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THE HUMAN RIGHTS OF THE UNDERCLASS

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WHAT ARE HUMAN RIGHTS?

It is always best to begin with definitions. What are human rights? According to Edmund Burke, who, although a valiant fighter against the excesses of the British Crown in Ireland, the American colonies and India, never recovered from the shock of the French Revolution, they are mere pretexts behind which hide "pride, ambition, avarice, revenge, lust, sedition, hypocrisy, ungoverned zeal, and all the train of disorderly appetites."

But according to Antigone, determined to bury her brother Polyneices despite Creon's prohibition, they are "the unwritten and unfailing laws of heaven, for their life is not of today or yesterday, but from all time." More than two millennia later, Alexander Hamilton expressed the same view, in words bordering on plagiarism: "The sacred rights of mankind," he said, "are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of divinity itself, and can never be erased or obscured by moral power."

For myself, I am not convinced that the hand of divinity ever bothered itself with the drafting of a code of human conduct or that, if it did, the results have been reliably reported to us, although Moses seems to have made a pretty good job of it on Mount Sinai. But, while I would agree with Edmund Burke that the language of rights can be a mask for hypocrisy, self-interest and disorderly appetites -- as in "I have a right to be a racist, or a sweatshop operator, or an imperialist" -- I am firmly on the side of those who regard human rights as overarching precepts of universal validity. And it does not matter a great deal whether one views human rights as given by God or deduced by reason from the nature of human beings and human society, because, while the starting points of the inquiry are different, the goal is essentially the same. Thus Thomas Jefferson, good politician that he was, based the right of the American colonists to assume their separate and equal station among the powers of the earth on "the laws of nature and nature's god."

Moreover, the half century since the founding of the United Nations in 1945, has witnessed the validation and expansion of classic human rights doctrine in the form of countless international, regional and national treaties, declarations, conventions, constitutions and laws defining and refining the rights of virtually every conceivable constituent group of society, from human beings as such -- what used to be called "the rights of man,"

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before women were discovered -- to children, the disabled, refugees, workers, minorities, war victims, prisoners, stateless persons, you name it. It is as if, for thousands of years, poets, dramatists, philosophers and various others in the thick of or on the fringes of statecraft had been taking snapshots of the landscape of human rights and finally, starting about the middle of this century, all that exposed file had been developed, yielding a series of pictures so stark and dramatic in their clarity that they are impossible to ignore. Taken together, they constitute what has been dubbed the international bill of rights, and what I prefer to call the emerging constitution of the world.

One result of this extraordinary development is that it has virtually swept away the centuries old conflict between human rights idealists and human rights positivists, between those seeking to persuade others what human rights ought to be and those who maintain that a human right is whatever is defined as such by a lawmaker, nothing more, nothing less. If you don't believe me, take a look at United Nations Publication ST/HR/1/Rev.3 (1988), entitled "Human Rights: A Compilation of International Instruments." It contains the texts of no fewer than 67 such "instruments," from the Universal Declaration of Human Rights (1948) to the Declaration of the Principles of International Cultural Cooperation (1986).

If you still don't believe me, go to Section 701 of the Restatement (Second) of the Foreign Relations Law of the United States, the authoritative text on international law, published in 1986 and representing the consensus of the leading scholars in the field. Section 701 is headed "Obligation to Respect Human Rights" and reads as follows:

"A state is obligated to respect the human rights of persons subject to its jurisdiction

(a) that it has undertaken to respect by international agreement;

(b) that states generally are bound to respect as a matter of customary international law; and

(c) that it is required to respect under general principles of law common to the major legal systems of the world."

But, I hear you saying, if that is the case, why are billions of the world's people hungry and millions homeless when Article 11 of the International Covenant on Economic, Social and Cultural Rights, which has been ratified by 92 countries, provides that "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing . . .?" Good question. For the answer, you must look to Article 2, which states that "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant . . ."

There's the rub, or rather, the two rubs: One, the word "progressively"; two, the phrase "to the maximum of its available resources." No such word, no such phrase, appears in the International Covenant on Civil and Political Rights, which deals with such "classic" rights as the right to life, freedom from torture and slavery, liberty and security of the person, freedom of movement, equality

before the law and freedom of speech, religion, and association. On the contrary, Article 2 of the Civil and Political Covenant provides that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant..." and Article 4(2) provides that most of these rights may not be abrogated even "in time of public emergency which threatens the life of the nation."

In other words, political and civil rights are real; economic and social rights are to be implemented only to the extent that states, meaning the rulers of states, decide that it is feasible, in their opinion, to take them seriously. One way that lawyers have of expressing this difference is to refer to political and civil rights, at least those which may not be derogated under any circumstances, as peremptory norms, which sounds like something closely related to categorical imperatives, while calling economic and social rights "aspirational," or, worse yet, "merely aspirational." Another semantic distinction sometimes made is between "first generation rights" and "second generation rights," thereby taking all the bite out of the latter. (Not to mention such "third generation rights" as the right to development or to a safe environment).

WHAT IS THE UNDERCLASS?

Let us now put human rights aside for awhile and turn to the underclass. I am not sure where that term originated. It is not to be found in any dictionary or encyclopedia at my disposal.

My intuition tells me that the underclass is situated somewhere between what used to be called the proletariat and the lumpen-proletariat, before Marx was

excommunicated. My intuition also tells me that "underclass" is one of those terms coined by a semanticist for the establishment charged with defanging militant words; probably the same guy who substituted "preventive defensive action" for "nuclear strike," "user fee" for "tax" and "underprivileged" for "poor."

"Proletariat", after all, evokes images of underpaid workers storming factory gates and "lumpenproletariat" suggests the great, smelly unwashed. "The underclass," on the other hand, has about it an aura of resignation and docility, like the poor who will always be with us anyway and therefore have little to gain by making trouble.

What, by the way, is the underclass under? Under the horizon? Under the middle class? Under the volcano?

As good a definition as any probably comes from a cartoon by Rob Rogers, reprinted in the Times' News of the Week for March 25. It shows a census taker consoling a homeless person in the following words: "You'll no longer be the invisible sufferers, the forgotten people, the uncounted Americans . . . Now you'll be a statistic."

But then, we all know what the underclass is. It's the fifty percent of all Americans over 65 who, according to Congressman Pryor's Committee on Aging, lack money for food at some time; it's the three million homeless and additional millions living on the edge of homelessness; it's what Senator Moynihan calls the feminization of poverty and what Dr. Jean Mayer of Tufts University calls the infantization of poverty; it's the 32.5 million of our people who live in poverty and the 23 million who are

functionally illiterate; it's the twelve percent loss in household income for the poorest fifth of the population since 1963; it's the 63 percent cut in education block grants to states during the Reagan years and the 81 percent slash in federal funding for subsidized housing; it's America's No. 20 rating in infant mortality among the 22 principal industrial countries, with black infant mortality twice that of white, and black prenatal care one-half that of white; it's the racism and the sexism still endemic in our society, which keeps thousands down while a few rise up.

Let us say that, in our country, the ignored, the forgotten, the stepped over, the ones who have fallen off the train, amount to roughly 20 percent of the total population and 40 to 50 percent of the population of color. For the world at large, the situation is reversed: probably no more than one billion, roughly 20 percent of the total, - shall we call them the overclass? - can be said to enjoy that quality of life which the aforementioned human rights instruments purport to guarantee to all.

Here are some statistics taken at random from the UN's 1989 Report on the Social Situation:

- The maternal mortality rate, in 1983, was 30 per 100,000 live births for developed countries, 450 for developing countries.
- Life expectancy at birth, for the period 1985 to 1990, is 51.9 for Africa, 75.5 for North America.
- The average daily supply of calories and protein, respectively, for 1983 to 1985, was 1859 and 38.6 for Bangladesh, compared with 3343 and 96.4 for Australia.

- The lowest decile of 100 countries measured, representing 22.01 percent of the world's population, had a gross domestic product of 264 billion dollars; the highest decile, representing 8.89 percent of the world's population, had a gross domestic product of 5533 billion.

- In 1985, 44 percent of the total population of developing countries were living in absolute poverty.

- From 1980 to 1985, total central government expenditure for all developing countries declined from 21.32% of GDP to 18.22% of GDP.

- In 1983, the developed market economies (EEC, Japan, US) accounted for 72.7% of total world expenditures on research and development, compared with 24.2% for European centrally planned economies and 3.1% for all developing countries.

- The world's forests are disappearing at a rate of 15 million hectares per year, with most of the losses occurring in Asia, Africa, and Latin America.

- The index of real minimum wages in Tanzania in 1986 was 36 percent of the 1980 level; in Somalia, it was 16 percent, in Kenya, 75 percent.

- The total literacy rate in Africa in 1986 was 50 percent (61 percent for males and 39 percent for females).

And so it goes, not to mention the more than one trillion dollars of external debt of developing countries and the nearly one trillion dollars of annual, worldwide defense expenditures. (For details on this, see Ruth Leger Sevard's annual masterpiece, "World Military and Social Expenditures.")

THE NEXT STAGE OF HISTORY

Does the underclass have human rights? In one sense, this is a silly question. The underclass, being made up of human beings, has the same rights as all other human beings. In another sense, it may turn out to be the most relevant question of the next stage of history. So far, the only definition of that stage on which there is a consensus is that it is post-cold war, which doesn't tell us very much about its content. But some shadowy contours are beginning to emerge. Let's list some of them:

- With no visible enemies on the horizon, an annual expenditure of eight hundred plus billion dollars on defense is not only the height of folly, but a veritable crime against humanity.

- The debate over whether political and civil rights are a Western luxury or a universal norm is over. The pro-democracy movement has carried the day. While torture, censorship, preventive detention and other forms of societal brutalization are still practiced in too many countries, hardly anyone defends them anymore on theoretical grounds.

- "Quality of life," the demand for the satisfaction of human needs, is emerging as the dominant theme of the last decade of this century and will certainly carry over into the next one.

- But, as Gorbachev's increasingly frantic and so far unsuccessful efforts to raise the standard of living of Soviet citizens demonstrate, the formula for achieving social and economic progress remains elusive. Shouting "market economy" from the rooftops does not put a chicken in every pot.

- And, paradoxically, while the developed world gloats over the triumph of its "system", the system is beginning to crumble within the developed world: Witness the increasing pauperization of ever larger sectors of its population and the recent collapse of the Japanese stock market.

- From Bensonhurst to Baku, from Soweto to the Sudan, racism and tribalism are flourishing. Pluralism releases all sides of human nature, including the darker ones.

- Concern with the environment is no longer the exclusive province of the privileged, liberal few. While Europeans are building the common house of Europe, millions throughout the world fear the collapse of the common house of humankind.

With the exception of the last point, concerning the environment, and the continuing threat of nuclear extinction, the problems of the current stage of history are basically problems of the underclass, locally, nationally, and transnationally. But what are the chances of the underclass climbing out from under, of achieving the egalité which, along with liberté and fraternité, was one of the goals of the French Revolution; the freedom from want which was one of FDR's four freedoms; the right to "a standard of living adequate for ... health and well-being" guaranteed to it by Article 25 of the Universal Declaration of Human Rights?

At the moment, not very good. Here at home, a spineless Congress and an uninspired President seem concerned only with preserving the status quo while casting about for a new ordering principle to substitute for anti-communism, which served them so well and the people so badly for the past forty years, and

of which Mikhail Gorbachev and the long suffering people of Eastern Europe have so treacherously deprived them.

There, in Eastern Europe, it looks as if consumerism will have to have a field day before some kind of synthesis is forged between the gentler aspects of socialism - universal health care, social security, education for the masses, minimal unemployment, affordable culture - and the productive forces being unleashed by the wild swing toward the market as the *deus ex machina*.

And the poor third world, no longer able even to get a pittance from playing off one superpower against the other - no longer entitled to call itself nonaligned! - is left swinging in the wind of change, its terms of trade steadily worsening, its raw materials less and less necessary to the developed economies, its burden of debt sitting on its back like a huge, grinning, unshakable monster.

Only Western Europe seems set on a slightly upward course, but even there all is not well: the miracle has gone out of the German economy, Maggie Thatcher's popularity is at an all-time low, Belgian unemployment is at an all-time high and Sweden's middle way is fighting for its life.

So anyone inclined to agree with Francis Fukuyama that we have reached the end of history, and with it the millennium, had better take a look at Paul Kennedy's "The Rise and Fall of the Great Powers."

The remarkable thing about the current phase of history is the helplessness, the lack of imagination, the apathy with which it is viewed by most of those passing through it. In this week's New Yorker, Mimi Kramer begins

her review of "Grapes of Wrath", the musical which recently opened in New York, as follows:

In John Ford's 1940 movie of "the Grapes of Wrath"....there is a scene in which Ma Joad ... goes through a box of old things ... trying to decide what to throw away and what to take with her to California. There's a postcard from New York, a newspaper clipping about Tom being sent to prison, a pair of earrings. A pot of coffee is boiling on the stove beside her; on the soundtrack, an accordion is wailing "Red River Valley;" and as Ma holds the earrings up to her face and looks at her reflection in the coffeepot she catches sight of what she has become. The precise thing that is happening in the melody of "Red River Valley" at the moment when [her] face changes breaks your heart."

Anyone who attends the Steppenwolf Theatre Company's production of "The Grapes of Wrath" ... hoping to see this scene (or one very much like it) is in for disappointment. The .. production ... is quiet, low-key, and utterly unsentimental. There's nothing in it to pull at your heartstrings; it makes no appeal to nostalgia - no appeal at all to your emotions.

In other words, the census takers have come around, and Ma and Pa Joad have become a statistic.

A CURE FOR APATHY

Is there some hope for putting the wrath back in "The Grapes of Wrath;" for "taking seriously," to use Ronald Dworkin's phrase, the rights of the one-third of a nation and two-thirds of a world ill-clothed, ill-housed and ill-fed? Let me be bold and suggest that there is.

If what we are looking for is an ideology, or, more modestly, a motivating and ordering principle, it is, in the words of the Bard, "invisible as a nose on a man's face, or a weathercock on a steeple." It is, in fact, right there, under our collective noses. It is called, as I have said before, the international bill of rights, or the constitution of the world.

Now the trouble with constitutions, as we know only too well from our own experience, not to mention those of countries which lock people up for demanding their constitutional rights, is that they are far easier to commit to paper than to translate into meaningful action. I am fully aware of the difficulties which beset even the most high-minded legislators and administrators in the fact of contending interest groups, growing deficits and shrinking budgets. But I submit that the outlines of a decent world order have, for the first time, been formulated on the basis of a very broad, to some extent universal, consensus and that this constitutes both a mandate for governors and a powerful tool in the hands of the governed.

How is this to be done? Here are some suggestions:

EXPOSURE

The first step in human rights enforcement is to expose the violations and the violators, who are as dedicated to covering up their misdeeds as to committing them. Nongovernmental organizations like Amnesty International are playing an increasingly important role as observers of and reports on violations of political and civil rights. Your own Africa Rights Monitor is an example of such activity. There is no comparable,

systematic nongovernmental operation in the field of economic and social rights, including periodic reports and country missions. There should be.

EDUCATION

A massive effort needs to be made to overcome the invidious distinction between "real" and "aspirational" rights, to which I have referred earlier; to convince judges, government officials and the public at large that the constant growl of the stomach is as offensive to human dignity as the midnight knock on the door. This must have a political action component to it, like the comprehensive welfare rights movement of the sixties or the various issue-specific, currently functioning organizations concerned with homelessness, hunger, inadequate healthcare and other deprivations of human needs. It also requires serious theoretical work, to get beyond such conversation-stoppers as "How are you going to feed everyone when there isn't enough food to go around?" and move on to such questions as "Why isn't there enough food to go around?" and "Do the underfed have an enforceable right to some of the nourishment of the overfed?"

INSTRUMENTS

When it comes to our own country, it is a sad fact that no economic or social rights are specifically guaranteed by the federal constitution. We need, therefore, to go on a great scavenger hunt for other morally, politically and, to some extent even legally significant sources of such rights, such as

- "The pursuit of happiness" in the Declaration of Independence.

- The general welfare clause and the mysterious 9th Amendment to the Constitution of the United States (the latter reads "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the People.")

- Various provisions in state constitutions and legislative enactments, e.g., the right to health in the constitution of New York, the right of the disabled and elderly to equal access to public transportation in the Mass Transportation Act of 1968;

- The common law;

- The various international human rights instruments, both as independent sources of rights and as aides to the interpretation of domestic legislation.

JUSTICE

Judges must be educated to move to higher ground in the area of human rights, in the only way that ever moves judges to higher ground, which is a combination of persuasive legal argument and forceful expression of public opinion; including, if necessary, in the streets. The Indian Supreme Court is a model for other courts to follow in its recognition of economic and social rights, although it has not always been successful in enforcing its writ.

I have referred to the 9th Amendment to the US Constitution as a sleeper. Here is another: Article 28 of the Universal Declaration of Human Rights. It reads: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." These rights include the right to social security (Art. 22), work (Art. 23), rest and leisure

(Art. 24), a standard of living adequate for health and well-being (Art. 25) and education (Art. 26).

TAXATION

Does this mean that the starving children of Ethiopia have a call on the treasury of the United States? Yes. Am I talking about a system of international taxation? Yes. Is this crazy talk? Yes, but no more so than was talk of a US tax based on income prior to the adoption of the 16th Amendment in 1913, after nearly a four year ratification process.

Perhaps we should think of this strange, heady, unnerving time through which we are living as time out. Time to lick wounds, to catch a little breath, to think about past mistakes, to plan for the next bout. And perhaps, when the gong sounds, there will be no opponent in the other corner. Except war and famine, global warming and AIDS, illiteracy and poverty. And perhaps the referee, a tattered copy of the Universal Declaration of Human Rights in hand, will admonish the fighters: "WHEREAS disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want - I repeat that, and freedom from fear and want - has been proclaimed as the highest aspiration of the common people, THEREFORE go to it! Fight clean, and fight hard!"

Now that is crazy talk, isn't it?

CORD Conference

Karamo Sonko

The CORD Conference on "World Debt and the Human Condition: Structural Adjustment and Basic Human Rights" ended on an upbeat note at the University of Denver Conference Center on April 27. The Conference, which brought together a diverse group of presenters - from the IMF and World Bank to GSIS students - was one of the very few gatherings on third world debt which approached the topic from a human rights perspective.

Joan Nelson of the Overseas Development Council delivered the keynote address. She focussed on the "Impact of Structural Adjustment: What Can Be Done to Reduce the Human Cost?" Her optimistic treatment of structural adjustment, the market mechanism and the intentions of multilateral institutions, contrasted sharply with Professor Alan Gilbert's criticisms of these.

The morning panel was devoted to "Theories of Global Redistribution and the Right to Development." Professor Ved Nanda's paper, presented on his behalf by David Penna, dealt with the definition and application of the concepts of "Emerging Rights and the Right to Development." He stressed the legal basis of the right to development and the need for implementation on a global scale. Professor Dana Wilbanks of the Iliff School of Theology discussed the normative basis for developing alternative policies to the debt crisis. He stressed the responsibility of governments and international institutions to create just solutions.