



## Legal implication of unlawful dealing in new psychoactive substances in Nigeria

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### Abstract

Since New Psychoactive Substances are not controlled under International Drug Conventions, their legal status can differ widely from country to country. Up to mid 2015, over 50 countries have implemented legal responses to control New Psychoactive Substance with many countries having used or amended existing legislation and others having used innovative legal instruments. Several countries including Nigeria where large numbers of different New Psychoactive Substances have rapidly emerged have adopted controls of New Psychoactive Substance using generic approach or have introduced analogue legislation that involves the principle of chemical similarity to already controlled substances. This created a problem as Nigerian Courts often require prosecution to adduce additional evidence even where the accused has pleaded guilty. In some instances, some Judges do not accept that Psychoactive Substances are drugs similar to cocaine, heroin or LSD. It is the aim of this research to discuss the legal situation of New Psychoactive Substance in Nigeria, categories of New Psychoactive Substance, consequences of an offence, effect of conviction, jurisdiction for trial of offences, the risk of New Psychoactive Substance, what are New Psychoactive Substance etc.

**Keywords:** legal, implication, unlawful, dealing, new, psychoactive, substances

### 1. Introduction

The world is witnessing an alarming new drug problem and much of the drugs are legal. Marketed as “legal highs,” New Psychoactive Substance (NPS) are proliferating at an unprecedented rate and posing significant public health challenges. The total number of such substances already estimated to be in hundreds, is growing steadily. Mixtures of NPS bought unknowingly by users have resulted in unprecedented and sometimes disastrous effects [1]. For example, Section 11 of the NDLEA Act Cap N 30 LFN 2004 proscribes the importation of Cocaine, heroin, LSD or any other similar drugs. Also, Section 19 proscribes the unlawful possession of cocaine, LSD, heroine or any other similar drug. Countries have implemented legal responses to control New Psychoactive Substance with many countries having used or amended existing legislation. Nigeria, where a large number of New Psychoactive Substances have rapidly emerged have adopted controls using generic approach in her legislation [2]. The categories of Psychoactive or Psychotropic Substances are not closed. For a drug to be listed as Narcotic or Psychotropic or psychoactive substances is a continuous process. It is a matter of convenience or discovery. What is a drug over a counter today may be a listed drug under the schedules or controlled drug tomorrow [3]. For instance, codeine was sold over the counter as at the year 2000, today it is a controlled drug.

The Commission on Narcotic Drugs, an affiliate of the Economic and Social Commission of the United Nations has the power to determine whether a new drug chemical should be transferred to another schedule or deleted. This board works in conjunction with the International Narcotic Control

Board (INCB) established in 1968 [4]. Today, a weed vegetation common in Nigeria known as “zakami” (*Detula stramonian*) is being considered by the International Narcotic Control Board (INCB) as a plant to be listed because it has been found to contain alkaloids of equal potential as that of coca leave or cannabis sativa [5]. For one to know the recent drugs listed or delisted, one should endeavor to look at the International Narcotic Control Board (INCB) Annual Statistical Report [6]. The major problem encountered by law enforcement in effectively enforcing the drug laws is that must Judges do not consider New Psychoactive Substance and psychotropic substances as drug similar to cocaine or heroin as provided by Section 11,19,20 and 21 of the NDLEA Act [7]. Some Judges prefer to see the law clearly proscribing those drugs instead of using generic terms like “any other similar drugs” or “drugs similar to cocaine, LSD or heroine [8]” while other Judges consider drugs like tramadol as mere analgesics [9]. Other problem encountered by law enforcement is the non listing of New Psychoactive Substance like zakami, goskolo (local brew), adhesive (rubber solution) as well as other improvised drugs.

New Psychoactive Substances have been a source of growing frustration for governments throughout the world. New Psychoactive Substances have generated essentially reactive policy, requiring innovation of a complicated process to ban the next substances flowing out of Clandestine Laboratories in response to the previous sets of prohibitive regulations. No government looks good in the role, apparently off-guard and transparently enable to articulate what will come along next. The improving technological capabilities in China and India increased communication and trade via the internet and the

ability to produce new substances in small laboratories have all contribute to an increase in the number of different New Psychoactive Substances flowing into nations.

Our attempt in this paper is to examine the drug related laws in Nigeria; the consequences of unlawful dealing in New Psychoactive Substance and Psychotropic substances, the consequences of an offence, effect of conviction, categories and risks of New Psychoactive Substances etc.

## 2. Clarification of Key Terms

The topic has limited us to legal implication of unlawful dealing in New Psychoactive Substance and psychotropic substances under Nigerian drug legislation. It is therefore important that attempt be made to clarify the key and operational terms.

### 2.1 New Psychoactive Substances

New Psychoactive Substances contain one or more chemical substances which produce similar effect to illegal drugs like cocaine, cannabis and ecstasy. Although some of these New Psychoactive Substances have been legal in the past, many are currently illegal and it's important to realize that none of these drugs will be legal to produce, supply or import (even for personal use) for human consumption<sup>[10]</sup>. The main effects of almost all psychoactive substances can be described using the main categories:

- a. Stimulants
- b. Sedatives
- c. Opioids
- d. Synthetic cannabinoid receptor agonists
- e. Classic hallucinogens (psychedelics)<sup>[11]</sup>

**a. Stimulants:** A chemically diverse group of substances (including *phenethylamines*, *cathinones*, *aminoindenes* and *piperazines*) which acts as a central nervous system stimulants by mediating the actions of dopamine, *norepinephrine* and *serotonin*, resulting in a range of effects. Substances that have the effect of traditional drugs such as cocaine, amphetamine and ecstasy. Since these drugs are similar to cocaine, heroin or LSD as proscribed by the NDLEA Act, their possession, dealing, importations are illegal and unlawful<sup>[12]</sup>.

**b. Sedatives:** Substances in this group are central nervous system depressants with actions derived from their activation of receptors in the GABA receptor complex in the brain. The effect of substances under international control such as benzodiazepines, diazepam and *alprozolam*, valium, D5 prescribed by physicians for patients who cannot sleep due to ailments fall within this category. Those abusing this category of drug realized that indiscriminate use have a feeling of satisfaction and keep them awake for as long as they want. Most Judges in Nigerian courts do not consider these drugs as drugs similar to cocaine or *heroin* but mere sedatives.

**c. Opioids:** A chemical diverse group of substances which are central nervous system depressants. They bear structural features that allow binding to specific opioid receptors, resulting in morphine like effects e.g. analgesic. Drugs like tramadol are many a times regarded as analgesics by Nigerian courts. This was the decision in *FRN v. Vincent*

*Eze*<sup>[13]</sup>, where the Federal High Court Jigawa held that Tramadol is not synonymous to psychotropic substances but mere analgesic drug for relief of pain in the body<sup>[14]</sup>.

- d. Synthetic cannabinoid receptor agonists:** These substances bear structural features that allow binding to one of the known cannabinoid or Cannabis Sativa receptor and produce effects similar to those of delta 9 *tetrahydrocannabinol* (THC). The only known psychoactive component in cannabis. There is no specific provision under the NDLEA Act which proscribes cannabis. But the power to arrest and prosecute cannabis offenders is derived from a generic term "any other similar drug" i.e. any drug similar to cocaine, heroin or LSD<sup>[15]</sup>.
- e. Dissociative:** These substances are class of hallucinogens which produces feelings of detachment and dissociation from self and the environment. Substances in this group include the controlled substances Phencyclidine (PCP) and *hetamine*.
- f. Hallucinogens:** A chemical diverse group of substances (e.g. ring substituted *phenethylamines*, *tryptamines*) which produces hallucinogens. For example "zakami" found in Northern Nigeria and correction fluids<sup>[16]</sup>.

### 2.2 Psychotropic Substance

The NDLEA Act<sup>[17]</sup> does not attempt to define psychoactive substances; rather it defines Psychotropic substances as follows:

Psychotropic substances mean any natural synthetic or any natural materials specified in schedule I, II and IV of the Convention on Drugs or Psychotropic Substances of 1971<sup>[18]</sup>

From this definition, it follows that all drugs listed in the aforementioned schedule of the Convention on Drugs and Psychotropic Substances and other International Conventions to which Nigeria is a signatory becomes incorporated in the NDLEA Act<sup>[19]</sup>. Accordingly, substances could be classified as Psychoactive according to their effects, chemical structures, legal classifications, medical or scientific uses, or even its availability. Modern scientific discoveries have also expanded the list of substances and this list keeps on growing with technological advancement.

### 2.3 Unlawful Conduct

For a thing to be unlawful means it is prohibited by law and a violation of which there is always a consequence. The term "unlawful is defined by Black" Law Dictionary as<sup>[20]</sup>:

"Conduct not authorized by law, a violation of a civil or criminal law"

The term "unlawful" is also defined by Oxford Advanced Learners Dictionary as "conduct not authorized by law, a violation of a civil or criminal law<sup>[21]</sup>"

### 2.4 Dealing

The word "dealing" is defined by the same Oxford dictionary to mean:

"To buy and sell particular produced<sup>[22]</sup>".

It is fundamental to state that under the NDLEA Act, dealing in Psychotropic or Psychoactive substances is not ab initio

prohibited but controlled. This presupposes that there are instances when a person can lawfully deal in drugs. The condition precedent to dealing in psychoactive or psychotropic substances is the existence of “*lawful authority*”. This point is very important and because psychoactive/psychotropic substances as earlier defined generally have very vital medicinal uses for the sustenance of life itself and it will be contrary to reason for the law to put a blanket ban on its uses for the simple reason that its illegal use is injurious to the individual and the society. It is for this reason that the law did not totally proscribe the usage of the drug, but placed it in the category of controlled drugs.

### 3. Legal Analysis

#### 3.1 Drug Related Laws in Nigeria

##### 3.1.1 Dangerous Drugs Act<sup>[23]</sup>.

This was colonial Act which came into effect in 1935 and was part of the received English laws. It was the first attempt at controlling the possession, sale or distribution of such drugs classified under the law except by persons licensed or otherwise authorized in that behalf. This law regulated coca leaves and cannabis and their derivatives. These laws along with the Indian Hemp Act have generated jurisdictional problems between the Police and the NDLEA<sup>[24]</sup>. The NDLEA Act empowers the NDLEA to be coordinator of all drug laws but did not repeal the earlier drug legislation which also gave the Police the same power to enforce drug laws. This problem was generated by the failure of the legislators who drafted the NDLEA Act to repeal all previous drug laws which gave the Police the power to prosecute drug offences. This jurisdictional lacuna has allowed the Police to still prosecute drug offenders before the magistrate courts neglecting Sections 26 of the NDLEA Act and 251 of the 1999 Constitution which gave the Federal High Court the exclusive jurisdiction of entertaining all drug cases.

Section 251 of the Constitution clearly shows that the Indian Hemp Act is inconsistent with the Constitution. This is because the constitution Provision has given the Federal High Court the exclusive jurisdiction to hear drug cases. In other words, both the Indian Hemp Act and the Dangerous drug Act which gave the magistrate court the power to entertain drug cases are at variance with the Constitution. *The Commissioner of Police v. Abdulaziz Mohammed and 2 Ors*<sup>[25]</sup>, the NDLEA issued a notice of preliminary objection against the Police power to prosecute a drug case before the Chief magistrate Court Bauchi that the Police has no statutory powers to arraign or prosecute the accused persons for the offence of unlawful possession of cannabis sativa. Also, that the magistrate court lacks jurisdiction to entertain a case involving cannabis in view of Section 251 (I) (m) of the Constitution and the Federal Republic of Nigeria. The case was eventually settled out of court at the option of the Police. It is significant to mention that the Police is divested of any powers to investigate and prosecute drug related offences by the provisions of section 3 (I) (b) of the NDLEA Act. The Act provides thus:

Subject to this Act and in addition to any other functions expressly conferred on it by other provisions of this Act, the Agency shall have responsibility for the coordination of all drug laws and enforcement functions conferred on any person

or authority, including Ministers in the Government of the Federation by any such laws.

##### 3.1.2 Indian Hemp Act 1966<sup>[26]</sup>

The law was signed into law on 31<sup>st</sup> March 1966 and since that time there has been numerous changes in the global view of Indian hemp. For instance many countries have decriminalized the possession of small quantities of cannabis. Whether Nigeria should decriminalize the use of hemp or legalize its sale is still an issue for future debate. The NDLEA Act did not specifically provide for the proscription of Indian hemp. But Sections 11, 19 and 20 have drawn cannabis among the drugs similar to cocaine, heroin and L.S.D. In other words, the punishment for possession, importation, exportation, manufacture etc of cocaine, heroin and L.S.D is also applicable to cannabis.

##### 3.1.3 Pharmacy Council Act of Nigeria<sup>[27]</sup>

This Act establishes the Pharmacy Council of Nigeria charged with many responsibilities among which is to regulate and control the practice of the Pharmacy profession in Nigeria.

##### 3.1.4 Food and Drug Act<sup>[28]</sup>

This Act prohibits the sale of certain food items, drugs, cosmetics and devices for treatment of certain diseases. The Act prohibits the importation, exportation, distribution and sale of specified drugs. It also prohibits practices such as misleading packaging, labeling and advertizing as well as manufacturing food and drugs in unsanitary conditions. It conveys the power to appoint inspecting officers and food and drug analyst.

##### 3.1.5 Counterfeit and Fake Drugs Unwholesome Processed Foods (Miscellaneous Provision) Act<sup>[29]</sup>

This Act prohibits the production, importation, manufacture, sale and distribution of any counterfeit, adulterated, banned or fake drugs. It also prohibits person from selling drugs in an open market without permission from authority.

##### 3.1.6 National Agency for Food and Drug Administration and Control (NAFDAC) Act<sup>[30]</sup>.

The law charges the NAFDAC to regulate and control the importation, exportation, manufacture, advertisement, distribution, sale and use of foods, drugs, cosmetics, medical devices, bottled water and chemicals etc.

##### 3.1.7 Foods Drugs and Related Products (Registration etc.) Act<sup>[31]</sup>

This law makes it illegal for an unregistered drug or similar products to be advertised unless it is registered under the law. It also regulates the manufacture, importation, exportation, sale or distribution of processed food, drugs, cosmetics, medical devices, bottled water and chemicals etc.

##### 3.1.8 National Drug Formulary and Essential Drugs List Act<sup>[32]</sup>

This Act prohibits the importation, advertisement, display of, sale or manufacture of any drug not contained in the list of drugs provided in the Act.

### 3.1.9 National Drug Law Enforcement Agency Act<sup>[33]</sup>

The NDLEA Act remains the basic and most comprehensive legislation regulating dealing in psychoactive substances in Nigeria. According to the preamble of the NDLEA Act, we have briefly stated the above laws to show historically how attempts have been made to regulate the use and dealing in Nigeria. There are also several laws in our statute books that have attempted to regulate drugs, chemical and food apart from the ones listed above.

### 3.2 Consequences of an Offence (An Overview of Key Provisions)

The offences created by the NDLEA Act on Psychotropic or Psychoactive substances and other drugs are strict liability offences. Strict liability offences are offences that do not require mens rea. They are crimes that do not require you to intend to do something wrong or morally blameworthy<sup>[34]</sup>.

Under the NDLEA Act<sup>[35]</sup> it is an offence to import, produce, export, transport, sells or buys or knowingly possesses the categories of drug listed therein without lawful authority<sup>[36]</sup>. Any person who “imports, manufactures, produces, plants or grows drugs popularly known as cocaine, LSD, heroin or any other similar drugs shall be guilty of an offence and is liable to life imprisonment.” As mentioned earlier, the terms “any other similar drug” have brought within the preview of this provision other psychoactive substances. The essence of such generic terms is to accommodate other drugs not within the contemplation of the Legislators during legislation. It is essential to state that one of the problems encountered by prosecutors is that even where the suspects plead guilty to the charges under the relevant sections, the court always insist that the prosecution must comply with section 274(I) of the ACJA, 2015. The section provides<sup>[37]</sup>:

- a. Where a defendant pleads guilty to an offence with which he is charged the court shall :
- b. Invite the prosecution to state the fact of the case; and
- c. Enquire from the defendant whether his plea of guilty is to the fact as stated by the prosecution to tender evidence of certificate of test analysis from the Forensic Science Laboratory to ascertain whether the drug in issue is really drug.

However, this position was laid to rest by the court in the case of *Samuel Ayo Omoju v. FRN*<sup>[38]</sup>. This is a case of exportation of 1.1kg of heroine. The defendant was convicted based on his plea of guilty and his confessional statement. On appeal, it was contended that the prosecution did not discharge the burden of proof beyond reasonable doubt as the defendants plea of guilty does not amount to conclusive proof of guilt. The Court of appeal held that the confession is the strongest evidence against an accused person and an accused person may be convicted on his confessional statement alone. Thus, the appeal was dismissed for lacking merit. It is therefore clear that a free and voluntary confession of guilt by a person whether under examination by a court or otherwise, if it is direct and positive and is duly made and satisfactory proved, is sufficient to warrant conviction without any corroborative evidence as long as the court is satisfied of the truth of the confession<sup>[39]</sup>. Also in *John Timothy v. FRN*<sup>[40]</sup>, in a case of importation of cocaine, the court of appeal held that an

accused person can be convicted on his statement alone, though it is desirable but not mandatory that some other evidence consistent with the confession is produced.

*In Eze v. Federal Republic of Nigeria*<sup>[41]</sup>, the defendant was arraigned for unlawful possession of the psychoactive substances tramadol under Section 19 of the NDLEA Act. He pleaded guilty to the charge, and the prosecution reviewed the facts in line with section 274 (I) of the ACJA, 2015 and tendered the relevant exhibit forms<sup>[42]</sup> in evidence. He was convicted and sentenced accordingly. Dissatisfied with the decision, the defendant appealed to the court of appeal on the ground that there was no evidence of expert analysis on the recovered drug to prove that it is actually tramadol. Dismissing the appeal, the court of appeal per Jummai Hannatu Sankey held:

“While it is desirable for a further confirmatory test to be carried out, the fact that the appellant did not oppose the admission of both the narcotic substances and the certificate of test analysis in evidence rendered the documents both admissible and unchallenged evidences”

The appeal was therefore dismissed and the conviction was affirmed. From the above judgment it is clear that if the appellant had opposed the admission of both the narcotic substances and the Certificate of Test Analysis, the appeal would have succeeded.

The Act also criminalizes several acts in relation to production, manufacture, cultivation, possession of equipment conversion of drugs<sup>[43]</sup>. These offences are also contrary to the Singles Convention of 1961 and the 1971 Convention on Psychotropic Substances<sup>[44]</sup>. It is significant to state that most cases involving Psychotropic Substances in NDLEA are brought under section 20 of the NDLEA Act. In *Federal Republic of Nigeria v. John Aleke*<sup>[45]</sup> the accused person was arraigned before the Federal High Court Dutse alleging possession of 500grams of Tramadol tablets contrary to section 20(I) (a) of the NDLEA Act<sup>[46]</sup>. The contention was whether tramadol is a mere analgesic or a control drug. Exhibit B which is a result of the forensic laboratory shows that Tramadol is a drug similar to morphine or heroin. The court held that based on the forensic result it is conclusive proof that tramadol is a morphine, heroine and therefore found the accused guilty.

Apart from the wide range of offences under Section 20 (I) (a), the section also provided for the offence of cultivation of opium puppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs<sup>[47]</sup>.

Under the Act<sup>[48]</sup>, any person whose journey originates from Nigeria without being detected of carrying narcotic drugs or psychotropic/psychoactive substances, but is found to have imported such prohibited drugs into a foreign country, notwithstanding that such a person has been tried or convicted for any offence of unlawful exportation or possession of such drugs in that foreign country shall be guilty of an offence of exportation of narcotic drugs or psychotropic substances from Nigeria.

This provision seems very harsh on the offender and may lead to falling into constitutional pitfalls with regards to the accused constitutional right to fair hearing involving double jeopardy<sup>[49]</sup>. The section provides:

No person who shows that he has been tried by any Court of

competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of superior court<sup>[50]</sup>.

However, the accused could be charged for a different offence with different ingredients or elements such as the offence of bringing the name of Nigeria to disrepute as provided by the NDLEA Act<sup>[51]</sup>. The section provides:

Any Nigerian citizen found guilty in any foreign country of an offence involving narcotic drugs or Psychotropic substances and who thereby brings the name of Nigeria to disrepute shall be guilty of an offence under this subsection<sup>[52]</sup>.

A person shall be deemed to have exported a narcotic drugs or psychotropic substances under the NDLEA Act, if he brings to or deposit the substances concerned at any time at any Customs area, Customs station, Customs airport, Customs port or any other Customs point generally<sup>[53]</sup>. In *Samuel Ayo Omoju v. FRN*<sup>[54]</sup>, the defendant was convicted in a case of exportation of 1.1 kg of heroin based on his plea of guilty and his confessional statement. On appeal, it was contended that the prosecution did not discharge the burden of proof beyond reasonable doubt as the defendant's plea of guilty does not amount to a conclusive proof of guilt. The Court of appeal held that an accused person may be convicted on his confessional statement alone. Thus, the appeal was dismissed for lacking merit. And this was subsequently affirmed by the Supreme Court.

### 3.3 Jurisdiction for Trial of Offence

The NDLEA Act has conferred the Federal High Court the exclusive Jurisdiction to try offender, who violate any provisions under the Act<sup>[55]</sup>, as well as the powers to impose the appropriate punishment<sup>[56]</sup>. This also is in tandem with the provision of Section 251 (I) and S.253 of the 1999 constitution which confers exclusive jurisdiction on the Federal High Court to try offences relating to narcotic drugs and psychotropic/psychoactive substances.

### 3.4 Effect of Conviction

Any person convicted of an offence under the Act shall forfeit to the Federal Government all the assets and properties which may or are subject to interim forfeiture order of the Federal High Court after an attachment by the NDLEA as specified in section 34 of the Act<sup>[57]</sup>. Also included are assets derived from any proceeds of unlawful dealing in drugs including instrumentalities used in any manner to commit or to facilitate the commission of an offence<sup>[58]</sup>. If it is established that a convicted person has assets or properties in a foreign country, such assets depending on if Nigeria has entered a treaty with such country shall be forfeited to the Federal Government<sup>[59]</sup>. Under Section 28, the convicted person forfeits to the Government all movable and immovable properties traceable to the proceeds of crime. Where the offence involves importation or exportation, the convict forfeits his International passport to the Federal Government<sup>[60]</sup>. A person who unlawfully deals in psychoactive or psychotropic substances is under obligation upon arrest to make a full disclosure of his assets and liabilities in the prescribed manner. False disclosure constitutes an offence punishable by imprisonment of ten years<sup>[61]</sup>.

It is pertinent to state that in Nigeria and most African countries, assets can be forfeited to the Federal Government after conviction. In other words, Nigeria is practicing a conviction based forfeiture system<sup>[62]</sup>.

The Act also empowers the Agency to issue a freezing order on money in the account of an arrested person if satisfied that the money was made through illegal dealing in trafficking of psychoactive/psychotropic substances<sup>[63]</sup>.

### 4. The Risk of New Psychoactive Substances

The use of New Psychoactive Substances is often linked to health problems. In general, side effects of New Psychoactive Substances range from seizures to agitation, aggression, acute psychosis as well as potential development of dependence. New Psychoactive Substances users have frequently been hospitalized with severe intoxications. Safety data on toxicity and carcinogenic potential of many New Psychoactive Substances are not available or very limited, and information on long term adverse effects or risks are still largely unknown<sup>[64]</sup>. Purity and composition of products containing New Psychoactive Substances are often not known which places users at high risk as evidenced by hospital emergency admissions and deaths<sup>[65]</sup>.

### 5. How Widespread Are New Psychoactive Substances

New Psychoactive substances have become a global phenomenon with over 100 countries and territories from all regions of the world having reported one or more New Psychoactive Substances. Up to December 2015, more than 600 substances have been reported to the UNODC Early Warning Advisory (EWA) on New Psychoactive Substances by Governments, laboratories and partner organization<sup>[66]</sup>. New Psychoactive substances have similar effects as substances under control such as cannabis, cocaine, heroin, L.S.D, MDMA (ecstasy) or methamphetamine. Looking at the effects of New Psychoactive Substances that have been reported until December 2015, the majority are synthetic *cannabinoid* receptor agonists and stimulants followed by classic hallucinogens<sup>[67]</sup>. Based on the above effects, it is clear that New Psychoactive Substances have appropriately fallen within the purview of drugs similar to cocaine, heroin and LSD as provided by the NDLEA Act<sup>[68]</sup>. It is against this background that the Federal High Court Dutse in the case of *FRN v. Kelvin Aleke*<sup>[69]</sup> reversed its earlier position that tramadol is not a drug similar to cocaine, L.S.D or heroin, but mere analgesic<sup>[70]</sup>. The court held thus:

Tramadol is a drug similar to heroin and morphine and therefore within the statutory authority of the NDLEA to prosecute and therefore within the meaning of section 20 (I) (a) of the NDLEA Act.

The decision of this court was influenced by the forensic laboratory certificate of Test Analysis which shows that the psychoactive substance (tramadol) is a drug similar to morphine or heroine. This result was also signed by a Government Chemist Arekameh A.B within the meaning of section 55 of the Evidence Act<sup>[71]</sup>.

### 6. How UNODC Assist Governments

To assist member states in the identification and reporting of New Psychoactive Substances, UNODC established the Early

Warming Advisory (EWA) on New Psychoactive Substances which serves as a monitoring tool and knowledge hub – offering information on New Psychoactive substances trends, national legislative, responses as well as technical information to policy makers, laboratories and law enforcement officers [72]. To enhance the forensic capacity of national drug laboratories, UNODC prepared a number of manuals on the identification of synthetic cannabinoid and *piperazines* in seized materials. Selected chemicals standards are distributed to laboratories as part of the UNODC International Quality Assurance Program. In addition, training and awareness raising workshops for law enforcement and laboratories are provided [73].

### 7. The Emergence of New Psychoactive Substances Belonging to the Benzodiazepine Class

As mention earlier, the most common New Psychoactive Substances (NPS) abused in Nigeria are Tramadol, Exol 5, Diazepam, Roche, Cough Syrup with Codeine, Rehypnol, and Amphetamine etc. As a relatively new phenomenon New Psychoactive Substances (NPS) belonging to the benzodiazepine class have emerged on the market and are being sold under street names such as “legal benzodiazepine” “designer benzodiazepine” or “research chemicals”. This group of substances includes substances that were tested but not approved as medicine in the pharmaceutical industry that have been manufactured by modifying the core structure of existing pharmaceutical benzodiazepine [74]. Some of the first New Psychoactive Substances (NPS) belonging to the benzodiazepines class that were available online included substances such as diclazepam, flubromazepam and pyrazolam [75]. While certain New Psychoactive Substances (NPS) belonging to the benzodiazepine class have pharmaceutical benzodiazepines [76], profiles of most of the emerging substances are not well described.

### 8. Regulatory and Legal Alternatives

There are different legal approaches to control New Psychoactive Substances:

The first is controlled based on chemical similarities or intended psychoactive effects to substances already controlled by law [77]. This is similar to the generic term used by the NDLEA Act, “any other similar drug”. The second is controlled different groupings of substances regardless of chemical variation that have a specific neuro pharmacological effect on brain [78]. The third is prohibiting supply, import and export of any psychoactive substances that is not exempted [79]. The fourth is through detailed regulations, permit and regulate sale of limited class of New Psychoactive Substances that are proved to be of low risk [80]. The fifth is the restriction of New Psychoactive Substances to limited points of sale, labeling, age etc. until harms are established [81]. The first three approaches prohibiting the production and the use of new non-therapeutic psychoactive substances. It is the only one part from the total ban in which government is not purely reactive. Substances in this class were thought to be of low harm and thus restricted to adults and regulations were placed on manufacturers and distributors.

Another possible approach to controlling New Psychoactive Substances is through laws that regulate medicines and other

products marketed and sold in Pharmacies. Such laws are designed to protect consumers from products that make fraudulent claims or pose a modest to severe health risk to the user. In many jurisdictions, the utilization of medicine laws would provide stringent controls on marketing and distributions.

Another option is the total prohibition or ban of New Psychoactive Substances [82]. One advantage of the total ban that has gone unnoticed by many experts is that if successful it should reduce the number of New Psychoactive Substances introduced in a given period. If every new substance poses a risk of being dangerous or popular, then the total ban lowers the risk. Critics of the total ban are of the view that if the penalties for violations of total ban are to be proportional to the harm of the substances involved, then it may be necessary to conduct an expensive and time-consuming testing programme to show what are the harms associated with each specific substances. Also, the ban raises troubling civil liberty issues associated with the enforcement of a ban that can bring many individuals into the net of potentially harsh criminal sanctions [83]. Little thought has been given to how the total ban will affect the behavior of producers, distributors and users. Alternative options, including the use of the civil penalties or cease and desist orders, for first and second offenders are also good approaches.

### 9. Conclusion

From the above discussion, the following observations are made:

1. Promulgation of laws and the establishment of law enforcement institutions alone are not sufficient to combat dealing in psychoactive substances. They must be supported [84] by strong political will on the part of government and real and meaningful implementation of the laws through investigations, prosecutions and convictions to give credibility to such laws.
2. It has been observed that in Nigeria, the use of generic words to draw New Psychoactive Substances within the purview of the law has created lots of problem leading to lack of success in prosecution.
3. The requirement for additional evidence where a defendant pleads guilty to an offence under Section 274 of the ACJA, 2015 has led to delay in successful prosecution of cases in our courts.
4. There is no stringent restriction on import of psychoactive substances and precursor chemicals for their manufacturer in Nigeria.
5. Stiff regulations are also not placed on manufacturers and distributors of psychoactive substances and precursor chemicals.
6. There is also the inadequate manpower of staff of the National Drug Law Enforcement Agency as well as shortage of logistics.

### 10. Sequel to above, it is recommended that

- a. There is the urgent need for Nigeria to review relevant national legislation as new substances of abuse continue to emerge and exert a negative impact on public health;
- b. Law enforcement and health agencies, are encouraged to strengthen coordination of national authorities both at the

national and regional level in order to enhance information sharing;

- c. Government is encouraged to improve the capacity of their forensic laboratories in order to better identify new psychoactive substances.
- d. Government to make use of existing international, regional and domestic instruments, tools, mechanisms to address the challenges posed by psychoactive substances and diversion of precursors.
- e. There is also the need for Government to exploit and utilize the different legal approaches earlier mentioned which include; prohibition of supply, import and export of any psychoactive substances that are not exempted; through details regulations, permit and regulation of sale of limited class of New Psychoactive Substances that are proved to be of low risk and restriction of NPS to limited point of sale etc.
- f. To conduct empirical research of the substances needed for medical use in the hospitals.

In conclusion, it is fundamental to state that under the NDLEA Act, dealing in Psychotropic or Psychoactive substances like Benalyn with Codeine, Tramadol, Exol 5, Valium D5, Roche, etc. is not *ab initio* prohibited but controlled. This presupposes that there are instances when a person can lawfully deal in drugs. The condition precedent to dealing in psychoactive or psychotropic substances is the existence of “*lawful authority*”. This point is very important and because psychoactive/psychotropic substances as earlier defined generally have very vital medicinal uses for the sustenance of life it self and it will be contrary to reason for the law to put a blanket ban on its uses for the simple reason that its illegal use is injurious to the individual and the society. It is for this reason that the law did not totally proscribe the usage of the drug, but placed it in the category of controlled drugs.

## 11. Reference

1. For example, Section 11 of the NDLEA Act Cap N 30 LFN 2004, proscribes the importation of Cocaine, heroine, LSD or any other similar drugs. Also, Section 19 proscribes the unlawful possession of cocaine, LSD, heroine or any other similar drug.
2. For example s. 11 of the NDLEA Act, Cap. N30, LFN, 2004 proscribes the importation of cocaine, heroin or any other similar drugs. Also, s. 19 proscribes the unlawful possession of cocaine, LSD, heroin or any other similar drug.
3. For example, the drug known as tramadol was not listed in the schedule of the 1961 and 1971 Conventions. But presently, it is listed as a control drug.
4. The International Narcotic Control Board (INCB) is responsible for assessing new chemicals or drugs for possible international control.
5. It is being cultivated in West African Countries like Nigeria, Chad and Mali in commercial quantity.
6. These listed or delisted drugs could also be found in the schedule of the 1961 singles convention and the 1971 convention.
7. Cap N30 LFN, 2004
8. See Section 11, 19 of the NDLEA Act, Cap N 30 LFN, 2004
9. See FRN v. Vincent Eze, Suit No. FGHC/DT/CR/55/11, 2013 (unreported)
10. www.talk to frank.com. Accessed on the 5<sup>th</sup> of November 2017 at 12:45pm
11. United Nations Office on Drugs and Crime 2017
12. Section 11, 19 and 20 of the NDLEA Act Cap N30 LFN, 2004 makes it unlawful to be in possession, to import, to deal and manufacture Narcotic drugs and Psychotropic substances.
13. Opcit n.9
14. The DEA has now categorized tramadol as a controlled drug in line with the relevant conventions on drugs and psychotropic substances. In September 2010, the DEA was presented with a scientific and medical evaluation, along with scheduling recommendation. After assessment of tramadols abuse potential, legitimate medical use and dependence liability, it is recommended that tramadol is scheduled as a class iv substance. The final decision was supported inter alia that abuse of tramadol may lead to limited physical dependence relative to drugs or other substances in schedule 11
15. Opcit n.7
16. A weed vegetation common in Nigeria known as “zakami” falls within this category. It has been found to have equal potential as that of coca leave or cannabis.
17. Cap N 30 LFN 2004
18. Section 44 (v) of the NDLEA Act, Cap N 30 LFN, 2004
19. The Conventions are the Single Convention of 1961; the 1971 Convention against Psychotropic Substances and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.
20. 7<sup>th</sup> edition at page 1536
21. Page 1305
22. At page 298
23. Cap D1 LFN, 2004
24. Section 3 (1) (b) of the NDLEA Act has given the responsibility of coordinating all drug laws to the NDLEA.
25. CMC VII/32C/1013/32/013(unreported)
26. Cap.16, LFN,2004
27. P17 LFN, 2004
28. Cap.F32 LFN,2004
29. Cap. N1 LFN 2004
30. Cap.N1 LFN 2004
31. Cap.F.33 LFN 2004
32. Cap. N29LFN 2004
33. Cap.N30 LFN 2004
34. You are held responsible regardless of your intentions. Even though you don’t have the guilty mind that usually makes a criminal morally blameworthy you are held responsible.
35. Cap. N30 LFN, 2004
36. Section II (a) (b) (c) (d) of the NDLEA Act.
37. Section II (a)
38. (2008) 7nwlr (PT.1085) 38
39. Oluwolu Goke V FRN (2015) SC.163/2011
40. (2013) 4NWLR ( pt. 1344) P.13

41. (2016) NGCA 47 (6 May 2016)
42. The exhibit forms are the request for scientific and certificate of test analysis and the packaging of substances forms.
43. Section 20 of the NDLEA Act.
44. These conventions were the first UN Conventions on Drugs and Psychotropic substances. They were later merged into the 1988 Convention against Drug and Psychotropic substances (The Vienna Convention)
45. Suit No. FHC/DT/CR/71/2013 (unreported)
46. Cap N.30 LFN, 2004
47. Section 20 (I) (b)
48. Section 22 (I) of the NDLEA Act, Cap N.30 LFN, 2004
49. Section 36 (I) of the 1999 constitution (as amended)
50. Ibid
51. Section 36 (2) of the NDLEA Act, Cap. N30 LFN, 2004
52. Ibid.
53. Section 21 (I) of then NDLEA Act Cap. N30 LFN, 2004
54. (2008) 7NWLR (pt.1085) 38
55. Section 26
56. Section 26 (2)
57. Section 27 (I) (a) In addition, the convicted person becomes an ex convict and may lose some privileges of the elective office or hold some appointments
58. Sub Section (I) (a) and (b)
59. Section 28 (I)
60. Section 30
61. Section 35 of the Act
62. Forfeiture means that the competent authority has authorization to transfer ownership of the specified assets to the country itself.
63. Section 42 of the Act
64. UNODC, Early warning Advisory on New Psychoactive Substances, 2005.
65. Ibid.
66. United Nations office on Drugs and Crimes, Early Warning Advisory on New Psychoactive Substances, 2015
67. Ibid.
68. See Section 11, 19, 20 and 21 of the NDLEA Act Cap. N30 LFN, 2004.
69. Suit No. FHC/DT/CR/20/2014 (unreported)
70. See FRN V. Vincent Eze. Suit No FHC/DT/CR/55/11 (unreported).
71. Cap E.14 LFN 2004. Section 55 of the Evidence Act provides that a certificate signed by the Government Pharmacist, the Deputy Government Pharmacist, an assistant Government Pharmacist etc may be taken as sufficient evidence of the facts stated in it.
72. UNODC Early Warning Advisory on New Psychoactive Substances, 2015
73. Ibid.
74. Moosman, B; King L.A; Auwarter V. (2015) "Designer benzodiazepine: a new challenge". World Psychiatry 14 (2) : 248.
75. Mossman B; Bisal, P; and Auwarter, V. (2014) "Characterization of the designer Benzodiazepines diclazepam and preliminary Data on its metabolism and Pharmacokinetics". Drug Testing and Testing 6(7-8) 757 - 763
76. World Health Organization (WHO) Expert Committee on Drug Dependence. "Phenazepam: The Revises Report. Agenda item 5.8" Thirty seventh meeting, Geneva, 16 – 20 November 2015. World Health Organization (WHO) Expert Communication Drug Dependence.
77. This has been included in the United States Federal Analogue Act. It is also contained in Sections 11, 19, 20 and 21 of the Nigerian NDLEA Act, Cap N30 LFN, 2004.
78. Cannabimimetic agents under the United States synthetic Drug Abuse Prevention Act
79. Irish Psychotropic Substances Act.
80. Newzealand Psychotropic Substances Act.
81. Newzealand Class D substances under Misuse of Drugs Act.
82. Ireland has had a total ban for 5 years. Headshops disappeared and the number of individuals being treated for New Psychoactive Substances dependence or abuse had decline from 2011 to 2012.
83. <http://onlinelibrary.wiley.com/doi/10.1111/add.13439/full>. Accessed on 10/12/2017 at 6:30am
84. The NDLEA presently is having less than 5000 staff and inadequate logistics to spread to all the nooks and crannies of the country.