

CHAPTER I

INTRODUCTION

I.1. Background

John Locke (1632-1704) in Chapter V of his writing titled “Second Treatise of Civil Government” (<http://www.constitution.org>) said:

...yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, ..., are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. ... as much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property.

Two major justifications given for original property¹ are effort and scarcity: John Locke emphasized on **effort** i.e. mixing labor with an object like clearing and cultivating virgin land while Benjamin Tucker² preferred to look at what is the purpose of property to solve **scarcity** problem. For something to be economically scarce, it must necessarily have the exclusivity of property and it is used by one person to exclude others from using it. These two justifications lead to different conclusions on what can be property. Intellectual property—non-corporeal things like ideas, plans, orderings and arrangements (musical compositions, novels, computer programs)—are generally considered valid property to effort justification, but invalid to scarcity justification. By either standard, one's body is one's property ([http://en.wikipedia.org/wiki/Private property](http://en.wikipedia.org/wiki/Private_property); see Appendix 1).

The rights of individual properties are protected by the American Constitution, particularly the Fifth Amendment stating “Nor be deprived of ... property, without due process of law; nor shall private property be taken...without just compensation.” The Constitution guarantees that every individual has right over his/ her private property and the government has no right to simply deprive or take it.

The protection of private property has been so important to American politics and culture and the ownership of private property has so far shaped the country's political system (Nedelsky, 1994). Property brings a paradox in America: it self-restricts government, whereas it requires a somewhat-strong government for

¹ For further explanation, see Appendix 1 on Private Property

² See Appendix 2 for further explanation about Benjamin Tucker.

protection. The focus of the Constitution is not a democracy but the protection of private property. American Constitution protects the individual right of property, meaning that every individual shall be secured from a tyranny over his/her property. The function of the government was to genuinely protect private property:

... the original structure of constitutionalism rested on an effort to prevent democratic control of property...property was the focus around which the basic issues of limited government were worked out. The story of limited government in America, thus, in part, the story of the triumph of the Federalist perspective and of the priority it accorded to property (Nedelsky, 1994: 3-4).

The Constitution guarantees that individual right of property shall be protected. However, the government still is allowed to take individual property (land) for the sake of the public by imposing its authority called the power of *eminent domain* as seen in the case of *Kelo v. New London* (http://en.wikipedia.org/wiki/Eminent_domain; also, see Attachment 3). The appropriation of Kelo's land indeed is a taking by the government. What really is a taking? A taking is an appropriation of land but it also can be in form of a loss of right to reasonably use a property (body) due to oppressive regulation:

Where the impact upon the individual is found to be unduly burdensome, if, for example, it deprives the owner of any reasonable use, some courts that use the balancing test will declare it to be a taking without even considering the public benefit, ... Finally, there should be a demonstrable justification for the regulation. This requirement demands that the objective be legitimate, ..., and that the means not be duly oppressive on the individual (Sloan, 1988: 22-24).

When a regulation goes too far and hinders the right of private property, a taking does exist. From Sloan's elaboration, which is of the American's Legal Almanac Series No. 78; thus, a law that bans abortion can also be categorized a taking because a woman's right to use her body is restricted by the ban, which is oppressive on her. In that regard, we can conclude that both the government's power of eminent domain to take individual land and the policy to ban abortion are no less than "property takings".

Human being cannot exist without his/her body. Human existence has to be equipped with a right of making action into reality—to think, to work and to keep the results of action. A libertarian condemns that an abortion ban definitely violates the right of woman to use her own body. All persons are the absolute owners of their lives, and should be free to do whatever they wish with their own bodies

(properties), provided they do not infringe on the rights of another to engage in that same freedom (see Appendix 3 on Libertarianism and Liberalism).

This thesis is to analyze the takings of private property in light of the abortion ban and *eminent-domain* power. Taking a property without a strongly reasonable argument is unconstitutional. In politics, to be sovereign a government has to have a power to take individual property for the sake of the public. The government's right to take individual's property (land) for public use is called a power of *eminent domain* (Sloan, 1988: 144). The conceptual bases of ownership of private property can be analyzed from American values of libertarianism³ and conservatism⁴.

American conservatism is a disposition to keep to the already-established ways of life in politics, culture and economy of the country. It opposes a progress but accepts a change as long as it is for improvement and based on the country's traditional values. The values can be modified with or adjusted to contemporary values for the sake of improvement but any attempt to abandon or replace the traditional values with the new ones will be totally opposed by the conservatives (<http://usconservatives.about.com>).

American libertarianism advocates a concept of free will by upholding a principle of unrestricted individual liberties. A libertarian accepts a progress and allows a replacement of the old value with the new one; when necessary all the old values from the past could be replaced. Libertarians are pragmatic; for them, an ultimate value rests on no moral ground and no absolute—but relative—truth. Human will decide which is true or wrong based on the objective truth (<http://en.wikipedia.org/wiki/Libertarianism>).

In this research, by a means of text interpretation two corpora⁵ i.e. the Partial Birth Abortion Ban Act 2003 and the U.S. Supreme Court Decision 2005 in the case of *Kelo vs. New London* are analyzed. The analysis will be focused on property takings suffered by woman and land owner.

Cultural values in America are much influenced by libertarianism and conservatism. Libertarianism (regardless of misnomer⁶: liberalism—Ed) and

³ Instead of liberalism I prefer to use "libertarianism". For further explanation about liberalism and libertarianism, see Appendix 3.

⁴ For further explanation about American conservatism, see Appendix 4.

⁵ corpus n, *pl* corpora: a body of writings or works.

⁶ misnomer : a wrong name or designation—liberalism is of liberal principles and theories. (*liberal*

conservatism have taken roots in American cultures since long time ago. The values are embedded in the politics as revealed from policies made by the three governmental branches i.e. legislative, executive and judicative (<http://usinfo.state.gov>).

The concept of property in America should refer to both divine right and natural right. Natural right is advocated by libertarians, who had been much influenced by the Enlightenment and deism whereas divine right is advocated by conservatives, who had been influenced by Calvinism. Divine rights based on Calvinism had been much believed and long practiced by Puritans in Massachusetts and Connecticut, the Dutch Reformed people in New York and New Jersey, the Orthodox German sects in Pennsylvania and the Huguenots in the south, the Scotch-Irish Presbyterians who were called the Puritans of the South in the mountains (Riley, 1959: 6). According to Riley (p.9), natural rights were introduced by free thinkers (deists) who emphasized on liberty of human action.

Natural right was philosophically advocated by Thomas Jefferson and other Founders. Life, liberty and property are the ultimate rights of individual; any compromise to ignore those rights can imperil human freedom and to restrict them is a tyranny (see Appendix 3). Property right in American politics was much affected by the Enlightenment and the political philosophy refers to John Locke and the economic philosophy to Adam Smith. The function of government is to protect individual's natural rights of life, liberty and the pursuit of happiness in form of material wellbeing or property (<http://usinfo.state.gov>).

Alexis de Tocqueville in his writing titled *Democracy in America* written in 1830s emphasized the role of pluralist government in the United States in protecting individual liberties, particularly in providing opportunities for personal development in form of material wellbeing or property (Dean, 1983; <http://usinfo.state.gov>).

Most conservatives believe in the supremacy of law while individual liberty should be subordinated to the law and in economics they support limited government, limited taxation, and balanced budget (see Appendix 4). Government's intervention in economy is perceived unproductive, deceitful and motiveless. For them, a system of free market economics will promote economic growth. They support a system of market because what they know is that the economy does work

means *not narrow minded, tolerant, or not literal*)

under the system. Competition in free market is more effective than a regulated industry, providing the absence of monopoly. They prefer to weaken federal government following the steps taken by the Founders who were distrustful of centralized state like Britain, from which they had just won their self-determination (USDFA, 2004).

In extremes a libertarian may call for Cultural Revolution whereas a conservative condemns it. A crucial difference between libertarianism and conservatism can be articulated by G. K. Chesterton in *The Victorian Age in Literature*:

"...real development is not leaving things behind, as on a road, but drawing life from them as from a root. Even when we improve we never progress. For progress, the metaphor from the road implies a man leaving his home behind him: but improvement means a man exalting the towers and extending the gardens of his home" (http://en.wikipedia.org/wiki/American_conservatism).

Conservatism continues to remain significant in American life. It can be seen from the growth of audience of Fox News Channel: From the years 1998 to 2004 the percentage of Fox viewers who described themselves as conservatives increased from 40 percent to 52 percent (O'Reilly, 2006; also, see Appendix 5).

I.2. Research Problem

The problem of this research is "What makes property-takings in light of Abortion Ban and *Eminent Domain* take place in America". Since America claims itself a country of freedom, which is explicitly declared in its Constitution, thus a property taking will indeed be a problem for the country. The two takings that are legitimated by the three governmental branches will generate a big impact to the future concept of private property in economic and political spheres. In this research I want to find out why Americans who adore individual freedom (individualism) can accept property takings by the government. Also, it is my intention to create a *small* theory on property rights in American perspective.

In building a new theory inductively I take the steps as follows: (1) to gather information based on available data and sources, (2) to ask questions of research i.e. one grand-tour question followed by two sub-questions, (3) to form categories (4) to look for my own theoretical pattern, (5) to develop or update a theory or compare it with others (Creswell, 1994: 94-6).

Theoretically, an abortion ban is a *taking* of woman's right of her property (body). Unbelievably the ban was legitimated by three governmental branches i.e. the legislative, the executive and the judicial. Also, a taking of land property was legitimated by the Supreme Court. In a quick look, here is the process of legitimating the takings of private property in the United States, which is well-known as a country of freedom:

President Bush signed a law banning a late-term procedure, which Mr. Clinton had twice vetoed. Polls showed that a majority of Americans was in favor of the ban (Wall Street Journal, Jun 2'04: D3). Bush's administration would take every necessary step to defend the abortion ban and expected to eventually go to the U.S. Supreme Court (Dow Jones, 2004).

In year 2004 the House voted 281-142 for the abortion ban and the Senate approved the bill 64-34. Previously in a 117-page ruling the U.S. District Judge, Phyllis Hamilton, who was appointed by President Clinton, said the abortion ban caused an unfair burden to woman in deciding a second-trimester⁷ abortion and was unconstitutionally vague while ignoring mother's health. But on April 18, 2007 the U.S. Supreme Court decided to endorse the abortion ban (Wall Street and Dow Jones 2004).

The issue of *Eminent Domain* as resolved in the 2005 U.S. SUPREME COURT DECISION in *Kelo vs. New London* became a heated topic of discussions. The Supreme Court decided: "The governmental taking of property ... in furtherance of economic development constitutes a permissible 'public use' under the Fifth Amendment". The Court held in a 5-4 decision, which was widely criticized and accused of violation of property rights and misinterpretation of the Fifth Amendment (http://en.wikipedia.org/wiki/Kelo_v._City_of_New_London).

I.3. Research Purpose

The purpose of this study is to find out "how and why property-takings can be accepted in America: On one hand, as a country of freedom America protects individual rights of property, but on the other hand it allows property takings. In finding the reasons on why America allows such property takings, this research

⁷ trimester *n* 1: a period of three or about three months (as in pregnancy).

explores the values embedded in the Constitution with emphasis on the rights of life, liberty and property. The result of this thesis is useful in understanding the concept of property rights applied in America known as the most liberal country in the world.

I.4. Research Questions (Guiding Hypothesis)

The two corpora i.e. the Partial Birth Abortion Ban Act 2003 and the U.S. Supreme Court Decision 2005 in *Kelo vs. New London* indicate that property takings are tolerable. What actually makes property takings be tolerated? I respond to one grand-tour question followed by two sub-questions—or as popularly called a “guiding hypothesis” (Creswell 1994:70, Locke 2000): Why are property-takings legitimated in America? Followed by 2 sub-questions: (1) What makes America allow the abortion ban? (2) To what extent can the power of *eminent domain* be applied?

I.5. Theory

In this study I refer to theories by Max Weber, Michel Foucault, and some prominent writers. The theories are to present an ideal model (pattern) of interconnected thoughts. The concept and the connection of the theories will form a mutual reinforcement in a closed system. Any explanation must fit into a logic inductive process of research. In using those theories it is not my intention to be constrained by any of the theories. In consistence with a qualitative study I am inductively developing a theory during the process of research.

Max Weber pondered on political judgment and value relevance in exploring the values of American culture. In value relevance to be rational in conducting a qualitative research, cultural values cannot be overlooked. Without signifying particular values of culture, any attempt to analyze a concrete reality of American society will be worthless. People’s actions are analyzed to find meanings in social life. In a process of interpreting or understanding, which is popularly called *Verstehen*, any actor is identified by getting inside the “head” and understanding his/her motif, belief and desire. Actor’s subjective action is objectively understood while the situation of doing action is learnt (Schwandt, 2000).

The guarantee of liberty is the continuous practice by individuals. America

proves that a guarantee of freedom is the freedom itself; there is no a machine of freedom. Based on a Foucauldian theory, individual liberty is undeniably fixed in American culture; it can be elaborated from what he said during an interview with editor Simon During (Foucault, 2001: 135):

M.F.:The liberty of men is never assured by the institutions and laws that are intended to guarantee them. This is why almost all of these laws and institutions are quite capable of being turned around. Not because they are ambiguous, but simply because 'liberty' is what must be exercised.

M.F. : ... I think that it can never be inherent in the structure of things to guarantee the exercise of freedom. The guarantee of freedom is freedom.

Q : Meaning that architecture⁸ in itself cannot resolve social problem?

M.F.: I think that it can and does produce positive effects when the liberating intentions of the architect coincide with the real practice of people in the exercise of their freedom.

Enlightenment has freed Americans from faith: liberty means to cut away moral order (Christians, 2000). Americans believe in freedom and set loose from faith that restricts them. Sovereignty as human beings is demonstrated by the mastery of natural order. By liberating themselves from nature they become autonomous and independent of authority. Freedom motif was the deepest driving force in the Renaissance and recognized during the Enlightenment, which was engendering reputation of natural science in setting people free and making them free thinkers.

Society can be distinguished on the basis of the 'mode of subsistence', which is the factor of survival. American society had obviously surpassed a mode of subsistence since long time ago and the economic surplus was then central to the country's politics (Garnham, 2001). Economic surplus appears in form of property ownership, thus the rights of property become central to American politics.

The concept of America's economy derives from its own legacy of culture during the era of conquest and colonization, which had made America different from its European origin. The concept of property was much associated with American capitalism, which was developed culturally instead of organically or naturally:

... with the profound Eurocentrism of Marxist theory. ... Marxist theory...suggested that capitalism evolved organically from within its own transformations. Whereas I came from a society where the profound integument of capitalist society, economy, and culture had been imposed by conquest and colonization. This is a theoretical, not vulgar critique. ...;I am

⁸ what he meant by architecture is a social architecture or a governmental structure—Ed.

questioning the theory for the model around which it is articulated: Eurocentrism (Hall, 2001: 103).

What Hall wanted to say is that the economic concept of capitalism including the concept of private property is uniquely American based on traditional culture of the colonists during the frontiers.

I.6. Method

Instead of hypothesis I use some research questions. My research questions are readily transformed into a hypothesis in form of a declarative statement that can be tested to be either true or false. At the end of the research what I have to say is “Here is how the American world looked when I conducted the research” (Locke, 2000: 13).

I contextually interpret mute evidences (document and written text) to find meanings, which do not explicitly reside in them but I have to interpret them based on the way of writing and reading. Words in written texts are not a transparent medium of realities. By interpreting texts based on context and condition of production, real meanings can be found. I am concerned more in interpreting texts to reveal realities rather than questioning whether the texts contain true or false statements. In analyzing texts I re-engage my research questions in broad cultural and institutional contexts as well as social order (Gabrium, 2000; Silverman, 2000; Hodder, 2000). I then make evaluation by (1) identifying the context of similar meaning and compare with different data (2) recognizing similarities and differences: people respond similarly to similar situations within cultural boundaries, and (3) assessing the relevance of general and specific historical theories to available data. In fact, this thesis derives from a library research.

I.7. Thesis Structure

This thesis comprises six chapters. Chapter One includes the background, research problem, research purpose, research questions (a guiding hypothesis), theory, method and thesis structure. The background highlights property takings in light of abortion ban and *eminent domain*. The problem of study emerges from the government’s policy to ban abortion and the Supreme Court’s decision to endorse the imposition of government’s power of *eminent domain*. This chapter also presents

a procedure of conducting a qualitative research inductively.

Chapter Two is about women and property by highlighting the right and sovereignty of property, cultural and political aspects and takings.

Chapter Three is exploring the first corpus i.e. The Partial Birth Abortion Ban Act 2003 by highlighting the culture and politics of conservatism.

Chapter Four explores the second corpus i.e. The U.S. Supreme Court Decision 2005 in *Kelo Vs New London*. It ponders on politics of libertarianism, government sovereignty, and private versus public rights.

Chapter Five is about a synthesis of American values based on conservatism and libertarianism by exploring pragmatism, absolutism and cultural conflicts.

The last chapter is the conclusion of my thesis in the form of a declarative statement or hypothesis, which is open for testable inquiries and further wrong-or-false proof.

