

CHAPTER 6

PROPERTY LAWS

There is one important level affecting return that was not mentioned in the last chapter - the property laws that existed in former Yugoslavia, the laws passed during the war, and those passed since the Dayton Agreement. Property laws may not seem to be important factors in considering the return of refugees and displaced persons, but they are critical, particularly in refugee flows where genocide and ethnic cleansing has been involved. Property laws can be used as a key instrument in ethnic cleansing. By first forcing people to flee for their lives and then passing laws which designate the property left behind as abandoned, in effect, properties are expropriated without compensation. When these same properties are then turned over to members of one's own ethnic group who have fled the territory of the other side, or if displaced people from the other side simply move into vacated properties, squatter's rights for these homeless people now complicate the legal issues involved in obtaining the property back following a peace agreement.

The situation gets even more complicated when three rather than two ethnic groups are involved. Thus, if a member of an ethnic group, A, becomes displaced and 'abandons' property where the majority population belongs to group B, and a member of Group B, who has fled the harassments of Group C, occupies that property, while the property of B in a third territory, in turn, is occupied by a member of Group C, then arrangements for unwinding the complicated mess become much more difficult than in two-way struggles. In fact, mathematically, they are six times as difficult to straighten out. For example, in Rwanda under a Tutsi-dominated government, Tutsi were required to return to returning Hutu, on very short notice (usually two weeks) Hutu property occupied after the war in 1994 and genocide ended, but no effort was made to restore property to Tutsi who had 'abandoned' property 35-40 years earlier.

The issue in ex-Yugoslavia is even more complicated than the complications of involving three instead of just two ethnic groups. For the situation does not just involve one country but two. Thus, Serbs who fled the Krajina area of Croatia and took over homes of Bosniacs in BiH, depend on the legislation as well as politics of two different states to recover their properties. Further, BiH is not simply one state but a very loose confederation of two states, Republika Srpska and the Federation, each with its own property laws. In effect property recovery involves not only three ethnic groups but three different legal regimes.

The importance of property recovery should not be hard to understand. For the average person's life savings are primarily invested in the family home, ignoring for the moment the investment in memories that any home contains; loss of one's life savings is a critical handicap to recovering from the traumas and devastations of war, particularly for the heads of household who are over forty. Further, the importance of the family home can be gauged when, in virtually every survey of displaced people and refugees, one of the most important, and usually the most important factor that refugees and displaced people want is good home, hopefully their original one or one comparable to it. Of course, getting a job and having security in their environment will be crucial as well. But a home is often a key means to recover status and sense of

security.

That is why survey results can be very misleading. For when refugees and displaced people are polled to ascertain their priorities, they will usually indicate that return to their homes is a high and often the highest priority. This may be for ideological reasons, or because they want to return to the status quo ante, or simply because they want to recover the equity and life savings of the home they left. That is why a survey can indicate that refugees or displaced people most want to return to their homes, while a different question may elicit a response that they are unwilling to return to their homes. These answers are only apparently contradictory. For one answer may refer to a highest wish and the other to an expression of intent. Any poll designed with any degree of sophistication will recognize this difference and try to differentiate between wishes and intentions, as well as the conditions attached to the latter.

This chapter, however, is focused not on wishes or intentions, the subjective aspects of the return process, but a very different objective set of factors influencing the process of return, the legal framework governing the ownership of property. That framework includes not only issues of title and ownership, and issues of occupancy rights as a different form of ownership than freehold title, but the conditions for transferring or otherwise disposing of such property rights.

Freehold title is the easiest to understand. It is the form of property ownership with which most westerners are familiar. It simply refers to the title to a property, whether a house or an apartment, and the right to repair, finance, sell, lease or transfer such property generally as one sees fit. But all states have restrictions of some kind on what is otherwise free title. For example, the state may give certain authorities expropriation rights to be exercised under certain conditions. Those restrictions may or may not contain conditions which protect the right of the owner to ensure he or she obtains fair compensation, but, in any case, interferes with the owner's right to dispose of his or her property as s/he sees fit.

There may be other restrictions on such freedom. For example, many if not most western states recognize tenant rights, the right of a person in legal occupancy not to be deprived of that legal occupancy by the owner or, at the very least, under very stringent conditions. Some jurisdictions even allow squatters rights, the rights of people in occupancy who may not have acquired such occupancy by legal means, not to be dispossessed if the owner cannot demonstrate an imperative alternative use for the property that was otherwise vacant.

All of this becomes more complicated when one is faced with occupancy rights rather than free title. It is a form of ownership. Thus, a tenant in some jurisdictions where there are rent controls may dispose of his occupancy right to another prospective tenant who wishes to enjoy the same low rents as the tenant in occupancy. In some jurisdictions this has effectively meant transferring a great deal of the equity value in a property not otherwise encumbered to a tenant. It is often viewed as an indirect form of expropriation.

In another form of occupancy right, ownership of a building may be held by a corporate entity in which the occupant is usually a member - a co-op in which one is a member and/or shareholder, or where one's union owns the title to the building as a whole. The member is usually given an occupancy right which entails the ability to occupy that apartment as long as one wishes and may include the right to transfer that

occupancy right to immediate members of one's own family or to other members of the corporate entity or to one's eligible to become members of the corporate entity or, in other cases, without any significant restrictions whatsoever. Restrictions on occupancy rights vary widely with the jurisdiction. As an example, ownership in a co-op apartment in New York may entail ownership in shares in the co-op in general conjoined with occupancy rights for a specific apartment unit (and possibly a parking space as well which may be as valuable as the apartment occupancy right). That share conjoined with an occupancy right may be able to be sold subject to the restriction that any prospective purchaser must be approved by a Board of Directors before a purchase can be completed. That may mean that the co-op may veto a sale to ex-President Nixon because such a sale would bring undue notoriety to the property in general. (This is a real example and not a hypothetical case.) Or the restrictions can be used to deny sales to certain ethnic groups, members of a certain 'race', etc. either directly or, where there are rights protections which prohibit passing laws which discriminate on the basis of race, color or creed, by indirect means. Thus, property in the form of occupancy rights which legitimize restrictions on possession and disposition provide a very formidable set of tools in the hands of those intent on ethnic cleansing.

There are many other aspects of property law, some much more tangential and others more centrally related to this issue. For example, the above discussion focused on ownership issues. But there are a whole set of issues related to the right to finance and the ability of financial institutions to provide financing for the repair, renovation, reconstruction or construction of homes and apartments. Such financing laws and rules can be used to enhance or to reduce liquidity in property depending on the policies of the regime.

Similarly, wherever there is a market in real estate, real estate agents are almost inevitably involved in conjunction with the existence of such markets. Legal regimes can encourage honesty in such agents or facilitate fraud and exploitation of desperate people. Laws and regulations governing financial institutions and the conduct of and compensation for real estate agents are all part of a legal property regime in virtually any jurisdiction in which there is a real estate market.

There is, however, one item specific to the ex-Yugoslav situation that needs to be introduced in order to understand the complexities of the situation in BiH and Croatia. It is the issue of "double occupancy". This does not mean two parties occupying the same property, but the occupancy by one member of a family of a property that has been 'abandoned' when the family has occupancy in another apartment or house. Double occupancy may be used to fill the homes of another ethnic group who have fled and left properties behind to discourage return, establish facts on the ground, to make provision for future need, or simply to 'steal' another's property and acquire that property by occupancy. Double occupancy may be encouraged or discouraged by authorities and the property laws they pass.

With this very sketchy introduction to the issue, we can now turn to an examination of the specific legal situation in BiH and Croatia.

The Socialist Federal Republic of Yugoslavia (SFRY) or ex-Yugoslav legislation distinguished between *real* property, property over which an individual has legal ownership title, and *virtual* property (my terminology), apartments "socially-owned" by companies, government organs or social organizations

in which residents were given *occupancy rights*. Occupancy rights, unlike most western legislation, could not be transferred by sale but could be inherited by family members. *Usage rights* are simply the rights of family and household members to exercise occupancy rights.

This law on occupancy rights and their transference, which pre-dated the war, is critical in understanding a few of the legal issues attached to the issue of property. In the last chapter I indicated that the total amount of housing in former Yugoslavia was quite adequate with a 30% ratio of properties in relationship to the total population. Unlike many North American jurisdictions where a significant proportion of the population may only be tenants with virtually no property rights whatsoever, in ex-Yugoslavia there was a very high percentage of private ownership which may surprise an outsider approaching this former socialist society with preconceived ideas about socialism and the absence of private property ownership often associated with such regimes. In ex-Yugoslavia, 80% of property was held by means of free title; 20% was held in the form of an occupancy right. In the cities, however, property held by means of occupancy rights constituted 50% of the housing stock.

This means that the benevolent occupying power with their financial clout have a great deal of ability to influence what happens to property held by means of occupancy rights. Outsiders can act as if occupancy rights were simply a more extended form of tenancy right and attempt to structure the situation to increase liquidity in property and enable the occupancy charges to be increased to reflect market rents and/or more closely cover the costs of repairs and renovations. Alternatively, the neo-colonial officials may regard the situation as an opportunity to make occupancy rights a property right with greater liquidity. In that case, the rights to sell, finance and otherwise dispose of such occupancy rights may be enhanced so that the focus is not on raising occupancy charges to market rents so much as ensuring that whatever equity is present in such properties devolves to the benefit of the occupant at the time the war started.

Clearly, in a situation such as BiH and Croatia, what is done will not be only a matter of economic ideology, but different determinations will have effects on the dominant nationalist ideologies. For example, if the desire is to transfer benefits to the squatters and effectively expropriate any residual ownership value in occupancy from those in possession before the war to those now in possession, then it may be more desirable to treat those with occupancy rights as simply having a peculiar form of rental right. This propensity can be further enhanced if, in the name of privatization, plans are made to privatize the ownership of the assets of apartment buildings so that the new capitalists can gain assets at fire sale prices from those with access to finances and the clout to reconstruct and rehabilitate the property. On the other hand, compensation policies and transfer policies from previous owners to possessors (presumably of the dominant ethnic group) may be used to enhance the dominance of one ethnic group and the virtual exclusion of another.

There are, thus, many ideological dimensions to the property issue which do not simply impact of the rights of displaced persons and refugees to recover and even repossess their properties but which entail the carrying forth of a nationalist ideological program of ethnic cleansing by other means, or entail setting up two very different forms of privatization of ownership, one that distributes ownership in homes and apartments as widely as possible and as much as possible to the people which occupy them, or a form a corporate privatization in residential properties which results in cities in which 50% of the residents have

no equity in their homes whatsoever but are simply tenants or renters. The choices are further complicated when the regime which helped instigate the war and which may have significant power or total power after is a corrupt one or one in bed with profiteers interested in massive accumulations of private capital in the form of property by taking advantage of the crisis brought on by a very horrific war and its aftermath.

All of these issues are further complicated by laws concerning which property has been abandoned and can be legally seized with the least interference. The *Law on Housing Relations for the Socialist Republic of Bosnia-Herzegovina* (1974) determined that occupancy rights were abandoned (with exceptions in cases of imprisonment, sickness or service in the army, but war is not specified as a mitigating circumstance) if rights of use were not utilized for six months. Thus, inherited law did not provide a right of return and repossession of occupancy rights for property after six months for victims who fled their properties during war. It is important to stress that this law was not passed during the war to benefit one party at the expense of another but was a law on the books when ex-Yugoslavia fragmented. Further, the *Law on Housing Relations*, the pre-war legislation regulating occupancy rights, applied to *virtual* property, property held by means of occupancy rights, as well as to property held directly by title.

Laws passed during the war built on this legal foundation for determining which properties were abandoned. They granted temporary occupancy rights and then subsequently canceled original rights and granted the temporary rights holders effective permanent rights. Thus, in Croatia, Bosnia and Herzegovina and in the breakaway Serb republic, a series of laws passed dealing with ‘abandoned’ properties, initially in effect, temporarily, but later, permanently, expropriated the rights of owners of those properties. For example, the *Law on Temporarily Abandoned Real Property Owned by Citizens* (1992- 6/92, 8/92, 16/92, 13/94, 36/94, 9/95 and 33/95) [Official Gazette of HZHB 13/93] allowed authorities to declare *real* property as *abandoned* after 30 April 1991 and to grant temporary, but only temporary, occupancy rights to others. The *Decree on Temporarily Abandoned Real Property Owned by Citizens During a State of War or Immanent War Danger* (1993) provided that once a request for rightful ownership was granted, the owner must be granted occupancy within 3 days if unoccupied or within 8 days if occupied by a temporary resident. This *Law on Abandoned Properties*, as amended, applied to *virtual* property (property held by means of occupancy rights) as well as *real* property.

Subsequent legislation went further and canceled the original rights and granted temporary rights holders effective permanent occupancy rights. In this next stage, a BiH law, *Amendment to the Law on Abandoned Properties* (22 December 1995) changed the previous *Law on Abandoned Properties* and provided that if properties with occupancy rights were not reclaimed by 6 January 1996 (or by 29 December if the individual resided within the territory of BiH) and usage commenced, they could be declared permanently abandoned and be reallocated permanently. Note that the law required that a claim be filed **and** that usage be resumed. Usage of destroyed or badly damaged properties could not possibly be rehabilitated in such a short time. However, the law was permissive; it did say “could” and did not say that such properties were automatically considered abandoned. Two months later there was clearly no remorse or regret for passing a law so unconcerned about the rights of property owners because the legislators went a step further and extended the law to apartments held by means of occupancy rights; *The Decree on the Abandoned Property Utilization Law* (21 February 1996) defined virtual (as well as real) property and chattels as abandoned on the same basis.

These laws were passed right after the Dayton Agreement. Yet Annex 7 of the Dayton accords and Annex 4 of the BiH Constitution under Dayton provided for the free right of return of all refugees and displaced persons to their homes occupied before the war *and required* legal changes to the property laws passed during *and before* the war; that is, the 1974 law was included. Given the extremely short time allowed to reclaim property rights under the Abandoned Property legislation passed during the war, it does not take much discernment to see this as an effort to expropriate, without compensation, the properties of those who left BiH. Such laws ran directly contrary to the benevolent peacemakers who wanted to snatch victory from the jaws of defeat and reverse the process of ethnic cleansing, but it could be rationalized in the name of reconstruction to provide the state with the clout to commence rehabilitation without the red tape of seeking permissions and authority from the 'rightful' owners. Most significantly, the laws not only flouted the spirit but the actual letter of the Dayton Agreement.

Two years later, the process of removing the property rights of owners without compensation began to be reversed, but not yet by recognizing the property rights of the initial owners. Rather, a process for providing compensation and for determining that compensation was passed with respect to property held in the form of occupancy rights. *The Law on Sale of Apartments with Occupancy Right* (6 December 1997) obligated the owners of apartments with occupancy rights to sell such apartments to the holders of those occupancy rights. Those occupancy rights could have been held by someone who possessed their property under the Law and Decree on Abandoned Property, thus giving the occupant a real right to purchase the property, which, if exercised, would have stood in the way of repossession by any returnee. The Law, however, did enable the original owner of the occupancy right who was in possession an opportunity to convert that occupancy right to freehold property, property held by direct title. The law allowed an application for such a purchase to be filed after 6 March 1998 by those who had not abandoned their property and who were in possession and actual occupancy and had resided therein for 6 months to convert the occupancy right to *real* property. Purchasers, however, had no right of resale for 5 years after purchase. The law also set the purchase price at 600 DM per square meter, increased or decreased by up to 20% depending on location and further reduced based on monies invested to obtain the occupancy rights, costs of removal of war damage, but not to exceed 30% of the original value, further reduced for depreciation based on 1% per year for not more than 60% of the value, further reduced based on 1% per full year of service, further reduced again at .25% per month for army service and at .12% per month for service in Civil Protection Units, and subject to 100% reduction for war victims (orphans and invalids) 75% reductions where 2 or more family members were killed in the war or a spouse of another spouse with a pre-school age child was killed, or by 50% of someone whose spouse was killed, and by 25% for civil or military persons who suffered 20% to 60% physical handicaps. There was no ambiguity about the intent of the law; it was aimed at directly benefitting those who had stayed throughout the war - overwhelmingly members of the dominant group in that area - and particularly those who had served and suffered from the war.

Finally, under pressure from the international community, two new laws were passed to reverse the intentions of the above laws favoring one's own ethnic group and preventing, in effect, the holders of the original property rights from regaining occupancy and possession of their properties. The first, *The Real Property Law* (1998), more formally known as the law *On the Cessation of the Application of the Law*

on Temporarily Abandoned Real Property Owned by Citizens (3 April 1998), [Official Gazette of the Federation of Bosnia and Herzegovina 11/98] provided a realistic procedure for both repossessing real property as well as addressing the needs of the temporary occupants. It provided that claims be filed within 6 months of the law coming into force and allowed 30 days for a claim to be processed and 90 days notice for a temporary occupant to move, except where the day of intended return of the owner is later than 90 days or when that occupant had been granted permanent occupancy prior to 7 February 1998 under the *Law on Cessation*; in such cases, the occupancy provision could be postponed up to one year pending finding a permanent apartment for the temporary occupant.

The second law went further and reversed the injustices to property owners of the laws passed during and immediately after the war. *The Law on Taking Over* (ZOSO), more formally *The Law on Taking Over the Law on Housing Relations* (4 April 1998) eliminated the right to cancel occupancy rights and deemed the occupancy rights holders in Article 6 to be refugees or displaced persons under Annex 7 of the Dayton Peace Accords (the General Framework Agreement for Peace in Bosnia and Herzegovina) unless it could be shown the apartment was abandoned for reasons unrelated to the war.

If the legal situation in BiH appeared prejudicial towards original owners of property or holders of occupancy rights, the legal actions of the Republic of Srpska were even more draconian and have not, as of the time of this writing, yet been reversed. For example, in addition to very similar legislation passed by BiH, the *Decree on Taking Over the Military Housing Fund of the Yugoslav National Army* (1992) allows property of ex-Yugoslav National Army (JNA) to be taken over as the real military property of the Republika Srpska Army when those ex-JNA occupants could not register their right to buy ownership. In effect, Bosniacs and Croats in BiH who would and did not serve in the Serb-dominated Yugoslav army that had initiated aggression against their own people were deemed deserters and lost the occupancy rights to their apartments. Thus, not only were the conversion rights (from occupancy to ownership) of those who fled denied, but the army was given the real property rights of ownership. Even worse, these draconian measures extended to real in addition to virtual property.

After Dayton, gestures were made to be fairer to original owners, but they were legal gestures and not substantive ones. The *Law on the Use of Abandoned Property of the Republika Srpska* (1996), which covered both real and virtual property rights, allowed abandoned property to be allocated to temporary residents for one year with the right of extension. But real property (not property held by way of occupancy rights) could be repossessed within 15 days if vacant, and within 30 days if temporarily occupied, a) *but only if the temporary resident is reinstated in his/her property in the Federation or Croatia*, and b) the temporary resident is compensated, including compensation for repairs, and/or c) alternative *appropriate* housing is found for the temporary occupant. Further, agreements for occupancy by either original owners or those who held occupancy rights were made null and void by the legislation. Court orders to obtain reinstatement are expensive to obtain, and, once obtained, are difficult to enforce, particularly if proof cannot be provided that the temporary occupant has appropriate alternative housing and/or reinstatement of rights in BiH or Croatia.

At the time of writing, the laws on abandoned property have not been amended yet to ensure that they comply with the conditions of the Dayton Accords, but negotiations are underway with the new

government to pass such legislation. It is difficult to know at this time, with the assumption by the moderate, Milorad Dodic as Prime Minister in RS, whether the new government in RS will be able or interested in overcoming the resistance in that region to return for the displaced people and refugees who fled. There is, however, little indication that the moderate leaders in RS are likely to act, and almost certainly unlikely to act before the elections in the fall of 1998.

On 26 June 1998, finally, and after considerable international pressure, the legislature of Croatia passed legislation with respect to its property laws consistent with those of the Federation and in compliance with the Dayton Accords. It was hoped that if the legislated expropriation of original property owners without compensation in the formerly Serb dominated and temporarily held Krajina enclave could be reversed, a domino effect would result in RS and allow, if not the repossession of property, the sale of those properties by their original owners. But it will be some time before we know whether there is a sincere intent in Croatia to enforce the laws passed consistent with the intentions of the Dayton Accords.

Since, as indicated above, Annex 7 of the Dayton accords and Annex 4 of the BiH Constitution under Dayton provided for the free right of return of all refugees and displaced persons to their homes occupied before the war, legal changes to the property laws passed during *and before* (1974) the war needed to be amended. *The Cessation Law* (1998) - *On the Cessation of the Application of the Law on Abandoned Apartments* (3 April 1998) [Official Gazette of the Federation of Bosnia and Herzegovina 11/98] - superseded the *Law on Abandoned Properties* and made decisions under that law null and void. (For example, Article 49 provided agreements made between third parties and owners or users who left the territory were null and void and Article 53 nullified the use of agents.) The new law also provided a realistic procedure for both repossessing property as well as addressing the needs of the temporary occupants. *The Law on Taking Over* (ZOSO) - *The Law on Taking Over the Law on Housing Relations* (4 April 1998) eliminated the right to cancel occupancy rights under 3 and 4 above and deemed the occupancy rights holders in Article 6 to be refugees or displaced persons unless it could be shown the apartment was abandoned for reasons unrelated to the war.

Thus, progress has been made on the legal front to advance the rights of refugees and displaced persons to repossess their properties, or, at least enable their sale, certainly in the Federation of Bosnia and Herzegovina and, most recently in Croatia. Positive signs are emanating from RS. But the legal situation is one thing; the situation on the ground is another.

Let me offer an example. If as indicated in previous chapters and as will be documented in greater detail in subsequent chapters, the original property owners, including those with either title or with occupancy rights, who formerly lived in what is now RS, are intimidated from or fearful of returning to their original homes, and even if they now want to sell, it has to be recognized that the property values in RS will be very depressed for a number of reasons: a) it is the one area of BiH with a property surplus if our previous calculations are correct, though this is unlikely to be the case for all areas of RS; b) the unemployment rate is extremely high in RS (and it is in RS that we find the greatest desire to return to their original homes); c) real wages in RS are much lower than in the Federation d) and the reason for 'b' and 'c' is that the economic situation in RS is very depressed. As a result, consistent with real estate markets

everywhere, property values will be even more severely depressed and, except for the displaced Serbs, there probably would not be a very active market for real estate in RS. So amounts of compensation available to original owners will likely be very low. Thus, the Bosniacs and Croats who fled or were forced to leave their homes in RS are likely to suffer a triple punishment, not only loss of the enjoyment of their homes, not only the loss of loved ones especially for the Bosniacs who suffered such a high percentage of casualties, but the loss of most of the value in their homes even if eventually compensation schemes are developed.

If war is politics fought by other means, or politics is war fought by other means, property law, therefore, (and the entire property regime, including legislation over ownership, financing, using transfer agents, etc.) is but another method of engaging in the war and politics of ethnic cleansing. But property laws are not only related to nationalistic politics; they are deeply embedded in economic ideology, not the ideology of capitalism versus socialism, but the ideology of corporate private ownership versus personal property ownership. Either could be encouraged.

Further, legislation is also a crucial and necessary instrument of the western peacemakers to fight ethnic cleansing, or, at the very least, prevent unfairness to previous owners, but the way it is done will influence whether corporate property ownership will be encouraged or whether family ownership of residential real estate will be encouraged. In fact, issues of fair compensation may be at odds with policies on return. For example, if a minority return policy is being pursued but is not being very effective, then monies put into that scheme will not be available to facilitate a compensation process. More indirectly, if a minority returns policy is the focus, but it is not being effective, then owners not in possession of their property will less likely be compensated fairly if the compensation is based on market values, and one area in the scheme (RS) is much more severely economically depressed. In other words, efforts at minority return can be counterproductive, not only in decreasing the resources available for alternative solutions, but in reifying ethnic cleansing because of the absence of economic liquidity to facilitate movement and the indirect economic costs to former owners who are now refugees and displaced.

Finally, I have merely touched on one aspect of the property regime. I have not explored the financing legislation available which effects transferability. Nor have I gone into the laws related to transfer of real estate agents. My interest, however, is less on being comprehensive about the property regime and more concerned about analyzing the effects of the property regime on the return of refugees and displaced persons.

As outlined above, however, It is completely understandable that the pressure by the international community would stress minority returns, not only because of ideological reasons as an effort to reverse ethnic cleansing, not only because the rights of the refugees and displaced persons must be recognized, but because the housing shortage in the Federation would be eased considerably, the economic prospects of RS would be improved, and the effective market expropriation costs would entail paying very little compensation to the displaced persons and refugees from what is now RS. It is in this very understandable light that we will examine the policy of minority returns in the next section, but only after we provide some more detail on the first phase of return which was majority return.