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CONDEMNATION IN THE UNITED STATES AND EXPROPRIATION IN VENEZUELA: A COMPARATIVE LEGAL STUDY

HARVEY YATES*

I. BACKGROUND¹

Condemnation is the process by which property of a private owner is taken for public use without his consent but upon the award and payment of a just compensation.² Though many North Americans³ equate the word "expropriation" with "confiscation" it is more correctly thought of as an exercise in a sovereign's power of eminent domain comparable to the use of condemnation in the United States. This paper is a comparative legal study of condemnation, or expropriation, as it is utilized in controlling the use of land in Venezuela and in the United States.

Both the Venezuelan and the United States legal systems are eclectic. But, each has drawn from a different heritage. For example, while the United States borrowed the British common law approach, Venezuela adopted a Spanish-French civil law system. This difference in background helps to explain differing approaches of the two countries today. For example, it probably is an important factor in explaining why the United States' legal system, relative to Venezuela's legal system, accentuates the protection of individual rights.⁴

The reader can draw from this comparative study of condemnation law several examples of this difference in approach. For instance, he will see that Venezuela often pays for expropriated property by use of bonds,

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thereby casting on the expropriatee a financial burden equal to the difference in the present value of the land and the present value of the bonds. In the United States, compensation ordinarily must be paid in money.

If the Venezuelan legal system, expropriation laws and problems can be taken as generally representative of Latin America,⁵ then the recurring conflict between the United States and Latin American countries over expropriation might have been anticipated. An examination of the differences in present approaches and the trends of the two legal systems as seen through the expropriation laws should give the reader an insight as to the likelihood of future conflict in this area.

Today in the United States the control of greater amounts of land for use in ways which benefit the public is of concern to many people. Condemnation is one of several legal devices for controlling the use of land. In ascertaining how this device might be altered to improve its effectiveness the reader, through this study, hopefully can draw on the Venezuelan experience for ideas adaptable for use here. For instance, the reader might consider whether a jurisdiction within the United States would benefit from a comprehensive statutory scheme of condemnation. He might wonder to what degree the public welfare would be enhanced by permitting compensation in certificates of indebtedness rather than in money. Or, he might ask whether it would be well for a state to institute a system of betterment charges in combination with its condemnation laws.

II. CONDEMNATION IN THE UNITED STATES

A. GENERAL

Governments in the United States condemn private land for uses such as airports,⁶ canals,⁷ highways,⁸ historic sites,⁹ parks,¹⁰ public buildings,¹¹ and, in short, for any such facilities to be owned by the public.

Private corporations,¹² partnerships,¹³ and individuals¹⁴ under grants of authority from a state or the Federal government, sometimes exercise condemnation powers to take private land and apply it to a specific use which benefits the public. Examples of such uses are public utilities,¹⁵ universities,¹⁶ cemeteries,¹⁷ and in earlier years, water mills.¹⁸ Similarly, in Venezuela, private companies engaged in certain industries may exercise the power of expropriation. For instance, hydrocarbon concessionaires are authorized to expropriate lands under circumstances specified by law.¹⁹

In the United States the Federal government and many state governments condemn private property and make it available to companies or individuals who will develop and utilize it for private use, in accordance with a plan adopted by the government.²⁰ For instance, a privately owned store, and the land upon which it stood, have been condemned by a government, and the land has been made available to private developers who constructed private housing on it in accordance with a governmental blight clearance plan.²¹

Condemnation of this sort is often employed in connection with "urban renewal." The reader will be able to relate this utilization of condemnation and the use of expropriation in Venezuela's agrarian reform, discussed in the following chapter. In both instances the government takes property from private parties and makes it available to other individuals.

In this country, in some states, land in excess of that required for a project is condemnable if the extra land will be needed for future expansion of the project. For example, a state has condemned more land than necessary for a highway, reserving the extra land for highway enlargement.²²

Unneeded remnants of the land condemned for a governmental project also are taken in some states if the remnants are unsuitable for private use²³ or if the "severance damage"²⁴ is more or less equivalent to the value of the remnant.²⁵ For instance, a state, upon condemning a small portion of land for a highway, also condemned a large remnant, the severance damages to which would have been almost equal to the value of the remnant.²⁶

In some states, land adjacent to a proposed public improvement may be condemned, either to protect the improvement or for reasons of safety. For example, land surrounding a newly constructed reservoir has been condemned in order to protect the reservoir from contamination and in order to control the public use of the reservoir.²⁷

Each of the three preceding paragraphs discussed a form of "excess" condemnation utilized in this country. Venezuelan law also authorizes "excess" expropriation. Art. 12 of the *Ley de Expropiación por Causa de Utilidad Pública o Social*²⁸ authorizes the expropriation of a strip of land sixty meters deep from the edge of a road, garden or plaza. The "excess" expropriation is to form the economic or aesthetic "base" of the public work.²⁹ The style, location and height of buildings constructed on the expropriated strip of land are to be in "harmony" with the public project.³⁰

Land in the strip may be sold to individuals who will construct such buildings.³¹ The person from whom land is taken has preference in repurchase.³²

Government entities in some states of this country exercise condemnation power to acquire the fee, or interests less than fee, in land adjoining rivers, highways and parkways in order to preserve the beauty of such lands. For instance, a state has condemned an easement in the land adjacent to the highway thereby precluding the land's owner from developing it in a manner which would adversely affect the land's scenic beauty.³³

Land can be condemned in Venezuela for aesthetic reasons. Also, under Venezuelan law, easements can be condemned.³⁴ But, the two ideas have not been combined to allow condemnation for aesthetic reasons of interests in land which are less than the fee—interests such as the “development rights” and “scenic easements.”³⁵

B. CONSTITUTIONAL LIMITATIONS ON THE EXERCISE OF CONDEMNATION

1. *Federal*

[No person shall] be deprived of . . . property without due process of law; nor shall private property be taken for public use without just compensation.³⁶

The Constitution of the United States contains no statement regarding condemnation other than that given above. Is there an implication in the statement that the Federal government possesses the power to condemn land lying within the states? Early, it was thought not, or so history implies, for the Federal government until 1875 did not condemn such property on the basis of its own right to do so.³⁷ Rather, it used the circuitous method of having a cooperative state government condemn needed land.

In 1871 the Supreme Court of Michigan declared that the State of Michigan had no authority, by virtue of its power of eminent domain, to condemn private lands for the benefit of the Federal government.³⁸ It also argued that the Federal government, by virtue of its sovereignty, possessed an inherent right to condemn private land necessary to the exercise of the powers delegated to it by the Constitution. In 1875, in *Kohl et. al. v. United States*,³⁹ the Supreme Court of the United States

accepted the argument, combined it with the implication contained in the Fifth Amendment, and established the right of the Federal government to condemn private property lying within the states.⁴⁰

The Federal government's power to condemn, though now thoroughly established, is none the less bounded by constitutional limitations. Of them, four are significant for our purposes.

a. The Delegated Authority

The Federal government's right to condemn is no more extensive than is its delegated authority. In short, its power to condemn stops where its sovereignty stops. The court in the *Kohl* case implied this limitation.

[The Power of Eminent Domain] is inseparable from sovereignty, unless denied to it by its fundamental law. [citations omitted] . . . That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends . . . [I]f the right of eminent domain exists in the Federal government, it is a right which may be exercised within the States so far as it is necessary to the enjoyment of powers conferred upon it by the constitution.⁴¹

More recent cases also imply this limitation,⁴² which I shall hereafter refer to as the "delegated authority limitation."

These days, great difficulty lies in ascertaining the boundary between state and federal sovereignty. For example, the Federal government, as noted in *Kohl*, shares sovereignty with the states; indeed, it is the Federal government, not the states, which is restricted to functioning within the limits of delegated authority. Yet, though one would think that the control of state land would be a fundamental element of state sovereignty, the states must yield state-owned land when the Federal government exercises its power of eminent domain.⁴³

b. The Public Use

The Federal government can condemn private property only for a public use.⁴⁴ But, much litigation has concerned the meaning of the term "public use."⁴⁵ Often the issue has been whether property may be condemned when mere public advantage or benefit will result, or whether condemnation is permissible only when the public will actually use the

condemned property. Today there is no doubt that the federal courts sanction the former, the "public benefit" theory.⁴⁶

Though the issue is judicially reviewable the federal courts usually acquiesce in a legislative determination that a particular condemnation will result in a "public use."⁴⁷ Furthermore, federal courts now seem to merge the "delegated authority" issue and the "public use" issue, failing to give them independent significance. For instance, in *Berman v. Parker* Justice Douglas said: "Once the object is within the authority of Congress the right to realize it through the exercise of eminent domain is clear."⁴⁸

c. Just Compensation

The Federal government must pay just compensation for the property it condemns.⁴⁹ "Just compensation" is the market value of the property taken, or so the courts have held; the condemnee ordinarily receives nothing for inconvenience and sentiment.⁵⁰ Compensation must usually be paid in money. However, some courts have approved as compensation the benefit accruing to the condemnee resulting from the additional value of his retained land remnant, caused by its proximity to the public improvement for which land was condemned.⁵¹ This benefit can only be used to offset the condemnee's claim against the government. It is not used for sustaining further charges against him.⁵² The Venezuelan law as to this issue is different. It is discussed in the next section.

d. Due Process

No person may be deprived of property without due process of law.⁵³ In exercising its power of condemnation the government must meet procedural and substantive essentials of "due process." Procedural due process requires that the condemnee be given notice and an opportunity to be heard by a competent tribunal, in an orderly proceeding which is adapted to the nature of the case and wherein his fundamental rights are not abridged.⁵⁴ Substantive due process requires that the taking be for public purposes,⁵⁵ that compensation be given⁵⁶ and that government not exercise its power arbitrarily or capriciously.⁵⁷

2. State

The power to condemn is an inherent power of the states of this country.⁵⁸ It is an attribute of their sovereignty and is not based on an

authorization from the Federal government. In this way, the condemnation power of states differs in this country and in Venezuela.

Though Fifth Amendment limitations on condemnation did not initially apply to state exercise of the power of eminent domain, the Supreme Court, in construing the Fourteenth Amendment "due process" clause, made the Fifth Amendment applicable to the states. Therefore, a condemnation by a state government is subject not only to limitations imposed by its own constitution but is also subject to the federal constitutional limitations discussed above.

State constitutions often include provisions comparable to the Fifth Amendment limitations on condemnation. Yet, if state courts, in construing such provisions, set more rigorous standards, the condemnor may fail state constitutional requirements while passing federal requirements. Such a result is sometimes caused because some states employ the "use by the public" test rather than the "public benefit" test.⁵⁹

While the expediency or necessity of constructing a particular public improvement is not generally justiciable, nonetheless the issue of whether the taking is founded on a public necessity is justiciable.⁶⁰ A condemnee could, for instance, complain to the court that there was, in fact, no public need for his property in that it was being condemned for purposes for which it could not be used.

The necessity issue often arises when property is sought for a future use. Some state courts do not allow condemnation where the use contemplated is, in the court's opinion, too far in the future.⁶¹

A further note is due before leaving constitutional considerations. Governments in this country, without paying compensation, have taken what was, at common law, considered to be property. In Louisiana all riparian land is subject to the right of the state to build levees on it without compensation.⁶² Submerged land under navigable rivers is taken for improvement of navigation without compensation.⁶³ Airspace above 1,000 feet in congested areas and 500 in other areas has been taken by the Federal government without compensating the owners of the land which lies below the airspace.⁶⁴

In the following section expropriation in Venezuela is examined in detail. The section also contains additional information on condemnation in the United States, inserted for comparative purposes.

III. EXPROPRIATION IN VENEZUELA^{64a}

A. CONSTITUTIONAL AND STATUTORY DEVELOPMENT

Venezuela's first constitution was adopted in 1811. It laid the basis for the development of that country's expropriation law.

[N]o one shall be deprived of the least portion of his property, nor will it be applied to public uses without his own consent or that of the Legislative Bodies, . . . and when some legally proved, public necessity demands that the property of some citizen be applied to such uses, he shall receive for it a just indemnification.⁶⁵

Venezuela has had 25 constitutions since 1811.⁶⁶ Many of them have supplemented the expropriation law. For instance, the indicated constitutions have added this basis for, and this limitation on, expropriation.

1819	basis:	general utility ⁶⁷
1864	limitation:	adversary trial ⁶⁸

By 1947, the constitutional elements basic to Venezuela's present expropriation law had appeared in one or more constitutions.⁶⁹

The first special law regulating the circumstances in which private property could be taken for public use appeared in 1860, based on the constitution of 1858.⁷⁰ Expropriation had previously occurred, but the introduction of the special law indicates an attempt at its systematic regulation.⁷¹ A second special law related to expropriation was promulgated in 1863.⁷² It contributed to the law by requiring that the agent of the state, in case of controversy, apply to a court formally, demanding that the property owner cede the property.⁷³

Thus, the Venezuelan concept of expropriation is a product of historical development rather than recent innovation.

B. PRESENT LEGAL BASES

The essential elements of Venezuelan expropriation law appear again in the present constitution.⁷⁴

1. *Public Utility and Social Interest*

As is true of the Fifth Amendment of the United States Constitution, Art. 101 of the Venezuelan Constitution supports the government's right to expropriate by negative implication:

The expropriation of any kind of property can only be declared for reasons of public utility or of social interest by means of a final judgment and the payment of a just indemnification.

The Venezuelan legislature has defined projects which have public utility this way:

Works shall be considered as having public utility which have as a direct object to render to the Nation in general, to one or more of the States or Territories, to one or more towns or regions, any use or improvement that gives common benefit, whether they be executed for the National government, for the States, for the Municipalities, for the Autonomous Institutes or for duly authorized individuals or enterprises.⁷⁵

The Constitution of the United States contains a "public use" provision similar to the Venezuelan "public utility" requirement.⁷⁶ We saw in the preceding section that in this country there has been a change in the meaning of "public use." The concept now connotes not only "use by the public" but "benefit to the public."⁷⁷

In Venezuela there also has been an evolution of the purposes for which property can be taken. This can be seen by the addition, in the present constitution, of "social interest" to "public utility" as a reason for which property may be expropriated. Also, as explained by *Corte Federal*, there has been an evolution in the concept of "public utility" itself.

Moreover one observes how one can confirm from varied sources that the concept of public utility has been evolving progressively and expanding. The character of public has been extended toward that which is merely social. Therefore, no connection is required with decided public services, and in order to expropriate, it is considered sufficient that the social interest be manifested in the conservation of things or historic relics or be within the orbit of that which is merely aesthetic or artistic. In short, it is sufficient that expropriation have in view "a general interest of material and moral order for a mass of citizens."⁷⁸

2. Contributions, Restrictions and Obligations

Art. 99 of the Venezuelan Constitution makes property subject to contributions, restrictions and obligations established by the law. As we shall see in the section dealing with legal limitations on expropriation, the

mentioned portion of Article 99 has been held by the courts to constitute a legal basis for expropriation.⁷⁹

3. *Elimination of the Latifundistic System*

Much of the recent expropriation in Venezuela has arisen under the agrarian reform. The constitutional bases for such expropriations include the articles referred to above plus Art. 105.

The latifundistic system is contrary to the social interest. The law shall provide whatever is conducive to its elimination, and shall establish norms directed toward granting the land to *campesinos* and rural workers who lack it, as well as providing them with the means necessary to make it produce.⁸⁰

The dictates of these constitutional provisions are carried into effect by several special laws, primarily the "Law of Expropriation for Reason of Public or Social Utility,"⁸¹ and the "Law of Agrarian Reform."⁸² Specific provisions from these laws are discussed in the section dealing with the utilization of expropriation in Venezuela.

C. LEGAL LIMITATIONS

The legal limitations on the power to expropriate arise from implications drawn from the previously discussed constitutional articles, from explicit constitutional prohibitions and from statutory provisions.

1. *Confiscations*

Though a prohibition such as that contained in Art. 101 of the Constitution, denying the use of expropriation unless just indemnification is paid, would seem to imply a prohibition on confiscation, the Venezuelans have chosen to articulate the prohibition and two exceptions to it.

Article 102: Confiscations shall neither be decreed nor executed except in the cases permitted by Article 250. There are excepted from this, in respect to foreigners, those measures accepted by international law.

Art. 250 is the sole article under the constitutional section "Inviolability of the Constitution." It provides for confiscation to reimburse the Republic for damages from those who interrupt the effect of the Constitu-

tion by force, from persons who repeal it by means other than those provided and from persons who are unlawfully enriched under the protection of such usurpation.

In its special law, Venezuela has also attempted to provide additional safeguards against misuse of expropriation. Under Art. 55 of the "Law of Expropriation" the judge or public functionary who takes, or orders the taking of, another's property without complying with the legal requirements is made personally responsible for the value of the property taken and the damages caused.

One of the more interesting expropriation related cases involved an interpretation of Art. 55, ultimately by the *Corte Suprema de Justicia-Casación*.⁸³ In 1953, municipal authorities of the Federal Municipal District (Caracas) took part of Nestor Moreno's land. In addition they prohibited his using some of his other land because, they said, it was being studied for use as green space. They also built a highway causing him to construct a retaining wall to protect his buildings from the talus of the roadbed. Moreno was paid nothing. After a change of administration he sued the Federal District. It defended claiming that Art. 55 implicitly required that Moreno rely solely on the liability of the offending functionaries.⁸⁴ The Court rejected this interpretation of Article 55⁸⁵ and pointed to Art. 47 of the Venezuelan Constitution which states:

No Venezuelan or Foreigner can claim that the Republic, the States or Municipalities should indemnify him for damages or expropriation that have not been caused by legitimate authorities in the exercise of their public function.⁸⁶

The Court said that this constitutional provision forced it to conclude that when legitimate authorities cause damages or expropriations to Venezuelans or foreigners, the named entities were obligated to respond for proved damages and expropriations.⁸⁷

The "Law of Expropriation" also contains a provision allowing the property owner, who is deprived of the enjoyment of his property, without the proper formalities, to use possessory actions to regain the use and enjoyment of his property.⁸⁸ In addition, this provision has been interpreted to allow the property owner to bring an action against a governmental entity for indemnification.⁸⁹

2. *The Guarantee of the Right of Property*

The Venezuelan Constitution guarantees the right of property.⁹⁰ However, the guarantee does not limit the right of the government to

exercise its power of expropriation. The seeming conflict between the right of property and the power to expropriate has been reconciled this way:

In order to justify expropriation one should consider that the State, as representative of the public interest, always needs certain property which is privately held in order to realize the aims of its agency; and, in this conflict of both interests, logically, the private interest has to yield in the fact of the collective interest.⁹¹

“Condemnation” in the United States has been supported by similar rationalizations.⁹² However, from a comparative standpoint, there is a more interesting rationale which the Venezuelan government could utilize to justify minimizing the right of property. It is derivable from the Venezuelan legal concept of property. The country’s civil code defines the word “property” this way:

Property is the right of using, enjoying and disposing of a thing in an exclusive manner with the restrictions and obligations established by law.⁹³

Therefore, though the right of property is guaranteed, the ownership of property itself carries a requirement that the restrictions and obligations established by law be performed. If there is an established legal obligation to yield property in the face of governmental need, there is no conflict between the exercise of expropriation and the right of property.⁹⁴

3. *Public Utility and Social Interest*

As was shown above, Art. 101 of the Venezuelan Constitution prohibits expropriation except for reasons of “public utility or social interest.”⁹⁵ We saw that the Fifth Amendment to the United States Constitution and articles in many state constitutions, impose a similar limitation in that private property can only be taken for “public use.” However, there are consequential differences between utilization of the limitation in Venezuela and in the United States.

In this country the issue of whether a particular use is a “public use” is subject to review by the judiciary. Indeed, in certain instances, state courts have prohibited the exercise of condemnation because the proposed use of the property was not, in the court’s opinion, a public one.⁹⁶

In Venezuela the Legislature’s determination of “public utility” is not reviewable by the court. The issue of judicial review was raised in *Sentencia del 18 de mayo de 1945*.⁹⁷

The first defense . . . can be synthesized this way — that the Legislative Assembly abused its power because it considered to be a work of public utility that which is not a work of public utility, and therefore that the decree of expropriation should be declared a nullity.

According to the applicable law it is not a prerogative of this court to decide whether or not the criteria of the Legislative Assembly was correct when it made the decree, which is the subject of this controversy.⁹⁸

The court based its holding on the “Law of Expropriation,” a legislative enactment. It therefore may be interpreted as saying that it would not review a legislative enactment because the legislature precluded it from doing so.⁹⁹

Though the Venezuelan “public utility” requirement, unlike this country’s “public use” requirement, is not a deterrent on legislative action capable of being imposed by the judiciary, there is nonetheless a relevant inhibiting feature built into the Venezuelan system. The “Law of Expropriation” requires that the public utility of the project, for which the expropriation is to occur, be publicly declared before the expropriation can be effectuated.¹⁰⁰ A Venezuelan court explained the feature this way:

And, in order that this interest [the collective interest in works of public utility] will not be lessened by agents of the administration utilizing the power for private ends, the legislator demands a prior declaration of public utility. . . . In this manner the question of public utility is reduced to one formal question of whether the public utility has previously been declared by the competent organ of the state.¹⁰¹

The legislature has excepted from this prior declaration of “public utility” certain types of projects because they are “plainly of this nature.”¹⁰² The list of exceptions is long and includes the construction of highways, railroads, hospitals, cemeteries, airports, canals, urban works and so forth.¹⁰³ Therefore, this “prior declaration” provision does not operate as a limitation requiring the investigation of most individual projects, such as specific roads, to ascertain whether they are indeed for the “public utility.”

4. *Just Indemnification and Payment*

In addition to requiring that expropriation be declared only for reasons of public utility and social interest, Art. 101 of the Venezuelan

Constitution requires that a just indemnification be paid for the property taken. There are similar requirements in the Venezuelan Civil Code and in the "Law of Expropriation."¹⁰⁴ The Supreme Court has interpreted these provisions as requiring that the expropriator properly consign the indemnification due the expropriatee before he takes the property.¹⁰⁵

Though compensation in the United States is made in cash,¹⁰⁶ the same is not always true in Venezuela. Art. 101 of the Venezuelan Constitution provides:

In the expropriation of real property for purposes of Agrarian reform or of the expansion or improvement of towns, and in those cases of serious national interest specified by law, payment may be deferred for a specified time or partial cancellation [may be had] by the issuance of bonds of obligatory acceptance with sufficient guarantee.

It is clear that the Venezuelan courts recognize that in not requiring that cash be paid for property taken, the law actually forces a contribution from the expropriatee. The Supreme Court, in discussing the constitutionality of the use of bonds as payment under the agrarian reform, said:

It was the purpose of the Constitutional Assembly to accept for the State the major responsibility of financing the Agrarian Reform, but for this same reason it was considered necessary to establish by law some measures to assure the contribution of individuals, among which stands out the emission of an agrarian debt as an efficacious formula for aiding the Agrarian Reform and placing the debt among individuals—imposing on them, in this way, an important collaboration in the realization of the Agrarian Reform.¹⁰⁷

5. *Adversary Trials and the Final Judgments*

Art. 101 of the Venezuelan Constitution requires that expropriation occur by virtue of a final judgment. To this the Civil Code adds the requirement that expropriation be utilized by means of an adversary trial.¹⁸⁰ However, these limitations on the exercise of expropriation do not preclude an expropriator from occupying the property before final judgment is rendered.¹⁰⁹ He must show that the project, for which the property is being expropriated, is urgent, and must properly attach payment to the expropriation petition.¹¹⁰ This exception to the limitations carries with it the qualification that if the expropriation proceeding is paralyzed for a reason imputable to the expropriator, the property owner may bar the continuation of the project.¹¹¹

6. *The Law of Expropriation*

The limitations on the exercise of expropriation considered above are derived primarily from the Venezuelan Constitution and Civil Code. The "Law of Expropriation" itself stipulates two circumstances under which the petition for expropriation can be opposed.¹¹²

Opposition to the petition for expropriation shall only be based on the violation of the law or based on the fact that the expropriation should be total because the parcelization makes the land useless or makes it inappropriate for the use to which it is appointed.

The second of the acceptable reasons for opposition — parcelization, making the retained portion unfit — is clear enough. However, the former basis for opposition has required judicial clarification. The *Corte Federal* has held that it refers not to the violation of any law, but to the violation of laws that refer concretely to the dispositions that regulate the process of expropriation.¹¹³ Thus, this provision of the "Law of Expropriation" has been narrowly construed and does not encompass the violation of general legal provisions.

D. THE UTILIZATION OF EXPROPRIATION IN VENEZUELA

1. *General*

A comparison of the two preceding sections with the material relating to condemnation in the United States should indicate to the reader that the Venezuelan power to expropriate is broader and less limited than the North American power to condemn. The legal basis of expropriation in Venezuela includes a license to use the device for broad social purposes.¹¹⁴ It is doubtful that the power to condemn in the United States, as interpreted by State and Federal courts, is as broad.¹¹⁵ Furthermore, the limitations on the use of expropriation are less stringent in Venezuela.

Though the expropriatee may legally found an objection to the petition for expropriation on an alleged violation of the law, this limitation on the power to expropriate has been interpreted narrowly.¹¹⁶ It is far less reaching than the broad "due process" limitation imposed on the power to condemn in the United States. Furthermore, the judiciary in Venezuela does not examine the proposed project, for which the expropriation is to occur, in order to ascertain whether it is for the "public

utility." In the United States such a project is subject to judicial scrutiny to determine whether it is for the "public use."¹¹⁷ Lastly, the Venezuelan "just indemnification" limitation is less stringent than the North American "just compensation" limitation because under the former payment may be deferred for a limited time or given in bonds. This difference is of great practical significance because the utilization of condemnation by governmental entities in the United States is stifled by their need to compensate condemnees in money.

Though the power to expropriate is more extensive in Venezuela than is the power to condemn in the United States, it is not true that the utilization of the land use control device in Venezuela overlaps each instance of its use in the United States. For example, we have seen that in Venezuela aesthetic easements and development rights have not been expropriated.¹¹⁸

2. *Special Laws Affecting Expropriation*

Venezuela regulates the use of expropriation by a number of special laws. Of them, only the "Law of Expropriation" was written for the primary purpose of regulating expropriation generally. Other relevant special laws such as "Agrarian Law" and the "Law of Civil Aviation" either adapt the expropriation to the subject matter of the special law (Agrarian Law) or declare the public utility of a type of project in order to avoid the formalities of such a declaration for each project (Aviation Law).

The first article of the "Expropriation Law" explains the hierarchy of the special laws:

Except as specified in the laws of Mining and Hydrocarbons, expropriation shall not be carried into effect save according to the present law. . . . [E]xpropriation of lands for the realization of the agrarian reform shall be regulated, in addition, by the provisions contained in the special law that carries it into effect.

The Agrarian Law requires that its provisions be followed when they conflict with the provisions of the Law of Expropriation.¹¹⁹

3. *Method*

The purpose of this section is to present information concerning the Venezuelan method and utilization of expropriation by concentrating

on those features which are most interesting from the standpoint of comparative law and land-use planning. The section begins with a description of the judicial procedure used in expropriation cases. Thereafter the more important attributes of the utilization of expropriation in Venezuela are discussed in detail.

a. *The Judicial Procedure*

In the United States the judicial proceedings in a condemnation case are usually concentrated in a hearing. In this proceeding each side presents evidence which will enable the fact finder—the judge or jury—to render a verdict specifying the compensation due the condemnee. If legal issues are raised, the judge usually considers them in the same proceeding.

Venezuelan judicial proceedings follow the civil law pattern. There is no jury. *Peritos* (experts), in a proceeding separate from the judicial trial, decide on the amount of indemnification which will be owed to the expropriatee. The trial is not an uninterrupted presentation of the material relevant to the issue. Instead, it occurs in three stages with many *audiencias*.¹²⁰ Some *audiencias* are dedicated to reading briefs. Others are hearings in which witnesses and oral arguments are presented.

Each of the three stages in an expropriation trial are summarized below. Under the Agrarian Law these stages have been altered somewhat. The more significant alterations are indicated.¹²¹

(1) *Stage 1*

(a) Delivery of the petition for expropriation to the proper court: The expropriation trial is heard by a Civil Court of First Instance in the place where the property is located. However, when the Federal Government petitions for the expropriation, the trial is held before the Supreme Court of Justice. But this procedure has been altered under the Agrarian Law. Though a national agency is responsible for the petition, this trial is held before a competent court located in the area where the property lies.

The petition for expropriation must identify the object of the expropriation and the names of its owner, as well as the names of other interested parties. If all of the necessary facts, including encumbrances on the property, are not included in the petition, the court asks the

appropriate office of registration for such facts. Under the agrarian reform law, the report from this office is mandatory. It must include a classification of the type and the quantity of the land to be expropriated.

(b) Notification of the parties: The interested parties are summoned. Both the summons and the petition are published in appropriate newspapers. Notice is also given by posting a copy of the published notice on the door of the appropriate office of registry.

(c) Appearance to answer the petition for expropriation: Within ten days of the last publication, the parties are to appear in court. A defensor is named for those failing to appear.¹²² Following the ten day period, there are additional *audiencias* during which the petition for expropriation is answered. The Law of Agrarian Reform requires that the persons summoned give their answers within five hearings following the last publication.

(d) Procedure followed if the response to the petition is opposition to the expropriation: We have seen that opposition to the petition can only be founded on an alleged violation of the law or on the contention that the whole parcel of land should be expropriated because the retained parcel would be useless or inappropriate for its appointed use. If there is such opposition, a lapse of 15 days is granted for gathering relevant information. Under the "Agrarian Law," if the opposition is founded on the law, the judge hears the oral arguments of the parties and renders his decision by the fifth *audiencia* following the answer to the petition for expropriation. This altered procedure is a legislative attempt to expedite the agrarian expropriation trial.

(e) The reading of reports and briefs, the hearing for oral arguments and the decision by the judge: Following the 15 day period, the judge in successive *audiencias* reads the relevant reports. He then establishes a time for presentation by the parties of briefs and oral arguments. This hearing may continue for several *audiencias*. The judge renders his decision within three days following the termination of the hearing. If the proceeding is under the agrarian reform law, the written briefs are presented in the first or second *audiencia* following the 15 day lapse. Oral arguments are heard in the subsequent *audiencia*. Each party may speak only once and for no more than 30 minutes. The judge renders his decision in succeeding *audiencias*.

(f) Appeal: Appeal from the judicial decision must be made to the Supreme Court within three days.¹²³

(2) *Stage II*

(a) Attempted agreement over price: After the court renders its final decision, it sets a time for the parties to meet in order to attempt to agree on a price for the property. Reasons for the value agreed on must be presented to the court. However, if the proceedings occur under the Agrarian Law, the parties are required to meet to attempt an agreement as to price during the first *audiencia* following the answer to petition for expropriation, that is, during Stage I.

(b) Failure to agree on indemnification: If no agreement is reached, the judge designates a time for the naming of *peritos* (experts) who are to establish the value of the property. The parties appoint either one or three *peritos*. If the parties cannot agree on the naming of the third expert, he is appointed by the judge. Under the Agrarian Law the experts are appointed during Stage I and their proceedings continue simultaneously with the trial.

Appeal from the expert's valuation decision must be taken to the court of first instance within five days after the delivery of the decision.¹²⁴ The costs of the valuation of the property are paid by the expropriator.

(3) *Stage III*

(a) Payment and delivery of property: If there is an agreement as to price, or if the valuation of the experts becomes final, the expropriator consigns payment for the expropriatee. The payment is delivered to the property owner within one day if no third party claims an interest in it. Delivery of the property to the expropriator follows the consignment of payment.

(4) *Summary of the Judicial Procedure*

In the United States, the evidence and oral arguments in a condemnation proceeding are usually presented in a single hearing. The fact finder—either the judge or a jury—determine the compensation payable to the condemnee. However, in Venezuela the judicial proceeding is composed of many *audiencias*. Experts, in a subsequent or separate proceeding, rather than a judge or jury, determine the indemnification due the expropriatee. The judicial procedure under the "Agrarian Law" is basically the same as that followed when an ordinary expropriation

occurs. However, under the former, certain measures have been adopted, aimed at expediting the proceedings. Opposition to the petition for expropriation only can be founded on alleged violation of the law or the contention that all rather than part of the property should be expropriated.

b. *Selection of the Property for Expropriation*

(1) *Location*

There must be a formal declaration that the project for which the property is to be expropriated is for the public utility. This has been discussed in an earlier section.¹²⁵ An additional declaration—that part or all of the property is indispensable for the project—is also required.¹²⁶ Location of the project is therefore the determinative factor in selection of the property to be expropriated under the “Law of Expropriation.”¹²⁷

Similarly, property in the United States is ordinarily subject to condemnation because of its existence within the project’s ambit. Of course, in both the United States and Venezuela, the uniqueness of the property may be the reason for the project’s location.¹²⁸

Under Venezuela’s “Agrarian Law”, location is but one criterion by which property may be selected for expropriation.

(2) *Selection of Land Under the Agrarian Reform*

In order to accomplish the purposes of the agrarian reform, the Venezuelan government has charged an autonomous national institute with the responsibility of instituting the reform.¹²⁹ The institute is to acquire only land whose exploitability is verified in a report rendered by experts.¹³⁰ In addition, it is to proceed with the expropriation of private lands only when there is not sufficient, or appropriate, vacant public land.¹³¹

(a) *Failure to Comply with Social Function as a Criterion of Selection*

An aim of the agrarian reform is to eliminate the latifundistic system and replace it with a just system of property, tenancy and exploitation of the land.¹³² To accomplish this, the Venezuelan government extended the reach of the “Agrarian Law” first to rural properties which do not comply with their “social functions.”¹³³

In an earlier part of this section we discussed limitations on the exercise of expropriation. We saw that property cannot be taken except for "public utility or social interest." But we also saw that Venezuelan courts do not review a determination that a particular expropriation is for the "public utility or social interest." Now we consider the "social function" requirement.

When turned about this requirement also can be thought of as a limitation on expropriation. Rural property cannot be expropriated if it meets its "social function" (except in circumstances to be discussed subsequently). But this requirement (or limitation if you wish) should not be confused with the "public utility or social interest" limitation. The former is applicable to rural property only, and the issue of whether particular property meets its "social functions" is reviewable by the courts.

Property complies with its "social functions" when it meets each of the following requirements,¹³⁴

1. It must be exploited efficiently and must be used in such a way that the factors of production are efficaciously applied, considering the land's own characteristics and the topographical and climatic zone in which it is located.
2. Except in those cases of eventual indirect exploitation for a justified reason, the work, the direction of personnel and the financial responsibility of the agriculture enterprise must be the property owner's.¹³⁵
3. The property must meet conditions related to the conservation of renewable natural resources.
4. The legal standards regulating salaried labor, the standards regulating labor relations in rural areas, and the standards regulating agriculture contracts must be respected.
5. The rural property must be registered in the "*Oficina Nacional de Catastro de Tierras y Aguas*" in accord with the pertinent legal requirements.

As can readily be seen, the Venezuelan government, in choosing compliance with social function as a criterion for expropriation, has elected to consider not so much the property itself but the property's management—the managerial form, the managerial efficiency, the

managerial compliance with registration requirements and the management's relationship with labor.

The listed requirements have generated an abundance of litigation requiring that the Supreme Court interpret them.¹³⁶ One such case illustrates some of the pressures which brought about the agrarian reform.¹³⁷

An expropriatee contended that the relevant date for determining whether his property met the "social function" requirements was the date on which his property was invaded by *campesinos*¹³⁸ rather than the date of the petition for expropriation, several years later. *Campesinos* had evidently retained control of the land from date of invasion. The Supreme Court held that the date for determining whether the requirements were met would be the date of invasion, if the property owner had attempted to regain his land by use of the property and possessory actions available to him.¹³⁹ In the opinion of the court, the expropriatee failed to prove that he had instituted such actions.¹⁴⁰

By establishing "social function" requirements, each of which must be met and which together are extensive, the Venezuelan legislature made much land expropriable.¹⁴¹ The legislature established a preferential order for expropriation of this land, placing uncultivated lands and lands exploited indirectly at the top of the list.¹⁴²

(b) Size

The "Agrarian Law" requires that land be classified on the basis of its quality.¹⁴³ To be expropriable land of the first class must exceed one hundred and fifty hectares.¹⁴⁴ Expropriable minimums increase for lands of lesser quality.¹⁴⁵ The expropriable minimum for the poorest quality, economically exploitable land is five thousand hectares.¹⁴⁶ If property is composed of several classes of land, the number of hectares of each class is converted to its first class equivalent.¹⁴⁷ The first class equivalents are then added to ascertain whether the sum exceeds one hundred and fifty hectares.¹⁴⁸

An owner of land which is subject to expropriation may reserve for himself a quantity of land equivalent to the appropriate expropriable minimum discussed above.¹⁴⁹ For example, an owner of a large block of first class land which does not comply with its social function may select for retention 150 hectares. This retained portion may be increased by 15% by the addition of contiguous land which is indispensable for

the proper exploitation of the reserved land.¹⁵⁰ Lands may not be reserved on portions of the property which were cultivated indirectly.¹⁵¹ Nor may an owner of more than one piece of arable land, which is subject to expropriation, retain more than one piece of reserved land.¹⁵²

Under Art. 32 of the "Agrarian Law" the inappropriability of parcels smaller than the established minimums and the inappropriability of reserved lands terminate if such lands have not been cultivated in *three years* or exploited efficiently for a livestock operation in *five years*. The lands also become expropriable if during these periods they have been exploited in an indirect form.¹⁵³

Both the wording of Art. 32 and the "*Exposición de Motivos*" (*Exposé des Motifs*) of the "Agrarian Law" indicate that the provision is to be applied futuristically.¹⁵⁴ For instance, reserved land is to become expropriable if within the prescribed period after its reservation it is not cultivated or if it is exploited indirectly. However, in 1962, *two years* after the "Agrarian Law" was enacted, the Supreme Court held that by virtue of Art. 32, an inefficiently exploited parcel of land totaling less than one hundred and fifty hectares was expropriable.¹⁵⁵ The law as to the inappropriability of such property is therefore not clear.

(c) Location

The reader will remember that the location of the project for which the expropriation is to occur is the primary factor of selection under the "Law of Expropriation." "Location" can also be a criterion of selection under the "Agrarian Law."

Even if a parcel of rural land complies with its social function, and even if it totals fewer hectares than the "expropriable minimums," it may be subject to expropriation. If in the geographical area it is necessary to establish an agrarian organization to which the parcel constitutes an economic or technical obstacle, the property may be expropriated.¹⁵⁶

(3) *Summary of the Means of Selection*

Though in the United States the selection of real property for condemnation is almost always a result of the location of the project for which the taking is to occur, in Venezuela, under the "Agrarian Law," the selection of property for expropriation is often determined by the compliance of the owner of the property with certain requirements established by law. His failure of compliance makes the property ex-

propriable for not meeting its "social functions." The Venezuelan agrarian law makes property covering fewer than a specified number of hectares inexpropriable. Under certain conditions it also allows the reservation of a part of an owner's expropriable land.

c. Amicable Settlement

Both the "Law of Expropriation" and the "Agrarian Law" require that the potential expropriator attempt to reach an "amicable settlement" with the property owner before proceeding with the expropriation.¹⁵⁷ However, the Supreme Court in 1965 held that the purpose of the requirement is to avoid, if possible, the inconvenience and delay of judicial action.¹⁵⁸ The court felt that once the judicial action has been commenced, there would be no practical utility in staying the trial, even though the evidence demonstrates that there had been no real effort at amicable settlement.¹⁵⁹

In 1967, in executive order, the President of Venezuela ordered that an application for expropriation must be accompanied by proof that the required amicable agreement had been attempted.¹⁶⁰ In its absence, the order states, "the judge shall not consider the expropriation petition."¹⁶¹ Nonetheless, the Supreme Court has continued to treat the expropriator's failure to make a serious effort to reach an amicable settlement as not being sufficiently significant to require either a suspension of the trial or a reversal.¹⁶²

The lack of opportunity to reach an amicable settlement may be consequential to the landowner. As we shall see in the section of this section on payment, only "B" bonds are used for compensation under an "amicable settlement."¹⁶³ But the landowner often receives bonds of a lesser quality if his land is expropriated.

d. Valuation

In the United States the amount of compensation payable for land taken is a judicial question.¹⁶⁴ The opinions of experts may be presented in court, but such opinions are taken as evidence only.¹⁶⁵

In Venezuela, the legislative branch of the government has provided the factors to be considered in valuing the property. It has vested in the expert the responsibility of determining the amount which will be paid.¹⁶⁶ Except in very unusual circumstances,¹⁶⁷ the judiciary is limited to approving the expert valuation unless it finds that the experts failed to follow the law.¹⁶⁸

(1) *Factors to be Considered in Valuation of the Property*

In the United States, ordinarily only the market value of the condemned property is utilized in determining the compensation due the property owner.¹⁶⁹ In Venezuela it is not clear that the experts are to use only the market value. Among other factors, the "Law of Expropriation" requires that the following ones be taken into account in determining the value of the property to be expropriated.¹⁷⁰

- a) The fiscal value of the property declared or accepted by the property owner.
- b) The value of the property established in the "*Actos de transmisión*" of the property which took place at least six months prior to the expropriation decree.¹⁷¹
- c) The average price that similar real estate has been sold for in the twelve months preceding the expropriation decree.¹⁷²

In valuations made for the purpose of the agrarian reform, in addition to the above listed factors, the *peritos* are to consider the following ones:¹⁷³

- a) The rural property's average production during the six years preceding its acquisition or during the six years preceding the petition for expropriation.
- b) The declared or officially estimated value made for fiscal purposes as required by relevant laws.
- c) The purchase price of the real estate in the last transfers of ownership made in the ten years preceding the valuation and the price of acquiring similar real estate in the same region . . . during the five years preceding the date of the petition for expropriation. . . .

The value of the improvements are also to be considered by the experts.¹⁷⁴

Factors in addition to those listed may be considered by the experts in determining the "just price" for the property.¹⁷⁵ But the listed factors must be taken into account.¹⁷⁶ The expert valuation is subject to examination by the judge in the expropriation proceeding,¹⁷⁷ and is subject on proper appeal to judicial review to determine whether the valuation was made according to law.¹⁷⁸

(2) *Factors Not to be Considered in the Valuation*

The "Agrarian Law" proscribes consideration by the expert of either hypothetical damages or affective ties the property owner has to the property.¹⁷⁹ The "Law of Expropriation" also prohibits the experts from taking into account the increased value of the real estate due to its proximity to the contemplated public project.¹⁸⁰ Similar prohibitions are also applied to valuation for condemnation in the U.S.¹⁸¹ However, in Venezuela the prohibition has been interpreted by the Supreme Court to forbid consideration of the effect of an existing public project (a highway) upon the value of the property taken.¹⁸² The Court's rationale was that the state should not pay more for real estate when the state itself, by constructing and maintaining the public project, was responsible for the property's increased value.¹⁸³

(3) *Valuation and "Just Indemnification"*

Under Art. 101 of the Venezuelan Constitution the payment of "just indemnification" is a prerequisite to expropriation. The Supreme Court has explained the ideal behind the concept of "just indemnification" as being that of leaving the property owner neither richer nor poorer.¹⁸⁴

Because of the wording of Art. 101, an interesting question has arisen in some expropriation cases. Does giving "just indemnification" mean more than simply paying the value of the expropriated property? In addition, a subsidiary issue has arisen. Does the judge have the power to adjust the compensation set by the experts to make it "just indemnification?"

These issues were considered by the Supreme Court in *Sentencia del 24 de enero de 1966*.¹⁸⁵ There, a "prior occupation"¹⁸⁶ had occurred. The expropriatee charged that he should receive not only compensation for the value of the property but interest on the compensation from the date of the prior occupation.¹⁸⁷ A majority of the court held that the concept of "just indemnification" is not equivalent to the "just value of the thing expropriated;" therefore, other elements of "indemnification" should be considered.¹⁸⁸ Over a vigorous dissent it awarded the interest demanded.¹⁸⁹ The dissent rejected the majority's reasoning and stated that "judges cannot *motu proprio* accord other indemnifications, neither verified nor valued expertly. . . ."¹⁹⁰

The majority opinion appears reasonably to follow the statement made in earlier decisions by Venezuelan courts—that the ideal behind

indemnification is to leave the expropriatee neither richer nor poorer.¹⁹¹ The denial of interest would have left the property owner poorer by the amount of income he might have had from the property from the date of occupation to the date of expropriation.¹⁹²

One can conclude from the majority opinion that, under some circumstances, the expropriatee in Venezuela will receive a compensation greater than the value of the property as established by the experts.¹⁹³ It can also be inferred that such additional compensation may be established by the judge.

(4) *Betterment Charges*

In Venezuela, when only a portion of a parcel of land is taken, the experts consider the detriment to the retained portion caused by the severance.¹⁹⁴ Similarly, in the United States, the requirement that "just compensation" be paid has been held to mandate paying for the damage to the retained parcel.¹⁹⁵

The Venezuelan system of expropriation includes provisions for assessing "betterment charges" when property is advantageously affected by the construction of a public project.¹⁹⁶ When only a portion of a parcel of land is to be expropriated, the experts are required to calculate the "immediate and permanent" detriment and benefit to the retained portion which will be caused by the projected works.¹⁹⁷ The estimated benefit is deducted from the estimated detriment.¹⁹⁸ If the benefit exceeds the detriment, the excess is deducted from the compensation payable for the land expropriated.¹⁹⁹ However, if the excess exceeds one quarter of the indemnification due to the landowner, he has the option of requiring that all of the property be expropriated.²⁰⁰

In some states in the United States, when a portion of the property is retained, any benefit to the retained part is used to offset the detriment to it resulting from the severance.²⁰¹ However, in many, if not all, states, the next step is not taken.²⁰² If the benefit to the retained portion exceeds the detriment caused by the severance, the excess may not offset the compensation due for land taken.²⁰³

Above we discussed the Venezuelan law of "betterment charges." In practice it is rarely applied.

In Venezuela, one could say that in the programs of urban renovation, the legal norms relative to betterment contributions have no application, perhaps due to the failings of the law itself. In effect, the fact that two appraisals are required, one before the construction

of the project which was the cause of the expropriation, and the other later, to determine the increased value acquired by the properties adjacent to the project . . . inhibits the effective application of betterment charges in our country.²⁰⁴

In addition to the "betterment charge" provision discussed above, the "Law of Expropriation" contains another provision analogous to the "special assessment" laws utilized in many states in this country.²⁰⁵ The Venezuelan provision allows an assessment against properties, no part of which are expropriated, but which will be increased in value by at least 10%, due to the construction of public works nearby.²⁰⁶ This required betterment contribution is limited to three quarters of the increased value of the property.²⁰⁷

In Venezuela the method of imposing special assessments theoretically should never cause property to be assessed more than the value of the actual benefit to the property.²⁰⁸ In the United States some state constitutions also prohibit assessment in excess of the benefit actually received by the property.²⁰⁹

(5) *Summary Of The Valuation Section*

Though in the United States the amount of compensation payable to a condemnee is a judicial question, in Venezuela, under ordinary circumstances, an expropriatee's indemnification is determined by experts who follow guidelines established by the legislative branch. The determination made by the experts ordinarily is reviewable by the judiciary only for violations of the law. However, the concept of "just indemnification" encompasses more than just the value of the expropriated property as determined by experts. Therefore, the Venezuelan judiciary occasionally will require that the valuation be supplemented so the expropriatee will be justly indemnified.

The Venezuelan "Law of Expropriation" includes provisions for two kinds of betterment charges, one assessable against the expropriatee's compensation, and the other assessable against the property of non-expropriatees. The latter betterment charge is similar to the special assessment utilized in the United States.

e. *Payment*

In the United States, payment for condemned property is made in a lump sum, in cash.²¹⁰ As discussed in an earlier section, the Constitu-

tion of Venezuela permits payment to be deferred for a specified time. It also authorizes the partial cancellation of the expropriator's debt by issuance to the expropriatee of bonds of "compulsory acceptance with sufficient guarantee."²¹¹ The "Law of Expropriation" exercises the constitutional authorization by permitting payment to be deferred up to ten years if the real estate has been expropriated for the purposes of enlarging and renewing towns.²¹² In such circumstances, interest is paid, though the National Executive is authorized to set its rate.²¹³

Recently, most cases in which the issue of payment was litigated have arisen under the "Agrarian Law." Therefore, the balance of this section will deal primarily with it.

Indemnification for property taken for the agrarian reform is made in cash or in cash and bonds. The relevant Article is 178. It is summarized below.²¹⁴

CHART I

Mode of Payment

<i>Indemnification Due</i>	<i>Cash/Bonds</i>
1) Bs 100,000 or less	All cash
2) Bs 100,000 to Bs 250,000	40%/60%
3) Bs 250,000 to Bs 500,000	30%/70%
4) Bs 500,000 to Bs 1,000,000	20%/80%
5) Above Bs 1,000,000	10%/90%

Only: In all cases in which the value of the expropriated part exceeds one hundred thousand *bolívars* (Bs. 100,000), this sum shall be paid in cash.

(1) *Cash*

As can be seen, an indemnification totaling one hundred thousand *bolívars* (twenty-two thousand eight hundred and twenty dollars)²¹⁵ or less is paid in cash. Beyond this point, article 178 becomes confusing. If one-hundred thousand *bolívars* are to be paid when indemnification exceeds that amount, 2) would never be applicable.²¹⁶ Likewise, 3) could often not be applied.

The Supreme Court interpreted Art. 178 to eliminate much of its confusion.²¹⁷ It held that indemnification exceeding one hundred thousand

bolívars is to be paid in the following manner. First, one hundred thousand *bolívars* in cash are to be paid. This cash payment is to be deducted from the total indemnification. The cash/bond ratio is then to be applied to the remaining indemnification.²¹⁸ Therefore, in all cases in which the total indemnification exceeds one hundred thousand *bolívars*, more than that amount is payable in cash.²¹⁹

The above discussed method of calculating the cash payment is applicable only when class "A" or "B" bonds are utilized. The cash payment associated with "C" bonds requires a different calculation and is discussed below.

(2) *Bonds*²²⁰

In order to finance the Venezuelan Agrarian reform, the Venezuelan Congress authorized the creation of a nationally guaranteed public denominated "*Deuda Agraria*," and placed it under the charge of the *Instituto Agrario Nacional*.²²¹ It also established three bond categories, each differing from the other in rate of interest and life.²²²

Article 174 § 1:

Class "A" has a maturity date twenty (20) years from the date of issue, and will return an annual interest of three percent (3%) . . . [T]he corresponding coupons may be received for payment of National taxes. The bonds are not transferable, but they shall be received as security for loans granted the expropriatee by official financial institutes for agriculture or industrial purposes, or shall be received in payment of agricultural or cattle credits obtained from such institutes prior to the publication of this law. The bonds of this class shall be of obligatory acceptance, and shall be applied in payment . . . for the expropriation of uncultivated or indirectly exploited rural property according to the requirements of Parts 1) of article 27 and Unico of article 179 of this law. . . .²²³

The *Exposición de Motivos (Exposé des Motifs)* justifies the non-transferability of "A" bonds by pointing to the type of rural property—uncultivated or indirectly exploited—for which the bonds go as partial payment.²²⁴ Furthermore, the *Exposición* claims that "A" and "B" bonds²²⁵ will not be inactive paper in the hands of the expropriatees.²²⁶

[T]he credits that they can attain [through the mentioned official institutes] using their bonds as guarantee will give them the

required means to organize the exploitation of their reserve of lands or [to organize] the formation of an industrial enterprise.²²⁷

Rural property which was once unexpropriable, either because it was "reserved" or because it covered less than one hundred and fifty hectares and which has become expropriable²²⁸ is paid for by using "A" bonds.²²⁹ Art. 179 *Unico* makes the expropriatee of such property subject to a fine of up to seventy-five percent of the indemnification due him. The *Exposición* explains the rationale for the fine this way:

The requirement in the *Unico* paragraph of Article 179 is a consequence of the property owner's culpable negligence in [not?] transforming his rural property or his reserve of land into an efficient enterprise.²³⁰

Class "B" bonds, like the "A" bonds are of obligatory acceptance.²³¹ They differ from the "A" bonds in the following respects:

- 1) They mature fifteen years after date of issuance and draw four percent interest.²³²
- 2) They are to be applied in payment of all expropriated rural properties which do not comply with their social functions and which are not paid for by "A" bonds.²³³
- 3) They are to be applied in payment for rural property acquired by negotiation or "amicable settlement."²³⁴

The Supreme Court has held that "B" bonds, and no others, can be utilized in paying for property acquired under an "amicable settlement."²³⁵ Furthermore, it has held that the proportion of cash to bonds under such an agreement is controlled by the article controlling cash/bond ratios for expropriated property.²³⁶ Therefore, neither the cash/bond ratios nor the kind of bond can be adjusted to make an "amicable agreement" more appealing to the landowner.

Problems occasionally arise in ascertaining whether property not complying with its social function should be paid for by "A" or "B" bonds. Suppose a rural property either is in part exploited indirectly,²³⁷ or is in part not cultivated but is otherwise exploited directly or cultivated. In such a case, the Supreme Court held that "B" bonds were to be utilized.²³⁸ It reasoned that a property exploited in part indirectly is not a property exploited indirectly and therefore that the "catch-all" clause²³⁹ relating to "B" bonds was applicable.²⁴⁰

The reader will remember that some rural property is subject to expropriation because of its location, even though it complies with its social purpose or even though it covers less than one hundred and fifty hectares.²⁴¹ When such property is expropriated, an amount equal to the value of the existing useful improvements, movables, livestock, and mortgage debts (contracted for and applied to the development and improvement of the property), is payable in cash.²⁴² The remaining indemnification is made in "C" bonds.²⁴³

The *Exposición* describes "C" bonds as "a form of preferred payment that is equivalent to cash payment because . . . they are of easy placement in the market for their nominal value."²⁴⁴ This class of bond matures ten years after date of issue, has its interest rate set in accord with market conditions and is income tax exempt.²⁴⁵

Lower courts at times have attempted to indemnify expropriatees with a variety of bonds, sometimes, for instance, ordering the payment of "C" bonds for improved property.²⁴⁶

The Supreme Court has been quick to reverse such holdings and to emphasize that "C" bonds are to be used for indemnification only when the expropriated property meets its "social function."²⁴⁷

(3) *The Position of Creditors*

Creditors who have loaned money on rural property which has later been expropriated because it failed to comply with its social function are not in a favorable position under the "Agrarian Law." They receive their payment in the same medium in which the expropriatee is paid.²⁴⁸ The original draft of the Agrarian Law provided that a creditor who had extended credit repayable earlier than the agrarian bond maturity date, would receive bonds which would mature on the date the credit became due.²⁴⁹ The Congress rejected this provision to avoid possible machinations and subterfuges.²⁵⁰

The constitutionality of this portion of the "Agrarian Law" has been litigated.²⁵¹ It was alleged that because of the law's retroactive effect it violated the National Constitution.²⁵² In answer, the court said:

One especially has to take into account that like property, understood in a strict sense, . . . any other property right, like a mortgage, is subject to the contributions, *restrictions* and obligations established by the law for reasons of public utility or general interest consistent

with the . . . Article 99 of the Constitution, . . . among which restrictions is precisely that of receiving at a given moment the amount of . . . credit in a determined form. . . .²⁵³

The Supreme Court reversed the lower court decision which had provided that the creditors' portion of the indemnification be cash. The higher court required that the creditors be paid in the same medium as the expropriatee.²⁵⁴

The burden imposed on the creditor by the agrarian reform is better appreciated if one remembers that "A" and "B" bonds are not transferable.²⁵⁵

The "Law of Expropriation" has a creditor provision comparable to that of the "Agrarian Law."²⁵⁶ It is applicable only in the limited circumstances in which the expropriator under the "Law of Expropriation" may defer payment.²⁵⁷

(4) *Summary*

In the United States payment for condemned property is made in a lump sum, in cash. However, in Venezuela indemnification is often made by use of bonds or other securities. This is especially common under the agrarian law which provides for the issuance of three types of bonds. "A" and "B" bonds are used as partial indemnification for rural property which does not comply with its "social function." "C" bonds are used as partial indemnification for rural property which is expropriated even though it complies with its social function. In either case, the other part of the indemnification is paid in cash. Under ordinary circumstances, only an expropriatee owed Bs. \$100,000 or less is indemnified totally in cash.²⁵⁸ Creditors may be adversely affected by the agrarian reform. They often must receive payment, for credit they have extended to the expropriatee, in the same medium in which the mortgagee is indemnified for his expropriated property.

E. SUMMARY OF EXPROPRIATION IN VENEZUELA

The Venezuelan law of expropriation is a product of historical development rather than of recent innovation. The constitutional bases for expropriation may be found in the present Venezuelan constitution in Art. 99, 101 and 105.

The Venezuelan government's power to take private property is limited by the requirements that:

- a) property may not be confiscated except in two specified circumstances;
- b) property be taken only for reasons of public utility or social interest;
- c) the expropriatee be justly indemnified by payment made before the property is taken; and
- d) the expropriation occurs by virtue of a final judgment following an adversary trial.

Though these limitations appear to be comparable to limitations on the use of condemnation in the United States, their effect is less stringent. Whether property is taken for reasons of public utility, for instance, is not reviewable by the judiciary. Furthermore, indemnification in certain circumstances may be deferred or paid in bonds.

The power of expropriation in Venezuela has recently been utilized to deal with problems arising from rapid urbanization and to effectuate an agrarian reform. In using expropriation for the latter purpose, the Venezuelan government has attempted to raise the relative position of the agrarian class.

The expropriation trial in Venezuela ordinarily includes a series of *audiencias*. The value of the property to be expropriated is determined not by the judge or a jury, as in the United States, but by experts whose decision is reviewable only for violations of the law.

The existence of private property within the ambit of a projected public project is the primary reason for property's selection for condemnation in the United States. The same is true in Venezuela as to expropriation under the "Law of Expropriation." However, under the Venezuelan "Agrarian Law" the primary rationale for the expropriation of property is not location but rather property's failure to comply with its social function. Such a failure results when its owner has not efficiently and directly exploited the property according to requirements established by the "Agrarian Law."

The factors considered in the valuation of property are similar in Venezuela and in the United States. However, in Venezuela it is possible that a property owner will not be given credit for the additional value of

his property resulting from its proximity to existing public works — such as a highway — for which he has not contributed directly. In addition, the Venezuelan law requires that the experts deduct from the price of the expropriated property, the value of any betterment accruing the expropriatee's retained property because of its proximity to the projected public project.

Payment in Venezuela for expropriated property is made in cash or in cash and bonds. Under the agrarian reform law, the kind of bond an expropriatee receives is determined by the nature of his property's compliance with its "social function." The expropriatee's mortgage creditor is often not in an envious position because he sometimes must receive his payment in the same medium as the expropriatee receives his indemnification.

IV. CONCLUSION

A. VENEZUELAN EXPROPRIATION LAW AND THE UNITED STATES CONSTITUTION

Viewed through its expropriation laws, Venezuela's legal system, relative to this country's legal system, accentuates the state's rights; conversely, the system of this country, relative to that of Venezuela, accentuates individual rights.²⁵⁹ Consider what would be two of the "unconstitutional" aspects of the Venezuelan expropriation law, were it to become operative here and therefore subject to the United States Constitution.

The Venezuelan law in certain circumstances permits payment of the condemnee in bonds which are long term, low yielding, and not transferable except to specified government institutions. It is recognized by Venezuelan courts that this thrusts part of the social burden of expropriation on the landowner. This imposition on the individual land owner would not be constitutionally acceptable here. It would be held to violate the "due process" clauses,²⁶⁰ the "just compensation" provision²⁶¹ and possibly the "equal protection" requirement.²⁶²

The Venezuelan "Agrarian Law" requires that the creditor receive his payment in the same medium as the expropriatee receives his indemnification. Thus, part of the social burden of expropriation is thrust on the creditor. This would not be constitutionally acceptable here. In addition to offending "due process" clauses and the "equal protection" clause

this would be held to be an unconstitutional impairment of the obligation of contracts.²⁶³

Though other "constitutional" problems exist, these examples suffice to indicate the difference in the orientations of the two countries' legal systems as seen through the expropriation laws. They also imply that caution should be employed when suggesting that Venezuelan or Latin American concepts be utilized here.

B. TWO SALIENT FEATURES OF THE VENEZUELAN EXPROPRIATION SYSTEM AND LAND USE PLANNING IN THE UNITED STATES

1. *The "Social Function" Concept*

Particular features of the Venezuelan system, however, may be instructive for use here, now or in the future. One of the salient features of the Venezuelan expropriation system is its use of the concept of the "social function" of property. Before we examine whether this concept might be beneficially utilized here, the distinction between "social function" and two other concepts — "public use" and "zoning" — must be made clear.

"Public use" pertains to the employment of property after it is condemned — that is, once it is within the government's control. "Social function," however, relates to the use of the property while it is in the owner's control. In this way "social function" regulation is like zoning, which also affects the use of land in the hands of the "owner." Yet, it is distinguishable from zoning in that the latter is a restraint which ostensibly does not force the owner to do anything. It only precludes him from utilizing his land in certain ways. On the other hand, under the "social function" concept, the government can decide how land should be used and the "owner" risks its expropriation if he fails to so use it.

By fastening the "social function" concept to expropriation a government can have the best of both worlds. It may actively control the use of property whether it be in public or private hands.

We should attempt to ascertain whether this land-use planners' dream is transferable here. Our endeavor first leads us to inquire whether

there are analogous historical examples of this country's applying a "social function" concept to regulate the utilization of private property of any kind.

Before the industrial revolution wealth here lay in land. Subsequently, income producing industrial assets became the greater source of wealth. Their concentration in relatively few hands was a significant factor in causing this country to institute an income tax. This tax imposes a "social function" requirement on one form of private property — investment capital. For instance, less income from capital is taken by the government if the capital is utilized (invested) in specified ways.²⁶⁴

This analogy perhaps will lead us to speculate that if land too were concentrated in only a few hands and were the primary source of wealth, we would be inclined to impose a "social function" requirement on it. Before we accept this hypothesis, however, it would be worthwhile to know the circumstances which led to the imposition of the social function requirement in a country where it is used.²⁶⁵

Venezuela enlisted in the industrial revolution later than did this country. For various reasons much of her industrial development — aside from the mining of her petroleum reserves — began in the 1950s. Since then she increasingly has offered a good environment for the creation of wealth in industrial assets. Yet, if the owners of relatively unproductive rural property were "locked in" to their assets, they might not participate in the accumulation of this industrial wealth. We might surmise, therefore, that such "owners" would support, or at least not resist, a law through which they could convert agrarian assets to industrial assets. The "Agrarian Law", which allows such a conversion,²⁶⁶ was passed in 1960. As those who have been reading the footnotes know, this study has produced some evidence that some owners of rural land have been eager that it be expropriated.²⁶⁷ The "social function"-expropriation arrangement probably benefitted and drew support from two groups — the landless *campesinos* and the "locked in" land owners.

From our earlier discussion regarding the imposition of the income tax in this country we saw that one could conclude that a "social function" requirement on land might be imposed if land were a primary source of wealth controlled by few people. Our above discussion of the Venezuelan experience suggests that we should add to this hypothesis the practical political caveat that political forces need be properly aligned. Let us now consider the likelihood that this country will soon accept the imposition of a "social function" requirement on land.

In the 1960s a real estate agency in New Mexico was fond of advertising: "There will always be more people but there will never be more land." If it were true that the population will always increase, then perhaps it would be logical to suppose that land would ultimately become so dear that it again would constitute the primary source of wealth. However, recent demographic data indicate that it is not true that population here will increase always. Further, in this country, the ownership of land is dispersed. Therefore the rationale that a "social function" requirement should be imposed because land will be the primary source of wealth and will be concentrated in the hands of a few would not serve here.

I suspect that the New Mexico real estate agency employs the slogan today as it did in the 1960s. There is some relative validity in its advertisement. Even if the national population ceases to grow, there will be a readjustment of population causing some areas to grow remarkably. Some people in those areas are concerned about what they consider to be the ravages of development. Today, if any rationale for the implementation of the "social function" concept is valid, it would be that the social demand for the regulation of the development of land is tremendous, and no less potent, existing or possible public land-use control device will do the job.

The social demand for regulating the development of land is growing and the existing land-use control tools, so far, have not proven adequate to the job. Yet, this country will likely reject the active utilization of the "social function" concept. Its implementation would require a constitutional amendment, and political factors militate against such adoption. Not only is the ownership of land widely dispersed, but those who hold large blocks of land often do so in order to divide it and sell it. The "social function" regulation of land therefore would affect not only the developers but the potential buyers — a potentially powerful political group. In addition, one could imagine a number of strong philosophical arguments against the concept. Some of them would relate to the growth of governmental power and the possible loss of individual freedom. Others would question the government's ability to use the "social function" concept advantageously as a land control device, that is, to ascertain now which development scheme eventually will prove to have been best for society.²⁶⁸ In any case, the likelihood that this country will soon accept an active imposition of the "social function" concept is minute.²⁶⁹ The social stakes are not sufficiently high, and the political forces for its adoption are not properly aligned.

In concluding this discussion of the "social function" concept, something should be said to emphasize the concept's role *vis-à-vis* other land-use control devices. Public land-use control in this country may be divided into two major modes of control: 1) control by "regulation" and 2) control by "acquisition," which includes condemnation. For either constitutional or practical reasons a hiatus may exist between these two modes of control; that is, land which cannot be consequentially regulated also may not be available for condemnation. For instance, a government here may not constitutionally preclude the development of a block of land via regulation because that would be a "taking." Yet, it also may not be permitted to condemn the same land because its need for the land may be too speculative. The Venezuelan "social function" concept eliminates this type of constitutionally caused hiatus by bringing regulation and condemnation together—land which does not meet its social function (regulation) may be condemned.

2. *The Use of Bonds*

The practical problem of the lack of government funds also sometimes causes a hiatus between regulation and condemnation. When governments in this country overreach the constitutional bounds of land-use regulation, courts, upon negating the overreaching, often remind them that they possess the power to condemn. From the courts' standpoint, condemnation avoids a "taking" under the guise of "regulation" and thereby assures that the owner will receive "just compensation" for his property. From a government's perspective, this constitutional requirement may be a practical prohibition on land control, for the government often does not have sufficient money in its coffers to compensate the owner. Venezuela has solved this problem in large part by compensating with long term, low interest bonds of compulsory acceptance. This use of bonds is the second salient feature of the Venezuelan expropriation system.

Here a similar utilization of bonds would not be constitutionally acceptable,²⁷⁰ but the concept of making compensation in bonds optional to the condemnee may be worth some thought. Communities faced with rampant, haphazard development which cannot be controlled adequately by regulation may have to resort to condemnation. A community's present cost of condemnation could be lowered to the extent that some condemnees voluntarily accepted bonds.²⁷¹ In the United States, however, both practical²⁷² and legal²⁷³ problems probably would militate against the use of even optional bonds in conjunction with condemnation.

Hopefully this paper has familiarized the reader with the system of condemnation in two countries. For some readers it perhaps will have confirmed a notion that in Latin America a person holds property at his risk. This writer sees it differently. He is impressed by the rationality of the Venezuelan system of expropriation, for Venezuela. Furthermore, the glimpse of the Venezuelan legal system seen through the expropriation laws appears to him to show a far more just and less capricious system than he thinks most North Americans would imagine — especially if the glimpse is confined to more recent years.

Our legal system is in need of improvement. It always will be. In that way it is no different from other legal systems, yet, in a hundred other ways it is different. From the differences we can draw comparisons and from the comparisons we can derive ideas to help us along our journey of improvement.

In this section we have considered two differences in the expropriation systems of Venezuela and the United States — the mode of payment (bonds) and the use of a “social function” concept. Other salient features of the Venezuelan expropriation system, and their North American counterparts, are left for the reader to consider. Perhaps from his own comparisons he can derive ideas which would contribute to the improvement of our system of condemnation. He might consider whether we should institute a system of betterment charges, whether experts rather than a jury would render fairer valuations, and whether we need a more comprehensive system of condemnation.

NOTES

¹I have attempted to aim the text of this paper at the general reader by relegating to the Notes material of interest primarily to the scholar or to the person with a greater interest in the topic. The Notes also amplify points made in the text. As a result of these two factors, much of the substance of this paper is to be found in the Notes, some of which are lengthy.

²BLACK'S LAW DICTIONARY, 364 (4th ed. 1968).

³I was once berated by an Embassy official in Mexico for referring to United States citizens as “Americans.” “Mexicans,” he huffed, “are Americans as well.” Indeed they are. Yet, again I risk his ire (I am not sure the Mexicans care) by referring to the people of this country as “North Americans.” Polite company in Venezuela seems to prefer that to “gringos” and my own origin leads me to prefer it over “yankees.” “United States citizens” is too long and besides is inaccurate for it does not encompass all who in a spiritual (some would say “vulgar”) sense are “Americans.” So, with an apology to Mexicans, Canadians and my Embassy official, I shall use “North Americans.”

⁴An interesting question is whether this country's relative predilection for protecting individual rights stems in part from the fortuity of having a common law system. The argument for the hypothesis would be this: Because a judge is continually faced with individuals he, over time, is more likely to mold the law to protect their rights vis-à-vis the state than is the legislature—a manufacturer of group compromises known as statutory law. This propensity in the judge is more likely to find vent when the legal system recognizes in the judiciary a power to make law than when it denies that power. On the other hand, even if the judiciary is more likely to develop a predilection for individual rights than is the legislature, there are other significant factors, not necessarily associated with the common law system, which would influence the exercise by the judiciary of its hypothesized bias. To wit, the security of judicial tenure, the nature and influence of the political entity to which members of the judiciary owe their present position and will owe their future rank, and the recognition in the judiciary of the right to interpret the constitution. Furthermore, it is interesting to note that Professor Schlesinger points out that “[c]ivilians [those living under a civil law system] are apt to regard complete codification of the law as an important bulwark against official (especially judicial) arbitrariness.” See RUDOLF B. SCHLESINGER, *Comparative Law* (3rd Ed. 1970), hereafter cited as SCHLESINGER), p. 232, n. 45.

⁵The similarity between the expropriation systems in Venezuela and other Latin American countries is dealt with subsequently.

⁶*Rueb v. Oklahoma City*, 435 P.2d 139 (1969); *Carlor Co. v. City of Miami*, 62 So.2d 897 (Fla. 1953).

⁷NICHOLS, *THE LAW OF EMINENT DOMAIN* §7.5131 (1940) (hereinafter cited NICHOLS).

⁸See NICHOLS, §7.512; *The Public Use Doctrine: 'Advance Requiem' Revisited*, 1969 LAW AND THE SOC. ORDER 688, 691.

⁹*Roe v. Kansas ex. rel. Smith*, 278 U.S. 191 (1921).

¹⁰*Adirondack Ry. v. New York State*, 176 U.S. 335 (1900).

¹¹NICHOLS, §7.511.

¹²*Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30 (1916).

¹³*Moran v. Ross*, 79 Cal. 159, 21 P. 547 (1889); NICHOLS, §3.24.

¹⁴*United States v. 243.22 Acres of Land*, 43 F.Supp. 561 (D.C. E.D. N.Y. 1942), *aff'd* 29 F.2d 678 (CA.2d 1942); *Ortiz v. Hanson*, 35 Colo. 100, 83 P. 964 (1905).

¹⁵*Texas Eastern Transmission Corp. v. Wildlife Preserves Inc.*, 48 N.J. 261, 225 A.2d 130 (1966); *Central Louisiana Elec. Co. v. Pugh* 96 So.2d 523 (La. 1957); *Hendersonville Light and Power Co. v. Blue Ridge I. Ry.*, 243 U.S. 563 (1917).

¹⁶*Craddock v. University of Louisville*, 303 S.W. 2d 548 (Ky. 1957).

¹⁷*Young v. Bunnell Cemetery Ass'n*, 221 Ind. 173, 46 N.E.2d 825 (Ind. 1943).

¹⁸*Murdock v. Stickney*, 88 Cush. 113 (Mass. 1851).

¹⁹Law of Aug. 7, 1967, Law of Hydrocarbons [1967] Gac. Of. 1,137 Ext. Aug. 8, 1967, art. 52 (hereinafter cited Ley de Hidrocarburos).

²⁰Some state governments are forbidden by their constitutions from condemning private land unless the land is to be used by the public. See *City of Little Rock v. Raines*, 241 Ark. 1071, 411 S.W.2d 486 (1967); *Hogue v. Port of Seattle*, 54 Wash. 2d 799, 341 P.2d 171 (1959). See also *The Public Use Doctrine: 'Advance Requiem' Revisited*, 1969 LAW AND SOC. ORDER 688, 696-702 where the cases noted suggest

that, when eventual private ownership is contemplated, some courts distinguish among governmental plans, allowing, for instance, the use of condemnation for public housing but denying its use for industrial parks.

²¹*Berman v. Parker*, 348 U.S. 26, 75 Sup. Ct. 98, 99 L.Ed. 27 (1954). One should also see *Brown et al. v. United States*, 263 U.S. 78, 44 S.Ct. 92 (1923), where the Federal government condemned private land to sell it to individuals whose land and homes were being flooded by an artificial lake created by the government. The plaintiffs argued that the government's power of condemnation was not so extensive as to allow the government to take one man's property in order to sell it to another man. The Supreme Court of the United States decided that the taking was so necessary to the completion of the government's project that the fact that the lake would involve public use was sufficient to justify the taking of the land in question.

Note that *Berman* also involved the taking of private property under an established project or plan. One question, a step beyond these cases, is whether government can condemn land when no government plan exists. Commenting on the current status of the law, Professor Ernest Roberts wrote: "It remains debatable . . . whether land can be condemned, even in urban areas, if the authorities have no definite redevelopment scheme in mind." ROBERTS, LAND-USE PLANNING 5-38 (1971).

In both the *Brown* and *Berman* cases private land was condemned for transfer to private persons. But, it was done under a scheme designed to benefit the public. What if there had been no such benefit to the public? Can land be condemned simply for the benefit of other private persons? Justice Frankfurter gives an answer in *United States v. Welch*, 327 U.S. 546, 66 S.Ct. 715, 90 L.E. 843 (1943), in his concurring opinion: "This Court has never deviated from the view that under the Constitution a claim that a taking is not for public use is open to judicial consideration ultimately by this Court." 66 S.Ct. at 720. However, some courts have sustained condemnation when it was obvious that most, if all, of the benefit would accrue to a private party rather than the public. For instance, one man has been allowed to condemn another man's property in order to run water to the condemnor's land. See *Kaiser Steel Corp. v. W.S. Ranch Co.*, 467 P.2d 986 (N.M. 1970). The theory often used to sustain such condemnations is that public benefit will accrue because the condemnor's use of the water will help develop state resources. Could one man condemn another's land to build a house on it in order to develop the housing resources of the state?

²²For cases approving excess condemnation for purposes of future expansion see *Rueb v. Oklahoma City*, 435 P.2d 139 (Okla. 1969), and *Carlor Co. v. City of Miami*, 62 So.2d 897 (Fla. 1953). For a case disapproving excess condemnation for the same purpose, see *State v. 0.62033 Acres of Land*, 49 Del. 174, 112 A.2d 857 (1955).

²³See *State ex. rel. State Highway Dept. v. 9.88 Acres of Land*, 253 A.2d 509 (Del. 1969). See NICHOLS §7.5122 [1].

²⁴The severance damage is the amount by which the remnant's value is decreased because of the remnant's lessened usefulness as a separate block of land.

²⁵See *People v. Superior Ct. of Merced Co.*, 68 Cal.2d 206, 65 Cal. Rept. 342, 436 P.2d 342 (1968), and *People v. Jervis*, 274 C.A.2d 217, 79 Cal. Rept. 175 (1969).

²⁶See *People v. Superior Ct. of Merced Co.*, 68 Cal.2d 206, 66 Cal. Rept. 342, 436 P.2d 342 (1968). (The severance damage to the remnant was large because the condemnation would have left the remnant isolated, with no available access.) The theory supporting the excess condemnation exemplified here is denominated the "Remnant Theory." See NICHOLS §7.5122 [1] and 6 A.L.R.3d 297, at 317.

²⁷See *Tulsa v. Williams*, 100 Okla. 116, 227 P. 876 (1924); *United States v. 91.69 Acres of Land*, 334 F.2d 229 (C.A. 4th Cir. 1964); *Truit v. Borough of Ambridge Water Authority*, 389 Pa. 429, 133 A.2d 797 (1957).

This type of taking rests on a doctrine denominated the "Protective Theory" which hypothesizes that the government may acquire adjacent land for the purpose of placing restrictions thereon for safety or aesthetic reasons. See *White v. Johnson*

et al., 146 S.E. 411 (S.C., 1929) (adjacent right of way condemned for reasons of safety) and, see n. 33 for cases in which such "excess condemnation" was used for aesthetic reasons.

There is a question, however, whether case law in any state presently allows a governmental entity to condemn, for aesthetic reasons alone, property adjacent to a public project for reconveyance to private third parties. In the often cited case *Pennsylvania Mutual Life Ins. Co. v. Philadelphia*, 242 Pa. 47, 88 A. 90 (1913), the court forbid just such condemnation. Though recent Pennsylvania cases have allowed condemnation for reconveyance to private third parties in urban renewal situations, the question remains whether the condemnation and reconveyance would have been allowed if aesthetics only had been at issue.

For those who support such use of the condemnation device, dicta in the case of *Berman v. Parker*, 348 U.S. 26, 75 Sup. Ct. 98, 99 L.Ed. 27 (1954), furnishes heady stimulation. In interpreting the limits the Federal Constitution places on condemnation and reconveyance, Justice Douglas said:

It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled. In the present case [involving the condemnation of a sound building and its lot in a blighted neighborhood for ultimate reconveyance, with restrictions, to private third parties], the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us [the Court] to reappraise them. If those who govern the District of Columbia decide that the National Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way. 75 Sup. Ct. at 101-2.

However, *Berman* did not involve condemnations and reconveyance for aesthetic reasons only. For, as Justice Douglas said: "Congress... made determinations that take into account a wide variety of values." *Id.*

²⁸Law of November 4, 1947, Law of Expropriation for Reasons of Public or Social Utility [1947] Gac. Of. 22, 458, Nov. 11, 1947 (hereinafter cited *Ley de Exprop.*).

²⁹*Id.*, art. 13.

³⁰*Id.*

³¹*Id.*, arts 13 and 14. This "excess" expropriation provision illustrates a problem sometimes found in legislation and which is usually avoided in the common law approach. The Venezuelan law allows excess expropriation up to 60 meters. What if more depth is needed? In this country land has been condemned between a highway and the horizon, or hill line, along the road—this in order to prevent development from destroying the view. The Venezuelan law would not permit this approach unless the hill line is within 60 meters.

Might not this problem be eliminated by removing the 60 meter limitation? Perhaps. However, in a country where the court is not apt to inquire into the issue of actual "necessity," the legislature might feel compelled to limit possible administrative excess by providing specific limitations on administrative reach.

Note that under the Venezuelan law land can be expropriated for aesthetic reasons and then be sold to private parties. See n. 27 for a discussion of the status of similar condemnation in this country.

Note also that one form of excess condemnation generally not accepted by courts here is condemnation in order to resell the taken property at a profit and "recoup" the cost of the public project. See *Cincinnati v. Vester* 33 F.2d 242 (6th Cir. 1929). The Venezuelan law seems to allow such excess expropriation. However, I found no cases litigating the issue.

³²*Ley de Exprop.* art. 14.

³³See *Kamrowski v. Wisconsin*, 31 Wis.2d 256, 142 N.W.2d 793 (1966) (condemnation of a scenic easement along a highway); and *Re City of New York*, 63

N.Y.S. 196 (Sp. Ct. App. Dis.2d Dept. 1901) (the owner, after condemnation, was left with only those rights in the land which would allow him to use it as a courtyard).

See Pontiac Improvement Co. v. Board of Commissioners, 104 Ohio St. 447, 135 N.E. 635 (1922), for a case dealing with the ambiguities which arise when less than the fee interest is sought to be condemned. See J. Krasnowiecki and J. Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 UNIV. OF PENN. LAW REV. 179, at 194 for a view questioning the efficacy of condemning less than the fee.

³⁴See Ley de Exprop. art. 36 and 37.

³⁵Perhaps the primary reason in this country for the condemnation of "development rights" or "scenic easements" rather than the whole fee is an economic one. The drain on the government's treasury should be less because the compensation due the condemnee should be less. This rationale is not as viable in Venezuela because she has a better way of controlling the drain from the treasury—payment by long term bonds.

³⁶U.S. CONST., AMEND. V.

³⁷*Kohl et al. v. United States*, 91 U.S. 367, was decided in 1875. It was the first case establishing the Federal government's right to exercise power of eminent domain in the States.

³⁸*Trombley v. Humphrey, Auditor-General*, 23 Mich. 471 (1871).

³⁹91 U.S. 367 (1875).

⁴⁰The court said: "The right [of eminent domain] is the offspring of political necessity; it is inseparable from sovereignty. . . ." *Id.*, 374. Also in *Kohl* the Court said:

[T]he Constitution itself contains an implied recognition of it [the power of eminent domain] beyond what may justly be implied from the express grants. The Fifth Amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken. *Id.*, 373.

⁴¹*Kohl*, 91 U.S. at 374-376.

⁴²See, for instance, *Barnridge v. United States*, 101 F.2d 295 (8th Cir. 1939): "If the Federal government, under the constitution, has power to embark upon the project for which land is sought, then the use is a public one," at 298.

⁴³See *the City of Tacoma v. Taxpayers of Tacoma*, 60 Wash.2d 166, 371 P.2d 936, (1962), and *State of Washington Department of Game v. Federal Power Commission*, 207 F.2d 391 (9th Cir. (1953)).

An additional indication of the extensiveness of the Federal government's delegated powers arose in these cases. Not only was the federal right utilized to condemn state land, but it was employed by the State's own local governmental entity against the will of the State. The Federal Power Commission had issued federal licenses giving the local entities the authority to utilize the Federal government's condemnation power.

⁴⁴U.S. CONST., AMEND. V, SEC. II, B.1. of text.

⁴⁵See the following Notes and the cases cited therein: *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L. JOURNAL 599 (1949); *Eminent Domain—The Meaning of the Term Public Use—Its Effect on Excess Condemnation*, 18 MERCED L. REV. 274 (1966).

⁴⁶The most famous recent case approving the "public benefit" theory is *Berman v. Parker*, 348 U.S. 26, 75 Sup. Ct. 989, 99 L.E. 27 (1954). An extension of either

the "use by the public" theory or the "public benefit" theory might bring undesired results. The former would support the condemnation of property for hotel and gasoline facilities, for both are used by the public. The latter would perhaps underwrite the use of condemnation by large enterprises such as transportation and steel companies whose activities benefit the public generally.

⁴⁷Justice Douglas in *Berman*, 348 U.S. at 32, said: "The role of the judiciary in determining whether that power [eminent domain] is being exercised for the public use is an extremely narrow one."

⁴⁸*Berman*, 348 U.S. at 33. Also see *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L. JOUR. 599 (1949), and n. 12, this section.

⁴⁹U.S. CONST., AMEND. V, n. 44, *supra*.

⁵⁰See ROBERTS, LAND USE PLANNING, 7-157 (1971); and *City of Trenton v. Lenzer*, 16 N.J. 465, 109 A.2d 409 (1954).

⁵¹See NICHOLS, §8.2 *United States v. 1,000 Acres of Land*, 162 F.Supp. 219 (D.C. E.D. of La., 1958) and *Richard v. United States*, 285 F.2d 129 (Ct. Cl., 1961).

⁵²See *Richard*, 285 F.2d 129.

⁵³U.S. CONST., AMEND. V, n. 44, *supra*

⁵⁴NICHOLS, §4.10.

⁵⁵*Id.*, §4.7.

⁵⁶*Id.*, §4.8; see also *West v. Chesapeake and P. Tel. Co.*, 295 U.S. 662, 55 S.Ct. 894 (1935).

⁵⁷NICHOLS, §4.9.

⁵⁸See *Kohl et al. v. United States*, 91 U.S. 367, 371 (1875):

No one doubts the existence in the State governments of the right of eminent domain. . . . It is out of the necessity of their being. . . .

See also *City of Little Rock v. Raines*, 241 Ark. 1071, 1078, 477 S.W.2d 486, 390.

⁵⁹See *Threlkeld v. Third Judicial District*, 36 N.W. 350, 15 P.2d 671 (1932), and *Reed v. Seattle*, 124 Wash. 185, 213 P. 923 (1923). See also *The Public Use Doctrine 'Advance Requiem' Revisited*, 1969 LAW & SOC. OR. 690 (1969) where the author suggests that three tests have been employed in state courts to ascertain whether the public use criterion has been met: One requires that the public actually use the property; the second requires that the public have a right to use the property; and the third requires only that the public benefit from the use of the property.

⁶⁰NICHOLS, §4.11 [2].

⁶¹*Id.* See also *Board of Education v. Baczewski*, 340 Mich. 265, 65 N.W.2d 810 (1954) (use contemplated thirty years in the future), and *O'Neil v. Board of County Commissioners of Summi Co.*, 3 Ohio St.2d 53, 209 N.E.2d 393 (1965) (undetermined future use).

⁶²NICHOLS, §8.1 [2].

⁶³*Id.*

⁶⁴See 52 Stat. 980, 49 U.S.C. §1304 (1938), and Civil Aeronautics Regulation, 14 C.F.R. §60.17 (1956). Also see *Air Rights—A Developing Prospect* by Julius L. Sackman in *INSTITUTE ON EMINENT DOMAIN 2* (1969).

^{64a}Does the Venezuelan system of expropriation exemplify the systems found in other Latin American countries? The broad outline of the Venezuelan approach to

expropriation may be taken as more or less representative of the approach of most Latin American countries. For instance, the use of a comprehensive expropriation statute is common. There is usually no judicial review of "public purpose." Compensation commonly may be deferred.

However, the laws of some countries stand as exceptions to these examples. Furthermore, there are significant differences between Venezuela and many Latin American countries in the utilization of expropriation. For instance, unlike Venezuela, some Latin American countries have not instituted an agrarian reform. The person with more than a passing interest in the expropriation law of a particular Latin American country should examine the law of that country.

See A. Lowenfeld in *EXPROPRIATION IN THE AMERICAS* 314 (ed. Lowenfeld 1971) for a summary of the general expropriation law of several of the major Latin American countries including Venezuela.

⁶⁵VENEZ. CONST. art. 165 (1811). See MARINAS, *LAS CONSTITUCIONES DE VENEZUELA RECOPIACION Y ESTUDIO PRELIMINAR* 165 (Madrid, 1965) [hereinafter cited as MARINAS].

⁶⁶See MARINAS 4.

⁶⁷E. PEREZ, *Prólogo* to A. BREWER, *LA EXPROPIACION POR CAUSA DE UTILIDAD PUBLICA O INTERES SOCIAL* 9 (Caracas, 1966). *LA EXPROPIACION* is primarily a collection of Venezuelan cases and administrative decisions related to expropriation. When a case reported in the book is cited in this paper, reference to the book is given BREWER, *EXPROP.* If, in addition, I have found the case in one of the official or unofficial Venezuelan case reporters, that report is also cited. References to the prologue of *LA EXPROPRIACION* are hereinafter cited *Prólogo*, *EXPROP.*

The 1819 constitution can be found in MARINAS at 163.

⁶⁸Art 14. See MARINAS 306.

⁶⁹See the 1947 and preceding constitutions in MARINAS 126-897.

⁷⁰*Prólogo*, *EXPROP.* 10.

⁷¹*Id.*

⁷²*Id.*

⁷³*Id.*

⁷⁴Some of the elements of the legal basis of Venezuelan expropriation may also be found in *CODIGO CIVIL DE VENEZUELA* 1942 [hereinafter cited *CD. CIV.*]. See, for instance, arts. 545, 547.

⁷⁵*Ley de Exprop.* art. 2.

⁷⁶U.S. CONST., AMEND. V.

⁷⁷See Sec. II. B.1.b.

⁷⁸Sentencia del 18 de mayo de 1945 (C.Fed.) BREWER, *EXPROP.* 65, 66. The court's footnotes have been omitted. It quoted from C. BAUDRE, "L'EXPROPRIATION..." 5, 6, No. 5 (1937).

⁷⁹See Sec. III. C. 2. Also, Sentencia del 24 de febrero de 1965 (C.S.J.-Pol. Ad.) BREWER, *EXPROP.* 27, 28.

⁸⁰A "campesina" is an inhabitant of a rural area and is usually a poor one.

⁸¹This law, when referred to in the text, shall hereafter appear "Law of Expropriation."

⁸²This law, when referred to in the text, shall hereafter appear "Agrarian Law."

In addition to the constitutional provisions mentioned in the text, the following should be noted.

Art. 103 — The lands acquired for the purpose of the exploration or exploitation of mineral concessions including those of hydrocarbons and other combustible minerals shall revert to full ownership of the Nation, without any indemnification when the respective concession is terminated for any reason.

⁸³Sentencia del 22 de julio de 1964 (C.S.J.-Casación) X Juris. 386. For the statement of facts see the same case subsequently before a lower court. Sentencia del 8 de abril de 1965 (Corte Superior Tercera), XII Juris 266.

⁸⁴Sentencia del 22 de julio de 1964 (C.S.J.-Casación) X Juris. 386, 387.

⁸⁵*Id.* 388.

⁸⁶*Id.* 389.

⁸⁷*Id.*

⁸⁸Art. 4.

⁸⁹Sentencia del 8 de abril de 1965 (Corte Superior Tercera) XII Juris. 266.

⁹⁰VENEZ. CONST. art. 99.

⁹¹Sentencia de 24 de febrero de 1965 (C.S.J.-Pol. Ad.), BREWER, EXPROP. 27.

⁹²See for instance Kohl *et. al.* v. United States, 91 U.S. 367-371 (1875).

⁹³CD. CIV. art. 545.

⁹⁴Article 99 of the Venezuelan Constitution also speaks of the subjection of property to the contributions, restrictions, and obligations established by law. For a case in which this "subjugation" of property was used as a partial rationale for the power to expropriate, see Sentencia de 24 de febrero de 1965 (C.S.J.-Pol. Ad.) BREWER, EXPROP. 27, 28. For information on the application of this "subjugation" concept of property to the mortgage — which is considered in Venezuela to be an interest in property — see Sec. III. D. a.(3).

⁹⁵See Sec. III. B.1.

The Civil Code also contains a comparable limitation:

One can neither be obligated to yield his property nor obligated to permit others to use it except for reasons of public or social utility
 . . . CD. CIV. art. 547.

⁹⁶See Sec. II. B.2.

⁹⁷BREWER, EXPROP. 65.

⁹⁸*Id.* 66.

⁹⁹This judicial reticence will seem strange to the person accustomed to the relatively freewheeling judiciary of the United States. The difference is traceable to the differing status of the court in each country.

The cited case is from 1945. I found no cases more recent where the power of the court to review a project's "public utility" was raised. This, I suggest, is due to the general acceptance of the view that the determination of "public utility" is for the legislature.

¹⁰⁰Art. 3.

¹⁰¹Sentencia del 29 de octubre de 1948 (C. Fed. y Cas. Fed), BREWER, EXPROP. 66, 67. The power to declare a project to be one of public utility is not limited to the

National Legislature. The state legislative assemblies, the state executive (for an urgent matter in time of the assembly's recess) and the National executive (when he considers land or structures essential for the security or defense of the Nation) have the power to declare the public utility, Ley de Exprop. art. 10.

¹⁰²Ley de Exprop. art. 11.

¹⁰³*Id.*

¹⁰⁴See CD. CIV. art. 547 and Ley de Exprop. art. 32.

¹⁰⁵See Sentencia del 12 de diciembre de 1963 (C.S.J.-Pol. A.D.) BREWER, EXPROP. 221, 223. Ley de Exprop. art. 40 requires that the indemnification be consigned with a government authority. Art. 42 requires that the tribunal order delivery of the indemnification to the property owner the day of the consignment if there is no opposition by a third party.

¹⁰⁶See Sec. II. B.1.c.

¹⁰⁷Sentencia del 4 de julio de 1967 (C.S.J.-Pol. Adm.), XVII Juris. 418, 419, 57 Gac. For. (2d) 6, 12.

¹⁰⁸CD. CIV. art. 547. The civil code requires a *juicio contradictorio*.

¹⁰⁹Ley de Exprop. art. 51.

¹¹⁰A judge of the jurisdiction aids in giving notice to the property owner and performs a visual inspection in order to discover all of the factual circumstances that should be taken into account in valuation of the property and which might change as a result of the occupation. Ley de Exprop., art. 52.

In instances where prior occupation is allowed (not to be confused with cases where immediate but temporary occupation is necessary because of a disaster) before a judicial decision is rendered, the expropriator must attach with his petition for expropriation, payment equivalent to the valuation of the property established by the *Comisión de Avalúos*. Ley de Exprop., art. 51. If the expropriatee agrees with the amount of payment given and raises no other valid objection, the expropriation proceeding is concluded. *Id.*

¹¹¹Ley de Exprop., art. 53.

¹¹²Art. 26.

¹¹³Sentencia del 30 de marzo de 1960 (CF.), BREWER, EXPROP. 110. In expropriation cases the courts of Venezuela seem willing to utilize general provisions in two circumstances. First, when specific provisions are ambiguous or leave gaps in the law. And, secondly, when a specific provision of a special law has been violated and the court seeks additional support for its decision. The court appears to be unwilling to utilize general constitutional provisions to examine the process established in the special laws. At least in regard to the special laws regulating expropriation, there seems to be at play no general provision comparable to the United States' "due process" limitation under which the established process itself will be examined for violation of general fairness standards.

¹¹⁴See Law of March 5, 1960, Law of Agrarian Reform, art. 1 [1960] Gac. Op. 610, Mar 5, 1960 [hereinafter cited Ref. Ag.]:

The present law has as its object the transformation of the agrarian structure of the country and the incorporation of its rural population in the economic, social and political development of the Nation by means of substitution for the latifundistic system, a just system of property, tenancy, and exploitation of the land based on the equal distribution of the same...

¹¹⁵As the preceding note implies, the agrarian reform — of which expropriation is an important component — involves an attempt to alter the country's social struc-

ture by eliminating the latifundistic system and raising the relative status of the agrarian class. In the U.S. it is questionable whether even the liberal "public benefit" test is presently so expansive. Furthermore, some courts in this country seem to reject the "public benefit" test and accept more restrictive interpretations of "public use."

The most comparable example of the utilization of condemnation here for such broad social purposes is urban renewal. One of its nominal purposes was to provide additional and better housing in urban areas. However, this purpose was smothered by the program's other purposes, and the net impact of urban renewal was a substantial reduction of the number of housing units.

By what is said above and in the text about the license to use expropriation in Venezuela for broad social purposes I mean to compare the legally accepted use of condemnation here. I do not mean to imply, for instance, that the agrarian reform was not a product of compromise among social classes. Nor do I mean to imply that classes other than the *campesinos* failed to benefit from expropriations under the agrarian reform.

It has been suggested that owners of rural property have often encouraged that their land be expropriated, in order that they be able to use their indemnification for investment in urban areas. See O. Warriner in SIGMUND, MODELS OF POLITICAL CHANGE IN LATIN AMERICA 238 (1970) hereinafter cited Warriner in MODELS]. My own study furnishes some evidence that some land owners have wished to have their property taken. The National Agrarian Institute, the administrative agency responsible for instituting expropriation procedures under the agrarian law, has halted expropriation procedures occasionally only to have the potential expropriatee contend that the Institute does not have the power to desist, once it begins. See Sentencia del 7 de abril de 1971 (C.S.J.-Pol. Ad.) XXVI Juris. 319; Sentencia del 22 de enero de 1968, (C.S.J.-Pol. Ad.) 59 Gac. For. 2d 5; Sentencia del 27 de junio de 1963 (C.S.J.-Pol. Ad.) 41 Gac. For. 32; and Sentencia del 12 de diciembre de 1963 (C.S.J.-Pol. Ad.) 905 Gac. Of. 4 May 1964. One writer, in 1969, even suggested that compulsion of landowners was unnecessary under the agrarian law, see Warriner in MODELS 237. (I suggest that the reader reserve his opinion as to the need for compulsion until he finishes the chapter.)

¹¹⁶See Sec. III. C.6.

¹¹⁷See Sec. II. B.1.b.

¹¹⁸*Id.*

¹¹⁹Ref. Ag. art. 36.

¹²⁰*Audiencia* may be translated roughly "audience" or "hearing" but there is no exactly comparable procedure in this common law jurisdiction. Perhaps the best translation would be "a judicial sitting for the purpose of hearing arguments or witnesses, or reading briefs, or reviewing evidence which together with other *audiencias* form the integrated trial."

¹²¹The subsequent information in the text, unless otherwise indicated, is taken from Sentencia del 24 de febrero de 1965 (C.S.J.-Pol. Ad.), BREWER, EXPROP. 74 and from the procedural provisions of the special laws, Ley de Exprop. title III, IV and Ref. Ag. art. 36.

¹²²For an appellate case reversing the lower court for failure to properly appoint a *defensor* for parties failing to appear in court, see Sentencia del 3 de junio de 1969 (C.S.J.-Pol. Ad.) XXI Juris 510.

¹²³Appeals under the "Agrarian Law" are to be made to the *Corte Federal* which is today the *Sala Político-Administrativa* of the *Corte Suprema de Justicia*. The old *Corte Federal* is not to be confused with the *Sala Federal*, the department of the Supreme Court contemplated by th 1961 Constitution.

¹²⁴See Ley de Exprop. art. 30 which states: "The time in which to appeal decisions of the first instance shall be three days." In an interesting opinion, Sentencia

del 31 de octubre de 1962 (C.S.J.-Pol. Ad.) 38 Gac. For. 85 the court decided that Art. 30 is not applicable to an *impugnación* of the valuation. It instead applied Art. 177 of the Código de Procedimiento Civil which gives five days for making appeals. It based its opinion on the fact that the determination of valuation was not a judicial decision and on the fact that it would be the court of first instance rather than an appellate court before which the valuation would be contested. These factors, according to the court, distinguish an *impugnación* from an "appeal." The court therefore applied the law of general applicability—the civil code of procedure—rather than the Law of Expropriation, art. 30 quoted above. The court failed to mention that art. 177 of the procedural code also speaks in terms of "appeal" rather than *impugnación*. Article 177, however, is not limited by its terms to appeals from the court of first instance and this could have been the consequential distinction.

¹²⁵See Sec. III, C. 3.

¹²⁶Ley de Exprop. art. 3 §2.

¹²⁷Under the *Ley de Hidrocarburos* the concessionaire may expropriate land, see art. 52. The same is true under the "Ley de Minas." Therefore, the location of the property relative to the project or relative to the suspected location of the minerals is the determinative factor in its selection.

¹²⁸Condemnation or expropriation for an historic monument is an example.

¹²⁹Ref. Ag. art. 154.

¹³⁰*Id.*, art. 24. The Congress left to the Executive branch the promulgation of a directive regulating the classification of lands. *Id.*, art. 204. In Decree 746 of Feb. 8, 1967, Regulation of the Agrarian Reform [1967] Gac. Of. 1089 of Mar. 2, 1967 [hereinafter cited Reglamento] the National Executive supplied the classification method to be used, see *Capítulo XV*. Land which gets 40 points or less on a hundred point scale is considered to be unexploitable. Reglamento art. 250.

¹³¹Ref. Ag. arts. 10 and 27. National parks and forests, forest reserves, protected zones, natural and artistic monuments and wildlife sanctuaries are not affected by the agrarian reform. *Id.* art. 28.

¹³²Ref. Ag., art. 1.

¹³³*Id.*, arts. 19, 22, 27.

¹³⁴*Id.* See especially art. 19. The failure to meet any one of the requirements makes the property subject to expropriation for not complying with its social functions. Sentencia del 23 de octubre de 1963 (C.S.J.-Pol. Ad.), BREWER, EXPROP. 15. However, the failure should be one sufficiently grave to merit expropriation rather than a simple failure to observe one of the enunciated requirements. Sentencia del 30 de julio de 1964 (C.S.J.-Pol. Ad.), BREWER, EXPROP. 48.

¹³⁵This requirement is essentially a prohibition against indirect forms of exploitation, including most, if not all, rental arrangements. Art. 27 and 30 list proscribed arrangements, some of which are explained below. The distinctions between forms of rent were more significant in earlier decades than they are now and many of the terms are today almost synonyms.

arrendatario: Either a crop or cash rental arrangement. The renter may hire employees.

medianos: Crop rent. In earlier times, the crops were split 50/50—therefore the term "medianos." Today, the owner may receive a much smaller portion. The term implies an arrangement for several years.

colonos: The *colono* usually rents more land than the *arrendatario*. He probably has a house on the land and employs help.

ocupantes: The term implies that the renter has no contract. He is allowed to utilize the land, perhaps through a tacit agreement.

One rental form of significance today is not listed in either art. 27 or 30, the *conuqueros*. As the migration to urban areas has taken *campesinos* out of the rural labor market, landowners have sought to make working on the farm more attractive by allowing the laborer a plot for his own use.

¹³⁶Such questions as the following have arisen. Is (a), requiring the efficient exploitation of the property, met if an owner, in preparation for selling his property, has sold most of his cattle? Sentencia de 10 de junio de 1963 (C.S.J.-Pol. Ad.), 40 Gac. For. (2d) 295, VII Juris. 462.

Is (b), requiring the direct exploitation of land, met if the owner's brother operates the property? Sentencia del 30 de julio de 1964 (C.S.J.-Pol. Ad.), BREWER, EXPROP.. 48. If only one of the co-owners operates the property? Sentencia del 20 de febrero de 1964 (C.S.J.-Pol. Ad.), 43 Gac. For. (2d) 37.

Is (c), requiring registration of the real estate, met if there was no actual registration but if during the period for registration the Agrarian Institute had agreed to acquire the property and such agreement forestalled registration? Sentencia del 10 de junio de 1963 (C.S.J.-Pol. Ad.), 40 Gac. For. (2d) 295, VII Juris 462. Each question above was answered in the affirmative.

¹³⁷The case related in the following paragraph is Sentencia del 23 de octubre de 1963 (C.S.J.-Pol. Ad.) 27, 295 Gac. Of. 14 Nov. 1963.

¹³⁸*Campesino* means countryman but the better translation here is "a poor person from a rural area." The property owner in this case alleged:

In the month of September, 1958, when by my effort and under my personal supervision, the agriculture development was fully underway, a massive invasion of the land occurred by the *campesinos* of the region, who broke the fence, entered the property, destroying the sheds and threatening to burn the tractors and other machinery. . . . Thereafter the invaders arbitrarily proceeded at their whim to parcel my land, which as expressed, was already prepared for planting, and they planted on it pineapple, smaller fruits and pastures. 27, 295 Gac. Of. 14 Nov. 1963.

¹³⁹Sentencia del 23 de octubre 1963 (C.S.J.-Pol. Ad.), 27, 295 Gac. 14 Nov. 1963.

¹⁴⁰*Id.*

¹⁴¹See **Exposición de Motivos in 1 SECCIONES DE INFORMACION y PRENSA E IMPRENTA DEL CONGRESO NACIONAL, LA LEY DE REFORMA AGRARIA EN LAS CAMARAS LEGISLATIVAS 16-29** (Caracas, 1961) [hereinafter cited LAS CAMARAS], for a discussion of ownership of land in Venezuela and the intended effects of the reform.

¹⁴²Ref. Ag. art. 27. For an explanation of the meaning of "indirect exploitation" see n. 11.

¹⁴³Ref. Ag. art. 204.

¹⁴⁴*Id.* : t. 29. There are 2.471 acres in each hectare.

¹⁴⁵Ref. Ag., art. 29. Land is put into one of seven classes based on its quality. Reglamento art. 248. Experts, using a method given in the *Reglamento* classify land by considering its ecological makeup, its topography, the climatic zone, and the property's proximity to markets, Reglamento art. 238.

¹⁴⁶Ref. Ag., art. 29.

¹⁴⁷Sentencia del 8 de noviembre de 1965 (C.S.J.-Pol. Ad.), BREWER, EX-PROP. 50.

¹⁴⁸*Id.*

¹⁴⁹Ref. Ag., art. 30.

¹⁵⁰*Id.* Reasons for such additions might be the pasturage of animals, the location of buildings or the location of mountains which serve as windbreaks or sources of water. Upon petition of the Instituto Agrario Nacional the court may also reduce the quantity of the reserved lands by 50% if the lands are located in a dense demographic zone or are located adjacent to a hydraulic reserve. Under certain conditions, the court may reduce the reserve by 33% if it is located next to towns with fewer than 3,000 inhabitants.

¹⁵¹Ref. Ag., art. 30. The article prohibits the reservations being chosen on the part of the land which was cultivated indirectly by the systems of *arrendamiento* (cash rent), *aparcería* (crop rent), *fundación* (ground rent) and other similar systems. See Sentencia del 14 de agosto de 1969 (C.S.J.-Pol. Ad.) 65 Gac. For. 141, 150 for a case in which the right to reserve land was denied, apparently because all of the land was exploited indirectly.

¹⁵²Ref. Ag., art. 31.

¹⁵³*Id.*, art. 32. Livestock operations are considered efficiently exploited if cultivated pastures predominate or if such improvements as fences, stables, watering places exist, and if the land can maintain the greatest number of cattle on the least amount of land without biologic harm to the ground and to the animals.

¹⁵⁴See 1 LAS CAMARAS 13, 37.

¹⁵⁵Sentencia del 26 de abril de 1962 (C.S.J. Pol.-Ad.) 44 Gac. For. 41, 44.

¹⁵⁶Ag. Ref., art. 33. If expropriation takes place under such conditions, the expropriatee receives a higher quality payment bond, see p. 75. If the land of a small or medium property owner is taken under such conditions, he has the right, once the agrarian organization is established, to *titulo oneroso* of a parcel equal to the largest one available. *Id.*

¹⁵⁷See Ley de Exprop. art. 3 § *Unico* and Ref. Ag., art. 35.

¹⁵⁸See Sentencia de 21 de abril de 1965, BREWER, EXPROP. 72, 73. See this case also for a list of previous decisions interpreting the subject requirement. See also Sentencia del 26 de abril de 1962 (C.S.J.-Pol. Ad.) 36 Gac. For. (2d) 41, 45.

¹⁵⁹Sentencia de 21 de abril at 73.

¹⁶⁰Reglamento art. 19.

¹⁶¹*Id.*

¹⁶²Sentencia del 14 de agosto de 1969 (C.S.J.-Pol. Ad.) XXII Juris. 359.

The "amicable settlement" provision of the "Law of Expropriation" is not precise, see art. 3 §*Unico*. A reform was attempted unsuccessfully in 1970, see CAMARA DE DIPUTADOS, EXPOSICION DE MOTIVOS Y PROYECTO DE LA LEY DE REFORMA PARCIAL DE LA LEY DE EXPROPIACION POR CAUSA DE UTILIDAD PUBLICA O SOCIAL 1-2 (1970).

Even under the "amicable settlement" provision the Venezuelan courts have required that experts, not the expropriator and expropriatee, set the amount of indemnification, see LA SOCIEDAD DE TASADORES DE VENEZUELA, CONFERENCIA DICTADA POR EL DR. ALLAN RANDOLPH BREWER CARIAS ACERCA DEL PROYECTO DE REFORMA PARCIAL DE LA LEY DE EXPROPIACION POR CAUSA DE UTILIDAD PUBLICA O SOCIAL 22 (Caracas, 1970) [hereinafter cited CONFERENCIA].

¹⁶³See Sec. III D.e.(2).

¹⁶⁴NICHOLS § 8.9. The legislature may make provision for compensation in excess of that constitutionally required, but the judiciary ultimately decides on the

payment constitutionally required. *Id.* The Venezuelan judiciary has taken a short step toward exercising comparable power. See Sec. III.d.

¹⁶⁵See generally NICHOLS § 18.44 regarding experts and U.S. condemnation proceeding, and see § 18.41 regarding the weight given to the expert's testimony.

¹⁶⁶See Sec. III. D.a.(4).

¹⁶⁷One instance of such unusual circumstances is discussed in Sec. III. D.d.(3). There, the judiciary supplemented the valuation of the experts not because it felt that the valuation was inaccurate, but because it felt that under the circumstances, the valuation was not equivalent to the "just indemnification" required by the constitution.

¹⁶⁸If the experts failed to follow the law, the remedy is a second valuation by experts rather than a substituted judicial valuation of the property. See Sentencia del 29 de octubre de 1959 (C. Fed.) BREWER, EXPROP. 161, 165 and Sentencia del 28 de abril de 1960 (C. Fed.) BREWER, EXPROP. 165.

¹⁶⁹NICHOLS § 12.1. The factors considered in determining the market value vary from jurisdiction to jurisdiction.

Where the character of the property is such as not to be susceptible to the application of the doctrine of market value, the courts have based their award on the so-called actual or intrinsic value. *Id.*

¹⁷⁰Ley de Exprop., art. 35.

¹⁷¹See besides Ley de Exprop., art. 35, Sentencia del 7 de abril de 1965 (C.S.J.-Pol. Ad.), BREWER, EXPROP. 173.

The *Corte Federal* has held that in using the term "*actos de transmisiones*" the legislature intended for the experts to consider only transactions which were registered in the appropriate office of the public registry before the deadline established in the Agrarian Law. Sentencia del 5 de agosto de 1959 (C. Fed.) BREWER, EXPROP. 176, 25 Gac. For. (2d) 138. In this case, the court refused to allow the experts to consider a sale consummated before the 6 months deadline but registered thereafter. As to the instruments pertinent to the transactions, the court said:

Even if it were unquestionable that the alluded documents had a certain date, full validity and fulfilled all of requirements between the contracting parties, it does not make it less true that as to the Nation it did not have this character for which reason it can not produce effects against it.

Venezuela, like European civil law jurisdictions, uses a system under which transfers of land encumbrances are to be registered. See SCHLESINGER 464-478 for information on European registration systems.

¹⁷²See Sentencia del 28 de abril de 1960 (Ct. Fed.) BREWER, EXPROP. 184, 28 Gac. For. (2d) 30 which holds that the 12 month period immediately preceding the decree is the relevant period. This is not clear from the special law itself.

In Sentencia del 5 de agosto de 1959 (Ct. Fed.) BREWER, EXPROP. 179, 25 Gac. For. (2d) 120, the court held that it is for the experts to determine whether a similarity exists between two pieces of real estate.

¹⁷³Ref. Ag. art. 25. See sentencia del 24 de enero de 1966 (C.S.J.-Pol. Ad.) BREWER, EXPROP. 167.

¹⁷⁴Ref. Ag., art. 25, para. 2.

¹⁷⁵See Ref. Ag., art. 25, para. 1. See Ley de Exprop., art. 35, "*among the elements of valuation there shall be taken into account...*" (emphasis added). The elements mentioned in the text Sec. III, D, d. (1) are then listed.

¹⁷⁶Sentencia del 29 de octubre de 1959 (Ct. Fed.) BREWER, EXPROP., 161; Sentencia del 25 de abril de 1960 (Ct. Fed.) BREWER, EXPROP. 165, 28 Gac. For. (2d) 33. These two cases involved the same piece of property. In the first case, the appellate court ordered new experts to be appointed because the former experts had considered only one factor in valuing the property — annual net revenue. The second group of experts apparently agreed with the first group that “the only method of valuing real estate of this type is to base it on the net annual rent,” Sentencia del 29 de oct. at 163. They used no additional factors and the Court again annulled the valuation. In a later case, the Corte Suprema de Justicia held that if the experts were unable to utilize all of the factors of evaluation, the way to meet the imperative terms of Ref. Ag., art. 25 and Ley de Exprop., art. 35 would be to make clear in their report the relevant circumstances prohibiting them from doing so. Sentencia del 22 de enero de 1962 (C.S.J.-Pol. Ad.) BREWER, EXPROP. 171, Gac. For. (2d) 37.

¹⁷⁷Sentencia del 10 de febrero de 1970 (C.S.J.-Pol. Ad.) 67 Gac. For. 146, 148.

¹⁷⁸For appellate court cases reviewing valuations made by experts in order to determine whether the valuations were made according to the law, see the cases, n. 176.

¹⁷⁹Ref. Ag., art. 25, paragrafo 3. In the U.S. the sentimental value to the owner of the property is not a factor in determining the market value. NICHOLS §12.22.

¹⁸⁰Ley de Exprop., art. 35.

¹⁸¹NICHOLS §12.21. “The general rule forbids consideration of the effect of the proposed project upon the value of the property taken.” *Id.*

¹⁸²Sentencia del 22 de enero de 1962 (C.S.J.-Pol. Ad.) V Juris. 480.

¹⁸³*Id.*, 484.

¹⁸⁴Sentencia del 7 de abril de 1965 (C.S.J., Pol.-Ad.) BREWER, EXPROP. 186, 187. This case also cites earlier cases in which the same statement was made. Besides those cited see also basically the same statement by the *Corte Federal*, in Sentencia del 14 de marzo 1952 (C. Fed.) BREWER, EXPROP. 27, 28.

¹⁸⁵BREWER, EXPROP. 153 (C.S.J.-Pol. Ad.).

¹⁸⁶See Sec. II, D.c.5.

¹⁸⁷BREWER, EXPROP. 153.

¹⁸⁸*Id.*

¹⁸⁹*Id.* 153, 154. In the U.S., interest is paid from the date of the taking if payment is made thereafter. NICHOLS §8.63. Damages are assessed as of the date of the taking. NICHOLS §23.4.

¹⁹⁰*Id.*, 156.

¹⁹¹See n. 184, *supra*.

¹⁹²One could argue that in awarding the expropriatee interest, the court still might have left the expropriatee either richer or poorer depending on whether the interest award was more or less than the actual income of the property. On the other hand, one could argue that as a practical matter the property is taken on the date of the occupation and that thereafter the expropriatee is entitled to income from money (interest) and not income from land.

¹⁹³Unable to find a provision in the special laws which would be directly applicable, the majority decided to rely for its holding on “general principles of law” and legal provisions regulating analogous problems. The court was able to rely on the analogy and negative implication of a paragraph in Ley de Exprop., art. 40 §Unico.

Nonetheless, while the property owner continues in material possession or enjoyment of the real estate because the occupation has not been effectuated, the securities which represent the price shall not accrue interest.

¹⁹⁴Ley de Exprop., art. 35.

¹⁹⁵NICHOLS §8.6204. See also *Bauman v. Ross*, 167 U.S. 548, 42 L.Ed. 270, 17 S.Ct. 966 (1897).

¹⁹⁶Ley de Exprop., arts. 15, 35.

¹⁹⁷*Id.*, art. 35.

¹⁹⁸*Id.*

¹⁹⁹*Id.* Theoretically it would be possible for the benefit assignable to the retained property to exceed the combined value of the detriment to the retained parcel and the value of the expropriated property. If such were the case, the expropriatee would owe the government for taking his property. One can imagine this occurring were the government to take a small part of the expropriatee's property to build a commercial avenue where none had existed before.

²⁰⁰Ley de Exprop., art. 35.

²⁰¹NICHOLS §8.6204. The rules under which this is done vary from state to state. *Id.* [4].

²⁰²See NICHOLS §8.6204.

²⁰³*Id.* In some states, a special constitutional provision denies this step while in others the courts have held it violative of the fundamental requirement that compensation be paid in money. The argument is that a benefit to the condemnee's property is not money, and if less than the market value of the property taken is paid in money, then the condemnee's rights have been violated. *Id.*

²⁰⁴CONFERENCIA 20. Ley de Exprop. art. 15. For information on special assessments in the U.S. see NICHOLS §7.41 [4].

²⁰⁵Ley de Exprop. art. 15. The public works for which an assessment is allowed include streets, highways, plazas, parks and irrigation and sanitation facilities. In the U.S., the imposition of special assessments is often limited by the requirement that such assessments not be imposed when the public work is primarily for the benefit of the general public rather than nearby property, see *City of Waukegan v. DeWolf*, 258 Ill. 374, 101 N.E. 532 (1913) and *Mayor and Aldermen of Savannah v. Knight* 172 Ga. 371, 157 S.E. 309. In such cases the revenue should be raised by a general tax rather than a special assessment.

In Venezuela there does exist a distinction between burdens on property — such as betterment (or special assessment) charges — and taxes on real estate, see *Sentencia del 25 de enero de 1965 (C.S.J.-Pol. Ad.) 47 Gac. For. 51*. In the cited case the Supreme Court struck down an ordinance passed by a municipality in the State of Zulia, *Id.* 56. The ordinance required a contribution for public works which directly or indirectly benefited property situated in the municipality. According to the court, the Constitution prohibits a state or municipality from imposing special "contributions" on property, VENEZ. CONST. art. 31 §3.

²⁰⁶Ley de Exprop. art. 15. The betterment contribution is paid either in a lump sum, in cash or in ten consecutive annual payments. In the latter case, the contribution is increased by 25 percent. *Id.*

²⁰⁷The Venezuelan system requires that the property be appraised before and after the completion of the public project which causes the increased value. Ley de Exprop. art. 16.

²⁰⁸NICHOLS §1.41 [4].

²⁰⁹*Id.* In some instances, the total cost of the project has been assessed against property located within a certain area selected by the legislature. Assessment on parcels within the selected area has been based on the parcels' proportionate size, frontage or value. *Id.*

²¹⁰NICHOLS §8.2.

Statutes requiring that the condemnee accept stock or bonds or municipal warrants which the holder could enforce only by a suit at law, if not paid, have been unhesitatingly held invalid. *Id.*

²¹¹See Sec. III. D(e) The applicable constitutional provision is to be found in VENEZ. CONST. art. 101.

²¹²See art. 40 §*Unico*.

²¹³*Id.*

²¹⁴Article 178:

In accord with... Article 174, having to do with the class of bonds to be given for indemnification, the payment of the price of the rural property acquired or expropriated under the present law shall be made... according to the following scale:

The article then gives in five paragraphs the information contained in Chart I, of this section.

²¹⁵The exchange rate Oct. 31, 1972 was 1 Bs. = 22.82 U.S. cents. *N.Y. Times*, Nov. 1, 1972 at 69 col. 4.

²¹⁶Number 2) never would require the payment of more than Bs. 100,000 (40 x 250,000 = 100,000) in cash. Therefore because of the "Only" requirement it would never be applicable. See Chart I.

²¹⁷Sentencia del 16 de febrero de 1965 (C.S.J.-Pol. Ad.) XII Juris. 580.

²¹⁸*Id.* 582. The courts' basis for its new interpretation of Art. 178 is in itself interesting as a method of statutory interpretation.

In this emergency, caused by the conflict in Art. 178, it is necessary to resort to the general rules covering the application of the laws, taking into consideration the precise statutory norms having to do with expropriated rural properties. The law protects, in such circumstances, the position of the defendant and obliges the judge to hold in his favor in conformity with article 12 of the Code of civil procedure, *Id.*

Article 12 is a general procedural article requiring, among other things, that a judge in doubt hold in favor of the defendant. The principle underlying this provision seems to be comparable to the common law principle which requires that, at least initially, the burden of proof be on the plaintiff. However, the Venezuelan court utilized the principle in a unique fashion — to interpret a statute. The consequence of such a utilization of article 12 would seem to be that a different interpretation of a muddled statute would emerge each time the defendant's position changes in relation to it.

Whether or not the application of the Article 12 to statutory interpretation is one the court would wish to again make, its interpretation of Ref. Ag. art. 178 makes good sense.

However, there is an additional problem with art. 178 which may not so easily be solved by judicial interpretation. It can be seen by perusing the chart below, which shows that the cash/bond ratio gradients are so great that an expropriatee who is owed more indemnification than an otherwise similarly situated expropriatee, may receive substantially less cash. To make the point emphatic, I have hypothecated

expropriatee Z in each "Situation" being owed only one bolivar more than expropriatee X.

% Cash	Value of Property	Cash Received	Expropriatee	Situation
	(100,000	40,000.00		
40%	(to			
	(250,000	100,000.00	X)	
)	a)
	(250,001	75,000.30	Z)	
30%	(to			
	(500,000	150,000.00	X)	
)	b)
	(500,001	100,000.20	Z)	
20%	(to			
	(1,000,000	200,000.00	X)	
)	c)
10%	1,000,001	100,000.10	Z)	
	or more			

²¹⁹The confusion arising from art. 178 results in large part from the "only" provision ("*Unico*" in the law). A look into the legislative history of the Ley de Reforma Agraria reveals that the original text did not include such a provision, Proyecto: Ley de Reforma Agraria, art. 189 (since changed to art. 178) in 1 SECCIONES DE INFORMACION Y PRENSA E IMPRENTA DEL CONGRESO NACIONAL, LA LEY DE REFORMA AGRARIA EN LAS CAMARAS LEGISLATIVAS 83, 140 (Caracas 1961) [hereinafter cited LAS CAMARAS].

The bicameral commission added §*Unico* and made this comment:

In order to eliminate the injustice that could result from the application of the scale contained in this article in those cases in which the value of the rural property oscillates, for example, between 100 and 120 thousand bolivares — in which case the . . . expropriatee would receive larger [smaller?] quantities of cash than another whose property has an inferior value — *Unico* has been added . . . LAS CAMARAS 182, 215.

²²⁰As one can see from Chart I, a large proportion of indemnification under the agrarian law is paid in bonds. In this regard, the comments of Deputy Rodríguez Bauza, during the congressional debates, are interesting. He had just proposed that for properties exceeding the value of Bs. 100,000, no more than that sum be paid in cash. Sesión del Día 18 de Enero de 1960 in LAS CAMARAS 579, 589.

Citizen President, Citizen Deputies: The proposal which we make is not a bit radical. It has been adopted in other countries that can not be accused . . . of being communistic, such as Cuba, such as Japan — where the champion of anticommunism, MacArthur, upon instituting the agrarian reform, inculcated the same measure. It is not a bit radical because with this measure we recognize the ownership of the whole quantity of land, the majority of which has really been stolen. We recognize the property, we are going to pay for it, and we are going to pay interest with these bonds, *Id.*

²²¹Sentencia del 4 de julio de 1967 (C.S.J.-Pol. Ad.) XVII Juris. 418. See also, Ref. Ag. art. 173.

²²²Ref. Ag. arts. 173, 174.

²²³The reference to part I of article 27 seems to do no more than clarify that "A" bonds are to be used to pay for properties expropriated for not complying with their social function because they are uncultivated lands, lands exploited indirectly or lands not exploited within the five years preceding the initiation of the expropriation, see Exposición de Motivos in LAS CAMARAS 13, 65. [References to the *Exposición de Motivos* are hereafter cited *Motivos*.]

²²⁴Motivos, LAS CAMARAS 13, 65.

²²⁵"B" bonds are also non-transferable except to the mentioned institutes, Ref. Ag. art. 174 §2.

²²⁶Motivos, LAS CAMARAS 13, 65.

Because of the low yield of the bonds he receives, the expropriatee will be inclined to transfer them if he may. Inflation will be his stimulus. Venezuela's Consumer price index since 1960, taken from 22 UNITED NATIONS, STATISTICAL YEARBOOK 569 (1970), is given below. The base year is 1963.

YEAR:	60	61	62	64	65	66	67	68	69
FOOD:	100	100	98	101	103	103	102	104	107
ALL									
ITEMS:	97	100	99	102	104	106	106	107	110

²²⁷*Id.*

²²⁸See Sec. III. D. b.(2)(b).

²²⁹See Ref. Ag., arts. 179, 32, 30 and 29.

The reference to part "*Unico*" of Art. 179 in the art. 174 §1 quoted above in the text is apparently to make clear that in such circumstances "A" bonds are to be utilized. There is an implication in "*Unico*" that no part of the payment for such property is to be made in cash. It states: "[T]he property owner is to receive the payment of the price in Class 'A' bonds." It makes no reference to article 178, the cash/bonds section, though it refers to other sections.

²³⁰Motivos, LAS CAMARAS 13, 67.

²³¹Ref. Ag. art. 174 §2.

²³²*Id.*

²³³*Id.* Article 174 §2 makes the blanket statement that "B" bonds "shall be applied to the payment of the price of the expropriable rural properties not encompassed in the foregoing part regarding 'A' bonds." This statement can be misleading because "C" bonds are used in payment for expropriated rural property which complies with its social function. *Id.* §3.

²³⁴Art. 174 §2.

²³⁵Sentencia del 4 de julio de 1967 (C.S.J.-Pol. Ad.), 57 Gac. For. (2d) 6, 15, XVII Juris. 418, 422. In this case, the *Instituto* had agreed to pay the property owner cash for all improvements and the rest in bonds—60% class "C" and 40% class "B". The court struck down the agreement.

²³⁶*Id.*

²³⁷The reader will remember that property is indirectly exploited if it is rented under one of the proscribed methods.

²³⁸Sentencia del 20 de febrero de 1964 (C.S.J.-Pol. Ad.), 43 Gac. For. (2d) 37, 40. The facts upon which the court based its decision were the following:

It can be regarded as a direct and indirect exploitation... it is direct because the Administrator of the land, Señor Rafael José Lucena, who... is co-owner, carries out cattle exploitation, though it is poorly organized, with some fifty head... as is the exploitation of some fifty-one hectares of *cafe*. *Id.* 39.

It was indirectly exploited because part of the land was rented. *Id.* 40.

²³⁹The "catch-all" clause is paraphrased in the text, p. 49. (See para. 2). B bonds are to be given when it is determined that A bonds would be inappropriate.

²⁴⁰Sentencia del 20 de febrero de 1964 (C.S.J.-Pol. Ad.) 43 Gac. For. (2d) 37, 40.

²⁴¹See Sec. III. D.b.2.(c).

²⁴²Ref. Ag. art. 33.

²⁴³*Id.* "C" bonds are applied in payment of rural property covering less than 150 hectares when the property is expropriated because of its *location*. However, if the property is expropriated because of the failure of the owner to establish an efficient enterprise after an established number of years, the indemnification is made in "A" bonds and is subject to a 75% fine, Ref. Ag., art. 179 §*Unico* and Sec. II. A.

²⁴⁴LAS CAMARAS, 13, 37.

²⁴⁵Ref. Ag., art. 33. The tax referred to is the "*impuesto sobre la renta*." "*Renta*" can be translated as revenue, profit, income or rent.

²⁴⁶See Sentencia del 16 de octubre de 1963 (C.S.J.-Pol. Ad.), BREWER, EXPROP. 204 (The lower court ordered the *Instituto* to give 80% of the indemnification due after the cash payment in 'C' bonds. This angered the Supreme Court. "In doing this the judge . . . in his decision incurred in flagrant contradiction and poor application of the law." *Id.* 205); Sentencia del 10 de junio de 1963 (C.S.J.-Pol. Ad.), 40 Gac. For. (2d) 327 (The trial court required payment of 10% cash and bonds of various sorts, including "C" bonds for deforested land); and Sentencia del 4 de julio de 1967 (C.S.J.-Pol. Ad.), 57 Gac. For. (2d) 6 (The judge gave 60% in "C" bonds and 40% in "B" bonds).

The provisions having to do with the use of "A", "B" and "C" are clear. One wonders whether the number of cases in which lower courts applied the provisions incorrectly indicates a reluctance among the lower courts to apply the Agrarian Reform Law.

²⁴⁷See the decisions cited n. 240, all of which are *Corte Suprema* cases.

²⁴⁸If mortgages exist covering rural property expropriated for the purposes of the agrarian reform, . . . these shall be translated to the respective price in the same conditions in which the expropriatee receives the price. . . . Ref. Ag. art. 179.

²⁴⁹Proyecto Ley de Reforma Agraria Art. (190 para. 1) in LAS CAMARAS 83, 141.

²⁵⁰Informe que Presenta la Comision Bicameral in LAS CAMARAS 181, 215. The Bicameral Commission indicated its fear regarding possible machinations and subterfuges under the projected draft and suggested the substitution of the following sentence:

If the credits to which article 190 [now 179] refers, have a date anterior to that of the bonds, . . . the maturity of these bonds shall be the same as that of the respective credit, if this credit has attached before the promulgation of this law, *Id.* 216.

The suggested substitution itself was eliminated from the text in the subsequent congressional consideration, see the text of the *Proyecto* for the third congressional discussion in LAS CAMARAS, 494. The article number by then had been changed to 185.

²⁵¹Sentencia del 16 de octubre de 1963 (C.S.J.-Pol. Ad.) BREWER, EXPROP. 212.

²⁵²*Id.*

²⁵³*Id.* 212-213.

²⁵⁴*Id.* The application of the rule regarding creditors appears to be universally applied. In Sentencia del 10 de junio de 1963 (C.S.J.-Pol. Ad.) 40 Gac. For. (2d) 327, the creditors were official financial institutes. They, like the expropriatee, received 10% of the amount due them in cash and 90% in bonds, *Id.* 357.

²⁵⁵I found no case litigating the issue of the transferability of "A" and "B" bonds in the hands of the creditor. However, in a "*Dictamen de la Consultoria Juridica*" (roughly equivalent to an opinion rendered by an attorney general), the Consultoria opined that such bonds in the hands of creditors were not transferable, BREWER, EXPROP. 305. This burden on the creditor of the expropriatee who receives "A" or "B" bonds is not cast on the creditor of the expropriatee whose property complied with its social function. Such a creditor is paid in cash if the proceeds of his loan were applied to the development and improvement of the property, Sentencia del 16 de octubre de 1963 (C.S.J.-Pol. Ad.), BREWER, EXPROP. 212.

²⁵⁶Ley de Exprop. art. 40 §*Unico*.

²⁵⁷*Id.* The "Law of Expropriation" says nothing about the transferability of securities issued. However, the National Executive is given power to determine the conditions of issue, art. 40 §*Unico*. See Sec. III. C.4 regarding the circumstances in which the expropriator is entitled to defer payment.

²⁵⁸The extraordinary circumstances would arise when property is expropriated which complies with its social function and which is mortgaged up to 100% of its value.

²⁵⁹This statement may be thought to be simplistic because increasing "state rights" does not always diminish "individual rights." For instance, if some individuals are too powerful, the enlargement of "state rights" may increase "individual rights" generally.

One can imagine four possible situations resulting from the impact of increased "state rights" on "individual rights:" 1) Rights of certain individuals might be decreased with a compensating increase in "individual rights" generally (hereafter called "common rights"); 2) the rights of certain individuals might be decreased with no compensating increase in "common rights;" 3) the "common rights" might be diminished in order that "common rights" be preserved or in order that they can later be expanded; 4) "common rights" simply might be diminished.

Viewed through its expropriation laws, the Venezuelan legal system, relative to this country's legal system, accentuates the state's rights. Therefore, "individual rights" are lessened. I offer no opinion as to the effect on "common rights."

²⁶⁰U. S. CONST. AMEND. V, XIV.

²⁶¹*Id.*, AMEND. V.

²⁶²*Id.*, AMEND. XIV.

²⁶³*Id.*, amend. I §10 §§1.

²⁶⁴I think it can be argued that the progressive income tax itself imposes a "social function" requirement of a sort on income producing property, but the text example is given because it corresponds more closely with the Venezuelan use of "social function."

²⁶⁵We should recall that in our earlier examination of expropriation in Venezuela we saw that the active utilization of the "social function" requirement has been associated with the agrarian reform. The subsequent speculation in the text therefore relates to the "Agrarian Law."

²⁶⁶See Sec. III. D.e.(2)

²⁶⁷See n. 115.

²⁶⁸Today many people believe that the government has not properly utilized the planning-condemnation authority given it. As a result, legal devices for aiding the owner of undeveloped private land to avoid the reach of government condemnation power have been suggested. See, for instance, Note, *Eminent Domain and the Environment*, CORN. L. REV. 651 (1971)

²⁶⁹I think it can be shown that as a practical matter the zoning laws of some states, as interpreted by the judiciary, are moving toward "social function" like regulation. This is a topic, however, for another paper.

²⁷⁰See Sec. II. B.I.C.

²⁷¹A scheme to utilize optional bonds with condemnation in order to facilitate land control might incorporate:

- a) the use of tax free local bonds to entice condemnees to exercise the option and in order to place part of the cost of land-use control on the federal government,
- b) the use of any property condemned, whether acquired by cash or bonds, as security for the bonds issued,
- c) the formation of a master plan for the development of the property condemned,
- d) the eventual sale or lease of the property to developers contractually bound to follow the master plan, and
- e) the redemption of the bonds with funds thus generated.

²⁷²One practical problem might be that the government's cost of carrying the bonds would be too high. The cost would at least have to be offset by the appreciation in land values realizable by the government.

²⁷³The legal problems might include 1) the need to pass state enabling legislation, 2) the necessity of altering the state constitution's ceiling on local government debt, and 3) "equal protection" issues raised by condemnees.