98354 - His country forbids plural marriage and he wants to marry a second wife with the permission of her brother but not her father

the question

I live in a country where polygamy is prohibited. Customary marriage is not allowed either; so it cannot be registered one day! The wali is not accepting the idea of letting one of his daughters get married secretly. What is the solution for this, knowing that I am married but liked her, and she agreed to marry in such a way? Her younger brother who is 25 years old also agreed, but he requests that we keep this marriage secret.

Detailed answer

Praise be to Allah.

Firstly:

We do not know how some of those to whom Allaah has granted authority over the Muslims dare to oppose Allaah and His religion. They are not content only to forego ruling in accordance with that which Allaah has revealed, but they also oppose sharee'ah, go against its rulings and mock it. An example of that is their putting restrictions on that which is halaal and banning it, and spreading haraam and approving of it. If one commits sin and that is limited to himself, the matter is not as serious as one who propagates sin by force of law, so that the one who does it is rewarded and the one who does not do it is punished. We ask Allaah to set the affairs of the Muslims straight, both rulers and subjects. If they were to think for a few moments of how their destiny is a narrow grave in which they will not have their servants, followers, ministers, wealth, crowns, food and drink with them, they would understand this matter and realize that it is serious and there is no room for joking. If they were to think of the meeting with their Lord, they would re-examine the path they have chosen to follow. If Allaah saw anything good in them He would have guided them.

Secondly:

You should realize that it is not permissible to marry without the woman's wali (guardian) being involved. If her father is present then her brother has no right to arrange her marriage. The father loses the right of guardianship if it is proven that he is preventing his daughter from marrying anyone, for no legitimate shar'i reason or for no reason that is acceptable according to sharee'ah. If he prevents her from marrying in a case like that which you describe, he has done well, and it is in accordance with sharee'ah and sound reason. How can you want to marry his daughter with no documentation that is recognized by the state?! Do you know of the evil consequences that can result from that?

Documentation of marriage contracts – and other kinds of contracts – is not a bid'ah or innovation in Islam, rather it serves the general purposes that are in accordance with sharee'ah.

General purposes (al-masaalih al-mursalah) are those which Islam did not refer to in specific terms, so they are not enjoined or ignored. Rulings on these general purposes are to be based on the general principles of sharee'ah.

Shaykh al-Islam Ibn Taymiyah (may Allaah have mercy on him) said, defining the meaning of al-masaalih al-mursalah:

This applies to cases where the mujtahid thinks that this action will bring a certain benefit and there is nothing in sharee'ah to forbid it.

Majmoo' al-Fataawa (11/342, 343).

There are several interests to be served by documenting marriage, such as the following:

1 – Preserving the wife's rights, such as proof of the delayed portion of the mahr, recording the conditions stipulated by her, and allowing her to take her share of inheritance from her husband and children.

2 – Proof of her children's parentage from her and their father.

3 – Prevention of another marriage contract being done for her when she is married to another husband.

4 – Preserving the husband’s rights, as the mahr that the wife received is recorded.

5 – Preventing the husband from marrying more than four women.

And there are many other interests, which sharee’ah would not overlook, rather it would stipulate them as conditions in marriage so as to preserve people’s rights and ward off evil.

In al-Mawsoo’ah al-Fiqhiyyah (6/170) it says:

Allaah has prescribed recording and witnessing so as to protect people’s rights. He says (interpretation of the meaning):

“O you who believe! When you contract a debt for a fixed period, write it down”

“And get two witnesses out of your own men.”

“But take witnesses whenever you make a commercial contract”

[al-Baqarah 2:282]

And Islam enjoins documenting some commitments because of their seriousness, such as marriage. End quote.

The scholars of the Standing Committee were asked:

Is it necessary in marriage to have a person who prompts the woman’s wali to give the proposal and prompts the husband to accept, or is the marriage valid without this person if the marriage fulfils all the conditions and necessary aspects?

They replied:

If the matter is as described in the question, whereby you propose and the father accepts, and

there are witnesses, and the girl named in the marriage contract agrees, then the marriage is valid, even if another person does not do the marriage contract between you, because that is not a condition of the marriage being valid or complete. Rather the government requires people to do the marriage contract before one whom it has authorized to do that and record it, so as to avoid chaos and prevent people from toying with marriage, and so as to preserve lineages and protect people's honour and rights, and so as to avoid denial of prior agreements in the event of disputes. Obeying the authorities in such good matters is obligatory, because that is helping them to run people's affairs properly and serve their best interests.

Shaykh Ibraaheem ibn Muhammad Aal al-Shaykh, Shaykh 'Abd al-Razzaaq 'Afeefi, Shaykh 'Abd-Allaah ibn Ghadyaan, Shaykh 'Abd-Allaah ibn Munay'

Fataawa al-Lajnah al-Daa'imah (18/105, 106)

Based on this, the fact that the father of this woman has refused to let you marry her because of the ban on plural marriage is acceptable, and what he has done is not going against sharee'ah, and it is not permissible for you to marry her without her father's permission. Her brother's acting as her wali is invalid if her father is present, and any marriage contract that is done with her is invalid and unacceptable.

Thirdly:

As for the 'urfi marriage, it takes two forms:

1-Where a woman gets married in secret, without the approval of her wali. This is what people think of when this word is used. If that is the case, then it is a haraam contract which is not valid, because the approval of the wali is one of the conditions of a marriage contract being valid.

2-Marriage with the approval of the wali, but without announcing or publicizing the matter, or documenting it in the courts. Although this is a valid marriage in that it has met the conditions, it leads to many negative consequences, and those scholar who have examined this issue have ruled that it is definitely not allowed, especially because of the lack of documentation.

In your case which you have asked about here, the woman's father does not approve of the marriage, so it is not allowed for two reasons:

(i)The wali has not given his approval

(ii)It has not been documented.

In the answer to question no. 2127 you will find an important summary of the conditions of marriage and the conditions of the wali.

In the answer to question no. 7989 you will find further important information on the importance of the wali as a condition of the marriage being valid.

In the answer to questions no. 45513 and 45663 you will find a discussion on the ruling on 'urfi marriage.

And Allaah knows best.