



Abominable rapes in the name of *Nikah Halala*: An analytical study of *Halala* with special reference to *Rape Laws in India*

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Abstract

The practice of '*Nikah Halala*' is one of the most misconceived Islamic practices necessitating cohabitation by the woman victim of irreversible talaq with another man, in the name of marriage, so as to enable the first husband to re-marry such divorced woman. In realism, the purpose behind the practice of *Nikah Halala* was to make it difficult for the impulsive man, who pronounces *talaq* upon his wife, to get his wife back into marriage. Thus, the procedure stipulated for *Nikah Halala* must be followed without any pre-design. However, fairly recent incidents have come to light unveiling the physical, psychological and financial exploitation of women in the name of *Nikah Halala*. Such postulation of the practice of *Nikah Halala* has placed it into the category of one of the most heinous crimes under the Indian Penal Code i.e. Rape wherein the distraught female submits her body to be used as a plaything merely to pay for the thoughtless pronouncement of *talaq* by her husband.

Keywords: *Nikah Halala*, rape, *talaq*, consent, remarriage

Introduction

The practice of '*Nikah Halala*' is one of the most misconceived Islamic practices necessitating cohabitation by the woman victim of irreversible talaq with another man, in the name of marriage, so as to enable the first husband to re-marry such divorced woman. In realism, the purpose behind the practice of *Nikah Halala* was to make it difficult for the impulsive man, who pronounces *talaq* upon his wife, to get his wife back into marriage. Thus, the procedure stipulated for *Nikah Halala* must be followed without any pre-design. However, fairly recent incidents have come to light unveiling the physical, psychological and financial exploitation of women in the name of *Nikah Halala*. 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^[1]. Such postulation of the practice of *Nikah Halala* has placed it into the category of one of the most heinous crimes under the Indian Penal Code i.e. Rape wherein the distraught female submits her body to be used as a plaything merely to pay for the thoughtless pronouncement of *talaq* by her husband.

Offence of rape under the Indian penal code, 1860

The definition of the offence of *rape* in Section 375 of the Indian Penal Code, 1860 includes the act of penetration under certain circumstances which have been expatiated under the seven specified descriptions. Among others, one of such circumstances is '*without her (the female's) consent*'. Thus, a man is said to have committed the offence of *rape* if the act of penetration has been done *without the consent* of the female. Some perspicacity to the term '*Consent*' is provided by the

Explanation 2 attached to Section 375 of the Indian Penal Code, 1860.

Section 375, Explanation 2: Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity^[2].

Thus, the common theme of rape trials between two adults is the issue of '*Consent*'^[3]. In *Uday v. State Of Karnataka*^[4], the Supreme Court has quoted several judgments which elaborately define the term '*Consent*'. Consent on the part of a woman, as a defence in a prosecution for rape requires voluntary participation after the exercise of intelligence, based on the situation, but after having freely exercised a choice between resistance and assent^[5]. Thus, the understanding of the term '*Consent*' abridges down to the concept of 'voluntary agreement' between the parties who engage into the sexual act. Consequently, if the act is voluntary, the man is not held liable, however, if the act is involuntary the man is held guilty for the offence of '*rape*' irrespective of the fact that the woman did not physically oppose the act of penetration. The dictionary meaning of the term 'voluntary' is '*done, given, or acting of one's own free will*'^[6]. A pertinent question which arises for consideration here is what would constitute the *free will* of the female. If a female is indentured and

coerced by her soi disant relatives, into the sexual act in the garb of religious customs, can she be said to have been acting of her own free will? Undeniably, she might not even oppose the sexual act, however Explanation 2 to Section 375, Indian Penal Code, 1860 does not even make such physical opposition by the female a pre-requisite while defining the term 'consent'.

Nikah Halala

The word '*Nikah Halala*' nowhere appears in the Holy Quran and thus, refers to an un-Islamic impermanent *Nikah* obligated upon the wife who has been a victim of reckless pronouncement of irrevocable three divorces by her husband. The first two times the *talaq* is pronounced, it may be withdrawn. But the third time it is pronounced, the divorce is irrevocable^[7]. To apply the effect of irrevocable *talaq* to her is to make her *halal* (permissible) for another man whereas she is *haram* for him (the first husband) and it is this "*nikah e halalah* which has been made haram by Allah and His Messenger^[8]."

Nikah Halala, a practice followed by the Muslim community, stipulates that such divorced wife can only be allowed to remarry her first husband if she voluntarily marries another man, consummates the marriage with her second husband and then the man divorces her irrevocably. In reality this practice is a manifest contortion of the Quranic injunction wherein the husband who has recklessly pronounced *talaq* upon his wife, sets up a pliable person to enter into a second marriage with his wife, consummate the marriage overnight and divorce her the next day so as to legitimize her remarriage with the original husband in accordance with the law laid down in the Noble Quran (verse 2:230):

"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 people who know."

Origin of the concept of nikah halala

The word 'Halala' emanates from the word '*Halal*' which means 'which is considered appropriate or permitted within the bounds of Islam'^[9]. Antithetical to the concept of '*Halal*' is '*Haram*' which means 'what Allah has forbidden'. The Quran expounds that once a woman has been divorced by her husband, she becomes '*Haram*' to him and can only become '*Halal*' if someone else marries her and after consummation of marriage decides to divorce her^[10]. It stands to reason that the procedure for making a woman *Halal* for her first husband should be followed without any pre-meditation. The purpose being to catechize men that they cannot be permitted to divorce their wives by pronouncement of *talaq* impetuously in a state of anger or under the influence of intoxication; and if they do, it will be strenuous for them to get back their divorced wife. However, the question if this purpose has been subsumed in the society till present is mootable; an argument against the same being the warped development of the practice

of *Halala* in order to sustain the male domination in the society. Patriarchy reshapes and reinterprets religion which favors its ascendancy^[11]. Customs and religion have been deformed to exercise control and domination over women to conform to the patriarchal needs of the society. Consequently, the pertinent point here is that a *Halala Nikah* cannot be pre-planned. A forced marriage is a form of psychological and emotional violence^[12]. If the divorced wife marries a second husband under a pre-planned *Halala*, her relationship with the second husband and with the first husband (to whom she returns after the performance of *Halala*) will be designated as illegitimate. The Prophet (Pbuh) has cursed both such men who perform *Halala* and for whom *Halala* is performed. The second Caliph Hazrat Umar ruled during his reign that he will punish with stoning to death, those who perform a pre-planned *Halala*^[13].

Misuse of nikah halala and a comparative analysis of halala with the offence of rape under Indian penal code

As more and more human rights disappear under the pressure of mounting fanaticism and traditionalism in many areas of the Muslim world^[14], the practice of *halala* is construed as extremely heinous and offensive to the honor of both the man and woman^[15]. The manner in which this practice has been constructed in the contemporary situation is nothing but a ghoulish glimpse at the Islamic state's duty to rape in the name of religion. It is a practice which is institutionalizing the degradation of women in the garb of religion. Indeed, it will be a travesty of Islamic religion, if the former husband post the inadvertent pronouncement of irrevocable *talaq*, after realisation of his mistake of abandoning his wife, is allowed to stage manage a second marriage of his divorced wife solely to legitimize his remarriage with her. Such postulation of the purpose behind '*Halal-a*' in the Holy Quran is implausible and reduces a woman to a piece of amusement who can be deserted through alacritous utterances of *Talaq* and be bartered after a one-night stand with some stranger sifted out specifically for this purpose. It is difficult to ascertain what a woman goes through emotionally, spiritually and physically in such a scenario^[16]. The Caliph Omar and Abdullah bin Omar regarded such marriages as adultery^[17]. In fact, such marriages have also been denounced by the Prophet:

"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^[18]."

The annihilation of *Nikah Halala* has placed this Islamic practice in equatibility with the offence of *rape* as defined under Section 375 of the Indian Penal Code, 1860. When the companion-less destitute divorced wife, in contemplation of returning to her former husband and saving her marriage, scruples at nothing including her dignity and endures the coercive tryst supported by religion, it can dexterously be etched as 'without her consent'.

The definition of the offence of Rape under Section 375 of the Indian Penal Code, 1860 provides '*without her consent*' as one of the circumstances under which the act of penetration by the male is made punishable. Explanation 2 to Section 375

defines the term 'consent' as an unequivocal voluntary agreement wherein the willingness of the female to participate in the specific sexual act is clearly expressed, and discards the proof of absence of physical opposition by the female to the act of penetration as a test to determine consent/ voluntariness of the female to engage into the sexual act.

Incontestably, the grotesque Islamic practice of *Nikah Halala* fails to lend sufficient opportunity to the divorced wife who has been heedlessly divorced and deserted by her husband. Post the pronouncement of irrevocable *talaq*, when the husband attempts to overcome the canonical scruples of divorcing his dutiful wife by his sincere penitence and elects to espouse the easy recourse to *Nikah Halala* to bring back his wife in marriage, the alternatives available for such divorced wife are exiguous. In such circumstances, when the wife is abandoned offhandedly by the husband, she also yearns to return to the husband and concedes to a pre-planned *Halala* which as per (un)Islamic practices, stipulates that she will only be *Halal* i.e. lawful for her first husband once she enters into a connubial relationship with a stranger for a single night and gets divorced by such stranger the very next day.

When such divorced wife acquiesces to the (presumed) obligatory one night engagement solely for preserving her first marriage, it is difficult to contend and hold that she was acting *of her own free will* or with her consent. Consent being the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former^[19]. In cases of pre-fixed *Halala* marriages, it becomes difficult to construe if the woman has an unconfined right to withhold the act into which she is dragged under compelling circumstances.

The essence of the offence of *Rape*, under Section 375 of the Indian Penal Code, 1860 lies in the 'absence of consent' of the woman and the practice of *Halal-a*, especially the obligatory consummation of the second marriage so as to return to the first husband, also takes place without the consent or free will of the woman, thereby drawing parallels between the offence of *Rape* and the practice of *Halal-a*. It is here that the difference between consent and submission becomes crucial. An act of helpless resignation in the face of inevitable compulsions is not deemed to be consent in law^[20].

In *Rao Harnam Singh, Sheoji Singh v. State*^[21], the Punjab & Haryana High Court laid down the below points while distinguishing between the concept of 'consent' and 'submission':

- 1) A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law.
- 2) Submission of her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent.
- 3) Consent of the girl in order to relieve an act, of a criminal character, like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a

balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure.

Thus, the passive acquiescence by the female when she is not in a position to rationally accept the foreordained practice of *Nikah Halala*, but still becomes a part of it barely to desperately return to her first husband, can only be designated as 'submission' and not 'consent', which must be proved as a defence to the allegation of Rape. The cases of *Nikah Halala*, especially when the female does not voluntarily, in the ordinary course of nature, after getting divorce from her first husband engages into a second marriage, must fall within the definition of the offence of Rape.

There have been numerous reported incidents of the laceration of the practice of *Nikah Halala*. As awful as it may sound, a number of religious scholars are offering themselves up for a one-night stand with divorced Muslim women apparently trying to save their marriages under a disputable Islamic law^[22]. Should such religious scholars who are exploiting woman in the name of misconstrued religious practice of *halala* and charging between Rs 20,000 and Rs 1.5 lakh to participate in *Nikah Halala*, not be held guilty of Rape? Reports also show that there are online services to ostensibly help Muslim women to enter into *halala* marriages to get back together with husbands who divorced them^[23]. Consequently, if the veil off the *Nikah Halala* is lifted, a loutish diabolical practice will be revealed which is primarily designed to exploit women physically in the name of religion.

Conclusion

Tolerance always has limits – it cannot tolerate what is itself actively intolerant^[24].

-Sidney Hook

Islam, one of the greatest of world religions through the 1500 years of existence, has been by far the most misunderstood and misrepresented. The reason for this does not lie outside but it is only due to sheer ignorance of its own followers^[25]. Extensively, due to the non-codification of the Muslim laws, the practice of *Nikah Halala* has also been widely misinterpreted. So much so that Muslim divorced women are increasingly exploited and forced to get into a one-night stand with strangers so as to legitimize their remarriage with their first husband.

The traumatic stitch of *Halala*^[26] is the obnoxious corollary of *triple talaq* which has already been declared unconstitutional (being violative of the fundamental right guaranteed under Article 14 of the Constitution) by the Supreme Court of India in *Shayara Bano v. Union of India*^[27]. After winning a hard-fought battle against instant *triple talaq*, the Bhartiya Muslim Mahila Andolan^[28] is ready with its draft of 'Muslim Family Law, 2017', which, if debated and enacted by the parliament, would bring an end to acts of polygamy and *Nikah Halala*, too^[29]. Appropriately, a codified law imposing a ban on this practice can remarkably leash out the despondency faced by women in the name of *Nikah Halala*.

Regarding the need for law to be flexible so as to adapt to the

changing needs of the society, it has been fairly commented:

'If the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind'³⁰.

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