The Constitutionality of sections 56 and 57 of the Central Bank of Malaysia Act 2009 - *JRI Resources Sdn Bhd v Kuwait Finance*

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I INTRODUCTION

The Federal Court of Malaysia sitting for the first time on a nine-bench panel passed a landmark decision on Islamic banking and finance on 10 April 2019. It ruled through a majority of five that ss 56 and 57 of the Central Bank of Malaysia Act 2009 ('CBMA') was constitutional and that the *Shariah* Advisory Council's role was no more than that of an expert body giving evidence. This case note will begin with the legal background of ss 56 and 57 CBMA and will then discuss both the majority and minority decisions of the case before analysing it.

II LEGAL BACKGROUND

The *Shariah* Advisory Council ('SAC') is a body of expert persons[1] who are qualified in *Shariah* or who have knowledge or experience in *Shariah* and in banking, finance, law or such other related disciplines.[2]

The SAC was established under s 16B of the repealed Central Bank of Malaysia Act 1958. The new CBMA provides for its establishment under s 51, which states that the SAC shall be the authority for the ascertainment of Islamic law for the purposes of Islamic financial business.

Historically, in 2004 the role of the SAC was extended through s 16B(8) of the Central Bank of Malaysia (Amendment) Act 2003 ('Act A1213'). The SAC was given the mandate to be the ultimate authority to ascertain Islamic law for the purposes of dispute resolutions in Malaysia. Section 16(8) of the Central Bank Act 1958 set out that in any proceedings involving *Shariah* issues, the court or arbitrator *may* take into consideration any written directives issued by Bank Negara after consultation with the SAC or refer the issue to the SAC for a ruling. The decision of the SAC was binding on an arbitrator but not on a court.

However, this discretion given to the court was revoked in 2009 with the coming into force of the CBMA, where it is now mandatory for courts to refer to any published rulings and in the absence of published rulings, refer a question to the SAC for a ruling

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1 Currently there are 10 members.

2 Sections 52 and 53 Central Bank of Malaysia Act 2009.

on *Shariah* matters and the ruling 'shall' be followed by a court of law – ss 56 & 57 of CBMA.[3]

The mandatory binding effect of the SAC ruling on the civil courts was questioned for the first time in the case of *Mohd Alias Ibrahim v RHB Bank Bhd & Anor*[4] (*Alias* case). This case raised questions on the constitutionality of ss 56 and 57 and whether these provisions usurped the court's judicial power. Mohd Zawawi Salleh J, as he then was, held that the sole reason of establishing the SAC was to ascertain Islamic law, and not determine it. The learned judge stated that the SAC was not performing a judicial or quasi-judicial role, "as the process of ascertainment has no attributes of a judicial decision".[5]

The issue of constitutionality of ss 56 and 57 of the CBMA 2009 was again raised in the case of *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd* [6] which was presided by the same learned judge Mohd Zawawi Salleh J. The learned judge repeated his decision in the *Alias* case and confirmed the constitutionality of both sections. The learned judge ended his judgment with a warning on the complexities of Islamic law and the incapability of civil court judges to resolve them even with the help of expert evidence, and the necessity of a special body like the SAC to resolve *Shariah* issues.

This decision was appealed to the Court of Appeal in *Tan Sri Khalid Ibrahim v Bank Islam Bhd*.[7] After considering the facts and arguments of the appellant, the Court of Appeal dismissed the appeal and concluded that ss 56 and 57 are valid and constitutional. The Court of Appeal reiterated that the duty of the SAC was "confined exclusively to the ascertainment of the Islamic Law on financial matters or business….the fact that the Court is bound by the ruling of the SAC under s 57 does not detract from the judicial functions and duties of the Court in providing a resolution to the dispute(s) which the parties have submitted to the jurisdiction of the Court".[8]

Thus, the law as it stood before the Federal Court decision in *JRI Resources Sdn Bhd v Kuwait Finance House (Malaysia) Bhd*[9] was that ss 56 and 57 of the CBMA are constitutional.

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3 See CBMA, s 56. (1) – "Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a *Shariah* matter, the court or the arbitrator, as the case may be, shall— (a) take into consideration any published rulings of the *Shariah* Advisory Council; or (b) refer such question to the *Shariah* Advisory Council for its ruling. (2) Any request for advice or a ruling of the *Shariah* Advisory Council under this Act or any other law shall be submitted to the secretariat"; and s 57 – "Any ruling made by the *Shariah* Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under section 55 and the court or arbitrator making a reference under section 56".

4 *Mohd Alias Ibrahim v RHB Bank Bhd & Anor* (2011) 4 CLJ 654.

5 Ibid para 106.

6 (2012) 7 MLJ 597.

7 (2013) 4 CLJ 794.

8 Ibid 10-11.

9 Full case of *JRI Resources Sdn Bhd v Kuwait Finance House (Malaysia) Bhd* is available at https://www.deolgill.com/panel/upload/resources/Federal%20Court%20case%20on%20BNM%20Shariah%20Advisory%20Council%20(SAC)_compressed%20(1).pdf.

III *JRI RESOURCES SDN BHD V KUWAIT FINANCE HOUSE (MALAYSIA) BHD*

A *The Facts*

The applicant, JRI Resources Sdn Bhd ('JRI') was the first defendant, and the respondent Kuwait Finance House (Malaysia) Bhd ('KFHM') was the plaintiff in the High Court. In 2008, the respondent transacted with the applicant on various Islamic credit facilities, namely, four *Ijarah Muntahiah Bitamlik* facilities and a *Murabahah Tawarruq* Contract Financing Facility. In the transactions, the respondent purchased the shipping vessels at the request of the applicant and then leased them to the applicant. Eventually the applicant defaulted in making the monthly lease payments and this resulted in the respondent calling on the guarantors to remedy the applicant's default. The guarantors were unable to do so.

The respondent then took a legal action against the applicant and the guarantors to recover the amounts owing under the facilities. A summary judgment was given against the applicant and the guarantors to the sum of RM 118,621,126.26 together with compensation fees.

The applicant in the summary judgment proceedings argued that there was a failure to derive income from the leasing of the vessels because the respondents failed to carry out major maintenance works on the shipping vessels. The argument was premised on the contention that it was the responsibility of the respondent to carry out the major maintenance works as owner of the shipping vessels. This contention was notwithstanding the express wording in cl 2.8 of the *Ijarah* Agreement which read as follows:

> Notwithstanding the above clause 2.7, the Parties hereby agree that the customer (applicant) shall undertake all of the major maintenance as mentioned herein and the customer will bear all the costs, charges and expenses in carrying out the same.

The applicant appealed to the Court of Appeal on the ground that cl 2.8 of the *Ijarah* Agreement was not *Shariah* compliant as it made the Applicant bear all costs of maintaining the shipping vessels. The Court of Appeal allowed the appeal and directed the *Shariah* issue of whether the clause was *Shariah* compliant to be referred to the SAC. The SAC decided that the maintenance cost relating to the ownership of *Ijarah*'s asset is the responsibility of the owner, meanwhile the cost relating to the usufruct of the rental is the responsibility of the lessee.

However, SAC allowed a few arrangements to be made between the contracting parties which include:

1) the owner of the asset can delegate the cost of the maintenance to the lessee and the amount of the cost will be fully deducted in the transaction's sale and purchase of the asset at the end of the lease period; and
2) both the owner and the lessee may negotiate and agree to decide which party will bear the maintenance cost of the asset.

Thus, the negotiation to determine the party that will bear the maintenance cost of the asset is allowed, as long as it was mutually agreed by the contracting parties. The

applicant disagreed with the SAC's ruling and filed for an application for a reference to the Federal Court to determine if ss 56 and 57 of the CBMA under which the SAC gave its ruling was constitutionally valid.

B *Decision of the Federal Court*

1 *Majority decision delivered by Mohd Zawawi Salleh J*

After setting down in detail the background of the case and the submission of counsel, Mohd Zawawi Salleh J set out the legislative history of the SAC and emphasised the importance of *Shariah* compliance in the Islamic banking industry. He also explored the reason why ss 56 and 57 were amended from being 'discretionary' in nature to being 'mandatory'. Zawawi J concluded that this amendment was made to ensure certainty, prevent diverse decisions by the judiciary and ensure *Shariah* compliance. Zawawi J stressed that *Shariah* compliance in Islamic banking and finance is what differentiates an Islamic bank from a conventional bank.[10] Failure to ensure *Shariah* compliance in Islamic banking and finance will not only result in losses, fiduciary and reputational risks to the Islamic banking and finance industry, but it will also affect public confidence and weaken the faith of customers, stakeholders, investors and depositors towards the industry.[11]

The learned judge opined that the CBMA enhanced the role and functions of the SAC as this cleared any ambiguity and left no room for conflicting rulings being rendered by *Shariah* Committees of Islamic financial institutions.[12] The learned judge agreed with the submission of the respondent that s 51 of CBMA 2009 has served the need for an authoritative body on *Shariah* matters in the industry. [13]

The learned judge agreed with the judgment of Justice Rohana Yusuf (as she then was) in the case of *Tan Sri Abdul Khalid v Bank Islam Bhd*[14] that it must be in contemplation of the differences in the views and opinions in the area of *muamalat* that led legislature to designate the SAC to ascertain the acceptable position in *Shariah*.[15] Besides this the learned judge also stressed the fact that the statutory duty and function of the SAC is not to hear evidence nor decide a case, but to ascertain Islamic financial matters or business only, which has been affirmed by the Court of Appeal in the case of *Tan Sri Abdul Khalid*.[16]

Again, the learned judge made a distinction between the word 'ascertainment' and 'determination' as he did in the *Alias* case and stated that the critical feature was that the SAC makes a ruling but does not give a final decision between both parties.[17]

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10 Ibid *Kuwait Finance House (Malaysia) Bhd* v *JRI Resources Sdn Bhd* (Majority judgment by Justice Mohd Zawawi Salleh) at para 54.

11 Supra n9 para 54 & 55.

12 Ibid para 77.

13 Ibid para 79.

14 [2010] 4 CLJ 388.

15 Supra n9 para 81.

16 [2013] 3 MLJ 269.

17 Supra n9 at para 130.

The learned judge then went on to address the doctrine of separation of powers. Justice Zawawi held that there is no pure form of separation of powers in a government as there is an overlapping and blending of function[18] which makes absolute separation of powers impossible, and thus, the doctrine of separation of powers continues to evolve.[19] The learned judge held that the SAC does not possess any characteristics of judicial power as laid down in *Semenyih Jaya v Pentadbir Tanah Daerah Hulu Langat*[20] case. The ruling made by the SAC is solely confined to *Shariah* issues and no other issues and the judge who refer to the SAC will then exercise his judicial power and decide the case before the court. It was held that since the SAC does not possess the attributes of judicial power, the SAC does not usurp the judicial function of the court.[21]

Justice Zawawi also noted that Islamic banking matters fall under the civil courts' jurisdiction, however the civil courts do not have sufficient knowledge to make findings on Islamic law.[22] Justice Zawawi stressed the fact that SAC rulings are made through collective *ijtihad* (independent reasoning) and the SAC comprises of qualified individuals that have vast experience and knowledge especially in Islamic law and finance.[23]

Furthermore, Justice Zawawi opposed the idea of the use of expert evidence other than the SAC. This is because many practical considerations need to be considered, such as – (i) to what source would a judge refer to; (ii) in differing opinions among the experts, which *mahzab* should the judge adopt; and lastly (iii) would civil or *Shariah* law be the applicable law.[24] The learned judge also opined that the use of other expert evidence would not be helpful to a civil court judge as this would further complicate the case if the expert evidence is based on different schools of jurisprudence. [25]

Justice Zawawi strongly believed that the SAC is the proper body to deal with questions of validity of contracts in the Islamic financial industry, as the SAC is a body which consists of eminent jurists who are properly qualified in Islamic jurisprudence and/or Islamic finance. [26]

Based on the findings above, Justice Zawawi held both ss 56 and 57 are constitutional.

2 *Judgment of Justice Azahar Mohamed (supporting judgement)*

Justice Azahar Mohamed while agreeing with the judgment of Justice Mohamed Zawawi Salleh wrote his supporting judgment to further discuss the issue on the doctrine of separation of powers. In the learned judge's view, the doctrine of separation of powers recognises that the delegation of power by one branch of the government to another is allowed where necessary.[27] Justice Azahar Mohamed opined that the legislative powers

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18 Ibid para 95.

19 Ibid para 99.

20 *Semenyih Jaya* v *Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MLJ 561.

21 Supra n9 para 108.

22 Ibid para 140.

23 Ibid para 143.

24 Ibid para 156.

25 Ibid para 157.

26 Ibid para 158.

27 Supra n9, supporting judgment by Justice Azahar Mohamed at para 7.

and discretion on the ascertainment of Islamic law for the purposes of Islamic financial business are neither inherent nor integral to the judicial function.[28]

The learned judge was of the opinion that since our Federal Constitution is silent on the usage of methodology to ascertain Islamic law, it falls entirely within Parliament's powers and discretion to decide how this matter should be exercised.[29] And thus, the Parliament has the discretion of delegating its power in ascertaining Islamic law in the Islamic banking and finance industry.[30] The learned judge stated that Parliament was wise in enacting several legislations to establish the SAC in order to support and facilitate the operation of Islamic banking in Malaysia as the complexity and variety of problems that the Islamic financial industry faces in the present world are indisputable.[31] Justice Azahar Mohamed also emphasised on the point that the purpose behind the establishment of the SAC was to ensure consistency and certainty in its application of Islamic principles in the Islamic finance industry.[32] Justice Azahar Mohamed pointed out the fact that the necessity for SAC was due to the rising complexities of Islamic finance products, the increase in disputes and the tremendous increase in the number of players in Islamic banking.[33] Since the Islamic finance industry faces challenges like whether the instruments and development of financial services are *Shariah* compliant, commercially viable, valid and enforceable, the SAC was established to exclude any uncertainties in the interpretation of Islamic laws.[34]

Justice Azahar Mohamed was also of the view that since the approach of Central Bank of Malaysia Act 1958 resulted in numerous inconsistent decisions, the CBMA 2009 Act was introduced as an answer to all these problems.[35] The learned judge also stated that the SAC comprised of members who were fit and best suited to ascertain what *Shariah* law is in order to ensure that the application of Islamic principles in the industry strictly adhered to *Shariah* law, as opposed to members of the judiciary who did not have the expertise to arrive at a decision concerning *Shariah* law.[36]

The learned judge believed the SAC should be looked at as a proper constitutional mechanism in assisting the courts in applying the precise Islamic laws to solve disputes and also to uphold *Shariah* complaint on such matters. The SAC and the courts have to operate with some level of integration within our framework of Federal Constitution if our Islamic banking and financial services are to operate and function well.[37]

Besides this Justice Azahar Mohamed reached the conclusion that the ascertainment of Islamic laws for the purposes of Islamic financial business are a function or power delegated by the legislative branch to the judicial branch and the SAC. Thus there is

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28 Ibid para 12.
29 Ibid para 13.
30 Ibid para 17.
31 Ibid para 18.
32 Ibid para 19.
33 Ibid para 20.
34 Ibid para 24.
35 Ibid para 32.
36 Ibid para 36.
37 Ibid para 39.

no stripping the judiciary of its powers as the principle of separation of powers has no intention of invalidating any legislative delegation of powers to the SAC.[38] Based on the findings above, Justice Azahar was of the opinion that both ss 56 and 57 are constitutional.

3 *Judgment of Justice David Wong Dak Wah (Dissenting judgment)*

Dissenting, Justice David Wong referred to the judgment of *Semenyih Jaya*[39] case where s 40D of the Land Acquisition Act[40] was held to be unconstitutional and struck down as it took away the constitutional function of judging from a judge and gave it to two non-judicial assessors.[41] Justice David Wong agreed with Justice Zainun binti Ali's view in *Semenyih Jaya* that the civil courts have the exclusive and inherent jurisdiction to review the actions of a public authority and this is a basic part of the Federal Constitution that cannot be removed. Justice David Wong was of the view that the *Shariah* courts do not have exclusive and inherent jurisdiction as they do not have the same power as the civil courts and judicial independence do not apply to *Shariah* courts. [42]

In para 46 of the judgment, the learned judge stated that the SAC had adjudicated the rights and liabilities of both parties and finally determined it. There was no room for the disputing parties to adduce any evidence that was contrary to the ruling of the SAC, or even to appeal against it. The court had no choice but to apply the substance and effect of the SAC ruling in making the order and delivering the decision since the ruling of the SAC bound the court.[43] Besides, Justice David Wong was of the view that the SAC's role had all three elements, which are elements of adjudication, finality and enforceability under ss 56 and 57. [44] The learned judge was also of the opinion that the SAC may arguably form part of the judicial power even if its function did not exhibit the core characteristics of judicial power.[45]

Besides that, the learned judge opined that he was now bound to refer to the SAC in which both ss 56 and 57 are framed to achieve the intended purpose of Parliament.[46] The learned trial judge would have accepted and taken into account respective conflicting events had it not been for both ss 56 and 57 of the Act.[47] This means that the deliberation of the trial judge has been usurped completely as the judge was prohibited completely from determining a substantial issue between the parties.[48] Justice David Wong opined that the SAC's ruling is now much more than an advice to the courts. The learned judge held the view that the purpose of the provisions was to remove the judicial power of the

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38 Ibid para 42.

39 *Semenyih Jaya* v *Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MLJ 561.

40 Land Acquisition Act 1960 (Act 486).

41 Supra n9 dissenting judgement by Justice David Wong Dak Wah.

42 Ibid para 39.

43 Ibid para 46.

44 Ibid para 47.

45 Ibid para 48.

46 Ibid para 50.

47 Ibid para 51.

48 Ibid para 52.

civil courts in *Shariah* matters and replace it with the SAC's decision.[49] This was said because the court is now obliged to refer to SAC any dispute on *Shariah* compliance for its ruling, even though it is not part of the court structure. It was also submitted that judges have been prohibited from exercising their constitutional duty of judging in relation to both ss 56 and 57.[50] By making the ruling binding on the courts, the learned judge was of the opinion that these two features have made SAC part of the judicial framework. [51]

Apart from that, the learned judge opined that both the said sections have undermined the rights of a litigant to a fair trial[52] as the applicant was prohibited from tendering evidence and this infringes the notion of rule of law.[53]

Furthermore, the judge opined that both sections intentionally disregarded the existence of the civil courts. The civil courts are there to adjudicate disputes between both parties and to make an informed decision after all relevant evidence had been heard. The learned judge was fully aware that the civil courts may not be well equipped when it comes to deciding complex Islamic law issues.[54] Justice David Wong was of the opinion that this case was no different from other cases like medical negligence or intellectual property, where expert evidence from both sides would allow judges to analyse and make an informed decision later.[55] Justice David Wong suggested that when it comes to a *Shariah* matter, the court should be able to choose whether to refer to the SAC for its opinion. The learned judge also suggested that expert evidence in support of or against that of SAC's opinion should be allowed in order for the court to to make a decision, after all the expert evidence has been adduced.[56] Based on the findings above, Justice David Wong opined that both ss 56 and 57 have violated the doctrine of separation of power by clothing the SAC with judicial power when SAC is not an adjudicatory body under the Federal Constitution.[57]

4 *Judgment of Justice Richard Malanjum (Dissenting Judgment)*

Justice Richard Malanjum while disagreeing with the majority decision and agreeing with the judgment of Justice David Wong Dak Wah, stressed on the point that the fundamental reason for the division of the powers of the government into three branches was to ensure proper mechanism of checks and balance[58] and to maintain the rule of law.[59] There are certain overlaps between functions of the government and such overlap is to promote efficiency of a government.[60] However, the learned judge opined that the

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49 Ibid para 52.

50 Ibid para 53.

51 Ibid para 53.

52 Ibid para 54.

53 Ibid para 55.

54 Ibid para 58.

55 Ibid para 59.

56 Ibid para 61.

57 Ibid para 62.

58 Supra n9 dissenting judgment by Justice Richard Malanjum at para 6.

59 Ibid para 8.

60 Ibid para 12.

power of Parliament to make laws must be understood in the context of the constitutional scheme as a whole. The Parliament is not allowed to make laws which are contrary to the separation of powers.[61] If Parliament could delegate legislative power to the judiciary, it would be a mockery to the doctrine of the separation of powers.

The learned judge held that the ruling of the SAC is a determination which affects the rights and liabilities of both disputing parties and not a general pronouncement on policy matters for future.[62] Since the ruling of the SAC is now binding on the courts, it is not open to the courts to determine any question of law or consider any expert evidence on the issue. The ruling of the SAC is regarded as final and it cannot be challenged by contrary expert evidence, or be reviewed by the High Court, or be overturned in an appeal.[63] In this case, cl 2.8 of the *Ijarah* facilities was referred to the SAC and the SAC found the clause to be *Shariah* compliant and the High Court was unable to reach other possible outcomes. [64] It is now said the SAC has taken over the task of adjudication from the High Court and the learned judge opined that due to both sections, the SAC had doubtlessly exhibited features of judicial power.[65]

Apart from that, the learned judge was of the opinion that due to the binding nature of its ruling, the ascertainment has become an integral part of the judicial process of determining the rights and liabilities of the disputed parties.[66] The Parliament in delegating its power to the SAC on *Shariah* matters in Islamic finance business cannot be an excuse to a constitutional transgression and this delegating power cannot be done by challenging the independence of the judiciary.[67] The learned judge was of the opinion that the purpose of the legislature can be achieved through other methods which do not involve the infringement of judicial power. For example, both parties can come to an agreement to submit any questions in relation to *Shariah* law in Islamic finance business to the SAC and in the event of any dispute, both parties are to be bound by the determinations of the SAC.[68] It was indeed true that substantial weight ought to be given by the High Court to the ruling of the SAC,[69] courts would ordinarily have no reason to justify the rejection of expert opinion, particularly given by the highest authority in Islamic law. However, when the judge disagrees with a ruling, he has the liberty to do so and justifications should be given.[70]

Based on his reasons above, the learned judge thought that s 57 should be struck down as it contravenes art 121 of the Federal Constitution. Striking down of the said

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61 Ibid para 19.
62 Ibid para 43.
63 Ibid para 49.
64 Ibid para 44.
65 Ibid para 45.
66 Ibid para72.
67 Ibid para75.
68 Ibid para77.
69 Ibid para 81.
70 Ibid para 82.

section does not destroy the SAC's role and does leave the courts unaided when dealing with *Shariah* law matters.[71]

IV ANALYSIS

On analysis, the majority view is made based on the purpose of establishing the SAC. To explain further, the purpose of the SAC was to ensure certainty, stability and to mitigate *Shariah* and reputation risk in the Islamic financial industry. The majority view emphasised that the SAC is nothing more than an expert body.

The two dissenting judgments, on the other hand focussed heavily on the *Semenyih* case and the separation of powers and the rule of law. The minority view emphasised that while strict separation of powers would not be conducive to the smooth running of a country, the overlap should only be between the executive and the legislature. The judiciary should be strictly separate and independent.

In the authors' opinion, the majority view is made based on commercial and business sense, while the minority view is made based on the strict application of the rule of law.

The authors believe that both sides, although having opposing views, have their merits. However, on the issue of constitutionality one must be strict. In other words, the SAC was established as the highest authority on *Shariah* matters for the Islamic banking industry to ensure certainty and *Shariah* compliance, and its role is to ascertain Islamic law on a *Shariah* issue. However, the mandatory requirement that the civil courts must apply the ruling of the SAC, encroaches upon the powers of the judiciary. This undermines the doctrine of separation of powers and is unconstitutional.

Further, Islamic jurisprudence allows diversity in opinion and this is why within each school of law there may be differences in opinion on *fiqhi* (jurisprudential) matter.[72] The SAC may be the highest authority on *Shariah* in the Islamic financial industry but should it be the only *Shariah* ruling that the courts have a choice to apply when deciding on a case? The authors believe no, because even in Islamic jurisprudence there is room for differences in opinion. There is room for differences of opinion because there is flexibility on whether to strictly follow a ruling on commercial matters in *Shariah*. In the opinion of the authors, the courts should not be fettered into only applying the expert opinion of the SAC.

Be that as it may, the authors believe a simple legislative amendment to s 57 of the CBMA would overcome the issue of unconstitutionality of ss 56 and 57 CBMA.[73] Before the amendment is explained, the authors will lay down the reasons for suggesting the amendment.

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[71] Ibid para 79 and 80.

[72] See Imran Ahsan Khan Kyazee. Islamic Jurisprudence. The Other Press: Kuala Lumpur, 2000. The authors are thankful to the reviewer who mooted this idea.

[73] See Kunhibava, S., "Legal Issues In Shariah Governance In The Islamic Financial Industry In Malaysia," *ISRA International Journal of Islamic Finance*, 2015, Vol. 1, issue 2, pp. 55-80, and Kunhibava, S . "Ensuring Shariah Compliance At The Courts And The Role of The Shariah Advisory Council In Malaysia," *Malayan Law Journal*, 2015. Vol. 3, pp. xxi-Ix.

In the process of trying to create a solid *Shariah* governance system for the Islamic financial system, that is *Shariah* compliant from product development to the resolution of disputes, Parliament inadvertently made it mandatory for the civil courts to seek the ruling or advise of the SAC and apply it. This amendment encroaches on the doctrine of separation of powers. The judiciary, as Justice Malanjum pointed out, provides the 'check and balances' necessary for the proper and just administration of the whole country, the judiciary must be independent. While there cannot be a strict separation of powers as highlighted by Justice Zawawi and Justice Azahar, the 'blending' of powers for a proper functioning system should only be between the executive and the legislature, as highlighted by Justice Malanjum.

That the civil courts should be independent was also recognised and highlighted by the majority view, so much so, that both Justice Zawawi and Justice Azahar emphasised strongly that the function of the SAC is only to 'ascertain' the relevant Islamic law on a *Shariah* issue. In other words its role is not to 'determine' or judge between the parties in a case. The learned judges also highlighted that the SAC is only an expert body of highly prominent jurists in Islamic banking and finance and *Shariah*, and the ruling made by the SAC is equivalent to expert advice. However, two points cast doubt on role of the SAC to 'ascertain' Islamic law and to be an 'expert'.

Firstly, in the ordinary course of the law of evidence, expert opinion is not binding on the civil courts, it is up to the civil courts to decide whether to apply it or not. In the case of the SAC the mandatory requirement to apply the ruling of the SAC under s 57 CBMA makes it more than 'expert' evidence.

Secondly, when there is a lacuna in the *Shariah* sources on an issue in Islamic finance, as an example, when there are no authorities on a particular Islamic finance issue, the SAC uses legal maxims, *maslahah* (public interest) and other supporting evidence from the *Quran* and *Sunnah* and by collective *ijtihad* (independent reasoning) to issue resolutions which form part of the *fiqh* (legal jurisprudence) of Islamic banking and finance. Is this merely 'ascertainment' or does it also involve 'determining'?[74] Ultimately the SAC cannot just ascertain the law it will have to determine the law, in certain situations, as the final authority on *Shariah* in the Islamic finance industry in Malaysia. This may not be true when an issue in a case is referred to the SAC, but for the Islamic financial industry it maybe too farfetched to insist that the SAC's role is only to 'ascertain'. In reality it is submitted that the role of the SAC is not just to ascertain Islamic law but also to determine it in certain situations when there is a lacuna in *fiqh*. This is the role of the SAC and the SAC is best suited for this role.

Apart from that, the authors also believe that the SAC should have the right to determine whether a clause in a contract is *Shariah* compliant. This would improve the industry since experts in *Shariah* will be determining the *Shariah* compliance of a transaction.

In other words, the role of the SAC should not only be confined to the strict interpretation of 'ascertainment' of the relevant Islamic law. The SAC should have a wider role to establish Islamic law when there is a lacuna in *fiqh* relating to Islamic financial

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[74] Ibid.

business and the SAC should be able to give their opinion on the practice of the parties as to whether it is *Shariah* compliant or not.

Since the SAC is considered an expert, it should give an opinion and it should be up to the courts to decide whether they want to follow the opinion or not.

To solve issues of constitutionality and also to give the SAC a wider role, the ruling or advice of the SAC should not be binding on the trial judge.[75]

In other words, the solution to allowing the SAC to decide on such matters without encroaching on the functions of the court is to have legislative changes made to s 57 of the CBMA. It should be compulsory to refer to the SAC's published rulings or refer questions of *Shariah* to the SAC and thus maintain s 56. However, the advice of the SAC should not be binding on the trial judge when a question has been referred to it.[76]

In other words, s 57 should revert to the old s16(8) provision where the court 'may' take into account the decision(s) of the SAC. In this way the trial judge would have the last say, issues of constitutionality would not arise and the court can easily refer questions to the SAC on whether the practice of the parties are *Shariah* compliant. After all, an expert opinion is exactly that – it should, at the end of the day, be up to the trial judge to take the ruling made by the SAC into consideration (or not to take it into consideration) when making a decision. The courts should have full autonomy.[77]

V CONCLUSION AND RECOMMENDATION

In summary, the majority view as explained by Justice Zawawi and Justice Azahar was that both ss 56 and 57 are constitutional as the role of the SAC is only to ascertain, not determine. On the other hand, the dissenting judges, Justice David Wong and Justice Richard Malanjum opined that both the sections are unconstitutional as the role of the SAC is more than just ascertainment and it has inadvertently usurped judicial power. The authors opine that there are merits in both sides of the argument. To accommodate this and to ensure the separation of powers and the rule of law is upheld, s 57 of the CBMA should be amended from 'shall' to 'may' to allow the civil courts to have the ultimate discretion whether to apply a ruling of the SAC.

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75 Ibid.

76 Ibid.

77 Ibid.