RECENT DEVELOPMENTS

CONSTITUTIONALITY OF REQUIRED PAYMENT OF DUES TO INTEGRATED BAR ASSOCIATION

Lathrop v. Donohue
367 U.S. 820 (1961)

Lathrop instituted suit in the Circuit Court of Dane County, Wisconsin, to recover dues paid to the treasurer of the integrated bar of Wisconsin. The circuit court sustained a demurrer to the complaint on the ground that no cause of action was stated. On appeal, the Wisconsin Supreme Court treated the case as if it had been originally brought before it and decided the case upon its merits. The court found that the payment of dues as a condition precedent to the practice of law was not violative of petitioner's constitutional freedoms of speech and association.[1] The case was then appealed to the Supreme Court of the United States. Despite the failure of majority support for any of the five opinions filed,[2] the Court ruled (7-2) that bar integration does not violate freedom of association. The issue of freedom of speech was left unresolved.[3] The swift growth of the integrated bar concept, now in operation in twenty-six states,[4] points to the importance of a definitive stand on this issue.[5]

It appeared as early as 1956 that the constitutionality of the integrated bar had been resolved. In *Railway Employee's Department v. Hanson*, Justice Douglas asserted, "On the present record, there is no more infringement . . . of First Amendment rights than there would be in the case of a lawyer . . . required to be a member of an integrated bar."[6] The courts of a state possess the power to provide the means of carrying on their business, and normally the courts themselves may determine what is necessary.[7] In a series of cases decided in 1961, the United States Supreme Court re-emphasized this state interest and power.[8] However, the Court has generally taken the stand that any state action which curtails first amendment freedoms will be carefully scrutinized by the federal judiciary.[9] It has

[1] Lathrop v. Donohue, 10 Wis. 2d 230, 102 N.W.2d 404 (1959).

[2] Lathrop v. Donohue, 367 U.S. 820, 865 (1961). Justice Black commented, "I do not believe that either the bench, the bar or the litigants will know what has been decided in this case—certainly I do not."

[3] Because of the failure of four of the justices to discuss the issue, an indecisive vote of three to two in favor of constitutionality resulted.

[4] Lathrop v. Donohue, *supra* note 2, at 847.

[5] For reference to Ohio's effort see 24 J. Am. Jud. Soc'y 51 (1940).

[6] 351 U.S. 225, 238 (1955). This statement is repudiated by Douglas in the instant case at 879.

[7] Re Lockwood, 154 U.S. 116 (1893); Laughlin v. Clephane, 77 F. Supp. 103, 105 (1947).

[8] Konigsberg v. State Bar of California, 366 U.S. 36 (1961); Re Anstapulo, 366 U.S. 82 (1961); Cohen v. Hurley, 366 U.S. 117 (1961).

[9] NAACP v. Alabama, 357 U.S. 449 (1958); DeJonge v. Oregon, 299 U.S. 353 (1937); Near v. Minnesota, 283 U.S. 697 (1931).

been suggested by a unanimous court that in such cases the state may prevail only by proof of a compelling interest.[10]

Petitioner asserted that by being forced to pay fifteen dollars into the bar treasury as a condition precedent to his practice of law his freedoms of speech and association had been violated. He argued that a direct corollary to freedom of association[11] is freedom from coerced association. Certainly it is as noxious to individual liberty to be forced to associate with individuals whose interests are incompatible with one's own as it is to be denied the right to associate with individuals who hold similar views. He further contended that the use of his dues to support legislation which he opposes diminishes his freedom of speech.[12] The use of this segment of his fees increases the effective voice of those who support this legislation, and thereby decreases his voice by that same amount.[13]

The major purpose of the state bar seems to be the furtherance of legal ethics, competency, and education, and some believe that the prior form of voluntary association did not meet the above needs.[14] The record shows that the total dues collected by the integrated bar amount to about $80,000 a year.[15] From this are taken funds for the salary of the Executive Director ($14,000), the publication of "The Wisconsin Bar Bulletin," postgraduate education of lawyers, studies related to the improvement of the legal profession, and other programs directed at improving the services rendered by lawyers to the public. Another vital aspect of the integration program is the assumption of a major role in assisting the Wisconsin Supreme Court in the disciplining of members for unethical practices.[16] Certainly, if the multifaceted program now in operation in Wisconsin is successful, the public will benefit in terms of better legal service. However, many of the benefits from such a program are actualized only by the full co-operation of the member lawyers. As the state points out, members are not compelled to attend meetings or participate in any of the bar activities.[17] Thus, it would appear that the major benefits of integration are a better disciplinary machinery,[18] increased funds, and the prospect of increased legal proficiency if the members of the bar avail themselves of the programs and educational opportunities provided.

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10 Bates v. Little Rock, 361 U.S. 516 (1959).

11 For a discussion of the constitutional evolution of the freedom of association, see Abernathy, The Right of Assembly and Association (1961).

12 In International Association of Machinists v. Street, 367 U.S. 740 (1961), decided the same day as Lathrop v. Donohue, the Court in a confusing opinion denied the union the power to use dues money for political purposes a member opposed.

13 He further argued that bar integration tended to reduce his freedom of speech by furthering governmental establishment of political views, developing a guild system, drowning out the voice of dissent, and causing compelled affirmation.

14 Lathrop v. Donohue, *supra* note 2, at 833.

15 *Ibid.*, at 846.

16 *Ibid.*, at 830.

17 *Ibid.*, at 828.

18 Wicker, "Integrated Bar," 21 Tenn. L. Rev. 708, 713 (1951).

Of all our freedoms, none have been more jealously guarded than those of the first amendment.[19] Nevertheless, upon cursory examination it would appear that little infringement has been made upon petitioner's rights.[20] All that is required of petitioner is that he pay fifteen dollars per year[21] and have his name on the membership list of the Wisconsin Bar. While inconvenient or distasteful, it seems that his freedom of association has been unscathed. He may still belong to his local bar association and associate with his fellow lawyers in theoretically any independent manner he desires.

The fact that a portion of the bar funds are used to sponsor legislative changes raises a more serious ground for attack. Although only a small fraction (5%)[22] is used in this fashion, and the proposals mostly relate to procedural changes, petitioner is nevertheless being forced to support an attempt to influence legislative action against his will. In an opinion delivered the same day as the instant case, the Court, while avoiding the constitutional issue of freedom of speech, ruled that the Railway Labor Act did not permit the expenditure of funds against a union member's will for political purposes he opposed.[23] While it may well be argued that the legislative changes supported by the bar are non-political,[24] it is apparent that the issue was clearly before the Court.[25]

While the attack upon petitioner's constitutional rights appears to be minimal, both the grounds for the decision and the decision itself seem inadequate. The majority was content with drawing an analogy between coerced membership in a labor organization and the integrated bar. Members of the industrial community may be forced to join labor unions because it is felt to be essential to industrial peace[26] and it is believed to be equitable to spread the cost of collective bargaining to those who benefit—all members of the union.[27] It is suggested that lawyers may likewise be required to contribute to the benefits of the integrated bar because they are a group affected with the public interest. While it is not to be denied that if a lawyer avails himself of the bar's programs he too will benefit, the principal benefactor appears to be the public generally. The lawyer as an individual or a class is required to pay dues so that there will be a better administration of justice. This seems to be a far cry from the reasons prompting the legal acceptance of the union shop. Moreover, why the integrated bar?

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19 West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

20 "In such cases, the process of balancing the competing interests of the parties is undertaken." Karst, "Legislative Facts in Constitutional Litigation," The Supreme Court Review 75, 84 (1960).

21 Since the upholding of the Wisconsin integration, fees have been increased to $20 for those practicing more than 5 years and to $10 for those who have practiced less.

22 Lathrop v. Donohue, *supra* note 2, at 836.

23 International Association of Machinists v. Street, *supra* note 12, at 776.

24 Lathrop v. Donohue, *supra* note 2, at 837.

25 The issue was comprehensively discussed by four of the justices.

26 Railway Employee's Department v. Hanson, 351 U.S. 225, 233 (1955).

27 Slovenko, Symposium on Labor Relations Law, 65 (1961).

Many of the best bar associations in the country are unintegrated.[28] Ohio has over two-thirds of the lawyers in the state enrolled on its state bar membership list and operates on an annual budget of about $200,000.[29] Evidently, Ohio and other states have been able to achieve the objectives sought by bar integrationists without forced association. In fact, prior to integration in Wisconsin membership in the bar was rapidly increasing, committees were effective, post-graduate education was prospering, and local bar associations were active.[30] Where then was the "compelling necessity" for integration?

If in fact there is little infringement upon petitioner's constitutional rights, and if in fact the upholding by the Court of the integrated bar was the greatest single contribution to the administration of justice since the coming of the Federal Rules,[31] it still seems to be rather sad that the objectives desired could not be gained upon a voluntary basis. It has been suggested that the issue of use of funds for political purposes will once again appear before the court.[32] If and when such occurs, and if the issue is sufficiently clear, considering the result reached in the *Street* case, it would appear that the Court will be inclined to strike down that portion which allows the expenditure of funds for political purposes while upholding the constitutionality of the integrated bar concept.

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[28] Winters, "Integration of the Bar—You Can't Lose," 39 J. Am. J. Soc'y 147 (1956).

[29] 47 A.B.A.J. 587 (1961).

[30] 48 A.B.A.J. 156 (1962).

[31] 45 J. Am. J. Soc'y 44 (1961).

[32] International Association of Machinists v. Street, *supra* note 12, at 785.