



**LAW AS INTERPRETATION: AN  
EXPLORATORY INQUIRY FROM ISLAMIC  
LAW JURISPRUDENCE**

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*Awwalu H. Madudu*  
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## SUMMARY OF PRESENTER'S BIODATA



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### **PERSONAL**

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### **EDUCATION WITH QUALIFICATIONS**

Harvard Law School, USA (1981 - 1985)	LL.M, SJD
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School for Arabic Studies, Kano (1969 - 1973)	Grade II Teacher's Cert
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Visiting Scholar, Harvard Law School, USA	1989 - 1990
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Senior Lecturer, BUK	1 <sup>st</sup> Oct 1989 - 30 <sup>th</sup> Sep 1992
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Ministry of Justice, Kano State	1978 - 1980
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Professor A. H. Yadudu has been very conspicuous in community service in Kano State, in particular, and Nigeria, in general. At the University, he has been a Head of Department, Dean of Faculty and Deputy Chancellor (Academic) as well as a member of the Governing Council. These positions have placed him at the head of several important university committees through which he has contributed tremendously to the academic and administrative growth of Bayero University. At the state level, he was a member of the Kano State Committee on Social Policy (1987 – 1988) and edited the book published by that committee as well as on the committee implementing the policy on Almajirai. At the national level, he was a member of the Constitution Review Committee (1987 – 1988), a member of the subsequent Constituent Assembly (1988 – 1989) and a member of the Constitution Debate Coordinating Committee (1998 – 1999); thereby contributing actively to the decision-making process in fashioning the constitution of the nation and the social policies in the immediate community.

On the professional and academic level, Professor Yadudu has taught several aspects of Law at the Bayero University, Harvard School of Law and Emory Law School both in the USA and has served on the NUC committee on minimum standards in the Law Curriculum of Nigerian Universities. He is a member of the Nigerian Bar Association, a member of the Nigerian Association of Muslim Social Scientists, a member of the USA Association of Muslim Social Scientists, a member of the International Bar Association and was once (1991) the President of the Nigerian Association of Law Teachers. He has published over thirty articles in reputable books and journals, edited quite a few of the books and has written a considerable number of technical reports.

Professor Yadudu speaks Hausa, English and Arabic fluently, has a working knowledge of French and is happily married to Zainab Yadudu and blessed with children.

## LAW AS INTERPRETATION: AN EXPLORATORY INQUIRY FROM ISLAMIC LAW JURISPRUDENCE<sup>1</sup>

### 1. INTRODUCTION

In ordinary interactions between individuals, conversations in words and through gestures need explaining and call for interpretive efforts for proper understanding. Historians, engaged in the business of trying to understand, account for or otherwise explain past events and the role of personalities, do interpret, give meaning and make sense out of what some may consider as a fortuitous event. More ordinarily, those whose business it is to render a text from one language into another, as translators, have to grapple with a complex phenomenon, as does a Historian and are, similarly, called upon to bring to bear on the text an interpretive role. So do literary critics who assess the worth and aesthetic value of a literary and other works of art.

Coming to more familiar terrain, it is now generally accepted even by the most doctrinaire positivist that when judges adjudicate cases and, in that process, attempt to apply a rule of law to a given set of facts, they are not merely applying some rules that possess a pre-determined fixed meaning. Especially faced with what Dworkin has popularized as Hard Cases, their interpretive capacities are called into play and put to test to find a most fitting meaning before deciding to apply a rule to the case. In the realm of religious discourse, exegetes are always called upon to search for, discover and explain the eternal Message from the revealed text or other spiritual communications.

In much similar ways, a Muslim jurist, like his western counterpart, the judge called upon to decide a hard case, has to engage in, to borrow Weiss' phrase, the "search for God's law" in his attempt to understand the import of a Qur'anic verse, the text and context of a Hadeeth; in reconciling one text of the *Nass* which appear to contradict or limit the application of another; in extending the application of a rule of *Hukm* to new analogous situations; in deciding whether contemporary Muslims are bound by particular interpretations and meanings placed on texts by earlier generations of jurists or even in deciding whether the entire body of Islamic law as embodied in the traditional sources has relevance and applicability to all facets of contemporary Muslim life.

My task in this address is

- (a) to review a variety of legal hermeneutical methods deployed in the textual and constitutional arenas that are in vogue on the American scene,
- (b) to restate what are considered to be the classical or orthodox Islamic hermeneutical methods and procedures,
- (c) to critique some identified alternative proposals (one strand, by self-acclimation, radical or revolutionary, the other originalist or conservative but systemic) proffered by a host of contemporary scholars such as An-naim, Abusulayman, Shahrur, Turabi, etc, and

- (d) to advance a preferred perspective or view, and
- (e) conclude by posing challenges for Muslim jurists generally, and Nigerians Muslims in particular..

**Hermeneutics** connotes an attempt or a process of explaining, expressing or translating. More comprehensively, it means interpretation through words, language use or translation. In theological and philosophical discourse, it is used to connote exegesis. However, in conventional use, hermeneutics is about the aims and criteria, which regulate the practice of exegesis, translation or interpretation. As McAuliffe has summarized the development of the term, "hermeneutics", was considered at some point in time to be the enterprise which identified the principles and methods prerequisite to interpretation of texts" in theological use.<sup>2</sup> Conscious of the different and varied meanings attached to hermeneutics in Europe - in political, legal and philosophical discourse - an early writer on legal interpretation, a term he prefers to hermeneutics, clarifies it to signify "*the art which teaches us the principles, according to which we ought to proceed in order to find the true sense (of any forms of words used in text)...This art or science is, however, called the principles of interpretation.*"<sup>3</sup> In philosophy, hermeneutics involves attempts to identify the irreducible conditions of human understanding. It is often associated with rules and procedures governing interpretation. But Gadamer emphasizes that the scope of hermeneutics should not be so restricted to rules and procedures governing interpretation. Rather its purpose is to identify "not what we do or do not do (in interpretation), but what happens to us over and above our wanting and doing."<sup>4</sup>

Bruns has identified two broad strands of contending conceptions of legal hermeneutics in the USA. One, represented by Dworkin, advocates that legal texts are to be understood, interpreted and applied on the model of a logical proposition to yield a wrong or right answer (the best fit interpretation). Goodrich, on the other hand, provides a view of legal hermeneutics, which urges that legal texts are historically situated and informed by political discourse which they seek to legitimate and in light of which they can only properly be understood.<sup>5</sup> In this polarized sense, legal hermeneutics is, wrongly in the view of Bruns, understood as being either radical or reactionary. "*It seeks either to undermine the logic of the law and legal application or to mystify the law as a body of original meanings and authoritative doctrines handed down from a divine origin through successive generations of priestly interpreters.*"<sup>6</sup>

## 2. AMERICAN THEORIES OF CONSTITUTIONAL AND TEXTUAL INTERPRETATION

No single area of American law is as deserving of some articulated conception of the principles and rules of interpretation, which should enjoy some measure of consensus among the adjudicators and legal commentators as constitutional law.<sup>7</sup> Yet no area is as bedeviled with contending views or conceptions of the hermeneutical enterprise as this. As Ely has observed in a

seminal work, there is perennial ideological dispute in constitutional law that assumes different guises at different times. *"Today we are likely to call the contending sides 'interpretism' and 'noninterpretism' - the former indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, the latter the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document."*<sup>8</sup> Just as Bruns has categorized two broad conceptions of legal hermeneutics as conservative/reactionary or progressive/radical,<sup>9</sup> other labels have been tagged to conflicting approaches to constitutional interpretation. These include 'true intent', 'originalist', 'foundationalist', on the one hand, and 'purposive', 'antifoundationalist', 'neutral principle', the 'best fit' approaches, on the other.<sup>10</sup> Morawetz has rather aptly summarized these contending views on constitutional interpretation thus:

The true intent advocates *"... argue that a correct understanding of judicial interpretation ... requires adherence to the intentions of the founders. Others try to show that interpretation is governed by 'disciplining rules' that assure judicial objectivity. Still others describe a method for arriving at the 'best interpretation' of tacit principles embodied in our constitutional legacy."* Clusters of those who share this varied view of constitutional interpretation are described as foundationalists. Opponents of this liberal view of the constitutional or textual interpretation hold that rules or constitutional principles are not disembodied of a variety of biases and assumptions. Not believing in the existence of any objective rules, the anti-foundationalists, as a cluster of proponents of these approaches have come to be described, merely seek to subvert the liberalist claim to objectivity in interpretation *"... by attacking assumptions about shared social values, individual impartiality, and fixed textual meaning."*<sup>11</sup> Basically the bone of contention, as typified by the running discourse between Natural law advocates represented by Dworkin and proponents of Critical Legal theory, is that the one ascribes some determinate materiality to legal norms discoverable through disciplined interpretation or construction while the other sees open-endedness, and inescapable indeterminacy to each and every legal rule.

Dworkin believes that *"constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong"*, with the history or shape of the particular practice or object constraining the available interpretation.<sup>12</sup> Goodrich, representing the other end of legal hermeneutical divide, believes that legal text should be *"historicized; that is, it always needs to be situated within the state of affairs in which it helps power to circulate in the desired direction."* This conception of legal hermeneutics, which attaches indeterminacy to legal doctrine or text, though viewed by others as bordering on nihilism, is, quite on the contrary, *"emancipatory, rather than (being) destructive. As stoutly defended by its proponents, such a conception opens up*

*the possibility of a theory of legal practice as the mounting of arguments among alternative social and institutional ideals, as against underwriting tradition or established order by means of ritual appeals to precedent and the internal necessity of rules."*<sup>13</sup>

### 3. DWOKIN'S CHAIN NOVEL METAPHOR

Admittedly, Dworkin has not pretended nor claimed to be offering detailed or systematic hermeneutical methods, rules and principles which should govern adjudicative interpretation. He has nevertheless put forward a conception of the interpretive role of judges in adjudication which seeks to account for and explain how judges dispose of Hard Cases. He has sought to achieve this by hypothesizing how an invented or imaginary judge, Hercules as he calls him, working within and constrained by some shared notions of adjudicative and institutional propriety, could dispose of a case concerning some imaginary and "real" constitutional dispute with a Hard Case component or element to it. Working within such constraints, although enjoying a large measure of interpretive creativity,<sup>14</sup> Hercules is believed to be capable of performing the Herculean task of arriving at the best interpretation of the text. Dworkin likens judicial role in the interpretation of a legal text to the production or criticism of a literary work of art by many authors, *"each of whom, determined as one mind, to create the "Best Book of art, ... an interpretation of a piece of literature (that attempts to show) which way of reading the text reveals it as the best work of art."*

Dworkin elaborated his metaphor of The Chain Novel, by which he likens the participatory role of judges in adjudicatory interpretation to a community of literary men who, working in concert as a community in turn much as judges do in interpreting and choosing to follow or not follow a line of precedential authorities, agree to contribute a chapter to create a single novel. He summarizes their task thus: *"In this enterprise a group of novelists writes a novel seriatim; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case law as integrity. The imaginary literary enterprise is fantastic but not unrecognizable. Some novels have actually been written in this way though for a debunking purposes ... In our example, however, the novelists are expected to take their<sup>15</sup> responsibilities of (maintaining) continuity more seriously; they aim jointly to create, so far as they can, a single unified novel that is the best it can be"*<sup>16</sup>

For Dworkin, the legal equivalence of these literary principles of interpretation are adjudicative principles of integrity which, when a judge is faced with a Hard Case in the constitutional law area, *"instruct the judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author - the (adjudicative) community personified -*

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*expressing a coherent conception of justice and fairness. ... Propositions of law (arrived at through such a process) are true if they figure in or follow (sic) from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."*<sup>17</sup>

Amplifying further his chain novel metaphor, Dworkin acknowledges that each novelist will, while discharging his part in his turn, have to grapple with the problem of deciding what the theme of the novel is and how to continue with it. While doing that he takes into account aesthetic value, attempts to make sense of the intention of earlier contributors etc. He is not merely or mechanically following their dictates but will be called upon to exercise a certain degree of his independent judgement, aware nevertheless of the judgement of his peers, to conclude what would amount to making the novel the best work of art it can be.

Law as integrity, proposes Dworkin, asks a judge deciding a common law case to think of himself as an author in the chain novel of the common law. *"He knows that other judges have decided cases that, although not exactly like his case, deal with related problems; he must think of their decisions as part of along story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be. The judge's decision ... must be drawn from an interpretation that both fits and justifies what has gone before, so far as that is possible."*<sup>18</sup> Dworkin has listed several factors which go to make an interpretation the best it can be. It must be based on a coherent set of principles. It should fit past decisions; must defer to legislative competence and supremacy. To be faithful to the enterprise, the judge must subject his political convictions to the legitimating political history of his community as a sort of some check. Faced with equally eligible interpretations he must choose that which shows the community's structure of institutions and decisions in a better light from the standpoint of political morality etc.<sup>19</sup>

The foregoing is a very broad description of currents in approaches to and conceptions of judicial interpretation against the background of which I shall later situate my discussion and critique of the programs proffered by An-naim, Shahrur and Abusulayman. I have gone to a greater length describing Dworkin's conception of judicial interpretation because I have found it enlightening and highly instructive for my purpose and will utilize its framework to better appreciate the Shari'ah hermeneutics at the appropriate place in the following pages. I proceed next to outline the principles and procedures which govern Islamic legal hermeneutics.

## 4. SHARI'AH HERMENEUTICS

The Islamic law is a *Nass*, text-based legal system. Its primary sources, the Qur'an and Sunnah, are basically textual. The validity of any of its rules, a *Hukm*, is essentially determined by reference to and reliance on a text of the Qur'an, Sunnah or other subsidiary sources of the Shari'ah. Consequently Qur'anic interpreters, jurists and other companions of the prophet, the *sahaba*,

felt a very early need to ascertaining the full import of God's commandment to the believers as embodied in the Qur'an which Muslims consider to contain divine revelation sent to prophet Muhammad in the Arabic language for the ultimate guidance of the believers. So they had to labor to ascertain the prophetic Sunnah on a given issue in order to observe it. In other words, both during the life of the prophet, while divine revelation continued, but especially with his demise; with the expansion of the frontiers of the Muslim world; the compilation of the Qur'an and authoritative Hadeeth collections, the most essential corpus of the Shari'ah had been written down. With this development, the need to formulate hermeneutical rules was felt sorely to facilitate uniform and authoritative interpretation of the Shariah.

The earliest Muslims to encounter the need for the conception and development of Islamic hermeneutics - broadly speaking principles and methods which are deemed necessary for the interpretation of the texts - were the *mufasssirun*, Qur'anic translators or interpreters who had to set the pace in this field. To understand Islamic legal hermeneutics, one must start with their views about the enterprise.

Tabari's tafsir provides a convenient starting point.<sup>20</sup> To his own question on how to arrive at a correct interpretation of a Qur'anic verse, he answers by categorizing Qur'anic text in order of their amenability to human interpretation. First, the Qur'an has itself clothed the prophet with interpretive capacity in respect of *Muhkam* (*Nass minhu and Nass bi dalalah*), verses with normative legal implication, when it referred to the prophet as possessing, endowed with capacity or enjoined to explain the message (*li tubiyyinah*). Such verses may be understood only in light of prophetic explanation. These are verses often containing clear words or which are fortified with clarity (*bayan*), go to details (*tafsil*) but others may be clothed with plurality of meanings. The only necessary discussion of them (which the author gives) is that whereby the Messenger of God explains his interpretation.<sup>21</sup>

The second category of Qur'anic text is that called the *Mutashabih*, verses which pertain to the knowledge of the Last Hour or the resurrection of prophet Isa or which resemble one another or are repetitive. God alone knows the full import of these. The third category relates to those verses of the Qur'an, which anyone knowledgeable in Arabic, the language of the Qur'an, should be able to interpret. While language use and content should count in understanding these verses, every muslim should be able to understand the import of *Ifsad*, *islah* and know the difference between *halal* and *haram*. In short, Tabari's scheme envisages the Qur'an to contain verses, mainly the *Muhkam ayats*, some of them explicit or unequivocal. The determination of the full import of these should be done in accordance with divine and prophetic explanation. He envisages several others for which "a full range of meanings is conceivable" and discoverable by knowledgeable believers. However, he believes that the *Mutashabih* verses, although not identified with greater specificity, are not as accessible to human interpretation.<sup>22</sup>

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If Tabari was preoccupied with the classification of Qur'anic text with regard to their amenability to diversity of meanings, which are constrained, in the case of Muhkam, by the explanation placed on them by the prophet, Ibn Kathir, another exegete who came some three centuries after him, put forward a methodological procedure, which should be followed, in Qur'anic interpretation. Like Tabari, Ibn Kathir,<sup>23</sup> benefitting immensely from the vast repository of knowledge which had been accumulated in the field of Tafsir, the Science of Hadeeth and the systematic development of *usul al-fiqh*, Islamic jurisprudence, outlined his conception of Qur'anic hermeneutics in an introduction to his Tafsir.

To his query what would be considered the best method of interpreting the Qur'an, he proffered a hermeneutical scheme. Viewing the Qur'an as a unified body of revelation that contains verses that embody succinct statement and others providing more details and clarification, Ibn Kathir prescribed that the first and best step in Qur'anic interpretation is to let the Qur'an speak for itself. Believing further that the prophet is divinely-guided and his Sunnah is divinely inspired, Ibn Kathir, in turn, stipulates that should a Qur'anic verse remain ambiguous or further details be needed to fleshen the dry bones of Qur'anic text, then resort should next be made to Sunnah for guidance. The views of the companions of the prophet and those the *sahaba*, whom he considers to be "... eyewitnesses to the circumstances and situations" and further endowed with means of "complete understanding, sound knowledge and righteous actions" of revelation and the emergence a prophetic practice, the Sunnah, could be utilized to explain a Qur'anic verse.<sup>24</sup> With this neat, self-regulating and validating procedural approach to Qur'anic hermeneutics, Ibn Kathir discounts any use of, resort to or reliance on non-Muslim texts to interpret the Qur'an. He specifically mentions that what was known then as "Israilayat", narrative accounts from Jewish and Christian sources, could not be used to contradict a meaning derivable from intra-textual interpretation of the Qur'an. However, they could be "quoted for supplementary attestation but not for full support" or, for that matter, to contradict a clear Qur'anic or Sunnah text.<sup>25</sup>

Describing Ibn Kathir's personal interpretive involvement or approach within the scheme he has designed, Macauliffe observes that he takes various views into account, ratifies the sound or rejects the false or unsound and let the matter drop.<sup>26</sup> In summary the picture of Qur'anic hermeneutics that emerges from the works of Tabari and Ibn Kathir is that early Muslim jurists and exegetes did recognize that a vast amount of Qur'anic and Sunnah texts are pregnant with a whole range of possible meanings. Some classification of their amenability to interpretation and the criteria with which to carry this out had to be developed. While Tabari imposes a principle of organization to the text, Ibn Kathir was more concerned with procedure to assess the validity of any interpretation.<sup>27</sup>

It had been observed above that Ibn Kathir worked out his Qur'anic

hermeneutical method within the systematized body of Shari'ah. Soon the need for developing more detailed principles to govern interpretation of legal texts generally was felt and undertaken with meticulous detail within the specialized field of *usul al-fiqh*.<sup>28</sup> Discussion is subsumed a consideration of other techniques of developing the rules of Islamic law. Of particular relevance for our purpose, is the fact that principles and rules of adjudicative and scholarly interpretation of Islamic law receive prominent attention in *usul al-fiqh*.<sup>29</sup>

While summarizing some of these rules we begin with Amidi's view of legal hermeneutics. He views the role played by a *mujtahid*, a knowledgeable Muslim scholar who seeks to extend the application of an existing rule of Islamic law through independent efforts to new situations not explicitly covered by the Nass of Qur'an and Sunnah or Ijma, as formulative as well as interpretive. To Amidi, the words of any text bristle with uncertainties and are imbued with many probable imports. Amidi ascribes various degrees of probablism to every ascertainable meaning that a text is amenable to. As Weiss observes of Amidi's interpretive method "this probablism enables jurists (*fuqaha*) of Amidi's ilk to combine a steadfast intentionalism with a realistic recognition of the uncertainties entailed in the interpretive enterprise."<sup>30</sup> For a *mujtahid* engaged in such interpretive "toiling", the meaning of the texts under consideration would ultimately find its way into the mind of the searching scholar despite a variety of hurdles through the co-functioning of word and context. The *Mujtahid* is, however, not given a free license to arrive at any conclusions as to the proper meaning of the text. He is severely constrained and must work within the ambit of language use, context, and the validating influence of the Nass, which is the starting point. What are these facilitating, enabling or constraining elements in texts?

Kamali has given us an outline of these as understood in classical *usul al fiqh*. "The function of interpretation", he restates the *usul al-fiqh* principle, "is to discover the intention of the Lawgiver from his speech or actions." A *mujtahid* is not only in need of comprehending the language of the law but also needs a methodology and guidelines with which to resolve instances of conflict in reaching his conclusions.<sup>31</sup> To facilitate a disciplined approach to interpretation, *Usulists have*, by following, building upon and perfecting even more the works of exegetes like Tabari, classified words in legal texts, the Nass, into several categories having regard to their amenability to interpretation.<sup>32</sup> In conclusion, Kamali has thrown a caution to indicate the limit of individual interpretive capacity to disrupt the application of such hermeneutical rules. "The basic rule to be stated at the outset", he emphasized, "*is that a legal text never implies its opposite meaning and that any interpretation which aims at reading a divergent meaning into a given text is unwarranted and untenable. .... Any attempt to obtain two divergent meanings from one and the same text is bound to defy the very essence and purpose of interpretation.*"<sup>33</sup> However, as will be discussed in greater details at the appropriate place, this is precisely what An-na'im has sought to do. He asserts that the arabic word "*Qawama*" in a Qur'anic verse<sup>34</sup>

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has been interpreted to subordinate women and deny them active participation in the public life of the Muslim community. His understanding of Taha's reinterpretation of the word "qawama" is that since in contemporary times women are less dependent economically and that the status and rights of spouses as citizens is primarily determined by the constitution, such a incapacity such be lifted over Muslim women.<sup>35</sup>

The hermeneutics method developed in *usul al-fiqh* is not restricted to prescribing rules and guidelines to govern the domain of textual interpretation. It also addresses the complex Shari'ah interpretive mechanism known as abrogation, *Naskh*. As observed elsewhere, the shari'ah has a legal tradition, which is heavily text-based, one having the twin pillar of the Qur'an and Sunnah enjoying divine inspiration and acknowledged to occupy a prime-validating place within the hierarchy of its sources. Owing to this nature of Islamic law, the problem of inter- and intra-textual conflict is conceivable and was indeed as early as during the lifetime of the Prophet encountered. To facilitate for the orderly and authoritative application of rules of Islamic law, the *Usulists* had to work out detailed rules with which to resolve such conflicts. *Naskh*,<sup>36</sup> abrogation, is the technical Islamic law term for identifying which of conflicting rules has been repealed or its application restricted or suspended. Kamali has provided a simplified definition of *naskh* as follows: *Naskh* is suspension or replacement of one Shari'ah ruling by another, provided that the latter is of a subsequent origin and that the rulings are enacted separately from one another."<sup>37</sup>

Once more, we turn to Amidi for a brief description of this complex terminology. Jurists are agreed that a Qur'anic text could abrogate another. So could Sunnah text abrogate another? Although there is some differences of opinion among jurists on this, it is generally accepted that a Qur'anic text could abrogate that of Sunnah and vice versa<sup>38</sup>. Considering both Qur'anic and Sunnah text to be clothed within divine guidance or inspiration, Amidi has forcefully argued that it should not pose any problem to envisage Sunnah text abrogating a Qur'anic text and vice versa. He cites (Q 53:3) "Nor does he speak of his own desires" as sufficient Qur'anic support for his position.

Amidi did proceed to supply illustrative instances of such cross abrogation. Those who hold a contrary view do not contemplate abrogation in the repealing or displacing effect that others see. To them Sunnah merely elucidates, supplies details to Qur'anic text and is not amenable or susceptible to abrogation by the Qur'an or vice versa. Other rules governing valid and acceptable abrogation are that, by a careful determination of chronological order of the texts, it must be demonstrated that the abrogating text lags behind the abrogated; abrogation is limited to the sphere of texts (*Nass*), for "in true abrogation, one text affirms a rule and the other text either indicates in some way that the rule is not operative or affirms another rule in conflict with it."<sup>39</sup> Kamali provides additional rules namely that abrogation does not apply to perspicuous text (*Muhkamat*); or to attributes of God; or belief in the

fundamental principles of faith; or to invalidate the totality of the Shari'ah itself.<sup>40</sup> It is also generally agreed that neither Qur'anic nor Sunnah text may be abrogated through individual *ijtihad* or *qiyas*. "A rule formulated by an individual *mujtahid* is always tentative, being based on a fallible interpretive endeavor which others may or may not accept."<sup>41</sup>

## 5. CONTEMPORARY ISLAMIC HERMENEUTICS

The foregoing are interpretive rules that were put to extensive application by jurists before the alleged closure of the door of *ijtihad*. In the early part of the eleventh century a fortuitous event took place: the invasion and conquest of the Abbasid dynasty headquartered in Baghdad by the Tartars. Fearing that the infidel invaders would do much to harm not only the territory just acquired but may wreck havoc to the Shari'ah as well, a decision was purportedly arrived at to throw a shield of protection around the Shari'ah by foreclosing all further development of this law through *ijtihad*, an interpretive mechanism which immensely facilitated the development of Islamic law rules to meet the ever-changing condition and circumstances of Muslims. With that decision, the door of *ijtihad* was considered as closed. Consequently it was purportedly decreed that the Shari'ah had reached its perfect status and, henceforth, it was to be applied as already conceived. In turn, all further individual exercise in the interpretation of the law outside established wisdom, which was believed to have been attained within the juristic views canvassed by a particular School of Law, was disallowed. With this ban in place, rigorous development of the Shari'ah through individual *ijtihad* ceased. Before the occurrence of this big event, however, other trends tending toward the rigidity of the development of Islamic law such as the emergence and crystallization of Schools of Law, (*Mazahib*); an alternating practice of official adoption of views of particular Schools by the ruler and a slowing down of rigorous *ijtihad* had all combined to pave way for the decision to close the door of *ijtihad*.<sup>42</sup>

In the wake of this decision and far continuing far into more recent times, the development of Islamic law through the interpretive role of judges, scholars and rulers took new forms such as the issuance of *Fatwa*, a legal opinion sought by an individual from a scholar deemed to possess the necessary credentials and knowledge but which does not have the binding force of as a judicial decree. By issuing *fatwa* at the request of individual Muslim or the political head, a mufti, juri-consult, may extend the application of a settled principle of the Shari'ah within a particular *Mazhab*, to a new case as proposed by the inquirer. Although he might in the process have evolved a wholly new Islamic law principle, the mufti would not claim to have engaged in *ijtihad*.<sup>43</sup>

Owing to multiple forces and factors, the Muslim world, from as early as the mid-nineteenth century to the present, has been faced with the problem of how to adapt the fossilized body of Islamic law which they have inherited to meet the needs of modern times.<sup>44</sup> Some of these developments include the dismemberment of the remnant of the Ottoman caliphate and the emergence of

several nation states in the Muslim world; the encroachment of incipient secularizing forces introduced through association with colonial powers; and in the face of internal decay and inertia long brought about with the cessation of *ijtihad*. Certain questions have agitated their minds. Shouldn't they, as their predecessors, engage in *ijtihad* to expand the frontiers of Islamic law? Are they bound by the decision which purportedly closed the door of *ijtihad*? If they feel unbound, what should they make of the vast legal literature, apart from the Qur'an with its exegeses and the Sunnah in its various compilations, which they all consider to have timeless relevance, normative value and validating authority? Some have asked narrower questions.

Viewing a substantial part of the Shari'ah as being "historically constructed", they wonder whether Islamic law should not be deconstructed to distill from its expansive mass aspects considered to enjoy divine origins and be left untouched or scarcely affected by the deconstruction exercise. Specifically some pointed questions are being raised regarding what to make of the Shari'ah rules constructed through the interpretive mechanism of abrogation as outlined above, which rules are found to be either inconsistent with the Islamic Message, viewed as whole, or simply at variance with some identified modern notions.

A variety of actors such as social, religious and legal reformers have had a bite putting forward proposals on how best to proceed. The pragmatists among them have advocated re-interpretation process called *talfiq*, a synthesis of various views from different Schools to arrive at the best solutions to the myriad socio-legal problems facing Muslims today. The *Salaf*, foundationalists, insist that all the principles of Shari'ah handed down to us are as valid today as then and that, especially the entirety of the Qur'an and all authentic hadeeths, are unchangeable in their tenor and timeless in their applicability, but that, possessing the requisite qualifications and with an attitude of deference to earlier jurists, *mujtahids* of today should, as did their predecessors, be able to develop the law through an interpretive role which is constrained by the primary sources and must derive its validity from these. Secularized elements and apologists among Muslims have tried one contrivance, often totally lacking conceptual or foundational bases, to re-interpret rules of Islamic law considered to be antiquated and at variance with modern notions of progress and development.<sup>45</sup>

The views recently canvassed by three contemporary such advocates deserve attention and may merit a detailed inquiry and critiquing. Abusulayman's call for the development of a new methodology for Islamic scientific inquiries in various fields and his critique of the *Naskh*, abrogation doctrine - although not fully articulated in a systematic way to point to a preferred new approach to reinterpreting Islamic - is one position to be critiqued.<sup>46</sup> An-naim's reformative political program of reinterpreting a select number of Qur'anic verses conceived in and informed by his reformatory movement dedicated to the emancipation of women and the reconception of Human Rights in Islam and reconstructing the vast domain of Islamic public

law to rescue it from the shackles of 'historical' Shari'ah, is another variety.<sup>47</sup> Shahrur's novel theoretical construct for the re-interpretation of the Sharia'h on his new paradigm of, what he terms, a theory of Limits is another.

In the next section of this Lecture I shall attempt to place what I would consider to be the old or orthodox method of interpreting Islamic law through ijihad under the guidance and constraints of the Islamic rules and procedures of hermeneutics, as outlined above, and the three divergent but contemporary "alternatives" broadly identified above within the context and against the background of some American concepts or approaches to constitutional and textual interpretation, also as outlined above, as a jurisprudential exercise. I would particularly endeavor to critique An-naim's jurisprudential (fiqh) re-interpretation program as conceived in his *Toward Islamic Reformation* pointing out:

[a] its total incongruence and incompatibility with orthodox and universally accepted Shari'ah methods;

[b] the legitimacy crises it is destined to encounter in the eyes of Muslims whom it seeks to liberate and

[c] its paradoxical nature and potential outcome.

Similarly I shall, while critiquing Abusulayman's proposals

[a] point out its redemptive value; and

[b] outline its shortcomings.

In similar vein I shall point out the following problems which Shahrur's novel, albeit controversial, theory of limits poses to Sharia'h hermeneutics:

[a] its total lack of roots in mainstream *usul al fiqh* and its rejection by Muslims;

[b] its total disavowal of inherited wisdom and adventure into an uncharted path;

[c] the nihilistic consequences which may result from such a misadventure;

In conclusion, I shall put forward a few observations regarding what lessons are worth learning from the Dworkian hermeneutical method which conceives of the adjudicative interpretive enterprise as a disciplined exercise which, while recognizing and allowing for individual initiative, should be undertaken under certain institutional and doctrinal constraints.

## 6. ABUSULAYMAN AND NEW ISLAMIC METHODOLOGY

Dr. Abdul Hamid Abusulayman is a Muslim activist concerned with the stagnant state of Islamic scholarship in our contemporary times and determined to initiate an intellectual movement, which will serve as a catalyst to the reinvigoration of Islamic scholarship. Such a new methodology must trace its roots to the Islamic tradition but could borrow from and modify existing non-Islamic methodologies beginning with the social sciences. He and several of his colleagues have devoted considerable efforts to cultivate a conducive

atmosphere for Muslims to lead a community life in the West, a life that is consistent with and informed by the ideals of the total "Qur'anic experience". Their effort is not limited to an endeavor to practicalize Islam in a communal sense only but extends into developing, along side that, the intellectual framework that will facilitate the realization of these goals and is in conformity with the dictates of Shari'ah.<sup>48</sup> Distinguished of these is the establishment of the International Institute of Islamic Thought, Herndon, Virginia that works strenuously to sponsor research and produce literature in the field of Islamization of knowledge and the development of new methodology for Islamic disciplines.

In his book, *The Islamic Theory of International Relations*, originally a Ph.D. dissertation, Abusulayman has given a glimpse of his concern for a reconsideration of Islamic hermeneutics especially in the area of abrogation, the *Naskh* doctrine. He is of the view that abrogation had been improperly used to interpret certain verses of the Qur'an touching on Islamic law of War and Peace. Although an interpretation which enjoined perpetual state of hostilities and precluded peaceful coexistence between Muslims and non-Muslims is understandable given the persecution and hostility which the nascent Islamic state and Muslims were subjected to by the non-believing Meccans and their allies, he views it objectionable that even with changed circumstances, Muslims should be eternally bound by it. He observes that "the psychological effect of the struggle and the continuation of confrontation with neighboring powers partly explain the exaggerated usage of the concept of *Naskh* especially in the field of external relations. *Naskh* helped the jurists in their effort to gain legitimacy and rally support against hostile, neighboring non-Muslim powers. It did not help them, however, to think into the future beyond their immediate circumstances."<sup>49</sup>

Satisfied that such a misconceived and restrictive interpretive use of abrogation appears to have ignored a "whole spectrum of Qur'anic and Sunnah texts, the experience of Makkah and early Medina", Abusulayman calls for the development of a new Islamic interpretive methodology which will enable "Islam to regain all the dimensions of the Qur'anic experience ... by reexamining the meaning of the Qur'anic experience and the place of abrogation." He further calls for a fundamental change, which will necessitate limiting the scope of abrogation and alter its familiar meaning in Islamic jurisprudence.<sup>50</sup> In his critique of traditional notions of abrogation, Abusulayman further states that jurists merely assert that a verse has been abrogated without showing whether the prophet has specified that such and such verses have been abrogated and by which verses. He has also observed that the traditional doctrine limits its reach to texts revealed before the message of Islam was completed. He points out that the classical idea of abrogation results in producing a static conception of a doctrine in that it understands *Naskh* "as an act which occurred once in history and that Muslims are trapped in a single position decided by an accident of a course of actions that took place some time back in history."<sup>51</sup> His preferred

methodological way out of the trap is to:

- (a) consider all Islamic rules and values as qualified source of legislation then and now;
- (b) restrict the application of the doctrine of Naskh to clear cases such as change of the Qiblah from Jerusalem to Makkah;
- (c) take the dynamics of time and space into account in determining whether a rule of shari'ah has eternally or tangentially been abrogated;
- (d) take concepts of husna, sabr as well as Qital (fighting, war) in both its psychological and physical sense into account in conducting international diplomacy and cultivating relations;
- (e) restore intellectual, political and legislative maneuverability within Islamic framework. Concluding, he argues that contemporary Muslims "need Islamic political thought and scholarship comprehensive enough to respond creatively to the new realities and challenges of the contemporary world." <sup>52</sup>

## 7. AN-NAIM'S ISLAMIC REFORMATION

Abdullahi Ahmed An-nai'm is a lawyer by profession and a former lecturer and Head of the Department of Public Law, University of Khartoum, Sudan. Initially starting his early legal education in Sudan, he received his LL.B. and Ph. D. degrees from Universities of Cambridge and Edinburgh respectively. He is a member of the Republican Brotherhood, a religio-cum-political organization in the Sudan, described as "un-orthodox reformist." <sup>53</sup> Since 1985, apparently in the wake of the execution of his teacher, "*ustadh*" Mahmoud Mohamed TAHA, An-na'im first turned to human rights advocacy and worked with the Africa Watch and subsequently joined the faculty of Emory Law School in Atlanta where he teaches and directs research in Islamic law and Human Rights as the Director of the Centre for the Study of Law and Religion. He has written extensively in the area of human right law and is the translator of his teacher's, inspirational work. <sup>54</sup>

Deriving guidance and inspiration from the radical reform element contained in the Second Message and impelled, it would seem to me, by a frenzied type of human rights advocacy, his new calling, An-na'im has put forward a methodology of reforming the substance and interpretive mechanism of historical Shari'ah to rescue it from its inherently irreconcilable substantive inadequacies and methodological flaws. <sup>55</sup> Achieving genuine and sufficient reform of the public law of Islam through which a new version of Islamic public law would be constructed that is as Islamic and as the sharia has ever been "... as it will draw on the same basic sources of Islam from which earlier jurists have constructed relevant principles of historical sharia." He also believes that historical shari'ah is tainted with irrelevancies and an anachronism in contemporary times having regard to universally accepted standards in the domain of public law, his specialty, and hopes that his reform method and

program will assist in purging it of its "iniquitous" baggage vis-a-vis its "discriminatory" prescriptions based on gender, creed and political persuasion.<sup>56</sup>

I shall briefly outline his reformation program as articulated in the three main sources.<sup>57</sup> My critique will be directed narrowly and specifically at his interpretive method and legal conclusions rather than his political leanings nor his human rights advocacy nor even his religious idiosyncratic persuasion.

His views may be summarized as follows. While re-echoing the views of his teacher, An-na'im believes that the Islamic message as contained in the Qur'an and Sunnah, and more specifically, the rules of the Shari'ah which pertain to the realm of public law (with case studies in Criminal Justice, Constitutionalism and International law branches), gender and inter-religious relations, and basic human rights issues, can be reinterpreted to both conform them to modern notions and retain their divine or Islamic legitimacy.<sup>58</sup> Such a view has support in TAHA's insightful interpretive gift, which he acquired following a rigorous program of prayer, fasting, and meditation. According to TAHA's Second Message of Islam, since the "Qur'an is the literal word of God, human beings can receive an enlightened understanding of the word and learn directly from God through His word revealed to the Prophet Mohamed." he claimed to have received such an enlightened understanding which he "subsequently articulated as the 'second message' of Islam."<sup>59</sup>

By way of providing a rationale for his reform proposals, An-na'im asserts that the ideal shari'ah should be distinguished from historically constructed shari'ah. Historical Shari'ah lacks any divine content. Rather it is the product and has been shaped by the intellectual and political ideas of its times. Muslims are entitled to question its conclusions and prescriptions.<sup>60</sup>

On the exercise of *ijtihad*, he has questioned whether contemporary Muslims are bound to follow the constraints built around it or not. He has also labored to demonstrate the doctrinal, substantive, institutional and procedural inadequacies of historical shari'ah in the public law domains of Criminal and Penal system, constitutionalism, international law, and on various human rights issues. He claims that try as hard as one could to rescue historical shari'ah on its own terms, one would end up either reproducing the discredited rules and processes or simply find no guidance whatsoever. He thinks, however, that this is not an unsurmountable obstacle.<sup>61</sup> He holds this view, because he believes that there is another internally generated Islamic alternative interpretive method that could come to the rescue. Such a goal could be attained within the framework of Taha's second message of Islam.<sup>62</sup>

He believes in the progressive realization of the essential Islamic ideals attainable through the exercise of reverse *naskh*. This new conception of abrogation argues that there are certain universalist attributes of the Islamic message contained in what Taha characterizes as the "primary" Meccan revelation. These are non-discriminatory. They recognize multi-religious inclination and disposition of mankind and are tolerant of that. They advocate and encourage principles of self-determination and are Republican or libertarian

in their conception of a polity. However, the "subsidiary" Medinese message, claims Taha, tends to contain legislative norms, or have been interpreted to contain such, which negate or contradict the earlier ideals. Taha, imbued with the extra-ordinary insight referred to above, claims that he understands the secondary revelation to have temporarily suspended or held in abeyance the application of the more equitable ideals of primary revelation. Through a process of reverse *naskh* or progressive realization of the eternal message of Islam, An-nai'm, while re-echoing and refining the ideas of his teacher, wishes to reform Islamic public.<sup>63</sup> An-na'im has himself hinted at some candidates such as the verses on intestate succession that gives men twice the share on women.

## 8. MUHAMMAD SHAHRUR'S THEORY LIMITS

Muhammad Shahrur, an engineer by basic training, is a Syrian scholar who has, in our contemporary times, been credited with advancing a revolutionary theory and methodology for a re-interpretation of the Sharia'ah.<sup>64</sup> On account of his basic training, he draws heavily from the natural sciences to offer a fresh re-interpretation of the Shari'ah leading to the emergence of his own unique variety of its hermeneutics. Understanding the Qur'an as *Zikr*, Remembrance, he asserts that it is the product of its time which has been "preserved" by divine power. However, he is portrayed as having observed thus: "*as ... each generation bestows on the Qur'an an interpretation emanating from the particular reality in which it lives ... we in the twentieth century are entitled to confer on the "Remembrance" an interpretation that reflects the condition of this age.*"<sup>65</sup> He distinguishes between an aspect of the Qur'an which is prophetic and another which is textually ambiguous and capable of varying interpretations subject to *ijtihad*. He understands legal texts to hover between *istiqama*, straight line and *hanifiyya*, curvature in the way they regulate conduct. God's decrees, injunctions and prescription on any legal matter, many examples of which he gives from the Qur'an such as the verses on theft, polygamy, zakat, contain normative prescriptions and punishments that hover between curvature and linearity – an upper and lower limit.<sup>66</sup>

To paraphrase the matter, the theory of limit envisages that the divine decree expressed in the Book and Sunna, sets lower and upper limits for all human actions: the lower limit represents the minimum required by the law in a particular case, and the upper limit the maximum. For instance, he understands the Qur'anic verse on theft, which prescribes the amputation of the hands of a convict, as setting the upper limit having regard to the sentence which may be imposed. Having set such an upper limit, the verse leaves the *mujtahid* ample room to determine when to mitigate the penalty according to the objective condition prevailing in the society. He further understands the range of verses, which stipulate that a male child gets twice the share of a female heir, as prescribing the maximum for male (66%) and the minimum for a female (33%). Thus society could decide to vary what each gets within these limits – increasing that of female to, say 40% and lowering that of the male to 60%!<sup>67</sup>

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In the same vein, Shahrur asserts that the doctrines offered by the traditional Schools of law, which incidentally do not admit of such a theory, are not binding upon modern Muslims because they are based upon certain misconceptions, such as their belief that a state of perfection had been reached in the liberation of women, ameliorating the condition of slaves and such other earth-shaking reforms attained at the inception of Islam. In his view the reforms commenced were on-going processes and the Sunnah not a complete model to be frozen in time. He further understands the Sunnah to be a methodological model for legislation and not a norm that is clothed with an attribute to provide for specific and concrete cases for legislation. "Law, in his view, is ever changing as long as it moves between the Limits and not beyond them."<sup>68</sup>

## 9. CONCLUSIONS

The lessons to be learnt from these exploratory discussions on classical and modernist approach to interpretation in Islamic law are many. The hermeneutical classification of Tabari; the methodological interpretive framework of Ibn Kathir; the methodological remarks of Abusulayman and the radical, libertarian and reformatory program of An-naim are very instructive. The first frameworks, the pacesetters, for their groundbreaking role and rigor of analyses, the others for the insight they have shed on how best and how not to proceed. In their own respective ways, Tabari and Ibn Kathir, with the benefit of the complementary efforts of later *Usulists* have provided for us both the institutional framework and enduring legitimating doctrines, principles and a starting point. Although tentative in his proposals but believing in the everlasting relevance of what he has termed the entire "Qur'anic experience" but having detected some fault lines and inadequacies in the methodology of the past and their conclusions, Abusulayman has pointed at a line of further inquiry. He is satisfied that there is ample legislative and political maneuverability in the Islamic message, which can accommodate this for contemporary Muslims and those unborn. An-naim had to make a wholesale borrowing to offer his critique of "historically constructed and flawed" Shari'ah from non-Muslim scholarship, even as he is selective in critiquing, I should think more appropriately stated disparaging, otherwise sound views of his actual and imagined political rivals.<sup>69</sup> Although he claims his reformation program to be rooted in what his mentor has described as the Meccan Shari'ah ideals and prescriptions, it is not difficult to see the hollowness of the claim.<sup>70</sup>

For instance, while making the case for the historicity of the Sharia'h, An-na'im quotes, with tacit approval, the disparaging, but unsubstantiated remarks of Vesey-Fitzgerald who observed that one cardinal evidentiary defect of authenticating *hadeeth* is the presumption that "a respectable man who would not willingly tell a lie is therefore necessarily telling the truth." For he has by his own suggestion described his and his mentor's method and substantive ideas to be heretical.<sup>71</sup> He concluded that it might even be banned in some countries! Perhaps it is a measure of the book's legitimate roots in Shari'ah, purged of all

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historical distortions, that the only place it has received accolades is in the West and among like minds. Neither the Foreword to the book nor the catchy excerpts from the reviews which don the book's cover have been written by Muslims or non-muslims known to hold moderate or contrary views.

Although both An-naim and Abusulayman have suggested that Muslims be freed from the shackle or trap of the classical doctrine of abrogation as traditionally understood, by abandoning it, albeit for divergent reasons and with varying degrees, I would consider such an undertaking, in the absence of a credible substitute, to be perilous, at best disruptive, and at worst, nihilist or subversive. While it appears perfectly sensible and defensible to question strict adherence to the application of the doctrine of abrogation at the level of offering rationales for conducting international diplomacy more pragmatically, advocating its wholesale abandonment, save for a few specific cases, as I take Abusulayman to be urging, would leave a great vacuum and perhaps irreparably affect a whole range of Shari'ah rules and doctrines in other fields and branches of Islamic law. The doctrine of abrogation has been extensively utilized to rationalize and resolve conflicts in countless principles of Islamic law in the realm of family law, Islamic rituals and modes of worship, and rules governing Qur'anic interpretation and recitation.<sup>72</sup> Surely this is an instructive reminder.

On the other hand espousing An-naim's method of reverse abrogation and Shahrur's Theory of Limits would amount to claiming prophetic inspiration and would leave the entire text of the Qur'an and other authoritative Books of Sunnah so open-ended and bedeviled with fluid indeterminacy that what we know today as the universal Holy Qur'an or, to use Shahrur's popular term, the Remembrance, which is so well preserved and protected over the years by divine power, and specific verses with definite prescriptive norms, may very soon acquire many versions - starting with TAHA's the Second Message of Islam and Shahrur's Qur'an: a New Reading. Also an interpretive method which envisages "progressive realization" of the changing meanings of the Qur'anic text, as An-naim's and Shahrur propose, falls foul of one cardinal rule of Islamic hermeneutics and ascribes imperfect and incomplete knowledge on the part of both God and the Prophet.<sup>73</sup>

The lesson from Dworkian conception<sup>74</sup> of judicial interpretation expressed in the metaphor of the chain novel lies for Islamic hermeneutics in its suggestion that the interpretive enterprise should be viewed as a continuing exercise engaged in by actors who possess the requisite religious and scholarly credentials and, imbued with a common sense of some shared notion, work within institutional and doctrinal constraints to extend the frontiers of Islamic law as earlier mujtahids had done before. Perhaps the Islamic law chain novel, which commenced with the active utilization of ijtiḥād to expand the horizons of the sharia under the validating influence of the Qur'an and Sunnah but which was suddenly aborted with the closure of the door of ijtiḥād, resumed several centuries later with intermittent cessation and reactivation, ought now to be resumed afresh under the same guidance.

ENDNOTES

<sup>1</sup> This is a considerably modified version of an address given by the author to students of Islamic law, Harvard Law School, on Wednesday, March 23, 1994. The tentative ideas expressed then have now been further developed and the original essay reworked to take into account and place the discussion in the context of the on-going implementation of Shariah by some 12 States in Nigeria. I hope it will set the stage and serve as a preface to another work which will address the specific problems which have confronted the law-makers called upon to pass legislation through the instrumentality of which the Sharia'h is being implemented.

<sup>2</sup> MCAULIFFE, *Qur'anic Hermeneutics: The Views of al-Tabari and Ibn Kathir, APPROACHES TO THE HISTORY OF THE INTERPRETATION OF THE QUR'AN*, Rippin edit. (1988) at p. 47.

<sup>3</sup> Leiber, *Legal and Political Hermeneutics*, (1970 Reprint) at p.23-24.

<sup>4</sup> Gadamer, *Truth and Method* (1982), xvi.

<sup>5</sup> Bruns, *Law and Language, LEGAL HERMENEUTICS*, Leyh edit. (1992), 23. He observes thus: "On the one hand, there is the idea that legal text is to be construed on a model of logical proposition, that is, a statement can be judged as (in some sense) true or false according to rules of consecutive reasoning. On the other hand, there is the idea that legal text is always historically embedded and politically motivated, so that it is no longer possible to take the law simply as the product of reason and argument: one must also (always) construe it according to categories of materiality - powers, technology, social relations, sexual difference, and so on." at p.23.

<sup>6</sup> Bruns, id, p.26.

<sup>7</sup> Perhaps this is primarily because if there is anything canonical about American law it would be found in the constitutional law realm. Operating within the definition and confinement of a written constitution, American polity, law and society have come to be understood as emanating from and living under the shadow of the fundamental, original or basic Law to the extent of ascribing a semblance of divinity and canonicity to the words of the constitution. Legal and political interpreters of the constitution are always at pains attempting to ascertain the true intent of the founding fathers as expressed in dry constitutional textual principles. See Morton J. Horwitz's characterization in his *Foreword: The Constitution of Change: Legal Fundamentality without Fundamentalism*, 107 Harv. L. Rev. 30, 44.

<sup>8</sup> ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980),1. The author further noted that interpretism and noninterpretism dichotomy is itself a continuation of the long-standing debate between legal positivist and Natural law proponents.

<sup>9</sup> Bruns, supra, note

<sup>10</sup> Ely, 43 et seq, Horwitz, 44 and 51, Tushnet, *Following the Rules Laid Down: A Critique of Interpretism and Neutral Principles*, 96 Harv. L. Rev. 781, 786 and 804, and Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence; Applying Wittgenstein to Positivism, Critical Theory, and Judging*, U. PA. L. Rev. 371, 389-395.

<sup>11</sup> Morawetz, id, 390-392.

<sup>12</sup> DWORKIN, LAW'S EMPIRE, (1986) 52.

<sup>13</sup> Bruns, supra, note , 25. This is the picture painted of the CLS movement as projected by Unger, although, admittedly there are several varying tendencies within the CLS. Refer to Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 563. Refer especially to footnote 1 in which he outlines some of these tendencies.

<sup>14</sup> Dworkin's idea of Law as Integrity deplores the mechanism of the older "law is law" view as well as the cynicism of newer "realism", views which he both considers to be as rooted in the false dichotomy of finding and inventing law. He concludes that "an imaginative interpretation can be constructed on morally complicated, even ambiguous terrain" (LAW'S EMPIRE, 228).

<sup>15</sup> DWORKIN, A MATTER OF PRINCIPLE, (1985) 149

<sup>16</sup> LAW'S EMPIRE, 229.

<sup>17</sup> DWORKIN, LAW'S EMPIRE (1986) 225.

<sup>18</sup> Dworkin, Law's Empire, 238-239.

<sup>19</sup> Dworkin, id, 240-258. Dworkin's Hercules and his interpretive methods have been criticized. In making choices to arrive at the best interpretation he is seen to be playing politics; has often been described as being fraudulent; Hercules is mythical and cannot serve as model; "that legal practice is too deeply contradictory to yield to any coherent interpretation at"; and that eligible "fit" interpretations, drawn as they are from incompatible visions of human action, are irreconcilable and cannot stand together., id, 258 et seq.

<sup>20</sup> Abu Ja'afar Muhammad bn Idris al-Tabari (d.310 A.H/932) prefaced his famous and seminal Tafsir work, Jami' al bayan 'an ta'wil al-Qur'an, with an introduction in which he outlined his thoughts on Qur'anic hermeneutics. For discussion in this section I have heavily relied on MCAULIFFE, Qur'anic Hermeneutics: The Views of al-Tabari and Ibn Kathir, APPROACHES TO THE HISTORY OF THE INTERPRETATION OF THE QUR'AN,

<sup>21</sup> Macauliffe, id, 149.

<sup>22</sup> Macauliffe, id, 53. These pose grave hermeneutical difficulties such that Tabari has to caution thus: "The wrong-headed exegete, ... is one who deliberately seeks out the more obscure Qur'anic verses and then manipulates their meaning in order to support his preconceptions. Rather than attempting to understand these verses in light of those which are clearly Muhkam, he ignores the latter, thereby perpetuating his own confusion and that of others.", 53

<sup>23</sup> 'Imad al-Din Ismail bn Kathir ( d 779 A.H/1373 ), prefaced his monumental Tafsir al-Qur'an al'azim with a carefully laid out procedural steps of Qur'anic exegesis in which his hermeneutical methods are clearly spelt out.

<sup>24</sup> His intra-textual interpretative method is known as *Tafsir bil Ma'thur* by which a heavy reliance is placed on one or several parts of the Qur'anic or Sunnah text ( Nass ) to explain

another.

<sup>25</sup> Mac Auliffe, id, 57.

<sup>26</sup> Ibn Kathir, id, 58. While commenting on the possible meanings of the word "ya'udun", return to in (Q58:2) a verse which pertains to a type of Talaq, divorce in which the husband likens his conjugal relations to his wife to his mother, Ibn Kathir offers several possible meanings ascribed to it thus: 1. to repeat the offensive word, 2. to retain her for a long period after uttering the word without releasing her from the marriage, 3. to resume or attempt to resume conjugal relations following such a Talaq without performing the prescribed purgatory expiation, 4. to resume conjugal relations other than actual sexual intercourse, etc. He dismisses the first view as clearly wrong, supports the last two with Sunnah text and lets the matter drop. See *Mukhtasar Tafsir Ibn Kathir (A Summary of Tafsir Ibn Kathir)* Sabuni, Muhammad Ali, vol. III (Dar al-Qur'an al-Kareem, Beirut, 1402/1981) 460.

<sup>27</sup> MacAuliffe, id, 61-62.

<sup>28</sup> Usul al-fiqh could be liberally translated as Islamic jurisprudence. As a discipline it is primarily concerned with a discussion of the source and hierarchical ordering of Islamic law. Within this

<sup>29</sup> The field is vast and complex. For primary Arabic sources on Usul al-Fiqh see the following representative works: Al'amidi, *Kitab al-ihkam fi usul al-ahkam* 4 vols. ed. Afifi, 2nd ed. (Beirut, al-Maktab al-Islam, 1402/1982), Abu Zahrah, Muhammad, *Usul al-Fiqh*, (Cairo, Dar al-Fikr al-Arabi, 1377/1958). Works in English are few. Among them Kamali, Muhammad Hashim, *PRINCIPLES OF ISLAMIC JURISPRUDENCE*, (Islamic Text Society, Cambridge, 1991) and Weiss, Bernard, *THE SEARCH FOR GOD'S LAW: ISLAMIC JURISPRUDENCE IN THE WRITINGS OF SAYF AL-DIN AL-AMIDI*, (University of Utah Press, 1992) are the best and most readable.

<sup>30</sup> Weiss, *The Search for God's law*, id, 685.

<sup>31</sup> Kamali, *Principles of Islamic Jurisprudence*, 87.

<sup>32</sup> Words in Nass text have explicit or clear, (zahir) implied (dalalah), generic (mujmal or 'amm), restricted (khas), inherent or partial ambiguity (Khafi or mushkil), allusive (isharah), signifying (Ibarah), derivative import etc. For fuller discussion of these classifications refer to Kamali, id, 91 - 137.

<sup>33</sup> Kamali, id, 130-131. Watch this out on An-naim's dual interpretation of "qawama".

<sup>34</sup> "Men are protectors and maintainers of women because Allah has given the one more (strength) than the other and because they support them from their means. Therefore the righteous women are obedient..." (Q4:34). Yusuf Ali, *THE HOLY QUR'AN: TEXT, TRANSLATION AND COMMENTARY*. An-na'im's translation is thus: "Men have Qawama (guardianship and authority) over women because of the advantage they [men] enjoy over them [women] and because they [men] spend their property in supporting them [women]," *Toward and Islamic Reformation*, 99.

<sup>35</sup> An-na'im, id, 99-100. Quite apart from offering an hermeneutically "wrong" or contrary

meaning to the word, the author has simply ignored the fact that much as the constitution may wish to treat spouses on an equal basis as citizens, their rights and obligation under the Shari'ah have not changed correspondingly. A husband is still legally obligated, under Islamic law, to maintain, clothe and provide shelter to his wife. Failure to discharge such an obligation could serve as a sufficient ground for her to seek for judicial dissolution of the marriage.

<sup>36</sup> Citing with approval a definition of Naskh provided by Baqillani, Amidi restates it as follows: Naskh signifies that "addressed speech (Qur'anic or Sunnah text) of the legislator that indicated that a rule of law established by earlier addressed speech has become inoperative and does so in such a manner that, were it not for the later addressed speech, the rule would continue to be operative." He also gives his summarized version of the definition thus: "an addressed speech of the legislator that obstructs the continuing operation of a rule established by means of a preceding speech." Amidi, id, 503 and 504.

<sup>37</sup> Kamali, Principles of Islamic Jurisprudence, 149.

<sup>38</sup> Amidi, id, 503 et seq

<sup>39</sup> Amidi, id, 511 and 548. This means that one should demonstrate the conflict or contradiction in the contending texts.

<sup>40</sup> Kamali, id, 161.

<sup>41</sup> Amidi, id, 531.

<sup>42</sup> For a general discussion on this development refer to DASUKI, *Al-ijtihad fil fiqh al-islami*, (Cairo, 1969) and PASHA, *Nazrah tareekhiyya fi huduth al mazahib al-fiqhiyya*, (Cairo, 1969).

<sup>43</sup> For discussion of such developments refer to Johansen, Legal literature and the Problem of Change: the Case of the Land Rent and Powers, Legal Consultation (Futya) in Mediieval Spain and North Africa both in ISLAM AND PUBLIC LAW: Classical and Contemporary Studies, Mallat, ed. (Graham & Trotman, London, 1993) 29, and 85 respectively. Refer also to Hallaq, W.B; *From Fatwa to Furu'*: Growth and Change in Islamic Substantive Law, *Islamic Law and Society*, 1 (February 1994) 17 - 56.

<sup>44</sup> The following authors have given us a representative account of such attempts: VOLL, ISLAM: CONTINUITY AND CHANGE IN THE MODERN WORLD, (Westview, Boulder, 1982) and Roberson, The Emergence of the Modern Judiciary in the Middle East: Negotiating the Mixed Courts in Egypt, ISLAM AND PUBLIC LAW, Mallat ed. 107.

<sup>45</sup> I have discussed at length a variety of such techniques and the motivating forces behind each variety in ISLAMIC LAW AND LAW REFORM DISCOURSE IN NIGERIA, an unpublished dissertation submitted to Harvard Law School in partial fulfilment for the S.J.D. degree in June 1985. Reference may also be made to N. COULSON, A HISTORY OF ISLAMIC LAW (1964) 197-201.

<sup>46</sup> ABUSULAYMAN, THE ISLAMIC THEORY OF INTERNATIONAL RELATIONS: NEW DIRECTIONS FOR ISLAMIC METHODOLOGY AND THOUGHT, (International Institute of Islamic Thought, Herndon VA, 1987) will be our main point of reference.

<sup>47</sup> Reference will be made to his views and the scheme he has drawn up in AN-NAIM, TOWARD ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW (SYRACUSE, 1990) and Human Rights in Islamic law, Harvard Int'l Human Rights Review, and the views of his teacher and mentor, TAHA, THE SECOND MESSAGE OF ISLAM, (SYRACUSE, 1987)

<sup>48</sup> He and several other Muslims who have studied in or immigrated to and settled in the USA have been involved in one form of communal and intellectual endeavor or another. The most

<sup>49</sup> The doctrine of abrogation was resorted to to reconcile earlier Meccan verses of the Qur'an which enjoined an attitude of patience (sabr), persuasion (husna), tolerance (la'ikrah), and right of self-determination (lasta alayhim bi musaytir) on the part of the believers in their relations to non-believers later Madinese verses, commonly described as "Verses of the Sword". These verses (e.g. 9:36) were understood to have resulted in the abrogation of, by some account some 120 to 140, earlier verses. Refer to Abusulayman, The Islamic Theory of International Relations, 36.

<sup>50</sup> Abusulayman, id, 36. Cautious to point out that he was not calling for a wholesale abandonment of the doctrine of abrogation or of the rich Islamic juristic tradition, the author admonishes thus: "This attempt to deal objectively with Muslim thought and its research methods should not be interpreted by Muslim intellectuals in a way other than to draw their attention to strategic factors that prevented Muslim thought from reaching a broader and more basic understanding of the Qur'anic experience. The intention is the betterment of the conditions of Muslims in modern world. This broader understanding is an alternative to the formalistic, superficial and narrow type of intellectual life in which the Muslim world of today is trapped" (see note 57 at p.54).

<sup>51</sup> Abusulayman, id, 107.

<sup>52</sup> Abusulayman, id, 107.

<sup>53</sup> Voll, in his Foreword, p.ix, to An-na'im, Toward an Islamic Reformation, quoting from FLUEHR-LOBBAN, ISLAMIC LAW AND SOCIETY IN THE SUDAN (1987). Perhaps with a view to clearing the author's "impeccable" credentials, Voll quickly adds that "An-na'im is not in that broad grouping which some observers have identified as "fundamentalist"

<sup>54</sup> TAHA, THE SECOND MESSAGE OF ISLAM ( SYRACUSE, 1987).

<sup>55</sup> He asserts that his reformation program shall, while ensuring a balance between Muslims' and non-muslims' right to self-determination and maintaining Islamic legitimacy, adjust and adapt rules, principles, doctrines and processes of Islamic law to the circumstances and contemporary life of Muslims "even if this should involve discarding or modifying certain aspects of historical sharia." (An-na'im, Toward an Islamic Reformation, 7, 9-10 and 49-51)

<sup>56</sup> An-na'im has described a variety of lowly and discriminatory status attaching to women and non-muslims which he considers unacceptable and proceeded to construct another view of Islamic law which will remove these. See An-na'im, id, 84-100 and An-na'im, Human Rights in Islam, 46-49.

<sup>57</sup> AN-NA'IM, TOWARD ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN

RIGHTS, AND INTERNATIONAL LAW, (SYRACUSE, 1990), TAHA, THE SECOND MESSAGE OF ISLAM, (SYRACUSE, 1987) and An-na'im, Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives, 3 HARV. HUM. RTS. J. 13.

<sup>58</sup> An-na'im, refer to note 54.

<sup>59</sup> Aware of the heretical import of such a claim, TAHA was reported to have emphasized that although his vision of the future of Islam was "God-given and not the result of purely rational secular thinking", nevertheless he was careful to explain clearly that "he had not received any fresh revelation, as he shared the common Muslim belief that all heavenly revelation ended with the Prophet Mohamed." TAHA, Second Message, 4.

<sup>60</sup> An-na'im, *Toward Reformation of Islamic law*, 14.

<sup>61</sup> An-na'im believes that a revolutionary reform of historical sharia is unattainable through the exercise of *ijtihad*, however contrived, because such a reform process is limited and restrained by the structures of historical sharia. A desirable revolutionary reform of certain principles of Islamic public law be attained by making changes which must be contrary to sharia. Refer to: *Toward Islamic Reformation*, 49-51.

<sup>62</sup> An-na'im, *id.*, 59.

<sup>63</sup> The proposal falls short of specifying exactly which verses are candidates for reverse abrogation and by which. However, Taha has given some hints on some of these. Those on Zakat which he considers not to be an original concept in Islam. Its purpose was to prepare the Muslim community for socialism! The concept of hijab is another. Primary Mekkan revelation envisage *Sufr*. Commenting on the distinction between *sufr* and *hijab*, An-na'im states that whereas hijab permits the display of only the face and hands, *sufr* permits more exposure "provided modest and decent dress is maintained in general". See pp. 161 and footnote no 16 at p. 143, in Taha, *The Second Message of Islam*.

<sup>64</sup> Refer to his *al-kitab wal-Qur'an: Qira'a mu'asira*. (Cairo and Damascus: Sila lil-nashr. 1992). This can be described as *The Qur'an: A New Reading* in which he has outlined his scheme. I have not had the privilege of reading the Arabic version but have heavily relied on a rendering of these views made by Hallaq, in his Book, *A History of Islamic Legal Theories: An Introduction to Sunni usul al Fiqh*, (Cambridge University Press, 1997).

<sup>65</sup> W. A Hallaq, *at.* P.246.

<sup>66</sup> His theory has derived its name from the pendulum of choices which swings between the two extremes of a linear line and a curved one representing limits for conduct and punishments which may attach to infraction or to duty imposed.

<sup>67</sup> Refer to Hallaq, p.248. The author gives a detailed explanation of Shahrur's theory of limits as is applicable to various spheres and legal problems. While justifying why the ratio of distribution could be varied between male and female in the form given above, contrary to all known precedent in Sunni fiqh, he was represented as having contended thus: "Law must not be perceived as the literal application to a modern condition of a text revealed centuries ago," as this will violate his theory of limits. *Id.*, p249.

<sup>68</sup> Hallaq, p 253.

<sup>69</sup> For instance while discussing views of political rivals such as those Dr. Turabi, he has been most unfair and dismissive of them.

<sup>70</sup> It can easily be demonstrated that his propositions and prescriptions are unorthodox and cannot stand rigorous scrutiny from primary Islamic law sources. His case for painting the Sharia'h as "historically constructed" relies heavily, perhaps exclusively, on non-muslim sources such as N. COULSON, *A HISTORY OF ISLAMIC LAW*, 9-74 & J. SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* (1964), 28-68. Conclusions reached in these sources have strongly been doubted by other works.

<sup>71</sup> By his own account, he anticipates that both the substance and methodology of his reform will be opposed by those immersed in historical Shari'ah, those overwhelmed by repressive /authoritarian attitudes (p.67); "reactionary forces", even beneficiaries of the proposed reform: the educated women who are fundamentalists; Muslims living at a "superficial level of both Islam and modern civilization, (p186), and those with "vested interests" *Human Rights in the Muslim World*, 51.

<sup>72</sup> In response to some scathing remarks about the hopeless sameness in character and content and dearth of amusing tales in all Law Review articles, a tradition regrettably set by the pioneer Law Review, *Harvard Law Review*, Glen quipped thus: "If you must discard standards of good taste and sanity of the *Harvard Law Review*, surely a well-rounded, maturely developed substitute should be offered" (*Notes on an Antediluvian*, 23 *Va. L. Rev.* 47).

<sup>73</sup> Progressive realization suggests a notion that something hidden from God has suddenly become evident or been discovered. Amidi has observed that to safeguard the Divine Being against the infringement upon the eternal perfection of His knowledge while affirming His ability to abrogate rules, it is imperative that a valid doctrine of abrogation be dissociated from progressive realization (*The Search for God's Law*, 506).

<sup>74</sup> Some colleagues have drawn my attention to some anticipated problems of using Dworkian metaphor. One less charitable commentator worries whether resuming the Islamic law chain novel may not amount to resuming the writing of a Fairy Tale! Another wonders what factors, amongst colonial impact, the input of Muslim reformers, the language of deconstruction etc, those called upon to continue the chain novel may or may not be permitted to take into account. One other problematic area relates to making a determination as to who is qualified to embark on continuing with the enterprise. My tentative answer to these are that indeed Muslims have, under different guises, continued with the enterprise even after the closure of the door of *ijtihad* such that it is not a novel entirely abandoned. On the other hand, the development of a workable methodology of the Islamization of knowledge, such as is being envisaged by Abusulayman [see note] could help immensely in providing the ground rules. On the whole, however, this is an exploratory essay. Queries of the sort raised above and several other problems, which the resumption of the chain novel may pose may be addressed in another paper or when it is being published.

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