

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 3

2021

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Nikah Halala: Law in theory v. Law in practice

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ABSTRACT

The practice of Nikah Halala is presently under a huge radar of criticism, initiated by aggrieved Muslim women and other human rights organizations. The consequences of the usage and enforcement of this practice are the cause of this criticism. But the practice has been grossly misunderstood and misinterpreted and is being followed in various parts of India by the religious leaders at their own behest and according to their own interpretations. This arbitrary imposition of principles of Halala propagated by individuals which are not endorsed by the Quran became a source of ambiguity and uncertainty for many of the followers, who are ignorant of the Islamic ideology behind the practice. The usage of this practice is having destroying effects on Muslim women who fall prey to demands and desires of their husbands. India, despite being a progressive third-world nation, has been seeing a shocking rise in the cases of Halala-fixing, which is a pre-arrangement enabling a woman to remarry her former husband by marrying an un-known man, consummating the marriage and obtaining the divorce. Such postulation goes against the spirit of the Islamic jurisprudence, which will be elaborated upon subsequently. With the help of chronicles brought forth in this paper, we shall understand the evolution of this practice and understand the distinction behind the law in theory as compared to the law in practice. The wrongful postulation of Nikah Halala and its practice as a pre-arrangement is projected against the penal provisions and a lucid elaboration is provided in this regard. Further, the paper summarizes notable solutions in view of the wide prevalence of this practice in India and concludes remarks on the subjects of equality and upliftment of Muslim women

Keywords: *Nikah Halala, Tahleel marriage, Halala-fixing, The Holy Quran.*

I. INTRODUCTION

In the recent past, subsequent to the ban on Instant triple talaq, there has been a huge uproar against the practice of *Nikah Halala*, an age-old customary practice of permitting remarriage in the Muslim Law. The practice of *Nikah Halala* is perceived as a widely misinterpreted law

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that is subjecting women to unruly discrimination and exploitation. Notwithstanding this notion, it is imperative to critically view the origin of this practice and identify the distortions that are rendering this practice as an unfit for this modern era. If we see, it is well established by the Quran that Islam is a strong proponent of marriage, with no room for celibacy.² The Muslim marriage (*Nikah*) is delineated as, “A word which, in its literal sense signifies conjunctions, but which, in the language of law implies the marriage contract”.³ It is further attributed as an institution that contributes to man's upliftment and is considered a way of enforcing human race's continuity and partners are essentially told to honor and love one another.⁴ But when a divorce occurs in the manner of irrevocable separation and the wife wishes to marry her ex-husband again, it is essential for her to marry another man, consummate that marriage, obtain a decree of divorce and further observe *iddat* before marrying again.⁵ This practice is termed as “*Nikah Halala*” or “*Tahleel* marriage” in the Islamic law.⁶ The expression *Halala* originates from “halal” which means something that is permissible.⁷ Broadly, it can be understood that in order make the remarriage of the woman with her ex-husband permissible, she must follow this practice. However, this procedure is seen as a hindrance to the freedom and rights of Muslim women since it has been sighted in the recent times that these women are being exploited physically, psychologically and financially under the impression of following this religious practice. Though the times have advanced, many of the archaic provisions of these laws, subject women to bias. Although the courts reiterated the significance of fundamental rights over the religious laws and practices that go against public order and morality, little change has been brought about.

II. HISTORICITY OF NIKAH HALALA

As opposed to the rule of law among the ancient Arabs of the Pre-Islamic period, Prophet Muhammad, the founder of Islam, has put women on a basis of almost total equality with men in the exercise of all legal powers and functions.⁸ Reforms were witnessed only during his period of prophethood in relation to the rules of "marriage by agreement (marriage through consent)".⁹ However, the term *Nikah Halala* does not have mention in the Holy Quran.¹⁰ The practice appears to have been inferred by some Hanafi Scholars through a *Hadith* of the Prophet

² Rakesh Kumar Singh, Muslim Law 57 (3rd ed., 2017).

³ Hughes, Patricks, Thomas, Dictionary of Islam 438 (1986).

⁴ A.A.A. fyzee, Outlines of Muhammadan Law 90 (Oxford University Press, 1999).

⁵ Syed Khalid Rashid, Muslim Law 87 (6th ed., 2020).

⁶ *Id.*

⁷ *Id.*

⁸ Charles Hamilton, Hedaya 25 (2nd ed., 1870).

⁹ Ahmed, Leila., Women and Gender in Islam 76 (Yale University Press, 1992).

¹⁰ Syed Khalid Rashid, Muslim Law 87 (6th ed., 2020).

that said: “*she (the divorced wife) must now taste the sweetness of another*”.¹¹ The Muslim law endows upon men, three ways to divorce their wives, extrajudicially, and they include *Talaq, Ila* and *Zihar*.¹² Among these, the widespread form of divorce is *Talaq* that does not require the consent of Muslim wife and is separated into “*Talaq-Ul-Sunnat*”, which is revocable and “*Talaq-Ul-Biddat*” (triple talaq), which is an irrevocable practice of divorce.¹³ When a wife is divorced irrevocably, she becomes “*Naamharaam*”, meaning, she does not possess the original matrimonial identity.¹⁴ This rule of irrevocability has emerged to protect the pristine institution of marriage and ensure discipline as said by Muslim jurist, Mounlana Ashraf Ali Thanvi.¹⁵ But the wife can go through the process of *Nikah Halala*, also called an intervening marriage, to retain the original matrimonial identity, which also involves consummation.¹⁶ Though the intervening marriage has no roots in *Usul al-Fiqh*, certain South Asian Muslim communities believe the practice is consonance with the Quranic injunction.¹⁷

The Holy Quran, in its Second chapter, states:

*“Divorce is twice. Then, either keep [her] in an acceptable manner or release [her] with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allah. But if you fear that they will not keep [within] the limits of Allah, then there is no blame upon either of them concerning that by which she ransoms herself. These are the limits of Allah, so do not transgress them. And whoever transgresses the limits of Allah – it is those who are the wrongdoers.”*¹⁸

*“And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him. And if the latter husband divorces her [or dies], there is no blame upon the woman and her former husband for returning to each other if they think that they can keep [within] the limits of Allah. These are the limits of Allah, which He makes clear to a people who know.”*¹⁹

The above verse provides that proper amount of reconciliation is needed after every pronouncement of *Talaq* and the wife can marry a person of her choice after the said divorce.

¹¹ Tucker, J. E. Women, Family, and Gender in Islamic Law 88 (Cambridge University Press, 2008).

¹² Kusum and Poonam Pradhan Saxena, Family Law 6 (4th ed., 2015).

¹³ *Id.*

¹⁴ Satyabhama Kaushikei, *Nikah-E-Halala: An Un-Islamic Contractual Rape* 5 MLJ 1,2 (2018).

¹⁵ Vibha V, Adhish Anilkumar Kulkarni, *Critical Analysis on Practice of Nikah Halala in the light of India Rape Laws* 1(6) Lex Forti 5-18 (2020).

¹⁶ 1 Kusum and Poonam Pradhan Saxena, *supra* note 11, at 8.

¹⁷ Shaheen Sardar Ali, *Cyberspace as Emerging Muslim Discursive Space - Online Fatawa on Women and Gender Relations and Its Impact on Muslim Family Law Norms*, 24 Int'l J.L. Pol'y & Fam. 352, 338-360 (2010).

¹⁸ Quran 2.229 (Al-Baqarah).

¹⁹ Quran 2.230 (Al-Baqarah).

The concept of “Consummation” has not been talked about in the verse. “*Muhallil*” is the person that marries a woman in order to make her remarriage with former husband permissible, whereas the former husband is called “*Muhallal lahu*”.²⁰ When a marriage is based on genuine intentions, the Quran does not object to it.²¹ But if a man states his intention during the marriage or intends to do so after the marriage that he shall make a woman permissible for her former husband, it is considered *haraam*.²²

Moreover, Abu Dawood (2076) postulates, as narrated by Ali Ibn Abu Talib that, “*Curse be upon the one who marries a divorced woman with the intention of making her lawful for her former husband and upon the one for whom she is made lawful.*”²³

The said verse explicitly states that if a *Halala* is pre-planned in order to enable a woman to lawfully marry her former husband, it is not permissible by the Holy Quran. This clause is said to have been introduced to forbid a Muslim husband from exploiting his wife through ceaseless divorces and remarriages according to his desire. Temporary (*muta*) marriage for the sake of enforcing a permissible remarriage with the former husband followed by a divorce (also called “*Tahleel* marriage”) are “*haraam*” as proposed by a vast majority of scholars.²⁴ Ibn Majaah(1936), as narrated by Uqbah ibn Aamir, called the *Al-muhallil* a borrowed billy-goat and further cursed both the *Al-muhallil* and *Al-muhallal lahu*.²⁵ These *Tahleel* marriages are thus invalid and further, Abdullah Bin Masod said: “*May Allah curse anyone who makes Tahleel marriage and the one for whom it is made*”.²⁶ Therefore, a pre-arrangement of *Halala* is considered “*Zina*”, i.e., a curse that marriage is a pristine institution, and the prior objective and strategy to make it legal by the consummation process violates Quranic provisions.²⁷

III. DISTINCTION BETWEEN THE LAW IN THEORY V. THE LAW IN PRACTICE

In theory, according to the Quran, as mentioned previously, the wife can divorce a latter husband in the natural course of events with genuine intentions and remarry her former husband but the distorted reality of pre-arrangement and fixation of *Halala* is highly prevalent in the current era, although impermissible. The purpose, as understood from the Quranic verses is to disallow men from pronouncing “*Talaq*” impetuously in a fit of anger or rage or intoxication

²⁰ Shaheen Sardar Ali, *supra* note 16, at 352.

²¹ *Id.*

²² *Id.*

²³ Satyabhama Kaushikei, *supra* note 13, at 2.

²⁴ Shaheen Sardar Ali, *supra* note 16, at 353.

²⁵ *Id.* At 354.

²⁶ Yusuf Al-Hajj Ahmad, *The Book of Nik'kah (Marriage)* (Darussalam Publishers, 2014).

²⁷ Satyabhama Kaushikei, *supra* note 13, at 2.

and make the reconciliation through remarriage strenuous.²⁸ But the reality projects a stark opposite interpretation and usage of this provision is evidently a perversion of the Quranic injunction. The concept of *Tahleel* marriage is a subject of great controversy, attracting many criticisms from across the world but is deemed lawful only by a small minority of *Hanafi* Scholars.²⁹ In the present scenario, after being divorced by way of Triple-talaq, the parties who wish to reconcile and remarry with desperation, approach the *mulla/imam* of a local mosque for him to conduct himself as the “intervening husband”.³⁰ These men often gratify the request made by the parties in the name of helping the couple and engages in this illegal and immoral act according to the Holy Quran. Yet, many Muslim communities tend to observe the practice despite it being forbidden in some of the dominant Islamic jurisdictions like Pakistan, Egypt and Iran.³¹ Though the legality of this practice has been challenged concerning the ambit of *Sharia* law³², it is an on-going practice in India.³³ The reshaping and reinterpreting of the religion for the sake of ascending patriarchy and dominating women to conform to their needs is highly unjustified and severely flawed. A pre-planned *Halala* is highly detrimental to the wife which induces her to enter into this marriage, regardless of her consent, subjecting her to psychological and emotional instability. The relationship enforced by way of *Tahleel* marriage is not legitimate as it does not carry the tenets of a credulous marriage.³⁴ The practice is being leveraged to shroud the impulsive declarations of divorce by Muslim men and the enforcement of pre-arranged *Halala* marriages. In general dialect, it is called as “*Halala-fixing*”. This practice is nothing but a travesty of the Islamic religion which reduces a woman to an object of amusement who is deserted and subjected to the atrocious utterances of *Talaq* and be claimed back after marrying and divorcing a stranger, specifically sifted out for this purpose. The woes of these women are incomprehensible as to the estrangement of the original matrimonial identity and the entering into a forceful marriage. But the All-India Muslim Personal Law Board (AIMPLB) has ratified the practice as Quranic in numerous instances.³⁵

In 2011, the Bharatiya Muslim Mahila Andolan (BMMA) approached the All India Muslim

²⁸ Rashi Gupta, *Abominable rapes in the name of Nikah Halala: An analytical study of Halala with special reference to Rape Laws in India*, 3(1) International Journal of Advanced Research and Development 132, 131-134 (2018).

²⁹ Tucker, J. E. *supra* note 9, at 88.

³⁰ Shaheen Sardar Ali, *supra* note 16, at 353.

³¹ *Id.*

³² Parbina Purkayastha, *Muslim law board endorses nikah halala, says it is quranic practice and cannot be challenged*, India Today (Apr., 5, 2021, 09:33 AM), <https://www.indiatoday.in/india/story/muslim-law-board-endorses-nikah-halala-says-it-is-quranic-practice-and-cannot-be-challenged-1286497-2018-07-15>

³³ Amrita Ghosh & Pratyusha Kar, *Prenuptial Agreements in India: An Analysis of Law and Society*, 12 Nujs L. Rev. 217 (2019).

³⁴ Rashi Gupta, *supra* note 27, at 132.

³⁵ Parbina Purkayastha, *supra* note 31.

Personal Law Board questioning the abominable practice of *Halala* and the sufferings because to its enforcement.³⁶ The cases and questions put forth by the BMMA showcased aggrieved Muslim women who were subjected to this practice not once but seven, eight times, due to the reason that the husbands have uttered *Talaq* in a state of annoyance or anger or rage.³⁷ The women continued to complain that they felt like prostitutes, forced to sleep with a stranger so that the former husband can claim them back as wives.³⁸ It is highly disturbing to note that the practice is termed as a service offered to the couples and acting as a source of monetization without paying any heed to the brutalities faced by the women.³⁹ It was reported that the *Maulvis* pre-arrange and take money for the marriage and consummation from the Muslim couples in the name of saving their marriage.⁴⁰ The Islamic clerics who are also married, along with *Imams/Maulvis*, are taking part in this and reportedly taking anywhere from Rs. 20,000 to Rs. 1.5 Lakh to engage in the pre-arranged *Halala*.⁴¹ The process is made more and more simpler by the clerics who initiate marriage on a particular day and participate in a one-night stand and divorce the woman the very next day of performing the act, atrociously violating and abusing the rights of the Muslim women.⁴² There have also been instances where the performing of marriage was ignored but the consummation was done, here, the plight of these women is beyond anyone's imagination as the practice has been completely twisted and curated to the whims and fancies of the *Imams*.⁴³ Not just the *Imams* but these women are sometimes compelled to observe *Halala* with relatives.⁴⁴ In some of the appalling instances, the latter husband does not offer the wife divorce as stipulated/fixed during the time of marriage, further trapping the wife in the undesirable marriage.⁴⁵ Women who refuse to undergo *Halala* face severe humiliation from their community and are forced to abandon the rights of custody over their children.⁴⁶ This fright has led many Muslim women to undergo this abominable process.

³⁶ Dr. G. Jambu, *Socio-Economic Status of Women A Study In Warangal District In Telagana State*, 3(1) Human Rights International Research Journal 25, 24-27 (2015).

³⁷ *Id.*

³⁸ Saumya Parmarathi, *Our Nation and Its Women* 2(1) Human Rights International Research Journal 34, 34-36 (2014).

³⁹ Athar Ahmad, *The women who sleep with a stranger to save their marriage*, BBC (United Kingdom) (Apr., 5, 2021, 10: 30 AM), <https://www.bbc.com/news/uk-39480846>

⁴⁰ Sushant Pathak, *Exposed: How maulvis take money for one-night stand with divorced women trying to save marriage*, India Today (April, 09, 2021, 11:20 PM) <https://www.indiatoday.in/india/story/nikah-halala-islamic-scholars-one-night-stand-divorced-muslim-women-marriage-1029887-2017-08-16>

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Dhaval Kulkarni, *Muslim groups plan to meet Prime Minister Narendra Modi for abolition of regressive personal laws*, DNA Mumbai (Apr., 10, 2021, 10:11AM) <http://www.dnaindia.com/mumbai/reportmuslim-groups-plan-to-meet-prime-ministernarendra-modi-for-abolitionof-regressivepersonal-laws-2007733>

⁴⁵ Athar Ahmad, *supra* note 38.

⁴⁶ Challa Srinivas, *Status Of Women Empowerment In India:Problems And Concerns* 3(2) Human Rights International Research Journal 122, 122-124 (2015).

IV. NIKAH HALALA AND THE LAW

The Muslim Personal Law in India has not sufficiently been touched upon by the Legislature. In *Ahmedabad Women Action group (AWAG) v. Union of India*⁴⁷, a Public Interest Litigation (PIL) was filed addressing the issues of Triple Talaq and *Nikah Halala* wherein the apex court held that Indians have been under the governance of personal laws from time immemorial and the interference of the court with these laws will give out undesirable results. The court has abstained from dealing with these issues and dismissed the petition. It was in the case of *Sabah Adnan Sami Khan v. Adnan Sami Khan*⁴⁸ subject *Nikah Halala* was broadly discussed upon and wherein it was upheld that remarriage with a former husband is valid only in the case of Triple Talaq after the due observance of *Halala*. Later, the historic verdict in the case of *Shayara Bano v. Union of India*⁴⁹ the court set aside the practice of Triple Talaq as unconstitutional and raised questions about reformation of personal laws. Although Triple Talaq has been held as unconstitutional, the practice of *Halala* has not been deserted completely due to the prevalence of other forms of divorce like *Talaq-e-hasan*.⁵⁰ Through this case, the court invited the subject of laws of Muslim marriage to constitutional principles on equality of gender. Later in 2018, numerous Public Interest Litigation (PILs) were filed challenging the constitutional validity of Polygamy, *Nikah halala* and other discriminatory practices.⁵¹

The issue of consent has been continuously raised and many termed this practice as a criminal offence of “rape”.⁵² The practice of *Nikah Halala* has further been placed in equitability with the offence of rape under Section 375 of the Indian Penal Code, 1860.⁵³ In *State of Karnataka v. K.P. Thimmappa Gowda*⁵⁴ it was held that, “Consent being an exercise of free will and right to forbid or withhold something is a conscious acceptance of what is proposed with the concurrence of the former.” The pre-arranged *Halala* marriages posed a difficulty in construing the consent of a woman who has an absolute right to deny the performance of an act into which she is compelled to engage in. The obligatory process of consummation undergone by these women without free-will enable the projection of analogues between the criminal offence of rape and *Nikah Halala*. A distinction between ‘consent’ and ‘submission’ has been laid down

⁴⁷ AIR 1997 3 SCC 573.

⁴⁸ AIR 2010 Bom 109.

⁴⁹ 2017 9 SCC 1.

⁵⁰ *Id.*

⁵¹ Sameena Begum v. Union of India WP (C) 222/2018.

⁵² Sushant Pathak, *supra* note 38.

⁵³ Satyabhama Kaushikei, *supra* note 13, at 3.

⁵⁴ ILR 2004 KAR 4471.

in *Rao Harnam Singh Sheoji Singh v. State*⁵⁵ wherein it was stated by the Punjab & Haryana High court that passive acquiescence by a female when she is helpless under duress cannot be understood as ‘consent’ but ‘submission’ where every consent involves submission but not *vice versa*. Thus, the helpless resignation of these aggrieved Muslim women unable to rationally accept the foreordained *Halala* cannot be construed as ‘consent’.

The practice also attracts the provisions of cruelty enlisted in Section 498A of the Indian Penal Code as it entails physical, mental and emotional harassment caused by the former husband and his relatives to compel a woman to observe this practice.⁵⁶ The women are subjected to pressure from various corners of the society and family, leaving her with no alternative but to yield to the demands of the former husband who unilaterally pronounces divorce.

Recently, the Indian Government criminalised Triple Talaq and termed it as illegal under “Muslim Women (Protection of Rights on Marriage) Act, 2019”. This practice has now become a cognizable offence and has allegedly reduced the cases of triple talaq by 82%.⁵⁷ Most of the cases of *Nikah Halala* emerge from the divorces due to Triple Talaq, but since this form of divorce has been penalized, the enforceability of this practice is expected to be whittled down. Though this legislation is seen as a victory by many, it actually has little effect on the entrenched Muslim traditions. Muslim women have long been subjected to these traditions which only possess the traits of inequality and discrimination and now, genuine empowerment of Muslim women by addressing these issues is the need of the hour.

V. CONCLUSION

Islam is the one of the fastest growing religions but is also one of the most misinterpreted and misused forms and this is solely due to the naivety and ignorance of its followers and practitioners.⁵⁸ The non-codification further contributes to the ambiguity of the Islamic laws. It is observed that a large percentage of Muslim women suffer in silence when it comes to following scathing practices like *Nikah Halala* as they helplessly give up on their rights. This practice not only poses a moral problem but also a legal one as it infringes the fundamental rights of Muslim women under Articles 14, 15 and 21. The practice isolates them from exercising their rights to equality, life and liberty. Muslim women who are subjected to these arbitrary practices, are plunged into suppression and dismissal of equal treatment. Further, the

⁵⁵ AIR 1958 P H 123.

⁵⁶ Indian Penal Code, 1860, § 498A, No. 45, Acts of Parliament, 1860 (India).

⁵⁷ Press Trust of India, *About 82% decline in triple talaq cases since law enacted by Modi govt: Naqvi*, The Hindu (July 22, 2020, 03:37 PM) <https://www.thehindu.com/news/national/about-82-decline-in-triple-talaq-cases-since-law-enacted-by-modi-govt-naqvi/article32160348.ece>

⁵⁸ Samreen Hussain, *Triple Talaq: A Socio-Legal Analysis*, 1 Ili L. R. 129, 127-132 (2010).

silencing of the voices of these women is leading to the creation of a toxic and unsafe atmosphere which is further throttling the progress in this area. This state of condition severely debilitates Muslim women from exercising their rights. The archaic principles which go against the basic human rights must be rethought and revamped. Further, the patriarchal elements deeply embedded in the religious laws must be removed and replaced with gender-just provisions so as to provide everyone equal treatment and protection. The organisations dedicated to advocate for the needs of Muslim women can only achieve so far, the power certainly remains with the legislature to enact laws and protect citizens' interests and it is submitted that this power must be realised and exercised accordingly for the societal progression.

After a thorough understanding the practice of *Nikah Halala*, the author would like to make a few suggestions which are deemed desirable in alleviating the current situation. It is suggested that a Conditional *Nikhanama* be enforced at the time of marriage which allows the parties to freely add terms and subsequently be bound by them. Since the practice of *Halala fixing* or pre-planned *Halala* is against the tenets of the Holy Quran, while the Qazi registers the marriage, the terms of abolition of pre-planned *Halala* could be added. Further, an amendment in Section 2⁵⁹ of the Kazi's Act, 1880 could be enforced wherein it is mentioned that a Qazi should be appointed after consulting the local Muslim community but a Muslim jurist could also be appointed so that a record of the number of divorces in the city can be kept and checked upon, who could also monitor whether *Halala* has been followed or not.

In case of forceful observance of these practices by women, regardless of their wish and consent, the practice must attract the penal provisions as discussed in the previous chapter and the persons compelling such women must be tried under these offences. Awareness must be propagated to curb the silence of these women who painfully undergo this process under the pretence of distorted interpretation of the Quranic verse. Prioritisation of gender equality must be perceived with a lot of significance which further facilitates the women to enjoy their rights and freedoms. The ministry dedicated to the empowerment of women can enforce schemes of awareness and redressal.

The implementation of the Uniform Civil Code is considered a decisive step towards national consolidation and could be the very foundation of a civilized society by one section of the society where the other laments that such a code, thrusting homogenization, would only wreak chaos among the religious communities. However, it is famously proposed that these

⁵⁹ Kazi Act, 1880, § 2, No. 12, Acts of Parliament, 1880 (India).

irregularities in the religious laws can be eliminated through a uniform code but in reality, it is not desirable as of now just as stipulated in the Law Commission report on Consultation of Reforms in Personal laws.⁶⁰

⁶⁰ Law Commission of India, Consultation on reforms of Family Law 57 (2018).