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## **Buchanan's social contract unveiled**

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### **Abstract**

Although public opinion and most of the academic community reject libertarian anarchy, explaining why governments are legitimate remains a major and much neglected problem. This paper discusses the foundations of social-contract theorising with emphasis on the Hobbesian approach. It then examines the constitutional alternatives (including Buchanan's) and draws three main critical conclusions. First, the Hobbesian construction is not a social contract dictated by nature, since the individuals' instinct to survive does not necessarily justify the presence of a watchman. Second, the constitutional contract takes the status quo for granted, fails to identify the signatories, and ignores the presence of dissenters. Finally, Buchanan's version of the constitutional approach shares the Hobbesian perspective, and focuses on describing the bargaining process, rather than on assessing the legitimacy of government. Although it is a fitting description of the context prevailing in today's Western democracies, Buchanan's view ends up replacing the rule of law dear to the classical-liberal tradition with the rule of compromise.

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## **Buchanan's social contract unveiled**

**Enrico Colombatto**

### **1. On the legitimacy of governments and clubs**

Most people accept that the presence of an authority endowed with coercive powers – let us call it a government or a ruler -- is a desirable feature of a community. Although one may object to the identity of the ruler (who could be accused of usurping power) and/or disapprove of what he does (abuse of power), some issues garner broad consensus. For example, hardly anybody believes that God designates the ruler, possibly through an earthly intermediary; and even fewer people maintain that this divine appointment includes ownership of a region and the right to consider the creatures living in such region as his own chattel. Likewise, theorising about the social nature of man is also regarded as a rather doubtful way of justifying government. The very fact that people interact because this is their instinct (as argued by Lord Shaftesbury in the early 18<sup>th</sup> century) and/or because sociability enhances individual and collective wealth (Bernard Mandeville, also in the early 18<sup>th</sup> century) ensures that individuals usually welcome those who strive to make cooperation possible and easier. However, even if laudable, the efforts of self-appointed and possibly altruistic coordinators do not give them legitimacy to rule, to impose their views about cooperation, let alone to resort to direct or indirect coercion.<sup>1</sup>

In spite of the agreement about what does not justify the presence of government, acknowledging the problem of legitimacy and establishing what gives the ruler authority remains troublesome. This is understandable. By questioning the legitimacy of governments, one necessarily accepts the possibility of libertarian anarchy, an option that horrifies a very large portion of the population and that most authors consider

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<sup>1</sup> The expression “indirect coercion” describes a situation in which the ruler wants to influence B’s choice. In order to do so, the ruler forces agent A, who interacts with B, to modify his (A’s) behaviour and thus affect the alternatives and costs that B is facing. Nudging, compulsory persuasion (or libertarian paternalism) are forms of indirect coercion and are thus in contrast with a free-market vision (Beraldo 2018). This is the case, for example, when the government requires that the seller position his goods on a shelf in a given order to encourage the consumer to buy one item rather than the other.

unfeasible.<sup>2</sup> In fact, public opinion tends to regard the presence of governments inevitable, and considers their ubiquitous presence as some sort of proof of legitimacy. Dissatisfaction with their activities leads to disputes about what justifies the rulers' actions, and where one should draw the line between abuse and compliance with their supposed mission. However, most people do not question the role of governments because they are illegitimate, but because they fail to meet expectations (Rothstein 2009). Put differently, today's debate about the legitimacy of government continues to aim at establishing what governments can do and to whom they are accountable, and neglects to analyse their very existence and nature.

As mentioned above, in the Western world the term "government" identifies an actor who rules a community and features two elements: He has the authority to apply coercion (violence is legal), and the exclusive power to do so (the monopoly of violence). By contrast, a ruler without legitimacy is a predator, since coercion would be equivalent to aggression, and his request to enjoy the monopoly of violence unacceptable. To illustrate this point, let us imagine that people living in a given region trade and interact on a voluntary basis. Of course, living and interacting give none of these individuals (or somebody coming from outside the region) the right to impose his/her will on any of the residents. A group of residents could decide to create a club,<sup>3</sup> agree on a statute, and call such club a political community. Moreover, this group could appoint/elect a board of directors responsible for ensuring that the club members comply with the statutory rules, and perhaps issuing new rules. The board can take any name, including "government". Yet, neither the club members nor the directors have the authority to force all those who reside in a given area to join the club or follow the rules of the club. Put differently, the government appointed or elected by the members of the

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<sup>2</sup> Of course, the fact that libertarian anarchy is unfeasible does not justify the presence of a ruler. Yet, it strengthens the case for government as a lesser evil. This is the basis for a pragmatic view of the social contract. See Spooner (1867-70), for an early and forceful argument against the legitimacy of all governments and the irrelevance of constitutions; and Huemer (2013) for a more recent contribution on the feasibility of the anarchic option.

<sup>3</sup> It is also important to underscore the difference between a club and a (social) community. A club is an association among individuals with a view to producing excludable and non-rival goods (within limits). A social community is a group of people who share a set of conventions. Thus, although a political community is frequently composed by the members of a social community, being part of a social community does not imply the existence of a political community. See also Hume (1752/2001), according to whom the agreement that justifies a political community is a set of conventions. In this light, a political community is legitimate only if its members are part of a social community. Of course, this condition would be necessary, but not sufficient.

political community (the club) has no authority over those who never applied to join the political community, chose to remain outside and possibly trade with the club and with other clubs on a voluntary, case-by-case basis. The same applies to those who have left the club. Likewise, the non-members have no obligation towards those who acknowledge the authority of the government (the members of the political community).

Certainly, in today's real world there is a crucial difference between a club or a cooperative agreement on the one hand, and a political community on the other. A club provides for freedom of exit by dissatisfied members, and its board of directors has the right to exclude unruly members and undesirable candidates. In this context, therefore, the use of violence is limited to preventing entry or forcing exit. By contrast, when a group of residents in a given region creates a political community and its government claims authority over all those residing in that region, the outcome consists in the use or threat of violence against potential dissenters. Not surprisingly, the political community or the government that claims to act on its behalf would argue that its use of violence against the reluctant residents is legitimate. Yet, over three centuries of pondering have not produced very strong arguments supporting such claim (see Cordes and Schubert 2007). The use of violence is associated with the power to rule; otherwise, it would be a matter of cooperation. However, where does such power come from? Few would accept that a ruler has an innate natural right to govern.<sup>4</sup> Hence, legitimacy without agreement must necessarily come from outside -- from above (God) or from below (the people). The social contract is how the literature defines the latter option, which theorises how a political community can force outsiders within a given region to join and recognise the incumbent governing body as their own ruler. This is the focus of the first part of this paper, which considers some aspects of social-contract theorising with emphasis on the Hobbesian approach (sections 2 and 3). The following parts analyse the constitutional alternative and Buchanan's view (sections 4 and 5), discuss the implications for natural liberty (section 6) and offer some conclusions (section 7).

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<sup>4</sup> The word "innate" is important. In this context, it means that given individuals have a natural right to rule, a notion in contrast with the principle of men's moral equality (birth does not justify rent-seeking). The medieval belief in the existence of an innate right to rule differs from the modern notion of an acquired right to rule. The modern notion mentions one's social upbringing, as argued by Edmund Burke; or historical accident, as argued by a tradition that started at least three centuries ago (Thomas Hobbes) and is now presented in term of procedural compliance.

## 2. An introduction to social contract theorising

This and the next sections draw attention to two different ways of framing the social contract. One assumes that the social contract materialises before government comes to life: The residents do not accept a self-appointed ruler, but recognize a government as long as it is born out of the social contract they have created, and complies with the terms defined by the agreement. With regard to violence, this makes the difference between aggression and legitimate coercion. In particular, the social contract is an agreement subscribed by all the residents, who form a political community in order to reduce their transaction costs, enhance the division of labour, and take advantage of the opportunities for exchange. In order to reach unanimity, therefore, the social contract is necessarily limited to cooperation and enforcement, and the ruler is the actor to whom the contractors give the authority to make the agreement operational for a given time period, and the instruments necessary to function.<sup>5</sup> Clearly, the social contract should be renewed relatively frequently, since each draft weakens as time goes by, as the number of the original subscribers necessarily drops, and new residents who never agreed to the current contract are born. In this paper, we put the question of obsolescence aside, and draw the reader's attention to the tensions that emerge when the ruler tries to expand his role and expects to enjoy – say -- monopoly power in promoting cooperation, interpreting the very meaning of cooperation, attaining efficiency, enforcing contracts and preventing/sanctioning crimes. When this happens, most residents often agree with the essence of the ruler's requests – see the expansion of the welfare state in modern democracies during the 20<sup>th</sup> century -- and stay in the political community. In fact, this apparent acquiescence results from a compromise between two parties. One party includes the members of the political community who tend to collude with the ruler in order to share the prospective privileges that the ruler promises to create and distribute. The other party includes those who feel inclined to oppose the ruler's requests and resist the institutional change, but are also unwilling to abandon the cooperative contract and

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<sup>5</sup> The same would be true when a very large majority suffices to give birth to a social contract. Those who do not want to subscribe to an agency enhancing cooperation can stay out of the political community or form their own political community, with their own agency. Dissenters might well enjoy a free ride. Yet, if their number is relatively small, the other residents can still create and finance an agency that enhances cooperation, ensures contract enforcement and possibly provides security (police and defence). Some people could find the presence of free riding annoying. However, free riding is not an act of aggression and causes no victims.

lose the benefits it entails. Typically, the two parties meet halfway. The dissidents fear retaliation by the other group, and hope to fine tune or redefine the limits of government from within the political community. At the same time, the ruler's supporters yield ground in order to avoid turmoil and enhance the ruler's role and legitimacy by keeping the size of the political community intact.

By contrast, according to the second approach, the residents consider the incumbent ruler inevitable, and the social contract is a device that the residents use in order to restrain oppression. According to this view, therefore, legitimacy plays a minor role, and an agreement is signed between the residents (or some of them) and the ruler/predator. In particular, the population offers a veil of legitimacy to the incumbent government. By declaring loyalty and support to the incumbent predator, the residents make it more difficult for the newcomers to grab power. In return, the residents obtain that the ruler restrains abuse, and possibly extends his time horizon and becomes a long-term exploiter, rather than a roving bandit. Of course, most of the time this is a dream, since the incumbent predator knows that loyalty is fragile. In fact, long-term exploitation takes place only when – a necessary but not sufficient condition -- the ruler is in absolute control, and does not fear that his authority can be challenged from outside (an invasion) or from within (a palace coup). When this is the case, however, the existence of a social contract is an illusion; and much of the literature devoted to finding ways of showing the legitimacy of government is an exercise aimed at pleasing the ruler. A strong ruler would feel reassured, while a weak ruler would know where to find loyal supporters.

In fact, today the real world devotes little attention to the first view (the social contract as a cooperation agreement). Rather, it focuses on the second perspective (the social contract as a deal between an unavoidable predator and its victims): People resign themselves to the fact that a group of predators inevitably takes control of a given region and imposes its will on the residents, possibly colluding with rulers in other regions (Sugden 1993; Holcombe 2004). Getting rid of one predator merely opens the way to other predators, and it is by no means obvious that the latter are better than their predecessors. Thus, rather than engaging in useless debate (let alone fighting), most of the time the residents strive to avoid the worst and converge on an institutional deal that fills the gap between their own interests and the ruler's.

### **3. Rationality and the Hobbesian ruler**

The Hobbesian perspective is different, and despite intense criticism, it still offers some elements that help understand how people regard institutions. Absent explicit unanimous agreement among the residents in a given area, Hobbes gives a compelling argument that justifies the presence of a ruler based on natural principles. Hence, it does not require a contract between the ruler and his counterpart. As a matter of fact, although Thomas Hobbes is often regarded as the founding father of modern social-contract theory, the core of his argument is not a real contract.

The essence of the Hobbesian view consists in claiming that the social contract materialises when an individual – or a group of individuals -- forces other individuals to buy security, possibly from the same and unique provider. The legitimacy of this forced transaction rests on two key assumptions. Survival is the priority of all human beings, and in order to meet this goal, each individual needs and welcomes protection against aggression. In particular, the Hobbesian approach postulates that no one prefers to rely on his own resources to repel an attack, nor does he choose to organise collective defence. Moreover, all individuals are characterised by aggressive instincts, which urge them to attack and rob to enhance their wellbeing and guarantee their own survival. Two consequences follow. Nobody endowed with a human nature would decline an offer by a supplier of security services (the Hobbesian ruler), unless one is himself an aggressor. In this light, the presence of aggressors from within the community (criminals) and from outside (enemies) legitimizes the Hobbesian ruler to engage in suitable action – including taxing a community to finance the required security services -- as long his action aims at protecting the potential victims.

Three points deserve attention within this context. First, the identity of the supplier of protection services plays a minor role. This explains why the procedure through which a community selects the supplier is all but irrelevant from a Hobbesian standpoint. Second, since one cannot rule out that more suppliers intend to offer their services, either the potential suppliers resort to violence in order to obtain a monopolistic position; or they compete for clients by adding to the effectiveness of the protection they supply and lowering the price they charge. In the latter case, one can imagine that



various groups of residents choose different suppliers. This process would create different political communities within the same geographic area (political fragmentation), each community characterised by a different ruler (i.e., several Hobbesian security suppliers).<sup>6</sup> Third, as mentioned above, the Hobbesian perspective not only takes it for granted that the primary natural goal of man consists in the struggle to survive, but also postulates that human nature includes the instinct to attack and rob/kill other human beings. A Hobbesian supporter would argue that one individual can attain his primary goal (survival) only if the others' violent instinct is checked by a third party acting as a watchman (the ruler), lest he be robbed or killed. Hence, each man is necessarily born with a built-in desire to ensure that the others obey the ruler and, moreover, that each man is legitimised in requiring that all other men do so.

All the points mentioned above have been subject to critiques (see, for instance, Goldman 1988 and Baier 1994), the evaluation of which lies beyond the scope of this paper. However, we believe that this line of reasoning also raises two broader questions, which pertain to the very nature of the Hobbesian contract, and have been somewhat neglected. One regards the fact that the ruler's source of legitimacy is actually his alleged superior ability to make an appropriate use of coercive power. We have already observed that the presence of the Hobbesian ruler is not the only solution generated by the Hobbesian view of human nature. An individual who believes that aggressing another individual is the right thing to do to survive might also choose to look for aggressive allies, rather than for neutral watchmen. Actually, since the purpose of the watchman consists in the preservation of the community (or of humankind) despite the individuals' bellicose instincts, one suspects that his presence is the result of long-term rational reasoning, rather than of a natural disposition of all human beings. Put differently, the Hobbesian ruler is not justified by man's natural instinct to survive. Rather, he justifies himself by appealing to an ideal of knowledge and foresight, which gives him the authority to force the residents in a given area to set aside their aggressive instincts and submit to the provider of security.

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<sup>6</sup> This situation would correspond to libertarian anarchy (see for example Rothbard 1982). In contrast with what suggested in Buchanan (1975/2000: chapter 1), anarchy does not necessarily imply Hobbesian warfare and chaos. In fact, anarchy corresponds to an institutional context in which no agency has the monopoly of violence or the authority to prevent people from pursuing their preferences and choosing accordingly.

Furthermore, one wonders whether one can call a contract an arrangement with no contracting parties. If one accepts the Hobbesian postulate following which instinct leads individuals to believe that the best way to survive and augment their wellbeing consists in aggressing other individuals, they will hardly cooperate by agreeing to hire a protecting agency. Indeed, the Hobbesian agency does not need a contract. Rather, it draws its legitimacy to exist and operate from a combination of an a priori assumption regarding human nature and rationalistic paternalism, regardless of the individual's actual preferences about how to survive.<sup>7</sup>

#### **4. The constitutional alternative**

Today's alternative to the Hobbesian paradigm is the constitutional social contract, which excludes references to human nature and moral principles, and draws its legitimacy from an agreement on procedures (Hayek 1960 and 1976). In particular, procedures determine how and to whom the members of a community delegate decision-making power, and the areas to which such power applies. In theory, procedures are established at times called constitutional moments and are approved unanimously. Of course, constitutional moments also serve purposes other than institutional design. For example, in the real world constitutions often include a list of desirable goals (e.g., health and education for the largest possible number of individuals) and/or of fundamental principles, possibly with qualifications (e.g., the inviolability of private property, unless it runs against the interest of the community). Yet, shared ambitions and vague promises are subject to interpretation. As a matter of fact, ranking priorities and choosing among sets of possibilities becomes the very task of the legislator, the legitimacy of which is measured with reference to procedural compliance. This explains why procedures frequently end up transferring considerable discretionary power to the selected rulers.

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<sup>7</sup> The Rousseauvian and the Rawlsian social contracts reproduce the same pattern: the elites are not legitimised to rule because their policies reflect people's preferences. Rather, in the Rousseauvian context they govern because they enforce a general will, the meaning of which is defined by the elites themselves. Instead, in the Rawlsian context the elites enforce some form of equalitarianism. The difference between the two approaches is in the principles advanced by the elites: consequentialism in the Rousseauvian case, (social) justice in the Rawlsian framework.

Not surprisingly, the constitutional alternative presents a number of elusive issues, especially in regard to the position of those individuals who reject the constitutional contract and opt to remain in the Lockean state of nature. Similar comments apply to those born in a region where the constitution is enforced, but are never asked to manifest their opinion about it, let alone join it or opt out of it (Huemer 2013). In theory, constitutional authors acknowledge that the jurisdiction of a political authority legitimized by a procedural agreement does not apply to dissenters. In practice, however, those who subscribed to a constitutional contract and/or their representatives do not hesitate to attack the nonconformists. This is unjustified violence. The fact that dissenters can profit from the positive externalities created by the members of a political unit – those who joined the constitutional contract – makes no difference. Free riding is not a violation of property rights or a breach of contract.

Another question regards the width and composition of the political community identified by the constitutional contract. As mentioned earlier, in the real world a political community is defined by the area over which a political body exercises its power, an area that results from an agreement among different political bodies (governments), none of them overly concerned about their own legitimacy, especially after the decline of absolute monarchies. This standpoint is consistent with the view of the public, which usually accepts the state as inevitable, and its jurisdiction as a historical accident. Two consequences follow. Within this context, the issue of legitimacy over a territory replaces the problem of justifying government vis-à-vis the individual. Individuals are no longer considered as persons, but as creatures (chattel?) identified by the territory in which they live or in which they are born. Likewise, the legitimacy of the current context is taken for granted (it is inherited from the past), and opposition to governmental action is reduced to disagreement with ordinary law making, rather than with the inherited constitutional corset.

Of course, if one ignores the issues related to the legitimacy of the status quo, the constitutional social contract becomes a fiction, since it does not originate from a constitutional moment, but from historical accidents that created and empowered a political agency and its territorial jurisdiction. In the same vein, the frailty of a contract that comes to life when a historical accident occurs becomes apparent when one considers what it takes to change the features of the contract (the procedures). Arguing

that the constitution can change only by unanimous decision is equivalent to saying that all procedural changes are actually defined by the procedures established at the latest constitutional moment – the moment of the accident. In other words, the constitutional contract is drafted by the elites that happen to be in power when a significant historical accident occurs, and the current procedural context follows from the rules set at the point in time. For example, at the historical moment the ruling elite may establish that no changes are possible, or that all changes must be agreed by all members of the community, or that changes must be approved by qualified majorities. In brief, change can take place when a new historical accident materialises (a coup?), or is in the hands of those in charge of interpreting the alleged social contract (e.g., a constitutional court).

## 5. Buchanan's position

James Buchanan (1975/2000: 9, 12-13) takes for granted that the state is inevitable. In his view, people need and accept a ruler in order to recognise property rights, enforce spontaneous cooperative agreements, and produce a set of merit goods, including security. Certainly, justifying the existence of government because it is necessary or at least desirable draws heavily on the Hobbesian tradition. However, and consistent with what we observed in the Hobbesian context, this argument does not rely on a social contract. Although Buchanan does not develop his case in these exact terms, he assumes that a ruling agency that enforces private contracts and guarantees security brings about a Pareto improvement for the community.<sup>8</sup> Thus, as long as it does not engage in improper behaviour, government is legitimate or – better – not illegitimate. This description corresponds to what Buchanan calls “the protective state”.

Yet, Buchanan goes beyond the Hobbesian approach, and in his 1975/2000 book develops a theory about what we call the pragmatic (social) contract,<sup>9</sup> a theory designed

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<sup>8</sup> Legitimising an institutional arrangement by claiming that its presence involves a Pareto improvement is not unique to Buchanan. For example, De Jasay (1991 and 2005) bases his presumption of liberty on a Paretian criterion. However, in De Jasay, the criterion is met when you guarantee freedom to choose, the ownership of one's own self and private property. By contrast, according to Buchanan the very fact that government is preferable to anarchy seems enough to qualify government as legitimate. This seems to apply even when the government operates in a condition of “constitutional anarchy”, i.e. when it violates the contract it should have enforced.

<sup>9</sup> Buchanan's notion of “constitutional” differs from that used by Hayek and E. Ostrom. According to Buchanan, constitutions define both the rules of the game and what governments are allowed and possibly

to justify the so-called “productive state”, in which the government produces merit goods and, more generally, takes an active role in defining property rights. Surprisingly enough for a free-market supporter, Buchanan does not follow the classical liberal view on property rights. In particular, he ignores the Lockean and libertarian views on the origins of private property,<sup>10</sup> and argues that the assignment of property rights and the definition of the limits to private property are in fact the substance of the constitutional moment, and imply deviations from the status quo.<sup>11</sup> These deviations and later amendments must be approved unanimously, but it does not matter how unanimity is obtained – whether it emerges spontaneously or as a response to threats.<sup>12</sup> In other words, Buchanan believes that the legitimacy of the pragmatic contract originates from the fact that the contract makes each member of the community better off, compared with a situation in which property rights are up for grabs. It makes no difference whether resources are up for grabs because property rights are undefined, or because they are indeed defined, but poorly enforced by the government. In particular, this agreement includes two parts. One specifies the deviations from the property-right arrangement characterising the status quo, including the perimeter within which the ruler can exercise discretion or – better – the social goals that justify encroachment. A second part defines procedures, by means of which the social contract is amended, the ruler is selected, and ordinary law making unfolds.

Thus, and consistent with what we already pointed out earlier, Buchanan tacitly tries to circumvent the requirement of unanimity by resorting to multilateral bargaining, which is expected to lead to a Pareto improvement. This process takes off when a significant portion of the community is dissatisfied with the status quo and threatens to attack the rest of society. When turmoil is realistic, the potential victims give in, and amend the contract by compromising with the aggressor and stop wasting resources in fighting.

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encouraged to produce. By contrast, Hayek emphasises constitutional design with a view to preserving the rule of law, while E. Ostrom uses this term to separate the substance of ordinary law making from the rules of the game within which ordinary law making takes place. This explains why we prefer to use the term “pragmatic” when we refer to Buchanan, and the term “constitutional” when we refer to the Hayekian tradition.

<sup>10</sup> See Colombatto and Tavormina (forthcoming).

<sup>11</sup> Interestingly enough, Buchanan does not seem to attach much importance to the legitimacy of the status quo. Yet, it is a crucial point, as emphasised in Vanberg (2004) and Meadowcroft (2014), especially since the status quo is the point of departure for developing a social contract based on unanimous consensus.

<sup>12</sup> See, for example, Buchanan (1975/2000: 224-25).

The aggressors are pleased because they improve their condition by extracting resources from the prospective victims. Of course, it is apparent that in this context the notions of spontaneity and individual sovereignty take an unusual turn.

Eminent authors have argued that the social contract exists because it is inevitable, and it is inevitable because the members of a community cannot avoid agreeing on a set of reasonable procedural rules emerging from below through utilitarian conjectures (e.g., Hayek 1945); or because it follows from an evolutionary process driven by “immanent criticism” (e.g., Hayek 1960: chapter 1; 1976); or because it is imposed from the top by enlightened lawmakers (e.g., Sen 2009). Yet, this view is not free from ambiguities. First, the very fact that some people could consider opting out of the social/constitutional contract shows that the initial assumption is flawed. The possibility that a constitutional contract makes everybody better off because it avoids conflict (Buchanan), and/or allows institutional efficiency (Hayek),<sup>13</sup> and/or is the result of shared wisdom and articulated debate by the elites (Sen) could make the contract attractive. However, it is only a possibility, and is not enough to make it compulsory. Moreover, if one accepts Buchanan’s line of reasoning, according to which the social contract is driven by the need to avoid tensions (this justifies the ceaseless redefinition of property rights), the protective nature of government is inevitably weakened. In brief, in Buchanan’s world the government enforces property rights only up to a point. If opposition turns out to be unbearable, the terms of the social contract would be revised, allegedly obsolete rights would no longer be protected, and new rights would be enforced. However, who decides about the new terms of the social contract or, more precisely, who is in charge of reinterpreting the set of norms and principles listed in the constitution, to match the new balance of powers within the community? And what about the credibility of a protective state whose range of activities is ultimately a question of discretion by the elite, which has a choice between negotiating a compromise to avert tensions and resorting to violence to enforce the existing rules? Third, it seems that Buchanan’s emphasis on qualified protection and ongoing change driven by the power, noise and threats of different interest groups supports the redistributive and regulatory state, rather than the productive state. Once again, the fact that an elite (possibly backed by a majority) believes that a good is desirable because it

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<sup>13</sup> See Sugden (1993) and Servant (2017) for a detailed analysis of “Hayek as a contractarian”.

defuses social tensions legitimises neither taxation, nor state production of goods and services.

In other words, we suspect that the argument in favour of the productive/redistributive state actually undermines the working of the protective state. If this were true, Buchanan's pragmatic contract would replace the rule of law with the rule of compromise (or expedience), and definitely take a community far away from the classical liberal perspective.

To summarise, we submit that Buchanan's view on the constitutional contract is in fact an ex-post utilitarian rationalisation of why political communities do not break up in spite of weak legitimacy for the ruler. In particular, Buchanan's contract does not define the composition of the community; and it does not explain how a community gives birth to a collective agreement and, if such agreement does exist, from where it draws the authority that legitimises the use of violence against dissenters. Certainly, Buchanan's constitutional (social) contract describes the operational features of a system of rules inherited from the past, how these rules should evolve and how they should relate to ordinary law making. Yet, if this imaginary institutional context is deprived of normative content, then it remains all but a tautology, since the expression "social contract" actually represents a situation characterised by the lack of tensions within the community, and considers that the presence of tensions characterises a situation in which the social contract is about to be redefined.

That said, it is conceded that the vision put forward by Buchanan is a fitting description of the institutional context prevailing in today's Western democracies, a context in which a rather awkward notion of social contract applies. Most people accept that, regardless of its history, the status quo "must be evaluated as if it were legitimate contractually" (Buchanan 197/2000: 109), and that from the status quo rent-seeking activities and political manoeuvring unfold. In particular, the origin and legitimacy of the existing property rights are hardly disputed,<sup>14</sup> and the nature of the alleged social contract that defines a community is de facto ignored. Past historical events define the

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<sup>14</sup> An important exception is the legitimacy of the past structure of property rights when a change in regime occurs – see, for example, the transition from communist dictatorship to democracy in Eastern Europe after the fall of the Berlin wall. Of course, it is not clear why expropriation by a democratic ruler is legitimate, while it is not acceptable under a dictatorial regime.

extent to which a government has authority, while a set of procedures characterised by different majoritarian mechanisms (procedural legitimacy) specifies the law-making process. Moreover, and in accord with the Hobbesian perspective, very few individuals doubt the desirability of some form of central government enjoying monopolistic privileges, fearing that otherwise a community would end up in chaos and self-destruction. In contrast with Hobbes and in at least partial accord with Buchanan, however, in today's democratic practice government is not an agency that enforces the terms of an agreement, but an actor who is born out of the agreement and who contributes to defining its terms by making proposals with a view to defusing tensions. Of course, governments frequently fail to meet people consensus and allow violations of the current agreement (if it exists), thus leading to "constitutional anarchy" (Buchanan 197/2000: 19). Oddly enough, however, this very context does not open the way to investigating the nature of libertarian anarchy, but becomes a new (legitimate) status quo, from which a new agreement would be negotiated.

## **6. What about natural liberty?**

Interestingly enough, Buchanan's approach to the social contract changed over time, from a normative vision based on an ideal contract that applies to a hypothetical community behind the veil of uncertainty (Buchanan and Tullock 1962),<sup>15</sup> to a more pragmatic concept designed to describe how the real world operates, how changes are brought about, rationalised and justified (Buchanan 1975/2000).

The libertarian critique of the ideal contract behind the veil of uncertainty is well known. Critics point out that although some could prefer a world free from rent-seeking, this possibility does not exclude that other individuals might actually like the presence of privileges. For example, most people believe that patents are fair, and that a minimum income level should be guaranteed to all residents. Put differently, and in contrast with the view presented by Buchanan and Tullock, freedom from rent-seeking is not necessarily a goal that would garner unanimous or even majoritarian agreement. More generally, libertarians would insist that a community does not have a goal.

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<sup>15</sup> The veil of uncertainty is still present in later years, although in a different form. See for example Brennan and Buchanan (1985) and the critique levied by Müller (1998).



Individuals do. Thus, men and women may agree on common rules because such rules allow them to pursue their own individual objectives. Absent a general will or a general goal, rules are necessarily based on fundamental principles (primarily private property and freedom to choose and exchange). These are in fact the bedrock of a system of natural liberty. In other words, the difference between cooperation within a community and collusion by a set of cronies is that the former rests on voluntary actions, while the latter is based on the violation of somebody else's natural liberty, which necessarily requires the use or the threat of force against dissenters. In this light, rent-seeking is unacceptable not because individuals agree to ban it, nor because the community as a whole would be better off without it. Rather, it is intolerable because it violates a fundamental right peculiar to all human beings, and remains intolerable until all the members of the community agree to give it away. Ironically, one can thus conclude that a social contract cannot rest upon an agreement to ban rent-seeking (you do not need an agreement to recognise and authorise the natural order), but rather upon an agreement to accept it.

As mentioned earlier, Buchanan discarded the libertarian anarchic alternative as impractical, and neglected to consider its epistemological value. At the same time, he was hesitant about the Hayekian view, a view following which the evolutionary quest for the rule of law is the core explanation of the existence of a political community. On the one hand, despite his scepticism towards the evolutionary standpoint, one may suppose that Buchanan appreciated the fact that the Hayekian approach does not require that a community explicitly agrees on a social contract, and regards the outcome of an evolutionary process as satisfactory proof of the rightfulness or at least acceptability of the existing rules. Of course, this implies that history rather than principles is the basis for legitimacy, and that the lack of conflict testifies to the presence of a collective agreement, which can be assimilated to a contract. If so, this would justify Buchanan's emphasis on how the contract operates, rather than on its founding principles.

On the other hand, the pragmatic strategy undertaken by Buchanan is also useful in appreciating his notion of liberty, shared by many classical-liberal scholars. As observed earlier, Buchanan rejects the libertarian view according to which liberty is an end in itself; and follows the classical-liberal tradition, according to which liberty is an instrument. For example, Smith (2018/1776) argued that natural liberty promotes the

common good (the wealth of the community), but neglected to mention the principle of equal dignity (i.e., nobody has a right to impose his own preferences upon somebody else).<sup>16</sup> Put differently, the classical-liberal tradition argues that natural liberty means freedom to choose within an existing set of institutional arrangements, and that constraints apply even before the constitutional moment.<sup>17</sup> Hence, the case for liberty within the classical-liberal context reflects the fear that government may abuse its powers, engage in discretionary policymaking, and eventually make the community worse off. From this viewpoint, the fight for freedom is actually the fight against whatever threatens the wellbeing of a society. Big government is clearly the prime suspect, but merely a suspect.

The intuition that makes it possible to bridge the gap between social wellbeing (a concept normally meaningful only in a Benthamite perspective) and individual wellbeing without being constrained by unanimity consists in conceiving of a notion of welfare based on opportunity costs in a Hobbesian context. In brief, it is assumed that an individual considers the appeal of an institutional change by examining the benefits and costs he/she would enjoy as a result of the proposed change. However, the costs also include the likely reaction of the rest of the community or of its representatives, should the individual decide to oppose the change. This is the Hobbesian touch. For example, suppose that according to the constitutional context inherited from the past, state revenues are initially generated by a proportional tax on net wealth. Suppose now that some political groups aim at replacing the current system with a progressive tax on income. If the potential opponents to the proposed change fear that their refusal to comply ends up in expropriation or in migration (which involves costs), they might rationally accept the new tax regime, possibly negotiating some minor amendments in exchange for their support.

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<sup>16</sup> Some two centuries later, Hayek (1960) suggested a similar line of thinking, by claiming that in a world of uncertainty in which institutions follow a virtuous evolutionary path, a system of (natural) liberty is the best way of redressing and possibly avoiding mistakes. As Rees (1963) promptly pointed out, however, Hayek's notion of liberty is not equivalent to the absence of coercion, but to freedom of action within norms consistent with the rule of law. In turn, Hayek's notion of the rule of law corresponds to the absence of privileges.

<sup>17</sup> Individuals enter the constitutional moment with the rights and constraints defined by the "natural distribution" (which differs from the natural order), a distribution inherited from a past necessarily characterized by an (almost) undisputed ruler.

Certainly, Buchanan does not believe in the Hayekian evolutionary process and emphasises the importance of “philosophical precepts” (1975/2000: 210-11 and 1978/2001). However, and similarly to Hayek, he believes that liberty cannot be unbounded (Buchanan 1975/2000: xv), and suggests that individuals voluntarily and rationally accept to limit their liberty, lest undesirable scenarios come true.

Investigating the potential tensions between the idea of bounded freedom and the philosophical concept of unbounded liberty under threat is beyond the purpose of this paper. Nonetheless, one must recognise that nowadays the notion of natural liberty is far less important than the quest for political freedom within a political community. The emphasis is on freedom of expression (which includes no censorship and democratic elections) and of association, while economic freedom plays a secondary role (Wagner and Gwartney 1988). At the same time the cost of not being part of one – and especially of quitting one -- has become high. The individual is vulnerable to attack by the government that claims sovereignty over a given region, and faces discrimination if he/she succeeds in leaving the political community. How can he/she travel if no authority issues a passport? How would an employer subject to a government treat a potential employee who has no nationality and objects to social security or withholding taxation?

Two phenomena may help understand why economic liberty is no longer a critical issue in public debates. First, the cost of qualified quitting (migrating to another community) is regarded as fair, since public opinion holds that one must always belong to a political community, even if it is not particularly attractive. Put differently, and consistent with Buchanan’s approach, natural liberty is not a natural right characterising each individual, but an ideal that one could strive to approach through peaceful compromise with the rest of the community. Second, it is undeniable that the ruling elites do their best to stay in power and possibly create additional rent-seeking opportunities. Within this framework, sustainable success is guaranteed by their ability to ensure that the cost of leaving the political community is prohibitively high, by garnering consensus towards the regime (if it is a democracy) or by eliminating potential competitors (if it is a dictatorship). Certainly, manipulating the rent-seeking process is a key ingredient under all circumstances, and weakening the sense of individual responsibility is essential. It is thus clear that the roles of ideology and education can hardly be

overestimated. Buchanan would have disliked resorting to ideology and education to manipulate a community, but his view with regard to the outcome would have been benign, and he would have probably considered the loss of natural liberty a tolerable price to pay to reduce transaction costs and guarantee social tranquillity.

## 7. Concluding remarks

As mentioned in the early sections of this article, unless one accepts the Hobbesian standpoint and turns a blind eye on its ambiguities, social contract theories find it impossible to circumvent the need for unanimous, explicit agreement among the potential members of a political community.<sup>18</sup> Compromise prevails, both when the ruler asserts his/her legitimacy and when he/she expands its powers. In this light, the approach proposed by Buchanan (and partially derived from Hayek) is not very persuasive. Yet, it is realistic. Although it fails to offer a satisfactory justification of government, it offers a good description of where the real world stands: constitutional anarchy punctuated by pragmatic contracts.

Hayek and Buchanan assign a minor role to principles and natural rights, and introduce the idea of an agreement about the rules of the game. The agreement is generated by evolution (Hayek) and bargaining (Buchanan), and the parties involved may modify it when they wish to do so. This is the essence of today's constitutional arrangement. Thus, these authors aim at describing the ideal working of a democratic system aiming at creating chances for the member of a political community. The downside is that they neglect to discuss the intrinsic legitimacy of a monopolistic government. They content themselves with arguing that the presence of government is the outcome of a historical process; and that its legitimacy originates from its compliance with the rule of law (Hayek) or with its ability to guarantee social tranquillity (Buchanan).

The views put forward by Hayek and Buchanan complement each other. Since a political community seldom corresponds to the ideal of the rule of law imagined by Hayek, Hayek's evolutionary vision calls for a theory about dealing with disagreement.

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<sup>18</sup> The Hobbesian hypothetical contract rests on the principle of survival, which is a natural trait of all human creatures. Buchanan's and Rawls' veils rest on the assumptions that people are necessarily against privileges and on the notion that inequality is bad, respectively. Yet, none of these veils is based on natural principles and, therefore, none of them justifies a hypothetical implicit contract.

Such theory is the cost-benefit analysis suggested by Buchanan. Buchanan's constitutional moment and contracts are in fact a synonym for compromise, in which the weaker gets the short end of the stick. Of course, there is hardly any room for a contract free from ominous pressures.

Moreover, it is true that the classical-liberal view of the social contract presented by Hayek and Buchanan admits that an individual reject a constitutional contract and leave the political community in which he/she is born. However, since all political communities claim unconditional sovereignty on the land they control, the act of leaving necessarily implies physical dislocation; and since political communities have occupied all the land on the planet, dislocation necessarily means migration from one political community to another. The upshot is that in order to preserve natural liberties, the classical-liberal view should recognise that territorial control and political legitimacy are two distinct notions, and that individuals – not political communities – have property rights on the land. In other words, the classical-liberal theory of property rights should reproduce the libertarian view on the matter (see for example Rothbard 1974). Of course, this is not the case.

In the end, Hume's approach based on conventions is much more persuasive. Yet, conventions relate to a social community within which the members are happy to interact and exchange on a voluntary basis. Certainly, conventions are not compulsory rules. Rather, they are default rules that have developed to reduce transaction costs and from which the trading partners may deviate if they agree to do so. This makes the difference between Hume on the one side, and Hayek and Buchanan on the other; and explains why the former rightly rejects the notion of social contract, while the latter are indeed contractarian. Although Hume's scepticism has won the war of ideas, however, it is apparent that Hayek's and Buchanan's views prevail in today's real world.

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