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Mika Viljanen Dr
University of Turku, mivevi@utu.fi

Mikko Rajavuori
University of Turku, mijora@utu.fi

Tal Kastner
Princeton University, talkastner@gmail.com

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Introduction: Imagining Post-Neoliberal Regulatory Subjectivities

MIKA VILJANEN, MIKKO RAJAVUORI, AND TAL KASTNER

Neoliberalism, as an abundantly flexible intellectual scheme and set of governance programs, has dominated governance techniques for close to fifty years. In this time, both the doctrines and their real-world applications have evolved at a rapid pace and moved far beyond the intellectual principles formulated in the 1936 *Colloque Walter Lippman*, from which the doctrine emerged.¹ Neoliberal doctrine has transformed into an exceedingly variable, opportunistic, and at times, contradictory set of dicta, aspects of which have inverted and reimagined many of its prior intellectual fundamentals.² On the level of practical governance program, neoliberalism has metamorphosed “from dogmatic deregulation to market-friendly reregulation, from structural adjustment to good governance, from budget cuts to regulation-by-audit, from welfare retrenchment to active social policy, from privatization to public-private partnership, from greed-is-good to markets-with-morals.”³

Neoliberal legal regimes⁴ have also taken numerous forms. The straightforward deregulatory programme of early roll-back neoliberalism has been replaced by increasingly intensive, conceptually variegated, pro-market, technocratic and undemocratic re-regulatory interventions⁵, which, conceptually, seem to share little besides a fundamental belief in the power of markets, price mechanisms, and market actors, in various configurations and deployments, to do better than their alternatives.

1. DANIEL STEDMAN JONES, *MASTERS OF THE UNIVERSE* (2014).

2. Manuel B. Aalbers, *Neoliberalism is Dead . . . Long Live Neoliberalism!* 37 *INT'L J. URBAN REGIONAL RESEARCH* 1083, 1083–1090 (2013); Mitchell Dean, *Rethinking Neoliberalism*, 50 *JOURNAL OF SOCIOLOGY* 150–163 (2014).

3. Jamie Peck, *Zombie Neoliberalism and the Ambidextrous State*, 14 *THEORETICAL CRIMINOLOGY*, 104, 106 (2010).

4. David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW AND CONTEMPORARY PROBLEMS* 1 (2014).

5. Aaron Major, *Neoliberalism and the New International Financial Architecture*, 19 *REV. OF INT'L POL. ECON.* 536–561 (2012).

“New governance” techniques—principle-based regulation, management-based regulation, meta-regulation, risk-based regulation, and enrolment strategies⁶—constitute the bulk of the innovative instruments in the re-regulatory neoliberal legal toolbox. These techniques destabilize the traditional state-centered, binding legal template that dominated the earlier roll-back neoliberal and pre-neoliberal legal regimes. They do so by granting regulated entities a degree of autonomy within loose regulatory frameworks. In the process, these techniques respect and often replicate the practices and norms that regulated entities have developed. They thereby relocate regulatory power from democratic processes to technocratic and often captured bodies, and, typically, encourage the state to recede from its former dominating position.⁷

One underexplored facet of these new governance techniques is their relation to the subjectivity—the internal organization, goals, and cognitive frames and processes—of the regulated entities. For example, the regulatory impact of some of the Basel banking regulation rules, the ISO 26000 Guidance on social responsibility or the OECD Principles of Corporate Governance stems from a distinctive—and provocative—mechanism. Rather than establishing first-order behavioral duties aligned with the regulatory objectives, these regulatory instruments seek to attain their behavioral goals indirectly, by addressing how their subjects should construct themselves as actors.⁸ To illustrate, what banks are likely to do, for example, will be significantly altered, once they have complied with the Basel Accord rules on the Internal Capital Adequacy Assessment Program.

These regulatory schemes manifest a suggestive phenomenon: law seeks to work by using procedure to implement subject-internal structures that will increase the likelihood of the subject choosing certain courses of action over others. This points to the ways these schemes—engaging legal frameworks—function by *purposely and effectively* manipulating the agency or—in anthropomorphic terms the subjectivity—of the regulated entities.⁹ This legal impact channel seems novel. Most lawyers and legal scholars are not accustomed to think that law will explicitly aim to change its subjects. To the contrary, a widely

6. See e.g. Julia Black, *Paradoxes and Failures: “New Governance” Techniques and the Financial Crisis*, 75 MOD. L. REV., 1037, 1037–1063 (2012).

7. *Id.*

8. See e.g., Christopher Carrigan & Cary Coglianese, *The Politics of Regulation: From New Institutionalism to New Governance*, 14 ANNUAL REV. OF POL. SCI., 107, 114 (2011).

9. See John McMahon, *Behavioral Economics as Neoliberalism: Producing and Governing Homo Economicus*, 14 CONTEMP. POL. THEORY, 137, 137–158 (2015), on implications on behavioral economics and nudging.

accepted philosophy of *ex ante* rational subjects¹⁰ renders the legal subject as a self-determining entity that legal regulation ought not explicitly seek to penetrate. Of course, law impacts and is impacted by its subjects' subjectivity as argued by for example, feminist,¹¹ postcolonial,¹² and black¹³ studies inspired by Foucault¹⁴ and Butler¹⁵. These effects, however, have not typically been the explicit purpose of legal regulation, but rather—sometimes convenient—side-effects.

This tentative realization informed a call for papers that went out in June 2014. A shift in the regulatory approach to confront subjectivity seemed to be underway, portending to pose challenges to legal theory. Despite an initial, instinctual anxiety over the ethical implications, purposeful regulatory shaping of subjectivity seemed to carry with it a promise of post-neoliberal legal futures.¹⁶ The turn toward this approach presents an ironic conceptual twist given its origin in the neoliberal regulatory agenda. The *homo economicus neoliberalis*¹⁷—however boundedly rational and imperfectly informed—that had resided at the center of the conceptual structure of legal neoliberalism, seemed radically denaturalized. The transformation seems to expose the free, self-sufficient individual as the product of contingent technological assemblages, rationality practices and dynamics of power. The denaturalization of the archetypal neoliberal subjectivity—challenging the presumption of identity, desire, ethical inclinations, free will, among others, as arising from within a bounded legal subject—opens a new space for ethical struggles. Once we begin to explicitly reimagine the bounds of the self, the privileged position of neoliberal subjectivity begins to unravel as a design. As a result, the playing field is fundamentally levelled: regulation becomes a battlefield of multiple ethics and the concomitant assemblages of markets and, most importantly, subjectivities.

10. Robert Baldwin, *From Regulation to Behaviour Change: Giving Nudge the Third Degree*, 77 MOD. L. REV. 831, 831–857 (2014).

11. See, e.g., Nicola Lacey, *The Constitution of Identity: Gender, Feminist Legal Theory, and the Law and Society Movement*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 471–486 (Austin Sarat ed., 2004).

12. EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO (2001).

13. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331–1387 (1988).

14. Michel Foucault, *Technologies of the self*, in ETHICS: SUBJECTIVITY AND TRUTH 223–252 (1997).

15. JUDITH BUTLER, THE PSYCHIC LIFE OF POWER (1997).

16. Damien Cahill, *Beyond Neoliberalism? Crisis and the Prospects for Progressive Alternatives*, 33 NEW POLITICAL SCIENCE, 479, 479–492 (2011).

17. Clive Barnett et al., *The Elusive Subjects of Neoliberalism: Beyond the Analytics of Governmentality*, 22 CULTURAL STUDIES, 624, 624–653 (2008).

To explore these tentative diagnoses and conceptualizations we called for papers engaging different aspects of law's subjectivity turn. A selection of papers that map the possible genealogies for the emergence of post-neoliberal law, address the implications of anthropomorphic corporate regulation, or analyze transformations in sovereign subjectivities is now published in this symposium issue. The paper stake up and make salient an array of the big questions of our day.

While overlapping, the papers can be broadly divided into two categories. The first category consists of papers that explore the internal make-up of legal and regulatory subjectivities. Drawing on history, queer theory and regulation studies, among others, the papers explore the most pertinent questions about the interaction of law with those it regulates. The second category of papers probes into the composition of the post-neoliberal order. Grounding the analysis in investment law, human rights, and contractual regimes, the papers expose a number of techniques through which the contours of post-neoliberal world[s] are shaped and contested.

Situating the impacts of the subjectivity turn in the present, the issue begins by confronting the past. In her contribution, *Tara Helfman* weaves a compelling historical narrative detailing the emergence of the corporate subject in the Anglo-American judicial tradition and, in doing so, develops a suggestive notion of corporate conscience. Focusing on bureaucratic regulatory subjects, *Mika Viljanen* and *Jacob Schemmel* shed light on the formation of novel subjectivity regulation schemes. While Viljanen maps the intrusive framework of the Basel Accords, Schemmel uses the ESA-Guidelines, a curious soft law instrument, as an analytical lens through which lawmakers approach "substantive programming" of regulated bureaucratic organizations.

Shifting the focus to the level of the individual subject, *Chantal Nadeau*, relying on Roberto Esposito's notion of immunity, traces the tectonic changes in the construction of queer subjectivities, suggesting the emergence of the "Global Gay" as a useful analytical category. In a similar vein, *Tal Kastner* makes salient the ways American and European consumer contract regimes engender distinct consumer subjectivities. Finally, grounding her narrative in disaster assistance schemes, *Susan Sterett* analyzes emotional subjectivities. Identifying bureaucratic documents as the site of many people's encounters with law, Sterett examines how these documents elicit and bracket off emotional responses by recognizing people's connections to home.

Against the backdrop of this rich discussion of the formation and maintenance of individual and collective subjectivities, the contributions by *Nicolás Perrone*, *Joe Wills & Ben Warwick*, *Mikko Rajavuori*, and *Jaakko Salminen* focus on the techniques through which post-neoliberal

orders could be shaped. Surveying changes in the international investment regime, Perrone argues that the oft-suggested “balancing” adjustments to the investment system are extremely unlikely to displace the paradigm of neoliberal legality. Wills and Warwick, on the other hand, analyze the potential and limitations of socioeconomic rights in shaping the “post-neoliberal” order. Along similar lines, Rajavuori sheds light on the extent to which contemporary business and human rights governance identifies the market as the most efficient medium for the human rights enterprise. Stepping away from the realm of public international law, the article by Salminen discusses contract boundary spanning governance mechanisms as a key potential key lever in the governance of global production. Collectively, these contributions demonstrate the deep reliance on neoliberal techniques in contemporary global governance.

Finally, as an intervention transcending the subjectivity/technique divide, David Wishart, unsatisfied with the notion of subjectivity, explores alternative ways for construing legal persons.

True to the initial call, the papers in this issue confront what it means to be a human subject and what the bounds of the human subject are. As they do so, they also take on the issue of the non-human subject and the implications for the regulation and welfare of human beings as a result (see, e.g., contributions by Viljanen, Nadeau, and Helfman). In the process, the papers raise questions about the bounds between private and public and between the local and the regional, as well as the relation of a subject to a legal regime more generally (see, e.g., contributions by Nadeau, Perrone, and Rajavuori). In this context, the papers also confront the forms that law takes, and the ways these forms implicate or are implicated by power and efficacy (see, e.g., contributions by Salminen, Willis & Warwick, Schemmel, and Perrone). The papers pursue the questions of how these commonly-invoked distinctions and categories are constructed in connection with law and how these categories facilitate, undermine or otherwise impact experience, human interaction, the exercise of power, and the development of identity (see, e.g., contributions by Sterett, Kastner, and Nadeau). Moreover, the papers take up the question of how we map these categories. In other words, what is the space/place of law and are the phenomena of our era something new in time (see, e.g., contributions by Perrone, Wishart, and Sterett)?

By considering the function of post-neoliberal regulation, we are also necessarily raising the question of value and values: What are the goals of regulation or of interventions in markets? What other ways do we or can we imagine value? How does law in different contexts define, impose, impact, or reflect value (or values) in a global framework? To

what extent and by what processes does/can law regulate value--or does value drive law? Moreover, how does value in this framework shape the subject or vice versa? In this context, considering regulation and subjectivity, these papers address the questions of who is acting and how they act. In doing so, the papers trace the channels of power that enable the action. More fundamentally, these papers collectively pose the question of whether the subject—and/or subjectivity—can be understood independent of law. All of which leads back to the important question the papers individually and collectively take up: How do we—whether as scholars, regulators, social architects, or leaders—and how ought we define these terms, and what impact does or should a global perspective have on how we do so?

Independently, these questions have been engaged by legal thinkers, theorists, and social scientists. This collection however puts them in conversation across disciplines and regional perspectives demonstrating the richness of the endeavor to understand subjectivity in legal context in the current post-neoliberal and global age.