



## The Possibilities and Limits of International Human Rights Law to Foster Social Inclusion and Participation

Paolo Carozza<sup>[1]</sup>

In an era in which global norms, institutions, and processes of human rights law have begun to turn their attention to the challenge of social exclusion, it is helpful to ask what role we can reasonably expect human rights systems, particularly in their supranational dimensions, to play in bringing about a more comprehensively inclusive and participatory society. How does the concept of “social exclusion” relate to the idea of human rights and what does a human rights approach to social exclusion have to offer us? What are the possibilities and limitations of supranational human rights mechanisms in addressing and providing remedies for the problems of social exclusion?

In what follows, I will argue that we should not invest high expectations in the capacities of international human rights systems to bring about dramatic social transformations in the direction of inclusive, participatory societies. This is because of inherent, conceptual, and structural limitations in the apparatus of human rights protection, which makes it largely inapt for the goals we are aiming to achieve. However, human rights mechanisms do have an important, even if ultimately limited, part to play in overcoming widespread social exclusion.

### **1. The emergence of social exclusion as a focus of human rights law**

The idea of and attention to the problem of social exclusion (or its converse, social inclusion), present in the social science literature at least since the early 1970s, has only much more recently begun to make its way into the discourse and practice of human rights law on the world stage. Certain constitutional systems have a longer history of engagement with the issue in their public law; in India, for example, the concept of social equality is embedded in the preamble of the Indian Constitution and in its Directive Principles, and the social inclusion of Scheduled Castes/Tribes has accordingly been a constitutional theme there for decades.<sup>[2]</sup> In the broader context of international human rights law, it is more recent. We see the concept of social exclusion first introduced formally into the Council of Europe’s system in 1996, but that reference received virtually no discernable substantive attention until 2011. In the Inter-American human rights system discussions of social inclusion/exclusion began to be heard about a decade ago, and similarly have acquired much more momentum only in the last five years. Today, however, there is an increasingly lively discussion of the issue in human rights scholarly and practice circles, especially in the Americas.

The heightened interest in and attention to the problem of social exclusion in this historical period has many causes; among them are the fallout of the financial and economic crises beginning in 2008; chronic unemployment, especially among youth; the challenges of integration of increasing numbers of migrants, particularly in Europe; the dysfunctional character of many contemporary democratic systems where clientelism and elite capture have provoked populist backlashes; and, more generally, a widespread perception of the failure of the promises of liberal internationalism to advance the well-being of large segments of the poor and middle classes.

Many of those reasons resonate in Europe even more than in Latin America, but in the latter region there are also additional bases for the surge in interest in social exclusion as a concern of human rights that are worth identifying here. The first has to do with the main purposes and mandates of the regional systems of human rights protection in Latin America in general. Broadly speaking, we might say that in the first era of the development of the regional human rights systems (from the 1960s into the 1980s), the norms and institutions focused heavily on exposing and opposing the military dictatorships that used the abuse of human rights as a systematic instrument of repression. In the second era of its work, after the so-called “third wave” of democratization starting in the 1980s in Latin America, the actors of the regional human rights system turned their central attention more to questions of transitional justice, accountability for past abuses, memory, and the consolidation of the basic liberties and institutions necessary for the consolidation of the newly-(re)established democracies of the region. By the early 21st century, however, the regional consensus around the main purpose of the human rights system began to fragment considerably, with a significant number of states in the region beginning to question what the fundamental role of regional human rights protections should be in an era when the majority of states are now reliably democratic (at least at the level of their formal electoral legitimacy).

In this uncertainty, the question of social exclusion arose as one of the central problems of the young and endemically weak democracies of the region. At the same time, the controversial but influential movement toward “Latin American neoconstitutionalism” characteristic of countries such as Bolivia and Ecuador made social inclusion one of the pillars of its experimental, post-liberal constitutional model, while in Venezuela “participatory democracy” became the hallmark of the Bolivarian Revolution’s attacks on the liberties and guarantees of classical liberal constitutionalism. In short, the point is that for a variety of reasons, in Latin America the relationship of human rights protections to discussions of social exclusion, social inclusion, and broad participatory initiatives has arisen in the context of significant political and ideological divergences. As I will discuss later, this has some negative implications for the possibilities of using the norms and processes of human rights law to foster social inclusion and broadly participatory societies.

## 2. Conceptual clarifications

The first puzzle we encounter in trying to frame properly the relationship between social exclusion and human rights as a conceptual one.

Social exclusion is often defined in terms of rights, but it is far from clear (at least in the area of law and legal sciences) whether social exclusion is better understood as an *outcome* condition in which certain social sectors are denied their human rights, or whether instead human rights violations should be seen as the *causes* or *sources* of social exclusion. As used (perhaps for the first time?) by René Lenoir in his book *Les Exclus: un Français sur dix* (1974) the term social exclusion was initially defined as the mechanisms through which persons and groups were denied participation and social rights; the absence of (social) rights was therefore understood as the outcome of a *process* of exclusion.[3] Scholars such as Maryse Robert continue to describe social exclusion in just this way,[4] as a process which ultimately results in a denial of human rights. If this is the case, then we might regard the respect for human rights as something of an indicator of levels of inclusion and exclusion. And in seeking to remedy the problem, we would therefore logically not so much fight social exclusion through the juridical guarantees of human rights as the opposite: seek to attain higher levels of realization of human rights by addressing the root causes of exclusion in the social, economic, and political spheres.

On the other hand, in the human rights literature the terms frequently are lexically ordered in exactly the opposite way: patterns of human rights violations – such as systematic discrimination that prevents individuals and communities from securing work and education, participating in political life, and accessing social benefits – are understood to cause or substantially contribute to a multidimensional phenomenon that is not defined in terms of rights violations but that includes such broad features as entrenched poverty, stigmatization, social rejection, a breakdown of social ties and bonds, disempowerment, and social conflict.

A different possibility altogether is simply to see social inclusion as itself a human right, and social exclusion as its violation. This approach is in some ways analogous to debates within fundamental rights about human dignity. While in most constitutional and international documents and jurisprudence, dignity is understood as the foundation of rights, as the basis on which to assert rights, in a few of them (for example, in German constitutional law, or in the International Convention on the Rights of Persons With Disabilities) the right to dignity is recognized directly as itself a human right.[5]

Which of these makes the most helpful sense of the phenomenon of social exclusion and the role of human rights in it? Let’s begin with the last option: expressing social inclusion as itself the right at issue seems too broad and amorphous to be useful. It leads to problems much like those notoriously plaguing the “right to development” in international law. Aggregating under that single right what are in fact a host of interrelated but nevertheless discrete problems effectively serves to obscure more than illuminate the problem as a whole. While there may be rhetorical and aspirational value in affirming a human right to development, forty years of legal experience have shown us that it is not a very useful construct, because we are hard pressed to identify the content of the right in practical terms, or the holders of whatever duties are correlative to the right.[6] In important ways, the value of using the language of human rights at all is in large part because it helps us to disaggregate larger notions like “dignity”, “common good”, and “development” into more specific relationships of justice where the right-holder and the duty-bearer can be more easily identified and held to account.[7] At a juridical level, at least, re-aggregating rights into larger concepts thus serves to deprive them of much of their force and utility. In short, social exclusion (or inclusion) expressed as a human right in itself is so difficult to give juridically specific content to that we are hard pressed to articulate what exactly it requires and of whom it would be required (for instance, who, exactly, is “doing” the “excluding”?).

Turning instead to the question of the lexical priority between rights and exclusion, two reasons favor the approach that sees violations of rights as contributing to a broader and multidimensional phenomenon of exclusion (that is itself not defined merely in terms of rights), rather than the opposite (i.e., exclusion as resulting in, and thus measured by, deprivations of social rights). The first is one of logic: if social exclusion equals exclusion from human rights, and conversely realization of human rights is elimination of social exclusion, then

the addition of “social exclusion” to the concept of human rights is entirely self-referential and circular. It adds nothing to our analysis. Second and more importantly, social exclusion as a human reality has many facets that are in complex interrelationship and not easily reducible to the (relatively) wooden and artificial language of rights: psychosocial elements such as shame and humiliation and loss of a sense of self-worth; the breakdown of relationships at all levels, from families to neighborhoods to broader associations of civic life; barriers of communication and language; and so on. It is instead easier to capture reasonably (in the sense of accounting for the totality of its factors) the reality of the phenomenon of social exclusion if we recognize that human rights violations can frequently trigger, exacerbate, and perpetuate the conditions of exclusion, but do not in themselves explain exhaustively the dimensions of the problem.

### 3. From concept to the positive law and practice of human rights

These reflections on the conceptual relationship between human rights and social exclusion are not merely formalities. The divergences are reflected in the existing attempts to address social exclusion through the positive law and practice of human rights, with differing tangible effects.

The Council of Europe has adopted the only explicit reference to the idea of social exclusion in a formal legal instrument of the positive law of human rights. Article 30 of the Revised European Social Charter (1996) begins with the recognition of social inclusion as itself a basic human right, stating that “everyone has the right to protection against poverty and social exclusion”. The official Explanatory Report[8] accompanying the Revised Social Charter specifies further that Article 30 refers to persons who find themselves in a position of extreme poverty through an accumulation of disadvantages, who suffer from degrading situations or events or from exclusion ... Social exclusion also strikes or risks to strike persons who without being poor are denied access to certain rights or services as a result of long periods of illness, the breakdown of their families, violence, release from prison or marginal behaviour as a result for example of alcoholism or drug addiction.[9]

Here then we have a somewhat jumbled statement. First, protection from social exclusion is itself declared to be a right, but it is unhelpfully defined partly in terms that are circular (the protection from exclusion applies to persons “who suffer ... from exclusion”), partly as the consequence of the violation of other rights (“social exclusion ... strike[s] persons who ... are denied access to certain rights”), and partly as indicative of complex social and personal pathologies not necessarily related to the violation of rights at all, such as illness, family breakdown, and alcoholism. The internal ambiguities and contradictions do not take us very far.

Looking instead at the interpretation and application of this provision in the practice of the Social Charter reveals a little bit more. Article 30 has been invoked by the European Committee on Social Rights in only a very small number of individual cases, all of them dating from 2011 to 2013. In examining a complaint by the *European Roma and Travellers Forum v. France* (2012), the Committee concluded that discriminatory rules in France regarding residency affected the voting rights of Travellers of French citizenship, and found that “the right to vote, like other rights relating to civic and citizens’ participation, constitutes a necessary dimension in achieving social integration and inclusion” within the scope of Article 30.[10] In a different case brought that same year, *Médecins du Monde v. France* (2012), the Committee concluded that France’s failure to adopt “a coordinated approach to promoting effective access to housing” for the Roma population in France violated Article 30’s right to protection from social exclusion.[11] And in *International Federation for Human Rights v. Belgium* (2013), Committee determined that the State’s failure to collect reliable data and statistics in respect of highly dependent persons with disabilities prevents an “overall and co-ordinated approach” to the social protection of these persons and the development of targeted policies concerning them, in violation of Article 30.[12] Two other cases found there to be no violation of Article 30. In one (*European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France* (2012)), the Committee explored the policy of family allowances in France, which are conditional on children’s regular school attendance and suspended for truancy. The Committee concluded that:

the possibility of being placed in uncertain economic and social circumstances through the partial withdrawal of family allowances may result in a reduction of the economic and social protection of families under Article 16 [...]. However, as such, this measure cannot be seen to undermine the coordinated approach of the protection against poverty and social exclusion that should be afforded under Article 30 of the revised Charter.[13]

And finally, in *Defence for Children International (DCI) v. Belgium* (2012), the Committee held that although Article 30 essentially requires states to adopt an overall and coordinated approach consisting of measures to promote access to social rights (including in particular employment, housing, training, education, culture, and social and medical assistance), it does not apply universally to all persons present in society but only those specifically mentioned in paragraph 1 of the Appendix – thus excluding unlawfully present foreign minors from their protections. The Committee concluded that the Charter’s fundamental purpose is not “to secure the most fundamental human rights [such as the right to life] and to safeguard the persons covered by the provisions in question from serious threats to the enjoyment of those rights”.[14] In other words, the obligation to address

social exclusion under the Social Charter, does not have the same universality as, say, the right to life under the European Convention on Human Rights but instead is contingent on a person's legal status.

What can be drawn from these few examples? First, it is notable that where there has been a determination of a violation of Article 30 with regard to actions restricting access to housing and political participation, the Committee has reached conclusions that are no different in scope or analysis than what would have been arrived at using the right to housing or the right to vote alone. In these cases, establishing a new right to protection from social exclusion, and framing these existing rights in the larger context of social exclusion, adds nothing more to our understanding of the problem or to the remedies prescribed. Secondly, in two other cases the Committee's decision on the requirements of Article 30 turns on the existence or absence of an "overall and coordinated approach" to social protection. And lastly, it is made clear that "social exclusion" in the Charter in general is not simply a synthesis of all other fundamental rights, as the Committee refers the protection of life and physical integrity to other norms.

It is not surprising that after the initial flurry of cases five years ago, Article 30 has essentially ceased to be relevant to the Committee's case law. What have we gained by analyzing the problem in terms of social exclusion, or by bringing the language and mechanisms of human rights to bear on the problems of social exclusion put before the Committee? Essentially, it consists only of a requirement that states take an affirmative and coordinated approach, rather than an *ad hoc* or case-by-case one, to the realization of the other rights guaranteed by the Social Charter. That is not a bad thing, and it does imply a recognition that social exclusion, having systemic aspects, demands a systemic approach. But does the Social Charter's approach really help enhance participation and agency in society by those who are socially excluded? Not discernably. Based on the limited European experience, then, it is hard to conclude that adding the concept of social exclusion to the human rights systems, or bringing a human rights approach to the problem of social exclusion in general, has provided any useful analytical or remedial tools.

The Inter-American system has fared a bit better in this regard. While not necessarily using the term "social exclusion" as such in its jurisprudence, both the Inter-American Commission on Human Rights (in Washington, DC) and the Inter-American Court of Human Rights (in San José, Costa Rica) have decided a number of contentious cases that are widely seen as addressing problems that lead to and entrench the social exclusion of certain vulnerable and marginalized groups. These cases include, inter alia (in the interests of space I include only ones from the Court of San José):

# Abandoned "street children" in Guatemala (*Villagran Morales*, 2001);[15]

# Ethnic (indigenous) minorities inhibited from participating in the electoral process in Nicaragua (*Yatama*, 2005);[16]

# Women in Ciudad Juárez, Mexico, subjected to aggravated risk of "femicide" (*González*, a.k.a. The "Cotton Fields" Case, 2009);[17] and

# Irregular migrants detained in inhumane conditions in Panama (*Velez Loor* 2010).[18]

And most salient of all are a series of cases, starting in 2001, involving the well-being and integrity of indigenous peoples in Nicaragua, Paraguay, Suriname, and Ecuador.[19] All of these cases address the exclusion of indigenous communities from the possession and control of their ancestral lands, which in turn has led directly to widespread malnutrition, lack of education, poor health, harm to the traditional religious beliefs and spiritual practices of the communities, and eventually the loss of cultural memory and cultural integrity altogether.

In cases such as these, the Inter-American human rights system has taken aim at forms of social exclusion through the application of human rights norms in ways considerably more comprehensive and relevant than the European institutions have. Note, first, that it is not creating a "right to protection from social exclusion", nor simply conflating social exclusion with the violation of rights per se (both problems that characterize the European approach). Rather, the Court has in each case considered the way that patterns of human rights violations are part of a much broader, multidimensional, and structural problem of vulnerability and marginalization. While not themselves exhaustive of the problem of social exclusion as such, these patterns of violations are understood by the Court as helping to produce and reinforce the broader problem in important ways. And this, in turn, leads the Court to draw up multifaceted remedies. The Inter-American Court is in general known for its very creative and assertive use of its remedial authority – compensating victims not merely in pecuniary terms, like the European Court of Human Rights does, but also ordering a variety of moral and symbolic actions and various "guarantees of nonrepetition", from training programs for authorities to criminal prosecutions of violators, to major legal and constitutional reforms designed to address broad social problems. [20] The Court has made full use of these remedies in what I call the "social exclusion cases" described above, going far beyond the direct compensation of immediate victims and ordering the creation and alteration of

significant social programs, such as the establishment of trust funds for the education of children from the affected communities.[21]

#### **4. The promise and the limitations of human rights**

Precisely in the Inter-American cases, we can see both the promise and the perils or limitations of seeking to use international mechanisms of human rights protection to tackle social exclusion in a comprehensive way.

On the one hand, they help to illustrate exactly the common core of principles at stake, flowing from a recognition of the universality of human dignity: principles of the moral equality of all human beings, of the demands of justice, of the protection of various forms of participation in society such as rights to vote, to work, to be educated, or to believe and worship. All of these help to specify the content of the common good and therefore to give useful detail to what we should be seeking, at least in part, when we seek to realize participation and inclusion in our societies. Respect for human rights is not coterminous with social inclusion in these cases, but it is an essential aspect of building genuinely inclusive and participatory societies. For all these reasons, relying on the path opened up by human rights problems like those in the social exclusion cases, some Latin American legal scholars such as Victor Abramovich and Óscar Parra have strenuously argued that international systems of human rights protection should even more self-consciously dedicate themselves to combating social exclusion by reinterpreting rights to focus on achieving substantive equality, addressing patterns of discrimination, and reducing systematic violence.[22]

On the other hand, it is important to note that the more aggressive and creative Inter-American approach to the challenge of social exclusion is in many ways problematic as well. For one thing, we must acknowledge honestly the fact of the relatively limited practical impact of the Inter-American Court's remedial interventions. In general the states party to the disputes have paid the reparations due to the immediate victims, and often provided measures of symbolic and moral reparations (such as public apologies, for instance). But by far the most difficult measures of reparation have been those seeking to ensure the non-repetition of the violations – i.e., exactly those remedial measures most centrally related to the impact that the violations have on the more general systemic problem of social exclusion. When the guarantees of non-repetition involve training programs for the “sensitization” of civil servants or police forces, they are as commonly complied with as they are seemingly ineffective at producing real change. The much harder and rarer steps to take are those requiring substantial legal and constitutional reforms. By the Court's own assessment in its ongoing supervision of compliance with its judgments, these are rarely implemented.[23] Even in the few cases where there has been some partial implementation by the states of the structural legal reforms envisaged by the Court, the ongoing prevalence of the underlying social problems (such as violence against women in Ciudad Juarez Mexico,[24] or the detention of migrants throughout Central America)[25] would suggest that the Court's remedial prescriptions have not had a significant ameliorative effect. We might suppose that it is just a question of giving them more time, perhaps, but even in the few cases in which there have been more substantial levels of state compliance with requirements of legal reform, such as *Villagran Morales v. Guatemala* and *Rodriguez v. Mexico* (“*Cotton Fields*”), date from 2001 and 2009, respectively, and still lack evidence of having brought about any deep changes. In the case of the Awas Tigni indigenous community in Nicaragua, even though the Nicaraguan State did, after more than a decade, provide the indigenous community with collective title to a portion of their ancestral lands in compliance with the Inter-American Court's 2001 order,[26] severe social conflicts over the protection of those lands persist unabated today.[27]

This brings us directly to the limitations of international human rights mechanisms to address the problem of social exclusion or to bring about substantially higher degrees of inclusion and participation in society. Even when the conceptual relationship between the two is reasonably oriented, and even when the institutions of law do attempt to take very seriously the role that human rights violations play in sustaining the conditions of social exclusion, still we see the positive outcomes to be limited in their scope and tangible impact.

To some extent, we have run up against the limits of law in general in bringing about substantial social change. At the margins, law sometimes leads and often follows societal attitudes and mores, but rarely is it dramatically different from them. So, to expect from law the eradication of social exclusion, and the generation of inclusiveness and participation, is already necessarily a semi-utopian project at best.

I would like to go beyond that baseline problem, however, and suggest some structural reasons why international human rights norms, processes, and institutions, are even more hampered, beyond the limitations law in general, in their capacity to bring about major changes in this area. I will briefly mention four of them.

The first begins from the self-evident observation that social exclusion is a complex, deeply rooted, and multidimensional phenomenon. This may seem to be banal, but I am not aiming to make a point about the phenomenon of social exclusion so much as a point about the language and practice of human rights, especially in its supranational instantiation. Precisely what has made human rights a politically and juridically powerful

practice is its ability to take problems of justice, writ large, and situate them in an analytically more manageable triadic form where there is a right-holder or claimant, on the one hand, a duty-bearer (often but not always the State), on the other, and a specific norm of justice applicable between them.[28] This allows us to focus on the value of each person (or sometimes group) as a bearer of rights, and to make specific demands of what is owed to the claimant by the duty holder, while at the same time abstracting to a high degree from the particularities of the claimant's history, social status, environment, etc. The universality in theory and the effectiveness in practice of human rights claims, especially in the transnational context, relies heavily on this dynamic. It is what allows us to say with sufficient clarity and categorical force, for instance, that no one shall be subject to slavery or torture. Yet, these same characteristics which give the language of human rights their rhetorical and political potency make the apparatus of human rights less well-suited to articulating the demands of justice where the social problems are highly diffuse, and where the demands of justice are less susceptible of being framed in the triadic form of claimant/norm/duty bearer – as is the case in addressing the problem of social exclusion.

Second, but related to the first reason, is the difficulty of moving from specific human rights violations to general conditions of “the right”, and vice versa. The problem is analogous to the thorny divide existing today between our growing knowledge of the dynamics of economic development at micro-levels and our need to address development at the macroeconomic levels if we are to succeed in having a significant impact on global poverty levels. Even when we are able to identify that a specific development intervention has a positive outcome on the well-being of its particular beneficiaries, we often know strikingly little about how the same intervention, when scaled, would affect the general equilibrium conditions of the economies in which they are situated. So it is with human rights' focus on remedies for individual violations. Internationalizing access to justice by individuals has been one of the most powerful and transformative developments in international law of the last seventy-five years. But that same dynamic does not obviously yield generalizable solutions to the “general equilibrium conditions” of social inclusion and exclusion. Moving between these levels is highly uncertain and debatable.

The third challenge is one of institutional competence and legitimacy. Even in the best of domestic circumstances, judges and courts are not particularly well-suited to untangling complex, multidimensional problems using various disciplinary perspectives (as we are attempting to do here). They frequently lack the expertise to analyze the situation adequately, judge its causes and dimensions, and to be able to act on it appropriately. Transposing that to an international plane magnifies the problem even more, because it becomes not only a question of relevant competence (in the sense of substantive expertise, not merely formal legal competence), but also of social and political legitimacy.

International human rights institutions are deliberately removed from direct accountability to individual states, and even more from their populace. Designed to provide external checks on the possible abuses of nation-states, they displace local political life in favor of external, elite, and putatively expert decision-makers. It becomes paradoxical, then, to rely on them to enhance authentic participation in the local political, economic, and social environments. They are frequently perceived, in fact, as precisely designed to depoliticize those environments and to remove from the local context the power to make collective decisions over certain basic rules of social life. Not surprisingly to any political scientist, such conditions also frequently make international institutions vulnerable to interest group capture. Note that I do not mean to say that the anti-political nature of international human rights systems is necessarily a bad thing – in many ways it is exactly what we would want, where we are concerned about the threats of dictatorship, the suppression of minorities, and so forth. My point is merely that specifically as institutional tools for broadly enhancing social *participation* there is a deep internal contradiction at their very root. That contradiction in international human rights law in general is mediated by the structural principle of subsidiarity,[29] and any attempt to use its institutional mechanisms to achieve greater social inclusion would have to take subsidiarity quite seriously in order to avoid the problem of imposing greater “participation” from the outside. Furthermore, the problem of institutional legitimacy is heightened in a situation like that of Latin America, where (as described at the beginning of this paper) there is not at present a clear consensus around the core purposes of the regional human rights system and where the very idea of social exclusion currently has a clear and unfortunately partisan ideological valence. I think it is not accidental that the regional institutions' delving into the complex questions of social exclusion coincides in time with a significant questioning, on the part of the member states, of the institutional legitimacy of the Commission and Court.

Fourth and finally, a more contingent but no less powerful objection comes from some of the particular features of international human rights discourse in the contemporary era. The critique of “rights talk” and the kind of society that it generates is not new, tracing its roots at least to Karl Marx on the left and Edmund Burke on the right. Today, various versions of that critique come from many sides: postcolonial contexts where European and North American rights ideologies are perceived to clash with autochthonous cultural beliefs and practices; a variety of religiously-grounded understandings of rights; and many different forms of communitarianism. Especially in the secular, liberal, North-Atlantic dialect that has a fairly hegemonic grip on international human rights orthodoxy today, the practice of international human rights at present tends

strongly toward extreme forms of individualism and finds relational goods very hard to account for. So, for instance, even though the family is provided for as the “natural and fundamental group unit of society” in the Universal Declaration of Human Rights,[30] in contemporary human rights practice the family appears almost exclusively as a locus of domination and suppression of individual autonomy, never as a place of education toward participation, inclusion, and personal flourishing. And yet, contrary to that individualistic paradigm, at the heart of the challenge of inclusion and participation is in fact the structural human need for relationship and belonging. Similarly, dominant human rights discourse today tends strongly toward negative forms of freedom as autonomy and almost never toward positive understandings of freedom and responsibility. Instead, a consumerist *mentalité* favors transposing any strong desire or preference into a human rights (witness, for instance, the new right of being able to artificially create human beings, as now recognized in both the European and Inter-American human rights systems).[31] Finally, contemporary human rights talk tends toward a statism and thus is not well equipped to account for the civil economy or for horizontal subsidiarity.

I refer to all this laundry list of problematic features of rights talk all together as “contingent” because unlike some antiliberal rights-skeptics I do not find it *necessarily* the case that the language of rights needs to be dominated by an ethic of individual autonomy and consumerism. But today, it is undoubtedly so in fact. It is telling that even Pope Francis, in his many exhortations to us to make our societies more welcoming, inclusive, and open, very rarely resorts to the language of human rights to articulate his position. On the contrary, he has become probably the fiercest Papal critic of rights-talk since the 19th century. Speaking to the Food and Agriculture Organization in 2014, for example, he pointed out that:

Nowadays there is much talk of rights, frequently neglecting duties; perhaps we have paid too little heed to those who are hungry. It is also painful to see that the struggle against hunger and malnutrition is hindered by “market priorities”, the “primacy of profit”, which have reduced foodstuffs to a commodity like any other, subject to speculation, also of a financial nature. And while we speak of new rights, the hungry remain, at the street corner, and ask to be recognized as citizens, to receive a healthy diet. We ask for dignity.... [32]

Speaking to the European Parliament, he pressed the point even further:

Care must be taken not to fall into certain errors which can arise from a misunderstanding of the concept of human rights and from its misuse. Today there is a tendency to claim ever broader individual rights – I am tempted to say individualistic; underlying this is a conception of the human person as detached from all social and anthropological contexts, as if the person were a “monad”, increasingly unconcerned with other surrounding “monads”. The equally essential and complementary concept of duty no longer seems to be linked to such a concept of rights. As a result, the rights of the individual are upheld, without regard for the fact that each human being is part of a social context wherein his or her rights and duties are bound up with those of others and with the common good of society itself.[33]

In short, Francis sees the practice and ideology of rights, in their contemporary forms, as being frequently at odds with an ethic of radical solidarity with the poor and the marginalized, and at least at times as more likely to be an obstacle to greater participation and unity in the common good than as a means to facilitate them.

## 5. Conclusion

Does all of this mean that human rights, particularly as embodied and practiced through the norms, processes, and institutions of international law, are not helpful to advance our goal of a more inclusive and participatory society? Not at all. For the reasons mentioned earlier, they can be useful and important instruments, provided, however, that we understand their role to be limited. Thus, human rights mechanisms can identify and help remove specific barriers to participation – for example, a prohibition on new political parties aimed at bringing more voters into the democratic process, or on public expressions of religious pluralism in society. They can even address some of the more systemic forms of discrimination, such as the legal incapacity of women to provide legal testimony or to own property or to exercise certain professions. But beyond this (admittedly hard-to-define) core of concerns with direct and overt kinds of exclusion, human rights are perhaps best directed not to the utopian project of transforming society but instead to the more modest and realistic one of maintaining the conditions of openness within which persons and groups can have the conditions to exercise their moral agency, room to develop new social initiatives generative of greater inclusion, and the space to dedicate themselves to the good of one another in community.

Human rights mechanisms can in other words serve the aim of social inclusion by protecting the dimensions of freedom – the freedom to speak, to organize, to educate, to worship – that permit new forms of solidarity and responsibility to arise from the bottom up. Or, as again Pope Francis has put it, the spaces and freedoms that allow people to “become the artisans of their own destiny”.[34] The mechanisms of human rights can’t make the seedlings of participation and inclusion germinate, but they can nourish the soil in which they sprout and protect them from being trampled so that they have the opportunity to grow strong and flourish.

- [1] University of Notre Dame.
- [2] See The Constitution of India, Article 17 and 18.
- [3] René Lenoir, *Les Exclus: un Français sur dix*, p. 125 (Paris, Seuil 1974).
- [4] Maryse Robert, *Inequality and Social Inclusion in the Americas: Key Drivers, Recent Trends, Way Forward*, in OAS, *Inequality and Social Inclusion in the Americas: 14 essays* p. 37 (2 ed. 2014).
- [5] See Paolo G. Carozza, *Human Dignity in Constitutional Adjudication*, Tom Ginsburg and Rosalind Dixon, eds., *Comparative Constitutional Law* p. 459-472 (Edward Elgar, 2011); Paolo G. Carozza, *Human Dignity*, Dinah Shelton, ed., *The Oxford Handbook of International Human Rights Law* p. 345-359 (Oxford University Press, 2013).
- [6] See, Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 *California Western International Law Journal* p. 473 (1985).
- [7] John Finnis, *Natural Law and Natural Rights*, Chapter VIII (Oxford University Press, 2nd ed, 2011).
- [8] European Social Charter (revised), Explanatory Report, [1996] COETSER 4 (3 May 1996), (ETS No. 163).
- [9] *Id* at par 114.
- [10] Complaint No. 64/2011, Council of Europe: European Committee of Social Rights, 24 January 2012, at par 71.
- [11] Complaint No. 67/2011, Council of Europe: European Committee of Social Rights, 11 September 2012, at par 106.
- [12] Complaint No. 62/2010, Council of Europe: European Committee of Social Rights, 21 March 2012, at par 201.
- [13] Complaint No. 82/2012, Council of Europe: European Committee of Social Rights, 19 March 2013, at par. 59.
- [14] Complaint No. 69/2011, Council of Europe: European Committee of Social Rights, 23 October 2012, at par 36.
- [15] Series C. No. 63, Inter-American Court of Human Rights, 19 November 1999.
- [16] Series C No. 127, Inter-American Court of Human Rights, 23 June 2005.
- [17] Series C No. 205, Inter-American Court of Human Rights, 16 November 2009.
- [18] Series C No. 218, Inter-American Court of Human Rights, 23 November 2010.
- [19] Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Series C No. 79, Inter-American Court of Human Rights, 31 August 2001; Caso Comunidad Indígena Yakye Axa v. Paraguay, Series C No. 125, Inter-American Court of Human Rights, 17 June 2005; Caso Comunidad Indígena Sawhoyamaya v. Paraguay, Series C No. 146, Inter-American Court of Human Rights, 29 March 2006; Saramaka People v. Suriname, Series C No. 172, Inter-American Court of Human Rights, 28 November 2007; Caso Comunidad Indígena Xákmok Kásek v. Paraguay, Series C No. 214, Inter-American Court of Human Rights, 24 August 2010; Kichwa Indigenous People of Sarayaku v. Ecuador, Series C No. 245, Inter-American Court of Human Rights, 27 June 2012; Caso Pueblos Kaliña y Lokono v. Suriname, Series C No. 309, Inter-American Court of Human Rights, 25 November 2015.
- [20] See Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 3rd ed. 2015).
- [21] See for example Saramaka People v. Suriname, Series C No. 172, Inter-American Court of Human Rights, 28 November 2007
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- [23] With regard to the details of compliance with the Inter-American Court of Human Rights' judgments, see *Annual Report 2016 of the Inter-American Court of Human Rights* available at <http://www.corteidh.or.cr/index.php/en/court-today/informes-anuales>.
- [24] Kyle Swenson, *Hundreds of women disappear in Ciudad Juarez each year. A smartphone app could help*, *The Washington Post*, 10 July 2017 available at <https://www.washingtonpost.com/news/morning-mix/wp/2017/07/10/hundreds-of-women-disappear-in-ciudad-juarez-each-year-a-smartphone-app-could-help/>
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- [27] Frances Robles, *Nicaragua Dispute Over Indigenous Land Erupts in Wave of Killing*, *The New York Times*, 16 October 2016, available at <https://www.nytimes.com/2016/10/17/world/americas/nicaragua-dispute-over-indigenous-land-erupts-in-wave-of-killings.html>
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- [29] Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 *American Journal of International Law* p. 38-79 (2003).
- [30] Universal Declaration of Human Rights, Article 16.
- [31] Costa and Pavan v. Italy, No. 54270/10, European Court of Human Rights, 28 August 2012; Artavia Murillo v. Costa Rica, Series C. 257, Inter-American Court of Human Rights, 28 November 2012.
- [32] Pope Francis, *Address to the Plenary of the Conference*, 20 November 2014, par 1, archived at [https://w2.vatican.va/content/francesco/en/speeches/2014/november/documents/papa-francesco\\_20141120\\_visita-fao.html](https://w2.vatican.va/content/francesco/en/speeches/2014/november/documents/papa-francesco_20141120_visita-fao.html)
- [33] Pope Francis, *Address to the European Parliament*, 20 November 2014, par 12, archived at [https://w2.vatican.va/content/francesco/en/speeches/2014/november/documents/papa-francesco\\_20141125\\_strasburgo-parlamento-europeo.html](https://w2.vatican.va/content/francesco/en/speeches/2014/november/documents/papa-francesco_20141125_strasburgo-parlamento-europeo.html)
- [34] Pope Francis, Participation at the Second World Meeting of Popular Movements (Bolivia), *Address of the Holy Father*, 9 July 2015, par 3.2, archived at [http://w2.vatican.va/content/francesco/en/speeches/2015/july/documents/papa-francesco\\_20150709\\_bolivia-movimenti-popolari.html](http://w2.vatican.va/content/francesco/en/speeches/2015/july/documents/papa-francesco_20150709_bolivia-movimenti-popolari.html)