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Book Reviews

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BOOK REVIEWS

STANDARDS OF AMERICAN LEGISLATION. An Estimate of Restrictive and Constructive Factors. By Ernst Freund, Professor of Jurisprudence in the University of Chicago. Chicago: The University of Chicago Press, 1917; pp. xx 327.

Dr. Freund's book was read by the reviewer in the summer of 1917, but a combination of circumstances, greatly regretted by him, has prevented the completion and publishing of the review then partially prepared. The justification for printing it now lies in the excellence of Dr. Freund's work and in the vital importance of careful study by American lawyers of the too long neglected field of legislation as, with the War, apparently ended, the Nation enters upon a period of political and social reconstruction, which seems destined to be epochal. With the organized forces of the titanic struggle halted, and its tumult suddenly stilled, we emerge swiftly into a period of seeming calm, but portentous with the suggestion which we now only vaguely sense and cannot yet analyze, that the mighty forces released in the world's convulsion cannot be returned within their old confines. It is a time that calls for constructive statesmanship of a high order; many complex and radical changes will undoubtedly be made, changes for the making of which the gradual processes of the courts, and precedents and *stare decisis* were never designed and for which they are totally inadequate. The ship of state can be kept on a true course, as it emerges from the international storm, only by the resort to legislation, organic or fundamental and ordinary, unless indeed the hyenas of society, aided by hair-brained and egotistical visionaries are to subject us to the direct and destructive methods of Bolshevism. At any rate it would seem that our courts as at present organized, hampered by tradition and restricted and in important respects made ineffectual by archaic and blundering constitutional and legislative checks and restrictions in many states will be wholly unequal to serve as the agents of the inevitable transition,* and that the volume of our legislation already overwhelming will be enormously augmented.

Dr. Freund says of his book in the preface: "Its purpose is to suggest the possibility of supplementing the established doctrine of constitutional law which enforces legislative norms through *ex post facto* REVIEW and negation by a system of positive principles that should guide and control the making of statutes, and give a more definite meaning and content to the concept of due process of law." The introduction differentiates between principle and policy in legislation, confusion concerning which has undoubtedly produced many of the unfortunate court decisions which had much to do with the demand for the "recall of decisions" a few years ago. Thus as Dr. Freund says (p. 2): "It was rather a fundamental policy of distributive

* For an illuminating discussion of Courts and Legislation see Pound, 7 Amer. Polit. Sci. Rev. 361.

justice which the New York Court saw" (in the regrettable case of *Ives v. South Buffalo R. Co.*, 201 N. Y. 271) "fixed upon the state by the guaranty of due process—fundamental, but after all only a policy, likely to be changed by the process of economic and social thought." But what have courts to do with policy? Dr. Freund's answer appears later.

The first five chapters are largely historical, a rapid but very penetrating examination of the changes of policy in regard to such juristic conceptions as the right of personality, freedom of thought, repression of unthrift, etc. The common law as a system of public policy is shown to be inadequate and the "tasks and hazards of legislation" are indicated, and constitutional limitations considered. Concerning the latter Dr. Freund concludes:

> "Upon a larger view, then, of our constitutional history we are impressed with the fact that in assigning a controlling function to the courts we have after all not altered the universal character of constitutional issues: in America as well as in other countries they are, in the main, issues of power and policy. Compared with these issues the question of the conformity of legislation to financial principles of law has engaged the attention of the courts only to a relatively slight extent, and their decisions offer little in the way of enlightening discussion of canons of justice applicable to legislation."

and this he thinks is what was to have been expected:

> "But above all it is necessary to realize, not only that constitutional law as represented by judicial decisions does not furnish us with a body of principles of legislation, but that it does not even indicate fully and clearly the nature and scope of these principles.

In Chapter VI, "The Meaning of Principle in Legislation" are more completely distinguished:

> "While principle in common law simply stands for logic, reason, and established policy, its meaning in legislation is far more complex. We can hardly say more to begin with than that it means a settled point of view, and any closer analysis requires careful differentiation.
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> "At the opposite ends of the various classes of considerations that move the legislator we should place constitutional requirement and policy. The constitutional rule must be obeyed no matter what opinion may be entertained of its wisdom, and is thus withdrawn from argument except for the purpose of interpretation."
>
> "Policy, on the other hand, represents the freedom of legislative discretion. No matter what array of facts and arguments we may bring to bear upon certain problems, we must recognize that in the present state of human thought and knowledge their determination is controlled by considerations which lie beyond the forum of compelling reason, and depends upon fundamental differences in habits and ideals."

And as to the social sciences in their relation to legislation he says:

> "The bulk of modern legislation deals with social, economic, or political problems. These problems are not amenable to the same methods of treatment as the problems of physical science, and few of the conclusions offered in the name of the social sciences can claim finality or acceptance as absolute truths. Those who insist that the legislature is bound to defer to experts do well to remember that, of the great social measures of the nineteenth century, the factory acts were carried against the protests of economists, while the public-health laws were largely based on theories of the spread of disease which are now rejected."
>
> "Nevertheless, a science of legislation desirous of establishing a status of its own would treat the data of the social sciences as lying outside of its own sphere and consider that its task begins only when their conclusions have been reached and formulated."

The final chapter is devoted to constructive suggestions, among which are the creation of special commissions for the drafting of bills, increasing the powers of administrative commissions, drafting bureaus, and the right of the executive to introduce bills and to participate in the debates

The treatment throughout is suggestive rather than exhaustive, but from cover to cover it is the work of a scholar and characterized by wide knowledge, clear, objective and scientific analysis.

Unquestionably American lawyers and law schools have given too little attention to the study of legislation. There is great promise in such work as Dr. Freund is doing, and it is to be hoped that he will publish further studies of this kind.

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THE ARMY AND THE LAW, by Garrard Glenn, of the New York Bar, Associate Professor of Law, Columbia University. New York: Columbia University Press, 1918: pp. I, 197.

The purpose of this book is to define "the relation of the common law to the army,"—not including the rules governing the internal affairs of the army, nor the international laws of war, except incidentally, but "with the army only in its relation to the common law which governs the general public, and with the soldier only insofar as his activities are, in point of law, of interest to non-military persons."

Mr. Glenn does this under the following heads: Introductory; The Constitution of the Army; Military Law and Military Courts; The Army's Right of Self-Regulation: The Army in Its Relation with the Enemy; Military Occupation in Matters of Government; Military Occupation in Matters of Property; Relation of Soldier to Civilian in Time of Peace; Relation of Soldier to Civilian in Time of War; and Martial Law.

It is a real pleasure to meet such a book as this at this time. Nothing could be more timely. The book should be read and studied by civilians and

soldiers alike; and lawyers, whose ideas upon these matters are more or less hazy certainly will find help and pleasure in its perusal. While perhaps one would take issue with the author upon some matters and conclusions, or would not quite agree with his statement of the basis of the decision of some cases referred to,—as, for instance, *Ex parte King*, 246 (not 247) Fed. 868 (p. 59)—yet on the whole this reviewer does not know where so much meaty substance, so well arranged, so clearly put, in so small a space, on the topics treated, can be found as in this book. It and Part I of BOTY AND MORGAN'S WARS: ITS CONDUCT AND LEGAL RESULTS, should be read together.

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