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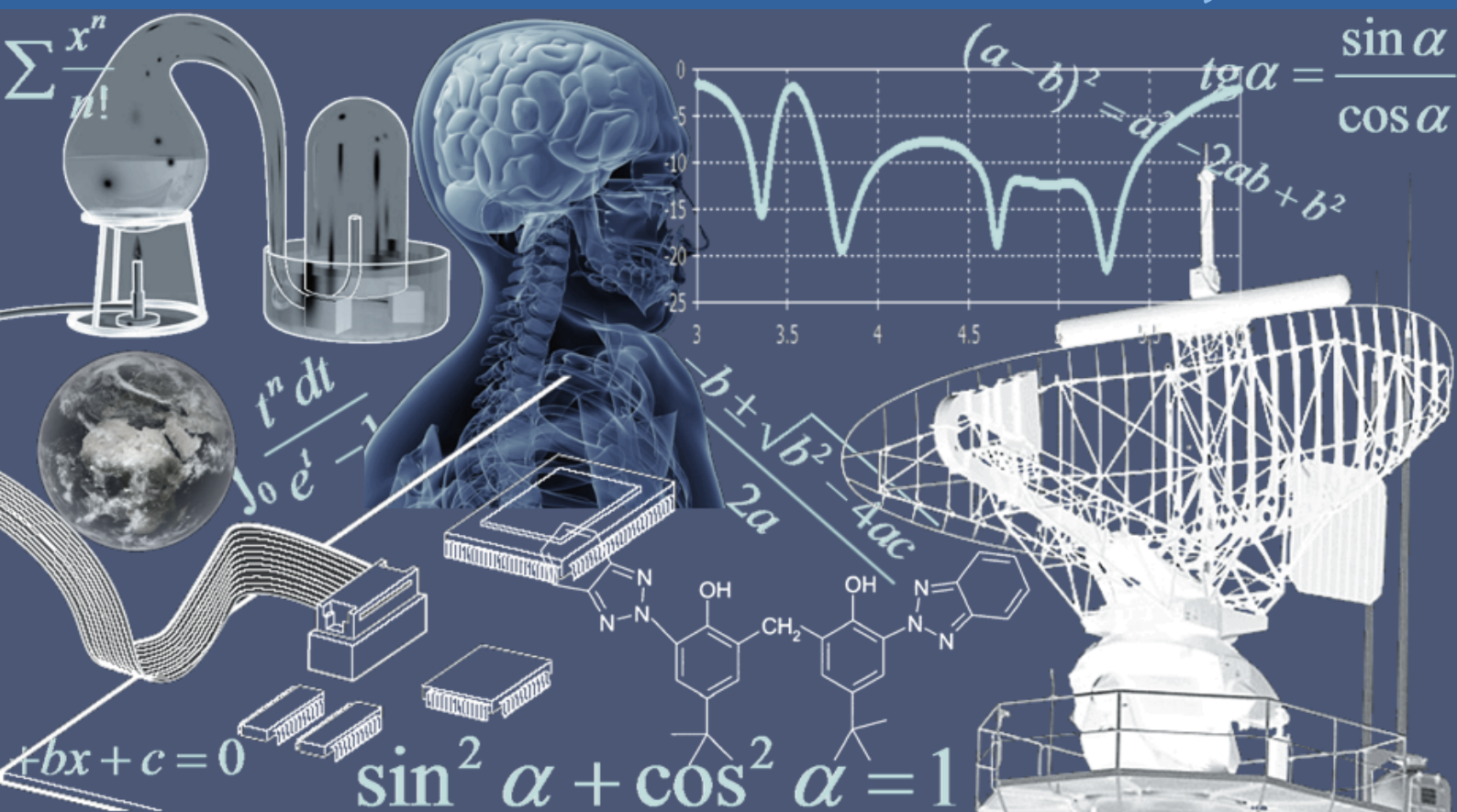# OF
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# AND APPLIED STUDIES

**International Peer Reviewed Monthly Journal**

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# The Historical Development of Constitutional Islamic Religious Text of the legal status of non-Muslims in Islam

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**ABSTRACT:** This paper examines the question of the historical development of constitutional Islamic religious text of the legal status of non-Muslims in Islam from the beginning of the call of the Prophet up to the modern time. The paper follows and explores the nature of the religious foundations of the Dhimma system by shedding light on the constitutional religious texts that played a big role in the establishment of the legal status of non-Muslims in early Islam. This research based mainly on primary sources, particularly the classical works of Islamic law, but it will refer only to Maliki jurisprudence. This study will not look at the sources of Islamic law from the religious' point of view. Second sources of data will be the secondary sources that are composed of specialized academic literature such as historical books, journal and magazine articles on this subject. This subject will be divided into through two sections. The first section, clarifies concepts such as Ahl al-Dhimma and dhimmis by drawing a picture on the development of the concept of Ahl al-Dhimma in Islamic classical *fiqh*. The second section, analyzes the historical development of the foundational texts that determine the status of non-Muslims in early Islam up to the modern time*.*

**KEYWORDS:** Islamic Religious Text, Constitutional, Dhimma, Legal Status, non-Muslims, *ṣaḥīfat al-Madīna, al-Shurūt al-'Umarīyah*.

## 1    INTRODUCTION

At the time of the establishment of the first Muslim state in al-Madīna in 622 CE, the relationship between Muslims and non-Muslims (Jews) living in al-Madīna determined by the so-called *ṣaḥīfat al-Madīna*. Al-Madīna (Yathrib) was a mix of diverse tribes that were totally different religiously and culturally. So the Prophet established the first state in a diverse community, especially of Jews. The framework by whish non-Muslims were ruled is through a covenant of protection that was called later, especially after the death of the Prophet, the Dhimma Law. This covenant has been specified explicitly in the primary religious texts of Islam. These Islamic heritage texts have seen many changes during the history from the era of the Prophet up to the modern time. This study addresses how the constitutional Islamic religious texts dealt with this diversity; how it is reflected in historical reality between Muslims and non-Muslims in Muslim countries and to what extent were religious texts able to respond to these challenges of religious diversity in Muslim countries. The purpose is to understand the nature of the religious text by which Muslim rulers rule non-Muslims in the first centuries. To find out this issue, it will be illustrated through two sections. The first section, clarifies concepts such as *al-Dhimma*, *Ahl al-Dhimma* and *dhimmis* by drawing a picture on the development of the concept of *Ahl al-Dhimma* in Islamic classical *fiqh*. The second analyzes the historical development of the foundational texts that determine the status of non-Muslims in the Islamic legal system.

## 2    CLARIFYING THE CONCEPTS

Let us first start by quoting here a rule in classical *fiqh*, concerning people living in a Muslim country, whether they are Muslims or not, that states, "if Islamic law is a religion and law for Muslims, it is a law for non-Muslims as long as they live in

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*Dar al-Islam".*[1] Based on this rule, the political Islamic jurisprudence classifies non-Muslims into two groups: one belongs to *Dar al-Islam*[2] and the other group belongs to *Dar al-Harb*.[3] There is also another division for those who belong to *Dar-al-Islam,* which they were divided into two categories. The first one is foreigners (not indigenous people of a Muslim country), but they come to a Muslim country for some reasons as messengers, merchants, visitors, or students (*musta'manin*). The applicable law for those is the safety contract (*'Aqd al-Amān*) that will be explained bellow. The second is *Ahālī* or non-Muslims who are indigenous people of the state and are living permanently in a Muslim country. There are regulated under the contract of *al-Dhimma* (*'Aqd al-* Dhimma)

## 3    CLARIFYING THE CONCEPT OF THE SAFETY CONTRACT (*'AQD AL-AMĀN*)

The safety contract (*'Aqd al-Amān*), in classical *fiqh*, is a temporary contract, which regulates the relationship between Muslim countries and non-Muslims who want to stay for a limited period in a Muslim country for any legitimate reason such as trade, visiting relatives, treatment and hospitalizations, learning, teaching, tourism or for any other purpose.[4] This contract provides for the owner (*Musta'man*) limited rights including the rights to protection and security (assurance of safety) for his life, honor and property and also the right of temporary residence and movement.[5] According to Maliki *fiqh*, the only one who has the right to issue this contract is the head of state (Imam) and does not allow to anyone to issue it.[6] In harmonization of the safety contract with the contemporary context and make it fit today's context, it can be argued that it is quite similar to the modern system of a visa in the international relations today.

## 4    CLARIFYING THE CONCEPT OF *DHIMMA, AHL AL-DHIMMA AND DHIMMIS*

The word *dhimma* as it is specified in the famous Arabic dictionaries and also in Islamic Law and carried on in practice means protection. According to the classical dictionary *Lisan al-'Arab,* the term of *dhimma* is derived from the Arabic word "الذمة", literally meaning "covenant, contract (*'Aqd),* protection, guarantee, safety, custody, sanctity and duty".[7] *Dhimmis* or *Ahl al-Dhimma* is the name applied by classical Muslim jurists to indigenous non-Muslims from *Ahl al-Kitāb,* and also to who enter under such rule as Zoroastrians (*Majūs*), living in the Islamic territory permanently.[8] Therefore, it is called *dhimmis "Ahl al'Ahd"* (people of the covenant).[9] The term means that they are in custody of Allah and His Messenger (Prophet Muhammad) and are not in the custody of any one of people.[10] The Qur'an mentions this meaning of the term of *dhimma* twice in Surah 9 (*al-Taubah*) the verses 8 and 10 in the context of speaking about the relationship between Muslims and *mushrikūn* in the case in which *mushrikūn* are the victors. The verses say that "With regard to believer, they respect not the ties, either of kinship or of covenant! It is they who are the transgressors".[11] The word *dhimma* in these verses is used in the meaning of *'ahd* (convenant). Thus, the term of *dhimma* was a vocabulary that was used in the speech of Arabs and in practice before Islam, where the protection and the care of neighborhood were one of the key personal attributes and the requirements of magnanimity in Arab community.[12]

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[1] *Abd al- Karim Zaydan, Ahkam al-Dmmiin wa-al Musta'min fi Dar al-Islam (Beirut: Maktbat al-9uds, 1982), 5.*

[2] *Dar al-Islam is used by classical fiqh to describe a Land that is under the rule of Muslims, where Muslim rulers provide a security to people who are living there whether they are Muslim or are not. In contrast, dar al-Harb is used by classical fiqh to describe non-Muslim's lands that were under the rule of non-Muslim suggesting that all such lands should be considered as at war until it come under the rule of Muslims. For these classifications see the book by ʿAbd al-Wahhab, Khalaf, Islamic politics [al-Siyāsā al-Sharʿiya](Cairo: 1932), 69.*

[3] *There is nowhere such classification explicitly in the Quran, and neither was it known in the time of the Prophet or His companions. It was developed by classical fiqh later according to their political and social considerations.*

[4] *Abd al- Karim Zaydan, Ahkam al-Dmmiin wa-al Musta'min fi Dar al-Islam, 46.*

[5] *Abd al-Rāhmān al-Najdi, Ahkām 'aqd al-Amān wa-al Musta'min fi al-Islam (Riyadh: 1990), 105.*

[6] *Abd al- Karim Zaydan, Ahkam al-Dmmiin wa-al Musta'min fi Dar al-Islam, 49.*

[7] *Muhammad Ibn Manzur, Lisan al-'Arab [the Arab tongue](Beirut, 1990) Volume, 15/ 111.*

[8] *Muhammad ibn Abu Bakr ibn Qayyim al-Jawziyyah, Ahkam Ahl al-Dhimma, 78.*

[9] *Abd al-Wahab El-Messiri, Jews, Judaism and Zionism encyclopedia. Volume 4/325.*

[10] *Ibid.*

[11] (لايرقبون في مومن إلا ولاذمة، وأولئك هم المعتدون. الاية.8 )

[12] *Magdy Girgis, Coptic Judiciary in Egypt, 5*

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## 5    THE STABILITY OF THIS TERM IN ISLAMIC LEGAL LITERATURE TO REFER TO NON-MUSLIMS

Tracking the root of the term and its origin, there is no use of this expression to refer to non-Muslims living in a Muslim territory permanently in the Qur'an. However, the Qur'an used other expressions to refer to non-Muslims such as *Ahl al-Kitāb*, *al-Nasārā wa al-Yahud*, pagans and infidels.[13] Regarding *Hadiths*, the Prophet used this expression in his many sayings (*hadiths*), such as "Whoever hurt a *dhimmi* has hurt me, and I will dispute with him on the Day of Judgment" (من أذى ذميا فقد أذاني وأنا خصمه "يوم القيامة").[14] And also in farewell speech (*Jabal 'Arafat*), "I command you to deal with *Ahl al-Dhimma* well (to do the good with them because they are in my custody)" ("أوصيكم بأهل ذمتي خيراً").[15] Through this descriptive formula that was used by the Prophet in these *Hadiths*, the term of *Ahl al-Dhimma* became a vocabulary in Muslim communication to address non-Muslims whether in practice, or in the books of *fiqh*. Then, at a later stage, the expression developed during the classical period of Islamic jurists and thus, *'Aqd al-Dhimma* became a synonym for the term *al-Shurūt al-'Umarīyah*.[16] Consequently, it stabilized in the Islamic idiosyncratic and legal construction and served as a terminology to refer to non-Muslims in a Muslim country. This led to talk about the foundational texts to the legal status of Jews to know the history of the real start of the implementation of the *dhimma* system.

## 6    THE LEGAL STATUS OF NON-MUSLIMS IN ISLAMIC LEGAL HERITAGE

The *dhimma* system drives most its characteristic form from a document known as *al-Shurūt al-'Umariyya*, "a kind of bilateral contract in which non-Muslims agree to a host of discriminatory regulations in return for protection".[17]

### 6.1    THE ESTABLISHMENT OF THE SYSTEM IN THE TIME OF THE PROPHET

The basic center of the call that was launched by the Prophet of Islam was a theistic attempt in which it has focused on the argument of the belief in one God as creator of the universe.[18] So, during his time in Mecca before his migration to Medina, the principle of the belief of the revelation of the book was only a criterion that divided people to two different categories; idolaters that were called (*mushrikūn*) and monotheistic (*mua'minūn*) including Muslim, Jews and Christians.[19] In this regard, when the Prophet was forced to move to Medina, the population of Medina was a mix of many different tribes, especially of Jews.[20] He immediately became founder of religious-political community, so he rapidly started combining all communities that were living there to form one community, which is he called *Ummah*.[21] In this respect, he held a public treaty with Muslims on one hand and with Jews on the other. This public treaty is known as a Constitution of Medina or in Arabic *Ṣaḥīfat al-Madīna*.[22] The principal motive that encouraged the Prophet to do so is that he was believed that the theistic experiment is a way of rapprochement with the Jews of Medina to fight against the Quraysh of Mecca and also as pillar of building a new society as one community.[23] The purpose of the Prophet was to establish a new society and put the rules of an Islamic state based primarily on the concept of ummah, which has a political and civil nature and also on unifying not based on religion, dogma, or tribe.[24] *Ṣaḥīfat al-Madīna* contains many principles of new community regulations and organizations. Among these principles that are related to this section's argument are the statements about the position of Jews in Medina in this new community. It was stated in clause 25 that "The Jews of Banu Awf (non-Muslim minorities) shall be considered one community along with the

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[13] *Ibid.*

[14] *Reported by Al-Khatib with authentic chain of narrations and also by At -Tabarani in Al-Awsat with good chain of narrators.*

[15] *Abd al-Wahab El-Messiri, Jews, Judaism and Zionism encyclopedia, V.4/325.*

[16] *Ibid.*

[17] *Mark R. Cohen, Under Crescent and Cross: the Jews in the Middle Ages (New Jersey: 1994), 54.*

[18] *Hassān al-Zayn, al-Awdā' al-Qānuniyya, 6.*

[19] *ibid*

[20] *The historical sources report that Medina was filled with Jews belonging to several tribes, when the Prophet came to there. In addition, it was strong relations between Jews and Arab tribes such as Khazraj and Aws until those become familiar with the Jewish ideas. See, for example, Hassan Ibrahim Hassan, Tarikh al-Islam, V. 1 (Beirut: Dar al-Jil, 1991), 79.*

[21] *See the document of Medina in the book Muhammad Rasul Allah by Muhammad Reda (Beirut: 2006), 157-159.*

[22] *And this time Medina became consisting three groups: Immigrants, supporters and Jews. See, Hassan Ibrahim Hassan, Tarikh al-Islam, V. 1, 85.*

[23] *Hassan Ibrahim Hassan, Tarikh al-Islam, V. 1, 88.*

[24] *Ahmed Sha'ibi, "Document of Medina: the Content and Significance", published by the nation book, volume 110, 2006, 87.*

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Muslims, and they have their religion and the Muslims have their religion except those behave unjustly and sinfully",[25] and in clauses 1 and 2, it was stated that "the believers and the Muslims of the Quraysh and Yathrib and those who shall follow them and fight along with them are/form one community/nation".[26] It was also stated in clause 20 that "the Jews shaped one community along with the believers and the Jews who follow us have the right to receive help and assistance from Muslims as long as they (Jews) do not work against the Muslims or provide aid to the enemies of the Muslims".[27] *Saḥīfat al-Madina* identified the members who composed what was termed one community, which are believers of the new religion and who follow and join them and fight with them such as Bedouins, hypocrites and Jews. The first clause states that this document applies to its original parties and who follow them without specification of a group over the other. This principle is repeated again in the clause 16 pointing to the Jews in particular. It was stated that "the Jews who follow us have the same right of protection and also the right to receive help and assistance from us (state)".[28] *Saḥīfat al-Madina* shows that the political community, which was created by the Prophet, was a contractual community and varied in religious affiliation. *Al-Saḥīfat* is not only announced that all tribes in Yathrib are one community, but it explicitly declared that the Jews form one community with believers in the clauses from 25 until 35.[29] Therefore, the Jews formed with Muslims a community in a political sense and not in a religious sense. In this sense, this new community was a nation in a political sense and two nations in a religious sense. In addition to that the clauses of *al-Saḥīfat* did not prevent Jews from participating in the defense of the state in case of an attack on the state. It was stated in the clause 54, "The Muslims and the Jews shall be jointly responsible to defend (the state of) Madina against any outside attack".[30] On this basis, *Saḥīfat al-Madina* is the first constitutional text that set up the basic guidelines of the relationship between Jews and Muslims in one community. It was able to combine all communities that were in Yathrib according to a new vision based mainly on the concept of ummah in a political sense not in a religious sense. However, some Jews of Yathrib did not respect these principles, where it appeared the first attempts of the violations of the content of *al-Saḥīfat* in the aftermath of the Battle of Badr.

Following the Battle of Badr[31] it appeared some members of the Jews of Medina indicated a lack of commitment, and thus an end of the agreement with them. They set up a secret relationship with the Quraysh to kill the Prophet Mohammad.[32] The plot hatched by the Jews of Qaynuqa' in collaboration with the Quraysh created a kind of caution and suspicion among Muslims.[33] Later, this tribe received the first blow were forced to leave Medina.[34] This was followed by a series of events starting with the defeat of Muslim military in the battle of *Uhud*, and ending with the battle of Khaybar, which was a victory of Muslim military in the year 6 Hijri.[35] However, in spite of that, the Prophet did not change his dealing with Jews. Among examples that show these is his dealing with the Jews of Khaybar, where he returned all their synagogues and did not force them to convert to Islam, but he signed with them a covenant of peace in 628 AD.[36] Hence, these events led in the end to bring about a change in the constitutive text of legal status of Jews. There is a verse determining a new status for Jews. In the verse 29 in Surah 9 (*al-Taubah)*, Allah said: "Fight against those who believe not in Allah, nor in the last day, nor forbid that which has been forbidden by Allah and His Messenger and those who acknowledge not the religion of truth among the people of the Scripture, until they pay the *jiziyah* with willing submission, and feel themselves subdued". This verse was a significant turning point in the legal status of Jews in the first era of Islam. It provides new procedures towards the status of non-Muslims, where it was adding the *jiziyah*. It was the first practical application of this procedure with the Christians of Najran in 631 AD.[37] In fact,

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[25] *Ibid.,44.*

[26] *Ibid.,41.*

[27] *Muhammad Tahir-ul-Qadr, The Constitution of Medina: 63 Constitutional Articles, (London: Minhaj-ul-Quran Publications, 2012), 7.*

[28] *Ahmed Sha'ibi, Document of Medina, 43.*

[29] *Ibid,.88.*

[30] *Muhammad Tahir-ul-Qadr, The Constitution of Medina, 15.*

[31] *This Battle was in 624 AD as the first military war between Muslims and Quraysh.*

[32] *Wasfi al-Rahman Mubaarakfoori, Sealed Nectar (الرحيق المختوم) in the Prophet's Biography (Qatar: 2007), 238.*

[33] *Hassān al-Zayn, al-Awdā' al-Qānuniyya, 9.*

[34] *Ibid.*

[35] *Hassān al-Zayn, al-Awdā' al-Qānuniyya, 9.*

[36] *Ibid., and also the book of History of Jews in Arab countries by Israel Welfensohn, 157-174.*

[37] *The books of Prophet's biography tell us about Najran delegation. This delegation came to prophet in Medina in the context of response to a letter sent by him inviting them to Islam. After a long conversation between them and the Prophet about his message and also about his opinion about Jesus, they refused to accept Islam. Thus, they wanted a peace treaty, promising to accept all what they agreed on. They signed a peace agreement in return of paying jiziyah.*

<div dir="rtl">صفي الرحمن المباركفوري ، الرحيق المختوم في سيرة الرسول، 450-51.</div>

those texts genuinely reflect the early Islamic attitude towards Jews. It is appropriate to quote here Mark R. Cohen who summarizes the situation of Jews with the Prophet. Cohen points out that

Muhammad established another precedent for religious toleration in the Constitution of Medina, his compact with the Arabs and some of the Jews of Medina, which granted the Jews autonomy to the latter. True, Muhammad later fiercely repressed the Jews in reaction to their enmity and ridicule, but this kind of conduct was not the norm in Muhammad's treatment of non-Muslims. His treaties with the Jewish or Christian inhabitants of various other oases and towns in Arabia guaranteed them safety in return of tribute, a policy that endured.[38]

These new relations will be organized in independent treaties that will take later the name of the contract of *al-Dhimma* or the contract of *al-Sulh* (reconciliation). All the contracts that were signed by the Prophet with the Jews and Christian (the famous one is Najran treaty in the year 10 Hijri -631AD) and also the letters that were sent to non-Muslims reflected this new legal status. Therefore, *'Aqd al-Dhimma* has emerged and set up in the time of the Prophet.

### 6.2   THE SYSTEM OF *DHIMMA* AND THE BIG CHANGE (THE ORIGIN OF THE *AL-SHURŪT AL-'UMARĪYAH*)

It is important to start by quoting here Professor Cohen in his describing *al-Shurūt al-'Umariyya*. He states that *al-Shurūt al-'Umariyya* is "itself a product of cumulative development based on Muhammad's practice, the exigencies of [Arab] conquests, and the influence of Christian-Roman Jewry Law".[39] The professor Hassan al-Zayn states a set of factors that led to the emergence of *al-Shurūt al-'Umariyya* in its final form in classical Islamic Jurisprudence.[40] It is also important to bring here two versions of the pact of 'Umar; one exists in the historians and traditions sources and another is in the classical jurisprudence. Through following the track of this document in medieval classical Islamic writings, it has been found that there are two main dates in the development of this document, and also there are two versions of this document which vary in its content. The first Muslim historian who reported the pact of 'Umar is Ya'qubi (284 AH, 898 A.D) in his book *History*[41] in a brief formula about 250 years of the date of *'uhda al-'Umarīyah*/the pact of 'Umar (15 AH). Then he was followed by several historians such as al-Tabari. From a historical perspective, the text of al-Tabari is considered the longest and the best one among versions in the historian sources.[42] The Document, in the version as exists in historical books, is a written charter by 'Umar b. al-Khattāb to people of Jerusalem for a guaranteed of protection and allows them to practice their religions freely. In this version, there is no mention of any derogatory conditions and restrictions, especially certain conditions, as will appear later in the version of the Islamic jurists and also there is no mentioning to *jiziyah*.[43] The version do exist in *Hadiths* sources is similar to the historian sources; especially they earmark a significant part to the provisions of *dhimmis* such as Ibn Hibban (965 A.D)[44], in his book الثقات (Trustworthy), and Ibn 'Asākir (1177 A.D) in his book *History of Damascus*.[45]

Unlike the historian and tradition sources, the medieval Islamic jurisprudence sources refer to a different version of *'Uhdah al-'Umarīyah*. They narrate a written answer to *al-'Uhdah al-'Umarīyah* (in particular the letter from the Christians Jerusalem to 'Umar) under the name of *al-Shurūt al-'Umarīyah*. The first time when this version was appeared in jurisprudential sources[46] was in the book *Ahkam Ahl al-Milal* by al-Khallal Abi Bakr Ahmed al-Baghdadi al-Hanbali (311 AH, 935 AD). Then was followed in the second half of the fourth century Hijri, by another book by Abi al-Shaykh (369 HA, 941 AD) under title *Shurūt 'Umar*" or *Shurūt al-Dhimmis*.[47] After that *al-Shurūt al-'Umarīyah* became famous among Classical jurists. Among jurists who dealt directly with *al-Shurūt al-'Umarīyah* Abi al-Qasim al-Tabari (418 AH, 1019 AD) in his works entitled *the Explanation of the Kitāb of 'Umar*. In addition, in the year 458 Hijri, there was another book entitled *Shurūt Ahl al-Dhimma* of al-Qadi Abi Ya'la (458AH, 1066 AD).[48] Since the most of these books are still in manuscript and not print, the oldest printed book that contains *al-Shurūt*

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[38] *Mark R. Cohen, Under Crescent and Cross, 55.*

[39] *Mark b. Cohen, Under Crescent and Cross, 57.*

[40] *Hassan al-Zayn, al-Awdā' al-Qānuniyya, 11-26.*

[41] *Ya'coubi, The history of Ya'coubi (Beirut: 2010), 37.*

[42] *Ramadan Isaac Azayan "'Umar's pact Narratives: Documental Study", Journal of the Islamic University (Islamic Studies Series) Volume XIV, issue 2 ( June: 2006)185.*

[43] *See the text in the History of Ya'coubi, 37.*

[44] *Muhammad Ibn Hibban, الثقات (Trustworthy) (The Ministry of Knowledge high for the government of India: 1978), 213.*

[45] *Ramadan Isaac Azayan 'Umar's pact Narratives, 176.*

[46] *Abd al-Rahman Kahila, The Covenant of Umar: A New Reading (Cairo: 1996), 55.*

[47] *Ibid.,56.*

[48] *Ibid.,57.*

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al-'Umarīyah is the book of the Andalusian jurist Ibn Hazm (456 AH, d 1064) in his *Kitāb al-Muhallā*,[49] followed by Ibn Qayyim al-Jawziyyah (d. 1350) in his book *Ahkam ahl al-Dhimma*.

With respect to the application of *al-Shurūt al-'Umarīyah*, it goes back to the year 700 AH, 1302 AD, where was mentioned officially and practically to *al- Shurūt al-'Umarīyah* and the reference to this *al-Shurūt* became usual thing by states and was applied.[50] Abd al-Rahman Ibn Khaldūn reports a story showing that the first time it was mentioned officially and practically to *al- Shurūt al-'Umarīyah* was in a meeting consists of religious *'Ulama*, the Christian Patriarch and the head of Jewish community, which was convened by the Sultan al-Nasir Muhammad b. Qalwun in Egypt, in 1301.[51]

In terms of content, this document addresses the rules that regulate the relationship between *dhimmis* and Muslims. Generally, it states the conditions and restrictions that *al-Dhimmis* should follow towards Islam and Muslims. Thus, *al-Shurūt al-'Umarīyah* centers around the stipulations which the Christians of Jerusalem imposed on themselves. It addresses the stipulations in a formal letter to 'Umar b. al-Khattāb requesting from him "a guarantee security for adherence to a set of seemingly humiliating conditions"[52] such as "not to build in their cities or in their vicinity new churches, hermitages, monasteries, or monk's cells, not to renew the churches that have fallen into ruin or which are located in the quarters of Muslims and adhering their dress such as binding *the zunnār(*a distinctive belt*)* around their waists and not to teach their children the Qur'an".[53] After The Caliph 'Umar b. al-Khattāb received this letter, he wrote to 'Abd al-Rahmān B. Ghanm commanding him to sign what they asked with the addition of the two amendments: "They shall not buy anyone made prisoner by the Muslims", and "whoever strikes a Muslim which deliberate intent shall forfeit the protection of this pact".[54] 'Abd al-Rahmān b. Ghanm implemented 'Umar's recommendation and applied these conditions also to the Christians of Jerusalem and of all the cities in the Levant.[55] The reason that led Medieval Islamic jurisprudence to adopt this document and based on in the field of codifying the relationship between the Islamic state and non-Muslim citizens were the political considerations in their time.

## 6.3    THE CHANGING STATUS OF *AHL AL-DHIMMA* IN THE ISLAMIC CONTEMPORARY TEXTS

As mentioned above, the development of the *dhimma* system was not only a product of religious considerations. But it was caused by certain circumstances related to intellectual and political conflict at that time; sometimes with the Byzantines and sometimes with Crusaders.[56] Based on this idea, today, especially with the emergence of the concept of liberal citizenship, it "raised many problems by critics of the *dhimma* system, notably the unequal rights and duties it grants Muslims and non-Muslims".[57] This helped several Muslim jurists and intellectuals in attempting to rethink in classical *dhimma* law and to rewrite a new *fiqh* that deals with the issue of *Ahl al-Dhimma* in today's context. They discussed many concepts, which do exist in classical *fiqh* such as the concept of *Ahl al-Dhimma*, citizenship, *jiziyah* and also the pact of 'Umar which forms the basis of the *dhimma* system for jurists. Thus, they have "advanced the concept of *"muwāṭana"* as an authentically Islamic solution to the problems".[58] Their attempting is based on a new reading of the Constitution of Medina *(Saḥīfat al-Madīna)* ratified between

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[49] *Ibid.,58.*
[50] *Ibis., 61.*
[51] *The story tells that, in the year 1301, when a vizier from al-Maghreb, in his way to al-Haj, arrived to Egypt and saw the status of dhimmis and on what they are of luxury and what they have achieved of senior positions in Egypt, he outraged at this status of local dhimmis and condemn what he saw. This strong reaction of vizier toward the status of dhimmis in Egypt put the Sultan in an embarrassing position. Thus he ordered to convene a meeting attended by religious representatives of three monotheistic faiths. They discussed the status of dhimmis in light of the pervious Muslim treaties, where in the end they agreed on a set of restrictions that reported in al- Shurūt al-'Umarīyah. On behalf of their communities, the heads of Jews and Christian committed themselves to adhere to the contents of this document and not violate that. It was sent this agreement to all Egyptian and Levantine states to apply all restrictions of al- Shurūt al-'Umarīyah without exception. Ibn Khaldūn (d. 1406), Kitāb al-'ibar [Tarikh ibn Khaldūn] (Beirut: Dar al-Fikr, 2000), 476-77.*
[52] *Mark b. Cohen, "What was the Pact of 'Umar? Literally Historical Studies", JSAI 23 (1999), 103.*
[53] *Ibid.,107.*
[54] *Ibid.,108.*
[55] *Ibn Qayyim al-Jawziyyah, Ahkam Ahl al-Dhimma, 1109.*
[56] *Hassān al-Zayn, al-Awḍā' al-Qānuniyya, 22.*
[57] *David H. Warren and Christine Gilmore, "Rethinking neo-Salafism through an Emerging Fiqh of Citizenship: The Changing Status of Minorities in the Discourse of Yusuf al-Qaradawi and the 'School of the Middle Way'", New Middle Eastern Studies, issue 2, (29 October 2012), 2.*
[58] *Ibid.*

the Prophet and non-Muslims in the first year of Hijra "as a potential framework for managing a heterogeneous society, in spite of its apparent abrogation under the rules of traditional jurisprudence".[59] When many of Muslim thinkers (al-Qaradawi, Fahmi Howeidi, Salim al-'Aawa, Rashid Ghannoushi) examined the contents of Document of Medina, they found that the people of book were enjoyed the rights of full citizenship in accordance with the Document of Medina. They were also practicing their worship freely, providing advice to the Muslims, and cooperating with them to protect their state from harm and danger, each in his position to carry burdens.[60] Based on this, the concept of *dhimma* is not inconsistent with the concept of citizenship. This was confirmed by Rashid Ghannouchi who said that citizenship is above all differences of national, gender, and language and other differences that established between humans. He also confirmed that the principle of equality of citizens in Islamic state is fixed, when the rights and duties of Muslim do not differ from rights of non-Muslims except in relation to creed. In the same direction, Fahmi Howiedi went on by providing several evidences for his claim which among them in the document of Medina. [61] For Wahba al-Zhili, the citizenship required in Islam the availability of two basics, first: the freedom and the lack of the tyranny of ruler, the second is the availability of equality between citizens in rights and duties regardless of religion, creed or custom.[62] For Ahmed al-Sha'ibi in his book *The Document of Medina*, "the basis of citizenship for non-Muslims is loyalty to Islamic state through the convenant, because the right of citizenship does not require the unity of faith or creed or the unity of race and this corresponds to the clauses of the document of Madina.[63] Based on the concept of liberal citizenship, modern scholars criticize other concepts in the *dhimma* system as the concepts of *al-Dhimma* and *jiziyah.* For al-Qaradawi the concept of *al-Dhimma* is not important. In his article written in 1955, "*the rights of non-Muslim minority*", he argues that there is no need to adhere to the concept *Ahl al-Dhimma* that harm Christians brothers in Egypt and in the Arab and Muslim countries, who mingle with Muslims. He justifies that it is not of pillars of Islam that God obligate us to worship Him through it and 'Umar b. Khattāb deleted the word *jiziyah* although it is mentioned in the Qur'an.[64] However, in another article of al-Qaradawi *the Nation and National-Belonging in the Light of Doctrinal Foundations and the Purposes of Sharia'*, he "went one step farther by shifting away from the *dhimma* model towards a regime of equal citizenship".[65] Fahmi Howiedi suggests that the concept of *Ahl al-Dhimma* become now more descriptions need to be reviewed and revised.[66] In another point, Muhammad al-Ghazali (d.1996) in his book *Intolerance and Tolerance between Christianity and Islam*, denies the existence of *al-Shurūt al-'Umarīyah* arguing that he searched on the origin of these *al-Shurūt* in historical, biography and Islamic books, but he did not find it at all and says that it is bogus and forged.[67] This is also the case for Kahila who threw the responsibility on scholars in creating this *al-Shurūt*.[68] Through this attempt at reading of the Islamic contemporary jurisprudential attitude across a range of contemporary books, it is clear that there is a new change in the legal status of *dhimmis*. This is big evidence that indicates that *fiqh* has nothing to do with religious factors, but it is product of reality when it is born. As for what Jews have suffered from insults and humiliation in Islamic states because of *dhimma*, there is no responsibility for this in Islam, but the scholars and rulers who are the responsible for this.

## 7   DISCUSSIONS

The Constitutional religious text has seen many changes over the centuries. In terms of content, we can notice that the content of the first text is very different from the following religious text, especially the text that exists in classical Islamic *fiqh*. Legally, the difference between the contents of *al-Shurūt al-'Umarīyah* and the peace treaties in the time of the Prophet and his successors clearly explains the strength of the change. The tone of contempt and various abuses that were used in *al-Shurūt al-'Umarīyah* indicate to a fundamental change in the legal status of *Ahl al-Dhimma*.[69] This document, legally, served as a key foundational text in the legal formulation of *dhimmis* status during the period of Islamic classical *fiqh* and, in practice, as a main

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[59] *Ibid.,1.*

[60] *Abd al-Wahab El-Messiri, Jews, Judaism and Zionism encyclopedia, volume 4/329.*

[61] *Fahmi Howeidi, Citizens not Dhimmis (Cairo: Dar al-Shuru9, 1999), 110.*

[62] *Wahba al-Zhili, The Concept of Citizenship in the Islamic Perspective, Islamiyat,*
*http://www.islameiat.com/Pages/Subjects/Default.aspx?id=15181&cat_id=107. 2 October 2012. Accessed 11/3/2014.*

[63] *Ahmed al-Sha'ibi, 'Document of Medina: the Content and Significance', 68.*

[64] *Shaykh Yusuf al-Qaradawi," the Rights of non-Muslim Minority", the Journal of al-Tawhid, issue 84, 1955.*

[65] *David H. Warren and Christine Gilmore, "Rethinking neo-Salafism", 5.*

[66] *Fahmi Howeidi, Citizens not Dhimmis , 110*

[67] *Muhammad al-Ghzali, Intolerance and tolerance between Christianity and Islam (Cairo: 2000), 45.*

[68] *Abd al-Rahman Kahilah, the Pact of 'Umar, 53.*

[69] *Ibid., 284.*

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source of any arbitrary actions towards *Ahl al-Dhimma* whenever there are political reasons calling for it. These conditions, which a number of researchers[70] see that, were decided in the 'Abbasid reign[71] and were attributed to the Caliph 'Umar to take a legal force. Unlike *"Shurūt al 'Umarīyah*, all these documents, *Saḥīfat al-Madīna*, the Qur'an, and also the peace treaty of the Prophet with the Christian of Najran 10 Hijri are free from conditions and constraints except for the fact that they had to pay jizya that there is not mention to it in ṣaḥīfat al-Madina. They focused on the protection of religious freedom, the protection of properties and the protection of lives. However, the content of what has been called *"Shurūt al 'Umarīyah"* contradicts the text and spirit of the previous texts. This calls into question the accuracy, truthfulness, and the nature of this document. It also led to consider this document is only a result of the diligence of jurists who attributed it to 'Umar b. Khattāb to take a legal force. On the other hand, generally, jurisprudence is only a human action that is subjected to the reality factors in which it is influenced by economic, political, social considerations and therefore is not obligated for all followed ages as *al-Shurūt al-'Umarīyah*.

Furthermore, as we have seen, the signs of the system of *dhimma* were established in the Prophet's time, where it was to a large extent a product of peace treaties and letters which the Prophet signed or sent to inhabitants of areas that were conquered or made peace with him. These treaties and letters led, in the end, to the emergence of the expression of *'Aqd* or *Ahd al Dhimma*.[72] Following the time of the Prophet, the series of many political considerations played a big role in bringing about change in the *dhimma* system and push it in a new different trend during the first periods of the Islamic conquests.[73] This shift in the legal *dhimma* system peaked which caused the emergence the so-called *'ahd 'Umar* or al-*Shurūt al-'Umarīyah* (stipulations of *'Umar*), where it imposes on *dhimmis* a case of hostility and ill-treatment.[74] Thus, it is important to note that the variety of these Islamic religious texts came as a result of the development of the social and political circumstances of non-Muslims. It started from the time of the Prophet to His successors, and the historical events, which followed.

## 8 CONCLUSION

The framework by which Muslims govern their minorities is through a system called *dhimma*. As we have seen through this study, the paper explores the question of the historical development of constitutional text of the legal status of non-Muslims in Islam from the beginning of the call of the Prophet up to the modern time. It examines the history of the emergence of the first foundational texts that played a significant role in the establishment of the legal status of Jews. Through the study, it became clear that this legal status was established in the reign of the Prophet and the constitutional text in the beginning tried to create an integrated society composing of religious groups, races and tribes. Because the Jews were composed a large proportion of the population in Medina, this text considered them indigenous citizens in which they was forming one nation with Muslims. All within the *ummah* are equally protected and all are able to give protection to other members, so that complete solidarity with everyone in the dual role of protector and protected is assured for all. The constitutional religious text has changed over time. This study illustrates how the status was changed after the emergence of several political factors between Jews and Muslims that led to come down the first verse imposing *jiziyah*, which the first application of it with Najran Christians in 631 AD. Following the death of Prophet, the study mentions to some factors that led to emerge the third constitutional text (the pact of 'Umar) that Islamic jurisprudence based on in codifying the legal status of Jews. The study discusses the versions showing the differences of the content of these versions in Islamic legal heritage arguing that this text is only a result of the diligence (*ijtihad*) of jurists who attributed it to 'Umar b. Khattāb to take a legal force. For the contemporary *fiqh*, this study shows the attempts of modern scholars to create a new understanding to the *dhimma* system by referring to the Document of Medina as a model of dealing with the heterogeneity and diversity does exist in Muslim communities.

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[70] *Mark R. Cohen, Hassan al-Zin, Abd al-Rahman Kahila*
[71] *Ibid.*
[72] *Hassān al-Zayn, al-Awdā' al-Qānuniyya, 284.*
[73] *Ibid.*
[74] *Ibid.,22.*

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