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# Administrative Instructions or Publications between Internal Implicit Nature and Organizational Function: A Comparative Study

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## Abstract:

At the administrative level, we can enumerate a large number of documents of varying legal value. Here, we shall distinguish between the external administrative texts beside the internal administrative texts or implicit administrative standards, which include administrative instructions or publications, directives and finally internal administrative procedures. All these documents concern the internal administrative organization,and they do not relate to the legal centers of individuals, which, in turn,made the lawmakers remove them from the department of legal texts that are subject to judicial administrative control.This solution has raised several legal problems. It has led to the "immunization" of some regulatory acts of judicial supervision, which has posed a real danger to the legal centers of individuals, which has made the administrative judiciary, today tend to strengthen the control of such documents despite the fact that they are radically different from administrative decisions which appear as internal administrative documents. Its essence may include some organizational aspects. All of these factors have made the administrative judiciary in contemporary regimes, including the Algerian and French systems, accept the cases of cancellation filed against these documents. This solution presented an exception requiringthe removal of such measures from the scope of judicial control.

**Keywords:** Internal Administrative Measures, Administrative Instructions and Publications, Principle of the Legitimacy, Cancellation Case.



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## Introduction:

Public administration is a very complex phenomenon characterized by great flexibility and wide mobility. It reflects the political, economic and social perceptions of a state over a given period of time[(1)],which made the first jurists conclude that the state represents only a group of public administrations consistent with public interest, so it does not represent the authority of coercion or leadership authority, but a legal fact[(2)].

This means that the state triesto appear as a form of cooperation between the public administrations, monopolizing the process of its formation and management while granting it a certain area of freedom and independence,

(1) Public administration reflects the political, economic and social perceptions of a country during a certain period of time, which makes it a very complex phenomenon characterized by great flexibility and wide mobility. Public administration carries out a concrete and precise activity, although its goal is to achieve the public interest by a public person or under his control. The framework of a legal system that is wholly or partly subject to the provisions of administrative law and the achievement of this goal within these coordinates remaindependent on the scientific and technical techniques as well as the magnitude and diversity of demand and finally the general objective conditions surrounding the state. "As Brigadier General Perdue said," it will never be a abstract and abstract legal concept. Burdeau (G), l'Etat, Seuil, Paris, 2001, p 36.

(2) This dual convergence of the state as a public figure and public administration as a reformist organization at the ideological, institutional and legal level leaves no room for the private initiative to "leak" into the public administrative space. Perhaps the "hidden" administrative activity behind this objective analysis will have a more ideological and political future Including by strengthening the role of the state as the sole official of the public interest without any participation or competition, in addition to liberating the individual from all dependency relations, so as to enable his integration into the general will of the nation. Duguit (L), traité de droit constitutionnel, Ed Fontenois, Paris, 1911, P 61. Picavet (E), Vues rétrospectives sur le droit administratif français, LGDJ, Paris, 2002, p 311 et s.



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in order to alleviate the impasse of the presidential conjunction [1]. It also seeksto improve its performance by strengthening some of the privileges of public authority, allowing it to influence the legal centers of individuals with its measures. From this perspective, public administration constitutes, in fact, the true expression of the authority of the State[2].

The French State Council adviser Professor Wiener (C), expressed this issue by saying: "Laws and decrees - although published in the Official Gazette - remain only an inspiration for administrative staff, unless followed by precise and specific administrative instructions[3]. This was also expressed by her fellow jurist Dèroche (H), who concluded that: "In practice, we cannot apply legislative or regulatory texts unless they are followed by executive decrees, and even the latter is unable to move the administrative activity on its own for lack of efficiency, which led to make public administration staff in constant need of the instructions or publications of the central bodies[4]. This result, in turn, leads us to say that we are faced with the combined efforts of two parallel authorities:on the one hand,the LegislativeAuthority that legislates laws, and on the other hand, the authority of public administration represented by ministers and administrators who put these laws into practice with their instructions or administrative publications[5].

(1) Burdeau (G),le statut du pouvoir dans l'Etat, LGDJ, Paris, 2000.

(2) Beaud (O), la puissance de l'Etat, PUF, Paris, 2004, p 88.

(3) Wiener (C), recherches sur le pouvoir réglementaire des ministres, LGDJ, Paris, 2002, P 185.

(4) Déroche (H), les mythes administratifs, PUF, Paris, 2006, P 176.

(5) Haberle (P), l'Etat de droit, Dalloz, Paris, 2006, p 37 et s.Boissard (S), le pouvoir hiérarchique au sein de l'administration française, in C.F.P, N° 223, Paris, 2003, P 4.In this context, it should be noted that the law here is not determined by its existence, but by its influence, its dominance and its effectiveness in everything and at all times, and in all existing relationships, and practices, both at the individual and the governmental levels. It should also be noted that the concept of a "state of law", although from the very beginning was an idea primarily linked to traditional legislative texts (the Con-



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However, it is noted that the general regulations (orders and decrees) issued by the presidential administrative bodies (the President and the Prime Minister) can also constitute the primary material of the instructions and publications. Therefore, the administrative subordinates must respect them by relying on them as a derivative frame when drafting their internal texts in order to ensure the unity and harmony of administrative work, which indicates the existence of an internal normative standard at the level of all legal texts enacted by the executive authority of different departments(1).

From this point of view it appears that the possibility of enacting instructions or administrative publications by the administrative president is not based on the material or objective nature of the performed work, but is mainly based on the administrative authority he enjoys vis-à-vis the subordinates. Thus, these documents neither constitute texts to activate the administrative activity, nor represent the real appearance of power or administrative leadership(2). In this case, these texts are considered to be binding by the persons who address them in connection with the principle of presidential administrative hierarchy and the need to respect the peaceful presidential relationship in performing administrative tasks. Any violation of this legal definition will lead to disciplinary sanctions quickly and directly.

stitution, parliamentary laws and regulations), the subsequent development of administrative activity allowed for the expansion of the law to include all legal standards in force regardless of their forms Their sources and their impact on legal centers. Miaille (M), l'Etat de droit, P.U, de Grenoble, 1978, P 198 et S.

(1) Administrative instructions or publications constitute vital and practical means of information-sharing within the administrative organs. This result can be explained in two ways, first, because it is difficult to imagine the extent to which these texts are being implemented, and second, because it is also difficult to determine which authorities have exclusive jurisdiction over the enactment of such measures, given their complexity and practical diversity.

(2) Debbasch (C) et Pinet (M), les grands textes administratifs, Sirey, Paris, 1994, P 273.



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In contrast to all these developments, lawmen have encountered a fundamental problem concerning the difficulty of generalizing all administrative measures. Administrative instructions and publications represent measures related to the organization of the internal activity of public administration, and therefore lack the main characteristics of public organizations. This is the rule, but the exception concerns the ability of some of them to influence the general legal system governing public administration. France changed their attitude towards them by including them within the range of legal standards implicitly, which opened the debate again regarding the true legal nature of these documents(1).

On the basis of all these facts, we shall ask fundamental question:

Can we say that we are dealing with two different or package deals, and are their internal administrative nature and their inability to influence the legal centers of individuals directly are sufficient to remove them from the regulatory administrative texts established for the law, From the scope of the cancellation claims?

This is what we will try to answer through this research, which we preferred to divide into two main sections:

- The first principle: the limits of similarities and differences between the instruction and the publication.
- The second principle includes the position of the administrative

(1) Administrative instructions or publications are not a functional monopoly for government members only. They can also be issued by the administrative heads of the central departments as well as their external interests, especial-lydecentralized groups andadministrative deconcentration bodies, in order to expand the application of the law and to convey directives, instructions and recommendations to the smallest administrative units subordinate, and here we mean that the administrative head shall mean the employee who has been appointed at the head of a facility, a directorate or an administrative depart-ment in order to conduct, direct and lead its activities, with the extension of his presidential authority over all employees and agents of the administrative unit under his jurisdiction.Fombeur (P), les circulaires impératives sont des actes faisant grief, in RFDA, N° 4, Paris, 2003, P 287.



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judiciary of the phenomenon of instructions or publications.

## The first principle: the boundaries of similarities and differences between instruction and publication

In fact, jurisprudence and administrative judges found it very difficult to define a comprehensive definition of these texts because of the excessive use of these texts, as well as the confusion and disintegration of the concepts associated with them. If the "battle" of separation between these documents and other internal administrative measures has been overcome after much trouble, in the modern The new "battle" is related to the search for new elements to distinguish the instruction from the publication, which was rejected by some thinkers because of the congruence and conformity of the two concepts, while the latter received considerable attention from other thinkers, who found that the matter is "much more complex than we thought".

### The first requirement - what is the instruction or publication.

A part of French jurisprudence concluded that what constitutes a weak point for administrative law is the lack of clarity and inaccuracy of the terms its uses(1). Indeed, we note that the jurisprudence and the judiciary often use the terms of instruction or publication to develop knowledge, and adapt the facts to legal systems.However, they haven›t been able to define a comprehensive definition of this phenomenon, perhaps because of the extensive use of these documents, which made the administrative judiciary give a very broad and inconsistent meaning, which, in turn, has contributed to the obstruction of jurisprudence efforts in defining a final definition of it(2).

In this regard, a part of French jurisprudence has included instructions or publications within the scope of the unregulated administrative work of

(1) Waline (M), empirisme et conceptualisme dans la méthode juridique, faut-il tuer les catégories juridiques ?,Sirey, Paris, 1985, P 359.

(2) Mehl-Mignot (H), approche des normes et hiérarchie des normes suivant les situations juridiques, LGDJ, Paris, 2002, P 335.



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the law. If the generalization of the term of internal administrative work is based on instructions or publications by some jurists, it is a distortion of the fact that this extract is not absolutely sound. In all cases, it must be removed from this circle and give it the status of realism, because of its distinction from other administrative documents. Instructions or publications usually contain directives, recommendations or interpretations issued by ministers or heads of administrative departments, addressed to the administrative staff concerned with the conduct of the administrative activity intended for such documents.

Therefore, it is wrong to provide a conclusive and final solution regarding the identification of the dimensions of these documents because they are characterized by continuous mobility. They may take the form of interpretations or explanations. Finally, an executive nature may be taken when it comes to determining the application of legislative and regulatory texts, particularly with regard to the provision of an appropriate solution to a particular case or case before the administrative organ, in the light of the substantive framework established by the general legal texts.

Which is adopted by another aspect of French jurisprudence, adding that the inclusion of instructions or publications on certain organizational elements because of their connection with legislative or regulatory texts does not make them self-regulatory texts or rather legal texts, because the application of general legal texts by instructions or publications does not mean that the latter can pre-determine the content of these texts by elaborating them and highlighting their main elements, or the procedures to be followed in order to ensure their optimal application, or to clarify possible administrative controls, Etc. All these references indicate that the instructions or publications were originally found to analyze, facilitate and apply a pre-existing legal text, and not to create their own legal rules themselves, making them subscripts or appendices rather than established texts Law itself[1].

(1) Dé Laubadere (A) et autres, traité de droit administratif, T1, LGDJ, Paris, 2004, P 655.



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On the other hand, another aspect of French jurisprudence focused on the scope of the application of these texts. They considered that they were not directly directed at individuals and thus had no authority to evict them. All this meant that they were not binding on them because they were not directly connected in their legal positions, which is sufficient to justify the inclusion of such documents within the range of non-self-executing texts(1).

Emphasis on the "internal" nature of publications or instructions may appear to have meaning only within the media line of administrations and public facilities. However, if we recognize that these documents affect legal centers, it adds new elements to the principle of legality and affects the traditional hierarchy of legal standards. This result, in turn, represents the most serious manifestation of the indiscriminate use of publications or administrative instructions(2).

The influx of their uses, in parallel with the indirect transfer of some of their effects to the conciliators, and finally their containment of some organizational aspects due to their "friction" with the general legislative and organizational texts, all these factors, have made modern administrative legal professionals feel that the flexibility and mobility of these measures may give them a place in the Legal standards list in the future, although this is still the subject of several interpretations of jurisprudence(3).

On this basis, it is necessary to search for the final adaptation of these texts, in order to remove them from the internal administrative texts of the "weak" legal effect, and to say otherwise means to neglect the main characteristics of the instructions or publications, without other internal

(1) Vedel (G) et Delvolvé (P), droit administratif, T1, PUF, Paris, 2003, P 260. Massot (J), décisions non formalisées et contrôle du juge de l'excès de pouvoir, Dalloz, Paris, 2011, P 521.

(2) Azouz (Y), la classification des instructions et circulaires dans le système pyramidal des normes juridiques en Algérie, mémoire de magistère, Université d'Alger, 2002, p34.

(3) Gaudemet (Y), remarques a propos des circulaires administratives, LGDJ, Paris, 1993, P 563.



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administrative measures[1].

Finally, we can say that administrative instructions or publications constitute a new reality in the legal arrangement. They represent the best example of the development of the lower standards in the traditional pyramid. These documents have been transformed from internal administrative work into texts with real and effective extension of the general regulatory authority. It has managed to make itself an implicit regulatory standard with a connection to the principle of legality, which may result in «a real, silent and fundamental normative revolution."

**The second requirement - the problem of separation between instruction and publication**

Among the problems which are still relevant to the issue of internal administrative measures is the «problem" of distinguishing between instruction and publication. For this reason, some believe that the two terms constitute "two sides of one coin." This is illustrated by the use of the word "or" between the two terms, others believe that the two terms are "different currencies", and therefore prefer to employ the word "and" between the two terms, in order to indicate the coordination that we are in front of two different elements.

**First, the jurisprudential tendency to distinguish the meaning of instruction about publication**

Some of legal professionals believe that instructions and publications represent two ways of performing one work. In view of the "fusion" of the two concepts in one mold, it becomes very difficult to highlight the fundamental differences between them. All these elements are not sufficient to say that the two conventions are final with several differences separating them, was based on this trend to justify his position on a three-dimensional analysis:

(1) Braibant (G), le problème des circulaires, Economica, Paris, 2008, P 347.



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1. At the level of definition: Determining the meaning of both idioms will form a model image, which in turn will represent a fundamental point of reference in showing all other formal and objective differences. Thus, the instruction was considered as part of the inner life of the administrative facility, which is to ensure that the public facility is maintained regularly and moderately, and therefore its production is contingent upon the practical need required by the facility, in order to ensure the best performance of the public service.

At the substantive level, instruction constitutes an internal administrative criteria.It includes a set of rules and provisions aimed at regulating the status of administrative personnel and personnel as well as their working conditions and "interacting" relations, as well as subordination to subordinates as a means of exercising presidential authority which is an essential element of the facility. Therefore, the instruction represents the administrative document that discloses the relationship between the president and the subordinates within the framework of the rules of procedure of the facility, which makes them often "produce" general effects(1).

2. At the level of form: the use of publications or instructions whether for internal communication or for the circulation of public information is a continuous and repeated practice, which clearly contributed to the intensification of its growth. This may also be the dissolution of external forms between the two criteria; in other words, the confusion of the meaning of the two documents in terms of formality, because of the lack of clarity of the graphic characteristics of editing both, a proof that the owners of the authority to take instructions and publications in the basics and rules and techniques of editing administrative documents(2).

(1) Geneviève (K), les circulaires administratives, Economica, Paris, 2003, P 21.

(2) Interpretation publications refer to internal administrative documents that facilitate the application of legislative and regulatory texts by interpreting, analyzing, elaborating, and clarifying their various elements, without departing from the original text in its form and content. Therefore, the purpose of these texts is to present a clear presentation of the original text, not to



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Algerian legal thought, however, considered that careful contemplation of both documents could show some secondary differences at the level of form or method of editing. He saw that the instruction appeared to be more precise and more attractive than publication, which is shown by comparing the outer shape as well as the way the subject is presented in both(1).

In practice, we note that instructions usually take a certain form, which is typical for them, just as in the case of laws or regulations, where the subject is detailed into several carefully-arranged axes and some references into some legal texts in force.

As for its contents, instruction contains a set of directives and recommendations of a purely or impersonal nature, because the speech in question is not addressed to a specific person or persons, but to specific persons in their legal positions. Therefore, instruction is of general effect, which is similar to the general legislative texts .As for the presentation of the elements of the subject, we note that all instructions commence with a suggestion that there is a presidential relationship between the parties concerned, all these documents begin with the words "I have the honor to inform you ..." or "I have the honor to draw your attention to the following question ...", which have become part of the Model Instructions Framework.

3. At the level of the subject: If some thinkers make it easy and put the publication and the instruction under one concept, considering

provide a random comment around it, to evaluate it or to present a personal view of it, or to make a specific proposal to generalize the application of the interpretation outsidethe scope of the administrative apparatus source of interpretation, Thus, the general framework for practicing this jurisdiction is to facilitate the understanding of general legal texts, without deviating from thei r essence or distorting their true meaning, all this suffices to say that interpretative publications constitute descriptive or analytical texts rather than texts that are included in the presentation of administrative orders separately and individually .Troper (M), une théorie réaliste de l'interprétation dans la théorie du droit, PUF, Paris, 2001, P80

(1) Yelles Chaouche (B), recherches sur les mesures d'ordre intérieur, Thèse de Doctorat en droit, université de Strasbourg, France, 1981, P 100.



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the two as mere internal administrative documents, addressed to the subordinates and relate only the internal process of the facility, so the administration does not need to inform the public because it does not have any authority in their face.

Such a statement would neglect several aspects of research. The term «instruction» is a translation of the French term which clearly expresses the exercise of presidential authority.The power to issue instructions is entirely in the hands of the presidential authority, but it is the direct expression of the administrative president's enjoyment of that authority.

Publication is merely a tool for interpreting the law of the annex or the law on the status of administrative personnel and is thus more relevant to the original legal text than to presidential authority, as it appears as an intermediary between general legal standards and administrative acts of specific situations(1).

In this way, publication appears as an effective tool for communicating the legislative or regulatory text to the persons claiming to apply it by presenting this legal text in a simplified manner by means of more precise and clear terms, all of which are linked to the binding nature which is given to the interpretation that is included in mandatory publications and makes them enforceable by agents and administrative personnel.

(1) The administrative publications issued by the President of the Republic are widely circulated, but what distinguishes them is the acquisition of the idea of presidential authority over its content, which tends to the traditional concept of instruction rather than the concept of publication, because it contains a set of recommendations or directives of a general nature targeted for political purposeswhich made the characteristics of the administrative publications not take all the theoretical dimensions when applied to these documents.On the other hand, we observe a broad monopolyof political discourse through the terms used, among them, «Enhancing the gains in transparency ... the emergence of a credible representation ...» This is an example of the political preference on the administrative side of the documents issued by the President of the Republic. No. 09 of 2004, p. 25.



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While publication constitutes the administrative chief's tool to standardize the interpretation to be given to any legal provision applicable within the annex, unlike the instruction, it is conditional on the existence of a pre-existing legal provision, the purpose of which is to "rationalize" the discretion of administrative agents, by defining the precise interpretation of general legal texts, which they must apply strictly without adding any new elements beyond the original text.

**Second: The jurisprudential trend stating that the meaning of instruction corresponds to the publication**

On the other hand, other legal professionals see that the continuous development of internal administrative texts, in parallel with the absence of appropriate criteria for distinguishing these documents at both the formal and substantive levels, has made legal professionalsfind it very difficult to distinguish these texts from one to another. The comparison is related to implicit internal directives or texts, but it is more complicated when instruction is distinguished from publication.

For our part, we believe that the examination of this matter is «legally useless» as long as both of them depart from thelegal standards under administrative judicial control as a public asset. Both documents represent a material letter, written by a presidential administrative authority, legally competent to issue such texts. The subject of this speech is to draw the attention of subordinates on a particular issue and to inform them of the new measures they must take into account in practicing their functions. Therefore, there is no way to distinguish instruction from publication. This is true by applying the formal and objective criteria. Formally, we see that both have the same information or data include the title or the name, date, subject and signature.

Even objectively, this is also the case, especially with the extension and complexity of the responsibilities placed on the administration's obstruction, as the latter does not pay much attention to the nature of the document it issues, as much as it is concerned with the solutions that it puts in order to face the practical challenges.



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Even if it is said that the substance of the matter could constitute a dividing line between the two documents, instruction constitutes presidential orders directed at the subordinates to perform certain acts or abstain from certain acts, as deemed appropriate by the presidential authority to improve the yield of the facility. A mere account of the interpretations and explanations put forward by the presidential authority on the legislative and regulatory texts in force.

This is a very weak solution and is unable to adequately frame this issue. The administration has issued a new class of internal texts, the meaning of which is mixed between instruction and publication. It contains a brief presentation of the new legal texts that subordinates must respect in the performance of their duties, as well as guidance, recommendations and direction to improve the performance of the facility. Some jurists have tried to justify this coincidence, arguing that the normative development of internal administrative documents has contributed to the emergence of new forms, although some refer to the same content .The traditional relationship, which lasted for a long time to perform the monopoly of administrative activity, is essentially based on presidential authority, and since this element constitutes an essential element of instruction, it means that the latter was the first to emerge from publication.

Since the beginning of the 1980s, a new movement has emerged calling for the "democratization" of administrative life. Political discourse has focused on strong management in order to achieve full transparency of the relations between the general administration and the public. While the instruction is a tool to translate authoritarian presidential endeavors more than a means of addressing internal administrative issues, it was considered inappropriate to embody genuine administrative democracy.

On the pieces of the instruction, the attention shifted to the publication - which, although known since the decision of the French Council of State on 29 January 1959has allowed the judicial and jurisprudential attention to this tool to be determined. Through a very active discussion, publication was presented as a democratic "leap» of instruction»[1]، hence, publication

(1) Geneviève (K), l'administration n'est jamais tenue de prendre une circulaire, op.cit, p 1446.



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acquired the usual status of the instruction and its complex concept of existence has emerged, as it's attributed to every administrative action that has a general effect. It interferes with internal administrative measures and, on the other, with legal actions of general effect. All these characteristics have made the French state delegate, Tricot, describe it as "The suite that includes a variety of goods: order, opinion, proposal, direction, organization and even legal rule»[1].

## The second topic - the position of the administrative judiciary regarding the phenomenon of instructions or publications

The idea of administrative instructions or publications has been a major question mark for jurists, because their legal nature is not always clear and stable. The performance of a specific work in a specific way, and finally it can appear as real organizational standards, which made the administrative judiciary in general "determined" to find a final and effective solution to this issue.

### The first requirement - the position of the French administrative judiciary of instructions or publications

We note that the French administrative judiciary deals with instructions or publications different treatment according to nature, object and effects, considering that part of it carries an explanatory nature, and this category tends more to the range of internal administrative standards, beside him find another class of organizational nature. The latter constitutes the highest administrative document, in order to extend its legal effects outside the internal administrative sphere. The distinction between the two areas is of great importance, because the motion of cancellation is acceptable only against regulatory texts[2].

(1) Ricci (J – CL), Mémento de la jurisprudence administrative, Hachette, Paris, 2010, P 71.

(2) Administrative instructions or publications are those internal administrative measures aimed at adding something to the law by influencing existing legal centers, either by imposing obligations and duties on individuals or, conversely, by granting them new rights and guarantees.



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In the beginning, it adopted a very simple criterion for distinguishing between them, which is the formal criterion. If the administrative authority concerned has regulatory authority, and thus the possibility of challenging it to override power. In the opposite case, Instructions or publications issued by administrations that do not have regulatory authority also do not have this characteristic, given the control of the formal standard of administrative conduct in general(1).

In fact, the application of this standard may be valid for some administrative instructions or publications, such as those issued by the President or the Prime Minister, but the generalization of this solution would be legally "sterile" because it is not covered by all administrative regulatory texts, The issuer of these texts does not have the organizational or regulatory character as a beginner and the prime example of this is the ministers(2).

Therefore, the French Council of State retracted this solution, adopting the objective criterion in contrast to it. It stipulated that the work of a legal act should have legal consequences and that it would produce legal effects in its own right. Thus, actions that have no effect, such as opinions and intentions, as well as actions that have no impact on their own, but which are effective in conjunction with other actions, such as preparatory work for the administrative decision such as proposals, presentations and actions related to the implementation or confirmation of decisions(3).

(1) Conseil d'Etat, le 21 Avril 1961, librairie Aristide Quillet et S.A.R.L Cabus et Raulot, in AJDA (Actualité Juridique – Droit Administratif), Paris, 1961, P 361 et S.

(2) It was strongly criticized by some of the French jurisprudence on the grounds that the minister is the most men of management in the use of administrative publications. This development has contributed to the modernization of its previous conception by means of a generalization and broadening of its scope of application. Thus, its scope is no longer confined to the level of internal organization of ministries.

(3) Lakhal (M), le contrôle judiciaire sur le pouvoir réglementaire de l'administration publique, Etude comparative, thèse de doctorat en droit,



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This solution seems to have been greatly influenced by the jurisprudential "debate" between the "pillars" of administrative law in France, in particular the proposition presented by the jurist Carré Demalberg, considering that part of the administrative procedures enjoy legal value despite their special and distinct nature. In practice, there are powers that the Constitution recognizes as the power to establish laws in the name of the nation, namely the Parliament and the President. Administrative procedures issued by the remaining authorities also enjoy full legal value, despite their internal character and despite their "lack" of the constitutional basis indicating this property(1).

A trend which was also embraced by the jurist André DéLaubadere, who considered that publications or instructions did not constitute texts that had absolutely no legal implications, but could constitute acts of merit if they could introduce any additions to the law or, rather, to the legal organization of the State, especially if new burdens are imposed on individuals or new guarantees are established for them.

Thus, the French Council of State has settled on the need to distinguish between rule and exception, the rule that instructions or publications are not self-sufficient to apply and they do not contain measures that are independently applicable and therefore are not subject to cancellation(2).

This extraction has become a stable basis for the French Council of State, which has left no occasion for the subject of legal standards to emphasize its own view of the concept of hierarchy and relations that must be between the various legal texts on an ongoing basis(3).The constant search for the

université de Montpellier, France, 2014, p 214.

(1) Dé Malberg ( C) , confrontation de la théorie de la formation du droit par degrés avec les idées et les institutions consacrées pas le droit positif Français relativement à sa formation, Sirey, Paris, 1988, P 77.

(2) Conseil d'Etat, le 8 Décembre 1972, Syndicat National des greffiers d'instance, in RDP, 1973, P 1360 et S.

(3) Petit (J), les circulaires impératives sont des actes faisant grief, in RFDA, N°3, Paris, 2007, P 515.



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substance of the texts and measures in force in the State reveals its will to extend its competence to the extent that organizational activity ends in order to ensure that these texts are rationalized in an optimal application of the principle of legality in its broad sense(1).

**The second requirement - the position of the Egyptian Administrative judiciary of instructions or publications**

At the jurisprudential level, we note that the subject of instructions or publications has been given great attention by the legal professionals in Egypt, but they differed at the point of adaptation to be given to these measures, which divided them into two groups:

The first group: these procedures are only internal texts that are limited to the administration itself, and do not bear any effects in the face of individuals, as long as they have no effect on their legal status, and therefore their rights and duties are determined by the legislative and regulatory texts directly, the administration does not have this jurisdiction, since the constitution does not expressly authorize it.

For this reason, the proceedings against such measures are inadmissible unless new provisions of the individual will of the Department are included, and are not based on any previous legislation. These procedures are transformed into administrative decisions, and thus acquiescence is accepted by revocation.

The second group considers that discrimination should be based on the external appearance of the text and not on the intent of the source of the instruction or publication. This aspect should be examined through the clues related to the substance or the concept ofthese texts. If it contains provisions directed at non-staff members of the source of the publication or instruction, we have to face a regulatory or regulatory text. However, if the final effect of these texts does not exceed the limits of administrative directives and instructions confined to the internal administrative

(1) Delvolvé (P) et autres, les grands arrêts de la jurisprudence administrative : arrêt institution Notre dame de Kreisker, Dalloz, Paris, 2003, P 499.



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framework of the administration, in this case does not bear the nature of the authority, and thus graduated from the Department of texts subject to judicial administrative control.

However, there are no major differences between the two directions in principle, since both depend on the adaptation of the direct effect of the application of administrative instructions or publications in order to determine the competence of the administrative judge.If this is the case at the level of jurisprudence, what is the position of the Egyptian administrative judiciary of publications or instructions "phenomenon" in the midst of a legal system characterized by mobility and complexity?

In fact, the provisions that have been exposed to the issue of publications and internal regulatory procedures in Egypt are very few. However, it may be noted that the jurisprudence of the Administrative judiciary has tended to adopt the prevailing opinion in the jurisprudence and administrative judiciary of France, In particular in terms of the criteriaadopted for distinguishing between organizational publications and interpretative publications, or rather limiting the scope of publications subject to judicial and administrative control alone(1).

At the beginning of its inception and in its ruling of 25/05/1947, the Administrative judiciary,ruled that: "...every administrative body is free to issue the regulatory instructions it deems necessary for the proper operation of the work, as long as it does not conflict with the general laws and regulations relating to employees, in a general sense. However, if it

(1) The emergence of this «new» category of publications has created considerable practical difficulties, in particular for the distinction between them and interpretative publications, since both are subject to a distinct legal regime. If organizational publications are a source of legitimacy by virtue of their ability to influence existing legal centers, this is not the case for interpretative publications that do not create any effects themselves and are not directly related to the legal centers of individuals.Thus, the generalization of legal solutions together is a neglect of the «exceptional characteristics» of organizational publications alone. Hence, the practical benefit that can be gained if we succeed in determining the basis for the separation of the two documents.



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does so, it must respect these instructions and act on them in the individual decisions it makes regarding its employees. If its side is counted as illegal, every employee has the right to appeal these decisions for violating the previously established regulations. (1)

In another judgment of the same court issued on June 16, 1949, it ruled that: "... The last paragraph of Article 4 of the Anti-Fraud and Fraud Law provides that a decision by a Cabinet may indicate cases where drugs or specimens are considered adulterated or corrupt. No ministerial decision has been issued to this effect until now, the instructions issued by the Ministry of Health in 1948 do not serve as the aforementioned ministerial decision, and therefore they do not apply to individuals and their effect does not exceed the framework of employees required to implement them as purely internal instructions issued by the Ministry of Health with Organization of the work entrusted to them.

It also ruled in another judgment issued on 7 February 1954 that: " it was finally settled on subjecting pharmacists to tax on commercial and industrial profits as the letter of the Tax Authority constitutes an administrative publication and is not considered an administrative decision...»(2)،As a result, it refused to recognize the organizational nature of the publication and therefore ruled that it had no jurisdiction to hear the appeal against its administrative work.

The Administrative Court of Justice has affirmed the previous principle in several other provisions, particularly by its ruling of 20 December 1954, in which it stated: «... where the interpretive decisions issued by the executive authority ... differ in all ways from the regulations where the executive regulations, the independent regulations and the regulatory mandates result in the creation, cancellation or modification of legal positions within its specialty whereas explanatory decisions do not establish principles or rules and do not bring new interpretations of the law that they interpret. Shall not be considered, by their nature and effects, to be administrative decisions.»

(1) Lakhal (M), op.cit, p 224.

(2) Ibid, p 227.



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These provisions show that the Egyptian administrative judiciary has followed the same legal development as in France regarding the true and fundamental nature of the administrative instructions or publications, considering that they are merely internal texts that seek to convey the directives and recommendations of the administrative head to subordinates. Is the responsibility of the staff members who address them only, and, in contrast, is not binding on individuals who leave the facility because they do not relate to their legal status and therefore cannot appeal against cancellation before administrative courts.

However, in the opposite case, the status of publications of an organizational or organizational nature that affect the legal status of individuals by establishing, modifying or revoking them is considered an act of allegiance and can thus be brought before administrative courts. This trend has become a stable and recognized judicial solution in the case of the Egyptian administrative judiciary, despite the lack of rulings on such matters.

### Third requirement -The position of the Algerian Administrative judiciaryof instructions or publications

We note thatadministrative jurisprudence of Algeria has expanded in the identification of different types of administrative instructions or publications, divided into three sections:

Section 1 as a general asset, the Minister does not have the competence to enact texts of an organizational nature, but - in turn - seems to be necessary for his position as Chief Administrative Officer, which has been remedied by other tools called «model texts». Ms. Wiener (C) referred to this phenomenon as a new procedural method aimed at bringing the administrative head closer to subordinates. (1).

The first is to prepare and formulate a set of rules and measures in the framework of a particular form or model signed, and then send it to the departments concerned within the core of administrative publications, and

(1) Wiener (C), op.cit, P 86.



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the latter shall clone other models and distribute to other administrations, which shall apply the model obtained without any modifications or interpretations thereof, and thus the version to be applied shall be the same as the original version prepared by the Chief Administrative Officer(1).

The second section includes the instructions, recommendations and directives issued by the administrative head of subordinates in order to ensure the performance of a particular work better. Interpretative publications that do not create legal rules themselves, but merely provide explanations and details that are necessary for the legislative and regulatory texts in force in order to facilitate their understanding and facilitate their application by their subordinates(2).

In this regard, we note that all these documents are not directed to the individuals who are appended and therefore are not bound by them, as long as the scope of their application does not extend beyond the limits of the internal administrative area and thus cannot be challenged to override the authority before the administrative judiciary(3).

(1) Rongere (P), le procédé de l'acte – type, LGDJ, Paris, 1998, P 60.

(2) For example,publication No. 6632 of 04 October 2012 issued by the Directorate General of the Public Service, which includes the prohibition of combining two jobs. This publication is intended to explain the legislative and regulatory texts in force, in particular Order No. 06-03 of 15 July 2006, including the General Basic Law on Public Service. Therefore, it did not create any new rules, but merely sought to introduce some interpretations and details in order to facilitate understanding of the general legal texts.

(3) Informative publications are simple administrative texts related to internal administrative management, which publish and distribute information within the general administrative fabric. They are different from the Model Publications because the Chief Administrative Officer does not present here a specific model for application on a given issue. They are also different from regulatory publications because they do not aim at influencing existing legal centers, nor do they differ from interpretative publications, because their substantive content is not intended to interpret valid legislative or regulatory texts.



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The third section includes the instructions or the organizational or legal publications, which constitute the highest administrative documents and the most legal ones, because they are out of the internal administrative framework and extend their effects widely to the addressees. These texts alone are concerned with the supervision of the administrative judge because of their impact on the legal centers of individuals: it must therefore be regulated both by amendment and judicial cancellation.

We have come across this type of document when the Chief Administrative Officer regulates a particular matter independently, without relying on the legal texts in force or when he deviates from the original text on the occasion of his interpretation through administrative publications, such as providing new and additional interpretations that are not included in the original legislative or regulatory text. .In both cases, we note that the administrative president has "underestimated" the establishment and creation of full legal rules without granting him this competence under the constitutional document, which means that we are in the face of a defect of authority, which is sufficient reason for the administrative jurisdiction.

Thus, it appears that the Algerian administrative judiciary has been following the same developments regarding these measures, whether in France or Egypt, but this development remains a theoretical principle in search, especially since its practical application has raised several legal problems. With reference to article 70 of the Algerian Code of Civil Procedure, the basic condition for the acceptance of a revocation case relates to the existence of a final administrative decision. In the sense of the offense, the selection of this element is sufficient reason to dismiss the case without addressing the subject. Administrative decisions are made in the academic sense. Therefore, they cannot be invoked before administrative courts in any case because of their "lack" of one of the essential elements of the cancellation action, which is the condition of the final administrative decision.

The adherence to this standard will lead to several practical complications, especially as administrative life tends to diminish the use of classical legal standards.particularly administrative decisions and, in turn, to expand internal measures because of their flexibility and ease of



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production and the difficulty of controlling them through different means of control because of its secret and closed nature.»[1]،The free application of article 7 of the Algerian Code of Civil Procedure shall result in the removal of a wide variety of administrative work from the scope of administrative judicial control, despite its organizational nature, for a simple reason related to the selection of the pre-administrative requirement[2].

This situation is further complicated by the fact that practice has shown that administrative publications have formed new standards for the creation of legal norms, such as legislation and regulations.Therefore, the removal of this category of texts from the framework of administrative judicial control means to strengthen the discretionary management of the

(1) For example, instruction No. 94-3/842 of the Minister of the Interior, Local Communities, Environment and Administrative Reform dated 7 December 1994 concerning the Privilege and Leasing of Local Public Utilities, noting that this internal administrative document has established, separately and independently, the legal system for the concession and lease of public utilities without being based on any other legal provision, which made it a complete regulatory document, with all the technical and legal implications.
Ben Mebarek (R), commentaire a propos du circulaire 94 - 3 / 842 relative au contrat de concession des service publique, mémoire de magistère, Université d'Alger, 2004, p 21 et s.

(2) El Hassar (M), à propos de l'article 7 du code de procédurecivile, in RASJEP, N°1, Alger, Mars 2009, p 462 et s. Professor Lecoq: "The administrative function of the French system has become mixed up with the concept of exécutive function concerning the implémentation of law. Lecoq (P), le pouvoir de dérogation de l'administration, thèse de doctorat en droit, université de Lille, 1971, P 190.Thus, the administration tries to incorporate legislative and regulatory texts into its administrative staff by means of instructions or publications aimed at disseminating new legal texts at the internal administrative level, or by giving new interpretations to old legal texts because of changing circumstances affecting the administrative process. Thus, interpretative publications refer to those internal administrative documents that facilitate the application of legislative and regulatory texts by interpreting, analyzing, elaborating and clarifying their various elements, without derogating from the original text in its form and content



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absolute, which makes the administrative head unique to the creation of law by his own will, without the existence of any restriction or contrary to this jurisdiction in practice(1).

The growth of these measures will eventually lead us to a dual concept of legality, a concept that is only related to the principles and rules laid down in the general legislative and regulatory texts, and another completely distinct concept that expresses the inherent ability of the administration to create the law on its own volition. This result represents the most serious injury to the principle of the classical hierarchy of legal rules.(2).

All these practical problems were the main motivation that prompted the Administrative Chamber of the Supreme Council to break its silence and finally to decide on the fate of administrative publications of an organizational nature. This was done on the occasion of its consideration of the Sempac case against the OAIC where the General Manager of Sempac decided in accordance with publication no. 20/650 of February 3, 1976, to release the percentage of the extraction of semolina from the grain, to achieve the objectives set by the revolutionary authority, in the context of winning the battle of production. Since the General Manager of Sempachas not only explained the texts in force, but has added new rules, and since the publication is of an organizational nature, it is consequently subject to appeal before administrative courts. For this reason, the Administrative Chamber of the Supreme Council accepted to consider the publication of the dispute, considering that the administrative jurisdiction was based on the material criterion, bearing in mind that the said publication had added new provisions to the original texts in force, because it determined individually the amount of extraction of the semolina from the grain, but not in the original reference texts, which made it self-influential existing legal centers and, as a result, abolished it(3).

(1) Brahimi (M), la circulaire ou l'instruction comme source de droit en Algérie, mémoire de D.E.S Université d'Alger, 1985, P 90 et 91.

(2) SBIH (M), l'administration publique algérienne, Hachette, Paris, 1980, p 124.

(3) In this regard, Professor Stirn (B) adds that: "... the great steps taken by the



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When we comment on this decision, it is clearly shown that the administrative judge applied the material criterion as implied by the fact that it is adapted to the organizational nature of the disputed publication, since this property has been referred to by the term " "... the objectives set by the revolutionary authority in the framework of winning the battle of production ...", which constitute a very weak and indirect reference to the organizational nature of the publication, which made the solution reached by the administrative judge very vague and dubious, It is the analysis adopted by weighted category of Algerian legal thought.As well as the decision of the Administrative Chamber of the Supreme Court of 14 May 1995 concerning the case of the Director-General of Customs against Mr. B.S, the General Manager of Customs appealed the decision of the Administrative Chamber of the Algiers District Court dated 08 March 1993, Issued by the Customs Department on 7 April 1992, and the appeals were as follows:

The first is a formal appeal concerning the non-competence of the Administrative Chamber of the Judiciary Council because of the publication by a central authority.While the second, which is the value of the reserved property, is within the jurisdiction of the Customs Department, that is, it has discretion in this area, suggesting that the customs administration does not want to recognize the organizational nature of this publication.

On the contrary, the Administrative Judge also considered that, since the publication to be revoked was issued on 07/04/1992, the goods applied to the value of this publication arrived at the port on 06/04/1992 A.D. These goods are in accordance with article 2 of the Civil Code, which provides for the non-retroactivity of the legal rule, all of which suggest that the judge

internal administrative standards have contributed to the modernization of the previous conception, which calls for dispensing with the old ideas that have remained, so it is now possible to create or modify Or the repeal of certain legal systems based on the individual will of "privatized" management in regulatory publications. Standard development therefore tends to bring such measures closer to the range of administrative decisions. Stirn(B), les sources constitutionnelles du droit administratif, LGDJ, Paris, 1995, P 59 et S



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has treated this publication as a regulatory text with a full legal nature.

Finally, we can only say that jurisprudence has clearly demonstrated the gradual «degeneration» of the organic standard and the «recovery» of the materialstandard in the area of determining the jurisdiction of administrative disputes, especially with the emergence of a new range of "hidden" legal texts under Internal administrative systems.

This is a hard work for the judiciary. For all these reasons, we believe that there is a need for coexistence between the organic and physical criteria, in such a way that the first is the limit in the distinction between administrative acts subject to judicial review, while the second constitutes an additional or supplementary criterion to strengthen this section.

## Conclusion:

We conclude from this study that the rethinking of the legal nature of administrative instructions and publications has put to the test a large side of the subjects of administrative law, the most important of which is the following:

The first conclusion is that the great steps taken by the internal administrative standards embodied in the administrative instructions and publications have contributed to the development and updating of the previous conception, which calls for reconsidering the sterile jurisprudential concepts that have existed for a long time, especially in light of its ability today to create, modify or abolish existing legal systems. This means that general normative development tends to bring these measures closer to the range of administrative decisions through the generalization of organizational characteristics, without violating the principle of legality.

The second conclusion shows through this study that the organizational activity authorized by the executive authority does not end with the general regulatory authority granted to the president or the derived regulatory authority granted to the prime minister but was extended very widely at the level of all ministries by the organizational decisions, before its practice is circulated by all public departments by instructions and publications, and



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this makes us stand in front of the internal standard hierarchy commensurate with the administrative hierarchy.

At the administrative level, we can count a large number of administrative instructions or publications.They are not related to the legal centers of individuals but are usually directed to the internal administrative organization, which made the law men take them out first from the legal texts that are subject to judicial administrative control, because they lack certain characteristics of the legal rule, in particular its general and abstract character.

We recommend that this requirement be amended in the Code of Civil and Administrative Procedure by extending the application of the material standard to the admissibility of cancellation proceedings in order to determine the real protection of individuals against the abuse of public administration.

The third conclusion is that the rapid development of public administrations, both in their functions and in their objectives, necessitated the rapid production of the necessary legal texts to embody them. Therefore, the weight of the law-making procedures at the Parliament level may not be consistent with this dynamic. Attention to administrative instructions and publications, they constitute simple standards in terms of procedures of enactment, fast in terms of time of issuance, few means of control and disabling, and can harm the same function of ordinary law, within this perspective they represent the appropriate criteria for the design and implementation of state programs.

However, in contrast to the high rate of public administration issuing of administrative instructions and publications, in parallel with their tendency to amend and repeal legislative texts on their own, this would undermine a very important legal principle - the «general principle of parallelism». It also raises the problem of a decline in the role of the legislative text in the legal system of the State, because of the deviation in the application of the principle of hierarchy of legal texts.



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The fourth conclusion may appear from the outset that instructions represent subsidiary texts and not independent, but this did not really prevent the violation of this rule, by freezing the application of some regulatory or legislative texts to provide the conditions necessary for them or to give interpretations as long as the administrative officer has a particular discretionary authority to give an interpretation that he deems appropriate to the original legal text.

This exception may also be achieved for instructions or publications issued by the Chief Administrative Officer in order to direct the administrative activity of his subordinates in a particular direction, even though the content of such measures is not included in the existing legislative or regulatory texts, given the very broad interpretation of these texts. This is legally acceptable due to its association with the circumstances associated with the discretionary authority granted to the Department, usually in the event of some practical developments that require urgent and exceptional administrative solutions. This solution remains limited in a very narrow range.

The fifth conclusion as a general asset: the Prime Minister represents administrative authority, and therefore the instructions or publications issued by him are aimed at ensuring regular and moderate management of the public administration. Therefore, these documents have a full administrative nature, but the advanced analysis of this issue may show some new elements. The Prime Minister is not only an administrative authority but also a political authority within the framework of the principle of dual executive power. He is politically responsible for his government's return to Parliament.

Therefore, the instructions or administrative publications it adopts in the performance of its functions do not have a strictly administrative nature,but it is mixed with the intentions, motives and political endeavors set out in its government program, which makes it characterized by a double nature, on the one hand reveals the will of the Prime Minister to organize and direct the administrative work in the direction he deems appropriate, or concerning the determination of interpretations and interpretations which it deems appropriate for the legislative or regulatory texts in force.



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On the other hand, the prime minister uses these texts to clarify the government›s strategy on the subject matter of these texts, so it is like a double convergence of policy and management in order to achieve one goal which is the public interest.

The sixth conclusion is that the hierarchy of administrative functions is translated by administrative publications, which are passed and circulated continuously along the administrative organs forming the public sector, for example, that the Prime Minister issued a specific instruction or publication in order to present a set of recommendations and instructions, In order to facilitate their understanding of the relevant departments in the light of the government program. In order to do so, ministers will issue separate publications independently to publish and distribute the government instruction or publication at the ministerial level. The "production" cycle of instructions or publications continues along the presidential administrative bodies of all relevant ministries.

Thus, we find ourselves in the face of a huge flow of administrative publications with a single source. However, we cannot rush to criticize this result, since the «great production» of administrative documents may weaken the value of original texts because of conflicting interpretations. On the contrary, it must be given a positive concept which is explained by the French jurist «Chevallier» (J), considering that the legal protection requires expanding the scope of measures explaining the legislative and regulatory texts, which does not weaken these texts. On the contrary, it is intended to expand its scope by ensuring its access and dissemination even at the level of simple administrative units. On the other hand, it allows for the removal of ambiguity and coverage of loopholes that are usually left to us by general legal texts because of their broad and vague general nature.

Based on all these data, we conclude that administrative instructions or publications can provide the public administration with practical benefits that cannot be dispensed. As they became the preferred administrative means to facilitate understanding of the law without distorting its meaning, as well as framing the discretionary powers of the departments within the jurisdiction of each administrative official in order to prevent deviation from the application of the law.



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The findings of this study, especially those relating to the status of instructions or administrative publications in the context of the hierarchy of legal standards, have highlighted the dark side of these measures, the aspect in which they appear as administrative means established by law because of their organizational nature.Therefore, we believe that it is necessary to change our view and deal with it on this basis, both legislative and judicial. Once again, we recall the specificity of administrative law in the development and continuous adjustment. This situation raises questions about the legal developments that will be seen in the future administrative standards.

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# التعليمات أو المنشورات الإدارية بين الطبيعة الضمنية الداخلية والوظيفة التنظيمية: دراسة مقارنة

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## ملخص البحث:

على الصعيد الإداري يمكننا أن نحصي عددا كبيرا من الوثائق ذات القيمة القانونية المتفاوتة، تشمل القرارات والعقود الإدارية، إلى جانبالمعايير الإدارية الضمنية، والتي تضم التعليمات والمنشورات والتوجيهات وأخيرا التدابير الإدارية الداخلية، وكلها موجهة للتنظيم الإداري الداخلي، الأمر الذي جعل رجال القانون الأوائل يخرجونها من دائرة الرقابة القضائية الإدارية، لكن هذا الحل سرعان ما أدى إلى «تحصينها» بشكل هدد المراكز القانونية للأفراد،لذلك تراجع القضاء الإداري اليوم عن موقفه السابق، متجها إلىتوسيع رقابته عليها في إطار المشروعية، هذا الاتجاه الجديد – بدوره - اصطدم بمشكلة معيار تحديد الاختصاص القضائي الإداري، بسبب الطابع المختلط لهذه الوثائق، حيث تتسم بالطبيعة الإدارية الداخلية من حيث الشكل، في حين أن جوهرها يخفي كثيرامن الخصائص التنظيمية، وهيالنتيجة التي حتمت على القضاء الإداري المقارن قبول الطعن فيها بالإلغاء.

**الكلمات الدالة:** التدابير الإدارية الداخلية، التعليمات والمنشورات الإدارية، مبدأ المشروعية، دعوى الإلغاء.



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