Spiritualising in the Godless Temple of Biotechnology: Ontological and Statutory Approaches to Dead Bodies in Nigeria, England, and the U.S.A.

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"Ay, my little God. Where are my corpses?
That's all I want to know so I can bury them."
Miguel Angel Ortega, El Salvador earthquake victim.[1]

I. INTRODUCTION

IN THE CONTEXT OF THE EVOLUTION OF MODERN Philosophy from the seventeenth century, Bertrand Russell observed: "Social cohesion and individual liberty, like religion and science, are in a state of conflict or uneasy compromise throughout the whole period."[2] The conflictual interaction of science and religion manifests remarkably in the Nigerian milieu, where the peoples' traditional transcendental beliefs inexorably reject the interference of biomedical and biotechnological applications. The pursuit of scientific inquiry within the domain of indigenous peoples has often resulted in the devastation of their social organisation and devaluation of their spirituality. Recently, Patrick Tierney lucidly examined how some American scientists, pursuing the theoretical connection between violence and reproduction, and the effect of radiation on genetic materials, contributed to the cultural and spiritual impoverishment of the Yanomami of Venezuela and utterly dislocated, if not annihilated, their political and social institutions.[3]

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1 N. Price, "Neighbourhood Flattened" *National Post* (15 January 2001) A3.

2 B. Russell, *A History Of Western Philosophy* (London: Unwin Paperbacks, 1946) at 15.

3 P. Tierney, *Darkness in El Dorado: How Scientists And Journalists Devastated The Amazon* (New York: W. W. Norton & Company, 2000).

The contribution of science to contemporary civilisation and well-being is arguably axiomatic, but it is not the only social good or value worthy of pursuit. Respect for the dead and religious beliefs are legitimate and equally important social goods meritorious of pursuit. Though present scientific knowledge dismissively consigns traditional religious beliefs to the category of superstition, it is well known that most indigenous peoples continue to be ordered and regulated by their cosmovision. For them, biomedical technologies pose a dilemma: do they tenaciously protect the integrity of their ontology and forfeit or reject the benefit of any conflicting biomedical innovations, or do they accept these innovations even when they entail some spiritual devaluation? This dilemma is a recurrent theme of this work, which puts in perspective the contending forces of science and religion, potentially emergent in any biomedical research in Nigeria, and attempts to craft possible ways of achieving reconciliation.

While most Western legal systems have fertile judicial or scholarly commentaries on the nature and extent of rights that inhere in the dead body of a human being or parts of it, there is neither a systematic legal discussion of the subject in the Nigerian context nor a reported Nigerian case law that directly discusses the existence, or otherwise, of a property interest in a dead body or human tissue.[4] Some ideas, however, can be gleaned from the literature on customary family law. Consequently, I do not have the advantage of a judicial or juristic precedent on the subject, and my susceptibility to error is enhanced. However, I have tried to construct the legal status of a dead human body and its parts under customary law based on a rationalisation of the Ibo ontological and religious traditions, its anthropology and sociology, and some literary works of fiction that depict Ibo communitarian and mortuary tradition. "Ibo" is used both linguistically and ethnically. It depicts the predominant ethnic group or nationality that indigenously inhabits south-eastern Nigeria. It also refers to the language spoken by this group. Ibo is the starting-point of my analysis, though

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[4] My review of the subject index of cases reported in various law reports in Nigeria did not reveal a case on point. *Egbe* v. *Onogun*, [1972] 1 All N.L.R. 95 [hereinafter *Egbe*] would have been the first reported Nigerian case to discuss the law on dead bodies but the case eventually turned on procedural issues. The plaintiff had instituted an action against the defendant for trespass to the plaintiff's father's grave. The plaintiff also asked for an interim injunction to restrain further acts of trespass pending the determination of the substantive suit. The learned trial judge, in dismissing the application for an interim injunction, held that the plaintiff had no possessory interest in the father's grave entitling him to the relief claimed. On appeal to the Nigerian Supreme Court, the issue was whether the learned trial judge directed himself properly on the principles governing the grant of an interim injunction. The Supreme Court held that the decision of the trial judge on sepulchral right was premature and therefore set aside the lower court's decision. Because of the way the Supreme Court framed the issue for determination, it lost the opportunity to discuss the law on dead bodies in Nigeria.

conclusions here may be generalisable to other ethnic groups in Nigeria and other parts of Africa, which share the Ibo's ontological tradition.

Analysis of the Ibo worldview supplied the foundation of my proposition on the property interest that exists in a corpse or body parts in Nigerian customary law. I juxtaposed this proposition with the relevant statutory and received laws in Nigeria, to reflect the latter's shortcomings. Throughout, I tried to grapple with the impact of customary law's apparent propertisation of the human body on scientific and biotechnological activities. I have at each stage of the paper drawn helpful comparisons with the relevant laws in United States of America and England. The necessity for adoption or rejection of the English or American view on some aspects of the subject was also canvassed. The paper concludes with a suggestion on how the Nigerian law on dead bodies could be tailored to meet the demands of modernisation and technological development.

II. WORLDVIEW OF THE IBOS

THE WORLDVIEW OF NIGERIANS IS SPIRITUAL. Nigerians, like many other Africans, have a spiritual perception of the world and things around them. The social, economic, and political structures are intertwined in a complex web of religion. Religion is the engine that propels every aspect of life in traditional Nigerian society. This explains their spiritual conception of the heavenly bodies and natural phenomena.[5] African religious manifestations come in various and equally applicable forms, and are therefore theistic, dynamistic, and spiritistic.[6] These spiritual attitudes engender Africans' proclivity to the veneration of the phenomenal. While a Caucasian's experimental instincts would be aroused by the sight of a phenomenal entity, like an unusually large tree, and would naturally want to investigate the scientific cause of the strange size, an African would immediately spiritualise such a phenomenon. As said:

> In his environment anything in nature that inspires awe either by its glow or brilliance like the moon or the sun; or anything that extorts his veneration by its massiveness or giddy height like the mountain; or anything that is dreadful from its cast or general look like a very thick cluster of tall wooded dark forest; or anything that appears

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5 R.T. Parsons, *Religion In An African Society* (Leiden: E.J. Brill, 1964) at 159.

6 I adopt Parsons' definition of these terms, *ibid.* at 163:

> Theism ... is the belief in and the practices and rules of conduct, associated with the belief in a supreme being. Dynamism is the belief in, and the ritual and rules of conduct associated with a belief in, an impersonal, all-pervasive force, operating in "medicines," charms, taboos, omens and curses. Spiritism is the belief in, and the practices and rules of conduct associated with the belief in spirits, whether disembodied human spirits or nature-spirits that were never human.

> horrible from its sound like the "rapid" or the "fall" of a river, is deemed to house a small god that should be adored and worshipped.[7]

Pope Paul VI recognised this African spirituality when he observed:

> The constant and general foundation of African tradition is the spiritual view of life. Here we have more than the so-called "animistic" concept, in the sense given to this term in the history of religions at the end of last century. We have a deeper, broader and more universal concept which considers all living beings and visible nature itself as linked with the world of the invisible and the spirit. In particular, it has never considered man as mere matter limited to earthly life, but recognizes in him the presence and power of another spiritual element, in virtue of which human life is always related to the after-life.[8]

Consequently, religion permeates all aspects of the African life,[9] and is the foundation of most customary legal rules. In some African societies, like the Ibos of south-eastern Nigeria, some actions, like incest and murder of a kinsman or woman, are considered offences against the earth deity. Green has characterised such offences as being "against a supernatural power." Such offences demand propitiation, as physical or penal punishment would not be sufficient in the circumstances.[10] There is a general belief in reincarnation, which is demonstrated in burial ceremonies and rites. For instance, if it is intended that a man should be a genius upon his reincarnation a very resourceful person in the community is procured to perform an aspect of his

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7 Account of F.O. Isichei in E. Isichei, *Igbo Worlds: An Anthology of Oral Histories and Historical Descriptions* (Philadelphia: Institute For The Study Of Human Issues, 1978) at 179.

8 Pope Paul VI, "Message of His Holiness Pope Paul VI to all the Peoples of Africa for the Promotion of their Religious, Civil and Social Good of their Continent" in E.C. Amucheazi, ed., *Readings In Social Sciences: Issues In National Development* (Enugu: Fourth Dimension Publishers, 1980) at 325.

9 Rt. Rev. Msgr. S.N. Ezeanya admirably observed in "The Contribution of African Traditional Religion To Nation Building" in Amucheazi, *ibid.* at 324:

> For the African, life is religion and religion is life. It is unimaginable for the African, following his traditional environment and culture, to think of human life divorced from religion. For the African, there is nothing like a person becoming converted to embrace a religion because life is impossible for anyone who is not religious from birth. There cannot be existence, not to talk of a person making any headway in life if he divorces himself from religion. Man has innate obligation to be religious. It is unnatural for the African that man should be otherwise than religious from cradle or rather, conception to grave. The African lives, moves and has his being in a religious atmosphere, in an atmosphere controlled by countless invisible powers both good and evil that steer the course of human destiny.

10 M.M. Green, *Ibo Village Affairs*, 2nd ed. (New York: Frederick A. Praeger, 1964) at 99–100.

burial rites.[11] Abuse or mutilation of the dead is strictly prohibited. Here, African mortuary tradition shows a deep conflict with laws of most Western countries that allow, in some circumstances, autopsy on the dead or dissection of the dead for medical or scientific purposes.

A. Reincarnation and Mutilation of the Dead

The belief in reincarnation provides anchorage for the supposition that mutilation of the dead, for whatever purpose, will lead to disablement or physical disfigurement upon reincarnation. As we shall see, this type of mortuary tradition constitutes a bulwark against biomedical and anthropological research. Mutilation of a dead body is allowed, probably, in a single instance, *i.e.*, where a mother experiences recurrent birth and death of an infant child. Typically of the African worldview, the death of an infant or baby is considered abnormal and is spiritually interpreted. The traditional rationalisation is that the dead child was an *Ogbange*: a child who entered a bond with a group in the spirit world, undertaking not to live to age of maturity. Such children are believed to die as soon as they are born or few years after their birth, only to be reborn again. As soon as such recurrent birth and death is noticed, the child is characterised an *Ogbange*, and steps are taken to outwit it. One step is that the corpse of an *Ogbange* is mutilated so that it could easily be identified upon rebirth. It is believed that an *Ogbange* dreads recognition and will likely live a full life if it became aware of its recognition. The villages are replete with stories of children born with mutilation marks given to them upon their previous death. Mutilation is also believed to discourage such children from continuing their interminable circle of death and rebirth.

Another step is to prevent the mother from sleeping in her home on the night following the death of her baby, because it is believed that such children "re-enter" their mother's womb on the night of their death, preparing to be born again.[12] The mother, on that night, could sleep outside her home, usually with a relative. Such relocation deceives the *Ogbange* and makes it difficult for it to be conceived by the mother. Save in the case of *Ogbange*, mutilation of a corpse is not allowed because of its adverse physical consequences on the after-life, and for constituting total irreverence to the dead.

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[11] *Ibid.* at 87.

[12] O.A.C. Anigbo, *Commensality And Human Relationship Among The Igbo* (Nsukka: University of Nigeria Press, 1987) at 135.

B. Customary Law's Conception of Death

For an Ibo, life does not end with death[13] and a man's manner of life on earth will heavily impact on his life after death.[14] Death is seen as the commencement of a journey to the spirit world of the ancestors. It is therefore customary to enclose in the deceased's casket certain items of food and clothing that it will use in that journey. As Anigbo observed, "[P]utting food, clothing and even walking sticks in the coffin can illustrate how the Igbo conceive life beyond the grave. For them life after death entails essentially the same experiences as are had in this world."[15] It is on account of this that the customary laws of most African communities recognise that the deceased could still marry after his death, and his posthumous wife could legally give birth to children in his name.[16] Under such customary law, as in Onitsha of south-eastern Nigeria, a deceased's family consented to a marriage contracted for and on behalf of the deceased, thirty years after his death, by his two sisters.[17]

Thus, in *Okonkwo* v. *Okagbue*,[18] all the three courts, High Court, Court of Appeal, and Supreme Court of Nigeria, affirmed the existence of this custom, which was established by the evidence of expert witnesses on the point. Though the plaintiff argued against the existence of this custom, his witnesses, in agreement with the defendant's, gave evidence in support of the custom.[19] While the High Court and Court of Appeal accepted the legality and enforceability of the custom, the Supreme Court, however, struck it down for being contrary to natural justice, equity, and good conscience.[20] Throughout the length of the judgment, the Supreme Court acted on the Western concept of marriage, which requires that the parties must be in existence.[21] No regard was had to African philosophical abstraction of man, as articulated in this paper.[22]

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13 Parsons, *supra* note 5 at 24.

14 Ezeanya, *supra* note 9 at 327.

15 Anigbo, *supra* note 12 at 142.

16 *Okonkwo* v. *Okagbue*, [1994] 9 N.W.L.R. 301 [hereinafter *Okonkwo*].

17 *Ibid.*

18 *Ibid.*

19 *Ibid.* at 317–318 and 328–329.

20 *Ibid.*

21 *Ibid.* at 324, 343, and 346.

22 Indeed, many African customary law systems allow posthumous, levirate, sororate, and "ghost" marriages that have the effect of perpetuating the deceased's name: K.S.A Ebeku, "The Legal Status Of Nigerian Children Born By A Widow: *Chinweze* v. *Masi* Revisited" (1994) 38 J. African L. at 46; C.O. Akpamgbo, "A 'Woman To Woman' Marriage And The Repugnancy Clause: A Case Of Putting New Wine Into Old Bottles" (1974–1977) 14

The Ibo's non-materialistic philosophy of existence is shared by the American Indians, who have been described as "America's first citizens."[23] The American Indians equally believe that the universe is governed by forces and spirits.[24] The utilisation of such forces or spirits, could largely be determined by the Indian peoples' worship and attitude. There is also a belief in the continuity of life after death. Consequently, death does not end existence and legal personality. This explains a recent case, *Na Iwi O Na Kupuna O Mokapu* v. *Dalton*,[25] brought by some American Indians in the name of some human remains. In denying standing to the human remains, Ezra, J., observed:

> The Mokapu remains were intended as Plaintiffs in their own right. Hui Malama asserts that according to Hawaiian custom, human remains are spiritual beings that possess all of the traits of a living person. The Federal Defendant's physical examination of the remains was, they contend, a violation and desecration of the remains. As a result, the remains have allegedly suffered an injury to their spiritual well-being and have standing to bring suit.
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> However, as the Federal Defendant contends, neither the provisions of *NAGPRA* nor the common law afford standing to the Mokapu remains. ... The court finds no sound legal basis for granting standing to human remains. Even the cases cited by Hui Malama refer to living organisms or dynamic ecosystems that are generally recognized as capable of suffering real injury in terms of physical or demonstrable detriment. Objects or entities without any attributes of life in the observable or provable sense are generally not afforded a legally-protected interest for standing purposes.[26]

However, the court considered the above an *obiter dictum*, since "it is unclear whether this court could even reach the issue of the remains' eligibility for legal standing."[27] Therefore, the case was, in part, decided on the basis that the remains had not met the common law's three requirements for standing.[28] The intermixture of the American Indian social, economic, and political life with

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African L. Stud. at 87. Consequently, the legal father of resultant children may not be their biological father: *Ibrahim* v. *Amalibini*, [1978] 1 G.L.R. 368.

[23] Statement of Senator D. Inuoye, quoted in J.F. Trope & W.R. Echo-Hawk, "*The Native American Graves Protection And Repatriation Act*: Background And Legislative History" (1992) 24 Ariz. St. L.J. 35 at 59.

[24] M. Battiste & J.Y. Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing Ltd., 2000) at 42–43.

[25] 894 F. Supp. 1397 (1995).

[26] *Ibid.* at 1406–1407 [citations omitted].

[27] *Ibid.* at 1407.

[28] Stipulated in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 at 559–561 (1992), as follows: 1. The plaintiff must have suffered an "injury in fact," *i.e.*, an invasion of a legally protected interest; 2. There must be a casual connection between the injury and the conduct complained of, *i.e.*, the injury must be fairly traceable to the challenged action of the defendant; and 3. It must be likely that the injury will be redressed by a favourable decision.

religion is demonstrated in the dissenting judgment of Justice Brennan in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n.*[29] There, the defendant, relying on the First Amendment's Free Exercise Clause, sought to stop the government from constructing a road across a sacred forest or near that forest in a way that burdened the defendant's religious activities. In demonstrating the inability of the Supreme Court's majority judgment to capture the spiritual essence of the Plaintiff's claim, Justice Brennan, in his dissenting judgment, observed:

> As the Forest Service's commissioned study, the Theodoratus Report, explains, for Native Americans religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life "is in reality an exercise which forces Indian concepts into non-Indian categories." App. 110; D. Theodoratus, Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest (1979). Thus, for most Native Americans, "[t]he area of worship cannot be delineated from social, political, cultural, and other areas of Indian life-style." American Indian Religious Freedom, Hearings on S.J. Res. 102 before the Senate Select Committee on Indian Affairs, 95th Cong., 2d Sess., 86 (1978) (statement of Barney Old Coyote, Crow Tribe). A pervasive feature of this life-style is the individual's relationship with the natural world; this relationship, which can accurately though somewhat incompletely be characterized as one of stewardship, forms the core of what might be called, for want of a better nomenclature, the Indian religious experience. While traditional Western religions view creation as the work of a deity "who institutes natural laws which then govern the operation of physical nature," tribal religions regard creation as an on-going process in which they are morally and religiously obligated to participate. ... Native Americans fulfill this duty through ceremonies and rituals designed to preserve and stabilize the earth and to protect humankind from disease and other catastrophes. Failure to conduct these ceremonies in the manner and place specified, adherents believe, will result in great harm to the earth and to the people whose welfare depends upon it. ... Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being.[30]

C. Disinterment of a Corpse

Ibos' reverence for the dead, belief in reincarnation, and continuity of life after death dictate that once buried, a corpse is not to be disinterred. Disinterment is believed to be a mark of disrespect to the deceased and capable of obstructing its journey to the spirit world of its ancestors; or after finishing such journey, disinterment can destroy the deceased's socialisation with fellow ancestors. The laws of most Western countries equally prohibit disinterment, except for compelling reasons, having regard to public health, the filial relationship of the parties with the deceased, and the particular circumstances of a case.

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[29] 485 U.S. 439 (1987).

[30] *Ibid.* at 460–461.

Among the Ibo of south-eastern Nigeria, disinterment is allowed for the purpose of exorcising the spirit of the dead, which is then magically and ritualistically imprisoned, and therefore rendered impotent. This expedient is resorted to when the deceased continues to afflict the living relations with pains and sufferings. This usually occurs with the spirits of dead relatives who died prematurely or in terrible circumstances. Instead of joining the ancestors, they hover around the world harming, or threatening to harm, their living relatives, as if to vent their anger arising from the circumstances of their death. Such spirits are considered evil. They are therefore exorcised and, in traditional parlance, chained. But exorcism is only resorted to after elaborate rituals and divinations, because living relatives are most reluctant to regard the spirit of a dead relative as evil. With this exception, the Ibo regards as sacred and untouchable the graves of departed loved ones.

Disinterment, in African ontology, is capable of leading to the destruction of the metaphysical force of the deceased and, except as indicated above, is strictly prohibited. As a scholar in African Philosophy observed:

> A deceased who has just brought injury to the life of members of the clan, or who, by exercising a pernicious influence on strangers, is compromising the clan which is responsible for his deed, will be called among the Baluba "mufu wa kizwa," a bad departed, a wanton, petulant deceased ("wa nsikani"). ... Vital restitution making good the evil wrought can only, in such cases, consist in a struggle which the living members of the clan will undertake against this pervert brother. This is the self-defence of life against the principle of destruction. They insult and injure such a deceased: an attempt will be made to drive him away; if necessary, recourse will be had to "manga," that is to say, to "natural forces"; and, if that is not enough, the ministrations of the "manga" man will be sought, to get him to take away from the deceased such force as may remain in him, to paralyse his harmful actions, to prevent him from having further dealings with the living; and by preventing his rebirth, which is the utmost diminution of vitality. It is possible even to go so far as to disinter the corpse, to burn it and to scatter the ashes. ... The deceased is then completely "dead," cut off from the living. And so ordered existence is restored in face of trouble, perversion, disorder. An ontological purification of the clan has taken place.[31]

III. Legal Implications of the Ibo Worldview

THE MAJOR LEGAL CONSEQUENCE OF THE IBOS' non-materialistic conception of the world is that the human body, whether living or dead, is property[32] owned

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[31] Rev. P. Tempels, *Bantu Philosophy*, trans. Rev. C. King (Paris: Presence Africaine, 1959) at 103–104.

[32] A learned professor has ably suggested to me that a *sui generis* categorisation may better reflect the Nigerian position than the idea of property. He may be right and the idea of *sui generis* is implicit in decisions like, *Davis* v. *Davis*, 842 S.W. 2d 588 (1992) and *Janicki* v. *Hospital of St. Raphael*, 744 A. 2d 963 (1999) [hereinafter *Janicki*], which held that human embryo or pre-embryo occupies a middle position between property and

by the particular person and his or her family. This analogised proposition seems the best medium to demonstrate to the reader the immeasurable interest which an Ibo family has in the life, death, and corpse of its relative. When the juridical concept of property is reduced to its pragmatic signification,[33] it becomes obvious that it does not fully capture the essence of an Ibo's family interest in the corpse of a member of the family. The sepulchral right of an Ibo family is ampler, and approximates more to proprietary interest, than an equivalent right

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personhood, which makes it entitled to a special respect. Also, D. Gracia, "Ownership Of The Human Body: Some Historical Remarks" in H. Ten Have, *et al.*, eds., *Ownership Of The Body: Philosophical Considerations on the Use of the Human Body and its Parts in Healthcare* (Dordrecht: Kluwer Academic Publishers, 1998) at 68–69, in examining the attitude of Roman Law towards the ownership of the human body observed:

> The living human body was considered in Roman Law as a constitutive element of each person, and not a "thing." Only the dead body was considered a "thing," *res*, but *res religiosa*, and therefore *sui generis*, neither appropriable (*res extra patrimonium*) nor salable (*res extra commercium*).

However, I have emphasised in the subsequent paragraphs that I am not strictly deploying "property" here as the resultant ethno-conceptualisation of the human body. Since customary law does not thrive in the familiar English categorisation of private law, with well-defined concepts, "property" is only used by way of analogy as the most suitable Western legal term that conveys the idea of an Ibo interest in the human body. While this interest is arguably *sui generis* in its Western legal reduction, it is a term, and legal attitude that has not enjoyed comparable legal definition, certainty, and juristic commentary as property. In any case, its use in analogy, rather than property, does not seem to capture the profundity of that interest which an Ibo man has in the corpse of his relative.. Even in English and Australian laws, the human body parts have been propertised in a way that makes a *sui generis* characterisation a bit inopportune: *Dobson* v. *North Tyneside Health Authority*, [1997] 1 W.L.R. 596 [hereinafter *Dobson*]; *R.* v. *Kelly*, [1998] 3 All E.R. 741 [hereinafter *Kelly*]; *Roche* v. *Douglas*, [2000] W.A.S.C. 22 [hereinafter *Roche*]. Property has increasingly become a fluid concept of utility that serves to protect a highly regarded interest, even when it does not possess traditional proprietary characteristics. Thus, it has been suggested that "whiteness" is property since it gives rise to racialised privileges and expectations of social, economic and political benefits, which the law expressly and implicitly protect and gratify: C.I. Harris, "Whiteness As Property" (1993) 106 Harv. L. Rev. 1709–1791. Thus, the property analogy is not out of place.

[33] A right of property ought to be of commercial value, transferable, devisable, tangible, inheritable, and permanent: *National Provincial Bank* v. *Ainsworth*, [1965] A.C. 1175; *First Victoria National Bank* v. *United States*, 620 F. 2d 1096 (1980). Similarly, A.M. Honoré posited in "Ownership" in A.G. Guest, ed., *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) at 113:

> Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmisssibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity: this makes eleven leading incidents.

exercised over a corpse in England, Canada, and America. In these legal systems, it seems settled that a corpse is not the subject of property, except where it has been transformed by the application of skill and labour, though possessory right of custody is given to the next of kin for the purpose of burial. This right terminates upon burial.[34] A slightly different formulation of this rule, in terms of "quasi-property" is of no practical relevance, since it gives exactly the same non-proprietary rights as the general statement of the rule.

While most western legal systems are still struggling with the scope and ambit of the interests of the "next of kin," Ibo customary law is spared of such controversy, with all its niceties and nuanced distinctions.[35] When a person dies in an Ibo community, the death is a loss to the family in particular and the community in general. These two have standing with respect to matters concerning the deceased and priority depends on a particular issue and is well known. For instance, if another community causes the death, the community of the deceased, as a political entity, seems to have standing, with respect to disputes arising therefrom, in preference to the deceased's family.[36] Generally, no relation of the deceased, notwithstanding the nearness or otherwise of the pedigree, is denied standing. This brings in bold relief the cohesion that animates an African society, where the biblical injunction—love your neighbour as your self—is not only the customary norm but also a common feature of daily life.

Therefore, property seems to be the nearest western legal concept that best expresses the profundity of interest exercisable over a corpse by an Ibo family. The corpse, both before and after burial, remains the property of the family, which has a sacred duty to protect it against mutilation, disinterment, desecration, and ensures its reunion with the ancestors in the world beyond. An accomplished African scholar, Ollenu, was right when, in the context of customary family law, he observed:

> Belonging to a family includes the concept of the individual being owned by and under the control of the family, and extends to family ownership of all properties which the individual acquires by his personal exertions, mental and otherwise. So long as the individual is mentally capable of managing his affairs, the family leaves him in absolute control of himself and his property with powers of alienation *inter vivos* or by will. The individual's authority, or his mandate to manage his affairs, ceases upon the happening

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[34] But in *Dobson*, *supra* note 32 at 600, Gibson, L.J., of the English Court of Appeals, doubted whether, apart from executors, administrators, and parents of an infant child, a next of kin had a right to the custody and possession of a corpse of a deceased relative.

[35] For instance, the struggle for the exercise of burial rights between natural parents and adopting parents in *Smith* v. *Tamworth City Council*, [1997] 41 N.S.W.L.R. 680 (Supreme Court of New South Wales) [hereinafter *Smith*]; or between the father of the deceased and deceased's partner in *Felipe* v. *Vega*, 570 A. 2d 1028 (1989) [hereinafter *Felipe*].

[36] P. Contini, "The Evolution of Blood-Money for Homicide in Somalia" (1971) 15 J. African L. 77.

> of any event which incapacitates him, *e.g.*, upon his becoming insane, or upon his death. In any of these eventualities the family resume full control of his person and property, which are theirs, and administer them. ...[37]

IV. EXCEPTION TO THE PROPERTY RULE UNDER IBO CUSTOMARY LAW

CLEARLY, WITH RESPECT TO DEAD BODIES, a property rule seems applicable under Ibo customary law. One exception ought to be noted, and relates to the concept of "Evil Forest," especially among the Ibos of south-eastern Nigeria. The Evil Forest was, and where it still survives is, a huge forest, usually at the outskirts of a village, where people believed to have died from unnatural causes were or are thrown into and not buried. For instance a sick condition which left a person's abdomen swollen or bloated before his or her death is attributed to the wrath of the gods.[38] The person's death is seen as an abomination and a pollution of the earth, belonging to the earth deity.[39] The indigenous mortuary law demands cleansing the earth, in such situation, and entails dumping the deceased on the Evil Forest, without burial.

Similar treatment is accorded the corpse of one who committed a suicide, the corpse of an *Ogbange*, already mentioned, dead bodies of twins,[40] and the corpse of one who died during the Week of Peace, *i.e.*, a week immediately before the commencement of planting season, observed by some Ibo

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37 N.A. Ollennu, "The Changing Law and Law Reform in Ghana" (1971) 15 J. African L. 132 at 150.

38 O.M. Ejidike, "Human Rights In The Cultural Traditions And Social Practice Of The Igbo Of South-Eastern Nigeria" (1999) 43 J. African L. 71 at 75.

39 Compare Justice Whitbeck's judgment in *Dampier* v. *Wayne County*, 592 N.W. 2d 809 (1999), that defendants alleged action which led to the decomposition of the deceased, plaintiff's relative, did not amount to mutilation of a dead body.

40 The reason for some of these examples seems to lie in the Ibos' belief in the perfection of creation: a woman gives birth to a child at a time, only animals can give birth to more than one at a time; therefore, sharing an animal's characteristic was most awful, unnatural, and a sign of evil visitation. Also, a person after birth is expected to grow through to maturity and ripe old age. Death in-between was an abomination and a pollution of the earth. If the corpse of a person who died prematurely or committed suicide was buried in the ground, or twins were left to live, it was believed that the whole community would be afflicted with the wrath of the gods. One discovers that the life of an Ibo is characterised by a series of ritualistic transitions from the time of birth to death at an old age, when the deceased makes the final transition to the world of the ancestors. Because the early missionaries and colonists did not appreciate the socio-religious bases of what, with the benefit of hindsight, is today a barbaric custom, they readily depicted African ancestors as mere blood thirsty savages.

communities, during which absolute peace is decreed and any quarrel or violence attracts very severe penalty. As Zahan observed:

> These and other such customs [*i.e.*, allegedly barbaric customs] encountered in Africa have often provoked the indignation of researchers, who have denounced them as cruel and inhuman. But these denunciations have constituted a rather quick judgment without accomplishing beforehand the necessary unravelling of the intricacies which order these practices.[41]

Unravelling this metaphysical order, which animates the purported barbaric practices of the African people, was the intellectual challenge ably confronted by Rev. Father Placide Tempels in his seminal book.[42]

Tempels ontologically abstracted the African, all animate and inanimate things around him, as metaphysical forces, which animate and orient the African. These forces inter-lock and influence one another and differ in their metaphysical strength, depending on their vital rank in the ontological hierarchy of forces. The Supreme Being stands at the apex of this hierarchy, followed by the dead ancestors, and ends with plants and animals. Those forces are designed to empower the African.[43] The single most important aim of an African is to gain metaphysical power, and not diminish his vital force. Real death, in contradistinction to physical death, is associated with a total diminution of one's force to a zero level. "Abnormality" in birth, *i.e.*, twins, or unusual physical deformities are traced to a disturbance in the hierarchy of forces, which, if left to exist, could lead to a diminution of a living African's force:

> Every unusual phenomenon, every abnormal being is called by the *Baluba* "bya malwa," and these eccentricities they hold to be disturbances in the natural order, forces out of the ordinary, bizarre. Besides, if all forces find themselves in relationships of influence according to their vital rank, it is but a step to the conclusion that a force, abnormal in itself, will usually if not necessarily have a disordering influence upon the forces upon which it exercises its action. A monstrosity does not constitute, any more than any other being, an autonomous force; but, like every other force, it will have a vital influence and this influence will be logically monstrous.[44]

Chinua Achebe, in *Things Fall Apart*,[45] that famous novel, made copious references to the Evil Forest phenomenon. The novel itself is both a fictional

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[41] D. Zahan, *The Religion, Spirituality, and Thought of Traditional Africa*, trans. K.E. Martin & L.M. Martin (Chicago: The University of Chicago Press, 1979) at 46.

[42] Tempels, *supra* note 31 at 86.

[43] O.M. Ejidike has suggested that these forces work in a parallel, rather than in a hierarchical and vertically downwards manner: "Human Rights In The Cultural Traditions And Social Practice Of The Igbo Of South-Eastern Nigeria" (1999) 43 J. African L. 71 at 95–96.

[44] *Ibid.* at 86.

[45] C. Achebe, *Things Fall Apart* (London: Heinemann Educational Books Ltd., 1958).

and historical expression of the anthropological and sociological underpinnings of the Ibo society, and derives juristic relevance from its systematic dramatisation and configuration of the Ibo customary law. Achebe observed:

> 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.[46]

Consequently, corpses that were thrown into the Evil Forest belong to nobody, and, just like in English, Canadian, and American laws, a no-property rule seems to apply to such corpses, subject to the law of trespass.[47]

V. EFFECT OF THE RECEIVED ENGLISH LAW ON THE LAW OF DEAD BODIES

ENGLISH LAW WAS RECEIVED IN NIGERIA for the first time in 1863 following the cession of Lagos. In that year the British colonial government established formal colonial administration in Lagos and by legal instrument received English common law, equity, and statutes of general application into Lagos with effect from 4 March 1863. In 1900 the other parts of Nigeria also received the English law. The reception of English law continues to be a feature of Nigerian legal system, long after the end of colonial rule in 1960, when the country gained its independence from Britain. A paradigmatic reception statute is s. 45 of the *Interpretation Act*:

> 45(1) Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall be in force in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation.[48]

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[46] *Ibid.* at 16–17. Similar incidents are also found at 28–29, 71, and 186–187.

[47] Sir W. Blackstone, *Commentaries of the Laws of England*, vol. 2 (Chicago: The University of Chicago Press, 1979) at 429, stated more than two hundred years ago:

> But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried.

[48] *Interpretation Act*, c. 89.

We therefore have an apparently contradictory situation of English common law, recognising no property in a corpse,[49] applying alongside Ibo customary law that maintains an opposite proposition. However, as evident from s. 26(1) and (2) of the *High Court Law*,[50] where the deceased and the parties to the case, or one of such parties, are natives, it seems that the customary mortuary law will apply, save if it is repugnant to natural justice, equity, and good conscience.[51] With the rate some recent Nigerian Supreme Court decisions have denounced some customary law principles, as being contrary to justice, equity, and good conscience,[52] it will be most interesting, and now left to imagination, to see how the Nigerian Supreme Court, or any Nigerian court for that matter, will assess a rule of customary law allowing ownership of a dead body by the deceased's family.

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[49] In *Kelly*, *supra* note 32, the English Court of Appeals, criminal division, laid down an exception to the general rule; to the effect that where a corpse has been preserved, by the application of skill and labour, for the purpose of exhibition or medical training, then it becomes property capable of being stolen.

[50] *High Court Law*, c. 60, Laws of Lagos State 1994:

> 26(1) The High Court shall observe and enforce the observance of customary law which is applicable and is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force, and nothing in this Law shall deprive any person of the benefit of customary law. (2) 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.

[51] A similar internal choice of law provision was interpreted by the Nigerian Supreme Court in *Zaidan* v. *Mohssen*, [1973] 1 All N.L.R. 86.

[52] In *Meribe* v. *Egwu*, [1976] 1 All N.L.R. 266, the Supreme Court held that a "woman to woman" marriage, an otherwise established customary law phenomenon, was repugnant to natural justice, equity, and good conscience. The case was ably criticised by Akpamgbo, *supra* note 22. In *Peter Chinweze* v. *Masi*, [1989] A.N.L.R. 1, the same court held *obiter* that a custom which allowed a deceased man to have posthumous children, through his wife's sexual relationship with another man, was "contrary to the course of nature" and therefore unenforceable. This decision was also justifiably criticised by Ebeku, *supra* note 22. In *Okonkwo*, *supra* note 16, it was held by same court that a custom which allowed a woman's marriage to a deceased person, contracted after the deceased's death, was repugnant to natural justice, equity, and good conscience. In *Mojekwu* v. *Mojekwu*, [1997] 7 N.W.L.R. 283 and *Muojekwu* v. *Ejikeme*, [2000] 5 N.W.L.R. 402, the Nigerian Court of Appeal held that a custom which allowed a surviving male member of a deceased's family to inherit the deceased's estate as against the deceased's female child was contrary to natural justice, equity, and good conscience. These cases are criticized by R.N. Nwabueze, "The Genius and Dynamics of Nigeria's Indigenous Legal Order" (2002) Indigenous L.J. [forthcoming].

VI. AMERICAN AND ENGLISH DISTINCTION BETWEEN THE DEAD "BODY" OR "CORPSE" AND SKELETAL REMAINS

AMERICAN JURISPRUDENCE MAINTAINS A DISTINCTION between a dead body or corpse and the skeletal remains. The words "corpse" and "dead body" are interchangeable.[53] A corpse, in its American legal signification, characterises a dead human being, whose body has not undergone a complete process of dissolution or decomposition. Upon complete decomposition of a dead body, the dead ceases to be known as a "corpse" or "dead body."[54] It therefore merges with the soil and loses its identity therein.[55] There is no rule of positive law that prescribes the time for the decomposition of the dead body. That depends on particular soil characteristics and climatic conditions.[56] After decomposition, the human body loses legal signification under the above distinction. It becomes part of the land wherein it is interred, and attracts the application of land law. Its subsequent reference as skeletal remains seems to carry no legal significance, except, probably, under law relating to antiquities, as we shall see below.

This alleged distinction between the corpse and skeletal remains raises profound, if not scary, consequences. It is, therefore, pertinent to examine the cases that allegedly introduced the distinction into American and English jurisprudence. The first direct decision on the point seems to be *Carter* v. *Zanesville*.[57] The plaintiff, an administratrix, complained that the defendants, proprietors of a cemetery, disinterred and took into their possession, 38 year old remains of the plaintiff's daughter, without the plaintiff's permission or consent. This civil action was brought under an Ohio statute that damnified in damages any person "having unlawful possession of the body of any deceased person ... ."[58] It seems that the real ratio of the case is that by the very nature of their duty, cemetery proprietors cannot be in unlawful possession of remains buried in their cemetery: "Nor is the penalty imposed by it [the Ohio statute] directed against cemetery associations (or their trustees) where such remains may be quietly reposing."[59] However, the court did not stop at that. It went on to postulate that:

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53 *Carter* v. *City of Zanesville*, 52 N.E. 126 (1898) [hereinafter *Carter*].

54 It was suggested in an Australian case that a monstrous stillbirth may not qualify as a "corpse": Barton J.'s concurring judgment in *Doodeward* v. *Spence*, 6 C.L.R. 406 at 415 (1908) [hereinafter *Doodeward*].

55 *Gilbert* v. *Buzzard*, [1820] 161 E.R. 761 at 768 [hereinafter *Gilbert*].

56 *Ibid.*

57 *Carter*, *supra* note 53.

58 *Ibid.*

59 *Ibid.*

> This statute is directed against such persons, *etc.*, as have unlawful possession of a "body" of a deceased person. The section further refers to the "body" as such "corpse." The terms "body" and "corpse," found in this statute, do not include the remains of persons long buried and decomposed.[60]

As already stated, this distinction was not necessary for the actual decision in that case, *i.e.*, that cemetery proprietors or trustees were not within the contemplation of the statute. Nevertheless, it has been the foundation and inspiration of subsequent cases.

In *State* v. *Glass*,[61] a developer bought large acres of land, a small portion of which was previously used as a cemetery,[62] where four dead bodies about 125 years old[63] were buried. In the course of development, he employed an undertaker to disinter and re-inter these bodies in another cemetery, albeit without all the required permits.[64] He was therefore charged under a grave robbing statute that criminalised any "willfully and unlawfully open[ing] [of] a grave or tomb where a corpse has been deposited."[65] In delivering the majority judgment, and heavily relying on *Carter* v. *Zanesville*,[66] Justice Gray offered this syllogism: the statute penalises the unlawful removal of a corpse; a completely decomposed body is not a corpse; the bodies in that case were long completely decomposed;[67] therefore (1) there was no corpse in that case, as required by the statute, (2) since there was no corpse, there was no grave that was robbed.[68] On this logic, the defendant was discharged of the offence of grave robbing.[69]

First, the main precedential justification of *State* v. *Glass*, *i.e.*, *Carter* v. *Zanesville*, is distinguishable, as I have tried to show. Second, Justice Gray's logic became problematic when he nevertheless convicted the defendant under the second count, for the unlawful removal of a gravestone.[70] Unless we do

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60 *Ibid.*

61 273 N.E. 2d 893 (1971) [hereinafter *Glass*].

62 This portion was excluded from his deed.

63 *Glass*, *supra* note 61 at 896.

64 *Ibid.* at 895.

65 *Ibid.* at 898.

66 *Carter*, *supra* note 53.

67 He held them to be about 125 years. Though Stephenson, J. in his dissenting judgment held that the complete decomposition of the bodies or their ages were not proved by the record and were based on mere supposition: *Glass*, *supra* note 61 at 900.

68 *Ibid.* at 898.

69 *Ibid.*

70 *Ibid.*

serious damage to the meaning of "gravestone,"[71] how could there have been a gravestone marking a grave unless there was a grave, which was denied by the learned justice.

The truth is that the majority was under a heightened and self-imposed pressure to discharge the defendant,[72] whom it found to have duly re-buried the bodies, tried to secure all the necessary approvals, did not harvest any burial goods from the graves,[73] and even undeservedly underwent a sanity examination for 60 days, under the order of the lower court.[74] The minority judgment of Stephenson, J. agreed with the distinction between a corpse and a completely decomposed body, *i.e.*, skeletal remains, but maintained that the distinction did not obliterate the equally strong distinction between a "corpse" and "grave," so that a grave remains in existence and could be robbed even after the complete decomposition of its content.[75] Therefore, *State* v. *Glass* evinces a unanimous judgment on the point of distinction between a corpse and completely decomposed body.

It is pertinent to comment on the English decision, and second case,[76] relied upon by the majority in *State* v. *Glass*. Justice Gray rationalised *Gilbert* v. *Buzzard*[77] as holding that, "the right of burial extends in time no farther than the period needed for complete dissolution [of the corpse]."[78] If this means that the rights which relatives have over a corpse expire upon its decomposition, then it tantamounts, with respect, to an imperfect rendition of the ratio in *Gilbert* v. *Buzzard*. There, the plaintiff, a parishioner of an English church claimed a right to have his deceased wife, equally a parishioner, buried in the church cemetery in an iron coffin.[79] The church refused to accept the burial in an iron coffin, unless the plaintiff was willingly to pay higher burial fees. The stalemate raised a serious pandemonium and chaos resulting in the temporary

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71 It is defined as: "a stone marking a grave": *The Oxford Encyclopedic English Dictionary* (Oxford: Clarendon Press, 1991) *s.v.* "gravestone"; also *R.* v. *Moyer*, [1994] 2 S.C.R. 899 at 908–909.

72 The judgment did not state the punishment the defendant received for conviction on the second count.

73 *Glass*, *supra* note 61.

74 *Ibid.* at 897.

75 *Ibid.* at 900.

76 *Gilbert*, *supra* note 55.

77 *Ibid.*

78 *Glass*, *supra* note 61at 898.

79 The resort to iron coffin was a protective devise to guard against the depredations of grave robbers.

deposition of the deceased's body in a "bone-house."[80] The plaintiff therefore brought an action against the church, for the common law offence of obstructing the interment of a dead body.[81] Plaintiff's counsel argued that the sanctity and inviolability of the grave was "among the most ancient and universal rights."[82] It was therefore contended that the protection of this right demanded that once a cemetery spot was appropriated to a particular burial, then it remained irreversibly allocated to the deceased therein buried, so that no subsequent burial could be had on the same spot.[83]

The church, defendant, contended that its increasing population, limited burial grounds, and high mortality rate of about 800 persons per year, required that after complete decomposition of a corpse, it should be able to use the same spot for another burial. This objective, it further contended, would be defeated if burial in an iron coffin was allowed, at no extra cost, since iron coffins would delay and prolong the natural decomposition of the remains.[84]

In answering the plaintiff's contention, on the irrevocable appropriation of a spot for a particular corpse, Sir William Scot reasoned that the contention falsely assumed the imperishability of a corpse as, "there can be no inextinguishable title, no perpetuity of possession belonging to a subject which itself is perishable."[85] His Lordship maintained that a corpse completely decomposes, after an indefinable period of time, and merges with the soil.[86] Consequently, a parishioner buried in a particular spot of the church cemetery relinquished the possession thereof upon complete decomposition of the body, in which case the living and future parishioners became entitled to succeed to the same spot.[87]

It seems, therefore, that the decomposition of a corpse becomes relevant only with respect to the above right of succession; *i.e.*, in determining when it arises.[88] This point seems, with respect, to have eluded Justice Gray in *State* v. *Glass*. Sir William Scot never set out to say, as implied in the American distinction, that flesh is everything and bones are nothing.

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80 *Gilbert*, *supra* note 55 at 763.

81 *Ibid.*

82 *Ibid.*

83 *Ibid.* at 762.

84 *Ibid.* at 762.

85 *Ibid.* at 768.

86 *Ibid.*

87 *Ibid.*

88 The American case of *Wilson* v. *Read*, 74 N.H. 322 (1907), seems to reach a similar result when it refused to interfere with the burial of a woman in a spot where an infant was buried 49 years previously.

Incidentally, a recent American decision, *State* v. *Redd*,[89] which did not mention the above cases, has held that there is no legal difference between long decomposed remains, about 1000 years old in that case, and yet-to-be decomposed dead bodies. Justice Zimmerman of the Supreme Court of Utah therein observed:

> [I]t may be that reading this statute [Utah Code Ann. S. 76-9-704(1)(a) (1995)] as protecting partial remains of a thousand-year-old Anasazi will not accord with the expectations of some persons ... . But a moment's reflection should demonstrate the soundness of the broader public policy our interpretation advances. It will protect the partial remains of many with whom people can readily identify, such as pioneers buried long ago in crude graves, or of war dead, or of victims of horrendous accidents, or crimes.[90]

However, the above distinction has become so ingrained in American jurisprudence[91] that it can hardly admit of the dilution suggested in this paper, though more cases like *State* v. *Redd*, may ultimately make the necessary inroad. Several consequences flow from the distinction.

First, it seems that the various rights of possession, custody, and burial, given by law to surviving relatives, characterised as "quasi-property" in American law,[92] extinguish upon the complete decomposition of their deceased member.[93] These valuable rights, which enable relatives to maintain an action for abuse of a deceased member's body, will no longer avail them upon the translation of the deceased from "corpse" to "skeletal remains."[94] Second, a

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89 992 P. 2d 986 (1999).

90 *Ibid.* at 991.

91 F.J. Ludes, *et al.*, eds., *Corpus Juris Secundum* (St. Paul, Minnesota.: West Publishing Co., 1966) at 488; 21 A.L.R. 2d 472 at 476–477 (1952); B. Swartz, "Property—Nature Of Rights In Dead Bodies—Right Of Burial" (1939) Southern Cal. L. Rev. 435.

92 *Carney* v. *Knollwood Cemetery Assn.*, 514 N.E. 2d 430 (1986).

93 M.B. Bowman recognised this point and therefore argued against the distinction between a corpse and skeletal remains: "The Reburial Of Native American Skeletal Remains: Approaches To The Resolution Of A Conflict" (1989) 13 Harv. Env. L. Rev. 147 at 169.

94 However, it is evident from the majority of cases decided by the American courts in the past 150 years that relatives of the deceased were awarded damages for unauthorised or wrongful disinterment, in circumstances where it was reasonable to hold that the deceased's body had been completely decomposed. An example is the famous American case of *Re Beekman Street*, 4 Bradf. 506 (1856), where an old cemetery was acquired by the City of New York, for a public purpose and upon payment of compensation. One of the claimants of this money was the daughter of a man who had been buried for more than 50 years, and ought ordinarily to have been completely decomposed. In fact, his remains were identified only with a ribbon. Nevertheless, it was held that she was entitled to indemnity for the cost of disinterring and reintering the remains. Logically, this indemnity would not have been possible if the legal significance of the remains had been lost upon the decomposition of the body. It could well be that such cases are explainable on the ground

completely decomposed body loses its identity and falls within the meaning of land, and would only be protected by the law regulating trespass to land.[95] Therefore, an owner of land becomes owner of the skeletal remains, except as provided under antiquities or similar applicable laws. Again, since the remains have merged with the land, a court would not have *in rem* jurisdiction to order exhumation of a corpse buried outside its territorial jurisdiction.[96] Third, the skeletal remains of a completely decomposed body might be free for the taking, except as limited by positive law. This was the result reached in *Carter* v. *Zanesville*,[97] where the defendants who took possession of the remains in that case were held entitled to do so, against the wishes and protests of the deceased's family. Fourth, the alleged distinction would lead to despoliation and desecration of old graves. It was for the same reason that the court, in *Charrier* v. *Bell*,[98] refused to hold that burial goods could be abandoned. If burial goods were deserving of protection against acquisition by a stranger,[99] then skeletal remains of a completely decomposed body are much more sacrosanct, and merit even a higher degree of protection.

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that the damages awarded attached not to interference with the remains, which arguably have no legal significance, but to interference with the grave, which housed the remains. R.F. Martin, 21 A.L.R. 2d 472 at 477 (1952), seems to make the same point:

> A grave is nothing more than a place where a body (or ashes of a cremated body) is buried. It continues to be a grave as long as it is recognized or recognizable as such. This may extend over centuries, long after the interred body and its trappings have merged with the soil and have become altogether indiscernible. Against such a grave acts of desecration may be perpetrated .... In the majority of cases an unlawful or unauthorized disinterment and removal constitutes an offense against both the grave and the cadaver. In a sizable number of cases it is not clear what the transgressor offended—whether it was the grave, the corpse, or both"

The injury to the grave, as opposed to the remains, captures the essence of the dissenting judgment of Stephenson, J. in *Glass*, *supra* note 61 at 893, who held, with respect to about 125-year old grave, that the defendant was guilty of interference with a grave, as opposed to the remains. But whether you are looking at the body as separate from the remains, or the grave as separate from its decomposed content, the point still remains that, apart from the law of trespass to land or antiquity, a decomposed body is given little or no legal protection.

95 *Meagher* v. *Driscoll*, 99 Mass. 281 (1868); *Thirkfield* v. *Mountain View Cemetery Association*, 41 P. 564 (1895); *R.* v. *Sharpe*, [1857] 169 E.R. 959 at 960 [hereinafter *Sharpe*].

96 *In re Estate of Medlen*, 677 N.E. 2d 33 (1997) [hereinafter *Medlen*].

97 *Carter*, *supra* note 53.

98 496 So. 2d 601 at 605 (1986).

99 *Ibid.*

In any case, the alleged distinction is strange, at least in the Nigerian context, and is not likely to become part of her law. As already noted, African philosophy conceives a corpse as a force existing within the hierarchy and community of other forces, animate and inanimate, living and dead. The flesh and skeletal remains are material embodiment of a deceased's force, with spiritual and ritual significance. Where the spirit of the dead unjustifiably terrorises its relatives, it is exorcised. A ritual in which the remains are disinterred and completely burnt accomplishes this, and the spirit is "chained." This is a complete destruction of a "force," by the destruction of its remains. A distinction that trivialises human remains, and unintentionally renders them free for the taking, would, if applied in the African context, wittingly or unwittingly impinge on African spirituality, and may lead to annihilation of the metaphysical constitution of the African people.

VII. IS A STILLBORN A DEAD BODY?

A RELATED ISSUE IS THE CHARACTERISATION of a stillborn foetus. Is it a dead body and therefore subject to the law on dead bodies? There does not seem to be a judicial unanimity on the point. It is probable that the first case on the subject is *Doodeward* v. *Spence*,[100] which was an action to recover possession of a double-headed stillborn foetus. While Griffith C.J. and Higgins J. seemed to have accepted that the stillbirth in that case was a corpse or dead body, Barton J., however, held that the monstrous stillbirth was not a corpse.[101]

Recently, the Superior Court of Connecticut was presented with a similar problem in *Janicki* v. *Hospital of St. Raphael*.[102] The plaintiff gave birth to a nineteen week-old non-viable foetus, which was dissected by the defendants against the plaintiff's express instruction. She claimed, in addition to other causes of action, damages for negligent infliction of mental distress, resulting from the unauthorised dissection of the foetus. The court's decision turned on whether the foetus was a "tissue" or "child"; if the latter, the law on dead bodies would apply.[103] However, the court did not explicitly resolve this problem of characterisation, but it held that a stillborn foetus was neither a tissue nor a child.[104] It seems, however, that the court's affirmation of the existence of the plaintiff's "quasi-property" right over the foetus,[105] a concept applicable to dead

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[100] *Doodeward*, *supra* note 54.

[101] *Ibid.* at 414–415.

[102] *Janicki*, *supra* note 32.

[103] *Ibid.* at 965.

[104] *Ibid.*

[105] *Ibid.* at 967–969.

human bodies, is an arguable ground for concluding that it recognised a foetus as a dead body.[106]

In Nigeria, it seems that the courts would have recourse to available statutes for guidance in the resolution of the above characterisation problem. An example of such a statute is the *Births, Deaths and Burials Law.*[107] The birth of a stillborn is not registrable.[108] However, the death of a stillbirth is registrable[109] and duty of burial, with respect to it,[110] is imposed on some persons by that law.[111] Consequently, it is suggested that since statutory law already accords some sepulchral rights and duties, with respect to a stillbirth, it should be admitted to the characterisation of a dead body.

VIII. NIGERIAN STATUTORY LAWS AFFECTING THE HUMAN BODY AND ITS REMAINS

A. Nigerian *Criminal Code*

The customary law's position on dead body would likely have a serious impact on the interpretation of the offence of stealing under Nigeria's *Criminal Code.*[112] Section 390 of the *Criminal Code* provides: "Any person who steals anything capable of being stolen is guilty of a felony, and is liable, if no other punishment is provided, to imprisonment for three years." However, things "capable of being stolen" are defined as including:

> Every inanimate thing whatever which is the *property of any person*, and which is movable, is capable of being stolen. Every inanimate thing which is the *property of any person*, and which is capable of being made movable, is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it ... .[113]

"Property" is further defined to include, "everything, animate or inanimate, capable of being the subject of ownership."[114] Therefore, to be convicted under this section, the prosecutor must prove that what the accused has stolen

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[106] It should be emphasised that the court only applied the "quasi–property" concept by analogy, and maintained that a stillborn foetus, like a pre-embryo, occupied a middle position of "special respect," *i.e.*, neither person nor tissue.

[107] C. 13, Laws of Lagos State, 1994.

[108] *Ibid.* at s. 3(3).

[109] Combined effects of ss. 18, 31, and 36(2).

[110] *Ibid.* at s. 35.

[111] *Ibid.* at s. 40.

[112] *Criminal Code*, c. 42 [hereinafter *Criminal Code*].

[113] *Ibid.* at s. 382 [emphasis added].

[114] *Ibid.* at s. 1(1).

amounts to property in law and owned by another person. The question then becomes: is a corpse, under the Nigerian *Criminal Code*, a property of another?

This writer is not aware of any Nigerian decision on point.[115] The general legal position in England, subject to the exception introduced by *R.* v. *Kelly*,[116] is that there is no property in a corpse; with the result that an accused can hardly be convicted for the theft of a corpse. However, the English common law recognises the offence of desecration of a grave, which is a misdemeanour. That is the only way by which the common law protects a grave and, indirectly, its content.[117] However, that protection does not extend to the corpse itself. As stated by Sir James Stephen: "The dead body of a human being is not capable of being stolen at common law."[118]

It seems that a Nigerian court confronted with a charge of stealing a corpse will embark on a jurisprudential exercise of localising the English common law, by casting it in the mould of African ontological and religious abstraction of man, whether dead or alive, as a contagious force which is owned by a community of forces, including the living and dead members of a man's family. As already stated, the implication is that an African is the property of his or her family and community. Consequently, it seems that a Nigerian court might hold an accused guilty of stealing a corpse, under the relevant section of its *Criminal Code*. In doing so, it would be stating as its own general rule what might be regarded as an exception under the English common law, recently introduced by the English Court of Appeal's decision in *R.* v. *Kelly*.[119] However, the general rule suggested for Nigeria will be wider than *R.* v. *Kelly's* exception, since the case is limited to the transformation of a corpse by the application of scientific skill and labour.

In that case, an artist, desirous of making casts or moulds of some old anatomical specimens[120] in the premises of the Royal College of Surgeons, lured a junior technician of the College to surreptitiously remove some of the anatomical specimens, which were then given to the artist. Both the artist and technician knew they were not entitled to remove the specimens from the premises of the College; nevertheless, they thought that the College was not

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[115] In *Egbe*, *supra* note 4, the Nigerian Supreme Court held that the trial court's finding that there was no possessory right over a grave was premature in the circumstances of that case.

[116] *Kelly*, *supra* note 32.

[117] *Sharpe*, *supra* note 95 at 960.

[118] Sir J. Stephen, *A Digest of the Criminal Law*, 7th ed. (London: Sweet & Maxwell, 1926) at 307. It was stated at note 6 at 307 that: "It [the dead body] is not property, though it may have value." Also, *R.* v. *Haynes* (1614), 2 East P.C. 652.

[119] *Kelly*, *supra* note 32.

[120] The judgment showed that the specimens were at least 20 years old.

entitled to legal possession of the specimens.[121] They therefore claimed to have acted honestly, on a charge of stealing the specimens. On the defendants' submission that the parts were not property which could be stolen, the Court of Appeal, relying on the Australian case of *Doodeward* v. *Spence*,[122] observed:

> Parts of a corpse are capable of being property within s. 4 of the *Theft Act*, if they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes.[123]

It seems that the Court of Appeal deliberately set out to change or, at least, modify the common law no-property rule because, as it observed, "the common law does not stand still."[124] It also realised that the current exception based on preservation of a corpse for exhibition or medical training, may not be ample enough[125] and, therefore, envisaged a more elastic future exception:

> It may be that if, on some future occasion, the question arises, the courts will hold that human body parts are capable of being property for the purposes of s.4, even without the acquisition of different attributes, if they have a use or significance beyond their mere existence. This may be so if, for example, they are intended for use in an organ transplant operation, for the extraction of DNA or, for that matter, as an exhibit in a trial.[126]

The above observation seems to have prophesied the recent decision of the Supreme Court of Western Australia in *Roche* v. *Douglas*.[127] It was a civil case in which the plaintiff's paternity was in issue. The plaintiff claimed to be the biological daughter of the deceased and therefore entitled to inherit from the deceased's estate. The executor of the deceased contended that the plaintiff was an adopted daughter of the deceased's mother, and was therefore the deceased's sister. To prove her paternity, the plaintiff sought an order of the court allowing a DNA analysis of the deceased's tissue sample, obtained and preserved during a medical procedure on the deceased during his lifetime. Under the prevailing Rules of Court, the judge was only entitled to make the order if the tissue sample qualified as property. After a detailed review of some Australian and English authorities touching on the point, Master Sanderson held that a human

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121 *Kelly*, *supra* note 32 at743–744.

122 *Doodeward*, *supra* note 54.

123 *Ibid.* at 749–750.

124 *Ibid.* at 750.

125 That was partly why the exception was not applied in the earlier case of *Dobson*, *supra* note 32, because the preservation in that case, as observed by Justice Gibson at 601, was not for medical teaching or exhibition, but pursuant to the performance of a statutory duty under the coroner's law.

126 *Doodeward*, *supra* note 54 at 750.

127 *Roche*, *supra* note 32.

tissue qualified as property. The judge considered that it was necessary to conform the law to scientific developments, such as DNA analysis techniques; moreover, the DNA evidence would save the court enormous time and expense. No doubt, this case is an important precedent that is likely to inspire others, as it attunes the law to biomedical reality. Consequently, a general rule in Nigeria that the dead body is property, on the basis of customary law, will even find support in the above recent cases.

B. Burial in Homes and Within Living Places

Section 246 of the *Criminal Code*[128] is also pertinent to the analysis undertaken in this paper. It provides:

> Any person who without the consent of the Governor-General [now President] or a Governor buries or attempts to bury any corpse in any house, building, premises, yard, garden, compound, or within a hundred yards of any dwelling-house, or in any open space situated within a township, is guilty of a misdemeanour, and is liable to imprisonment for six months.

The above section contradicts African mortuary tradition. African metaphysical conception of the dead, as already noted, and the belief in continued relationship with a dead relative explain the burial of dead relatives in their homes or within the premises of living relatives. As such, when married women die, they are taken to their paternal homes for burial, so that their spirits could reunite with their own biological relatives.[129] This practice, burial in the homes, was observed by Rev. Samuel Johnson: "The Yorubas [a Nigerian tribe] do not bury their dead in graveyards or cemeteries, but in their houses. ... The graves of aged people are dug generally in the piazza or in one of the sleeping rooms."[130]

The Nigerian *Criminal Code* was originally drafted and enacted by the British colonial administration in 1904, for Northern Nigeria, and was made applicable to the whole country in 1916,[131] following the amalgamation of

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[128] *Criminal Code*, *supra* note 112.

[129] Anigbo, *supra* note 12 at 145 states:

> The custom is that when she dies her remains must be brought back ceremonially for burial in her lineage land. Burial in her lineage land thereby becomes a confirmation of her membership of the group. Therefore members of her lineage must receive back her remains with dignity and honour due to a member of the lineage.

[130] S. Johnson, *The History of the Yorubas* (Lagos: CSS Bookshops Ltd., 1921) at 137.

[131] For excellent historical account of Nigerian criminal law see C.O. Okonkwo, *Criminal Law In Nigeria*, 2nd ed. (London: Sweet & Maxwell, 1980) at 4–17.

northern and southern Nigeria in 1914, by Lord Lugard.[132] That amalgamation created the political entity known today as Nigeria. In historical perspective, one can understand such provisions, like s. 246, which the British colonial government used to infuse Western mortuary practice[133] into the mortuary tradition of Nigerian society. But the real surprise is that long after independence in 1960, this section is still statutory criminal law in Nigeria. One can appreciate the health arguments in support of s. 246, *i.e.*, the need to prevent the spread of diseases likely to be caused by such burial practice;[134] but the fact that burial in or around homes is still the general practice in Nigeria shows how tenaciously the philosophy that animates that practice is held. No wonder there does not seem to be any reported case on s. 246 of the *Criminal Code*.

C. *Antiquities Act*

The *Antiquities Act*[135] came into force on 1 August 1954 and was originally promulgated by the British colonial government in Nigeria, for the preservation of antiquities found in Nigeria, which may, with the necessary permit, be exported out of Nigeria.[136] The *Act* exhaustively defined an antiquity:

> "Antiquity" means
>
> (a) any object of archaeological interest or land in which any object is believed to exist or was discovered; or
>
> (b) any relic of early European settlement or colonisation; or

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[132] For a detailed discussion of the administrative, economic and social factors giving rise to the amalgamation see Lord F. Lugard, *The Dual Mandate in British Tropical Africa*, 5th ed. (Connecticut: Archon Books, 1965) at 94–113.

[133] *Gilbert*, *supra* note 55 at 764–765.

[134] Health reasons account for the initial absolute prohibition, by the common law, of burial within churches, cities, and large towns. Burial within churches or in the church-yard began to be allowed from the time of Pope Gregory I; so that church members could, upon the view of the sepulchres, pray for their departed members. The common law's prohibition was in turn based on the Roman law. As Mr. Justice Abney observed in *John Andrews* v. *Thomas Cawthorne*, [1774] 125 E.R. 1308 at 1309 [hereinafter *Andrews*]:

> Now it is most notorious and certain that all burials by the Roman laws were prohibited not only within the temples but even in cities and large towns ... and this prohibition was founded on a prudent state policy, to prevent infection, from a great number of corrupt corpse lying contiguous in putrefaction; and it is well known that the poorer sorts in great parts of the Kingdom are buried in shrouds without coffins even to this day.

[135] *Antiquities Act*, c. 12.

[136] *Ibid.* at s. 22.

> (c) any work of art or craftwork, including any statue, modelled clay figure, figure cast or wrought in metal, carving, housepost, door, ancestral figure, religious mask, staff, drum, bowl, ornament, utensil, weapon, armour, regalia, manuscript or document, if such work of art or craftwork is of indigenous origin and
>
> (i) was made or fashioned before the year 1918; or
>
> (ii) is of historical, artistic or scientific interest, and is or has been used at any time in the performance, and for the purposes of, any traditional African ceremony.[137]

Paragraph (a) above seems to interest us most; consequently, an "object of archaeological interest" is defined as, "any *fossil remains of man* or of animals found in association with man," or "any ancient structure, erection, memorial, causeway, bridge, cairn, tumulus, *grave*, shrine, excavation, well, water tank, artificial pool, monolith, group of stones, earthwork, wall, gateway or fortification."[138] The unfortunate result is that the sacred remains of our ancestors are characterised as objects of antiquities, potentially exportable,[139] and a veritable object of archaeological inquisition.

The *Act* established an Antiquities Commission,[140] to implement its provisions, and consists of 16 members appointed pursuant to its provisions.[141] Among other things, the Antiquities Commission is given power to accept any gift, loan, devise, or bequest of any antiquity; to enter upon and inspect any monument, public museum, or archaeological excavation, or any land where excavations or similar operations are being carried out for archaeological purposes;[142] and to grant permits for archaeological excavations.[143] The Director of Antiquities Service is given power, for the purpose of discovering antiquities in any area, to carry out excavations with the consent of the local government authority of that area.[144]

With the objectification of our ancestral remains, under the *Antiquities Act*, contrary to African mortuary tradition and philosophy, the questions become: Can a Nigerian family lawfully stop a proposed or on-going excavation of the grave of its ancestor? In other words, can such a family stop the

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137 *Ibid.* at s. 2.

138 *Ibid.* There are four other definitions of the phrase, which are not relevant to this discussion [emphasis added].

139 *Ibid.* at s. 22.

140 *Ibid.* at s. 3.

141 *Ibid.* at s. 4.

142 *Ibid.* at s. 9(1).

143 *Ibid.* at s. 23(1).

144 *Ibid.* at s. 13(a).

Antiquities Commission from issuing a permit for the excavation of an ancestral grave? Again, in whom does the *Antiquities Act* vest ownership of the contents of such grave?

The answers to these questions seem to depend on the interpretation of ss. 23, 24, and 25 of the *Act*. Section 23(1) provides:

> No person shall by means of excavation or similar operations search for any antiquity unless authorised by a permit issued by the Commission with the consent of the local government authority of the place where the search is to be carried out.

Such permits are to be issued to persons who are competent by training and experience to carry out the operations for which the permit is required, and have the financial or other support of an archaeological or scientific society or institution of good repute.[145] By s. 23(1) above, only the consent of a local government authority is required for the Commission's permit, apparently excluding the need for the consent of the family, whose ancestral grave might be the object of the permit. Taken alone, this section would devastate a family's traditional and metaphysical relationship with a deceased member.

However, s. 23(3)(c) seems to confer some protection to such family:

> A permit issued under this section shall not of itself confer any right to enter upon any land without the consent of the person entitled to grant such consent.

Therefore, it seems that notwithstanding a permit granted by the Antiquities Commission, with the consent of a local government authority, a family can still use the law of trespass to prevent the abuse and desecration of its ancestral grave. Consequently, a permit duly granted by the Antiquities Commission does not ensure, by itself, access to an ancestral grave. But what happens where illegal access, *i.e.*, without a family's consent, is gained to an ancestral grave, say by an archaeologist, and the grave is excavated, and the contents taken away? Apart from possible damnation of the trespasser in damages for trespass, does the *Act* establish any framework for return of the contents of the excavated grave, or does the *Act* vest sufficient ownership in the family to enable it claim the return of such items?[146]

It is arguable, under s. 23(5), that a "grave robber," subject only to damages in trespass, can keep the objects of his robbery. This seems to follow from the fact that s. 23(5) only penalises illegal excavation by a fine or imprisonment or both:

> Any person who contravenes the provisions of subsection (1) or subsection (4) of this section or fails to comply with any condition [*i.e.*, given under Section 23(3)(a)]

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[145] *Ibid.* at s. 23(2).

[146] It is interesting to point out that a court in Kenya is now faced with determining ownership of the fossilized remains of a hominid, dating back about six million years, excavated in Kenya by a team of French scientists: P. Calamai, "Skull Find in Kenya Shakes Evolution Tree" *The Toronto Star* (22 March 2001) A1.

> subject to which he has been granted a permit under this section shall be guilty of an offence and liable to a fine not exceeding one hundred pounds [now 200 naira] or to imprisonment for a term not exceeding six months, or to both such fine and such imprisonment.

The above section applies only when a valid permit was not obtained, but not when the landowner's consent was not obtained under s. 23(3)(c), which does not come within the express terms of the penalty section above. Then, what happens in the case of a tresparous despoliation of a grave, albeit pursuant to a valid permit? Since the excavator may not be convicted for illegal excavation under s. 23(5), can the family, apart from resort to trespass, claim a return of the skeletal remains or any cause of action based on ownership?

This sets the stage for an application of the general property-rule as I have suggested above. Under this rule, an excavator who, in spite of a family's refusal, excavated a grave merely on the basis of a valid permit will, apart from damages for trespass, be ordered to return the skeletal remains to the "owners" or pay appropriate damages for their conversion. Even in cases of illegal excavation, the criminal punishment under s. 23(5) does not include a return of the grave contents. But the court may exercise its equitable jurisdiction to order their return, regard being had to the customary law on dead bodies.

Again, when s. 25 is read in conjunction with s. 23, there seems to be a vesting of ownership in a family, with respect to its ancestral grave, enabling it to claim the return of any grave item:

> 25.(1) When any object of archaeological interest is discovered after the commencement of this Act, the local government authority of the place where the object is discovered may, if it thinks fit, constitute itself the guardian of the object
>
> (2) Save as otherwise provided in this Act, *the owner of, and any other person having an estate or interest in, any object of archaeological interest of which a local government authority has become the guardian under this section shall have the same right and title to, and estate and interest in, the object* in all respects as if the local government authority had not become the guardian thereof.
>
> (3) A local government authority which has become the guardian of an object of archaeological interest under this section may maintain the object and may have access at all reasonable times by its officers or other employees or any person duly authorised by it to the object for the purpose of inspecting it and doing such acts and things as may be required for the maintenance thereof; and, in the case of a movable object, may, unless the owner refuses his consent, remove the object to, and keep it in, an approved museum. [emphasis added]

Certainly, as argued in this paper, a family is such an owner having an interest or estate in an ancestral grave or its contents, and despite the designation of a local authority as a guardian of the contents of an excavated grave, the *Act*, by s. 25(2), certainly gives a family superior title. Consequently, though the *Act* infelicitously characterised the ancestral graves of Nigerians and their contents as "antiquities" and "objects of archaeological interest," it seems that a proper

interpretation of the *Act* gives some protection against the desecration of an ancestral grave, and enables a family to claim the return of a grave item. As I pointed out, contrary interpretations are possible. The *Antiquities Act* needs an amendment[147] to eliminate its obnoxious formulation, eliminate ambiguities, and enhance the protection of Nigerian ancestral graves. It may be remarked that this writer is not aware of any Nigerian case law on the *Antiquities Act*. This probably shows how much archaeologists and the Antiquities Commission appreciate the sanctity and philosophy that surround a grave in Nigeria.

American Antiquities Act 1906,[148] seems to be the American equivalent of the Nigerian *Antiquities Act*, but both differ in their import and reach. The American *Act* allows the excavation, with permission, of "any object of antiquity,"[149] "archaeological sites,"[150] or the "gathering of objects of antiquity."[151] These characterisations have been lampooned as a most disrespectful description of Native American human remains and sacred objects.[152] So characterised, ownership of Native American human remains is vested in the government, quite unlike the Nigerian *Act*, because the American *Act* provides that such objects of antiquity shall be gathered "for permanent preservation in public museums."[153] Today, the *American Antiquities Act 1906* is largely replaced by several similar statutes[154] passed thereafter, which are to be read subject to the *Native American Graves Protection and Repatriation Act* ("*NAGPRA*").[155] Even before the passage of the *American Antiquities Act*, there was a shameful scramble for Native American human remains and sacred

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147 The Nigerian *Antiquities Act* is not reproduced in the latest revised laws of the Federal Republic of Nigeria 1990. It may not be an omission as the 1999 *Nigerian Constitution*, Second Schedule, Part 2(3) puts it in the concurrent legislative list, *i.e.*, giving states legislative competence with reference to antiquities.

148 *American Antiquities Act 1906*, 16 U.S.C. 431–433 [hereinafter *American Antiquities Act*].

149 *Ibid.* at s. 1.

150 *Ibid.* at s. 3.

151 *Ibid.*

152 R.M. Kosslak, "*The Native American Graves Protection And Repatriation Act*: The Death Knell For Scientific Study?" (1999–2000) 24 American Ind. L. Rev. 129 at 134–136.

153 *American Antiquities Act*, *supra* note 148 at s. 3.

154 An excellent account of the subsequent statutes is given by M.B. Bowman, "The Reburial Of Native American Skeletal Remains: Approaches To The Resolution Of A Conflict" (1989) 13 Harv. Env. L. Rev. 147 at 185–196; J.B. Winski, "There Are Skeletons In The Closet: The Repatriation Of Native American Human Remains And Burial Objects" (1992) 34 Ariz. L. Rev. 187 at 194–198.

155 25 U.S.C. 3001–3013 (1991) [hereinafter *NAGPRA*].

objects by archaeologists, anthropologists, art collectors, grave robbers, and even the American government.

In 1868, the American government, through its Army Surgeon-General made a call for the collection of Indian crania for the Army Medical Museum. This led to the decapitation of fallen Native American soldiers and wide scale excavation of Native American burial sites.[156] Again, Thomas Jefferson, who became the third president of the United States, desecrated Native American burial ground, albeit before becoming president. He wanted to satisfy his curiosity and unravel a myth surrounding a particular burial mound, but at the spiritual expense of the Native Americans.[157]

Archaeologists, like the famous, if not infamous, Dr. Morton, were the worst Native American grave desecrators. They were involved in cranial studies that sought to prove a horrendous and now defunct racial theory that portrayed Native Americans, and indeed Blacks, as intellectually inferior to Whites. This study led to increased demand for Native American human remains and sustained the activities of grave robbers and desecrators who wanted to satisfy the increasing market demand.[158] Of course, the above situation drew the ire of Native Americans and some writers, who roundly condemned the desecration and contempt meted out to Native American human remains and sacred objects.[159] This effort bore some fruit when the American government enacted, in 1991, the *Native American Graves Protection And Repatriation Act*,[160] to redress decades of cultural and spiritual injustice to Native Americans.

NAGPRA established a system that requires museums, funded or partly funded by the American government, that have Native American human

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[156] J. Riding In, "Without Ethics And Morality: A Historical Overview Of Imperial Archaeology And American Indians" (1992) 24 Ariz. St. L.J. 11 at 19–20.

[157] *Ibid.* at 15–17.

[158] Winski, *supra* note 154; G.A. Marsh, "Walking The Spirit Trail: Repatriation And Protection Of Native American Remains And Sacred Cultural Items" (1992) 24 Ariz. St. L.J. 79; Riding In, *supra* note 156.

[159] There is a huge amount of literature on the subject which, in addition to sources already cited, includes: J.F. Trope & W.R. Echo-Hawk, "*The Native American Graves Protection And Repatriation Act*: Background And Legislative History" (1992) 24 Ariz. St. L.J. 35; S. Hutt, "Illegal Trafficking In Native American Human Remains And Cultural Items: A New Protection Tool" (1992) 24 Ariz. St. L.J. 135; R.W. Johnson & S.I. Haensly, "Fifth Amendment Takings Implications of the 1990 *Native American Graves Protection And Repatriation Act*" (1992) 24 Ariz. St. L.J. 151; S.D. Brooks, "Native American Indians" Fruitless Search For First Amendment Protection Of Their Sacred Religious Sites," [1990] 24 Valparaiso University L. Rev. 521; P. D'Innocenzo, "'Not In My Backyard!' Protecting Archaeological Sites On Private Lands" (1997) 21 Am. Ind. L.J. 131; J. Brady, "Land Is Itself A Sacred, Living Being: Native American Sacred Site Protection On Federal Public Lands Amidst The Shadows Of Bear Lodge" (1999–2000) 24 Am. Ind. L.J. 153.

[160] *NAGPRA*, *supra* 155.

remains, and cultural or sacred objects,[161] and other public agencies that discovered such remains or objects, to compile an inventory thereof,[162] with a view to repatriating them to Native Americans.[163] *NAGPRA* vests ownership of a cultural item, depending on its nature, in the lineal descendants of the Native American, an Indian tribe or Native Hawaiian organisation.[164] *NAGPRA* imposes penalties on museums for failing to comply with its provisions,[165] which are enforceable in the United States district courts.[166] *NAGPRA* has been described as "human rights legislation,"[167] which

> finally recognizes that Native American human remains and cultural items are the remnants and products of living people, and that descendants have a cultural and spiritual relationship with the deceased. Human remains and cultural items can no longer be thought of as mere "scientific specimens" or collectibles.[168]

The interpretative problem that can arise under *NAGPRA* emerged in the recent case of *Bonnichsen* v. *U.S. Dept. of the Army*.[169] There, part of the question was whether *NAGPRA* applied to human remains which were about 9000 years old. However, the court did not decide this question but remitted the case[170] back to the Army Corps, with a list of questions and issues it should consider before arriving at any decision concerning the ancient remains in that case. As directed by the court, the first issue the Corps should consider was: "Whether these remains [about 9000 years old] are subject to *NAGPRA*, and why (or why not)."[171] It is hoped that when this case comes back to court, if it ever does, more light will be thrown on *NAGPRA*'s provisions. It should be noted that *NAGPRA* achieves for Native Americans a position similar to that obtainable under Nigerian customary law, which is largely maintained by the Nigerian *Antiquities Act*.

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161 *NAGPRA* uses the phrase "cultural items," which is given a wide definition in 3001 as meaning "human remains" and including all the various objects mentioned in the section.

162 *NAGPRA*, *supra* note 160 at s. 3003.

163 *Ibid.* at s. 5.

164 *Ibid.* at s. 3002.

165 *Ibid.* at s. 3007.

166 *Ibid.* at s. 3013.

167 Trope & Echo-Hawk, *supra* note 159 at 59.

168 *Ibid.* at 76.

169 969 F. Supp. 614 (1997).

170 *Bonnichsen* v. *U.S. Dept. of the Army*, 969 F. Supp. 628 (1997).

171 *Ibid.* at 651.

D. *Anatomy Act*

The Nigerian *Anatomy Act*[172] was modelled after the English *Anatomy Act* of 1832,[173] which is repealed and replaced by *Anatomy Act* 1984.[174] While the *Anatomy Act* 1984[175] provides for anatomical examination of a whole corpse or complete parts of a corpse, the *Human Tissue Act*, 1961[176] is mainly concerned with the use of a specified part or some specified parts of a corpse for therapeutic purposes and purposes of medical education and research.[177] The purpose of an Anatomy Act could be gleaned from the preamble of the English *Act* of 1832.[178]

This preamble becomes more meaningful in its historical context. Common law prohibits disinterment of dead bodies, even for purpose of anatomical examination.[179] This rule significantly limited the availability of cadavers for

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172 *Anatomy Act*, c. 17 [hereinafter *Anatomy Act*].

173 *Anatomy Act*, 1832 (U.K.), 2 & 3 Williams, c. 75 [hereinafter *Anatomy Act* (1832)].

174 *Anatomy Act 1984* (U.K.), 1984, c. 14, s. 13(2) [hereinafter *Anatomy Act* (1984)].

175 *Ibid.*

176 *Human Tissue Act*, 1961 (U.K.), 9 & 10 Eliz. II, c. 54 [hereinafter *Human Tissue*].

177 The Preamble and s. 1 of the *Human Tissue Act, ibid.*

178 *Anatomy Act* (1832), *supra* note 173:

> WHEREAS a knowledge of the causes and nature of sundry diseases which affect the body, and of the best methods of treating and curing such diseases, and of healing and repairing divers wounds and injuries to which the human frame is liable, cannot be acquired without the aid of anatomical examination: And whereas the legal supply of human bodies for such anatomical examination is insufficient fully to provide the means of such knowledge: And whereas, in order further to supply human bodies for such purposes, divers great and grievous crimes have been committed, and lately murder, for the single object of selling for such purposes the bodies of the persons so murdered: And whereas therefore it is highly expedient to give protection, under certain Regulations, to the study and practice of Anatomy, and to prevent, as far as may be, such great and grievous crimes and murder as aforesaid .... .

The *Anatomy Act* (1984), supra note 174, contains a similar preamble:

> An Act to make provision about the use of bodies of deceased persons, and parts of such bodies, for anatomical examination and about the possession and disposal of bodies of deceased persons, and parts of such bodies, authorised to be used for anatomical examination, and for connected purposes.

179 *R.* v. *Lynn*, [1788] 100 E.R. 394 at 395 [hereinafter *Lynn*]. Willes, J. in *R.* v. *Feist*, [1858] 169 E.R. 1132 at 1135 [hereinafter *Feist*] stated that: "It is clear that at common law it is a

medical research purposes, partly resulting in wide illegal and notorious practices of delaying burials to enable dissections to be performed.[180] The prohibition hardly abated the horrendous activities of the "resurrection men"[181] and likely contributed to the crime of murder mentioned in the preamble to the 1832 *Act*. Before the 1832 *Act*, the main legitimate source of cadavers for anatomical examination were the bodies of convicted and hanged murderers, which were, under a 1752 *Act*,[182] liable to be sent to a surgeon, by the court's Sheriff, for compulsory anatomical examination.[183]

The 1752 *Act* was meant to discourage the then rising crime of murder by imposing the punishment of dissection, in addition to the sentence of death. It therefore required the judge to expressly state the sentence of dissection in the judgment.[184] However, breaches of peace often arose from struggle between Sheriffs and surgeons, on one hand, and relatives of the convicted and hanged murderers, on the other hand. These parties struggled over possession of the dead bodies of the convicts after execution of the sentence of death. The pandemonium often resulted in dire consequences for the convicts relatives, as the 1752 *Act* provided that persons who rescued or tried to rescue such bodies after execution, "shall be deemed and adjudged to be guilty of felony, and shall be liable to be transported to some of his Majesty's colonies or plantations in America for the term of seven years."[185] It was probably due to social problems and breaches of the peace resulting from the execution of the 1752 *Act* that led to its repeal by s. 16 of the 1832 *Act*.[186] In other words, the repeal pertains only to the additional sentence of dissection, which no longer obtains as the 1832 *Act* directed that the body should be buried after execution.[187]

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misdemeanour to take up a corpse out of a burial ground and sell it even for the purpose of dissection."

180 It is an offence under common law to delay the burial of a dead body, which will likely result in health hazard: *Lynn*, *ibid.*; *Feist*, *ibid.*; *R.* v. *Stewart*, [1840] E.R. 1007; *Andrews*, *supra* note 134; *R.* v. *Cheere*, [1825] 107 E.R. 1294.

181 A characterisation for men in the eighteenth century who illegally disinterred and marketed dead bodies for anatomical purposes. An excellent historical account of the depredations of the resurrection men is given by S.M. Shultz, *Body Snatching: The Robbing of Graves for the Education of Physicians* (North Carolina: McFarland & Co., Inc., 1992).

182 *Anatomy Act*, 1752 (U.K.) 25 Geo. II, c. 37, vol. 20.

183 *Ibid.* at ss. 2 and 5.

184 *Ibid.* at s. 3.

185 *Ibid.* at s. 10.

186 *Anatomy Act* (1832), *supra* note 173.

187 *Ibid.*

Only recently, some archaeologists, in search of Roman and Anglo-Saxon artefacts at an excavation site previously occupied by Oxford University medical school in the 18th century, discovered a pit dug in 1767 and containing more than 2000 bones believed to be skeletal remains of condemned murderers dissected under the 1752 *Act*, and those of infants whose bodies were believed to be stolen by grave-robbers.[188] The nature of the bones is believed to offer a clue as to the anatomical methods employed by surgeons and medical students during the embryonic period of medicine.[189]

The *Anatomy Act* 1832 was meant to remedy the above defects by establishing a licensing system for the practice of Anatomy, and a voluntary and non-commercial system of cadaver donation by persons mentioned in the *Act*, *i.e.*, person in lawful possession of the corpse; the deceased, by decision to that effect made during his life time; or an executor. It was even thought by Willes, J., wrongly though, that "the *Anatomy Act* [*i.e.*, of 1832] has altered the common law, and has rendered the selling of a dead body for the purpose of dissection lawful under certain circumstances."[190] It is easily noticed that none of the 21 sections of the 1832 *Act* is crafted in the language of commodification. Rather, the dominant words or phrases used in that Act were mainly of non-commercial nature. They include, "to permit the body ... undergo anatomical examination,"[191] "direct ... his body ... examined anatomically,"[192] "shall nominate."[193] These phrases do not evince a commercial transaction for value.

It may be that His Lordship was influenced by the facts of that case where a master of a workhouse, and in lawful possession of the dead bodies of some paupers, sent the bodies for dissection and received some remuneration for his efforts. The court, in the circumstances examined below, held that the 1832 *Act* justified his actions. It seems that the remuneration was not a purchase price for the dead bodies but paid as, "gratuities for his [accused] trouble in going through the formalities and giving the notices and obtaining the certificates, in respect of each of the bodies, required by the *Anatomy Act* [1832]."[194] Therefore, much as the *Anatomy Act* 1832 created a system that

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188 S. Bisset & R. Syal, "Scientists Find Dissected Remains In Oxford Pit: Former Medical School" *National Post* (21 February 2001) A14.

189 *Ibid.*

190 *Feist*, *supra* note 179 at 1135.

191 *Anatomy Act* (1832), *supra* note 173 at s. 7.

192 *Ibid.* at s. 8.

193 *Ibid.*

194 *Feist*, *supra* note 179 at 1132.

facilitated the supply of cadavers for anatomical purposes, it does not seem that it sought to do so by legalising the commodification of cadavers.

Although the Nigerian *Anatomy Act* did not reproduce the preamble of the English *Act*, and in fact does not contain any preamble, it is suggested that it's nearly complete reproduction of the substantive provisions of the English 1832 *Act* makes the above preamble a relevant aid in the interpretation of the Nigerian *Anatomy Act*.[195] Neither the Nigerian *Act* nor the English 1832 *Act* defined the phrase "anatomical examination," which was repeated in most of their provisions; though the meaning could be deduced from the preamble of the English 1832 *Act*. However, the English *Anatomy Act* of 1984,[196] which replaced the 1832 *Act* defines "anatomical examination":

> "anatomical examination" means the examination by dissection of a body for purposes of teaching or studying, or researching into, morphology; and where parts of a body are separated in the course of its anatomical examination, such examination includes the examination by dissection of the parts for those purposes.[197]

It seems reasonably clear that the purposes of the Nigerian *Anatomy Act* are to ensure a licensed practice of Anatomy and an adequate supply of cadavers for medical research purposes.

Consequently, the Nigerian *Act* establishes a voluntary system of donation of dead bodies for anatomical examination. The deceased, while alive, could, either in writing or verbally in the presence of two or more witnesses during the illness that caused his death, donate his dead body to any school of anatomy for anatomical examination.[198] But what happens where the deceased made a donation of his body during a particular illness but died of another unrelated illness? The deceased's surviving spouse or known relative can, however, defeat a donation by the deceased, resulting in the interment of the deceased without anatomical examination.[199]

An executor or other person in lawful possession[200] of the deceased's body could make a donation of the dead body to a school of anatomy, unless the deceased had indicated, either in writing during his life time or verbally in the presence of two or more witnesses during his last illness, that the body should

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[195] In fact, ss. 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of the Nigerian *Act* were respectively taken from ss. 2, 7, 8, 9, 10, 12, 13, 14, 15, and 18 of the 1832 English *Act*.

[196] *Anatomy Act* (1984), *supra* note 174.

[197] *Ibid.* This *Act* does not apply to Nigeria and is only relevant as an aid to interpretation.

[198] *Anatomy Act*, *supra* note 172 at s. 4.

[199] *Ibid.*

[200] In *Feist*, *supra* note 179, it was held that the master of a workhouse is a person having lawful possession of the bodies of deceased paupers. Certainly, an African family has lawful possession of the body of its deceased member.

not undergo anatomical examination. The executor's power to donate the deceased's body, or the power of a person in lawful custody to make such a donation could also be defeated by the objection of the deceased's surviving spouse or known relative,[201] resulting in the body being interred without an anatomical examination.

Section 7 of the English 1832 *Act*, which is similar to s. 3 of the Nigerian *Act*, was interpreted in *R.* v. *Feist*.[202] There, the defendant, master of a workhouse at Newington, played a trick on the relatives of some deceased paupers and, as a result of which, he obtained their dead bodies, sent them to a hospital for dissection, and received certain payments for his efforts. Defendant's counsel relied on s. 7 of the *Anatomy Act* 1832, which gave lawful possession of the bodies to the master of the workhouse, to contend that in the absence of express request of burial from the deceased relatives, the master of the workhouse could dispose of the bodies for dissection. The jury convicted the defendant for unreasonable delay of burial with a view to dissection. The conviction was set aside on appeal. Pollock C.B. opined:

> We are all of opinion that this conviction cannot be sustained, and the ground on which I believe we all proceed is, that what was done by the defendant was done according to law. He had legal possession of the body, and he did with it that which the law authorised him to do. It may be that he prevented the relatives from requiring the body to be interred without undergoing an anatomical examination by acting a lie; but if that was wrong in the eye of the law, he should have been prosecuted for that wrong.[203]

Similarly, Bramwell B. observed:

> I assume that, except for the statute [*Anatomy Act* (1832), s. 7], this indictment would be good at common law. Then, is the defendant protected by the statute? He was justified by the statute in what he did, unless some relative required the body to be buried without dissection. Mr. Robinson [the Prosecutor] admits that none of the relatives did this in terms, and that in fact the idea of dissection never entered their minds; but he contends that their conduct with respect to the burial, and the defendant's fraud in concealing the intention to dissect, are equivalent to a requirement; but this is not so. I think the Act means that there must be an affirmative requirement. The only doubt I have had has been this—the Act seems to mean that the relatives shall have an opportunity of requiring, and for this purpose they must have a reasonable time to do so; and I have had a doubt whether this reasonable time had been afforded them; but I think it had: a reasonable time could not be longer than that which ought to intervene between the death and the burial. The relatives had the whole of this period to make the requirement, and during a portion of this time there had been no fraud. The truth is; a wrong has been done to the relatives by the concealing from them by fraud what they ought to have been made acquainted with. It

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201 *Ibid.* at s. 3.

202 *Feist*, *supra* note 179.

203 *Ibid.* at 1134.

> may be that this would afford a cause of action, but I cannot think that it forms a ground for this indictment.[204]

It is pertinent to emphasise that under the Nigerian *Act*, and the English 1832 *Act*, the deceased's surviving spouse, and in fact "any known relative" can override the deceased's decision to have his body submitted for an anatomical examination. This is in conformity with Nigerian customary law which vests ownership of a person and the dead body in his or her family. I believe that this veto power, though contained in the Nigerian *Act* and the English 1832 *Act*, is conspicuously missing in the English *Anatomy Act* 1984.[205] Section 4(1)(2), above, is similar to s. 4 of the Nigerian *Anatomy Act* and s. 8 of the *English Anatomy Act* 1832. The major point of departure is that while the Nigerian and English [*i.e.*, 1832] *Acts* give a surviving spouse or known relative a right to override the deceased's anatomical donation, the quotation above does not seem to reproduce such a right. Section 4(3)(a)(b), which makes mention of such a right, seems to create a different right: objection to an executor's anatomical donation and seemingly should not be read together with s. 4(1) and (2).

Section 4(3)(a)(b) is a reproduction of s. 8 of the English 1832 *Act*, which was copied in s. 3 of the Nigerian *Act*. The last two statutes, as well as s. 4(3)(a)(b) of the 1984 Act, give a separate and distinct[206] right to an executor

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[204] *Ibid.* at 1135–1136.

[205] *Anatomy Act* (1984), *supra* note 174. Section 4 provides:

> Subsection (2) applies if a person, either in writing at any time or orally in the presence of two or more witnesses during his last illness, has expressed a request that his body be used after his death for anatomical examination.
>
> If the person lawfully in possession of the body after death has no reason to believe that the request was withdrawn, he may authorise the use of the body in accordance with the request
>
> Without prejudice to subsection (2), the person lawfully in possession of a body may authorise it to be used for anatomical examination if, having made such reasonable inquiry as may be practicable, he has no reason to believe:
>
> > that the deceased, either in writing at any time or orally in the presence of two or more witnesses during his last illness, had expressed an objection to his body being so used after his death, and had not withdrawn it, or
> >
> > that the surviving spouse or any surviving relative of the deceased objects to the body being so used.

[206] This right is different from the deceased's own right to make such a donation. As already stated, he can make such a donation in his lifetime to take effect after his death.

or person in lawful possession of the deceased's body, other than possession as an undertaker, to make a donation of the deceased's body for anatomical examination, except the deceased, during his life time, verbally in the presence of witnesses or in writing, objected to such an examination. The power of an executor or person in lawful custody of the corpse to make such a donation could also be overridden by the objection of a surviving spouse or known relative of the deceased.

Therefore, what the 1984 English *Act* seems to have done is to enact in one section, *i.e.*, s. 4, the two separate sections in the 1832 *Act*, ss. 7 and 8, and the two separate sections in the Nigerian *Act*, ss. 3 and 4, but without reproducing the right given by s. 4 of the Nigerian *Act*, and s. 8 of the 1832 *Act*, to a surviving spouse or known relative of a deceased person to override the deceased's donation of his own body for anatomical examination. The omission of this power in the 1984 English *Act* seems to be deliberate and justified by the apparently growing need to make more cadavers available for medical research.

It is believed that the difference between the English *Anatomy Act* of 1984 and its Nigerian equivalent, with regard to the power of a surviving spouse or known relative to override the deceased's anatomical donation, is a material one founded on fundamental religious difference and philosophical orientation. Again, we find here an inhibition to medical research flowing from tradition and spiritualism.

Since the philosophy that animates Nigerian perspective on dead bodies ensures, or potentially ensures, inadequate supply of cadavers for anatomical examination, which can lead to medical breakthroughs, one wonders how the various teaching hospitals in Nigeria have managed to source their raw materials for anatomical examination. It seems the bulk of teaching hospitals' supply of cadavers has come from unclaimed dead bodies, or persons with unknown relatives who died in the hospital.[207] It would appear that in such situations, the hospital qualifies as a person in lawful possession of a dead body,[208] under s. 3 of the Nigerian *Anatomy Act*.[209]

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[207] Compare s. 1(6) of the Nigerian *Corneal Grafting Act*, c. 69 [hereinafter *Corneal Grafting*]:

> In the case of a body lying in a hospital, any authority under this section may be given on behalf of the person having the control and management of the hospital by any officer or person so designated in that behalf.

[208] Stephen, J., was of the same opinion in *R.* v. *Price*, [1884] 12 Q.B. 247 at 251 [hereinafter *Price*]. In Hungary, where presumed consent is the controlling doctrine, a cadaver can freely be used for organ transplantation and anatomical purposes, unless the deceased made a contrary request during his or her lifetime: B. Blasszauer, "Autopsy" in H. Ten Have, *et al.*, eds., *Ownership of the Human Body: Philosophical Considerations on the Use of the Human Body and its Parts in Healthcare* [Dordrecht: Kluwer Academic Publishers, 1998] at 19–26.

E. *Coroner's Act*[210]

Legislative competence with respect to coroners is vested, by the *1999 Nigerian Constitution*, in the states of the Nigerian federation.[211] Although all the states of the federation now have their own coroners' laws, their provisions were copied from the *Coroners Act*,[212] which previously applied to the whole federation, but to northern Nigeria with some modifications.[213] Consequently, I shall concentrate on the federal legislation.

A coroner[214] is a person who investigates a sudden, unnatural, or violent death;[215] or death that occurs in prison and police custody,[216] or in suspicious circumstances. The investigation of a coroner is called an inquest, which, though not defined by the *Act*, covers all the coroner's activities in his capacity as such.[217] Every magistrate in Nigeria is a coroner; however, other persons may be appointed as a coroner.[218] It seems a coroner acts in a judicial capacity, even though an inquest is a fact-finding exercise.[219] A coroner's judicial powers, however, are not as wide as those of a judge, and may only be exercised for the purpose of ascertaining the identity, time, place, and manner of deceased's death.[220]

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209 *Anatomy Act*, *supra* note 172.

210 A very useful and fascinating exposition of the law and practice of coroner is the article of an experienced London coroner, Dr. J. Burton, "Is there any Future for Inquests and Inquiries" (1999) 67 Medico-Legal J. 91.

211 *Constitution of the Federal Republic of Nigeria*, 1999, s. 4 [hereinafter *Nigerian Constitution*].

212 *Coroners Act*, c. 41 [hereinafter *Coroners Act*].

213 *Ibid.* at s. 1(2) and 3.

214 *Ibid.* at s. 2: "'coroner' means any person empowered to hold inquests under this Ordinance."

215 *Ibid.* at s. 5.

216 *Ibid.* at s. 7.

217 *Davidson* v. *Garrett*, [1899] 5 C.C.C. 200 at 205 [hereinafter *Davidson*].

218 *Coroners Act*, *supra* note 212 at s. 4.

219 *Ibid.* at s. 17:

> 17(1) A coroner holding an inquest shall have and may exercise all the powers of a magistrate with regard to summoning and compelling the attendance of witnesses and requiring them to give evidence, and with regard to the production of any document or thing at such inquest.

Burton, *supra* note 210 at 101.

220 *Coroners Act*, *supra* note 212.

A coroner does not investigate a matter which is already a subject of criminal proceedings;[221] and must stay the inquest where it becomes apparent that evidence with respect to the death has been disclosed against a particular person. This is to enable criminal proceedings to be instituted against that person.[222] A coroner has all the powers of a magistrate, for the purpose of the inquest, and may issue summons and warrants, and compel the attendance of witnesses.[223] A coroner is statutorily barred from returning a verdict of guilt against anybody.[224] The coroner's verdict is limited to identifying the deceased, the place, time, nature, and circumstances of death.[225] A coroner, in the course of an inquest, may engage a medical practitioner to determine the cause of deceased's death, and such medical practitioner may dissect the deceased.[226] Although s. 13 requires the post-mortem request to be in writing, it seems that oral request may be valid, even if made before the formal commencement of the inquest.[227] Consequently, a dissection by a medical practitioner, pursuant to a coroner's request, will not give rise to a cause of action in favour of the deceased's relatives.[228] It has been held that where some body parts of a fatal accident victim were inadvertently left at the scene of the accident by a company acting as an agent of the medical examiner or coroner, such omission was protected by official immunity for the performance of a discretionary duty.[229]

A coroner may not have sufficient legal possession of the deceased's body to make a gift of it for medical education,[230] but he or she has lawful possession for the purpose of, and throughout the duration of, the inquest.[231] After the coroner has viewed the body, it has to be buried.[232] Preservation of a deceased's body pursuant to an inquest, does not amount to scientific application of skill

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221 *Ibid.* at s. 5(b).

222 *Ibid.* at s. 24.

223 *Ibid.* at s. 17.

224 *Ibid.* at s. 27.

225 *Ibid.* at ss. 15 and 26.

226 *Ibid.* at ss. 13 and 14.

227 *Davidson*, *supra* note 217.

228 *Ibid.*

229 *Guerrero* v. *Tarrant County Mortician Services Co.*, 977 S.W. 2d 829 (1998).

230 *Anatomy Act*, *supra* note 172 at s. 10; S. White, "The Law Relating To Dealing With Dead Bodies," (2000) 4 Med. L. Intl. 145 at 163–164.

231 Burton, *supra* note 210 at 95.

232 *Coroners Act*, *supra* note 212 at s. 16.

and labour[233] necessary for the application of the exception in *Doodeward* v. *Spence*,[234] or *R.* v. *Kelly*.[235]

However, ss. 6 and 10 of the *Coroners Act* are very relevant to this paper. Section 6 allows exhumation or disinterment of bodies buried without an inquest, in circumstances where the *Act* requires an inquest to be held. The section applies "notwithstanding any law or custom to the contrary." Section 10 entitles the coroner to prohibit any burial or cremation, in respect of a death for which an inquest has to be held. These sections, especially s. 6, are targeted at the relevant customary laws in most parts of Nigeria. Most deaths in Nigerian traditional society, especially those resulting from rituals or initiations into a traditional cult, in those forgotten days, and which may be accidental, would clearly come under the jurisdiction of the coroner. Burial, for such deaths, is usually done without contacting the coroner; in fact, tradition may prohibit the presence of such a stranger. The result is that performance of such a traditional burial duty would now attract a penal sanction under the *Coroners Act*.[236] Again, the sections allow a coroner to exhume a dead body, in circumstances which would be considered a desecration by the relatives, and spiritually offensive. However, a coroner may not exhume a body "where there is no reasonable probability of a satisfactory result being obtained."[237] It is expected that in the Nigerian context, coroners will give more weight to this proviso than the main rule.

F. Births, Deaths, and Burials

The regulation of births, deaths, and burials is within the legislative competence of the states,[238] though most states legislation on the matter is copied from an old federal statute that previously applied throughout the country.[239] My discussion shall be based on Lagos State's *Births, Deaths and Burials Law*.[240] This law makes it compulsory to register births[241] and deaths[242] occurring within

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233 *Dobson*, *supra* note 32 at 601–602.

234 *Doodeward*, *supra* note 54.

235 *Kelly*, *supra* note 32.

236 *Coroners Act*, *supra* note 212 at s. 33.

237 *Ibid.* at s. 6.

238 *Nigerian Constitution*, *supra* note 211 at s. 4.

239 *Births, Deaths and Burials Act*, c. 23, Laws of the Federation of Nigeria and Lagos, 1958.

240 *Births, Deaths and Burials Act*, c. 13, Laws of Lagos State, 1994 [hereinafter *Births, Deaths and Burials*].

241 *Ibid.* at s. 3.

242 *Ibid.* at s. 18.

the state. This obligation must be discharged by certain persons mentioned in the enactment, *e.g.*, parents, relatives, guardians, or occupiers of certain premises, and within the period stipulated by the law.[243]

The law expects that, subject to coronial jurisdiction,[244] burial should take place within three or four days of the death of the deceased.[245] This seems to be a safeguard against the putrefaction of the corpse and consequent health hazard, but it does not seem to reflect current biomedical technology, which makes it possible to safely preserve a corpse for a much longer time. Again, except with the written consent of a divisional officer, every burial must take place within a designated public burial ground.[246] Thus, the law is brought into conflictual interaction with the custom of most Nigerian tribes, pursuant to which corpses are buried in or near dwelling houses of the living relatives.[247] Presumably, the custom facilitates the deceased's reunion with his or her ancestral relatives. This probably explains why in *Onyeanusi* v. *Pan Am*,[248] the plaintiff, an Ibo of south-eastern Nigeria whose mother died while on a visit to the United States,[249] had to make every effort to have the mother's corpse taken to his homeland for burial. Unfortunately, due to nine days flight delay, the corpse became partially decomposed before the plaintiff could receive it, and he therefore sued for damages. The 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.[250] Because of the court's desire to protect Pan Am in accordance with the declared objective of the *Warsaw Convention*,[251] 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 tribe.[252]

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243 Births should be registered within twenty-one days of birth (s. 9), and deaths should be registered within two days of its occurrence (s. 18).

244 *Ibid.* at ss. 23, 31, 32, and 33.

245 This follows from a combined reading of s. 18 which requires registration of death within two days of its occurrence; s. 31 which obliges the registrar to issue a certificate of burial immediately upon registration of any death; and s. 35 which requires burial to take place within twenty-four hours of the issuance of a burial certificate.

246 *Births, Deaths and Burials*, *supra* note 240 at s. 39.

247 This aspect of Yoruba custom is well documented by Rev. S. Johnson, *The History of the Yorubas* (Lagos: CSS Bookshops Limited, 1921) at 137.

248 952 F. 2d 788 (1992) [hereinafter *Onyeanusi*].

249 *Ibid.* at 789.

250 *Ibid.* at 795.

251 *Ibid.* at 792–794.

252 *Ibid.* at 790.

The deceased's executor, and in his absence, each and every relative of the deceased has the duty of burial. If there is no known relative, the occupier of the building where the body lies has the duty of burial.[253] In most Western legal systems, the person who has the duty, and the correlative right, of burial is often a controversial issue,[254] which seems to have been statutorily settled in the case of Nigeria.[255] After burial, and subject to a coroner's order,[256] the law does not allow exhumation of a corpse, except with the written permission of the State Commissioner.[257]

Certain general observations may be made with respect to this law. It partly deals with burials and imposes the duty of "causing the body of a deceased person to be buried" on certain persons under s. 40; but it does not define what amounts to burial.

Does cremation, instead of burial, amount to compliance with the law? Unlike most countries in the West, cremation is not a popular burial practice in Nigeria, and has yet to be statutorily regulated. However, there does not seem to be any statute prohibiting it. It is arguable that since the English common law is part of the received law in Nigeria, the court may hold that a duly performed cremation is lawful and complies with the enactment under consideration.[258] Again, unless the coroner otherwise orders, the law allows exhumation only pursuant to the Commissioner's written permission. Does this mean that the jurisdiction over exhumation of dead bodies exercised originally by the Ecclesiastical Courts, and now secular courts in most Western legal systems,[259] is unavailable in Nigerian courts?

First, the decision of the Commissioner will be subject to judicial review by the courts, since it involves the exercise of discretion by a public official. Second, it seems that the original jurisdiction of the High Court under s. 272 of

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253 *Births, Deaths and Burials*, *supra* note 240 at s. 40.

254 *Smith*, *supra* note 35; *Felipe*, *supra* note 35.

255 In traditional Ibo society, of south-eastern Nigeria, the custom requires, but does not oblige, the eldest male child to bury the father and bear the cost of funeral expenses; partly because he inherits most of the deceased's estate. A younger son who discharges this custom, in the case of refusal or impecuniosity of the eldest male child, is expected to receive more than his traditional share of the deceased's estate. It is interesting to note something of a convergence of this custom with s. 40 of *Births, Deaths, and Burials*, *supra* note 240. However, s. 40, unlike provisions relating to registration of birth and death (s. 45), does not impose any penalty for failure to discharge the duty of burial.

256 *Coroners Act*, *supra* note 212 at s. 6.

257 *Births, Deaths and Burials*, *supra* note 240 at s. 44.

258 Cremation was held to be a lawful means of disposing a corpse under common law: *Price*, *supra* note 208; *Home Undertaking Co.* v. *Joliff*, 19 P. 2d 654 at 655 (1933).

259 *Medlen*, supra note 96.

the *1999 Constitution of Nigeria*, and its inherent powers under s. 6(6)(a) of the same *Constitution* are expansive enough to include jurisdiction over exhumation or disinterment of dead bodies. Also, the *Birth, Death, and Burial Law* seems to have outlawed the religious and traditional practice of exorcism, mentioned earlier in this paper, which involves exhumation of a corpse. The Commissioner, however, is not precluded from giving his written consent to exhumation merely because it relates to exorcism.

G. Impact of African Mortuary Law on Scientific and Biomedical Research

The scientific implication of customary law's affirmation of ownership in the human body is enormous. Certain questions beg for answers. Will the Nigerian law on dead bodies not interfere with some anthropological and scientific inquisitions on human remains? Does its mortuary tradition not exclude anatomical examinations which may lead to scientific breakthroughs? Does its spiritualisation of the body not interfere with the modern administration of justice, under which post-mortem and coronial inquisition may be undertaken in certain cases? Does its unyielding attitude concerning the integrity of the human body not interfere with the performance of ethically unproblematic biomedical research using human research subjects?

Fortunately for Nigeria, it has no recorded history of pothunters, grave robbers, and desecrators, all of which form the saddest commentary on the history of Native Americans. As we have seen, the desecration of Native American remains was partly inspired by the quest for scientific knowledge by anthropologists and archaeologists, who were least concerned about the feelings of the living relatives of the objects of their scientific inquisition. Though such intrusive research has not been witnessed in Nigeria, it does not seem that the situation will remain so for a long time. In fact, Nigeria and many other developing African countries have recently become the brides of researchers. The reason is not unconnected with the relative availability of research subjects, illiteracy of a majority of the population, and the low-income level of these countries, which render them easy prey to some unconscionable western researchers.

Just recently, *The Washington Post* published a report of Pfizer's 1996 clinical trial of its drug trovafloxacin in Nigeria.[260] The trial sought to determine the drug's safety and efficacy in the treatment of epidemic meningococcal meningitis; a disorder which leads to degeneration of the brain and spinal cord. Many children who participated in the trial either died or were physically deformed. *The Washington Post* report shows that the trial was conducted in

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[260] J. Stephens, "The Body Hunters: As Drug Testing Spreads, Profits And Lives Hang In Balance" *The Washington Post* (17 December 2000) A1.

circumstances of doubtful compliance with ethical requirements and principles of biomedical research.[261] Pfizer has denied any unethical conduct with respect to the trial, and asserted that the deaths or deformities were the natural result of the disease, rather than the trial drug.[262] The fact that Nigeria, instead of the U.S.A., was chosen for the trial remains pertinent for my discussion, and exemplifies the in-roads scientific activities, which may be destructive, are making in Nigeria.

Nigerian mortuary law's conception of a corpse, and even the living, as the property of its living relatives will likely serve as a bulwark against any free-for-all excavation of graves and disinterment of remains by scientists. The property concept will help in maintaining the sanctity of these graves and preserving the spiritual communion between the dead and living. Consequently, archaeologists, anthropologist, and other researchers may be denied an important tool of their trade. Unfortunately, this may be so even when such activities may be socially useful and needed to meet the demands of a technological, globalising, and dynamic world. Because scientific efforts, when ethical and properly channelled, could be beneficial to the public, it may be appropriate for developing countries like Nigeria to embark upon a search on the ways to balance the competing interests of African spirituality and scientific research. Dr Ogbu made poignant observation on the impediment of African spirituality to scientific research and development.[263]

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[261] *Ibid.*

[262] Pfizer, on 17 December 2000, posted its defence to *The Washington Post's* allegation on its web site.

[263] O.U. Ogbu, "Religion as a Factor in National Development," in Amucheazi, *supra* note 8 at 315:

> In the new fad of cultural revival some may take a romantic attitude towards the religion of our forefathers. Admittedly theirs was a viable and an alive universe. Core values such as sanctity of life, respect, good character, obedience, honesty, achievement, solidarity of kin group, primacy of the family, loyalty to the group, bravery and industry were held in high regard. But it was a precarious world: evil spirits terrified the living, even good spirits were capricious, priest craft held sway and the movement of time was in an endless cycle. It was a closed society. Numerous rituals engrained brutality. Harsh nature bred hard 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. We must admit that some of our concerns about pollution, exploitation, clean surroundings and so on are in fact acquired sensibility. Our traditional societies practised ritual murders and slavery without any qualms and within an ethical system which made sense. The African traditional world had its joys, music, drama and relaxation. But the pace of change was slow; so, also was the concept of technological growth or the deliberate re-fashioning of the environment. To this extent religion in our traditional environment bred

To balance the demands of religion, spirituality and science, Nigeria may find it beneficial to learn from the similar experience of Native American Indians, where several statutes, like *NAGPRA*, have been used to maintain a reasonable balance. It is also true that the Nigerian legislature, by laws regulating anatomy, antiquities, coroners, births, deaths, and burials, tried to free the country from the tenacious hold of traditionalism. These laws, however, apart from leaning towards traditionalism in some of their provisions, are yet to be judicially interpreted by the courts. It is feared that any interpretation that is anchored on the traditional mortuary law, without regards to the compelling interest of science, may leave us behind the technological world.

What seems to be needed at this point is an intense public education. Peoples' religion and philosophy cannot be effectively wiped out by a legislative fiat. But with education, given formally and informally, citizens would come to realise the debilitating aspects of our philosophy. It is true that rapid urbanisation, interstate and international commercial transactions, communication, and travel have brought about a loosening of the walls of traditional religion and philosophy. Yet, the majority of Nigerian citizens live in the rural areas and are, to some extent, still traditional. Even a good percentage of the elite, including the well-educated ones living in the West,[264] are still guided by their traditional philosophy. Unless we embark upon such a public enlightenment campaign and open our doors to legitimate scientific enterprise, we may find ourselves many years behind the current biotechnological world.

IX. CONCLUSION

IT IS INTERESTING TO NOTE THAT NIGERIA DOES not yet have the equivalent of laws like the *Human Tissue Act*,[265] *Human Organ Transplant Act*,[266] *Uniform Anatomical Gift Act*,[267] *Human Tissue Gift Act*.[268] It is only a demonstration of

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> order, served as an explanation system and a means of controlling space-time events. But it hardly provided an avenue for progress. The agricultural seasons and the lives of communities flowed in an endless cycle. Folk memory saw no possibilities of a different way of doing things. Rapid change was impeded by traditionalism.

[264] It will be remembered that the claim of the Nigerian Ibo plaintiff in *Onyeanusi, supra* note 248 at 790, was partly based on the traditional belief that the mishandling of the deceased's body would bring misfortune upon the plaintiff, his family, and village.

[265] *Human Tissue, supra* note 176.

[266] *Human Organ Transplant Act 1989*, c. 31.

[267] *Uniform Anatomical Gift Act*, 8A U.L.A. 19 (1987).

[268] *Human Tissue Gift Act*, R.S.O. 1990, c. H-20.

the state of medical care and technology in Nigeria.[269] When that fact is juxtaposed with a strict interpretation of our world view, with its propertisation of the human body, it becomes more evident that we may miss the biotechnology train as we have already missed the information highway that flourished in the 1970s and 1980s. I have attempted to analyse the world view of the Ibo people of Nigeria, shared by most African people, to show that though it furnishes a veritable foundation for a moral and communitarian life, it conflicts, or potentially conflicts, with the demands of science and technological development. This is partly done by analysis of some of the Nigerian statutes having an impact on the human body and their effect on the worldview of Nigerian citizens. I have also suggested that a conscious and articulated public education may help in liberating us from the clutches of undesirable aspects of our traditionalism.

It is true that we are yet to witness intense scientific activity but, as suggested, we do not have to wait for such scientific activities to occur before taking steps to remove possible obstacles to such enterprise. This paper is not a global condemnation of our mortuary tradition, the benefits of which have been underscored. I am only suggesting that every aspect of our mortuary tradition and philosophy does not seem to be good, and may well be counter-productive in this era of globalisation.

[269] However, Nigeria has the *Corneal Grafting, supra* note 207, which regulates the harvesting of eyes from deceased persons for therapeutic purpose.