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Legislative Regulation-A Study of the Ways and Means of Written Law, by Ernst Freund

J. O. Muus
University of North Dakota

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BOOK REVIEW

Legislative Regulation—A Study of the Ways and Means of Written Law. By Ernst Freund. (The Commonwealth Fund, New York, N.Y. 1932. Pp. xvi. 458.)

Because of the growing importance of the place of legislation in legal science and in legal education, *Legislative Regulation* is of unusual interest and value. Professor Freund has chosen from the mass of statutes in American and foreign jurisdictions the significant forms and developments of legislation. In the preface the purpose of the study is stated by the author: "The topics dealt with in the book are intended to be of some value to those concerned with the function and tasks of legislation; the possibilities of general as distinguished from special legislation, problems of phraseology and style, available forms and methods, and the technical detail of penal and civil legislation. More abstract and theoretical aspects of legislation may well be deferred."

The book is divided into five parts. In the first of these, legislation is dealt with as a form of law wherein there appears a distinction between unwritten or declaratory law, which is the province of the courts; and written or regulative law, which is within the scope of the legislatures. Reserved to this written law are the criminal codes, public law, and regulative law. On the continent of Europe, private law is also written, and appears there in the form of Civil Codes. Legislation for governmental purposes is contrasted with regulative rules in aid of law legislation. The following chapters show the abuses of special legislation which result from the attempt to secure local benefits.

Part two deals with the general legal aspects of regulation. Under the heading of "Methods and Forms" appear the distinction between penal and civil legislation. Civil regulations, which have the accomplishment of a desired result as a means of enforcement, will best operate when their terms are self-executing; but in both types of legislation, the intervention of official power may be advantageously used. Protective expedients and form requirements are important factors in successful liability legislation. A detailed explanation is made of deferred control, whereby the qualitative standard established by the legislature is administratively applied from case to case by either advance determination or corrective intervention. One of the numerous practical suggestions which the book contains occurs in the statement that a cumulation of requirements may cause conflicts, while prohibitions do not, yet they have the advantage of ease of enforcement. In the enactment of policies and standards

of legislation the purpose is that of abuse correcting rather than that of model setting, the best results being obtained by the establishment of minimums. A superior form of regulation may be secured through the use of a comprehensive plan of legislation wherein each matter is given its proper and proportionate attention. In drafting of all statutes the draftsman should keep in mind the limitations upon legislation so as to effect adherence to constitutional and jurisdictional requirements.

The last three portions of the book deal with the mechanics of legislation in which may be found an excellent discussion of its phraseology and terms. Legislative language is definite while political language is such as will result in marginal ambiguity, and consequently loopholes for subsequent escape. Then legislative language is explicit, its terms being capable of literal interpretation, while judicial language is of but essential validity. This entire section of the book dealing with legislative style is one of its outstanding features. A complete form for a statute is presented, together with valuable warnings to avoid a needless elaboration of qualifying terms, the passive voice, positive provisions, and those which are not self-executing. Especially must the terms employed in statutes be precisely measured in meaning, for the use of indefinite terms results in difficulties of enforcement in penal regulation, though this is not true of their use in statutes imposing civil liability.

Concerning the technique of penal regulation, the publicity and checking requirements should be so devised as to make the duty effective, a result best obtained through the establishment of their performance as a condition precedent to the securing of the necessary facilities. In drafting provisions for the granting of licenses or orders, if the desire is to make the determination nondiscretionary, care should be taken so as to avoid the use of terms which involve expert judgment. Full attention is given to the procedural requirements essential in the statutes relating to licenses and orders. Suggestions given concerning enforcement provisions include: care in placing duties upon responsible persons, the moderate use of adverse presumptions, summary enforcement through equity procedure, the avoidance of informers' suits, and certain administrative aids to enforcement.

As a leading principle of the technique of civil regulation, the draftsman should not prescribe exact words as necessary to the accomplishment of any legal result. The details of the organization of bureaus may well be left to the head officer, but the appointments to office should be made so as not to cause a conflict with civil service regulations. The major problem in the use of civil regulations is that of defect and error in their application. Numerous methods of caring for the instances of inadvertent failure to comply with civil requirements are given. The leading ones are those of conclusive

administrative or judicial determinations by which may be secured a verification of compliance with the statutory safeguards. Finally, the draftsman should give careful attention to a matter often neglected; namely, provisions relating to the application and effect of statutes.

Professor Freund's book contains valuable suggestions for the lawyer as an aid in the reading and interpretation of statutes and for the legislative draftsman as a manual of practical guidance. Throughout the entire work, legislative practices are presented, commented upon, and evaluated, with many references to appropriate judicial comments. Frequently employed are models taken from American, English, French, and German statutes. Because of his broad knowledge of this field, Professor Freund has been able to produce a book which offers a sound basis for the study of legislation.

J. O. MUUS.

The University of North Dakota.