# Hobbes, Locke and Rousseau in Los Angeles

# A reply

Max Atkinson

***The least attractive feature of the theory that an oppressive political system or administration may put Hobbes' theory into reverse and permit open warfare, is that it so obviously serves the interests of those who hold power.***

*Max Atkinson teaches law at the University of Tasmania.*

The sophistication of conventional contract theory, reflecting its organisation of a range of moral considerations relevant to making agreements and keeping promises, is impressive. It distinguishes between circumstances which will render the agreement a nullity, such as its illegality, the lack of capacity of a party, or that it is *contra bonos mores*, and those circumstances which will amount to a violation of its terms, giving the innocent party a right to seek redress in damages. The breach of an important term will also give a right to end the contract, so as to relieve both parties of any future obligation. In addition, any contract may set the conditions which terminate it, as well as the interdependence of its obligations, thereby making clear which prior acts by one party are necessary to impose obligations on the other.

Accordingly, a party seeking release from particular obligations will often need to rely on the contract itself, and argue for enforcement of such terms, which may of course be implicit. Where the action is for damages, the litigant likewise relies on the validity of the contract, whether we see this as redress for the 'wrongful' breach or (following Holmes's suggestion that damages are an option to performance), as enforcement of an implied promise to pay compensation in lieu. However, things are different where the contract is a nullity, since all disputes must now be settled on the basis that no valid agreement exists. Actions for damages and for performance at common law thus honour and rely on the agreement while the arguments for nullity deny its existence.

## The social contract theorists

When we turn to the classic social contract theorists to help resolve problems of civil disobedience and unjust laws, it seems only natural to look to this model for the kinds of argument contract law offers to limit the scope of our obligations. But contract law does not operate in a vacuum; it is the law governing agreements enforceable within an existing legal system, and it is precisely this feature which is lacking in the contract model of political obligation, which has no social context because it is itself the supposed basis of all social life. Dr Sandra Berns, in her thought-provoking paper on the Los Angeles riots, cites passages from Hobbes, Locke and Rousseau to bring out certain moralistic features seen as essential to their respective visions of a social contract, and to show their differing formulation. While it is not easy to conclude from the passages cited whether these features were seen as part of the contract or as preconditions to its validity (nor even whether that distinction was comprehended in their analyses), there can be no doubt that she herself has opted for the latter interpretation.

That choice, which has important consequences for any jurisprudential evaluation of the Los Angeles riots, keeps faith with Hobbes' emphasis on the essentially pragmatic and psychological factors he propounded to explain the historical evolution of a political community. Hobbes constructed his theory on the concept of natural right rather than natural law, and the universal right he took as fundamental was that of self-preservation. This explains his only qualification to the absolute authority of the commonwealth, that a citizen might withdraw allegiance where the latter can no longer provide that security, a proposition he developed at the end of *Leviathan*, and which led to his exclusion from the exiled court of Charles II in Paris.

But Hobbes' theory is also complex; he insists on 'Justice', and extols 'Equity' as a 'Precept of the Law of Nature', to which 'a Soveraign is as much subject, as any of the meanest of his People'. We might be tempted to see here a moral argument meant to govern the integrity of the contract, but for Hobbes this would be anathema, and it is no surprise (given his personal experience of the Civil War, and his deep commitment to peace and stable government), that his theory foreclosed all claims to civil disobedience in the name of justice, with the dogma that a sovereign could not be unjust to citizens who consented to its protection. For Hobbes such a sovereign need have no covenant with its subjects, and no one could place limits on it.

While it would be silly to suggest Hobbes had no concern with issues of justice and rights, his absolutist theory of political authority and civil obligation left these to be resolved by the sovereign itself. It was bound by the Law of Nature which was itself the Law of God, but no one under the umbrella of its protective force had any right to enforce this Law. Any suggestion to the

contrary would for Hobbes be uncomfortably close to a Natural Law theory. It would also open a door to the kind of civil war and social anarchy which so closely affected his own life. His essentially pragmatic analysis offers a rationalistic account of the origin and viability, over time, of a social compact, not a moral justification of the ruler's right to make law.

The strength of Hobbes' analysis accordingly lies in the fact that it does not rest on grand claims about fundamental principles of morality, as the Thomist tradition preached. Its weakness is that it can offer only an explanation for the origin and breakdown of political allegiance, not a justification for civil disobedience. That distinction is crucial to any analysis of the Los Angeles experience however, and helps explain why the appeal to Hobbes must ultimately be counter-productive to any moral resolution of the legal rights and duties of the citizens concerned. The major difficulty with the argument drawn from Hobbes is that it is put forward as an argument of contract *nullity*, not an argument of contract *violation*, since the manifest intent and effect of deploying it is to dissolve the 'social contract' itself, leaving citizens in the pre-social, pre-legal state described by Hobbes as the 'war of all against all'. The requirements for maintaining the validity of social and legal obligations are, on this approach, not a condition *of* the social contract, in the sense in which promises become enforceable terms of a legal contract, but conditions *necessary to* the existence of a pact from which all political and legal obligation is seen to be derived. Moreover, this is the only choice Hobbes' theory allows because his thesis, in the end, tells us why people accept social restraints, not why they should.

One could not make that claim about either Locke or Rousseau, whose theories are not designed to justify a rigid (albeit stable) authoritarian state, but to limit the state's power in order to maximise the welfare and liberty of its citizens. Locke agreed with Hobbes' naturalistic account that men came together to form political society in order to escape the intolerable state of nature. But their society was founded on consent, and its sovereign power was bestowed only to effect a trust whose aim was the protection of person and property. If the trust was betrayed then citizens had a right, and indeed a duty, to withdraw their allegiance. Such a betrayal would occur if a ruler ceased to govern for the common good, or forsook government by settled law in favour of 'inconstant, uncertain, unknown, and arbitrary government'. Where Hobbes' theory justified an absolutist form of constitutional monarchy to protect citizens from anarchy and war, Locke's theory justified revolution (in particular the 'glorious, bloodless revolution' of 1688-89), to protect citizens from sovereign abuse of power.

Despite his influence as a founder of European liberal philosophy, Locke had no coherent theory for resolving practical issues of civil disobedience. Indeed, his own politics appear less than consistent; when, after the accession of William of Orange, he published his *Letter for Toleration* to denounce the use of secular power to enforce morality, he continued to support the suppression of Catholics for their allegiance to a (foreign) Pope, and atheists because their word on oath could not be trusted. (Maurice Cranston, *John Locke: A Biography, 1957*). Nevertheless, and despite its descriptive component, Locke's social contract theory is primarily a moral argument, deriving its power from a combination of the principles of liberty and welfare which underlie the trust concept, the utilitarian value of the trust itself, and the fairness of keeping to a compact by which each citizen has compromised a range of personal freedoms in order to maximise the liberty of all.

Rousseau's social contract theory is more elusive, as might befit a thinker who could be described as

> a *philosophe* and an enemy of philosophy, a rationalist and a romantic, a sensualist and a puritan, an apologist for religion who attacked dogma and denied original sin, an admirer of the natural and uninhibited and the author of an absolutist theory of the State. [John Plamenatz, *Man and Society*, 1963, p.364]

What seems clear is that Rousseau envisaged an agreement between equal and free citizens to create government as an executive agent solely to carry out their wishes as sovereign legislator. The theory looked to an idealised society which maximised the capacity for each individual to make and follow his own rules and thereby to be as 'free' as before. The legislative power of the sovereign was never surrendered by the people, who were to make the laws directly and not through representation. Rousseau was aware that his concept was highly idealistic and that it could never work in a large, decentralised state. No matter, it described the kind of society he himself found morally attractive. As Plamenatz observes:

> . . . he was one of the most self-absorbed and emotional of writers, and his political and social theories are deeply affected by his personal difficulties, by his eccentricities and hatreds . . . Nobody who spoke so often of man in the abstract gives so strong an impression that he is speaking always of himself. [Plamenatz, above, p.364]

Both these theories are primarily prescriptive, emphasising in varying degree the government's duty to govern for the welfare of its citizens, and to do so in accordance with relevant principles of justice and equity. But if this is the role of government then we might well ask if these same principles of justice and equity must logically pre-exist the contract they are invoked to control. How could we treat them simply as a product of that agreement? They thus remain a morality behind the morality of the law, committing both philosophers to a kind of inchoate if vague bill of rights, with constraints on sovereignty far more flexible and extensive than Hobbes' sole exit clause.

This line of argument (which must question the foundations of any contract theory of political morality and which would require more philosophical support than is possible in this paper), is discussed further below. It concludes that both theories may leave room for a claim that laws in breach of the legislator's duty are a violation of the contract for government, *without* putting an end to the underlying social contract itself. Whether it is fair to suggest this of Rousseau's idea is a moot point, given the notorious difficulties in interpreting his text (see, for example, Plamenatz, above, Ch.10), but Locke, in the final paragraph to his *Second Treatise on Government*, distinguishes dissolution of the social contract from termination of the legislative authority given to an assembly. The former 'can never revert to the individuals again as long as the society lasts, but will always remain in the community'. By contrast, the latter power may return to the community, either because its term of duration has been provided for, or through forfeiture for the 'miscarriages' of those in authority.

Hence for Locke we need not persevere with the question whether the principles which first shaped the social contract are still available to judge its due performance; we need only point out that they will at least have force as principles *of* the contract, and in that capacity will govern the power of the 'legislative'. Instead of citing the underlying social contract to question the validity of legislative and other official acts, we need only point to a lapse or breach of the accord for government.

That distinction, as Richard Peters notes, was already a commonplace in the early 17th century, and discussed in terms of the *pactum unionis*, which was the basis of civil society (in much the way the Pilgrim Father's declaration of 1620 covenanted themselves to a form of civil society) and the *pactum subjectionis*, whereby the constituted society submitted to a particular form of government, Magna Carta being an historical example of conditional submission. Peters explains the contract theory of society as the conventional means to defend individualist values of freedom and equality against political absolutism and arbitrary rule traditionally justified by invoking the divine right of kings, itself derived from the Old Testament. It emphasised that all political authority came from the people, not from these self-serving ideas. Hobbes' peculiar genius was to use the same contract idea to institutionalise absolute sovereignty, by arguing that acceptance of a sovereign was the key to membership (R. Peters, *Hobbes*, 1956).

## Is there a social contract?

With this two-level characterisation of classical contract theory, we can certainly protest the legitimacy of government, and question the scope of our legal obligations, without impugning the social pact itself. But Sandra Berns' resort to this more radical alternative is jurisprudentially much more interesting, and her paper more challenging, not least because it would seem to take us close to the territory of the theory of associative obligations which she notices in her reference to Dworkin's *Law's Empire*. For to say the sovereign must comply with the 'social contract' seems merely a less direct way to assert his duty to respect the moral principles of liberty, welfare and justice which comprise it.

The contract model is an apt metaphor for the presumption of a tacit consent to respect such principles; they are binding, not in their own right, but because we have promised each other to abide by them. But as Hume pointed out, such a theory must also assume the logical priority of the moral obligation to keep a promise. If that principle of fairness must pre-exist the contract, then so might our other principles of freedom, welfare, candour, respect for individuals, etc. The justly famous theory of a political 'contract', which says we must bargain to become a community, would then be seen as unnecessary adornment. The jurisprudential interest of Dr Berns' paper lies in the fact that it inevitably requires us to evaluate this more fundamental objection derived from Hume. The issue has great practical importance in assessing the Los Angeles crisis, because on it hangs the crucial question whether we can resort to the principles which framed the social contract to contest the validity of bad laws (in just the way we would appeal to the explicit principles of a bill of rights), without deserting all social morality for a dubious imagined world where no such principles would exist.

Notwithstanding the failure of classic social contract theories to confront this issue, and despite the evident competing force and simplicity of a direct appeal to principles justifying moral right, Dr Berns' argument seems committed to follow the Hobbesian line, treating social morality as itself the creature of contract rather than its architect. This is indicated in the conclusion that, for each of these theories, the appropriate route to advance justice and freedom from oppression is to negate that basic compact which is the foundation of social life. Whilst that drastic step seems the only escape from a moral duty to obey law, it does not question what, if anything, freedom and justice could mean in a pre-Hobbesian world. But despite the concern to find a political solution in accord with a sense of the moral rights of victims of official neglect and oppression, this interpretation leaves the relevant citizens of Los Angeles entirely at the mercy of the authorities, including those responsible for the insult and injury, and with the exclusive power to enforce their will. This is despite their having suffered the discriminatory harassment of 'pro-active' policing, the general neglect of successive federal administrations, and the provocation and distress arising from the failure to secure a conviction for Rodney King's assailants. With the dissolution of the social contract all their moral and legal claims must likewise disappear, although it is precisely these claims, and not the antagonistic policies of the City, its police, or other public authorities, which should prevail.

Some of these authorities are presently negotiating settlement of a multi-million dollar suit by Rodney King. The police chiefly responsible have now been indicted under federal laws protecting civil rights, and the LA police chief has been dismissed. Although this response cannot address the massive inequity in welfare distribution which is such a depressing feature of American politics, it is important to see that the theory proposed must relieve the authorities from responsibility even for these steps, and from all other claims to redress. Even more disturbing is that no law would now govern the relationship between citizens, whether or not they are members of a victimised class (should mitigation extend to the attempted murder of a passing truck-driver?); old scores might be settled with impunity and restraint on self-interest would be foolish in the extreme. Any alliance of the oppressed must now compete with naked self-interest, with organised civil disobedience virtually impossible in the resulting 'warre of every man against every man'.

The least attractive feature of the theory that an oppressive political system or administration may put Hobbes' theory into reverse and permit this open warfare, is that it so obviously serves the interests of those who hold power, and who can choose at any time to precipitate the collapse of the social contract, in order to reshape a society in accord with their interests. Numerous historical and contemporary examples exist where elected and other heads of state have either provoked or taken advantage of social disorder to destroy political opposition for the benefit of an elite; the thesis proposed, because it must discount all social morality, offers a prescription for this unlimited opportunism, with the weak left to survive under the rule that might is right, perhaps the only standard left in Hobbes' dark universe.

It is difficult to see how one could avoid this result and still keep faith with Hobbes. Sandra Berns' paper suggests she might well believe a version of the theory could be applied in a local and temporary manner, so that a kind of moratorium would relieve a persecuted minority from onerous civic obligation, and avoid the risk that those in authority would, through prejudice or ignorance, misunderstand the moral basis for their public rage, and fail to extend normal principles of excuse and mitigation. That would seem a radical and puzzling interpretation, raising a host of problems beyond the scope of this paper, and perhaps impossible to reconcile with any classical contract theory. Be that as it may, even the mini-version would overlook the fact that those who wield official power, and who were formerly subject to a wide range of moral and legal constraints, may now pursue their interests as they please. So much follows from the theory that they did not violate their duty under the contract, they simply put an end to it.

## Resolution

Is it possible to resolve these problems without giving up the contract theorists

altogether, or by following through the implications of the claim that their theories (including Hobbes') must be read exclusively as attempts to justify political and thereby legal obligation, and not in any sense as explanations (however interwoven and fortified by moral assertion) of how and why political systems might arise and survive? That quickly leads to questions about the logical status and source of the principles used to define prominent features of the social contract, as has been suggested, and we cannot easily ignore them in favour of the more accessible historical and psychological issues.

Some modern philosophers who have seen this priority, like John Rawls, find the defensible core of contract theories in the idea that social obligation arises from the fairness of a system of agreed reciprocal restraints. But there is also a much older philosophical tradition, part of an intellectual culture against which each of these theories, in their own way, has reacted, and against which they might also be viewed. This is the Catholic philosophy championed by Thomas Aquinas, who saw all political and legal authority as ultimately derived from God, and who put the issue of abuse of Sovereignty in more simple and direct terms: *Lex Iniusta non est Lex.*

That simplicity has not impressed positivist legal philosophers, such as Jeremy Bentham and H.L.A. Hart, who defend a conceptual scheme which describes such laws (assuming they do not violate legal or constitutional standards) as legally 'valid', but as too immoral to obey. If one believes, as Thomist philosophy argues, that a universal Natural Law of moral precepts is accessible to the rational mind, then Aquinas' theory for civil disobedience seems eminently sensible, since it neatly resolves our provisional moral duty to respect the law in a more profound morality of justice. Because Hart sees the background Natural Law claim as optimistic, he offers no basis stronger than personal conviction and conventional moral practice from which to impugn such laws, hence no warrant nor means to elevate such moral values into a concept of 'legal' validity. But he does not disagree with the central point that they impose no moral obligation; it is just that the values in question are (to a positivist) either too abstract in expression, or too individualistic in content, to make this issue amenable to any authoritative social judgment.

A modern Kantian approach, as exemplified by Ronald Dworkin, might nevertheless support the Angelic Doctor's proposition on non-theological grounds. For Dworkin, the moral values which shape the constitutional constraints of a bill of rights would lose neither their distinctively 'legal' relevance, nor their logical status as articulate if highly implicit standards, were they deleted from the constitutional documents. As is well known, Dworkin has defended for many years an original philosophical thesis about the nature of social moral standards. He argues that, given their contextual role in the critical legal and political life of a community, the controversy inherent in interpreting their necessarily abstract formulation provides no basis in logic for dismissing them as inarticulate standards for judgment. On the contrary, as his celebrated account of Hercules is meant to show, they are the only means language both offers and permits to do this job with precision (see *Taking Rights Seriously*, Ch. 4). Because Dworkin's political community exists on the basis of reciprocal moral commitment, obligations arise on all participants directly from the ideals of fairness implicit in this arrangement. Dworkin thus bypasses classical social contract theory, by treating the feature of consent as secondary to the core ideal of fairness which gives it moral bite.

Nevertheless, if we wish to defend a specifically contractual theory of social obligation, but also acknowledge that all citizens have fundamental civil rights, both as individuals and minorities, then we must in the end argue that these rights are a central part of the contract itself, so that they can be defended against any attack, and in any political crisis, however extreme. Further, we must hold this contract beyond negotiation, so that its principles of justice, freedom and welfare will govern all social disputes, including disputes over the abuse of power and the suspension of duties. John Rawls, with his famous blindfold interpreter, has described a way to identify and elucidate the kind of principles which might justify such rights, and it is arguable whether Dworkin's Hercules, with unlimited intellect and all-seeing eyes, would reach significantly different conclusions. Neither, however, supposes these principles hold good because we are pledged to them by contract.

However, if we try to follow in the path of the classic social contract theorists, and also insist that the social contract, as the basis of civil society, is itself dependent on the continued respect by authorities for such rights and principles, then (unless our argument is merely a statement of social or psychological fact), we will leave those who rely on such rights vulnerable to any claim that the contract is ended as Sandra Berns has, I think mistakenly, suggested. Hobbes' refusal to countenance withdrawal from the commonwealth, and Locke's notion that one could withdraw allegiance from civil authority but not from the social pact, may well have been prompted by this very realisation. On the other hand if, as I would argue, we truly believe that these principles and rights have such distinctive importance in our political and legal life, then why should we bother to postulate a 'contract' model in the first place?

*Continued from p. 208*

The principle of equal rights and self-determination of peoples has introduced new elements to the integrity of the principles of non-use of force and non-intervention. The efficacy and desirability of the latter principles may seriously be impaired in the case of South Africa as a result of the regime's persistent violent denial of equal rights and self-determination of the blacks. This denial serves to legitimate a violent exercise of self-determination. Were such to occur in South Africa, the international community and its forum, the UN, so committed to the eradication of apartheid, should regard it as not a violation of, but instead as being in compliance with, the purposes and principles of the UN.

## References


1. See the *Australian*, 30.6.92, p.6; the *Guardian*, 5.7.92, p.7.
2. For the text see (1970) 9 *Int'l Leg Mat* 1296. The Declaration must be distinguished from the recommendatory functions of the General Assembly which, acting under the direct authority of the UN Charter Articles 13 and 14, has codified the Charter provisions on the seven selected principles of international law and created legal rights and duties deriving therefrom. These are binding on member states.
3. For this alliance see the *Guardian*, 5.7.92, pp.17-18; Islam, M. Rafiqul, 'South African "Inkathagate": A Hidden Agenda', (1991) 16 *LSB* 270-72.
4. The *Amnesty International Report* 1992 at 233-36; (1992) 8 *South African J on Human Rights* 144-48; *Time*, Aust., 6.7.92, at 20.
5. Katanga's violent attempt was supported by a Belgian mining company and Belgian troops right from the very beginning.