Regulatory Hybridization in the Transnational Sphere

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and Ren Yatsunami

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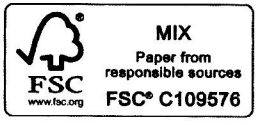

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Kyushu University is one of the leading academic institutions in Japan. Having celebrated its centennial anniversary in 2011, Kyushu University is committed to its objective to remain a world-class centre of excellence open not only to students and academics from Asian states, but also to the broader international community. In 1994 the Faculty of Law was the first in Japan to launch the LL.M. in International Economic and Business Law (IEBL) Program. This program attracts students from around the world and provides a supportive environment for academics and professionals in various fields to encourage students to confront the challenges of international economic affairs and cross-border commercial transactions. Besides the LL.M. Program, several new programs have also been successfully launched in order to widen the scope of international education: the LL.D. program and in 2011 the so-called 'Bilingual Program' was initiated to provide a unique opportunity to study law both in Japanese and English.

This volume presents the proceedings of a conference entitled *Regulatory Hybridization in the Transnational Sphere* which took place at the Faculty of Law of Kyushu University in Fukuoka, Japan on the February 11 and 12, 2012. This was the seventh annual conference organized by the Faculty of Law of Kyushu University with the objective to strengthen international education in Japan. A distinctive feature of these conferences is that students are entrusted with the organization of the whole event and play an active role in facilitating the discussion through their critical questions and comments. The conference as well as this subsequent book project was made possible through generous support from Kyushu University. We would also like to express our gratitude to Shu-Lin Lee for her excellent assistance in the linguistic editing of the volume.

Paulius Jurčys, Poul F. Kjaer and Ren Yatsunami
Fukuoka/Copenhagen/Tokyo August 2012

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'Transnational Law, Evolving' in Jan Smits (ed.), *Elgar Encyclopedia of Comparative Law* (2nd ed., 2012) 898–925 ssrn.com/abstract=1975403; 'Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order' 1 *Global Constitutionalism* (2012) 16–51, ssrn.com/abstract=1949320.

CONTENTS

INTRODUCTION

Poul F. Kjaer

This book analyzes the phenomenon of regulatory hybridization within the larger framework of the emerging field of transnational law. A dual move towards hybridization can be observed through the increased breakdown of two distinctions: the separation between national and international domains of world society and the distinction between public and private spheres of society. A central argument of this book is that the two forms of hybridization which transpire as a result of the increased breakdown of these distinctions are intrinsically intertwined, thereby leading to the emergence of a particular form of "double hybridization".

Hybridization implies a "mixing" of, so far, separate entities. Historically speaking such mixings are of course not a new phenomenon. The public/private and national/international distinctions have never been as clear-cut as typically assumed within the dominant twentieth century paradigms of law and society.[1] The intensification in the globalization of social processes in recent decades has however made hybridization an even more defining feature of regulatory frameworks.

The presumption guiding the contributions in this book is that this development has profound consequences for the impact of law on society and as well as for our understanding of law itself, thereby necessitating a rethinking of many basic legal categories. For example, as testified by the phenomenon of colonialism, the transnational level of global society has always been characterized by a strong reliance on private law and private ordering.[2] In fact one might argue that the claim to supremacy of public law vis-à-vis private law, which has been widely upheld in national contexts, has never been a central feature in the transnational sphere of world society. The growth of globalization in recent decades has in turn led to an

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[1] See, for example, Charles Donahue, 'Private Law Without the State and During its Formation' *American Journal of Comparative Law* (2008) 56; Duncan Kennedy, 'The Stages of the Decline of the Public/Private Distinction' 130 *University of Pennsylvania Law Review* (1982) 1349–57.

[2] Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' 61 *University of Toronto Law Journal* (2011) 1–36.

increase in the centrality of social processes, which are transnational in nature when compared to social processes that can be considered as purely national. In world society very few social processes and phenomena can be considered to be exclusively national. Thus, the structural transformations brought about by globalization profoundly reconfigure the relationship between public and private law insofar as private law frameworks gain in importance.

Against this background it is hardly surprising that the relation between public and private law is central to the academic discourse on transnational law. The concept of transnational law was first introduced by Philip Jessup in his famous Storrs lectures held at Yale University in 1956.[3] In the lectures Jessup instigated discussions about the nature and implications of normative orders that do not clearly fall within the category of nation-states. Jessup argued that transnational law is a discourse that analyzes the interrelationship between state and non-state actors, and also looks at the various regulatory challenges posed by transnational law. In the wake of the globalization discourse dominating the 1990s and the first decade of the new millennium, the concept of transnational law gained new prominence. For example, as manifested in the work of Gunther Teubner and other scholars inspired by the systems theory of Niklas Luhmann, more elaborate theoretical frameworks emerged emphasizing the distinctness of transnational law vis-à-vis nation state law and classical international law.[4] Thus, the degree of autonomy enjoyed by transnational law became the core issue of academic contestation. Is transnational law to be understood as an autonomous type of law or is it ultimately operating in the shadow of territorially delineated national law? The focus on the autonomy of transnational law triggered increased attention on the implications of and relations between transnational law and the existing normative regimes operating outside the realm of nation-states. The focus of the discussion was on the demise of state sovereignty and the increasing role of public and private transnational communities ranging from the European Union and the World Trade Organization to multinational companies and large scale NGOs, and usually centered on issues of effectiveness as well as the legitimacy of transnational law arrangements and private ordering beyond the state. Whereas Gunther Teubner departs from a private law perspective, a distinct public law perspective

[3] Philip C. Jessup, *Transnational Law* (New Haven, Yale University Press, 1956).

[4] See, for example, Gunther Teubner (ed.), *Global Law without a State* (Aldershot, Dartmouth, 1997).