# JUDUCIAL PROVISION FOR THE MAINTTAINANCE OF CHILDREN IN TROUBLED MARRIAGES IN NIGERIA: A PHILOSOPHICAL CRITIQUE

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**Abstract**
Legal provisions for the stability of marriage and most importantly maintenance of children of marriage especially when stability can no longer be guaranteed are necessary for the wellbeing of every society. In Nigeria these provisions are provided for in the *Matrimonial Cause Act*. Section 69, of the Acts provides for the interpretation of "marriage", S. 70, the powers of court in maintenance proceedings, S. 71, power of court in Custody proceedings,S. 72,power of court in proceedings with respect to settlement of property&S. 73, the general power of court. In this context, financial reliefs are generally made ancillary to a pending matrimonial Cause but it does appear that the provision of S.70 are wide enough to admit an independent application for maintenance under the Matrimonial Cause Act. Based on this, there is a long standing controversy among jurists and philosophers of lawon whether there is an adequate legal provision in Nigeria for the maintenance of women and especially children who are involved in marriages that are going through crisis. While some scholars on the one hand, believe that S. 70 of the *Act* provides only for such maintenance as ancillary to a main legal process seeking the dissolution of a marriage, there are other scholars who argue that the provision of section 70, especially subsection 1, can be interpreted broadly and considered as a cause on its own independent of a motion seeking the dissolution of a marriage. This paper following its findings argues that this controversy arises from lack of clarity in the wordings of this particular section of the Act. The study sees this as evidence of the lack of adequate provisions for children on the horn of collapsing marriages. It therefore calls for a legislative amendment of the document to make the Act not only clearer but also make adequate provision for the protection of children and women in marriages embroiled in crisis.

**Keywords:** Dissolution of Marriage; Maintenance; legal; Children

## Introduction

In places like the United States of America and many countries in Western Europe, adequate legal provisions are put in place for the maintenance and care of women and children who happen to become victims of collapsing marriages. For instance, in the US, a man who separates from the wife still has the legal obligation to remit a big percentage of his monthly income for the upkeep of the children especially when the children are still minors. "The percentage of what is remitted is determined by the age and the economic need of the children."[1]

This type of legal arrangement must be commended because it ensures on the one hand, that children who find themselves in marriage going through crisis are not left uncared for and on the other hand, that mothers and other caregivers are not allowed to shoulder the responsibilities of caring for children unassisted. In addition, this legal arrangement does not only hold men who would ordinarily be irresponsibly to account for their actions but it also serves as a ligament binding together, the bond of marriage as most people are known to have backed down after due diligence of what they will lose if their needless pursuance of the legal dissolutions of their marriages pull through.[2]

To say the least, it is very unfortunate to recognize that Nigeria lacks these important legal provisions that protect especially children from unnecessary hardship. In those legal instruments where these provisions exist, they lack clarity and robust judicial history. Sad to observe that this state of affair has contributed immensely to the high crime rate in the country as children who find themselves in this situation and whose mothers cannot take care of adequately end up becoming social misfits and coming back to hurt the society.

To be sure, a lot of factors, including cultural, moral and legal factors contribute to the threat and actual dissolution of marriages in Nigeria and the attendant hardship such dissolutions bring upon children. Some cultural and moral factors worthy of note here are, lack of male children, infidelity, polygamy, inheritance system in Nigeria, etc. However, the intention of this study is to explore the legal dimension of the problem.

In an empirical and objective research, involving prisoners in the prisons in all the 36 state of Nigeria including the Federal Capital Territory, Ademola and Adinka have argued that 85 percent of those who commit crime in Nigeria are people who come out of broken homes. The research discovered that this is more common among children abandoned by their fathers and whose upbringing are left for their mothers alone. In their concluding remarks and recommendations, the authors argue that there is a strong connection between crime rate in Nigeria and the care given to children in their homes. They therefore recommended that since a law cannot be put in place to stop couples with children from separating, as that would amount to infringing on their fundamental human rights, there should at least be judicial provision that ensures that children of such unions are not unattended.[3]

Thus, unlike the countries cited above, couples seeking Decree of Order *Nisi* for a Judicial Separation, *Nullity* or a Dissolution of Marriage in Nigeria tend to be more engrossed in the legal burden of proving that the marriage "has broken down irretrievably", so that the children of the marriage, who are often viewed as the spoils of war in the circumstance, are left uncared for, and if at all, inadequately catered for.[4]

In most cases, in Nigeria, couples in separation usually do not bicker over who takes custody of the children, especially if they are still infants or minors. The presumption is that the mother will usually have custody of them. It has been held in a decided Supreme Court case of Odogwu v. Odogwu[5], that this presumption is however rebuttable and can be impeached if, during court proceedings, for instance, it can be shown that e. g the mother is immoral, she has an infectious disease, she suffers insanity or is cruel to the child. The issue of custody of the children of the marriage is only secondary to the issue of the welfare, wellbeing and maintenance. These in fact guide the courts in awarding custody to either of the parties before it, whether the father or the mother.[6]

However, the issues of the maintenance and settlement with regard to the welfare of children which are the burden of this study are not as straightforward and simple as the issue of custody. For instance S. 70**(1)(2)(3)(4)** of the Act which is concerned with maintenance defines the powers of court in maintenance of proceedings as follows:

(1) Subject to this section, the court may, in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.
(2) Subject to this section and to rules of court, the court may, in proceedings for an order for the maintenance of a party to a marriage, or of children of the marriage, pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earnings capacity and conduct of the parties to the marriage and all other relevant circumstances.
(3) The court may make an order for the maintenance of a party notwithstanding that a decree is or has been made against that party in the proceedings to which the proceedings with respect to maintenance are related.
(4) The power of the court to make an order with respect to the maintenance of children of the marriage shall not be exercised for the benefit of a child who has attained the age of 21 years unless the court is of opinion that there are special circumstances that justify the making of such an order for the benefit of that child.[7]

Scholars and jurists differ and bicker over the correct interpretation of this section.The bone of contention is whetherthe pursuance of anaction for the financial

maintenance of children and settlement could be pursued independently or only as ancillary in view of the provisions of S. 70 of the *Matrimonial Cause Act.* The objective of this study therefore is to investigate the conflicting interpretations and application of S. 70 of the MCA. On the whole, the paper discovered that the wording of this particular section of Act is ambiguous and that is why it attracts such diverse interpretations and applications.

This in part as well contributes to why many children from all over Nigeria who could have been better catered for under a better legal provision, are left in the care of their mothers where more often than not they turn out to become social misfits. Based on this, the paper recommends amendment of the Act to put to end the ongoing conflicting interpretations and applications surrounding S. 70 of the Act and also to ensure that children from broken home are bettered cared for.

**Provisions of 1970 Matrimonial Cause Act**

*The Matrimonial Causes Act*, Cap. M7, Laws of the Federation of Nigeria, 1970 (the "Act"),[7] Part IV, S. 69 defines "Marriage" for the purpose of Maintenance, Custody and Settlement to include the following children of a marriage:

(a) Adopted children by either or both husband and wife.

(b) Any child born before the marriage, whether legitimated by the marriage or not.

(c) Any child (including an illegitimate child of either of them and adopted by either of them) if, "at the relevant time", the child was already a member of the household of the husband and wife.[8]

It is worthy of note that the legitimacy or otherwise of a child of a marriage as contemplated by the Act appears to be inconsistent with Section 42 (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) which provides that "No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth." This apparent inconsistency will have the effect of holding the above provisions of the Act void to the extent of their inconsistencies with the constitution- Section 1 (3) of the 1999 Constitution (as amended).[8]It can therefore be argued that for the purpose of determining the legitimacy and otherwise of a child entitled to maintenance, welfare and so on, a child cannot be disadvantaged "by reason of the circumstances of his birth" anymore.

The fact that question of legitimacy and illegitimacy as laid out by the Act contravenes the constitution of the Federal Republic of Nigeria, which is the supreme law of the land also reinforces the case of this study that there is an urgent need for legislative intervention to better reword the document in such a way that it better protects the rights of vulnerable children in the society.

The law lays out the persons deemed to be children of a marriage but it does not give the same clarity as to maintenance, welfare and education of the children without a pending divorce or judicial separation proceedings in court. Presently,

there appears to be no leeway in our adjectival laws under the Act which allows a child (mostly through his mother or guardian) to make such claims independent of proceedings for a decree of dissolution of marriage, nullity of marriage, judicial separation, restitution of conjugal rights or jactitation of marriage (See S. 114 (1) (a) of the Act). A very careful and comprehensive reading of S. 70 (1) (2) & (3) and S. 114 (1) (c) respectively of the *Act* reveals that the Act contemplates that for a court (in this case the High Court) to make orders as to maintenance of the children of the marriage, there must subsist a pending "matrimonial cause" or "proceedings" as stipulated in S. 114 (1) (a) of the Act.[9]

The effect of these is that the powers of the Court to make orders as to maintenance, welfare, advancement and education of the children of the marriage seem to be restricted by the Act to be granted only as reliefs ancillary to the principal prayer for any of decrees mentioned in Section 114 (1) (a) of the Act. While there are legal scholars and jurists who agree and argue that the aforementioned is the correct interpretation of the Act, there are others who interpret the Act as providing the Court with powers to treat the issues of maintenance and settlement independently. Two examples will be cited here to elaborate on this.

**Scholarly Opinions and Cases**

Holding the first position, that is, that the powers of the Court to make orders as to maintenance and settlement of the marriage are restricted by the Act to be granted only as reliefs ancillary to the principal prayer for any of decrees mentioned in Section 114 (1) (a) of the Act is A. Olakunle. Accordingly, he explained that "there appears to be little or no legal provisions as to the welfare and maintenance of children who are caught up in such peculiar circumstances under the *Matrimonial Causes Act*." Nevertheless, he cites the *Child Right Act*, 2003 as a solution to this lack in the *Matrimonial Cause Act*and encourages children and caregivers who find themselves in the crossfire of a collapsing marriage to take advantage of the *Child Right Act*. Here is his position:

> However, the Child Rights Act, 2003 and other related legislations in States within the Federation have come to the rescue of children who are caught in this situation, and in need of adequate maintenance and welfare. Whereas the Act offers no relief to children who are caught in between separation and divorce, a large number of those affected continue to suffer and do not appear to take advantage of the law that is rightly in their favour. This is perhaps a reflection of the socio-cultural backdrop of family life in Nigeria. Most women who are separated from their husbands seem to be reluctant to file for divorce and opt for

> seemingly perpetual separation. This tentative arrangement makes it all the more imperative to ensure that legally binding arrangements are put inplace for the welfare of the children.[10]

Olakunle uses the following case to substantiate why maintenance and settlement are treated as ancillary in the Acts:

> …as already stated in a Court of Appeal decision in the case of Ugbah vs. Ugbah (2009) 3 NWLR (pt. 1127) 108, where Dalhatu Adamu U. J.CA reading the lead judgment held that:…the present suit or action by a wife against her husband for her maintenance and the welfare and education of the children of the marriage can only be commenced and instituted under the Matrimonial Causes Act and should be ancillary or incidental to a pending or concluded main relief as adumbrated above…The aim and purport of this prohibition is in the need to preserve the sanctity of the marriage institution and to avoid its possible breakdown or cause any dissatisfaction between or amongst the members of the family during the subsistence of the marriage. This is also the reason why the courts are reluctant even to grant the main relief unless it is proved that the marriage…has broken down irretrievably.[11]

His conclusion therefore is that: "even though children of a marriage cannot seek certain reliefs independent of a pending Separation or Divorce proceedings as contemplated by the Act, the Child Rights Act provides a useful remedy to the inadequacies of the Act. It is important to note, however, that only 24 States of the Federation have domesticated the Child Rights Act in Nigeria; a trend the other States will do well to emulate."[12]

Holding a contrary opinion in their *Modern Nigerian Family Law & Succession* are Agu G. Agu and E. A. Odike.[13] After an initial concession that "Financial reliefs usually are made ancillary to a pending matrimonial Cause", the authors interpreted the Act as providing rooms for independent actions: "but it would appear that the provision of section 70 are wide enough to admit an independent application for maintenance under the Matrimonial Cause Act." They claim that their view was adopted by Adefarasin J. in Akinuwuni V. Akinuwinu Suit No M/66/70 of 19th March 1971 and by the Court of Appeal, Lagos Judicial Division in Etim Efiong.

Agu G. Agu, E. A. Odike, specifically supported their claim with the following illustrations. Nakanda V. Alice Uzoamaka Nakanda Suit No CA/L/99/81 delivery on 17th June1988 per Ademola, Akpata, Babalakin, JCA. In the case Ademola JCA opined:

> First I must say that the wording of Section 70, sub-section1 is different from the wording of Section 70, sub-section 2. Section 70, sub-section 1 as it has been emphasized in the respondent's brief requires the court in proceedings for maintenance other than proceedings for maintenance in a pending suit to make such orders as it thinks proper having regards to the means, earning capacity and conduct of the parties, and to all other relevant circumstance. This wording to my mind has introduced a distinction between that Section and 75, sub-section 3 on the question of maintenance. It is possible to maintain an action for maintenance under Section 70, sub-section 1 as an independent proceeding unrelated to any pending proceedings relating to matrimonial causes under principal Decree. In other words, any party to a marriage that is about to collapse, if he so wishes, can ask for maintenance under that Section 70, sub-section 1. This he can do with a hope that parties may reconcile their differences and the need to have a dissolution of the marriage or judicial separation may not come about. After all, it is one of the stated policy of the Act that the Court should permit reconciliation and for the time being one of the spouse get maintained.[14]

It is clear from this intervention that Agu and Odike are convinced that section 70 of the *Matrimonial Cause Act* can be interpreted widely enough to allow maintenance to be treated independent of any legal proceedings for nullity. In arguing this position they anchored on the need to preserve the institution of marriage which their interpretation here assumes will not be possibly if there is an ongoing proceeding for dissolution. Whether this interpretation is compelling enough to warrant a philosopher's assent remains to be seen. That cause of action will be pursued in the next section.

**Evaluation Conclusion**

What is clear from the foregoing presentation is that the *Matrimonial Cause Act* is ambiguous concerning the powers of the Court with regards to how cases of maintenance and settlement should be handled. As seen above, the ambiguous position of the Acts on this is obvious from the conflicting interpretations and court judgements on the Issue.

While it is easy to agree with Olakunle's suggestion that *the Child's Right Act* provides option for legal relief to children who find themselves on the horn of a collapsing marriage, it is difficult to agree with him that the *Child Right Act* should be a permanent solution to the problem. As he rightly observes, the fact that the *Child Right Act* has not be adopted by all the states of the federation is itself a limitation to the number of children and cases the *Act* can cover. Besides, waiting for all the states of the federation to pass their *Child Right Act* will not only take time but also amount to unnecessary multiplication of laws.

It should as well be ventured that the interpretation of Agu G. Agu and E. A. Odike belaboured or overstretched the jurisdiction of the *Matrimonial Cause Act* and does not seem to represent the intention of the legislators who framed the Act as the two jurists alleged.In the first place, the only reason furnished for their assumption that treating maintenance independent of a main proceeding for the voidance of marriage is that such a process allows room for reconciliation between the warring couples .[14] However, Agu and Odike failed to show with due clarity how withholding judicial separation while pursing the cause of maintenance can encourage the couples to sue for reconciliation.

Furthermore, contrary to Agu G. Agu and E. A. Odike[15] the case can be made that treating instituting proceeding for maintenance independent of proceeding for the dissolution of the marriage can even help to pull the couples apart and further the cause of nullity as one of the couple, especially the man may feel that he is been treated unfairly economically. In fact, A. Godfrey corroborated this claim in an empirical research carried out in Germany to determine how paying for the upkeep of children affects the relationship of African couples living in Germany. In this research, Godwin discovered that couples have less chances of coming together again in cases where the men are forced by German laws to pay to their wives when they are separated.[17]

What has come out very forcefully from a careful examination of the two positions examined in this work is the emphasis that the purpose of the *Matrimonial Cause Acts* is to encourage the stability of the marriage and by that extent the stability of the society since the family is the microcosm of the larger society. On this ground, the lawmakers and the Acts, on the one hand, and the interpreters of the Acts analysed in this paper deserve commendations for it will be self-destructive of the Act to tire down the very marriage institution it was promulgated to protect

However, the fact that none of the two interpretations and the judicial precedence deployed to support them are convincing enough to warrant a philosophical assent, is indicative that additional intervention is required. Consequently and as has been consistently observed, the reason for this is that the Act, especially the section considered in this work, is ambiguous and thus open to a multiple interpretations. Based on this, it becomes imperative to recommend a legislative amendment of the Act in other to make the position clear on the issue of maintenance.

More importantly, outside the judicial technicalities examined in this study, the main purpose of the paper has been to call attention to the urgent need to protect the right of children born in marriages that are going through crisis. The study believes that Nigeria's judicial system has performed very poorly on this as children find themselves in this condition and their caregivers are often left to fend for themselves without any appropriate legal support to fall back to. These children, most times because of lack of care end up becoming menaces to the society. Developing an appropriate legal system for handling this issue will not only serve the need for justice as regards protecting the rights of these children, it will also go a long way in curbing the high rate of crime in Nigeria.

As an addendum, part of the legislative intervention to ameliorate the situation can include creating legislation that uses financial capacity to determine and enforce on men the number of children and wives they can have. Men who do not have appropriate financial muscles should not be allowed to needlessly acquire wives and breed innumerable number of children they cannot cater for.

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