

'Fee-To-Practice' Imbroglio: The Constitutional Limitations to the Payment of Professional Practicing Fees.

Fredrick Ikenna Awkadijwe*

Adamaka Josephine Awkadijwe**

Simon Uchenna Ortuanya***

Nkem I Itanyi****

Abstract

Professional associations in Nigeria are funded from a large proportion of compulsory statutory practicing fees, collected by the different professional regulatory bodies in the professional designating Acts. The professional regulatory bodies are also funded with the remaining proportion of the practising fees. The objective of this paper is to ascertain whether the federal legislatures, whose exclusive constitutional legislative matter is designation of professional occupations, have the constitutional legislative competence while designating professional occupations, to confer the right of collection from professional practitioners any form of compulsory practicing fees, for the purpose of remitting part of the aggregate to the funding of related professional associations. The methodology is doctrinal. The paper evaluates all the relevant provisions of the Constitution of the Federal Republic of Nigeria (CFRN) regarding associations, and the fundamental constitutional rights to association, liberty and personal property; and finds that the federal legislatures are destitute of any constitutional competence whatsoever to confer the right of collection from professional practitioners, any form of compulsory practicing fees, for the purpose of remitting part of the aggregate towards the funding of related professional associations. The paper recommends immediate amendments to the professional Acts to reflect voluntary funding of professional associations.

Keywords: Practising Fees, Constitutional Legislative Competence, Liberty, Nigeria, Professional Associations, Property.

1. Introduction.

Professional associations in Nigeria are funded from a proportion of the compulsory statutory practicing fees, collected by the different professional regulatory bodies established by the different professional designating Acts. These Acts make it mandatory that every practising professional practitioner pays an annual practicing fee before he can practise in a year. The annual practicing fees are mostly determined by the professional associations and their related regulatory bodies, and are imposed on all the practising members of the professions. The collected funds are vested in both the regulatory bodies and their related professional associations, in statutorily prescribed proportions. By virtue of Item 49 of Part I of the Second Schedule to the Constitution of the Federal Republic of Nigeria (CFRN) 1999 as amended, the federal legislatures are constitutionally empowered to designate professional occupations. According to paragraph 1 of Part III of the Second Schedule to the CFRN, where by in the Schedule the National Assembly is required to designate any matter or thing or to make any declaration, it may do so either by an Act of the National Assembly or by a resolution passed by both Houses of the National Assembly. It is based on that paragraph that the federal legislatures have made the different professional designating Acts in Nigeria for the different professional occupations. These designating Acts, mostly enacted during military dictatorships, assign statutory rights of representation at the

* **Fredrick Ikenna Awkadijwe** MBBS Nig, LL.B, LLM (In-View), FWACS, Consultant Obstetrician and Gynecologist ESUT Teaching Hospital Parklane Enugu, Nigeria. Email: awkadijweikenna@gmail.com. Phone number: 08039555380.

** **Adamaka Josephine Awkadijwe** LLB Nig, BL, Ministry of Justice, Enugu State. adamakaawkadijwejosephine@gmail.com.

*** **Simon Uchenna Ortuanya** SJD (Loyola University, Chicago School of Law) LLM, LLB, BL, FCIArb, Dean, Faculty of Law, Enugu State University of Science and Technology, ESUT.

**** **Nkem I Itanyi** Lecturer, Faculty of Law, University of Nigeria Enugu Campus. nkem.itanyi@unn.edu.ng.

professional regulatory Councils to the professional associations, and compel all the practising members of the professions to sponsor and be compulsory members of the professional associations; hence necessitating the enquiry in this paper into the resource, congruity, basis and constitutional validity for the statutory compulsion of all the practising members of the professions to sponsor and be compulsory members of the professional associations

Associations are purely private bodies.¹ They originate and exist in virtue of the extent of their constituting members' donated rights that are transmogrified into a common interest. Personal rights in the common interest of an association are usually stated in the domestic constitution of the association, to be subject to the majority opinions of members.² Conferring on an association the statutory right to remittance from compulsory practising fees, or representations at the profession's regulatory Council, does not make the association a statutory or public body.³ The nature of a public or private body, is not determined by the conferment of statutory rights or obligations on the body.⁴ Courts will not restrict themselves to the 'source of power' test, but can apply the 'public functions' test, to properly determine if the actions or inactions of a body is public or private.⁵ The Court of Appeal in *Datafin* holds that bodies performing public duties or exercising powers that are public in nature may be subject to judicial review even though the powers being challenged arises from a non-common law, non-prerogative or non-statutory source.⁶ In *Datafin*, the Court of Appeal holds that the Panel on Take-Overs and Mergers is amenable to judicial review in relation to its powers over those it regulates. *Datafin* case establishes that source of power to regulate, is decisive; and that contractual source of power is not open to judicial review, not being an exercise of public function. In professional associations, there is a conferment of non-regulatory statutory rights, but no statutory regulatory powers.⁷

Associations, though formed under the CFRN and ordinary statutes, may be formed under the residual common law.⁸ The common law has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal,⁹ hence justifying the concept that human persons can do anything unless validly forbidden by law.¹⁰ It is in this respect, amongst others, that the common law has a constitutional role to play. Professional associations, though are assigned statutory rights in professional designating Acts, are not formed under the legal framework of any known federal or state statute. The necessary implication is that they are formed under the constitutionally permissible common law rights available under the unlegislated or partially legislated constitutional legislative matters.¹¹ Professional associations are neither political parties

¹ See section 40 & 229 of the 1999 CFRN. (As amended).

² See also *Chinwo v Owhonda & Ors* (2008) 3 NWLR (Pt. 1074) 341 at p360 para-F-H (CA).

³ See *Ojukwu v The Registered Trustees of the NBA & Ors* (2022) LPELR-57895(CA).

⁴ The conferment of statutory rights or obligations on an unincorporate association only confers quasi legal personality. See *Carlen (Nig) Ltd. v. University of Jos and Anor* (1994) 1 NWLR (pt. 323) 631.

⁵ See *R (Holmcroft Properties Ltd) v KPMG* [2016] EWHC 323 (Admin).

⁶ *R v Panel on Take-Overs and Mergers, ex parte Datafin* (1987) QB 815.

⁷ See *Ojukwu v The Registered Trustees of the NBA & Ors* (2022) LPELR-57895(CA).

⁸ The scope of the operations of common law rules in Nigeria, as permitted by section 315 of the 1999 CFRN (As amended), is as provided in relevant states laws; being that substantive matters of common law rights or rules are not in Part I & II of the 1999 CFRN (As amended). Hereinafter referred to as the CFRN.

⁹ See Allan TRS, *The Common Law of the Constitution: Fundamental Rights and First Principles* in Saunders (ed) *Courts of Final Jurisdiction – The Mason Court in Australia* (1996, Federation Press) at 148.

¹⁰ See *Minister for Immigration & Citizenship v Haneef* [2007] FCAFC 203 (21 December 2007) at 113.

¹¹ a natural person is at the liberty to perform acts in exercise of his fundamental rights, as well as to perform any other act whose regulation the national constitution has conferred on the legislatures, as long as there is no limiting

nor trade unions, and therefore cannot be created under a federal legislative framework.¹² In the absence of any state legislative framework creating them, professional associations are therefore state common law associations.

The law is trite that for a legislature to have the competent authority to legislate a law on a legislative matter that shall have been appropriately constitutionally assigned to it, the legislature shall at least have a competent substantive power to legislate on an equally competent substantive constitutional matter.¹³ This paper therefore seeks to ascertain if by the clear provisions of sections 4, 35, 40, 44 & 45(1) of the CFRN, and Items 22, 32, 34, 49 & 56 of Part I of the Second Schedule to the supreme CFRN 1999 as amended, the federal legislatures are possessed of any requisite constitutional competence to legislate compulsory funding of professional associations by all the members of the professions practising the professions. The paper is organized in five parts, including Part One, this Introduction. Part Two is on the constitutional regulation of liberty to association. Part Three analyzes the entrenched constitutional right to property of professional practitioners. Part Four questions the constitutionality of compelling sponsorship and membership of professional associations, while Part Five concludes the paper.

2. The Regulation of Liberty to the Formation and Joining of Associations.

The substantive constitutional legislative matters for the formation and regulation of associations are as contained in section 40 of the CFRN and Items 22, 32, 34 & 56 of Part I of the Second Schedule to the CFRN.¹⁴ The primary provision on association in Nigeria is section 40 of the CFRN which states that: 'Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests: Provided that the provisions of this section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission with respect to political parties to which that Commission does not accord recognition'. This section is a limbed tripod. The first limb states that 'Every person shall be entitled to assemble freely and associate with other persons'. The second limb states that 'and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests'. The third limb states that 'Provided that the provisions of this section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission with respect to political parties to which that Commission does not accord recognition'.

The first limb guarantees freedom of association to every person irrespective of their status. Thus, soldiers, police officers, professional practitioners, civil servants and laymen are not exempted from this fundamental constitutional right.¹⁵ By virtue of the first limb of section 40 of the CFRN, the constitutional guarantee of liberty to associate or disassociate cannot be compelled or limited within competent jurisdiction by any law¹⁶ or beyond the prescription of procedure for the exercise

common law, and where the appropriate legislature has not yet exercised a limiting or prohibiting authority through an ordinary statute over the act.

¹² Any association that is not a political party or trade union, including professional occupational associations, is on an unenumerated matter, and can only be formed under states' legislative frameworks.

¹³ In *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (CanLII), [2021] 1 SCR 175.

¹⁴ With the corresponding states residual matters.

¹⁵ See the reasoning in *INEC v. Musa* (2003] 10 W.R.N.1.

¹⁶ See also *Nigeria Union of Teachers (NUT) Kaduna & 3 Ors v The Governor of Kaduna State & 4 Ors* unreported suit number NICN/KD/19/2018 delivered on 6th day of May 2019 per Honourable Mr Justice Sanusi Kado.

of liberty as contained in the CFRN itself.¹⁷ The import of the first limb of section 40 of the CFRN is that the provisions in professional occupational enabling statutes that seek to compel sponsorship or membership of all practising professional practitioners, may be unconstitutional.¹⁸ In *INEC v. Musa*,¹⁹ section 229²⁰ of the CFRN is found to have defined an 'association' thus: '229. In this part of this chapter, unless the context otherwise requires "association" means any body or persons corporate or unincorporated who agree to act together for any common purpose, and includes an association formed for any ethnic, social, cultural, occupational or religious purpose'. Compulsion of sponsorship or membership is not an ingredient or a feature of any association.

A careful look at section 4 of the CFRN, the second limb of section 40 of the CFRN, and Items 22, 32, 34 & 56 of Part I of the Second Schedule to the CFRN, will reveal that other matters of 'trade unions' and 'political parties' than those for the protection of personal interests of members of the associations, are dispatched to Part I of the Second Schedule to the CFRN, for the federal legislatures to exclusively legislate for the federation or any part thereof; while other matters of 'any other association' beyond the protection of personal interests of members, are dispatched to the residual competences of states legislatures for the different states. Professional associations are not for the protection of personal interests of its members, but instead are for the nomination of representatives to related professional regulatory Councils.²¹ Item 49 of Part I of the Second Schedule to the CFRN has no constitutional legislative matter for the legislation of statutory framework for professional associations. This is even more so because *accessorius sequitur naturam sui principalis*, ie an accessory follows the nature of its principal.²² If the federal legislatures have no constitutional legislative power over matters of 'any other association',²³ the federal legislatures cannot provide a legal framework of operation, or compelled sponsorship or membership of professional associations while designating professional occupations in the designating Acts. In the obvious absence of the enumeration of matters of professional associations in Part I of the Second Schedule to the CFRN as done for political parties and trade unions, laying down legal framework for the operations, sponsorship and membership of professional associations,²⁴ is too remote to be of any competent incidental consequence in the designation of professional occupations.²⁵ The federal legislative creation of compulsory associations over unenumerated matters, is a grievous contravention of sections 1(3), 4(7)(a) & 40 of the CFRN.²⁶ Furthermore, in matters of entrenched fundamental constitutional rights, every person or citizen as the case may be, is at the same constitutional pedestal of authority as the legislatures, such that the legislatures cannot commandeer a person or citizen to belong to or sponsor an association.²⁷ The provisions of the Brady Handgun Violence Prevention Act requiring state law enforcement officers

¹⁷ See section 35(1) of the CFRN.

¹⁸ See also the unconstitutional conditions doctrine in *Thomas W. Merrill, Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 *Denv. U. L. Rev.* 859 (1995).

¹⁹ (2003] 10 W.R.N.1.

²⁰ Repealed in 2010.

²¹ See for instance section 1 of the Medical and Dental Practitioners Act Cap M8 LFN 2004.

²² See *Tukur v Government of Gongola State* (1989) 4 NWLR (Pt.117) 517.

²³ Including professional occupational associations.

²⁴ that are independent private bodies separate from the professional regulatory bodies.

²⁵ See section 10(2) of Cap I23 LFN 2004.

²⁶ *Expressio unius est exclusion alterius* ie the enumeration of one thing is the exclusion of the other not enumerated. See also *EHUWA V INEC* (2006) 28 NSCQR 545 @ 565 per Ogbuagu, JSC.

²⁷ See *Printz v. U.S.*, 521 U.S. 898 (1997), where the Tenth Amendment to the US Constitution is used to strike down a federal legislation as exceeding Congress' federal legislative competences.

to participate in a background check process for gun transfers are held to be invalid because they are unconstitutionally commandeering of state officials.²⁸ The federal legislative commandeering of all the professional practitioners to compulsorily belong to or sponsor related professional associations before they may practise their professions, against the provision of the first limb of section 40 of the CFRN, is not only a violation of the principle of constitutional supremacy²⁹ and the clear intentions manifested in Chapter IV of the CFRN;³⁰ but is also an unconstitutional condition for professional occupational practice. The doctrine of unconstitutional conditions will step in to preserve the practitioner's entrenched constitutional liberty to association and his benefits arising from government's discretions of professional practice.³¹

The unconstitutional conditions doctrine is a constitutional doctrine;³² and when applicable, confers a windfall to the rights holder who gets to keep to himself both the discretionary benefits of government and his constitutional right.³³ This doctrine applies in appropriate cases to invalidate unconstitutional conditions,³⁴ as government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.³⁵ The doctrine will apply to professional practitioners who are unconstitutionally compelled to sponsor a professional association before they can practice their professions.³⁶ The US Takings Clause, into which the Nigerian practice of payment of practising fees to professional associations reasonably falls, has judicial protection under the unconstitutional conditions doctrine.

Robert F. Nagel³⁷ comments on the determinants of the applicability of the unconstitutional conditions doctrine in Merrill,³⁸ which when professional practitioners, professional Councils and professional associations are considered, will show that the doctrine will apply to compelled sponsorship of professional associations. The extant principle on unconstitutional conditions doctrine is that the utilization of the unconstitutional conditions doctrine should depend on the 'public value' to 'total value' ratio. The unconstitutional conditions doctrine should be invoked when the ratio of the right's public value is high relative to its total value.³⁹ The higher public goods

²⁸ See also *N.Y. v. US* 505 U.S. 144 (1992) which holds that a provision of the 1985 Low-Level Radioactive Waste Policy Amendments Act, that requires states to conform to federal law or be forced to take title of wastes, is unconstitutionally commandeering.

²⁹ See *Opara & Anor v Amadi & Anor* (2013) LPELR 20747(SC) for the constitutional principle that the supremacy of the CFRN in section 1 thereof is equally shared and enjoyed by all the sections of the CFRN, and that in interpreting provisions of the CFRN care must be taken not to render any other section redundant or impotent.

³⁰ Particularly unconstitutional to sections 35, 40 & 44 of the CFRN.

³¹ For the judicial position on unconstitutional conditions doctrine, see *Dolan v City of Tigard* 114 S. Ct. 2309 (1994).

³² The doctrine is derived from the need to safeguard persons' constitutional rights in the national Constitutions.

³³ See Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 *Denv. U. L. Rev.* 859 (1995) at 872.

³⁴ See the application of the doctrine in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

³⁵ See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

³⁶ See Chief Justice Rehnquist's leading opinion in *Dolan v. City of Tigard* 114 S. Ct. 2309 (1994) extending the unconstitutional conditions doctrine to the Takings Clause; in particular, to attempts by local zoning authorities to avoid the just compensation requirement by conditioning the grant of a discretionary building permit upon the donation of property, akin to the deposition of association subscriptions masqueraded as statutory practising fees, to the government.

³⁷ See Robert F. Nagel, *A Comment on Constitutional Rights as Public Goods*, 72 *Denv. U. L. Rev.* 889 (1995) at 889.

³⁸ Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 *Denv. U. L. Rev.* 859 (1995). Available at: https://scholarship.law.columbia.edu/faculty_scholarship/365.

³⁹ See Robert F. Nagel, *A Comment on Constitutional Rights as Public Goods*, 72 *Denv. U. L. Rev.* 889 (1995) at 889.

value of the exercise of a constitutional right (expressed as $PGV = EB - EC$),⁴⁰ the more vigorously courts will enforce the unconstitutional conditions doctrine. The smaller the PGV, the justification for a government program that requires a waiver of rights as a condition of employment.⁴¹ The theory behind the doctrine of unconstitutional conditions is that when constitutional rights are perceived by courts as having a large public-good dimension, courts will be reluctant to enforce conditions attached to entitlements programs in which individuals waive the exercise of the right in exchange for some discretionary benefit. Because a fundamental right cannot be waived by the right-holder because of the public good that it externalizes, an ordinary law causing the right-holder to waive the right is constitutionally justified only if the exercise of the right is very crucial to the right-holder. In other words, an ordinary statute inducing waiver of constitutional right is constitutional if the right in question is crucial to the individual as a person, but unconstitutional if the constitutional right is not crucial to the individual as a person.⁴² The other permissible reason for not invoking the doctrine is that there must be a nexus between the property sought and the government's discretionary benefit.⁴³

The imposition of statutory sponsorship or funding of professional associations from the personal property of professional practitioners involves their constitutional rights to compensations.⁴⁴ The Court⁴⁵ agrees that the proposed denial of compensation to the plaintiff (called exaction) is governed by the unconstitutional condition's doctrine. The government may not require a person to give up a constitutional right, here the right to receive just compensation when personal property is taken for a public use, in exchange for a discretionary benefit where the property sought has little or no relationship to the benefit.⁴⁶ There is therefore no reason why the courts will not apply the unconstitutional conditions doctrine to invalidate compulsory statutory sponsorship of professional associations.

Professional associations service professional interests, and do not serve personal interests.⁴⁷ The compulsory payment of practising fees for the funding of professional associations, is an unconstitutional taking of the property of professional practitioners.⁴⁸ Constitutionally, any attempt by the federal legislatures to compel the practitioner's sponsorship of professional associations would trigger the Takings Clause of section 44 of the CFRN. The federal government would have possessed the practising fees, and pay the practitioner just compensation for the value of the fees taken from them and given to the professional association. The federal government is seeking to evade this constitutional requirement by dispossessing the practitioner to fund the professional

⁴⁰ EB is the magnitude of the external benefits associated with the exercise of a constitutional right while EC is any external costs associated with exercise of the right. Contrast with Robert F. Nagel ratio.

⁴¹ See *Thomas W. Merrill, Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 *Denv. U. L. Rev.* 859 (1995) at 877.

⁴² See Robert F. Nagel, *A Comment on Constitutional Rights as Public Goods*, 72 *Denv. U. L. Rev.* 889 (1995) at 889; See also *Thomas W. Merrill, Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 *Denv. U. L. Rev.* 859 (1995) at 877.

⁴³ See *Dolan v City of Tigard* 114 S. Ct. 2309 (1994), at 2317.

⁴⁴ See section 44(1) of the CFRN.

⁴⁵ i.e. the court in *Dolan v City of Tigard* 114 S. Ct. 2309 (1994), at 2317.

⁴⁶ *Dolan v City of Tigard* 114 S. Ct. 2309 (1994), at 2317.

⁴⁷ They provide for a group nomination of representatives at the professional Councils with the Council obligation to remit funds to the association, and nothing to members in their individual capacities.

⁴⁸ See other forms of unconstitutional taking of personal property in *Dolan v City of Tigard* 114 S. Ct. 2309 (1994), whose exaction is even for public purpose.

association free of charge in return for a licence renewal.⁴⁹ There is therefore no reason why the courts will not apply the unconstitutional conditions doctrine to invalidate compulsory statutory sponsorship or membership of professional associations.⁵⁰

In *Dr Awkadiwe, Fredrick Ikenna v Dr Olusegun Olaopa*,⁵¹ the trial court holds that compulsory sponsorship of professional associations could be, where a statute permits it. The court does not go further to examine if the unconstitutional conditions doctrine applies to the statutory conscription of sponsorship. However, the doctrine of unconstitutional conditions directs courts not to enforce certain conditions attached to entitlements programs, contracts or all forms of government employment that waive constitutional rights.⁵² The doctrine warns the court that the State is not at liberty to render fundamental constitutional rights of persons ancillary to any right, benefit or interest it creates outside its constitutional obligations to the persons; being that fundamental constitutional rights are not just private rights that government may readily induce their waivers, but instead are public goods that the government needs to protect.⁵³

3. Practitioner's Fundamental Constitutional Right to Their Personal Property.

No moveable property or any interest in an immovable property shall be taken possession of compulsorily, except in certain stipulated conditions and circumstances in section 44(2) of the CFRN.⁵⁴ The said stipulated conditions and circumstances do not include the imposition of fees or subscriptions for the funding of professional occupational associations. Although section 44(2)(a) of the CFRN exempted the imposition of tax, rates and duties from the acts that violate the fundamental right to property, the imposition of practising fees for the purpose of remittance to professional associations does not fall within that exemption.⁵⁵ Even if membership of professional associations were taken to be a contract between a member and the corporate association,⁵⁶ yet, section 44(2)(c) of the CFRN cannot avail the federal legislatures, as professional designating Acts are not general laws relating to rights or obligations arising out of contracts. If anything, the constitutional legislative power and matter to enact general contract laws that can statutorily impose such contractual obligation, are within the residual constitutional legislative competences of states legislatures, and not within the constitutional legislative power and matter of the federal

⁴⁹ See also *Dolan*, 114 S. Ct. at 2317.

⁵⁰ There is low personal value and high PGV in an enactment that provides for a compulsory sponsorship or membership of professional associations, and the doctrine of unconstitutional conditions must apply to invalidate the enactment.

⁵¹ suit number NICN/EN/26/2019 judgment of which was delivered on 27th February 2020 per Hon. Justice Oluwakayode O. Arowosegbe.

⁵² *Thomas W. Merrill Dolan v City of Tigard*: Constitutional Rights as Public Goods, 72 Denv. U. L. Rev. 859 (1995) at 859.

⁵³ See *Thomas W. Merrill Dolan v City of Tigard*: Constitutional Rights as Public Goods, 72 Denv. U. L. Rev. 859 (1995) at 859.

⁵⁴ See section 44(1) of the CFRN.

⁵⁵ *expressio unius est exclusio alterius*, meaning that the express use of a word or words is an implied exclusion of another or others not mentioned. See *Attorney-General of Lagos State v. Attorney-General of the Federation* (2014) 9 NWLR (pt 1412) 217-322; *Azubuikwe v. Government of Enugu State* (2014) 5 NWLR (pt 1400) 364-411).

⁵⁶ Membership in a voluntary association does not automatically create a contract between the association and the member. The existence of by-laws and/or a constitution does not in and of itself give rise to a contractual relationship. Each case must be assessed on its own particular facts on the basis of general contract principles. If parties do not demonstrate an objective intention to enter into legal relations, membership is not contractual. The question is what intention is objectively manifest in the parties' conduct. See *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22. See also *Bonsor v Musicians Union* LN-e-LR/1955/8 (HL) (alternative citation: (1956) A. C. 104).

legislatures. In *INEC v Musa*,⁵⁷ the Supreme Court of Nigeria goes ahead to uphold the constitutionality of the statutory imposition of fees for statutory regulatory bodies,⁵⁸ but the imposition can only be valid where the fees are purely administrative, procedural or evidential.⁵⁹ The provisions in professional designating Acts for the imposition of practising fees on practising members of the professions for the purpose of the remittance of large chunks of the aggregate sum to the professional associations, are not impositions on the personal monetary properties of the practising professional practitioners that are purely administrative, procedural or evidential. The part of the designating Acts providing for the part of the practising fees that vest in professional associations, do not fall within section 44(2)(j) of the CFRN.

The statutorily imposed practising fees are clearly vested, partly in the statutory professional regulatory bodies and partly in the private professional occupational associations,⁶⁰ and thus the impositions are constitutional only to the extent that the fees are vested in the statutory professional regulatory bodies. In the case of *Ben Oloko v The Incorporated Trustees of Nigeria Bar Association*,⁶¹ the High Court of Enugu state, without reference to the constitutionality of it, endorses the ordinary statutory validity of compulsory sponsorship and membership of the Nigerian Bar Association (NBA). The imposition of penalty or fine for late payment of practising fees, even without trial and conviction, whether under section 36(1) or 36(2) of the CFRN, is also rendered unconstitutional by section 44(2)(b) of the CFRN, which requires mandatory convictions before criminal penalties are imposed. In *Lawal Aliyu v LASTMA & Ors*,⁶² the court relying on Sections 34, 36 and 41 of the 1999 CFRN, makes a declaration that the imposition and enforcement of LASTMA fine without an order of a court of competent jurisdiction is unlawful, illegal and null and void. The court obviously missed section 44(2)(b) of the CFRN which is even the major provision rendering any imposition against personal property on criminal accusations before conviction unconstitutional. The unconstitutionality of imposition of fine before a conviction is constitutionally grounded on the right to personal property in section 44(2)(b), and not on the right to fair hearing by court in section 36(1) of the CFRN, because section 36(2) of the CFRN has permitted administrative fair hearing, in certain cases, to determine rights and liabilities. It is after the determination of rights and liabilities that the issue of sentencing or imposition of fine kick-starts. In other words, a professional regulatory Council may fairly determine rights and liabilities of a practitioner, but it cannot exact a professional practitioner's practising fees or punishment for late payment, without a civil proceeding in court or competent criminal trial and conviction.

The argument may be made that practising fees are paid to government for the public good in the sponsorship of professional associations, and not to professional associations. It is equally tenable to argue that professional occupational associations are publicly funded from government coffers,

⁵⁷ (2003) LPELR-1514 (SC).

⁵⁸ This decision is perfectly in sync with section 44(2)(j) of the CFRN that exempted from unconstitutionality of imposition of payments on persons, any general law relating to property vested in bodies corporate directly established by any law in force in Nigeria.

⁵⁹ See per Ayoola, JSC at 327. In *INEC v Musa* (2003) All N.L.R. 322.

⁶⁰ See for instance section 14(4) of the Medical and Dental Practitioners Act Cap M8 LFN 2004 where seventy percent (70%) of the accrued impositions is vested in the professional association. In Cap L11 LFN 2004, ninety percent (90%) of the accrued impositions is vested in the professional association.

⁶¹ Suit No OB/27/2020 delivered on 29th day of July, 2022.

⁶² unreported judgment which was delivered on 23/09/2022 per Justice Justice Olalekan Oresanya of the Lagos State High Court sitting in the Ikeja area.

and not privately by the professional practitioners.⁶³ But, in view of section 44(1) (2a & j) and *INEC v Musa*,⁶⁴ is it constitutionally tenable to impose statutory payments on practising professional practitioners for the purpose of the funding their related professional associations? The answer is clearly in the negative. It is equally beyond recondite whether, or not, the statutory procedure for the compulsory conduit sponsorship of professional associations is constitutional. First, it is unconstitutional being contrary to sections 80 & 162(1&3) of the CFRN 1999 for the federal legislatures to enact professional designating Acts that enable deductions as a first line charge on the Federation Account to fund a federal concern or interests, including these professional occupational associations.⁶⁵ By virtue of sections 80 & 162 of the CFRN, that part of the practising fees vesting in the professional association is not an amount standing to the credit of the Federation Account as envisaged by section 162(1) of the CFRN for moneys received for the federation; and the federal legislatures have no constitutional legislative competence to prescribe the use of that part of the practising fees outside the distributable federation account, as required by section 162(3) of the CFRN. The sponsorship of professional associations by the federal government ought to be by way of federal budget, raising the further question of the constitutionality of federal government's funding of matters of professional occupational associations that are constitutionally within the residual competences of states legislatures. In *Attorney General for Rivers State v Attorney General of the Federation & Ors*,⁶⁶ the Federal High Court holds that by virtue of section 162(1) of the CFRN, all revenues collected by the Federation of Nigeria, except some specified personal income taxes, is required to be paid into the Federation Account for onward distribution to the federal, state and local governments; and that the federal government is not entitled to appropriate or withhold any sum from the federation account, including direct collections of levies from companies for the funding of the Nigerian Police Trust Fund, to finance the federal government or any of its organ or agency. The court goes ahead to order that the Police Trust Fund be shared amongst the federal, state and local governments that participated in the action. Even if the imposition of the Police Trust Fund Act 2019 is constitutional section 162 of the CFRN, being that the imposition qualifies as a tax, the imposition and style of collection of that part of the practising fees vesting in professional associations are both unconstitutional, null and void. The imposition is not for the constitutionally envisaged three tiers of government, and the distribution does not pass through the constitutionally required federation account.⁶⁷

4. The practical unconstitutionality issue for compelling sponsorship and membership of professional associations in the Acts.

It must be submitted at the outset that huge enormity of the public utilitarian value without crucial private value, of compelling sponsorship and/or implied membership of professional occupational

⁶³ See the reasoning in *Professor Ernest Ojukwu (SAN) v The Registered Trustees of the Nigerian Bar Association & Ors* (2022) LPELR-57895(CA).

⁶⁴ (2003) LPELR-1514 (SC).

⁶⁵ See the judicial position in *Attorney-General, Federation v. Attorney-General, Abia State & 35 Ors. (No. 2)* (2002) 6 (Pt. 764) 542 SC in *Attorney-General of Ogun State & 4 Ors v Attorney-General of the Federation* (2002) NGSC 2.

⁶⁶ unreported suit number FHC/ABJ/CS/511/2020 judgment of which was delivered on 26/01/2022 per Justice A. R. Mohammed.

⁶⁷ See also *M.C. Anozie Executive Modification of Existing Laws Under Section 315 of the 1999 Constitution* (2002-2010) 9 Nig. J. R.

associations, invokes unconstitutional conditions doctrine.⁶⁸ The law is that the formation or joining of all the associations in Nigeria is voluntary.⁶⁹ Voluntarism does not give persons unrestricted freedom to form or join any association that they wish.⁷⁰ Voluntarism simply means that within a competent jurisdictional scope of forming or joining an association, a person is free to choose whether or not to associate or disassociate.⁷¹ Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.⁷² The Labour Act,⁷³ the Trade Unions Act⁷⁴ and the professional designating Acts⁷⁵ have, against the clear and unlimited provisions of section 44(1 & 2) of the CFRN,⁷⁶ made it possible for compulsory payment of subscriptions and fees to associations⁷⁷ by willing and unwilling members of staff or professions. Government remittances to professional associations from practising fee expropriations are remittances to private organizations; and the fact that professional associations nominate representatives into public organizations like the professional Councils, or assist the Councils in the discipline of misconducting practitioners, does not make professional associations public organizations with regulatory functions.⁷⁸

It is beside the point to argue that a person who undertakes to be enrolled into a profession has equally undertaken to be paying annual practising fees for the sponsorship of his related professional association.⁷⁹ There is no such intendment in the CFRN, Item 49 of Part I of the Second Schedule to the CFRN, in the professional designating Acts or any other valid legislation. Payment of practising fees, part of which is meant for professional associations, is a broader scheme of statutory imposition involving the remittance of expropriated funds to private organizations upon which the property owner is entitled to be heard to refuse.⁸⁰ In Nigeria, one's right to one's property is an entrenched constitutional right under section 44 of the CFRN. In the ipsissimis verbis of the CFRN itself, such a property or any right attendant thereto can only be taken possession of or compulsorily acquired by or under the provisions of such a law that must provide for the payment of adequate compensation therefore to him and must give the owner the right of access to a High Court for the determination of his interest in the property and the amount

⁶⁸ High public good value (PGV) under the unconstitutional conditions doctrine invokes the doctrine to quash waiver. See Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 *Denv. U. L. Rev.* 859 (1995).

⁶⁹ See section 40 of the CFRN.

⁷⁰ See for instance: *Sea Trucks (Nig.) Ltd V PYNE* (1999) 6 *NWLR* (Pt.607) 514.

⁷¹ See also *PERESSA V SSACGOC* (2009) 14 *N.L.L.R.* (pt.39) 306.

⁷² See also *United States v Morrison*, 529 U.S. 598, 607 (2000).

⁷³ See section 5(3) of the Labour Act.

⁷⁴ See section 17 of the Trade Unions Act. See also *Bethel Ezego & 4 Ors (Suing for themselves and on behalf of Non-Management Staff of Beloxi Industries Limited) v National Union of Food, Beverage and Tobacco Employees (NUFBTE) & Anor* unreported Suit No. NICN/LA/221/2017 the judgment of which was delivered on 16/07/2018 per His Lordship Hon. Justice B B Kanyip, PhD.

⁷⁵ See for instance section 14(4) of Cap M8 LFN 2004 and section 8 of Cap L11 LFN 2004.

⁷⁶ Section 44(1 & 2) of the CFRN excludes, by the principle of non-inclusion, every statutory imposition of payments on persons for federal associations.

⁷⁷ See for instance section 14(4) of Cap M8 LFN 2004.

⁷⁸ See *Professor Ernest Ojukwu (SAN) v The Registered Trustees of the Nigerian Bar Association & Ors* (2022) LPELR-57895(CA).

⁷⁹ *Chinwo v Owhonda & Ors* (2006) LCN/2005(CA) is but an obiter dictum, not a ratio decidendi.

⁸⁰ For landed property, see *Orianzi v A-G, Rivers State; Rivers State Housing and Property Development Authority; Grace Dima & Samuel Dima* (2017) 6 *NWLR* (Pt. 1561) 224. See also MA Vikram & K Murali, 'A Critical Review on Land Acquisition and Valuation Process across the World' *Journal of Mechanical and Civil Engineering* (2015) 12 (5) at 13. Also available online <www.iosrjournals.org> accessed on 4th January 2025.

of compensation due to him. It follows therefore that any purported imposition on or acquisition of personal property which is not according to a law containing the above provisions, is unconstitutional.⁸¹ It is therefore submitted with vehemence that section 14(4) of the Medical and Dental Practitioners Act,⁸² which does not fall within the exceptions in section 44 of the CFRN, and having not provided for the practitioner to be heard on his compelled property channelled to a private organization or providing for adequate compensation for such dispossession, is not in compliance with the provision of section 44 of the CFRN, and having not contained the above safeguards, is completely null and void. Funding of the professional regulatory Councils is not a compulsory acquisition under section 44(1) of the CFRN as it is excepted by section 44(2)(j) of the CFRN; but funding of professional associations by statutory imposition or compulsion is a compulsory acquisition under section 44(1) of the CFRN as it does not fall within the exceptions provided in section 44(2) of the CFRN. The imposition of practicing fees on professional practitioners, to be distributed between the professional Councils and professional occupational associations, in the professional designating Acts, is partially void, ie to the extent that the Acts provide for remittance of parts of the practising fees to professional associations, without providing for prompt payment of compensation to practitioners that have no membership interest in the said professional associations, and access to court to determine the quantum of that compensation. Any remittance of the professional association's part of a practising fee to a professional association pursuant to such a partially void statutory imposition of practising fees, is an unauthorized remittance of a practitioner's fund, which will result in damages.⁸³ That part of the practicing fees has not been taken possession of or acquired from the professional practitioner by state until the conditions provided in section 44(1) of the CFRN is provided in the designating Acts and followed through. It would be an abuse of language to call an unauthorized remittance of a practitioner's fund to a private organization a statutory function of the professional regulatory Council. Assuming without conceding that section 45(1) of the CFRN empowers the legislatures to make limiting laws to fundamental rights in sections 37-41 of the CFRN,⁸⁴ this constitutional legislative power, if it is constitutionally tenable as it has been held,⁸⁵ is only restricted to fundamental rights in sections 37-41 of the CFRN,⁸⁶ and does not extend to section 44 of the CFRN entrenching property rights.⁸⁷ The end result of the unconstitutional conferment of expropriatory rights on these professional occupational associations⁸⁸ by the federal legislatures,⁸⁹ is the availability of free and unearned

⁸¹ See *A-G Bendel State v Aideyan* (1989) 9 SC 127 at 140.

⁸² Cap M8 LFN 2004.

⁸³ Both in tort and under fundamental rights enforcement procedure.

⁸⁴ This author argues, with utmost respect to the position of the Nigerian Supreme Court, that section 45 of the CFRN is not a fundamental right limiting provision, but instead is a provision that makes it possible to protect the disadvantaged persons in the society.

⁸⁵ See *in Aviomoh Erasmus Osawe & 2 Ors v Registrar of Trade Unions* (1985) 1 NWLR part 4 page 755.

⁸⁶ See *Erasmus Osawe & 2 Ors v Registrar of Trade Unions* (1985) 1 NWLR part 4 page 755.

⁸⁷ Peruse section 45(1) of the CFRN.

⁸⁸ which are private organizations. Private properties are expropriated for public, and not for other persons' private, use.

⁸⁹ In constitutional legislative matters of any association whatsoever, only the states legislatures, not federal legislatures, can make ordinary laws for the formation or joining of professional or any other association than trade unions and political parties; while only federal legislatures can make ordinary laws for the incorporation of any unincorporate body, whether formed or joined under the federal or states laws. See sections 4 & 40 of the CFRN, and Items 22, 32, 34 & 56 of Part I of the Second Schedule to the CFRN. There is no association matter in Item 49 of Part I of the Second Schedule to the CFRN.

funds,⁹⁰ readily available; either or not they perform, steady means of incomes by compulsory fees and conduit remittances are assured.⁹¹ Cases abound where the contest for the leaderships of those associations involve violence, calumny and fraudulent electoral practices just for an access into the regularly filled tills.⁹²

The main purpose of forming or joining professional associations, which is also the purpose for the recognition of professional associations in professional designating Acts⁹³ is usually completely lost on the associations,⁹⁴ while persons in the leadership positions concern themselves with the tenorial habits of unbridled emptying of the associations' compulsorily acquired funds on matters that are legally unavailable to professional associations, and matters that are not envisaged in the designating Acts.

Ogakwu JCA, in *Professor Ernest Ojukwu (SAN) v The Registered Trustees of the Nigerian Bar Association & Ors*,⁹⁵ appears to suggest that practising fees that have been entrenched in professional designating Acts are narrowly tailored to the statutory function of choosing the representatives of the professional associations to their related Councils, which of course is not what obtains in most professional occupational associations in Nigeria where the funds accumulated from the aggregated compulsory practicing fees and remitted to the professional associations, are not even channelled towards the election of the representatives at the Councils; but towards trade union and cooperative society objects in their domestic constitutions.⁹⁶

In a country like Nigeria where the supremacy of the national constitution is the extant law, the national constitution is the yardstick of all law or rule of law. Here, the judicial arm of government adjudicates disputed rights, and may strike or set aside executive actions or declare legislations invalid, null and void for being unconstitutional. Constitutional supremacy is contrasted with legislative supremacy, where the legislatures are the head that determine the limits of what the executive and judicial arms of government may do. In constitutional supremacy, the federal legislatures have the power, in the course of legislating, to nullify or abrogate decisions of any court of law, including that of the apex court, the highest court of the land. In other words, courts of law cannot question the vires of the legislature to nullify or abrogate the common law and once that is done, the particular decision of the court will no more have the force of law. That is one side of the coin. The other side of the coin is that the courts, in the exercise of their judicial powers under section 6 of the CFRN, have the jurisdiction to nullify a legislation which is not enacted in

⁹⁰ An association should only earn its subscriptions from those that voluntarily subscribe to it, and not from the imposition on nonmembers.

⁹¹ See also the apt reasoning on the dangers of compulsorily obtained and unearned funds to associations, in Dr Awkadiigwe, Fredrick Ikenna v Dr Olusegun Olaopa suit number NICN/EN/26/2019 judgment of which was delivered on 27th February 2020 per Hon. Justice Oluwakayode O. Arowosegbe.

⁹² See the narrations of shameless conducts of members of the NMA during association's election in the Communique Issued At The End Of The National Executive Council (NEC) Meeting Of Nigerian Medical Association (NMA) Held At Awka, Anambra State, Nigeria From 8th To 12th December, 2020, retrieved on 7th January 2025 at <https://www.ajol.info/index.php/sjmrp/article/view/210640>

⁹³ which is for the nomination of some practising professional practitioners as representatives of the professional associations at the professional regulatory Councils.

⁹⁴ See the domestic constitution of the Nigerian Medical Association (NMA) which does not contain any provision for the nomination of representatives of the association at the medical Council by members of the association.

⁹⁵ (2022) LPELR-57895(CA), per Ogakwu, J.C.A. This is an update on this article as sent to all the leaderships of the medical associations.

⁹⁶ See the domestic constitutions of professional associations and their branches that provide for remittance to members as condolences payouts for bereavements, support funds, and issues of strikes and salary increments.

accordance with the CFRN. That is exactly what the Nigerian Supreme Court did in *Attorney General of Ogun State*.⁹⁷ The judiciary under section 6 of the CFRN, and the legislatures under section 4 of the CFRN, have their functions cut out for them within the supreme national Constitution, such that where the federal legislatures enact any section of the professional designating Acts in contravention to the clear provisions of sections 4(7)(a), 40 and /or 44(2) of the CFRN, the court when called upon, must intervene to purge the legal system and jurisprudence of any detected constitutional infraction by the federal legislatures. The only valid law in a constitutional democracy operating on constitutional supremacy, is the law that is made in accordance with the dictates of the CFRN; and it does not matter if certain opinions are natural and familiar or novel and even shocking.⁹⁸

5. Conclusion.

Under the supreme CFRN 1999 as amended, exercise of legislative powers is not at large.⁹⁹ The unfortunate statutory voyage of the National Assembly of Nigeria into the realm of statutory imposition of practicing fees on the practising members of a professions, with parts of the fees vested in the professional associations, without more, is a violation of section 44(2)(j) of the CFRN. The imposition, without a statutory provision for compensation and access to court, is an applicable unconstitutional condition, and a clear violation of the fundamental constitutional rights of the members of the professional occupations to their properties and liberties in that part of the practising fees vested in the professional associations. The paper recommends immediate amendments to the professional Acts to reflect voluntary funding of professional associations.

⁹⁷ *Attorney General of Abia State & 2 Ors v Attorney-General of the Federation & 33 Ors* (2006) NGSC 45; (2006) 2 All N.L.R. 24.

⁹⁸ See *Roe v. Wade*, 410 U. S. 113, 163 (1973). See also Mr. Justice Holmes' admonition in *Lochner v. New York*, (1905) 198 U. S. 45, 76

⁹⁹ See *Attorney-General, Federation v. Attorney-General, Abia State & 35 Ors.* (No. 2) (2002) 6 (Pt. 764) 542 SC; *Attorney-General of Ogun State & 4 Ors v Attorney-General of the Federation* (2002) NGSC 2.