

FRANKLY SPEAKING: THE BLIND SPOT THAT CANNOT BE AVOIDED EVEN BY LEGAL TECH



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One of the core arguments against putting in-house lawyers on an equal footing with external lawyers was that salaried in-house lawyers are dependent on instructions and therefore cannot be independent. Has the amendment of § 46 of the Federal Lawyers' Act changed this situation?

From a system-theoretical point of view, doubts are justified. People who work in organisations quickly adopt their patterns, beliefs and cultural imprints and orientate their actions to the organisational framework conditions available to them. (see already Bateson, Steps to an Ecology of Mind, 1972, 381). The attempt to look at the organization from the inside, so to speak, is usually accompanied by the phenomenon of the blind spot (see Luhmann, Die Wissenschaft der Gesellschaft, 1990, 231). Something like objectivity or neutrality in its pure form appears as an illusion.

Classical management theory assumes that options between which management decides are reality. Systems theory, on the other hand, assumes that descriptions of reality are only a construct of reality produced by an observer. At the moment of observation or action, the observer sees neither

- the other side of the observation, nor
- the currently used distinction, nor

- other possible distinctions.

In its role as a legal department, the Legal Department is there on the one hand to perform a regulatory function and ensure legal certainty; on the other hand, however, it is also an operational service provider with a high degree of customer orientation that relieves the burden on the operational units and focuses on availability, speed, cost awareness and quality. Finally, it is also a strategic advisor to decision-makers, i.e. an expert with an entrepreneurial focus.

The independence of corporate lawyers has very hungry food enemies, which are organizationally well secured. The control systems of the companies are predominantly oriented towards market success measured in terms of sales and earnings. The legal department is also subject to this. Key figures for legal departments that aim to promote the legal culture in the company and are included in the target agreements are exotic exceptions (see on key figure systems: Large in: Beck'sches Formularbuch für die Rechtsabteilung, B. IV. 4). In their work processes, legal departments also orient themselves predominantly towards the established main processes and position themselves as serving functions in the company. To put it more clearly: the blind spots which corporate lawyers - like all employees of a company - have from a systemic point of view are very well secured and perpetuated from an organisational point of view.

Is there a way to get your own blind spots into view?

For individual industries there are detailed regulations on organisational duties and the associated compliance organisation (such as for investment services companies in § 33 WpHG), but these are not generally transferable to all companies and organisations. It is recommended that the compliance office be set up independently of business and settlement departments (to ensure its independence) and with direct responsibility to the management, or at least always have an external advisor at its side to provide the outside view. In order to fulfil its tasks, the compliance office should be granted the necessary resources and unrestricted rights of information, access and inspection with regard to all relevant documents and processes.

In the case of the legal department, this would mean that the legal function would be located outside the existing hierarchy and that the external view would be compared with the external view through regular exchanges with external parties. However, it is necessarily part of the organization, and thus exposed to the cultural rules of the game there, and it develops the same blind spots as the organization itself. In case of doubt, it will avoid confrontation, especially with hierarchical superiors, out of self-interest (job security, promotion opportunities, etc.). This contradicts the mission to protect the organisation as a whole and its responsibility to society.

Legal Tech as a synonym for computer-optimised processing of routine processes will not change this, as it only repeats the organisation's own procedures, albeit faster. Although there is a chance with the introduction of EDP-based processes to question and, if necessary, redefine them. But the Blind Spots are relevant precisely when the extraordinary happens, i.e. when the system's own reflection, triggered by the outside

view, is necessary to do something differently than before. And this is exactly what Legal Tech cannot do in case of doubt.

Legal management should work towards equipping the functional area organisationally in such a way that the task can be performed independently of dependency relationships - be they disciplinary or hierarchical - and without conflicts of interest from a variety of roles. The first steps are to establish separate process flows for the management and service processes of the legal department, in which reflection loops and quality assurance are organizationally provided and secured. This is accompanied by a control system that strengthens the independence of the legal department and promotes the legal culture in the company.

The most important thing, however, is to set up legal management in the company in such a way that the Sisyphean task of immunizing the law against organizational patterns can be constantly performed.