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## Simplification vs Uncertainty? Lessons from Italy<sup>1</sup>

### Cases

I'll start from some Italian cases, whose lessons can be easily applied in other countries<sup>2</sup>.

First case: On 13<sup>th</sup> March Pope Francis announced a Jubilee, starting from the next 8<sup>th</sup> December<sup>3</sup>.

We had only 6 months to prepare Rome for the arrival millions of pilgrims and tourists more than usual. The Jubilee of 2000 was an opportunity to improve facilities and this has resulted in huge expenses<sup>4</sup>. The current procedures are complex, and time is running out. Besides, the Pope several times has intervened against corruption<sup>5</sup>.

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1 An earlier version of the paper was presented at 2015 ICON-S Conference on "Public Law in an Uncertain World", New York University, July 1-3, 2015.

2 The most important Italian essays on simplification are: F. SATTA, *Proposte per la semplificazione*, 2013, *Semplificare, semplificazione*, 2015, *È possibile semplificare?*, 2013, *Liberalizzare e semplificare*, 2011 in *Apertacontrada.it*; L. TORCHIA, *La modernizzazione del sistema amministrativo: semplificazione e decentramento*, in *Le Regioni*, 1997, 354; ID. *Tendenze recenti della semplificazione amministrativa*, in *Dir. amm.*, 1998, 385; S. CASSESE, *La semplificazione amministrativa e l'orologio di Taylor*, in *Riv. trim. dir. pubbl.*, 1998, 703; L. VANDELLI - G. GARDINI (edited by), *La semplificazione amministrativa*, Rimini, 1999; F. PATRONI GRIFFI, *La "fabbrica delle leggi" e la qualità della normazione in Italia*, in *Dir. amm.*, 2000, 97; V. CERULLI IRELLI - F. LUCIANI, *La semplificazione dell'azione amministrativa*, in *Dir. amm.*, 2000, 617; A. NATALINI, G. TIBERI (edited by), *La tela di Penelope. Primo Rapporto Astrid sulle semplificazione legislativa e burocratica*, Bologna, 2010; G. VESPERINI, *Note a margine di una recente ricerca sulla semplificazione amministrativa*, in *Gior. dir. amm.*, 2010, 203, *La semplificazione, politica comune (Commento a d.l. 24 giugno 2014, n. 90)*, in *Giorn. dir. amm.*, 2014, 1019, *Le norme generali sulla semplificazione - La riforma della Pubblica Amministrazione Legge 7 agosto 2015, n. 124. Analisi della normativa*, in *Giorn. dir. amm.*, 2015, 629; B. CAROTTI, E. CAVALIERI, *La nuova semplificazione*, Milano, 2009; M. CLARICH, *Modelli di semplificazione nell'esperienza comparata*, in *Riv. trim. dir. pub.*, 1998, 679; M. AINIS, *La semplificazione complicante*, in *Federalismi.it*, 2014; S. PELLIZZARI, *Make it better and simpler. Semplificazione amministrativa e principio di semplicità dell'azione dei pubblici poteri, nell'ambito dell'ordinamento dell'unione europea*, in *Dir. pub.*, 2012, 265; G. VESPERINI (edited by), *Che fine ha fatto la semplificazione amministrativa?*, Milano, 2006; N. RANGONE, *Semplificazione amministrativa*, 2014, *Treccani.it*; R. FERRARA, *Le "complicazioni" della semplificazione amministrativa: verso un'amministrazione senza qualità?*, in *Dir. proc. amm.*, 1999, 323; G. SPINA, *La semplificazione amministrativa come principio dell'essere e dell'agire dell'amministrazione Studio sull'evoluzione delle logiche di semplificazione amministrativa in Italia dal 1990 ad oggi*, Napoli, 2013; E. CASSETTA, *La difficoltà di semplificare*, in *Dir. amm.*, 1998, 335; S. BATTINI, *Le politiche di semplificazione nell'esperienza italiana*, in *Giorn. dir. amm.*, 2004, 450; T. BONETTI, *Semplificazione amministrativa e competitività del sistema paese*, in *Riv. trim. dir. pub.*, 2008, 173; G. DELLA CANANEA, A. NICITA, *Le semplificazioni per le imprese*, in *Una democrazia funzionante per una politica economica riformatrice*, Roma, 2007, 119; M. IMMORDINO (a cura di), *Semplificazione normativa e amministrativa*, in *Nuove Autonomie*, 2008; F. BASILICA, F. BARAZZONI, *Diritto amministrativo e politiche di semplificazione*, Rimini, 2<sup>a</sup> ed., 2015; C. PINELLI (edited by), *Italiadecide. Rapporto 2015. Semplificare è possibile: come le pubbliche amministrazioni potrebbero fare pace con le imprese*, Bologna, 2015.

3 [http://www.huffingtonpost.com/2015/03/13/pope-francis-short-papacy-pizza\\_n\\_6864994.html](http://www.huffingtonpost.com/2015/03/13/pope-francis-short-papacy-pizza_n_6864994.html).

4 T. PIPAN, *Emergenza Giubileo*, in *Il Mulino*, 2000, 296.

5 J.M.BERGOGLIO, *The Way of Humility: Corruption and Sin; On Self-Accusation Paperback*, San Francisco, 2014.

But the adoption of procedures in derogation, the award of contracts for the provision of a public service by direct agreement and not through a tendering procedure will result as a celebration of certainty, of the rule of law? Perhaps do they contribute to feed corruption? Ultimately, has this Pope unintentionally promoted corruption?

Second case: some years ago there was a demonstration in Milan. A NGO, *Architectural and Urban Forum* gathered in a famous square to toast to the replacement of Torre del Carmine in favor of a one thousand meter high skyscraper that would have housed one million people<sup>6</sup>. The application had been filed with the municipality of Milan using the tool of *replacement of authorizations by notifications*, and the municipal government had not sent any notice to stop the works<sup>7</sup>. It was only a demonstration, also because under that regime it was impossible to use that tool in presence of cultural heritage. But there was an underlying real issue.

The recent Italian reform of Public Administration provides the mechanism of *silent consent* even when the administration responsible for the protection of environment, landscape and territory, for the historical and artistic heritage, or for the protection of health doesn't provide its consent, authorization or clearance<sup>8</sup>.

This examples can be useful to introduce the main subject of this paper, Uncertainty.

## Uncertainty vs Simplification?

In short, the complexity of a globalized society, as well as the plurality of different legal systems create uncertainty<sup>9</sup>, due, for example, to the presence of worldwide risks, conflicts and economic crises, and to the plurality of involved actors, authorities, entities.

A “reconstruction” of certainty implies, according to what is requested to public powers by citizens and business: efficiency of public administration, predictability of the time needed for the procedure

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6 Corriere della Sera, ed. Milan, 10.7.2010, [http://www.aufo.it/doc/2011-09-21\\_press\\_kit.pdf](http://www.aufo.it/doc/2011-09-21_press_kit.pdf), 9.

7 According to art. 19, Law N. 241/1990. An english version is available at <http://www.ijpl.eu/assets/files/pdf/leggi/Law%20no%20241-1990%20-%20for%20publication%20-%2025.03.2011.pdf>. The law has been examined in depth by: M.A. SANDULLI (edited by), *Codice dell'azione amministrativa*, Milan, 2012; and A. ROMANO (edited by), *Saggi sistematici sull'azione amministrativa. Dalla l. 241 del 1990 alla l. 124 del 2015*, Turin, forthcoming.

8 Art. 17-bis, Law N. 241/1990, introduced by the Law n. 124/2015 “Deleghe al Governo in materia di riorganizzazione delle amministrazioni pubbliche”, available at [normattiva.it](http://normattiva.it).

9 Z. BAUMAN, *Liquid Times: Living in an Age of Uncertainty*, Cambridge, 2006. See, on uncertainty, AIPDA, *Annuario 2014. L'incertezza delle regole*, Naples, 2015.

and of the outcome of public measures, minimization of the legal risks connected with economic activities<sup>10</sup>. In that sense, simplification aims to achieve greater certainty.

Every year The World Bank in the report “Doing Business” measures both costs, days, easiness in starting an economic activity and the efficiency of the legal instruments necessary to exercise it (i.e. enforcement tools, bankruptcy laws): the rankings there published make investors move capital from a country to another<sup>11</sup>. There are no doubts that the approach of the World Bank aims at removing obstacles in undertaking an economic activity, and at minimizing public intervention, at least in the initial stage<sup>12</sup> (because public intervention is invoked, i.e. for the enforcement of a contract)<sup>13</sup>. Therefore we need to look carefully at the report, because its primary objective is not the protection of fundamental rights or social rights. But surely the attention of the World Bank shows how simplification is important worldwide.

But we have to go deeper, examining the possible outcomes of simplification.

Now, my point is that if we think about simplification, we shall admit that it is an ambiguous principle, because it can reduce as well as increase uncertainty.

Therefore, the issue is not about promoting simplification in any circumstance, but about boosting good simplification, whose application can give certainty.

Nevertheless, simplification is generally praised without any distinction between different applications of the general principle<sup>14</sup>.

If simplification means “make simple”, simplifying isn't the right choice in every situation, in the same way in which reducing costs isn't necessarily the best way to help a company to make more profit.

Why? Mainly because simplification is good if it succeeds in reducing complication; it is bad if wants to reduce complexity. The first one is a disease, while the second is an inherent aspect of the economic system, which cannot be eliminated<sup>15</sup>.

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10 C. PINELLI, *Per la semplificazione amministrativa*, 18, B. TABACCI, *Riflessioni sull'indagine conoscitiva della commissione bicamerale per la semplificazione*, 29, both in *Italiadecide. Rapporto 2015.*, cit.

11 The last reports: *Doing Business 2015. Going Beyond Efficiency*; *Doing Business 2014. Understanding Regulations for Small and Medium-Size Enterprises* are available at [www.doingbusiness.org](http://www.doingbusiness.org).

12 *Doing Business 2014*, cit., 72.

13 *Doing Business 2014*, cit., 110.

14 See a distinction in C.R. SUNSTEIN, *Simpler. The future of government*, 2013, New York, 10.

15 C. PINELLI, *op. cit.*, 17. See the confusion between complexity and complication in R. BIEBER – C. AMARELLE, *Simplification of European Law*, in *Col. Journ. Eur. Law*, 1998, 16.

Simplification is a “synthetic” expression that refers to the adoption of several tools in various fields: rules, burdens, duration of procedures, costs, and controls. Every listed item is different<sup>16</sup>.

## Simplification and uncertainty

Let's start from the “bad” simplification, through four examples.

First: reasons of urgency or big events can justify exemptions from the ordinary rules<sup>17</sup>. The Decree 47/2014, "Housing Plan 2014", with a section intended for the Expo Milan 2015, provided an exception from the regulations on procurement and public works: according to the ordinary regime, contracts should have been carried under principles of "transparency, adequate advertising, non-discrimination, equal treatment, mutual recognition, proportionality, and based on informal procedures in which at least five tenderers are invited to participate". As everyone knows, many cases of corruption have been uncovered<sup>18</sup>.

A similar phenomenon occurred last year in Russia, on the occasion of the Olympic Games. We can read in a report: “Russia handed out massive contracts with no real competition to contractors who overcharged them by hundreds of millions of dollars and, almost without exception, has failed making them face the consequences”<sup>19</sup>.

Emergency is simplifying in nature, but as well it creates distortions of the competition, growth of the expenses, high risk of corruption: that is because it is hard to verify whether the enormous discretionary power of the administration has been well exercised<sup>20</sup>.

When we consider that Olympic Games or Expo 2015 are not earthquakes or tornadoes, but events well known in advance, the justification for that simplification appears unacceptable.

Besides, in these cases, powers converge in the hands of special commissioners. Instead of having competences distributed between different public actors, commissioners have enormous

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16 OECD, *From Red Tape to Smart Tape. Administrative simplification IN OECD Countries*, 2003, 13; OECD, *Cutting Red Tape. National strategies for administrative simplification*, 2006, 19, 59.

17 A. FIORITTO, *L'amministrazione dell'emergenza tra autorità e garanzie*, Bologna, 2008; *Associazione italiana dei professori di diritto amministrativo. Annuario 2005. Il diritto amministrativo dell'emergenza*, Milan, 2006; *Amministrare*, 2006, n.2.

18 *Arrests, corruption probe, cast cloud over Italy's Expo 2015*, [reuters.com/article/2014/05/12/us-italy-corruption-expo-idUSBREA4B0FW20140512](http://reuters.com/article/2014/05/12/us-italy-corruption-expo-idUSBREA4B0FW20140512).

19 *16 Eye-Popping Examples Of Alleged Corruption At The Sochi Olympics*, [buzzfeed.com/maxseddon/eye-popping-excerpts-from-a-report-alleging-corruption-at#eu48nV0EMX](http://buzzfeed.com/maxseddon/eye-popping-excerpts-from-a-report-alleging-corruption-at#eu48nV0EMX).

20 B. BALDASSARRI – M.T. BASILI et al., *Corruption in the Italian Public Administration. Corruption and public contracts*, *Sapienza Legal Papers*, 2012, 12

attributions. What is the price of simplification? The concentration of powers has its bad side-effects: i.e. the risk of corruption or the suspension of the fundamental procedural limits<sup>21</sup>.

Second example: the sacrifice of relevant interests to fight inefficiency.

In some cases, the intervention of agencies that protect relevant interests in proceedings may be omitted.

What if an agency doesn't give its mandatory advice? Skipping its intervention simplifies the proceeding, but who cares about its public interest? Legal instruments like *conferenza di servizi*, that is a body responsible for organising coordination between the different authorities, could work also in absence of the intervention of some of them, but that means that the decision of a public authority devoted to the protection of a public interest would be missing<sup>22</sup>. As an effect, the final measure can result unpredictable. Sect. 3 of the Reform of Public Administration above mentioned goes in the same direction (the case of the tower), providing that the lack of intervention of an agency in a proceeding doesn't affect the final measure<sup>23</sup>.

Third example: automatism to speed up the business start-ups.

Legal instruments like *silence is consent*, or *replacement of authorizations by notifications* require a very careful regulation to prevent serious damage to strong interests. The OECD, after some worries about them<sup>24</sup>, is now promoting their adoption among the countries<sup>25</sup>.

The Italian system has been a forerunner in regulating them, and has experienced how high is the level of uncertainty produced: banks don't grant loans without an express measure coming from an administration authorizing an economic activity<sup>26</sup>; administrations retain their power to intervene at any time to monitor the regularity of the activity, nevertheless *ex post* controls can be carried out late, and damages can have already occurred<sup>27</sup>.

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21 D. CALDIROLA, *Il commissario straordinario nell'emergenza*, in *Amministrare*, 2010, 197; G. BERTI - L. TUMIATI, *Commissario e Commissione straordinaria*, in *Enc. Dir.*, VII, Milano, 1960, 842; G. RIZZA, *Commissario (dir. pubbl.)*, in *Enc. Giur.*, VII, 1998; V. CERULLI IRELLI, *Principio di legalità e poteri straordinari dell'amministrazione*, *Dir. Pub.*, 2007, 345.

22 E. SCOTTI, *La conferenza di servizi*, in *Italiadecide*, cit., 333.

23 Art. 3, sec. 3.

24 OECD, *From Red Tape to Smart Tape*, 52.

25 OECD, *Overcoming Barriers to Administrative Simplification Strategies guidance for policy makers*, 2010, 22.

26 A. ZAMBRANO, *Una difficile mediazione*, in *Italiadecide*, cit., 103.

27 E. BOSCOLO, *La segnalazione certificata di inizio attività: tra esigenze di semplificazione ed effettività dei controlli*, in *Riv. giur. urb.*, 2010, 580.

In short, the simplification described, that works on complexity and not complication, promotes corruption, negatively affects economic growth and competition, and violates citizens' rights. Ultimately, it feeds uncertainty. And, nevertheless, it is simplification.

## Simplification and certainty

There is also a “good” simplification, resulting in better rules, less bureaucracy, faster decisional procedures. Unlike the previous approach, that simplification shall produce predictable measures, minimum and predefined costs, effective controls. So it may reduce corruption, boost economic growth, increase the trust in institutions. In short, it can fight uncertainty.

Moving from the proposals contained in a huge research on simplification recently published I'll try to point out what is necessary to have a good simplification, and more certainty<sup>28</sup>. These can be labeled as pre-conditions, but without them, no good simplification is possible.

First: there is a need for certainty on competences: fragmentation among authorities produces uncertainty and litigation, with paralysis of the administrative action<sup>29</sup>. Real simplification removes ambiguities and overlaps, eventually cuts competences. Cutting competences without certainty results instead in a bad simplification.

Second: there is a need for stabilization of legislation<sup>30</sup>. The well known saying of Tacitus *corruptissima re publica plurimae leges* (too many laws equal too much corruption)<sup>31</sup>, doesn't mean only that a good simplification cannot be implemented through a reduction of the number of the laws, but implies a self restraint in the adoption or amendment of rules. Besides, in most countries, there are various levels of government (States, Regions or Lands) that frequently enact legislation on the same matters: in these cases simplification requires an integration of the regulations, possible only through the legislative stability. Again, repealing laws is not enough, since simplification means stability and clarity in legislation, to promote certainty.

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28 The author of the proposals is the editor, C. PINELLI, in *Italiadecide*, cit., 581.

29 *Documento conclusivo dell'indagine conoscitiva sulla semplificazione legislativa e amministrativa*. [www.camera.it/application/xmanager/projects/leg17/attachments/shadow\\_mostra/file\\_pdfs/000/023/949/DOCUMENTO\\_CONCLUSIVO\\_31\\_03\\_2014.pdf](http://www.camera.it/application/xmanager/projects/leg17/attachments/shadow_mostra/file_pdfs/000/023/949/DOCUMENTO_CONCLUSIVO_31_03_2014.pdf). § 5.6.

30 M. AINIS, *La semplificazione complicante*, in *federalismi.it*, 2014, 18; M. RUOTOLO, *La semplificazione normativa a livello statale perchè non credo nella "better regulation"*, in *Dir. Soc.*, 2011, 555; N. RANGONE, *La qualità delle regole: molti strumenti, pochi risultati*, in *St. parl. pol. Cost.*, 2010, 170, 97.

31 *Annales*, III, 27.



Third: sharing best practices and adoption of guidelines bring a real simplification<sup>32</sup>. It is useless reducing the burdens in a proceeding, if a Babel of procedures, different from State to State, municipality to municipality, survives. In Italy, transport of special waste through the country can require up to twenty different authorizations, one for each Region crossed<sup>33</sup>. A good simplification requires uniform and standardized procedures and the sharing of best practices, to help implementing new virtuous practices. There is no need to explain why that would foster certainty.

Fourth: we need a strong public interlocutor<sup>34</sup>. A good simplification requires that public officers have skills to identify the needs of the administration, evaluate the proposals and negotiate with contractors.

Often simplification is meant as a phenomenon of reduction of administrative agencies that can intervene in a procedure, or of substitution of unilateral measures with agreements, or of delegation to private entities. So it turns out to be an inadequate remedy, for the inability of the administration to know what is better to pursue the general interest<sup>35</sup>, that increases risk of regulatory capture. In these cases, we find a weak administration that doesn't give certainty.

Fifth: E-government. Set apart the disturbing rhetoric about the benefits of ICT (Information and Communication Technologies)<sup>36</sup>, if ICT can drive more transparency, participation and collaboration<sup>37</sup>, administrative action requires first strategies, choices of priorities, balancing of the interests that cannot be replaced by a machine<sup>38</sup>. ICT cannot help simplification, if improperly used.

Sixth: Participation. It is a serious mistake looking at the participation with annoyance, thinking that without it it would be possible to take decisions in a short time and with the least possible obstacles (and discussion would be one of them). Instead, even the stakeholders would prefer more participation and a public debate<sup>39</sup>, once again, for more certainty: it is better to verify in advance if the spread of the Nimby Syndrome will obstruct the construction of a radioactive waste storage

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32 The website [buonepratiche.interno.it](http://buonepratiche.interno.it) has not been updated since december 2014; see instead the website on quality of public administration, [qualitapa.gov.it](http://qualitapa.gov.it).

33 *Documento conclusivo dell'indagine conoscitiva sulla semplificazione legislativa e amministrativa*, §5.6.

34 S. CASSESE, *Governare gli italiani. Storia dello Stato*, Bologna, 348.

35 G. FIDONE, *I contratti pubblici complessi*, in *Italiadecide*, cit., 57.

36 V. BEKKERS – V. HOMBURG, *The Myths of E-Government: Looking Beyond the Assumptions of a New and Better Government*, in *The Inf. Soc. Int. Jour.*, 2007, 373.

37 US Open Government directive, 8.12.2009, [www.whitehouse.gov/open/documents/open-government-directive](http://www.whitehouse.gov/open/documents/open-government-directive)

38 See F. COSTANTINO, *Autonomia dell'amministrazione e innovazione digitale*, Naples, 2012, 210; ID., *Open Government*, Dig. disc. pub., forthcoming.

39 M. GENTILE, *Snellire le procedure, semplificare i comportamenti*, in *Italiadecide*, cit., 64; ENEL, *La semplificazione amministrativa nel settore energetico, tra modifiche costituzionali, legislative e regolamentari*, in *Italiadecide*, cit., 226.

facility that testify its effects years later. So, counter-intuitively, participation promotes simplification, in an indirect way, but also in a direct way if, according to an internal law, the acceptance of proposals presented by the participants is rewarded with simplification of the procedural burdens.

Seventh: Abuse of revocation. We can simplify with *silent is consent* or *declaration instead of authorization*, but what if an administration finds out that an activity should not have been taken up at all? In that case simplification becomes complication, as the administration has to revoke a measure. It affects also certainty, so that the Court of Justice of the European Union had to establish the principle of protection of legitimate expectations against arbitrary changes of opinion of the administration<sup>40</sup>. We have two ways to address this problem. The first one is to reduce the use of *silent consent* or *declaration instead of authorization*: private actors do not ask for implicit measures, because they prefer to receive a late, explicit decision than an unstable or uncertain one<sup>41</sup>. The second approach lays in limiting the power of revocation to make the administration responsible for the uncertainty caused, giving less time to intervene to the authority, stating a duty of compensation, providing strict rules to circumscribe the power of administration,<sup>42</sup>.

## Short conclusions

The seven tools just described can be qualified as conditions for a good simplification. Their adoption could make the difference between good or bad simplification. So good simplification would fight complication, not complexity, and generate certainty, instead of uncertainty.

Simplification cannot be improvised, it shall not sacrifice strong interests, and must improve, not worsen the administrative action. Otherwise, the risks of uncertainty would be too high.

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40 P. CRAIG – G. DE BÙRCA, *EU Law: texts, cases, and materials*, 5, Oxford, 2015, 558; A. PORTUESE - O. GOUGH - J. TANEGA, *The principle of legal certainty as a principle of economic efficiency*, in *Eur. Jour. of Law Econ.*, 2014, 1; J. RAITIO, *The principle of legal certainty in EC law*, 252; F. MERUSI, *Buona fede e affidamento nel diritto pubblico*, Milano, 2001 .

41 See M. A. SANDULLI, *L'istituto del silenzio assenso tra semplificazione e incertezza*, in *Nuove Auton.*, 2012, 435.

42 See art. 21-nonies of 241/90, as recently emended..