Place of Sadd Adh–Dharā‘i in The Shari‘ah Framework: Examples Of Zinā And Sariqah

Kazeem Adekunle ADEGOKE
Department of Arts and Social Sciences Education,
Islamic Studies Unit,
University of Lagos,
delajpenny@yahoo.com

Abstract
Shari‘ah legal principles are dynamic in nature. One of the features of its dynamism is the concept of Sadd Adh–Dharā‘i. This is an instrument which is used in preventing commission of crimes. This paper re-examines the place of Sadd Adh–Dharā‘i within the framework of Shari‘ah in relation to the prevention of the crimes of Zinā and Sariqah. It gives conceptual clarifications of these terms and does a review of juristic opinions on same.

Introduction
Shari‘ah law has been seriously attacked by the advocates of the common laws and all other secular systems and laws. The calumny and propaganda against the feasibility of the Shari‘ah legal system in the contemporary time is so extremely manipulated that not only the non-Muslims subject the Shari‘ah law into hostile attack but even the western educated Muslims and uninformed Muslims. These unfounded calumny and propaganda against the Shari‘ah legal system cut across several nations in the Europe, Asia and Africa as a result of the people’s ignorance of the flexible, elastic and dynamic natures of the Shari‘ah in its operation and application in the human society. One of these flexible, elastic and dynamic nature of Shari‘ah is the concept of Sadd Adh–Dharā‘i in the legal operation and application of Shari‘ah law in the human society. In an Islamic state where Shari‘ah legal system is in full application and operation, it is very easy to regulate moral and social norms of the people so as to achieve social harmony and record low crime rate in the society. Thus, Sadd Adh–Dharā‘i becomes a vital instrument in the principle of Islamic jurisprudence ‘Usūl al-Fiqh among some Islamic jurists who are Usul al-Fiqh and Fiqh ‘a ‘ to regulate the moral lives of the people so as to shut the door against the occurrence of crime and evil in the society. Morality and discipline of the people in a society is the safest and surest principle on which an operating law of a nation should be based for better social control of human conduct of affairs. This serves as one of the basic differences between Shari‘ah law and common law where the concept
morality and operated law are not necessarily co-existing in the matters of crimes and torts. In Şanə ah, man as a basic unit of a society is the object of the social reform through the effective use of the concept of Şadlı Adlı-Dhañə in the society. It is on this line that the study aims at investigating into the role playing by the concept of Şadlı Adlı-Dhañə in the human society within the Şanə ah framework with a particular reference to the social crimes of Zinə and Sariqah.

Conceptual Definition of Some Keywords
The term “Şadlı Adlı-Dhañə” is a compound word formed from two different words of “Şadlı” and “Dhañə”. “Şadlı” is a verbal noun derived from the root verb “Şadlı” which means “he closed up, he stepped up, he blocked up, he barricaded.” Thus, “Şadlı” means closing, stopping up obstruction, barring, barricading, blocking. “Dhañə” is a plural word for the term “Dhañə” which is derived from the Arabic verb “Dhañə” which means “he measures, he crossed or traversed the border, he used something as a pretext or an excuse as a means.” Dhañə therefore means medium, means expedient, pretext, excuse. Cowan[10] describes Dhañə as a synonym of Wajid which signifies the means to obtaining a certain end. Şadlı Adlı-Dhañə could be technically defined according to Kamali[11] as blocking the means to an expected evil and or consequence which is likely to materialize if the means towards it is not obstructed. The term “Zinə” linguistically means adultery or fornication[12]. In the technical sense of the term, Doi[13] describes Zinə as sexual intercourse between a man and a woman not married to each other. He further stresses that it is immaterial whether one or both parties have their own spouses living or unmarried or whether this criminal act is committed with or without the consent of the involved parties. The term “Sariqah” linguistically means theft or stealing. It is a crime of taking something that belongs to another person secretly or without permission[14]. It is unanimously agreed by the Islamic jurists that the stealing or theft (Sariqah) has taken place when any of these conditions occurs[15].

(a) The stolen property is taken away secretly.
(b) The stolen property is taken away with criminal intentional.
(c) The stolen property should be legally owned by the person from whom it is stolen.
(d) The stolen property should have been taken out of the possession of its real owner.
The stolen property should have already come under the possession of the thief.

The stolen property should reach the value of Nisāb (premium value) of theft.

Sha’īb linguistically means water hole, drinking place, approach to a water hole. Some linguists describe it as a source of water, the resort of one who is in need of water, or path lead to the source of water in the desert. On this linguistic definition of the term, Ajrumobi stresses that the term “Sha’īb” acquired its importance to the Arabs during pre-Islamic era when the water and the way leading to it were extraordinarily important to them since they live in the desert where water is often scarce. Technically, Sha’īb according to Rashid, means an act of rules which regulates the conduct and affairs of people for setting all differences and avoiding all disputes. For the context of this study, Hornby describes “place” as a role or importance of somebody or something in particular situation, usually in relation to others. He also defines “framework” as a set of beliefs, ideas or rules that is used as the basis for making judgment, decisions et cetera.

Concept of Sadd Adh-Dhāri’ic Among the Islamic Jurists

Concept of Sadd Adh-Dhāri’ic is formulated by the Islamic jurists (Usūlīyyūn) for the purpose of preventing evil before it actually takes effect. It is therefore not always necessary that the result should actually come into being. It is rather on the expectation that the particular means is likely to lead to an evil result which renders the means in question unlawful even without the realization of the expected result. Abu Zahrah was right to have observed that the nature and value of the means is determined by looking at the purpose that it pursues regardless as to whether the latter is intended or otherwise. When a particular act is deemed to lead to a certain result, whether good or evil, such act (Fā’ih) is held to be the means towards that end. The question of the intention of the actor (Fā’ih) is, as such, not relevant to the objective determination of the value of the means. The goodness of the expected result of an act would determine the value and nature of the means regardless of the intention (Ni‘ayah) of the actor or the actual realization of the expected result itself. Ash Shatibi, similarly observes that Allah, the law-giver permits and condemns same acts in accordance with the benefit or harm that they lead to. Therefore, when a particular act brings about a result which is contrary to the objectives of the Law-giver, then the latter would be held to prevail over the former. This is to say that if the means
to a certain end violate the basic purpose of *Shari'ah* (Maqasid al-Shari'ah), they must be blocked.\(^\text{20}\)

Islamic jurists divide the means (*Dhann* \(^\text{20}\)) into four divisions in accordance with the degree of probability or otherwise that a means is expected to lead to an evil end. They are as follows: \(^\text{20}\)

(i) The means (*Dhann*) which definitely leads to an evil end. The generality of Islamic jurists of all schools of thought maintain unanimous agreement on the prohibition of this type of means (*Shari'ah*) regardless of its nature and value and the intention of the actor. For instance, setting a trap for hunting the animal on the road side, urinating on the public dam, dejecting on the road side, et cetera.

(ii) The means (*Dhann*) which is most likely, on the basis of assumption (*Zana al-Ghalib*), lead to an evil and is rarely, if ever expected to lead to a benefit. For instance, selling arms and ammunition during warfare to the opposing war camp or selling grapes to a wine maker.

(iii) The means (*Dhann*) which frequently leads to evil, but in which there is no certainty, nor even a dominant probability, that this will always be the case. The suitable sample for this is remaining in privacy (*Khulah*) with non-relative opposite sex. This frequently leads to fornication, though not amounting to positive proof that it might lead to fornication. Similarly, the sharing of a single room by the male and female children of twelve years of age of the same family regardless of whether it can lead to incest or not.

(iv) The means (*Dhann*) which is rarely expected to lead to an evil and is most likely to lead to a benefit. For instance, growing a grape fruits on one's land farm. It is possible that this grape fruit may be fermented into intoxicant (*Khamr*), but a mere possibility of this evil may be over looked in view of stronger likelihood of the benefits that would be achieved from the grape fruit.

It should be rightly mentioned at this juncture that Islamic jurists are, however in disagreement (*Khatulat*) over the validity of *Sadd Ad- Dhann*. The Hanafi and Shafi'i jurists do not recognize it as a source in the principle of jurisprudence (*Usul al-Fiqh*) in its own right on the grounds that the necessary ruling regarding the means (*Dhann*) can be derived from other jurisprudential principles such as analogical deduction (*Qiyas*) and the Hanafi's doctrine of juristic preference (*Istibdâm*) and local custom (*Urf*).\(^\text{20}\) Dot observes that *Sadd Adh Dhann* is not much
different from the public interest and welfare (Muṣāḥah al-Mursalah) employed by the Maliki and Hanbali jurists. This is the main reason why the concept of Sadd adh Dharāʿī was validated as a source of Shariʿah in its own right.

Application of Sadd Adh– Dharāʿī in Relation to Zinā Crime

Zinā is one of the grievous social crime in the human society. This crime is not taken with a pinch of salt as it attracts penalty (Hadd) in Shariʿah legal system irrespective of marital status of the culprits. In order to save humanity from the menace of Zinā, Shariʿah does not completely rely on the punitive measure to curb this social crime in the human society, it employs reformatory and prohibitory measures on a large scale. These reformatory, prohibitory and preventive measures such as marriage and other means which could block someone away from Zinā are what is referred to as Sadd Adh Dharāʿī in the Shariʿah legal system which are going to be discussed in the following passages:

Enjoining Islamic Marriage (Nikāh)

Islamic marriage (Nikāh) is the foremost kind of Sadd Adh Dharāʿī to shut the door against the Zinā crime in the human society. Shariʿah decrees that sexual desire of man and woman should be satisfied through the lawful way of prescribed course of an Islamic marriage. It is as a result of this that Shariʿah encourages early marriage among the youth and adolescents and this should be sponsored by their parents if those youth and adolescents are financially incapable to venture into marriage. All the schools of Thought (Madhābīh) unanimously agree that marriage becomes obligatory on a person if he or she:

1) Fears that he or she will commit Zinā if not married.
2) Is unable to fast to control his or her sexual passion.
3) Discovers that the fasting does not curb his or her sexual passion.

Thus, marriage is seen in Shariʿah as a form of worship (Iḥlāl) as it protects man and woman from promiscuity, adultery, fornication, homosexuality, lesbianism, celibacy et cetera. It is on this line that the Prophet (S.A.W) says:

Oh young men, whoever is able to marry should marry, for that will help him lowering his gaze and guard his modesty (Sahih al-Bukhari).
Preventive Measures

There are also several Šadd Adh-Dharāt against the Zina crime which come up as preventive measures so as to create a social enabling environment and consequently make the occurrence of this crime impossible since not all the people in the society could afford to go into marriage because of their financial capability. After all, some jurists are of the opinion that man should not be advised to go into marriage if he cannot financially maintain the wife and children, because he may commit theft (Zanāqah) in order to meet the need of his family. This is to say that in order to avoid evil of Zina crime if he does not marry, he becomes the victim of another crime (theft). Whatever the case, these preventive measures in Šadd Adh-Dharāt are aimed at weakening those means of evil (Dharāt) that lead to Zina crime in the social system. These preventive measures are as follows:

Prohibition of Lustful Look

Šaría prohibits the gazing or looking of an opposite sex with sexual lust and desire. A human eye is created in such a way that it easily conveys the sight message to the heart as it has a direct communication link to heart. All the means (Dharāt) leading to the occurrence of Zina usually start with a lustful look. Qur’an 24:30-31 enjoins that male and female believers should lower their gaze and guard their private parts from Zina. In support of this, the Prophet (S.A.W) elucidated that eyes commit Zina, and their Zina is lustful looking at the opposite sex. In the same way, looking at the Awrah (nudity or nakedness) of others is strictly prohibited in Šaría regardless of whether the person concerned is of the same sex or not. Prophet (S.A.W) condemned this in his saying that: 35

A man should neither look at the Awrah of another man, nor a woman, neither should a man go under one cloth with another man nor a woman with another woman. (Ṣahih Muslim)

The Awrah of man falls between his knee and navel while that of woman is all parts of her body with the exception of her face and her hands up to the wrist joints. It should be rightly mentioned at this juncture that watching a blue movie and film, attending a beauty contest and macho-man contest and looking at a pornographic picture are also means of lustful look.

Prohibition of Displaying Adornment (Tabarruj)

Šaría prohibits all the means of displaying the adornment and ornament put on by the woman in order to entice or seduce opposite sex. This could be done by clothing oneself in a transparent and tight dress so
as to reveal the contour of the body, adorning oneself with the dressing of an opposite sex, putting on the half-naked dress in public such as low-necked and low-back blouse and mini or micro mini skirt, short knicker or boxer, participating in a beauty and macho-man contest and displaying fancy hair-do and other beauty decorations and fineries. On this Qur'an 33:33 says

... And do not go about displaying your fineries and decorations as woman used to do in the days of ignorance ...

By this, woman's adornment which includes, cloth and other artificial decorations such as dress, hair-do, ornaments and natural features such as face, hair, neck, breast, bosom and other seductive parts of the body must be covered before the opposite sex who are Ghayr al-Mahram. Displaying of one's fineries also includes the voice of woman in public with unnatural soft speech, using of perfume in public, public singing and dancing which can arouse the sexual desire of opposite sex on them. Sometimes attention is attracted not by the woman's natural voice but by some other devices such as speaker, microphone et cetera. Simultaneously, perfumed clothes and bodies of woman can lead to emotional stimulation from the opposite sex. Without mincing word, music, singing and dancing of the current time have a strong tendency to excite the sexual passions of the opposite sex which could finally lead to immorality in the society.

Avoidance of Privacy (Khalwah) and Touching with Non-Relative opposite Sex

Shari'ah prohibits the private meeting between non-relative man and woman in an exclusive place because they can be seduced to one another regardless of their intention and this could lead to immoral consequences. Touching of non relative woman through hand shaking, kissing and hugging is also prohibited. On this, the Prophet said:

"Beware that you do not call on woman in privacy" (Sahih Muslim)

"I do not take the hand of a woman, verbal oath of allegiance (Bay'ah) is enough" (Sahih Bukhari)

Enjoining Rules of Entrance

Shari'ah enjoins the man to observe entrance regulation before entering the house and room belonging to other fellows regardless of their sex. This rule can be observed by knocking, waiting for the response and
finally offering a greeting of peace (Tashim) before entering. On this, 
Palanpuri submits that when the young child attains the age of maturity 
or puberty, they should ask for the permission before entering into the 
house or room and when asking a woman for something or an article, 
they should ask for it from behind a curtain. (Hijab).

Prohibition of Women Travelling Alone

Shari'ah prohibits women from travelling alone or travelling with non-
relative men. Woman must be accompanied in her traveling with either 
her male relative or blood relative (Mabrum) who would be protecting 
and monitoring her in the travel. The same rule also applies if she is on 
Haj pilgrimage for religious purpose. Prophet said:

A woman who believes in Allah and the Last 
Day shall travel only in the company of a near 
blood relative who she cannot marry.

Prohibition of Unnecessary Intermingling with Opposite 
Sex

Shari'ah prohibits unnecessary intermingling with opposite sex which 
could arise from enjoying the company of the opposite sexes, being too 
familiar with the opposite sexes, engaging oneself in a girl-boy friend 
affairs et cetera.

Application of Sadd Adh-Dharath in Relation to 
Sariqah Crime

Sariqah crime is also a common social crime in the human society. Just 
like Zina crime, it also attracts the penalty in Shari'ah legal system 
regardless of the gender or sex of the culprit. In order to curb this crime 
in the human society, Shari'ah lays down some means of Sadd Adh-
Dharath so as to ensure the safety and protection of human property in 
the society. Some of these Sadd Adh-Dharath are highlighted below:

Provision and Maintenance of One’s Dependents

Provision and maintenance of one’s dependant is popularly known as 
Nafaqah in Shari'ah legal system. It simply means the provision of food, 
clothing, shelter and some other essential services on one’s dependants 
such as wife, children, junior brothers and sisters, aged parents, uncle and 
various types of needy or poor relatives. These provisions and 
maintenance are to be provided for the dependants in the light of modern 
necessities suitable to the circumstances of the countries and their standard 
of living. According to Doi, it is the responsibility of the father to 
maintain his daughters until they are married, and sons until they reach
the age of puberty and have the means of living such as job or employment. It is also the responsibility of a child to maintain his parents and grand parents, maternal as well as paternal if he can afford to do so. Likewise, if one has the means, one should look after the needs of one’s poor relatives. This is enjoined in Shari’ah legal system so as to serve as a means of blocking the crime of Sairajah in the society.

Institution of Guardianship in Islam
Guardianship in Islam is instituted in Shari’ah legal system so as to put the care of the orphan, minor, and broken-home child before their age of puberty under the authority of financially capable somebody who would be playing the parental role for them. In Shari’ah, special attention should be directed towards the maintenance of these unfortunate needy children so as to prevent them from sourcing their living from the criminal acts such as Sairajah crime and other related crimes. As a result of this, guardianship is instituted in order to minimize the risks to which these children and their property are subjected to by the unscrupulous relatives.

Institution of Hadanah in Islam
Hadanah is an act of putting the child under the custody of one of his or her parent so as to receive proper and suitable care commensurating to his or her age. Thus, in the case of the death of the father or occurrence of irrevocable divorce, mother is entitled to the custody of a male child up to the age of seven and of a female child until she reaches the age of puberty. Despite this, the father must not ignore his responsibility of supervising his children under the custody of their divorced mother. If the mother is dead or religiously unqualified to handle due to the difference of religion, the child will be given to the following female Muslim relatives in the order of priority: mother’s grand mother, full sister, uterine sister, daughter of full sister, daughter of uterine sister, full maternal aunt, uterine maternal aunt and full paternal aunt. If all these female relatives are not available or religiously disqualified, the following male Muslim relatives would take the charge of child’s custodianship and guardianship: father, nearest paternal grand father, full brother and consanguine brother or any other paternal relatives within the prohibited degree. If the custody of an orphan, minor and broken-home children is rightly and properly handled by suitable and capable relative, their involvement in the Sairajah crime and other related criminal acts would be blocked.

Right to Inheritance and Wasiyyah
Shari’ah lays down the rule that the property left behind by the deceased relatives should be shared among those people who by the reason of
blood relationship, marital relationship or consanguinity relationship have the strongest claim to be benefited from the property and in proportion to the strength of such claim. Apart from this, it is also recommended in Shi'a for the deceased, prior to this death, to will some properties to those relatives whom his inheritance may not be extended to. Although, the bequest (Wasiyah) should not be more than the one-third of the whole property and should not be given to those heirs who are eligible to inherit. Both inheritance and bequest (Wasiyah) are permissible in Shi'a so that the deceased do not leave behind their family and relatives in poverty after their death which might consequently lead them to get involved in Sirajah crime for survival.

**Permissibility of Disposal of One’s Property**

It is permissible in Shi'a to dispose one’s property to the non-relative poor and needy in the society through Hadjih or Hibah (gift) and Waqf (endowment). Hadjih or Hibah is a gift from a matured and sane person to another person without usurping or neglecting the rights of one’s descendant and near relatives. In short, it is a transfer of one’s property to another person without an exchange with a definite proposal on the part of the person who gives the gift and acceptance on the part of the person to whom the gift is given. As for the Waqf, it is an endowment property which is detained from the ownership of the appropriator by devoting its profits and charity on the poor, needy and for other good objects for the benefit of the masses. Both means of disposing one’s property to the poor and needy in the society are permitted in Shi'a so as to assist financially handicapped masses and also to block them from involving themselves in Sirajah crime and other related criminal acts people.

**Payment of Obligatory Alms of Zakat**

Zakat is the amount of property set aside or a specific rate taken at a specific time from a specific amount at a specific level and expended on specific areas. Zakat is an obligatory charity while Sadaqah is a voluntary alms. However, Qur'an uses both terms interchangeably. See the Qur'an 9:60 on this. Both alms are instituted in Shi'a as poverty alleviators for the poor masses and means of blocking the people’s tendency of involvement in Sirajah crime and other related criminal acts.

**Permissibility of Employment and Trade**

Shi'a permits the people to engage themselves in the lawful business, trade and any forms of timely paid employment such as office jobs, white collar jobs or civil service. Thus, it is enjoined that the cardinal values of equity, justice, mutual co-operation and self-sacrifice must be re-organised through lawful means of earning a living in order to ensure peaceful socio-economic atmosphere in the human society, where every
worker is economically satisfied.\textsuperscript{51} Islam strictly encourages the people to create a job, employment and trade in the human society so as to make a standard of living for others and to serve as an avenue of blocking the people’s involvement in social crimes such as theft (\textit{Si\'a\'qah}) and fraud.

**Permissibility of Involving Oneself in Debt**

\textit{Shari\'ah} permits the people to borrow from their friends, neighbours, relatives or philanthropists when there is a need for keeping themselves and their family affairs going smoothly. Thus, Islam lays down the principles concerning debt (\textit{Daw\i\'ah}) and the repayment of the loan or borrowing materials, as indicated in Qur’an 2:282. The prayer of the Prophet (S.A.W) against debt notwithstanding, the \textit{Shari\'ah} still permits borrowing and preferred it to armed robbery, stealing and fraud. \textsuperscript{51}

**Permissibility of Begging**

\textit{Shari\'ah} excuses begging for the following three categories of people.\textsuperscript{52}

(i) A person who accepts to be a guarantor (\textit{Kulh}) on someone’s behalf and has no money to pay.

(ii) A person whose property is destroyed by calamities such as flood disaster, fire disaster, war \textit{et cetera}.

(iii) A person who is starving of food due to poverty and three people of her locality confirm that he is really starving.

It is permissible in \textit{Shari\'ah} for these three categories of people to beg until they get enough means which would soften their condition of hardship. Apart from these three conditions, \textit{Shari\'ah} strictly discourages begging of whatever form. The only time that begging is permitted is when a man is hardly pressed and there is no other way of solving such hardship rather than asking for assistance from others. Despite this, \textit{Shari\'ah} fords the habit of taking begging as a means of living or profession. It is only permitted as a means of blocking the people from engaging in social crime of stealing (\textit{Si\'a\'qah}).

**Conclusion**

This study examined the place of \textit{Sadd\i Adh-Dhaf\i\'i} within the framework of \textit{Shari\'ah} in relation to the crimes of \textit{Zina\i} and \textit{Si\'a\'qah}. The study discovers that the \textit{Shari\'ah} provides several alternatives for humankind through which the commission of crimes can be avoided. This is in line with with the features of the Islamic law. These include dynamism, flexibility and universality. It is within this framework that \textit{Sadd\i Adh-Dhaf\i\'i} finds amplification. The latter is a divine scheme
which is enshrined into the law to diminish the tendency in humans to commit infractions against the law. After all it is often said that "prevention is better than cure".

Notes and References

2. This is the plural form for ‘Uṣūl who is an expert of the principle of Islamic jurisprudence ('Usūl al-Fiqh).

3. This is the plural form of Faqīh who is an expert of the Islamic jurisprudence (Fiqh).


7. Ibid. p.403.

8. Ibid. p.308.

9. Ibid. p.309.

10. Arabic linguists regard both Dhari‘ah and Wasilah as synonymous words in their language usage Bi Dhari‘ah or Bi Wasilah which means the same, that is “a means or an expedient. See Cowan, The Hans Wehr..... p.308.


29. Penalty of *Zina* is one hundred lashed of cane (*fulkh*) and one year exilement (*Taghiriy*) for bachelor and spinster, and one hundred lashed of cane (*fulkh*) and stoning to death (*Rajm*) for married person. For more information, see Doi, *Shar‘ah: the Islamic Law* .... pp.236-239.


36. As quoted in A.N. Muhammad, *A Study of Islamic Injunctions Against Social Vices*, p.32.


38. *Ghayr al-Ma‘ram* are the people who do not belong to the prohibited category of the people whom the woman can enter matrimonial alliance with.


41. As Quoted in Palanpuri, Kitaabun Nikah …., p.9.

42. *Ibid* pp.8, 9.

43. Muhammad, A Study of Islamic Injunctions …., p.32.

44. Capital punishment of *Sa‘iqah* Crime is amputation of hand of either male or female culprit. For more information on this, see, Doi, *Shari‘ah: the Islamic Law* …, pp.245–260.


47. Ibid. p.293.


51. Ibid. p.385.

52. Ibid. p.395.