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The Inherent Conservatism of the Legal Profession

Edgar Bodenheimer
University of Utah

THE INHERENT CONSERVATISM OF THE LEGAL PROFESSION

By EDGAR BODENHEIMER*

The legal profession, not only of this country, but of other countries as well, has often been criticized for being behind the times, for opposing progress and change, and for clinging to the legal traditions of ages long past. It is the purpose of this article to ascertain whether this criticism has some basis in fact and, if so, to examine the reasons underlying a conservative attitude on the part of the legal profession. Throughout this discussion, the term "legal profession" is used to denote the men called upon to decide with authoritative force disputes and controversies arising in society (i.e., the Bench), and the men engaged in assisting, counseling, and representing persons involved in such controversies or in other matters of a legal nature (i.e., the Bar).

I.

When we study Roman as well as Anglo-American legal history, we find it to be true as a general proposition that the most far-reaching changes and fundamental innovations in the structure and fabric of the law were brought about, not by the actions of the legal profession, but by the efforts and acts of men or groups of men outside its ranks. Several of the great codes of law, like those of Hammurabi, Justinian, Frederick the Great of Prussia, and Napoleon, were promulgated by absolute rulers, some of whom took an active and leading part in the execution of the legislative project. Sometimes, as in the case of France, a political and economic revolution was necessary to break the ground for a fundamental revision and codification of the law. Celebrated statutes, like the XII Tables in Rome and Solon's legislation in Greece, owed their origin to violent struggles between economic classes, resulting in the enactment of the legislation as an expedient of political compromise. The Magna Carta, which had such a far-reaching influence on

* J.D., 1932, Heidelberg; LL.B., 1937, B.A., 1940, University of Washington. Associate Professor of Law, University of Utah. Author of "Jurisprudence" (1940).

the course of English constitutional and legal history, was the outcome of political strife between the English king and the fuedal barons. The enactment of constitutions, embodying the fundamental principles of the legal order, was generally the result of a new alignment of political forces, causing basic changes in governmental structure, or was brought about by the willingness of rulers to make certain concessions to their people. Military conquest or occupation by a foreign power have also been the occasion for fundamental modifications of the constitutional and legal system of a country, as recent events in Europe amply demonstrate.

In all of these cases, the torch of law reform and basic innovation was carried by men or groups wielding political power rather than by professional men learned in the law. The contributions of the legal profession in promoting and accomplishing momentous changes in the law have been relatively small. They were at best of an auxiliary nature, consisting in the preparation and drafting of constitutions and other legislation. It is, of course, true that political leaders instrumental in law reform have sprung from the legal profession, and lawyers have frequently been members of legislatures or law-making councils. Since, however, a formal professional training in the law has hardly ever been made a prerequisite for the exercise of law-making functions, the previous connection of such men with the legal profession was a more or less accidental factor. By and large, it can be said that judges and lawyers, as such and in their capacity as professional men, have rarely been the primary architects of basic legal change.

It might be objected that the path of English and American law is strewn with the decisions of great judges opening up new legal vistas resulting in significant developments in the law. Lord Mansfield's decision in *Moses v. Macferlan*,[1] giving birth to the modern law of quasi-contracts, and Chief Justice Marshall's decision in *Marbury v. Madison*,[2] pronouncing the doctrine of judicial review of legislation, might be cited to support such a thesis.

It is very questionable, however, whether either of these decisions (and others of similar fame) should be

1. 2 Burr. 1005 (1760).
2. 1 Cranch 137 (U.S. 1803).

deemed to constitute a sharp break with the past, in the same sense in which many of the provisions of the Napoleonic Code, or of Solon's legislation, or of some of the modern English and American statutes in the field of social legislation, must be considered as decisive departures from past legal tradition. As is pointed out by Holdsworth, the decision in *Moses v. Macferlan* merely gave precision and form to a previously existing incoherent set of rules stated in a number of heterogeneous cases.[3] And furthermore, Lord Mansfield, in his own opinion, merely purported to give express and articulate sanction to a remedy which already the Roman Law had recognized and which he considered to be grounded on the postulates of "natural justice" and equity. As to *Marbury v. Madison,* it is arguable that the pronouncement of the principle of judicial review of legislation was not, as some have contended, an arbitrary usurpation of power by the judiciary, but a necessary corollary of a political and legal system governed by the idea of the supremacy of constitutional law over ordinary legislation; and many of the men intimately associated with the initial organization of American government and the drafting of the Constitution considered the doctrine as an inherent part of American governmental theory.[4]

It is believed that in both of these decisions, although they have at times been labelled "revolutionary," the eyes of the deciding judges were not entirely directed forward, to the future, but were also fixed on the past, in an attempt to build on that which earlier generations had done, or to determine that which was reasonable and necessary to give full effect to an existing system of government. In fact, it will be a rare and exceptional occurrence to find a judicial decision to which the attribute of "revolutionary" is truly applicable. On the whole, the evolution of law through the actions of the judiciary has been of an extremely gradual character and has been achieved by adding or subtracting a little here and a little there; by granting an old remedy in a new situation; by devising a novel remedy for a situation so similar to an adjudicated situation that elementary postulates of justice demanded an extension of

3. Holdsworth, "A History of English Law" Vol. VIII, 97 (1925).
4. Cf. Potter, "Judicial Power in the United States" 27 Mich. L. Rev. 1, 167, 285 (1928).

judicial relief; or by cutting down step by step the application of a principle deemed antiquated to an increasingly smaller number of fact situations, until the time seemed ripe for an abandonment of the principle itself. The practice of the courts has continually changed, but with rare exceptions each change was so slight that it was hardly perceptible until a series of changes had brought about the emergence of a new principle or of a new practice. In other words, the judiciary has kept the law abreast of the changing times by cautious patchwork, by closing some gaps, by repairing small leaks, and by filling some cavities in decayed parts of the legal structure. It has not considered it its function to tear down substantial parts of the structure and to replace them with new ones.

These considerations apply to the English and American judges as well as to their Roman counterpart, the praetor. While the praetor, like the Anglo-American judge in a jury trial, did not participate in the determination of the issue of fact in a litigation, the decision as to whether an action should be granted to the plaintiff or a certain defense be allowed to the defendant was entrusted to him. And in awarding remedies and recognizing defenses, the praetor enjoyed a large amount of power and discretion.[5] However, the most decisive changes in the body of the Roman Law in the course of its history did not stem from the actions of the praetors. The improvements and innovations which he introduced in the judicial system were slight and gradual, and no praetor claimed the power to abrogate a statute or a basic rule of the civil law, just as no common law judge would say—in the words of Justice Holmes—that "the doctrine of consideration is a bit of historical nonsense and I shall not enforce it in my court."[6] The most far-reaching modifications in the structure and fabric of the Roman Law, especially in the field of social legislation, were brought about by the action of popular assemblies, resolutions passed by the Senate or, in the period of the late Empire, by decrees of all-powerful Emperors. Here again we observe the phenomenon that, even though the professional officials charged with administering the judicial system had been

5. See Bryce, "Studies in History and Jurisprudence" 693-694 (1901).
6. Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917).

endowed with large powers, fundamental legal change came, not from inside, but from outside the legal profession.

There was once a judge in France, M. Magnaud, who as president of the judicial tribunal at Chateau-Thierry considered the judicial function in a sense much different from the traditional approach of the Anglo-American judge or the Roman praetor. He believed his function to be that of a social innovator who would bend the law in all cases to suit the needs of the economically weaker party in litigation coming before his court. His sympathies were with the poor and the working people, and in his judicial decisions he set out on a course designed above all to protect their interests. In doing so, he did not feel bound by the traditional legal doctrine and by the established practice of other courts. He scorned "legal law" and would be guided solely by his own preconceived notions of social justice, a policy which in a number of cases led to a deliberate disregard of statutory law.[7]

The experiment of Judge Magnaud found few defenders and evoked the criticism even of those legal scholars who were willing to allow a comprehensive scope to the creative activities of the judges.[8] His approach is generally rejected for the same reasons which prompt us to deny judges the right to establish minimum wages or enact health insurance schemes in the absence of statutory regulation—such experiments not being within the legitimate area of judicial action.

Turning from the Bench to the Bar, the observation that the legal profession is a group of men strongly tied to the past rather than a group of pioneers blazing new trails into the future applies with even greater force. It would be very far from the mark to assert that the famous Roman *jurisconsulti* were the great advocates of legal change in Rome, that the chief initiative for remedial legislation amending certain shortcomings of the Common Law came from the English Inns of Court, or that the American Bar Association has been the main driving force of legal reform in

7. See Radin, "The Good Judge of Chateau-Thierry and his American Counterpart" 10 Calif. L. Rev. 300 (1922). Justice James E. Robinson of North Dakota was, according to Radin, in some respects an American counterpart to Judge Magnaud.

8. See Gény, "Méthode d'interpretation et sources en droit privé positif" Vol. II, 287-307 (1932).

the United States. We know that the Roman jurists, with few exceptions, were extremely conservative in their views, and that they were much more prone to cite the opinion of a jurist who had been dead for 200 years as controlling their case than to make an eloquent argument for revision or abandonment of a long-established rule. In England, the Inns of Court, being the representative organs of the legal profession, were much more concerned with preserving and maintaining the tradition of the Common Law than with initiating and sponsoring reform legislation. And it is common knowledge that the American Bar has opposed many attempts to introduce far-reaching legal innovations, especially in the sphere of social legislation.

II.

What is the explanation for this conservative and tradition-bound attitude of the legal profession? It might perhaps be argued that the customary conservatism of the legal profession finds its explanation in the fact that the most prominent lawyers, the leaders and spokesmen of the profession, have an emotional attachment to the existing social and economic order which brought them fame and monetary reward, and are therefore disinterested in basic social and legal change which would upset the *status quo.* But this argument does not furnish a full answer to the problem we are investigating. The medical profession, too, presents in its most successful representatives a body of men who have achieved recognition and wealth under the existing order of things and are generally not in favor of any change. Politically and economically, the American Medical Association is probably just as conservative as the American Bar Association. But there exists a significant difference. It cannot be said that the medical profession, within the sphere of its own activity, is generally and habitually inclined to oppose changes in medical methods, the introduction of new therapeutic techniques found to be effective, or the use of new drugs affording improved methods of treatment. A physician is not likely to object to the use of a therapeutic technique because 300 years ago some wizard in the profession had rejected it. The legal profession, on the other hand, is quite prone to maintain the authority of a rule or principle proclaimed 300 years

ago on the ground that it represents the old-established law. Furthermore, radical advances and innovations in medicine have usually originated within the ranks of the medical profession and have not, as has happened so frequently in the history of the law, been imposed from the outside and in the face of resistance by the profession. The explanation for these differences is to be sought in the fact, to be analyzed on the pages to follow, that, in the sphere of the law, the "yesterday" is to a much greater extent an integral part of the "today" than, for instance, in the domain of medicine.

It is the thesis of this article that there are reasons inherent in the nature and purpose of the law itself which account for much of the traditional conservatism of the legal profession and impart to it a certain element of inevitability. It would seem that there exist in human life, and in society, forces which push us forward dynamically along a certain road, as well as forces which hold us back and restrain us from moving along too fast. The dynamic force of motion, in nature as well as society, is countered by the restrictive force of inertia. The law, it is believed, belongs to the sphere of the restrictive forces in social life.

Let us start out with some considerations of a very general nature. There is a force in the life of an individual which drives him forward to spend himself and to exhaust fully the possibilities of his existence. But there is also a voice, of varying strength in different persons, which exhorts him to go slowly and not to waste his strength precipitately and prematurely. Restraint, the desire to keep young and to conserve one's energies are frequently in a struggle with the inclination to use one's powers and faculties to the fullest, to test one's capacities to the limit of the possible, to "fulfill oneself."

The same is true of the life of nations. Dostoyevsky once pointed out that nations were moved and swayed by a force, the origin of which was unknown and inexplicable. He described that force as "the force of an insatiable desire to go on to the end, though at the same time it resists that end."[9] If we try to paraphrase this thought, we might say that every nation has an inexorable urge to test and use its powers to the utmost and to fulfill its historical mission

9. Dostoyevsky, "The Possessed" Part. II, ch. 1.

and destiny, and an equally strong impulse to prolong its life and national existence and avoid premature exhaustion of its strength.

In this dialectic process, the law appears as one of the strongest exponents of the restraining and conserving forces active in the life of nations. The law represents "restraint" not only in the sense that it imposes limitations upon the exercise of power by private individuals as well as by the government,[10] but also in a wider and more general sense. Law is an institution which prevents nations and other forms of human society from "going too fast"; it is a great brake checking the free and unbridled play of the dynamic forces in national and international life.

The dynamic and expansive forces in human society may be conveniently designated by the term *power*. Power is the great agent of change in social development. Its most extreme manifestations are war and revolution, both of which are antithetical to the idea of law. "The time of arms is not the time of law," said Julius Caesar with great insight into the nature of law. And a revolution is essentially a negation of law; it is a dynamic phenomenon in which power is rampant, with few checks and restraints, and which is characterized by a more or less complete breakdown of law.

But the impact of power is not only visible in the great readjustments of the law which are the result of social upheavals, revolutions, and wars. Power is also a causative agent in effecting basic innovations of the law undertaken by legislatures. In the making of law by legislatures, political forces, determined in their direction and strength by constellations of power, are always operative together with other factors, and the processes of law-making are in many important respects basically different from the processes governing the administration and application of the law.

In the process of legislation, we see the operation of a phenomenon which may be called the *transformation of power into law*. The dynamic pressures of individual or group power find an adjustment in the law; and the more permanent this adjustment is, the more successfully have the functions of the law been achieved. The transformation may be likened to the process by which, in nature, energy

10. Cf. Bodenheimer, "Jurisprudence" 14 (1940).

congeals into matter. Power may be compared to free-flowing, highly-charged energy, which is often destructive in its effects. Law, on the other hand, has some of the attributes of matter: it is solid and acquires a degree of permanency and constancy which purely kinetic energy does not have. Like matter, law is characterized by inertia; it is resistant to change, while power, like energy, is a dynamic force promoting change.

There have been nations which have been less successful than others in transforming the dynamic force of power into the stabilizing and conserving force of the law. In such nations, to use Dostoyevsky's words, the "desire to go on to the end" has outweighed the urge "to resist that end." Ancient Greece and (in a quite different way) Hitlerite Germany are examples of this type of nation. In both, the impulses of power gained the upper hand over the instincts of restraint and conservation, although this was much more marked in the case of the Third Reich than in the case of Greece.

Ancient Greece had an illustrious history, but its span of life as a leading power in the Mediterranean World was short. After a brilliant display of genius, which manifested itself in an unsurpassed outpouring of great works of art, philosophy and literature in the fifth and fourth centuries B.C., the Greek city states declined rapidly. And the Macedonian Empire of Alexander the Great, which absorbed them and conquered a large part of the ancient civilized world, was of short duration and disintegrated immediately after Alexander's death. The lack of political acumen which characterized the Greeks was probably an important element in these developments. Chaotic and destructive political and social forces often remained uncontrolled and were given a more or less free play. This led to an early exhaustion of the political organism in fratricidal struggles between, as well as within, the various city states composing Greece; and the Macedonian Empire, too, was held together more by the dominating personality of Alexander than by impersonal cohesive forces which could have given it stability and durability. It was not the gift of the Greeks to develop and master the law as an instrument by which the disintegration of their political system could have been checked or at least slowed. They did not even invent a term for

"law" which would identify it as an independent agency of social control. The word "nomos," which they used, was a concept which embraced social conventions and moral principles as well as the law.

Hitler's Germany (and perhaps Germany generally) is another example of a nation unable to make a practical use of the integrative power of the law. Hitler made an effort of incredible violence to subjugate the world by force and to make Germany the supreme master of all peoples. The law was almost entirely abandoned as an instrument of national as well as international policy in this endeavor to "go on to the end" and fulfill the "Teutonic destiny," as Hitler conceived it. The fall of the nation, dissipation of its power, disintegration of its national life were the outcome of this attempt to lead Germany to glory and conquest through a super-dynamic, unbridled use of force.[11]

The history of Rome, on the other hand, presents the spectacle of the rise of a nation which knew the secret of utilizing the law as an effective tool in the building of an Empire. The Roman national state and, later, the Roman multi-national Empire developed and grew in a slow and organic manner, without undue and premature exhaustion by consuming and dynamic forces eating away the strength of the nation. There occurred, it is true, social struggles and political convulsions in Roman history which tested the fiber of the nation to the utmost. But the stabilizing force of the Roman Law prevented political disintegration and anarchy, and gave to the whole development a certain cohesion, consistency, and gradualness. The forces of tradition and conservation formed an effective counterbalance against the dynamic and expansive forces pushing Rome toward the full consummation of her power in an Empire which was able to preserve peace in the civilized world for 200 years; even the descent from the pinnacles of the Empire was marked by a remarkable gradualness and by many moments of political recovery and legal reconstruction.[12]

11. The supreme glorification of force in Hitler's Third Reich had significant roots in earlier German philosophy. Even the *legal* philosophy of Germany was strongly permeated with an anti-rational voluntarism, emphasizing the "arbitrary will", and with state adoration. Cf. in this connection Dewey, "German Philosophy and Politics" 14 et seq. (1942); Northrop, "The Meeting of East and West" 214-215 (1946).

12. There are many indications in the history of the Anglo-American world which show an equally keen recognition of the value of law as an instrument of national and international life.

In these examples, the law appears as an institution tending to integrate certain valuable and constructive elements of the past into the fabric of the present, thereby permitting a comparatively unbroken and continuous development of a nation. An intimate study of legal history will also disclose the fact, related to the previous observation, that the law is often an effective device for the *neutralization of tensions.* Frictions and conflicts of power within as well as between nations can in many cases be resolved or at least alleviated by the law through compromise and adjustment. In this neutralizing process, the treatment of individuals, groups, and nations on the basis of a certain equality plays an important part in the realization of the aims of the law. Just as tensions in the atomic world of nature are neutralized when negative electricity combines with positive electricity of equal charge, thus tensions and frictions in human life tend to become relieved when grave disparities of power are removed and the conflicting forces are brought into a certain state of balance and equilibrium.

Where such an equilibrium has been achieved, the law will strive with all its might to maintain and protect it against disturbances and disruption. This is one of its essential functions. For the neutralization of tensions which the law endeavors to realize would be largely illusory and of little value if the adjustments accomplished by it are of an entirely temporary and fleeting character. This brings us to another element in the concept of law which is important for purposes of our argument—the element of *durability.*

Where the notion of duration in time is entirely absent, one cannot talk of law.[13] An individualized command made for a single occasion (like the command of a policeman to a driver to make a detour because the main highway is temporarily blocked) is not, as such, a law. A system of justice administered by a whimsical despot where each act of his subjects is judged exclusively according to the momentary mood and temper of the ruler, without any reference to objective standards, is not a system of law. The more ephemeral the character of an act or measure is, the farther it is removed from the primary base of operation of the law. A certain intent of self-perpetuation is inherent in typical creations of a legal character; a law is designed

13. Contra: Kelsen, "General Theory of Law and State" 38 (1945).

to serve as a general rule of conduct governing an indeterminate number of situations likely to arise in the future. The lawgiver means to build a lasting and durable structure; and the greatest monuments of the law are those which have most successfully stood the test of time.

The Bible, in the Book of Daniel, tells us that in the ancient Empire of Persia no law could ever be changed.[14] If it is true that durability and premanency are essential attributes of the idea of law, should we conclude that this rule of the Persians embodies the last word of wisdom with regard to the law and should have been adopted by other nations?

The answer must, of course, be in the negative. But not for the reasons advanced by certain adherents of the "Realist School" of jurisprudence, who believe that the quest for stability and certainty of the law is evidence of mental immaturity and of infantile regressive tendencies on the part of those advocating these values.[15] Stability, certainty, and durability are desirable goals which have been pursued wherever men have attempted to build effective systems of law. The reason why these goals have been achieved with only relative and partial success lies in the antinomic structure of nature, which confronts us with the phenomena of change as well as constancy, motion as well as rest, instability as well as stability, and which ordains that life should always feel the tug of these opposing tendencies.[16]

Justice Cardozo wrestled deeply with the problem of how the need for stability in the law can be reconciled with the necessity for change. He believed to have found the answer in the proposition that the spirit of conservation and the spirit of change are both essential ingredients of the idea of law.[17] But this thought can be accepted only with certain reservations. The law, as we have seen, is

14. Daniel 6:1.
15. See Frank, "Law and the Modern Mind" 21, 244-245 (1935).
16. See the remarks of Morris Cohen in his "Reason and Nature" 412 (1931). One might add to his remarks: even if it is true that nothing in nature stands absolutely still, even if the seemingly immovable and unyielding peaks of the mountains undergo transformations in time, there is a vital difference between things which change by infinitesimally small and imperceptible degrees, and dynamic events in which the impact of change is clearly visible, so that the antithesis of change and constancy is logical and justified.
17. Cardozo, "The Paradoxes of Legal Science" 7 et seq. (1928).

primarily a conserving force, it tends to resist motion and change, and is to a highly perceptible degree governed by the force of inertia; this furnishes a valid explanation for the fact that the law often lags behind the times, as many of its critics have noted. The great changes in the law come from the outside, through the exercise of political power, and the greater and the more incisive these changes are, the greater is the role of power in their effectuation. There is a constant interaction between power and law in the social process, and the actual relations between these two forces are as complex and unstable as the relations between energy and matter. As energy may freeze into matter, and matter may become converted into energy,[18] so power may be transformed into law, and law may disintegrate into power (as in the case of revolution and war). The kinetic forces operating in human social and political life are so strong that they constantly strive to tear into the protective armor with which the law clothes existing institutions and spheres of interest. Power is constantly tugging at the substance of the law, and sometimes we are in doubt as to whether we find ourselves in the area of the one or the other.

It would seem that a slight or gradual yielding to the kinetic forces is by no means incompatible with the idea of law. The means by which the judiciary endeavors to keep the law abreast of the changing social conditions are still within the legitimate province of the law. But if the law gives up its claim to duration and self-perpetuation and becomes a cluster of *ad hoc* measures, solely designed to meet the exigency of the moment, it is on its way to self-abdication. When the rights and the legal status of individuals and groups in a social system become insecure, indeterminate, and subject to constant change at short intervals, this is a sign that law has given way to arbitrary power. Social conditions of excessive fluidity and chronic instability are hostile to the idea of law.

III.

To what extent have these considerations helped to clarify our initial question? An attempt has been made to show that the law, in its essential nature, is strongly tied to the past; that it is a force holding back rather than

18. Cf. Hecht, "Explaining the Atom" 110 (1947).

pushing forward; that it operates as a brake upon the dynamic forces in human society which, if wholly unchecked and unrestrained, may consume individuals, groups, and nations by their relentless impact. If we view the law in this light, if we see in it an attempt to arrest perpetual and chaotic change and to surround certain human relations and institutions with guaranties of permanence and duration, the commonly retrospective and conservative attitude characteristic of the legal profession appears not only as logical but as well-nigh inevitable. The members of the Bench and Bar are not primarily pioneers and engineers of the future. Their functions are those of conservators of certain values of the past which have proved to be worthy of preservation; and the most challenging part of this task is perhaps that of weaving these values intelligently into the texture of the present.

If this is true, we shall not blame the judiciary for making a cautious, sparing, and reluctant use of the instrument of change. We shall understand and, within proper bounds, find justification for the disinclination of the judges to cast off, suddenly, long-established principles and doctrines, even where basic social changes make us skeptical of their continued application.[19] If the courts have yielded to the forward-moving forces in social development only slightly and gradually, and usually only in cases where a change in social *mores* was so clear that the application of an old rule to new conditions would have been entirely unreasonable, this has been due to reasons inherent in the nature of the law itself.

We find that the functions of the judiciary in the revision and modernization of the law are confined to minor alterations and "repairs," necessary to protect the structure,

19. A good example of this disinclination is furnished by the case of Hynes v. New York Central R.R. Co., 231 N.Y. 229 (1921), where a boy standing on the springboard on railroad property was killed by the defendant's high tension wires falling from a pole. In this case, the application of the old rule that the possessor of land is not liable for harm done to a trespasser caused by his failure to put the land in a reasonably safe condition, would have led to hardship and injustice. The court, in an opinion written by Justice Cardozo, left the rule intact and put the liability of the railroad on the ground that the boy would have gone to his death even if he had not been on the board but below it or beside it—a somewhat unconvincing type of reasoning born of a desire to get around the ancient rule without actually throwing it overboard.

or parts of it, from disintegration and decay; they do not normally go beyond this type of "maintenance work." For great structural changes the judge must rely on outside assistance. He cannot himself tear down the edifice of the law or substantial parts of it, and replace them with new ones. He is the superintendent of this edifice, charged with the duty of keeping it in a good state of preservation, rather than its architect.

The same is true of the lawyer. He, too, must work with the tools which the past has handed to him, and his chief task is not that of an innovator. The Bench and Bar are not the proper proving ground for reformers and advocates of fundamental social change, whose activities must be confined to the arena of political action where power meets power, and where the dynamic forces of change are beating against the protective harness with which the law surrounds existing interests and institutions.