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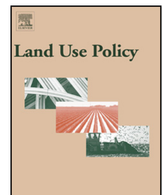

Reflections on the *Consolidated Text* of the Spanish *Land Use Act of 2008*: Increased power of the arbitrary, fostering of corruption, and increased upward pressure on land values

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ABSTRACT

This work contains a political and economic analysis of the *Real Decreto Legislativo 2/2008, de 20 de junio, por el que se aprueba el texto refundido de la Ley de suelo* – the *Consolidated Text* of the Spanish *Land Use Act of 2008* – and of its consequences. The study focusses on the increased power of the arbitrary, the fostering of corruption, and the increased pressure on land values to rise caused by the adoption of this bill into law and on the doubtful constitutional validity of the legal text.

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1. Introduction

Legislation on land use and ownership is a key issue in the Spanish political arena for two reasons: the political corruption associated with land transactions and reallocation/reclassification in Spain[1] and the market rise in the price of housing (from 2001 to 2007), which was subsequently followed by a fall (from 2008 to 2015). There are two potential ways to solve these problems: on the one hand, by trusting that savers, consumers, and investors will be able to work together in the marketplace, armed with information on the situation of relative scarcity consequent on free prices (Hayek, 1972a, 1972b), and on the other, by continuing with the centralized planning of land management that has been dominant in Spain since the passing of the first Land Use Act in in 1956 (*1956 Land Law* hereafter) (regulating and re-regulating the performance of the entities responsible for implementing it, and each time aggravating the underlying issues rather than solving them).

The system affects the consumer in a number of ways that are unfortunate and can rarely be specified, predicted, or effectively prevented; and rather than modify the measures that produce this damage to society in the first place, the national political parties and the different governments have attempted to remedy the damage by subsequent, ever wider and more obstrusive interventions, which create further conflict with the working of the market mechanism, following the typical pattern of the dynamic of interventionism (Lavoie, 1982). These overlapping interventions and regulations often cause the economic agencies at work to alter their attitudes in unpredictable ways, making legislative attempts to solve the problem by regulating enormously complicated and counterproductive (Peltzman, 2007).

The political project at the heart of the Real Decreto Legislativo, 2008*Real Decreto Legislativo 2/2008, de 20 de junio, por el que se aprueba el texto refundido de la Ley de suelo* – in English, the *Consolidated Text* of the *Land Use Act of 2008* (*2008 Consolidated Text* hereafter) – following a tradition started in the middle of the last century, is a product of this reality. This text revises the Ley, 2007*Ley 8/2007, de 28 de mayo, de suelo*, or *Land Law 8/2007* (*2007 Land Law* hereafter), and the articles of the Real Decreto Legislativo, 1992*Real Decreto Legislativo 1/1992, de 26 de junio, por el que se aprueba el texto refundido de la Ley sobre el Régimen del Suelo y Ordenación*

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[1] For a list of the most important cases of corruption associated with land transactions and reallocation/reclassification in Spain, consult the list published by 20 Minutos at http://www.20minutos.es/noticia/165247/0/corruptelas/urbanisticas/ediles/.

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Urbana, or *Consolidated Text* of the *Land Use Act of 1992* (*1992 Consolidated Text* hereafter) that were not repealed.[2] The *2007 Land Law*, which constituted a major part of the *2008 Consolidated Text* that we are considering here, received considerable support in the Congreso de los Diputados (Spanish Congress of Deputies, the lower house of parliament). The Zapatero government, which passed the *2007 Land Law*, repeated many times that this law contained the mechanisms needed to solve the problem of corruption in housing matters in Spain. The Minister of Housing at the time, María Antonia Trujillo, went so far as to write at the time the *2007 Land Law* was approved in 2007 went so far as to say in writing that the *Law* 'plays a key role in the fight against speculation and corruption' and that it 'promotes transparency and sustainability, versus opacity and [...] speculation' (Europa Press, 2007). Furthermore, it should be noted that although the main opposition party (the Partido Popular) at that time was strongly opposed to the approval of the *2007 Land Law*, after winning the November 2011 election with an absolute majority this party has not repealed the content of the *Law* but instead, in October 2015, has repealed the *2008 Consolidated Text* and approved in its place the new Real Decreto Legislativo, 2015*Real Decreto Legislativo 7/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley de Suelo y Rehabilitación Urbana*—the *Consolidated Text* of the *Land Use and Rehabilitation Act of 2015* (*2015 Consolidated Text* hereafter), which contains within it the articles of the *2007 Land Law*, the articles of the *1992Consolidated Text* except for some that have been repealed, and some of the articles of the Ley, 2013*Ley 8/2013, de 26 de junio, de rehabilitación, regeneración y renovación urbanas*, or the *Urban Rehabilitation, Regeneration and Renovation Law of 2013*.

There remain, however, serious reasons to believe that *2008 Consolidated Text* has not achieved its objectives and furthermore that the new *2015 Consolidated Text* will not reach them in the future. It is indeed possible that far from providing solutions, the new text may have introduced new problems, making it more difficult to survive the present international economic crisis—a crisis that has affected the Spanish economy with particular virulence.

As we shall see, in attacking the mistakes of the past, the land legislation we are examining considerably increases public intervention in land management. Among the perverse effects of the legislation are that it encourages speculation, fosters corruption, increases the pressure on land values to rise, eliminates the principle of indemnity in the expropriation of property, and, finally, generates great juristic-economic uncertainty. Furthermore, a large number of the articles of the *2008 Consolidated Text* may be considered unconstitutional.

2. Doubtful constitutional validity

Let us start with the last issue. Many of the articles of the *2015 Consolidated Text*, if not most, are of dubious validity in the light of the Spanish Constitution. Appeals have been lodged against the *2007 Land Law* by Autonomous Communities and entities like the Consejo de Gobierno de Madrid (Governing Board of the Madrid Autonomous Community), the Consejo de Gobierno de La Rioja (Governing Board of the La Rioja Autonomous Community), more than fifty *diputados* from the Partido Popular, and the Gobierno de Canarias (Government of the Canary Islands Autonomous Community), and also against the *2008 Consolidated Text* by the Consejo de Gobierno de Madrid and the Consejo de Gobierno de La Rioja. These appeals, however, did not discuss many of the articles mentioned in this work. For these reason, *Judgement 141/2014* of the Tribunal Constitucional (Constitutional Court) ignores many of the concepts of doubtful constitutional validity as discussed in this paper. However, *Judgement 141/2014* nevertheless declared unconstitutional the third paragraph of article 22.1 of the *2007 Land Law* and the third paragraph of article 23.1 a) of the *2008 Consolidated Text*, and there was even a dissenting opinion by a judge which showed that more articles should be unconstitutional, mainly those related to valuations for purposes of expropriation.

In effect, the *2008 Consolidated Text* seems to ignore *Judgement 61/1997* of the Constitutional Court, which closed the debate on whether the State could legislate on planning issues (Asís et al., 1997). This judgement states with total clarity that the national legislator has no competency whatsoever as regards regional or town planning, and furthermore that s/he may not even establish related supplementary norms. The sentence stipulates that the national legislator only has competency as regards the following: basic conditions related to property rights, general guarantees governing compulsory purchase and in consequence the system of land valuation and the responsibility of the government over patrimony (property rights), the aspects of land and housing title registry relevant to civil legislation, and some other issues of minor importance (Fernández, 2004). The text, however, seems to ignore these determinations, and retains articles concerning issues that are the competency of the Autonomous Communities.[3]

2.1. *'Developer agent' (*agente urbanizador*)*

Article 6 of the *2008 Consolidated Text* grants third parties permission to develop and build without the necessity of ownership, thus fomenting a form of 'private expropriation' that is in direct contradiction to the concept of private property as it is understood in the west and even as it is defined in the Spanish Constitution, which recognised the right of all Spaniards to private property.

In such a business model, a company may approach the Municipal Council in power with a proposal to develop land the company does not own but that is classified as building land in the *Plan General de Ordenación Urbana* (Master Municipal Plan).[4] If the Council like the proposal, they may authorize the development. At that point, the owner is given the chance to participate in the urban development of his land. Should the owner be unable to participate or be uninterested, the developer keeps much of the land in payment for the urbanization of the same. In such a case, the owner has not choice and s/he cannot stop development conducted by the 'development agent'. As the difference in value between the land untouched and the land developed is enormous, the 'developer agent' keeps practically all the property. Should the owner instead decide to develop the land him- or herself (an unusual occurrence, because most such owners lack the expertise or resources to do so), and should the Autonomous Community's legislation allow it, s/he must pay the 'developer agent' the cost of the project approved by

[2] Subsequent to *Sentencia 61/1997 del Tribunal Constitucional* (*Constitutional Court Judgement 61/1997*), the *1992 Consolidated Text* was declared unconstitutional, with the exception of a number of articles that have remained in force until today as supplementary legislation.

[3] When the Spanish Constitution came into force in 1978, the Spanish state became a nation made up of 'Autonomies' or 'Autonomous Communities'. Article 148.1.3 of the Constitution gives the Autonomous Communities competency in subjects related to urban planning, housing, and regional planning. Today all the Autonomous Communities have assumed said competencies.

[4] The Master Municipal Plan is the principal instrument of the Spanish planning system. It is responsible for establishing the different land use classifications (urban, developable, or not developable), thus designating different rights over land use. When land is classified as developable the owner is given the right to develop it. To read more on the allocation of property rights in the urban planning system in Spain, read Lee, S., Webster, C., Melián, G., Calzada, G., and Carr, R., 2013, 'A Property Rights Analysis of Urban Planning in Spain and UK', *European Planning Studies* 21 (10) 1475–1490.

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