The Indian Act, the Supremacy of Parliament, and the Equal Protection of the Laws

A purely interpretive measure, or one by which legislation might be invalidated? That was the central question concerning the effect of section 2 of the *Canadian Bill of Rights*.[1] The decision in *Reg.* v. *Drybones*[2] which answers the question in the latter sense touches not one but several issues of fundamental constitutional importance. It is noteworthy enough that the Court has held that existing legislation may be rendered inoperative because of conflict with the *Bill of Rights*. Of even greater importance are the issues which the decision raises concerning the content of section 1(b) thereof, which recognises and declares the right of the individual to equality before the law and the protection of the law. These rights, evocative of protections contained in the United States and Indian constitutions,[3] having been given substantive content in Canada may, in the light of the Supreme Court's decision, be made into substantial impediments to the competence of Parliament. For the *Bill of Rights* will now invalidate prior legislation. It is difficult in the light of the definition contained in section 5(2) thereof to deny it the office of acting as an impediment to future legislation. We are, if this is so, firmly in the arena of "manner and form" limitations to the supremacy of Parliament.

The facts in *Reg.* v. *Drybones* were simple. Drybones, a North American Indian, was charged with being unlawfully intoxicated off a reserve, contrary to section 94(b) of the *Indian Act*.[4] That section makes it an offence for an Indian to be, *inter alia*, intoxicated off a reserve. Unlike the *Territorial Liquor Ordinance*[5] the section is directed explicitly towards Indians. Again, unlike the Ordinance, section 94(b) of the *Indian Act* makes provision both for a minimum

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[1] See Tarnopolsky, *The Canadian Bill of Rights*, (1966) at pp. 90-98; Laskin, *Canada's Bill of Rights*, (1962), 11 I.C.L.Q. 519; Pavley, *Some Aspects of the Canadian Bill of Rights: an American View*, (1966), 4 Osgoode Hall L.J. 36; Driedger, *The Canadian Bill of Rights* in Lang, (ed.) Contemporary Problems of Public Law in Canada, (1968); Bowker, (1970), 8 Alberta L.R. 409.

[2] (1970), 9 D.L.R. (3d) 473, affirming (1967), 64 D.L.R. (2d) 260, aff. (1967), 60 W.W.R. 321. The decision of the Court of Appeal is noted by Lysyk in (1968), 46 Can. Bar Rev. 141.

[3] The Constitution of the United States, 5th and 14th amendments; the Constitution of India, article 14.

[4] R.S.C. 1952, c. 149.

[5] R.O.N.W.T. 1956, c. 60.

and a higher maximum penalty. The respondent's argument was simply that section 94(b) denied to Indians in the North-West Territories, by reason of their race, equality before the law; that section 94(b) therefore authorised the abrogation, abridgment or infringement of one of the human rights recognized and declared in the *Bill of Rights* as existing in Canada without discrimination by reason of race; and that as a result of the conflict between section 94(b) of the *Indian Act* and the *Canadian Bill of Rights*, section 94(b) was rendered inoperative. In order to uphold this argument the Court, as Cartwright, C.J.C. pointed out, was obliged to hold that an infringement of a freedom recognized by section (1) but not specially dealt with by section (2) of the *Bill of Rights*, could render the inconsistent legislation inoperative.[6]

On the first question, that of repugnancy, a majority of the Court held that the *Bill of Rights* could render inconsistent legislation inoperative. Ritchie, J. (with whom Fauteux, Martland, Judson, Spence and Hall, JJ. concurred on this issue[7]) considered that the opening words of section 2:

> "2. Every law of Canada shall, *unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights*, be so construed and applied as not to abrogate... any of the rights or freedoms herein recognised..."[8]

applied both to the freedoms recognized in section 1 and to those aspects of the freedoms specially dealt with in section 2. If a statute or part thereof does purport to have this forbidden effect, the offending provision becomes inoperative. While the Court might, by analogy from cases on the construction of section 91 of the *B.N.A. Act* 1867 have driven a wedge between the general words of section 1 and the enumerations in section 2, it is hard to see any warrant for any such holding.[9] There is much to be said for this construction. There can be no doubt that the *Bill of Rights* was intended to apply to prior legislation. Had it been intended as a purely interpretative measure, section 2 would surely have been more narrowly drafted, since section 1 contains such general lan-

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[6] (1969), 9 D.L.R. (3d) 473, at p. 475 citing a passage from the judgment of Davey, J.A. in *Reg.* v. *Gonzales* (1962), 32 D.L.R. (2d) 290, at p. 292.

[7] Hall, J. further elaborated his reasons in a separate concurring judgment.

[8] Italics mine, Ritchie, J. italicizes the same passage at 9 D.L.R. (3d) 473, at p. 482.

[9] Professor Tarnopolsky, *op. cit.* at p. 94, recognised this danger. It may have been a line of reasoning which Cartwright, C.J.C. was prepared to adopt, but as to this, *sed quaere*. Cartwright, C.J.C. simply relies on a part of the judgment of Davey, J.A. in *Reg.* v. *Gonzales*, *supra* at n. 7, in which this distinction appears. His lordship does not appear to support the distinction as such.

guage as the *Bill of Rights* contains. Indeed, it appears that the Government, in introducing the *Bill,* did intend to give it an overriding effect.[10] To the majority of the Court, following the reasons of Cartwright, C.J.C. in his dissenting judgment in *Robertson and Rosetanni* v. *The Queen,*[11] the effect of sections 1, 2 and 5(2) of the *Bill of Rights* is to make it clear that where there is an unreconciliable conflict between the *Canadian Bill of Rights* and another Act of Parliament, the *Bill of Rights* must prevail. Ritchie, J. relies strongly on the words of section 2 which refer to a declaration by Parliament that an Act may operate notwithstanding the *Bill of Rights* provided that there is an express declaration in the Act to that effect. These words, would, in his Lordship's view be superfluous if section 2 of the *Bill of Rights* were merely an interpretative measure. The argument is a formidable one, as Pigeon, J. (dissenting) conceded. In the result the Court rejects the holding of Davey, J.A. in *Reg.* v. *Gonzales*[12] that section 2 of the *Bill of Rights* is an interpretative measure only, and holds explicitly that the effect of inconsistency between the *Bill of Rights* and an Act of Parliament is, in the absence of a declaration to the contrary, inoperative.

The dissenting judgments are, in a sense, difficult to explain. Cartwright, C.J.C. who resiled from his former position in *Robertson and Rosatanni* v. *The Queen*[13] based himself on the reasoning of Davey, J.A. in *Reg.* v. *Gonzales.*[14] So apparently did Abbott, J. To Davey, J.A. and now to Cartwright, C.J.C., the words of section 2 impose an imperative duty to construe and apply prior legislation inconsistent with the *Bill of Rights*; that is, a duty ultimately to apply the law even if it infringes one of the declared rights or freedoms. The difficulty with this view, as Pigeon, J. ruled, is that the exception in section 2:

> "unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*" is thereby deprived of any practical meaning. It cannot be denied that the operation of a rule of construction is not normally subject to such a qualification.[14a]

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[10] Bowker, *loc. cit.*, n. 1 at p. 414 refers to the proceedings in Parliament. See also Dredger, *loc. cit.*, n. 1.

[11] [1963] S.C.R. 651.

[12] (1962), 32 D.L.R. (2d) 290.

[13] *Supra*, n. 11.

[14] *Supra*, n. 12.

[14a] *Supra*, n. 2, at p. 490.

This point is attractive.[15] It is perhaps not conclusive. If one took the view (and no member of the Court explicitly did so) that some legislation would under the *Bill of Rights*, require to be restrictively construed because of its discriminatory character, but that it was desirable that it be widely construed because the discrimination amounted to a paternalistic or protective measure,[16] or was considered to be a necessary, if objectionable, war measure,[17] one might by declaration wish to except the legislation from the (interpretative) impact of section 2. We would again return to the realm of ambiguity.[18] Pigeon, J. tried to avoid making a choice of this character by construing section 2 subject to section 1 (which must surely be correct), but then holding that the freedoms recognized by section 1 exist only to the extent that existing laws conferred or did not limit them. The result of this scheme is said to be that:

> nothing more than proper construction of existing laws in accordance with the Bill is required to accomplish the intended result. There can never be any necessity for declaring any of them inoperative as coming into conflict with the rights and freedoms defined in the Bill seeing that these are declared in them.[19]

Even if this reasoning as to existing laws were admitted, and the concededly vague character of the rights and freedoms recognized makes it difficult to do so, the argument would settle nothing concerning the effect of section 2 on future laws. Furthermore, Pigeon, J.'s analysis is difficult to reconcile with the references in the *Bill of Rights* to the *War Measures Act*.[20] Cartwright, C.J.C. and Abbott, J. did not adopt Pigeon, J.'s approach.

A further, but related argument adopted by Pigeon, J. is that to read section 2 in such a way as to hold existing legislation inoperative amounts to a radical departure from accepted constitutional theory which can only be justified by plain words in the statute. Allied to this is the fear of the unknown which might stem from so fundamental a departure from existing law. To the extent that ambiguity is present, Pigeon, J.'s argument is perfectly justified.

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[15] It is particularly relied on by Lysyk, (1968), 46 Can. Bar Rev. 141, at pp. 144-45.

[16] As for example, sec. 94(b) of the *Indian Act*.

[17] As for example the U.S. Emergency regulations dealt with in such cases as *Hirabayashi* v. *United States*, 320 U.S. 81 (1943), dealt with at pp. ..... post.

[18] Even further circumstances of ambiguity can be suggested. Suppose, for example, the word "construed" in section 2 applied to the judicial function, while "applied" were taken to refer to the executive function?

[19] (1970), 9 D.L.R. (3d) 473, at p. 490.

[20] Canadian Bill of Rights 1960, c. 44, sec. 6.

But it cannot be said that the dissentients fully exploited those elements of ambiguity which section 2, in my submission, presents.

Even in the light of *Reg.* v. *Binus*[21] giving the Supreme Court power to depart from its prior decisions, this may appear to be a threshing of old straw. Granted the majority decision on this aspect of the case, we now enter the era of manner and form limitations to the supremacy of Parliament.[22] This possibility once so radical in appearance, now seems relatively commonplace in Commonwealth jurisdictions, though not in England.[23]. In *Bribery Commissioner* v. *Ranansinghe*[24] the Privy Council held that procedural restraints which apply only the forms of lawmaking cannot be iguored by the legislature upon which they are imposed. Admittedly, the limitations which these cases discuss derived from the constitutional instrument which created the legislature.[25] Nonetheless, there can be little doubt that the legal rule of recognition, once altered so as to recognize procedural limitations to the competence of Parliament, could extend to procedural limitations in any document which the Court was prepared to consider as of constitutional importance.[26] The Canadian *Bill of Rights* can be so characterized without doing violence to the spirit of judicial pronouncements on the suject. In this respect section 2 of the Canadian *Bill of Rights* does provide machinery by which Parliament can declare that a statute overrides the *Bill of Rights*. The limitation to Parliament's competence is thus formal in character. It would appear that the Supreme Court has modified its theory of Parliamentary supremacy, though within bounds no wider than those which obtain in some Commonwealth jurisdictions and, conceivably, the United Kingdom.[27] And yet it is surprising that no member of the Court explicitly refers to a debate which has now endured for twenty years.

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[21] [1967] S.C.R. 594.

[22] This indeed was a reason why Laskin, *loc. cit.* at note 1 above considered that the Bill of Rights was interpretative only.

[23] E.g. *Bribery Commissioner* v. *Ranasinghe* [1964] 2 W.L.R. 130 (P.C.); *Akar* v. *A.G. of Sierra Leone* [1969] 3 W.L.R. 970 (P.C.); and of course *Harris* v. *Minister of the Interior* 1952(2) S.A. 428.

[24] At n. 23 above.

[25] This is a circumstance much relied on by Wade Chitty's in *The Basis of Legal Sovereignty* [1955] C.L.J. 172 for asserting that manner and form limitations could not apply to the United Kingdom. Cf. J.D.B. Mitchel, *Constitutional Law*, (2 ed. 1968).

[26] Or indeed, to any document. But this would require a very considerable departure indeed from the rule of recognition, and a dangerous one.

[27] See further Marshall, *Parliamentary Sovereignty: A Recent Development* (1966), 12 McGill L.J. 523.

The most extensive debate however, is likely to take place over the extent to which section 1(b) of the *Bill of Rights* recognizes the right of the individual to equality before the law and the protection of the law. These phrases had been narrowly construed in *Reg.* v. *Gonzales*,[28] and the narrow construction given in other recent cases to the concept of religious freedom[29] would have led one to assume that the Court would choose a narrow interpretation. In fact, Ritchie, J. applied the phrase without enunciating any formal limitations. In *Robertson and Rosetanni* v. *The Queen*[30] it was said that the *Bill of Rights* is not concerned with rights and freedoms in an abstract sense, but rather with such rights and freedoms as they existed in Canada immediately before the statute was enacted. In the instant case Ritchie, J. finds that this characterization of the issue did not conclude the debate because, as there was no conflict between freedom of religion and the *Lords Day Act*, the question of repugnancy did not then arise. Having thus disposed of his former judment, Ritchie, J. turns to the judgment of Tysoe, J.A. in *Reg.* v. *Gonzales*[31] and in particular to the statement therein that legislation directed at a racial group which treats all the members thereof equally does not violate the gnarantee to the individual of equality before the law and the equal protection of the law. This suggestion Ritchie, J. demolishes. It would, as his Lordship remarks, require the most glaring discriminatory legislation against a group to be enforced provided that each individual member of the group were being discriminated against in the same way. But it is not clear how widely Ritchie, J. would construe section 1(b) of the *Bill of Rights*. It means at least that no individual or group is to be treated more harshly than another under the law. Ritchie, J. concludes that an individual is denied equality before the law if it is made an offence punishable at law on account of his race for him to do something which others can do without having committed an offence or being subjected to a penalty. Hall, J. in discussing this issue, drew support for his conclusion from *Brown* v. *Board of Education*,[32] the case which, in the United States, destroyed the "separate but equal" doctrine. The relevance of these decisions is to show that the Canadian *Bill of Rights* is not fulfilled simply by treating Indians equally with other Indians. In language which goes beyond

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[28] (1962), 32 D.L.R. (2d) 290.
[29] E.g. *Walter* v. *A.G. of Alberta*, (1969), 66 W.W.R. 513 (Can. S.C.).
[30] [1963] S.C.R. 571.
[31] (1962), 32 D.L.R. (2d) 290, at p. 296.
[32] 347 U.S. 483 (1953) overruling *Plessey* v. *Ferguson*, 153 U.S. 537 (1896).

that of Ritchie, J., Hall, J. concludes that the *Bill of Rights* has meaning.

> ...only when, subject to the single exception set out in s. 2, it is seen to repudiate discrimination in every law of Canada by reason of race, national origin, colour, religion or sex in respect of the human rights and fundamental freedoms set out in s. 1 in whatever way that discrimination may manifest itself not only as between Indian and Indian, but as between all Canadians, whether Indian or non-Indian.[33]

There can be little doubt that the key to the importance of *Reg.* v. *Drybones* will be in the way in which sections (1) and (2) are construed. The remarks which follow are restricted to section 1(b). Ritchie, J. seems in fact to construe the section quite narrowly, as applying to situations where discriminatory legislation creates an offence to which a particular class of individuals alone is subject. Hall, J.'s approach is much broader. By relying, at least by way of analogy on American decisions relating to the due process and equal protection guarantees, the possibility is created of the *Bill of Rights* extending beyond discriminatory penal provisions, into the area of discriminatory civil disabilities as well. And this area now comprehends a wide range of governmental activities. Certainly in the United States and in India, the constitutional guarantees cover the totality of government functions, including in America the content of legislation and its local enforcement.[34] In the United States legislative classifications or discriminations based on race alone have long been void as contravening the equal protection clause. Similarly, a conviction founded on the discriminatory enforcement of a law cannot stand.[35] In wartime cases the Supreme Court in upholding discriminatory restrictions against Japanese Americans upheld them as relevant to the constitutionally recognized purpose of defence.[36] In one highly significant respect the Supreme Court has gone far beyond this position. It now seems likely that discriminatory classifications which involve race must be proven to be related to a legitimate purpose. The test for classification is whether the impugned classification relates to the achievement of a valid

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[33] (1970), 9 D.L.R. (3d) 473, at pp. 486-7.

[34] For india, see Seervai, *Constitutional Law of India*, (1967), at pp. 188 ff.

[35] E.g. *Yiek Wo* v. *Hopkins*, 118 U.S. 221 (1886).

[36] *Herabayashi* v. *United States*, 320 U.S. 81 (1943); *Korematsa* v. *United States*, 89 L. Ed. 194, at p. 199 (1943); *Re Erdo*, 89 L. Ed. 243. In these cases the "due process" clause of the 5th Amendment which applies to the Federal power was in issue. But there is an overlap between the due process and equal protection guarantees, the latter of which under the 14th amendment applies only to the States. See *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

State purpose.[37] The assumption which a majority of the Court passed in wartime with the argument of military necessity was prepared to make in favour of the executive it will not make today.[38] Furthermore, it is difficult to see how a racial classification can relate to an overriding legitimate purpose. Certainly the prevention of misconception has been held not to be such a purpose. Justice Steward indeed goes so far as to hold that a State law can never be valid where it makes the criminality of an Act depend upon the race of the actor.[39]

The potential relevance of all this is evident enough. It is further relevant to an argument advanced in both *Reg.* v. *Gonzales*[40] and *Reg.* v. *Drybones*[41] that section 94(b) of the *Indian Act* does not contravene the *Bill of Rights* because its purpose is protective. This argument evidently appealed to Pigeon, J. Mr. W.F. Bowker, Q.C. to whose learned note I am indebted would also support section 94(b) on this footing.[42] Mr. Bowker rightly contends that the majority decision in *Reg.* v. *Drybones* implies that legislation imposing penalties on Indians *quâ* Indians is discriminatory and therefore a denial of equality. He further notes that the decision of the Court of Appeal, unlike that of Ritchie, J. deals not simply with intoxicants, but with the provisions of the Indian Act generally. In Mr. Bowker's view such legislation, being protective, is not discriminatory, and ought not therefore to be held inoperative as contravening section 1(b) of the *Bill of Rights*. In developing his argument, Mr. Bowker relies extensively on American doctrine which, inevitably, will have an increasing role to play in this area.

The problems, or potential problems with this argument are twofold. First, even a protective measure may be discriminatory, at least viewed from the standpoint of the individual rather than the group. If the constitutional protections enure to the benefit of individuals (and the Canadian *Bill of Rights* is so drafted) then much discrimination in the interests of the group may be invalid, however benign the intent underlying it.[43] If rights are individual, then

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[37] See in general Forkosch, *Constitutional Law*, (1963) pp. 467 ff.

[38] Thus for example the facts concerning separate education were investigated in *Brown* v. *Board of Education*, 347 U.S. 483 (1953).

[39] *Loving* v. *Virginia*, 388 U.S. 1; 18 L.Ed. 2d. 1010 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964).

[40] (1962), 32 D.L.R. (2d) 290.

[41] (1970), 9 D.L.R. (3d) 473.

[42] (1970), 8 Alberta L.R. 409.

[43] On an analogous point, also involving equality before the law, see Hellerstein, *The Benign Quota* (1963), 17 Rutgers L. Rev. 531.

any individual in a protected group is entitled to repudiate the protective measure as discriminatory. He need not accept governmental paternalism where this restricts him in exercising rights which others enjoy. Of course these remarks will not fit all cases. If for example land were conveyed to a group, only the members of which could occupy it, and none of whom was granted a separate interest which he could alienate, the restraint upon him would not amount to invalid discrimination. The right and the restriction arise *uno flatu.*

Secondly, and of equal importance is the evident reluctance of American Courts to assume the existence of racial characteristics warranting protective legislation. Like Mr. Bowker, Justice Douglas has written of the devastating effect of liquor on the North American Indian as providing a constitutional basis for discriminatory legislation.[44] In the past this has proven to be sufficient justification for discriminatory federal liquor laws.[45] In this respect it should be noted that while the United States Constitution contains no single provision corresponding to section 91(24) of the *B.N.A. Act* 1867, Congress enjoys plenary powers over Indians, deriving from the commerce and treaty powers. Such powers are of course subject to the American *Bill of Rights.*[46] Today however, in particular since the American Indians obtained citizenship, the United States has taken the view that legislation curtailing the liquor traffic with Indians may be unconstitutionally discriminatory and has limited drastically the impact of the Indian Liquor laws.[47] Furthermore, cases like *Brown* v. *Board of Education*[48] show that American federal courts are simply not prepared to assume that particular racial groups labour under innate disadvantages which warrant the application to them of protective or segregating measures. Classification on segregation of students by educational criteria for example, is per-

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[44] *We the Judges,* (1956), p. 399, cited in Lockhart, Kamisar, Chopper *The American Constitution,* (1964). Mr. Bowker cites Committee findings in support of the claim that Indians still have difficulty in coping with liquor. This, but for the instant case, would appear to give colour of right to the *Indian Act,* sec. 94(b).

[45] *U.S.* v. *McGowan,* 392 U.S. 535, 82 L.Ed. 410 (1938); *U.S.* v. *Sandoval,* 231 U.S. 28, 58 L.Ed. 107.

[46] *Stephens* v. *Cherokee Nation,* 174 U.S. 445, at p. 478 (1899); *Shoshone Tribe of Indians* v. *United States,* 299 U.S. 476 (1937).

[47] *Federal Indian Law,* (1958) p. 382, and see 67 Stats. 586.

[48] 347 U.S. 483 (1953).

mitted. Race is not recognized as an apt criterion.[49] Nor is racial classification permitted in relation to the employment or assignment of teachers[50] or their promotion.[51] If this doctrine were followed in Canada, and the possibility arises from the judgment of Hall, J. and is not excluded by Ritchie, J., it might well be that even conceding the plenitude of Federal power over Indians under section 91(24) of the *BNA Act* 1867, protective legislation would require an express declaration that it was intended to operate notwithstanding the Canadian *Bill of Rights*. There is nothing surprising in this. In India where a doctrine of classification taken from the United States operates,[52] article 15(4) was explicitly inserted in the Constitution in order to permit favourable discrimination in the interests of socially and educationally backword classes of citizens or for the Scheduled Castes or Scheduled Tribes.

It is clear, as Pigeon, J. and Mr. Bowker point out, that the protective provisions of the *Indian Act* extend beyond the sections dealing with liquor. The importance of *Reg.* v. *Drybones* extends beyond the *Indian Act*. A glance at a standard American casebook[53] for example, discloses that the equal protection doctrine extends to education, the right to marry and the franchise. And the reach of due process can overlap.[54] While some of these areas are within provincial competence in Canada, other areas such as employment in the Federal service or in federally controlled agencies governed by statute may well appear at some time or other to be subject to the operation of the *Bill of Rights*. In the result, Canadian constitutional law has lost some certainty. It has gained in interest and, some would say, in humanity.

L.H. LEIGH *

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[49] *Hobson* v. *Hansen*, 269 F. Supp. 401 (1967). It is probably right to say that no showing that segregation would reflect innate abilities would prevail. See *United States* v. *School District 151 of Cooke County Ill.*, 301 F. Supp. 201 (1969); *Moore* v. *Tangepahoa Parish School Board*, 304 F. Supp. 244 (1969) at p. 249.

[50] *Wall* v. *Stanly County Board of Education*, 378 F. 2d. 275 (1967); *Smith* v. *Board of Education*, 365 F. 2d. 770 (1966).

[51] *Porcelli* v. *Titus*, 302 F. Supp. 726 (1969).

[52] Seervai, *op. cit.* at note 34 above; *Dalmia* v. *Shri Justice Tendolkar*, [1959] S.C.R. 278 at pp. 298-300.

[53] Barrett, Bruton and Honnold, *Constitutional Law*, (3rd. ed. 1968) Chapter 9.

[54] E.g. *Loving* v. *Virginia* 388 U.S. 1; 18 L.Ed. 2d. 1010 (1967); *Bolling* v. *Sharpe*, 347 U.S. 497; 98 L.Ed. 884 (1954).

* Reader in English law, London School of Economics and Political Science. This piece was originally a case note. Thanks to the complexity of the subject it grew somewhat. But it is only a preliminary examination of the subject and purports to be no more.