

# The Past and Future of Proactive Law: An Overview of the Development of the Proactive Law Movement

By

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## 1. Introduction

Over the recent years, a growing body of literature, conferences, books and other publications has contributed to the definition and further development of *proactive law* following its introduction in the late 1990s.<sup>2</sup> Since then the idea of a *proactive approach to law* has been developed further, enriched, refined,<sup>3</sup> and extended into new areas, thereby enlarging the concept of proactive law and its fields of application. Recently, academic courses on proactive law and management have been established in European law and business schools<sup>4</sup>, and the concept has been

1. I thank Helena Haapio for her insights and comments on an earlier draft of this chapter.
2. The approach specifically called proactive law emerged in Finland in the late 1990s. See the first publication relating to the approach: Helena Haapio: Quality Improvement through Proactive Contracting: Contracts Are Too Important to Be Left to Lawyers!, American Society for Quality, Proceedings of Annual Quality Congress (AQC), Philadelphia, PA, Vol. 52, May 1998, pp. 243-248.
3. See e.g. Henrik Lando, Determinants of the Optimal Degree of Pro-activeness in Contracting, in A PROACTIVE APPROACH 255 (Scandinavian Studies in Law vol. 49, Peter Wahlgren ed. 2006) [hereinafter A PROACTIVE APPROACH], available at <http://www.scandinavianlaw.se/pdf/49-14.pdf>.
4. See ERASMUS curriculum development project on Proactive Management and Proactive Business Law (PAM PAL) funded by the Lifelong Learning Programme of the European Commission. See ProActive Management and ProAc-

taken up by the European Economic and Social Committee in the form of its own-initiative opinion on “The proactive law approach: a further step towards better regulation at EU level” published in the Official Journal of the European Union in 2009.<sup>5</sup> The proactive approach to law, sometimes also called *proactive law movement*, has triggered interest not only by people working in the field of law and regulation but also in other academic and professional areas such as information technology, economics, strategy, marketing and communication, commercial and contract management, thereby fostering its interdisciplinary scope.

Without pretention to be exhaustive, this chapter is a modest attempt to synthesize some of the existing literature on proactive law. Hopefully it can make a small contribution to the definition and the development of a comprehensive theory of proactive law by providing a framework for future research in the area of proactive law and the development and application of proactive legal and management tools in academia and practice.

In the following I will explain the concept of proactive law, summarize the history of the proactive law movement, and reflect on some of the reasons for the emergence of the approach. I will describe its origins in and contrast it from preventive law, identify the basic principles of proactive law, and finally conclude with perspectives on future research.

## 2. History of the proactive law movement

The approach specifically called proactive law emerged in Finland in the late 1990s. The first publication relating to the approach was a paper entitled “Quality Improvement through Proactive Contracting” that Helena Haapio presented at the Annual Quality Congress of the American Society for Quality in Philadelphia in 1998. This paper was followed

tive Business Law, TURKU UNIVERSITY OF APPLIED SCIENCES, <http://pam-pal.turkuamk.fi/index.php>.

5. See Opinion of the European Economic and Social Committee on ‘The proactive law approach: a further step towards better regulation at EU level’, 2009 Official. J. Eur. Union, July 28, 2009, at C 175/26, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:175:0026:0033:EN:PDF>.

by a series of publications and the first proactive law conference, which was held in Helsinki in 2003.

A central player in the field is the Nordic School of Proactive Law, a network of researchers and practitioners from Denmark, Finland, Iceland, Norway, and Sweden, each of whom has an interest in proactive law. The Nordic School was instrumental in the creation of the ProActive ThinkTank, led by a core team from Denmark, Finland, France, the Netherlands, and the United Kingdom. The mission of the ThinkTank is to provide a global forum for business leaders, lawyers, academics, and other professionals to discuss, develop, and promote the proactive management of relationships, contracts, and risks and the prevention of legal uncertainties and disputes.<sup>6</sup> Among the publications following conferences organized by the Nordic School are three English language books, *A Proactive Approach*<sup>7</sup>, *Corporate Contracting Capabilities*<sup>8</sup>, and *A Proactive Approach to Contracting and Law*.<sup>9</sup> Some of the early work of the Nordic School is available in Finnish or Swedish only.

After initial developments in the Nordic countries, the proactive approach started to awaken interest outside Scandinavia, first in Europe and later in other countries, leading to conferences and publications on a broader scale.<sup>10</sup> Through these and the International Association for Contract and Commercial Management (IACCM), information about the approach reached pioneers of *law and strategy*, and law for competitive advantage (LCAM),<sup>11</sup> an emerging field of legal scholarship in the United States.<sup>12</sup> This expanded the already existing close collaboration

6. See ProActive Think Tank Mission Statement, available at <http://www.proactivelaw.org/>. See also <https://www.iaccm.com/gp/proactive/?java&preview>.
7. *A PROACTIVE APPROACH*, Scandinavian Studies in Law vol. 49 (Peter Wahlgren ed. 2006).
8. *CORPORATE CONTRACTING CAPABILITIES*, University of Joensuu Publications in Law, No. 21 (Soili Nyste'n-Haarala ed. 2008).
9. *A PROACTIVE APPROACH TO CONTRACTING AND LAW* (Helena Haapio ed, 2008).
10. Proactive law conferences have taken place biannually in Helsinki, Stockholm, Turku, Nancy and Copenhagen.
11. See Larry A. DiMatteo, George J. Seidel & Helena Haapio, *Strategic Contracting: Examining the Business-Legal Interface*, in this book.
12. See generally Robert C. Bird, *Pathways of Legal Strategy*, 14 *Stan. J. L. Bus. & Fin.* 1, 3-4 (2008); Constance E. Bagley, *Winning Legally: The Value of Legal Astuteness*, 33 *ACAD. MGMT. REV.* 378, 383 (2008); Constance E. Bagley, *What's*

between the promoters of preventive law and proactive law to new fields and led to first attempts to trace the history of these parallel developments and to merge their common themes.<sup>13</sup>

### 3. Definition and nature

Proactive law seeks a new approach to legal issues in business and society. Instead of regarding law as a constraint that companies and people in general need to comply with, a cost factor, an administrative burden, or – at best – a means to protect one’s own or somebody else’s interests against harmful behaviour of others, proactive law considers law as an enabling instrument to create success and foster sustainable relationships. An objective of proactive law is to use the law as a lever to create value for the company, the individual or society in general.

According to definitions found in common English language dictionaries, the word *proactive* (also spelled *pro-active*) implies “acting in anticipation of future problems, needs, or changes.”<sup>14</sup> According to Randy M. Page, “[t]he concept of proactivity emphasizes taking personal responsibility for behaviour” based on values rather than “blam[ing] circumstances, conditions or, conditioning for their behaviour.”<sup>15</sup> These definitions go back to experimental psychology from the 1930s which define proactivity as “impairment or retardation of learning or of the

Law Got to Do with It?: Integrating Law and Strategy, 47 AM.BUS.L.J. 587 (2010); Robert C. Bird, Law, Strategy and Competitive Advantage, 44 U. CONN. L. REV. 61(2011), available at <http://connecticutlawreview.org/documents/Bird.pdf>.

13. See e.g. George J. Siedel & Helena Haapio, Using Proactive Law for Competitive Advantage, 47 AM. BUS. L.J. 641 (2010); Gerlinde Berger-Walliser, Robert C. Bird & Helena Haapio, Promoting Business Success Through Contract Visualization, 17 J.L., BUS. & ETHICS 55 (2011); Larry A. DiMatteo, George J. Seidel and Helena Haapio, Strategic Contracting: Examining the Business-Legal Interface in this book.

14. <http://www.merriam-webster.com/dictionary/proactive>.

15. Randy M. Page: Fostering Emotional Well-being in the Classroom. Chapter 2: Skills for Emotional Well-Being. Paragraph: Responsibility: Are We Proactive or Reactive? pp 50-52 Jones & Bartlett Publishers, 2003, citing Stephen R. Covey, The Seven Habits of Highly Effective People, 1992, 2004 and Viktor E. Frankl, Man’s search for meaning: an introduction to logotherapy, 1959.

remembering of what is learned by effects that remain active from conditions prior to the learning".<sup>16</sup> Today, the word proactive or proactivity is commonly used (and sometimes misused) in different contexts, such as life sciences, business, information technologies and management literature.<sup>17</sup> The latter differentiates between *proactive thinking*<sup>18</sup> and *proactive behaviour* (proactivity).<sup>19</sup> The so-called *proactive thinking framework* developed by Alain Paul Martin, Herbert A. Shepard and Richard Beckhard "applies primarily to issues (threats and opportunities) and complex social systems such as communities and organizations (corporations, government, NGOs, World Bank),"<sup>20</sup> while *proactive behaviour* mostly applies to the individual, namely in the workplace.<sup>21</sup> Findings from the aforementioned literature show that professionals who are considered to be proactive typically engage in the following behaviors:<sup>22</sup>

1. Scan for change opportunities.
2. Set effective, change-oriented goals, and focus on accomplishment with real impact.
3. Anticipate and prevent problems.
4. Do different things, or do things differently.
5. Take action.
6. Persevere, persist in their efforts.
7. Achieve results.

16. Whiteley, Paul L.; Blankfort, Gerald (1933), „The Influence of Certain Prior Conditions Upon Learning“, *Journal of Experimental Psychology* (APA) 16: 843-851.

17. See generally The Professional Development Institute, *Proactive Thinking and Strategic Brainstorming*, at <http://www.executive.org/proactive/Default.asp>.

18. Alain Paul Martin (1983). *Think Proactive: New Insights into Decision-Making*. The Professional Development Institute. 233 (1983).

19. See e.g. Bateman, T. S., & Crant, J. M. (1993). The proactive component of organizational-behavior: A measure and correlates. *Journal of Organizational Behavior*, 14(2), 103-118.

20. The Professional Development Institute, *Proactive Thinking and Strategic Brainstorming*, at <http://www.executive.org/proactive/Default.asp>.

21. Id.

22. Thomas S. Bateman, & J. Michel Crant, J. M., *Proactive Behavior: Meanings, Impact, and Recommendations*, *Business Horizons* 63 (1999).

In addition to the research on proactive thinking and proactivity at work, organizational research has identified design features which characterize a *proactive organization*. According to Jon M. Shepard, Michael Betz and Lenahan O'Connell the proactive organization adopts the following four features: cooperation, participation, negotiation, and direct anticipation.<sup>23</sup>

Some of these features are reflected in the already existing literature on proactive law; others could be developed further in the future. Proactive lawyering involves acting in anticipation of legal disputes, taking control of potential problems, providing solutions, and self-initiation, instead of reacting to failures and shortcomings as traditional law usually does. Literature and those practising proactive law try to develop concepts, theories and tools to use legal instruments proactively in order to achieve business goals. This includes drafting contracts that foster good relationship(s) and provide a roadmap for performance (instead of providing legal safeguard clauses in case something goes wrong), regulation that encourages good behaviour, or agile contracts that adapt to changing situations and help to create trust among business partners.

On the website of the Nordic School of Proactive Law, proactive law is defined as: "... a future-oriented approach to law placing an emphasis on legal knowledge to be applied before things go wrong. It comprises a way of legal thinking and a set of skills, practices and procedures that help to identify opportunities in time to take advantage of them – and to spot potential problems while preventive action is still possible. In addition to avoiding disputes, litigation and other hazards, Proactive Law seeks ways to use the law to create value, strengthen relationships and manage risk." This definition of proactive law builds the foundation for many publications on proactive law, and is reflected in the EESC opinion on the proactive approach.<sup>24</sup> While this initial definition of proactive law has lost nothing of its validity and well reflects the basic idea of proactive law, it is not static or graven in stone. The definition of proactive law will be subject to modification as the concept of proactive law evolves. Al-

23. Jon M. Shepard, Michael Betz and Lenahan O'Connell, *The Proactive Corporation: Its Nature and Causes*, 16 *Journal of Business Ethics* 10, 1001 at 1007 (1997).

24. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:175:0026:0033:EN:PDF>.

ternative definitions which stress different aspects of proactive law, and concentrate more on the concept and methods than the “approach” or the “way of legal thinking” which characterizes the early work on proactive law, have already been developed.<sup>25</sup> The concept has been adapted to different areas such as contracting, ICT, management or regulation.

#### 4. Origins and causes

The concept of proactive law has been developed based on a certain dissatisfaction with the current legal system, often called “traditional law” in opposition to the proactive approach to law. Proactive law could be classified among other emerging alternative legal approaches, which Susan Daicoff in her extensive study on the law as a *healing* profession calls *vectors* of the *comprehensive law movement*, and which approach law in a more comprehensive, integrated, humanistic, interdisciplinary, restorative way.<sup>26</sup> Some of these alternative approaches or processes (vectors) are also reflected in proactive law, such as collaborative law, restorative justice, procedural justice, transformative mediation, therapeutic jurisprudence, holistic justice, creative problem solving.<sup>27</sup> A common

25. See e.g. Salmi-Tolonen PAMPAL glossary (2011), on file with the author, who states that proactive law “is a comprehensive concept concerning civil and commercial matters which refers to any regulation measure/activity, undertaken by public or private actors, as well as its methods, instruments, and results, whose purpose is by imposing duties, conferring rights and creating competences enable and empower individuals concerned or private or public bodies in achieving their commonly defined goals. In practice, the forms this concept takes are rules, practices and/or processes.”

26. See Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement”*, bepress Legal Series, Working Paper 1331 (July 22, 2005), available at: <http://law.bepress.com/expresso/eps/1331>.

27. It can be argued whether “creative problem solving” is a specific vector of the comprehensive law movement, see Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement”* (July 22, 2005). bepress Legal Series. Working Paper 1331, at 22-25. available at: <http://law.bepress.com/expresso/eps/1331>, or a part of preventive law, see Thomas D. Barton and James M. Cooper, *Preventive Law and Creative Problem Solving: Multi-Dimensional Lawyering*, National Center for Preventive Law, available at [http://www.preventivelawyer.org/content/pdfs/Multi\\_Dimensional\\_Lawyer.pdf](http://www.preventivelawyer.org/content/pdfs/Multi_Dimensional_Lawyer.pdf).

feature for all these different forms of comprehensive legal approaches, and essential for proactive law, is that they seek to optimize human well-being and consider “extra-legal factors”, whereas the prevailing European legal theory considers law as “a coherent conceptual system that creates legal cause and effects relationships”<sup>28</sup> in a framework of greatest possible neutrality.<sup>29</sup> The idea of proactive law has been born out of practical needs, in collaboration between academics and practitioners in order to “balance the prevailing legal logic”.<sup>30</sup> It is not as the name proactive law *movement* could suggest a legal ideology, but deeply based on existing realities, practice-oriented, with the objective to reach real-life (especially business) goals. Insofar, and not surprising given its Finnish origins, proactive law is rooted in (Scandinavian) legal realism<sup>31</sup>, and takes into account the economic dimension of legal decisions.<sup>32</sup>

#### 4.1 From prevention to promotion

The idea of an *ex-ante* view or proactivity in law is not new in itself. It has been known for years that the sooner a dispute or a potential dispute is addressed, the better the chances of a fair and prompt solution. In the context of practicing law, the idea of prevention was first introduced by Louis M. Brown, himself an experienced practitioner as well as a law professor. In his ground-laying treatise *Preventive Law* published in 1950, he states a simple but profound truth that has not lost any of its value. Indeed, many attorneys and in-house-counsel actually act according to this motto: “It usually costs less to avoid getting into trouble than to pay for getting out of trouble.”<sup>33</sup> The contribution of Louis M. Brown and other scholars in the field of preventive law consists in identifying preventive law with its own name, organizing it into a distinctive

28. Soile Pohjonen, Proactive Law in the Field of Law, in A PROACTIVE APPROACH 54 at 56 (2006).

29. Soile Pohjonen, Proactive Law in the Field of Law, in A PROACTIVE APPROACH 54 at 57 (2006).

30. Soile Pohjonen, Proactive Law in the Field of Law, in A PROACTIVE APPROACH 53, at 54 (2006).

31. Soile Pohjonen, Proactive Law in the Field of Law, in A PROACTIVE APPROACH 54 at 57 (2006).

32. See e.g. Henrik Lando, Determinants of the Optimal Degree of Pro-activeness in Contracting, in A PROACTIVE APPROACH 255 (2006).

33. Louis M. Brown, *Preventive Law* 3 (1950).

way of thinking, developing concepts, if not a comprehensive general theory of preventive law.<sup>34</sup> By doing so they made preventive law visible and recognizable for people with a similar mindset. They have created awareness, which is necessary to change people's mindset in order to use the law according to business goals, to become more creative, preventive – “better” lawyers.

Edward Dauer identifies four core principles of preventive law:<sup>35</sup>

1. Preventive law aims at predicting human behavior. A lawyer practicing preventive law tries to predict human behaviour. He or she will search for a legal solution, which takes into account what the people will do, and by doing so helps anticipate and prevent litigation. Traditional law practice tries to predict what a court will decide. Insofar traditional law practice also seems to be preventive. It might prevent losing in court, but still not achieve what the people really need and want. Therefore traditional law practice remains backwards, and failure and litigation-oriented. It does not improve personal or business relationships, which is essential for preventive – and proactive – law.
2. Preventive law is based on the assumption that the most successful treatment is prevention, and seeks to transfer this idea from the medical to the legal context of conflict management.<sup>36</sup> Dauer sets forth a three-step strategy for managing legal risk, illustrated in Figure 1 (see page 22).
3. Adapted from: Edward A. Dauer in *A Proactive Approach to Contracting and the Law* 14, at 25 (Helena Haapio ed. 2008). Preventive law embraces risk. This means to deliberately embrace some risk as a way of reducing overall risk, rather than try to drive one element of risk to zero.
4. Make preventive legal services available to clients: According to the basic ideas of preventive law, lawyers must work with others in multi-disciplinary teams in the planning of clients' ventures. While the first three principles predominantly ask for a change in the at-

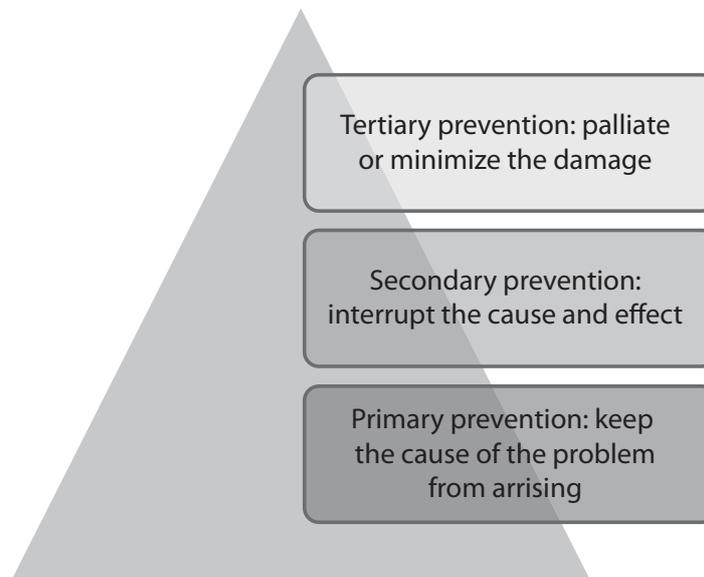
34. Edward A. Dauer, *Four Principles for a Theory of Preventive Law*, in *A Proactive Approach to Contracting and Law* 14 (Helena Haapio Ed., 2008).

35. Id.

36. Tobias Mahler, *The State of the Art of Contractual Risk Management Methodologies*, in *A Proactive Approach to Contracting and Law*, at 63 (Helena Haapio, Ed. 2008).

titudes and practices of lawyers, this fourth principle is oriented towards the client – the business or private person. Not only do lawyers need to become more prevention-oriented, but clients need to bring in lawyers early enough, so they can together detect legal risk and prevent harm from occurring and engage in interdisciplinary collaboration, otherwise even the best preventive lawyer won't help.

Figure 1: A three-step strategy for managing legal risk. Source: Daver.



Proactive law encompasses the basic principles of preventive law described above, namely preventing what is not desirable, and keeping problems and risks from materializing. To the preventive dimension, proactive law adds a second aspect – the promotive (or positive, constructive) dimension that is promoting what is desirable, encouraging good behaviour. While preventive law prevents problems and ill-health, proactive law promotes “legal well-being” and clients’ “self-care”.<sup>37</sup> It has been stated that Louis M. Brown’s work on preventive law was targeted toward lawyers. While influenced by his work, the proactive law approach emphasizes the importance of collaboration between legal professionals and other disciplines. Though – so far – mainly rooted in

37. See Helena Haapio, Introduction to Proactive Law: A Business Lawyer’s View, in *A Proactive Approach to Contracting and the Law* 23, at 24 (Helena Haapio ed., 2008).

the legal paradigm, proactive law expressively addresses other fields of expertise. The practice of proactive law requires collaboration between lawyer and non-lawyer, therefore the client can't be a passive "patient", leaving the legal issues to the legal professional, but needs to take an active role in the law-making, contract drafting, or other law related processes.<sup>38</sup> In the words of Soile Pohjonen: "[preventive law] favors 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 emphasized."<sup>39</sup>

#### 4.2 Development of proactive law

The concept of proactive law was first introduced and continues to be extensively used in connection with contracts.<sup>40</sup> From the perspective of proactive law, traditional contracts are often reactive, focusing on legal problems and litigation instead of serving as a management tool and to foster collaboration between business partners, though the latter is crucial for success in today's global and networked economy.<sup>41</sup> In contrast to *contract law*, which is based on the interpretation of legal rules

38. Id.

39. Soile Pohjonen, Proactive Law in the Field of Law, in A PROACTIVE APPROACH, supra note 3, at 53; see also Soile Pohjonen, Law and Business – Successful Business Contracting, Corporate Social Responsibility and Legal Thinking, TIDSKRIFT UTGIVEN AV JURIDISKA FÖRENINGEN I FINLAND (JFT) 470, 477 (2009), available at <http://www.helsinki.fi/oikeustiede/omasivu/pohjonen/Law%20and%20Business.pdf>.

40. Helena Haapio: Quality Improvement through Proactive Contracting: Contracts Are Too Important to Be Left to Lawyers!, American Society for Quality, Proceedings of Annual Quality Congress (AQC), Philadelphia, PA, Vol. 52, May 1998, pp. 243-248.

41. See e.g. Gerlinde Berger-Walliser, Robert C. Bird & Helena Haapio, Promoting Business Success Through Contract Visualization, 17 J.L., BUS. & ETHICS 55 (2011); Vaula Haavisto, Contracting in Networks, in A PROACTIVE APPROACH, 49 SCANDINAVIAN STUD. L., in A PROACTIVE APPROACH 237 (2006); Soili Nystén-Haarala, Contract Law and Everyday Contracting, in A PROACTIVE APPROACH 263 (2006); Tim Cummins, Best Practices in Commercial Contracting: Key Initiatives That Are Driving Competitive Advantage, in A PROACTIVE APPROACH 132 (2006); Tobias Mahler, Faculty of Law University of Oslo, Legal Risk Management: Developing and Evaluating Elements

by a court, i.e. *ex post*, *proactive contracting* emphasizes the contracting process and tries to develop an adequate set of tools for building functioning collaboration in real life (business) relationships. When drafting a proactive contract, the focus is on capturing the goal of the business deal, assuring a shared understanding between the contract partners and developing structures, rules and procedures that *ex ante* enable the creation and achievement of desired goals and avoidance of future problems.<sup>42</sup>

Shortly after its emergence in contracting, the *proactive approach* has been extended to other areas<sup>43</sup> and a more comprehensive theory has started to evolve.<sup>44</sup> Legal scholars<sup>45</sup>, business practitioners,<sup>46</sup> and the European Economic and Social Committee are calling for a paradigm shift. According to the latter: “[t]he time has come to give up the centuries-old reactive approach to law and to adopt a proactive approach. It is time to look at law in a different way: to look forward rather than back, to focus on how the law is used and operates in everyday life and how it is received in the community it seeks to regulate. While respond-

of a Method for Proactive Legal Analyses, With a Particular Focus on Contracts (2010).

42. See e.g. Soile Pohjonen, Proactive Law in the Field of Law, in A PROACTIVE APPROACH 53, at 55 (2006); Tobias Mahler, The State of The Art of Contractual Risk Management Methodologies, 57 in A PROACTIVE APPROACH TO CONTRACTING AND LAW, AT 63 (HELENA HAAPIO, ED. 2008); for an example of possible application see Soile Pohjonen and Katja Koskelainen, Empowering Contracting Parties, Proactive and dialogic contracting in public procurement, in this book.
43. See e.g. Dag Wiese Schartum, Introduction to A Government-based Perspective on Proactive Law, in A PROACTIVE APPROACH 35 (2006); Jarl S. Magnusson, Proactive Law – and the Importance of Data and Information Resources, in A PROACTIVE APPROACH 407 (2006).
44. See e.g. Soile Pohjonen, Proactive Law in the Field of Law, in A PROACTIVE APPROACH 54 (2006); Thomas D. Barton, A Paradigm Shift in Legal Thinking, in A Proactive Approach to Contracting and The Law 35 (Helena Haapio, Ed. 2008); Edward A. Dauer, The Role of Culture in Legal Risk Management, in A PROACTIVE APPROACH 93 (2006).
45. Thomas D. Barton, A Pradigm Shift in Legal Thinking, in A PROACTIVE APPROACH TO CONTRACTING AND THE LAW 35 (Helena Haapio, Ed. 2008).
46. Tim Cummins, Taking the Law Out of Contracts – And Putting Lawyers Into the Contracting Process, in A PROACTIVE APPROACH TO CONTRACTING AND THE LAW 97 (Helena Haapio, Ed. 2008).

ing to and resolving problems remain important, preventing causes of problems is vital, along with serving the needs and facilitating the productive interaction of citizens and businesses."<sup>47</sup> The claim for this legal paradigm shift is based on the observation of changing economic and social realities.<sup>48</sup> The scope of this chapter doesn't allow developing these sociological aspects in depth, leaving this to further research. In a nutshell one can say that society has changed, from a nationalistic, vertical structure, based on authority towards a globalized, horizontal, networked and individualistic social and economic system.<sup>49</sup> Or in the words of Thomas D. Barton, from a system of rules, separation, and power to one based on understanding, integration and accommodation.<sup>50</sup> According to proactive law researchers and some sociologists, these societal changes require a change in the role of lawyers. More than ever in Western societies, the law affects personal and business life. One of the reasons for the observed "colonization of personal life by the law"<sup>51</sup> could be the loss of traditional authorities in today's society, thereby leading to increasing litigation. According to Eric van de Luijt-garden, lawyers in our contemporary western society are increasingly functioning as professional substitutes for lost authority. This implies that lawyers are asked to take over functions that go beyond their traditional role and classic legal theory. These functions require other than legal knowledge, skills that lawyers typically are not trained in. He proposes that proactive law, which as described above is inter-disciplinary

47. See Opinion of the European Economic and Social Committee on 'The proactive law approach: a further step towards better regulation at EU level', 2009 Official J. Eur. Union, July 28, 2009, at C 175/26, § 1;4, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:175:0026:0033:EN:PDF>.

48. E.g., Richard Susskind, *The Future of Law* at 292 (1998); Kaisa A.E. Sorsa & Tarja Salmi-Tolonen, *Contracting in Transition* (Apr. 16, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1120919>; Soili Nysten-Haarala et. al., *Contracting Capabilities in Industrial Life-Cycle and Service Business* (research summary), at 3, available at <http://wanda.uef.fi/oikeustieteet/siviili/CCC%20Research%20Report.pdf>.

49. Eric van de Luijtgaarden, *PAMPAL Handbook*, on file with the author.

50. Thomas D. Barton, *Preventive Law and Problem Solving, Lawyering for the Future* at 8, Vandeplass Publishing (2009).

51. Lawrence M. Friedman, *The republic of choice, law authority and culture*, Cambridge Massachusetts/London at 15 (1990); Jürgen Habermas, *Legitimation crisis*, London at 356-373 (1976).

in nature and by definition takes into account social and economic realities, and its integration in law school curriculum, could help to fill this gap and enable lawyers to better fulfil their new role.<sup>52</sup>

## 5. Basic concepts of proactive law

Just like preventive law, proactive law is not new in itself;<sup>53</sup> there have always been proactive lawyers, or proactive elements in contracts or legislation. An area of law where the move towards “understanding, integration and accommodation” has already become clearly visible is the broad use of ADR (Alternative Dispute Resolution) mechanisms in today’s dispute resolution practice.<sup>54</sup>

The objective of the proactive law movement is to identify and generalize this shift in legal thinking, collect and evaluate practical experiences and develop theoretical studies and concepts which show what can be gained in developing further the proactive dimension of the legal domain and interdisciplinary collaboration between lawyers and managers, or subject-matter experts from other for example technical fields. Cecilia Magnusson Sjöberg clarifies that the notion of law in this context “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. a basis for risk analyses, legal system design and management.”<sup>55</sup>

While preventive law originated in the US, in response to the adversary Common law system, proactive law has evolved in the European, less litigation-oriented, Civil law context, which explains its different focus. Also, the context in which proactive law has developed and continues to develop is very different from the preventive law movement in the US. While research on preventive law and the comprehensive law movement in general is predominantly located in US law schools, concerned with traditional legal topics such as litigation, criminal law,

52. See generally Eric van de Luitgaarden, PAMPAL Handbook, on file with the author.

53. See Cecilia Magnusson Sjöberg, in *A Proactive Approach*, at 1.

54. Thomas D. Barton, *Preventive Law and Problem Solving*, *Lawyering for the Future* at 8, Vandephas Publishing (2009).

55. *Id.*

constitutional law, corporate law, employment law etc., the proactive law movement from its early stages has been truly interdisciplinary and business-oriented. It pays particular attention to non-legal disciplines such as project management, quality management, contract and risk management, legal document management, and ICT. Referring to Figure 1, presented above, preventive law so far has focused on the secondary and tertiary level of legal care, while proactive law concentrates on the primary causes of legal disputes.

To the preventive aspects described above, proactive law adds a *promotive* dimension. The main objective of proactive law is helping the stakeholders – be it individuals, businesses or legislators, reach their objectives. For example contracts are designed as to enable the parties to reach their common goals and implement their business plans the way they want them to be. This implies tight collaboration between lawyers and those implementing the contract. The parties need to reach a common, unambiguous understanding of all clauses of the contract, leaving nothing to unexpected ex-post interpretation by a court, which might run counter the parties' true interests. For the legal profession this means a different type of legal counseling. Instead of making sure that the contract is "safe" in case of non-performance or legal dispute, the lawyer (or whoever is in charge of contract design and drafting) must work with those involved in the business relationship to identify, and translate into contractual language, the parties' goals and expectations regarding scope, intentions, requirements, etc. of the business deal. The person in charge of drafting the contract has to make sure that the business deal doesn't fail and the parties reach their objectives. This fundamentally changes the nature of the contract: it turns from a failure-oriented risk management tool into an instrument which assures performance, quality and success.<sup>56</sup>

The main differences between preventive law and proactive law can be identified as follows in Figure 2 ( see page 28):

56. See generally Larry A. DiMatteo, George J. Seidel & Helena Haapio, Strategic Contracting: Examining the Business-Legal Interface, in this book.

**Figure 2: Main differences between preventive law and proactive law.**

Preventive law focuses on	Proactive law focuses on
Managing conflict and handling problems	Eliminating causes of problems, promote sustainable relationship
Avoiding litigation	Help stakeholders reach their common goals
Managing risks	Balancing risk and reward, achieving desired outcomes, i.e. success
Minimizing costs and losses	Creating value for all parties involved
Professional legal care	Shared care and team approach, lawyers supporting client's self-care

Recently more mutual influence between European and US researchers can be observed. On the one hand, the proactive and interdisciplinary dimension has been added to the preventive dimension of preventive law (see Dauer's principle 4 above), on the other hand common interests have been discovered between the European proactive law movement and the emergent discipline of *law and strategy* in the US which, similar to proactive law, aims at creating value through strategic use of law.<sup>57</sup>

Though proactive law has only developed recently, and literature, compared to other vectors of the comprehensive law movement (see above) is less abundant, at this stage the following principles of proactive law can be identified:

1. Proactive law is based on legal certainty, literacy, and cross-professional collaboration. In the words of Helena Haapio, for a lawyer helping business people navigate in unknown regions trying to find out where the safe routes run, proactive law is about "localizing the mines and preventing them from exploding."<sup>58</sup> Today's legal system evolves rapidly. Requirements for corporate compliance, environmental and safety standards, regulation of the information society etc. are constantly becoming more demanding. Therefore not only legal experts need to be informed about the law, but management and employees need to be aware of the legal "mines". Lawyers, in turn, need to be knowledgeable about the business processes and

57. George Siedel and Helena Haapio, *Using Proactive Law for Competitive Advantage*, 47 AM. BUS. L. J. 641-686; see also Larry A. DiMatteo, George J. Seidel & Helena Haapio, *Strategic Contracting: Examining the Business-Legal Interface*, in this book.

58. Helena Haapio, *Introduction to Proactive Law: A Business Lawyer's View, in A Proactive Approach*, at 21.

objectives of the company they are counseling. Recent scandals such as Enron or WorldCom have shown how integrated law and business are. It is not only about compliance with the law; ethical standards and the reputation of a company are at stake as well. Therefore, in addition to avoiding lawsuits through compliance with regulations, companies need to engage in cross-professional collaboration and group-learning. They need to manage their compliance with the law and align it to business objectives. In order to be able to do this, not only lawyers and regulators need to know the law, managers and other actors in society need to have at least a basic understanding of the legal “mines”. They need a basic legal literacy<sup>59</sup>, awareness, or legal astuteness,<sup>60</sup> which in the end can help them not only to avoid litigation and the costs related to it, but enable them to use the law for competitive advantage.<sup>61</sup>

2. Law and legal professionals should create economic value and therefore need to be outcome orientated. As the organizational behaviour research on proactivity cited above suggests, lawyers need to scan for change of opportunities, set effective, change-oriented goals, and focus on accomplishments with real impact and take action and achieve results. Preventing legal disputes may save costs and time wasted by legal proceedings, but from an economic standpoint this is not enough. In order to convince companies of the importance of the law, lawyers need to be able to show to their clients not only the negative side of law – constraints that are “in the way of business”, but the economic value, the opportunities proactive use of the law can offer to build solid business foundations, roadmaps for performance, trust, and better, sustainable business relationships.

59. Helena Haapio, in *A Proactive Approach*, at 23.

60. Constance E. Bagley, *Winning Legally: The Value of Legal Astuteness*, 33 *Acad. Mgmt. Rev.* 378, 383 (2008).

61. See generally George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, 47 *Am. Bus. L.J.* 641, 667-68 (2010); Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 *Am. Bus. L.J.* 727, 728 (2010); Constance E. Bagley, *Winning Legally: The Value of Legal Astuteness*, 33 *Acad. Mgmt. Rev.* 378, 383 (2008).

3. In proactive law the focus is on dispute pre-emption, legal risk management, rather than dispute resolution.<sup>62</sup> Though there is need for case studies to prove the following, the hypothesis in proactive law is that if practiced correctly, there would seldom be need for any dispute resolution. Many legal disputes are due to misunderstandings and disappointed expectations. The objective of proactive law is to avoid getting to the stage of dispute, through careful attention to legal clarity, early warning mechanism and enhanced collaboration between business partners.
4. For proactive law, cross-professional collaboration between lawyers, managers and subject matter experts, such as the engineers in charge of the execution of the goals set forth in a business contract, are essential to reach common goals and to avoid problems and legal disputes. A common understanding is necessary, which can be enhanced by the use of non-traditional legal communication tools such as visualization.<sup>63</sup>
5. Creative thinking: Because of the outcome orientation of proactive law, and as proactive law looks towards the future rather than the past, it requires from all actors the ability to develop new ideas and concepts in order to respond to needs, problems or challenges, sometimes by means of an original and previously non-existing approach.

## 6. Conclusion and perspectives

Some of the principles of proactive law enumerated above seem to be obvious factors for successful legal counseling. Therefore some lawyers, especially in-house or corporate counsel, when they are confronted with the ideas of proactive or preventive law for the first time, suggest that this is what they actually do. Though this might be true for some experienced business lawyers who possess extensive business knowledge and

62. See also Richard Susskind, *The Future of Law*, at 292 (1998).

63. See generally Gerlinde Berger-Walliser, Robert C. Bird and Helena Haapio, *Promoting Business Success through Contract Visualization*, 17 *Journal of Law, Business and Ethics*, pp. 55-75 (2011); Larry A. DiMatteo, George J. Seidel & Helena Haapio, *Strategic Contracting: Examining the Business-Legal Interface*, in this book.

anability for strategic legal thinking, traditional young law school graduates are not educated in the proactive use of the law. Interestingly, observations by the author in the PAMPAL curriculum development project<sup>64</sup> have shown that even students enrolled in double-degree programs such as law and economics or JD-MBA programs seem to quickly adapt to classic legal theory and “forget” about a truly integrated approach to law and management. There also seems to be some lack of knowledge or understanding related to the proactive and preventive approaches,<sup>65</sup> which need to be addressed in future work. Preventive and proactive law are not (only) about keeping clients out of court or making sure that one’s client’s interests will prevail in case of a legal dispute. Proactive law is about problem-solving, detecting real-life causes for potential misunderstandings and failures, but mostly about fostering sustainable relationship, enabling stakeholders to reach their goals, creating value for businesses, individuals and society as a whole. One of the reasons for the aforementioned lack of understanding could be that proactive law literature so far has extensively addressed the reasons and objectives of the paradigm shift it calls for, but to a lesser degree how to make it happen. What will be needed in the future are more case studies, identification of best practices, and more distinctive methods and tools to turn proactive law into practice.<sup>66</sup>

64. See ERASMUS curriculum development project on Proactive Management and Proactive Business Law (PAMPAL) funded by the Lifelong Learning Programme of the European Commission. See ProActive Management and ProActive Business Law, TURKU UNIVERSITY OF APPLIED SCIENCES, <http://pampal.turkuamk.fi/index.php>.

65. See Petri Mäntysaari, *Theories of Commercial Law, Corporate Governance and Corporate Law* at 35 (2012).

66. Some interesting examples already exist, e.g. the Managers Legal Plan™ in George J. Siedel and Helena Haapio, *Using Proactive law for Competitive Advantage*, *Am. Bus. L. J.* 641, 651-656 (2010); or Tobias Mahler, *Legal Risk Management, Developing and Evaluating Elements of a Method for Proactive Legal Analyses, With a Particular Focus on Contracts*, Faculty of Law, University of Oslo (2010); Soile Pohjonen and Kerttuli Visuri, *Proactive Approach in Project Management and Contracting*, in *A PROACTIVE APPROACH TO CONTRACTING AND LAW*, AT 75 (HELENA HAAPIO, ED. 2008); Antoni Brack, *A Managerial Format for a Business Legal Audit*, *12 European Business Law Review* 34 (2001), see also Larry A. DiMatteo, George J. Seidel & Helena Haapio, *Strategic Contracting: Examining the Business-Legal Interface*, in this book.

