

The Application of *Maqāṣid al-Sharī'ah: Wasaṭiyyah* as a Significant Aspect in the Banker-Customer Relationship in Malaysian Islamic Banks

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Abstract

The banker-customer relationship is a contractual relationship based on the contract between Islamic banks and its customers. Islamic banks use standardized contracts and offer them on a 'take it or leave it' basis where the terms cannot be negotiated, subsequently creating the potential for Islamic banks with the economic strength to exploit the contracts. The main purpose of this study is to examine the terms and conditions that may result in significant imbalance between rights and obligations in the banker-customer relationship, which detracts banking consumers. Findings in this study reveal that there exists unequal bargaining power whereby the customer wields the weaker bargaining power. Using the content analysis method, this study analyses the application of *Maqāṣid al-Sharī'ah* through the maxim of *wasatiyyah* in the banker-customer relationship to reshape good self-governance and propose improved legal documentation towards a just transaction. The strength of the banker-customer relationship will determine the future success of the Malaysian banking industry.

Keywords: Banker-customer Relationship, Islamic Banks, *Maqāṣid al-Sharī'ah*, Malaysia, *Wasaṭiyyah*

تطبيق مقاصد الشريعة: الوسطية كأقوى جانب في العلاقة بين المصارف الإسلامية المالية والمتعامل معها ملخص البحث

إن علاقة المصرف والعميل علاقة تعاقدية مبنية على ما تتعاقد المصارف الإسلامية وعملاؤها عليه. وتستخدم المصارف الإسلامية العقود الموحدة، وتعرضها على العملاء على أساس "اقبل أو ارفض" إذ لا يُفتح مجال التفاوض في الشروط. وبالتالي، تمكن هذه العملية المصارف الإسلامية من التمتع بالقوة الاقتصادية لاستغلال العقود. والهدف الرئيس من هذا البحث هو دراسة الشروط والأحكام التي قد تؤدي إلى اختلال التوازن بين الحقوق والالتزامات في علاقة المصرف مع العميل، والتي تسبب الضرر على عملاء البنك. اكتشفت هذه الدراسة أن المساومة بين المصرف والعميل غير متكافئة، إذ أن العميل يستخدم أضعف القوة المساومية. واستُخدم المنهج التحليلي في الدراسة، وذلك لبيان مقاصد الشريعة في ضوء مبدأ الوسطية في علاقة المصرف مع العميل، لإعادة تشكيل الحوكمة الراشدة في المصارف الإسلامية ولإقتراح تعديلات للوائح القانونية التي تحسن المعاملة المصرفية. وأخيرا، تقوية علاقة المصرف والعميل هي الحل الوحيد لنجاح البنوك المالية.

الكلمات المفتاحية: علاقة المصرف مع العميل، المصارف الإسلامية، مقاصد الشريعة، ماليزيا، وسطية

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Introduction	77	Islam is a faith of divine guidance for humanity, based on peace, spirituality, and the oneness of God. Apart from being a relationship between man and God, Islam as a way of life also preaches compassion, tolerance, and justice. The basis of these beliefs is provided by the <i>Sharī'ah</i> , the drive for a just, productive, humane, compassionate, harmonious, and highly democratic society. <i>Sharī'ah</i> also
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provides the foundation for creating the Islamic banking system in Malaysia. Indeed, the objectives of the *Sharī'ah* (*Maqāṣid al-Sharī'ah*) is today's most effective intellectual means and methodology being applied by Muslim scholars in creating new proposals and the development of the Islamic banking industry in Malaysia.

Kuala Lumpur, as Malaysia's capital is ranked 22nd globally in the world financial sector, and in the Asian top 10 in the Global Financial Centres Index (GFCI)¹. Malaysia has a large banking market with assets valued at US\$561b and has an advanced financial infrastructure which has been liberalized and integrated in the global financial market². The development process of the financial sector was also given prominence in two 10-year master plans: the Financial Sector Master plan (FSMP) for the period of 2001-2010 and Financial Sector Blueprint (Blueprint) for 2010-2020 respectively³. It is envisioned that the financial sector would be a key driver and catalyst of Malaysian economic growth.

The banking business plays a significant role in the economic development of Malaysia. To date there are 27 commercial banks with eight domestic and 19 foreign ones in Malaysia which are the most significant providers of funds in the banking system. The conventional banks run in parallel with the Islamic banks. Currently, Malaysia is also the world's hub for Islamic finance and has become an Islamic gateway to the world offering Islamic fund and wealth management. It has 16 fully-fledged Islamic banks including six foreign ones, with total Islamic bank assets of US\$168.4 billion, which accounts for 25% of Malaysia's total banking assets and over 10% of the world's total Islamic banking assets⁴. The Malaysian Islamic banking model is also one of the most advanced models in the world, and subsequently has led to the existence of considerable consumer demand for Islamic banking products in Malaysia.

The banker-customer relationship in the Islamic banking sector is contractual, without which the transactions are void of legal significance. This contractual relationship is governed by Malaysian contract law.

However, such law does not provide adequate protection for banking consumers against unfair practices by the Islamic bank. Indeed, there is inadequate legislative and judicial control over the use of standard form banking contracts that tempts the bankers to use their overwhelming bargaining power way beyond reasonably necessary by imposing clauses on banking consumers that protect their legitimate interests. The widespread use of unfair contract terms and the detriments experienced by banking consumers would impose strain in the banker-customer relationship and create risk in reducing confidence to the banking world. Therefore, this paper intends to promote the use of the *Maqāṣid al-Sharī'ah* approach from the perspective of the Islamic concept of *wasatīyyah* in the banker-customer relationship so as to highlight the characteristics of justice, an excellent and balanced society, as well as to curb extremism (*taṭarruḥ*) within the Islamic banking industry. The *wasatīyyah* approach represents the 'best approach' to eliminate extremism in all worldly matters. By balancing extremism in the light of wisdom and good self-governance by the Islamic banks, the banking consumers are granted considerable protection against serious inequality of power by the Islamic bank.

This paper is structured as follows: Part 2 describes the literature review on the application and importance of the *Maqāṣid al-Sharī'ah* in the Islamic banking sector. It provides the definition and scope of the maxims of the *Maqāṣid al-Sharī'ah* and *wasatīyyah*. It also analyses various meanings of *wasatīyyah* and justification put forward by scholars for the adoption of the *wasatīyyah* approach in human activities. This part also focuses on the impact of applying the *Maqāṣid al-Sharī'ah* and the *wasatīyyah* principles in the banker-customer relationship towards better self-regulation of the Islamic banks. Part 3 concludes that the application of both principles will result in the creation of justice and righteousness (*iḥsān*) in Islamic banking practices in line with the *Sharī'ah*.

Defining Maqāṣid al-Sharī'ah

Sharī'ah is an Arabic word derived from the root word *shara'a* which literally means "the road to watering place" or "the road to take or the line to follow" (Karim, 2005). The terminology of *Sharī'ah* is further defined as the canon of pre-sanctioned laws and rulings of Allah, or prescribed commandments which Muslim should abide by so they can relate to Allah as well as other human beings. Ibn al-Qayyim (d.478 AH/ 1347 CE) defined the *Sharī'ah* and the fundamental implication of going against it saying:

Sharī'ah is based on wisdom and achieving people's welfare in this life and the afterlife. *Sharī'ah* is all about justice, mercy, wisdom, and good. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the *Sharī'ah*, even if it is claimed to be so according to some interpretation. (Auda, 2008).

Linguistically, the term *maqṣid* (plural: *maqāṣid*) is defined as a purpose, objective, principle, intent, goal, or end. The *Maqāṣid* has become the focus of attention of Muslim scholars as it tends to provide a ready and convenient access to *Sharī'ah*. Hence, *Maqāṣid al-Sharī'ah* are the objectives or purposes behind Islamic rulings. The Qur'ān and Ḥadīth are the primary scriptures of the Islamic faith and are *Maqāṣid*-laden which frequently indicates the purposes, intents, and ends behind its rulings. The Qur'ān explains the main objectives of *Sharī'ah* [Al-Anbya: 107]: "*We have not sent you but as a Mercy to the worlds*", which means that the most important purpose of Prophet of Muhammad (S.A.W.) was as a guider of mercy. Muslim scholars have therefore considered mercy as the all-pervasive objective of *Sharī'ah* for the benefit of the people (*maṣlaḥah*). Indeed, removal of hardship from the banking consumers are among the main objectives of *Sharī'ah* in Islamic banks. This indicates that it is not advisable for bankers to choose harsh verdicts in a situation where just and benevolent alternatives can be found.

The primary objectives of *Sharī'ah* are the realization of benefit to the people and protecting them against evil

and corruption, especially regarding their affairs in this world and the hereafter (Laldin, 2006). In Islamic finance, *Maqāṣid al-Sharī'ah* refers to the overall objectives in the enactment of financial laws and principles related to financial activities and transactions but specific to Islamic banks, the most important objectives are the establishment of justice and elimination of exploitation in business transactions (Lahtasna, 2009). Islamic banks are financial institutions established to promote and perform some of the operational roles of Islamic economics, which are guided by moral values (Hassan, 2011). The objectives of the Islamic economic system are derived from the *Maqāṣid al-Sharī'ah* which include: to achieve *al-falaḥ*, to provide basic human needs, to achieve moral and material development, to promote the brotherhood concept and unity, to achieve fair and equitable income distribution, wealth circulation, as well as to eliminate exploitation (Chaudhry, 1999). The *Maqāṣid al-Sharī'ah* are 'the objectives and rationales of the *Sharī'ah* which reflect the holistic view of Islam as a 'complete and integrated code of life of the individual and society as a whole, in this world and hereafter' (Dusuki & Abozaid, 2007). *Maqāṣid* are also a group of divine intents and moral concepts which form the basis of *Sharī'ah*, such as justice, human dignity, free will, facilitation, and social cooperation' (Auda, 2008a). 'It is one of today's most important intellectual frameworks and methodologies for the establishment and development of Islamic banking' (Auda, 2008b).

However, the development of theories on the *Maqāṣid al-Sharī'ah* was primarily restricted to three broad categories in a descending order of importance as suggested by Imam al-Ḥaramayn al-Jūwairī (d.478/1085), one of the pioneer contributors to *Maqāṣid* theory, namely: the essential purposes (*daruriyyat*), the complementary objectives (*ḥajjiyyat*), and the desirables (*taḥsinīyyat*) (Lahtasna, 2011, p.15). After he died, his disciple and an eminent scholar, Imam Abu Ḥamid Muhammad al-Ghazālī (d.505/1111) further expanded the objectives of *Sharī'ah* as to 'promote the well-being of mankind and the protection of the five essentials namely: religion, life, intellect, lineage, and property' (Kamali, 2008), to which al-

Qarāfi added a sixth, that is human dignity (Auda, 2008c). These advancements by al-Ghazālī has become widely accepted by many scholars (Gamal, 2010) ⁵. In recent developments, some scholars have further developed the *Maqāṣid al-Sharī'ah* theory and its classification so as to include other purposes like: individual freedom and social justice, world peace, universal brotherhood, comprehensive communal prosperity, equitable distribution of wealth, material development, circulation of wealth, and moderation (*wasatiyyah*) in all aspects of human life among other things (Kamali, 2015)⁶.

In recent development, contemporary scholars have introduced *wasatiyyah* as a new maxim of the universal *Maqāṣid* that allows them to respond to global issues and concerns. In fact, the very understanding of *Maqāṣid al-Sharī'ah* relies on moderation because everything in Islam is actually based on moderation. *Wasaṭiyyah* as one of the basic principles in Islam means moderation, justice (*al-'adl*), as well as moral excellence and overall goodness (Hassan, 2013c). The theory of *wasatiyyah* is extremely relevant in addressing the 'contemporary issues of global policy such as: justice, women's rights, environmental and financial balance, as well as globalization' (Kamali, 2015, p.10). The concept of *wasatiyyah* and the place of Islamic moderation in it is an important yet most often a neglected concept of Islam (Feisal, 2012).

Wasaṭiyyah As A Maxim Of The Maqāṣid Al-Sharī'Ah

The term *wasatiyyah* comes from the Arabic noun *wasat*, which literally means just and unextreme. Other Arabic terms synonym to *wasatiyyah* are *i'tidāl*, *tawssut*, *iqtiṣād*, and *tawāzun* which are also closely connected to justice and taking a middle position between two extremes (Kamali, 2015, p.10). The term *wasat* in the Qur'ān is interpreted within the context of "*ummatan wassatan*" (a just community), as stated in the well-known verse of [Al-Baqarah: 143]: ﴿Thus we have made of you a community justly balanced that you will be witnesses over the people and the Messenger will be a witness over you﴾. *Wasat*

here means 'just community' or 'a moderate nation' that embraces the attributes of justice, excellence and balance in order to serve as Allah's trustworthy "witnesses over mankind" (*shuhadā'ala al-nas*) (Kamali, 2015). This makes the 'just community' as witnesses over mankind by establishing justice and monitoring over those whom have deviated from the straight path by guiding them to moderation in their belief and worldly affairs. As for being witnesses over mankind on the Day of Resurrection, the *ummah* (the Muslim community) will be witnesses to support the messengers sent by Allah that they have conveyed the message of Allah to humankind. So, the best way for the Muslim to behave is in moderation; a "just community is a community in the middle way" which is important in maintaining unity and the equilibrium of the *ummah* (Asad, 1980).

Generally, *wasat* may also be translated as the middle position of justice, fairness, and balance as well as 'justly balanced nature of Islam' or 'justly balanced quality of the Islamic community' (Hassan, 2013a)⁷. Al-Qur'ān also applies *wasatiyyah* to indicate centrality, moderation, and balance⁸. Other definitions of *wasat* may include: fairness, simplicity, moderate, rational, justice, prosperity, balanced, right, not extreme, and do not overdo to name a few (Abdul, 2014). However, the more popular translation of *wasat* is moderation which implies justice that establishes right upon those who are deserving, which transpires between excess (*ifrāt*) and laxity (*tafrīt*) (Hamka, 1984 as cited in Ahmad & Amir, 2015)⁹, which clearly rejects licentiousness and exaggerated asceticism (Hassan, 2013b).

However, the more comprehensive and up-dated meaning of *wasatiyyah* as shown in Figure 1, encompasses the three following attributes of (Hassan, 2013)¹⁰:

- a) Justice (*al-'adl*),
- b) Excellence, and
- c) Balance or moderation.

These qualities of *wasatiyyah* must be defined in light of the Qur'ān and the *Sunnah* and not from superficial

philosophical perceptions of any Muslim so as to avoid misconceptions. From these two primary sources, the concept of *wasatiyyah* is postulated on three key attributes of Islam namely: belief (*imān*), knowledge (*ilm*), and compliance to divine guidance (*taqwā*)¹¹. In this context, *imān* is translated as belief in Allah as the only God worthy of worship (monotheism) and that Prophet Muhammad (S.A.W.) is His final messenger¹². The importance of knowledge as another foundation of *wasatiyyah* is premised from the verse [Al-'Alaq: 1-5] which mentioned the belief in Allah goes together with the pursuit of knowledge. Knowledge presupposes everything in Islam that belief in God can only be acquired through knowledge. Knowledge helps in attaining a balanced frame of thought. As of *taqwā*, it means to 'fear to Allah, to act upon revelation, to be content with little and to prepare for the Hereafter'¹³. Those with *taqwā* possess the characters of pleasant, civil and sound judgment. *Taqwā* is the best protector and life companion that guards against sin and evil. It is important to strive for *taqwā* as it encourages a believer to be wary of anything that displeases Allah. *Taqwā* when coupled with *imān* and knowledge, makes a well-rounded believer.

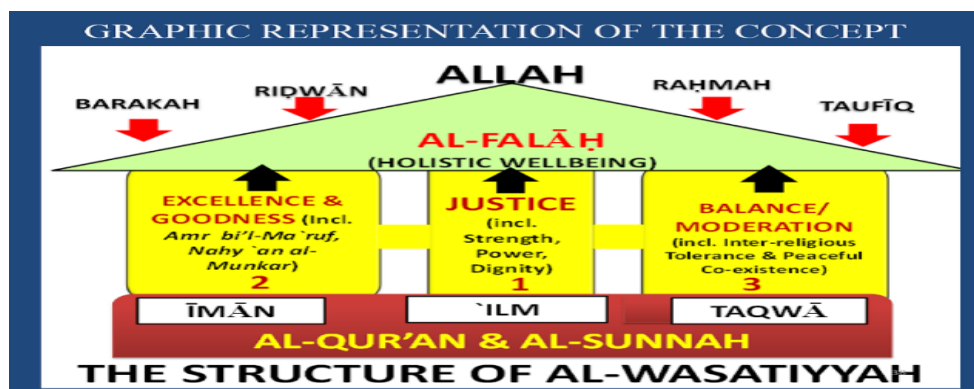
a) *Wasatiyyah* as justice (*al-'adl*)

In a broader meaning, justice includes justice to Allah (S.W.T.), justice to human beings and other inhabitants, justice to nature, and justice to oneself. It becomes an obligation of the 'just community' to always to be just in accordance to the *Sharī'ah* when making decisions, resolving disagreements and granting the rights on those

deserving of it. *Wasatiyyah*, which is based on the Qur'an and *Sunnah*, is a primary aspect in Islam which emphasizes justice as the focal point for humanity. It necessitates everybody to become diligent, excellent, and consistent (*istiqāmah*) in goodness. The principal mission of moderation and justice is to have a just social order, hence mankind is charged with acting justly at all times, while rejecting oppression and injustice. Qur'anic conception of justice goes beyond the confines of legal connotations and courtroom proceedings. Justice here is enriched and moderated by Islamic ethical guidelines on fairness, forgiveness, patience, and forbearance. It requires the 'just community' to uphold the truth in their worldly affairs, not influenced by biases or prejudice in making decisions, and not to deviate from divine norms of justice and fairness.

However, the notion of justice (*al-'adl*) is often overlooked and misunderstood in striving to seek the middle path in everything. Justice should be based entirely on balancing the worldly affairs in this world and at the same time preparing for life after death as mentioned in the Qur'an [Al-Qaṣaṣ: 77]: ﴿So seek the abode of the Hereafter through what God has given you and do not forget your part in this world﴾. Without these attributes of comprehensive justice and fairness, the *ummah* cannot be a 'just community' that executes the plans of Allah thereby becoming vicegerents of Allah that practice balance and moral excellence in their worldly affairs as well as preparation for the hereafter.

Figure 1-The Structure of *wasatiyyah*¹⁴



b) Excellence and Goodness

Excellence is incorporated in the definition of *wasatīyyah* based on its usage in the Arabic language which means the 'best choice' or 'excellent' which generally is connected to the powerful Quraysh tribe where Prophet Muhammad (S.A.W.) was a member. Similarly, the *Sunnah* identifies Prophet Muhammad (S.A.W.) as the *wasat* among all and as a role model for all mankind or 'the noblest among the Qurayshī descent' (noblest among all mankind).

c) Balance and Moderation

This third attribute of *wasatīyyah* is most popularly applied by the Arabs and prominently emphasized in practicing *wasatīyyah*. Moderation does not simply mean to be in the middle between a worst scenario and an excellent situation. It is all about striving to uphold what is good as propounded by Islam and to achieve righteousness (*iḥsān*) in all doings. Moderation is only one important dimension of *wasatīyyah* but not the whole of it. All the three qualities of justice, excellence, and moderation are in fact intertwined and integrated. Care should be taken so as not to highlight only one aspect at the expense of the other qualities.

It is important to note that in this concept¹⁵, the aspect of *wasatīyyah* becomes the twinning concept with *khayr ummah* or the 'just and best community' as mentioned in Al-Qur'ān [Al-'Imrān: 104]: ﴿You are indeed the best community that has ever been brought forth to invite goodness for mankind: you enjoin doing what is right and forbid what is wrong, and it is these who are successful﴾. The *khayr ummah* concept affirms all three attributes of *wasatīyyah* and emphasizes the obligation on mankind to enjoin good and forbid wrongdoing in their activities. The Prophet Muhammad (S.A.W.) has warned that dire consequences will befall mankind if they neglect such an obligation of ((enjoining the right and prohibiting the evil)).

Applying Wasatīyyah Approach On Banker-Customer Relationship In Islamic Banks

The relationship between the Islamic banker and the customer is a contractual one which is created by an agreement between the parties in relation to any banking transaction. It is a multi-contractual relationship which depends on the type of contract that parties have opted to choose. For example, for financing purposes, it could be in the dynamics of vendor-purchaser, investor-entrepreneur, principal-agent, lessor-lessee, transferor-transferee, and between partners in a business venture¹⁶. As for the deposit account, the relationship can be that of agent-principal, depositor-custodian, lender-borrower (but free of interest), investor-entrepreneur as well as between fellow partners in a joint investment project.¹⁷ It is these contractual relationships that specify the rights and obligations imposed on both banker and customers. Such is the situation in banking contracts that banks would normally make stipulations in various clauses to protect their interests and minimize their liability. Due to the relationship being contractual, it is governed by principles of Malaysian contract law. This freedom to enter into contractual relationship is valid as long as the contract is not void or voidable contracts under the Contracts Act 1950 (CA 1950).

However, the implementation of contract law under the pretext of CA 1950 in the banking context results in some problems. To begin with, this freedom to contract is subject to abuse as CA 1950 does not take into consideration the situations of inequality of bargaining power or absolute absence of bargaining power between the contracting parties. The contract law presumes that both parties are equal in power. However, the banker-customer relationship is characterized by serious imbalance of power between the parties and, the CA 1950 does not provide any particular protection for the weaker parties. Banks in maximizing their profits have tended to neglect their legal responsibility in contract law, for example the usage of such terms as 'bank may at its absolute discretion and without any liability whatsoever',

'bank reserves the right to add, delete, alter or amend any of these terms', 'bank shall have the right at any time without prior notice to customer' to name a few. Hence, contracts are drafted in an unfair and confusing manner to circumvent the provision of CA 1950 to render the contracts void or voidable. These unfair contracts are detrimental to the rights and obligations of a banking consumer since there is no law in Malaysia that regulates them. Moreover, banks enter into such unfair contracts on anticipation of inadequacy of contract law in this area. Such is the situation in the banking scenario that banks make stipulations in various clauses so as to protect their interests and to minimize their liability. Even the courts in Malaysia have adopted a very conservative approach in the situation of unequal bargaining power in contracts. Courts usually prefer not to intervene in the content of a banking contract or to remove depriving contractual clauses from banking contracts. As such, the banks have taken advantage of court's passive attitude and continued applying contracts that include unfair terms. The existing application of contract law in banking disputes has failed miserably to create a proper balance between the banks and their customers and at the same time it has also not provided the suitable level of protection to banking consumers.

Indeed, effective protection of a banking customer requires a self-regulatory approach by the Islamic banks, which could be found by applying the *Maqāṣid al-Sharī'ah* from the *wasatīyyah* perspective. The spirit of *wasatīyyah*, with all its attributes of moderation, centrality, and balance without any elements of extremism as well as enjoining the good and forbidding wrongdoing, imposes on the bank, a sense of brotherhood among humankind that stands on the twin principles of *ʿadl* and *iḥsān* (justice and righteousness). This is the intent of the Qur'ānic verse [Al-Baqarah: 195]: ﴿be the agents of good, for God loves those who do well﴾. The Prophet (S.A.W.) added his own voice on this when he declared: ((None of you is a true believer unless he loves for his brother that which he loves for himself.))¹⁸

In promoting the good and removing hardship, *wasatīyyah* which is identified as a relationship with ethical behavior, is intended to curb the power of the bank and ensure that the bank does not abuse it to the detriment of the customer. Since the Prophet (S.A.W.) and his companions have approved of *wasatīyyah* by applying justice, excellence and moderation at almost every opportunity, these principles could become a justified and worthy beacon of light for the protection of banking customers in the context of Islamic banking. The spirit of *wasatīyyah* serves as a complementary and correcting standard where the contract law has failed. These principles set a very high standard of conduct for the bank, obligating it to act with integrity, fairness, professionalism, and benevolence. However, the most important duty of the bank is to perform its duties as a bank solely for the purpose of promoting Islamic economy, without any ulterior motives at the same time protecting the interests of the beneficiary, the customer. The Islamic banks must act for the best interest of the banking customers and preferring the interests of its customers over its own self-interest.

The following are standard terms that indicate the rights of Islamic banks as stated in Islamic banking consumer contracts which might have *Sharī'ah* implications and the potential to be regarded as unfair. However, by applying the *wasatīyyah* principle, these issues may be improved as illustrated in Table 4.

Table 4 – The Contractual Rights of Islamic banks

No	Rights of Islamic banks in banking contracts	Original contract terms extracted from various Islamic banks in Malaysia ¹⁹ .	Applying <i>wasatīyyah</i> & action to be taken
1	Right to debit account	"The bank has the right at any time without notice to you to debit your current/ savings account with us towards payment of the monthly payment of financing and any other cost or	Term should be deleted. It is detrimental to the rights of consumers as Bank can exclude or limit the legal rights of

		expenses incidental thereto."	banking consumers.
2	Right to consolidate and set-off	"The Bank shall have the right to consolidate any or all accounts of the Customer with the Bank, such right to be exercised at the Bank's absolute discretion."	Term should be deleted
3	Right to vary term generally	"The Bank reserves the right to modify the terms and conditions, review periodically or recall the Facility pursuant to Clause 7 as and when the Bank deems it necessary at its absolute discretion. On such expiry or termination, all amounts then outstanding together with all monies due to the Bank under the facility will be immediately due and payable without further notice and demand."	Term should be deleted because it enables the bank to alter terms of the contract unilaterally without a valid reason as specified in the contract
4	Right to exclude/ limit liability for failure to perform contractual obligations	"The Bank shall not be liable to the Card member in contract or tort or otherwise for any direct or indirect financial or economic losses, costs, liabilities or expenses".	Term should be deleted because it inappropriately exclude/ limit the legal rights of banking consumers in the event of total/ partial non-performance by the Bank of any contractual obligations.
5	Right to recall	"The Facility shall be subject to the Bank's right to recall on demand and be reviewed from time to time by the Bank and the Bank shall have the right to withdraw the Facility at any time it deems fit to do so."	Term should be deleted since it gives the Bank the right to terminate the contract. In Sharī'ah, a non-payment

			will not render a contract terminated.
6	Right to cancel/ terminate	"The Bank reserves the right to terminate or withdraw the Facility at any time irrespective whether or not the Customer has breached any of the terms and conditions contained therein or in any other documents in relation to the Facility."	Term to be revised. <u>New term:</u> 'Either party shall have the right to terminate this Contract without penalty within seven days. In the event of such termination by either party the Bank shall refund to Customer sums paid by the Customer.'
7	Right to final decision	"The Bank may without prejudice to all its powers privileges or remedies contained herein at its absolute discretion and upon such terms and subject to such conditions as the Bank may deem fit to impose, suspend, waive or cancel all or any part of the Facility and such act of the Bank shall not impair the rights of the Bank to insist on the compliance of the Condition Precedent at any later date."	Term should be deleted since it gives the Bank exclusive right to interpret any contract term.
8	Right to enforce unfair clauses	"The Facility is granted conditional upon the Customer conducting the account satisfactory at all times. Notwithstanding the above, the Bank reserves the right to modify the terms and conditions, review periodically or recall the	Term should be deleted.

		Facility pursuant to Clause 7 as and when the Bank deems it necessary at its absolute discretion. On such expiry or termination, all amounts then outstanding together with all monies due to the Bank under the Facility will be immediately due and payable without further notice and demand."	
9	Right to impose unfair financial burden	"The Customer shall at any time, if and when required by the Bank to do so, execute in favor of the Bank or as the Bank shall direct such legal or other mortgages, charges, assignments, transfers or agreements as the Bank shall require off and on all the Customers' estate, right, title and interest in any assets or business belonging to the Customer or which may hereafter be acquired by the Customer and the benefits of all licenses held in connection therewith to secure all monies and liabilities hereby agreed to be paid or such mortgages, charges, assignments, transfers or agreements on Bank's behalf at the Customers' cost for the Bank's benefit as the Bank may require."	Term should be deleted.
10	Right to restrict consumers' redress	"Any liability the Bank might otherwise incur and any right or immunity the Customer might otherwise possess and whether arising under this Ijārah or under any prior	The terms should be revised. <u>New term:</u> 'If there is any dispute arising from this agreement,

		agreement or in oral or written statements made by or on behalf of any person prior to this Ijārah are hereby excluded."	either parties may claim damages accordance to the general rules of Malaysian law.'
11	Right to decide meaning of terms	"The Bank has the absolute discretion to review and/ or amend the terms and conditions of the Facility offered and/ or cancel the same."	Term should be deleted.

Having acknowledged the application of the *Maqāṣid al-Sharī'ah* and *wasāṭiyyah* with reference to contractual terms in Islamic banks such as the right to cancel/terminate contracts and the right to restrict consumers' redress; the original terms which disadvantage the banking consumers are recommended to be revised to new and improved terms. These new terms should promote fair bargain aspects which afford some protection for banking consumers. However, the terms that indicate other rights of Islamic banks such as rights: to debit account, to consolidate and set-off, to vary terms, to exclude/ limit liability, to recall, to final decision, to enforce unfair clauses, to impose unfair financial burden and to decide meaning of terms; all such rights should be deleted due to extremism in conduct. Avoidance of extremism may provide a balanced sense of justice for fair bargain and valuable guidelines to guard against behavioral biases and protect banking consumers from irrational behavior of Islamic bankers. We have witnessed the unfortunate rise of extremism, especially of 'the systemic breakdown of accountability and ethics' after the global financial meltdown in 2008 and persistent shortfalls in customer satisfaction which all pose a great threat to the sustainability of the banking industry.

Generally, there are many duties owed by the Islamic banker to the customers. However, the discussion here will focus only on the duty of an Islamic banker to perform a contract ethically: transparency in dealings, non-excessive profits, and fair contract terms. Other general duties of

Islamic banks include the implied duty to fulfill contractual obligations in good faith and to enforce fair dealing to the customers: *Renard Construction (ME) Pty Ltd v Minister of Public Works (Priestly JA)*. Currently, Malaysian law has been hostile to the concept of good faith whereby Malaysian courts have not recognized the implied duty to perform contracts in good faith in commercial contracts mainly due to the concern that it would undermine commercial certainty by an unacceptable degree. This was mentioned by the Court of Appeals in the landmark case of *Aseambankers Malaysia Berhad & Ors v Shencourt Sdn Bhd & Anor*²⁰. The case involved an action by appellants, also participant banks to a syndicated loan, for recovery of the loan from respondent borrower and developer whom had defaulted in the repayment obligations. The loan facility was finally terminated even after restructuring, refinancing, deferments, and extensions of time were given. The respondents claimed that by terminating the loan facility, the appellants had breached the duty to act in good faith and honesty in granting and administering the syndicated loan. The High Court was in favor of the respondents and agreed that the appellants owed a duty of good faith and honesty which has been breached. The respondents were awarded with substantial damages. However, the Court of Appeal had unanimously allowed the appellant's appeal and rejected the general duty of good faith and decided that such ruling by the High Court was wrong. The implied duty to act in good faith is not imposed upon parties negotiating commercial contracts was summed up in the following terms by Mohamad Ariff JCA²¹,

...Absent any peculiar special relationship between Lender and Borrower, a Borrower-Lender relationship in a banking transaction, noted for very detailed and precise terms (invariably drafted and vetted by lawyers for both sides) being incorporated in the contract document, cannot with respect be a suitable subject matter to interpose any general obligation of good faith and fair dealing. The twin requirements of certainty and predictability in banking transactions have to be accorded primacy consistent with commercial needs and sensibilities. In

my view, the banking industry is best guided, and its continuing growth secured, when disputes between parties can be resolved by reference to the actual written terms and conditions in the contract documents, without interposing them with an overarching and uncertain perceived equitable obligation of good faith and fair dealing....

Banking consumers should have a number of rights when it comes to standard form banking contracts. These rights include:

1. Rights to change their mind and cancel the agreement for any reason of receiving a written copy of the agreement i.e. cooling off period.

This right entitles the banking consumers to change their minds and cancel banking contracts for goods and services. This cancellation rights would provide quick and effective means of legal redress for consumers and improve banking compliance with consumer law. It allows banking consumers the right to think again about the contract, terminate the contract without liability, and get their money back without having to resort to court action. This right also requires that consumers be informed about all the necessary information in the contract on their right to cancel the contract, how long is it available, how to do so and who to inform, otherwise banking consumers have the right to cancel the contract at any time. But banks sometimes avoid this obligation which results in banking consumers being less aware of and less confident to utilize the available cancellation rights. There is a need for banks to trade fairly and improve enforcement of cancellation rights which allows enforcement bodies to take injunctive actions.

2. Rights to Redress

This right entitles banking consumers to obtain a fair settlement of just claims and requires the bank to give compensation to banking consumers monetarily for any damages/losses they suffered in contracting with the banks. This redress mechanism must be free, accessible, and convenient where banking consumers can lodge complaints against the bank. In Malaysia, the Ombudsman

of Financial Services (OFS) is one such mechanism for banking consumers to express their displeasure or grievance caused by the banks. Indeed, banking consumers also have the right to be informed of the ongoing resolution process and the basis for any decision arrived at. Where banking customers are not satisfied with the decision of OFS, they have the right of review to the courts.

3. The Right to Equality

This right entitles all banking consumers to be treated equally irrespective of race, age, gender, and financial standing. It is wrong for banks to practice preferential treatment to certain individuals at the expense of other customers of the bank. However, banks are allowed to have differential treatment base on nature and types of financial products and services customers subscribe to.

4. The Right to refuse the contract if they do not fully understand the contract or feel pressured.

The consumer is allowed to refuse and does not have to agree to sign a contract they are not comfortable with. They can take time to think and should not feel pressured to sign anything not properly read or that which they do not fully understand. Consumers should only sign contracts that they fully understand and agree to.

5. The Right to Good Service

All banking consumers are entitled to the right to be treated with respect and dignity by the bank and their representatives. Customer satisfaction is the epitome of a good banking provider. Islamic banks must be consumer-centric by providing fast and appropriate responses to customer needs and complaints.

As for the obligations/duties of banking consumers to the Islamic bank, they are defined by case law and they constitute duties to negotiate and perform a contract in good faith. This indicates that only duties of care, implied as contractual terms, will be accepted and that any wider duties of care will not be recognized. Also, such terms will only be implied provided they comply with the

requirements of reasonableness and equitability, which are required for the contract to have business efficacy. It should be noted that the intention to create this term must be obvious and clearly expressed and does not clash with any other terms.

The Malaysian Code of Ethics (CoE) for Financial Services Industry (FSI) was launched by the Financial Services Professional Board (FSPB) on 6th January, 2016 which sets out 5 core ethical principles namely: competency, integrity, fairness, confidentiality and objectivity. This CoE is applicable throughout the industry which includes banking, capital markets, insurance, and Islamic finance which should be adhered to and relied on for guidance. The CoE which was developed 'by the industry, for the industry, in the public interest' complements the existing formal system of regulation at the same time contributes towards public oversight of the FSI. Each bank has its own code of conduct or ethics, for example, the AMMB Holdings Bhd (AmBank Group) has actually adopted all the principles of CoE in its Group's Ethics Policy. In addition, the Association of Banks in Malaysia (ABM) also helps set up policies and guidelines for banks in Malaysia. However, there is no enforcement mechanism but the ABM may approach BNM for assistance to ensure compliance by member banks.

This paper suggests that a Code of Banking Practice ('the Code') which would be the banking industry's customer charter on good banking practice, should be drawn up by FSPB and enforced by the ABM. The Code would be a set of regulations and guidelines which define the standard of good banking practice. It presents key commitments and obligations of bankers to their customers such that the banks must act fairly and reasonably and not to mislead banking customers in any situation. These key commitments include: the promise to give banking customers clear information on terms and conditions of the banking contracts; to regularly update banking customers about changes to terms, conditions, charges, and so forth; banks to deal with customers' problems promptly and efficiently; the obligations and

rights of the contractual parties must be in clear and plain language and if there are any significant variations in terms and conditions then the banking customers must be made aware of it and be given a new copy of terms and conditions of the contract. It is hoped that by adopting this code in the Islamic banking industry, it will help to improve the significant imbalance and extremism that exists on the parties' rights and obligations.

The Islamic banking services represent ethics and responsible investments and the essential feature of Islamic business contracts is to ensure benefit for both contracting parties. The *Maqāṣid al-Sharī'ah* impose the duty to perform contracts ethically, such as transparency in dealings, non-excessive profits, and fair contract by bankers which could strike a balance between certainty of terms while condoning unethical or exploitative behavior. The *Sharī'ah* also imposes intense commitment to brotherhood and justice for the well-being of human beings in order to eliminate exploitation in business transactions. Apart from embracing the philosophy of profit sharing in Islamic banking transactions, equally important concepts applied in Islamic banks are ethics, the quest for justice, and the promotion of social and economic welfare which extends beyond profit maximization. It is allowed for Islamic banks to achieve profit, but it must be pursued according to the *Sharī'ah* which provides the guidelines for human conduct so as not to avoid cheating and exploitation in business transactions.

Conclusion

The banker-customer relationship is characterized by power inequality, and the existing contractual tools in Malaysia are inadequate in providing the protection required by the banking consumers. Banks not only have to consider their profitability and growth, but also the interests of society by taking responsibility on the impact of their activities on stakeholders, employees, shareholders, customers, and community. The rights and obligations of banker-customer are guaranteed by law and regulations in

Malaysia. Nevertheless in the realm of banking consumer contracts, the law has not been developed in a manner warranted to protect banking consumers against abuses by bankers.

Banking consumers' requirements around the attributes of fairness, reliability, and transparency poses significant influence in building a trusted relationship between banking customers and banks. A standard form banking contract should be fair in form as well as substance. Fair here means that clauses in a contract must be legible, intelligible, using plain, and ordinary language. Contracts should also be short and simple and terms that are draconian, superfluous, and legalese should be avoided. There is evidently a need for Islamic bankers to incorporate *Maqāṣid al-Sharī'ah* in their management strategy to reflect on how best to become consumer-centric and contain such abuse of power, at the same time to restore justice and righteousness in the banker-customer relationship. *Wasatiyyah* involves the ability of the bank as being part of the 'best of *ummah*', to discern right from wrong and the commitment to do the right thing even if it is not to the bankers' advantage.

The teachings of Islam are based on making things easy rather than making them difficult. Islamic ethics stresses the concept of responsibility and accountability which involves the moral codes of truthfulness, trustworthiness, benevolence, fair treatment, and avoidance of evil practices such as cheating, extremism, and exploitation. The underlying principle of *wasatiyyah* is an important aspect in Islam that promotes moderation, excellence, and justice towards the realization of a just and balanced society. This approach, which is comprehensive and integrated, places justice as the focal point for humanity, which makes it beneficial in solving the issues and needs of the *ummah*. Indeed, *wasatiyyah* and avoidance of extremism are moral virtues and valuable guidelines in the banker-customer relationship. It is essential for Islamic banks to always be just and in line with *Maqāṣid al-Sharī'ah* in granting the rights of banking consumers. The banks should implement the 'justly

balanced community' that is closely calibrated to consumer sophistication, which is exactly the kind of dynamism that the banking industry needs today. The development and growth of Islamic banking worldwide, together with the proper understanding and implementation of *Maqāṣid al-Sharī'ah* through the principles of Islamic moderation, excellence, and justice or *wasatiyyah*, would ensure the sustainability of IBIs in Malaysia.

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Endnotes

¹ Global Financial Centre Index 19. *The Overall Rankings*. Retrieved on 20 July 2016 from

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³ Bank Negara Malaysia. *Financial Sector Development*. Retrieved on 20 July 2016 from <http://www.bnm.gov.my/?ch>.

⁴ *Ibid*.

⁵ Fakhrudin al-Razi (d.606 AH/1209 CE) and al Amidi (d.631 AH/1234 CE) followed al-Ghazali in his terminology.

⁶ For example: Ibn Ashur (d.1325 AH/ 1907 CE) gave priority to *maqasid* concerning to nation than individuals; Rashid Rida (d.1354AH/1935CE) included reform and women's right in his *maqasid* theory; Yusuf al-Qaradawi (1345 AH/ 1926 CE -) identified six different related to wealth and economy which included human dignity, faith, moral and rights.

⁷ *Wasatiyyah* as enunciated by Tan Sri Professor Muhammad Kamal Hassan is invaluable and forthcoming because it seeks to define a comprehensive conceptualization of moderation/ balance.

⁸ Al-Qasas, 77; Al-Furqan, 67; Al-Isra', 29 & 110; Al-Baqarah, 68.

⁹ See Sheikh Mahmud Shaltut in *Min Tafsir al-Quran*, divided the situations of ummah in the world into *ifrat* and *tafrit*, which is applied in matters of aqidah, personal, community, business etc.

¹⁰ The image source was taken from Professor Kamal Hassan's slide presentation in the Second International Conference on Terrorist Rehabilitation and Community Resilience in Singapore (26-27 March, 2013).

¹¹ Professor Hassan however did not elaborate these three respective values.

¹² At its most basic meaning, iman is translated as belief in God, revealed books, His prophets, angels, ethical responsibility and accountability, and the Hereafter.

¹³ Mohammed A.K, "Taqwa: The Provision of Believers". Al-Firdous Ltd, London.

¹⁴ The image source was taken from Professor Kamal Hassan's slide presentation in the Second International Conference on Terrorist Rehabilitation and Community Resilience in Singapore (26-27 March, 2013).

¹⁵ This one significant aspect of the Professor Hassan's conception of *wasatiyyah* is that there is no *wasatiyyah* without all Muslims playing this role to enjoin good and forbid wrongdoing ('*amr bi-al makruf and nahy al-munkar*').

¹⁶ Chartered Institute of Management Accountants (CIMA). *Introductory guide to Islamic Finance*. Retrieved on 19 October 2016 from <http://www.cimaglobal.com/Documents/Islamic%20finance/2011/Guides/Introduction.pdf>.

¹⁷ *Ibid*.

¹⁸ Hadith no. 118.

¹⁹ Due to confidentiality issue, the names of banks are not disclosed.

²⁰ Civil Appeal No. W-02-808-2009, 27th September 2013.

²¹ [131] Yam Seng PTE Ltd v International Trade Corporation Ltd [2013] 1 All ER (Comm) 1321, 146 Con LR 39, [2013] BLR 147, [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526, [2013] 1 CLC 662.