216816 - She got divorced when she was pregnant, then she miscarried, but there were no human features in the embryo; she thought that her ‘iddah was over at that point, then she got married

the question

I am a revert and about 3 years ago, my husband gave me a Talaq. We have always been living separately during our marriage . Four weeks after he had given me a divorce, I found out that I was 5 weeks pregnant. I went the following day to the hospital because I started bleeding. They found out that it was an Ectopic pregnancy (pregnancy in the tube) and a few hours later, they removed the pregnancy. I was told that the iddah period of a pregnant woman terminates once she delivers the baby and that it was apparently the case for me too as I had lost the baby. But browsing on your website, I understood that I should still have had a 3 month iddah period because it wasnt a foetus with human features. My point here is 2 months and one week after my husband had divorced me, I remarried another brother. Our marriage got organised by the brother'sisters who are followers of the Naqshbandi tariqa. At that time, neither me and the brother were aware of the deviant beliefs of this group. We certainly would have not conducted our nikkah there but at an Alhus sunnah wal jamaah masjid. The other issue is that I didn't have a wali at this wedding.Is this marriage valid

Detailed answer

Praise be to Allah.

If a woman with whom her husband has consummated the marriage is divorced by talaaq, then she is obliged to observe the ‘iddah (waiting period). If she is a woman who menstruates, then she must observe ‘iddah for three complete menstrual cycles after the divorce (talaaq), meaning that one period comes and goes, then another comes and goes, then another comes and goes (and she purifies herself after each period). That is three complete menstrual cycles, whether the timing

between them is long or not. This has been discussed previously in fatwa no. 12667.

This applies if she is not pregnant. However if she is pregnant, then her ‘iddah lasts until the pregnancy ends, as explained in the fatwa referred to above. It should be noted that the pregnancy for which delivery (of the foetus) signals the end of the ‘iddah is that in which human features can clearly be seen in the foetus – according to the more correct view. The minimum period at which human features appear clearly in the foetus is eighty days from the beginning of the pregnancy, but the usual period is ninety days. If the woman miscarries and no human features can be seen in the embryo, the ‘iddah does not end at that point – according to the more correct opinion; rather in that case she must still observe ‘iddah for three menstrual cycles, as explained previously in fatwa no. 107051.

The Maalikis have a different view; they are of the view that if a woman miscarries and passes congealed blood, then her ‘iddah ends at that point, even if no features could be seen in it. It says in Mukhtasar Khaleel (1/130): The ‘iddah of a pregnant woman in the case of divorce (talaaq) or the death of her husband is when her pregnancy ends completely, even if that is by passing congealed blood. End quote. The Maaliki scholars interpreted “congealed blood” which signals the end of ‘iddah in their view as that which does not dissolve if hot water is poured on it. It says in Sharh Mukhtasar Khaleel by al-Kharashi (4/143):

What is meant by congealed blood is that which does not dissolve if hot water is poured on it. End quote.

In ash-Sharh al-Kabeer by Shaykh ad-Dardeer (2/474) it says: The sign of it having been a pregnancy is that if hot water is poured on it, it does not dissolve. End quote.

You state that there were no human features in what was passed. As that was the case, your ‘iddah did not end when you passed it – according to the more correct opinion; rather what you should have done was to observe ‘iddah for three menstrual cycles.

But so long as the second marriage has indeed taken place on the basis that you thought that your ‘iddah had ended, and this idea is in accordance with a school of thought (madhhab) that is

recognised by the scholars, which is the madhhab of the Maaliki fuqaha' who say that the 'iddah ends when congealed blood is passed, then it is permissible for you to forego the view of the majority and follow the Maalikis in their view that the 'iddah ended when this blood was passed. Hence the verdict is that the second marriage is valid.

This – i.e., following a less correct opinion after the fact – is the view favoured by a number of scholars, especially if adhering to the more correct view would cause hardship or difficulty. In that case ash-Shaatibi – may Allah have mercy on him – said in al-Muwaafaqaat (5/190): If a person has done something that is not allowed, but the rulings concerning the situation may lead to more than is appropriate – in terms of consequences , not in terms of the rulings themselves – or rectifying it may lead to greater hardship than the reason why it was prohibited in the first place, then he may be left as he is, without efforts being made to undo what has been done. In other words, we may overlook whatever bad things have occurred, in a manner befitting justice, on the basis that what has been done was in harmony with some (scholarly) view, even if that view is less correct, because it is the correct view in this case which requires us not to undo what has happened, because leaving it is more appropriate thing than undoing it; that is because trying to undo it may cause more harm than the harm the Lawgiver sought to protect him from when it told him not to do it. End quote.

The point is that it may be the case that the evidence for prohibition is stronger before it happens, and the evidence for overlooking it is stronger after it has happened, because of contingent circumstances that weigh more heavily on the side of overlooking it, as was pointed out in the hadeeth about rebuilding the Ka'bah on the foundations laid by Ibraaheem (peace be upon him) [the Prophet (blessings and peace of Allah be upon him) thought of rebuilding the Ka'bah on the foundations of Ibraaheem, but because Quraysh were so new in Islam and would be shocked by the change, he decided to refrain]; and the hadeeth in which the Prophet (blessings and peace of Allah be upon him) stated why he did not execute the hypocrites [despite it being permissible for him to do so because of their treachery; he did not want people to say that Muhammad killed his companions]; and the hadeeth about the man who urinated in the mosque – the Prophet (blessings and peace of Allah be upon him) ordered that he be left alone until he was done, because if he had

interrupted him whilst he was urinating, that could have led to his clothes becoming contaminated and could have caused him some physical harm. So the issue of allowing him to carry on with a forbidden action was more appropriate than interrupting him, which would have caused him harm and would have led to contamination of two places (the ground and his clothes), whereas if he was left alone, only one place would be contaminated.

In the hadeeth it says: “Any woman who gets married without the permission of her guardian, her marriage is invalid, invalid, invalid.” Then he said: “But if he has consummated the marriage with her, then she is entitled to the mahr because he has been intimate with her.” This is correcting the situation (marriage of a woman without her guardian’s permission) in one way, hence the couple inherit from one another if one of them dies, and any child who is born as a result is to be attributed to the man. By applying these rulings to an invalid marriage as if it were a valid marriage, and by ruling that in-laws become mahrams and so on, the scholars indicated that the marriage is basically valid, otherwise it would come under the rulings on zina, but it does not come under the rulings on zina at all, according to scholarly consensus.

Therefore with regard to a marriage concerning which there is a difference of scholarly opinion, all views may be taken into consideration, so that no separation should take place after the marriage has been consummated, based on the new situation after consummation which makes the view that it is valid stronger.

Based on that, what appears to be the case – and Allah knows best – is that the second marriage is to be regarded as valid, based on the opinion of the Maalikis who say that the ‘iddah ends when the pregnancy is miscarried, even if human features are not visible in it.

But there remains another issue, which is what you said about the marriage having been organised by followers of the Naqshbandi tareeqah (Sufi order). You did not explain to us the nature of these arrangements. If what you mean is that the marriage contract – only – was done in their mosque, and nothing else, then this does not matter, if a Muslim guardian and two witnesses of good character were present.

But if what you mean is that the marriage contract was done without the presence of a guardian at all, or that it was done under the guardianship of a person who follows this misguided and innovated tareeqah, then in this case the marriage contract was done in an invalid manner, because the marriage contract done without a guardian is invalid, as we have explained in fatwa no. 144712

The followers of the Naqshbandi tareeqah are in grave danger and there are many serious innovations (bid'ahs) in their beliefs and practices.

Hence in order to be on the safe side you should repeat your marriage contract; if you now have a Muslim guardian among your family and relatives, then he may do the marriage contract for you; if you do not have a Muslim guardian, then your marriage contract may be done by the Muslim qaadi (judge), if there is one, or by the director of the Islamic Centre, the imam of the mosque or a Muslim man of good character.

For more information on the Naqshbandis and their deviation, please see the following link (in Arabic): http://www.saaid.net/feraq/sufyah/t/6.htm

And Allah knows best.