Roundtable on Administrative Law: Proceedings

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Professors Anthony, Pooley, and Pooley discuss the role of Administrative Law in the Development Process, emphasizing the concept of the rule of law and its implications in less-developed countries. They consider two main lines of inquiry: how adequately do the received systems of administrative law serve the development needs of newly-independent countries, and where should the criteria be to strike the balance between effective development and the rule of law values of protecting private parties? The discussion highlights the importance of administrative law in facilitating development, yet acknowledges the challenges it faces in authoritarian or corrupt environments.
different emphasis from that which one would adopt if one were looking into similar problems either in the United States or Great Britain. Under the Nkrumah government, where a clash occurred between what the government perceived as being the necessities of development and individual liberty, or legalitarianism, the imperatives of economic development took precedence. Therefore, one finds very little concern, either during the colonial period when one would expect little such concern, or since independence, with the problems of the individual, especially the problems of the individual when taken before a court, when he is aggrieved by some decision affecting him, especially governmental decisions which flow through the medium of a statutory corporation.

The proper concern of the lawyer in these areas should be with the question: how are the statutory corporations set up; what sort of legal characteristics do they have; what the government and others have supposed them to be; what their aims have been; and how far they have been successful in securing those aims, and insofar as they can be perceived to be unsuccessful, what were the causes of failure? To what extent has this lack of success been due to a lack of flexibility, innovation, and so on, on the part of lawyers who have been concerned with advising the government with respect to appropriate devices for the channeling of government investments?

In this connection, I might note that a great deal of effort from western countries is available with respect to economic expertise, and sometimes with respect to expertise regarding administration. Ghana has had a number of development plans which have been fairly specific as to the role of a public sector, and as to the role of statutory corporations in that sector. As a result of the economic difficulties which occurred in Ghana in 1966, a great number of advisory teams from the I.M.F., from the World Bank, from the United Nations, U.S.A.I.D., and so on, have been rendering advice to the Ghana government, and I think it is important to note at the outset that as far as I know, none of these groups contained any lawyers—all the advice was received from economists. The most important government officials are themselves economists, brought up in the British tradition of the law in which, I suspect, the role of lawyer—certainly the role of the Attorney General’s Department, and the government lawyers—is more or less confined to that of draftsmen—drafting instruments which others have decided upon. And therefore, the beasts, so to speak, with which we have to deal, are beasts which are not necessarily the creation of lawyers, but with which lawyers nonetheless have to work.

I think it was foreseeable that upon independence, given a strong inclination on the part of the independent government of Ghana quickly to accelerate the economic growth of the country by means of public investment, that the device of the statutory corporation would be used; partially because English-trained lawyers, English-trained Ghanaian lawyers, were used to this device in England; partially because under the Colonial government itself, long before statutory corporations in the manufacturing and distributing areas were set up in England, such corporations did exist in Ghana, and therefore, this device seemed to come to hand very naturally.

One of the criticisms that I would make is that there is implicit in the idea of the statutory corporation a great misunderstanding as to what this
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being is; and in Ghana, for example, in the early days, pre-independence, and in some cases post-independence, wholly government-owned corporations were set up under the company’s ordinance, as though they were ordinary corporations.

Even when the government established such corporations either by executive instruments or by legislative instruments, or by act of the Assembly, one still found the sort of language which is appropriate to a private corporation—it being said, for instance, in the statute that the corporation has a paid-up capital of so many pounds, or cedis, or whatever it was.

And one finds that the only duties which are put upon Boards of Directors are sort of duties that one finds with respect to a private corporation, with respect to audit, and so on. It might be said that this is a misapprehension, for surely a statutory corporation is nothing like a private corporation at all; it is a wholly-owned government entity, and it seems to me to be not inappropriate, but inevitable, that the government is going to take a very strong interest in what happens in this corporation. The government’s interests in what happens in this statutory corporation are much greater than the government’s interests in a private corporation.

Further, the interests which have to be protected, and the forms of behavior over which government might have some sort of control, are also necessarily different in a public corporation from a private corporation. A private corporation is involved with stockholder interests and creditor interests; it is involved with the interest of the public; one is concerned with making public the accounts of the corporation, and so on.

The interests of the Government might be somewhat different. When one looks at the vast array of statutory corporations which were established between 1957 and 1964, one can, I think, determine that they were set up with potentially a variety of different purposes in mind. Some were set up, I think, quite clearly and frankly as more or less public utilities corporations, to render a public service, possibly on a subsidized basis, such as transportation systems. State publishing corporations for school books—and it was appropriate for the Government to run that as a subsidized operation.

Another professed aim in setting up corporations was to engage in manufacturing by way of import substitution. There, obviously, an economic line has to be drawn somewhere. One would not necessarily suppose that an industry, an infant industry, set up for the purpose of saving foreign import would operate at a profit on the day by day, month by month, year by year operation. But there obviously comes a point at which one cannot tolerate a loss.

A number of other purposes come to mind. Probably the most important statutory corporation in Ghana is the Cocoa Marketing Board, a body set up to have a monopoly of purchasing cocoa locally, and selling it on the market, purchasing at low prices and selling at whatever it can get in the world market. It provides far more income to the Ghana Government than any other form of tax. It was clearly also the aim of the Nkrumah Government to establish corporations in Ghana, both to occupy what Britain has been called the commanding heights of the economy, to make sure that strategic interests were not in the hands of foreigners, and also make
sure that the strategic goods were produced in Ghana, rather than Ghana being dependent upon its supply from outsiders.

And some corporations probably were set up simply as a Government investment in industry, and were designed to make a profit.

If one looks at the post-'66 situation, one finds that virtually all the political and economic debate about these corporations centers around whether they were or were not successful, and success in these terms happens to mean profitable. Did they or did they not make a profit? It does seem to me that this ignores possibly one of the most important aspects of the whole operation, and that is the purpose for establishing the corporation in the first place.

Here it seems to me that the similarity, the alleged similarity, between the private corporation and the public corporation, leads the Government, or has led the Government in Ghana, to omit from its thinking at the time of the establishment of the corporation, those factors which clearly should be spelled out—whether the corporation is supposed to make a profit; whether it is supposed to provide a public service; if so, what public service. If it is to run at a loss, what kind of loss; what kind of global sum is the Government thinking of putting into this enterprise; and then one comes across another set of important distinctions, it seems to me—who are the personnel of the corporation? Is there someone who sits as managing director—a civil servant, subject to notions controlling Civil Servants as these notions were received from the British; or is he an independent agent, an independent contractor hired out to the Government; or is he something else. Obviously, it's very important to these personnel to know where they stand, for one of the most important complaints being made about statutory corporations is weakness of the managerial level.

One might raise the question, is this not because the status of managerial staff has not been made clear? Bob Seidman has, in published writings, alluded to the great difficulty which confronts a corporation if it is conceived of as being a Government department and if, therefore, its staff is conceived of as being Civil Servants governed by Civil Service guidelines—especially British Civil Service guidelines. What is such a man going to do if he is expected to show a large amount of initiative in commercial enterprise? In marketing, for example, in advertising a new product, and making feasibility studies, and so on, is he likely to be—and do the terms upon which he is appointed allow him to be—a person who is inventive, imaginative and so on, acting on his own. Or, is the reverse the case? Does Government really want somebody in charge of the corporation who will on a day to day basis be responsible, either to a Minister or to an Assembly—or what is to be the basis of the relationship between the corporation and Government?

Here, it seems to me, is the nub of the administrative question, and that is to describe how these corporations fit into the structure of Government; what kind of value you give to that, and to what extent—it's never been clear in Ghana—to what extent they are subject to normal rules affecting all persons of the Government. Do they pay taxes? It was only recently pointed out that conceivably some of the State-run pioneer industries might have applied for pioneer status in Ghana, which would
have given them a five-year tax-free run. The people thought they had no rights to apply for such status, and this obviously increased their loss.

Further questions are attached to the very complicated matter of communication between one corporation and another, because of the perceived British ideas as to how such corporations are responsible to the Government. They have in the past been responsible to a particular Minister, with no requirement other than through a very feeble State enterprises Secretariat, which never really worked, such that one found that many corporations, up to 70 in number, often working at cross-purposes—one with another.

Finally—I don't want to speak too long about this—it is an enormously, large, important question one now has to consider, what has happened since the coup, and what the Ghana Government has done as a result of advice tendered to it.

It is quite clear that this advice has caused the Government to suppose that its best interests lie in making these corporations entirely independent of the Ghana Government. For example, the Electricity Corporation was established in 1967, and the next year, 1968, they received a $10 million dollar loan from the World Bank. It was established as a completely separate entity. The Government's only power is to nominate the Board of Directors in the first instance; it has no powers to give directions, even general policy directions. It seems to me while such a policy might in the short run make the possibility of a loan from the World Bank to that corporation more feasible, it is idle to suppose that under a civilian government in Ghana, individuals elected to the Assembly are going to take no interest in whether electricity is taken to their rural areas, and that this will not become a matter of political debate. Obviously in an undeveloped country, it is one of the things most people are interested in. Electricity is now being produced there in very substantial quantities; therefore, it does seem to me to be a little unrealistic to suppose that this mammoth corporation can continue to run completely independently of the Government.

The other matter is the fact that 19 of the principal manufacturing corporations have, by a National Liberation Council Decree, been amalgamated, and there is now one corporation, the Ghana Industrial Holding Corporation, which manages the affairs of all these 19 industries, a total investment of some $75 million. Here, again, the Ghana Industrial Holding Corporation is set up pretty much independently of Government—not quite as much as electricity is in administration, because the Commissioner for Industries has some voice in management.

But, again, one wonders to what extent the management of $75 million worth of Government investment can really be put in the hands of private individuals.

These are some of the problems which seem to me to arise with respect to statutory corporations. I suspect that Bob Seidman's paper, hopefully, will provide some of the answers.

(Applause.)

MR. ANTHONY: Professor Robert Seidman, of the University of Wisconsin, is spending the year in East Africa, and he has been unable to get to this meeting. He has, however, prepared a paper which will be
presented to us by Dean Y. P. Ghai, the distinguished Dean of the University of East Africa, Dar es Salaam. Mr. Seidman's paper is on the subject of the Adequacy of the Received System of Administrative Law to Serve the Development Needs of Anglophonics.

PROFESSOR Y. P. GHAI: I'm at a slight disadvantage in presenting Seidman's paper, since I've been told it is too long to be read, and has to be summarized. I've only read it once myself, so I hope you will bear with me if it is not coherent.

Seidman starts his paper by alluding to the corruption, and the rumors of corruption, in Africa, to the Mau Mau Administration, and executive action. He says that in the very early days of independent administration, governments are legitimized by charisma—charisma of the leaders who led. But charisma wears thin with time, and already in many parts of Africa, charisma has been unable to hold the nation together. There is, therefore, need for institutional rules to keep the country together, to legitimize administration and to win acceptance of the people for the tasks and methods of the Government.

The Anglophonics African country has inherited common law administration, which worked reasonably well in Britain, and worked reasonably well in Colonial Africa, and gave an impression of legitimacy of certain nationalities. But the feeling now is that these rules are no longer relevant or adequate for the independent Governments in Africa, and the question that Mr. Seidman discusses is how is it that the rules which were inherited by the Governments in Africa, and which functioned reasonably well in Britain and in Colonial Africa, are no longer functional. He does not assume, as some other people do, that the politicians are corrupt, or civil servants are physically incompetent.

To answer these questions we shall first examine Weber's classical definition of bureaucracy, and draw from it its implication for administrative law. We shall then examine the norms of administrative behavior in Britain and Colonial Africa, and the specific constraints. Finally, we shall examine these institutions as received by independent Africa, with its specific constraints, and the emerging new institutions which aim at achieving the legitimacy that the received institutions were unable to ensure.

Legitimacy is seen as having two aspects, substantive legitimacy and formal legitimacy. Substantive legitimacy consists in planning which meets the needs of the people, and which answers their petitions. Formal legitimacy consists in the procedures which are employed in administration. Formal legitimacy must be instrumental to the various political institutions and society.

There must be a clear-cut division of labor through the distribution of official duties in a fixed way—officers organized in a methodical manner, operations governed by a consistent system of fixed rules, consistent application of these rules to particular cases, and the conduct of office in a spirit of impartiality, without the bias of human emotions. To achieve this formal rationality, it is necessary that there should be four conditions. First of all, there must be channels of communication up and down—up to the administration, down to citizenry. Secondly, in order to insure a division of labor which is decided by rule and not by whim, administrative rules
must be defined as narrowly as the nature of the case will admit. Thirdly, there must be norms of procedure that contain built-in assurances that decisions will be taken in as secularized a way as possible. There must be procedures to insure that there is an adequate input into the decision-making, and that there is an adequate feedback device. The last requirement, as seen by Seidman, is that there must be institutions to supervise the application of the norms of administrative law, and to sanction the breach thereof.

I will only summarize the next part of the paper, which is a discussion of the English legacy to Africa. This is a discussion of the rules of English administrative law. An attempt is made to demonstrate how the criteria set out by Weber were met in English context, by the rules of English law. These rules depended for their efficacy upon active and vigorous parliamentary systems, on well-established codes, and on the knowledge by the people of their remedies under the law. These were the rules which were given to Africa, but they have not worked in Africa, because the assumptions that underlay their operation did not obtain in Africa.

I will, therefore, jump to the third part of his paper, which is a discussion of Colonial Africa.

Now, Professor Seidman sees the administration in Africa by the colonial powers, directed by the expatriate colonial community of these countries, as a system of administration devised for the administration of the indigenous people of these countries, who basically lived in a subsistence economy. He makes the point that where the expatriate of the colonial community was concerned, the rules imported into Africa were reasonably adequate. They were adequate, partly, because they were the rules understood by this expatriate community. But they were efficacious also because there was a very close social connection and relationship between the administrators, who were British by and large, and the European community in the country. They met at clubs and cocktail parties, and the result was very often not having to form rules. Many of the decisions were made over a glass of whiskey, and even if these had weaknesses, they were never exposed, because resort was never had to them. He points out, interestingly enough, that in East Africa most of the cases which went to the Courts involving administration involved Asian businessmen. The Africans might have problems but might not have the knowledge or ability or means to go to Court; the English businessmen had the ability or the money to hire legal services.

Now, the other important point he makes is that colonial civil servants had a very wide discretion. Under the criteria laid down by legislation as to the exercise of discretion, in a large number of cases there was no possibility of any legal or judicial challenge.

His conclusion is that as far as the expatriate community was concerned, the administrative law functioned reasonably well, not because of the basic rules themselves, but because of the social system in which they operated. As far as the rules were concerned in their application to Africans, many of the formal procedural and substantive rules of Britain would not apply. The District Commissioner combined in his person the functions of a civil servant and a judicial officer. Professor Seidman argues that it was not important for Britain to worry about legitimacy in relation to the African
population, because Britain maintained her full rule, not by any genuine acceptance of her right to rule, or her credentials to govern these countries, but purely by brute force. As long as force was the basis of rule, such legitimacy was an unimportant concern.

In relation to the question of corruption he says that it is surprising, given the lack of criteria for action and the lack of judicial controls, that the British Colonial civil service was so remarkably honest and there was so little corruption. The explanation for this is in the peculiar system of recruitment into the colonial service. The Colonial civil service was essentially recruited by one person for a period of 30 years. A person could be recruited only if he came from a good family, went to a public school and to Oxford or Cambridge. A person who had been through this rather special system of upbringing and education had a certain ethos which he carried with him into the service. Often he had to look for promotion or transfer within the system of the Colonial office, which would obviously be concerned about his record. Therefore, though there were not any great legal sanctions against corruption, there were built-in factors which insured a reasonably honest and competent administration.

After independence, the received norms of administration were no longer functional. Much of the malaise in Africa can be attributed to the irrelevance of these rules. Professor Seidman outlines some of the factors which make the task of government difficult, and I shall just briefly mention these.

He says that the Colonial Government was concerned to legitimate itself only in the eyes of the white population, the settlers, and possibly the Colonial Government office in London, but that the new Governments must legitimize themselves not only to the new elite in Africa, military in particular, but also the general populace. Therefore the new administration has this double gallery, and, therefore, the need to build entirely new methods of communication.

The second problem that has arisen with independence is the Africanization of the civil service. One of the first things independent government has to do is to replace colonial servants with indigenous civil servants. The effect of this has been, first of all, to politicize the whole system. Similarly, with a wholesale replacement of personnel in the civil service proper, there is the lack of experience and lack of familiarity with procedures, which raises additional problems.

The third problem that the countries face is that they have to undertake tasks somewhat different from the colonial government. The colonial government's tasks were basically the making of law and order. The task of the new government is one of the transformation of society, not just the maintenance of old traditions and customs. Because you have to transform society in structure, there is increased tension, and this gives rise to problems in administration.

The fourth problem is connected with the growth of political parties, particularly what he calls the displacement function of the political party, whereby the financing of a party becomes an important preoccupation to politicians. The party mechanism distorts bureaucratic decisions. Particularly, there is often the requirement by Ministers that for every contract given to a company, a certain percent must be paid as a commission to
the party. And, of course, much of this money finds its way into hot little private hands.

The fifth problem he sees that the newly-independent country has is that for the first time the whole administration is subjected to political controls. In the colonial situation political control was relatively unimportant, but with independence political controls become important. There is to some extent a state of hostility between the politician and the Civil Service, which is often more highly educated and is highly suspicious of politicians. The politician regards the civil servant as a hangover of the colonial administration, and does not entirely trust his good faith.

The final problem that the country of Africa faces in independence is that for the first time opportunities for reaping a golden harvest are everywhere. The Africans have entered into the groups, either as politicians or civil servants, and are handling larger sums of money than they have handled before. There is no strong discipline, and they are easily given to corruption.

Professor Seidman points out these problems and says, therefore, that a whole new situation has arisen. The British system in Africa had worked because there was a certain code of conduct and certain social restraints which kept the system going. These have disappeared. You have a new Civil Service. African civil servants, particularly if they need to keep a large number of relatives supplied with food and other essential needs, are tempted to advance their own interests.

Attempts have been made in each of these countries to impose restraints on government through a constitutional system. The Courts could have been more imaginative and fashioned new rules to restrain action, but this has not happened. The Courts have been all too willing to uphold wide and arbitrary grants of discretion. Seidman mentions Liversidge v. Anderson, a notorious English case allowing detention without trial, which has been applied in a large number of countries in Africa, despite the fact that constitutions do incorporate a Bill of Rights and do circumscribe the sovereignty of Parliament.

The Boards of Inquiry, the Administrative Tribunal, the Marketing Boards, and the statutory corporations that were mentioned in the last paper, had been to some extent used in the colonial period as a method of consulting with the European community. With independence, there has been some change in the function of these administrative bodies. More and more the membership is determined by the Minister who makes the appointments. Professor Seidman sees these institutions as offering the opportunity, through consultation, for a kind of opening of channels. But one might state that to some extent these institutions are being used increasingly as a form of patronage.

So, he says, the Government first of all has to establish communications with what he calls the bush—with the people in the country, in the other areas. Secondly, the problems of bureaucracy must be explained to the people. The people must be told what problems the Government is facing, and what is being done to remedy them. Finally, he says, the Governments in Africa are characterized by the emergence of a "bureaucratic bourgeoisie". In England and America a person becomes rich, and then becomes a politi-
In Africa, the reverse is true. Because persons acquire high office, they use the office to acquire wealth. He sees a trend in certain governments that is actually encouraging the Civil Service and the politicians to acquire wealth, and a conscious policy of encouraging a very small group of people to acquire interests in land and private corporations, and so on. And this, of course, again, has the effect of blocking channels of communication, and is an abandonment of concern for legitimacy.

Looking at the received sanctioning institutions, he says that, since Parliament hasn't really begun to play any important role, they are not really a control mechanism at all. The party often controls the membership of the legislature, and the conduct of the legislature. The party itself is not an instrument of control, because in a one-party system the party is aligned with the administration and is not an independent force overlooking the Government.

He does consider some examples of new institutions which he finds hopeful. In particular, he mentions an experiment in which three Commissioners play a role of inquiry similar to that of the ombudsman in Scandinavia, and he sees some hope of legitimacy in establishment and the efficient function of such mission of inquiry.

He concludes: “The institutions of administrative law serve the function of ensuring the legal-rational legitimacy of Government. Ideally, they provide channels of communication to the relevant publics, narrow norms of decision-making, rational decision-making procedures, and sanctioning institutions. The received English law meets all these requirements within the context of late 19th and early 20th Century English economy, politics and society. The same institutions transplanted to Africa were largely irrelevant to the colonial situation. Authoritarian political structure, the plural society, and the changed tasks of administration conspired to produce unlimited grants of power, coupled with an absence of significant norms of decision-making, save in a few corners of the governmental process. Informal organization and careful recruiting, however, saved the legitimacy of Government. What was handed over to the independent states were not a set of institutions capable of reproducing themselves, but a government of men, not of laws. And the men on whom it was based were soon to leave.

Without institutions guaranteeing legal-rational legitimacy, that its absence should be the rule rather than the exception in Africa was to be expected. Courts serve only the limited purposes which they achieved in Colonial Africa, and have proven themselves incapable of forging new norms out of the new constitutions. Few new norms of decision-making have arisen, although the development of new structures for planning may presage significant change, and so may Tanzanian efforts to place restrictions on the acquisitive activities of high officials. New sanctioning institutions may be slowly emerging especially an African version of the ombudsman. The most elementary proposition of social science is that people act in predictable ways because there are social norms describing role expectations, and sanctioning devices to enforce the norms. The departing British did not bequeath either norms or sanctioning institutions appropriate to the development of legal-rationality in the newly emerging states. Absent norms delineating the minimum requisites of legal-rational legitimacy, and absent
sanctioning institutions to enforce them, that African governments have not yet achieved that sort of legitimacy is to be expected. Until institutions emerge that satisfy the minimum requirement, one can only expect African governments to continue on their present course.

(Applause)

MR. ANTHONY: If I may say so, Dean Ghai, you've given an extremely clear summary of Professor Seidman's sophisticated paper. Thank you so much.

Next, William Burnett Harvey, Dean of Indiana University Law School.

DEAN WILLIAM BURNETT HARVEY: I mused, as I sat here, that my role as commentator this afternoon is far more felicitous in at least three respects than that commentators usually enjoy. First of all, I have the privilege of commenting on old friends whose views I have long known and respected, and with which, by and large, I agree. Second, insofar as I'm inclined to be critical, at least one of my targets won't be here to shoot back, and that's a great advantage in dealing with Bob Seidman. Third—and this is perhaps the greatest advantage of all—I can claim to know absolutely nothing about administrative law, so that this gives me an assurance and a freedom which are usually denied to the knowledgeable.

Professor Anthony started off with a reference that started my hackles on the way up, and then he stopped. He spoke of administrative law as resting on the same sort of implicit assumptions as "the rule of law." I have said publicly, and ad nauseam probably, all of the doubts and misgivings I have about this concept of "the rule of law," and I must say I'm delighted, Bob, that you did not pursue that, thereby giving me an opportunity to bore you again this afternoon.

Pooley, as I understand his comments on the statutory corporation, is raising one of the most significant problems of administration and administrative law in the less developed parts of the world. He really poses the question—how can the enormously proliferated governmental involvements in the economy, social life, etc., be rationalized so as to achieve at least some kind of minimum effectiveness.

I would suppose that if we talked in terms of values at this level, the ones that concern Pooley are not essentially or necessarily humanistic. We might summarize the value problem by the single word "Zweckmässigkeit"—the appropriateness of means to whatever ends have been postulated within the particular society and by the particular government. It seems to me that this is one of the gravest deficiencies in Africa today, and that the deficiency is well-illustrated by Ghana's tinkering with the statutory corporation.

A friend of mine once observed, toward the last days of the Nkrumah period in Ghana, that to him the most disconcerting and disturbing aspect of the Nkrumah government was not its venality, its corruption, or its ideological errors, but rather, simply the irrationality of all official action; that specific government action did not fit into any kind of design—it was ad hoc in far too many cases.

One could illustrate this in an enormous number of ways. Development plans would be produced—they were called development plans, although I
suspect they were simply collections of pious platitudes and noble aspirations—but the legal status of the plan itself was left indeterminate. Certainly the plan seemed to have almost nothing to do with official conduct. Ministers committed the government in ways that ran directly contrary to the plan. Official agencies were not able to get from relevant ministries the data that might be needed to carry out the plan or other official programs.

I would suggest, therefore, that the ambiguity of the nature and function of the statutory corporations in Ghana provides a splendid illustration of what seems to me perhaps the greatest need in African administrative law development, that is, a functional review of the various agencies of government, of their relations to each other, and to whatever overall plan of attack on the pressing needs and aspirations of the people of the African countries may have been developed.

Seidman's paper, which was excellently reviewed by Dean Ghai, poses the question—are received administrative institutions responsive to the contemporary needs of Africa? And, I think Dean Ghai might very appropriately have summarized the Seidman paper with an expression, "Hell, no." This is essentially what Seidman says, and he doesn't go much beyond that, although he has some rather extended views as to details of the inadequacies. Seidman, as I understand him, is really concerned with the aspect to which Professor Anthony briefly alluded, that is, administrative law as a scheme of controls to assure at least minimum decency in official actions. Since the paper has been extensively summarized, let me make only one or two comments on it.

I think the central point that Bob leaves us with is that in the African context one cannot rely for achieving that decency on the presuppositions of English or American administrative law, which depends very largely upon an aggrieved private party who comes in and complains before some tribunal, and thereby invokes official agencies in his behalf to correct a particular injustice, and hopefully, to provide deterrents to official injustices in the future.

For a whole variety of reasons, which are rather obvious in the African circumstances, Seidman does not see that approach as being a fruitful one, and therefore he is inclined to look much more to governmental institutions to provide the needed safeguards. As illustrations, he points to the permanent Commission of Inquiry in Tanzania, and to the Ombudsman provided for in the proposed, post-coup constitution of Ghana. I think Bob is on the right track, but such constitutionalized safeguards by which public power is checked and balanced do present certain hazards. These are well illustrated, I think, by the proposed constitution in Ghana. Extreme sensitivities and fears have been aroused by their experience under a government that gravely disappointed their expectations and imposed oppressive rule upon them. These fears may lead them to structure governmental power with so many counterbalances for every power center as to deny any real hope of effectiveness in meeting the urgent needs of the day.

Now, I am not making a sort of low-key argument that authoritarianism is needed to further development. I don't want to ride that horse. I can't avoid, however, the feeling, as I try to analyze the proposed Constitution of Ghana—which probably will come into effect next year—that they have
created so many special institutions like the Ombudsman the Council of State, an extremely powerful judiciary, and other institutions, have checked and balanced official powers in so many complex ways, that they may very well discover that they have created a government which will be paralyzed as soon as it enters office.

I surely have no formula for avoiding or solving this kind of problem. My guess would be that the African countries will experiment with a variety of expedients, some of which they will borrow from abroad some of which hopefully, will emerge out of their own indigenous culture and law-governmental institutions. In my experience which certainly doesn't bracket all of Africa, indigenous institutions have built into them and rest implicitly upon extremely humane values in far more instances than most of us have yet recognized. I remain reasonably optimistic that those values will guide and inspire constitution and law making so as to keep government within decent bounds without rendering it incapable of dealing with the urgent and complex problems of African development.

(Applause)

PROFESSOR ANTHONY: Thank you very much. I'm sure we would all agree that the implementation of development plans and programs of this sort, as described by Dean Harvey, shouldn't be due-processed to death in any country.

Professor Nathanial Nathanson, of Northwestern University, has been unable to attend this meeting. He has prepared a summary of his remarks on projects for the study and development of Administrative Law in India. Those remarks will be referred to in the presentation of our next panelist, Mr. H. C. L. Merillat, of Washington, D. C. Mr. Merillat will speak on the role of Administrative Law in India, and make particular reference to land reform in that country.

MR. H. C. L. MERILLAT: As Professor Anthony has mentioned, unhappily for him and for us, Nat Nathanson is a victim of the flu. Nat and I met a few weeks ago to talk over the topic we were trying to cover in the presentation here today, so I do have the benefit of a conversation with him, as well as the benefit of the notes which he has sent on to us here.

I want very briefly to talk about three topics we rather arbitrarily selected from the vast number of possibilities. One of these Professor Nathanson was going to present to you concerned the research program undertaken by the new Indian Law Institute, which was founded about 12 years ago. I see two people in the room who have had some experience with that eminent organization.

This, by the way, is an interesting experiment in collaboration, between what Professor Nathanson described as Indian lawyers and judges, who had, of course, practical experience with the legal and governmental problems of India, and a group of American law teachers whose experience in India was practically nil, but who had, in addition to their broad knowledge within their specialized fields of interest, a native skepticism. It was this thought they could be helpful in organizing and carrying out a program of legal research through this new Institute, which was set up for the purpose of considering
some of the public law problems that were beginning to concern Indians, particularly the judges and the Bar in independent India.

I am sure you are all well aware that in general the Constitution of India creates a parliamentary Cabinet government on the British model, with the important difference that there is a Bill of Rights, or Fundamental Rights, written into the Constitution which the Courts are explicitly instructed and authorized to apply in testing the validity of legislation.

This, of course, is quite unknown under the British system and some of the difficulties that have ensued in the first two decades have undoubtedly arisen from this clash between the more familiar British notion of absolute parliamentary supremacy and the new gimmick of fundamental rights enforceable in the Courts. Perhaps it was to be expected that in this process of deciding where the balance should be struck between public and private interests, the Courts and the Bar have often been cast in the role of defending the private interests.

To get back to the research program in the Indian Law Institute, Professor Nathanson points out in the beginning that a small group, consisting of himself, and a person he describes as the “well-known starry-eyed idealist,” Clark Byse (whom I see among us today), S. M. Sikri, then Advocate General of one of the States of India, and now a member of the Supreme Court of India, and P. K. Tripathi, who is now Dean of the Law Faculty at Delhi University—these, together with Professor Lawrence Ebb who organized the effort to review the public law problems that seemed to be of importance in India—these got together and identified twelve research areas that seemed to call for attention.

I won’t refer to all of those mentioned by Professor Nathanson, but I will to some—particularly those that have led to later activity. One concerns the Delegation of Legislative Power, a subject where judges and lawyers in India had come to regard as one calling for much deeper study. The suggestion was made that a study should cover the practices of both the legislature and rule-makers.

Another suggestion was to consider the possible usefulness of a Uniform Administrative Procedure Act, in which our own inquiries into the usefulness of such an Act, and our experience with such an Act, might be relevant.

Another topic which it was decided merited further study, was the Process of Administrative Decision, the suggestion being that in India, as in England, there appeared to be little role for the hearing officer or inspector, with emphasis on the institutional decision.

Another was the Right to Counsel in Administrative Proceedings, the suggestion here being that in India relatively little place was accorded to counsel in administrative proceedings.

Others concerned familiar questions, such as bias in administrative proceedings; separation of functions of rule-making, decision-making and hearing of disputes; the scope of judicial review in administrative action; what legal interest one must have to serve as a basis for challenging administrative action.

As I said, there were twelve of these areas. Professor Nathanson then goes on to give an account, so far as he knows it, of what actually happened.
after these initial plans were made. Four or five significant studies have emerged. One of these concerns the administrative process under one particular Act. It happens to be an important act in India—the Essential Commodities Act, under which the Government has broad powers to regulate the production, distribution, rationing, and prices of essential commodities, which the Government also has the power to designate; that is, it may designate what commodities are to fall within the Act from time to time.

That study has since been completed by Dr. M. P. Jain, who was at one time a Director of the Law Institute, and has been printed under the auspices of the Institute. This study concluded with some suggestions, including the recommendation that there be greater explanation of reasons for the issuance of orders and policies underlining the order; that there be adequate statements of grounds for possible revocation of licenses, or, indeed for any decision made by the administrative officer or body; that greater and more consistent consultations be effected with industries that were affected by the many regulatory statutes in effect in India; that there be hearing procedures before rules are actually made, and better publication of orders. This last point has been a long-standing problem in India—the lack of information as to what specific orders have been passed under authorizing legislation.

A second study concerned Disciplinary Proceedings against Government Servants in one particular department—the Central Public Works Department, which has important contracting authority, and rightly or wrongly, has been accused of being more prone to have officials and civil servants who will take a little something under the table, than others.

The Civil Service, of course, is very important in India. It is a preferred career and the kinds of safeguards that civil servants have to protect their careers—to protect themselves against unjust accusations; to preserve their prerogatives and the security of their position—assumes an importance that it would not have, perhaps, in our country.

The study, too, led to some recommendations that an independent officer outside the Central Public Works Department should determine whether formal proceedings should be instituted against the civil servant against whom charges had been made; that the Union Public Service Commission might well be assigned to a greater partnership in disciplinary proceedings; that the existing prohibition against representation by legal counsel be lifted—and this prohibition is found under many Indian statutes that provide for administrative tribunals.

A third area of study which has been followed up concerns delegated legislation. This, too, has been completed and Professor Nathanson refers to a few of the conclusions and recommendations that were made. One was that there be improvements in the procedures for allowing hearings in which interested parties could be heard before the rule-making authority actually passes a rule, and again, that there be a much improved system of publication of the vast number of orders and rules being made under legislative authority.

I'm going to mention just one other project which the Institute has undertaken in the field of Administrative Law, in an attempt to improve the con-
sideration and study of administrative legal problems in India, and that was the production of a casebook for a course in Administrative Law. Such a course would be a new departure in Indian legal education, although everyone recognizes the growing importance of administrative authorities in India, and massive intervention of government in private affairs of all kinds, so that every citizen is well aware of the existence of administrative officers who affect the conduct of his daily affairs.

But the study of this body of law has been very slow to come to India's legal curriculum, and over a period of years, under the auspices of the Indian Law Institute, the book of cases and materials was put together, using mainly Indian material, which would be relevant to the Indian law student and legal scholar.

Professor Nathanson's estimate is that the case-law here collected offers a cross-section of administrative laws as actually practiced in India. He refers to the broad range of subject matter covered, ranging, as he said, from the most complex problem of economic regulation to the most poignant problems of personal concern, including, for example, high school students barred from examinations for cheating, without hearing, as well as the man who had a traditional right to hold a cattle-fair on his property, who was suddenly informed by the District Officer that he should please abandon the idea, because as a matter of policy it had been decided that such fairs could only be held by local governmental bodies, and not private individuals.

These examples of the kinds of problems in Administrative Law that have concerned, if not the Government of India, at least the judges and the bar of India, point, I think, to the dilemma that the previous speakers have referred to.

Is there something in the nature of the development process that makes it especially difficult to develop fair administrative procedures? Of course, we are dealing here with a country that is far advanced economically, politically, and, probably legally, in comparison with most of those referred to as "developing countries." Is the more sophisticated body of Administrative Law that we like to think appropriate for our country and our times, as also for Europe and England—is this a luxury that a developing country cannot afford? I mean, must you really defer concerted attack on obvious instances of injustice, arbitrariness, and the like, in the interests of speed and decisiveness in getting the job done—although you agree that the expeditious decision is not necessarily the wise one?

But, it is a problem that Indians face, as every other newly independent country faces, and I was struck—when Dean Ghai was reading Professor Seidman's paper—by the similarity of problems found in Africa, although I would say that the Indians have a far more sophisticated and stabler framework, in which to deal with these problems than has yet emerged, it seems, in large parts of Africa. One reason, of course, that the law concerning procedural safeguards and standards to govern government officials in administering legislation, one reason that this body of law is not so far advanced in India as we might otherwise expect, is in part to be found in its inheritance from the days of British rule. In India, as elsewhere, the executive was the last stronghold of foreign power—the executive veto, for instance, of legislation passed by the colonial Parliament, which might
be formed largely by people of that country, plus wide areas of discretion in interpretation and application of those laws. And, of course, the British executive authority in India before independence wanted to work in as unhampered a way as they could. It became boiler-plate in most statutes to say—I don’t remember the exact words—but to this effect, “No act undertaken under the authority of this Statute shall be called in question in any court of law,” and any civil servant who acted on the basis of the authority of that statute was immune from legal complaint by the affected individual.

Oddly, this boiler-plate remains in a great many statutes in India today, although it is obsolete by virtue of the fundamental rights, because any citizen, for example, who alleges that his right to conduct a business, or his right to hold or dispose of property has been unreasonably restricted, can go to the Court and petition for the appropriate writ, to restrain or order the appropriate official not to do, or to do, certain acts, so that the kind of boiler-plate that one found in pre-independence legislation find is quite out of date. Indian litigants have made extensive use of this guaranteed right to petition the court in such instances.

By and large, however, the courts have been reluctant to interfere with Government actions under regulatory statutes. Professor Nathanson mentioned the Essential Commodities Act, which is one of the most important regulatory statutes. Another is the Industries Development and Regulation Act, under which all industrial undertakings are licensed. Without such a license there can be no establishment or expansion of an industrial plant in India.

In addition to being part of the hangover from the British rule, I think another reason for the relative lack of procedural safeguards, and standards for administration, undoubtedly comes from the fact that India is in a continuing state of economic crisis. The Essential Commodities Act is a direct descendant of the Defense of India Act and Rules enacted during the time when, of course, the Government of India, controlled by the British, regulated the economy in great detail in all its aspects, in emergency conditions—defense wartime emergency then. Well, with independence, there was a continuing shortage of commodities of all kinds, and the necessity of marshaling scarce resources of all kinds, directing those resources into chosen lines of development, and in this continuing situation one must expect that the Government will insist upon large areas of discretion in carrying out the purposes of the Act.

Let me take just two minutes to refer to one other particular form of administration, that’s of particular interest and importance. This concerns land reform.

The first major issue that arose in India did not concern administration, but whether compensation should be paid for interests of large land-holders that were taken over to be distributed among the landless, or smaller holders. We don’t want to get into the substance of that program—but simply to mention that this has been one of the most hotly controverted constitutional issues in India in the past two decades.

Apart from the question of the official language—what should be the official language, English, some local language, or an all India language,
for official use—apart from that the problems surrounding property rights have been the most conspicuous continuing subject of vociferous and emotional contention, which has resulted in a kind of stand-off between the Courts and the Bar on one hand—the Courts have been more protective of property rights than the Government sometimes thought appropriate—a stand-off between them and the Government and Legislatures on the other hand.

Well, for our purposes, the relevance of the land reform program is this: that whatever drama has gone on at the high levels of Constitution-making and interpretation in relation to property rights, the shortcomings of Indian land reform, if indeed they are shortcomings—at any rate, in terms of what the planners said they wanted to do, the actual programs definitely fall short of those plans—are to be found far more at the level of administration than at the level of judicial interpretation of the Constitution. Whatever laws may be passed by legislatures, the outcome, of course, depends upon the effectiveness and honesty and thoroughness of those who administer the laws at the local level. In a situation where local officials have long been subordinate to big land-holders of the area, it has proved impossible even after 20 years, to get adequate records of rights—who has rights to tenancies, and to interests in this or that parcel of land; to enforce the laws regarding security tenure for tenants; to enforce the laws regarding ceilings on the amount of land that any one person can hold. I think this is relevant to the problems of many other developing countries, too, where land reform is under consideration, and a matter that lawyers shall constantly keep in mind. It is easy to draft a beautiful statute. If it isn’t carried out at the local level by effective, honest administrative machinery, with some effective recourse for those who are injured by failures to administer properly, land reform will mean very little.

Thank you.

(Applause.)

PROFESSOR ANTHONY: Thank you very much, Mr. Merillat.

Our next panelist is Keith Rosenn, of Ohio State University. Professor Rosenn will talk about the extremely interesting phenomenon of how extralegal channels have evolved in Brazil to circumvent the formal administrative procedures of that country.

PROFESSOR KEITH S. ROSENN: I’d like to shift the geographic focus of this panel from Africa and India to South America, more particularly, to Brazil. I think you will find the culture and traditions there very much different from India and Africa. You may come out of this session learning little about Administrative Law in Brazil, but you should come out of it with an appreciation of the meaning of at least one Brazilian expression—“jeito”, which I cannot really translate into English for you.

A very amusing and perceptive study of the Brazilian way of life, called BRASIL PARA PRINCIPIANTES, by a European immigrant called Peter Kelleman, tells of his first contact with Brazilian administrative practice. During a visa appointment in Paris, the Brazilian Consul asked, “What is your profession?” He replied, “I just graduated from medical school.” The Consul then asked, “Do you expect to practice in Brazil?” He replied,
"Well, I really don't know. I don't understand the language, the customs. Perhaps." The Consul then stated, "Then instead of doctor, let's put down agronomist. In that way I can give you your visa today. You know how it is. Confidential instructions from the Department of Immigration, and all that nonsense. This way, if I put down agronomist, it will all be perfectly legal. You'll have your visa today."

At first Kelleman remonstrated, afraid that the Consul was trying to trap him into making a false declaration, and then deny his visa.

Finally, after some explanation, it dawned on him that the Consul was really trying to be helpful by expediting the issuance of the visa. He was not trying to extract a bribe, or play agente provocateur. Not until some time latter did Kelleman realize that he was dealing with "a representative of a country where Government regulations and instructions are decreed with prior calculations about the percentage that will be obeyed; where the people constitute a large legal filter, and where civil servants, be they small or powerful, create their own law. And though this law doesn't happen to correspond with the original law, it meets with general approbation, provided it is dictated by good sense."

While there's some measure of hyperbole in Kelleman's description, the fact remains that Brazilian laws and regulations are constantly being interpreted and bent to expediency by the people charged with administering them. The process by which this is done has become a highly-prized Brazilian institution called "jeito."

Undoubtedly, some of this occurs in all countries, be they developing or developed, but what is truly remarkable about Brazil is the extent to which this occurs. Indeed, in many areas of the administrative process, resort to the "jeito" is the norm rather than the exception.

The jeito operates hand in glove with another Brazilian institution, called the "despachante," who lubricates an administrative process that becomes rather stickly. The despachante is typically a former civil servant or politician, who, in return for a fee, fills out the proper forms, delivers them to the proper people, and extracts the needed government document or permit. Resort to the despachante is so common that one governmental agency frequently hires a despachante to get something out of another governmental agency.

The despachante functions by having friends in administrative offices, and he's very careful not to forget these friends. The young doctor in Brasil para Principiantes—the doctor who just became an agronomist—was very fortunate to have a total stranger perform a jeito for him, without any consideration. Normally what occurs is summed up in the Portuguese maxim: "Para nossos amigos, tudo;"—For our friends, everything—"para os indiferentes, nada;"—for strangers, nothing—"e para nossos inamigos, a lei,"—and for our enemies, the law.

It is important to distinguish the jeito from a related institution called the "Jeitinho" or little jeito, which is really a bribe for overlooking some violation of the law. Unhappily, the jeitinho is still as familiar a part of the Brazilian landscape as the Sugar Loaf, although it has become less visible since the military revolution of 1964 that ousted Goulart.
The jeito does not really have the blatantly dishonest aspect of the jeitinho. Rather, it is a bypass of the formal aspects of the legal system by merely paying lip-service. Facts may be fabricated or mischaracterized, dates or states may be altered, or formal requirements may be waived. But the purpose is really to take a short cut through the labyrinthic layers of red tape that invariably intertwine any kind of administrative action in Brazil. Indeed, it sometimes appears that were it not for the jeito, the entire economy would grind to a halt, simply mired in the quicksand of the enormous disorganized bureaucratic structure.

The roots of the jeito run quite deep into colonial times. One of the most striking features of Brazil is its enormous land mass, larger than the United States. Portugal tried to govern this enormous land mass from one central administrative point, frequently by very formalistic, legalistic measures. Communications in Brazil still leave much to be desired, but in colonial times they were practically nonexistent. The Brazilians frequently ignored Portuguese decrees, simply because they didn't know about them. But even when they knew about them, Brazilians frequently ignored them anyway, because they were utterly unrealistic for Brazilian society.

This custom of twisting the law to expediency has persisted for a number of reasons. Independence, unfortunately, brought little relief from this tradition of having legal norms which were wholly unrelated to the needs of the society. Laws have frequently been imported from Europe or from the United States, without any consideration of whether they were suitable for implantation in the Brazilian soil. Brazilians commonly refer to laws much the way we do refer to vaccinations—there are those which take, and those which do not.

Moreover, the rapid transformation of Brazil from a feudal agrarian rural society into a modern, industrialized urban state, that has been going on so strikingly in the past 20 years, has rendered many of the basic codes and statutes utterly obsolete. Traditional civilian reverence for codes and reluctance to change one part of the Code without changing the entire Code has also impeded the progress of law reform.

Finally, the military government of Castelo Branco, which took over in 1964, decided that the legal system needed a complete revamping. Then came the legislative deluge. It has been calculated that from April of 1964 to November of 1966, more than 7300 new laws, decrees and regulations have been issued, changing the pre-existing law so rapidly that even lawyers and judges were highly uncertain about the state of the law. Legal research had to be conducted by newspaper.

Even though much of this legislation was more socially relevant, much of it was drafted by economists and engineers who had little feel for practical administrative problems or the niceties of juridical language. Hence, some of these laws are impossibly complex, and the people who have to administer them frequently have no knowledge of just what it is they're supposed to be administering.

I do not mean, in any way, to imply that Brazil had any shortage of laws prior to 1964. Brazil may lack electricity and water on occasion, but there is no shortage of laws. The paternalism that permeates Brazilian society has made every aspect of Brazilian society subject to regulation. Last year
a journalist quipped on T.V., “It seems like if something isn’t forbidden in this society, it’s mandatory.” And Brazilian legislators are normally not content to set out desired conduct in very general terms. Rather, they seem compelled to spell out with great specificity almost every detail of administrative conduct. Frequently situations which would be governed by the term “reasonableness” in American legislation, are spelled out in such great detail that it seems as though one is told exactly on which peg to hang his hat as he enters the door.

Equally important to understanding the persistence of the jeito is the nature of the Brazilian civil service. Ever since the 1930’s, when the government began to intervene in the economy in earnest to promote economic development, there has been a New Deal type proliferation of governmental agencies. Indeed, it seems at times that the favorite governmental solution to any national problem is to create a new agency to deal with it. And, frequently, functions overlap. For example, four different agencies now have responsibility for price control, and they frequently operate at cross-purposes.

Thus, Brazil’s bureaucracy has become enormously swollen. But as in most developing nations, there are critical shortages of trained manpower as well as much under-employment. Consequently, even though there is a very comprehensive civil service scheme on the statute books, in practice a great many posts are filled by the spoils system. This was particularly overt during the administration of Kubitschek and Goulart, when attempts were made really to blanket in thousands of temporary appointees without going through the civil service examination. Political clientage, whose roots go back well into the traditional rural Brazil, still dominates the bureaucratic structure, and if you owe your job to a politician, or to a friend, you can’t very well refuse to perform services for him.

Moreover, the influx of the large numbers of untrained personnel has led to a multiplication of red tape, partly to give these people something to do—a kind of featherbedding operation—and partly to diffuse responsibility so as to make it difficult to affix blame for incompetence.

Attraction of topflight talent to government service has been hampered by the relatively low level of government salaries. I recall one prominent lawyer in Rio who told me that the last time he worked on a project for the government he almost went bankrupt. He prefers to work for the government without any salary, but on a part-time basis. A large number of civil servants have one or more jobs, moonlighting by the light of day. Substantial numbers show up only to collect their paychecks. Indeed, the situation is so bad that the last military regime came up with a plan to pay superfluous government employees to stay home, if they would agree to retire after a certain number of years.

In this ambiente, civil servants find it relatively simple to justify levying direct taxes on those members of the public who require their services. It’s commonly said, “Éles cream dificuldades só para vender facilidades”—they create difficulties only to sell facilities. But the tolls collected from those traveling their highways and byways are really the only way in which a number of these civil servants can live, considering the fact that their salaries have not kept pace with the breath-taking inflation of recent years.
Even though the formal structure of Brazilian administrative law offers a well-developed system for protecting individuals from arbitrary governmental action (particularly via the "mandado de-segurança," a unique Brazilian institution, combining our writs of prohibition, mandamus, quo warranto and injunction, into one writ), as a practical matter access to the courts is available to but a small segment of the population. And, there is so much delay in certain courts that the oft-heard complaint, "What enters into the courts, never comes out," has some basis in fact.

Continued tolerance of this state of affairs is largely attributable to the amazing docility of the Brazilian masses, and to the availability of the jeito to the elite. Unless he has a "patrão" to intercede for him with the bureaucracy, a poor Brazilian may wait days, indeed months, to obtain the simplest document, such as a certificate that he has no police record. He may then have to wait months or years to receive the permit or benefit that he seeks. Yet a member of the elite can come up with the needed document, if not on the spot, in a day or two, provided he has jeito.

Aristocratic traditions are dying slowly, but Brazil is a long way from having laws which apply equally to all. It's often been assumed that efficient public administration is necessary for development; yet, Brazil has been developing at a really impressive pace. To some extent the jeito has helped Brazilian economic growth, because it permits industry and commerce to avoid administrative hangups. You can get what you need out of bureaucracy by resorting to jeito; nevertheless, by acting as a safety valve, the jeito has been instrumental in preventing the build-up of sufficient pressure to have the kind of administrative and legal reforms that the country really ought to have.

Eventually, a more rational and democratic system must come to Brazil. But, as long as half of the population remains illiterate and disenfranchised, and the basis of the political system is clientage, such reform is quite unlikely. It certainly can't be accomplished by simply passing more legislation.

Much of this kind of reform is a natural by-product of economic development, with the growth of the middle class, and its accompanying value system. Until then, I think, one can expect that the Brazilians are going to continue to resort to jeito to deal with the administrative system.

Thank you.

(Applause.)

PROFESSOR ANTHONY: The round table is open for general discussion, if any of you at this hour wish to generally discuss. Mr. Davis?

PROFESSOR K. C. DAVIS: I keep thinking that perhaps young nations, like young people, will come up with ingenious and inventive ideas about the administrative process. I haven't been in the room all the time, but I want to ask: Have some ideas brought out by these panelists, that we in America need and don't have, and might possibly adopt usefully?

PROFESSOR POOLEY: I talked about statutory corporations, and also a question of law; but I would suspect that this is a challenge, both to the indigenous lawyers and lawyers from the West and East, who are, of course, interested in these questions. And one of the things that I should, perhaps,
have said, is that it seems to me that one of the challenges precisely in that area of creativity, to create legal devices, just as the corporation was devised during the 19th Century to fulfill certain social ends in our society, it seems quite clear to me, all developing nations having different demands from those we have now, or ever had, creativity, inventiveness, is necessary to create new devices, but insofar as their appearing on the scene—no, partly because I think governments have not given much attention to this.

FROM THE FLOOR: I wanted to ask a reverse question. I don't know whether Professor Davis was referring to that, but does the idea of the statutory corporation have any application to our form of administrative law, and perhaps as a substitute for administrative regulations, in achieving certain social ends?

PROFESSOR POOLEY: I hesitate to answer that question, really. I think if you look at the history of the statutory corporation in Ghana, and the degree of social and economic success that it has had, you would answer no. There has probably been more experience—more written about it—in relationship to the nationalized industries of Britain, which are, of course, statutory corporations of the government, and it seems to be one of the most profoundly unsatisfactory aspects of a device which fits happily in an Anglo American common law system, especially in the relationship of the corporation to the government. But as to whether it should be adopted here I have grave doubts.

PROFESSOR FRED DAVIS: Professor Pooley has mentioned something here which I think is of interest. As I listened to all of the speakers and panelists I was struck by the many parallels to what one finds at the state level of administrative law in this country. Almost every facet of administration law discussed here in connection with these developing countries—Brazil and Ghana for example—suggests a parallel or analogous institution or practice typically found in an American state, and I am thinking particularly about your so-called “statutory corporations.” We have many of these although they don't parade under that very same banner. They don't bear that label, but they’re similar, at least, and they are typically used when the purpose is to implement a policy rather than to umpire disputes between competing interests. Thus, although a state Public Service Commission typically acts pretty much as an umpire often times one can find that a state highway department or a Port Development Authority acts very much like a “statutory corporation,” in that it is separately funded and implements certain policies. In other words, state agencies such as these, like “statutory corporations,” actively engaged in the market place and in the use of resources.

In addition, “statutory corporations” of a sort were fairly popular at the federal level during World War II. Professor Gellhorn is not here now, but both he and Professor Byse, who is still here, know more about this than I do, but I think we have some survivors from that era, of which the Export-Import Bank might be a good example. That agency, today, does thinks not unlike what is done by the statutory corporations of Ghana.

Finally, I can't resist noting another parallel. I was in Turkey for a year, and it became clear to me during that time that the Turks were employing
something akin to statutory corporations in order to organize and stimulate economic development there. Strangely enough, however, these "statutory corporations" were called "banks," although they really weren't banks at all. They were government agencies with "owned" and managed resources.

MR. O. I. ODUMOSU (of Nigeria): I would like to mention the position of the statutory corporation. First of all, I think we have to get a clear idea of the need for this type of corporation in these various countries. It has been pointed out in the discussion that the statutory corporations that were created after independence had no power during the colonial days, and this is a very important point. In some African countries they are faced with many problems about statutory corporations, or the type of corporations to be created, and functions to be fulfilled. In some cases there was need to create a public corporation providing public utilities, like your transport system. The Civil Service Commission in these countries would not be a statutory corporation, but a sort of independent institution, with certain rights, just the same way as you would find in some African Constitutions. Now, on the other hand, there are individual corporations that, in fact, have had to control a sizeable amount of assets. For instance, the Marketing Boards in Nigeria and in Ghana declare prices each season. It is possible to accumulate a lot of money through these systems, so that the problem then in most independent government fields was: should the control of such a large amount of public assets be vested in independent bodies, with the government having no control whatsoever. While many of these statutory corporations were placed under control the ministerial control was not always exercised bona fide, and it has led to many abuses. Now, I do want to make an apology for these governments, but one has to understand their position. They have to learn, and it seems to me an important point that was made by Mr. Pooley, as to whether the ministerial control might be removed and a manager might be placed inside of the statutory corporation.

Professor Seidman's very brilliant paper dealt with quite a number of fundamental problems. But in some cases, I think Professor Seidman made a lot of generalizations which I am not sure are valid for the whole continent of Africa. For instance he mentioned the point that usually the civil servants in the post-independence era are usually well educated, better educated than the ministers, and that the ministers regard them as an obstructive hangover from the colonial period. As far as my knowledge goes of some countries in Africa, I don't think this to be a valid point.

Now, briefly, I want to comment on what Professor Seidman said about courts in Africa. It may be true that the courts in Africa have not taken the position that we would expect an institution like that to take. But, of course, we have to look at the background again. When did this country achieve independence? For how many years have you had this system going? What is the method of appointing the judges?

I want to end with this note. The typical African country is faced with a number of problems at the same time, and time is not on the side of the Government to solve them, because they must be solved almost immediately. We have to take this into account.

PROFESSOR ANTHONY: Thank you very much, Mr. Odumosu. We're gratified to have your comments, and happy to have you present.
Would any members of the panel care to comment on Mr. Odumosu's remarks?

PROFESSOR GHAII: I will begin by saying, in reply to what Mr. Odumosu said, that I was privileged to read Mr. Seidman's paper, but there are several items in his paper that I, myself, would differ from. I don't want people to leave this room with the impression that there is no hope for developing countries. We did inherit a system, and there I agree with Seidman, that it is not functional for our needs. We have to get rid of many of the concepts and notions that were inherited. Attention is being given to new forums and new institutions, and I do think—I'm very optimistic myself—that we will come up with new ideas. Tanzania has already come up with very interesting experiments. Unfortunately, not much is known about the experiments in Africa. There is not much publication; many of the writings about legal institutions are published not in legal journals, but in political science articles, and do not reach an audience in this country.

When one asks how democratic a country is, one should not single out the institution of a formal opposition, in the sense of an opposition party here or in Britain, but only how the system operates. If you look at some of the so-called one-party states in Africa, you will find a remarkable degree of democratic participation.

I agree that it's important to think about rules and procedures which might limit discretion. But I think there is a danger of limiting discretion too narrowly. You cannot really narrow discretion so much that function of administration becomes a mechanical one. The demands of development require more flexibility. The demands of development are such that we often have to cut short and bypass procedure. I do think it is necessary to make clear to governments that there is no necessary inconsistency between the procedures and government. In this context it's important to study the institutions in the socialist countries, because it's important to demonstrate that socialist countries are concerned about procedures and rules. I think once it's made clear that procedures and conformity with rules do insure a more reasonable way of decision, there will be more weight given. I do think it is important that we should give these developing countries more time for experimentation. There is still too much feeling of looking towards America or Britain for solutions, but with the growth of universities in these countries, there will be new ideas coming up, arising from an acquaintance with the situation.

PROFESSOR ANTHONY: Thank you very much, Professor Ghai.

Has anyone else a comment?

MR. FREDRICK W. HUSZAGH: Have you given any consideration whether the principle of the jeito is also adherent in our administrative process?

PROFESSOR ROSENN: No.

PROFESSOR ANTHONY: Thank you all very much.

Thereupon, the discussion was concluded at 5:55 o'clock P.M., Saturday, 28 December 1968.