262134 - Divorce during menses and the meaning of the words “tell him to take her back”

the question

I read that "talaq in menstruation counts and "the evidence is the naration in al-Bukhari and Muslim that during the life of Prophet (PBUH) Ibn Umar had divorced his wife in her menstruating." The alim also wrote "there's a narration in Bukhari with words, 'it is considered a legal divorce'. Then "return her back" means that there was a separation hence a talaq. Ibn Taymiya, Ibn Qayyim and some scholars say; talaq isn't counted as a legal talaq, on the base of some other narrations that read; "He didn't count it (divorce) anything" (Ahmed and Abu Dawood]. Majority's view that the talaq is valid is the preponderant because: A)The abundance of the narrations that prove the validity of such a talaq B)The narrations that prove the validity of this talaq are strong than the other narration which suggest the opposite." Your fatwa 20153 says"the scholars are agreed that Bukhaari and muslim are most sound of books after the Quran. The narrations in Bukhaari and Abu Dawood are opposit but both can't be right. You don't count this talaq; you said in fatwa 72417; "then the Prophet (PBUH) said: “That is the prescribed period at which Allah has commanded men to divorce women". A man may only divorce his wife in a prescribed period, when she is pure (not menstruating). 1) what does "return her back" means in Bukhaari or in other narration? 2)Do you regard narrations in Abu Dawood or others stronger than Bukhaari's narration which says he counted it as a one legal talaq

Detailed answer

Praise be to Allah.

Firstly:

There is a difference of opinion as to whether divorce (talaq) issued at the time of menses counts as such. The majority of scholars, including the four imams and others, are of the view that it does

count as such.

A number of scholars are of the view that it does not count as such. This is the view of Taawoos, Khallaas ibn ‘Amr, Ibn ‘Aliyyah, Hishaam ibn al-Hakam, Ibn Hazm, Ibn Taymiyah, Ibn al-Qayyim, as-San‘aani, ash-Shawkaani, Ahmad Shaakir, Ibn Baaz, Ibn ‘Uthaymeen, and others.

This matter is one of the major issues concerning with both sides have a variety of evidence to support their view, especially the report about Ibn ‘Umar, who divorced his wife when she was menstruating. It was narrated from him – in most of the reports narrated from him – that he counted it as a divorce (talaq), and it was also narrated from him that he did not count it as a divorce.

Abu Daawood (2185) narrated from Abu’z-Zubayr that he heard ‘Abd ar-Rahmaan ibn Ayman, the freed slave of ‘Urwah, asking Ibn ‘Umar, whilst Abu’z-Zubayr was listening: What do you think about a man who divorces his wife when she is menstruating? He said: ‘Abdullah ibn ‘Umar divorced his wife when she was menstruating, at the time of the Messenger of Allah (blessings and peace of Allah be upon him). ‘Umar asked the Messenger of Allah (blessings and peace of Allah be upon him) about that, saying: ‘Abdullah ibn ‘Umar has divorced his wife when she was menstruating. ‘Abdullah said: He asked me to take her back, and did not consider it to count as anything. And he [the Prophet (blessings and peace of Allah be upon him)] said: “When her menses ends, let him divorce her or keep her.” Ibn ‘Umar said: And the Prophet (blessings and peace of Allah be upon him) recited the verse: “O Prophet, when you [Muslims] divorce women, divorce them for [the commencement of] their waiting period” [at-talaq 65:1] that is, at a time when their prescribed waiting period can properly start.

This hadith was classed as saheeh by Ibn Hazm, Ibn al-Qayyim, Ibn Hajar and al-Albaani.

Abu’z-Zubayr was not the only one to narrate that. It was also narrated by ‘Abd al-Wahhaab ath-Thaqafi from ‘Ubdayullah ibn Naafi‘ that Ibn ‘Umar said concerning a man who divorced his wife when she was menstruating: No attention is to be paid to that. This was narrated by Muhammad ibn ‘Abd as-Salaam al-Khushani from Bandaar from him. Its isnaad is saheeh, as al-Haafiz Ibn Hajar

said.

Ash-Shawkaani said: The report of Abu'z-Zubayr is supported by what was narrated by Sa'eed ibn Mansoor via 'Abdullah ibn Maalik from Ibn 'Umar, that he divorced his wife when she was menstruating, and the Messenger of Allah (blessings and peace of Allah be upon him) said: "That does not count for anything."

It was narrated from Ibn 'Umar that it was counted as a divorce, as al-Bukhaari (5253) narrated that Ibn 'Umar said: It was counted as a divorce in my case.

Muslim (1471) narrated that Anas ibn Sireen said: I asked Ibn 'Umar about his wife whom he divorced. He said: I divorced her when she was menstruating, and I told 'Umar about that, and he told the Prophet (blessings and peace of Allah be upon him), who said: "Tell him to take her back, then when her menses ends, he may divorce her when her menses has ended." He said: So I took her back, then I divorced her when her menses ended. I said: Was that divorce that you gave her when she was menstruating counted as such?" He said: Why wouldn't I count it? It must be counted even if I acted in an ignorant and foolish manner.

According to another report: I said to Ibn 'Umar: Did you count that divorce as such? He said: Of course.

Those who say that it did not count as a divorce responded by noting that Ibn 'Umar did not explain who counted it as such in his case. What appears to be the case is that he himself counted it as such, based on his own ijtihaad (reasoning).

Ibn al-Qayyim (may Allah have mercy on him) said, in his commentary on Tahdheeb as-Sunan: They said: With regard to your argument that the report of Naafi' concerning Ibn 'Umar is more sound and more appropriate than that of Abu'z-Zubayr, because he was closer to Ibn 'Umar, so it is more appropriate that his report should be accepted,

this argument could be valid if there were a contradiction between the two reports, but here there is no contradiction. The report of Abu'z-Zubayr clearly states that it was not counted as a divorce

in the case of Ibn ‘Umar. As for Naafi‘, there is nothing in his reports that clearly states that the Prophet (blessings and peace of Allah be upon him) counted it as a divorce in the case of Ibn ‘Umar. Rather he, on one occasion, answered by saying, Of course, meaning: what else could it be? This is not saying that the Prophet (blessings and peace of Allah be upon him) counted it as a divorce. And on another occasion he said: How about if he acted in an ignorant and foolish manner? This shows that it was merely the view of Ibn ‘Umar, meaning that he acted in an ignorant and foolish manner; i.e., he issued a divorce at a time when it was not permissible for him to do that.

It is known that if Ibn ‘Umar thought that the Prophet (blessings and peace of Allah be upon him) counted this as a divorce, he would not have said to the one who asked him, How about if he acted in an ignorant and foolish manner? So these words of his do not constitute evidence that the divorces counted as such, because with regard to one who acts in an ignorant and foolish manner, his case should be judged on the basis of knowledge and the Sunnah of the Messenger of Allah (blessings and peace of Allah be upon him). So how could it be thought possible that Ibn ‘Umar would conceal a statement of the Messenger of Allah (blessings and peace of Allah be upon him) about counting that as a divorce, and say instead: How about if he acted in an ignorant and foolish manner? On one occasion, a man asked him about something and he answered him by quoting a report from the Prophet (blessings and peace of Allah be upon him). The questioner asked him: What about if the case was such and such? He said: Keep far away from asking such questions!

On one occasion he said: It is to be counted as one divorce (talaq). This is the statement of Naafi‘, not of Ibn ‘Umar. Similarly, it is stated clearly in the hadith in as-Saheehayn. ‘Abdullah said to Naafi‘: What happened to that divorce? He said: It was one divorce that was counted as such. According to some versions, he said: It was counted as a divorce. In a version narrated by al-Bukhaari from Sa‘eed ibn Jubayr, from Ibn ‘Umar, it says: It was counted as a divorce. But this version was narrated only by Sa‘eed ibn Jubayr from him, and it is different from what Naafi‘, Anas ibn Sireen, Yoonus ibn Jubayr and the other narrators reported from Ibn ‘Umar, and they did not mention him saying, It was counted as a divorce in my case. Ibn Jubayr is the only one who narrated it, just as Abu’z-Zubayr was the only one who narrated that “he did not consider it to

count as anything.” So if the two reports cancel one another out, then there will be nothing in any other reports to indicate that divorce took place. If one of these two reports is deemed to be more sound than the other, then the report of Abu’z-Zubayr is clearly marfoo‘, whereas the report of Sa‘eed ibn Jubayr is not clearly marfoo‘, because it does not mention who counted the divorce as such. Perhaps his father [‘Umar] (may Allah be pleased with him) counted it as such after the death of the Prophet (blessings and peace of Allah be upon him) at the time when ‘Umar compelled people to count the threefold talaq as such, which he did on the basis of his own ijtihaad and to serve some interest of the ummah, so that they would not persist in a haraam form of divorce; once they realized that they would be held to it and compelled to go ahead with it, they would refrain from doing that. At the time of the Prophet (blessings and peace of Allah be upon him), a threefold divorce would not be counted against them, but when ‘Umar saw that the people were doing that a great deal, he decided to hold them to it and counted against them.

They said: on the basis of the above, we can reconcile the many hadiths that were narrated concerning this issue, and we may understand the meaning; thus there will be no contradiction or confusion, and there will be no need for far-fetched interpretations of these texts. It will become clear that all these reports are in accordance with shar‘i guidelines.

End quote from Haashiyat Ibn al-Qayyim ma‘a ‘Awn al-Ma‘bood (6/171).

Thus it will become clear that the report of Abu Dawood is more sound than the report narrated by al-Bukhaari and Muslim, according to those who do not regard divorce during menses as valid. That is because the report of Abu Daawood is clearly marfoo‘ and its isnaad goes back to the Prophet (blessings and peace of Allah be upon him), whereas with regard to the report in as-Saheehayn, there is only the possibility that it may be marfoo‘.

For further information on this issue and the discussion of the evidence presented by both sides, please see the paper al-Fayd fi Tahqeeq Hukm at-talaq fi’l-Hayd by Dr. Sulaymaan ibn Fahd ibn ‘Eesaa al-‘Eesaa, published on the following link

Secondly:

One of the reasons for the difference of opinion concerning this matter is the difference of opinion concerning the meaning of the words of the Prophet (blessings and peace of Allah be upon him) to ‘Umar: “Tell him to take her back (falyuraaji‘ha).” The majority of scholars are of the view that what is meant here is taking her back in the sense of the fiqhi technical term raj‘ah, which can only happen after a divorce (talaq) has taken place. Those scholars who do not regard divorce during menses as valid say that what is meant by raj‘ah here is taking her back in the linguistic sense, which is taking the woman back so that she will be as she was [as if nothing happened]. They supported their view with the report of Abu Daawood quoted above, in which it says: He asked me to take her back, and did not consider it to count as anything. They also quote the report narrated by an-Nasaa’i (3398) from Ibn ‘Umar, that he divorced his wife when she was menstruating, then the Messenger of Allah (blessings and peace of Allah be upon him) told him to take her back, then later on he divorced her when she was not menstruating. Classed as saheeh by al-Albaani in Saheeh an-Nasaa’i.

Ibn al-Qayyim (may Allah have mercy on him) said: With regard to the words, “Tell him to take her back (falyuraaji‘ha)”, the root word muraaja‘ah is used in three senses in the Quran and Sunnah:

1.

In the sense of returning to a marriage with a new marriage contract, as in the verse (interpretation of the meaning): “And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him. And if the latter husband divorces her [or dies], there is no blame upon the woman and her former husband for returning to each other if they think that they can keep [within] the limits of Allah” [al-Baqarah 2:230]. There is no difference of opinion among Quran ic scholars that the man who is divorcing her here is the second husband, and that the one who is taking her back is the first husband, and that is with a new marriage contract.

2.

Taking back in a physical sense, so that matters will be as they were before, such as when the

Prophet (blessings and peace of Allah be upon him) said to the father of an-Nu‘maan ibn Basheer, when he gave his son [an-Nu‘maan] a slave as a gift, to the exclusion of his other children: “Take back [your gift].” This was taking back a gift that was unfair, that the Messenger of Allah (blessings and peace of Allah be upon him) described as injustice and said that it was not valid and was contrary to justice, as we shall see below, in sha Allah.

Another example of that is what the Prophet (blessings and peace of Allah be upon him) said to one who separated a slave woman and her child when selling them. He forbade doing that and revoked the deal. His revoking it does not mean that the transaction was valid and then he annulled it, because it was an invalid transaction; rather he was returning the two slaves so that they would be together as they had been before. Similarly, the command to Ibn ‘Umar to take back his wife was putting the situation back to the way it had been before the divorce; it does not imply that divorce took place during the wife’s menses at all.

End quote from Zaad al-Ma‘aad (5/208).

Shaykh Ahmad Shaakir said in his paper, Nizaam at-talaq fi’l-Islam (p. 23): One of the arguments presented by our opponents is their claim that the Prophet’s words “Tell him to take her back (falyuraaji‘ha)” indicate that divorce issued when the wife is menstruating counts as such. But this is a flawed argument, because what is meant here is taking back in the linguistic sense of the words. As for using the word muraaja‘ah (taking back) in the case of a revocably divorced woman [i.e., after a first or second talaq], this is fiqhi terminology that was introduced after the time of the Prophet (blessings and peace of Allah be upon him); it was not used in that sense in the Quran at all. Rather the words used in the Quran are radd and imsaak, as in the following verses (interpretation of the meaning):

“And their husbands have more right to take them back [raddihinna]…” [al-Baqarah 2:228]

“Then, either keep [her] [imsaak] in an acceptable manner” [al-Baqarah 2:229]

“either retain them [fa amsikuhunna] according to acceptable terms” [at-talaq 65:2]

“and do not keep them [wa la tumsikuhunna], intending harm” [al-Baqarah 2:231].

With regard to the word muraaja‘ah, it is used in the Quran in a sense other than the fiqhi technical term; it is used with regard to a woman who has been divorced three times, if she marries someone else who then divorces her, and she goes back to her first husband [with a new marriage contract]. “And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him” [al-Baqarah 2:230].

Conclusion:

Those who say that divorce during menses does not count as such understand the words of the Prophet (blessings and peace of Allah be upon him), “Tell him to take her back”, as meaning that the wife is to be regarded as she was previously; they do not understand it in the sense of the fiqhi technical term of raj‘ah. They say that it does not make sense to regard the divorce as having taken place then to keep the wife in order to issue another divorce.

Whatever the case, this issue is one of the major well-known issues of contention, and each group has its evidence and its own interpretation for the textual evidence of the other group.

And Allah knows best.