

Citizens' Group on Electoral Process

POSITION PAPER

**National Reconciliation Ordinance - NRO 2007
Analysis and the Impact on the General Election**

PILDAT is an independent, non-partisan and not-for-profit indigenous research and training institution with the mission to strengthen democracy and democratic institutions in Pakistan.

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The NRO 2007 & the General Election

Preface

The National Reconciliation Ordinance (NRO) was issued, amidst a lot of public hostility against its perceived and reported content, on October 5, 2007. This background paper has been prepared especially for the benefit of the members of the Citizens Group on Electoral Process (CGEP) and the public to provide detailed background and analysis of the National Reconciliation Ordinance 2007 in order to promote an informed debate in the public domain on whether or not political parties and the executive are justified in condoning the alleged excesses and financial embezzlements by political leaders, former / current Members of Parliament and other individuals. Since the timing of the NRO coincided with the Presidential Election and the coming General Election, the paper especially examines its impact on the Election.

The NRO is believed to be promulgated as a part of a broader understanding between Gen. Musharraf and the PPP which included that the PPP will assume a certain posture and position during the Presidential and the General Election. The Analysis and Impact of the NRO is especially assessed in the paper on the General Election.

Authored by **Mr. Shahid Hamid**, Senior Constitutional Lawyer, former Governor Punjab and former Minister of Defence, the paper examines in detail various clauses and legal aspects of the issuance and applicability of the NRO.

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Islamabad
November 2007

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The NRO 2007 & the General Election

Introduction

The National Reconciliation Ordinance 2007 was notified on October 5, 2007. It is not a secret that various drafts of the proposed NRO were exchanged between the Government and the Pakistan Peoples Party. Towards the end of this process, the Muttahida Quami Movement (MQM) was also involved. In the negotiations between the Government and the PPP, the latter had purportedly raised a number of demands. These included the repeal of Article 58(2)(b) relating to the President's power to dissolve the National Assembly, the removal of the 3rd term ban on Prime Ministers, which can only be removed with the consent of the President (because the law imposing the ban is included in the Sixth Schedule to the Constitution), the doffing of the uniform by the President prior to his re-election and the withdrawal of all cases against Mohtarma Benazir Bhutto and other PPP leaders. In the event, only the last of these demands was conceded through the enactment of the NRO. However, this one concession achieved the purpose desired by the President and his advisers. The PPP MPs did not resign from either the National or the Provincial Assemblies thereby affording the Presidential elections held on October 6, 2007 a degree of credibility both at home and especially abroad - that these elections would have certainly not enjoyed had the PPP MPs also resigned along with the rest of the MPs belonging to other opposition parties (but not including the JUI-F members in the NWFP Provincial Assembly).

Analysis of the NRO 2007

Section 2 of the NRO

The NRO has several beneficiaries. Section 2 was apparently inserted at the instance of the MQM. Section 2 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 01, 1986 and October 12, 1999. In case, the Review Boards find that the accused persons in these criminal cases 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 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 important to note that the respective heads of the Federal and Provincial Review Boards are to be appointed by the Federal and Provincial Governments.

The NRO does not say that the respective governments are bound by the recommendations of the Review Boards. Further, although the power of the Public Prosecutor to withdraw a criminal prosecution under section 494(1) of the Code of Criminal Procedure is subject to approval of the concerned court, this salutary safeguard is not there in the case of the exercise of the withdrawal power by the federal or the provincial governments.

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 reinstatements and righting of wrongs in several hundred cases. However, the withdrawal of pending criminal cases is prima facie on a different level, and of more serious import, than withdrawal of termination of service orders.

There could be a few reservations on Section 2. To start with, there could be a question 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 objection that the law is flawed because it does not require the review boards to hear the complainants before making their recommendations. Another (possible) flaw is that the respective governments do not appear to be bound by the recommendations of the review boards.

Section 3 of the NRO

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

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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.

Section 4 and 5 of the NRO

Sections 4 and 5 of the NRO prescribe that no sitting 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. 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 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. The 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 the 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 victimisation in the matter of the NAB-related investigations against sitting (opposition) Members of the Parliament and the Provincial Assemblies. This begs the question why the NAB cannot be re-made into an institution that does not act at the behest of the government of the day.

Section 6 and 7 of the NRO

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, however, is certainly 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 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 risks 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)?

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 aforementioned cases.

Constitutional Questions

Article 25 of the Constitution is part of the Fundamental Rights. It provides for equality of citizens. All citizens are equal before law and entitled to equal protection of law. One of the 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

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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). Another question of equal importance 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 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 guilt or innocence by a certain date?

Beneficiaries of the NRO

Despite best efforts it has not been possible thus far to ascertain the number of beneficiaries of sections 6 and 7. A letter sent to the Chairman National Accountability Bureau (NAB) sent by PILDAT (Appendix II) on October 20, 2007 remains unanswered. One government source has put the figure at around 70. Another non-government source at between 550 to 600.

NRO - a Misnomer

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, and not national reconciliation. 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 balming effect. 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 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 the public office.

Status as an Ordinance

Under Article 89 of the Constitution, a Presidential Ordinance has a constitutional life-span of four 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. The life of any ordinance is four (4) months and if not converted into an Act of Parliament or disapproved in one of the two Houses of Parliament within four (4) months, the Ordinances stand lapsed. Presidents have many a times re-promulgated the same ordinance on expiry of the four (4) month period though their lawful power to do so is not altogether free from doubt. However, the Provisional Constitutional Order (PCO) of November 3, 2007 has provided for the continuation of all Presidential Ordinances indefinitely. This means that whereas under the normal circumstances, if the NRO was not converted into an Act of Parliament within four (4) months, it would have stood repealed at the end of four (4) months. After the PCO, the life of all ordinances has increased indefinitely until disapproved by either House of Parliament or converted into Acts of Parliament.

Benefits despite Repeal

Leaving aside for a moment the challenges to the NRO, a question arises is as to what would have happened, or might still happen, if the present or future Parliament balks at converting the NRO into an Act of Parliament? The answer is to be found in Article 264 of the Constitution which deals with the effect of the 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

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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 the 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.

The SC Interim Order

All these calculations appear to have been set at naught by the interim order of the Supreme Court on the various petitions filed including the one by the erstwhile PPP leader Dr. Mubashar Hassan, challenging the vires i.e. legality of the NRO on the touch-stone of several constitutional provisions including Article 25 relating to equality before law and impermissible discrimination. The Supreme Court has passed an interim order that any benefit derived by any person under the NRO will be subject to its final order as to its vires.

The effect of a 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 recent 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 is no delay and the Supreme Court has already declared within days of its enactment that any benefit derived from NRO will be subject to its final order. Consequently if the NRO (or say its section 7) is declared void the cases that have been withdrawn/terminated will automatically revive.

Will an adverse final order of the Supreme Court on section 7 of the NRO jeopardize the liberty and/or political prospects of the PPP leader? Possibly not if Government has decided not to pursue cases against her regardless of the Supreme Court order. However, any such Supreme

Court order will certainly embarrass the Government and the PPP leadership. Furthermore, the other beneficiaries of section 7, whether in the PPP or in other political parties, as also ex-government servants accused of corruption, may not go scot-free.

One conclusion is not in doubt. The NRO has not promoted national reconciliation thus far and is unlikely to do so in the future also unless and until all political parties and forces within (and outside) the country are brought within its fold.

The NRO and its Impact on the General Election

Another significance of the NRO is that it has been promulgated in an election year, to mainly benefit one political party, i.e., the PPP. The NRO has come in the midst of talk of a “deal” between General Pervez Musharraf and Ms. Bhutto that is being brokered by the US to bring together a “coalition of the liberals” to rule Pakistan. The NRO clearly keeps out of its ambit Mr. Nawaz Sharif. The NRO, by favouring one or a few political parties, tilts the level of the electoral field to one side with the message that Gen. Musharraf is ready to play ball with Ms. Bhutto but Mr. Sharif is still *persona non grata*.

The NRO has facilitated the full participation of the PPP leader in the election campaign of her party. This will certainly impact the electoral process in a significant way. Mr. Nawaz Sharif of PML-N has also been allowed to come back to Pakistan and lead his party during election campaign. Irrespective of the merits or the demerits of the NRO, the case of free and fair election will be served by the return and active participation of the two leaders in the election campaign.

The ordinance is yet another milestone in the journey of political disillusionment traversed by the people of Pakistan. There is an across the board resentment against the ordinance as detrimental to the rule of law. People perceive the ordinance as a licence for committing large-scale corruption by holders of public office. How will public anger manifest itself in the weeks and months to come is not clear yet but public participation in political and electoral politics is expected to be adversely affected.

Appendix I

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Government of Pakistan
Ministry of Law Justice & Human Rights

No.2(1)/2007-PublIslamabad, October 5th 2007

The following Ordinance promulgated by the President is hereby published for general information:-

Ordinance No.LX of 2007

AN ORDINANCE to promote national reconciliation

WHEREAS it is expedient to promote national reconciliation, foster mutual trust and confidence amongst holders of public office and remove the vestiges of political vendetta and victimization, to make the election process more transparent and to amend certain laws for that purpose and for matters connected therewith and ancillary thereto:

AND WHEREAS the National Assembly is not in session and the President is satisfied that circumstances exist which render it necessary to take immediate action;

NOW, THEREFORE, in exercise of the powers conferred by clause (1) of Article 89 of the Constitution of the Islamic Republic of Pakistan, the President is pleased to make and promulgate the following Ordinance:-

1. **Short title and commencement.**- (1) This Ordinance may be called the National Reconciliation Ordinance, 2007.
(2) It shall come into force at once.
2. **Amendment of section 484, Act V of 1898.**- In the Code of Criminal Procedure, 1898 (Act V of 1898), section 494 shall be renumbered as sub-section (1) thereof and after sub-section (1) renumbered as aforesaid, the following new sub-sections (2) and (3) shall be added, namely:-
 - (2) Notwithstanding anything to the contrary in sub-section (1), the Federal Government or a Provincial Government may, before the judgment is pronounced by a trial court, withdraw from the prosecution of any person including an absconding accused who is found to be falsely involved for political reasons or through political victimization in any case initiated between 1st day of January 1986 to 12th day of October 1999 and upon such withdrawal clause (a) and clause (b) of sub-section (1) shall apply;
 - (3) For the purposes of exercise of powers under sub-section (2) the Federal Government and the Provincial Government may each constitute a Review Board to review the entire record of the case and furnish recommendations as to their withdrawal or otherwise.
 - (4) The Review Board in case of Federal Government shall be headed by a retired judge of the Supreme Court with Attorney-General and Federal Law Secretary as its members and in case of Provincial Government it shall be headed by a retired judge of the High Court with Advocate-General and/or Prosecutor-General and Provincial Law Secretary as its members.
 - (5) A Review Board undertaking review of a case may direct the Public Prosecutor or any other concerned authority to furnish to it the record of the case.”

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3. **Amendment of section 39, Act LXXXV of 1976.**- (1) In the Representation of the People Act, 1976 (LXXXV of 1976), in section 39, after sub-section (6), the following new sub-section (7) shall be added, namely:-
 - “(7) After consolidation of results the Returning Officer shall give to such contesting candidates and their election agents as are present during the consolidation proceedings, a copy of the result of the count notified to the Commission immediately against proper receipt and shall also post a copy thereof to the other candidates and election agents.”

4. **Amendment of section 18, Ordinance XVIII of 1999.**- In the National Accountability Ordinance, 1999 (XVIII of 1999), hereinafter referred to as the said Ordinance, in section 18, in clause (e), for the full stop at the end a colon shall be substituted and thereafter the following proviso shall be added, namely:-

“Provided that no sitting member of Parliament or a Provincial Assembly shall be arrested without taking into consideration the recommendations of the Special Parliamentary Committee on Ethics referred to in clause (aa) or Special Committee of the Provincial Assembly on Ethics referred to in clause (aaa) of section 24, respectively.”

5. **Amendment of section 24, Ordinance XVIII of 1999.**- In the said Ordinance, in section 24.-
 - (i) In clause (a) for the full stop at the end a colon shall be substituted and thereafter the following proviso shall be inserted, namely:-

“Provided that no sitting member of Parliament or a Provincial Assembly shall be arrested without taking into consideration the recommendations of Special Parliamentary Committee on Ethics of Special Committee of the Provincial Assembly on Ethics referred to in clauses (aa) and (aaa), respectively, before which the entire material and evidence shall be placed by the Chairman, NAB.”; and
 - (ii) after clause (a), amended as aforesaid, the following new clauses (aa) and (aaa) shall be inserted, namely:-
 - (aa) The Special Parliamentary Committee on Ethics referred to in the proviso to clause (a) above shall consist of a Chairman who shall be a member of either House of Parliament and eight members each from the National Assembly and Senate to be selected by the Speaker, National Assembly and Chairman Senate, respectively, on the recommendations of Leader of the House and Leader of the Opposition of their respective Houses, with equal representation from both sides.
 - (aaa) The Special Committee of the Provincial Assembly on Ethics shall consist of a Chairman and eight members to be selected by the Speaker of the Provincial Assembly on the recommendations of Leader of the House and Leader of the Opposition, with equal representation from both sides.”

6. **Amendment of Section 31-A, Ordinance XVIII of 1999:**- In the said Ordinance, in section 31A, in clause (a), for the full stop at the end a colon shall be substituted and thereafter the following new clause (aa) shall be inserted, namely:-
 - “(aa) An order or judgment passed by the Court in absentia against an accused is void ab initio and shall not be acted upon.”

7. **Insertion of new section, Ordinance XVIII of 1999:** In the said Ordinance, after section 33E, the following new section shall be inserted, namely:-

“33E Withdrawal and termination of prolonged pending proceedings initiated prior to 12th October, 1999:-

 - (1) Notwithstanding anything contained in this Ordinance or any other law for the time being in force, proceedings under investigation or pending in any court including a High Court and the Supreme Court

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of Pakistan initiated by or on a reference by the National Accountability Bureau inside or outside Pakistan including proceedings continued under section 33, requests for mutual assistance and civil party to proceedings initiated by the Federal Government before the 12th day of October, 1999 against holders of public office stand withdrawn and terminated with immediate effect and such holders of public office shall also not be liable to any action in future as well under this Ordinance for acts having been done in good faith before the said date.

Provided that those proceedings shall not be withdrawn and terminated which relate to cases registered in connection with the cooperative societies and other financial and investment companies or in which no appeal, revision or constitutional petition has been filed against final judgment and order of the Court or in which an appellats or revisional order or an order in constitutional petition has become final or in which voluntary return or plea bargain has been accepted by the Chairman, National Accountability Burea under section 25 or recommendations of the Conciliation Committee have been accepted by the Governor, State Bank of Pakistan under section 25A.

- (2) No action or claim by way of suit, prosecution, complaint or other civil or criminal proceeding shall be against the Federal, Provincial or Local Government, the National Accountability Bureau or any of their officers and functionaries for any act or thing done or intended to be done in good faith pursuant to the withdrawal and termination of cases under sub-section (1) unless they have deliberately misused authority in violation of law”.

GENERAL
(PERVEZ MUSHARRAF)
PRESIDENT

(MALIK HAKAM KHAN)
Draftsman/Additional Secretary

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Appendix II

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October 20, 2007

Mr. Navid Ahsan
Chairman
National Accountability Bureau
Attaturk Avenue, G-5/2
Islamabad

Request for a list of the cases falling under the purview of Section 7 of the National Reconciliation Ordinance, 2007.

Sir,


PILDAT is an independent, non-profit organization which conducts research in topics relating to governance. We are currently working on a study of the National Reconciliation Ordinance, 2007 (Ordinance No. LX of 2007).

We will appreciate if your organization can provide us a list of the cases which come under the scope / purview of sections 6 and 7 of the National Reconciliation Ordinance, 2007. Kindly include the names of the accused in the list.

In case this information is available on the website of NAB, please advise us how to access it as we have unsuccessfully tried to look for the information on the website.

With the warmest regards,

Sincerely yours,


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Appendix III

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GOVERNMENT OF PAKISTAN
MINISTRY OF LABOUR, MANPOWER
and Overseas Pakistanis
(LABOUR DIVISION)

Islamabad, the 20th May, 1989

NOTIFICATION

No.LR.17(61/8): The President has been pleased to constitute a Review Board for the purpose of reviewing the cases of employees of industrial and commercial establishments set up, managed or controlled by Government, who were removed or dismissed from employment under a Martial Law Regulation or as a result of conviction by a Summary Military Court or otherwise purely on political grounds, as the case may be.

2. The Review Board shall comprise the following:-

- 1) Chairman, National Industrial Relations Commission Chairman
- 2) Syed Rizwan Hussain, Control Labour Advisor,
Labour Division Member
- 3) A representative of the Administrative Ministry
Responsible for the administration of the establishment Member
To which the employee belongs

3. The Review Board shall take up review of cases after inviting applications from the affected persons and make its recommendations after examining the available record and affording to the applicants an opportunity of being heard.

4. Any employee of an industrial or commercial establishment referred to in the first paragraph of this notification who was removed or dismissed from employment under a Martial Law Regulation or as a result of conviction by a Summary Military Court or otherwise purely on political grounds, as the case may be, may submit a review petition to Review Board by the 31st May, 1989.

5. The National Industrial Relations Commission shall be responsible for all administrative and financial matters relating to the Review Board.

Sd/-
(FAZAL KARIM KHAN)
Deputy Secretary

The Manager
Printing Corporation
of Pakistan Press
Karachi

Copies for information and necessary action to:-

1. The Chairman, National Industrial Relations Commission, Islamabad.
2. Syed Rizwan Hussain, Central Labour Adviser, Labour Division, Islamabad.

(S.M.ASHRAF)
SECTION OFFICER

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