



RULING OF THE CHAIR

CONSTITUTIONAL REQUIREMENT OF ANNOUNCEMENT OF NATIONAL FINANCE COMMISSION AWARD

This Ruling flows from the following, amongst other, facts:-

- (i) In the Senate sitting held on 12th May, 2015, Senator Sassui Palijo drew attention of the Minister for Finance, Revenue, Economic Affairs and Privatization towards delay in the announcement of 8th NFC Award. Engineer Khurram Dastgir Khan, Minister for Commerce, on behalf of the Minister for Finance made a statement in the following terms:-

"Article 160 of the Constitution of the Islamic Republic of Pakistan provides for setting of the National Finance Commission at intervals, not exceeding five years and the last NFC which was the 8th Award, was constituted on 21st of July, 2010. Therefore, it was a legal obligation of this Government to constitute the 9th National Finance Commission Award on or before 21st of July, 2015. I am with some humility wish to report to the House that this Government fulfils its responsibility well ahead of time and in pursuance of Article 160 of the Constitution, the President of Pakistan constituted the 9th National Finance Commission on the 24th of April, which was eighteen days ago. Therefore, the question of delay in announcement of the NFC Award does not arise, it's only been eighteen days. "

I restrained from giving a Ruling on the matter, however, I did inform the Government that traditionally NFC Award is supposed to be finalized and announced within five years.

- (ii) Again, in the Senate sitting held on 14th May, 2015, Senator Mir Hasil Khan Bazinejo raised the matter of non-issuance of NFC Award by the Federal Government prior to the announcement of Budget. He demanded a Ruling from the Chair on the issue.
- (iii) In the Senate sitting held on 12th November, 2015, during discussion on the report of the 1st Biannual Monitoring on the Implementation of National Finance Commission (NFC) Award (July-December, 2014), Members raised the issue of non-announcement of the Award within the constitutional timeline of five years.
- (iv) In the Senate sitting held on 13th November, 2015, Minister for Finance, during his winding up speech, stated that *"the previous Award which was technically stricto sensu was valid till 30th June, 2015, has been extended and that has been happening. The impression that it is unconstitutional, no this extension is constitutional."*
- (v) In the Senate sitting held on 19th April, 2016, Senator Saleem Mandviwala, through a Calling Attention Notice, drew attention of the Minister for Finance towards non-convening of meeting of the National Finance Commission for the new NFC Award. Minister for Law and Justice, on behalf of the Minister for Finance, made a statement that, *"sub-Article (1) of Article 160 of the Constitution provides that the National Finance Commission will be constituted at intervals not exceeding five years. Now, the last NFC that is the 8th NFC was constituted on the 21st July of 2010. We were, of course, required to constitute the 9th NFC before the 21st July, 2015. In fact, it was constituted on the 24th of April, 2015."*
- (vi) Again, in the Senate sitting held on 22nd July, 2016, Senator Sassui Palijo moved a Calling Attention Notice to draw attention of the Minister for Finance towards the continuous delay in the 8th NFC Award. Minister for Law and Justice, on behalf of the Minister for Finance, stated that 7th NFC Award is still

in the field as it has a legal cover vide President's Order No. 5 of 2010. I, once again, brought it to the notice of the Government that, *"this is the second Budget which has been passed without the announcement of the Award. It is correct that President of Pakistan has given new life to the old NFC, however, new NFC Award should come after five years."*

(vii) In the Senate sitting held on 20th January, 2017, during discussion on the 2nd Biannual Monitoring Report on the Implementation of National Finance Commission (NFC) Award (January-June, 2016), Members raised concerns regarding non-announcement of the new NFC Award. Mr. Baligh-ur-Rehman, Minister of State for Interior, on behalf of Minister for Finance, made a statement. While replying to the concerns raised by Members, he stated that, *"when it has been said that an Award shall come after every years then there should also be a consensus that when to take up the new Award"*.

(viii) In the Senate sitting held on 21st March, 2017, Senator Sassui Palijo on her behalf and on behalf of Senator Mukhtiar Ahmed Dhamrah, through a Calling Attention Notice, drew attention of the Minister for Finance, towards the continuous delay in finalization of NFC Award. Mr. Shahid Khaqan Abbasi, Minister for Petroleum and Natural Resources, on behalf of the Minister for Finance, made a statement, wherein he stated that, *"it is not necessary that there should be an Award of every NFC"* and made reference to previous NFCs in this regard. He further stated that, *"it has a five years' life. It is deliberating the issue and it will come up with the Award if a consensus is reached. That is the situation, the Commission has a five years' life; it will deliberate it. Hopefully, it will reach a consensus."*

- Senator Aitzaz Ahsan, Leader of the Opposition, objected to this stance of the Government and stated that, *"National Finance Commission is the basic component of the federal structure of the Constitution; the Commission is under obligation to give an Award. Commission is not constituted to only sit, have tea and TA/DA, it has to give an Award under which a smooth and adequate of financial and resources distribution between the Provinces will take place"*.
- I made an observation in the following terms:-

"Article 160 is very clear. NFC is the basis of federalism; if Award is not being announced, each day that it is not coming, it is an unconstitutional step. For this reason we have talked about increase in powers of the Senate and passed a unanimous Resolution that the Constitution should be amended to provide that if NFC Award is not announced within five years then the Government should take permission from the Senate for extension of the Award and Senate should have power to increase the share of provinces to one percent."

- (ix) In the Senate sitting held on 9th June, 2017, Senator Taj Haider raised the issue of non-issuance of NFC Award and under transfer of funds to the Provinces.
 - (x) Finally, in the Senate sitting held on 23rd October, 2017, Senator Mukhtiar Ahmed Dhamrah @ Aajiz moved that the House may discuss the situation arising out of non-announcement of NFC Award and if this situation continuous the Budget for 2017-18, will also be without the Award. Members raised concerns as to the constitutional violation and demanded that a Committee of the Whole be constituted to take up this matter. I reserved my ruling on this point.
2. On 31st October, 2017, I asked the Minister for Law and Justice to assist the Chair as to how the Government interprets clause (1) of Article 160, Constitution, 1973. Whether National Finance Commission is to be constituted within five years or the Award should be announced within five years. In the Senate sitting held on 7th November, 2017, Minister for Law and Justice made a statement (verbatim annexed). The gist of his statement is as under:-
- i) Two most important aspects of clause (1) of Article 160, Constitution, 1973, are, - the constitution of a National Finance Commission at intervals not exceeding five years and that the Federal Minister for Finance, the Ministers for Finance for the Provincial Governments and the other persons to be appointed by the President.

- ii) Wording of the Constitution does not bind the National Finance Commission to finalize an award every five years; the requirement is that a National Finance Commission be constituted every five years.
- iii) The first, fourth, fifth and seventh National Finance Commissions have given Awards; first National Finance Commission Award enforced for 16 years, fourth award enforced for 6 years, fifth award enforced for 13 years and now the seventh award has been enforced since 2010 onwards.
- iv) In the Presidential Orders there is a commencement date, but there is no thought of a validity date; it remains enforced till the next Award comes. Every new Award or rather every new Order that is issued after the Award is made, repeals the earlier Order. This is an indication that it remains enforced till such time as the new Order is issued. Every Order repeals the earlier Order.
- v) Amending Orders have been issued by the President; previously modifications of Awards were made mainly because of the census and due to the failure of the Commission to give recommendations.

After hearing the arguments of Minister for Law and Justice, I reserved my Ruling.

3. In terms of the aforementioned facts and queries raised, the question which needs to be answered is,-

"In terms of clause (1) of Article 160, Constitution, 1973, whether the National Finance Commission is to be constituted every five years or the Award should also be announced every five years?"

4. In order to examine and answer the question framed herein, it will help us in understanding the delays in the announcement of the awards if we travel through the pages of history. Prior to the Constitution, 1973, the position was as under;

- (i) After the independence, Sir Jeremy Raisman was asked to formulate a feasible revenue sharing formula between the Federation and federating units of the

country. The Raisman formula was presented in December, 1947 and subsequently adopted on April 1, 1952.

- (ii) After the 1952, Award, there were three NFC Awards of 1961, 1964 and 1970.

After the Constitution, 1973, came into existence, the following position emerged:

- (i) 1974 National Finance Commission gave the First Award, the same year, after the promulgation of the Constitution, 1973, and a new Award was due in 1979.
- (ii) The Second National Finance Commission was constituted in 1979, during Martial Law. It never held any meeting and consequently made no recommendations. Therefore, for resources distribution in the interim period, the 1974 Award was followed. After the new census conducted in 1981, the population proportion changed and the resources shares were adjusted accordingly.
- (iii) The Third National Finance Commission was constituted in 1985, during the tenure of General Ziaul Haq. The Commission held 9 meetings in 3 years but was unable to finalize its recommendations. The resources distribution from the Divisible Pool remained as of the 1974 Award, and it continued till 1990.
- (iv) After almost 16 years, the Fourth National Finance Commission constituted in 1990, under civilian rule gave recommendations in April, 1991.
- (v) The Fifth National Finance Commission was constituted in December, 1996. The Commission announced the Award in February 1997.

- (vi) The Sixth National Finance Commission was constituted on 22nd July, 2000, under General Musharaf. It held 11 meetings but could not finalize its recommendations.
- (vii) Another National Finance Commission was constituted on 21st July, 2005, under General Musharaf, it also failed to give its recommendations. This gave rise to a deadlock, as a consequence of which the Provincial Chief Ministers vested the authority to the President (General Musharaf) to announce the Award. As a result, the President under Article 160(6) of the Constitution, 1973, through Ordinance No.1 of 2006, made amendment in the "Distribution of Revenues and Grants in Aid, Order 1997. The new Award was announced to take effect from 1st July, 2006.
- (viii) The Seventh National Finance Commission was constituted by the President of Pakistan on 21st July 2009. The Award was announced vide Presidential Order No.4 of 2010 on 18th March, 2010. On 10th May, 2010, the Presidential Order No.5 of 2010, made an amendment to the Presidential Order No.4 of 2010. The Award became effective from the 1st July, 2010, and still in force because the Eighth National Finance Commission constituted on 21st July 2010, failed to make recommendations.
- (ix) The Ninth National Finance Commission was constituted on 24th of April, 2015 which, till date, is effective.

5. After walking through the pages of historical facts on the composition of the National Finance Commissions and the Awards they were able to announce or not announce, one glaring fact that should not be lost sight of it, is a tossed up period where the Constitution has been held in abeyance or restrained. I will now take up the legal position and examine Article 160, Constitution, 1973, the said Article is reproduced as under;

(i) Article 160, Constitution, 1973;

"160. National Finance Commission.—(1) Within six months of the commencing day and thereafter at intervals not exceeding five years, the President shall constitute a National Finance Commission consisting of the Minister of Finance of the Federal Government, the Ministers of Finance of the Provincial Governments, and such other persons as may be appointed by the President after consultation with the Governors of the Provinces.

(2) It shall be the duty of the National Finance Commission to make recommendations to the President as to—

(a) the distribution between the Federation and the Provinces of the net proceeds of the taxes mentioned in clause (3);

(b) the making of grants-in-aid by the Federal Government to the Provincial Governments;

(c) the exercise by the Federal Government and the Provincial Governments of the borrowing powers conferred by the Constitution; and

(d) any other matter relating to finance referred to the Commission by the President.

(3) The taxes referred to in paragraph (a) of clause (2) are the following taxes raised under the authority of Majlis-e-Shoora (Parliament)], namely:—

(i) taxes on income, including corporation tax, but not including taxes on income consisting of remuneration paid out of the Federal Consolidated Fund;

(ii) taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed;]

(iii) export duties on cotton, and such other export duties as may be specified by the President;

(iv) such duties of excise as may be specified by the President; and

(v) such other taxes as may be specified by the President.

(3A) The share of the Provinces in each Award of National Finance Commission shall not be less than the share given to the Provinces in the previous Award.

(3B) The Federal Finance Minister and Provincial Finance Ministers shall monitor the implementation of the Award biannually and lay their reports before both Houses of Majlis-e-Shoora (Parliament) and the Provincial Assemblies.]

(4) As soon as may be after receiving the recommendations of the National Finance Commission, the president shall, by Order, specify, in

accordance with the recommendations of the Commission under paragraph (a) of clause (2), the share of the net proceeds of the taxes mentioned in clause (3) which is to be allocated to each Province, and that share shall be paid to the Government of the Province concerned, and, notwithstanding the provision of Article 78 shall not form part of the Federal Consolidated Fund.

(5) The recommendations of the National Finance Commission, together with an explanatory memorandum as to the action taken thereon, shall be laid before both Houses and the Provincial Assemblies.

(6) At any time before an Order under clause (4) is made, the President may, by Order, make such amendments or modifications in the law relating to the distribution of revenues between the Federal Government and the Provincial Governments as he may deem necessary or expedient.

(7) The President may, by Order, make grants-in-aid of the revenues of the Provinces in need of assistance and such grants shall be charged upon the Federal Consolidated Fund."

- (ii) Clause (1) of Article 160, Constitution, 1973, provides that "at intervals not exceeding five years, the President shall constitute a National Finance Commission consisting of.....". the words "shall" and "not exceeding five years", makes it mandatory to constitute a National Finance Commission within five years, this is the maximum outer time limit as a Commission can be constituted within one year or as early as the previous Finance Commission finalizes an Award.
- (iii) Clause (1) of Article 160, Constitution, 1973, cannot be read in isolation, it has to be linked with the remaining clauses of the said Article in order to ascertain the intention of the legislature and understand the *modus operendi* for fiscal decentralization.
- (iv) Clause (2) of Article 160, Constitution, 1973, provides that, "it shall be the duty of the National Finance Commission to make recommendations to the President as to..."(emphasis provided). The words 'shall' and "duty" have been defined in Black's Law Dictionary, Ninth Edition, at pages 580 and 1499 respectively, as;

Duty

"A legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right."

Shall

"Has a duty to; more broadly, is required to <the requester shall send notice> <notice shall be sent>. This is the mandatory sense that drafters typically intend and that courts typically uphold."

- (v) The legal definition, of the two words when read in the said clause, enunciates that the National Finance Commission, constituted under clause (1) of Article 160, Constitution, 1973, will have to give recommendations before its conclusion. In terms of the definition of the term 'duty' it is an obligation of the NFC to give recommendations and Provinces have a corresponding right to have distribution of net proceeds of the taxes mentioned in clause (3) of Article 160, Constitution, 1973, after every five years. It becomes all the more important in terms of sub-Article (3A) of the said Article which provides that the, *"share of the Provinces, in each award of National Finance Commission shall not be less than the share given to the provinces in the previous Award"*.
- (vi) Clause (4) of Article 160, Constitution, 1973, provides that *"As soon as may be after receiving the recommendations of the National Finance Commission, , the president shall, by Order, specify, in accordance with the recommendations of the Commission under paragraph (a) of clause (2)....."* (emphasis provided) the use of the words "after receiving the recommendations", "the President shall", shows the intent of the legislature that the recommendations of the NFC shall be given affect by a Presidential Order, as soon as possible.
- (vii) The legal position as stated above is corroborated with the intent of the legislature, which can be gathered from the debates of the Constitution making Assembly in 1973. Reference is made to the statement of the then Minister for Law, Mr. Abdul Hafeez Pirzada (Late), who while responding to an amendment moved in clause 160, made the following statement:-

**The National Assembly of Pakistan Debates (Vol. II No. 27-36)
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*"I would say that we have worked, as admitted by him, in the spirit of co-operation and particularly the larger provinces in Pakistan have shown some magnanimity to create institution which will inspire confidence of the smaller provinces. We have tried to strike at the root of the problem. The problem has existed in this country is the lack of the faith and confidence in each other. Unnecessarily, people have been taking blame for something which they never did. People have been excused but that has always been a limited group responsible for exploitation. The institution that we have suggested is more or less on the line of the council of common interest. The Federal Finance Minister and the Provincial Finance Ministers and such other number of persons as President may decide shall form the National Finance Commission. **Every five years it will give a report**, and in this all the Provinces will have participation as well as sense of participation, and when five Finance Ministers of the Federation and of Provinces sit together with the help of such other members as the President may be pleased to appoint, and the President shall do so under the advice of the Prime Minister".*

- (viii) It is evident from the statement made by the then Minister for Law that the Commission is obligated to submit its report before or at the expiration of five years.
- (ix) This intent is further provided in the Distribution of Revenues and Grants-in-Aid (Amendment) Order, 2006, wherein the provincial Chief Ministers vested the authority to the President to announce an Award due to the failure of the NFC to give recommendations, as a result the President under clause (6) of Article 160 of the Constitution, 1973, through Ordinance No. 1 of 2006, made amendment in the "Distribution of Revenues and Grants in-Aid Order, 1997. Preamble to the said Order provides as under:-

"And whereas the Commission could not submit its recommendations with regard to the said distribution and the matter being of urgent and national importance cannot be further delayed;"

The Preamble is testimonial to the fact that the NFC was under obligation to give recommendations.

- (x) Another recent example establishing that a fresh Award needs to be given every five years, is the Seventh NFC Award itself. Clause (3) of Article 4 of the Presidential Order No. 5 of 2010, while laying down special arrangement for Balochistan, provided that *"this arrangement for Balochistan shall remain protected throughout the remaining four years of the Award based on annual budgetary projections"* (emphasis provided). The drafters of the Presidential Order were conscious of the fact that this Award will remain enforced only for five years and after the expiration of five years a new Award will have to be announced. As the new Award could not be announced within the stipulated time, therefore, vide Presidential Order No. 6 of 2015, the above mentioned words of Clause (3) of Article 4 of P.O. No. 5 of 2010, were substituted with the words that, *"this arrangement for Balochistan shall remain protected throughout the Award period based on annual budgetary projections"*.
- (xi) Provisions of Article 160, Constitution, 1973, are not unique as such like provisions are provided in Constitutions of other countries. It is imperative to make reference to the Indian Constitution in this regard as clause (1) of Article 160, Constitution, 1973, is *para materia* to Article 280 of the Constitution of India, which is reproduced as under:-

"280. Finance Commission

(1) The President shall, within two years from the commencement of this Constitution and thereafter at the expiration of every fifth year or at such earlier time as the President considers necessary, by order constitute a Finance Commission which shall consist of a Chairman and four other members to be appointed by the President

(2) It shall be the duty of the Commission to make recommendations to the President as to

(a) the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds;

(b) the principles which should govern the grants in aid of the revenues of the States out of the Consolidated Fund of India;

(c) any other matter referred to the Commission by the President in the interests of sound finance.

(4) The Commission shall determine their procedure and shall have such powers in the performance of their functions as Parliament may by law confer on them"

- (xii) Clause (1) of Article 280, Constitution of India, also provides a Constitutional obligation to constitute a Finance Commission at the expiration of every fifth year or at such earlier time as the President considers necessary. Clause (2) of the said Article provides that "*It shall be the duty of the Commission to make recommendations to the President as to*" (emphasis provided). In essence, clauses (1) and (2) of Article 280, Constitution of India, with slight variation, are identical to clauses (1) and (2) of Article 160, Constitution of Pakistan, 1973. In order to give effect to the spirit of this Constitutional provision, the Indian Finance Commission is set up every five years to suggest principles governing the distribution of tax proceeds among the Centre, states and local bodies. The Commission gets two years to submit its report after consultations with central and state bodies and a cross-section of society; it becomes *functus officio* after completing its assigned work. A chronological order of the Indian Finance Commissions and Awards is as under:-

| Finance Commission | Constituted Year | Report Submitted Year |
|---------------------------|-------------------------|------------------------------|
| First Finance Commission | 1951 | 1953 |
| Second Finance Commission | 1956 | 1957 |

| | | |
|-------------------------------|------|------|
| Third Finance Commission | 1960 | 1962 |
| Fourth Finance Commission | 1964 | 1965 |
| Fifth Finance Commission | 1968 | 1969 |
| Sixth Finance Commission | 1972 | 1973 |
| Seventh Finance Commission | 1977 | 1978 |
| Eight Finance Commission | 1982 | 1984 |
| Ninth Finance Commission | 1987 | 1989 |
| Tenth Finance Commission | 1992 | 1994 |
| Eleventh Finance Commission | 1998 | 2000 |
| Twelfth Finance Commission | 2002 | 2004 |
| Thirteenth Finance Commission | 2007 | 2009 |
| Fourteenth Finance Commission | 2014 | 2015 |

6. In view of the Constitutional, legal, factual and international position explained above, the question at para 2 hereinabove is answered in the following terms:-

- (i) In terms of clause (1) of Article 160, Constitution, 1973, the President of Pakistan shall constitute a National Finance Commission within five years.
- (ii) In terms of clause (1) read with clause (2) of Article 160, Constitution, 1973, the National Finance Commission shall give its recommendations to the President of Pakistan before the expiration of its tenure i.e. five years.
- (iii) In order to give effect to paragraphs (i) and (ii), the following procedure may be adopted:-
 - a. Immediately after the announcement of an Award, the President shall constitute the next NFC to give recommendations within its tenure;
 - b. NFC shall give its recommendations to the President well before the expiration of its tenure;

- c. The recommendations shall be given effect vide a Presidential Order, in terms of clause (4) of Article 160, Constitution, 1973, hence, completing the entire procedure within five years.

7. I agree with the contention of the Minister for Law and Justice that historically the NFC Awards have remained effective for more than five years, sometimes till sixteen years. However, I am also conscious of the fact that the constitutional derailments and discontinuity of the Parliament has also remained a factor in this regard. Therefore, without touching upon the merits of previous NFCs and their Awards and disturbing the scheme of the present Award, which remains effective, position reflected at para 6 above will play a pivotal role in ensuring fiscal decentralization and participatory federalism through enforcement of constitutional rights of the Provinces.

8. The Secretariat is directed to send a copy of this ruling to the President of Pakistan, Prime Minister, Minister for Law and Justice, Minister for Parliamentary Affairs, Provincial Chief Ministers and Speakers of Provincial Assemblies for necessary action.



MIAN RAZA RABBANI
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Chairman Senate

Dictated in Chamber
Announced in the House on 17th November, 2017.
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