EMERGING TRENDS IN ASSISTED REPRODUCTIVE TECHNOLOGIES (ART) AND THE REPUGNANCY TEST FOR RULES OF CUSTOMARY LAW: A CALL FOR RE-EVALUATION*

Abstract

The received English Laws did not abolish the Customary Laws of the colonial people. They were to be observed and enforced by the established Colonial Courts. However, for such customary law to be enforced, it must pass the requisite validity test of not being repugnant to natural justice, equity and good conscience, not being incompatible either directly or by implication with any law in force for the time being; nor contrary to public policy. Post-colonial statutes like the Evidence Act in section 14 (3) and the various High Court Rules of the states of the federation echoed this test. On the basis of these tests, some rules of customary laws, especially those relating to what the author called Assisted Customary Reproductive System (ACRS); were declared repugnant and rejected over the years. In the face of modern trends in Assisted Reproductive Technologies (ART) in the field of orthodox medicine, the paper questions the basis for the continued observance of the repugnancy test for rules of customary law; especially those relating to ACRS. The paper finds that what modern ART seeks to do or is doing for people with fertility challenges in contemporary times; customary law was doing for pre-colonial people with fertility problems. Aside methodology, the paper finds no other significant difference with both methods. The intents, purposes and philosophical underpinning of the two systems remain the same. The paper, therefore, recommend that as ART is pushing legal systems to modify existing laws to accommodate it, there is need to also re-evaluate and uphold ACRS; since both serve the same purpose.

Keywords: Customary law, Assisted Reproductive technologies, Repugnancy test, validity test, emerging trends, Assisted Customary Reproductive System

1. Introduction

Before the advent of colonialism, Africans govern themselves through customary laws enriched in the custom, local usages and belief which a particular community accepts as binding. These customary laws developed and grew from time immemorial and cover every facet of life: marriage and matrimonial, land, commerce, succession, criminal, and even inter-community relations etc. Like any other law regulating the conduct of men in any social formation in the world, customary laws were accepted as binding and applied in indigenous courts under the supervision of traditional leaders. However, with colonization comes the requirement of validity test which every rule of customary law must pass before it can be enforced. It should be pointed out here that in the Charter of the Royal Niger Company of 1886, the British undertakes, as a matter of policy, to respect and uphold the customs and laws of the people(s) of its colonial territories.[1] In what seems a follow up of this policy, Ordinance 4 of 1876 provided for the preservation of customary law and declared in Section 18 that the colonial courts should enforce the observance of the customary laws of the people of the territory. A proviso was, however, added that such customary laws to be enforced must not be repugnant to natural justice, equity and good conscience and must not be incompatible either directly or by implication with any law for the time being in force. Post colonial statutes like the Evidence Act and High court laws of the states in Nigeria re-echoed this provision.[2] On the basis of these tests, many rules of customary law were and are still being rejected by the courts as repugnant to natural law, equity and good conscience. A cursory look at some of the decisions of the courts will reveal that they were decided by reference to the value judgment and universal standard of morality as conceived by the British and other colonial powers of the time. The decisions did not reflect the mores, aspirations, expectations and sensibility of the people of the colonial territories but the values of the civilized nations. Rules of customary law which permits a barren woman to procure another woman so that she could bear children by her, for instance, were rejected as woman to woman marriage and declared repugnant for negating the principles of marriage.[3] Similarly, the rule of customary law which award paternity of children of an illicit association with a married woman during separation to the husband of the woman was declared repugnant to natural justice, equity and good conscience and contrary to public policy on the ground that the custom denied paternity to the biological father.[4] No doubts, the decisions of the courts in the foregoing cases and many more, as we shall see, were influenced by the cultural background of the English judges that presided over them. The British at that time, conceived marriage purely as a union between a man and a woman and; natural paternity in terms of blood relations between the child and the father. Anything outside this is seen as offensive and should be rejected. The paper re-evaluates the basis of the

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[1]Newbury, C.W; (1960) *British Policy Towards West Africa: Selected Documents (1875-1914),* (London: Hutchinson & Co ltd) p. 254

[2] See section 20 of the High Court Law of Akwa- Ibom State and Section 26(1) of High Court Law of Lagos State

[3] *Meribe v. Egwu* (1976) 3 SC 50 at 58.

[4] *Edet v. Essien* (1932) 11 NLR 47, See also *Mojekwu v. Ejikeme* where the Nrachi custom of the Nnewi people which allows a father to put his unmarried daughter in his compound for purpose of raising children, especially males to succeed him was rejected on the ground that the children were denied the paternity of their natural father.

repugnancy test for rules of customary laws in the face of emerging trends in reproductive technology; especially Assisted Reproductive Technology (ART) methods like In Vitro Fertilization (IVF), Surrogacy, Gestational Carrier, Gamete donation (donation egg fertilized with donated sperm) and; social trends like Same Sex Marriage; which seems to whittle down the concept of marriage and paternity by blood as previously held but are fast becoming new universal moral standard in contemporary times.

2. Customary Law as a Social Norm

Generally, in any social set up, there are diverse norms- legal, moral, religious, political, traditional etc. However, moral and legal norms, sometimes jointly referred to as social norms, stand out in the social system because; they form the basis for social order and regulation. They exist to solve challenges that confront the society and in doing so they also adapts to new situation as they unfold.[5] It is within this context that customary law should be appreciated as a social norm. The term customary law has many definitions. Statutorily, customary law has been defined as the rule of conduct which governs legal relationship as established by customs and usage.[6] A judicial force was added when the court describes it as the organic or living law of the indigenous people of Nigeria regulating their lives and transactions.[7] Customary law may well be described as the body of organic rules and regulations, derived over the years from the customs and cultural practices of a particular community which has been accepted by the people as binding for the regulation of legal relationships. It is necessary to point out here that the term customary law does not indicate that there is a single uniform set of customary laws in Nigeria. The term is rather employed as an omnibus description for diverse customs in Nigeria. However, despite this diversity there are significant points of convergence in the application of the rules customary law in different community. Before the advent of colonialism, there are laudable features or characteristics of customary law which makes it standout. First, enforced rules are as accepted by the community as binding. In other words, the requisite assent is the people and; it thrives based on the experience, sensibility, aspirations and value judgment of the community and not as dictated from the outside. Although, there is room for borrowing from outside, even at that, it must respond to the sensitivity of the people. Flexibility is another characteristic worthy of mention. Customary law has the ability to adjust and adapt to social imperatives as situations changes in the community without losing its relevance. This is so because; it does not have a cumbersome procedure for amendment. In most case, a rule may be amended or changed after a meeting of the traditional ruler and his council on the prevailing situations in the community. Even at that, the amendments or changes were not dictated from outside and they reflect the value or moral judgment of the people.

3. Colonialism and the Three-Part Validity Tests of Customary Law

The suzerainty of customary law as accepted by the people based on their moral judgment and sensibility was encroached upon in Nigeria with the imposition of British rule. Historical literature indicates that the British colonized Nigeria from 1863 to 1960. The process started with the conquest and annexation of Lagos on 6 August 1861 as a British colony. This was followed by the amalgamation of the Colony of Lagos with Southern protectorate in 1906. The consolidation of the Northern Protectorate with the Colony and Protectorate of Southern Nigeria in 1914 to create the Colony and Protectorate of Nigeria; marks the end of the process. With this f*ait accompli,* came the introduction of the whole gamut of British legal system to Lagos and subsequently the whole country. However, the British Colonial Administration did not abolish the customary laws of the indigenous people of Nigeria but permitted their enforcement in the British created courts within a restrictive spectrum. In fact, section 18 of Ordinance 4 of 1876 enjoined the established Colonial Courts to enforce the observance of the customary laws provided they pass what could be called the Three-Part Tests: (a) the customary law to be applied must not be repugnant to natural justice, equity and good conscience, (b) the customary law must not be incompatible either directly or by implication with any law for the time being in force, and (c) the customary law to be applied must not be contrary to public policy. It will interest you to know that even post colonial statutes like the Evidence Act in section 14 (3) and the various High Court Rules of the states of the federation merely re-echoed in substance this British innovation. This colonial innovation has immense consequences for the development of our customary law. First, it makes the colonial power the ultimate determiner of what is repugnant and what is not. This is so because; the innovation stripped the people of the power to determine what norms becomes customary law and vest same on the colonial courts. Secondly, the validness or other wise of a rule of customary law is judged according to the civilization and moral judgment of the colonial power and not of the people. In fact, most English judges that presided over the courts were influenced by their cultural background hence they could not appreciate the moral rectitude behind most customs they were called to apply. Thirdly, it unnecessarily restricts the scope of application and stifles the organic development of rules of customary law. In

[5] Uweru, Bethel Chuks, 'Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism' *African Research Review* (vol.2 No2) 2008, 286-295 @287, Doi:10.4314/afrrev.v212.41055
[6] See Section 2 of the Nasarawa State Customary Court of Appeal Law, 1996.
[7] *Oyewumi v. Ogunesan* (1990) NWLR 182 at 207.

order words, the innovation makes the application of customary law uncertain and unpredictable. Fourthly, the innovation led to the imposition of the English legal system on the customary legal system which led to a kind of new version of customary of law.

The reason for the introduction of the validity tests, according to Lord Wright, was to invalidate barbarous customs.[8] Lord Atkin was more forth coming when he said that a barbarous custom must be rejected on ground of repugnancy as the court cannot transform it to a milder one.[9] To the British, a custom is barbarous if it is uncivilized and; uncivilized is judged according to their moral standard and cultural background. Therefore, any custom that fall below the British cultural standard is held to be repugnant. Indeed, it has been argued that the repugnancy test was an instrument used by the British to reform and bring our customary law within the acceptable objective standard of moral law recognized by all nations.[10] According to Uweru,[11] another reason for the introduction is the multiplicity of the customary laws enmeshed in superstitions which makes judicial proof difficult. In his view, the test was introduced so as to remove superstitious and harsh elements, and make customary law to conform to the universal standard of morality.[12] Elias T.O. threw his weight and argued that the repugnancy test has positive effect on the development of customary law as it eliminate gross injustice inherent in its application.[13] In order words, the repugnancy test is intended to civilize customary laws by eliminating offensive customary practices and provoke a sense of reform of the customary law in the people of the colonial territories. With due respect, the author disagreed with the views expressed above and contend that if, anything, the repugnancy tests, in reality, created a new version of our customary laws that do not reflect the sensibility and moral judgment of the people but that of the colonial power. In order words, the intended amendment or reform of the customary law was effected from outside, using external parameters.

In fact, the British were playing out the role of a bully in subjecting our customary law to their standard of morality. The doctrine empowered the British to 'cherry pick' using their moral standard while they jettisoned what might strengthen our moral and cultural belief in the process. Secondly, it cannot be convincingly said that repugnancy test was imposed in order to bring our customary law to be in conformity with universal standard of the morality. Morality, apart from being subjective, often reflects the wish or belief of the powerful. What is referred to as universal standard morality is nothing but morality as conceived by the powerful. The powerful makes the rules and imposed same on the weak or the subjugated. Historical literature attests to this fact. At the local level for instance, the Sokoto caliphate imposed Islamic legal and moral standard on the aborigines of what is present day Northern Nigeria after their successful expansionist programme. Furthermore, in 1976, the courts in Nigeria, under the guise of enforcing universal moral standard, abhorred a rule of customary law that permits woman to woman marriage and declared same as repugnant to natural justice equity and good conscience. [14]

Today, it is interesting to know that powerful western nations, who once conceived marriage as a union of a man and a woman and rejected same sex marriage as repugnant to natural justice; now recognized gay marriages and homosexuality as human rights and a new universal morality. And all efforts are geared toward imposing same on the weak nations of the world as a new universal moral standard under the guise of human rights. Thus, universal moral standard is what the powerful says it is per time. This lends credence to the view expressed by a school of thought that sees the repugnancy doctrine not just in term of law but a kind of colonial subjugation of customary law to British law in order to prevent it from coping with the socio- economic development of Nigeria.[15]

4. Repugnant to Natural Justice, Equity and Good Conscience Test

As pointed out above, the first test every rule of customary law to be applied must pass is that it must not be repugnant to natural justice, equity and good conscience. The test is popularly referred to as the repugnancy doctrine. Although, the phrase may appear to have three different meanings, in practice, however, it is interpreted conjunctively since it conveys only one common idea which has been expressed in apparently three phrases.[16] The Supreme Court of Nigeria made this point clear when it declares that equity in it broad sense, as used in the repugnancy doctrine is equivalent to the meaning of natural justice and embraces almost all, if not all, the concept

[8] *Laoye v. Oyetunde* (1944) AC 170.
[9] *Eshugbaye Eleko v. Government of Nigeria* (1931) AC 262 @ 273
[10] Uweru (n.5) 294
[11] Ibid, 293
[12] ibid
[13] Elias, T.O, *The Nature of African Customary Law* (England: Manchester University press, 1956)
[14] *Meribe v. Egwu* (1976) 3SC 50
[15] Okolie E.O; 'Need for Statutory Intervention in the Continued Operation of the Repugnancy Doctrine in Nigeria'; Academic Scholarship: ISSN: 2141-3428 <www.researchgate.net> accessed 5/4/2021

[16] Ibid @ 4

of good conscience.[17] Historically, the origin of the doctrine is not so clear but it has been trace to the Roman-canonical law which were imposed and applied in most states of medieval European.[18] While the term ‘repugnant’ means repulsive or disgusting, offensive or distasteful, the precise meaning to be ascribed to the phrase ‘natural justice, equity and good conscience’ has been a very difficult issue. This difficulty has been compounded by the evasive posture of the courts to give a clear cut definition of the phrase. In *Lewis v. Bankola*[19] for instance, Osborne CJ lamented that phrase is made up of high sounding word he was not sure of their meaning and therefore; would not be amenable to a strict and accurate definition. The Nigerian Court of Appeal also acknowledged the difficulty in giving a strict and precise definition to the phrase.[20] However, it will interest you to know that while the British colonial authority in Nigeria prevaricated as to the precise meaning to be ascribed to the phrase ‘natural justice, equity and good conscience’, their French counterparts in Cameroon were more forthcoming. The French colonial authority adopted the phraseology which gave a strict interpretation to the effect that local customary laws were to be applied provided they were not contrary to the principles of French civilization.[21] In other words, French civilization is the yardstick for judging the validity or otherwise of a rule of customary law. In the final analysis, it safe to point out that by virtue of this test, many indigenous rules of customary law were and are still being rejected as repugnant.

5. Review of Some Relevant Cases

In the light of the foregoing, I will now consider the application of the doctrine of repugnancy through some relevant cases in order to show the attitude of the courts. In *Edet v. Essien*[22]the husband and wife were separated but without paying back the bride price paid on the wife, the wife had children by another man. The estranged husband, in exercise of his right under customary law, laid claim of the children of the illicit affair. The court declared the customary law repugnant to natural justice, equity and good conscience on the ground that it denied the natural father paternity of the children. In *Mojekwu v. Ejikeme*[23], the Court of Appeal held that the customary law rule of *Nrachi* of the Nnewi people; where a father places one of his unmarried daughter in his house for the purpose of raising children, especially male children, who could succeed him as repugnant to natural justice because the children born to the daughter in respect of whom the ceremony of *Nrachi* has been performed are denied the paternity of their natural father.[24] In *Nwaribe v. President Oru District court*[25] a widow who decided to stay in her late husband house had a child by another man. She then sought formal dissolution of her customary marriage with her dead husband and in the process the issue of paternity of the child was raised. The high court presided by Egbune (J) held that since the man knew the custom and still went ahead with it, awarded the paternity of the child to the brother of the widow’s late husband. Justice Egbune was criticized for departing from the precedent set by Edet v. Essien by awarding paternity of the child to a non-biological father.

A community evaluation of the foregoing cases will reveal that the courts have gone beyond the factual finding of the extant rules of customary law but has gone further to consider the effect of the application of a rule of customary law. This is apparent because; almost always, the *ratio decedendi* put forward by the court is that the customary law allowed the award of paternity of a child to a non- biological parent. The second reason, which goes to the effect of the application of the customary law, is to the effect that upholding the customary law will encourage or promote promiscuity. With due respect, it goes without saying that the courts do not appreciate the jurisprudential underpinning of the customary practice. The extant customary law on which both *Edet v. Essien (supra) and Nwaribe v. President Oru District court (supra)* were decided rest solidly on the sound principle of law that a man should not be allowed to profit from his wrong doing. The point is succinctly expatiated upon that in Africa, the family is a precious unit and a man’s house must not be invaded by strangers. Even when spouses are separated, third parties should not interfere with the wife. If a third is desirous of marrying another’s wife, he must first of all encourage the woman to legally divorce the husband. It is the failure to seek the requisite divorce that is punished by taking away the fruits of the illicit association.[26] In other words, an adulterous man must not

[17] per Uwais, JSC in *Okonkwo v. Okagbue and Ors* (1994) 9 NWLR (Pt. 308) 301 at 320
[18] Uweru (n.5)289
[19] (1908) 1NLR 8
[20] See *Mojekwu v. Ejikeme* (2000) 5 NWLR 402
[21] See Salacuse, J. 1969 An introduction to law in French speaking Africa: African South of the Sahara. Virginia: Mitchie publishers in Mikano E. Kiye ‘The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon’ *African Studies Quarterly* Vol. 15, Iss 2 March 2015 page 85 -106 at 89.
[22] (1932)11 NLR 47
[23] (2000) 5NWLR 402
[24] per Tobi (CJA)
[25] (1964) 8 ERNLR 24-27
[26]Olayide Adigun, Cases and Texts on Equity, Trusts and Administration of Estate (Ibadan: Ayo Sodimu publishers, (1987) 42 cited in E.O. Okolie’s ‘Need for Statutory intervention in the continued operation of the Repugnancy Doctrine in Nigeria’ (2019) *Academic Scholarship*:ISSN:2141-3428 @ www.researchgate.net <accessed 5/4/2021

be allowed take benefits of his wrong doing. In this regard, therefore, one can confidently say that the decision of Egbune (J) in *Nwaribe*'s case (supra), although criticized for departing from the precedent set in Edet v. Essien; represents the true grasp of the essence of the custom and; accord with the jurisprudential underpinning behind the customary practices.

Furthermore, one of the reasons given especially in *Mojekwu v. Ejikeme (supra)* for rejecting the *Nrachi* custom is that it denied the natural or biological father of paternity of the children of such association. This also is not a sound reason for rejecting the custom. Paternity is a position of responsibility that can be assumed in several ways by anybody at any time depending on the situation. Biology or nature (i.e. genetics) is just one of such ways. Adoption, for instance under the relevant law, is yet another way one can assume this responsibility. It is a well established scientific fact that an adopted child does not share in the Deoxyribonucleic acid (DNA) of the father yet; he is the father of the child. Every society, the law has a way of meeting the peculiar need of a class of the peoples; and in line with the utilitarian principle, the English developed the law on adoption. In the same vein, since the typical African society is patrilineal, the *Nrachi* custom was developed to meet the peculiar need of a father who has no male successor. *Meribe v. Egwu (supra)* is one of the earliest cases where the notion of woman-to-woman marriage received judicial attention in Nigeria. The fact of case revealed that a barren woman, in line with the customary law of the people, married another woman for her husband so that she could have children by her. Under the extant customary law, the issues of such a marriage are regarded as issues of the barren woman for the purpose of inheritance. Although the court distinguished the word married in the context of the case as merely colloquial and meaning procured, nonetheless laid down the principle for rejecting woman to woman marriage. The court said:

> In every system of jurisprudence known to us, one of the essential requirements for a valid marriage is that it must be the union of a man and a woman thereby creating the status of husband and wife. Indeed, the law governing any decent society should abhor and express its indignation of a woman-to-woman marriage; and where there is proof that a custom permits such an association, the custom must be regarded as repugnant by virtue of the proviso to section 14(3) of the Evidence Act and ought not to be upheld by the court.[27]

In *Okonkwo v. Okagbue,*[28] a subsequent case decided on the principle enunciated by the Supreme Court in *Meribe v, Egwu (Supra),* the facts of the case were that a wife who had no son for her husband while he was alive, decided to marry a woman for the dead husband to bear sons that will stand in the name of the dead husband for her for the purpose of inheritance; a practice recognized under customary law. The supreme of Nigeria held that the customary law was repugnant to natural justice. The court held as follows:

> …It is a fiction and a fallacy, for there is no way in which a dead person can naturally get married to the living. It is utterly impossible. Therefore, what, at best, happened in the instant case at hand is a marriage between the 3rd defendant and the 1st and 2nd defendants, which is a marriage between a woman and two women. This is what this court has held in Eugene Meribe's case (supra) that must be regarded repugnant to natural justice equity and good conscience.[29]
> The Supreme Court went further as follows- The marriage is therefore between a woman and a woman, a custom which has been declared repugnant by this court in the case of *Eugene Meribe v. Joshua Egwu* (1976) 3Sc 23. In that case, the facts revealed a custom less distasteful than the present case.[30]

Marriage is seen purely as a union between a man and a woman. Again, the courts missed the point and fail to appreciate the jurisprudential underpinning behind the practice which is to assist women with fertility challenges to have children. What is referred to as marriage between woman and woman is nothing but procuring- a situation where a barren woman procures another woman for either her husband or another man for the purpose of having children by her for the husband. There is nothing distasteful or immoral in the custom as the women involved do not engaged in same sex sexual relationship. Although, the Supreme Court acknowledged this factual finding in Meribe's case (supra), yet, went ahead to declare the custom repugnant and set the precedent. Indeed, as shall be revealed shortly, the customary practice is akin to modern Assisted Reproductive Technology methods like In Vitro Fertilization (IVF), Surrogacy, Gestational Carrier, sperm and ovum donation; which are pushing for space and are fast becoming accepted norm in contemporary legal systems.

[27] per Madarikan JSC at page 58
[28] (1994) 9 NWLR (Pt. 308) 301
[29] per Uwais (JSC) at pages 324-325, para F-G
[30] ibid

6. Emerging Trends in Modern Assisted Reproductive Technologies

Over the ages, infertility has been a major challenge to couples in all human society of the world; pushing both traditional and modern societies to device ways to surmount the problem. However, with recent advances in the field of orthodox medicine in form of Assisted Reproductive Technologies (ART), especially *in vitro fertilization* (IVF), ovum and sperm donation, surrogacy and; gestation carrier; hope is being restored to couple hitherto called barren. As the technology becomes common place, however, there is constant shift in the way society perceived human life and claim to genetic offspring and; legal systems are being modified to accommodate them. It is important to note here that ART is an omnibus phrase used to describe various artificial reproductive methods of which IVF is the first stage.

In vitro fertilization (IVF), popularly known as test tube baby, is a modern assisted reproductive technology used in the treatment of infertility that allows laboratory conception of children. Scientifically, IVF process entails combining a man's sperm and a woman's egg outside their body in a laboratory dish and the fertilized egg (i.e. embryo) is then injected and implanted in the woman's uterus (womb) to develop to maturity.[31] In other words, couples with fertility challenges can go through this method and have their biological children (i.e. children carrying their gene). The history of IVF is traced to the successful birth of Louise Brown, reputed to be the first world test tube baby, on July 25, 1978. [32] Since then, IVF has become common place technology in the treatment of infertile people all over the world. This advancement in reproductive technology is not without a prize and risks. Injury to organs near the ovaries, such as the bladder, bowel, or blood vessels, pelvic infection, maternal hemorrhage, delivery by cesarean section (C-section), gestational diabetes etc are some of the risks involved.[33] This is in addition to the huge financial cost. The average cost per IVF cycle in the United States ranges approximately between 9,266 to 33,000 USD.[34] In Nigeria, the average cost of one cycle of IVF treatment is put at N900,000 excluding the cost of drugs, diagnosis and other ancillary services. The cost of IVF drugs ranges between N400,000 and N800,000, depending on the treatment plan.[35] However, the risks and financial cost is nothing compare to the joy and sense of fulfillment that accompanied a successful outcome of the process.

Surrogacy and Gestational Carriers are yet other stages or processes of assisted reproductive technologies. Surrogacy has been described as an arrangement where a woman agrees to carry a pregnancy using her own oocytes (egg) but the sperm of another couple and undertakes to relinquish the child when born to the couple whose sperm was used to fertilize her.[36] In other words, the woman who carries the pregnancy also provides the egg to be fertilized using the sperm of couple who will later claim the baby when delivered. Apparently, the process does not involve sexual relationship between the man and the surrogate woman but there is genetic link. And it is designed to assist women afflicted with infertility but whose husbands are virile. From all indications, the child when relinquished to the couple will carry the DNA of the father alone.

Gestational Carrier on the other hand, entail an arrangement where a couple, who has undergone IVF with their own genetic gametes (i.e. egg and sperm) and then places the resultant embryo in the womb of another woman, the gestational carrier, who then carry the pregnancy and relinquish the child to this couple upon delivery. Apparently, the child of this arrangement will bear the gene of both parents and no genetic link with the carrier.

Gamete Donation /Third party reproduction is another growing trend in reproductive technologies. It is a situation where a person or couples with infertility problem receives help from other people to have a child. The help that may be offered and received as the case may be include donation of egg, donation of sperm, donation of embryos etc. Generally, gametes are sperm or egg cells. In modern times, donated eggs and sperm have been used to produce children for couple with fertility challenge. The first pregnancy resulting from egg donation was reported in 1984. Since then, egg donation has helped many struggling with infertility to conceive. With egg donation, the intended parents will have, at least, a genetic link to the child if the husband contributes the sperm

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[31] America Society for Reproductive Medicine, 'In Vitro Fertilization (IVF): What Are the Risks?' @ www.reproductivefacts.org accessed 15/5/2021.

[32] Jones H.W, 'Moments in the life of Patrick Steptoe', *Fertility and Sterility,* vol. 66, no.1, pp.15-16, 1996 cited in Paul R. Brezina and Yulian Zhao, 'The Ethical, Legal, and Social Issues Impacted by Modern Assisted Reproductive Technologies' *Obstetrics and Gynecology International,* vol. 2012, Article ID 686253, doi: 10.1155/2012/686253., p.1.

[33] America Society for Reproductive Medicine, 'In vitro fertilization (IVF)' @www.asrm.org

[34] Paul R. Brezina and Yulian Zhao, 'The Ethical, Legal, and Social Issues Impacted by Modern Assisted Reproductive Technologies' *Obstetrics and Gynecology International,* vol. 2012, Article ID 686253, doi: 10.1155/2012/686253., p.3.

[35] Fertility Hub Nigeria, 'Understanding IVF Treatment Cost in Nigeria'; @fertilityhubnigeria.com <Accessed 15/5/21>.

[36] James S. Chilvers R *et al*, 'Avoiding legal pitfalls in surrogacy arrangement', *Reproductive Biomedicine,* vol.21, no7, pp862-867, 2010 in Paul R. Brezina & Yulian Zhao, (supra) p.4.

used to fertilize the egg. [37]However, if third parties donates both the eggs and the sperm, the child will not have genetic link to both parents, yet the recognized as parent of the child. There are different factors to be considered before the donation. One is whether the identity of the donors will be known or he/she will be an anonymous donor. Reasons for egg donation are to assist women whose ovaries have either been removed or are functioning poorly. Women who were born without ovaries can also take benefit of this process. Women with poor egg quality, advanced in age, women who have had multiple failed IVF etc also take advantage of the process.[38] Sperm donation on the other hand may be due to decreased sperm count, ejaculatory dysfunction, when there is no male partner such as with single woman who wish to become parent or lesbian couples who desire a pregnancy, but who lacks a male partner.[39] Good as the processes may sound, there are risks associated with the process. It potential channel to pass on diseases like syphilis, hepatitis B and C, human immunodeficiency virus (HIV), even zika virus and other heritable diseases.[40] Other health complications may also include ovaries swell and fluid accumulation in the abdominal cavities, bleeding, damage to surrounding structures such as bowel and bladder (transvaginal ultrasound aspiration), ectopic pregnancy etc.[41]

7. ART and ACRS have one common Goal

It is apparent from our analysis that many rules of customary law rejected for being repugnant; share many features with modern assisted reproductive technologies. In *Meribe's* case for instance, the woman procured by the barren woman for her husband shares the same status with a surrogate mother under modern ART. The child under surrogacy belongs to the couple and not the surrogate mother even though it was her egg that was fertilized with the couple sperm. Yet, the barren woman was denied paternity of the children the procured woman had for her husband on the ground that it is woman to woman marriage. Similarly, *Okonkwu v. Okagbue* where, after the death of her husband, the widow who had no son married another woman for her late husband who begat sons for her. The custom was declared repugnant and the widow was denied the paternity of the children on the ground that it was a woman to woman marriage. However, a critical look AT what played out will reveal that the procured woman fit perfectly into the position of a surrogate mother whose egg is fertilized with sperm donated by an anonymous donor under ART. Usually, under ART, the parenthood of the child when born belong s to the woman who procures the surrogate mother and sperm. Even the facts of *Mojekwu's case* are in accord with gamete donation /third party reproduction method of modern ART. The father under the Nrachi custom is akin to a man who procures gamete (i.e. donated egg fertilized with donated sperm) and his daughter who under goes the Nrachi ceremony takes the position of a gestation carrier of modern ART. And as customary with ART, paternity of the product of the arrangement belongs to the man who procures. Yet, the Nrachi custom was declared repugnant and the father denied paternity of the children. The point being stressed here is that in both systems: Assisted Reproductive Technologies (ART) and Assisted Customary Reproductive System (ACRS), the underpinning philosophy is one and the same: society giving a helping hand in one way or the other to members who could not produce children on their own. The separating line, however, is methodology. While ART employs modern scientific methods; ACRS is anchored on tradition methods. Indeed, both methods have their own strength and weakness but the overall aim is to solve a peculiar problem in human society and promote happiness. One thing that is apparent is that both systems de-emphasized paternity based solely on genetics or blood relation. Furthermore, both systems have also brought to bear a tectonic shift in the way society view human life and genetic offspring. And in this regard, one can boldly say that customary law, but for the repugnancy test which stultified its development, is far ahead of modern ART. Aside this, considering the cost, the health risks and disorder; the excruciating pains associated with modern ART procedures, one is, perhaps, to prefer the customary method. In all, both methods aimed at promoting equality and happiness in society which, in essence, is the fulcrum of the utilitarian school of thought that conceives happiness as one of the prime goals of man. And any action, no matter how distasteful it may appear, is right provided it will put an end to misery, pain, and suffering and; engenders happiness in society. In fact, the pains, misery, low esteem and unhappiness experience by people with fertility challenges in society can best be imagined.

8. Imperative of a Re-Evaluation of the Repugnancy Test

Today, almost all societies have embraced and accepted the reality of modern ART practices as a new universal norm or moral standard; and legal systems are being modified to accommodate it. But the unfortunate thing is that while societies are celebrating modern ART breakthroughs; rules of customary law which performed the same functions in pre-colonial African societies are still being jettison as repugnant. There is need to re-think the

[37] America Society for Reproductive Medicine, 'Third –Party Reproduction: sperm, Egg, and Embryo Donation and surrogacy' <www.reproductivefacts.org>
[38] Ibid
[39] Ibid.
[40] Ibid.
[41]Wikipedia 'In vitro fertilization' <en.m.wikipedia.org> accessed 21/5/21

repugnancy test in the face of this developments. This is the whole essence of this paper which is to draw attention to this trend and provoke a re-evaluation of the basis upon which some rules of customary law, especially those the author refers to as ACRS, were and are still being rejected as repugnant.

9. Conclusion

Infertility is a major problem that engages the attention of both traditional and modern societies because it rubs its victims of necessary joy and self-esteem. All societies seek ways to overcome it through their laws. ACRS is the one of the solutions to the challenges of infertility in pre-colonial African societies. Unfortunately, it growth and development was stultified by colonial doctrine of repugnancy. ART is modern society solution to the problem. However, while the emergence of ART is widely accepted and existing laws are being modified to accommodate it, ACRS is rejected as repugnant. Aside methodology, the paper finds no difference in both methods in terms of purpose or philosophical underpinning. They both have their strength and weakness. Therefore, no one of them should be accepted and promoted while the other declared repugnant.