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Procedures for Including A Public Servant

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ABSTRACT.

The inclusion of a special system through which the project aims to achieve two goals. The first is to remove the damage caused to public money by the employee or the person charged with public service. The second: is to protect public money from harm by deterring the employee and others from any harm that occurs, so the importance of this study becomes clear through its touch on the subject that is Important, sensitive, and recurring at present, which is the repeated attack on public money, and the need to work to remove or repair the damage after it has occurred, and to search for and investigate the perpetrator after allowing me to defend himself. For some government workers, holding public office has become a way to pursue unlawful personal interests, even though the legislature granted the administration the authority to safeguard taxpayer funds. The employee's responsibility and the amount of inclusion may be decided without resorting to judicial power, thanks to the administrative authority in the inclusion of the rights provided to it by the legislator (the court). We have made it clear in the study's body that the administration may collect the inclusion payment all at once or in installments and that it can use legal means if the employee refuses to pay.

JEL Classification: K12,
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Introduction

The inclusion of a special system through which the project aims to achieve two objectives, the first: removing the damage caused to public money by the employee or the person charged with public service, and the second: protecting public money from damage by deterring the employee and others from any damage that occurs, so the importance of this study is evident by touching on an important, sensitive and frequent topic that occurs at present, which is the repeated attack on public money, and the need to work to remove or repair the damage after it occurs, and to search for the perpetrator and investigate him after allowing me To defend himself. The problem of the research is to know the degree of success of the legislator in his departure from the general principle of compensation, as it granted this jurisdiction to the administration even though it was originally to have the judiciary. How effectively does Inclusion Law No. 31 of

2015 protect public funds? Is the employee bound by the decision issued by the administration in assessing compensation?

The research problem can be summarized by exposure to the following points:

- 1- Establish the proper mechanism through which the administration can protect public funds owned by the state.
- 2- Finding sound solutions through which the administration balances the legal guarantees of the public employee, protecting his rights from the administration's deviation from its regulatory authority, and providing ways to protect the funds owned by the state.

In this study, we relied on the analytical approach for the texts that dealt with the procedures for including the employee or the person assigned to public service in an attempt to diagnose the strengths and weaknesses of the texts when touching the scientific reality and the study focused on the eleventh inclusion law No. 31 of 2015. To discuss all the details of the research, so we divided it into three sections; where we address in the first Section the concept of the decision to include and the competent authority to issue an inclusion decision, and we divided it into two sections, the first Section is the definition of the inclusion decision, the second Section is the competent authority to issue an inclusion decision, the second Section is the procedures for including the public employee, and we divided it into two sections, the first Section is how to form an investigative committee competent to include. The second Section is about the duties of the competent investigative committee in inclusion. The third Section is compensation for damage and appeals to the inclusion decision. We divided it into two demands, the first Section determining the amount of inclusion, and the second Section the procedures for appealing the inclusion decision. We conclude our study with a conclusion that includes a set of conclusions and recommendations. We have divided this Section into two sections, where we look at the first Section for the definition of the inclusion decision, and the second Section looks at the authority of the special to issue the inclusion decision.

2. First Section

2.2. Definition of inclusion decision

Inclusion is a language within the thing that breaks a guarantee guaranteed by it. It is a guarantor and implied, and the thing is guaranteed by implication, so it guarantees it, that is, find it and obliges it to it, and it is said that the thing is guaranteed by guarantee, the guarantor, that is, obligated to preserve and care (). As for the terminology, the Iraqi legislator in the inclusion law No. 31 of 2015 in force did not define inclusion but only stipulated in its first article that (the employee or person charged with a public service guarantees the value of the damages incurred by the public treasury due to his negligence, negligence or violation of laws, decisions and instructions). Since the definition is not the function of the legislator, jurisprudence has provided a definition, where some have defined inclusion as "a set of procedures carried out by the administration authorized by law through the investigative committee to determine who is responsible for the events of the damage and the gravity of the act committed and to determine the number of damages according to the prices prevailing in the markets at the time of the date of approval by the competent authority against every person who caused damage to public funds due to his negligence, negligence or violation of laws, regulations, and instructions. "

It was also defined as "obliging a person to guarantee the damage caused to public funds by deliberately or wrongfully trespassing by an order issued by the administration without the need to resort to the judiciary..." (). As for the judiciary, the Baghdad Court of Appeal defined in one of its decisions the inclusion decision as (... It is not a routine intelligence implication but an administrative decision with significant financial consequences. Therefore, it is clear that

those covered by the provisions of the law of inclusion are both the employee or the person charged with a public service that causes damage to public money and that the persons mentioned in the first article of the law of inclusion came exclusively and not as an example, so it is not permissible to add another person since the persons covered by the law are all (the employee and the person charged with a public service), so the person who is damaged by public money is obliged to compensate for the damage he has done (). Therefore, through the preceding, inclusion can be defined as (the obligation of the employee or person charged with a public service to pay compensation for damage to public funds as a result of his negligence or default by a decision issued by the competent public administration).

3. Second Section

3.1. The competent authority to issue the inclusion decision

The competent authority to determine the amount of compensation must be the judiciary. Still, the Iraqi legislator has departed from this order and has given the administration the competent authority to determine the amount of compensation and issue a decision to include.

When the Iraqi legislator gave the administration this privilege, the aim was to redress the damage caused to State funds and to protect these funds from the tampering of the tamperers. Article II, paragraph three of the law of inclusion of the effective stipulates that (the competent minister or the head of the entity not associated with the ministry or the governor shall issue a decision based on the recommendations of the investigative committee formed under item (first) of this article, so the decision issued in the inclusion is an administrative decision, so it must be issued by the authority specified by the law, and that the competence granted to the minister or the head of the entity not associated with the ministry to issue an inclusion decision is considered its competence and therefore is not justified for him to impose it. For subordinates, even if their positions are higher in the administrative hierarchy (). The jurisdiction rules relate to public order, so the competent person may not agree with others to amend those rules. Otherwise, the decision is defective by lack of jurisdiction. Therefore he can challenge this defect either the judiciary and demand its annulment, but the plea of this defect is not extinguished. It was also allowed to delegate this authority to any of them without specifying the level of the authorized person and indicating that he is an employee of special grades or an ordinary employee if instructions No. (2) of 2017 were issued instructions to facilitate the implementation of the Inclusion Law No. (31) of 2015, which addressed this matter in Article (1/I) with its text (The minister shall constitute Provided that the degree of the authorized person shall not be less than that of a general manager) (). But the question here is, what if employees of another ministry in conjunction with the employees of the affected ministry cause? Who is the competent authority to include the affected party or the affiliation of the employees causing the damage?

The answer to this question is that the Council of State addressed this by one of its decisions on the occasion of the request of the Ministry of Municipalities and Public Works for the opinion of the Council of State on this subject, which was stated in one of the decisions of the Council that "the competent minister is responsible for including his ministry. "

What if the management cancels the disciplinary sanction imposed on the employee in question? What is its impact on the inclusion decision?

The answer is that the Iraqi Council of State has distinguished between the procedures for imposing disciplinary punishment against the employee through the inquiry of the Ministry of

Science and Technology about the impact of the minister's cancellation of the penalty for officers against the employee on the inclusion procedures stated in the decision above: "The Minister's decision to cancel the disciplinary penalty issued against the employee does not preclude the possibility of including the value of damages caused to public funds." So here, the question arises whether the provision contained in the law of regulation in force fulfilled all the problems. Or does he still have some problems?

To answer, we refer to the provisions of Article (2/IV) of the law in force, which we see that it stipulates that (the Prime Minister is the competent minister of the ministry and the heads of bodies not related to the ministry). That is, the legislator has turned to three things, the first: is to subject ministers to the law of inclusion, which is not previously stipulated in the previous law, and the second: is that it is the determination of the authority of inclusion to the Prime Minister, and the third: is that the concept of the employee in Article (I) of the law will include everyone who is below the minister and that among them is a special degree, and it seems that the law in force is also silent about whether the executive authority applies the law or a legislative and judicial authority. Some jurists believe that it is a specialty entrusted to the competent minister, and the Speaker of the House of Representatives, the President of the Supreme Judicial Council, the President of the Office of the Presidency of the Republic, the Secretary-General of the Council of

Ministers and the heads of independent bodies, each of which concerns their employees, including in the exercise of this specialty.

4. General Position Inclusion Procedure

They have divided this Section into two sections. The first is how to form a competent investigation committee to include, and the second is the duties of the investigative committee concerned with inclusion.

4.1. First Section

How to form the investigative committee competent to include

Article 2/I of the current Inclusion Law No. 31 of 2015 stipulates that "the competent minister or the head of an entity not associated with the ministry or the governor, or whoever is authorized by any of them, shall form the investigation committee consisting of a chairman and two members with experience and competence, provided that one of them has at least an initial certificate in law."

Therefore, we note that the legislator will regulate the provisions concerning the investigative committee and its composition in terms of composition, membership, membership of the legal element, and the use of experts.

We will talk about these provisions in detail as follows:-

First: - The authority that has the authority to form the committee: We have shown that the law has authorized the minister or the head of the entity not linked to the ministry or the governor to provide the authority to form a committee for those who authorize him to any of them, which was not permissible under the repealed law, as well as the Prime Minister is the competent minister concerning the ministry and the heads of bodies not related to the ministry ().

4.2. Second: The number of members

The legislator specified in the law to include the current formation of the investigative committee, a chairman, and two members, and that the legislator's choice of the number three

achieves two goals. The first: is that the number is three of the odd numbers, which is productive in voting. However, there is no majority if the investigative committee is formed after the evens and equal votes. Therefore it is impossible to reach recommendations or a decision, but the goal: The second is that the number three is the least odd. Suppose the committee is formed with five or more members. In that case, this will lead to difficulty grouping members and the difficulty of agreeing on a unified opinion, which leads to the loss of the right, the avoidance of the work of employees in a larger number, and the opportunity for them to perform their job duties (). The position of the Iraqi legislator in the current inclusion law is clearer than the repealed law since the latter gave the administration the ability to increase the number of committee members without dropping it because the text restricts it. If it is removed from it, its composition is null and void.

4.3.Third: The legal element

The current law requires that one of the committee members must have at least a first university degree in law and that this formulation contained in the law is clear, as it prohibits any jurisprudence regarding the admission of graduates of the Institute of Legal Administration to it.

4.4.Fourth: The use of experts

The law in force requires the investigative committee to seek the assistance of experts, and the instructions to facilitate the inclusion law stipulates that (the investigative committee seeks the assistance of experts and has no competence to seek their opinion, and they do not have the right to vote). After the provisions of the investigative committee are completed, we believe that it is better in the legislative formulation of the above directives, not to mention the right to vote, but the right to sign, because the investigative committee will sign the minutes of its meeting unanimously (by agreement) and the majority, and not vote because it will be like elections. One important thing to pay attention to is that the subject of inclusion is a predominantly financial one, as we agree with the view that it should include the composition of the committee competent to include a member financially since it is not enough to say that the legislator has left this matter to the administration because the administration may often neglect this matter out of ignorance or even deliberately.

5. the Second Section

5.1. Duties of the Investigative Committee on Inclusion

Article 2 (ii) of the current Inclusion Law sets out the duties of the competent investigative committee¹, which are as follows:

- 1- Written investigation with the employee or person assigned to public service.
- 2- Determine who is responsible for causing the damage.
- 3- Determine the gravity of the act committed.
- 4- Specify an inclusion amount.

¹ - Article (2/II), of the current inclusion law, No. 31 of 2015.

We will discuss these meals as follows:

5.1.1.Editing with the employee or person charged with a public service

The administration cannot decide on the matter without conducting an administrative investigation concerning a subject where the accused has the right to defend himself. The administration takes no punitive acts except through formal and objective procedures.²The Iraqi legislator has succeeded in the current inclusion law by specifying the procedures that must be followed by the investigative committee, as mentioned in subsection (a) of the second paragraph of Article II, which stipulated that the investigative committee shall investigate in writing with the person covered by the provisions of this law, record his statements and the statements of witnesses, and have access to all documents and data that it deems necessary to see, and write a record in which it proves the measures it has taken and the statements it has heard with its recommendations, which are either By or by not including the employee.³The Iraqi legislator also stressed that the investigation should be conducted in writing with the person covered by the provisions of the law, which is something that the legislator has succeeded in because codification has many benefits, perhaps the most important of which is that it is a means of preserving the investigation procedures and certain results and preserving them from loss and forgetfulness. ⁴

5.1.2. determination of the person responsible

for causing the damage: The investigative committee shall determine who is responsible for causing the damage and is faced with one of two possibilities, first: if the person causing the damage is an employee or a public service officer, it falls within the scope of the law of inclusion, and second: if the cause of damage is other than these two categories, then the call is subject to general provisions, and jurisdiction is held under its general jurisdiction, whether the natural or legal person (...).⁵

5.1.3.Determining the gravity of the act committed

The current inclusion law did not classify intentional and unintentional errors, such as the law of the repealed. The main objective of this matter is to protect public money for the person to pay compensation for the damage suffered, and according to what we have seen that this matter is criticized as the law did not differentiate between the person who is intentionally damaging public money and the person who intended only negligence or ignorance of this matter, as the law had to double The amount of inclusion on the person is intended to damage public money.

5.1.4.Determining the amount of inclusion

² - Dr. Awwad Hussein Yassin Al-Obaidi, former director, p. 78.

³ - Article (2/sec/a), Current Inclusion Law, No. 31 of 2015.

⁴ - Dr. Walid Marza Al-Makhzoumi, previous source, p. 50.

⁵ - Dr. Marwian Saber Hamad, Procedures for Including the Employee and the Assigned to Public Service in Iraq, A Comparative Study, for the year 2016, Faculty of Law, Salahaddin University - Erbil, p. 154.

When the responsibility of the employee or the person charged with public service is completed, i.e., under any investigation of all the elements of responsibility, he must pay compensation for the damage suffered, and we will address the explanation of this topic more accurately in the third Section. After the completion of the duties of the investigative committee, an important question arises to us: What is the administration's procedure if new evidence emerges after the approval of the minister or the head of the entity not related to the ministry on the recommendations of the inclusion committee? The answer to this question is that the administrative judiciary is an important reference for administrative law, and in the case of considering disputes before the judge, diligence and finding a solution in the absence of a legal text and one of its decisions based on the request of the Ministry of Commerce for the opinion of the Council, which stated (it is not permissible to re-investigate cases involving a decision to include unless new evidence appears affecting the investigation).⁶ From this, we know that the investigation can be repeated, but the new evidence must be important, and the verdict on this order may change, and here the investigation opens again.

6. Compensation for damages and appeal of the inclusion decision

We have divided this Section into two sections, dealing with the first Section to determine the amount of inclusion and the second Section on how to appeal the decision to include.

6.1. First Section

6.1.1 Estimate the inclusion amount

As we discussed earlier, if the responsibility of the employee or the person charged with public service is established, if the elements of responsibility are fulfilled, he must pay the amount of damage that occurred and is named by the legislator (the amount of inclusion). Article (3) of the current Dam Law stipulates that "the amount of inclusion shall be determined according to the prevailing prices on the date of approval by the Minister or the head of the entity not associated with the Ministry or the governor of the decision of the investigative committee formed within a period not exceeding 90 from the date of the damage."⁷

As the Iraqi legislator has succeeded in drafting this legal text, he has paid attention to the price fluctuations that can accompany the rise and fall and the currency difference, and that the amount of the inclusion amount at the time of ratification will be his position for the two parties even if the value of the currency changes, and despite what the legislator has done from the guidance that we referred to in determining the amount of the time of estimation on the date of ratification, there is a difficulty that appears in determining the amount of inclusion in accordance with Article (3) of the inclusion law. It is now that the inclusion committee determines the amount of inclusion in its recommendations, then the recommendations are approved by the competent authority and the inclusion decision is issued, thus showing that the real date of estimation of the inclusion amount is the date on which the investigative committee

⁶ - State Council Decision No. 28/2018, issued on 1/3/2017, Collection of State Council Decisions and Fatwas of 2017, p. 92.

⁷ - Article (3), the current inclusion law, No. 31 of 2015.

completed its recommendations and not the date of approval⁸. The methods of collecting the amount of inclusion, as stipulated in article A (4) of the current law (the amount of inclusion shall be paid in one lump sum) (٩), as ⁹this method is considered a quick means of payment, but when referring to the text of the article (4) of the law, it is not specified who pays the amount to him, as it is stated in general, and that the payment period is (30) days, to allow a person to collect the amount of compensation to pay it. There is a method of collecting the inclusion amount, which is through the installment of the amount, as stated in Article (4) of the Inclusion Law No. 31 of 2015, which states (... The competent minister or the head of the entity not associated with the ministry or the governor may approve the installation of the amount). Still, here it was better for the legislator to set controls on this matter because any employee who will be included will submit an installment request, as there are small amounts that are paid in installments in this matter that lead to the waste of private state funds and that the installment period is five years, which is a long period, where the legislator must protect state funds by reducing the installment period, As for what guarantees the right of the State, where the legislator requires that the employee or person charged with a public service provide a guarantee¹⁰, article 4 of the current Damj Act indicates that the guarantee may be personal or real estate.¹¹ But it may raise the question that if an embedded employee rejects the inclusion decision, what is the solution he follows? Article (7) of the current law has replied (The provisions of the Government Debt Collection Law No. 56 of 1977 shall apply to the included if he refuses to pay the amount of inclusion)¹².

This is resorted to when the decision is rejected, or any installment is not paid within 30 days. Still, there is a final method of collection, which is to reserve the guaranteed salary in no more than the percentages stipulated in the Execution Law No. 45 of 1980, to be resorted to when the employee refuses to pay the amount. It is impossible to collect it under the Government Debt Collection Law referred to earlier, which is stipulated in article 6 of the instructions to facilitate the implementation of the current inclusion law¹³.

6.2.Second Section

Procedures for appealing the inclusion decision

The legislator had specified article (6) of the current inclusion law to clarify the procedures for appealing the inclusion decision, as it stipulates (the grievance before the authority that issued the inclusion decision by the included employee, i.e., the employee or the person charged with a public service within 30 days from the date of notification)¹⁴, and the minister or the head of the ¹⁴entity not associated with the ministry or the governor must decide on the grievance within

⁸ - D, Ghazi Faisal Mahdi A book titled Explanation of the law of inclusion For a year 2015 , Baghdad Iraq 2016, p. 21.

⁹ - Article (4), the current inclusion law, No. 31 of 2015.

¹⁰ - dRasha Mohammed Jaafar Al-Hashemi, 2017, previous source, p186.

¹¹ - D, Ahmed Faris Abd Alazzawi, Research entitled Means Legal forCrisis Handling Finance in Iraq, Publication In the Journal of the College of Law - university Crook Year 2015 ,p. 304.

¹² - Article (7)), Current Inclusion Law, No. 31 of 2015.

¹³ - Article (6), Help Facilitating the Incorporation Act Current.

¹⁴ - Article (6/II), the current inclusion law, No. 31 of 2015.

30 days from the date of submission of the grievance¹⁵. Another way of appeal is to appeal the annexation decision, where, according to article 6 (IV), the insurer can appeal the decision to the Administrative Court within 30 days from the date of notification of the inclusive refusal of extradition from the party to which it was submitted¹⁶. The question may be raised: What if the Court of Administrative Justice approves the decision of the minister or the head of the unrelated body in the ministry or the governor? Does this decision have to be implemented when it is communicated? Or is there another way to appeal? However, the Law of the Council of State states that the decisions of the administrative courts are not final and that its decisions can be appealed to the Supreme Administrative Court, which serves as the Court of Cassation and whose decisions are final and enforceable¹⁷.

Conclusions and Discussion

When the lawmaker delegated authority to the administration to include its purpose, it intended to protect public money. However, for some public employees, the public office has become a means of pursuing personal interests that are not legitimate. It is the authority of the administration in the inclusion of the privileges granted to it by the legislator, through which the responsibility of the employee can be determined, and the amount of inclusion is determined, without the need to go to the judicial authority and ask for their opinion on the matter. These procedures are derived from public order, and their purpose is to strike a balance between the authority of the administration on the one hand and the protection of the rights of employees on the other hand. This was mentioned in the body of the research. The administration should include this information through a set of procedural restrictions that the law has set. This was mentioned. The administration has the right to forcibly collect the amount from the employee if he refuses to pay, and we have indicated that in the body of the research. The administration can collect the inclusion amount in either one payment or installments. Due to negligence and negligence in paying the sum of the inclusion, which leads to a waste of money that belongs to the state, we hope that the Iraqi legislator will cancel the right to installment due to negligence and negligence in paying the sum of the inclusion. The requirement for laborious effort To cut down on the amount of time it takes to reach a settlement and speed up the payment of the debts owed by the employee, placing emphasis on the unique characteristics of the implication lawsuits and giving them due consideration is a top priority. The investigation committee's independence must be preserved at all costs, and it is equally essential that members of the committee have no familial or personal ties to those who have caused damage due to favoritism that has been exercised at the expense of public funds. Due to an error in the wording of the text, we are hoping that the legislator will refer to Article (3) of the current inclusion law. This article states that the investigative committee issues a decision, even though investigative committees do not issue decisions but recommendations; therefore, we hope this article will be amended to reflect the reality that investigative committees do not issue decisions but rather recommendations. We have high hopes that the Iraqi legislator will include a judicial component in some aspect of the investigations or the work of the investigative committee. This would ensure greater precision in the decisions made, as well as the possibility of collaborative efforts between the administrative and judicial branches.

¹⁵ - Article (6/III), the current inclusion law, No. 31 of 2015.

¹⁶ - Article (6/IV): Current Inclusion Law, No. 31 of 2015.

¹⁷ - Consultation legal, neighbourhood In David Hamad God Ibid.

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