

Book Review: Children's Socio-Economic Rights, Democracy and the Courts

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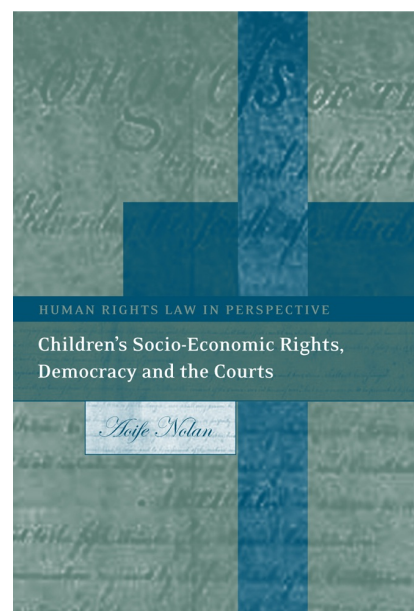
*Despite increased academic interest in both children's rights and socio-economic rights over the last two decades, children's social and economic rights remain a comparatively neglected area. This is particularly true with regard to the role of the courts in the enforcement of such social rights. **Aoife Nolan** attempts to remedy this omission, focussing on the circumstances in which the courts can and should give effect to the social and economic rights of children. **Anashri Pillay** thinks this book is on the course to becoming the 'go to' source on the adjudication of children's socio-economic rights for human rights scholars and practitioners.*



Children's Socio-Economic Rights, Democracy and the Courts.
Aoife Nolan. Hart Publishing. September 2011.

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[Aoife Nolan](#) is currently Professor of International Human Rights Law at Nottingham University. She has published widely in the field of human rights – international, domestic and comparative. She has also contributed to human rights practice – in particular, she has acted as expert advisor to national and international organisations working in the field. *Children's Socio-economic Rights, Democracy and the Courts* brings together Nolan's two main areas of expertise – socio-economic rights; and children's rights. The breadth of the book is ambitious and impressive. It draws on the experiences of courts in a wide range of jurisdictions from Brazil, India, to the United States, and to the European and Inter-American courts of Human Rights.



This book is also timely. Despite the widespread ratification of the [Convention on the Rights of the Child](#) and the protection of children's socio-economic rights in other treaties, children still make up a disproportionately large percentage of people living in poverty globally. The marginalisation of children's socio-economic rights is not limited to developing states but is also a feature in relatively affluent countries like the UK. In its [September 2011 response](#) to the discussion paper drafted by the Commission on a Bill of Rights, Rights of the Child UK referred to the large number of children living in poverty in the U.K. arguing for much greater protection of children's rights.

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As Nolan points out in her book, the cuts in social spending that have resulted from the global recession have exacerbated the social and economic vulnerability of children around the world. A majority of the members of the Commission on a Bill of Rights recently concluded that they would be 'hesitant' about including socio-economic rights in a potential UK Bill of Rights. The tenor of some members' individual reports and the political impetus for a home-grown Bill of Rights suggest support for a reigning in of rights currently protected under the Human Rights Act, rather than an extension. The current political and economic climate speak to a worrying possibility that the position of the most vulnerable members of this society (immigrant children, for instance) may be even less secure in time to come.

Nolan's book adds to a burgeoning scholarship which questions traditional assumptions about the legitimacy and capacity of courts to play a role in the implementation of socio-economic rights. The specific issues addressed in this book — democratic legitimacy and separation of powers from the perspective of children's rights — is its most novel element. To what extent can it really be said that children's socio-economic rights are represented in democratic processes? The gist of Nolan's argument here is that children are singularly un-enfranchised, in the obvious sense of having no, or limited, voting power; and, more widely, because those who do have the power to vote and to lobby government more effectively, fail to adequately represent the views and interests of children.

The marginalisation of various other groups in society – from prisoners to refugees to people with disabilities – has been well-documented and there are several studies which challenge the claim that legislatures ensure wide public participation in deliberations about important societal issues. However, Nolan's argument that children are a special case is well made. Not only do children lack access to the formal electoral process for ensuring that their interests are protected, they are also less capable of engaging the assistance of enfranchised groups in placing their rights on the political agenda. Furthermore, the evidence explored in the first chapter shows that the long-term impact of the infringement of their socio-economic rights on children is generally much more severe than that on adults subjected to a similar denial of rights. This adds to the strength of Nolan's central claim regarding the singular status of children.

In Chapters 3 and 4, Nolan effectively challenges the application of two important objections to judicial review – the counter-majoritarian argument; and the separation of governmental powers – to the case of children's socio-economic rights. Nolan draws on Jeremy Waldron's work as a principal example of the argument that judicial review in matters on which people may legitimately disagree (such as fundamental rights) is 'counter-majoritarian'. The counter-majoritarian argument rests on the idea of self-government: people should be able to make decisions about matters that affect them. They can do this through their elected representatives. The intervention of unelected judges contradicts this idea. Nolan effectively uses the fact of the un-enfranchisement of children (explored in Chapter 2) to undercut this argument. She then considers John Hart Ely's claim that judicial review can play a ['representation-reinforcing'](#) role with respect to minorities. Ely adopts a narrow view of when representation needs to be reinforced by the courts.

Societal prejudice or hostility is the trigger for their intervention. Nolan makes the case for a more nuanced approach which would, in the case of children, take their singularly vulnerable position in society into account in concluding that courts may be entitled to intervene to protect them. Nolan briefly examines the literature criticising Ely's focus on process concerns. Ely's approach is restricted, not just in terms of when the courts should intervene but also with respect to the nature of that intervention – policy or value-based decisions should be left to elected officials. This aspect of his approach would also narrow the scope of judicial intervention in children's socio-economic rights cases. It is worth emphasising the limited usefulness of Ely's approach when it comes to the adjudication of socio-economic rights. Nolan picks up on this point arguing for a 'deeper understanding of the impact of the structural inequality, social and democratic vulnerability and the de facto non-representation of children'.

Having made the case that there is no principled basis on which to deny the courts a role in implementing children's socio-economic rights, Nolan turns to the question of the efficacy of judicial intervention in this area. In Chapter 5, she argues that the institutional limitations of the courts tend to be exaggerated. Although courts may not be the best vehicles through which to give effect to these rights, there are a range of ways in which they have, and can continue to have, a valuable impact in this area. However, Nolan reminds the reader in Chapter 6 that the limitations of courts cannot simply be dismissed. There are certain disadvantages in relying on the courts. Most importantly, courts suffer from some of the same representational and participative drawbacks, when it comes to children, as legislative bodies do. Nolan does not explore ways in which the views of children can be more accurately defined and seriously considered in litigation.

The concessions Nolan makes regarding the limitations on what judges can do in this area could be read as undermining her main argument that courts can, and should, play a useful role in giving effect to children's socio-economic rights. However, she is right not to over-state the role of courts. Recent scholarship in this field suggests that a preoccupation with judicial review detracts from the vital role of other players – like civil society and local government – in securing access to goods like food and medication. The question of how the shortcomings of the litigation process may be redressed deserves further exploration but would, perhaps, have extended the scope of the book beyond what was feasible. Nolan indicates that this is an area for future research and analysis.

Nolan's book is based on extensive, wide-ranging research and is very skilfully argued. Add that to the novelty of taking a child-centred approach to socio-economic rights and the book looks set to become the 'go to' source on the adjudication of children's socio-economic rights for human rights scholars and practitioners.

Anashri Pillay is a lecturer in the School of Law at the University of Leeds, where she teaches constitutional law and judicial review. She worked in the Department of Public Law at the University of Cape Town (South Africa) for a number of years. Her research focuses on the adjudication of economic and social rights. [Read more reviews by Anashri.](#)