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W. Burnett Harvey

University of Michigan Law School

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THE RULE OF LAW IN HISTORICAL PERSPECTIVE*

W. Burnett Harvey†

EVENTS of the past two decades have made imperative a fundamental re-examination of the basis of government and the legal order. The gross inhumanities of the German and Japanese regimes during the Second World War are fresh in our memories. In many areas of the world today, the force of law is being used for the systematic suppression of claims to freedom and human dignity. The revolutionary ferment of the post-war years has brought into existence new governments with the task of determining their fundamental orientation and the direction of their legal orders.

In such times the basic problems of government and law demand re-examination. Older societies, contemplating the barbarities of their own governments or of those they have defeated with the incalculable cost of war, press the question — what safeguards can and should be erected to restrain within decent bounds the acts of public officials. The emerging societies and older ones as well challenge traditional concepts of government and law with insistent demands for positive action on broader fronts to provide a better life for the people.

In discussion of these problems the phrase, “the Rule of Law,” recurs. In recent years two great international conferences, reflecting the principal political division of the world, have met in Chicago and Warsaw to examine the Rule of Law in the West and in the East. The American Bar Association, under the leadership of its recent president Charles Rhyne and with the *imprimatur* of the President of the United States, has inaugurated an annual “Law Day” to memorialize our devotion to the Rule of Law. A distinguished university has established a “World Rule of Law Center” to further the study of this concept in international affairs.

All this is probably worthwhile but what do we mean by the Rule of Law? Are we using a notion of determinate content to illuminate the dark corners of government and law, or are we tilting with Leviathan with only the emotive force of a cliché?

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† Professor of Law, University of Michigan.—Ed.

It seems especially appropriate in a gathering of this kind to turn our attention at least briefly from the technical knowledge and skills of our profession to a consideration of the meaning and function of this concept and, hopefully, to the fundamentals of the legal order.

It would be a digression today to speculate on the origins of government and law in small, primitive kinship groups. It is enough to note that man's life in society has seen an inexorable movement toward larger governmental units and toward ever-widening areas of official power. This development had not progressed beyond the city states of ancient Greece, however, when the philosophers raised the basic questions which still perplex men's minds: Whence comes the authority of the State? What title to respect and observance has the law? And, ever recurring in different contexts, the agonizing dilemma of Antigone whose conscience and sense of justice demanded that she perform the customary burial rites for her brother, though Creon, regent of Thebes, had decreed that he should remain unburied as punishment for his treason. This apparent conflict between law and justice is still a part of our daily lives.

Greek thought, funneled into the main stream of Western ideas about government and law primarily by the Roman Stoics, postulated a view of the universe, of man, and of law which retains its vitality today. Cicero stated:

"True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. . . . We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. . . ."¹

Christian thought built on these foundations and provided a theory of government and law which appeared to reconcile authority and justice. The cosmic order, emanating from the mind of God, ac-

¹ CICERO, *DE RE PUBLICA*, bk. III, XXII (Keyes transl. 1928).

ording to St. Thomas Aquinas, to some extent is perceptible to man's rational faculties and, as Natural Law, provides a universal standard for the formulation and administration of human law by those invested with the care of the community. The objective of government and law is thus the common good. While some deference even to unjust law may be warranted by the gain of civil peace, the commands of reason are ever present to guide the lawmaker, to inform and support the governed, and in the extreme case to justify a rejection of the demands made by human law.

The Reformation ended the harmony of medieval thought which was based on this view. The unity of the Church was destroyed — with a consequent undermining of confidence in a universal and cognizable standard of justice. Concurrently the emerging spirit of nationalism produced increasingly powerful states whose diverse enactments rendered untenable the earlier justification and validation of positive law as the enactment of universal justice. To explain and justify the law-making and -enforcing aspirations of the new national states, the theory of territorial sovereignty was developed. While not the earliest, certainly one of the most powerful formulations of this theory was presented by Thomas Hobbes in 1651. Starting from the postulate of a pre-governmental condition of man, which was a war of all against all and in which the life of man was "solitary, poor, nasty, brutish and short," Hobbes attributed the institution of civil government to a compact granting unlimited authority to the sovereign. To Hobbes, the meaning and content of justice were determined by the sovereign's enactments of positive law. The only consolation he offered to men ground under the heel of Leviathan, the mortal God, was the contemplation of their far worse condition in the absence of civil government.

Building on the foundations provided by Hobbes, John Austin in the early 19th century defined law as sovereign command, deriving its peculiar character from the naked fact that the manifestation of the sovereign's desire is coupled with a sanction, the threat of an evil, to assure compliance. It would indeed be unfair to Austin and many other positivists to suggest they ignored or were insensitive to the problem of evaluative standards for the positive legal order. Austin expressed his belief in a law of nature and suggested that the principle of utility was man's best index to

this standard. But evaluative standards were carefully delimited from law and from the proper province of jurisprudence. It is not surprising, therefore, that the developed positivistic tradition, whether derived from Austin or his modern continental counterpart, Hans Kelsen, has accepted the postulate of a going legal order, based on the sovereign monopoly of force, and has insisted that the primary, even exclusive, task of jurisprudence is to analyze and understand that order. Judgment or evaluation is someone else's function.

The significance of these philosophical developments, divorcing law from evaluation, is brought into sharp focus by technological, economic, and sociological developments of the last century and a half. The Industrial Revolution inundated the simple economy of household craft and stimulated the growth of great urban centers. The production and distribution of goods have become increasingly complex. Channels of commerce have lengthened to the far corners of the world and the significant forms of wealth have been fundamentally altered.

It was, of course, inevitable that such revolutionary developments in socio-economic conditions should have affected deeply the nature and function of government and law. Demands have been insistent that government act to correct social and economic maladjustments and to provide public services. In meeting these demands the apparatus of government has grown phenomenally, with the result that official interest and regulation range broadly over the most significant aspects of men's lives.

Against the background of a positivistic theory of law can we fail to be concerned by this development of the modern state? With its reserved monopoly of force, its economic power, its overpowering resources of information to be disseminated, or withheld, or spread in partial or distorted forms, with its fantastic proliferation of legislation and decision, how can we cope with it, whether as an individual, a minority group, or the broad mass of the population? Lord Acton's famous aphorism that power tends to corrupt and absolute power corrupts absolutely focuses historic experience on our dilemma. In a demanding, complex society like that in which we live, it is unthinkable that governmental authority and the administration of justice should be reduced to the elemental level of preserving the public peace.

Yet how can we reconcile such great and pervasive power with the preservation of those values we cherish most highly?

It is, then, with this problem in view that we turn to an analysis of the Rule of Law. One common meaning of the term may be mentioned briefly and immediately put aside as not significantly responsive to the present interest. This meaning equates the Rule of Law merely with the existence of public order maintained through the systemized application or threat of force by a modern state. In this sense, the Rule of Law exists in every developed state, is not dependent upon any particular ideology, and applies no restraint on official action in relation to individuals or groups. On this basis, it is plausibly arguable that the Rule of Law is furthered as the scope of legal regulation is extended into the lives of citizens. In fact, this argument was made by the apologists of the late Nazi and Fascist regimes.

It is obvious that more than this notion is involved in the thought of those who offer the Rule of Law as a bridle for Leviathan. In their views, may I identify very briefly three basic meanings of the Rule of Law and suggest some criticisms of each concept.

The first of these, while in no sense prior in point of time, perhaps deserves first mention because of its association with Professor A. V. Dicey, who popularized the term, the Rule of Law. In his well-known work on *The Law of the Constitution* which first appeared in 1885, Dicey declared that since the Norman conquest two features had characterized English political institutions. The first of these was the supremacy of the central government, and specifically in modern development, the supremacy of Parliament; the second was the Rule of Law. To Dicey this second feature had three distinct facets: first, "that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."² Therefore the Rule of Law, according to Dicey, is "contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint."³ Second, the Rule of Law meant

² DICEY, *THE LAW OF THE CONSTITUTION* 183-84 (6th ed. 1902).

³ *Id.* at 184.

that every man was subject to the ordinary law of the land and came within the jurisdiction of the ordinary courts; therefore Dicey vigorously rejected the idea of a separate body of administrative law applied by special tribunals to the conduct of officials, best exemplified in the French Conseil d'Etat. Third, according to Dicey, the principles of English constitutional law, and specifically the rights of individuals, were derived from judicial decisions and not from written constitutions.

Before commenting further on Dicey's classic formulation, a word might be said about the extreme theory of one of Dicey's modern disciples, the Austrian economist, Friedrich Hayek. In his widely read book, *The Road to Serfdom*, Hayek asserts that the Rule of Law, stripped of all technicalities, means "that government in all its actions is bound by rules fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."⁴ Thus the Rule of Law, according to Hayek, is antithetical to state planning, for planning necessitates the exercise of official discretion in regulating the affairs of determinate people.

Much criticism might be levelled against the theories of Dicey and Hayek. The former purported to describe the operative constitutional principles of late 19th-century Britain; yet even at this level his view was partial and hence distorted.⁵ He ignored the many privileges, powers, and immunities of the Crown which then existed and produced essentially different treatment of official and private conduct. He ignored the developing administrative agencies in Britain and grievously misunderstood the nature of administrative justice on the continent which has succeeded far better in developing meaningful review of administrative action and curbs on abuses than have been achieved, even today, in England.⁶

⁴ HAYEK, *THE ROAD TO SERFDOM* 72 (1944).

⁵ JENNINGS, *THE LAW AND THE CONSTITUTION* 53-78, 289-301 (4th ed. 1952).

⁶ See HAMSON, *EXECUTIVE DISCRETION AND JUDICIAL CONTROL: AN ASPECT OF THE FRENCH CONSEIL D'ETAT*, *passim* (1954).

Basic in the thinking of both Dicey and Hayek is a sharp distinction between law and administration. Law was conceived by them as a body of rather specific rules applied by the ordinary courts, while administration meant discretion and official arbitrariness. Yet such a sharp distinction was not descriptive even in Dicey's day and is even less realistic in the middle years of the twentieth century to which Hayek speaks. Surely no one beyond his first year in law school conceives of law as directions printed in heavy black type, susceptible of literal and mechanical application by the courts. Discretion in the administration of the law by the courts is inevitable. It appears when a judge scales punishment to fit the criminal and not the crime; it is invoked by the application of such concepts or standards as reasonableness, *bona fides* or the jurisdictional test in equity of the inadequacy of the remedy at law. The crucial point, perhaps, to the theories of Dicey and Hayek, is *who exercises the discretion*. As Sir Ivor Jennings has pointed out, Dicey's asserted goal of "rule by the law alone" comes close to meaning "rule by the judges alone."⁷

Finally, insofar as Dicey proposed the Rule of Law as a substantive safeguard of individual rights against the ravages of government, he is caught in an irreducible contradiction. His entire catalog of the ancient rights of Englishmen, developed and protected by the ordinary courts, stands under the deep shadow of the initial characteristic of English constitutional law — the supremacy of Parliament. Ultimately it would seem therefore that the preservation of individual liberties is less dependent upon the Rule of Law, as conceived by Dicey, than upon the threat of political action should the acceptable bounds for official action be exceeded.

Thus this first concept of the Rule of Law purports to reflect certain constitutional principles of 19th-century Britain. On analysis, it seems more accurately reflective of the political ideology of a late 19th-century Whig valiantly fighting a rear guard action against the inevitable governmental developments arising from an increasingly complex, technological society. In terms of the allocation of governmental powers essential to an adjustment of the legal order to the life of society, the theory implicitly prefers the

⁷ Jennings, *op. cit. supra* note 5, at 294.

dominance of the judicial branch. Its political thrust is inherently conservative.

The second basic meaning of the Rule of Law is essentially procedural. The following succinct statement by Professor Harry Jones of the Columbia Law School provides a highly satisfactory summary:

“For want of a commonly understood American version of the rule of law, I will hazard my own understanding of the term’s connotation in the American legal order. The rule of law is a tradition of decision, a tradition embodying at least three indispensable elements: *first*, that every person whose interests will be affected by a judicial or administrative decision has the right to a meaningful ‘day in court’; *second*, that deciding officers shall be independent in the full sense, free from external direction by political and administrative superiors in the disposition of individual cases and inwardly free from the influence of personal gain and partisan or popular bias; and *third*, that day-to-day decisions shall be reasoned, rationally justified, in terms that take due account both of the demands of general principle and the demands of the particular situation. This enumeration does not purport to exhaust the meaning of the ‘rule of law’; doubtless there are other essential attributes to be included in the term’s full intension. But any American lawyer would say, I think, that the three features just given characterize the best of our legal institutions — for example, our criminal litigation when properly conducted — and make up the adjudicative ideal of our legal tradition.”⁸

This concept, usually referred to in this country as due process of law, surely is part of the conditions of responsible and respectable government. Yet if the Rule of Law purports to encompass all significant aspects of the individual’s relation to his government, this procedural perspective can be only a partial view. In the Anglo-American common law tradition it is not surprising that regulative ideas germane to the judicial process should claim the center of the stage. Yet these ideas speak indirectly, if at all, to the innumerable impacts between government and citizen which do not result in litigation either in the ordinary courts or in the new administrative agencies exercising quasi-judicial powers.

⁸ Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 145-146 (1958).

Perhaps the gravest inadequacy of this primarily procedural view of the Rule of Law is its lack of relevance to the legislative process and its unresponsiveness to felt demands that the legislative power be subjected to substantive curbs. One poignant illustration of this point comes from the Union of South Africa.

In the pre-dawn hours of December 6, 1956, one hundred and fifty-six persons were arrested in various parts of the Union and flown by military aircraft to Johannesburg. There they were charged with high treason and other serious crimes. This miscellaneous group was made up of Europeans and Africans, of laborers and professors, of militants and pacifists, of Christians and pagans. They shared only one obvious characteristic — an avowed opposition to *apartheid*, the South African version of white supremacy.

The crimes charged merit some explanation. The first was high treason. In South Africa, this is a Roman-Dutch common law offense of exceedingly broad inclusion, punishable by death. For example, one commentator suggests that it apparently may be committed merely by suppressing information.⁹ The accused were also charged under the Riotous Assemblies Act which makes criminal a wide variety of acts “calculated to engender feelings of hostility between the European inhabitants of the Union on the one hand and any other section of the inhabitants of the Union on the other hand. . . .”¹⁰ Why the actions of the government in implementing its policy of *apartheid* are not in direct contravention of this act is somewhat difficult to discern. The government, however, charged that the activities of the accused in opposing that policy were in violation of the statute. The third basis of charge was found in the Suppression of Communism Act which defines “Communism” broadly enough to include any scheme or doctrine “(b) which aims at bringing about any political, industrial, social or economic change within the Union by the promotion of disturbance or disorder, by unlawful acts or omissions or by the threat of such acts or omissions or by means which include the promotion of disturbance or disorder . . .” or “(d) which aims at the encouragement of feelings of hostility between the European and non-European races of the Union

⁹ Dr. Eduard Hambro, former Registrar of The International Court of Justice, in 8 BULLETIN OF THE INTERNATIONAL COMMISSION OF JURISTS 46, 48 (1958).

¹⁰ Riotous Assemblies (Amendment) Act, Act No. 19 of 1930, § 1, amending Riotous Assemblies and Criminal Law Amendment Act, Act No. 27 of 1914.

the consequences of which are calculated to further the achievement of any object referred to in paragraph (b)."¹¹ Again the *apartheid* government seemed to be exempt from accusations of this broadly-defined "Communism," while those in opposition, even Christian moderates like Chief Albert Lithuli, head of the African National Congress, are "Communists" to be suppressed.

We cannot take time to follow the trial through its various proceedings in the tedious months and years which followed the arrests. My point can be made much more simply. The judges assembled to try the accused were steeped in the Roman-Dutch law, which has a tradition of judicial fairness comparable to our own. The proceedings have been orderly and full opportunity has been given to the defendants to be represented by counsel and fully heard. Thus there were procedural protections in full measure. But does all this make it possible to say that the Rule of Law prevails in South Africa?

Commenting on the South African Treason Trial, Dean Erwin Griswold of the Harvard Law School has stated succinctly the problem confronted by one who measures the Rule of Law primarily or exclusively by the conditions of a fair trial. He said:

"No question can be raised about the competency or the capacity of the court. Each of the judges named is a member of the Supreme Court of South Africa for one of the Provincial Divisions. South Africa has long had excellent courts maintaining high standards of fairness and justice; and this court will, of course, fit into the South African judicial tradition. Nevertheless, no matter how fair and competent a court may be, if the underlying legal situation is deeply unsound the Court may, simply because it must act according to law, be compelled to unsound results."¹²

It seems clear, therefore, that if the Rule of Law is to define adequately the relations of men to civil government, it cannot focus entirely on one manifestation of governmental power. It must comprehend the legislature and the executive, as well as the courts.

The third basic meaning of the Rule of Law, to be discussed here, is the most ancient. Like many of our ideas it was expressed

¹¹ Suppression of Communism Act, Act No. 44 of 1950, §1.

¹² Griswold, *Treason Trial in South Africa*, *The Times* (London) Sept. 25, 1958.

in the thought of ancient Greece. Aristotle, you will recall, observed in the *Politics*:

“He who commands that law should rule may thus be regarded as commanding that God and reason alone should rule; he who commands that a man should rule adds the character of the beast. Appetite has that character; and high spirit, too, perverts the holders of office, even when they are the best of men. Law [as the pure voice of God and reason] may thus be defined as ‘Reason free from all passion.’ ”¹³

This same view appeared in the earlier quotation from Cicero’s *De Re Publica*. Many other exponents of this view of the Rule of Law, ancient and modern, might be cited, but I prefer to use as illustration the views of a contemporary American, far removed from sheltered academic halls.

During his year in the presidency of the American Bar Association, Charles S. Rhyne, expressed on a number of occasions his view of the Rule of Law. At the dedication of the Association’s memorial to Magna Carta at Runnymede, Mr. Rhyne declared: “What do we mean by freedom under law? We mean a great deal more, surely, than mere obedience to written laws. We mean acknowledgement of the fact that there are moral limitations on civil power. We mean that human beings have rights, *as human beings*, which are superior to what may be thought to be the rights of the state or of society.”¹⁴ Though spelled out more fully in later statements¹⁵ the essentials of Mr. Rhyne’s view appear here: there is an order, a moral order, in the universe which is perceptible to man through his rational faculties. This order ascribes to the individual a status, a dignity, and certain fundamental rights. These rights antedate civil government and hence serve as morally, perhaps even legally, valid limitations on the power of government which primarily exists to safeguard those rights.

So stated, this view is a familiar one. It expresses the ancient belief in a law of Nature and of Reason. But unlike the classic view of Aquinas which postulated the Law of Nature as a criterion for

¹³ ARISTOTLE, *POLITICS*, bk. III, XVI, § 1 (Barker transl. 1946).

¹⁴ *The Magna Carta Memorial Ceremonies: Runnymede, Sunday Afternoon, July 28, 43 A.B.A.J.* 900, 905 (1957).

¹⁵ Rhyne, *The President’s Page*, 44 *A.B.A.J.* 195 (1958); Rhyne, “*Law Day—U.S.A.*”: *Emphasizing the Supremacy of Law*, 44 *A.B.A.J.* 313 (1958); Rhyne, *World Peace Through Law: The President’s Annual Address*, 44 *A.B.A.J.* 937 (1958).

human law to provide for the common good of the community, for Rhyne the central datum appears to be the individual with inalienable rights. Thus Rhyne echoes the language of John Locke and the Declaration of Rights of 1688, of the American Declaration of Independence and the Bill of Rights — and of the Supreme Court of the United States in the period when it invalidated social legislation under the banner of the inviolable rights of liberty and property.

A fair appraisal of Natural Law thought is exceedingly difficult and requires far more time than is available today. Within the main stream are varying cross-currents, forming eddies of profound significance. They cannot be explored in full. We know that a belief in Natural Law has often been a rallying cry, enlisting men in the fight for human dignity and a fuller, richer life. Yet this same belief has at times served as shield and buckler for those who resisted the felt needs of their times in blindness to the vision of a better tomorrow.

I would make only two specific comments on the utility of a belief in Natural Law as the basis for a theory of the Rule of Law. First, despite a widely shared confidence in man's rational faculties and in his capacity to perceive supra-mundane norms, history has not shown stable agreement on the substantive content of those norms. When Natural Law thinkers have seriously attempted to reconcile universally valid norms with the fluid needs of society in time and space, they have formulated the principles of Natural Law at such levels of generalization that the norms become purely formal, providing no significant guidance in solving the complex and harrying problems of the legal order. At the other extreme are those philosophers who, in attempting to delineate a substantive code of Natural Law, show a remarkable tendency to up-grade the positive legal system with which they are familiar to the level of cosmic norm. A central difficulty with Natural Law theory, then, is epistemological — how can we know it and how can we test the validity of the insights of those who offer precepts as the Law of Reason, of Nature, or of God?

The cardinal merit of Natural Law thought suggests at the same time its second basic inadequacy, even danger. The Natural Law exponent has always stood ready to remind the positive legal order that *it* is not the ultimate criterion of justice, that the positive law is subject to evaluation, and perhaps, invalidation, by reference to a higher standard. It is, of course, entirely appropriate to remind

those exercising civil power that theirs is a derivative and not ultimate authority, that it must be either justified and supported or condemned and displaced, by reference to a test of purpose — a purpose defined by an extrinsic set of values.

In subjecting the positive law to such a continuing critique, much Natural Law thought has insisted that basic harmony with supra-positive standards is of the very nature of the law. Thus the distinguished German philosopher, Gustav Radbruch, late in life and after the tragic experience of Nazi tyranny, appears to have concluded that certain moral restraints were implicit in the idea of law itself and that official action transgressing those restraints is not law, no matter how duly enacted, adjudged, or executed.¹⁶

One can sympathize with this insistence on the intimacy of law and morals and appreciate its utility in resisting the tyrant, while at the same time recognizing the danger in it. Briefly stated, the danger is this. It is a regrettably short step from insistence that nothing is law unless it is right, to the conclusion that whatever is law, in terms of legal enactment or declaration, is therefore right. From this perspective can be seen the significance of the Nazi slogan — *Gegetz ist Gegetz*, Law is Law. This is, of course, an extreme manifestation of the recurrently conservative impact of Natural Law thought — a tendency to take the old, the familiar, the existent, the legally-enacted, and defend it from attack on the ground that it represents the natural order of things. Implicit therefore in Natural Law philosophy is the danger that it will devour itself, that instead of providing a significant basis for evaluating the positive law, it rather will substantially immunize the positive law from criticism and evaluation.

In brief summary, three basic meanings of the concept of the Rule of Law have been pointed out. The first is identified with certain assumed constitutional principles of 19th-century Britain; the second emphasizes the conditions of a fair trial, subsuming much the same specifics as the more typically American concept of due process of law; the third represents a more pervasive effort to subject government and law to the restraints of an axiology deriving its validity from human reason, nature, or God. Each seems to me a partial view, susceptible of distortion.

¹⁶ See RADBRUCH, *VORSCHULE DER RECHTSPHILOSOPHIE* 27, 28 (1947); Radbruch, *Gesetzliches Unrecht und Uebergesetzliches Recht*, 1 *SUEDDEUTSCHE JURISTENZEITUNG* 105-07 (1946); Radbruch, *Fuenf Minuten Rechtsphilosophie*, reprinted in WOLF, *RADBRUCH-RECHTSPHILOSOPHIE* 335-37 (1950).

Those who are familiar with the work of the International Commission of Jurists may question why nothing has been said of its developing concept of the Rule of Law. The omission at this point is intentional. I have tried to suggest certain basic emphases in Rule of Law thinking. The work of the International Commission of Jurists builds on these earlier formulations but is eclectic and much more broadly responsive to current needs. More will be said about the views developing in the Commission in my next lecture.