



JUDICIAL SYSTEM MONITORING PROGRAMME  
 PROGRAMA MONITORIZASAUN SISTEMA JUDISIÁL

PARLIAMENTARY PRIVILEGE AND  
 IMMUNITY IN TIMOR-LESTE:  
 HOW TO ENSURE EQUALITY BEFORE THE LAW?

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 between the Governments  
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## INTRODUCTION

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In this report JSMP examines the scope of parliamentary privilege and immunity in Timor-Leste by analyzing two recent corruption cases against the Deputy Prime Minister Jose Guterres and Minister of Justice Lucia Lobato. These cases highlight the need to clarify the policy of providing broad immunity from criminal proceedings to members of the parliament and government, and its potential conflict with the principle of equality before the law. This issue is directly relevant to the integrity of the key institutions of the State, namely the legislature, executive and the courts. JSMP believes that continuing tensions between these institutions of State and allegations of corruption undermine the public's confidence in their system of democracy and the rule of law in Timor-Leste.

This report explains the concepts of parliamentary privilege and immunity and outlines the scope of privilege and immunity in Indonesia and Portugal. It then examines the constitutional, legal and policy issues relating to the scope of privilege and immunities granted to members of the National Parliament of Timor-Leste and the government. Based on this analysis, JSMP submits the following recommendations:

**Recommendation 1: Article 8 of the Rules of Procedures of the National Parliament should be immediately reviewed and amended to remove broad immunity for members of parliament from criminal proceedings. Article 8.3 must be repealed or at minimum amended so that it only applies where the member has been charged with a less serious criminal offence punishable by less than 2 years imprisonment. This is consistent with the immunity given to members of government under section 113.2 of the Constitution.**

**Recommendation 2: The National Parliament must issue guidelines on the proper procedure for formalizing the suspension of a member of government under section 113.1 of the Constitution. The guidelines must clarify that the suspension applies from the commencement of the legal proceedings (i.e. laying of criminal charges) until the conclusion of the legal proceedings, including any appeal process.**

**Recommendation 3: The National Parliament should clarify that all members of government charged with crimes punishable by more than 2 years imprisonment must be suspended without delay and without discretion.**

**Recommendation 4: The National Parliament should urgently debate Draft Law No.21/II on Anti-Corruption.**

JSMP urges the National Parliament and the government to consider the recommendations made in this report so that the system of privilege and immunity does not undermine the democratic values on which Timor-Leste was founded.

## 1. BACKGROUND

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### A. Concepts of parliamentary privilege and immunity

The term ‘parliamentary privilege’, also known as ‘parliamentary non-accountability’, refers to special legal rights that are given to members of parliament so that they can perform their parliamentary functions without fear of intimidation or punishment and without impediment. The underlying rationale for parliamentary privilege is to protect the independence and autonomy of the institution of parliament from interference from outside bodies, notably the courts and the executive.<sup>1</sup> While the scope of the privilege varies between countries, at minimum it protects members of parliament from legal liability for what they say and do during the course of parliamentary proceedings.<sup>2</sup>

‘Parliamentary immunity’, also referred to as ‘parliamentary inviolability’, is the protection of members of parliament from civil or criminal proceedings for acts undertaken within and outside the exercise of their parliamentary functions. This immunity generally means that members of parliament can only be arrested and/or prosecuted with the consent of the parliament.<sup>3</sup> The underlying rationale for parliamentary immunity is also to protect the independence and autonomy of parliament by allowing parliament to verify that proceedings brought against its members are legally founded.<sup>4</sup> However parliamentary immunity is often criticized as undermining the rule of law which requires that all citizens are equal before the law.

#### *Parliamentary privilege*

Parliamentary privilege or non-accountability is generally guaranteed worldwide either in constitutions or in specific laws, with the exception of only a few countries.<sup>5</sup> The scope of the privilege varies greatly. Generally the privilege applies to what members of parliament say and do in parliamentary proceedings such as words spoken in committee or assembly meetings, written or oral questions and votes. In some countries the privilege may also apply to words spoken during meetings of political groups in parliament, participation in televised or radio debates and interviews.<sup>6</sup> In many countries this privilege extends beyond members of parliament to protect individuals who are required to participate in parliamentary debates and proceedings, such as officers of parliament and witnesses summoned to appear before parliamentary inquiries.<sup>7</sup> The privilege can also extend to those who reproduce parliamentary debates, such as newspaper publishers.<sup>8</sup>

In many common law jurisdictions the privilege is adopted in similar terms to the United Kingdom (UK). Article 9 of the *Bill of Rights 1688* (UK) states that ‘the freedom of speech, and debates or proceedings in Parliament, ought not be impeached or questioned in any court or place out of Parliament’. Article 9 gives members of parliament and others taking part in proceedings of parliament immunity from legal action and examination in legal proceedings. The *Parliamentary Privileges Act 1987* of the Australian Federal Parliament enacts the privilege as stated in the UK Bill of Rights, while clarifying that giving evidence or

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<sup>1</sup> Manfred Nowak, ‘Human Rights Handbook for Parliamentarians’ (2005) at 64-65:  
<<http://www.ohchr.org/Documents/Publications/training13en.pdf>>

<sup>2</sup> Inter-parliamentary Union, ‘Parliamentary Immunity - draft background paper’ (September 2006) at 7:  
<<http://www.gopacnetwork.org/Docs/Global/IPU%20-%20UNDP%20Immunity%20Paper.pdf>>.

<sup>3</sup> Id at 13.

<sup>4</sup> Above n1 at 65.

<sup>5</sup> Above n2 at 7.

<sup>6</sup> Above n2 at 9-10.

<sup>7</sup> Above n2 at 7.

<sup>8</sup> See for example *Parliamentary Papers Act 1840* (UK).

submitting a document to a parliamentary committee amount to ‘proceedings in parliament’ and is covered by the privilege.<sup>9</sup> Canada and New Zealand have legislated in similar terms.

### **Parliamentary immunity**

The practice of parliamentary immunity or inviolability varies across countries. Originating in France, it has never applied in relation to criminal charges in the UK Parliament and other common law countries. In countries where immunity exists, questions have been raised over the level and extent of the protection afforded to members of parliament. Parliamentary immunity is far more controversial than parliamentary privilege and some countries no longer recognize it (eg. Malaysia, Namibia, Netherlands).<sup>10</sup>

In countries where it still exists, the trend has been to increasingly restrict the scope of the immunity to oversight over the arrest and detention of members of parliament but not in relation to bringing criminal charges against members. For example in Iraq, Philippines and Argentina, the arrest of a member of parliament is subject to the consent of parliament.<sup>11</sup> In France, parliament’s authorization to bring criminal charges against a member is only required when the member’s liberty may be restricted. Italy revoked immunity from criminal proceedings in 1993 and other countries, including Belgium and Austria, have further limited parliamentary immunity in the last few decades. Immunity may also be restricted depending on the type of the offence. For example, immunity may not be available for serious crimes. Conversely in Rwanda, immunity is granted for serious crimes only.<sup>12</sup>

## **B. Case studies**

### **Indonesia**

Parliamentary privilege for members of the People’s Representative Council (DPR) and the People’s Consultative Assembly (MPR) of Indonesia provides an interesting case study for Timor-Leste. Article 20.3 of the Indonesian Constitution of 1945 states that ‘in addition to the other rights provided for in this Constitution, members of the People’s Representative Council have the right to pose questions, present proposals and opinions, as well as the right to immunity’.

This matter is provided for more specifically in article 196 of Law No. 27/2009,<sup>13</sup> commonly known as the MD3 Law. Article 196.2 states that:

Members of the DPR cannot be prosecuted before the courts for their statements, questions and/or opinions that are expressed orally or in written form during meetings of the DPR or outside of meetings of the DPR which relate to the functions, duties and competencies of the DPR.

While referred to as ‘immunity’, this protection falls within the concept of parliamentary privilege or non-accountability. It provides limited protection from legal proceedings for acts done in connection with the performance of the member’s parliamentary duties. It does not provide members with general immunity from criminal and civil proceedings for acts done outside the performance of the member’s parliamentary

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<sup>9</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (11 March 2010): <<http://www.alrc.gov.au/publications/report-112>>

<sup>10</sup> Above n9 at 116.

<sup>11</sup> Above n2 at 15.

<sup>12</sup> Above n2 at 15.

<sup>13</sup> Law on the People’s Consultative Assembly, People’s Representative Council, District Consultative Assembly and District Representative Council.

functions.<sup>14</sup> It is clearly aimed at allowing members to fulfill their functions without fear of legal persecution. A practical example of the scope of this privilege is in relation to action for defamation. Members of the DPR or MPR cannot be sued for defamation for statements made in parliament about individuals which are then quoted by the media.<sup>15</sup>

Article 196.4 of the MD3 Law set outs two exceptions where privilege does not apply: if a member of parliament discloses the contents of a meeting that has already been declared confidential or the member is disclosing something else that is understood to constitute a state secret. However, at the present time this exception is obscure because the rules regarding state secrets have not yet been prescribed. Further, if the statement, question or opinion raised by the member is incorrect or unethical and is considered to tarnish the good name of an individual, there is a mechanism to report the matter to the DPR Disciplinary Board<sup>16</sup>.

## **Portugal**

Portugal provides an interesting comparative case study for Timor-Leste given the colonial history and continuing influence of the Portuguese language and legal tradition on the legal system of Timor-Leste. There are many similarities between the organization of the states of Portugal and Timor-Leste, including the constitutions of the respective countries.

The Constitution of the Portuguese Republic<sup>17</sup> establishes immunity from criminal proceedings for the President, members of the Assembly of the Republic and members of the government.

Article 130 of the Constitution provides the President with both jurisdictional privilege and immunity from criminal proceedings. Article 130(1) states that the President can only be prosecuted for crimes committed in the exercise of presidential functions by the Supreme Court of Justice (i.e. jurisdictional privilege). Article 130.2 states that criminal proceedings against the President can only be initiated with the approval of the Assembly of the Republic. The President also enjoys complete immunity from criminal prosecution for crimes committed outside the exercise of official functions, but only for the duration of the term of office (article 130.4).

Members of the Assembly of the Republic enjoy both parliamentary privilege and limited immunity from criminal proceedings under article 157 of the Constitution.

### **Article 157 (immunities)**

1. Members shall not be civilly or criminally liable for or subject to disciplinary proceedings in relation to their votes or the opinions they express in the performance of their functions.
2. Members shall not appear as makers of declarations or defendants without the Assembly's authorization. In the event of strong evidence of the commission of a serious crime punishable by imprisonment for a maximum term of more than three years, the Assembly shall obligatorily authorize a Member's appearance as defendant.

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<sup>14</sup> The DPR and MPR are responsible for legislative, budgetary and oversight functions (article 69.1 of the MD3 Law). See further article 71 of the MD3 Law for the duties and competencies of the DPR and MPR.

<sup>15</sup> 'Defamation' is a civil action that allows a person whose reputation has been harmed by the publication of materials, words or other means, to sue the person responsible.

<sup>16</sup> Media Indonesia, 'The Right to Immunity applies to members of the DPR and MPR' (6 May 2011): <<http://www.mediaindonesia.com/read/2009/12/15/111707/16/1/Hak-Imunitas-Melekat-Pada-Anggota-DPR/ya>>

<sup>17</sup> Seventh Revision, 2005 (English version as approved by the Assembly of the Republic): <<http://www.tribunalconstitucional.pt/tc/conteudo/files/constituicaoingles.pdf>>

3. No Member may be detained, arrested or imprisoned without the Assembly's authorization, save for a serious crime punishable by the type of prison term referred to in the previous paragraph and in flagrante delicto.
4. In the event that criminal proceedings are brought against any Member and he is definitively charged, the Assembly shall decide whether or not he is to be suspended so that the proceedings can take their course. In the event of a crime of the type referred to in the previous paragraphs, the Assembly shall obligatorily suspend the Member.

Article 157.1 protects members from civil, criminal or disciplinary proceedings for acts committed in relation to the exercise of their parliamentary functions. Articles 157.2 and 157.3 provide immunity from being called as a witness or defendant, or from being arrested, detained or imprisoned without the approval of the parliament. This immunity does not apply where the relevant crime is punishable by maximum imprisonment of more than three years or where the member has been arrested flagrante delicto (i.e. in the commission of a crime).

Article 157.4 states that where a member has been charged with a crime, parliament will decide whether to suspend that member. However, parliament must suspend the member where the relevant crime is punishable by imprisonment of more than three years. That is, immunity must be lifted for serious crimes.

Article 196 establishes a similar system of immunity for members of the government. The key point of difference is that government members do not enjoy immunity from being compelled as witnesses to legal proceedings.

## 2. PARLIAMENTARY PRIVILEGE AND IMMUNITY IN TIMOR-LESTE

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### A. Parliamentary privilege and immunity for members of the National Parliament

The Democratic Republic of Timor-Leste is a democratic, sovereign, independent and unitary State based on the rule of law, the will of the people and respect for the dignity of the human person.<sup>18</sup> The State comprises the President, the National Parliament, the government and the courts.<sup>19</sup> The Prime Minister, who heads the government, is designated by the political party holding the majority of seats in the parliament or by a majority coalition of parties.<sup>20</sup> Members of the government are appointed by the President on the recommendation of the Prime Minister.<sup>21</sup> Members of parliament must resign if appointed as a member of the government.<sup>22</sup>

Section 94 of the Constitution of the Democratic Republic of Timor-Leste provides for parliamentary privilege for members of the National Parliament:

#### **Section 94 (Immunities)**

1. The Members of National Parliament shall not be held liable for civil, criminal or disciplinary proceedings in regard to votes and opinions expressed by them while performing their functions.
2. Parliamentary immunities may be withdrawn in accordance with the Rules of Procedures of the National Parliament.

Section 94 is drafted in identical terms to article 157.1 of the Constitution of Portugal and is similar to article 20.3 of the Indonesian Constitution. It is also similar in scope to provisions in many common law jurisdictions including the UK and Australia. It provides members of parliament protection from all legal proceedings relating to acts undertaken in the performance of their parliamentary functions.

The Rules of Procedures of the National Parliament further provides:

#### **Article 8 (Immunity)**

1. Members of Parliament are not subject to civil, criminal or disciplinary proceedings for the votes or opinions expressed in the exercise of his duties or because of them.
2. No Member of Parliament can be preventively detained or arrested, except for a felony punishable by imprisonment exceeding five years, without authorization given by the National Parliament.
3. In the event that there are criminal proceedings initiated against a Member of Parliament and such Member is definitively charged, the National Parliament shall decide whether this Member shall be suspended in order to give continuation to the process.
4. The suspension referred to in the preceding paragraph shall be requested by the competent judge in a document addressed to the National Parliament, with the decision to be taken by secret ballot and by absolute majority of Members present, preceding the opinion issued by the competent committee.

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<sup>18</sup> Section 1 of Constitution of the Democratic Republic of Timor-Leste (hereinafter the 'Constitution').

<sup>19</sup> Section 67 of the Constitution.

<sup>20</sup> Section 106.1 of the Constitution.

<sup>21</sup> Section 106.2 of the Constitution.

<sup>22</sup> Article 5 of the Law on the Status of Members (4/2005).



5. The decision not to suspend the Member automatically produces the effect of suspending limitation periods in relation to matters provided for in criminal law.

Article 8.1 of the Rules of Procedure is a restatement of the parliamentary privilege contained in section 94.1 of the Constitution.

Article 8.2 provides limited immunity by giving parliament oversight over the preventative detention and arrest of its members. This immunity is not expressly limited to legal action arising from the performance of the member's parliamentary functions. However, it does not apply in relation to crimes punishable by imprisonment of more than 5 years. Under the Portuguese system, this type of immunity does not apply in relation to crimes punishable by imprisonment of more than 3 years.

Article 8.3 further provides that only parliament can suspend a member who has been charged with a crime so that legal proceedings can continue against that member. This article is broad and has been ambiguously drafted. It is not expressly limited to criminal proceedings for crimes punishable by imprisonment of less than 5 years, unlike article 8.2. It is also unclear whether the 'continuation to the process' includes imprisonment on the finding of guilt. This provision is far broader than article 157.4 of the Constitution of Portugal which states that parliament must suspend a member where the crime charged is punishable by more than three years imprisonment.

Article 8.4 outlines the process for suspending a member of parliament pursuant to article 8.3.

Article 8.5 relates to the timeframe of the immunity. The intention appears to be that immunity from criminal proceedings is only effective for the duration of the member's term of office. Members of parliament can subsequently be prosecuted for crimes after the end of the members' parliamentary term. A refusal by parliament to suspend the member will automatically suspend any statute of limitations applicable to the offence.

## **B. Immunity for members of the government**

Section 113 of the Constitution outlines the scope of immunity for members of the government.

### **Section 113 (Criminal liability of the members of Government)**

1. Where a member of the Government is charged with a criminal offence punishable with a sentence of imprisonment for more than two years, he or she shall be suspended from his or her functions so that the proceedings can be pursued.
2. Where a member of the Government is charged with a criminal offence punishable with a sentence of imprisonment for a maximum of two years, the National Parliament shall decide whether or not that member of the Government shall be suspended so that the proceedings can be pursued.

### **Section 114 (Immunities for members of the Government)**

No member of the Government may be detained or imprisoned without the permission of the National Parliament, except for a felonious crime punishable with a maximum sentence of imprisonment for more than two years and in flagrante delicto.

Sections 113 and 114 provide a much more limited immunity for members of the government than article 8 of the Rules of Procedures of the National Parliament. Government members must be suspended when charged with a crime punishable by imprisonment of more than two years (article 113.1). Only where the

charge is for a crime punishable by maximum imprisonment of two years does the parliament have authority to decide whether or not to suspend that member (article 113.2). Parliament only has the authority to refuse permission for the detention or imprisonment of a member of government where the relevant crime is punishable by imprisonment of maximum two years (article 114).

When the member of government is charged with a crime punishable by imprisonment of more than two years or is caught in the commission of the crime (i.e. in flagrante delicto), parliament has no power to prevent the member's detention or imprisonment. This provision is more limited than the equivalent provision in the Constitution of the Portuguese Republic which automatically lifts immunity for crimes punishable by imprisonment of more than three years.<sup>23</sup>

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<sup>23</sup> Article 196 of the Constitution of the Portuguese Republic.

### 3. THE CASE OF DEPUTY PRIME MINISTER JOSÉ LUIS GUTERRES

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#### A. Chronology of events

Jose Luis Guterres is the current First Deputy Prime Minister of Social Affairs of Timor-Leste under the leadership of Prime Minister Xanana Gusmão who formed a coalition government in 2007. Under the previous government led by Mari Ben Amude Alkatiri, Guterres served as the Vice-Minister of Foreign Affairs and then Ambassador to the United Nations in New York.

In 2011 while serving as First Deputy Prime Minister for Social Affairs, Guterres was embroiled in allegations of corruption and abuse of power. The allegations originated from 2006 when he was serving as the Ambassador to the United Nations in New York under the second government of Timor-Leste led by Prime Minister Alkatiri.<sup>24</sup> This case was brought to the public's attention after a report was made by the Fretilín party via the Office of the Ombudsman for Human Rights and Justice which was then referred to the Office of the Prosecutor-General.

31 August 2011	<p>The national newspaper <i>Tempo Semanal</i> publishes the following information relating to the charges of corruption against the First Deputy Prime Minister:</p> <p>Based on a confidential document dated 31/08/2010 from the Office of the Prosecutor-General that was accessed by <i>Tempo Semanal</i>, the Public Prosecutor charged Jose Luis Guterres, Vice Prime Minister of Timor-Leste, Minister of Foreign Affairs, Zacarias Albano da Costa, Joao F. do Camara, Timor-Leste Ambassador to Thailand, Rogeiro dos Santos, Official or Diplomat assigned to the TL Embassy in Brazil and Ana Maria de Jesus Moreira Valeiro for their involvement in the criminal act of collusion to enrich themselves.</p> <p>The indictment against Guterres is for corruption under article 292 of the Penal Code (passive corruption for an illegal act) and abuse of power under article 297 of the Penal Code.</p> <p>The document from the Office of the Prosecutor-General accessed by the newspaper states that the illegal acts of the government officials cost the State a total of US\$19,569.</p>
2 March 2011	<p>Guterres attends Dili District Court to provide testimony relating to the charges.</p> <p>However, the hearing does not take place because of his immunity as a member of the government under section 113(2) of the Constitution. The trial is adjourned another two times by Dili District Court for the same reason.</p>

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<sup>24</sup> Timor Post (3 March 2011) at 1.

6 April 2011	<p>In an extraordinary plenary session, 38 of the 56 members present in the National Parliament vote in favour of Resolution No. 62/11 on the suspension of Guterres from his post as Deputy Prime Minister. This resolution removes his immunity so that he is compelled to appear in court.</p> <p>Resolution No. 62/II states:</p> <p style="padding-left: 40px;">Pursuant to Article 113.1 of the RDTL Constitution, the National Parliament temporarily suspends JLG from duty so that his case can be heard by the Dili District Court.</p>
11 April 2011	Dili District Court hears testimony from Guterres and examines several witnesses.
14 April 2011	A second hearing takes place to examine other witnesses.
9 May 2011	Dili District Court reads out a decision presenting its findings on the facts in the case against Guterres. Dili District Court finds Guterres not guilty of committing the criminal act of abuse of power as charged by the Public Prosecutor.

## B. Legal analysis of the case

The Timor-Leste Penal Code defines three types of corruption: passive corruption for an unlawful act, passive corruption for a lawful act and active corruption.

Article 292 deals with passive corruption for an unlawful act which carries a sentence of between 3 and 15 years imprisonment. Passive corruption for an unlawful act is where an official requests or accepts any undue benefit in exchange for an act or omission that is contrary to the duties of the office.

### **Article 292 (Passive corruption for an unlawful act)**

1. Any official who, directly or through a third party endorsed by the former, requests or accepts, for him or herself or any third party, any undue material or immaterial benefit, or promise thereof, in exchange for an act or omission contrary to the duties attached to the office, even if prior to said request or acceptance, is punishable with 3 to 15 years imprisonment.
2. Whenever the perpetrator, before commission of the act, voluntarily repudiates the offer or promise accepted, or returns the benefit, or, when a fungible item, restitutes its value, the same shall not be punished.
3. The penalty is extraordinarily mitigated whenever the perpetrator assists in collection of decisive evidence for identification or capture of other persons responsible.

Article 293 of the Penal Code defines passive corruption for a lawful act which carries a sentence of three years imprisonment or a fine. Passive corruption for a lawful act is where the official requests or accepts any undue benefit in exchange for an act or omission which is not contrary to the duties of the office. For example, this article would cover situations where the official accepts gifts from individuals and businesses who want to win influence the official in the future.

Article 294 of the Penal Code defines active corruption which applies to the person who gives or promises to give a benefit to the official in exchange for the official's conduct.

Article 297 of the Penal Code defines the offence of abuse of power by an official:

**Article 297 (Abuse of power)**

Any official who abuses powers or violates duties inherent to his or her office, with intent to obtain, for him or herself or any third party, any unlawful benefit or to cause loss to another, is punishable with 1 to 4 years imprisonment if no heavier penalty is applicable by virtue of another legal provision.

The offences of passive corruption for an unlawful act and abuse of power have similar elements. Abuse of power is wider in scope as it is not limited to acts done by an official for personal benefit or the benefit of a third party, but also covers intentional acts done by the official to cause loss to another person. Article 297 covers more broadly 'abuses of power' by the official. It is unclear what 'abuses of power' may include. It appears that the offence of abuse of power was included in the Penal Code to cover cases where the stricter elements required by the more serious offences of passive corruption cannot be proven.

Article 297 was ultimately relied on by the Prosecutor to charge Guterres after the charge of passive corruption for an unlawful act was dropped. Presumably, the Prosecutor decided that the facts of the case could only support the lesser charge of abuse of power. Guterres was found not guilty of the charge of abuse of power under article 297 by Dili District Court on 9 May 2011.

Section 113 of the Constitution relating to immunity for members of the government from criminal charges is relevant to this case. One of the critical issues was the nature of the criminal charge against Guterres.

Guterres was originally charged under article 292 (passive corruption for an unlawful act) and article 297 (abuse of power). Later the charge for passive corruption was dropped. Both offences carry a maximum sentence of more than 2 years. Therefore, section 113.1 of the Constitution, which relates to offences punishable by a sentence of more than 2 years, was applicable to this case. Section 113.1 of the Constitution provides that the member must be suspended when charged with an offence punishable by imprisonment of more than 2 years so that legal proceedings against him can be pursued.

There is also the issue of whether section 113.1 of the Constitution provides for automatic suspension or whether a competent body has to formalize the suspension. Prime Minister Xanana Gusmão stated that he did not have competence to suspend Guterres as a member of the government. He stated that only the National Parliament was competent to do so. The Prime Minister referred the issue to the National Parliament to take action in accordance with their authority under section 113.2 of the Constitution to decide if it was necessary to remove Guterres' immunity. However as Guterres was charged with offences carrying penalties of more than 2 years imprisonment, section 113.1 of the Constitution applied rather than section 113.2.

Even if parliament was the proper institution with authority to suspend Guterres, it did not have discretion to vote against the suspension. A decision by the National Parliament not to suspend Guterres would have been constitutionally invalid. It is strongly arguable that Guterres' immunity was automatically removed once he was charged with an offence carrying a sentence of more than 2 years and that it was not necessary to go through the parliamentary procedure. Alternatively, it could be argued that either the Prime Minister or the President had the authority to formalize the suspension so that the legal proceedings could be pursued.

### C. Public reaction to the events

The decision of Dili District Court was met with mixed responses from the community. Some parts of the community were of the opinion that the decision was the result of pressure placed on the court by political parties and therefore the result was not truly fair and just. As such, the public considered that there was potential for politicization and created much public debate.

Resolution No.62/II to suspend Guterres was met with objections from the opposition Fretilin party. They disagreed with the contents of the resolution because it suspended Guterres 'temporarily'. Fretilin argued that this violated the Constitution because section 113.1 does not refer to any 'temporary' suspension. Aniceto Guterres, Chairman of the Fretilin opposition in Parliament, stated:

We ask for a full suspension. Full suspension is what is provided for in the law, so that the act can be tried. This is the term that is used. We can't just make things up..... If he is suspended today, then he will attend court tomorrow. When the suspension is finished then the circumstances will be different. Next week he will have to be suspended again so he can attend court. This doesn't happen anywhere in the world..... Ordinary rules and principles regarding suspension around the entire world establish that if a person is suspended in order to answer to charges in court then the suspension will be maintained for as long as the legal process continues.

On the other hand, the President of the National Parliament, Fernando de Araujo, stated that:

This suspension is a penalty. But, the decision against our deputy Prime Minister to remove his immunity today is so that he can attend the trial. I think this is fair....The court will decide if he is to be penalized for 2 or 10, or 2 to 3 years. I believe that the Prime Minister will suspend him, but we cannot make a decision before the court finds a person guilty.

While the difference of opinion between the parties was largely based on the respective political interests of the parties, it is also apparent that this case progressed slowly due to excessive bureaucracy and confusion over the process of removing a government member's immunity under the Constitution.

## 4. THE CASE OF MINISTER OF JUSTICE LÚCIA LOBATO

This section relates to the case for corruption against the Minister of Justice, Lúcia Lobato. At the time of writing this report, the Dili District Court has handed down a decision finding the Minister guilty of taking advantage of her position and profiting from economic activities under article 299 of the Penal Code (economic participation). She was sentenced to 5 years in prison for this crime.<sup>25</sup> As the defendant has a right to appeal against this decision, this section will explain the facts and chronology of the case so as to not prejudice the legal proceedings.

It should be noted that the defendant had resisted calls for her resignation and rejects the charges made against her. Some members of parliament have stated that the suspension must only apply when the defendant is required to appear before the court while others think that the suspension must apply for the entire duration of the legal proceedings until a final decision is handed down. Some members of Fretilin have refused to vote on the resolution regarding the suspension of the Minister and lifting of the immunity because they consider that it is the responsibility of the Prime Minister to suspend the Minister. These differing views highlight the need for greater clarity on the proper procedure for lifting the immunity of members of the parliament and government.

29 November 2011	<p>Office of the Prosecutor-General decides to charge the Minister of Justice, Lucia Lobato, with three counts of aggravated maladministration under article 274.1 and 274.2 of the Penal Code and aggravated abuse of power under article 297 of the Penal Code. Applicable penalties are increased by one third (i.e. aggravated) when they apply to offences committed by a holder of public office (article 301.1 of the Penal Code). The Prosecutor also accuses the defendant with article 299 concerning economic participation. All charges carry penalties of more than 2 years imprisonment.</p> <p>An employee of the Ministry of Justice, Antonio de Araujo Freitas, is also charged with the offences of falsifying documents, abuse of power, maladministration under the Penal Code and corruption under the Penal Code and article 3 of the Indonesian Law No.31/1999 on Anti-Corruption.</p> <p>The charges relate to the construction of civil registry buildings (<i>Direcção Nacional dos Registo e dos Notariado</i>) in 2009 in 8 districts with a total cost of US\$1.6 million. The Public Prosecutor claims that the Minister colluded with a tenderer to award the building contract contrary to the procurement guidelines.</p>
9 February 2012	<p>Dili District Court sends a letter to the National Parliament requesting that it suspend the immunity of the Minister of Justice so that she can attend the court hearing relating to the charges on 14 March 2012.</p>

<sup>25</sup> Dili District Court handed down its decision on 8 June 2012.

2 March 2012	Request to suspend Lobato's immunity is referred to Committee I of the National Parliament which deals with internal regulations, ethics and mandate of parliamentarians.
14 March 2012	Court hearing cannot proceed as parliament has not passed a resolution suspending Minister Lobato's immunity. Dili District Court adjourns the hearing until 24 May 2012.
20 March 2012	<p>Committee I finds that parliament must lift the immunity of the Minister for Justice pursuant to the Constitution so that she can answer the charges against her in the Dili District Court.</p> <p>The National Parliament approves Resolution No. 87/II lifting Lobato's immunity. It reads:</p> <p style="padding-left: 40px;">The national parliament decides, in accordance with the provisions of Section 113 of the Constitution of the Republic, the following:</p> <p style="padding-left: 40px;">Suspend the Hon. Minister of Justice from the exercise of her functions, for the continuation of Case No. 622/2011.TDDIL <b>with immediate effect</b>.</p> <p>However, the President of the National Parliament decides to cancel the gazettal of the resolution and proposes Draft Resolution No. 89/II which suspends the Minister from the date of the beginning of the trial until the final decision.</p>
21 March 2012	Resolution No. 87/II is published in the Journal of the Republic (gazetted). The resolution suspends the Minister with immediate effect rather than delaying the suspension until the court hearing date.
2 April 2012	The National Parliament schedules the debate of Draft Resolution No. 89/II to amend previous Resolution No. 87/II and delay the suspension of the Minister until the date of the court hearing. Parliament cannot debate and pass the resolution as it cannot form a quorum.
23 April 2012	<p>The Prime Minister assumes the duties and powers of the Minister of Justice. The press release from the Secretariat of State of the Council of Ministers state that:</p> <p style="padding-left: 40px;">This exercise of jurisdiction will extend the duration of the suspension of duties of the Minister of Justice, with the suspension to expire upon the completion of the relevant judicial proceedings.</p>
24 April 2012	The Dili District Court commences hearing the charges against Lobato. The defendant and her co-accused, Antonio Freitas, gives testimony. The trial is expected to continue for 4 days until 27 April 2012.



May 2012	The trial continues in the Dili District Court.
23-25 and 28 May 2012	Dili District Court continues to hear Case No. 62/C/Ord/2011/TDD and Case No. 580/C.Ord/2011/TDD involving the ex-Minister for Justice and Antonio Freitas as defendants.
30 May 2012	<p>Dili District Court continues to hear the case and schedules final arguments.</p> <p>The Public Prosecutor in its final argument asks the court to sentence Lobato to 12 years imprisonment and Freitas to 9 years imprisonment.</p>
8 June 2012	<p>Dili District Court finds Lobato guilty of taking advantage of her position to profit from economic activity under article 299 of the Penal Code (economic participation). The court sentences Lobato to 5 years in prison and payment of civil compensation to the State of US\$4350 and court fees of US\$300. The court absolves Lobato of allegations of abuse of power and maladministration. The court absolves defendant Antonio Freitas from all charges of falsification of documents, abuse of power and maladministration.</p>

## 5. KEY ISSUES AND ANALYSIS

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The two recent corruption cases outlined in this report have raised a number of questions regarding immunity for members of the government and parliament in Timor-Leste. These questions are directly relevant to the fundamental principle of the rule of law. This principle that everyone, including the State and its representatives, is accountable to laws that are equally enforced and independently adjudicated is fundamental to justice, peace and democracy. Equality before the law, accountability to the law, fairness in the application of the law, the separation of powers, avoidance of arbitrariness and procedural and legal transparency are all essential to upholding the rule of law in a society.<sup>26</sup>

The International Covenant on Civil and Political Rights, which Timor-Leste ratified on 18 Sep 2003, requires that the principles of legality and the rule of law be upheld by the State.<sup>27</sup> The Constitution of Timor-Leste itself enshrines this principle in section 2 (sovereignty and constitutionality) which provides that ‘the State shall be subject to the Constitution and to the law’ and section 16 (universality and equality) which provides that ‘all citizens are equal before the law, shall exercise the same rights and shall be subject to the same duties’.

There are legitimate reasons why certain protections should be given to members of the parliament and government. Parliamentary privilege, where limited to enabling members of parliament to speak freely in debates and represent their constituents, protects the independence of the parliament and promotes the democratic process. Members of parliament must be able to fully carry out their primary functions of making laws, representing the people and conducting oversight of executive government. Nonetheless, there must be mechanisms to ensure that this privilege is not abused, for example to intentionally defame other public figures for political advantage.

Broad immunity from criminal and civil proceedings for both parliamentarians and members of the government threatens the rule of law. It creates a public perception that members of parliament are above the law and undermines public confidence in the parliament, the government as well as the judicial system.<sup>28</sup> Broad immunity also increases the risk of corruption in the institutions of parliament and government. For example in the Ukraine and Peru corrupt government officials have in the past sought to avoid prosecution by being elected to parliament.<sup>29</sup>

*Should members of the National Parliament enjoy immunity from criminal proceedings? Are the provisions of immunity for members contained in the Rules of Procedures of the National Parliament consistent with the Constitution?*

Any special legal rights for members of the parliament and government should only be granted if it is necessary to protect the independence and autonomy of the parliament or to ensure the effective and proper functioning of the government. Where a member of parliament or government has been charged with any criminal offence, it is in the interest of justice to ensure that they are properly tried in court. It is also in the interest of the good administration of justice that members of parliament and government participate as civil litigants or witnesses in legal proceedings. This is consistent with article 2 of the Constitution which states

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<sup>26</sup> Secretary General’s report ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (S/2004/616) at 4: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>>

<sup>27</sup> Article 14 of the International Covenant on Civil and Political Rights.

<sup>28</sup> Above n2 at 19.

<sup>29</sup> Carmen Lane, ‘Parliamentary Immunity and Democracy Development’ (August 2007) DAIdeas Democracy Brief Issue No.2: <[http://www.dai.com/pdf/daideas/Parliamentary\\_Immunity.pdf](http://www.dai.com/pdf/daideas/Parliamentary_Immunity.pdf)>

that the State shall be subject to the Constitution and to the law and the fundamental principle of equality before the law.

Members of parliament must be able to participate freely in parliamentary debates and proceedings without fear of prosecution. However, individuals should also be able to obtain redress for wrongs done by members of parliament. Section 94 of the Constitution attempts to achieve the proper balance by granting members privilege from civil, criminal or disciplinary proceedings only in relation to the performance of their functions and by providing that the privilege may be withdrawn by the National Parliament.

The broad immunity from criminal proceedings provided for by article 8 (immunity) of the Rules of Procedures of the National Parliament is more difficult to justify on public policy grounds. It could be argued that parliament should have some oversight of the arrest and detention of its members so that this power is not used to intimidate, harass or prevent members from fulfilling their functions. However article 8.3 of the Rules of Procedures of the National Parliament effectively provides that only the National Parliament can decide whether a member should face criminal charges in court regardless of the seriousness of the charges. This provision cannot be justified. It is in the interest of justice that a member be made to promptly answer criminal charges in court. To delay court proceedings interferes with the administration of justice, the right of the alleged victim for redress and creates public perception that members of parliament are above the law. Article 8 of the Rules of Procedures of the National Parliament is also inconsistent with the immunity provided to members of the government by the Constitution.

**Recommendation 1: Article 8 of the Rules of Procedures of the National Parliament should be immediately reviewed and amended to remove broad immunity for members of parliament from criminal proceedings. Article 8.3 must be repealed or at minimum amended so that it only applies where the member has been charged with a less serious criminal offence punishable by less than 2 years imprisonment. This is consistent with the immunity given to members of government under section 113.2 of the Constitution.**

*Does section 113.1 of the Constitution provide for automatic suspension or does it require a competent body to formally suspend the member?*

Members of the government of Timor-Leste do not sit within parliament and as such do not enjoy parliamentary privilege. Sections 113 and 114 of the Constitution provide a much more limited immunity for members of the government than article 8 of the Rules of Procedures of the National Parliament. The cases involving the First Deputy Prime Minister of Social Affairs, Jose Luis Guterres, and Minister of Justice, Lucia Lobato, raise questions about whether members of government should enjoy any immunity from criminal prosecution. Both cases involve allegations of corruption. Corruption by public officials is a serious crime which impacts on the proper functioning of the State and undermines people's confidence in their system of democracy. The serious nature of the crime is recognized by article 301 of the Penal Code which provides that where holders of public office commit crimes in the exercise of public functions, the maximum penalty for that crime will be increased by one third.

In cases involving allegations of corruption by a member of government, it is in the public interest that immunity be automatically revoked so that the member can promptly answer the charges. It should be noted that all offences under Title VI of the Penal Code (crimes committed in the exercise of public duties) carry a maximum sentence of at least 2 years.

There is also the issue of whether section 113.1 of the Constitution provides for automatic suspension of a member of government charged with a crime punishable by more than 2 years imprisonment or whether a competent body must formalize the suspension. Section 113.1 is not clear and the practice in the cases of both Guterres and Lobato has been for the National Parliament to refer the matter to Committee I for advice and to debate a resolution on whether to suspend the member. This process is not specified in section 113 of the Constitution and has the potential to delay the court process. This process is only mandated for suspending a member to answer criminal charges punishable by less than 2 years imprisonment under section 113.2 of the Constitution.

*Is it valid to suspend a member temporarily or must the member be suspended until the end of the legal process?*

Resolution No.62/II to suspend Guterres stated that he was suspended temporarily. Parties who disagreed with the contents of the resolution stated that the temporary suspension violated the Constitution because section 113.1 does not refer to any 'temporary' suspension. Section 113 does not specify whether the suspension has to be worded as a 'temporary' or 'permanent' suspension. It is implied that the suspension should commence from the laying of criminal charges and continue for as long as the legal proceedings continue against that member of government. Should the member be found not guilty, the suspension would end. Should the member be found guilty, the normal course of the legal process will continue. The member may have the opportunity to appeal or the sentence will be executed.

**Recommendation 2: The National Parliament must issue guidelines on the proper procedure for formalizing the suspension of a member of government under section 113.1 of the Constitution. The guidelines must clarify that the suspension applies from the commencement of the legal proceedings (i.e. laying of criminal charges) until the conclusion of the legal proceedings, including any appeal process.**

**Recommendation 3: The National Parliament should clarify that all members of government charged with crimes punishable by more than 2 years imprisonment must be suspended without delay and without discretion.**

It should also be noted that Timor-Leste has not yet passed Draft Law No.21/II on Anti-Corruption. This means that Indonesian Law No.31/1999 on Anti-Corruption continues to apply. There have been a number of recent cases involving allegations of corruption by public officials, namely the cases of Guterres and his co-accused, the case against Lobato and the successful prosecution of the former Dili District Administrator, Ruben Joao Braz de Carvalho for fraud and misuse of power. Most recently on 23 April 2012 the National Parliament also approved Resolution No. 70/II which lifts the immunity of the Minister of State Administration and Territorial Management, Dr Arcângelo Leite, on request from the Bacau District Tribunal (42 votes in favour, 1 against and 1 abstaining). The suspension relates to charges against the Minister for maladministration under articles 274.1, 274.2 and 30.2 (joint commission) of the Penal Code. These cases highlight the need to properly investigate and prosecute allegations of corruption in the public service.

**Recommendation 4: The National Parliament should urgently debate Draft Law No.21/II on Anti-Corruption.**

## 6. CONCLUSION

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The issue of whether members of the parliament and government should enjoy immunity from criminal proceedings in Timor-Leste is of fundamental importance as a nation that is continuing to establish and strengthen its system of democracy. It is important to take a balanced approach to ensure that the institutions of parliament and government can function effectively while upholding accountability and the rule of law. Equality before the law, accountability to the law, fairness in the application of the law, the separation of powers, avoidance of arbitrariness and procedural and legal transparency are essential components to a strong democracy. Giving broad immunity from criminal prosecution to some members of the community is contrary to these democratic principles.

JSMP hopes that this report highlights the urgent need to review the policy of providing immunity to members of parliament and the government. JSMP urges the National Parliament and the government to consider the recommendations made in this report so that the system of privilege and immunity does not breach the democratic values on which Timor-Leste was founded.

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