



**15th INTERNATIONAL
ANTI-CORRUPTION
CONFERENCE**

**MOBILISING PEOPLE:
CONNECTING AGENTS OF CHANGE**

**BRASÍLIA BRAZIL
7-10 NOVEMBER 2012**

Long Session Report: Global Solutions

Session Title: Does immunity Lead to Impunity

Date & Time: 7 November 2012

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Experts:

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- **Astrid Leigh, Lawyer**
- **Pramono Anung, Deputy Speaker of Indonesia House of The Representative**
- **Fernando Cepeda, Political Science Professor, University of Colombia**
- **Wellington Saraiva, Prosecutor, Attorney General Office Brazil**
- **Moderated by:
Session coordinated by: Bruno Speck, Professor of Political Science, UNICAMP**

Summary of Panellists' Contributions & Discussion Points (please be as detailed as possible)

Impunity arises from the failure of the state to meet their obligation to investigate violation, to take appropriate measure in respect of the perpetrator, particularly in the area of justice by ensuring that those suspected of criminal responsibility are prosecuted tried and duly punish; to provide victim with effective remedies and to ensure that

they receive preparation for the injuries suffered; to ensure the inalienable right to know the truth about violation, and to take other necessary step to prevent a recurrent of violation.

Immunity slightly closely with impunity. Immunity aim to protect parliament from indirect political pressure when they criticize government. However, this definition of immunity closely related to corruption due to irresponsible behaviour of the parliament member. They believe that they will not be prosecuted.

In many cases parliament members are exactly those who misuse their position to fill their own pocket and to gain more and more power and wealth; cynically also protected by their formal position as political players granting them immunity. Hence, those who make the rules also make sure to be able to escape them, and often enough use their position to dominate the economic life of the country.

The panellist gave different perspective of immunity that lead to impunity. They are diverse from political context, judicial system, electoral system and citizen participation. However, all panellists have the same issue on the ethics of parliament member. The Parliament member is immune to guarantee their duty as people representative.

The four countries experiences showing different approach dealing with immunity. Columbian regulations radically give political death to the perpetrator. Peruvian experienced on Fujimori case flourish citizen concern to monitor on immunity that attributed to their congress. Indonesian and Brazilian parliament member do not have immunity by law, however they have authority to make legislation that are not harmful their interest.

Fernando Cepeda Ulloa:

The political context in Columbia on 1980 was so bad, the parliamentarians abused the immunity privilege . Then on 1991 constituent assembly was held in order to made the new constitution because people did not trust to the congress anymore, that was why the congress did not invited. The new constitution established the new rule, high standard for the congress people and also abolished the immunity privilege and replaced with special “fuero” before the supreme court. Until 5 June 2012, 53 senators and representatives condemned.

Beside that, the new constitution also made 2 strict controls: political death and disciplinary sanction. The political death put an end to the political mandate and it make the person impossible to be elected anymore. Eventhough the person could be appointed for other non election functions. For this political death, 57 members congress sanctioned.

Astrid Leigh:

Peru has parliamentary Immunity that is considered on the article 93 Peruvian Constitution. It protects activities of the congress man in congress not for anything they do outside. But there is a problem. In criminal cases, the congress man can be investigated by police or by prosecutor but they cannot be taken to the criminal court unless the supreme court first has asked congress to lift the immunity of that congress man. It is a very useful tool to protect congress man. But what happens if the congress man involved in criminal cases?

Astrid gave an example: On last July, Peru has elected 130 of the parliament members but 33 of them had prior pending trials or had been convicted in many cases: drugs, trafficking, money laundering, facilitating of prostitution or bribes. How can they be elected? Today, Peru has 33 members who work in congress that have integrity problems and they use their immunity that given by constitution.

In the country that still has fragile democracy like Peru, Immunity to the congress man is still needed from the political pressure. It is very important because political pressure is very strong: money, wealth, power, politics, can come together. In fact, Immunity definitely can lead Impunity. But people can break that circle by put congress man with good integrity and quality.

Bambang Widjojanto

KPK established on 2004, independent from the executive, legislative or judiciary and responsible to the public. KPK has investigation body and also prosecution for corruption and money laundering cases. So far at least 65 parliament members has already sent to the jail, also 8 province governors, 4 ambassadors, etc. In Indonesia, all citizen shall has equal status before the law. In Indonesia, parliament member has immunity in term of to carry all of their function. Immunity only covers privilege of the parliament members in performing their duty, task and authority and not be given to any person who committed to a crime.

Eventhough the other law mention that law enforcement agency police and attorney general should send red notice to the president in order to do investigation. This is also the other form of immunity the politicians. But two months ago, Indonesia Constitutional Court released the decision that mention to abolish the permission. Law enforcement agency should not sent red notice to the president in order to perform investigation. In case of the KPK, this body has special authority can directly detain suspect.

Indonesia Parliament has 3 authorities: first is legislation: to draft, to amend and to pass the bill of law. Second is the budgeting to approve the state budget, and third is interpellation. In this area, potential abuse of power can going up. In Indonesia, one of the law that always to be revised by the parliament is the KPK bill. In many meetings when KPK invited by the parliament, some parliament members asked about the cases. It should not be done. interference of the Parliament is still going on through their authorities. Another challenge, parliament can interfer law agencies by amending, holding, reduce, minimize power or function during the legislation. The second, hold, reject, refuse or limit budget proposed by the law agency, the third one to question or to point the law agency on specific case, investigation or in confidential matters.

Wellington Saraiva

Parliament of Brasil or other authorities do not have any specific kind of immunity law. In Brazil criminal law, there are two different kind of immunity. First, material immunity that against any possibility of prosecution . In criminal law, members of parliament or even president of the republic are able to be prosecuted if they are committed to crime. The second type is formal immunity. It is a kind of protection to be prosecuted and judged by the specific member of prosecutions service or by specific court. Brasil contitution has provision in article 102 that mention to some people, President – Vice President, member of congress, member of the Supreme Court, the Prosecutor General must be judged by the Supreme Court.

Pramono Anung

Indonesia now has the direct election, starts from the chief of the village, Major, Governor, President also the members of parliament from district level or national level. Indonesia has around 500 districts, 33 provinces that means everyday Indonesia has 3 times direct election. The serious problem of this situation are about the money politics, the

corruption, the recruitment of the politicians, and the budget. The reason why the politicians are corrupt also because of the political system.

For the public position like parliament members, just for duty they have immunity. It is also reflected in law 27/2009. However, the immunity does not concern immunity against legal violations.

Main Outcomes (include interesting questions from the floor)

- To implement integrated response to impunity the full support of integrity and accountability of the parliament member as well as civil society participation to monitor their immunity.

Recommendations, follow-up Actions

All the floor agree that (1) immunity is needed to guarantee parliament right to do check and balance, (2) to avoid abuse of immunity, regulation needed, (3) parliament should have high level ethical standard.

Furthermore, civil society play role to break the chain into impunity by actively monitor the accountability and transparency of their representatives. Participation in the law formulation as well as its implementation.

Due to the position of parliament member as political party member, there is a need of high quality of recruitment process. As well as clean and clear financial management.

Parliament member have legislation authority, however they should clean from conflict of interest.

Through its constitutional function (legislation, budgetary, and supervision) always reaffirms its commitment to fight against impunity in relation with corruption cases and strengthen its role to ensure fair and transparent government.

Independency of Law Enforcement Agencies from direct intervention of parliament member where they can only questioning the policy not the case investigated.

Highlights (200 words please include interesting quotes)

Immunity, or in more general term “parliamentary privilege” has been developed by the Legislative over the course of centuries to protect freedom of speech, independent lawmaking and criticizing the government without fear.

Still today in many countries where the rule of law is not guaranteed, where criticizing and exposing the government is not part of the democratic culture and more specifically where the separation between the prosecuting agency and the government does not exist, inconvenient and critical MPs who defy or criticize the government are still subject to different forms of pressure from politicized law enforcement agencies.

Prosecuting MPs for their political action and opinion is banned by rules on immunity, which protect the right to speech. The rules and limits of immunity are often written into the constitution of countries. MPs should not be accountable for their actions as MPs to agencies other than public opinion and the voter.

Where rules of immunity are in place prosecuting MPs might not be an option for the government. In addition, a government that does not respect basic rights of the opposition and reprehends MPs for their political positions might also face domestic and international criticism.

Therefore, prosecuting MPs for civil, administrative and criminal offenses is a way to work around immunity. To protect parliamentarians from this indirect pressure many legislatures have introduced rules of impunity. Impunity protects MPs in a broader sense. It means freedom from prosecution even where a criminal offence exists.

While this extended definition of parliamentary privilege (immunity + impunity) protects the public good of freedom of speech, it has developed new forms of abuse. Protected from prosecution MPs have become irresponsible citizen, trespassing the law in the private realm as well as in public matters. More than that, the office of MP has become a safe haven for criminals who run for office to shield themselves from prosecution.

Parliamentary privilege, meant to protect a public good (free speech and opposition) has turned into a tool to protect private interests.

The panel examined the question of how to design and implement parliamentary immunity “without fear of favour”.

Key Insights Recommended to be included in the IACC Declaration

Abuse of immunity lead to impunity when transparency and accountability of the parliament member absent. They need to be legitimate to their citizen. In conclusion, there are need to regulate parliament immunity and the best initiative should come from the parliament member to voluntarily open their secrecy. The challenges are how to make balance between guarantee parliament free of fear and guarantee their free of favour and personal privilege.

Illian Deta Arta Sari
17 November 2012
