Rethinking the alternative remedy rule in Nigeria

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Abstract: This paper examines the application of the alternative remedy rule by Nigerian courts especially the Supreme Court. The paper compares the Nigerian practice with the English courts’ practice. The paper finds that Nigerian courts have not been consistent and that the application of the alternative remedy rule by Nigerian courts obstructs access to justice. The paper therefore calls for a rethinking of the alternative remedy rule in Nigeria and also offers a way of resolving the mass of conflicting decisions already produced by the Supreme Court on the matter.

Keywords: access; justice; alternative remedy; exclusive remedy; rethinking; rule of law; democracy; administrative law; public law; adjudication.


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1 Introduction

Access to justice is a very significant component of the Rule of Law and Democracy worldwide. That is why today, the British Department for International Development and other similar agencies are paying serious attention to it. In developing democracies, such as Nigeria particularly with its military antecedents in governance, issues concerning access to justice take the centre stage. More often than not, whenever issues of access to justice come up for discussion, what readily comes to mind are such matters as locus standi, ouster clauses, state immunity and delay in the administration of justice. Hardly
does the existence of the alternative remedy rule and its application appear to the courts as a serious component of access to justice. As a result, little or scant regard has been paid to this very important aspect of our law in the dispensation of justice in our legal system, particularly in our public law system. Where the principles have been expounded, the decisions do not appear to be consistent, and the dicta emanating from the judges appear to be contradictory with the effect that today, it can hardly be said that the law is very well settled on the relationship between the existence and application of the rule of alternative remedies and the rights of the ordinary citizen to access to justice. It is against this backdrop that we intend to examine the law relating to alternative remedies, their relationship with and effect on the rights of citizens’ to access to justice. The paper is divided into four parts. Part one introduces the subject of discourse. Part two deals with the concept of access to justice. In part three, the paper examines the concept of the alternative remedy rule, its application in England as well as its application in Nigeria drawing from existing case law. In part four, the paper concludes with an attempt to find a criterion for reconciling the mass of conflicting decisions already produced by the apex court so as to ensure that citizens’ right of access to justice is not unduly interfered with and that the law is enforced with a good degree of consistency.

2 Access to justice

The phrase, ‘access to justice’ is a difficult one to define. ‘Access’ according to the Oxford Advanced Learners Dictionary is a means of approaching or entering a place or a way in; the opportunity or right to use something or approach somebody. Access to justice may therefore aptly mean a means of getting justice or the right to justice. Access to justice may be seen from two perspectives – a narrow perspective and a broad perspective. From a narrow perspective, it means access to the courts without undue restraints. It means an approach or means of approaching the court or the right to approach the court without restraint to seek for redress whenever a right is violated or infringed upon. According to Anozie, access to justice is the legal right of an aggrieved party to go to court and question the offending act of either a private person or government agency. In a broader sense, access to justice means providing opportunity for a just and timely result. In this sense, it encompasses a fair and equitable set of laws; access to popular education about laws and legal procedure; as well as access to formal courts without obstacles and if preferred in any particular case; a dispute resolution forum based on restorative justice. It means the right of a party to have his matter determined justly and timely if necessary by a court of law.

It is true that access to justice is often used in the narrow sense, i.e., to refer exclusively to access to the formal state justice system (i.e., the courts). It is also true that access to justice means more than merely access to the court. This is because; mere access to court though a threshold may not ipso facto ensure justice. Justice is ensured by both access to the courts and an honest, faithful interpretation and application of fair and equitable rules. Whatever view one takes, it is very clear that access to the courts without undue restraint or hindrance is a core component of access to justice. We think, with respect that the broader view of access to justice is a better view. In this sense, we refer to access to justice as the right of a party or a person to have his matter determined justly and timely if necessary by a court of law without any hindrance in the nature of road-blocks being mounted in the way of litigation against private citizens in favour of
officials or government agencies. That is why, very often, access to justice is used as though it were a synonym for access to court. However, it is patently clear that access to justice is wider, includes and connotes access to court. We shall therefore adopt the wider view of the concept of access to justice in this work. Access to justice may therefore be described as a means of getting a fair adjudication, application or administration of impartial rules in a manner that culminate in a fair and just result.

2.1 The alternative remedy rule – meaning and philosophy behind the rule

Statutes often provide channel of redress other than the courts for an aggrieved person under the scheme of such statutes. Sometimes, these other channels or avenue of redress of grievance exist only as a matter of routine or established departmental practice. These other channels or avenues for redress either as provided by statute or as a matter of routine or departmental practice are then seen as alternative to the courts. They are therefore called alternative remedies. According to Prof Wade, “many statutory schemes contain their own system of remedies, e.g., by way of appeal to a tribunal or to a minister. There may then be a choice of alternative remedies either under the Act or according to the ordinary law.”

The alternative remedy rule is a rule which requires an aggrieved party to first exhaust the alternative channels or avenue of redress particularly where such channels or avenue have been provided statutorily, before coming to the courts. The philosophy and reasoning behind this rule is that the administration or an administrative agency should be given an opportunity to make good an unlawful or irregular action or decision of its official and it is only when it is unable or neglects to do so, that an aggrieved person should go to court. Clearly, there is merit in the argument that the administration or an administrative agency should have an opportunity of taking a second look at the actions of its officials or agencies before being dragged to court. Such an approach has the capacity to reduce not only the number but also the scope of such disputes. The second reason behind the rule is that articulated in Healay v Minister of Health, to wit, the undesirability of having two inconsistent findings, one by the inferior tribunal and the other by the High Court. But the question is, whether such a rule is an inviolable rule of law and to what extent should such a rule be allowed to interfere with a citizen’s free access to the ordinary courts of the land? We think that the alternative remedy rule is not and at any rate should not be an inviolable rule of law. It is a rule that ought to be applied with some level of flexibility if the citizen’s right of access to justice is not to be unduly interfered with. Application of the alternative remedy rule by our courts as an inflexible rule of law admitting of no exceptions is a clog on the wheels of access to justice.

2.2 The alternative remedy rule in England

Leading authorities in English administrative law are in agreement that in England, an alternative remedy which a subject might pursue does not deprive the citizen of his inalienable right to seek redress in court. This is so whether we are dealing with certiorari and prohibition, mandamus or declaration. According to Prof Wade, in what he described as the established rule:

“First principles dictate that there should be no rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital aspect of
the rule of law is that illegal administrative action can be challenged in court as soon as it is taken or threatened. There is therefore no need to pursue any administrative procedure or appeal in order to see whether the action will in the end be taken or not. Thus, where a police officer, invalidly dismissed by a watch committee, did not exercise his statutory right of appeal to the Home Secretary, this was held not to be a bar to his obtaining a declaration from the court. According to Wade, if an order is one which the applicant is entitled for any reason to have quashed as a matter of law, it is pointless to require him first to pursue an administrative appeal on the merits. According to Prof. Garner, in dealing with finality clauses and the exclusion of judicial review, “there are many cases of statutes providing that the decision of an inferior tribunal or of a Minister shall be ‘final’… ‘Final’ usually means, in relation to a particular administrative jurisdiction, merely that the particular remedy in question cannot be taken any further; it does not deprive the disappointed litigant of such other remedies as he may have, or exclude him from recourse to the courts.” He then cited the instance of the Pyx Granite Co v Minister of Housing and Local Government. In that case, under Section 35(6) of the Town and Country Planning Act 1971, a person refused planning permission by the Local Planning Authority may appeal to the Secretary of State for the Environment whose decision ‘shall be final’. The Pyx Granite Company in this case instead of appealing to the Minister headed straightaway for the courts. The House of Lords granting the declarations sought held that:

“It is a principle not by any means to be whittled down that the subject’s recourse to Her Majesty’s courts for the determination of his rights is not to be excluded except by clear words. That is …. a fundamental rule from which I would not for my part sanction any departure. It must be asked, then, what is there in the Act of 1947, which bars such recourse. The answer is that there is nothing except the fact that the Act provides him with another remedy. Is it, then, an alternative or an exclusive remedy? There is nothing in the Act to suggest that, while a new remedy, perhaps cheap and expeditious, is given, the old and as we like to call it, the inalienable remedy of her Majesty’s subjects to seek redress in her courts is taken away.”

Notwithstanding the above dicta, there have been subsequent conflicting dicta from the English courts. For instance, in R v Chief Constable of Merseyside Police exp. Calveley it was stated that “where there is some right of appeal, judicial review will not be granted “save in the most exceptional circumstance and that the normal rule is that the applicant should first exhaust whatever other rights he has by way of appeal”. Prof. Wade described this attitude as novel and stated that it does not appear to be based on authority, and has not yet resulted in judicial review being denied merely because a right of appeal has not been exercised. He however concluded that, “that may occur before long if these formidable dicta are taken at face value.” In another case, R v Inland Revenue Commissioners exp. Preston, where the complainant had failed to show abuse of power by the commissioners, Lord Scarman stated that, “it was a proposition of great importance that a remedy by way of judicial review is not to be made available where an alternative remedy exists and that, it will only be very rarely that the courts allow the collateral process of judicial review to be used to attack an appealable decision.” But his Lordship at once went on to state that judicial review would be available had the commissioners done something that is equivalent to abuse of power for instance if they had exceeded their powers, committed
an error of law or breach of the rules of natural justice. In yet another case, Sir John Donaldson MR stated that “it is a cardinal principle that, save in the most exceptional circumstances, the judicial review jurisdiction will not be exercised where other remedies were available and have not been used.” His Lordship Donaldson MR, repeated the above words while granting judicial review to police officers who had been unfairly dismissed in a typical natural justice case which had nothing exceptional about it at all.

An examination of the English case law according to Prof. Wade will show that “the established rule is still working but behind a camouflage of discouraging language.” For Prof. Wade, none of the above dicta appear to recognise that appeal and review have radically different purposes; that appeal is concerned with merits, while review is concerned with legality; that review is the primary mechanism for enforcing the rule of law under the inherent jurisdiction of the court, while appeal is a statutory adjunct with no such fundamental role. If an applicant can show illegality, it is wrong in principle to require him to exercise a right of appeal. Illegal action should be stopped in its tracks as soon as it is shown.

In practice, English law makes a distinction between alternative remedies and exclusive remedies. Many statutory schemes contain their own system of remedies, e.g., by way of appeal to a tribunal or to a minister. There may then be a choice of alternative remedies either under the Act or according to the ordinary law. On the other hand, it may be held that the statutory scheme impliedly excludes the ordinary remedies. If its language is clear enough, it may exclude them expressly. Where it is a case of alternative remedies, the existence of such remedies cannot be a bar to the ordinary right of action as shown in the established rule. Where however, it is a case of exclusive remedies, the party aggrieved is enjoined to exhaust the statutory remedy, it being exclusive. The statutory remedy usually exists for purposes of appeal on the merits while the ordinary remedy is for the prevention of illegality. In some cases, the overlapping remedies exist for identical purposes and the question would then arise, is the statutory remedy exclusive or concurrent? According to Wade, the court’s interpretation may be determined by convenience, but the likelihood is it will be held to be exclusive where the right given by the statute does not exist at common law and can be enforced only in the way provided by the statute. In such a case, the right and the remedy are given uno filato, and the one cannot be dissociated from the other, or where the power of determination is expressly conferred on a named authority by the Act. Wade’s position is supported by the decision of the House of Lords in Pasmore v The Oswaldtwistle Urban District Council where it was stated “the principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately stated that principle in the case of Doe v Bridges. He says, ‘where an Act creates an obligation and enforces the performance in a specified manner, we take it be a general rule that performance cannot be enforced in any other way.’”

2.3 Alternative remedies under Nigerian law

English law recognises the distinction between alternative remedies and exclusive statutory remedies. This is predicated upon the fact that, in English law, parliament can by express or clear words take away the jurisdiction of the ordinary courts in a given
matter. As the saying goes, parliament in England can turn a man into a woman and vice versa. Prof. Garner has compared the English position with the USA position and stated that in the USA, relying on the due process clause of the fifth or fourth Amendment to the Constitution, a provision in Federal or State statute would be declared void if it purported to exclude the right of the citizen to appeal to the courts. Nigeria follows closely the USA model when it provided in Section 4(8) of the constitution as follows:

“Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or a House of Assembly shall be subject to the jurisdiction of law and of judicial tribunals established by law and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.”

The question whether resort to an administrative or statutory remedy can be exclusive in Nigeria is thus a serious constitutional matter particularly in view of Section 36(2) of the 1999 Constitution which provides that: without prejudice to the provisions of Section 36(1) of the Constitution, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law

a provides for an opportunity for the person whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person

b contains no provision making the determination of the administering authority final and conclusive.

2.4 An examination of the Nigerian case law on exhaustion of alternative remedies

In examining the Nigerian case law on this subject, we shall focus attention on five leading authorities. These cases, we believe, aptly represent the various conflicting and unresolved views expressed by the Supreme Court on the issue of study. The first case to be discussed is *Eguamwense v Amaghizemwen*. The plaintiff/respondent, (Amaghizemwen) and the defendant/appellant (Eguamnwense) were contesting the rightful person to be vested with the traditional title of Amaghizemwen of Benin, a traditional hereditary title in Benin, which was created in about 1735 by Oba Oresoyen of Benin. The family mediation ended in favour of the appellant. The respondent was dissatisfied with it and he appealed to the Oba of Benin. The Oba referred the dispute to the Ekegbiam of Benin, Chief Inneh. Chief Inneh could not settle the dispute whereupon the Oba decided to hear the dispute himself and decide it. The Oba’s decision was in favour of the appellant, and the Oba did not alter his decision despite respondent’s protests. The respondent being aggrieved took out a writ of summons on the 7th February 1986 in the High Court seeking the following reliefs:

“a a declaration that the plaintiff and not the defendant is entitled to be conferred with the chieftaincy title of Amaghizemwen of Benin, it being a hereditary title under Benin Native Law and Custom;
b a declaration that the conferment of the hereditary title of Amaghizemwen of Benin by Omo N’Oba Erediauwa, the Oba of Benin, on the defendant on or about the 3rd of July 1985, in Benin within Benin Judicial Division is contrary to Benin Native law and custom of inheritance and therefore ought to be set aside.

c An order of perpetual injunction restraining the defendant, his heirs, servant and agent from parading himself as the Amaghizemwen of Benin.”

The trial High Court granted all the reliefs. The Court of Appeal affirmed the judgement of the High Court. The appellant then appealed to the Supreme Court, where he raised for the first time, the issue of jurisdiction of the High Court to entertain the respondent’s claim. The appellant contended that since a statute had provided for the enforcement of the respondent’s rights, the respondent ought to have exhausted the remedy provided under the statute and that the court had no jurisdiction to hear the case except by way of review. In deciding the appeal, the Supreme Court examined the provisions of Sections 21 and 22 of the Traditional Rulers and Chiefs Edict No.16 of Bendel State, 1979. They provide as follows:

“SECTION 21 – The Executive Council may appoint in respect of a Local Government area or part thereof, an authority (in this Edict referred to as the Prescribed Authority) consisting of one person or a committee of two or more persons to exercise the powers conferred under this part in respect of the office of a traditional Chief or an honorary Chief whose Chieftaincy title is associated with a community in that area.

SECTION 22

1 The conferment of a traditional Chieftaincy shall be in accordance with the customary law and shall be subject to the approval of the prescribed authority or where the provisions of Section 23 have been applied, to the approval of the executive council.

2 Where a traditional chieftaincy is conferred on a person by those entitled by customary law to do so and in accordance with customary law the prescribed authority or the Executive Council as the case may be, may approve the appointment.

3 Where there is a dispute as to whether a traditional chieftaincy title has been conferred on a person in accordance with customary law or as to whether a traditional chieftaincy title has been conferred on the right person, the prescribed authority or the Executive Council as the case may be, may determine the dispute.

4 The decision of the prescribed authority or the Executive Council as the case may be:

a to approve or not to approve the conferment of a traditional chieftaincy title on a person; or

b determining a dispute in accordance with Sub-section (3) of this section shall not be questioned in any court.

5 The prescribed authority shall not withhold approval of the conferment of a traditional chieftaincy title on a person if such conferment is made in accordance with the customary law regulating the conferment of the chieftaincy title.

6 The Executive Council may, on the application of an aggrieved party:
a review the decision of a prescribed authority made under Sub-section (3) of this section and substitute its own decision therefore; or

b approve the conferment of a traditional chieftaincy title on a person if such approval was withheld by the prescribed authority contrary to Sub-section (5) of this section.

7 before exercising the power vested in it by Sub-section (6) of this section, the Executive Council may cause such inquiries as appear to it to be necessary Section 27 of this Edict."

The Supreme Court held, *inter alia*, that the High Court lacked jurisdiction, as the plaintiff/respondent did not exhaust the local remedies in the statute. Note that the Supreme Court here avoided the use of ‘alternative remedies’ and instead chose to talk about ‘local remedy’. Note also, that the prescribed authority had rendered a decision here yet the Supreme Court held that appeal to the Executive Council was not an alternative remedy to the court but a local remedy, which must be exhausted before any action can be instituted in court.32 According to the Supreme Court:

“Where a statute prescribes a legal line of action for determination of an issue be that issue an administrative matter, chieftaincy matter or a matter of taxation, the aggrieved party must exhaust all the remedies in that law before going to court. The provisions of Section 21 and S.22(1) – (6) of Traditional Rulers and Chiefs Edict (No. 16) 1979 (Bendel State) are clear steps to take.

The plaintiff seems to have jumped the stile as he avoided all avenues that availed him and went to the High Court. I am of the view that he did a wrong thing indeed. This court is not asked nor were the lower courts fully adverted to S. 22(4) (a) and (b) (supra) and I shall not pronounce per incuriam on that subsection; but suffice to say here the provisions of S.22 (5) and (6) have amply provided for redress which the plaintiff failed to seize advantage of. The provisions of S.236 of 1979 Constitution is not an open gate for all High Courts to assume jurisdiction in all subjects. All local remedies in the statute on every subject must be exhausted before embarking on actual litigation in court.33

By the provision of Section 22(6) of Traditional Rulers and Chiefs Edict 1979 (hereinafter referred to as the 1979 Edict) it appears to me that the machinery set down by the Edict has not been exhausted….”

In the second case, *Olu of Warri v Kperegbeyi*,34 Coram Wali JSC (Lead judgement) Belgore JSC, Kutigi JSC, Mohammed JSC and Igu JSC, the plaintiffs brought an action in the Warri High Court seeking *inter alia* declarations:

That the recommendation, nomination and/or selection of Mr. Isaac Omiretsuli Jemide for the conferment of the Chieftaincy title Oshodi by His Royal Highness, Gbemi Emiko Erejuwa II, the Olu of Warri as per letter dated 25th October, 1985 be declared null and void and contrary to the Itsekiri customary law regulating the nomination, selection and conferment of the said Oshodi.

The plaintiff also claimed in the alternative:

“a Declaration that the conferment of the title of Oshodi on Isaac Jemide is contrary to the Traditional Rulers and Chiefs Edicts 1979 and thereby null and void.

b Perpetual injunction restraining the defendants by themselves, their privies, servants and/or agents or otherwise whosoever from conferring, parading, recommending, nominating or selecting the 2nd defendant with the Chieftaincy title of Oshodi.”
After exchange of pleadings, the defendant filed a preliminary objection by motion on notice arguing that the trial court lacked jurisdiction pursuant to S. 22 of the Traditional Rulers and Chiefs Law 1979 otherwise known as Edict No. 16 of 1979 of Bendel State; and that plaintiffs lacked locus standi to institute the action. After exhaustive arguments, the learned trial judge ruled in favour of the defendants and struck out the suit. The plaintiffs appealed to the Court of Appeal and in a well-considered judgement, the Court of Appeal allowed the appeal (Coram Ogundare JCA as he then was, Mustapher and Salami JICA), set aside the order of the trial striking out the case for want of jurisdiction and remitted the case back to the High Court for hearing on the merits. Against this judgement, the defendants appealed to the Supreme Court. At the Supreme Court, the issue for determination was inter alia: “Whether the learned Justices of the Court of Appeal were right in holding that the High Court of Warri wrongly declined jurisdiction to entertain the plaintiff/respondent’s claim?”

The Supreme Court [Coram Belgore JSC (as he then was) Wali, Kutigi Mohammed, Igu JSC] dismissing the appeal answered the above question in the affirmative. According to the Supreme Court, the jurisdiction of the High Court to grant a declaration cannot be taken away except by clear words. Eguamwense v Amaghizemwen was referred to. The court further held that by virtue of Section 1(1) and (2) of Decree No. 1 of 1984, it was intended that Sections 6 and 236 of the Constitution of the Federal Republic of Nigeria 1979 should remain extant. By those provisions of the Constitution, chieftaincy among others shall be matters within the jurisdiction of the High Court of every State. It follows, therefore that any law or edict which purports to remove those matters from the jurisdiction of a State High Court is inconsistent with the provisions of Decree No.1 of 1984 Section 1(1) and (2) and Sections 6 and 236 of the Constitution. The Supreme Court further held that the alternative remedy which a party can resort to in order to pursue his right does not exclude his inalienable right to seek redress in court. Accordingly, any party involved in the dispute has a choice either to refer the dispute to the prescribed authority, which in this case is the Executive Council; or go to court for a judicial resolution of the dispute, which will be binding on the Executive Council. In the words of Mohammed JSC, relying on Pyx Granite Co Ltd v Ministry of Housing and Local Government.

After the decision of the prescribed authority to wit, the Olu of Warri, it is open to the party wishing to challenge the decision to either take the matter to the Executive Council of the Military Governor or go to court for redress. Having chosen to go to court whose decision shall be binding on the executive council, it is an error to question why the respondents chose to take their matter into court. From the wording of the statute, it is clear that going to the Executive Council of the Governor is an alternative remedy. Even if that is so, since under the provisions of Sections 6 and 236 of the 1979 Constitution, chieftaincy disputes, among others, are matters within the jurisdiction of the High Court, the respondents are right in seeking redress in the High Court. The alternative remedy which a party can resort to in order to pursue his right does not exclude his inalienable right to seek redress in the courts.

In another case, Osagie II v Offor, a case which arose from a decision of the Agbor High Court, the learned trial judge, Gbemudu J, struck out the plaintiff’s action for want of jurisdiction on the ground that being a chieftaincy matter, it was premature for the
plaintiff to have come to court without first seeking redress from the prescribed authority
or the Executive Council by virtue of the provisions of Bendel State Chiefs Law No. 16
of 1979. Dissatisfied with the ruling, the plaintiff appealed to the Court of Appeal. The
Court of Appeal allowed the appeal, set aside the ruling of the High Court and remitted
the case back to the High Court to be tried on its merits by another judge. The
defendant/respondents (appellants in the Supreme Court) then appealed to the Supreme
Court. At the Supreme Court, two issues fell for determination, to wit:

i Does the Traditional Rulers and Chiefs Edict No. 16 of 1979, Bendel State
of Nigeria provide in its Section 22(2), (3) and (6) any condition precedent
to the assumption of jurisdiction by the courts over suits relating to
Traditional Rulers and Chieftaincy Title Disputes, or in particular, the Eje
of Ekuoma Chieftaincy dispute?

ii Does Section 22(2), (3) and (6) of the Traditional Rulers and Chieftaincy
Edict No. 16 of 1979, Bendel State of Nigeria derogate from the powers of
the High Court to entertain suits in view of Section 6(6) (b) and 23 6(1) of
the Constitution of the Federal Republic of Nigeria, 1979?

In a considered judgement delivered by Kutigi JSC (as he then was) and concurred with
by Wali, Mohammed, Onu and Iguh JJSC, the Supreme Court dismissed the appeal and
held inter alia that:

"Section 22(2), (3) and (6) of the Bendel State Chieftaincy Law 1979 cannot in
any way derogate from or circumscribe the provisions of Section 236(1) of the
1979 Constitution. Any attempt to do so would make it inconsistent with that
constitutional provision and therefore to that extent void. A decision that it
delays the right of an aggrieved party to come to court, or that it is a condition
precedent to the exercise of a right to file an action to be entertained by the
High Court seeks to circumscribe the powers of the High Court under Section
236(1) of the Constitution and to that extent is void and of no effect. The
decision of the trial court that Section 22(2) (3) and (6) of the Chieftaincy Law
makes the action of the appellant premature and the striking out of the same is
wrong.

Edict No. 16 of 1979 in Section 22 Sub-sections (2), (3) and (6) prescribed no
condition precedent to the exercise of jurisdiction by High Court. I am also not
in doubt whatsoever that these sub-sections derogate from the powers of the
High Court to entertain suits in view of Sub-section 4 which stated that the
decision of a prescribed Authority or the Executive Council “shall not be
questioned in any court”. While I do not quarrel with the existence of a
domestic forum for settlement of chieftaincy disputes, an aggrieved person
should be free to decide if and when he should go there and it should not be to
his detriment if he is dissatisfied with such a decision and wants to go to court
on the same dispute."42

According to Wali JSC,

"In so far as the provision of Section 22 (2), (3) and (6) of the Traditional
Rulers and Chiefs Edict No. 16 of 1979 of defunct Bendel State puts a clog on
the constitutional right of a litigant ride s. 236 (1) of the 1979 constitution to
resort to count, the section is unconstitutional as it derogates from the right
conferred on the citizen by the said Section 236 (1) supra. The respondents in
this appeal are not bound to follow the provision of s. 22 of Edict No. 16 of
1979 (supra) before filing their action in the High Court."43

For Igu JSC,
It cannot be overemphasized that whatever a state Edict or Laws provide, they cannot override the provisions of the constitution of Nigeria, 1979. In my view, an aggrieved party may at any stage in the selection process of a candidate in a chieftaincy matter properly challenge the same in a court of Law.

There is no provision in Section 22 of the Bendel State Traditional Rulers and Chiefs Edict 1979 (apart from Subsection 4 admitted to be unconstitutional) which makes it mandatory that unless Subsections (3) and (6) thereof are complied with, the jurisdiction of the court as enshrined in Sections 6(6) and 236 of the 1979 constitution of eth Federal Republic of Nigeria is ousted."^44

According to Onu JSC,

“In Eguamwense v Amaghizemwen (supra), this court reversing the Court of Appeal and allowing the appeal on the issue of whether the jurisdiction of the High Court was expressly taken away, I had occasion to state the position of the law as follows:

The Traditional Rulers and Chiefs Edict, 1979, No. 16 of Bendel (now Edo) state having by its Sections 21 and 22 (ibid) expressly or by clear provisions excluded the jurisdiction of the courts in the form of declarations in respect of customary law relating to the selection of chiefs, such sub-legislature function must perforce be vested in the prescribed authority and not a function exercisable by the court. See Adigun v Attorney-General of Oyo State (supra). It is in this wise that I held that the High Court’s jurisdiction in respect of such declaratory reliefs as sought by the respondent in the instant case was wrongly invoked…

As in the instant case, the jurisdiction of the High Court was neither ousted nor contemplated; the case of Amaghizemwen (supra) is clearly distinguishable. There being no merit in this appeal, and for the more detailed reasons given by my learned brother Kutigi, JSC with which I am in entire agreement, I too, dismiss this appeal and make similar consequential orders inclusive of those as to cost."^45

According to Mohammed JSC at pp.213–214

“I agree with my Lord, Kutigi JSC, in the judgment just read that this appeal has no merit at all. The trial High Court was wrong to strike out the action filed by the plaintiff/respondent for alleged want of jurisdiction. If the intention of Bendel State in enacting Section 22 of Traditional Rulers and Chiefs Edict No. 16 is to oust the jurisdiction of the High Court it is void and unconstitutional.”

In the case of Adesola v Abidoye,^46 the controversy centred around the application of Section 22 of the Chiefs Law of Oyo State 1978 vis a viz Sections 33 and 236 of the 1979 Constitution of the Federal Republic of Nigeria.^47 Section 22 of the Oyo State Chiefs Law is substantially the same with Section 22 of the Bendel State Traditional Rulers and Chiefs Edict No.16 of 1979 under which Eguamwense v Amaghizemwen was decided. The facts of this case are that the appellant and 1st respondents were members of two branches of the Oloukon family in Ibadan. The second respondent is the Olubadan of Ibadan, i.e., the prescribed authority for the Mogaji of Oloukon Family, the chieftaincy title in dispute. In 1986, after the death of the then last Mogaji of Oloukon, they were respectively nominated by their branches to fill the vacant title of Mogaji of Oloukon family. Both parties appeared on invitation before the prescribed authority under the law, to defend their claims to nomination and election to the vacant position. After listening to the parties and their witnesses, the prescribed authority, whose decision was final under
the chiefs Law adjourned for decision to a named date. Before that date, and before a
decision was taken by the second respondent, the prescribed authority, the appellant
instituted an action against the respondents at the High Court seeking declaratory reliefs
to the effect that he was the rightful Mogaji and that the installation of the first
respondent was null and void being contrary to native law and custom. The appellant also
prayed for injunctive reliefs. While the suit was pending, the second respondent (the
prescribed authority) approved the nomination of the first respondent and installed him
as the Mogaji of Oluokun family of Ibadan. After hearing the suit and receiving evidence
from the parties, the learned trial judge granted all the claims of the plaintiff. Being
dissatisfied, the first respondent appealed to the Court of Appeal. At the Court of Appeal,
the first respondent raised for the first time, the jurisdiction of the trial court to entertain
the matter on the ground that the plaintiff had not exhausted his remedy under the Chiefs
Law of Oyo State before filing his suit. The suit was therefore premature. The Court of
Appeal allowed the appeal and struck out the plaintiff’s claim holding that the word
‘May’ in the context of Section 22 of the Chiefs Law of Oyo State 1978 with regard to
the steps to be taken by a person aggrieved by the decision of the prescribed authority
was mandatory. Aggrieved by the decision of the Court of Appeal, the
plaintiff/respondent (now appellant) appealed to the Supreme Court. At the Supreme
Court, the resolution of the case rested on the proper construction of Section 22 of the
Oyo State Chiefs Law, vis a viz Sections 33 and 236 of the 1979 Constitution of Nigeria.
provided as follows:

“22 (2) Where a person is appointed, whether before or after the
commencement of this law, to fill a vacancy in the office of a minor
chief by those entitled by customary law so do appoint and in
accordance with customary law, the prescribed authority may
approve the appointment.

(3) Where there is a dispute whether a person has been appointed in
accordance with customary law to a minor chieftaincy the prescribed
authority may determine the dispute.

(4) The decision of the prescribed authority -

(a) to approve or not to approve an appointment to a minor
chieftaincy or

(b) determining a dispute in accordance with sub-section 3 of this
section shall be final and shall not be questioned in any court.

(5) Any person aggrieved by the decision of the prescribed authority
by subsections (2), (3) and of this section, may within twenty-one
days from the date of the decision of the prescribed authority, make
representations to the commissioner to whom responsibility for
chieftaincy affairs is assigned that the decision be set aside, and the
commissioner may, after considering the representations confirm or
set aside the decision.

(6) Before exercising the powers conferred by subsection (5) of this
section, the Commissioner may cause such inquiries to be held in
accordance with section 21 as appear to him necessary or desirable.

(7) Where the Commissioner in his determination under subsection (5)
of this section sets aside an appointment to a chieftaincy, he shall
require the persons responsible under Customary Law for the
Rethinking the alternative remedy rule in Nigeria

appointment of the person to fill the vacancy in that chieftaincy to appoint another person in accordance with the Customary Law within such time as he may specify."

Dismissing the appeal, the Supreme Court, Coram Karibi-Whyte, Ogundare, Onu, Igu and Ayoola JSC held inter alia that where a statute has prescribed a particular remedy, an aggrieved party should be left to exhaust the remedy. In the instant case, where the appellant has not resorted to the remedies statutorily available to him on the infringement of the alleged right by the prescribed authority, his action is premature and does not give rise to a cognizable cause of action. The appellant jumped the gun in instituting his action. He should have first exhausted the remedies set down by the relevant laws before embarking on litigation. According to Karibi-Whyte JSC who delivered the lead judgement:

“Section 22 of the Chiefs Law, has vested in the prescribed authority the determination of disputed minor chiefs. The aggrieved party has also been compelled by statute to pursue a special remedy under the Chiefs law. “It would be mischievous” in the words of Lord Herschell in Barraclough v Brown (1897) AC 615, to hold that when a party is compelled by statute to resort to an inferior court he can come first to the High Court to have his right to recover determined. Such a proposition is not supported by authority, and is I think, unsound in principle”. I entirely agree. Having vested the determination of disputed minor Chiefs in the prescribed authority, the aggrieved by statute compelled to resort to a particular remedy, should be left to exhaust his remedy. Since the right and the remedy are given uno flatu, the one cannot be dissociated from the other. – see Lord Watson in Barraclough v Brown (1897) AC at pp.621–622.

The inequities of the exercise of concurrent jurisdiction between the inferior tribunal and the High Court was pointed out by Lord Denning MR in Healay v Minister of Health (1955) 1 QB 221-228. He observed that there is the possibility of “two inconsistent findings; one by the Minister and the other by the court. That would be a most undesirable state of affairs. This is what happened in this case. The decision of the High Court was different from that of the prescribed authority. He then stated what I regard as the crux of the matter. He said, “In my opinion, if the court were to entertain this declaration, it would be going outside its province altogether. It would be exercising a jurisdiction to ‘hear and determine’ which does not belong to it, but to the Minister.

In the instant case, the determination of disputed minor chieftaincies is a jurisdiction by statute vested in the prescribed authority. I agree with the submission of learned counsel to the respondent that the High Court has no jurisdiction to exercise jurisdiction vested in the prescribed authority. In Eguamnwense v Amaghizemwen (1993) 9 NWLR (pt 315) 1, this Court held that where the right and remedy being uno flatu must be taken together. Appellant has not complied with any of the preconditions enabling him to bring the action. Indeed, he applied for a declaration even before the prescribed authority gave his decision. Appellant has not even applied to the Commissioner for Chieftaincy Affairs, within twenty-one days of the determination by the prescribed authority. For the above reasons, Appellant has not satisfied the preconditions for bringing an action. The action of the appellant is accordingly premature and does not give rise to a cognizable cause of action. The Court of Appeal was accordingly right to hold that the learned trial judge lacked the requisite jurisdiction to hear and determine the claims before him.”

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For the Supreme Court, the preconditions for access to the court in respect of disputes arising from the determination of the prescribed authority in a minor chieftaincy dispute in Oyo State are that:

a the prescribed authority must have made a determination;

b the aggrieved party should have made a representation to the Commissioner for Chieftaincy Affairs within twenty-one days of the giving of the decision; and

c the Commissioner for Chieftaincy Affairs should have determined the dispute after due inquiry.

These steps according to the Supreme Court exhaust the remedy available to persons aggrieved under the exercise of powers vested in the prescribed authority. Osagie v Offor and Olu of Warri v Kperegbeye were neither cited nor relied on by the Court, even though Eguamnwense v Amaghizemwen was cited and relied on. The Court further held that the provisions of Section 22 of the Chiefs Law of Oyo state 1978 do not exclude the exercise of supervisory jurisdiction by the High Court. In the instant case, however, the declarations sought were not claimed as supervisory remedies as they do not challenge any ‘decision’ made by the prescribed authority but act of ‘installation’.

The last decision is Abu v Odugbo, Coram, Belgore, Ejiwunmi, Ogundare, Mohammed, and Achike JJSC. The dispute centred on the succession to the clan head of Iviario in Owan Local Government of the then Bendel State. The plaintiffs claimed for among others:

“A declaration that according to Iviario customary law, it is the most senior title holder, ‘Odion Ejere’ who has the exclusive preserve of conferring on deserving Iviario person ‘Ejere’ title (i.e., Chieftaincy title) by turbanning and it is he who becomes the Village Head of Iviario in Ivbi-Ada-Obi clan when a vacancy occurs.”

On the other hand, the first defendant claimed that by the customary law regulating the appointment of the Village Head, the Village Headship is the exclusive right of Afimosi family of Euorue sub-quarter in Ebesse quarter. According to the first defendant, only title holders are entitled to be nominated and these are only from Afimosi descendants. After hearing evidence led by the parties, and their learned counsel, the trial Judge Maido J, delivered a well-considered judgement upholding the claim of the plaintiffs. The first defendant being dissatisfied appealed to the Court of Appeal. The Court of Appeal dismissed the appeal. The first defendant then further appealed to the Supreme Court. At the Supreme Court, the lone issue for determination was whether the trial High Court had jurisdiction to entertain and grant the reliefs claimed by the plaintiffs. For the first defendant/appellant, it was argued relying on Eguamwense v Amaghizemwen, that the trial High Court lacked jurisdiction firstly because, the vesting of power to decide a question of law or fact in an authority other than a court of law may be construed to mean that it is the intention of the legislature to oust the jurisdiction of the courts of law from entertaining disputes over such questions. Secondly, it is also argued that where the authority designated by statute has decided the matter remitted to it, a court of law will not or ought not to entertain an action for declaration designed to determine that very same matter. For if that were permissible, it will lead inevitably to the possibility of having contradictory or inconsistent decisions on the same matter. For the plaintiffs, it was argued that the moment approval was given by the Executive Council to the
appointment of the first defendants, acting under powers given to it by the Traditional Rulers and Chiefs Law No. 16 of 1979, the plaintiffs became vested with a right to contest the recognition of the first defendant by recourse to the High Court under the provisions of Section 236 of the 1979 constitution. It was further argued for the plaintiffs that the Owan Traditional Council acted without or in excess of authority and that if the act or transaction complained of was void, a declaration to that effect might issue. The Supreme Court after a review of Eguamwense v Amaghizemwen distinguished Eguamwense from the present case and held that the High Court had jurisdiction. In reaching this decision, the Supreme Court, per Ejiwunmi JSC who delivered the leading judgment considered and approved its judgement in Olu of Warri v Kperegbeyi, Osagie v Offor, Osagie v Offor, Military Government of Ondo State & ors v Adewunmi and Edewor v Uwegba.

2.5 Comments on the Nigerian Case Law

Issues that have arisen from the case law narrated above include the following:

1. Whether there is a conflict between Osagie v Offor and Eguamwense; whether there was really a distinction between Osagie v Offor and Eguamwense v Amaghizemwen?

2. Whether there is a conflict between Eguamwense and Abu v Odugbo; whether there was really a distinction between Eguamwense v Amaghizemwen and Abu v Odugbo?

3. Whether Adesola v Abidoye was not wrongly decided either in toto or in part?

Whether exhaustion of alternative remedies as a condition precedent is waivable?

2.5.1 Issue one

Whether there is a conflict between Eguamwense and Abu v Odugbo? We must state straight away that there is a conflict between the decision in Osagie v Offor and Eguamwense v Amaghizemwen; and between Eguamwense v Amaghizemwen and Abu v Odugbo. The Supreme Court was not in doubt at all as to this conflict when it stated as follows:

“It would appear, therefore, that the decision of this court in chief Osagie v Chief Offor is inconsistent with its earlier decision in Eguamwense and later decision in Adesola. I hope the court will have the opportunity someday to resolve the conflict.”

The question then, is, “was there really a distinction between Osagie v Offor and Eguamwense v Amaghizemwen as sought to be made by Onu JSC?” Both cases had as the determining law the provisions of Section 22 of the Bendel State Chieftaincy and Traditional Rulers Law No. 16 of 1979. In each case, the primary issue was want of jurisdiction arising from alleged prematurity of the suit because the plaintiff in each case had not exhausted the procedure set out in Section 22 of the Bendel Chiefs Law. In the two cases, the Supreme Court arrived at two contradictory judgements. In our humble view, the distinction sought to be made by his lordship between the two cases appear to be artificial and superficial. With respect, a distinction was sought to be made where none existed. In Eguamwense, the prescribed authority had actually taken a decision. The sin of the plaintiff was that he did not further appeal to the Executive Council or in the words
of the Supreme Court “exhaust the local remedies in the statute.” The Supreme Court held that the court lacked jurisdiction. But in Osagie v Offor where the plaintiff did not utilise at all the provisions of Section 22 of the Bendel State Chiefs Law, the Supreme Court held that the court had jurisdiction. One is bound to ask, which ‘sin’ is greater? Partially utilising the procedure or not utilising it at all? If the court felt able to hold that the High Court had jurisdiction in the latter case, it should have held with even greater force that the High Court had jurisdiction in the earlier case.

2.5.2 Issue two

Is there a conflict between Eguamwense v Eguamwense and Abu v Odugbo? Again the answer is unequivocally yes. Whereas Eguamwense firmly held that an aggrieved party must exhaust all the local remedies in the statute on every subject before embarking on actual litigation in court, Abu v Odugbo unequivocally held that immediately after the decision of the prescribed authority, it is open to the party wishing to challenge the decision to either take the matter to the Executive Council or go to court for redress. According to the court, from the wording of the statute, it is clear that going to the Executive Council is an alternative remedy. Even if that is so, the alternative remedy which a party can resort to in order to pursue his right does not exclude his inalienable right to seek redress in the courts. Query: can it then be said that Abu v Odugbo has overruled Eguamwense albeit impliedly? The question is interesting because the court in Abu v Odugbo refused specifically to go into the question because it was not invited to do so. Thus, in spite of the fact that the court sought to distinguish between the cases, yet, on the fundamental principle belying the decision, that is, the interpretation of Section 22 of the Bendel State Chiefs Law, the court reached a decision that is diametrically opposed to its earlier decision in Eguamwense. In holding that the High Court had jurisdiction after the decision of the prescribed authority, the Supreme Court was consistent with Olu of Warri v Kperegbeyi and appear to have overruled Eguamwense in that respect without expressly saying so. This is because, according to the court, after the decision of the prescribed authority, it is open to a plaintiff either to go to the Executive Council or to go to court. Thus, we have a situation where we have two conflicting decisions of the Supreme Court standing. However, in our humble view, the decision in Abu v Odugbo destroyed the authority of the decision in Eguamwense v Eguamwense and any other decisions that are based on its authority, such as Adesola v Abidoye. There is no doubt that Abu v Odugbo is a better reasoned judgement, and the express approval of that judgement in Osagie v Offor, and Olu of Warri v Kperegbeyi, leads to this irresistible conclusion. There is also no doubt that if Eguamwense had come up after Abu v Odugbo, the decision would have been different because at the point the plaintiff took up his case in Eguamwense, the prescribed authority had already given a decision.

Eguamwense appears not to have been properly decided. That case was a clear case of alternative remedies not exclusive remedy. By the provisions of Section 22(3) of the Edict, an aggrieved party had the option of taking his claim or case straight either to the prescribed authority or the Executive Council. In other words, the prescribed authority and the Executive Council had a ‘concurrent jurisdiction’. In another breath, Section 22(6) of the same edict vested an appellate jurisdiction on the Executive Council in respect of a decision by the prescribed authority but left it open (gave a discretion) to the aggrieved party either to use it or not to use it.
A true construction of these provisions show that immediately after the decision of the prescribed authority, an aggrieved party had a right of action to go to court. Appeal to the Executive Council became only an alternative, which he is free to accept to utilise or assert his right of action. It is therefore not very surprising that in the latter case of *Abu v Odugbo*, the Supreme Court made a volte-face from their decision in *Eguamwense*.

### 2.5.3 Issue three

Whether *Adesola v Abidoye* was not wrongly decided either in part or in toto? *Adesola v Abidoye* appears to have been wrongly decided. This decision was delivered in 1999 after the decision in *Osagie v Offor* and *Olu of Warri v Kperegbeyi* had been handed down. *Osagie v Offor* was not cited nor referred to. Very importantly, Section 22(4) of the Oyo State Chief’s Law which provided that “… Prescribed authority …. His decision shall be final and shall not be questioned in any court by virtue of Section 22(4) of the Chiefs Law” had been earlier on before then struck down as unconstitutional by the Supreme Court in *Military Governor of Ondo State v Adewumi* and *Edewor v Uwegba*. Neither the Adewumi case nor the Edewor case was cited or referred to by the court but *Eguamwense* was cited and relied on. In *Osagie v Offor*, *Eguamwense v Amaghizemwen* was mentioned and even though, his Lordship, Onu JSC, was of the view that Eguamwense is clearly distinguishable, the attempt at distinguishing was feeble and the court literally discountenanced it. This was because from the court’s point of view, whether the provisions of Section 22 of the Bendel State Traditional Rulers and Chiefs law is seen as alternative or exclusive remedies, the court was of the firm view that Section 22 of the Bendel State Chiefs Law in its entirety was unconstitutional and was struck down. Having handed this decision and having considered Eguamwense before reaching it, it would appear that any other decision upholding Section 22 or its equivalent in other States’ laws is *per incuriam*. It appears that *Adesola v Abidoye* may have been decided *per incuriam*.

The case also appears to have been decided on the basis that Section 22 of Oyo Chiefs Law provided an exclusive remedy not an alternative remedy. That is why Karibi-Whyte JSC stated that “… Section 22(5) of the Chiefs Law of Oyo state, 1978 places a duty on the aggrieved authority to make his representation to the Commissioner for Chieftaincy Affairs within twenty-one days of the decision, the use of the expression ‘may’ in this situation is not merely facultative, but mandatory. There is no alternative. The aggrieved has no choice of action in the remedy provided for him.” We are however, of the humble view that upon a true and proper construction, Section 22(5) of the Oyo State Traditional Rulers and Chief’s Law provided an alternative remedy not an exclusive remedy as propounded by his Lordship.

### 2.5.4 Whether non-exhaustion of alternative remedies can be waived – the relation of waiver and jurisdiction?

One of the issues arising from the cases is the issue of waiver and the relation of non-exhaustion with jurisdiction, it being usually argued that because a party has not exhausted the alternative remedy, the action is premature and therefore, the court lacks jurisdiction. For instance, in *Adesola v Abidoye*, the issue was raised for the first time in the Court of Appeal. In *Eguamwense v Amaghizemwen*, it was raised for the first time in the Supreme Court. Similarly in *Abu v Odugbo*, it was raised for the first time in the
Supreme Court. On each occasion, the court has always entertained the issue because of the rule that an issue of jurisdiction can always be raised at any stage of the proceedings even for the first time in the Supreme Court.\footnote{57}

However, we think that there is a need to re-appraise the current attitude. Prematuredness of a case is predicated on the fact that a case has not yet ripened for a court of law to waste its precious time on it. Whether a case is ripe or premature in our humble view should be a threshold matter. If a matter or dispute has developed to the point where the parties feel able to exchange pleadings and join issues on the merits of their various cases without raising the issue of prematuredness and a decision is given on the merits of the cases without raising the issue of prematuredness, we think with respect, that it is taking doctrine too far to allow any of the parties to raise the issue of prematuredness particularly when based on non-exhaustion of alternative or local remedies on appeal. The current attitude of allowing non-exhaustion of alternative remedies to be raised as an issue of jurisdiction for the first time on appeal is reminiscent of hard technical justice, which our courts have moved away from in favour of substantial justice.\footnote{68} Non-exhaustion of alternative or exclusive remedies as a condition – precedent to civil action where applicable is a procedural matter that can be likened to pre-action notice to public authorities. The current attitude of our courts to such pre-conditions is that they are waivable and if they are not properly raised in the court of first instance, they would be deemed to have been waived.\footnote{69} There is no reason why our courts should not adopt the same attitude in the case of exhaustion or non-exhaustion of alternative remedies. Being a matter of procedural irregularity or procedural jurisdiction (not substantive), a party who is aware that a matter has not gone to the prescribed authority and goes ahead to fight his case on the merits must be deemed to have waived the right to complain. Otherwise, he should have raised the same in his pleadings and raised objection. This was what happened in Osagie v Offor and Olu of Warri v Kperegbeyi and is commendable.

The Supreme Court is humbly enjoined to use the earliest opportunity to reverse the current attitude. His Lordship, Iguh JSC in Adesola v Abidoye was not in doubt at all that certain procedural prescriptions laid down in statutes could be waived. According to his lordship, “whereas in the instant case, a special statutory provision is made for the filing of or the prosecution of a relief, the procedure so laid down ought to be followed and complied with unless it is such that may be waived.”\footnote{70} Even though Ariori v Elemo\footnote{71} was referred to, his lordship appears not to have applied the principles enunciated therein properly in the latter case.

### 2.6 Declaration, exhaustion of alternative remedies, judicial review and the merits of a decision by administrative authority

At the root of the problem of exhaustion of alternative remedies is the likelihood of having two inconsistent decisions – one by a prescribed authority and another by the High Court. The refusal of the courts to assume jurisdiction to grant a declaration in the face of non-exhaustion of an alternative remedy has been based on the undesirability of the above-mentioned scenario. The attitude of the courts has been that once authority is conferred on a prescribed authority or other administrative authority to decide a matter, the High Court’s jurisdiction to make a declaration in respect of such a matter is ousted except probably by way of judicial review.\footnote{72} As aptly captured by Karibi-Whyte JSC, the issue is “whether the High Court can exercise its declaratory jurisdiction in respect of a
matter already decided by the prescribed authority in the exercise of its statutory power.” Put differently, the issue is, whether the decision of an inferior tribunal can be challenged by way of an action for declaration in the High Court? As stated by Karibi-Whyte JSC, “Respondent has not challenged the validity of the decision of the ‘prescribed authority’ either by appeal to the Executive Council for review, or by certiorari removing it to the High Court to be quashed. It is inappropriate to do so by a declaration…. The High Court went outside its jurisdiction in granting the declaration sought.” The Supreme Court answered the question in the negative because according to it, relying on Healey v Minister of Health, granting a declaration would involve rehearing the case afresh and may lead to two inconsistent findings.

Mohammed JSC dissented on this point and held after reviewing the authorities that the High Court has jurisdiction to grant such declaratory reliefs but it is subject to the discretion of the court. We agree with Mohammed JSC. With respect to their Lordships in the majority decision, their decision is fraught with loopholes. We think, with respect, that their lordships fell into an error – the error of distinguishing between jurisdiction to entertain or grant a remedy and discretion to grant or entertain a remedy. These are entirely two different things. According to the learned authors of Constitutional Law and Administrative Law, the jurisdiction to grant declarations is as wide as the law itself, except that the judges may as a matter of discretion impose limits on its use. Continuing, the learned authors stated that the existence of an alternative remedy does not deprive the Administrative Court of jurisdiction, but requires the court to exercise its discretion: whether leave for judicial review is granted will depend on whether the statutory remedy is a satisfactory and effective alternative to review.

In reaching the above decision, the court relied heavily on Chief F.R.A Williams’ formulation of the principle as follows:

“Where an authority vested with statutory function (including power to decide any question of law or fact) exercises that function and he does so in relation to a matter of a kind over which he is authorized to act, then the validity of his action can only be challenged by an appeal or review (where that is available or by invoking the supervisory jurisdiction of the High court to quash it or set it aside). It cannot be challenged by an action for a declaration.”

The principle as formulated by Chief F.R.A. Williams is to the effect that the legality or legal validity of an administrative decision based on a statutory donation of power can only be challenged by way of an appeal or an application for judicial review. For Chief Williams, appeal and review proceedings on the one hand and an action for declaration on the other hand are mutually exclusive. This is so because according to Chief Williams, “the vesting power to decide a question of fact or law in an authority renders such decision of the authority binding on the parties affected unless and until it is nullified on appeal to the court or appropriate proceedings in the manner prescribed by the enabling statute. Hence, a party affected by the decision cannot treat it as non-existent and therefore bring an action for declaration contrary to the determination of the statutory authority.” Of course, the principle as proposed by Chief Williams was not only fallacious but misleading. The fact that a party can challenge an administrative action by way of an appeal does not automatically preclude challenge of such action either by way of judicial review or a suit in the exercise of the original jurisdiction of the court. A lot depends on the enabling statute. If the enabling statute does not make an express provision for appeal to the High Court, there is nothing in law or in fact precluding the
aggrieved party from proceeding either by way of review proceedings or by action for declaration by way of writ of summons. The fact that a party brings an action for declaration by way of writ of summons in the exercise of the original jurisdiction of the court does not mean that the party is treating the decision of the statutory authority as non-existent. In fact, a decision to bring such an action assumes the existence of such a decision by the statutory authority. That is why the action is brought in the first instance. The decision brings to the fore the controversy surrounding the nature of judicial review proceedings under the Nigerian Legal System. How do we distinguish between judicial review proceedings, appeal and an action in the original jurisdiction of the court? Is an action to be deemed an exercise of the original jurisdiction of the court merely because such an action was commenced by way of writ of summons and not by way of an application for judicial review? Surely, the answer to this question is in the negative. The essence of judicial review is that the claimant challenges the legality, not the merit or rightness of a decision. And, the mode or method by which he has come to court is not the real issue. What is important is the substance of the claim whether it be commenced by writ of summons, application for judicial review or any other mode. This is consistent with the principle of substantial justice (not technical justice) as enunciated by the Supreme Court in *Falobi v Falobi* and applied recently in *Maja v Samouris*.

A question that arises here is, if the prescribed authority has not made any declaration, will the High Court then have jurisdiction since there will be no conflicting decisions? If the prescribed authority refuses to make a declaration or continues to postpone same, will the High Court still be ousted? The proposition that the right of a claimant under Bendel State Chiefs and Traditional Rulers Edict and the remedy are created *uno flatu* needs to be re-considered. Does it mean that the right of indigenous communities to select their chief or leader in accordance with their customary law is one created by statute or is it a right inherent in the people and augmented or recognised by statute? The above question is very important because if it is a right inherent in the people, i.e., a right that existed at common law, then the whole argument about exhaustion of alternative remedies is flattened to the ground because, the doctrine of *uno flatu* as being enunciated by the courts will have no place at all. We think with respect that the right of the people to be led by their chiefs properly selected in accordance with the applicable customary law is not one created by any statute. Where a statute such as the Bendel Chiefs and Traditional Rulers Edict exists, it simply recognises this right and to that extent, the doctrine of *uno flatu* has no application here.

### 3 Conclusions – reconciling the conflict in Nigerian case law

It appears that our courts have not generally made any distinction between alternative remedies and exclusive remedies in their application of the alternative remedy rule. The Nigerian law on exhaustion of alternative remedies before access to the courts in our public law adjudication is far from being settled. This is in evidence both in its application to certiorari and prohibition, mandamus as well as declaratory reliefs (all, public law remedies). The decisions from the Supreme Court appear to establish two lines of authority. While their Lordships Wali, Belgore, Kutigi, Mohammed, Achike, Ogundare and Ejinwumi JJSC are on the one side of the divide, holding that there is no requirement to exhaust alternative remedies, there Lordships Karibi-Whyte and Olatawura JJSC are firmly on the other side of the divide holding that alternative
remedies must always be exhausted before the court can have jurisdiction to entertain any action where there are such alternative remedies. Igu and Onu JJSC appear to be vacillating in-between the two as both took part in Osagie v Offor as well as Adesola v Abidoye and both were unanimous decisions even though the change in opinion was either not explained at all or not adequately explained. Their lordships need to harmonise their views and be consistent.

The opportunity to do this presented itself recently in Okomalu v Akinbode but the court did not appear to have seized the opportunity. In that case, the Supreme Court after holding that it is elementary that High Courts have jurisdiction to grant declaratory reliefs in chieftaincy matters and they exercise that jurisdiction without equivocation went further to hold that.

“While it is good law that a court has no jurisdiction to make declarations of customary law relating to the selection of chiefs under an enabling law, it is also good law that a court has jurisdiction to make a finding of what the applicable customary law is and apply that law in respect of any declaratory reliefs. In the instant, the three reliefs in question have nothing to do with declarations of customary law relating to the selection of chiefs. Rather, they are all to do with making a finding of what the applicable customary law is in respect of the Baale of Osagere chieftaincy.”

In reaching the above decision, the Supreme Court referred to Fawehinmi v IGP, Adigun v A-G Oyo State, Eguamwnwese v Amaghizemwen, Chief Osagie v Chief Offor, Adesola v Abidoye, Abu v Odogbo, and Ikine v Edjerode.

The pertinent question that has arisen from the Okomalu decision is, “what is the distinction between the court making a declaration of customary law relating to the selection of Chiefs and the court making a finding of fact of what the applicable customary law is and applying that law in respect of any declaratory reliefs?” To answer this question, we must go back to the very nature of declaration or declaratory reliefs. A declaration is merely an authoritative pronouncement by a court of competent jurisdiction on the legal position of the parties in relation to any state of affairs. With respect, there can be no more authoritative pronouncement of the correct legal position of parties in relation to a particular state of affairs than the making of finding of fact of what the applicable customary law is and applying it in respect of any declaratory reliefs by a court of competent jurisdiction. What the Supreme Court appears to have done in Okomalu v Akinbode is to toe the line suggested by Prof. Wade that the established principle is still working but under a camouflage of reluctant or discouraging language.

What clearly stands out in that case is that the Supreme Court neither overruled Eguamwnwese nor commented on the sharp contrast between Eguamwnwese v Amaghizemwen and Chief Offor v Chief Osagie. The result is that the position remains as it has been – two conflicting decisions of Supreme Court standing. Okomalu v Akinbode is somewhat similar to Abu v Odogbo in that the matter had been entertained by the Executive Council and so the issue of exhaustion of remedies became more or less academic. However, His Lordship Niki Tobi JSC who delivered the lead judgement conceded, that, “failure to exhaust local remedies will oust the jurisdiction of the court to hear the matter…”

Another interesting issue that was thrown up by this case is the issue of bias in the administering authority. The issue of bias is pivotal in all these proceedings. In fact, it can rightly be said to be the crux of the matter. Those who refuse to go the so-called prescribed authorities do so mainly because they believe that they cannot get justice there.
as a result of interests or bias. There is therefore lack of confidence in the prescribed or administering authority. As already stated, justice is rooted in confidence in the administering body or authority. Justice is destroyed when parties are compelled to have their matters determined by particular tribunals in which they do not have confidence. In the Okomalu case, his Lordship was clearly of the view that where the minds of those who took the decision are biased, justice cannot be obtained in the circumstances. An aggrieved party was therefore free to go to court.99 His Lordship’s decision was premised on a decision taken by “the final authority (i.e., the Governor or Executive Council). The question is, what happens where it is evident that a prescribed authority is biased in favour of a party? Why should an aggrieved party be compelled to go to such a prescribed authority for a decision? The Supreme Court appears to have answered that question in Garba v University of Maiduguri.100 The action in that case was commenced in the Borno High Court without appealing or having recourse to the University Council under Section 17 of the University of Maiduguri Act, 1979. The Supreme Court held that although, under Section 17 of the University of Maiduguri Act, it is to the University Council that an appeal against the decision of the Vice Chancellor can lay, an aggrieved student can bypass the Council and come to court if he feels that his fundamental rights have been infringed upon. Our comment on this decision is that it appears to be limited to cases in which a claimant alleges a violation of his fundamental rights in the sense that a decision has already been rendered violating his fundamental rights. Query – what happens where the right has not yet been violated but it is obvious to a party that a prescribed authority is poised to violate the same by rendering a biased decision? Is he to fold his arms and wait until a decision is made against him (a decision which once made becomes an uphill task to upturn)? Is he entitled to go for a prohibitory order? If he is entitled to a prohibitory order, is he also entitled to a declaratory order? It is obvious that there can be no justice in those circumstances and the insistence on exhaustion of local remedies or alternative remedies in the circumstances amount to no more than giving a stamp of legality to an illegality. As far back as 1961, the Federal Supreme Court, per Ademola CJF, Brett and Unsworth F.JJ had in R v District Officer & Adie Oko Ex parte Eti Atem101 in answering the question, “Will certiorari lie when other remedies are available?” held that “although when an alternative remedy is available, certiorari will not be granted, it is nevertheless granted when that alternative remedy means going to some other tribunal where the appellant is not likely to get help to remedy the injustice done to him.” The basis of that decision was that certiorari like declaration is a discretionary remedy and their lordships in that case in deed went ahead to exercise their discretion in favour of the appellant by awarding the order of certiorari. The courts appear to have discarded this invaluable piece of decision resulting in erroneous decisions.

It does appear that Eguamwenese was not properly decided. That case was a clear case of alternative remedy NOT exclusive remedy. That is why Supreme Court in Abu v Odugbo came to this conclusion. However, even the decision in Abu v Odugbo itself is not satisfactory. The decision in Abu v Odugbo appears to mean that under the Bendel Chiefs and Traditional Rulers Law and similar State laws, while resort to the prescribed authority is an ‘exclusive remedy’, appeal to the Executive Council or option to go to court is an alternative remedy. The above position is simply inexplicable and irreconcilable. Abu v Odugbo approved of the decision in Osagie v Offor.102 In our humble view, this amounts, though not in so many words, to impliedly overruling
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Eguamwense v Amaghizemwen. We think the Supreme Court should use the earliest opportunity to expressly overrule Eguamwense, since it is manifestly erroneous.

We respectfully submit that the alternative remedy rule should be a rule of convenience not a strict rule of law. It is a rule that calls for some flexibility in application if substantial justice and not merely formal justice is to be achieved. According to Lloyd, one of the ways in which a legal system may aspire to attain not merely formal but also substantial justice is by imparting a certain flexibility in the rules applied by the courts or other organs of legal administration so as to confer on the judges and other legal officials the possibility of developing the law and adapting it to the needs of the society in which it operates.103 In this wise, the courts can borrow a leaf from customary law. One of the major features of customary law that has commended it is its flexibility – the ability to adapt to changed and changing circumstances. According to Osborne C.J in Lewis v Bankole, “one of the most striking features of West African native custom… is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character.”104 The Supreme Court needs to fashion out the conditions for the application of the alternative remedy rule in Nigeria and its possible exceptions. The emphasis should be on the exercise of discretion to grant or not grant the remedy, taking into account all the relevant factors. Therefore, where it will produce manifest inconvenience, such as where a party seeks to raise it for the first time on appeal as a jurisdictional issue, it should be jettisoned. That way, we would be able to reconcile the many varied opinions already produced by the conflicting decisions of the courts.

A blanket ban on right of action unless alternative remedies were exhausted without restriction or conditions when it will not apply cannot be supported. Such a blanket ban impacts negatively on the rights of the ordinary citizen to access to justice as it imposes unnecessary roadblocks and land mines in the part of litigation particularly where public agencies are concerned. Such a blanket ban was not the true import or purpose of the rule as it was developed in England not to talk of Nigeria with its written and rigid constitution with inviolable entrenched provisions. Even in international law, where the rule of exhaustion of local remedies105 is established as an important principle of customary international law,106 it is still not a rule without exceptions. According to Shaw, “the requirement to exhaust local remedies applies only to available effective remedies. It will not be sufficient to dismiss a claim merely because the person claiming had not taken the matter to appeal, where the appeal would not have affected the basic outcome of the case. This was stressed in the Finnish Ship’s Arbitration…”107 Thus, where the local remedy or alternative remedy is either not available or if available, is or will not be effective, then, its application must be jettisoned. We need to rediscover the philosophy behind the decision in Ex Parte Eti Atem and apply it consistently in our public law particularly in the award of the order of declaration. According to Prof D.I.O. Ewelukwa, a leading authority in Nigerian Administrative Law,

“It is often asserted that a declaration will not be awarded where there are adequate alternative remedies, such as certiorari or a special statutory relief. But there is no logical or legal foundation for such an assertion. Where there are alternative remedies, it still remains the prerogative of the plaintiff to choose which alternative is most likely to give him maximum satisfaction.”108

We agree entirely. Finally, our courts must strive to distinguish between alternative remedies and exclusive remedies. A judge faced with legislative provision for resort to
some other tribunal before access to the courts must faithfully construe such a provision to determine whether it is an exclusive remedy or a true alternative remedy. In the former case, such a remedy is exclusive in the sense that it must be exhausted before resort to the law courts and in no other sense. In the latter case, even though administrative convenience may suggest exhaustion of such remedy before resort to the courts, there is nothing in law or logic to prevent such an aggrieved person from exercising his right of action without resort to any other body. Indeed, resort to such other bodies may, depending on the circumstances, worsen rather than ameliorate the position of the aggrieved citizen.

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Notes

2 The impervious wall of *locus standi* has been broken in Fundamental Rights Enforcement cases by the new Fundamental Right Enforcement Procedure Rules 2009. Paragraph 3(e) of the preamble to the new Rules provides inter alia that the court shall encourage and welcome public interest litigations in the human rights field and no human rights case shall be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates or groups as well as any Non-Governmental Organizations, may institute human rights application on behalf of any potential applicant.” This is a welcome development and a boost for access to justice.
5 Anozie, M.C., supra note 3, p.218.
7 Shaw discussing the local remedies rule (the corollary of the alternative remedies rule in international law) has stated that the purpose of the rule is both to enable the state to have an opportunity to redress the wrong that has occurred within its own legal order and to reduce the number of international claims that might be brought. See Malcolm, S. (2003) *International Law*, p.730, Cambridge University Press.
8 (1955) 1 QB 221.
9 Wade, H.W.R., supra note 6, p.712.
10 See *Cooper v Wilson* (1937) 2 KB. 309.
11 Wade, H.W.R., supra note 6, p.713.
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14 Per Lord Simonds at p.206.
15 (1986) QB 424 at 435, per May, L.J.
16 Supra note 6, p.714.
17 Ibid. (Exactly what the Supreme Court of Nigeria appears to have done, i.e., taking the dicta at face value).
18 (1985) AC 835 at 852.
19 R v Epping and Harlow General Commissioners exp. Goldstraw (1983) 33 All ER 257 at 262.
20 Exp. Calvey, supra note 15.
21 Supra note 6, p.715.
22 Ibid., pp.715–716.
23 Ibid, p.716.
25 Barraclough v Brown (1897) AC 615 at 622.
27 (1831) 1 B & Ad 847, 859. Emphasis mine.
29 Ibid.
30 Formerly Section 33(2) of the 1979 Constitution. Emphasis mine.
31 (1993) 9 NWLR (Pt. 315) 1. SC.
32 Contrast with later decisions to the effect that once the prescribed authority has made a decision, the rest are alternatives as was held in Olu of Warri Kperegheyi and Osagie v Offor discussed below.
33 Per Belore JSC at p.25.
35 (1993) 9 NWLR (pt 315) 1 at 35 – The judgement of Mohammed JSC.
36 Supra note 34 at p.444.
37 Ibid, p.441.
38 Ibid, per Wali JSC at pp.441–442.
39 (1958) 1 QB 554.
40 Supra note 34, p.444.
41 (1998) 3 NWLR (pt 541) 205.
42 Ibid, per Kutigi JSC (as he then was) at pp.212–213.
43 Ibid, per Wali JSC at p.213.
44 Ibid, at p.216.
45 Ibid.
48 Supra note 46, at p.59; see also Igu JSC at p.66. According to the learned JSC, the real question for determination is whether the appellant is entitled to discountenance the adjudicative statutory provisions laid down under Section 22 Subsections (5), (6) and (7) of the Chiefs Law and resort to a declaratory action in the trial Court in the assertion of his grievance against the decision of the prescribed authority in the dispute. In answer to this question, the learned JSC stated as follows, “I find it difficult to accept that the appellant is entitled to discountenance the provisions of the said section 22(5) of the Chiefs Law of Oyo.
state and decide to go the High Court – a superior court to have his grievance relegated to an inferior adjudicating body, the Commissioner for Chiefs Affair determined.” pp.66–67.

50 *Supra note* 41.
51 *Supra note* 34.
52 *Supra note* 46, p.69.
56 (1985) 3 NWLR (Pt. 13) 493.
57 (1987) 1 NWLR (Pt. 50) 313.
58 *Supra note* 53, per Ogundare J.S.C., p.679.
59 See Onu JSC in *Osagie v Offor, supra note* 41, at p.216.
60 *Supra note* 35. See Belgore JSC at pp.23–24, Olatawura JSC at p.30 and Onu JSC at pp.42–43. Emphasis mine.
61 *Supra note* 53, at p.655, per Ejivunmi JSC.
63 *Ibid*, per Ejivunmi JSC at p.663. The major distinction one can actually make of the two cases is that in *Abu v Odugbo*, the challenge was against the decision of the Executive Council. In other words, the plaintiffs in that case could be said to have exhausted the so-called alternative or local remedies. In Eguamwense on the other hand, the challenge was against the decision of the prescribed authority. But in both cases, the gravamen of the complaint was that the appointment was contrary to the applicable customary law of the people. See the claims of the plaintiffs in the two suits – see *Abu v Odugbo, supra note* 53 at p.633 and *Eguamwense, supra note* 35 at p.17.
64 (1985) 33 NWLR (Pt. 13) 493.
65 (1987) 1 NWLR (Pt. 50) 313 at 315.
66 *Supra note* 46 at p.56.
69 See *Mobil Producing Nig. Unltd v LASEPA & Ors* (2002) 18 NWLR (Pt. 798) 1.
70 *Adesola v Abidoye supra note* 46 at pp.65–66.
72 See *Eguamwense v Amaghizemwen, supra note* 35 at pp.42–43, per Onu JSC. There appear to be some confusion here as the matter in the High Court could not have been commenced by way of an appeal. Appeal is not an originating process in the High Court. The matter was in fact commenced by a writ of summons.
74 *Ibid*, pp.24–25. Inherent in his lordship’s exposition is that if the action had been one for certiorari, then the court would have had jurisdiction to grant the remedy. Query – is certiorari any more a public law remedy than declaration? Is the law of exhaustion of alternative remedies applicable to certiorari different from the one applicable to declaration? We think not. His lordship could have as well held that no action lay at all.
75 (1955) 1 QB 221.
76 *Supra note* 35, p.23. See also Onu JSC at pp.42–43.
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77 See Bradely, A.W. and Ewing, K.D (2007) Constitutional Law and Administrative Law, p.763, Pearson, Longman. Prof. Anthony W. Bradely is a Professor of Constitutional law at the University of Edinburgh while Professor Keith D. Ewing is a Professor of Public Law at the King’s College London.

78 Ibid., p.771.

79 P.19.

80 Ibid.

81 See Mil. Gov. Ino State v Chief Nwauwa (1997) 2 NWLR (Pt. 490) 675


83 (2002) 7 NWLR (Pt. 765) 78. This is exactly what was achieved by the recent review of the Fundamental Rights Enforcement Procedure Rules 2009. By the new Rules, it does not matter the mode by which an action is commenced. What is important is the substance of the action. Order 2 Rule 2 provides that an application for the enforcement of Fundamental Right may be made by any originating process accepted by the Court, which shall subject to the provisions of these Rules, lie without leave of Court.

84 Lawal v Oke (2001) 7 NWLR (Pt. 711) 88 and Ex Parte Eti Atem (1961) 1. All NLR were all cases of certiorari.

85 Akintemi v Onwumechili (1985) 1 NWLR (Pt. 1) 68 SC dealt with mandamus.

86 Incidentally, both justices are now retired.

87 Even though Belgore JSC took part in the majority judgement in Eguamwnwese, in Olu of Warri v Kperegbeyi, he changed his position and has since maintained that position.


89 (2000) 7 NWLR (Pt. 665) 481.

90 (1987) 1 NWLR (Pt. 53) 6.

91 (1993) 9 NWLR (Pt. 315) 11.

92 (1980) 3 NWLR (Pt. 441) 205.


94 (2001) 7 NSCQR 624.

95 (2002) 10 WRN 46.

96 According to Bradely and Ewing, supra note 77, p.763, “A declaratory judgment is one which merely declares the legal relationship of the parties and is not accompanied by any sanction or means of enforcement. The authority of a court’s ruling on law is such that a declaratory judgment will normally restrain both the crown and public authorities from illegal conduct.” Accordingly, the phenomenon called declaration or declaratory judgement is as old as judicial history. See Borchard, E.M., Declaratory Judgment, cited in S.A.de Smith (1980) Judicial Review of Administrative Action, 4th ed., p.476, Stevens & Sons.

97 Wade, supra note 6, at p.6.

98 Supra note 88, at p.23.

99 Ibid.

100 (1986) 1 NWLR (Pt.18) 550 SC.

101 (1961) All NLR (Pt. 1) 51 at 56–57; (1961) A.N.L.R. 55 at 62. Emphasis mine. See also R v Wandsworth Justices ex parte Read (1942) 1 KB 281 at 285; (1942) 1 All E.R. 56 at 58.

102 Supra note 41, per Ejivunmi JSC at p.657.


104 Lewis v Bankole (1909) 1 NLR 100–101.
The alternative remedies rule is the domestic counterpart of the local remedies rule in international law. This is apparently why Belgore JSC (as he then was) in *Egiamwense v Amaghizemwen*, supra note 35 at p.25 chose to use the phrase ‘local remedies’ instead of alternative remedies.

See the Elettronica Sicula SpA (ELSI) Case, ICJ Reports, 1989, p.15; 84 ILR, p.311.


D.I.O. Ewelukwa, unpublished notes on Declaratory Judgments in Nigerian Administrative Law.