

August 5, 2009

# National Reconciliation Ordinance 2007

## Current Status of the Legislation

The Ordinance was promulgated by the President of Pakistan late in the day on October 5, 2007 just a few hours before both the National Assembly and the Senate were to meet on October 6, 2007 and later vote in the Presidential Election. Before the ordinance could be laid either before the National Assembly or the Senate, the then President / Chief of Army Staff proclaimed a 'state of emergency' on November 3, 2007 which remained in place till December 15, 2007. During the period of 'emergency,' General Musharraf promulgated a Provisional Constitutional Order (PCO) under which 37 ordinances including the NRO 2007 were given permanence which meant that these, according to the PCO, did not require passage by the Parliament. The Supreme Court, in its judgement of July 31, 2009, has declared the permanence accorded to these ordinances as void and required that these be laid before the Parliament as per the Article 89 of the Constitution. If either house of the Parliament takes no action on the Ordinance, it will automatically stand repealed at the expiration of 4 months from the date of the judgment. The Parliament, in the meantime, may pass the law as it is or with amendments or disapprove it altogether by a simple majority. Two constitutional petitions challenging the NRO 2007 are pending before the Supreme Court.

## About the Legislative Brief

The Brief is and is primarily based on a position paper authored by **Mr. Shahid Hamid** at the request of PILDAT. The objective of the Brief, put together by PILDAT, is to assist the parliamentarians to understand the context, objective and the issues relating to the ordinance and to take well considered position on it. The Brief is intended to enhance awareness of the Citizens and Media as well.

Mr. Shahid Hamid is a noted lawyer and senior advocate of the Supreme Court of Pakistan. He has been the Governor of the Punjab, Federal Minister of Defence and Federal Minister of Law in Pakistan. Although the Brief is based on the position paper authored by him, the responsibility of the contents of the Brief is that of PILDAT.

## Highlights of the Ordinance

- The Ordinance consists of 7 Sections spread on less than 5 pages.
- The Ordinance mainly amends three existing laws; One, the Code of Criminal Procedure, 1898 (Act V of 1898) Section 494; two, the Representation of the people Act, 1976 (LXXXV of 1976) Section 39 and three, the National Accountability Ordinance, 1999 (XVIII of 1999) Sections 18, 24, 31A and insertion of Section 33E.
- Section 2 of the Ordinance provides for Review Boards at the federal and provincial levels for review of criminal cases lodged between January 1, 1986 and October 12, 1999 (i.e. the date General Musharraf took over the Government). In case the review boards find that the accused persons in these criminal cases including absconders have been falsely involved for political reasons or through political victimization the boards can recommend withdrawal of such cases to the respective governments, and the concerned governments have been empowered to withdraw the same.
- Section 3 of the NRO provides that on the Election Day, after consolidation of results, the returning officer shall immediately provide to the contesting candidates and their election agents a copy of the result of the count sent to the Election Commission. Until now, the result of the count of each polling station was provided to polling agents but not the consolidated count of each constituency by Returning Officers.
- Sections 4 and 5 of the NRO prescribe that no Member of Parliament or a Provincial Assembly shall be arrested in a NAB-related case without taking into consideration the recommendations of the concerned Parliamentary or Provincial Assembly's Special Committee on Ethics. The Special Committees on Ethics are to comprise a chairman and an equal number of Government and Opposition party members appointed by the respective Speakers/Chairman Senate on the recommendations of the Leaders of the House(s) and the Leaders of the Opposition respectively.
- Section 6 provides for a new clause in section 31-A of the NAB Ordinance to the effect that a judgment passed in absentia against an accused is void ab initio and shall not be acted upon.
- Section 7 provides for immediate withdrawal and termination of all NAB cases against holders of public office which were initiated both inside the country and outside prior to October 12, 1999 and which are pending in any court including the Supreme Court except where the court orders have become final or where voluntary return or plea-bargain has been accepted by the Chairman NAB or the Governor State Bank, as the case may be. Another exception is cases related to Cooperative Societies and financial and investment companies which are to continue. Section 7 also provides protection to NAB and its functionaries, as also to the federal, provincial and local governments and their functionaries against suits and prosecutions on account of withdrawal and termination of the afore-mentioned cases.

## National Reconciliation Ordinance 2007

### Executive Summary

The NRO, 2007 had apparently been promulgated as a result of an understanding reached between General Pervez Musharraf's government and the late Ms. Benazir Bhutto, Chairperson of PPP. The ordinance covers four broad areas. Firstly, the ordinance amends Section 494 of the Code of Criminal Procedure, 1898. This amendment provides that all criminal cases registered between January 1, 1986 and October 12, 1999 will be reviewed by Review Boards formed at the federal and provincial levels. Those cases found to be false and politically motivated by the Boards will be recommended for withdrawal by the governments. Secondly, the Representation of the People Act, 1976 has been amended such that the Returning Officer shall provide a copy of the result of count to contesting candidate and their election agents. Thirdly, the National Accountability Ordinance, 1999 has been amended to provide that no member of the Parliament or Provincial Assemblies can be arrested in NAB cases without taking into consideration the recommendation of Special Committees on Ethics to be formed separately for the Parliament and the four Provincial Assemblies. These committees shall consist of members of the concerned legislatures with equal representation from the ruling party and the opposition. Fourthly, National Accountability Ordinance, 1999 has been amended such that all NAB cases initiated prior to October 12, 1999 both inside and outside the country stand withdrawn and terminated with immediate effect. It is this fourth part of the Ordinance which proved to be highly controversial and has been generally criticized. The Ordinance has been challenged in the Supreme Court. It is expected that the first, second and third parts as indicated above may survive the judicial scrutiny and can be accepted by people also with some minor improvements but the fourth aspect regarding immediate withdrawal of all NAB cases may be found in conflict with Article 25 of the Constitution and hence may be declared void by the Supreme Court, if and when challenged there. The Ordinance needs major improvements to conform it to the letter and spirit of the Constitution and to make it acceptable to people at large who have generally expressed serious objections especially on Sections 6 and 7 of the NRO. Section 3 of the NRO dealing with electoral reform is wanting in many respects and a more comprehensive set of electoral reforms especially the ones dealing with the appointment of Chief Election Commissioner, Independence of the Election Commission, appointment of the Caretaker governments, display of progressive polling station-wise results on the Election Commission website and the preparation of an Election Code of Conduct, etc. should be included in this section or made apart of a separate more comprehensive legislation focusing exclusively on Electoral Reforms. The Members of Parliament can play an effective role in improving the legislation through amendments when it comes up before the Parliament for passage as an Act. Citizens, Citizens Organizations and Media can also play important roles in improving the legislation and in seeking greater transparency about the list of all cases and beneficiaries of the Ordinance especially its Sections 6 and 7.

### Background of the Ordinance

Mohatma Benazir Bhutto, Chairperson of Pakistan Peoples Party and her spouse Mr. Asif Zardari, have been facing a number of corruption cases followed by the National Accountability Bureau (NAB) on behalf of the Government of Pakistan. Almost all of these cases were initiated during Mr. Nawaz Sharif's Premiership or the Caretaker Government preceding the 1997 General Election. Some of these cases were being investigated in some foreign countries such as Switzerland but the NAB was very vigorously following up those cases to get Ms. Bhutto and her husband convicted. Gen. Pervez Musharraf, who adopted 'Enlightened Moderation' and 'Liberalism' as a slogan and policy since after 9/11, needed stronger political allies in addition to Pakistan Muslim League - Quaid-e-Azam (PML-Q) and Muttahidda Quami Movement (MQM) to lend legitimacy to his election as President for a new term starting in November 2007 while he held the office of the Chief of Army Staff as well. All Opposition Parties such as Muttahidda Majlis-e-Amal (MMA) and Pakistan Muslim League Nawaz (PML-N) resigned from the National Assembly and all provincial assemblies except NWFP to dent the credibility and legitimacy of the election. Pakistan Peoples Party Parliamentarian (PPPP) which was the largest opposition party, also threatened to resign if General Pervez Musharraf refused to

accept their demands which were narrowed down to 3 about 10 days before the Presidential Election and ultimately narrowed down to just 1 about 3 days before the Presidential Election. That one demand was 'Amnesty' or 'Clemency' or 'Indemnity' against criminal corruption cases. The NRO 2007, issued a few hours before the polling for the Presidential Election was to get underway, is the result of an understanding reached between Ms. Benazir Bhutto and Gen. Pervez Musharraf. Most of the media and all other opposition parties branded this as a deal under which the PPPP legislators, in return for the ordinance, did not resign from the assemblies. The ordinance, of course, is not PPP-specific but has been drafted specifically with the PPP in mind and its draft was reviewed and vetted by the PPP leadership and their legal experts before it was promulgated. The ordinance was almost immediately challenged in the superior courts. The Supreme Court refused to suspend the legislation, however it passed an interim order on October 12, 2007 that all benefits accruing due to the ordinance will be subject to the final judgment of the Court. The order was set aside by the post-emergency Supreme Court on February 27, 2008. Two constitutional petitions challenging the NRO 2007 are still pending before the Supreme Court.

**National Reconciliation Ordinance 2007****Analysis of the Ordinance**

**1. Review of the Criminal Cases Registered because of Political Victimization:** The NRO has several beneficiaries. Section 2, apparently inserted at the instance of the MQM, amends section 494 of the Criminal Procedure Code. Prior to the amendment only the Prosecutors-General were empowered to withdraw pending criminal cases. Section 2 provides for Boards at the federal and provincial levels for review of criminal cases lodged between January 1, 1986 and October 12, 1999. In case the Review Boards find that the accused persons in these criminal cases including absconders have been falsely involved for political reasons or through political victimisation the Boards can recommend withdrawal of such cases to the respective governments, and the concerned governments have been empowered to withdraw the same. The NRO does not say that the respective governments are bound by the recommendations of the Review Boards. However, the power of the governments to withdraw pending criminal cases is subject to the approval of the concerned courts. The Federal Review Board is to be headed by a retired Judge of the Supreme Court and is to include the Attorney General and the Federal Law Secretary as its Members. The Provincial Review Boards are to be headed by retired judges of the High Courts and are to include the Advocates General and/or Prosecutors General and the Provincial Law Secretaries as its members. It is not clear who will select and appoint the retired judges to head the Review Boards but it is a critical point for an objective review because rest of the members are government functionaries. There were similar Review Boards constituted during the tenure of the first Benazir Government for review of cases of public sector employees wrongfully terminated during the Zia ul Haq years on account of their PPP affiliations. The recommendations of these Review Boards led to re-instatements and righting of wrongs in several hundred cases. Prima facie section 2 may survive judicial challenge. There could be a finding that the dates are arbitrary. Why all cases between January 1, 1986 to October 12, 1999? Why not also similar cases in earlier and later periods? There could also be an argument advanced that the law should require the Review Boards to hear the complainants before making their recommendations and that the respective governments must record reasons in case they disagree with the recommendations of the review boards. These are some of the desirable amendments which legislators should consider when debating the legislation in the Parliament.

**2. An amendment in Electoral Laws to Guard Against Manipulation of General Election Results:** Section 3 of the NRO provides that on Election Day, after consolidation of results, the returning officer shall immediately provide to the contesting candidates and their election agents, who are present during the consolidation proceedings, a copy of the result of the count sent to the Election Commission, and also post a copy of the result to other candidates and their election agents. There cannot be any lawful quibble with this amendment in the Representation of the People Act which (hopefully) will prove useful in ensuring free, fair and transparent elections. However, this section appears to be somewhat out of place and, strangely, provides for just one electoral reform while so many other and apparently more important electoral reforms like consensus appointment of the Chief Election Commissioner, making the Election Commission truly independent, ensuring neutral caretaker governments and displaying progress polling station-wise election results on Election Commission website were not addressed.

**3. Future Arrest of Legislators on Corruption Charges Made Subject to Recommendations of the Parliamentary Ethics Committees:** Sections 4 and 5 of the NRO prescribe that no Member of Parliament or a Provincial Assembly shall be arrested in a NAB-related case without taking into consideration the recommendations of the concerned Special Committee on Ethics. Section 31-C of the NAB Ordinance affords a degree of protection to officers of banks and financial institutions accused of impropriety in the write-off, waiver, etc, of loans. NAB cannot proceed against them without prior approval of the State Bank. Section 31-D of the NAB Ordinance gives similar protection to loan defaulters. They cannot be prosecuted without the permission of the Governor State Bank. Persons accused of hampering a NAB investigation cannot be prosecuted without the sanction of a committee headed by Chairman NAB. A number of European countries have laws similar to sections 4 and 5 of the NRO. The purpose of sections 4 and 5 *ibid* appears to be to ensure that there is no political victimization in the matter of NAB-related investigations against Members of Parliament and the Provincial Assemblies. It is obvious that the main beneficiaries of this provision will be Opposition Legislators under any government. This begs the question why NAB cannot be re-made into an institution that does not act at the behest of the Government of the day. Nevertheless, for the reasons given above, it may be that sections 4 and 5 *ibid* survive the challenges pending before the Supreme Court.

**4. Court Judgments Passed in Absentia Declared Void:** The real controversy before the Supreme Court will be with reference to sections 6 and 7 of the NRO. Section 6 provides for a new clause in section 31-A of the NAB Ordinance to the effect that a judgment passed in absentia against an accused is void *ab initio* and shall not be acted upon. There may be some other beneficiaries of this provision; one of them has certainly been late Ms. Benazir Bhutto. Section 6 protected the PPP leader from arrest on her arrival in the only matter in which she has been convicted and sentenced. The provisions of Article 63(1)(p) of the Constitution (inserted *vide* Legal

**National Reconciliation Ordinance 2007****Analysis of the Ordinance (Continued)**

Framework Order 2002 and ratified by the 17th Amendment) also require to be noticed in this behalf. Article 63(1)(p) disqualifies a person from elective office if he/she has been convicted and sentenced to imprisonment for having absconded. On the basis of certain recent judgments of the Superior Courts it is fairly certain that the PPP leader could have had her conviction set aside by appearing before the Court which sentenced her. It appears however that the PPP legal team did not want to take any risk in this matter. The question remains whether the risk has been avoided. Under Article 45 of the Constitution the President can grant pardon and reprieve, respite and remit any sentence. It is debatable whether this can be done through legislative fiat especially when the law has the effect of setting at naught the disqualification contained in Article 63(1)(p)?

**5. The Most Controversial Section of the Ordinance - Withdrawal of All NAB Cases Against Holders of Public Office:** Section 7 provides for withdrawal and termination of all cases against holders of public office which were initiated by the Federal Government prior to October 12, 1999 and which are pending in any court including the Supreme Court except where the court orders have become final or where voluntary return or plea-bargain has been accepted by the Chairman NAB or the Governor State Bank, as the case may be. Another exception is cases related to cooperative societies and financial and investment companies which are to continue notwithstanding the fact that they were initiated prior to October 12, 1999. Section 7 also provides protection to NAB and its functionaries, as also to the federal, provincial and local governments and their functionaries against suits and prosecutions on account of withdrawal and termination of the afore-mentioned cases.

**6. Article 25 of the Constitution 'Equality of citizens' and the NRO:** Article 25 of the Constitution is part of the Fundamental Rights. It provides that 'all citizens are equal before the law and entitled to equal protection of law.' One of the questions that the Supreme Court will be required to answer in the pending constitutional challenges to the NRO is whether section 7 offends against these equality provisions. The precise question will be whether it is rational, whether is it reasonable and not capricious and not arbitrary, to withdraw/terminate all NAB related cases lodged prior to October 12, 1999 against holders of public office in which there is no final order and thus distinguish such cases from all other criminal prosecutions (including prosecutions for offences committed prior to October 12, 1999 but commenced subsequent to this date).

**7. Does the NRO Constitute an Impermissible Trespass of Legislature into the Judicial Space?** Another question of equal importance for the Supreme Court will be whether section 7 constitutes an impermissible trespass into the judicial realm of State. Can a law be passed declaring a person to be guilty of a particular offence? The self-evident answer, based on several provisions of the Constitution, including its Articles 4 'Right of individuals to be dealt with in accordance with law etc.' and 25, is a categorical NO. Can then a law be passed which has the effect of declaring a person innocent simply because proceedings against him or her have not concluded in any final judicial verdict within a given period of time? Can the Legislature in this manner take over the function to be performed by the Judiciary? Is it constitutionally permissible for the Legislature to say that a person is innocent simply because the Judiciary has not finally determined his/her guilt or innocence by a certain date.

**8. The Number of Cases and Identity of Beneficiaries:** Despite best efforts it has not been possible thus far to ascertain the number of beneficiaries of sections 6 and 7. One government source has put the figure at around 70. Another non-government source at between 550 to 600. Basic principles of transparency and justice demand that the Government and specifically the NAB should make public the details of all cases and identity of all beneficiaries of Sections 6 and 7 of the NRO. In addition to the courts of law, the court of the people should also be facilitated by immediately making available all relevant information so that they may also form their opinion about a law which is expected to have far-reaching impact on the political and legal landscape of Pakistan. In fact the Government should have released all such details at the same time as the Ordinance was promulgated.

**9. Does the NRO Really Promote Reconciliation?** The title of the NRO is clearly a misnomer. In the first place its designed purpose was to achieve certain political goals of the two negotiating parties, three if you count the MQM as an entity separate from the main coalition partner in the Government. Secondly, the adverse reaction nationwide, including the open hostility of the main PML-Q leaders has accentuated the cleavage within society rather than having any healing or balm effect.

**10. Any Reference to South Africa's 'Truth and Reconciliation Commission' is Misplaced:** The 'reconciliation' part of the NRO title appears to have been borrowed from the 'Truth and Reconciliation Commission' set up in South Africa at the instance of its then President

**National Reconciliation Ordinance 2007****Analysis of the Ordinance (Continued)**

Nelson Mandela in the aftermath of the White Apartheid Rule. The letter and spirit of the South African Commission was altogether different from that of the NRO. White rulers who had committed atrocities and injustices during Apartheid were required to confess their crimes and seek forgiveness. There were defined parameters built into the enabling parent law. Many confessed and were forgiven but a much larger number were not. There was not, as in section 7 of the NRO, a blanket amnesty for all crimes of corruption and misuse of power by holders of public office.

**11. What happens if the Parliament does not approve the NRO?** Under Article 89 of the Constitution 'Power of President to promulgate Ordinances,' a Presidential Ordinance has a constitutional life-span of four (4) months. It has the force of law in the same manner as an Act of Parliament. The President can exercise this power whenever the National Assembly is not in session and the President is satisfied that circumstances necessitate immediate action. If the NRO is not converted into an Act of Parliament within four months or disapproved by either House of Parliament within the four month period it will stand repealed at the end of four months or from the date of disapproval as the case may be. Presidents have many a times re-promulgated the same ordinance on expiry of the four month period though their lawful power to do so is not altogether free from doubt. A question arises as to what would happen if the Parliament balks at converting the NRO into an Act of Parliament? The answer is to be found in Article 264 of the Constitution 'Effect of Repeal of Laws'. This Article prescribes, amongst other things, that whenever a law is repealed the repeal shall not affect any right, privilege, obligation, or liability acquired, accrued or incurred under the law. This explains the present wording of section 7 of the NRO and the refusal of the PPP legal experts to consider inclusion of a review board mechanism, such as that contained in section 2 of the NRO, for withdrawal of the NAB cases. They are/ were evidently of the view that the right acquired under section 7 viz withdrawal and termination of NAB cases with immediate effect, could not be taken away even if the NRO was later not converted into an Act of Parliament or disapproved by either House or even withdrawn by the President.

**12. Interim Order of the Supreme Court:** Supreme Court passed an interim order on October 12, 2007 on the various petitions filed, challenging the vires, i.e. legality of the NRO on the touchstone of several constitutional provisions including Article 25 relating to equality before the law and impermissible discrimination. The order held that any benefit derived by any person from the NRO will be subject to its final order as to its vires. The order was set aside by the post-emergency Supreme Court on February 27, 2008. Two constitutional petitions challenging the NRO 2007 are, however, still pending before the Supreme Court. The effect of a possible future Supreme Court order holding that the NRO (or any part thereof) is ultra vires the Constitution will be altogether different from the effect of its repeal. An Ordinance that is held to be ultra vires is one that is void ab initio, in other words as if it never existed. Whenever there is a delay between the enactment of a law and a decision declaring such law to be ultra vires, for example the decision holding that employees of federal statutory corporations were not civil servants and hence could not invoke the jurisdiction of the Federal Service Tribunal (the law was made in 1997 and declared void in 2007) the Supreme Court normally saves past and closed transactions under the void law. In the case of the NRO there was no delay and the Supreme Court had already declared within days of its enactment that any benefit derived from the NRO would be subject to its final order. Although the post-emergency Supreme Court set aside that order subsequently, that court itself has now been declared unlawful in the Supreme Court judgment of July 31, 2009. Nobody knows what position will the Supreme Court take on the question when and if it comes before it again. If the NRO (or say its section 7) is declared void by the Court in future, the chances are that the cases that have been withdrawn / terminated will automatically revive.

**13. Impact of a Possible Adverse Judgement of the Supreme Court:** Will an adverse judgment of the Supreme Court on section 7 of the NRO jeopardize the liberty and/or political prospects of the intended beneficiaries of the ordinance? Possibly not if Government has decided not to pursue cases against them regardless of the Supreme Court order. However, any such Supreme Court order will certainly embarrass the Government and the affected political leadership especially that of the PPP. Other beneficiaries may not go scot-free.

## National Reconciliation Ordinance

### Recommendations to the Legislators

1. The Ordinance requires a serious review and improvement. The legislators especially the members of the standing committees on Law, Justice and Human Rights which may be entrusted with consideration of the Ordinance should examine various sections of the NRO especially Sections 6 and 7 from the point of view of its conformance to various articles of the Constitution of Pakistan especially Article 25. The Ordinance should withstand the demands of natural justice and fair play.
2. Besides making the legislation fit to withstand constitutional scrutiny, the Parliament can act as what it is really meant to be a forum to develop genuine consensus among contending parties and groups leading to real reconciliation.
3. The Section 3 of the ordinance introduces just one token reform into the electoral laws of the country. In case real electoral reforms are intended, a more comprehensive job needs to be done keeping in mind that the procedure of appointing the Chief Election Commissioner; Powers of the Election Commission especially regarding the control and accountability of government officials during the election period; complete transparency and immediate display of polling station-wise progress results of each constituency; need to develop consensus among all political parties represented in the parliament about the Caretaker Governments during election and developing consensus on Election Code of Conduct require serious consideration by the Parliament. It may be more appropriate to introduce a separate but more comprehensive legislation addressing exclusively the questions of electoral reforms.
4. The legislators should be mindful of the fact that the ordinance is already challenged in the courts where the ordinance will face judicial scrutiny. If the ordinance does not pass the test of compatibility with the Constitution and Basic Human Rights enshrined in the Constitution, the judiciary may strike it down and the legislature may have to face public humiliation in that case.

### Recommendations to the Citizens and Citizens' Groups

1. The Ordinance is the first of its kind and whether it is passed as it is, suitably amended or is completely abandoned through disapproval or natural death after four (4) months will have a serious impact on the future political, ethical and social trends in the country. It is extremely important that the citizens of Pakistan and various citizens' groups should not be insensitive or oblivious to this legislation. They should effectively and forcefully convey their feelings to political leaders and parties especially those who stand to get benefit generally perceived to be undue. They should express their point of view forcefully through the media which fortunately is by and large open, free and welcoming to contending views.
2. Workers and Members of political parties can play the most important role in improving the NRO. They should insist on discussing the subject within their party forums and bodies. They should try to prevail upon their leadership from within to improve the legislation so that it may not irreparably damage the credibility of political parties and political process in general and the main beneficiaries of the legislation in particular.
3. Both individual citizens and citizens' groups should write to the NAB and demand through the media as well that the details of all the cases which come under the scope of Sections 6 and 7 of the NRO and the intended beneficiaries should be made public.

### Recommendations to the Media

1. The Media can play a crucial role in raising general awareness about the impact the Ordinance is going to have on the credibility of the political process and political parties of Pakistan. It is very heartening that the national media, both print and electronic, are doing a great job in highlighting public concerns and ethical questions.
2. It is very important that the detailed list of all the cases and intended beneficiaries of Sections 6 and 7 of the legislation should be made public and transparent. Since the NAB has not done so yet, the media and its talented, and courageous reporters should invoke their investigative journalism and bring the facts to the knowledge of the people.