

Prohibited Degrees under Muslim Law- In Special Reference to Nikah Halala

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ABSTRACT

As the men become civilised he made the rules of marriage civilised. Marriage is the foundation of the family and the basic building block of society. It brings significant stability to human relationships. It remains the ideal for the raising of children. Halala Nikah is a practice in the Muslim community which allows a man to marry his wife after he irrevocably pronounces Triple-Talaq. According to the Holy Qur'an, if a husband divorced his wife (for a third time), he can't, after that remarry her until after she has married another husband and he has divorced her. This second marriage of the wife is called Halala. Halala has been severely criticized as it harms the dignity of a woman by forcing her into a compromised sexual relationship, which is nothing else than Rape. To research on this topic my objective is to analysis the prohibited degrees of relationship for marriages under the muslim law in special reference to nikah halala, and legislature has included these prohibited degrees of relationship for marriage as necessary conditions or prerequisites of a valid marriage in various Acts and Enactments, non-compliance of these conditions will render the marriage void.

Keywords: *Prohibited Degrees, Muslim Law, Nikah Halala*

INTRODUCTION

As social science research and government surveys increasingly show, the decline in marriage since the 1960s has been accompanied by a rise in a number of serious social problems.² Muslim Law in India actually signifies "that bit of Islamic Civil Law which is connected to Muslims as a Personal Law. It consists of the injunctions of Quran, of the traditions introduced by the 'practice' of the Prophet (Sunna), of the common opinion of the jurists (Ijma), of the analogical deductions of these three (Qiyas), and of the pre-Islamic customs not abrogated by the Prophet Mohammad. Further, it has been supplemented by the juristic preference (Istihsan), public policy (Istilah), precedents (Taqlid) and independent interpretation (Ijtihad). It has been additionally altered by State Legislation and current legal points of reference of the High Courts and the Supreme Court of India and furthermore of the Privy Council.

Halala Nikah is a concept under the Muslim personal law wherein a wife upon whom 'triple-talaq' has been pronounced cannot re-marry her husband unless she marries someone else, consummates the marriage and then her second husband divorces her. The practice was introduced to safeguard the basic unit

² Available at: <http://wikipedia.org/wiki/marriage>, (visited on May 1, 2017)

of the family whereby the husband was to be prevented from dissolving the marital relation and breaking up the family because of a passing passion or insignificant disputes.

Concept of Marriage under Muslim Law

Marriage i.e. Nikah in pre-Islamic Arabia, mint different forms of sex relationship between a man and woman established on certain teams. In pre-Islamic days, women were treated as chattel and were not given any right of inheritance and were absolutely dependent. It was Prophet Mohammed who brought about a complete change in the position of women. He placed women on a footing almost perfect equality with men in the exercise of all legal powers and functions.³

The Prophet of Islam said: "Marriage is my 'Sunna' and those who do not follow this way of life are not my followers." Before coming to law proper, we shall consider the three aspects of marriage in Islamic law, namely- (i) Legal (ii) Social (iii) Religious.⁴

- i. *Legal aspect*: Juristically, it is a contract not a sacrament. It has three characteristics :
 - a. Consent is mandatory for marriage.
 - b. As a contract, there is provision for its breach, the various kinds of dissolution by the act of parties or by operation of law.
 - c. The terms of a marriage contract are within legal limits capable of being altered to suit individual cases.
- ii. *Social aspect*: In social aspect, three important factors are there:
 - a. Islamic law gives to the women a high status after marriage.
 - b. Restrictions are placed upon the unlimited polygamy and limited polygamy is there.
 - c. Prophet encouraged the status of marriage. "There is no mockery in Islam, expresses his attitude towards celibacy briefly but adequately."
- iii. *Religious aspect*: This aspect is often neglected or misunderstood. Marriage is regarded in Islam as basis of society. The tradition of the Prophet follows the same lines, "marriage when treated as a contract is a permanent relationship based on mutual consent on the part of a man and a woman between whom there is no bar to a lawful union."

Tyabji⁵ defined as, "Marriage brings about a relation based on and arising from a permanent contract for intercourse and procreation of children, between a man and woman."

Some jurists consider Muslim marriage as a civil contract. This observation seems to be based on the fact that marriage, has similar characteristics as a contract, under Muslim law:-

³ Charles Himilton, The Hedaya: Commentary on the Islamic Laws, 25 (1989)

⁴ Asaf A.A. Fyzee, A Modern Approach to Islam, 88- 89 (2008)

⁵ Tyabji, Muslim Law, 44-45 (1918).

1. As marriage requires proposal (Ijab) from our party and acceptance (Qabool) from the other so is the contract.
2. There can be no marriage without free consent and such consent should not be obtained by means of coercion, fraud or undue influence." It is unlawful to oppress or coerce women into marriage or to obtain her consent by force or coercion, or to compel her to marriage."
3. As in case of contract, entered into by a Guardian, on attaining majority, so can a marriage contract in Muslim law, be set aside by a minor on attaining the age of puberty.
4. The parties to a Muslim marriage may go into any bet matrimonial or post marital agreement which is enforceable by law provided it is sensible and not restricted by the policy of Islam. Same in contract.
5. There is a provision for breach of Marriage contract by divorce although it is discouraged both by holy Quran and Hadith.

One may conclude the nature of Muslim marriage by the observation of M. Jung. "Marriage is an institution of 'Ibadat' clothed in the legal form of contract regaling sexual intercourse; lent its continence is dependent upon the maintenance of conjugal affection."

The Shia Law allows two kinds of marriages, namely: permanent and temporary or Muta. Temporary or Muta marriages are void according to Sunni Law. According to Mulla,⁶ there are only limited incidents of a Muta marriage.

MUSLIM LAW ON PROHIBITED DEGREES OF RELATIONSHIPS FOR MARRIAGE

According to justice Mahmood, "Marriage among Mohammedan is not a sacrament, but purely a civil contract"⁷

Essential of Valid Muslim Marriage (Nikah)

The rituals of marriage solemnization adherence to sure forms, necessities and formulas of marriage. They are known as the necessities of a valid marriage. If any of those needs isn't consummated the wedding becomes either void or irregular, because the case is also. So the necessities/essentials are as follows:

1. Proposal and Acceptance- Marriage like every alternative contract is habitual by ijab-o-qabool, that's by declaration and acceptance. One party to the marriage should build a proposal (Ijab) to the opposite party. The wedding becomes complete only the opposite party has accepted the proposal.
2. As if there should arise an occurrence of agreement, entered by a guardian, on accomplishing age of majority, so can a marriage contract in Muslim Law, be put aside by a minor on achieving the time of puberty.

⁶ Mulla Dinshah Fardunji, Principles of Mahomedan Law, 258 (1905)

⁷ Abdul kadir V. Salima, (1886) 8 All. 149 at 154

3. The parties to a Muslim marriage may enter into any ante-nuptial or postnuptial agreement which is enforceable by law provided it is reasonable and not opposed to the policy of Islam. Same is the case with a contract.
4. The terms of a marriage contract may also be altered within legal limits to suit individual cases.
5. Competent parties- The Parties to a wedding should have the capability of entering into a contract. They have to be competent to marry. Muslim who is of sound mind and who has entered puberty could enter into a contract of wedding. The parties should be able to perceive the character of their act.
6. No legal incapacity- Means the existence of sure circumstances under that marriage isn't allowable. These prohibitions have been classified into four classes:-
 - 1) **Absolute Incapacity or Prohibition:** The reasons for absolute incapacity or prohibition arises from the below given causes:
 - a. **Consanguinity (Qurabat)** means blood relationship and bars a man from marrying
 - b. **Affinity (Mushaarat)** prohibits a man from marrying:
 - a. His wife's mother or grand-mother how highsoever
 - b. His wife's daughter or grand-daughter how lowsoever
 - c. Wife of his father or paternal grand-father how highsoever
 - d. Wife of his child or son's child or daughter's child how lowsoever
 - c. **Fosterage (Riza)** means that once a woman aside from its own mother has breast-fed a child under the age of two years, **the lady** becomes the **foster-parent** of **the kid**. A man may not, for example, marry his foster-mother or her daughter, or his foster sister.

Exceptions of the Rule of Prohibition

Under the Sunni law, there are a few exemptions to the last provision of prohibition on the base of fosterage and a generous marriage may be contracted with:

1. Sister's foster mother, or
2. Foster's sisters mother, or
3. Son's sister, or
4. Foster brother's sister.⁸

The Shia law jurists place fosterage and kinship on an equivalent footing and refuse to acknowledge the exception allowable by the Sunnis.⁹

⁸ Baillie, 1, 24, 322.

⁹ Iruraiya V. Rudsia begum, 24 Cal 643.

The previously mentioned denials because of 'association', 'proclivity' or 'Fosterage' are outright and the relational unions contracted in contradiction of these principles are void.

2) **Relative Incapacity or Prohibition:** These insufficiencies or forbiddance springs from cases which render the marriage invalid just insofar as the reason which makes the bar exists. The minute it is evacuated, the insufficiency closes and the marriage end up substantial and authoritative. The accompanying are the cases.

a) **Unlawful conjunction: In Azizunnissa V. Karimunnissa,**¹⁰ It was held that the marriage of a man with his significant other's sister, his better half being not separated and alive, was invalid and void.

b) **Polygamy or marrying a fifth spouse:** implies majority of wives, i.e. wedding a fifth wife. It is unlawful for a Mohammedan to have greater number of spouses than four. In India no Muslim wedding under or getting his marriage enrolled under The Special Marriage Act, 1954, can marry a second wife during the lifetime of his life partner.

c) **Absence of legitimate witnesses:** It is fundamental among the Sunnis that no less than two male witnesses or one male or two female witnesses must be available to affirm that the agreement was appropriately gone into between the gatherings. The witnesses must be of sound personality, grown-up and Muslim. In Shia Law, a marriage contracted by the companions themselves or their guardians in private are held legitimate. Presence of witnesses isn't mandatory.

d) **Differences of religion:** In any case, as per Fyzee, such a marriage is thoroughly void. Along these lines a marriage between a Muslim and a non-Muslim can just happen under The Special Marriage Act, 1954

e) **Woman undergoing Iddat:** Under Sunni Law marriage with a lady experiencing Iddat is unpredictable and not void. But under Shia law marriage with a woman who is undergoing Iddat is void.

(3) **Prohibitive Incapacity to Marry and Remarry:**

It arises in the following cases:

- i. **Polyandry:** implies the reality of having in excess of one spouse. Polyandry is prohibited in the Muslim framework and a wedded lady can't wed second time insofar as the principal marriage subsists.¹¹
- ii. **Muslim lady wedding a Non - Muslim:** A marriage of a Muslim female with a non-Muslim male, regardless of whether he is a Christian, or a Jew or an idolator or a Fire-Worshiper is sporadic under Sunni Law and void under Shia Law.

¹⁰ (1895) 2 Cal 130.

¹¹ Liyaqat Ali V. Karimunnissa, ILR 15 All. 396, 39

(4) Directory Incapacity to Marry (Prohibited Degrees):

This may arise from:

1. **Marrying a woman 'enceinte':** It is unlawful to marry a woman who is already pregnant by her former husband.
2. **Marriage during pilgrimage:** Under Shia Law, Marriage during pilgrimage is void.
3. **Marriage with a sick man:** Marriage with a wiped out man experiencing malady which is probably going to be deadly is invalid. If however, he recovers and the marriage is consummated, it is valid.¹²
4. **Prohibition of divorce (Halala):** When the marriage is dissolved by the pronouncements of divorce three times, re-union is prohibited except after the lawful marriage of the woman with another man and then it's being dissolved after consummation.¹³

PROHIBITED DEGREES AND NIKAH – HALALA

As per the Holy Qur'an, if a husband divorces his wife (for a third time), he cannot, after that remarry her until after she has married another husband and he has divorced her. This second marriage of the wife is called Halala. But lately it has been witnessed that Halala Nikah is being used as a tool to cover up the reckless pronouncements of divorce by the Husbands and as an arrangement for the remarriage of the wife with her former husband. This is done in the form of what is generally termed as 'Halala-fixing', whereby another man agrees to marry the woman, consummate the marriage and then divorce her. Halala has been severely criticized as it harms the dignity of a woman by forcing her into a compromised sexual relationship, which is nothing else than Rape.

The Muslim Personal Law is an area which remains untouched by the Legislature to a great extent. The reason for such non-interference by the Government has been the reluctance of the Muslim community to accept the secular Indian laws to govern their private realms. But in 2011, the Bharatiya Muslim Mahila Andolan,¹⁴ hereinafter referred to as the BMMA, created a stir in the Muslim community when the organization sent a letter to the president of the All India Muslim Personal Law Board¹⁵ regarding the sufferings of the Muslim women resulting due to 'Halala.' But the cases that were highlighted by BMMA revealed the darker side of the practice. The cases involved women who were subjected to Halala not once but seven to eight times simply because their husband pronounced talaq when annoyed, or drunk or when they lost their job. The women said they felt more like prostitutes who were forced to bear husbands for

¹² Ameer Ali : Mohammedan Law, P. 358

¹³ Baille's Digest, 11, 124, 162.

¹⁴ Dr. G. Jambu, Socio-Economic Status of Women- A Study In Warangal District In Telagana State; Human Rights International Research Journal : ISSN 2320-6942 Volume 3 Issue 1 (2015), Pg 24-27

¹⁵ Bharatiya Muslim Mahila Aandolan (BMMA), is an autonomous, secular, rights-based mass organization led by Muslim women which fights for the citizenship rights of the Muslims in India. BMMA was formed in January, 2007. Available at <http://bmmaindia.blogspot.in/p/about-us.html>. (last visited on 23.12.2015).

one-night so as to get back to their first husband.¹⁶ Organisations such as BMMA have demanded a ban on Halala, but only in vain since no action has been taken in pursuance of it. It is disturbing to note that 'Halala service'¹⁷ is flourishing as a business these days and there is no check to avoid the brutalities faced by women in Halala.

Talaq-ul-biddat and Talaq Hasan (Triple – Talaq) and nikah halala

Under Muslim law, a husband has a greater right to divorce than his wife. The divorce given at the instance of husband without the consent of the wife is called *Talaq*. There are two forms in which *Talaq* can be given: *Talaq-ul-sunnat* and *Talaq-ul-biddat*.

Prophet and is further divided into types: *Talaq Ahsan* and *Talaq Hasan*. *Talaq Ahsan* is considered to be the most proper form of divorce. In this form of divorce, the husband has to pronounce divorce in a single sentence when his wife is in the state of *Tuhr* (purity) and has to then abstain from intercourse for a period of 3 months. The *talaq* is revocable before the end of the period of 3 months. In *Talaq Hasan* the husband pronounces the word 'talaq' three times, each after a period of one month and in the presence of witnesses, and after the third pronouncement the divorce is final. If no intercourse takes place between these three pronouncements, the *Talaq* is final once the third pronouncement is made.¹⁸ *Talaq-ulbiddat* means innovated (or sinful) form of Divorce. It is the divorce which is pronounced thrice in one sitting when the wife is in the state of purity. It is recognized only by Sunnis whereas Shias do not recognize it.¹⁹

The rule of Halala is required to be complied with only where the husband has repudiated his wife by three pronouncements as is necessary in triple *Talaq*, such as in *Talaq Hasan* and *Talaq-ul-biddat* consisting of three pronouncements.²⁰

SOCIAL IMPLICATIONS OF TRIPLE TALAQ

While triple *talaq* is used as a shotgun to ruin the married life of a woman, a Muslim man easily escapes from his responsibility of taking economic liability whatsoever, consequent to imposing such type of divorce in India. Even the wife cannot return to her husband soon after receiving the triple *talaq* message due to its irrevocable nature. Thus, Muslim women are highly vulnerable to this whimsical mode of unilateral divorce. The suffering becomes more aggravating and painful for the vast majority of illiterate/less educated women who are dependent along with kids on their husband's earnings only. Clearly, they are

¹⁶ Saumya Parmarhi, Manu Gupta, Our Nation and Its Women; Human Rights International Research Journal : ISSN 2320-6942 Volume 2 Issue 1 (2014), Pg 34-36

¹⁷ The changes in the law of marriage under Muslim law, (Shodhganga, Gandhinagar). Available at http://shodhganga.inflibnet.ac.in/bitstream/10603/8109/1/11_chapter%204.pdf. (last visited on 23.12.2015).

¹⁸ Vangalaravinder, Dr.G.Shailaja, Women Literacy In India After Independence: A Study On Debatable Affinities And Divergences; Human Rights International Research Journal : ISSN 2320-6942 Volume 3 Issue 2 (2015), Pg 125-129

¹⁹ Masroor Ahmed v. State (NCT of Delhi) and Anr., (2007)ILR 2Delhi1329.

²⁰ A. S. Parveen Akhtar v. The Union Of India, (2003- 1-LW(Cr)115).

directly victimized because, no provision was made by any Law, Act or, Court of India to protect these women from the blatant discrimination, economic deprivation and social stigma inflicted on them through triple talaq. It may not be out of place to mention here that India has the second largest Muslim population in the world. After having the hurricane experience of government interference at the initiative of Late Rajiv Gandhi, the then Prime Minister of India in the **Shah Banu case**²¹ and its political aftermath no political party has the guts to raise the issue in an appropriate forum for fear of political backlash and probability of losing potential Muslim vote banks.²²

ISSUES ARISING OUT OF HALALA NIKAH

The number of Halala marriages has suddenly increased to alarming numbers. The women in Halala have also reported abuse at the hands of their husbands.²³ These women are forced to undergo Halala with their near relatives also at times and according to the report by Kamal Khan, NDTV journalist from Lucknow, the business of Halala service is on the rise. He writes in his report that ‘The cleric in Akbarpur has inherited a lucrative business from his father. He conducts the marriage and divorce ceremonies. The business is growing.’²⁴ He further puts across one of the major risks that is posed to a woman in fixed Halala that a number of times the second husband has violated the terms of a fixed Halala and has refused to part with the woman, often because she was prettier than his own wife. Women who deny undergoing Halala often face humiliation in the society and are forced to give up their custody rights over their children. The fear of losing their children had led many women to undergo Halala even unwillingly.²⁵

POSSIBLE SOLUTIONS

A basic reading of this concept makes clear the two apparent problems arising out of this scenario to which the Muslim law does not offer an answer.

- The first is identification as to whether the Halala is ‘a natural course of event’ or ‘a pre-planned’.
- The second problem is that there should be a limit as to the number of times a woman can be subjected to Halala. All attempts to ban triple-talaq in India have met with failure and thus the researcher does not intend to delve into this matter.

Thus, the only solution to these problems seems to be a complete ban on the practice of Halala. But the point is that whether such a practice can be banned or not. Muslim Personal Law was majorly uncodified till the enactment of laws such as The Shariat Application Act, 1937 and The Dissolution of Muslim Marriage

²¹ Mohd. Ahmed Khan v. Shah Bano Begum And Ors, 1985 SCR (3) 844

²² Anusha Rizvi, “The Indian Media’s Focus on Shayara Bano Betrays an Ignorance of Important Precedents”, 11/06/2016, visit <http://thewire.in/42276/the-indian-medias-focus-on-shayara-bano-betrays-an-ignorance-of-important-precedents>

²³ See Mrs. Sabah Adnan Sami Khan v. Adnan Sami Khan, 2010(112)BOMLR1409.

²⁴ Dhaval Kulkarni, Muslim groups plan to meet Prime Minister Narendra Modi for abolition of regressive personal laws, (DNA, Mumbai, Monday, 4 August 2014 - 10:11am IST), (2014). Available at <http://www.dnaindia.com/mumbai/reportmuslim-groups-plan-to-meet-prime-minister-narendra-modi-for-abolition-of-regressivepersonal-laws-2007733>. (last visited on 24.12.2015).

²⁵ Challa Srinivas, Status Of Women Empowerment In India:Problems And Concerns; Human Rights International Research Journal : ISSN 2320-6942 Volume 3 Issue 2 (2015), Pg 122-124

Act, 1939. The reason behind enactment of these laws was to ensure that that customary law does not take the place of Muslim Personal Law. It was also necessary since in the absence of a codified law, customary practices which were divergent from the values and principles of the Quran had emerged.²⁶ Similar rules can be applied in case of Halala Nikah since 'Halala fixing', which is clearly against the rules laid down in the Holy Quran, has now emerged and is being practiced rapidly. A codified law banning this practice can be a solution to the violence and miseries that women in Halala face.

CONCLUSION

The concept of Halala Nikah is degrading to the status of women. Though the practice was introduced with an intention to safeguard the rights of women in a marriage and to save her from unthoughtful divorce, the practice has not been able to serve the intent. Due to the unwritten laws in Muslims, the practice has been misused by Muslim men who forced their wife to marry another man and complete the requirements so that he can have her back. It is difficult to imagine the humiliation that such women have to face while getting married to another person and getting divorce the next day. A ban on this practice can put an end to this humiliation. The Muslim Personal Law Board can introduce another way out for divorced couples to get married again without forcing the wife into any unwanted marriage or relationship of such nature. Thus, the solution in order to fight the evil practice of Halala in order to protect the dignity of Muslim women is a codified law banning it.

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²⁶ Muhammed Ghulam, *Halala : Another Name For Rape Of Muslim Women*, (Dawoodi Bohras, Thursday, Dec 08, 2011 6:24 pm), (2011). Availabe at <http://www.dawoodibohras.com/forum/viewtopic.php?t=6727>. (last visited on 24.12.2015).