



Hilla marriage: An analysis

MOHAMMAD MOIN UDDIN

At the outset, I hope the readers would be generous to allow me to quote the very first para preferred by Dr. Tahir Mahmood in the Preface to the first edition of his celebrated book 'The Muslim Law of India'. I quote- "Muslims sometimes awfully misuse their personal law, more in sheer ignorance than deliberately for selfish ends. Non-Muslims often tentatively misunderstand its precepts. The former are unaware, the latter misinformed. Both have to be properly educated". To me, here 'education' means 'right information' and 'a search for truth'. However, this write-up is an attempt to refresh the memory of conscious readers about hilla marriage; particularly the background of this provision and the wide gap prevailing in practice.

We know that in family matters like marriage, dower, divorce, guardianship etc. Muslims are governed by their personal law necessarily reflecting the tenets and prescriptions of their religion. This is constitutionally recognised and judicially enforceable. But surprisingly personal laws sometimes offer some provisions so peculiar and exceptional in nature that nothing comparable exists elsewhere. The provision of hilla marriage is one of such exceptional areas.

The word 'Hilla' is of Arabic origin which translates 'a device' or 'a way out'. Hilla marriage is a device through which a legal bar, to remarry the earlier divorcing husband, is removed. But beware of the fact that such device becomes necessary only in case of triple divorce (whether given at a time or in the Hasan Form leading to the irrevocable stage). If the divorce is given in any other form like one or two revocable talak, Khula, Zihar, Mubarat etc., hilla marriage is not necessary.

According to Muslim Law, a husband may pronounce revocable divorce twice. So if he divorces for the third time, thereafter no chance was left to the husband to recall the decision and take her back as wife, excepting (a) that she had been married to a third person capable of sexual intercourse, (b) that the marriage to the third person must be actually consummated, (c) that the third person divorces her at his own will. Only then after the expiry of her Iddat the former husband (exercising triple divorce) shall be enabled to marry her again and take her back. Thus the marriage with the third person is a device for validating the marriage with the former husband; which is why it is called hilla marriage.

Because of the precise and

unequivocal prescription of this provision in the holy Koran (verses- II: 229 and 230) there had been almost no debate about the propriety of this provision among the early schools of Muslim Law.

Apparently it is a harsh provision entailing a hardship on the way to their reunion but we shall be surprised to know that this hardship was aimed at solving a greater social evil prevalent in the pre-Islamic society. It was customary with an Arab during the Jahiliyat days to divorce his wife as many times as he liked and then take her back as often as he pleased. Womenfolk were absolutely helpless in the face of men's tyranny. It was to prevent such barbarous practice that the law of talak-e-bain was interposed and made the dissolution irrevocable leaving the husband to stew in his own juice.

Some western writers like Sautayra and Sedillot observe that hilla marriage is a very wise provision to check the whimsical exercise of divorce. To quote Syed Ameer Ali, "Sautayra and Sedillot agree with the Moslem jurists in thinking, that this rule (Hilla) was framed with the object of restraining the frequency of divorce in Arabia. Sedillot speaks of the condition as "a very wise one", as it rendered separation more rare by imposing a check on its frequent practice among the Hebrews and the heathen Arabs of the Peninsula. Sautayra says that the check was intended to control a jealous, sensitive, half-cultured race by appealing to their sense of honour".

That is, psychology of the husband is the target of this rule. The device of hilla always warns the husband that if you pronounce the divorce (for the third time) you cannot revoke it anymore; also you will not be able even to remarry your wife right away. If you so wish you will have to pay a penalty - which due to human nature, you will never like - the penalty of finding your wife in somebody else's bed and remarrying her only if and when she is lawfully free of the second marital bond (the penalty is known as halala).

What is the effect of non-compliance with this rule of halala? Is the remarriage with the former husband without hilla marriage merely irregular or totally void? In an earlier case of Rashid Ahmed v. Anisa Khatun (1931) 59 I.A. 21, one Ghiyasuddin pronounced a triple divorce in abominable form and executed a deed of divorce accordingly. The couple afterwards lived together for 15 years and five children were born. There was no proof of hilla marriage. The Privy Council held that the talak being triple and there being no intermediate marriage, the bar to remarriage was

not removed. In these circumstances, the marriage was void and the five children were illegitimate.

The Muslim Family Laws Ordinance 1961 (later on referred to as MFLO 1961) is acclaimed for bringing radical changes to the traditional Muslim law of divorce in Section 7. But this law also did not do away with the requirement of hilla marriage altogether. Section 7(6) holds that there is no bar for a wife, whose marriage has been terminated by talak effective under this section (complying all the formalities), to remarry the same husband without an intervening marriage with a third person, unless such termination is for the third time so effective.

A careful reading of this subsection reveals that the necessity of hilla marriage arises only if (1) the marriage has been terminated by talak effective under this section, and (2) such termination is for the third time so effective. It is mentionable here that, a talak to become effective under section 7, the divorcing husband must give a notice to the chairman, who shall for the purpose of reconciliation form an arbitration council. If the reconciliation attempt is baffled, talak becomes effective after 90 days from the receipt of the notice of talak. If this procedure is followed for the third time, hilla becomes necessary under section 7 sub-section 6 of the MFLO 1961. In the following two diagrams the relative contradiction is shown between the existing law and the original Muslim Law as regards hilla marriage.

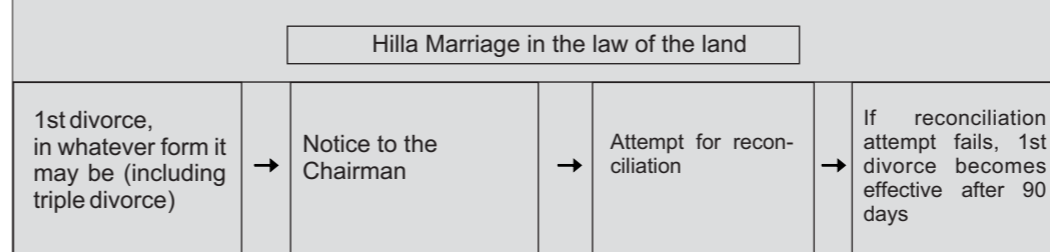
Here, to enter into a valid marriage with the former husband, a hilla marriage with a third person is obligatory.

So, undoubtedly there is a gulf of difference between the original Muslim Law and the existing law of divorce so far as the requirement of hilla marriage is concerned. Section 7 of the MFLO 1961 clearly allows remarriage after any form of divorce (including triple divorce) without an intervening marriage with a third person for the first and second time; which is not so possible under Muslim Law if the initial pronouncement is for the triple divorce. In this circumstance, we must remember the general principle of law i.e. if the state law is in conflict with personal law, state law will prevail.

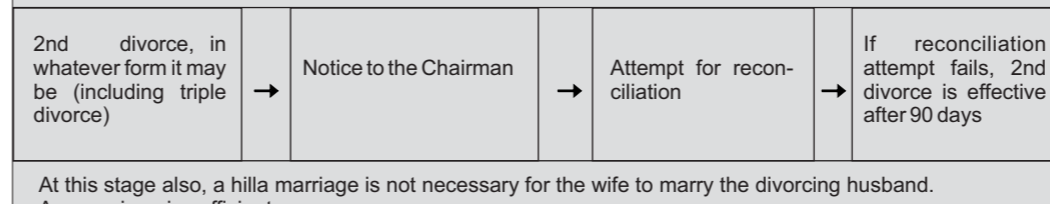
Let us now recapitulate the existing malpractices and misconceptions regarding hilla marriage in our country, the rural areas in particular.

(1) People think that triple divorce is the only way to sever the marital tie, and therefore, they mistakenly become accustomed to this type of

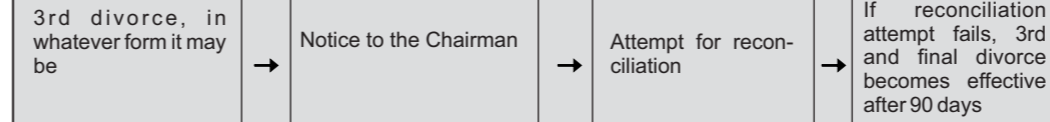
DIAGRAM 1



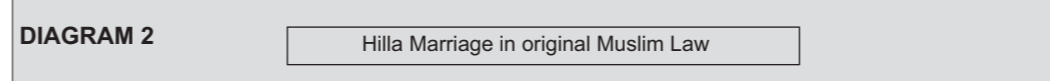
At this stage, no hilla marriage is necessary for the couple's reunion. Only a formal marriage will do.



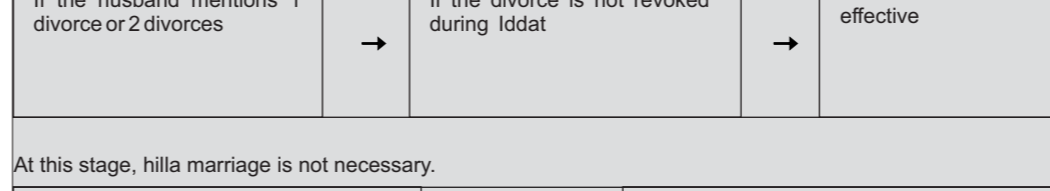
At this stage also, a hilla marriage is not necessary for the wife to marry the divorcing husband. A remarriage is sufficient.



At this stage, hilla marriage is not necessary.



At this stage, hilla marriage is not necessary.



divorce instead of approved forms of divorce. Undoubtedly, the triple divorce triggers off the hilla marriage in motion, though preliminarily according to original Muslim Law (also finally as per the existing law).

(2) Although due to their strict faith upon their religious prescription people think the hilla marriage obligatory, they take it as a fictitious marriage, not a bonafide intervening marriage - often in the nature of 'marriage of convenience' at the whims of the earlier husband or matabbars. Whereas, Muslim Law contemplates a bonafide intervening marriage and also a bonafide divorce by the intermediate husband - not with the intention of making her available to the first husband. If the wife gets solace of mind in the intervening husband and the husband also feels corresponding love and affection to her, he is not

bound to divorce her for making her available for the first husband, notwithstanding any contract to the contrary.

(3) There is a misconception even among the literate people that there is nothing like hilla marriage in our legal paradigm. Certainly there is! Unless and until the necessity of hilla marriage is expressly obviated by a clear legislation, it remains an enforceable provision under the auspices of Muslim Family Law.

Finally, as a conscious student of Muslim Law, I like to remind the readers that divorce in general is seriously discouraged in the Koran and the Sunna; of course, it is allowed as a necessary evil. Prophet said - "Talak is the most detestable of all permissible things before the Almighty Allah". Hilla marriage, which imposes a deliberate hardship, is also a device to discourage frequent exercise of divorce. We know that the best con-

struction of laws is one when a law is read with the law-giver's own words and intention.

Whatever be the law, hilla marriage should not become an engine of oppression to women at the hands of matabbars and fatwabaz people. It is only our courts, higher or lower, that can decide in a fit case whether in the circumstances of that particular case it is necessary or not. Before condemning the device of hilla marriage, our first plan of action should be to make people aware of the negative consequences of divorce, the triple divorce in particular. To obviate the sufferings of a penalty, we should, at first, prevent ourselves from committing the offence itself. Shouldn't we?

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LAW news



NRIs in US get access to RTI

Since October 2005 the RTI Act has been extensively used in India to obtain information from Government offices. Now nearly two years on, the Embassy of India in Washington DC has implemented the Right to Information bringing its operations fully under the Act's purview. This means, any Indian citizen with a valid Indian passport can now file an RTI application to the Public Information Officer at the Indian Embassy by paying a fee of 24 cents.

Battling corruption

A software programmer based in Maryland, Arun Gopalan has been in the US for three years now. However, he still kept abreast of the news in India especially that of the enactment of the Right to Information Act in 2005.

"The RTI act was implemented in India in October 2005 and at that time I was here and I was sort of feeling left out because anti-corruption has been an issue that has always been close to my heart. I have always wanted to do something about it," said Arun Gopalan, Member, Association for India's Development.

Thanks to the efforts of RTI activists in the United States, now Non-Resident Indians (NRIs) like Arun who live in America can also exercise the Right to Information (RTI). In April this year, after months of campaigning by RTI activists from India and America, the Central Information Commission issued an order bringing the Indian embassy in Washington DC under the purview of the RTI Act, 2005.

"The RTI act has now been implemented at the embassy of India in Washington. Any Indian national based in the United States, this applies to NRIs too, and who are based here can apply for information under this Act," said Rahul Chhabra, Public Information Officer, Indian embassy, Washington DC.

Reaching out

The RTI Act 2005 empowers Indian citizens to question government decisions, and makes it mandatory for the government to disclose all information pertaining to those decisions.

All one needs to file an application in the United States is a plain sheet of paper. You can type or hand-write the questions. Mention that you are exercising your right under RTI 2005. Attach personal check for 24 cents, equivalent to Rs 10. Checks should be made in favor of "Embassy of India, Washington DC". Attach a copy of the first page of your passport as proof that you are an Indian Citizen.

Send the application and the cheque along with the return address to the Public Information Officer (PIO) at the Embassy of India in Washington DC.

Arun was one of the first NRIs living in America to file an RTI application. Ironically, his application raised questions about what the embassy was doing to make NRIs in America aware of their new rights. "The RTI Act was implemented by the Indian embassy but what was happening was that this information was not reaching the people it was supposed to. That is basically the NRI population here in the US."

So I filed an application with the embassy asking them when this information was going to be available on the web site, who was responsible for it and whether they had set up a time frame by when it was expected to be up. And boom the next day the information was up on the website," said Arun Gopalan, Member, Association for India's Development.

Over a dozen RTI applications have been filed over the last month here at the embassy in Washington DC. RTI activists are now taking inspiration from America's Freedom of Information Act.

In 2005, over 20 million Freedom of Information Act requests were processed here in the US and activists are now hoping to see a similar support for India's Right to Information Act from Indians living here in the United States.

Source: Youth Assembly of Asia-e group.

HUMAN RIGHTS analysis



UN Declaration on the Rights of Indigenous Peoples: Recognising the Rights of Peoples

"Over the years, we have witnessed the immense obstacles certain persons and groups face in enjoying their human rights fully. Among the groups most at risk and in need of protection are indigenous peoples, who have suffered perennial prejudice and discrimination." Statement by 28 Independent experts of the UN Human Rights Commission, Human Rights Day, 10 December 2004.

The United Nations Declaration on the Rights of Indigenous Peoples (DRIP) is once again up for debate in the United Nations General Assembly (GA). DRIP has been in the development process for over 20 years, consulted on by states, experts, indigenous peoples and organisations. In its own words, DRIP presents "minimum standards for the survival, dignity and well being of the indigenous people of the world" (article 42). Indigenous peoples live everywhere in the world and occupy every sector of society, yet "the vast majority of Indigenous peoples, hundreds of millions, live and die in poverty every day." 1 Passing of the DRIP by the GA is crucial; it can not be delayed again.

On 26 June 2006 the UN Human Rights Council finally adopted a resolution on DRIP and the declaration was forwarded to the GA for final approval. If adopted, the declaration will represent a major step towards confronting the widespread human rights violations faced by millions of Indigenous peoples around the world. The DRIP is not legally binding; it addresses the key areas for improvement of the human rights situations of Indigenous peoples.

The adoption of DRIP was stated by the GA on 27 November 2006, ignoring the Permanent Forum on Indigenous Issues' appeal to the GA (16 October, 2006) "to adopt the

Declaration without delay at its present session." The Namibian delegation put forth a non-action resolution that was supported by the UN General Assembly's Third Committee and therefore, states have to come together again to vote before the end of the 61st session of the GA in September 2007. The delay in adopting DRIP is a serious setback in the universal recognition of the rights of Indigenous peoples. Currently, the only international treaty that addresses the rights of Indigenous peoples is Convention 169 of the International Labour Organisation.

The Universal Declaration of Human Rights guarantees fundamental rights of all people, but specific Indigenous group rights still need to be recognised as they are in DRIP. The key themes of DRIP include: dignity and equality, maintenance and continuation of distinct cultural practices, children's rights to be brought up in their culture, development consultation, land use and self-determination.

A prevalent experience faced by Indigenous peoples around the world is "systematic discrimination" as named by Rodolfo Stavenhagen, UN Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples. Systematic discrimination refers to how Indigenous peoples are excluded from all levels of society, in all places that Indigenous peoples live, making them the poorest of the poor and most excluded from accessing resources for basic needs. It must be emphasised that this systematic discrimination exists in all places where Indigenous peoples live, including the world's most developed and seemingly human rights friendly



countries such as Canada.

Adoption by the GA would in no way solve the issues of Indigenous peoples, but as DRIP itself states it is "as a standard of achievement to be pursued in a spirit of partnership and mutual respect." Besides systematic discrimination, there remain vast protection gaps for Indigenous peoples between social, cultural, economic and political rights and the reality of their lives. DRIP presents goals to be sought after.

Cooperation is required to successfully pass DRIP, not only among Indigenous peoples and organisations, but within the international community as well. As Rodolfo Stavenhagen stated 13 April 2005 at an Indigenous forum at the 61st Session of the United Nations

Commission on Human Rights, on the topic of the wide spread human rights violations faced by Indigenous peoples, "this is not only, I believe, a concern of and for Indigenous peoples around the world, but it is a concern for every body in the world who is interested and at all concerned with human rights of human beings everywhere."

1 Milliani Trask at Advancing the Human Rights of Indigenous Peoples: A critical challenge for the international community, Voices from a forum at the 61st session of the UN Commission on Human Rights 13 April 2005.

Source: Asian Forum for Human Rights and Development.

Parties unwilling to sit with EC with ban on politics

The Election Commission's (EC) initiative to hold dialogue with the political parties on proposed electoral reforms has apparently failed due to the parties' unwillingness to sit in such dialogue amid the embargo on indoor politics. "We are to wait for lifting of the embargo on indoor politics," Election Commissioner Muhammed Sohul Hussain told reporters at his office. The EC last week announced that any political parties could sit with the EC to discuss the draft proposals for electoral reforms by sending representatives despite the embargo on indoor politics. Law and Information Adviser Mainul Hosen ay reiterated the government's 'no objection' if the political parties discuss with the EC on the proposed electoral reforms. But no political parties, not even the name-only ones, expressed interest in sitting for dialogue with the EC amid the embargo on indoor politics, EC sources said. "We want to hold discussion with the political parties. But so far we know none of the political parties want to sit in dialogue so long as the embargo on indoor politics remains effective," the election commissioner said. -- *The Daily Star, July 2.*

Over 200 hill plunderers identified in Chittagong

Department of Environment (DoE) has primarily identified 155 hilly areas in Chittagong Division that were subjected to illegal hill cutting, and listed over 200 individuals, organisations and business groups as plunderers of hills. Former fisheries and livestock minister Abdullah Al Noman and detained Chittagong City Corporation (CCC) Mayor ABM Mohiuddin Chowdhury, Chittagong City Corporation (CCC), Kafco and KEPZ and Abul Khair Group are on the DoE list. The list is based on information collected by seven DoE teams through field visits in Chittagong, Cox's Bazar and the three hill districts of Rangamati, Khagrachhari and Bandarban, DoE Director Nazmul Hoque told The Daily Star. They might finalise the list today and send it to the Ministry of Environment. The DoE director said they would continue mobile court drives in the affected areas and take legal action against all those responsible for hill cutting. In the port city, hills were devoured for setting up housing projects, brickfields, hospitals and other establishments in around 48 areas. Fifty people and thirteen organisations and commercial firms were involved in the evil practice. The DoE teams detected 27 incidents of hill cutting in Sitakunda, 16 in Satkania, 14 in Rangunia and Chandroghonia, 14 in Hathazari, 4 in Chandanai, 5 in Anwara, 5 in Banskhal, 2 in Mirsarai, 4 in Lohagara and 7 in Cox's Bazar, 5 in Rangamati and 4 in Khagrachhari, DOE sources said. -- *The Daily Star, July 3.*

Govt to show zero tolerance for illegal tree felling: CA

Chief Adviser Fakhruddin Ahmed said the government will show "zero-tolerance" to stopping indiscriminate felling of trees and destruction of forests in the country. Referring to the arrest of some top forest officials on charges of corruption, he asked the officials and employees concerned to remain 100 per cent accountable in conserving trees and forests to avert such action. "Stern legal actions will be taken if any official and employee's negligence is proved in protecting trees and forest resources," he warned. The CA made the remarks while speaking at a function on the closing of the month-long countrywide National Tree Fair 2007 at Osmani Memorial Auditorium. A total of 48 individuals and institutions in 16 categories were given Chief Adviser's National Award 2006 in Tree Plantation while one individual got a special award for outstanding performance in tree planting. The CA distributed the award among the first-position holder in each category and the special award to Kartik Pramanik of Chapainawabganj. Environment and Forest Adviser CS Karim presided over the function. Acting Secretary of the Environment Ministry AHM Rezaul Kabir delivered the address of welcome. The head of the caretaker government said if necessary, the existing laws will be amended to make tougher provision to protect trees and forests. -- *Unb, Dhaka, July 3.*

CHT district councils may be restructured

The caretaker government is going to bring changes in the three Hill District Councils (HDC) formed by the past four-party alliance government, sources in the CHT affairs ministry said. The newly selected chairmen and councillors of the district councils may take over within a couple of days, added the sources. However, the Rangamati, Bandarban and Khagrachhari district councils did not receive official orders as of yesterday, officials of the HDCs said. Fax messages from the ministry regarding the changes are being expected within 2/3 days. Rangamati and Bandarban district councils have been dissolved entirely while Khagrachhari district councillors have been replaced and its chairman retained, a source in the CHT affairs ministry said. The ministry sources said retired chief engineer of Public Works Department (PWD) Jagat Jyoti Chakma and Prof (retd) Thanjama Lusai have been made chairmen of Rangamati and Bandarban district councils. Monindra Lal Tripura is to remain chairman of Khagrachhari district council. -- *The Daily Star, July 4.*

EC plans dialogue barring small parties

The Election Commission (EC) this time plans to keep in-name-only political parties out of the talks on its proposals for electoral reforms. It might invite around 20 political parties to the dialogue and most of those would be selected using the criteria set [in the draft proposals] for registration, said sources in the EC Secretariat. To be registered with the commission, a political party must have representation in any of the parliaments since 1973 or offices in at least half of the existing 64 administrative districts. "Political parties that are fit for registration with the commission will be given priority," Election Commissioner Brig Gen (retd) M Sakhawat Hossain told reporters at his office. Only later could some other political parties be allowed to express their opinion on the proposed electoral reforms, he added. The immediate past EC led by Justice MA Aziz had invited 116 political parties including a large number of organisations in name only to a dialogue on the preparation of the voter list in 2005. Excepting the then ruling four parties including the BNP and Jamaat-e-Islami, most of the major political parties boycotted the series of discussions that turned out to be a complete farce. -- *The Daily Star, July 4.*

Mannan Bhuiyan sued for illegal land registration

A case has been filed against BNP Secretary General Abdul Mannan Bhuiyan and four others with a local court for having 10 acres of land registered illegally. According to the first information report (FIR), Bhuiyan, a former LGRD and cooperatives minister, had the land in his name to set up an office for BNP at Badarkhali in Chakoria in 2002. Badarkhali Krishi Uponibesh Samabay Samity owns the land where the then ruling party built the office at a cost of Tk 10 lakh in 2003, it added. Moulavi Abdur Rahman and Kafil Uddin, members of the Samity, filed the case on May 4. They alleged that Salauddin Ahmed, former state minister for communications now on detention, assisted the BNP general secretary in the act violating the cooperative law. Bhuiyan was aided and abetted also by the then president and general secretary of the Samity. The complainants said the accused have been pressing them to withdraw the case since its filing. Meanwhile, UNB reports that separate extortion cases were filed yesterday against former BNP lawmakers MAH Salim in Bagerhat and Sardar Shakhawat Hossain Bakul in Narsingdi. Razia Makbul, a health worker, filed the case against Salim and six BNP leaders and workers with Kochua Police Station. With this, 12 cases have been filed against Salim on charges of extortion and land-grab. -- *The Daily Star, July 4.*

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