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Equal Treatment in Land Use Planning: Investigating the Ethics of the Transfer of Development Rights

Francesco Chiodelli*

1. Introduction: the ethics of transferable development rights[1]

Most of the international literature on transferable development rights (TDR) focuses, in particular, on methods, limitations and potentialities of *implementing* TDR programmes (the same applies to the literature on the Italian version of the transfer of development rights, the so-called '*perequazione*'). This focus on operational aspects is rather obvious: the transfer of development rights is a technique adopted for practical reasons (for instance, in the US, TDR programmes have been traditionally used to preserve agricultural and natural areas, or historical sites, because of the difficulties of pursuing such aims through traditional authoritative planning tools). By contrast, less attention has been paid to the 'ethical side' of the issue – that is, to the ethical values on which the choice to implement (a specific version of) transferable development rights rests/should rest. In this note, I will offer some ideas on the question. In the first section, I will focus on the appropriateness and legitimacy of choosing ethical values on the grounds of TDR programmes (and, generally speaking, of land use planning), and I will stress the fact that planning cannot avoid taking the principle of equality of all citizens before the law into serious consideration. In the second section, I will discuss some implications of the principle of equality before the law with reference to the transfer of development rights.

2. How to choose the ethical values on the basis of which to design a TDR programme

Space organization, design and ruling are essentially normative activities, in which «the application of aesthetic, economic, moral and cultural criteria […] depends on legitimate ideological choices» (Mazza, 2009: 131-132); as a consequence, it needs some ethical values of reference, the grounds on which it is based and which orient its choices. However, the choice of these values is extraneous to planning: it falls within the prerogative of the overall political, cultural and civic debate. In fact, the domain of the proper and legitimate competence of planning as a specific technical discipline is not the eth-

* Gran Sasso Science Institute, viale Francesco Crispi 7, 67100 L'Aquila; e-mail: francesco.chiodelli@gssi.infn.it.

1. Some of the reflections contained in this text have been presented in a brief note recently published in *Archivio di Studi Urbani e Regionali*. Nonetheless, I have accepted the invitation by the editorial board of *Scienze Regionali* to expand these reflections as a contribution to the ongoing debate on the transfer of development rights hosted by this journal. I thank Enzo Falco, Ezio Micelli and Stefano Moroni for many comments on this paper and its earlier drafts.

ical-normative field[2]. «*The choice of 'good' or end should come from a political process beyond the scope of the 'planner-as-scientist'; only the choice of means is a technical/social scientific manner*» (Harper, Stein, 1995: 14). In other words, as Gometz (2008) states, technique is about how to act to produce a certain desired outcome; therefore, the ethical values on which a certain planning decision is grounded are not generated within the planning field, but are external constraints on it (Stein, Harper, 2005).

This position on ethical values in planning is not obvious; nor is it shared by all planners. On the contrary, many planners maintain that the aim of planning is to define and promote a preferred state of affairs and some preferred values (e.g. social justice, participation or equity)[3]. From this point of view, planning almost overwhelms politics and the civic debate, since it self-defines the values and the substantive idea of a good city (and a good society) that is to be attained[4].

The question is controversial, and an in-depth analysis on the issue is beyond the remit of this paper. However, regardless of the different ideas on the matter, it appears possible to agree on the fact that, at least, land use planning *should not violate* certain values that are fundamental to our liberal-democratic societies (Stein, Harper, 2005). In other words, land use procedures «*can start only after a liberal institutional framework has been established, and only within the limits that it sets*» (Moroni, 2015: 9) Among these values, to be mentioned is the equal treatment of all citizens under the law (i.e. the equality principle). In fact, even if this is clearly one of the fundamental values of (and constitutional rights in) our liberal-democratic societies, in the majority of Western countries land use planning involves practices that are very often in violation of the equality principle. Euclidean zoning is constitutively an instrument of differentiation among the plots of interest to land use plans (and, as a consequence, among landowners); the rationale at the base of these differences is never a necessary and purely technical one. In fact, as Mazza (2009: 133) writes, «*It could be said that planning has its own 'grammar', in other words a group of technical and scientific rules, but that it does not have its own 'logic': the logic of planning is delineated by political decisions*». The violation of the equality principle is negative *per se*, for deontological reasons (regardless its negative consequences). However, it is worth noting that this fact has also some negative consequences. For instance, in many cases, zoning has been used as an instrument of discrimination: «Detailed mandatory zoning standards inevitably impair efficient urban growth and discriminate against migrants, lower classes, and landowners with little political influence»

2. The proper domain of competence of planning is the technical-anankastic field (from the Greek Ἀνάγκη: necessity), i.e. the set of propositions that express a necessity (if you want *x*, you must *y*). From this point of view, we can state that the core of planning is the formulation of technical rules aimed at 'translating' into spatial forms and rules some *externally* defined objectives (justified according to certain ethical-political principles and reasons). On this issue, see Chiodelli (2012).
3. See, for instance, Campbell and Marshall (1999: 476): «The challenge for planning theorists, as others, is to find a way of giving prominence to universal values such as equity, environmental sensitivity and social justice».
4. For a critical discussion on this issue, see Chiodelli, Scavuzzo (2014).

(Ellickson, 1973: 779). Today, some of the most evident and severest forms of discrimination through land use planning have ceased to exist (at least in Western countries; consider, for instance, racial discrimination); however, the power of differential and discretionary treatment in land use planning continues to have negative outcomes. One of them is the problem of corruption. As Cullingworth (1993: 253) states, «*The problem [of corruption] is […] particularly acute in land use planning where [...] the opportunities are far greater than in other areas of public policy*». This is closely linked to the fact that the features of traditional planning systems generate strong incentives for corruption: while land use decisions have large-scale economic outcomes, these decisions can be taken in a highly discretionary manner, creating wide differences among landowners. All this acts as an incentive for the corruption of public officials and politicians by landowners in order to obtain economically favourable land use determinations (Chiodelli, Moroni, 2015).

3. Equality and the transfer of development rights

The use of transferable development rights can be justified in various ways. For instance, such rights have been often justified in terms of their capacity to mitigate the uneven economic impacts of traditional land use plans on landowners: «*Euclidean zoning and related regulatory means frequently result in uneven impacts on landowners. […] A fairer system would allow all landowners to benefit from the area's development and would require all benefiting landowners to pay the costs associated with preserving and protecting sensitive land*» (Nelson *et al.*, 2012: 95). In this regard, three points should be stressed.

First: equity or equality? In some cases, the implementation of a TDR programme has been justified on the basis of the principle of equity (see for instance: Camagni, 2014; Renard, 2007). In such cases, the principle of equity has been – explicitly or implicitly – asserted as an alternative to the principle of equality. The concept of equity has many meanings; nevertheless, it is arguable that it is clearly distinct from the concept of equality – even if some conceptions and interpretations of equity are closer to the concept of equality (see for instance Micelli, 2011). In fact, the concept of equity implies the primacy of some forms of differentiation and redistribution aimed at pursuing a certain idea of the good city; as a consequence, the abstract and formal equality of treatment under the law is not a basic principle and does not bind tightly public actions. The underlying idea seems to be that it is unfair to treat equally persons who are, from many points of view, different. Without providing a detailed analysis of this issue[5], it is worth noting that the principle of equal treatment does not exclude *per se* the possibility of *some* forms of redistribution – this is, for instance, Rawls' idea (Rawls 1971; 2001). Such forms of redistribution, however, are hierarchically subordinated to the principle of formal equality – they can

5. It is worth mentioning that the principle of equal treatment under the law implies exactly that factual differences are not valid reasons for differentiated public treatment (Moroni, 2014). For instance, gender and religious differences are not acceptable reasons for different access to political rights (e.g. the right to vote in municipal elections).

only be exceptions (strong, precise and ethically justified exceptions) to the principle of equality. As a consequence, the difference between the foundation of a TDR programme on equality and its foundation on equity does not rest on the possibility of having some forms of redistribution (neither on their magnitude), but rather on the *constraints* within which the redistribution can occur. In the latter case (today the prevalent one), *any* form of redistribution is acceptable if it is effective in achieving the desired city, even if this implies the highly differentiated treatment of landowners.

To be noted is that, within the framework of a welfare (liberal-democratic) state, we can assume that the aim of public authorities is not to level *any* form of *substantive* difference; the task of the State is to balance the equal treatment of all citizens under the law with some forms of redistribution that must benefit the disadvantaged and the poor by assuring them the fulfilment of basic rights and equal opportunities in their life chances. What seems to be happening in planning today is that, in many cases, 'redistribution' is an empty catchword (a sort of rhetorical cudgel) considered sufficient to legitimise any kind of land use decision. In all these cases, redistribution is equated with 'building the public city', whose realisation the TDR programmes more easily allow (without the problems relating to land expropriation and at lower public costs). However, in so doing, we abandon, from the outset, the principle of equal treatment; and we open the way to numerous kinds of differentiation, many of them not at all desirable (for instance, this may give rise, as said, to corruption-related incentives, as well as discrimination against 'unwanted' minorities)[6]. Moreover, in so doing, we run the risk of diverting attention away from the proper subjects (for instance, the poor) of redistribution – in fact, the building of the 'public city' does not necessarily imply a form of redistribution towards the disadvantaged; on the contrary, in many cases, public spaces and buildings designated for the public are not ordinarily used by the poor.

Second: different TDR programmes have different equality potentials. Generally speaking, TDR programmes always assure more equality than traditional forms of land use planning. However, the potential of transferable development rights in terms of equal treatment is closely related to the design features of the TDR programme. For instance, in some TDR programmes, the treatment of different plots (i.e. of different landowners) is still very diversified. This is evidenced by the high number of classes (each characterised by a different building index) according to which land is classified. In Italy, for instance, this is the case of the plan of Piacenza (Micelli, 2002). In other cases, the treatment of landowners is more equal – the TDR programme has a lower number of land classes as well as building indexes (in Italy, for instance, this is the case of the plan of Milan)[7]. Moreover, some (theoretical) proposals for a version of the TDR programmes which take the equality potential to a maximum level have been put forward (the

6. This is, for instance, the case of Muslims. In Italy, it is precisely through spatial planning that many municipalities deny the constitutional right of Muslim groups to build places of worship (see Chiodelli, 2014; 2015).

7. The recent master plan (*Piano di governo del territorio*) of Milan envisages the possibility of a unique building index (even if, in practice, three basic building indexes are established). For a discussion on the Milan master plan (see De Carli, 2012; Galuzzi, 2014; Gibelli, 2014; Goggi, 2014; Rocella, 2014).

so-called 'zoning-alternative TDR programmes'; see, for instance, Moroni, 2015).

Obviously, the mere fact that one TDR programme treats landowners more equally than another programme does not mean *per se* that the former has to be preferred to the latter. A comprehensive assessment of a TDR programme must take account of some other factors and values. However, this does not diminish the importance of making the question of equal treatment a central element in evaluating the potential and drawbacks of a certain TDR programme (and, more generally, of a planning system) – at least equal in importance to other factors and values which are today considered fundamental.

In this regard, another minor point deserves attention. To be noted is that the equality potential of a TDR programme is not properly linked to the transferability of development rights; it is linked to the conferment of building indexes (the transfer of development rights is only a mechanism with which to ensure the effectiveness of the land use plan and the functioning of the land market). From this point of view, the 'zero-growth land use plans' endorsed by some Italian municipalities (see for instance the case of Cassinetta Lugagnano, Milan) are also characterised by high equality of treatment of all landowners with empty plots – in this case, a null building index is assigned to all the plots without the need for (and possibility of) transfer[8].

Third: guiding ideal or chimerical idea? While TDR programmes are characterised by a higher equality potential than traditional forms of land use planning, in no case can they guarantee perfect equal treatment of all *citizens*. As Renard (2007) states, «*The practice of transferring development rights is thus equivalent [...] to distributing the overall capital gain generated by urban development (betterment) among landowners only. […] Introducing TDR is thus a means of sharing betterment among landowners only, instead of sharing it among the overall population of the city*» (Renard, 2007: 57). In fact, the equality of treatment applies only to the 'club of landowners'[9]: those who are not owners of empty plots at the time of the plan's approval are excluded from the benefits of equal treatment. However, this does not diminish the importance of safeguarding the equality principle. This principle does not require that *anyone*, *at any moment*, is treated in exactly the same manner; it instead implies that the law should apply to broad and impersonal categories of people (and not to specific persons) in an abstract and impersonal manner. Generally speaking, equality in TDR programmes impersonally concerns the category of 'landowners' to the benefit of whoever is currently a landowner and who will be a landowner in the future (the idea that anyone can be a landowner)[10]. This point introduces a fundamental issue: the principle of equal treatment is a guiding ideal, though certainly an unrealistic and chimerical idea. As well known, in the planning domain, problems are 'wicked' and situated (Rittel, Webber, 1973); as a consequence, the rigorous implementation of the equality principle is not always possible since it must be balanced with operational problems (and

8. In the cases of the Italian 'zero-growth land use plans', some limited developments on empty plots are always allowed.
9. I thank Ezio Micelli for bringing this issue to my attention.
10. In the same manner, for instance, as the right to vote in political elections applies to all present and future adults.

conflicting values). Thus, equality in planning is a guiding ideal. However, it is not an unrealistic and chimerical idea, i.e. a principle with no applicability to (and influence on) the real world. If we agree on the fact that equal treatment is a fundamental principle in the public ethics of Western liberal-democratic societies, therefore, all public rules – planning rules included – should aim to get as close as possible to such a principle. We might conceive equality in the planning domain as 'bad infinity': perhaps it is impossible to arrive at full achievement of the principle of equality in the planning field (as well as in the field of TDR programmes). However, this is not a good reason to avoid making any attempt to approach it as closely as possible – trying at the same time to violate it as seldom as possible, if ever (and only in extreme cases and by virtue of sound ethical reasons).

4. Conclusions

As I have argued in this note, it is important to focus not only on the operational side of the transfer of development rights, but also on the ethical side, i.e. on ethical values on which it is appropriate to ground the design of a particular planning tool. These ethical values cannot blossom autonomously within the field of planning; rather, they are external (independent) constraints on planning decisions, because they are the domain of political and civil discussion. Among these values, the equal treatment of all citizens under the law is indubitably one of the (constitutional) pillars of our liberal-democratic societies. As a consequence, it should necessarily become a fundamental point of reference in spatial planning (and in TDR programmes) as well – contrary to what usually happens in the majority of traditional Euclidean planning systems, in which decisions are taken in a highly discretionary manner, generating a very differentiated treatment of landowners. It is only *after* the principle of equality has been recognised as a fundamental value of reference (even if not the only one) that we can discuss different technical alternatives (in terms of both planning systems and TDR programmes) for implementing it in the field of land use planning. In this regard, different alternatives are currently available, and others might also be conceived. Some alternatives are more 'radical' and subvert the traditional forms of planning (see, for instance, the ideas of nomocratic planning and zoning-alternative TDR programmes in Moroni, 2010; 2015). Others are closer to traditional forms of land use planning – this is, for instance, the case of some kinds of zoning-integrative TDR programmes with a very limited number of land classes; but consider also 'zero-growth land use plans' or the radical forms of land value (or betterment) capture. Each alternative has drawbacks and potentials that must be carefully evaluated. As planners, we can debate these drawbacks and potentials, but without calling into question the need to respect the principle of equal treatment.

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