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"The evolution of the partition system of jurisdiction and the nullity of administrative measure "

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The thesis proposes the attempt to reconstruct the evolutionary process of the system of partition of jurisdiction for being able to deepen the problematic ones tied to the application of the criterion of partition previewed in Constitution and based on the distinction between subjective legal positions made to be worth, considering also the recent work of coding of the defects of the administrative measure realized from the Law n. 15 of 2005.

The first chapter it of the thesis, in particular, travels over the evolution of the partition system between civil and administrative justice since the times of the Reign of Sardinia till the end of the Twentieth century. Passing through the appraisal of the contents of the Law that abolished the administrative jurisdiction, of the Law that instituted the Quarter Section of the Council of State and of the Law that in 1923 instituted the exclusive jurisdiction of the administrative judge, it is reached to examine the terms of the debate that were developed to the first of the 1900's on the purposes of the baby administrative jurisdiction and on the nature of the legal positions that it meant to protect, debate that seemed to find a definitive solution in the c.d. Agreed jurisprudential of 1930.

The thesis, therefore, continues through the examination of the intense activities coaches of some of the norms of our Constitution in matter of jurisdiction and partition between civil and administrative jurisdiction, and describes the formulation that, in conclusion, the Constituent understandings to give to the system of the jurisdictional protection of the subjective rights and the interests of the citizen in toward the administration. Successively it comes faced a fundamental passage of the evolutionary process of partition of jurisdiction: the attention, in fact, is concentrated on the Court of Cassation sentences of years Forty in matter of partition. As a result of the Agreed one of 1930, in fact, the Supreme Court had stated the existence of a remarkable confusion in the identification of the legal positions subtended to the controversies and, called to decide on partition of jurisdiction, had been looked at forced regularly to deny the jurisdiction of the civil judge in all those controversies in which it recognized the existence of an interest towards the administration, with the consequence that the sphere of jurisdiction of the civil judge shrinked itself and it was impossibile to exercise the power of remove

the effects of the administrative measures, wich was recognized by the Law that abolished the administrative jurisdiction. The judge of the jurisdiction, then, to the aim to place remedy to dictates situation, decided to fix a tightening criterion that he concurred to establish with exactitude when a controversy regarded the interests toward the administration and when, instead, the subjective rights: quoting the emergent theory of the weakening, for which the interest toward administration other is not if not a subjective right that has a jam quickly because of its refering with the general interest and the discretionary power of the administration, the Cassation asserted several times that it existed a direct and unavoidable relation between the exercise of the power and the jurisdiction of the administrative judge and established de facto the equation deficiency of being able = violation of a subjective right, bad use of the power = violation of an interest legitimizes. It dictates formulation did not lack to provoke wide perplexity in doctrine as it was doubted which it had to be the moment in which the degradation of the right would have been had and it was worried to us in characterizing which, between invalidity and nonexistence, was the defect that plagued the provision emitted in deficiency of power.

Sin from publication of first study systematic on problem of invalidity of action administrative, in fact, was evidenced remarkable confusion conceptual between categories of nonexistence, of invalidity and of annulment, that they very turned out delineated in the Germanic pandettistica but not also in the Italian doctrine, initially absorbed in the search of the features of specialties that distinguished the administrative action from that one of negotiation and influenced from the French civil tradition, for which could not exist invalidity apart from those express previewed for law. The process of assimilation of the categories of German origin, therefore, had happened a lot slowly and only with the work of O. Ranelletti and the elaboration of the theory of the public legal store, it had been had, the fulfillment of the process of homologation between the action of private right and the administrative action is under the profile works them that under that pathological one. The foretold theories, if also continued from authoritative exponents of the administrative doctrine of the age, came criticized from many authors who thought

that the theory of the administrative invalidity had to be reconstructed to the light of the positive right, with the consequence that only two had to be the administrative invalidities: the annulment and the nonexistence. In jurisprudence, moreover, the theories of the pandettistica did not find acceptation and, thus, a serious ungluing between the conclusions was created which reached era the majority doctrine and the jurisprudential right. At a distance hardly ten years, then, the Supreme Court returned to pronounce itself on the problem of the deficiency of being able and revalued the positions expressed in 1949, ending in order to amplify of the capacity: the deficiency of being able in abstract, in fact, was possible only in rarest cases of school and it had not guaranteed that re-expansion of the jurisdiction of the ordinary judge who had been originally wished from the Cassation. Consequently, the United Sections asserted that the power of the administration in the exercise of its functions had to be assumed nonexistent (with consequent negation of the degradation of the subjective right in interest not only legitimizes) in the cases of lacked attribution the power from the norm but also in the event of lack of the foundations for its exercise. Near the jurisprudence of the Supreme Court the deficiency of being able in concrete found wide continuation and the principles above all in matter of provisions were asserted some in almost constant and unanimous way descoling instruments adopted in absence or after the expiration of the declaration of public usefullness. The deficiency of being able in concrete, of the rest, concurred with the ordinary judge to reconquer the land that had been lost in the comparisons of the administrative judge as a result of the Agreed one of 1930: if with the deficiency of being able in abstract, in fact, it had been able to only take care itself of the reply of the presence of the subjective foundation of the action, with the deficiency of being able in concrete returned to inquire on all the other foundations, comprised the historical situation he acclimatizes them, and therefore on all the conditions and the elements that were present in the cases that defined the single one to be able and that they were express in elastic terms, as the public usefullness and the urgency. Supported from the deficiency of being able, in some cases, the ordinary judge even succeeded in to control the exercise of the discretionary power from Public Administration. It was for that the administrative judge showed quickly from hostility regarding the deficiency of being able in

concrete, own and above all in the matter of the expropriation for public usefullness and in particular in the cases of qualification of the emitted autocratic measure after the expiration of the declaration of public usefullness that is according to a not containing declaration the terms of beginning and completion of the intense activities and for the adoption of the expropriation decree.

After this deepening on the theory of the deficiency of being able in abstract and concrete, then, the first chapter proceeds in the description of the evolution of the system of administrative justice that followed to the advent of the Constitution: the attention comes focused on the legislation of years Ninety and on the Decree Legislative n. 80 of 1998, with which the borders of the exclusive jurisdiction of the administrative judge were expanded like never before had been made. The first chapter it, therefore, is concluded with the description of the appraisals contrasting that, of the reform of 1998, they were given from the Court of Cassation and the Council of State, and pronounces with it of the Constitutional Court that declared illegittimo for delegation excess article 33 of the Decree Legislative n. 80 of 1998, in the part in which it devolved to the exclusive jurisdiction of the administrative judge the controversies in matter of publics services without to specify of the limits, and article 34, codicil 1, in the part in which it devolved to the exclusive jurisdiction of the administrative judge the controversies in matter urban planning and building also in presence of mere behaviors of the administration.

The second chapter, dedicated to the examination of the most recent jurisprudence of the Constitutional Court in matter of partition of the jurisdiction, has beginning there where the precedence had been concluded: the new pronounces of unconstitutionality of codicils 1 and 2 of article 33 and codicil 1 of article 34 of already cited Decree the Legislative one n. 80 of 1998, for like introduced from the Law n. 205 of 2000. The attention comes, in fact, headed at the contents of it pronounces n. 204 of 2004, from which four principles come proceeds, profits to the continuation of the thesis: a) the administrative judge is the natural judge of the interests legitimizes and not already the judge of administration; b) the interest I legitimize exists which subjective legal situation in head to private every which time not only is the exercise of a power from the administration but said power it is

exercised with autocratic power, that is by means of actions of provvedimentale nature or substitutive or integrating actions of first; c) the legislator does not have flood discretionary power in widening the number of the matters of competence of the exclusive jurisdiction of the administrative judge but it can make it if matters regards also legal positions of interest I legitimize, that is legal positions for the protection of which it would be, however, previewed the jurisdiction of legitimacy of the administrative judge; d) the compensation other is not that one of the modalities of jurisdictional protection is of the rights that of the interests modality legitimizes, with the consequence that the cognition of the compensation is up to the judge who has cognition on the legal position made to be worth. The examination, therefore, proceeds through the appraisal of the practical fallen back ones of the foretold one pronounces, in matter of services publics, matter of building and urban planning (with a due reference to the successive one pronounces of the Constitutional Court n. 191 of 2006), in matter of compensation of the damage from violation of interests legitimizes and in prejudicial matter of administrative. According to chapter it, therefore, two pronunce is closed with the examination of others of the Constitutional Court: the n. 77 and the n. 140 of 2007. Before it faces (and it resolves) the problem of the traslatio iudicii (disciplined, successively, by article 59 of 18 Law n. 69 of 2009), asserting that the plurality of the judges and the jurisdictions, characterizing our jurisdictional system, cannot means a minor effettivity, or quite, in a nullify the jurisdictional protection of the legal positions of the citizen, as it dictates plurality has been recognized and consecrated from the Constituent in order to assure, on the base of distinguished competences, more adapted answer to the question of justice of the citizen. The second one pronounces, instead, it faces the problem of I leave again of jurisdiction in matter of absolute rights and constitutionally guaranteed: asserting that a autocratic power of Public Administration also in presence of absolute a subjective right can exist, which that one of the health, the Court recognizes that in sayings cases the administrative judge can know or of the annulment question that of that compensation of the recurrent one, considered that it has flood dignity of jurisdictional organ, equal to the ordinary judge. Indeed, the Court continues, in these cases the administrative judgment not only assures the protection of every

right for effect of the requirement, coherent with the principles of which to articles 24 and 111 of the Constitution, to concentrate davanti to an only judge the entire protection of the adverse citizen the modalities of exercise of the public function, but also because that judge is suitable to offer full protection to the subjective rights, also constitutionally guaranteed, been involved nell' exercise of the administrative function.

The third chapter recalls it the considerations that had been made in the first one in matter of deficiency of being able and defects of the administrative provision and passes to carefully examine the doctrine and jurisprudential evolution of the institute of the invalidity of the administrative provision from the first half of the 1900's till the work of contained coding in the Law n. 15 of 2005. It dictates Law, introducing in the Law n. 241 of the 1990 articles 21 *septies* and *octies*, for the first time supply a definition of the defects of the invalidity and the annulment of the administrative provision: if with respect to the annulment, but, the legislator limits itself to confirm this that already was previewed from the trial-like norm and that nobody had never put in argument, and that is that the annulment is generated from the violation of law, the incompetence and the excess to be able, with respect to the invalidity the legislator adopts instead a more complex choice. Trying to take position in the tormented debate existed and existing on the topic, in fact, he tries translate in norm the result to which are landed doctrine and jurisprudence and characterizes four compulsory cases of invalidity: the violation of norms of laws that express preview the invalidity of the provision for said circumstance, the absolute defect of attribution, the presence of essential structural defects and, at last, the violation or the cheat of the sentence. Analyzing the single cases of invalidity of the administrative provision, it is demonstrated that the result which reaches the legislator somewhat turns out lacunoso and not suitable to resolve many of the interpretative doubts that were before the new law. Under the trial-like profile, then, the acknowledgment of the defect of the invalidity in the administrative right appears not supported from specific rules in order to make to be worth the defect in the administrative process and, under the profile of I leave again of jurisdiction, the

invalidity of the administrative provision leaves wide spaces of interpretative contrast.

The attention, therefore, is concentrated on the consequences that the coding of the defect of the invalidity produces on the system of leaves again of the jurisdiction. The first observation that comes made is that from the reading of the disposed arranged one of cited articles 21 *septies* and *octies* it is gained with certainty that the legislator has meant to less clear every doubt with respect to the existence or in the administrative right of c.d the virtual invalidities, that is of those cases of invalidity that the Civil code previews for the contract contrasting imperative norms that, also express not arranging the endorsement of the invalidity for the case of their violation, they introduce a such relevance to make to appear inadequate the remedy of the annulment. If, in fact, for article 21 *septies* the provision is null single that violates norms that for their violation preview the invalidity express and for 21 article octies the law violation determines in all the other cases only the annulment of the measure, from the disposed arranged one of the two norms it can be inferred that the virtual invalidity in the administrative right cannot exist. The second observation that comes made is that to the hypothesis of the invalidity for absolute defect of attribution, previewed by the article 21 *septies*, must be reported not only to the cases of absolute defect of being able and absolute incompetence (rather improbable cases in the daily praxis) but also all those cases in which if also the law abstractly attributes to the power to the administration, it uses the power without the subsistence of the right or fact foundations (makes reference to cases in which there's a complete difference between the abstract case previewed from the attributive norm of the power and the concrete case in which the administration expects of exercising that power).

To the light of the foretold considerations and the principles obtained previously from the sentence n. 204 of 2004, then, are revalued critically the use made from the Cassation in the course of the last ones Fifty years of the theory of the deficiency of being able in concrete. And in fact, except various and expressed law disposition, a null provision can be had and totally unproductive of effects single if it lacks the attributive norm of the power or is absolute incompetence or if you it has

been violation of norms that characterize the foundations for the acknowledgment of the power in head to the administration. Various, if one is in presence of a violation of norms that concern to the exercise of the power and that they find in the development of the administrative procedure the within of their application, is had a voidable and productive provision of effects end a lot that it does not come annulled from the judicial authority (or the same administration, in the event of exercise of the power in self-defence). The fact, then, than the provision it is affection from invalidity does not involve necessarily that said defect it must be known from the ordinary judge: it's necessary to definitively deny, in fact, the idea that the null provision is not suitable to shape in head to its adressee a legal position of interest I only legitimize but of subjective right. Leaving from the task that the interest I legitimize it is not born from the degradation of a right but it comes to existence in the moment in which the law it attributes to the administration the autocratic power and can be made to be worth in the moment in which the private one it starts or it sees started an administrative procedure regards that it (directly or indirectly) and that it is finalized to the exercise of the foretold one to be able autocratic, is supported then that if the invalidity of the administrative provision drift from the lack of one of the elements essential (structural invalidities) or from an expressed forecast of law (express law invalidity), said defect must be made to be worth in front of the administrative judge because an exercise of the power, although vitiated, has been. Differently, if the invalidity derives from the absolute defect of attribution, it must be made to be worth in front the ordinary judge as the lack of the autocratic power in head the administration does not concur to shape an interest legitimizes in head to the private one. The administration that operates ago in lack of the power at par of as it could make it a private one and the relationships between private are not object of the administrative judgment, but of the ordinary judgment. The third chapter it, therefore, after to have assessed the constitutional legitimacy of the forecast of the exclusive jurisdiction for the cases of invalidity for violation or elusion of the sentence, it is concluded with the examination of the modalities with which the invalidity of the administrative provision can be made to be worth: the problem of the acceptability of the declaratory judgment actions in the administrative process, the problem of the legitimacy to make is taken an

examination to be worth the invalidity of the provision and the objecting by the office of the same one, the problem of the the term for the action, the problem of the eventual compensation action in the comparisons of the administration for damage from null measure.

The thesis, therefore, is concluded with a reference to the delegation that the Parliament has given to the Government in order to proceed to rearranges of the administrative process to the aim to adapt it to the enforced norm in matter of administrative justice and to the most recent jurisprudence of the constitutional Court and the advanced jurisdictions, let alone to the norms of the Code of civil. It is evidenced that in said delegation it is previewed, among other things, the mandate to preview in the administrative process the declaratory judgment actions and it is wished that the Government very knows to take advantage of the occasion for a renovation of the administrative process and to render the system of the more harmonic and more suitable justice to guarantee the full protection of the subjective legal positions of interest toward the administration and of subjective right.