

**Jean-Jacques Burlamaqui**

July 2012

**Summary:**

Jean-Jacques Burlamaqui was a citizen of Geneva and a legal theorist of the 18<sup>th</sup> century. He taught at the University of Geneva and was a tenant of natural law, inspired by Pufendorf, Grotius and Barbeyrac.

Natural law theorists consider that the aim of their discipline is to provide objective laws originating directly from nature and not from a human will. They usually start with a study of human nature and then deduce “natural” laws that are in accordance with their definition of a human being.

An introduction to Burlamaqui’s thought will illustrate this process. Starting from the simple idea that humans are rational beings looking for their happiness, he constructs a legal framework, which goes as far as an ideal governmental structure.

The “natural law” approach hereby illustrated as then been criticized by legal positivism, in particular by Hans Kelsen, who accuses natural law tenants of hiding personal beliefs behind a false scientific objectivity.

## Burlamaqui and Natural Law

According to natural law theorists, laws come from nature. In other words, a study of human nature should lead the jurist towards universal and objective laws. Looking at Burlamaqui's thought will illustrate this kind of approach.

At the basis of Burlamaqui's thought on natural law<sup>1</sup> is a definition of the human being. According to him, a man is an intelligent being whose main characteristic lies in pursuing his happiness. Man is defined as a being using reason to attain his happiness. Reason is more than a tool among others: according to Burlamaqui, reason is a necessary condition to achieve happiness. The first natural law is therefore to follow what reason teaches.

To completely fulfill his humanity, man has to achieve his pursuit of happiness. Natural laws are therefore, Burlamaqui states, the ones ensuring that man attains this aim rapidly. They are a set of rules human beings have to follow in order to pursue happiness successfully.

But how exactly can one find these laws leading to happiness and how can the legislator enact them? The ideal sovereign, according to Burlamaqui, possesses three main characteristics: he is omnipotent, omniscient and benevolent. Only the combination of these three characteristics, he argues, can produce a legitimate sovereign.

Indeed, such sovereign would produce laws that are those of natural law: the omniscient sovereign knows which paths lead to happiness and tries to help his citizens to achieve it by obeying to his laws, because he is benevolent. The fact that man sometimes doesn't follow reason requires the sovereign to be powerful in order to force his citizens in the right direction.

However, sovereignty doesn't exist in what Burlamaqui calls the "state of nature". In this state, men are not in a political community. They live independently, freely and are equals among themselves. This equality renders power, and thus the figure of the sovereign, impossible

The pursuit of happiness being more difficult in the state of nature, Burlamaqui considers it reasonable, and thus in accordance with natural law, that men create a community, a State and create a government, thus leaving the state of nature to enter into the state of society.

In the state of society, men submit to the sovereign authority in order to pursue happiness more efficiently. Burlamaqui therefore proposes to limit the power of the sovereign. The legislator should only pursue the citizens well being. Whenever the sovereign aims at something else, he loses his legitimacy because he doesn't act in accordance with natural law. Legislators therefore have the obligation to reject their passions and private interests to care only about the well being of the citizens.

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<sup>1</sup> Mostly developed in *Principes du Droit Naturel*, chez Barrillot & Fils, Genève, 1747. An English translation is available online, together with a translation of *Principes du droit politique*: <http://oll.libertyfund.org/1717>

Of course, Burlamaqui recognizes that this benevolent figure is not realistically attainable. Man, always subject to his passions, will often lack benevolence and misuse his power. The solution advanced by Burlamaqui is to separate power in different branches, a quite new idea at that time. Each branch will ensure that the others do not overstep the prerogatives the people have given them through the constitution.<sup>2</sup> According to historians, this idea had an impact on the United States' Founding Fathers who included the right to the pursuit of happiness and the idea of check and balances in their Declaration of Independence and their Constitution.

This overview of Burlamaqui's thought is a good illustration of how natural law theorists develop their theories. The thinker starts by providing a reflection on human nature, saying that it is characterized by the use of reason and the pursuit of happiness, and then derives a series of laws he calls "natural" because they are in accordance with human nature and permit its accomplishment.

In the natural law tradition, the jurist's work is to study nature in order to find objective laws. Law is not a product of a will, but an unchanging aspect of nature. This idea has later been criticized by legal positivism. According to positivists such as Hans Kelsen, legal theorists should refrain from trying to discover supposedly natural and objective laws, but should instead focus on studying legislation as it is.<sup>3</sup>

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<sup>2</sup> This idea is mostly developed in *Principes du droit politique*, a book published postmortem in 1751. An English translation is available online, together with a translation of *Principes du Droit Naturel*: <http://oll.libertyfund.org/1717>

<sup>3</sup> See on that: *Hans Kelsen et la théorie pure du droit*, KBB, February 2012