

THE MUSLIM WORLD LEAGUE JOURNAL

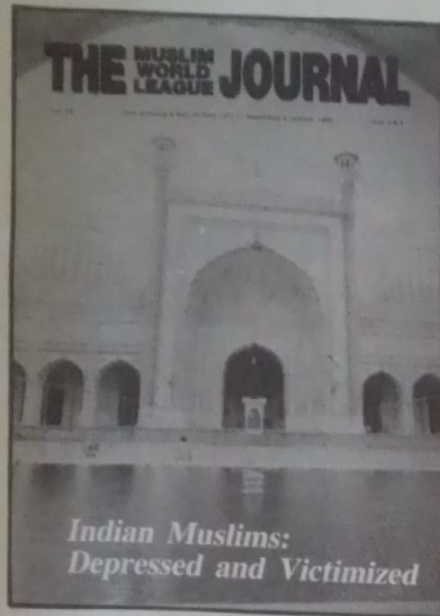
Vol. 18

Rabi al-Awwal & Rabi al-Akhir 1411 — September & October 1990

Nos. 3 & 4



*Indian Muslims:
Depressed and Victimized*



Back Cover: An example of Islamic architecture in Fez, Morocco.

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Annual Subscription Rate

Saudi Arabia (Individuals) . . . SR 36
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(or Equivalent)

Cheques and cash payable to:
Muslim World League,
P.O. Box 537,
Makkah al-Mukarramah,
Saudi Arabia.

Published by:
The Press and Publications
Department,
Muslim World League,
P.O. Box 537,
Makkah al-Mukarramah.

(All articles and correspondence may please be addressed to **Mr. Sayyid Hasan Mutaahar** by name. While the Editorial Board reserves the right to edit, summarize or reject any contribution, no article, report or letter will be returned to the sender.)

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An Integral Part of Islamic Law

I. O. Oloyede

The word "*Hadanah*" is an Arabic word whose root is *hadanah*: "to embrace or carry in one's arm."¹ Technically, the word means "take into one's arms or care; cradle, foster (a child), nurture, nurse a newly born baby."² *Hadanat*, in Islamic law, means the right to custody and nurturing of the children of an Islamic marriage.

The English term of guardianship is not the same thing as *al-hadanah* which implies the physical and spiritual up-bringing of the children but which excludes the financial burden of the up-bringing and final authority over the affairs of the concerned children.

The maintenance of issues of the marriage upto certain ages is basically the responsibility of the father, whether or not the marriage subsists. The Almighty Allah said:

*The mothers shall breast-feed their children for two full years, he who desire to complete the term of breast-feeding and the one to whom the child is born shall bear their sustenance and their clothing equitably.*³

Islamic law of marriage contains many provisions that are inter-related to one another for the benefit of the direct and indirect parties to the Islamic marriage contract. Marriage, like other institutions established under the Islamic law, is to be wholly and faithfully executed if man is to have a maximal enjoy-

ment of the intended and incidental benefits of such institutions. Allah asked:

*Do you, then, believe in a part of the book and disbelieve in a part of it? Whosoever among you do so, their penalty shall be humiliation in this life, and in the day of judgement they shall be driven to the severest chastisement.*⁴

Marriage in Islam is a life-long contract between man and a woman but with a proviso that, if the marriage becomes impossible to sustain, separation is allowed. The Holy Prophet said: "With Allah, the most detestable of all things permitted is divorce."⁵ The Glorious Qur'an requested relations of the wife and husband to play the noble role of settlement in case of any rift, and the husband and wife are requested to be mentally and physically prepared for settlement while Allah promised to effect reconciliation, once the other parties discharged their duties effectively.⁶

Certain other integral provisions have been made in the Islamic law of marriage to provide social as well as spiritual reinforcement for a peaceful continuity of an Islamic marriage. Some of these provisions have been jettisoned by some actors within the Islamic marriage system through overt and covert interpolation of Islamic and the customary rules and rites. For instance, in Yorubaland of Nigeria,⁷ the customary courts

which are charged with the responsibility of adjudicating over customary and Islamic marriages,⁸ would not hesitate to grant custody of children to the erstwhile husband in case of divorce, irrespective of the religion or the law under which the marriage was contracted. It is our opinion that the non-application of certain provisions of Islamic Marriage Law is one of the major reasons for high rate of divorce resulting from Islamic marriages in Yorubaland.

We may want to further support this position of ours with the findings of a recent research into causes of divorce among Muslims in Abeokuta local Government of Ogun State.⁹ It was discovered that 23% of broken Islamic marriages,¹⁰ are as a result of quarrels arising from conduct of the marriages and the receptions. 65% of such cases are directly related to the expenses incurred by the parents over receptions for the marriage of their children or wards. Whereas in Islam, organisation and funding of marriage receptions are the responsibility of the wife and the husband, at any time of their choice, after the consummation of their marriage.¹¹ So, if the principle has been applied, it is very unlikely that most of the cases of divorce resulting from such quarrels over parental financial involvement could not have been averted.

Our goal in this paper is to call attention to the potency of Is-

Islamic provisions on *al-hadanah*, to sustain matrimonial concord and harmony. We also intend to present Islamic rules on *al-hadanah* with a view to reminding our audience of this seemingly neglected aspect of Islamic matrimonial law.

2. Focus of Al-Hadanah:

It is said that "In case of separation the care of the infant children belong to the wife."¹² The general practice among Islamic jurists is to restrict the relevance of *hadanah*, right to custody, — to only cases of divorce or separation between the parents. While one agrees that the issue of child-custody is primarily related to cases of divorce, it need not to be restricted to divorce. Other instances in which the rules concerning *al-hadanah* still apply either wholly or partly are at the death of the husband; at the death of the wife; at the death of the both; where husband and wife live in separate abodes; and when the husband and the wife live together.

When husband and wife live together, the wife, as a mother, is not absolved of her duty of keeping the child, and the husband is to provide maintenance for both his wife and his children. The duty of nurturing and rearing of the child is basically that of the mother without any prejudice to the supervisory roles of the husband. The Holy Qur'an says:

His mother bears him in burden over burden and his weaning takes two years

and

*...His mother bears him in pain and borne him in pain and the bearing of his and his weaning extends over thirty months, until when he attains full maturity, at forty years and said: O Lord grant me the favour...*¹⁴

Thus the Qur'an does not put anyone in doubt as to whose basic

responsibility it is to nurture and rear the child and whose responsibility it is to fund the nursing.

When the husband is dead and he is survived by children and wife, the rules of *al-hadanah*, in our opinion, still apply while the guardian of the child or children performs the role of the father. Cases abound in Nigeria of situations when the relations of a deceased husband would seize the child from his/her mother and leave the mother in agony of having to be forcibly separated from her child whereas the prophet said:

Whoever separates the mother and child, Allah will separate him and his most beloved (wife) on the Day of Ascension.¹⁵

When the wife/mother is survived by husband and child, the rule of *hadanah* could still be applied to save the relations of the mother from the unilateral and selfish decision of the husband who may want another wife of his to nurse the issues left behind by his deceased wife. If *hadanah* is applied, the purpose of catering for the interest of the child for which the rules of *hadanah* are meant, would be met.

In cases where a husband and a wife live separately and each of them wants the child to stay with him or her, the matter would not degenerate to divorce or coercion if these basic principles of *hadanah* in Islamic law are made to apply.

3. The Order of Precedence of Hadanah:

1. The mother has the first right to *hadanah* of her children.¹⁷ This right of the mother to the custody of her children is affirmed by all the schools of Islamic Law. The Holy Prophet is reported to have told a divorced woman:

You have more right to him (the

son) unless you re-marry.¹⁸

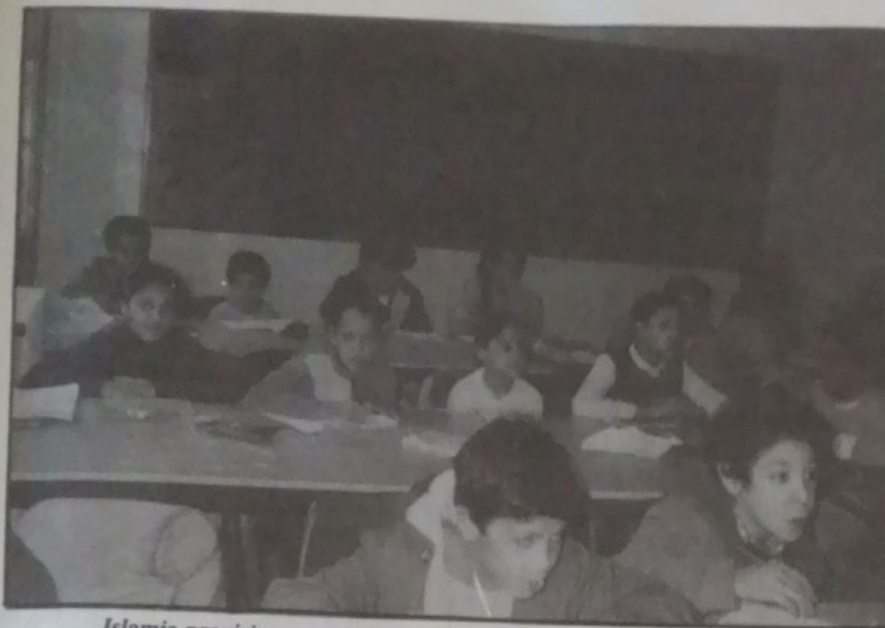
This right shall apply irrespective of the social or religious status of the wife/mother.

2. The mother's mother of a child or children has the right, next to that of the mother in case the mother loses the right or she is no more.
3. The mother's maternal grand mother.
4. The mother's paternal grand mother.
5. The maternal aunt of the child (i.e. mother's sister).

The full sisters of the mother shall take precedence over sister by only the same mother and the latter shall take precedence over a sister by only the same father.

It is to be noted that under Hanafi and Shafi schools of law the germane sister, the uterine sister and the consanguine sister respectively take precedence over the aunt.¹⁹ The full sister's daughter and the uterine and consanguine sisters' daughter shall also take precedence over the maternal aunt in the Shafi and Hanafi schools of law.

6. The mother's maternal aunt (germane, uterine and consanguine in that order).
7. The mother's paternal aunt (germane, uterine and consanguine).
8. The mother's paternal grandmother of the child, howsoever upward in the family ladder.
9. The father.
10. The child's sister.
11. The child's paternal aunt.
12. The father's paternal aunt.
13. The father's maternal aunt.
14. The brother's daughter (germane, uterine or consanguine).
15. The sister's daughter (germane, uterine or consanguine).
16. The testamentary guardian of the child.²⁰
17. The child's brother.
18. The grandfather on the father's side,²¹ howsoever upward in the family ladder.
19. The nephew (the brother's son).
20. The paternal uncle.
21. The paternal uncle's son.
22. The child's patron.
23. The slave enfranchised by the child's father or grandfather.
24. Freedman of the child's patron.
25. It is when all these are non-existent that a person whose right had earlier lapsed could be consi-



Islamic provisions on al-Hadanah are meant to sustain family harmony.

dered. For no one would then have the locus standi to challenge his or her right.²²

4. Duration of the Custody:

Once the custody is granted and retained by a person, according to Maliki law, the custody shall last till when a male child attains puberty and when a female child is married and the marriage is consummated.²³

The Hanafi school stipulates that *hadanah* lapses over a male child when he is seven and when the female attains puberty.²⁴

The Shiites state that the custody of a male lasts for only two years and that of a female-child for seven years.²⁵ The Shafi and Hanbali opined that the *hadanah* granted to a person other than the father lasts till when a female child is seven or eight years old.

The Maliki scholars are of the opinion that after the expiration of the period of the *hadanah*, the child is passed to the father, whose responsibility it becomes to look after the children either solely or in conjunction with others, such as the husband of the daughter.²⁶ Some Maliki scholars opined that the children

have the right, even at this stage, to choose between the father's taking over and retainance in the custody of mother, while others within the school opined that the children have no choice other than being passed to the father.²⁷ The Shafi school grants the choice to the children while the Hanafi school stipulates that the children automatically pass to the care of the father and the school emphasises that the issue of choice does not arise. Hanbali school also grants the choice to the child.²⁸

5. Attributes of one who has right to al-Hadanah:

For a person to validly qualify to claim her or his right to *hadanah*, he/she must possess intelligence, discretion and capability.²⁹ The person must neither be under-age nor be too aged to discharge the functions of child-rearing imposed by the *hadanah*.³⁰ Any major physical deformity renders a person incapable of claiming the right to *hadanah* unless he or she has an able supporter or aid to help her/him in the discharge of his or her responsibility over the child.³¹ Reputation and disposition to-

wards the child are additional criteria in case there are two or more equally close persons to the child.³²

A qualified custodian must have a suitable abode not only for the physical safety of the child but also for his/her moral uprightness.³³ The custodian must be trustworthy. A person who is an hardened sinner such as an adulteress or a drunkard shall not be qualified to be a custodian of a child. A prodigal person or one who suffers from a contagious or offensive disease shall not be adjudged as having a conducive atmosphere for the rearing of the child. No male person shall have right to the custody of an unmarried female girl unless he falls within the prohibited degrees³⁴ of relations to the girl.³⁵ It is after all the above stated conditions have been met that a person becomes qualified to be considered a custodian of a child under the Islamic rules of *al-hadanah*. Furthermore, certain other factors which we shall now consider may constitute obstacle to a person's or persons' right to the custody of a child.

6. Impediments to custody rights:

A person who is otherwise qualified to be a custodian may forfeit the right under certain conditions.

The mother's right or the right of any female relations for that matter, to the custody of a child lapses if she is married to a person who is not a blood relation or comes within prohibited degrees of relationship to the child.

If a person who has the right to custody does not, for a whole year, after having known that the female custodian has cohabited with a non-relation of the child, challenge the right of the female custodian to continuous custody of the child, the right of the silent relative shall not thereafter be

entertained by the court unless the challenger can prove that she or he was not aware of the cohabitation; the rule concerning the time lag; or that there was a valid and reasonable excuse to delay the challenge.³⁶

A person who resides in the same house with a person whose right to custody has lapsed has also lost his or her right to the child's custody. The locus standi to challenge the right of a person to custody lies with the child's guardian³⁷ or one who has the next right to custody in event of its forfeiture by the person currently invested with the right.³⁸

The forfeiture of a mother's right shall be waived in a situation where the child refuses to suckle the breast of another woman and the child is less than two years.³⁹

Similarly, if the mother is married to the child's guardian⁴⁰ who may or may not be a relative of the child or to one who also has the right to the custody of the child, her right to custody shall not lapse.⁴¹

Another impediment arises when the custodian resides in a place far away from the place of residence of the father or the guardian of the child. This provision has a number of conditionalities. The distance shall effect a forfeiture if it is up to about seventy two miles.⁴³ Where the custodian is the child's mother, she shall have the right to move with the child to the place where her marriage contract with the child's father was executed irrespective of the distance to the place of abode of the father.⁴⁴ There is also the additional view that the place of the marriage contract, to be so moved into, must be the native place of the woman. This provision is based on the hadith of the Prophet that "whoever marries a woman of any city is thereby re-

ndered a citizen of that city." The general view is that the residence of the mother at a place where her marriage was contracted⁴⁵ or her native city shall not deprive her of the right to the custody of her child.⁴⁶

Where the custodian travels on a long journey and resides at the place of sojourn, which is a long distance away from the father or the guardian of the child, whether or not the custodian travels with the child, the custodian's right to custody has lapsed.⁴⁷

It also needs be mentioned that the child shall be reasonably safe from danger on the course of the journey, otherwise the traveller — custodian-loses the right.⁴⁸ A guardian, who moves his place of abode to a distance long enough to prevent his supervision, shall take an oath that the movement is not punitive and not deliberately done to deprive the custodian of her right. This oath shall effect the mother's forfeiture of the right to custody only if she is staying at a place other than her native place or the place where her marriage to the child's father was contracted.

Where a person has surrendered his/her right to custody of a child, she/he shall not thereafter recall the right unless under certain few specific conditions. The conditions are: illness which later healed; the death of the grandmother which qualifies a mother who has waived her right to custody of her child to reclaim the right unless she is otherwise disqualified, and if the married mother becomes a widow and she assumes the custody of the child before the next qualified person challenges her right to continuous custody of the child.⁴⁹

The original view among the Maliki scholars is that dissolution of marriage or its nullification

shall not accord a person the right to recall her right to custody which had been assumed by another person.⁵⁰

Another impediment to child custody is a proven case of immorality against the custodian.⁵¹

It is noteworthy that religion of the mother does not simply affect her right to custody unless there is a genuine and proven case of likelihood of the mother's religion having corruptive tendencies on the spiritual upbringing of the child,⁵² in which case a Muslim relation will be made a co-custodian of the child.

Another impediment is proven negligence of the proper care of the child against the custodian.⁵³ Where a male custodian does not have in his abode a person, preferably a female, to look after the child, he loses the right to custody on account of lack of proper and adequate facility.⁵⁴

7. Implications of the provisions:

The right of a person to custody goes along with his or her right to receive the child's maintenance from the child's guardian. The right does not entitle her to any compensation beyond what is necessary to reasonably maintain the child. Generally speaking, the right does not normally include the rent for the house in which the child lives.⁵⁵

The Holy Qur'an has also provided some guidelines towards the establishment of a reasonable and just maintenance payable to the custodian. Allah demands that the terms must be equitable.⁵⁶ Allah also went further that:

No one shall be burdened beyond his capacity. No mother shall be treated harshly on account of her child. Nor father on account of his child, and this shall be the same in relation to the heir. If both (parents) should agree by mutual consulta-

tion and consent upon weaning the child, there shall be no blame on them.⁵⁷

The first implication of the quoted verses is that justice coupled with mutual consideration should be uppermost in the minds of the parties. The Qur'an further directs that:

Let the man of means spend according to his affluence, and the man whose resources are limited should spend only according to what Allah has given him. Allah puts no burden on any person beyond what He has given him.⁵⁸

The father or guardian reserves the right to visit the child at reasonable frequency. This right is likely to be injured if the mother of the child, who is married to a stranger,⁵⁹ is allowed to enjoy the custody of her child. The erstwhile husband or his relative is not likely to be free or considered safe with the child in the new husband's house. Thus, in our opinion, a mother who clings to the custody of her child, inspite of her disqualification, does not deserve to receive the child's maintenance.

The barrier imposed by distance between the places of abode of the child and the guardian is to reduce the risk to be taken by the guardian if he were to be put in a position of passing a night in a completely strange land where he has gone to visit his ward. In the olden days, twenty four (24) miles is a reasonably long distance, but in view of the modern means of transportation, the seventy-two miles restriction, is reasonable.

Though the mother is not forced into marriage with a relative of his deceased husband, the love to retain the custody of her child may condition her to choose a new husband within the family of her deceased husband. This, in our view, is healthy for the development of the children.

Marriage constitutes an impediment because a wife's primary responsibility is to her husband and unless the husband is keenly interested in any other matter which may attract a substantial attention of the wife, the marriage may not be peaceful.

8. Concluding Remarks:

We have been able to highlight Islamic provisions on *hadanah* and to call attention to some implications of the rules. The rules, if applied, are likely to contribute meaningfully to the stability of not only the nuclear family but also to the improved inter-human relations within the extended family.

Other by-products of the application of the rules on *al-hadanah* include that:

- i) A man who has the power to divorce his wife is normally likely to be considerably restrained on account of the economic implications which the divorce of his child's mother may impose on him.
- ii) The co-operative association between a man and his divorced wife or between the families of the two parties, for the maintenance and upbringing of the issue is likely to ensure that bitterness is reduced even when the couple is separated, thus ensuring tolerance and good relations inspite of the cessation of the marriage contract.
- iii) A wife who is aware that not even her infant child shall be taken along with her to a new husband's house, and a mother who is not prepared for a single-life of an unmarried lady, shall aspire to sustain her marriage, thus reducing the high rate of divorce among the young married ladies.
- iv) Unscrupulous men who induce married women, through the connivance of the cankerous *Babakekeres*⁶¹ to divorce shall have the task more difficult, in relation to loving mothers who are aware that the interest of the children clashes with that of the concubines.
- v) Members of the wife's family who are conscious of their obligations to the up-bringing of her children, in case of separation, are likely to be more active in the prevention of the breaking of the marriage. If they refuse to keep their female-relation's child, as demanded by law, they are likely to offend their female-relations and if they take the custody, their burden is increased.
- vi) The husband's relation's, too, who are conscious of the fact that divorce shall deprive them of unrestricted access to their male-relation's children shall not encourage divorce. In fact, the two families are likely to be more interested in the subsistence of the family, at least that the fate of the family is connected with aspects of their own interests.
- vii) A new wife of a divorcee is saved the largely unrewarding and thankless job of rearing the children of an ex-co-wife with the attendant mutual suspicion and rancour which such unappreciated and delicate assignment entails. Thus avenues of acrimony and hatred in the family are curtailed.
- viii) The husband who must maintain the children despite his being depossessed of the physical company of the children shall think twice

before contemplating divorce.

- ix) The couple who realise the full implications and the legal obligations imposed on their relations as regards the upbringing of the couple's children, in case of eventuality, shall be more considerate of the relations, thereby improving the level of blood ties.
- x) The child is not made to unduly suffer on account of the carelessness of either or both of her parents. His right to upbringing is elaborately provided for despite his relative incapability and position of helplessness.

Notes & References

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2. H.S Feruqi: Faruqi's Law Dictionary, (Arabic-English), Librairie Du Liban, Beirut, 1972 (ed.), p. 105.
3. The Glorious Qur'an 2:233.
4. Ibid. 2:85.
5. Hadith Abu Dawood 13:3. See M. Ali: A Manual of Hadith, Lahore, n.d., p. 284.
6. The Glorious Qur'an 4:36.
7. The South Western side of Nigeria.
8. The Christian marriages are excluded from the jurisdiction of the customary courts and decree — Matrimonial Causes Decree of 1970 — puts adjudication over Christian marriages under the jurisdiction of high courts.
9. I.O. Oloyede: "Causes of Dissolution of Islamic Marriages in Abeokuta Local Government Area of Ogun — State, (1989)." Of the 390 cases used as samples.
10. Abdullahi S. Al-Shamari: *Al-Iklil*, Cairo Press, n.d., p. 202.
11. C. Hamilton: *The Hedaya*, Premier Book House, Lahore, 1982, p.138.
12. The Glorious Qur'an: 31:15.
13. Ibid. 46:15.
14. Hadith.
15. According to Maliki School of

Law except otherwise stated in this paper.

17. M. Hidayatullah and A. Hidayatullah: *Mulla's Principles of Mohammadan Law*, Tripathi, Bombay, 1906, p. 367.
18. Hadith. Abu Dawood.
19. See C. Hamilton: op. cit., p. 138 and M. Hidayatullah (et al) op. cit., p. 369.
20. The guardian chosen by the father before his death.
21. Never to the maternal grandfather. Khalil B. Ishaq: *Mukhtasar Khalil*, Cairo, 1986, p. 178.
22. S. Abdus-Sami Al-Abi al-Azhari: *Jawahiru 'l-Iklil*, Daru 'l-Fikr, Beirut, n.d., Vol. I, p. 409.
23. Ibid.
24. M. Hidayatullah (et al) op. cit., p. 367.
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27. Ibid.
28. Abdul Rahman Al-Jazairi: *Al-Fiqh ala 'l-Mashabi 'l-Arbah*, Ihlal Vakvi, Istanbul, 1983 (ed.) Vol. IV, p. 18.
29. Shamsu'd-din Muhammad Ad-Dasuki: *Hashiyah D-Dasuki al-sh-Sharhi 'l-Kabir*, Daru'l-Fikr, Beirut, n.d., 'Vol. II, p. 528.
30. Ahmad Ad-Dirdir: *Sharhu 'l-Kabir*, Daru 'l-Fiqr, n.d. Vol. II, p. 529.
31. Ibid.
32. Khalil B. Ishaq: op.cit., p.221.
33. Ali B. Abdu 's-Salam At-tasuli: *al-Bahjah fi Sharhi 'l-Tuhfah*, Cairo, 1951 (ed.), Vol. II, p. 407.
34. The Glorious Qur'an 4:
35. M. Hidayatullah (et al): op.cit., p. 372.
36. S. Abu 's-Sami Al-Abi Al-Azhari: op. cit., Vol. I, p.409 E.g. Pregnancy as a proof of cohabitation when there is no other proof.
37. Ibid., p. 410.
38. Abdullahi S. al-Ghamari: op. cit., p. 249 Other scholars are of the view that any person on the list of precedence and who has not been disqualified possesses the right, to avoid conspiracy between the person who holds the right and the next person to him or her in order of preference.
39. Ibid. Some jurists opine that no matter the age, if the child refuses to go with any other person, the

mother shall continue to enjoy the custody. This provision, if made general, shall render the whole order of precedence ineffective and this shall contradict the hadith on the issue. Moreover, an infant is not likely to pose serious and continuous resistance to another person's custody. However, in case it is sincerely established that the child's life or well-being is threatened by change of custody, the mother may continue to enjoy the custody.

40. Be it Wali 'l-Mali or Wali 'l-hadanah.
41. C. Hamilton: op. cit., p. 138.
42. M. Hidayatullah (et al), op. cit., p. 370.
43. Malik b. Anas: *Al-mudawwana 'l-Kubra*, Cairo 1323, A. H. ed., Vol. III, pp. 359, contains two *barids* i.e. about 24 miles and a *barid* is roughly 12 English miles.
44. C. Hamilton: op. cit., p. 139.
45. Not when she was merely on a journey to the place.
46. C. Hamilton: op. cit., p. 140.
47. Khalil b. Ishaq, op. cit., p. 223.
48. Ibid.
49. Ibid.
50. C. Hamilton: op. cit., p. 138; shows that Hanafi school allows it.
51. M. Hidayatullah et al.: op. cit., p. 370.
52. S. Abdus Sami Al-'Abi al-Azhari: op. cit., Vol. I, P. 410.
53. M. Hidayatullah et al., op. cit, p. 371.
54. Abdullahi S. Al-Ghamari; op. cit., p. 250.
55. Some jurists are of the view that the rent shall be borne by both the guardian and the custodian. The Glorious Qur'an 2:233.
56. Ibid.
57. Ibid.
58. To the child.
59. See also C. Hamilton: op. cit., p. 39.
60. Court aids who are very common in Kwara State Area Courts. It is generally believed that a large number of these aids contribute significantly to corruption in the judiciary.

(The writer is Lecturer in Arabic and Islamic Studies, Department of Religion, University of Ilorin, Nigeria.)