# Analysing the process of compulsory acquisition of land through the lens of procedural fairness

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## Abstract

Compulsory acquisition of land is contested bitterly by affected landowners for various reasons including fairness in the compensation that is offered to landowners and fairness in the process that is followed in land acquisition by acquiring authorities. While there is a volume of research that has focussed on compensation, there is a paucity of literature analysing fairness in the process of land acquisition.

This paper examines fairness in land acquisition using the case of Scotland, which is currently in the process of reforming laws and policies governing the compulsory acquisition of land. A primary survey was undertaken with stakeholders involved in a road project and information was analysed using 'qualitative content analysis'.

This research identifies the gaps in the existing process of compulsory acquisition using the theoretical lens of 'procedural justice' with a strong focus on the social psychology dimension and argues for the incorporation of basic principles of 'procedural justice'. Fifteen major procedural gaps were identified, which include weak decision-making power of the members of the public in the identification and design of public projects; inadequate representation of objectors due to the high personal cost associated with representation in a public inquiry; time delays; information asymmetries and inefficient grievance management.

## 1 Introduction

Substantial scholarly literature has focussed over time on the concept of justice in the context of compulsory acquisition of land. Much of this literature has examined what constitutes just

compensation and how burdens and benefits to society[1] could be equitably distributed. From the standpoint of theories of justice, distributive justice[2] is concerned with the question of 'how a society or group should allocate its scarce resources or products among individuals with competing needs or claims' (Roemer, 1996, p. 1) and this has guided definitions of just compensation. Kolm (1996) writes that outside the 'normative sciences' of economics and philosophy, justice is the subject of law, politics, sociology and psychology and there is a growing body of literature, mostly in psychology and law, that is concerned with the fairness of procedure for attaining equitable distributions, which is the subject matter of theories of procedural justice (Bayles, 1990). While distribution that is based on costs and benefits seems to be concerned with the end outcome (distributive justice), it ignores how that end objective is achieved and whether the process in achieving the end objective has been fair (the procedural fairness). Ever since the publication of Rawls's monograph, 'A Theory of Justice' in 1970, there has been a lot of development in the area of procedural justice, that has been mostly relevantly applied in the context of legal dispute resolution (Thibaut & Walker, 1975). More recently, principles of procedural justice have gained application in politics (Boggild & Peterson, 2016), education (Rodabaugh & Kravitz, 1994), and management (Lavelle, et al., 2009).

The most common justification for exercise of the power of compulsory acquisition is that the proposed project serves a larger public purpose which is worth compromising the private

[1] An avid reader may refer to Rowan-Robinson & Hutchison (1995); Newell, et al. (2011); Grover (2014), A.Fischel (1995) for empirical and theoretical discussions on just compensation from across the globe. More recent works in the context of UK include Sams (2017) Rao (2017, 2018a).

[2] Kolm (1996) provides a detailed account of the theories of justice and more specific discussion on distributive justice are taken up by Roemer (1996).

property rights of a few landowners. However, the definition of public purpose is often caught in passionate controversies among the social, political, and legal contestants (Nichols, 1940). Constitutional Laws in different jurisdictions define public purpose differently and accordingly countries choose from a range of democratic decision-making processes[3] when identifying public projects. Pre-acquisition stage of project identification and design is the first interface of the people with the project and giving them the power to influence these decisions improves democratic legitimacy of government decisions (Albert & Passmore, 2008) and a prerequisite for smooth exercise of compulsory acquisition powers.

Compulsory acquisition of land is a psychologically traumatising experience for most affected landowners, and a fair process may avail them the opportunities to express their grievances, opinions and suggestions, and the opportunity to protect their personal, familial, and financial interests to the best possible extent. This is not to say that a fair process of compulsory acquisition may influence the compensation[4], but instead it would reduce procedural challenges in recovering compensable losses alongside ensuring a fair and respectful treatment to the affected landowners who suffer the alienation of their assets.

From time to time the laws of compulsory acquisition have been revised, although with limited attention to the revision of the process itself. Currently, Scotland is creating a new statute for compulsory acquisition and there is opportunity to bring improvement to the compulsory acquisition process in light of the principles of procedural justice. With this objective, this

[3] Refer to Albert and Passmore, 2008 for a detailed review of processes of public participation.

[4] This is to say that a fair outcome (or compensation) is independent of the procedure through which it is achieved. Please refer section 2 for more details.

research analyses the process of compulsory acquisition by focussing on procedural justice and suggests improvements to the acquisition process to make it fair towards the affected landowners, and the public at large. This does not imply that fair compensation is of lesser importance and that is why it is being left outside the scope of this paper. The argument for focussing on process is that this aspect has been underserved in literature, though requires a comprehensive consideration when fairness in compulsory acquisition is discussed. A primary survey to identifying gaps in the process as perceived by the affected landowners, and other key stakeholders involved in the process, has been conducted to inform lacunae in the process. It may be emphasized here that the process analysed and the perception of dissatisfaction with the process are specific to Scotland and Aberdeen Western Periphery Road as extracted through various methods (discussed later) but general principles can be deduced to inform better process for compulsory acquisition.

More discussions on the principles of procedural fairness follow in section 2. Section 3 explains the method used in this research, which is a Qualitative Content Analysis of primary interviews and textual material from the Scottish Law Commission (SLC). Section 4 presents the analysis in the form of gaps in the existing mechanism of compulsory acquisition in Scotland. Suggestions received from the affected landowners, their agents, and the SLC, on improving the process are discussed in section 5, while section 6 presents the conclusions.

## 2 Literature

### *2.1 Endowment effect and socio-psychological justification for procedural fairness*

Theoretical and empirical research on compulsory acquisition has mostly been centred around the question of 'just compensation' under the guidance of theories of distributive justice[5]. Given this dominant view of dissatisfaction, the grievance redressal mechanisms through administrative awards, mediation, arbitration or the courts have focussed on compensation and components of compensation. Evaluation of the fairness of the process, through which the compensation award and acquisition of land happens, is ignored. Affected landowners often tend to perceive the outcomes of compulsory acquisition to be unjust and behavioural economists attribute this to the 'endowment effect' of land and property (Holtslag-Broekhof, Marwijk, Beunen, & Wiskerke, 2016). Endowment effect means that 'goods that are included in the individual's endowment will be more highly valued than those not held in the endowment, *ceteris paribus*' (Thaler, 1980, p. 45). Put another way, the disutility of disowning a good is perceived to be greater than the utility of acquiring the same good (Kahneman & Tversky, Choices, Value and Frames, 1984), Landowners give more weight to their loss of land than the compensation amount which they receive in return (Holtslag-Broekhof, Marwijk, Beunen, & Wiskerke, 2016). There could be many ways for taking away land and a fairer process is likely to reduce this sense of loss and improve social cooperation and compliance with unfavourable decisions, a point which is discussed next.

Decades of research from social psychology supports the argument that people are morally concerned with not only outcomes, but also the processes through which such outcomes are achieved (Boggild & Peterson, 2016). Social psychologists have offered three different

[5] An avid reader may refer to Blume, et al., (1984) and Rao (2018a) for a detailed account of utilitarian and capability approach to efficient and just compensation for compulsory acquisition, respectively, to a fair outcome of the compulsory acquisition of land for public projects.

theoretical accounts to explain why people pay attention to the features of the decision-making process when evaluating its outcomes. The 'instrumental model' argues that people desire for a greater control over and attain best possible outcome through control over the process (Thibaut & Walker, 1975). Tyler (1990) criticizes this model for being ignorant of non-instrumental motivations and proposed the 'relational model of authority' as per which people's desire to construct and uphold a social identity motivates them to seek procedural fairness (Tyler & Lind, A Relational Model of Authority in Groups, 1992). Put another way, people want a clear indication of the extent to which the group and especially its authority figures regard them as an equal and a valuable group member (Lind & Tyler, 1988; Tyler & Lind, 1992). Empirical evidences support this argument and demonstrate that unfair processes lower the self-esteem of people and decrease their trust in authorities and compliance with decisions (De Cremer, et al., 2005; Koper, et al., 1993). However, the concept is criticized for being unable to explain why procedural fairness matters to people in a large-scale setting beyond personal interactions (Leung, Tong, & Lind, 2007). A relatively new justification is the 'fairness heuristic theory' according to which when people receive outcomes from group decisions and lack relevant information to evaluate the fairness level of the outcome, they tend to compensate for this uncertainty by applying information on procedural fairness (van den Bos, Lind, Vermunt, & Wilke, 1997). However, the theory invites criticism for being unclear as to why people would choose information on procedural fairness, over other types of information, to overcome uncertainties (Gonzalez & Tyler, 2007). While there are theoretical contestations, the above arguments together provide multiple socio-psychological reasons to be concerned with procedural fairness, which consequentially improves perception of fairness of outcome; compliance with unfavourable outcomes; social cooperation; trust on decision makers; and reduces the sense of loss of self-identity and esteem.

## *2.2 Rawls's theory of procedural fairness and its application to the process of compulsory acquisition*

In the context of Rawls theory of procedural justice, a process can either be purely, perfectly or imperfectly just. Pure procedural justice obtains when there are no independent criteria for a right outcome, 'instead there is a correct or fair procedure such that the outcome is likewise correct or fair … provided the procedure has been properly followed'. For example, if a number of people engage in a series of bets, as is the case in gambling, the distribution of cash after the last bet is a fair outcome assuming that no one is cheating, bets are made voluntarily and so on. Two important characteristics of a perfect procedural justice are, firstly there is a criterion for determining the fair outcome, which is independent of the process adopted to achieve the outcome; and secondly, it is possible to devise a procedure that gives the desired outcome with certainty. Rawls acknowledges that 'perfect procedural justice is rare, if not impossible, in case of much practical interest' (Rawls, 1971, p. 85). Often, Rawls's idea of pure procedural justice has been challenged for its claim that characteristics of a 'just' procedure could be transferred to cause 'just' outcomes (Nelson 1980; Davis 1982). Testimony of Rawls's conception of pure procedural justice is beyond the scope of this research, which rather aligns with the idea for that part of the process of compulsory acquisition which deals with the identification of 'public projects' and this is discussed next.

Imperfect procedural justice is exemplified by a criminal trial where it is almost impossible to design a process that can generate the desired outcome with surety, that is to punish the culprit. Imperfect procedural justice accommodates for the imperfections of the real world and despite being fair, the process can still lead to the wrong outcome, for example when an innocent person is declared guilty and an offender is set free (ibid). Rawls (1971) explains that since

these processes, that approximate a prespecified goal, are subject to the unavoidable constraints and hinderances of everyday life, these are a case of imperfect procedural justice (discussed earlier). On the contrary, perfect procedural justice demands that the procedure leads to the desired outcome for sure, which is difficult to achieve in the real world (ibid).

A closer scrutiny of the process of compulsory acquisition reveals three major parts to the process, each guided by a different theory of justice:

- Firstly, the process of determining whether the proposed project qualifies as a public project, which is the prerequisite for the exercise of the power of compulsory acquisition, would ideally be a fair and democratic process of public consultation, thus guided by the principles of pure procedural justice;
- Secondly, the process of determining a fair distribution of burdens and benefits arising out of the compulsory acquisition of land and the proposed public project, such as the cost of land acquisition and benefits brought by the project post-execution would be guided by theories of distributive justice and this part is beyond the scope of this research; and
- Thirdly, the principles of imperfect procedural justice would best guide the process of approximation of just outcomes determined by the theories of distributive justice.

### *2.3 Principles of procedural justice*

Theoretical and empirical research[6] in law, politics, philosophy, and psychology has come up with several criteria for determining what constitutes a fair procedure (Boggild & Peterson, 2016). Fuller (1964) proposed eight procedural requirements that would result in a just rule of law: the existance of general rules, promulgation, prospectivity, clarity, consistency, the defence of impossibility, consistency through time, and congruence between official actions and declared rules (compliance). Lucas (1966) sets out similar principles which include the following:

> No man shall be a judge in his own cause (neutrality); that both sides of any case shall be considered (representativeness); that full consideration be given to all cases; that irrelevant considerations shall be excluded from consideration; that like cases shall be decided alike (consistency across people); that cases finally settled shall not be reopened; that justice shall be done and shall appear to be done; that every judgment will be justified by stated reasons (accountability) (Lucas, 1966, p. 130).

Later, Leventhal (1980) used an inductive method to derive six criteria (or justice rules) that must be satisfied for the process to be perceived as fair, which are: (i) consistency; (ii) bias-suppression; (iii) accuracy; (iv) correctability; (v) representativeness; and (vi) ethicality. In addition to the above, Bies & Moag (1986) coined the new concept of 'interactional justice' which is concerned with the 'quality of interpersonal treatment exhibited by leaders during the

[6] An avid reader may refer to Thibaut & Walker (1975) and Lind & Tyler (1988) for legal procedure; Tyler & Caine (1981) on education procedure; Lavelle et al., 2009 on management; and Bøggild, 2014 and Tyler, 1994 on political procedures.

enactment or implementation of decision procedures' (p. 44). Bobocel & Gosse (2015) summarize Bies and Moag's precepts of interactional justice to providing clear and adequate explanations of allocation decisions and giving respectful treatment to recipients during the implementation of procedures.

Theories of procedural justice have not been adequately studied in the context of the process of compulsory acquisition of land despite the land acquisition process being unceasingly criticised for injustice towards the affected landowners. A few relevant works in this area include: Cremer & Knippenberg's (2003) experimental study of the positive influence of procedural fairness, mostly accuracy and voice/representation, on the level of cooperation in social dilemma situations, observed through people's contribution to public goods; King & Murphy's (2012) study of the influence of procedural fairness on opponents' attitude, wrongly perceived to be a NIMBY[7] attitude towards public infrastructure project in Australia (King & Murphy, Procedural Justice as a component of the Not In My Backyard (NIMBY) syndrome: Understanding opposition to the building of a desalination plant in Victoria, Australia, 2012); and Vu (2017) detailed analysis of procedural fairness issues experienced by people affected by compulsory acquisition in Vietnam.

[7] The acronym 'NIMBY' is used for those people who are perceived to have a negative Not in My Backyard attitude and are unsupportive of a development in their region (King & Murphy, Procedural Justice as a component of the Not In My Backyard (NIMBY) syndrome: Understanding opposition to the building of a desalination plant in Victoria, Australia, 2012)

## 3 Research design

This research undertakes a case study of Scotland and adopts qualitative methods of data collection and analysis to identify the gaps in the current mechanism of compulsory acquisition, from the perspective of procedural fairness.

First, multiple sources of data were used to understand the process, then to identify gaps from a fairness perspective. Procedural understanding also involved a thorough review of secondary textual materials including the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947; Land Compensation (Scotland) Act 1963; the report on the European Convention on Human Rights and Property Rights (referred as ECHR, 1998); and the Discussion Paper no. 159 on Compulsory Purchase by the Scottish Law Commission (referred as SLC Discussion Paper 159, 2014).

Critical views on the process of compulsory acquisition in Scotland were sought through primary investigations conducted between February and June 2017, which included 12 landowners whose land was compulsorily acquired for an ongoing road project in Scotland, called the Aberdeen Western Peripheral Route (AWPR); four in-depth interviews with experienced surveyors, and one focus group discussion with nine key agents in Scotland who were collectively handling approximately 80 percent of the cases related to the AWPR project, and had extensive experience in the compulsory acquisition and compensation process for multiple projects.

Respondents represented diverse types of landowners including residential property owners, farmers, entrepreneurs, and those whose property had not been acquired but were negatively

impacted by the externalities caused by the road project. Of these, some landowners were members of an organised group of objectors who had been actively involved in intense discussions at all stages of the process. A short code[8] is used to describe the characteristics of the respondent and the subject land.

Written responses received between 2014 and 2015 by the Scottish Law Commission (SLC) on reforming compulsory acquisition laws were also analysed as primary textual sources of information. Of the forty-seven responses which were received by the SLC, eight were from landowners who had been affected by compulsory acquisition under different projects, including the AWPR project. These eight responses are used as primary text material for this research and have been analysed in the same way, as in-depth interviews with other landowners.

The method of Qualitative Content Analysis (QCA) is used to analyse the data, after converting all data in a textual format (refer to Mayring, 2000 for more details on QCA). A systematic coding technique was used to identify original themes, in the form of gaps or problems in the current process, and a series of processes were adopted to finalise results (refer to David & Sutton, 2004 for details on systematic coding technique). While reading the text, each type of problem reported in the process was tagged as a separate theme or code. Following this, a

[8] The code is built of four alphabets followed by a number indicating $n^{th}$ respondent out of total twelve. The first alphabet indicates respondent's country, Scotland 'S'; the second alphabet stands for gender, male 'M', female 'F'; the third alphabet indicates sole ownership 'I' or joint ownership 'J'; and the fourth alphabet states the use of subject property as agricultural 'A'; residential 'R'. For example, SMJR stands for a Scottish landowner; male; owning property jointly with wife or children and is using it for agricultural purposes.

thorough analysis of these themes was undertaken to reduce overlapping themes into a single, distinguishable category.

Having obtained a comprehensive list of problems at this stage, these findings were triangulated in three ways. Firstly, by cross-review of research findings with procedural gaps and reforms suggested to the SLC by important public organisations such as the Lands Tribunal for Scotland; secondly, through discussions with co-researchers; and thirdly, by inviting views from concerned government agencies, experienced surveyors, and members of the public including the affected landowners (who were the original respondents). Section 5 of this research also presents a summary of suggestions on procedural improvements, collected from the affected landowners; experienced surveyors; primary text responses received by the SLC from experts and members of the public; and the authors' understanding of good practices adopted in Australia and India (where recent reforms in land acquisition have been undertaken), developed through earlier research works (refer to Rao, et al., 2018 and Rao, 2019).

It is especially emphasised here that the draft paper was reviewed by key stakeholders who are involved in reforming laws and policies governing the compulsory acquisition of land in Scotland and findings in this research are informed by their feedback. These stakeholders included a senior member of the Lands Tribunal for Scotland and civil servants heading the Compulsory Purchase Order Policy at the Scottish Government. The draft paper was also shared with the Transport Scotland, and persistent attempts were made to seek their views without much success. Such rigorous triangulation methods have reduced researchers' bias and improved the overall reliability of findings of this research. It is important to acknowledge that dominant views in this research are those of the affected landowners, who are the target group to whom a fair process should appeal.

# 4 Analysis

This section discusses major gaps in the four stages of the process of compulsory acquisition, identified through the analysis of primary data, using the lens of procedural fairness.

## *4.1 Stage 1: Project identification and design*

### *4.1.1 Weak decision-making power of the members of the public*

The Scottish legislature endorses advocations of the European Convention on Human Rights (ECHR) following which the compulsory acquisition of private property is justifiable only when the purpose for which an individual's property is to be acquired achieves social welfare, proportionately larger than the welfare compromised by the individual landowner (or 'proportionality' principal); and there is relatively no better means than compulsory acquisition to achieve the proposed objectives (ECHR, 1998). However, the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 is silent on the level of accountability of public agencies for providing convincing justifications for the above. More direct involvement in project identification and design may reduce the burden of the acquiring agencies for such justifications, while improving people's trustworthiness in the outcomes so achieved.

Even though the Community Empowerment (Scotland) Act 2015 aims to give strength to the citizens' voice in making decisions on public projects involving land and buildings, its interaction with the compulsory acquisition process has only been weakly established. 'My impression, which I know is shared by many others, is that the road officials within Transport

Scotland and members of the Jacobs Team merely listened to the land-owners then completely ignored their concerns, expertise and experience' said respondent SMJA_8.

Lack of public participation in the decision-making process together with poor transparency raises doubts on the legitimacy of decisions or outcomes. For example, many respondents doubted the decision of the Transport Minister to change the route of the AWPR road project because it happened without public consultation. Lack of transparency and information made everyone doubtful of ulterior motives – such as safeguarding the land of influential people from getting acquired. Most critical were those whose land was coming under the influence of the project after the change of route. This led to the creation of a strong opposition group who challenged the new route and the matter was debated at the highest level of the judiciary, the Supreme Court. Ultimately the opposition group was unsuccessful and the project went ahead without changes but suffered time delays. As discussed earlier in the literature on pure procedural justice, in a democratic society the definition of public purpose is to be constructed through public consultation and thus the fairness of the process determines the perceived level of fairness of the outcome, i.e. how fair and acceptable would be the 'public' nature of the proposed project.

### *4.2 Stage 2 – Releasing the Compulsory Purchase Order and inviting suggestions and objections*

After the release of the final Compulsory Purchase Order (CPO), the statutory objectors are given the opportunity to raise objections to matters other than that of compensation. The purpose of inviting objections is to give the opportunity to the affected people to safeguard their land from getting acquired by suggesting better alternatives, if any. However, due to

inadequate consultation process at the initial stage of the project planning, generally people tend to use the opportunity of a public inquiry to present alternate design solutions and modifications to the project, as observed in the case of the AWPR project.

### *4.2.1 Inadequate representation of objectors due to the high cost of representation*

The cost of representation in a public inquiry is very high in Scotland and all expenses are generally incurred by the concerned person unless their argument is successful, and the property is removed or partly removed from the CPO. Respondent SMJA_4 argued that the acquiring authority utilises public money in dealing with objections and legal disputes whereas the affected landowners deplete their personal financial resources[9], and due to this imbalance in financial capacity, there is inadequate representation of their views.

### *4.2.2 Information asymmetries between the affected landowners and the acquiring agency*

Knowledgeable respondents seek full information on the project, including technical details of the project, tender document and other relevant documents through which they can better understand the project and responsibility of each stakeholder. However, many such documents are not available in the public domain, thus reducing the opportunity for people to participate effectively in the project, as envisaged in the legislature. For example, respondent SMJA_8 undertook a rigorous technical analysis of the junction and proposed an alternate solution to the problem of poor visibility at a road junction proposed near his residence. During the Public

[9] All expenses concerning representation at the PLI are generally incurred by the objectors themselves unless their argument is successful and the property is removed or partly removed from the CPO (refer (Robinson & Farquharson-Black, 2009).

Local Inquiry, he clearly explained that the junction design did not meet the absolute minimum standards. The respondent made repeated unsuccessful attempts to seek information on the final junction design and whether it had been rectified to comply with Visibility Splays[10] standards prescribed by Transport Scotland. Landowners were generally of the opinion that they were less resourceful than the acquiring agency, in terms of information accessibility due to which the decisions/outcomes achieved at this stage were more likely to be in favour of the acquiring agency.

> I consider that both Transport Scotland and the AWPR CJV have a duty of care to the general public to ensure that all new junctions etc. are designed and constructed to the lawful minimum standards but, to date, I have yet to receive AWPR CJV's detailed design plans. I also consider that my agricultural vehicle-turning requirements have not been fully catered for at this junction by way of appropriate swept path analysis. This information is also urgently required, wrote respondent SMJA_8 in his letter to the Scottish Minister.

### *4.2.3 Lack of neutrality in the assessment of objections and suggestions received from statutory objectors*

'The government has the first say, and the last say and whatever is said in between by anyone else does not matter' said respondent SMJA_6, frustrated with the fact that the confirming authority is not independent or unbiased of the acquiring agency. To explain more, the confirming authority (or the Scottish Minister) is required to either hold a 'public local inquiry' or afford an opportunity to the objector to be heard. The Scottish Minister forwards the objections to the Directorate of Planning and Environmental Appeals (DPEA) which then

[10] Visibility Splay is defined as 'the distance a driver needs to be able to see left and right along the trunk road when waiting to turn out of a junction or access onto the trunk road' (Transport Scotland, 2016, p. 5).

appoints a person (or Reporter) who holds the inquiry or hearing[11]. During a public inquiry, the confirming authority may afford the opportunity to the acquiring authority to be heard at the same time. After the inquiry, the reporter submits a detailed report to the confirming authority on the CPO and recommendations on whether to confirm the CPO or not. However, the reporter's recommendations are not an imposition on the confirming authority which may or may not confirm the order, with or without modification, after considering the objection and the report submitted by the reporter.

### *4.2.4 Unequal time restrictions on the acquirer and acquiree*

After inviting public objections, the acquiring authority can negotiate with objectors, without any mention of timelines in the statue. Also, the time between holding a hearing or public inquiry and submission of the final report to the confirming authority is not fixed and varies greatly depending upon the complexity of the project (SLC Discussion Paper 159, 2014). Such flexibilities cause frustration among objectors and may skew the timeline for project delivery, which can be frustrating for the landowners, developer as well as the public at large.

In contrast with the absence of timelines in the statute with respect to the local authority, the original owners in the case of the AWPR were given a short time of approximately twenty-eight days to raise objections to the CPO. Much information is required before challenging a

[11] In practice, on initial receipt of objections, the Minister forwards these to the acquiring authority which tries to negotiate an agreement with the statutory objectors (SLC Discussion Paper 159, 2014). Before fixing a hearing or public inquiry, the DPEA would grant another opportunity to the acquiring authority to negotiate and reach a compromised agreement with the objectors (ibid). If the acquiring authority fails to reach an agreement, the DPEA proceeds to appoint a reporter and hold an inquiry or hearing (ibid).

CPO or suggesting modifications and the time seemed inadequate to many respondents. Respondents perceived the inequality of time limitations as a lack of consistency in the process across stakeholders.

#### *4.2.5 Poor accountability of concerned public agencies towards objections and suggestions received from the statutory objectors*

'I am a supporter of the project but not the way they have done it', said respondent SMJA_4. Respondents doubt that their genuine suggestions are often ignored as a symptom of a 'NIMBY' attitude, contrary to which many landowners were of the view that, 'someone has got to get it (road) in their backyard, but the public authority should at least speak to the people' (respondent SMJA_4). For example, the residents of a local community prepared an alternative proposal for Accommodation Works and presented it at the Public Local Inquiry but never heard back after the meeting. In a follow-up letter to the Transport Minister, Respondent SMJA_8 wrote on behalf the local community: '… Community's request to implement the suggested improvements have been consistently ignored by Transport Scotland which is contrary to the ethos of the Community Empowerment (Scotland) Act 2015 - which your Government introduced. In addition, according to Scottish Government Circular 6: 2011, on Compulsory Purchase Orders, it is clear to me that Transport Scotland has failed to give our Community fair treatment in accordance with this document.'

### *4.3 Stage 3 – Project execution*

### *4.3.1 Poor compliance with prescribed procedures and mitigation measures during the course of the project*

As respondent SMJA 4 mentioned, written documents and reports published by the acquiring authority were a contract between the people and acquirer and are the terms and conditions based on which people agree to give their land. However, respondents reported poor compliance by the acquiring authority towards prescribed procedures mentioned in published documents such as on the AWPR Environmental Statement. For example, section 7.5 of the report prescribes 'provision of access for land interests to their holdings at all times during construction and operation; pre-construction drainage works where required, and reinstatement/provision of new drainage as required to maintain agricultural land capability and avoid flooding issues' (AWPR Environmental Statement, 2007), but the same was not performed, as reported by respondent SMJA_8 and SMJA_4. Regarding unattended drainage issues in his community, respondent SMJA_8 mentions (in his letter to the Transport Minister) that 'Transport Scotland has not lived up to the fine words made in that (Environmental) Statement and spoken to at the Public Local Inquiry.' Landowners affected by the AWPR project struggled to get attention from the acquiring authority on these day to day matters which caused huge inconvenience to them.

Residents cannot approach the contractor directly to raise issues concerning construction works (such as littering, violation of work hours; poor compliance with standard construction practice; and so on) and must go through the community liaison officer whose usefulness was questioned by landowners. Respondents suspected that issues on the construction site were totally out of sight of the public agency and expected that the public authority should keep a check on the compliance issues during the phase of construction.

## *4.4 Stage 4 – Compensation determination and payment*

### *4.4.1 Inconsistency of decisions across people and time*

Many respondents reported *inconsistency* across public officials on decisions concerning discretionary items of compensation. For example, SMJR_11, who provides teaching assistance to children with learning and hearing difficulties, reported that - 'I spoke to the managing team before the project started, when it went to public enquiry, and I was told that I would be assisted to build a sound-proof studio … The person I had spoken to was very sympathetic, and he was very good…The team at Transport Scotland decided that they would not recommend that because that would set a precedent.' Thus, he chose to absorb the cost and avoid a complex, discretionary, nondeterministic process of claiming compensation.

### *4.4.2 Longer timeline and greater uncertainty in seeking compensation for the negative externalities*

There is a higher level of *uncertainty* involved in seeking compensation for the negative externalities of the project, such as increased noise and traffic, on properties that are not acquired. Also, the onus lies on the affected landowner to prove the negative impact, which is at times difficult to demonstrate unless the project is complete and operational, which may take many years. This may compel landowners to hold the property until project completion. Being unable to sell the property at the time of choosing or need may negatively affect the financial wellbeing of those who were preparing to sell their property at the time when CPO was released. For example, respondent SMJR_2 had plans to sell the house and relocate to Edinburgh, because all his three children have relocated there. The value of their property had

reduced to two-thirds over a period of ten years, and the couple were desperately waiting for the project to get completed so that their claim for injurious affection could be settled.

### *4.4.3 Unaccountability for time delays in payment of compensation at different stages of the project*

A senior legal representative from the Land Tribunal for Scotland justified that there could be multiple factors which cause time delays to the compensation process, such as the inevitable paper chase required to make a good case (such as obtaining a CAAD[12]); parties being unwilling to make disclosure; unrealistic financial claims being attached to worthy claims and so on.

Public agencies are *unaccountable* for time delays or non-payment of discretionary components of compensation, such as compensation for disturbance caused during the entire process of compulsory acquisition and project execution. For example, many farmers including respondent SMJA_4 and SFJA_4, were compelled to make multiple adjustments to their farmland, in response to the division of their farm by the new road such as installation of new water pumps and troughs for the animals on either side of the divided farmland; creating new fencing; creating alternate roads to access the farms and so on. After putting forward their claim, they did not receive a response from the concerned agency for a long time. On this

[12] Certificate of Appropriate Alternate Development (CAAD). Refer to Rao, 2018a for more details on CAAD and the process to obtain it.

subject, respondent SMJA_4 expressed concern for other neighbouring farmers, ‘While they just ignored the fact that we’d have to pay out of our pocket for all that, we were in a better situation than most because we had a reasonable financial cushion, but I feel for people who were living from year to year, and many farmers do’.

On a similar note, a few respondents were anxiously waiting to receive advance payment for compensation ever since they put forward the request. The only option for the affected landowner is to raise judicial review, which in turn is time-consuming.

### *4.4.4 Lack of financial co-ordination across acquiring agency and its partners on compensation matters*

There was clearly a *lack of co-ordination* between the acquiring agency and its partners (private developer) on whose responsibility it would be to take up the cost of disturbances caused during project execution. Many respondents such as SMJA_4 reported that they struggled to recover the cost of repair to the drains which were dug out for the construction of the road and other similar disturbances, because there seemed to be a confusion between the government agency and the private developer, as to whose cost these were.

### *4.4.5 Unequal negotiation power arising out of imbalance in financial capacity of the affected landowners and the acquiring agency*

There are many negotiable components in the compensation package and the onus lies on the claimant to justify these claims, thus adding to the landowner's cost of negotiation/arbitration. If the landowner is dissatisfied with negotiation outcomes, they should take forward the question of disputed compensation to the Lands Tribunal for Scotland (Section 8, Part II, Land

Compensation (Scotland) Act 1963)[13]. Following the information shared by respondents SMJA_12 & SFJA_12[14], up to January 2019 there were 98 landowner applications to the Lands Tribunal for Scotland under the Land Compensation Act 1963 in relation to the AWPR project. Of these, 92 applicants have requested that their application is immediately sisted pending negotiations. The Scottish Law Commission (2014) acknowledges that 'settling is a desirable outcome, even if the case is compromised in some way, as it avoids the parties incurring the expense of a contested hearing, particularly if the settlement is achieved before they incur the expense of a contested hearing' (p. 282).

In the case of unsuccessful claims where compensation determined by the Lands Tribunals does not exceed the compensation offered by the acquiring authority, the Tribunal may order the claimant 'to bear his own expenses and to pay the expenses of the acquiring authority' (Section 11, Part II, Land Compensation (Scotland) Act 1963). On the contrary, if the compensation determined by the Lands Tribunal is greater than or equal to the original offer of compensation made by the acquiring authority, then the Tribunal may order the acquiring

[13] As per the Lands Tribunal for Scotland Rules (2003), the process of disputed resolution can be instituted by any party by sending a written application to the Tribunal. The Tribunal has the flexibility to set the procedure for dispute resolution, as it may think fit (Section 14, Part V, Lands Tribunal for Scotland Rules 2003). However, in practice, a clear majority of cases of disputed compensation are resolved by agreement by parties without reference to the Lands Tribunal for Scotland (SLC Discussion Paper 159, 2014). Usually, the landowner appoints a surveyor to discuss the matter on their behalf, and the district valuer negotiates on behalf of the acquiring authority (ibid). These agreements are not completely outside 'the shadow' of the Lands Tribunal, which then decides on the remaining cases that cannot be resolved by agreement (ibid).

[14] This information was acquired by respondent SMJA_12 & SFJA_12 in January 2019 from Transport Scotland using the Freedom of Information (Scotland) Act 2002).

authority to pay for the expenses borne by the claimant (ibid). Landowners generally perceived it to be unfair to be incurring the full cost of arbitration because as taxpayers, they had previously contributed towards the cost of negotiation of the acquiring agency who used public money.

## *4.5 Common problems at all stages of the process*

### *4.5.1 Poor accountability of the acquiring agency towards meeting verbal commitments*

Many respondents reported that they were let down by the representatives of the acquiring agency who made promises during public hearings or in other meetings and never fulfilled them. Respondent SMJA_4 shared his experience of the public inquiry meeting where he presented the proposal to build a private road to access the other part of his farm, and even though his proposal was verbally agreed during the meeting, the offer was withdrawn immediately after the minutes of the meeting were published. The respondent viewed this as a strategic behaviour by the officials who managed the meeting process by giving verbal commitments.

### *4.5.2 Lack of respectful interpersonal treatment and inefficient grievance management*

'I think being treated with respect and honesty, for me that is the single most important thing. I think that's far more valuable than finance…the biggest single thing that would've made a difference to me, is just being treated with respect and my integrity being respected rather than being questioned' said respondent SMJR_11. In the words of respondent SMJA_4, 'the affected parties are treated more like an inconvenience (to the acquirers) than as stakeholders.'

On approaching the Aberdeen Roads Limited for more information on the change of route which had affected her land, landowner SFJA_4 felt that she was dismissed for having a NIMBY attitude. She reported that the officer-in-charge lacked concern towards the affected landowners and how they were getting on with the news of acquisition which was received around Christmas in 2005.

Many respondents expressed that dismissive behaviour of public agents reduces landowners trust in the agency and furthers their apprehensions that their interests are not safeguarded. 'A willingness to listen to the points made would have significantly reduced stress' said respondent 1_SMOS. When talking about raising inquiries with the acquiring agency respondent SFJA_4 said '…their argument is just to ignore you. Eventually you will go away. They do not respond to emails, phone-calls, requests, letters or anything'. Being ignored was a common experience across all landowners.

Being disappointed with the treatment they received from their District Valuer[15], respondents SMJA_12 & SFJA_12 raised a complaint with the Valuation Office Agency to find out that the complaints procedure is complex in itself and takes a long time to settle - 'we are still progressing our complaint about the behaviours of our own specific District Valuer. This process started in 2017 and is still continuing (as on February 2019)'. Another respondent SMJA_8 was considering scaling up the complaints of his local community to the Parliamentary Ombudsman, the final stage for unresolved complaints against public agencies in the United Kingdom.

[15] 'The district valuer is from the District Valuer Services (DVS), the property arm of the Valuation Office Agency, an executive agency of HM Revenue & Customs.' (SLC Discussion Paper 159, 2014, p. 280)

### *4.5.3 A stressful process for the affected landowners*

‘Whilst I have received some payments to account in terms of financial compensation and further compensation will hopefully be due in due course, I consider it will be most unlikely these monies will come anywhere close to fully compensating me for all the pressures I have had to endure over the past eleven years’ said respondent SMRA_2. Most respondents found it unfair on the affected landowners to have taken on the stressful process that was not of their choosing. From discussions with the affected landowners it was revealed that much stress is caused due to the procedural imperfections discussed earlier, the important ones being: (i) time and cost consumed in the process of preparing alternate proposal/suggestions to the project; in attending public meetings and seeking information on the project and its impact on properties; and in preparing their case for compensation; (ii) disturbance in day to day operation of farmland due to temporary damages caused during the construction of the road; (iii) negative changes to the local environment (views, sound level, traffic and congestion) and its impact on their day to day life (iv) depreciation in property value due to negative externalities; (v) disturbance (noise, vibrations, and dust) caused due to construction works; (vi) dismissive attitude of public agencies and poor grievance management; (vii) uncertainty and time delays to project completion, compensation payment and so on.

## *4.6 Summary*

The diagram below summarises the procedural gaps and links them with relevant principles of procedural fairness, as discussed earlier in the literature (section 2).

*Figure 1: Gaps identified in the process of compulsory acquisition in Scotland, through the lens of principles of procedural justice*

(Insert figure here)

At the first stage, which is primarily a decision-making stage, 'representativeness' emerges as the most important principle because people expect to have greater control (as envisaged in the Community Empowerment (Scotland) Act 2015) and make decisions on the nature and design of public projects. In the second stage when suggestions and objections are invited on the CPO from statutory objectors, again people demand wider representation, information exchange and transparency. Also, they demand easy and inexpensive opportunities for representation, providing suggestions, and raising objections to the existing solutions. Most importantly, people expect timely response to their suggestions and objections and that these should be assessed by a neutral agency (independent of the acquiring agency), which would provide reasons for their decisions. Thus representativeness, accountability, and neutrality emerge as the most crucial principles that should be addressed at this stage. At later stages 3 and 4, people expect greater compliance and accountability of the acquiring agency and its partners towards prescribed procedures and mitigation measures and timely payment of compensation. Given that there are many negotiable components of compensation, the affected landowners wish inexpensive opportunities for negotiation. A common concern across all stages of the process is a respectful treatment (or interactional justice), correctability, and grievance management. Overall, it could be concluded that principles of representativeness, accountability and correctability warrant urgent attention of policymakers and lawmakers in Scotland. A clear majority of problems in the process are due to the lack of respectfulness and a grievance management system in place. These problems can be overcome through procedural reforms

(discussed in section 5) and without making any compromise on the public interest and benefits desired from the project.

# 5 Suggestions for procedural improvements

This section presents eleven procedural improvements derived through a survey of key stakeholders including the affected landowners; experienced surveyors; and members of the public at large.

## *5.1 Meaningful involvement of members of the public*

Pure procedural justice requires that determination of what constitutes a public project which is worth acquiring private land, is best executed through a democratic decision-making process. Albert & Passmore (2008) analyse a wide range of public participation processes in the context of Scotland that can increase public satisfaction, restore peoples' trust in public institutions and politicians, and reduce the 'democratic deficit'. In projects that involve non-government players implemented through Public Private Partnership and other futuristic formats, it is important that public participation is guaranteed at all crucial decision-making stages of the project (Lands Tribunal for Scotland, 2015).

The importance of demonstrating the 'proportionality' principle of the ECHR (discussed earlier under section 4.1.1) has been acknowledged in many democratic countries. For example, recent improvements in the Indian statute require the acquiring agency to consult the concerned rural

and urban local bodies at the village or ward (smallest administrative unit of a local government) level and demonstrate whether the proposed acquisition serves a public purpose; whether the extent of land proposed for acquisition is the absolute bare minimum extent needed for the project; whether land acquisition at an alternate place has been considered and found not feasible; study of the social impacts of the project, and the nature and cost of addressing them and the impact of these costs on the overall costs of the project vis-a-vis the benefits of the project (Section 4(4), LARR 2013). Regarding identification of projects which are truly in the interest of the people, the new statute requires the acquiring agency to take consent of at least 80 per cent of the total affected families if the land is to be acquired for a private company, and 70 per cent affected families in case of public-private partnership projects (LARR, 2013). This certainly adds to the decision-making power of the community and helps co-building the meaning of 'public purpose' with the people.

### *5.2 Providing a fair opportunity to the people to express views, suggestion and objections on the CPO*

The Lands Tribunal emphasises that 'If the procedures for determining CPO objections are not robust then legal and HR challenge is more likely and, from the perspective of the LTS, there risks a greater sense of grievance by the time an objector has become a claimant for compensation.' (Lands Tribunal for Scotland, 2015, p. 2). To improve the efficiency of the public hearing process, the Lands Tribunal for Scotland suggests that people should be allowed to cross-examine the promoters of the project. In this research, the respondents expressed that the public inquiry was their only formal opportunity to ask questions, raise objections, share opinion and provide opinion. It is important to make the process easy and inexpensive. Experts in property law, like Milne (2015), in their response to SLC's draft report on legal reforms, argue for expanding the list of statutory objectors by including landowners in close vicinity to

the project and they ‘should … be entitled to progress a legal challenge on the point of law or flaw in process’ (p. 4).

The pressure for timely completion of the project is often used as justification for providing limited opportunities for the affected landowners to raise objections or to share their views. Milne (2015) argues that ‘the legislation must continue to reflect the need for a balance between the interests of the acquiring authorities seeking to deliver a public scheme and the interference with landowners’ ECHR rights. Therefore, while simplicity and streamlining procedure may be attractive, this should not be delivered at the cost of removing landowners’ rights to be consulted and to object.’ (p. 1).

### *5.3 Reducing informational asymmetries*

Theoretical and empirical literature on procedural justice argues that procedures that are opaque with lower accountability towards people are perceived as less fair (Leventhal, What Should Be Done With Equity Theory?, 1980). For transparency, accountability and better participation, landowners suggested that complete information on technical details of the proposed project and other relevant information be made available in the public domain.

### *5.4 Reducing financial asymmetries*

To address imbalance in financial power between the acquirer and objectors, SLC proposes to award protective expenses order (PEO) in selective cases. Milne (2015) agrees that, ‘where a member of the public is facing so great an interference with his ECHR rights, consideration could be given to the availability of public funding for objections’. This may reduce the sense of injustice arising due to ‘having to take part in a legal dispute that was not of their choosing’ (SLC Discussion Paper 159, 2014, p. 287). Furthermore, Milne (2015) argues that when private

firms are involved in the project then there is scope for taking away a share of the private benefits against the cost of legal advice for the affected landowners. Frivolous claims, however, must be discouraged (Milne, 2015).

SLC (2014) suggests that alternative dispute resolution (ADR) methods, which are usually cheaper, could be allowed to reduce legal expenses in compensation dispute resolution. However, this will not compromise the right of the affected landowner to apply to the Lands Tribunal for Scotland (which is a necessity under Article 6 of ECHR). A similar approach is adopted in Australia where, to make the process of dispute resolution 'accessible, fair, just, economic, informal, and quick', the Administrative Appeals Tribunal uses methods of alternative dispute resolution which include conferences, conciliation, case appraisal, and neutral evaluation (AAT, 2019).

### *5.5 Unbiased assessment of people's suggestions and objections*

The unbiased assessment of objections and alternative design proposals for a proposed project prepared by landowners is crucial, as often they spend a significant amount of time and expense in preparation. This is also important for project design which responds to the local environment and is socially acceptable. Therefore, the surveyed landowners and those who responded to draft SLC report suggested that the confirming authority should be an independent body with no vested interest or stake in the proposed project.

### *5.6 Timely assessment of public objections*

Milne (2015) argues that public inquiry and public objection process does not cause delays to the project, but rather complexities involved in the decision making, more so on the part of acquiring agency and the judiciary cause delays. Milne (2015) and many other respondents

suggest defining the timeline for the Scottish Minister within which objections should be referred to the DPEA will speed up the process. Similarly, other stages in the process can be streamlined to make the acquiring agency more accountable for time delays.

### *5.7 Inducing consistency across discretionary components of compensation*

Due to the personal nature of negotiation for components and value of compensation between an individual claimant and the acquirer, it is important that landowners have a single point of contact to maintain consistency. This must be complemented with proper record keeping as many projects have long implementation periods, over which time the public officials in charge of these projects may change.

As suggested by Respondent SMJA_4, acquirers must prepare a detailed list of components of compensation in discussion with each affected landowner to avoid arbitrariness and pay the estimated amount of compensation in advance, or as per an agreed timeline, while final settlement (or 'compromised agreement') may happen towards the end of the project when actual expenses are known. While reaching an upfront agreement over the list of items of compensation might be difficult, providing lumpsum upfront compensation for an obvious set of additional losses, should reduce arbitrariness in the compensation process and lower the negotiation cost. There are parallel rules in other jurisdictions, such as India and Australia, which pay an additional lumpsum solatium without arbitration. Furthermore, in Australia, the details on the components of the compensation and valuation report is shared with the affected landowners, along with the CPO notice (Rao, Tiwari, & Hutchison, 2018). Having these details might reduce ambiguities over uncovered/under-compensated losses.

### *5.8 Ensuring timely payment of compensation and advances*

In the current statute there is no effective mechanism in place that can enforce timely payment of compensation, particularly advance payments, by the acquiring authority. Moreover, there is no incentive for the acquiring agency to make advance payments within a reasonable time. As per Section 40 of the Land Compensation (Scotland) Act 1963, statutory interest is payable on all outstanding compensation monies that have not been paid on the vesting date. However, the rate of judicial interest is calculated at 0.5 percent below the Bank of England base rate, on simple rather than compound interest basis (SLC Discussion Paper 159, 2014). Such an interest rate might compensate for the loss of 'time value' of money but is not an incentive for the acquiring agency to timely deliver the compensation amount (SLC Discussion Paper 159, 2014). To overcome this problem, RICS (Scotland) suggested to the SLC to impose a high statutory interest rate of approximately 3 percent above the base rate on unpaid amounts (SLC Discussion Paper 159, 2014). A similar argument was made by a senior valuer (during in-depth interview), and based on his discussion with other experts, he suggested an interest rate of 4 percent above the base rate.

### *5.9 Improving accountability and commitment fulfilment*

Landowners emphasised the need to improve accountability of public agencies towards people and suggested that final decisions on their suggestions and objections should come along with proper reasoning. Steel (2015) writes that accountability and transparency are particularly important when the confirming authority is an arm of the promoting body of the project for which acquisition is proposed. Respondent SMJA_6 expressed that if the public authority is more responsible and accountable towards suggestions and queries raised by the people, it may relieve people from stress caused otherwise due to the feeling of powerlessness and helplessness.

Respondents also recommend formal record keeping of the minutes of important meetings between key stakeholders (i.e. general members of the public, affected landowners, public and private agencies) to improve the accountability of public officials towards their verbal commitments.

### *5.10 Helping the affected landowners in dealing with mental stress*

Most respondents expressed that the stress caused due to the project was immense and deserved appropriate compensation that may not necessarily be in monetary terms. Respondent's and their agent's suggested that compensation of stress may include payment for the modes of de-stress such as consultation with a psychiatrist, relaxation therapy, and so on. That said, it is first important to reduce complexities in the process and make it simple, fair, and respectable enough for the affected landowner.

### *5.11 Improving overall service delivery*

Respondent SMJA_8 suggested that public authorities should take feedback from the people, particularly those who are directly affected by the project, with the intention of learning lessons and improving future services.

Procedural gaps and suggestions discussed above could be a useful guide to policymakers and lawmakers across the globe. These suggestions are, however, open for debate and criticism. Alongside empirical testing, these suggestions would require a more specialised discussion on legal aspects of procedures, which is beyond the scope of this research.

# 6 Conclusion

Most works in the area of compulsory acquisition of land are centred around defining fair compensation for the affected landowners. While compensation is a crucial topic affecting the wellbeing of the affected landowners, this research extends the discussion to the fairness of processes adopted during the compulsory acquisition of land when analysed through the lens of procedural justice theory. The main objective of this research is to identify the gaps experienced by the affected landowners in the process, as a source for further discussion while the statute in Scotland is under reform. Findings from this research suggest that the most crucial problems at the initial stages of project planning and compulsory acquisition are concerned with the lack of representativeness of the members of the public; poor accountability of acquirers towards acquirees; and non-neutral assessment of people's suggestions and objections. At the next stage of project execution, people expect greater compliance to previously agreed processes and greater accountability of the acquirers towards acquirees. On matters concerning compensation negotiation, people demand inexpensive procedures for representation. A common concern across all stages of the process has been the lack of respectful treatment (or interactional justice); correctability of errors by acquirers and their partners; and grievance management.

Based on the opinions shared by key stakeholders involved in the process of compulsory acquisition in Scotland such as the Lands Tribunal of Scotland and civil servants heading up CPO Policy, this research provides the following suggestions for improvement of the process. First, explicit demonstration of the 'proportionality' principle of 'public' projects by undertaking a detailed socio-economic cost-benefit analysis. Secondly, equal representation of all stakeholders at the initial stages of project identification and design. Thirdly, ensuring

informational and financial symmetries between acquirers and acquirees. Fourthly, ensuring a neutral assessment of people's suggestions and objections by a third party. Fifthly, improving accountability of the acquiring agency and its partners towards verbal and written commitments and timelines. Sixthly providing counselling services or other suitable help to affected landowners in dealing with mental stress and finally, improving overall service delivery and a more responsive grievance management system.

In summary, it could be concluded that the process of compulsory acquisition warrants urgent attention of policymakers and lawmakers in Scotland on principles of representativeness, accountability and correctability. The above suggestions are open for further debate and await empirical market testing.

**Acknowledgement:**

The authors would like to thank the many contributions to this research and the helpful comments from the anonymous reviewers.

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