Marxist theory of law

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Review of Between Equal Rights a Marxist Theory of International Law

Between Equal Rights is an adaptation of China Miéville’s PhD thesis, in which he offers both a comprehensive history of the development of international law and a devastating critique of the liberal idea that it can be used against imperialism for progressive ends. In doing so he also addresses the question of the legal form at a theoretical level, attempting to address the difficult and recurring question: “What is the nature of a law between bodies without a superordinate authority?”

In the context of an antiwar movement that often used the “illegality” of the US / UK invasion of Iraq in 2003 as a key criticism of the ensuing war and occupation, one can understand why Miéville has entitled his first chapter “International law has become important.” He starts by pointing out that international law is often lacking in theory and tends to be defined by its supposed regulatory effect, rather than systematically looking at the legal form which, for Miéville, must be the fundamental unit of analysis. This review will focus primarily on Miéville’s analysis of the legal form, his criticism of international law, and his argument that law, including international law, is inseparable from violence.

The legal form

Miéville rejects both positivism (the idea that the practice of states constitutes the primary source of international law) and naturalism, which sees basic principles of law as derived from universally valid principles of justice. He rightly argues that neither is persuasive from a materialist point of view. He approves of McDougal’s view of “law as inextricably part of politics?” and his view that interpretation not just something done to understand law but “part of the process that is law,” but points out that this still does not explain the existence of law as a distinct part of political process.

Miéville devotes chapters three and four to an examination of the legal form, with chapter three providing a detailed exposition on the theory of Pashukanis, who was the most famous Soviet Marxist legal philosopher in the 1920s and 1930s as well as the only one to be significantly recognised outside the USSR. While Pashukanis saw himself as building on a theory that already existed in Marx and Engels, Miéville sees this as overly modest; it may be more accurate to say that Pashukanis used the theoretical tools of Marxism to tackle an entirely new subject. Pashukanis’ book The General Theory of Law and Marxism published in 1924 can be seen as “the starting point for Marxist jurisprudence?” with its “attempt to approximate the legal form to the commodity form?” Commodity exchange occurs “when man becomes seen as a legal personality - the bearer of rights (as opposed to customary privileges).” It is therefore an exchange where two property-owning agents are equal and opposed, so that “contestation is at least implied” and “a specific form of social regulation is necessary” in order to mediate this - namely law.

Miéville argues that this theory of law is preferable to other Marxist views, e.g. of law as “an ideological fiction, imposed on a social reality to which it has no correspondence by some organ of centralized authority.” In his view, although there obviously is an ideological function to law, including international law, this does not explain “why this “idea” of international law should have arisen at a certain time and
political-economic context. Similarly, sociological theories of law, which treat[ed] law...as the manifestation of state coercion? are rejected because they direct their attention exclusively towards the class interests served or the economic functions performed by one or other measure of law or punishment?, instead of why these interests should have been served by the legal form of regulation.? In other words, Pashukanis, like Miéville, insists that the key question is why the legal form has been chosen rather than its effects. This may be true, but it is never fully explained why Marxists should not be just as interested, if not more so, in understanding and explaining the repressive, pro-capitalist effects of the law; arguably Beyond Equal Rights could benefit from some more detail on the latter.

This is not to deny the theoretical importance of Pashukanis? work on the legal form; its basis in Marx?s own writings is shown when he quotes from Capital Volume One ?In order that these objects may enter into relation with each other as commodities, their guardians must place themselves in relation to one another as persons whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and alienate his own, except through an act to which both parties consent.? This convincingly shows the basis of law in the need to regulate relations between individuals exchanging commodities.

While Pashukanis?s writing is an essential basis for Miéville?s theory, it did not in itself focus mainly on international law. However, he did write an entry on ?International Law? for the Encyclopaedia of State and Law published between 1925 and 1927 by the Communist Academy, which is reproduced as an appendix in Between Equal Rights. Here he developed his commodity-form theory of law, writing for example that ?Every struggle, including the struggle between imperialist states, must include an exchange...Every exchange is the continuation of one armed conflict and the prelude to the next.? He also briefly described how ?The spread and development of international law occurred on the basis of the spread and development of the capitalist mode of production.?

Miéville spends chapter 4 developing the application of Pashukanis? theory to politics, and then to international law. He argues that the social relations of capitalism can be revealed through law in many different ways, and makes the important point that ?Manifestation may not be one-sidedly in the interests of capital: class struggle is intrinsic to capitalism, and the attempt to ?domesticate? resistance means that ?progressive? laws may be passed at times of working class strength.? He cites Marx?s discussion of laws limiting the working day - it was in this context that Marx pointed out both the space for contestation, and the unequal bargaining power of the capitalist and the worker in this situation, stating ?Between equal rights, force decides.? 

Miéville then discusses ?state-derivation? theory, whereby the class character of state power is concealed and coercion appears as ?emanating from an abstract collective person, exercised...in the interest of all parties to legal transactions.? However, it is here that his views begin to diverge from those of Pashukanis who argues that ?coercion...contradicts the fundamental precondition for dealings between the owners of commodities,? which is in sharp contrast to Miéville?s (correct) view that ?disputation and contestation is intrinsic to the commodity, in the fact that its private ownership implies the exclusion of others.? This leads him to the important point that ?This system of social production relations generates a permanent and general requirement for means of ?defence?... Without a constant threat and / or application of force, commodity production would stand in danger of rapid subversion and breakdown.? 

However, what is crucial for Miéville about Pashukanis?s theory is that the state is seen as contingent to the legal form, so that the lack of an international sovereign does not mean there is no international law. He argues that ?The entire feudal legal system rested on...contractual relations, guaranteed by no ?third force?. In just the same way, modern international law recognises no coercion organised from without.? It
therefore becomes possible to understand why legal systems without a sovereign are regulated by ‘self-help’ remedies - that is, violence and coercion. This is undoubtedly a brilliant insight, compared to which, as Miéville notes, ‘The signal failure of much mainstream international law to make sense of sanctions and violence is marked.’ It applies to international law since ‘despite the importance of the UN in international law, it is in no real way a superordinate authority...The only bodies able to provide the necessary coercion for international law are the subjects of that law themselves, the states.’

The history of international law
The first half of Between Equal Rights is extremely abstract and theoretical, but in chapter 5 Miéville turns to consider the history of international law. He stresses the distinct nature of modern international law, which, in his view, cannot exist without sovereign states, and distinguishes it carefully from ‘written agreements between rulers of pre-feudal antiquity.’ While certain institutions of international law ‘can be traced across the historical rupture to modernity,’ it is only ‘with the triumph of capitalism and its commodification of all social relations that the legal form universalised and became modern international law.’ Taking the example of treaties, early agreements can be distinguished from those under modern international law because the subjects are not sovereign nation states.

Miéville goes on to discuss where international law originated, criticising theories that regions such as Asia and Africa had ‘international law’ which are ‘sometimes adduced without argument, simply by reference to the existence of interacting polities.’ He does not see international law as one Western system, or one Western and one Eastern system, but as ‘the dialectical result of the very process of conflictual, expanding inter-polity interaction in an age of early state forms and mercantile colonialism.’ Rather than international law spreading as a result of colonialism, international law is colonialism. A key example given to back up this bold claim is the discovery of the Americas and the ensuing period of mercantile colonialism, which ‘gave rise to a vast number of disputes which the scanty International Code of the Middle Ages was quite unable to settle.’ Hence the Treaty of Torsedillas, on 2 July 1494, where Spain and Portugal drew a line 370 miles west of the Cape Verde Islands to divide the Americas between them, the West becoming Spanish and the East Portuguese. The mediaeval schema, based on the Pope and the Christian community, was also problematised by the discovery of native Americans, whose legal status did not fit into this and was therefore uncertain. The early writer Vitoria emphasised that, although barbarians, they were human like the Europeans. This shows the beginnings of a theory of sovereignty, although unlike European Christians the native Americans were not seen as having the right to wage a ‘just war.’ Central to the theory of sovereignty which developed was the formal equality of parties engaging in trade, despite their inherent inequality given the huge material discrepancies.

Miéville then discusses the changes that took place in the concept of ‘sovereignty’ in the seventeenth century: while it was not initially seen as intrinsically linked to equality, there was a move towards a legal order centred on ‘juridical agents conceived as equal owners of alienable property.’ The fact that this increasing emphasis on equality disguises unequal forces of coercion means that law, and international law in particular, not only is a system predicated on violence but is its own ideological obfuscation of that fact.

The final part of the chapter analyses the changes occurring in seventeenth century maritime law to argue that the political forms of this period were transitional to capitalism. He discusses various legal strategies that were deployed as part of the mercantilist state-building process, including the East India monopoly companies on which the trade with India was founded. Unlike the colonial plunder of the fifteenth and sixteenth centuries ‘in the new global order such lines [dividing territories] could not be drawn, but nor were the colonial powers politically powerful enough to ensure hegemony through the hidden coercion in
the legal form? as they ?possessed a degree of sovereignty... the East India Companies were the perfect agents to police this ?transitional colonialism???. This is in contrast to theorists like Teschke, who argues against the idea of a transitional period and believes that the public/private form of the East India Companies means they could not be leading towards modern capitalism. Miéville points out that this is based on an erroneous view that capitalism separates the economic and the political, when in actual fact, ?actually-existing capitalism is replete with examples of the political intruding into the economic, such as the post-war welfare state and nationalised industries, and...massive - systematically sustaining - arms spending.?

Miéville also notes that the fundamental reason Teschke wishes to separate mercantilism and capitalism is the centrality of war to mercantilism. To this he contrasts the ?tradition of Marxist writing in which the political coercion in the economic form is precisely expressed in war, citing both Lenin?s Imperialism: The Highest Stage of Capitalism and Bukharin?s Imperialism and World Economy. Miéville calls the latter work ?brilliant? although he recognises that Bukharin?s view of twentieth-century monopolisation of ever larger firms buying each other up and tending towards state-capitalist trusts is ?perhaps too schematic.? Mieville adopts this position because of the SWP?s long term attraction to Bukharin?s theory, as opposed to Lenin?s, in explaining imperialism as if fitted their world view of Russia being state capitalist before 1991. In fact, it is symptomatic of Bukharin?s propensity to extrapolate tendencies of world development which led Lenin, despite his admiration for Bukharin?s work, to state that he ?never understood the dialectic.? However, the more important point here is Bukharin?s view of ?military competition in monopoly capitalism as an expression of the same competitive dynamic associated with capitalist economies, which, ?gives the lie to Teschke?s claims that the war-based exchange of mercantilism is antipathetic to capitalism.? This helps to understand the prevalence of violence in international law, as a substitute for the kind of overarching authority that exists domestically.

Imperialism

Miéville looks in more depth at theories of imperialism in chapter 6, in which he continues to argue that imperialism and international law mutually constitute each other - although they cannot be reduced to one another. He criticises Lenin?s Imperialism: The Highest Stage of Capitalism, for categorising certain ?basic features? as fundamental to imperialism, giving the example of the export of capital and stating that ?some imperialist powers, like the US and Japan, in fact imported capital up to 1914.? This is actually an erroneous criticism since capitalism was not yet fully developed in the US and Japan at this time. Indeed, US capitalism was exporting capital by 1914 - for instance the first US owned factory in Europe was the Singer factory in Scotland, built in the 1890?s. However, he accepts other fundamental aspects of Lenin?s theory, such as the focus on monopoly capitalism and the crucial point that ?imperialism is not simply a policy of the stronger powers? but rather stemmed from ?a dynamic in capitalism itself.? He then looks at the end of the mercantilist monopolism as a dominant system from 1776, to be replaced by free-trade, and argues that at this time European states generally ?did not want to take on the burdens of formal colonial rule.? At this point, international law denied any legal existence to the colonies, but crises of colonial power meant that it was increasingly forced to recognise them as legal entities. However, Miéville argues that the very politics of recognition was bound up with imperialism; as a result, ?formal sovereign independence not only does not preclude domination, but can, through recognition, be the very institution by which domination is exercised.? He argues that there is no single agenda on the basis of which recognition will or will not be granted; rather, this relates to inter-imperialist rivalry. It could be interesting to develop this point and look more specifically at the material factors influencing whether or not a country is recognised - for USA refused to recognise the People?s Republic of China until, in 1917, Beijing agreed to side with Washington against Moscow.
Moving on to a discussion of the nineteenth century, Miéville quotes the point that “It was principally by using force or threatening to use force that European states compelled non-European states to enter into treaties that basically entitled the European powers to whatever they pleased.” This is a very compelling argument and a reader already coming from a Marxist or anti-imperialist standpoint would have little trouble believing it. However, it would be much more generally convincing if he gave an example of a treaty, what it said and how the non-European state was forced to enter it. He does say that the 1842 Treaty of Nanking, concluded at the end of Britain’s first Opium War with China, is a classic example, but explains only that “Britain threatened to bombard Nanking, and forced the Chinese to accept utterly punitive and degrading terms.” However, he does not explain what the terms were or how they put the Chinese at a disadvantage. In fact, the Treaty ceded Hong Kong to Britain and allowed the establishment of five treaty ports at which the British could trade freely. This not only legalised the profitable opium trade but opened China to competition from cheap British goods, especially textiles. Into the bargain, China had to pay 21 million silver dollars in reparations to the British. It is fair to say that this treaty fully illustrates Miéville’s point about the role of violence in imposing unfair terms on poorer nations.

After discussing the “scramble for Africa” in which the bulk of the continent was divided between imperialist powers, Miéville goes on to look at the decolonisation. He argues that while this “was often hard won by the mass action of those at the sharp end of imperialism,” “the juridical form of independent sovereignty was one which imperialism itself tended to universalise.” This raises the interesting question of whether or not, without the struggles in the colonies, independence would still have been gained at significantly the same time as it was. In any case, as this process was completed “the commodity-form of law began to formalise relations as the market economy encroached on pre-existing modes of production, distribution and exchange.” Miéville convincingly shows how imperialist relations were intrinsic to the formal equality of sovereignty and thus to international law.

**Criticism of international law**

In his early discussion of theory in international law, Miéville points out the importance of distinguishing between firstly, those who deny that international law is law at all and secondly, those who allege that international law is not an ultimately determining force in international affairs and state’s policies; and, thirdly, those who are merely sceptical of the view that international law can be used to systematically improve the world. Miéville rejects the first two theories as formalist, as they are derived from the traditional approach of looking at behaviour and then comparing it to “rules” of law. He is in favour of the third - the view that “international law is law, is effective, but cannot maintain justice or order.”

Such criticism is rare for international lawyers, not only because of resistance to “biting the hand that feeds”, but also because of the liberal view of world politics as having an acceptable structure, which is just interrupted by the pathological condition of violence. Writers from the Critical Legal Studies (CLS) school have criticised these liberal views, pointing out their internal contradictions and inability to resolve the tension between demands for individual freedom and social order. Of the handful of CLS scholars writing on international law, Miéville discusses the work of Martti Koskenniemi in most detail. Koskenniemi builds on Marx’s understanding in Capital that the social relations of general commodity production are foundations for liberalism & its contradictions, and argues that relations between states under capitalism are founded on the same principle. Just as within the nation state, individuals interact as property owners, so on an international level states interact as property owners, because each state is seen to “own” its sovereign territory.

Miéville also spends some time examining those few Marxists that have written specifically on international law. He quickly rejects the “official” theories of the former Soviet bloc, which centred on “the extent to which a new and separate sphere of “socialist international law” was operational, thus offering only “a
slightly modified variant of mainstream, bourgeois international legal theory. He is more sympathetic to the work of B.S. Chimni, who points out the difficulties of international law relying on interpretation and argues that a system based on rules would be more progressive. However, Miéville criticises Chimni for seeing the class nature of international law as deriving from the content of particular legal rulings, as laid out and enforced by ruling classes...rather than anything in the structure of international law. To Miéville, this means that Chimni, like other theorists, fails to provide a systematic theory of the legal form, because he denies without any theoretical investigation the possibility that the very legal form itself - of which these rules are simply expressions - is constrained and embedded with inequalities ultimately derived from class inequality.

Miéville also takes issue with Chimni's views that mutually constituting legal concepts such as domestic jurisdiction and international concern, aggressive war and self-defence are not really indeterminate. By contrast, Miéville agrees with writers like Koskenniemi, who see disagreements over the meaning of such concepts as inherent and essential to international law. Miéville's example of the Vietnam war shows the importance of this point: the legality or otherwise of the conflict depended largely on the reading of Articles of the UN Charter, namely Article 2(4) (refraining in international relations from the threat or use of force against the territorial integrity or political independence of any state) and Article 51 (such provisions do not affect the inherent right of self-defence against an armed attack). The same point can be made about many conflicts which, to any anti-imperialist or even pacifist observer, are clearly acts of aggression, but are justified as defensive actions by the aggressor - Israeli operations against neighbouring countries such as Palestine and Lebanon being a good example.

Much later in the book, Miéville takes up the example of Israel to show the serious limitations of international law as a vehicle for progressive change. As his book went to press in 2005, the International Court of Justice ruled that the huge concrete and barbed wire fence Israel was constructing around and into the occupied territories was illegal and tantamount to de facto annexation. Today, what has come to be known as the Apartheid Wall in the West Bank continues to be built, stealing land and water resources from Palestine and cutting Palestinian off from their jobs and families. This is hardly surprising since, as Miéville explains, Israel immediately made it clear that it would ignore the ruling, making it nothing more than ink on paper, completely impotent to protect the land and lives of the Palestinian people.

Miéville makes the same point in the context international law and the war on Iraq. He begins his final chapter, Against the Rule of Law, with reference to a letter by 16 scholars of international law published in the Guardian in March 2003, just weeks before the US and UK invasion, which argued that there is no justification under international law for the use of military force against Iraq. As he points out, the first and most obvious problem with this letter is its failure to achieve its ends: These writers cannot back up their interpretations with force. The Iraq war went ahead, with the British and American governments insisting it was legal.

Fundamentally, the question of whether or not a war is legal is, firstly, beside the point - even if the invasion and occupation of Iraq was legal, all progressive people must clearly still be opposed to it as a conflict that has devastated a country and killed over a million civilians so that oil companies and other multinationals could profit - and, secondly, can never be conclusively answered anyway, since for every claim there is a counter-claim. Miéville looks at these claims and counterclaims in detail for the first Gulf War and criticises Chomsky's insistence that this was obviously illegal, arguing that, The Gulf War can plausibly be defended as either legal or illegal. Saddam Hussein's justifications included the views that Kuwait was de jure part of Iraq, that he had been invited in, and that Kuwait had harmed his interests. While these arguments may be unconvincing and unpopular, Miéville's point is that this does not change their status as legal arguments. It is impossible to say conclusively whether or not they are correct
because, unlike the national arena, where claims and counterclaims are ultimately resolved by a judge, there is no such arbitrator on an international level. The only reason that legal arguments do not go on forever is that their resolution is not a result of the internal logic of the concepts, but represents interpretation backed by force. Hence Marx's observation, on which the book's title is based - Between equal rights, force decides.

**International law and violence**

This explanation of the decisive nature of force in international law substantiates Miéville's assertion early in the book that International law is not counterposed to force and imperialism: it is an expression of it. This argument draws strongly on Pashukanis who argued that a group capable of defending their conditions of existence in armed struggle was the morphological precursor of the legal subject. The implicit, constitutive nature of violence within international law is demonstrated by the example of Russian Reinsurance case, in which Justice Lehman said that a state would be recognised on the fall of one government establishment and the substitution of another governmental establishment which actually governs, which is able to enforce its claims by military force.

If claims are enforced by military force, then clearly stronger states with greater military might will be better able to back up their interpretations of international law. Moreover, the debate at an international level is at the more abstract level of deciding not only whether an action fits a particular category - e.g. whether an action is a reprisal - but also whether that category of action is itself illegal. Miéville then goes on to say that the more powerful state is the more powerful capitalist state, and that the strategic logic of capitalist states...is ultimately derived from the exploitative logic of capitalism. While he is absolutely right to say this, he does not fully explain what he means by it. An example to illustrate his point would be useful; this could be as simple as the widely-accepted understanding of the War on Terror as stemming from a need to control resources, particularly oil, in the Middle East.

A discussion of the War on Terror would also add to Miéville's explanation of the use of human rights rhetoric to justify violent intervention, but cites another important example which shortly preceded it - the NATO war against Serbia over Kosovo in 1999. Although humanitarian justifications for conflict are not new, Miéville argues that their recent articulation has, to an extent, restructured international legal relations and dovetailed with a move towards international criminalisation. While theorists such as Hardt and Negri have cited the development of a new juridical structure over and above states, Miéville argues against the notion of a fundamental change; against the claim that sovereignty is now no longer inviolable? he points out that in fact, of course, sovereignty has always been overridden by intervention.

**Conclusion**

Beyond Equal Rights is a very impressive work in which Miéville has pulled together the threads of Marxist theory and international legal scholarship to produce a convincing theory of international law. The only significant criticism is that parts of the book are arguably too abstract, omitting examples or failing to develop these to conclusively prove a point. However, the theoretical points that Miéville has developed - chiefly, the commodity form theory of law and the inextricable nature of international law, imperialism and violence - are undoubtedly correct, and his in depth discussions are a hugely valuable contribution to the under-developed Marxist school of international law.

In the light of these arguments, as well as the failure of international law to prevent the brutal events of the War on Terror, Miéville is surely right in his contention that To fundamentally change the dynamics of the system it would be necessary not to reform the institutions but to eradicate the forms of law - which means the fundamental reformulation of the political-economic system of which they are expressions. The project to achieve this is the best hope for global emancipation, and it would mean the end of law.
It is worth adding, as Miéville does not, that this project can only be achieved in one way - through a global revolution.

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