

# Half Widows and Orphans

## *- A Way Forward in Islamic Jurisprudence*

by Khurram Parvez

The International Day of the Disappeared is commemorated every year on 30 August. More than 8,000 people have been subjected to enforced disappearances in Jammu and Kashmir since 1989. The government acknowledged nearly 4,000 disappeared persons in the state.

The survivors, particularly half widows and orphans, are facing multiple problems. To deliberate over the plight and rights of half widows and to ponder over the orphans' inheritance rights, the Association of Parents of Disappeared Persons (APDP) held a seminar, entitled **"Half Widows and Orphans - A Way Forward in Islamic Jurisprudence and the International Treaty Against Disappearances"** held on the International Day of the Disappeared. Islamic scholars and civil society leaders were invited.

The personalities and Islamic scholars invited were Mufti Azam Bashir-ud-din Sahab, Moulana Yaqoob Sahab of Jamait-e-Ahlihaadees, Moulana Mushtaq Sahab of Baramulla, Molvi Yaseen Sahab of Budgam, Mr. Gautam Navlakha, Dr. Altaf Hussain, Dr. Mubarik Ahmad and other civil society members.

Mr. Zahir-ud-din, the moderator, stated that he requested different NGOs to take half widows under the

care of their organizations, but they refused by saying there are no such aims in their Constitution and By-laws which oblige them to help the half widows. He said that nobody is ready to help them. He prefixed a request in the program that the executive members of APDP with other personalities participating in the program constitute a committee for fund-raising in order to help orphans. He said that this is our obligation.

Molvi Mohammad Yaseen Sahab of Baramulla commenced the first session. He said: "When we observe Quran, there is not a single chapter mentioning widows and orphans. In Allah's book, it is clearly written that we should extend a helping hand. We will try to develop a consensus so that we can initiate a step for helping survivors. There are always debates about the victims but there should be something practical."

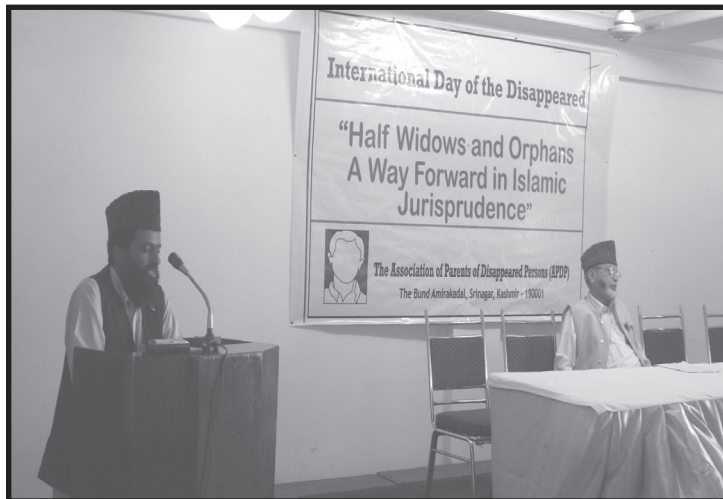
Prophet Mohammad (SAW) said, "If you keep your hand on an orphan, you have kept on me, if you are feeding an orphan in your home, you are feeding me."

### **Mufti Azam Bashirudin Sahab's Narrative on the Issue of Half Widows and Orphans**

In view of the Quran and Sunah, it was discussed how Ulemas has projected Islam and has made society



**On the 2009 commemoration of the International Day of the Disappeared, family members in Kashmir join the world's families of the disappeared in honoring their loved ones.**



Maulana Showkat Sahab shares his wisdom regarding the half widows' problems. (©APDP)

abide by these norms. Then society accepted this as a law known as Shariah. This law mentions women's rights over men, minors' rights over parents, one brother's rights over another and one neighbor's rights over another. The Shariah has, in different perspectives, explained the norms of inheritance and norms of marriage and remarriage.

In our state, there is a burning issue of disappeared persons (Arabic = Maqood-ul-Khabar - means whereabouts of a person is unknown, whether the person is dead or alive, where is the person? what he is doing?). If a person has disappeared, he left his children behind and there is none who can take care of their well-being. Shariah said that we have to understand what is to be done to the destitute. About 95% of Muslims of the world who follow the directions of Imam-e -Azam Hazrat Umar-e-Farooq (RA), but some of his directions are not accepted by some people, not because they are wrong but because it is interpreted by other schools of thought like Imam-e-Shafi (RA), Imam-e-Malik(RA), Imam-e-Ahmad bin Hambal. These are basically four schools of thought which have interpreted Islam and have given their several interpretations of Shariah. By virtue of our obligation, we have to abide by all these schools of thought.

Imam Azam said that a woman has to wait for ninety years before she remarries if her husband has disappeared. But the other Imams question the length of the period. The Imam Maalik's school of thought provides that if a married person will be missing for 4 years and there would be no clue of the person's status even

after proper investigation, then, the Qazia Shariah or Mufti (religious scholar) will cancel the person's marriage and the person would be considered dead, even if the person might still be alive. When Qazi Shariah will declare the disappeared person as dead, then the half widow has to wait for four months and 10 days and after this, she can remarry.

In Jammu and Kashmir, enforced disappearances started in the 90's. Thousands of disappeared persons left behind their relatives, e.g. father, mother, brother, sister, wife and children.

"If the husband of any woman is disappeared, I request her to go to Qazi Shariah and seek permission for a second marriage. Unless or until a Qazi would not give his verdict about the whereabouts of the missing person after proper investigation, a woman cannot remarry. However, there are state laws as Marriages Acts which provide that a woman has to wait for seven years since the disappearance of her husband. According to the Act, a disappeared is declared dead after 7 years of being disappeared. There is a contradiction between the State law and norms of Shariah, but according to our religion, norms laid down in Shariah will prevail over State Laws."

"As per the property of the disappeared person, it cannot be divided or distributed until after ninety years. But if the person would have children, then the property would be distributed among them. In case the disappeared person would be living with his father, under such circumstances, the power of distribution of property lies with the father. The children of the disappeared



Muhammad Iqbal Kumhar contributes to the inputs on the topic of half widows. (©APDP)

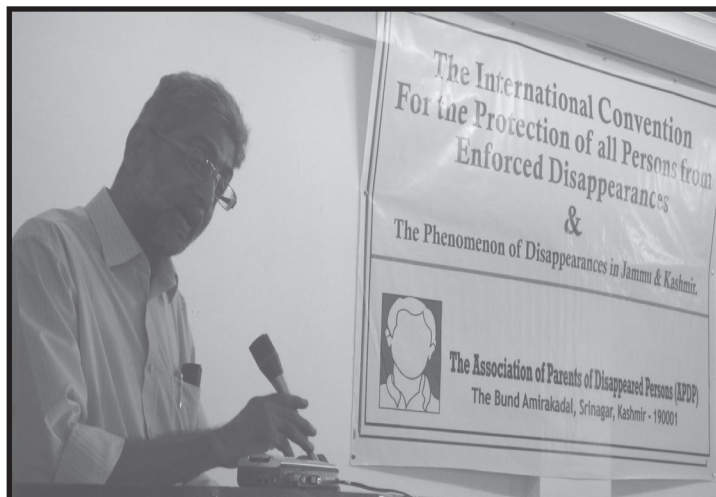


cannot claim property from their grandfather. But if there would be involvement of other relatives, in that case, the issue of property would be kept pending."

Bashir-ud-din further said: "If APDP constitutes a committee for the welfare of the survivors of the disappeared persons, we would appeal for people to come forward and donate for the welfare of the survivors of the disappeared."

While speaking about the problems and inheritance rights of half orphans, Moulan Yaqoob Sahab said: "It is really great that people have the concern with the destitute. In the Islamic way of life, a person should not only be concerned with his problems but he should also look into his surroundings and be concerned with other people's problems. A person should contribute to the resolution of the problems of the victimized. Sahab also appreciated the initiative of APDP in organizing such kind of seminars and in fighting for the rights of survivors of disappeared persons.

On inheritance of half orphans, he said: "If a person is disappeared and he left behind his children, the primary responsibility of taking care of these half orphans falls on their grandfather. Islam says that the grandfather has to look after his grandchildren and has to provide them with all necessary things including education. Ulamas says that even if the orphans are not entitled to the inheritance of their father's property but under such complex circumstances, it is obligatory that a grandfather has to inherit something in favor of his grandchildren. But it is sad when their orphans' grandfathers deprive them of everything and oust them from their families. This is



Gautam Navlakha presents his insights on the issue from the civil society's point of view. (©APDP)

not permissible in Islam. The close relatives have to take care of the inheritance rights of orphans. If a half orphan's grandfather is dead, the uncles have to look after and contribute to their education and ensure their good future.

## OPEN FORUM

**Question 1:** Yaseen Malik of Zandfaran Baramulla and Ashiq Hussain of Natipora Srinagar asked: A half widow remarried 17 years after her husband's disappearance. But if her first husband would return, would the woman be wife of the first husband or the second husband?

Mufti Azam Bashir-ud-din replied: If the half widow had approached Qazi Shariah and have sought permission for remarriage, then she would remain the wife of the second husband even if the first husband would come back after the remarriage. But if the half widow has remarried without seeking permission from Qazi, the second marriage would not be valid. The woman would remain wife of the first husband. Seeking permission from Qazi Shariah is compulsory for remarriage, otherwise the remarriage would be invalid.

**Question 2:** Yousuf Kumhar of Banihal questioned: A half-widow with her two children, one daughter and one son lives with her two brothers-in-law. She has no source of income. Due to such conditions, the brother of the half widow wants his sister to stay at her maternal house until her son grows up. But the two sisters-in-law of the half widow argued that she would be deprived of the property of her husband if she migrates to her maternal house. Her sisters-in-law argued on the pretext that they have



Kashmiri women, especially half widows, bear the brunt of the cruel effects of enforced disappearances. (©APDP)

to take care of the half widow's property if she stays at the maternal house.

I want the scholar's (Ulamas) decision on this matter. I want to know if the half widow will migrate to her maternal house, will she really be deprived of her property or not?

Mufti Azam Bashir-ud-din replied: If the half widow is young and insecure at her in-laws' house, she can stay at her maternal house along with her children. According to Shariah, the brother-in-laws of a half widow cannot deprive her from her husband's property, even if she prefers to stay at her maternal house.

**Question 3:** Sajad Ahmad of Alamgari Bazar, Srinagar asked: If a person has been subjected to enforced disappearance and his wife has waited for 4 years, 4 months and 10 days and would have remarried after seeking permission from the Qazi Shariah, but soon after the remarriage, her disappeared husband who would have been forcibly disappeared, would come back, can the disappeared person claim his remarried wife? How will he defend his case of enforced disappearance before Qazi Shariah?

Mufti Azam Bashir-ud-din replied: Imam Malik (RA) has said when 4 years would pass and the half widow has no clue about her husband's fate, she could approach Qazi Shariah and get a consent for remarriage. According to Shariah, if four years have passed since the disappearance of a person, Qazi Shariah could declare the person dead and then direct his half-widow to wait for 4 months and 10 days if she wants to remarry. Even though her husband would have been kept under unlawful detention or whether her husband would be alive at any place or would have died, her remarriage would be considered valid if she sought the permission from Qazi Shariah. If her disappeared husband returns after her remarriage, he cannot claim her as his wife.

Mufti Bashir-ud-din, while answering the question, added: "According to legal norms, a divorced woman remains the wife of the husband who divorced her until she remarries, but in Holy Quran, it is mentioned that the divorced woman remains wife of the husband for 3 months and is entitled to maintenance for the same period of time. Our courts in the matter of divorce rely on the case ruling of Shah Bano vs. Mohammad Ahmad, where it was said that a divorced woman remains wife of the first husband till she remarries. There is a contradiction between court orders and the Shariah decision. If a complication may arise in such



Sahil Turiq makes his transparent views and hopes to help the half widows. (©APDP)

circumstances, the Shariah decision would prevail and preference would be given to it."

Zahirudin suggested that Ulamas contribute a pamphlet containing norms on rights of survivors of disappeared persons. He suggested that the pamphlet be published by the Ulamas themselves because the APDP cannot afford the cost.

### **International Convention for the Protection of All Persons from Enforced Disappearance and its Relevance to the Phenomenon of Disappearance in Kashmir**

The session started with the speech of Dr. Altaf, a renowned state pediatrician. Dr. Altaf said: "This part of the program is about the persons who were forcibly disappeared by security agencies. As we know from the last 20 years, 8,000 – 10,000 people were subjected to this crime. If a person disappeared, he leaves behind agonies to his family members. If he is alive, how is his physical, mental and spiritual condition? Does he get food? Is he away from calamities? If the disappeared is in bad health, does he get medication and other basic facilities? In case the family presumes the disappeared as dead, the family gets haunted as to how their beloved had died, if he had indeed, died or was killed, was he tortured, strangled or shot to death? Were his last rites performed or not?"

He further said: "If a person is killed, the suffering remains for a short period of time while if a person is disappeared, the survivors suffer endlessly and this fact continuously traumatizes them."

"A lot of work is being done internationally to bring an end to disappearances. A convention against

disappearances has been passed by the UN in 2006. India has signed this convention but has not ratified because if it ratifies, there would be pressures if more disappearances would occur. Internationally, India claims protection of human beings and zero tolerance to human rights violations. But in Jammu and Kashmir, India continuously disappears people who demand for their fundamental rights. We have to campaign so that the Convention would be implemented and there would be an end to disappearances," concluded Dr. Altaf.

**Narrative of Mr. Gautam Navlakha, Editor of Economic and Political Weekly, New Delhi:**

Twenty years of conflict have passed and nothing has been done about the phenomenon of disappearance in Jammu and Kashmir. It is only the APDP which is campaigning against the issue and is disseminating information about the disappeared.

In 2006, the UN Convention for the Protection of All Persons From Enforced Disappearance was adopted by the General Assembly. The Convention provides us an opportunity to campaign more for justice. The convention explains what is enforced disappearance. How grave is this violation?

Enforced disappearance is a crime against humanity and the Convention provides protection from it. Unfortunately, the APDP cannot evoke this convention because in Art. 31, it is laid down that the

committees constituted for campaigning against the disappearance cannot file a complaint or forward information against the country of their origin if the country would not be a signatory to the convention. But we should not lose hope because the Convention and other international norms provide us space to take our issue forward to the international community.

We should not forget that in the UN, the issue of Kashmir has been registered in 1948.

At that time, a resolution was passed providing that the Kashmiris can decide on their own future, which signifies the importance of Kashmiris in the UN. However, India will not agree on the Convention because it has been disappearing people continuously and have disappeared more than 8,000 Kashmiris in the last twenty years.

For more than fifteen years, the APDP has been demanding that the government hold an independent inquiry commission to investigate cases of disappearance in Kashmir in order to divulge their exact number

and to let the family know the truth. So far, not a single ruling party has helped because the state government claims that it is an elected government but in fact, it works on the dictates of the central government. The state government can arrest or pick up anybody irrespective of age, involvement or association but cannot release a single person because the whole power lies in the central administration of India. Recently, the Home Department of State Government during the assembly session acknowledged 3,428 cases of disappearance in the state. There is a judgment which says that the government only claims and acknowledges those facts which it would have investigated and surveyed properly. So it is clear that the state government would be having the records of the 3,428 cases. We want it to provide information on the fate of these victims.

## *"Twenty years of conflict have passed and nothing has been done about the phenomenon of disappearance in Jammu and Kashmir..."*



Parvez Imroz speaks about the meaning of The Convention Against Disappearances to the lives of Kashmiri people. (©APDP)





The treaty against disappearances also provides that a person, after arrest, must be presented before the court within twenty-four hours and a report must be lodged in the police station. But in Kashmir, people are arrested without any warrant. No reports are filed and the victims are not presented in court within the given period. Eventually they disappear.

Dr. Mubarik Ahmad, a social activist, also spoke over the issue of disappearance in the state. He encouraged the efforts and campaigning of the APDP.

#### **Narrative of APDP Legal Advisor, Parvez Imroz:**

India has signed the International Convention for the Protection of All Persons from Enforced Disappearance in 2007 along with three other Asian states, e.g. Japan, Mongolia and Azerbaijan, among other states in other regions. In India, disappearances have remained a national phenomenon. In north east states, e.g. Mezoram, Nagaland, Manipur, Assam, the insurgent groups have been, for decades, fighting for their political rights. India imposes on these states the Armed Forces Special Powers Act, which gives extraordinary powers and complete impunity to the army and security forces. In north east state in Punjab, violent uprising against Indian state has continued and thousands of members of Sikh community are being subjected to disappearance. In district Amritsar alone, more than two thousand Sikhs disappeared according to the Central Bureau of Investigation(CBI) which was ordered by the Indian Supreme Court to investigate on the matter. The CBI found that the bodies had been cremated but none of the perpetrators has been punished.

In Kashmir, more than 8,000 people have been subjected to enforced disappearances and the institutions like Judiciary, State Human Rights Commission (SHRC) and the National Human Rights Commission (NHRC) have failed to prevent it or identify and punish the perpetrators. The government of India has not allowed the UN Working Group on Enforced or Involuntary Disappearances and even Amnesty International to visit India or Kashmir. However, the Working Group on disappearances had been invited to other countries, e.g. Sri Lanka, Thailand, Philippines and Nepal.

The signing of the international treaty against disappearances is not enough unless the government ratifies it. India will not be willing to ratify unless there is sustained campaign. Only an international campaign can pressurize governments to ratify the convention and to give justice to all *desaparecidos*.



*Khurram Parvez, an undaunted champion for peace, defends human rights in war-torn Kashmir, encourages young people to pursue peaceful approaches to change and advocates for families affected by the violence. While he was a university student in Kashmir, Khurram witnessed the distress and hostility of students accustomed to a lifetime of violence. He was a recipient of the 2004 Reebok Human Rights Award. He works for the AFAD as an alternate Council member representing the APDP.*