



Authors of Their Own Lives? Children, Contracts, their Responsibilities, Rights and Citizenship

Tom Cockburn

University of Bradford

t.d.cockburn@bradford.ac.uk

Abstract

This article explores contract theory and suggests that a focus on contracts provides an understanding of what it is to be human and the concomitant rights that spring from this. Thus despite children being a 'special case' and requiring higher levels of protection and intervention than adults, this always remains a gift that does not have the clarity or effectiveness that contracts provide. While retaining a constant critical distance attention to children's 'ability' to write contracts illustrates in a clear way the evolving capacities of the child and the graduated way in which children are expected to gain responsibilities. This more complex and contested formulation of rights tends to be embedded in specific case laws at a local level, in direct contrast to the more abstract forms of rights that may present all children as vulnerable and lacking. Though the prism of contracts, a perspective to wider economic inequalities is enabled in a manner that may give us a different approach to issues such as consumerism.

Keywords

children; contracts; consumption rights

The issue of 'contracts' has a long and extensive literature in political theory.¹ At least since the 17th century onwards, the 'social contract' has been the cornerstone of citizenship theory in the English-speaking world. Few theorists, and no political programmes, have since explored the formulation of autonomous and independent people coming together to formulate a social contract amidst economic inequality and with the complete writing out of children from this agreement.² Children are not alone in this exclusion as women, prisoners and 'foreigners' were also written out as 'incompetent', incomplete, unduly under the influence of other people or as 'undeserving'. Thus, within a

¹ For an interesting analysis of 'social contract' theory from a feminist perspective, see Carole Pateman's (1988) *The Sexual Contract*. John Rawls (1972, 1993) is perhaps the most eloquent and influential liberal development of the term.

² With the exception of John O'Neill (1994).

supposed society of free and equal individuals showed, some were portrayed as in some ways less, or incomplete, human and thus lacking the capacity of writing contracts. Even today, while we may be tempted to congratulate ourselves on the better ways we recognise and protect the rights of children, a cursory look at the statistics on domestic violence and child abuse dents such optimism.

This article revisits contract theory and suggests that a focus on contracts provides a deeper understanding of what it is to be human and the concomitant rights that spring from this. Thus despite children being a 'special case' and having higher levels of protection and intervention than adults, this always remains a gift that does not have the clarity or effectiveness that contracts provide, thereby, accounting for some of the vulnerabilities children have from their full human rights. Secondly, a focus on children's 'ability' to write contracts illustrates in a clear way the evolving capacities of the child and the graduated way in which children are expected to gain responsibilities (Lansdown, 2005). For instance, there is no real bar to children making the contract to purchase a glass of milk (assuming the child can afford it); however, there are restrictions to a child purchasing alcohol, an 'offensive weapon' or exchanging a contract of marriage. This more complex and contested formulation of rights tends to be embedded in specific case laws at a local level, in direct contrast to the more abstract forms of rights that tend to present children as vulnerable and lacking. Thirdly, viewing children as authors of contracts, rather than passive recipients, a different approach to issues such as consumerism and wider social inequalities can be illustrated. Finally, attention to children's right to make contracts illustrates ways in which children's rights are curtailed and to identify actions to support them from those adults and organisations concerned with children's rights. In short, and given the paucity of direct attention, a focus on children's contracts may provide an agenda for further research or for social action.

Social Contracts, Citizenship and Children

So what is a 'contract'? In most countries that adhere to commercial law a contract is basically an agreement between two parties, where one party supplies a service and the other pays for it. It needs to be noted that the discussion below focuses on practice used in English law. Although, divergent approaches to interpretations will be adopted world wide, there is still some form of legal recognition to the various ways that legally binding contracts can be drawn up (McKendrick, 2011). The most common way of making a contract is for both parties to sit down and draft a contract in writing, with all the terms and conditions laid out. Regardless of whether this contract is set down in

writing, or given orally, it is still a binding contract under law. Thus under the eyes of the law oral contracts are just as legally binding as written contracts (albeit less easy to enforce). These must include an offer, acceptance and an intention to create a legally binding contract. There are a variety of ways in which this can be achieved in different media, such as e-mails, faxes, telephone calls, etc are all considered binding legal contracts. What is important is the degree of acceptance of the contract made or implied and any breach can legally be disputed. Contracts are thus legally binding and the terms and conditions set out in a contract are of paramount importance. However, most courts recognise that contracts can be limited or deemed unfair if the contract was inequitable, or there was a lack of good faith between the parties, or there was an imbalance in the terms towards one of the parties' rights and obligations.

Discussion of contracts amongst political philosophers begins by looking at the work of John Locke. Locke's *Two Treatises of Government*, was published in 1690 in order to justify the 'English Revolution'³ of 1688 and we find that personal liberty is the overriding ideal, of which, political society exists entirely to protect that personal liberty. Locke uses the word 'property' to include human life and refers to 'that which belongs to each person and encompasses each person's life, liberty and possessions'. Property, for Locke, is an important term referring to the thing a person needs to be free; the sole purpose of political society is the protection of each person's property from invasion or appropriation from others, whether this is other private individuals or governments. The invasion or appropriation of a person's property is a violation of their rightful freedom. For Locke, the only kind of political arrangement that protects people's rightful amount of personal liberty is the one to which they owe obedience. In order to justify political society Locke instigates a hypothetical pre-social 'state of nature'. In the state of nature all persons are equal: by this Locke means that nobody is entitled to exercise absolute power over another. Nobody is born a slave and everyone is equal in the eyes of God and in the eyes of reason, therefore, all individuals have an equal right to be free. However, participants come together in a form of contract with one another and a sovereign to create the peace and provide a force capable of ensuring the proficient exchange of contracts.

However, in Locke's work, and in general liberal political theory, there is a fundamental tension in social relationships under this social contract. On the one hand, people are moral equals and possess equal rights to their own preservation and the respect to have the equal recognition to author their

³ This was not necessarily a 'revolution' as was to be later used to describe the French, American and industrial revolutions. It was more a takeover of the Catholic Stuart throne by the protestant William of Orange.

own contracts with government and other private citizens. But on the other hand, they are fundamentally unequal in relation to material possessions, as there is a right to 'free exchange' and to transmit their property to others. This material inequality distorts the moral equality of the original position in the 'state of nature'. Locke went on to justify slavery, 'domestic rule' and 'ordinary discipline' of men over women, children, 'servants' and waged employees, because of their material or social dependence. In effect, these people traded in their fundamental freedoms for financial and social support. This rule of independence (or lack of dependence), under the social contract, realistically made men of property as the only full holders of political and civil rights, and thus the only full members of society. However, Locke's ideas were advances on existing patriarchal theories; Locke questioned the extent of women's passivity, contested the literal ownership of children and queried the structuring society according to kinship. In contrast to previous political philosophers, Locke argued that 'parenthood', although an important institution, nevertheless required specific rights and limits. Parental authority was only a temporal one and was restricted to the period of a child's life that preceded the 'age of reason'. Locke states:

Children ... are not born in this full state of equality, though they are born to it. Their parents have a sort of rule and jurisdiction over them when they come into the world, and for some time after, but it is a temporary one. The bonds of subjection are like the swaddling clothes they are wrapt up in and supported by the weakness of their infancy. Age and reason as they grow up loosen them, till at length they drop quite off, and leave a man at his own free disposal (Locke, 1986, p.142-143).

In *Some Thoughts Concerning Education*, published in 1693, Locke introduced a 'developmental' understanding of a child's nature. The purpose of education was to produce a rational man by controlling and structuring the child's environment where learning would be like writing on the blank slate of a child's mind. Central to Locke's psychology of children was the distinction between the child without reason and the (educated) adult in possession of reason. Children thus do not, and cannot, hold property and thus have no executive rights to offer in any government of consent and can only have their natural rights protected by either parents or government. He thus retained children in a subordinate position at a societal level since they could not 'reasonably' engage in the consenting to a social contract and were instead dependent upon others.

Cunningham (1995) notes that although Locke says children 'should be treated as rational creatures' and thus their curiosity encouraged, nevertheless, this incipient child-centredness 'was continually blunted by his stress on the overall purpose which was to produce an adult who conformed to the role of someone in her or his rank' (Cunningham, 1995, p.64). Thus, there was a focus on education that was to produce citizens not in the here and now but as a 'complete' adult citizen who would materialise in the future.

Contract theory developed and was refined in the 18th and 19th century by thinkers such as Jean-Jacques Rousseau, Adam Smith, John Stuart Mill, amongst others, into a system of natural rights that served to exclude women and children, as well as the economically impoverished. Even the children of the property-owning classes were considered 'pre-moral', unable to comprehend or act appropriately in the contract-making public sphere, free from dependence upon others. In the 19th century, with the industrial revolution, new ideas came to prominence that challenged the exclusivity of natural rights and citizenship. New, large scale and more powerful women's and working class movements challenged many of the assumptions of natural law to lay claims for extending citizenship. The extension of these groups and the development of the new 'social contract' by Beveridge in the 1940s consolidated adult civil and political rights and added new social rights to health care and income security (Marshall, 1950). Although these movements arguably benefited children's material lives, this was to the detriment of children's moral natural rights to one increasingly shaped by the bourgeois image of 'innocence', 'incompetence' and 'vulnerability'. Thus, there is very little discussion of extending political rights to children, with the exception perhaps of a modest lowering of the voting age.

Contemporary Contracts and Children

The Lockean assumption of contracts and reason can be seen in English contract law as a case in hand. A 'minor' is any individual under 18 years of age. This is, of course, historically constructed and variable: it had been 21 until the Family Law Reform Act of 1969 defined the age of majority at 18. Prior to this throughout history the age of majority, if defined, varied (Holdsworth, 1936). Today, English law presumes that children under the age of seven years do not have the power to make contracts, along with those adults deemed mentally ill, or those who are very drunk or drugged. If a minor under seven does enter into a contract the law always assumes that he or she cannot understand the implications. Children lack the 'real capacity' to enter into a contract with them, although the adult party to whom the child contracts is bound by their contract. Thus, the 'general rule' of English (and most modern legal systems) is that contracts have a caveat where a minor will remain protected even to the disadvantage of the other party. The minor is able to cancel any contract at any time prior to reaching the age of majority and for a reasonable period after that time.

However, minors do need to be able to create binding agreements, and are legally bound to their contract, when acquiring essential items for living. These 'necessaries' include goods and services, which are considered necessary for

ordinary living or are beneficial to them. These are mostly to do with contracts for service, apprenticeships, education or employment that tend to affect minors at the older teenager age range, although not exclusively so. The rationale behind this exception is to give organisations certainty when entering into a contract with a child that enables that child to earn his living or to start to do so. This is fairly evident in the cases of education and apprenticeships. It also includes obvious purchases, such as food and clothing. Contracts with minors span a wide range of situations and include expensive and far-reaching purchases. Minors may contract for the purchase or lease of land, or for a service which carries with it ongoing obligations (such as marriage settlements, or the purchase of shares); such a contract will be binding upon the minor upon reaching the age of majority, should they not choose to repudiate it within a reasonable amount of time. The 'reasonableness' of the amount of time varies. Financial obligations, which fall before repudiation, are binding on minors and a minor in an agreement to rent a flat may be sued for non-payment of rent.

Minors have the capacity to enter into contracts for employment, and these are binding when the terms are of benefit to the minor. Thus minors are bound to employment contracts providing the employer provides a safe and generally is to the advantage of the minor.

Although it is clear that contracts for necessities can legally bind minors, the terms of such a contract may defeat it. Where a contract contains particularly burdensome or unfair terms, the courts may decide that a minor does not have the capacity to be bound by them. For instance, if a minor hires a car and through no fault of their own they are involved in an accident, the hire company cannot place the risk of the hire entirely at the minor's jeopardy.

Under English law the necessities of one minor will not necessarily reflect those of another. The particular circumstances, such as age and immediate needs, may lead to differing outcomes. This is seemingly unproblematic if one accepts all children to have a similar degree of equality; however, this cannot be assumed in England, given the large levels of economic and social inequality. Indeed, looking not just at purchases but at educational contracts, are the benefits of going to a poorly run school to a child's benefit? Yet many children of poorer parents are obliged to do just that.

Contracts and Evolving Capacities

Although social contract theory can be seen to operate more clearly in those countries which owe most to the liberal tradition, such as the United Kingdom or North America, inequalities and the influence of liberal and

neo-liberal ideas can be seen in other European corporatist, Catholic and social democratic 'welfare regimes' (Esping-Andersen, 1990). The liberal assumption of the incompetent, vulnerable, innocent, 'blank slate' that characterises children in political theory, is only partially accepted in the everyday world. The complexities in which children's competencies are engaged in are recognised, even by legislators. Thus in England there are specific laws which define the ages in which people can buy aerosol paint (16), firearms (17 with a firearms certificate), knives and fireworks (both 18). Interestingly, there are no limitations on what age children can have body piercing.

There are no limitations as to when a child in England can open a bank or building society account, other than those defined by the individual banks or building societies. Credit or overdrafts can also be obtained, although this is usually subject to a guarantor, as we saw in the previous section, under-18s are not responsible for debts. This freedom from responsibility, while an important and necessary element of protection for children, comes at the price of financial independence. Furthermore, legislation actively denies children under a certain age of the ability to engage in the contract of exchanging their labour, so fundamental in establishing citizen identity. At a wider level the limits to children's ability to contract for credit prevents children and young people from setting up their own organisations, since it is necessary in English law for a treasurer to be named to set up a recognised civil society organization (Cockburn and Cleaver, 2009).

Thus, children have been compelled to be dependent upon adults. The lions' share of the responsibility for children falls to a child's biological parents. Indeed, in official documents 'adults with children' claiming benefits are referred overtly as 'adults with *dependents*'. In the 20th century the 'welfare state', especially after World War II, had part responsibility for children. The post-War state had responsibilities to provide income, education, health and housing for all citizens at the point of need to all, including children. However, in recent years parents are becoming more responsible for their children with a shrinking away of the state's responsibilities. Such and Walker (2005) have noted that the problem of rights and responsibilities being framed through dependency leaves parents as alone responsible for ensuring the rights of children are met.

Children's ability to contract or negotiate a contract with the state has never been taken into consideration. The move towards a more contractual welfare state around ideas of 'consumerism' and 'choice' has, at least nominally, provided contractual space for adult agency in the negotiation of choices. However, in legislation on parental choice in education, for instance, there is no room for reciprocity, interactivity and negotiations of rights and responsibilities between parents and children. As incompetent 'adults in waiting', children are excluded from the responsibilities of the adult world.

Children under 16 years of age are reliant on parental approval to engage in the significant contracts that affect their lives in the fields of education, housing, income and so on. There is the interesting exception of children between 16 and 18 years of age where a gradual increase in contractual competence is assumed. Although, there is little logic to how the age increments are put in place. Children at 16 can live alone, have children and write employment contracts, yet cannot begin to apply for a car driver's licence until they are 17.

These specific legal stages in this sense seem absolute. However, when this is transferred into the real lived lives of children the complexities of the issues surrounding 'evolving capacities' can be discerned. The European Convention on Human Rights (ECHR) – enacted in the UK by the Human Rights Act 1998 – argues that self-determination for those with relevant competence is no different, whether they are an adult or a child. Indeed, the ECHR and the United Nations Convention on the Rights of the Child (UNCRC) advances the notion of generic children's rights. In English law, as noted above however, the more 'abstract' principles of legislation are interpreted and re-interpreted through 'case law'. It is the large body of case law that has been evolved and shaped through the national political culture of politicians, media and the general public.

The relationship between children's and parents' rights has been referred to above. During the 1980s debates in the UK added another dimension to children's 'competence' by engaging with medical knowledge. At first sight, the *Gillick* principle and the Children Act 1989 empowered children under 16 to receive contraceptive advice without parental knowledge to protect children fearful of their involvement (Clayton, 2000). A child could give consent – thus the ability to write a contract – to medical surgery without a parent's consent. A child's 'competence', Lord Scarman described as a 'significant understanding and intelligence to enable [him or her] to understand fully what was proposed' (quoted in Perera, 2008, p.413). Furthermore, there is no necessary lower age limit for this competence in English law and the Lords felt that there could be children as young as 12 that could give consent. There is no necessary scientific grounds on why this cannot be lower than 12; however, this frequently does not fall below 14 in real cases.

This was a considerable move forward in children's rights and debates soon formed on the very difficult area of what is actually the level of understanding required for a child to gain competence? Fundudis (2003) argues, in the medical context, that this requires a patient to specifically understand and weigh up information to arrive at a decision. This in other words is the *capacity* to understand, interpret and evaluate information and this is extremely difficult to prove and places the burden of proof on a doctor. The child's entitlement to veto conflicting parental wishes is usually qualified by the necessity of support

from another adult, in particular doctors' opinions that can counter parental views. Thus, the measures of a child's competence and capacity to be right are only correct when other adults agree that it is correct. Thus the rights of competent children under 16 are not set clearly in statute but are only given this through case law and the effectiveness of the Human Rights Act 1998 and other diets of human rights are yet to be fully understood.

Children and Consumption

It is very hard for discussions of children's role as consumers to move away from the image of children as a 'victim': a victim of advertisers, adult sexual themes or as being at the receiving end of inequalities of income and consumption. It is certainly unarguable that children in advanced capitalist societies are the targets of multi-billion dollar enterprises from the high streets, media and commercial spaces. Indeed, commercialism is increasing in terms of its market valuation and entrenching itself, with the new media, into more and more spaces where children live. Thus, consumption is seen as something which children are socialised into, moving from incompetent consumers as children to competent consumers as adults. Children and consumption is often placed ambiguously as either empowered or exploited. Most academic and popular contributions have fed into the 'child as exploited' model. Thus Neil Postman's (1982) *The Disappearance of Childhood* characterizes children and childhood as becoming 'lost' as the media's 'total disclosure' of information that forces children to 'grow up quickly'.

The exception to this has been from the Childhood Studies and sociological perspectives (see Martens *et al.* 2004) that have attempted to bring in children's own experiences and understandings of consumption (Pilcher, 2011). While this increasing and valuable body of literature is welcome, Daniel Cook (2009), however, notes that businesses and enterprises seeking to provide goods and services for children have long engaged with children's wants, desires, viewpoints and choices. It is the other world of adults around policy makers, parental fears and a branch of media happy enough to pander to these fears that have presented children as only victims and exploited beings blank and passive enough not to be able to resist the actions of marketers.

The passive image of a child consumer thrown about, manipulated and buffeted by marketers and hard-hitting sales people does not reflect the reality of children's relationships with consumerism. Nairn (2011) has shown how children, while coveting certain brands and technologies, did not regard them as central to their well-being. Instead, material objects and consumer goods were wanted to fulfil certain symbolic and social functions in their lives. Thus,

goods and services were wanted because of the social utility, rather than the individual utility.

Cook (2009) also acknowledges that it is through the vehicle of consumption and media activities that children form relationships with their parents and other adults, thereby dispelling some of the fears of a 'disappearance of childhood', or a separation of the worlds of adults and children. As Peterson (2005) has pointed out, it is through global brands and media entertainments that has enabled an intermixing of childhoods across continents, cultures and classes.

There are still, nevertheless, problems with consumerism. Notably, those children from low-income families who find themselves outside of a great deal of valued culture. According to Wilkinson and Pickett (2009), increased economic inequality influences the well-being of children and might easily lead to social exclusion. The lack of financial resources may develop into social marginalization because resources are needed in order to be a participative member in society. As noted above in contemporary society, consumption is central in people's everyday lives and the construction of their identities. Therefore, consumption – the purchasing and possession of goods and services from the market – has become an important dimension of social inclusion, especially among children and young people. Put the other way, lack of financial resources can exclude children from social activities and networks (Pugh, 2004).

Redmond (2009) nevertheless notes that children experiencing poverty are active in creating models and strategies to influence the consequences of poverty and moderate their effects. On the other hand it is necessary to remain cautious about giving children unrealistic capacities; Cook (2005: 156) notes the 'empowered child is superheroic. As an active, knowing being who makes her or his own meaning out of every morsel of culture, the empowered child offers hope, rather than fear, about the ultimate locus of power in the world.' Children, like adults, are both individual and dependent social agents and the one should not exclude the other. Thus, as Cook (2009) concludes: 'children's place in consumer culture must be engaged in ways that recognize the hand of corporate power in the hyper-commercialization of childhoods while also acknowledging children's stake in commercial life as something other than exploitation' (Cook, 2009, p.343).

The most useful ways of understanding children as consumers is recognising that although they may be on the receiving end of consumer exploitation, they are also empowered by the practices of writing contracts around consumption. A recognition of the multi-layered nature of children's consumption practices serves to go beyond the straightforward and taken for granted assumptions about contracts, children and childhood.

Contracts and Social Provision

If the act of consumption is rarely entirely an individual action and social by nature, the writing of contracts are also social in character and thus it is necessary to move away from seeing them as an individual act. Some writers have argued that the increasing shift towards privatised consumption has transformed social relations, moving the power away from those who control the delivery of goods and services to those who use it (Saunders, 1986). Therefore, the argument goes, individuals will have more control over the state and public sector classes. There has been a shift away from state or collectively provided to privately funded services. For instance, in 2007 nearly 17 per cent of British children attended independent school (DCSF, 2007). There has been an ever-increasing move towards 'markets' within public provision, thus the 'social contract' envisaged by Beveridge in the 1940s between the state and people can be seen as a series of Lockean contracts with service providers across both the public and private sectors.

The more contractual nature of the individual and state relationship does not lead to positive outcomes for all. It is necessary to distance ourselves from the merits of the move towards a more 'consumerist' provision, the critiques of which stretch beyond the purposes of this article. Very quickly, there is growing evidence of this 'consumerism' leading to greater inequalities, a restriction in the relationships between service provider and receiver, and so on (Vandenbroucke and Vleminckx, 2011). However, it is necessary to note that children may be presented with some opportunities to participate as consumers, as well as a danger of being further left out of these decisions. Rather than the state entering into a contract with children themselves they are more directly contracting with parents and carers as those *responsible* for children.

It is hoped that parents would engage with children with major decisions, such as school choice, where to live, decisions on medical treatment, and so on. There is some evidence too that families are increasingly doing this (Mayall, 2009). However, it is necessary to point out that there is no compulsion (and little encouragement) for children to participate in parental decisions over these matters (Jones and Welch, 2010). Indeed, the direct provision of services by the state has been seen by some commentators as a subverting of parental power (Holland *et al.* 2005). Thus some children may become removed from the greater 'choices' offered within a marketised system of state and social provisions. Indeed, evidence exists that discrimination takes place in some families because of gender, birth order and sexuality where even emotional security and affective support are lacking, let alone equitable participation in social rights (Engle, 2006).

Conclusion

So why should there be attention paid to children as contracting citizens? There are many reasons why encouraging children as authors of their own contracts could lead to distinct problems. First, it could fragment children as a social category into a series of individuals isolated from common causes. There is, of course, an obvious view that sees contracts as a potentially divisive construct that may contribute to maintaining social inequalities. Additionally, identities of consumption are arguably shallow and trivial. Furthermore, as environmentalists have argued, socio-cultural patterns of over-consumption, within the neo-liberal economies of developed societies, present an impending ecological threat to individual, social and global well-being. Finally, issues around contract cover goods and services provided by the state, collective or private markets. These do not cover arguably the most important aspects of children's lives: the care and love they receive. These are provided in the context of domestic production and given by siblings, mothers, fathers and other carers. Thus it is essential to maintain a critical distance to what an attention to contracts may offer.

However, contracts have real, tangible and enforceable obligations on all parties and allow children to be real partners in issues. These issues can affect their lives in important areas, such as decisions on housing, education and health. These should not be refused lightly.

The process of drawing up and agreeing contracts presents an image of an agentic person who is active, important and has access to some form of power. This is in marked contrast to the constructions of passivity, vulnerability, risk and endangerment that has characterised the history of childhood: one only has to look at images of the 'schooled' child, or the 'sick' child, 'poor' child, the 'child in danger', on which the state and others have 'intervened' with such ambiguous results. Those in receipt of state welfare are presented as passive and dependent whether there are contracts or not. A focus on contracts may offer some ways of progressing beyond negative stereo-typing to a more complex and social child.

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