National mechanisms against illicit enrichment case study: Senegal

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Abstact

There have been many national and international mechanisms established to address the phenomenon of financial corruption, or in other words, financial crimes, many national legislations in Africa have failed to find an end for financial corruption, Senegal is one of the african countries that has created the special court of illicit enrichment to deal with such crime. This could be considered the first step in Africa, and by the end of 2014 and mid-2015, the Court has presented its final decision in a case that is one of the most famous cases of the Court in its history. The tribunal has generated considerable controversy on many issues which we will be studying in this research.

Keywords: illicit enrichment, Senegal, private court

Introduction:

Financial corruption is a global phenomenon, he has an economic, social and even political dimension. It is also one of the most serious phenomena facing countries around the wold, especially the non developing countries. This has led to the inability of most of these states to face the developments challenges facing to it. At the level of Africa, the phenomenon of financial corruption shown in different cases. By the individuals, it is mostly appeared, in tax evasion, theft and other crimes, as well as those made by systematically group of individuals, such as the cement scandal in Nigeria in 1975, which will made by a large segment of public officials, mediators and private individuals. There is also a corruption known as the corruption of high grades, which is carried out by senior officials and employees to achieve substantial

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material or social interests, and this type is the most dangerous and the most comprehensive because it costs large amounts to the state.

Because of the many challenges that corruption brings to the society, it has become a cause of great concern today not only to the state but also to the institutions of higher learning. A threat to Justice and sustainable peace in Africa. Corruption is an injustice in itself. Justice relates to Peace by way of a logical conjunction then the prevalence of corruption in any state affirms a lack of peace even in the absence of violence. The systemic nature of corruption in many African states actually compounds the structural violence that citizens suffer. In the words of the Pontifical Council for Justice 2006, corruption is a contradiction of solidarity because it gives rise to injustice and poverty, and a contradiction of subsidiary because it does not respect the different social and institutional roles but corrupts them.

With the increasing incidence of financial corruption in Africa, the African countries have recently takes several measures to combat this phenomenon. Some countries have enacted strict legislation on financial crimes, for the public officials, especially illegal enrichment. Some countries begun to include this case in their legislation such as Nigeria in 1979 and 1999, and Cameroon, where the crime of graft was included in its criminal law in 1967. Similarly, the State of Mali who has added the crime of graft in its criminal law since 1982, one year after Senegal, for Senegal in addition to this law, it establishes a special court for the crime of illicit enrichment, which is still now on force.

1. The concept of illicit enrichment.

Definitions of illicit enrichment identify and describe the elements of the offense, which are a series of essential components that must be present in order for an accused to be found guilty. They are defined in legislation and through the court's interpretations in jurisprudence. The most examples presented in this study illustrate the variations in the definition of illicit enrichment in international conventions.

International conventions seek to harmonize the elements of the crime across states, but, as we will see that there are differences still exist between the key relevant conventions. In addition, the debates during the negotiations of the United Nations Convention against Corruption (UNCAC) further highlighted differences in the national perspectives with regard to the appropriate formulation of such elements. These differences notwithstanding, there are greater similarities than differences among the national approaches adopted. As a result, the trend has been toward developing some common elements of illicit enrichment.

1.1. Definition of the illicit enrichment in international conventions.

1.1.1 The United Nations Convention against Corruption.

It was defined as follows "Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offense, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income".[2]

1.1.2 The Inter-American Convention against Corruption.

It defined it follows "The substantial increase of the staff member if he is not reasonably able to justify them in comparison to their legitimate entry into the exercise of his or her functions"[3]

1.1.3 The African Union Convention on Preventing and Combating Corruption.

It as defined as follows "means the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income".[4]

Seeking to harmonize the definition of illicit enrichment is intended to ensure that the focus is placed on the underlying conduct, not the name of the offense. In this respect, while some provisions similar to illicit enrichment are linked to the failure to disclose assets or the misstatement of income and asset disclosures, those provisions are usually based on noncompliance with disclosure laws and, for our purposes, are not considered illicit enrichment. Accordingly, while income and asset disclosures may be used to provide evidence of illicit enrichment and are discussed in this context in subsequent chapters, offenses arising out of noncompliance with income and asset disclosures are not addressed in this study. Also, some provisions use the term "illicit enrichment" for an offense that is actually a classical corruption offense, requiring an unlawful action or misconduct from the public official, while a "pure" illicit enrichment offense is based only on the unexplained increase in the assets of a public official. Illicit enrichment specifically targets public officials. All three of the aforementioned international conventions and all of the national enrichment laws reviewed in the course of this study identify public officials as the persons of interest the individuals who may be prosecuted for the crime. Two issues merit further consideration:

[2] United Nations Convention against Corruption Article 20
[3] Inter-American Convention against Corruption, Article 9
[4] African Union Convention on Preventing and Combating Corruption Article 1

first, the categories of public officials that are included as persons of interest and, second, whether the persons of interest should include a wider range of individuals beyond public officials.[5]

1.2 Definition of the illicit enrichment in the national legislation.

The international conventions oblige States parties to implement their international obligations. Either the State may include them in their national legislation or establish appropriate special mechanisms to ensure the implementation of the Convention. African countries, which found the most of non-developed countries, and the most vulnerable to the problem of corruption in general, tried in several attempts to reach a legislative appropriation that takes into account the crime of illicit enrichment, In the Senegalese Penal Code, the definition of the illicit enrichment is as follows: “The illicit enrichment is constituted when a notice is given to one of the above-mentioned persons, unable to give justifications for the legal assets that allow them to acquire these assets, with his income”[6]

While the Nigerian law states that "the offense of illicit enrichment is constituted when a person obtains assets or exercises a kind of life for which his earnings do not allow him to justify."[7]

In the same context, the Moroccan draft law defines it the following: "Any public official who has increased his financial assets without justification, as compared to his financial earnings after his arrival in office, shall be guilty of the crime of illicit enrichment".[8]

We note a significant similarity between these definitions and the definition of corruption, where corruption is defined as "the use of public influence for private gain or benefit ..."[9] or "misuse of public authority for personal gain"[10] Despite this similarity, the word corruption remains more general and comprehensive than the crime of illicit enrichment, which is a form of corruption.

2. Scope of application of illicit enrichment.

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[5] Lindy **MUZİLA**, and authers, Criminalizing Illicit Enrichment to Fight Corruption, International Bank for Reconstruction and Development, 2012, p 13
[6] Code penal du senegal 1965 art. 163 bis
[7] Ordonnance n° 92-024 du 18 juin 1992 portant répression de l'enrichissement illicite.
(Journal Officiel spécial n° 01 du 18 juin 1992)
[8] Avant-projet de code penal marrocain art. 256-7
[9] Jassim **DAHABI**, Administrative Corruption and its Economic and Social Cost, article.
[10] Saif Rashed **Al-JABRI** and Kamal Sakr al-Qaisi, How Islam Faceed Administrative Corruption, First Edition, 2005, p. 37

The illicit enrichment is characterized by the rest of the financial crimes in the scope of application, through the advanced presentation of the concept of the crime of graft and its relationship to corruption in terms of concept, we find a question may appear, Is corruption in its administrative and financial form, including the illicit enrichment, achieved within the scope of government departments or public sector activity only? Or it can be achieved in the private sector as well?

Some believe that illicit enrichment occurs only in the public and government sectors, in the sense that such corruption is achieved by persons who have administrative and financial deviations when performing their duties in the public sector or while performing public service. Others believe that illicit enrichment is not limited to deviations Administrative or financial offenses committed by the employee or public service in the state or public sector, but also includes deviations that fall within the activities of the private sector, with the aim of achieving material or illegal gains of the same person or others. Through the application of states in their national legislation, the crime of financial corruption extends from the public sector to the private sectors. Financial crimes may be crimes of corruption punishable by law regardless of their personal status. The crime of illicit enrichment only for the public sector, which they exploit their status for special interests. Some States have consistently identified those who are subject to this law.

2.1 Mali.

İn Mali the law No. 82-39 / AN-RM was promulgated on March 26, 1982, which defined the scope of application of the crime of illicit enrichment t law's, this law states that the Public Prosecutor of the Special Court of State Security are competence to investigate with “any civil or military employee and all employees by the State, public authorities, companies and all types of public or mixed State institutions whose assets are presumed illegal under Article II Of this law”[11]

2.2 Niger.

Niger promulgated Act No. 92-024 of 18 June 1992, the law of illicit enrichment, in which it determined the nature of the crime and the penalty prescribed for it, The first article of the law shows that the legislator wanted to expand the scope, as stated in the article, “The illicit enrichment is formed when a person acquires assets or exercises a kind of life for which his earnings do not allow him to give a justification” the word a person is absolute and

[11] the law No. 82-39 / AN-RM Article 7

unrestricted, and may enter the public and private sector, however, the second article is in states the crime is constituted by public activity, but the article is still unclear because the private sector may carry out public activity, but it may by understood that public official are intended in this law anyway. With a more severe penalty than other financial crimes.[12]

2.3 Senegal.

In Senegal, Act No. 81-53 was issued on 10 July 1981 concerning the illicit enrichment after the presentation of the causes and components of the crime. The law stated the scope of the application in a clear and limited way. In Article III of the corresponding law the Article 163 bis of the Criminal Code mentioning follows:

• Everyone elected or appointed for a public office.

• Judges.

• Civilian, military or public officials.

• Persons in charge of a public office.

• Public ministries.

• Anyone who manages:

- Public Institution.

- A national company.

- A mixed company subject to State control.

- A legal personality in private law receiving state support.

- A special body entrusted with the implementation of a public service.

- A public institution of public benefit.

It is clear that the Senegalese law was clear in determining the scope of application of the this law, which may be distinguished from other countries. In the same law, a special court was set up, known as the " Private courts of illicit enrichment " which is until now in force.

3. Senegalese Private courts of illicit enrichment.

3.1 Creation.

[12] Niandou **KARIMOUN**, La coruption des fonctionaires au Niger, p 19

Senegal was one of the first African States to consider illicit enrichment a punishable offense. In 1981, the Senegalese President adopted Act No. 81-53 concerning this crime. The main motive behind the promulgation of this law also incorporating it into the Senegalese Penal Code, was an actual application of socialist ideology which the President belongs, which led him to explain the reasons behind the enactment of this law by saying: “In order for the public authorities to be in line with the socialist option, we would like to establish ways to eradicate from Senegalese society practices that are contrary to our ethics, lead to social injustice, paralyze the development of the country and undermine democracy”.

The Senegalese legislator not only adopted the law but also established a special court, consisting of a special prosecutor, an investigation chamber and a trial chamber. However, the court did not have much activity. From its inception until 2013, it had only two cases. The court had a controversial case, known as the "traque des biens mal acquis", which targeted a number of officials of the liberal party system between 2000 and 2012. At the end of the Liberal Alliance, a large-scale financial corruption was observed involving government ministers and accomplices, the most famous of which was former minister Karim Wade.

3.2 Competences.

Article 163 bis of the Penal Code of Senegal states in its first and second paragraphs the limits of the crime of illicit enrichment, its substantive and personal jurisdiction, and the penalty prescribed for it as follow. “Illicit enrichment of any elected public official, appointed government official, any judge, civil or military official of the State, public authority, any person authorized to perform a public office, a person entrusted with public activity or ministerial action, or A person who manages an institution of a public nature, a national corporation, a mixed corporation subject to the control of the State, or legal persons benefiting from government support, the professional public system, the private institutions authorized to implement a public facility, or institutions and associations of public utility, Shall be punished with a term of imprisonment of five to ten years and a fine equal to the amount of the gain at least”[13]

“The crime of graft is formed when one of the above-mentioned participants is given notice, unable to give justifications for the legal assets that permit him to acquire these assets, or when he practices a kind of life that is not commensurate with his legitimate income”[14]

[13] Article 163 bis paragraphe 1 of the Senegalese Penal Code 1965
[14] Article 163 bis paragraphe 2 of the Senegalese Penal Code 1965

While the rest of the paragraphs states the means of proving the crime and the provisions of accomplices to the crime as follows:

Paragraph (3) "The legality of assets owned may be proved by any means."

Paragraph (4) "However, it is not enough to adhere to a donation only as a means of proving assets."

Paragraph (6) "In the event that the illicit enrichment is made by a third party, or the natural person who manages a moral person, they shall be prosecuted as accomplices with the principal perpetrator".

3.3 composition.

The Court consists of three main organs: the Trial Chamber, the Public Prosecutor's Office and the Commission of Inquiry, as stipulated in the Constitutional Law of the Court No. 81-54 in Section I, Article 2, Section II, Article 4, and Section III, Article 8, as follows:

3.3.1 Trial Chamber.

The trial Chamber consists of a president and four assistants, chosen by presidential decree from the judges of the courts in the first and second levels of the judiciary.

3.3.2 The Public Prosecution.

The Public Prosecution exercises its functions as a special public prosecutor appointed by presidential decree. It shall have the same powers as the Republican Attorney General in all his affairs related to his work. He is the only one competent to issue an arrest warrant according to the provisions of Article 163 bis.

3.3.3 Commission of Inquiry.

The commission of inquiry It consists of a president and three judges appointed by presidential decree, among the judges of the courts in the first and second degrees.

3.4 Procedures.

The process of trial and pleadings takes place through three stages: the preliminary investigation stage, the judicial investigation stage, and the trial stage.[15]

3.4.1 the preliminary investigation.

The prosecution process begins when the case is brought before the Public Prosecutor or the Public Prosecutor submits the case on his or her own initiative The Attorney General then directs the investigating police to order a preliminary investigation. If the investigation finds evidence indicating illicit enrichment, the prosecutor will call the person concerned and inform him of the possibility of prosecuting the crime of illicit enrichment. The files related to the prosecution must be delivered 48 hours before the summons, The suspect may have legal counsel, on the appointed day, the Attorney General hears from the suspect, with the possibility the present of his counsel, and he has to inform him the results of the investigation, and all details related to the amount of his assets, compared to the current assets and the type of his life after being a public official, and then gives him a full month to justify the legitimacy of the assets suspected against him, If the person concerned brings convincing justifications for the legality of his or her assets, the Public Prosecutor shall close the file without prosecution. If the person concerned does not attend or does not bring any evidence or the evidence is unconvincing, the public prosecutor shall refer the case to the Commission of Inquiry. The Public Prosecutor shall transfer the file to the competent authority for the lawful exercise of prosecution.

3.4.2 Judicial investigation.

This stage begins when the Attorney General finds the necessary to continue the prosecutor, and this could be in three possibilities.

First: Absence of the person concerned, second: Attendance without providing any evidence, the third: to provide evidence unconvincing to the Attorney General, The Commission shall take all available means to carry out its mission in the investigation, and its mission shall not exceed six months from the date on which the file is referred to. The investigation shall end with the dismissal or transfer of the case. The decisions of the Committee shall not be subject to any recourse. Before the court, and the judge of the subject can only start the process of the trial or reject the request.

3.4.3 The trial.

[15] Loi n 81-54 du 10 guillet 1981 creant une cour de repression de l enrichissment illicite art. 6,9,10,12,13,14,15,16,17,18

After the order of referral the court begins the trial process, The court must issue its verdict later than two months at the latest. The accused must be prosecuted with the main perpetrators at the same time. The trial process shall be carried out in public and may be ordered by the President of the Court to be closed. The decision shall be read in public and the judgment shall be overturned by the Supreme Court In accordance with Decree No. 60-17 of the Supreme Court, and the judgment of the Court shall be implemented in accordance with the Code of Criminal Procedure.

4. Senegalese Private courts of illicit enrichment and Karim Wade case.

After the fall of the coalition (coalition sopi) in 2012, the Private courts of illicit enrichment (Cour de Répression de l'Enrichissement Illicite) was activated to prosecute 25 officials, including ministers and other public officials. After the initial investigations, The trial began on July 31, 2014 and the court issued its verdict publicly on March 23, 2015. The main suspect in the case is former minister Karim Wade.

4.1 The facts of the case.

From 2000 to 2012, Kareem Wade held several public positions, some of which were governmental. He started as adviser to the President of the Republic, then Chairman of the National Council of Supervision, the National Agency of the Organization of the Islamic Conference (ANOCI) and then Minister in the Republic, during this period he acquired 117,037,993,175 franc CFA, in addition to a number of companies that were not evaluated even at the beginning of the trial. During the investigations, he admitted that before 2000 he had a total asset of 8 billion, other than the movable funds he had, his legal sources of income, including allowances from 2000 to 2012, amount to only 500 million franc CFA. When his assets were estimated to be movables and real estate, the list of charges brought by the public prosecutor for the court included 117 billion franc CFA.

4.2 Court decision.

The defense of the accused Karim was sometimes to deny the ownership of the assets attributed to it, and other times claiming that donations from his father and gifts from foreign president.

The court accepted some evidence, most of which were rejected on the basis of the following:

In the term of deny the ownership The Court stated that “the funds in a bank account belong to the account holder until a reverse proof is established”.

In terms of alleged father-to-son donation, the court stated that "the call to donate only is sufficient to justify the legitimacy of the funds, in addition to the lack of evidence to prove the truth of this donation".

In terms of claiming gifts, the court stated that "the request made by the Attorney General to prove these gifts, Karim did not give convincing answers to him, and it is known that any citizen has the ability to benefit from gifts so expensive should not find it difficult to prove it".

The court found that Karim Wade, who is accused of illegal enrichment, is unable to prove the legality of his assets. For all the motifs mentioned before the court decided that "Karim Mesa Wade is convicted for five years prison for illegal enrichment of 138,239,086,396 franc CFA." [16]

Conclusion.

In general, illicit enrichment is not per se contrary to the presumption of innocence. However, introducing this new criminal offense into a legislation triggers the question of an added value. Namely, the central issue concerning criminal law prevention and suppression of corruption is how to optimize the existing legal framework rather than substituting it with the new one. In other words, instead of introducing a new criminal offense into an anti-corruption legislation, due attention must be paid on how to improve the system of confiscations of illicit proceeds acquired by corruption criminal offenses. So the accent should not be on new criminalization but on improving the already existing system set up to demotivate potential perpetrators from engaging in different forms of illegal exchange. Apart from this argument, introducing illicit enrichment into a legislation could be manipulated in various ways for the purpose of undermining political opposition. Other negative consequences could be an increase in the number of false accusations and similar crime reports not supported by any tangible piece of evidence. Instead of engaging in often very difficult searches for evidence with usually unpredictable outcomes, it would be much easier for the prosecution to rely on an illicit enrichment statute and to shift the burden of proof to the defendant.

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