

Proactive Law in the Field of Law¹

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1 Introduction to Proactive Law

People desire to understand, explain and develop themselves, the world and its phenomena, which function scientific theories and ways of thinking also represent. While the theoretical models that attempt to explain and develop the behaviour of human beings and human societies are inevitably simplifications, they are often so much so that their very feasibility needs to be questioned, as for example the very one-sided human image *homo oeconomicus* that economics has created for use as a theoretical starting point. The complexity of life seldom fits the rigor of theories. Even if the “both-and” way of thinking (rather than “either-or”) is largely a feature of scientific discussions, it is often still considered to be illogical from a theoretical viewpoint. Models based on a particular understanding reign until balancing elements enter the discussion.

In their article “How business schools lost their way” (Harvard Business Review, May 2005, 1-9), Warren G. Bennis and James O’Toole argue that business schools are too focused on “scientific” rigor in research which is often of little use in the real world: “When applied to business – essentially a human activity in which judgements are made with messy, incomplete, and incoherent data – statistical and methodological wizardry can blind rather than illuminate.” They say it is “necessary to strike a new balance between scientific rigor and practical relevance”. Similar arguments could be highlighted from the viewpoint of Proactive Law. Bennis and O’Toole anyway praise law schools for being practice-oriented and connected to real world. Praise is probably justified if law is considered to be the art of arguing in court but when it is seen more as the comprehensive planning and managing of the affairs of people who do not live in courtrooms, the situation is often different.

Proactive Law belongs to approaches born out of real-life needs to balance the prevailing legal logic.² It belongs to legal approaches which emphasise the many-sided, varied, and interactive nature of human reality.³ These approaches can be seen as making concrete discussions which have questioned the belief in universal and objective science. In legal discussions, for example, feministic and pluralistic, polycentric jurisprudence have represented thinking in which life is viewed as multi-faceted, and viewpoints and understandings are seen as context bound, and where the realities of life have also been taken into consideration.

While Proactive Law has received much inspiration from Preventive Law,⁴ the latter favours the lawyer’s viewpoint i.e. the prevention of legal risks and problems. In Proactive Law, the emphasis is on achieving the desired goal in particular circumstances where legal expertise works in collaboration with the other types of expertise involved. In Proactive Law, the need for dialogue between different understandings is emphasised. It is about “thinking together”

² Law and Society research and the Access to Justice approach are examples of legal discussions in which the social point of view has been emphasised.

³ See, e.g. *Practicing Therapeutic Jurisprudence, Law as a Helping Profession*, eds. Stolle, Dennis P., Wexler, David B., Winick, Bruce J., Carolina Academic Press 2000. In this book many approaches are introduced such as relational lawyering, affective lawyering, restorative justice, collaborative law, holistic law, and creative problem solving.

⁴ Brown, Louis M., *Manual of Preventive Law*, Prentice-Hall, Inc., New York 1950.

and respecting difference. The idea is not so much to change the world as to listen to it. Paradoxically, as its basis is more on existing realities than on ideals constructed in thin air, change is more effectively facilitated.

The approach specifically called Proactive Law emerged in Finland, and its source was Proactive Contracting in business contexts.⁵ It has been developed in interdisciplinary cooperation between researchers and experts in contracting practice. Knowledge of the reality concerned, in this case business activity, has been an essential foundation of this approach. It is not usual for cooperation between theory and practice to be based on comprehensive interaction. Practitioners are often seen as implementing in practice theories that have been learned at university and/or used as empirical research objects. Proactive Contracting could be characterised as the viewpoint of a corporate lawyer who has learned to understand the ways in which other professionals think, and to collaborate in the search for common goals, i.e. enabling success by providing one of the necessary elements: legal know-how. This understanding is learned through the conduct of business.

Contract law is based on the viewpoint of a court i.e. it is about the interpretation of rules *ex post*. Contract law concentrates on contracting failures. It does not offer an adequate set of tools for building functioning collaboration in today's circumstances. In-depth knowledge of successful practice cannot be achieved without experience. From the viewpoint of a researcher, this means there is a requirement for close collaboration with successful experts who possess this experience. In the absence of equal-sided cooperation, theorists can quietly analyse matters using previously-adopted starting points without having to account for disturbing realities, while practising experts, for their part, can generalise their own experiences without the possible complications introduced by theoretical considerations. In such circumstances, theory cannot be sensitive to reality and the changes which occur in real life, and is unable to offer thinking tools that can be used by professionals either directly or indirectly. In legal discussions, praxis usually means court praxis, not the praxis of everyday life.

In Proactive Law, the focus is in the development of understandings, structures, rules and procedures that *ex ante* enable the creation and achievement of desired goals and the avoidance of unnecessary problems (future-orientation). If the circumstances and realities of a particular situation are not taken into consideration, the goals being sought will probably not be achieved and are unlikely to represent the real will of the parties or community concerned. Proactivity differs from reactivity in that it emphasises consideration of how one can oneself create the preconditions for achieving goals in a manner that does not contribute to unnecessary problems. It is not therefore about simply reacting to something that has happened or is happening. It is about self-reflection and responsibility. Since court decisions have constituted the core interest in legal thinking, the most common future-oriented element in legal discussions has been the anticipation of those decisions.

⁵ In 2002 we published the anthology *Ennakoiva sopiminen (Proactive Contracting)*, ed. Pohjonen, Soile, WSOY Helsinki. On proactivity in legal informatics see the article authored by Peter Seipel in this volume of Sc.St.L.

2 Law and the Praxis of Life⁶

Legal ways of thinking reflect the ways of science. In both science and religion, it is typical for mind, reason and theory to be elevated in relation to matter, feelings and praxis. In legal science, the division between mind/matter and theory/praxis is represented by the division *sein/sollen* even if the meaning attached to these words differs in different discussions. *Sein* is matter formed by the ideals of *sollen*. In Hans Kelsen's Pure Theory of Law⁷ there is no matter/praxis left, law has become *sein*: the research object. In these schemes, praxis, i.e. people and our lives, have only two positions: to be formed by a set of ideals or exist outside the law. There is a continuous search for balance in the relationship between law and society. Law is seen, on the one hand, as a system defined by itself which has intrinsic value and in which internal coherence is the most essential element. On the other hand, the task of law in realising social goals has also been highlighted.

If law is seen as a neutral autonomous system which interprets legal rules according to legal logic, the social consequences of its decisions i.e. the question of the kinds of reality they do in fact promote is not considered as legally relevant. Law has been seen as a coherent conceptual system that creates legal cause and effect relationships. Law, i.e. drawing decisions from legal rules according to legal principles, is the goal with intrinsic value. In European legal theory, this kind of attitude has been the prevailing one. In their own ways, conceptual (Begriffsjurisprudenz) and analytical jurisprudence have represented this stream. Social and psychological dimensions have been defined outside the law and have relevance only in connection with the birth of the legal rules to be analysed. Kelsen's Pure Theory of Law targeted the idea of science as adopted in the modern natural sciences⁸, even if he did not equate research in the natural sciences with jurisprudence. "The rule of law does not say, as the law of nature does: when *A* is, "is" *B*; but when *A* is, *B* "ought" to be, even though *B* perhaps actually is not."⁹ The Pure Theory of Law wanted to free the science of law from alien elements.¹⁰ It targeted answers to the question of "What and how the law is?" and not "How it ought to be?".

As a research object, law is still often seen as an autonomous system of norms separate from society. Modern Civil Law jurisprudence has even been

⁶ About my Finnish perspective: Nordic countries have continental, Civil Law legal systems. These have sometimes been grouped as a special Nordic legal family, alongside the Romanistic and German legal families (Zweigert, Konrad and Kötz, Hein, *An Introduction to Comparative Law*, Clarendon Press, Oxford 1998, pp. 276-285). Looked at from a closer angle there are, naturally, national differences in the attitudes adopted by Nordic legal scholars. My article is written from the Finnish background. Generally speaking Finnish legal discussion is sometimes considered to be more theoretically oriented compared to other Nordic countries where Scandinavian realism has had a stronger impact.

⁷ Kelsen, Hans, *Pure Theory of Law*, Peter Smith, Gloucester, Mass., 1989.

⁸ Quantum physics and fuzzy logic, for example, have since become widely known developments which have brought both-and interactivity to the understanding of natural sciences.

⁹ Kelsen, p. 77.

¹⁰ Kelsen, p. 1.

seen as being based on this separation, on this identification with the analysis and interpretation of legal norms. According to this understanding, legislation and application of the law do not belong to the “hard core” of law but are social practices. Adapted from Montesquieu, the idea that legislation, court practice and administration should be separate areas has also influenced the separation of jurisprudence. These three areas are anyway parts of the same whole which both influence each other and also affect the potential that each of the other parts have for realising their individual goals. Even if the separation of power is considered to be necessary, the creation of systems that are able to reach their goals should be based on understanding the interaction between their different parts.

Legal realism has constituted a counterbalance to the above mentioned attitudes, Scandinavian realism is a representation of Nordic social engineering in legal discussions. Socially-useful aims are sought using realistic interpretation arguments i.e. the consequences of court decisions are taken into consideration. In jurisprudence, the attitude taken towards realistic arguments has varied all the way from encouragement to outright refusal. In the latter case, the arguments have been considered to be irrelevant from a legal point of view. They have become a current issue with the appearance of European Law. Promotion of the goals of the European Union and the European Commission are taken into consideration in decisions by the European Court of Justice.

Questioning of the separation of law from society and social goals has been a continuing stream in legal discussions. Law has been both seen and used as a tool for achieving social targets. The Italian *uso alternativo del diritto* created by left-leaning judges advocated rationality where needs and goals are openly pondered in the application of laws. The Finnish social civil law (*social civilrätt*)¹¹ targeted welfare-state law. Protection of the weaker party was a central tenet in both of these approaches. In legal approaches emphasising the social dimension, interest has, however, usually been in the *ex post* situation i.e. interpreting and systematising *legal* norms. In legal research, this interpreting and systematising of legal norms is usually considered to be the approach to law which is most practice oriented – and this is indeed true if practice is viewed as legal practice. If, however, it is understood as practice in real life, then legal philosophy or the sociology of law are, for example, potentially more practice-oriented. In legal application, real life is re-formed according to legal logic. Only matters which are considered legally relevant are taken into consideration. “Out there”, phenomena are more complex, and in legal process the real reasons for a dispute may not have any place in which to appear if they have no legal relevance.

The fact that real life is complex, many-sided, and is seen and understood differently from different starting points has been the subject of much discussion in jurisprudence. The relationship-oriented and interactive elements of life have also been pondered. Pluralistic and polycentric law¹², restorative justice¹³ and

¹¹ Wilhelmsson, Thomas, *Social civilrätt*, Lakimiesliiton Kustannus, Helsinki 1987.

¹² These terms also have distinct meanings. See e.g. Sousa Santos De, Boaventura, *Law: A Map of Misreading, Toward a Postmodern Concept of Law*, Journal of Law and Society 3/1987, pp. 279-302.

feminist jurisprudence (or women's law)¹⁴ are examples of approaches in which these elements are central. Women's law and the sociology of law have already been mentioned as examples of branches where legal and some other expertise or particular realities are combined. Law and Economics is another example. Post-modern science has questioned the objectivity of truths. In order to understand one's subjectivity, self-reflection is required – and paradoxically, science which is rather more objective may result. While this is easy to understand in theory, it is not easy to understand in practice. Our own pre-understandings are often so deeply buried that we do not even see them, but take them as self-evident. To create systems which respond to difference is no easy task. The difficulty of hearing the different voices in society and in law has been a subject of widespread discussion.

Scientific theories are based on particular world-views and viewpoints concerning human beings. Formality is emphasised when human beings are seen as selfish and only seeking their own benefit. To be able to believe in non-formal proceedings, one needs to believe in solidarity between people and in a human ability to seek the common good¹⁵. Both beliefs are necessary and both are right – or wrong if taken as absolute truths. Theories should assist us in understanding phenomena. By simplifying and generalising they focus attention on some aspects - and neglect others. While they can never be perfect, final or completely right, they are only rarely completely wrong. All of us have limited expertise and background and our ability to absorb other understandings is also restricted. We take in new information through old frameworks, transforming it in the process. To be able to create systems and theoretical thinking which reflect a wide collection of experience and world-views we need to collaborate, to “think together”. If we do not do this, theories and methods can easily be oversimplistic. If theories, concepts and principles are too distant from any forms of reality they no longer help in understanding those realities, and when systems are too far from reality they do not fulfil their social tasks in a satisfactory way. Theory and real life affect each other continuously¹⁶ but conscious consideration of this interaction helps us to be proactive rather than reactive by improving our understanding of this spiral. The world changes ever more rapidly and the reality in which legal concepts were created no longer corresponds to today's reality. The tools we have are not always suitable for the task in hand – if indeed they ever were.

¹³ *Restorative Justice, Theoretical foundations*, eds. Weitekamp, Elmar G. M., Kerner, Hans-Jürgen, Willan Publishing, Devon 2002.

¹⁴ A Nordic anthology: *Responsible Selves, Women in the Nordic legal culture*, eds. Nousiainen, Kevät et al, Ashgate, Aldershot 2001.

¹⁵ See e.g. Vindelov, Vibeke, *Konflikt, tvist og mægling – konfliktløsning ved forhandling*, Kobenhavn 1997, pp. 438-439, on the views of human beings behind the thinking of Alf Ross and Torstein Eckhoff, based on an article by Krarup, Ole, *Fra gyldighed til virkelighed, Om Alf Ross og Torstein Eckhoff*, Lov & Rett 1995, pp. 87-99.

¹⁶ This kind of phenomenon has been emphasised for example in hermeneutics (the hermeneutic circle by H. G. Gadamer).

3 Law as an Enabler

The role of law in defining people's lives and enabling a good life and difference has been the subject of much discussion. The more active the legal system is in promoting what is considered "good", the more it also interferes in people's lives. The broader legal rules are the more unpredictable their interpretation and application is. Constitutions represent the broadest and the most stable form of regulation: goals and frameworks are established but the means of reaching the set goals are left open. A similar logic supports the reflexive law created by Gunther Teubner.¹⁷ Social needs are met by creating self-regulatory mechanisms structured by law. Law is seen as interactive and functioning in specific environments.

The really difficult question is how legal frameworks do in fact enable realisation of the will of self-regulatory entities. Precondition for mechanisms to reach their goal is that they are based on good knowledge of the relevant surroundings and of the prevailing and contradictory interests that exist in them. In the world of people framed by law there are no areas which are completely free of law any more than there are, for example, areas free of human nature. Human behaviour, among other things, frames the abilities of legal systems to exert influence. In self-regulating areas, legal expertise is needed to ensure that free will is realised, but legal expertise is only able to help in achieving desired goals if it is intertwined with adequate knowledge of the prevailing circumstances. This is the mission of Proactive Contracting in freedom of contract.

Formal law interprets and applies legal rules according to defined legal logic. This method should result in decisions which are reasonably predictable. The strong ideal of modern law is to be a neutral system which can realise different values and goals. How real this neutrality actually is has been the subject of questioning at many levels. Legal systems are inevitably based on particular sets of understandings and values. The same method cannot, in any case, be soil in which all flowers bloom in an equal manner - to some it does not even have that potential, and in some cases it is not even meant to offer such a possibility. Goals are not realised with the same prerequisites in different realities. The conditions for realising different goals have to be searched for from the prevailing realities. It is important however to remember that the manner in which reality is viewed is always subjective, based as it is on individual characteristics, experiences and world-views.

The legal system defines and secures space and the conditions for people to live their lives and carry on their activities, for example by providing protection and preventing despotism. People are granted rights, and traditionally particularly rights which guarantee freedom from something. Welfare-state rights are more akin to freedom to something (positive freedom) than freedom from something (negative freedom). In this case, law is no longer simply a framework based on formal rationality but should enable the actual realisation of rights and freedoms. To fulfil the task of enabling particular goals (rights), the

¹⁷ Teubner, Gunther, *Substantive and Reflexive Elements in Modern Law*, Law & Society Review, vol 17, 1983, pp. 239-285.

legal system needs to be an interactive part of the whole. If the structures and procedures of the legal system are truly to promote the aims set for them, these structures and procedures need to be continuously pondered. Actual realisation happens in particular situations. In the cycles of history, the balance between situational and generalising rules of law has varied and varies even at this moment in different legal systems. For example, in our Western systems, the mediation today viewed as an alternative was actually a central feature before the breakthrough of modern law. In many forms of mediation, with the help of a facilitator, the parties involved themselves develop a solution within the framework of the system.

In legal approaches which have social goals, general clauses and consideration of discretion have, for example, been central means of deviating from strict or prevailing rules and widening the space available for the exercise of discretion. On the other hand, it has also been observed that since they are not clear, general clauses do not effectively promote the desired goals. Vague guidelines do not support the achievement of defined aims. Stable and detailed rules help target-oriented activities: parties know what they are doing and the extent of their responsibilities and they can trust the stability of this knowledge. Stable rules freeze plans as ready and final. However, since the creation of rules can never be based on all potential situations being predictable because the circumstances and understandings change, flexibility and situational sensitivity are also required in target-oriented activities. Flexible and open rules allow reaction to changing circumstances and consideration of the special features of a particular situation. The operational process can be represented as a journey in which circumstances are continually changing and where travelling companions do not share all views. Rather than structuring operations in detail, legal rules frame them in a general way. They may be interpreted differently when applied in concrete situations and the same rules can be used to justify opposing targets.

Because the reality that the rules are intended to guide is changing, complex and seen from different viewpoints, rules and targets cannot be eternal and absolute but need to be objects of continuing discussion. Just as this is true in the case of an individual business operation, it is even more so in value-laden questions that touch the whole of society. For example, the right to life could be considered a clear and eternal rule. Accordingly, killing of people is usually criminalized. There are however many exceptions such as self-defence and war, where, on the contrary, refusing to kill may be a criminal act. People can be killed in an indirect manner through unequal social structures. Both abortion and euthanasia are subjects of fierce discussion. The interest in reducing abortions is usually shared. Preventive and proactive methods for achieving this goal would include the provision of educational information, contraception, social support, welfare etc. The attitude that condemns abortion is a moral conviction which is viewed as universal and considered to have an intrinsic value, and for these reasons it should be forced on everyone. From this starting-point, whether such an attitude directly or indirectly increases the number of abortions actually performed is not relevant.

In legal systems, legislation represents an *ex ante* viewpoint. Even if, in the continental European legal systems, legislation has a central role in creating legal rules, interest towards it in legal research has been slight. However, in

parallel with legal approaches that acknowledge real-life interests, interest in legislation is also increasing. Even here, though, the focus of legal research is mainly in legislation as a separate phenomenon: how *it* influences and how *it* is able to realise the targets set for it. Legislation's relationship to other procedures, the interaction between different viewpoints, professions and scientific fields, situational aspects and the changing of circumstances are, however, also matters for discussion as they are in Proactive Law. In regulation theory, the focus is on regulation in general so that in principle, legislation is only one guiding measure among others.¹⁸ This starting point has much in common with Proactive Law, where the idea is a wide dialogue between different viewpoints in which the process of creating the targets is as central a focus as actually achieving them. What is essential is that different viewpoints, needs and understandings are taken seriously, and this kind of "thinking together" requires widespread collaboration and research. Even though the legislative process usually involves the hearing of different interest groups and members of parliament also represent different interests, it is seldom a genuine effort to "think together".

Often, pondering the relationship between aims and means has not been based on a thorough knowledge of the circumstances that prevail in real life. Only in their proper surroundings do problems appear in their many-faceted forms. In legal discussions, real life and its needs have often appeared as assumptions at quite a general level. If, for example, the interest of business is seen to be the security of exchange or freedom of contract, this is still a long way from understanding how these goals are promoted in actual circumstances and business practices. If the aim is to discover functional procedures, the starting point cannot be ideals or prejudices, it needs to be many-sided, changing and imperfect people and reality. In real-life collaboration, contradictions are natural and can be expected. Difference cannot be respected without accepting that its existence is permanent and results in conflicts.

In Proactive Law, the effort to create systems in which targets may be achieved in particular context is taken seriously. This means that the system is understood as a whole within which the setting of goals, the solving of conflicts and achieving or enforcing goals are all interactive parts of that whole. There is a need for much new understanding of realities outside the law in which goals are sought and reached for, and where the influential factors in this process appear. Law will appear as a tool used in an interactive manner together with other tools when it both frames activities and functions in the realities defined by other elements.

Legal rules, procedures and logic are tools which may be used as main components, partly or perhaps not at all in a particular problem situation. The starting point should be real-life problems and their solution, not the legal tools and how they should be used. To promote new understanding "together" between different views of the reality concerned, participants need also to be able to understand each other's ways of thinking in sufficient depth. If this is not the case, different viewpoints will remain separate rather than forming a functioning whole. Proactive Law is solution-oriented rather than problem-

¹⁸ See e.g. *Regulating Law*, eds. Parker, Christine, Scott, Colin, Lacey, Nicola, Braitwaite, John, Oxford University Press 2004.

oriented. In a corresponding way, solution-oriented approaches in psychotherapy are not so tightly bound to the starting points of particular doctrines and appropriate measures, they attempt to be receptive to different kinds of alternatives in order to find solutions which work in a specific situation.¹⁹

4 Law as a Learning Process

The rigid normative character of modern positive law has been seen as hindering the emergence of a learning law which would permit one to compare the consequences of different solutions and experiences.²⁰ If law is seen as an autonomous system handed down from somewhere – either God or Reason (as in natural law), Evolution (law as a historic organism), Legislation (as in positive law) or Precedents (as *stare decisis* in Common Law) – the learning aspect is outside its field of interest. Changing of the system, its rules and procedures just happens and is simply observed. In contrast, socially-oriented legal approaches adopt an active role in using the legal system to further particular goals and this also allows learning. In legislation, experiments represent the learning approach - ideas are experimented with in practice and thus include the experiences and views of the people involved in the reality in question.²¹ Ideas which treat law as an interactive process cycle represent better grounds for a learning attitude than those which treat law as an object to be analysed. Lawyers are not traditionally trained to be actors in a learning process. In addition to theoretical interests, a central practice-oriented goal in Proactive Law is to create procedures which function in specific realities in cooperation with other branches of expertise. This approach is inevitably an interdisciplinary dialogue between different disciplines and between theory and practice – i.e. a learning process.

The traditional arena of law has been the courtroom. From the viewpoint of changing and learning organisations, the traditional legal approach represents a top-down attitude.²² Laws and procedures are developed somewhere and courts

¹⁹ See Miller, Scott D., Duncan, Barry L., Hubble, Mark A., *Escape from Babel, Toward a Unifying Language for Psychotherapy Practice*, New York 1997 on comparing different methods of psychotherapy whose success do not appear to correspond so much to the method used but rather to the attitude which prevails when the methods are used: relationship-centred orientation has proved to be successful.

²⁰ Teubner p. 264, referring to Niklas Luhmann.

²¹ In Finland the question of equality before law has been brought up concerning local legislation experiments (for example concerning the law on youth-punishment which came into force in 2005). If experiments are local, then all people in the country are not treated equally. It can be argued that if a system were to be experimented with by using the whole country, implementation would be more difficult and more expensive and when legislation is changed the equality problem remains: not in regional terms but temporal ones.

See Alvesalo, Anne and Tombs, Steve, *Researching Law in Action: evaluating economic crime control practice*, Retfaerd 108, 2005, pp. 57-76, on evaluation and Law in Action.

²² For matters dealt with in this paragraph see Haavisto, Vaula, *Court Work in Transition*, University of Helsinki 2002, pp. 37-68 on the Implementation of Change as a Learning Challenge, in which courts are viewed from the perspective of the behavioural sciences.

and administration have the task of implementing them. These institutions have not been regarded as active co-developers in the implementation or reform process. In civil law, the ideal of law as being the same for everybody and as an art of interpretation separated from politics, i.e. legislation, still strongly represents the image of law even if its actuality has been the subject of frequent questioning: Courts cannot be automatons which produce similar results, decisions are made by specific people in specific circumstances. In top-down leadership, learning means the adoption of pre-given models. Court has also been understood as more or less a synonym for judge. It has not been seen as an organisation in which different types of people work, which cooperates with other organisations and which has clients whose concerns are dealt with. Both the individual and top-down viewpoints essentially ignore the organisational aspect of working and learning. They represent an ideal of stability, not change in which collaborative processes are seen as attempting to create something new and/or something which works in real life.

When law is seen as a continually-developing process of understanding, both the reactive and proactive ability and sensitivity of the system is increased. The system becomes more self-reflexive. Law is thus seen as a responsible actor in a particular social reality, which reflects what kind of reality it furthers. To establish a dynamic balance – for example between regulation and freedom - in a particular situation, both the functioning elements and their effects need to be realised. In situations where people collaborate, this, correspondingly, demands good levels of self-knowledge. Actors need to be aware of the personal feelings, hopes and fears which may lie behind the attitudes they adopt. By making these conscious, the unconscious effects of these attitudes can be diminished and every actor can view the reality of the situation and her own role in the process with increased clarity.²³ In research concerning project management, much attention has been paid to the ability to receive weak signals. As this is needed for managing a process, the structures of the process need to enable such sensitivity. Processes of change are often slow and gradual.²⁴ Traditionally, ideal laws and contracts have been viewed as final. Their task is to bring clarity and stability and even though it is known and understood that circumstances and understandings change, laws and contracts are not usually constructed to be responsive to change in a considered manner. Even though it is known that changes will come, systems are not prepared for them in a proactive way. In contracting practice, change management is receiving an increasing degree of attention.

5 Dialogue and Law

The idea that knowledge and understanding are born in a process of interpretation and argumentation has also become a central topic in the legal

²³ “True proactiveness comes from seeing how we contribute to our own problems.” Senge Peter M., *The Fifth Discipline, The Art & Practice of The Learning Organization*, Random House, London 1999 (1990), p. 21.

²⁴ See Senge, pp. 21-23, 27-54.

discussion (referring, for example, to hermeneutics, discourse, dialectics and rhetoric). Law has come to be viewed as a dialectic process, which means it is not an unchanging entity that can be found somewhere or in some way. Argumentation theories (those of Chaim Perelman for example) that hold a central position in legal discussions are usually based on ideas presented already in antiquity, especially by Aristoteles: dialectic arguments in which the auditorium of reasonable people decides which thoughts become accepted.²⁵ Participants aim at convincing each other by means of good reasoning. The ideal is for the final outcome to be the best possible one so that a single common understanding is reached. To be able to achieve this goal, participants need to have a sufficiently-common pre-understanding of the situation. In a court, for example, the audience to be convinced is often a clearly-defined legal one for whom legally-relevant arguments are conclusive.

Formal legislation aimed at producing predictable decisions searches for clear and precise wordings. *Target-oriented* welfare-state regulation, in which the goal is to reach a target in a concrete reality requires regulation of a more framing nature, in which detailed realisation is left to be considered in specific situations. When law is understood as being formed in a *dialog process*, even the targets are, in a way, continually potentially open and matters for discussion. In processes where new solutions and an appreciation of difference are aimed at creativity and new understandings are increasingly required, rational, i.e. exact and logical arguments, confine discussion to already-known tracks. In a game of arguments and counter-arguments, participants also tend to stick to their own positions, defending them and reasoning in their favour in order to make them the common solutions. Bohmian (David Bohm) dialogue is a process of knowledge-creation in which no single common outcome is sought. In this type of process, rational language is often not very effective. By employing metaphorical language, it is possible to convey ideas while at the same time leaving space for different understandings and solutions.

Metaphors help us understand an aspect of, for example, a concept, an experience or a feeling and create new understanding.²⁶ They are imaginative rationality, uniting reason and imagination. It has been argued that human thought processes are largely metaphorical and our conceptual system is mostly metaphorically structured. This has not, though, been admitted to any great extent in our scientific traditions where concepts have been understood as conscious, literal, and disembodied. Many metaphors are so common in our culture that we do not notice them any longer. "Rational argument is war" is one of these. Because the metaphor is built into the conceptual system of our culture it is used constantly and often without notice. While the academic and legal world mostly see themselves as presenting rational arguments and drawing logical conclusions there are positions to be defended, attacked, destroyed or shot down, and cases to win or lose. "Irrational" and "unfair" tactics which are not supposed to be used in rational argumentation are used all the time. Lakoff

²⁵ See e.g. Eriksson, Lars D., *Rättslig argumentering och den dialektiska logiken*, JFT 1966, pp. 445-482.

²⁶ This paragraph is based on Lakoff, George and Johnson, Mark, *Metaphors we live by*, The University of Chicago Press, Chicago and London 2003.

and Johnson give (p. 64) typical examples, some of which follow: It would be unscientific to fail to... (threat), As Descartes showed... (authority), The work lacks the necessary rigor for...(insult). In research that believes in objective meanings there has been only slight interest in the ways that people understand things. Metaphors are of great interest from that viewpoint. They are interactive in nature and it is important to understand their role when we are interested in human cooperation and dialogue.

The word dialogue can be understood in different ways - from being a synonym for discussion to a flow of “thinking together”. In Bohmian dialogue²⁷, the primary idea is not to make others understand us, but to try and improve our understanding of ourselves and each other. In active listening, the idea is that one tries to avoid assumptions and instead makes sure by repetition and by asking whether one has correctly understood what others meant. The goal of Bohmian dialogue is to achieve a state of flow in which we are no longer producing polite monologues or speaking our minds, nor even engaged in a reflective dialogue in which we are already more interested in the subject than in the impression we ourselves are giving, but after having passed through these phases, reaching the flowing state of “thinking together”.²⁸ This kind of dialogue is more a relationship-oriented than a solution-oriented way of reaching together for an understanding which process may never result in a common understanding. In Bohmian dialogue, a central starting point is the existence of difference and respect for it. Participants are not expected or assumed to have the same pre-understandings. No-one is expected to become convinced and consequently change their opinion. The goal is not a compromise but a flow which carries the participants to unknown paths and places. There are various tried and tested methods for creating a dialogue such as the above-mentioned active listening and, for example, the use of a facilitator. Isaacs has grouped the elements in a (concrete) dialogue as listening, respecting, suspending and voicing.²⁹ Self-reflection is an important prerequisite for understanding others. To be able to release ourselves from pre-understandings and feelings which affect the way we receive others’ messages, we need to first become conscious of their existence.

Both laws and ideas of justice are created and applied in different kinds of dialogical processes. As already mentioned, legal dialogue is often understood as rational argumentation in which the position which is best grounded wins. Both constructing cooperation (Proactive Contracting) and restorative justice, such as mediation, are already based on the concept of a dialogical “thinking together” in which the idea is to create new understandings and possibilities. Normal court processes are also increasingly expected to be based on dialogue and interaction and result in decisions which enable future activities such as arrangements concerning the custody of children. Listening to Others and conveying one’s own messages to them is not easy through legal pre-understanding and with

²⁷ Bohm, David, *On Dialogue*, ed. Nichol, Lee, Routledge, London and New York 1999 (1996) and Isaacs, William, *Dialogue and the art of thinking together*, Currency, New York 1999.

²⁸ Isaacs, p. 261, referring to C. Otto Scharmer.

²⁹ Isaacs, pp. 83-183.

language based on it. Legal language is seldom a very good tool for furthering understanding.

In legal education, the ability to understand others and their needs is pondered only rarely and seldom taught, even though legal professionals need considerable ability in this area to be able to employ their legal expertise in support of matters they are handling.³⁰ The same considerations also apply, however, to other disciplines. Taking contracting again as an example of the effects of the one-sided education, it can be observed that lawyers (in contracts), economists (in business management) and technical experts (in project management) often see the process only from their own individual starting points and are seldom aware of the significance and effects of other expertise i.e. the wholeness – both in practice and in research. Legal contracts are often seen as separate from the process of business contracting.³¹ But if legal solutions are not based on the reality of the business activity in question they cannot really support that business. Looking at the contracting process as a cooperative and communicative process, we come to the need for expertise in the human sciences. In cooperative or social processes, creating circumstances which enable and promote the discovery and realisation of the will of the parties or citizens involved is of paramount importance.

5.1 *Dialogic Justice and Autonomy*

The object of law is usually seen as being justice. People desire and even believe in getting justice, for example via a just court decision. The problem is that what is considered to be just varies a great deal. It can be shaped by values, circumstances or even by habits. For example, some people engaged in business get so used to certain general contract clauses that they begin to see them as self-evident and just and take the clauses concerned for granted even when they have not been included in a contract. Observed from different starting points and alternative viewpoints, justice can appear different. While laws being the same to everyone has been viewed as a just principle, it has also been pointed out that in different circumstances the same laws do not promote the same things. The aim of proactive and dialogic law is to take the realisation of justice seriously by admitting that it is, in essence, impossible – and by aiming at developing procedures and dialogues which allow as many people as possible to feel that they are living in a just society. Groups with differing values and understandings should somehow be included in the social dialogue. Listening to Others, especially members of unfamiliar marginal groups, is always difficult and requires an attempt to view reality from their point of view. Justice is always connected to reality: it has not been realised if it is not realised in real life.

One of the legal ways of promoting the opportunity to participate in a social dialogue has been to define freedom of speech as a constitutional and human

³⁰ In the Therapeutic jurisprudence approach, emotional hindrances to the realisation of legal plans have been pointed out, psychological soft spots should be prevented.

³¹ In contract law, contract planning has not been viewed as a central topic and when it has been considered it has usually been understood as the legal planning of a legal contract, see e.g. Collins, Hugh, *Regulating Contracts*, Oxford University Press (1999) 2002.

right. By using this right, people are able to also promote other rights and their realisation. On the other hand, freedom of speech can also be used in efforts to limit the rights of others, for example by advocating sexual and racial discrimination. When people are subjected to clearly-expressed threats and contempt their development into autonomous individuals is discouraged and they have many difficulties in using their own freedom of speech. This speaks for limiting freedom of speech by forbidding the use of discriminatory expressions. Again on the other hand, condemning particular kinds of opinions may lead to unwanted counter-effects. If the expression of these opinions is prohibited in matter-of-fact discussions they may explode in more one-sided and dangerous ways. For example, if people are not allowed to express their concerns about the changes taking place in their society as the number of foreigners increases without being accused of being racists, they may begin to vote for people who are racists even if they, i.e. the voters, are not actually racists themselves.

Even if one of the central tasks of civil law is to protect freedoms, inside the legal system discretion, i.e. freedom from strict rules, is often seen as a threat to legal safety. In discussions concerning freedom of contract, mediation, reflexive law and so forth, legal safety always becomes an issue. Universal legal rules which can be anticipated are seen as protecting freedom. In many cases this is true, but it is also true that general rules never cover the many facets of reality and that in many situations, the emphasis is more on creating situations which will work in the future in a specific case with particular participants according to their needs and wishes and thus no universal justice is needed. In the former situation, legal principles exist to provide a framework for solutions when there are no rules which are applicable to a particular case. In the latter, legal principles are required only in special cases: the system is there to provide protection as a final resort but not in everyday disputes.

Autonomy and freedom of will are central starting points in western law. If we take them seriously, we have to think of them more as goals in a community.³² Legal interest concerning freedom of will is usually to protect people from being forced, manipulated or exploited. Will is viewed as being free if its freedom is not hindered. In reality, however, the will of a human being is a complicated internal process. We are influenced by many things, external and internal, material and mental. Strict rules and dogma do not enable the development of an autonomous mind even if they may, on the other hand, enable autonomy by creating, for example, a safe and free environment for people to live in. When the will and values of a community are being sought, in both collaboration (i.e. contracting) and society (i.e. laws) the ability and the possibility to listen to and understand others – in addition to oneself – and to communicate one's own will in an understandable way is required. A common will, however, is an illusion, there are always conflicting ideas and aims. When we adopt the enabling of autonomy as the leading principle, we have to evaluate different understandings by asking whether, in real life, they empower or subordinate. The task of law is not to protect the freedom to oppress but to

³² Hellsten, Sirkku, *Oikeutta ilman kohtuutta, Modernin oikeudenmukaisuuskäsityksen kritiikkiä*, Gaudeamus, Helsinki 1996, pp. 67-69, 105.

protect from oppression. Decisions based on this principle are also, however, very value based. In Proactive Law, the interest is in the processes of creating and manifesting will and enabling its realisation.

In contract law, will is mostly viewed through the image of a rational human being who knows what he (the image is a “he”) wants. Law is there to provide protection if he is hindered or cheated. Welfare-state contract law emphasises that he – and now she is added to the image – may not be able to realise her will because of the imbalance of power between the parties, and equitable discretion is therefore required. But the level to which equal “normal” contracting parties are capable of knowing their own will and expressing it has not been given much consideration. In contracting, most disputes arise from a lack of clarity, misunderstandings and gaps in contracts. Fairness in a specific situation is not easy for external parties such as a court to assess. But if contracts are supposed to be expressions of free will and thus binding – *pacta sunt servanda* – should we not try to ensure beforehand that contracts really do, more or less, express the will of the parties involved rather than being, for example, legal documents whose meaning the parties do not have any idea about? Also, when the main emphasis in contracts is on their legal significance, the contracting parties have to give most of their attention to matters that are of secondary importance from the viewpoint of the business they are trying to agree upon. If the parties instead agree to solve their disputes through mediation, the process of discovering and creating their own will can continue. Proactive Contracting and contracting capabilities³³ are created to enable successful contracting, the focus is not, as it is in contract law, on assessing contract failures.

When the legal system is seen as a social tool to further a good life and autonomy it is essential to give serious consideration to whether a particular item of legislation and its implementation in court, and especially more extensively in society and by other social institutions, actually realise the goals that have been set for it. Even if the ideas of natural law and pure law are no longer main stream understandings of the essence of law, they still have their effect on legal thinking. Law is still often seen as an autonomous system which functions according to its own principles. Not only in legal decision-making has it been argued that actual consequences cannot be taken into consideration - theoretical consistency has been more important than the actual consequences this consistency may indirectly have in real life, for example as a basis for legislation. There is, however, an increasing amount of (constitutional) legislation in which the objective is to promote particular autonomous states of affairs such as equality. This means a legal duty to ponder which activities actually promote the goals set by legislation. The borderline between politics and frozen politics³⁴ (i.e. law) becomes increasingly vague. Neither in contracting nor in developing society can the rules and the tasks for which those rules are created be kept separate. In administrative law, good administration has become an important focus of attention. Matters of social importance are both

³³ See Haapio, Helena, *Business Success and Problem Prevention through Proactive Contracting*, section 3.4, in this volume of Sc.St.L.

³⁴ Unger, Roberto Mangabeira, *The Critical Legal Studies Movement*, Harvard University Press, Cambridge, Mass. London 1986, p. 92.

prepared and realised in administration. The question of whether administration functions in a way which enables good development from the viewpoint of the matters and citizens concerned is of fundamental importance. Bureaucracy developed to further its own operation is not a very good way of promoting goals that have been set for it.

In international affairs, the variety of different values and understandings is even wider. In discussions of international law³⁵, the question of whether international law is even law and not just politics and diplomacy has often been asked. In some situations, formal law is a very good tool for promoting human rights and world peace but sometimes this approach results in the emphasis being on drafting wordings in documents and arguing about guilt, neither of which effectively increases an understanding of the viewpoints held by others or leads to good levels of cooperation. Also, international law does not have powers of enforcement that are strong enough³⁶ for formal law to function in the way it does at national level. Questions such as world peace are also matters of such a serious nature that diplomacy, i.e. an orientation towards achieving goals, is easily understood as being a necessity. International law as “international frozen politics” is developed as a process, for example human rights have become “frozen” in binding treaties through recommendations in declarations. On the other hand, the imbalance of power at international level and accordingly in international law is quite clear. If formal law can be used to benefit the interests of a powerful interpreter there is even less dialogue when a powerful party applies its own morality declaring Others as immoral beings whom the moral ones are not only entitled but obliged to destroy. Law is anyway based on a wider discussion and not on the moral convictions of a single party which that party then tries to force on others.

6 Dynamic Balancing in the Flow of Life

One of the central characteristics of civil law is guaranteeing the important principles of a society by guarding their frozen state, this makes law appear conservative and guiding. With the assistance of the law we are influenced from outside to adopt certain principles and to act in certain ways. This is especially true when law is viewed in the light of natural law: morality and laws are to be discovered somewhere rather than agreed upon at a social level as is the idea with positive law. In principle, universal natural laws do not leave any room for difference and change. Law does not encourage the development of an autonomous morality, it promotes the moral principles generally adopted in a society. By promoting safe living conditions, however, law guarantees fertile soil for the development of an autonomous morality. Even if law conserves social morality and accordingly promotes certain goals (frozen politics), it has also been seen as being separate from morality and goals. Law may be viewed as

³⁵ See Koskenniemi, Martti, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press 2002 on the development of international law and the logics behind it.

³⁶ Instead there is a wide variety of institutions involved in negotiation and mediation.

a neutral interpretation technique or science which operates in its own fictional reality where it self defines what is relevant. It is thus seen as an impartial tool for achieving targets which have been set from outside of it. A tool, however, only generates the results which it can produce, and since those who apply laws inevitably have their own opinions about the idea of legal rules the ideal of impartial and technical law is always an illusion.

Balance between freezing and flowing needs to be sought in every particular situation. What then becomes essential is to realise that there is a need to ponder and examine the choices and alternatives – i.e. to stay awake. If we believe that we are continuously moving, the main subject of attention is not the grinding of rules and wordings, but the means by which particular targets can be reached. Also, the idea of language and communication is not so much to seek clarity in accordance with a certain logic, but as a means of fostering contact and understanding. When the starting point is a particular reality, it inevitably incorporates difference. If, in contrast, the starting point is a particular way of thinking such as legal logic, it is easy to end up attempting to create a perfect and harmonic system. While rights protect people's freedom, they also exacerbate confrontations. When rights conflict, the parties involved excavate deeper into their own understandings instead of searching for creative solutions that would satisfy everyone.

There is need for both what is frozen and free, situational flow in society and in cooperation between people. Clarity of goals and in the rules invented to realise them supports the achievement of those goals. On the other hand, the rules that are developed may not in fact promote the desired goals and even the goals themselves may change. Stability is in the nature of law: rules and decisions should be anticipated. In natural law-type thinking, rules and their realisation are concretely seen as final. But if we view law as a human learning process we will always be on a journey and will never arrive at a final destination. This means that we continuously need to feel out "the winds" and accordingly create the best possible ways of proceeding at this moment in the present reality. This demands dialogue and creativity. While rights protect our living conditions to a certain point, if they are given too much emphasis they may make things too rigid and become inherent values which eventually even work against the original targets. The logic of our present law is not suited to all of the tasks given to it, and all of the targets that have been set cannot be reached by employing legal logic and legal tools. On the other hand, legal logic suits some tasks very well and its central elements are certainly important interactive parts of the whole.

According to the principles of *tao*: if we want clarity and order let us make room for fuzziness, and if we want flowing freedom let us build channels for the flow.