ABSTRACT. Modern society is characterized by complexity and change. Weber’s theory of these phenomena explained them with changes in basic religious concepts. Conceptual changes are again under investigation here, but the theory is somewhat different. In this paper, it is assumed that law is a system that follows the Ashby’s systems theoretical law of requisite variety. Society can respond to growth of complexity in its environment by either adaptation or selective indifference. The example of the evolution of legal persons in German law is used here to show how law has developed contingent concepts as a cognitive buffer between itself and the demanding environment of modern society. The legal system can balance adaptation and selective indifference by constructing and observing its basic concepts as contingent. The construction of autonomy is shown to be a continuous process where law establishes an increased level of autonomy.

KEY WORDS: adaptation, autopoiesis, change, complexity, contingency, evolution, indifference, systems theory

INTRODUCTION

The modern legal system, as we are used to see it today, evolved during the 19th century in many countries simultaneously. Constitutions made law the instrument of political forces and a legal method aimed at change and updating law for a changing societal environment replaced natural law in legal systematization (systematische Auslegung). In defense of natural law positive law was held to be arbitrary, but this criticism has to do with a misunderstanding of law’s capacity for change and evolution. In German legal thinking during the early 19th century Savigny had revolutionized legal theory and legal method by introducing the historical school to jurisprudence. He had shown that law had to correspond to changes in the surrounding society in order not to become a relic. His doctrinal developments have since then been the backbone in continental and Scandinavian legal systems. Gerber and Puchta criticized the historicism of legal method

2 The programmatic declaration is F.C. v. Savigny, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft (Hildesheim, 1967) [Reprinted from the edition Heidelberg, 1840].
by pointing at the need for advanced systematization in doctrinal works. Their criticism resulted in the Begriffsjurisprudenz movement. The movement aimed at further improvement of law’s ability to change. The idea was that a legal system bound to its historical sources could produce nothing but the heritage from the past. Legal thinking in this respect seemed underdeveloped compared to Roman law.\(^3\) If law should be contributing to the building of structures in a rapidly developing society, law had to become less conservative and more flexible. The remedy in Germany was a strengthening of legal theory and a vivid legal conceptualization.

A Begriffsjurisprudenz of today would appear as an extreme methodological position, but the battleground won by legal scientists during the 19th century is preserved to some extent in contemporary methodology. As modern society develops faster and its development is accelerating a new emphasis on law as a system in evolution and adaptation is reasonable.\(^4\) Law has reacted to this challenge by becoming a differentiated system in a differentiated society.\(^5\) Differentiation, in turn, may induce additional complexity and change. Subsystems of society become environments for each other and their relative independence contributes to their respective production of complex societal structures. Thus, complexity produces complexity and change produces change in accelerating spirals spinning society towards the future. One might wonder then what mechanisms society and its subsystems have to regulate the growth of complexity and the acceleration of change.

The question now is whether the legal system has to react with a corresponding growth of internal complexity.\(^6\) The purpose of this article is to show how modern legal systems have learned the ability to meet change with stability and complexity with simplicity by treating the difference between adaptation and selective indifference to external changes as func-

\(^3\) C.F. v. Gerber, Gesammelte juristische Abhandlungen (Jena, 1872).

\(^4\) There is a new and rising interest in theories in which law and society are treated with the same theoretical tools and as the same type of empirical phenomena. The works of N. Luhmann on law as an autopoietic system is the most successful attempt so far.

\(^5\) The question of differentiation of society has been dealt with by classics such as E. Dürkheim, The Division of Labour in Society (New York: Clarendon Press, 1997). From a systems theoretical perspective, this point has been developed by N. Luhmann, The Differentiation of Society (New York: Columbia U.P., 1982). The legal reactions on modernity can be seen in N. Luhmann, Rechtsoziologie (Opladen: Westdeutscher Verlag, 1987); N. Luhmann, Das Recht der Gesellschaft (Frankfurt am Main: Suhrkamp, 1996); N. Luhmann, Die Gesellschaft der Gesellschaft (Frankfurt am Main: Suhrkamp, 1997); N. Luhmann, Ausdifferenzierung des Rechts (Frankfurt am Main: Suhrkamp, 1999).

\(^6\) Systems should have requisite variety only, W.R. Ashby, An Introduction to Cybernetics (London: Chapman & Hall, 1956), 206.