

Ruling concerning divorce during menstruating period

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In the name of Allaah, the Most Merciful, the Bestower of Mercy

Question: A woman was divorced by her husband in 1992 during her menstruating period in Ramadhan: he uttered the word of divorce then the civil divorce happened the year 1993 and she spent Al-'Idda (prescribed waiting period) in her father's house. Now after that the civil divorce has occurred, and that she learnt that the divorce pronounced during the menstruating period is not valid, she asks what would she do? Does the civil divorce take effect or is she still his wife [even] after three years? Benefit us may Allaah reward you.

Shaykh Aboo `Abd-al-Mu`iz `Alee Farkous al-Qoobee (May Allaah the Most High preserve him): All praise is due to Allaah, the Lord of the Worlds. Peace and blessing be upon whom Allaah sent as a mercy to the Worlds, upon his Family, his Companions and his Brothers until the Day of Resurrection:

Know that whoever divorces his wife while she is in her menstruating period, or divorces her when being purified and after having sexual intercourse with her, or divorces her by three pronouncements while she is pure, then it is a heretical and forbidden divorce and whoever does it will incur sin, for he is a transgressor of his Lord's Limits, a disobedient and unjust towards himself. This view is held by the majority of the scholars; yet they diverged over the divorce during the woman's menses: some scholars among the Predecessors and the Successors¹ held that it takes effect and accordingly it is considered as a divorce, this is the opinion of the four Imaams², this opinion is based on the strongest [religious] evidence and the most true consideration [analogically and rationally]. Concerning the point of divergence, one text should suffice, which is the hadeeth reported by Naafi' on the authority of Ibn 'Umar (May Allaah be pleased with both of them): "That he divorced his wife during her menses. 'Umar (Ibn Al-Khattaab) made a mention of it to Allaah's Messenger (May the peace

¹ See: "Al-Kaafee" by Ibn 'Abd Al-Barr (263), "Badaa'i' As-Sanaa'i'" by Al-Kaashaanee (3/141), "Al-Mughnee" by Ibn Qudaama (3/99), "Al-Qawaaneen Al-Fiqhiyya" by Ibn Juzay (219), "Al-Insaa'f" by Al-Mardaawee (8/448) and "Mughnee Al-Muhtaa'j" by Ash-Shirbinee (3/307).

² This is contradicted by some Predecessors who hold the view that the divorce does not take effect during the period of menses and it is not counted. This was also held by the jurisprudential School of Adh-Dhaahiriyya, and was adopted by Ibn Taymeeyah, Ibn Al-Qayyim and others. [See: "Al-Muhallaa" by Ibn Hazm (10/161), "Al-Mughnee" by Ibn Qudaama (7/100), "Majmoo' Al-Fataawaa" by Ibn Taymeeyah (33/66), and "Zaad Al-Ma'aad" by Ibn Al-Qayyim (5/218)].

Ruling concerning divorce during menstruating period

and blessings of Allaah be upon him) whereupon he considered it one (divorce)”³; According to this, Ibn ‘Umar (May Allaah be pleased with both of them) delivered his fatwa regarding this issue. Naafi’ reported: “When Ibn ‘Umar (May Allaah be pleased with both of them) was asked about the person who divorces his wife in the state of menses, he used to say: “If you pronounced one divorce or two, Allaah’s Messenger (May the peace and blessings of Allaah be upon him) had commanded to take her back, and then allow her respite until she enters the period of the second menses, and then allow her respite until she is purified, and then divorce her (finally) before touching her (having sexual intercourse with her); and if you pronounced three divorces [at one and the same time] you have in fact disobeyed your Lord with regard to what He commanded you about divorcing your wife. And she is, however, finally separated from you”⁴.

Therefore, there is no ambiguity over the breakdown of the marriage relationship with the end of Al-‘Idda, established religiously, with three [menstrual] terms, for Allaah (Mighty and Majestic is He) says:

﴿وَالْمُطَلَّقَاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلَاثَةَ قُرُوءٍ﴾

The meaning of the verse:

﴿Divorced women remain waiting [i.e.do not remarry] for three periods﴾
[Al-Baqarah: 228]

He is recommended to take her back due to the commandment of the Prophet (May the peace and blessings of Allaah be upon him) according to the soundest of the scholars’ opinions. The basic principle is that the woman observing her ‘Idda from a revocable divorce has to observe it in the marital house where she used to live before she got separated from her husband, and this is from the perspective of Ta’abbud (as an act of worship). With this in mind, she is not allowed to observe her ‘Idda in her father’s house except out of a religious excuse. Such an obligation concerns even her husband who is not allowed to turn her out of her house until her ‘Idda comes to an end, forasmuch as it is a question of a religious obligation which cannot be waived either by mutual consent or other manner, pursuant to His saying (Mighty and Majestic is He):

﴿وَأَنْقُوا اللَّهَ رَبَّكُمْ لَا تَخْرُجُوهُنَّ مِنْ بُيُوتِهِنَّ وَلَا يَخْرُجْنَ إِلَّا أَنْ يَأْتِيَنَّ بِفَحِشَةٍ مُّبِينَةٍ﴾

³ This is contradicted by some Predecessors who hold the view that the divorce does not take effect during the period of menses and it is not counted. This was also held by the jurisprudential School of Adh-Dhaahiriyya, and was adopted by Ibn Taymeeyah, Ibn Al-Qayyim and others. [See: “Al-Muhallaa” by Ibn Hazm (10/161), “Al-Mughnee” by Ibn Qudaama (7/100), “Majmoo’ Al-Fataawaa” by Ibn Taymeeyah (33/66), and “Zaad Al-Ma’aad” by Ibn Al-Qayyim (5/218)].

⁴ Reported by Muslim (1471), from the hadeeth of Ibn ‘Umar (May Allaah be pleased with both of them).

Ruling concerning divorce during menstruating period

The meaning of the verse:

﴿**And fear Allaah your Lord (Ô Muslim). And turn them not out of their (husband's) homes nor shall they (themselves) leave, except in case they are guilty of some open illegal sexual intercourse**﴾
[At-Talaaq:1]

The period of 'Idda is counted even if she did not spend it in the marital house; and the sin falls upon he who transgresses Allaah's limits. This being said, if we consider that the divorce did not happen, she would be under no obligation to observe 'Iddah because it exists only with the presence of divorce which did not happen. But here the judicial divorce is -apparently- valid and three years necessary contain the time of the waiting period so surely she is a stranger (not Mahram) for him and there is no need to take her back. Besides, he can remarry her anew with a marriage contract and a dowry, and accordingly she returns back to him by counting the first divorce.

The perfect knowledge belongs to Allaah (*Mighty and Majestic is He*); and our last prayer is all the praises and thanks are to Allaah, the Lord of the Worlds, and prayers of Allaah are to Muhammad and his Family, Companions and Brothers until the Day of Resurrection.

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