

Effects of Temporal and Spatial Evolutions on Religious Punishments (Sharia)

Naser Ghassabi^{1*}, Kiomars Kalantari²

^{1*}MA in Criminal Law and Criminology, Mazandaran University, Mazandaran, Iran

²Department of Law, Faculty of Law and Politic Sciences, Mazandaran University, Mazandaran, Iran.

*Corresponding Author: nboukan@yahoo.com

Abstract: Nowadays, punishment has become the most challenging subject in Iranian Law as one of the most important discussions in jurisprudence. Following the Islamic jurisprudence, Iranian Law has recognized a wide range of physical punishments in its legal system which the possibility or impossibility to review its principles is propounded according to increasing influence of human rights discussions in legal and intellectual societies. Apart from the issue of possibility or impossibility, the necessity to review these rules is essential regarding some special conditions of these days, but important arguments may be raised about possibility or impossibility too. This study considers legal evidences of these potential changes.

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1. Introduction

The problem of compatibility and coordination between legal ideas and foundations with social developments and changes is the most important and fundamental issue in all legal systems. Criminal jurisprudence of Islam has the characteristics of a legal system, so it confronts with such a problem, even harder and more sophisticated than other criminal systems because it claims to be universal, immortal, stable and an equivalent for natural rules, but other criminal systems have emerged as a social phenomenon and follow social developments. Yet, the process of encounter between legal theories and social developments in criminal system of Islam is obviously considerable.

After Islamic Revolution and following legal system of Islam, Forth Principe of Constitutional Law was approved in order to adaptation of all approvals with Islamic Rules and not inconsistency of them with religious principles in legal system of Iran. Law-maker have tried to correct and improve these rules (especially criminal rules) since 1982 and has considered religious criteria to reapprove them to have no inconsistency with legal rules and jurisprudence as much as possible, such as approval of Islamic Punishment Law, penance, blood money and retaliation (1982) and approval of suspended sentences (1983) by Commission of Legal and Judicial Affairs of Parliament of Islamic Republic of Iran. Revitalization of some Islamic punishments such as stoning, retaliation, amputation of hand, rigid punishment, etc and also principles of swearing, the right to select criminal for blood money, lowering the age of criminal, etc are the most important changes to provide above-mentioned goal. Whatever is important

to restore these punishments is the compliance or noncompliance with legal viewpoints of global society. According to increasing influence of human rights discussions in legal and intellectual societies and regarding protection of world powers and western countries of development of criminal rules according to philosophy of human rights and also development of activities of western organizations, there is a great pressure on Iran about execution of these principles, so that Iranian judicial authorities are forced to repair these principles unofficially and it is possible only by elimination of these punishments. For example, Head of Judiciary Power prohibits performance of some punishments such as rigid punishment and limits the right to select criminals from six to three people according to article 297, and or members of parliament try to eliminate stoning punishment. Such these efforts, cross these questions in the mind that this paper is trying to one of the most important problems, namely the ability or lack of ability to adapt Islamic rules about punishments with temporal and spatial circumstances. Iranian law-maker will pass these problems powerfully according to requirements of the Forth Principe of Constitutional Law and based on requirements of temporal and spatial changes. Historical Origin of Temporal and Spatial Problem: One of the methods to recognize any problem accurately is to consider its historical background. Researching evolution of an opinion along the history provides many hidden angles to try to complete and probably correct it. It may be claimed that while the earth and its inhabitants were deprived of inspiration and prophecy was finished, the problem of temporal and spatial evolutions appeared.

In fact, confronting of newly established Islamic society with legal problems was the ground of jurisprudence and deliberation in many Islamic texts, and the principles derived from Islamic texts turned to various philosophies and faiths gradually and along the history, namely jurisprudence and its principles were appeared in different tendencies.

The approach of Sunnites toward syllogism, charity, sent interests and reunion as resources of religious jurisprudence is the result of confrontation with these legal problems and issues, some difficulties such as the problem of ... about new subjects and events, appearance of the hidden Imam, executive obstacles against anticipated principles and rules in Sharia. Historically, Sunnites faced legal and religious problems sooner than Shiites because first of all, religious texts did not include all issues and affairs, and second of all, jurisprudence of Sunnites was involved with governing the society and exercising political sovereignty continually⁽¹⁾. Apart from this historical antecedence, it may be said that both Shiism and Sunnah found the reply of modern legal problems in "religious jurisprudence and duties of jurispudent". According to both philosophies, the jurispudent should remove the conformity problem of jurisprudence with temporal and spatial circumstances with his jurisprudence. The differences are about the method of jurisprudence and its resources referred by any jurispudent and also the validity of these methods and resources, not about necessity of jurisprudence.

2. Description of Religious Rules

It is said to describe a religious rule: Invention of lawgiver for a specific subject including human, items and contexts⁽²⁾. It is also said⁽³⁾ namely, it is religious obligations with verification and negation (necessity and reverence) which usually comes with "must" and "must not" or other words. Anyway, religious rule defines viewpoint and special position of religion about a special subject. These viewpoints are mentioned as "lawful", "unlawful", "obligatory", "recommended" and "disapproved".

The meaning of "rule" differs from the meaning of "law" in expression of jurisprudents, and the meaning of "law" for jurisprudents differs from the meaning of law in Law Books. The purpose of

jurisprudents from "Law" is permanent and stable general rules which are enacted by God based on real interests and mischiefs, and are according to numerous evidences, but "rule" includes real general rules of Sharia and discoveries of jurisprudents which may be general or partial. According to lawyers, law means necessary principles to regulate social relationship and may exist for a long time but it is not permanent and stable.

3. Division of Rules:

Jurisprudents divide religious rules according to various expressions. They categorize religious rules in three groups according to their constancy and changeability:

A) Real divine rules as the texts of Holy Koran and traditions (of course jurisprudence tradition) are not changeable in the manner of nullification. These rules are called explicit text rules.

B) Apparent religious rules or in other words, statements of jurisprudents which can be interpreted according to explicit texts and are changeable.

C) Government Rules are enacted by Vilayet (Supreme Religious Authority) as expedient rule which are changeable by him or by the authorities who are appointed by Vilayet.

Some other jurisprudents divide religious rules in primary and secondary. Secondary rules are those which jurisprudents may change or invent them according to some exceptional conditions. Secondary rules have causal relationship with personal and social circumstances of people and their conditions, so they are a way for temporal and spatial effect on Islamic rules through secondary pretexts.

3. Applicability of secondary rules

1- The most important issues: As Islamic rules follow the real interests and mischiefs and these interests and mischiefs may lead to practical conflict while performance, Islam has authorized religious experts to relinquish the least important issues due to save the most important ones. Holy Prophet of Islam says: "When two affairs are intercourse, both are worthy of respect, the lesser should be relinquished due to the greater"⁽⁴⁾.

2- Reluctant and distress issues: Duties are the rules which are propounded for those who are empowered and authorized and are not distressed. In this way, when somebody is distressed or has to do something reluctantly, its performance is authorized⁽⁵⁾.

3- Governing and adjusting rules: Among Islamic rules, there is a series of rules which are adjusting and govern other rules. Namely, when performance

¹ Vaezi, Ahmad; stable and unstable bases in Islamic jurisprudence; series of papers in eighth international conference of Islamic Unity, 1995, p. 3

² Gorji, Abolghasem; Papers of congress to consider judicial bases of Imam Khomeini, volume 14; p. 277

³ Al-Asefi, Mohammad-Mehdi; Opinion of Imam Khomeini about Spatial and Temporal Effects on Ijtihad

⁴ Mottahari, Morteza; Conclusion of Prophecy

⁵ Surah Baghara; verse 173

of a religious rule harms specific people or puts Muslims or Islamic society in a critical situation of difficulty and fault, the rule will be set aside until such a condition exists, and a secondary rule will substitute with it, because the subject is related to fault and difficulty not the essence of subject.

Sometimes the punishment of a crime will turn to other kind of punishment due to temporal and spatial Evolutions. A brief review of criminal rules, approved by Parliament and Expedience Council of Iran, shows that for some reasons, law-makers have lessened punishment of whipping and have tried more to exercise financial punishments or imprisonment or other complementary and preventing punishments. This effort is a kind of punishment changing. Substitution of camel with money by Imam Ali (PBUH) to pay blood money confirms this principle⁽⁶⁾, so in our country the payment of blood money includes the currency of the country instead of six various materials, mentioned previously in Islam. By the way, changing punishments is sometimes to harden them and sometimes to lessen them, and may be for internal and external situations of country, or it may be to perform new criminal policies which are more effective than punishments in texts. In all instances, the punishments may be changed and altered such as changing of whipping for fraudulence, theft, treachery in trusts and so on. Sometimes, penances may be changed, for example, suppose the performance of stoning is not in a good interest in present times or amputation of the hand may weaken Islam and Muslims around the world, so the Islamic Ruler changes them to other punishments. Criteria to avoid changing penances during a war and along the land of enemies include all these punishments too.

Of course, those who believe that penances are not required to be performed during the Age of Absent Imam surely do not mean to leave the criminals free and not be punished anyway. They believe in substitution of other punishments with penances and to change penances to lawful punishments. Problems Encountering Criminal System of Islam about Changes of Rules Today, the speed of changes and social developments is so high that sometimes legal symbols and concepts are being changed subsequently, so that, it sometimes seems that the only way to exist a legal system is to set aside some of the old concepts and structures. The process to encounter of legal opinions and social developments as one of the most fundamental issues in philosophy of law is considerable in the realm of Islamic criminal system. It should be mentioned that

⁶ Dehghan, Hamid; Effects of time and place on criminal law of Islam, Madyan publications, 1997

the essence of existence of such a problem is not deficiency or imperfection, but its existence is unacceptable. Confronting a problem is the base to offer a "theory" and interaction and investigation over a theory is the base to form and complete a scientific theory. These theories change to a mental and practical "system" in their evolutionary process. This is a rule for all humanities. Among Islamic sciences, the history of jurisprudence is a clear and rational instance of this rule. The texts of Holy Koran and traditions caused the creation of jurisprudence due to their variation, and the science of essentials was born of jurisprudence.

According to the history of jurisprudence and Ijtihad, Islamic jurisprudence has faced a great development such as other legal systems. One of the main reasons of these developments is to expand the relations between humans and various changes in human life. Of course these changes have made a deep influence on logic of jurisprudence, namely science of essentials. Basically, the creation of science of essentials has been due to these problems and issues; just as, the systematic development, deepening and completion of this science has been the same⁽⁷⁾. Sensitiveness of jurists to employ the element of time has regarded the intellect as the fourth resource of Shiite jurisprudence in the width, not in the length, of other resources (Holy Koran, traditions, and unanimity). Islam is a natural religion, and one of the natural and instinctive goals and ideals of human is to achieve interests and advantages, either personal and private interests or public and general ones. Islam, due to its nature, pays a complete attention to personal interests and advantages of humans and enacted the rules to obtain these goals and high interests. The attention of the Great Lord (the great law-maker) to these interests and advantages is obvious through traditions about Vilayet, government and business such as contracts, cadences and all rights including what is due to God and what is due to men⁽⁸⁾.

Following issues justify the attention to social developments to enact any rule and religious statement:

A. Changing the Subject

Rule is the cause, and subject is the effect. So while the subject is not practical, the rule will not exist. Consequently, if subject is changed due to temporal and spatial evolutions, the rule will

⁷ Mehr-Rizi, Mahdi; problem of jurisprudence and time

⁸ Marashi, Seyed Mohammad Hassan; New viewpoints about criminal law of Islam, Mizan publications, 1994

naturally changed too. For example, sculpture is a subject which was changed⁽⁹⁾.

B. Changing Performance Outline of Law

Performance outline for many jurisprudential rules has been changed in comparison with one thousand years ago. A jurist should consider these changes while he states his statements, for example the subject of slavery. "During the wars occurred in the beginning of Islam, slavery was authorized and allowed due to retaliation, and any fighting party would take the forces of the opposite party as its slaves and sell them. Islam was not able to nullify this rule; if so, this nullification was unilateral and would cause the weakness of Islam and strengthening of enemy"⁽¹⁰⁾. While there is no performance ground, the rule of slave selling should be nullified along with international contracts.

C. Scientific and Industrial Developments

The development of industry and technology may change a rule. For example, alphas is an illness which gives the husband the right to divorce his wife (article 1123 of civil law), but if medical developments be able to treat this illness during a short time, will the husband rightful to divorce his wife again? Apparently no, because when such a rule was enacted, alphas was an epidemic illness which might penetrate to the husband and it was also a difficult-to-treat illness. If these circumstances are removed, the rule will be nullified too.

New thinker jurists always consider social changes when enacting their statements such as followings:

1- Ibn-Timieh says: During the era of Tartars, I met some of them when walking with my followers and I said them: Great Lord has prohibited wine because it deceives people to remember God and to pray, but drinking wine prohibits them (Tartars) to kill people and to plunder them, so leave them in peace".

2- Based on convenience, Abu-Hanifah had believed that the duration to rent an estate from orphans or an endowed property should not exceed one year and the duration to rent lands should not exceed three years, but other jurists after him let longer period based on convenience of their time.

4. Conflict between Islam and Human Rights

Critics believe that rough and harsh Islamic punishments are one of the bases of conflict between Islam and human rights. In fact, they have problem with criminal law of Islam. Fifth article of International Letter of Human Rights (General

Assembly of United Nations, 1948) says: "Nobody should be tortured or be punished or be behaved cruelly and contrary to humanities and human authorities or based on humiliating acts". The sixth article of International Pact of Civil and Political Rights (General Assembly of United Nations, New York, 1966) recognized the right of living as a natural right for human and specifies that nobody should be deprived of life unlawfully. The punishment of execution is specific for very important crimes under the law and by the explicit order of authorized courts. Punishment of execution may not be performed for youngsters under eighteen. The seventh article of this Pact prohibits torture or cruelly and savagely punishments and behaviors. The Convention to prohibit torture or cruelly and savagely punishments and behaviors is one of the most important international documents which is approved in 1984, describing and explaining any torture (article 1) and making member governments bound to avoid any kind of torture and to guarantee this prohibition by effective legal and executive measures. The convention recommends that no exceptional circumstances such as war, war threat, internal political disorder and any other emergency situation is a justification for torture (article 2). Some religious punishments in Islamic jurisprudence can be performed by people without order of court and judge, even the punishment of execution which may be performed as a religious duty. One of the conditions for retaliation is that killing the criminal is not revered and prohibited. So, natural apostates, cursers to Holy Prophet of Islam and those who claim to be a prophet can be killed without permission of authorized court, defense of guilty and the judgment of the Jury and other formalities. In authorized killing, retaliation is not allowed. It is true about killing those who should be executed for retaliation (with permission of relatives of criminal) or penance. If somebody kills such a criminal because his killing is authorized, he will not be retaliated. If a man finds his wife making sexual relation with another man, he is authorized to kill both of them religiously.

The second point in this conflict is the way to perform religious punishments. Today, some punishments such as burning the criminal in the fire, throwing the criminal from the height on the mount with closed hands and feet, beheading by the sword, stoning, imprisoning with hard work such as beating at the time of praying or shortening the amount of food and water, hanging on a cross, cutting right hand and left foot, cutting four fingers of a hand or whipping are the evidences of rough punishment and against humanity, so all religious penances which order to above punishments are declared as punishments against principles of human rights.

⁹ Mousavi Bojnoordi, Seyed Mohammad; Role of time and place to change rules

¹⁰ Mohaghegh Damad, Seyed Mostafa; the same source

Definition of such heavy punishments by the law has been for eradication of heavy crimes. But the opinion of human rights goes forward to eliminate physical punishments completely, to limit execution and to lessen it up to elimination, and to remove any rough method of execution, generally toward elimination of rough punishments. So, according to religious punishments all religious penances and whipping are against principles of human rights. The third point in this conflict is to force offender to give information and to break his or her resistance to cooperate with the judge. Human rights believe that any kind of physical and mental pressure on the criminals is a torture even by judicial officers and to force them to confess, and the convention of human rights has approved prevention of torture exactly to avoid these measures. Although the conflict between human rights and legal law of Islam is not limited to above items and includes many other subjects, so we point at them briefly:

4.1. Punishments in Islamic rules

Generally, crimes are divided into five groups according to criminal system of Islam and due to policies of great Law-Maker (Great Lord):

1. Crimes against religion: Apostasy, religious innovations, disrespecting Holy Koran
2. Crimes against the intellect: Drinking wine, taking drugs
3. Crimes against body: Murder, beating and injuring
4. Crimes against generation: fornication
5. Crimes against properties: Theft, unlawful profit⁽¹¹⁾.

Other categorizations can be represented beside the above categorization such as categorization based on the rate, quality and type of punishments for performed measures such as:

1- Crimes deserving penance: The punishment for these crimes is defined. These crimes are the sin against God and never can be forgiven such as fornication, fighting with the religion of God and theft.

2- Crimes deserving retaliation and blood money: The amount of punishment is defined. These crimes are the sin against people and can be forgiven such as murder, beating and injuring.

3- Under-law punishments: The punishment of these crimes is not defined in law and if they are the sin against people, they may be forgiven. The judge is capable to define these crimes and the limits of their punishments. Administrative punishments and disciplinary breaches are among this category. Of course it should be said that the authority of judge is

valid until his decisions are according to real interests and mischiefs in viewpoint of religion, because the goal of religion to give these authorities to the judge is to capable him to regulate social relations and to guide the members of society toward appropriate directions and to save the interests of society and to prevent circumstances⁽¹²⁾.

4.2. Effects and consequences of performance of religious physical punishments

Performance of physical punishments during the initial years after Islamic Revolution of Iran, under the name of religious punishments, was one of the consequences of Islamic Revolution which had too many internal and international interactions, different from what law-makers and performers expected. Inside the country, creation of a kind of distaste about performers of these punishments and even pessimism about religious rules among various social classes especially educated people and the youth on one hand, and doubtful efficiency of these punishments to prevent repetition of crimes especially about those criminals who were addicted to crimes on the other hand, were the consequences of these punishments. The newly-established government which strongly needed the support of various social classes and had to attract the people especially during the unwanted imposed war to stand against external pressures, faces serious problems to perform physical punishments. Although these decisions were supported by people, but some punishments such as stoning and whipping in the squares of cities had excited people. On the other hand, leaving criminals after physical punishments and the feeling of addiction of criminals to punishments had made the judicial authorities too worried about the security of society and efficiency of physical punishments. These problems were not all the difficulties arose by physical punishments. The problem of opposition of international societies and institutions and some political and legal authorities in various countries with physical punishments were added to internal problems. Especially when photos and videos were taken by some foreign agents from the scene of whipping and stoning in the public, and were demonstrated for the people of foreign countries, negative injurious effects were brought up for the Islamic Revolution among the people and authorities of those countries, and reduced international support and public opinion of other countries to which, our country required hardly especially during the initial years after the Revolution. Although supreme authorities of country

¹¹ Gorji; the same source

¹² Audah, Abdolghader; Islamic Criminal Jurisprudence, First edition, Beirut

at first resisted against international oppositions and public opinion inside and outside the country and tried to show that these oppositions are unimportant, but continuation of this situation brought political and social problems, and authorities of government could not be indifferent against these consequences especially those who were more anxious about the future of revolution and Islamic rules. Of course if there was no doubt about the efficiency of physical punishments, and great reduction in the statistics of crimes was obtained, and the cost of insistence to perform these punishments was proportional with obtained advantage, the performance of these punishments was more defensible. But such a thing never happened and political and social costs of these punishments were increasing inside and outside the country about the obtained advantages. The major reasoning of adherents of these punishments was that the performance of these religious punishments would have cost for the revolution as the victory of revolution had heavy costs for people, and performance of divine rules is valuable against political and social costs. In addition, if performance of criminal rules of Islam may be endangered due to opposition of some opponents, the base of Islam will be endangered too. To escape from this problem, these punishments can be reviewed by jurists and under continuous jurisprudence of skillful jurists of Islam, just like hundreds of religious problems. So, it is possible to save the essentials of religious rules and to create new and effective frames according to scientific criteria to substitute new punishments with physical punishments. In this case, performance of divine rules was saved as a major goal of Islamic Revolution and negative consequences were reduced. With due consideration that jurisprudence of Imams has been shortly performed in the past, executive problems of such these rules have been occurred less for jurists of Imams and for this reason, there is little judicial innovation in this area of jurisprudence as the continuous and updated jurisprudence. After Islamic Revolution during which, performance of criminal rules was dismissed from merely scientific and mental subjects and the possibility of scientific fulfillment of them was prepared, executive problems were appeared, in a way it required multiple scientific efforts to remove these problems and to offer more scientific solutions with less political and social costs. The jurists will perform these reforms that insist on criminal law of Islam like other parts of jurisprudence and believe that these rules are both sufficient and practical and on the other hand, are sensitive and feel commitment to reduce internal and external oppositions and various political and social costs. Offering new judicial viewpoints about under-

law punishments have created major developments in religious punishments gradually during two decades, and in Islamic Criminal Law, approved in 1996, in many cases the same punishments of previous law was substituted again with punishment of whipping, or the punishment of imprisonment and financial penalties were added to whipping. Judges are allowed to select appropriate punishment according to the situation of people and their states. It should be said about penances, blood money and retaliation that although these rules are approved by Islamic texts and all of them aim to avoid mischiefs and crimes to provide a healthy society, doubtlessly they conflict with other interests of society and cause many disadvantages such as representation of a rough face of religion and application of hidden methods to perform evil deeds. But avoiding crimes which are the main target of these religious texts are practical in new methods and brings no mischiefs of text punishments. In other words, it does not include many of penances as it is said in Holy Koran: The advantage of an evil deed is an evil deed⁽¹³⁾.

Many traditions say that religious rules have not been stable during the time and have been changed according to interests of society. Of course these changes have not been for interference and possession of Islamic rules, but they knew that divine rules are not stable and depend on a specific time and should be changed if other interests occur⁽¹⁴⁾. So, jurist not only should argue about document of traditions and its accuracy, but also should know the difference between stable and unstable rules. He should know which rule is stable and which one is not⁽¹⁵⁾. Punishments are enacted for some interests and these interests are generally for people and society, but as we know the interests of people are changeable because human finds new interests during the time and previous interests will be insufficient and repetitive for him. Allameh Helli says: The existing rules are the orbit of interests and interests are changeable and various according to the power of those who are responsible to perform them, so a specific rule may be in interest of a nation in a specific time. In such a case, this rule is honored and should be performed. This specific rule may not be in interest for another nation in another time. In such a case, the rule is prohibited and should not be performed. So stability of rules in all times and places is not a strong statement⁽¹⁶⁾.

As the Islamic rules follow the real interests and mischiefs and these interests and mischiefs may

¹³ Surah Shora, verse 40:

¹⁴ Audah, Abdolghader; the same source, p. 176

¹⁵ Audah, Abdolghader; the same source, p. 211

¹⁶ Helli, Jafar-Ibn-Hassan; Jurisprudence of Islam

have conflict in practice, Islam has het experts of religion to relinquish less important issued due to the most important ones ⁽¹⁷⁾. Great Lord has strictly prohibited the weakness of Islam and Muslims. For example presence of non-Muslims is prohibited while performance of penance and performance of penance in the land of enemies is not allowed. So if performance of penances weakens Islam and Muslims, they should be given up. So, the attention should be paid that principles and rules of Islam are the effect of interests of believers to God. Islam as the most complete religion aims the prosperity and honor of Muslims and Islamic system and always tries to invite the followers of other religions to Islam, so enough efforts should be taken to show a kind and advancing face of Islam. If any disadvantage is bound to performance of penances or if Islam and Muslims are being weakened, the performance of penances will be relinquished due to the principle of conflict and Ijtihad, in order to provide interest of Muslims according to temporal and spatial evolutions.

6. Conclusion

It can be concluded according to all propounded subjects that due to naturality of Islam and due to temporal and spatial effects on this human essence, Islamic rules have nothing to do instead of accepting these changes and developments. This development and impression is not a new and strange issue in Islam and has been discussed since the appearance of Islam by creation of the rules in Islamic manuscripts. Today, the necessity to make changes in rules of punishment especially in physical punishments is obvious for any body, and logical judicial justifications can be offered. Following this authority, the Iranian Law-Maker can bring up himself as the pioneer authority for these changes in the Islamic world. So insightful and provident jurists with their supreme Ijtihad should introduce an acceptable and practical appearance of practical rules of Islam, while avoiding any deviation and distortion, and try to discover interests of rules and their philosophy and to understand the real opinion of Great Lord about temporal and spatial evolution instead of relying on obligatory rules and following Islamic texts in social affairs. They should enter the concept of criminal policy in criminal law and insist on removing punishments and administrative and disciplinary punishments and rely on civil solutions to provide new requirements of society.

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¹⁷ Dehghan, Hamid; the same source; p. 162