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The Evaluation of the Efficiency of Law and Law Norms[*]

The issue of the law efficiency assessment and measure is the important task of legal, sociological, philosophical, and other scholarships which are dealing with law as the object of their interest. This article deals with the comparison of different approaches to the efficiency of law assessment. The authors identify two basic approaches to the efficiency of law assessment – internal and external, on the basis of criteria that will be used in assessment of the efficiency of law. The internal approach and external approach represented by Sociology of Law and Economic Analysis of Law are analysed according to their view on efficiency of law. Special attention is paid to the internal approach and the external approach presented by the Economic Analysis of Law. The criteria of the efficiency of law assessment used in particular approaches are presented and summarized.

La valutazione dell'efficienza del diritto e delle norme di diritto

La questione della valutazione e della misura dell'efficienza del diritto è compito importante delle borse di studio legali, sociologiche, filosofiche e di altro tipo che si occupano del diritto come oggetto del loro interesse. Questo articolo si occupa del confronto tra diversi approcci all'efficienza della valutazione del diritto. Gli autori individuano due approcci fondamentali all'efficienza della valutazione del diritto: interno ed esterno, sulla base di criteri che saranno utilizzati nella valutazione dell'efficienza del diritto. L'approccio interno e l'approccio esterno rappresentati dalla Sociologia del diritto e dall'analisi economica del diritto sono analizzati secondo il loro punto di vista sull'efficienza del diritto. Particolare attenzione è riservata all'approccio interno e all'approccio esterno presentati dall'Analisi Economica del Diritto. Vengono presentati e sintetizzati i criteri di efficienza della valutazione del diritto utilizzati in particolari approcci di carattere scientifico e intrepretativo.

1.*Introduction.* The law could be characterized and perceived as the dynamical system that is subject to changes and evolution. The very changes of law should be consequences of the different factors, whether of natural, social, economic

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nature, or those circumstances with origin in the own system of law. Changes of law are usually done by admitting new legal norms or by changing or replacing the previous legal norms, sets of legal norms, legal institutes, legal acts, branches of law, eventually, by a change or replacement of the whole legal system.[1] The very question is how the law or its changes impact and how efficient they are, whether outside of the system of law (externally) or inside of the system of law (internally). The idea law impact research and its measure is not new in a society. Despite this, the general acceptance of theses on the regulation of the effect of law is one thing, and the effort to formulate the level of the efficiency of such impact in a relatively exact way, with criteria for assessing the effects achieved and research of factors of influence this efficiency, of another matter.[2]

In order to specify and discuss the approaches to the efficiency of law assessment (evaluation), we must first analyse the issue of definition of the efficiency of a legal rules (norms) or law as such.

The efficiency of law and law norms have been also the subject of legal research in Slovak and Czech legal environment for a longer time, especially in the eighties and seventies years of the past century.[3] Although most of these papers have been written with style characteristic and adequate for socialistic legal research production, there is no reason to deny some results and reflections of these papers authors. Especially, reflections in relation to the definition of law efficiency or law norms and analyses of the concept disparities of the term law efficiency and the law force are beneficial for legal research until today. These sources are even more valuable considering the latest legal development of e.g. criminal law (including substantive as well procedural law) not only in Slovak republic[4] but also in the European Union[5], when the attention and purpose of drafted

[1] The example of change or replacement of the whole legal system with another legal system could be presented in case of the replacement of the customary law by the written law, e.g. in field of civil law in Slovak legal environment in 20th century.

[2] GERLOCH, *Teorie práva. 7. Aktualizované vydání.* Plzeň, 2017, p. 292.

[3] See e.g. CEPL, *K pojmu efektivnosti právních norem,* in *Právník*, 1973, CXII., 10, pp. 892 – 900; BALVÍN, *Poznámka k pojmu efektivnost právních norem,* in *Právník*, 1974, CXIII., 3, pp. 232 – 244; HAJN, *Efektivnost práva - pojmový aparát*, in *Právník*, 1978, CXVII., 7, pp. 613 – 629; CUPPER, *Pojmy efektívnosť a účinnosť v práve*, in *Právnik*, 1982, CXXI., 6, pp. 503 - 514, GERLOCH, *Zamyšlení nad možnostmi zjišťování a zvyšování efektivnosti právní regulace*, in *Právník*, 1986, CXXV., 7, pp. 592 – 604; TERYNGEL, *K podmínkam účinnosti trestního práva*, in *Československá Kriminalistika*, 1986, XIX., 4, pp. 310 – 322; KNAPP, *Efektivnost práva a efektivnost národního hospodářství*, in *Právník*, 1988, CXXVII., 4, pp. 293 – 309.

[4] Recent legislative proposition to amend Slovak Criminal Code in order to increase the efectivness of sanctions and (de)penal policy. available on - line https://www.slov-lex.sk/legislativne-procesy/-/SK/dokumenty/LP-2021-744.

[5] Recent legislative proposition of the European Commission issued the Proposal for a Directive on

amendments are more and more often getting justified by the increase of effectiveness of criminal proceeding, sanction and penal policy or particular legal tool etc.

It can be derived based on this development that the legislators and drafters did not consider the effectiveness of the legal norm as prima facie interest while its drafting in the past and it can be asked as well how actually the effectiveness of the legal norm (e.g. criminal norm) can be measured in order to conclude the ineffectiveness of the legal norm and the necessity for its change. It should be understood as a strategy focused on the divisions of the penal power in order to increase its effects such as regularity, efficiency, consistency and firmness and to decrease its economic costs.[6] He concluded, based on Beccaria's axioma[7], that a crime is being committed and motivated by its pros and advantages and if we connected the idea of crime with more exceeding disadvantage, the crime would not have been desirable.[8]

Recently, the issue of the efficiency of law and law norms has begun to be subject of legal research again, both in the theory of law and in the context of Law and Economics[9] and Law and Sociology[10] movement. Some authors arise from results and reflections which were made by authors in the eighties and seventies years of the past century.[11]

2. Definition of the efficiency of law and law norms. If we want to research the efficiency of law or any system, we must necessarily identify the conditions (assumptions) that allow us to even consider that the examination of the efficiency of the system has any sense at all. The first assumption is the existence of at least

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asset recovery and confiscation in order to strengthen the capabilities to identify, freeze and manage all relevant assets;and to improve the cooperation between all actors involved in asset recovery and promote a more strategic approach to asset recovery. Available on - line https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0245&from=EN.

[6] FOUCAULT, *Surveuller et punir. La naissance de la prison, Éditions Gallimard*, 1975, translated by Miroslav Marcelli, 2004, p. 81.

[7] BECCARIA. *Des délits et des peines,* p. 89.

[8] FOUCAULT, *Surveuller et punir. La naissance de la prison, Éditions Gallimard*, 1975, translated by Miroslav Marcelli, 2004, p. 96.

[9] See e.g. VEČERA, *Účel jako hledisko interpretace práva,* in *Časopis pro právní vědu a praxi*, 2013, 31, 3, pp. 317 – 326; BROULIK, *Nedorozumění o ekonomické analýze práva.* in *Právník*, 2015, 154, 5, pp. 361 – 377; ŠMIHULA, *Efektívnosť spoločenských organizácií, právnych systémov a ich kolaps.* in *Právník*, 2014, CLIII., 7, pp. 583 – 599.

[10] See e.g. VEČERA-URBANOVÁ, *Sociologie práva. 2. upravené vydání.* Plzeň, 2011, pp. 215 – 222.

[11] ČECHÁK, *Axiologické aspekty efektivnosti působení práva.* Disertation thesis, Praha, 2010 p. 7 ss.; BAŇOUCH, *Překážky efektivnosti práva.* Dissertation thesis, Praha, 2010, p. 36 ss.

one system[12] and at least one of the systems must be dynamic. Examining the only single static system would not make sense because such a system does not change its state in any way, and the possibility of changing the state is a prerequisite for examining the efficiency. If one of the systems were static and the other was dynamic, by assuming its reciprocal interaction, the influence of the dynamic system on the static system can cause changes in the dynamic system itself or the interaction consequences on the static system will be no change of this system, in other words, the inefficiency of such an action. A further assumption emerges from this is the existence of the possibility of an interaction and action between the elements of the system itself or the systems themselves.

If the system under examination or one of the systems under examination is a system that was created by man or a system that was derived independently of man´s will, but it is controlled by man, we denote it as the social system[13] and we are dealing with evaluating the efficiency of social systems, in which law also belongs. Another assumption for examining (evaluating) the efficiency of the system is the purpose of the action.

Thus, the concept of efficiency implies not only the existence of a relationship between the systems or their elements and their interaction, but also the emergence of a certain result that is induced by such interaction, whereby in the case of the social systems, the element of man will relate both to the interaction itself and to the result of this interaction. In the case of the social systems, the purpose is always given if the other assumptions are given and the purpose itself is a measure of efficiency. In reality, interaction of one system with the other (or the interaction of the individual elements of one system to each other) could not only produce one effect of a certain kind, but could produce more diverse effects at the same time, where all of them have not to be required or expected. Therefore, efficiency is always related to the effects that are also the purpose of the action that causes them. Efficiency, as an attribute of the action, therefore, must be understood as a success in relation to the achievement of the purpose of this action.[14]

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[12] This assumption is inconsistent with the assumption given in the works KNAPP, *Efektivnost práva a efektivnost národního hospodářství*, in *Právník*, 1988, CXXVII., 4, pp. 293 – 309; ČECHÁK, *Axiologické aspekty efektivnosti působení práva*. Disertation thesis, Praha, 2010, p. 7 ss. These authors require the existence of two systems in term of the efficiency of law research. However, such definition implies a research of the efficiency of law or its action only externally and not within the own legal system, what represent the efficiency of law in terms of the interaction between law elements.

[13] ČECHÁK, *Axiologické aspekty efektivnosti působení práva*. Disertation thesis, Praha, 2010, p. 5; KNAPP, *Efektivnost práva a efektivnost národního hospodářství*, in *Právník*, 1988, CXXVII., 4, p. 296.

[14] For details see e.g. ČECHÁK, 2010, ref. 13, pp. 7 – 9; KNAPP, 1988, ref. 13, p. 296.

For the purpose of definition efficiency of law as a whole and the law norms as its part, we need to define what the law is. The law definition is a central point and the problem of legal theory from the earliest times of their existence. There exist number of definitions that are dependent on the author´s subjective perspective on the law and its role in society and other factors, which usually emerge from the author's inclination to a specific law school or though. According to Luby – probably the best known representative of Slovak law science in the 20th century – objective law is the complex of law norms which govern people's behaviour and the existence of which is ensured by the threat of compulsion from external power equipped in a specially manner.[15]
Gerloch[16] under the objective law understood law in a normative sense, that is, the complex of legal norms as the generally obligating rules of behaviour, which were constituted or accepted by the state.
The classical definition of law, in the meaning of legal positivism, is the definition according to Kelsen[17] who considers law as an external coercive arrangement. Therefore, it is a specific social technic, where the desired social state has been achieved or tends to be achieved by linking the contrary human behaviour to this state with coercive act as a consequence of these contrary behaviour, considering such act as the harm to which they want to avoid. The purpose is to coerce people in case of certain (undesirable) behaviour to opposite behaviour by threatening them through harm.
Another definition defines objective law as *"a purposive system existing in a society, whose component laws are made by those having positions of power or influence in the society. The purpose of the laws is to regulate or shape the behaviour of the members of the society, both by prescribing what is permitted or forbidden, and by enabling them, through the establishment of institutions and processes in the law, to carry out functions more effectively."*[18]
Hart[19] considers the law as a system of rules, divided into primary (rules of conduct) and secondary rules (rules addressed to officials to administer primary rules). Secondary rules are further divided into rules of adjudication (to resolve legal disputes), rules of change (allowing laws to be varied), and the rule of recognition (allowing laws to be identified as valid).

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[15] FÁBRY-KASINEC-TURČAN, *Teória práva*. Bratislava, 2017, p. 34.
[16] GERLOCH, *Teorie práva. 7. aktualizované vydání*. Plzeň, 2017, p. 21.
[17] See KELSEN, *Čistá právna náuka*. (translated by P. Holländer), Krásno nad Kysucou, 2018, p. 37 – 71.
[18] ALLOT, *The Effectiveness of Laws*. in *Valparaiso University Law Review*, 1981, 15, 2, p. 233.
[19] HART, *The Concept of Law. 2e edition*. New York, 1994, p. 315.

On the other side, Hayek[20] views law (especially common law in his meaning) as a spontaneous order that arises out of the human action but not from the human design. Therefore, he conceives of law as a purpose-independent set of legal rules bound within a larger social order.
It is probably impossible to make the review of all definitions of law, especially if there are not only definitions given by legal theorists but also definitions made by social scholars, philosophers, etc. Instead of that, based on presented law definitions, we should consider the affect of human and other subjects (entities) behavior in the assumed and approved way of the law as a crucial goal of the law.
The alone term of the efficiency of law is generally not defined in legal theory, but it is quite often used – widely by the authors, who especially deal with and evaluate certain legal institutes – usually in the meaning of the relation between the goals (purposes) of the legal regulation and its concrete (real) effects. Some authors[21] recommend using the term efficiency of law enforcement rather than the term efficiency of law. Others[22] distinguish in terms the effectivity of law and the efficiency of law, whereby the effectivity of law is understood as the degree in which the law is applied to social relationships, either as voluntary compliance by recipients or as a coercive effect by state enforcement. The efficiency of law is then connecting with its evolution, which means the ability to enforce at the society level in the process of the collective evolution selection. However, Knapp[23] considers the terms effectivity of the law and efficiency of the law as synonyms.
We will continue to use the terms efficiency of law, legal regulation, institutes or legal norms in our work because we will also be mentioning the approaches of the efficiency assessment that are not primarily dealt with the impact of the law on society.
The complications with definition of the term efficiency of law, legal norms or legal institutes and law subsystems are also indicating from the fact that there are several approaches to its evaluation and research. Probably the most comprehensive review of different views on the research and evaluation of the efficiency of law or legal norms was presented by Hajn.[24] He is presented, in many others, the classification of the efficiency of law or the legal norms according to

[20] HAYEK, *Law. Legislation and Liberty. A new statment of the liberal principles of justice and polictical economy. Volume 1. Rules and Order*. London, 1998, p. 180.
[21] ČECHÁK, 2010, ref. 13, p. 10.
[22] ŠMIHULA, *Teória štátu a práva*. Bratislava, 2010, 400 pp.; ŠMIHULA, *Evolúcia práva*. Bratislava, 2013, 271 pp.
[23] KNAPP, 1988, ref. 13, pp. 293 – 309.
[24] HAJN, *Efektivnost práva - pojmový aparát*. in *Právník*, 1978, CXVII.,7, pp. 613 – 629.

the object of the research
formal – researching the behaviour *secundum legem*, which is divided on
subjective formal efficiency,
objective formal efficiency,
material – researching social consequences of the impact of the legal norm.
the scope of research
whole efficiency – researching (describing) efficiency of whole legal system,
partial efficiency – researching (describing) the efficiency of particular subsystems of the legal system (law).
the induced effects
stabilizing
innovative
according to time perspective (different stages of the existence of the legal norms);
forecasting efficiency or efficiency de lege ferenda,
realized efficiency or efficiency de lege lata,
Another sample of the efficiency of law classification presented by Hajn[25] is
positive – when the desirable effects of legislative regulation have been achieved,
negative – when legislative regulation has produced undesirable, negative effects,
imaginary – when effects have been achieved as a consequence of other factors than legal norm or regulation impact.
Čechák[26] has been also presented the possible classification of the concept and the assessment of the efficiency of law or the legal norms in his dissertation work, in which instead of the term the efficiency of law, he proposes to use the term The efficiency of law enforcement and distinguishes:
the efficiency of law enforcement in the narrow sense,
the efficiency of law impact in the wider sense.
Under the efficiency of law enforcement in the narrow sense is understood the measure of the legal norms' compliance, in the meaning of the degree, in which the general rule of law has become a verifiable standard of the social behaviour. In the broader sense, according to this author, we can discuss about the efficiency of the legal norm if norm´s compliance leads to the achievement of the social state that was anticipated (intended) as a result of her impact (enforcement). Presented classification is, in essence, similar to

[25] *Ibid.*
[26] ČECHÁK, 2010, ref. 13, pp. 10 – 14.

Hajn´s[27] classification of the efficiency of law (legal norms) according to the object of research on the formal or the material efficiency.
Gerloch[28] and Baňouch[29] have been attempted to classify the efficiency of law according to the approaches used in the research and understanding of the efficiency of law. The last-mentioned author also presented the concept of abstract expression of the efficiency of law in his work. Baňouch[30] distinguishes three following field approaches of efficiency of law research, in addition to the abstract expression of efficiency, namely:
economic - based on the application of economic methods and theory in legal research,
sociological – based on the application of sociological methods in legal research, especially sociology of law,
legally theoretical – related with an assessment of law by the legal theory, especially the assessment related to issues what is required to be understood under the efficiency of law, how to interpret this term and what is the relation of this term to other law institutes, such as the force and validity of legal norms.
Gerloch[31] distinguishes four concepts of efficiency of law, which he classifies as:
the objective – outcome concept – characterized by research of the relationship between the goals (objectives) of a legal regulation and the results (outcomes) achieved by this legal regulation,
the cost – outcome concept – characterized as a ratio between the results achieved by a legal regulation and the costs incurred to achieve these results,
functional concept – characterized as a measure in which the function possibilities of law are performed and under what conditions and circumstances are these function possibilities fulfilled,
methodical concept characterized by complex approach involving relations of goals and outcomes, goals and needs, outcomes, and costs. Gerloch associates this concept with the sociological (sociolegal) concept of the efficiency of law.
According to Večera,[32] the objective – outcome concept of the efficiency of law corresponds to the sociological (socio-legal) concept of the efficiency and

[27] HAJN, 1978, ref. 24.
[28] GERLOCH, *Teorie práva. 7. aktualizované vydání*. Plzeň, 2017, pp. 292 – 293.
[29] BAŇOUCH, *Překážky efektivnosti práva*. Dissertation thesis, Praha, 2010, pp. 3 – 38.
[30] BAŇOUCH, 2010, ref. 29.
[31] GERLOCH, 2017, ref. 28.
[32] VEČERA, *Účel jako hledisko interpretace práva*. in *Časopis pro právní vědu a praxi*, 2013, 31, 3, p. 325.

the cost – outcome concept corresponds to the economic understanding of the efficiency of law and according to him the sociological view of the efficiency of law exceeds the economic one. In addition, Večera - Urbanová[33] classify the efficiency in terms of the range of social (legal) relationships as
the general – relating to the evaluation of all legally regulated relationships,
the special – relating to the assessment of a certain segment of social or legal relationships,
the particular - related to the assessment of concrete legal relationship.
Rubin[34] has presented a similar classification pattern of approaches to efficiency assessment (research) and according to them classifies concepts or more precisely efficiency on:
micro efficiency - based on an examination of the efficiency of particular rules and particular legal doctrines by which attempts to determine if they are efficient,
macro efficiency - examining the overall efficiency of legal system (according to the author especially by comparison the efficiency of the common law system to continental or code (civil) law system).
Here can also be mentioned the classification made by Schrama.[35] According to this author, a distinction has to be drawn between the different types of efficiency of a legal system. Legal systems ultimately regulate and order people's behavior. Whether a specific legal provision successfully contributes to this goal depends, according to Schrama,[36] dependent on two distinct sets of efficiency:
the internal – deals with the consistency and coherency of the legal norms and their definitions. Internal consistency is essential for any legal system. In order to achieve the goals of legislation, legal norms should, for example, not contradict each other and should be clear. The issue of internal efficiency may relate to both the *de lege lata* (ask if a specific legal instrument is consistent and coherent as it stands) and the *de lege feranda* perspective (ask how a specific legal approach could be optimised).
the external – measures efficiency of a legal norm in real life, so it concerns the law in action. The task issue is whether a legal solution achieves its objec-

[33] VEČERA-URBANOVÁ, 2011, ref. 9, p. 218.
[34] RUBIN, *Micro and Macro Legal Efficiency: Supply and Demand.* in *Supreme Court Economic Review*, 2005, 13, pp. 19 – 34.
[35] SCHRAMA, *How to carry out interdisciplinary legal research. Some experiences with an interdisciplinary research method.* in *peer-reviewed section of the Utrecht Law Review*, 2011, 7, 1, pp. 147 – 162, available on-line <*https://doi.org/10.18352/ulr.152*>.
[36] *Ibid.*, p. 148.

tives in its operation in society. External efficiency refers to the *external consistency* of the legal system with the context and culture in which it functions.
"*Both types of efficiency can be evaluated separately from each other. This implies that even when a legal norm is not in all respects internally consistent with other legal norms, it can still be successful in achieving the desired effects in people's behaviour.*"[37]
Based on the work of Kornhauser,[38] we can classify the approaches to efficiency assessment in terms of time on:
the evolutionary (dynamical) – based on theory that the law tends toward efficiency because more efficient rules persist longer than inefficient ones, or more efficient rules replace less efficient ones more frequently than less efficient rules replace more efficient rules. The approach emphasizes the process by which the law moves toward efficiency rather than the efficiency of the prevailing rule,
the non-volutionary (static) – these approaches do not emphasize the process of rule generation and rule change, instead they assert that existing rules are more efficient than some other feasible class of rules.[39]
Evolutionary approaches to the assessment of the efficiency of law norms (mainly in common law) could be classified according to Hirsch[40] on:
differential investment concept of evolutionary efficiency – based on the premise that parties with more to gain from a favourable rule will tend to invest more in the litigation contest than their adversaries with less at stake. Over time, the more efficient rule becomes the more desirable rule and survives because it is supported by greater adversarial resources. Even in a population of one, where no alternative rule is extant, the relentless pressure of periodic, lopsided litigation exerts itself upon an inefficient rule until eventually it gives way.
differential litigation concept of evolutionary efficiency – based on assumptions that inefficient rules prompt more frequent challenges than efficient rules, and courts overrule precedent infrequently and at random. By hypothesis, under these conditions, efficient rules should prevail for longer periods of

[37] *Ibid.*, p. 148.
[38] KORNAHUSER, *A Guide to the Perplexed Claims of Efficiency in the Law*. in *Hofstra Law Review*, 1980, 8, 3, p. 611, available on-line <*http://scholarlycommons.law.hofstra.edu/hlr/vol8/iss3/6*>.
[39] It is necessary to point out that these approaches are mostly connected with common law system and its specifics, primarily with application of law by judges.
[40] HIRSCH, *Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism*. in *Florida State University Law Review*, 2005, 32, 2, pp. 428, 432, available on-line <*http://ir.law.fsu.edu/lr/vol32/iss2/6*>.

time than inefficient ones. Inefficient rules are subject of judicial review in greater numbers, so it is more probable to change or abandon them.
An interesting insight into efficiency has been given by Zywicki.[41] Although it is primarily focused on common law and study of its efficiency, according to Zywicki, it is not necessary to view assessment of the evolutionary concepts of efficiency in common law according to the only demand side represented by litigants who are asking (demanding) for efficiency legal norms, but also to the supply side, which is represented by the historical competition between different kind of court systems and bodies of law, which lead to a situation that judges and courts competed to supply efficient rules to get the business of disputants. This is because judges were paid from court fees, and all courts competed for business and fees. Such a situation created an incentive for each court to provide efficient resolution of disputes in meaning of their unbiased, accurate, and quick adjudication. Courts could also borrow remedies and rules from each other for these purposes, and such courts facilitated the evolution and spread of efficient rules and remedies.
Another possible classification of efficiency of law norms or law assessment approaches is based on number criterion used by evaluation.
single-criterion efficiency assessment,
multi-criterion efficiency assessment.
According to our view, research and assessment approaches of the efficiency of law could be basically summarised into two basic cohorts (such as legal research by itself), namely:
the internal approach also referred to some authors as theoretical-legal, formal, or the efficiency of law in the narrow sense. In the research of the efficiency of law or law norms, the internal approach will appear from a law point of view according to what law should be, what laws content is and therefore what is given. The efficiency will be assessed and researched within the system of law itself and will be sought for solutions of identified inefficiencies in it. For example, it will deal with identifying and solving competition issues of legal norms, the ambiguous interpretation of legal norms, the absence of a certain regulation, and the like, which affect the efficiency of these legal norms and hence the law as a whole. It will deal with questions of the relation of a legal norm to the other legal norms, its compliance with the law, its clarity, and the relation to the basic categories of legal standard as validity and force.

[41] ZYWICKI, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*. in *Northwestern University Law Review*, 2003, 97, 4, pp. 1551 – 1633, available on-line <*http://dx.doi.org/10.2139/ssrn.326740*>.

Mostly, it will be the subject and outcome of doctrinal (internal) legal research.

the external approach – is using methods and approaches other than the legal science or legal theory used to use, and the aim is to find out how the law (legal norm) is effecting on society, in other words, action of law outside - externally. In contrast to the internal approach, the external approach of assessing the efficiency of legal norms and law will focus on law in the meaning how it manifests itself in reality. The most commonly, the economic or the sociological approaches to legal research will be applied.

The both cohorts of approaches could be used in research and assessment of the efficiency of law or legal norms that is for the reason of allowing considering all betweenness in system of the social goals, interests, values and needs as well as in the system of social factors that influence and limit the results. In particular, an internal approach could be a prerequisite and a starting point for an external one.

In general, efficiency can be defined as a degree of exploitation or the ability to cause the consequences, whether desirable or undesirable. The ability of legal norms to produce the consequences and, therefore, their efficiency is represented in legal theory by the term force. However, it is necessary to distinguish the terms efficiency and force from a legal point of view, as the term force or exactly entry into force has a specific meaning in law.[42]

For the purpose of better understanding, we have to write that in the economic view, there is a difference between terms efficiency and effectiveness, which are in lexical meaning synonyms. The term effectiveness generally refers to doing the right things, to the ability to produce benefit (effect, purpose, product), and is most often used in evaluating the ability to produce the desired effect. On the other side, the term efficiency represents productivity and implies the useful effect of the embedded resources and the benefits gained from them. In other words, it is the ratio of inputs and outputs of a particular activity or system. Reversed as: *Efficiency is doing things right, and effectiveness is doing the right things.* Forasmuch as we will also be dealing with economic approach to assessment of efficiency of law, we will use the term efficiency for these reasons.

In general, according to most of the scholars (especially those oriented on external approaches), the efficiency of law (or law norms) could be characterized as a ratio of the expected (monitored, intended) goal (purpose) of legal norm (law) to the result achieved by the implementation (realization, action) of legal norm or

[42] See HAJN, *Efektivnost práva - pojmový aparát.* in *Právník*, 1978, CXVII., 7, pp. 613 – 629.

law. Therefore, we will compare the relationship between the state before and after some change. In a dynamic approach, the evolving and the duration of the efficiency of legal rule according to time will be studied. In other words, the efficiency of a legal rule is most often understood as the successful realization of the lawmaker's intention that should be caused by the realization of the rule. Therefore, a general test of the efficiency of law (or a particular provision of a legal system) is to see how far it realizes its objectives, i.e., it fulfills its purposes.[43] Sometimes, the efficiency of law norms is characterised, in general, as its positive influence on social reality.[44]

Perhaps, for practical reasons, we could agree with opinion that efficiency will always be just a tool for comparing the different situations, not an absolute description of one isolated phenomenon, in principle. It can be a comparison of one social system before and after a certain change, as well as a mutual comparison of the different systems.[45]

The methodological procedure of assessing the efficiency of law (legal norms) was presented and analysed by Gerloch,[46] who mentioned sequentiality and differentiation as the main principles of the research of efficiency of law (in his concept the legal regulation). The first step is to investigate whether the legal norm exists and is affecting the social relations. The second step (level) is research of the relation between the goals of the legal norm to which a certain legal norm tends and the real results of legal norm action. Furthermore, the cost research that was needed to achieve the results in this level as well as the heterogeneous factors that affected the results is carried out. The third level is the verification of the adequacy of the legal regulation goals in relation to real social needs. However, according to this author, it is not possible to very differentiate particular steps of the efficiency research in an absolute way.

Based on a literature analysis, we can claim that there is no exclusive or prevailing notion what could be understood under the efficiency of legal norm or law, and what criteria are necessary to evaluate the efficiency of legal norms, their sets, legal institutes or whole law. In the following parts, the most common approaches to assessment of the efficiency of legal norms and law will be described, both internal denoted by legal - theory approach as well as external approaches presented by the sociological approach and the approach of economic

[43] cfr. ALLOT, *The Effectiveness of Laws.* in *Valparaiso University Law Review*, 1981, 15, 2, p. 233.
[44] HAJN, 1978, ref. 42, p. 613.
[45] BROULIÍK-BARTOŠEK, *Ekonomický přístup k právu. 1. vydanie*, Praha, 2015, p. 216.
[46] GERLOCH, *Zamyšlení nad možnostmi zjišťování a zvyšování efektivnosti právní regulace.* in *Právník*, 1986, CXXV., 7, pp. 592 – 604.

analysis of law.

3. Approaches to the Efficiency of Law Assessment. 3.1 Theoretical-legal approach (internal). Neither recently, the legal theory has omitted the issue of the efficiency of law or legal norms in general, but it should be noted that this issue is not a key object of its own legal theory in our legal background (this means Czech and Slovak conditions).[47] For example, the Slovak textbook of legal theory from the authors Fábry – Kasinec - Turčan[48] is not separately analysed the issue of efficiency of law or legal norms. On the other side, Cupper[49] was engaged in research on the efficiency of law in the period before the revolution, but he mainly analysed the efficiency of law in relation to meaning and relations between the terms of the efficiency of legal norms and entry to force. In the period after the revolution, Prusák[50] has been included the issue of the efficiency of law in his textbook of legal theory. Recently, the efficiency of law is the object of interest of the research carried out by Šmihula,[51] who deals primarily with the issue of the evolution efficiency of legal systems which is realized within the framework of the collective evolution selection mechanism at the society level.
In Czech literature from period after the revolution, the issue of the efficiency of law is analysed in the text book of legal theory from Knapp,[52] Gerloch,[53] Večera et al.,[54] however these authors present this issue on a couple of pages only.[55] It is necessary to mention that the efficiency of law is the object of separate works of several Czech authors in the field of legal theory[56] but on the other side, it should

[47] The research of the efficiency is almost purely concentrated in field of single legal branches and there is concentrated on assessment of real action of concrete legal norm or legal regulation. As example from criminal law see ČENTÉŠ-KRAJČOVIČ, *Consideration of the effectiveness of flat-rate compensation for damage* in *insolvency proceedings*. in *Entrepreneurship and Sustainability Issues*, 2019, 7, 2, pp. 1435 – 1449; ČENTÉŠ-BELEŠ, *Regulation of agent as a tool for combating organized crime*. in *Journal of Security and Sustainability Issues*, 2018, 8, 2, pp. 151 – 160.
[48] cfr. FÁBRY-KASINEC-TURČAN, 2017, ref. 15.
[49] CUPPER, *Pojmy efektívnosť a účinnosť v práve*. in *Právnik*, 1982, CXXI., 6, pp. 503 – 514.
[50] PRUSÁK, *Teória práva*. Bratislava, 1995, 331 pp.
[51] ŠMIHULA, *Teória štátu a práva*. Bratislava, 2010, 400 pp.; ŠMIHULA, *Evolúcia práva*. Bratislava, 2013, 271 pp.; ŠMIHULA, *Efektívnosť spoločenských organizácií, právnych systémov a ich kolaps*. in *Právník*, 2014, CLIII., 7, pp. 583 – 599.
[52] KNAPP, *Teorie práva*. Praha, 1995, 247 pp.
[53] GERLOCH, *Teorie práva. 7. aktualizované vydání*. Plzeň, 2017, 335 pp.
[54] VEČERA, M. et al.: *Teorie práva v příkladech. (3. aktualizované vydání)*, Praha, 2016, 388 pp.
[55] Especially in comparison with textbook of Sociology of law from VEČERA-URBANOVÁ, *Sociologie práva. 2. upravené vydání*. Plzeň, 2011, 313 pp., who are analysed the efficiency of law in more detail and more broadly than earlier mentioned authors on pp. 215 – 222.
[56] See ČECHÁK, *Axiologické aspekty efektivnosti působení práva*. Disertation thesis, Praha, 2010, 183 p., BAŇOUCH, *Překážky efektivnosti práva*. Dissertation thesis, Praha, 2010, 233 p.

be noted that these works do not only interpret the issue of the efficiency of law from the view of legal theory but also from the sociological point of view as well as from the point of view of economic analysis of law.
The internal approach represented by traditional legal scholars by using the legal dogmatic research has been understood as an autonomous system, the official legal system comprising the rules which scholar systematises and interprets. Their central task is to interpret and systematise legal norms or rules and explore the content of valid legislation (law). The goal is to create coherence within the legal system. Therefore, the perception of law is limited to current official legislation.[57] The other object of interest is the issue of the acceptance of legal norms by their recipients.[58]
Apart from the scope of the approach mentioned above, the internal approach is also different from the external approaches by using the special methods, namely the doctrinal analysis method that is typical for legal scholarship. This involves a hermeneutical approach to law and application of linguistic and logical interpretation of legal norms. The objects of the scholarship are already the legal norms involved in legislation and the judicial decisions that apply the legal norms in real cases. These factors are the basis for the evaluation of law according to its acceptance by recipients. This orientation distinguishes this approach from the external one that uses different methodologies and is mostly evaluating the social implications of law.
The legal theory approach to the efficiency of legal norms and law represents an internal approach of the efficiency of law and legal norms research. As such and how it was mentioned above, this approach evaluates the efficiency of legal norms or law in regard to the law in the meaning of how law ought to be and how it should be interpreted. It is interested in the internal consistency and coherence of the legal order (system). The efficiency is evaluated and researched within its own legal system and in this system solutions are sought relating to the identified inefficiencies.
In terms of legal theory approach, it could be, for example, the situations where a legal norm cannot be applied or the existence of another legal norm that establishes other obligations, rights, or the procedure makes its application more difficult. Alternatively, it could be the situations where the legal norm is inapplicable due to the absence of an implementing law regulation or because the legal norm has an ambiguous interpretation. In such cases, such norms are obviously

[57] ERVASTI, *Sociology of Law as a Multidisciplinary Field of Research.* in *Scandinavian Studies in Law*, 2008, 53, pp. 137 – 150.
[58] See PRUSÁK, 1995, ref. 50, p. 210.

considered to be inefficient or without effect. The task is to determine the measure of the efficiency or inefficiency of such norms. Apparently, it is not possible to expect a measure of the efficiency quantification in the case of internal approach; rather, its outcome will be the identification of the inefficient or partially inefficient legal norms or the establishment of the rules for legal norms admission that would eliminate some sources of the inefficiency.

The very question is whether there is a purely internal approach to the efficiency of law or legal norms evaluation. Bauňouch[59] has been attempted to describe the abstract expression of the efficiency of the legal norm, the set of legal norms and law using mathematical expressions in his dissertation thesis. However, it is clear from the conclusions of his work that the method used by this author to describe efficiency evaluation is characteristic for external approaches, in particular, when the relationship between the goals of the legal norms[60] and the real effect achieved by the impact of the legal norm.

Authors dealing with legal theory are usually presented and compared several approaches in relation to the question of the efficiency of law and legal norms, but they have not pursued any purely theoretical-legal definition of the efficiency of legal norms or law, as such.[61] Further presented views on the efficiency of law represent the views or opinions of some representatives of the legal theory.

The efficiency of law, according to Allot,[62] is measured by the degree of compliance. *"In so far as a law is preventive, i.e., designed to discourage behaviour which is disapproved of, one can see if that behaviour is indeed diminished or absent. In so far as a law is curative, i.e., operating ex post facto to rectify some failing or injustice or dispute, we can see how far it serves to achieve these ends. In so far as a law is facilitative, i.e., providing formal recognition, regulation and protection for an institution of the law, such as marriage or contracts, presumably the measure of its efficiency is the extent to which the facilities are in fact taken up by those eligible to do so and the extent to which the institution so regulated is in fact insulated against attack. ... Compliance with a law may be intentional or accidental. In the former case, the subject is aware of the norm, and conforms his behaviour to it. In the latter case, he is unaware, and compliance is hence unintended."*[63]

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[59] BAŇOUCH, *Překážky efektivnosti práva*. Dissertation thesis, Praha, 2010, *passim*.

[60] We will be not analysed the goals of the legal norms and their identification in general because it goes beyond the scope of this work. The goals will only be analysed to the extent necessary in relation to the legal norms which regulate the criminal procedure.

[61] See e.g. GERLOCH, A., 2017, ref. 53; BAŇOUCH, H., 2010, ref. 59.

[62] ALLOT, *The Effectiveness of Laws*. in *Valparaiso University Law Review*, 1981, 15, 2, pp. 229 – 242;

[63] *Ibid.*, pp. 234 – 235.

In Viktor Knapp's concept (in period after revolution), a legal norm is considered effective when this norm is achieving her own purpose and to such dimension in which this purpose is achieved, but according to him, the efficiency of legal norm cannot be measured quantitatively. Quantification is not possible because the law is not the only regulator of social behavior and it is almost impossible to distinguish the ratio of the law and the ratio of the other regulation systems related to the situation of a certain observed society.[64] In his former work,[65] he has been considered as the efficient of legal norms that work as they should, and this work is socially useful. Knapp has distinguished the performance of the legal norm in two ways. Namely, the first is that norms are working as norms should be working, that is, situation where norms are respected (the efficiency of legal norm in the narrower sense). The second is when legal norms work as norms would have to work when norm compliance is achieving the social aspects that were predicted (intended) as the results of their work (the efficiency of a legal rule in a broader or legal and social sense). Knapp[66] has been considered possible, but it is very difficult to measure the efficiency of law.
Gerloch[67] recognizes the above-mentioned four concepts of law efficiency mentioned above in his textbook on legal theory and concludes that it is not possible to present a relatively simple model of the efficiency measure that would be universally applicable. In a work written in the period before revolution Gerloch[68] has been also expressed the doubts about the possibility of catching the efficiency of legal branches and the whole law through methodological means. He also recommends using the term the efficiency of legal regulation instead of the term the efficiency of law, and the legal regulation is considered as efficient if there have been successful in consolidation, development, or changing the socially desirable and necessary elements of given social relationship. According to his opinion, the criteria for assessing the efficiency of the legal norm arise from the extent to which the norm meets a particular social need. However, efficiency, according to Gerloch,[69] can only be ascertained ex post and not at the time of the actual action of the norm and not in the future at all.

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[64] See KNAPP, 1995, ref. 52, pp. 35 – 36.
[65] KNAPP, *Efektivnost práva a efektivnost národního hospodářství*, in *Právník*, 1988, CXXVII., 4, pp. 293 - 309,
[66] *Ibid.*, pp. 305 – 306.
[67] GERLOCH, 2017, ref. 53, p. 293.
[68] GERLOCH, *Zamyšlení nad možnostmi zjišťování a zvyšování efektivnosti právní regulace*. in *Právník*, 1986, CXXV., 7, pp. 592 – 593.
[69] *Ibid.*

Prusák,[70] as representative of the Slovak legal theory, perceives the efficiency of law as one of the material requirements of the validity of the law (along with the morality) on which sociological or natural legal theories lay emphasis. According to him, the inefficiency is represented by obsolete legal norms. The efficiency legal system (law) is a valid legal system into which, in general, the subjects of law are respected the orders and restrictions, utilized the consents and the state authorities are applied sanctions and state coercion in case of law violation or evasion. The efficiency of law and legal norms is dependent on a number of factors especially on law acceptation that is determined both by recipients of legal norms (subjectively) and by the character, the quality, the internal and the external consistency, and the stability of legal system (objectively). The degree of acceptance is also determined by the form of the government and the relations between the government and the public.[71] In his work, Prusák is mostly influenced by the works of H. Kelsen as well as A. Pecznik in his understanding of the efficiency of law. Unlike the works of these authors, he is required from the law (legal system) more or less openness to its environment in order to respond to the social system evolution by his own evolution. At the same time, he is urged for certain balance between the dynamic (evolution) of the law and its stability. In terms of this, we can observe pervasion of sociological approach in his work.

Kelsen[72] defines the efficiency of law (or rule of law) as a facticity that he perceives in that manner that the behaviour of people to which the rule of law is referred to is satisfying it to some extent or that the facticity to which the rule of law (as a whole) is referred is satisfying it in general. However, Kelsen strictly separates the validity of the law (norms) from its efficiency (facticity) by telling that the absence of legal norm efficiency does not mean that the norm is not valid. In addition, according to Kelsen[73] the pure law understands the legal system as a separate normative order of its meaningful content and does not deal with the purpose which the rule of law follows and achieves. It deals with the system of law itself, does not evaluate the relation between system of law and its purpose, and therefore does not study purpose as the possible source of a certain effect. Therefore, Kelsen's view on a legal sociology and the object of its research, when, according to him, the legal theory is focusing on legal norms as the meaning s contents and the sociology of law is focusing on research of

[70] PRUSÁK, *Teória práva*. Bratislava, 1995, pp. 208 – 2014.
[71] *Ibid.*
[72] KELSEN, *Čistá právna náuka*. (translated by P. Holländer), Krásno nad Kysucou, 2018, p. 102 – 105.
[73] *Ibid.*, pp. 64 – 66.

sources and effects of such natural events which have been appearing as legal processes in terms of legal norms. The object of sociology of law research, according to Kelsen, is not the law itself as a normative system, but the effects accompanying it in nature, in other words its external manifestations. It can be concluded that Kelsen, in principle, has been not interested in the issue of the efficiency of law, which he defines as a facticity and for him it is not the task of legal theory as such. This perception has been still persisting as the Czech and Slovak traditional legal theory is traditionally originated from the pure theory of law and theory[74] presented by Kelsen and Weyr[75] . However Weinberger, as a Weyr 's student[76], in his theory of institutionalism dealt with the effectiveness formulated as a social efficiency of the norms determining legal realism in the context of mistaken dichotomy[77] between legal realism and legal idealism (Sollen)[78].

Weinberger's institutionalism developed a unique attempt to merge the analytical jurisprudence and pure theory of law with the sociological approach to the law, however the effectiveness of the norm as such is only one of the determinants in the Weinberger's institutional life of the norm.[79] This stream has not been widely researched and theoretically analysed in the Slovak republic and the problem of effectiveness of the legal norms has been raised by the law enforcing practitioners[80].

Peczenik[81] reads the efficiency as the component of the external validity of the law, the factor that leads to distinguishing the valid law from other normative orders. The efficiency leads into the so-called realistic view of law, and Peczenik considers the efficiency as the social fact, not as a part of legal norms content.

Another influential legal theoretic F. A. Hayek[82] conceives of law as a purpose-independent set of legal rules bound within a larger social order. The law (espe-

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[74] *Ibid.*

[75] WEINBERGER, *Institutionalismus, Eine neue Theorie de Handlung, des Rechts und der Demokratie,* translated by Alexander Brostl, 1995, 2009, Bratislava, 2010, pp. 33- 41.

[76] WEINBERGER, *Alternative Handlungstheorie*, Wien-Koln- Weimar, 1996, p. 11.

[77] WEINBERGER, *Institutionalismus, Eine neue Theorie de Handlung, des Rechts und der Demokratie,* translated by Alexander Brostl, 1995, 2009, Bratislava, 2010, pp. 33- 41 pp. 377-378.

[78] *Ibid.*, p. 376.

[79] *Ibid.*, pp. 328-360.

[80] See the Recitals 11-17 of the of the proposed Directive. Available on July 30th, 2022, at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0245&from=EN. Also see Reasoning. Available on July 30th 2022, at: https://www.slov-lex.sk/legislativne-procesy/-/SK/dokumenty/LP-2021-744.

[81] PECZENIK, *On Law and Reason*. Cham, 2009, p. 231.

[82] HAYEK, *Law. Legislation and Liberty. A new statment of the liberal principles of justice and polictical economy. Volume 1. Rules and Order*. London, 1998, 180 pp.

cially the common law) arises from a spontaneous order research method of which the authors have only been able to develop the economy. Despite the fact that Hayek has not analysed the efficiency of law or legal norms directly, a conclusion about the efficiency of law could be drawn from his opinions. Hayek has been presented with the disbelief that any collective decision maker, including a judge, has the ability to collect and weigh enough information to be able to consciously develop and improve the law according to any measuring stick of social outcome.[83] This means that Hayek is skeptical of the possibility of law creation and modification in the direction of his greater efficiency because he assumes that no one (even the legislator or judge) can predict future results and impact of legal norm or legal regulation.[84] Therefore, the efficiency of law is unpredictable in light of the future, because the result of law impact is open-ended. Hayek has been seen to see the purpose of law in preservation of legitimate expectations and in enabling interpersonal coordination and not in trying to accomplish some end-state goal. The law provides order and predictability in a world characterized by unpredictability and variability. The law serves to preserve legitimate expectations because the purpose of the law is to provide guidance for individual actors to predict the behaviour of other individuals. Legitimate expectations are best preserved by making legal norms internally consistent within a given set of norms. If the decision cannot be logically deduced from recognized norms (rules), it still must be consistent with the existing body of such rules in the sense that it serves the same order of actions as these rules. The legal norms (rules) such as prices comprise some of the external facts that individuals rely upon in coordination their activities in connection with other individuals. Therefore, we should not engage in an external critique of the efficiency of legal norms, but instead engage in a process of internal or "*immanent criticism*" of the extent to which any given legal norm or decision coheres with other related and conceptually surrounding norms. In this way, the focus should be on improving the internal coherence of the legal system rather than on improving the legal system relative to some external benchmark. According to Hayek, interpersonal coordination, not aggregate economic efficiency, should be the overarching goal of the legal system.[85] Although an economist, Hayek is opposed to the efficiency of law understanding presented by main schools of economic analysis of law (represented mostly by the Chicago economic school). Therefore, in Hayek´s ap-

[83] ZYWICKI-SANDERS, *Posner, Hayek, and the Economic Analysis of Law.* in *Iowa Law Review*, 2008, 93, 2, p. 561.
[84] HAYEK, 1998, ref. 82, p. 117.
[85] ZYWICKI- SANDERS, 2008, ref. 83, pp. 577 – 578.

proach, the measure of efficiency of law is to ensure interpersonal coordination through improving the internal coherence of the legal system, enabling the preservation of legitimate expectations of individuals. In terms of the relation of legal norms to time, Hayek is representative of the evolutionary concept of evaluation of the efficiency of legal norms, where the more successful norms create the advantage for those who have adopted them into their legal system over those who do not have such an effective legal system.[86]
Another legal theorist, R. M. Dworkin has been denied, for example, the external approach to the efficiency of law assessment in the form of the economic efficiency represented by wealth maximization as a value goal of law how it was presented in works of some representative of economic analysis of law, especially those represented by R. A. Posner and G. Calabresi.[87]
It is obvious that the legal theory does not have any unified approach to the efficiency of law evaluation, and for that, what should be understood under this term. In addition, some authors are sceptical about the possibility of measuring the efficiency of law or the legal norms as such. The problem of the law efficiency research with regard to an internal (or legal theory) approach also results from the impossibility to objectively measure the internal coherence and the absence of contradictions of elements of the legal system, i.e. to determine a quantifiable measure for their assessment. Perhaps this could only be possible with the help of some substitutional evaluation measures.

3.2 The external approaches. This approach basically involves a number of approaches that represent the study of the efficiency of law in a wider society, social, and political context, using a wide range of methods originating from social and humanities sciences.[88] External approaches use a scientific methodology in research of the law and its efficiency, which is often other than the legal sciences used to use. Sometimes, there is a paradoxical situation that many external approaches to law research (e.g., economic analysis of law) are considered, from the viewpoint of other sciences, as more scientific than the standard internal approach to law research itself, and hence according to the efficiency of law re-

[86] See HAYEK, 1998, ref. 82, p. 99.
[87] DWORKIN, *Is Wealth a Value?* in *The Journal of Legal Studies*, March 1980, 9, 2, pp. 191 – 226, available on-line <*http://liberpedia.net/t/Dworkin-Wealth.pdf*>; DWORKIN, *Why Efficiency? - A Response to Professors Calabresi and Posner*. in *Hofstra Law Review*, 1980, 8, 3, pp. 563 – 590, available on-line <*http://scholarlycommons.law.hofstra.edu/hlr/vol8/iss3/5*>.
[88] There should be done comparison to legal research approaches presented by McCONVIILLE-CHUI, *Introduction and Overview*. in *Research Methods for Law*, a cura di McConville-Chui, Edingurg, 2007, p. 4.

search also.[89] Contrary to the internal approach, the external approach to the efficiency of legal norms and law research will focus on the law in the meaning of how it is affecting, that is, how it manifests itself in reality. In a legal-oriented literature, this approach will be predominantly represented by an economic or sociological approach to the law research. In the following text, we will focus mainly on the presentation of an economic approach that, unlike the sociological one, does not have a tradition in european legal background and is only recently being considered (especially e.g. in Czech Republic[90]). The sociological approach will be mentioned briefly to the necessary extent. Our attention will be more concentrated on approach of Law & Economy because this approach is not used typically in legal research of continental law systems. On the other side, the issue of efficiency is widely analyse in this approach.

3.2.1 The sociological approach to the efficiency of law. The sociological approach to the evaluation of efficiency could be summarized from the work of Black[91] according to whom the legal efficiency[92] captures "*the major thematic concern of contemporary sociology of law. The wide range of work that revolves around the legal effectiveness theme displays a common strategy of problem formulation, namely a comparison of legal reality to a legal ideal of some kind. Typically a gap is shown between law-in-action and law-in-theory. Often the sociologist then goes on to suggest how the reality might be brought closer to the ideal. The Law is regarded as ineffective and in need of reform owing to the disparity between the legal reality and the ideal.*"[93]
The Sociology of law researches into the difference between realizations of law in practice and the intention (goal) of lawmaker presumed by legal theory with which the lawmaker has been coupled the certain legal norms, legal institute or the whole legal regulation admission. This difference is called a *gap* in sociology. According to Sarat[94] the social research on law is closely connected with the

[89] GÁBRIŠ, *Úvod – externá a interná právna veda*. in *NEDOGMATICKÁ PRÁVNA VEDA. OD MARXIZMU PO BEHAVIORÁLNU EKONÓMIU*, a cura di GÁBRIŠ, et al., Praha, 2017, p. 12.
[90] See among others BROULÍK-BARTOŠEK, *Ekonomický přístup k právu. 1. vydanie*, Praha, 2015, 216 pp.; FRYŠTENSKÁ, *K ekonomické analýze práva*. in *Časopis pro právní vědu a praxi*, 2014, 22, 4, pp. 328 – 336; ŠÍMA, *Ekonomie a právo. 1. vydanie*, Praha, 2004, 207 pp.
[91] BLACK,.: *The Boundaries of Legal Sociology*. in *Yale LJ*, 1972, 81, 6, pp. 1086 – 1100.
[92] Black is using the term effectiveness but, from our point of view, the efficiency is more appropriate term that we are used according to arguments, which we mentioned earlier.
[93] BLACK, 1972, ref. 91, p. 1087; similarly TAMANAHA, *Law and Society*. in *A Companion to Philosophy of Law and Legal Theory. 2th edition*, a cura di Patterson, Chichester, 2010, p. 372.
[94] SARAT, *Legal Effectiveness and Social Studies of Law: On the Unfortunate Persisatnce of a Research Tradition*. in *Legal Studies Forum*, 1985, IX., 1, p. 23.

study of law efficiency, that is, to the desire to understand the conditions under which law (legal norms, judicial decisions) effectively guide behaviour or result in anticipated and desired social changes. Research of the efficiency of law begins by identifying the goals of legal policy and then moves to evaluation of its success or failure by comparing the goals followed with the results produced. Whereas, as is almost inevitably the case, the results do not match the goals, attention is paid to the factors that might explain the 'gap' between the law in the books and the law in action.

Similarly, Večera[95] is presented that the socio-legal view understands under the efficiency of law the measure of the legal system's ability to achieve the goals that are coupled with the legal norm, and thus represents the relationship between the results of the realization of the legal norm achieved *de facto* and the goal pursued by the legal norm. The achieved result of the realization of the legal norm (application) can be verified on the basis of empirical material through the analysis of legal phenomena, namely

the real behaviour of the law recipients and the activities of the state authorities;
the extent of conflicts and disputes that occur in the field of the given legal regulation;
The undesirable subsidiary effects and
the deficiencies of law regulation.[96]

The goal of the efficiency of legal norms (law) analysis is to identify and create conditions to maximize the social effect of the legal norms application along with minimalization of negative and unintended effects. From a broader point of view, it is necessary to analyse the circumstances affecting the efficiency of law in relation to the efficiency of legal regulation. According to Večera – Urbanová,[97] these circumstances are the nature of regulated social relations, the quality of legal norms, the stability of the rule of law, the frequency of law violations, the quality of law enforcement, the prestige of law and legislator, the relationship between law (legal norm) and extrajudicial social norms and other social regulations of the socio-cultural system and the level of legal awareness.

On the other hand, some sociological authors are sceptic, or more precisely, they refuse the investigation of the efficiency of law because of the overwhelming gap between law and society[98] or because of the impossibility to examine the ef-

[95] VEČERA, *Účel jako hledisko interpretace práva*. in *Časopis pro právní vědu a praxi*, 2013, 31, 3, p. 325.
[96] See VEČERA-URBANOVÁ, *Sociologie práva. 2. upravené vydání*. Plzeň, 2011, p. 215 – 216.
[97] *Ibid.*
[98] TAMANAHA, *A General Jurisprudence of Law and Society*. Oxford, 2001, p. 142 – 148.

fects of legal norms (rules), because by doing so the sociology will be involved in unscientific speculations.[99] According to Black :[100] "*...value judgments cannot be discovered in the empirical world and, for that reason, are without cognitive meaning in science. For this last reason, science knows nothing and can know nothing about the effectiveness of law. Science is incapable of an evaluation of the reality it confronts. To measure the effectiveness of law or anything else for that matter, we must import standards of value that are foreign to science. "*

3.2.2 Efficiency of law according to Law & Economics (the Economic Analysis of Law). Probably the most theoretically revised and most discussed and from the point of view of the other approaches, the most critically rated approach to the research of the efficiency of law is approach of Law & Economics, also referred to as an economical approach to law or economic analysis of law. The statements mentioned above relate to the fact that according to the main thesis of law & economics, efficiency is a fundamental value of law.[101]
The economic analysis of law, according to its methodological background, can be classified as the external approach in terms of efficiency research. However, based on the claim about efficiency as the basic (fundamental) value of law and appear from the work of some authors (especially R. A. Posner), we can also find elements of the internal approach in it, for example, when according to R. A. Posner's views, judges should decide disputes with respect to achieving efficiency, which is coupled with wealth maximization as a goal, in his opinion.[102] In his earlier work, he expressed the idea that even the state (its organizations) should take decisions (also legal acts) to ensure the maximization of social wealth, that decisions should be efficient and such assumed efficiency is a value.[103] In principle, R. A. Posner treats efficiency (in the sense of wealth maximization) as an idea that should be already applied in law-making as well as in interpretation and application of law. By this approach, he does not only evaluate the law and the legal norms in terms of how they are but also in terms of how they ought to be, which is characteristic of the internal approach. For these opin-

[99] BLACK, *The Epistemology of Pure Sociology*. in *Law & Social Inquiry*, 1995, 20, 3, pp. 862 – 864.
[100] BLACK, 1972, ref. 91, p. 1092.
[101] FAMULSKI, *Economic Efficiency in Economic Analysis of Law*. in *Finanse i Prawo Finansowe*, 2017, 3 (15), p. 28, available on-line <*http://dx.doi.org/10.18778/2391-6478.3.15.03*>.
[102] See POSNER, A., R., *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*. in *Hofstra Law Review*, 1980, 8, 3, pp. 487 – 507, available on-line <*http://scholarlycommons.law.hofstra.edu/hlr/vol8/iss3/2*>.
[103] See POSNER, A., R., *Utilitarianism, Economics, and Legal Theory*. in *The Journal of Legal Studies*, 1979, 8, 1, pp. 103 – 140, available on-line <*http://www.socio-legal.sjtu.edu.cn/Uploads/Papers/2011/OCS110520114837026.pdf*>.

ions and claims, R. A. Posner has also been criticized.[104]
The economic analysis of law is not a single unitary practice, but a set of projects that share a methodological approach. It is a specific way to deal with legal questions that emphasizes a particular methodology.[105] The economic analysis of law uses the tools of microeconomic theory to study legal rules and institutions.[106]
There are several fundamental concepts that underlie the economic analysis of law. The application of these concepts to particular branches of law constitutes the essence of Law & Economics approach. The most important of these are rational choice theory and its relation, utility maximization theory, the Coase theorem and the issue of transaction costs, bargaining theory and the efficiency of law.[107] There could be a distinction between the 'old' and the 'new' economic analysis of law according to the fields of their interests. The 'old' focuses primarily on legal regulations of activities in traditional economic markets. '*The (modern) economic approach to law extends the traditional economic models, designed to analyse traditional markets, and applies them to non-economic markets, such as the market of crimes, the market of conflict resolution, the market of innovation, etc. It also emphasizes the role of law and legal institutions in economic and non-economic markets. In performing these tasks the economic analysis of law has also shifted traditional economic analysis to put more weight on normative analysis, pointing to the desirable legal rules and institutions to achieve certain goals (such as efficiency)...*"[108]
Although some authors report the Economic analysis of law as a Law School, it must be emphasized that this will stand up, in particular, to the common law legal system, from which the economic analysis of law has emerged. This interpretation is also evidenced by the fact that these authors sourced exclusively from the authors of the common law system, while formulating the content of the law school. When examining the economic analysis of the law, one has to

[104] See DWORKIN, *Is Wealth a Value?* in *The Journal of Legal Studies*, March 1980, 9, 2, pp. 191 – 226, available on-line <*http://liberpedia.net/t/Dworkin-Wealth.pdf*>; DWORKIN, *Why Efficiency? - A Response to Professors Calabresi and Posner*. in *Hofstra Law Review*, 1980, 8, 3, pp. 563 – 590, available on-line <*http://scholarlycommons.law.hofstra.edu/hlr/vol8/iss3/5*>.
[105] See SALZBERGER, *The Economic Analysis of Law - The Dominant Methodology for Legal Research?!*. University of Haifa Faculty of Law Legal Studies Research Paper No. 1044382, 2007, 40 pp., available on-line <*https://ssrn.com/abstract=1044382*> or <*http://dx.doi.org/10.2139/ssrn.1044382*>.
[106] KORNHAUSER, The Economic Analysis of Law. in *The Stanford Encyclopedia of Philosophy (Fall 2017 Edition)*. [on-line], a cura di Zalta, 2017, available on-line <*https://plato.stanford.edu/archives/fall2017/entries/legal-econanalysis/*>.
[107] BEŁDOWSKI-METELSKA-SZANIAWSKA, *Law & Economics – geneza i charakterystyka ekonomicznej analizy prawa*. in *Bank i Kredyt*, 2017, 38, 10, p. 54, available on-line <*http://bankikredyt.nbp.pl/home.aspx?f=/content/2007/2007_10/beldowski.html*>.
[108] SALZBERGER, 2007, ref. 105, pp. 14 – 15.

consider the question of why the economic analysis of the law is being developed in the United States of America.
In continental legal culture, in our opinion, it is more appropriate to speak rather about the approach to the law than to consider it as a separate law school. However, this note does not diminish in any way the importance and need for an economic analysis of law in continental legal culture. It only tries to point out the economic analysis as an approach has developed quite rapidly in the United States in the 1960s, but has not been reflected in the continental understanding to a law that is more than conservative. This is confirmed by V. Knapp as a famous legal scholar, who does not even include the economic approach to the law in his textbook of Legal Theory.[109]
Finding the cause of this development in continental Europe is a challenging and complex task, and there is no clear answer to why it is so. It is probably a collection of several social, historical, and geopolitical factors that are specific to the continental Europe. Kuhn goes further in the formulation when he states that continental lawyers have forgotten the economic analysis of the law in the 19th century.[110]
One of the determinants may be the development of the legal culture on the continent after World War II. This period is characterized by the formulation of catalogues of generations of fundamental human rights and freedoms at the United Nations. It is quite natural that, in the Europe marked by war and the genocide, the natural right of every living human being, regardless of race, ethnicity, political, or nationality, is emphasized; within this legal course there is relatively limited space for the efficiency of law.
Another important factor that influenced the continental understanding of law and its place in society was the decolonization of traditional European naval powers and the associated right of colonized nations to self-determination. This fact also strengthens the perception of the continent's right as a natural normative in relation to nations. The perception of "efficiency and minimization of transaction costs" may have a rather negative context.
The third fact, which we believe could have affected the development of economic analysis of law in Europe, is related to the geopolitical distribution of forces in Europe. As Kühn has said, economic analysis of law makes sense as one of the many methodological approaches that operate in pluralistic terms,

[109] See KNAPP, 1995, ref. 52.
[110] KÜHN, *Economic Analyses of Law and the Post - Communist Legal Cultures: Alice´s Adventures in the Wonderland of Textual Positivism?* in *Prague Conference on Political Economy*, 2006, available on-line: <*http://gfx.libinst.cz/pcpe06/saturday/17/law_economics_2/zdenek_kuhn.mp3*>.

competing with other approaches that they complement.[111] Within the socialist economy and class society in central and eastern Europe that was managed by central planning, there was little place for the development of legal theories based on efficiency and market behaviour.

For the sake of completeness and correctness, it should be mentioned that as early as 1888 the Austrian Victor Mataja issued a study; the subject was apart from other economic analyses of delinquent law and contractual liability, without any overlap with the American School of Economic Analysis.[112]

In every community of people, it is necessary to answer three basic economic questions - what to produce, how to produce, and for who to produce. It is necessary to distinguish facts from justice questions of fact from questions of justice[113] while answering these questions. These differences lead to different approaches to the facts considered.

The economic analysis of law employs the microeconomic theory and its methodology in evaluation or research of legal norms or law based on the assumption that the legal norms and institutes are incentives to which people respond by their behaviour. People, in particular, the individuals, are considered as rational actors in relation to their behaviour, and their decisions, made under uncertainty, follow their interests (self-interests) and preferences influenced by incentives.

Before we consider the concept of efficiency of law closer, it is necessary to define the concept of rationality. A possible confusion of these terms could lead to a not quite correct understanding of the substance of the presented issue. The economic analysis of law - and economics as such - works with the rationality of human behaviour, assuming it in its theories.[114] In terms of understanding rationality, two approaches can be distinguished. The common approach is to derive rationality from reason (late *ratio*). The first conception puts the mind and passion into opposition (Seneca), respectively. The second conception added the notion of self-interest (the French moralists of the seventeenth century). However, the concept of rational choice is important for economic analysis.[115]

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[111] KÜHN, *Diskriminace a ekonomická analýza práva: pohled právnika na možné podněty pro český právní diskurs*, in *Neviditelný pes* [on-line], published 26.11.2006, available on-line <*http://neviditelnypes.lidovky.cz/pravo-diskriminace-a-ekonomicka-analyza-prava-foh-/p_spolecnost.aspx?c=A061123_132154_p_spolecnost_wag;*>.

[112] LITSCHKA-GRECHENING, *Law by human intent or evolution? Some remarks on the Austrian school of economics' role in the development of law and economics.* in *European Journal of Law and Economics*, 2010, 29, 1, p. 57, available on-line <*https://doi.org/10.1007/s10657-009-9110-1*>.

[113] SAMUELSON-NORDHAUS, *Economics: An Introductory Analysis. 16th Revised edition edition*, NewYork, 1998, p. 8.

[114] Compare with POSNER, A., R.: *Economic analysis of law. 6th edition.* New York, 2003, p. 17.

[115] See ELSTER, J.: *Reason and rationality.* Translated by Steven Rendal. Princeton (USA): Princeton

As has been said, one of the basic assumptions of economic analysis is the assumption of rational human behaviour with its rational choice. Posner[116] understands rationality as the ability and inclination of an individual to use thinking to achieve success in life. Rationality, however, does not limit the consciousness or unconsciousness of the individual. Mises[117] gives a clear and acceptable approach to the concept of human rationality. Above all, it rejects the term "rational action" when it is called pleonastic. He states that human action is necessarily rational. He further argues that rationally includes actions leading not only to the satisfaction of material and material needs but also to the fulfilment of "ideal" or "higher" interests. When he compared medical practices 100 years ago and today, he admits a difference in the efficiency of negotiations, but not in his rationality.
Thus, human action may be inappropriate (ineffective) to achieve the goal pursued, but it will always be the result of the use of reason and thus rationally. Mises[118] recalls that human reason is not infallible and that people very often make mistakes when choosing resources. By doing so, we get to two basic rules. People make serious mistakes in deciding important things, but in the most important situations they are able to suppress their emotions.
In this regard, Epstein[119] argues - how can we look at individuals who suffer from cognitive and emotional constraints as rational? He offers a certain answer in investing in emotional and intellectual control that allows one to do things better than before. For the sake of completeness of interpretation, it should be reiterated that irrational behaviour is not the opposite of action, but that the response to the initiative is not reactive response. Mises[120] refers to a response to stimuli from bodily organs and instincts that are not subject to the person's will. He adds that for the same stimulus, a person can respond both reactively and acting under certain conditions.
In view of the above, it can, in principle, be summarized that rationality is a subjective category. Thus, it is not possible to compare the behaviour of two individuals in this way because both are rational in nature. The problem of rationality lies in the fact that it is often confused with the correctness and with the efficiency of the individual's actions. The relationship between rationality and effi-

university press, 2009, 96 pp.
[116] POSNER, A., R.: *Economic analysis of law. 6th edition*. New York: ASPEN Publishers, 2003, 747 pp.
[117] MISES, *Human action: A treatise on economics*. Auburn, 1998, 912 pp.
[118] *Ibid.*
[119] EPSTEIN, *Behavioral Economics: Human Errors and Market Correction*. in *Univ. Chicago LR*, 2006, 73, 1, p. 111.
[120] MISES, 1998, ref. 117.

ciency can be illustrated, for example, if one eats poison; his own body naturally tries to neutralize the poison (the so-called reactive response). However, one can actively intervene by taking the antidote (action). However, if he or she has a choice of several antidotes, he or she will have to decide. The decision is undoubtedly dependent on objective factors (time, number of antidotes, etc.) and subjective factors (eg knowledge of poisons and their antibodies).[121]
The efficiency of an individual's decision in this case will depend only on subjective factors. If this poisoned individual takes an ineffective product, his decision cannot be considered effective (right). Still, he will be rational, because he had to act, he had to decide reasonably.
The general assumption of information asymmetry, as illustrated above, is a substantial complement to the basic assumptions of economic analysis of law. Information asymmetry of information indicates a situation where the operators in a given transaction have (despite the same status in the legal sense of the word) an unequal position for differentiation by informing them about the transaction. Economic theory advises Information asymmetry of information between market failures. In other words, it is precisely the awareness of different subjects that makes the market perfect. From the model makes reality.
For the purpose of economic analysis of law, we consider the asymmetry of information as a general assumption rather than a market failure. At the same time, we call this "general" because it is to be applied across all other assumptions of economic theory. The causes of asymmetry of information are essentially of two kinds: subject's abilities and possibilities. The right can also be raised in two ways: indifferent or protective.
In particular, the choice of the legislator should be based on the interests of society and the frequency of the hypothesis in the real world. The asymmetry of information is not just about the realities of the world. Distinguishing factual incentives and legal norms is important in creating effective law as such. To sum up, for economic analysis of the law, it is necessary to assume not only a different level of awareness of the subject about the outside world as such, but to focus this assumption in particular on awareness of the law itself, i.e. focus on the availability of the source of law and its comprehensibility. Therefore, the causes of information asymmetry should be shifted from the level of abilities[122] to the level of freedom,[123] only when the de facto barriers to access to the law are re-

[121] *Ibid.*
[122] Meaning the ability of a human being to inform itself about the law in relation to its mental capabilities and unclearness of the legal text as such.
[123] A human being had the right to inform itself about the law but it has not use it.

moved, it can be meaningful to enforce the principle of *ignorantia legis neminem excusat*.

Probably, the best-known proponent of economic analysis of law - Richard A. Posner - made two claims that have usually defined the debate around the philosophical foundations of economic analysis of law. The first claim, *the positive claim,* asserts that common law legal rules are, in fact, efficient. The second claim, *the normative claim,* asserts that common law legal rules should be efficient.[124] These claims, when first made by Richard A. Posner, were related to common law. However, since then economic analysis of law has been applied to continental law. Therefore, the efficiency thesis can be perceived as a philosophical claim about law in general. An important difference between continental and common law systems ought to be considered in this context.

The economic analysis of law does not yield assessment judgments about applicable law, it leaves to the normative stream and does not interfere with the law itself, and it considers it as given. Mentioned above the economic analysis of law in continental Europe, one of the few applicable examples is the normative approach. This is represented on the continent by lawmakers, who very often adopt generally binding legal rules in order to make legislation more effective.[125] Doing so, the legislator is expected to predict the possible behaviour of a group of individuals (determined by species) and to generalize this prediction to the legal norm hypothesis in this model. The legislator must also define the common features of the anticipated behaviours and its incentives.

Kornahauser[126] suggests for the continental systems another version of the efficiency thesis that could be concretely formulated as - interpretations of statutes ought to induce efficient realization of those statutes. Furthermore, each Posner claim is, according to Kornhauser,[127] ambiguous. For these reasons, Kornhauser[128] presents even eight philosophical claims about law from the economic analysis of law: "*Claim (I), the explanatory claim, asserts that common law legal rules induce efficient behaviour. Claim (II), the content claim, asserts that the criterion of efficiency determines the content of the law. A positivist might un-*

[124] KORNHAUSER, *The Economic Analysis of Law.* in *The Stanford Encyclopedia of Philosophy (Fall 2017 Edition).* [on-line], a cura di Zalta , 2017, available on-line <*https://plato.stanford.edu/archives/fall2017/entries/legal-econanalysis/*>.

[125] Contrary to the common law system, where the judge law prevails.

[126] KORNHAUSER, *The Economic Analysis of Law.* in *The Stanford Encyclopedia of Philosophy (Fall 2017 Edition).* [on-line], a cura di Zalta, 2017, available on-line <*https://plato.stanford.edu/archives/fall2017/entries/legal-econanalysis/*>.

[127] *Ibid.*

[128] *Ibid.*

derstand this claim as a claim about the content of the rule of recognition. Claim (III), the doctrinal claim states that the criterion of efficiency rationalizes prevailing legal rules and institutions. This doctrinal claim is weaker than the content claim; the latter asserts either that efficiency causes the content of the law or that it justifies it. The doctrinal claim, by contrast, asserts only that efficiency makes sense of the legal materials. ... Claim (IV), the behavioural claim, asserts that economic rationality explains how individuals respond to legal rules and institutions. Claim (V), the causal claim, asserts that economically rational action by both public officials and private citizens, explains the content of legal rules and the structure of legal institutions. .... Claim (VI), the adjudicatory claim asserts that judges ought, in their decision of cases, to promote efficiency. ... Claim (VII), the evaluative claim, asserts that the primary criterion against which to assess legal rules and institutions is efficiency. Claim (VIII), the design claim, asserts that policymakers should design legal rules and institutions to promote efficiency."

Presentation of these basic philosophical claims about law, from the economic analysis point of view, have shown that the issue of efficiency of legal norms and law is important part of research in the field of approach of the economic analysis of law. Many notions about nature, interpretation, criteria, and assessment (evaluation) of efficiency according to the economic analysis of law were presented in the literature.

R. A. Posner - the author of the basic claims – interpreted efficiency as 'wealth maximization' but then interpreted wealth maximization as 'willingness to pay'.[129] In this sense, legal rules (norms) and law are efficiency if they maximize the wealth considered with respect to willingness to pay. This interpretive stance yielded an argument that judges in (common law) cases (or legislators or judges in coded continental law) ought to choose the legal rule (norm) that maximized the ratio of benefits to costs, as measured by the sum of individual willingness to pay.

Russell,[130] also influenced by the economic analysis of law, understands efficiency as a key legal norm when he argues "*one might argue from any moral perspective that law should be efficient in achieving whatever it does achieve; but the*

[129] Concrete according to R. A. Posner „*Efficiency means exploiting economic resources in such a way that value – human satisfaction as mesuared by aggregate wilingness to pay for goods and services – is maximized.*" Posner, R., A. Economic Analysis of Law 10 (2nd edition) cited according to MARGOLIS, *Two Definitions of Efficiency in Law and Economics*. in *The Journal of Legal Studies*, 1987, 16, 2, p. 471.

[130] RUSSELL, *Magic on the Frontier: The Norm of Efficiency*. in *University of Pennsylvania Law Review*, 1996, 144, 5, p. 1992, available on-line <*https://scholarship.law.upenn.edu/penn_law_review/vol144/iss5/11*>.

tradition from Hobbes to Coase and law and economics makes efficiency the goal that law is to achieve. The efficiency is not merely of the instrument of law, but rather of its effects on the society it serves. In this vision, efficiency is itself a welfarist notion: Greater efficiency implies greater welfare." In the law, according to Russel,[131] the norm of efficiency is generally definable as mutual advantage and where mutual advantage applies in the law, that is, where all relevant parties can be best served by a rule that benefits them all in the long run of the many interactions in which they may be involved, it produces a powerful norm of efficiency within the legal system.

Another scholar, E. A. Posner[132] – appears from Law and Economics approach – explains the legal norm as a rule that distinguishes desirable and undesirable behaviour and gives a third party (state actor) the authority to punish a subject who engages in the undesirable behaviour. Thus, a norm constrains attempts by people to satisfy their preferences. According to this author, the starting point for analysing efficiency is to say that a rule or group of rules is efficient if it can plausibly be understood to maximize social benefits. There are generally, according to him, three alternatives to the efficiency evaluation rules. "*First, a rule is efficient if it has actually been chosen by rational actors under conditions in which they presumptively behave in a manner that maximizes social wealth (the choice test). Second, a rule is efficient if it would survive the competition of other rules in an evolutionary process that can be shown to produce efficient equilibria (the evolutionary test). Third, a rule is efficient if it seems consistent with a model of economically efficient behaviour (the behavioural test).*"[133] People demand efficient norms, but this demand does not automatically bring about a supply. To provide standards, members of a group must, at least, have an incentive to recognize rules and punish violators of those rules; To provide efficient standards, one must add the additional condition that some mechanism ensures that inefficient standards fall away and that efficient standards are produced and sustained.[134] Posner[135] argues that norms are probably inefficient when they enable people to cooperate for the purpose of producing a collective good, but they do not enable them to exploit the full cooperative surplus that would exist if cooperation were costless. This is an implication of the Coase theorem. There-

[131] *Ibid.*, pp. 2019 – 2020.
[132] POSNER, A., E., *Law, Economics, and Inefficient Norms.* in *University of Pennsylvania Law Review*, 1996, 144, 5, pp. 1697 – 1744, available on-line <*https://scholarship.law.upenn.edu/penn_law_review/vol144/iss5/2*>.
[133] *Ibid.*, p. 1701.
[134] POSNER, A., E., 1996, ref. 132.
[135] *Ibid.*, pp. 1724 – 1725.

fore, the state can, in theory, produce laws that enable people to obtain a larger share of the potential cooperative surplus than they would be able to achieve through private creation and enforcement of norms. The reason is that, given the demand for a particular collective good, the state has access to institutional mechanisms that aggregate information, achieve coordination, and minimize opportunism more effectively than do private mechanisms.

Posner[136] concludes that a welfare-maximizing state should try to change inefficient norms or at least provide mechanisms that blunt their impact. But two problems emerge. The problem is how the state can discover whether a norm is inefficient when the group's members, not the state, usually have the best information about the efficiency of a norm. Even if the state will be able to discover whether a norm is inefficient, it will be difficult to determine the proper legal response. Posner identified the three approaches to solve the problem of inefficient norms by state. "*First, under the "norm-violation" approach, the state overrides inefficient norms by enacting laws that provide incentives for people to violate those norms. Second, under the "norm-transformation" approach, the state transforms inefficient norms by giving groups incentives to modify those norms or by influencing individuals' attitudes toward behaviour the state seeks to promote or suppress. Third, under the "norm-circumvention" approach, the state facilitates attempts by parties to bargain around inefficient norms.*"[137]

The last-mentioned opinion is the application of welfare-maximizing criteria and the basic theorem of economic analysis of law based on the work of R. Coase. According to Posner[138] "*the Coase theorem implies that inefficient laws do not necessarily lead to inefficient outcomes. If transaction costs are low, parties bargain around the laws to a deal that allocates entitlements efficiently. By the same token, inefficient norms do not necessarily lead to inefficient outcomes because, if transaction costs are low, parties strike a deal that allocates entitlements efficiently. If it is expensive for the state either to override or transform inefficient norms, the Coase theorem suggests that the welfare-maximizing state should remain passive when parties can cheaply bargain around the inefficient norms. But when high transaction costs prevent such bargaining, and when the cost of undermining or transforming inefficient norms exceeds the cost to the state of reducing those transaction costs, the state should reduce the transaction costs.*"[139]

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[136] POSNER, A., E., 1996, ref. 132.
[137] *Ibid.*, p. 1726.
[138] *Ibid.*, p. 1733.
[139] For more about Coase theorem see COASE, *The Problem of Social Cost.* in *The Journal of Law and Economics*, 1960, 3, pp. 1 – 44.

Other proponents of welfare criterion (well-being) as a criterion of the efficiency of law are, e.g., Kaplow – Shavell.[140]

When assessing the efficiency of legal regulation or admission of new legislation or amendment of existing law as well as law application, the economic analysis of law uses also the evaluation of efficiency on the basis of Pareto criteria or Kaldor-Hicks criteria of efficiency, eventually the marginal analysis concept.[141] Efficiency evaluated in the Pareto sense avoids the problem of comparing preferences. A given state of things is improved in the Pareto sense, when the change in social reality (eg, in law) brings the benefit to at least one person (increases the utility of that person) and does not worsen the state of any other person (does not decrease the utility of any other person). In the Pareto sense, a situation is effective when no further such improvements can be made. When applied to economic analysis of law, understanding efficiency in the Pareto sense would call for such legal regulations that make improvements oriented towards Pareto efficiency.[142] The concept of economic efficiency based on improving the Pareto efficiency concept is efficiency in the Kaldor-Hicks sense. The difference is that the improvement of the person's state could worsen the state of the other person, but the benefit of the first person is greater than the loss of the other person, so that there is a possibility of the loss being compensated and the first person still having higher utility. In the Kaldor-Hicks sense, a situation is effective when no further such improvements can be made. Compensation does not actually have to be made, but it must be possible in principle. In principle, this concept is akin to cost-benefit analysis. In cost-benefit analysis, a project is undertaken when its benefits exceed its costs, which implies that the gainers could compensate the losers. Cost-benefit analysis attempts to take into account both the private and social costs and benefits of the action contemplated.[143]

The cost-benefit analysis is based on a marginal analysis. "*Marginal analysis is a method of inquiry into relations between costs and benefits of an activity. An activity may require costs to be incurred, and result in benefits. As long as benefits exceed costs, the activity is efficient. However, at some point the costs may*

[140] KAPLOW-SHAVELL, *Economic Analysis of Law*. Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series. Paper 251, 1999, 101 pp., available on-line <*http://lsr.nellco.org/harvard_olin/251*>; KAPLOW-SHAVELL, *Fairness versus Welfare*. in *Harvard LR*, 2001, 114, 4, pp. 961 – 1388.

[141] See FAMULSKI, 2017, ref. 101.

[142] Ibid., p. 32.

[143] See e.g. FAMULSKI, 2017, ref. 101; COOTER-ULEN, *Law and Economics, 6th edition*. Berkeley Law Books. 2; Addison-Wesley, 2016, 555 p., available on-line <*https://scholarship.law.berkeley.edu/books/2*>.

start to exceed the benefits. At this point, an activity can no longer be called cost-efficient. For instance, crime prevention is costly, but it results in certain benefits for society. However, a complete elimination of any criminal activity would be so expensive that its costs would exceed its expected benefits. The purpose of marginal analysis is to locate a point at which the use of resources is as high as possible, but still results in benefits."[144]

The microeconomic theory also distinguishes so-called productive efficiency and allocative efficiency. In the sense of economic analysis of law, the purpose of law could be the admission of such legal regulation according to property rights, which can create incentives to maximize a nation's wealth in two different ways. First, property rights are the legal basis of voluntary exchange, which achieves *allocative efficiency* by moving goods from people who value them less to people who value them more. Second, property rights are part of the law that makes owners internalize the social costs and benefits of alternative uses of the goods they own. Owners achieve *productive efficiency* by balancing the social costs and benefits of what they do with what they own.[145]

Our review of proponents of economic analysis of law notions in relation to the efficiency of law has shown that the scope of law and economic approach to assess the efficiency is broad and is almost impossible to present the basic concept, at least.

4. Conclusion. Based on the review presented above, we can summarize that the majority of authors discussing the efficiency of legal norms or law evaluate the efficiency on the basis of a static, non-volutionary approach. They assess the efficiency as the relationship between the anticipated effect of a legal norm or law and the real effect of the legal norm or law at a given time. The kind of measure (characteristic) used to determine the assessment effect depends, in particular, on an approach that has been used to investigate the law or legal norms.

In the case of the internal approach that law considers as an autonomous system governed by its own rules, the efficiency assessment will be based on a criteria that seek to characterize the level of internal consistency and the coherence of the own law system of which the legal norms are basic constituent components.

From the sociological approach point of view, the law is perceived as one of the social systems that interacts with other social systems, and therefore the assessment criteria will be characterized the external law impact and its interaction

[144] FAMULSKI, 2017, ref. 101, p. 33.

[145] COOTER-ULEN, *Law and Economics, 6th edition.* Berkeley Law Books. 2; Addison-Wesley, 2016, p. 108, available on-line <*https://scholarship.law.berkeley.edu/books/2*>.

with other social systems, especially in terms of assessing what is by law pursued and what it is really achieved and how it is achieved (law in action in comparison to law in books).

The economic analysis of law has been understood to include law and legal norms as incentives that influence the behaviour of people (individuals) in their decision on how to meet their needs or preferences. Therefore, the efficiency of law (legal norms) will be assessed in the light of how they stimulate the behaviour and decision making of individuals in relation to the effective use of scarce resources, not only for individuals but for society as a whole. Efficiency itself is often understood as the fundamental category of law and law enforcement creation. The evaluation criteria will be mostly economic values and their comparisons.

The research of efficiency of law based on the evolutionary approach understands efficiency as a choice (i.e. a dynamic phenomenon), that leans on the process of eliminating inefficient legal norms (or law) and maintaining the efficient ones. In the selection process, there play a role both litigants – participants of the dispute or the seeking parties (in economic meaning, this represents the demand side) and the decision-making authorities which are adjudicating the disputes or the requirements (in economic sense, it is supply side of the evolutionary efficiency model concept). The criteria for assessing the efficiency or inefficiency of the legal norm will be, in this case, based on the approach chosen for the investigation of the efficiency. Mostly it will be criteria used in sociological approach or in economic analysis of law approach.

Most of the analysed Slovak and Czech authors, who deal with the issue of the efficiency of law, argue that the efficiency of law could not be quantitatively measured.[146] These opinions could be accepted partially only. The efficiency of law could not be quantitatively measured in general; nevertheless, this does not exclude the possibility to quantitatively define the efficiency of some legal norms or sets of legal norms (legal institutes). The mostly it regards the legal norms that are able to induce the quantitively measured effects (e.g. the norms of national budget, the legal regulation of the allowable length of certain procedure, negative or forbidding statutes, etc.). Also, the legal norms which effect or efficiency is not possible to directly measure quantitatively

[146] See e.g. KNAPP, V., 1995, ref. 52, pp. 35 – 36, 117, 165; KNAPP, V., 1988, ref. 65, pp. 299 – 300; GERLOCH, A.: K možnostem stabilizace právního řádu ČR a zvýšení efektivnosti legislativního procesu. in Vostrá, L., Čermákova, J. (Eds.). *Otázky tvorby práva v České republice, Polské republice a Slovenské republice*. Sborník příspěvků z mezinárodního vědeckého sympozia „Aktuální otázky tvorby práva v České republice, Polské republice a Slovenské republice", Plzeň, 2005, p. 23.

could be assessed with the aid of the substitutional values which characterize the effect that have the direct relation with the action of surveyed legal norms and so they can serve for the assessment of the efficiency of these legal norms. So, there certainly exist a number of legal norms that could be presented and examined quantitatively. According to our opinion, one of the branches of law where the quantitatively measurement of efficiency of its legal norms is possible is also the criminal law and especially the legal norms regulated the criminal procedure.

It cannot be concluded that there exists any universal approach to the efficiency of law assessment or there are any concrete, generally accepted, criteria of the efficiency related to law norms, institutes or law globally. According to our opinion, the assessment of the efficiency of law norms, institutes, or law as such should appear from the combination of criteria or approaches. The combination of an internal approach with one of the external approaches to the efficiency of law assessment seems to be appropriate in this way because it could enable one to obtain a more complex and objective view on the efficiency of law or its particular institutes. On the other side, the combination of approaches conceals the danger consisting in that question whether the only scholar is competent, per se, to utilise and combine the methods of two different field of science adequately, thus whether he or she would be able to apply the doctrinal legal research methods along the methods of e.g. sociology, economic, or statistic. This is the issue and the very question of the interdisciplinary scholarship and its limits, which unfortunately exceed the scope of this paper.