

The Moral and Legal Dimensions of *Talaq* (Divorce) by SMS: A Critical Reading

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Introduction

The precedent for a divorce via short message service (SMS) was set in Dubai (United Arab Emirates). According to religious scholars to whom the matter was referred to by the court, divorce declarations sent via SMS on mobile phones, e-mails and other electronic communications is valid and enforceable.¹ South African *'ulama* (Islamic scholars) have in principle approved of divorce by way of these modern means, especially SMS and the issue has become a subject of heated debate. Modern means of communication can and is often easily misused. The *'ulama* of the Western Cape Muslim Judicial Council (MJC) have thus issued a warning against the misuse of these means to terminate marriage and emphasise that verification is of utmost importance, whether it be SMS, e-mail or telephone.² The Fatwa committee of the MJC headed by Moulana Yusuf Karan stressed that the process of verification would be strictly implemented before the *talaq* could be accepted as valid and enforceable. This forces us to seriously consider the implications of *talaq* by SMS in light of classical and contemporary understandings of *fiqh* (Jurisprudence). In this article I will explore this question from both the moral and legal dimensions of the *fiqhi* (legal) discourse.

Fiqh is the discipline in Islam that translates the injunctions of the Qur'an and the Sunnah (the exemplary conduct of the Prophet (saw)) into our lives in light of the prevailing social, spiritual, cultural, political and moral factors. As such fiqh deals with legal issues and can be translated as Positive Law, although it is based on firm Islamic legal principles.

Fiqh has a legal and a moral dimension. They are not the same, yet there is an organic and natural link between them. My aim is to elaborate on both these dimensions in order

to forward an argument against divorce by way of SMS and any other means of modern electronic communication. I will commence with the legal aspect.

The Legal Dimensions of the Debate

In classical fiqh, divorce by SMS could be compared – even based upon – the verdict of divorce by writing (*kitabatan*). Traditional scholars base their ruling on the permissibility of *talaq* by way of these modern means of communication and technology on the classical ruling that a *talaq* issued by a husband in writing to his wife (sent to her) is permissible. The classical ruling in essence is that a written divorce is legally enforceable. This raises the question as to how present-day scholars arrived at their position. Was it derived from the earlier classical ruling of written divorce? This could either be done by resorting to *qiyas* (analogical deduction) or by extending the principles of their respective schools (in the South African case the Shafi'i and Hanafi schools).

The scholars of the Muslim Judicial Council (in the Western Cape) seem to have dealt with the issue as a straightforward matter where a husband sent his wife a clear message, as in the case of a written letter, stating he has divorced her. In the case of the Jamiatul Ulama (Muslim Institutions in Gauteng and Kwazulu-Natal) it would more likely be an extension of the principles of the Hanafi school of thought, which will be outlined below.

Classical Islamic jurists agree that a *talaq* may be executed orally as well as in writing and that both are equally binding upon the spouses.³ From a purely technical legal sense an SMS can without doubt be considered as valid as it qualifies as a form of writing, it can also be printed and will then have a semblance of permanency. The position and the approach of our classical scholars provide many subterfuges and loopholes to justify e-mail and SMS divorce.⁴ The process of verification is a secondary matter, though necessary in order to establish whether the husband did divorce his wife. Someone else with sinister aims could have sent the divorce. If such a divorce is legitimated on the basis of *qiyas* it would be a case of *qiyas ma' al-faariq* (false or incongruent analogy) and therefore not correct.

The reason is that divorce by writing has a very strong element of verifiability (*ithbaat*). Every individual has a unique style of handwriting and as such it stands to reason that a wife would recognize her husband's handwriting. This is not so with SMS since the text is electronically generated and as such the essential element of verification is in fact absent. Thus the ruling on the validity of *talaq* by SMS does not fulfil the requirements for a valid *talaq* in written form approved by the classical paradigm.

I will now explore some of the other legal principles employed by jurists of the different schools in delineating a divorce communicated by writing. The Jurists of the four *madhahib* (legal schools) agree that a written *talaq* is legally binding, though with variations in the details thereof. According to the Hanafi School, a written *talaq* is either *mustabinah* (clear manifest handwriting with a permanent trace such as on paper) or *ghair mustabinah* (writing of which no trace remains, such as in the air or on water). *Mustabinah* in turn is divided into two categories, namely *marsumah* and *ghair marsumah*: *Marsumah* is issued and addressed in the wife's name as in conventional letters. This is regarded as an explicit divorce and is enforceable even if the husband did not intend it, provided that the letter stated "*anti taaliq*," i.e. that you (the wife) are divorced. *Ghair al marsumah* is when the husband writes on a piece of paper "that my wife so and so is divorced," without addressing it in her name as in conventional letters. This divorce is only enforceable if the husband intended it.

In the Shafi'i School an explicit written *talaq* without intention is invalid.⁵ Ja'fari 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 Shi'a Ja'faria restrict the sphere of *talaq* in its overall application to the maximum extent and impose severe restrictions on both the husband and the wife.⁶

The aim of presenting the views of the different schools of thought is to demonstrate the degree to which the classical ruling can be applied to the modern situation of *talaq* by SMS. My view is that *talaq* by SMS is not applicable for several reasons: The liquid crystal display of the mobile phone could be categorized under *ghair mustabinah* for the

writing has no permanency and is therefore not valid.⁷ The verification process is not possible or is very difficult to determine. This in addition to the possibility that the husband can claim that he did not send the SMS or that his phone was stolen etc. The legal principle, *sadd al-dhari'a* (blocking the means) is applicable here. This principle prevents/blocks the possibility of abuse by prohibiting anything that is perceived to lead to abuse. *Talaq* by SMS widely opens the door precisely for that kind of abuse.

Another legal principle worthy of investigating is that of *al-Masalih al-Mursala* (General Welfare). I find no grounds for justifying SMS divorce on this basis either. For the application of General Welfare to be valid the following requisites are fundamental according to Al-Ghazali (d. 1111): General Welfare must be in congruence with the kind of enactments of the law. It must not clash with clear, explicit text. It must be of absolute necessity. What could also be a requisite (though not always so) is that the Welfare must be universal (*kulliyun*) and certain (*qat'iyun*), in other words, achievable.⁸ Divorce by SMS does not fulfil the requirements of General Welfare. In fact it goes against the very spirit of the concept. It also violates two of the five elements necessary for human existence, namely protection of the intellect ('*aql*) and dignity ('*ird*), i.e. it violates the wife's dignity and intellect. Divorce is not similar to a commercial transaction, as it directly involves two human beings and not commodities. Any legal process must succumb to this fundamental reality which is the aim of General Welfare.

The Moral Dimensions of the Debate

We now look at the issue from the moral dimension of *Fiqh*, for if my legal argument is flawed, we are still able to pursue the issue from the angle of morality. Unfortunately only the legal dimensions are generally taken into account in most issues pertaining to *fiqh*, as is the case with SMS divorce.

The problem I have with both the classical and contemporary ruling regarding *talaq* by notification (written by hand or SMS) is that it disregards the humanity of the wife as well as the sacredness of the marriage. The wife is the person whom the husband is closest to and most intimate with. They are the source of each others joy, happiness and

protection, epitomised in the language of the Qur'an: " they (the wives) are a garment to you and you are garment to them..." (2:187). How then can a husband divorce his wife by this cruel and unethical way?

Many Muslim husbands are not moral or compassionate when it comes to these matters and it is the wives who suffer terribly, psychologically and materially. Given the egalitarian message of Islam I think that our respected scholars should be unequivocal in condemning this method of *talaq* and declare it to be *haram* (prohibited). Women suffer under this terrible experience whilst we argue over the legal dimensions of the issue. To me it is a matter of existential importance. Women have dignity and humanity granted by Allah.

Another issue for which the contemporary scholars should be criticised is that when they take from classical *Fiqh* they seem to be oblivious of the context. Here I refer to the moral awareness of the early Jurists that we find lacking in today's times. This is indicated in the incoherence of our scholars when applying the classical legacy.

In the final analysis, I want to urge our scholars to seriously reconsider their *fatwa* on divorce by SMS. They must consult with women in this regard as it is a religious imperative and not merely an academic exercise. Such dialogue would save many wives from the emotional trauma that men rarely experience.

Endnotes

¹ Allie, Shouket. "Divorce by SMS and Islamic Law" in *Muslim Views* (September 2001), p. 12.

² Karan, Munadia. "Divorce by SMS a No-No South Africans Say" in *Al-Qalam* (July 2001), p. 2.

³ op cit. *Muslim Views*

⁴ ibid

⁵ Zuhayli, W. 1989. *Al-Fiqh al-Islami wa Adilatuhu*. Dar al-Fikr, (3rd ed.), Damascus, volume 7, pp. 382-384

⁶ Badran, A. n.d. *al-Zawaj wa al-Talaq fi al-Islam: Fiqh Muqarin bayna al-Madhib al-Arba'a al-Sunniah wa al-Madhib al-Jaffari wa al-Qanun*. Mu'assasah Shabab al-Jamiah, Alexandria. pg. 369.

⁷ op cit. *Muslim Views*

⁸ Zuhayli, W. 1996. *Usul al-Fiqh Al-Islami*. Dar Al-Fikr, Damascus, (1st edition), pg. 774