



Compulsory purchase for biodiversity conservation in the Netherlands



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ABSTRACT

Policy instruments are the building blocks of land use policies. Instrumentation of policies relates to values. Compulsory purchase is a direct government instrument that may be an effective way to implement policies of biodiversity conservation and the allocation of land for recreational use. It is, however, in many contexts, politically controversial. The Netherlands' Government has endorsed policies that involve compulsory purchase in up to 10% of land purchases. This paper reviews if this 10%-ceiling can structure relationships between landowners and government agencies in such a way that it relieves constraints imposed by land availability for biodiversity conservation and the provision of recreational areas. The analysis consists of (1) the background of this 10%-ceiling, (2) the actual procedures of compulsory purchase, by analysis of Royal Decrees, (3) the actual compulsory purchases, and (4) the indirect instrumental effects of the use of this instrument. The paper concludes that the 10%-ceiling does not lift the constraints of land availability, but does influence the relationship between stakeholders, the implementation of biodiversity objectives, and land policy strategies. Nevertheless, compulsory purchase may provide possibilities to acquire land necessary for a consolidated natural area.

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Introduction

As part of our natural capital, the conservation of biodiversity is an important policy issue. Based on the idea that the existing network of reserves is not large enough to maintain biodiversity, land purchases are an important part of a programme to conserve biodiversity (James et al., 2001).

"Biodiversity is a public good and thus is not supplied in sufficient quantities by individuals acting in their own self-interest. (...) Conservation initiatives in the United States, Australia, and most of Europe increasingly emphasize more direct incentives: land purchases, leases, and easements, as well as financial incentives such as performance payments and tax relief." (Ferraro and Kiss, 2002, 1718).

However, public policy instrumentation does not include a politically neutral set of tools to complete the job efficiently and effectively (Peters, 2002). Policy instruments are 'bearers of values' (Lascoumes and Le Gales, 2007, 4), and the choice of instruments may influence the structure of the policy more than the expression of its aims (Hood, 2007; Lascoumes and Le Gales, 2007). This also applies to the choice of instruments to conserve biodiversity, or to improve recreational facilities in peri-urban rural areas.

Allowing compulsory purchase for these matters means farmers are not those who decide to cease farming at a certain location under certain circumstances, but gives governments power to do so. This makes the values of biodiversity conservation and recreational facilities (for urban inhabitants), as delineated by the authorities, superior to individual farmers' decisions. Allowing this instrument of compulsory purchase has a very strong political dimension, which may affect its actual use. Instruments, such as compulsory purchase, 'produce specific effects, independently of the objective pursued' (Lascoumes and Le Gales, 2007, 3).

This paper analyses such a situation of compromise, in which, the national authorities of the Netherlands (MSP and MF, 2001) have indicated that provinces implementing national policies on biodiversity conservation and the development of recreational facilities, may acquire a maximum of 10% of the area necessary using compulsory purchase proceedings. Although landowners cannot stop compulsory purchase once the 10%-ceiling has been reached, the ceiling has played a significant role in debate and argumentation behind the use of compulsory purchase for the conservation of biodiversity, recreational areas and landscape. The question this paper poses is whether setting such a 10%-ceiling to the use of compulsory purchase is a feasible option to overcome land-availability constraints in relation to the aims of biodiversity conservation and the development of recreational facilities.

The next section of the paper positions this within the context of academic literature on land availability constraints and on the use of policy instruments. The section 'Method and context' introduces the research methods and the structure of the compulsory

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purchase instrument in the Netherlands. The fourth section, presents the findings and the final section reflects on the outcomes.

Land affordability constraints and the sociology of public policy instruments

The relevance of this paper is twofold. Firstly, this study investigates if the potential, moderate use of compulsory purchase helps to ease land availability constraints in relation to biodiversity conservation (and additional recreational facilities). Secondly, it reveals insights into the way, in which, the instrument of compulsory purchase structures behaviour and choices. More precisely formulated, the potential use of compulsory purchase for up to 10% of the areas destined for biodiversity conservation, or recreational facilities.

Land availability constraints

Although Ehrlich et al. indicate that “. . . we are still in the early stages of developing the scientific basis, and the policy and finance mechanisms, for integrating natural capital into land use and other resource decisions on large scales” (Ehrlich et al., 2012, 70), there is some evidence that suggests that land acquisition may be an effective option to preserve biodiversity (Snyder et al., 2007; Miller et al., 2009; Sanders and Gerritsen, 2011; Butsic et al., 2012).

The interaction between the land market and policies to conserve biodiversity is strong. Land purchases take place under market conditions and affect the outcome of the biodiversity conservation programme (Armsworth et al., 2006). Knight et al. indicate that “. . . the effectiveness of land acquisition initiatives depends fundamentally upon two constraints, to which, biological data provides no answers: availability of (1) funds for purchase of protected areas, and (2) lands for acquisition” (Knight et al., 2011, 2623).

There are also alternative options suggested, which will not be evaluated in this paper. One of these is to accept the constraint of lands available for nature conservation and show flexibility in relation to the areas for purchase. After all, a regional conservation design is just ‘the plan of the day’ (Pressey et al., 2013, 166), which will be progressively updated in due time. However, this may impede goal achievement (Knight et al., 2011). Other alternative options address the willingness to sell of land managers, such as by paying premium prices (Armsworth et al., 2006; Knight et al., 2011), which has, of course, impact on the other constraint referred to above – land affordability. Yet further options are to refrain from ‘direct government’ (Leman, 2002) by land acquisition and choose an indirect government-approach by making contractual arrangements with private landowners in relation to the conservation of biodiversity, such as by conservation easements. This option is dependent on the willingness of land managers to allow these easements and the consequent enforcement of them in interplay between landowners and managing authorities, which may be an issue in practice (Kozich and Halvorsen, 2012). Besides these, other options have been suggested to address biodiversity via zoning, easements, or in urbanising areas (e.g. Doremus, 2003; Alterman, 2010; Williams, 2012).

These alternative options are, however, less direct than compulsory purchase, as this instrument is especially suited to address an owner not willing to sell land. Compulsory purchase of land for biodiversity conservation may be an effective way to eliminate the constraints imposed by willingness-to-sell. Depending upon the local legal context, the conservation of biodiversity by the assembly of land may be considered as a public utility that provides the grounds for the use of compulsory purchase. However, in an actual policy context, biodiversity conservation may not be the only and highest objective that a government pursues, i.e. these goals may be

‘typically undervalued’ (Ehrlich et al., 2012, 70). Biodiversity may not have the same standing as railroads, major highways or defence facilities, i.e. national security, in using compulsory purchase to address unwilling landowners. One of the reasons for this is that there are different, often conflicting, views on the governance and use of the natural world (Purdy, 2012).

Also for recreational facilities, which are considered to address public health problems including sedentariness and obesity by enabling and tempting people to make more active life choices, public access of private land for recreational activities is an issue (Howley et al., 2012). This paper provides extra insights into this dilemma between, on the one hand, effective conservation of biodiversity and recreational areas and, on the other hand, constraints of private property rights to deal to use massive compulsory purchase to overcome the problem of unwilling landowners.

Public policy instruments

Within the academic field of public policy, many different definitions exist for public policy instruments. According to some of the numerous definitions, compulsory purchase is not an instrument at all. Brukas and Sallnäs, for example, use in a recent article in *Land Use Policy* the following definition: “. . . a policy instrument is a deliberate structured effort by governors to solve a policy problem by modifying actions of the governed” (2012, 606). Although this definition includes the use of compulsory purchase as threat to motivate landowners to follow policies, it excludes the use of compulsory purchase as direct governmental instrument to acquire land from a non-consenting landowner. In our paper, we will follow a wider-ranging definition, which includes the latter use of compulsory purchase. Salamon defines, for example, a tool or instrument of public action as ‘an identifiable method, through which, collective action is structured to address a public problem’ (2002, 19).

This definition emphasises that the interesting question is not “when does a given legislated rule cause the intended results”, but “what difference does the law make in a concrete situation of behavioural choice?” (Griffiths, 2003, p 19). This latter question hints at the values associated with instruments, such as compulsory purchase. Within legal academic debate there is a long tradition of normative debate on the use of compulsory purchase and the conditions in which, and by whom, this is allowed. The fierce political and academic debates following the Kelo-ruling of Supreme Court of the USA on the meaning of the concept of *public use* in relation to planning interests (Blomley, 2007), is a recent example. The conditions under which compulsory purchase is allowed tend to vary, based on jurisdiction-specific particularities. However, some common norms have emerged, which relate to aspects, such as compensation, equal treatment, public utility and proceedings that prevent planning blight. These norms can be found in the principles of international investments law (in many bilateral and multilateral treaties between states; see Dolzer and Schreuer, 2012) and the First Protocol of the European Treaty of Human Rights (Loof et al., 2000; Ploeger and Groetelaers, 2007). On all of these aspects, national jurisdictions, but also policy makers, may find their own weighting of interests, showing the normative variations between legal systems and instruments used for public policy implementation.

Moreover, Lascoumes and Le Gales highlight the relational nature of policy instruments as a device ‘that organises specific social relations between the state and those it is addressed to’ (2007, 4). This relational addition matches our analysis of norms and values, as property rights exist as “the relations among people concerning the use of things” (Weimer, 1997, 1). Thus, the instrument of compulsory purchase organises or structures relationships concerning land (and land availability). This structuration affects the position of all actors in these relationships. Rules about the

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