



# Exclusion of Evidence and Its Impact on Criminal Justice: a Comparative Study

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## Abstract

This article discusses the exclusion of evidence in the Qatari and US legal systems. It focuses on the legal basis on which the exclusion of evidence is established in these two systems. The Qatari legal system is a dual system between Islamic Sharia and Qatari legislation. It relies heavily on the rule of invalidity, which is a procedural penalty that is applied when the conditions stipulated by the law are violated in relation to the procedure that was conducted. Meanwhile, the US legal system relies on the exclusionary rule, as this rule has a judicial source. This research discusses the exceptions to the exclusion of criminal evidence in the Qatari and US legal systems to explore how effective are these exceptions in achieving a balance between the goal of protecting the rights and freedoms of individuals and the goal of punishing criminals to preserve the stability of society.

## Keywords

criminal justice – evidence – exclusionary rule – invalidity – Islamic law – Qatari Penal Code – US legal system

## 1 Introduction

It is not possible to punish a person who commits an act that the law considers a crime without due process, which is a set of successive procedures that must be followed according to the law to eventually reach a judgment either convicting or acquitting the defendant.<sup>1</sup> The prosecution follows these procedures from one stage to another until a final judgment is made based on its merits. The first procedure is the recording of information, which is the initial stage conducted by police members to gather preliminary information on crimes. Next, a preliminary investigation is conducted, in which the government collects evidence to determine whether to refer the case to the Court. Once the government decides to refer the defendant to the Court, the Court follows specific procedures in the final investigation stage, reaching a verdict about whether a crime has been committed.<sup>2</sup>

Because of the multiplicity of procedures, legal systems in the world aim to achieve two important goals. The first is to protect the rights and freedoms of individuals by protecting them from any violation aimed at affecting their security and privacy, such as privacy related to the ban on searching for them and the ban on accessing their homes and personal correspondence. Another goal is the need to punish and hold criminally accountable everyone who commits a crime (also called the effectiveness of criminal justice or the goal of the public interest),<sup>3</sup> given that the crime is an assault on society,<sup>4</sup> and therefore criminals must be handed over to the criminal justice system.<sup>5</sup> Both of these goals are important, as the goal of protecting the rights and freedoms of members of society has multiple effects, the most important of which are that it enhances the dignity of society, protects and preserves it from prejudice and reflects the high image of the state as an institutional state. The goal of

1 M.N. Hosni, *Explanation of the Criminal Procedure* (Cairo: Dar Al-Nahda Al-Arabiya, 2016) 210; See Z. Zantana, *The System of the Relationship Between the Accusation and Investigation Authorities* (Cairo: The Arabic Center, 2017) 35.

2 B.Y. Bakri Muhammad, *Al-Wajeez in Criminal Procedures* (Cairo: Dar Al-Nahda Al-Arabiya, 2016) 5.

3 A.F. Sorour, *Constitutional Criminal Law* (Cairo: Dar Al Shorouk, 2002) 528.

4 A crime is an act emanating from criminal will that entails prejudice to a right or an interest, and the law provides a criminal penalty for the perpetrator. A.S. El-Din, *Explanation of the Qatari Penal Code: General Section* (Doha: Qatar University, 2010) 16.

5 These two goals have been addressed by legal research and many judicial decisions in many comparative countries, as our research will show. See A.A. Bilal, *The Exclusionary Rule in Comparative Criminal Law Procedures* (Cairo: Dar Al-Nahda Al-Arabiya, 2013); M.T. Kafka, 'The exclusionary rule: an alternative perspective', *William Mitchell Law Review* 27 (2001): 1895–1939, 1897.

punishing criminals is to achieve deterrence and retribution, which aims to protect society from the abuse of criminals and achieve stability, tranquillity, safety and criminal justice. Thus, the first goal will not be achieved if there is a lack of respect for the rights and freedoms of individuals, and the second goal will not be achieved if criminals escape criminal accountability and punishment.<sup>6</sup>

These goals are to be achieved, and there are many means to ensure their achievement. For example, an important method of achieving the first goal is through procedural legality. Procedural legality is a basic principle in the constitution through the principle of legality in crimes and penalties and the rest of the provisions of the constitution that relate to rights and freedoms.<sup>7</sup> Procedural legitimacy means that a legislator sets conditions for each legal procedure, and the person in charge of the procedure must respect these conditions, because infringing upon them is considered a violation of the rights and freedoms of individuals.<sup>8</sup> Respecting these conditions is the only way that controls the process of carrying out legal procedure against members of society. For example, to conduct a search, there must be a felony or misdemeanour and clear evidence that attributes the crime to the defendant.<sup>9</sup>

To achieve the second goal, state authorities carry out many legal procedures aimed at searching for the perpetrators of crimes and collecting evidence that convicts perpetrators before the court. The verdict of acquittal or conviction relies heavily on evidence collected by the state authorities (police and public prosecution). If a person prosecuted and found innocent, the release of an innocent person will not harm society. If he is convicted, he will be punished; thus, criminal accountability will be achieved, which will ensure the stability and reassurance of society.

Considering what was presented, we raise an important question: Are there any challenges facing legislators or the judiciary in achieving these goals? The answer to this question is yes. The challenges represented in what previously mentioned: procedural legitimacy. The rule of invalidity has been applied to ensure the enforcement of procedural legitimacy. Invalidity is a violation of the conditions stipulated in the procedure, and the consequence of achieving

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6 R.M. Pitler, 'The fruit of the poisonous tree revisited and shepardized', *California Law Review* 56 (1968): 579–651, 586.

7 Hosni, *supra* note 1 at 22.

8 Hosni, *Ibid.*, p. 22.

9 The Qatari Code of Criminal Procedure, Article No. 41, Law No. 23 of 2004.

invalidity has a serious impact, which is the exclusion of evidence based on the invalidity procedure.<sup>10</sup>

It is clear from the foregoing that invalidity aims to activate the role of procedural legitimacy, which in turn aims to achieve the first goal — to protect the rights and freedoms of individuals from violations committed by respective state authorities when they enforce legal procedures without respecting the conditions mentioned therein. The evidence that the government obtained through the illegal procedure will be excluded, and it will not be used by the government before the Court when considering the case of the defendant committing the crime.<sup>11</sup> For example, in a study conducted by the National Institute of Justice, it was found that the number of the federal cases in US that have been rejected due to the presence of procedural problems reaches about 5%, and the same study indicated that one public prosecutor in Los Angeles rejected about 32% drug cases due to procedural errors.<sup>12</sup>

But what does this mean? This means that the exclusion of evidence, which is one of the effects of invalidity, may unintentionally lead to a failure to achieve the second goal — holding criminals accountable and punishing them for the crimes they have committed. This also leads to not protecting society from criminals, which may lead to instability and insecurity in society. Why? if the evidence that can convict the defendant excluded for a procedural reason, this may lead to the acquittal of the defendant because there is no legal evidence to convict him.<sup>13</sup>

10 I.A. Muttalib, *The Invalidity* (Egypt: The National Center for Legal Publications, 2018) 75.

11 In general, the trend about the exclusionary rule varies from one legal system to another. A legal system may apply the rule in a rigid and absolute manner, such that it excludes all evidence obtained illegally. The second trend may deny the application of the exclusionary rule and admit evidence regardless of the method by which it was discovered. The third trend may adopt a compromise solution, such that it does not adopt the rule absolutely, but that there are practical solutions that are determined by the circumstances of each case separately. The same illegal evidence can be accepted in some cases and rejected in others, depending on the need for society to convict criminals on the one hand, and the interest of society that requires protecting individuals from an arbitrary on the other hand.

12 H.M. Caldwell & C.A. Chase, 'The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding about Its Effects outside the Courtroom', *Marquette Law Review* 78 (1994): 45–77, 51.

13 The reason for this is due to the presumption of innocence. For example, Qatari Code of Criminal Procedure states that: 'The judge shall decide the case according to the belief he has arrived at with his full discretion. Nevertheless, he shall not base his judgment on any evidence not presented before him in the hearing or illegally obtained. Any statement

If we assume that we do not have invalidity — no exclusion of evidence based on illegal (invalid) procedures — this means that the defendant will be tried and punished, and thus the second goal will be achieved. But what will be happened in return? The first goal will be wasted because the rights of the criminal were violated through an illegal search or illegal arrest, and this violation of rights occurred without any procedural penalty.

Considering the results of invalidity, there may be a conflict between achieving these two goals. Accordingly, the following question appears to us: How do we ensure that one of these two goals is not sacrificed at the expense of the other? Some comparative systems have attempted to balance these two goals by mitigating the exclusionary rule (the rule of exclusion illegal evidence) and placing an exception on the exclusionary rule.<sup>14</sup> This means that the exclusionary rule will not be applied in certain cases and therefore evidence based on the illegal procedure will be used, and punishment will be imposed on the criminal who committed the crime. These legal systems believe that these exceptions achieve the first goal by invalidating the procedure and achieve the second goal by not applying the exclusionary rule and allowing the use of evidence in Court to convict a criminal.<sup>15</sup> But do these exceptions really achieve this balance? Does the existence of these exceptions really guarantee that one of these two goals will not be sacrificed at the expense of the other?

From here, the main research question emerged: How effective are the exceptions to the exclusionary rule in achieving a balance between the goal of protecting the rights and freedoms of individuals and the goal of punishing criminals to preserve the stability of society? To answer this question, we must study aspects of various legal systems, but we certainly cannot review all the legal systems in the world because of the difficulty in achieving this in practice. We will answer this question by reviewing two different legal systems that follow different schools of thought to generalise the results to the rest of the legal systems that follow the same legal schools. These two legal systems are: Qatari legal system, whose historical roots go back to Egyptian law, which belongs

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proved to be obtained by the suspect or witnesses under duress or threat shall not be relied upon'. Qatari Code of Criminal Procedure, Article No. 232, Law No. 23 of 2004.

14 For example, Article 182 of the French Procedural Code stipulates that: 'in the event of a violation of formalities prescribed by law under penalty of invalidity ... the court of cassation ... may pronounce the invalidity only where this has had the effect of damaging the interests of the party concerned'. French Code of Criminal Procedure, Article No. 182, 1958. Also, in the English legal system, the exclusionary rule is applied to evidence if its admission violated the integrity of the trial. See Bilal, *supra* note 5 at 49.

15 Bilal, *Ibid.*, p. 120.

to the Latin legal system,<sup>16</sup> and the US legal system, which has its roots in the Common law system.

What distinguishes our research is that the Qatari legal system is a dual system between Islamic Sharia and enacted law. Islamic Sharia is the main source of the criminal system, and the general rule is the application of the rules of Islamic Sharia in the courts to crimes. The exception is the application of Qatari law, as we will observe later. Therefore, it must be noted that the importance of this research stems from its supplementing of a lack of literature on the procedural aspect of Islamic criminal legislation, as most research focuses on the objective aspect of the elements of the crime.

This research may provide an opportunity for the Qatari legislator to review his position on the legal texts of invalidity, exclusionary rule and exceptions contained therein, by presenting the trend of the US legal system. We do not mean that the US legal system is better than the Qatari legal system in its dealings with invalidity or the exclusion of evidence or exceptions contained therein. It is only an opportunity for Qatari legislators to evaluate the provisions of its law considering US law. The importance of this opportunity increases due to the recent legislative revolution that the State of Qatar is undergoing. This has resulted in the issuance of more than one law in response to the changes occurring in the country, such as the cybercrime law and the witness and victims' protection law, which we see as an ideal opportunity to review the provisions of the Qatari Code of Criminal Procedure regarding invalidity and its effects.

Therefore, we will discuss the issue of exclusion of evidence and its exceptions in this research, employing a descriptive-comparative methodology to study and analyze the texts of the Qatari legal system on the issue of exclusion of evidence and the US legal system. This research is also important as a comparative study, as two legal approaches from two different systems are examined, namely, the Latin and Common law system systems. Further, the Qatari legal system is a mixture between Islamic law and the Latin legal system, which creates an opportunity for researchers who are not specialized in these two systems to learn more about the Islamic and Arab legal systems. Qatari legal system is like much of the Arab legal system in terms of its position on invalidity, its effects, and the exceptions made to the exclusion of criminal evidence.

The research is presented in two main sections. In the first section, we discuss the exclusion of evidence in the Qatari legal system through the theoretical

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16 For this reason, when discussing the Qatari legal system, we will use the decisions of the Egyptian judiciary, which is a historical source for Qatari law and most of the Gulf states. This is also the reason why we have many Egyptian judges working in Qatari courts.

aspects of Islamic Sharia, enacted law. Moreover, we will present the position of the Qatari legal system regarding the exceptions of the exclusionary rule. In the second section, we discuss the exclusionary rule of evidence in the US legal system, including its legal basis, its historical dimensions, its applications, and the exceptions to the rule. Moreover, through these two sections, we will discuss the analytical reading of Qatar and the US legal system regarding the exceptions to the exclusion of evidence. Through this presentation, we will answer the important research question related to the extent to which these exceptions are able to achieve the rebalance between the two previously mentioned goals.

## 2 Exclusion of Evidence in the Qatari Legal System

### 2.1 *An Overview of the Qatari Legal System*

Before discussing the legal basis for the exclusionary rule in the Qatari legal system, it is necessary to consider the criminal system in the State of Qatar, which is an Islamic country that follows Islamic Sharia in many of its provisions.<sup>17</sup> The Qatari constitution explicitly stipulates the application of Islamic Sharia as a main source of legislation. According to Article No. 1 of the constitution, 'Qatar is an independent sovereign Arab State. Its religion is Islam, and the Islamic Sharia shall be the principal source of its legislation.'<sup>18</sup> In addition, Article No. 1 of the Qatari Penal Code stipulates that:

The rules of the Islamic Sharia shall be applicable on the following offences when the defendant or the plaintiff is a Muslim: The Dogma/Quranic offences (hudud offences) such as: Theft; Banditry; Adultery; Defamation; Drinking alcohol; and Apostasy. Offences of retribution (qisas) and blood money (diya). Save as otherwise specified above, the rules of the enacted Law and other laws shall be applicable to determine the offences and penalties.<sup>19</sup>

It is clear from this text that the general rule is the application of the rules of Islamic Sharia to crimes, and the exception is the application of enacted

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17 Islamic Sharia are the principles and provisions set forth from Allah Almighty to all the people to facilitate and regulate their affairs in religion and life in pursuit of achieving stability and establishing justice.

18 The Qatari Constitution of 2004, Articles No. 1.

19 Qatari Penal Code, Article no. 1 (2004). Law No. 11 of 2004.

law. Qatari legislators obligate judges to apply the rules of Sharia if one of the crimes mentioned in Article No. 1 is found to have been committed. This means that according to Article No. 1 of the Qatari Penal Code, there are two different criminal systems: Islamic Sharia and enacted law. It means that the exclusionary rule has two different sources. This requires us to discuss each system separately to clarify its rules and exceptions.

## 2.2 *The Basis of Exclusion of Evidence in Islamic Sharia*

### 2.2.1 The Rules of Islamic Sharia

By Islamic Sharia (or Sharia Law), we mean the general rules that are characterized by perfection, transcendence, and permanence, and whose source goes back to the Quran, Sunnah, consensus, and analogy.<sup>20</sup> The rules of Islamic Sharia have regulated crimes and penalties from an objective and a procedural point of view, and this means that every crime that is dealt with by Islamic Sharia is subject to the procedural rules mentioned in Islamic Sharia. As for the general procedural rules concerned with regulating trial procedures and others, the provisions of Qatari law are applied to them.<sup>21</sup>

It should be noted also that the substantive and procedural rules of Islamic Sharia are applied to a certain number of crimes, the most important of which are hudud. Hudud are crimes stipulated by Islamic Sharia and for which Islamic Sharia sets appropriate punishments.<sup>22</sup> These crimes are adultery, theft, banditry, defamation, apostasy and drinking alcohol. When a Muslim commit one of these crimes, the rules of Islamic Sharia must be applied regarding determining the elements of the crime, as well as with regard to the procedural rules that govern proving these crimes. As for the rest of the crimes that are

20 A. Odeh, *Islamic Criminal Legislation Compared to Enacted Law* (Cairo: Heritage House Library, 2005) 3.

21 The Qatari Court of Cassation states that ‘... the first paragraph of Article One of the Penal Code promulgated by Law No. (11) of 2004 necessitated the application of Islamic Sharia rules in the Hudud crimes related to theft, robbery, adultery, slander, drinking alcohol, apostasy, retribution crimes, and blood money if the defendant or the victim was a Muslim, and the Penal Code is that branch of the law according to which the state sets the rules of criminalization and punishment, while the Code of Criminal Procedure lays down the rules regulating litigation procedures before the courts to ensure the proper course of justice. The application of Sharia on the crimes restricted to the objective rules of the crime, without the procedural rules regulated by the Code of Criminal Procedure and which are applicable ...’. Qatari Court of Cassation, Criminal Cases, Appeal No. 431 of 2015.

22 M.N. Hosni, *Introduction to Islamic criminal jurisprudence* (Cairo: Dar Al-Nahda Al-Arabiya, 1984) 17; See Z. Zantana, *The System of the Relationship Between the Accusation and Investigation Authorities* (Cairo: The Arabic Center, 2017) 35.



not specified by Islamic Sharia, the rules of the Criminal Procedure Code are applied regarding the exclusionary rule. This means that the exclusionary rule in Islamic Sharia is applied to a certain number of crimes, and therefore it is not permissible to apply any other rules to them. However, the exclusionary rule of the Code of Criminal Procedure is applied to the rest of the crimes that Islamic Sharia does not provide for, such as drug and arms trafficking. Therefore, it is not permissible to apply any other exclusionary rule to them. Accordingly, it is necessary to first discuss the exclusionary rule in Islamic Sharia and then identify the exceptions to this rule.

### 2.2.2 Exclusion of Evidence in Islamic Sharia

Islamic history has many examples of procedural rules being applied, specifically the exclusionary rule when proving crimes. The history of Islamic jurisprudence shows the existence of many incidents through which the exclusionary rule was applied. In an incident highlighted in many books of the history of Islamic Sharia, the second Rashidun caliph Omar ibn Al-Khattab (R.A.) was wandering at night to check on the condition of the Muslims at that time when he heard a man's voice singing with a woman's voice, so he searched his house and found wine. Omar ibn Al-Khattab (R.A.) said to him, 'O enemy of Allah, did you think that Allah would protect you while you disobeyed him?' The man replied, 'And you, O commander of the faithful, do not rush me. Where Allah forbade spying and you spied on me, and Allah forbade walling up and you walled up on me, and Allah forbade entering houses without salutations and you entered the house me without that'.<sup>23</sup> Based on what the man said, Omar ibn Al-Khattab (R.A.) pardoned him, and he did not enforce the punishment prescribed by Islamic Sharia. Therefore, it is important to discuss the reasons for the exclusion of evidence in Islamic Sharia.

#### 2.2.2.1 *The Violation of Individual Freedoms and Personal Rights*

The privacy of individuals has a great place in Islamic Sharia, and this is evident through many rules of Islamic Sharia that clarify the sanctity of this issue and the necessity of respecting it by the ruler and all individuals. Privacy can be defined as any private matter that a person hides from other people.<sup>24</sup> Privacy

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23 This story was mentioned in many writings, the most important of which is Al-Bukhari in *The Great History*. See M. bin Ismail Al-Bukhari, *The Great History (The Ottoman Encyclopedia, 1941–1959)*; Holy Quran (Surah Al-Hujraat:12); Holy Quran (Surah Al-Baqara:189); Holy Quran (Surah An-Noor:27).

24 A. Al-Otaibi, *Provisions and Controls of Inspection in Islamic Sharia* (Riyadh: Umm Al-Qura University in Makkah Al-Mukarramah, 2013) 112.

includes many areas, such as the privacy of a person in his home, the privacy of a person's property, and the privacy of a person in his car. All areas of this privacy are protected by Islamic Sharia.<sup>25</sup>

Respect for privacy is a duty that has its source in many verses (Ayat) in the Quran, and the Sunnah of the Prophet (Hadith). Allah Almighty says, 'O believers! avoid many suspicions, 'for' indeed, some suspicions are sinful. And do not spy, nor backbite one another. Would any of you like to eat the flesh of their dead brother? You would despise that! And fear Allah. Surely Allah is 'the' Acceptor of Repentance, most merciful'.<sup>26</sup> This is also the case with many hadiths that were narrated. On the authority of Abu Barzah Al-Aslami, the Prophet Muhammad (PBUH) said, 'O community of people, who believed by their tongue, and belief did not enter their hearts, do not back-bite Muslims, and do not search for their faults, for if anyone searches for their faults, Allah will search for his fault, and if Allah searches for the fault of anyone, He disgraces him in his house'.<sup>27</sup> Likewise, there are many narrations in Islamic Sharia that reinforce the meaning and importance of privacy; it has been reported that a man was brought before Abdullah bin Masud (R.A.) because his beard was giving out the smell of wine. Bin Masud (R.A.) said, 'We have been prohibited from spying on Muslims and finding faults with them. But we can take to task only and only if the sin is overt'.<sup>28</sup> Ibn Masoud (R.A.), teaches us that a Muslim does not spy on his Muslim brothers, and does not track their private parts.

The acts through which privacy may be violated are numerous. The rule to be applied in this regard is that all evidence that is found through these acts must be excluded and not relied upon when proving the crime against the accused. Among the most important of these acts are the act of espionage (tajss) and the act of trespassing (tasur). The act of espionage is intended to search for people's private parts and their secrets and to reveal them for the purpose of harming the individual or satisfying curiosity.<sup>29</sup> This is done either by watching or listening. Allah Almighty has forbidden espionage by saying, 'O believers! avoid many suspicions, for indeed, some suspicions are sinful. And do not spy, nor backbite one another. Would any of you like to eat the flesh of

25 Al-Otaibi, *supra* note 24 at 112.

26 Holy Quran (Surah Al-Hujraat:12).

27 Sunan Abi Dawud, General Behavior, Book 43, Hadith 4880.

28 Riyad as-Salihin, The Book of the Prohibited actions, Book 17, Hadith 1572.

29 M. bin Saad Al-Ghamdi, *The Death Penalty: A Comparative Jurisprudential Study of the Provisions of the Death Penalty in Islamic Jurisprudence* (Riyadh: Dar Al Salam Library, 1993) 470.

their dead brother? You would despise that and fear Allah. Surely Allah is 'the' Acceptor of Repentance, most merciful'.<sup>30</sup>

Trespassing entails entering premises without the permission of the owner, and this may be done by any available means.<sup>31</sup> An individual who engages in trespassing is considered to have violated the privacy of individuals. Islamic Sharia forbids trespassing in more than one place, including a Quranic verse that reads, 'O believers! Do not enter any house other than your own until you have asked for permission and greeted its occupants. This is best for you, so perhaps you will be mindful'.<sup>32</sup> We note here that trespassing and espionage are similar in that they constitute a violation of the privacy of individuals, but espionage focuses more on the person himself, his body, his actions, his words, and his possessions. Trespassing is focused on violating the sanctity of a dwelling and seeing what is found inside it. Both acts have the same rulings in terms of the necessity of excluding any evidence based on them.

Of course, this does not mean that it is not permissible to search through people's private spaces or belongings, as the rules of the Islamic Sharia stipulate many jurisprudential rules that allow searching for evidence of a crime, even if that results in a violation of the privacy of an individual if the conditions stipulated in each rule permitting this are fulfilled. One of these rules is the rule of necessities,<sup>33</sup> which permits a prohibited act, provided that the necessity is greater than the prohibition itself. Jurists agree that the need for inspection to detect a crime is a necessity that permits the prohibited act.<sup>34</sup>

There are many hadiths that prove the allowability of conducting searches. Among the hadiths that show the permissibility of a search when certain conditions are met is the incident of the Prophet's companions whom the Prophet Muhammad (PBUH), sent to search the luggage of a woman for a lost book. When they went to the Prophet Muhammad (PBUH), he did not rebuke them for their action, which indicates the permissibility of the search when it is issued by the ruler.<sup>35</sup> This indicates that a search aiming to reveal the truth may be permissible on the condition that the order for the search is from the ruler or authority that he delegates.

Likewise, for the inspection to be permissible, conditions must be fulfilled related to the authority that undertakes the inspection, as well as the one in

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30 Holy Quran (Surah Al-Hujraat:12).

31 See generally Al-Otaibi, *supra* note 24 at 116.

32 Holy Quran (Surah Al-Noor:27).

33 Al-Otaibi, *supra* note 24 at 101.

34 Al-Otaibi, *Ibid.*, p. 103.

35 Jami at-Tirmidhi, The Book of Tafsir, Book 47, Hadith 357.

charge of the procedure. Regarding the authority responsible for the inspection, the inspection must first be through the authority that has been entrusted with this competence by the ruler of the Muslims. In Islamic Sharia, this is what is called Wilayat al-Hisba,<sup>36</sup> which corresponds to the Public Prosecution Office in the State of Qatar. This authority's mandate is a responsibility to apply the rules of Islamic Sharia by enjoining good and forbidding evil. In doing so, it may carry out investigations or hand down discipline and perform other duties assigned by the ruler.

As for the conditions related to the one in charge of performing a search, he must be a just, sane, Muslim, adult, and the most important condition is that the inspection be performed with the permission of the authority that has been trusted by the ruler of Muslims to do so.<sup>37</sup> Of course, in order to authorize the search and for the inspector to perform it, there must be a valid goal that the Wilayat al-Hisba assesses according to Islamic Sharia, which is revealing the truth.

#### 2.2.2.2 *The Evidence Is Not Complete in Accordance with the Conditions Stipulated by Islamic Sharia*

Hudud crimes are based on many pillars, the most important of which are the material pillar and the moral pillar. Also, Islamic Sharia specifies for each hudud crime specific evidence, and the crime is not to be proved except on this evidence. Among this evidence, for example, is the confession (Iqrar), which is a person's confession of having committed a crime.<sup>38</sup> These confessions must be given before judges by sane adults. Likewise, there is evidence of what is called testimony (shahada), which is the testimony of a person that he saw the accused committing the crime prohibited by Islamic Sharia.<sup>39</sup>

The general principle is that the evidence, once its conditions are fulfilled, is relied upon. However, Islamic Sharia stipulates for some evidence additional conditions that are not related to the origin of the evidence, as is the case with testimony evidence. Testimony, to be fulfilled in Islamic Sharia, must meet several conditions, such as that the witness be a sane, Muslim and adult. In general, once these conditions are met, the testimony is accepted. Although, Islamic Sharia excludes this evidence if there is a violation in achieving the required number of testimonies to be submitted. For example, for the crime

36 Al-Otaibi, *supra* note 24 at 211.

37 A. Al-Shuhadi, *Fundamentals of Criminal Investigation and Research Methods, General Rules of Criminal Investigation and Their Application* (Cairo: The World of Books, 1977) 25.

38 See Odeh, *supra* note 20 at 384.

39 See Odeh, *ibid.*, p. 351.

of adultery to be proven, it is required that there be four direct eyewitnesses to the sexual intercourse. If the required number of witnesses is not met, then the rest of the testimonies are excluded and cannot be used for proof, even if each of these testimonies fulfills its own conditions (adulthood, masculinity, etc.). Allah Almighty says, “As for<sup>1</sup> those of your women who commit unauthorized intercourse — call four witnesses from among yourselves. If they testify, confine the offenders to their homes until they die or Allah ordains a ‘different’ way for them.”<sup>40</sup> The same is the case with testimony in the crimes of drinking alcohol or theft, for which it is required that there be two witnesses. If there is only one witness, the testimony of the other person is excluded.<sup>41</sup>

Based on the foregoing, the evidence is excluded and is not considered if the rule of Islamic Sharia regarding the number of witnesses required is not met. This path differs from the path of enacted law, where it is sufficient to prove crimes with the availability of one testimony if the conditions of this testimony are fulfilled. As the principle is the freedom of the judge to be convinced of any evidence that meets its conditions and is presented to him in court, the Qatari Court of Cassation has followed this path in terms of the need to apply the rules of Islamic Sharia regarding the number of witnesses more than once. For example, the court states that ‘The judge may take from any evidence or presumption that he is comfortable with as evidence for his judgment unless the law restricts it to specific evidence.’<sup>42</sup> What is meant by the evidence that the ‘law restricts’ is the text of Article No. 1 of the Qatari Penal Code, which stipulates the application of the rules of Islamic Sharia regarding proving crimes. Evidence for this is what the same court referred to in another ruling: ‘It is decided that the jurists of Islamic Sharia have unanimously agreed that the hudud punishment for theft — amputation — must be inflicted on the thief if it is proven against the accused by the testimony of two just men ...’<sup>43</sup>

So, what distinguishes this rule is that it excludes honest evidence if the required number of witnesses is not achieved for other evidence. This rule cannot be underestimated in Islamic Sharia. Rather, Islamic Sharia obligates the punishment of other witnesses who do not present valid testimony if the number of testimonies was incomplete. For example, in the crime of adultery, four witnesses are required. If three witnesses present valid testimony, they will be punished because there is no fourth witness. The punishment here would be flogging, just as the companion Omar ibn al-Khattab (R.A.), flogged

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40 Holy Quran (Surah An-Nisa:15).

41 See Odeh, *supra* note 20 at 454.

42 Qatari Court of Cassation — Criminal Cases, Appeal No. 21 of 2014.

43 Qatari Court of Cassation — Criminal Cases, Appeal No. 54 of 2012.

three people who testified against a Muslim man called al-Mughira that he committed adultery with a woman. When the fourth testimony was not presented, the companion Omar ibn Al-Khattab (R.A.) flogged the witnesses as a punishment.<sup>44</sup> This punishment is intended to act as a deterrent to revealing information about a crime to any person until after confirming it and making sure that its conditions are met; otherwise, the testimony may result in defamation.

### 2.2.3 Exceptions to the Exclusionary Rule in Islamic Sharia

The exclusion of evidence in Islamic Sharia is characterized by many jurisprudential rules that distinguish it from enacted law. Perhaps the most important of these features is the specificity of the exceptions to the exclusionary rule and their difference from others. For example, in Islamic Sharia, it is not permissible to apply the rule of 'Procedure indirectly related to an illegal procedure', which is the exception that we will see later that allows evidence to be accepted if the relationship between the evidence and the method through which the evidence was obtained is weak. The reason for this is due to a hadith saying, 'Avert the prescribed punishment by rejecting doubtful evidence',<sup>45</sup> which is intended that those in authority should prevent the application of the penalties stipulated in Islamic Sharia for hudud crimes if there is doubt, even a small one, regarding the elements of the crime or the evidence to prove it. If there is, for example, a suspicion in a Muslim's confession that he drank alcohol, and it turns out that this confession is related to the unauthorized entry of a person who witnessed him inside the house while he was drinking alcohol, and the confession was connected, albeit weakly, to this unauthorized entry, then this suspicion, even if it was small, is sufficient to prevent the application of the punishment to him. Therefore, there are many exceptions to the exclusion of evidence in Islamic Sharia, which we will present accordingly.

#### 2.2.3.1 *Transforming the Crime from a Hudud Punishment to a Tazir Punishment*

We have mentioned that Islamic Sharia establishes objective pillars and procedural methods of proof for a certain number of crimes. Islamic Sharia has determined the methods of proving these crimes to apply the punishments prescribed for them. For example, if the crime of adultery is committed, the offender must be punished by flogging, as Allah Almighty says, 'As for female and male fornicators, give each of them one hundred lashes, and do not let pity

<sup>44</sup> See Odeh, *supra* note 20 at 374.

<sup>45</sup> Bulugh al-Maram, Book of Hudud, Book 10, Hadith 17.

for them make you lenient in 'enforcing' the law of Allah, if you 'truly' believe in Allah and the Last Day. And let several believers witness their punishment',<sup>46</sup> as well as stoning if the adulterer is married.<sup>47</sup> Likewise, if the conditions of theft are met, the prescribed punishment is amputation of the hand, as Allah Almighty says, 'As for male and female thieves, cut off their hands for what they have done — a deterrent from Allah. And Allah is Almighty, all-wise'.<sup>48</sup> Other criminal penalties stipulated in Islamic Sharia are very similar; most of them are either flogging or execution, depending on the type of crime. Of course, as was mentioned previously, each crime has certain methods of proof through which evidence is accepted, and the method through which evidence is obtained must be legitimate.

It is important to mention that if the evidence is excluded for one of the reasons mentioned previously, either because the method of obtaining it violated the privacy of individuals or because the evidence was not supported by other evidence, then the evidence will be excluded. However, evidence may be accepted on the condition that the accused be punished with a lighter penalty than that specified by Islamic Sharia, and this exception is called the 'Transformation of the punishment from the most severe to the lightest'. This means the transformation of the crime from its description as a hudud, to which the rules of Sharia are applied, to a tazir.<sup>49</sup> Tazir are punishments whose pillars are not determined by Islamic Sharia, and their punishments are not specified but rather left to the determination of the ruler.<sup>50</sup> In the current era, these are called 'Man-made laws', such as the Qatari Penal Code. It must be noted that the issue of replacing hudud punishments with tazir is up to the ruler's discretion, so the ruler may not order the application of tazir instead of hudud and may release the accused as soon as the hudud is found not to apply to him.

This means that a punishment different from that mentioned in Islamic Sharia must be applied, and it is always a less serious punishment. For example, if a married person commits adultery, the punishment according to Islamic Sharia is stoning. However, if there are not enough witnesses and the evidence is excluded according to the aforementioned rule, the accused will be

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46 Holy Quran (Surah Al-Noor:2).

47 Odeh, *supra* note 20 at 341.

48 Holy Quran (Surah Al-Maidah:38).

49 Odeh, *supra* note 20 at 115.

50 Al-Otaibi, *supra* note 24 at 69.

punished with a prison sentence.<sup>51</sup> The punishment must not reach the rank of hudud punishment, otherwise, this would be contrary to Islamic Sharia.<sup>52</sup>

Support for the existence of this exception goes back to the Prophet's Sunnah. For example, in the Sunnah, there is a hadith of the Prophet Muhammad (PBUH) saying that in the event that the conditions of theft are not met and the hand cannot be cut off, then the thief must pay money instead.<sup>53</sup> Likewise, it was narrated that Omar ibn al-Khattab (R.A.) applied a tazir punishment instead of the hudud punishment due to the failure to verify the evidence based on the hudud punishment for adultery.<sup>54</sup> The reason for the existence of this exception is to ensure that a criminal does not completely escape punishment and to ensure the stability of society and not harm it through the impunity of criminals. Evidence for each criminal offense may be difficult to verify, and therefore if the accused is immediately acquitted due to the exclusion of the evidence, this will lead to communal fear of criminals and a failure to achieve deterrence, which may harm the stability of society.

Of course, this exception to the exclusion of evidence in Islamic Sharia is applied in the Qatari legal system. For example, if there is a hudud punishment within the scope of Islamic Sharia, there is a corresponding punishment within the scope of the Qatari Penal Code. For example, theft is punishable by cutting off the hand, while in the Qatari Penal Code, the punishment is imprisonment.<sup>55</sup> Likewise, defamation is punished in Islamic Sharia by flogging, but its punishment in the Qatari Penal Code is imprisonment.<sup>56</sup> Also, the Qatari Court of Cassation has applied these exceptions in many rulings.<sup>57</sup> Of course, in the event that this exception is achieved, the general rules of evidence apply in the tazir crime.

51 K. Al-Saliby & Izz Al-Din Adnan, 'Tazir instead of Hudud punishment', *Journal of the Islamic University for Sharia and Legal Studies* 29 (2021): 58–90, 69.

52 Saliby & Adnan, *supra* note 51 at 72.

53 Sunan an-Nasai, *The Book of Cutting off the Hand of the Thief*, Book 46, Hadith 4958.

54 Saliby & Adnan, *supra* note 51 at 71.

55 Qatari Penal Code, Article no. 344 (2004), Law No. 11 of 2004.

56 Qatari Penal Code, Article no. 326 (2004), Law No. 11 of 2004.

57 The Qatari Court of Cassation states that '... Since this was the case, and if the accused had confessed to the theft through the investigations of the Public Prosecution, but he denied it in the Judicial Council, and the required numbers of testimony was not available in his case, so it was necessary to exclude the hudud punishment and impose the disciplinary punishment in accordance with the Penal Code'. Qatari Court of Cassation — Criminal Cases, Appeal No. 54 of 2012.



### 2.2.3.2 *The Most Severe Damage Is Removed by the Lesser Damage*

There is another Sharia exception that may be applied to the exclusionary rule, which is what is called the most severe harm removed by the least harm.<sup>58</sup> We consider this exception to be applicable only if the violation is focused on violating privacy. What is meant by this rule is that if there are two harms that have been achieved, and these two harms conflict with each other so that one of them must be achieved at the expense of the other, then the lesser harm must be committed if it results in the removal of the greater harm. Therefore, it is not permissible to allow severe harm if it is possible to remove it by committing lesser harm. This exception finds its origin in a rule supported by the hadith of the Prophet Muhammad (PBUH), which is 'There is no injury nor return of injury'.<sup>59</sup>

The origin of this exception is found in the acts of worship and family matters. For example, it is permissible to divulge the secret of a patient who is about to get married if his concealment has resulted in greater harm, such as if a husband is sick with an infectious disease that will result in the wife's illness.<sup>60</sup> However, many have permitted this application in matters of search and obtaining evidence in Islamic Sharia.<sup>61</sup> For example, if four of those responsible for implementing the rules of Islamic Sharia knew that someone was committing acts of adultery in his house, and they trespassed and entered this person's house without his permission, then the inspection harmed the privacy of the adulterer. But there is another harm, which is committing the act of adultery. Here, a balance is made between these two harms and the lesser of them is given preference. If the judge considers that the harm caused by trespassing was less than the harm that occurred to society because the accused committed the crime of adultery, then in this case he may accept the evidence based on the unauthorized search to apply the hudud punishment to the adulterer to deter him.

We note that this exception should not be applied in general to all crimes, but rather it should be applied to each crime separately and in consideration of all circumstances. For example, if the crime committed does not result in significant harm, such as drinking alcohol, and some people did spying and walling up at the house of the drinker, which results in harm to family members,

58 Al-Otaibi, *supra* note 24 at 103.

59 Muwatta Malik, Book of Judgements, Book 36, Hadith 31.

60 Z. Maatouk, 'The rule of the greater harm is removed by the less harm and its contemporary applications in some family issues', *Journal of Sharia and Economy* 4 (2015): 183–222, 200.

61 See generally M. Sidqi bin Ahmad, *Al-Wajeez in Explanation of the General Rules of Jurisprudence* (Beirut: Global Message Foundation, 1996) 260.

then in this case the evidence might be denied and not relied upon. In this example, we find that the harm of espionage and eavesdropping is more severe than the harm of drinking alcohol.

Another exception stems from this exception, which is that specific harm is accepted to prevent general harm.<sup>62</sup> This rule is based on the legitimate objectives of achieving the interests of individuals. Islamic Sharia aims to preserve people and their properties, and it prevents everything that results in general harm to them, and for this reason, Islamic Sharia orders the punishment of cutting off the hand of the thief if he commits the crime of theft. Based on that, if espionage results in specific harm to an individual to prevent greater harm, for example, the act of thief, then there is no doubt that this specific harm resulted in removing general harm. Therefore, the evidence based on this specific harm may be accepted.

### 2.3 *The Legal Basis of Exclusion of Evidence in the Qatari Legal System: Invalidity*

Most crimes are governed by the Qatari Penal Code and not the Islamic Sharia. Therefore, the exclusion of evidence in the Qatari legal system is mainly based on the provisions stated in the Code of Criminal Procedure. The Constitution establishes general constitutional rights and principles, while the Code of Criminal Procedure represents the detailed rules that follow these rights.<sup>63</sup> The most important of these rules is invalidity. Invalidity is defined as a procedural sanction for the failure to meet all or some of the conditions on the validity of the criminal procedure, and it results in the procedure not producing its usual effects in the law.<sup>64</sup> Invalidity is discussed in Chapter Five of the Qatari Code of

62 Sidqi, *supra* note 61 at 263.

63 The Qatari Constitution stipulates many constitutional principles and rights. These are general principles that serve as the basic source for the Qatari Code of Criminal Procedure relating to an invalidity and its effects. An example of these constitutional rights is the presumption of innocence, as the Qatari Constitution states in Article 39: 'The defendant is innocent until his guilt is proven before the judiciary in a trial in which the guarantees to exercise the right of defense are provided'. The Qatari Constitution of 2004, Article No 39. Also, the principle of the right to human dignity. Article 36 of the Qatari Constitution states that '... no person shall be subjected to torture or degrading treatment, and torture is considered a crime punishable by law ...'. This means that any evidence that results from any procedure that offends human dignity shall be excluded, such as evidence that is obtained through the commission of a criminal offense against the defendant (e.g., torture). The Qatari Constitution of 2004, Article No. 36.

64 K. Al-Saeed, *Explanation of the Code of Criminal Procedure* (Amman: House of Culture, 2010) 794.

Criminal Procedure, from Articles 256 to 262.<sup>65</sup> Therefore, invalidity is a legal reason for excluding evidence. For example, Article 262 states,

If the procedure is null and satisfies the elements of another procedure, it shall be considered correct regarding the procedure whose elements are satisfied. If the procedure is null in part thereof, then this part alone shall be considered to be null. The invalidity of the procedure shall not imply the invalidity of preceding procedures if not directly resulting from it.<sup>66</sup>

The basis for this procedural penalty is the rule of procedural legality, which states that it is not permissible to perform any procedure that is not stipulated by law or to perform any procedure in a way that violates the conditions stipulated by the law.<sup>67</sup> Invalidity is always based on the principles and rights stipulated in the Constitution, such as the right to privacy, the right to defense, and the freedom of movement of individuals. It is not permissible for any authority to undermine these rights except by law and in cases of necessity — and then only in the manner stipulated by law — and therefore any violation of these rights leads to the invalidity of the procedure.

Moreover, there are two types of invalidity: absolute and relative invalidity. Absolute invalidity is a violation of a legal rule related to the public order, and the judge can rule on its own without the need to apply.<sup>68</sup> This does not mean that he is judged from his personal knowledge; rather this type of invalidity must be reflected in the case papers or mentioned in the pleading. Therefore, the general rule is that the Court shall be exposed to every issue related to public order as long as it has been mentioned in the case file or in the pleading.<sup>69</sup> However, if there is no mention of this issue in the case papers or the pleading, the Court may not rule on its own.

Relative invalidity is not related to the public order; rather, it is related to the interests of one of the parties that do not rise any public order matter.<sup>70</sup> An example of this is the right of defence, which allows the defendant to respond to the accusation made against him or her. These rules were established to enable the defendant to fulfil his or her right to defence, and therefore it is

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65 Qatari Code of Criminal Procedure, Article No. 257, Law No. 23 of 2004; Qatari Code of Criminal Procedure, Article No. 256, Law No. 23 of 2004.

66 Qatari Code of Criminal Procedure, Article No. 262, Law No. 23 of 2004.

67 See generally Muttalib, *supra* note 10 at 75.

68 A. Mahdi, *Explanation of the General Rules of Criminal Procedure* (Cairo: Dar Al-Nahda Al-Arabiya, 2019) 220.

69 See Egyptian Court of Cassation — Criminal Cases — Appeal No. 7015 of 2003.

70 Hosni, *supra* note 1 at 404.

left to the defendant to assess whether the breach of these rules would result in a breach of his right to defence.<sup>71</sup> However, it should be noted that if the rights of defence rise to the level of defence guarantees that society provides to the parties to the case, then they are part of the public order and are related to absolute invalidity, as described earlier. Further, there are cases of relative invalidity for which the legislature exclude invalidity, such as if the investigation procedures occurred in the presence of a lawyer and the lawyer did not object to them.

Finally, the effects of invalidity are represented first, by excluding evidence based on an illegal procedure, and second, by invalidating subsequent procedures that are based on the illegal procedure, which is known as the fruit of the poisonous tree.<sup>72</sup> However, subsequent procedures that are independent of the illegal procedure are not invalidated. We will discuss the effects of invalidity and the exceptions in the next section.

### 2.3.1 The Invalidity Effects

#### 2.3.1.1 *Exclusion of Evidence*

The invalidity of a procedure results in the exclusion of evidence obtained from that procedure.<sup>73</sup> The basis of this effect is the following text from Article 232 of the Code of Criminal Procedure:

The judge shall decide the case according to the belief he has arrived at with his full discretion. Nevertheless, he shall not base his judgment on any evidence not presented before him in the hearing or illegally obtained. Any statement proved to be obtained by the suspect or witnesses under duress or threat shall not be relied upon.<sup>74</sup>

An example of an illegal procedure is performing searches in cases other than those stipulated in the law. In this event, the evidence is excluded and not relied upon because it is based on an illegal procedure, which is a search conducted without a legal basis. In this matter, the Qatari Court of Cassation ruled that ‘... it is decided that the invalidity of the arrest and the subsequent procedures will not lead to relying on any evidence derived from it ...’.<sup>75</sup> It also decided in another judgment that,

<sup>71</sup> A.F. Sorour, *Criminal Procedure Law: Book One* (Cairo: Arab Renaissance House, 2016) 647.

<sup>72</sup> Hosni, *supra* note 1 at 408.

<sup>73</sup> Mahdi, *supra* note 68 at 226.

<sup>74</sup> Qatari Code of Criminal Procedure, Article No. 232, Law No. 23 of 2004.

<sup>75</sup> Qatari Court of Cassation — Criminal Cases, Appeal No. 99 of 2013.

justice does not harm by the impunity of a criminal as much as the harms through infringements on people's freedoms ... Since the contested judgment had relied in its merits on the evidence derived from the illegal arrest and search, the judgment should not rely upon any evidence derived from them ... Therefore, the testimony of the person who carried out this illegal procedure is not relied upon. So, the Court shall acquit the defendant.<sup>76</sup>

### 2.3.1.2 *Invalidity of a Procedure Resulting from an Illegal Procedure*

The second effect is the invalidity of subsequent procedures based on the illegal procedure.<sup>77</sup> We noted above that invalidity may occur both in the trial stage and the preliminary investigation stage. However, the preliminary investigation procedures are most subject to invalidation.<sup>78</sup> The aim of these preliminary procedures is to collect evidence that helps to reveal the truth. These procedures usually depend on each other, meaning that each new conclusion is based on conclusions of the previous procedures. For example, the public prosecution member may hear the testimony of witnesses who testify that the defendant possessed narcotics in his home, and based on this procedure, take another action, such as the issuance of a warrant to search the defendant's residence, which results in the seizure of drugs. This leads to the issuance of an arrest warrant for the defendant, after which the defendant is interrogated, leading to a confession.

Accordingly, invalidity is governed by the jurisprudential rule that anything that is based on invalidity is null. In other words, an illegal procedure nullifies every subsequent procedure for which the illegal procedure was consequential.<sup>79</sup> For example, imagine that a defendant is interrogated based on material coercion, and the investigator obtains a confession from the defendant that he committed the crime of bribery and that he hid the illegal funds obtained from this crime in his residence. Based on this confession, a warrant is issued to search the residence of the defendant. When the search is carried out, the illegal money is found. In this example, the invalidity of the interrogation procedure extends to each subsequent procedure, including the issuance and execution of the search warrant and the seizure of the funds resulting from this search.

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76 Qatari Court of Cassation — Criminal Cases, Appeal No. 53 of 2009.

77 Hosni, *supra* note 1 at 408.

78 M.Z. Abu Amer, *Criminal Procedures* (Cairo: New University Publishing House, 2014) 497.

79 Sorour, *supra* note 71 at 666.

### 2.3.2 Exceptions to the Effects of Invalidity

As mentioned previously, invalidity results in the exclusion of evidence based on the illegal procedure as well as the invalidity of the procedure resulting from the illegal procedure. However, the Qatari legislature included exceptions to the effects of invalidity, specifically the exclusion of evidence, whether due to the original illegal procedure or the illegal procedure based on the original. These exceptions are mentioned in Article 262 of the Code of Criminal Procedure: ‘... the invalidity of the procedure does not result in the invalidity of the previous procedures, or the subsequent procedures if they were not directly related to it ...’<sup>80</sup>

#### 2.3.2.1 *Independent Procedure*

An independent procedure — or what is called an unrelated procedure — is not directly or indirectly related to the illegal procedure.<sup>81</sup> It can occur in two cases. The first is if the procedure preceded the illegal procedure, for example, if there was a valid search resulting in the seizure of an illegal substance, but the procedure that follows, the interrogation of the defendant, involves violence against the defendant. Here we have an illegal procedure — the violent interrogation. While the confession was excluded, the previous search procedure is valid and independent of the illegal procedure. The reason we consider this procedure as an exception to the rule of invalidity is the application of the principle of supporting evidence, as all evidence presented before the judge is connected, and therefore if one piece of evidence requires invalidity this applies generally to all the evidence.<sup>82</sup> Hence, the judge then has to carry out a screening process to cleanse the rest of the evidence from this invalidity. If the judge determines that there is evidence based on an independent procedure, as in the previous example, then it is exempted from invalidity and considered legitimate evidence.<sup>83</sup> In this regard, the Qatari Court of Cassation ruled that,

It is decided that the invalidity of the arrest for its illegality will not lead to any reliance on any evidence resulting from it. However, this invalidity does not extend to other investigation procedures prior or after it, if these procedures are not related to the illegal arrest. Since the illegal arrest of

<sup>80</sup> Qatari Code of Criminal Procedure, Article No. 262, Law No. 23 of 2004.

<sup>81</sup> Hosni, *supra* note 1 at 410.

<sup>82</sup> G. Ghamam, *Explanation of the Qatari Rules of Criminal Procedure* (Doha: Qatar University, 2017) 644.

<sup>83</sup> M.S. Nammour, *The Origins of Criminal Procedures: An Explanation of the Code of Criminal Procedure* (Amman: House of Culture, 2019) 81.

the defendant took place after sending a letter to the embassy ... and while he was dealing with the corresponding cash amount in the place he specified, then it is permissible to arrest him. Also, he confessed that he had committed the crime before his illegal presentation to the prosecution, and the contested judgment in the conviction was based on this confession that happened before the illegal procedure. Therefore, the defendant's raises in this regard are not correct.<sup>84</sup>

Further, the independent procedure may be subsequent to the illegal procedure.<sup>85</sup> An example of this is a search procedure based on legitimately obtained information about prohibited substances, which are then found based on the search. If the judge ensures that this procedure is not related to an illegal procedure, then it is valid regardless of the previous illegal procedure. Accordingly, the Qatari Court of Cassation ruled that.

It is decided that the assessment of the seriousness of the investigations and their sufficiency to issue a search warrant is one of the substantive matters entrusted to the investigation authority under the supervision of the trial Court, as in the case presented ... Also, the trial court states that they build their judgment upon an independent procedure such as the confession of the defendant, which is not related to the illegal procedures.<sup>86</sup>

### 2.3.2.2 *A Procedure Indirectly Related to an Illegal Procedure*

This exception is primarily subject to the judge's discretion, as it is related to the illegal procedure. That is, it is not independent, but the relationship between them is not direct, meaning that it is not a strong connection, and the Court has the authority to assess the relationship between the two procedures.<sup>87</sup> The law expressly stipulates this exception in Article 262: '... The invalidity of the procedure shall not imply the invalidity of preceding procedures, if not directly resulting from it'.<sup>88</sup> In applying this, the Qatari Court of Cassation ruled that

Arrest — assuming its occurrence — does not preclude the Court from taking all the other evidence not related to it ... and among this evidence

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84 Qatari Court of Cassation — Criminal Cases, Appeal No. 11 of 2008.

85 Hosni, *supra* note 1 at 410.

86 Qatari Court of Cassation — Criminal Cases, Appeal No. 72 of 2012.

87 Sorour, *supra* note 71 at 667.

88 Qatari Code of Criminal Procedure, Article No. 262, Law No. 23 of 2004.

is the subsequent confession of committing the crime ... and the judgment on the aforementioned statement shows that his confession is separate from the arrest, Therefore, excluding it would be inappropriate.<sup>89</sup>

In a different case, the Court ruled that ‘... The invalidity of the arrest and search for its occurrence does not preclude the Court from taking all the other evidence not related to it ...’<sup>90</sup>

We note that there is a difference between this exception and the previous one. This exception focuses on evidence obtained from a procedure related to the illegal procedure, but the link is not strong (indirect), while in the previous exception, evidence is obtained from a procedure that is not related to the illegal procedure but rather is independent of it, regardless of whether this procedure precedes or follows the illegal procedure. However, we note that the Qatari Court of Cassation unintentionally confuses these exceptions, applying this indirect exception to the independent procedure and vice versa. An example of this is a case in which the Qatari Court of Cassation ruled that:

It is decided that it is not sufficient for the case of flagrant depict for a crime of bribery that the judicial policeman had received the information of the crime and did not witness any of its effects that predicted its occurrence ... The Court concluded that arresting the defendant and the evidence derived from it are null ... Since that was the case, and this invalidity did not extend to the subsequent procedures if it was proven in the trial that they are independent from that illegal procedure ... The trial Court had to decide whether this subsequent evidence (confession) is related to the illegal proceeding or whether it is disconnected from that illegal proceeding.<sup>91</sup>

Here, the Court of Cassation applied the unrelated procedure rule — an independent procedure — to the evidence associated with the illegal proceeding, which was the defendant’s subsequent confession that came after the illegal procedure.<sup>92</sup> This confession was considered to be related to the illegal procedure, even though the relationship was indirect, so it would have been better to apply the exception related to the indirect procedure exception rather than the independent procedure exception.

89 Qatari Court of Cassation — Criminal Cases, Appeal No. 215 of 2008.

90 Qatari Court of Cassation — Criminal Cases, Appeal No. 186 of 2018.

91 Qatari Court of Cassation — Criminal Cases, Appeal No. 165 of 2007.

92 Qatari Court of Cassation — Criminal Cases, Appeal No. 215 of 2008.



#### 2.4 *Comments on Exceptions to the Exclusionary Rule in Qatari Legal System*

It is a bright spot in the Qatari legal system that there is space for the application of the rules of Islamic Sharia in matters of proving crimes. We have already mentioned that there are a certain number of crimes for which the legislature referred the application of its substantive and procedural rules to Islamic Sharia, as mentioned in Article No. 1 of the Qatari Penal Code. This means applying the exclusionary rule as stipulated in Islamic Sharia. As for the rest of the crimes — which comprise the majority — the exclusionary rule stipulated in the Code of Criminal Procedure is applied. Although this space is narrow and limited, and only applies to a limited number of crimes, the most important of which are hudud crimes, we see that it is distinctive and deserves to be the subject of research studies in the future. The exceptions of the exclusionary rule stipulated in Islamic Sharia, from my personal point of view, succeed in achieving the required balance in the two aforementioned goals.

We note, for example, that the first exception related to the transformation of a crime from hudud to tazir, and the effect of reducing the punishment of the accused, is an exception in which the rights of society are respected and preserved from any violation committed by the authority in charge of the procedure, and at the same time society is protected from criminal impunity. Society will ensure that evidence obtained illegally will not be used to prove a crime (hudud crime), and society will also ensure that the accused will not escape all the punishment but will be punished more lightly. The lighter punishment here is more like compensation borne by the authority that violated the rights and privacy of the individual.

The same is the case in the second exception related to the fact that the greater harm is removed by committing the lesser harm. Here the judge is empowered to balance two important goals: the goal of society in protecting rights and freedoms and the goal of punishing criminals. If he believes that the interest of protecting rights and freedoms is more important than the interest of punishing criminals, the evidence is rejected, and vice versa. This exception greatly supports the issue of the balancing process that we raised in this research because it does not give a rigid solution to the judge who is committed to applying it to all crimes, but rather gives him space to carry out the balance on his own.

On the other hand, when studying the trend of the Qatari Code of Criminal Procedure, it becomes clear to us beyond any doubt that Qatari law is very similar to most Latin law regarding the issue of stagnation in applying the exclusionary rule due to its wide application of this rule and adopting only two exceptions to it: the independent procedure and the procedure indirectly related to an illegal procedure.

Hence, it is clear to us that there is a gap between the goal of protecting the rights and freedoms of members of society and the goal of punishing criminals and holding them criminally accountable. Exceptions to the exclusionary rule do not close the gap between them. This means that the exceptions contained in the Qatari legal system do not achieve an adequate balance between the two goals. Rather, they indicate that Qatari legislators and judiciary tend to achieve the goal of protecting the rights and freedoms of individuals over the goal of punishing the perpetrators of crimes. This conclusion is based on the following reasons:

- (1) The exceptions to the exclusionary rule are limited in terms of number and type. We are faced with only two exceptions. Indeed, if we read the texts of the Criminal Procedure Code, it becomes clear to us clearly that the legislator adopted one exception: the procedure indirectly related to an illegal procedure. The exception of independent procedure was created by the Qatari judiciary, which was influenced by the Egyptian judiciary.<sup>93</sup> In terms of type, there is an overlap between these two exceptions and there is no real separation between them, as we explained previously. This limitation in the exceptions illustrates the unwillingness to abandon the goal of protecting the rights of society.
- (2) Most exceptions to the exclusionary rule are limited to one type of evidence, which is a confession made by the defendant. In other words, the Qatari courts do not tend to apply these two exceptions to other types of evidence, such as testimony or police records. In a study published by the Qatari Supreme Judicial Council that aimed to gather and document the legal principles approved by the Qatari Court of Cassation from 2005 to 2014,<sup>94</sup> it is clear to us that the court applied the exception of the exclusionary rule to only one evidence: the confession. This exception did not extend to any other evidence, and this is what most judicial decisions issued by the Qatari Court of Cassation follow.<sup>95</sup>
- (3) The Qatari courts of cassation explicitly favor the goal of protecting the rights and freedoms of members of society over the goal of punishing perpetrators of crimes. They explicitly state that criminal justice is achieved when the first goal is achieved and that the damage to criminal justice

93 This is a historical source for Qatari law and the decisions of the Qatari Court of Cassation, given that most of the Qatari law and principles of cassation are derived from Egypt.

94 M.H. Muhammad & M.S. Shiha, *The First Criminal Decimal Group of Legal Rules Determined by the Court of Cassation in Criminal Matters* (Doha: Qatari Court of Cassation, 2014).

95 M.H. Muhammad & M.S. Shiha, *The First Criminal Decimal Group of Legal Rules Determined by the Court of Cassation in Criminal Matters* (Doha: Qatari Court of Cassation, 2019).

due to criminals escaping criminal accountability is much less than the damage that will happen when failing to protect the rights and freedoms of society members.

In a decision issued by the Qatari Court of Cassation, the court explicitly states that justice is not harmed by the impunity of a criminal as much as it is harmed by trampling on people's freedoms and unjustly arresting them.<sup>96</sup> This explicit statement of adopting one goal at the expense of another is something that deserves review and discussion. This shows that there is strictness in applying the exclusionary rule to protect the rights of members of society. Also, there is a reluctance to apply the exceptions to the exclusionary rule to achieve justice, which the Court considers confined only to achieving the first goal.

However, we do not agree with this position since these two goals must be equal in the eyes of the legislators and judges. If there is an imbalance between them, the Court should try to bring these two goals closer together and not explicitly announce the preference for one goal at the expense of another. This is because criminal justice is also harmed when a criminal escapes punishment, and it may even lead to a lack of stability and security due to criminals frequently escaping criminal justice. This approach shows that there is a real will to not rebalance these two goals, which may cause a real imbalance in the understanding of the concept of criminal justice and its goals.

The justification of this approach can be found in the source of these goals, as it is clear to us that the source of the goal of protecting the rights and freedoms of members of society is the Qatari Constitution, which has enshrined this goal in many of its texts. For example, the text of Article 36 of the Qatari Constitution promotes personal freedom and prohibits any infringement of it, except in the manner stipulated by law,<sup>97</sup> and the text of Article 37 of the Qatari Constitution promotes the protection of individual privacy and prohibits any interference or infringement on it in ways other than those stipulated by law.<sup>98</sup> This is in addition to the text of Article 39, which presents the presumption of innocence and does not permit a conviction unless it occurs via a legal trial in which the necessary legal guarantees are available.<sup>99</sup>

All these texts make it very clear that this goal is protected by the provisions of the Qatari Constitution as its main source. As for the other goal, we find that punishing the perpetrators of crimes and holding them accountable do not have a direct source in the texts of the Constitution. Its source is based

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96 Qatari Court of Cassation, Criminal Cases. Appeal No. 146 of 2015.

97 The Qatari Constitution of 2004, Article No. 36.

98 The Qatari Constitution of 2004, Article No. 37.

99 The Qatari Constitution of 2004, Article No. 39.

on the texts of criminal procedure law, not the Constitution. This does not mean that the Qatari Constitution ignores the importance of this goal; rather, it is certainly an important and necessary goal, but what is meant here is that this goal does not have an explicit and direct source in the provisions of the Qatari Constitution. Based on the foregoing, the preference of the legislator through limited exceptions to the exclusionary rule, as well as the direction of the judiciary in limiting the application of these exceptions to confession in most cases, is due to the desire of the legislator and the judiciary to protect the Qatari Constitution and apply its provisions over any other source. The comparison here is between the Constitution and the rest of the legislation below it.

### 3 Exclusion of Evidence in the US Legal System

#### 3.1 *The Legal Basis of Exclusion of Evidence in the US Legal System: the Exclusionary Rule*

The exclusionary rule has been established by the American judiciary, as it considers every procedure that violates the US Constitution, specifically the Fourth Amendment to the Constitution, will result in the exclusion of evidence and its inadmissibility in Court.<sup>100</sup> In other words, the US Constitution does not contain a text that decides to exclude evidence; rather, it is a judicial rule that aims to protect the Constitution.<sup>101</sup> This is because the Fourth Amendment protects individuals from any action that results in an unlawful search or seizure.<sup>102</sup> In this regard, the US Supreme Court decided that

The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure [works] no new Fourth Amendment wrong. The rule thus operates as 'a judicially created remedy designed to safeguard Fourth Amendment'.<sup>103</sup>

<sup>100</sup> L.E. Jones Jr, 'Fruit of the poisonous tree', *South Texas Law Journal* 9 (1966): 17–22; Pitler, *supra* note 6 at 1.

<sup>101</sup> R.M. Re, 'The due process exclusionary rule', *Harvard Law Review* 127 (2014): 1885–1966, 1899.

<sup>102</sup> See D. Gee, 'The independent source exception to the exclusionary rule: The Burger court's attempted common-sense approach and resulting cure-all to fourth amendment violations', *Howard Law Journal* 28 (1985): 1005–1050.

<sup>103</sup> *United States v. Leon*, 468 US 897 (1984).

However, this rule has recently been considered a basis in the local legislation of the states, and based on this authority, states can provide greater protection to the people than those stipulated in the constitution, provided that it is within the permissible constitutional limits.<sup>104</sup> The exclusionary rule is based on two important questions: 1) Did the executor of the procedure violate the Fourth Amendment to the US Constitution? 2) Is the evidence derived from this illegal procedure within the scope of the exclusionary rule?<sup>105</sup>

In a study conducted by the American Bar Foundation Research Journal, more than 140 cases have been heard by the US Supreme Court relating to the Fourth Amendment from 1974 to 2000.<sup>106</sup> The first case that established this rule was *Weeks v. United States* in 1914,<sup>107</sup> and it serves as the cornerstone of the exclusionary rule in the US legal system.<sup>108</sup> In this case, the federal agents entered the defendant's home and seized papers, accusing him of illegally selling lottery tickets. The police did this without a search warrant. The question before the Court was whether the police action violated the Fourth Amendment to the US Constitution. The Court excluded this evidence from the conviction and asked the relevant authorities to return these documents to the defendant since they had violated the Fourth Amendment, which protects the rights of individuals from any violation of their privacy. Although the Court applied the exclusionary rule, they limited it to federal law only, so they did not apply it to constitutional violations by the state police.<sup>109</sup> The exclusionary rule continued to emerge in the case of *Silverthorne Lumber Co. v. United States* in 1920, when a group of federal agents illegally seized books and documents and made copies of them, and then returned the originals in their place. The Court decided that it is not permissible to use the evidence obtained indirectly from the wrong procedure. Thus, the invalidity includes not only the initial evidence but also its 'fruits'.<sup>110</sup>

Subsequently, in the case of *Wolf v. Colorado* in 1949,<sup>111</sup> the defendant was arrested for committing an abortion and claimed that the authorities had

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104 Pitler, *supra* note 6 at 581.

105 Jones, *supra* note 100 at 17.

106 See P.F. Nardulli, 'The Societal Cost of the Exclusionary Rule: An Empirical Assessment', *American Bar Foundation Research Journal* 8 (2000): 585–609.

107 Jones, *supra* note 100 at 17; *Weeks v. United States*, 232 US 383 (1914); FEo. R. CRiM. P. 41(e).

108 Gee, *supra* note 102 at 1008.

109 Jones, *supra* note 100 at 18.

110 *Silverthorne Lumber Co. v. United States*, 251 US 385, 392 (1920); Pitler, *supra* note 6 at 590; L. Crocker, 'Can the exclusionary rule be saved?', *Journal of Criminal Law and Criminology* 310 (1993): 310–351, 313.

111 *Wolf v. Colorado*, 338 US 25 (1949).

violated the Fourth Amendment to the US Constitution by conducting illegal searches and seizures. However, the Court did not accept this plea and convicted him. The defendant then submitted the case to the US Supreme Court for consideration. In its judgment, the US Supreme Court recognized that everyone has the right to privacy that could not be violated by the authorities, but it did not impose a specific penalty on the state police for violating this rule. Rather, the determination of the appropriate procedural penalties for each state was left to the state in question based on its law.<sup>112</sup> This judgment indirectly recognizes the exclusionary rule for the states, although it did not impose a specific procedural penalty for violating the US Constitution.

This situation continued until 1961, when the case of *Mapp v. Ohio* appeared, which is one of the most famous cases in the US legal system. The Supreme Court held that the exclusionary rule applies to the federal government and states under the Fourth and Fourteenth Amendments to the US Constitution.<sup>113</sup> Further, the Court states that the aim of the exclusionary rule is to deter police from violating the US Constitution and obtaining evidence by illegal means.<sup>114</sup> Thus, allowing the state police to use illegally obtained evidence would lead to the weakening of the rights protected by the US Constitution. Accordingly, the US Supreme Court overturned its previous judgment in *Weeks v. United States*, applying the rule to states.

Accordingly, some may ask, where did this rule come from if it had no basis in the US Constitution? It can be said that the US courts drew this rule from Common law rules, specifically the idea of harm and compensation.<sup>115</sup> Where it is considered that a policeman's violation of the constitution entails harm to the rights of the defendant, such as searching him without permission and seizing prohibited properties based on this illegal search, this procedure is more like a trespass. Therefore, harm always requires compensation, and compensation, according to the US Supreme Court opinion, is to return the seized property and not use it as evidence.<sup>116</sup> In other words, the exclusionary rule bases its philosophy on the idea of harm and compensation in tort law.<sup>117</sup> Note that the US Supreme Court then expanded on this philosophy and allowed the defendant to request the exclusion of evidence — even if it did not belong to him — which means that it is permissible to demand the exclusion of

112 Gee, *supra* note 102 at 1010.

113 Re, *supra* note 101 at 1888; See also, *Mapp v. Ohio*, 367 US 643 (1961).

114 Gee, *supra* note 102 at 1011.

115 B.P. Wilson, 'Exclusionary rule', *California State University, San Bernardino* (1983): 1–8.

116 Wilson, *supra* note 115 at 3; *Weeks v. United States*, 232 US 383 (1914).

117 Wilson, *ibid.*, p. 1.

evidence, even if there is no direct relationship between the defendant and the property.<sup>118</sup> This is considered an expansion of the idea of harm and compensation in tort law.

Based on this presentation, we may see the justification for this rule, which can be summarised in three basic goals:

- (1) It is a way that enhances the goal of protecting the rights and freedoms of members of society from any violation of their constitutional rights that may occur.<sup>119</sup> The US Supreme Court has the authority to do so through the authority of the judicial review, which gives the US Supreme Court the right to enforce the rules of the Constitution and apply them to various institutions.<sup>120</sup>
- (2) The second is to deter policemen by prohibiting the use of illegal evidence, as indicated earlier.<sup>121</sup> The US Supreme Court did not recognize this goal in the 1960s but rather believed that the main goal was merely to protect the rights and freedoms of the members of society.<sup>122</sup> In the *Linkletter* case, the US Supreme Court began to justify the goal of the exclusionary rule as mainly aiming to achieve deterrence.<sup>123</sup> The reason for this shift in our opinion is that the US Supreme Court considered that it cannot be acceptable to say that the protection of rights and freedoms is the only justification for excluding evidence, given that the rights of the defendant have already been violated and cannot be retrieved. Therefore, the US Supreme Court considered that the goal was to deter police so that the rights of others would not be violated in the future.<sup>124</sup>
- (3) Promoting judicial integrity,<sup>125</sup> as the US Supreme Court may not base its judicial decision on convicting a person based on evidence obtained through violations of the rights and freedoms of individuals in the US Constitution.<sup>126</sup> Therefore, any decision based on illegal evidence means

118 *Ibid.*; See also, *Mapp v. Ohio*, 367 US 643 (1961).

119 M. Cloud, 'Judicial Review and the Exclusionary Rule', 26(4) *Pepperdine Law Review* 4 (1999): 835–853.

120 Cloud, *supra* note 119 at 9.

121 Pitler, *supra* note 6 at 580. Also, the US Supreme Court issued a judgment based on a deterrence-causation rationale before deciding whether to accept the evidence. See *Wong Sun v. United States*, 371 US 471, 488 (1963).

122 *Mapp v. Ohio*, 367 US 643 (1961).

123 *Linkletter v. Walker*, 381 US 618 (1965).

124 The US Court says that the deterrence is the only goal of exclusionary rule. *Mapp v. Ohio*, 367 US 643 (1961).

125 Re, *supra* note 101 at 1904.

126 J. Turner & T. Weigend, *The Purposes and Functions of Exclusionary Rules: A Comparative Overview*, (Cham: Springer, 2018) 258.

that the court implicitly agrees to and participates in these constitutional violations by punishing the defendant even though he is the victim of these violations.

However, we do believe that the goal of this rule is to protect the rights and freedoms of individuals. Deterrence is not separate from the goal of protecting rights and freedoms; rather, it is a method of achieving this goal.<sup>127</sup> The court cannot punish the violating policeman, criminally or civilly,<sup>128</sup> but it can punish him — procedurally — by excluding the evidence — in other words, removing any legal value of the procedure he took. This penalty will deter this policeman and other policemen in the future, which will ultimately lead to enhance protection of the constitutional rights and freedoms of members of society.

The goal of judicial integrity is also related to the goal of protecting rights and freedoms. In other words, strengthening judicial integrity is one of the effects of protecting the rights and freedoms of members of society. The role of the court in protecting these rights and not accepting their violation automatically entails the protection of judicial integrity. In contrast, the violation of the goal of protecting rights and freedoms results in a breach of the integrity and dignity of the judiciary. Summarising the foregoing, the primary goal of the exclusionary rule is the protection of rights and freedoms, and all other goals are merely either a means to achieve this goal or effects that result from achieving this goal. This clearly shows that there is a great need to adopt this rule in the US legal system until there is another mean through which the protection of the personal rights and freedoms of individuals can be achieved.

### 3.2 *Exceptions to the Exclusionary Rule*

Despite the importance of the exclusionary rule for deterring violations by policeman, there are several exceptions to it. By exceptions, we mean here that it is permissible to use evidence based on an illegal procedure. These exceptions aim to narrow the exclusionary rule as much as possible to avoid the harms that may result from it,<sup>129</sup> such as the impunity of criminals. Rather, these exceptions are also important due to the consequence that the application of exclusion of evidence may not achieve sufficient and required deterrence. For example, two published research studies show that deterrence

<sup>127</sup> Kafka, *supra* note 5 at 1897.

<sup>128</sup> K. McDonald Henning, 'Reasonable Police Mistakes: Fourth Amendment Claims and the Good Faith Exception after Heien', *St. John's Law Review* 90 (2016): 271–327.

<sup>129</sup> Pitler, *supra* note 6 at 587.



achieves very little effect on the behaviour of policemen.<sup>130</sup> These exceptions are the invention of the courts and are not provided for by the US Constitution. We will discuss these exceptions in further detail. It should be noted that this section is theoretical and aims to present the exceptions and their historical development. In the next section, we will evaluate, study, and analyze these exceptions in light of the research question we presented in the introduction.

### 3.2.1 Attenuation

Attenuation means that there is a weak link between the illegal procedure and the evidence derived from the procedure based on constitutional violation.<sup>131</sup> This exception was created by the judiciary because excluding the evidence, in this case, will not achieve deterrence, given the weak link between the evidence and the illegal procedure.<sup>132</sup> The initial stage of this exception is based on *Nardone v. United States*, where the Court states that evidence that is illegally discovered is admissible if the link between the evidence and the illegal procedure is attenuated (weak).<sup>133</sup> In this case, the government used illegal records from which evidence was obtained, which the Court later refused to admit.<sup>134</sup> The US Supreme Court states that there are three considerations in deciding whether attenuation occurred: Has the Court used illegal recordings? Is a large part of the government's evidence based on illegal recordings? Does the evidence the government provided have an independent source other than the illegal recordings?<sup>135</sup>

Following the *Nardone* case, the first case that clearly discussed this exception was *Wong Sun v. United States* in 1963.<sup>136</sup> In this case, the federal agents arrested a person named 'Wong' based on information obtained through the illegal arrest of the defendant for selling drugs. During the search of Wong's residence, no narcotic substances were found. The US government presented the trial Court with four pieces of evidence incriminating the defendants, but

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130 J.E. Spiotto, 'Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives', *Journal of Legal Studies* 2 (1973): 243–278; D.H. Oaks, 'Studying the Exclusionary Rule in Search and Seizure', *University of Chicago Law Review* 37 (1970): 665–757.

131 B.D. Stratton, 'The attenuation exception to the exclusionary rule: A study in attenuated principle and dissipated logic', *Journal of Criminal Law and Criminology* 75 (1984): 139–165, 141.

132 Stratton, *supra* note 131 at 141.

133 *Nardone v. United States*, 308 US 338, 341 (1939).

134 Gee, *supra* note 102 at 1023.

135 *Nardone v. United States*, 308 US 338, 341 (1939).

136 Stratton, *supra* note 131 at 146.

the trial Court did not accept the evidence because it had been obtained based on Wong's confession following an illegal arrest. The US Supreme Court ruled that Wong's confession was not considered the fruit of a constitutional violation, as he was released after his arrest and returned to the police voluntarily to confess, which caused the link between the confession and the unlawful arrest to 'become so attenuated as to dissipate the taint'.<sup>137</sup> Thus, it was not allowed to refuse the confession.<sup>138</sup>

This judgment may be the basis of the 'attenuation' exception, which states that evidence is to be accepted, even if the procedure based on it is illegal, as long as the relationship between the evidence and the illegal procedure is weak, and thus the evidence is attenuated from the illegal procedure.<sup>139</sup> However, in this judgment, the US Supreme Court did not explicitly consider the attenuation as an independent exception to the exclusionary rule. The US Supreme Court also held that the attenuation consisted of two components.<sup>140</sup> The first was the government's failure to exploit the illegal procedure, which attenuated the relationship between the government and the discovery of evidence. Secondly, the voluntary action of the defendant in presenting the evidence also helped to attenuate it.<sup>141</sup>

Attenuation continued to confuse the judiciary because of the lack of clear criteria for determining whether the relationship between evidence and procedure was attenuated. This remained until the case of *Brown v. Illinois* in 1975. In this case, a man named Richard Brown was arrested for murder without probable cause. He was then taken to the police after twice being administered a 'Miranda warning', and he confessed to the murder after ninety minutes. He also repeated the same confession after seven hours of arrest. The question before the US Supreme Court was whether Miranda's warning sufficed to break the causal chain between the illegal arrest and the evidence; in other words, whether the relationship between the evidence and the illegal procedure had become so weak that the evidence could be admitted.<sup>142</sup> The US Supreme Court decided that the Miranda warning did not attenuate the evidence based on the illegal procedure and did not make the relationship between the evidence and the illegal procedure weak.<sup>143</sup> Rather, the US

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137 *Wong Sun v. United States*, 371 US 471 (1963).

138 Gee, *supra* note 102 at 1027.

139 See *Wong Sun v. United States*, 371 US 471 (1963).

140 See *Wong Sun v. United States*, 371 US 471 (1963).

141 Stratton, *supra* note 131 at 146.

142 *Brown v. Illinois*, 422 US 590 (1975).

143 *Brown v. Illinois*, 422 US 590 (1975).

Supreme Court set four criteria for determining whether a relationship exists between the evidence and the illegal procedure:

- (1) Did the police provide the defendant with a Miranda warning?
- (2) The time between the confession and the arrest procedure
- (3) Were there intervening circumstances between the evidence and the illegal procedure?
- (4) The purpose of and the flagrancy of the official misconduct.

Accordingly, the US Supreme Court found that the confession occurred a short time following the arrest, there were no intervening circumstances between the arrest and the confession, and the police action was not justified. Therefore, the evidence was not admitted.<sup>144</sup> Although these criteria were applied in this case to confession evidence, the US Supreme Court has applied them to several other pieces of evidence, such as witness testimony in *Ciccolini*.<sup>145</sup>

Moreover, in 2006, in *Hudson v. Michigan*, decades after the previous case, the police started searching the residence of the defendant Hudson and found weapons and drugs.<sup>146</sup> The defense claimed that the procedure for entering the defendant's residence was not legal because the police did not wait long enough in front of the defendant's door, entering it after a short period of only five seconds after announcing their presence.<sup>147</sup> The defence requested the exclusion of all evidence found because the police violated the 'knock-and-announce rule' and therefore violated Hudson's Fourth Amendment right. The US Supreme Court decided that failing to knock on the door does not require the suppression of the evidence found during a search. The Court also balanced the interest of obtaining evidence and the damage of not knocking on the door, finding that the costs of applying the exclusionary rule were greater than the benefits of suppressing the evidence.<sup>148</sup> This case clearly shows that the Court examines the evidence for over one factor and does not limit itself to the deterrence factor, as the danger of applying the exclusionary rule will lead the defendant to escape from criminal liability.

### 3.2.2 Independent Procedure

This exception focuses on evidence obtained from a procedure independent of the illegal procedure, as such evidence is not subject to it and may thus be used

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<sup>144</sup> Stratton, *supra* note 131 at 148.

<sup>145</sup> *United States v. Ceccolini*, 435 US 268 (1978).

<sup>146</sup> *Hudson v. Michigan*, 547 US 586 (2006).

<sup>147</sup> *Hudson v. Michigan*, 547 US 586 (2006).

<sup>148</sup> *Hudson v. Michigan*, 547 US 586 (2006).

in Court.<sup>149</sup> In other words, as long as the evidence is obtained from a legitimate procedure, there is no reason to exclude it.<sup>150</sup> It may seem this is not an exception to the exclusionary rule, as the independent source is in fact an independent procedure. However, we do not agree with this opinion, given that when an illegal procedure occurs, it affects all the evidence in the case, so they are subject to exclusion. However, before applying the exclusionary rule, the judge reviews all evidence to ensure that there are no exceptions to the exclusionary rule in one of them, such as the exception related to the independent source.

One case in which this exception was discussed is *Bynum v. United States*, where the federal agents illegally arrested the defendant and then took his fingerprints.<sup>151</sup> During the trial, the Court refused to approve the introduction of fingerprints as evidence because of the invalidity of the arrest. The government then provided fingerprints obtained from an independent source, and the Court accepted them as they were completely unrelated to the unlawful arrest.<sup>152</sup> However, the most famous case of the independent procedure is *Murray v. United States* in 1988,<sup>153</sup> in which federal agents obtained a warrant to search a warehouse after they had first entered it illegally. The agents asked the magistrate for a warrant to enter this warehouse, without mentioning their early illegal entry, and they did not rely on any observations made during that entry.<sup>154</sup> A search warrant was granted, and the agents entered and seized the contraband in the warehouse. Prior to the trial, the defence requested the exclusion of the evidence obtained from the search. This is because the federal agents had not disclosed their prior illegal entry to the magistrate. The trial Court rejected this request, and the appeals Court upheld this rejection. When the matter was brought to the US Supreme Court, the Court allowed the evidence to be admitted because it had been discovered independently from the illegal entry.<sup>155</sup> The Court adopted this view because the federal agents were aware of the presence of marijuana before their illegal entry into the warehouse, and therefore if the search warrant was not based on the information available from the illegal act, there was no Fourth Amendment violation.<sup>156</sup>

149 Gee, *supra* note 102 at 1041.

150 Pitler, *supra* note 6 at 627.

151 *Bynum v. United States*, 274 F.2d 767 (D.C. Cir. 1960).

152 Pitler, *supra* note 6 at 625; *Bynum v. United States*, 274 F.2d 767 (D.C. Cir. 1960).

153 S. DeLoach, 'Keeping the faith with the independent source foundations of inevitable discovery: Why courts should follow Justice Breyer's active and independent pursuit approach from *Hudson v. Michigan*', *Mississippi Law Journal* 83 (2014): 1179–1217, 1202.

154 *Murray v. United States*, 487 US 533 (1988).

155 *Murray v. United States*, 487 US 533 (1988).

156 *Murray v. United States*, 487 US 533 (1988).

It must also be noted that this exception was extended to include the primary information obtained to secure a search warrant or an arrest warrant. In other words, if there is information from an illegal source that is not presented to the magistrate, it will not affect the search warrant issued by the magistrate, given that this information has been excluded.<sup>157</sup> However, the magistrate shall ensure that the search warrant issued was based on legitimate information and that the source of this information was not affected in any way by the illegally obtained information.<sup>158</sup>

### 3.2.3 Inevitability (Inevitable Discovery)

This exception focuses on evidence derived from an illegal procedure, which is accepted if lawful means would have inevitably discovered it.<sup>159</sup> This means that the judge must evaluate this issue based on his judicial discretion of whether the police would have discovered the evidence even if the illegal procedure had not occurred. If the answer is yes, then the evidence was inevitably based on the ordinary course of events, and therefore it is not fair to exclude it. If the answer is no, then the evidence is excluded. The reason for this exception is that the exclusion of evidence will not achieve deterrence if the evidence would have been discovered in a future event.<sup>160</sup> Further, this exception aims to prevent criminals from escaping justice when evidence of their crimes would inevitably be discovered in the ordinary course of events.<sup>161</sup>

This exception has gone through many cases, through which it has developed. In 1984, in the case of *Nix v. Williams*,<sup>162</sup> Williams was arrested for killing a 10-year-old girl and throwing her onto a gravel road. Williams, without the presence of his attorney, confessed to the police and informed them of the location of the body. In Court, the defence asked the Court to dismiss the confession, but the Court rejected this because even if Williams had not made this confession, the body would inevitably have been found.<sup>163</sup> Accordingly, the US Supreme Court decided that the evidence would have inevitably been discovered within a short period, as the police were searching near the location of

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157 See generally DeLoach, *supra* note 153 at 1202.

158 See generally DeLoach, *ibid.*, p. 1202.

159 W.M. Cohn, 'Sixth amendment-inevitable discovery: A valuable but easily abused exception to the exclusionary rule', *Journal of Criminal Law and Criminology* 75 (1984): 729–754, 729, 733.

160 See generally *Nix v. Williams*, 467 US 431 (1984).

161 See generally R.M. Bloom, 'Inevitable discovery: An exception beyond the fruits', *American Journal of Criminal Law* 20(1) (1992): 79–103, 82.

162 *Nix v. Williams*, 467 US 431 (1984).

163 *Nix v. Williams*, 467 US 431 (1984).

the body during the confession. Therefore, the confession based on the illegal procedure did not affect the evidence because its discovery was inevitable.<sup>164</sup>

Inevitability was also an issue in *United States v. Allen*.<sup>165</sup> In this case, the police searched for a bag belonging to the defendant without a warrant. The police claimed that the bag was abandoned and that the defendant denied ownership. The prosecution asked that Court to admit the evidence because the bag would have been discovered by the sniffer dog when it was passing between bags. The Court rejected this claim and considered the police search to be illegal. The Court decided that Inevitability did not apply in this case because, first, it was not proven that the defendant denied the ownership of the bag, and second, there was no proof that the dog had been used on a bus before, and it was not used until the police smelled and discovered the contraband inside the bag.<sup>166</sup> Thus, it could not be said that the evidence would have been discovered in the ordinary course of events. The Court found that the inevitability doctrine did not apply to searches when police had probable cause or could have had probable cause but neglected to get a warrant.<sup>167</sup> It must be noted that this exception contains many important notes that must be presented for its evaluation, which we will do in the next section.

#### 3.2.4 Good Faith

This exception occurs when the illegal procedure was performed in good faith, and thus the evidence will not be excluded based on the illegal procedure.<sup>168</sup> The basis of this exception is that the person in charge of the procedure would have inevitably made this mistake according to an objective standard.<sup>169</sup> The reason for this exception is that it would not achieve the purpose of deterrence, given that the person implementing the procedure did not make a mistake; rather, the error was made by another person, such as the magistrate. The exclusion of evidence, in this case, would not deter the policemen, as the error was not theirs.<sup>170</sup> This exception is an expansion of the exceptions to the exclusionary rule of evidence.

164 *Nix v. Williams*, 467 US 431 (1984).

165 *United States v. Allen*, 159 F. 3d 832 (4th Cir. 1998).

166 *United States v. Allen*, 159 F. 3d 832 (4th Cir. 1998).

167 *United States v. Allen*, 159 F. 3d 832 (4th Cir. 1998).

168 J.M. Miller, 'The good faith exception to the exclusionary rule: Leon and Sheppard in context', *Journal of Criminal Justice* 7 (1984): 181–201, 193.

169 Miller, *supra* note 168 at 181.

170 R. Davis, 'What fourth amendment — HR 666 and the Satanic expansion of the good faith exception', *Policing: International Journal of Police Strategies and Management* 20 (1997): 101–112, 104.

This exception was shown in *United States v. Leon* in 1984,<sup>171</sup> which discussed whether the exclusionary rule should be applied if the policeman carrying out the procedure reasonably relied on an illegal search warrant that had been issued by the magistrate. Specifically, the magistrate issued a search warrant that was illegal because there was no probable cause to issue it, and the policeman executed the search warrant, which he reasonably believed to be correct.<sup>172</sup> The lower Court excluded the evidence due to the illegality of the search and did not apply the rule of good faith. The matter was submitted to the US Supreme Court, which did not apply the rule exclusionary rule and allowed the admission of the evidence because the officer had good faith in relying on this warrant.<sup>173</sup> The Court held that the insignificant benefits of excluding evidence cannot justify the huge losses resulting from excluding the evidence.<sup>174</sup> This case is one of the few times the Supreme Court balanced the benefits and costs of excluding evidence, which is the manner in which criminal justice is activated. Therefore, this judgment represents an expansion of the exceptions to the exclusionary rule of evidence.<sup>175</sup>

However, it should be noted that the US Supreme Court, in this judgment, emphasized the need for the person in charge of the procedure and the person who issued the search warrant to act in good faith and be unaware of the defect in the warrant.<sup>176</sup> Here, the magistrate was working within his scope and believed in good faith that the information he had received from the informant was sufficient to create probable cause to issue a search warrant, but this information later turned out to be insufficient to issue the search. The person in charge of the search was also acting in good faith and did not recognize the defect in the search warrant. The Court states that this exception would not be realized if the judge knew or could have known that the information obtained was insufficient to issue a search warrant.<sup>177</sup> However, the Court emphasized that each case should always be considered separately to determine this matter.<sup>178</sup>

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171 *United States v. Leon*, 468 US 897 (1984).

172 *United States v. Leon*, 468 US 897 (1984).

173 Henning, *supra* note 128 at 284.

174 *United States v. Leon*, 468 US 897 (1984).

175 See generally G.C. Thomas III & B.S. Pollack, 'Balancing the fourth amendment scales: The bad-faith exception to exclusionary rule limitations', *Hastings Law Journal* 45 (1993): 21-62.

176 *United States v. Leon*, 468 US 897 (1984).

177 *United States v. Leon*, 468 US 897 (1984).

178 *United States v. Leon*, 468 US 897 (1984).

Accordingly, the good faith doctrine has not been applied in many cases, such as *United States v. Vigeant* in 1999,<sup>179</sup> where the Court held that a good faith clause was not fulfilled because the officer knew that the warrant was illegal or could have known that it was illegal if not for his negligence and recklessness. Similarly, the good faith doctrine was not applied in 1992 in *United States v. Decker*, where the Court held that the magistrate knew he was breaking the law.<sup>180</sup> In *United States v. Kelley* in 1998, the Court decided that if the defect in the warrant was obvious, the good faith doctrine should not be applied, and in this case, the magistrate did not sign the search warrant.<sup>181</sup> The good faith rule also applies when a policeman relies on the text of a law that is later discovered to be unconstitutional, as in the 1987 case of *Illinois v. Krull*.<sup>182</sup> Likewise, in the case of *Arizona v. Evans* in 1996, the policeman relied on an arrest warrant that was based on inaccurate information from a Court clerk.<sup>183</sup>

Finally, we note that the good faith exception focuses on the person in charge of the procedure by distinguishing between that person and the person who issued the order for the procedure, such as the magistrate. This exception aims to prevent the executor of the procedure from being penalized for the mistakes of others, as long as the person in charge of the procedure did not know and could not have known that the defect had occurred in the search warrant. However, this conclusion also requires ensuring that the magistrate was working in his field and did not exceed this scope and that he was acting in good faith in the sense that he was not aware or could not have been of his violation of the law.

### 3.3 *Comments on Exceptions to the Exclusionary Rule in the US Legal System*

In the previous section we presented an overview of the exceptions to the exclusionary rule by stating what is meant by them, their basis, and their judicial applications. However, this theoretical presentation needs to be evaluated and analyzed to answer the important research question: did these exceptions achieve a balance between the goals of protecting rights and freedoms and the goal of punishing perpetrators of crimes? It is not possible to answer this question directly, as the issue needs explanation and detail.

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179 *United States v. Vigeant*, 176 F. 3d 565 (1st Cir. 1999).

180 *United States v. Decker*, 956 F. 2d 773 (8th Cir. 1992).

181 *United States v. Kelley*, 140 F. 3d 596 (5th Cir. 1998).

182 *Illinois v. Krull*, 480 US 340 (1987).

183 *Arizona v. Evans*, 514 US 1 (1996).



It is noted that the Attenuation exception is based on the idea of the relationship between the constitutional violation and the evidence, as this exception considers that the violation that happened was attenuated according to subsequent factors, such as the confession of the defendant.<sup>184</sup> In looking at the criticisms of this exception in our opinion, we see that the attenuation exception has two main defects:

- (1) This exception does not deny the absence of a constitutional violation of the defendant's rights by policeman. The US Supreme Court, in its acceptance of the evidence, acknowledges the constitutional violation, but it considers it as it is a weak constitutional violation.<sup>185</sup> This goes outside the scope of the US Supreme Court in assessing the exception in the first place. The language of the Fourth Amendment of the US Constitution did not make exceptions for minor or major constitutional violations. The US Constitution aims to protect the rights and freedoms of individuals regardless of the nature of the violation.
- (2) The issue of attenuation is vague and cannot be determined by clear criteria. It is an undisciplined exception and is based on vague elements. This is what prompted the US Supreme Court to amend its application of this exception in the cases of *Nardone*, *Wong Sun*, *Brown*, and *Ciccolini*. Indeed, also the elements of these criteria are illogical, as was the solution in *Brown's* case in which the US Supreme Court decided to refuse the confession, given that it was submitted after two hours.<sup>186</sup> The US Supreme Court indicated that the time period played a role in the validity of the confession. We see that the element of time is not suitable for application in all cases, as it is an undisciplined element and differs according to each case. The defendant may confess after an hour, and the confession may be free and voluntary. He may confess after 10 days, but this confession may still be affected by the constitutional violation. The issue of evaluating the confession is about whether it was voluntary and is based on several factors, not just the time factor.<sup>187</sup> Other factors that should be considered are the fear of the defendant, the nature of the offense committed against him, the nature of the crime he committed, the good faith of the government, and the defendant's criminal record.

Also, as mentioned in the introduction, the policeman's violation of the conditions of the procedure results in an imbalance between the goal of protecting

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184 Stratton, *supra* note 131 at 141.

185 *Wong Sun v. United States*, 371 US 471 (1963).

186 *Brown v. Illinois*, 422 US 590 (1975).

187 This is similar to what happened in *Wong Sun v. United States*, 371 US 471 (1963).

the rights and freedoms of society and the goal of preserving the security of society by punishing the criminal. The exclusionary rule entails giving preference to the goal of protecting constitutional rights and freedoms at the expense of holding criminals accountable for their crimes. This exception is the reverse of the exclusionary rule, as it clearly outweighs the goal of holding the criminal accountable despite the damage that occurred to the rights and freedoms of members of society. All judicial decisions that applied this exception did not deny the absence of a constitutional violation; they decided that there was a weak link between the evidence and the violation, which makes accepting the evidence permissible. Thus, the violation of the rights and freedoms of individuals remains regardless of the justifications that allow the Court to accept the evidence. These justifications focus heavily on the second goal — punishing criminals — which is actually achieved. Therefore, it is very clear to us that this exception harms the constitutional rights stipulated in the US Constitution and makes them vulnerable to violation based on vague criteria, as we indicated previously.

As for the independent procedure exception, it is based on specific elements represented by the presence of two procedures: one is an illegal procedure in which the evidence is excluded, and the second is a legal procedure through which legitimate evidence is obtained.<sup>188</sup> This means that there must be independence between the independent procedure and the illegal procedure so that the independent procedure is not derived directly or indirectly from the violating procedure. To achieve the independent nature of the independent procedure, it must be based on legal grounds that allow it, such as a search warrant based on probable cause, so that the independent procedure does not violate the Constitution.<sup>189</sup>

In evaluating this exception in terms of the observations about it, we see that one of the matters affecting this exception is how the judge can ensure that the procedure is independent and not related to the violating procedure. It might be difficult to say that the illegal procedure did not affect the policeman and was not a reason for the emergence of the independent procedure, as the effects of the illegal procedure may remain in the mind of the policeman and push him to cover this violation by finding another legitimate procedure. After committing a constitutional violation, the policeman may hide the information — which he obtained illegally — and will not present it to the magistrate judge, and this may express bad faith on the part of the policeman. This in my opinion happened in *Murray* case, which indicated that it was permissible

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<sup>188</sup> Pitler, *supra* note 6 at 627.

<sup>189</sup> *Murray v. United States*, 487 US 533 (1988).

to use evidence that was discovered in an illegal way if it was reached again in a legal way.<sup>190</sup> This means that the evidence was initially subject to a constitutional violation, but the same evidence was obtained later in a legal way.

In addition to the foregoing, this exception may cause overlap and confusion with the inevitable exception in that it is based on the same idea. The difference is that inevitable is based on an assumed independent procedure, while this exception is based on a real independent procedure. The US Supreme Court addressed this in the *Murray* case:

The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent procedure doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.<sup>191</sup>

Despite these observations, we find that this exception is the most important one that guarantees a balance between the goals of protecting rights and freedoms and the goal of punishing criminals for committing crimes. This balance is achieved because the government cannot use any evidence in which there was a violation of rights and freedoms, and at the same time, the government has the right to punish the defendant through independent procedures. The US Supreme Court explicitly mentioned this issue in *Nix* case:

The independent procedure doctrine teaches us that the interest of society in deterring unlawful conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred.<sup>192</sup>

Accordingly, it can be said that — considering the previous observations — this exception protects rights and freedoms, as we indicated previously, and enhances the application of the goal of punishing criminals.

The Inevitability exception is based on several elements, the most important of which is the hypothesis of ‘inevitability’, which means that illegal

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190 ‘The independent source doctrine also applies to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality’. *Murray v. United States*, 487 US 533 (1988).

191 *Murray v. United States*, 487 US 533 (1988).

192 *Nix v. Williams*, 467 US 431 (1984).

evidence can be accepted if it is to be discovered in a legal manner.<sup>193</sup> In other words, the judge assesses the extent to which evidence can be obtained in a legitimate way. If he sees that this evidence would have been discovered in a way other than an illegal way, then the evidence will be accepted.<sup>194</sup> This exception is based on evaluating two matters related to the evidence: the illegal method that actually occurred and the legal method that would have happened. Therefore, it is not permissible to waste the evidence in the presence of another legal method that would have resulted in it.

In looking at the evaluation of this exception and the comments made on it, there are many defects that affect it. This exception will hinder the application of deterrence, and to say that the policeman would have inevitably undertaken a procedure is not sufficient to justify the exception. There are many questions that must be answered in this regard. First, has the government violated the Fourth Amendment? The answer is yes. Second, could the government have avoided this violation before committing it? The answer is yes. Third, has the government found another legitimate means of obtaining evidence? The answer is no. Fourth, could the government have obtained the evidence lawfully? According to this exception, the answer is yes. The problem here is that this exception stops with this question. It would have been more appropriate for the judge to ask another question: What prevented the government from obtaining this evidence in a legitimate way in the beginning (before performing the illegal procedure)? This question must be answered to determine whether the government falls short; therefore, the exclusionary rule achieves deterrence in these cases because it will push the government to search for legitimate methods before illegal ones in the future.<sup>195</sup>

Regarding this exception and its effectiveness in achieving a balance between the two goals, we see that this exception does not achieve balance; rather, it wastes the two goals together.<sup>196</sup> The reason for this is that the

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193 Cohn, *supra* note 159 at 729.

194 On the other hand, if the court cannot prove the existence of inevitability, the evidence will not be accepted. An example of this is the Allen case, where the court decided: "When evidence could not have been discovered without a subsequent search, and no exception to the warrant requirement applies, and no warrant has been obtained, and nothing demonstrates that the police would have obtained a warrant absent the illegal search, the inevitable discovery doctrine has no place. The inevitable discovery doctrine cannot rescue evidence obtained via an unlawful search simply because probable cause existed to obtain a warrant when the government presents no evidence that the police would have obtained a warrant. *United States v. Allen*, 160 F.3d 1096 (1998)."

195 This was also discussed in Bloom, *supra* note 161 at 96.

196 This issue was also discussed in *Nix v. Williams*, 467 US 431 (1984).

constitutional violation that harms the goal of protecting rights and freedoms has actually occurred and the preference for the goal of punishing criminals has occurred based on a hypothesis — and not a fact — which leads to admitting the evidence. Therefore, this exception harms both goals together. Society has not been repaired because of the violation, and the police have not been deterred. Moreover, the criminal was convicted based on a hypothesis and not on factual facts.

With regard to the good faith exception, as we have noticed, it is based on the following: (1) the good faith of the policeman, (2) procedural errors caused by others such as magistrates in issuing arrest or search warrants, and (3) a balance between the benefits and harms resulting from not using evidence obtained from illegal procedures. Among these harms may be the obstruction of the Court's role in applying the law to criminals, in addition to criminals escaping from justice or receiving fewer penalties. For example, in *Leon* case, the US Supreme Court decided that the harms of excluding the evidence were high and that the benefits of excluding it were very few.<sup>197</sup>

When assessing the reasons behind this exception, the US Supreme Court tried again in the *Leon* case to find justifications for this exception, and accordingly, it decided that the US Constitution does not contain any express provision prohibiting the use of evidence derived from procedures contrary to the Fourth Amendment. Also, the US Supreme Court also confirmed that if evidence based on an illegal procedure is used, this does not constitute a new violation of the Fourth Amendment.<sup>198</sup> The US Supreme Court states that there was nothing to prevent the use of this evidence. The exclusionary rule does not aim — and cannot remedy — the infringement of the defendant's rights that have already been violated. From the foregoing, we note that in this decision, the US Supreme Court tries to mitigate the constitutional value of the exclusionary rule and assure that there is no explicit connection between the exclusionary rule and the Constitution.

Looking at the evaluation of this exception and the observations about it, we see that there are several observations of this exception. Regarding deterrence, we see that the US Supreme Court limited the scope of deterrence to policemen, although there is nothing in the constitution that prevents the application of deterrence to judges or public prosecutors as if the Court immunizes them from any procedural prejudice. This specifically affects deterrence because the judge will not fear any procedural penalty resulting from his negligence or bad faith in the future. It is true that the Court stressed the need for

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<sup>197</sup> *United States v. Leon*, 468 US 897 (1984).

<sup>198</sup> *United States v. Leon*, 468 US 897 (1984); See Davis, *supra* note 170.

the judge's work to be within its scope and for him to be of good faith, but the US Supreme Court is inconsistent with itself in this matter when it says that the exclusionary rule is focused on policemen only and not judges.<sup>199</sup> So, what is the benefit of the judge's intention if the exclusionary rule was originally not applied to him? From this, it is inferred that the requirement that the judge works within his scope is an ineffective condition.

One of these exception defects is that it does not answer why this exception is not applied to the policeman who believes that a crime was committed, and then he searches the defendant based on this suspicion, which later turns out to be wrong. Why is this exception limited only to errors based on warrants issued by judges? Is not the philosophy behind this exception achieved as well on the honest mistakes committed by policemen who acted in good faith, such as when he carries out a search believing that there is a reasonable cause indicating that the defendant committed a crime.

It must be noted here that this issue has already been dealt with in US federal courts, as in the Williams case, in which the Court of Appeal (Five Circuit) states that this exception applies to mistakes based on good faith that was made by policemen based on false estimates related to the existence of a crime. The Court states that these mistakes were different from the technical mistakes that happened when policemen did a search or arrest based on a warrant issued by judges. After this, it turned out that this warrant was contrary to the Constitution.<sup>200</sup> However, the US Supreme Court then refused to expand this exception and narrow it only to the technical mistakes, for example, based on search or arrest warrants, the same that happened in the Leon case.<sup>201</sup>

Finally, answering the question of whether this exception enhances the balance between the two goals. This exception may be one of the most notable exceptions to this balance. The US Supreme Court clearly recognizes that the goal of punishing criminals and bringing them to justice is of interest to the Court and that it must not be wasted.<sup>202</sup> Likewise, the Court acknowledges that the harm that occurred for the goal of protecting rights and freedoms has already been achieved and ended; therefore, it is not acceptable to violate another goal and allow criminals to escape from justice.<sup>203</sup>

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199 *United States v. Leon*, 468 US 897 (1984).

200 *People v. Williams*, 622 F.2d 830 (5th Cir. 1980).

201 *Miller*, *supra* note 168 at 192.

202 *See generally United States v. Leon*, 468 US 897 (1984); *See Davis*, *supra* note 170.

203 *United States v. Leon*, 468 US 897 (1984).

## 4 Conclusion

This research concluded many important results, perhaps the most important of which is that the Qatari Criminal Procedure Law adopts the exclusion of evidence through invalidity, which is the rule stipulated in the Qatari Criminal Procedure Law that aims to enforce procedural legitimacy.<sup>204</sup> We concluded that there are two exceptions to the exclusionary rule in the law: the independent procedure and the procedure indirectly related to an illegal procedure. In addition to the existence of two other exceptions applied to a limited number of crimes in accordance with the rules of Islamic Sharia. On the contrary, we found that the exclusion of evidence in the US legal system is based on the judiciary, which is achieved once the police violate the constitutional rights stipulated in the US Constitution, the most important of which is the Fourth Amendment. We noticed that there are several exceptions to the exclusionary rule that aim to mitigate it as much as possible.

In addition, we clearly say that no legal system is better than the other, as each system adopts its own philosophy toward the goal of protecting rights and freedoms and the goal punishing criminals, and bringing them to justice. For example, the US legal system tends to move away from the application of the exclusionary rule whenever possible, this is what results in a gradual increase in exceptions, which weakens the application of the exclusionary rule in every period of time. This may be because the courts are not convinced of the effects of this exclusionary rule, the most important of which is the criminal escaping justice, especially in the absence of constitutional protection for this rule.

Hence, we answer the important question with which we started our research, which is whether the exceptions to the exclusionary rule can restore the balance between the goal of protecting the rights and freedoms of individuals and the goal of punishing the perpetrators of crimes. We began our research with this important question, which we decided to answer in light of an analytical study of two legal systems that follow two different legal schools. Thus, we see — in light of these two legal systems — that any attempt to

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<sup>204</sup> In this regard, the Qatari Court of Cassation ruled as follows: “It is decided by the Court of Cassation that the procedural legitimacy, whether related to the impartiality of the investigator, the personal freedom and human dignity of the accused, observing the rights of the defence or what is related to the obligation of judges, all of which are legal constants. The constitution and the law are surmounted by the judiciary to protect them, not only in the interest of the accused but in the first place, but also for targeting a public interest ... Procedural legitimacy prevails, even if its implementation leads to the impunity of a criminal, due to higher considerations regulated by the constitution and the law. Qatari Court of Cassation: Criminal Cases — Appeal No. 166 of 2013.”

restore balance after applying the exclusionary rule failed. Perhaps the only exception to this answer is the exceptions contained in the rules of Islamic Sharia, which, from our point of view, have achieved a distinguished impact in the process of balancing between these two goals.

Through this research, we found that a large number of exceptions to the exclusionary rule tried to achieve a balance, but the balance was not achieved due to the presence of many observations and defects in these exceptions, in addition to the lack of agreement on their application by the judge. This may mean that these exceptions were not necessarily intended to increase the opportunity for rebalancing but rather that they may be aimed against the exclusionary rule. Because of the observations that affect these exceptions in the two legal systems, this prompts us to say that these exceptions may lead to more violations of rights and freedoms and may even lead to the non-achievement of the two goals together instead of achieving one goal. For example, inevitability, we found that it cannot protect the goal of rights and freedoms, given that the violating procedure has already violated these constitutional guarantees and at the same time led to the punishment of criminals based on future assumptions that may or may not be achieved, regardless of the strength of their possibility.

Accordingly, it is not possible to restore balance through the exceptions set forth in the Qatari Code of Criminal Procedure and in the US legal system, which makes us focus on finding other solutions that may be more beneficial and ensure the achievement of both goals. The first of these solutions is to study the exceptions contained in the rules of Islamic Sharia and work to implement them in a way that is consistent with the Qatari and US legal systems. We have observed, for example, in the first exception that accepting evidence based on an illegal procedure entails reducing the punishment of the accused from a more severe punishment to a lighter one, as is the case with theft, substituting imprisonment for amputation. The second exception stipulated in the rules of Islamic Sharia gives judges the power to balance between the most severe harm and the least harm. This gives judicial authority, which is widely considered to be the first protector of rights and freedoms in society, the power to carry out the balancing process in every case independently by balancing the damage resulting from the wrongful procedure with the damage resulting from the commission of the crime. The harm resulting from an illegal procedure has degrees, and the same applies to the harm resulting from a crime, according to the type and circumstances of each crime.

For example, violating the privacy of a person by searching him alone in a public place differs in terms of the harm that occurs if the search is in his



residence, and when the search is in front of his family. Likewise, regarding crime, there is a difference between an illegal search for the crime of drug abuse, in which harm may be confined to the person himself, and an illegal search for a drug trafficking crime that may result in harm to hundreds of people. Therefore, it is important to present these solutions to the table before legislators, and study them in terms of benefit and harm, as well as examine their suitability for integration into the enacted law. These two exceptions are clearly distinguished from the rest of the exceptions contained in many legal systems, which call for further study and research in their different scopes and fields.

The second solution is related to the conduct of the policemen (and prosecutors and judges in the Latin legal system), as the procedural error that occurred is the first reason leads to an imbalance between these two goals. Accordingly, it must be ensured that the person in charge of the procedure is sufficiently aware of the constitutional rights that must be respected before conducting the procedure. This may be achieved by intensifying legal scientific courses for police and continuing to evaluate this knowledge on an annual basis through the various performance tests they carry out for promotion or professional evaluation matters. This solution is also important because the studies show that the exclusionary rule achieves very little deterrence against policemen.<sup>205</sup> Indeed, US courts are still questioning whether the exclusion rule actually achieves deterrence against policemen.<sup>206</sup>

Moreover, the basis of the imbalance problem is the exclusionary rule, which was supposed to be a solution to the problem of police conduct. There is a great need to reconsider the exclusionary rule and find other solutions to replace it, for example, to strengthen the civil liability of policemen by allowing individuals to sue them, as the current situation does not allow this. For example, in the Qatari legal system, many legal texts, including Article 6 of Qatar's public prosecution law, state, 'The public prosecution may not be held accountable for the results of its actions or procedures in the exercise of its functions'.<sup>207</sup> This applies to policemen, as they are subject to the supervision and accountability of the members of the prosecution in accordance with the

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205 B.C. Cannon, 'Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion', *Kentucky Law Journal* 62 (1973-1974): 681-730.

206 'Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained'. *Elkins v. United States*, 364 US 206 (1960).

207 The Public Prosecution Law, Article No. 6, Law No. 10 of 2002 regarding public prosecution.

text of Article 28 of the Qatari Code of Criminal Procedure, which states that ‘the judicial officers shall be subordinate to the Attorney General and subject to his supervision with regard to the work of the judicial control’.<sup>208</sup>

However, if there is no desire to try any new solutions, we see the necessity of restricting the exclusionary rule rather than providing more exceptions. Especially since the current situation may lead to the escape of many criminals as we mentioned before. In a study conducted in Chicago, it was found that about 13% of drug cases are excluded because the evidence was obtained through invalid procedures.<sup>209</sup> Therefore, these restrictions may mitigate the serious consequences that may harm criminal justice. One of the restrictions to this rule is that it is limited to a certain type of violation that occurs by policemen or that is applied to certain crimes. Regarding restrictions on violations committed by policemen, the US legislator tried to enact a draft law that adopted the application of this idea to specific violations, but it was not approved.<sup>210</sup> This suggestion depends on several factors, such as the policeman’s intent to harm, the extent of the policeman’s indifference, and the damage inflicted on the defendant. As for the scope of its application to certain crimes, American jurisprudence has also tried to not apply the exclusionary rule to certain crimes, such as treason, espionage, murder, armed robbery, and kidnapping by terrorist groups.<sup>211</sup>

It must be emphasized that all these solutions still need to be studied and analyzed before being applied. This is what we will do later in future research, given that our research was based on the exceptions to the exclusionary rule and their impacts on rebalancing the goals of protecting the rights and freedoms of members of society and the goal of punishing criminals. However, we hope that these solutions will lead to avoiding the imbalance between these two goals and the possibility of achieving them together. For example, abandoning the exclusionary rule and replacing it with civil compensation for the defendant will result in protecting rights and freedoms by compensating the defendant financially. This will guarantee the achievement of the first goal, as well as lead to accepting the evidence derived from violating the procedure, which will ensure that criminals are punished for committing crimes. Since

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208 Qatari Code of Criminal Procedure, Article No. 28, Law No. 23 of 2004.

209 See M.W. Orfield, ‘The exclusionary rule and deterrence: an empirical study of Chicago narcotics officers’, *Chicago Law Review* 54 (1987): 1016–1069.

210 Bilal, *supra* note 5 at 495.

211 See generally J. Kaplan, ‘The limits of the exclusionary rule’, *Stanford Law Review* 26 (1974): 1027–1055.

exclusionary rule in the Qatari and US legal systems was not stipulated in the Qatari and US constitutions, there is no constitutional protection from its abandonment. In conclusion, achieving both goals together are theoretically possible, but it requires bold solutions and real steps to ensure that one goal is not preferred over another. It is in the interest of society to punish criminals and bring them to justice, and it is also the right of society to protect its rights and freedoms from any violations that may occur.