

**SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

Mr. Justice Gulzar Ahmed, CJ  
Mr. Justice Faisal Arab  
Mr. Justice Ijaz ul Ahsan

(D.J.) AFR

**CIVIL APPEALS NO.421 TO 423 OF 2018 & 19-K OF 2019 AND  
CIVIL PETITION NO.852 OF 2018, CMA NO.5668 OF 2020 IN C.A.  
NO.421 OF 2018, CMA NO.5669 OF 2020 IN C.A. NO.421 OF 2018,  
CMA NO.955 OF 2017 IN C.A. NO.421 OF 2018, CMA NO.956 OF  
2017 IN C.A. NO.422 OF 2018 AND CMA NO.957 OF 2017 IN C.A.  
NO.423 OF 2018**

(Against the judgments dated 24.11.2016, 3.1.2018, passed by the Islamabad High Court, Islamabad, High Court of Sindh, Karachi, in I.C.As. No.292 to 294 of 2016, C.P. No.3134 of 2015 and C.P. No.1837 of 2014, respectively)

<b>CA.421/2018</b>	<i>Privatization Commission through its Secretary Vs. Aftab Hussain and others</i>
<b>CA.422/2018</b>	<i>Privatization Commission through its Secretary Vs. Ch. Siraj Abbas and others</i>
<b>CA.423/2018</b>	<i>Privatization Commission through its Secretary Vs. Ch. Siraj Abbas and others</i>
<b>CA.19-K/2019</b>	<i>Chairman and others (Officer &amp; Non-officers) Pakistan Petroleum Limited Officers Association and others Vs. Federation of Pakistan through Ministry of Finance Revenue and others</i>
<b>CP.852/2018</b>	<i>Muhammad Arif Akhtar and others Vs. Federation of Pakistan through Ministry of Petroleum and Natural Resources, Islamabad and others</i>
<b>CMA.5668/2020 in CA.421/2018</b>	<i>Privatization Commission through its Secretary Vs. Aftab Hussain and others</i>
<b>CMA.5669/2018 in CA.421/2018</b>	<i>Privatization Commission through its Secretary Vs. Aftab Hussain and others</i>
<b>CMA.955/2017 in CA.421/2018</b>	<i>Privatization Commission through its Secretary Vs. Aftab Hussain and others</i>
<b>CMA.956/2017 in CA.422/2018</b>	<i>Privatization Commission through its Secretary Vs. Ch. Siraj Abbas and others</i>
<b>CMA.957/2017 in CA.423/2018</b>	<i>Privatization Commission through its Secretary Vs. Ch. Siraj Abbas and others</i>

For the Appellant(s)  
(in CAs.421 to 423 of  
2018) and

: Mr. Sohail Mehmood,  
Addl. Attorney General for  
Pakistan

For Respondents (in CA.19-K of 2019 as Federation)	Ch. Akhtar Ali, AOR along Mr. Ikram-ul-Haque Qureshi, Sr.Legal Counsel head of Privatization Commission of Pakistan.
For Respondents No.1 to 239 (in CA.421/2018, Respondents No.1 to 32 (in CA.422/2018) and For Respondents No.1 to 17 (in CA.423/2018)	: Mr. Abdul Rahim Bhatti, ASC Syed Rifaqat Hussain Shah, AOR
For OGDCL (in CAs.421 to 423/2018)	: Mr. Khurram Mumtaz Hashmi, ASC
For Applicant (s) (in CMAs.5668 & 5669/2018)	: Syed Asghar Hussain Sabzwari, Sr. ASC Mr. Mehmood A. Sheikh, AOR
For the Appellant (s) (in CA.19-K/2019)	: Mr. Mazhar Ali B. Chohan, AOR/ASC (via video link from Karachi)
For the Petitioner (s) (in CP.852/2018)	: Mr. Salahuddin Ahmed, ASC
For Respondent(s) (in CP.852/2018)	: N.R.
For Respondent (PPL)	: Mr. Muhammad Akif Khan, Sr. Legal Counsel
Date of Hearing	: 22.10.2020

### **ORDER**

**GULZAR AHMED, CJ.**- In Civil Petitions No. 382 to 384 of 2017, leave to appeal was granted vide order dated 10.01.2018, which is as follows: -

“In order to consider inter alia (i) whether the Cabinet’s decision dated 05.08.2009 while approving the Benazir Employees Stock Option Scheme (BESOS) is in violation of Article 154 of the Constitution of Islamic Republic of Pakistan, 1973 (the constitution); (ii) whether the benefits given to the employees under the BESOS were not part of the Terms and Conditions of their employment and therefore, the same could not be enforced under the

law; (iii) what is the effect of the judgment dated 03.01.2018 passed in Constitution Petition No.1837/2014 by the learned High Court of Sindh whereby it declared the said decision of the Cabinet to be violative of the Constitution. Leave is granted in these petitions.”

2. The respondents in Civil Appeals No.421-423 of 2018 filed writ petitions in the Islamabad High Court, Islamabad (**hereinafter called ‘the Islamabad High Court’**), which were disposed of by a learned Single Judge of that Court vide judgment dated 29.04.2016, in the following terms:-

“11. It has already been held that pursuant to issuance of the “Unit Certificates” rights were accrued in favour of the petitioner. Admittedly, their cases have been processed and sent to the Privatization Commission so that the funds could be released. This Court has been informed that the implementation of the Scheme is being considered by the Ministry of Finance. There is no cavil to the proposition that policies formulated and even implemented by the Federal Government can be revamped, considered or altered provided the rights which have come into existence remain protected. It would, therefore, be just and proper to direct as follows:

- i) The ministry of Finance while considering the implementation of the Scheme shall take into consideration the rights which have accrued in favour of the petitioners.
- ii) The federal Government shall ensure that the rights of the petitioners remain protected and to their extent the benefits under the Scheme are not denied in case it is decided to revamp, alter or wind up the scheme.
- iii) The Federal Government shall take a decision to the extent of the rights of the petitioners, preferably within ninety days from the date of receipt of this order.”

This judgment of the learned Single Judge was challenged by filing of three Intra Court Appeals (**ICAs**) and a learned Division Bench

of the Islamabad High Court, vide impugned judgment dated 24.11.2016, dismissed all the three ICAs. The appellants in Civil Appeal No.19-K of 2019 and the petitioners in Civil Petition No.852 of 2018 filed two constitution petitions in the High Court of Sindh, Karachi (**hereinafter called "the High Court of Sindh"**), which were dismissed by a learned Division Bench of that Court vide impugned judgment dated 03.01.2018.

3. The short facts of the matter are that the respondents in Civil Appeals No.421-223 of 2018 were employees of Oil and Gas Development Corporation Limited (**OGDCL**), while the appellants in Civil Appeal No.19-K of 2019 and Petitioners in Civil Petition No.852 of 2018 were employees of Pakistan Petroleum Limited (**PPL**). Both OGDCL and PPL are entities of the Federal Government of Pakistan. The Federal Cabinet approved a policy in the name of Benazir Employees Stock Option Scheme (**hereinafter called 'the Scheme'**).

The Scheme, *inter alia*, provides as under: -

"THAT THE SALIENT FEATURES OF BENAZIR  
EMPLOYEES STOCK OPTION SCHEME (BESOS)

BESOS AS APPROVED  
BY THE CABINET ON 5<sup>TH</sup> AUGUST 2009 ARE AS FOLLOWS:-

1. Empowerment of Employees of SOEs/other GoP shareholding through transfer of twelve percent (12%) of the GoP shareholding and a seat on the Board.
2. All permanent employees and contractual Employees (with minimum service of five years) are eligible for the BESOS and can only exist on retirement or otherwise easing to be Employee of the SOE.
3. Twelve percent (12%) of the GoP shareholding to be transferred for free.
4. SOEs to create a Trust for BESOS with token cash. The board of Trustees to consist of Government Nominees and Employees representatives.

5. The Shares of respective SOE to be transferred to the Trust.
6. Trust to assign units to Employees in proportion to their entitlement on the basis of length of service through Unit Certificate.
7. Unit Certificates are not saleable, however, these can be pledged or hypothecated.
8. Employees to surrender the Unit Certificates to Trust on retirement or otherwise ceasing to be an Employee.
9. Trust to make payment for surrendered Unit.
10. Surrendered Units to be returned by Trust to the Federal Government.
11. The GoP will guarantee the buyback of the surrendered units on the following basis:-
  - a. The market value of the listed companies.
  - b. Break-up value at historical cost based on the last audited financial statements excluding re-valuation reserves for the unlisted and private limited companies.
  - c. On net-worth based on the last audited financial statements excluding re-valuation reserves for SOEs established under Special Acts and Ordinance till such time they are corporatized.
12. Employees representative on the Board to be nominated by GoP through Line Ministry/Holding Corporation on the recommendation of Trust. Such representative to be a Chartered Accountant or a Corporate Lawyer or, an eminent professional having minimum professional having professional experience of 15 years or a Senior Government official not below the status of a Joint Secretary.
13. Trusts are entitled to receive dividends, if any from the date of applicability of the BESOS.
14. Funding arrangements:-

50 % of the dividends to be transferred to central revolving fund for annual payout and 50% to be distributed amongst the employees. This will result into an annual payout of Rs.1,670/- billion which will be funded by GoP.
15. A central revolving fund out of the future dividends to be established in Privatization Commission for payments against surrendered Unit Certificates.

16. The BESOS to be implemented by the Privatization Commission in coordination with the Line Ministry /holding corporation/respective SOEs.
17. Corporation of the SOEs established under Special Acct/Ordinance by the Privatization Commission in-coordination with the Line Ministries.”

4. Pursuant to this Scheme, the OGDCL Employees Empowerment Trust (**hereinafter called ‘the Trust)** as well as PPL Employees Empowerment Trust were executed and 12% shares of OGDCL and PPL in the shape of Unites Certificates were allocated and distributed to their employees. It seems that as many as 130 retired/deceased employees of OGDCL benefited from this scheme while in PPL about 2693 employees benefited from this scheme. The scheme having huge financial implications on the funds of the Federal Government, could not be continued and its payment was stopped. The respondents in Civil Appeal No.421-423/18 so also the appellants in Civil Appeal No.19-K/2019 and the petitioners in Civil Petition No.852/2018 had filed petitions for seeking direction for making payment to them under the scheme.

5. We have heard the learned counsel for the parties at length and have also gone through the record of the case. Leave was granted to consider three questions, reproduced above, which shall be taken up one by one. The first question reads as under: -

**(i) Whether the Cabinet decision dated 05.08.2009 while approving the Benazir Employees Stock Option Scheme (BESOS) is in violation of Article 154 of the Constitution of Islamic Republic of Pakistan, 1973 (the Constitution)**

6. The main controversy is that whether the Scheme, which was launched in furtherance of a cabinet’s decision to transfer to the

employees, through the means of trust deeds, 12% shares of Government of Pakistan in State Owned Enterprises (“**SOEs**”) and other Government of Pakistan Shareholdings, was lawfully prepared. In this regard, learned counsel for the appellants, at the outset, contended that the very issuance of the Scheme was illegal, in that, its purpose was to benefit the selected number of employees of the SOEs and further that no consideration whatsoever was provided in the Scheme for entitling the employees of the SOEs to the benefit of the Scheme. Further, the Scheme itself was a political stunt at the State expense with no benefit whatsoever to any of the SOEs, rather the Scheme became a huge burden on the public exchequer and could not be allowed to be continued being contrary to the Constitution and was even against the Rules of Business, under which the Scheme is said to have been made.

7. First of all we shall consider the Scheme of the Constitution of the Islamic Republic of Pakistan (“**the Constitution**”) whereby it envisaged arrangement for the exercise of executive authority in the Federation. Article 97 of the Constitution lays down that the executive authority of the Federation is coextensive with the Parliament’s power of making laws. However, there is a qualifying phrase ‘subject to the Constitution’ at the beginning of Article 97 *ibid.* It clearly provides that the extent of the executive authority of the Federation is not absolute rather circumscribed by other Constitutional provisions. The executive authority of the Federation, to be exercised by the Federal Government/Federal Cabinet, is subordinated to the Constitutional division of powers among different state organs. Reliance may be made to the case of Messrs Mustafa Impex, Karachi and others vs. The Government of Pakistan through

Secretary Finance, Islamabad and others (PLD 2016 Supreme Court

808), wherein it was held as under: -

“The use of the phrase "subject to the constitution" in Article 97 indicates that the executive authority of the Federation, as exercised by the Federal Government, is subordinated to the constitutional scheme in relation to the conferment of constitutional powers and responsibility on the three great organs of the State. It would be recollected that all executive actions of the Federal Government are expressed to be taken in the name of the President. It is not the actions of the Secretary, or head of a Division, as such, but the executive actions of the Federal Government which are to be taken in the name of the President.”

8. In this background, it needs to be determined as to what is the nature of the Scheme, and whether Federal Cabinet was competent to independently take a decision about it. Apparently, the Scheme emerged from a decision taken by the cabinet to empower the employees of SOEs and other Government of Pakistan Shareholdings through transfer of shares and representation on the Board. A substantial portion of government holding in SOEs and other Government of Pakistan Shareholdings i.e. 12% shares was to be transferred for free. Thus, huge amount of public money was involved in the matter. The scheme was not limited to one or two government enterprises but was designed generally for all the SOEs and other Government of Pakistan Shareholdings. It is evident that the cabinet's decision to launch the Scheme was not merely related to the internal management or day to day working of an SOE or Government of Pakistan Shareholding, rather, it was a major decision taken to provide financial benefit to the employees of SOEs out of the



Government of Pakistan Shareholdings. In fact, it was an extensive measure affecting dozens of SOEs/Government of Pakistan Shareholdings and entailing financial implications for the state, which was done within the realm of policy formulation. It needs to be seen whether the Federal Cabinet was competent to take a policy decision about launching of the Scheme or whether, in view of the qualifying phrase of Article 97 *ibid*, its authority was restricted in the matter.

9. The relations between the Federation and the Provinces are managed in terms of Chapter 3 of Part V of the Constitution. One of the modes provided therein is the Council of Common Interests (“**CCI**”). Article 154 of the Constitution provides the functions and rules of procedure of the CCI. Clause (1) thereof provides that CCI “shall formulate and regulate policies in relation to matters in Part II of the Federal Legislative List (“**FLL**”) and shall exercise supervision and control over related institutions.” Entry No.3 of Part II of FLL, *inter alia*, deals with the institutions, establishments, bodies and corporations administered or managed by the Federal Government, and undertakings, projects and schemes of such institutions, establishments, bodies and corporations, industries, projects and undertakings owned wholly or partially by the Federation or by a corporation set up by the Federation. The said entry reads as under: -

“3. Development of industries, where development under Federal control is declared by Federal law to be expedient in the public interest; institutions, establishments, bodies and corporations administered or managed by the Federal Government immediately before the Commencing day, including the Pakistan Water and Power Development Authority and the Pakistan Industrial Development Corporation; all undertakings, projects and schemes of such institutions, establishments, bodies and corporations, industries, projects and undertakings

owned wholly or partially by the Federation or by a corporation set up by the Federation.”

10. From the above, it is clear that in terms of Article 154(1) of the Constitution read with Entry No.3 of Part II of FLL, CCI has authority to formulate and regulate policies in relation to matters regarding institutions, establishments, bodies and corporations administered or managed by the Federal Government, and all undertakings, projects and schemes of such institutions, establishments, bodies and corporations, industries, projects and undertakings owned wholly or partially by the Federation or by a corporation set up by the Federation. However, under Clause (6) of Article 154 of the Constitution, *Majlis-e-Shoora* (Parliament) in joint sitting may from time to time by resolution issue directions through the Federal Government to the CCI, generally or in a particular matter, to take action as *Majlis-e-Shoora* (Parliament) may deem just and proper and such directions shall be binding on the Council. Under Clause (7) thereof, if the Federal Government or a Provincial Government is dissatisfied with a decision of CCI, it may refer the matter to *Majlis-e-Shoora* (Parliament) in a joint sitting, whose decision in this behalf shall be final.

11. It is to be noted that the word ‘schemes’ is used in Entry No.3 of Part II of FLL. Thus, it appears that formulation and regulation of policies in relation to all schemes of institutions, establishments, bodies and corporations, industries, projects and undertakings owned wholly or partially by the Federation or by a corporation set up by the Federation falls in the domain of CCI. In view of the above-referred Constitutional scheme, it follows that the decision of launching of the Scheme needed to be discussed in CCI.

12. CCI is a separate body apart from Federal Government. The Constitution has curtailed the executive authority of Federal Government in relation to matters in Part II of FLL and handed it over to CCI. The matter of authority of Federal Government and CCI qua Part II of FLL has come up before this Court in a number of cases. It has been held by this Court in Federation of Pakistan through the Secretary, Ministry of Finance, Government of Pakistan, Islamabad etc. vs. United Sugar Mills Ltd. Karachi (PLD 1977 Supreme Court 397) as under: -

“Again in one significant respect the federal executive authority has been abridged under the Constitution and has been entrusted to a newly created institution called “the Council of Common Interests”. It is a body quite apart from the Federal executive. (See Articles 153-156). The administration of matters falling in Part II of the Federal Legislative List (Railways, mineral oil, natural gas etc.) and item 34 of the Concurrent List (electricity) are entrusted to the Council of Common Interests.”

The matters referred to in Part II of FLL are required to be placed before CCI for formulating and regulating policies. It has authoritatively been held by this Court in Messrs Gadoon Textile Mills and 814 others vs. WAPDA and others (1997 SCMR 641) as under: -

“29. We are inclined to hold that the matters referred to in Part II of the Federal Legislative List and Item 34 of the Concurrent Legislative List (electricity) are to be brought before C.C.I. for formulating and regulating policies. . . .”

13. The role of CCI was under consideration before this Court in Wattan Party through President vs. Federation of Pakistan through Cabinet Committee of Privatization, Islamabad and others (PLD 2006

Supreme Court 697). The matter had arisen out of privatization of Pakistan Steel Mills Corporation. The impugned judgment of the High Court of Sindh had held that “the provisions of Article 154 are mandatory and the functions of the Cabinet under the Privatization Ordinance, 2000 ought to be performed by the Council of Common Interest”. A 9-Member Bench of this Court upheld the view of the High Court of Sindh and also approved the earlier view taken in Gadoon Textile Mills’ case (supra) with reference to functioning of CCI under Articles 153 & 154 of the Constitution, which is as follows: -

“35. . . . . Therefore the view taken by this Court in the case of Messrs Gadoon Textile Mills ibid is respectfully approved with reference to functioning of C.C.I. under Articles 153 & 154 of the Constitution. As a consequence whereof the view taken by the Sindh High Court in the impugned judgment is upheld.”

14. In the case of Pakistan Medical and Dental Council through President and 3 others vs. Muhammad Fahad Malik and 10 others (2018 SCMR 1956) while considering the role of CCI viz. power of Parliament, this Court held as under: -

“9. ... .. In order to create inter-provincial harmony, CCI has been created under Article 153 of the Constitution which is appointed by the President and includes, the Prime Minister who shall be the Chairman of the Council, the Chief Ministers of the Provinces and three members from the Federal Government to be nominated by the Prime Minister from time to time. According to Article 153(4) of the Constitution, CCI is responsible to Parliament and is required to submit an Annual Report to both Houses (of Parliament). Article 154(6) of the Constitution provides that Parliament may, from time to time, by resolution, issue directions through the Federal

Government to CCI generally or in a particular matter to take action as Parliament may deem just and proper and such directions shall be binding on CCI. Furthermore, as per Article 154(7) of the Constitution, if the Federal or a Provincial Government is dissatisfied with a decision of CCI, it may refer the matter to Parliament in a joint sitting whose decision in this regard shall be final. Thus, the foregoing provision of the Constitution clearly indicates that CCI is subservient, and not superior to Parliament.

10. Parliament on the other hand, under Article 70 of the Constitution, has been given absolute authority to make laws with respect to the matters enumerated in the Federal Legislative List. From a plain reading of the said Article, it is abundantly clear that no constitutional restriction or constraint has been imposed upon the power and authority of Parliament to legislate with respect to the matters enumerated in the Federal Legislative List. Article 70 *ibid* is an independent Article and neither subject to nor subservient to any other provision of the Constitution. However, CCI does not have unfettered power and is responsible to Parliament. As per Article 154(1) of the Constitution, CCI has been given power to formulate and regulate policies in relation to matters in Part II of the Federal Legislative List and to exercise supervision and control over related institutions. Therefore, it is clear from this provision that CCI has no role in the legislative process with respect to the matters enumerated in the Federal Legislative List, rather it is restricted to formulation and regulation of policies in relation to the said matters, and that too contained only in Part II of such List. Once policies are finalized, CCI cannot interfere in the legislative process, nor can any legislation be struck down for the reason that CCI was not involved in the relevant legislative process. Additionally, CCI

can exercise supervision and control over the related institutions but not over Parliament, which according to the scheme of the Constitution is supreme and all the other institutions have to function whilst remaining within their constitutional domain. ”

15. It is, thus, apparent that CCI holds a significant position in the Constitutional structure. Its role is not limited to deliberations only. Rather, it is endowed with important functions of formulating and regulating policies in relation to the matters detailed in Part II of FLL of the Constitution. The Constitutional provisions relating to the functions of CCI are mandatory in nature and, no other person, body or authority can perform the functions of CCI. However, the Parliament, in joint sitting, may by resolution issue directions through the Federal Government to the CCI, to take action as the Parliament may deem just and proper and such directions shall be binding on CCI. If the Federal Government or a Provincial Government is dissatisfied with a decision of CCI, it may refer the matter to Parliament, in a joint sitting, whose decision in this behalf shall be final.

16. In view of the above, irrespective of the objective of the Scheme, we are of the considered view that the matter of transfer of 12% shares of Government of Pakistan in dozens of SOEs and Government of Pakistan Shareholdings without any policy input by CCI, definitely fell outside the ambit of the authority of the Federal Cabinet. We, therefore, hold that the Federal Cabinet was not competent to take decision dated 05.08.2009 approving the Scheme and the same is declared to be in violation of Article 154 of the Constitution.

17. Now we shall consider the second question formulated in the leave granting order, which reads as under:

***(ii) Whether the benefits given to the employees under the BESOS were not part of the terms and conditions of their employment and therefore, the same could not be enforced under the law***

The grievance of the employees relates to their claims emanating from unit certificates issued to them as a consequence of transfer of 12% shares of Government of Pakistan in OGDCL and PPL. Leave was initially granted to consider whether the benefits given to the employees under the Scheme were not part of the terms and conditions of their employment and, therefore, the same could not be enforced under the law. However, our determination on question No.(i), that the Federal Cabinet was not competent to take a policy decision of approving the Scheme relating to SOEs and other Government of Pakistan Shareholdings, decides the fate of the employees of OGDCL and PPL. As a consequence, question No.(ii) becomes academic because when the main Scheme has been declared to be ultra vires, any benefit arising out of it would be illegal and not protected.

18. The next question formulated in the leave granting order reads as under:

***(iii) What is the effect of the judgment dated 03.01.2018 passed in Constitution Petition No.1837/2014 by the learned High Court of Sindh whereby it declared the said decision of the Cabinet to be violative of the Constitution.***

In this regard it is to be noted that leave was granted vide order dated 10.01.2018 in Civil Petitions No. 382 to 384 of 2017 preferred by the Privatization Commission against the judgment of learned Islamabad High Court passed in ICAs No. 292 to 294 of 2016 when

judgment dated 03.01.2018 passed in Constitution Petition No. 1837 of 2014 by the learned High Court of Sindh had not been assailed before this Court. A question was, therefore, framed to consider the effect of judgment dated 03.01.2018 passed by the learned High Court of Sindh. Subsequently, the judgment of the learned High Court of Sindh was also impugned before this Court through Civil Petition No. 521-K of 2018 and leave was granted vide order dated 12.04.2019. Another Civil Petition No. 852 of 2018 challenging the judgment dated 03.01.2018 of the learned High Court of Sindh was also preferred before this Court. All these matters were clubbed and heard together.

19. In view of our discussion above, where the very Scheme has been found to be against Article 154 of the Constitution, we set aside the judgment dated 24.11.2016 passed by the learned Islamabad High Court in ICAs No. 292 to 294 of 2016 and uphold the judgment dated 03.01.2018 passed by the learned High Court of Sindh in Constitution Petition No. 1837 of 2014.

20. Above are the reasons of our short order dated 22.10.2020, which is as follows: -

“We have heard the learned counsel for the parties at length and have also gone through the record of the cases. For reasons to be recorded later, Civil Appeals No.421 to 423 of 2018 are allowed and the impugned judgment is set aside, while Civil Appeal No.19-K of 2019 and Civil Petition No.852 of 2018 are dismissed. All the pending Civil Misc. Applications are disposed of.”