THE *JOSEPH NWOBIKE CASE*, THE VOID FOR VAGUENESS DOCTRINE AND CLARIFYING AN OTHERWISE UNEXPLORED JURISPRUDENCE*

Abstract

A critical intersect of constitutional law, criminal law and public policy is the concept of due process which amongst other things requires that a person shall not be convicted of a criminal offence unless that offence is defined and the penalty prescribed in a written law. Using the recent Supreme Court decision in Nwobike v FRN as a background, this paper examined the void for vagueness doctrine which stipulates that a written law creating a penal regime should be couched in sufficient clarity of language that those required to obey it should understand the limits of prescribed behaviour. In lieu thereof, the statute is declared void for being vague. Part 1 set out the factual background and part 2 examined the basic constitutional rule requiring creation of penal regimes only vide written enactments. Part 3 examined the necessity of advance knowledge of what constitutes criminal conduct as the basis of the void for vagueness doctrine; and part 4 analysed clarity in language as a prerequisite of advance knowledge of prohibited conduct. Part 5 questioned and suggested restricted use of ejusdem generis in construal of criminal statutes. Part 6 detailed the offending provisions of the statute in the Nwobike case and pointed out its shortcomings as a criminal statute. Part 7 theorised that though the courts may find statutes void only where requisite parameters are lacking, they should not be reticent. This led to the conclusion, that until perfection in use of language is attained, void for vagueness challenges would continue, and the only executive machinery for reducing textual imprecision is careful legal drafting.

Keywords: Clarity, Crimes, Due Process, Ejusdem Generis, Perversion of Justice, Vagueness

1. Introduction

Joseph Nwobike, a legal practitioner and Senior Advocate of Nigeria was charged before the High Court of Lagos State for several offences which included the offence of attempting to pervert the course of justice contrary to s. 97(3) of Criminal Law of Lagos State. The Law under which he was charged did not define the offence of attempting to pervert the course of justice. At the trial, he contended that the offence penalized in s. 97(3) of the Criminal Laws of Lagos State is devoid of definition, in contravention of the Constitution.[1] The trial court actually made a finding that *'s. 97(3) of the Criminal Laws of Lagos State pursuant to which the Defendant stands charged does not define or describe the manner of perversion anticipated under this provision….'*[2] Nevertheless, he was found guilty and convicted of attempting to pervert the course of justice, and was sentenced to a term of imprisonment. On appeal up to the Supreme Court, the Supreme Court held that against the backdrop of the finding of the trial Court, that s. 97(3) of the Criminal Laws of Lagos State does not define the offence of perversion of justice for which the Appellant was charged, tried and convicted, unless it is shown that the offence is defined under any other written law, it follows that the provision is inconsistent with the 1999 Constitution.[3] The Supreme Court then concluded that having found that the offence is not defined; the trial court should have held that the aforesaid section was inconsistent with the Constitution and should have refrained from evaluation and determination of the guilt of the Appellant on a charge founded on an offence which is not defined by law. The challenge of void for vagueness is a rarity in both Nigeria's constitutional law and its criminal law defence. Consequently, the outlines, ramification and extent of the doctrine remain undefined in our penology. This paper sets out a cohesive and integrated framework for application of the void for vagueness doctrine in Nigerian law. Part 2 argues that existence of the constitutional provision for due process is a prerequisite for existence and application of the doctrine. Part 3 then sets out the theoretical basis for the doctrine. Part 4 expounds that clarity in description of prohibited conduct is a constitutional requirement and a predicate to application of the doctrine. Part 5 points out the pitfalls in the use of *ejusdem generis* and residual clause in creating criminal offences. Part 6 examines the provisions of s. 97(3) of the Criminal Laws of Lagos State in order to elucidate whether its clarity satisfies requisite constitutional standards. Part 7 examines and highlights the role of the courts in clarifying the void for vagueness doctrine. Finally, Part 8 concludes. Although the trial of Nwobike under s. 97(3) of the Criminal Laws of Lagos State provides both the historical and contextual background for this paper, the implications and application of the investigation and analysis here go beyond the particular case and the particular statute. They reach to every other penal statute at both Federal, state and local government levels.

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[1] s. 36(12) of 1999 Constitution of Federal Republic of Nigeria

[2] *Nwobike v FRN*, SC/CR/161/2020; judgement delivered on 20/12/2020. Page 42 of the judgment captured vol. 4, page 2039 of the records of appeal to the Supreme Court

[3] S. 36(12) (n 1)

2. Constitutional Pre-requisite for Creation of Crimes

In accordance with constitutional provisions, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty prescribed in a written law. In this regard, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.[4] The first and immediately obvious aspect of this constitutional rule is the unequivocal prerequisite that criminal law can only be premised upon duly enacted stipulations. Thus, any rule, provision, proviso or condition required to be enforced as criminal law must as a predicate come under the legislative crucible. If not, it is not enforceable as criminal law, however convenient, useful or desirable it may appear.[5] In *Okafor v Governor of Lagos State*[6] the Governor of Lagos State issued a directive restricting the movement of citizens and residents during the State's monthly environmental sanitation exercise, the Court of Appeal unanimously held that the Appellant could not be arrested or prosecuted for disobeying or flouting the Executive Order or Directive of the Governor because the Appellant could only be arrested and prosecuted for an offence that is prescribed in a written law.[7] A second aspect of this constitutional rule which though, is not as obvious as the first, is the necessity that a criminal statute must not only be enacted, but must be presented in such language and with such clarity and specification, that those called upon to obey it, understand the limits of behaviour prescribed by the statute. It is thus, a constitutional prerequisite that citizens have a right to be informed of what is lawful and what is unlawful. This will enable them to conduct themselves in such a manner that they are not found in breach of the law. Accordingly, a penal statute must define the criminal offence with sufficient definiteness that ordinary people can understand what conduct is prohibited.[8] The principle that a prior legislative enactment that in a clear and precise manner, discloses proscribed conduct, is the only basis for criminal liability and punishment is the most fundamental tenet of criminal law. This is known as the Principle of Legality.[9] This constitutional rule that a person shall not be convicted of a criminal offence unless that offence is defined, translates to the constitutional provision that no person shall be deprived of life, liberty, or property, without due process of law, and is interpreted to guarantee citizens notice of what behavior is or is not illegal. To preserve this guarantee, the courts have adopted the '*void-for-vagueness doctrine'*, which requires that the terms of a penal statute must be sufficiently explicit to inform those required to obey it, what conduct on their part will render them liable to its penalties; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law.[10] Within the context of the void-for-vagueness principle, the following are legal manifestations of the notice requirement: first, the vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Second, the canon of strict construction of criminal statutes, ensures fair warning by resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise

[4] (ibid.)

[5] In *Aoko v Fagbemi* (1961) 1 All NLR 400, a decision of the High Court in which Fatayi-Williams, J. (as he then was), quashed the conviction of an accused person by a customary court of the customary offence of adultery on the ground that it was not a written offence. In other words, a court of law only has jurisdiction to punish for an offence provided for in a statute. See also *FRN v Ifegwu* [2003] 15 NWLR Part 842, 133

[6] (2016) LPELR-41066

[7] (ibid.) In his concurring judgment, Justice Georgewill, JCA at 46-47 stated 'It is my view, that democracy thrives more on obeying and promoting the rule of law rather than the whims and caprices of the leaders against the lead. I find the conduct of the Respondent in not only persecuting the Appellant, yes that is what in my view it amounts to when a free Citizen of this great Country such as Citizen Faith Okafor, is put through the rigours of criminal process for an offence not prescribed in any written law but merely on the directive of the Governor of the Lagos State. An action which if allowed to thrive in a democracy such as ours could confer on such office holders infinite, absolute and autocratic powers contrary to the clear provisions of the Constitution of the land, to which both the leaders and the led are subject. I refuse to allow such autocratic, absolute and infinite powers to fester upon our nascent democracy.'

[8] *Skilling v US*; 561 US 358; 130 S. Ct. 2896 (2010); *Lanzetta v New Jersey*, 306 US 451, 453 (1939) [No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.]

[9] John F. Decker, 'Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws', (2002) 80 *Denver University Law Review* [241-343] 244; *Lanzetta v New Jersey*, (ibid.) [The basis for this rule of law is that all persons are entitled to be informed as to what the [government] commands or forbids.]

[10] *Connally v General Construction Co.*,, 269 US 385, 391 (1926) (citing *Int'l Harvester Co. v Kentucky*, 234 US 216, 221-22 (1914)); see also *Collins v Kentucky*, 234 US 634, 638 (1914); John F. Decker, (n 9) 245; *Skilling v US*, (n 8) [To satisfy due process, a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement] *Kolender* v *Lawson* , 461 US 352

uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.[11]

3. Jurisprudential Basis of the Void for Vagueness Rule

From the perspective that '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes, All are entitled to be informed as to what the State commands or forbids; '[12] failure of a law to clearly and explicitly itemise either required or prohibited conducts and observances makes it impossible for the ordinary citizen to know what the law requires.[13] The void for vagueness doctrine is predicated on two connected principles. In the first place, notice of what constitutes legal or illegal conduct should be clear so that people would accord their behaviour with the law. In the second place, when statutes are vague, it places undue power in the prosecution, and the exercise of this undue power invariably results in arbitrary law enforcement through selective arrests and prosecutions.[14] In this regard, vague statutes are not just a trap for the unwary, they also act to discourage even legal conduct. This results in an incongruous situation where citizens refrain form a large circle of possibly lawful conduct due to their fear that it might somehow be prohibited by the vague statute.[15] This doctrine finds justification in the proposition that deprivations of liberty can only be rightfully effected after proper notice. The primary significance of the doctrine, that laws should afford a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly, has rendered the doctrine of principal use as a tool for defendants to contest their arrests and convictions.[16] In point of fact, a good number of laws, are to a certain degree implicated in some form of vagueness without necessarily being unconstitutional. In the light of this, the requirement of due process is focused on those laws which are more vague than may be constitutionally permissible. In other words, laws that permit '*more unpredictability and arbitrariness*' than is constitutionally permissible.[17] A vague law *'impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application*.'[18] It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large.[19]

4. Clarity in Description of Prohibited Conduct as Constitutional Requirement

In the process of mediating the conflict between public and private interests, there is a need for control over the scope and regularity of exercise of governmental force. That scope and probable regularity will, under a legislative system be mediated by words. The void-for-vagueness theory attempts to control the acceptable extent of flexibility of words.[20] Theoretically, it has been suggested that the void-for-vagueness doctrine has roots in the

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[11] *US v Lanier*, 520 US 259, 266 (1997); *Rewis v US,* 401 US 808 (1971) [The doctrine of strict construction of penal statutes, requires resolution of differing interpretations of language in a criminal statute to the advantage of the accused. If a criminal stricture is sufficiently nebulous that it fails to define that which is supposed to be illegal, then it suffers from the perils of vagueness. If vague, it is void; it is unsalvageable.]; John F. Decker, (n 9) 245; Paul H. Robinson, *'Criminal Law'* (1997) § 2.2, at 76

[12] *Lanzetta v New Jersey*, (n 8)

[13] *Connally v General Construction Co.,* (n 10)

[14] *Thornhill v Alabama*, 310 US 88 (1940); *Herndon v Lowry*, 301 US 242 (1937); *in Grayned v City of Rockford* 408 US 104, 108-09 (1972) the US Supreme Court articulated the critical policy considerations at the heart of the due process mandate requiring avoidance of statutory vagueness: 'Vague laws offend several important values. First, because [this Court] assume[s] that man is free to steer between lawful and unlawful conduct, [this Court] insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and . . .. . discriminatory applications.' In *Papachristou v City of Jacksonville*, 405 US 156 (1972) the US Supreme Court struck down a statute that criminalized vagrancy for those who were '*loafing*' or '*wandering and strolling*'**, and** held the statute unconstitutionally vague because it gave too much arbitrary power to the police.

[15] Carissa Byrne Hessick, 'Vagueness Principles', (48) *Arizona State Law Journal* [1137-1167] 1141-2

[16] Andrew E. Goldsmith, 'The Void-for-Vagueness Doctrine in the Supreme Court, Revisited', (2003) 30 *American Journal of Criminal Law*, 279, 280; see 'The Supreme Court - Leading Cases Fifth Amendment - Due Process - Void-For-Vagueness Doctrine - *Sessions v Dimaya' Harvard Law Review,* (2018) 132 [367-376] 372

[17] Jessica A. Lowe, 'Analyzing the Void-for-Vagueness Doctrine as Applied to Statutory Defenses: Lessons from Iowa's Stand-Your-Ground Law' (2020) 105 *Iowa Law Review*, 2359

[18] *Grayned v City of Rockford*, (n 14)

[19] *US v Reese*, 92 US 214, 221 (1875)

[20] A. G. A. 'The Void-for-Vagueness Doctrine in the Supreme Court (1960) 109 *University of Pennsylvania Law Review*, [67-116] 90

common-law practice of the judiciary to refuse enforcement to legislative acts deemed too uncertain to be applied.[21] Part of the problem with legislations that do not delineate the limits of permissible conduct with specificity is that it entrusts to another man, a public or an administrative official, the responsibility of determining whether an offence has been committed. In this regard, it was held in *Yick Wo v Hopkins*,[22] that *'[t]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.*' Vague laws offend several important values. In the first place, since it may be assumed that a man is free to steer between lawful and unlawful conduct, it is necessary that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Furthermore, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.[23] In modern times, penal statutes have become incredibly enlarged, with new offences constantly created and added to the already existing penal laws. Though it may be hoped for, textual clarity that eliminates every possibility of controversy is impossible to attain in these ever-expanding tomes of legislation. From the perspective that the increase of criminal law is achieved at the cost of criminalisation of hitherto lawful behaviour, the necessity of notice and clarity becomes vital. While it is recognized that *'[i]n most English words and phrases there lurk uncertainties,'*[24] a statute written in terms so ambiguous that persons '*of common intelligence must necessarily guess at its meaning and differ as to its application*' is unconstitutionally vague. Yet again, '*a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process.*'[25] The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.[26]

Since the essential purpose of the void for vagueness doctrine is to warn individuals of the criminal consequences of their conduct,[27] the courts demand that the opportunity may not be denied the rational individual to know and

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[21] Ibid 67

[22] 118 US 356, 370 (1886)

[23] *Grayned v City of Rockford*, (n 14) [An ordinance is void-for-vagueness when it '*fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.*']

[24] *Rose v Locke*, 423 US 48, 50 (1975)

[25] *Connally v General Construction Co.*, (n 10); in *Coates v City of Cincinnati*, 402 US 611 (1971), the City passed an ordinance which provided that: 'It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($50.00), or be imprisoned not less than one (1) nor more than thirty (30) days or both.' Coates, a student, and four other appellants, participated in a demonstration and were convicted of violating the said law by conducting themselves in an '*annoying manner'*. Coates appealed, alleging amongst other things that the ordinance as written was so vague that it violated the due process guarantees of the Constitution. The US Supreme Court struck down the ordinance, finding that it '*is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard*.' Justice Stewart delivered the opinion of the court, explaining that as the ordinance specified no standard of conduct at all (annoying conduct being based mainly on personal opinion), '*men of common intelligence must necessarily guess at its meaning*.'

[26] *US v Harriss*, 347 US 612, 617 (1954); in *Cohen v California*, 403 US 15 (1971) s. 415 of California Penal Code prohibited citizens from maliciously and wilfully disturbing the peace of any individual or community through offensive conduct. Cohen was charged with violating this law after he wore a jacket that said '*Fuck the Draft'* in a corridor of a Courthouse. Cohen was convicted and the state appellate court sustained the conviction, finding that the statute could be applied to individuals who act in a way that has a tendency to provoke violence or, generally speaking, disturb the peace. The US Supreme Court, found among other things that the statute was overly vague in describing the conduct that it prohibited.

[27] *Williams v US*, 341 US 97, (1951); *Screws v US*, 325 US 91 (1945)103-104; in *Papachristou v City of Jacksonville*, (n 14), eight defendants had been convicted of violating a vagrancy ordinance that criminalized vagrancy, loitering, and related activity. The ordinance at the time of the defendants' arrests and conviction was the following: 'Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.*'* The Supreme Court held that the vagrancy ordinance was unconstitutionally '*void for vagueness'* for two reasons. First, it failed to provide

choose between permitted and prohibited conduct.[28] In *City of Akron v Akron Center for Reproductive Health*[29], the US Supreme Court struck down a provision of Akron's abortion law which required that physicians dispose of foetal remains in a '*humane and sanitary manner*'. '*Humane*' was judged to be unconstitutionally vague as a '*definition of conduct subject to criminal prosecution'*; the physician could not be certain whether or not his conduct was legal. In *FCC v Fox Television Stations Inc.*[30] the court ruled that since the words *'obscene', 'vulgar', 'profane',* and *'indecent',* were not accurately defined by the FCC, it was unconstitutionally vague to enforce the restrictions against *'obscene', 'vulgar', 'profane',* or *'indecent'* acts since any person may see different things as obscene, vulgar, profane, or indecent. A statute lacks clarity and is thus void for vagueness if it fails to draw reasonably clear lines between lawful and unlawful conduct such that the defendant has no way to find out whether his conduct is controlled by the statute.[31] In *Musser v Utah*,[32] defendants, Mormons who advised and counselled other members of their sect to practice polygamy, had been convicted under a statute, penalising conspiracy 'to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws.' While noting that statute 'standing by itself . . . would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order,' the Supreme Court remanded the case to the trial courts to decide upon the statute as against a void-for-vagueness challenge. In the final analysis, it is unacceptable to hold an average man to the peril of an indictment for the unwise exercise of his knowledge involving so many factors of varying effect that neither the person to decide in advance nor the court to try him after the fact can safely and certainly judge the result.[33] Consequently, penal sanctions will not lie where words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law.[34]

5. The *Ejusdem Generis* Rule and the Question of Clarity

The *ejusdem generis rule* is an interpretative rule which the Court would apply, in an appropriate case, to confine the scope of general words which follow special words as used in a statute or document or Constitution within the genus of those general words. In the interpretation of statutes therefore, general terms following particular ones apply only to such persons or things as are *ejusdem generis* with those understood from the language of the statute to be confined to the particular terms. The general words are therefore to be read as understanding only those things of the kind as that designated by the preceding particular words or expressions, unless there is something

fair notice to individuals about what conduct was forbidden by the law. Second, it encouraged arbitrary arrests and convictions. The Court reasoned that the ordinance did not give sufficient notice about what was forbidden and that, as written, it could in fact criminalize a variety of innocent activities. For example, the ordinance forbids *'habitually living without visible means of support,'* which the Court noted may be involuntary. Similarly, the ordinance labeled as vagrants, men who were *'able to work but habitually liv[e] upon the earnings of their wives or minor children.'* The Court reasoned that this would encompass both men who were unemployed due to a recession or structural employment, as well as men who had married rich women. The ordinance also prohibited *'nightwalking,'* which the Court observed that many people do simply when they can't sleep, and '*wandering or strolling around from place to place without any lawful purpose or object.'* Far from being criminal, the Court stated, that wandering about with no purpose is an activity that is *'historically part of the amenities of life as we have known them,'* The Court held that such an activity is not only inherently innocent but also constitutionally protected.

[28] *Grayned v City of Rockford*, (n 14); see *US v Harriss*, (n 26); *Thornhill v Alabama*, (n 14)

[29] *Akron v Akron Center for Reproductive Health*, 462 US 416 (1983)

[30] *FCC v Fox Television Stations Inc.* 67 US 239 (2012)

[31] *Smith v Goguen*, 415 US 566, 574; in *Winters v New York*, 333 US 507 (1948), the defendant was convicted of an offence of possessing with intent to sell certain magazines '*devoted... principally... [to] criminal news, police reports, and accounts of criminal deeds, and pictures and stories of deeds of bloodshed, lust and crime*' contrary to the New York Penal Code. The US Supreme Court reversed the conviction. The Court noted that, it was uncertain as to what type of materials might be interdicted because of the utter impossibility of the actor or the trier to know where the standard of guilt would draw the line between the allowable and the forbidden publications. Further, no criminal intent or purpose was required in order to convict an alleged offender, and it carried no technical or common law meaning. Further, the statute had the capacity to reach, for example, *'[c]ollections of tales of war horrors'* and criminalize other *'innocent'* activity. The statute did not set guidelines for the distributor of questionable materials or a standard for courts or juries. As the '*standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement,*' this proscription that was devoid of '*fair notice*' was contrary to due process of law and thus void for vagueness.

[32] *Musser v Utah*, 333 US 95 (1948)

[33] *Cline v Frink Dairy Co.*, 274 US 445, 465 (1927) [Which held unconstitutional a statute that outlawed certain agreements and associations in restraint of trade, excepting those whose object was to market at *'a reasonable profit*' products which could not otherwise be so marketed.] *US v L. Cohen Grocery Co.*, 255 US 81 (1921) [Which had voided for vagueness s. 4 of an Act, proscribing the making of *'any unjust or unreasonable rate or charge in handling . . . any necessaries.'*]

[34] *Champlin Ref. Co. v Corporation Comm'n*, 286 US 210, 243 (1932)

to show that a wider sense was intended by the legislature.[35] In penal statutes, courts construe *ejusdem generis* words strictly - in favour of the defendant - in order to afford defendants every possible protection. Unless the defendant (or his action) is clearly *ejusdem generis* with the persons or acts specifically enumerated in the statute, no violation will be found. In other words, the rule will more frequently operate to prevent application of a statute in a given case.[36] The *ejusdem generis* rule has the purpose and effect of bringing within putative criminality, acts and conduct that are not specifically and precisely set out in the penal statute. These acts and conduct though not specifically set out become subject to penal sanction because they are implied to be of the same genus as particularly delineated acts. Similar to the *ejusdem generis* clause is the residual clause which is a clause included in some rules, which allows the rule to apply to situations not explicitly listed in the rule.[37] From the perspective of the requirement of clarity, particularity and specificity in delineation of prohibited conduct, application of *ejusdem generis* in construction of penal statutes creates a conundrum. It is evident that the terms of a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. As already stated, a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.[38] Now it is obvious that the *ejusdem generis* rule is resorted to when, instead of a clear delineation and particularisation, a statute resorts to analogy and reference in creation of a penal regime. The question is whether utilisation of the device of equivalence and analogy in the prohibition of a conduct under pain of penal sanctions is constitutional? In answer to this question, we suggest that in the light of the constitutional requirement for definite characterisation of what constitutes a crime, use of *ejusdem generis* clauses in penal legislation are of suspicious constitutional pedigree. They violate the void for vagueness principle.[39] The effect of this argument in substance is that it denies to the legislature the power to use a generic

[35] *Nwobike v FRN*, (n 2); in *FRN v Ifegwu* [2003] 15 NWLR Part 842, 133, it was held that the *ejusdem generis* (or sometimes *noscitur a sociis*) rule helps to confine the construction of general words within the genus of special words which they follow in a statutory provision or in a document. In *Cooney v Covell* (1901) 21 NZLR 106 at 108, Williams, J. stated thus: *'There is a very well-known rule of construction that if a general word follows a particular and specific word of the same nature as itself, it takes its meaning from that word, and is presumed to be restricted to the same genus as that word. No doubt that rule is one which has to be followed with care; but if not to follow it leads to absurd results, then I am of opinion that it ought to be followed.'*

[36] Walter M. Clark, 'The Doctrine of *Ejusdem Generis* in Missouri', (1952) 2 *Washington University Law Quarterly,* [250-264]; in *State ex rel. Springs v Robinson*, 253 Mo. 271, 161 S.W. 1169 (1913), a State statute provided: *The Board [State Board of Health] may refuse to license individuals of bad moral character, or persons guilty of unprofessional or dishonourable conduct, and they may revoke licenses ... for like causes.... Habitual drunkenness, drug habit or excessive use of narcotics, or producing criminal abortion... shall be deemed unprofessional and dishonourable conduct under this section, but these specifications are not intended to exclude all other acts for which licenses may be revoked*. The Board became suspicious of defendant, a doctor, believing that he was performing criminal abortions. In order to either allay or confirm this suspicion, the Board sent letters to defendant, signed '*Susie Davis*,' a fictitious character. These notes confessed that the lady '*was indiscreet to allow my beau liberties which I should not have done*,' and requested that he abort her. After exchange of several letters, defendant agreed to perform the procedure for a stated consideration. At this point defendant's license was revoked. Defendant appealed and was reinstated. The State Supreme Court said that since the statute was penal in nature, it must be construed liberally in favour of defendant, and that '*where the penalty, as in this case, is onerous, no one can be held to have violated its provisions, unless his acts come within both the letter and spirit of the law*.' Regarding the *ejusdem generis* rule, the court noted that all those acts of dishonourable or unprofessional conduct enumerated were affirmative acts, and that all defendant had done was consent to do an act. The court said that the defendant had done no act, and that mere willingness to act criminally was not *ejusdem generis* with acting criminally. This opinion is a strict interpretation of the statute. In *McClaren v G. S. Robins & Co*., 349 Mo. 653, 162 S.W.2d 856 (1942), the State Supreme Court refused to rule that one who sold carbon tetrachloride without marking the bottle '*poison*' had violated a statute requiring such marking of bottles containing '*any arsenic, strychnine, corrosive sublimate, prussic acid, or other substance ... usually denominated as poisonous.*' The court pointed out that carbon tetrachloride, a grease solvent sold commercially as a cleaning fluid, was not *ejusdem generis* with the named items, which were all drugs. Hence, it felt the product could not be included under the statute's catch-all phrase, '*or other substance usually denominated as poisonous*.' Other cases have also adhered to strict interpretation of penal statutes where *ejusdem generis* has been applied. In *State ex Tel. Vogel v Busch*, 83 Mo. App. 657, 665 (1900), a statute required that persons seeking office in the municipal assembly '*shall not have been convicted of malfeasance in office, bribery or other corrupt practices or crimes*,' The Court held the statute inapplicable to one who had been convicted of selling lottery tickets. The court said that such an act '*is not in its nature or turpitude to be classed with malfeasance in office or bribery*.'

[37] <https://www.quimbee.com/keyterms/residual-clause> Accessed May 21, 2021

[38] *Connally v General Construction Co.*, (n 10)

[39] In *Johnson v US*, 135 S Ct. 2551, 2555 (2015), the US Supreme Court struck down the '*residual clause*' of an Act under which, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or

description, and if pressed to its logical conclusion would make it essential that legislation should define, without the use of generic terms, all the specific instances to be brought within it.[40] However, even where the court is timorous and not prepared to go the full extent of holding *ejusdem generis* clauses generally unconstitutional, its application of the *ejusdem generis rule* should not be a matter of course, and the rule must not be pushed too far but be applied with caution in the absence of other indications disclosing the explicit intention of the legislature.[41] Recourse to application of the rule should be had only where there exist concrete, cogent, convincing and compelling reasons. Where there is absence of clear definitions of an offence in a statute, it may be justified to apply the *ejusdem generis* rule only if there are strong reasons from the history and circumstances connected with the Act, and from the structure of the Act itself, to indicate the real meaning of the Legislature, that the rule is one which not only can, but ought to be applied.[42]

6. Sections 97(3) of CPL Lagos and 126(2) of CCA and the Challenge of Clarity

Basic concerns over deprivation of life, liberty, or property without fair notice constitute the foundation of the void for vagueness doctrine. In this regard, if an enactment is so loosely worded that determination of the prohibited conduct is difficult of determination to an ordinary person, then it is too vague, irrespective of the penalty consequent on its violation.[43] The test for whether a given statue is vague is objective in nature and asks whether the provision *'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute'*[44] S. 97(3) of the CPL of Lagos State, is a verbatim reproduction of s. 126(2) of the Criminal Code Act and provides that *'[a]ny person who attempts in any way not specifically defined in this Law to obstruct, prevent, pervert or defeat the course of justice commits a misdemeanour.'*[45] Credit must be given to the law for its obvious honesty in stating on its face that it is criminalising conduct which '*in any way [is] not specifically defined in this Law.'* That effort to criminalise undefined conduct however renders its patent unconstitutionality more egregious. This drafting methodology of deliberate forbearance to define, enumerate and specify prohibited conduct is calculatingly purposed to spread a wide net, and catch as many people as possible within its provisions. It finds analogy and equivalence with certain internationally prohibited fishing practices. An example of this is the method known as bottom trawling. This is an industrial technique in which massive fishing nets weighted with ballast are dragged along the sea floor. As the fishing vessel moves along, the net gathers and accumulates all marine life on its path; not just fish, but every other marine animal and plant. The rejects that eventually get thrown back to the sea are invariably traumatised to such an extent that they end up dead.[46] This prohibited fishing technique is a fitting metaphor for the deliberate and cavalier gloss of s. 97(3) of CPL and similar statutes on the indispensability of clear enumeration of prohibited conduct. The clear response

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more previous convictions for a '*violent felony*,' which is defined as any crime punishable by imprisonment for a term exceeding one year that (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; (2) is burglary, arson, or extortion, involves the use of explosives; or (3) '*otherwise involve[s] conduct that presents a serious potential risk of physical injury to another*.' This third definition is what is known as the '*residual clause*.' The Court held that this definition is unconstitutionally vague, and contrary to the Constitution's guarantee of due process. In *Sessions v Dimaya*, 138 S Ct. 1204; 200 L Ed 2d 549, the Immigration and Nationality Act (INA) classified some categories of crimes as *'aggravated felonies'*, and immigrants convicted of those crimes, including those legally present in the US are almost certain to be deported. Those categories include *'crimes of violence'*, which are defined by the *'elements clause'* and the *'residual clause'*. The US Supreme Court struck down the *'residual clause'*, which classified every felony that, *'by its nature, involves a substantial risk'* of *'physical force against the person or property'* as an aggravated felony. The Court held that the residual clause in the Act was unconstitutionally vague.

[40] *Baltimore & O.R.R. v ICC*, 221 US 612, 620 (1911)

[41] See: *SPDC v FBIR* [1996] 8 NWLR Pt. 466, 256; in *Onasile v Sami* (1962) LPELR – 25040 the Supreme Court held as follows: *'It is true that the ejusdem generis rule should not be pressed too far: it cannot be applied unless there is a category or class into which things of 'the same kind as those specified' can be fitted. On the other hand, the disjunctive construction should, also, not be pressed too far, or it will produce something totally alien to the context. The aim must be to arrive at the intention of the legislature, and the method indicated by Sankey, J., in A.G. v Brown, (1920) 1 KB 773, at 798, may well be followed; the learned judge said:-'Although therefore the doctrine of ejusdem generis is to be applied with caution, where in an Act of Parliament there are strong reasons (a) from the history and circumstances connected with its passing, (b) from the structure of the Act itself, to indicate the real meaning of the Legislature, in my view the doctrine of ejusdem generis is one which not only can, but ought to, be applied.''*

[42] *Nwobike v FRN* (n 2)

[43] Katherine Brosamle, 'Obscured Boundaries: Dimaya's Expansion of the Void-for-Vagueness Doctrine,' (2018) 52 *Loyola of Los Angeles Law Review* [187-209], 205-6. [It is nearly impossible to have fair notice of a law that holds different meanings depending on your location.]

[44] *US v Harriss*, (n 26)

[45] The conspiracy provisions of s. 97(1) of Criminal Law of Lagos State specifies that *'[a]ny person who conspires with another to obstruct, prevent, pervert or defeat the course of justice, commits a felony'.*

[46] <https://www.conserve-energy-future.com/methods-causes-illegal-fishing.php> Accessed on May 17, 2022

to such statutes remains the assertion that vague statutes are constitutionally unacceptable because they fail to provide citizens with fair notice or warning of statutory prohibitions so that they may act in a lawful manner.[47]

7. The Role of the Court in Clarifying the Limits of the Jurisprudence

No characteristic of organised and cohesive society is more fundamental than its erection and enforcement of a system of rules defining various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner.[48] The judicial powers vested on the courts created or authorised by the Constitution extend, notwithstanding anything to the contrary, to all inherent powers and sanctions of a court of law; and extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.[49] Thus, when one believes seriously that rights accorded to him by law have been or are being violated, the proper forum in an orderly society for the vindication and protection of those rights is the courts.[50] The primary duty of the court is to do justice to all manner of men who are in all matters before it. When the court sets out to do justice so as to cover new conditions or situations placed before it, there is often a compelling need to have recourse to equitable principles. A court, because it is authorised to administer both law and equity, must, in the exercise of its equitable jurisdiction be seen as a court of conscience. Consequently, Judges who dispense justice in the courts of law and equity must always be ready to address new problems and create new doctrinal solutions where the justice of the matter so requires. On the principle of *ubi jus, ibi remedium,* the court will provide a remedy irrespective of the fact that no remedy is provided either at common law or by statute, if from the facts available before the court, it is satisfied that: the defendant is under a duty to the plaintiff; there was a breach of that duty; the defendant suffered legal injury; and the injury was not remote.[51] The Court as a general principle consistently favours interpretation of legislation which supports its constitutionality. It is only if no construction can save an Act from a claim of unconstitutionality that courts are we willing to reach that result.[52] The vagueness doctrine was developed by the courts in order to ensure notice, protect against arbitrary and discriminatory enforcement, and to prevent unwarranted delegation of legislative authority.[53] In this regard, the void for vagueness rule has close relationships both with the substance of individual freedom from arbitrary and discriminatory governmental action and, with the institutional processes established to protect that freedom.[54] Thus, the vagueness doctrine is most frequently employed as an implement for curbing legislative invasion of constitutional rights.[55] Defendants benefit from the void-for-vagueness

[47] *Connally v General Construction Co.*, (n 10) 388

[48] *Boddie v Connecticut*, 91 S Ct 780, 401 US 371

[49] s. 6(6) (n 1)

[50] *Louisville & N. R. Co. v Bass*, 17 FPD 2d, 231

[51] *Amaechi v INEC*, [2008] All FWLR. Part 407, 1, here, the statute did not provide any remedy for a wrong substitution of a political candidate who won primaries with a person who did not contest primaries at all, and there was no common law remedy. The Supreme Court therefore fashioned a remedy by declaring the wrongly substituted person as the proper candidate for the elections and the true winner of the elections even though in actual fact, he did not stand for the elections. See *Onyemobi v President, Onitsha Customary Court* [1995] 3 NWLR Part 381, 50 [It is the function of courts of law to open their doors for aggrieved parties to seek redress. As a matter of law, the entire essence for establishing courts of law is to adjudicate upon disputes between parties and come to a clear decision one way or the other.] In *Okeke v Petmag Nigeria Ltd.* [2005] 4 NWLR Part 915, 245 it was held that a wrong must not necessarily be remediable under a known head of tort before it is justiciable. Once there is a wrong, there must be a remedy. What is important is simply the presentation of the factual situation which if substantiated entitles the plaintiff to a relief against the defendant. In *Ewhrudje v Warri Local Government Council*, [2005] 7 NWLR Part 924, 334, it was held that in exercise of the duty of the court to provide a remedy for a plaintiff even if none has been prescribed in the statute book, it must not follow that because a claim for damages fails, the claim for injunction must also fail. If a trespass is threatened, or reasonably apprehended or likely to occur, an injunction to restrain the defendants from committing a trespass may be granted, even though no trespass has been proved.

[52] *Screws v US*, (n 27)

[53] Carissa Byrne Hessick, 'Vagueness Principles' (2016) 48 *Arizona State Law Journal* [1137-1167] 1167

[54] A. G. A. (n 20) 88

[55] Ibid. 87; *Franklin v State*, 257 So. 2d 21 (Fla. 1971), was a case in which the Florida Supreme Court struck down Florida's sodomy law as being *'unconstitutional for vagueness and uncertainty in its language, violating constitutional due process to the defendants.*' The case involved two men, who were arrested for committing a *'crime against nature'*. Police charged them with a felony, punishable by up to 20 years in prison, for violating a Statute enacted in 1868, which read: *'Whoever commits the abominable and detestable crime against nature, either with mankind or with beast, shall be punished by imprisonment in the state prison not exceeding twenty years.'* The Florida Supreme Court overturned the convictions, which had been upheld on appeal by a district court, and stated: 'The renewed attack on the language of this statute for constitutional vagueness and overbreadth is not surprising in view of the guarded wording used in such statutes in 1868 when it was drafted. A very serious question is raised as to whether the statute meets the recognized constitutional test that it

principle because it operates to strike down statutes deemed impermissibly vague, which operate to the prejudice of defendants.[56] While the void for vagueness doctrine is a principle regulating the acceptable relationship between written law and the potential offender, it is more than that. It is also an instrument mediating between organs of public coercion of a state and protection of the individual's private interests. Thus, the doctrine determines the extent to which administration of public order may make possible, the deprivation of the rights of particular citizens.[57]

A related, but different defect that might blight a criminal legislation is the concept of *ambiguity.* A statute is ambiguous if an otherwise clear statute or provision renders itself open to two or more similarly possible interpretations. When faced with ambiguity in a statute, the court will usually follow whichever interpretation is most beneficial to the accused person.[58] Notwithstanding the readiness of the courts in an appropriate circumstance to intermediate on behalf of the defendant to grant relief from the unconscionable overbearingness of a vague statute, relief is not automatic upon the request. A defendant seeking the invalidation of a law upon the grounds of vagueness must satisfy a requisite consideration. In order for a court to find a statute as uncertain, it must be clear and evident, that the contents of the statute offer little or no warning of the precise details of conduct prohibited by its provisions, and as a corollary, grant great discretion to law enforcement agencies and judicial officials and other persons charged with its application and enforcement to determine the legal contents of its provisions.

8. Conclusion

Words are the primary, if not the only mode of communication in statutes and enactments. At times, words could be exact and particular. Often times however, they are terribly imprecise. The effect of this imprecision is magnified when it manifests in a penal statute. Vagueness in statutes reposes on individuals, the power of arbitrary law enforcement through selective arrests and prosecutions. They are antithetical to the rule of law. With the continuous increase in the *corpus juris* of the society, it is inevitable that imprecision in statutes would continue to recur. With increasing criminalisation (read over-criminalisation) of hitherto lawful conduct, a vague penal statute portends incalculable danger to fundamental rights and liberties. This paper is not predicated on an expectation that words used in legislation could or should attain the precision and exactness of algorithms. It is however the suggestion of this paper that greater attention to detail in legal drafting would reduce the incidence of vagueness in legislative drafting. Yet again, elimination of the use of the residual clause and *ejusdem generis* clauses in legislative language could assuage part of the problem. In the final analysis, the ultimate resolution lies with the courts, on an *ad hoc* basis, to either uphold or strike down a statute on a vagueness challenge. In this

inform the average person of common intelligence as to what is prohibited so that he need not speculate as to the statutory meaning. If the language does not meet this test, then it must fall and the matter must be left to legislative correction. . . . The language in this statute could entrap unsuspecting citizens and subject them to 20-year sentences for which the statute provides. Such a sentence is equal to that for manslaughter and would no doubt be a shocking revelation to persons who do not have an understanding of the meaning of the statute. . . . 'The statute, 800.01, is void on its face as unconstitutional for vagueness and uncertainty in its language, violating constitutional due process to the defendants. We anticipate and recommend legislative study of the subject and, pending further legislation in the matter, society will continue to be protected from this sort of reprehensible act under Section 800.02, Florida Statutes, F.S.A., which provides: 'Unnatural and lascivious act. Whoever commits any unnatural and lascivious act with another person shall be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding six months. Under the evidence in this case, the conduct denounced in Section 800.02, Florida Statutes, F.S.A., is a lesser included offense. Accordingly, we must, without any criticism of the able trial jurist who was following the decisions then existing, reverse the two judgments adjudging the defendants of being guilty of a felony and remand the causes to the trial court with directions to enter a judgment of guilty of Section 800.02 which is a misdemeanour, and to impose sentence accordingly. In view of our former decisions, this judgment holding the felony statute void is not retroactive, but prospective only. We recede from prior opinions inconsistent with this holding.'

[56] Jessica A. Lowe, (n 17) 2359; 16A Am. Jur. 2d *Constitutional Law* § 428 (2020) [Imprecise laws can be attacked on their face under two different doctrines: first, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of constitutional rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep; second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests.]

[57] A. G. A. (n 20) 81

[58] John F. Decker, 'Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws,' (2002) 80 *Denver University Law Review* [241-343] 243; *McNally v US*, 483 US 350, 359-60 (1987) ['The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.']

regard, where statutes are couched in such a manner that the only realistic methods of law administration are those which involve *ad hoc* judgments, considerable pressures are created in favour of permitting an *ad hoc* judgment scheme.[59]

[59] A. G. A. (n 20) 95