193599 - Guidelines on what constitutes consummation of the marriage and ruling on divorce of one whose husband has been alone with her, at the time of menses

the question

If the wife moves to live in her husband’s house, but she suffers from vaginismus (involuntary vaginal muscle spasms), which prevents full intercourse from taking place, i.e., it does not take place to the extent stipulated in shar‘i rulings, then in this case can the marriage be regarded as unconsummated, and can what happened be regarded as merely having been alone with her? If the husband clearly utters the word of divorce at the time of the wife’s menses, and in this situation, is it regarded as a Sunni divorce or an innovated (bid‘i) divorce?

Detailed answer

Praise be to Allah.

Firstly:

If the vaginismus prevents full intercourse from taking place, in the sense that the husband is unable to insert the tip of his penis into his wife’s vagina, then he is not regarded as having consummated the marriage with his wife, because the intercourse that counts in terms of consummation is that in which the tip of the penis disappears into the vagina.

Ibn Qudaamah (may Allah be pleased with him) said in al-Mughni (7/156): The rulings that have to do with intercourse are connected to to the disappearance of the tip of the penis. End quote.

An-Nawawi (may Allah have mercy on him) said in al-Majmoo‘ (2/152): With regard to all the rulings having to do with intercourse, it is stipulated that the tip of the penis should disappear completely into the vagina. End quote.

If the tip of the penis does not disappear entirely into the vagina, then it cannot be ruled that the marriage has been consummated with the woman.

Secondly:

If the spouses are alone together (khulwah – seclusion), and it is possible for intercourse to take place, but there is some factor that prevents that happening, on the part of both spouses or one of them, then their being alone together still counts as such, and the consequences are still applicable, namely the mahr (dowry) and ‘iddah (waiting period following divorce or death of the husband), according to the correct scholarly view. This is the view of the Hanbalis (may Allah have mercy on them), especially if he has been intimate with her in a manner that is not permissible for a man except with his wife.

Shaykh Mansoor al-Bahooti (may Allah have mercy on him) said: The mahr (dowry) is confirmed in the event of seclusion (khulwah) as mentioned above, even if no intercourse took place, and even if there was a factor that prevented it in both spouses or if there was a physical impediment in one of them, such as if the man has no penis or the woman has no vaginal opening… The same rulings come into effect once seclusion is established as come into effect once intercourse is established, with regard to the mahr becoming due in full and the obligation to observe the ‘iddah (waiting period following divorce or death of the husband).

End quote from Kashshaaf al-Qinaa‘ (5/153)

Shaykh Ibn ‘Uthaymeen (may Allah have mercy on him) said, commenting on az-Zaad:

The ‘iddah is required of every wife who has been separated from her husband (by divorce or death) if he was alone with her (khulwah)… and during that seclusion he would have been able to have intercourse with her, even if there was some factor affecting both of them or one of them that would prevent that taking place, or there was a physical or shar‘i factor affecting one of them that prevented it.

The phrase “was alone with her” means that there was no one else present of the age of

discernment, i.e., he and she were alone in a place where no one else who had reached the age of discernment was present.

The phrase “he would have been able to have intercourse with her” means if he was physically able to have intercourse. If he was alone with her but was tied with chains, this does not count as the khulwah as a result of which the rulings on marriage and so on come into effect.

“even if there was some factor that would prevent that taking place”. This refers to intercourse, i.e. if there was some impediment to intercourse occurring.

“affecting both of them” i.e., whatever the impediment was, such as if the man was lacking a penis or the woman had no vaginal opening. In this case the impediment affects both of them, as the man who lacks a penis is not able to have intercourse and if the woman has no vaginal opening it is not possible for penetration to occur

“or one of them” i.e., if the impediment affects either of them, such as if he is lacking a penis but she is sound, or she is lacking a vaginal opening but he is sound.

“or there was a physical or shar‘i factor” that is, if there was a physical or shar‘i impediment on the part of one of them. The physical factor is what we have discussed above. With regard to the shar‘i factor, an example would be if one or both of them were observing an obligatory fast, because if a person is observing an obligatory fast, it is not permissible for him to have intercourse, although ‘iddah would still become obligatory (in the event of divorce or death of the husband, following khulwah) even if there is some shar‘i impediment to intercourse taking place.

End quote from ash-Sharh al-Mumti‘ (13/322-323)

Once it is established that ‘iddah would be obligatory in the case of one whose husband has been alone with her, then it is not permissible to divorce her during her menses.

Shaykh Ibn ‘Uthaymeen (may Allah have mercy on him) said: “If the husband divorces a wife with whom he has consummated the marriage during her menses or during a period of purity in which he has had intercourse with her, this is an innovated divorce (bid‘ah).”

With regard to the phrase “with whom he has consummated the marriage”, if the author had said “one for whom ‘iddah has become obligatory (in the event of divorce or death of the husband)”, that would have been more general, because the woman becomes subject to the requirement of observing ‘iddah if the marriage is consummated with her, i.e., if he has intercourse with her or is alone with her or touches her with desire or kisses her, according to what is mentioned above in the chapter on the mahr (dowry).

“during her menses or during a period of purity in which he has had intercourse with her” i.e., if he divorces one who is obliged to observe ‘iddah as a result of consummation or being alone with her, and it is not established that she is pregnant, during her menses or during a period of purity in which he has had intercourse with her.

“this is an innovated divorce (bid ‘ah)” i.e., this is an innovated divorce which is haraam.

End quote from ash-Sharh al-Mumti‘ (13/43)

For more information on the ruling on divorce of a woman when she is menstruating, please see the answer to question no. 72417

And Allah knows best.