



Analysing Nikah Halala under the Doctrine of Constitutional Morality

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“Muslims sometimes awfully misuse their personal law, more in sheer ignorance than deliberately for selfish ends, Non-Muslims often terribly misunderstand its precepts. The former are unaware, the latter misinformed. Both have to be properly educated. This is indeed an important need of the hour.”

Prof. Tahir Mahmoodⁱⁱⁱ

Abstract: *This article is an effort to understand the concept of Nikah Halala which is to be performed by a divorced wife on irrevocable talaq, which was devised as a check on the behaviour of the husband. An attempt to understand it from the point of view of the doctrine of Constitutional morality as highlighted in the Sabrimala Judgement has been made in this article.*

Nikah Halala comprises of two words Nikah meaning ‘marriage’ and Halala which has its origins from the word ‘halal’ which is stated to be ‘lawful’ or in other words it can be said ‘to be allowed/permitted within the precepts of Islam’. Nikah Halala is also known as ‘Tahleel Nikah’. Nikah halala is a practice prescribed to be undertaken when the final or irrevocable divorce has been announced by the husband upon his wife and in the situation whereby the wife wants to marry the same husband she actually got divorced from that is her former husband. It is believed that if she marries or stays with her husband after the final revocation of the nikah then such marriage/ nikah wouldn’t be valid and such wife is described to be haram to his husband and eventually if any offspring comes into being during such stay, then such child would not be considered legitimate.

Talaq finally given by the husband to her wife sets the wife free to marry any man but her former husband. The idea behind nikah halala was to protect a woman from being a destitute in case her second husband died, then, there was a chance that she could go back to her former husband, if she pleased. So, if we look into its reasoning as provided by the Holy Quran was to provide a woman with safety and security.

Nikah halala and the Holy Quran:

The holy book of Quran states that marriage is Nikah Eshaan whereby the word ‘eshaan’ is derived from the word ‘hisn’ meaning ‘fort or protection’. Therefore, nikah or marriage is considered to be a safe haven for

the wife whereby she is being protected by her husband. Also, in nikah the relationship between the husband and wife is fortified and it checks upon the sexual desires of the husband. The institution of nikah doesn't allow one to go beyond the bounds of marriage and indulge in sexual activities. Such activities are not allowed in Islam. Now, in analysing the concept of Nikah Halala, as per the guidelines provided by the Holy Quran, it does not in any form fulfil any norms as prescribed by the holy book as this does not in any way protect the woman or her dignity. Further, it is not mentioned in the holy book itself. So, it can be clearly understood that nikah halala is not a product of the traditions and the Holy Quran rather Prophet Mohammed (PBUH) had warned against such halala and called it sinful.

The prevalent halala or the modern halala is the distorted version of Fiqhi Halala. According to Fiqh, it is allowed if a marriage is solemnised with the intention or will to divorce, but it is not acceptable if there are pre-conditions to divorce. As a result, the precondition of divorce is typically unaccepted, although the intention of divorce is. The volumes of Fiqh include the sharai specifics of prerequisite and intention. As a result, halala would be permitted if a normal marriage occurs, and then the second marriage is dissolved due to circumstances such as talaq or the husband's death, the woman can marry her first husband.

In today's era, religious authorities support the distorted version of the practise of one-night nikah in order to make the wife halal or permissible for a specific reason. Though the intention of the halala was to instil dread in the husband's mind so that he would refrain from doing triple talaq in a fit of fury, it is widely misunderstood. What was intended to be a check on the husband has now become a double punishment for the wife. When her husband divorces her, she is forced to go through the agony of divorce all over again in order to reclaim her spouse and secure her marital house; she is forced to consummate the nikah with an unknown person.

Contrary to the ideology of protection of women and provide them with security it has become an oppression of Muslim women. Earlier, this was also done to keep a check upon the husband so that he would not divorce his wife in haste or without thinking about the consequences of his action.

Nikah halala is practiced in India by the Sunni Community of the Muslims. The legality of Nikah halala has been a question which has to be deeply analysed under the lens of constitutional morality which was devised as a doctrine in the case of Sabrimala Temple whereby the entry of women of menstruating age were not allowed inside the temple. While passing the judgement against such exploitive practice, the apex court highlighted a need to look on the matter on the basis of constitutional morality rather than popular or societal morality.

The Supreme Court, in Sabrimala Temple judgement devised one more element of "careful scrutiny" under essential practices test and a need to not let imposter beliefs to be given protection under the garb of religious practices. Further, a need to do away with superstitious beliefs which have no constitutional backing and giving decision in line with constitutional morality instead of popular morality has been emphasized by the Court.^{iv}

Doctrine of Constitutional Morality:

Constitutional Morality's doctrine was highlighted in the case of Sabrimala Judgement^v. And this doctrine of constitutional morality caught the attention of the legal lobby after it was criticised by the Attorney General of India K.K Venugopal^{vi}. For understanding what this doctrine denotes we need to decipher between morals and law and further we need to understand the difference between public morality and constitutional morality.

Morals or morality can be understood as principles derived from particular religion, civilization, culture and philosophy and can differ from one place to another. They are variable in nature. Morals in contrast to laws are considered to be more stringent in bringing order in the society. Public morality can be understood as the

popular morality which is prevalent in the society and it may or may not be justified as per the Constitution but it holds good for being the part of the majority of the society. Contrary to this popular morality, constitutional morality stands on the principles enshrined in the Constitution even if, at times, the essence of such morality may be against the majority of the population.

Analysing Nikah Halala:

The Constitution of India is the guiding light when it comes to any problem and when the issue is regarding the religious practices, customs and rites; the doctrine of constitutional morality comes into being. Not only that the halala nikah is violative of fundamental rights guaranteed by the Constitution but against constitutional morality as well.

Article 14 provides for right to equality but on evaluating the concept of halala, the practice is biased towards the Muslim women who are made to go through the menace of one night stand kind of set up which is highly exploitive in nature. Further, Article 15 which has its essence in the protection of women in order to promote them, this nikah is a blot whereby the women are not only physically but emotionally, spiritually as well as economically drained and are made to become “pure” or “halal” for the marriage to her former husband. The most important and essential fundamental right is Article 21 which states right to life and personal liberty unless curtailed by the procedure of law. Nikah halala nowhere supports the concept of right to life rather it hinders the right to life and personal liberty. Muslim women are forced by their families to have nikah halala with someone devoid of their wish thereby infringing the very basic guarantee to their life.

It is to be highlighted that even if the Constitution provides for right to religion such right is not absolute. It is here that constitutional morality comes into play. Article 25 and 26 mentions the word morality but this word should not be read as popular/majority morality rather it should be read within the framework of the Constitution.

The stand of the Supreme Court was same when it came to deciding on the entry of women of menstruating age in to the temple of Lord Aiyappa that such discrimination on the basis of religion cannot be allowed to prevail in the society. The court highlighted that constitutional morality cannot be martyred at the expense of popular morality when giving judgement on decriminalising Section 377^{vii}.

Conclusion

Throughout its 1500-year history, Islam has been by far the most misunderstood and misrepresented of all world religions. The cause for this is due to the followers' own ignorance, not to any external factors^{viii}. This could be ascribed to the fact that Muslim Personal Law is largely uncodified, leaving religious scholars to bend and twist religious laws according to their whims and fancies. Nikah Halala has played a key role in the exploitation of women's dignity. It may also benefit religious experts who wish to supplement their income by agreeing to pre-arranged marriages and divorces. Further, after analysing it within the Constitution of our country it is clear that it is violative of the fundamental rights and stand against the doctrine of constitutional morality.

The traumatic suture of Halala is the odious corollary of triple talaq, which has previously been deemed unlawful by the Supreme Court of India in *Shayara Bano v. Union of India*^{ix} (for violating the fundamental right provided by Article 14 of the Constitution). It is past time to eradicate the scourge of nikah halala from society and provide Muslim women with a safe and secure environment in which to live with dignity. The exploitation and prejudice that Muslim women experience at the hands of their husbands and religious clerics must end.

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ⁱⁱⁱ Prof. Tahir Mahmood, *The Muslim law of India*, Preface, Lexis Nexis Butterworths, New Delhi, First Edition 1980.

^{iv} Elizabeth Sheshadri, “The Sabarimala Judgement: Reformative and Disruptive”, *The Hindu Centre for Politics and Public policy*, October, 05, 2018.

^v Indian Young Lawyers Association v. State of Kerala, (2018) SCC Online SC 1690.

^{vi} Upendera Baxi, “The Court’s Voice” *Indian Express*, December 17, 2018.

^{vii} Navtej Singh Johar v. Union of India (2018) WP (Crl.) 76/2016; WP (C) 572/2016.

^{viii} Samreen Hussain, *Triple Talaq: A Socio-Legal Analysis*, 1(1):130, *ILI Law Review*, 2010.

^{ix} SCC Online SC 963.

