
Masters of Ambiguity: How Legal Can Lead the Business

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Abstract

This chapter of “*Liquid Legal: Transforming legal into a business-savvy, information-enabled and performance driven industry*” takes a systemic approach to the legal function in business enterprises. Defining *law* as a set of rules to govern human behavior, *legal* as the social system with the ideal of *justice* as normative reference, and *laws* as the medium through which this norm is operationalized, the article proposes to view both *the dissolution and creation of ambiguity as legal modus operandi*.

Ambiguity is simultaneously dissolved and created in legal contexts which frame the interactions of agents such as governments, courts, law firms, business enterprises, and private citizens. A legal context centers on a case or matter. Cases emerge when the law (the abstract set of rules) is applied to events (concrete facts in time and space). Cases are thus instances of the law, and they are always situated in a specific context that is defined through interest-driven relations of law and event, of the general and the particular. Like all self-referential systems which take their own output as new input, legal, through ambiguity as its *modus operandi*, primarily produces *more legal*.

I interpret the current pressure on in-house legal departments to “*do more with less*” as a symptom for the dis-functionality of the self-referential legal function within a business enterprise.

For legal to overcome this dis-functionality and to take a leadership role in business, I propose to shift the legal mind set from *adversarial* to *collaborative*. Looking at the constructive side of ambiguity, corporate lawyers can learn from each other and develop standards for simpler legal transactions. By focusing on “win-win” rather than “win-lose” relations, legal will create new business value instead of self-referential output.

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Technology and the ability to streamline and automate workflows, leverage the scalability of digitalized legal assets, and create transparency across the whole enterprise will enable such an increase of legal value contribution. Transparency can help establish a corporate culture built on trust, fairness and equality of opportunity—a culture which I believe is conducive to doing business in a globalized, complex and polycentric world.

1 “What?” “Who?” “Why?”: An Introduction to *Legal*

Webster online dictionary defines the meaning of the term *legal* as “*established by or founded upon law or official or accepted rules.*”¹ The adjective can be used in a predicative way, as in: “*Her action was legal,*” or in an attributive way: “*She took legal action.*” When used in an attributive way, *legal* no longer expresses the legality of a thing or action, but, together with the noun, creates a new specific meaning. We talk about “the legal system” and “the legal industry,” about “legal disciplines,” “legal practices,” and “legal institutions,” and it appears we are all fine with this usage and understand each other rather well.

However, latest when, as in *Liquid Legal*, a genuine noun is missing, the meaning of *legal* becomes ambiguous. As a nominalized term, *legal* may refer to jurisprudence or the profession of law in general; it may also refer to in-house legal departments, to law firms and legal process outsourcers (LPO), to law-making bodies or agencies, to courts, or to any other organization or activity somehow related to *the law*. The title of this book further enhances this linguistic ambiguity by qualifying *legal* as *liquid*—as something fluid, amorphous, and without shape.

Such ambiguity appears to be fundamentally opposed to the concept of law and the goal of the legal profession. The purpose of law is to govern behavior, and this purpose only seems achievable if the meaning of laws is clear and can be univocally understood. Using terms with unclear meaning, let alone intentionally creating ambiguity, appears counterproductive to that goal, and one of the deadly sins of lawyering. The below statement from Escher² expresses the negative connotation which the term *ambiguity* carries for most legal professionals³:

Lawyers must be capable of advanced legal reasoning, they must know the law, and, because so many in-house positions are transactional in nature, clients look to lawyers to effectively memorialize business agreements. By “effectively” the clients mean that the

¹Webster WordNet Dictionary. <http://www.webster-dictionary.org/definition/legal>. Accessed Oct. 15, 2016.

²Jon Escher, “Building a Legal Department in a Metrics-Driven World,” in LL, p. 363–364.

³Throughout my article, I will quote other articles of “Liquid Legal” to connect the individual texts and help create a network of ideas. However, the selected quotes and references are primarily intended to support my own theses; it is not my intention to summarize or even capture the main theses of these other articles. To understand the authors’ intentions and to do justice to their ideas, readers are advised to read the original articles themselves.

lawyers will draft agreements that accurately reflect the business understanding while at the same time shielding the company from undue risk, ambiguity, and misunderstanding.

While it is true that, in each single case, ambiguity is problematic for achieving agreements and thus should be reduced to the minimum, I want to make a structural argument for why ambiguity also, in principle, is unavoidable and a necessary constituent of all legal activity. The simultaneous dissolution and creation of *ambiguity*, that is the central thesis of this article, is *the basic legal modus operandi*, an operation without which legal could not even exist.

Part one of this article, entitled “*Justice, Law, and the Legal System*,” compares the functioning of legal to the functioning of language. Just like speech acts are situational linguistic instances which presuppose a whole system of language in the background, cases are situational legal instances which presuppose a whole system of law in the background. And just like the meaning of a particular speech act depends on the situational context, the meaning of single rules and the assessment of individual cases (who and what is “right or wrong,” “legal or illegal”) also depends on the context which the agents create. Legal cases and contexts are in a state of flux, constantly dissolving and, at the same time, producing ambiguity.

In the second part of this article, entitled “‘*Win-win*’ versus ‘*win-lose*’: *The Systemic Predicament of In-house Legal Departments*,” I explain the difference between a business and a legal frame of reference. I structure legal services in a 2×2 matrix and review two areas in which legal can take a proactive role in serving clients and delivering more value to the business: *Risk management*, i.e. switching between legal and business frames of reference and turning legal issues into quantifiable business issues, and *project management*, i.e. improving individual and group performance in legal service delivery, especially when working with external counsel.

The third and final part of the article “*Corporate Culture and The Business of Legal*” calls for a mind shift of legal professionals, a shift which I deem necessary to *run legal as a business*. I am sharing thoughts on what *Liquid Legal* could look like in corporate practice, showing what legal practitioners can do to advance the role, its relevance and the leadership potential of in-house legal departments. In essence, I argue that legal should make corporate culture its business and help create what, in another publication, I have called a *Culture of Lines*,⁴ characterized by abundant information, pervasive communication, and transparent rules.

2 Justice, Law, and the Legal System

*Law*⁵ is one of mankind’s greatest inventions. Regardless of the structural and material differences between common law, civil law, and religious law, and independent of the specific procedures of how, when, and by whom national and

⁴Strathausen (2015).

⁵There are numerous definitions of *law*, none of which can claim to represent the last word on the subject. In our context here, whenever I talk about *law* or *the law* (singular), I mean an institutionally sanctioned set of rules to govern human behavior.

international laws⁶ are being created, implemented, and sanctioned—the fact that human communities and cultures of all times have given themselves rules to govern their behavior separates us from all other species on earth.

Of course, people do not always accept or adhere to the law; if they did, police, courts and prisons would be superfluous. Criminals intentionally break the law to gain a personal advantage, and even among law-abiding citizens, conflicting opinions exist within one and the same jurisdiction as to what exactly *is* or *should be* the law, and whether or not particular forms of behavior do or should constitute a legal offense.

Such conflicts are an integral part of the legal system. Laws not only refine and complement but also oppose and contradict each other. The meaning of a particular law may appear abundantly clear when looked at in isolation; but when a given law is applied to a particular case, several other laws may apply as well, and legal meanings start to shift. The individual right to freedom of speech must be balanced with personality rights and ends where other individuals are being insulted.⁷ The right of an organization to enter into contracts with employees, suppliers and clients is limited by national labor laws and civil laws. If and how particular laws matter, and what exactly they mean, depends on the particular circumstances of the case, and on the relations between one law and other laws. Legal ambiguity leads to dissolution attempts via new laws, and new laws lead to ambiguity because they change the overall system of law on which the meaning of individual laws depends.⁸

Conceptually, one opposite of ambiguity is *clarity*; the other conceptual opposite of ambiguity is *obscurity*. The ambiguity created through contexts stands between clarity and obscurity. Multiple legal meanings of a matter are only possible because contexts first of all create *the possibility of legal meaning per se*. Legal contexts dissolve and, at the same time, create ambiguity because they constantly shift and are ultimately contingent. Even if one assumes that the facts of a matter can be objectively established, and that laws are fairly applied, the interests of the parties will always remain unforeseeable and idiosyncratic. Law itself, as a set of rules, is dead. Law comes to live only when parties express their interests, when event and

⁶By *laws* (plural) I mean all kinds of institutionally sanctioned national and international social rules, including constitutions, statutes, decrees and regulations, etc.

⁷The defamation law suit launched by the Turkish president Erdogan against the German satirist Jan Böhmermann (see Böhmermann affair), a law suit which was explicitly sanctioned by the German government, provides proof that even in art, not everything is allowed, at least in the eyes of the state.

⁸For example, the September 2015 ruling of the EU Advocate General dissolved the ambiguity around the question whether or not the previously existing Safe Harbor agreement between the United States and the European Union (EU) provided adequate protections for data privacy. The court ruled that it did not—and in doing so, it created ambiguity in other legal contexts, as attested by an Accenture study: “Now, however, US companies may be at risk if their technology suppliers are not compliant with the tougher standards.” (<https://www.accenture.com/us-en/insight-spend-trends-privacy-protection-compliance.aspx>).

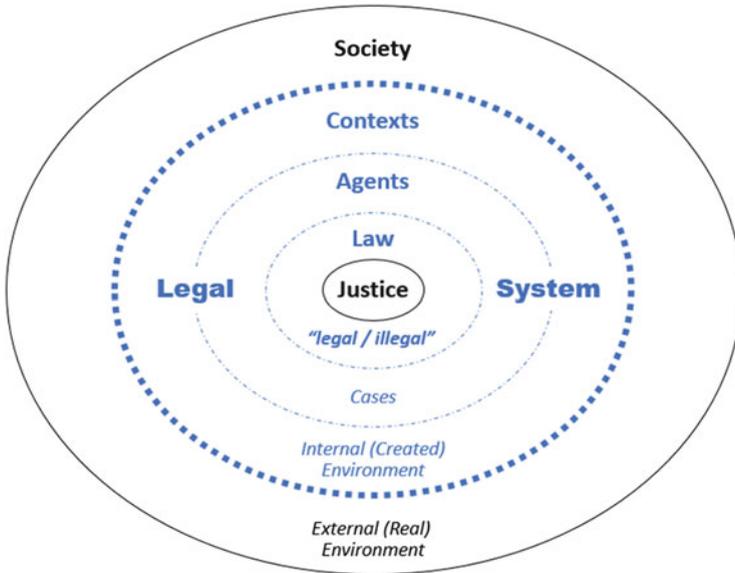


Fig. 1 The Legal System (own material)

rules, the particular and the general, are connected in a particular context and create legal meaning—*when the case emerges*.

Following the German sociologist Niklas Luhmann⁹ who has transferred the biological concepts of autopoiesis and self-referentiality to social systems, I regard the legal system as operationally closed and structurally open (or coupled). Like all systems, legal is “blind” towards its real environment because the distinction between itself and the environment is internally produced, “a re-entry of the form into the form,” as the English mathematician George Spencer Brown famously formulated. The environment (politics, the economy, science, etc.) stimulates the legal system and causes changes (structural openness), but such changes themselves are always the result of legal’s own internal operations (operational closure), i.e. of dissolving and creating ambiguity through the continuous application of the binary code “legal or illegal” (Fig. 1).

At any given moment, law embodies different perspectives and conflicting interests which must be balanced for “the greater good.” As one of the three independent forces in modern democratic states, the *judicative* includes court trials and other mechanisms to resolve legal disputes and achieve justice. Every case contains pros and cons for each position. In Western art, *Justitia* is represented as a goddess with three attributes: a blindfold, symbolizing the irrelevance of the wealth and status of the parties involved, a scale indicating the weighing of competing

⁹Luhmann (1992), pp. 1419–1441.

positions, and a sword showing the power of the courts. When judges deliver a verdict, not everyone, least of all those convicted, will necessarily *agree* that justice has, indeed, been served. Justice is an idea, a cognitive construct; yet exactly as an unattainable ideal, justice remains indispensable for the legal system to operate and to ultimately decide what should be *legal* or *illegal*. Elusive and contested, justice represents the ultimate norm which is operationalized as law and which legitimizes individual rules. Justice is a never-ending process and no fixed state. Subjectively, as individuals, each one of us may believe to be just, but collectively, as a society, we can only agree on operational procedures which we think will increase the likelihood that legal outcomes may be just. Timmer¹⁰ remarks on the relation between law and justice:

Throughout the ages, the law and legal culture have hugely benefited the development of individuals, organizations and democratic societies. Although one can, even in the most advanced legal cultures, be critical of many aspects of the law, an advanced and balanced legal system raises the overall standards of justice and fairness in society. Studies also show that the efficacy and independence of a country's legal system contribute significantly to a country's economic prosperity (cf. Veld & Voigt 2003).

Laws are complex and difficult to understand for laymen. As a group of experts with special education and knowledge, and with the state-certified ability to practice law, lawyers help apply laws to social reality. Paradoxically, the self-understanding of lawyers as being "special" is one of the reasons why the legal profession has come under scrutiny in business environments, as Cummins¹¹ remarks:

Why would senior in-house lawyers suggest that the current top job should go to the non-lawyer? The answer, in part, may rest in the term 'non-lawyer'. As one speaker observed: 'We are the only profession to see the world in such simple terms – you are either a lawyer or a non-lawyer'. And in this simple depiction, he perhaps highlighted what is wrong with the legal profession today and what is threatening its future. Lawyers have a tendency to see themselves as 'special', as an elite with unique and valuable knowledge on which business and society depends.

In my view, the current crisis of in-house lawyers is primarily an identity crisis, created by uncertainty about *who or what is a lawyer?*¹² While having passed the bar distinguishes lawyers socially, such distinction is mostly irrelevant and, in fact, often counter-productive in a business environment. Corporate lawyers rarely represent their companies in court, and often work with external counsel instead.

¹⁰Ivar Timmer, "Look to the moon. Managing and Monitoring the Legal Function," in LL, p. 344.

¹¹Tim Cummins, "Need a lawyer? – Use a robot instead!", in LL, p. xiii.

¹²The debate in Germany about whether or not corporate counsels are allowed to remain exempt from public old age insurance can be seen as an expression of this identity crisis. In 2012, the German Federal Social Court (BSG) had ruled that corporate counsels do *not* practice law, thus could not become members of insurances for lawyers and, consequently, could not be exempt from public insurance. This BSG ruling was adjusted in 2015 by parliament which strengthened the legal status of corporate counsel as lawyers. See www.syndikusanwaelte.de (only in German).

Later in this article I will argue that the special skills of lawyers, the ability to see different sides of a matter and to think through ambiguity, still possesses huge value for companies—provided that it becomes increasingly embedded in a business frame of reference.

To fulfill their social function, laws, which serve as the social medium through which the ideal of justice is implemented, must themselves be coded into a communicable medium. Social rules can also be tacit and implicit, as is the case in cultural habits and norms which will play a crucial role for the arguments advanced later in this article. But only when rules are explicitly expressed somewhere, for all to see and comprehend, a society can reasonably demand of its members to follow them, and only when non-compliance of these rules is sanctioned through official social institutions such as police and courts do we commonly speak of *laws*.

Stating that laws must be *coded* does not mean that all law is *codified*. The codification of rules into a complete body or *code of law* which can only be changed through legislators is the defining characteristic of civil law jurisdictions like Germany. In common law jurisdictions such as the UK and the US, not only legislators, but also courts can *make law* by setting precedents which must then be observed in later court rulings.

The difference between codified civil law and non-codified common law points to the basic operation of any legal system: *the reconciliation of the particular with the general*.¹³ For law to govern all possible human behavior, it must consolidate similar forms of behavior into abstract categories (e.g. fraud) and define general rules of legal assessment (e.g. intent and financial gain). Social reality, on the other hand, is concrete, not abstract. The real life situations out of which legal disputes arise are always local, specific, and bound to a certain time and place. Any legal case represents a unique set of related facts, and each case demands to be looked upon as a whole, as something which is more than the sum of its part and which may ultimately differ from seemingly identical cases. Killing a person for money constitutes a very different legal case than killing a person out of self-defense.

Through their ability to adjust to the social environment and through the hierarchical structure of laws, legal systems allow for flexibility and change. The less fundamental a law, the easier it can be adjusted if public opinion shifts or political

¹³Common law, by allowing judges to set precedents and create law, emphasizes the particular case, while civil law, restricting judges to the mere application of existing laws, emphasizes the general rule. Yet even civil law jurisdictions develop mechanisms to use court decisions for legislative purposes. In Germany, the “Bundesverfassungsgericht” (Federal Constitutional Court) over the past 60 years has become the de facto last instance to resolve political conflicts, reaching from military draft and freedom of speech to abortion and issues of social equality. While political scientists lament the seeming dissolution of the division of powers, the political parties themselves consciously use the path to the *Bundesverfassungsgericht* to avoid making unpopular decisions, e.g. regarding European integration. It appears that in common law jurisdictions, perceived inadequacies of existing laws to do justice to single cases is dealt with immediately by lower courts, while in civil law jurisdictions, such perceived inadequacies are escalated upwards and dealt with only on the highest court level.

processes require it. In federal countries, state and communal laws may differ in certain practice areas, reflecting the values and beliefs of the respective constituencies, and such state and communal laws can also be changed more easily than the national constitution embodying the values and beliefs of the whole population.¹⁴

Of course, even constitutions do evolve over time, along with the human experience upon which they are built. The US constitution was put in effect in 1789 and has been amended 27 times, last in 1992. Throughout human history, technological advancement, most of all in the areas of transportation and telecommunication, enabled and also forced states, companies and individuals to collaborate across different jurisdictions. The twentieth century has seen alignment of national criminal, tax and finance laws to common standards established and upheld by the United Nations, the European Union and other inter- and supranational organizations. International private law becomes increasingly important since, for example, more and more people with different nationalities get married and divorced. Technological innovation like the internet have enabled new social practices and created new legal subject areas. The high volume electronic trading of ill-rated derivatives which caused the Great Recession in 2007/08 has led to the Dodd-Frank Act and other legislation that imposes stronger regulations on financial markets.

On the other hand, globalization also caused, and continues to cause, ideological counter movements insisting on regional, local and religious identities. The vote of the British people to leave the European Union (EU) is the latest example of this widespread desire to maintain a sense of national self in the face of increasing globalization and integration. In the Middle East, revolutions and warfare have led to radical changes of legal systems, a recent example being the establishment of the Sharia, the Islam religious law, by the terror organization “Islamic State” in large parts of Syria, Iraq and Libya.

But such abrupt and fundamental changes of legal systems are few and far between, and they remain restricted to times of social crisis and war. Law can *claim* to govern everyday life precisely because the majority of people experience the law as relatively stable during their lifetime. By providing security, fostering trust and enabling people to work together, law is both, an expression and a fundamental driver of human civilization.

¹⁴Linguistic vagueness and ambiguity in fundamental laws and frame contracts is often intentional to leave space for refinement in subordinate laws and contracts. Through such ambiguity, the frequent and rather insignificant changes on the lower level do not require changes on the higher level—which could create severe uncertainty and instability. The wording in constitutions will be rather abstract, vague and ambiguous (for example, §1 of the German constitution states: “*The dignity of man is untouchable*”), and the wording in traffic decrees will be rather concrete, clear and unambiguous (“*Parking cars outside of designated parking areas will result in a fine of 5 Euros*”).

Because laws must be explicit and communicable, they are usually coded in written language.¹⁵ Philosophical attempts to define laws more abstractly, e.g. as “a particular kind of assemblage of signs” or as “signification of volition” appear to be problematic and have met widespread criticism.¹⁶ The coding of laws in language does not mean that language is the only medium relevant to the legal professional. When lawyers practice law, for example by drafting contracts or advancing arguments in court, they do so primarily in language and with words, but not exclusively.

We all know from personal experience that it matters in which medium a “message” appears. Reading a Harry Potter book, and watching a Harry Potter movie, are two very different experiences, although both media carry the same content in terms of characters and plot. Language conveys information sequentially and creates a relative clear cognitive understanding while images convey a totality of information instantaneously through an aesthetic impression, but are also more open to interpretation and different meanings. As the Canadian media theorist Marshall McLuhan famously stated: “*The medium is the message.*”

A specific medium of communication can thus further or hamper legal intentions. Haapio and Barton¹⁷ convincingly argue that the use of images can make the meaning of written contracts more intuitively understandable for laymen. However, images may also blur cognitive nuances which can matter in contracts, and Haapio and Barton thus also point out that images should only support and not replace language as the primary form of contracting. In court, the showing of video footage depicting, for example, a physical assault certainly conveys a more objective account of what happened than a verbal description by a witness (provided, of course, that the video has not been tampered with). On the other hand, the strong emotional impact of such images may cause jurors and judges to deemphasize, or even overlook, other facts of the case, perhaps making it more likely that the defendant is being convicted.

Thus in legal, there always exist uncertainties, trade-offs, and pros and cons for each position. As the seemingly least ambiguous medium, language is privileged over images and other forms of legal signification. Linguistic proficiency and good communication skills are central to the work of lawyers, and they represent important hiring criteria which companies use to assess the quality of job applicants. Also, the semantics (meaning) and pragmatics (usage) of legal language differ from everyday language. Sheila Hyatt from the University of Denver points out that the legal system creates new words like “judicata” and “mens rea,” and also gives a specific meaning to ordinary words. Legal language demands a high degree

¹⁵Oral laws only exist in primitive cultures. The unwritten rules of illegal or otherwise secret organizations like the Mafia are not sanctioned through official social institutions and thus cannot be called *laws*.

¹⁶Stanford Encyclopedia of Philosophy: Law and Language. <http://plato.stanford.edu/entries/law-language> (2016). Accessed Oct. 15, 2016.

¹⁷Helena Haapio, Prof. Thomas D. Barton, “Business-Friendly Contracting,” in LL, p. 389.

of precision, down to the use of commas, to ensure that intentions are expressed correctly.

(A) person who leaves \$50,000 ‘to each of my children who took care of me,’ has a different intention than a person who leaves \$50,000 ‘to each of my children, who took care of me.’¹⁸

Finally, the meaning of many legal terms such as “resident” depends on the particular practice area (e.g. getting a driver’s license, or getting a divorce) and on the nation or state in which it occurs. The German political theorist Carl Schmitt has used the Greek concept of *Nomos* to express this *unity of location and law* (in the German original: “*die Einheit von Ortung und Ordnung*”).¹⁹

To clarify the importance of context, I want to compare the functioning of legal to the functioning of language. My thesis is that both function as a systemic structure in which the context ultimately determines the meaning of single elements. Like all languages, English consists of different kinds of words (nouns, adjectives, verbs, conjunctions, prepositions, etc.) and a set of rules (grammar) prescribing how these words can be combined to sentences. In order to speak and write, and for participating in the social practice of communication, the speaker or author must know the whole system of language even though he or she only uses a very small subset of the linguistic possibilities. The reason is that words (in linguistic terms: the signifiers) have no intrinsic reference (in linguistic terms: the signified), and that linguistic meaning is an effect of formal differences. A single word alone does not mean anything. There is nothing intrinsic to the signifier “house” that signifies a house, the real object with walls and a roof that people live in. Rather, the signifier “house” can only signify a real object *because* it differs from other signifiers, e.g. from “louse,” “mouse” and all other words in the English language. *Linguistic meaning rests on a system of difference between signifiers, and meaning, therefore, is always dependent on context.*

In the following part, I will take a closer look at *legal in business*. If the meaning of single laws depends on the whole system of law—what happens when this whole system of law is framed by economic and financial interests?

3 “Win-Win” Versus “Win-Lose”: The Systemic Predicament of In-House Legal Departments

One of my friends is a corporate lawyer in a logistics enterprise. Occasionally, we have lunch together, and one time he told me about his work.

¹⁸Sheila Hyatt: Legal Language. <https://www.law.du.edu/index.php/law-school-learningaids/legal-language>. Accessed Oct. 15, 2016.

¹⁹See: Schmitt (2003).

"I love my job," he said, "but it also stresses me. The stakes are high. One mistake in my contracting and litigation cases could have devastating effects for the whole company – we are talking millions, and in some cases hundreds of millions of Euro! But that's not the problem. I actually like big cases because all parties send their best lawyers, and together, we usually settle things in a good way. And the few times we don't settle, I take my case to court, and I enjoy that as well. No, my problem is not the work as such – it is the quantity of work! I do not just have three or four cases in parallel, I have a dozen of them, and they keep getting more. It's simply too much, I drown in cases!"

I tried helping my friend by telling him the story of *The Busy Woodchoppers*, a story my first manager told me when I started out in the software industry about 20 years ago.

The Busy Woodchoppers *A man encounters a group of feverishly working woodchoppers in the forest. "Why are you working so hard?" he asks one of them. "Well," the woodchopper answers, "we have to cut down all these trees, and we are behind schedule."—"Why are you behind schedule?" the man asks. "It always happens," the woodchopper sighs, "when we work hard, our axes become blunt, and then we must work even harder to make up for the lost time."—"So why don't you take a break and sharpen your axes?"—"Oh no," the woodchopper exclaims, "that would take far too much time – I told you, we are already behind schedule!"*

As investors, we know it takes money to make money. As project managers, we ought to know that *it takes time to make time*. My friend's situation reminded me of the woodchopper story because, like these hard working men, he seemed to focus too much on the execution of single cases, and too little on creating the tools that would enable him to scale case execution.

Why have legal in-house departments come under such extreme pressure to increase their performance?

On the surface, the demand to "do more with less" was the result of the Great Recession in 2007/08 and the increased financial strains on business enterprises. But underlying this effect of the financial crisis is what I would like to call the *systemic predicament of in-house legal departments*, a conflict of two frames of references: business and legal. To illustrate the systemic difference between business and legal, recall the definition of legal as a self-referential and operationally closed system that maintains its own identity against the environment by relying on the binary code "legal or illegal." I use the example of *contracts* to first of all illustrate the systemic interdependence of dissolving and creating legal ambiguity in a business enterprise.²⁰

²⁰A plethora of literature exists on the topic of ambiguity in contracts which I will not deal with here. In general, the discussions center around the questions how ambiguity can be avoided in the first place and how it is best dealt with once it is perceived (see, for example, *Contra Proferentem*). This article, however, is primarily concerned with the *systemic function of ambiguity* and seeks to show that ambiguity is constitutive for legal operations per se.

While contracts are intended to express a joint desire of the contracting parties and to create a clear understanding of mutual rights and obligations, such unambiguity is, in principle, unattainable. During all phases of the contract cycle, the legal meaning of the contract and its clauses depends on contexts: on the explicit context documented in the contract itself, and on implicit contexts assumed by the parties. The diversity of such implicit contexts become apparent when claims are made, e.g. when real events reveal opposing interests of the contracting parties and create legal conflicts.

Personally, I like the old-fashioned way of contracting: You look each other in the eyes and shake hands on a joint goal—and if there's a problem down the road, you take care of it then. Of course, that is the business person speaking. For lawyers, such an attitude is reckless at best and clearly contradicts the mandate to reduce the legal risks of clients. In a contractual situation, the desire to prevent such risks and to ensure maximum legal protection for each party motivates lawyers to turn implicit contexts (“What if...?”) into explicit contexts, for example by adding new clauses to the contract. Over time, contracts thus become larger, more complex—and again more ambiguous.

The increase in government regulations and compliance laws can itself be seen as a consequence of the self-referentiality of the legal system. For *public institutions* like parliaments and courts, self-referentiality presents no problem because legal is their sole purpose. Financial and other restrictions may indirectly affect their activities, but they are merely means to an end. The law remains the only normative frame of reference.

Law firms are in a different situation. They are commercial entities that sell legal services to external clients. As businesses, their ultimate frame of reference is financial, and legal services are only the means by which law firms achieve this financial end. But since legal is their core service, the business of law firms largely coincides with legal competence. Legal and business performance are strictly proportional in law firms and can be measured in billable hours and revenue.

Such a direct connection between legal and business does not exist for *in-house legal departments* in complex enterprises. Legal departments are cost-centers providing an internal support function for selling non-legal products and services, and in doing so, they must observe corporate requirements and economies of scope and scale. By having to reconcile two often conflicting normative frames of reference, legal in-house departments find themselves in a predicament which can best be expressed as the conflict between two relational paradigms: *win-win* versus *win-lose*.

In a market economy, business rests on the idea that all parties, e.g. seller and buyer, benefit from a transaction—otherwise the transaction would not occur. Money, the medium through which the economic system functions, is expandable²¹

²¹Similar to the hierarchical structure of laws (from constitutions down to decrees), the concept of *money* includes different levels of supply: M0 is the name for the money base, the sum of cash and central bank reserves; on this level, money is closest to its function as concrete payment method.

and allows for win-win relations, i.e. both parties can “make money” through one and the same transaction. Public corporations, for example, can simultaneously increase both their respective stock value through a merger or acquisition. From an economic perspective, rational agents will only spend money if they believe the transaction possesses value that equates or exceeds the costs of consumption (e.g. buying a private car) or investment (e.g. buying a company car). Just like the ideal of “justice” serves as norm in the legal system, with laws (and the binary code of “legal or illegal”) as medium of social implementation, the ideal of “value”²² serves as norm in the economic system, with money (and the binary code of “gain or loss”) as medium of social implementation. In the economic system, “win-win” relations, expressed as monetary gains through business transactions, are possible and, in fact, the norm.

The legal system, on the other hand, is characterized by adversarial relations and the binary code of “right or wrong” (legal or illegal). If one party *wins* a case in court, it normally means that the other party has *lost*. Laws, the medium through which the legal system functions, are fixed, and opposing claims cannot both be right—otherwise laws would lose their ability to govern human behavior.²³

Because the outcome of legal cases is hard to predict, rational agents such as business enterprises think twice before going to court and risking losing a case. Instead, they will try to quantify their legal risks and consider alternative means of dispute resolution. Hagel²⁴ provides detailed examples for how legal disputes can be translated into a business case of monetary gains and losses, and he also emphasizes the importance of communication for avoiding costly court cases.

The goal in dispute management is to minimize the risks while maximizing the profit. (...) Except for rare cases, avoiding conflicts and disputes makes commercial sense. In order to effectively avoid conflicts, the main causes of disputes need to be known. Disputes are often caused by miscommunication. Parties communicate (1) on the wrong subjects, (2) in the wrong way and (3) at the wrong time.

Yet even though conflicting parties seek to avoid miscommunication by collaborating and settling legal conflicts outside of court, they only do so because they *fear losing the case in court*. “Win-lose” is the relational paradigm in the legal

The higher levels of money supply, from M1 to M3, are increasingly more removed from everyday life and include abstract forms of money such as credits and stocks. See Wikipedia on Money Supply.

²²The understanding of economic terms depends on the theoretical framework applied, and thus there are numerous definitions of “value.” Mark Skousen in “The Making of Modern Economics,” New York 2009, presents a good overview of economic theories and their terminology.

²³In some cases, courts may rule that both parties are partly “right” and partly “wrong,” and occasionally, both parties may feel, or at least say, they “won” the case. But such psychological “win-win” outcomes are not the norm and simply illustrate that parties can only do one of three things in reaction to a court ruling: they can either accept the ruling (and maybe declare victory to feel better), file an appeal (if legally possible, thus producing more costs and more uncertainty), or disobey the court ruling—and risk social sanctions like fines and imprisonment.

²⁴Dr. Ulrich Hagel, “The Dispute as a Business Case,” in LL, p. 242.

system, and it contrasts sharply with the “win-win” relational paradigm of the economic system. In this systemic perspective, the increase of alternative dispute resolutions suggests that businesses prefer to remain within their own economic system of “making or losing money” and seek to avoid entering the legal system of “being right or wrong” in the first place. Lawyers are not only averse to risk but to change in general. Byberg²⁵ remarks:

Lawyers are notoriously skeptical about change, and while there are honorable exceptions, my experience is that the general public is more right than wrong when thinking of the legal community as change-resistant. My favorite quote to this point is a Danish Supreme Court Judge allegedly having stated that he was resisting all change—including change for the better!

Going forward, I structure the activities of in-house legal departments in a 2×2 matrix. On one axis, I distinguish two frames of reference: law (being right or wrong), and business (making or losing money). The business frame of reference includes internal rules which a company gives itself in order to advance its goals and produce positive outcomes. Such internal business rules are often expressed in corporate value and mission statements as well as internal policies and guidelines which are considered “good” for business, or else the organization would not impose these rules on itself. How a company understands and practices social responsibility, the ways it deals with diversity and other ethical norms may have no immediate connection to revenue and profit. But by investors and employees alike, these activities are increasingly seen as crucial for branding and competitive advantage, as Mucic²⁶ argues:

For too long we have neglected the influence of Legal on how the companies they serve are perceived. The way a company deals with legal issues, the language it uses in legal contexts, in contracts and clauses tells a story that we are often not aware of. So do our legal decisions: when and how we negotiate, litigate, settle, appeal, and when we “interpret” the rules—all of that constantly produces context that employees and the outside world read as indicators of our corporate culture. Legal decisions and discourse clearly have strong ramifications in what the external codified law requires and what financial gains or losses may come with them for our companies, but they also have a lot to do with what a company stands for or rather would like to stand for, that is with its purpose and its values.

On the other axis of our 2×2 matrix, I distinguish two kinds of client engagement in rendering legal services: By “downstream engagement” I mean that lawyers react to a request *coming down from the clients*, and by “upstream engagement” I mean that lawyers work pro-actively *towards the clients*, trying to promote “right” behavior and seeking to avoid the emergence of legal issues in the first place (Fig. 2).

²⁵Arne Byberg, “Change Management for Lawyers,” in LL, p. 175.

²⁶Luka Mucic, “Bridging the Gap – The New Legal,” in LL, p. xi.

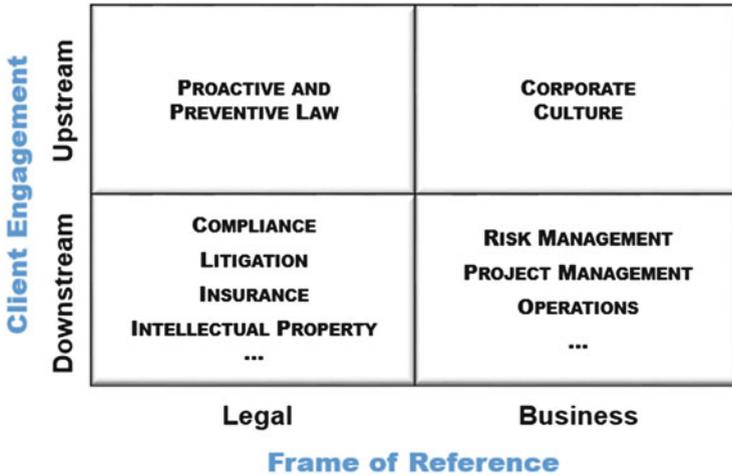


Fig. 2 In-house Legal Service Portfolio (own material)

When we look at legal services in this 2×2 matrix, it becomes clear that most activities fall in the lower left quadrant: In litigation, insurance, compliance and intellectual property issues as well as in all other traditional practice areas, legal departments’ frame of reference is the law, and its normal mode of engagement is to react to ad hoc service requests (downstream). Lawyers seek to achieve their internal clients’ explicit goal by reconciling the facts of the case at hand with the law.

It is less common that legal departments refer to external law in a proactive mode and deliver upstream services with the goal to prevent the emergence of legal issues or cases in the first place (upper left quadrant). Nonetheless, *Proactive and Preventive Law* is a growing discipline, as Haapio and Barton²⁷ remark:

Preventive Law focuses on dysfunctional cycles that generate recurring losses. It seeks to identify and understand the conflicting elements of a system, as we have done above, that unless somehow resolved will continue to generate problems. Proactive Law adds a focus to achieving positive goals and value. Together, PPL can alter mentalities and harness tools toward smoother operations and successful outcomes.

In the lower right quadrant, the frame of reference is business, so self-imposed rules supporting monetary gains, and the mode of client engagement is reactive (downstream). I have put risk management and project management here as two examples for such legal services. By assessing the likelihood and financial impact of legal risks, risk management helps convert legal issues into business issues. Meents and Allen²⁸ differentiates pre-engagement legal risks, referring to a

²⁷Helena Haapio, Prof. Thomas D. Barton, “Business-Friendly Contracting,” in LL, p. 376.

²⁸Jan Geert Meents and Stephen Allen, “The Value of Everything,” in LL, p. 232.

company's breach of regulatory obligations, and post-engagement legal risks, referring to situations in which a company fails to carry out contractual obligations. Mascello²⁹ remarks on the changed role of general counsels:

(T)he general counsel is now perceived as a risk manager. He is also expected to provide general problem-solving beyond legal subject-matter tasks and to act as a co-designer of the company's strategic development. Consequently, legal strategies are being integrated into corporate strategies.

Besides risk management, project management is becoming increasingly important to legal departments. As a reaction to the financial crisis, many companies have reduced internal legal staff and outsourced work to law firms. While externalizing service delivery reduces the need for subject matter expertise, it also requires corporate counsels to use proven methodology and IT tools to manage a high number of parallel projects and to deliver results on time and budget. In-house lawyers must have a good market overview and select the right law firm, get contracts in place and check invoices, set up the case strategy together with external counsel, keep deadlines in mind, validate work results, and solve all kinds of problems and operational hick-ups along the way.

The upper right quadrant of the in-house legal service portfolio matrix shows *corporate culture* as a practice area. I use corporate culture as an umbrella term for proactive (upstream) legal activities in a business frame of reference—activities enabling and promoting internal and sometimes even tacit rules for collaboration and win-win relationships. For many enterprises, culture holds high and unrealized value potentials, and we will explore these value potentials in the last part of this article.

4 Collaboration, Corporate Culture, and the Business of Legal

In Berlin, I often walk by a second-hand store called “Goods without Fault” (“*Waren ohne Mängel*”). The naiveté of this marketing approach has always baffled me. *Why should a fundamental requirement of any product ever be worth mentioning, let alone entice customers to buy?* Basically all goods, second hand or not, must function and be without fault—or else one could only use them for spare parts. It seems to me that the owner of this store has little understanding of fundamental marketing principles.

It's similar with legal departments: To present the legal department's achievements to executives, as many general counsels do, by saying “We do legal well,” or “We protect our clients from legal risk,” etc. actually offers little marketing value—*because protection from legal risk is why legal departments*

²⁹Dr. Bruno Mascello, “Procurement of legal services – How customers professionally procure legal services today,” in LL, p. 292.

exist. Companies hire and pay lawyers because they are expected to do legal well—it's a fundamental requirement of the job!

Of course, legal departments possess a certain degree of freedom in how exactly they organize the work. Lawyers may specialize in certain practice areas, or become generalists with a broad knowledge over many practice areas. And general counsels may choose to insource or outsource case work. Sako³⁰ has investigated the conditions under which general counsels tend to internalize or externalize legal work:

Evidence from Fortune 500 companies reveal that internalizing corporations have more intangible assets (such as brands and intellectual property) to defend, and are more international in their presence. Moreover, companies that externalize legal resources have developed more stable relationships with fewer law firms, each providing legal services in a broader range of practice areas.

Yet regardless of how and by whom the work is done: If legal departments want to lead the business, they must deliver value above and beyond what is expected of them, and they have to start promoting their achievements. My impression is that in order to repair their damaged image, legal departments should make a stronger effort to market themselves—even though, or rather *because* most lawyers seem to frown upon such activities. Endowed with a special education prescribed and sanctioned by society, lawyers used to offer what Timmer calls *credence services*: services whose quality clients cannot assess because they lack the knowledge to do so. Now however, legal departments stand next to Legal Process Outsourcers (LPO) and other alternative legal service providers, and therefore, in the eyes of many executives, in-house departments “*need to earn the right to exist.*” This right should be earned not by competing but by collaborating with LPOs. Ross³¹ argument for strategic collaboration between law firms and LPOs applies equally to in-house legal departments because like law firms, legal departments will use LPOs only for the effective delivery of internal services and not for representing their companies in court:

The theory behind strategic collaboration is not rocket science, just the premise that the whole is greater than the sum of the parts. Contrary to early concerns that LPO providers would compete directly with law firms, it has become abundantly clear to those firms embracing strategic collaboration that the most effective legal services delivery model is a symbiotic ecosystem in which law firms and LPO providers both play crucial roles. LPO providers do not practice law and so are not true alternatives to law firms. (Ross, p. 6)

For in-house legal departments, there is absolutely nothing dubious or shameful about doing good things for the company—and *talking about them*. Legal departments must promote themselves to their clients, to corporate executive and

³⁰Mari Sako, “Globalization and the Changing Role of General Counsel,” in LL, p. 33.

³¹Mark Ross, “Legal Process Outsourcing,” in LL, p. 83.

to their own team members just like all other lines of business do. Brown³² points out that legal can benefit hugely simply by learning from others:

Successful legal departments address the growing “more for less” challenge by adopting proven, relevant practices from other business functions. The most effective General Counsel and senior legal department leaders have stepped into their ‘C-suite of Legal’ shoes, running the legal department with business discipline.

I want to pick up Brown’s idea of a “C-suite of Legal” and illustrate what and how legal can learn from three other established business functions: management, operations, and human resources.

4.1 The Management of Legal

Many general counsels have reacted to executive pressure by measuring and managing legal performance and by trying to involve legal in strategic business decisions. Pauleau, Collard and Roquilly³³ write:

The legal performance of a company can be understood in two different ways. In a narrow sense, it refers to the performance of its LD, in other words the capacity of that department to achieve its own missions and objectives. (...) A broader – and perhaps more appropriate – understanding is to see legal performance as the company’s ability to deploy legal resources (especially intangible resources such as a specific legal capability) and combine them with the other types of resources at its disposal in order to achieve its objectives, in particular its strategic objectives. In this sense, legal performance can be considered as an important factor in the overall performance of the company. And the performance achieved by the legal team significantly contributes to the legal performance of the company as a whole.

Bassli³⁴ emphasizes that general counsels must pay more attention to financial metrics and business planning, for example by questioning traditional models of engaging and paying for law firms, and by considering managed services as an alternative:

Switching from a traditional hourly based billing model to a managed legal services model yields business benefits for both sides of the engagement. One benefit that immediately comes to mind is the predictability of a recurring monthly billing. A flat fee for services eliminates the peaks and troughs of normal hourly billing, making forecasting easier and more reliable for both parties.

³²Liam Brown, “Running the Legal Department with Business Discipline,” in *LL*, p. 397.

³³Pauleau, Collard, Roquilly, “KPIs: Run Legal with Business Metrics,” in *LL*, p. 119.

³⁴Lucy Endel Bassli, “Shifting Client Expectations of Law Firms,” in *LL*, p. 66.

Meents³⁵ cautions against a purely cost focused approach in managing legal and emphasizes the importance of delivering effective services that secure value realization and prevent value leakage:

Measuring cost is important. Legal functions need to be more efficient, and their failure to do so has only increased the level of scrutiny they face. Almost all commentary on legal departments, to date, has focused on the cost of legal and its failure to leverage technology and alternative ways of working. However, if everything is viewed only through the ‘cost lens’ then effectiveness is often overlooked - and ‘value’ not understood.

The orientation towards finances and performance also brings up the question if future general counsels must be lawyers at all, as asked by Hartung and Gärtner³⁶:

Nowadays, most GCs are lawyers. Is this a necessary prerequisite for a GC? Rather not. The GC has to advise the board on the best, or most appropriate, way forward with regard to risk and compliance management. Many legal and/or regulatory questions have to be taken into account. However, a GC who only focuses on legal issues would miss the point. Hence, being a lawyer can be one of the preconditions of being a good GC but it is not a *conditio sine qua non*.

Finally, Chomicka³⁷ points out that the separation of tasks from education not only allows non-lawyers to work in legal, but also enables lawyers to work in other lines of business, thus creating new job opportunities:

What if a contract administrator, contract manager or even a project manager, rather than a construction professional with an appreciation of legal issues, happens to be a law practitioner trained in basic construction ‘stuff’?

4.2 The Operations of Legal

Since its inception some years ago, the Corporate Legal Operations Consortium (CLOC), a non-profit community of legal professionals, has looked at legal departments as true business units whose internal operations must be optimized for efficiency and strategic relevance. Brenton,³⁸ two of the founders of CLOC, describe leading legal departments as being proactive and business minded:

These teams don’t simply solve the problems that their internal clients bring them – they anticipate and plan. They don’t just try to run more efficiently – they innovate and experiment. They listen to their “customers” – the internal client teams – but don’t limit their contributions simply to addressing their issues. Their numbers are few, but growing.

³⁵Jan Geert Meents and Stephen Allen, “The Value of Everything,” p. 227.

³⁶Hartung, Gärtner, “The Future of In-house Legal Departments and their Impact on the Legal Market,” in LL, p. 283.

³⁷Barbara Chomicka, “A rose under any other name,” in LL, p. 142.

³⁸Connie Brenton, “Sharing Best Practices and Setting Standards,” in LL, p. 304.

Roux-Chenu and de Rocca-Serra³⁹ argue along the same lines and call for legal departments to become business creators:

Every Legal Department should be looking to not only be a business enabler but it should be a business creator in order to make a real difference. This is possible because very often the Legal Department is involved in contract negotiations with the whole ecosystem, in the case of Capgemini this would mean clients, procurement and alliances contracts. This unique central position allows Legal to have a 360° view, to foresee the needs of the market, and to develop solutions for its internal and external clients.

von Alemann⁴⁰ stresses that both, the challenge and the opportunity to improve operations through communication with other business functions applies equally to legal departments in large corporations and in small and midsize enterprises (SME):

The need to constantly communicate with other departments of the company may be even more important for members of small legal departments than for members of bigger legal departments. That is because small legal departments – as opposed to large legal departments – usually do not have a formalized process for alignment with other departments. Through communication, members of small legal departments can therefore detect legal issues early and prevent non-compliance instead of only reacting to legal problems after they are discovered. By communicating with other corporate functions as business partners, legal departments of all sizes can actively shape the direction of the business, for example by providing options, by communicating legal problems early and by making sure all stakeholders are involved.

Such constant communication of legal with other departments is facilitated by information technology (IT) and the increasing digitalization of legal service delivery. Although technology is only part of a systemic solution mix which must also include governance, process and people aspects, it is in this area that legal departments can have the greatest impact and fastest success for satisfying business expectations. The English anthropologist Gregory Bateson defined information as “a difference that makes a difference,” i.e. a change that matters to an observer. IT improves legal operations not only by providing the tools for scaling communication, i.e. the exchange of information, but also by creating new insights and shifting basic forms of legal reasoning from humans to machines, as Zetterberg and Wojcik⁴¹ remark:

There is an entirely new type of software, very different than office automation or efficiency tools, and it changes the way lawyers work. It leverages a new set of technologies referred to as Artificial Intelligence (AI), and combines Machine Learning (ML) and Natural

³⁹Isabelle Roux-Chenu, Elisa de Rocca-Serra, “How the Legal Department Can Be a Business Enabler,” in LL, p. 203.

⁴⁰Dr. Sven von Alemann, “LegalTech Will Radically Change the Way SMEs Handle Legal,” in LL, p. 215.

⁴¹Ulf Zetterberg, Christina Wojcik, “How Emerging Technology is bringing In-House Legal Counsel into Modern Legal and Business Practices,” in LL, p. 326.

Language Processing (NLP) in a way to help lawyers change what they do in their engagement with clients, not just make what they do more efficient.

However, Matthaei and Bues⁴² point out that for the foreseeable future, lawyers will not be replaced by robots since the definition of a problem domain, i.e. the setting of a context within which legal meaning arises, requires a form of strong AI which currently is still beyond reach:

AI currently used in LegalTech tools is far away from strong AI. [Therefore, when we speak of AI in the context of LegalTech, we mean technologies which seem intelligent but have defined functions, i.e. weak AI.] It uses models of its problem domain given to it by programmers. Weak AI cannot perform autonomous reduction, whereas strong AI has a real understanding of a problem domain. Therefore, weak AI requires an expert who performs all required reduction in advance and implements it into a system. As a result, weak AI will only have a specific set of tasks it can solve.

4.3 The Human Resources of Legal

As important as technology and efficient operations are for legal departments, Hartung and Gärtner are absolutely right in stating that *“processes and structure won’t save the company’s life in a crisis. It is instead the human workforce that makes the difference.”* Telling his own career story, Fawcett⁴³ provides a real life example of how leadership and team work can transform a legal department:

As a renewed leadership team, we changed the culture of the group from what it had been – a loosely organized collection of lawyers – to a true team of business partners and counselors. We found new ways to work with outside counsel, getting better returns and accountability by using data in powerful new ways. We implemented a new “Legal Ecosystem” that integrated legal operations professionals alongside traditional legal experts into a single, coherent global team.

Tumasjan and Welpé⁴⁴ maintain that, in order to lead and act entrepreneurially, lawyers must shift from a predominantly preventive to a predominantly promotional mindset:

Regulatory focus theory posits that individuals use two different mindsets to guide their behavior: promotion vs. prevention focus (Higgins, 1998). In a promotion focus, individuals concentrate on gains, advancement, growth, and positive outcomes. They act with an open mindset toward novel opportunities, consider many different alternatives, and “think big”. In contrast, in a prevention focus, individuals concentrate on losses, security, safety, and negative outcomes. They exhibit high vigilance, are prone to behave and think conservatively, and focus on details and accurateness (Halvorson & Higgins, 2013).

⁴²Dr. Emilio Matthaei, Dr. Micha-Manuel Bues, “The Bright Future of LegalTech,” in LL, p. 93.

⁴³Matthew Fawcett, “Creating Your Path: Building Towards Liquid Legal,” in LL, p. xi.

⁴⁴Dr. Andranik Tumasjan, Prof. Dr. Isabell M. Welpé, “The Legal Entrepreneur,” in LL, p. 130.

Individuals act in both mindsets – depending on the task and situation – but usually, one of the mindsets is dominant.

While entrepreneurial spirit transcends race and gender, Markfort⁴⁵ points out that in most legal departments, promoting diversity and gender equality is still in its infancy:

Lawyering, for a long time, has been a masculine domain. We are just starting to take stock of the real negative impact inflicted on our global society by gender inequality. Whether viewed from an ethical, economic or managerial perspective, statistics demonstrate the benefits we are collectively and individually missing if we don't give this matter the consideration it truly deserves.

The below diamond-shaped model of Liquid Legal summarizes what legal departments can learn from established business functions like management, operations and human resources. It combines the four dimensions of principles, people, portfolio and processes into a holistic approach for transforming traditionally reactive and law-focused silos into agile networks that not only satisfy increasing demands for service efficiency and effectiveness, but also, as announced in the title of this paper, reverse the situation and actually start leading the business (Fig. 3).

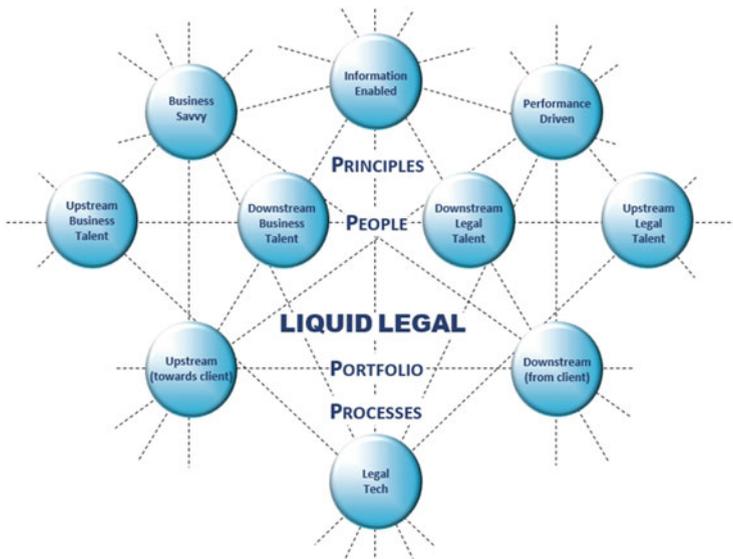


Fig. 3 Liquid Legal Model (own material)

⁴⁵Dr. Rainer Markfort, “Shifting the Mind Set of Lawyers,” in LL, p. 52.

Liquid legal is not defined by departmental borders, hierarchical reporting and an “us versus them” mentality, but by dispersed communities in all lines of business which share the same norms and values. From proactive and preventive law, liquid legal takes over “(t)he goal (...) to promote ‘legal well-being’: embedding legal knowledge and skills in corporate culture, strategy and everyday actions to actively promote success, ensure desired outcomes, balance risk with reward, and prevent problems.” (Haapio and Barton, p. 17)

I want to use the term *corporate culture* to denote implicit and often tacit behavioral norms that promote creativity, collaboration and self-organized teams, a culture in which processes and the interaction of people are more important than fixed structures and managerial ranks.

Seen from a business perspective, law is at least as much collaborative as it is adversarial. One does not have to be an expert in idealism to understand one of the German philosopher Hegel’s basic ideas, namely that *giving ourselves a rule is the highest form of human freedom*. Law not only means freedom *from* oppression, but also freedom *for* expression. It is because of the trust in law that foreigners interact and do business with each other although they are not personally acquainted. In cultural artefacts throughout human history, from religious texts thousands of years old to contemporary Hollywood movies, *good* wins over *evil* because the villains, by abusing their fellow men and only seeking their own advantage, fail to create lasting communities and ultimately always turn on themselves. Trust is the ultimate legal currency, and the greatest value delivered by law!

Let lawyers be the ones to prove to employees, executives and the whole organization that pursuing business opportunities does not have to be at the expense of legal security. Legal departments of the future can start improving their internal standing by promoting a culture of trust. Just like the heart pumps blood through physical organisms, legal, by establishing fair and transparent rules among people, departments, lines of businesses, divisions and subsidiaries, *can carry trust through business organisms*. *Liquid legal* is the belief that trust is the essence of business—and that together, we are better off than alone.

Legal can lead the business because lawyers are masters of ambiguity—trained to see different sides of a matter, to understand varying interests of different parties, and to lay the foundation for win-win situations. When it comes to mergers and acquisitions, to corporate strategy, to product lines and service portfolios, in fact: with regard to all business decisions that require assessing scenarios and weighing alternatives, lawyers should stop limiting themselves to legal aspects only. Instead, they need to go above and beyond what is expected of them and simply start applying their key skill in a business frame of reference: the ability to reason and to think through ambiguity.

5 No Conclusion

In this article, I have tried to outline basic ideas for a theory of Liquid Legal: systemic reflections on why and how corporate legal departments should transcend the confinement of traditional practice areas and apply their ability to think through ambiguity in a business frame of reference. Legal can lead the business if it stays conscious of its role to *serve*. The new theory of *servant leadership*⁴⁶ stresses the importance for any leader to selflessly serve an ideal. Lawyers, by definition, serve the law and the ideal of “*doing the right thing*.” And in an increasingly complex world, lawyers, as *servants*, might be just the kind of leaders that today’s businesses need: smart, committed, and prepared for the unexpected.

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⁴⁶See “Servant Leadership” in Wikipedia.



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