

Divorce through Modern Means of Communication: An Analysis from *Shariah* and Legal Perspective

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Abstract:

Extensive use of social media such as SMS, Whatsapp, Email, Skype, Facebook and twitter has brought ease in life. Meanwhile, they also adversely affected certain aspects of human life and married life is one them. The ratio of divorce has significantly increased after the excessive reliance on these tool. Islamic law of divorce and divorce under Muslim Family Law Ordinance 1961 (MFLO) of Pakistan has provided a certain procedure to be followed in order to effectuate it. According to some contemporary jurists, the divorce through these modern means of communication does not take place but other jurists consider it to be valid from Sharia perspective on the analogy of written divorce with certain precautions. This study is focused to analyze the status of the divorce given through any modern means of communication from Shariah and legal perspective. The research is designated to explore, through qualitative content analysis, whether the divorce given through modern means of communication, for instance SMS or Whatsapp is valid from *Shariah* perspective or not. Further it investigates how the Family Laws and Courts of Pakistan are treating the divorce given through modern means of communication and what is the status of such divorce in other Muslim jurisdiction.

Keywords: Pakistan, divorce, communication, modern means, *Shariah*, laws

INTRODUCTION

Technological revolution that occurred in recent years has brought major changes in our society. The development of information and communication technology has a positive impact on building and maintaining relationships with other people throughout the world. It also has potential benefits like sharing information anywhere anytime, enabling people to communicate without borders, spending leisure time, online learning and so on. On the other hand, these modern means of communication have adverse effects on every aspect of human life including personal relationships, family and marital life of the spouses (Drago, 2015).

Introduction of modern means of communication has played a vital role in changing behaviors, perceptions, and attitudes especially among young couples. Existing literature is evident that modern communication devices has played a vital role in increasing the divorce rate throughout the world. Muslims around the world are also facing new issues and challenges in the arena of family life as the divorce through Modern means of Communication is breaking the taboos associated with the procedures provided for the divorce in *Shariah*. Islam has provided a specific and detailed recommended procedure for divorce which is adopted by Family Laws in Pakistan too. Therefore, the divorce through modern means of communication requires an appraisal from *Shariah* perspective and evaluation to determine its conformity with Family laws of Pakistan. Hence this research aims to briefly describe the law of divorce in *Shariah* in part II and then it evaluates the

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validity of the divorce given through modern means of communication both in Shariah and legal system of Pakistan in Part III.

THE LAW OF DIVORCE IN SHARIAH

Marriage is an important institution of *shariah* and law of divorce is a logical sequence of the status of Marriage. In *Shariah* marriage is regarded as a civil contract and the parties are given right to dissolve it under specified circumstances. A thorough study of the law of marriage and divorce in Islam reveals that marriage tie is recommended to be respected and continued till the possible extent. In case of dispute and disagreement between the spouse, their relatives, well-wishers and the court is advised not to leave any stone unturned for the subsistence and continuation of the marriage (Ahmad, 2003). But if after all these efforts living together is not possible divorce is allowed as a last resort. Prior to Islam Arabs used to exercise the unilateral right to divorce wives and revoked the same frequently. Islamic law did not ban the practice of unilateral divorce prevalent in Arab at that time but imposed a number of restrictions on the exercise of right of divorce. It provided a definite procedure and a proper time for divorce and after divorce husband is obliged to pay maintenance and dower to the divorced wife (Faizi, 1974).

So under Islamic law, a man cannot divorce and take back his wife whenever he pleases. Divorce although permitted but not favored in Islam and Prophet Muhammad (PBUH) is reported to have said that, "of all the permitted acts divorce is most displeasing to *Allah* (Abu Dawud, Kitab al Talaq, 2278)". Prophet (PBUH) also warned his followers regarding divorce. He (PBUH) is reported to have said "Curse of Allah be upon him who repudiates his wife capriciously"

It is narrated from "*Mu'adh bin, Jabal* that *Allah's Messenger* said to him, *Mu'adh*, *Allah* has created nothing on the face of the earth dearer to him than emancipation, and *Allah* has created nothing on the face of earth more hateful to him than divorce (Abu Dawud, Kitab al Talaq, 2172-73)." It is clear from *Sunnah* that *Islam* does not regard divorce as desirable. The Holy Prophet (PBUH) is reported to have said that among all the permissible things in *Islam*, divorce is the most hateful act in the sight of *Allah* (Emery, 2013).

THE LAW OF DIVORCE IN SHARIAH; RULING FROM QURAN

The law of divorce is very sensitive part of *Islamic* law. Certain basic guidelines are provided in *Quran* and *Sunnah* of Prophet (PBUH) and detailed rules are discussed by the classical jurist in *Fiqh*. The Holy *Quran* discusses the divorce in the following verses.

"O Prophet! When you divorce women, divorce them at their 'Iddah (prescribed periods) and count (accurately) their 'Iddah (periods) and fear Allah your Lord (Quran 65:1).

"A (revocable) divorce can be pronounced twice only: then, either honorable retention or kind release should follow (Quran 2"229)."

"Then, if he divorce her (irrevocable) after the third time, she has no longer remain lawful for him unless she marries a man other than him, Quran 2:230)."

In another verse *Allah Almighty* says that,

"When you have divorced women, and they have approached the end of their waiting periods, then, either retain them with fairness or release them with fairness. Do not retain them with wrongful intent, resulting in cruelty on your part, and whoever does this, actually wrongs himself. Do not take the verses of Allah in jest, and remember the grace of Allah on you and what He

has revealed to you of the Book and the wisdom, giving you the good counsel thereby, and fear Allah, and be sure that Allah is the One who knows everything (Quran 2:231).

It may be analyzed from the above- mentioned verses that a man can divorce his wife unilaterally and the person doing so must wait for an “appropriate time” which according to jurists is the time of cleanliness which increases the chances of their reunion by physical intimacy. From the same verses, certain class of jurists interpret that divorce given in menstruation period does not count as same is not recognized in the *Holy Quran*. Moreover, a man can pronounce divorce twice and this possibility is given to him only to make a wise decision that after third pronouncement, the divorce will become irrevocable and it will not be lawful for them to live together (Ahmad A. , 2007). Therefore, divorce is permissible only twice during the lifetime of the husband after that wife will be permanently alienated from him. This possibility is only given that husband can make conscious decision whether he still wants to live with his life or not and husband should also realize the effect of divorce on him and his family life. This possibility is also given to stop the practice of uncountable divorces given by husband to his wife as in earlier times. The rule was provided to check the practices of *Arabs* where men, in order to harass their women, used to pronounce as many a divorce as they desire but used to revoke it before the expiry of *Iddah*. After revelation of the above *verse*, it became clear that divorce can only be revoked twice within the period of *Iddah*. The Right of revocation of divorce expires with expiration of *Iddah* period. However, they can remarry if willing. If the divorce is pronounced third time then even remarriage shall not be allowed except with intervening marriage (Mansoori, 2012). These provisions demonstrate that the revocation of marriage through divorce is allowed only if all reconciliatory measures have failed and that it follows the procedure prescribed in the *Quran* and *Sunnah* in this regard. In *Qur’an*, *Allah* has not mentioned any specific phrases by which divorce takes place. It indicates that divorce takes place with any word which conveys the meaning and intention of divorce, explicitly or implicitly (Ahmad N. , 2009).

The Law of Divorce in *Shariah*: Ruling From *Sunnah* of Prophet (PBUH)

The law of divorce provided in *Quran* is further reinforced by the Hadith of the Prophet wherein he warned that ‘of all things which have been permitted, divorce is the most hated by Allah’. In *Shariah* divorce is permissible under unavoidable circumstances, when living of the spouses together become impossible to observe the limits of *Allah* and to fulfil the marital responsibilities. *Abu Huraira* (God be pleased with him) reported *God’s Messenger* saying, “Every divorce is valid except the divorce of the *Ma’tuh* (Idiot and Lunatic person) whose reason is overcome (Tirmidhi, Kitab al Talaq, 1191). It is clear from the *Hadith* that divorce is valid from person who understands its consequences and have intention. *Abu Hurairah* reported the *Apostle of Allah (May peace be upon him)* as saying: There are three things which, whether, undertaken seriously or in jest, are treated as serious: Marriage, divorce and taking back a wife (Abu Dawud, Kitab al Talaq, 2189).

Ayesha (may God be pleased with her) reported, “I heard the Messenger of God Say, There is no divorce and no emancipating by compulsion; that is, for one man to say to another, free your slave, and divorce your wife” (Abu Dawud, Kitab al Talaq, 2188). In a case where wife was not willing to live with her husband but husband was not divorcing her. The relatives to wife took him at a lonely place and threaten him and made him to write a letter of divorce to his wife. The man, for fear of his life wrote down the letter of divorce. Such divorce is not valid and will not be effective as narrated

in *Hadith*. It is clear from the tradition mentioned above that divorce is only valid by someone when the meanings of divorce articulated verbally or in writing within the framework of *Quran* and *Sunnah* (Bahadur & Hussain, 1977).

DIVORCE THROUGH MODERN MEANS OF COMMUNICATION: SHARIAH PERSPECTIVE

Classical Muslim jurists agree that divorce whether pronounced orally or in writing is equally binding and enforceable. Similarly, majority of the contemporary Muslim scholars agree on the permissibility of *divorce* by way of modern means of communication and technology on the analogy of written divorce. They base their ruling on the classical *Fiqh* that a divorce sent by a husband in writing to his wife is permissible if it fulfills the requirement of written divorce as provided in classical *Fiqh*.

The eminent jurists from all the Sunni schools of thought (*madhahib*) agree on the validity of written divorce, despite disagreeing on details of written divorce. According to the *Hannifin* School of thought, a written divorce may be *mustabinah* (clear manifest handwriting with a permanent trace such as on paper) or *ghair mustabinah* (unclear without permanent traces). A written divorce, with clear and permanent traces, issued and addressed in the name of wife is regarded an explicit divorce (termed as *marsumah*) and is enforceable even if the husband did not intend it provided that it is directly addressed to wife with the words that “*you are divorced*,”. Whereas written divorce, with clear and permanent traces, without addressing in the name of wife is only enforceable if intended by husband. According to *Hanfi* law when written divorce is *ghair mustabinah*, means unclear without permanent traces (termed as *Ghair al marsumah*) it is not enforceable even husband has intention of divorce and addressed to his wife.

In the *Shafi* School an explicit written *talaq* without intention is invalid. *Jafari* Jurists, on the other hand, do not regard a written *talaq* as valid except in the case of a husband who is unable to speak. The Shia restrict the sphere of *talaq* in its overall application to the maximum extent and impose severe restrictions on both the husband and the wife. *Shia* law do not recognize divorce in writing and divorce should be valid if husband pronounced it in the presence of two witnesses. According to the majority of jurists including the *Shafis*, *Malikis*, and the *Hanbalis* divorce in written form is valid if husband gives with the intention of divorce to his wife (Zuhayli, 1989).

It is stated in *Al-Bukhari* that *Umer Farooq* (May God be Please with him) reported that Apostle of Allah (May peace be upon him) said that Actions are to be judged only by intentions, and a man will have only what he intended (Ali, 1965). In the light of above mentioned Tradition of *Holy Prophet (PBUH)* it is clear that if a husband emailed a letter to his wife or sent a message of divorce through SMS or Whatsapp stating terms to the effect I divorce you, whether he send seriously with intention of divorce or send it only in jest, divorce would be established between the spouses in the light of *Sunnah*.

When a husband writes in the e-mail or through other modern communication devices “*Talaq*” and sends it to the wife, then this becomes a formal letter of divorce in writing establishing the divorce between them. As soon as the husband’s email, message or whatsapp is sent, it becomes *Marsumah* because it is addressed to the wife’s contact number or email so divorce is effective either he has intention of divorce or not. If he had not sent it but just typed ‘*Talaq*’ then it will depend on the intention of the husband. Divorce in writing and divorce typed on an electronic device or other

modern means of communication have same effect because divorce typed on a message falls under the category of divorce in writing. Majority of jurists including the *Shafis*, *Malikis* and the *Hanbalis* “are of the opinion that divorce in writing will only be effective if it is coupled with intention. Thus, in the case of divorce through SMS, following the views of the majority jurists, it will only be effective if it is coupled with intention on the part of the husband to divorce his wife”. The intention of the husband may be proved from the surrounding circumstances. Any word written on paper or typed on mobile phone does not denote divorce alone but may also mean something else, hence intention is requisite in such cases of divorce (Kaur, 2014).

As oppose to this view, another group of contemporary scholars state that validating divorce through these modern means have serious legal and moral implications. Technically, SMS/Whatsapp message or email qualifies as a form of writing with a semblance of permanency and may also be printed. However, the analogy of divorce through SMS/Whatsapp on the written divorce creates many subterfuges and loopholes. If divorce through these means is validated on the basis of *Qiyas* upon written divorce it would be a case of *Qiyas ma’ al-Faariq* (dissimilar/incongruent analogy) and therefore invalid. This is because the written divorce is verifiable (*Ithbaat*) through hand writing experts (as such it stands to reason that a wife would recognize her husband’s handwriting), which is nearly impossible to determine in case the divorce is sent through these means as the messages are electronically generated and lack permanency. Rather the crystal display of the mobile phone could be categorized under *ghair mustabinah* for the writing has no permanency. Thus, the ruling on the validity of divorce by SMS does not fulfil the requirements of written divorce as approved by the classical paradigm (Mathee, 2014). Moreover, divorce by SMS / Whatsapp messages etc. opposes the principle of *Masalih al-Mursala* (General welfare) and may also be invalidated on the basis of doctrine of *sadd al-dhari’a* (blocking the means that may lead to some harmful or prohibited act) as it opens the abuse door.

Contemporary *Fatawa* on Divorce through Modern Means of Communication

The issue regarding the validity or invalidity of divorce through the modern means of communication became the subject of discussion in Muslim world when a man in Dubai divorced his wife through SMS. Scholars in UAE issued *Fatawa* that a marriage may be terminated through SMS/Whatsapp messages and also declared that divorce sent through SMS on mobile phones, e-mails and other electronic communications is valid and enforceable. According to *fatwa* of Dubai’s Department of Islamic Affairs and Charitable Activities, SMS message sent by a husband to his wife containing the word “divorce” is enough to make the divorce valid (Munajjad, 2015). The fatwa was issued in response to the husband’s query regarding the validity of such divorce.

In 2003, the 59th National Council for Malaysian Islamic Affairs Fatwa Committee 16 *Muzakarah* concluded that divorce via Short Messaging System (SMS) is the form of divorce in writing. So, if the husband sends it with intention through SMS, e-mail or other such devices that divorce is valid. In Saudi Arabia the issue of divorce through modern means of communication has been thoroughly discussed. The top Saudi *Ulema* who follow the *Hanbali* school of thought has put together the arguments of the majority Sunni scholars and arguments of minority *Ulema* such as *Ibn Taymiyah* and *Ibn Qaiyam* and ruled that divorce sent from husband by using any modern mean like SMS, E-mail etc. results in the termination of marriage bond between the spouses. (Munajjad, 2015).

According to the *Dar-ul-Ifta* Egypt, if a person intending to give his wife one *talaq*, typed "I give one talaq to you" in his cell phone SMS, but after thinking over, changes his mind and does not send the SMS at all, it will amount one talaq whether the SMS was sent or not. In Islamic law, the term "SMS" is a text which, if written by husband with the intention of divorce, will be valid as written divorce. The *Ulama* of the Western Cape Muslim Judicial Council (MJC) have in principle approved divorce by way of these modern means, especially SMS. They, however, have issued a warning against the misuse of these means to terminate marriage and emphasized that verification of message containing divorce is of prime importance, whether it is sent through SMS, e-mail or telephone. The Fatwa committee of the MJC headed by Moulana Yusuf Karan stressed that the process of verification of divorce sent through these modes must be strictly implemented before the *talaq* could be accepted as valid and enforceable.

Divorce through Modern Means of Communication: Legal Perspective

In Pakistan, Muslim Family Law Ordinance 1961(MFLO) governs the divorce given by husband. Section 7 of Muslim Family Law Ordinance 1961 provides that any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of divorce in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife. Whoever, contravenes the procedure of divorce provided in MFLO shall be punished with simple imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both. The courts are trying all forms of divorce by meticulously enforcing MFLO 1961 which has set an obligatory procedure that must be followed for the purpose of divorce. The above mentioned legislation is silent on the issue of divorce through Modern Means of Communication (Tariq, 2018).

There are no precedent on the issue as well the only available case is *Munas Parveen vs. Additional Session Judge/Ex Officio Justice of Peace, Shorkot and Others* (Munas Parveen Vs Additional Session Judge/Ex Officio Justice of Peace Shorkot and others, 2015), in which the petitioner contracted a second marriage after receiving divorce from her husband both on a call and then through SMS. An FIR of *Zina* was registered on the order of Additional Session Judge/Ex Officio Justice of Peace, Shorkot. The petitioner went to Lahore High Court where her learned counsel submitted that she has been divorced by the petitioner telephonically and through SMS in the presence of witnesses and after almost eleven months of termination of her first marriage, the petitioner has contracted another *Nikkah* which is valid under both family laws of Pakistan and Muslim personal laws. Divorce given telephonically is an oral form of divorce which became effective as given in the presence of witnesses and divorce given through SMS is written form of divorce which too is recognized under Islamic personal law. The husband, however, denied the divorce through SMS. The court framed the issue of validity of divorce given through SMS. The introduction of modern means of communication including the SMS are valid and accepted all over the world. However, the witnesses which were present at the time of information through modern devices conveyed or received are always important to prove the fact by verifying it. Although modern devices are legally acceptable in court of law under section 73 of the Qanun e Shahdat Order 1984 but in order to prove a fact, the required procedure has to be followed. The procedure of divorce has been prescribed by the legislature in the best of the wisdom and for sanctity of the institution of marriage divorce is the last option. The court further stated that if divorces are allowed to take effect merely on the basis of SMS then, what will be the level of society particularly in our

patriarchal society. Undoubtedly, the pre-requisites for pronouncing a divorce is the peace of mind, the purposes and objectives of such act should be made in the presence of witnesses. However, on the perusal of the message in the instant case the wording of the SMS does not categorically mention the above pre-requisites.

The court disposed of the petition with the observation that factum of divorce will be properly addressed and adjudicated upon by the Family Court of Shorkot in the suit for restitution of conjugal rights. The logic of the court in deciding the matter does not seem to be appropriate as *Sunni* law of divorce does not demand the witness for the validity of divorce and the peace of mind has never been the prerequisite for pronouncing divorce. Similarly, the electronic evidences as per Article 164 of Qanune-e-Shahadat Order 1984 are acceptable in evidence however, the judgment made it mandatory that mere production of such SMS will not serve the purpose unless the witnesses in whose presence such SMS was sent were produced. Furthermore, the evidence qualifies the criteria of article 73 of Qanune-e-Shahdat Order 1984 which prima facie, makes the judgment per-incuriam, as the production of mobile itself as primary evidence can serve the purpose hence calling witnesses, which in several cases are seldom available, is nothing but a denial of a primary evidence available on the record.

CONCLUSION

The benefits and reliance on the use of modern means of communication cannot be negated in this era of technology. Nonetheless, the challenges which these technologies are bringing need to be dealt wisely both in legislation and rulings of the courts through *Ijtehad* and interpretation. The divorce pronounced by the husband either orally or in writing, through modern means of communication, when coupled with the intention cannot be turned down and is assumed valid being the written divorce which is acceptable in all *Sunni* schools of thought. The debate in such a divorce, in the presence of contemporary *Fatawa*, must not be regarding its permissibility or impermissibility from shariah perspective rather the focus should be on how to prove such a divorce in the courts of law when negated by the husband on the ground that the message, email or Whatsapp is not sent by him. There are the chances of malafide use of these devices. The process of verification must be provided before accepting the divorce to be legally enforceable. Moreover, the Council of Islamic Ideology and Federal *Shariat* Court of Pakistan should take up the matter and provide a detailed guideline regarding the validity of such divorces.

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