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By By Malik Muhammad Ashraf

The question of presidential immunity is the most controversial issue at the moment and the intellectuals, politicians and the media outlets are all engaged in guiding and misguiding the masses about the intent and the scope of article 248 of the constitution that confers immunity on the President from prosecution. A section of the media seems hyper active in its agenda setting role and hell bent to rub in the theory that the President does not enjoy immunity in regards to the Swiss cases. It has also been maintained that a 13-member Supreme Court bench headed by Justice Khalil Ramday which restored the deposed CJ through a short order on 20th July 2007, in its detailed order issued on 24th December 2009 has already held that the president does not enjoy immunity under article 248.

Unfortunately the proponents of this view have created a lot of confusion by giving interpretations of their own liking to the court decision on NRO and other court judgements without making any distinction and the exceptions implied in those decisions. The confusion surrounding this very vital issue, therefore, necessitates an objective appraisal and anatomy of the article 248 with a view to spotlight what it purports to achieve, to give the masses a clear and unbiased picture of the conundrum and set the record straight. That would first of all require reproduction of the article 248 particularly clauses 2-4 that deal with the immunity to the President and the Governor, to begin with. The said article reads, “(2) No criminal proceeding whatsoever shall be instituted or continued against the president or governor in any court during his term of office. (3) No process for the arrest or imprisonment of the president or a governor shall issue from any court during his term of office. (4) No civil proceedings in civil cases in which relief is claimed against the president or a governor shall be instituted during his term of office in respect of anything done by or not done by him in his personal capacity whether before or after he enters upon his office, unless at least sixty days before the proceedings are instituted, notice in writing has been delivered to him or sent to him in the manner prescribed by law, stating the nature of the proceedings, the cause of action, the name, description and place of residence of the party by whom the proceedings are to be instituted and the relief which the party claims.”

Clause 2 of the Article in categorical terms reiterates that no criminal proceeding of any nature can be instituted or continued against the president and the in any court during his term of office. There is no ambiguity in this clause that would require any interpretation. The stress on the word any court implies courts within and outside the country. Therefore the view by certain circles that the president does not enjoy immunity from prosecution in the foreign courts is out rightly misleading and mala fide. Clause (3) also is very clear and grants absolute immunity to the president and governor from arrest during their

tenure of office. This also needs no interpretation. Clause 4 even grants them immunity from prosecution in civil cases, though a qualified one as spelled out in the clause itself.

Now coming to the contention that the Supreme Court in its judgement while restoring the deposed CJ has held that the president does not enjoy immunity under article 248 and the question of immunity therefore has already been settled (as claimed in a news report by Ansar Abbasi published in The News on 30th January), it may be pointed out that the report has failed to highlight the grounds on which the court held that the president can be impleaded. Para 170 of the judgement which has been referred to reinforce the argument actually bases that view on the breach of the constitution by the president, as he was not competent to remove the CJ. That was a fair comment in terms of article 47 (1) which reads, "Notwithstanding any thing contained in the constitution, the president may, in accordance with the provision of this Article be removed from office on the ground of physical or mental incapacity or impeached on a charge of violating the Constitution or gross misconduct."

As is evident the court used the breach of the constitution as a justification for restoring the deposed CJ only and did not propose initiation of any action against President Musharraf.

Ostensibly the court was aware of the fact that it could not take any action against the president even in case of violation of the constitution by the president and as it was only the prerogative of the Parliament to initiate impeachment proceeding against the president. The best the court could do was to refer the case of infringement of the Constitution to the Parliament. In the quoted judgement also the court has nowhere held that the president can be impleaded even in criminal cases or waived the immunity of the president under Article 248. The Swiss cases against the president are of criminal nature and therefore he cannot be prosecuted during his tenure as president. The interpretation given to the judgement and inferences being drawn are therefore malicious in intent aimed at pushing a particular agenda and also a crude attempt to mislead the masses.

It has also been contended in another report in The News on 2nd February that Barrister Aitzaz Ahsan who was pleading the case on behalf of the deposed CJ, in his arguments before the court had taken the position that the president did not enjoy immunity from prosecution. He is quoted to have told the court that "If Hazrat Umar can be questioned, why not president." Here again he has been quoted out of context. An English daily reporting the court proceedings reported on May 30 that Chaudhry Aitzaz Ahsan told the court that under article 248, the president and governor could not be made a party in criminal cases, they could not be arrested; but if any of their acts was contrary to the law, they have no protection under Article 248.

It is clear that what Aitzaz said then was exactly what the Article 248 says and what Article 47 requires. His pleadings before the court were very much within the confines of law and the constitution. He talked of removal of immunity only in case the president breached the constitution. In his recent press statement also he contended that under Article 248(2) of the constitution no criminal proceedings whatsoever could be instituted

or continued against the president or governor in any court. The president could only be removed from office by the Parliament in accordance with Article 47 and even if a court disqualifies the president from holding public office, the Parliament is the final authority to remove the president from office. There is absolutely no contradiction in what he said before the court in the CJ case and what he has stated now. The only way the president can be removed from office is through impeachment under Article 47. The Supreme Court itself is bound to remain within the domain of the powers conferred on it by the Constitution under the principle of trichotomy of powers. This fact also has been reiterated by the Supreme Court itself in its judgement on the NRO case. The court held that in interpreting and applying the explicit provision of the constitution it will bear in mind the objects of our fundamental law to present the collective aspirations of the people and protecting their interests.

But that as a creature of the Constitution it can only exercise such authority as vested in it by this fundamental law and therefore has no power to venture outside the framework of the Constitution even on grounds of saving the interests of the people of Pakistan.