

Robert C. Pozen, Legal Choices for State Enterprises in the Third World. New York: New York University Press, 1976. 263 pp., incl. two appendices, notes, selected bibliography, and index. \$15.00.

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The general subject-matter of Pozen's book is a phenomenon which can be characterised, in a nutshell, as "State Capitalism." The phenomenon may be freely paraphrased as a compendium of those political, economic, and legal strategies under whose composite banner the State ventures into the business entrepreneurship area in pursuit of a great variety of stated and unstated aims. In the specific context of countries of the Third World, the most recurring articulated aim - also, ironically enough, the most often frustrated - of "State Capitalism" is to maximise corporate profits, which can then be used to push forward the frontiers of the development effort. Other aims are often pursued, either as ancillary to the dominant aim of the maximisation of corporate profits or as ends in themselves. Thus, state enterprises are sometimes created to provide and maintain employment; to push capital investment into areas which are unattractive to private capital because the risks are too high; to maintain industries with non-market importance, such as defence; and to deliver essential services, such as electricity, postal and telecommunication services, rural and urban transportation, and many more.

The proliferation of state enterprises during the last few decades, especially in the United Kingdom and in a number of Third World countries, has attracted widespread notoriety largely because of the poor performance of most of these state enterprises. This rather unsavoury state of affairs has, as is to be expected, given rise to severe and widespread questioning of the idea of the state enterprise as a strategy for economic development. The particular focus of attention of the present addition to the increasing literature on state enterprises in the Third World is the legal framework within which state enterprises are usually brought into being and operated.

By far the most favoured legal framework that has been pressed into service as a vehicle for the creation and operation of state enterprises is the public corporation, which is invariably a sui generis creature of statute law. This legal device has presented an apparently dazzling attraction for Labour Party governments in the United Kingdom since the end of the last World War. It has also proved to be an extremely exportable commodity to far-

flung countries of the Third World, many of which are former colonies of the United Kingdom. In these circumstances, a notable authority on the administrative process in the United Kingdom has been prompted to conclude that the public corporation is "the most important invention of the twentieth century in the sphere of government institutions."¹

The basic idea of this "most important invention" is that it uniquely achieves a judicious mixture of political accountability through governmental control and managerial autonomy. Almost as an article of faith, it is postulated that once a judicious balance has been struck between political accountability through governmental control, on the one hand, and managerial autonomy, on the other, business efficiency will be achieved, and the blessings of corporate profits will flow freely - all for the benefit of the generality of the people. To these ends, a public corporation for the carrying out of a state enterprise is typically created by statute law with two distinct sectors. First, there is a Board of Directors, conceived of as "the high custodians of the public interest."² Second, provision is made for the hiring of a technical managerial staff, whose duty is to carry out the day-to-day working of the enterprise. The Board is obliged by the law which creates it to be politically accountable, usually through a Minister of State, to a representative institution, such as an elected legislature. The managerial staff, headed by a General Manager who would be the equivalent or counterpart of President or Chairman of a private business undertaking, is in theory free to adopt all legal means to bring about business efficiency, subject only to the policy directions of the Board.

As adumbrated earlier, the maintenance of optimal equilibrium between political accountability and managerial autonomy is crucial to the success of a state enterprise carrying out a business undertaking through the medium of a public corporation. But once the proper balance is struck, there seems to be an almost mathematical prediction that the result must be a maximisation of corporate profits for the general good. This curious faith in the ability of the public corporation to deliver the goods, so to speak, largely accounts for the marked reluctance of countries of the Third World to utilise, on any appreciable scale, the other legal models open to a government that decides to engage in state enterprise. These alternative models, moreover, are seen to possess certain intrinsic demerits. Thus, the first of the two major alternatives, the limited liability company (in which the state owns all, or a controlling part, of the shares) suffers from its rather rigid straight-jacket legal framework, which is useful as a means of blanket control of private enterprises but which does not allow the government to intervene in particular cases to promote specific policy preferences other than profit-making. The second alternative, the creation of an ordinary government department, or the extension of an existing one, is frowned upon because of the government department's notoriety, not wholly undeserved, for the tendency to be bogged down in red-tapism and overbearing bureaucracy. In any case, a state enterprise wholly merged in a

government department, and therefore without a legal identity of its own, would be insulated against pointed scrutiny by the well-known civil service anonymity of British-derived constitutional theory.

In spite of the theoretical superiority of the legal format of the public corporation over those of the limited liability company and the government department, public corporations have generally performed poorly, judged by the dominant criterion of success, namely, the generation of corporate profits. This is true both in the United Kingdom where, as we have seen, the format was invented, and in Third World countries, typified by Ghana, where the format has been transplanted. Pozen rejects the argument that a legal transplant of the public corporation format is doomed to failure simply because of the "foreignness" of the format to the recipient country. He demonstrates the fallacy of this argument by showing:

- (1) that even in its country of origin, the public corporation's performance has fallen well below expectations; and
- (2) that the borrowed model is invariably modified to suit local conditions, and not just transplanted lock, stock and barrel.

The basic hypothesis of the book is that "the choice of legal form makes little impact on the performance of state enterprises" (p. 111). Pozen begins with a general review of the history and performance to date of all major public corporations in Ghana and in the United Kingdom. He then subjects two public corporations in Ghana to intensive study, following their vicissitudes of fortune from their birth through their many legal transformations to their latest legal forms. These are the State Distilleries Corporation (SDC), which is now a division of the giant government holding company, the Ghana Industrial Holding Corporation, and the Tema Development Corporation (TDC), which was set up to administer and develop Ghana's first model township of Tema. The selection of these two corporations was dictated because of the historical fact that during substantial periods of its long and chequered history, the TDC was treated more like a government department than a public corporation, while in the case of the SDC it was treated like a limited liability company during substantial periods of its existence.

Pozen's major conclusions are of enormous importance to decision-makers at the highest political levels and to lawyers of countries from which legal forms like the public corporation are borrowed, as well as those of recipient countries. His conclusions are not very palatable for either group of persons.

The research on public corporations in Ghana severely undercuts the instrumental view of law as an important determinant of economic performance in the Third World.

The current debates devote considerable attention to the level of managerial autonomy and governmental control allegedly produced by the three legal forms for state-owned enterprises: the public corporation, the government department, and the limited liability company. But the case studies of the Tema Development Corporation and State Distilleries indicate that the choice among these three legal forms will probably have little impact on the ratio of autonomy to control for state-owned enterprise (pp. 161-62).

Pozen then bemoans the fact that "the symbolic functions played by legal choices and legal reforms" are often neglected, and concludes, rather cynically, that "the adoption of the public corporation may make sense in terms of its symbolic functions for particular interest groups" (p. 165), but in terms of nothing else. One of Pozen's examples of the type of symbolic function that could be served by resort to a legal form, imported or homegrown, is particularly interesting and topical. He suggests that a military junta in a Third World country could successfully divert attention from its troubles by deciding to "incorporate a large government department with chronic fiscal losses," and then "launch diatribes against the fiscal ineptitude of corporate managers instead of taking political responsibility for departmental losses." In fact, military governments in Ghana, Nigeria and other African countries have launched diatribes against existing government departments and other administrative units without bothering to go through the legal transformation suggested by Pozen, and have commanded high credibility in doing so.

The scepticism which permeates the book under review is welcome, but only to the extent that it serves to point out avoidable mistakes attendant upon the law's efforts to aid the developmental effort in Third World countries or, for that matter, in any country. In so far as Pozen seems to be offering a counsel of despair, however, his central message is not helpful at all. Perhaps the most generous presentation of this message is to be found in the very last sentence of the text: "In short, while lawyers can assist in developmental efforts as technical translators [of political decisions into legal forms] and publicity agents for political leaders, in their capacity as lawyers they probably cannot make a significant impact on the achievement of economic growth" (p. 171). No wonder that Tony Killick, who provides an economist's preface to Pozen's book, finds himself "reluctant to believe that lawyers cannot help us find an institutional form that makes it more difficult [Killick's emphasis] for state enterprises to be misused" (p. xv). The present reviewer could not agree more with the preface writer.

The fact of the matter is that Pozen's general conclusions are not wholly borne out by the abundant evidence he produces. Many of the instances of poor performance by state enterprises catalogued by Pozen are the result of misuse and abuse of the legal processes by an army of personnel including managers, chair-

men or members of Boards of Directors, Ministers, technicians on the job, and so on. These abuses are avoidable, not inevitable as suggested by Pozen, though the law is certainly not the only instrument that can, or should, be used to avoid such abuses. As a member of several Government Committees appointed to enquire into the operation of certain government enterprises, including the State Distilleries Corporation, the present reviewer can testify to the fact that the malaise that befell the State Distilleries and other corporations was almost entirely due to avoidable transgressions by management personnel and government representatives, and not simply to some inevitable and fatalistic lack of correlation between corporate performance and the legal vehicle used. Indeed, some of the state enterprises mentioned in Pozen's book have known periods of successful operation, measured in terms of the postulated goal of generating corporate profits. These periods have been typically those following the careful identification and ruthless removal of such constraints to efficient and successful business operation as over-employment of labour, poor and antiquated machinery, lazy and lackadaisical work-methods, and other lapses in management practices. Although Pozen does acknowledge the debilitating effect on business health of some of these lapses, he seems to assume that the choice of legal form can have no significant effect upon the likelihood of their occurrence. That basic assumption has, in the view of the present reviewer, regrettable consequences, the most important of which is that it prevents Pozen from addressing himself squarely to the important problem of how lawyers can help to minimise, and eventually eliminate, the misuse and abuse of the legal forms with which he deals.

To point out some of the deficiencies of Pozen's book is not to belittle its importance as a welcome addition to the literature about the relationship between the development effort that must be undertaken in the Third World countries and the many strategies that can be employed to bring about desired change and modernisation. Through his detailed studies of two important, and wisely selected, public corporations in Ghana, Pozen has thrown a useful searchlight on an area of the administrative process in Ghana that has regrettably been neglected so far, except for sensational disclosures in ill-researched new-items in the popular dailies. Pozen also presents a sound general overview of public corporations in Ghana in a way that should spur further research in this dimly-lit but crucial sector of the national scenario. The two comprehensive appendices (providing chronological and functional lists of public corporations in Ghana) and the wide-ranging bibliography should be of great assistance in this regard.

More importantly, Pozen's book provides a unique opportunity for the reader to gain a rounded understanding of the history and operation of diverse forms of state enterprise in Ghana by setting this essentially evolutionary process in its political, social and cultural context. At first blush, this methodology has the appearance of presenting no more than a dissertation-like study of particular institutions within a particular country. Yet the

total and ultimate effect is to bring an unmistakable quality of universality to the themes he pursues so vigorously, thus justifying the universalist title, which embraces the entire Third World. We often hear and read about the yawning gap between public rhetoric and actual performance in Third World countries, especially when these countries attempt to address themselves to the problem of accelerated development, which confronts all of them. Rarely, however, do we encounter a presentation of the total picture of this much-discussed theme in an important area - that of state enterprises - that is at once as delicate and as picturesque as Pozen's.

Legal Choices for State Enterprises in the Third World points out the true nature of law as an essential part of the more comprehensive social and political process, and by so doing cautions against indiscriminate and unimaginative legal transplants that have scant chance of "taking" unless, as pointed out in the Lawyer's Preface by Prof. Lawrence Friedman, the donor country and the recipient country share closely allied cultures, like blood types. Any scholarly work which, like Pozen's, provides empirical reference to this relatively old, but often neglected, inspired wisdom deserves to be cheerfully commended for wide readership.

NOTES

1. Robson, Nationalised Industries and Public Ownership, 28 (1962), a work from which the author of the book under review frequently quotes.
2. Ibid.