

## EFFICACY AND AUTOPOIESIS OF THE SYSTEM OF SCIENCE, EDUCATION, LAW AND POLITICS

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### Summary

*Law is a system of hierarchy of norms. Harmonization of higher and lower norms and their application ensure legality and effectiveness of law. At the same time, law is a changing system. These changes are the result of various political and other social influences. Their complexity often makes it impossible to clearly determine the hierarchical structure itself, which raises the question of the sufficiency of certain dominant legal methods for a more comprehensive interpretation of the effects of the legal system. The paper examines whether and in what way the interpretation of the efficacy of the legal system by means of the reduced principle of imputation differs, or is insufficient, in relation to the reduction of complexity of the legal system by means of codes and operations that make it autopoietic. I shall explain the most significant theoretical implications on the example of a legal norm of one section of public law - university law and the law of scientific organisations - by determining the criteria for assessing legal and societal efficacy with respect to the feature of autopoiesis of the pertaining systems - law, science, education and politics in the way they are determined in Luhmann's systems theory.*

**Keywords:** *functional equivalence; reduction of complexity; codes; stability; operations.*

### 1 INTRODUCTION

In the German classical philosophy of Kant, Fichte, Schelling and Hegel, one can find one of the most influential philosophical reflections on the system, based on certain metaphysical and ontological tenets of the understanding of knowledge, morality, law, politics, etc. Giving up or distancing oneself from such a systematic interpretation was conditioned by, *inter alia*, positivist influences on the development of science, creation of new scientific paradigms and methods, and the process of

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emancipation of individual sciences, which resulted in an abandonment of some metaphysical and ontological theses as the dominant starting points for reflections and research. Almost two centuries after the aforementioned *idealistic* systems, Luhmann establishes his social systems theory. However, unlike the former, in whose reflections, e.g. those of Kant, the concept of causality, or more precisely the causality of necessity and the causality of freedom,<sup>1</sup> was a starting point for understanding relationships, Luhmann in his systems theory does not interpret relationships primarily from the perspective of *cause* and *effects*, but from the perspective of *functions*.

The developments described have had an impact on the development of the science of law. However, unlike philosophical and sociological theories and approaches, any legal theory - and any theory of positive law - must begin with the assumption that law is first and foremost a - system. This inevitably includes (scientific) determination of its parts, understanding the connection between parts and the whole, establishing principles, regulations and procedures belonging to the legal system, as well as determining the features that are distinctive in relation to everything that system is not and that does not belong to it.<sup>2</sup> In doing so, one should take into consideration that an *essential* feature of law is that law as a system should make one whole, a non-contradictory unity. Without it, there is no legality. Without it, the system is not efficacious. Therefore, a question necessarily arises: by means of which methods and approaches?

In normative theory, which is considered a type of law positivism, such unity is interpreted primarily from the perspective of a hierarchical system of legal norms implying, *inter alia*, the alignment of a lower norm with a higher one, and ultimately with a principle of law. This should ensure the efficiency of the application of the principle of legality and thereby the integrality of the legal system. The relations between these norms are interpreted by means of *causality*, *normative necessity* or *imputation*.<sup>3</sup> However, what if it is impossible to unequivocally determine the hierarchy of legal norms or the hierarchy of principles of law, which is an issue that is becoming increasingly important in the works of a number of theoreticians?<sup>4</sup> This is often the case in some branches of public law due to too frequent legislative changes. This then makes their clear hierarchical determination more difficult, which is a consequence of the influence of different political and other social goals and interests. In other words, in such circumstances, the integrality of the legal system turns out to be more and more often an *ideal* whose starting point, the principle of legality, is constantly challenged in its application, concretisation, operationalisation and empirical verification.

1 Immanuel Kant, *Kritika čistoga uma* (Zagreb: Matica Hrvatska, 1984), 18; Immanuel Kant, *Kritika praktičnog uma* (Zagreb: Naprijed, 1990), 45.

2 For more cf in: Ksenija Grubišić, *Sveučilišno pravo i pravo znanstvenih organizacija* (Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2023), 1-35.

3 Hans Kelsen, *Opća teorija normi* (Zagreb: Naklada Breza, 2015), 39.

4 Ronald Dworkin, *Shvaćanje prava ozbiljno* (Zagreb: KruZak, 2003), 52-53.

Generally, the aforementioned justifies every effort to re-examine other theoretical approaches in addition to normative and dogmatic methods for the purpose of attaining a more thorough understanding of the dynamic nature and change of the legal system in relation to its fundamental - normatively interpreted - features of uniqueness and integrality. For, what if the relations among legal norms, and especially the *effects* of these norms within the unity of the legal system cannot be explained more comprehensively only by means of teleological causality, normative necessity or imputation, but also by means of social *functions*?

Kelsen interprets causality and imputation as two different types of one *functional* connection, “two different ways in which two states of affairs are connected together as condition and consequence.”<sup>5</sup> Causality would mean that there is a relationship of means and purpose, i.e. of cause and effect between the creation of a norm and behaviours corresponding to the norm if, inter alia, the act of norm creation is used as a means to achieve behaviour corresponding to the norm as the effect.<sup>6</sup> Stating that this does not always have to be so, Kelsen therefore interprets that the principle of imputation is more appropriate to normative systems (morality and law) than the principle of causality.<sup>7</sup> Namely, it implies a relationship between certain behaviour as a condition and a sanction as a consequence, which is established by an act of will whose meaning is some norm. It follows that the guarantee of efficacy is recognised in the normative connection between condition and consequence, more precisely in sanctions. Moreover, it follows that such a normative relationship between cause and effect does not assume an infinite sequence, in the sense that all these conditions to which sanction is imputed in any moral or legal law as a consequence “are not necessarily a consequence which has to be imputed to some other condition.” More precisely, the causal sequence guided by the principle of imputation is not infinite or inexhaustible since imputation “does not have an unlimited number of articles but in principle only two.”<sup>8</sup>

I shall attempt to interpret the (in)sufficiency of such “reduction” of the interpretation of possible effects of normative systems - in this case of law - for the understanding and study of legal and social efficacy of the legal system based on individual understandings of Luhmann’s functionalist theory. The starting point for the functionalist reflection on the previously described - and in jurisprudence prevailing - understanding of the unity and integrality of law arises from his thesis on the issue of reducing the science of law to a normative science. In doing so, one must consider that Luhmann, like Kelsen, distanced himself from the traditional, ontologically founded understandings of causality, because they “ignore or disrespect the system’s limits.”<sup>9</sup> At another place, as I shall demonstrate, he explains such distancing using the expression of *functional equivalence*.<sup>10</sup>

5 Kelsen, *Opća teorija normi*, 39.

6 Kelsen, *Opća teorija normi*, 26-27.

7 Kelsen, *Opća teorija normi*, 38.

8 Kelsen, *Opća teorija normi*, 39.

9 Niklas Luhmann, *Pravo društva* (Zagreb: Naklada Breza, 2014), 27, 392.

10 Niklas Luhmann, *Soziologische Aufklärung: Aufsätze zur Theorie sozialer Systeme, Band 1* (Opladen: Westdeutscher Verlag, 1974), 14.

Consequently, the paper examines whether and in what way the interpretation of the efficacy of the legal system by means of the *reduced* (in relation to causality understood as a sequence of causes and effects) principle of imputation differs, or is insufficient, in relation to the *reduction of complexity* of the legal system by means of codes and operations that make it autopoietic. I shall explain the most significant theoretical implications on the example of a legal norm of one section of public law - university law and the law of scientific organisations - by determining the criteria for assessing legal and societal efficacy with respect to the feature of autopoiesis of the pertaining systems - law, science, education and politics in the way they are determined in Luhmann's systems theory.

## 2 RELATIONS AND EFFECTS

The introduction sufficiently explained that the meaning of the legal norm within the framework of the normativist method arises from the relation between higher and lower norms. Thereby, efficacy is interpreted as a condition for the validity of the norm only in a certain sense. Namely, the norm must become valid only if it is possible for it to be efficacious, i.e. it does not postulate as "ought" something impossible to attain.<sup>11</sup> In any other sense, the absence of efficacy does not influence the meaning of validity, in the sense of this legal norm belonging to the legal system.<sup>12</sup> The understanding described should be partly understood in the context of Kelsen's "distancing" himself from causality to the benefit of imputation, also mentioned in the introduction.

In brief, efficacy is understood as the ability of a legal norm to produce legal effects intended by this legal norm. Consequently, it is obvious that a broader context of the understanding of efficacy comprising, for example, questioning the objectives or the will of the legislator is not decisive here in a way as this is the case when applying the dogmatic method. Or, determination of the content of the will, e.g. volition, as in Kant's philosophy.<sup>13</sup> This is significant. Calling his theory "*pure theory of law*," i.e. the fundamental concept of Kant's philosophy, Kelsen somewhat determined himself a follower of his interpretation. In Kant's philosophy, a concept of pure reason is the concept of freedom that has only a regulatory character in relation to the possibility of its comprehension, whereas the concept of freedom understood in such a way proves its existence in practical action as the *law of causality of pure reason*, which determines volition regardless of all empirical circumstances. This is true of both moral and legal law, since they do not differ by duties, but "by various legislations that both connect freedom to law."<sup>14</sup> Unlike the inner moral law (the categorical imperative), external legislation and legality are characteristic of law, and based on that the authority to use force "in order to remove the obstacle to freedom

11 Kelsen, *Opća teorija normi*, 157.

12 Luka Burazin, "Pojam prava i (društvena) učinkovitost - analitički pristup," *Pravni vjesnik* 33, no. 3-4 (2017): 119, 124.

13 Immanuel Kant, *Metafizika čudoređa* (Zagreb: Matica Hrvatska, 1999), 11.

14 Kant, *Metafizika čudoređa*, 18-19.

in line with freedom *vis-à-vis* general laws.” More precisely, right is “*the sum of the conditions*<sup>15</sup> under which the choice of one can be united with the choice of another in accordance with a universal law of freedom,” whereas legality is “the mere conformity or nonconformity of an action with law, irrespective of the incentive to it.”<sup>16</sup>

Considering this, it is important to note Kelsen’s distancing himself from the application of causality, even the causality of the law of pure reason as the original or (only) decisive one for the interpretation of validity and efficacy of law. Unlike Kant’s interpretation of causality of freedom, Kelsen explains that in legal orders even categorically formulated norms can be valid only conditionally. For example, for the norm “one should not steal” or “one should not kill” positive social orders will introduce norms for the conditions under which it is not forbidden to deprive somebody of property or kill.<sup>17</sup> However, a question arises whether these are truly the arguments that rebut Kant’s approach? Or are these just empirical examples of an alignment of the universal law of freedom with the volition of another? Is it perhaps for this very reason that Kant commences one of the formulations of the universal principle of right with “a set of conditions...,” as previously emphasised? And finally, does the pure theory of right lack the explanation of the will and its content - desires, volitions and effects - for a more comprehensive understanding of efficacy? For Kant, a volition that can be determined by pure reason *is* free will, which in law concerns the practical relationship between one person and another, if their action (indirectly or directly) can influence one another, where this relationship denotes *only* the relationship of the will towards the will of another (and not the wish of another). In other words, one does not consider the content but just the form of the relationship of mutual will “if it is observed as free and if it is in this way one compatible with the freedom of another by universal law of action.”<sup>18</sup> Although Kant’s interpretation also just sticks to the form, which is surely a link to the subsequent normative approach, it still presupposes the criterion of verifying the effects of the legal norm that does not arise only from (directly) the higher legal norm, but it *presupposes* the interpretation of the ability of the will (as free volition) on the basis of the law of causality of pure reason, i.e. by means of the universal principle of right.

As part of the dogmatic method we find a broader interpretation of efficacy, which includes the will of the legislator.<sup>19</sup> This means that the meaning of the norm does not only arise from the relationship between higher and lower norms, but also considered are *objectives* that the legislator or norm-maker had in mind at the moment of their creation. In other words, efficacy is determined as the ability of the legal norm to achieve the objectives for which it was made. In order for them to be more precisely determined, the need inevitably arises to determine the will of the legislator, which presents additional challenges in the field of university law and the law of

15 Italics by K.G.

16 Kant, *Metafizika čudoređa*, 17, 27, 28.

17 Kelsen, *Opća teorija normi*, 35.

18 Kant, *Metafizika čudoređa*, 27.

19 Nikola Visković, *Teorija države i prava* (Zagreb: Birotehnika CDO, 2001), 104-105.

scientific organisations. The first is that this will in systems of higher education and science should be determined at national levels and at the European level alike. At both levels, it is not sufficient to reflect on it only within the context of the political will. Namely, different subjects at different political, scientific and academic levels, such as institutions of higher learning as part of the university, emerge in the role of norm-maker in this part of the legal system. This is a direct consequence of the application of the fundamental legal principle in this part of the legal system - the principle of autonomy. Furthermore, the process of Europeanisation of higher education and science does not materialise only by means of European formal legal sources. The virtually most important principles and *goals* of the establishment of the European higher education area, which has existed for over 30 years, are adopted through a process of harmonisation, alignment. The expression often used to describe this process is “voluntary harmonisation of goals, values and principles of EHEA” which then cannot be (in terms of formal law) unequivocally determined since the will of the norm-maker appears as “voluntary.”<sup>20</sup> Such a feature of *voluntariness* goes beyond the framework of reflection on the normative interpretation of formal laws, and to a certain extent beyond the dogmatic method.

It follows that it is justified to assume that determination of the criteria of achievability of the goals, principles and norms that are harmonised at the European level, and that are normatively regulated at national levels, does not include only the connection between norm and behaviour, but also the network of other relations that should be considered if we want the norms to be efficacious.<sup>21</sup> Consequently, this means that questioning the efficacy of legal norms that constitute university law and the law of scientific organisations does not only include the questioning of the ability of the legal norm to achieve the goals for which it was adopted in the first place, but also determining the function or the role (of part) of the legal system. The latter includes therefore questioning the social efficacy of norms, which I shall explain in more detail in the context of Luhmann’s functionalist theory.

Some of the reasons for this selection are already referred to in the introduction. With his thesis on the problem of reducing jurisprudence to a normative science, Luhmann in fact strove to demonstrate that, as a result of the emergence of increasingly complex legal systems, it is not possible to reflect on the unity of law only on the basis of the normative method, which is definitely the case in the section of law emphasised here.<sup>22</sup> An additional reason is connected perhaps in a more direct manner to the criteria for systemising this new part of the legal system such as university law and the law of scientific organisations.<sup>23</sup> Some of them, such as -

20 Grubišić, *Sveučilišno pravo*, 248-260.

21 Hans Ryffel, *Rechtssociologie: Eine systematische Orientierung* (Berlin: Luchterhand Verlag, 1974), 245, 258.

22 Grubišić, *Sveučilišno pravo*, 250-251.

23 There are eight criteria: legal (formal and substantive) sources, general and abstract regulations and hierarchy of regulations, principles (their number) underlying them and the hierarchy of principles, (a certain) number of related social relations, a type of social relations these regulations refer to and the manner in which these relations are regulated, precisely determined subjects and cases, structure and competence of bodies, (complex) institutional structures, and

legal (formal and substantive) sources, a (certain) number of related social relations, the type of social relations these regulations refer to and the manner in which these relations are regulated - can best be explained by means of Luhmann's *reduction of complexity*. What I mean here is the explanation to the way of how individual substantive sources (social influences and circumstances) gained legal relevance through the form of legal validity expressed by the code legal/illegal, and in what way individual (highest) legal norms are determined by legal and non-legal influences when assessing the criterion of their efficacy.

### 3 RELATIONS AND FUNCTIONS

In addition to the pure theory of law, Luhmann's autopoietic theory of law is often considered the most consistent attempt to conceptualise the autonomy of the legal system, as a system that only obeys its own legal requirements.<sup>24</sup> The most significant differences between both theories arise from the understanding of causality, and thereby indirectly from different perceptions of the unity of the (legal) system.

As already indicated, Luhmann does not interpret the functional method within the limits of the ontological concept of causality, which at the same time presupposes that he does not define the concept of function itself by means of causal terms. More precisely, the functional relationship is not interpreted as a special type of causal relationship but reversely, causality is observed as a case of the use of functional order.<sup>25</sup> At the same time this means that, unlike interpretations given in social sciences up to that time that determined the functional relationship as a type of purposeful, useful effects, Luhmann, invoking Parsons, includes the feature of *freedom from purpose* (in German *zweckfrei*) in the meaning of the concept of function. Moreover, in his view, the latter meaning comprises the most important problem of social sciences and this is, in addition to purposeful (in German *zweckdienlich*) also *unthought* (in German *unbedacht*) effects of actions. Consequently, the function would be a special type of effects denoting *any* action that contributes to the maintenance of the complex structure of the *unity* of the system.<sup>26</sup> In the following text, I shall explain the most significant implications of such understanding.

*First, the starting point of this method is not determining the cause but determining equivalence.*<sup>27</sup> This arises from the previously highlighted thesis that, to Luhmann, the concept of functional equivalence is the key to understanding the difference between the functional and the causal scientific method. In this connection,

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scientific activity in the respective area (Grubišić, *Sveučilišno pravo*, 23).

24 Eckard Bolsinger, "Autonomie des Rechts? Niklas Luhmanns soziologischer Rechtspositivismus Eine kritische Rekonstruktion," *Politische Vierteljahresschrift* 42, no. 1 (2001): 3.

25 Luhmann, *Soziologische Aufklärung*, 10, 16. In German: *Die Funktion ist nicht eine Sonderart der Kausalbeziehung, sondern die Kausalbeziehung ist ein Anwendungsfall funktionaler Ordnung.*

26 Luhmann, *Soziologische Aufklärung*, 10.

27 Luhmann, *Soziologische Aufklärung*, 18.

the function is not only explained as an effect (purposeful and/or unthought), but also as a *regulatory scheme* of meaning, which denotes a specific viewpoint from which *various possibilities* may be comprised in a *single* aspect. This means, *inter alia*, that in a functional relationship it is not only important to determine just a law-like or more or less probable relation between certain causes and certain effects that would exclude other possibilities, but quite the opposite - “*establish the functional equivalence of several possible causes from the perspective of a problematic effect.*”<sup>28</sup> From such a perspective, individual performances manifest themselves as equivalent, interchangeable, although as concrete processes they can be incomparably varied. It is important to note that in this context, Luhmann defines the function in the spirit of Kant’s definition as “the unity of the action of ordering different representations under a common one.”<sup>29</sup> If the concept of function in that sense is understood as a *regulatory principle* for determining equivalent possibilities within individual variables - in which process it interprets the variables as a class of all functional equivalences - then it follows that the requirements of a certain system are in fact functional reference points that make visible the equality of different possibilities for meeting them. Which input values belong to a certain variable is a matter of empirical knowledge. However, the variables do not result in determining the cause of an individual change or its prediction. By means of them, features of the system are analysed with regard to other equivalent possibilities, including the possibility of change, exchange and replacement and their influences and effects in the system, which, to Luhmann, is difficult to assess from the perspective of traditional ontological causal science.<sup>30</sup>

*Second, identity is not understood as substance but as a system.* This thesis can also be interpreted as a starting point for Luhmann’s distancing himself from traditional ontological causal science, in the sense that concepts such as being, subject or unity presuppose universal meanings that still cannot adequately encompass increasingly complex social systems such as the legal system.<sup>31</sup> Namely, each ontological theory understands identity as substance, which somewhat implies a continuous reduction of truthful possibilities of a being of substance in a way that excludes any indefiniteness, and this also means other possibilities from the essence of the idea itself. In other words, identity contains just constants, not variables.<sup>32</sup> In functionalist thinking, such an ontological premise is reversed: identity cannot be understood as exclusion of other possibilities of existence, but as an order of these possibilities. Identity then is not any self-sufficient matter, but in that sense is always - a *system*. Its existence is not based on an unmodifiable essence of being that knowledge should discover, but on the maintenance of its function of order for a consistent, socially oriented experience.<sup>33</sup>

28 Luhmann, *Soziologische Aufklärung*, 14, 17.

29 Luhmann, *Soziologische Aufklärung*, 14.

30 Luhmann, *Soziologische Aufklärung*, 15-16.

31 Bernard Keenan, “Niklas Luhmann: What is Autopoiesis? 2022,” accessed June 1, 2024, <https://criticallegalthinking.com/2022/01/10/niklas-luhmann-what-is-autopoiesis/>.

32 Luhmann, *Soziologische Aufklärung*, 15, 26.

33 Luhmann, *Soziologische Aufklärung*, 25-26.



Although with such an approach Luhmann distanced himself from the universal ontological interpretation, one should not exclude universalist endeavours in his interpretation that the complexity of social systems can be reduced to meaningful statements and decisions that generate stable expectations and structures.<sup>34</sup> As I shall demonstrate in the following section, the basis for such understanding is his interpretation of autopoietic systems, whose attractiveness in the works of individual legal theoreticians arises from the possibility of a simultaneous explanation of self-motivation in the sense of dynamism of legal systems and self-preservation as a resistance to external interests.<sup>35</sup> This leads to the final implication that largely arises from the previous two.

*Third, the basis of the understanding of functional equivalence is the problem of stability and not the hypothesis of steadiness.* Functionalist interpretation does not comprise solely the cause-effect relation, but focuses: either on exploring possible causes from the perspective of effect, or on exploring effects from the perspective of cause, or on the relations of several causes to one another, or several effects to one another, i.e. on determining functional equivalence. The goal is to determine recognisable systems of social action that are relatively stable *vis-à-vis* their environment.<sup>36</sup> In doing so, it is obvious that this stabilisation cannot have the form of an unchangeable relationship between certain causes and effects, but such action should always be stabilised in a network of other possibilities. More precisely - in the *reduction* of infinite possibilities to some fixed structures. For this reason, the central problem of the functionalist method is the problem of stabilisation.

For example, the stability of expectations of behaviour as the central problem of each social action can be problematic in the temporal dimension and in the social dimension. It can be encouraged through repeated experiences and consensus. Stabilising a consensus of expectations is problematic in itself: it can occur more through the institutionalisation of general norms and roles or more through leadership. For example, highlighting what leadership is necessary for which function entails differences in the status, which in return cause problems of adjustment for the subordinate. The aforementioned examples clearly show Luhmann that every action can be important for several functional reference points of view and as such can take part in different series of equivalences with various other performances. Moreover, each action, if analysed from multiple aspects, has not only favourable but also unfavourable effects. This means that each problem resolution encumbers other interests of the system, for example if a social order relies more on institutionalisation of roles than on leadership, then its adaptation to a changing environment can be jeopardised. All these (dys)functional effects are to Luhmann, unlike in the scientific method of causality, also comprised by the functional method in a way that does not offer a logical solution for the contradiction between function and dysfunction, but

34 Hugh Baxter, "Niklas Luhmann's Theory of Autopoietic Legal Systems," *9th Annual Review of Law and Social Science* (2013): 183.

35 Arthur J. Jacobson, "Autopoietic Law: The New Science of Niklas Luhmann," *Michigan Law Review* 87, no. 6 (1989): 1666.

36 Luhmann, *Soziologische Aufklärung*, 26-27.

offers a method to confront them.<sup>37</sup>

Therefore, for a social science to be able to resolve the problem of stability in social life, this problem should be made the central reference point of its analysis and from there one should seek different functional equivalent possibilities of research into stabilising expectations of behaviour. Based on that, Luhmann interprets that the *reference viewpoint* of functionalist analysis is the *problem of stabilisation, not the hypothesis of steadiness*.<sup>38</sup>

#### **4 EFFECTS: EXAMPLE OF A LEGAL NORM**

The previously presented individual features of the functionalist method are certainly more decisive for determining social rather than legal efficacy. Nevertheless, I believe that the application of these features to a legal system *presupposes* and *in essence* supplements the presented understandings of legality and legal efficacy. Thereby, it contributes to a more comprehensive understanding of the essential determinants of this system - its uniqueness and integrity. For, the normative criteria of efficacy prove to be insufficient to interpret these very determinants.<sup>39</sup>

Only some features have been highlighted thus far in which, indirectly or directly, one can see only individual functionalist criteria of efficacy. In order to explain them more thoroughly, it is necessary to put them in the context of Luhmann's understanding of autopoiesis of the system. In the following text, I shall try to demonstrate it in a branch of the legal system such as university law and the law of scientific organisations. I shall use legal norms governing the powers of the faculty to autonomously decide on its study programmes.

The Scientific Activity and Higher Education Act<sup>40</sup> was the basic law governing the aforementioned branch of the legal system in the Republic of Croatia (until a new act came into force). In the 2003-2022 period, it was amended approximately 15 times. At the same time, the fundamental legal principle of university activity, namely the principle of autonomy, was violated several times, on which the Constitutional Court of the Republic of Croatia decided 19 times, and 6 times of them on the constitutionality of individual provisions of the latter Act. Based on this, any question on the legal efficacy of this branch of the legal system is justified. The same is true of social efficacy if one considers the rising number of social relations that become legally relevant in this field, which then essentially determine it.

Art. 19 Para. 3 Pt. 1 of the new Higher Education and Scientific Activity Act<sup>41</sup> (hereinafter: the Act) contains the following provision:

*The Faculty or Academy Council shall have the following powers:*

37 Luhmann, *Soziologische Aufklärung*, 20-21, 23.

38 Luhmann, *Soziologische Aufklärung*, 18, 27.

39 Grubišić, *Sveučilišno pravo*, 251.

40 Scientific Activity and Higher Education Act [Zakon o znanstvenoj djelatnosti i visokom obrazovanju], Official Gazette, no. 123/03, 105/04, 174/04, 2/07, 46/0., 45/09, 63/11, 94/13, 139/13, 101/14, 60/15, 131/17.

41 Higher Education and Scientific Activity Act [Zakon o visokom obrazovanju i znanstvenoj djelatnosti], Official Gazette, no. 119/22.

*1. to adopt decisions on issues of teaching, science, art and profession.*

In the context of the normativist method, efficacy is assessed depending on whether the norm achieves legal effects originally envisaged by it, and in relation to its higher norms. Consequently, and in particular with regard to higher legal norms, Art. 68 and 69 of the Constitution of the RC are relevant since they guarantee the autonomy of universities, as well as of scientific, artistic and cultural creativity.<sup>42</sup> Since constitutional principles are binding for the legislator, the following legal norms should be interpreted as a concretisation of the constitutional guarantee, which would then be used as a basis for interpreting the normative criteria of efficacy of the highlighted norm.

Art. 4 Para. 3 Pts. 2 and 4 of the Act provide:

*(3) University autonomy shall comprise:*

*[...] 2. defining educational, scientific, artistic and professional programmes  
[...]*

*(4) University autonomy shall constitute an institutional framework whose purpose is to protect academic rights and freedoms of members of the academic community and intellectual independence of the university from all political pressure and economic power. University autonomy shall include responsibility towards the social community.*

Furthermore, for the interpretation Art. 19 Para. 3 Pt. 1 is authoritative and Art. 66 Para. 3 of the Act provides:

*(3) The higher education institution shall adopt a study programme in compliance with this Act and regulations governing quality assurance in higher education and science.*

The first part of the provision in the latter article should not be contentious, since “in compliance with this Act” means, *inter alia*, in compliance with all the legal provisions set out before. However, provided that the legal effects of the highlighted legal norm (Art. 19 Para. 3 Pt. 1 of the Act) should testify, *inter alia*, to a normative concretisation of the principle of autonomy, the second part of the provision specifying that the higher education institution adopts a study programme “in compliance with regulations governing quality assurance in higher education and science” is problematic. This primarily refers to the Quality Assurance in Higher Education and Science Act<sup>43</sup> (hereinafter: QA Act), especially Art. 15 Paras. 1 and 2 read:

*(1) The procedure of initial accreditation of studies shall be initiated by a request for the issuance of a licence for study delivery. The request shall be submitted on a form to the Agency and in line with the instructions provided by the Agency.*

*(2) The request from paragraph 1 of this article shall be accompanied by:  
1. A proposal for a study programme*

<sup>42</sup> Constitution of the Republic of Croatia [Ustav Republike Hrvatske], Official Gazette, no. 56/90, 135/97, 28/01, 76/10, 5/14.

<sup>43</sup> Quality Assurance in Higher Education and Science Act [Zakon o osiguravanju kvalitete u visokom obrazovanju i znanosti], Official Gazette, no. 151/22.

2. *An opinion of a competent body on meeting the prescribed requirements for regulated professions*
3. *A proposal justifying the delivery of studies at the public higher education institution*
4. *Employment contracts with teachers*
5. *Proof of availability of premises and equipment for the study*
6. *Proof of financial resources for the study.*

Based on the quoted provision of the QA Act, it is beyond any doubt that the final decision on delivery of a study programme is not adopted by the faculty or by the university, but by a body of public administration, i.e. the agency in charge. This is particularly worrisome since this is a novelty in legislation compared to the previous Quality Assurance in Science and Higher Education Act.<sup>44</sup> In that sense, the previous Act respected university autonomy by providing different norms for the procedure of initial accreditation of study programmes at higher education institutions within the university in relation to polytechnics and higher schools. Art. 20 Paras. 1 and 10 read:

*(1) The request for delivery of a new study programme shall be submitted by private institutions of higher learning, public higher schools and polytechnics. [...]*

*(10) University study programmes shall be established and delivered based on a university senate decision after obtaining a prior assessment by the unit in charge of internal quality assurance and advancement system... University study programmes can be funded from the state budget only based on an agreement signed with the Ministry, with the previously obtained positive opinion of the Agency.*

Consequently, it is justified to assume that the effects of the legal norm provided by Art. 15 Paras. 1 and 2 of the QA Act are not in accordance with the principle of autonomy as prescribed in Art. 4 Para. 3 Pts. 2 and 4 of the Act.

Therefore, the issue to be resolved presently is what effects arise from such a restriction of university autonomy, in this case faculty autonomy, which also includes determining or at least clarifying the goals that wish to be achieved by a different provision of norms on the powers of faculties for the adoption of study programmes based on the QA Act. In accordance with the interpretations presented in the previous sections, this means that it is necessary to determine the legislator's will. It can best be seen in the official explanation contained in the Final Draft of the Quality Assurance in Higher Education and Science Bill. Reasons for new normative solutions as contained in Art. 15 of the QA Act (in relation to previous legislative solutions) arise directly from the parts of the official explanation where the following is indicated as goals of the change: "equal quality standards regardless of the type of study programme," establishment of a new system for "evaluation of study programmes through accreditation and re-accreditation to advance procedures of establishing new programmes of study" and introduction of a new system of "quality assurance, based on modern criteria, [...] with the view of encouraging the establishment and

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44 Quality Assurance in Science and Higher Education Act [Zakon o osiguravanju kvalitete u znanosti i visokom obrazovanju], Official Gazette, no. 45/09.

development of study programmes in the fields relevant for economic and state development.<sup>45</sup>

### **5 FUNCTIONS: EXAMPLE OF A LEGAL NORM**

As a reminder, in terms of the functionalist method, the efficacy criteria need to be interpreted and then applied in the context of the problem of maintaining stabilisation of expectation that evolves in “the network of other possibilities.” The thesis that these possibilities *cannot be reduced* either to unchangeable relations of causes and effects or to a specific - individual - relation of causes and effects in the way it is understood based on the premise of the traditional ontological causality, directly points to a different understanding of identity. Namely, identity is not interpreted as substance, in the sense of excluding other possibilities of existence, but as a system understood as determining the equivalence of these possibilities. At one point, Luhmann states that the heretofore explanations of causality “ignore or disrespect the system borders.”<sup>46</sup> Consequently, this means that the borders of -identity - are not respected.

Therefore, based on the presented features of this method, the following criteria for evaluating the efficacy of the highlighted norm would result:

1. Since the function is a type of effect that denotes *every* action, the assessment of efficacy of the application of Art. 19 Para. 3 Pt. 1 of the Act includes determining both purposeful and unthought effects of the norm application.
2. As a regulatory scheme of meaning, the function also denotes a specific point of view based on which different causes can be encompassed in a unique aspect. In the application to the highlighted legal norm, this would require determination of functional equivalence, *equivalence of several possible causes* that influence or may influence (dis)respect of the principle of autonomy, and academic freedoms of faculties and university to autonomously adopt study programmes.
3. Such equivalence of several possible causes does not only imply determining the cause based on normative concretisation or imputation or based on the goals for which it was originally adopted. In order to determine both desired and unthought effects of application of this and other provisions prescribing the autonomous adoption of study programmes, it is necessary to determine political, educational, scientific and other social causes as possible. For example, the highlighted part of the explanation during the procedure for enactment of the QA Act could be explained more fully if this criterion would be taken into consideration.
4. Determination of all these possible causes at the same time means the determination of a central point of reference. More precisely, in order

45 Government of the Republic of Croatia, The Final Draft of the Quality Assurance in Higher Education and Science Bill of November 24, 2022, 28-30.

46 Luhmann, *Pravo društva*, 392.

to assess the efficacy of application of Art. 19 Para. 3 Pt. 1 of the Act, it is necessary to determine all the causes that, in relation to an unstable social environment, generate stable expectations as - effects - during its application. In the final part, it will become clearer that this understanding is very close to the interpretation of legal certainty. The number and relevance of such possible causes are not infinite but limited, or better yet, they are *reduced by the limits of an individual social system*, in this case of the legal system.

In accordance with the latter criterion described and Luhmann's previously stated objection whereby the limits of the system are not respected in causal explanations, it is further necessary to explain in what way the limits of the system are determined in relation to the environment, and in relation to other social systems, within the framework of his theory. This will contribute to a more complete interpretation of the previously described functionalist criteria. Namely, the paper deliberately uses the expression "university law and the law of scientific organisations" (and not "the science and higher education system") in order to, *inter alia*, emphasise that this is about studying the functionalist criteria of efficacy of (part) of the legal system. However, it is directly connected to other social systems such as the system of science, education. Moreover, bearing in mind that the effects of Art. 19 Para. 3. Pt. 1 of the Act point to, *inter alia*, enforcement of the constitutional guarantee of autonomy, this legal norm points to the connection to the political system, as I shall demonstrate. Explaining the limits of the system presumes understanding the basic features of the *autopoiesis* of the system.

## 6 AUTOPOIESIS AND CODES

For Luhmann, functioning in modern society is characterised by the functional differentiation of societies into different systems such as law, education, science, and politics. Such differentiation rules out the possibility of interpreting society on the basis of an assumption or idea of unity. However, the question arises as to the criteria according to which these systems are differentiated, as well as the criteria according to which these systems are functionally connected at the same time. It is therefore not surprising that the initial question of his systems theory is: How does something create its own boundaries in relation to the surrounding world?<sup>47</sup> The answers to this question point to a further aspect of his distancing himself from the traditional interpretation of causality, which then necessarily requires a different interpretation of the efficacy of a particular (sub)system of society, which is most clearly reflected in the relationship between this system and the environment. Given the features of autopoiesis, he does not interpret these relationships in such a way that environmental influences - including other systems - can *directly* cause effects within a particular system (e.g. the legal system). Therefore, in application to law, Luhmann poses the question of *how* law produces *its own* boundaries in relation to the surrounding world, that is, "How can the influence of the surrounding world on law be exercised without

47 Luhmann, *Pravo društva*, 31-32.

causing law and society to become indistinguishable?”. These intrinsic boundaries arise from their own - legal - operations, whereby Luhmann, unlike Kelsen, does not refer to the norm but to the *form of legal communication* that “performs its own cut in society and only thus creates an intra-social surrounding world of law in society.”<sup>48</sup>

The following follows the above. First, autopoiesis means that the boundaries of the system are determined only by the system, not by the environment. It also means that the system can only continue its own operations if it has the ability to *recursively* - by reapplying the operation - resort to its own operations as *causes*.<sup>49</sup> Secondly, related to this, the concept of *operations* is the starting point for understanding the relationship between the legal, but also the relationship between all other systems and the environment. This also means that these relationships are not described by the concept of relation, in that way enabling the observer to decide what to use to describe the system. This is because the term operation denotes a reality that is independent of the observer. This is made possible by the fact that the term is conditioned by binary codes that give a particular system the property of autopoiesis. In fact, they also mean the association of certain codes with certain social functions of a particular system.<sup>50</sup> Thus, the legal system operates through the binary code of legal/illegal, science through the code of truth/not truth, education through the code of better/worse, and politics through the binary code of government/opposition or power/not power.<sup>51</sup>

From the described features of autopoiesis arises a different interpretation of the unity of each system, including the legal one, manifested as the *unity of operational closeness*. Namely, for Luhmann, the autonomy of the system understood as autopoiesis “is nothing more than the establishment of one’s own unity through one’s own system operations.”<sup>52</sup> However, this does not mean that the features of the autonomy of the system exclude a causal connection between the system and the environment, because another name for this feature is autopoiesis, which means “production” or dependence “on internal and external, available and unavailable causes.” However, the fact that social systems act autonomously or autopoietic on the basis of their own code means, first of all, that a particular (sub)system cannot *directly* communicate with its environment. Because it is operationally closed, it can observe and interpret only by its own operating codes, i.e. programs and recursiveness.<sup>53</sup>

However, Luhmann points out another feature - which is the *cognitive openness* of autopoietic systems, which is, of course, “only possible on the basis of

48 Luhmann, *Pravo društva*, 31-33.

49 Niklas Luhmann, *Znanost društva* (Zagreb: Politička kultura, 2001), 159, 167, 168.

50 Luhmann, *Znanost društva*, 157-158.

51 Niklas Luhmann, *Soziologische Aufklärung 4: Beiträge zur funktionalen Differenzierung der Gesellschaft* (Opladen: Westdeutscher Verlag, 1987), 184-185; Luhmann, *Znanost društva*, 158; Luhmann, *Pravo društva*, 55,70. There are some controversies in interpretations about unambiguously determining the codes of the political system - whether it is government/opposition, government/governed, or power/not power, in: Baxter, “Niklas Luhmann’s Theory,” 180.

52 Luhmann, *Znanost društva*, 167.

53 Jacobson, “Autopoietic Law: The New Science of Niklas Luhmann,” 1648.

closedness.”<sup>54</sup> Namely, although as mentioned above, the system itself decides on the boundary between the system and its environment, at the same time it is also cognitively open to change, but only by using its own operations. For example, when interpreting law, it is often necessary to take into account certain external facts and knowledge. In such situations, the law only takes into account information from the outside that it considers relevant for internal legal reasons. This then shows that law as an autopoietic system is open to innumerable states and events of the environment or other systems only on the basis of its own operational closeness, and that they rightly acquire information value determined *exclusively* by the legal/illegal code.<sup>55</sup> In this sense, the environment is not ontically ‘real’, but is produced internally, as a result of observing and reducing its complexity based on codes.<sup>56</sup>

In relation to the previous question about the criteria of differentiation, accordingly, it can be concluded that social systems such as law, science, education, and politics are differentiated on the basis of their own operations, i.e. the codes of each of these systems. These codes determine their boundaries and thus their autopoietic identity. This is then also a fundamental position that makes it possible to reflect on the uniqueness of a particular system. In the application to law, this means that its boundaries or identity are determined by the codes legal/illegal. Luhmann recognizes this fundamental form of legal communication in the *form of legal validity*. Its *function* is participation in the system of law because only through it are norms codified as valid and non-valid, which means - the form of validity is a prerequisite for finding the codes legal and illegal, and thus also *a symbol of the dynamic stability of the system*.<sup>57</sup>

Related to the considerations in the previous section, in which we established that efficiency criteria need to be applied in the context of the problem of maintaining the stability of expectations which takes place in a network of other equivalent possible causes, as well as in relation to the four efficiency assessment criteria mentioned, it now clearly follows that it is the form of legal validity as a regulatory scheme that constitutes a “specific point of view” in the legal system, i.e. the function of maintaining stable expectations. Therefore, it is also a criterion for determining the equivalence of several possible causes, both intentional and unintentional, which influence and (co-)determine the effects of the application of the law, including the highlighted Art. 19, Para. 3 Pt. 1 of the Act, which should then be able to be determined and covered in a unique aspect in relation to such a specific function.

## **7 AUTOPOIESIS AND STRUCTURAL COUPLING**

Also related to the four emphasized functionalist criteria, it remains to determine even more closely the ways of determining the equivalence of several possible causes, with the operative closure as the relevant context, but also the cognitive openness

54 Luhmann, *Pravo društva*, 69, 76, 101.

55 Luhmann, *Pravo društva*, 76, 78.

56 Keenan, “Niklas Luhmann: What is Autopoiesis?”.

57 Luhmann, *Pravo društva*, 91-96.



of the system. Indeed, determining these causes in the context of interpreting the efficacy criteria of a prominent legal norm requires research of relevant educational, political and scientific causes. In doing so, the feature of cognitive openness also leads to the answer to the question of how functionally differentiated systems - as autopoietic - are interconnected.

Luhmann's thesis that causalities "do not respect the boundaries of the system" has already been mentioned. Therefore, instead of the traditional concept of causality, he explicitly describes his interpretation of the relationship between the system and the surrounding world using the term "structural coupling."<sup>58</sup> With this term, he seeks to show the structural connection between autopoietic systems by pointing to a certain *dependence*, but at the same time showing their mutual *effective reduction*.<sup>59</sup> It, in turn, is effective insofar as it reduces the complexity of external environmental influences through operations or codes immanent to a particular system because it reduces the infinite possibilities of influence and causes on fixed structures, which leads to the stabilization of the expectation of action in a particular system. In this sense, one should also understand the thesis that complexity reduction is a prerequisite for building complexity.<sup>60</sup> Using examples of individual systems relevant to the interpretation of the efficacy of the highlighted norm, which are precisely for this reason repeatedly mentioned in this paper, I will try to clarify their structural connection or openness.

The structural coupling for connecting and reducing the legal and political system refers to *the constitution* and *legislation*. Namely, through the constitution, both the positivisation of law and the democratization of politics functions are realized: "Law gives us leeway for action, which then politically enables the formation of democratic will. But operations, always recursively networked in their own system, remain separate. The political meaning (questionability, controversy) of a law is something completely different from its validity." In this sense, structural coupling not only affects politics but can also deform constitutional law.<sup>61</sup> In addition, the constitution is a special legal source because its validity cannot be determined (only) by a legal solution (e.g. by the hierarchy of legal sources). The answer to this paradox, since it is the highest legal regulation, actually requires a political solution.<sup>62</sup>

The science system and the education system are structurally linked by the *universities' organizational form* and *reputation*. Universities represent an organizational community of research and education, which politically justifies receiving significant state funding. In doing so, they affect scientific publication and the overload of education with science and its alienation from practice.<sup>63</sup> Also, since the university is characterized by unity of research and teaching, which obviously simultaneously benefits both science and education, these two systems are structurally

58 Luhmann, *Pravo društva*, 392.

59 Niklas Luhmann, *Društvo društva II* (Zagreb: Naklada Breza, 2011), 683.

60 Luhmann, *Pravo društva*, 393.

61 Luhmann, *Društvo društva II*, 686-687.

62 Baxter, „Niklas Luhmann's Theory,” 181.

63 Luhmann, *Društvo društva II*, 688.

connected and their complexity is reduced through *reputation*.<sup>64</sup> Namely, functional equivalents are needed to determine which scientific texts are relevant to education while education by itself, however qualified, does not contribute to the reputation of university teachers or researchers.<sup>65</sup> Therefore, education shares the reputation of scientific research, while research owes its reputation mainly to the fact that it is carried out by university scientists.<sup>66</sup>

At this point, it is important to single out one particular feature of the education system, as it is almost directly applicable to the interpretation of the highlighted norm of the Act. Namely, for all systems, but especially for the education system, alongside codes Luhmann also lists programs as two levels of behaviour stabilization control, where programs have the function of assigning values to codes and can only be changed from the perspective of that function. The educational system differs from other functional systems in the way it uses its own programs to distribute the better/worse codes or codes conveyable/non-conveyable.<sup>67</sup> Specifically, the education system is coded through the career, understood as the time structure of the process of social inclusion or selection, so that this code is then primarily interpreted through better or worse career progression. Given that social selection is a process by which the education system affects the environment, but not vice versa, programs that manage the selection, more precisely teaching and learning programs, should be adapted to the requirements of the environment.<sup>68</sup>

In the scientific system, Luhmann recognizes a peculiarity in the specific ways of reading the characteristics of cognitive openness, in relation to how this characteristic determines other social systems. Namely, the identity of science is essentially determined by the openness of scientific principles, which is guided by the truth/not truth code in realizing its function of acquiring new knowledge.<sup>69</sup> Based on the recursiveness of its own operations, science has today “by abstracting its code, achieved that level of certainty that cannot be hurt without questioning itself. Everything it communicates is either the truth or not the truth, regardless of whatever is moving in the system.”<sup>70</sup>

## **8 INSTEAD OF A CONCLUSION: THE ADVANTAGES OF THE FUNCTIONALIST METHOD IN INTERPRETING EFFICACY**

By linking the aforementioned features of the autopoietic nature of the system relevant to the interpretation of the highlighted norm of the Act with the four

64 Luhmann, *Soziologische Aufklärung 4*, 204-205.

65 Luhmann, *Društvo društva II*, 688.

66 Luhmann, *Soziologische Aufklärung 4*, 204-205.

67 Claudio Baraldi, and Giancarlo Corsi, *Niklas Luhmann Education as a Social System* (Cham: Springer, 2017), 65.

68 Luhmann, *Soziologische Aufklärung 4*, 182, 189, 193.

69 Klaus Taschwer, “Science as System vs Science as Spractice: Luhmann’s Sociology of Science and Recent Approaches in Science and Technology Studies (STS) - A Fragmentary Confrontation,” *Social Science Information* 35, no. 2 (1996): 216.

70 Luhmann, *Znanost društva*, 158, 172.

functionalist criteria for assessing its efficacy, it can be concluded that:

1. The method of determining the beneficial and unexpected effects of the application of Art. 19, Para. 3 Pt. 1 of the Act is primarily conditioned by the characteristic of the operational closure of the legal system, i.e. the code legal/illegal, and then the codes of other systems relevant to that norm.
2. Therefore, the effects of this norm, given the functional equivalence of several possible causes, should also be determined from the perspective of the features of cognitive openness, but on the basis of legal operations. At the same time, it is necessary to define the relevant structural (normative) determination, since the unity of law is comprised of the totality of its operations and structures.<sup>71</sup>
3. The specific point of view of interpreting all these possible causes is the form of legal validity, through which their complexity is “independently” reduced.<sup>72</sup> And this, in fact, means that these causes should not be interpreted in such a way that they causally affect the effects of the application of the highlighted norm of the Act, but through structural coupling. In application, this means the following: since the (un)desired effects of the norm are also related to (non)compliance with the provisions of the Constitution, the operations or codes of the political system are also relevant. Also, since its application contributes to the function of acquiring knowledge as well as the function of career development, its efficacy is conditioned, but also reduced, by the codes of the science system and the education system.
4. Relying on the introduced thesis that codes and programs represent two levels of control of stabilization of action, the application of codes of the systems of politics, science and education with a basis in the form of legal validity should reduce external influences, in a way that would contribute to the interpretation and application of this norm in relation to the primary function of stabilizing the normative expectations of the legal system. Here it is important to point out the similarity of this perception with the meaning of the legal principle of protection of legitimate expectations or legal certainty which we encounter in legal theories.<sup>73</sup>

Consequently, it is obvious that the starting point for the interpretation of the efficacy criteria is not some (higher) norm or principle, nor the will of the legislator. The origin is the *form* of legal validity. For this reason, the question of efficacy primarily covers the issues of applying codes that ensure the operational unity of the legal system, but also structural coupling and reduction, which, in turn, are co-determined by whether the norm is constitutional, and whether study programs contribute to career development and research to the acquisition of knowledge and the reputation of scientists and universities.

71 Luhmann, *Pravo društva*, 66, 68.

72 Luhmann, *Pravo društva*, 56.

73 Marko Šikić, “Zaštita pravne sigurnosti stranaka u upravnom postupku,” *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* 35, no. 1 (2014): 159.

In conclusion, several advantages can be singled out for understanding the efficacy of law in the way it is interpreted based on the highlighted understandings of Luhmann's systems theory. The first is a more comprehensive explanation of the increasingly complex social influences on that system, which I consider indispensable for any attempt to systematize material sources of law. Especially because it offers a clear theoretical perspective for interpreting the uniqueness and autonomy of the legal system. This perspective assumes both a normative and a dogmatic method but complements them in certain ways. Namely, Luhmann himself interpreted the hierarchy of sources or types of law as the most influential construction of the unity of law.<sup>74</sup> However, as mentioned in the introduction, he also problematized the reduction of legal science to normative science in all theories of law that originate in the positivity of law. Because this means that their starting point is in normative structures that are increasingly differentiated and changing, and as such they do not provide answers about unity, the sense of autonomy of the legal system, and its functions on the basis of which (normative) expectations would be formulated.<sup>75</sup>

In contrast, and thus we come to another advantage, Luhmann recognizes the unity of the legal system in its operational closeness. Accordingly, the origin of the interpretation (efficacy) of law is the form, not a norm. This then means that the form of legal validity cannot be determined by *normative and external variabilities*, but is measurable by *the code legal/illegal* which - as a form - is *immutable*. That is why this code is a symbol of the dynamic stability of the system that enables exercising the function of law. Reflecting on the previous thesis, an objection could be made that Luhmann problematized the reduction of legal science to a norm, whereby he himself reduced legal science to form. Which stands. Because legal validity is a "form of participation in the unity of law," and through it the consistency of decision-making is ensured and thus the law is feigned as a unity.<sup>76</sup> At the same time, such a formal anchor has a regulatory meaning, so it is not unusual for him to refer to Kant, which was pointed out in this paper. And thus, we are on the track of the third advantage to be singled out.

The first part of the paper explains Kant's interpretation of the general principle of law. This is a purely mental and therefore formal principle of action that, in the cognitive sense, given the limits of human knowledge, can only have a regulatory meaning. By analogy, it is justified to interpret codes as formal principles of action that have such a regulatory and transcendental (which for the most part means normative and cognitively reduced) meaning.<sup>77</sup> Because they are criteria "regardless of all empirical circumstances". For example, referring to Kant, Luhmann explains that "transcendental philosophy responds to the social fact of the differentiation of a special functional system for science... it only needs to be de-anthropologized and transferred from the human subject to the social system of science."<sup>78</sup> Although

74 Luhmann, *Pravo društva*, 20.

75 Luhmann, *Pravo društva*, 10.

76 Luhmann, *Pravo društva*, 93.

77 Luhmann, *Pravo društva*, 93.

78 Luhmann, *Znanost društva*, 173.

the latter statement refers to the system of science, taking into account everything presented so far, including his interpretation of the system as an identity, it is justified to assume an analogous understanding for other systems as well. In another place, he says: "The system does not see itself needing to establish some *cognitive* connection and cognitive closure, but *normatively*. Opening for cognition is always under the autopoietic condition of incorporating an individual case or/and a changed norm into the constantly ongoing decision-making practice of the system."<sup>79</sup> These "autopoietic conditions" are the codes of the legal system, and subsequently the codes of other relevant systems for the interpretation of a particular norm or part or the entirety of the legal system. All of them - as immutable forms, reduce the complexity of external influences in such a way that they are determined by them, and then ranked in relation to the relevant codes, the desired and unexpected effects in regard to the function of a particular system. And thus, they enable systematic, but also more comprehensive interpretation perspectives.

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79 Luhmann, *Pravo društva*, 73.

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Sažetak

## KRITERIJI UČINKOVITOSTI I AUTOPOIETIČNOST SUSTAVA PRAVA, ZNANOSTI, OBRAZOVANJA I POLITIKE

Pravo je sustav hijerarhije normi. Usklađivanje viših i nižih normi te njihova primjena osiguravaju zakonitost i učinkovitost prava. Istovremeno, pravo je promjenjiv sustav. Te su promjene posljedica različitih političkih i drugih društvenih utjecaja. Njihova kompleksnost nerijetko onemogućava jasno određivanje same hijerarhijske strukture, što otvara pitanje dostatnosti pojedinih dominantnih pravnih metoda za obuhvatnije tumačenje učinaka pravnog sustava. U radu se ispituje razlikuje li se i na koji se način razlikuje tumačenje učinkovitosti pravnog sustava putem reduciranog načela pripisivanja, ili je ono nedostatno, u odnosu na redukciju kompleksnosti pravnog sustava putem kodova i operacija koje ga čine autopoietičnim. Najznačajnije su teorijske implikacije pojašnjene na primjeru pravne norme jednog dijela javnog prava (sveučilišnog prava i prava znanstvenih organizacija) određivanjem kriterija procjene pravne i društvene učinkovitosti s obzirom na obilježja autopoietičnosti pripadajućih sustava prava, znanosti, obrazovanja i politike na način kako su ona određena u Luhmannovoj teoriji sustava.

**Ključne riječi:** *funkcionalna ekvivalencija; redukcija kompleksnosti; kodovi; stabilnost; operacije.*

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