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Foreword

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FOREWORD

By Azizah Y. al-Hibri

Throughout recent history, changes in the law have been significantly influenced by technological developments. It was, after all, the increasing need for capital to finance massive projects, such as railway systems and auto manufacturing, along with related services, such as banks and insurance companies, that changed the face of the modern legal profession, accelerating the emergence of today's corporate structures and securities laws.¹ These developments had other important consequences when combined with the prevalent value system in our society at the time as it related to race and ethnicity. The labor of the Chinese in the construction of railways and the labor of African slaves on cotton plantations are examples of such consequences. Technology, whether agricultural or industrial, was not used to liberate humanity from the drudgery of everyday work. Rather, it was used, along with the resources and labor of disadvantaged groups of people at home and abroad, to increase the wealth of another group of people and make their life more comfortable.

With the advent of the twenty-first century and the Age of Informatics, many thinkers had great expectations for humanity. They predicted the emergence of a new global community, a global village which is "spatially dispersed yet globally integrated."² Finally, humanity was going to overcome its state of fragmentation and alienation. But the new technological capabilities turned out to mean different things to different people. For some, it meant a "New World Order" based on economic, political, and digital hegemony. For others, it meant a world community based on cooperation and equity.

Octavio Paz belonged to this second group. In his *Labyrinth of Solitude*, he defines community as "a world in which men [sic] recognize themselves in

1. The establishment of the University of Pennsylvania Law School in response to the needs of the new technological society of railroads and industry is a case in point. It marked a departure from the earlier system of apprenticeship to the current form of legal education. For more on the history of the American corporation, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 188-89 (2nd ed. 1985). Furthermore, as the need for greater amounts of capital escalated, and corporations sought funding from the public, the securities markets prospered. Market manipulation and change in economic conditions, however, led to the collapse of the securities market in 1929 and the passage of the Securities Act of 1933, and the Securities Exchange Act of 1934. For more on this, see LOUIS LOSS AND JOEL SELIGMAN, *SECURITIES REGULATION* 27 (3rd ed. 2001). The section also contains a discussion of a similar, but earlier experience in England, which underwent the process of industrialization long before the United States.

2. SASKIA S. SASSEN, *THE GLOBAL CITY* 3 (1991). See also MARSHALL McLuhan, *UNDERSTANDING MEDIA* 170-78 (1996) (reprinting McLuhan's editorial that originally appeared in the *Times Literary Supplement* of London on July 19, 1963).

each other, and in which the “principle of authority” – that is, force, whatever its origin and justification – concedes its place to a responsible form of liberty.”³ Despite the choice of gendered words, this definition comes very close to the feminist one that views human relations not in hierarchical authoritarian terms, but rather as a network of somewhat egalitarian and democratic relationships.

Unfortunately, our political and legal systems today do not generally reflect the latter values, despite their claims to the contrary. Campaign finance reform addresses only the tip of the iceberg in a structure that appears to favor the rich. Laws that prohibit felons who served their time from re-entering the electoral process may appear rational. But when combined with the fact that the prison population is skewed decidedly towards minorities, they have a sinister effect on the right of minorities to be an active part of our democracy.⁴

Corporate law has similar problems. It subscribes to a relatively strict hierarchy of interests. As a result, its main concern appears to be serving the interests of owners/shareholders.⁵ This is reminiscent of the days when voting rights were accorded only to landed gentry. In the corporate context, the interests of the workers/employees are marginalized. In fact, such interests are relegated to and regulated by labor law. Only recently have laws been adopted in some jurisdictions to protect the wider interest of these other stakeholders and the community as a whole.⁶ Furthermore, entrenched organizational hierarchies often distort even the limited corporate goal of serving the interests of shareholders. This is most apparent in cases where the board of directors follows the lead of an authoritarian chief executive in approving a merger, even if its value to the shareholders is questionable.⁷

Hierarchical and authoritarian structures permeate not only our laws, but the legal profession as well. A quick look at relations within many law firms confirms such a conclusion.⁸ After all, it has often been noted that older law

3. OCTAVIO PAZ, *THE LABYRINTH OF SOLITUDE*, 175 (New York 1961)

4. For a deeper understanding of the various aspects of this problem, see the Fact Finding Meeting and Community Forum held by the Virginia State Advisory Committee to the United States Commission on Civil Rights, on March 7th, 1997, in Newport News, VA., 22-26. I was a member of the committee at the time and participated in the hearings personally.

5. Any standard textbook on corporate law would assert this basic fact. See, e.g., M.A. EISENBERG, *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS* 137-38 (2000); see also discussion of these issues in C. R. O’KELLEY, JR. & R. B. THOMPSON, *CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS* 341-46 (1996). Courts have also reiterated this point of view. See, e.g., *Unocal Corp. v. Mesa Petroleum Company*, 493 A.2d 946, 955; see also, *Katz v. Oak Indus., Inc.*, 508 A.2d 873, 873-879 (Del. Ch. 1986).

6. For protections in such cases, see, e.g., Penn. Consol. Stat. Ann. Title 15, § 1715; Indiana Code Ann. § 23-1-35-1; N. Y. Bus. Corp. Law § 717.

7. See Nell Minow, *Who’s Looking Out for the Shareholders?*, *NEW YORK TIMES*, December 14, 2001.

8. For a detailed analysis of hierarchical structures within law firms, see Azizal al-Hibri, *On Being*

firms were modeled after the military. Until recently, many partners continued to act like generals, not democratic leaders or educators. At the same time, there are law firms and CEO's with relatively democratic institutional cultures. There are also domestic popular movements in both the political and corporate arena demanding greater reform and transparency in our systems, as well as the elimination of all forms of discrimination. And they are having some success. This fact indicates that our culture is moving from the values of the Industrial Revolution to that of the new Age of Informatics. We are in the midst of cultural wars of a different kind.⁹ But things could still go either way, and given the global implications of the result, it could put us either at the threshold of an era of global peace, or throw us into the midst of a global clash of civilizations.

Recent world events have also underlined the fact that the shrinking global village is not moving automatically towards increased democracy, peace and cooperation. The use of force continues to be the preferred tool for conflict resolution, despite all claims to the contrary. To complicate matters, the new technological innovations are bringing violence instantaneously to our doorstep. Conflicts in far away regions of the world can no longer be ignored. They have cast their shadow over our cities. The dream of the global village has become a nightmare, with no apparent exit. What can we do about it?

A French Catholic thinker from the past century, Gabriel Marcel, tried to respond to this question. He noted that without "an act of faith,...the malady from which mankind to-day (sic) appears to be suffering is perhaps mortal, and that there is nothing, at the purely human level, which insures our race against that risk of collective suicide."¹⁰

The views of Muslim Syrian thinker Jawdat Sa'id are strikingly similar. In a recent article, he makes the following keen observation:

If a country now is devastated by an epidemic, we blame it on the lack of sufficient hygiene. So too, the wars that erupt here and there are caused by the ignorance of the intellectual organisms that infect communities with hate and influence people to commit atrocities. In today's world, relying on science, we concern ourselves with preventing germ warfare while sheltering the intellectual viruses that destroy us: our intellectual foods are still polluted. We cannot afford to continue to be confused or ignorant about these invasive

A Muslim Corporate Lawyer, 27 TEX. TECH. L. REV. 947, 948-954 (1996).

9. For more on these cultural wars, see Marsha Lewis Mumford, *The Three Phases of Machine Civilization*, in TECHNOLOGY AND HUMAN AFFAIRS 254-262 (L. Hickman & A. al-Hibri, eds. 1981); see also my discussion of the thoughts of Marshall McLuhan on this subject in *The American Corporation in the Twenty-First Century: Future Forms of Structure*, in 31 U. RICH. L. REV. 1399, 1409-1413 (1997).

10. Gabriel Marcel, *Technical Progress and Sin*, in TECHNOLOGY AND HUMAN AFFAIRS (1981).

germs.¹¹

Sa'id argues that it is these invasive germs which led Cain to murder his own brother Able. But the murder did not establish Cain's power over Able because Able refused to play by the same rules.¹² As a result, Cain was anguished and found his pain, after the murder, unbearable.¹³ In Hegelian terms, the "Master" (Cain) discovered that subverting¹⁴ the "Slave" (Able) by killing him (or even enslaving his will) did not fulfill the murder's original purpose: that of having the "Master" recognized as such by the (independent) consciousness of an "Other"¹⁵. This is the folly of violence.

Sa'id relies on the Qur'an in developing his critique against violence. He points out that in the Qur'an, prophets (such as Abraham, Moses, Jesus and Muhammad) are all presented as of one mold that preaches non-violence.¹⁶ "Their world is one," he says, "even if diversified, dispersed and different."¹⁷ Furthermore, the Qur'an expands the circle of messengers by telling us that there are messengers it had not mentioned.¹⁸ "This approach," argues Sa'id, "combats racism and ethnocentrism."¹⁹ It invites us to recognize from every tradition all those who meet the criteria defining what it is to be a messenger, such as the call for justice and equity.²⁰ Furthermore, "this approach ... will help foster cooperation and mutual understanding, and it will create the mutual recognition that we are equal participants in the journey of humanity, for the Qur'an states that there has never been a nation without a messenger."²¹

This conclusion is not surprising, given the fundamentals of Islamic jurisprudence. For example, the Islamic principle of harmony (non-violence) is rooted in the ontological equality of all humans, unambiguously announced in the Qur'an itself. In various passages, we are informed that all human beings are created from the same *nafs* (soul).²² We are also told that from this *nafs*, God created us into male and female, and from these we were made into

11. Jawdat Sa'id, *Law, Religion and the Prophetic Method of Social Change*, RUTGERS J. LAW & RELIG., nos.1 and 2, 83 (2000-2001).

12. *Id.* at 124-25.

13. *Id.* at 125.

14. For more on the "Master-Slave" dialectic, see G. W. F. HEGEL, *THE PHENOMENOLOGY OF MIND*, 228-240 (trans. J. B. Baillie 1967). The word "sublate" refers to a specifically Hegelian dialectic mode of over-coming, negating or canceling the Other.

15. *Id.* at 236-237.

16. Sa'id, *supra* note 12, at 88.

17. *Id.*

18. *Id.* at 92.

19. *Id.* at 93.

20. *Id.*

21. *Id.*

22. *Id.*

various nations and tribes.²³ The differences among us, the Qur'an explains, exist so that we get to "know" each other; that is to enjoy our diversity (not to feel superior to others).²⁴

When humans begin viewing diversity as sufficient justification for the creation of a hierarchy then they move away from Qur'anic logic and embrace the logic of arrogance and destruction. The Qur'an warns us against that, stating that the closest to God in the eyes of God are those who are most pious.²⁵ As all good religious people know, piety and arrogance do not mix. Thus the famous medieval philosopher al-Ghazali noted that if a rich person believes that he is better than a poor person, or a white person believes he is better than a red or a black person, or a free person believes that he is better than a slave, then such a person would be engaging in Satanic logic, the hierarchical logic of arrogance.²⁶ Of course, the same is true of a hierarchy based solely on gender.

Now that the world has experienced a massive religious awakening, these critical arguments and calls to peace, cooperation, and equity, which are made within every faith, are critical to the survival of humanity. They are also critical to combating what Nietzsche called "the Will to Power"²⁷ or what Marcuse would describe as the triumph of Thanatos over Eros in the dialectic within a civilization, and among civilizations.²⁸ They are the "acts of faith" referred to by Marcel.²⁹ Unfortunately, they seem to be muted so far by secular considerations. But, then the path to a truly higher consciousness is full not only of challenges, but also of hope.

23. *Qur'an* 4:1, 6:98, 7:189. The author relies on the English translation of THE HOLY QUR'AN, TEXT, TRANSLATION AND COMMENTARY (A. Yusuf Ali 1983).

24. *Qur'an* 49:13.

25. *Id.*

26. ABU HAMID AL-GHAZALI, 'IHYA' 'ULUM AL-DIN (4 vol.) 342-343 (1939). For a longer discussion of this point, see Azizah Y. al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. OF INT'L L. AND POL'Y 1, 26-27 (1997).

27. FRIEDRICH WILHELM NIETZSCHE, THE WILL TO POWER.

28. Herbert Marcuse, *The Dialectic of Civilization & Eros and Thanatos*, in EROS AND CIVILIZATION, 78-105, 222-37 (1966).

29. See Marcel, *supra* note 11, at 285.

