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Is It in Fact a Private Club

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to the process of change when it comes to the modification and improvement of its own culture. But the importation of a foreign system at the expense of that which is African is always dispised and rejected. Thus, after nearly 200 years of alien domination, tribal Africa remains virtually the same, waiting to change its own way.

There is a need for a new system of land tenure, but the urgency with which a new land system can be made available depends upon the diligence and sincerity with which African governments approach the problem.

CHEA CHEAPOO

"Is It in Fact a Private Club?"

The main question, whether a club is or is not "in fact" a private club, is one from which has arisen great controversy and sharp dissent among the American judiciary today. It has in itself initiated a judiciary revolution because in the long fight for civil rights, judges have explored the Constitution and its varying intended interpretations. Since the question has aroused the judiciary in such a challenging manner, the courts have had to unify their efforts and apply several standards as set by the Civil Rights Act of 1964 and try to come as close as possible to the interpretive intention of Congress in passing the Act.

The Civil Rights Act of 1964, Title II, Sections 201 A, B-1, 2, 3, 4b; 201 D, E, 203, 204 is directly applicable to public accommodations as it relates to the effect these accommodations have on interstate commerce, and state action as related to discriminatory support. These sections also define public accommodations and their applicability to the enforcement of the Title under the Act.

Section 201 (A) provides that "all persons shall be entitled to the tull and equal enjoyment of goods, service, facilities, privileges, advantages, and accommodations of any place of public accommodation as defined in this section, without discrimination or segregation on grounds of race, color, religion or national origin."

Section 201 (B) provides for establishments affecting interstate commerce or supported in their activities by state action. Such places of public accommodations are lodgings, facilities principally engaged in selling food for consumption on the premises, gas stations, places of exhibition or entertainment and other covered establishments. Each of the follow-

ing establishments which serves the public is a place of public accommodations within the meaning of this subchapter if its operations affect commerce or if discrimination or segregation by it is supported by state action: 1. Hotels, motels, inns or other similar establishments serving transient guests, except those located in a building which has not more than five rooms for rent and is actually occupied by the proprietor as his residence. 2. Restaurant, cafeteria, lunch room (counter), soda fountain or other facility principally engaged in selling food for consumption on the premises included, but not limited to, any such facility located on the premises of any retail establishment, or any gas station. 3. Any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment. 4. Any establishment, (a) (i) which is physically located within the premises of any establishment otherwise covered by this sub-section or (ii) within the premises of which is physically located any such covered establishment and (b) which holds itself out as serving patrons of such covered establishment.

Section 201 (C) covers the operations of an establishment affecting commerce within the meaning if (1) it is one of the establishments described in paragraph 1 of sub-section B of this section; (2) in the case of an establishment described in paragraph (2) of sub-section (B) of this section, it serves or offers to serve interstate travelers a substantial portion of the food it serves or gasoline or other products which have moved in commerce; (3) in case of establishments in paragraph (3) of sub-section (B) of this section, it customarily presents films, performances, athletic teams, exhibitions or other sources of entertainment which move in commerce and (4) establishments described in paragraph (4) of sub-section (B) of this section.

Section 201 (D) provides that discrimination or segregation by an establishment is supported by state action within the meaning of this section if such discrimination or segregation: (1) is carried on under color of any law, statute, ordinance, or regulation or (2) is carried on under color of any custom, usage required or enforced by officials of the state or political sub-division thereof or (3) is required by action of the state or political subdivision thereof.

Section 201 (E), The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (B).

Section 203 provides that no person shall deprive, withhold, deny or attempt to withhold, deny, or deprive or attempt to deprive any person of any right, or privilege secured by Section 201 or 202 or interfere or attempt to interfere with the exercise of any such right or privilege, punish or attempt to punish, intimidate or coerce for exercising or attempting to exercise any right or privilege secured by Section 201 or 202 of this title.

Section 204 (A) authorizes any person aggrieved to consult the Attorney General to institute an action for injunctive relief for violations of Section 203.

Section 204 (B) permits the courts in any action commenced, pursuant to this title, to allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs and provides that the United States shall be liable for costs the same as a private person.[1]

The courts in interpreting these sections define and determine whether or not a bona fide private club exists. There has been an increasing number of cases which have explored the various standards set by the Act and their intended meanings. The effectiveness of the sections of the 1964 Civil Rights Act which the courts have interpreted is expressed through the courts' exploration of the intent behind these offending organizations as well as the entire operation of the organizations and to exempt from coverage only those clubs which are in fact genuinely private. The bulk of the litigation in the area of public accommodation for the past three years has centered upon the Act's coverage.[2] Since the statutory inclusions and exclusions of Title II appear to be patterned after the historical test of dependence—that an interstate traveler is more dependent on the hotel, motel, and various facilities contained or located within them, than he is on a barbershop, beauty parlor, or bowling alley, the coverage of the Act will continue to be extended by case-by-case litigation.[3]

Generally, in determining the validity and genuineness of these so-called private club operations, the courts examine six basic elements: (1) the membership process, (2) the affect the operations have on commerce, (3) the use of the facilities by non-members, (4) the control and participation of members, (5) the support of the state in the discriminatory policies and (6) the use of the finances received by the club.[4]

The element of membership is one of the most important points

[1] Pub. L. No. 88-352; 78 Stat. 241 (1964).
[2] Le Marquis DeJarmon (Spring 1968), *Public Accommodations*, ILLINOIS LAW FORUM, 194.
[3] *Id.*
[4] Footnote omitted.

considered in the final determination. Congress recognized that a bona fide private club should be able to restrict its services to its members; however the Act is silent on whether clubs can discriminate in the selection of those members.[5] The purpose of Congress in limiting those clubs that were to be exempted from the arms of the Act was to separate those establishments which were not in fact private but were sham operations using the private club veil as a cover to carry on their discriminatory policies. A characteristic of most of the so-called private clubs is the inconsistent treatment of Negro applicants and white applicants. The Negro applications that are taken are seldom, if ever, acted upon and therefore the applicant is never notified of the outcome, while on the other hand, the white applicants are notified of their acceptance shortly after applying. Those black applications that are taken are very quickly rejected without any committee or representative ever meeting or interviewing the applicant so as to have concrete grounds for acceptance or rejection. In *Nesmith v. YMCA of Raleigh*,[6] a Negro minister applied for membership in the Men's Athletic Club, but was rejected as insincere, without any interview or meeting with the club's official. In this case the Court of Appeals reversed the District Court's decision and one ground for declaring the Athletic Club not private was that the plaintiff's application was rejected without any club meeting with the prospective applicant to form a basis for the determination of his acceptance or rejection. Another indication that these operations are sham establishments is the fact that usually all white applicants are accepted for membership and no Negro applicants are ever accepted.[7]

There are also many ostensible requirements to be met when Negroes seek admission or membership, but these requirements never apply to whites who seek the same admission or membership. Membership cards are a common example of this. In many instances there have been members of the white public who have used the facilities of the so-called private club, who were not members, nor guests of members and who were transient guests. These ostensible membership requirements are usually a mere subterfuge to avoid coverage of the Civil Rights Act.[8] The requirement of having two sponsors and two references are actually cover-up devices because most Negroes do not know the club members

[5] Le Marquis DeJarmon (Spring 1968), *Public Accommodations*, ILLINOIS LAW FORUM, 194.
[6] 397 F.2d 96 (1968).
[7] Lackey v. Sacoolas, 9 RACE RELATIONS LAW REPORTER, 2625 (1964).
[8] Daniel v. Paul, 393 U.S. 975 (1969).

and will not be able to get any references from the members, or get the members to sponsor them. It naturally follows that if they are not sponsored, they will not meet these sham admission requirements. The courts in looking at the membership process look for a uniform system of application treatment and the screening of applicants with sound criteria for membership.

The second element the court looks at is the overall operation of the club to determine whether there is a unity of interest and participation by the entire membership body in the income and profits of the club. When there is no such participation and the members share only in the expenses by paying dues and paying for the facilities as they use them, this is a good indication that the club is not bona fide. In some instances, the members may elect a Board of Governors or other governing bodies, but generally it will be found that the members are not allowed to share in the profits of the organization. The actual control of operations of this kind stems from the individuals responsible for establishing and organizing the club. One of the most significant rights of an organization or club of a bona fide nature is the sharing in the income and profits by the members who have paid dues into the club; not merely burdening the expenses of running the club or operation.[9]

Many of the cases involving the Civil Rights Act as applied to private clubs under the public accommodations section will show that white non-members are allowed to use the facilities when requested, but Negroes are denied this right because they are not members. This is a clear view that these organizations are practicing racial discrimination which is prohibited by the Act. The Act was intended to avert such practices which are directly contrary to the intention of Congress. Congress passed the Act to end discrimination and humiliation that such practices cause. "The primary purpose of the Civil Rights Act of 1964 is to solve the problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments."[10] "Discrimination is not simply dollars and cents, hamburgers and movies; it is humiliation, frustration and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or his color."[11]

[9] *Id.* at 977.

[10] Heart of Atlanta Motel Inc. v. United States *et al.*, 379 U.S. 241 (1964). See Justice Goldberg' concurring opinion at 291, also see Black and Douglas at 268 and 279 respectively.

[11] *Id.*

The financial appearance of the club should be explored with depth. The courts are not going to overlook the use of the funds of the club, to determine the actual ownership and the degree of participation of the club members. In some of the cases that have gone before the courts, it has been discovered that the actual ownership is by a private stock corporation or a silent partnership.[12]

The fifth criteria used by the court in determining whether a club is "in fact" private or not is the effect the full operation has on interstate commerce. This is set forth in Section 201 (C) of the Act, which defines commerce as travel, trade, traffic, transportation or communication among the several states or between the District of Columbia and any state. When any one of the facilities of an establishment offers to serve or serves interstate travelers as defined by the act, this is sufficient to bring the entire establishment under the act. When any restaurant or other type of eating facility that sells food for consumption on the premises or a substantial portion of the food it serves moves in commerce, the Act can apply.[13] Many so-called private clubs have dining rooms principally engaged in selling food for consumption on the premises. A substantial portion of the food they serve does move in commerce and the facilities will offer and serve interstate travelers.* Here the court will explore the entire commercial import of the establishment, and when applying the substantial portion test, the meaning given it is that the main foods consumed have moved in commerce. In Katzenbach v. McClung,[14] the court said:

> The refusal to serve Negroes and their total loss as customers, lessens the number of customers a restaurant enjoys, therefore it sells less food and consequently it buys less. 'This type of discrimination imposes an artificial restriction on the market and interferes with the flow of merchandise, and interstate travel is impeded by such discrimination.'

The courts have declared that Congress was within its power in enacting the Civil Rights Act of 1964 to regulate commerce as applied to a place of public accommodation serving interstate commerce. The

[12] See generally, Castle Hill Beach Club v. Arbury, 142 N.Y.S.2d 432 (1955).

[13] Daniel v. Paul, 393 U.S. 975 (1969); Wooten v. Moore, 400 F.2d 239 (1968); Katzenbach v. McClung *et al.*, 379 U.S. 294 (1964); Gregory v. Meyer, 376 F.2d 509 (1967); Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968).

* Note—See legislative history to the effect that the Civil Rights Act, Title II, uses the term "substantial." Hearings on Senate Bill 1732 before the Senate Committee on Commerce. S. Rep. No. 872 88th Congress 2d. Session pp. 171-173, 212, 229.

[14] 379 U.S. 294 (1964).

interstate movement of people is commerce which concerns more than one state. This was the court's opinion in *Heart of Atlanta Motel v. United States.*[15] Many clubs have lodging facilities for non-member white transient guests, but Negroes cannot lodge at these facilities, so it is up to the courts to enforce the moral as well as the legal principle that a person traveling in interstate commerce must at least have the opportunity to lodge at night. The refusal to lodge Negroes in interstate travel, and the acceptance of white transient guests who are not members of these clubs with facilities for guests in interstate travel, amply demonstrate the practice of discrimination because of color and race. This in itself interferes with interstate commerce and is directly contrary to the full enjoyment of goods, services, privileges, facilities and accommodations that Congress intended to grant by enacting Section 201 (A) and 201(a) 1 of Title II of the Civil Rights Act of 1964.

> Congress, in enacting section 201a and 201(a), intended to vindicate human dignity and not mere economics. The long practices of racial discrimination by state laws, custom and tradition were a raft which Congress intended to destroy, and the Act was to reassure the rights granted by the 14th Amendment, 13th Amendment, and the Due Process Clause of the 5th Amendment.[16]

Interstate commerce may also entail the entertainment the club has or the participants in the entertainment. If any of the entertainment, whether persons or equipment, have moved in commerce then this is a strong indication that the establishment is involved in interstate commerce. The entertainment is not limited or restricted to exhibitive type, but may also be participative.[17] The golf and country club may be an illustration of the participative type of accommodation. These types of clubs have so many of their facilities for public entertainment, that may very well come within the Act upon examination by the courts. Golf and country clubs generally have facilities for swimming, golfing, tennis, and eating facilities for the public. By virtue of the type of events that these clubs have it is reasonable to say that guests are not always members and in many instances may be transient guests. Sports events may be carried on on the premises, such as golf tournaments and some of the participants have in many cases traveled in interstate commerce to participate in

[15] 379 U.S. 241 (1964).

[16] *Id.*

[17] Miller v. Amusement Enterprises Inc., 394 F.2d 342 (1968); see also Daniel v. Paul 393 U.S. 975 (1969).

the event. "The court in its interpretation of section 201 of the act relating to entertainment has not limited its interpretation to 'exhibitive entertainment,' but has also included participative entertainment declaring that this view would not be contrary to the theory of 'ejusdem generis.' "[18]

The final criterion examined by the court is the involvement of the state as related to its support in discriminatory policies practiced by establishments. "This support may be under color of statutory law, local ordinances or by color of custom."[19] There are various ways in which a state may support discrimination under color of law or custom. The state may give the so-called private golf club special tax assessments for the establishment and maintenance or continued existence of clubs which provide special entertainment and recreation for state residents.[20] The control is found to be indirect. The establishment or country club is controlled by the state in the sense that by setting a certain standard of compliance in order to qualify for this special privilege, and continue to receive the special privilege, the state can revoke the privilege if conformity is not maintained. If the club is practicing discrimination and the state awards the privilege with knowledge of this fact, it may be said that the state is supporting the discriminatory policies of the club under color of law. "It is settled law that the governmental sanction need not reach the level of compulsion to clothe what is otherwise private discrimination with state with state action."[21] "When a state function or responsibility is being exercised by an otherwise non-governmental organization, it matters not for the 14th Amendment purposes that the institution actually chosen would otherwise be private, the equal protection guarantee applies."[22]

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[18] *Id.* at 344.

[19] Pub. L. No. 88-352; 78 Stat., 241, The Civil Rights Act of 1964, Title II, section 201 D (1) (1964).

[20] *See,* MARYLAND ANNOTATED STATUTES, art. 81, § 19(e) (1965).

[21] Simpkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (1963).

[22] *Id.* at 961, see also Marsh v. Alabama, 326 U.S. 501 (1946); Terry v. Adams, 345 U.S. 461 (1953).