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Dead Bodies in Nigerian Jurisprudence

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Abstract

Recent events and a few judicial decisions in Nigeria show the need for a serious analytical engagement with the law relating to dead bodies. Topical issues from these cases focus on jurisdiction, the right to control the disposition of remains, and remedies available for the infringement of a burial right. While the meaning and content of sepulchral rights remain the same in Nigeria as in many industrialized nations, its prioritization is markedly different. In contrast to the highly individualized nature of burial rights in many Western legal systems, the control of sepulchral right in Nigeria is familial in character. In some circumstances, however, recourse may be had to statutory provisions that import English priority rules. While a range of remedies is available for an interference with a burial right, injunctions and declarations are the most sought after by Nigerian litigants. An expedited hearing is preferable to an interlocutory order of injunction.

INTRODUCTION

Recent macabre accounts of interference with cadavers in Nigeria invite a serious engagement with the law relating to dead bodies. One account involved a mistake in the identification of two corpses deposited in a Lagos morgue.[1] A family (family X) went to the morgue to pick up their deceased relative for burial in the eastern part of the country, some six hundred kilometres from Lagos. During the short viewing before burial, they discovered that the deceased was a stranger and that the wrong corpse had been claimed from the mortuary. It appeared that identification of the cadaver in Lagos was done in a sloppy manner and placed undue reliance on the assurances of the morgue attendant that the appropriate corpse had been released. Confused and upset, family X quickly returned the ''strange'' corpse to Lagos only to learn that the corpse of their relative had also been mistakenly released to another family (known here as family Y). Family Y took the corpse released to it, believing it to be the body of their own relative, for burial in another part of the country. It became clear that the two unrelated families had unknowingly exchanged the corpses of their deceased relatives. Police investigation of a complaint by family X showed

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1 Account of this incident was given to the author a few years ago by a policeman working at the Lion Building Police Station, Lagos.

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that family Y buried the wrong corpse without discovering their mistake. The two families explored the possibility of disinterment but no action was brought against the morgue, leaving the legal issues unanalysed.

More shockingly, newspapers in August 2004 reported that the police had made the ghoulish discovery of 50 bodies in various stages of decomposition and 20 skulls in a forest belonging to a deity known as *ogwugwu*[2] in Okija, a town in south-eastern Nigeria. *Ogwugwu* is a traditional dispute settlement mechanism that involves the administration of oaths and lethal potions. Verdict is signalled by the death of the guilty party, automatically resulting in vindication of the claims of the surviving party.[3] Relatives of the guilty, however, fear that proper burial of the deceased and due inheritance of his property will attract punitive spiritual sanctions. Consequently, the deceased and all his possessions are dumped at the shrine of *ogwugwu*. In that way, atonement and propitiation are made for the deceased's transgressions. This adjudicatory tradition has been in operation for many decades but is now confronting the dynamics of a society that professes the values of modern civilization.[4] The acquisition mentality that delineates current socio-cultural contexts in Nigeria creates even greater challenges for the *ogwugwu* tradition. It appears that the eclipse of traditional moral values in Nigeria and the entrenchment of materialistic social philosophy have caught up with the *ogwugwu* priests. Although these priests were historically known for their high moral standards, simplicity and relative poverty, they have become part of the amorphous wealthy class of the new Nigerian society. There is speculation that *ogwugwu* priests engage in ritual murder and deliberately poison one of the disputants in order to claim his or her

2 '"Evil Forest' : more than 50 corpses and numerous body parts found in wooded areas could be connected with ritual killings, police say" (7 August 2004) *Associated Press*, Lagos, at 6; S Ekwowusi "Okija shrines and crisis of values" (18 August 2004) *THISDAY*, available at: <www.thisdayonline.com/archives/2004/08/18/20040818com01.html> (last accessed 26 May 2006); D Balint-Kurti "Nigerian police arrest 30 after 50 bodies found in cult shrines" (6 August 2004) *Boston Globe*, available at: <www.amren.com/mtnews/archives/2004/08/nigerian_police.php) (last accessed 22 November 2005); OS Nwosu "Lost between two worlds" (15 August 2004) *Osondu.com: Newsletter*, available at: <www.nigeriavillagesquare1.com/Articles/Guest/2004/08/Lost-between-two-worlds-by-okenwa-s.html> (last accessed 12 February 2006); "Horror: police find 50 bodies, 20 skulls in Anambra shrine" (5 August 2004) *The Nigerian Village Square*, available at: <www.nigerianvillagesquare.com/board/showthread.php?t=1397>.

3 With hindsight, it is now obvious that *ogwugwu* priests have in the past committed murder in the name of justice.

4 It is surprising that *ogwugwu*-type oath-taking is still a part of current customary adjudicatory processes and that in some cases even communities outside Okija engage the services of *ogwugwu* priests to administer the oath to community members involved in a land dispute. For instance, the facts of a recent Supreme Court of Nigeria decision (*Onyenge* v *Ebere* [2004] 13 NWLR (Part 889) 20) were based on the customary arbitration by *ogwugwu* in a land dispute involving litigants from Ukwa Local Government Area (Ukwa is in another state some distance from Okija). Ironically, the Supreme Court's decision (affirming the customary arbitration by *ogwugwu*) was delivered in a period when the Okija incident captured popular imagination in Nigeria.

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wealth.[5] Newspaper reports of the *ogwugwu* incident in Okija claim that some of the corpses and property found at the *ogwugwu* shrine were those of known wealthy businessmen, politicians and top public officials. Although the police made widely publicized arrests of the priests and people connected with *ogwugwu*, no charges have been brought and the interesting legal issues, again, remain unanalysed.

It is in the above contexts that this article proposes to look at some of the issues raised by cases relating to dead bodies in Nigeria. Since there is not yet a reported Nigerian case on rights relating to dead bodies,[6] this article proposes to explore some of the few unreported High Court decisions on the subject with a view to highlighting the juridical nature of the issues they raise and the analytical inquiry that is entailed by those issues. The use

5 It is difficult to adopt or justify a romantic attitude towards *ogwugwu* tradition, both in its current forms and primordial manifestations. Trial by ordeal remains one irrespective of differences in time and space, and the resultant murder is not made any less painful by historical considerations. But this conclusion arguably makes sense only in a decontextualized and timeless assessment. Some people might argue that earlier *ogwugwu* priests dispensed, or were thought to have fairly dispensed, justice, and that their actions are only condemnable on the basis of knowledge from hindsight. Support for this comes from the acceptance of *ogwugwu* tradition by previous generations in contrast to its rejection by most members of Nigerian society today. But this argument only throws up the familiar debate between historicism and presentism. Robin H Wells provides a good analysis of this intellectual dichotomy in the context of early modern studies in id "Historicism and presentism in early modern studies" (2000) 29 *Cambridge Quarterly* 37. Historicists argue that moral or value judgments should be made in the contexts of time, space and circumstances; they would probably judge earlier *ogwugwu* tradition in that light. Presentists, however, argue that present day or current standards must furnish the lenses for evaluating past conducts. OU Kalu probably waved the presentist flag when, in relation to African society and its obnoxious customary practices, he observed: "It was a closed society. Numerous rituals engrained brutality. Harsh nature bred human beings. Competition for survival and for public acclaim bred exploitation. To a very large extent, traditional African societies lacked sensitivity. Raw nature was too near and proved indomitable…Our traditional societies practised ritual murders and slavery without qualms and within an ethical system which made sense": OU Kalu "Religion as a factor in national development" in EC Amucheazi (ed) *Readings in Social Sciences: Issues in National Development* (1980, Fourth Dimension Publishing) at 315. There is no need to be detained by this historical dialectic, but it suffices to say that whatever injustice or murder the *ogwugwu* traditionalists perpetrated in the past, it pales in comparison to what the Okija incident revealed. It also means that even if it is possible to forgive earlier *ogwugwu* practitioners for walking in the dark, as it were, nothing mitigates the murder and exploitation that are perpetrated by its modern day practitioners.

6 This contrasts with Kenya's judicial experience arising from the case of *Otieno* v *Ougo & Siranga* (Civil Appeal No 31 of 1987 – excerpted in E Cotran *Casebook on Kenya Customary Law* (1989, Professional Books)), where a Kenyan widow vigorously asserted her right to control the disposition of her deceased husband's remains. Although she lost at the Court of Appeal, her case questioned the suitability of customary law rules, or their application, to modern conditions. For scathing reviews of the decision, see P Stamp "Burying Otieno: the politics of gender and ethnicity in Kenya" (1991) 16 *Signs* 808; and JW Doren "Death African style: the case of S.M. Otieno" (1988) 36 *American Journal of Comparative Law* 329.

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of customary law in this article deserves some qualification. Unless otherwise stated, ''customary law'' should be taken as a reference to Igbo customary law. But this entails another qualification. Different systems of customary law apply in the geographical area occupied by the Igbos.[7] Although commonalities exist, variations in Igbo customary law are well acknowledged, and skilfully documented in a seminal restatement of customary law applicable in the old Imo and Anambra states.[8] For the same reason, Nigerian customary law does not exist and the concept is indeed fallacious. There are probably as many customary law systems in Nigeria as there are national and sub-national groupings.[9] Igbo customary law, therefore, is a loose reference to those aspects of customary law that are generally shared among the Igbo-speaking people of Nigeria.

JURISDICTION OVER DEAD BODIES: INTERNATIONAL AND COMPARATIVE

Some of the Nigerian cases under review raise serious issues of jurisdiction over the right of sepulchre. In analysing these cases, it would be helpful to look at the practice in other jurisdictions with more experience in dead bodies' litigation. The question of jurisdiction is of cardinal importance in the process of adjudication. It is the responsibility of a plaintiff to ensure that the appropriate form of action is employed and that the proposed court has subject matter jurisdiction. Although courts are unlikely to decide a case based on procedural irregularities, jurisdictional deficiencies are usually fatal for the case.[10] In some cases, however, it is not clear whether an irregularity is merely procedural or jurisdictional.[11] Litigation relating to dead bodies requires careful scrutiny of the originating processes and the adjudicatory competence of a chosen court. Disputes over burial rights are laden with emotion and can hardly tolerate any mental distress occasioned by delays from wrong processes or successful jurisdictional objections.

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7 AEW Park *The Sources of Nigerian Law* (1963, Sweet & Maxwell) at 65–66.

8 SNC Obi *The Customary Law Manual* (1977, The Government Printer, Enugu).

9 For instance, Sagay analysed the customary law of succession applicable in Benin, Nigeria, and its impact on Wills Law. See IE Sagay ''Customary law and freedom of testamentary power'' (1995) 39 *Journal of African Law* 173.

10 The Nigerian Supreme Court has consistently held that it will not allow procedural deficiencies to defeat substantial justice: *Ndayako* v *Dantoro* [2004] 13 NWLR (Part 889) 187; *Noibi* v *Fikolati* [1987] 1 NWLR (Part 52) 619; *Atanda* v *Ajani* [1989] 3 NWLR (Part 111) 511; *Nneji & Ors* v *Chukwu & Ors* [1988] 6 SCNJ 132; *Nasco Management Services Ltd* v *AN Amaku Transport Ltd*. [1999] 1 NWLR (Part 588) 576; *Ibeanu* v *Ogbeide* [1994] 7 NWLR (Part 359) 697.

11 In *Ndayako* v *Dantoro*, Edozie, JSC, noted the distinction ''between two types of jurisdictions *viz* – jurisdiction as a matter of procedural law and jurisdiction as a matter of substantive law. Whilst a litigant can waive the former, no litigant can confer jurisdiction on the court where the Constitution or a statute or any provision of the common law says that the court shall have no jurisdiction'': *Ndayako* v *Dantoro*, above at note 10 at 219.

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In the USA, jurisdiction over dead bodies is exercised by the courts of equity.[12] In contrast, a probate court or a judge sitting in that capacity has no jurisdictional competence to entertain questions of interment or disinterment of dead bodies. The issue arose in *Fisher's Estate* v *Fisher*[13] where an executrix brought an application in an Illinois probate court seeking an order permitting her to disinter the deceased for the purpose of burial in another cemetery. The widow of the deceased made a successful objection both in the probate court and in the circuit court. On further appeal to the Court of Appeal, Burke, J, raised the issue of the jurisdiction of the probate court. He observed that: "Certainly the dead body of the deceased forms no part of the estate. The Probate Court has no general equitable jurisdiction of controversies relative to the interment and disinterment of human bodies".[14]

In the UK, there are just a few specific or systematic analyses of the jurisdiction of English courts over burials and disinterment.[15] The reason could be that the underlying system is effective in preventing jurisdictional problems from arising. It seems, however, that the old common law courts (currently replaced by a single High Court) and ecclesiastical courts shared jurisdiction over cadavers depending on whether interment was in a consecrated ground or not, and whether the issue related to right of burial or manner of burial.[16] For instance, issues relating to manner of burial in churchyards (or consecrated portions of cemeteries), reservation of a burial space, and faculty to disinter and reinter a corpse were within the jurisdiction of an ecclesiastical court (for instance, consistory court).[17] The common law courts, in contrast, had jurisdiction over issues relating to the recovery of funeral expenses,[18] damages for loss of exclusive right of burial,[19] and the determination of the duty of burial.[20] Similarly, a parishioner's right to be buried in the churchyard of his or her parish was enforceable by injunction in the common law courts.[21] However, since

12 *Petition of Sheffield Farms Company* 22 NJ 548, 126 A2D 886 (1956); Removal and Reinterment of Remains (1952) 21 ALR (2d) 472 at 483–91.

13 *Fisher's Estate* v *Fisher* 117 NE 2d 855 (ACI, 1954).

14 Id at 859. The subsequent decision of *In re Estate of Medlen* 677 NE 2d 33 (111 App 2 Dist 1997) came to a different conclusion in similar circumstances because of a later amendment to the Illinois Constitution.

15 *Halsbury's Laws of England vol 10* (4th ed, 2002, Butterworths LexisNexis) at 455; MR Russell Davies and DA Smale *Davies' Law of Burial, Cremation and Exhumation* (2002, Shaw & Sons); GH Newsom and GL Newsom *Faculty Jurisdiction of the Church of England* (1993, Sweet & Maxwell); *Reed* v *Madon* [1989] Ch 408; *Re St Luke's, Holbeach Hurn* [1991] 1 WLR 16.

16 In *Re West Norwood Cemetery* [1994] Fam 210; it may, thus, not be strictly accurate to say that the "English ecclesiastical courts...had exclusive jurisdiction over the dead": *Sherman* v *Sherman*, 750 A 2d 229 at 233.

17 *Re St Luke's, Holbeach Hurn*, above note 15; *Re Atkins* [1989] 1 All ER 14.

18 *Rees* v *Hughes* [1946] KB 517.

19 *Reed* v *Madon*, above at note 15.

20 *Clark* v *London General Omnibus Co Ltd* [1906] 2 KB 648.

21 *Ex Parte Blackmore* [1830] 1 A & AD 122 at 123–24, Littledale, J, observing that "The Clergyman is bound by law to bury the corpses of parishioners in the churchyard; but he is not bound to bury in any particular part of the churchyard".

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the Supreme Court of Judicature Act 1873, there is now a single High Court in England which sits in multiple divisions, with each division exercising all the powers of the High Court.[22] The English High Court's system for the distribution of cases among its divisions certainly ensures that jurisdictional disputes hardly arise. In the event that such a dispute does arise, it appears that any division of the High Court is competent to consider the matter, although it could in the exercise of its discretion assign the case to a more appropriate division. As the Court of Appeal stated in *Fabric Sales Ltd* v *Eratex Ltd*:

> ''The fact that there may be rules as to the distribution of business in the court (High Court) does not affect the jurisdiction which by statute is vested in a judge of the High Court. Of course in most cases a judge who finds himself asked to deal with a matter that is usually dealt with by some other division or by some special court will have due regard to that fact and may well in most cases refuse to exercise the jurisdiction although he undoubtedly possesses it''.[23]

In Nigeria, the 1999 Constitution[24] has illumined the first steps in the jurisdictional analysis, though deeper inquiry reveals greater complexity. Section 270 of the 1999 Constitution establishes only one High Court for each state of the federation. This means that, like England, any division of the High Court of a state can exercise all the jurisdiction and powers vested in the High Court by the Constitution or any other law. Section 272 of the 1999 Constitution gives a state High Court the jurisdiction ''to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue''. As in other areas of the Constitution, section 272 is fleshed out in specific enactments, particularly the High Court laws of the various states of the federation. Before looking at such statutes, it is important to note that although the High Courts' jurisdictions are said to be general and original, the Nigerian Constitution does not expressly employ such expansive words, despite the possibility of reading that meaning into section 272. Accordingly, it is not unconstitutional to confer jurisdiction on similar or other subject matters on courts below the High Court. For instance, Nigerian customary courts are usually given exclusive jurisdiction to hear and determine issues relating to customary marriages or land held under customary law.

As observed earlier, section 272 of the Constitution is implemented by the provisions of the state High Court laws. Most Nigerian state High Court laws have very similar provisions and that of Lagos state is used as a representative sample. Part three of the Lagos State High Court Law[25] deals

22 *Halsbury's Laws*, above at note 15; In *Re Hastings (No 3)* [1959] Ch 368 (Divisional Court).
23 [1984] 1 WLR 863 at 866 (CA).
24 Constitution of the Federal Republic of Nigeria 1999.
25 Cap 60, High Court Law.

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with the issue of jurisdiction. Section 10 provides that in addition to the jurisdiction conferred by the Constitution, the High Court shall have: "all the jurisdiction, powers and authorities which are vested in or capable of being exercised by the High Court of Justice in England". More specifically, section 16 of the High Court Law provides that the "jurisdiction of the High Court in probate causes and proceedings may, subject to the provisions of this law and in particular of section 26, and to the rules of court, be exercised by the court in conformity with the law and practice for the time being in force in England". Since English courts of probate did not, at least historically, exercise jurisdiction over burial rights, does a Nigerian High Court hearing a probate matter have jurisdiction to entertain an application relating to a dead body? Or is it a mere error in the originating process, a matter of procedure (which could be waived)? These questions admit of different answers and are relevant to cases in which the issue of burial right arose in the course of an unrelated proceeding.

It might be argued that the High Court has no jurisdiction in such circumstances and would strike out the application. It would be absolutely chaotic suddenly to transform a court sitting as a probate court into an admiralty one or a matrimonial causes' (family) court, all in the name of original and general jurisdiction of a High Court. In a legal dispute between a husband and wife over the ownership of a piece of land, are they entitled to ask the court to grant them a divorce decree in the same suit? Is the court entitled to exercise matrimonial jurisdiction in a land case simply because the Constitution employs broad language to describe its jurisdiction? Such a proposition might seem fantastical. Moreover, it hopelessly empties the meaning of provisions similar to section 16 of the High Court Law, which lucidly restricts the court to probate matters when sitting in that capacity. On this view, therefore, it would seem that although a High Court exercises all the jurisdictions previously exercised by the English common law courts and the court of equity, and has original jurisdiction under the Constitution, its jurisdiction is nevertheless restricted when sitting in a particular capacity. Such will be the case when it sits as a probate court, matrimonial court, or an admiralty court.[26] Consequently, applications for an interlocutory order of injunction authorizing burial or surrender of a corpse for the purpose of burial should not be entertained by a High Court sitting as a probate court or divorce court. The application ought to be struck out for want of jurisdiction. The proposition that a court of general jurisdiction is limited when sitting in a particular capacity finds support in American jurisprudence. For instance, in *Estate of Jimenez*,[27] the Court of Appeal held that although a superior court's jurisdiction was general, it did not have jurisdiction over interment and reinterment when sitting as a probate court:

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26 Sec 251 of the 1999 Nigerian Constitution conferred exclusive admiralty jurisdiction on the Federal High Courts.

27 65 Cal Rptr 2d 710 at 714 (Cal App 2 Dist 1997).

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> "The particular court that has jurisdiction over these matters is the superior court sitting in probate, which is commonly referred to as the 'probate court'... Although the probate court has all the powers of the superior court when considering cases brought before it under the Probate Code, its jurisdiction is limited in the sense that it exercises only such powers over decedent's estates as conferred upon it by the Statute".

On the other hand, it is equally arguable that a High Court has jurisdiction in the circumstances mentioned above. Advocates of this view would contend that general and original jurisdiction means nothing except that a High Court is empowered to entertain an application relating to any right, notwithstanding the capacity in which it sits. Moreover, since there is only one High Court, the nature of a claim before it is not a jurisdictional matter, but goes to the procedure for commencement of an action, a conceded procedural deficiency that carries no unfortunate consequences.[28] Accordingly, a High Court should, even when sitting as a probate court, have all the jurisdictions vested in it under the Constitution, including the determination of entitlement to a right of sepulchre. The refusal of a probate court or a family court to hear an application relating to dead bodies could be explained on grounds other than jurisdiction. For instance, an adjudicatory disinclination could be said to be a judicial statement that procedural convenience and expeditious dispensation of cases require that only related claims ought to be determined in the same suit. Otherwise, the wheel of justice will be unnecessarily clogged by the cluster of land, burial and divorce claims in the same suit. In other words, a High Court has jurisdiction to adjudicate the three claims either in the same suit or separately, but would for purposes of convenience and justice separate the claims into two or more suits. Because the court has jurisdiction in such cases, it will not necessarily strike out the case, but could order amendment of the proceedings, order a party to take out a fresh originating process, or transfer one or more of the claims to another division of the court. That this is a proper approach is borne out by the decision of Brightman, J, in the English case of *Re Shilena Hosiery Co Ltd*,[29] where declaratory actions were brought in the Companies Court by a liquidator on a summons in liquidation. There was an objection that the matter ought to have been begun by writ of summons and that the Companies Court had no jurisdiction to grant the declarations sought. In overruling the objection, Brightman, J, observed:

> "The Companies Court is not a court separate and distinct from the High Court, with its own peculiar jurisdiction. The jurisdiction to wind up a company is conferred on the High Court, not the Companies Court...nor is the Companies judge invested with a special jurisdiction not possessed by a

28 Relevant cases are cited above at note 10.
29 [1980] Ch 219.

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> High Court judge sitting elsewhere. The Companies Court is a way of describing the High Court when dealing with matters originating in the chambers of the Bankruptcy Register, dealing with company matters, and the Companies judge is a way of describing a High Court judge when trying such matters...Once it is accepted that the Companies Court is merely a description of the High Court when operating through the chambers of the Bankruptcy Register dealing with company matters, the question of jurisdiction is greatly narrowed because every judge of the High Court has jurisdiction to grant relief under section 172 of the Law of Property Act, whether he is or is not sitting as the Companies judge. All that remains is a procedural question, namely whether relief under section 172 is capable of being granted in proceedings begun by a summons issued in the Companies Court as distinct from some other form of procedure''.[30]

In the same vein, it could be said that a probate court in Nigeria is just a description of a Nigerian High Court hearing a probate matter, but with all the jurisdiction and powers of a High Court. If we accept this argument in favour of jurisdiction, it only remains to determine the circumstances under which a High Court would exercise its discretion against the assumption of jurisdiction. What is the test for this discretionary power? It seems that a High Court will exercise its jurisdiction only when the claim ''arises in and in consequence'' of the main suit.[31] Thus, Brightman, J, observed that: ''So far as the exercise of my discretion is concerned, my decision is based solely on the fact that the section 172 claims arise in consequence of the winding up''.[32]

SEPULCHRAL JURISDICTION IN PRACTICE

A sensible conclusion from the analysis above is that whether a court declines jurisdiction over dead bodies or exercises its discretion against jurisdiction, its decision is bound to cause some delay, to the distress of sepulchral litigants for whom expeditious disposal of their claims is uniquely important. Jurisdictional issues were raised in the following unreported High Court decisions in Nigeria.

In *Ikwechegh & another* v *Ukandu & ors*,[33] the deceased (Eunice) died eight days after the burial of her husband. Before her death, Eunice was accused by her husband's relatives (defendants) of ''killing'' her husband. They alleged that the fact Eunice died so soon after her husband's death constituted the spiritual evidence of her ''murderous'' act. The defendants were quick to point to traditional religious beliefs, claiming that the spirit of their deceased brother had quickly avenged his death on his ''wicked''

30 Id at 224.
31 Id at 226.
32 Id at 227.
33 Suit No A/118/92, unreported case of the High Court of Aba Judicial Division, Abia State, filed on 25 March 1992 (on file with author).

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wife and that the eight-day time span was an incontrovertible traditional evidence of her guilt. Although the defendants neither asked for any form of autopsy nor reported the matter to the police, they maintained their accusation of murder in the relevant court processes. The plaintiffs (Eunice's children) averred, in contrast, that the defendants rejected suggestions to perform an autopsy on their deceased brother. This averment was not challenged by the defendants. Accusations of this character are rife in Nigeria (especially in eastern Nigeria), even when they are notoriously devoid of any medical or legal basis. Nonetheless, such accusations are culturally powerful and carry enormous consequences for a widow who may find herself in complete social isolation. In addition to losing the opportunity to mourn her husband, a widow facing similar accusations would be completely disinherited and humiliated. Poor relatives (usually male members) of a deceased wealthy man usually resort to this cultural gap to assume control of their dead relative's property to the exclusion of his wife.[34]

Eunice, eight month's pregnant at the time of her husband's death, was unable to tolerate the mental torture, the pain and the humiliation she went through. Unsurprisingly, she and her unborn child died. The defendants considered the timing of her death to be a spiritual confirmation of their accusation and refused to permit Eunice's burial in her husband's premises. They alleged that Eunice's act of ''murder'' was sacrilegious and that her burial in the husband's premises would bring untold spiritual suffering on the defendants. In response, the plaintiffs, two of Eunice's seven children, brought an action in the High Court of Aba, asking for:

> ''(a) A declaration of this Honourable court that only the plaintiffs and their sister and brothers are entitled to inherit the estate of late Chief Mascot Ukandu Ikwechegh (Eunice's husband) who died intestate on the 2nd day of January 1992.
>
> (b) An order of this Honourable court compelling the defendants to disclose and surrender to the plaintiffs all the assets of late Chief Mascot Ikwechegh which have come to their knowledge or possession since the death of the said Mascot Ikwechegh on 2nd January 1992.
>
> (c) An order of this Honourable court nullifying any letters of administration obtained and or applied for by any of the defendants in respect of the said estate of late Chief Mascot Ikwechegh.
>
> (d) An injunction permanently restraining the defendants, their agents and or privies from trespassing into MUNIK CASTLE, the country house of late Chief Mascot Ikwechegh which castle is a part of the estate and interfering in the management of the entire estate of the said late Chief Mascot Ikwechegh...''.

34 Stamp argued that economic considerations underpinned the Kenyan case of *Otieno* v *Ougo & Siranga*, above at note 6.

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Following the filing of the above suit, the plaintiffs' counsel brought an ex parte application seeking an order that the plaintiffs be "allowed by the defendants and their agents to bury the plaintiffs' mother late Mrs Eunice Uzoaru Ikwechegh in the premises of MUNIK CASTLE IGBERE which is the family house of the plaintiffs", and also an injunction "restraining the defendants and their agents or representatives from disrupting or interfering with the burial of late Mrs Eunice Uzoaru Ikwechegh at their said family house at Igbere". There was also a request that the court should order the burial to be supervised by a team of armed policemen.

It is apparent that the plaintiffs' claims are all matters within the probate jurisdiction of a court or matters within the administration of estates. The suit was not concerned with the declaration of any right of burial or entitlement to bury the deceased or injunction to that effect. But, as evident from the filed documents, the aim of the suit was not to determine the administration of the estate of Eunice's husband, but to access the sanction of Aba High Court in the exercise of the plaintiffs' undoubted right of sepulchre. Two documents make this hypothesis very compelling. First, less than one week before the commencement of the suit, the plaintiffs' lawyer petitioned the local police station asking it to stop the defendants from burying Eunice at Aba, a town far removed from her family house at Igbere where her husband was buried.[35] Secondly, the plaintiffs' lawyer, with the permission of the plaintiffs, discontinued the suit after securing an injunction to bury Eunice in her husband's premises. The action was then struck out. In the application to discontinue the suit, the plaintiffs alleged that the matter had been "overtaken by events".[36] Beyond the writ of summons, no document contained in the file, at least in this author's possession, made mention of anything relating to intestate inheritance. The administration of estate theory, which dominated the claim, was a complete legal fiction. As already indicated, Johnson, J, granted the injunction sought by the plaintiffs and Eunice was buried in her husband's compound, although it appears that the defendants subsequently exhumed her corpse (illegally) and took it to her father's village.

An interesting aspect of this case, however, is that Johnson, J, assumed jurisdiction over the plaintiffs' interlocutory application seeking to determine a burial right in a probate action. In fairness to the judge, the issue of jurisdiction was neither raised in the ex parte proceedings nor in the motion to set aside the ex parte order made by the defendants' counsel.[37] Alhough the outcome of *Ikwechegh*'s application deserves

35 Petition to police dated 19 March 1992 (on file with author).
36 Notice of Discontinuance filed on 8 October 1992 (on file with author).
37 Motion to set aside order of court filed by defendants' counsel on 8 April 1992 (on file with author).

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approbation, it is arguable that the court did not have jurisdiction to entertain the case. At the minimum, the court ought to have directed the filing of an application to amend the originating process. On the face of the claim, it was entirely a probate matter and if the jurisdiction of the High Court in that regard is to be in conformity with the jurisdiction of probate courts in England, then it did not have jurisdiction to make the ex parte order. The point is that the delay, which could have been occasioned by the striking out of the suit for want of jurisdiction or amendment of the processes, was hardly tolerable by the plaintiffs who lost both parents within a period of two months and, at the same time, had to go through a stressful contentious litigation to assert their burial rights and bring closure to their ordeal.

Two other interesting unreported cases are relevant to the analysis of sepulchral jurisdiction. The first, *Ndubueze* v *Ndubueze*,[38] concerned a petition for the dissolution of marriage under the prevailing Matrimonial Causes legislation in Nigeria. Comfort and Emmanuel Ndubueze married in 1978 but separated in 1995. On 15 December 2000, Comfort brought a divorce petition against Emmanuel on the grounds of adultery and desertion. Unfortunately, Comfort died on 27 December 2000, during the pendency of her petition. A dispute arose between Emmanuel and Comfort's relatives concerning the right to bury Comfort. Emmanuel claimed that, as Comfort's husband, it was his duty to bury her. Relatives of Comfort argued that, under the customary law binding on the parties, Emmanuel lost sepulchral priority upon his non-judicial separation with Comfort in 1995. At this stage, Emmanuel launched an ex parte application in the divorce suit, adding one of Comfort's relatives as a "Party Cited," and claiming an:

> "order of interim injunction restraining the party cited Okorie Okeasu Okorie, by himself, agents, family members and servants from carrying, removing, burying or in any way tampering with the body of the deceased petitioner Comfort Ndubueze, now lying at Alaoma specialist Hospital Mortuary, Umuahia, Abia State, for the purpose of burial or for any other purpose whatsoever".

As it were, the ex parte application in the divorce suit looked like a hairy snake. Okorie Okeasu Okorie, who was cited as a party in the application, was not a party to the divorce petition. To expedite matters, Emmanuel attempted to circumvent the need to institute a fresh action against Okorie by citing him as a party to the interlocutory application. The relief sought in the application underscores the fact that it had nothing to do with the divorce petition which literally died with Comfort (petitioner). Could a divorce court, on the theory of general and unlimited jurisdiction and in

38 Suit No HU/2D/2000, unreported case filed at the Umuahia Judicial Division of the High Court of Abia State on 15 December 2000 (on file with author).

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the circumstances of this case, entertain the type of ex parte application brought by Emmanuel?

The records available to this author do not provide adequate guidance as to what happened, but certain things are clear. Emmanuel's ex parte application, filed on 29 January 2001, was fixed for hearing on 31 January 2001. It is unclear what happened to the application on the hearing date of 31 January 2001. It is probable that the judge indicated jurisdictional problems with the application and his reluctance to proceed with it. This may explain the fact that Emmanuel commenced a fresh and proper declaratory and injunctive action on the same day (31 January 2001) against Okorie: *Emmanuel Ndubueze* v *Okorie Okeasu Okorie*.[39] This new action also contained an ex parte application that was identical in terms to the one in the divorce petition. Another explanation for the events of 31 January 2001 is, however, possible. It appears from paragraph 4 of Emmanuel's reply to the Statement of Defence filed by Okorie that the divorce suit (*Ndubueze* v *Ndubueze*),[40] in which the ex parte application was filed, was struck out on 31 January 2001 for want of prosecution. Does this suggest that the ex parte application was not struck out for want of jurisdiction, but for tardy prosecution of the petition? In other words, did the ex parte application simply die with the divorce petition? Or was it transferred to the fresh suit in the exercise of subject-matter jurisdiction? The fact that the *ex parte* application resurfaced in the fresh action does seem to support the inference that the judge assumed jurisdiction over it in the divorce petition but transferred it to the new action instead of striking it out for want of jurisdiction. This inference is not compelling since the court cannot strike out a suit and then retain jurisdiction over some aspects of it, even for the purpose of transfer.

It is more likely that the fresh action was filed later in the day after the divorce petition was struck out. In that case, the ex parte application could not have been transferred to a non-existent suit. But it is arguable that the fresh suit was filed earlier in the day on 31 January 2001, before the hearing of the divorce petition. The existence of the fresh action enabled the court to strike out the divorce petition for want of prosecution and then, possibly, to order the transfer of the ex parte application to the fresh action. This argument is not attractive either. The fact that the new action contained an identical ex parte application under a new suit title excludes the possibility of such a conclusion. Moreover, the argument assumes that a court would be abusing its own process by creating or permitting a multiplicity of applications. This dialectical torture only aims to show that the most compelling inference is that, on 31 January 2001, the court declined jurisdiction to entertain the subject matter of the ex parte application in the divorce suit and struck it out with the divorce petition

39 Suit No HU/24/2001, unreported case of the Umuahia Judicial Division of Abia State High Court, filed on 31 January 2002 (on file with author).

40 Above at note 38.

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itself. This negative outcome emphasizes, once again, the need for sensitivity to questions of jurisdiction in litigation over burial rights.

THE RIGHT TO CONTROL THE DISPOSITION OF A DEAD BODY

Apart from jurisdiction, questions relating to the right to control the disposition of a dead body feature in all the unreported cases examined in this article. Claims relating to exercise of burial rights in Nigeria evince difficult conflict between customary law and some statutory enactments (including other sources of non-customary law).[41] Before looking at the nature of this conflict, it is helpful to provide a brief examination of the concept of burial rights. Burial rights come in a single package and refer to the right of a person entitled thereto, to determine the time, place and manner of burial.[42] Sepulchral (or burial) rights are personal in nature and lack proprietorial quality.[43] Sepulchral rights include the right of an executor or next of kin to the possession and custody of a deceased person for the purpose of burial.[44] Although the panoply of sepulchral rights is described in American jurisprudence as ''quasi-property'', it is well settled that there is no property right in a dead human body.[45] Property rights, however, exist where a dead human body or parts of the human body are the subject of scientific skill and labour, or attain attributes that differentiate them from a corpse awaiting burial.[46] It does appear that the no-property rule, which is generally applied in the legal systems of most industrialized countries, is not applicable in Nigeria. It has been forcefully argued elsewhere that a limited property rule applies to dead bodies and body parts in Nigeria.[47]

It is generally agreed that the place of burial, manner and time of burial are sentimental matters that attract universal reverence. Such sentiments are given legal protection through the concept of sepulchral rights and a civil action for damages is available to vindicate their breach by a defendant.[48] A caution on terminology is pertinent. What is generally termed ''sepulchral rights'' are in law duties imposed on a person to ensure

41 This conflict was acutely expressed by the Kenyan case of *Otieno* v *Ougo & Siranga*, above at note 6.

42 Detailed analysis is provided elsewhere: see RN Nwabueze ''The concept of sepulchral rights in Canada and the USA in the age of genomics: hints from Iceland'' (2005) 31 *Rutgers Computer & Technology Law Journal* 217.

43 *Fidelity Union Trust C* v *Heller* 84 A2d 485 at 487 (NJ Super Ct Ch Div 1951).

44 *Dobson* v *North Tyneside* [1997] 1 WLR 596; *Miners* v *CPR* [1910] 3 Alta LR 408.

45 *Halsbury's Laws*, above at note 15 at 461.

46 *AB* v *Leeds Teaching Hospitals NHS Trust* [2005] QB 506; *R* v *Kelly* [1998] 3 All ER 741; *Doodeward* v *Spence* [1908] 6 CLR 406.

47 This point is fully developed in RN Nwabueze ''Spiritualising in the godless temple of biotechnology: ontological and statutory approaches to dead bodies in Nigeria, England, and the USA'' (2002) 29 *Manitoba Law Journal* 171.

48 25A CJS, Dead Bodies § 4 (2002).

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that the deceased is decently interred. In the classical Hohfeldian sense, the existence of a right in one person imports a correlative duty in another person.[49] However, in the literature on sepulchral rights both the right and the duty paradoxically are vested in the same person. Accordingly, ''right'' and ''duty'' are used, in this area of law, loosely and interchangeably and should not be taken to entail the Hohfeldian framework.[50] But the challenge is to determine the person entitled to the control or exercise of sepulchral rights and how these rights are prioritized. Different legal systems have dealt differently with the issue, although a common feature of the legal systems of most industrialized countries is the individualization of burial rights.

Priority rules: United Kingdom, United States of America and Nigeria

United Kingdom

In the United Kingdom, it is well established that the right of burial belongs to the executor. The executor's wishes prevail over the contrary wishes of a surviving spouse and children of a deceased person. Executors are, however, naturally sensitive to the wishes of close relatives in the exercise of their sepulchral right. The executor's priority is so well established in English law that it overrides any burial wishes of a deceased person. There is no compelling policy rationalization for this anachronistic rule that easily sacrifices the wishes of the deceased person and his or her surviving spouse.

The English priority rule is based on the old case of *Williams* v *Williams*,[51] where the deceased had directed in his codicil that his executors should deliver his body to Miss Williams (not one of the executors), who would know what to do with it. The deceased had earlier given instructions to Miss Williams concerning the cremation of his body. On the death of the deceased, Miss Williams brought the deceased's burial wishes to the attention of his family and executor. Miss Williams, both before and after the funeral, expressed her willingness to carry out the crematory obligation she had freely undertaken. The executor and family of the deceased rejected Miss William's request and buried the deceased. Miss Williams subsequently obtained an order, through deception, to exhume the deceased for the purpose of cremation. She brought an action to recover her expenses in the cremation. Kay, J, held that since a dead human body did not qualify as property, it could not be disposed of by a testator's will. He observed that after a person's death, ''his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried''.[52] On the legality of the

49 WN Hohfeld ''Some fundamental legal conceptions as applied in judicial reasoning'' (1913–14) 23 *Yale Law Journal* 16; WN Hohfeld ''Fundamental legal conceptions as applied in judicial reasoning'' (1916–17) 26 *Yale Law Journal* 710.

50 *Caen* v *Feld* 371 SW2d 209 at 212–13 (Mo 1963).

51 *Williams* v *Williams* [1882] 20 Ch D 659.

52 Id at 665.

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deceased's direction, Kay, J, observed that "the direction in this codicil to the executors to deliver over the body to Miss Williams…is a direction which, in point of law, could not be enforced, and was void. She had no right of property in the body under that direction, nor could she enforce the delivery of the body by the executors".[53] Although the *Williams* case has been consistently followed in the UK, it is important to note that the wife of the deceased (Mrs Williams) was not a direct party to the dispute (which was only between the executor and Miss Williams). Thus, the court was not concerned with how claims to sepulchral priority by a spouse would impact on the paramount right of an executor. Accordingly, it is suggested that in a dispute between a spouse and an executor, there is still room for creativity and some opportunity to distinguish the *Williams* case.

United States of America

In the United States, priority is differently ordered. Courts give preference to the wishes of the deceased regarding the disposition of his or her remains. As the court observed in *Thompson* v *Deeds*: "It has always been, and ever will continue to be, the duty of courts to see to it that the expressed wish of one, as to his final resting place, shall, so far as it is possible, be carried out".[54] The burial wishes of a deceased person are matters of fact that are provable by evidence. Where the deceased's burial directions are contained in a testamentary instrument, it would be given effect even if the will is found to be invalid.[55] Testamentary directions on the disposition of remains may be revoked informally, without the execution of another will, codicil or other written instrument.[56] Burial directions may also be embodied in a non-testamentary instrument, such as the filling of relevant forms with a funeral home[57] or the signing of a written burial directive.[58] Parol directions regarding the disposition of one's remains are valid, provided they are unambiguous and ascertainable.[59] It seems also that some US courts would admit hearsay evidence to prove a decedent's burial directions.[60] In the absence of such burial directions, priority is given to the deceased's spouse and, failing that, to the children. But, as in the UK, burial rights are usually exercised by a single person, whose wishes are regarded as paramount and judicially enforceable. It is here that Nigerian law, especially its customary aspects, parts ways with most Western legal systems.

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53 Ibid.

54 61 NW 842 at 843 (Iowa 1895).

55 *Estate of Jimenez* 65 Cal Reptr 710 at 713 (Cal Ct App 1997).

56 *Fidelity Union Trust Co* 84 A2d 488.

57 *Estate of Jimenez*, above at note 55.

58 *Bruning* v *Eckman Funeral Home* 693 A2d 164 at 165 (NJ 1997).

59 *Stewart* v *Schwartz Brothers-Jeffer Memorial Chapel, Inc* 606 NYS 2d 965 at 968 (Sup Ct 1993).

60 *Bruning*, above at note 58.

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Nigeria

In contrast to the individualization of burial rights in the UK and the US, burial rights under many customary law systems in eastern Nigeria (among Igbo people) are familial in character. Decisions regarding the place, time, and manner of burial are not the prerogative of any single person, regardless of their relationship with the deceased. When a person dies, the duty to bury him or her falls on the family.[61] If English law categories were necessary to describe what happens, then it could be said that the head of family holds the burial right on trust for members of the family, especially the principal family members. Thus, where a woman's husband dies, the right of burial does not belong to her, but to the family of her deceased husband.[62] In that case, the head of family may be a father, brother or uncle of the deceased. The surviving wife is obliged to acquiesce in the family's decision regarding burial. In some customary law systems of Nigeria, where the surviving wife could herself be inherited by one of her husband's relatives,[63] her position is more tenuous and granting her any sepulchral right is hardly conceivable. Sepulchral priority under customary law is increasingly being abused, as indicated in a recent newspaper report about the death of a wealthy Nigerian public official in Cross River State.[64] The report stated that the deceased's relatives, led by his father, refused to bury the deceased, whose coffin was left in the rain, until the wife of the deceased would agree to surrender all of her husband's property. The Kenyan case of a widow who vehemently opposed efforts to exclude her from controlling the disposition of her husband's remains highlights the injustices inherent in the prioritization of burial rights under customary law.[65] Although the ultimate decision of the Kenyan Court of Appeal was against the widow, her judicial struggles have helped to chart a course for

61 In certain circumstances, however, customary law does not regulate the ordering of a person's affairs and would be irrelevant to the disposition of his or her remains. The circumstances for exclusion of customary law include the making of a will, the appointment of a legal representative/administrator (with letters of administration), and evidence of life-style or conduct unknown to customary law: Sagay ''Customary law'', above at 9; RN Nwabueze ''The dynamics and genius of Nigeria's indigenous legal order'' (2002) 1 *Indigenous Law Journal* 153 at 174–91. Even if customary law is not applicable, there is no testamentary capacity to dispose of one's body by a written will. A testator's dead body does not form part of his property or estate, which could be disposed of by will: *Williams*, above at note 51. But the making of a will could furnish evidence that the deceased did not want his or her affairs to be regulated by a system of customary law.

62 Provided the application of customary law is not excluded, as indicated in footnote 61 above.

63 Widow inheritance is excellently analysed in a restatement of customary law in eastern Nigeria prepared by Dr SNC Obi: see Obi *The Customary Law Manual*, above at note 8 at 152–60.

64 T Moses ''Family abandons corpse, fights widow for property'' (20 November 2005) *Daily Champion*, Nigeria, available at: <Http://odili.net/news/source/2005/nov/20/511.html> (last accessed on 22 November 2005).

65 *Otieno*, above at note 6.

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any African widow unwilling to surrender her sepulchral rights to a husband's relative.

The position is the same for the young children of a deceased person. Unless the application of Igbo customary law is excluded, it does not generally allow young children to control the disposition of a parent's remains. (In contrast, sepulchral rights are available to children in some states of the United States.)[66] Children are subject to the wishes of the head of their family (usually their grandfather or uncle) concerning the disposition of their parents' remains. This point appears to be contradicted by the *Ikwechegh* case,[67] where the plaintiffs were two of the young children of the deceased parents. However, that case did not get to trial and the injunction granted to the plaintiffs, affirming their right of burial, was made ex parte (without hearing the defendants). It is pertinent to note that in the *Ikwechegh* case, the first defendant resisted the burial of Eunice in the grounds of her husband's estate based on his customary law right, as head of family, to control the disposition of Eunice's remains to the exclusion of her children. Accordingly, the defendant averred: "That the decision not to bury the deceased (Eunice) in our village is a collective decision of both men and women and it was taken in the interest of our community".[68] Although this article is not concerned with the constitutionality of customary law, it is fairly apparent that customary law's priority rules discriminate against children and women and raise very serious human right issues. This may be a fruitful area for future work. At present, however, it is possible to use principles of English common law and equity (received into Nigeria since 1900) and relevant Nigerian statutory enactment to dilute the harshness of customary priority rules. This window of protection for widows and young children of a deceased person will be explored later.

Although older children[69] of a deceased person enjoy sepulchral rights as part of the principal members of a family,[70] the first daughter, if married, is given special consideration in the prioritization of burial rights under most forms of Igbo customary law. She performs special rites in the burial of her father. Her husband also plays a clearly defined role. On the death of her father, she is informed as quickly as possible and her views regarding the time, manner and place of interment are given sufficient consideration.[71]

Disagreement between the head of an Igbo family and some of the principal members can on occasion raise interesting legal problems,

66 *McKibben* v *McKibben* 119 NYS 2d 685 (Mun Ct 1952).

67 *Ikwechegh*, above at note 33.

68 Para 31 of the counter-affidavit of Ukandu Ikwechegh, filed in the above suit (at note 33) on 8 April 1992 (on file with author).

69 The determination of the age of maturity under customary law is much more complex than in other legal systems. Relevant factors are not just a person's number of years but include his or her responsibilities and circumstances in life.

70 One of them, depending on the circumstances, might even be the head of the family.

71 In *Agba and ors* v *Agba and ors* Suit No A/M 136/2000, unreported case filed on 12 May 2000 at the Aba Judicial Division of the High Court of Abia State (on file with the author), the first plaintiff sufficiently pleaded this aspect of customary law.

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despite customary arbitration and conciliation mechanisms. The question arose in *Agba and ors* v *Agba and ors*,[72] where members of the same family quarrelled over the right to bury their deceased father. The deceased had married three wives. The first plaintiff was the first son of the deceased and the second wife, while the first defendant was the second son of the deceased and the first wife. Of the deceased's remaining two sons, one joined the plaintiff and the other joined the defendant. The plaintiff claimed that as the first son and new head of family, he had a right to fix the date of burial with the consent of some members of their family. In exercise of that right, the plaintiff fixed the burial for 12 May 2000. The defendant, however, instructed the hospital in possession of the deceased not to release the body to the plaintiffs. The defendants claimed that the first plaintiff failed to consult them as required by customary law and also that the date chosen by the plaintiffs was not convenient for the defendants. The plaintiffs, therefore, brought a motion seeking an injunction that would compel the defendants to release the body of the deceased to the plaintiffs for burial. In the course of the proceedings, however, the traditional ruler of the parties' village intervened and encouraged them to settle the matter out of court. Even though the ultimate order of court was based on the out-of-court settlement, its semantic formulation is indicative of the prevailing view of customary law on the matter: "That the body of the late Mazi Michael Agba...be and is hereby ordered to be released to the 1st plaintiff Fabian I. Agba as head of the family of late Mazi Michael Agba for and on behalf of the Agba family...in order to ensure that the burial takes place on the said 1st December, 2000".[73]

HUSBAND AS HEAD OF THE FAMILY

On the death of a married woman, her husband, as head of the family, is entitled under Igbo customary law to the possession and custody of her corpse for burial. He also determines the time, place and manner of burial. But, as noted earlier, a kind of trust is foisted upon this sepulchral right. Accordingly, Igbo customary law obliges the husband to provide relevant information to the relatives of his deceased wife at the earliest opportunity and in a recognized manner. In addition, the husband consults not only his own relatives, but also the relatives of his deceased wife. He must take the convenience and views of his in-laws into serious consideration. Relatives of a deceased married woman jealously guard their rights of sepulchre and would not hesitate to impose recognized customary sanctions upon erring husbands for treating them with ignominy.

72 Ibid.

73 Order of Akomas, J, made in the above suit (at note 71) on 8 November 2000 (on file with author).

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The paramount right of a husband is, however, subject to the existence of a valid customary law marriage with the deceased. It is also subject to good treatment of the deceased during her lifetime. The husband must also have lived with the deceased as husband and wife in the period preceding her death. Accordingly, where the marriage was invalid under the applicable Igbo customary law, the husband would be unable to claim priority unless the application of customary law is excluded. The fact that the marriage was valid under the Marriage Act is only one of several considerations relevant in determining whether the application of customary law should be excluded.[74] Where customary priority eludes the husband, the wife's relatives are quick to assert their right of sepulchre. Non-assertion of this right is usually considered disgraceful and shows how little the deceased was regarded by her own relatives. A few cases illustrate some of these points.

In *Ojukwu* v *Ogudo*,[75] the deceased (Patience) was previously married to Mr Ogbonnaya and they had three children together. The marriage broke down and was properly dissolved under customary law. Patience returned to her family and started life again as a single woman. Thereafter she fell in love with the defendant. They lived together as husband and wife. The defendant took steps to undergo a customary marriage with Patience, but failed to complete the required rites. The defendant and Patience also failed to go through any statutory form of marriage. Nevertheless, Patience and the defendant had three children together. She died a few days after the birth of her last child. The defendant's attempts to bury Patience were aggressively challenged by Patience's relatives. They brought an action (through the head of their family) against the defendant, seeking two important declarations and an injunction:

> "1. A Declaration that the late Mrs. Patience Oyidiya Okendo (also called Mrs Patience Oyidiya Ogudo) ought to be buried in accordance with the native law and custom of the Amaokwe Item community in Bende L.G.A. of Abia State, Nigeria
> 2. A Declaration that the plaintiff is the person entitled to remove from the 2nd Defendant's (the hospital where the body was kept) custody and control the corpse of the said Patience O. Okendo and to accordingly bury the same at Amaokwe Item aforesaid
> 3. A Perpetual injunction restraining – (a) The 1st Defendant, his servants, Agents or privies from interfering with or removing the said corpse

74 Although the application of customary law could be excluded in various ways, including the making of a valid will (*Idehen* v *Idehen* [1991] 6 NWLR (Pt 198) 382), a valid statutory marriage does not automatically exclude the application of customary law. At best, it only provides a *prima facie* evidence of the exclusion of customary law: see *Obusez* v *Obusez* [2001] 15 NWLR (Pt 736) 377 at 399–400.

75 Suit No A/359/95, unreported case of the Aba Judicial Division of Abia State High Court filed on 3 March 1995 (on file with author).

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> from the 2nd Defendant's custody and control for the purposes of burying the same save and excerpt as directed by the plaintiff".

The plaintiff also filed a motion seeking to restrain the first defendant/"husband" from taking possession or custody of Patience for the purposes of burial and the second defendant (the hospital) from releasing the body of Patience to anybody "save the plaintiff/applicant".[76] The court granted this motion and Patience was buried by her relatives. Although this decision is, for other reasons, criticized later in this article, the point is that the court affirmed the right of a deceased woman's relative to bury her in preference to the right of her live-in partner. This outcome sharply contrasts with the position in some of the states in the United States. In *Felip* v *Vega*,[77] the deceased and the plaintiff were not married but lived happily as husband and wife for five years before the death of the deceased. They also had a child together. The plaintiff's application to disinter the deceased and re-bury the remains in a nearby cemetery was opposed by the father of the deceased. In finding for the plaintiff, Gibson, JSC, observed that, "although the couple lived together as man and wife there is no question that New Jersey does not recognize common law marriages...On the other hand, I see no reason why plaintiff's non-marital status alters any of the considerations already related. Plaintiff's love and her devotional needs seem no less strong because of it".[78]

In Nigeria, statutory marriage alone, despite its evidential value, does not automatically exclude the application of customary law.[79] This contrasts with the more certain exclusionary effects of a will[80] or the obtaining of letters of administration.[81] Thus, in *Ndubueze* v *Okorie*,[82] the plaintiff and the deceased were validly married under the Marriage Act, but not under the Igbo customary law binding on them. The court held that the defendants, who were the relatives of the deceased woman, were entitled to custody and possession of her body for burial. Although the court did not treat the matter in this systematic manner, its rejection of the plaintiff's application to restrain the defendants from burying their sister was a clear, but implicit, rejection of the defendant's claim that there was a customary law marriage between him and the deceased. The court's ruling was also tantamount to a declaration that statutory marriage alone is not sufficient for sepulchral claims. Absent customary law marriage, therefore, the paramount right of a husband is displaced in favour of his in-laws, even in the face of statutory marriage.

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76 Ibid.
77 570 A 2d 1028 (NJ Super Ch 1989).
78 Id at 1031.
79 *Obusez*, above at note 74; *Asiata* v *Goncallo* [1900] 1 NLR 41; *Smith* v *Smith* [1924] 5 NLR 105; *Onwudinjoh* v *Onwudinjoh* [1957] ERNLR 1; *Ajayi* v *White* [1946] 18 NLR 41.
80 *Idehen*, above at note 74.
81 *Ayorinde* v *Ayorinde* [2004] 13 NWLR (Pt 889) 83.
82 Above at note 39.

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CONFLICT BETWEEN CUSTOMARY PRIORITY RULES AND STATUTORY PROVISIONS

Despite the familial conception of sepulchral rights under Igbo customary law, some statutory provisions on the subject import notions of individualism that characterize sepulchral rights in industrialized countries. For instance, section 40 of the Births, Deaths and Burials Law provides:

> ''40 (1) The duty of causing the body of a deceased person to be buried is imposed on the persons following –
> (a) the executors of the deceased:
> (b) in the absence or default of an executor each and every one of the relatives of the deceased: and
> (c) in the absence or default of the relatives, the occupier of the premises on which the body lies: Provided that any person who shall cause a body to be buried shall be entitled to be paid all reasonable expenses incurred out of the property of the deceased in priority to all other charges''.[83]

Section 40, of course, has the welcome effect of safeguarding the sepulchral right of a widow, to the exclusion of her husband's relatives. This is, however, on the condition that her husband dies testate and has made her an executrix. Where a man dies intestate, it is most likely that his widow would be judicially favoured for the grant of letters of administration and an astute Nigerian widow seeking to overcome the impediments of customary rules of priority is better off applying for letters of administration, entitling her to claim priority under section 40 above. Although this article is solely concerned with sepulchral rights, a Nigerian widow could generally prevent her dispossession by recourse to the constitutional provisions relating to property.[84] There are two drawbacks, however. First, since her husband's body does not legally qualify as property,[85] it does not come within the constitutional provisions relating to the protection of property rights. Secondly, it does not appear that chapter IV of the Nigerian Constitution (relating to fundamental human rights) is applicable to actions between private persons (ie, between a widow and the relatives of the deceased),[86] although it would certainly apply to an action by a widow

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83 Births, Deaths and Burials Law, Cap 13, Laws of Lagos State 1994.

84 1999 Nigerian Constitution, chap IV, particularly secs 43–44.

85 *Williams*, above at note 51; *AB* v *Leeds*, above at note note 46.

86 Similar aspects of other federal constitutions (such as the Canadian Constitution) have been held to be devoid of horizontal effects (that is, they apply only to actions against the government or agents of the government): *Retail, Wholesale, and Department Store Union, Local 580* v *Dolphin Delivery Ltd* [1986] 33 DLR (4th) 174 (Sup Ct Can); *McKinney* v *University of Guelph* [1990] 76 DLR (4th) 545 (Sup Ct Can). The House of Lords avoided the issue in *Campbell* v *MGN Ltd* [2004] 2 AC 457 at 465, by holding that the law relating to breach of confidence was sufficient to determine the issue before the court, and that it was not ''necessary to pursue the controversial question whether the European Convention itself has this wider effect'' (that is, not necessary to determine whether the European Convention applies to actions between private persons).

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against the government or agents of the government. In other words, it is not clear that the Nigerian Constitution (chapter IV) has a horizontal application.[87] Customary law might not, otherwise, be easily displaced.[88] Unless its application is excluded (for instance, through the making of a will or by the grant of letters of administration), customary law inexorably furnishes the rule of decision where the parties are both subject to it. Thus, section 26(2) of the High Court Law of Lagos State[89] provides: ''Customary law shall be deemed applicable in causes and matters where the parties thereto are natives and also in causes and matters between natives and non-natives where it may appear to the court that substantial injustice would be done to either party by a strict adherence to any rules of law which would otherwise be applicable''. This type of provision could prove to be a powerful tool for the relatives of a deceased person who seek to dispossess his widow. The High Court Law, however, disallows the observance and enforcement of a rule of customary law that is ''repugnant to natural justice, equity, and good conscience'' or is ''incompatible either directly or by implication with any law for the time being in force''.[90] There is little doubt that where the relatives of a dead man seek to enforce sepulchral rights acquired under customary law in a manner that is calculated to prejudice the interests of his widow, a court is bound in justice to disregard the alleged customary rule.

CONTENT OF SEPULCHRAL RIGHT: DETERMINATION OF PLACE OF BURIAL

Having briefly analysed the meaning of sepulchral right and its prioritization under the legal systems of the UK, the US and Nigeria, this section will

87 This is a difficult constitutional issue which is yet to be decided in Nigeria, at least directly. In *Mojekwu* v *Mojekwu* [1997] 7 NWLR (Pt 512) 283, an action between individuals in their private capacities, N Tobi, JCA (as he then was), suggested that a rule of customary law that discriminated against female children was inequitable and inconsistent with the constitutional protection of freedom from discrimination. This aspect of the judgment was, however, set aside by the Supreme Court when the matter came to it on appeal: *Mojekwu* v *Iwuchukwu* [2004] 11 NWLR (Pt 883) 196. But neither the Supreme Court nor the Court of Appeal considered the question of the horizontal effects of the Nigerian Constitution. The problem is examined in Nwabueze ''The dynamics and genius of Nigeria's indigenous legal order'', above at note 61 at 192–97.

88 For instance, in the Kenyan case of *Otieno* v *Ougo & Siranga*, above at note 6, the fact that the deceased lived a Western life-style, obtained a Western education, lived in the city of Nairobi and was a famous professional lawyer did not exclude the application of customary law to the disposition of his remains. The deceased did not, however, make a will. Although a will cannot validly dispose of the remains of a testator (see *Williams*, above at note 51), it might be evidence that he did not intend his affairs to be regulated by customary law. In addition to a will, letters of administration would exclude the application of customary law and could give a widow complete control over the disposition of her husband's remains.

89 High Court Law, above at note 25.

90 Id at sec 26(1).

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provide a deeper exploration of one of the contents of sepulchral rights: the right to determine the place of burial.

It is in the determination of the place of burial that the essence of sepulchral rights in a cultural context becomes more meaningful. A question common to all the unreported cases analysed in this article centres on who has the decisional authority to determine the place of burial. Such questions are unlikely to abate in the future for certain cultural reasons. The place of burial is very informative. In Nigeria, the status and personality of a man or woman is evident from the place in which he or she was buried. The place of burial is so important in Nigerian cultural milieu that distance is not usually regarded as a problem. In *Onyeanusi* v *Pan Am*,[91] the plaintiff, an Igbo of south-eastern Nigeria whose mother died while on a visit to the United States, made every effort to have his mother's corpse returned to her homeland for burial. Unfortunately, due to a nine-day flight delay, the corpse became partially decomposed before the plaintiff could receive it, and he therefore sued for damages. The US Court of Appeals, Third Circuit, however, affirmed a district court's ruling dismissing the plaintiff's claim for want of the required notice under the Warsaw Convention, applicable to claims against air carriers. Owing to the court's desire to protect Pan Am in accordance with the declared objective of the Warsaw Convention, it did not give much attention to the plaintiff's claim that the mishandling of his deceased mother's remains was bound to bring misfortune upon him, his family and his tribe.

An Igbo man is usually buried in his ancestral home, commonly referred to as his village. Many Igbos live and carry on their businesses or professions in the urban areas and major cities, but when they die their corpses are usually taken to their villages for burial. Burial in homes or within living premises is the accepted mortuary practice in many parts of eastern Nigeria, despite its criminalization by the Nigerian Criminal Code.[92] Apart from its health implications, burials within living quarters can raise serious economic concerns, such as the ability to secure a mortgage on the security of a piece of land which includes a grave space.[93]

Burial of an Igbo man in a place other than his village is open to negative interpretation. It may also indicate that he was a minor. Corpses of children are often buried in the locality where the death occurred. The treatment of deceased children might have some traditional roots. Igbo worldview regards the death of a child as an abnormality. A child is expected to grow to adulthood and live a normal life. Premature death is seen as spiritually problematic and the cadaver of an infant is, in some places, buried in a

91 *Onyeanusi* v *Pan Am* 952 F 2d 788 (1992).

92 Sec 246 of the Nigerian Criminal Code, c 42, makes burial within living premises a misdemeanour.

93 TI Ogowewo has analysed this interesting point in the context of capital formation: TI Ogewowo ''Functional corporate law as an essential part of the development agenda for Africa'' (unpublished paper delivered at the World Bank Conference on Law and Development in Africa held at Abuja, Nigeria, on 5 February 2003).

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shallow grave in a local cemetery or in the forest. More cruel treatment is given to the corpse of an *Ogbanje*, that is, a child who undertakes in the spiritual world to experience an endless circle of birth and death. An *Ogbanje* dies soon after birth. If a child is suspected to be an *Ogbanje*, her corpse is severely mutilated before burial. Mutilation marks facilitate the recognition of an *Ogbanje*. It is believed that an *Ogbanje* child will not die if he or she is recognized at birth. Corpses of *Ogbanje* children are treated with irreverence and are usually dumped in ''evil forests''. Traditionally, there is no sentimentalization of the corpse of an infant, worse still an *Ogbange*. The *Ogbange* phenomenon, however, is better understood as a pre-modern society's attempt to rationalize high infant mortality due to diseases that are now largely eradicated.

In some circumstances, corpses of adults are also be dumped in the evil forest. These are usually cases involving the commission of an abomination or deaths attributable to the wrath of gods. The belief is that proper burial within living premises will attract punitive spiritual sanctions against living relatives. The corpse belongs to the gods and must be surrendered to the evil forest. Chinua Achebe captures the cultural underpinnings of the evil forest concept in his fictional, but anthropologically accurate, book, *Things Fall Apart*:

> ''When a man was afflicted with swelling in the stomach and the limbs he was not allowed to die in the house. He was carried to the Evil Forest and left there to die. There was the story of a very stubborn man who staggered back to his house and had to be carried again to the forest and tied to a tree. The sickness was an abomination to the earth, and so the victim could not be buried in her bowels. He died and rotted away above the earth, and was not given the first or the second burial''.[94]

The evil forest phenomenon explains the gruesome discoveries at the Okija shrine described above. The public outcry that followed that incident should be seen in context. It is doubtful that the inhabitants of Okija were surprised that certain corpses were left in the evil forest of *ogwugwu*. Of course, this observation should not be taken to prejudice any Christian disapprobation of the phenomenon itself and its traditional religious underpinning. However, public anger in this case arose due to the fact that the *ogwugwu* tradition was being abused, rather than from the actual concept of the evil forest itself. Some custodians of traditional shrines, who ought to be priests of the gods, have turned themselves into merchants of the worst type. It is alleged that they kill innocent parties in the name of the gods of the land in order to acquire the deceased's property. As already noted, when a person dies after taking an oath, the corpse and property must be brought to the shrine. There are rumours that such corpses are

94 Chinua Achebe *Things Fall Apart* (1958, Heineman Educational Books) at 16–17. Similar incidents are also found at 28–29, 71, and 186–87.

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now feeding the illegal market in cadavers and body parts, which could explain the missing body parts of some of the corpses found at the Okija shrine. The point, however, is that a traditional bystander, with the knowledge that an Igbo person was buried outside his or her village or outside the premises of his or her ancestral home, would reasonably conclude that the corpse was that of a child or that the deceased died an abominable death.

In addition, an Igbo man who dies poor or without sufficient means of livelihood is likely to be buried at the place (locality) of his death, if different from his village. Because burial outside a man's ancestral home reflects badly on the reputation of living relatives, serious financial efforts are usually made by the living relatives to ensure that the deceased receives a culturally appropriate interment. Where the deceased was a titled man, the place of burial is inflexibly considered to be his ancestral home. Even distant relatives, and indeed the entire community, will ensure that a proper burial takes place within the premises of the deceased. The ontological rationale for the place of interment stems from the desire to hasten the union of the deceased with the spirit of his or her ancestors. In traditional religious belief, death is not the end of life, but the beginning of a journey to the spiritual world of ancestors, and the journey will be hampered by burial in foreign places.

In the case of a married Igbo woman, the place of burial carries even more powerful connotations. A woman who lived happily with her husband until her death is buried within the premises of her husband's ancestral home. It dignifies her as a properly married woman and legitimates the status of the man as a husband. A man whose wife is buried outside his own home or village is open to indignity and ridicule. It might be evidence that he was not properly married to the woman or that he mistreated her. A married man does not easily yield his right to control the disposition of the remains of his deceased wife, as seen in *Ojukwu* v *Ogudo*,[95] and *Ndubueze* v *Okorie*.[96] A married woman could, nevertheless, give directions that she should be buried in her own village. Such requests are usually respected and Igbo customary law, in this instance, is similar to priority rules in American jurisprudence. A married woman's burial directions could be based on a desire to reunite with the spirits of her own ancestors more easily. It could also be a mortuary protest over her husband's unacceptable behaviour.

In brief, therefore, the place of burial is a significant content of the rights of sepulchre and is a hotly contested issue in Nigerian jurisprudence. It is determined by the person or family with the paramount right to control disposition of the remains of a deceased person. Traditional rules, however, make the place of burial almost self-evident. For instance, the place of burial is generally within the premises of a deceased adult person, despite

95 Above at note 75.
96 Above at note 39.

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the criminalization of that mortuary practice and its negative economic and health effects. Although there are potentials for the application of statutory provisions which incorporate English priority rules, the determination of place of burial and other incidence of sepulchral rights are currently regulated by customary mortuary rules.

REMEDIES FOR INTERFERENCE WITH DEAD BODIES

This section will examine remedial issues raised by some of the unreported cases under scrutiny. Judicial remedies are available to vindicate a breach, or threatened breach, of sepulchral rights. These include declaration of rights, injunctions, general damages, tort actions for emotional distress or psychological harm, and intentional or negligent interference with dead bodies. In certain circumstances, it might be possible to bring an action for breach of privacy. More controversially, a claimant could also make property or quasi property claims, such as damages for conversion where there is an appropriation of the whole or any part of a corpse or for detinue where there is a refusal to deliver a corpse. In certain instances, a claim for unjust enrichment would be suitable. This article will examine only those remedies, such as declarations and injunctions, raised by the unreported Nigerian cases.

Declarations and injunctions

A person complaining of interference with his or her right to bury a deceased person is entitled to bring an action in the High Court, seeking a declaration of entitlement to the right of sepulchre and an injunction restraining the defendant from interfering with the exercise of such right. With the exception of *Ikwechegh* v *Ukandu*,[97] and *Ndubueze* v *Ndubueze*,[98] all the unreported cases considered in this article were properly framed as declaratory and injunctive actions. Framing an action to assert a burial right as a petition for divorce (or as part of a divorce petition) or as an administration of estates or probate suit only confuses the issues and causes unnecessary delay. Owing to the contentious nature of cases in this area, claimants are better advised to commence an action with a writ of summons. Originating processes meant for actions where the facts are not in dispute are not appropriate for claims over burial rights. Although the granting of declarations and permanent injunctions are not problematic (because they come at the end of a trial), the courts face unique challenges in granting an interim or interlocutory injunction in relation to burial rights.

As a matter of principle, an interlocutory or interim injunction authorizing burial should not be granted to any party except in the most exceptional circumstances and, probably, should never be granted ex parte.

97 Above at note 33.
98 Above at note 38.

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An interlocutory injunction is mainly granted to protect the subject matter of litigation so that the ultimate decision of a court will not be in vain. Thus, section 18(3) of the Lagos High Court Law[99] provides for the granting of an "injunction to prevent any threatened or apprehended waste or trespass". In litigations relating to dead bodies, the subject matter of adjudication is the body itself and the conflict usually centres on the right to control the disposition of the deceased. Accordingly, any pre-trial decision (through injunction) entitling one party to bury the deceased is bound to overreach the other party. Burial pursuant to an interlocutory injunction practically amounts to a destruction of the subject matter of litigation before the rights of parties are finally determined. It is a judicial route that should be traversed only rarely. One appreciates the pressure on Nigerian judges to adjudicate cases relating to dead bodies expeditiously, and it is suggested that the availability of public and private morgues in Nigeria should be able to countervail the judicial tension between the need to ensure speedy burial and the determination of rights of the parties on merit.

The injustice of interlocutory injunction in relation to dead bodies is clearly evident in all the unreported cases cited in this work. Except for *Ndubueze* v *Ndubueze*,[100] which was a divorce suit, the claims of all the plaintiffs in the cases discussed were for a declaration of their right to bury the deceased and an injunction to enforce such right. Even *Ikwechegh* v *Ukandu*,[101] which was on paper a case for administration of estates, was in reality a dispute over the control of sepulchral rights. Such transformation was also witnessed in *Ndubueze* v *Ndubueze*.[102] It is also very significant that, except in *Ndubueze* v *Okorie*,[103] none of the plaintiffs claimed damages. Even the claim for damages in *Ndubueze* v *Okorie*[104] came through an amendment of the writs of summons after the corpse had been buried following the court's refusal to preserve the rex by an interlocutory injunction. It could be said for *Ndubueze* v *Okorie* that the court's refusal to grant the plaintiff an injunction to preserve the rex was tantamount to granting the defendants an injunction to bury the deceased. That actually happened; the deceased was quickly buried after the rejection of the application for injunction. Thus, at the core of all the unreported cases was the right to bury the deceased. Claims for monetary damages did not feature strongly in these cases.

Interlocutory injunction granted in all the unreported cases had the practical effect of determining the disputes before trial. *Ikwechegh* v *Ukandu*[105] is paradigmatic. Although an interlocutory injunction may be a

99 High Court Law, above at note 25.
100 Above at note 38.
101 Above at note 33.
102 Above at note 38.
103 Above at note 39.
104 Ibid.
105 Above at note 33.

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sensible remedy in certain circumstances concerning disputes over burial rights, it is generally open to objections and might be difficult to justify. It has potentials to overreach the other party. More importantly, it implies that the court has by itself prematurely destroyed the subject matter of litigation, with the possibility that its ultimate decision would be academic and in vain. What happens if the case was eventually decided the other way round, against the party who secured the interlocutory injunction authorizing burial? The body has already been buried. Exhumation might not be an adequate remedy for a litigant in these circumstances. For one thing, the dynamics of law are different after burial since the dead body is regarded as being in the custody of law. Once a dead body is buried, the rights of parties are not as strong as they were before burial and the general rule is that exhumation will not be ordered except when reasonable circumstances are shown. Factors to be considered by a court may include those external to the interests of the parties, such as public policy and environmental protection. Of course, reasonable circumstances for exhumation would certainly include a judicial order for disinterment of a body buried in accordance with an interlocutory injunction. It is, however, debatable whether a court in Nigeria has the original jurisdiction to order exhumation. These difficulties assail any hope that mistakes in the grant of an interlocutory injunction would be remedied by an order for exhumation.

This analysis only seeks to underscore the unique potentials of an interlocutory injunction to determine prematurely the rights of parties involved in litigation over burial rights. This eventuality could be illustrated with the case of *Ojukwu* v *Ogudo*.[106] The plaintiff claimed two declarations and a perpetual injunction in his writ of summons. For emphasis, the injunctive relief is set out in full:

> ''A perpetual injunction restraining:-
> A. The Ist Defendant, his servants, agents, or privies from interfering with or removing the said corpse from the 2nd Defendant's custody and control for the purpose of burying the same save and except as directed by the plaintiff
> B. The 2nd Defendant, its servants, agents and/or privies from releasing the said corpse either to the Defendant or to his servants, agents or privies for the purpose of burying the same or at all, save and except as directed by the plaintiff''.

After filing the suit, the plaintiff filed a motion on notice seeking an almost identical injunctive relief:

> ''1. Restraining the first Defendant/Respondent his servants, agents or privies from removing from the 2nd Respondent's custody and control the corpse of one Patience Oyidiya Okeudo (or Patience Oyidiya Ogudo) and,

106 Above at note 75.

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> 2. Restraining the 2nd Respondent, its agents or servants from delivering to or allowing either the 1st Defendant/Respondent or any other person whatsoever, *save the Plaintiff/Applicant*, to remove from its custody and control the corpse of the late Patience Oyidiya Okeudo (Patience Oyidiya Ogudo) [Italics supplied]
>
> Pending the determination of the substantive suit''.

The italicized words make it clear that, even though the order sought purports to prevent the burial of Patience until the suit is disposed of, it would actually authorize the plaintiff to take custody and possession of the corpse for burial, even before trial. A judge confronted with this type of interlocutory prayer, where the remedy sought is practically identical to those in the substantive suit, should be on his or her guard. Such applications involve a more important fundamental right, the right to be heard on merits before the determination of a case.

It is relevant to recall that *Ojukwu* v *Ogudo*[107] involved a dispute between the relatives of a deceased woman and the alleged husband. The relatives claimed that they were entitled to the right of burial since there was no customary law marriage between the deceased and the defendant. The defendant disputed their claims, alleging the existence of a valid customary law marriage and his right to bury the deceased. Thus, the right of burial turned on whether there was a valid customary law marriage between the parties. Akomas, J, who heard the application for an interlocutory injunction, appreciated this issue and correctly held that a decision on it was premature:

> ''Surely, these are vital issues (*i.e.*, the validity of the alleged customary law marriage) yet to be determined by this court at the trial. The Supreme Court has advised courts, that care should be taken, when a court is hearing an interlocutory application to avoid making any comment or observation in its ruling on that application, which might appear to prejudge or pre-empt the main issue or issues in the proceeding relative to the interlocutory application...Therefore, going into the issues raised by both parties in their conflicting affidavits, at this stage, may, in fact lead to the court pre-empting its findings on the substantive suit''.[108]

It is ironic that notwithstanding this correct judicial direction, Akomas, J, eventually granted the prayers sought in the interlocutory application. Looking more closely at that judicial direction, could it not be said to be more relevant to the subject matter of litigation itself? If a trial court was not allowed to predetermine the issues in a case at the interlocutory stage, why should it be able to dispose of the subject matter of litigation at that stage? Since the right to bury Patience in that case depended on the validity

107 Ibid.
108 Id at 5.

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of the alleged customary law marriage, which was left for trial, could Justice Akomas not be said to have prematurely determined that important issue by allowing the plaintiff to bury Patience? Beyond the sanctimonious profession of allegiance to the words of the Nigerian Supreme Court, it is doubtful that Akomas, J, actually followed its directives.

It is possible to subject Justice Akomas' ruling to closer scrutiny, an opportunity that is provided by its relative detail. The brief ruling in the other unreported cases makes any significant critique difficult. After finding that the suit raised triable issues and, therefore, passed that stage of the test for the grant of an interlocutory injunction, Justice Akomas went on to analyse the issue of balance of convenience. He observed that an escalating mortuary bill was a detriment suffered by both parties. After referring to the plaintiff's undertaking to pay the defendant's damages if the injunction turned out to be wrongly granted, he quite surprisingly observed:

> "It is the court's view, that this (undertaking as to damages) is a sufficient guarantee of any costs or expenses the 1st defendant/respondent, may incur, if he miss [sic] the case in the end. The 1st defendant/respondent has not averred that no amount of damages will heal any injury or compensate for any damages he may suffer or incur if this application is granted".[109]

It is strange that in the circumstances of that case, the court took the view that damages were an adequate compensation for the defendant's loss, which could correctly be said to be irreparable.[110] Monetary compensation is hardly adequate in litigations relating to dead bodies. The claiming of monetary damages in only one of the unreported cases shows that Nigerian litigants in this area do not consider damages as a sufficient compensation for their loss. Moreover, the defendant in the *Ojukwu* case did not make any counterclaim for damages, and when his counter-affidavit is considered as a whole, it contradicts any supposition that he would make do with damages. It appears too technical and unrealistic to say that a party's failure to disavow specifically the adequacy of compensatory damages automatically shifts the balance of convenience and makes him liable to an injunction. The court is required, in such circumstances, to look at the case as a whole and to determine whether damages recoverable under the plaintiff's undertaking as to damages would be an adequate remedy for the defendant.[111] Thus, the plaintiff is not automatically entitled to injunctive relief by simply giving an undertaking as to damages. One can imagine some situations where the plaintiff not only gives an undertaking as to damages, but avers that the defendant's injury would be adequately compensated by damages. In that case, if the defendant admits the averment then the balance of convenience may be tilted. That was not the situation in the *Ojukwu* case. It would be good practice for judges involved

109 Ibid.
110 *Saraki* v *Kotoye* [1992] 9 NWLR (Pt 264) 156 (Nig Sup Ct), per Agbaje, JSC.
111 *American Cyanamid Co* v *Ethicon Ltd* [1975] AC 396 at 408.

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in litigation over burial rights to take judicial notice of the inadequacy of damages as a compensatory remedy for the infringement of a party's burial rights. Such judicial notice can easily find anchorage in the universal sentiment towards the dead.

Ultimately, Akomas, J, granted the interlocutory injunction and concluded that the balance of convenience lay in permitting burial for two reasons: (1) to avoid the increasing cost of preserving the deceased in the mortuary; and (2) to prevent the corpse from deteriorating on account of power outage.[112] With respect, these reasons are not convincing. From personal experience, the author can say that some morgues in Aba operate at a relatively high level of efficiency and there are known cases of dead bodies preserved in Aba morgues for a very long time. In any case, the evidence of power outage was not before the court. The hospital was a party but did not give any evidence relating to any alternative power supply or its ability to preserve the corpse. It is common knowledge, at least in Aba, that hospitals with morgues have reliable power-generating machines. Those that do not have reliable alternative power sources would obviously not attract sufficient business. Moreover, reasons relating to electricity supply were not the foundation or part of the plaintiff's application for an interlocutory order. In any event, the above reasons do not provide any compelling justification for overreaching the right of the defendant.

As if sceptical of the propriety of his order, Justice Akomas observed that: "If the 1st defendant/respondent wins at last, he may cause the body to be exumed [sic] if, he so wishes, or be adequately compensated in costs or damages, for any mental pain or suffering, or truma [sic] he may have undergone".[113] Obviously, this conclusion does not square with the unique claims of parties over burial rights and does not address the inherent inadequacy of damages for their injury.[114] Moreover, exhumation does not provide or account for all the traditional burial rites that are associated with a first burial. The lost opportunity to observe certain traditional mortuary ceremonies could be substantial and irreparable, especially if the deceased was a titled person.

Justice Akomas should have also considered the difficulties associated with a disinterment jurisdiction. Section 44(1) of the Births, Deaths and Burials Law[115] of Lagos State, which is representative of similar legislation

112 Ibid.

113 Ibid.

114 But Justice Akomas' views on the reparability of damages through the remedy of disinterment could be supported with a similar observation by Fisher, PJ Ch, in *Sherman* v *Sherman* 750 A 2d 229, 237 (NJ Super Ct Ch Div. 1999): "First, while troublesome, the injury which plaintiffs seek to fend off – the burial of decedent in Middletown – is not necessarily irreversible. The court, as noted earlier, possesses jurisdiction to order disinterment upon an appropriate showing...If the facts and circumstances ultimately support plaintiffs' position in all respects, and the court finds it necessary to grant such relief, the decedent could be disinterred and the remains turned over to plaintiffs for an alternate disposition".

115 Births, Deaths and Burials Law, cap 13.

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in other states, provides: ''The State Commissioner may by writing under his hand order the exhumation of anybody buried in any place within the Lagos State''. Section 44(2) peremptorily states that: ''Save as provided in subsection (1) no corpse shall be taken up, exhumed, transferred or removed from a public burial ground: Provided that nothing in this law shall be deemed to effect the power of a coroner to order exhumation as he may deem fit''. Does this mean that a High Court in Nigeria does not have an original disinterment jurisdiction? Two interpretations are possible. First, it is arguable that the High Court does not have an original jurisdiction to order exhumation but can do so by way of judicial review. In other words, it has jurisdiction only when a party aggrieved by the commissioner's decision applies before it for a review. Since the commissioner is a public official, his decision in relation to disinterment is a reviewable exercise of discretion. Section 44 is, thus, likely to be seen as a condition precedent to the exercise of a court's disinterment jurisdiction. This means that absent prior recourse to the commissioner for action, the court lacks jurisdiction in the matter.[116] The compelling nature of this view is enhanced by the Canadian case of *Poplar Point Ojibway Nation* v *Ontario*.[117] Secondly, it could be argued, on the contrary, that the original jurisdiction of a High Court under section 272 of the 1999 Nigerian Constitution, and its inherent powers under section 6(6)(a) of the same Constitution, are expansive enough to include jurisdiction over exhumation of cadavers.

The point, however, is that it is dangerous to grant an interlocutory injunction based on a forlorn judicial hope that any injustice will be remedied by the exercise of a disinterment power. Many of the difficulties above would have been avoided if the parties were granted an expedited hearing rather than an interlocutory injunction. In that way, the proceedings would have been completed within days and weeks rather than months or years. This seems a sensible way to achieve justice in disputes relating to dead bodies.

CONCLUSION

A few unreported High Court decisions in Nigeria show the need for a serious analytical engagement with the law relating to dead bodies. Topical issues from these cases focus on jurisdiction, the right to control the disposition of remains, and the remedies available for infringement of a burial right. Jurisdiction remains fundamental in this area as in many other areas of law. Delays that may result from jurisdictional disputes are bound to inflict psychological injury on litigants. While the meaning and content of sepulchral rights remain the same in Nigeria as in many

116 *Reed* v *Madon*, above at note 15. But in *St Luke's, Holbeach Hurn*, above at note 15, it was held that a Consistory Court could grant a faculty for disinterment without requiring the licence of the secretary of state for the Home Department pursuant to sec 25 of the Burial Act 1857.

117 [1993] OJ No 601.

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industrialized nations, its prioritization is markedly different. In contrast to the highly individualized nature of burial rights in many Western legal systems, the control of sepulchral right under many systems of customary law in eastern Nigeria is familial in character. Customary law has a well-established system of priority based on the head of a family. Although customary mortuary rules apparently discriminate against children and widows, recourse may be had to statutory provisions that import English priority rules. The place of burial is very significant in customary mortuary jurisprudence because of the information it conveys on the status and position of the deceased in his or her life time. While a range of remedies is available for an interference with a burial right, injunctions and declarations were the most sought after in the decisions explored in this article. In this area of law, interlocutory injunctions tend to destroy the rex and prejudice the rights of litigants. An expedited hearing, where possible, is a better approach than the grant of an interlocutory injunction.

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