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Capitalism and the Legal Foundations of Global Reparations

Abstract: It is widely contended that Africans were complicit in enslaving other African people, that slavery was legal at the time it was in force and, hence, that demanding reparations from states can have no legal basis. Drawing on the work of Nora Wittmann, this essay questions these presumptions, advances the argument that there is a legal basis for reparations, and puts the case for grounding the legal approach within a wider political economy of reparations.

Keywords: capitalism, reparations, political economy

I. Introduction: Capitalism, Slavery, and Reparations

In 1944, Eric Williams rigorously demonstrated what has since remained irrefutable: that the enslavement of African people was central to, and remains vital for, the institution and functioning of capitalism (Williams [1944] 2021). Today, the uneven and unequal world capitalist system continues to trigger new and worsening existing economic and ecological crises. These have become existential. Thus, a fundamental critique of capitalism must include the demand for reparations to African people (Mueller 2023; Obeng-Odoom 2023). The 2022 Dakar Declaration puts this case forcefully (African Economic and Monetary Sovereignty Initiative 2022).

But antireparations arguments stand in the way. Was slavery legal? The dominant view among legal scholars is that even if slavery has been outlawed now and slavery was morally wrong at its apogee, the principle of nonretroactivity should operate to stymie any legal claims for reparations. Is the question of reparations, then, a merely academic one for debate among legal scholars (Brophy 2001, 2006; Posner and Vermeule 2003; Brooks 2004)?

Economists also oppose reparations, but for different reasons, such as their impracticality and divisiveness (*The Economist* 2020, 7–8, 48–50). More radical economists and analysts support reparations but oppose the legal approach. For William Darity Jr. and A. Kirsten Mullen:

> Jurisdiction over the matter of black reparations should be removed from the judicial system for three fundamental reasons: (1) Lawsuits brought against corporations, colleges, and universities for their participation in slavery are unlikely to succeed because slavery was legal at the time that they engaged in the practice. Their activities were undoubtedly immoral, but they were not illegal at the time. (2) In order to sue the U.S. government for reparations for the continuation of racial violence and discrimination in

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> the post-Civil Rights legislation era, one would have to establish that U.S. government agencies knowingly and intentionally did not enforce the new laws. This would require an effort of Xena-esque proportions. (3) The courts do not have the capacity to implement or enforce any legal mandate they might hand down for black reparations. (Darity and Mullen 2020, 257)

These concerns are addressed by Nora Wittmann in *Slavery Reparations Time Is Now* (2013). At the heart of the book are the UN International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts. These articles delineate under what modern conditions crimes against humanity could be litigated against nation-states. Under these articles, two elements need to be established: namely, that the states were either (1) directly (commission) or (2) indirectly (omission) responsible for acts that, at the time they were committed, were illegal under international law (Wittmann 2013, 2–3). The critical legal principles in this book are *international law*, *nonretroactivity*, *acquiescence*, and *laches*.

What we regard as international law is central. What constituted international law at the time of slavery? Was international law just European or American law, or was international law a plurality of laws, including African customary law? Drawing on historical evidence and decided cases, Wittmann demonstrates that during the time of slavery, international law was a pastiche of law that included customary law. Europeans' acceptance of customary law, for example customary law shaping the form of trade, bolsters the claim that such law must also be considered in establishing the prevailing international law on slavery and enslavement.

On this and on other bases, related to nonretroactivity and the principle of *laches*, Wittmann argues that slavery was illegal for three reasons. First, before the law proclaiming slavery to be legal was promulgated, slavery had been outlawed in the slaver countries or was illegal according to other prevailing types of law. So, the prevalent legal position internationally was that slavery was illegal. Second, the law that made slavery legal was imposed on African nations by force and fraud. African practices of servitude that the slavers treated as equivalents to slavery were quite different from chattel slavery: they involved only other Africans, and within these systems servants or "slaves" were not regarded as chattel—for example, such servants had rights of appeal. Third, because slavery and the system it established continue to this day, the demand for reparations is not estopped by the principle of nonretroactivity.

Wittmann also contests the argument about acquiescence, the idea that because Africans were complicit and, hence, could be said to have aided and abetted the crime of slavery, they should lose any legal right to claims for compensation. According to Wittmann, African complicity was largely the result of coercion. She demonstrates the many ways in which Africans resisted their enslavement, showing that, ultimately, most of those who participated in the slave trade had little or no choice: further resistance would have contributed to their own enslavement. This enslave-or-be-enslaved dynamic was rigorously maintained with armed force.

The governments of slaver countries were aware that they were involved in illegality. In their own countries, slavery had mostly been outlawed. That they continued to enslave Africans—by writing the codes and laws for doing so, by providing licenses to the companies involved, by taxing such companies, or by investing in slavery themselves—made those states complicit. This complicity benefited the enslavers, who reaped substantial profits and power from the slave trade. This spurred on the Industrial Revolution. But Africans lost people, flora, and fauna. Wittmann argues that it was slavery that gave birth to underdevelopment. Prior to enslavement, Africans had used their natural resources for their own livelihoods, but since slavery, those

resources have been exploited for the benefit of former slavers. The current system of global development is the heir of enslavement, and so the crises precipitated by enslavement continue.

Under international law, Wittmann contends, historical slavery is a crime against humanity. Such a crime is not subject to any statute of limitations. If addressed by reparations, however, this system of continuing destruction of the African people would be dismantled, because the international law of reparations entails both restitution and the discontinuation of the crime. From this basis, Wittmann contends not only that there is a legal case for reparations, but also that successful litigation of that case would save capitalism from its worst forms by recompensing the theft from Africa. Thus, Wittmann calls for all activists in the fight against climate change and against capitalism itself to join the reparations movement. She calls the reparations movement the mother of all activism because when it triumphs, all other movements will succeed legally and morally.

II. Law, Economics, and Political Economy

The book's discussion of the legal approach to reparations could be extended in three ways. First, while its focus is on international law, more attention to local and national law could help strengthen both arguments and activism supporting reparations. Locally, this approach could even more thoroughly engage specific African laws and norms, such as the Manden Charter,[1] that are stridently opposed to slavery and strongly advance the equality of all. Nationally, the experiences of the US, one of the biggest spaces of enslavement, could be examined a bit more to provide a context and to build the case. The national legal struggles of key organizations in the reparations movement, from the Afro-Descendant Institute of Human Rights, led by Mustafa Ansari to the work of Nketchi Taifa, President and CEO of The Taifa Group, LLC, and a founding member of the National Coalition of Blacks for Reparations in America (N'COBRA), for example, could be engaged. US courts have dealt with some landmark cases that could provide a point of departure in contesting unconstitutional discrimination. Take *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 833 (C.C.D. Mass. 1822) (No. 15,651). In that case, a US court addressed whether African enslaved people were incapable of ruling themselves. According to the court, as barbaric and uncivilized people, Africans needed help to be governed and tamed. Europeans and Americans were, therefore, doing Africans a favor by enslaving and, hence, taking care of them (Muhammad 2004, 887–89). Such rulings are clearly fatuous given the outstanding Black economies that Black people have created and nurtured around the world, from Tulsa in the US (Oklahoma Commission 2001), to the Great Zimbabwe in Zimbabwe, to the many cities and regions in Egypt (see, for example, Diop 1974).

Although Wittmann does not advocate litigation for reparations, preferring a political strategy, the presumptions of legal decisions such as those described above could be robustly challenged and legally contested. Activists could legitimately pursue multiple regional legal options around the world, with different plaintiffs and defendants based on diverse contexts. If necessary, an entity like the African Union could consolidate some of these cases and prosecute them on behalf of all plaintiffs. Litigation might help document the advanced civilizations of African peoples and delegitimize the Afro-incompetence argument, in order to provide a stronger basis for reparations. Testing out the reparations case in courts could help build the legal foundations of reparations.

[1] Manden Charter, proclaimed in Kurukan Fuga (Mali Empire), thirteenth century, https://ich.unesco.org/en/RL/manden-charter-proclaimed-in-kurukan-fuga-00290.

Consider the two affirmative action cases, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023), which, along with its companion case *Students for Fair Admissions, Inc. v. University of North Carolina*, was recently decided in the US Supreme Court. Although not about reparations per se, Justice Clarence Thomas's concurring opinion fleshing out the decision of the court contains some clues about how a reparations case could be framed. At the very minimum, such a case would clearly need to pass the "strict scrutiny" test. So, a claim of repair would need to (a) spell out the concrete, measurable, and quantitative benefits of reparations, stressing the exact *period of time* in which the effects of reparatory justice could be envisaged, (b) avoid harming others, (c) be capable of being objectively ascertained by the judiciary, and (d) show that there is a constructive alignment between the goal and the means to achieve it. 600 U.S. at 252-78 (Thomas, J., concurring). The case would need to be so compelling that it can meet the high bar of "judicial skepticism." 600 U.S. at 257 (Thomas, J., concurring). One way to mitigate the doubt is to be narrow and specific, rather than broad and broad-brush. As Justice Thomas notes, "any attempt to compensate victims of past governmental discrimination must be concrete and traceable to the *de jure* segregated system, which must have some discrete and continuing discriminatory effect that warrants a present remedy." For Thomas, this "close remedial fit" is what must be established. 600 U.S. at 260 (Thomas, J., concurring). Could claims be "judged based on the actions of . . . great-great-great-grandparents?" Justice Thomas thinks not, especially when such contentions are only demonstrated with correlations, not concrete causal proof, steeped in racial determinism centered on the average Black person without taking into account agency, context, institutions, or a wider web of other identities including religion, class, city, and country. 600 U.S. at 278-86 (49–58). A reparations case that contains such elements should pass the test of constitutionality as seen by a literalist justice and could easily be supported by a purposive jurist (Obeng-Odoom 2022).

Second, Wittmann's book could have engaged works investigating the more contemporary economic drivers, consequences, and approaches to address the resulting racial wealth gap a bit more. Neither Wittmann's (2013) book under discussion nor Wittmann's (2016) more recent article examines "the economics of reparations" (Darity and Frank 2003) or the much older work on reparations and justice in John Maynard Keynes's *The Economic Consequences of the Peace* ([1919] 2019). Economists have proposed multiple approaches to measuring the appropriate size of a reparations bill, with estimates ranging from $15–20 trillion US in reparations in the United States and $9–10 trillion in the Caribbean to around $100 trillion in Africa (for a review, see Darity and Mullen 2020; Craemer et al. 2020; Obeng-Odoom 2023). A legal approach could usefully engage and, perhaps, reconcile these figures and methods. This transdisciplinary analysis could help to establish additional methodologies for estimating ecological reparations.

Third, while key purposes of seeking reparations are to bridge the racial wealth gap (Darity and Mullen 2020) and address injustices from war (Keynes [1919] 2019), the legal case for reparations could also be used "to work out an evolutionary and behavioristic, or rather volitional, theory" of reparations (Commons 1924, vii). Such a theory must engage with principles of mechanism (Newtonian classical economics), scarcity (neoclassical economics), and structuralism (Marxian economics). But it must go beyond these to be grounded in institutional and evolutionary economics, an approach to economics that pays attention to the rules which shape and are shaped by groups and intergroup relations, including constitutional law, common law, statutory law, and the law of property (Commons 1924). Drawing on these currents and the stratification economics of Samuel L. Myers Jr. (see, for example, Myers 2011), as well as that of other stratification economists committed to an ongoing challenge of capitalism, could also provide the wheels for this legal approach to reparations.

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