221686 - Marriage to a mahram woman is a major sin but does not mean that one is an apostate

the question

What is the ruling on a man who marries a woman who is not permissible for him, and he is aware of that, as some people deem him to be a disbeliever, quoting as evidence the hadith of al-Bara' ibn 'Aazib (may Allah be pleased with him) who said: My paternal uncle al-Haarith ibn 'Amr passed by me carrying a banner that had been given to him by the Messenger of Allah (blessings and peace of Allah be upon him). I asked him and he said: The Messenger of Allah (blessings and peace of Allah be upon him) has sent me to strike the neck of a man who married his father's wife.

Detailed answer

Praise be to Allah.

As far as we are aware, the scholars of the four madhhabs and others are unanimously agreed that marriage to a mahram or to someone to whom marriage is not permissible does not constitute apostasy in and of itself, and it does not constitute disbelief that makes it permissible to fight a person and seize his wealth. Rather it is one of the major sins and shameful acts of disobedience to Allah. It does constitute disbelief and apostasy if that person denies that it is prohibited and believes that this marriage is permissible.

The scholars differed concerning the punishment of the one who does that, but none of them suggested that he is to be executed for apostasy.

According to the Hanafis, there is no hadd punishment for that; rather he is to be subjected to a disciplinary punishment (ta'zeer). They interpreted the hadith mentioned by the questioner as referring to one who regarded his action as permissible.

Ibn al-Humaam al-Hanafi (may Allah have mercy on him) said:

This indicates that he regarded that as permissible, and thus became an apostate. End quote from Fath al-Qadeer (5/261)

The majority of the Maalikis, Shaafa'is and Hanbalis are of the view that anyone who marries a woman who is his mahram should be subjected to the hadd punishment for zina; if he was previously married then he is to be stoned and if he was not previously married, then he is to be given one hundred lashes. They also interpreted the hadith of al-Bara' ibn 'Aazib as referring to one who regarded this deed as permissible.

It says in at-Taaj wa'l-Ikleel, which is a Maaliki book (8/370):

If he marries the wife of his father or the wife of his son, he is to be subjected to the hadd punishment [for zina], if he was aware of the prohibition on that. End quote.

The Shaafa'i scholar al-Maawardi (may Allah have mercy on him) said:

Because he regarded as permissible that which Allah, may He be exalted, had definitively stated was prohibited, the Prophet (blessings and peace of Allah be upon him) regarded him as an apostate, and by taking the khums he classified his wealth as fay' (a kind of booty).

End quote from al-Haawi al-Kabeer (8/146).

The Hanbali scholar al-Bahooti (may Allah have mercy on him) said:

With regard to the report of al-Bara' (about executing a man and seizing his wealth), Abu Bakr said: According to Ahmad, it is to be understood as referring to one who regarded that prohibited act as permissible, and that the one who does not regard it as permissible is to be treated as a zaani (fornicator or adulterer).

End quote from Kashshaaf al-Qinaa' (6/54-55). See also: al-Furoo' by Ibn Muflih (10/56).

Shaykh al-Islam Ibn Taymiyah (may Allah have mercy on him) said:

With regard to the hadith of Burdah ibn Nayyaar, according to which the Prophet (blessings and

peace of Allah be upon him) sent him to someone who married his father's wife, and he instructed him to strike his neck and seize one fifth (khums) of his wealth, the fact that he seized one fifth of his wealth indicated that he was a disbeliever, not just an evildoer. He was deemed to be a disbeliever because he did not regard as prohibited that which Allah and His Messenger had prohibited.

End quote from Majmoo' al-Fataawa (20/90)

What Shaykh al-Islam (may Allah have mercy on him) meant when he said that "he did not regard as prohibited that which Allah and His Messenger had prohibited" is that he regarded that act as permissible, as is indicated by the words before and after that.

Shaykh al-Islam (may Allah have mercy on him) was asked about a man who bought a slave woman and had intercourse with her, then he gave her to his son. Is it permissible for his son to have intercourse with her?

He replied:

It is not permissible for the son to have intercourse with her after his father did so. This is according to the consensus of the Muslims. Whoever thinks that that is permissible should be asked to repent; if he repents, all well and good, otherwise he is to be executed. In as-Sunan it is narrated that al-Bara' ibn 'Aazib said: I saw my maternal uncle Abu Burdah carrying his banner and I said: Where are you going? He said: The Messenger of Allah (blessings and peace of Allah be upon him) has sent me to a man who married his father's wife, and he has instructed me to strike his neck and take one fifth of his wealth. There is no disagreement among the leading scholars that it makes no difference whether he had intercourse with her on the basis of marriage or on the basis that she was his slave.

End quote from Majmoo' al-Fataawa (32/77)

Ash-Shawkaani (may Allah have mercy on him) said:

It is essential to interpret this hadith as meaning that this man, who the Prophet (blessings and

peace of Allah be upon him) issued instructions was to be executed, was aware of the prohibition on that deed, and he did it on the basis that he regarded it as permissible. This is something that implies disbelief, and the apostate is to be executed.

End quote from Nayl al-Awtaar (7/137)

Ibn Hazm was of the view, which is also narrated from Ahmad, that the punishment of one who has intercourse with a mahram should be more severe than the punishment of one who commits zina. He must be executed in any case, whether he was previously married or not.

However they said that he is to be executed as a hadd punishment, not because of apostasy.

This view was favoured by al-Khattaabi and Shaykh al-Islam Ibn Taymiyah.

Ibn Hazm (may Allah have mercy on him) said:

Whoever has intercourse with his father’s wife on the basis of a contract that he calls marriage, or without such a contract, must inevitably be executed, and seizing one fifth of his wealth is obligatory. The rest of his wealth goes to his heirs – if he was not an apostate – or it goes to the Muslims if he was an apostate.

End quote from al-Muhalla (12/204)

Ibn al-Qayyim (may Allah have mercy on him) said:

By Allah, (the Prophet (blessings and peace of Allah be upon him)) did not merely rule that he was to be subjected to the hadd punishment of zina; rather he ruled that his neck was to be struck and his wealth seized. And this is the pure truth, for his crime was greater than that of one who commits zina with his father’s wife without a marriage contract, for such a one commits one sin, whereas the one who does the marriage contract with her adds to the sin of intercourse the sin of a marriage contract that Allah has forbidden. Thus he transgresses the sacred limits of divine law by doing such a marriage contract and he transgresses the sanctity of his mother by committing incest.

End quote from I‘laam al-Muwaqqi‘een (2/249). See also: Zaad al-Ma‘aad (5/13-14); al-Mughni (9/56); Majmoo‘ al-Fataawa by Shaykh al-Islam Ibn Taymiyah (34/177); Ma‘aalim as-Sunan (3/329)

Conclusion:

Although this deed is emphatically prohibited and is a serious crime, it does not constitute disbelief in and of itself, as is indicated by the words of the scholars concerning the hadith quoted above, unless the person who does it regards it as permissible, and does not submit to the ruling of Allah and His Messenger concerning it.

And Allah knows best.