

BOOKS

THE STATE AND THE RULE OF LAW IN A MIXED ECONOMY.

By W. Friedmann. London: Stevens & Sons, 1971. Pp. 104. £ 2.

The State and the Rule of Law in a Mixed Economy is, like all Professor Friedmann's writing, the work of a first-class scholar, drawn from a mature and deeply considered philosophy of law. The book consists of his Tagore Lectures, delivered at Calcutta in 1970. They address the law for controlling the "mixed" economies of modern democracies. In the first instance, the lectures summarize for an Indian audience some of the lessons Professor Friedmann draws from the Anglo-American experience in reconciling both personal freedom and "the rule of law" with the steady and perhaps accelerating recent growth of the public sector in the economic and social life of democratic societies. While the book is rich in aperçus of interest to all who labor in the vineyard, it has a quality of sketchiness nearly inevitable in lectures that deal with a wide range of problems. Although it is surely unfair to criticize a man for not having written the book his reviewer would have preferred, I should nonetheless note my regret that in preparing his lectures for publication Professor Friedmann did not substantially enlarge the texts he delivered in Calcutta. A more thorough treatment of the important questions he poses and, above all, a treatment that gave full weight to problems of economic and social policy generated by the processes to which he alludes, would have made his book invaluable.

Professor Friedman posits a pluralist society as the indispensable predicate for personal freedom.¹ In such a society, under the regulation of adequate law, the autonomy of many independent groups, including the state, should prevent the emergence of a monopoly of power in any one set of institutions, private or public, and thus preserve the possibility that a wide zone of liberty can remain for the individual. In this process of ordered tension, as Friedmann perceives it, the law has both negative and positive roles: to set limits on rivalry, thus protecting the community against the emergence of a Moloch; and to fulfill the society's norms of justice.

Rejecting either a Hegelian or a Marxist hypothesis, Professor Friedmann sees the state not simply as the repository of a limited degree of public power, but also as "the focus of loyalties, of emotional allegiance and, especially in times of crisis, the embodiment of a sense of unity transcending

1. Professor Friedmann excludes from his survey socialist societies in which the state owns nearly all property, or directly controls all or nearly all economic activity. In such societies, he seems to assume—as von Mises and Hayek argued a generation ago—that democracy is impossible, since the individual has no genuine alternative to complete economic dependence upon the state.

the balancing of competing interests— . . . (p. 9)" the embodiment, that is, "of certain ideas of justice and public interest encompassing the community as a whole." (p. 10) In a pluralist society, he writes,

of which "the mixed economy" is an important aspect, the help of the state may be invoked either against private power (e.g., price controls or anti-trust decrees or nationalization of enterprises) or against public power (e.g., through judicial restraint on administrative arbitrariness). In the latter case, one arm of state power is used to control another. (P. 10).²

In Professor Friedmann's view—with which I fully agree—"any legal order reflects the social ideals of the society that it seeks to order" (p. 20). Absent Divine revelation, there is no escape from this primary relationship between law and its matrix of custom, mores and aspiration. Professor Friedmann therefore starts his analysis by evoking the common social ideal of contemporary democracy—an ideal, he contends, that is shared by the United States as well as by India, by the Netherlands as well as by West Germany and Australia.³ Among the elements of that quintessential ideal, he suggests, two are of overriding importance: (1) a rejection of *laissez-faire*, and an acceptance of a far larger positive role for the state in economic life than that which obtained in the nineteenth century; and (2) a concern for personal freedom, translated into an insistence on pluralism as the basic principle of social organization.

Professor Friedmann's subject, therefore, is the rightful function of public law in societies of the Western model, whether they choose to describe themselves as socialist or capitalist. What is important, he urges, is that in such societies private property and private enterprise remain both economically and socially significant, as are economic activities conducted or directed by the state. Among the economic functions now generally undertaken by the state in modern democracies, he concentrates on four: those in which the state is (1) *provider* of social services; (2) *regulator* of private economic activity, through the licensing of investment, the management of exchange controls, and the like; (3) *entrepreneur* of a nationalized public sector; and (4) *umpire*, seeking to meet the community's standard of justice in resolving conflicts and competing claims to economic resources, privileges and opportunities.

It is surprising that Professor Friedmann does not examine the central task of the state in "the mixed economy" of modern democracies: that of managing its fiscal and monetary policies in ways that are intended to provide the private sector with effective incentives to maintain full employment without inflation. More than a quarter-century of experience with the effort

2. See also p. 72 *et seq.*

3. P. 20.

has spawned a rich array of problems, as urgent for Western Europe, Japan, and the United States as they are for India. Indeed, the new challenges to policy that have emerged in the era of full or super-full employment are as acute within the planned economies of Eastern Europe as they are in and among the planned economies of the West.

In all the democracies, under a variety of procedures, governments have used fiscal and monetary policy to offset fluctuations in private expenditure, in order to keep the private sector under the pressure of enough spending to ensure high levels of employment from reasonably competitive markets. These planning efforts have thus far prevented prolonged depressions of the kind that used to plague the world economy. But they have given rise to new and equally difficult problems. No Western society has been able for an extended period to maintain wage rates compatible with full employment at stable prices. The fact that wages and prices rise at different rates in different countries has weakened the international economy, and imposed great burdens on developed and developing countries alike. In many parts of the world, there is not enough entrepreneurship and capital to create enough jobs for a rising population. And in some, most mysteriously of all, the habits of work that Max Weber thought essential to the development of the modern economy seem to have altered.

Dilemmas of this order, and those to which they give rise, frame and shape the problems treated in Professor Friedmann's book. The central focus of his concern is the spectrum of legal issues that arise within the framework of particular administrative systems—those of social security, regulatory agencies, or nationalized industries. His perspective is that of the traditional legal literature on these matters: that is, his attention is directed almost entirely to problems of developing and enforcing fair, efficient, and uniform rules to regulate the regulators and other public officials who carry out functions of this kind. The few pages he devotes to the welfare state deal briefly with the shift from liability for fault to judicial or administrative arrangements for transferring the cost of accidents, illness, old age, and unemployment from individuals to private or public schemes of insurance. But he does not alert his listeners in India, or his readers elsewhere, to the crises of cost and of administration that now threaten to engulf programs of health, education, and welfare in many democratic societies. These cascading problems are among the most urgent issues of public policy for almost every democratic welfare state. They present difficult economic and moral questions of how far to carry a redistribution of income in the name of social justice. They raise as well questions of motivation and of social discipline that are almost entirely novel to the experience of modern capitalist societies. It is therefore unfortunate that Professor Friedmann does not consider the theories which seek to explain many of these phenomena—such as the startling disintegration of

quality that has taken place in many health and educational systems in recent years—and the remedies that have been proposed to correct them.

Similarly, while he comments perceptively on the growing role of the state in regulating labor agreements, and other contracts and arrangements affecting employment, and in controlling the abuse of economic power—particularly the extended American experience with legislation against monopolization and restraints on competition—his treatment is largely descriptive; he does not attempt to anticipate the problems that will almost surely dominate these fields during the next decade. In discussing the American antitrust laws, or the possibility of international agreements regulating trade and investment, for example, he does not discuss the problem of conglomerates, or the issues of policy presented by multi-national corporations.

Professor Friedmann's treatment of the experience with nationalized enterprises, both in mixed economies and in the Communist states, is more satisfactory. Here he notes the variety of motives that have led to the nationalization of sectors and enterprises in mixed economies, and the problems of management, energy, accountability, bureaucracy, and absence of the competitive spur that have made the record uneven, both in mixed and in communist economies. Rightly calling for criteria of social judgment broader than those of profitability alone, he concludes, with Geoffrey Vickers, that the community evaluation of public enterprises should consider non-economic and non-quantitative factors, which, complex and intangible, as the true province of political decision-making.

The most original passage in Professor Friedmann's book is his analysis of the complex problem of the state as umpire in a mixed economy—its classic function of developing and administering law capable of articulating public policy on the one hand, and of fairly supervising its execution on the other. In the modern mixed economy, he warns, the most difficult task of the state as umpire is to protect the legitimate autonomy of individuals and private groups while fully acknowledging the unique functions of government as protector of the public interest. He concludes that, to carry out this responsibility, administrative justice on the French model is indispensable, despite the ingrained suspicion with which the idea has always been viewed in common law countries. The essential tool of such control over the administrative process, in his judgment, is unified judicial review, preferably by a specialized tribunal, to check excessive power and the abusive exercise of power in derogation of private rights. The consistency and uniformity of law that should be achieved by this procedure, Professor Friedmann believes, would assure "the rule of law" in the conduct of public and private economic activities, and in the establishment of fair rules to govern their competition when public and private enterprises are rivals in the marketplace.

In the end, Professor Friedmann assumes that the role of the state in

mixed economies is bound to increase, although perhaps not at the rate of its recent growth. Stressing the importance of maintaining an appropriate balance between the public and the private sectors—in the interest of human freedom—he concludes that economic criteria alone cannot determine where the line should be drawn for a given society at a given time.

It may be that the tragic increase in military expenditures, everywhere so conspicuous, will fulfill Professor Friedmann's prophecy. But if we can, for a moment, put the security problem to one side, there is no inherent reason to suppose that Professor Friedmann's assumption is based upon an irreversible law of nature. The shortage of entrepreneurship and of managerial skills, and the congestions of the bureaucratic and administrative process, are in fact working in the opposite direction throughout the world. In Communist countries, developing nations and Western industrial states alike, the trend in business organization is towards greater decentralization, more reliance on market incentives, and more rapid growth in the private than in the nationalized sectors. This process, visible in the statistics and in ordinary experience, does not threaten the capacity of the state to carry out the critically important planning functions which it alone can undertake—managing the flow of spending; conducting antitrust and regulatory functions; or acting as owner and manager of selected enterprises. If an adequate theory of effective planning for mixed economies is developed, and accepted by public opinion, there is no reason why many functions that the state has taken over in recent years for reasons of inertia, ideology, or bankruptcy cannot be remitted to the private sector during the next generation, on the basis of the kind of social judgments Professor Friedmann recommends.

The legal literature on planning for mixed economies is not yet voluminous, and Professor Friedmann's book is a welcome addition to a rather small shelf. It does not undertake to deal with all the urgent issues in the field. But it treats the problems that it does examine with sophistication, flair, and judgment based on sustained thought.

EUGENE V. ROSTOW

Sterling Professor of Law & Public Affairs
Yale University Law School

THE LOGIC OF THE LAW. By Gordon Tullock. New York: Basic Books, Inc., 1971. Pp. 278. \$7.95.

There is a cracker-barrel style about this book that is disarming. The very first chapter, titled *Law Without Ethics*, suggests to the unwary reader that he will be spared an unsettling encounter with the complexities of ethical philosophy; that he will, instead, be treated to a nostalgic romp