

Reparations for Recent Historical Injustices.

The Case of Romanian Communism*

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Abstract: The debate concerning the legitimacy of awarding reparations for historical injustices focuses on the issue of finding a proper moral justification for granting reparations to the descendants of the victims of injustices which took place in the remote past. Regarding the case of Romanian communism as a more recent injustice, and analyzing the moral problems entailed by this historical lapse, within this paper I argue that overcoming such a legacy cannot be carried out, as in the case of historical injustices situated more remotely in time, through the means of selective reparations, such as restitutions or compensations. For, even though they are justified from the perspective of rectificatory justice, selective reparations do not fulfill the requirements of social justice. Rather, I argue that the fall of the Romanian communist regime should have been followed by an equal distribution of all properties illegitimately seized by the state, to all adult Romanian citizens at that time, in order to attain the imperative of equal distribution of property among all citizens. The equal distribution thesis is the only way through which the Romanian society could have complied, at that moment of political and social renewal, with the requirements of justice. I also aim at explaining why other principles of justice, which either have or could have been implemented, cannot be properly justified. Finally, I analyze two main objections which could be invoked against my thesis, namely the economic efficiency objection and the legal realist objection.

Keywords: Romanian communism, reparations, historical injustices, rights, rectificatory justice, distributive justice, equal distribution thesis

Looking back on the Romanian post-communist policies regarding restitution and compensation for the wrongs perpetuated by the communist regime, we can adopt two viewpoints. The first leans upon the conclusion that these policies were not successfully implemented, meaning that the requirements of the series of laws and regulations regarding restitution and compensation issued after 1989 were not fully carried out by the powers of the state. An evidence of the shortcomings occurred along the process of implementing these series of policies consists in the fact that the restitution and compensation attempts are still debated and contested up to today (Government Ordinance no. 66/2015).

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This conclusion usually results from comparing the similarities and differences among reparatory policies carried out in the neighboring countries from Central and Eastern Europe (Kuti 2009) which share a similar communist legacy, or, more ambitiously, from setting beside various reparatory policies designed at diverse moments along human history (Elster 2004, Meyer 2004).

The second viewpoint concerns the deeper issue of the moral legitimacy of the reparatory laws and regulations, irrespective of their proper or improper application. As the first perspective implicitly encompasses a certain justification for the described policies, the second viewpoint is only formally separated from the first one. From this second viewpoint, the main question to be asked is whether the policies which were issued can really be considered as the most appropriate to be enacted after a radical change of political regime. In other words, the question to be asked is: which are the proper requirements of justice regarding reparations and compensations for the injustices perpetrated by an unjust political regime and how could they be best transposed into laws? In what follows, I focus on the issue of moral legitimacy of the reparatory laws and regulations, trying to answer these questions in the light of the injustices perpetrated during Romanian communism.

Historical injustices are defined as “major cases of past wrongs, in which all the original wrongdoers, and all the original victims, have passed away.” (Perez 2011, 153) This definition, which is accepted in the contemporary debate regarding reparations for historical injustices, highlights three essential aspects in order to consider certain historical events as historical injustices: firstly, the events are significant wrongdoings about which there is enough information, secondly, the victims of the injustices and the perpetrators are no longer alive and, thirdly, they regard persons who were not directly related to those wrongdoings, as are, for example, the descendants of the victims of the injustices as well as the descendants of the perpetrators of the injustices. This way of defining historical injustices makes the contemporary debate controversial, for it gets to deal only with aloof descendants of both the victims and perpetrators who should, today, be compensated or held accountable for wrongs which were neither suffered, nor committed directly by themselves.

If, in the case of older historical injustices, the necessity of any reparatory effort is debatable from a moral point of view, the recent historical injustices entailed, for example, by totalitarianisms in Eastern Europe, challenge more stringent moral issues, for part of the victims are still alive, as are, also, part of the perpetrators. Therefore, the immediacy of the need for reparatory efforts is somehow similar to the cases of criminal and/or civil justice. Yet, in the case of recent injustices, such as those generated by totalitarian regimes, the arguments for and against reparations are different from the arguments used in the case of older historical injustices (Crișan 2014). Among this different type of arguments, the most prominent one is the one regarding the way reparations should be granted.

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Still, the contemporary moral debate does not *yet* define Romanian communism as a historical injustice. The ambiguity of its character is given by its borderline position: neither is it properly a contemporary injustice that requires punishment and reparations obtained by the means of the judicial system, nor is it, yet, a historical injustice. At any rate, as an injustice soon to become fully historical – for those who were either victims or perpetrators of the injustices committed during the Romanian communist regime will not live forever – it constitutes a moral problem which needs to be taken into consideration. Romanian communism will be regarded as a historical injustice only when the society will comprise only descendants of the victims and the perpetrators. The fact that, at the present moment, the survivors and the descendants of the injustices co-exist with the perpetrators and with their descendants is not the only problem which occurs in questioning the issue of reparations. What is also of great importance concerning justice is the fact that all members of society, including those who have not been directly inflicted upon, or have participated, or are the descendants of the ones who carried out the acts of repression, have requirements of justice. Thus, a related problem – that of overlapping generations, which all have different demands of (social) justice within the same society – requires proper debate in the case of the communist injustices.

In addition, because Romanian communism represents a case of a *recent* injustice, which stands on the verge of transforming itself into a *historical* injustice, the main objections to the awarding of reparations for the injustices perpetrated in the cases of more remote historical injustices can barely be invoked, for they are not entirely applicable and, therefore, they are easier to be overcome in the case of the reparations for the injustices committed during this political regime.

In spite of this distinction between recent injustices, defined by the fact that at least some of the victims and perpetrators are still alive, and remote and/or historical injustices, defined by the fact that all the victims and perpetrators are no longer alive, the requirements for reparations in both cases should be similar, based on the argument that in both cases (similar) harms were committed either against persons or against groups of people, irrespective of the specificities of the reasons which led to the respective harm doing. When I affirm that similar harms were committed in both cases of injustices, I do not take into account the issue of retributive justice, i.e. of the imperative of finding and punishing the perpetrators of the injustices, which should be treated as an independent process in the aftermath of recent injustices. Rather, herein, I strictly refer to rectificatory justice, i.e. to the imperative of restituting the properties or compensating for their loss or for the suffering of the victims of the injustices, aiming at finding the strongest moral justification for the solution to be enacted in the aftermath of recent injustices. In finding the strongest moral justification I seek for a thesis which is compatible with most of distributive justice theories and has the least valid objections. More specifically, in what

follows, I treat Romanian communism as a case of recent injustice and I critically analyze the way in which rectificatory justice was implemented along the transition from communism to democracy, starting from the questions which should have been discussed and answered when awarding reparations has been, without a thorough examination, assumed as necessary, for it was viewed as a symbolic means of starting to respect the rule of law and property rights. The question to which I try to give an answer is whether reparations were the proper means of overcoming the communist regime and starting the transition towards democracy. In other words, I examine whether other solutions to the rectificatory problem had not better fitted the Romanian post-communist society.

One such solution could have been that of choosing not to award any special restitution or reparation to those who lost their properties or suffered other harms during the Romanian communist regime, yet choosing, instead, to equally distribute to all Romanian adult citizens all properties belonging to the state. For, in the case of communist regimes, the wrongdoings disseminated to so many levels and overpassed the limit of mere property seizure to such an extent, that the injustices of the communist regime could not be properly repaired or overcome simply by restituting or compensating only the citizens whose properties were confiscated and only by granting other type of victims a different kind of reparations for the sufferings they endured under the communist regime. Several arguments in support of this idea will be further approached.

Even if communism had the intention of designing an egalitarian society, history has taught us that communist regimes could not achieve, in a long enough time lapse of fifty years, real equality among citizens. Even worse, they created a type of social inequality based upon political affiliation or collaboration with the regime. Equality of opportunity, economic equality, as well as equality of resources were all strongly affected by the political participation of citizens. Even if we admit that from all these types of equality, the achievement of an equality of opportunities represents the most symbolic step on the path from communist regimes to democracy, in the post-communist circumstances, equality of opportunity had no chance of being reached without a preliminary equality of resources. The post-communist Romanian state had neither the political and economic means, nor the will to ensure equality of opportunity for all its citizens. Yet, it had a certain amount of resources, i.e. state-owned properties which, if properly, fairly distributed to all citizens, could have ensured a minimal basis for creating a proper framework for a further implementation of the equality of opportunity.

For that time lapse, by a just distribution of state-owned properties I understand that the state should have distributed its properties in such a manner as all adult Romanian citizens to own equal properties, based upon a previous evaluation of each citizen's wealth. It is obvious that a perfect equality of resources is highly improbable to achieve (Dworkin 1981). I believe that the

equal distribution of state properties would have led to similar opportunities for all citizens, even though their capacities and talents were, of course, as in any other society, unequally distributed. This thesis of the equal distribution of state properties would have symbolized a moral amnesty not only in the relation between the, up to then, harmful state and its citizens, but also among the citizens themselves, as all (victims and perpetrators) had been, yet, to different degrees, affected by the communist regime. This symbolic amnesty could have entailed a graceful moment of absolution of some of the bitterest wrongs of the past. By this equal distribution, a form of compensation would have been granted also to those who unjustly lost relatives, members of their families, for example in communist prisons or because of other political crimes and who, therefore, had lost the chance of being compensated themselves.

From a purely theoretical point of view, this moment of initial equality seems to be compatible with most theories of distributive justice.

Firstly, it conforms to an egalitarian principle, which applied to the post-communist context, entails the smallest amount of problems associated with it.

Secondly, it overlaps with a prioritarian principle, for it takes into account the ones who, because they were more affected by inequalities, be they inequalities of opportunities or of resources which persisted during the communist regime, were at the time of political change, worse-off compared to others. Herein, I refer to the fact that party members had more resources and opportunities than the 'average' citizens and the high ranked party members owned more resources than common party members.

Thirdly, compared to a sufficientist principle, which asserts that state property should be distributed with the result that each citizen gets to own a sufficient share of it, the equal distribution thesis is favored by that it does not need to answer the question concerning the reason why some of the citizens end up by owning larger properties while, others, smaller ones. In the case of applying a sufficientist principle, it would be hard to find the criteria which could justify the differences in wealth, following the distribution of state property.

These theoretical compatibilities to theories of distributive justice such as egalitarianism and prioritarianism, along with its prominence to the sufficientist theory, represent only the rooftop of the formal reasons which sustain the thesis of equal distribution of properties as the only principle of justice related to the problem of reparations for the injustices perpetrated during the communist regime which can be justified after the fall of communism. The body of this theoretical structure consists in the arguments which demonstrate that all the other competing theses have major issues regarding their justification and should, therefore, not be preferred.

With respect to the requirements of justice, there are two competing theses which can be formulated regarding post-communist reparations for communist wrongdoings.

The first thesis asserts that no reparations should have been awarded. This implies that neither an equal, nor an unequal distribution of properties should have been carried out. Against this passive option concerning reparations, few arguments can easily be brought about. The communist ideal of the equality of property among all citizen strongly differed from other contemporary egalitarian ideals, for it was based upon a society-wide leveling down of all well-off citizens. Thus, during communism, the 'equal' distribution of properties was based upon an initial unjust seizure of private property by the state. The citizens who, up to the instauration of communist regime, were well-off were the ones who were targeted as first victims of the regime policies regarding the confiscation of properties. Even small property owning ended up by being viewed as 'too much' of owning. Upon this idea, the agrarian reform together with the collectivization process, through which those who had more land and were better-off were brought to the same level with the others, were legitimized. Private property of citizens was limited by the communist state. Therefore, no citizen was permitted to own companies, equity or productive land, and common citizens were limited to own only one residence and few goods of personal use (1965 Constitution of the Socialist Republic of Romania, article 36).

This no-reparation and no-redistribution thesis is grounded on an argument which specifically concerns recent historical injustices, and is directed against all forms of rectificatory justice in post-communist Eastern European countries. Jon Elster argues that retribution as well as restitution and compensation should not be carried out for at least the simple reason that it is impossible to do it at full extent (Elster 1992, 15). In other words, unless all suffering endured by the former members of communist societies in Eastern Europe can be compensated for, nobody should be compensated. His argument asserts the moral inappropriateness of reparations based upon a factual impossibility to carry out an exhaustive process of reparation. Moreover, the impossibility to carry out the entire range of reparations required determines Elster to assume that all forms of rectificatory justice, regardless of their character of retribution, restitution or compensation, could be treated as undifferentiated and, on the basis of the argument of the factual 'impossibility' to exhaustively reparate, thereby rejected.

In the perspective of Elster's argument, the fact that the Romanian post-communist state has decided to carry out restitution or, in the cases in which restitution proved to be impossible, to award different forms of compensations lacked any moral grounding. Over and above, the way in which restitution and compensation were eventually carried out in Romania, after their stipulation through various legal provisions issued starting with 1991, as well as the fact that most of all these reparatory acts have woken much debate, would constitute, in the logic of Elster's argument, yet other two more reasons to reject the kind of reparations for (historical) injustices awarded in post-communist Romania.

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Forasmuch as it is impossible to identify, at full extent, the persons who suffered, as well as to prove that certain kinds of injustices were more blameworthy than others, it seems to become almost acceptable to reject the need to award reparations. This could be an easier way to avoid any further injustices which could occur by granting reparations only to certain citizens who do not have full historical entitlement to the properties they claim. At any rate, I admit that the way in which reparations were granted along Romanian post-communist time lapse was at least a risky endeavor, if not an unfair one. In the view of the historical truth that, during the communist regime, all citizens suffered, to a certain degree, different types of injustices, Elster concludes that it becomes impossible to compensate everybody.

Nevertheless, given that other solutions, better attuned to the requirements of justice, such as the equal distribution of state properties, could have become fully available in the aftermath of the fall of the communist regime, through a weakening and/or dissemination/transfer of state power to the people, one can no longer legitimize the no-reparation and no-redistribution thesis and eschew the necessity of awarding reparations.

The second thesis which can be formulated regarding post-communist reparations for communist wrongdoings affirms that reparations should have been granted under the form of special restitutions or compensations, and awarded only to those who could prove their loss, or could prove the confiscation of their property under the communist regime.

According to this thesis the right to reparations is morally grounded in the harm or the wrongdoing suffered by the initial victims of the injustices. This initial harm, understood as a violation of fundamental rights, in the case of libertarianism freedom and property, entails the right to reparation as the only requirement of justice. Therefore, the reparations awarded should not depend upon the contemporary situation of the surviving victims or of their descendants. Even if the harm or the wrongdoing brought by past injustices had not caused present negative consequences, such as a worse life for the victims or their descendants, reparations should still be awarded. Hence, in order to be able to determine what type of reparations should have been awarded in the aftermath of the fall of the Romanian communist regime, as well as to offer a possible solution to today's inherited injustices, one must appeal to what happened in the past. Libertarian theories are 'historical' in the sense that they take into consideration only the past and not a desired future end-state or end-result (Nozick 2001, 150-155). Therefore, being a backward-looking theory, it is a theory which conceives reparations only under the form of a right to reparations, which can be understood as restitutions of properties or compensations for the loss of properties or of individual freedom.

Even if, during communism, private property still existed in a limited form, each citizen being allowed to possess only a very limited number of residences, or a limited surface of land, the procedures through which the communist state

confiscated private property from its citizens were declared illegal by the post-communist reparatory laws. As a consequence, these reparatory laws established full restitution, by affirming that private property illegally confiscated by the communist regime should be given back, but *only* to those to whom it belonged before the communist regime came to power or to their descendants if the former did not survive.

This idea hides three libertarian assumptions. The first one argues that citizens have ideal moral rights to rectification through restitution and compensation, even in the case in which they cannot factually be determined. But this assumption, upon which the legal provisions regarding reparation for the injustices perpetrated by the communist regime were grounded and, then, carried out in post-communist Romania, should be questioned, because recent history has proved that their implementation led to other injustices.

The second one holds that property rights count among fundamental rights, such as the right to life or the right to liberty. This assumption has been already criticized by Thomas Nagel (Nagel 1995). From Nagel's critique could, as well, rise another question regarding post-communist reparations: is the right to property of greatest importance in the process of granting reparations? Even though Nagel argues that the right to property does not enjoy the same moral status as the other two above mentioned rights, the protection of this right is essential in any democratic society. Consequently, in the shift from a communist type of society, which grounded itself precisely on radically restricting the right to private property, any gesture such as that of awarding reparations for the seizure of properties becomes symbolic for the promise of protecting the right to property and for the success of setting up a renewed, democratic political order.

Above that, the same libertarian idea requires a third assumption, namely that of setting up an injustice-free cut-off date, from which to start awarding reparations for rights violations. In the Romanian legal provisions issued after 1989, the cut-off date varied. If, initially, the cut-off date for the restitution of properties was established as the 6th of March 1945 (Law No. 112/1995), a subsequent provision changed the cut-off date with the year 1940 (Law No. 10/2001). The Romanian post-communist reparatory laws, for example, ended up following exactly the framework of this type of assumption. Long after the fall of the Romanian communist regime and without a rich and consistent public debate, the reparatory laws starting from 2005 (Law no. 247/2005) and ending in 2013 (Law no. 165/2013) stipulated that restitution of the properties illegally taken by the former communist regime should be carried out in kind based on the rightful owners' previous legal right to property (Kuti 2009, 179; Stan 2013). According to these laws, the right to the restitution of private property, which was contained within the right to private property itself, became also inheritable from one's ascendants, following the civil legal regulations of heritage.

To this libertarian assumption which seems to support the full restitution of property or goods to their former owners, one possible reply is by asserting

that it is highly uncertain that at the moment at which communists took power in Romania, after the Second World War, all property rights were morally and even legally justified. *Retrospectively* analyzing the status of property rights, it becomes quite possible to learn that the communist regime was not the first to violate these rights. Consequently, in this matter, the cut-off date is always chosen in an arbitrary manner. By establishing it, allegedly, no injustices existed before that particular moment.

This arbitrariness could, as well, be a relevant sign that historical theories of justice prove to be unable to morally ground restitution. If it were to apply this idea to the post-communist Romanian reparative laws, it becomes quite obvious that the fact that they leaned on a prescription of pre-communist injustices led to an incorrect reparatory scheme. In any case, historical justice theories require a regress in time, in order to establish the validity of the entitlement to the goods and/or properties in question. While applying the paradigm of historical justice theories to the case of Romanian reparations after communism, a mere regress in time to the period before the communist regime came to power would show that, in most cases, the validity of the entitlement for the properties of the claimants cannot be, as easily, declared as certain.

Howbeit, both the year 1945 and the year 1940 represent mere arbitrary cut-off dates, groundless moments of initial acquisition of property. Moreover, it is impossible to legitimately establish such an initial moment in time, which does not present an arbitrary, therefore unjust trait. Besides that, arbitrarily choosing a cut-off date entails an epistemological difficulty: with regard to past injustices, no one can be totally sure that they have not been preceded by former injustices and that a just starting point can be established. Yet, finding and establishing such an initial just moment represents a requirement in the libertarian theory of justice. Even if I agree that a libertarian theory of distributive justice such as that formulated by Robert Nozick could, at least at a first glance, endorse a right to reparations for the citizens who had their property rights violated by a regime such as the communist one, I consider that its requirement to establish an initial point clear of any injustices would block any attempt to apply these libertarian claims in the case of the Romanian process of overcoming communism.

Taking into consideration only the infringement of property rights by the communist regime, thus neglecting the current status of the initial victims or of their descendants, the above discussed reparation thesis supports the necessity of restituting to the owners or to their descendants exactly the same properties, in the exact amount due; this backward-looking scheme simply searches for the legal reenactment of rights that cannot, ultimately, be morally grounded. Beyond this critique regarding the moral legitimation of the mere legal enactment of reparatory policies, another relevant argument can be brought about: legal actions usually demand various types of resources, such as time or money. In the case of post-communist reparatory legal provisions, the ones who owned properties before the communist regime took power and were entitled to

property rights needed to employ, after the 1989 regime shift, lots of their resources, in order recuperate their confiscated properties. There were many cases in which they preferred to sell, at low prices, their litigious rights to speculators who considered them an investment. This situation creates yet another inequality. Hereby, victims or successors of victims who had their property rights violated by the communist regime became, among themselves and also before the law, unequal.

Besides competing with the other two theses regarding what should have been done at the beginning of post-communism, i.e. the no-reparation thesis and the special reparation thesis, the equal distribution thesis is exposed to two major objections. The first one is based on the economic unfeasibility of implementing such a distributive principle and the second consists in a legal type of objection, based on a realist conception of the law and of its grounding.

The economic objection is based on the difficulty of correctly implementing such a distribution and on its lack of efficiency. This objection to the equal distribution thesis stands upon the premise that economic efficiency and economic growth are values supereminent in regard to the moral value of justice. Consequently, this objection sets the two values, which pertain to different domains in opposition. This objection subtly assumes that an equal distribution of resources would in itself cause economic downturn. However, not all economic theories consider that an initial moment of equality of properties is an obstacle to economic growth. On the contrary, this initial, graceful, moment of equality of properties may be considered as a condition of economic growth (Stiglitz 2015).

Against this objection, we could argue that the equal distribution of state properties would have enabled citizens to seize economic opportunities to a much larger extent than any of the other two competing principles could have allowed. There is a strong economic reason to prefer the equal distribution thesis to the other available thesis, even though not all citizens used those opportunities, or were able to become entrepreneurs. Against this objection, which states that an equal distribution would necessarily lead to an inefficient and, thus, bad economic outcome, following Stieglitz's argumentation, one could assert that the equal distribution thesis numbers among the theories which, if properly applied, could entwine the moral grounding of reparations for historical injustices with the onset of an economic growth.

The second objection to the equal distribution thesis pertains to the paradigm of legal realism. It refers to the impossibility to ground the equal distribution thesis in the Romanian post-communist legally setting. Forasmuch as, at any point after the 1989 political shift, neither the Romanian Constitution, nor the other issued laws were compatible with such an equal distribution of state property to all its adult citizens. This springs from the fact that neither the legal provisions of the 1965 socialist Constitution, which one had expected to contain the idea of equality of wealth among citizens, nor the 1991 first

democratic Constitution supported or even mentioned the implementation of this type of egalitarian perspective. Even further, because of the fact that Romanian laws used to be, and still are in a great amount, strictly grounded in legal and/or political considerations, thus putting aside any deeper, moral justifications, the moral requirements of justice, claimed by the equal distribution thesis, may have seemed to be incompatible with any legal requirements which were enacted within the Romanian society, be it the communist or post-communist. This might be the reason why such a thesis could not have been implemented at the dawn of Romanian democratic state and why it was replaced by various other reparatory laws which resulted in incomplete, sometimes even unjust, compensatory policies and process. The reparatory idea, according to which compensations were directed towards those who had their properties confiscated by the communist regime and, moreover, could prove that their entitlement to property rights had existed prior to the communist regime, seems to be most fitted for the Romanian legal system. Yet, from a purely legal point of view, the fairness of the reparatory laws issued in post-communist Romanian setting was not properly questioned and remained, therefore, unimproved and unreformed. Within the Romanian legal framework, it is considered that laws have to be respected and obeyed, irrespective of their being grounded upon a proper moral justification. Explained differently, in the Romanian legal framework, moral principles, such as the requirements of justice, could be taken into account, yet they are only peripheral in the process of grounding the legal principles. What was, and still is considered critical in grounding the legal principles in the Romanian legal system, are the values which are not external to the social and political realm.

Oddly enough, the idea that especially the laws issued after the fall of the Romanian communist regime have to respect, if not even to promote social values which are considered important for democracy, also serves, to a significant extent, for supporting the thesis of equal distribution, for it entails a pragmatic implication. Namely, in the implementation of the thesis of equal distribution, a greater social cohesion is embedded.

In short, the equal distribution thesis does not only fulfill the requirements of justice, but also supports values which are independent from moral considerations and are essential to democracy in post-communist times. Therefore, the equal distribution thesis is fully compatible with democratic values such as social cohesion and political stability. History has proved that in the absence of a moral amnesty which could have been accomplished if the equal distribution of all state properties had been carried out, both social cohesion and political stability have been powerfully affected in the aftermath of the fall of Romanian communist regime.

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