the next generations? One of the virtues or differences that may arise from Burlamaqui with regard to the other natural law writers, if we see the two foundational contracts, is that there is no return to the state of nature in case there should be a breach of the second of them by the government, since they are still bound as a nation and

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<sup>54</sup> Compare this view with SAMUEL VON PUFENDORF, *DE IURE NATURAE ET GENTIUM*, *op. cit.* Bk. VII, Ch. XI, para 1. For a brief comment on this, see also, RAUL PEREZ JOHNSTON, *CLÁSICOS DEL DERECHO INTERNACIONAL, DE IURE NATURAE ET GENTIUM LIBRI OCTO DE SAMUEL VON PUFENDORF, NOTA INTRODUCTORIA Y TRADUCCIÓN* [Classics of International Law, *De Iure Naturae et Gentium Libri Octo*, by Samuel von Pufendorf, Introductory Note and Partial Translation], in 4, No. 12, ADE, REVISTA DE LA ASOCIACIÓN DE DIPLOMÁTICOS ESCRITORES (September-November, 2004).

consequently, they only have to reformulate it through a constitutional convention.

47. In this sense, Burlamaqui's conception of a social contract in what we call three stages, not only two (two foundational compacts and another designating government), which as seen before, differs from Pufendorf, despite being accused of having copied him on that regard,<sup>55</sup> is superior to the one of Locke and most clearly Rousseau, who only see basically one social contract (even if Locke divides the object of the contract into two, it still accounts for one in the case of a revolution as he frames it).<sup>56</sup> This is so, because in the case of the exercise of self defense by the people against a tyrant, where by resisting oppression it reassumes its sovereign capacity, in accordance to Locke and Rousseau, there would be an immediate return to the state of nature, with a complete destruction of all the legal and social organization, falling, temporarily, into anarchy while a new social contract is celebrated, while according to Burlamaqui's conception, the reassumption of sovereignty would imply only, at most, the election of new authorities and the drafting of a new governmental organization in a new constitution, but the state, society and its ends remain intact, and therefore, the "people", as a political unit, is still constituted into one nation and bound by a set of (natural) laws and principles.<sup>57</sup>

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<sup>55</sup> See generally GAGNEBIN, *op. cit.* at 171.

<sup>56</sup> Despite distinguishing in Chapter XIX of the *Second Treatise on Government* between the dissolution of society and the dissolution of government, which is in the lines of Burlamaqui's ideology, in the case of a revolution, Locke equates the situation to being back in the state of nature:

First, as, in some countries, the person of the prince by the law is sacred; and so, whatever he commands or does, his person is still free from all question or violence, not liable to force, or any judicial censure or condemnation. But yet opposition may be made to the illegal acts of any inferior officer, or other commissioned by him; unless he will, by actually putting himself into a state of war with his people, dissolve the government, and leave them to that defence which belongs to every one in the state of nature: for of such things who can tell what the end will be? and a neighbour kingdom has shewed the world an odd example.

JOHN LOCKE, *THE SECOND TREATISE ON GOVERNMENT* (1690) ch. XVIII.

The monist scheme of Rousseau's social contract is clear from the way he describes it as comprising all elements of the state:

At once, in place of the individual personality of each contracting party, this act of association creates a moral and collective body, composed of as many members as the assembly contains votes, and receiving from this act its unity, its common identity, its life and its will. This public person, so formed by the union of all other persons formerly took the name of *city*, and now takes that of *Republic* or *body politic*; it is called by its members *State* when passive. *Sovereign* when active, and *Power* when compared with others like itself. Those who are associated in it take collectively the name of *people*, and severally are called *citizens*, as sharing in the sovereign power, and *subjects*, as being under the laws of the State.

JEAN JACQUES ROUSSEAU, *LE CONTRAT SOCIAL* (1762), Bk. I, Ch. 6.

<sup>57</sup> On a comparative analysis of Burlamaqui's and Rousseau's concepts of social contract, see GARY L. BARRETT, *A COMPARISON OF THE MORAL AND POLITICAL IDEAS OF JEAN-JACQUES ROUSSEAU AND JEAN-JACQUES BURLAMAQUI*, 40 and 219-225 (1970) (unpublished Ph.D. dissertation, University of Arizona). For a comparison between Burlamaqui's and Locke's notions of social contract, see DOUGLAS G. SMITH, *CITIZENSHIP AND THE FOURTEENTH AMENDMENT*, 34 *San Diego L. Rev.* 718 and ff. (1997) and RAY FORREST

48. Consequently, it is almost ruled out that there might be a complete destruction of the compacts according to Burlamaqui. For example, if we were to take the Declaration of Independence as being the first compact, and then the Articles of Confederation as accounting for the second, when the Philadelphia Convention subverted the constitutional compact by not following the rules of amendment provided in the Articles, there was no return to the state of nature, only a substitution of the second and consequently of the third compacts, since new authorities were elected. But there was no anarchy as other positions might seem to suggest.
49. The second aspect that arises from this point, is the fact that sovereignty is popular, it resides in the people who created the first compact,<sup>58</sup> enlarged of course, with time, to the new members of the community who have accepted tacitly the terms of it, and become part of the franchise. Sovereignty is then merely entrusted to its agents: the government. This means that the body of the nation can, at a given moment, if necessary, reassume the totality of its power and frame a new constitutional setting. This would occur in the case of a violation of the third compact by the rulers by not fulfilling or governing through the ends and dispositions of the first two contracts that form the legal frame that it is bound to respect through the oath of office taken by each of its officials. In that case (of a breach), government forfeits its right of commandment, loses legitimacy and there is no impairing right of obedience by the people towards its actions.
50. This does not mean, however, that with any decision that is in violation of the social covenants, the people can start a revolution to resist oppression and have the whole sovereign power returned to the nation; but only in cases of necessity, when no other legal remedies are available. In this sense, although

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HARVEY, JEAN JACQUES BURLAMAQUI A LIBERAL TRADITION IN AMERICAN CONSTITUTIONALISM, 41 and ff. (The University of North Carolina Press, 1937).

Also, let it be said that this construction is obviously much more advanced than the ones where the social contract is seen as granted by the sovereign or even like a contract between a sovereign (who may even be divine by nature) and the people, since any breach in those contracts would imply an automatic return to the state of nature. In this large pool we can put authors diverse in ideas, ranging from Grotius, Du Plessis Mornay or Buchanan, to Bodin, Hobbes or even Filmer; Filmer is here included since despite denying any contractualist affiliations, he sets a scheme that bases patriarchal power in the consent of the chiefs of family to designate a hereditary ruler in the state of nature, which invariably leads us to a certain form of social contract.

<sup>58</sup> Burlamaqui defines this idea in the following terms:

When we inquire here into the source of sovereignty, our intent is to know the nearest and immediate source of it; now it is certain; that the supreme authority, as well as the title, on which this power is established, and which constitutes its right, is derived immediately from the very covenants, which constitute civil society, and give birth to government.

... It must therefore be agreed, that sovereignty resides originally in the people, and in each individual with regard to himself; and that it is the transferring and uniting the several rights of individuals in the person of the sovereign, that constitutes him such, and really produces sovereignty.

2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITICAL LAW, 33-34.

Burlamaqui is an advocate of the right of resistance, he sets some limits<sup>59</sup> to this right:

I said that the sovereign, as such, was neither accountable nor punishable; that is, so long as he continues really a sovereign, and has not forfeited his right. For it is past all doubt, that if the sovereign, utterly forgetful of the end, for which he was entrusted with the sovereignty, applied it to a quite contrary purpose, and thus became an enemy to the state; the sovereignty returns (ipso facto) to the nation, who, in that case, can act towards the person, who was their sovereign, in the manner they think most agreeable to their security and interests. For, whatever notion we may entertain of sovereignty, no man in his senses will pretend to say, that it is an undoubted title to follow the impulse of our irregular passions with impunity, and thus to become an enemy to society.

...

We must therefore observe here a just medium, and establish principles, that neither favor tyranny, nor the spirit of mutiny and rebellion.

It is certain that, so soon as the people submit to a king, really such, they have no longer the supreme power.

But it does not follow, from the people's having conferred the supreme power in such a manner, that they have reserved to themselves in no case the right of resuming it.

This reservation is sometimes explicit; but there is always a tacit one, the effect of which discloses itself, when the person, intrusted with the supreme authority, perverts it to an use directly contrary to the end, for which it was conferred upon him ....<sup>60</sup>

51. From the principles of popular sovereignty and resistance, one consequence is clear in the scheme of things set by Burlamaqui: people in charge of government, cannot do whatever they want, but their power is limited in favor of those for who they are governing, those who they represent.

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<sup>59</sup> It is interesting to see that unlike many authors of the XVIII and XIX centuries, Burlamaqui appears as quite moderate with regard to the right of resistance. Despite that, his view is not unambiguous (due to a lack of definition of what is to be understood as a "case of necessity" and therefore leaves room for what we could call "historical arbitrariness" to fill that void.

<sup>60</sup> 2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 39, 41. For a further development on the problem of resistance against oppression and the right to revolution as to its conditions and effects, see RAUL PEREZ JOHNSTON, NOTAS SOBRE EL CONSTITUYENTE REVOLUCIONARIO, EL DERECHO A LA REVOLUCIÓN Y EL DERECHO DE LA REVOLUCIÓN [Notes on the Revolutionary Constitutional Conventions, the Right to Revolution and the Right issued from a Revolution], XIII *IURIS TANTUM*, LAW REVIEW OF UNIVERSIDAD ANÁHUAC LAW SCHOOL, MEXICO (spring-summer of 2002).

#### 4.2.- Representative government, limited government – delegated powers, and separation of powers.

52. One of the aspects that spring from the body of Burlamaqui's thought is that government has to be representative. Either by the election of a Prince or a representative assembly, or whatever means the people chose, but by no means he conceives the possibility of the whole people exercising government, like Rousseau would seem to suggest, for instance.

53. This brings us back to the concept stated *supra* (III, 2) of the relation between education and the form of government. With regard to that, Burlamaqui thinks also that it is not an easy thing to understand the affairs of government. Therefore, no sovereign identity is possible.<sup>61</sup> Burlamaqui doesn't think that the people could exercise government on their own, since it has to be a full time task, therefore, politics ought to be professionalized and handled by specialists with the proper knowledge of government:

It is a great mistake to imagine, that the knowledge of government is an easy affair; on the contrary nothing is more difficult .... Whatever talents or genius they may have received from nature, this is an employment, that requires the whole man ... and this demands the greatest efforts of diligence and human prudence.<sup>62</sup>

54. Sovereignty has to be entrusted to somebody. This is made even more clear by the fact that Burlamaqui establishes that sovereignty is the right to command on someone else, which implies not only obedience, but also that someone forfeited his independence of the state of nature so that someone else exercises the right of sovereignty issued from the creation of the whole political community in its name. Therefore,

The sovereign is ... he, who has a right to command in the last resort. To command is directing the actions of those, who are subject to us, according to our own will, and with authority or the power of constraint. I say, that the sovereign commands in the last resort, to show that, as he has the first rank in society, his will is superior to any other, and holds all the members of the society in subjection. In fine the right of commanding

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<sup>61</sup> As a side note, commenting on Rousseau (*Contrat Social*, Bk. III, Ch. XV) prof. Pedro de Vega has spoken also of a concept of *democracia de la identidad* or "democratic identity". See PEDRO DE VEGA GARCÍA, LA REFORMA CONSTITUCIONAL Y LA PROBLEMÁTICA DEL PODER CONSTITUYENTE, [Constitutional Amendments and the Problem of Constituent Power] 117 (Editorial Tecnos, 1999).

<sup>62</sup> 2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 98 (Harvard University Press, 1807) (1751). Furthermore, on this topic see RAUL PEREZ JOHNSTON, ESTUDIO COMPARADO SOBRE LA POSIBILIDAD DE INSTAURAR EL REFERÉNDUM CONSTITUCIONAL EN MÉXICO, A TRAVÉS DEL ESTUDIO DEL CASO ESPAÑOL [Comparative study on the possibility of implementing a constitutional referendum in Mexico, through the study of the Spanish case], in XIV *IURIS TANTUM*, LAW REVIEW OF UNIVERSIDAD ANÁHUAC LAW SCHOOL, MEXICO (spring-summer of 2003).

is nothing more, than the power of directing the actions of others with authority. And, as the power of exercising one's force and liberty is no farther a right, than as it is approved and authorised by reason, it is on this approbation of reason, as the last resort, that the right of command is established.<sup>63</sup>

55. Nevertheless, regardless of a free bestowment of rights, Burlamaqui discards the possibility of an absolute government. He thinks on this question that even if an absolute government may be considered suitable in the hands of a wise ruler, this cannot be the general rule since it is very easy for people in a position of power to fall prey of its passions and degenerate into a tyrannical government.<sup>64</sup> Should this happen, the ruler would be loosing sight of the end for which he was appointed, which is to make people enjoy a solid degree of happiness, not to seek his own private advantage, passions and interests.<sup>65</sup>

56. The consequence of this fact makes Burlamaqui conclude that the conferral of sovereignty has to be limited, having at least, the public good as a parameter for government, constituting this a sort of supreme law under which all governments must abide, since it is the main goal of the social association as part of their pursuit of happiness for which men associate in the first place. On this regard, Burlamaqui rules out the possibility of an absolute grant of sovereignty:

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<sup>63</sup> 1 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 57. One interesting aspect of this definition though is the fact that the right of exercising sovereignty is bound by the approbation of reason in a way that even if the grant of sovereignty was absolute, the sovereign would still be bound by the laws of nature. In that sense, if the people that bestow sovereignty on him don't have a totality of rights because they are bound in all circumstances by the natural laws of the state of nature, moreover, the sovereign, who is an agent acting under the original power of the people, cannot have more powers than the source from which they derive. In the same sense, see JEAN JACQUES BURLAMAQUI, ÉLÉMENTS DU DROIT NATUREL, 19.

<sup>64</sup> On this, Burlamaqui wrote:

We may venture to affirm, that nothing can be compared to an absolute government in the hands of a wise and virtuous prince. Order, diligence, secrecy, expedition, the greatest enterprizes, and the most happy execution, are the certain effects of it. Dignities, honors, rewards, and punishments, are all dispensed under it with justice and discernment. So glorious a reign is the era of the golden age.

But to govern in this manner a superior genius, perfect virtue, great experience, and uninterrupted application, are necessary Man, in so high an elevation, is rarely capable of so many accomplishments. The multitude of objects diverts his attention; pride seduces him, pleasure tempts him, and flattery, the bane of the great, does him more injury than all the rest. It is difficult to escape so many snares; and it generally happens, that an absolute prince becomes an easy prey to his passions, and consequently renders his subjects miserable.

2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 67.

<sup>65</sup> Reinforcing this concept, it can be said that "... princes often lose sight of the end, for which they were appointed, and instead of thinking that the supreme authority was established for no other purpose, than for the maintenance and security of the liberty of mankind, that is, to make them enjoy a solid happiness, they frequently direct it to a different end, and to their own private advantage." *Id.* at 18.

When therefore the whole body of the people confer the sovereignty upon a prince, with this extent and absolute power, which originally resided in themselves, and without adding any particular limitation to it, we call that sovereignty absolute.

Things being thus constituted, we must not confound an absolute power with an arbitrary, despotic, and unlimited authority. For, from what we have here advanced concerning the original and nature of absolute sovereignty, it manifestly follows, that it is limited, from its very nature, by the intention of those, who conferred it on the sovereign, and by the very laws of God.<sup>66</sup>

...

It must therefore be acknowledged, that it never was the intention of the people to confer absolute sovereignty upon a prince, but with this express condition, that the public good should be the supreme law to direct him; consequently so long, as the prince acts with this view, be it authorised by the people; but, on the contrary, if he makes use of his power merely to ruin and destroy his subjects, he acts entirely of his own head, and not in virtue of the power, with which he was entrusted by the people.

...

By this it appears most evident, that all sovereignty, how absolute soever we suppose it, hath its limits; and that it can never imply an arbitrary power in the prince of doing whatever he pleases, without any other rule or reason than his own despotic will.<sup>67</sup>

57. On this regard, as a consequence of the foregoing argument, Burlamaqui sets himself to launch an attack on the advocates of absolute sovereignty:

The reason, why these writers<sup>68</sup> give this explication of the matter, is obvious. Their design is to give an arbitrary and unlimited authority to sovereigns, and to deprive the subjects of every means of withdrawing their allegiance upon any pretext whatever, notwithstanding the bad use the sovereign may make of his authority. For this purpose it was absolutely necessary to free kings from all restraint of compact or

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<sup>66</sup> The Laws of God are defined by Burlamaqui in the first volume of the *Principles* (concerning Natural Law). Burlamaqui considers them as a combination of natural laws, this is, the law of nature in accordance to the essence and constitution of man, and of the divine law revealed to man which has the characteristic of being a divine positive law that does not have to be based on natural law notions; an example of this could be the commandments given to Moses by God.

<sup>67</sup> *Id.* at 42-44.

<sup>68</sup> He is referring to Thomas Hobbes and his explanation on the foundation of the State in *De Cive*, ch. V, par. 7. In said work, as Burlamaqui seems to understand, Hobbes would be defining the State as a contract where the people submit to the sovereign without any conditions, so long as the others do the same. This is in the same line of Hobbes' theory as expounded in his *Leviathan*. For an early explanation and interesting critic of Hobbes' theory of an absolute grant of sovereign power by the people to the monarch, see ROBERT FILMER, OBSERVATIONS ON MR. HOBBS LEVIATHAN: OR, HIS ARTIFICIAL MAN, A COMMON-WEALTH, in OBSERVATIONS CONCERNING THE ORIGINAL OF GOVERNMENT, 1-11 (R. Royston, 1652).

covenant between them and their subjects, which, without doubt, is the chief instrument of limiting their power.<sup>69</sup>

58. In this sense, Burlamaqui continues his disquisition of why sovereignty must be limited even when there is no apparent express limitation to the power of a monarch in an argument similar to the one established almost two centuries earlier by George Buchanan in his celebrated pamphlet *De Jure Regni Apud Scotos*, where by trying to teach the true principles of government to his pupil, James VI of Scotland, future James I of England, he would try to convince the young king that by governing for the common good of his subjects and not for his personal interests, his power was being greater and more secure because in conformity to the laws of nature and the fundamental laws of the kingdom.<sup>70</sup>

59. This said, Burlamaqui argued that:

In fine this limitation of sovereignty forms the greatest security to the authority of princes; for, as they are less exposed hereby to temptation, they avoid that popular fury, which is sometimes discharged on those, who, having been invested with absolute authority, abuse it to the public prejudice. Absolute power easily degenerates into despotism, and despotism paves the way for the greatest and most fatal resolutions, that can happen to sovereigns. This is what the experience of all ages has verified. It is therefore a happy incapacity in kings not to be able to act contrary to the laws of their country.<sup>71</sup>

60. Limited government would then seem to be another consequence of the grant of sovereignty, which would appear as a condition to maintain legitimacy in government and avoid revolts or at least a deposal of his charge, be it by general assembly, impeachment or whatever other mechanism established in the fundamental laws or covenants of the country.<sup>72</sup>

61. Although Burlamaqui argues that sovereignty, either deposited in one person or one body of persons, has to remain indivisible, since it would be morally impossible to conceive the existence of several sovereign bodies commanding

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<sup>69</sup> 2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 28.

<sup>70</sup> See GEORGE BUCHANAN, DE JURE REGNI APUD SCOTOS OR, A DIALOGUE CONCERNING THE DUE PRIVILEGE OF GOVERNMENT IN THE KINGDOM OF SCOTLAND. BETWIXT GEORGE BUCHANAN AND THOMAS MAITLAND, 12 (Richard Baldwin, 1689).

<sup>71</sup> 2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 45. Accordingly, Burlamaqui considers the following:

... [T]he precautions, which the people take against the weakness or the wickedness inseparable from human nature in limiting the power of their sovereigns, to hinder them from abusing it, do not in the least weaken or diminish the sovereignty; but, on the contrary, they render it more perfect, by reducing the sovereign to a necessity of doing good, and consequently by putting him as it were out of a capacity of misbehaving.

*Id.* at 49.

<sup>72</sup> On fundamental laws as a limitation and condition of legitimacy of the sovereign, through the example of the *fueros* of Aragon, see *supra* note 53.

at the same time, this does not limit the possibility of establishing in the constitution different bodies in such a manner as to commit the exercise of the different parts of the supreme power to different persons or bodies, who may act independently of each other but all bound by the same fundamental laws, since it is not establishing a plurality of sovereigns but only making a partition of the same right. In this sense, none of them is sovereign independently, since they are mere executors of the law, but the whole represents the sovereignty entrusted by the people into government. This form of mixed government, by entrusting different parts of government to different bodies of the people produces that each becomes “a check on each other” which provokes a balance of authority, secures the public good and individual liberty.<sup>73</sup>

62. Sovereign power can be divided, separated for its exercise, without losing its main characteristic: indivisibility. A separation of powers is then possible, even positive towards the conservation of the entrusted sovereignty within the limits of their power. This brings us directly to Burlamaqui’s proposal for a need of a threefold division of powers:

Lastly, there is still another manner of limiting the authority of those, to whom the sovereignty is committed; which is, not to trust all the different rights, included in the sovereignty, to one single person; but to lodge them in separate hands, or in different bodies; that they may modify or restrain the sovereignty.

For example, if we suppose, that the body of the nation reserves to itself the legislative power, and that of creating the principal magistrates; that it gives the king the military and executive powers, &c. and that it trusts to a senate, composed of the principal men, the judiciary power, that of laying taxes, &c. it is easily conceived, that this may be executed in different manners, in the choice of which prudence must determine us.

If the government is established on this footing, then, by the original compact of association, there is a kind of partition in the rights of the sovereignty, by a reciprocal contract or stipulation between the different bodies of the state. This partition produces a balance of power, which places the different bodies of the state in such a mutual dependance, as retains every one, who has a share in the sovereign authority, within the bounds, which the law prescribes to them; by which means the public liberty is secured. For example, the regal authority is balanced by the power of the people, and a third order serves as a counterbalance to the two former to keep them always in an equilibrium, and hinder the one from subverting the other.<sup>74</sup>

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<sup>73</sup> See on this regard: 2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITICAL LAW, 58-60.

<sup>74</sup> 2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITICAL LAW, 49-50. With respect to this, Burlamaqui continues his analysis by considering that the essential elements of sovereignty are the existence of a legislative, executive and judicial functions. See. *Id.* at 52-54. This brings us to the notion of shared or divided sovereignty by a reciprocal contract between the different bodies of the state, which leads to a balance of powers, an aspect which is thought to be

63. Being power thus divided and checked, it can provide, in accordance to Burlamaqui, the best possible form of government: one that will ensure better the exercise of sovereignty in order to secure the common good and the opportunity of everyone of the members of the political community to be able to pursue happiness.

**4.3.- The respect of negative rights (non harmful portion of the state of nature) while asserting social (positive) rights to assure the end of the association and the rule of law.**

64. Also, a consequential principle of the establishment of a series of social compacts, according to Burlamaqui, is the respect of the natural and inalienable rights of man. But these rights are not absolute, and they are understood to be limited if they conflict with the collective right to the pursuit of happiness. This limitation occurs through a series of positive obligations of the State that are impaired to social rights. These social rights, more than a check on individual liberty, are a better means of asserting it, and all of this is possible through the rule of law, as long as these laws are made for the purpose they are intended: for the general good and security, as well as to contribute collectively in everyone's right to the pursuit of happiness.

65. With regard to the natural rights enjoyed in the state of nature, one must say that from the moment the community is formed, a government erected and selected, men lose their state of independence, to enter one of subordination with a common advantage. This state of subordination implies obedience to the selected officers of government, and a certain sacrifice of the rights enjoyed in the primitive state of man. Nevertheless, however great this limitation might seem, it cannot subvert all the essential rights and relations between men according to natural law.<sup>75</sup> The State is for Burlamaqui a natural complement to

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one of the main original contributions of Burlamaqui. On this regard, see HELENA ROSENBLATT, ROUSSEAU AND GENEVA, 100 (Cambridge University Press, 1997) and BERNARD GAGNEBIN, *op. cit.*, at 183-189.

Notwithstanding, as a criticism to this notion which might lead us to some misconceptions, we could say that Burlamaqui never pretends to divide sovereignty in itself, since, as already seen, he holds it to be indivisible, but merely that the exercise of sovereign power ought to be entrusted to the different bodies of government. Without the pomp and celebration of Montesquieu, Burlamaqui was saying "*le pouvoir contrôle le pouvoir*" a couple of years before to the celebrated maxim of *De L'Esprit des Loix* (1748), Bk. XI, Ch. VI.

<sup>75</sup> Burlamaqui affirmed on this:

When mankind renounced their independence and natural liberty, by giving masters to themselves, it was in order to be sheltered from the evils, with which they were afflicted, and in hopes, that, under the protection and care of their sovereign, they should meet with solid happiness. Thus have we seen, that by civil liberty mankind acquired a right of insisting upon their sovereign's using his authority agreeable to the design, with which he was entrusted with it, which was to render their subjects wise and virtuous, and thereby to promote their real felicity. In a word, whatever has been said concerning the advantages of the civil state, in preference to that of nature, supposes this state in its due perfection; and that both subjects and sovereign discharge their duties towards each other.

man's life in the state of nature, not a suppression of all the benefits therein enjoyed.<sup>76</sup> The objective of the State, achieved through law would be therefore, allowing man to enjoy most of his original rights, to guide him in whatever way is most convenient to assure him the possibility to pursue his real interests, to accomplish his happiness.<sup>77</sup> In this sense, the end of the exercise of

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2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 22-23.

<sup>76</sup> Burlamaqui's words on the subject are revealing:

Human society is simply of itself, and with regard to those, who compose it, a State of equality and independence.

... The civil state makes a great alteration in this primitive one. The establishing a sovereignty subverts this independence, wherein men were originally with regard to one another; and subordination is substituted in its stead. The sovereign becoming the depository as it were of the will and strength of each individual, which are united in his person, all the other members of the society become subjects, and find themselves under an obligation of obeying and conducting themselves pursuant to the laws, imposed upon them by the sovereign.

But how great soever the change may be, which government and sovereignty make in the state of nature, yet we must not imagine, that the civil state properly subverts all natural society, or that it destroys the essential relations, which men have among themselves, or those between God and man. This would be neither physically nor morally possible; on the contrary, the civil state supposes the nature of man such, as the Creator has formed it; it supposes the primitive state of union and society, with all the relations this state includes; it supposes in fine the natural dependence of man with regard to God and his laws. Government is so far from subverting this first order, that it has been rather established with a view to give it a new degree of force and consistency. It was intended to enable us the better to discharge the duties, prescribed by natural laws, and to attain more certainly the end, for which we were created.

1 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 134-135.

<sup>77</sup> A precision on what Burlamaqui expects on the law is of great interest here:

The objective, the finality of the law with regard to its subjects, is that they conform their actions to it, & by this they be procured real happiness.

Then the law is not made with the purpose of burdening the freedom of their subjects, but to make them act in a way compatible with their true interests.

As far as the sovereign is concerned, the objective he sets himself with regard to himself when he gives a law to his subjects, is his satisfaction, his glory, which consist in that the objectives he set himself with regard to his subjects, that is to say their happiness, be accomplished.

JEAN JACQUES BURLAMAQUI, ÉLÉMENTS DU DROIT NATUREL, 20-21. Also, it is important to note a further commentary by Burlamaqui on the matter:

We should therefore take care not to imagine, that laws are properly made in order to bring men under a yoke. ... Let us say rather, that laws are made to oblige the subject to pursue his real interest, and to choose the surest and best way to attain the end he is designed for, which is happiness. With this view the sovereign is willing to direct his people better, than they could themselves, and gives a check to their liberty, lest they should make a bad use of it contrary to their own and the public good. In short, the sovereign commands rational beings; it is on this footing he treats with them; all his ordinances have the stamp of reason; he is willing to reign over our hearts; and if at any time he employs force, it is in order to bring back to reason those, who have unhappily strayed from it, contrary to their own good and that of society.

1 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 70.

The metaphor of government guiding the people is frequently represented, in a compatible way to Burlamaqui's vision, as an angel guiding a lion, where the angel sheds light, reason and guidance upon the lion who would otherwise behave in accordance to its instinct; something which may not always be in the best of the lion's interest. For a similar view to Burlamaqui's, although subjecting

governmental power is no other than to procure the happiness and felicity of its subjects:

... [W]e must say, that the right of sovereignty arises from superiority of power, accompanied with wisdom and goodness.

I say, in the first place, a superiority of power, because an equality of power, as we have observed in the very beginning, excludes all empire, all natural and necessary subordination; and besides sovereignty and command would become useless and of no manner of effect, were they not supported by a sufficient power. What would it avail a person to be a sovereign, unless he were possessed of effectual methods to enforce his orders and make himself obeyed?

But this is not yet sufficient; wherefore I say, in the second place, that this power ought to be wise and benevolent; wise to know and to choose the properest means to make us happy; and benevolent, to be generally inclinable to use those means, that tend to promote our felicity.<sup>78</sup>

66. The exercise of power in order to procure the so sought after happiness of its subjects, carries not only the mandate on the State not to interfere with the rights of its citizens, but also, a certain set of duties in order for everyone to have a fair opportunity to pursue his own felicity. Burlamaqui says on this regard that "Providence has established things in a way that ordinarily the wellbeing of people within society is found within the general good, in a way that the surest rode to become happy is not to do anything that may disturb the public happiness, but on the contrary to work within all its power to procure it."<sup>79</sup>

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the end of government to the respect of the right of property rather than to the pursuit of happiness can be found in John Locke's *Second Treatise*, Ch. XIX.

<sup>78</sup> 1 JEAN JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW*, 63-64. On a similar note, Burlamaqui establishes: "As to the sovereignty we must define it the right of commanding civil society in the last resort, which right the members of this society have conferred on one and the same person\*, with a view to preserve order and security in the commonwealth, and in general to procure, under his protection and, through his care, their own real happiness, and especially the sure exercise of their liberty." 2 JEAN JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW*, 29.

\*The author clarifies further down that he is referring himself to a person, in the legal sense, not to a man, since sovereignty can be entrusted also to a representative assembly that would express its own will through voting between the members that conform it, or even, to a multitude of bodies (see *supra* note 74).

<sup>79</sup> JEAN JACQUES BURLAMAQUI, *ÉLÉMENTS DU DROIT NATUREL*, 106. This opinion would seem to be confirmed by prof. Grodin, who has written on the subject:

Burlamaqui ... appears to be talking about affirmative obligations imposed upon government by the nature of human beings, including an obligation to increase the happiness of its citizens.

For Burlamaqui, man has a duty to pursue happiness, and he posits an extension of that duty upon the state. Burlamaqui, ... reaches back to the earlier classical tradition of *salus populi*.

JOSEPH R. GRODIN, *REDISCOVERING THE STATE CONSTITUTIONAL RIGHT TO HAPPINESS AND SAFETY*; 25 *Hastings Const. L.Q.* 15 (1997-1998).

67. Therefore, it is the duty of the State, according to the finality for which it was erected, to act within all its power to procure the happiness to every member of the community, since the public good of the community has been entrusted to it. This being so, we could claim that Burlamaqui is one of the precursors of the theory of *Daseinvorsorge*, which is the consequence of the concept of the pursuit of happiness as a collective right.

68. On this regard, according to German theories of the 1930s, especially by Ernst Forsthoff, the State has to procure a minimum standard of living to its inhabitants, "Daseinvorsorge". This view starts from the fact that man develops and lives in an environment surrounded of material and immaterial goods and services that determine the existence of man, in what is called a "living space" or *Lebensraum*.<sup>80</sup> This vital space can be divided into two kinds; dominated and effective. The "dominated vital space" is the one where man is master of himself, like it is with regard to material goods, property, cultivating one's own backyard, etc. The "effective vital space" on the other hand, refers to the scope of implementing human life on things an ordinary individual has no control of, like public services, land use controls, etc. The more mankind develops, through human and technological progress, the more the "dominated vital space" is reduced, since men lose control over things; then, it is the duty of the State to compensate such situation by procuring men that "effective vital space" they need to procure for their own existence.<sup>81</sup>

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<sup>80</sup> Care should be taken with the use of such term, since it was one of the ideological foundations of Nazi expansionism; clearly we do not intend to use this *lebensraum* concept to justify any kind of territorial expansionism, which is contrary to any concept of Human Rights, especially of International Human Rights, since we will concentrate on the "effective vital space" and not on the "dominated vital space" which was one of the grounds for Nazi conquests. An analysis on the variations of the "effective vital space", rather than seeming monstrous, could be very helpful in determining the degree of State intervention required to assure every citizen the opportunity to pursue his own happiness.

<sup>81</sup> Now, summarizing this theory, lets imagine the shock of a man in the state of nature put into our twenty first century. The "*bon sauvage*" of which Rousseau spoke, transported to our present times. Unlike in his era, where he hunted his own food, made his own clothes, provided for his own security with a spear and his personal strength, in our age he would have to get educated in a prestigious and expensive school, have a decent job and earn a meaningful salary, in order to be able to buy in a supermarket and eat that same raw piece of meat he once hunted, to buy a pair of jeans and a shirt, to pay taxes in order for police to protect him, etc.; add to that shock the fact that if he wanted to buy a spear, he would probably have to order it through the internet to an antiquarian store!

While in the state of nature he was completely the master of his own destiny, nowadays he would depend importantly on external factors to accomplish his wishes. This dramatic change, according to this theory, has to be guaranteed by the State to maintain social order and a good standard of living for everyone. Notwithstanding the alleged German authorship of this conception, this theory can also be seen, more or less, by what the French Administrative School of Law of the early twentieth century sustained. On this regard, it is useful to consult Léon Duguit's assertion that: "The foundation of public law, is not any more the subjective right of commanding, it is the organization and management rule of public services. Public law is the law of public services". LÉON DUGUIT, *LES TRANSFORMATIONS DE DROIT PUBLIC* [The Transformations of Public Law], 52 (Librairie Armand Colin, 1913).

69. Taking that into consideration, the State must provide means to secure that minimum standard of living. One of the things that can be done in this regard, is to include this whole concept into the Human Rights catalog, either in the constitution or through ordinary legislation, like FDR's attempted Second Bill of Rights. The immediate result of such a conduct would seek as a result that people know and be able to render the State accountable for not procuring them with the necessary means to develop a free and healthy life. Also, this can be achieved by assuring this concept through direct intervention of the State in everyday life, by either managing resources and intervening directly, or by regulating these activities so that the individuals responsible of providing such minimum standards do not abuse of their "power".<sup>82</sup>
70. Burlamaqui certainly does not go so far in his analysis, but as we can see, there's no element of this theory that conflicts with any aspect of this foundation of the welfare state. This would be even corroborated by the fact that talking about certain rights, Burlamaqui certainly speaks of them with a social function. That is the case of the right of property,<sup>83</sup> of the rights of children not to be harmed by those legally exercising custody over them,<sup>84</sup> or simply by setting that the main objective of putting a criminal in jail is not only his isolation for the good of society, but his regeneration in order for him to be able to be reinserted

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<sup>82</sup> This conception is also compatible with the theory of social compact in which the vast majority of our constitutions is based, since assuring a minimum standard of living would only seem a fair bargain by someone willing to sacrifice its original liberties in the state of nature. The end of social and political association cannot be to the harm of at least one of the contracting parties. Therefore, the creation of the body-politic involves the obligation of the State to take care of its members, not only by securing them with police power, but also seeing that they live according to the expectations of having entered into a social contract. This doesn't necessarily mean converting the government into a gigantic "welfare state" bureaucracy, but at least obliging the state, through regulation or administrative agencies, to see that all services are justly provided, so that everybody has a fair access to them, in the proportion of their needs and capacities. In this sense, ¿wasn't the pursuit of happiness one of the primary ends of the political association, as stated in the Declaration of Independence of the United States in 1776?

<sup>83</sup> John C. Ford confirms this view:

... [T]here is no doubt that the right to pursue happiness includes the right to acquire property as well as the right to life and liberty; and there can be no doubt, either, that among the then current theories both of ethics and of political science, was the idea that happiness is a criterion of morality, and general happiness the ultimate criterion of good government.

JOHN C. FORD, NATURAL LAW AND THE PURSUIT OF HAPPINESS, 26 Notre Dame L. 442 (1950-1951).

<sup>84</sup> In an *avant la lettre* statement, Burlamaqui wrote in favor of the rights :

All men are born free; despite that, we do not let young people be absolute masters of themselves; but we assign them tutors, curators, in a word, masters. Why is that? It is because reason not being fully developed in them, if we would let them entirely to themselves, their liberty would be the cause of their ruin much more than procuring them perfection and happiness.

JEAN JACQUES BURLAMAQUI, ÉLÉMENTS DU DROIT NATUREL, 84. Moreover, he says: "But parental power does not reach the point of being able to expose or kill a child when it has come to the world; since a child, from its birth enjoys, as a human creature, of all the rights of mankind in the same manner that any other person." *Id.* at 307. This right diminishes and is bound to disappear when the child reaches the majority of age. See generally *Id.* at 308.

in society to keep pursuing his own happiness and collaborating to that of everybody else, once his time is up.<sup>85</sup>

71. These positive obligations of the state have to be met, among others, through the emission of laws, whose objective is going to be to direct men<sup>86</sup> for the prosecution of its own happiness<sup>87</sup> in accordance to the dictates of reason. Which leads us to the conclusion that those laws will have to be obeyed as long as they conform with the nature and constitution of man and procure for him to achieve his ends; these ends have to be possible to fulfill, useful and just.<sup>88</sup> Otherwise, these laws would be contrary to the principles established by the community for the primary association, as well as in those in the constitution and in the oaths of office with which the rulers bound themselves towards the people.

#### **4.4.- Supremacy of the constitution, the need for an institutional guardian of the constitution and judicial review.**

72. Finally, the last of the great principles that emanate as a consequence of the compact system established by Burlamaqui is the one of constitutional supremacy. For this, the Swiss professor establishes that the covenants constitute the fundamental laws of the country, and, since they are the

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<sup>85</sup> The objective of a criminal penalty is not only to assure the happiness and wellbeing of society, but also to amend the felon so that he can reinsert himself into society. *See Id.* at 21-22

<sup>86</sup> For Burlamaqui, "The term law, in its first origin means that which directs, or is well directed." *Id.* at 1.

<sup>87</sup> It is important to note that

... [W]hen we speak of a rule of human action, we suppose two things 1°. That man is susceptible of direction & of norms with respect to his actions. 2°. That he sets himself an objective, an end to which he wants to arrive. And the ultimate end of man, the objective that he sets himself in every action, is his happiness. ... [L]aw ... is nothing else than all that which reason approves as a sure and easy means to reach happiness; & therefore, since the word law in its first origin means that which directs, or is well directed, since direction supposes an end, an objective to which we want to reach, and since the ultimate end of man is his happiness, and he cannot reach happiness but through reason, it follows necessarily that law in general is nothing else than all that which reason approves as a sure and easy means to reach happiness.

JEAN JACQUES BURLAMAQUI, *ÉLÉMENTS DU DROIT NATUREL*, 13-14 and 15-16.

<sup>88</sup> Burlamaqui says on this subject:

This supposes naturally the three following conditions. 1. That the things, ordained by the law, be possible to fulfil .... 2. The law must be of some utility; for reason will never allow any restraint to be laid on the liberty of the subject, merely for the sake of the restraint, and without any benefit or advantage arising to him. 3. In fine, the law must be in itself just; that is conformable to the order and nature of things, as well as the constitution of man; this is what the very idea of rule requires, which, as we have already observed, is the same, as that of law.

1 JEAN JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW*, 73. An interesting comment that can be made to this regard is that if for Burlamaqui no restraint can be laid for the sake of it, but has to prove a certain benefit or advantage, couldn't we consider this as a first step towards justifying substantive due process in the light of the greater goals of society: i.e. the pursuit of happiness?

foundation of the state, every government is limited in its authority by its contents. These fundamental laws are then the supreme law of the land. On this respect, Burlamaqui wrote:

These regulations, by which the supreme authority is kept within bounds, are called the fundamental laws of the state.

The fundamental laws of a state, taken in their full extent, are not only the decrees, by which the entire body of the nation determine the form of government, and the manner of succeeding to the crown; but are likewise the covenants betwixt the people and the person, on whom they confer the sovereignty, which regulate the manner of governing, and by which the supreme authority is limited.

These regulations are called fundamental laws, because they are the basis as it were, and foundation of the state, on which the structure of the government is raised, and because the people look upon those regulations, as their principal strength and support.<sup>89</sup>

73. The consequence of this supremacy principle, just like Chief Justice Marshall would establish in his infamous decision in *Marbury v. Madison*, is that any act of government or the legislature, is null, void, if contrary to the fundamental laws of the country. This being so, against an act of authority in violation of the constitution, the other branches are entitled to refuse them and not to obey them for being manifestly unjust. With regard to this, Burlamaqui even considers an appeal to the laws of God, those laws of the state of nature, as an example of a clear case in which one must not obey a decree or a law.<sup>90</sup> But without going to as far as a violation to the laws of God, which might be an

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<sup>89</sup> 2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 45-46.

<sup>90</sup> Burlamaqui describes this thought with reference to a classic passage:

Thus a parliament, for instance, commanded by the prince to register an edict manifestly unjust, ought certainly to refuse it. The same I say of a minister of state, whom a prince would oblige to execute a tyrannical or iniquitous order; of an ambassador, whose master gives him instructions contrary to honor and justice; or of an officer, whom the sovereign should command to kill a person, whose innocence is as clear as noonday. In those cases we should nobly exert our courage, and with all our might resist injustice, even at the peril of our lives. It is better to obey God than man. For in promising obedience to the sovereign, we could never do it but on condition, that he should not order any thing manifestly contrary to the laws of God, whether natural or revealed. To this purpose there is a beautiful passage in a tragedy written by Sophocles. "I did not believe," says Antigone to Creon king of Thebes, "that the edicts of a mortal man, as you are, could be of such force, as to supersede the laws of the gods themselves, laws not written indeed, but certain and immutable; for they are not of yesterday or today, but established perpetually and forever, and no one knows when they began. I ought not therefore, for fear of any man, to expose myself, by violating them, to the punishment of the gods."\*

... Let us here collect the principal views, which the sovereign ought to have in the enacting of laws.

1. He should pay a regard to those primitive rules of justice, which God himself has established, and take care, that his laws be perfectly conformable to those of the Deity.

\* Sophocl. Antigon. Ver. 473, &c.

2 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW, 118-119.

extreme case, more likely to provoke a revolt than being dealt with through institutional channels, we must observe that not only in Burlamaqui's mind is spotting the nullity of an act of government because of its unconstitutionality, but also, perhaps, providing a practical solution to this problem: an institutional guardian of the constitution.<sup>91</sup>

74. The first mention to this possibility of installing a constitutional guardian of the regularity of norms and acts of government is by reference to the need, in a limited monarchy, of an assembly which will grant its consent so that certain decisions by the king may pass and be considered as valid.<sup>92</sup> This is obviously in mention to the French *Parlements*, and the *placitum* granted as approval of royal decrees, and therefore may not be considered very clearly as an institutional guardian of the constitution because these *Parlements* were representative of the different estates of the kingdom, which became later on the legislative body of Burlamaqui's scheme. By this adopted structure, Burlamaqui's legislative scheme is similar to the Parliament in England, who is no guardian of the constitution, especially once it is granted the legislative power. But the interesting mention with regard to this is made in the part when Burlamaqui is referring himself to the division of powers. On this regard, he considers that the senate ought to be entrusted with judiciary functions, and as this politico-judicial body, it has the duty of serving as a counterbalance and provide equilibrium with respect to the clashes between the executive and the legislative, to prevent them from subverting one another.<sup>93</sup>

75. Although Ray Forrest Harvey has gone to the extent of making equivalence between Burlamaqui and Coke's dictum in *Bonham's case*,<sup>94</sup> to pretend in Burlamaqui the origin of American judicial review, in the analyzed passage, we think this statement is out of proportion.<sup>95</sup>

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<sup>91</sup> It can be said that "Burlamaqui adopted a compact theory under which government acts in excess of the granted power are invalid". DANIEL A. FARBER and JOHN E. MUENCH, *IDEOLOGICAL ORIGINS OF THE FOURTEENTH AMENDMENT*; 1 Const. Comment. 242 (1994).

<sup>92</sup> On this regard, read the following assertion:

... [I]n a limited monarchy, there is a certain assembly, who, in conjunction with the king, take cognizance of particular affairs, and whose consent is a necessary condition, without which the king can determine nothing. But the wisdom and virtue of good sovereigns are strengthened by the concurring assistance of those, who have a share in the authority. Princes always do what they incline to, when they incline to nothing but what is just and good; and they ought to esteem themselves happy in having it put out of their power to act otherwise.

2 JEAN JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW*, 48. This idea is very similar to those of XVI century protestants, like George Buchanan (see *De Iure Regni apud Scotos*, op. cit. *supra* note 70), which leads us back to the idea of the influence of the ideology of the "Refuge" (see *supra* note 7) on Burlamaqui.

<sup>93</sup> *Id.* at 49-50. For the full reference on these paragraphs, see *supra* note 74.

<sup>94</sup> SIR EDWARD COKE, *Reports, Bonham's case*, Part VIII, 118 a.

<sup>95</sup> With respect to Burlamaqui's implication for the need of a judicial review, see RAY FORREST HARVEY, *THE POLITICAL PHILOSOPHY OF JEAN JACQUES BURLAMAQUI AND HIS RELATION TO AMERICAN CONSTITUTIONAL THEORY* 87-97 (1934) (unpublished Ph.D. thesis, New York University). In this respect, we believe that perhaps Burlamaqui's idea might have been

76. Nevertheless, we consider that Burlamaqui is establishing a different kind of institutional guardian of the constitution, more in the lines of the *pouvoir neutre* created by the theories of Emmanuel Joseph Sieyès and Benjamin Constant during the French revolutionary years.<sup>96</sup> In this sense, Burlamaqui ought to be seen more as a great precursor of the European tradition of Constitutional Courts, than of American judicial review.

77. On this regard, let us say briefly that Emmanuel Sieyès, while trying to establish a guardian of the French constitutions of 1795 (*Constitution de l'An III*) and 1799 (*Constitution de l'An VIII*), started with the concept of an assembly in charge of declaring the unconstitutionality of a law contrary to the constitution, under the premise that a constitution is supreme, or is in fact nothing. This idea of a "Constitutional Jury" will become the basis for the Conservative Senate of the Bonapartian constitution of 1799, which was a political assembly, similar to the senate Burlamaqui seems to be proposing. On the other hand, Benjamin Constant, retaking the concept of Sieyès, develops the need for a Constitutional Assembly in a republican setting that belongs to none of the three powers, with the mission of conserving the constitutional balance or equilibrium.<sup>97</sup> After the restoration of the monarchy, Constant will change his scheme and grant this moderating function to the king, in a constitutional monarchy, who without exercising power of government, is a neutral actor that can bring the others back into place in case of confrontation between two or more of them.<sup>98</sup>

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more compatible to an institution like the Council of Censors provided in the Pennsylvania Constitution of 1776, than to what Marshall will develop in *Marbury v. Madison* with the Supreme Court as guardian of the Constitution.

<sup>96</sup> Here, the originality of the thought is striking since there is no evidence that Burlamaqui might have thought on this idea by reference to reading Althusius' or someone else's account of the *Ephori* in ancient Greece. The only other precedent known on a similar kind of neutral power, which we can almost be sure that Burlamaqui did not read, is to be found in James I's *The True Law of Free Monarchies* (1598) when he writes: "And where he sees the law doubtful or rigorous, he may interpret or mitigate the same, lest otherwise *summum jus* be *summa injuria*. And therefore general laws made publicly in Parliament may, upon known respects to the king, by his authority be mitigated and suspended upon cases only known to him."

The only reference that might have seemed a plausible one to Burlamaqui's thought on the matter is perhaps the account of king Theopompus of Lacedemonia, which was a widespread example used in almost all the doctrine of the seventeenth century to account for limited power in a monarchy, since this is a king who submitted part of his power to the legislative assembly of Sparta in order to assure that the power he would pass upon his sons would be more durable; but Burlamaqui doesn't seem to draw any consequences of constitutional control from antiquity, therefore we will have to credit him with the benefit of doubt on his creativity on the subject.

<sup>97</sup> In the 1820s, Benjamin Constant, thinking about the great inconveniences of the French Revolution, thought that the threefold division of powers was insufficient to assure constitutional stability and that there needed to be someone to moderate when two or more traditional powers clashed against each other. See BENJAMIN CONSTANT, *COURS DE POLITIQUE CONSTITUTIONNELLE* (Société Belge de Librairie, Imprimerie et Papeterie, Hauman, Cattoir et Compe., 1837), chapter I.

<sup>98</sup> This power, in a constitutional monarchy, for Constant, is the king. This conclusion is reached by the French author by analyzing the British "constitution" and the royal prerogative. Constant says in the already referenced book, that the king rules but does not govern, since the latter is the task of

78. In this sense, the dispute concerning the neutral power of the constitution is going to be of great importance in shaping constitutions during the twentieth century, and it will find a perfect forum in the perennial disputes between Hans Kelsen and Carl Schmitt.
79. Hans Kelsen, in an article titled *Who should be the Protector of the Constitution*, established the necessity of a court outside the three traditional powers of Montesquieu's scheme, in charge exclusively of analyzing the constitutionality of government actions, including legislation, as a consequence of the supremacy of the constitution. On the other hand, Carl Schmitt, in his response, *The Protector of the Constitution*, thinks that in accordance to the principle of neutral power, the institutional guardian of the constitution, in a setting like the Weimar Republic, a parliamentary system, should be the President of the Reich, who exercises a power similar to the constitutional monarch.<sup>99</sup> The results of this dispute seem to be somewhat uncertain, since even though the great majority of countries have adopted ever since a constitutional court, with variations to the kelsenian model, there are some countries like France, where the President has a constitutional attribution to act in certain cases as a moderator, and in Spain, when on the occasion of the clash between the Supreme Court and the Constitutional Court, there where attempts made to involve the king to solve the dispute by invoking the theory of a neutral power as developed in Benjamin Constant.
80. It is difficult to say whether Burlamaqui had at all any influence on these matters, it is highly unlikely, but at least it is interesting to see what the consequences of his scheme brought, with a solution that was forwarded with almost two centuries before many European countries would come up with a similar solution.

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the prime minister, and that by being able to remove members of the cabinet without the power to punish them, he is repairing without being harmful. Therefore, the king is a sort of catalyst of the constitutional order, acting as if it were the "judicial power of the traditional powers" (see *Id.*, chapters I and II) when government agencies bring up claims against each other before him. In this case, should there be an abuse of power by any of the functions that exercise government, as it could be an unreasonable piece of legislation by Parliament, the King, as a neutral actor, above and separated from the executive, judiciary and legislative, can bring things back to a constitutional equilibrium.

<sup>99</sup> Carl Schmitt's argument is based on an analogy where he cites directly Benjamin Constant's theory on neutral power. For a more comprehensive discussion on the nature and debate around neutral power and the Kelsen-Schmitt controversy, see RAUL PEREZ JOHNSTON, *EL SUPREMO PODER CONSERVADOR (1835-1841), PRIMER TRIBUNAL CONSTITUCIONAL EN MEXICO Y EN EL MUNDO* [The *Supremo Poder Conservador (1835-1841), First Constitutional Court in Mexico and the World*], chap. I (forthcoming).

## V. BURLAMAQUI AND THE FOUNDING ERA.<sup>100</sup>

81. One final point that we ought to address is that of Burlamaqui's influence over the generation of American "Constitution-makers". By linking Burlamaqui to the ideas that created the American Constitution and subsequently served as a model to most constitutional conventions, from the XVIII century to some of the latest developments in Central and Eastern Europe, we believe we can show that Burlamaqui's theories on the social contract are worthy of rediscovery and deserve a closer and deeper analysis by scholars and jurists throughout the world. This being said, if his views were part of the source to one of the most important events in constitutional history, then maintaining them hidden or forgotten in a cellar, looks like an inappropriate thing to do.
82. On this regard, one could say that Burlamaqui was an influential author in the times of the framing of the Constitution. First of all, Burlamaqui's books were quickly translated into English, and copies of those editions arrived to the Colonies in America. That being said, J. Nourse's London edition of the *Principles of Natural Law*, translated by Thomas Nugent is of 1748. Then, as a sequel, in 1752, they printed the *Principles of Politic Law*. In 1763 there was a second edition by Nourse/Nugent in London, called *The Principles of Natural and Politic Law*, where both volumes were printed together. The third London edition is of 1784; a fourth edition is issued first in Dublin (1791) and then in Boston (1792), which could account as the first American edition, and a fifth edition was printed in Cambridge, Massachusetts in 1807.<sup>101</sup>

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<sup>100</sup> Despite the fact that the French editions of Burlamaqui's works had an immediate impact throughout Europe, and that he was widely read by the philosophers of the time, it is in the United States where his influence is most felt, mainly because it was there that the first great revolution of the XVIII century occurred. That is why we will focus on the "Founding Era" of the United States, instead of trying to weigh Burlamaqui's influence in other parts of the world. Just as a note to that, let us say that Burlamaqui was even read by Rousseau, who cited his fellow Genevan in the following terms: It is his ignorance of the nature of man that throws so much uncertainty and obscurity on the real definition of natural law: since the idea of law, says Mr. Burlamaqui, and moreover, that of natural law, are ideas manifestly related to the nature of man. It is then from that very nature of man, he continues, from his constitution and his status that the principles of this science ought to be deducted.

JEAN JACQUES ROUSSEAU, *DISCOURS SUR L'ORIGINE ET LES FONDEMENTS DE L'INÉGALITÉ PARMI LES HOMMES*, preface (1754). Nevertheless, this citation has led to much overrated speculation on the influence that Burlamaqui may have had on Rousseau. In our opinion, his impact on Rousseau's thought must have been somewhat limited. On this, see generally, GARY L. BARRETT, *A COMPARISON OF THE MORAL AND POLITICAL IDEAS OF JEAN-JACQUES ROUSSEAU AND JEAN-JACQUES BURLAMAQUI*, (1970) (unpublished Ph.D. dissertation, University of Arizona) as well as GIORGIO DEL VECCHIO, *BURLAMAQUI AND ROUSSEAU*, in 23, No. 3, *JOURNAL OF THE HISTORY OF IDEAS*, (1962).

<sup>101</sup> Even if the first American edition is of 1792, it shows to some extent the popularity of Burlamaqui's ideas during the first years of the American Republic, since it would seem that the available copies from the previous English editions were not sufficient. After that edition, there were subsequent ones until the mid XIX century. The idea this gives us is that after the approval of the Constitution, Burlamaqui's books must have been regarded as so descriptive of the institutions of the Federal Republic, that more printings were necessary.

83. As a consequence of the widespread acceptance of Burlamaqui's texts in the Colonies, we can affirm that "[i]n pamphlet after pamphlet the American writers cited ... Burlamaqui ... on the laws of nature and of nations, and on the principles of civil government."<sup>102</sup> The knowledge of Burlamaqui during the revolution has been thought of as widespread within lawyers and politicians of the time, and writers like Alexander Hamilton,<sup>103</sup> James Madison,<sup>104</sup> Thomas Jefferson<sup>105</sup> and James Wilson,<sup>106</sup> just to name a few, have been thought to have been directly influenced by the political theory of Jean Jacques Burlamaqui; also, the reference to the pursuit of happiness in the Declaration of Independence is believed to be of Burlamaquian ascent.<sup>107</sup>

84. The circumstance of Burlamaqui's influence in the American Colonies by the time of the Revolution of Independence would seem to be accentuated if we take into consideration the claims made against Sir William Blackstone of having committed plagiarism in his *Commentaries* and having copied his political ideas textually from Burlamaqui, while it can be said that Blackstone is also unquestionably a very highly influential figure of the time.<sup>108</sup>

85. While some authors have made a great apology of Burlamaqui to try to bring him back from oblivion, where he has remained for more than a century and a half, and others have reacted by diminishing his influence or impact,<sup>109</sup> we

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<sup>102</sup> BERNARD BAYLIN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION*, 27 (Harvard University Press, 1992).

<sup>103</sup> With regard to Hamilton and Burlamaqui's influence on him, see *idem* at 27, and RAY FORREST HARVEY, *JEAN JACQUES BURLAMAQUI A LIBERAL TRADITION IN AMERICAN CONSTITUTIONALISM*, 116 (The University of North Carolina Press, 1937).

<sup>104</sup> On the influence on James Madison, see BERNARD GAGNEBIN, *BURLAMAQUI ET LE DROIT NATUREL* 279 (La Frégate, 1944) and JEFF ROSEN, *WAS THE FLAG BURNING AMENDMENT UNCONSTITUTIONAL*, 100 *Yale L.J.* 1076 (1990-1991).

<sup>105</sup> On how Jefferson followed Burlamaqui's teachings, see MORTON WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION*, 161 and ff. (Oxford University Press, 1978), RAY FORREST HARVEY, *op. cit.* at 120 and ff. and BERNARD GAGNEBIN, *op. cit.* at 279.

<sup>106</sup> On James Wilson being influenced by the writings of Burlamaqui, see MORTON WHITE, *op. cit.* at 132 and ff., 227; RAY FORREST HARVEY, *op. cit.* at 114 and ff. and BERNARD GAGNEBIN, *op. cit.* at 279.

<sup>107</sup> See JOHN C. FORD, *NATURAL LAW AND THE PURSUIT OF HAPPINESS*, 26 *Notre Dame L.* 442 n.32 (1950-1951).

<sup>108</sup> On this, see BERNARD GAGNEBIN, *op. cit.* at 273-274 and for the contrary view, defending Blackstone, PAUL LUCAS, *EX PARTE SIR WILLIAM BLACKSTONE, "PLAGIARIST": A NOTE ON BLACKSTONE AND THE NATURAL LAW*, 7 *Am. J. Legal Hist.* 142 (1963), and HOLDSWORTH, W. S., *SOME ASPECTS OF BLACKSTONE AND HIS COMMENTARIES*, 4 *Cambridge L.J.* 279 (1930-1932).

<sup>109</sup> For an idea that Burlamaqui is treated at the same level as Locke during the Founding Era, despite being a secondary figure, see BERNARD BAYLIN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION*, 28 (Harvard University Press, 1992). For a contrary opinion, limiting the impact of Burlamaqui's doctrines, see JOHN DOW, *THE POLITICAL THEORY OF JEAN-JACQUES BURLAMAQUI*, 115 (1927) (unpublished B.A. thesis, Harvard University). Finally, prof. Del Vecchio, while being apologetic of Rousseau, led a harsh attack on Burlamaqui: "In these writings one would seek in vain a true, profound originality. ... Burlamaqui was not, and never wished to be, an innovator in the philosophy of law, but rather a teacher and spreader of the natural law doctrines dominant in his time." GIORGIO DEL VECCHIO, *BURLAMAQUI AND ROUSSEAU*, in

believe that whatever his real influence might have been in the past, he can be established as a traceable source to the Founding Era; the men that drafted the Declaration of Independence, had read Burlamaqui, and it would not surprise us that most of the delegates to the Federal Convention in 1787 also had knowledge of his works. Consequently, it is our reading that the works and ideas of Jean Jacques Burlamaqui stand to a good extent as a reference of XVIII century political thought, as prof. Roscoe Pound seems to suggest,<sup>110</sup> and can therefore be authoritatively used in order to read a new vision of what the framers might have intended in creating the American nation.

## VI. CONCLUSION

86. As we have been able to analyze all along this work, Burlamaqui's social compact theory relies on a heavy communitarian utilitarianism that goes all the way to justifying the necessity of social rights into a constitutional scheme of government, which differentiates him from other more libertarian and individualistic views like the one of John Locke. Natural equality seems to be the motor of the whole scheme, as an individual right, but also as a positive obligation upon the state in order to provide for the conditions of this equality. The consequence of this is the formulation of the principles of popular sovereignty, of delegated power, of a functional separation of powers into three independent departments, of a constitution as a fundamental law, and finally,

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23, No. 3, JOURNAL OF THE HISTORY OF IDEAS, 421 (1962). Nevertheless, these statements seem to conflict with the authoritative reasoning of Roscoe Pound, when he defines what he thought to be the standard views on politic law of the XVIII century:

Eighteenth-century juristic theory, down to Kant, holds to four propositions: (1) There are natural rights demonstrable by reason. These rights are eternal and absolute. They are valid for all men in all times and in all places.\* (2) Natural law is a body of rules, ascertainable by reason, which perfectly secures all of these natural rights.\*\* (3) The state exists only to secure men in these natural rights.\*\*\* (4) Positive law is the means by which the state performs this function, and it is obligatory only so far as it conforms to natural law.\*\*\*\* The appeal is to individual reason. Hence every individual is the judge of this conformity.

\* Burlamaqui, I, 1, chap. 7, para. 4; Wolff, paras. 68-69.

\*\* Burlamaqui, I, 2, chap. 4.

\*\*\* Id. II, 1, chap. 3; Wolff, para. 972.

\*\*\*\* Burlamaqui, II, 3, chap. I, para. 6; Wolff, para 1069; Vattel, liv. I, chap. 13, para. 159; Blackstone, I, 41.

ROSCOE POUND, THE END OF LAW AS DEVELOPED IN JURISTIC THOUGHT, 27 Harv. L. Rev. 623 (1913-1914). The interesting thing about this citation is that for every numbered statement, prof. Pound inserted a footnote with a direct reference to the work of Burlamaqui, an idea that allows us to think that if he stands for what Roscoe Pound thought was the core of the Eighteenth century juristic theory, then Burlamaqui cannot be a secondary figure. Also, it is noteworthy mentioning that the other authorities cited by Roscoe Pound are Christian Wolff, who has been said to have exercised some influence on Burlamaqui, although we have contested that, Emmerich de Vattel, who was allegedly a student in Burlamaqui's classroom at the University of Geneva and Sir William Blackstone, who must have been pretty much aware of Burlamaqui's writings to the extent that there have been some claims of plagiarism against him (see *supra* note 108). Consequently, Burlamaqui's ideas, one way or another, can be considered to have been influential in terms of the meaning of XVIII century political thought.

<sup>110</sup> See *supra* note 109.

for an institutional guardian of the constitution. A very liberal and contemporary view of law for someone living in a conservative environment in the first half of the eighteenth century; a circumstance which might give him more merit to embrace those positions, uncommon to his social status.

87. The importance of this topic, more than merely academic, nonetheless relies in the fact that Burlamaqui viewed the whole organization of society depending on a set of natural contracts based on a concept of social justice and the respect of personal freedom in order for everyone to achieve, with the help of the community, its personal goals in life; that is why the pursuit of happiness is one of the consequences of his social compact structure of the state.
88. Consequently, if this fundamental idea can be linked to a concrete historical moment or to a fundamental legal document, then it passes from abstract theory to becoming a model of interpretation for contemporary constitutions that may have followed it. Being as we have seen, that Burlamaqui can be considered as a reliable source to some of the Framers, and is believed to have had an important role in the ideas that drafted the first of the great compacts of American constitutionalism: the Declaration of Independence, which is the document that creates the American nation and sets as one of the main objectives of the association the pursuit of happiness, then the analysis of his theory on the social compact might help us shed some new light in the way of seeing the purpose and content of the American Constitution.
89. This, especially if we take into consideration that despite the similarity of language between one and another natural law thinker of the time, their lines of thought can be completely different; and in this case, interpreting a document like the Declaration or the Constitution through the lenses of Locke or Rousseau, instead of Burlamaqui, can make a great difference and bring out a completely different result in terms of interpretation and original meaning.<sup>111</sup> In this sense, and even more importantly, if we were to take Justice Chase's suggestion of interpreting the Constitution through the "first great principles of the social compact"<sup>112</sup>, determining whose "social contract" it is we ought to look at, is of the essence, since the outcome of picking one source over the other could be radically different: the choice of social contract theory could then determine the outcome of constitutional interpretation, from a Lockean

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<sup>111</sup> Citing A. P. d'Entreves (*Natural Law* (1951), p. 9) in the sense that "the mere fact that an identical expression recurs in different writers is no proof of the continuity of thought from one to the other", prof. McDowell rightly establishes that:

[a]t its deepest level, the idea of natural law that has periodically percolated to the surface of American politics is a confused collection of often contradictory claims. Whether "natural law" is being invoked in the sense of St. Thomas Aquinas or in the sense of Thomas Hobbes is a very important thing to know; the philosophic differences are profound. Sorting out those differences is thus essential to understanding the proper relationship of the Constitution to the sweeping historical tradition of natural law.

GARY L. MCDOWELL, THE LIMITS OF NATURAL LAW: THOMAS RUTHERFORTH AND THE AMERICAN LEGAL TRADITION, 37 *Am. J. Juris.* 57 (1992)

<sup>112</sup> See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

libertarian compact that could support *Dred Scott*<sup>113</sup> and *Lochner*<sup>114</sup> to a more liberal and socially minded contract in Burlamaqui, that would not only reject slavery and uncontrolled economic freedom, but perhaps also, support *Brown*<sup>115</sup> and other interpretations that have constituted the soul and hart of American social legislation. In this sense, the study of Burlamaqui instead of any other XVIII century scholar to give content to the meaning of the Constitution as a “social contract”, becomes an alternative of reconciliation between the notion of original intent and the constitutionality of progressive legislation. By looking back to the Founding Era, through the uncommon eye of Burlamaqui, we may find that, after all, the Framers did provide America with a constitution for the twenty-first century, a constitution set to endure the test of time and become the vehicle to assure every man the pursuit of his own happiness, for which men created societies a long time ago, without having to expect unusual and sometimes questionable interpretations by the guardian of the Constitution, namely, the Supreme Court.

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<sup>113</sup> See *Scott v. Sandford*, 60 U.S. 393 (1856).

<sup>114</sup> See *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>115</sup> See *Brown v. Board of Education*, 347 U.S. 483 (1954).