

# Introduction

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## 1 A Proactive Approach and the Nordic School of Proactive Law

This Volume 49 of Scandinavian Studies in Law is devoted to 'a proactive approach' which in the following will be encapsulated under the more generic term 'proactive law'. Briefly put, proactive law may be described as an approach which comprises a way of legal thinking combined with a set of skills, practices and procedures that help organizations and individuals to identify opportunities in time to take advantage of them, and to spot potential problems while preventive action is still possible. This legal method represents a future-oriented approach to law, based on the view that legal knowledge is at its best when applied before things go wrong.

It should be clarified right from the beginning that the notion of 'law' here is not equivalent to rules and regulations, but refers instead to law as an instrument that can be shaped in a whole variety of ways, e.g. as a basis for legal risk analyses, legal system design and management.

Furthermore, it should be emphasized that the issue here is not at all to present proactive aspects of law as something new and original as such. On the contrary, it is a well-known fact that law conventionally may function as both a proactive and reactive steering mechanism. Legal rules and regulations, contracts of different kinds, institutions for dispute resolutions may, for instance, both prevent conflicts and support problem-solving retrospectively.

In addition to the fact that lawyers so to speak always have been proactive in certain aspects there is a more modern movement of proactive law that in turn has emerged from more specific needs for a new approach. Practical experiences as well as theoretical studies show that there is much to be gained by further developing means and methods that place an emphasis on the proactive dimensions of the legal domain. This applies not least to the variety of professional roles that a legally educated person may encounter in today's working life.

Proactive law may thus be conceived of as a fundamental perspective within the legal discipline which has been especially investigated into in the United States and, further developed in Finland, being one of the Scandinavian countries.<sup>1</sup> A major incentive is here to avoid legal problems and costly litigation by way of practicing law in a proactive, preventive way.

Yet another aspect of proactive law can be traced to the legal discipline of law and informatics (‘rättsinformatik’) which has a tradition of studying the needs for proactive law in the context of modern information and communications technology. In an e-business<sup>2</sup> environment, for instance, the need for proactive law is constantly growing and at the same time not always that easy to detect, capture and merge into already existing business routines. Just to illustrate, standardised models for global e-business transactions are evolving and to a growing extent also been put to practical use, which indicates a sound development, were it not for the legal uncertainties – more precisely how the legal aspects have or have not been integrated into the technical system design. It concerns e.g. jurisdictional differences between how to present a binding offer as opposed to an invitation to treat, and how to balance measures for privacy protection with security functions for authentication, and non-repudiation, etc. The need to integrate law into technical e-business solutions is thus of major concern in order to achieve prospering e-business.

## 2 The Proactive Law Conference in Stockholm 2005

### 2.1 Conference idea

An attempt to merge the above-mentioned lines of interests associated with proactive law was made by organising the Nordic School of Proactive Law

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<sup>1</sup> For more information about Proactive Law and Preventive Law as specific perspectives of legal development and a growing research field of their own, see e.g. Barton, Thomas D. & Cooper, James M., *Preventive Law and Creative Problem Solving: Multi-Dimensional Lawyering*. California Western School of Law, National Center for Preventive Law (NCPL), 2000, “[www.preventivelawyer.org/content/pdfs/Multi\\_Dimensional\\_Lawyer.pdf](http://www.preventivelawyer.org/content/pdfs/Multi_Dimensional_Lawyer.pdf)”; Dauer, Edward, A., *Developing Preventive Law: From Lawyering to Quality*. Leadership and Management Directions Newsletter, Summer 1998. Law Practice Management Section, American Bar Association (ABA), “[www.abanet.org/log/lpm/bodies/newsarticle11142\\_body.htm](http://www.abanet.org/log/lpm/bodies/newsarticle11142_body.htm)”; Haapio, Helena & Smith, Anita: *Safe Sales in Cyberspace*. American Corporate Council Association (ACCA). ACCA Docket, July/August 2000. Also published in Albert Kritzer (Ed.). *International Contract Manual – Contract Checklists, Supplement 4*, Kluwer Law and Taxation Publishers, November 2000, “[www.acca.com/reprints/safesales.html](http://www.acca.com/reprints/safesales.html)”. More information can be found from: National Center for Preventive Law, “[www.preventivelawyer.org](http://www.preventivelawyer.org)”; California Western School of Law, Center for Creative Problem Solving, “[www.cwsl.edu/main/default.asp?nav=creative\\_problem\\_solving.asp&body=creative\\_probem\\_solving/home.asp](http://www.cwsl.edu/main/default.asp?nav=creative_problem_solving.asp&body=creative_probem_solving/home.asp)”; Proceedings from the international conference on “Future Law, Lawyering and Language: Helping People and Business Succeed”, May 12-13, 2003, Helsinki, Finland, “[www.ulapland.fi/contentparser.asp?deptid=13095](http://www.ulapland.fi/contentparser.asp?deptid=13095)”; Pohjonen, Soile (ed.) *Ennakoiva sopiminen 2002*, note by Anette Kavaleff in *Tidskrift utgiven av Juridiska föreningen i Finland* 3/2003, p. 419–424. See also the more in-depth presentations of proactive law that will follow in Part 1 of this volume.

<sup>2</sup> ‘E’ stands for ‘electronic’.

Conference in Stockholm June 12-14<sup>th</sup> 2005, hosted by the Stockholm Chamber of Commerce. The theme of the conference was “fusing best business practices with legal information management and technology”.<sup>3</sup>

The underlying conference idea may be expressed in the following way. Contracts, information resources and IT<sup>4</sup> are valuable assets and a source of strategic advantage. They create value and have fundamental impact on financial results. Consequently, they need to be planned, secured and protected effectively.

The modern information society currently challenges tools and techniques that have been developed over decades to support off-line, conventional business. It may be questioned to what extent traditional business methods apply in fast-paced transborder e-business. Of relevance is also to discuss how new technology solutions may contribute to the success of traditional business.

The conference proceedings that partly are being published in this volume of *Scandinavian Studies of Law*<sup>5</sup> may be outlined as follows.<sup>6</sup>

The underlying theme of the conference was as already indicated proactive law in the context of a global IT-based information society. The conference title –fusing best business practices with legal information management and technology – intends to capture this overall goal, implying also that corporate governance is much more than merely legal compliance. Furthermore, legal information is here defined broadly, comprising both core legal sources such as contracts and legal regulations of different kinds as well as legally relevant information, e.g. an electronically signed business record of exchanged business. The term business is here to be understood broadly, comprising activities in the private as well as public sector.

In line with the introductory remarks above, the foundations of the conference idea may be explained in the following way. There is no doubt that proactivity is a major feature of the legal discipline, for instance, in the context of contracting and legislative activities. Furthermore, the characteristics of society as informational goes way back historically. But – and this was a major incentive for the conference – proactive law impacts differently in today’s society.<sup>7</sup> Drawing on the Nordic experience in the front line of IT development

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<sup>3</sup> The Conference website is available at “[www.proactivelaw.org/](http://www.proactivelaw.org/)”.

<sup>4</sup> IT is here used as an abbreviation for Information Technology which to a considerable extent involves means for communication.

<sup>5</sup> Authors of this volume who also contributed to the Stockholm 2005 Conference are: Edward Dauer, Helena Haapio, Anette Kavaleff, Henrik Lando, Jarl Magnusson, Cecilia Magnusson Sjöberg, Soili Nystén-Haarala, Mats Vikström, Carolyn E. C. Paris, Babak Sadighi Firozabadi, Dag Wiese Schartum, Soile Pohjonen, Peter Seipel, Jan Trzaskowsky and Emily Weitzenböck.

<sup>6</sup> This part of the presentation takes its starting point in a version presented prior to the event: “[www.juridicum.su.se/proactivelaw/NordicSchoolofProactiveLawConference2005.pdf](http://www.juridicum.su.se/proactivelaw/NordicSchoolofProactiveLawConference2005.pdf)”.

<sup>7</sup> The accuracy of the perspective is well founded not least in previous research in the field of law and informatics. See further e.g. *Rättsautomation: Särskilt om statsförvaltningens datorisering*. Stockholm: Norstedts Juridik, 1992, and *Critical Factors in Legal Document Management: A study of standardised markup languages. The Corpus Legis Project*. Stockholm: Jure, 1998. 458 pp.

and the common legal and business culture, the conference journey was set to further develop what may be referred to as the Nordic School of Proactive Law.

An apt illustration of how proactive law impacts differently in the computerized information society is that legally relevant core activities often take place outside of acknowledged fora for regulative activities. Standardisation bodies of varying status have a major impact on the conditions for electronic messaging, content management, information security etc. Vocabulary design directed towards a unified business language for e-commerce is one example that calls for particular legal attention.<sup>8</sup>

Another example is that business choices related to system and software design have particular normative implications. The transformation of legal information expressed in traditional legal documents such as statutes, preparatory works, and decided (court) cases, contracts, etc. into program code commonly involves subjective measures of interpretation. Proactive law in this process means that vague concepts and ambiguous rules must be transformed into strict criteria that can be executed by a computer. It is important to note that this kind of automated procedures has become a common feature in many sectors of society.

As indicated above, the increased demand for proactive law has to do with the fact that contracts, information resources and IT are valuable assets, and that they need to be managed effectively. The management of such assets is not a trivial task, however. Consider, for instance, software and license audition on a global digital marketplace which calls for new means and methods. At the same time it is important that the business knowledge gained and methods developed over many years are taken advantage of in the internet era.

To conclude, the above statement that proactive law impacts differently in today's information society implies that:

- (a) It is important to be aware of and actively integrate legal aspects in early stages of system and business process design and development.
- (b) Tools and methods that appear to be merely of a technical nature often have legal consequences.
- (c) Proactivity in project, contract and risk management ensures best business practices and results in enhanced business results.
- (d) There is every reason for lawyers – working together with subject matter experts and IT professionals – to take on new roles in the shaping of law and business in today's information society.

## 2.2 *Topic Areas*

The Stockholm 2005 Conference emerged in response to well established needs to bring people from the legal side closer to developers and implementers of e-

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<sup>8</sup> See further documents available via the homepage of the LISA-network: Legal Information Standards Action Network: "www.lisan.org".

business solutions which also led to the establishment of the Working Party for Proactive Law in E-business, equivalent to the conference organisers.<sup>9</sup>

The scope of the conference was encapsulated in three major topic areas, namely (a) modern business models, (b) secure legal information management, and (c) contract and risk management.<sup>10</sup> The topic areas can briefly be illustrated as follows.

One example of a modern business model is the so-called single sign-on electronic market places. A basic idea is that a consumer, after having logged in just once, can enter into new deals with a whole set of vendors and suppliers without further identification measures. The legal challenge posed by such a business model is how to comply with pre-contractual as well as post-contractual duties as well as requirements of individual response. Electronic marketing is another feature of modern business models. In order to avoid being accused of unlawful spamming it is necessary to pay attention to predominating infrastructures for telecommunications and information management as well as applicable legal frameworks. Cross-border e-commerce evidently gives rise to jurisdictional issues. In this context there is reason to perform risk assessments of websites for insurance purposes, etc. Risk control and visibility for corporate governance is also of importance.

Secure legal information management refers to a whole variety of security issues of relevance to the legal domain. Of major interest is the practical need for and legal effects of different kinds of electronic signatures. Legally founded means and methods for long-term storage of digital business data is essential. A closely related issue has to do with development trends as regards digital evidence referring to information systems.

Contract and risk management, finally, is a disciplined, system-based approach to contracting processes and documents. It works both on-line and off-line and is applicable across many business contexts. For lawyers and business managers alike, contract and risk management generates control and visibility of company rights and obligations and promotes sound risk control and compliance policies. The focus is on key elements contributing to – or endangering – business success. It concerns also how to take advantage of contract and risk management for bid processes, procurement, software and information resources, etc. One important point to be made in this context is that business managers, legal and IT professionals must work together to achieve full benefit from contract and risk management and the related systems and solutions.

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<sup>9</sup> Generally speaking the conference could be labelled as a non-commercial joint venture bridging over both the private and public sectors of society, including academia. The Planning Committee comprised representatives from private enterprises and public agencies, academics as well as practicing business lawyers and technicians. The goal was thus not to set up a commercial conference product but instead to arrange an event shedding light on the role of law in today's information society. See further "[www.juridicum.su.se/proactivelaw/members.html](http://www.juridicum.su.se/proactivelaw/members.html)".

<sup>10</sup> The detailed programme and presentation materials provided by conference speakers have been published at the following address: "[www.juridicum.su.se/proactivelaw/programme/](http://www.juridicum.su.se/proactivelaw/programme/)".

### **3 Structure of Contents**

There are three blocks of articles in this Volume 49 of *Scandinavian Studies in Law*. The first part serves the purpose of introducing proactive law as a multifaceted perspective of the legal discipline. It will address proactive law from a practitioner's point of view as well as from an academic horizon. Furthermore, proactive law will be reflected upon in a business law context as well as in a government-based one. In addition to a scope ranging from commercial law to public law there are yet other views illuminated. For instance, internationally emerging approaches are introduced under the umbrella of the 'comprehensive law movement'.

The focus points of the second part are contract and risk management. The selection of this major field of interest reflects the choice of topics for the Stockholm 2005 Conference. A major issue in this part is therefore commercial contracting in an international business environment which to a growing extent is characterised by outsourcing, IT-based contract management tools, etc. In this context, virtual organisations and the impact of technical infrastructures on the foundations of businesses' daily operations are the subject of special inquiry. Reflections in the above-mentioned direction give in turn rise to a need for legal risk analyses and management in a global marketplace which quite a few articles are devoted to. To summarise, the contents of this second part of the volume penetrate challenges, also from an economic point of view, associated with proactivity in legal counselling comprising contracting and risk management.

Part three offers food for thought by broadening the perspective of proactive law to such areas as human rights and discrimination, tax legislation, media markets and the automation of society on a whole.

### **4 Summing up**

Proactivity is no doubt one feature of traditional business including legal work. In order to manage solutions to the challenges arising from e-business taking place in a global marketplace lawyers need to refine and explore new ways to work together as well as with other professionals. The Stockholm 2005 Conference investigated into how proactive law facilitates value-driving business models and how new technology at the same time can support proactive law. It was discussed how tools and techniques that are now available in combination with proactively working lawyers can help clients to design and master their contracts and transactions so that they produce predictable results, promote business success, and avoid unnecessary problems.

In general terms the Stockholm 2005 Conference resulted in further development of the Nordic School of Proactive law, as a label for a particular kind of awareness and strategies called for in today's information society. In a digital environment proactive law is used as a common denominator for a fusion of proactive legal thinking and utilisation of information management and technology in order to facilitate best business practices. It comprises steering mechanisms such as normative instruments including conventional legal rules

and regulations as well as program code and information standards. Improved negotiations, decision-making and documentation are other critical factors.

The Nordic School of Proactive Law seeks to be a catalyst in forthcoming discussions on proactivity and hopes to provide input to future work in a variety of arenas such as private and public organisations, commissions, standardisation bodies, private associations developing codes of conduct, societies for suppliers and vendors, etc.<sup>11</sup>

Last but not least there is every reason to express gratitude to those who made the Stockholm 2005 Conference possible by means of financial support and practical work efforts. Most valuable contributions were received from the Bank of Sweden Tercentenary Foundation, InfoData, the Confederation of Swedish Enterprise, the Edvard Cassel Foundation, the Law Firm Friends of the Stockholm Centre for Commercial Law, the Royal Swedish Academy of Sciences, the Stockholm Chamber of Commerce, the Swedish Law and Informatics Research Institute, Roschier Holmberg, Attorneys Ltd., and WM-data.

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<sup>11</sup> The Working party for proactive law in e-business will use the following internet site as a basis for information about upcoming events, etc.: “[www.proactivelaw.org](http://www.proactivelaw.org)”.