The period of the seventeenth and eighteenth centuries represents, in jurisprudence as in many other areas, a watershed in the development of European thought and may in effect be regarded as the beginning of the modern period. In the preceding centuries the intellectual and political life of Europe had undergone two major upheavals, the intellectual ferment of the Renaissance and the religious and political revolution of the Reformation which permanently shattered the institutional framework within which, for example, Thomist thought had originally developed. These developments engendered an intellectual climate in which fundamental assumptions could be questioned and basic issues re-examined. Like all neat categorisations of historical eras, the terms ‘age of reason’ and ‘age of enlightenment’ must be treated with great caution as necessarily gross simplifications and potentially highly misleading. The categorisation in terms of rationality and enlightenment reflects in part a tendency to a rather self-conscious and often somewhat arid intellectualism but also reflects a genuine spirit of enquiry and a desire to find rational frameworks of analysis for the discussion of major issues. The seventeenth century in particular was a period of fierce, and often violent, controversy as what was in many ways a new international order appeared while the eighteenth century in large measure built up the systems of thought which in the last decade of the century and in the next were to bring about the fiery birth of the modern intellectual and political world.

In jurisprudence the era was one of experimentation. As with all experiments, the results of some were more quaint than valuable but, equally, theoretical perceptions of great and lasting
importance were developed. In the present context two fruits of the era call for particular consideration; these are the group of theories known collectively as 'social contractarianism' and the work of Immanuel Kant.

The Social Contractarian method

'Social Contractarianism' is not a unified theory, it is instead a method of approach shared by a number of theories the essential concerns of which vary quite widely. The essence of the method is an enquiry into the rational social expectation as a means of determining the legitimate ambit of formal social prescription and in particular of positive law. This enquiry is conducted through the rhetorical device of an original 'social contract'. In effect the question is posed: 'If social order had been the product of agreement between free and rational individuals, upon what basis and to what end would they have set up their society?' The central concern is thus the proper extent of rational and formal restraint upon individuals in a society and the area properly reserved to the liberty of the individual. For the social contractarians the answer to this basic question lies in the analysis of the proper purposes of social organisation.

In one sense the use of the term 'social contractarianism' has proved rather unfortunate. There is a frequently encountered canard to the effect that as a matter of anthropological fact no primal assembly of 'free individuals' ever gathered together to 'agree' upon the basis of social life and therefore social contractarianism is misconceived and naïve. This argument is readily countered. Few, if any, social contractarians believed literally in a historical 'social contract' — the contract itself is merely a rhetorical device which is a convenient means of presenting basic questions and conclusions about the nature of society and social obligations. Social contractarianism is in fact a form of legal and social philosophical analysis, not a misconceived antique form of anthropology.

As an idea the notion of a 'contractual' basis for social obligation long predated the seventeenth century. Elements of the idea may be discerned in the Old Testament in which it is clearly indicated that the law of God was accepted by the ancient people of Israel rather than being merely imposed upon them. The notion is manifest in such Hellenistic thought and is certainly to be found in the writings of Plato in *The Last Days of Socrates* in the idea of the duty to the law, even to a 'bad' law, based upon acceptance of the benefits of life in the community regulated by the law. Something of the same idea of mutuality can be seen in St Thomas Aquinas's discussion of the office of kingship. Aquinas argued that the authority of government is Divine in source but that the mode of exercise of it is a matter upon which the community may choose and may indeed change their mind should a given form of government become tyrannical. In *De Regimine Principum* he gives the example of the deposition of the last king of Rome, Tarquinius Superbus, and the establishment of the Roman Republic in support of this contention. He is careful, however, to stress that the deposition of tyrants is a matter for action by the public leaders of the community and not a justification for individual acts of tyrannicide.

The seventeenth-century thinkers thus had a historical tradition of 'contractarian' theory upon which to draw in the formulation of their theories. It is indeed a tradition which continues and in modern dress can be found in the use of the rhetorical device of the 'actors' in the 'original position' by John Rawls in the derivation of his theory of justice.

The significance of the social contractarians of the seventeenth and eighteenth centuries was that they used the idea of the contract in the rational evaluation of law and society as a basis for the model of legitimate social structure in its own right, rather than merely as an explanation of the functioning and practical acceptance of prescription otherwise derived, as had earlier thinkers. In short, contractual bases of obligation were raised from an instrumental to a primary role in the explanation of law and the obligation imposed by it. The 'social contractarian' school covered a wide range of opinion but the work of three thinkers in particular, Thomas Hobbes, John Locke and Jean Jacques Rousseau, shows the pattern of developing social contractarian thought over the period in question.

*Thomas Hobbes (1588 – 1679)*

Thomas Hobbes lived through a tumultuous era of English history. He was born in the year of the Armada, reached manhood in the gathering constitutional storm clouds of the reigns of James VI and James I, lived through the reign of Charles I, the Civil
War, the Commonwealth and the Restoration, to die within ten years of the deposition of James II and the 'Glorious Revolution' and invitation to William III and Mary II in 1688/9. This background is important in the understanding of the political thought of Hobbes with its emphasis upon stability and order, qualities far from prominent in his own political experience. In his great work *Leviathan*, published in 1651, Hobbes sought to set out principles for the establishment of a stable social order which would secure its subjects from the primary perils of dislocation and anarchy and by virtue of doing so establish its claim to be obeyed. As a witness to civil war he considered that only such a secure order enabled mankind to maintain a level of existence above the merely brutish.

The starting point for Hobbes was the proposition that human beings are on average so naturally similar to one another in strength that a life of unregulated ‘freedom’ would soon degenerate into permanent conflict between the individuals which would prevent human life from ever rising above a brutish level. Even granted that the strong might from time to time establish local ascendancies these could never be more than temporary and precarious and the lot of the common man would in no way be thereby improved. Thus without some power exercisable over all and able to secure obedience human life would soon degenerate into a state of permanent conflict. Hobbes set out the consequences of this condition which has become famous:

... where men live without other security, than what their own strength, and their own invention shall furnish them... there is... continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.\(^5\)

This may almost be read as Hobbes’s own impression of the English Civil law, which most certainly informed his rather gloomy opinion of human nature in general. He considered that men seek power over others as a means to the end of increased wealth, influence and other ‘goods’ and secondly that men will always seek to avoid ‘evils’ and in particular the evil of their own death. In short he argued that human beings are motivated by the desire for power and by a natural instinct of self-preservation. Granted the assumptions about human nature the appalling Hobbesian vision of the unregulated ‘state of nature’ follows inevitably. The underlying purpose of social order is then presented as the means whereby this state of things is avoided and civilised life is rendered possible. It is this purpose which is spelt out in Hobbes’s conception of the ‘social contract’. The contract for Hobbes was essentially a surrender of anarchic freedom in return for a guarantee of security which was the basis of the legitimacy of the state and its laws.

Hobbes rooted the social contract in two basic natural laws which are set out in detail in *Leviathan*.

The first is that ‘... every man, ought to endevourage Peace, as farre as he has hope of obtaining it; and when he cannot obtain it he may... use, all... advantages of Warre’.\(^6\)

The second rule is that ‘... a man be willing... to... be contented with so much liberty against other men, as he would allow other men against himselfe’.\(^7\)

The first rule thus asserts an inclination to seek peace with a reservation of the right to self-defence; the second reflects a basic concept of ‘fairness’ in human relations which is a necessary aspect of any equitable social order. Both these principles are overtly concerned with the need to restrain the ambit of personal licence through the medium of collective restraint in the cause of social order. From the argument for social order Hobbes proceeds to advance the argument for government upon the following lines: (1) man is by nature competitive and unrestrained competition is incompatible with civilised life; (2) man desires the benefits of peace but in their absence reserves the right of self-defence—which in unrestrained exercise leads to the problem of (1) above; (3) the best means of avoiding this débâcle is for each individual to agree to the limitation of his personal powers in favour of a social order which is able to impose peace to the benefit of all; (4) a mere surrender of natural freedoms of competition and self-defence in favour of some concept of social order will not guarantee peace, however, because an abstention can always be reserved; (5) thus the natural capacities must not only be given up but actually and definitively be transferred to other hands, to be precise, into the hands of a political superior— the sovereign.

The Hobbesian social contract is thus a transfer of power to a political sovereign who in return guarantees the peace and social order which licentious freedom would destroy. This, according to Hobbes, is the basis of the individual’s obligation of obedience to the state. He expresses the point thus: ‘... when a man hath... granted away his Right, then he is... OBLIGED or BOUND not to hinder those, to whom such Right is granted...’\(^8\)

This, then, is the Hobbesian account of social obligation and
of the duty to obey the positive laws made by the state. Individuals transfer their personal 'political' capacities to the state in order to gain the benefits of peace and security and having done so are then under an obligation to obey the authority which is thereby constituted.

The most obvious objection to Hobbes's scheme is that no evident means is advanced of calling the sovereign to account for his use of the authority conferred upon him, or even of determining what the proper limits of sovereign authority actually are. Hobbes did not actually ignore this issue but it was very much peripheral to his central concerns. His answer to the point was essentially that even 'bad' rule is preferable to no rule, a reflection of his primary concern with the need for order in the face of the perils of anarchy rather than with the substantive morality of government or law-making. Thus Hobbes comments that:

... the estate of man can never be without some incommodity...;... the greatest,... in any form of government...is scarce sensible in respect of the... horrible calamities that accompany... that dissolve condition of masterlesse men without subjection to Lawes and coercive Power...

This is a gloomy conclusion, if not quite a counsel of despair, which was perhaps born of simple scepticism. Unprepared to take a Thomistic view of sovereignty as limited by any superior moral precept and thus unable to endow the 'lex tyrannica' with moral, as compared with formal or coercive force, to avoid the horrors of civil war or anarchy Hobbes was in the end driven to clutch at government, almost any government, as a source of security. Hobbes argues secondarily that rulers had no interest in oppressing their subjects since the vigour of the state depends upon the vigour of its people. This of course is not a satisfactory argument. The reasonable ruler would no doubt not be a tyrant, for moral as well as pragmatic reasons, but there is no reason to imagine that rulers will always be reasonable; indeed history strongly reinforces such sceptism. Hobbes in fact was not concerned with tyranny but with anarchy.

One is thus driven to enquire what is the quid pro quo which is demanded of the Hobbesian sovereign for the transfer of political power? The ruler receives power so that he can maintain the peace and order and obviate the perils of anarchy. What then if this rather basic consideration fails? In Chapter 21 of Leviathan Hobbes considers the circumstances in which the subjects' obligation to obey will be abrogated. He lists a number of such circumstances, being principally: (1) capture and release of an individual by a foreign state on terms of subjection by that state; (2) abdication of the ruler; (3) banishment, in which case the ruler could not logically demand a continuation of obedience; (4) transfer of obligation through international treaty — in short novation, cancellation, unilateral breach and transfer, to pursue 'contractual' analogies. One of these cases, however, deals with the problem of the 'bad' ruler or tyrant. The only case of failure on the part of the ruler which Hobbes does concede is that in which the sovereign fails to maintain the order which is his raison d'être. Hobbes's reasoning is that the obligation to the ruler is generated by the need for the maintenance of order and security and when that need goes unfulfilled the 'natural' right of personal self-defence, originally surrendered to effective sovereignty, resumes. A sovereign who fails to supply or maintain that peace forfeits his claim to obedience because he has failed to perform the basic contract upon which the obligation rests.

There is thus a duty imposed upon the sovereign, the breach of which can abrogate the obligation of subjects. Continuing obligation depends upon the maintenance of peace and order. However, enquiry must surely be made into the quality of this peace and order — there are after all few things more peaceful and ordered than a graveyard. Hobbes was not entirely insensitive to this issue. In Chapter 30 of Leviathan Hobbes makes some consideration of the nature of the sovereign's duty as a ruler. The duty of the ruler to maintain the security of the people is said to embrace 'not... bare preservation, but also all other Contentments of life, which every man by lawfull Industry, without danger or hurt to the Commonwealth, shall acquire to himself'. In short Hobbes, writing in the early years of the development of a capitalist economy, saw the role of government as the maintenance of stable social conditions in which individual initiative for self-betterment could flourish. None the less such matters of the quality of rule were left to the conscience of the ruler for which he would be answerable to God, and to God alone. It is only if the ruler fails to supply or maintain the essential social order that Hobbes concedes the termination of obligation through failure to perform the 'social contract'. Hobbes in fact makes the case for social stability in contrast to strife through the surrender of individual power to a
political sovereign. With the quality of the sovereign’s rule he is much less concerned, as the essential vacuity of his rather peripheral consideration of this issue in *Leviathan* demonstrates.

Hobbes’s views were received as a shockingly amoral advocacy of naked power politics in his own time and the idea of Hobbes as a grim apostle of totalitarianism lingers today. It is certainly true that Hobbes was centrally concerned with the power of government but this should not be misunderstood. Hobbes in some ways prefigured the positivist thought of the nineteenth and twentieth centuries in that, although his theory of government is certainly purposive albeit in a rather limited way, and in that sense quasi-naturalist, it is not concerned with any issues of substantive morality in government or law. This is not to say that Hobbes thought the morality of government to be unimportant — indeed *Leviathan* makes it clear that he did not, but, like Bentham, he in effect considered such issues to exist outside his innate frame of reference. In confronting the problems raised by civil strife and social dislocation it is not surprising that the main emphasis is placed upon stability, and is not unreasonable given the choice between civil disorder or order to choose the latter. Hobbes in fact was using the social contractarian method to argue the case for social order, and in the context of his times he may perhaps be forgiven if he placed an implicit trust in the willingness of sovereigns to behave in a morally appropriate way which in a less fearful age would be considered dangerous.

**John Locke (1632–1704)**

John Locke in the next generation turned the social contractarian method to other problems and became an advocate of constitutionalism. From 1666 onwards Locke was closely associated with Anthony Ashley Cooper, the Earl of Shaftesbury, a highly controversial figure in Restoration politics and a particular enemy of James, Duke of York, later King James II. This connection strongly coloured Locke’s political views. He fled abroad after Shaftesbury’s conspiracy to cause the Duke of Monmouth to usurp the throne, although there is no evidence that he was personally involved in the attempted coup. He eventually remained in refuge in Holland until James II was overthrown in the ‘Glorious Revolution’ of 1688/9 and replaced by William III and Mary II as joint sovereigns at the head of a government with which he was in very good standing. Locke’s theories in fact formed the ideological basis of the ‘Glorious Revolution’ and the constitutional arrangements which followed it. He is thus a figure of outstanding importance in the history of English constitutional development as also in that of the USA, the Constitution of which owes much to Locke’s ideas.

Like Hobbes, Locke used the social contractarian method in developing his ideas of government and state but the focus of his concern was quite different. His ideas upon government and the legitimate exercise of power are set out in his *Two Treatises of Government*. The first of these is an attack upon the idea of the divine right of kings; the second sets out Locke’s perception of the basis of civil government. Like Hobbes, Locke commences from the position of a hypothetical ‘state of nature’, the remedies to the defects of which are analysed through the medium of a ‘social contract’. Locke’s ‘state of nature’, however, differs markedly from the brutish anarchy envisaged by Hobbes. According to Locke the state of nature although without formal regulation was not wholly licentious, since there was from the beginning a ‘law of nature’. This he saw as essentially a ‘no harm’ principle which obliged each person to avoid injury so far as possible to the lives, liberty and property of others upon the basis of mutual respect. This principle in a ‘state of nature’ grounds rights not only of personal self-defence but also of mutual defence against harm among individuals. These led Locke to the conclusion that there is in nature a general and undifferentiated right to enforce a rational principle of mutual freedom from harmful incursion which is equally vested in all people in addition to the immediate and much narrower principle of personal defence. These for Locke are distinct bases of ‘punishment’, the general basis being for the restraint of delict in general, the personal basis being for the taking of reparation for some particular injury suffered. These general and personal rights to enforce a rational principle against delict make Locke’s ‘state of nature’ already in essence a ‘social’ order, albeit a very loose and open-textured one, in a way in which Hobbes’s was certainly not.

Within this state of nature Locke also argues that there exist certain definite ‘rights’ which are not dependent upon any principle of civil government, these being encapsulated in the concept of ‘property’. It is important to realise that ‘property’ in this context has a much wider meaning than its modern connotation of physical or pecuniary possessions. ‘Property’ in the sense
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used by Locke includes rights to personal freedom and economic entitlements as well as possessory rights over things. Indeed upon Locke’s construction the latter are derived from the former two. The argument is this; every person has a ‘property’ in himself and in his own skills; thus whenever he fashions something through his own labour he adds something of himself to the thing over which he thereby acquires proprietary rights. This concept, derived from Roman law, is almost a description of acquisition of title to a res nullius, a naturally occurring thing without former ownership, and, taken literally, is quite useless in the context of any economy ever so developed as that of seventeenth-century England. In the modern world it would, for example, hardly be said that a shipyard worker gains specific proprietary rights over that part of a ship such as the Queen Elizabeth II upon which he happened to work. Of course Locke’s argument must not be taken so painfully literally. The proposition actually advanced is that human beings have a natural ‘property’ in themselves and in their labour. Thus no one may properly demand the labour of an individual by subjection. On the contrary, the individual has the right to the fruits of his or her labour which means, in effect, the right to proportionate reward for work done. This can be seen as an argument of economic individualism which reflects the developing capitalist economy of England in Locke’s time. It is in fact a basic ‘bourgeois’ theory of economic relations.

All of these ‘rights’ and entitlements are regarded by Locke as having existence prior to the concepts of civil government and positive law. With so much treated as already inherent in the ‘state of nature’, what then is the purpose of civil society and the content of the ‘social contract’ at its root? The answer given by Locke, essentially, is security. Locke concedes in effect that the enforcement of natural rights through the random agency of individuals in a ‘state of nature’ could only be patchy, uneven and unsatisfactory. There is also the further problem that in the exercise of their personal rights men would of necessity be judges in their own cause with their judgement and impartiality at best questionable. In short, through insufficiency, through excess of zeal or through simple rage there would in a ‘state of nature’ be an inequity of maintenance of ‘rights’ which would be productive of insecurity of ‘property’ in the broad sense. The answer to this problem and the foundation of civil society given by Locke is the surrender of individual powers of protection and enforcement to a government in a political society which, having much greater force and being impartial as between persons can maintain natural rights with greater surety and efficacy. This is the substance of Locke’s ‘social contract’. It lies in the surrender of individual power and judgement to a governmental authority which then has power to maintain perceived natural rights in a political order. The state so created will then place obligation upon those subject to it, whose collective judgement it is taken to represent.

Order as such is not then the primary concern of Locke’s social contract: the aim is rather order of a very specific sort designed to maintain a community life founded upon clearly enunciated and pre-existing social rights. This is all quite distinct for Hobbes’s views and there is yet more significant distinction to be noted. The surrender of rights to the sovereign in Locke’s conception is not absolute and does not therefore enthrone an unlimited power to the sovereign. The purpose of government is presented as the achievement of specified ends which are taken to be the general aspirations and judgements of the community founded upon natural reason. The authority of government is not unlimited but dependent upon the continuing of the community wherein resides ultimate sovereignty.

Such a conception is of course relatively valueless, in the absence of means of implication, and this is the weakness of Hobbes’s conception of the duties of the sovereign. Locke agrees that if a civil government behaves in a manner contrary to the implication of the delegation of power made it by the community then its law will to that extent become tyrannical and its authority may by the same token be vitiated. In such a case the members of the community are entitled to resume their natural power and select a different form of government which may better be trusted to secure their ‘property’, which was the original and proper end of government. Thus we return, by a different route through social contractarian methodology, to the basic naturalist conception of law-making as a power held on trust to be exercised for the ‘proper’ benefit of the community. In some ways this parallels the Thomist view. There is, however, one major difference: Aquinas distinguishes ‘lex’ from the ‘lex tyrannica’ saying that the one has authority and imposes obligation whereas the other has only coercive force. Locke equally sees the ‘lex tyrannica’ as a breach of the trust of government, but regards this as a ground for political revolution rather than a denial of the status as such. In this analysis power is given to the sovereign by the community as a transfer of natural individual rights, which rights may be resumed
if the terms upon which the donation was made are breached. Until such a resumption takes place, the obligation owed to civil government remains. This of course follows the contractual logic of Locke’s argument. Locke’s approach was thus far more substantial in the duties which it imposed upon the state as the *guid pro quo* for its monopoly upon power. He did not, however, find it necessary in answering the problems raised by the constitutional clash of the reign of James II to go so far in his theory as did the final social contractarian thinker calling for attention in this context, Rousseau.

**Jean Jacques Rousseau (1712–1778)**

Jean Jacques Rousseau was nothing if not a controversial figure. He attracted both admiration and opprobrium in his own time and continues to do so today. He was born in 1712 in Geneva, a city-state for whose system of government he later claimed to have some admiration although his writings were far from pleasing to the authorities there. It was in France, however, that Rousseau made his greatest mark as a thinker and also there that his work had its greatest practical impact. He wrote a number of political and philosophical works of which much the most famous is his great statement upon civil society and government, *Du contrat social*, published in 1782.

It is probable that Rousseau was familiar with the work of Hobbes and Locke but, in his assumptions and conclusions, he differed from both of them in significant respects. Hobbes was concerned with insurance against civil strife and Locke with the limitation of arbitrary government whereas Rousseau was concerned with the principles upon which a truly virtuous social order could be based. He believed the society which he saw around him to be a distorted and corrupted social order which tended to make men worse rather than better by inculcating in them false pride and other vices. Like other social contractarian theorists he commenced from a rational *state of nature*, but in this case one which was a state of unrealised potential from which man had gone into moral decline as a consequence of badly conceived social orders. His conception of the state of nature was neither so rapaciously brutal as that of Hobbes nor merely insecure and inconvenient like that of Locke: it was more an amoral state of independence in which mankind might be happy but could not develop his inherent moral potential for lack of motivation or the means of doing so. Rousseau argued that man, as a social animal, finds the means of his social development within a social medium, but may develop for good or ill having until then shown a marked propensity to do so for ill. This is the implication of the famous opening statement of *Du contrat social*, ‘L’homme est ne libre, et partout il est dans les fers’, which is to say that man was born free yet he is everywhere in chains, the chains being not only those of servitude but also the intellectual shackles imposed by misconceived social structures.

There is some evidence that Rousseau originally conceived of the *state of nature* as a condition of primal innocence, but it is clear that in *Du contrat social* he perceived it was a pre-moral condition in which mankind was independent but not *free* because of the lack of any moral framework by reference to which ‘freedom’ could have any meaning. None the less Rousseau admits natural laws to exist as part of the character of man and he argues that these come to be reflected in an urge to form social groupings. Upon this analysis it is not fear or insecurity which impels mankind towards a ‘social contract’ but originally the collective advantage to be gained from group activity in, for example, hunting and agriculture. This is fuelled also by the urge of man towards association with his fellows. The social contract in fact arises, according to Rousseau, from the inability of mankind to develop morally or otherwise in isolation and the resultant need to develop a settled mode of community life.

Following this logic Rousseau saw the ‘social contract’ not as a surrender of individual power to a political sovereign but as a compact made among free individuals to enter into political society together. The contract then becomes the guiding spirit of the community, the *volonte generale* which is to say the ‘general will’. Thus each individual is said to surrender his political will to the composite will of the community and to be thereafter governed by that general will which is also the proper expression of his own morality or potential for morality. In Rousseau’s scheme the citizen is said to be ‘free’ in the sense of not being subjected to the will of any other individual (such as the Hobbesian sovereign) but is made subject to the will of the community as a whole which defines the parameters of right and duty. A man who thus obeys the rational extension of himself in the general will is not amoral ‘independent’ as in the state of nature but has the liberty of development which only a moral framework of reference can supply.
There are a number of possible objections to this scheme. As a sovereign power the general will must seem amorphous in the extreme and there is no evident reason why such a concept should at first sight be thought to differ from Locke's conception of the state of nature. Secondly, if the general will is merely the popular will, Rousseau's 'liberty' begins to sound like subjection to majority opinion which may well be conceived to be a particularly odious form of tyranny. Rousseau makes careful efforts to avoid these pitfalls. He does not in fact envisage the general will as popular opinion but more as the opinion which would be held by an informed and moral population. This is what Rousseau had in mind in asserting that the general will is always morally sound and correct but that the opinion of the populace may be misled. Rousseau also does not present the general will as a viable mode of government in anything but the smallest and most limited societies. Legislative validity in Rousseau's view can rest only in the general will but implementation and executive action in a community of any size is conceded to be vested in a government which should be one which understands and enforces the general will, *inter alia* through positive laws. It is stated that the law-maker should be a person of superior perception acting upon the general will and, thus, clearly not a mere demagogue acting upon popular opinion. The actual form of government is left fairly open, Rousseau having conceded that different societies might well find different forms of government suitable to their needs. The important limitation is that, whatever its form, a government has a legitimate authority to make laws and to regulate only within the terms of the social contract which means in fulfilment of a general will. Thus for Rousseau a law which is authoritative as opposed to merely coercive is one which is a concrete and specific reflection of the general will. Other prescriptions are the acts of a despotism and a tyranny and, being a defiance of the general will, are without moral suasion or claim to obedience.

It is important to notice here that Rousseau conceives the rationality reflected by the general will to originate in what he terms the 'Divine Providence'. His difference of opinion with much earlier thought lies in his wish to derive principles of human social organisation from the consideration of human rationality, not necessarily in the ultimate derivation of that rationality. The general will itself is the product of natural reason and therefore had certain definite limitations. Rousseau asserts expressly that the general will cannot will enslavement because that is contrary to natural reason which seeks moral 'liberty'. He further states that man is 'free' in relation to matters beyond the ambit of the social contract.

Rousseau has often been stigmatised as 'totalitarian'. There can be no doubt that his social conceptions were authoritarian and at first sight his general will bears an alarming resemblance to Nazi ideas of a debased form of *volksgeist* as 'the sound instincts of the people'. This latter doctrine of course became an instrument of arbitrary action on the part of the party which had no connection with any moral or even legal framework — it was in fact the foundation of the 'lawless' state of the Third Reich in Germany. This is a gross simplification, however, of Rousseau's argument. The general will is not popular opinion or prejudice; it is the expression of the rationally derived moral aspiration of the community and as such has limits and sets limits which would be intolerable to any modern totalitarian regime and indeed was inconceivable to despotsisms of the eighteenth century. The interesting point about Rousseau's version of the social contract is that it vests sovereignty not in a government, an external 'sovereign', but in the community itself. A government serves the general will and if it defaults it may be replaced by something more appropriate without any such break and remaking of the contract as Hobbes or Locke would have required. Rousseau's social contract is a compact for a rational social order and not for any particular form of government.

The use of the social contractarian method by the theorists of the seventeenth and eighteenth centuries can be seen to have produced a wide variety of conclusion upon the proper form and scope of legitimate government. Some commentators have argued that this diversity of conclusion is evidence of fundamental unsoundness in the social contractarian approach as a whole. It certainly cannot be said that thinkers such as Hobbes, Locke and Rousseau produced identical opinions. Hobbes argues for 'strong government' for the avoidance of the horrors of civil strife. Locke advances a 'constitutional' case for limitation upon despotism upon the basis of a more 'substantive' social contract than that required for the Hobbesian analysis. Rousseau's argument in contrast goes not to the 'contractual' basis of any particular type of government but to the basis for entry into 'society' in the first place as a means for the rational pursuit of human moral development. These conclusions are not of course by any means identical, but there is on the other hand no particular reason why it should be anticipated that social
contractarian thought should always tend to the same conclusion. Any such assumption rests upon characterisation of ‘social contractarianism’ as a theory of society and government in its own right, in the same sense that basic ‘Marxism’ might be so regarded. It has already been argued that such a characterisation would be false and that in fact ‘social contractarianism’ should be treated as a method of enquiry rather than as a ‘theory’ per se. Once this is understood the divergences of conclusion derived from the method become less startling because it becomes clear that basically different issues are being considered by the theorists concerned through a social contractarian method. Weak government as such would hardly be an aim if there is to be government at all, but at the same time the ambit of governmental power should surely be defined in a manner fit to obviate arbitrary and unaccountable rule. On a different level it seems not unreasonable to argue that social structures should be seen as based upon the moral aspirations of the community. All these issues can be discussed through the medium of the social contractarian method but remain none the less different questions open to different answers.

It may well be that in practice many social contractarian thinkers considered the issue which they immediately addressed to be the single most significant question to be asked and other issues to be merely peripheral, as appears from Hobbes’s discussion of tyranny. However, this should not divert attention from the significance of the method with its emphasis upon the importance of human social aspirations in the assessment of law and government wherein lies the continuing value of the social contractarian analysis.

In striking contrast to the often very particular speculations of the social contractarians is the work in relation to jurisprudential matters of the vastly influential philosopher Immanuel Kant who, a near contemporary of Rousseau, contributed a profound insight into the general moral nature of law.

**Immanuel Kant (1724–1804)**

Immanuel Kant cannot strictly be termed a legal theorist but his work is none the less of immense importance in any consideration of the moral nature of law and legal obligation. He was born the son of a saddler in Königsberg in 1724. After attendance at the university there and a period as a private tutor he was in 1770 appointed to the chair of logic and metaphysics at Königsberg where he remained for the rest of his life.

It is ultimately of the essence in any naturalist legal theory that the ‘authority’ of law, its claim to impose obligation rather than merely to coerce, is to be found in its moral quality rather than in its formal identity. All such theories involve of necessity some criterion of basic morality by which to judge positive laws. It is contended that such tests in the field of law are purposive in nature whether that purpose be found in the will of God or by rational enquiry into the human condition or, indeed, by some combination of these methods. It is none the less a major difficulty in such moral enquiries to find precise underlying principles to which propositions or actions which are ‘moral’ must be directly referable. It is his contribution to this area of thought which renders Kant’s work of great importance in the context of the immediate discussion.

That mankind considers himself to hold ‘moral’ opinions is beyond denial but what is problematic is whether or not such concepts are truly distinguishable from other sorts of understanding. Can ‘moral’ concepts be distinguished from, say, strongly held prejudices and, if so, upon what are they founded? In answer to this question Kant sought the basic moral principle, which is to say that underlying principle to which any action which is morally ‘good’ must be capable of reference. His ethical theory is to be found in the *Groundwork of the Metaphysic of Morals* published in 1785 and in the *Critique of Practical Reason* published three years later in 1788.

Kant commences his argument from the working hypothesis that moral judgements may be ‘true’, as opposed to mere conceit or opinion, and then proceeds to enquire into the bases upon which such truths could be maintained, arriving finally at the primary basis of moral judgement. He then sought to prove the basic moral principle by analysing rational insight into the principles of actions, proceeding by this means back to the same original principle. In the *Groundwork of the Metaphysic of Morals* Kant argues that the only phenomenon which can be considered to be purely ‘good’ is a good will. The same results might be produced, according to circumstances, by actions resulting from a ‘bad’ will but only a ‘good’ will is necessarily ‘good’ irrespective of circumstance or even degree of achievement. Such a will is, in short, ‘good’ per se and not merely ‘good’ in its practical product. How then is a ‘good will’ to be defined? To will is to decide upon a
course of action and not merely to desire a result; a will is then seen 
by Kant as ‘good’ if it is a proper fruit of rationality. In the case of 
mankind a rational will is defined in terms of ‘duty’. Thus for 
Kant the will, decision upon a course of action, is ‘good’ only if it 
is reached pursuant to duty. This aspect of Kantian thought has 
been much criticised as an apparent linking of aspiration to virtue 
with a grim sense of obedience. This, however, is not what is con-
voyed by the Kantian sense of ‘duty’. There can be no objection to 
a person desiring to do or enjoying doing what is his or her ‘duty’;
‘duty’ here affirms the inherent ‘rightness’ of an action which is 
done because it is ‘right’ — whether or not it also fulfils a desire or 
aspiration of the actor.

If a ‘moral’ action is one which is willed pursuant to duty in the 
sense of concordance with what is ‘right’, it must be determined 
how in fact ‘right’ for this purpose is to be defined. Kant's 
argument that the morality of an action is founded upon the 
maxim by which the actor proceeds in deciding upon its per-
formance requires that such maxims be referable to some general 
moral law. The general moral law at this level must clearly be a 
principle of universal rationality and this leads Kant to the funda-
mental principle enshrined in the famous ‘categorical imperative’.
This is that a man should act only upon a maxim which he could 
also will to become a universal law. The essence of this basic 
concept is that any maxim founding a ‘moral’ action will be one 
which could be operated by all people for their general good and 
not merely by an individual for particular advantage in a given 
case. It is a principle of uniformity providing that all ‘moral’ 
actions are founded upon compatible maxims which concord with 
a general rationality rather than merely representing transient or 
particular desires. The concept can be expressed at its most crude 
in the idea that no person should act upon a maxim which he 
would not be willing to admit as a foundation for universal action, 
including in respect of himself.

Kant argues that the categorical imperative provides an absolute 
test for the morality of any given maxim. He demonstrates this 
through a number of examples of ‘immoral’ maxims for action. 
Thus if a man acts upon the maxim that he will borrow money at 
need, promising to repay although he knows that in fact he will not 
do so, that maxim could not be made universal because if it was 
the whole concept of ‘lending’ and ‘borrowing’ would be entirely 
subverted. Thus the maxim conflicts with the categorical impera-
tive and may be judged an ‘immoral’ basis for action as leading 
to contradiction when made of universal application.

In his account of Kantian theory Körner suggests that, in a 
much more rigorously developed form, there may be a link 
between Rousseau’s notion of a ‘general will’ which is necessarily 
morally correct and Kant’s tests of conformability with universal 
moral law. It is certainly the case that both conceptions link 
morality to the possibility of general as opposed to particular good 
but, as Körner points out, Rousseau affords us no real criteria by 
which to distinguish the moral from the immoral in practice. 
Kant’s categorical imperative by contrast does not purport to offer 
yany substantive guidance but rather a means whereby substantive 
maxims for action can be related to a basic test of universality. The 
criterion afforded by the categorical imperative is thus universal 
and non-substantive, but can it in fact determine the morality of 
all maxims? The principal problem case is an instance in which a 
choice of alternative but incompatible ‘moral’ maxims for action 
appears to exist. An obvious instance here is provided by the law of 
mariage. There are three possible forms of matrimony: monogamy, 
polygamy and polyandry. The adherents of these 
various forms of marriage naturally assert the moral 
excellence of their own arrangements and, commonly, decry the ‘immorality’ of 
the alternatives. This implies that the underlying maxims are 
incompatible and that therefore at least two, if not all, of these 
possibilities are in fact ‘immoral’. These maxims can readily be 
identified. In the case of Christian ‘Western’ marriage the 
relationship can be defined as ‘. . . the voluntary union for life of 
one man and one woman, to the exclusion of all others . . . ’ If 
this becomes a universal maxim then polygamy, polyandry or 
‘arranged’ marriages are of necessity ‘immoral’. It is not obvious 
how the scheme of the categorical imperative can take account of 
such apparent moral alternatives. It may of course be argued that 
some aspects of these forms of matrimony are indeed ‘immoral’ 
but it must surely be conceded that to a considerable extent the 
range of difference results from simple cultural diversity, in short 
representing genuine ‘moral’ alternatives. The problem is of 
course resolvable if one questions the level at which the basic 
definition of Western Christian marriage in Hyde v Hyde and 
Woodmansee is set. It may be a particular cultural application of a 
more basic maxim to which the test of the categorical imperative 
can be applied satisfactorily across the range of cultures. It may be 
significant in this context that modern matrimonial practice does 
take account of different cultures not conforming to the Hyde v
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Hyde concept without the subversion of the institution of marriage. If this is accepted then the problem of cultural diversity does not constitute an objection to the operation of the categorical imperative.

The categorical imperative sets a test for the informing principle, the maxim of an action. Actions, however, are generally undertaken with ends in view and these, as well as the informing maxims, fall within the purview of moral assessment. The moral nature of the relationship of means and ends was not ignored by Kant. The solution to the problem is found in the 'principle of right' which is the proposition that humanity, whether in the person of the actor or in any other person, should never be treated merely as a means to an end but always accorded respect as an end in itself. This is a basic principle enjoining respect for human individuality per se. The application of the principle may readily be demonstrated. Take, for example, the problem of pornography. This is often addressed as an issue between 'morality' in a rather constrained 'Victorian' sense and 'freedom'. Upon the application of the principle of right the matter at issue is actually somewhat different. The subject of pornographic material, usually a woman, is by definition being treated as an object — not in the celebration of her human individuality but as an impersonal almost mechanical means to the end of the sexual stimulation of the recipient of the material concerned. The humanity of the subject is thus degraded and the fundamental 'immorality' of pornography is thereby exposed. The commonly encountered arguments that the readers or viewers of pornography enjoy it or that the subject of pornography 'do it for the money' or even enjoy their part in it is not relevant upon this perspective. No one, whether recipient or subject, can be 'right' to participate in the degradation of the humanity of any individual person and it is this which would rest at the base of any Kantian objection to the preparation and dissemination of pornographic materials.

It should be added that although in the Kantian, as in any other, thesis morality appears as a constraint upon action, it is in fact founded upon reason and is ultimately a principle of freedom in the development of human potentialities. According to Kant knowledge of right and justice exist a priori, but, because human perception is clouded by emotion and irrational impulse, natural principle is necessary and appears as a constraint upon action even though it is in fact the expression of moral freedom.

On this understanding human positive law, a formal prescription designed for the general guidance of action, should concord with the categorical imperative and should tend to the furtherance of humanity in accordance with the principle of right. It should not, for example, tend to the exploitation of the many in the interests of the few, or even of the few in the interests of the majority. A law which does not meet these criteria is without rational justification and is morally insupportable. These are not of course criteria for the assessment of positive law alone but a concordance of human and universal reason applicable to all human actions including the making of positive laws. The value of Kant’s moral theory from the viewpoint of the legal theorist lies in its generality as a means of relating maxims of law to universal reason. The tests are not substantive in nature but seek to assess the principles informing positive law in terms of compatibility with a universal rational scheme. Unlike social contractarianism this is not merely a method of enquiry into particular questions but a test in its own right of the rationality of law-making which must play a vital role in any ‘naturalist’ discussion of the proper purposes of law-making and the propriety of the content of given laws.

The rationalism of the seventeenth and eighteenth centuries contributed valuable new methods and insights to the study of legal theory, in some respects foreshadowing the innovations of the nineteenth century. There are, for example, strong hints of later positivism to be found in the work of Hobbes. It is misleading, however, to seek some great divide between a preceding ‘age of faith’ and the ‘ages of reason and enlightenment’. The context undoubtedly differs but the basic issues do not: the focus remains the authority and proper scope of ‘law’-making as compared to the imposition of arbitrary or ‘tyrannical’ demands. The concerns of the social contractarians can be seen as particular instances of these basic issues, the universal reason of Inmanual Kant is in the end functionally convergent with, if different in form from, the Lex Divina of St Thomas Aquinas. In this perspective the development of ‘naturalist’ enquiry can be seen as continuous rather than disjunctive and so capable of rendering an analysis of ‘law’ which is in fact the fruit of a process of development rather than of random and incompatible speculation.

Notes

1. Elements of a notion of consensuality at the root of obligation can be
seen in both ancient Judaic and Hellenistic thought. See Chs 1 and 2 earlier.
2. See Ch. 1 earlier. In particular the mode of presentation of the Mosaic law to the people of Israel.
3. See Ch. 2 earlier.
6. Ibid., Ch. XIV, p. 64.
7. Ibid.
8. Ibid., p. 65.
9. Ibid., Ch. XIX, p. 94.
11. *Leviathan,* Ch. XXX, p. 175.
12. It appears from *Leviathan* that Hobbes may at least to some extent have believed in the reality of the 'state of nature'. Locke, however, clearly did not.
13. Locke, *Two Treatises of Government,* Bk. II, Ch. II, s. 6.
14. Ibid., Bk. II, Ch. II, ss. 6–8.
15. See Locke, *Two Treatises of Government,* Bk. II, Ch. V, especially at ss. 44.
17. Ibid., Bk. II, Ch. 3.
18. Ibid., Bk. II, Ch. 6.
19. A point rendered less surprising than might be otherwise thought if it is recalled that Rousseau at various times wavered between adherence to Calvinism and Roman Catholicism.
20. See Kant, *Groundwork for the Metaphysics of Morals,* Chs I–II.
21. See ibid., Ch. IV.
23. Körner makes reference to this particular issue, see *Kant,* pp. 140–1.