# THE JURIDICAL CONDENSATION OF RELATIONS OF FORCES: NICOS POULANTZAS AND LAW

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Whenever contemporary authors refer to Nicos Poulantzas, they usually focus on his work on state theory. Bob Jessop has pointed out that in so doing, they tend to neglect the importance of Poulantzas's training as a lawyer. Nearly all of his early academic contributions dealt with the theory and philosophy of law. Even when he started engaging with the state, his analyses remained influenced by legal theory (Jessop 1985: 322f.). In fact, Jessop contends that legal theory was one of the three sources of his theoretical and strategic innovations; the other two were French philosophy and Italian Marxism (313).

I will reconstruct Poulantzas's contribution to the materialist theory of law by drawing largely on his later works[1] and presenting his legal theory in the context of his state theory. This will lead me to discuss how Poulantzas would need to be updated in order to overcome his class reductionism and to further develop his 'silent dialogue' (Adolphs 2011: 151) with both Michel Foucault and authors[2] drawing upon Marxian form analysis. First, however, I will outline the tradition in legal theory to which Poulantzas's arguments connect.

## 1. The law[3] as a technique of cohesion

### 1.1 Marxist legal theory between class interest and the legal form

Poulantzas's book *State, Power, Socialism* (SPS) was published during a brief

1 See Jessop (1985) for an account of the different phases of Poulantzas's work.

2 See Hirsch/Kannankulam in this volume.

3 Translator's note: In German, there is a distinction between 'Recht' and 'Gesetz', which is difficult to capture in English. Whereas 'Recht' denotes the abstract principle of law, 'Gesetz' is associated with the existence of a real-concrete, codified system of rules. In order to capture this difference, we have opted for using 'law' and 'the law' respectively in the translation.

historical phase when there was a wide Marxist debate on law. However, all in all, Marxists have usually treated legal theory like a 'neglected stepchild' (Negt 1975: 31; translated). Given that Marx himself did not leave behind an elaborated theory of law, the task of constructing it fell to his followers. Mostly, they portrayed the law as a 'mere reflex' of the 'economic base'. Once Marxist scholars became interested in the state, they assigned to the law a subordinate role by portraying it as an instrument for state interventions. As a result, they tended to overlook the autonomy of the law. Two Marxists working in the 1920s and 1930s were an exception: Franz Neuman, the jurist of the Frankfurt School, and the leading legal scholar in the Soviet Union, Evgeny Pashukanis.

Neumann reconstructed the state under the rule of law [Rechtsstaat] by looking at class relations. He stressed the bourgeoisie's interest to secure their economic freedoms by way of the law and to use the sovereignty of the state to destroy local and particular powers in order to create a unified and predictable economic space (1937: 23f.). Neumann argued that the law served to render processes of exchange predictable whilst 'obscuring' the 'actual distribution of power' under the outer form of the general law (46). This suggests that it also had the function of securing freedoms for the dominated classes. Herein lays its transhistorical character: the law's universal nature and the independence of judges contained elements that transcended their function under capitalism (ibid.). The law formed part of a totality, and yet its defining feature was 'relative independence' (1936: 16). Without this independence, law in the strict sense did not exist (ibid.). For Neumann, National Socialism was the classic example of a regime of direct domination that had dispensed with modern law.

In contrast, Pashukanis stressed the materiality of the law. He addressed the question of form. It was one thing, he argued, to explain the emergence of a legal regulation by referring to a society's material needs 'and thus [...] an explanation of the fact that legal norms conform to the material interests of particular classes'. But this would still leave unanalysed the reasons why these norms took on the *form* of law (1924: 55). Consequently, Pashukanis developed the 'legal form', following Marx's analysis of the value form. In his view, the legal form refers to the social relation expressed in the law, i.e., the exchange relation between commodity owners (93). Under capitalist conditions people do not encounter one another directly as social beings; due to the existence of a division of labour, private property and exchange, they satisfy their respective needs by exchanging commodities. In so doing, they recognize one another as individuals who are independent yet equal (151). According to Pashukanis, this meeting of the minds was the source of legal

subjectivity. In his view, legal subjectivity was based on freedom, equality and the 'abstraction of man in general' (113). Under such circumstances, differences in interest would not lead to violent conflicts, but to legal action. Whereas Neumann's argument was grounded in class theory, Pashukanis was interested in the reification of social relations, or more precisely, the autonomization of commodity relations within the legal form.

In the 1970s, the 'state derivation school' was established. Pashukanis can be viewed as its 'patron saint' (Miéville 2005: 122). It was in this context that Poulantzas developed his state and legal theory. Nevertheless, he dismissed approaches based on 'derivation', as for him these were 'stuck in the sphere of circulation' because of their fixation on commodity exchange (Buckel 2007). Accordingly, he chose to draw upon Neumann instead, but transformed him by engaging with Antonio Gramsci and Foucault.

### 1.2. The organization of hegemony

Drawing on Gramsci's key concept 'relations of forces' (SPN: 175ff.), Poulantzas took the relations of production and the social division of labour to be the basis of power (SPS: 25f.). He viewed class power as resulting from different class places in the relations of production and as forming part of a web of relations and conflicts. Poulantzas's relational theory of power states that the law is neither a thing nor a subject, but a strategic location within power relations (Jessop 1985: 129).

This position is somewhat similar to Neumann's class-based theory of the law – even if Poulantzas did not take the law to be an instrument of the ruling class, but rather a technique for the organization of hegemony in and through the state. Moreover, Poulantzas did not accept the juridical self-description of the state and the law as 'sovereignty' – unlike Neumann, who followed the liberal tradition in this regard. Rather, Poulantzas saw them as a condensation of the relations of forces materialized in apparatuses.

Gramsci introduced the concept of hegemony in order to depart from repressive theories of power and to emphasize a peculiarity of bourgeois democracy: the ruling classes 'undergo catharsis, that is, they take other interests into account and compromise' (Demirović 2001: 61, translated). In other words, the concept captures '*the political practices of dominant classes in developed capitalist formations*' (PPSC: 137). The effectiveness of these practices depends on whether they involve concessions, and on how universal they are. This also means that different social forces are compelled to cooperate and form alliances. If such alliances prove to be stable over longer periods of time, they constitute a coherent 'hegemonic bloc' (Bieling/Steinhilber 2000: 105, translated).

Poulantzas integrated the concept of hegemony into his approach to state theory. He insisted that the capitalist mode of production made it impossible for competing bourgeois class fractions to pursue a common interest directly. In accordance with this, he proposed applying the concept to relationships between these *fractions*, arguing that one of them would have to play the hegemonic role. If it succeeded in unifying the other fractions behind its rule, there would be a 'power bloc' (SPS: 127ff.).

Poulantzas argued that the role of the state lay in the representation and organization of the long-term political interests of this power bloc (ibid.). Moreover, it had the task of producing the overall unity of the social formation by creating a balance of compromise between the classes. This entailed disorganizing the subaltern classes, i.e., preventing them from building political organizations capable of overcoming the individualization that results from the process of production (PPSC: 188f.). According to Poulantzas, disorganization resulted from the 'isolation effect' triggered by the existence of the capitalist state. The latter divides the body politic into 'individuals' whilst representing the unity of these individuals in the form of a 'people-nation' (SPS: 63ff.). In other words, it sets off a double movement that institutionalizes individualization by transforming socio-economic monads into juridico-political individuals (persons/subjects), and unifies them at the same time (65ff.). Similarly, Foucault would later write that state power was 'both an individualizing and a totalizing form of power' (Foucault 1983: 131). In sum, Poulantzas argued that the basic function of the state lay in it constituting a 'cohesive factor' in a society divided into classes and class fractions (PPSC: 187; cf. Jessop 1985: 61).

### 1.3. The law

Like Neumann, Poulantzas used the term 'state under the rule of law' ('Etat de droit'/'Rechtsstaat') to bring together law and the state. He did not, however, take the term to refer to a contradictory unity of law and violence and a permanent struggle between the two (Neumann 1937: 22f.). Poulantzas insisted that the law is an aspect of the repressive order from the very beginning (SPS: 76). Like Neumann and almost all other Marxist scholars, he conceived of the legal system as a 'subdivision' of the state. Its paradigmatic expression was the existence of laws. According to Poulantzas, the legal system is a central aspect of state practice, i.e., the organization of hegemony, as well as a technique for the creation of cohesion and consensus. It constitutes a 'set of *abstract, general, formal and strictly regulated norms*' (86) that allow the atomized monads produced by the social division of labour to be transformed into a unified entity. In other words, he saw it as

a technique that had a generalizing effect on particular interests by virtue of its formal and abstract nature. This technique in turn rendered the fragmentation of society within the social division of labour manageable. In effect, relations of formal and abstract equality between individualized producers came into being, meaning that the latter were turned into classless subjects of the law.

For Poulantzas, the law not only produced the unity of subjects represented in the people-nation, it also led to the fragmentation of agents. It provided the code into which their differentiations could be inscribed: they became individual legal subjects with individual legal claims. 'The law is thus a hinge between the atomized individual and the unity of society' (Adolphs 2003: 87; translated). It is a mode of regulating differences as well as an ideological instance creating social cohesion (ibid.).

Consequently, Poulantzas saw the law as an 'important factor in organizing the consent of the dominated classes'; it endowed them with rights and prepared the ground for material compromises (SPS: 83). Moreover, it contributed to the organization of the power bloc by creating the possibility that modifications of the balance of forces could occur within it 'without provoking upheavals' (91). In other words, the law effected the 'organic circulation of hegemony among different fractions of the power bloc' (CD: 91).

### 1.4. Relative autonomy

The idea of 'relative autonomy' of the law already figures in Neumann's work (see above). And Poulantzas also had been fascinated by the autonomous reality of social relations that were in fact merely norms or ideas ever since he had concerned himself with Hans Kelsen's work. The unity of both the power bloc and the social formation is premised on a specific institutional structure (Jessop 1985: 56), that is, an ensemble of apparatuses with a specific materiality that ensures their independence. Consequently, Poulantzas was faced with the task of maintaining his relational theory and also conceptualizing the reification of relations of forces.

For him, relative autonomy was ultimately the result of the separation of the political from the economic in capitalism (SPS: 127). Producers are not subject to a *direct* political power – neither in the marketplace, where they have to sell their labour power, nor in the process of production. Poulantzas may have emphasized that the political, in a broader sense, is always present within the economy. But he also insisted that the political, more narrowly conceived as the institutionalized form of political domination, has come to be externalized [ausdifferenziert] into a separate political and

administrative system. On the grounds of his theory of hegemony he added that the system's relative autonomy was the result of the structural presence of all classes within the state. For thanks to this presence, no single one class could monopolize all the state apparatuses for itself. According to Poulantzas, relative autonomy made the long-term hegemony of the power bloc vis-à-vis the dominated classes possible. It was achieved, for example, by imposing material compromises on the power bloc (140). If the state did not possess 'minimal autonomy', 'that is, if it were nothing but a political "space" within which contradictory interests clashed with one another', then the potential for social conflict would not be lessened but intensified (Esser et al. 1983: 15, translated).

This also applies to the law. According to Poulantzas, the bourgeois legal system was the 'necessary form of a State that has to maintain relative autonomy of the fractions of a power-bloc in order to organize their unity under the hegemony of a given class or fraction' (SPS: 91). Poulantzas assumed that the creation of consent always went hand in hand with the organization of violence (Adolphs 2003: 82ff.): consent is organized through the law because all social groups, in principle, can achieve power legally in parliament; but the state's ability to resort to the monopoly of violence in order to enforce consensus reveals its relative autonomy. In this context, Poulantzas drew on Neumann and criticized Foucault, emphasizing that political authority is founded on physical violence even in modern societies (SPS: 78). The law, he argued, is the code of organized, constitutionalized and public violence (Jessop 1985: 120f.). Such violence may be deployed less regularly in regulated relations of domination but it is still inscribed into the mechanisms of consent; after all, the deployment of techniques of consensus presupposes a state monopoly of violence. This is the case even if there are no direct violent acts carried out by representatives of the state.

## 2. Updating Poulantzas's theory of law

The potential of Poulantzas's contribution to the theory of law has not been sufficiently appreciated, and my intention is to fill this gap. It is obvious, however, that certain additions to his approach will be required. This is both a result of the 'crisis of Marxism'[4] and of the fact that the opposition

4 Louis Althusser deployed this term to demand that Marxism engage not only with the history made in its name, but also with the 'new social movements', whose politics could no longer be subsumed under the Marxist matrix. He also stressed the deficits of existing Marxism with respect to the sphere that Marx had sometimes referred to as the 'superstructure', i.e., the state, the law and ideology. These had often been simply derived from the 'economic base'.

between post-structuralism and critical theory, which shaped Poulantzas's thoughts on the subject, is a matter of the past.[5]

### 2.1. Expanding the concept of 'relations of forces'

The relations of production were Poulantzas's point of departure, but he did not accord priority to the economy. For him, there could not be a purely economic space, and the political and the ideological were always already present in the economy. In other words, he took the relations of production to contain all the social relations within which production occurs. Later, Ernesto Laclau and Chantal Mouffe would repeat in almost identical words what Poulantzas stated at the beginning of SPS – that 'the space of the economy is itself structured as political space' (Laclau/Mouffe 1985: 76f.).

Yet there was one flaw that pervaded his approach: the classic Marxist emphasis on one particular relation of domination. In earlier phases of his work, Poulantzas had entirely ignored non-class relations of domination (Jessop 1985: 76). Later, in SPS, he recognized that power relations exceeded class relations, and that their base could lie in aspects other than the social division of labour. Above all, he took notice of gender relations (SPS: 43), and yet, he was unable to leave his class reductionism behind.

According to Poulantzas, all power in class societies has an element of class power within it – despite the fact that the division between classes is not the only terrain on which power is constituted (ibid.). In principle, this is correct – just as all power in patriarchal societies produces a matrix of two hierarchically organized genders. However, it does not follow that both the state and law can be explained solely with reference to class relations. Yet this is what Poulantzas infers, and consequently his theory does not do justice to the multiplicity of relations of domination in capitalism. Upon closer inspection the material condensation of relations of *forces* turns out to be simply a condensation of *class* relations and not one of gender or 'race' relations, which suggests that it is impossible to grasp sexual and racist violence with the help of this framework.

Laclau and Mouffe have argued that Gramsci's conception of hegemony is deficient due to its exclusive focus on class practices (1985: 69, 137f.). Buci-Glucksman and Therborn add that the elites of the working class

5 This opposition emerged under historically specific conditions. Instead of reifying it in a dogmatic fashion, Marxists ought to enter a dialogue with post-structuralists. This dialogue should not 'seek to simply level important differences (…), but to understand that both [approaches] contain potentials for social criticism that are developed to different degrees. These potentials can cross-pollinate productively and complement one another if people manage to engage in concrete social criticism' (jour-fixe-initiative-berlin 1999: 11, translated).

have taken position in the Fordist state with the help of social democratic parties. Consequently, it appears that the state exceeds the field of the power bloc. If institutional frameworks are no longer created exclusively by the bourgeoisie, and if they cease to be external to the workers, 'the problem of hegemony becomes – *for all political forces* – the problem of creating a ruling bloc, which is necessarily a construct' (1981: 126; translated).

As a consequence, an up-to-date materialist legal theory requires a broader conception of relations of forces. Gender relations, for example, are also constituted and reproduced by the state and law (Pühl/Sauer 2004: 169), and feminist state theory in particular has reflected on the inscription of the women's movement into legal (Dackweiler 2002) and state apparatuses (Sauer 2001). Furthermore, it is hard to imagine the existence of constructs such as 'race', 'nation' and 'sexuality' without state and legal regulation.

A relational theory of law should be grounded in a more plural conception of 'relations'. This would involve conceptualizing subjects as 'ensemble[s] of the social relations' (MECW 5: 4) and 'different subject positions' (Laclau/Mouffe 1985: 20). In these ensembles, relations of domination such as class, gender, sexuality and ethnicity constitute and interpenetrate one another. Feminist legal theorists have captured this with the concept of 'intersectionality'.[6] The point is not to merely to add one relation of domination to the next but to investigate the differences *within* each, for example by linking the hierarchical system of gender relations to the capitalist reproduction of labour power (Brunner 2005: 84). Expanding the concept of 'relations of forces' has consequences for how we see the two effects of the law that were of central importance for Poulantzas: consent and cohesion. If we assume a plurality of social spaces then hegemony can no longer emanate from a single social force (Laclau/Mouffe 1985: 141); instead, there is a 'multitude' (Hardt/Negri 2000) of social subjects involved in struggles for hegemony.

The law, in the sense of a technology of cohesion, is involved both in fragmenting agents through constructing them as abstract legal subjects, and in re-composing them into a 'people-nation'. The 'isolation effect' plays a major role for the first aspect of cohesion. Initially, Poulantzas mostly focused on the issue of juridical individualization because it generates the modern, rational, non-gendered individual subject imbued with subjective rights. In SPS, he expanded this conception and included in it the *disciplines* analysed by Foucault in *Discipline and Punish* (DP), i.e., the production of bodies that are individualized, drilled, and ordered hierarchically. At this point, a 'secret dialogue' between Poulantzas and Foucault ensued (Adolphs

6 For an overview see Elsuni (2006: 180ff.), Engel et al. (2005), and Knapp (2005).

2011: 151, translated). As a result, their approaches moved closer together – despite the fact that Poulantzas criticized Foucault in public, and that Foucault ignored Poulantzas. From today's vantage point, we can describe the isolation effect as a form of subjectivation. In other words, the law is an aspect of the modern regime of subjectivation, which in turn generates the modern 'human being'. According to Foucault, the 'juridical practices' are crucial here (1974: 4).

At the same time, and this is the second dimension, the law connects the monads thus produced: through laws, contracts, administrative acts, punishments and court rulings. The law regulates differences and at the same time manages their fragile unity (cf. Buckel 2007). It is a technology of consent, because its universalizing mode of operation provides an ideal type for the multiple hegemonic projects emanating from different social forces. Thanks to the existence of the law, juridical intellectuals are able to transform these projects into concepts of legal theory (Buckel/Fischer-Lescano 2009).

### 2.2. The legal form

My second revision of Poulantzas concerns his concept of 'relative autonomy'. In this context, Esser et al. speak of an 'almost magical hyper-functionalism' (1983: 17, translated): the state needs to possess relative autonomy because it guarantees the long-term hegemony of the bourgeoisie. Of course, Poulantzas can show that at any time, different social classes are present within the state, so that the latter cannot be seen as an instrument in the hands of a single class. But on closer inspection we find that the state's relative autonomy is not explained but simply presupposed – by asserting that there is a separation of the political (in a narrow sense) from the economic.

Jessop agrees that Poulantzas did not manage to clarify this concept. According to Jessop (1985: 131), Poulantzas's emphasis on class struggles was meant to inject an element of contingency into his account of the capitalist state, but also to show that the latter maintains class domination in the long run – even if this was 'only' the result of a multiplicity of micro-politics. But Poulantzas, Jessop suggests, did not explain the 'how' of this process: 'He erred in assuming that somewhere in the state there is something which can somehow guarantee bourgeois class domination' (136).

Unlike Jessop, however, I do not believe that Poulantzas should have given up on the concept of 'relative autonomy'. It is a key characteristic of the legal system that it possesses its own materiality. This is reflected in the fact that it follows its own 'laws', i.e., its own internal logic. Legal systems theory

can claim credit for highlighting the fact that the 'legal system' determines its own limits (Luhmann 2004: 58f.): legal operations are recursively linked only to other legal operations but not to economic or political ones (98f.). Extra-legal communication has to be translated into legal communication before it becomes relevant for the legal system.

There is one materialist approach that could have remedied this deficit in Poulantzas's theory – had it not been for the alleged opposition of (post-) structuralism and critical theory: form analysis in the tradition of Pashukanis. Although Poulantzas explicitly distanced himself from this tradition (1972; SPS: 50ff.), there is evidence of yet another secret dialogue,[7] and some of the arguments are similar in spite of differences in terminology.

Form analysis enables us to examine instances of reification in capitalist societies. It is based on a reading of Marx's *Capital* according to which the legal form is a social form, i.e., a reified and fetishized figure. Social forms are expressions of 'the reciprocal relations between social individuals', but they appear to be 'autonomous vis-à-vis their conscious will and actions' (Hirsch 1994: 161). They can only be decoded by way of theoretical critique. In other words, *social relations* congeal into a materiality imbued with its own dynamic, which at the same time obfuscates the fact that they are social relations. Thus form analysis is a theory that traces the autonomization [Verselbstständigung] of the results of human actions. Social entities are, of course, the result of practices and struggles within certain relations of forces, though these practices are usually carried out as part of a routine. Social forms allow for the perpetually regulated repetition of a particular practice by virtue of their autonomization, and in this way they cause structural effects.

Marx showed this to be the case for the value form: value is a social relation, but it appears as a property of labour products. Thanks to the processes of societalization that occur behind the backs of the individual actors (CI: 82f.), value exists only in the form of its appearance; it is 'natural-supernatural' [sinnlich-übersinnlich] – a thing and a relation, reified yet still purely social (82; translation amended).

The 'reification' of the legal form takes on the particular shape of legal procedures, and these operate on the grounds of specific knowledge. It is not everyday practices that define what is 'legal' or not, for processes of decision-making concerning such matters are codified in a juridical manner. Following Habermas (1996: 340f.), legal procedures organize information, issues, contributions, and justifications in such a way that only juridical arguments pass the 'procedural filters'. They exclude subaltern

7 See Hirsch/Kannankulam in this volume.

people and are the terrain of juridical intellectuals who have not only been disciplined through their training, but who are also versed in the techniques of legal argument. Legal methodology plays a crucial role here. Its specific language produces the self-referential nature of the legal form. As a result of these procedures, social relations (of forces) are transformed into legal relations: court rulings, files, codes of law, street signs, incarceration, deportation, etc. The legal form creates a new reality imbued with its own dignity: a 'counterfactual factual arrangement' [kontrafaktische Faktizität] (Brunkhorst) that is insulated against direct interventions from the outside. For example, parties to a civil action cannot simply make an appeal to 'justice'. Instead, they need to base their claims on legal norms and be aware of the legal methods for interpreting them. Furthermore, they need to prove their claims on the basis of particular rules of evidence: facts are only seen as 'true' if they can be substantiated with the help of admissible documents or witness statements. Moreover, the arguments put forward by the parties have to be presented in a specified form: usually only juridical intellectuals are allowed to present arguments and return verdicts; such a verdict becomes legally binding (i.e., enforceable by state institutions) only if it can be sustained at the next level of jurisdiction. Once a verdict has been confirmed it becomes part of the literature, i.e., of legal commentaries and treatises on legal theory. It informs other verdicts and becomes part of a sprawling web of legal operations. Thus the legal form is far more than just 'laws'.

Its autonomy, however, is *relative.* To be sure, autonomy and relativity appear irreconcilable principles at first glance. Yet if we accept that the autonomy of the law is the historically specific product of the autonomization of social relations under capitalism, it becomes obvious that it is always already part of a social totality. The law is only autonomous in abstraction from this totality, yet relative *in relation* to the other practices and relations or technologies of power. To avoid misunderstandings, one should really speak of '*relational* autonomy'. The concrete conditions that generate relational autonomy, however, need to be analysed in their respective historical specificity. They cannot be reduced to the state's monopoly of violence.

Accordingly, decisions about whether or not a social norm is part of the technology of law are made within the legal system itself. Every specific case has to be woven into the fabric of previous rulings, so that any arbitrary act responding to direct violence will be seen as an obvious breach of the law. The autonomy of the legal form breaks down when the latter ceases to adhere to its own laws of motion and instead follows extra-legal rationalities.

In this case, we are left with nothing but a 'dummy of legality' (Luhmann 2004: 109). *Only if* the legal form displays relational autonomy and powerful social actors find it impossible or very difficult to gain direct influence on the legal system, does it become possible to speak of 'law' in bourgeois-capitalist societies.

This point was crucial for Neumann in the context of the erosion of the rule of law under National Socialism: 'If law and the Leader's will are identical and if the Leader can have political foes killed without legal trial and this action is then celebrated as the highest realization of law, then one can no longer speak of law in a specific sense. Law in this case is nothing but a technical instrument for the execution of certain political objectives; it is nothing but the command of the ruler.' (1937: 61).

Seeing the law as the legal *form* allows us to connect these thoughts to Poulantzas's concept of relative autonomy. The political and the legal form are imbued with their own materiality and as such prepare the ground for the organization of hegemony. They take on the form of reified and fetishized entities, whose internal logic compels our obedience. The law does not exist *in order to* stabilize a society pervaded by relations of domination; however its reified *modus operandi,* which constitutes an unintended consequence of the autonomization of social relations, might indeed have this *effect* (cf. RC; Foucault 1977: 196).

### 2.3. Governmentality

Poulantzas's discussion of the law was little more than a by-product of his state theory. This reflects his 'methodological statism' or, as Jessop has it, his 'enduring politicism' (1985: 141). Following Poulantzas, the state, as a central factor of cohesion, constitutes the one instance in capitalist societies that guarantees the reproduction of the social whole (Demirović 1987: 60). With the help of form analysis, however, it becomes possible to show that other technologies of cohesion or social forms also play important roles. Society does not exist as an objectively given totality, but as the complex and unstable result of multiple political articulations.

Similar insights can be had from looking at Foucault's approach to state theory. First of all, it should be noted that he took a significant step in Poulantzas's direction at the beginning of the 1980s – a fact that he never disclosed. He expanded his conception of social technologies of power so that it included the state and 'governmentality', and this strategy bore similarities to Poulantzas's. Instead of viewing the state as an antecedent substratum and deducing the totality of practices from the "essence of the state" as though the latter were an autonomous source of power (BP: 77),

Foucault proposed seeing it as an ensemble of practices, 'a way of governing' (STP: 248, 277)". It was 'not that kind of cold monster' (248), no 'state-thing' (277). Foucault wanted to apply his analysis of micro-powers to state institutions (381). Thus it appears that Foucault was also talking about the 'material condensation of relations of forces': for him, 'materiality' was always the materiality of practices and dispositifs of power that inscribe themselves into bodies or institutions (Balibar 1991: 55).

Foucault conceptualized law and the state as technologies of power that maintain their relative autonomy. The relationship of the various technologies of power – i.e., the disciplines, biopolitics, law and government – to one another is determined by a system of correlations constituted by these technologies. According to Foucault, in the age of the modern nation state all technologies are over-determined by the practice of governing. His concept of governing shows many parallels to the idea of hegemony. Governing is not the same as reigning, commanding or ordering (STP: 115); rather, it describes the manner in which everyday behaviour is conducted. 'Hegemony' refers to the practices of social forces, while 'government' starts from power relations that get transformed into anonymous strategies. Both concepts are based on rejecting a repressive take on power: while hegemony is based on active consent, government is the art of persuasion. It is based on subjects that are either active or at least capable of being activated (Krasmann 2003: 136f.) and links the subjects' relationship to themselves ('governance' or 'technologies of the self') with technologies of domination.

When Foucault started investigating the problem of the population, he turned to looking at state practice – an unavoidable move if the goal is to analyse 'management of a whole social body' (BP: 186). He contemplated whether governmentality should be conceived as a kind of 'general technology of power' (STP: 120) that constitutes the exterior of the state apparatus. The state was not simply one of the forms or loci of power relations; rather, all power relations had become increasingly 'statified' so that they became linked to it. As a result, the technology of power inscribed into the apparatuses of the state, i.e., government, had achieved a position of dominance (STP: 108f.)

This approach takes into account the close historical relationship between the state and law whilst remaining aware of their respective relational autonomy. The legal form functions according to its own logic and cannot be reduced to an instrument for state intervention and steering. Together with the other technologies of cohesion, it processes a fragile mode of societalization, which emerges behind the back of actors. The fact that it is 'governmentalized' implies that it is also involved in the governance of the

population: it prepares the organization of hegemony and the consent to a specific mode of governance with the help of juridical subjectivation and cohesion.

Due to the transnationalization of social relations, the legal form and governmentality are no longer limited to the national state.[8] Today, questions of cohesion, hegemony and governance have to be discussed against the background of an expanded ensemble of apparatuses that cut across national, sub- and transnational spaces. Once again, a problematic comes to the fore that reflects a paradox: although the law is a reified social phenomenon and a technology of power, its relational autonomy means that power can be 'suspended'. Of course, this aspect of relational autonomy had to be fought for. Both the bourgeoisie and various social movements (e.g., the labour movement, the women's movement, the black power movement) managed to achieve, in principle, the recognition of their members as free and equal legal subjects. The practice of governing, however, over and over again produces subjects without rights. The latter's exclusion from the legal form in fact constitutes their biopolitical 'productivity', as is demonstrated by the example of 'illegal' migration. Transnationalization does not make borders redundant, quite the contrary: border regimes regulate cross-border labour mobility by way of the 'flexible decoupling of labour from its loci of reproduction, resources and rights' (Karakayali/Tsianos 2005: 49, translated). In so doing, they strip people of their rights and force them into clandestine life-styles.

Poulantzas maintained that every juridical system includes illegal zones, which in turn constitute gaps in its discourse (SPS: 84f.). A theory of law in the tradition of Poulantzas has to start from this paradox: from the simultaneous presence *and* absence of the legal form; and from demands to implement and, at the same time, go beyond the juridical conception of democracy. After all, the latter recognizes processes of social self-organization only on the grounds of the law, whose mechanisms of reification in turn work to derail such processes.

References

Adolphs, S. (2003) *Der Staat nach der Krise des Fordismus. Nicos Poulantzas und Michel Foucault im Vergleich*, diploma thesis, Faculty of the Social Sciences, Goethe University (Frankfurt am Main).

Adolphs, S. (2010) 'Biopolitik und die anti-passive Revolution der Multitude', in Pieper, M. / Atzert, T. / Karakayali, S. / Tsianos, V. (eds.) *Biopolitik – in der Debatte* (Wiesbaden: VS Verlag), 141-162.

8 See Wissel (2007) and his chapter in this volume.

Balibar, É. (1991) 'Foucault und Marx. Der Einsatz des Nominalismus', in Ewald, F. / Waldenfels. B. (eds.) *Spiele der Wahrheit. Michel Foucaults Denken* (Frankfurt am Main: Suhrkamp), 39-65.
Bieling, H.-J. / Steinhilber, J. (2000) 'Hegemoniale Projekte im Prozess der europäischen Integration', in Bieling, H.-J. / Steinhilber, J. (eds.) *Die Konfiguration Europas. Dimensionen einer kritischen Integrationstheorie* (Münster: Westfälisches Dampfboot) 102-130.
Brunner, G. (2005) 'Sexualität und Spätkapitalismus - revisited? Queer-politische Praktiken im Kontext neoliberaler Verhältnisse', *femina politica*, vol. 9, no. 1, 82-92.
Buci-Glucksmann, C, / Therborn, G. (1981) *Le défi social-démocrate* (Paris: Maspero).
Buckel, S. (2007) *Subjektivierung & Kohäsion. Zur Rekonstruktion einer materialistischen Theorie des Rechts* (Weilerswist: Velbrück Wiss.).
Buckel, S. / Fischer-Lescano, A. (2009) 'Gramsci Reconsidered: Hegemony in Global Law', *Leiden Journal of International Law*, vol. 3, 437-454.
Dackweiler, R.-M. (2002) 'Staatliche Rechtspolitik als geschlechterpolitische Handlungs- und Diskursarena. Zum Verrechtlichungsprozess von Vergewaltigung in der Ehe', in Dackweiler, R.-M. / Schäfer, R. (eds.) *Gewalt-Verhältnisse. Feministische Perspektiven auf Geschlecht und Gewalt* (Frankfurt am Main / New York: Campus Verlag) 107-131.
Demirović, A. (1987) *Nicos Poulantzas. Eine kritische Auseinandersetzung* (Hamburg: Argument-Verlag).
Demirović, A. (2001) 'Hegemoniale Projekte und die Rolle der Intellektuellen', *Das Argument*, vol. 43. no. 239, 59-65.
Elsuni, S. (2006) 'Feministische Rechtstheorie', in Buckel, S. / Christensen, R. / Fischer-Lescano, A. (eds.) *Neue Theorien des Rechts* (Stuttgart: Lucius & Lucius) 163-186.
Engel, A. / Schulz, N. / Wedl, J. (2005) 'Queere Politik: Analysen, Kritik, Perspektiven. Kreuzweise queer: Eine Einleitung', *femina politica*, vol. 9, no. 1, 9-23.
Esser, J. / Fach, W. / Väth, W. (1983) *Krisenregulierung. Zur politischen Durchsetzung ökonomischer Zwänge* (Frankfurt am Main: Suhrkamp).
Foucault, M. (1974) 'Truth and juridical forms', in Faubion, J. (ed.) *Power: Essential Works of Foucault 1954-1984*, vol. 3 (London: Penguin Press, 2000) 1-89.
Foucault, M. (1977) 'The Confession of the Flesh', in Gordon, C. (ed.) *Power/ Knowledge: selected interviews and other writings 1972-1977* (New York: Pantheon Books, 1980) 183-193.
Foucault, M. (1983) 'The subject and power', in Rabinow, P. / Rose, N. (eds.) *The essential Foucault. Selections from Essential Works of Foucault 1954-1984* (New York: New Press, 2003) 126-144.
Habermas, J. (1996) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press).
Hardt, M. / Negri, A. (2000) *Empire* (Cambridge: Harvard Univ. Press).
Hirsch, J. (1994) 'Politische Form, politische Institutionen und Staat', in Esser, J. / Görg, C. / Hirsch, J. (eds.) *Politik, Institutionen und Staat* (Hamburg: VSA-Verlag)

157-212.
Jessop, B. (1985) *Nicos Poulantzas. Marxist theory and political strategy* (Basingtoke: Macmillan).
jour-fixe-initiative-berlin (1999) 'Einleitung', in jour-fixe-initiative-berlin (ed.) *Kritische Theorie und Poststrukturalismus. Theoretische Lockerungsübungen* (Berlin/ Hamburg: Argument-Verlag) 5-12.
Karakayali, S. / Tsianos, V. (2005) 'Mapping the Order of New Migration. Undokumentierte Arbeit und die Autonomie der Migration', *Peripherie. Zeitschrift für Politik und Ökonomie in der Dritten Welt,* vol. 97/98, 35-64.
Knapp, G.-A. (2005) 'Intersectionality - ein neues Paradigma feministischer Theorie? Zur transatlantischen Reise von Race, Class, Gender', *Feministische Studien,* vol. 24, no. 1, 68-81.
Krasmann, S. (2003) *Die Kriminalität der Gesellschaft. Zur Gouvernementalität der Gegenwart* (Konstanz: UVK).
Laclau, E. / Mouffe, C. (1985) *Hegemony and socialist strategy: towards a radical democratic politics* (London: Verso).
Luhmann, N. (2004) *Law as a Social System* (New York: Oxford Univ. Press).
Miéville, C. (2005) *Between equal rights. A Marxist theory of international law* (Leiden: Brill).
Negt, O. (1975) '10 Thesen zur marxistischen Rechtstheorie', in Rottleuthner, H. (ed.) *Probleme der marxistischen Rechtstheorie* (Frankfurt am Main: Suhrkamp).
Neumann, F. (1937) 'The Change in the Function of Law in Modern Society', in Neumann, F. *The Democratic and The Authoritarian State: Essays in Political and Legal Theory* (Glencoe, Illinois: The Free Press, 1957) 22-68.
Neumann, Franz (1936) *The Rule of Law. Political Theory and the Legal System in Modern Society* (Leamington Spa: Berg, 1986).
Pashukanis, E. B. (1924) *Law and Marxism: A General Theory* (London: Pluto Press, 1989).
Poulantzas, N. (1972) 'Aus Anlass der marxistischen Rechtstheorie', in Reich, N. (ed.) *Marxistische und sozialistische Rechtstheorie* (Frankfurt am Main: Athenäum Fischer Taschenbuch Verlag) 181-199.
Pühl, K. / Sauer, B. (2004) 'Geschlechterverhältnisse im Neoliberalismus. Konstruktion, Transformation und feministisch-politische Perspektiven', in Helduser, U. / Marx, D. / Paulitz, T. / Pühl, K. (eds.) *Under construction? Konstruktivistische Perspektiven in feministischer Theorie und Forschungspraxis* (Frankfurt am Main: Campus Verlag) 165-179.
Sauer, B. (2001) *Die Asche des Souveräns. Staat und Demokratie in der Geschlechterdebatte* (Frankfurt am Main: Campus Verlag).
Wissel, J. (2007) *Die Transnationalisierung von Herrschaftsverhältnissen. Zur Aktualität von Nicos Poulantzas' Staatstheorie* (Baden-Baden: Nomos).