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DOMESTIC BORROWING WITHOUT THE RATE OF INTEREST:  
*GHARAR* AND THE ORIGINS OF SUKUK

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DOMESTIC BORROWING WITHOUT THE RATE OF INTEREST:  
*GHARAR* AND THE ORIGINS OF SUKUK

In literature, *Gharar* is usually examined from the perspective of modern Islamic private finance. In this article, I will focus on *gharar* in public finance. As we will follow *gharar* across centuries, we will notice that we will inadvertently end up discussing the origins of *sukuk* as well. Thus, this paper aims at investigating both of these important topics. A main point of this paper is that *sukuk* is by no means a new invention and its roots go back to the 18<sup>th</sup> and possibly even to the 15<sup>th</sup> centuries. What we are witnessing currently is, therefore, a re-invention of an instrument practiced by Muslims centuries ago.

Definition of *Gharar*:

The word *gharar* comes from the Arabic root verb *gharara/gharra* meaning to expose oneself and one's property to destruction without being aware of it. Thus, it has been argued, the most important element of *gharar* is deception and feeding the victim with false information, which disguises the truth, *haqq*.<sup>1</sup>

Some jurists have also interpreted *gharar* as doubt over the existence of the subject matter of the contract. Al-Sarakhsi has defined *gharar* as any bargain in which the result and the legal consequences of it are hidden and unknown. Ibn Rushd considers a transaction as *gharar* if the buyer suffers a loss due to a lack of knowledge concerning either the price or the non-existence of the subject matter. The essence of concern about *gharar* has been best summarized by the Prophet:

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<sup>1</sup> Buang, *The Prohibition of Gharar*, pp. 30-32.

“*La darar wa-la dirar*”, meaning that “there shall be no unfair loss, nor the causing of such loss”.<sup>2</sup>

This may, at first, appear to be confusing, because bulk of the classical literature, particularly referring to business partnerships, emphasizes the importance of risk. It is also well-known that *riba* is prohibited primarily because instead of sharing, all the risks are transferred to the borrower. Thus, clearly, Islam cannot be against the concept of risk. What then has the Prophet meant with the above statement? This has been explained by Ibn Taymiah:

“It is well-known that Allah and His Messenger did not prohibit every kind of risk. Nor all kinds of transactions that involve the possibility of gain or loss or neutrality are prohibited. What is prohibited among such kinds is eating wealth for nothing, even if there were no risk, not that risk as such is prohibited”<sup>3</sup>

Once again, the emphasis is on risk-sharing. Indeed, what is prohibited is “eating wealth for nothing”. Thus we reach the conclusion that while in a transaction involving two or more partners, shared risks are permitted and constitute no *gharar*, risks unshared and imposed solely on one of the partners are not permitted and constitute *gharar*. This can be considered a corollary of the prohibition of *riba*.

Al-Dhareer has identified 14 different *gharar* types.<sup>4</sup> Two of these, “ignorance of the quantity of the object” and “contracting on a non-existent object” are the ones that are, particularly, relevant for this paper.

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<sup>2</sup>Sunusi, “*Gharar*”, pp. 87-100.

<sup>3</sup> al-Suwailem, “Objective Measure”, p. 601.

<sup>4</sup> Al-Dareer, *Al-Gharar*, p. 11.

Concerning the first, if an object is not in sight, knowledge of its quantity is a condition for its validity. As we will see, this has direct relevance for the history of Islamic public finance.

Concerning the second, i.e., contracting on a non-existent object, there are non-existent items whose sale implies no *gharar* because, the consequence of the sale is not hidden from view. For example, sale of things which are non-existent at the time of the contract but which are *customarily certain to exist*, or the sale of things which will *come into existence in succession* imply no *gharar*.

Al-Dhareer has clarified the issue as follows: “every non-existent object whose future existence is uncertain must not be sold, and every non-existent object whose future existence is normally ascertainable, may be sold.”<sup>5</sup> The term “future existence normally ascertainable” is of crucial importance here.

Necessity (*maslaha*) is considered to be of paramount importance in determining whether a contract is a “*gharar*” contract.<sup>6</sup> Therefore, it has been concluded that it is the Lawgiver’s justice and mercy to permit contracts that people need even if they contain “*gharar*”.<sup>7</sup>

After this introduction, we will now focus on the question as to what extent a powerful Islamic state in the past dealt with the problem of *gharar* while financing itself.

Tax Collection:

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<sup>5</sup> *Ibid.* p. 32.

<sup>6</sup> This is based upon the verse “He made no hardship for you V:157; *Ibid.*, p. 49.

<sup>7</sup> *Ibid.*, p. 49.

Referred to in literature as tax-farming, the most widespread form of Ottoman tax collection during much of the 15<sup>th</sup>-17<sup>th</sup> centuries was the *iltizam*. While the origins of this system was known as *iqta'* and can be traced to the earliest periods of Islam, it appears to have extended in the following centuries. Indeed *iqta'* and its derivatives were widespread and found application from the Balkans to India.<sup>8</sup>

This was a method of tax collection through public auctions and worked as follows: In this system, the state delegated its right to collect taxes to an entrepreneur. Thus, taxes were actually collected by the private enterprise. The state chose the entrepreneur who would collect taxes on its behalf through competitive public auctions. The Ottoman tax collector, the *mültezim*, was basically a risk taker, an entrepreneur. He competed with others to be appointed as the designated tax-farmer. The competition was in the form of commitments. The entrepreneur who committed himself to pay the highest amount to the state was appointed as the *mültezim* to a specific tax-source, *muqata'a*. This authorized him to collect taxes from this tax source for a given period, usually from a year to three years.

Whenever a tax-farmer committed himself to collect a certain amount of taxes from a tax source and promised to pay the state a certain amount, he took a calculated risk based upon previous records and experience. Consider, for instance, collection of customs from a given port. The tax-farmer would base his decision to make his bid on the estimated amount of numbers of ships that would use the port. Because, the number of ships, the amount of goods they will

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<sup>8</sup> See on this, Morimoto, *Fiscal Administration of Egypt*; Cizakca, *A Comparative Evolution*, pp. 136-138.

bring and the amount of customs revenue to be collected are not known, there appears to be *gharar* here. If despite this uncertainty, this institution has been allowed to operate for centuries in various Islamic societies, this was probably based upon the two criteria we have mentioned above.

First, consider the sale of things which are non-existent at the time of the contract but which are *customarily* certain to exist, or the *sale of things which will come into existence in succession*. Obviously, the piecemeal arrival of ships to the port throughout the year means a gradual “coming into existence in succession”. This pertains to Al-Dareer’s conclusion that “every non-existent object whose future existence is normally ascertainable, may be sold”. There is no doubt that while the future existence of the amount of goods to be unloaded and taxed in the port continued to be uncertain, based upon customary previous experience, “future existence was normally ascertainable”.

The second criterion pertains to necessity. We have noted above that most *mazhabs* permit contracts on account of necessity even though they may bear the element of *gharar*. The necessity in this case was due to the fact that all early modern states collected their revenues (taxes) in kind and had difficulty converting these to cash. This conversion was made by entrepreneurs through the system of tax-farming. For all pre-modern states, in the Islamic world as well as the west, this conversion was vitally important.<sup>9</sup>

We can therefore conclude that based upon this criterion, necessity, tax-farming was permitted in most Islamic states throughout history. We will now focus on how the system of tax-farming evolved within the framework of Ottoman public

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<sup>9</sup> Hicks, *A Theory*, ch. 6.

finance. This institutional evolution will also inform us how the nature of *gharar* has changed over time as well.

Evolution of Ottoman Tax-farming:

Tax-farming played a very important role in Ottoman public finance. Indeed, in the year 1527, as much as 80 percent of the Egyptian revenues were collected through the *iltizam* system.<sup>10</sup>

The *gharar* element appears to have emerged in two different types in this system. First, at the time of the auctions when the *mültezim* committed himself, the amount of revenue to be collected from the tax-source was not known. Second, the tenure of the tax-farmer was also not known. This meant that although the intended duration of his contract may have been, say, three years, the actual duration may have been much less, say a year only. This is because, the state did not commit itself to any specific duration and was free to give the tax-farm to another tax-farmer at any time. Thus, the tax-farmer could never be sure to collect the amount he envisaged both because of the uncertainty of supply and because of the uncertainty of his own tenure.<sup>11</sup>

These uncertainties, i.e., *gharar* elements of the two types, eventually started to have impact and undesirable consequences for the Ottoman public finance began to emerge. To start with, tax-farmers facing uncertain tenures and wishing to start making profits as soon as possible, felt the need to maximize revenue at the shortest possible time. This meant that producers were harassed by these tax-

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<sup>10</sup> Çizakça, *Comparative Evolution*, ch. V.

<sup>11</sup> If the tax-farm was given to another *mültezim*, the first tax-farmer was naturally reimbursed.

farmers. Moreover, over-shadowed by such *gharar*, tax-farmers simply did not make any investments to improve the productivity of the tax-source they were controlling. But it was not only the tax-farmers, the state was also interested in obtaining the maximum revenue at the shortest possible time. These developments eventually led to certain improvements in the system. Each such improvement played a role in the evolution of the Ottoman public finance.

To start with, as the state felt an ever increasing urgency to collect its revenue at the shortest possible time, it began to demand from the tax-farmers to pay their commitments up-front. This increased the *gharar* element even further. Meanwhile, commitments were also continuously increasing. Risks as well as capital committed rapidly surpassed the means of single entrepreneurs and partnerships had to be formed. Tax-farms which were particularly lucrative could only be obtained by paying the state the promised amount in cash and upfront. But when no tax-farmers capable of paying upfront could be found, the state relented and allowed them to pay in instalments.

Payment in installments led to another problem – this time it was the state which was facing *gharar*. After all, the state had firm commitments to pay its military and wanted to make sure that the committed amount would actually be paid. Indeed, payments to the military constituted bulk of the state expenditure.<sup>12</sup> To ensure payment, it demanded surety from tax-farmers. A *kefil*, a person who agreed to stand as surety for the tax-farmer, had to be introduced.

It has been argued that since no one would normally assume the risks of being surety without something in return, the *kefil* must have been actually the silent

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<sup>12</sup> Other vital services such as health, education etc., were financed, organized and maintained by the waqf system. See on this, Çizakça, *Philanthropic Foundations*.

partner, *rab al-mal*, of the tax-farming partnership.<sup>13</sup> Since archival evidence does not give evidence of a uniform procedure regarding the *kefils* of failed tax-farming partnerships, this inconsistency has been explained by the changing liability structures of classical Islamic partnerships. Put differently, it has been argued that while *kefils* of *mudaraba* type tax-farm partnerships would only be held responsible to pay the amount of their initial investment (limited liability), *kefils* of the *mufawada* type partnerships assumed an unlimited liability and could be subject to confiscation even imprisonment.<sup>14</sup>

In view of these relative liabilities, it seems reasonable to assume that while the *kefils* must have preferred to associate themselves through *mudaraba*, the state must have preferred tax-farmers associated through *mufawada*. These arguments, which should be considered as hypotheses, can only be vindicated by analyzing actual contracts between tax-farmers and their *kefils*, a task not yet attempted.<sup>15</sup>

The *kafala*, surety, system just described, does not appear to have provided sufficiently reliable revenue to the state. This is only natural, for what the state could collect from the economy always depended on the economic conjuncture, which fluctuated. While competition among the tax-farmers in times of rapid economic growth led to ever increasing revenues (auction prices) from the tax-farms, in times of stagnation, revenues fell. Consequently, despite the *kafala*, the uncertainty the state faced was such that it decided to shift the entire uncertainty upon the shoulders of the tax-farmers and their partners, thus increasing the *gharar* further.

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<sup>13</sup> Çizakça, *A Comparative Evolution*, ch. V.

<sup>14</sup> *Ibid.*, p. 148.

<sup>15</sup> It is possible to do this research among the 11,000 volumes of Istanbul Ottoman Court Registers, held in the office of the *Mufti* of Istanbul.

### The Malikane System:

This happened when the Ottoman state unexpectedly faced a situation that threatened its very survival. The crisis came with the second siege of Vienna in 1683, when a long war ensued that lasted until 1699. This war resulted with significant territorial loss for the first time.<sup>16</sup> Huge budget deficits were the result and there was an urgent need to increase revenue substantially at the shortest possible time. The solution was found in the *Malikane* system introduced in 1695.

The new system reflects the ever increasing risk aversion of the state and what it was prepared to do to mitigate its risks. In a nut shell, *malikâne* transferred to the entrepreneurs, *malikânecis*, the right to collect taxes from a given tax-farm for a life time, in return for a large lump sum payment made upfront, *muajjalah*, combined with more modest and fixed annual payments called, *mal*. The state calculated a minimum rate for the *muajjalah* as, two to ten times the annual average estimated profit of the tax-source. These calculated amounts were then displayed at the doors of the Finance Ministry in Istanbul. The candidates then came and registered the actual *muajjalah* amounts they were prepared to pay. The highest bidder obtained the right to collect taxes from a certain tax-source for the rest of his life.

It will be argued here that the *gharar* element must have reached to new heights in this system. This is because, the *malikânecis* were now asked to pay a very large amount upfront on the assumption that they would be able to cover their

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<sup>16</sup> From 1300 to 1683 the Ottoman state normally expanded and did not suffer any major loss of territory. The only exception was the defeat suffered in 1402, when Tamerlane attacked Anatolia – a war between Turks.

expenses in the future. There were two different uncertainties here. First, the entrepreneurs had to guess how much taxes they would be able to collect, which would be a function of the economic conjuncture in the future and second, they would have to assume that they would live, at least, a certain amount of years. This was particularly important because, *malikâne* did not entail a transfer of property rights to the entrepreneur – it was made clear that the tax-farm could not be inherited by his offspring (s) and that it would be taken away from his family upon his death.<sup>17</sup> These risks were somewhat mitigated by the possibility of selling the *malikâne* to third persons. But such sales were subject to a tax of ten percent of the original *muajjalâh* amount paid.

The *malikânecis* could keep their tax-farms as long as they paid regularly the annuities, *mal*. Thus, the state was once again minimizing its risks. Indeed, if a *malikâneci* failed to pay the annuity, he would lose his tax-farm. Consequently, the very large *muajjalâh* paid upfront constituted a strong surety for the regular payment of the annuities.

In short, in the *malikâne* system the risk aversion of the Ottoman state had reached to the maximum and all the risks were transferred to the tax-farming entrepreneurs, who were primarily members of the military class, the so-called *askerî*. In return for this, the military/entrepreneurs were granted near complete property rights for as long as they lived. It has been argued that the *malikâne*

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<sup>17</sup> It will be argued here that if the tax-farm had been obtained by several tax-farmers in a partnership, the termination of the *malikâne* would depend on the number of partners. If the partnership comprised one or two partners, death of one of them would lead to the termination of the partnership and the *malikâne* would be taken over by the state. If, however, the partnership comprised three or more partners, the *malikâne* would continue. This is a hypothesis inferred from the partnership law and needs to be tested within the framework of the *malikâne* system. For further details see; M. Çizakça and M. Kenanoğlu, “Ottoman Merchants”.

system paved for members of the Ottoman *askerî* class the way towards full private ownership.<sup>18</sup>

The *malikâne* system achieved the following: First, the massive budget deficits were minimized and in 1701 a substantial budget surplus was achieved.<sup>19</sup> Second, it improved substantially the reliability of tax collection. Indeed, in the earlier *iltizam* system in times of depression, some tax-farms remained unsold – a situation which must have led to a considerable loss of revenue for the state. This problem was solved by the *malikâne* system by selling the tax-source on a life-term basis. Indeed, once sold this way, the state no longer had to worry about selling it at the next auction. The next auction did not take place until the *malikâneci* died.

The *Esham*:

About 80 years after the establishment of the *malikâne* system and despite the improvements achieved in its finances, the Ottoman Caliphate faced another disaster. In the year 1774, its armies were defeated, this time by the Russians, and a hefty war indemnity had to be paid. The situation demanded an urgent reform of the public finances. The solution was found in the introduction of a new system called, *esham*.

In comparison to *malikâne*, whereby the entire stream of revenue of a tax-farm was auctioned off to the highest bidder for his life-time, in *esham*, the annual revenue of a tax-farm was divided into equal shares and each share was sold off.

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<sup>18</sup> Çizakça, *Comparative Evolution*, pp. 160-163. While civilians enjoyed property rights, as embodied in Islamic law, members of the *askerî* class did not. This progress was arrested in 1775 with the introduction of the *esham* system, when tax-farms came to be managed directly by the state.

<sup>19</sup> Genç, “Malikane Sistemi”, p. 236.

Once bought, the purchaser of a share, *sehm*, continued to receive the same annual revenue for his life–time.

The initial steps to establish the new system appear to have been taken in 1758, when the Ottoman state decided to take over one of the most lucrative tax-farms in the empire, the Tobacco Customs of Istanbul.<sup>20</sup> This tax-farm had already been sold on life-term basis to a group of *malikâne*ci. So the state paid back to these people their original investments and evicted them. After taking over the tax-farm, it was soon noticed that the tax-farm generated an annual profit of one million *gruş*. In the year 1775, it was decided to apply a new method. This meant that the management of the tax-farm would not anymore be given to an entrepreneur. Instead, it was going to be managed by the state and the annual profit was going to be divided into equal shares and each one of these shares was going to be sold on life term basis. Careful calculations had indicated that the tax-farm would definitively generate at least 400,000 *gruş* profit annually. This figure was reached after deducting all expenses from the gross profit of one million *gruş* mentioned above. It was decided to divide this net profit figure into 160 shares. Thus each share was able to generate 2,500 *gruş* net annual profit. Shares were offered for sale from April 1775 on. The price of each share, known as the *muaccele* as in the previous system, was determined to be 12,500 *gruş*. This meant that if all the shares were sold off, the treasury would receive two million *gruş*.

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<sup>20</sup> Yavuz Cezar, *Osmanlı Maliyesinde Bunalım ve Değişim Dönemi* (Istanbul: Alan Yayıncılık, 1986), s. 81.

As a matter of fact, all the shares were sold. This was probably facilitated by the fact that the returns were guaranteed by the state<sup>21</sup> and the shares were divided into smaller fractions. Successful marketing of *esham* shares led to the extension of the new system. This was done by incorporating ever more tax-farms into the system.

The fact that the state guaranteed a fixed return to *esham* owners did not make these shares usurious. This is because there were uncertainties. But since these uncertainties were shared between the state and the investor, they did not constitute *gharar*. To start with, the uncertainty of the investor: although he was guaranteed fixed annual returns, he could never be sure if he could recuperate his investment. Put differently, the investor could never know if he could live long enough so as to collect a total stream of annual revenues exceeding his initial investment. His risk was in the form of a short lifespan preventing him from collecting sufficient annuities to recuperate his total outlay. But this did not constitute a *gharar* situation because the state was also facing uncertainties. The uncertainty of the state was in the form of the unknown number of years that it would have to pay the annuities. If the *esham* share holders *in toto* enjoyed long lifespans, the total amount of annuities the state would have to pay would exceed the total amount of revenue it collected from the sale of *esham*. By the same token, the lifespan uncertainty eliminated *riba* despite the fact that *esham* holders received guaranteed annuities. It should be added that the state did not commit itself to redeem the *esham* shares at a predetermined date.

*Esham* As the Origin of *Sukuk* - Securitization:

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<sup>21</sup> The state guaranteed a minimum return per share. If the aggregate profit of a tax-farm unexpectedly increased, then the state issued new *esham* shares and sold them to the public. I owe this point to Mehmet Genç.

Since modern *sukuk* are defined as “certificates of beneficial ownership rights in a pool of underlying assets..., which do not represent true ownership, but a right to returns for *sukuk*-holders”,<sup>22</sup> can we consider the Ottoman *esham* as the forerunner of *sukuk*? To start with, it is well known that every modern *sukuk* contains two distinct elements: generation of revenue and securitization of this revenue. The Ottoman *esham* did not contain the first element since it was based upon a ready source of revenue that belonged to the state. It was therefore merely a system of securitization of this already existing stream of revenue. The very first<sup>23</sup> Islamic securitization, therefore, took place in 1775 when the Ottoman state divided, *ex ante*, its expected revenue of 400,000 *gruş* from the tobacco customs of Istanbul into 160 equal shares and sold each share at a price of 12,500 *gruş*. This is clearly a process of securitization of the expected revenue. In this process, revenue generation was not needed as the whole enterprise was based upon an already existing source of revenue.

#### Process of Revenue Generation (Cash Waqfs):

For the origins of the process of revenue generation in modern *sukuk*, we need to go back to the Ottoman cash waqfs. This special waqf form has a long history and goes back at least to the fifteenth century. What made these waqfs special

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<sup>22</sup> Natalie Schoon, “Basel II and *Sukuk*”, p. 114. The full definition is as follows: “certificates of beneficial ownership rights in a pool of underlying assets, which either allow for the underlying assets to be considered as collateral (asset-backed *sukuk*) or not (asset-based *sukuk*). A specific form of Ottoman cash waqfs to be examined below, can be considered as asset-backed *sukuk*, since they secured the tenant’s property as collateral until he paid off his debt. See also; Kuwait Finance House, “Introduction”, p. lvii.

<sup>23</sup> Historians usually try to avoid calling something “the very first”. Indeed, it is perfectly possible that future research may reveal earlier examples. This does not, however, change the fact that within the limits of our *existing* knowledge, *esham* constituted the very first Islamic securitization.

was the fact that they were established with cash capital and had to invest this capital in order to finance the charity for which they had been established.<sup>24</sup> If we carefully examine the process of investing the endowed capital of an Ottoman cash waqf, we discover the very essence of the modern *sukuk al-ijarah*.

A typical Ottoman cash waqf invested its endowed capital by a process called *istiglal*. This involved a sale-lease back-repurchase transaction and worked as follows: a borrower requesting to borrow a certain amount, offered to sell his house to the waqf for that amount. The waqf agreed to purchase it and paid the amount to the borrower. The borrower, then, requested to stay on in his house although it had now become the property of the waqf. His request was accepted in return for a rent and the borrower thus became a tenant of the waqf. After a certain amount of time, usually, a year, the tenant paid back to the waqf the price of the house (or the amount borrowed) and repurchased his property. In short, this was a sale-lease back-repurchase transaction, which we observe clearly in all *sukuk al-ijarah* transactions.<sup>25</sup>

Waqfs and the SPVs:

Finally, we must note another remarkable phenomenon: the SPVs observed in all modern *sukuk* operations, bear all the basic characteristics of classical Islamic waqfs. This is because, in conventional securitizations, an originator will create a trust whereby legal title of an asset is held by a trustee for the benefit of the beneficiary. The issuer, SPV, will issue certificates to investors and the proceeds of this issuance are invested in assets that are held on trust for the *sukuk* holders.

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<sup>24</sup> Çizakça, *A History of Philanthropic Foundations*.

<sup>25</sup> Naturally, there were other similar methods as well, where the tenant was simply requested to submit his house as collateral for the capital he borrowed. See; Çizakça, *Comparative Evolution*, pp. 131-134.

Moreover, the assets held by a trustee do not form part of his own estate. The trustee is merely authorized to keep the assets by the powers given to him by the trust deed. The trustee is not at liberty to sell the *sukuk* assets.<sup>26</sup>

This entire description of the *modus operandi* of a modern *sukuk* and its SPV fit in perfectly well within the framework of a classical Islamic waqf. Consider the following:

1. “an originator will create a trust whereby legal title of an asset is held by a trustee for the benefit of the beneficiary”. Simply replace the words, “originator”, “trust” and “trustee” with “waqif”, “waqf” and “mutawalli”, then you have waqf. A “mutawalli” does exactly as described: he keeps the assets of a waqf created by an originator “waqif” for the benefit of a beneficiary.
2. “The issuer, SPV, will issue certificates to investors and the proceeds of this issuance are invested in assets that are held on trust for the *sukuk* holders”. This refers to securitization, which we have observed for the first time in 1774 (*esham*). But the proceeds are *held on trust* for the *sukuk* holders. Assets held by the trustee do not form part of his own estate. The trustee is merely authorized to keep the assets by the powers given to him by the trust deed. The trustee is not at liberty to sell the *sukuk* assets. This is clearly what the “mutawalli” does. He keeps the assets of the waqf in trust.

This remarkable similarity between the SPVs of a modern *sukuk* and waqfs should not surprise us. This is because, the modern SPVs are established as common law trusts. But the English trusts were originally borrowed from the Islamic world during the crusades. Indeed, Monica Gaudiosi has shown that

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<sup>26</sup> Rahail Ali, “Legal Certainty”, p. 95.

even the Merton College of Oxford University was founded as a waqf in the year 1264.<sup>27</sup> Thus, we are talking about institutional borrowing in two cycles: waqfs borrowed by the English in the 13<sup>th</sup> century, trusts borrowed from the English common law by Islamic financial engineers while designing the modern *sukuk*. The institutional similarities we have observed are therefore only to be expected.

#### Conclusion:

Islamic public finance, more specifically, the Ottoman tax-farming contracts, had many uncertainties. Notwithstanding this, they were not considered as *gharar* contracts and were permitted. While we do not yet have definitive evidence explaining why they have been permitted, we can surmise that the permission was probably based primarily on three points: first, necessity, *maslaha*. Second, the argument “the revenue coming into existence in succession was normally ascertainable”. Third, the fact that uncertainties and risks were effectively shared between the entrepreneurs and the state. When the Ottoman state wanted to reduce its risks to a minimum and shift bulk of them to the military/entrepreneurs, it had to improve property rights of the latter in compensation.

Although permitted, tax-farming contracts bearing *gharar* elements, had negative consequences in the long run. Much of the evolution of Ottoman public finance can be explained by the attempts to correct for these consequences. The final stage of this evolution led to the birth of the *esham* system.

In all probability, *esham* constitutes the very first securitization of state owned assets in Islamic economic history. It can therefore be considered as one of the

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<sup>27</sup> Çizakça, *Philanthropic Foundations* (Based upon Gaudiosi).

two sources of the modern *sukuk*. The other pertinent source (with respect to revenue generation) were the waqfs. While the modern SPVs have all the basic characteristics of classical waqfs, the sale/lease back/repurchase transactions of the modern *sukuk al-ijarah* have their genesis in the Ottoman cash waqfs.

We should therefore be aware that many modern financial instruments which we think we are inventing, have actually been invented centuries ago. This is a humbling observation, which invites us to be more respectful of our own past and civilization. The lack of respect becomes particularly annoying when Muslim financial engineers borrow modern instruments of finance from England without realising that the English had borrowed them from us about eight centuries ago. The situation borders on the ridiculous when the same engineers complain that they cannot apply these “common law” institutions in Islamic countries dominated by the French civil law.<sup>28</sup> I have a strong feeling that if, instead of trying to deal with the complexities of the British and French laws, the same engineers simply focused on modernizing Islamic financial institutions of the past, they would discover a substantial short cut. But for that they need a sea change in their attitudes, which should start with having more respect for their own civilization.

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<sup>28</sup> Rahail Ali, “Legal Certainty”, p. 105.

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