

# *Professional and Common Legal Understanding*

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## **I Introduction**

My paper addresses the question of how legal knowledge is developed and structured, and discusses the conflicting interests which dominate this process. My focus is the different demands of "consumers" and "producers" of legal knowledge. My viewpoints are general, sketchy, and need further development.

A main group in the production of legal knowledge is legal professionals like "jurists" or "lawyers". "Professions" are often characterized, or even defined, by a lengthy formal education which supplies them with their professional knowledge. In this paper I will also distinguish between law appliers and law users:

A law applier develops legal knowledge to further interests apart from his own, and is usually paid to do so. Examples are bureaucrats, lawyers, judges, paralegals, or other persons who are able to make legal decisions, give advice or exploit the legal position of other people. The legal profession constitutes only a segment of the law appliers.

A law user utilizes the law in his own interest. Law users may also be labelled as law consumers. All segments of society will be in the law user position.

The need for "clarity", "understandability" and "operationality" of law often will lead to different cognitive demands from law users and law appliers. The theme of my paper can be put into the following questions: Is law structured according to the interests of law appliers, to make decision-making easy and make it possible for them to build up an expertise that can be monopolized and sold to society? Or is law mainly structured according to the interest of the law users?

Such questions are complicated and answering them is rather demanding. My intention with this paper is only to point to some factors which I regard as important. First, I will present some ideas about how law and legal knowledge are structured.

## II Some structural features of legal knowledge

### *A. Legal positions*

The legal situation of the individual will be determined by three main factors:

- (1) The content of the abstract legal rules – statutes and law – which apply to the individual in question.
- (2) The content of decisions from courts or public administration concerning the problem.
- (3) The concrete situation of the individual.

The "social security"-situation of an unemployed will depend upon the content of the social security legislation and regulations in force, the actual decisions of the social security administration, the prospects on the job-market, health, sex, age, education, etc, of the individual in question, etc. The actual situation of the subjects to law, compared to the law in force, will constitute a complicated network of individual rights and obligations.

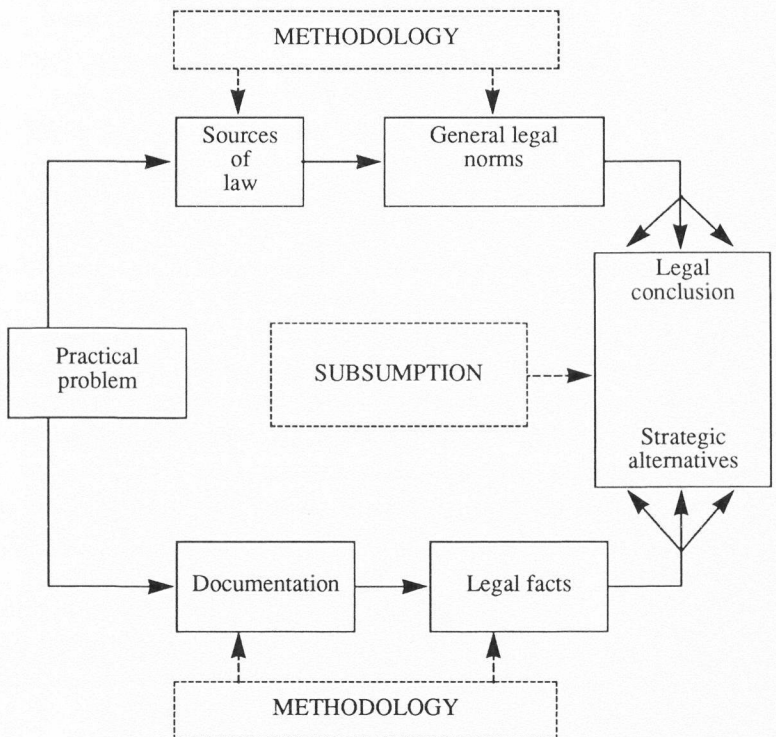
The term "legal position" can be used to describe the concrete legal situation of the individual in different connections. The complexity of a legal position depends on the meaning and formulation of the general rules, the way such rules are concretized through individual legal decisions, and the specific characteristics of the actual situation of the individual in question.

Legal positions mean opportunities to initiate legal reactions. Such legal reactions also have social effects, they influence the welfare of the citizen and the actual scope of action, in a variety of ways in nearly all areas of life. Legal positions open up for an enormous specter of *legal strategies*, which can be used to further the legal subjects' own interests, as well as to promote other, conflicting interests. Knowledge that enables the individual to make strategic use of legal positions is valuable, and may be worth buying, if the individual is unable to produce it himself or to receive it free from a law applier.

*B. Professional legal problem-solving*

What characterizes professional legal understanding? How is knowledge about individual legal positions generated and applied? I will try to describe how jurists generate professional legal knowledge. The process can be described by a general model:

Figure 1 Professional legal problem-solving



The starting point is an individual, practical problem. Then the analysis separates into a legal and a factual part. The legal part consists of mapping relevant legal sources, like statutes, regulations, court practice, administrative decisions, etc, to construct the general rules in force. The factual part consists of gathering the documentation which the general rules demand, and to structure the documentation into a legally relevant fact. Then the outcome of the legal and factual analyses is combined in a subsumption – and a legal conclusion is made. All processes are guided by rules of methodology developed by the legal profession.

The actual analysis will usually develop as a feed-back process. Since there is a mutual interdependence between the operations, the jurist will have to jump back and forth between the different operations until she or he reaches a consistent result, because the facts determine what rules are relevant, and the rules will determine the goals of the documentation process and the fact structuring process.

The main operations in legal problem-solving can be listed as follows:

- (1) To identify the problem
- (2) To map relevant legal rules and materials
- (3) To analyze and interpret the legal sources to construct the relevant legal rule(s)
- (4) To gather legally relevant documentation
- (5) To structure the documentation into a legally relevant factual description
- (6) To apply the general legal rules on the fact description
- (7) To analyze how the legal consequences which the subsumption implies, can be triggered off
- (8) To pursue realistic strategies.

Such a problem-solving process may produce more or less definite answers to the factual and legal questions, and to what the possible outcome of different strategies may be. Often there is a need for an analysis of alternative strategies. This also means that there is considerable space for creativity in legal problem-solving.

To what extent does the professional problem-solving model apply to all categories of law appliers? Clearly the model needs modifications:

Many law appliers will take “short-cuts”. They may arrive directly at the legal fact without doing any thorough research of the documentation. Complaint boards and courts of cassation, for example, will often build their decisions on the legal facts stated in subordi-



nate decision-making agencies. Law appliers may also do rudimentary documentation research only, to get rid of a case. And law appliers may arrive directly at the legal conclusion by combining the legal facts with standardized subsumptions, developed through routinized handling of huge amounts of similar types of cases.

There may also be an “overflow” of legal sources, especially in large legal systems with a great number of relevant decision-making bodies. This may represent an obstacle to the efficiency of the decision-making process, and may lead law appliers to limit the number of sources which they find necessary to take into consideration.

### **III The structure of legal knowledge and professional strategies to maintain the markets**

#### *A. The knowledge gap*

A main characteristic of professions is their expertise in a special field of knowledge. What constitutes their markets is mainly differences in knowledge – a knowledge gap. The “professional” has some expert knowledge which other segments of society are willing to buy. This also means that professional markets may be unstable. If the “buyers” develop their own knowledge, or if the expertise of the professional becomes outdated, demand may decrease. Professionals must always keep ahead to maintain their market. They use different strategies to maintain their superiority in knowledge.

One strategy is to hamper the development of competing expertise by establishing monopolies – to avoid interference from other professionals or from laymen. Lawyers have achieved a legal or factual monopoly to handle court cases in most western countries.

Another strategy is to make professional handling of certain matters obligatory for the public. The conveyance monopoly of the English solicitors may be one example from the legal profession, and in many countries court procedures and the assistance of lawyers are more or less obligatory in divorce cases. The use of lawyers in serious criminal matters is an unquestioned practice in most countries – often paid for out of the public purse.

A third strategy is to hamper knowledge-development among consumers, by restricting education and information to non-professionals. In Norway, there is a widely held opinion among jurists that

law is an entity. It is a difficult discipline to learn, and some knowledge is worse than none.

In this paper, I will concentrate on a fourth strategy; namely the ways lawyers continuously develop *new expertise*, to compensate for the buyers' own knowledge-development, with the sole purpose to secure an advantage over the law users.

### *B. Professional strategies for developing legal knowledge*

The model indicates a lot of possibilities to develop new professional legal knowledge:

The understanding of the scope of possible relevant practical problems for applying professional legal knowledge, may be developed. Social development creates a stream of new legal fields and new areas for developing professional knowledge like oil production, welfare problems, "public interest" law, information technology, etc. But also "old" fields can be further developed. Examples may be contract law, consumer law, housing law and company law, etc, in the private sector, and administrative law, tax law and procedural law in the public sector.

New understanding of the content of the legal sources may also develop professional knowledge. An important task for dogmatic research – or jurisprudence – is continuously to review existing legal sources in order to develop new understanding of for example court-practice.

The development of information technology (computers) has also opened up for a more extensive use of less available legal sources like decisions from lower courts and regulations and administrative decisions. A huge flow of relevant legal sources – which are relevant in professional counselling and decision-making, according to the existing methodological doctrine – can be made available. This also puts pressure on the decision-makers to take such material into consideration. These processes increase the complexity of the legal sources, and widens the knowledge gap between professional law appliers and law consumers.

Legal professionals also have other tools to maintain the knowledge gap. New decisions – especially when they differ from earlier decisions – also create new law. A constant search for "loop-holes" in the law from lawyers in private practice – which is an inherent and deeply rooted part of their professional behavior – also produces a stream of new decisions which alter the system and maintains the knowledge gap.

Also the fact-structuring process may be developed and altered. In legal "mass-production", the fact analyses tend to become standardized. If such a routinized fact structuring practice is challenged by binding decisions, this will also outdate old practical knowledge and increase demands for new professional insights. Especially legal counselors will profit, because such changes tend to increase the demand for their services. The consequences for legal decision makers may be mixed, as new demands will complicate the fact-finding and make it more difficult and time consuming to make proper decisions. Therefore, they may be less willing to change the routinized fact structuring.

The possibilities to represent the legal problem-solving processes in computers – so called expert systems – may reduce the knowledge gap and the value of expert knowledge. This may also lead to an attempt from legal professionals to undermine the validity of the expert system by attacking basic legal premises for the construction of the system. Such systems can also be outdated by the same techniques that can be used against none professional law appliers and law consumers.

But professional law appliers also try to incorporate automation-technology in their professional problem-solving techniques, to improve efficiency and quality for increasing profits. The point is to produce the professional solutions faster and cheaper, without reducing prices to the same extent.

### *C. New legislation*

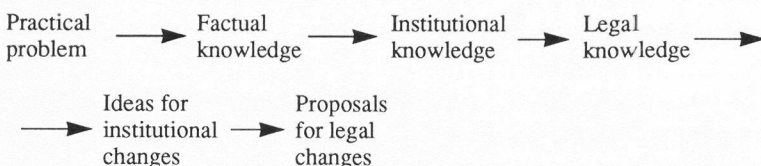
A less "professional" strategy to maintain the knowledge gap, is to press for new legislation. Changes in the law by new statutes or regulations, also mean that existing legal knowledge will be outdated. Professional law appliers will normally be quicker to generate understanding of the new legal realities than other law appliers and law consumers. Pressures for new legislation, more rule of law, and a decision making process in better accordance with law in new areas of social life, may also be viewed as strategies for expanding the professional territories of lawyers. Other professions may lose their monopoly, or non-professionals may lose another open area for economic activities.

Professional law users may press for changes for reasons of "technical" matters. They may argue that the existing rules cause problems in practice. Law makers often are sensitive to such de-

mands from strong professional bodies, because such claims often imply that the rules in question do not fulfill the tasks they were designed to handle. The reform question becomes a matter of efficiency, not of principle.

The structure of "law-making" or "law changing" knowledge may be described as in fig 2.

Figure 2 *Professional law making*



The professional lawyer's understanding of the practical problem is normally derived from analyses of practical problems in professional legal problem-solving. (See fig 1). Their factual and institutional knowledge also usually are products of their fact analyses in legal problem-solving. But institutional knowledge is also developed in their analyses of law and in their experiences in pursuing legal strategies. Only the last two elements in fig 2 demand development of knowledge not yet inherent in the ordinary legal problem-solving process. The lawyer must develop ideas of institutional changes which can eliminate or reduce the welfare problems in question, and these ideas must be translated into new legal rules that can trigger off the wanted solutions of the practical problems. Such new rules must be formulated in a way that makes the law appliers' decisions further the desired problem solutions.

#### IV Cognitive conditions for understanding law

My next problem is the cognitive structure of law users. To what extent are law users able to understand and internalize legal knowledge? The cognitive conditions for legal understanding will obviously vary between different groups of law users. Tapp and Kohlberg have made an analysis of the interrelationship between moral



development and understanding of law, which enlightens the cognitive conditions for legal problem-solving.

### *A. Tapp and Kohlberg's theory*

Kohlberg has developed a universal theory of archetypal development stages. He differentiates between three main stages, the pre-conventional stage, the conventional stage, and the postconventional stage. Tapp's contribution consists of two studies on ideas on law and legal justice; a longitudinal one, carried out in the U.S., which is a development study made on white youth from kindergarten to college, and a cross-cultural study, carried out in 6 countries, on "middle school pre-adolescence" (Tapp and Kohlberg, 1971).

*At the pre-conventional stage* the punishments and rewards of society are mainly perceived as physical phenomena. One has to submit to the physically stronger and avoid behavior which is sanctioned. It is also mainly physical rewards that are perceived as desirable. These attitudes imprint the moral consciousness.

The dominant attitude towards law is rule-obeying. The individual will follow the set rules and values without questioning them. The answers to the questions "What is a rule?" and "What is law?", in Tapp's study express that the function of the law is to issue prohibitions. Legal rules are orders or commands that restrain actions. They serve "no positive social good".

*At the conventional stage*, the attitudes towards law are dominated by a formal belief in authorities. The rules of society are obeyed because of their own legitimacy. There is no questioning of their legitimacy. The attitudes may be described as "nice girl/boy"-attitudes. The individual tries to conform with the stereotyped attitudes of the majority. Behavior is judged from the intention behind. "Good intentions" is an important part of moral defenses. The attitudes are also dominated by "law and order" – with respect for authorities and stress on fulfilling duties and obligations.

The attitudes towards law are also dominated by rule-maintaining – "rules must be followed". The individual must comply with the set rules and values of society. But, contrary to the pre-conventional stage, individual decisions can be evaluated – criticized or defended – as deviant to, or in accordance with, an established practice. The answers to the questions "What is a rule?" and "What is law?" express that the main functions of law are to prescribe and enforce. Law expresses common principles for the behavior of ordinary



people. As a system, law maintains society and hampers unsocial behavior. People distinguish between rules that define conduct as unwanted, and rules that advise punishment for such behavior.

*At the postconventional stage*, the individual develops his own moral principles, independent of the common standards. Moral evaluations are often made in terms of “legal rights” and “obligations”. But law is perceived as “man made rules” – regulations voluntarily enacted by society. Law may be altered on the grounds of rational evaluations of the social utility according to a set procedure. The moral attitudes therefore have both legalistic and utilitarian characteristics. They may assume the form of general ethical evaluations, based on conscious considerations with much weight on logical consistence and generality. The principles are abstract and ethical, and comprise justice, mutual responsibility, human rights and respect for the individual.

The attitudes towards law may be described as rule development or rule-pragmatism. The individual wants rationally created law without a particular value orientation. The individual evaluates the justice not only of individual decisions, but of the practice as a whole, and also of the rules according to universal moral principles. The attitudes open up for conflicts between individual and public interests.

Tapp and Kohlberg conclude that the individual development starts with the pre-conventional stage. Social conditions determine where it ends. The stages are not consistent within the individual. In some areas, the attitudes may be at the postconventional stage, in others at the conventional, etc. Tapp’s cross cultural study showed that the conventional stage was the dominant societal stage. Most people pass the pre-conventional, only minorities develop into the postconventional stage.

Kohlberg’s theory of moral stages is comprehensive and general, and has, of course, been criticized. This short summary isn’t meant to show its full credentials.

One obvious modification is that this theory does not apply to all categories of law users. The theory is developed for individuals, not for organization, and indicates a huge and stable knowledge gap between professional law appliers and individual law users. But most of the legal expertise is sold to bureaucratic entities, like firms, foundations, corporations, and to public institutions of different kinds. Bureaucratic entities may accumulate knowledge and legal problem-solving patterns in a rather more effective way than indivi-

duals do. Bureaucratic consumers of legal counselling therefore may accumulate legal knowledge, and routinize legal problem-solving methods relevant to them. This will make the knowledge gap unstable, and force the professional law appliers to continuously develop their professional techniques, to avoid decrease in the demand for professional legal counselling.

My main reason for referring to Kohlberg and Tapp, is that they clearly demonstrate the importance of the questions of how common legal understanding is developed in the western culture, and how it is structured, and therefore represent a useful starting point for further questions about the knowledge gap between law appliers and law users. And this will be my next question: To what extent are law users able to adapt the professional problem-solving model to utilize their legal positions ?

### *B. Legal problem-solving and cognitive conditions for understanding law*

At the pre-conventional stage, the individual will think of the legal system as "a demand for correct behavior". Consequently, he will put an effort into obeying all legal demands. The idea that legal positions can be utilized for one's own purposes will probably not occur to him. Strategy-oriented attitudes towards legal positions seem to be incongruent with the basic perception of law. It will be difficult to transmit the very notion of a rule enabling the rule-subject to apply for benefits, but leaving it to the individual to decide whether he wants to utilize such opportunities. The goal-oriented, self-interested attitude, demanded for a rational use of the legal problem-solving model, is probably lacking at this stage.

The idea that the authorities can make mistakes will also probably not occur, since the legitimacy of the legal system comes from the authorities themselves. "One must obey rules because the authorities have decided so". Rules and systems for complaints will therefore also seem meaningless.

At the pre-conventional stage, all rules probably ought to be formulated as duties and obligations, to be understood: "You are *obliged* to inform the authorities about your needs for social security, medicare, housing, etc."

Individuals at the conventional stage will probably perceive the main tasks of law as organizing "the world of authorities". Law describes the tasks of the authorities and the rights and duties of the

citizens. At this stage people will not easily think of law as something that may be utilized for one's own purposes. The individual must do what the law demands, but – differently from the pre-conventional stage – the authorities have the same obligation to fulfill their duties.

If law is to be understood at this stage, rules probably ought to be formulated as “rights” for the citizen, and as “duties” and “obligations” for authorities. The individual should get the impressions that the authorities are obliged to provide services, consider arguments, etc. Regulations that only offer opportunities to apply for discretionary benefits, will probably not be activated. Complaints in individual cases will also be more easily forwarded if the rules clearly state that the authorities are not doing what they should do.

The cognitive conditions necessary to adapt the legal problem-solving model, only exist at the post-conventional stage. At this stage the individual has developed purpose-oriented attitudes implying that it is a task for the legal system to satisfy human needs, and also the idea that the authorities ought to fulfill individual human needs.

Formulations like “may apply for” will mainly appeal to attitudes at the post-conventional stage. The attitude at the conventional stage will be: “There is little sense in applying, when it is up to the authorities to refuse”, and at the pre-conventional stage: “This rule does not concern me. It does not say I'm obliged to apply.” But one can also ask if an individual at the post-conventional stage, who puts much weight on his own moral judgments, is due to be misled concerning the law in force. What seems to be the just rule to the individual, is often not the rule in force.

The legal problem-solving model presupposes a strategic, goal-oriented attitude towards legal rules. It is mainly at the post-conventional stage, where the cognitive structure opens up for strategic action, that rules are perceived as something that can be utilized, criticized and changed. At the pre-conventional and conventional stages – where most people are – it is probably impossible to solve legal problems according to the model, because essential cognitive pre-conditions are lacking. As a conclusion, one may say that the cognitive apparatus is unsuited for understanding and utilizing the complex legal system of the welfare state, with much weight on public service given at the discretion of the authorities. This supports a hypothesis that the legal system mainly is structured to fit the tasks of law appliers.

Different hypotheses can be derived from the comparison of Kohlberg/Tapp and the professional legal problem-solving model.

Two examples:

- Tapp and Kohlberg indicate a strategy for developing the legal consciousness of the individual. An interaction model – like Kohlberg’s and Tapp’s – points at participation and conflict resolution as central means to develop a mature understanding of rules and law. The point is to produce incentives that conflict the existing cognitive structure of the individual, not to a degree, however, that makes it impossible to adjust with an acceptable effort. Legal rules formulated in terms of rights and duties are probably more understandable than competence, discretion and guidelines.
- If the theory holds true, one must expect a huge knowledge gap to exist between legal professionals and law users. This may give one possible explanation to why public attitudes towards lawyers and the legal machinery seem alienated. Individuals at the pre-conventional and conventional stages cannot have a clear understanding of how lawyers solve legal problems. Their distrust in lawyers and professional legal statements may be rooted in their lack of understanding of how lawyers handle legal matters and express themselves. Lawyers “do things with the law”, which stand in sharp contrast to their basic idea of what law should be.

This leads to the last question: To what extent is law and legal rules actually structured to fit the interests of law users, and to what extent does the legal structure favor the interests of the law appliers?

## **V The conflicting interests of law appliers and law users**

There are some important differences between law users and law appliers, in how law ought to be structured to fit their different qualifications for and interests in legal problem-solving. An important condition for starting a problem-solving process, is the ability to connect a welfare problem or another type of practical problem to the law. Complex and abstract rule-formulations will normally hamper this part of the problem-solving process for a law user. The



number and availability of the sources is also an important feature. Because of the mutual interdependence of the different parts of the legal problem-solving process, the degree of complexity of the sources of law will also influence the complexity of the other operations. Simple legal rules will simplify the integration of conflicting legal sources, the documentation and structuring of the facts, and the subsumption. Simple rules will also ease the planning and pursuing of legal strategies.

Modern legal systems can be characterized by four important structural development features; namely increased use of:

- (1) synthetic instead of casuistic formulations
- (2) fragmentation – eg. the tendency to construct the legal system in a way that makes it necessary to *combine* different types of rule-fragments, to develop a complete rule for the actual case.
- (3) delegation – especially from the parliament to public administration
- (4) discretionary rules

*Synthetic formulations* often mean increased complexity in the different entities of meaning in the law, even if the number of formulation-entities is kept constant. While the law user's task is to solve his or her unique practical problem, the task for the law applier typically is to solve a stream of cases. While the law applier is best served by standardized rules, formulated in an abstract language to be used on numerous individual cases, the law user is best served by casuistic formulations which are close to his or her own understanding of the problem. If law were communicated to law users as a catalogue of practical subsumptions, organized according to the structure and significance of the practical problems of the law users, this probably would ease the applying process for the law user.

The point of *fragmentation* is formulation-economy. That is, to reduce the number of formulations and to make them usable in terms of a plurality of connections and situations.

But this may also reduce the usability of law for the law users. The need for adjustment through interpretation increases. Fragmentation also means that general and special rule-fragments must be combined to find the complete meaning of the law. Singular prohibitions must be combined with general penal rules, to identify the whole meaning of criminal law. Rules of legal methodology must also be applied to map and evaluate the content of different legal sources. For a law user, the task of problem-solving is simplified if



all relevant rules can be found in one context. Law appliers will prefer to have rules of the same type gathered in one statute; criminal law ought to be divided in a general and a special part, and the rules for case-handling in public administration may be gathered in one general statute, because such "general rules" are to be used in a multitude of connections and combinations. What is a complication for the law user, is a rationalization for the law applier.

*Delegation* will increase the complexity of the legal system. Delegation norms and enabling acts mean increased formulation-complexity. At least, one needs rules which express the authority in question, *in addition to* the rules that the authority is supposed to be used to issue. Regulations are also often formulated with less effort than statutes, and rules in statutes may be repeated in the regulations. This may increase fragmentation. Delegation therefore also mainly serve the interests of the law appliers.

Rules may stipulate the legal consequences directly, or leave the stipulation to the *discretion* of the law applier. Discretion means incomplete legal rules. The legal consequences cannot be fully understood from the formulations in the legal sources. Although discretionary norms may have fewer formulation-entities than norms which determine the legal consequences in detail, they may increase the complexity and incalculability of the legal system, since they are incomplete. Important legal aspects of a given set of legal facts are not necessarily covered by the meaning of the relevant rules. The legal consequences of discretionary rules therefore are to a varying extent unstipulated and impossible to calculate with certainty for a law user.

While discretionary rules ease purpose-oriented decision-making for the law appliers, they reduce the predictability for the law user, because it is normally more complicated to overlook the different matters which the law applier will give priority – especially when the discretion is broad – than to understand legal consequences stipulated *in* the very rules. If legal consequences are easily mapped, this will also ease the strategic considerations of whether it is profitable to utilize the actual legal positions.

Many of the features of the legal system are irrelevant to a law user, because he only needs to know a small part of the total system to solve his problem. The main need is an easy way to locate the relevant rules. But a huge and unmanageable system is a serious problem to law appliers who work with larger parts. Here the total amount of rules and institutions, and the frequency of change, are

important. For a law applier, general systematics, uniformity, rule-economy, surveyability, etc, become important features.

The features I have described, support a hypothesis that law and legal rules mainly are structured to serve the interests of professional law appliers, who master a complicated methodology for legal problem-solving, and that little effort is put on structuring the system according to the interests of individuals who must depend on common legal understanding in solving legal problems.

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