**Capability approach to compulsory purchase compensation: Evidence of the functionings of land identified by affected landowners in Scotland**

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**Abstract**

This research was inspired by the challenges faced by landowners seeking adequate compensation for all their losses following the compulsory acquisition of land by public authorities in Scotland. This research uses Sen’s ‘capability approach’ and argues that the wellbeing contribution of land extends beyond its market value and therefore compensation payable following compulsory acquisition should include these other losses. The aim of this research is to identify the valuable functionings (or usefulness) of land from the perspective of the existing landowners. The functionings which contribute to their wellbeing, can be both financial and non-financial and should be appropriately compensated.

The exercise of the power of compulsory acquisition is a common instrument of land procurement for public projects and is often resisted, by the affected landowners, for a variety of reasons, of which inadequacy of compensation is the most debated. In recent decades, there have been spasmodic attempts at the policy level to harmonise the procedure and derive a fairer compensation mechanism for the loss of land and property rights. The first step towards achieving this bigger objective is to understand the role of land and property in the overall well-being of an individual landowner. In this context, this research identifies and creates a list of valuable ‘functionings’ of individual landowners who have suffered losses due to compulsory acquisition, servitude and severance under various public projects in Scotland.

Qualitative Content Analysis is applied to analyse case reports prepared by the Lands Tribunal for Scotland. In depth analysis of nineteen relevant cases is performed with the use of NVIVO software and reveals a list of fifteen different functionings of land. Results show that financial functionings are the most frequently discussed at the Lands Tribunal. The debate on the loss of financial benefits from expected and planned development on land in the near future is the most debated topic by the landowners.

Findings from this research can be advanced, in future research, to create a universal list of functionings offered by land and ownership rights that would help in understanding the role of landownership in the well-being of the landowners.

Keywords: compulsory purchase; compensation; capability approach; functioning and capability; landownership

**1. Introduction**

The importance of land for the welfare of an individual is unequivocal (see for example (FAO, 2002). Attempts to measure welfare in economics, have employed microeconomic techniques as a measuring tool at the economy level. Economists concerned with welfare derive a social welfare function and then determine a ranking of feasible allocation of resources based on the social welfare that they entail. Typically, these functions include measures of economic efficiency and equity. Recent literature has argued that the measure of welfare based on economic efficiency and equity is limited and Sen (1979) argues that welfare measures should include measures of economic freedom. This paper applies Amartya Sen’s (1979) capability approach to welfare to identify individual specific factors associated with land ownership that contribute to well-being.

Using Sen’s “capability approach” to welfare, this research acknowledges the importance of ‘land’ for landowner’s well-being and discusses the valuable functionings that are offered by the land. The objective of this paper is to create a comprehensive list of functionings offered by land, in the context of Scotland. In summary, this research explains the relationship between land, ownership and well-being of an individual through the theoretical framework of the “capability approach”.

The scope of this paper is limited to understanding the functionings of land that have been identified as being valuable to landowners, based in Scotland, but which are often left uncompensated when land required for a public project is acquired through compulsory purchase. The research question is thus what are the valuable functionings of land that are often ignored and are not compensated under the existing compensation mechanism? Using qualitative content analysis of nineteen relevant case reports from the Lands Tribunal for Scotland[[1]](#footnote-1), the paper identifies functionings associated with land in Scotland, with the objective that the findings from this research will contribute in refining the compensation strategies and the process of compulsory acquisition to make it fairer towards the affected landowners.

The research paper is divided into four further sections. Section 2 below, reviews the literature on private property and the theoretical principles underpinning the existing compensation model and the challenges to it. The research design is discussed in detail in Section 3 while Section 4 analyses the data and discusses the findings while Section 5 presents conclusions from the research.

## 2. Literature Review

Since the 19th century, private and public ownership of land has been the most common ownership type prevailing in the land market, with the former characterised by individual ownership of land and the latter state ownership. Other types of land rights, such as native title, tribal rights, community rights to land, and rural collectives are recognised as important, but are uncommon. Private ownership has enhanced personal freedom for those who own the land and has concentrated wealth in the hands of owners. The idea of private ownership of land developed as a response to a sovereign’s power in monarchies where the nobility in order to guard their power, pushed for recognition of their land rights (Gilman, 1984). In the words of Gilman (1984) “private property permitted the individual to be a “little king” of his/her own lands, imitating and competing against the claims of the state”. This, however, poses problems for the availability of land for the use of public benefits as from time to time privately held land is required for public purposes. It has long been accepted that private rights should give way on occasion to the wider public interest. To avoid public purposes being delayed or frustrated and to ensure that private rights give way when required, governments across the world have been ready to confer powers of compulsion.

The importance of land in Scotland is expressed in the recent report produced by the Land Reform Review Group (2014) in which the Minister for Environment and Climate Change, argued that “The relationship between the land and the people of Scotland is fundamental to the well-being, economic success, environmental sustainability and social justice of Scotland and her communities. The system and structure of land ownership is a defining factor in that relationship: it can facilitate and promote development, but it can also hinder it.” (p. 5).

Literature on welfare or well-being associated with land at the macro-level (not individual specific) is abundant and concerns the analysis of the impact of land reforms and land rights on economic performance (see for example Skoufias, 1995; Yao, 2000; Carter and Salgado, 2001, who analysed the impact of distribution of land rights on functioning of land markets). Authors such as Deininger & Jin (2003) and Lerman (2001) analysed the efficiency effects of land reforms in transitional economies. There is, however, a paucity of literature on land and well-being and welfare at the micro-level. The studies which have looked at welfare aspects of land at micro-level have analysed income effects and effects of land allocation due to land reforms and land rights as a measure of welfare (see for example Deininger & Jin, 2003; Brasselle, Gaspart, & Platteau, 2002). These are an important but only partial view of well-being and welfare.

The traditional economic definition of “well-being” was recently reviewed by Nobel Laureate Amartya Sen who identified “well-being” with “capability” and “functionings”. Wells (2016) interprets the meaning of ‘functionings’ and explains that ‘functioning’ is the state of ‘being or doing’ such as *being* well-nourished, or *doing* an activity like cycling. ‘Functioning’ should be distinguished from both (i) the resource (say a bicycle or a piece of land) which is in use, and (ii) the utility or happiness resulting from the act of using the resources possessed (Sen, 1985). Therefore ‘functionings’ are different from ‘utility’, where the former delivers rational benefits and the latter could merely be an emotional or mental state. ‘Capability’, on the other hand, is “the set of valuable functionings that a person has effective access to” (Wells, 2016). Sen (1993) writes that “the expression (capability) was picked to represent alternative combinations of things a person is able to do or to be – the various ‘functionings’ he or she can achieve” (Sen, 1993, p. 30).

The rights that ownership of land gives to the owners are central to what uses and functionings are drawn (Land Reform Review Group, 2014). In legal terms, the concept of private ownership of land has evolved as a bundle of rights. These rights include the right to (i) use (or not to use); (ii) exclude others from using; (iii) irreversibly transform; (iv) sell, gift or bequeath; (v) rent or lease; (vi) retain all rights not specifically granted to others; (vii) retain these rights without time limit or review (Gilman, 1984). In the context of Scotland, the rights of ownership for all landowners will allow (legal) access to the same set of functionings. But the ability of an individual to (practically) access these functionings varies depending upon landowners’ subjective characteristics. Sen (1985) uses the example of a bread loaf to explain these differences more clearly. He argues that “the possession of food (bread) gives the owner the access to the properties of the food which can be used to satisfy hunger, to yield nutrition, to give eating pleasure and to provide support for social meetings. However, the characteristics of the goods do not tell us “what the person will be able to do with those properties.” (Sen, 1985, p. 9). By putting emphasis on differences in individualistic capability, Sen argues that each individual shall be treated ‘as an end’, in completeness, and not merely as a module of social welfare (Basu & Kanbur, 2008). In the context of land as a good, each landowner will have different ability (say physical, fiscal, social, intellectual) to access functionings from the “universal set” of functionings of land. They will choose a few or all from among the accessible set, depending upon their requirements and choices. Increasing social welfare will mean equal marginal increase in the welfare of each individual, as well as widening the set of accessible functionings for each individual, thus increasing their capability.

In the case of compulsory acquisition of land in Scotland, the ownership rights (mentioned earlier) are suddenly withdrawn, but not without the payment of monetary compensation recommended by the law. However, compensation received by the affected landowner is often disputed because of its inadequacy (Rowan-Robinson & Hutchison, 1995) and does not necessarily satisfactorily replace or reconstruct the functionings lost when ownership is relinquished, especially the non-financial functionings, which are explained in detail in Section 4. Often, dissatisfied landowners enter cumbersome negotiation process that are concluded in the court. In this context, the Land Reform (Scotland) Bill 2016 emphasises that the Scottish legislature on compulsory purchase should be reformed to bring greater social justice to the individuals and businesses affected by compulsory acquisitions (Land Reform Review Group, 2014). Thus, when viewed from the lens of capability, fair compensation may be defined as a mechanism to identify and reconstruct the chosen and valued “functionings” of each affected landowner.

The history of the development of compulsory powers by public authorities has been one of striving to achieve a fair balance between, on the one hand retaining safeguards for the individual whose land is required and on the other, the importance of not delaying schemes which are to serve a much need public purpose, while offering value for money to the tax payer. With reference to the practice of payment of compensation, Stonebuck (1972) finds that such a principle is only “to the extent such can exist without a constitution.” (p. 554). The Scottish Law Commission narrates the history of English legislation on compulsory purchase and finds that land acquisition was happening prior to the nineteenth century, but its recognition in the legislature was demanded in 1830s when massive acquisitions were happening for railway development. Legislature was dealing with compulsory acquisition laws in a piecemeal format and private bills were passed by the Parliament that specifically dealt with a project. “Much of the legislature was repetitive and the volume of each Bill tended to obscure the real issues” of rail routes and viability (Scottish Law Commission, 2014, p. 47). As a solution to these problems, a separate legislature was proposed in 1845[[2]](#footnote-2) to combine the provisions that were considered necessary for standardising procedural aspects of the compulsory purchase process. The Lands Clauses Act of 1845 was the first permanent, general statute in England, on the topic of compulsory acquisition and earlier to that, the power of acquisition and the obligation to pay compensation were stated by respective Acts that directed the project for which the taking would occur (Stonebuck, 1972).

It is interesting to note that even though the 1845 Act did not explicitly state the requirement of payment of compensation, it was a common practice in England until the 1950s to pay ten per cent higher than the estimated value of condemned property to account for incidental losses. Epstein (1985) explains that this extra bonus can be justified on two grounds, “first, as a balm for the infringement upon autonomy brought about by any forced exchange, and second, as an effort to correct the systematic underestimation of value in the market value test.” (p. 184). An interesting justification is presented in an article in the Yale Law Journal (1957) that the need for extensive taking emerged in the first half of the nineteenth century when England was undertaking massive railroad developments. This required assembly of huge land stretches and thus acquisition could not be limited to small parcels of undeveloped private land and rather extended to big parcels that were highly developed industrial and commercial areas, thus causing more severe damages to the landowner than ever before (The Yale Law Journal, 1957). Morever, the land that was getting acquired was for the benefit of profitmaking railroads and therefore the courts were more sympathetic towards the claimant and were generously paying for incidental losses over and above the payment of the market value (The Yale Law Journal, 1957). A more political justification is presented by Benson (2008) where he finds that until the nineteenth century, voting rights in England were limited to property owners and the parliament was primarily represented by powerful landed aristocracy, the landholding knights and the merchants who owned homes and businesses in the town. These landowners were also the land losers and therefore “the requirement of compensation greater than the assessed value are not surprising” (Benson, 2008, p. 428).

In general, the payment of compensation is more of a customary obligation rather than a constitutional mandate (Benson, 2008). For example, in the case of *Attorney-General v De Keyser's Royal Hotel Ltd, 1920*, Lord Atkinson observed: “The conclusion [from the review of past practice], as I understand it, is this: that it does not appear that the Crown has ever taken for these purposes the land of the subject without paying for it, and that there is no trace of the Crown having, even in the times of the Stuarts, exercised or asserted the power or right to do so by virtue of the Royal Prerogative.” (Scottish Law Commission, 2014, p. 27). In the ongoing discussions to reform Scottish legislature on compulsory purchase, the Scottish Law Commission (2014) writes that “although a right to compensation can be readily inferred from the 1845 Act, it is not expressly stated. We therefore propose that the right to compensation as a result of compulsory purchase in Scots law should be expressly provided for in the new statute.” (p. 37). The right to compensation is deemed necessary for just treatment towards the loss of property rights of the affected landowner and also, for their ‘welfare’.

The Scottish Law Commission (2014) deliberates over the issues with the existing compensation methods and explains the legacy of legislative ambiguities associated with the assessment of ‘fair’ compensation. The discussion paper scrutinizes the 1845 Act and brings out the problem of non-conclusive expression of assessment of compensation, though, the inference can be derived from sections 48 and 61 of the Act, that compensation should include the value of land, injurious affection to other lands of the same landowner and also the damages sustained by the landowner, if any (Scottish Law Commission, 2014). The UK Parliament later adjusted the approach to compensation by setting out six rules in the 1919 Act that are consolidated under section 12 of the Land Compensation (Scotland) Act 1963, as stated below –

*“Compensation in respect of any compulsory acquisition shall be assessed in accordance with the following rules:*

1. *No allowance shall be made on account of the acquisition being compulsory;*
2. *The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise;*
3. *The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the requirements of any authority possessing compulsory purchase powers;*
4. *Where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the occupants of the premises or to the public health, the amount of that increase shall not be taken into account;*
5. *Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the official arbiter is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement;*
6. *The provisions of rule (2) shall not affect the assessment of compensation for disturbance[[3]](#footnote-3) or any other matter not directly based on the value of land: and the following provisions of this Part of this Act shall have effect with respect to the assessment.”*

The first rule stated above disallows compensation for non-financial losses and has invited criticism since inception (Scottish Law Commission, 2014). This problem was partially addressed in the 1973 Act[[4]](#footnote-4) that advocates supplementary payments for home loss and farm loss (for more details refer to Part III of 1973 Act). In summary, the existing compensation mechanism advocates payment of (i) the land acquired; (ii) consequential losses including injurious affection on other land owned by the same landowner and damages sustained by the owner due to the carrying out of the works; and (iii) ‘non-financial’ losses (Scottish Law Commission, 2014). Yet the definition of consequential losses and non-financial losses is very narrowly defined in the current legislature and therefore the courts are relying upon case laws that are evolving as a parallel reference to these Acts (ibid).

The existing legislative mechanism does offer limited opportunities of compensation for the loss of future development potential of the subject land by considering future hope value (for more details refer to Robinson & Farquharson-Black, 2009). That said, the ‘hope value’ does not take full account of all opportunities of development compromised in the taking of land and is rather deterministic in nature (Robinson & Farquharson-Black, 2009). Put simply, its realization is evidence based and does not account for unforeseen opportunities that a landowner may have at the time of acquisition (ibid). In addition to that, it is difficult to value opportunities in the remoteness of time, for the obvious reasons of identification of future potential and the uncertainty surrounding the success of a planning application in the future.

Thus the way hope value is realized now, extinguishes the real option aspects of landownership. In real estate, real option theory has been used to value future investment and development opportunities (Howell, et al., 2001). Private property rights encapsulate a real option for the landowner to take decisions on sale or investment at one or more points in the future. Marjit (2010) proposes a theoretical framework for option pricing of land for agrarian landowners in India. Though real option theory may help in valuing financial aspects of losses that are currently remaining uncompensated, it will still leave out other non-financial functionings associated with landownership.

When considering the loss of benefits linked with future development potential, it is important to acknowledge the Pointe Gourde principle (see section 6 of the Land Compensation (Scotland) Act 1963), which recommends that where the subject land has benefited as a result of the proposed project, an equivalent reduction should be made to the amount of compensation payable to the affected landowner:

*The compensation payable on a claim shall be reduced by an amount equal to any increase in the value of –*

1. *the claimant's interest in the land in respect of which compensation the claim is made; and*
2. *any interest in other land contiguous or adjacent to the land … to which the claimant was entitled in the same capacity on the relevant date, which is attributable to the existence of or the use or prospective use of the public works to which the claim relates.”*

Reducing the benefits caused by the proposed project from the compensation payable to the affected landowners is an additional check on future benefits linked with land holding. This raises further debate on the unequal distribution of positive and negative externalities as a consequence of public projects at the societal level.

In the case of compulsory purchase of land, most governments have been relying on the traditional approach to economic ‘welfare’, where the benefit is equated with money and market value of land is found to be the most appropriate compensation (see Blume, Rubinfeld, & Shapiro, 1984 for details on economic derivations). The income approach to welfare ignores non-income generating contributions of land in the well-being of an individual. Overall, there is a growing realisation towards non-monetary components of ‘welfare’ and one good example is the replacement of Gross Domestic Product by the Human Development Index as an indicator of country’s development (Basu & Kanbur, 2008). Taking advantage of the development of economic theory advocated by Sen (1979), that for the first time proposes a non-monetary approach to ‘welfare’, this research initiates discussion on redefining the ‘value’ of land, in terms of its usefulness to the landowner.

**3. Research Design**

As the Land Tribunal for Scotland is the final arbiter on compulsory purchase compensation claims, decisions from this body are considered the best available evidence of interpretation of the existing legislation. For a claimant, taking a case to the Lands Tribunal is costly in terms of their own legal fees (upwards of £30,000 in 2017) and is not without risk, as vexatious claims run the risk of the claimant having to pay the acquiring authority fees as well as their own. However, the very fact that claimants are willing to take matters to the Tribunal perhaps illustrates the strength of feeling on the veracity of certain heads of claim, a level of uncertainty on the interpretation of the rules, and undoubtedly in many cases the substantial sums of money which are at stake should the judgement find in favour of the claimant.

It is acknowledged that there are weaknesses in using Land Tribunal cases as evidence. For example, the high cost of legal fees may act as a barrier to landowners taking forward claims where they have limited wealth and cannot afford to do so, and it may simply not be economic to pursue small value cases where transaction costs exceed the potential gain. Thus, evidence from the Lands Tribunal cases are potentially bias toward higher value cases or more wealthy claimants, and against more speculative claims, smaller value cases and financially weaker claimants or to simply those who are risk averse. That said, there is also a practical reason for adopting Land Tribunal evidence in that it is very difficult to obtain detailed information on cases that have not gone to the Tribunal, as these remain confidential to the parties involved, whereas the Tribunal judgements are now available online with cases dating back to 1997. Thus, in this research, the subjective utility of land to landowners was identified through an analysis of claims presented to the Lands Tribunal of Scotland. Qualitative Content Analysis (QCA) was adopted to evaluate the evidence with the use of NVIVO software.

As a scientific tool of research, it is important that QCA is performed in a systematic manner that produces replicable findings. The first step was to formulate the criteria of selection of the object/unit of analysis. As at August 2016, there were thirty-eight[[5]](#footnote-5) case reports on disputed compensation available online on the website of the Lands Tribunal for Scotland. In depth reading of all thirty-eight cases was performed and the content was analysed briefly at this first stage of screening. The criteria of selection were the availability of information (or content) on the functionings of land and on this basis nineteen cases were selected and the remaining nineteen were rejected. Among the selected nineteen cases, the most recent case was decided in 2016, while the earliest case was in 1997, thus offering evidence over the two most recent decades. Detailed content analysis was performed on the selected nineteen cases. The flowchart in Figure 1. summarizes the procedure adopted.

(Insert Figure 1 here)

To be able to apply the same method of analysis on each case, it was necessary to ensure that the format of the text document for each case was the same. It was found that the formal structure to this report and all discussions presented before the Tribunal and the opinion/decision of the Tribunal are written for all cases in a similar format. Major sections of the case reports are summarised in Table 1:

(Insert Table 1 here)

Although it is important to read and understand each section of the report, the emphasis was on analysing the ‘background’, ‘applicant’s submission’ and the discussion by the Tribunal. The content was analysed in detail using NVIVO software.

This research used the procedure advocated by Mayring (2000) for inductive category development, presented as a step model in Figure 1. The criteria for defining the categories (or codes) are derived from the theoretical background of this research and the research question. The textual material was analysed to tentatively deduce the codes using an iterative process. A list of fifteen functionings were created, which formed the “sub-categories” in NVIVO. These sub-categories have further been classified under four broad headings, and are discussed in Section 4 below.

The focus of this research was on the manifest part of the text. In the analysis of manifest content, the codes or categories were based on existing theory and the codes were revised as the analysis progressed (Zakaria & Zakaria, 2015). The words and phrases were directly cited from the dataset, which in this research was the statement report prepared by the Tribunal. In analysing the content from the Tribunal, it was assumed that there was no evidence to the contrary, that all parties were equally knowledgeable and capable to state their concern and opinions. This ignores the comparative advantage of power, profile, knowledge, and other similar characteristics of some participants over others. Further possible limitations of using case reports as the source of information are that it may miss discussion on important functionings that are acknowledged as compensable losses as per the current legislature and that it may discuss only those functionings that are uncompensated but are believed to be provable and admissible under the existing legislature. This may leave out some basic functionings from being discussed.

## 4. Data analysis and Findings

The various losses that emerged from the discussions in the case reports, cover a wide range of functionings associated with land and property. Four broad headings (A to D) and fifteen sub-categories of functionings were obtained. Each of these functionings are discussed in detail below.

1. ***Financial functionings of the landowner***
2. *Financial gains from expected and planned development in the near future*

The most prevalent discussion in the Lands Tribunal cases was around the potential for development of the subject land in the future. The records show that there was often an expectation to receive financial benefits, direct or indirect, from these developments. This also covers cases where landowners had already initiated the planning or execution of some development in the near future. Examples of this type of losses are the following –

1. Loss of two additional wind turbines that were planned by the landowner in the case of Auquhirie Land Company Limited v Scottish Hydro Electric Transmission plc (2016).
2. Sterilization of the land for the establishment of two additional wind turbines, thus diminishing the value of land in the case of Marjory Gordon, Hugh Gordon and Executors of Hugh Gordon v National Grid Gas plc (2016).
3. Loss of development potential of land which was in use as a nursery and was considered developable as a holiday park in the case of Christies of Scotland Limited (Applicant) v Scottish Ministers (Respondents) (2015).
4. Loss of development potential of land for a supermarket in the case of David Strang Steel and Richard Strang Steel v Scottish Ministers (2014).
5. Division of a large, contiguous land parcel into two parts and the loss of agricultural efficiency and intensity and consequential reduction in the value of the remaining land, as seen in the case of Emslie v Scottish Ministers (2014).
6. Loss of development potential for a golf course in the case of Danzan Trust & The Dundas Trust v Edinburgh City Council (2007).
7. In the case of Julien v City of Edinburgh Council (2006), the landowner argued for better value of his land. The planning permission for a residential development was obtained but not used, thus demonstrating that the land had potential for residential development.
8. Sterilization of land for residential development as a result of a wayleave which was granted for an electricity transmission line in the case of G S Brown Construction Limited v S P Transmission Limited (2003).
9. In the case of Freshbright Cemeteries Limited v The City of Edinburgh Council (2001), the landowner (Freshbright Cemeteries Limited) purchased the cemetery land with intentions to carry out reinterment of the cemetery and to redevelop the site into a memorial garden and housing.

This heading also covers the loss of developability of the remaining land due to severance, for example in the case of David Strang Steel and Richard Strang Steel v Scottish Ministers, (2014) and Glenmore v Transco (2003). The claim was for injurious affection to the remaining land parcels that were being landlocked due to the acquisition of a part of the land holding.

To explain this functioning more clearly it is important to emphasise that the nature of losses in this category are linked with the curtailment of development activities, “expected” and “planned”, on the subject land, the emphasis being that the landowner was already planning the development activity before the Compulsory Purchase Order was issued; and was aware of the type (or nature) of development activity on their land. The landowners could support their claim with formal evidences validating their attempts towards developing the land. In reference to proving the loss of development potential, the evidence produced by the landowners often included formal planning permission, prior to the CPO, or Certificates of Appropriate Alternative Developments (CAADs), after the CPO.

1. *Future benefits linked with unseen development potential of the land parcel*

The unseen development potential of a piece of land offers the opportunity to the landowners to benefit from a market phenomenon that is certain to happen in the future, but the nature and extent of the development is unseen. Also, the lack of certainty of timeline of developments may make it look too remote or latent in the present date. A good example is the case of Young v City of Edinburgh Council (2001), in which the landowner argued for the unseen development potential of his land and while this was acknowledged by the Lands Tribunal, such was the uncertainty of obtaining the requisite planning permission, this cancelled out any increase in value.

The CAADs explain the probable uses of land in the future but the onus lies on the applicant to initially propose the classes of developments. For example, in the case of Marjory Gordon, Hugh Gordon and Executors of Hugh Gordon v National Grid Gas plc (2016); Christies of Scotland Limited (Applicant) v Scottish Ministers (Respondents) (2015); David Strang Steel and Richard Strang Steel v Scottish Ministers (2014); and Danzan Trust & The Dundas Trust v Edinburgh City Council (2007), the landowner applied for CAAD and the certificate mentioned uses which otherwise were unseen by the landowners. It is important to note that the CAAD is not conclusive and the onus still lies on the landowner to prove that the land has the potential for specified classes of development.

1. *Benefits from expected improvements in the market condition in the near future*

There is often expectation of improvement in demand of certain goods for which the production is dependent upon the availability of land. For example, in the case of Auquhirie Land Company Limited v Scottish Hydro Electric Transmission plc and Marjory Gordon, Hugh Gordon and Executors of Hugh Gordon v National Grid Gas plc (2016) it was argued that the demand for renewable energy from wind turbines was likely to increase in the future. In another case, Glenmore v Transco (2003), the landowner expected that the demand for residential units in the area would improve in the future. In the recent case of Christies of Scotland Limited (Applicant) v Scottish Ministers (Respondents) (2015), the landowners argued that the demand for recreational property, including caravan parks, was increasing despite the economic recession. The demand for a supermarket in the area was clearly established in the case of David Strang Steel and Richard Strang Steel v Scottish Ministers, (2014). In the case of Danzan Trust & The Dundas Trust v Edinburgh City Council (2007), the landowner was hopeful to benefit from imporved demand for golf courses in the future.

1. *Market value of the property and consequential reduction due to public works*

Land is a physical asset that normally appreciates in value over time through inflation or changes in real demand. This advantage is at times lost or hindered as a consequence of public works. The following are some reasons for the reduction in the property value, that were observed during case discussions –

1. **“**sterilization” of a portion of land that was otherwise considered useful for installation of wind turbines (Marjory Gordon, Hugh Gordon and Executors of Hugh Gordon v National Grid Gas plc, 2016);
2. “material detriment” was established based on the extent of loss of amenity (of a portion of the garden) (Aberdeen City Council v Glen Morrison and another, 2014)
3. sterilization of land for residential development due to the grant of wayleave for electricity transmission lines (G S Brown Construction Limited v S P Transmission Limited, 2003);
4. blight of land for the development of housing units (Glenmore v Transco, 2003);
5. physical damages to the existing industrial unit (Fitzpatrick v The Coal Authority, 2001);
6. physical factors (for example noise) caused by the use of the new by-pass, depreciated the value of residential property (Dobbie v Fife Council, 1998);
7. *Income (existing and expected) from land and its produce*

This functioning is derived from cases where the landowner was using the subject property for income generation, or was expecting to modify or intensify its use for income generation. This includes cases of acquisition of properties that were being used for the business of a nursery and garden centre (Christies of Scotland Limited (Applicant) v Scottish Ministers (Respondents), 2015); agricultural income generation (Emslie v Scottish Ministers, 2014); industrial activities (McEwan v East Dunbartonshire Council , 2004); brickworks and mineral extraction (SBC Properties Limited v Midlothian Council , 2002); cemetery (Freshbright Cemeteries Limited v The City of Edinburgh Council, 2001); and joinery business operation (Bussell and Others v City of Edinburgh Council, 1998).

1. *Agricultural efficiency that results from ownership of large land holdings*

In the case of agricultural use of land, the cost (including money, time and ease) of using machinery and tools is justified for large and contiguous landholdings. This cost increases if the land parcels are not contiguous or the size of the land is small. There is an interesting discussion in Emslie v Scottish Ministers (2014) on the reduction in the efficiency of an agricultural unit after it was split, by a road, into two smaller units. This functioning is especially valuable for the agriculture community.

1. ***Personal comfort offered to the landowner, both physical and psychological***
2. *Personal comfort from the physical environment in and around the property*

Owner occupiers are usually appreciative of the physical environment in and around their property and this forms an important factor in the enjoyment of their property. Changes in the physical elements of the property may cause inconvenience to the occupiers. For example, in the case of Dobbie v Fife Council (1998), as a consequence of a new road, the owner occupiers found their personal comfort was compromised due to (i) increase in the noise level from the traffic on the new by-pass road; (ii) the loss the views of the open fields; and (iii) the loss of their hobby of pigeon keeping. The following are some other examples of changes in the physical environment that negatively impacted the well-being of the owner occupier: reduction in the size of the garden and increase in traffic noise on the front road (Aberdeen City Council v Glen Morrison and another, 2014); physical damage caused to the industrial unit during execution of public works (McEwan v East Dunbartonshire Council , 2004); physical damages caused to a dwelling unit as a consequence of mining subsidence (Fitzpatrick v The Coal Authority, 2001); increase in traffic noise level (Robertson, King, McKinlay & Croll v Perth & Kinross District Council, 2004).

1. *Certainty of stable business operations at a particular location*

The physical location of the property is at times crucial for a stable business operation. In the case of compulsory acquisition of commercial properties, the businesses are forced to relocate. Alongside monetary losses to the business, there is often the loss of certainty of stabilizing the business operations given that the advantages of the earlier location, including old clientele, are usually lost after the relocation, as argued in the case of Bussell and Others v City of Edinburgh Council (1998).

In addition to that, there is a lack of certainty of finding a suitable place for re-establishment of the business that will fit into the budget as well as be an equally good replacement of the earlier location. A good example is the case of Callum Stewart Macfarlane v North Lanarkshire Council (2011), in which the owner argued over the inadequacy of compensation to find a suitable replacement of garage lock-ups for rental or ownership purposes, in a location where he could have possibly continued with his business.

1. *Experience and expertise in a particular trade*

Acquisition of business often compels change of trade, in response to the change of location and even otherwise. This is a serious loss of experience and expertise in the initial trade which may disturb the financial well-being of the affected person as discussed in the case of Bussell and Others v City of Edinburgh Council, (1998).

1. ***Rights of the landowner***
2. *Market power to negotiate in the open market*

The landowner often enjoys the privilege of negotiating the deal in the open market. However, in the case of compulsory acquisition of property the opportunity to negotiate is limited by the predicated outcome of forced sale. The loss of market power to negotiate is especially mentioned by landowers who were under discussion with different buyers and were hopeful to benefit from the existing competion among prospective buyers. This includes the case of Young v City of Edinburgh Council (2001). A good example is presented in the case of David Strang Steel and Richard Strang Steel v Scottish Ministers, (2014) where the landowner had offers from Tesco, ASDA, Morrisons and Sainsbury.

1. *Opportunity to make strategic investment in the land market, with the hope of receiving financial gains in the future*

This is an interesting function which has the potential of being highly valuable to landowners who purchased land for investment purposes, as in the case of Glenmore v Transco (2003) and Freshbright Cemeteries Limited v The City of Edinburgh Council (2001). The loss of land often causes a reduction in the expected investment return. The functioning of participating in land market speculation is often difficult to prove to the Tribunal, unless there is a provable loss of the development potential.

1. *Opportunity to choose a convenient time for sale, depending upon an individual’s (physical) availability to be able to satisfactorily manage the (forced) sale and related issues*

Sale of land and property is a major decision for a landowner and the process, which involves activities such as market research, documentation and negotiation, requires active involvement of the landowner or the decision maker. In the process of compulsory purchase, it is often assumed that the landowner will make themselves available to attend to the process. However, in the case of Julien v City of Edinburgh Council (2006), it was noted that the landowner could not make himself available at various occasions and it was difficult for him to remotely manage the process of sale and negotiation, to his satisfaction. Even though the process of compulsory purchase allows for slight adjustments in the time schedule, to suit the availability of the landowner, the time frame for final decision making is pre-decided. The process of compulsory purchase is therefore different from the open market sale, in the sense that the latter gives the landowner the opportunity to prepare for sale and to initiate the process at a convenient time when they are available to be actively involved.

In the context of the case of Julien v City of Edinburgh Council (2006), the applicant expressed dissatisfaction over the value of land that was concluded in negotiation with the security holder of the property. He was “contending that the settlement effected with Neilson’s did not effectively exhaust the value of the subjects.” The applicant (Julien) was often negotiating with the Tribunal to borrow time to be able to put his application “in shape”. He also expressed concern with the compulsory purchase procedure, the details of which are not mentioned in the case report.

1. *Choice of use to which land (portion) can be put*

In the case of Marjory Gordon, Hugh Gordon and Executors of Hugh Gordon v National Grid Gas plc (2016), servitude rights for the gas pipeline were imposed on a portion of the land. This constrained the choices of the landowner to use the land for certain type of developments which can co-exist with the gas pipeline. These functionings were derived in the context of this case and are considered generalizable for servitude acquisitions.

1. ***Securities for the future***
2. *Dependency on land as a fall back option and financial security*

The discussions in the case of Emslie v Scottish Ministers (2014), brought forward the landowner’s dependency on her land as a fall back option for income security in the eventuality of losing her job. This functioning of “future security” is of special value to landowners for whom the primary source of livelihood is dependent on land, for example those operating farms.

1. *Opportunity of self-employment on land*

Land is a reliable asset that can be used for self-employment in labour intensive activities like farming. The security of employment is guaranteed for agriculturists as in the case of Emslie v Scottish Ministers (2014). The security of self-employment is considered highly valuable for such landowners.

From the above case studies, the following results, in Table 2, have been derived with the help of NVIVO software. The percentage in the table shows the total number of times these functionings were discussed as a percentage of the total number of discussions on functionings. For example, there were 129 total references (or statements) found together from the nineteen cases and 56%, (72 discussions), were on financial functionings of land. It is important to note that there were multiple phrases within the same case study that discussed one particular functioning. The percentage does not reflect the “value” or importance of these functionings to an individual landowner. Rather, it reflects the frequency of discussions on each functioning. A probable explanation for the reasons why those functionings were discussed more, could be that these were admissible in the existing legislative statute, for a claim for compensation. However, this is only a probable explanation and would require further investigation into the legislature, to get a definitive explanation. Due to the current scope of this paper which is limited to the identification of functionings, this area of research is left for future studies.

(Insert Table 2 here)

Results from NVIVO reveal that the loss of financial functionings, particularly from expected developments in the near future, were frequently argued by the landowners. Non-financial losses are considered equally important by landowners and discussions on the loss of calm surroundings, green views, gardening and related hobbies were not uncommon. Other functionings mentioned by landowners include locational advantages to the business and the stability of the operation due to experience and expertise in a particular trade. Loss of right to negotiate in the open market was also mentioned in a few cases where landowners have had offers from prospective buyers other than the acquiring authority. Another important aspect of future securities associated with land ownership was brought forward in these case discussions.

The nature of functionings discussed in these cases varied in nature from individualistic loss of a hobby to more generalizable loss of development potential of land. In a few cases landowners expressed dissatisfaction over specific losses that may otherwise be less important for other prospective users. In reference to generalisability, it may be reasonable to assume that wherever the Tribunal admitted the functioning as a compensable loss, it could be regarded as an important functioning for other landowners as well, thus being generalizable. It is important to mention that the scope of this research is limited to the identification of functionings and refrains from commenting on the Tribunal’s judgement. That said, the findings from this research may encourage future research towards assessment of the value of these functionings for different landowners. This may be useful for the derivation of a fairer mechanism of compensation for land.

## 5. Conclusion

The existing approach to compensation which is based on the identification of the market value of land as the level of compensation, has produced sub-optimal outcomes from a welfare perspective. Land has far greater value for its owners than simply an income generating asset and this has been reflected in disputes that have followed compulsory acquisition of land in Scotland. In many cases the monetary compensation paid in lieu of the acquired land has not been sufficient to compensate for the loss of land to its owners.

This research investigated the functionings that land creates for its owners, which leads to their well-being. Sen in his capability approach argued that there are a few basic functionings that are considered important for the well-being of each individual, and these are independent of an individual’s own perception which at times is biased against self, due to circumstances and limitation of knowledge. On similar lines of argument, it may be contended that there are some basic functionings associated with landownership that are considered valuable for all landowners, for example the decision and timing to sell or to decline a sale. In addition to that, there will certainly be more specific and individualistic functionings that may not necessarily be generalizable. The objective of this research has been to identify as many functionings as possible with the intention that this will pave way for future research on the well-being associated with landownership. Given that the Scottish Law Commission is reviewing the existing legislature concerning compulsory acquisition and compensation, it is pertinent that the scope of review should include non-financial losses if a satisfactory solution for affected landowners is to be derived. Within the current political situation, where there is willingness to address issues concerning compulsory acquisition, this research should help in carrying forward the dialogue on losses to the affected landowners. Formal recognition of these losses in the legislature would help in forming a holistic solution.

In compensation cases related to compulsory land acquisition, it is paramount that the value of land is understood in reference to the ability of the landowner to convert this resource into a valuable functioning. This opens up opportunities to develop a framework for the assessment of subjective losses of affected landowners with respect to the loss of their functionings related to landownership, when their land is acquired compulsorily. This may prove helpful in devising a fairer compensation mechanism that could reduce the tension between affected landowners and the acquiring authorities.

Further analysis of the case discussions revealed that landowners often faced challenges in providing evidence to support their claim of the loss of their many valuable functionings. Provability of non-financial functionings is even more cumbersome. The loss of such functionings may require more attention from policy makers who are working towards deriving a fairer compensation mechanism.

Further research on the well-being associated with land ownership is strongly encouraged as it is an under-researched area of compulsory acquisition. The existing list of functionings is derived from reading case reports for each individual landowner. Due to the fact that only a limited number of cases were studied over a particular geography, the generalizability of the functionings to other geographies may be questionable at this stage. Further expansion of this research into other countries should help in deriving a universal list of generalizable functionings offered by land ownership. Further research is required in understanding the (economic) value of each of these functionings for different landowners. Social scientists and economists may dig further into understanding the (economic) value of each of these functionings with particular attention on non-financial losses of landowners. This research has identified that there is a requirement for the Scottish Government to investigate ways in which the loss of functionings can be minimised and any unavoidable loss properly compensated.

When viewed from the social lens, more specific inquiry, in the context of demography, for example, age, gender, class and so on, may help in understanding the role of land ownership among the ‘weaker’ segments of the society. Findings in this field of research may inspire policy makers to respond more efficiently towards deriving social equality for all the members of society.

In summary, the improvement of well-being of each individual member of the society should be the end objective of all development. The distribution of fruits of development may not always be equal and some may derive more benefit, depending upon their ability (financial, physical, intellectual and so on) to convert resources to their usefulness. There is a need to make the process of development more inclusive and equitable in a way that the welfare of all the members of the society is maximised.

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Table 1: Structure of the case report

|  |  |
| --- | --- |
| **Section** | **Coverage** |
| Introduction | Preface to the problem raised by the applicant and issues to be discussed in following sections |
| Statutory material | All relevant statutory references to the Acts, schedules and paragraphs, oft citing/quoting them directly.  |
| Authorities cited | List of all the authorities and previous cases that are referred at any stage, during the discussions |
| Procedural background | Describes the sequence of actions, by the public authority and the landowner if important. ‘Background’ provides information on both the procedural and factual matters. |
| Factual background | Discusses subject property in detail (date of purchase, use, area details, intended use, the sequence of events post purchase such as development permissions or rejections) and its association with the landowner. This usually states the about the property and its landowner. |
| Evidence for applicants | Elaborate textual description of the opinion (on the subject matter) of the witnesses and experts employed by the applicant. |
| Evidence for respondents | Elaborate textual description of the opinion of the witnesses and experts used by the respondents (usually the public authority).  |
| Applicants’ submission | Summary of the facts, figures and evidences discussed earlier, as acknowledged by the Land Tribunal. There are commentaries by the Tribunal about its interpretation of the evidence. |
| Respondents’ submission | Summary of the discussions and evidences put forward by the respondents. Also it contains the Tribunal commentary on the facts and figures presented by the respondents in the section on ‘evidence for respondents’. |
| Discussion by the Tribunal | Analysis of all arguments and evidences presented by different parties and puts forward its opinion on each matter respectively. This section is also the preface to the final decision.  |
| Decision | Final decision of the Tribunal is stated explicitly under this section. |

(Source: Lands Tribunal of Scotland cases)

Table 2: Relative recognition of functionings discussed by the Lands Tribunal of Scotland

|  |  |
| --- | --- |
| **A- Financial functionings of the landowner**  | **56%** |
| 1- Planned developments | 22% |
| 2- Unseen potential | 9% |
| 3- Market condition | 5% |
| 4- Market value | 11% |
| 5- Income generation | 9% |
| 6- Agricultural efficiency | 1% |
| **B- Personal comfort offered to the landowner, both physical and psychological** | **19%** |
| 7- Personal comfort | 12% |
| 8- Stability and location | 5% |
| 9- Experience of trade | 2% |
| **C- Rights of the landowner** | **20%** |
| 10- Negotiation opportunity | 9% |
| 11- Strategic investment | 3% |
| 12- Convenience and availability | 8% |
| 13 - Land use choices | 1% |
| **D- Securities for the future** | **5%** |
| 14- Fall back option | 2% |
| 15- Self-employment | 2% |
| **Total (A+B+C+D) = 100% = 129 references** |  |

List of Figures:

Figure 1: Step model for content analysis and inductive category development

1. The Lands Tribunal for Scotland, established in 1970, has statutory power to deal with various types of dispute involving land or property (Lands Tribunal for Scotland, 2016). The [Lands Tribunal Act 1949](http://www.legislation.gov.uk/ukpga/Geo6/12-13-14/42/contents) authorities the tribunal and governs various details of its constitution and jurisdiction (Lands Tribunal for Scotland, 2016). The Act describes the Tribunal as a specialised judicial body that shall deal with “questions relating to compensation for the compulsory acquisition of land and other matters…” (Lands Tribunal for Scotland, 2016). The members of the Tribunal comprise of both legal and valuation experts. The cases dealt by the lands tribunal therefore, present a rich discussion on the loss of useful functions of land for which the landowner expects (monetary) compensation. [↑](#footnote-ref-1)
2. In 1845, the Land Clauses Consolidation (Scotland) Act 1845 and the Railway Clauses Consolidation (Scotland) Act 1845 came into force in relation to Scotland and the Land Clauses Consolidation Act 1845 and the Railway Clauses Consolidation Act 1845 came into force in relation to England and Scotland. (Scottish Law Commission, 2014) [↑](#footnote-ref-2)
3. For more details refer to Part III of Land Compensation (Scotland) Act, 1973 [↑](#footnote-ref-3)
4. Land Compensation (Scotland) Act, 1973 [↑](#footnote-ref-4)
5. Online records are available from 1997. The latest decision considered in this research was issued on 10 August 2016 while the earliest record available was released on 14 March 1997. Thus, this research covers decisions spread over two decades. [↑](#footnote-ref-5)