84073 - Ruling on referring to tribal customs for judgement

the question

When a man commits zina with a woman, the tribe offers compensation to the girl’s family in the form of a payment, the amount of which is determined by tribal custom. It may be noted that the tribe helps the man to pay this money. What is the ruling on helping to pay this money if one belongs to the tribe of the one who did it? What is the ruling on taking this money if one belongs to the tribe of the girl? Please note that this town is ruled by a Christian and he does not rule it in accordance with that which Allaah has revealed (sharee’ah), hence the tribes resorted to tribal laws, which also involve ruling by something other than that which Allaah has revealed.

Detailed answer

Praise be to Allah.

Firstly:

With regard to this financial compensation, there may be two scenarios:

1 – When it is paid only where a woman is forced into zina (rape), where the rapist is made to pay the mahr to his victim, or to pay the mahr along with compensation for loss of virginity – if she was a virgin – according to those who say that this is required. The compensation for loss of virginity is the difference between the mahr of a virgin and the mahr of one who was previously married.

This money must be paid by the rapist, and the hadd punishment must be carried out on him, and it must be given to the victim if it is proven that she was forced into it.

If that is the case, then there is no problem with it, rather this is the ruling of sharee’ah even if it is in accordance with customs.

If we assume that they are unable to carry out the hadd punishment, but they can force the rapist to pay the mahr to his victim, then this is acceptable, because if it is not possible to do everything,

we should do as much as we can do. Allaah says (interpretation of the meaning):

“So keep your duty to Allaah and fear Him as much as you can”

[al-Taghaabun 64:16]

With regard to obliging the tribe to pay the mahr or help in doing so, there is no basis for that. Rather it must be paid from the wealth of the rapist, as stated above. Helping him to pay it means letting the rapist off lightly and encouraging rape. We will discuss the difference between the mahr and the compensation (for loss of virginity) below.

2 – If that is the procedure that is followed in all cases of zina, with no distinction between cases where the woman is forced into it (rape) and cases where she did it willingly, and the tribe is obliged to help the zaani pay this compensation, and that is regarded as a general ruling that all the tribes refer to, this is like a system of prostitution. The Prophet (peace and blessings of Allaah be upon him) said:

“The price of a dog is evil, and the earnings of a prostitute are evil and the earnings of a cupper are evil.” Narrated by Muslim (1568).

And he said: “The price of a dog, the fee of a soothsayer and the earnings of a prostitute are not permissible.” Narrated by al-Nasaa’i (4293).

It is obvious that this tribal law, which is known as saloom, is the ruling of Jaahiliyyah which is it is not permissible to judge by or to refer to for judgement, or to help with, because Allaah says (interpretation of the meaning):

“And so judge (you O Muhammad) among them by what Allaah has revealed and follow not their vain desires, but beware of them lest they turn you (O Muhammad) far away from some of that which Allaah has sent down to you. And if they turn away, then know that Allaah’s Will is to punish them for some sins of theirs. And truly, most of men are Faasiqoon (rebellious and disobedient to Allaah).

50. Do they then seek the judgement of (the days of) Ignorance? And who is better in judgement than Allaah for a people who have firm Faith”

[al-Maa'idah 5:49, 50]

“And whosoever does not judge by what Allaah has revealed, such are the Kaafiroon (i.e. disbelievers — of a lesser degree as they do not act on Allaah’s Laws)”

[al-Maa’idah 5:44]

“Have you not seen those (hypocrites) who claim that they believe in that which has been sent down to you, and that which was sent down before you, and they wish to go for judgement (in their disputes) to the Taaghoot (false judges) while they have been ordered to reject them. But Shaytaan (Satan) wishes to lead them far astray”

[al-Nisa’ 4:60]

“But no, by your Lord, they can have no Faith, until they make you (O Muhammad) judge in all disputes between them, and find in themselves no resistance against your decisions, and accept (them) with full submission”
[al-Nisa’ 4:65]

And there are other verses which indicate that it is obligatory to refer for judgement to the laws of Allaah and to reject the rulings of Jaahiliyyah that go against them. Allaah has decreed and prescribed that the zaani should be flogged if he is a virgin and stoned if he is a non-virgin, and this applies to both men and women. Every ruling that goes against this is a ruling of jaahiliyyah, which must be rejected and we must strive to abolish it.

The scholars stated that referring to Bedouin laws and tribal customs that go against sharee’ah is kufr.

Shaykh Muhammad ibn Ibraaheem (may Allaah have mercy on him) said: The sixth (type of major kufr with regard to referring to laws for judgement) is the law by which many of the heads of

Bedouin clans and tribes rule, based on the sayings of their forefathers and their customs which they call their saloom, which they inherited from them and they judge by it and refer to it for judgement in the event of disputes, based on the rulings of Jaahiliyyah or turning away from the rulings of Allaah and His Messenger. There is no power and no strength except with Allaah. End quote from the essay, Tahkeem al-Qawaaneen.

Shaykh ‘Abd al-‘Azeez ibn Baaz (may Allaah have mercy on him) said in an essay entitled “The ruling on referring for judgement to tribal customs and traditions”:

From ‘Abd al-‘Azeez ibn Baaz to whoever among the Muslims reads it: may Allaah help me and them to find out the truth and follow it.

Peace be upon you and the mercy of Allaah and His blessings…

The reason for this is to answer some questions that have been asked by one of our sincere brothers in the Kingdom. He says that in his tribe, and in some other tribes, there are bad tribal customs for which Allaah has not sent down any authority, such as not referring for judgement to the Book of Allaah and the Sunnah of His Prophet (peace and blessings of Allaah be upon him), and turning instead to tribal customs and ignorant traditions.

One of these is the concealment of testimony and not bearing witness out of tribal loyalty, or bearing false witness out of tribal loyalty also. And there are other reasons that may lead some people to go against sharee’ah.

Because of our duty to be sincere towards Allaah and His slaves, I say – and Allaah is the source of strength:

The Muslims are obliged to refer for judgement to the Book of Allaah and the Sunnah of His Prophet (peace and blessings of Allaah be upon him) in all things, and not to man-made laws or tribal customs. Allaah says (interpretation of the meaning):

“Have you not seen those (hypocrites) who claim that they believe in that which has been sent down to you, and that which was sent down before you, and they wish to go for judgement (in

their disputes) to the Taaghoot (false judges) while they have been ordered to reject them. But Shaytaan (Satan) wishes to lead them far astray”

[al-Nisa’ 4:60]

“Do they then seek the judgement of (the days of) Ignorance? And who is better in judgement than Allaah for a people who have firm Faith”

[al-Maa'idah 5:50]

No Muslim should give precedence to the rule of anyone other than Allaah over the rule of Allaah and His Messenger, no matter who he is. Just as worship is for Allaah alone, so too is the judgement or decision, as He says (Interpretation of the meaning):

“The decision [hukm] is only for Allaah,”

[al-An’aam 6:57]

Referring for judgement to anything other than the Book of Allaah or the Sunnah of His Messenger (peace and blessings of Allaah be upon him) is one of the greatest of evils and the most abhorrent of bad deeds, but as to whether the one who does that is a kaafir, that is subject to further discussion. Allaah says (interpretation of the meaning):

“But no, by your Lord, they can have no Faith, until they make you (O Muhammad) judge in all disputes between them, and find in themselves no resistance against your decisions, and accept (them) with full submission”
[al-Nisa’ 4:65]

So there is no faith for the one who does not refer for judgement to Allaah and His Messenger (peace and blessings of Allaah be upon him) with regard to the fundamentals of religion and its minor issues and with regard to disputes concerning rights and duties. Whoever refers for judgement to anything other than Allaah and His Messenger has referred for judgement to the Taghoot (false judges).

Based on this, the tribal Shaykhs must not judge among the people according to tribal customs that have no basis in Islam and for which Allaah has not sent down any authority. Rather they must refer any disputes among their tribes to the sharee'ah courts. There is no reason why they should reconcile between disputants in ways that do not go against sharee'ah, so long as they consent to that and there is no compulsion, because the Prophet (peace and blessings of Allaah be upon him) said: "Reconciliation between Muslims is permissible, except a reconciliation that forbids something that is permitted or permits something that is forbidden." And all the tribes should not agree to anything but the rule of Allaah and His Messenger … End quote from Majmoo' Fataawa wa Maqaalaat al-Shaykh IbnBaaz (5/142).

The Standing Committee for Issuing Fatwas was asked: What is the ruling if two men argue and refer for judgement to customary laws, and each of them chooses someone they think is of good character, and they agree to whoever among the tribal Shaykhs they choose to judge between them, and they sit before him and each of them states his case against the other. If it is a simple case, he rules usually rules that the one who is in the wrong should slaughter an animal and invite his opponent to the feast; and if it is a serious case he gives a judgement of al-janbiyyah, which in the past meant that they would strike him on the head with a sharp instrument until his blood flowed. But nowadays they pay the janbiyyah in money and they call this reconciliation. This is something that is widespread among the tribes and they call it a madhhab, and if you do not approve of what they do, they call you qaati' al-madhhab (one who has forsaken the madhhab). What is the ruling on this?

Answer: The Muslims must refer for judgement to Islamic sharee'ah, not to tribal laws. What you have mentioned is not a reconciliation in the true sense, rather it is referring for judgement to customary principles. Hence they call it a madhhab, and they say of the one who does not agree with the ruling that he has forsaken the madhhab. Their calling it a reconciliation does not alter the fact that it is referring for judgement to Taghoot (false judges). The ruling that they stipulate, of slaughtering an animal or striking the head with a sharp instrument until the blood flows is not a shar'i ruling.

Based on this, the tribal Shaykhs should not judge between people in this manner, and the Muslims should not refer to them for judgement, until they (the Shaykhs) turn away from that to Islamic laws. Today – praise be to Allaah – the authorities have appointed judges who judge between the people and resolve their disputes in accordance with the Book of Allaah and the Sunnah of His Messenger (peace and blessings of Allaah be upon him) and who solve their problems in ways that do not go against the laws of Allaah, may He be exalted. So there is no excuse for anyone to refer for judgement to false judges, after the appointment of scholars of Islam to whom they may refer for judgment and who judge in accordance with the law of Allaah.

And Allaah is the Source of strength. May Allaah send blessings and peace upon our Prophet Muhammad and his family and companions.

The Standing Committee for Academic Research and Issuing Fatwas.

‘Abd-Allaah ibn Qa’ood, ‘Abd-Allaah ibn Ghadyaan, ‘Abd al-Razzaaq ‘Afeefi and ‘Abd al-‘Azeez ibn Baaz. End quote.

As that is the case, it is not permissible for you to take part in his judgement or to pay the money or take it. Rather you must disavow yourself of that, and you must advise these people and explain to them the seriousness of what they are doing by passing judgements that are not in accordance with sharee’ah. They have no excuse for that, even if their governor is a Christian who does not apply the rulings of Allaah. They have to advise one another and strive to apply the rulings of sharee’ah as much as they can; whatever they are unable to apply, it is not permissible for them to invent rulings for it, no matter what interests they think may be served by that, otherwise they will be sinners who are introducing jaahili ways into Islam.

Secondly:

The majority of Maaliki, Shaafa’i and Hanbali fuqaha’ are of the view that if a woman is forced into zina (raped), then the rapist must pay a mahr equal to that of her peers.

If she was a virgin, is she entitled to compensation for loss of virginity along with the mahr?

Some of the fuqaha' are of that view, and it was narrated from Ahmad (may Allaah have mercy on him), but the well known view of the Hanbalis is that compensation for loss of virginity is not required, and the one who is forced into zina can only take a mahr equal to that of her peers. The Maalikis also pointed out that this mahr is not to be paid collectively by the male relatives of the rapist, because zina is a deliberate action, it is not something that can happen by mistake.

The Hanafis differed from that and did not impose a mahr for a woman who is forced into zina, whether she was a virgin or not.

This was also narrated from Ahmad (may Allaah have mercy on him), and was the view favoured by Shaykh al-Islam Ibn Taymiyah, who said concerning the mahr: it is khabeeth (evil).

Thirdly:

If he forced her to commit zina and he destroyed the barrier between the urethra and vagina, then he must pay the mahr and also compensation, but there was a difference of opinion as to the amount. The Hanafis and Hanbalis say that it is one-third of the diyah, and the Shaafa'is say that it is the full diyah. The Hanafis agree with them if he destroys the barrier between the urethra and vagina and she can no longer control her urine.

See al-Mabsoot (9/53), al-Muntaqa by al-Baaji (7/77), al-Taaj wa'l-Ikleel (8/342), Mughni al-Muhtaaj (4/75), al-Mughni (7/209, 8/373), al-Insaaf (8/306-308), al-Mawsoo'ah al-Fiqhiyyah (5/297, 21/95).

Conclusion: The mahr which is paid to the woman who is forced into zina (raped), and the mahr and compensation for loss of virginity which is paid to a virgin who is forced into zina, must be paid from the wealth of the zaani and not by his male relatives, and it must go to the woman who was forced into zina, not to her relatives. As for the woman who willingly commits zina, she is not entitled to anything.

All of this comes after zina has been proven and the hadd punishment has been carried out. This makes clear the difference between what is narrated in sharee'ah and the ruling of tribal customs.

And Allaah knows best.