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TÍTULO: Criminalización del espionaje desde el punto de vista de la Jurisprudencia y del Derecho Sustantivo.

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RESUMEN: El espionaje es un concepto que se ocupa de la actividad de cualquier persona que recopila información de forma secreta o inadecuada para el beneficio de los enemigos. Este concepto se describe como un hecho culpable por tener las condiciones establecidas en las fuentes y leyes jurisprudenciales. Mediante la evaluación del Corán y las enseñanzas narrativas, los autores han investigado los motivos de la criminalización, de acuerdo con la teoría del Utilitarismo de John Stuart Mill y la teoría del Refinamiento o el Filtrado, que anticipa el proceso de criminalización al proporcionar filtros triples. Los resultados se aplican a todas las instituciones, agencias y organizaciones de seguridad global.

PALABRAS CLAVES: Jurisprudencia y Ley Sustantiva, sentencias y leyes, secretos, espionaje, antiespionaje.

TITLE: Criminalization of Espionage from the point of view of Jurisprudence and Substantive Law.

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ABSTRACT: Espionage is a concept which deals with the activity of anyone who is secretly or inappropriately gathering information for the benefit of the enemies. This concept is described as a guilty deed for having the conditions stated in the jurisprudential sources and laws. By evaluation of Quranic and narrative teachings, researchers have investigated the grounds for criminalization, according to John Stuart Mill's Utilitarianism theory, and the theory of Refinement or filtering, which anticipates the criminalization process by providing Three-fold filters. The findings will be applicable to the entire global security institutions, agencies and organizations.

KEY WORDS: Jurisprudence and Substantive Law, judgements and laws, secrets, espionage, anti-espionage.

INTRODUCTION.

Protection of independence and sovereignty of every country is the key and primary task of every regime that governs the country and this goal is noticed by all political regimes governing any country regardless of their type and political differences with the previous ruling regime. Since what is protected, it is a land where the ruling political regime seeks to exert its dominion over it and a military force takes form and a considerable portion of national budget is being appropriated to this force,

because the stability of the country and ruling regime normally depends on the existence of such a force.

Espionage is one of the examples of first degree crimes against the national security and peace, because any negligence can pose serious threats to the independence, security and sovereignty of a country and would even result in the revelation of top secret information.

In the legal system of Islam, due to the sacred nature of Islamic establishment and the government as the ground of the objective realization of Islamic judgement, the crimes against the national security of country have been taken into earnest account by the legislator. In so far, as despite the codification of certain set of punishments and rules of the prosecution of such crimes, many previous normal violent punishments have been banned and some ways of minor retribution that are associated with certain exemptions like renunciation, regret and repentance have been predicted in the heart of the establishment. Nevertheless, in those cases where these crimes pose serious threats to the sovereignty of country or basis of Islam and borders of Islamic establishment, the punishment becomes tougher and is executed based on the conditions and circumstances of occurrence of crime as well as the criminal personality of the convict.

However, espionage has become an effective tool in international scene. According to Sun Tzu, the great Chinese philosopher who is also an expert in war as well as a seasoned secret agent: "Good espionage is the premise of victory.

In history, no country's name has been ever mentioned as glorious unless it has had a powerful intelligence service. When one of the commanders of Napoleon, the renowned emperor of France, proposed him to give *Ordre national de la Légion d'honneur* to one of the seasoned spies who had made a great contribution to a number of the brilliant victories of Napoleon, the Emperor says: only gold is appropriate for the spies". Moreover, Napoleon is also quoted to have said: an intelligent secret agent is superior to one thousand pawns fighting in the battle ground.

DEVELOPMENT.

1) Conceptual Analysis of Espionage.

1.1) Lexical Meaning.

Espionage or spy in English as its origin in French Espionnage. The latter term has become part of the discourse since the late eighteenth century in France and its root should be sought for in Middle French (French spoken in 14 to 16 centuries) in Espoin which is very close to Spy¹.

IbnManzur in his *Lisan al-Arab* has enumerated various meanings for *jasusi* (Arabic equivalent of Espionage) which is driven from rootword *jassa*:

Al-Jassu: touching by hand.

Jassa: touching something with one's hand.

Al-Jassu: Jassu al-Khabar, also Tajassus.

Jassa refers to the search of news and *tajassus* has the same meaning, and both mean seeking after news.

Tajassus denotes one's delving into the depths of affairs and is majorly concerned with evil things and *Jasus* refers to the man who possesses evil news (IbnManzur, 1984).

Al-Azhari in his *Tahzib al-Lughah* has considered *tajassus* and *jasus* to be derivatives of the root "j-s-s" and argues: "jasus is the one who spying on the news".

1.2) Jurisprudential Meaning.

Generally, in jurisprudential works the term *Eyn* – Eye in Arabic – is used instead of spy, because the latter is a neutral word and does not bear the negative connotations of spy and not like *Tajassus* has sympathetic implication. Then, we see that in jurisprudential works *Eyn* and *Jasus* are used interchangeably; e.g. "Al-Jasus has the same meaning as Al-Eyn and whoever is an Al-Eyn he is

¹www.dictionary.com

certainly a spy" (Al-Damghi, 1966); or Zahabi in his *SharhiSahih Muslim* writes: "verily al-Eyn is the al-Jasus" (Zahabi, 2000). In the books *Fath al-Bari fi SharhiSahih al-Bukhari* and *Neyl al-Utar*, these two terms have been defined as follows: "spy is called also eye, because his act of spying is done mostly through visual apparatus ... And his whole body organs turn to eye" (Shukani, 2001). In *Islamic Encyclopedia*, the term spy has been defined as follows: "spy is a word that is used to refer to a known meaning and it has eye as its equivalent and this is why one cannot always distinguish between these two in all states and cases" (Musavi Bojnurdi, 2001).

1.3) Legal Meaning.

Spy refers to one who seeks to have access to information or certain objects under some unknown and secret titles in favor of the enemy (Garraud, 1906). In other place, it is said that a spy is someone who acquires some information from political or military systems of a country under the guise of fake and unreal titles in order to deliver to the enemy (Shambayati, 1997).

In an alternative definition, we read: spy refers to someone who seeks to have access to secret information or objects or documents related to the military, economic and cultural potentialities of a country and delivering them to the enemy under fake titles (Validi, 1992).

According to public international law, a spy is someone who secretly or under fake titles struggles to have access to some information of the plan and power of the other party of a conflict. It also refers to someone who serves the enemy in the battle ground via getting access to the secret information by some diabolic methods and his goal is sending it to the enemy. Of course, one should say that espionage during peace time is not subject to international law and depends on the internal laws of states (Baladsu, 1996).

Professor Rene Garraud describes espionage as follows: "Espionage in its general sense includes two groups of measures: first group hosts the measures related to preparation which are concerned with

investigation and acquisition of secret information, while the other group consists of executive measures that are focused on the establishment of relations and bringing the acquired information to those who can be benefited from it" (Garraud, 1906).

The first group of measures might be adopted not for the sake of espionage; for example, the convict may have struggled to have access to secret information just out of curiosity and due to the negligence in order to enlighten his own nation not the foreigners (Garraud, 1906). But the second group of measures are always speaking of a specific intention for assisting foreigners to have access to the secret information and betraying the nation (Garraud, 1906).

2) Foundations of Espionage according to Quran and Prophetic Traditions.

2.1) Quran on the Foundations of Espionage.

The verse 10 of Surah al-Tahrim reads as follows: *"Allah presents an example of those who disbelieved: the wife of Noah and the wife of Lot. They were under two of our righteous servants but betrayed them, so those prophets did not avail them from Allah at all, and it was said, "Enter the Fire with those who enter".* In this verse, God has reminded the believers of the espionage of the wives of Noah and Lot against them because the wife of Noah addresses the nation in the following words: *Noah is crazy and I know his state better than others. The wife of Lot informed the people to harass the guests of Lot and kill whoever would have turned to him* (Shah Abdul Azimi, 1984). The most important point here is that two women are introduced as the examples of infidelism both of whom lived with two divine prophets (Qaraati, 2004), but they were coalescing with the enemies and the punishment for this espionage was the hell fire.

The verse 27 of Surah al-Anfal reads as follows: *"O you, who have believed, do not betray Allah and the Messenger or betray your trusts while you know [the consequence]"*. The reason for the revelation of this verse has been explained as follows: when the Muslims besieged the Jews of Bani Quraydhah

upon the order of Holy Prophet of Islam (peace is upon him), they proposed to make peace and immigrate to Levant and the Prophet did not accept and sent SaadIbnMaaz for arbitration. One of the Muslims named Abu Lababahwho was their old friend showed his own throat to them and told in silence that if they accept the arbitration of SaadIbnMaaz they will be killed. Gabriel informed the Holy Prophet of this silent talk. Abu Lababah became ashamed of his own betrayal and tied himself to the pillar of the mosque and did not eat anything for seven days and nights, and finally, the Lord accepted his repentance.

There is also another reason for the revelation of the latter verse. In Badr battle some of the Muslims wrote a letter to Abu Sufyan and informed him of the plan of Prophet (peace is upon him). Thus, Abu Sufyan deployed one thousand soldiers to the battle ground (Garraud, 1906). Verse 1 of Surah al-Mumtahinah reads as follows: "*O you who have believed, do not take My enemies and your enemies as allies, extending to them affection while they have disbelieved in what came to you of the truth, having driven out the Prophet and yourselves [only] because you believe in Allah, your Lord. If you have come out for jihad in my cause and seeking means to my approval, [take them not as friends]. You confide to them affection, but I am most knowing of what you have concealed and what you have declared. And whoever does it among you has certainly strayed from the soundness of the way*".

In exegeses, it has been suggested that one of the disciples of the Holy Prophet (peace be upon him) gave a letter to a woman to take it to the infidels in order to inform them of the decision of Holy Prophet as regards the conquest of Mecca. Gabriel informed the God's Messenger of the issue and Prophet ordered the letter to be taken back from the woman. The Prophet told the delegation, they would find the woman in which point of Mecca. The delegation started their search after the woman and they found the woman exactly where the Prophet had told them and asked her to give the letter back. The woman denied the allegations of the letter.

Some of the disciples believed the words of woman and decided to return to Medina but Imam Ali (peace is upon him): "Neither Gabriel has told any lie to the Prophet nor the Prophet to us then the letter is surely with the woman". Then he unsheathed his sword to search for the letter. The woman saw that the issue is serious and brought out the letter from her hairs and gave it to them. The letter was brought back to the Holy Prophet. The Prophet summoned the writer of the letter – HatibIbnAbiBaltah – and rebuked him. I am not a traitor but since my relatives live in Mecca with the infidels I sought to satisfy the infidels in order to let my relatives to live in peace, Hatib said. The Holy Prophet forgave him and the verses were revealed. It is interesting to note that the woman came from Mecca to Medina and asked help from the Holy Prophet. The Prophet asked: Have you converted to Islam? She told: No. Have you immigrated to join the immigrants in Mecca? Prophet asked. No, she said. The Prophet asked: Why have you come to Mecca? For asking help from you, she said. The Prophet said, then what about the youth who were around you? (The youth who were interested in her as a singer)! After the defeat of the people of Mecca in Badr no one came to me, she said. The Prophet ordered her to be helped (Garraud, 1906).

2.2) Traditional Foundations.

In *SirahIbnHusham*, the author has related some traditions of the events of Badr Battle which suggest that the Prophet deployed some spies in his wars in order to bring secret information from the enemy and the situation on the ground. Now a summary of the mentioned radition is presented: "...Then the Holy Prophet (peace be upon him) emigrated from Zafran region to a point near Badr. Prophet started to search the region with one his disciples. While they were searching through the region, they came across an Arab old man. The Prophet began to investigate the Arab old man as reardsQuraysh and Muhammd and his disciples and asked him what he has heard of them? Then, the Prophet returned to his disciples. At night, the Prophet ordered Ali IbnAbiTalib, ZubayrIbnAvvam, and

Saad Ibn Abi Vaqqas to go to a region of Badr where there was water and the caravans used to spend the night there and interrogate them and bring information of Quraysh to the Prophet. At the water pond, they came across people who were sent in advance by Quraysh to bring water as Raviyah. These water bringers consisted of Aslam, Ghulam Bani Hajjaj, and Ariz Abu Yasar, Ghulam Bani Us.

The spies of Prophet arrested them and brought them to Muslim camp. When they reached the camp, the Prophet was reading his prayer. The Muslims started to interrogate them and asked them to introduce themselves. They told that they are the water bringers of Quraysh and they have come to there from Mecca to help the army of Abu Sufyan. Muslims against the idea of Prophet (peace be upon him) decided to torture the prisoners in order to get more reliable information of the army of Abu Sufyan. In this moment Prophet finished his prayer and told the Muslims while he was angry why you are getting upset when they are giving you correct information and you are letting them be free when you get incorrect information?! I swear to God they belong to Quraysh not to Abu Sufyan's caravan. Then the Prophet interrogated them in person and asked some questions. Tell me whatever you know of the Quraysh and its army, Prophet said. We swear to God that they are behind this hill, they said. How many soldiers are with them? The Prophet asked. Many soldiers but we do not know their exact number, they said. How many camels do they kill for feeding the army? Prophet asked. Some days ten camels and some other days nine camels. The Prophet said that they are almost 9 hundred or one thousand. Then the Prophet asked: which ones of the rich men and elites of Quraysh are with them? They answered: Utaybah Ibn Rabiah, Sheybat Ibn Rabiah, Abu al-Bakhtar Ibn Husham and so on and so forth. After it the Prophet turned to his own disciples and said: it is Mecca that has thrown parts of its liver onto your skirt" (Montazeri, 1969).

In *Sahih Muslim*, Anas Ibn Malik has been quoted to have said: "Once the Holy Prophet sent a man named Basisah Zubaydah to spy on the commercial caravan of Abu Sufyan which was supposed to come to Hijaz from Levant and bring the required information" (Sahih Muslim, vol. 3: 1510; Kitab

al-Emarah, Section, 41 (Section Thubut al-Jannah Li Al-Shahid, Tradition, 145). Beyhaqi has also quoted the same tradition. Abu DavoodSajistani has also quoted the same tradition in his Book of Traditions (Garraud, 1906).

3) Foundations of Criminalizaiton of Espionage.

For correct recognition of the causes of criminal reaction of the society to a determinate behavior one has to analyze the behavior at issue as well as its social feedback. But before turning to this issue, one needs to consider the problem as to why and how a society considers a certain behavior to be a crime? In other words, what is the criterion for a behavior's being a crime? As we know, the course of changes in human societies during the past centuries endorses that the structure of societies is changing in a continuous fashion and evolves from simpler forms to more complicated forms. Thus, the concept of government¹ has become practically substatialized. For this reason, the criminal justice systems came to be officially controlled by governmental authorities instead of the unofficial institutions.

3.1) Harm Theory or Harm Principle.

The society as an organic whole is composed of close relations of individuals and their interactions and sometimes their conflicts. There are various criteria as to the legitimacy of a particular behavior as well as the question of the extent to which the citizens of a society are allowed to act as they will. But the harm theory or harm principle has more proponents and one can declare it to be the most famous principle that delimites the freedom of citizens which was first propounded by John Stuart Mill.² Due to his perspective of freedom and the necessity of its existence for human flourishing Mill considered the harm principle to be the unique principle of legitimacy by which the public opinion or

¹Government in this context generally refers to the ruling body not the executive alone.

²John Stuart Mill the British thinker of nineteenth century is one of the greatest representatives of the school of Utilitarianism the idea that it is utility that should be the basis of the domains of ethics, politics and economics. The founders of this school are Jeremy Bentham and James Mill the father of John Stuart Mill.

public power can control human behavior via force or supervision (John Stuart Mill, 1996). In other words, according to Mill, the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others (Klarckson, 1956).

3.2) Filtering Theory.

Jonathan Schenscheck revealed the shortcomings of this traditional method (Schenscheck, 1994) and offered a new hierarchical model called "filtering" that implicitly contained the balance method. According to this method, when we seek to criminalize a behavior the latter should successively and continuously pass through three filters so that the process of criminalization would appear morally justified and the government not to be accused of despotism and transgression of individual freedoms. In other words, a behavior that passes through triple filters is morally and legally prepared for criminalization. Schenscheck's filters consist of:

3.2.1) The Principles Filter.

In fact, this layer explains the principles and values of the society according to which individual freedoms can also be restricted. It is evident that these principles take form based on the values and normative foundations of every society and varies from one society to the other.¹ As a result, this layer builds a bridge between the decision making process and philosophy of law and legal foundations".² But the shared point of these principles is determination of the scope of interference of government in individual freedoms. To put it otherwise, "liberty limiting principles" depict the boundaries for the interference of government in individual freedoms of citizens and struggle to establish balance between the region of free behavior and governmental sovereignty.

¹ To demonstrate this claim, one can refer to the fundamental approaches of Islamic society as to the necessity of observation of Hijab which seems to be a restriction of the social freedoms of the women in line with the principle of "following the prophet and his disciples" as compared to the normative principles of western societies in this regard.

² Mahmoudi Janaki, Firouz, *ibid*, p. 309.

Although government can restrict individual freedoms in a legitimate way resorting to the principles violation of principles is tantamount to transgression of human liberty and lacks legitimacy and moral justification" (Garraud, 1906). Liberty limiting principles are many. For example, one can refer to the harm principle, principle of bothering others, and moralism principle.

Therefore, if a behavior can intelligibly pass through this filter this will prove that it is appropriate for social control and supervision and the society can show reaction to that behavior but it is not yet clear whether this reaction should be made via force or in criminal form or in uncriminal and civil manner and is preceded by other stages.

3.2.2) The Presumptions Filter.

In this stage, the legislator is forced to take certain non-criminal civil, administrative and disciplinary measures as a reaction to a determinate action and take advantage of other tools of social control and if they are appropriate for behavior prevention choose them and leave criminalization aside. In fact, the presumptions filter suggests that "those methods which cause less inconvenience for the individual and are less oppressive as compared to other methods should be preferred" (Habibzadah and Zeynali, 2006). This is to say that the government is allowed to resort to criminalization of a behavior when all peaceful tools fail and there remains no way but force.

Indeed, Schenscheck due to this filtering seeks to "refer to criminal law as the Last Resort and give priority to official non-criminal social tools. This priority has its origin merely in heavy costs that criminalization imposes to the government and the society" (Garraud, 1906). Then, the presuppositions filter is reflected in the following words of Bentham: "in some cases punishment is ineffective where it does not result in prevention and when evil can be prevented without punishment" (Bentham, 1844).

3.2.3) Pragmatics Filter.

In this layer, which represents the last stage and passage way the process of criminalization, becomes completed. In fact, in previous two filters the extent of intervention of the government in the domain of individual freedoms is clear and the government can set a ban on an action but there is still a subtle point that is concerned with the effects and outcomes of behavior criminalization. "This stage is based on instrumental rationality that reminds the cost-benefit analysis in this adventurous affair to the government and beware it from incorrect and ineffective actions" (Garraud, 1906). In this stage, we should take advantage of the cost-benefit analyses. In other words, after the behavior's passing through the two previous filters we need to see whether the benefits of criminalization for the society are more than its harms or not? It is in this stage that Schenshectakes advantage of Feinberg's Balance Model and puts the costs of criminalization and its heavy outcomes on the one scale of the balance and the benefits of criminalization on the other scale.

Thus, two previous filters are the necessary condition for justification of criminalization and passing through the last filter, i.e. dominion of the benefits of criminalization versus its costs is the sufficient condition.

4) Structure of Jurisprudential Permissibility of Espionage.

4.1) Necessity of Investigation of Social Affairs.

The majority of jurists believe that causing disorder in Islamic system is forbidden and preservation of the system is one the most important affairs that the legislator insists on it. On the other hand, this principle's realization is contingent upon certain affairs including the supervision of statesmen. Despite the evident nature of the necessity of preservation of the system several traditions exist that endorse this fact (Montazeri, 1969). The jurists have also announced in their fatwas the impermissibility or unlawfulness of causing disorder in the system.

The Muslim ruler must be informed of the opinions, needs, requests and complaints of people in order to fulfil his own tasks. This consciousness requires to be preceded by a type of investigation on the behalf of the ruler. Not only the interests of the Islamic system require such an investigation, the prophetic and Shia traditions insist on it. At the dawn of Islam, some people served as the mediation between the ruling system and people as "Naqib" and "Arif". According to the reports of some sources, Prophet had chosen twelve "Naqib" from among the people of Medina to inform him of the general affairs (IbnManzur, 1984). The Prophet has been quoted to have said that "inform me of the needs of the one who is unable to provide his own needs" (IbnBabuyah, 1998). Moreover, it is reported that the Prophet always sought to investigate of the affairs of his own disciples and asked of the general affairs of people (IbnHusham, 1997).

A- According to a tradition qoted by Imam Reza (peace be upon him), whenever the Holy Pophet ordered the army to head for a destination, he would have sent some people along with the commanders in order to report the affairs to the Prophet (peace be upon him).

B- The Commander of Believers (title of Imam Ali) (peace be upon him) ordered one of his own disciples named KabIbn Malik to supervise the actions of the officials of cities and villages of Iraq. According to the reports dispatched by the supervisors, many of the officials faced the anger and rebuke of Imam Ali. For example, one can refer to the letters written by Imam to Uthman Ibn Hunayf, Musqalah Ibn Hubayrah, Zyad Ibn Abyah, Abu Musa Ashaari, Monzer Ibn JarudAbdi, Muhammad Ibn AbiBakr, and Shurayh Ibn Harith (Dashti, 2008).

C- Imam Ali (peace be upon him) ordered Malek Ashtar Nakhaei not to suffice to choose competent statesmen rather he needs to take advantage of the assistance of secret agents to supervise their actions (Dashti, 2008). This supervision should be continuous and secret. Here, not only the role of investigation in betterment of situation and spread of tolerance among the staff and their behavior

with the people. An allusion has also been made to the investigation of the reports of the illegal actions of the staff (Subhani, 1991).

4.2) Security.

Moein dictionary of Persian Language has defined *Amnyat* (**Persian equivalent of Security**) as sense of peace and being away from the fears resulted from the sense of worry (Moein, 1983). In Amid Dictionary security is described in terms of peace of mind and confidence (Amid, 1968).

Terminologically speaking, security refers to the ability of creation and guaranteeing the interests and values (positive side) (NavidNia, 2009).

In general, one should say that the modern challenges resulted from the development of the concept of security are not merely focused on the one-sided threats posed to the borders or individual and physical threats rather they also include new aspects (Learner, 2004).

As to the role of security in the individual and social development, it suffices to say that without security no plan would be implemented ever. The necessity of security is so clear that the nations in the course of history have tolerated the despotic regimes in order to get benefited from the sense of peace and being secure against the invasions of dangerous nations (HashemianFard, 2009).

Imam Khamenei describes security in the following words: "Security is a great bounty. In Holy Quran there are several verses speaking of peace and security. In every society people need peace for material and spiritual developments.... The first condition for the massive social movement for a nation is security in the first degree".

As to the relationship of security and government, Musavi Kashmari writes in his book *Islamic State and Security* as follows: "according to the proposed definition of government (state) one cannot adopt a one-sided approach to security rather other aspects of it need to be taken into account. Thus, with such an approach to security the government is not able to provide the security but in a relative manner

although the active presence of religious and civil institutions can help us to earn more success" (Musavi Kashmiri, 2009).

5) Espionage in Substantive Laws.

5.1) Examples of Espionage.

5.1.1) Article 12 and Article 24 of Military Forces Criminal Act.

In the article 12 of the Military Forces Criminal Act, it is stipulated that the following people are known as spy and shall be punished:

1. Any one of the members of the military forces who acquires information or documents or objects of intelligence value and delivers them to the enemy and his action is harmful to a military operation or the security of facilities, military bases, factories and permanent and temporary arm stocks, temporary stations, military buildings, vessels or airplanes, and other military and security facilities of the country he will be punished as a traitor.
2. Any member of the military forces who acquires information for the enemy and fails to deliver it to the enemy regardless of the reason shall be sentenced to 15 years of imprisonment.
3. Any member of military forces who delivers the military, political, economic or industrial secrets of the country to the domestic or foreign enemies he will be sentenced to death as a traitor.
4. Any member of the military forces who enters secret sites for acquiring the information and documents for enemy if there is no other tougher sentences according to other acts shall be sentenced to two to ten years of imprisonment.
5. Any foreigner who enters military bases, factories, weapons warehouse, military headquarters, or temporary stations, defense and military buildings by means of land, air or sea vehicles shall be sentenced to two to ten years of imprisonment (Shambayati, 1998).

5.1.1.1) Legal Element.

In the article 24 of Military Forces Criminal Act adopted in 2003 delivering document or information and objects of intelligence value to the enemy is considered to be the legal element of the crime.

5.1.1.2) Material Element.

The constituents of the material element of this crime (Articles 12 and 24 of Military Forces Criminal Act) consist of:

The crime agent: since the word "any military" the crime agent must be described as the member of military forces as stipulated in the article 1 of the act.

Criminal action consists of "the positive act of providing documents or information or objects of intelligence value for the enemy or the foreigner of course if this act is harmful for a military operation or as to the security of facilities, fortifications, and so on and so forth or defense system of the country.

Harmfulness of the actions of the one who commits the crime for a military operation can be seen for example in informing the enemy of the hour of the beginning of the operation that would result in the failure of the operation.

Harmfulness of the actions of the convict as regards the security of the facilities, fortifications, military bases and the defense system of the country can be seen for example in informing the enemy of the place of military facilities or the address of the permanent weapons warehouses as the result of which the enemy would arrange air raids that could destroy the facilities and cause the forces to fail.

In other words, if the authorities come to the decision that the actions of military personnels had not been harmful for the military action and security of the facilities the convict shall not be subject to the judgement of the clause 1 of the mentioned article rather it seems that this type of failed actions are subject to the judgement of the clause 2 of the mentioned article (Razavi, 2012).

5.1.1.3) Spiritual Element.

This crime is among the intentional and conditional crimes. In other words, the convict besides having a general bad intention should also have a special bad intention. To put it otherwise, the convict should succeed firstly to acquire the target information and documents based on knowledge, consciousness and out of intention. Secondly, his actions should be harmful to the security of the facilities, fortifications, military bases and so on and so forth. If the effects and outcomes resulted from the criminal action of the convict had not been harmful to the security of the facilities the convict shall not be subject to the judgement of the clause 1 of the aforementioned article and this is not to say that the agent of this action should not be punished rather it seems that even this amount of actions makes him at least subject to the judgement mentioned in the second clause of the above article (Razavi, 2012).

5.2) Criminal Differences of Espionage and Treason.

The act of distinguishing between espionage and treason is not that easy and there are three theories in this regard.

5.2.1) Theory based on Nationality of Convict.

According to this theory, nationality is the line that separates espionage from treason. In other words, if a foreigner in a country proceeds to investigate and collect secret information and documents regardless of delivering them to his homeland or other foreign country and also regardless of having an ideological intention and aiming at taking a revenge from the target country or intending to help a foreign country or due to other reasons like being deceived, being entangled with romantic affairs, being bribed, or being captivated with carnal desires and position and fame, this action will be declared espionage. However, if the convict is one of the nationals of the target country he shall be punished as a traitor. For expectation of such an action from a national of a country is against the

sense of patriotism and is not permissible according to the judgement of reason and logic as well as the national ardour while expecting such an action from a foreigner is not hard to deem. Nevertheless, acceptance of this theory is not easy because there would be foreign nationals who are committed to conduct sincere investigations of a country and inform the authorities of the latter country of the results based on an explicit or implicit contract and in return of an amount of money or a privilege.

5.2.2) Theory based on the Criminal Intention.

According to this theory, to distinguish between espionage and treason one requires to pay attention to two factors, i.e. intention and motive. To put it otherwise, when the convict has made certain actions against the security of a country out of a bad intention or he has sought to inform or motivate the enemy how to take hostile actions against the country these actions shall be punished as an example of treason. But if the actions of convict are free from such an intention and motive and have been taken out of greed for reward or shallow-mindedness or due to other reasons like serving his own homeland "not against the country that owns the information" (even if it causes harms to the target country without having any intention of such harm) these actions shall be judged as espionage and the convict will be called spy.

As A.P. Garçon in his interpretation of the article 76 of the previous criminal code of France quotes the report of the advisor of the Supreme Court in a verdict issued on 22 May 1908 (s-1911-1-121) as regards the trial of Deryfus and distinguishes between espionage and treason in this way (Garraud, 1906). The late Dr. Zia al-Din Peymani in his annotation of the article 505 of Civil Code follows the latter line of thought. He argues that: "the condition is that the goal of the convict is the collection of information for the sake of destabilizing the security of a country no matter if he intends to make use of this information or he wants to deliver it to a third party. If delivering to a third party aims at earning certain benefits this crime can be described as an example of espionage" (Peymani, 1995).

One needs to remind the reader that the French courts took the intention and motive of the convict as the criterion in the past. Thus, they described an action against the security of a country as treason while they considered the actions done for the sake of money or other types of rewards espionage. However, French doctrine suggests that the distinction between these two should be made based on the nationality of the convict. Accordingly, French convict was declared a traitor while the foreign national was considered to be a spy (Garraud, 1906). Thus, according to this theory, if the convict is one of the foreign nationals in a country and he is at the same time committed to serve the country based on a contract but he delivers the results of his investigations to a foreign intelligence service in return of money or due to love affairs or if he transfers this information to his own homeland intelligence service for the sake of patriotic reasons he will not be considered a traitor.

By the same token, if such actions are taken by a country's national but not out of the sense of hostility or treason rather due to the mentioned intentions they are not considered to be an act of treason and these are the illogical and unjustified consequences that are driven from this theory and for this reason have caused several objections to be raised against it.

5.2.3) Theory based on the Nature of Crime.

According to this theory, the main problem as regards the issue at stake is the discussion of the limits of actions some of which constitute espionage in its true sense and some of them represent treason. Thus, espionage includes two types of actions regardless of its being conducted by a national of the country or by a foreign national. One of these actions consists of investigation in preliminary forms that is a distinctive feature of espionage and consists of investigation and delivery of the secret information and documents that is done in return of reward or any other reason whether it is done in a covered form or insincerely like secret entrance to fortifications or arsenals as a loyal staff.

The other is delivery operation that is also referred to as executive operation and is a sign of treason or loyalty and consists of the establishment of a secret relationship and delivery of secret information and documents to enemy who is interested in taking advantage of them. These two types of actions of investigation and delivery constitute criminal actions like the rings of a chain. In other words, to deliver the information to a third party the convict needs to conduct certain investigation and after acquisition of information he transfers it to the other. Then, today's spy is the tomorrow's traitor. To put it otherwise, espionage is the preparation of the ground for treason. Until the time when his actions are preparatory, he is a spy and when he delivers the information, he will be a traitor. Thus, the criterion for distinguishing between espionage and treason is paying attention to the nature of these two crimes.

But this criterion for distinguishing is not always clear through the operation and is not observable because it is against the reality. Accordingly, on the one hand, no one would ever proceed to acquire any information unless he decides to deliver it. On the other hand, these actions would be concerned with secret documents. It needs to be mentioned that secret documents, according to the act adopted by the board of minister on 22 December 1976, are those documents whose revelation without permission can cause irreparable damage to the regime and government.

Secret documents are those documents whose revelation could pose serious threats to the public interests and national security. Top secret documents are those documents the revelation of which cause disorder in the system of organizational affairs and turns the implementation of their basic tasks impossible and finally secret documents are those documents whose revelation can cause disorders in the internal affairs of an organization or would pose threats to the interests of the organization. Moreover, the secret classified documents and information of armed forces are subject to their own regulations.

CONCLUSIONS.

Espionage as a crime that causes comprehensive damage to the totality of a country from economic, security, social and cultural aspects enjoys such an importance that it has been criminalized in the laws and regulations of countries for preservation of national interests and sovereignty. Criminalization of espionage was assayed in the current essay in the form of a comparison of the western doctrines of the foundations of criminalization based on the harm centered theory of John Stuart Mill and also the filtering theory that predicts the stages of crime via offering triple filters. However, since the title of the essay is the study of criminalization in jurisprudential doctrines and substantive law, we studied the jurisprudential doctrines based on two foundational Quranic and traditional approaches.

As to Quranic foundations, we referred to numerous verses of Quran in which the necessity of punishment of spies and defense of the society and fortification of the military forces are emphasized. Moreover, from traditional point of view, the conducts of Imams (peace be upon them) particularly those of Holy Prophet and Imam Ali as regards the issue of espionage and its important place in traditions were discussed.

One can conclude that given the international threats and change of global system and development of enmity and greed for acquiring more resources for states espionage has become an important tool for acquisition of political, security, economic, and social information. Thus, governments invest on espionage and send numerous spies to other countries and this shows the significance of criminalization of espionage in jurisprudential and legal doctrines.

BIBLIOGRAPHIC REFERENCES.

1. Al-Damghi, Muhammad Rakan (1966). Investigation of Islamic Sharia, Library of Islamic Research Foundation of Razavi Shrine.

2. Amid, Hassan (1968). *Amid Dictionary*, Tehran, Javidan, Eleventh Edition.
3. Baladsu, Roberto (1996). *Dictionary of International Law*, translated by Aqaei, Bahman.
4. Bentham, Jeremy (1844). *Introduction to the principle of morals and Legislation*, pp160-164.
5. Dashti, 2008, *Nahjulbalaghah*, p: 752.
6. Garraud, (1906). *Theoretical and Practical Studies in Criminal Law*, trans. Seyed Zia al-Din, nd. Tehran, MehrAyen.
7. Habibzadah, Muhammad Jafar and Zeynali, Amir Hamzah (2006). *An Introduction of the Practical Limitaitons of Criminalizaiton*, NamehMofid, Legal, vol. 1, no. 1.
8. HashemianFard, Zahid (2009). *Security in Islam*, Tehran, University of Naitonal Defense.
9. IbnBabuyah, Muhammad Ibn Ali (1998). *Text and Translation of Maani al-Akhbar*, MuhammadiShahrudi, Tehran, Dar al-Kutub al-Islamyah.
10. IbnHusham, nd., *Al-Sirah al-Nabavyah*, Dar al-Turath al-Arabi, Beirut (1997).
11. IbnManzur (1984). *Lisan al-Arab*. Islamic press. Tehran.
12. Klarckson (1956). *Analysis of Foundations of Criminal Law*, trans. Hussein Mir Muhammad Sadeqi, Shahid Beheshti University Press, Tehran.
13. Learner, Daniel (2004). *Emergence of Renewed Traditional Society in Middle East*, trans. GhulamrezaSarvi, Tehran, Strategic Studies Institute.
14. Mill, John Stuart (1996). *On Liberty*, trans. JavadSheykh al-Islami, ElmivaFarhangi Press, Tehran.
15. Moein, Muhammad (1983). *Persian Dictionary*, Tehran, Amir Kabir.
16. Montazeri, Husseinali (1969). *Jurisprudential Foundaitons of Islamic State*, Qom, Keyhan.
17. Musavi Bojnurdi, Seyed Muhammad Kazim (2001). *Great Islamic Encyclopedia*, Tehran, Center for Great Islamic Encyclopedia.

18. Musavi Kashmari, Seyed Mahdi (2009). Islamic State and Security, Tehran, Majlese Khubrigan Rahbari.
19. NavidNia, Manizheh (2009). Social Security, Tehran, Strategic Studies Insitute.
20. Peymani, Zia al-Din (1995). Crimes against the Public Security, first impression, Mizan.
21. Qaraati, Mohsen (2004). Tafsir-e Noor, Tehran, Quran Lessons Cultural Institute, Eleventh Edition.
22. Razavi, Muhammad (2012). Crimes and Punishment of Military Forces, Cheshme, Tehran.
23. Schenscheck Janathan (1994). pp.64-70.
24. Shah Abdul Azimi (1984). Reasoning in Islam. Isfahan press.
25. Shambayati, Hushang (1998). Special Criminal Law, Tehran, Zhubin.
26. Shukani, Muhammad Ibn Ali, nd (2001) Al-Darari al-Muziah, Dar al-Marifah, Beirut.
27. Subhani, Jafar (1991). Foundations of Islamic State, Qom, Tawhid Press.
28. Validi, Muhammad Salih (1992). Specialized Criminal Law, Tehran, Ghurub Press.
29. Zahabi, nd. Alam al-Nabla (2000) Al-Risalah Institute, Beirut.

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