international levels have sought so much guidance on how to proceed from professionals versed in, and advising on the basis of, international law – guidance that was ignored, confused or dismissed by the politicians, who nonetheless debated the appropriate course of action by sustained reference to international law, as understood or opportunistically framed by them. It is an object lesson in occupational humility, imparted in modest style.

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Honor Brabazon (ed.). ***Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project.*** New York: Routledge, 2016. Pp. 214. £93.99. ISBN: 9781138684171

In this book, Honor Brabazon and her co-authors advance the debate on the nature of the relationship between law and neoliberalism. Since scholarship on the subject first took off in the early 2000s, considerable attention has been dedicated to tracing the intellectual influences of neoliberal theorists, identifying what is distinctive about the political ideology of neoliberalism and documenting and dissecting neoliberalism's manifestation as economic policy and practices of governmentality. By now, critical writing on neoliberalism has achieved the status of something like a sub-speciality in the social sciences and humanities. Yet, as Brabazon impresses in her introduction to the volume, 'the role of law in the neoliberal story has been relatively neglected, and the idea of neoliberalism as a juridical project has not been considered' (at 1).[1] Part of the explanation for this scholarly shortcoming may be that, for a number of years, the anti-statist, free market rhetoric of neoliberal politicians was taken at face value by many analysts. Neoliberalism was commonly equated with a politics of economic *laissez-faire*, and there was a tendency to 'reduce neoliberalism to a bundle of economic policies with inadvertent political and social consequences'.[2] When reference was made to law and regulation in the neoliberal context, overwhelmingly, the story was one of deregulation, conferring the impression that the neoliberal project was one in which law had a limited role to play. It has taken years of engagement with, and exposition of, the writings of the intellectual architects of neoliberalism for this narrative to be flipped and for it to be widely recognized that neoliberalism cannot sensibly be understood as a withdrawal of the state from the market or as an abdication of government regulation.

More recent scholarship on neoliberalism has advanced considerably in terms of elaborating what is 'neo' about *neo*liberalism, as compared with earlier iterations of liberal thinking on the

[1] This edited collection is the first book to address this topic in depth. However, a small group of legal academics has begun to turn their attention to the significance of law in the neoliberal project in recent years. Two notable contributions are a special issue of *Law and Contemporary Problems* (Grewal and Purdy, 'Introduction: Law and Neoliberalism', 77 *Law and Contemporary Problems* (2014) 1) and a new edited collection edited by Ben Golder and Daniel McLoughlin published the year after Brabazon's volume in 2018 (B. Golder and D. McLoughlin, *The Politics of Legality in a Neoliberal Age* (2018)).

[2] Brown, 'Neoliberalism and the End of Liberal Democracy', 7 Theory and Event (2003), available at http://muse.jhu.edu.ezproxy.lib.gla.ac.uk/article/48659.

economy. Precisely in contrast to the classical liberal emphasis on leaving spontaneously formed markets to operate unhindered by state regulation, neoliberal thought draws heavily on the earlier tradition of German ordo-liberalism and shares its support for a strong state that actively deploys laws and regulations to create, maintain and manage markets.[3] Thanks to the diligent excavation of its theoretical influences in a growing body of scholarship, neoliberalism is now understood as a project of reconstituting the state and reordering social relations in order to position impersonal market forces as the optimal arbiters of what should be produced and consumed in an economy.[4] For neoliberal thinkers, this mode of market ordering is necessary in order to ensure that individual freedom is paramount, and in order to prevent ill-adept, ill-informed governments from trying to direct processes of economic production and consumption towards concrete social goals (an objective that is doomed to fail according to the influential neoliberal Friedrich Hayek, as government is too easily captured by 'special interests' and is fundamentally incapable of marshalling or acting on the vast quantity of data needed to manage markets effectively).[5]

The project of Brabazon and her co-authors is to instil a more accurate appreciation of the role that law and legality have played in enabling the neoliberal project to come to fruition. The book counteracts a widespread tendency to portray law as the mere vehicle for neoliberal policy content: '[E]ven critical political and economic writing tends to characterise law as an institutional vehicle through which neoliberal reforms can be effected (when law is mentioned at all)' (at 1). For Brabazon and her co-writers, it is the form of law, and not just its content, that is generative of neoliberal politics and practice (at 2). In nine carefully researched chapters, the contributors to this volume investigate the multiple ways in which neoliberal ambitions to reform the economy and society have been realized, to a significant extent, thanks to specificities of the legal form and the way in which it configures social relations (at 2). Far from a project of deregulation, neoliberalism – so the central argument runs – has proceeded by means of an intensified juridification of social relationships (at 6–7). Brabazon acknowledges that some legal scholarship has engaged with changes in discrete areas of law that have been important for the neoliberal project. In particular, she cites scholarship in international economic law that has foregrounded the pivotal role that international financial institutions played in directing neoliberal processes of 'structural adjustment' that re-patterned state–economy relationships in many countries in the global South between the 1980s and the 2000s (at 1).[6] However, much of this scholarship does not advance beyond an understanding of law's relevance as one of the instrumentalization of neoliberal policy through law. There has been no systematic attempt to develop 'a holistic and coherent understanding of the relationship between law and neoliberalism' (at 2), Brabazon underlines. The purpose of the volume is to 'initiate such a discussion' (at 2).

[3] Both Andrés Palacios Lleras (at 62–67) and Ntina Tzouvala (at 120–125) discuss the relationship between neoliberalism and ordo-liberal thinking in their chapters.

[4] W. Davis, *The Limits of Neoliberalism* (2017); P. Mirowski, *Never Let a Serious Crisis Go to Waste* (2014); P. Mirowski and D. Plehwe, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (2009); Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018).

[5] F.A. Hayek, 'The Use of Knowledge in Society', 35 American Economic Review (1945) 519. The influence of Hayek's work on neoliberal thought and practice is considered by a number of the contributors, including Tor Krever, Andrés Palacios Lleras, Kenneth Veitch, Robert Knox, Ntina Tzouvala and Honor Brabazon.

[6] Buchanan and Pahuja, 'Legal Imperialism: Empire's Invisible Hand?', in P. Passavant and J. Dean (eds), *Empire's New Clothes* (2004) 73; Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000', in D. Trubek and A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006) 5; A. Lang, *World Trade Law after Neoliberalism* (2011).

Such discussion is crucial to the effort to understand the complex inter-linkages between the historical events, agencies, economic theories and multifarious legal developments that have transposed the political ideology of neoliberalism into social reality. The book makes an important contribution because, unusually for an edited collection, it allows its contributors to travel far and wide in their research, whilst bringing their writing back to engage with a central line of argumentation about the nature of law's role in the neoliberal project. I will now give an overview of the key arguments of the book, followed by a brief synopsis of each of the contributing chapters. I will conclude with some reflections on the book's core arguments and on the audience that it may attract.

1 Understanding the Role of Law in the Neoliberal Project

The volume begins with an introduction by Brabazon in which she sets out the argumentation of the book. Brabazon makes it clear that the objective of the book is not to uncover or devise 'the law of neoliberalism' but, rather, to investigate and theorize the relationship between law and neoliberalism through empirical case studies (at 2). No attempt is made by Brabazon or any of her co-authors to offer a totalizing or fixed definition of neoliberalism. Indeed, *Neoliberal Legality* remains agnostic as to which of the dominant theoretical lenses that have been applied to neoliberalism describe it best. As some readers will be aware, theoretical work on neoliberalism can be roughly organized into three strands: work that understands neoliberalism as an internally disputed 'thought collective' with footholds in both German ordo-liberalism and Chicago school economics; scholarship that regards neoliberalism as a class-based political project that is concerned to re-establish the conditions for capital accumulation in the post-war era; and writing that understands neoliberalism as a 'totalising rationality' that is productive of certain kinds of subjectivities and social relations that come to embody neoliberal ideology and propagate it as a kind of common sense or world view (at 3–4). While these different theoretical lenses can be complementary, as opposed to contradictory, arguably, the choice to not (over-)determine what neoliberalism 'is' sits uncomfortably alongside some of the book's stronger claims as to the existence of a distinctively 'neoliberal legality'. I will return to this point in the final section of the review.

The four principal arguments that the book explores and advances are articulated by Brabazon on the second page of the book. First, law takes a specific shape in the neoliberal period that is consistent with, but also more specific than, the liberal-capitalist form. Second, certain aspects of the law have enabled it to play a crucial role in 'conceiving, constructing, and cohering' neoliberalism in a way that other social institutions, structures or sets of norms could not. Third, neoliberalism should be understood as a juridical project as well as a political and economic project. And, fourth, the relationship between law and neoliberalism 'is not automatic' but, rather, embodies contradictions and vulnerabilities that could be used to leverage social change (at 2). The concept of 'neoliberal legality' is advanced to denote 'the specific form, mode, and role that law assumes in the neoliberal period' (at 2). At this juncture, Brabazon situates the book within the broader tradition of critique as developed by legal realist scholarship and scholarship from critical legal studies. In line with the *modus operandi* of these traditions, the book aims to expose the relationship between the form that law takes in different phases of capitalist society and the (re)production of, and legitimation of, a particular ideology (neoliberalism). The remainder of Brabazon's introduction offers a brief synopsis of each of the forthcoming chapters and draws out some of the key features of 'neoliberal legality' that emerge in the analyses of her co-authors. These features include the synergies between neoliberal economic theory and the rule of law (at 7–9); the centrality of contract as a means of re-patterning social relationships and conditioning neoliberal subjectivities (at 9–10); the ways in which law's indeterminacy is mobilized to suppress contradictions in the neoliberal project (at 10–11); the significance of the public–private distinction in facilitating the process of depoliticization and individualization in the neoliberalized social sphere (at 11); and the ways in

which the processes of 'marketization' associated with neoliberalism have involved an intense juridification of social relationships (at 11–12).

These key features are explored in nine chapters that take the reader on an empirical 'tour' through the various jurisdictions and diverse legal terrains in which neoliberal legality has been at work. Tor Krever, in the first stage of this tour, offers an insightful account of how the 'thick' understanding of the rule of law cherished in seminal works of jurisprudence has been refracted through new institutional economic theory into a tool to restructure legal rules and institutions in developing countries in accordance with the guiding light of market efficiency (at 22). Neoliberal legality, Krever writes, encourages a process-driven deployment of the rule of law as 'the disinterested application of technical principles to facilitate an efficient outcome with law as a neutral platform for individual productivity' (at 37). Importantly, for Krever, it is precisely through such a depoliticized process of efficiency-friendly legal restructuring that neoliberal subjectivities and social relations (atomized, individualistic and market predisposed) are reproduced. Nicolas Perrone continues the engagement by focusing in on one of the specificities of neoliberal legality identified by Krever: the centrality of contractual relationships between foreign investors and sovereign states in neoliberal political economy. 'Contracts are functional to neoliberal legality precisely because they serve to govern the entire society through the appearance of mere individual transactions', Perrone argues (at 56). This 'grants market actors [foreign investors] the possibility of supervising state behaviour in manners that are unimaginable under a property-sovereign paradigm' (at 57). Perrone draws on legal realist critiques of the social function of property to expose the disabling effects of this mode of contractual governance on the ability of a (purportedly sovereign) state to change course in economic policy. Andrés Palacios Lleras pursues this line of inquiry by discussing how the mode of market regulation employed by the state has changed under neoliberalism. Like Krever, Palacios Lleras delves into law and economics scholarship (this time with a greater focus on the work of the influential US jurist Richard Posner) to explore the ways in which 'the logic of the liberal legal form' has allowed law to be easily coupled with neoliberal economic rationality (at 61). Palacios Lleras highlights the synergies between the growing influence of law and economics scholarship and the proliferation of 'semi-autonomous' regulatory agencies that now have a ubiquitous presence in fields ranging from securities regulation and competition law to public utilities and environmental law in many countries worldwide (at 70). His analysis reveals how this shift in the mode of regulation has meant that neoliberal economic objectives can be realized by a new 'legal intelligentsia' of lawyer/policy analysts, who rely on economics to frame their policy decisions as a regulatory science (at 71).

Kenneth Veitch's and Robert Knox's contributions consider developments in social policy and labour relations under neoliberalism in one particular jurisdiction: the United Kingdom (UK). Veith identifies ways in which the legal form lends itself to processes of social restructuring that conform with neoliberal preferences for atomized, entrepreneurial individuals. His analysis illustrates how the rise of the 'workfare' contract and the move to private finance in the UK's National Health Service increasingly disciplines job seekers and health care providers into market-friendly logics of entrepreneurialism and competition. Veitch explores the tensions between what he identifies as a 'legal instrumentalist' social form of law that supported the development of the welfare state and the 'formal rational law' that has supported the rise of the capitalist economy, which is being re-imposed via the contractualization of welfare provision under neoliberalism (at 87–88). Knox charts another tectonic shift in social law under neoliberalism, which relates to the regulation of labour relations. He offers a highly detailed and theoretically rich account of how successive legal interventions that have progressively juridified labour relations have functioned to disaggregate a form of collective political subjectivity – the working class – and left in its place a society composed of alienated, individualistic, rights-focused employees. Through a 'flurry of juridification', which, among other things, restricted picketing, funnelled employee complaints into tribunals adjudicating on individual cases, narrowed the definition of a legitimate industrial dispute to a restricted category of employees and circumstances, imposed balloting requirements for union action and,

crucially, made unions liable under civil law for actions taken by workers striking in solidarity with affected groups, Knox shows how the law has created a series of 'material compulsions and incentives' that caused the disintegration of solidarity amongst the British working classes (at 94).

Labour law is also the subject of Ntina Tzouvala's chapter, 'Restraining the Right to Strike in Greece'; however, the nature of the relationship played by law in performing a similar function – disempowering labour and eroding the capacity to take effective strike action – is presented very differently in her account. Rather than charting numerous changes in the legal mediation of labour relations, Tzouvala's project is to demonstrate how, by virtue of law's inherent indeterminacy, the same Welfare-era constitutional provision that purported to guarantee the right to strike was, in practice, turned into an instrument to repress strike action. Tzouvala's contribution also substantially engages with the relationship between neoliberal legality and pre-existing liberal forms that facilitate capitalism: 'The neoliberal agenda can be realised to a significant degree by twisting, stretching and creatively interpreting the ordinary legal framework of a functional liberal Keynesian state' (at 131).

The final four chapters of the collection explore another dimension of neoliberalism's relationship to law, which is how neoliberalism co-opts possible strategies of resistance, and, relatedly, how, in spite of its legally conditioned recalcitrance, neoliberalism might be effectively resisted. Kristin Ciupa demonstrates how an ostensibly emancipatory category of internationally recognized human rights – indigenous rights – has served to incorporate indigenous people into dominant legal frameworks and to empower neoliberal governments and international institutions to manage and control indigeneity. What results is the commodification of indigenous knowledge and an encouragement of the performance of an acceptable indigeneity that is more compatible with the self utility-maximizing brand of citizenship preferred by neoliberal theorists (at 158–161). In her contribution, Brabazon begins by offering an analysis of the ways in which the liberal legal form is constitutive of capitalist socio-economic relations (at 169). Importantly, 'legal relations frustrate the pursuit of collective social goals' (at 170), and formal equality is emphasized over substantive equality. Thus, the legal form, and the rule of law specifically, Brabazon argues, perpetuate substantive inequalities whilst allowing relationships between unequal parties to 'appear to be merely the equal subjection of all to reason' (at 170). In the second part of her chapter, Brabazon builds on this analysis to demonstrate how the legal form has enabled fundamental shifts in the role of the state, the nature of dissent, the relationship between the state and dissent and social concerns, by remodelling political subjectivities and political relations in a way that is constitutive of neoliberalism. While Brabzon's chapter does signal some possibilities for resisting neoliberalism, the question of resistance is most obviously taken up in the final chapter. Vanja Hamzić starts by acknowledging the ubiquity of neoliberal law and the difficulty in surmounting it – above all through legal reform. Nevertheless, he has faith that 'the material zones of influence and realisation i.e. social, political and even economic human relations' are still capable of resisting the 'omnipresent neoliberal turn' (at 191). Hamzić is interested in exploring the contours of alegality – a capacity to be neither legal nor illegal – and how it might be possible to exist within (and act beyond) dominant capitalist modes of production (at 191). He engages with Fleur Johns' work on non-legalities in international law (at 195–196) and Boaventrua de Sousa Santos's work on alegality (at 197–198), and he draws on his experiences conducting ethnographic research in Pakistan to propose strategies for 'alegal self-governance'. He recommends that subjects need to pursue 'otherness' and to get away from the law's 'guidance' in order to nurture social relations that are free from the grip of legality (at 197).

2 Neoliberal Legality?

Among international lawyers, this collection will be most appealing to scholars of international economic law and to international lawyers who are interested in legal theory and political economy. Scholarship in these fields to date has engaged with the significance of neoliberalism as the dominant ideology informing state behaviour in recent decades. However, in much of that scholarship,

the nature of the relationship between law as a particular form of social relation and neoliberalism has remained under-elaborated. This book will be of great value for those international lawyers who are interested in the ideology that informs state behaviour in a wide range of contexts and who are concerned about potential obstacles to achieving a 'more social international law'.[7]

To my knowledge, this book is the first attempt at a rigorous analysis of how the legal form has been central to the neoliberal project. Brabazon and her co-authors convincingly demonstrate that neoliberalism might not have become so powerful, at the current time or in its current form, 'if legal liberalism had not enjoyed a particular decree of hegemony in the same moment as the political and economic conditions of neoliberalism occurred' (at 2–3). Each of the contributing authors also demonstrates the veracity of one of the book's central arguments: that neoliberalism has been a juridical project as much as it has been a political or economic one. I was certainly persuaded that a form of law that purports to be 'universal and fixed, independent of historical conjuncture and political will' (at 7), that depoliticizes and that increasingly re-patterns social relationships into atomistic, private law transactions, has been fundamental to the neoliberal project. However, I remain unsure as to precisely where the boundary between the form of liberal legality that constitutes capitalist political economy and the new form of 'neoliberal legality' that Brabazon and her co-authors describe lies. In the neoliberal era, it is evident that more and more social relationships are being juridified, re-patterned and marketized, but, to paraphrase Brabazon, at what point does the neoliberal legal form go beyond being consistent with the liberal-capitalist legal form and become something 'more specific' (at 2)?

I wonder if the difficulty in demarcating a boundary between these two forms of legality could be due to the fact that the collection is so agnostic about what precisely neoliberalism 'is'. Or it could be a consequence of the enormously varied territories that the contributors traverse in their respective analyses. Another possible explanation is that, in my view, some of the specificities of how capitalism has changed under neoliberalism – notably, with respect to processes of financialization in the global economy – are not substantially addressed in any of the chapters. One of the great strengths of this collection is its rigorous engagement with the neglected legal and social dynamics of neoliberalism. Yet, an unfortunate side effect of this brilliantly sharp and impressive focus on the legal and social has been a blurring of some of the most important transformations in the economic realm that neoliberalism has brought about. Is it possible to fully understand neoliberal legality without appreciating the shift from a global economy centred around the production and trade of commodities to one in which the volume of foreign exchange transactions carried out in a single day amounts to almost a third of the value of global trade in a year?[8] What shifts in the legal form have been necessary to enable a universe of new financial instruments known as derivatives to be created? Self-interested critiques aside, though, I learned a tremendous amount about the role of law in the neoliberal project from this erudite collection. I recommend it very highly, and I am in no doubt that this remarkable book will, as Brabazon hopes, start many important conversations in many different disciplines. In the mind of this reviewer, it already has.

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[7] The contours of a new trend towards a more social international law were outlined by Anne Peters in her keynote speech at the Inaugural Edinburgh-Glasgow International Law Workshop 'Edingow' on 9 April 2019, available at www.mpil.de/files/pdf5/Programme.pdf.

[8] In 1973, the ratio of the value of foreign exchanges in transactions to global trade was two to one; in 2004, this ratio reached ninety to one. By 2017, the total value of global trade was $17.88 trillion per year. That compares with foreign exchange transactions of $5.1 trillion per day. Frances Thomson and Sahil Dutta, 'Financialisation: A Primer', *TNI* (13 September 2018), available www.tni.org/en/publication/financialisation-a-primer#Q3.