Functions, Theories And Practice Of Administrative Law In Contemporary Governance

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The vast development in the socio, economic and political spheres of the contemporary society makes governance more demanding and cumbersome. This necessitates the rational for a system of administration where governmental powers and functions can legally be delegated to individuals and or corporate bodies otherwise known as administrative bodies to carry out the functions and powers of Government in modern society. Governmental powers and functions are traceable to the Constitution which provides the limits of such powers. Administrative agencies saddled with the responsibility of performing the functions of Government must be properly created and must at all times act within the scope of power created by the enabling law. Abuse by the administrative agencies in the exercise of their functions is inevitable, and hence this research through doctrinal methodology examines the system of law that oversees the internal operations of Government agencies through developments of administrative law principles. Although various theories in administrative law like red, green and amber light have emerged over the years with conflicting arguments, the court are nonetheless always ready to grant remedies to an aggrieved citizen whenever the administrative agencies exceed or abuse its powers.

A. Introduction.

Administrative law is part of the branch of law commonly referred to as public law; and this is the law that regulates the relationship between an individual and the state and it is concerned with the exercise of
power delegated by the state. Administrative law is the body of law that governs the activities of administrative agencies of Government. Government agencies action can include rule making, adjudication, or the enforcement of a specific regulatory agenda. Administrative law is a branch of public law and it deals with decision making of such administrative units of Government as tribunals, boards or commissions that are part of a national regulatory scheme in such areas as crime, taxation, immigration and transportation. It must be appreciated that administrative law expanded greatly during the twentieth century, as legislative bodies worldwide created more government agencies to regulate social, economic and political spheres of human interaction. A person, people or bodies may be affected by the policies and actions of an administrative authority. Therefore unless the law regulates the functions, and powers of administration, it may be unruly and aggrieved persons may be without remedy.

Based on this background, the author examines the rules governing the regulation of powers delegated by the state relating to procedures, special rules and regulations of government institutions. This research is expected to contribute to regulations, especially in the study of functions, theory and practice in government. The novelty of this research will make a significant contribution to determining the means, functions, and theories in the practice of administrative law in contemporary government

B. Discussion

1. Conceptual Framework

The conceptual framework adopted for this paper is the rule of law doctrine. Among the frontline apostles of the doctrine include erudite Aristotle, John Locke, Baron Montesquieu, and Albert Venn Dicey. The doctrine is capable of several meanings. However, one of its assumptions is related to this paper. Supremacy of the law is opposed to arbitrary use of power by the administration.

1.1 Concept of Administrative Law

In the field of law, the most significant and outstanding development of the 20th century is the rapid growth of administrative law. Administrative law is a branch of public law that is concerned with the procedures, rules and regulations of a number of governmental agencies. Administrative law specifically deals with such administrative agencies’ decision making as they carry out laws passed by state and Federal legislatures. Administrative law as a special legal topic has been a matter involving many difficult questions. For some people it is a branch of constitutional law dealing with the separation
of powers and with judicial review of administrative action. To others it is primarily a series of statutory enactments which create new quasi-judicial tribunals or quasi-legislative bodies together with the decisions of those bodies dealing with cases coming before them and the formulation of rules of procedure and of substantive law.\(^\text{12}\)

1.2 Definition of Administrative Law

Administrative law deals with the legal control of government and related administrative powers. In other words, we can define administrative law as the body of rules and regulations and orders and decisions created by administrative agencies of government.\(^\text{13}\) Administrative law consists of complaints relating to government action that adversely affects an individual (or a juristic entity). Thus, administrative law involves determining the legality of government actions. There is a two-fold analysis: the legality of the specific law itself and the legality of particular acts purportedly authorized by the specific law. Governments cannot perform every act by itself. Governments act through public officials who must act within certain limitations.\(^\text{14}\) A government’s power to act comes from the Constitution and or legislation. Thus, government officials must act within the parameters (or scope) of such legislation which give their actions lawful authority. These are lawful actions. If government officials act outside the scope of their lawful authority and individuals are affected by these acts, then the principles of administrative law provide individuals with the ability to seek judicial review of the administrative action and possible remedies for the wrongful acts.\(^\text{15}\) It is indeed difficult to evolve a scientifically precise and satisfactory definition of administrative law.

Many jurists have attempted to define it. But none of the definitions has completely demarcated the nature, scope and contents of administrative law. Either the definitions are too broad and include much more than what is necessary or they are too narrow and do not include all the necessary contents. Below, I explore some of the definitions provided.

**Definition by Ivor Jennings**

Ivor Jennings provided the following definition of the term ‘administrative law’.\(^\text{16}\) According to him; ‘administrative law is the law relating to the administrative authorities’. This is the most widely accepted definition, but there are two difficulties in this definition.

1. It is very wide definition, for the law which determines the power and functions of administrative authorities may also deal with the substantive aspects of such powers. For example: Legislation relating to public health services, houses, town and planning etc. But these were not included within the scope and ambit of administrative law as defined by Jennings, and

2. It does not distinguish administrative law from constitutional law.

**Definition by K. C. Davis**

According to K. C. Davis; ‘Administrative law as the law concerns the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action’.\(^\text{17}\) Interestingly, this definition only touched some aspects of the scope of Administrative law and therefore not comprehensive enough.

**Definition by Prof. Wade**

According to HWR Wade, any attempt to define administrative law will create a number of difficulties. But if the powers and authorities of the state are classified as legislative, administrative and judicial, then administrative law might be said to be ‘the law which concerns administrative authorities as opposed to the others’.\(^\text{18}\)

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Again, there are also some difficulties with this definition. It falls to distinguish administrative law from constitutional law, similar to Jennings’ definition mentioned above. Furthermore, this is also very wide definition. It includes the entire legal field except the legislature and the judiciary. It also includes the law of local government. It is also said that it is not possible to divide completely and definitely the functions of legislative, executive and judiciary. It is very difficult to say precisely where legislation ends and administrative begins. Though enacting laws is a function of the legislature the administrative authorities, legislate under the powers delegated to them by the legislature and this delegated legislation is certainly a part of administrative law.

**Definition by Jain and Jain**

According to Jain and Jain:

‘Administrative law deals with the structure, powers and function of the organs of administration, the limits of their powers, the methods and procedures followed by them in exercising their powers and functions, the method by which their powers are controlled including the legal remedies available to a person against them when his rights are infringed by their operation’.

Administrative law, according to this definition, deals with composition and the powers of administrative authorities, fixed the limits of the powers of such authorities, prescribes the procedures to be followed by these authorities in exercising such controls of these administrative authorities through judicial and other means.

**Definition by Griffith and Street**, the main object of administrative law is the operation and control of administrative authorities. It must deal with the following three aspects:

a. What are the limits of those powers?
b. What sort of power does the administration exercise?
c. What are the ways in which the administrative is kept within those limits?

In an attempt to improve the definition of Griffith and Street’s, the Indian Law Institute, postulated the following two aspects that must be added to the definition with a view to have a complete idea of the present-day administrative law:

a. What are the procedures followed by the administrative authorities?
b. What are the remedies available to a person affected by administration?

**Definition by Garner**,

Administrative law may be described as ‘those rules which are recognised by the court as law and which relates to and regulate the administration of government.’ Thus, Administrative law can be defined as the science of administrative authority, and the nature of such authorities' powers can be investigated under three headings: legislative or rule making; purely executive; and judicial or Adjudicative.

2. Notable Principles of Administrative Law:

2.1 Judicial Review:

The exercise of legal power may often involve the exercise of discretion to choose between alternative courses of action or, indeed, whether to act at all. However, the essence of discretion is that it is contained within legal limits. A power not contained within such limits would be arbitrary. The principles of judicial review serve to set legal limits to the exercise of discretionary powers. Judicial review is a process for challenging the legality of a decision by a government or administrative agency and ensuring that the decision is made within the framework of a constitutional law. It is a means of ensuring that the actions of public authorities are consistent with the rule of law and the constitutional framework. The principles of judicial review are based on the idea that the judiciary should have the authority to determine whether decisions made by public authorities are in accordance with the law. This is achieved through the examination of the decision-making process and the application of legal standards and principles. Judicial review is an important tool for ensuring that the actions of public authorities are consistent with the rule of law and the constitutional framework. It plays a crucial role in protecting individual rights and freedoms, and ensuring that the executive and legislative branches of government do not exceed their powers.

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review is concerned with the legality of the decision made, not with the merits of the particular decision.\(^\text{23}\)

Although the judiciary in Nigeria is a creation of the Constitution which positively granted powers that, in the end, transcend the Constitution itself.\(^\text{24}\) It through its power of review or the interpretative adjudication assumes, inadvertently, superiority over all other organs and the constitution. This paper is not unaware that there are some democracies without written constitutions and in which case the Parliament may be sovereign in the sense that the courts lack power to set aside or void any law made by it.\(^\text{25}\) It also agrees that courts in some democracies with written constitutions do not have power to review and declare an act of the Parliament void.\(^\text{26}\) In such democracies, the search for general or legal supremacy must take a different approach. Nigeria is a constitutional democracy with a written constitution vesting in the judiciary the power of review of both executive and legislative acts and its decisions are binding on all persons and authorities within the Federation.\(^\text{27}\)

### 2.2 Principle of legitimate expectation:

According to this concept a 'legitimate expectation' entitles the complainant to be heard before an adverse decision is made against him. It is not necessary to show that the decision affects his pre-existing right(s).\(^\text{28}\) It was for the purpose of restricting the right to be heard that 'legitimate expectation' was introduced into the English law. It made its first appearance in an English case where alien students of 'Scientology' were refused an extension of their entry permits as an act of policy by the Home Secretary, who had announced that no discretionary benefits would be granted to this sect.\(^\text{29}\) They had no legitimate expectation of extension beyond the permitted time and so no right to a hearing, though revocation of their permits within that time would have been contrary to legitimate expectation. Official statements of policy may cancel legitimate expectation; just as they may create it.‘

Nigerian courts have applied the principle of legitimate expectation in several cases and the most recent case was the celebrated case of Orient Properties Devt. Co. Ltd v Federal Ministry of Housing and Urban Devt\(^\text{30}\) where the Court of Appeal stated the general principle that the Court will intervene to prevent a decision-maker from making a particular decision, or will quash a decision that is already made, where the decision-maker's prior actions or inactions would make it unfair for that decision to stand.

### 2.3 Principle of reasonableness:

The concept of discretionary decision-making is one of the main issues of administrative law. The term discretion has been used to indicate administration’s choice to achieve its goal without arbitrariness since it achieves its goals by involving all citizens. Wielding this power, it can make choices from a range of solutions, but bounded by the principle of reasonableness. This principle expresses the logical relationship that must exist between discretionary decisions and the evaluation of all public and private interests involved in the circumstances of the case.\(^\text{31}\)

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\(^\text{24}\) By the clear provisions of Section 235 Constitution of the Federal Republic of Nigeria, 1999 (As amended); "no appeal shall lie to any other body or person from any determination of the Supreme Court." As the highest court of the land, it enjoys finality of authority, subject only to principles of natural justice, as are embedded in the rules of interpretation, which must constantly guide the court in its determination of matters brought before it.

\(^\text{25}\) England is a good example of these countries.

\(^\text{26}\) The third republic of France, and Canada are with written constitutions, but without the courts having power of review; Malaysia and Swiss both have written constitutions, but with limited power of review vested in the courts.

\(^\text{27}\) See Omidiran v Orabeku & Anor (2013) LPELR-20527 (CA).


\(^\text{29}\) Schmidt & Another v Secretary of State for Home Affairs [1969] 2 Ch 149 (CA), [1969] 1 All ER 904.


2.4. Principle of good governance:
Definitions of ‘governance’ vary across organizations and contexts.\textsuperscript{32} Graham define governance as a ‘process whereby societies or organizations make their important decisions, determine whom they involve in the process and how they render account’.\textsuperscript{33} According to Kaufmann,\textsuperscript{34} governance is ‘the traditions and institutions by which authority in a country is exercised’ as well as ‘the process by which governments are selected and replaced, the capacity of the government to formulate and implement sound policies, and the respect of citizens and the state for the institutions that govern economic and social interactions’. Common to these definitions is an emphasis on process; i.e. how decisions are made and implemented, and how decision makers are held accountable. Good governance is about the processes for making and implementing decisions. It is not about making ‘correct’ decisions, but about the best possible process for making those decisions. Good governance has eight major characteristics and they are participatory, consensus oriented, accountability, effective and efficient, equitable and inclusive, rule of law and transparent.\textsuperscript{35}

2.5. Principle of natural justice:
There is a general adage that provides ‘not only should justice be done, but it should be seen to be done.’\textsuperscript{36} It is not a written law but has been developed by courts in process of their judicial decisions. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, ‘an essential in-built component’ of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

2.6. The principle of rule of law:
‘Where laws do not rule, there is no constitution.’\textsuperscript{37} The notion of the rule of law can be traced back to at least the time of Aristotle who observed that given the choice between a king who ruled by discretion and a king who ruled by law, the later was clearly superior to the former.\textsuperscript{38} The essence of the rule of law is that of the sovereignty or supremacy of law over man and the government. The rule of law insists that every person- irrespective of rank and status in society- be subject to the law.\textsuperscript{39} Although it is always a good precept to beware of fashions in legal thinking, there is substantial support for the view that the foundation of modern administrative law is the rule of law.\textsuperscript{40}

2.7. The principle of accountability:

The principle of accountability requires that there must be in place forums in which decision makers may be called to account to justify their actions. Such accountability may be political or legal. A minister should be accountable to Parliament at the political level to justify, for example, that decisions taken are in the best interests of the nation. The principles of judicial review enable the courts to call decision-makers to account for the legal propriety of their decision-making. The principle of accountability helps in making a clear distinction between direction and arbitrariness. An arbitrary power is one which is open-ended, not subject to identifiable limits and, therefore, not capable of being controlled by the courts.

2.8. Objectives of Administrative Law:

Over the past decade it appears that administrative law has been minimized, allowing a number of governmental agencies to run ineffectually. Ultimately, this has resulted in numerous economic and environmental calamities within the United States, i.e.; British Petroleum, Enron, Wall Street, and the auto industry. The majority of governmental agencies within the United States are underneath the executive branch, with few being a part of the judicial and legislative branches.

Following are the objectives of administrative law:

a. Control of government powers;
b. Remedy to aggrieved person;
c. Equal status of state and public;
d. Effective use of government power;
e. Public utility;
f. Determination of government and public disputes;
g. Determination of social problems;
h. Performance of administration – improvement; and
i. Maintenance of rule of law.41

3. Theories of Administrative Law

When determining the role of judicial control over public administration with an intent to prevent an abuse of power and limit administrative discretion, there are various schools of thoughts that question whether the executive actions should be brought under strict judicial control or executive actions should be independent of judicial control or a mid-way should be adopted between the two.42 Therefore, there were three theories of administrative law that help in understanding all these discourses i.e. the red, green and amber light theories.

3.1 Conceptual development

The notion of traffic light theories i.e. red and green light theories in administrative law was first used by Harlow and Rawlings in 1948 A.D. in assessing the objectives of administrative law.43 These theories emerged as a result of extensive intellectual debates on the relevance of judicial control over executive actions. The landmark case of Marbury v. Madison44 decided by the American Supreme Court in 1803 A.D. was the first case to have recognized judicial supremacy45 and it is exercise through judicial review. This was later acknowledged by countries under common legal system such as Canada, Australia, New Zealand, India and Nepal wherein courts started applying the principles of administrative

44 (1803) (1 Cranch) 5 U.S. 137.
law to evaluate the plans, policies and actions of the government. This raised multiple crucial questions throughout the globe such as:

1. What is the role of the law? What is the function of the judiciary?
2. Should courts be primarily responsible for administration?
3. Who is to be entrusted with the ultimate power – government or the judiciary?
4. Would it be appropriate to borrow the model of private legal adjudication in settling administrative (public) disputes?
5. Should individual rights gain primacy over public interests?

In the early 1990s, there arose a huge debate worldwide over the concepts of “New Public Management” in England and “Reinventing Government” in America for governance reform. The conventional school of public administration favoured rule of law and significance of legal rules and directives for the operation of administration; whereas the new school supported the idea of governance reform that aimed to make administration more result-oriented through deviation from rigid legal rules and directives.

In this way, these political debates contributed to the development of various new thoughts and ideologies within the ambit of administrative law. One of such thoughts raised a prominent question as to whether the executive actions should be brought under strict judicial control or executive actions should be independent of judicial control or a mid-way should be adopted between the two. This question was then addressed through the foundation of traffic light theories. Initially, only the conception of red and green light theories existed. But, in 2004, two scholars namely Wade and Forsyth shed light upon the amber element between the two theories. Consequently, these theories came into being.

3.2 Red light theory

The red light theory is believed to have originated from the laissez-faire political tradition of the 19th century. This tradition held deep-rooted suspicion towards executive power and sought to minimize the encroachment of the state on the rights (especially property rights) of individuals. The concept of “legal sovereignty” explained by Dicey well portrays the idea of red light theory as he maintains that the government must function in accordance with the legal rules laid down by parliament. Thus, under circumstances wherein the government does not act according to these determined rules, the courts have a power to control it and ensure that it acts lawfully. The red light theory is closely associated with the principle of ‘self-correcting democracy’ in which the rule of law remains a prime concept. The law is regarded as an autonomous and coherent discipline which performs an important control function (‘checks and balances”).

A major assumption of this theory is that when public bodies or executive authorities exceed their powers, judicial intervention works as a sanction. This is because bureaucratic and executive power of the state and its institutions, if unchecked, will threaten the liberty of all individuals. Thus, judicial control is required in the political framework of a state. These are the various tenets of this theory:

1. Courts are the primary weapon for protection of the citizen and control of the executive.

46 Ibid.
47 Ibid; Stott & Felix (n1) 29.


51 Ibid.
2. The supremacy of law must prevail over politics.
3. The administrative authorities must be kept under judicial control.
4. For judicial control, the general system of adjudication is appropriate.
5. Public law must be oriented towards strengthening individual liberties.
6. The world of law is apolitical, neutral and independent of the world of government, politics and administration.
7. Administrative law should aim to curb or control the state.

3.3 Green light theory

As there spread multiple critiques and challenges to the red light theory, an alternative tradition emanated between the two world wars. This tradition constituted a counter theory to the red light theory termed as the “green light theory.” This theory maintains that the use of executive power to provide services for the benefit of the community is entirely legitimate. Thus, the function of the courts in checking executive action is a questionable activity. However, it does not favour unrestricted or arbitrary action of the state.

The green light theory, also perceived as functionalist theory, holds a positive outlook towards the state. It believes that the government is congenial and it cannot be suspected of committing unlawful actions. The green light theory thus emphasizes on how it is important for the administrative law to facilitate government action rather than intervening in it through judicial or political control. It suggests how law can be used as an enabling mechanism so that it acts as a weapon to the administrative bodies. This alludes towards a proposition that the collective (public) goals can be met by granting wide powers to the Executive and making it independent of judicial restrictions.

These are the various tenets of this theory:

1. Law is merely a matter of political discussion. Thus, law is not superior to administration or cannot prevail over administration.
2. Public administration is not a necessary evil but a good element of the state.
3. Administrative law should not only focus towards prohibiting negative practices of the government. It should also work on facilitating the administration and sound administrative practices.
4. For encouraging the administration, adjudication based on legal rules is not the sole appropriate idea.
5. There can be other alternatives to courts.

Therefore, the main concern of green light theory is to reduce the influence of courts over administration because the courts with their legal values are considered as a hurdle to administrative progress. The green light theory prefers democratic form of accountability.

3.4 Amber light theory

While the red and green light theories hold two different standpoints in administrative law, the amber light theory tends to bring a point of consensus between the two. The amber light theory maintains that administrative law should apply the positive elements of both the theories. This theory identifies the essence of both “fire-watching” as well as “fire-fighting.” The administrative law can perform “fire-watching” by setting good standards of administrative conduct and “fire-fighting” by nullifying erroneous administrative actions through court pronouncements.

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53 Scot & Felix (Supra) p. 30.
54 Ibid.

56 Carol Harlow & Richard Rawlings. Law and Administration. Cambridge University Press, New York, USA, 60.

The amber light theorists believe that there must be a balance between both external as well as internal controlling mechanisms for effective public administration. The amber element between the two theories has somewhere been realized by green light theorists too. As recognized by Harlow and Rawlings, green light theory does not wish to suggest that it favours unrestricted or arbitrary action by the state. In fact, it does not rebut the rigidity of red light theory to some extent.

These are the various tenets of this theory:

1. Law is both discrete from and superior to politics
2. The state can successfully be limited by law although that law should properly allow for the administration to enjoy a degree albeit controlled degree of discretionary authority.
3. The best way of controlling the state is through the judicial articulation and enforcement of broad principles of legality.
4. The goal of this theory is to safeguard a particular vision of human rights.

In this way, the amber light theory is a synthesis that combines the necessity for some control over administrative decisions with concern for setting good standards of administrative conduct, effective decision-taking, accountability, and human rights. It has a close association with both theories; however, it does not support the existence of any one theory in isolation. It acknowledges the tenets of both the theories and tries to reconcile between the two.

Analysis of theories

All these theories had been propounded at various points of time in order to determine the objectives of administrative law and the extent to which public administration can use discretion in exercising its powers and functions. The red light theory asserts that the administration must not be given uncontrolled discretion. If it is allowed to exercise unlimited discretion, there are high probabilities for it to misuse its powers. Thus, the aim of administrative law must be to keep the government under strict control so that the liberties of all citizens are protected.

Contrarily, the green light theory maintains that public administration cannot function efficiently when kept under strict judicial control. It does not deny the role of law entirely however proposes that even if the mechanism of law is applied to public administration, it should be facilitative rather than restrictive or controlling.

Finally, the amber light theory seeks a point of consensus or reconciliation between the two theories and holds that no one theory prevails over the other. In fact, both the theories have positive elements in their tenets. And, the aim of administrative law should be to extract positive elements from both theories and apply those in the state framework. If we are to assess the significance of each of this theory, it is the amber light theory that should gain primacy because it tries to connect both the red and green light theories without alleviating their individual essence.

Having examined the foregoing theories of Administrative Law, it may be inferred that public administration must be permitted to exercise a certain level of discretion in the exercise of their functions. However, the administration should not be left uncontrolled. There must be some limitations to their powers in order to prevent any potential misuse or abuse of those powers. Most importantly, the supremacy of law should prevail in order to protect individual liberties.

C. Conclusion/Recommendation

The rapid socio-economic development, information technology and population in the contemporary world unlike the primitive world made effective governance almost impossible without administrative bodies with technical acumen to carry out the required functions. In as much as the administrative bodies’ duties is to act within the enabling law with strict observance of the rule, judicial review of such administrative decisions is inevitable in case of arbitrary exercise of power.


Courts must guide their jurisdiction over every institution including administrative bodies in a society jealously, irrespective of exclusion clauses in the enabling law establishing or empowering the administrative bodies. For effective administration, administrative bodies must be allowed to exercise some level of discretion in the cause of their duties in as much as such discretion is not repugnant to natural justice, equity and good conscience. There must be some limitations expressly spelt out in the enabling law to the powers of administrative bodies in order to prevent any potential misuse or abuse of those powers. An administrative body acting ultra-vires or arbitrarily must always be checked to prevent arbitrariness. Courts must not be shy from awarding substantial damages where necessary to aggrieved individuals affected by the unlawful or wrongful act of the administrative bodies. Since the objective of administrative bodies is to serve the citizen better, every member of the society must co-operate with administrative bodies to achieve the desired results.

Bibliography


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England is a good example of these countries.


For example, Nigerian Communication Commission (NCC) is an agency of Federal Government established to make rules for the regulation of Telecommunications in Nigeria.


Jain and Jain, ‘Definition and Scope of Administrative Law’ accessed from
https://www.academia.edu/15316267/Definition_and_Scope_of_Administrative_Law
Legal Dictionary, https://legaldictionary.net/administrative-law/
Like Economic and Financial Crimes Commission (EFCC) in Nigeria.
https://www.jstor.org/stable/40709526
The third republic of France, and Canada are with written constitutions, but without the courts having
power of review; Malaysia and Swiss both have written constitutions, but with limited power of
review vested in the courts.
Tribunals of Inquiry Act, Laws of Federation of Nigeria 1990 empower the President to constitute
Tribunals of Inquiry and other matters ancillary thereto.