Nordic School of Proactive Law Conference, June 2005 Closing Comments

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In the world of sciences English has replaced Latin and taken on the role of a *lingua franca*. We need this 'second-hand English' to communicate, to collaborate, to analyse etc. in the world-wide context that has since long, and now more than ever, been the natural habitat of intellectuals, including legal scholars. Briefly put, English as a lingua franca is a necessary tool for multicultural intercourse. And it is a tool that we own together. At its best, it is a catalyst that turns a multicultural framework into an advantage, not an obstacle or difficulty.

So, what can we learn from these trivial observations? The lesson I choose to point at is *a question* emanating from listening to the many interesting and diverse contributions to this two-day conference. The question is:

> *Should we look upon 'proactive law' in the same way as English in its role as a lingua franca?*

In other words: Is proactive law a tool for multidisciplinary communication, *a way of formulating problems and questions* so that they make sense over disciplinary borders? And is it reasonable to describe proactive law as *a meta language* which serves to fuse fields of knowledge in new and useful blends?

Think of the many fields that have been commented on during the conference: law and economics, risk management, information security, digital rights management, contracting practices, just to mention a few.

According to this view, proactive law supplies a language, however imperfect at this stage, for problem formulation, analyses, theory building etc. in a fragmented environment. It enables dialogues where monologues used to be the case – specialists in procedural law, archive theory, risk management, document management, information system design and so forth can meet in a common semantic room where they all feel at home and where they have a chance to understand one-another.

So this is one way of describing the notion of 'proactive law'. As the conference has demonstrated, there are several other possible ways. For example, there are *nutshell descriptions* such as the following:

- To be proactive means not to be reactive.
- Proactive law means using legal and 'technical' strategies in a constructive and mutually supporting way.
- Proactive law is a tool to develop the information society according to specific blueprints.
- Proactive law is a strategy for risk management.

Such nutshell descriptions may be of a more or less general nature and more or less closely related to a particular field of interest or branch of expertise. For example, in his discussion of 'single sign-on market places and other legal changes' *Lundblad* finds his starting point in the open space between traditional 'industrial society law' and the emerging 'information society law'. And Lundblad poses the question: how can this gap be used proactively? Answers, he points out, are being developed in different ways ranging from subservient adherence to valid law to destructive attacks on existing legal solutions.

To clarify the meaning of proactive law, *metaphors* have also been suggested. Consider, for example, the symbol of the conference, the lighthouse – a 'coastal building with a light for sailors' (Encarta). The purpose of the building is to warn seafarers of dangers hidden in the dark by way of the flashing light. In a similar manner proactive law should aim at averting 'accidents' and its emphasis should be 'preventive' rather than 'curative' law.

Another kind of explanation or clarification, of which many speakers have given examples, strives to find useful *catchwords* to express the essence of 'proactive law'. Some examples from the conference are 'trust', 'standards', 'risk management', 'safe sales'. Catchwords are useful but some of them should be handled with care. They come and they go, they become fashionable and they become outdated. 'PPB' is now almost forgotten and 'IRM' lingers in the background. The 'semantic web' is in – for some time.[1] The novelty associated with such catchwords is sometimes little more than an illusion. In bad cases catchwords hide earlier experiences and knowledge already gained. Catchwords, when they are useful, may be seen as suggested common denominators for the many fields that take an interest in or are of interest for the proactive perspective.

This leads us to yet another way of understanding 'proactive law', namely to describe it as *a perspective* or *a world view*. One advantage of this description is that it avoids criticism of launching 'proactive law' as something completely new and a replacement for 'traditional law' – a criticism that, by the way, would be totally unfounded with regard to the present conference. But lack of destructive novelty does not mean that proactive law is an empty construction. Even small changes of perspective can make us see things differently and in a new way. To illustrate, consider three functions of law: prevention, prohibition, and punishment. Consider further three different legal systems where these three

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1 PPB = Planning, Programming, Budgeting. IRM = Information Resources Management. To illustrate my point, Let me mention that a *'PPB, planning, programming, budgeting'* Google search results in 111,000 English hits. An *'IRM, information resources'* search results in 96,300 English hits. A *'semantic web'* Google search results in 12,700,000 English hits.

functions are all taken for granted but where each legal system places emphasis on a different function and, thus, applies a different perspective. It is not far-fetched to assume that the choice of perspective results in substantial differences with regard to the orientation and build-up of each legal system. But a simple yes or no answer to questions of this kind, i.e. questions regarding the consequences of different perspectives on the legal system, is not sufficient. Instead, an acceptable answer ought to be *multifaceted*. Among other things, it should focus on the toolbox of law and discuss such things as tools for expressing the law, for solving conflicts, for achieving acceptance of the law etc. I think an effort of this kind has been at the core of the present conference. Briefly put: *to explore the possible uses and consequences of one particular perspective on law, the proactive perspective.* In the figure below an attempt is made to describe – in a compacted way, to say the least – the nature of this effort.

Reasoning seems to begin with either a self-evident notion of 'law' or some kind of critical assessment of traditional views of law and the way it operates ('reactive law', 'industrial society law'). Law is placed into a more or less well-defined context such as 'compliance', 'outsourcing', 'vendor collaboration' or 'long term archival'. The choice of context is further elaborated by focusing on particular 'fields of theory' such as 'sociology', 'organisation theory', 'risk management' and 'contract management'. On this basis particular issues are presented and discussed. Together they form part of a proactive perspective on law. Or, to put it a bit differently, the proactive perspective may be seen as a relatively vague starting point for a set of discussions of 'law in context'. These discussions serve two ends. On the one hand, they shed light on specific fields and issues, on the other hand they contribute to clarify the possible meaning(s) of a proactive perspective. The balance between the two objectives varies from one contribution to another.
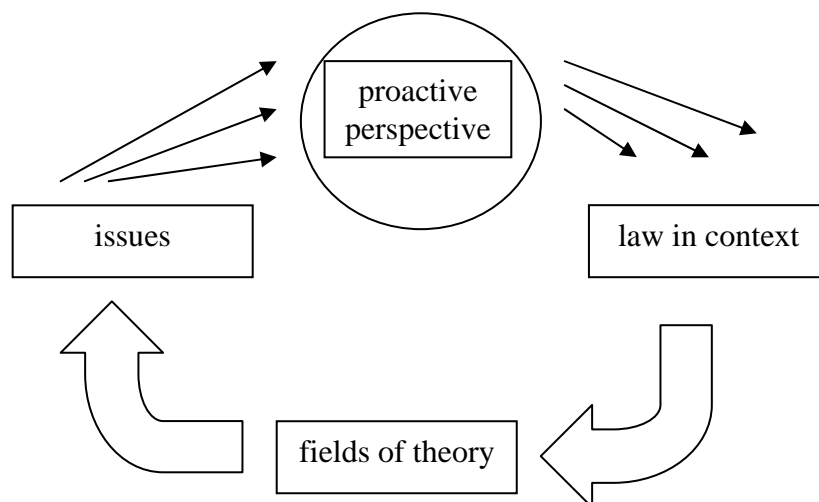
To conclude, I should like to add a few personal comments and reflections on proactive law.

My own home in the world of legal scholarship is *legal informatics* in which I have now been working for well over forty years. During this long time the proactive perspective on law has always been present, in fact one can say that it constitutes one of the pillars of legal informatics. Thus, early studies of adaptation of legal rules to automation appeared already in the 1960s and advanced attempts to develop a legal theory of databases were made during the 1970s.[2] One of the focal points of my own doctoral thesis in 1977 was 'legal system management' with the double meaning of 'legal management of information systems' and 'management of legal information systems'. Both tasks are closely linked to proactive thinking.[3]

As for the general nature of efforts at proactive thinking in legal informatics, I reached the following conclusion: "For my own part, I should like to place particular emphasis on the interest taken in the dynamic aspects of the legal system; law as a conceptual system subject to change and law as a system intended to produce as well as to accommodate changes in social structures. As we have already seen, this interest appears in many forms: analysis of decision-making processes, automation of legal decision-making, cost- benefit and cost-effectiveness analyses of legal activities and institutes, problems of social steering, organization and use of legal information systems, and so on. In particular, it should be noted that a field of "legal futurology" has been suggested as an important element of computing law; this field is intended to complement traditional historical and comparative legal research and to be concerned with prognostication of developments in the legal system and with future-oriented policy issues."[4] It may be said that many of the themes treated at this conference fit well into this framework and that the description indicates that many of the early theoretical challenges are still there to be met.

As for practical aspects, let me mention that for nine years, from 1994 to 2003, I had the privilege to work for the Swedish Government's Information and Communication Technology Commission and direct its work in the field of law.[5] In this context the proactive approach was a natural way of working, so natural in fact that it was suggested that the two age-old and familiar concepts 'valid law' (*lex lata*) and 'desired law' (*lex ferenda*) ought to have company, namely 'probing´ or 'speculating law' (*lex ponderanda*).[6]

The question of *how* 'lex ponderanda' ought to be developed and *by whom* proved to be both complex and controversial. Thus, the ICT Commission early on discovered that the question of *who undertakes to be the proactive* is politi-

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[2] *See*, *e.g*., Hans P. Bull, *Verwaltung durch Maschinen: Rechtsprobleme der Technisierung der Verwaltung*. 2 Aufl., Köln 1964 and Herbert Burkert, Theorieansätze in der Rechtsinformatik. Versuch einer Bestandsaufnahme und Kritik. In: Datenverarbeitung im Recht, Vol. 4 (1975) No. 3, 226.

[3] Peter Seipel, *Computing Law. Perspective on a New Legal Discipline*. Stockholm 1977, pp. 233-234, 240, 249-250, 258, 267-272.

[4] Op.cit. at p. 139. Note that in the thesis the term "computing law" was used instead of 'legal informatics'.

[5] *See Law and Information Technology. Swedish Views*. Ed. Peter Seipel. Swedish Government Official Reports SOU 2002:112. Stockholm 2002.

[6] Op.cit. at p. 16.

cally sensitive. The obvious reason is that the issue of *who* speculates about the future is very close to the issue of *whose description* of the future should guide regulatory work. The fact that the ICT Commission was an advisory body to the Government did not do away with the problems. They had to be solved by fine-tuning the work of the Commission with political initiatives of other government bodies and with the work of a several regular lawmaking committees. Simply put, proactivity on the level of lawmaking is not a simple practical matter since it opens up an arena for power play and conflicting initiatives of different actors.

This final remark may also serve as a reminder that proactive law has consequences for legal thinking from the highest political level to the day-to-day activities having to do with contracting, information system design, risk management, and so forth.

The conference has covered a broad territory. In more than one way it has demonstrated the value of efforts to further develop the notion of proactivity as a way of looking at law and legal activities. I congratulate the organisers and I warmly thank the speakers for their interesting contributions.