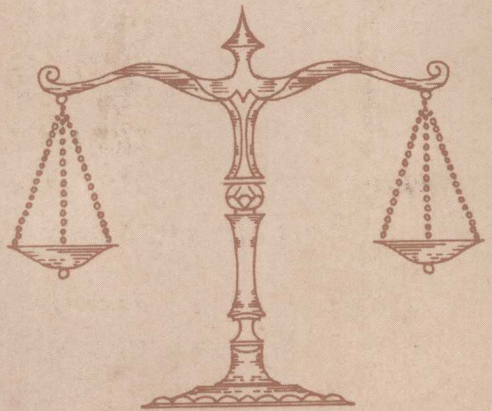




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CONTENTS

ARTICLES

- H. Yates*, Condemnation in the United States and Expropriation in Venezuela: A Comparative Legal Study 259-319
- M. W. Gordon*, Argentine Jurisprudence: The Parke Davis and Deltec Cases 320-345
- L. Kutner*, Due Process of Foreign Policy: Proposals for Presidential Guidelines 346-369
- E. A. Laing*, Revolution in Latin American Legal Education: The Colombian Experience 370-415
- A. T. Ulman*, Businessmen's Visas to the United States 416-424

REPORTS

- R. C. Benitez*, Inter-American Legal Developments 425-462
- I. Zanotti*, Regional and International Activities 463-488
- F. Orrego-Vicuña*
A. O. C. Tolosa } Latin American Economic Integration 489-524
- M. M. Marti*, Taxation 525-554
- B. A. Landy*
G. R. Harper } Economic Developments 555-573
- L. G. Mallon*, The Oceans 574-584
- J. M. Denaro*, Aviation 585-598
- J. O. Dahlgren*, Inter-American Bar Association 599-620

SPECIAL FEATURES

- Legal Periodical Review 621-630
- Source Material 631-633
- Recent Books 634-636

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,

*J. D., Cornell University; Member, New Mexico Bar.

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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