Freedom of Choice in Organizations in the British Commonwealth

Alfred Avins *

1. Attacks on Club Restrictions.

The advent of independence in British-ruled Africa has resulted in an unexpected by-product regarding private clubs which admitted only Europeans as members. Several African governments have moved to end the restrictive policies of these clubs. For example, in 1962, the only "whites-only" club in Tanganyika dropped its restrictions after the Home Affairs Minister warned Parliament that any such club which maintained restrictions against Africant membership would be closed.[1] The following year the Kenya Government advised all clubs to eliminate racially discriminatory constitutions after several African politicians had demanded that a private club for white persons only be closed for refusing to serve them.[2] In Zambia, the government has threatened to legislate against private miners' clubs which admit only European miners.[3]

These assaults on the right of private clubs to make whatever restrictions on membership they care to naturally raises the question of whether such restrictions by clubs violates the legal rights of the rejected applicant in any way. If racial restrictions are unreasonable, for example, and if private clubs can only restrict membership on reasonable grounds, the foregoing pressures could be justified on the theory that these new governments were merely enforcing the common-law rights of rejected applicants in a more expeditious and inexpensive method than judicial proceedings. On the other hand, if private clubs had no legal duty to use reasonable standards of admission or rejection, then these governmental pressures would merely

---

* B.A. 1954, Hunter College; LL.B. 1956, Columbia University; LL.M. 1957, New York Univ.; M.L. 1961, J.S.D. 1962, University of Chicago; Ph.D. 1965, University of Cambridge, (England). Member of the New York, Florida, District of Columbia, Illinois, and U.S. Supreme Court Bars. Professor of Law, Memphis State Univ.; former Special Deputy Attorney-General of New York; sometime Special Counsel, Attorney-General of Louisiana; sometime Special Counsel, Virginia Commission on Constitutional Government.

[1] N.Y. Times, March 20, 1962, p. 14, col. 2.

[2] N.Y. Times, Aug. 16, 1963, p. 2, col. 6.

[3] N.Y. Times, June 7, 1964, p. 29, col. 1.

constitute extra-legal, or even illegal, deprivations of the rights of club members.

The purpose of this article is to examine the state of the common law on the subject of admission to private clubs, societies, and other organizations in the British Commonwealth, to determine whether these pressures noted above can be justified from a legal point of view.

2. United Kingdom.

The earliest cases in England involving the right to be admitted to a society or organization were concerned with application for admission to professional societies. It was held in 1768 that a medical society which licenses physicians to practice could not arbitrarily refuse to admit persons to membership,[4] although the society could make reasonable rules to keep out unqualified applicants.[5] But in 1780 the Court of Kings Bench held that mandamus does not lie to require one of the inns of court to admit an applicant, since it was a voluntary society.[6] This holding was adhered to even though a refusal by an inn to admit an applicant to membership meant that he would not be called to the bar.[7]

In 1867, Lord Romilly, M.R., had occasion to pass on the extent of judicial review of the action of a political club in expelling one of its members. He ruled: "None but the members of the club can know the little details which are essential to the social well-being of such a society of gentlemen, and it must be a very strong case that would induce this Court to interfere".[8] Several years later, Sir George

---

[4] *Rex* v. *Askew*, (1768) 4 Burr. 2186, 98 Eng. Rep. 139.

[5] *Rex* v. *College of Physicians*, (1997) 7 T.R. 282, 101 Eng. Rep. 976.

[6] *Rex* v. *Benchers of Gray's Inn*, (1780) 1 Doug. 353, 99 Eng. Rep. 227. In accord, see *Rex* v. *Barnard's Inn*, (1836) 5 Ad. & El. 17, 2 Harr. & W. 62, 111 Eng. Rep. 1073.

[7] In *Rex* v. *Benchers of Lincoln's Inn*, (1825), 4 Barn. & C. 855, 107 Eng. Rep. 1277, 1278, Abbott, C.J., said: " 'They are voluntary societies.' The very term 'voluntary society' imports in it a discretion in the individuals composing it to admit or reject members as they please." Likewise, Bayley, J., declared: "They make their own rules as to the admission of members; and even if they act capriciously on the subject, this court can give no remedy in such a case; because in fact there has been no violation of any right." *Id.* at 1279.

[8] *Hopkinson* v. *Marquis of Exeter* (1867) L.R. 5 Eq. 63, 68. Lord Romilly also observed :

"These clubs are very peculiar institutions. They are societies of gentlemen who meet principally for social purposes, sometimes of a literary nature, sometimes to promote political objects, as in the *Conservative* or *Reform Club*. But the principal objects for which they are designed are social, the others are only secondary. It is, therefore, necessary that there should be a good understanding between all the members, and that nothing should occur that is likely to disturb the good feeling that ought to subsist between them." *Id.* at 67.

Jessel dealt with expulsion from a trade union in *Rigby* v. *Connol.*[9] But a few of his preliminary observations are relevant to clubs generally. He explained:

> There is no such jurisdiction that I am aware of reposed, in this country at least, in any of the Queen's Courts to decide upon the rights of persons to associate together when the association possesses no property. Persons, and many persons, do associate together without any property in common at all. A dozen people may agree to meet and play whist at each other's houses for a certain period, and if eleven of them refuse to associate with the twelfth any longer, I am not aware that there is any jurisdiction in any Court of Justice in this country to interfere. Or a dozen or a hundred scientific men may agree with each other in the same way to meet alternately at each other's houses, or at any place where there is a possibility of their meeting each other; but if the association has no property, and takes no subscriptions from its members, I cannot imagine that any Court of Justice could interfere with such an association if some of the members declined to associate with some of the others. That is to say, the Courts, as such, have never dreamt of enforcing agreements strictly personal in their nature, ... whether they are agreements for the purpose of pleasure, or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy...[10]

The Court of Appeal also held that a club member may resign at any time, and once having resigned he is no longer a member unless he is re-elected.[11]

Probably the leading case in English law on admission to membership in private organizations is *Weinberger* v. *Inglis.*[12] That was certainly a sympathetic case for judicial relief. The Stock Exchange re-elected all of its members annually, and no member was deemed to have a vested right to re-election. During World War I, the Stock Exchange adopted a rule barring from membership naturalized British subjects of German or Austrian birth, as a result of high anti-German feeling. The plaintiff, although born in Germany, had become a naturalized British subject in 1892 and a Stock Exchange member in 1895. In 1917, the plaintiff applied for but was refused re-election, although he had paid large sums for shares and other fees, and would lose his business by not being re-elected. No doubt was ever cast on his loyalty to England.

The Chancery Division admitted that this was a case of great hardship to the plaintiff, but ruled that "the committee had a wide and absolute discretion" in admitting or refusing to admit members, and that plaintiff's alien birth was a fact "which in law the committee

---

[9] (1880) 14 Ch. D. 482.
[10] *Ibid.*, at 487.
[11] *Finch* v. *Oake*, [1896] 1 Ch. 409 (C.A.).
[12] [1918] 1 Ch. 517, aff'd [1919] A.C. 606.

were entitled to consider..."[13] The Court of Appeal dismissed the appeal. Swinfen Eady, L.J., declared that plaintiff's naturalization gave him no right to be elected, reasoning that although he thereby obtained all the privileges of British subjects, election to a private organization was not among them. He observed that if the organization considered him ineligible, it was immaterial that he deemed himself eligible or others deemed him eligible.[14]

Bankes, L.J., rejected plaintiff's argument that German birth was "a mere geographic accident," like English birth, by explaining that "eligibility is a relative fact, and that the personal qualities and the position and circumstances of the member seeking re-election are not the only things to be taken into account, but the constitution and privileges of the Stock Exchange, and any relevant circumstances arising out of the conditions of the moment, are just as important, and have also to be taken into consideration." He said that the exchange was justified in considering the high feeling against persons of German origin arising out of the war.[15]

The House of Lords dismissed the appeal from the Court of Appeal. Lord Birkenhead, L.C., rested on the ground that since the committee had honestly concluded that it would not be in the interest of the exchange to re-elect the plaintiff, the courts could not review the adequacy of the reasons.[16] Lord Atkinson agreed, and pointed out that the committee was entitled to consider even the prejudices of the

---

[13] [1918] 1 Ch. 517, 540. See also *Cassel* v. *Inglis*, [1916] 2 Ch. 211, holding that the stock exchange, a voluntary association, is not bound to give any reason for refusing to elect someone to membership, and is not required to inform the applicant of any charges made against him or to hear his answer thereto.

[14] [1918] 1 Ch. at 544, where he said: "If ... the committee do not deem him eligible for re-election, there is no power vested in any Court to override their decision, or to hold that they ought to have considered him eligible,..."

[15] [1918] 1 Ch. at 553.

[16] [1919] A.C. at 617. Lord Buckmaster likewise said:

"... The Committee acted *bona fide* in what they believed to be the discharge of their duties, and that is to my mind the complete and sufficient answer to the whole appeal.

"It has been urged that their action was capricious and arbitrary, since it is impossible to analyze reasons why some people were re-elected and some refused. The Committee are not bound to assign any such reason, nor is it possible to speculate as to what their reasons may have been.

"... Of the wisdom, justice, and liberality of the decision, this House is no judge, for no circumstances have been disclosed that would entitle the Courts to interfere with the honest exercise of such a discretion as that vested in the respondents in the present case." *Id.* at 621.

other members.[17] Lord Wrenbury added that it was proper for the exchange committee to consider antipathy towards the plaintiff by other members on account of his German birth.[18] He declared further:

> If they take the matter into their consideration and act honestly and *bona fide*, their decision cannot in my judgment be reviewed in any court... [They have] the unassailable right to give effect to their own considered judgment and opinion without disclosing their reasons.[19]

The foregoing cases strongly point to a rule of English law that a person rejected for membership in a social club has no right to judicial review of the reasons for his rejection, even if some people might think these reasons to be arbitrary. Certainly, many of these cases deal with a loss far more appealing for judicial intervention than the amenities or fellowship of social clubs. If the courts are not prepared to interfere with cases of expulsion or refusal of re-election, a new applicant *a fortiori* has no legal grounds for complaint.

This view is supported, rather than refuted, by the recent Court of Appeal decision in *Nagle* v. *Feilden*,[20] which held that there was a common-law right to work in England, and that a private organization having a monopoly on employment could not refuse to license applicants arbitrarily. But Lord Denning, M.R., also observed:

> I quite agree that if we were here considering a social club, it would be necessary for the plaintiff to show a contract. If a man applies to join a social club and is blackballed, he has no cause of action : because the members have made no contract with him. They can do as they like. They can admit or refuse him, as they please;...[21]

Likewise, Salmon, L.J. said:

> There can be no doubt but that it is permissible to exclude anyone for any reason or no reason from membership of a social club just as anyone (unless he has a statutory right of entry) may be excluded from one's home.[22]

---

[17] He said: "It is the opinion of the Committee on the 'eligibility' of the member, old or new, which is the determining factor. If that opinion is honestly formed and acted upon in good faith with the intention of protecting or promoting the interest of the business of the Stock Exchange, their decision cannot be questioned, though it may, in the opinion of a Court of law, be erroneous and such a decision as that Court would not itself have, in the same circumstances, made. It would appear to me to be quite possible that political or social excitement or suspicion or prejudice, whether just or unjust, affecting a considerable section of the members of the Stock Exchange might render the presence, as members, of some of the most worthy and blameless members of the community a danger or impediment to the proper conduct of the business of the Stock Exchange. And if so that the Committee might legitimately consider and be guided by this circumstance in the exercise of their discretion." *Id.* at 624-5.

[18] *Ibid* at 642.

[19] *Ibid* at 641.

[20] [1966] 2 W.L.R. 1027, [1966] 1 All E.R. 689 (C.A.).

[21] *Ibid* at 693.

[22] *Ibid* at 698.

Scottish law would appear to be in accord with the above view. It has been held that rules of a trade union constitute an agreement among the members, and that new members cannot be admitted contrary to the rules of the union.[23] The Court of Session has also held that a member of a floral society cannot maintain an action to compel it to allow him to exhibit his flowers at a show.[24] Lord Stormouth Darling, in the Outer House, has also observed:

> I am not aware if any relevant action can be brought against a voluntary association for reduction of its proceedings, except by some person who can allege that he had a contract with the Association, and that the contract had been broken. I doubt whether even in such a case a good action would lie, unless it could be shown that some patrimonial interest of the pursuer had been invaded... The pursuer's case has failed in the initial stage because he has set up no kind of a juridical relation with the Association whose minutes he desires to have reduced.[25]

Irish authority is scanty, but what little authority there is looks in the same direction. Thus it was held that club members are deemed to contract with each other to obey the club rules, and courts have no authority to determine the validity of these rules where no property rights are involved.[26] It was also held that where a club owns private property it may exclude anyone therefrom, but where it holds public property by lease from the Crown for the benefit of the public it may not exclude members of the public except on reasonable grounds.[27]

3. Canada.

Authority on the right of clubs to restrict their membership is scanty in Canada, but such authority as there is appears to support this right. It is true that certain provinces have "human rights codes" which forbid ethnic discrimination in places of public accommodation, but these by their terms appear not to cover private organizations.[28]

It has been held that admission to a provincial law society is discretionary,[29] and that a real estate board member may be expelled

---

[23] *Martin* v. *Scottish Transport & General Workers U.* [1951] Sess. Cas. 129, 1951 Scot. L.T. 132, aff'd [1952] Sess. Cas. 1 [1952] Scot. L.T. 224 (H.L.), [1952] W.N. 142 [1952] 1 T.L.R. 677.

[24] *Cocker* v. *Crombie*, (1893) 20 R. 954, 30 Scot. L. Rep. 841, 1 Scot. L.T. 153.

[25] *Robinson* v. *Scottish Amateur Athletic Assn.*, (1900) 7 Scot. L.T. 356.

[26] *Matt* v. *MacLaughlin*, [1923] 1 Irish Rep. 112.

[27] *Bellaney* v. *Reilly*, [1945] Irish Rep. 542.

[28] The Ontario code is typical. Ontario Human Rights Code, 10 & 11 Eliz. II, c. 93, sec. 2 (1962) provides: "No person... shall (a) deny to any person or class of persons the accommodation, services, or facilities available in any place to which the public is customarily admitted... because of the race, creed, colour, nationality, ancestry, or place of origin of such person or class of persons."

[29] *Martin* v. *Law Society of British Columbia*, [1950] 3 D.L.R. 173, 192, (C.A.B.C.); *Re* Hagel, (1922) 31 Brit. Col. R. 75.

from the board based on a rule of vicarious liability,[30] in British Columbia. The Ontario Court of Appeal has held that a bookmaker may be excluded from race-tracks operated by a racing association for using offensive language to one of the association's officers.[31] A Manitoba court has decided that societies can be limited to those under a certain age.[32]

Probably the leading case is *Andreas* v. *Edmonton Hospital Board.*[33] In this case, the Supreme Court of Alberta held that a doctor could not be refused hospital privileges because of rumors that he had said that the German military forces could defeat the British. It reasoned that where a hospital was supported by public funds, and required by statute to be maintained for the public benefit, the board of the hospital empowered to pass upon applications by physicians and surgeons to be given the privilege of treating their patients therein must deal with the applications in accordance with the principles of "natural justice." But the Appellate Division reversed this holding, saying:

> ...plaintiff's counsel... speak of charges against the plaintiff which he should have indicated to him and have an opportunity to answer. This indicates a misconception of the rights and obligations of the person concerned. There were no charges and therefore no charges to be answered.
>
> There are many decisions on the principles to be applied in regard to ejection of a person from membership in an organization... [having] no application to the case of a person applying for admission to an association as the plaintiff was doing. The distinction between the expulsion from membership and an application for admission to membership is clearly and properly made by the medical superintendent in two answers on cross-examination by plaintiff's counsel which I quote:
>
> "Q. Do you think you had a duty to give him a chance to find out what the charges were against him ? A. Dr. Andreas was not a member of the staff that was being removed; he was making an application to come in it and it made all the difference in the world. If he had been a member of the staff that had his privilege removed I would say he should be called and have a fair trial, but he is asking the privilege to be a member.
>
> "Q. And I think you will admit he did not get a fair trial this time. Is that right ? A. It was not a question of trial at all. It is a question of men deciding whether he would be an asset to the hospital. And there was no

---

[30] *Wyman* v. *Vancouver Real Estate Bd.*, (1959) 19 D.L.R. 2d 336 (B.C. Sup. Ct.).

[31] *Scully* v. *Madigan*, (1912) 23 Ont. W.R. 876, 4 Ont. W.N. 394 (C.A.).

[32] *Broadbent* v. *1600 Club of Southern Manitoba*, 43 Man. R. 221, [1935] 2 W.W.R. 539, 2 I.L.R. 425, [1935] 4 D.L.R. 227, 229 (C.A.), where the court said: "The admission of persons over the specified age in defiance of the by-laws was *ultra vires* of the officers of the society."

[33] [1944] 3 W.W.R. 599, [1944] 4 D.L.R. 747 (C.A.), reversing [1944] 3 W.W.R. 9; [1944] 4 D.L.R. 192 (Alta. Sup. Ct.).

objection to him on the question of ability but on the other hand there would be lack of harmony and disunion and non-cooperation."

On applications for membership the members of the staff voted as they had a right to do by ballot. It was not necessary for any member to give or even to have a special reason for his vote any more than it would be necessary for a person to have a special reason for not inviting a person to his house.[34]

4. Australia and New Zealand.

The Australian authority which exists has dealt primarily with the rights of persons who are already members. The High Court has held that the rights of members of friendly societies are contractual only.[35] The Queensland Supreme Court has followed English cases in holding that exclusion of the right to exhibit dogs at a show because of breach of a society's rules does not give rise to a cause of action for legal remedy.[36]

The Supreme Court of Tasmania has likewise declared: "The general principles are clear. Associations for mere sporting or social purposes create, *ipso facto*, no rights in their members which a Court will enforce."[37]

In one case a voluntary association was formed by flour millers and sellers to promote commercial uniformity. An annual subscription was charged to defray expenses. Plaintiff was dropped from membership after having been in the association for some years. The group had only a small surplus from subscriptions. Plaintiff's suit to be restored to membership was dismissed by the Supreme Court of New

---

[34] [1944] 3 W.W.R. at 604-5.

[35] *Dickason* v. *Edwards*, (1910) 10 Comm. L.R. 243, 16 Aust. L.R. 149.

[36] In *Heale* v. *Phillips*, (1959) 52 Queensland Rep. 489, 498, Townley, J., said: "To my mind the constitution and rules were intended to be, and are, of social rather than legal significance. No doubt each person who joins the association may be said to be bound by and obliged to obey the constitution and rules in respect to the various matters to which they relate. But to say that it was intended that the constitution and rules should be legally binding upon them to the intent that any breach thereof should give rise to an action even for nominal damages or other legal remedy for that breach is a vastly different matter... Hitherto rules made by a political or like organization for the regulation of its affairs and the conduct of its activities have never been understood as imposing contractual duties upon its officers or its members. Such matters are naturally regarded as of domestic concern. The rules are intended to be enforced by the authorities appointed under them. In adopting them, the members ought not to be presumed to contemplate the creation of enforceable legal rights and duties so that every departure exposes the officer or member concerned to a civil sanction'."

[37] *James* v. *Arnott*, (1918) 14 Tasmania L.R. 99, 113. It also said: "The contention that this Court will enter into details of management and correct errors is to my mind hopeless..."

South Wales on the ground that since no property was involved the court lacked jurisdiction.[38]

While none of these cases directly involves a suit by a new applicant for admission, it would appear that such an action would have little chance of success under current legal authority in Australia. If the courts refuse to protect the contractual rights of existing members, if of a social nature, it is even more unlikely that persons who never have been members would be entitled to judicial review of the reasons for their rejection.

There is no specific authority on this point in New Zealand. But it was held in one case that club members make a contract with other members on joining and that English law would be followed to determine their relations.[39] Presumably, the law of clubs there is the same as in England.

5. India.

Indian law on the right to be admitted to a private organization has undergone an interesting transformation. At first, Hindu law was much concerned with social status, and the East India Company courts which administered it were prepared to give remedies where a person had lost his social standing in the community. In 1847, the Sudder Dewanny Adawlut of Bengal held that a person had a right to sue for readmission to caste and society,[40] and in 1859 it ordered a plaintiff restored to membership in a society.[41]

But a change became manifest after the merger of the East India Company courts with the Presidency courts in 1862 to establish high courts under direct imperial appointment. Four years later the Bengal High Court decided that Hindu law did not require one Hindu to ask other Hindus to an entertainment at his house against his will.[42] How-

---

[38] *Amos* v. *Brunton*, (1897) 18 N.S.W. Eq. 184, 186-7, 14 N.S.W.W.N. 69, where Manning, C.J., said:

"Even in bicycle clubs... the persons who join receive tickets which enable them to obtain their meals and refreshments at wayside inns at a cheaper rate than is open to the unattached bicyclist; yet, it could hardly be contended that this Court should interfere by injunction in the event of the members of such club declining to continue to associate with one of their number."

[39] *O'Neil* v. *Pupuke Golf Club, Inc.*, [1932] N.Z.L.R. 1012.

[40] *Sonaram Gazor* v. *Obhoyram Gazor*, [1847] Bengal Sudder Dewanny Adawlut Rep. 106.

[41] *Ramkant* v. *Ram Lochun Acharj*, [1859] Bengal Sudder Dewanny Adawlut Rep. 535.

[42] *Joychunder Sirdar* v. *Ramchurn*, (1866) 6 Sutherland's Weekly Rep. 325, where the court observed: "But it nowhere rules that Civil Courts can compel Hindoos, against their will, to ask other Hindoos to their houses or their entertainments."

ever, it was not until *Sudharam Patar* v. *Sudharam* [43] that the matter of freedom of association was finally settled. In this case, the lower Appellate Court declared that "there was no law which empowered a man to compel another against his will to come and dine at his house, and that such a decree would be in fact a direct interference with personal liberty."[44] The Bengal Appellate High Court affirmed this decision. Thus, Bayley, J., declared :

> No decree can be executed declaring a person's right to the membership of a Society, as the effect of such a decree would be to require that other persons do accept plaintiff's invitations and do partake of his food though against their will, and that they in their turn must give him similar invitations and dine with him whether they like to do so or not.[45]

The influence of English law thereafter gradually permeated the Indian decisions. Thus, in one unusual case involving dissension in the Bombay Jewish community, the Bombay High Court said: "The community is a private and voluntary religious society resting upon a consensual basis."[46] The Madras High Court has ruled that courts

---

[43] (1869) 3 Bengal L. Rep. (a.c.) 91, 11 Sutherland's Weekly Rep. 457.

[44] *Ibid* at 92.

[45] *Ibid* at 95. Markby, J., gave a full exposition on this point. He explained: "What is stated to us that the plaintiff alleged was this, that on a certain occasion he invited the defendants to dine at his house, that the defendants accepted the invitation, but afterwards refused to come and dine at the plaintiff's house; that from that time they ceased to ask the plaintiff on such occasions, although they invited all other members of a certain Society called *Samaj*, of which the plaintiff was likewise a member, and it is said that by these acts the defendants showed that they refused to recognize him as a member of that Society. The plaintiff therefore sues for a declaration of his right to the membership of that Society. It is assumed, and as far as I am aware, correctly, that the refusal to eat with the plaintiff does in effect exclude him from the Society of which he claims to be a member.

"... Nor is it contended that the plaintiff has been excluded from... the enjoyment of any right of any kind whatever, except the bare right of membership of a Society; and the form in which the first Court gave its decree which was in plaintiff's favour, was that the plaintiff and the defendant do live in one Society and mess together... only a question [was involved] as to whether or not the plaintiff was entitled to continue a member of the Society which partakes of a character partly social and partly religious.

"... Both the English law and the Hindu law appear to me to draw a clear distinction between interference for the protection of rights of property... and interference in matters of a purely social nature... if the main object of the Association be of a social character, the members of the Association are the sole judges whether a particular individual has so conducted himself as to entitle him to continue to be a member of the body." *Ibid* at 96-97.

[46] *Advocate-General of Bombay* v. *Haim David Devaker*, (1886) I.L.R. 11 Bom. 185.

will not interefere with a club's internal affairs,[47] while the Nagpur High Court has followed English authority in deciding that a club member may resign at any time.[48] The Supreme Court of India has recently held that relations between club members are purely contractual.[49]

A decision by Malik J., for the Full Bench of the High Court of Allahabad is closest to the problem under consideration. He said:

> A social club not being a profit-making concern, the terms on which the members would associate with each other depend generally on their choice and they are governed by the rules that they may frame for their own conduct... Ordinarily a Court of law has nothing to do with social relationships between the members...[50]

It thus appears that at the present time Indian law is in accord with English law in that a rejected applicant for membership in a club would have little chance of obtaining judicial review of the reasons for his rejection.

6. Africa.

In view of the fact that most of the pressure on private clubs to drop restrictions on membership has come from new African governments, it is of interest to examine the state of the law in Africa on the duty of clubs towards applicants. Most of the decisions have been rendered in South Africa, which uses Roman Dutch law in theory but follows English concepts in practice on this point.

The South African courts have held that club membership is a contractual relationship with other members,[51] and requires a serious intention among the members to associate with each other.[52] Accordingly, a club member may resign unilaterally.[53] It has also been held that club action must be taken by majority vote, absent some

---

[47] *Kowtha Suryanarayana Rao* v. *Patibandla Subrahmanyam*, A.I.R. 1940 Mad. 902, 1940 Mad. W.N. 771, [1940] 2 Mad. L.J. 330, 194 Ind. Cas. 760.

[48] *Vinkar Mandal Basim* v. *Narayanrao Gopalrao Dabhade*, I.L.R. 1948 Nag. 449, A.I.R. 1948 Nag. 327, 1948 Nag. L.J. 285.

[49] *T. P. Daver* v. *Lodge Victoria No. 363*, A.I.R. 1963 S.C. 1144.

[50] *Barwell* v. *Jackson*, I.L.R. 1947 All. 758, 763, A.I.R. 1948 All. 146, 1947 All. L.J. 637.

[51] *Pillemer* v. *Maltz*, 1954 (3) So. Afr. L.R. 139 (W.L.D.).

[52] *Valkin* v. *Daggafontein Mines, Ltd.*, 1960 (2) So. Afr. L.R. 507, 514, where the Witwatersrand Local Division said: "There was no acceptance of any obligation by any individual expressing a desire to create an association or to join as a member of an association already formed." The court therefore concluded that no club had been formed.

[53] *Matthews* v. *Executive Council, Garment W. Ind. U.*, 1955 (4) So. Afr. L.R. 42 (N.P.D.).

other provision in its by-laws;[54] presumably, this would include the election of new members.

South African law likewise follows English law in the refusal of the courts to review reasons for non-association by club members with another member.[55] This is even true of political clubs. In one case the Witwatersrand Local Division of the South African Supreme Court declared:

> It may be true that in the case of a voluntary association there is a contract to associate between the aggrieved member and the other members. But such an agreement is strictly personal in its nature, and a Court of law will not enforce it by an order for specific performance or by injunction. It will not enforce the continuence of purely personal relations.[56]

Even where club membership is of considerable economic benefit, the organization may decline to admit an applicant to membership or privileges for any reason satisfactory to it. Thus, it has been held that the right to get a license from a voluntary association is purely contractual,[57] and a club which withholds a license need not give any

---

[54] *Ex parte* Gill 1955 (2) So. Afr. L.R. 418, 424 (W.L.D.): "In the absence of any special rule to the contrary, for instance, in a constitution, it would seem that, today in any event, common sense would demand that where a number of people join together for some purpose and for the execution of such purpose decisions are from time to time necessary, the only way decisions can practically be made on any matter where there is a divergence of opinion is by a majority vote."

[55] In *Sooboo* v. *Pretoria District Indian Football Assn.*, So. Afr. L.R. (1943) T.P.D. 43, 46-47, it was held:

"... our law proceeds on substantially the same principles as the English Law. In a voluntary association the mere personal contract to associate is in itself insufficient to justify a Court of law enforcing it by an order for specific performance or by injunction. 'Something more than the mere right to associate, whether it be a right of property or something less must be involved.' ... in *Rigby* v. *Connol* (14 Ch. D. 482) Jessel, M.R., pointed out that a dozen people may agree to meet and play whist at each other's houses for a certain period, and if eleven of them refuse to associate with the twelfth any longer, a Court of Justice would not compel them to do so."

[56] *Snyman* v. *Vrededorp Electoral Division Committee of the National Party of the Transvaal*, So. Afr. L.R. (1929) W.L.D. 138, 143-4. The court also said:

"The only benefits conferred by membership consist in the right to associate with the other members of the party in various meetings for political purposes, coupled with eligibility for holding certain honorary offices. I do not think that benefits of that kind are rights which a Court of law will enforce by making an order which in effect compels the other members of the party to associate politically with the member expelled, however unjustifiable the expulsion of the latter may have been. The agreement between the parties to the voluntary association in such circumstances does not seem to me one which a Court of law should enforce by specific performance, or by injunction any more than in the case of a voluntary association consisting of a number of scientists who agree to associate for the purposes of scientific discussion."

[57] *Anschutz* v. *Jockey Club of S.A.*, 1955 (1) So. Afr. L.R. 77 (W.L.D.).

reason.[58] Accordingly, one decision observed: "The Jockey Club is a private association... but no member of the public has any claim against the Jockey Club for damages merely because the club refuses to admit him to any of its privileges or refuses to have anything to do with him."[59]

A very clear decision on this point has also been rendered by the High Court of Southern Rhodesia. Watermeyer, J., in the course of holding that a club need not elect an applicant to membership, or assign any reason for refusing to do so, said:

> Plaintiff came as a suppliant — so he had no rights in the matter beyond the bare right to send in his application. The committee before whom the application came have not condemned him, — have not passed any sentence on him; they have simply refused to take action for his benefit. The plaintiff's status is in no way altered. I think he exaggerates when he talks of the lasting stigma thrown on him; the committee have cast no reflection on his character whatsoever; they have simply in their discretion declined to grant him a favour which he asked for. His rights remains just where they were.[60]

No decisions from any other African countries in the Commonwealth have been found dealing with clubs except for Kenya, one of the new governments which pressured all-white clubs to eliminate racial barriers. The Supreme Court of Kenya has held that club members are bound by decisions of the majority;[61] presumably, this includes admitting new members.

The Court of Appeal for Eastern Africa, in a case on appeal from the Supreme Court of Kenya, has also pointed out how few rights a non-member has against a club. Here, a club member introduced as a guest a person who was disqualified to be a guest under club rules. The court held that the club member had, by joining the club, agreed to abide by the club rules, and therefore could not even give his friend the status of a guest on club premises against these rules.[62]

---

[58] In *Theron* v. *Jockey Club of S.A.*, 1954 (4) So. Afr. L.R. 723, 729 (E.D.L.D.), the court said: "in granting the license, the respondent exercised a discretion, unqualified, and there is nothing in the rules which would give to the applicant a right to query that decision."

[59] *Johnson* v. *Jockey Club of S.A.*, So. Afr. L.R. (1910) W.L.D. 136, 140 L.L.R. 417.

[60] *Rainsford* v. *Salisbury Club Trustees*, (1914) So. Rhodesia L. Rep. 65, 75-76.

[61] *Dewani* v. *Datoo*, (1952) 25 (1) Kenya L.R. 55.

[62] *D'Souza* v. *Machado*, (1952) 19 East Afr. L. Rep. 87, 88, where the court said: "... once he had been told the position the appellant knew or should have known that he was a trespasser and I regard the fact that Mr. Zuzarte who had introduced him to the club apparently encouraged him to continue the trespass matters not at all. It would only matter if Mr. Zuzarte, in spite of the rules, had the power to confer the status of a guest on the appellant, but he had not this power, because by acceptance of the rules he had deprived himself of it."

7. Conclusion.

The authorities are uniform in English and Commonwealth law alike that no person has a right to be admitted to any private club, society, or other organization, that the reasons for the rejection of his application for membership or other privileges may be wholly arbitrary, and that the courts will give him no relief if his application is rejected. Therefore, if a club rejects an applicant on racial grounds, it is merely exercising a legal right, and not violating the legal rights of the applicant in any way. Assuming for the sake of argument that racial discrimination in club membership is "arbitrary," it is not a violation of the rights of the person discriminated against.

Government action to prevent racial discrimination in private clubs therefore does not stand on any principle of law. A club may discriminate against applicants for a variety of reasons other than because of the race of the person applying, and these reasons may be justly considered as "arbitrary" as racial discrimination. For example, discrimination based on religion, politics, financial status, occupation, social views, age, personality, and a variety of other factors may be as arbitrary as racial discrimination, yet the law does not forbid such discrimination. To ban racial discrimination while permitting other forms of "arbitrary" discrimination, therefore, does not tend to equalize legal rights. On the contrary, it constitutes a species of special privileges for persons discriminated against because of race, while all other persons are left remediless.

The government could equalize legal rights if it wanted to ban racial discrimination by clubs, by banning all forms of arbitrary discrimination. This would give every rejected applicant a right of judicial review of the reasons for his rejection. But it is highly doubtful that any Commonwealth government would be prepared to break so radically with existing law and give the Courts so much authority over clubs. The alternative, if all persons are to remain equal before the law, is to leave the law as it is and give nobody a remedy for rejection, whether on account of racial discrimination or any other discrimination.