Volume 39 | Issue 4 Article 17

June 1933

Legislative Regulations, A Study of the Ways and Means of Written Law

George A. Shipman
West Virginia University

LEGISLATIVE REGULATION, A STUDY OF THE WAYS AND MEANS OF WRITTEN LAW. By Ernst Freund. New York: The Commonwealth Fund. 1932. Pp. xvi, 458.

In the study of American legislation as a means for the effectuation of state policy, the late Professor Freund was easily the pioneer. Beginning with a treatise on the police power published early in the century and continuing with lectures on the standards of legislation and a volume on administrative powers over persons and property, he has contributed a fundamental understanding to the process and technique of legislative government. This latest work might properly be designated as the by-product of his previous publications for in this he has gathered together his observations of statutory technique, the devises for making and enforcing legal standards. The comprehensiveness of a treatise is not claimed for this volume, nor does it pretend to treat exhaustively the myriad of problems which are included within its scope. No guide for the technician is offered, nor a book of reference for the harrassed student. It is rather a general commentary upon certain problems in the field of legislative regulation which is valuable because it is suggestive and stimulating, and also because it is illumined with the ever-wise comprehension of the process which has characterized each of Professor Freund's contributions.

The scope of the work suggests its breadth. The first part is devoted to legislation as the form of law, treating written and unwritten law, government-legislation and law-legislation, and general and special legislation. The second part, general aspects of legislation, embraces the problems of methods and forms, policies and standards, and limitations upon legislative powers as a legislative problem. Phraseology and terms, the topic of the third part, includes the language of legislation and the definiteness of terms. Parts four and five consider the techniques of penal and civil legislation respectively.

A good deal of the matter contained in the first two parts might appear at first glance to belong in the periphery rather than in the heart of the problem. Phraseology and terms, it might be argued, are of relatively minor importance as long as the language used conveys an impression of the purpose which actuates the legislator. Most fundamental from this point of view would be an exhaustive commentary upon the alternatives, and their relative merits, which are offered to solve the immediate problem of

how shall the draftsman proceed with the building of a complete statute. Freund's book convincingly negatives the first two contentions, not by an explicit justification of its course, but by an assumption of importance which weaves fundamental viewpoints into the warp and woof of legislation. The draftsman, moreover will be disappointed for no complete solution of his difficulties will be found. There is indicated, to be sure, a wide variety of problems with some suggestion as to the expedients followed in various jurisdictions, but an exhaustive analysis of any single one is left to the student of a particular project.

The fundamental considerations which are suggested deserve the thoughtful study of every student of legislation. The legislator must realize that all law cannot be reduced to written form, or rather perhaps to the regulatory provisions which the idea of written law connotes. Unwritten, even unwriteable elements determine the ultimate application of legislation as it controls human activity. Whenever law as legislation is imposed, the factor of interpretation directs the application. The use of declaratory rules, that is, the delimitation of standards to guide judicial and administrative interpretation, testifies to the inability to foresee and provide for every contingency. The codes of continental Europe are, after all, declaratory legislation to a very considerable extent, leaving to interpretation and analogy the solution of the intricate situations which are the material of the judicial process.

The distinction between government-law and law-legislation is related to the separation of perogative law and common law. The former was the absolute law of the crown devoted, presumably, to the common good, but resting entirely in sovereign discretion. The latter was the more or less natural product of private interrelationships, the adjustment of difficulties arising among private persons, and controlled by parliamentary enactments. In the United States little is known of executive legislation as such but various tendencies testify to its existence, such as emergency proclamations, the creation of administrative bodies guided chiefly by declaratory standards but subject ultimately to the restraint of judicial review, and the present tendency toward the delegation of broad discretion in the executive. The student of constitutional theory is, moreover, constantly alive to the somewhat analogous distinction, implicit rather than explicit, between the control of governmental organization and the invasion of private rights. Widely different theories control the application and the validity

of these powers, although the result upon the person affected is not greatly different.

The student of legislation must likewise be alive to considerations of methods and forms, that is to say, the uses of civil, as distinct from penal regulation, of civil disability, of classification, and of substantive and formal requirements. Hesitancy to arm a legislative policy with a penal sanction may lead the legislator to substitute a civil regulation. Thus a course of action is gaited to produce a legal rather than a factual result, liability to the person injured rather than to state prosecution. But, on the other hand, the civil sanction has a distinct, if secondary, role in the technique of regulation, for at least, it avoids the delicate questions of the constitutionality of direct public action. The use of civil disability has its merits, but seldom represents a clear-cut public policy.

To the casual reader of American statute law, the most distressing problem is the almost uniform prolixity of expression. The dictates or public policy seem most effectively concealed within the thicket of ambiguous terms and unwieldly language. This problem would be serious enough were not legislation still further confused because of the indiscriminate use of political as well as legal language. Political language appeals to sentiment and understanding; legal language to reason and logic. The definition of a standard of conduct demands the certainty of legal language, but political phrasing has its value for by this means the legislative intent can be most easily expressed. In order, however, to maintain a clarity of distinction between words intended as a declaratory standard and those setting the regulatory rule, a useful expedient is to preface the statute with a preamble setting forth in political terms and with declaratory intent the end which the act is intended to accomplish.

The habit of extreme verbosity is traceable immediately to amateur draftsmanship. On the average the legislator is not prepared to draw his own statutes, and in consequence private member's bills are burdened with words in an effort to avoid obscurity. Curiously enough this attempt at complete enumeration encounters the identical pitfall which it was intended to avoid. In statutes as elsewhere there is no substitute for simple language and clear-cut statement. The experience of Congress and of the British Parliament indicate a solution in professional draftsmanship.

In final evaluation of Professor Freund's book, it should be emphasized that it offers its principal interest to the student of

legislation rather than to the legislator or the technician. It undertakes neither a completeness of scope nor an exhaustiveness of treatment, but within the limits of its purpose it accomplishes an admirable result. The student, however, must still search for an adequate treatment of the legislative process as such and the study of the technique of legislation, not alone as the problem of regulation, but also as the necessity for a presentation of statutory material to the legislature itself which will facilitate the legislative consideration of the issues of public policy involved and will eliminate the practical obstacles of verbal obscurity and faulty technique. This still remains to be done.

—GEORGE A. SHIPMAN.

West Virginia University

THE HOLDING COMPANY. By James C. Bonbright and Gardiner C. Means. New York: McGraw-Hill Company. 1932. Pp. xiii, 398.

Before New Jersey led the day in 1880 by amending her general corporation law to authorize corporations to hold shares in other corporations the only holding companies of any significance were created by special legislation, principally in Pennsylvania.[1] In the "trust-conscious" days around the turn of the century the device passed the experimental stage as a form of business combination. Since the war it has come to dominate not only the utility field but a majority of the large industrial combinations of the country. Its latest conquest has been in the field of commercial banking.

This development is a matter of fundamental economic and legal significance. ". . . . the holding company has become the greatest of the modern devices by which business enterprises may escape the various forms of social control that have been developed, wisely or unwisely, as a means of limiting the vast power of the great captains of industry."[2] The ordinary citizen doubtless senses this point in a vague fashion and looks upon the holding company as a heartless, ununderstandable business monster capable of no good. Nothing could be more timely than a dispassionate description of the device in theory and operation and an analysis of the controversial phases of the subject in terms of

[1] See chapter 3.
[2] P. 7.