

Cyberspace Law and Other Kinds of Law

Peter Blume

1	Three Dimensions	348
2	Private Law	348
3	Antagonistic Interests	350
4	Cyberspace	351
5	The Law	351
6	Standards	352
7	No state?	353
8	Actors in Cyberspace	354
9	International Law	355
10	Data Transfer	356
11	Sanctions	356
12	The Future	357

1 Three Dimensions

The basic question to be considered is whether there can be law without the state. This is a challenging question as it is a long tradition that the state is the primary lawgiver and that legal conflicts are judged by the state courts applying the law. In some sense the statement on law without state presupposes that we know what a state is and what law is. The following considerations will not provide answers to these questions in depth but just define the state as an entity that through legitimate use of power ensures that society's law is respected by the population. The question is whether such control is possible through law and maybe other normative means not depending on the entity called state. It is tempting to conclude by giving a negative answer but it is also tempting to consider whether the answer could be positive. There is no simple answer to this question but it is worthwhile to consider the issue as it at least may enhance the understanding of what law is.

Today it may be observed that the law, i.e. European law, has at least three dimensions which have to be considered when determining which legal rules (norms) are valid at a specific time. The dimensions are national law, EU law and international law. Within these dimensions there can be legal sources that contribute to the determination of valid law in a European state within the EU and the EEA. It is well known that these dimensions have to be taken into account. The fact that there are three dimensions may be seen as a complication and even though EU law and international law do not relate directly to one specific state, these kinds of law do not in themselves imply that the state is not necessary for the existence of law. The reason is that the national state is active within all three dimensions. As indicated, the state does not on its own produce law in the EU or internationally but the state participates as one of several lawgivers and has to some degree the possibility of not accepting or endorsing the legal rules. Even though there are major differences between the dimensions it is fair to assume that all of these kinds of law currently is linked to the state and that the existence of EU and international law does not imply that there can be law without the state or negate that the state is a precondition for the existence of law.

2 Private Law

The state law issue may be illustrated when considering certain kinds of private law. Even though it is often discussed whether it is reasonable to make the distinction between private and public law this may be fortunate when considering the relationship between law and state. In general, private law accepts that individuals can reach agreements based upon promise, and that these promises are legally binding without previously having any basis in state made law. In Danish law in the same way as in many other kinds of national law, agreements are binding as long as they do not contravene law and decency. The law of contract is not dependent on statutory law but this is not in itself support that there may be law independently of the state. Even if this is

the case, it would be tempting to answer the question by referring to this kind of private law. However, this law exists because it is more or less tacitly accepted by the state who may intervene at any time. The autonomous private law serves society in many ways but it can be substituted by statutory rules if this is viewed politically fortunate. Intervention through state law has increased but real private law still exists.

Against this background, it is necessary to consider more closely what state law is. The question is whether state law has to be founded on certain legal sources and/or has to have institutional support. Maybe there has to be statutory law or law presupposing that it has been determined by a parliament or another authority that has been entrusted with lawgiving authority. If this is the case private law will prove that it is possible to have law without a state in particular in a situation where the level of intervention in the applied state rules is not too high. This is an easy way out and it will not provide any surprise for the common theory of law. The situation depends on legal culture and tradition. The sketched conclusion is reached within one specific legal tradition, civil law. Another approach is based on common law, where law is founded on other kinds of normativity than statute. It takes a broader approach. I am not well versed in common law so I will not continue this point and just mention that this kind of law seems to conform much better with the no state law assumption than civil law does. However, the use of courts may show another picture.

In order to pursue this path it must be considered how the position of the courts should be understood and whether they enhance the concept of state and what kind of law is located within the realm of the state. The courts are part of the state. This is quite often neglected but the courts are dependent on other parts of the state and when courts passes judgement in cases in which the state participates it is one part of the state judging another part. This might be different in respect to international courts, see below in 9. Judges are appointed and paid by the state, and the national courts figure on the annual fiscal budget. To repeat, even though the courts are independent and can make judgements against other parts of the state they are still part of the state. As it is well-known private law is determined through court decisions and accordingly private law is or is transposed to state law even though it basically derives from agreements made by two private parties. The different rules and even more the general principles of private law acquire real legal existence through the courts where these rules and principles are construed by precedent.

Even if this is accepted there may still be kinds of private law that are not dependent on the state. It could be argued that customary law is law without the state and it could be added that in old days, perhaps before states extensively applied statute, this kind of law had a primary position and that no one doubted that it was law. Some customs were generally recognized but even so most customary law functioned with the acceptance of the courts. In many areas it was easy for the state to replace custom with statute, and today there are few customs and maybe no new ones are being developed. In this sense customary law is a weak legal source, and once again the role of the courts is crucial. On the other hand, custom *contra legem* has been recognized and it is

likely that some of these “independent” customs exist today and may be recognized and accepted by the courts.

Private law may contain traces of law without state but mainly it shows how difficult the issue is. It seems necessary to reformulate the basic question so it is whether there can be law without state and state driven courts. It is not the individual legal source and its relation to the state that is important but whether the legal norms may exist and function without the backing of courts and the enforcement machinery behind the courts. This is an appropriate reformulation because courts exist in all societies and for this reason the answer, if there is an answer, seems to be a general answer. Courts may be substituted by different kinds of arbitration but this is probably not a good example as it is commonly accepted state law which is applied in arbitration. The forum is changed, not the law, and often judges participate in arbitration which may be viewed as an alternative kind of court.

3 Antagonistic Interests

It may be expedient to look other places and in the next section it is suggested that there might be law without state in the virtual world when we travel through cyberspace. However, before this journey starts it is expedient to consider very generally why law exists. Law serves several purposes. Law has both a hard and a soft side. It establishes order in a society. Ideally it promotes rules that support a just society. This is not certain as legal rules sustain interests and dependent of the political framework law makes some interests more important than others. Such law needs power and this power is normally delivered by the state. A question is whether this power has to come from the state and of course whether power is at all necessary. Law raises question marks and may be the vehicle for change. Before going out in cyberspace it is accordingly tempting to look very briefly for a theory that maybe envisions law without state.

Such a perspective may be linked to a legal theory related to the societal approach taken by Karl Marx. This theory seems to accept law without state. This theory is not mundane today but it is not forgotten and could have an interest with respect to the state/law issue. However, it does not provide an answer to our question as some of the theories inspired by Marx in general are based on the assumption that the state will wither away when the antagonistic class differences have disappeared and at this stage, the communist society, law will also disappear. There is no more need of legally based power when the societal interests are unified. This means that law and state share a mutual fate, and accordingly it does not provide an answer to a situation where there is no state but still law. It makes it clear that it must be explained that law functions without any reference to the state. Even though the answer is not provided, this theory has an interest as it indicates that it is the surrounding environment that determines use of legal regulation. It is the nature of the surrounding society that determines the nature of law. In order to be linked to the state, the law must serve purposes which are necessary for enabling the state to act as controller of society. When law serves other purposes then the state does not

have a supporting role with respect to the law. Against this background, the search for a situation where there is no state but law emerges from new directions.

4 Cyberspace

Today, it is tempting to take a look at a new environment This is constituted by modern technology which has created a virtual world in contrast to the traditional physical world. Maybe in the virtual world there is legal regulation which is not made by the state. Furthermore this regulation is not backed up or given efficiency by state organs such as courts. At the birth of the internet such a situation was part of the vision. On the net there would be real freedom and people would be able to communicate and make actions without dependency on or restraints from state organs. In this context freedom meant freedom from the state. In the vision the state is viewed negatively and as an enemy. Some even thought that people would live solely in the net as cyborgs as described in *William Gibson's* book *Neuromancer* (1984). This part of the vision is still a vision and even though it now appears to be unrealistic it maybe will become real through artificial intelligence.

It is evident that due to this vision there is no state in cyberspace while the vision does not exclude that there is at least some kind of law. In the dream cyberspace, the virtual reality, did not have a state. This vision is reflected in the decentral nature of the internet. Even though there are some ways to control the internet there is no central point from where the whole net can be controlled. The old state is not, at least not entirely, substituted by a new virtual state. Freedom is still regulated and the applied method may be law functioning without the state. This was the vision.

As it is well-known, the internet did not reflect this dream and in particular there has been enacted many legal rules that specifically aim at regulating behavior on the net. Even so, it may still be possible that the net embraces kinds of law that are not related to the state. The virtual and the physical might be different worlds with respect to the necessity of state made law. This is the case regardless of the fact that it is capitalistic economic relationships that dominate both these worlds. There could be certain parts of the internet without state law and if that is the case it would be sufficient to provide the answer we are looking for. In order to set the background it is necessary to have some idea of what law is. The question is when a regulation may be deemed as legal.

5 The Law

A basic issue is whether law can be defined in such a way that it is not related to the state. The question of what law is can fill this volume and many more. Here it is important that the definition does not rule out that the answer to the basic question may be affirmative. A focus can be that law is normative and consists of norms that are directed to citizens (enterprises/authorities)

determining how they must behave in order to serve the good of the community. Such a definition is not by far exclusive as the norms may be moral or religious. The definition does not separate law from other kinds of normative power. However, there is no reference to the state.

So far so good, but a difficult point that has to be considered is whether the definition of law should include a reference to an institution, not necessarily the state, or to power as such, and whether this will separate law from in particular religion that may refer to a church. The definition does not have to be exclusive but there seems to have to be an institution in order to make law efficient. Law does not exist on its own. Law has to be supported by some kind of power. This does not necessarily need to be an institution. Anyway, the existence of a supporting institution may not have to be included in the definition. Accordingly, a definition of law may or may not include a reference to an institution. Against this background the basic question may be rephrased so that it concerns whether there can be law without a supporting institution. This has the advantage that it is not necessary to apply a specific definition of a state. It remains to define power and to contemplate whether there can be power without an institution.

6 Standards

The travel through cyberspace continues searching for specific kinds of regulation that appear to be legal. We are primarily looking for rules that independently are determined by the actors in a certain area of space. We are trying to find such modes of regulation that are not dependent on institutions and in particular not on agents of the state. We are searching for regulation where the involved actors determine the situation independently. This may be the complete situation surrounding the regulation or it may be partial in the sense that the regulation intervenes in how a certain aspect of law is managed.

There is a connection between the physic and the virtual law and regulatory issues on the net often will lead to demands for legal regulation initiated in the physic world. There is no doubt that traditional law also applies on the internet so in this sense the state is active in the virtual world. Most traditional state made law applies also to the internet. However this does not prevent the development of law especially located in the internet which is not instigated by the state. This could be customs that are broadly accepted by users of the net. Such customs or legal rules will often at a later stage be incorporated in state made law but even if that is the case such rules will demonstrate that law without state is possible. Maybe only temporary but that is sufficient. Such rules may relate to the behavior in social networks creating norms on how to behave on e.g. Facebook. Even though the networks have been usurped by norms from the physical world coming from others than individuals, i.e. private enterprise, public authorities, it is still a world on its own thus making new kinds of law possible.

Security is essential in cyberspace. The enormous amount of data that flows on the net makes it necessary to have security that ensures that only authorized people with an authorized purpose access the data. This is necessary regardless

of what kind of data it is. The net needs trust and security is necessary to gain such trust in order to continue usage of the net. As a starting point it may seem natural that requirements to security is a legal theme and that an acceptable level of security can be sustained by traditional legal rules. This is quite natural and in several societal situations there are examples of rules with a technical theme.

Such rules do exist and data protection law is a good example. In this context it is interesting whether these rules cover the whole regulation or other norms are also at work. It seems appropriate to view security as a starting point of securing data protection leaving it to the formal legal rules to state the goals that have to be achieved. The actual security must be achieved by the data controllers or in practice the processors. The EU data protection Regulation (2016/679), applicable in 2018, article 25 states that personal data should be processed within the framework of privacy by design and by default. This is broad norms in the form of standards giving life to more detailed rules. It is left to the data controller how to implement them. In many ways the Regulation gives evidence to the existence of legal rules delegating power outside the state. It is prescribed that the controller has to perform a privacy impact evaluation (article 35) but the precise contents are left to the controller. It is made optional but recommended to use certification of processing procedures (article 42-43) and it is likewise recommended to employ codes of conduct (article 40-41). Especially the last two options rely on independent regulation determining law in principle without the state.

7 No state?

These examples make it expedient to return to the main question of law without a state and to consider what this question really means. In particular it must be considered whether it is enough to have rules that are not made by or imposed by the state or whether it is necessary that behavior related to rules is not judged by the courts or another state organ. Do legal rules without the state signify rules with no connection to the courts of the state, i.e. situations where the state does not in any way exercises normative power. If this is the case, then the examples above do not really prove that such law exists.

It seems reasonable to think about situations where in particular the courts are not and cannot be activated. There may be some kind of conflict solution but this has to be private and it must not be possible to take the conflict to a court. This should not only be due to recognized practice but the possibility of using a court should be excluded. However, if this is assumed there seems to be some kind of circle. In order to exclude the possibility of using the courts there has to be a legal rule that prohibits this practice provided of course that state courts still exist. This rule will be part of state law. As it is well-known today, courts will not judge in matters which do not refer to an issue of legal interest. As a consequence, the legal rule must make clear that something is not legal even though it is regulated by some kind of rule. This leads to the assumption that law without the state can exist but not in an universal sense, and on the

basis of a traditional legal rule. In other words, it is the state that accepts areas where state enacted law is not the regulating factor.

The question is viewed from the perspective of today. When it is assumed that law is necessary in order to accept that certain parts of the legal system can work without the backing of the state it must be taken into account that legal rules are located on different levels; the constitutional level being at the top. This leads back to the distinction between private and public law. Generally speaking, constitutions are mainly interested in public law as the main regularity theme is concerned with the relation between state and citizen. This implies that it is more difficult to loosen the chain binding law to state when it is public law. As an example the Danish constitution in article 63 has a rule that provides a right to take decisions by public authorities to the courts. When the legal system as is the case in most countries adheres to the *lex superior* principle such a rule constitutes an obstacle to a system where law and state are not related. It may be argued that a rule like article 63 ensures the rule of law but that this is only the case with respect to public law that presupposes the existence of the state.

8 Actors in Cyberspace

In cyberspace there are different actors with diverging capacities and powers. It is natural to take an interest in how these actors establish kinds of normativity in cyberspace. The actors of interest have escaped state made law but this does not imply that they have developed a position where they in their own capacity can use power in order to achieve results that are desirable and doing this by establishing some kind of normativity. This is in particular the case when the results are related to a high number of individuals. Social networks are primary icons of such a development.

The situation is in particular evident with respect to free speech and censorship. Both Facebook and Google have their own policy as to what can be communicated and shown. This can relate to nudity and political messages. These corporations create their own legal room and they use their power to enforce their rules. The policy is mainly based on conservative American values and accordingly the policy will not always correspond with the beliefs in the country of the user. Legal cultures clash. Freedom of information is a fundamental part of law in democratic countries and normally it is assumed that the state should ensure and protect this freedom. However, the state is not playing a part and does seem to want to. The regulator is private companies that play lawmaker and court at the same time. They make their own law and even though this is possible the state does not intervene. These corporations have in a very short time reached their position of wealth and influence. A little touch of magic has been working as use of the services is free but generates huge amounts of dollars.

Even though it is not quite the similar situation it is tempting to mention the position of Google after the ECJ decision (C-131/12) with respect to the right to be forgotten. This is a controversial right that has been developed in EU data protection law. The basic idea is that as in cyberspace information never

disappears there must a legal regulation that makes this happen at least when the information has an unfounded negative effect on the person. It must be prevented that the observation according to which the computer never forgets and never forgives becomes reality. The right to be forgotten has been opposed for many reasons and not least on the basis of freedom of information. Even so the ECJ has recognized this right in connection to search engines. Links must be removed on the request of the person when a search using the name of the person leads to information that is detrimental to the person, provided that the person does not attract a public interest. The information, provided it is legal, stays in cyberspace and this system merely means that the information is more difficult to find. It is still out there.

In this connection it is interesting who determines whether a link should be deleted. In the first instance Google makes the decision and if the link is not removed the person may complain to the data protection authority, i.e. a state organ. At first the decision is made by the private company without any connection with the state. Most cases are decided by Google and only some of the negative decisions are referred to the data protection authority by the affected person. The state has not disappeared but it plays a subsidiary role. Up till now Google has defined the scope of the decision and limited it to the European Google implying that the link disappears but this is not the case in other areas of the world such as USA where the link is still available when searching Google.inc.

All in all, there are only traces of law without state but these examples indicate that such law could be possible and that internationalization and globalization combined with digital communication could establish the conditions for such law, maybe not in all societal fields but in important ones. It furthermore indicates that size has importance. It must be possible to exercise normative power and to have some kind of institution enforcing the rules. The law cannot stand on its own and the supporting institution has to have autonomy and for this reason size is important.

9 International Law

Today law is everywhere and almost anything is legally regulated. The focus on cyberspace makes it natural to view international law covering many countries. The question is whether this kind of law implies traces of a situation where law is separated from state. As a starting point this does not seem to be the case as modern international law is developed through agreements between states or by state behavior. It is not the single state that sanctions violations but sanctions are used by a consortium of states, including international courts. Even though these observations are valid it should also be observed that the national state is not as important as normally is the case in other fields, and that state law is not directly the preferred method of regulation. Legal issues that transcend borders being important for persons or companies from many states are not suited to be regulated in a one law-one state model.

Today there are sometimes be developed regulatory models that although including national state elements mainly are based on other normative elements

(see in 10). This regulation is stated through a more or less complex web of contracts. The autonomy of the enterprises means that it is possible to apply sanctions that are effective. Not all kinds of sanctions can be used. Some are reserved to the state such as imprisonment as considerations to the rule of law strongly favor use of traditional state law.

10 Data Transfer

It is important for many companies that personal data easily can be transferred to other countries and for the general public that such data transfers do not undermine privacy and personal integrity. This is a theme for data protection law. The opposing interests cannot fully be satisfied solely applying state law. On the basis of rules in Directive 95/46 alternative models have been recognized with respect to the private sector; contracts between the importing and the exporting entity or Binding Corporate Rules.

It is in particular BCR that is interesting because these rules typically are applied in a group of companies and it is the group utilizing its relative autonomy that ensures that the rules are respected and if violated uses its own powers to sanction such behavior. The group of companies substitutes the state but only to a certain extent. The specific BCR has to be approved by a state institution (Data Protection Authority) and it is possible for violated persons to use state organs such as courts. The BCR is not totally independent. Regardless of these reservations BCR is a good example of the possibility of law without state. There is little doubt that these rules are strong and achieve their purpose without the help of the state. The closeness of the included entities constitute autonomy ensuring that the rules will be respected.

As mentioned state law has an important role but it could be argued that the market, at least in some situations, will ensure that rules are followed because misconduct will lead to negative response in the market resulting in economic loss. Another possibility is negative mass media reports. Bad publicity is a strong regulating force and it can, together with popular reactions, be conceived as a sanction applied without being dependent on the state.

11 Sanctions

This article uses cyberspace together with other societal phenomena as an area where law without state could be imagined and where there are some traces of such law. The examples previously discussed show that the main problem in such a scenario is how alternative normative orders can be upheld and what kind of sanctions can be applied and be accepted when such a normative order is violated. It is fairly easy to imagine rules of a legal nature without state backing being violated and even when such rules establish governance they will not be complete. It is well known that very few rules are respected by everyone. It is utopia to imagine that rules are respected by everyone even taken into account that many people follow rules due to a basic respect for the

law. One of the most important features of law is that it makes sanctions legitimate and acceptable. It is permissible to defend the law and through this context state power becomes legitimate.

Sanctions are necessary in order to ensure obedience to the law. Taking this into account the question is who will manage these sanctions if there is no state. It must be considered whether police and prisons are necessary. Taking into account that society is becoming still more complex and hard to comprehend it is not realistic to have law without sanctions. Such law will not function and cyberspace will be the Wild West. This is a basic problem. The examples used above are fragmented and do not by far cover all current law. Anybody can mention kinds of behavior that should be sanctioned. Against this background it is tempting to answer the question of law without state in this way: yes but only to a certain degree. Much law needs the state just as much as the state needs the law.

12 The Future

The law is in general bound together by common principles and ideas. These may be laid down in constitutional law or in international law such as The European Convention on Human Rights. Such general law principles aim at establishing a common identity. They create legal communities. It is the state or states together that make or at least formulate such rules. Again the question is who plays this role when the state has disappeared. If state is identified as national state then the successor is international orders. In Europe it is possible to imagine that the EU sometime in the future will develop into such an entity. However, it is easy to argue that in this situation the EU has just developed into a large state that is dependent on acceptance from the different communities. In some sense there is not qualitative news.

This is the reason why the discussion above to a certain degree has centered on Cyberspace and the changes that derive from modern information technology. When the current technological revolution has ended society most likely will be completely changed. Maybe man has a new role to play and maybe law is now independent from the state. The key to such a society is artificial intelligence, including robots. AI has for a long time been a vision that has not really emerged. However this situation seems to be changing and AI is already demonstrating its practical usefulness. Robots are replacing humans with respect to mundane and trivial work and many believe that this is just the beginning.

There are those who see threats lurking in this development, even imagining robots taking over, just as HAL in *Stanley Kubrick's 2001: A Space Odyssey*. Whether there is any foundation to this fear is uncertain but it may be observed that a situation with law without state maybe will be possible when the law is not solely directed to human beings but also to robots. Maybe it is the human factor that makes law backed by the state a necessity.

There are many challenging and exciting scenarios. The future is as always uncertain and unknown. Today it does not seem likely that the law as we know it can survive without the national state. Law is used in all states including

those who do not acknowledge the rule of law, and it is in most cases the state that controls the law and its normative messages. State law is the most important but there are parallel orders without dependence on the state. They can be “lawful” and legitimate but they can also be illegitimate as the order upheld by criminal organizations with reference to the classic discussion of whether the order of the mafia is law; at least they apply sanctions! It is always inspiring to fantasize about law and its future.

This contribution has to some degree been a fantasy just as its steering question appears to be. However, the remarks have tried to touch the real and existing legal world. It has indicated that law without state is a possibility even though the connection between the two probably only to a certain degree will be cut. It will still be a *Gordian Knott* without *Alexander*. The discussion of law without state is linked to many of the themes embodied in legal theory. By far all have been included or even touched upon here but even so law without state has, I hope, been contemplated in a productive way.