Stereo. HCJDA 38.

Judgment Sheet

IN THE LAHORE HIGH COURT, LAHORE.

JUDICIAL DEPARTMENT

……..

Writ Petition No. 12091/2024.

Ashba Kamran.

Versus

Federation of Pakistan through Secretary to the President, President's Secretariat, Islamabad and others.

JUDGMENT

Date of hearing: **11.07.2024.**

Petitioner by: Petitioner in person.

Respondent(s) by: Mirza Nasar Ahmad, Additional Attorney General for Pakistan.
Mr. Asad Ali Bajwa, Deputy Attorney General for Pakistan.
Ch. Imtiaz Ellahi, Deputy Attorney General for Pakistan.
M/s Mohsin Raza, Ch. Najam-ul-Hassan, and Ijaz Rehmat Basra, Assistants Attorney General for Pakistan.
M/s Imran Muhammad Naeem, Zeeshan Ghani, Munib Cheema, Hamid Rafique and Jamail Khan, Advocates for respondent No.6 / NADRA.

ASIM HAFEEZ, J. Petitioner, based on the information provided, seeks exercise of jurisdiction under Article 199(1)(b)(ii) of the Constitution of the Islamic Republic of Pakistan, 1973 (**the**

‘Constitution’) to inquire and adjudicate the question that under what ‘*authority of law’* respondent No.6 has been appointed, and is currently holding the *office of Chairman, National Database and Registration Authority* (**the ‘Office’**). National Database and Registration Authority (**the ‘Authority’**) is established in terms of section 3 of the National Database and Registration Authority Ordinance, 2000 (**‘Ordinance, 2000**’). Respondent No.6, ranked Lieutenant General in the Pakistan Army, is called upon to substantiate title to the Office, claimed, which is a public office for all intent and purposes. Notices under Order XXVII-A of Code of Civil Procedure, 1908 were issued. Petition was admitted for regular hearing in wake of legal issues involved. Written statements were submitted by respondent No.5 – Ministry of Interior – and respondent No.6 – [claimant of title to the Office].

2. *Factual narration*: Facts alleged, statedly leading to the change of guard at the Authority, claimed contiguity to the news item published in the Dawn newspaper of *May 6, 2023*, disclosing factum of initiation of criminal proceedings against some of the officials of the Authority [NADRA], accused of accessing data of the Chief of Army Staff (COAS) without authorization – Copy of news item is attached as Annexure-A. In follow-up thereto, another news item appeared in the Dawn newspaper of *June 14, 2023*, reporting an unanticipated resignation by ex-Chairman, NADRA, Tariq Malik. Copy of the news item is attached as Annexure-B. One, Mr. Asad Raza

Gillani, took charge as Acting Chairman of the Authority. In paragraph 11 of the petition reference was made to some advertisement of 06.07.2023 – [captioned: 'Job Advertisement for the post of Chairman NADRA']. Factum of advertisement was not disputed; nonetheless no further action was taken pursuant thereto. Shortly thereafter, the Caretaker Government introduced Rule-7A in the Appointment and Emoluments of Chairman and Members Rules, 2020 (the **'Rules, 2020'**). Rule-7A reads as,

> *"**7A. Secondment or deputation.** -Notwithstanding anything contained in these rules, the Federal Government may, when it considers expedient in national interest, appoint any serving officer of the service of Pakistan, not below the rank and status of BPS-21, as Chairman on secondment or deputation for such term or terms as provided for in sub-section (5) of section 3 of the Ordinance."*

3. It transpired from the contents of the written statement by Respondent No.5, that selection committee considered officers, comprising of the list of officers provided by the Establishment Division and Interior Division, and recommended three officers for the consideration of Caretaker Government. Caretaker Government approved the appointment of respondent No.6, notified through the Notification of 02.10.2023, contents thereof are reproduced hereunder.

GOVERNMENT OF PAKISTAN
MINISTRY OF INTERIOR
*****

No. 10/1/2023-NADRA *Islamabad, the 02nd October, 2023*

NOTIFICATION

In exercise of powers conferred under section 3(3) of the National Database and Registration Authority (NADRA) Ordinance 2000, read with Rule 7A of NADRA (Appointment and Emoluments of Chairman and Members) Rules, 2020, the Federal Government has been pleased to appoint ***Lieutenant***

General Muhammad Munir Afsar *as Chairman NADRA in terms of Section 3(5) of NADRA Ordinance, 2000, with immediate effect and until further orders.*

2. Terms and conditions of his appointment including emoluments will be determined separately.

-S/d-
Dr. Mudassar Rehman
Section Officer (NADRA)

4. As a consequence of General Elections of 8th February 2024, incumbent government assumed office, which proceeded to confirm the insertion of Rule-7A in the Rules, 2020 and appointment of respondent No.6 through two separate Notifications, both dated 28.03.2024, texts whereof are reproduced hereunder, respectively.

(1) GOVERNMENT OF PAKISTAN
MINISTRY OF INTERIOR
*****

No. 1/1/2023-NADRA Islamabad, the 28th March, 2024

NOTIFICATION

In furtherance of this Ministry's Notification dated 13th September 2023, the Federal Government is pleased to confirm the insertion of Rule 7A in NADRA (Appointment and Emoluments of Chairman and Members) Rules, 2020.

In the aforesaid Rules, after rule 7, the following new rule shall be inserted, namely:-

*"**7A. Secondment or deputation**. –Notwithstanding anything contained in these rules, the Federal Government may, when it considers expedient in national interest, appoint any serving officer of the service of Pakistan, not below the rank and status of BPS-21, as Chairman on secondment or deputation for such term or terms as provided for in sub-section (5) of section 3 of the Ordinance."*

-S/d-
Dr. Mudassar Rehman
Section Officer (NADRA)

(2) GOVERNMENT OF PAKISTAN
MINISTRY OF INTERIOR
****

No. 10/1/2023-NADRA Islamabad, the 28th March, 2024

NOTIFICATION

In furtherance of this Ministry's Notification dated 2nd October 2023, the Federal Government has been pleased to confirm the appointment of PA-29170 Lieutenant General Muhammad Munir Afsar, HI(M), as Chairman NADRA for a term of three years from the date of his original appointment, as outlined in section 3(5) of the NADRA Ordinance, 2000.

-S/d-
Dr. Mudassar Rehman
Section Officer (NADRA)

5. Fundamentally, title to the Office, claimed by respondent No.6 while banking upon Rule-7A of the Rules 2020, is subject of adjudication.

6. Petitioner submits that Federal Government lacked authority to appoint a serving officer to the Office under the Ordinance, 2000. Further submits that Rule-7A of the Rules, 2020 is inconsistent with the mandate of the enactment, contravenes the constitutional principle of equality of the citizens and abrogates guaranteed fundamental rights. Adds that incumbent government merely rubber-stamped the appointment, unlawfully made by the Caretaker Government without adhering to the requirements of conducting fair and competitive process for appointment by inviting potential aspirants.

7. Learned Additional Attorney General submits that question of vires of Rule-7A of the Rules, 2020 and plea of contravention of fundamental rights cannot be adjudged in exercise of *quo-warranto* jurisdiction, when neither the petitioner did compete for the Office, and nor aspirant thereto. Further submits that Federal Government is competent to undertake rule-making exercise under the mandate of section 44 of the Ordinance, 2000, which authority *inter alia* included the power to amend the rules. Submits that appointment was made under Rule-7A, *ibid*, and when discretion was exercised in terms thereof, there was no requirement of issuing a public advertisement or

to undertake competitive recruitment process. Adds that appointment was confirmed in national interest, and to justify appointment certain documents were provided - [privilege is claimed in respect of the documents provided].

8. Respondent No.6, represented through independent counsel, claimed that qualifications prescribed under sub-section (7) of section 3 of the Ordinance, 2000 are met and legal authority, to hold the Office, is drawn from Rule-7A of the Rules, 2020.

Matter heard: ***Opinion of the Court:***

9. Challenge thrown to the claim to the Office is two-faceted; firstly, it underlines illegality committed by the Caretaker Government; and secondly, the authority of incumbent government, to confirm appointment upon ratifying Rule-7A of the Rules, 2020, is questioned in the context of delegation under the Ordinance, 2000.

10. I now turn to deal with the first challenge. Illegality committed, in purported exercise of authority by the Caretaker Government, while amending the Rules, 2020 and appointing respondent No.6, need not be elaborated and dealt with independently, for the reason that incumbent government has accepted and acknowledged the baggage of appointment, which in fact endorsed it by confirming the insertion of Rule-7A in the Rules, 2020 and also confirmed the appointment. Hence, cause of action survives.

11. *Is Court competent to assume jurisdiction and what shall be the scope of inquiry to determine the claim to the Office.* Essentially, the scope and extent of adjudication involves determination of legality of the claim to hold the Office and an intertwined issue, that whether the authority purportedly exercised by the Federal Government is within the bounds of the Ordinance, 2000. An intertwined issue is in fact an elephant in the room. There is no disagreement over the power of the Federal Government to appoint the Chairman of the Authority, which is an essential component of delegated authority but subjected to the constraints prescribed under the Ordinance, 2000 – primary enactment. Notwithstanding, delegation of rule-making authority, the appointment must conform to the dictates of the primary enactment. Reference to primary enactment is indispensable in the context that Federal Government claimed that the appointment is confirmed under Rule-7A of the Rules, 2020, which provided for appointment of respondent No.6 in national interest. Lawfulness of this purported exercise of delegated authority has to be tested through the prism of the Ordinance, 2000.

12. The extent of the power / jurisdiction of the Court, to determine the legality of delegated authority exercised by the Federal Government is subject to frontal attack on the ground that scope of '*quo-warranto'* jurisdiction is limited.

In these circumstances, the *scope of jurisdiction, conferred under Article 199(1)(b)(ii) of the Constitution*, needs a sharper focus.

Though not explicitly stated but the jurisdiction conferred under Article 199(1)(b)(ii) of the Constitution, is, quintessentially, '*quo-warranto'* jurisdiction. Boxes, defining the ingredients required for assumption of jurisdiction, are all ticked; that is that requisite information is laid before the Court, whereby challenge to the title to the Office is raised; Office in question, having a defined and extendable tenure, possesses all attributes of a substantive position / post and qualifies to be a public office. And, even otherwise, it is not claimed that appointment under reference is either provisional or a stopgap arrangement.

13. Jurisprudentially construed, through judicial pronouncements, and contextually examined, jurisdiction conferred under Article 199(1)(b)(ii) of the Constitution essentially empowers the court to inquire into and determine the legality or otherwise of the claim to the public office, which *inter alia* includes power to determine claim of competence-cum-eligibility of the holder of the Office [the 'eligibility test']. And the jurisdiction extends and enables the Court to test that whether the appointing authority possessed the competence to make the appointment under challenge ["competence test"]. In the context of determination of competence test, it is a sheer misconception that merely upon referring to Rule-7A of the Rules, 2020, the jurisdiction, otherwise available to inquire into the allegation of *invalid* appointment, would cease to be available. Power to adjudge and determine the scope of delegated authority forms an integral part of the *'quo warranto'* jurisdiction, which entitles the court to reject alleged

claim to the public office, if it reaches conclusion that exercise of delegated authority is beyond the scope of delegation or otherwise inconsistent with the primary enactment. Use of specific expression '*authority of law*', in Article 199(1)(b)(ii) of the Constitution, is the preface of the *'quo warranto'* jurisdiction. Specificity intended requires due deference. Any confusion must be dispelled by highlighting that constitutionality of any provision of the Ordinance, 2000 is not under challenge but question of legality of the delegated authority exercised. Settlement of this delicate, but critical question, is vital.

14. First, I deal with the eligibility test. Notably, appointment was confirmed by drawing strength from Rule-7A of the Rules, 2020. It is not disputed that appointment under reference is an instance of direct appointment, which was not advertised; no qualification-based evaluation was conducted, and no exercise to ascertain relative suitability of potential-cum-eligible aspirants was carried out. A non-advertised and competitive deficient appointment is otherwise held contrary to the mandate of Article 18 of the Constitution. Reference is made to the case of "*MUSHTAQ AHMAD MOHAL and others Vs. Honourable Lahore High Court, Lahore and others"* **(1997 SCMR 1043)**, relevant paragraphs are reproduced hereunder,

> ***17. We reiterate that the appointments to various posts by the Federal Government, Provincial Governments, Statutory Bodies and other Public authorities, either initial or ad hoc or regular, without inviting applications from the public through the press, is violative of Article 18 read with Article 2A of the Constitution, which has incorporated the Preamble to the Constitution as part of the same and which inter alia enjoins equality of opportunity and guarantees for creation of an egalitarian society through a new order, which objective cannot be achieved unless every citizen equally placed or situated is treated alike and is provided equal opportunity to compete inter alia for the posts in aforesaid Government set-ups/institutions.***

> ***20.*** *We may observe that Article 27 of the Constitution is to be read in conjunction with inter alia Articles 2A, 18 and 25 of the Constitution. Aforesaid Articles 2A and 18 of the Constitution have already been referred to hereinabove. Whereas above Article 25 of the Constitution guarantees that all citizens are equal before law and are entitled to equal protection and that they shall not be discriminated on the basis of sex alone. Inter alia the above Articles of the Constitution are designed, intended and directed to bring about an egalitarian society based on Islamic concept of social justice.*
>
> [Emphasis supplied]

Ratio laid is, recently, re-affirmed in the case of *"ZAFARAN KHAN and others. Vs. NIZAM ULLAH and others."* (**PLD 2023 SC 371**), portion from paragraph 7 thereof is reproduced hereunder,

> ***7****. Now we have to consider whether the precedents of this Court, relied upon by the High Court in its judgment, are relevant to the moot question. To answer this point it is necessary to read all those precedents, and upon their reading, we found that in all of them the appointments were declared illegal on the ground that they were made through backdoor, as neither the vacancies were advertised, applications were not invited, nor the formalities of the rules were fulfilled, but here we are not confronted with such a situation, and thus to provide an answer to the main question under consideration, reliance on precedents was inappropriate.* ***Lest anyone misunderstand this, we make it clear that the appointment to any post under the government can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial, through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. Any appointment made on a post under the government without issuing advertisement, inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Articles 18 and 27 of the Constitution"***
>
> [Emphasis supplied]

Eligibility test has no relevance since appointment was made in national interest and not through competitive recruitment process.

15. Now, I discuss the competence test, in wake of jurisdictional objection that legality of exercise of delegated authority cannot be tested under the *'quo warranto'* jurisdiction. This precise objection is addressed in terms of the ratio of decision in the case of *'JAWAD AHMAD MIR v. Prof. Dr. IMTIAZ ALI KHAN, VICE CHANCELLOR, UNIVERSITY OF SWABI, DISTRICT SWABI, KHYBER PAKHTUNKHWA and others'* (**2023 SCMR 162**), relevant portions from paragraphs 8 and 9 of the decision are reproduced hereunder,

8. The writ of quo warranto is in the nature of setting forth an information before the High Court against a person who claimed and usurped an office, franchise or liberty. The rationality of the writ of quo warranto is to settle the legality of the holder of a statutory or Constitutional office ***and decide whether he was holding such public office in accordance with law or against the law.*** *The writ of quo warranto can be instituted by a person though he may not come within the meaning of words "aggrieved person". For the purpose of maintaining a writ of quo warranto there is no requirement of an aggrieved person, and a whistle blower need not to be personally aggrieved in the strict sense and may relay the information to the court to enquire from the person holding public office. The purpose of the writ of quo warranto is to pose a question to the holder of a public office: "where is your warrant of appointment by which you are holding this office?" In the writ of quo warranto no special kind of interest in the relator is needed, nor is it necessary to explain which of his specific legal rights is infringed. It is enough for this issue that the relator is a member of the public and acts bona fide. This writ is more in the nature of public interest litigation where undoing of a wrong or vindication of a right is sought by an individual for himself, or for the good of the society, or as a matter of principle. The conditions necessary for the issuance of a writ of quo warranto are that the office must be public and created by a statute or Constitution itself; the office must be a substantive one and not merely the function of an employment of a servant at the will during the pleasure of others; there has been contravention of the Constitution or a statute or statutory instrument by appointing such person to that office. The essential grounds for issuing a writ of quo warranto are that the holder of the post does not possess the prescribed qualification;* ***the appointing authority is not the competent authority to make the appointment and that the procedure prescribed by law has not been followed.*** *The burden of proof is then upon the appointee to demonstrate that his appointment is in accordance with the law and rules. It is clear that before a person can claim a writ of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by a usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not.*

9. In our jurisdiction, compliant with the dictum laid down by this Court in various judgments, such as the case of Masudul Hassan v. Khadim Hussain and another (PLD 1963 SC 203), it was held that writ of quo warranto was in its nature an information lying against a person who "claimed or usurped an office, franchise or liberty" and was intended to enquire by what authority he supported his claim in order that the right to the office may be determined. In the case of Capt. (Retd.) Muhammad Naseem Hijazi v. Province of Punjab and others (2000 SCMR 1720), this Court held that in the writ of quo warranto, under Article 199 of the Constitution of the Islamic Republic of Pakistan the High Court in exercise of its Constitutional jurisdiction is competent to enquire from any person, holder of a public office to show that under what authority he is holding the said office. Whereas in the case of Hafiz Hamdullah v. Saifullah Khan and others (PLD 2007 SC 52), it was held that the object of writ of quo warranto is to determine legality of the holder of a statutory or Constitutional office and decide ***whether he was holding such office in accordance with law or was unauthorizedly occupying a public office****. For issuance of a writ of quo warranto, the person invoking the jurisdiction of High Court under Article 199 of the Constitution is not required to fulfill the stringent conditions required for bringing himself within the meaning of an aggrieved person. Likewise, in the case of Imran Ahmad Khan Niazi v. Mian Muhammad Nawaz Sharif (PLD 2017 SC 265), this Court held that Constitutional petition in the nature of a writ of quo warranto was maintainable against a Member of the Majlis-e-Shoora (Parliament), if he was disqualified or did not possess or had lost his qualification, in such behalf. Power to disqualify a member in cases where for some reason he escaped disqualification at the time of filing his/her nomination papers but such fact/event was discovered subsequently, could, in appropriate cases and subject to availability of admitted facts or irrefutable evidence be exercised by the High Court under Article 199 and by the Supreme Court under Article 184(3) of the Constitution."*

Inquiry for deciding the question of usurpation of the Office empowers the court to test that if the appointment is in accordance with the law. In the case of *'University of Mysore v. C.D. Govinda Rao* (**AIR 1965 SC 491**) principles prescribing requisite conditions, for assuming *'quo warranto'* jurisdiction, were explained in paragraph 7, portion whereof is reproduced hereunder,

> ……..*"It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the Court, inter alia, that the office in question is a public office and is held by a usurper without legal authority, and that necessarily leads to the enquiry as to* ***whether appointment of the said alleged usurper has been made in accordance with the law or not'***.
>
> [Emphasis supplied]

The extent of the inquiry to be undertaken in exercise of *quo warranto* jurisdiction has been explained in the case of *'Malik NAWAB SHER v. Ch. MUNEER AHMAD and others'* (**2013 SCMR 1035**), portion of paragraph 11 is reproduced hereunder,

> ...."*In the case of PAKISTAN TOBACCO BOARD v. TAHIR RAZA (2007 SCMR 97) it was held that in writ of quo warranto the jurisdiction of the Court was primarily inquisitorial and not adversarial and thus the Court could undertake such inquiry as it may deem necessary in the facts and circumstances of the case, including the examination of the entire record and such exercise can even be done suo motu even the intension of the High Court is not drawn by the party concern."*

16. The scope of *'quo warranto'* jurisdiction is construed specifically in the context of the law applicable in particular jurisdiction. In Article 226 of the Constitution of India, expression, *'quo warranto'* is employed, and in our Constitution jurisdiction character of *'quo warranto'* is encapsulated in the expression '*authority of law*'. Notwithstanding variation in the scope of jurisdiction and use of varied expressions, there is an underlying commonality, i.e., that

either be it an act of the state officer or question of usurpation of the Office, the exercise of authority, to be valid and enforceable, must conform to the law and the terms of delegation. Absence of delegated authority is akin to exercise of authority in excess of delegation, and both are amenable to test through '*quo warranto'* remedy in various jurisdictions. For understanding the scope of the expression '*authority of law'*, it is expedient to discuss decisions from foreign jurisdiction. I lay my hands on a judgment of the Supreme Court of Florida, where *quo warranto* jurisdiction was exercised, instead of directing the petitioner, therein, to resort to seek remedy through declaratory judgment action, in case No. SC07-2154, titled *'Florida House of Representatives, et al. v. The Honourable Charles J. CRIST, Jr., etc*. (**999 So.2d 601 (2008**), where the act of the Governor of the State, to negotiate compact with Indian Tribes, was held invalid on the premise of improper exercise of powers, in absence of any authorization by the legislature. Ratio of the decision in *'Florida House of Representatives v. Christ'*, was reaffirmed in the case No.SC2023-1333, titled *'WEST FLAGLER ASSOCIATES, LTD., et al., v. RON D. DESANTIS etc., et al.* (**573 F.Supp.3d 260 (D.D.C.2021**), wherein relief of *quo warranto* was denied on the premise that legislature had ratified the power of the Governor to execute the compact, the reasoning extended to distinguishing the case of *Florida House of Representatives v. Crist*, is reproduced hereunder,

> *Similarly, Petitioners rely on Florida House of Representatives v. Crist, 999 So. 2d 601, to support their position that the compact may be challenged through quo warranto. But though that case involved the applicability of the writ of quo warranto to*

> *a gaming compact in Florida, it does not set forth a general rule that gaming compacts may be challenged through quo warranto actions.* ***Instead, that case involved the specific question of whether the Governor had authority to bind the state to a compact without ratification by the Legislature. See id. at 609 ("The issue is whether . . . the Governor . . . had constitutional authority to execute the Compact without the Legislature's prior authorization or, at least, subsequent ratification.").*** *That factual background distinguishes the case from Petitioners' challenge here, as Petitioners* ***challenge the substance of the agreement reached by the Governor and ratified by the Legislature rather than the bare ability to act.***
>
> *Ultimately, the relief that Petitioners seek is beyond what quo warranto provides.* ***We have never used the writ to test the substantive constitutionality of a statute, and we decline Petitioners' implicit invitation to expand the scope of the writ here. To do so would serve as an affront to an essential feature of quo warranto—that it is used to challenge the authority to exercise a state power rather than the merits of the action.*** *In addition, considering Petitioners' request here would undermine the structure of article V of the Florida Constitution, which circumscribed our ability to review the substantive constitutionality of a statute and commits that review, in the first instance, to the trial courts.*
>
> [Emphasis supplied]

In another case, writ of *quo warranto* was entertained in case No.SC11-592, titled '*WHILEY v. SCOTT,* (**79 So.3d 702 (Fla.2011**), holding that Governor of the State overstepped his constitutional authority and violated the concept of separation of powers. In the case No.74311 of *'Elvin L. MARTINEZ, Etc. v. Bob MARTINEZ, Etc.* (**545 So.2d 1338 (1989))**, Supreme Court of Florida declined relief sought through *writ of quo warranto* on the ground that legislature had conferred power on the Governor of the State, to call more than one special session of the legislature, however, the scope of *quo warranto* jurisdiction was delineated as that '*Quo warranto is the proper method to test the "exercise of some right or privilege, the peculiar powers of which are derived from the State'.*

17. Foreign judgments have persuasive / non-binding effect, but their analysis provide an effective tool for comprehending the proposition of law and assist in interpreting the legal concepts / jurisdictional issues. Reference to decisions from foreign jurisdiction is

made not for the purposes to follow the ratio settled therein, which ratio may have relevance in the context of the law regulating *'quo warranto'* remedy in the State of Florida, but to understand the extensiveness of the expression '*authority of law'*, in the context of Article 199(1)(b)(ii) of the Constitution. In the context of foreign judgments, discussed in preceding paragraph, law in the State of Florida, through *'quo warranto'* action, affords a legal remedy to test *'the exercise of some right or privilege, the peculiar powers of which are derived from the State*. In the judgments referred from foreign jurisdiction, largely, the authority of the state official is subject of adjudication, on the premise that whether the action taken, or decision made, is within the bounds of constitutionally conferred authority or not. In our jurisprudence, *'quo warranto'* remedy permits challenge to the appointment to or holding of the public office, but standard for such determination bears similarity to the principle(s) applied by the Supreme Court of Florida – wherein action / decision of the state official(s) had been subjected to the scrutiny in the context of authorization granted or not, under the legal framework. And in the same vein, scope of jurisdiction under Article 199(1)(b)(ii) of the Constitution entitles / empowers this Court to inquire and determine that whether appointment to the Office made is in accord with the *'authority of law'*. This underlying commonality persuades me to discuss the decisions from foreign jurisdictions.

To understand the scope and extent of *'authority of law'* it is expedient to break down the expression grammatically, by defining the words defined in Black's law dictionary- 11th Edition *Bryan A. Garner*.

> **Authority:** The official right or permission to act, esp. to act legally on another's behalf; esp., the power of one person to affect another's legal relations by acts done in accordance with the other's manifestations of assent; the power delegated by a principal to an agent.
>
> **Law:** The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action…., A statute. [Congress passed a law].

Of, a 'preposition', links the 'authority' with 'law', indicating the source or origin. Rephrased, expression '*authority of law*' means official right or permission to act, specially to act legally on another's behalf by virtue of authority, derived from, or granted by, or under the prevalent legal system – aggregate of legislation, judicial principles and accepted legal principles. Endorsement of acceptance / legitimacy to the appointment, otherwise made in excess of the delegated authority or contrary to the mandate of the enactment, is an illegality, *per se* - [authority of the legislature to make law and executive's domain to act and enforce legislative command in exercise of delegated authority, as delegatee, operate in their respective sphere(s) and context]. For the purposes of assumption and exercise of *'quo warranto'* jurisdiction,

scope of inquiry cannot be extended to include determination of the authority / competence of the legislature or for that matter embarking upon examining the *vires* / constitutionality of the law - for instance *vires* of sub-section (3) of section 3 of the Ordinance, 2000, which authorize the Federal Government to appoint the Chairman and Members to the Authority, or the wisdom of the legislature to delegate such authority to delegatee cannot be adjudged in guise of '*quo warranto'* jurisdiction. Notably the reliance of Federal Government is on Rule-7A of the Rules, 2020, which is a specie of delegated legislative authority, being subordinate to the parent enactment.

18. Legality and extent of exercise of delegated authority can be adjudged under '*quo warranto'* action. Guidance is solicited from decision in the case of *'Pir ILLAHI BAKSH v. MUHAMMAD AYOOB KHUHRO'* (**PLD 1956 Sind 101**), wherein exercise of authority by Governor-General was tested by the lordships, each of the three of them had recorded opinions separately but concurred on the conclusions drawn. In said case '*quo warranto'* was allowed and the then sitting Chief Minister of Sindh was de-seated, upon recording judicial findings that Governor-General had no authority to reduce the period of disqualification of the holder of Office through subsequent order, on the premise that the then existing legal framework does not authorize the Governor-General to amend its previous order, whereby same had earlier disqualified the holder of Office - respondent therein - for the period of six years and thereafter reduced said period, facilitating

assumption of the office of Chief Minister. Ratio settled depicts that authority of the Governor-General, purportedly exercised in terms of section 4 of the *Public and Representative Offices (Disqualification) Repeal Act, 1954*, was questioned, which was found devoid of any lawful authorization. And legality of Governor General's action was examined in the context of and upon construction of provision(s) of law. The authority applies to the proposition under consideration.

19. There is another aspect. Assumption and exercise of *'quo warranto'* jurisdiction largely depends on the nature of action, and in particular the relief claimed – in the case at hand the petitioner has not challenged any official act of respondent No.6 but had sought indulgence of the court to inquire that '*by what authority*' respondent No.6 is claiming alleged title to the office. The extent of the authority available to the appointing authority is subject to test of '*quo warranto'* jurisdiction. And it is fallacious to think that action of the appointing authority, despite being in excess of the delegated authority, is immune from judicial review under '*quo warranto'* jurisdiction. And likewise, when appointment made by the appointing authority – in capacity of delegatee – is found inconsistent with the legislative command, '*quo warranto*' remedy is available for ascertaining the extent of inconsistency. In this case Federal Government, in exercise of rule-making authority, through Rule-7A of Rules, 2020, had provided mechanism for direct and unadvertised appointment. Whether such

course is permissible under the primary enactment – this constitutes a crucial component of the controversy and is dealt with at proper place.

20. In view of the above, objection to the assumption of jurisdiction is dismissed, and it is held that court is empowered to inquire and determine that if exercise of authority by the Executive / Federal Government, in the guise of Rule-7A of the Rules, 2020, is authorized by, or otherwise, consistent with the terms of delegation under the enactment and purpose thereof.

I now proceed to decide the underlying controversy that *'whether act of direct appointment of respondent No.6 is legally covered within the terms of delegation and is in accord with the conditions prescribed, regarding appointment of Chairman, in the enactment, which is the Ordinance, 2000'*.

21. There is no disagreement that appointment of respondent No.6 was not pursuant to any public advertisement or competitive recruitment process – no such open or competitive process was adopted by the Caretaker Government and nor by the incumbent government, while confirming the appointment. [Caretaker Government carried a limited, in-house, suitability assessment amongst the hand-picked officers.] Federal Government conceded that appointment was confirmed in national interest and Rule-7A of the Rules 2020, authorized the Federal government to dispense with the requirements of qualification-based evaluation or adopting competitive recruitment

process. *Whether the Federal Government is empowered, in terms of the delegated authority, to make appointment in such cryptic manner.*

22. Textual reading of relevant provisions of the enactment – the Ordinance, 2020 – affirm that no direct appointment, *albeit* in the national interest, is permissible. Whether a delegatee could proceed to claim authority for making direct appointment, on the premise of implied or implicit delegation. To determine the context of implied or implicit delegation, the legislative intent and scope of delegated authority needed focus. In the present context, Federal Government is empowered to make appointment of the Chairman and Members in terms of sub-section (3) of section 3 of the Ordinance, 2000. Does this power include the power to make direct appoint without adhering to the standard of qualification-based appointment. Simplicitor, conferment of authority to make appointment, without prescription of qualifications in the enactment may be construed as extending implied power, to the delegatee, to prescribe requisite qualifications, and where required, make direct appointment. However, no such power or prerogative has been conferred on the Federal Government under the primary enactment. Legislature, through the enactment, had prescribed qualifications for the Office and no discretion was extended to the delegated authority to vary the qualifications or disregard them. Qualifications for the Office are prescribed in terms of sub-section (7) of section 3 of the Ordinance, 2000. Sub-section (3) of section 3 of the Ordinance, 2000, that authorizes Federal Government to appoint

Chairman, cannot be interpreted or construed to extend authority to the Federal Government to make direct or non-advertised appointment(s) to the Office, dispensing with the process of qualification-based evaluation envisaged under the enactment. It is expedient to examine sub-section (7) of section 3 of the Ordinance, 2000, which reads as,

> *Section (3)*
> *……*
> *(7). The Chairman shall be an eminent professional of known integrity and competence with substantial experience in the field of computer science, engineering, statistics, demography, law, business, management, finance, accounting, economics, civil or military administration, or the field of registration."*

23. Qualifications prescribed in the enactment need to be read in juxtaposition to the specifications / requirements under Rule-7A of the Rules 2020, to understand the inconsistencies therein – Rule-7A makes no reference to the qualifications prescribed under sub-section (7) of section 3 of the Ordinance, 2000. *Non-obstante* effect extended to Rule-7A, *ibid*, is to the extent of anything contained in the Rules, 2020, and not otherwise. Rule-7A, *ibid,* envisages and provides mechanism for making direct appointment; empowering the Federal government to appoint any serving officer of the service of Pakistan, not below the rank and status of BPS-21, on secondment or deputation, if deemed expedient in the national interest. Such discourse / mechanism is clearly inconsistent with the enactment, which specifically prescribed the qualifications for the office of Chairman. The enactment, furthermore, confers no authority unto the Federal Government, to resort to direct appointment in wake of alleged national interest. Unarguably, resorting to mechanism or making of direct appointment, without qualification-

based evaluation and determining relative suitability, is impermissible and any appointment made in disregard of qualifications tantamount to abuse / excessive exercise of delegated authority, contrary to the terms of the delegation and incongruent with the declared purpose of the enactment – appointment through qualification-based evaluation. Rule making authority is exercised within the limitations prescribed and powers extended in terms of primary enactment and no transgression is permissible. Rule-making authority is not in dispute, but fatal objection is that purported exercise of authority is excessive and in direct conflict with the conditions / limitations prescribed under the enactment. *Is Federal Government authorized to draft a rule in a manner to flout the necessity of qualification-based evaluation, intended through prescription of qualifications in the enactment*. No, Federal Government cannot travel beyond the terms of delegation or abrogate the mandate of the enactment. I am afraid that section 44 of the Ordinance, 2000 cannot be construed to allow the delegatee to act to vitiate the purpose of the Ordinance, 2000 – no disservice to the statute intended. It is absurd to assume that despite provisioning of qualifications under the enactment, legislature had simultaneously enabled the delegatee to engage in making direct and unadvertised appointment. Claim by respondent No.6 to possess the qualifications, in absolute terms, is otherwise irrelevant, when no qualification-based evaluation was undertaken, while making or confirming the appointment. Diversity of fields indicated in sub-section (7) of section 3 of the Ordinance, 2000 implies ascertainment of relative suitability,

instead of embarking upon direct appointment to the Office – and most unlikely, person centric selection.

In brief, prescribing of qualifications for the Office manifests clear legislative command for making merit-based appointments and suggests an in-built mechanism to restrict and curtail the powers of the appointing authority to indulge in making appointments without adhering to the qualification-based evaluation. Without ambiguity, provisioning of qualifications, explicitly in the enactment, *per se* negates alleged claim of an implied / implicit authorization by the Federal Government for making direct appointment to the Office. Aptly, this situation attracts legal maxim '*expressio unius est exclusio alterius'* [expression of one thing implies the exclusion of others], which mirrors the acknowledged principle, that where a statute has conferred a power to do an act and prescribed a mechanism for exercise of that power, such power cannot be exercised for the purposes of performing the act by adopting a different method, other than what has been prescribed. Relevant authorities on the proposition are *'Taylor v. Taylor'* (**1875(1) Ch D 426**) and *'GVK Industries Ltd. and another v. Income Tax Officer and another'* (**2011 (4) SCC 36**).

24. Reliance upon and legality qua appointment claimed in the context of Rule-7A of the Rules, 2020 is misplaced. Rule-7A, *ibid*, cannot be construed to sanction purported appointment made in excess of the delegated authority and otherwise found inconsistent with primary enactment. Rule-7A, *ibid*, manifests assumption and exercise of authority, in fact, not delegated to the Federal Government. This

eminently is an instance of excessive and unlawful assumption and exercise of authority. Federal Government, through insertion of Rule-7A of Rules, 2020, had attempted to increase its power and authority without appreciating that legislature had spoken clearly through the enactment and prescribed qualification to quell any ambiguity qua manner of appointment to the Office. In these circumstances, exercise of authority by the Federal Government to confirm the appointment of respondent No.6 to the public office is found incongruous with the enactment and otherwise contrary to the terms of delegation – inconsistency identified is direct versus qualification-based appointment. Hence, no protection to the claim to the Office can be extended.

25. Decision of the Federal Government is not entitled to any deference, on the plea that appointment is made in national interest, when exercise of delegated authority by the delegatee is unauthorized and contrary to the command of the legislature. Rule-making authority cannot be abused to claim status or role of the legislature. No legislative authorization is available for making direct appointment. Throughout the proceedings no plea was raised that appointment and manner of appointment – direct and unadvertised – has been ratified by the legislature.

26. Claim of national interest requires close attention. Federal Government struggled to substantiate the appointment on the premise of national interest. It is pleaded that appointment of respondent No.6 was confirmed in wake of lapses identified, irregularities committed

qua the affairs of the Authority, security breaches and compromised security benchmark. Learned Additional Attorney General provided some documents with dates, contemporaneous to the appointment of respondent No.6 by the Caretaker Government. Privilege claimed regarding documents is unjustified. Documents referred to an incidence of data leakage and formation of Joint Investigation Team to probe into the charges, which details appeared in the Dawn newspaper of March 27, 2024 – [one day before the issuance of Notification of confirmation of respondent No.6] - which news item disclosed the factum of probe into allegation of compromised data of 2.7 million citizens. Copy of news item is attached as Annexure-C. No material is relied on or provided to justify alleged national interest. Does it imply that any lapse or irregularity in the records of any statutory corporation or authority would justify resort to extralegal mechanism, for making direct appointment without the need for adoption of competitive recruitment process. Mere leakage of data, simplicitor, is no ground to abandon qualification-based and meritorious appointment(s). This close-door approach entails reduced competitiveness, exacerbates social inequalities and curtails professional opportunities, which results in intense brain-drain. Seeking refuge behind plea of national interest is non justiciable, which in fact violates the principle of separation of powers, where in fact the executive had exceeded or over-stepped delegated authority and proceeded to introduce an incompatible rule vis-à-vis primary enactment. Hence, claim of national interest fails, being un-plausible.

Since, appointment made is already found in excess of delegated authority, therefore, I find no reason to dilate upon the effect(s) of person-centric rule-making in the context of the ratio of decision in the case of *"Baz Muhammad Kakar and others Vs. Federation of Pakistan through Ministry of Law and Justice, Islamabad and others"* (**PLD 2012 Supreme Court 870**). In wake of dispositive determination of main question, I find no reason to discuss ratio of the decision in the case of *"Waris Meah Vs. (1). The State (2). The State Bank of Pakistan"* **(PLD 1957 SC (PAK) 157)** to dilate upon the effect of an *ex-facie* discriminatory legislation – for the purposes of ruled inserted through Rule-7A of the Rules, 2020 – and discriminatory application thereof. Likewise, no occasion arises, in the wake of holding the appointment in excess of the authority delegated, to discuss the case of '*Jibendra Kishore, etc. v. THE PROVINCE OF EAST PAKISTAN'*. **(PLD 1957 SC Pak 9)**, to highlight violation of constitutional mandate of '*equality before the law*'. Argument that on two different occasions the officer(s) in service had the privilege of serving as the Chairman of NADRA is without substance. An illegality committed previously would not *per se* validate the appointment under reference, not authorized by and in terms of the statute. I refrain from commenting on the scope of section 34 of the Ordinance, 2000 in particular with reference to the expression, *'engage'*, in the context when respondent No.6 claims service lien / retention of original post, which would be an academic exercise, in wake of affirmative findings recorded against the holding of the Office by respondent No.6.

It is alleged that remedy of '*quo warranto*' is of technical nature and it is in the discretion of the Court to decline issuance thereof. I am afraid that illegality committed by way of an unauthorized appointment, by the appointing authority in absence of delegation, cannot be covered – one cannot hide the elephant in mouse-hole. Hence, discretion necessarily needs to be exercised, to end usurpation of the office. In these circumstances, act of confirming the appointment of respondent No.6 is unauthorized and otherwise inconsistent with the enactment, therefore, without requisite '*authority of law*'.

27. Consequently, this petition is allowed, the appointment, confirmation and continuing holding of the office of Chairman NADRA by respondent No.6 is declared without the *'authority of law'*. Office shall send copy of this Order to the Federal Cabinet, Ministry of Interior and all departments concerned. No order as to the costs.

(ASIM HAFEEZ)
JUDGE

Announced and signed in open Court on this 06th day of September-2024.

JUDGE

Approved for reporting.

JUDGE

M. Nadeem/*

(Annexure-A)

FOUNDED BY QUAID-I-AZAM MOHAMMAD ALI JINNAH

DAWN

Saturday
May 6, 2023
Shawwal 15, 1444
LAHORE
Rs 30.00
18 Pages
Vol. LXXVII No. 124
Regd. No. CPL-199
www.dawn.com

Nadra takes criminal action over access to data of COAS' family

Elements on whose behest the breach took place are also being acted against, after sacking of six employees

By Iftikhar A. Khan

ISLAMABAD: The National Database and Registration Authority (Nadra) has initiated criminal proceedings against its employees behind the saga involving unauthorised access to data of the family of Chief of Army Staff (COAS) Gen Asim Munir.

An informed source told *Dawn* that the elements on whose behest the breach took place were also being acted against. As many as six Nadra employees had been terminated from service for illegally accessing COAS' family's record, following four separate inquiries ordered by Nadra Chairman Tariq Malik on Dec 23, 2022, and March 2, 2023, the source disclosed.

A joint probe conducted by Nadra and a sensitive security agency in December last year discovered that Farooq Ahmed, a junior executive employee working on a project of the Benazir Income Support Programme, was the first person to have unlawfully accessed the data in question. The high-powered inquiry committee on the direction of the incumbent chairman expanded the scope of the investigation by technically analysing logins, user IDs, system logs and IP addresses that were intact, reflecting the strength of the authority's database.

This led to the identification of a total of 10 employees who illegally accessed record of the army chief's family. After a fact-finding inquiry, the suspects were cross-examined and a detailed probe was launched.

Hence, a charge sheet into the imputations of accessing COAS family's data unauthorisedly and illegally was subsequently issued to the accused employees on Jan 6. As a result, in two inquiries the committee found six officials responsible. He said a committee imposed a major penalty of termination from service under the Government Servants (Efficiency & Discipline) Rules 1973 on these six employees.

Data security

He said Nadra introduced a number of additional security protocols to check on its own employees' behaviour. A few months ago, an additional service, 'Ijazat Aap Ki', was introduced to roll out a consent regime that informs citizens and asks for their permission in form of an OTP (one-time password) if their personal data is accessed remotely.

He said Artificial Intelligence-based log access reviews now send alerts of suspicious activities of employees. Mr Malik is the first chairman who had taken unprecedented measures to secure data and focus on privacy of citizen's personal data.

Meanwhile, in a message to Nadra employees, a copy of which is available with *Dawn*, the Nadra chairman has referred to various steps taken for their welfare, including a 65 per cent raise in salaries and a policy to reward those showing remarkable performance.

He said people trusted Nadra, which was a custodian of their personal and family information. He said there would be zero tolerance for any breach, adding that an AI-based system had been put in place and all possible steps had been taken to safeguard the public data.

Referring to some guiding principles, the chairman said no Nadra employee was authorised to use logins of any other colleague, no data entry operator had the permission to access personal data of any citizen and biometric of a family member was an essential requirement to access anybody's family tree. He said a comprehensive monitoring system was being developed to check any possible violation and as many as 131 had so far been dismissed in its light.

He made it clear that unauthorised access to somebody's data was a grave violation of the law and under Section 28 of the act may entail imprisonment of up to five years, a fine up to Rs1 million or both.

He also alluded in the letter towards the incident involving data of COAS' family and said six officials down from the level of a junior executive to director have been removed from service and criminal case against them were being filed.

He urged the employees to keep in mind the fundamental principle that be it a common citizen or an important office holder, the secrecy and security of their data should be the foremost priority.

He asked them not only to discharge their duties with honesty, but also to keep a vigilant eye on suspected individuals, and to inform their seniors in case somebody persuades them to access personal data of a citizen.

(Annexure–B)

FOUNDED BY QUAID-I-AZAM MOHAMMAD ALI JINNAH

DAWN

Wednesday
June 14, 2023
Ziqa'ad 24, 1444
LAHORE
Rs 30.00
18 Pages
Vol. LXXVII No. 163
Regd. No. CPL-199
www.dawn.com

Tariq Malik resigns as Nadra chief

ISLAMABAD: Tariq Malik on Tuesday resigned from his position as chairman of the National Database and Registration Authority (Nadra), a year before the completion of his three-year term.

The resignation was submitted by him during a meeting with Prime Minister Shehbaz Sharif.

The resignation came months after a controversy over the leak of data regarding the family of a army chief, entailing action against some employees by Mr Malik.

"I find it increasingly difficult to work in a charged and polarised political environment. It is difficult for any professional to maintain his integrity and independence in an environment that constantly pigeon-holes people in an 'us versus them' logic and where political loyalty is privileged over competence," read the three-page resignation, whose copy is available with *Dawn*.

Mr Malik in his resignation pleaded to the prime minister not to appoint a serving or retired bureaucrat as his replacement and instead pick a professional and technical person for the job. "The organisation deserves a thorough professional with a background in technology and management," he said, adding that Nadra cannot afford further political experimentation.

He said during his short stints at Nadra, he tried to serve the country to the best of his abilities and beyond narrow party or institutional interests. "I was selected to lead the organisation after a highly competitive process involving over 100 applicants and multiple rounds of interviews. At the time I was serving as the chief technical adviser of the UNDP headquarters in New York, US, advising member states on digital governance.

"In that capacity, I had the privilege of observing and shaping from close quarters the digitalisation of many rich and poor countries, anchored in digital ID. I also had the honour of shaping the global standards for digital ID at the World Bank. In the course of fulfilling various global assignments, Pakistan remained my first passion and foremost commitment. In this context, I was pleased to have played a humble part in contributing to the development of an organization that forms the backbone of Pakistan's development," he said.

Mr Malik was appointed Nadra chairman for a second time in June 2021, by the then PTI government. He had reportedly been facing immense pressure from the interior minister to resign after reports emerged that some officials of the authority had been found involved in leaking personal data of army chief and his family.

"PM during the meeting appreciated the services of [Mr] Malik," said a statement issued by Nadra. The official sources said that the premier also requested him to help the government, by utilising his expertise, in increasing tax net.

Earlier in the day, Interior Minister Rana Sanaullah addressing a press conference said that the resignation of Nadra chairman had nothing to do with the data leak issue. "He was facing no pressure to resign," he asserted, adding that action had already been taken against all those involved in the data leak.—Iftikhar A. Khan

(Annexure-C)

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DAWN

Wednesday
March 27, 2024
Ramazan 16, 1445
LAHORE
Rs 35.00
18 Pages
Vol. LXXVIII No. 87
Regd. No. CPL-199
www.dawn.com

2.7m citizens' data compromised over five years, probe finds

JIT submits report on Nadra data leak to interior ministry

By Iftikhar A. Khan

ISLAMABAD: A Joint Investigation Team (JIT), which was formed to probe a data leak from the National Database and Registration Authority (Nadra), has told the Interior Ministry that the particulars of as many as 2.7 million citizens had been compromised between 2019 and 2023.

Sources told *Dawn* the JIT, headed by a senior officer of the Federal Investigation Agency (FIA) and comprising representatives from various intelligence agencies, had completed its probe and subsequently submitted a report to the ministry.

The JIT found that Nadra offices in Karachi, Multan and Peshawar were allegedly involved in the data leak and recommended action against various officials.

Sources said that, according to the report, there was evidence of Nadra data surfacing in Argentina and Romania.

A source said Nadra has already taken numerous steps to deliver its services in an improved manner, ensuring the optimal security of its database.

Action has been initiated following a probe into the cyber security incident that took place in March 2023.

The JIT has also recommended an upgrade of technology, as well as departmental and criminal proceedings against those found responsible for the lapse.

The issue of the vulnerability of Nadra's data had been raised in the past, but gained prominence only after the disclosure of an information leak about certain senior military officials.

In November 2021, a National Assembly panel had been told that the personal data of millions of Pakistanis might have been compromised, allegedly due to weaknesses in Nadra's security framework.

During an earlier meeting of the National Assembly's Standing Committee on Information Technology and Telecommunication, a senior FIA official had revealed that certain biometric records had been hacked.

It was later clarified that only the biometric system used for SIM verification, among other things had been "compromised", and not the entire data record.