URBAN LAW, EMERGENCY AND RECONSTRUCTION. AN ESSAY FROM L'AQUILA EXPERIENCE

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Abstract

This paper discusses some issues related to urban law, emergency and reconstruction after a natural disaster, such as what an earthquake is, starting from the seismic event which affected L'Aquila in 2009, that has been considered a model that has influenced the next experiences and it is still central in the Italian debate about the normative instruments to manage the emergency and the consequential rebuilding phase.

It assumes the specific perspective of "land-use planning" (the Italian, *Governo del territorio*) as the Italian Constitution defines this matter.

The essay addresses the question of urban planning with a special attention to the reconstruction plans, comparing the last Italian earthquake experiences. These plans have a fundamental role to rebuild "where it was and how it was" but they are usually part of a more ambitious objective to promote the development of the affected areas. The article also analyses the discipline of the private re- building activity – which is the core of the actions managed to overcome the earthquake consequences – and the questions related to the chronic delays of the public reconstruction.

Finally, it expresses some final considerations about the Italian legislative trend to reduce the relationship between urban law, emergency and reconstruction to the prevalence of the emergency, which boundaries have been expanded up to include the activities necessary to the social, economical and physical rebuilding.

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1. The study object and its contents

Ten years ago, the 6th April 2009[1], a terrible earthquake destroyed L'Aquila, a city in the centre of Italy and regional capital city[2]. The relevance of this earthquake is linked to two specific reasons: the first one, is the extension of the affected territory; the second one, is related to the choices made by the Italian legislator to face the emergency and later the re-building process.

Before L'Aquila, Italy had already experienced four different and relevant earthquakes: the Belice one (in 1968), the Friuli

[1] The seismic events started at the end of March 2009. These facts were underestimated by the special Commission based on the Department of Civil Protection (*Commissione Grandi Rischi*) who was accused of not having alerted local population, which was affected by the disastrous earthquake after only 7 days. This fact was the central event of an important penal trial which had great importance in the penal debate. About this issue, see A. Amato, A. Cerase, F. Galdini (eds.), *Terremoti, comunicazione, diritto. Riflessioni sul processo alla "Commissione grandi rischi"* (2015); C. Crispi, *Disastri naturali e responsabilità penale: criticità relative al c.d. processo "grandi rischi"*, 7-8 Giur. Penale web (2018).

[2] According to the official data reported by the Italian Civil, 308 people died and about 1600 were injured. The Italian Civil Protection assisted about 67500 people. Among 77426 buildings, only 49% of them were inhabitable, more of 25% of them were deeply damaged and 5% were completely condemned because of external risks. About these data, see G. J. Frisch, *L'Aquila. Il trionfo dell'"urbanistica dell'emergenza"*, 1 Democrazia e diritto 117 (2009).

one (in 1976), the Irpinia one (in 1980) and the Umbria – Marche one[3], in 1997[4]. Despite their dramatic consequences, especially in the Southern Italy, all those events involved small and medium cities and an area less extended than L'Aquila. The earthquake of 2009 affected the city of L'Aquila and 56 other Municipalities: a territory of 2400 km sq with a population of 140.000 inhabitants (the so – called "*crater*"). The centre of the city was destroyed and one inhabitant out of three lost his/her house.

To face this emergency the Italian Government chose a centralized policy with one specific and preeminent goal: giving a house to the citizens before winter. To focus the world attention on the Italian disaster, the Group of Eight meeting (G8) was moved from Maddalena Island to L'Aquila.

For a long time, all those activities had only one direction: the central Government and the Head of the Department of the Italian Civil Protection. Local authorities and communities were excluded from the management of the initial emergency phase. The earthquake disrupted the lives of the local institutions; a part of the citizens lived in the camps set up in different areas of the "*crater*"; another part of them moved to the Adriatic Cost close by, hosted in hotels or private houses.

This brief initial picture of the situation is central for the aim of this paper, that deals with the answers given by urban law to the questions asked by the emergency and by the reconstruction, starting from L'Aquila earthquake, which has been considered a model that has influenced the next experiences and it is still central in the Italian debate about the normative instruments to manage the emergency and the consequent rebuilding phase.

This paper assumes the specific perspective of urban law or, *rectius*, of "land-use planning" (the Italian, *Governo del territorio*) as the Italian Constitution defines this matter[5]. Because of that,

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[3] For a detailed analysis of this earthquake, see F. Barberi (ed.), *1997-2007: dieci anni dal sisma: oltre la calamità: sviluppo e innovazione* (2007). About Marche Region, S. Catalino, V. Zenobi, *Marche 1997. La dispersione non è un bene, spostare le persone nemmeno*, 13 *Dialoghi internazionali – Città nel mondo* 76 (2010).

[4] For a comparison between these different experiences, see M. Sartore, *Umbria 1997. Ricostruire "dov'era com'era". Ma basta?*, 13 Dialoghi internazionali – Città nel mondo 61 (2010).

[5] See art. 117 Const. The constitutional formulation is the synthesis of the evolution of the concept, according to the Italian Constitutional Court sentences. It started from the original idea of urbanism related to the "development of built-

it doesn't analyse deeply the Italian system of Civil Protection but it considers only the aspects related to the main topics of the essay, that are also useful to understand the context of L'Aquila's experience. To this aim, it opens with a brief introduction of the essential aspects of the post- earthquake situation and of its regulatory framework, describing the steps that led to overcome the initial emergency phase and the subsequent rebuilding process.

2. The post-earthquake framework: a brief description of L'Aquila situation

In 2009, the system of the Italian Civil Protection was ruled by l. 225/1992[6], which established the "National Service of Civil Protection" with the aim "of protecting the integrity of the life, the goods, the settlements and the environment from the damages or from the risk of damages which follow natural calamities, catastrophes and other calamitous events". The Civil Protection Department has been grounded in the offices of the Presidency of the Council of Ministers, whose President made use of the Department to reach the above mentioned purposes. This law distinguished three different categories of events and the related competences (art. 2, par. 1, let. a, b, c). The letter c) dealt with the natural

up areas" (see Constitutional Court, July 24, 1972, no. 141) and arrived at an extended definition that includes "everything which is related to the land use" (see Constitutional Court, December 29, 1982, no. 239). See P. Stella Richter, *Diritto urbanistico, Manuale breve* (2016) who describes the evolution of the subject.

[6] About this law, see C. Meoli, *Protezione civile*, *Digesto, discipline pubblicistiche*, 132 (1997), C. Meoli, *La protezione civile*, *Giorn.dir.amm.*831 (1998); L. Giampaolino, *Il servizio nazionale di protezione civile* (*commento alla legge 24 febbraio 1992, n. 225)* (1993). For a general description of the Italian Civil Protection, see C. Meoli, *La protezione civile*, in S. Cassese (ed.) *Trattato di diritto amministrativo,* parte speciale, II (2003). See also A. Fioritto, *L'amministrazione dell'emergenza tra autorità e garanzie* (2008) who describes the evolution of the Civil Protection in Italy and also compares it with other foreign experiences. For some of the most important reformations, before 2018, see F. Di Lascio, *La protezione civile nella legislazione successiva alla riforma del titolo V,* Giorn.dir. amm. 385 (2004). The current system of the Civil protection is different than in 2009 and now it's ruled by Leg. D. 1/2018, the Civil protection code; for the new system of the Italian Civil protection, after its reformation, see A. Fioritto, *La riforma della protezione civile in Italia*, *Giorn.dir.amm.* 1059 (2012). For a more general analysis of the Italian civil protection in the European context of the civil security, F. Di Camillo *et alii*, *The Italian Civil Security System* (2014).

disasters, catastrophes or other events that, because of their intensity and extent, should be faced with extraordinary powers and means. The Department coordinated the response to those events of "C-type", after the President of the Council of Ministers had declared the state of emergency.

To enact the actions necessary to face the C-type events the Head of the Department could issue ordinances "notwithstanding the whole current regulation"[7]. These ordinances could be issued to: organize and carry out the rescue and assistance services for people hurt by the event; reactivate public utilities and strategic infrastructures (in the limits of the available resources); carry out operations to reduce the residual risk, deeply related to the event, with the preeminent aim of protecting private and public safety; identify the needs to reactivate private and public facilities and infrastructure (damaged); check the damages occurred to economic and business activities, to cultural heritage, to building stock (on the basis of a procedure ruled by the ordinance itself or another one); to start to implement the first measures to face the urgent needs, related to let. D), in the limits of available resources and based on the directives of the Council of Ministers, also in agreement with the regional governments.

The President of the Council of Ministers issued the state of emergency with the decree of 6th April 2009 and he gave the powers of Commissioner – Delegate, ex art. 5, par. 4 l. 225/1992, to the Head of the Civil Protection Department, who was in force as Commissioner – Delegate until 29 January 2010, when the emergency management was transferred to the President of the Abruzzo Region (Mr. Chiodi). With the same ordinance (O.P.C.M. no. 3833, 22.12.2009) the President of the Council nominated the

[7] The power of issuing ordinances has been exhaustively investigated by Italian scholars, because it involves the most important general principles of the administrative law. Although it could not be exhaustive, see G.U. Rescigno, *Ordinanza e ordinanze di necessità e di urgenza*, in Noviss. Dig. it. (1965); R. Cavallo Perin, *Potere di ordinanza e principio di legalità* (1990); R. Cavallo Perin, *Il diritto amministrativo e l'emergenza derivante da cause esterne all'amministrazione*, in *AIPDA Annuario 2005. Il diritto amministrativo dell'emergenza* (2006); C. Marzuoli, *Il diritto amministrativo dell'emergenza: fonti e poteri*, in *AIPDA Annuario 2005. Il diritto amministrativo dell'emergenza* (2006); V. Cerulli Irelli, *Principio di legalità e poteri straordinari dell'amministrazione*, *Dir. Pubbl.* (2007); A. Cardone, *La "normalizzazione" dell'emergenza: contributo allo studio del potere* extra ordinem *del governo* (2011).

Mayor of L'Aquila (Mr. Massimo Cialente) Deputy – Commissioner Delegate. President Chiodi worked with the powers and the derogations established by the ordinances adopted by the President of the Council to overcome the emergency[8].

The Mayor of L'Aquila was nominated Deputy – Commissioner Delegate for the re-building and for the assistance to the population[9]. The ordinance gave him the task to draw up, in agreement with the President of the Province (in the limits of his competences), the re – planning of the Municipality, the strategies to ensure the social – economic recovery, the requalification of the built –up area and the harmonious rebuilding of the urban – housing – productive fabric for the re-building of the historic centre.

The other Mayors (the *crater* Mayors) had to draw up, in agreement with the Commissioner Delegate, the re – planning of the Municipalities and they had to define the guidelines for the re-building of the historic centres and the social – economic recovery of the municipalities.

The state of emergency lasted until 31st August 2012, for five and a half years from the earthquake, when the Decree Law no. 83/2012 – converted into law no. 134/2012 – in the art. 67*bis* closed the emergency state. According to art. 67*ter*, since 16th September 2012, the re-building and every intervention necessary to facilitate and to ensure the return to normal life conditions in the areas struck by the earthquake, should be managed according to the competences ruled by art. 114 of the Italian Constitution. The article established some specific aims in order to manage these competences, because they should guarantee: the complete homecoming to those who were entitled, the restoring of functions and of public utilities, the attractiveness and the social – economic development of the municipalities, with a special regard for the monumental historic centre of L'Aquila.

During the time which occurred to return to the ordinary administration, the extraordinary management of the Department of the Civil Protection laid the basis for the "L'Aquila model", that

[8] The Head of the Civil Protection maintained the competence for the contracts related to the temporary houses (C.A.S.E, the Italian acronym for *Complessi Antisismici Sostenibili Ecocompatibili*), M.A.P. (the Italian acronym for *Moduli abitativi provvisori*) and for the temporary schools M.U.S.P. (the Italian acronym for *Moduli a Uso Scolastico Provvisori)*.

[9] According to the ordinance no. 3845/2010.

deeply influenced the urban choices and the "land-use planning" of the regional capital city and of the other municipalities.

Despite the complex regulatory framework, the reconstruction of L'Aquila can be divided in two phases: the phase after the L. no. 134/2012, the so – called "Barca's Law"[10] and the previous one, regulated by the Law Decree no. 39/2009 and the ordinances adopted by the Head of the Civil Protection, implementing that Decree. Barca's Law, in the art. 67*quinquies* provided for the adoption of a consolidated text (the Italian *Testo Unico*) to collect the entire regulation about the earthquake of 2009. Currently, this law doesn't exist. The only consolidated text of the regulation concerning the earthquake has been released by the Office for the rebuilding coordination, grounded in the offices of the Commissioner – Delegate Mr. Chiodi; this is not an official text, but it helped private citizens and public authorities to select the right rule for their needs and, unfortunately, it was updated at 7th June 2012.

3. The temporary – emergency housing: the "new towns" as an example of "urban planning upside – down"

The Italian law – specifically, the consolidated text about the construction activity, R.P.D. 380/2001 (the Italian *Testo Unico dell'edilizia*) – establishes a precise relationship between the construction activity and the urban planning: the first one cannot be in contrast with the second one[11]; the urban planning must precede the building activity[12].

It's not a formal relationship: a plan has the primary, despite non-exclusive, objective to govern the transformation of the cities and to discipline the growth areas. According to the Italian fundamental urban law[13] (art. 1) it's the main instrument to regu-

[10] Mr. Barca was the Minister for territorial cohesion.

[11] This is not an autonomously expressed principle. Despite that, it can be seen from the articles that discipline the administrative procedures for the building activity. Art. 20, par. 1 (that disciplines the building permit) and art. 23, par. 1 (that disciplines the Italian *s.c.i.a.*, *segnalazione certificate di inizio attività*, starting activity notice) put the preliminary legal condition of their conformity to the urban plans (adopted and approved).

[12] This principle is implicitly expressed by art. 9, R.P.D. 380/2001, that disciplines the building activity in the absence of urban planning.

[13] It is Law no. 1150/1942, the so called "*legge fondamentale urbanistica*".

late "the spatial planning and the building increase of the populated areas and the general urban development of the territory".

This statement, throughout the years, has received an extensive interpretation, different from its original meaning, that has given more value to the second part of the article, about the "general urban development of the territory". Finally, it expresses the need that a city has the physical structures necessary to use a site and to manage a specific activity – the primary urbanization works – and what is necessary for its inhabitants' social lives (public spaces, schools, churches, public offices, shops, recreational spaces, the secondary urbanization works). Moreover, it means that a plan shouldn't serve only the public interest for the orderly development of the territories but it should guarantee several other public interests, mostly related to constitutional principles (art.3, 9, 32, 42 Const.). The plan should also reflect the expectations of its community, expressed not only by its political representatives but also by its direct participation in the urban planning procedure[14]. This should be the preliminary context for every activity, especially the building one.

This premise is particularly relevant to understand the consequences of the choices made by the Italian Government to manage the housing emergency after the earthquake and the role of urban law.

For the first time, along the history of the Italian earthquakes, the emergency was addressed by permanent houses where citizens were supposed to live temporarily. The political project to give a house to the homeless people immediately was realized by a "temporary city". In less than 10 months, in different areas of the Municipality, 19 housing estates arose and about 15.000 accommodations were available. Before returning to their houses, people would have to move from the tents to the "new towns", the "Progetto C.A.S.E.", where C.A.S.E. in the Italian acronym for *Complessi Antisismici Sostenibili Ecocompatibili* (anti–seismic, sustainable and environmentally compatible estates).

At the root of this choice there was a wider idea of emergency, which included activities like the building of permanent houses, with the specific aim not to provide only the security of people affected by seismic events but to face the long-term incon-

[14] Council of State, IV, May 10, 2012, no. 2710.

veniences that it had caused them. Some urgent measures (such as giving a temporary accommodation to citizens) became definitive, the relationship between urban planning and building activity was inverted and the emergency and ordinary management were confused.

According to the Italian Constitution[15], Regions have the legislative power about the subject "civil protection", except for the principles, which are fixed by the State[16]. Despite this State – Regions concurrent legislative powers, the Italian Constitutional Court[17] has allowed the State intervention also at the regional level, in accordance with the principle of subsidiarity. When it is necessary to satisfy needs of a unique character, a State law can discipline also a regional subject; to avoid the risk of the ousting of the Regions, the constitutional judges had specified that this legislative power should respect the principles of reasonableness (it means that those needs of a unique character must really exist), of proportionality (the State intervention is absolutely necessary) and of loyal cooperation (State and Regions should conclude specific agreements)[18] . The subject of "civil protection" is one such case[19] and it's also a "cross – sectoral matter": it means that it could intercept other linked issues, like environment or land-use planning[20]. Therefore, a civil protection law could discipline some aspects related to the rebuilding activity, even more if the disaster event was an earthquake; likewise, the State could also intervene at the regional level, within the just mentioned limits dictated by the principle of subsidiarity.

The anomaly of L'Aquila situation wasn't the non - compliance of the formal competences but the choice of transforming an activity that usually belongs to the ordinary authorities in an emergency intervention: the future city was drawn using extraordinary competences, without the complex interests' assessments that are typical of the urban planning activity. A Law Decree and

[15] Constitutional Court, March 24, 2017, no. 60; Constitutional Court, April 05, 2018, no. 68.
[16] Constitutional Court, February 16, 2012, no. 22.
[17] Constitutional Court, October 1, 2003, no. 303.
[18] Constitutional Court, January 21, 2016, no. 8.
[19] Constitutional Court, October 30, 2013, no. 327.
[20] Constitutional Court, December 2, 2019, no. 246.

the ordinances substituted[21] the administrative activity that usually disciplines the "land-use planning". Surely, the local authorities contributed to the decisions, but as the final (and not decisive) link in one strongly centralized chain and in front of a city, *de facto*, drawn by the Law Decree and ignoring the (still) existent urban plans.

L. D. 39/2009 shows the main contents of the "urban - planning upside -down". Its art. 2 assigned to the Commissioner – Delegate (the Head of the Civil Protection Department) the design and the construction phase of those houses; for this purpose, he had to approve the interventions plan (in Italian, *Piano degli Interventi*), after a specific consultation with local authorities (in a conference of services), that acted by a majority of those present and voting[22]. According to art. 2, par. 4 the areas were chosen by the Commissioner – Delegate, in agreement with the President of the Region and consulting the Mayors of the involved municipalities. If the Interventions Plan was in contrast with the general city plan, it could change it. In summary, to localize the areas, the pre-existing city plan was not considered; the temporary buildings could be constructed in every place, also in derogation from the urban rules in force[23]. The C.A.S.E. were built in areas for agriculture purposes, increasing the sprawl in those spaces, without considering other alternatives, like brownfield sites[24], the available housing stock or some municipality areas that were on sale[25]. In a short period, thanks also to an anomalous expropriation proce-

[21] More generally, for the relationship between emergency and substitutive powers, see M. Bombardelli, *Gli interventi sostitutivi nelle situazioni di emergenza*, in *AIPDA Annuario 2005. Il diritto amministrativo dell'emergenza* (2006).

[22] This consultation wasn't ruled by l. 241/1990 (the general law about administrative procedure) but by a specific ordinance of the President of the Council, O.p.c.m. 30th april 2009, no. 3760. P. Properzi, *La questione urbanistica*, in P. Mantini (ed.), *Il diritto pubblico dell'emergenza e della ricostruzione in Abruzzo* (2010), gives an important report of the administrative procedure, where we can read (p. 63) that the technical offices (both Region and Province) had many doubts about the proposals of the Commissioner Delegate, that were balanced by the positive evaluation of the Municipality. As Properzi writes, politics prevailed on the technical rationality.

[23] See the resolution of the City Council, 25 April 2009, no. 58.

[24] A. Giusti, *La rigenerazione urbana. Temi, questioni e approcci nell'urbanistica di nuova generazione* (2018); M. Passalacqua, A. Fioritto, S. Rusci (eds.), *Ri-conoscere la rigenerazione. Strumenti giuridici e tecniche urbanistiche* (2018).

[25] See, P. Properzi, *La questione urbanistica*, cit. at 22, 62.

dure, a "none – city, without roads, public utilities and without a permanent population" was built[26].

4. Which plan for rebuilding?

The birth of the Progetto C.A.S.E. is deeply linked with another important choice, that had the aim of citizens' safeguard but influenced the future asset of the city.

The O.P.C.M. no. 3753/2009 gave the task to the Mayors to adopt every measure that was necessary and urgent to avoid dangerous situations and to give assistance to affected citizens. According to that ordinance, the Mayor of L'Aquila closed the historical center and no – one, without authorization, could enter (it was the "red zone", in Italian *zona rossa*). It means that every activity and house based on its perimeter should have been moved to another area: the city lost its center and new and sprawled centers were created. It was a sort of suspension of the city's life, that moved to temporary places and that was supposed to be reactivated thanks to the "reconstruction plan", ruled by 14, par. 5*bis* of the mentioned L.D.

In the general context of an emergency regulation, the Parliament (when the Decree converted into Law) introduced a planning instrument, the reconstruction plan, to define the strategic lines to ensure the economic and social recovery, the redevelopment of the town and to facilitate the return of the displaced persons. It considered only the historic center, that should have been defined according to the M. D. 1444/1968[27], corresponding to the "A zone". The Mayors (and not the City Councils) had the competence for their adoption, in agreement with the President of the Region. The Decree was too generic and it didn't give sufficient details about the juridical nature of this plan, its relationship with the other plans, about the procedures and the deadline to adopt them.

At the same time, the Decree in the art. 2, par. 12*bis* gave the task to the "Municipalities" (not to the Mayors), in agreement with

[26] Quoting again P. Properzi *La questione urbanistica*, cit. at 22, 62.

[27] It is one of the most important Italian urban disciplines. Briefly, it identifies the different areas included in a general urban plan (the Zones) and disciplines the limits that should be respected in each of them, to ensure the population a minimum equipment of urban standards.

the Deputy – Commissioner Delegate (the President of the Region), to set the re – town planning, defining the strategic lines to ensure the economic and social recovery, the redevelopment of the city, facilitating the return of the displaced persons and guaranteeing a harmonious reconstitution of the urban and productive fabric, also considering the C.A.S.E. estates.

This article could have different meanings: it could be interpreted as a formal (and not so necessary) statement of the ordinary competences about the land-use planning; it also could be interpreted as a special statement, that has the main purpose to bring the emergency choices (especially the *Progetto* C.A.S.E.) back to the ordinary planning instruments; finally, it could not be interpreted, but only red as a disharmonious presence of two uncoordinated rules, because it doesn't define the specific relationship between general and special re-building plans.

The L.D. didn't fix a term to start those re-building plans and, at the same time, put the re–planning activity (ex art. 2, par. 12) in an undefined future dimension. Finally, and above all, it didn't specify the juridical nature of the re–building plans, if they are special urban implementation plans or if they had the same value of a general town plan.

All those elements led to a first result: the city arose and got organized all about the choices linked to the reconstruction of the private houses, without the long-term vision that is necessary to plan and to really re-build a community and its territory. The severity of the damages and the localization in the historic centre were decisive for the allocation of the citizens, without considering the proximity to their houses or to the other places where they managed their daily activities before earthquake.

The town planning was "suspended", in favour of the priority of the temporary houses and private reconstruction and waiting for the re-building plans. Looking at this situation, the realization of those plans would have been the starting point for the return to an ordinary management: people could have left the temporary houses, the core of the city could have resumed its activity and the re-planning activity would have linked all those fragmented parts.

This sequence wasn't so linear as it has been described.

The bureaucracy delays and the slow launch of the reconstruction plans obstructed the hoped reorganization of the func-

tions and of the competences; add to this, the fact that those plans had the ambition, difficult to realize, to discipline the "physical" reconstruction and to restart the social and economic lives of the historic centers.

5. The reconstruction plans: how they could be a model for the emergency urban planning. On balance after L'Aquila's experience

The reconstruction plans are not original urban instruments; they were introduced, for the first time, in 1951, after the second world war[28]. Their main aim was "to make it quick"[29], beginning from the most urgent constructions but also trying to make them according to an idea of rational development of the cities. Because of that, those plans were less complex than an ordinary one, they had a short term (not more than ten years) and they allowed direct interventions by the State or by private individuals, thanks to a "concession" given them by the Public Works Ministry. The Municipalities that were in a specific list approved by that Ministry would have to adopt them; the law established faster land expropriation procedures. Those plans "suspended" the Italian fundamental urban law (many of them for a term longer than ten years) and they often introduced a punctual and fragmented discipline, without the rational and unitary vision that was necessary in such situations[30].

In the course of the time, they have been considered the most efficient instruments to face the emergency and to ensure a quick rebuilding. In fact, this choice has been repeated after the Irpinia earthquake and for the Friuli one. Also, the recent laws about the last earthquakes, in 2012 and 2016, have introduced those urbanistic instruments[31].

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[28] For a description of those plans, see E. Salzano, *Fondamenti di urbanistica* (2017); F. Salvia, F. Teresi, *Diritto urbanistico* (1992).

[29] Quoting E. Salzano, *Fondamenti di urbanistica*, cit. at 28, 110.

[30] See again, E. Salzano, *Fondamenti di urbanistica*, cit. at 28, 109.

[31] About these last experiences, see T. Bonetti, *Diritto amministrativo dell'emergenza e governo del territorio: dalla "collera del drago" al piano della ricostruzione*, *Riv.* Giur. Ed. 127 (2014); F. Spanicciati, *Emergenza sisma e nuovi strumenti decisionali: la pianificazione delle zone colpite dai terremoti 2016 – 2017*, 3 Istit. Fed. 711 (2017).

The experience of L'Aquila could be a "case study" to analyse which role they could really have to be a useful emergency urban instrument.

To this specific aim, it's necessary to introduce their essential elements, comparing them with the "ordinary" discipline.

The first point concerns the law sources and the competences.

According to the Italian Constitution (art. 117), the urban matter is shared between State and Regions; those plans had only a state emergency discipline, the L.D. 39/2009 and the Decree of the Commissioner Delegate (D.C.D.) n.3/2010.

In accordance with the Italian consolidated text about local authorities (Legislative Decree no. 267/2000), the Municipalities should have the tasks concerning communal territories, land use and planning (art. 13) and the City Council should decide about urban plans. The just mentioned emergency laws stated a complicated and centralized procedure, where the Mayors and the Deputy Commissioner Delegate (the Region President) took every decision.

For those reasons, many Authors defined the Decree 39/2009 (and the subsequent ordinances) the typical expression of an "urban town planning under the Commissioner"[32].

In fact, this is what emerges reading the procedures.

The first step[33] (art. 2, D.3/2010) of the procedure was the redrawing of the boundaries (the Italian *Perimetrazione*), necessary to develop the subsequent reconstruction plan. The boundaries were redrawn by the Mayor but they were approved with the partnership of the Commissioner Delegate; it couldn't innovate the pre-existence situation because the Decree expressly stated that it was a "mere highlight" of the parts of the territory, the structures, the urbanization projects and the areas where it was necessary to intervene (art. 3, D. 3/2010).

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[32] See G. J. Frisch, *An Inertial Reconstruction. The Challenges and Failures of Governance and Planning*, in A. Coppola, C. Fontana, V. Gingardi (eds.), *Envisaging L'Aquila. Strategies, spatialities and sociabilities of a recovering city* (2018).

[33] For this procedure, see also P. Mantini, *Lo ius publicum della ricostruzione in Abruzzo*, in P. Mantini (ed.), *Il diritto pubblico dell'emergenza e della ricostruzione in Abruzzo* (2010). About some concrete experiences of reconstruction plans, see L. Caravaggi, O, Carpenzano, A. Fioritto, C. Imbroglini, L. Sorrentino, *Ricostruzione e governo del rischio* (2013).

The technique was grounded on the preliminary definition of urban-building areas (in Italian, *ambiti urbanistico–edilizi*); the reconstruction would have been based on integrated actions and, concretely, it should proceed through one or more aggregate buildings (the Italian, *aggregati*) (art. 4, D. 3/2010).

The D.C.D. (art. 6) introduced an anomalous participative phase. The Mayor published a proposal concerning the areas of the reconstruction plans, by which he asked the interested owners to present a proposal for their properties, in 30 days from the public announcement. The proposals were evaluated by the Mayor and if the evaluation was positive, a second procedure started, divided in the two classical phases of adoption and approval. The Mayor adopted the plan (after informing the Delegate Commissioner) and it was filed at the Municipality secretariat; everyone who was interested could submit observations, for the next 15 days. Within ten days following the deadline to submit those observations, the Mayor should convene a conference of services, to receive opinions, go – head and every approval required by law and necessary to protect public interests, concerned by different authorities. The Municipality Council approved the plan; the D.C.D., only for the city of L'Aquila, gave special and substitutive powers to the Mayor, if the Council didn't provide after the conference of services. The approval was also valid as a declaration of public utility and urgency in order to realize public works included in those plans.

The plan could be implemented in different ways, ruled by art. 7. It was a complex discipline, which referred to the ordinances issued by the President of the Council to manage the reconstruction. The reconstruction plans could be implemented by single interventions, that involved one or more aggregate buildings. If the buildings were heavily damaged, they should be realized by integrated plans; in this case, the Mayor issued a public competition, to select a single implementing body, who had to project and build the public and private interventions. If some buildings had minor damages (because the level of the damages was A, B or C) they could have an autonomous reconstruction, according to the ordinance no. 3778 and 3779/2009; the article also referred to some other ordinances, mutatis mutandis.

According to L.D. 77/2009, the reconstruction plans should have also strategic contents, because they had to put the basis for

the social and economic recovery; both the law decree and the Commissioner decree didn't state anything else about this specific function. Furthermore, this activity should be combined with the more general re-planning function that the O.P.C.M. no. 3833/ 2009 gave to the Mayor, in partnership with the Province (in the limits of its competences).

With a literal overall reading of the rules, they could be, at the same time, strategic plans and urban implementation plans; despite they involved only specific areas (the historic centers), they had more extended objectives, that could intercept the finalities of the other general plans. It's significant that the committees of experts, appointed by the Minister of Territorial Cohesion, Mr Barca, gave two different interpretations of those plans. According to the juridical experts, they were urban implementation plans; the urban planning experts defined them strategic plans[34].

Those plans were considered emergency instruments but they should manage the situation following the earthquake; the result was an unclear distinction between emergency and ordinary phases, in a more general context where the emergency had a wider meaning, extended to the events not deeply related to unforeseen and unforeseeable situations[35]. It's significant that the laws didn't fix a term, that was introduced only by law 134/2012, in the art. 67*quinquies,* that gave a deadline for their adoption, in two months (120 days) from its entry into force. At the end of this transitory period, the same purposes should be entrusted to ordinary plans.

The above-mentioned art. 67*quinquies* tried to "tidying up" the past situation.

It stated that the reconstruction plans are strategic plans; it means that they can establish the financial rebuilding needs, they

[34] About the juridical nature of these plans, see F. Oliva, G. Campos Venuti, C. Gasparrini, *L'Aquila, ripensare per ricostruire* (2012).

[35] It is important to remember that L.D. 343/2011 was already in force. According to this decree the Prime Minister could issue ordinances also for public events, not related to natural disasters but that could have unusual proportions. They are the "*grandi eventi*", like the world swimming championship in Rome, in 2008 or the Funeral of Pope Giovanni Paolo II, in 2005. This provision was abolished in 2012 (by L. D. 59/2012). See, A. Cardone, *La "normalizzazione" dell'emergenza: contributo allo studio del potere* extra ordinem *del governo,* cit. at 7,180; M. Capantini, *I grandi eventi* (2010).

can discipline how to implement themselves and the timeline of the interventions in the historic centre. They cannot substitute the general statements of the existent plans, if there isn't a law that gives them that specific power. It is what emerges from the art. 67*quinquies*, that states that they can have urban contents (and they can update, modify or substitute the plans in force) but, in those cases, it is necessary a specific agreement (a Programme agreement) with the competent Province.

It doesn't deny the role of "reboot" given them, but it implicitly states that it should be limited in a short period, without "mixing up" short term objectives, more related to the emergency phase, and long terms objectives, linked to the return to the ordinary life. The Commissioner urban planning cannot substitute the democratic framework of the competences and the complex evaluations that put the basis for the vision of the city.

The art. 67*quinquies* is an important end point, useful to define the boundaries of the reconstruction plans as a model for the emergency urban planning.

Firstly, it confirms that the reconstruction is a function that should belong to the ordinary authorities and that a plan, for its own nature, could not be a Commissioner act, depriving the procedure of the democratic control that the City council could guarantee. This aspect is moreover relevant if we consider that the procedure drawn by the emergency laws didn't really involve the citizens in such relevant choices, like those concerning the reconstruction are. Realistically, it disciplines a participative phase (the public proposal and the "traditional" debate between private submissions and public replies) that aimed at the protection of individual situations (especially the right of property) related to the *ius aedificandi* and it shows a model of participation far from the "anyone's participation" introduced by the fundamental urban law.

Those last considerations may be objected, because a large participation sometimes could slow down and it could be an obstacle to the reconstruction. At the same time, the parts concerning the economic and social recovery introduce the vision of the future city and those decisions couldn't not involve the citizens, who are the addresses of those statements.

A right balance between the needs of a quick and participative reconstruction of the territories could be found through a

clear distinction between the levels of action and plans, distinguishing the different role of privates in those administrative choices. This is what the European and Italian principles of subsidiarity, adequacy and differentiation suggest.

When the natural disaster is an earthquake, the emergency phase could be extended to the first actions necessary to start the physical reconstruction of the most affected cities and to return to the houses[36]. Within these boundaries, the reconstruction plans could introduce a special regulation necessary to accelerate the procedures; in this process, the private rebuilding is central and it concerns especially the relationships between the owners and the administrative authorities and, if necessary, the third parties which could have related interests. However, if those plans have more ambitious objectives and they aspire to introduce a strategic vision of the future city, they exceed the emergency threshold and they cannot be reduced to a property issue. These plans should involve the different territorial levels, starting from the communities which live, work or study in those territories and they should gradually engage the different territorial authorities, according to their specific competences.

The different laws concerning the earthquake tried to find a solution that could combine both those requirements but they often overestimated the role of the reconstruction plans, they drew a scenario difficult to realize in front of the real situation of the affected lands or they didn't rule efficient procedures to manage a rapid rebuilding, that identified as a precondition for every consequent decision about the social and economic aspects.

The analysis of the reconstruction plans lays the attention on the binomial reconstruction – development, so essential but, at the same time, extremely difficult to realize, in front of the different demands to balance: a rapid physical reconstruction of the destroyed cities and towns, the social and economic recovery of the territories and an efficient and legal expending of public funds.

To consider that issue, it's necessary to widen the investigation, examining the essential elements of some other experiences and the role assumed by the reconstruction plans.

[36] See Constitutional Court, December 2, 2019, no. 246.

6. The difficult binomial reconstruction – development: a comparison between the last earthquake experiences

At an overall view of the last earthquake laws, the aim of the majority of the reconstruction plans is to rebuild "where it was and how it was". They are also part of a more ambitious objective to boost the economy and to promote the development of the territories.

The first important example was in Friuli Venezia Giulia, that is still considered a positive model and a successful experience[37]. In that period, the Civil Protection didn't exist and the Region was the main authority which managed the emergency phase and the subsequent reconstruction, that was included in a more general framework of economic development and land use planning. A State law (l. 544/1976) fixed the strategic lines and the intervention criteria for the subsequent regional laws and it took into consideration some strategic issues like industry, trade, craft, tourism (art. 2, par. 1), agriculture (art. 2, par. 2), public works and building activity (art. 2, par. 3).

The first and most important regional law (L. 63/1977) introduced different measures to reconstruct "where it was and how it was"; the reconstruction plans were one of them and they had a specific role, because they were implementation plans (in Italian, *piani particolareggiati di attuazione*) and the interventions were realized by single owners or grouped together in a consortium. Another part of the law disciplined the procedure to receive the public funding and the reconstruction methods; a third part concerned public and social houses and the last one the public works necessary to manage the cities (primary and secondary urbanization works) and the construction of news public works. The law no. 63/1977 didn't have specific rules about a more general urban planning, probably because the clear majority of the cities just had a town plan and a Regional Urban Plan was in force. At last, despite these laws didn't give much attention to the citizens' participation, it doesn't mean that it wasn't relevant. Local authorities, who had the responsibility for the reconstruction, worked closely with citizens and probably it was one of the first experience of an effective bottom up participation.

[37] See S. Fabbro, *Friuli 1976. La ricostruzione:* exemplum *paradigmatico o unicum irripetibile?* 13 *Dialoghi internazionali – Città nel mondo* 76 (2010).

In Friuli Venezia Giulia, the reconstruction plans dealt with private physical rebuilding and the local authorities had the competences. They hadn't a strategic economic content and those measures belonged to other instruments, the regional plans for the economic and social development, that should be divided into annual plans and district plans (art. 1, L. no. 546/1977).

Despite the laws had the same aim, the Irpinia experience[38] had less success and it is still considered one of the Italian failures; one of the causes were probably the choices made by the State law no. 219/1981. In spite of the premises of a reconstruction that should respect the local identities (art. 27), it tried to propose a different model of economic development that would have many difficulties to survive when the public funds finished[39]. It also introduced a complex urban planning system, described by the art. 28 that made it difficult to reconstruct "where it was" in a short time. This article disciplined three different kinds of executive plans, that didn't effectively run the direction "where it was". Furthermore, many municipalities didn't have a general town planning, and it also obliged them to adopt it in addition to those implementation plans. The result was a chaotic situation that both the affected administrations and the Region couldn't address.

According to some scholars[40], the model of reconstruction and development proposed in that occasion failed because of the lack of differentiated actions. Long and short term objectives were confused, as art. 28 clearly shows about town planning; the measures to face the reconstruction were extended to a larger area, that included about 687 municipalities, instead of the 71 ones of the Provinces heavily destroyed.

The most affected areas (the "*crater*") that needed rapid and efficient actions didn't have an autonomous consideration, and the

[38] For a general picture of this event, see I. VITELLIO, *Irpinia 1980. Giocavano Inter e Juventus, ma non si sa come andò a finire*, 13 Dialoghi internazionali – Città nel mondo 76 (2010).

[39] See M. Sartore, *Umbria 1997. Ricostruire "dov'era com'era". Ma basta?* cit. at 4, 63 who describes these effects of the "disaster-economy".

[40] See A. Becchi, *La ricostruzione come prerequisito dello sviluppo, e i suoi possibili esiti: l'esperienza della Campania e Basilicata*, 34 *A.S.U.R.* 10 (1989); M. Sartore, *Umbria 1997. Ricostruire "dov'era com'era". Ma basta?* cit. at 4, 62 where he also refers the opinion of Mario Rossi Doria.

first aim to give people a house and to reconstruct what the earthquake had destroyed got away.

The earthquake of Irpinia, because of the delays in rescuing and the national indignation, accelerated the establishment of the Civil Protection Department and put the basis for the modern system of Civil protection. It was a significant event but, at the same time, it was the epigone of the Italian attitude to extend the emergency over its physiological boundaries, until it became the "picklock" to substitute the ordinary competences, to introduce a relevant deregulation and to give more powers to the Commissioners, even when they weren't necessary.

This experience influenced the reconstruction after the earthquake that affected the Umbria Region in 1996[41]; the "Umbria model" tried to be different and it especially focused the attention to the physical reconstruction, distinguishing three categories, light reconstruction, heavy reconstruction and integrated reconstruction, using the Integrated Urban plans. Umbria didn't adopt the reconstruction plans and the development of the most affected area was entrusted to the so–called P.I.A.T., that were Integrated Plans for the most affected areas (the Italian, *Piano Integrato per le Aree maggiormente colpite dal Terremoto*). Those plans highlighted three directions: tourism, environment and culture but they hadn't a relevant influence: on a closer inspection, the reconstruction was the real development factor, despite it was specially addressed to the private rebuilding[42].

The experiences that preceded the earthquake of L'Aquila show that the most affected area should receive a priority attention and that an efficient reconstruction is the necessary starting point for the related actions aimed to a general development of the involved territories.

A reconstruction plan should focus on the physical rebuilding. They can be efficient instruments if they are quickly adopted, the procedures are efficient, the financial resources are adequate and if they contain a global vision of their objectives and priorities[43]. These plans involve a specific category of privates, the own-

[41] For a general framework of this event, see F. Barberi (ed.) *Dall'emergenza alla ricostruzione* (2007); S. Sacchi (ed.) *Oltre la ricostruzione* (2007).

[42] M. Sartore, *Umbria 1997. Ricostruire "dov'era com'era". Ma basta?* cit. at 4, 73.

[43] That is also highlighted by P. Mantini, *Lo ius publicum della ricostruzione in Abruzzo*, cit. at 33, 53.

ers of the buildings and who has a right of property or another real right related to the good that should be reconstructed. The scheme could be the same of the recovery plans (in Italian, *Piani di recupero*, introduced in 1978) or of the integrated interventions plans (in Italian, *Piani integrati di intervento*, that our national system has experimented since 1992[44]). They are implementation plans, that should respect the previsions of the general ones but that could derogate them, if the law specifically allows it. They are an example of "consensual urban planning"[45] that could guarantee a coordinated rebuilding process, avoiding conflicts between privates – and between privates and public administrations – where the relationship with the general plans are defined and the competence belong to the local authorities. The local authorities should define a program, the priorities and the related expense, to guarantee an ordinate and transparent procedure; private should implement them. Because of their exceptional role and the requirements of efficiency and transparency related to public funds they should have a limited term for their implementation and this rapid result could be guaranteed thanks to the provision of substitutive public powers, in case of owners' inaction.

Those plans, for their own nature, could not substitute the general urban plans, that describe the vision of the city, its physical and invariable elements, its strategic development profiles, and describes how to implement them, regulating the urban market and its development. These objectives shouldn't be achieved with a derogatory procedure or without involving the local authorities and the citizens, even if they haven't autonomous juridical situations corresponding to the property one. The choices made during

[44] For a general description of those plans and their discipline, see S. Perongini, *I piani di recupero: aspetti procedimentali e sostanziali*, II Riv. Giur. Ed. 232 (1982); M. Antonioli, *Sui rapporti tra piani di recupero e piani urbanistici generali*, I Foro amm. 872 (1985); G. Leondini, *Sulla natura giuridica dei piani di recupero,* Riv. Giur. Urb. (1989); C. Vitale, *Piani di recupero del patrimonio edilizio esistente (artt.27, 28, 30, L. 5.8.1978, n. 457),* in S. Battini, L. Casini, G. Vesperini, C. Vitale (eds.), *Codice di edilizia e urbanistica* (2013); A. Perini, *I programmi integrati di intervento: dal modello statale alla disciplina regionale,* Riv. Giur. Urb. 449 (2001); C. Ferrazzi, *I programmi integrati di intervento*, in D. de Pretis (ed.), *La pianificazione urbanistica di attuazione. Dal piano particolareggiato al piano operativo* (2002).

[45] For this effective synthesis, see P. Urbani, *Urbanistica consensuale. La disciplina degli usi del territorio tra liberalizzazione, programmazione negoziata e tutele differenziate* (2000).

the reconstruction or, more before, during the emergency phase should be integrated in the larger process of re-planning, but they cannot substitute the contents of a general plan (as happened with the C.A.S.E. project) or they cannot be confused or mixed up as happened in Irpinia. More generally, it's very difficult to face both the situations with the same instruments, with an unclear overlap of different levels (general plans and implementation plans) and of different objectives. It creates a confused distinction between the competences that cannot be avoided giving them to an only authority, how the Commissioner is.

The subsequent experiences tried to make their own the lessons of the past, with the slogan "not another L'Aquila". It is what happened in Emilia Romagna, in 2016, that introduced a model of reconstruction plans with the main objective to rebuild "where it was" and a comprehensive plan (in Italian, *piano organico*)[46] that wasn't compulsory and that should define the social and economic activities that were necessary to revitalize the areas included in the reconstruction plans, with a special attention to the historic center.

Despite that, in our Country the "temptation of the Commissioner" is still strong: the earthquake of 2016 was the occasion to introduce another authority, parallel to the emergency organization and that should manage the reconstruction phase[47]. According to the L. D. 189/2016, the Extraordinary Commissioner works in partnership with the Head of the Civil Protection Department, to overcome the state of emergency and facilitate the reconstruction. He had several tasks linked to the physical and economic recovery and he could adopt the ordinances necessary to exercise those powers, following an understanding with the Presi-

[46] For a general description of these plans, see T. Bonetti, *Diritto amministrativo dell'emergenza e governo del territorio: dalla "collera del drago" al piano della ricostruzione,* cit. at 31. About the "desire of Italians" to rebuild "where it was and how it was" and its real difficulties, F. Bazalgette, '*Where It Was – but Not How It Was': How the Sicilian Earthquake divided a Town*, *The Guardian* August 30, (2018).

[47] About this Commissioner, see F. Giglioni, *Amministrazione dell'emergenza*, in *Enc. Dir.* (2013); F. Giglioni, *Funzione di emergenza e modelli amministrativi alla prova dello stress test degli eventi sismici dell'Italia centrale*, in 2 Dir. Ec. 505 (2018); S. Spuntarelli, *Normatività ed efficienza del sistema delle ordinanze adottato in occasione della sequenza sismica di Amatrice, Norcia e Visso,* 3 *Costituzionalismo.it* 7 (2017).

dents of the Regions (as the parts of the cabin of coordination)[48]. These Presidents were Deputy Commissioners, with specific competences and responsibilities in order to the procedures for the private rebuilding[49]. As the doctrine has underlined[50], this choice has created a difficult overlap with the Civil Protection system, but it is the consequence of a general trend to consider the reconstruction a part of an extended concept of emergency and a part of the of its "normalization", as has been defined the process that has led to the creation of a permanent establishment with specific competences and powers[51], in addition to the general body for the emergency management.

The presence of both these authorities was read as an "agreement between bureaucracies"[52], useful to a more efficient answer to the problems related to the emergency and the consequent reconstruction. It could be also read as a new and more specific interest of the State for the reconstruction, that should gradually become a new administrative function, that legitimates that special authority and its competences.

The autonomous relevance of this function could be positive because it could be the basis for specific and special rules,

[48] These ordinances should respect the European laws and the general principles of the Italian law system. They also should be sent to the President of the Council of the Ministers (at. 1, par.2).

[49] The "temptation of the Commissioner" became stronger when Genova decree (L.D.109/2018) converted into law (L.130/2018). The original text of art.2, par. 2, L.D.189/2016 was modified and the agreement with the Presidents of the Regions was eliminated. According to the new text, the Head of the Civil Protection Department should only hear their opinions. The Italian Constitutional Court has declared illegitimate this article, because of its contrast with art. 117 of the Constitution and the principle of loyal cooperation, which require a specific agreement and consider the opinions insufficient (Constitutional Court, December 2, 2019, no. 246).

[50] See F. Giglioni, *Funzione di emergenza e modelli amministrativi alla prova dello stress test degli eventi sismici dell'Italia centrale*, cit. at 47, 508.

[51] The same expression is used with a negative meaning, as a criticism to the trend of Italian legislature to "stabilize" the emergency, which loses its original and authentic sense. See, A. Cardone, *La "normalizzazione" dell'emergenza: contributo allo studio del potere* extra ordinem *del governo*, cit. at. 7. For the different meanings given to this expression, see F. Giglioni, *Funzione di emergenza e modelli amministrativi alla prova dello stress test degli eventi sismici dell'Italia centrale*, cit. at 47, 501, note 4.

[52] This is an expression of F. Giglioni, *Funzione di emergenza e modelli amministrativi alla prova dello stress test degli eventi sismici dell'Italia centrale*, cit. at 47, 519.

avoiding the contraposition between ordinary and extraordinary discipline that sometimes is not the right perspective to observe the actions necessary for such a complex phase, like the reconstruction is. At the same time, the choice for (another) extraordinary Commissioner could not be the best solution, because it could have the risk of uncoordinated actions with the regional and local authorities, that should not be involved (or totally excluded) in the main decisions (especially if they belong to different political parts). This risk is evident at a more general overview of the last choices of the Italian Government, who has "normalized" the Commissioner as a substitute of the ordinary administration, to remediate to the last disaster which affected the Liguria Region[53] or as a more general way to accelerate the realization of strategic public works[54]. In front of these measures, the normalization of the emergency regains its negative meaning, as an expression that describes the general recourse to extraordinary powers and the simultaneous suspension of the ordinary competences and functions.

Reacting to a disaster wasn't easy but the myth of the efficiency opposed to the ordinary bureaucracy – that was the *leitmotiv* of the L'Aquila events and that continues to be repeated – is a dualistic perspective that could not be accepted; if Voltaire wrote his Candide[55] in our time, it could be the topic of one of its chapters, describing Pangloss' optimism before the efficient Commissioners' actions.

The urbanism under Commissioner or managed under special powers was not an efficient answer. The delays of the reconstruction and its difficulties are the proof that to rebuild is an activity that could not be ruled only by an emergency discipline; that it needs a clear assignment of competences and responsibilities between State, Region and Municipalities; that it's necessary to guarantee the representative function of the local Authorities and to involve citizens.

The reconstruction also needs the respect of the fundamental distinction between policy and administration that the emer-

[53] It is L. D. 28th September 2018, no. 109; about this decree, see F. Spanicciati, *Il "Decreto Genova" quale estremizzazione della deroga emergenziale*, 1 Giorn. Dir. Amm., 63 (2019).
[54] It is L.D. 18th April 2019, no. 32, known as "S*blocca Cantieri*" decree.
[55] Voltaire, *Candide or optimism*, Italian edition (2006).

gency laws had confused and eliminated; at last, the bad quality of the normative acts demonstrated that managing such events needs technical and juridical expertise, really integrated and coordinated.

This last fact is particularly evident at the analysis of the administrative procedures that disciplined the private reconstruction.

7. The private rebuilding between special rules and general principles of the administrative activity

The private rebuilding was the core of the actions managed to overcome the earthquake consequences. It influenced the implementation of the rebuilding plans, the allocations of the temporary houses, the future re-planning; above all, it has really influenced the process of the city re-birth. According to the aim of this paper, this activity should be analysed in a general perspective, to investigate if the solutions adopted for L'Aquila could be the model to face the urban emergency, because the discipline of the building activity is a relevant part of the matter "land-use planning".

In the critical situation after earthquake, there were different needs: to quickly reach the objectives, to reduce the unnecessary bureaucracy, to control the legal use of the public founds.

To reach all those goals, the ordinary legislation (the Italian consolidated text about building activity, R.P.D. 380/2001 and the regional laws) was substituted by special rules, introduced by ordinances.

The above mentioned R.P.D. 380/2001 provides three categories of building activity and three different disciplines: the free building activity (for the minor interventions), the building activity that could be started with a starting activity notice (the Italian *segnalazione certificata inizio attività*, s.c.i.a.) for the interventions mentioned in art. 22, and the activity that should be allowed by an administrative act, the building permit (art. 20).

The ordinances adopted another criterion because they distinguished the procedures on the basis of the entity of damages, from the minor level ("A") to the highest ("E" and "F"); these pro-

cedures aimed to receive the funds, as the preliminary condition to start the activity[56].

For minor damages, ordinance no. 3778/2009 introduced a simplified scheme: owners should notify to the Mayor for starting of the activity, with all the elements necessary to identify the building to repair, the damages and a cost estimate; the works could be started immediately, but the owners received the funds when they finished, after the notification of their completion. The procedure was more complex when damages were of level B or C. In these cases, the ordinance no. 3779/2009 introduced an ordinary administrative procedure, managed by the "Municipality" and the Delegate Commissioner; if the intervention involved some structural parts of the building, the authorization of the Civil Engineering Office (in Italian, *Genio civile*) was necessary. Ordinance no. 3790/2009 disciplines the procedure for the "E" level damages.

This system caused many delays and it's one of the causes of the negative opinion about the L'Aquila experience and the reason to find other solutions, to satisfy different (and sometimes opposite) needs: an efficient control on expenditures, the prevention of illegal episodes and a rapid result.

For the "B" and "C" level damages, the original text of the ordinance fixed a term of thirty days for the admission to the contribution; once expired that term, the application could be considered accepted and the silence was considered a silence – absence. This term was extended by the ordinance 3803/2009, it became 60 days.

In case of E level damages, the original term was 60 days, without the provision of a silence-absence; in case of delay, the silence was considered a silence – denial and the owners should only stand an administrative court, to obtain a sentence which condemned public administration to adopt the act, ex art. 31, Lgs. D. 104/2010 (the Italian code of administrative process).

The action against the silence is considered the way to give an effective judicial protection against the administrative inac-

[56] See the analysis of the procedures also in A. Scaravaggi, I *procedimenti amministrativi per gli interventi edilizi sugli immobili danneggiati dal sisma*, in P. Mantini (ed.), *Il diritto pubblico dell'emergenza e della ricostruzione in Abruzzo* (2010). Also see F. Oliva, G. Campos Venuti, C. Gasparrini, *L'Aquila, ripensare per ricostruire*, cit. at 34, 40.

tion[57]. Briefly, when the Court admits the complaint filed by the applicant, it states a sentence of condemnation to adopt the administrative act. If the administrative authority continues to be inactive, the Court appoints a Commissioner *ad acta*, who substitutes the administration and adopts the act.

The great numbers of recourses against the administrative delays, created a judicial paralysis because the Commissioner *ad acta* didn't implement the sentences in time. For that reason, a State decree, so-called *Sblocca Italia* (L. D., 133/2014, art. 4, par. 8*sexies*), introduced a term of 180 days to conclude the procedure; it also disciplined the Commissioner *ad acta*'s activity and it stated that he/she should respect the order of priority that the Municipality established. It means that if the Court admitted the complaint, the Commissioner should respect the order established by the administrative authority and the judicial remedy couldn't be a way to take precedence over the other applicants.

When the ordinances were adopted, they stated the general competence of the "Municipality", which had the support of three different authorities, for the specific needs of the preliminary activity. It was the so-called "supply chain" (in Italian, *filiera*) that managed the preliminary investigation: *Fintecna* gave its contribution for the administrative issues, *Releas* and *Cineas*, two academic consortia, carried out the technical preliminary investigation. Only when law 134/2012 was in force, a special department was created which managed the re-building files, thanks to an extraordinary public examination. That fact accelerated the administrative activity but it wasn't sufficient; for example, it didn't solve the coordination problems between this Department and the Civil engineering Office, that became of the relevant problem of private rebuilding.

The procedure delays showed that a special discipline couldn't be the only instrument for an efficient and effective rebuilding. The reconstruction process needed specific, competent and coordinated departments, to face the big number of files. That is what emerges from the sentences of the Italian administrative judges, when they decided the appeals against the inaction of the administrative authorities. In front of the complaints for the si-

[57]A. Giusti, *Il contenuto conformativo della sentenza del giudice amministrativo* (2012).

lence-denial, the Municipality always opposed that it wasn't responsible for the delays and it hadn't the passive legitimation; according to its defence, the authorities which managed the preliminary investigation were responsible for the delays; the special rules allowed to not respect the terms, as the general law about administrative procedure usually demands. The Administrative Regional Tribunals always refused that thesis and they underlined the preeminent role of the Municipality, which was considered "*dominus*" of the preliminary investigation and it should do everything necessary to manage the procedure and to conclude it in time. More specifically they focus the attention on the inability to manage the "ordinary" instruments disciplined by the general law about the administrative procedure, that the special rules couldn't overcome[58]. They also stated the administrative duty to give private citizens the information concerning their application, the status of the procedure and the reasons for the delays. The judges used severe words when they stated that the urgency and the extraordinary nature of the interventions couldn't be like an "allowance" for the administrations, thanks to which they couldn't respect the time to conclude the procedures; on the contrary, it required a strict observance of the timetable, to "normalize" the citizens' lives.

Another element that increased the bureaucracy was the introduction of competitive procedures, that private owners should promote to select the designers and the construction company. Despite a special Decree (P.C.M.D. 4th February) qualified the funds given to rebuild "private indemnities" and not "public sources", this selection was considered a solution to avoid and prevent corruption and mafia infiltrations; it was also considered a way to support local companies, in a such a critical economic situation.

At an overall view of the rules concerning private rebuilding, it seems that the negative elements cannot be found only in a system of special legislation that didn't simplify and didn't ensure the certainty of the rules; one of the most relevant cause of the delays was the inability to administrate and the little awareness that

[58] See Administrative Tribunal of Abruzzo - L'Aquila, April 11, 2013, no. 331; Administrative Tribunal of Abruzzo - L'Aquila, October 6, 2012, no. 636; Administrative Tribunal of Abruzzo - L'Aquila, September 12, 2012, no. 555 and no.556; Administrative Tribunal of Abruzzo - L'Aquila, January 18, 2011, no. 27.

the legislative solutions aren't enough to manage an emergency and its subsequent phase but a specific and competent administrative organization is necessary.

If we read the disciplines of private rebuilding adopted for the next experiences (Emilia Romagna, Marche and Umbria), we can find similar schemes and a gradual attempt to simplify the procedures, to arrive quickly to the result. They distinguish the interventions and their discipline on the basis of the damage level: minor interventions usually can be started when the Special reconstruction office has approved the application for the contribution. In case of severe damages, a specific authorization to start is necessary; the application for the contribution was considered or a starting activity notification (the Italian *s.c.i.a.*) or a request for a building permit, according to consolidated text about building activity. To avoid corruption and to give the same opportunity to all the companies, the enterprise should be chosen with a competition among three companies which are included in a special white list, the "Anti-mafia register" (in Italian, *Anagrafe anti-mafia*)[59].

Despite that, the chronicles about the reconstruction often report critical situations, because of the delays; it seems that the interest put on special legislation has made it prone to forget the culture of administrative decisions and that the emergency has allowed a minor attention on some fundamental rights and principles that characterize the administrative procedure[60].

From the sentences of the administrative regional tribunals emerges the necessity to respect, even in the circumstances of earthquake reconstruction, the principles of the due process of law[61], in both the directions of the administrative activity and its organization. Surely, it should be adapted to the specific circumstances and coordinated with the special procedures; but it remains a fundamental guarantee in front of the public powers, especially in " a context that doesn't weaken, rather aggravates, the total inertia of public powers"[62].

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[59] See art. 30, L.D. 189/2016.

[60] M. Cammelli, *Rischio sismico, territorio e prevenzione*, 2 *Aedon* (2017) underlines the fundamental role of a "strict (and for this reason unusual) ordinariness" as an efficient policy of prevention. Also see, M. Cammelli, *Italia e Rischio Sismico. La sfida della gestione ordinaria* 2 *Il Mulino* 300 (2018).

[61] See, G. della Cananea, *Due Process of Law beyond the State* (2016).

[62] Administrative Tribunal of Abruzzo - L'Aquila, September 12, 2012, no. 556.

8. The difficulties of the public reconstruction. A brief analysis

There is a website, called *Opendata ricostruzione*[63], that shows the data of the reconstruction after the earthquake of 2009; a similar website monitors the reconstruction in Emilia Romagna[64]; if we compare both the data about private and public reconstruction, the result is the same: despite the difficulties, private reconstruction is at one stage more advanced than the public one; if we read the singular data, we can discover that the percentages are not increasing and the funds effectively granted are less than which are allocated. It means that some fundamental infrastructures, like schools or other public offices, are still in temporary placements and their reconstruction hasn't started yet. Citizens are gradually returning to their houses but the public city, that is essential to rebuild the community and its life, is still missing.

The current system about public contracts, disciplined by the Italian contracts code (Legislative Decree no. 50/2016) is blamed for this *impasse*; the principle of public competition, the time necessary to award public contracts and the high risk of corruption are judged the main obstacles for the public reconstruction. In front of those difficulties, a derogatory system has been considered the easiest way to find a solution; more specifically, ordinary procedures are substituted by negotiated procedures, without publication of a contract notice, apparently without any contrast with the European rules.

According to Directive 2014/24 EU, in recital no. 50, those negotiated procedures "should be used only in very exceptional circumstances", because of their "detrimental effects on competition". This exception should be limited to cases where publication is either not possible, "for reasons of extreme urgency brought about by events unforeseeable for and not attributable to the contracting authority". As a consequence of that prevision, art. 32 Dir. 2014/24 EU permits the use of the negotiated procedure without prior publication, "in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation

[63] See http://opendataricostruzione.gssi.it/

[64] See https://openricostruzione.regione.emilia-romagna.it/

cannot be complied with". It also states[65] that "the circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority".

These European provisions have been implemented by the Italian code, in art. 63. Thanks to this article, in front of extraordinary events, usually the Italian legislator qualifies those facts of "extreme urgency" (in Italian, *estrema urgenza*), to award the contract without an ordinary procedure. The Italian public contracts code has introduced another article to manage emergency situations. It's art. 163, for the "highest urgency" (in Italian, *somma urgenza*) and civil protection contracts.

The law which delegated the Government to adopt the contracts code[66], specified that the discipline of art. 63[67] has been introduced to guarantee the transparency also of these procedures, avoiding corruption and conflicts of interests. It doesn't aim to protect the juridical goods connected to emergency situations; in fact, this is the objective of art. 163[68], that should be a discipline for "singular situations, connected to particular needs related to emergency events".

This article should have filled the legislative gap that emerged after the disasters that affected our Country; it should introduce a discipline useful to face the events immediately related to emergency and it was the only exception admitted to the general prohibition of derogatory procedures. Implicitly, it confirmed that the ordinary instruments should be used for all the other affairs, stopping the praxis of special laws, for specific events or singular procurement.

Currently, art. 163 disciplines two different cases: the first one, the hypothesis of highest urgency works, that doesn't allow any delay, because it is necessary to protect private and public

[65] L. 28th January 2016, no. 11, art. 1, par. 1, let. Q), point 1.
[66] L. 28th January 2016, no. 11, art. 1, par. 1, let. l).
[67] See A. Musio, *Art. 63 – Uso della procedura negoziata senza previa pubblicazione di un bando di gara*, in G. Esposito (ed.), *Codice dei contratti pubblici* (2017); for another comment, R. Damonte, M. Bersi, in R. Garofoli, G. Ferrari (eds.), *Codice dei contratti pubblici* (2017).
[68] See G. Greco – C. Massa, A*rt. 163 - Procedure in caso di somma urgenza e protezione civile*, in G. Esposito (ed.), *Codice dei contratti pubblici* (2017); see also, R. Ravasio, in R. Garofoli, G. Ferrari (eds.), *Codice dei contratti pubblici* (2017).

safety[69]; the second one, for every contract (works, services and supplies) related to civil protection events, according to the list included in art. 7 of the Italian Civil Protection code. The original text of art. 163 didn't include the entire list of the civil protection events but only the events in art. 7, let. c); now instead, this procedure can be used also for events that should be faced in an ordinary way, if the interventions are urgently necessary.

This modification has deeply changed the original purpose of the article; for this reason, the State Council[70] has deeply criticized the current text, because it has extended the boundaries of the "highest urgency" and there is the risk that it becomes like a "parachute – article", for interventions that could be scheduled but the actual circumstances made urgent, like an extraordinary event.

Currently – also because the relationship between art. 63 and art. 163 is not so clear – art. 63 and the "extreme urgency" is the most frequent legislative solution to accelerate the awarding of public works contracts.

Usually, the administrative authorities should evaluate if the requirements necessary to apply the rule exist. But sometimes, it's not easy to distinguish between the interventions that are an immediate answer to the emergency and those which are necessary to return to the ordinary life. The reconstruction offers many examples: shoring works are necessary to avoid other collapses but could be also considered the starting point of the rebuilding; preparing temporary houses could be a first aid measure but also the first phase of reconstruction[71]. More generally, when a big quantity of ordinary administrative activity should be managed, it could become an extraordinary event for the administration. In front of these situations, it's difficult to decide which is the correct procedure and the line between the blameless mistake and an illegitimate choice is not so clear; the fear of a future confrontation with the Courts of auditors, with the penal ordinary tribunals or with the Anti-corruption authority become serious obstacle for a rapid decision.

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[69] There is another specific discipline in the art. art. 148 par. 7 for cultural heritage.

[70] See, Council of State, Special committee, March 22, 2017 no. 782.

[71] See, F. Giglioni, *Funzione di emergenza e modelli amministrativi alla prova dello stress test degli eventi sismici dell'Italia centrale,* cit. at 47, 515.

To avoid the *impasse* and the over - deterrence effect, the legislator substitutes itself to the administration and it makes the evaluation of the requirements necessary to apply the code. We have many examples of this evaluation *ope legis*: L.D. 189/2016, in art.14, par. 3*bis* and 3*bis1* disciplines the public reconstruction and states that the interventions disciplined by those articles are considered of "highest urgency"; the last decree adopted after the Genova disaster, which also contains some specific rules about the earthquake that affected some cities in Southern Italy in 2017, defines the public works of "highest urgency".

This forcing of the rule shows that the risk of a contrast with the European discipline is high and that the synthesis of extreme urgency is not always adequate to balance the different interests involved in the reconstruction phases.

If the provisions of the public contracts code are not adequate[72], the same judgment can be expressed about the specific discipline of the Civil protection code.

Law 30/2017 delegated the Government to adopt a decree which could guarantee certain and effective statements concerning the public procurement for the Civil Protection organization and for the emergency situations, also involving the local communities and supporting the economy of the affected areas. Leg. D. 1/2018 doesn't have a specific discipline about contracts. According to the Italian State Council, it isn't well connected with the Lgs. D. 50/2016 and, more generally, it has not implemented the part of l. 30/2017 which demanded to regulate the procurement procedures when the ordinary concrete situation permitted to respect the European principles and the public contracts code[73].

Probably, this code has been another missed opportunity to introduce a steady discipline, special but not derogatory, useful to manage all those situations that are not qualified as "extreme" or "highest" urgency but need a "moderate competition", to aim the specific objectives related to an after-emergency event, when a

[72] After the Genova disaster, the Department of Civil Protection issued an ordinance (20.08.2018) that introduced a specific and derogatory discipline about public contracts and that was considered a first step for a future model of emergency –public contracts. See, A. Arona, *Codice appalti, Protezione civile-Regioni: "Deroghe automatiche nelle emergenze", Il sole 24 ore, edilizia e territorio* (2018).

[73] See the Council of State, Consultative Division for legislative acts, December 19, 2017, no. 2647 (par. 5).

critical situation still exists and it couldn't be managed with the general procedures.

This idea of "moderate competition" doesn't seem contrary to the European principles. In some matters the principle of competition is moderated by social, environmental and regional development factors or to protect the most vulnerable members of the society (it happens for the awarding of public road and rail passenger services[74]); more generally, the European system admits a moderate competition when there are overriding reasons relating to the public interest. As we can read in the recital no. 40 of Bolkestein Directive, the Court of Justice has developed this concept[75], it covers many grounds[76] "and may continue to evolve".

9. Final remarks

An earthquake or, more generally, a disaster event changes the life of a city and its community; in front of the emotional reaction of the entire Country, the State has a big responsibility, especially when the emergency ends and its necessary to support all those activities that are necessary to return to a daily life. The different events happened in our Country have contributed to create an efficient system to manage the emergency phases but have also showed the inability to regulate and administrate the subsequent stages. The relationship between urban law, emergency and reconstruction has been translated in the prevalence of the emergency, whose boundaries have been expanded up to include the activities necessary to the social, economical and physical rebuilding. All those processes have been ruled by a derogatory discipline and the Commissioners have substituted a large part of the ordinary administration. This derogation system had many negative consequences: it doesn't give certainty about the law that should be applied[77], it multiplies the decisional centres and, as the administrative sentences about private reconstruction in L'Aquila showed, risks absolving the ordinary authorities from their re-

[74] Reg. (CE) no. 1370/2007.
[75] In its case law in relation to Articles 43 and 49 of the Treaty.
[76] A list is in the recital no. 40.
[77] For this paradox, of a derogatory discipline more complex than the ordinary one, see also S. Spuntarelli, *Normatività ed efficienza del sistema delle ordinanze adottato in occasione della sequenza sismica di Amatrice, Norcia e Visso*, cit. at 47.

sponsibilities. On the other side, the ordinary system is not able to reconcile the different reconstruction demands of efficiency, rapidity, competition and legality.

In a Country such as Italy, where the culture of prevention has been lacking for many years and still struggles to establish itself as a fundamental principle of the administrative activity[78], it is necessary to improve it[79] as the main solution against the "normalization" of the emergency. It will probably reduce the derogations or the frequent abuse of the provisions of "highest urgency" or "extreme urgency".

The analysis carried out in this article shows two other elements that could be necessary to face the effects of emergency on the land use planning.

The first one is the urgency of a good and organized administration, with an efficient structure and able to carry out the procedures. It emerges comparing the different experiences of Friuli and Irpinia in the past but also observing the delays of the private reconstruction in L'Aquila, where the ordinary instruments of the administrative activity failed, as the Administrative Tribunals have denounced.

The second one is the possibility of identifying a different and "new" administrative function, related to the emergency or, *rectius* to the after-emergency events, that allows to introduce a special (but not derogatory) system, more appropriate than the general discipline to balance the different needs of those situations. The evolution of the model of the reconstruction plans could be an example; another one could be the solution of a "moderate competition", for the awarding of public contracts, which could stop the abuse of negotiated procedure without prior publication, ex art. 63 or 163 of the Italian public contracts code.

[78] About this, see A. Fioritto, *Risk Government: Prevention as an Ordinary Function of Administration,* in L. Caravaggi, O, Carpenzano, A. Fioritto, C. Imbroglini, L. Sorrentino, *Ricostruzione e governo del rischio* (2013). Also see, A. Police, *L'emergenza come figura sintomatica di sviamento dalla funzione pubblica*, 30 I *Diritto e processo, quaderni*, 611 (2019).

[79] E. Zanchini, *La cura del territorio oltre l'emergenza*, 2 *Il Mulino* 322 (2018).