CHAPTER-5

AN ANALYTICAL STUDY OF HINDUSTAN KI SHARI HAI SIYAT

The problem of legal status of India during the British period and afterwards, as pointed out earlier, had attracted many ulama and scholars of Indo-Pak subcontinent who examined and discussed it in different ways. The importance of this problem is evident from the fact that some separate books and treatises were written about the same. One such work was Hindustan Ki Shari Haisiyat written by Maulana Sayeed Ahmad Akbarabadi (1908-1985), the noted scholar and former Dean Faculty of Theology (A.M.U.Aligarh). The work published by the Faculty of Theology in 1968 contained seventy four pages. The learned author was a distinguished scholar of traditional sciences as well as well acquainted with modern knowledge. Apart from working as professor of theology in A.M.U. for about thirteen years, he was also associated with MacGill University as Visiting Professor for three years. His scholarly works about Quran, Islamic history and other aspect of Islamic studies testify to his command over fundamental sciences of Islam (tafsir, Hadith, fiqh) as well as Arabic and Persian language.¹

The present Urdu work, though brief is a very comprehensive and critical study of the problem under discussion. An important aspect of this work is that, first of all, the author thoroughly examined the views of the ulama of his own and earlier period and then evaluated their argument one by one. Secondly, he gave his own assessment of the situation that prevailed in India in the British and post-British period with regard to Muslims. Thirdly he presented his own findings about legal status of India keeping in view the old juridical division of land, the new types of countries and the rights of Muslim minorities in modern democracies.

At the outset of his discussion Maulana Akbarabadi had taken note of two works—Hindustan Aur Darul harb and Faisalah al-Aālam fi darul harb in Islam, published from Darul Ihsat-i Rahmani (Munger) and Maktaba Darul Tablig (Deoband) respectively. The first work was ascribed to famous muhaddis Maulana Anwar Shah Kashmiri (1875-1933) and the second was stated to have been written by Maulana Rashid Ahmad Gangohi (d. 1905). In both the works India was declared to be darul harb. In view of internal evidences, Maulana Akbarabadi thought that both are identical and written by single author and that Maulana Anwar Shah was actually transcriber (not the author) of the first treatise.²

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Moreover, with references to an addressed delivered by Maulana Kashmiri at Peshawar in Dec. 1927 A.D. Maulana Akbarabadi pointed out that he considered India *darul aman* or *darul ahd* (and not *darul harb*). He also observed that rules for such countries should be brought out from the authentic *fiqh*-works.

Examining the treatise of Maulana Rashid Ahmad Gangohi, Maulana Akbarabadi stated, that the views expressed therein about the legal position of India had contradiction with his opinion given in other writings. For example, in one of his fatwa recorded in *fatawa-i Rashidia* he did not say anything clearly about this matter and he simply stated that this problem still required to be examined and studied thoroughly.¹ Maulana Akbarabadi further observed that it was perplexing that he first categorically declared India to be *darul harb* and later he considered the issue to be examined afresh.² Thirdly, he pointed out that at the end of treatise of the Maulana Gangohi, Maulana Muhammad Sahul Usmani had written comments in which he stated that once on his enquiry, Maulana Gangohi had declared India to be *darul aman*.³

According to Maulana Akbarabadi this complicated problem could not be solved without studying it in the background of political and social conditions that prevailed in India in 18th–19th

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2. Sayeed Ahmad Akbarabadi, op. cit., p. 35.
3. Ibid, p. 35.
centuries. With reference to the writing of Shah Waliullah Dehlvi (1703-1763), Maulana stated that in later Mughal period the political situation was not favourable for the Muslims. On the other hand, their social and moral life was suffering from weakness and decadence and the condition was more deplorable in case of ruling class. Besides, in those days there was no security of life, property and honour of the Muslims. Many internal and external enemies and opponents of Muslims were working continuously against their interest. In this situation, the ulama of the period had started to think whether India, which had been darul Islam for more than six hundred years remained in the same position or not. In view of Maulana Akbarabadi though Shah Waliullah did not clearly use the term darul harb for India of that period but in whatever way position of Muslims was depcted by him gives the impression that they were not living in any darul Islam. In the same context, Maulana Akbarabadi pointed out that later on his son Shah Abdul Aziz (d. 1824) did not hesitate to issue fatwa to the effect that India had become darul harb. The same point was also explained by him in course of his discussion about the use of interest in those days India. He was also supported by many other ulama with regard to the legal position of India. For example, Maulana Abdul Hai (d.1828) proclaimed that the whole territories of the Christians (from Calcutta to Delhi and
adjoining regions till the north-west frontier) have become *darul harb* as un-Islamic beliefs and traditions prevailed everywhere in these territories and no concern is shown to the *Shariat* rule. In this context Maulana Akbarabadi had referred to the observation of a British writer that with rising of the political power of Britishers in India the attitude of *ulama* towards them was becoming harsher and their stand point (India being *darul harb*) was getting more strength. Maulana Akbarabadi also observed that this situation had prompted some *ulama* especially Sayyed Ahmad Shaheed Bareilvi to declare that waging *jihad* against them and overthrowing their rule had become obligatory for Muslims. This view was further endorsed by a *fatwa* signed by thirty eighty leading *ulama* and theologians of Delhi. This historic *fatwa* had played very important role in the first freedom war of 1857 A.D. Though the Muslims could not get success in this war, but the *Mujahideen* continued their struggle for getting freedom from the Britishers.

In view of Maulana Akbarabadi the situation somehow got changed after 1857 A.D. When the Britisher overcame this disturbed situation their position became more strong. Subsequently they attempted to bring peace and calm and gave assurance to the Indians for religious freedom and security of their

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6. Ibid, pp. 39-41

117
life and property. They also promised to provide them opportunity in government services. They further succeeded in the establishment of a constitutional government in this country. In this situation the Muslims had got good chance to develop their social and economic position and to work for the development of their own culture and civilization.⁷

Discussing all these developments in detail, Maulana thought that the situation in 19th century had got changed from 18th one. For this reason the attitude of ulama with regard to legal position of India had been different for different periods. So if we find three different opinions of Maulana Gangohi about this issue it should be no matter of surprising. These three opinions actually indicate to three situations pre-1857, the disturbed situation around 1857 and the period of political stability of the British government in the last part of the 19th century. In fact, it was with regard to the third phase of the British domination which was explained by Maulana Gangohi in term of darul aman. It is important to point out that later on Maulana Mohammad Qasim Nanautavi went ahead and inclined to consider India of that period darul Islam, though he was not fully satisfied with this point of view. Besides, Maulana Muhammad Abul Hai Firangi Mahli (1848-1886), a well known theologian of post-1857 period, clearly

⁷ Ibid, pp. 42-43
declared India to be *darul Islam*. He thought that India of that period could not be considered *darul harb* in accordance with the condition laid down by Imam Abu Hanifah and his two chief disciples for *darul Islam* and *darul harb*. The same kind of *fatwa* was also issued by some *ulama* of Bengal including Maulana Karamat Ali (1800-1873).  

Moreover, a number of Indian *ulama* of the period issued *fatwa* for migration (*hijrat*) from this country non-cooperation with Britishers, lawfulness of joining National Congress and for the co-operation with Khilafat movement. In view of Maulana Akbarabadi it is an important matter to find out that what was the standpoint of the *ulama* (who were carrying on all these movements) about legal position of India. If their struggle had been within lawful means then the legal position of the country would be different. But if they had given consent for violence and breaking state laws it would mean they had another attitude about this country. In this connection Maulana Akbarabadi cited the statement of some *ulama* particularly Anwar Shah Kashmiri who considered India *darul aman* or *darul ahd* and did not think it permissible to loot and plunder or to take away property of the

8. Ibid, pp. 43-46.
Britisher unlawfully as it would be against agreement or pact at which they arrived with them practically.⁹

Maulana Akbarabadi is also of the view that very harsh attitude of ulama against Britishers actually reflected their urge for drastic change in political setup of India and its emonicipation from the foreign rule. At the same time, there were some eminent Hanafi jurists in India like Maulana Ashraf Ali Thanvi who in spite of their opposition to the Britishers, did not consider the country as darul harb. Even they were opposed to causing any monetary loss to the government of the period. Besides, the well known of ulama of Ahl-Al-Hadith school of thought neither treated India darul harb, nor they were in favour of waging jihad against the Britisher as it has been clearly explained by Maulana Muhammad Husain Lahori in his treatise al-Iqtisad fi Masail al-jihad. The author of this work was also of the opinion that the country where Muslims have religious freedom would be called darul Islam though it had been occupied and ruled by non-Muslims. The well known Ahl-al Hadith scholar Maulvi Nazir Ahmad (d.1902), the famous translator of Holy Quran was also opposed to treating India of the British period as darul harb.¹⁰

It is quite evident from the comments of Maulana Akbarabadi on the statements of different ulama, that he agreed

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¹⁰. Ibid, pp. 50-51
with those *ulama* who considered India of the British period (especially in last part of their rule) as *darul aman* or *darul ahd*).

While discussing the issue of legal status of India the present work was not only confined to the British period, it also examined the view of different *ulama* especially that of Deoband school of thought about India of post-British period along with their respective arguments. The learned author evaluated their views under the parameter of the constitution of India and the actual position prevailing in those days. First of all, he took into consideration the views of Mualana Minatullah Mugeri (1914-1991), chief of the *Imarat Shariah Bihar* and of Maulana Muhammad Mian (1903-1975), former chief of Jamiat Ulama-i-Hind who treated Independent India as *darul harb*. According to Maulana Akbarabadi the latter was of the opinion that a country where Muslims are under the authority of non-Muslims and there is no government-recognized Institution or leader of the Muslims to look-after their interest is to be called *darul harb*. Maulana Akbarabadi has also mentioned some muftis of Darul Ulum (Deoband) who supported Maulana Muhammad Mian’s stand point. Commenting on the views of these *ulama* Maulana Akbarabadi observed that according to them, the matter of a country being *darul harb* depended on the majority of non-Muslims and their political domination in that land, but he thought that this problem
is not so simple or easy to be decided in this way. Accordingly Maulana Akbarabadi thoroughly examined this issue with reference to the well-known fiqh-works of Hanafi School. In course of his discussion he had particularly examined the definition of darul Islam and darul harb as well as conditions for transmission of one into another as explained by Imam Abu Hanifah and his two chief disciples namely Imam Abu Yusuf and Imam Muhammad. In the same context Maulana has discussed the juridical term Istila (domination) which was considered as basis for treating country as a darul ahrb. After explaining the term in the light of writings of jurists, Maulana has given his own comment which is of much importance. In his opinion it is quite clear from the words of earlier jurists, that the Istila would be applied to those countries where Muslims have no religious freedom and have no share in state administration. It means that if in any country where Muslims have participation in state administration or are not part of government but they have religious freedom, legally Istila (of non-Muslim) would not be established and that country would not be designated as darul harb.\(^{11}\)

After a thoroughly discussion about darul Islam and darul harb form juridical point of view Maulana Akbarabadi pointed out

\(^{11}\) Ibid, pp. 54-64.
that for arriving at a conclusion about legal status of India, it is very much necessary to assess the actual position prevailing in the country. Then it would be decided that India comes under darul Islam or darul harb or some other categories of land. In this regard Maulana Akbarabadi had very closely examined the constitution of India especially in the context of right and privileges of Muslims and then he had given his own assessment about the actual position with regard to religious freedom and socio-economic rights held by Indian Muslims in post-British period.

According to Maulana Akbarabadi after independence Indian government was formed on the basis of parliamentarian system of democracy. Under this government all the Indians have equal civil rights without any discrimination. Every citizen has right of franchise and the government is formed by the people and it is run under the guidance of parliament and assemblies whose representatives are elected by the people. As regards religious freedom, the constitution grants the same to all Indians. The followers of each religion have freedom to establish their religious, educational and charitable institutions and manage them. It was also declared by the constitution that the government will be neutral in the matter of religion and it would be a secular state. Maulana Akbarabadi also clarified that there was also Supreme
Court which was authorised not only to interpret the clauses of the constitution, it was also given responsibility of providing protection to the rights of the citizens in case of violation by the state or any individual.\(^{12}\) Maulana further observed that religious, social, economic and political rights guaranteed by the constitution to the Indians were practically held by the Muslims. He stated that Muslims were not only performing their religious duties freely they have also established religious institutions and propagate their religion without any hindrance. In the same way, they were free to adopt different professions for their livelihood and there was also no restriction on them to join the government services. Moreover, they have their representatives in parliament and assemblies and have participation in the state administration in different capacities. On the other hand, the Muslims like other citizens are free to express their opinion about the government and to show their resentment publicly in case of injustice or maltreatment towards them. In this reference Maulana Akabarabadi also pointed out that their might be cases of injustice with the Muslims, infringement of their rights and that of loss of their life and property, but it could not be overlooked that in such cases the Muslims have rights to complain to the government and to seek justice from the court.\(^{13}\)

\(^{12}\) Ibid, pp. 66-68.
\(^{13}\) Ibid, pp. 68-71.
In the light of above discussion Maulana came to the conclusion;

1. India is a secular democratic country which is not a state of any particular religion or religious group, so the juridical term *Istila* (domination of non-Muslims) could not be applied to this country.

2. All citizen have equal rights and the Muslims are also participants in the state administration.

3. According to the constitution Muslims are given religious freedom.

4. They have economic freedom and have right of expression of their thought.

5. The Indian government had diplomatic relationship with Muslim countries and with some of them had very close ties.

6. North west frontier of India is adjoining Muslims countries.

From these points Maulana Akbarabadi brought out his clear cut stand that India of present time could not be considered *darul harb*.\(^{14}\) Now the question arises that if India is not *darul harb* then what is this? Before replying to this question Maulana has attempted to dispel some misconceptions.

In his opinion it is misconception that according to Islamic law there are only two types of land, *darul Islam* and *darul harb*.

\(^{14}\) Ibid. pp. 70-72
and that both are opposite to each other which implies that if a country is not *darul Islam* it would be necessarily *darul harb* or vice versa. This concept has developed differences of opinion among the Indian *ulama* about the legal position of British India. Secondly it is also wrong to consider *darul ahd* and *darul aman* as a part of *darul harb*. In his view it is not right to confine the categories of land only within the two popular ones and to consider *darul aman* a part of *darul harb*. He wondered that how it can be said that their is one kind of fire that does not burn. In fact *darul aman* and *darul ahd* are not two types of *darul harb*. These are actually separate and independent categories of land. In this way there are four categories of *dar* in Islamic law and not only two as generally thought.\(^\text{15}\)

Maulana Akbarabadi here emphasised that Quran has described three categories of non-Muslims. (1) peace-loving non-Muslims, who do not give trouble to the Muslims, (2) those non-Muslims who have agreement with the Muslims (3) warring or combatant group of non-Muslims. Accordingly the Holy Book had laid down rules and regulations for treating and dealing with them. He further observed that relationships between two countries are generally of three kinds: (1) Neutrality (2) treaty or alliance (3) hostility or state of war. All these situations are separate from

\(^{15}\) Ibid, pp. 73-75.
each other and not dependent on or subordinate to each other. In this way, the non-Muslims countries may be also divided into three categories namely *darul amn*, *darul ahd* and *darul harb*.\(^{16}\) Maulana had quoted here some well known *fiqh*-works such as *al-siyar ul-Kabir* to bring forth the point that earlier jurists also recognised some other *dars* in addition to *darul Islam* and *darul harb*. In support of his view, Maulana Akbarabadi had also made reference to the writings of some modern jurists including Shaikh Muhammad Abu Zuhra and Shaikh Abdul Qadir Audah. Maulana had concluded this discussion with the observation that the division of land exclusively into *darul harb* and *darul Islam* by the jurists of the early Abassid period was actually in accordance with the emergent situation which was confronting the Muslims world over in those days.\(^{17}\)

Proceeding from this discussion Maulana Akbarabadi came to the main question that if India is not *darul harb* then what is its position? Responding to the same Maulana clearly stated as it was not *darul harb* and *darul Islam*, in the same way it could not be considered *darul aman* and *darul ahd*. Explaining its reason he pointed out that issue of legal position of India has two aspects. Its position with regard to Muslim countries and its status for the Muslims of this country itself. According to him, it is *darul ahd*
for Muslim countries and the scope of its relationship with them may differ from one to another in accordance with the nature of co-operation and partnership in different matters among them. As regards its position for Muslims it cannot be interpreted in term of any of the four above mentioned types of countries. The reason for India not being darul harb had been already explained and since it is a secular state it cannot be treated as darul Islam. Mualana Akbarabadi vary strongly opposed those ulama who considered India of British period darul Islam. The view that India is also not darul aman or darul ahd is evident from the fact that existence of these two types of countries is possible in a situation where Muslims are one party and non-Muslims form another party and there is relationship of muahid (one who makes agreement) and mustamin (protected person or one gets security as a result of this agreement) among them. In the opinion of Maulana Akbarababi this is not existent in case of Indian Muslims and non-Muslims, because inaccordance with the constitution both are one nation and the government is run by this nation under the guidance of the constitution which is being protected and implemented by the government. For this reason whatever rights and privileges are available to the Muslims are given by the constitution and not by
the majority people (non-Muslims). So India can not be *darul ahd* for its Muslim citizens.\(^{18}\)

Significantly enough Maulana had explained the legal position of India in a quite new term. He pointed out that relationship among the people of different religions in a country and the nature of International relationship which existed earlier is quite different from the present one. In fact, the earlier juridical division of countries and that of their people cannot be applied to the modern states. In this reference Maulana Akbarabadi stressed the point that sometimes the provisions of law or juridical opinions are changed in the new situations.\(^{19}\) It is a well known fact that previously there has been concept of rulers and subjects and in many cases the subject were divided into two parts (1) those who were followers of religion of rulers (2) those who were followers of other religions. The both may be called citizens in modern sense and be considered equal in fundamental rights, but the fact is that they differed from each other in some matters. Elaborating the point Maulana stated that in the present political setup subjects were replaced by citizenship or nationality and with the change of nature of the countries the position of their inhabitants also got changed. In modern period government is the representative of the common people which is formed by the

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process of election and it is quite different from the old feudal system of government or imperial form of the state. Now there is concept of state which had territorial sovereignty. This sort of the state is universally recognised and is largely adopted by Muslims and non-Muslim countries in the whole world and their international relations and mutual dealings are governed by the principles of new states.

In view of the new political setup and changing nature of the modern states, Maulana Akbarabadi thought that it was very difficult to apply the old juridical division of land to the Muslim and non-Muslim countries of the present time. In fact, hardly any Muslim and non-Muslim country of modern period fulfils the conditions laid down by the jurists of the classical period for *darul-Islam* and *darul harb*. If the Muslim countries of present days are to be called *darul Islam*, so the old definition of this *dar* required to be changed to conform it to the modern Muslim state. On the other hand, new concept of citizenship and nationality which is being universally recognised by the Muslims and non-Muslims demands that a new *dar* or new category of country is formed which may be called *al-watan al-quami* (National home). This may be aptly applied to India. Because, all Indians in spite of difference of religion, language, colour and race are one nation. Accordingly all these people including Muslims are being treated
equally with regard to passport, civil rights and national and international relationship. So India is not a land of people of any particular religion or group. It is native land of all those people who have Indian nationality or are part of Indian nation. With reference to the *Holy Quran* and *Hadith*, Maulana Akbarabadi has emphasised that Islam recognizes the concept of *watan* or national home. In the *Holy Quran* Prophets have frequently addressed the people of the land (to whom they have been sent) in term of *Ya qaumana, Ya qaumi* (oh our people, oh my people). Moreover, in the famous constitution of Madinah of the Prophet's time Muslims and Jews of that city came to be collectively referred to as *Ummatan Wahidah* and on this basis rules and regulations were laid down for social and political relationship between them. So Madinah became the native land for all those people who were included in this *ummah*. Maulana Sayeed Ahmad Akbarabadi concluded his discussion with the remark that legal position of India for its Muslim inhabitants can be best defined as *al-watan al-qaumi* (National home) for which obviously there are separate rules to be followed. Lastly Maulana rightly observed that in view of this status of India for Muslims it is their duty to take stand against oppression and injustice and to make maximum efforts for establishment of justice, spread of goodness and prevention of
evils. This will, of course, ensure the welfare of common people and protect their interest also.  

In view the above study *Hindustan Ki Shari Haisiyat* it may be said, that the learned author had studied the problem from different aspect in a very systematic way. His approach towards the writing towards the Indo-Pak *ulama* about the issue is quite critical. He not only thoroughly studied the earlier juridical work on the definition of *darul Islam* and condition for transformation of one into another. He also examined. The views of Indo-Pak *ulama* about the legal status of India of the British and post-British period to judge merits and demerits of the assessment of the Indian situation and determination of legal status of India accordingly. A very important aspect of the present study of the Maulana Akbarabadi in his response to the question that whether juridically or historically division of land in Islam was confined only within *darul Islam* and *darul harb* or there were some other categories of lands accordingly to his findings. Some other categories such as *darul ahd* and *darul aman* was also recognised by some eminent jurists of *Hanafi* school and historically these existed in the Muslim world. It is also significant to point out that in the light of his own situation the who whole worlds particularly in the India and that of consideration of the nature of the

20. Ibid, pp. 100-103.
international relationship of the modern period. Maulana Akbarabadi thought that, there is need to define and form new categories of land and to bring out guidelines for its working from the *Fiqh* work. In this connection he had presented the concept of *al-quam al-watani* (National home) especially with regard to Indian Muslims. It has very importance and required to be considered and further develop in the light of outlines, given Maulana Akbarabadi in the present work under discussion.