

CRIMINAL PROTECTION OF THE MARITAL RELATIONSHIP BETWEEN ALGERIAN AND EGYPTIAN LEGISLATION “THE CRIME OF ADULTERY OF ONE OF THE SPOUSES AS A MODEL”

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Abstract:

This study is concerned with the offence of adultery of one of the spouses, which is considered a serious offence negatively affecting the marital relationship. Offending the victim's spouse and damaging his or her honour, This leads to the dissolution of the marriage bond, especially since the injured spouse often has recourse to justice in order to file for divorce against the adulterous spouse. and therefore Algerian legislation had to tackle this crime vigorously and firmly in order to protect the marital relationship.

Both Algerian and Egyptian law have legally protected marital relations by criminalizing the act of adultery committed by one of the spouses. In order to reduce this offence, both laws impose a penalty on the perpetrator of adultery, whether the husband or wife, . However, both legislators have not reached To achieve the purpose of criminalizing adultery as a result of failure to address this crime in the appropriate manner and not to impose sufficient punishment.

Keywords: Marital relation, Affected spouse, Adultery, the elements of crime.

INTRODUCTION:

The family is the most important entity on which society is based because it has an impact on people's lives, And that's why the Islamic Shariah paid attention to the family, by giving sanctity to the marriage that made it the foundation on which the concept of family is based, This was followed by legislations through the enactment of a series of provisions aimed at maintaining the cohesion of the family and society, one of them is The Penal Code that penalizes any criminal offence affecting the family by establishing the criminal protection of the marital relationship.

so the family criminalisation is embodied in various offences involving family ties, including the offence of adultery of one of the spouses, which will be dealt with in this study as one of the most infringed offences to the basic of the marital relationship which is trust and security ,on one hand, and its negative consequences lead to family disintegration, on the other, because of The affected spouse by the act of adultery often has recourse to the courts in order to file for divorce against the adulterous spouse.

The aim of the study is to clarify the gravity of the offence of adultery of one of the spouses and the serious consequences of the offence on the couple's relationship. It also seeks to demonstrate the degree of difference between Algerian and Egyptian law and to analyse the texts of Algerian legislation in order to determine their effectiveness in reducing the offence of adultery of one of the spouses.

In this context, the study attempts to answer the following problems: how effective is Algerian legislation in protecting marital relations compared to Egyptian legislation?

The previous issue will be answered by the following points:

First: Definition of the offence of adultery of one of the spouses

Second: The elements of the crime of adultery of one of the spouses

The offence of adultery of one of the spouses is one of the most egregious crimes that may be committed against the family entity, since it has adverse effects on family life and in particular on the psychological impact on children. Therefore, this part of the research will address the definition of the offence of adultery of one of the spouses, as follows:

First : Definition of the offence of adultery of one of the spouses

In order to arrive at a proper definition of the offence of adultery of one of the spouses, the act of adultery must be defined as it is the material activity of the offence.

And To know the meaning of adultery, reference must be made to Islamic jurisprudence, where it appears that both of doctrine Maliki and Hanafi identify adultery as an prohibited penetration of the male organ, but it differs at the penetration site, where Maliki considers it to be an adultery whether the male is inserted in the front or the back of woman, However, the Hanafi doctrine considers the penetration of a male organ in the reproductive organ of woman as adultery¹.

This offence was defined also by law interpreters and defined by Professor Abdelaziz Mohsen as: "Any unlawful sexual intercourse between a married man or a married woman, based on their mutual consent if the marriage actually takes place or Circumstance"², defined by Professor Abdelaziz Saad as: "a completely unlawful sexual act, occurring between a man and a woman, both of whom are legally married or one of them at their common will and on the basis of their mutual consent without fraud or coercion"³.

The Supreme Council had previously attempted to define adultery in its decision of 25 March 1969, in which it was ruled that: "The crime of adultery is a deliberate offence requiring that it be constituted with criminal intent. This intention exists with the original perpetrator if the sexual intercourse or takes place at the will of one spouse and the spouse learns that he is abusing the other spouse's honour".

In another decision of 20 March 1984 : The crime of adultery is of a special nature because it requires interaction between two persons, one of whom is an original perpetrator, the adulterous spouse, and the other is a partner, and it is the one who initiated the sexual relationship with the original perpetrator, and the crime is achieved only through the intercourse between a man and his girlfriend or between a woman and her boyfriend. "⁴

Second: The elements of the crime of adultery of one of the spouses

For the offence of adultery of a spouse, the elements of the offence must be:

A. material element

material element of an offence means : any passive or positive material conduct or activity that has a harmful consequence. Therefore, both material activity and the criminal consequence are causal elements of the material element of the offence.

When measuring this definition against the offence of adultery of one of the spouses, it is clear that the material conduct constituting it is the prohibited sexual intercourse. This offence is achieved as soon as the physical activity has taken place, since the act of penetration is not required to give rise to a consequence and therefore the causation is not required.

the sexual intercourse means penetrating the male organ into the female organ, and penetration is not required to be complete but is sufficient to be partial, once the the beginning of male's organ in the whole vulva is absent or destined⁵, if for example, cut off, It is also not a requirement for the male organ to come into contact with the walls of the vulva, but rather to be considered penetration once the man inserts his male organ in the air of the vulva⁶, Nor does it preclude the existence of a barrier between the male organ and the vulva, which does not preclude the sense of sexual pleasure, nor does it require the recurrence of penetration, but the adultery is considered to exist even when the penetration happend once⁷.

¹Mahmoud Ahmed Taha, Criminal Protection of Matrimonial Relations, First Edition, Dar al-fiker and Law, Egypt, 2015, p. 21.

²Abdelaziz Mohammed Mohsen, Criminal Protection of Presentation, E 1, Al waFa 'Law Library, Alexandria, 2013, p. 403.

³Abdelaziz Saad, Crimes against the Family System, Dar Houma, Algeria, 2013, p. 94.

⁴See, Djilali Baghdadi, Jurisprudence in Penal Articles, Part 02, National Bureau of Pedagogical Works, 2001, p. 136.

⁵Mahmoud Ahmed Taha, op. cit, p. 23.

⁶Abdelaziz Mohammed Mohsen, op. cit., p. 43.

⁷Abdelhalim Benmashri, Offence of adultery in Algerian Penal Code, Journal of Humanities, No. 10, Mohamed Khidir University, Biskra, November 2006, p. 188.

On the basis of these details, the question arises whether or not it is punishable under Algerian or Egyptian law to initiate an act of prohibited penetration as adultery?

Initiation is reflected when one of the parties to the relationship prepares his or her genitalia for insertion or delivery into the other party's genitalia resulting in the fulfilment of the wrongful act, but this is not done because of an independent alien who does not enter the will of the spouse or other party.

The offence of adultery of one of the spouses is classified as a misdemeanour⁸, and attempted misdemeanour is punishable only if provided for by law⁹. By reference to the Algerian Penal Code or the Egyptian Penal Code, there is no provision for attempted The offence of adultery of one of the spouses is therefore not punishable by the mere attempt to commit an offence of adultery of one of the spouses, but must be achieved in its full form.

Therefore, the material pillar of the crime of adultery with one of the spouses is completed by achieving the act of unlawful intercourse in Algerian law, but the Egyptian legislator is distinguished between the crime of adultery with one of the spouses committed by the wife from the fornication of one of the spouses committed by the husband, where he was stipulated in the crime of adultery with one of the spouses in general, achieving an act The illegitimate intercourse, but it distinguished the crime committed by the husband, provided that the commitment of adultery by the husband in the marital residence, and this according to Article 277 of penal code.

A matrimonial home means every place where the husband resides alone or with the wife, whether known to her or unknown. Once she learns of it, she has the right to cohabit her husband, whether owned by one of them or rented for a certain period, that is, every place where the wife treats her as his owner as entering the house on her own initiative without requiring permission¹⁰.

The penalty imposed on a husband who commits an offence of adultery has also been reduced as compared to the penalty imposed on the wife who commits the offence. The latter is punishable by a term of up to two years' imprisonment¹¹.

In order to justify this distinction¹², the literature relies on a series of arguments, the most important of which being that a wife's adultery entails the birth of an illegitimate child attributable to her husband, resulting in a mixed lineage. The husband's adultery occurs casually, since his sexual appetite may exceed the ability of the wife, and that the wife is offended when the husband commits the offence of adultery at the home in which she is present.

A part of the literature¹³ criticized the conduct of the Egyptian legislator in requiring the crime to take place at the marital home, and considered that the insult to which the wife was subjected

⁸Article 5 of the algerian penal code. It states: "The original penalties for misdemeanour are:

1-A term of up to two months' imprisonment to five years' imprisonment except in cases where the law establishes more limitations.

2-Fine exceeding 20,000 DZ. " The penalty applicable to the offence of adultery of a spouse is one to two years' imprisonment, which is described as a misdemeanour. "

Article 11 egyptian penal code. "misdemeanour are offences punishable by the following penalties: imprisonment.

a fine of more than 100 ".

⁹Article 31 the algerian penal code It states: "Attempted misdemeanour shall be punishable only on the basis of an express provision of law", article 47 egyptian penal code It reads: "the misdemeanour prescribed by law that punish on the initiate and shall be punishable by law."

¹⁰fatouh Abdullah Al-Shazali, Explanation of the Penal Code, Special Section, University Publications House, Alexandria, 1994, p. 722

¹¹Art 274 Egyptian penal code.

¹²Abdullah Abdul Hafiz Abdullah al-Hilaj, kinship and its impact on criminal liability, thesis for doctorate in law, Faculty of Law, University of Menoufia, 2014, p. 28; Ahmed Fathi Bahnsi, Crimes in Islamic Jurisprudence, VI, Dar al-Sharouk, Cairo, 1988, p. 99, 100; Baha Rizeqi Ali, Family Criminal Protection, Doctoral Thesis, Faculty of Law, Ain Shams University, 2006, p. 76, 77.

¹³Mahmoud Najib Hosni, Explanation of the Penal Code "Special Section", Arab Renaissance House, Egypt, w.d.p. , p. 283, 284; Dina Mohamed Sobhy Hassan, Family Criminal Protection, Doctoral

from her husband's lack of sincerity wherever the husband committed adultery, so that the legislator had to unify the conditions and punishment in both offences and consider that the husband's adultery in the marital home was an aggravating circumstance.

Finally, it can be said that the distinction between the offence of adultery of a spouse committed by the wife and the offence committed by the husband is illogical and does not have positive consequences, but quite the opposite. as the husband may commit the act of adultery freely in any place of his choice other than the marital home, thereby spreading obscenity among the community, automatically resulting in the demolition of families and family disintegration, The first argument that the offence of adultery of one of the spouses is of a special nature necessitating the interaction of two persons is not complete without one of its parties. The same result is thus achieved for the husband's adultery if the woman with whom he made the intercourse is married; However, despite the Algerian legislature's equality between spouses in criminalizing the adultery of one of the spouses, this equality does not limit the damages caused by the act of adultery committed by those who do not possess marital status, the most important of which is the mixing of lineages.

Therefore, Both Algerian and Egyptian laws should criminalized adultery in general and the penalty should be increased if committed by a married person, in accordance with Islamic law.

B. Presumed element

The presumed element of the offence may be defined as the element presumed by law to exist in a particular offence at the time of its commission. so it must be available when the offender commits his or her material conduct so that the latter can be described as an offence.

The presumed element of a spouse's adultery crime is the establishment of a marital bond. therefore this offence does not take place despite the availability of the material and moral elements unless one or both of its parties are married. marriage contract must be valid, by concluding it in accordance with the requirements of the Family Code¹⁴, even if such marriages are customary because registration of marriages in civil status is only a means of proving marriage.

This is what the Supreme Court affirmed in its jurisprudence that: "Customary marriage is not a ground for denying the crime of adultery"¹⁵, and that: "The offence of adultery, even in the case of customary marriage. registered marriage contract is a means of establishing marriage "¹⁶.

Moreover, the offence of adultery of one of the spouses is committed only within a specified period of time, which is when the marriage contract is valid. Therefore, any sexual contact outside this period is not considered an offence of infidelity. the act of adultery committed during the period preceding the marriage as the period of engagement is not a punishable offence, as this period does not entail any rights or duties¹⁷; If the suitor committed adultery with another party, one of them could not sue the other party, even if the effect of adultery arose after the marriage contract¹⁸. as pregnancy, childbirth or abortion, The same provision is made for the death of one of the spouses even if the sexual relationship takes place during the woman's iddah period.

Thesis, Faculty of Law, Cairo University, 1987, p. 310; Ahmed Mouafi, *Between Crimes and Borders in Islamic Law and Law*, p. 6, Tahrir House, Cairo, 1966, p. 92, 93.

¹⁴Algerian legislation considers that the marriage contract has one element: consent between spouses, in accordance with article 9 of the Algerian Family Code and article 9 bis. a. " The terms of the marriage contract are the capacity to marry a dowry, a guardian, two witnesses, and the absence of legal barriers to marriage.

¹⁵See, Supreme Court decision, 01/06/2005, File No. 297745, Supreme Court Journal, p. 1, 2006, p. 577.

¹⁶See, Supreme Court decision, 28/07/2011, File No. 538865, Supreme Court Journal, p. 2, 2012, p. 325

¹⁷ Mansouri almabrouk, *infidelity in the Maghreb Penal Code*, Books of Politics and Law, No. 10, University of Quaddi Marbah, ourgla, 2014, 164.

¹⁸Mohammed Nour-Eddine Syed Abdelmadjid, *Impact of marital relations on the provisions of criminalization and punishment*, Dar Al-Ennahda Arab, Cairo, 2012, p 11.

As for divorce, a question arises as to whether a divorced woman in her iddah period in the event of her sexual contact with a man is a perpetrator of a spouse's adultery offence?

In order to answer this question, it is necessary to address the definition of the concept of iddah period. It is intended by the number prescribed periods of time by the Islamic Shariah for a woman to avoid marriage after her husband's death or divorce from him, ending in either birth, period or months depending on the situation of the woman¹⁹. The wisdom of the legislation of the iddah period is:

* Pure devotion to Allah in conformity with His order as a right of Allah, which is why it can not be drop even if the spouses agree on it²⁰.

* To ensure the pureness of the woman's womb in order to preserve the lineage from mixing. If not for iddah, the lineage will be mixed and the families lost. It is also an opportunity for both spouses to recalculate and choose to return to marital life²¹.

Therefore, in the case of divorce, it is necessary to differentiate between revocable divorce²² and irrevocable divorce²³. since the marital relationship remains a provision in revocable divorce until the expiration of the legally iddah period²⁴, and therefore in the case of a divorcee on revocable divorce committing a sexual relationship with another party, is consider committing offence of adultery of one of the spouses²⁵.

However, with reference to the provisions governing revocable divorce in the Algerian Family Code, there are several inconsistencies as compared to the provisions of the Islamic sharia. Article 49 of the Family Code²⁶ stipulates that: "Divorce shall be established only by judgement after several attempts to reconcile by the judge without exceeding three months from the date of the filing of the case". And Article 50 family code stipulates that: : "Whoever reviewed his wife during the reconcile attempt does not need a new contract and whoever reviewed her after the divorce verdict requires a new contract."

At first glance, it may be found that Algerian legislator do not admit revocable divorce, but only irrevocable divorce. However, according to these articles, Algerian legislator permit a husband to review his divorced wife retroactively without a new contract during an attempt at reconcile of at least three months' duration from the date of the divorce proceedings. This provision is inconsistent with the Islamic sharia law, which foresees divorce by mere word²⁷, as affirmed by the Supreme

¹⁹Abdelkader Shibah al-Hamad, Islamic jurisprudence explaining the achievement of the purpose of collecting sentencing evidence, p. 8, E. 7, Quran Science Foundation, Damascus, 2011, p. 3.

²⁰Anas Mustafa al-Baga, al-iddah 'a and its rulings, E1, Dar al-Mustafa, Damascus, 2014, p. 21.

²¹Hilmi Saleh Saleem Akl, Judgments of iddah in Islamic Jurisprudence and What Works in Jordanian Shari 'a Courts, Thesis for Master's Degree, Faculty of Shari' a, National University of Al-Najah, Nablus, 1992, p. 37.

²²revocable divorce : the divorced woman may be returned without going through a new marriage as long as the iddah exists and the absolute preservation of all the rights of the spouse including the right to review it in the iddah at any time he wishes, but it decreases the number of divorces owned by the husband. Mohammed Abu Zahra, Personal Status, E3, dar alfiker alarabi, Cairo, w.d.p, p. 312.

²³irrevocable divorce It is divided into a Minor irrevocable divorce, is a divorce where the man divorces his wife and does not review her until the end of the iddah but still could married his ex wife with new contract, or a Major irrevocable divorce is a divorce that the divorced woman cannot be returned unless she marries and divorces another man. Mohammed Muhyiddin Abd al-Hamid, Personal Status in Islamic Law, E 1, Al-Istalimah, 1942, p. 361-364.

²⁴Kamal uddin Mohamed Abdel Wahid Al-Saywasi Al-Sakandari, Explanation of Fatah Al-Qadeer, P4, E 1, Dar Al-Bookshop, Lebanon, 2003, p 141,142.

²⁵Mahmoud Najib Hosni, op.cit, p. 287; Mohamed Nouredine Syed Abdelmadjid, op.cit, p. 12, 13; Baha 'a Rizeqi Ali, op.cit, p. 67.

²⁶law No. 84-11 of 09 June 1984 contains the Family Code f.j.24 dated 12 June 1984), amended and supplemented by Ordinance No. 05-02 of 27 February 2005 (f.j. S-15, dated 27 February 2005).

²⁷Abiy Isaac al-Shirazi, polite in the jurisprudence of Imam el-Shafei, p4, e1, Dar al-Qalam, Dar al-Shamiya, Damascus, Beirut, 1996, p. 291; Mohamed Muhyiddin Abd al-Hamid, op.cit, p. 335.

Court in its judgment : "It is agreed in its jurisprudence and jurisprudence in the provisions of the Islamic sharia that the divorce that occurs from the husband is revocable divorce and that the judge's judgement does not alter its retroactivity as he has been on the application for divorce. A divorce that contravenes this principle is a violation of the provisions and principles of the Islamic Shari 'a and therefore requires the annulment of the decision that considered divorce by the will of the husband is irrevocable divorce. "²⁸

Thus, according to Algerian law, a divorced woman revocable divorce and her iddah period terminated can be charged with the adultery of one of the spouses if the reconciliation proceedings have not been completed. Therefore, Algerian legislation must avoid such inconsistencies by invoking the Islamic sharia's jurisprudence regarding the commencement of the counting of the iddah period once the divorce has occurred.

An irrevocable divorce, whether Minor irrevocable divorce or Major irrevocable divorce, results in the termination of the marriage bond, even if the iddah period does not end, and therefore in the case of an sexual intercourse, even in the period of the iddah, the offence of adultery of one of the spouses does not arise²⁹.

However, some of the literature criticized this view³⁰, on the grounds that it is contrary to the provisions of the Islamic sharia. Women must ascertain the pureness of their wombs and the absence of pregnancies in order to preserve their the lineage. According to this view, a woman in her iddah period from irrevocable divorce or death is considered to be the perpetrator of a spouse's adultery when she contacts another man sexually. In particular, the marriage of woman in her iddah period, whether from death or divorce, is considered a adultery in Islamic chariaa, and these not matter if there is an indication of the existence of the contract or its effect³¹.

Finally, the second tendency would be preferable, and it will be better if the penal legislator were to place the wrongfulness of the act of adultery committed by the woman an iddah period from divorce or death, In order to achieve penal protection of the family relationship by ensuring that the proportions of mixing are maintained. and the ordinance extends to providing for the criminalization the marriage of woman that is still in her iddah period from to an irrevocable divorce or death and not merely stipulating in the Family Code that woman that is still in her iddah period from divorce or death is a temporary impediments to marriage³² resulting only in the nullity of the marriage contract³³.

In the case of an absent husband, the wife is deemed to have committed an adultery offence against one of the spouses in the event of her sexual association with another man, as she can only be freed from such marriage by a judicial decision deciding on her request for divorce from her husband because of the husband's absence, as stipulated in article 53/5 of the Algerian Family Code³⁴ and article 12 of the egyptian Personal Code³⁵.

As for the missing spouse, article 113 of the Code : And article 21 of the Code stipulates that, the missing husband shall be sentenced that his dead if he overcomes unsafety four years after the date of his loss. In other cases where safety prevails, it is up to the judge to estimate the appropriate time after four years in order to sentence the death of the missing person, and therefore in the

²⁸Decision of the Supreme Council, 10/02/1986, File No. 39463, Judicial Journal, p. 1, 1989, p. 115.

²⁹Ali Abu al-Nil, Family Ties and Their Impact on Egyptian Criminal Law and Islamic Jurisprudence, New University House, Alexandria, 2014, p. 96; Mohamed Sobhi Najem, Explanation of Algerian Penal Code, Special Section, University Publications Office, Algeria, 2000 p 89.

³⁰Mohamed Abdel Raouf Mahmoud Ahmed, Impact of Family Ties on the Application of Criminal Law in Comparative Legal Systems, E 1, National Centre for Legal Issuances, Egypt, 2008, p. 69; Mohammed Nouredine Syed Abdul Majid, op.cit , p. 14.

³¹Ahmed Nasr al-Gendi, Personal Status in Islam, Dar al-maarif, Cairo, p. 18.

³²Article 30 of the Algerian Family Code.

³³Article 31 of the Algerian Family Code.

³⁴law No. 84-11 contains the above-mentioned Algerian Family Code.

³⁵law No. 25 of 1929 contains the Egyptian Personal Status Code (Egyptian Facts, p. 27 of 25 March 1929), as amended by law No. 140 of 2017 (f.j 29 bis dated 22 July 2017).

case of the wife's sexual association with another person after the sentence is handed down, she shall not be considered a perpetrator of the criminal offence.

C. Mental element:

Adultery is a deliberate offence for which the offender's criminal intent is required at the time of his wrongdoing and can be derived from the nature of the facts and the circumstances of the sexual act committed by one of the spouses³⁶.

In order for criminal intent to be established, there must be two elements:

*the knowledge :

Men or women knowingly engage in sexual relations with other than their spouses³⁷, which mean that the married offender known for Surely that he or she is committing the wrongful act with another party with whom he or she has no legitimate connection, This is achieved for a man by knowing that he made intercourse with women that these not combine a marriage contract between them . and for a wife to be aware that she is in a sexual relationship with a man other than her husband, Consequently, the element of knowledge does not exist in the event of an error in the person, like one of the spouses engages in a sexual relationship with another who thinks she is his wife. In this case, the offence of adultery does not arise³⁸. It also requires in the partner's the knowledge that the person with whom he has a sexual relationship is married In the event that he is unaware of the marital bond, the criminal intent for him does not exist³⁹.

*the Will: Will is the second element of criminal intent. It is intended to commit the offence of a married adultery freely, voluntarily and without any coercion. The offence of adultery of one of the spouses shall not be punished if one of the spouses commits a sexual relationship with another party and is compelled to do so.

Conclusion:

The various laws enshrined civil and criminal protection of the family against the various infringements to which it might be subjected. Most penal laws, including Algerian law, criminalize all acts affecting the family. One of the most serious crimes affecting the family entity that indirectly affects society is the crime of adultery of one of the spouses. Finally, the study concluded a series of findings:

- The offence of adultery of one of the spouses is a moral offence that must be addressed because of its possible negative consequences, the most serious of which is the mixed lineage, the prevalence of corruption and vice in society and the destruction of the marital relationship.
- There are numerous differences in the organization of the offence of adultery of one of the spouses between Algerian law and Egyptian law, the most important of which is that Algerian legislation does not differentiate between the offence of adultery of one of the spouses committed by the husband from that committed by the wife, both in terms of the conditions to be met for the commission of the offence and in terms of the duration of the penalty.
- The Algerian law, organize the criminal protection of a marital relationship against the offence of adultery of one of the spouses, but does not protect from damages that may be suffered indirectly as a result of the decriminalization of adultery committed by unmarried parties. This act entails the corruption of society, which inevitably leads to corruption and the dissolution of the family.
- The penalty imposed for the offence of adultery of one of the spouses is insufficient and the Algerian legislature had to introduce a heavier penalty in order to insert intimidation into the psyche of the spouses, so that the offence of adultery of one of the spouses may not be imposed for fear of punishment, thereby ensuring the maintenance of the marital relationship.

³⁶Abdelaziz Saad, op. cit., p. 96.

³⁷Njimi Jamal, Crimes of Morals, Justice and Prostitution in Algerian Legislation, dar Houma , Bouzraia, Algeria, 2014, p. 394.

³⁸Abdelkader Odeh, op.cit, p. 360.

³⁹Al-Aqun Rafiq, Wife's Criminal Protection: A Model Adultery Crime, Journal of Law and Political Science, No. 8, Part 2, Abbas University of Gharour, Khanshla Juan 2017, p. 865.



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