Asylum and Complexity: The Vulnerable Identity of Law as a Complex System[1]

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Introduction

Fineman argues that the essence of human vulnerability is the possibility of that change will expose vulnerability (Fineman 2008-09, p.12). Refugee movement is precipitated by persecution of one kind or another. By definition, those subject to persecution are vulnerable because they are subject to changes to their lives outside of their control. Those forced to flee their homes because of changes either in their immediate locality, or their country, represent the quintessence of vulnerability, a situation where the possibility of irresistible, negative change has become a reality. In the United Kingdom the response to this realisation of vulnerability has been mixed. The humanitarian and administrative justice challenges posed by refugee applications are the subject of intense political debate. In the national media, the credibility of asylum claimants has historically been viewed with some scepticism (Matthews and Brown 2012, pp.802-804; Philo, Briant and Donald 2013, pp.29-32). The political system, ever sensitive to popular political opinions shaped, in part at least, by the concerns of the mass media, have echoed these concerns (Khosravinik 2010, pp.10-11; Pearce *et al* 2009, pp.152-153). In consequence, the structures for understanding the concept of asylum, and each instance of asylum claimed, have come under pressure. What, though, are the consequences for the legal processes which have developed alongside these political considerations? Are simple solutions to the eminently complex challenges posed by intersecting vulnerabilities and conflicting national sentiments possible? For example, should the legal system accept political efforts to minimise, exclude, or invisibilise the refugee as a solution to this complexity and the tensions which their presence produces? Or will this reduce the meaning of law in this context, and the legitimacy which attaches to the use of social power through law, into pure politics?

In this chapter I argue that the perception of legitimacy is essential to the legal system's identity, and that identity is vital to the continuation of law's ability to claim to be *the* site for the resolution of legal disputes. To demonstrate this, I consider the extent to which complexity theory requires law to incorporate, rather than exclude, the concept of vulnerability. I argue that if vulnerability is not incorporated this poses risks to law's perceived legitimacy, and thus, law's identity. To show this, I reflect on how the concept of vulnerability is not only relevant to individual humans, or to humanity in general, but – drawing on DeLanda's concept of the social assemblage – social systems and processes

too (DeLanda 2006). To better elucidate how complexity theory deals with vulnerability, in places I contrast the complexity approach to that of autopoiesis. However, since my aim is to gain an appreciation of the complexity approach to vulnerability as a vehicle for appreciating the importance to questions of legitimacy/identity of recognising vulnerability, these considerations should be treated as incidental (for a more detailed discussion of autopoiesis and vulnerability see Philippopoulos-Mihalopoulos and Webb 2015). The primary reason for including any discussion of autopoiesis is as a foil to consider the consequences of either including or excluding a concept of human vulnerability from systemic thinking, and the implications of this for the systemic vulnerability of the legal system viewed from a complexity perspective.

This discussion is framed in the context of law's approach to applications for asylum in the United Kingdom, though there are other contexts in which it would also be applicable; most obviously as regards mental health adjudication, or concerns around human rights more generally. Much of the chapter is dedicated to conceptually unpacking the concepts of identity, difference, and vulnerability vis-à-vis complexity theory, and legal complexity specifically. the closing part of the chapter brings together this discussion to apply the conclusions drawn to two recent judgments – *R (on the application of Detention Action)* and *R (on the application of Public Law Project)*.[2] I argue that the interpretive action taken by the courts these cases can be understood through the language of complexity theory, and specifically how it interprets identity, difference and vulnerability, as an attempt to minimise exclusion and maximise integration in order to maintain law's legitimacy, and thus its identity. This provides one explanation for why the courts responded to the cases in the way that they did. That is, the need to pay attention to the systemic risk posed to law's legitimacy, and in consequence, law's identity, by invisibilising, or otherwise excluding the vulnerable subject from view.

It is evident that by examining the question of vulnerability in administrative justice processes – such as those of asylum – through complexity theory we can encourage the visibilisation of the vulnerable subject in those processes, and in the discourses which surround them. This enables two things. First, it causes social systems, and particularly the legal aspects of such systems, to confront the question of their own conceptual and material vulnerability if exclusion – of which vulnerability is a cause and a consequence – is not responded to. Secondly, and for the individual human experience perhaps the more important point, it demonstrates the reasons why social exclusion is detrimental to both individuals and society (see Neves 2001; Philippopoulos-Mihalopoulos and Webb 2015).

Constructing Systems and the Meaning of Difference

With my fellow editors I have given a more detailed view of the mechanics and consequences of complexity theory for law and legal systems elsewhere in this volume. Whereas that earlier discussion was intended as a general overview of our broad view of complexity theory and law, in what follows

I reflect on how complexity theory views the concept of system, and consider how the ideas of emergence and boundaries lead to a productive understanding of difference. It will be shown that the ability to establish difference is essential to developing an identity (difference, albeit on alternative conceptual foundations, is also key to establishing identity in autopoiesis, see Luhmann 1988, for example p.16; 1992a, p.172; Teubner 1993, p.9).

The only caveat to add to my observations on complexity theory and, to the extent that I deal with it here, autopoiesis, is that, in accordance with the modesty required of all observations based in complexity theory thinking (Cilliers 2005, p.256; 2010, p.8; Cilliers *et al* 2007, p.130; Preiser and Cilliers 2010, p.269), I do not think that a complexity theory approach provides a complete explanation for the behaviour of, *inter alia*, the law. Rather, it provides a shift in analytical perspective which permits access to previously unconsidered reflections on law and legal behaviour. Likewise, although I am sceptical of the analytical utility of autopoiesis when considering what can loosely be called meta-, and perhaps also meso-level social processes, as a framework for conceptualising individual, observer-defined social processes autopoiesis it has value. With these points in mind, it is now possible to begin a brief exploration of complexity theory thinking.

Systems

There is a risk when discussing complexity theory to tie oneself in knots over definitions of what is meant by "the system", and thus never get to the substance of applying the theory. Autopoiesis superficially avoids this problem by defining systems according to certain social functions, this approach is called functional differentiation (see Luhmann 1992b). Though, if one steps outside of the reality constructed by autopoiesis this is no solution to the definitional problem since it assumes that delineating the boundaries between the system and the rest of society – the system's environment – is to be achieved by assigning certain social functions the character of systems. There is no objective reason for doing so, nor is there any objective way for any of these given systems to know what is legal, other than to assert that it is so. This can be seen in King's reasoning:

> 'Any act utterance that codes social acts according to this binary code of lawful/unlawful may be regarded as part of the legal system, no matter where it was made and no matter who made it. The legal system in this sense is not confined, therefore, to the activities of formal legal institutions' (King 1993, pp.223-224).

On this basis, the question of what is legal is both relevant – since it entails the ascription of social meaning – and irrelevant – since the ascription of that meaning to law is presented as a foregone conclusion; the law always knows the meaning it ascribed to a social event was legal.

In the spirit of modesty which is at the heart of complexity theory, the concept of system is more malleable in complexity theory thinking. As will become clear from my discussion below, the idea that there are objectively identifiable systems is deeply problematic. This means, for example, that the "legal system" in complexity theory thinking is not intended to indicate a discrete system *per se*. Instead, it should be taken as shorthand for a co-construction of different conclusions about social events and processes arising from the interactions between social assemblages that have, for present explanatory purposes, been defined as legal. Similarly, those defining the legal system in this way, observers, are themselves as much a social assemblage as the subject of observation. The social assemblage is, again, intended only as shorthand for the collection of concepts, processes, objects and so on which go together to constitute a particular meaning in a given contingent time and place (for deeper elaboration see Philippopoulos-Mihalopoulos 2015 pp.47-49); it is a description of something which can be used *now* to productively engage in society (what is later referred to as a 'description strategy', see Cilliers 2001, p.141). Thus, to speak of complex systems is simply to ascribe descriptive parameters to a specified assemblage under observation for the purposes of analysis where it is thought that the assemblage displays the characteristics of a complex system (see Murray, Webb and Wheatley, in this volume). This does not mean that 'anything goes' (Cilliers 1995; 1998, p.viii) in complexity theory thinking, since any model which is patently nonsensical will not be engaged with. Rather, it entails a degree of pragmatism (Ansell and Geyer, 2017). A recognition that, since society is impossibly complex, and contingent, such that it defies modelling (Cilliers 2000, p.30; 2008, p.46), to say anything useful at all we must set limits to our discussion, and seek out interaction with others to test and refine our limited descriptions.

Emergence and Boundaries

Having outlined what I mean when I talk about complex systems, I can now briefly examine the key concepts within a complexity approach which are relevant to understanding how law's identity is dependent upon a recognition of the concept of vulnerability. I begin with emergence, and then consider the complexity understanding of boundaries.

Emergence is the essential first principle of complexity theory thinking, since without emergent behaviour, complex systems cannot exist. Emergence consists of two precepts. First, that *interaction between* the parts of the system – rather than the mere combination of the parts themselves – is what drives the creation of meaning within and between systems, and thus the prospect of future interactions (Cilliers 2010, pp.6-7). Secondly, and following from this, the meaning, definition, scope, or whatever other form of boundary one wishes to establish, of a social system, is dependent on that interaction (Richardson 2004, p.77; Waldrop 1994, pp.63-66), and the context in which that interaction occurs (Cilliers 2005, p.263). That is, any boundary – a definition, an identity – is a product of emergent interaction between the assemblage under observation, and the observer, and is

dependent on the context in which that interaction occurs (see DeLanda 2006, pp.10-11). Here one can see how the idea of the assemblage as shorthand for the way in which an observer's decision to establish specific analytical parameters has implications for the explanation they produce. This is because the construction of meaning, between observer and observed, is not one way, it is interactive, reflexive, and 'determined relationally' (Cilliers, 2010, p.6; de Villiers and Cilliers, 2010, p.29). To understand this process in a little more detail it is necessary to consider the understanding of boundary in complexity theory thinking.

Boundary is a multi-faceted concept (Webb 2013). In complexity theory thinking there are at least four understandings of boundary. The first, and most simplistic understanding of boundary is as a dividing line. This construction demonstrates the importance of being able to differentiate oneself, and one's descriptions from the environment to establish meaning and identity. The second understanding of boundary is intended to caution us against the overzealous use of the first. It entails the recognition that there is *no* boundary. That is, the recognition that society is irreducibly complex, and thus cannot be completely modelled demonstrates that any boundary claim is merely temporary, a transient description to enable future interaction. On this view, any model is only ever a partial representation of the system, since any model purporting to describe society would have to be at least as complex as that which it sought to describe (Cilliers 2007, p.161; Phillipopoulos-Mihalopoulos 2010, p.13). Nonetheless, having regard to the conclusions drawn about first, the importance of being able to distinguish, and secondly, the impossibility of objectively distinguishing, reveals the third meaning of boundary; as description strategy (Cilliers 2001, p.141). While accepting that creating complete models is an impossibility, it must also be acknowledged that to participate in meaningful interaction, an approximate understanding of society – *a* model – is needed.

The boundary as description strategy is a device which can be used to engage in productive interaction with society and reveal the fourth conception of boundary in complexity theory thinking; the boundary as interface. The description strategies of social assemblages, contingent descriptions of aspects of society, are employed to engage with other individuals to make sense of the world (Richardson *et al* 2001a, p.89). Their subsequent form is a relational product of that interaction (see again Cilliers, 2010, p.6; de Villiers and Cilliers, 2010, p.29; see also: Cilliers 1998, p.4, 2001, p.141; Richardson and Cilliers 2001, p.13; Webb 2005, p.237; Philippopoulos-Mihalopoulos 2015, p.41). By this process the interaction of models – description strategies – produces and reproduces emergence. It is the co-construction of the boundary that demonstrates why it is insufficient for law to merely assert its claim to be *the* legitimate site of legal decision-making. For complexity theory, law's identity is not constructed solely by law or legal processes, it is the product of emergent interaction, of the encounter between the self-understandings of assemblages of processes and concepts that claim the legitimacy

afforded by identifying themselves as legal, and those assemblages compelled to engage with them; other social processes, people.

Difference and Exclusion

The ability to interact and reflexively reformulate accounts of boundaries brings us back to our first understanding of boundary as a device which establishes difference. One description strategy is not the same as another, it is contingent (Cilliers 2005, p.259), it is the product of nonlinearity (Cilliers 2010, pp.3-4), and it is valuable to other description strategies because of its unique perspective – because of its difference, and capacity to be distinguished. The relative difference between description strategies is productively exploited to allow the observer to constantly revise their own imperfect understanding of the world. To flourish, therefore, complexity theory thinking reasons that individual description strategies require the existence of difference, established through the constant emergent renewal of the boundary. Productive interaction, that is interaction which allows complex social assemblages to continually engage with the world, requires boundaries, and boundaries require productive interaction. In a very simplistic sense, we might observe that the adversarial legal system, with its deliberately divergent constructions of evidence (claimant/defendant), is a microcosm of the wider interactive relational perpetual reconstruction of boundaries, because the interaction produces a new understanding; a verdict, a precedent, a judgment.

Although the concept of emergent interaction, and thus productive, constitutive, reflexive boundaries is superficially a positive one, it is predicated on assemblages possessing the capacity to access the interactive possibilities which the concept of emergence permits, and thus to establish difference, boundaries and identity. This recognition allows us to invert the concept of emergence to consider the systemic and human consequences of exclusion. If it is central to emergence that one is capable of interacting, of fuelling the relational experience which produces and reproduces meaning in society, then there must be correspondingly negative environmental, systemic and/or human consequences where this is not possible. Put simply, emergence is reliant on inclusion, and exclusion creates systemic, human and, by extension, environmental vulnerability (see further Neves 2001, pp.261, 263).

Neves (2001) observed that certain groups in society were much better placed than others to take advantage of the interactive possibilities presented by social systems; for example, because of their political, financial, or educational position. This meant that they could manipulate relationships, and their engagement with society, in ways simply not available to other individuals. Indicating that this arrangement was imbalanced, Neves referred to these individuals as being over-integrated, and those at the opposite end of the spectrum as being under-integrated (pp.261-263). By 'integration' both Neves and I mean the ability or inability to engage with systemic processes, rather than any pejorative meaning one might ascribe to "social integration". Integration in this context means that you have the funds to access a lawyer, to pay an accountant, to donate to a political party. Over-integration would

mean that, relative to your fellow citizens, you are more likely to secure a personally desirable outcome using the access to social interactions that your integration enables, than if you were under-integrated. Clearly there are degrees of over- and under-integration (Neves 2001, p.262), and it is certainly relative. However, the point for complexity theory analysis is that access to the relational, interactive possibilities which allow one to establish difference from the environment, an identity, depends heavily upon the degree of integration one can achieve. This is, in turn, partly dictated by the form which the structures for engaging in society take, and the expectations they place upon assemblages. Thus, if the law system is in principle premised upon formal legal equality, but nonetheless denies access to justice by placing financial barriers (e.g. court fees), or linguistic hurdles (e.g. jargon, the requirement to fill out complex forms), then this can have implications for the ability of individuals to access in practice the interactive – and, in the case of law, purportedly authoritative – processes available in theory.

In the light of this it can be seen that the principal risk to the individual of under-integration is exclusion from social interaction in a way that profoundly disadvantages you as an individual via the denial of access to the interactive possibilities which allow you to establish difference/identity (see also Philippopoulos-Mihalopoulos and Webb 2015). Without the possibility of interaction, it is not possible to establish difference, and difference is an essential precursor to both further interaction and the maintenance of identity in complexity theory thinking. This may cause you to look for other solutions to the challenges you face than those offered by established frameworks. At the same time, those who occupy over-integrated, or at least sufficiently-integrated frameworks are unable or unwilling to interact with you, because they are no longer able to differentiate you from the environment. Thus, exclusion is a profoundly dehumanising process. It has the effect of denying identity, and thus access to those processes which might prevent the risks inherent in human vulnerability from being realised. This account of boundaries and their relationship to emergence has implications that are integral to understanding the challenge of vulnerability to establishing identity.

Vulnerable Identities

By reflecting on how a traditional autopoietic understanding of vulnerability approaches change, where the realisation of uninitiated change is the essence of vulnerability, we can establish a useful counterpoint against which to understand the value of the model proposed by complexity theory. In so doing, it becomes possible to demonstrate the systemic risks of attempting to deny vulnerable individuals, such as refugees, the opportunity for unimpeded engagement with the legal system.

As already mentioned, the risk of change is at the heart of vulnerability. Autopoietic analysis stipulates that systems conceptualise change in their environment through their own internalised description of the environment via the processes of re-entry (Luhmann 1992b, p.411; Philippopoulos-Mihalopoulos

2006, p.226). Thus, change is always a product of how the system has, systemically, that is self-referentially, understood its history and place in the environment, and its difference from that environment. As Philippopoulos-Mihalopoulos has elaborated, at the core of functionally differentiated systems lies that which distinguishes them from the environment, 'identity is difference' (Philippopoulos-Mihalopoulos 2010, p.37; see also 2006, p.226). In this way the system is to be defined *by itself* by what it is not, and accordingly it produces understandings of difference to maintain its identity:

> 'It produces the difference between the illusion of identification and the abyss of loss of identity. It also produces the difference between the system's continuous attempt to describe itself and a continuous interruption by its environmental exteriority which establishes a permanent *dys*function in the system … The system inclines to its form with its environment, clings onto it with a longing whose object is precisely the maintenance of this difference…' (Philippopoulos-Mihalopoulos 2010, p.44)

One thus gets a sense of autopoietic identity as an inherently 'fragile, volatile, constructed thing' (Philippopoulos-Mihalopoulos and Webb 2015, p.457; see also Bankowski, 1996, p.71). The fear that recognising fundamental shifts which the system is not able to conceptualise (or the possibility of such), presents autopoietic systems with the prospect that they will be unable to maintain their difference from the environment; dedifferentiation being tantamount to system death.

While the concept of identity in complexity theory is also built on the concept of difference (Cilliers, 2010, pp.5-7, pp.13-14), the discussion of boundaries and emergence above indicates that the notion of vulnerability, and the value of change are to be embraced as creative forces. Whereas in autopoiesis the constant maintenance of difference via the perpetuation of self-referential functional differentiation is essential to the continuation of identity, in complexity theory identity is the product of interaction with other assemblages in the environment. Although the concept of identity is given a broad meaning, encompassing the 'myriad of influences that the self is exposed to everyday (other people, the media, objects that it encounters, its own history, memories, perceptions, physical sensations)' it serves to demonstrate that the self is a product of its interactions (de Villiers and Cilliers, 2010, p.27, note 30; see also Preiser & Cilliers 2010, p.267; Richardson *et al* 2001, p.7). Identity exists relative to these structures, it 'has to form and operate within the structures and constraints provided by the environment, regardless of will, intellect and memory' (de Villiers and Cilliers, 2010, p.33; also Cilliers 2010, pp.5-7). Furthermore, the self-constitutes part of the environment of all other 'selves', it is open to its environment such that 'it is impossible to point to some precise boundary where "we" stop and where the world begins' (de Villiers and Cilliers, 2010, p.34). Not only is there no physical-conceptual boundary to self, there is also no temporal boundary to identity. It is subject to change over time,

being the product of a set of prevailing interactions, influenced by our past; it is a 'network of traces' that forms a '(temporary) narrative' (de Villiers and Cilliers, 2010, p.35; see also Cilliers 2001, p.146).

Nonetheless, while the boundary is not capable of final definition, it is always in a state of becoming, it *does* exist for the assemblage itself. Indeed, without the ability to conceptually disaggregate the self as an assemblage from its environment, one cannot speak of there being an assemblage at all – difference is 'a precondition for their [complex systems'] existence' (Cilliers, 2010, p.5). Similarly, if one cannot differentiate one thing from another, it is not possible to give meaning to anything; 'meaning is the result of … distinctions, of the play of differences' (Cilliers, 2010, p.6). Whereas autopoiesis defines itself by its own internal self-construction of the other, for complexity theory, difference – identity – 'is determined relationally' (Cilliers, 2010, p.6). An assemblage is not to be understood by reference to how it *sees itself* as being different, but by an examination of, and interaction *with* other systems.

It can therefore be said that in complexity theory identity is not an isolated concept, a function of the system's differentiation, but is a co-dependent, emergent product of the interaction of assemblages, via the interface of their boundary. Similarly, the concept of difference is not isolating or divisive, it acknowledges that we all have a unique experience of the world that informs our existence and that of others. However, this individuality of experience is only revealed through engagement. Difference is only discernible in the presence of others, it is a positive, relational consequence of interaction (Cilliers and Preiser 2010, p.vii). If we return to the idea of relatively straightforward legal activity, the case hearing, we can see that a failure to make it through the doors of the court means that the experiences of those individuals who are palpably subject to the law will nonetheless remain largely unknown to it. From the perspective of the desire of the law system to maintain its legitimacy in the eyes of those people, this should be concerning for two reasons. First, because those experiences are denied to law. Preventing the law system from refining its own expectations of how it should function in given circumstances, of refining its own description strategy. Secondly, the problems of those who cannot access law do not go away simply because access to law is denied. People with problems will look for solutions, they may seek alternative remedies via political action or, ironically, activity deemed unlawful by law. We thus understand that identity is fundamentally about being able to distinguish oneself from the environment, from other identities, and that the absence of an ability to distinguish is an intolerable problem. In complexity theory, identity permits interaction and reveals further affinities and differences between identities. This emergent process produces, and is produced by the reflexive reformulation of identity in the face of interaction.

In what sense is this understanding of "identity" vulnerable? To answer this question we need to consider the idea of vulnerability in a little more detail. If we start with a return to Fineman's definition given at opening of this chapter we see that vulnerability is the exposure of all things, especially humans and human systems, to the risk of change, especially a change that we are not equipped to resist

(Fineman 2008-09, p.12). In recognising the urgent need to interact as being fundamental to the construction of identity, we can see that the loss of interaction – of integration, of inclusion in interactive processes – is necessarily detrimental. The risk of this loss is encapsulated in the concept of vulnerability because irresistible, often unlooked-for change breaks the interactive cycle I have been discussing. The loss of interactive opportunity excludes you, depriving you of the interaction that grants identity. It subsumes you into the background context of the environment.

This conceptual understanding of vulnerable identity must also be grounded in the material, especially in the bodily existence of humans, human institutions, and the world which they inhabit. The necessity of developing the idea of vulnerability in this way springs in part out of the implicit and explicit connections between the discourse on vulnerability, bodies and feminist approaches to legal studies (for example Bottomley 2002; Fitzgerald 2010; Sherwood-Johnson 2013), which has contributed to the exploration of vulnerability. However, that discourse has also made it clear that the concept of vulnerability is intuitively recognisable in all aspects of human social life. Thus, Fineman concludes that '… vulnerability is – and should be understood to be – universal and constant, inherent in the human condition' (Fineman 2008-09, p.1). The material aspect of vulnerable identity is therefore revealed in the recognition that, while one might mitigate some of the risks to which one is exposed through wealth and power, there is no getting away from the fact that your existence is a human one. The institutions upon which we all rely – both public and private – consist in part of a physical infrastructure that is composed of mechanical and digital machinery, and other humans (consider Philippopoulos-Mihalopoulos 2015, pp.41-42). What is more, though we might send satellites into space, and put humans on the moon, every aspect of human existence currently depends on the continuation of life on Earth. The collapse of the systems which make our existence on Earth possible would demonstrate conclusively the universal nature of human vulnerability (see Fineman 2008-09, pp.8-10 and generally).

Having considered the material and conceptual aspects of vulnerable identity, we can now return to Neves' notion of under and over-integration to consider the possible consequences of exclusion arising from destabilising change. Neves would doubtless point to those less able to assert their legal rights and engage with political frameworks (Neves 2001, p.262) as being acutely unable to resist change. The inability to resist undesirable change can in turn make vulnerability move from an abstract feature of humanity, to a burden upon your existence. This can have consequences both for individuals and communities. Individually such change might mean you lack the financial resources to engage lawyers to assert your rights, and thus render you unable to access the interactive processes of law systems. Where communities or particular groups are under-integrated, they may be unable to resist change imposed by the over-integrated with access to superior resources to command the attention of law-makers, which might include something as simple as the right to vote or as contentious as

capital to expend on lobbying, such as multinational organisations and political interest groups, who may argue for limitations on access to employment protection, housing, or asylum.

This type of exclusion, and the concretisation of vulnerability which accompanies it, denies the productive, interactive, relational possibilities that complexity theory indicates are so important to the establishment of identity, and the flourishing of ongoing emergent interaction. In this way exclusion dehumanises the individual by removing the possibility of defining oneself in the context of a wider human society, preventing the formation of identity. A clear example of this can be found in the construction of refugees in societal discourse. Refugees are homogenised and thus dehumanised, they are not thought of as individuals, nor even as individual bodies (Esses *et al* 2013; Innes 2010, p.459; Khosravinik 2010; Lewis 2005, p.7). The position of the refugee can be contrasted with those who are, systematically speaking, relatively well-integrated into society, and who are often constructed as citizens with individual rights conceptually in terms of mental autonomy (for example, freedom of thought, conscience and religion), physically through their bodily integrity (rights against torture, unlawful imprisonment, and to assembly), and procedurally (the right to a fair hearing). In this context, legal rights can be seen as a protection against vulnerability, a protection against certain types of change (in autopoiesis, a positive access route to social systems, see Verschraegen 2002, pp.264-268; Luhmann 2008, p.26). It should not, therefore, be surprising that those individuals, deprived of their individual identity through exclusion, seek riskier routes towards inclusion; towards the possibility of becoming individuals with an identity again.

It is true that we might be concerned about how individuals seek to redress this balance because of the other negative consequences it produces however, for complexity theory the answer is not to punitively contain these instances of circumvention as examples of counter-factual breaches of systemic expectations behaviour (see also Luhmann 1992c pp.1426-1427). Indeed, reducing this consequence of individual vulnerability to a specific legal, often criminal wrong undermines *systemic* resilience and creates further vulnerability for systems by, *inter alia*, preventing deeper consideration of how other aspects of, for example, the law system may be seen as contributing to the sources of that counter-factual behaviour. Containing understanding in this limited way prevents 'more adventurous, deeper structural couplings between systems', between assemblages (Philippopoulos-Mihalopoulos and Webb 2015, p.457). Conversely, the internalisation of the concept of vulnerable identity, and the recognition that the concept attaches to all social assemblages, not just people, has the potential to enable new interactions (see also p.456). Moreover, adopting a more flexible view of what constitutes an agent capable of engaging in social interaction opens new possibilities for non-traditional framings of social relationships for analytical purposes. While at an environmental and systemic level this does not "solve" the challenges of what happens to individual assemblages when vulnerability bites, the very acceptance of the potential for systemic processes to produce situations

which generate exclusion allows society and social interaction to internalise the concept exclusion, and the nature of what it excludes, and so articulate a response to the risks of exclusion.

Excluding Vulnerable Bodies

Having recognised the conceptual possibility that vulnerable identity will produce negative consequences if both the prospect of vulnerability concretises, and the processes designed to respond to it prevent the establishment of difference, and thus identity, we can now explore the material consequences, and opportunities of vulnerable identity. In particular, I propose to consider how the recognition of vulnerable identity in complexity theory thinking allows the production of stabilising forces and greater interactive possibilities. To do this, it is helpful to ground the discussion by briefly reflecting on how the body, as a key site for the concretisation of vulnerable identity, is conceived in complexity theory thinking. This, in turn, permits a consideration of the implications of vulnerable identity for assemblages that takes note of both the conceptual and material consequences which flow from it. Ultimately this shows the dangers of excluding assemblages, such as individual humans, from integration with systemic processes, and warns against any approach to the treatment of asylum applicants that seeks to make it harder for them to engage directly with legal processes.

In stark contrast to the exclusion of the physical and psychological existence of human bodies from systemic autopoietic contemplation (but see Philippopoulos-Mihalopoulos and Webb 2015), those drawing on complexity theory thinking have expressly acknowledged the material and the psychological. Speaking of human bodies as the subject of punishment by law, for example, DeLanda writes:

> 'Like all social assemblages the material role in organizations is first and foremost played by human bodies. It is these bodies who are ultimately the target of punishment. But punitive causal interventions on the human body are only the most obvious form of enforcement of authority. Other enforcement techniques exist … a set of distinctive practices involved in monitoring and disciplining the subordinate members of, and the human bodies processed by, organisations.' (2006, p.72).

Such an understanding of bodies by organisations requires also that they be aware of the physical distribution of bodies in order to execute procedures upon them, and to know of their location in time in order to stipulate 'cycles and repetitions' of those processes (72; also Philippopoulos-Mihalopoulos 2010, 88). Space and time are also important to understand when a body is within and outwith the jurisdiction of the organisation (DeLanda 2006, p.73). In view of this, the material, psychological and temporal manifestation of the human body is to be viewed as both a site of interaction, and an interactor with and within social assemblages. Ultimately these ways of acting upon

bodies help the organisation, for example, the law system, to maintain its legitimacy and authority to continue acting on those bodies. This is important because it allows the assemblage to exist alongside, in the context of, and as part of combinations of other assemblages; 'as part of populations of other organizations with which they interact' (DeLanda 2006 p.75). The human body is thus fundamentally implicated in how organisations conceive of their own identity, and how it is in turn perceived by other social systems. By extension, the material aspects of larger social assemblages are also integral to the operation of complex, emergent processes, in part because of how they operate alongside human bodies. For example, the physical presence of bodies in courts come to be interpreted in the context of that space, they act according to the expectations demanded by the setting, and are in the presence of other bodies there to carry out or witness the judicial process.

Just as the importance of the body is established in complexity theory (DeLanda 2006), the idea of embodiment is not a new concept in law (see, for example, Bottomley 2002). It is therefore unsurprising that both complexity theory and legal studies have come to view the body, and the idea of the subject, as a constructive and disruptive force that presents new information for consideration, and which must be engaged with (Bottomley 2002, p.131). The creative/disruptive potential of the body lies in its contingency, the novelty which is established by each new interaction between the body and other assemblages, of the presence of 'continuous uncertainty and ambiguity' (Phillipopoulos-Mihalopoulos 2015, p.43). This recognition demands in both legal studies and complexity theory that the body be internalised by the system, and runs counter to theoretical approaches which call us to '[leave] our bodies behind', such as orthodox autopoiesis (Bottomley 2002, pp.130-131, see also 135-137). Without the internalisation of the body, especially the body as a site of vulnerability, we would struggle to see that the material is as integral to the perpetuation of emergence, and emergent identity for human systems, as the conceptual and procedural aspects of vulnerability (see also Bottomley 2002, pp.140-146).

This understanding of embodiment as a positive force must also be coupled with the risks (and possibility of growth) which vulnerability brings. As Fineman observes, vulnerability encapsulates both the positive aspects of embodiment – of potential, possibility and becoming – and the negative – of suppression and exclusion. The desire to maintain the positive and overcome the negative aspects of vulnerability are what 'make us reach out to others, form relationships, and build institutions' to engage in interaction (Fineman 2012, p.71). At the same time, if the physical presence of the body is denied – for example, by the extra-territorialisation of decision-making processes, or the provision for appeals against asylum decisions to only be made out of country then much of the weight offered by the body is lost.

In consequence, if the human body, and the material existence it evidences, is bound up with the understanding of law as a complex, productive, emergent assemblage, then actions which exclude the

body from consideration, or which minimise the value ascribed to the experiences of the body at a systemic level, place the identity of the system in jeopardy. This is partly because the physical vulnerability of the body is key aspect of the physical vulnerability of law as an assemblage. The identity of law is wholly reliant on being able to maintain its claim that it is *the* site to solve legal disputes. If the body is excluded as part of the more general invisibilisation of certain categories of person then this creates further opportunities for call into question the validity of law's identity, as the body is forced to seek alternative ways of gaining inclusion – for example, by evading port authorities and not requesting asylum in an attempt to participate, to integrate – in the social processes of society, such as the economy. At the same time, to deny consideration of the body, or to take measures which undermine it as an important site of emergence undermines the creative possibilities – the access to new, important information, new relational connections – which are of central importance to emergent processes.

How then will the exclusion of the vulnerable subject in the context of asylum increase the risk that the complex system's own material vulnerability will be engaged? For some indications of the risks to which a complex system would be exposed by not incorporating the vulnerable body we can consider the approach taken by autopoiesis. Autopoiesis seeks to conceptually invisibilise 'vulnerability and the possibility of dependency', assuming that such an act of cognitive denial and normative blindness has the effect of 'eliminat[ing] the experience of either in individual lives,' but this is not the case (Fineman 2012, p.90). While such an action might have the effect of communicatively excluding the individual from participation in the functionally differentiated processes of society, and especially prevents engagement with legal processes – the body, and its physical and psychological distress do not go away just because they are deliberately unobserved. Indeed, the person *retains* their individual rights, but, because they struggle to engage with, or to be noticed by the system, they are prevented from realising those rights by the very system which gave them meaning in the first place (see further Philippopoulos-Mihalopoulos and Webb 2015). This is especially problematic where the exclusion is made in pursuit of objectives which seem unreasonable.

In consequence procedures which show a preference, for example, for objective country information in place of subjective human experience actively minimises the role of humans. It is difficult to grapple with the disorderly nature of human experience, but the disinclination to engage in a reflexive process of considering that disorder exposes the material vulnerability of the system. While there are those who will abuse any system of immigration and asylum regulation, it is also empirically true that there are those who constitute examples of human suffering that do not easily meet the criteria of the 1951 Refugee Convention (Firth & Mauthe 2013, pp.500-501; see also Kelley 2001). A reduction in the significance accorded to the marks on human bodies, and the damage to human minds, limits opportunities for creating meaningful, positively disruptive, substantive understandings that should

enhance the richness of decisions, and thus the quality of the reasons upon which they are based (see Baillot *et al* 2014; Herlihy et al 2010; Herlihy & Turner 2015; Kagan 2015; Sweeney 2016). Furthermore, the patent existence of suffering bodies, coupled with a set of procedures which appears to either exclude them outright, or to operate in such a way as to (inappropriately) exclude them in the final analysis, has implications for the legitimacy of the system. The perception and reality of procedural fairness is an essential component of legitimacy without which the legal system loses its authority to execute legal processes (DeLanda 2006, p.89). This is because, as I have discussed above, in complexity theory thinking human bodies and the actions practiced upon them are intimately bound up with the identity of social assemblages. Thus, the consequences of processes which enable the exclusion of vulnerable bodies have implications for how the identity of the law system emerges because the meaning created by the asylum applicant's body is bound up with the rest of their claim, their entire involvement with the system.

Where the legitimacy of a complex procedural assemblage is brought into question this can undermine the viability of the assemblage, and damage its identity to the point that differentiation from other assemblages becomes impossible; for example, the differentiation of legal processes from politics. Just as systems conceived as autopoietic fear dedifferentiation, so too do those constructed as complex assemblages. While for complexity theory the motivation towards differentiation is not based on self-reference, but on emergent interaction, the cost of a failure of differentiation is still a loss of identity. The loss of legitimacy, upon which organisations such as the legal system, and more specifically the network of adjudicative and administrative assemblages which constitute asylum processes depend, would deny law the exclusive jurisdiction to make pronouncements on these subjects. As legitimacy is the quintessence of legal identity, which differentiates it from mere political force, the loss of legitimacy is tantamount to a loss of identity.

To compound difficulties further, this loss risks a crisis (DeLanda 2006, p.90). While one might expect a relatively specialised aspect of the legal system, such as asylum, to have relatively isolated implications for the system as a whole, this is not necessarily the case. It is evident from popular discourses around the question of the United Kingdom's relationship with the European Union that immigration – in which asylum is inevitably, if inappropriately bound up – is a factor (Gietel-Basten 2016). The constitutional changes wrought by *inter alia*, the 'Brexit' referendum and 2017 General Election, while not necessarily amounting to a crisis, have evidently introduced a degree of uncertainty into the wider constitutional-legal assemblage for the time being.

Though it may seem counter-intuitive to suggest that the contribution towards instability of a popular concern with immigration could have been avoided if the vulnerable human bodies of refugees had been better incorporated into the thinking of the legal system and wider collection of social assemblages (especially, perhaps, the mass media), the discussion above demonstrates the negative

consequences of not acknowledging such vulnerabilities. Similarly, the failure to acknowledge the vulnerabilities of refugees, to permit and engage in dehumanising discourses about them, and to work to legally invisibilise them by, among other things, extra territorialising decision-making processes, is as much a condemnation of their plight as it is of the concerns of those *citizens* who themselves are vulnerable due to their under-integration.

Observing Vulnerability and Exclusion

Until now I have mainly discussed the hypothetical risks to the body, system and environment of not internalising a concept of vulnerability – in particular, vulnerable identity – into legal administrative justice processes. I have contended that one of the risks of the invisibilisation of vulnerability is that it undermines identity by challenging the capacity of an assemblage to differentiate itself from its environment. My central message has been that, whether one is employing an autopoietic or complex approach to analysis, both view the failure to differentiate as fundamentally bad thing because it compromises identity and, in law's case, the legitimacy of law systems to rule on matters which are purported to be within law's purview. What I have not discussed in any detail yet is that we can find examples in the case law, especially the case law concerning asylum applicants, of the law system taking measures to preserve its legitimacy in the face of the risk of de-differentiation. By this I mean that we can see law processes acting to encourage inclusion and integration, and to limit the effects of attempts to promote the under-integration, invisibilisation, or complete exclusion of asylum applicants from law processes. In this way, asylum applicants are encouraged – at least in the qualified sense established in the two cases discussed below – to engage with and articulate their problems to law, rather than to seek alternative remedies to their problem. That is, the cases demonstrate two ways in which the law presents itself as an assemblage keen to engage in emergent interaction, to recognise vulnerability, and to legitimately and convincingly assert that it is the proper site for the resolution of legal questions arising from asylum concerns.

The approach in two recent cases[3] supports the complexity perspective observation that the legitimacy of a legal system is bound up with how it internalises vulnerability. In *Detention Action* the High Court had concluded that the truncated nature of decision making under the so-called Detained Fast-Track application process was 'structurally unfair' such that it would lead to a 'serious procedural disadvantage' on the part of the asylum applicant (para. 60). In the Court of Appeal Lord Dyson MR, agreeing with Nicol J (see variously paras. 19, 22, 24, 37, 38, 45), added that because the Secretary of State for the Home Department was both the other party in the applicant's asylum claim, and in control of the decision to allocate a case to the fast track process, they were 'able to gain a major litigation advantage by being able to decide that the appeal is suitable to be placed in [Fast-Track Review]' (para. 24, also paras.46-48). The courts' concern over the misuse of powers granted to the Home Office seeks to honour a commitment to legality and more generally to the rule of law by

removing the exclusionary quality of the procedural arrangements. When these motivations are viewed from the perspective of complexity, it can be said that the judgment sought to rebalance the relative abilities of one party to an asylum appeal to engage with another; in Neves' language, to more adequately integrate both parties into the system, and to counter-act the over-integration of the Home Office.

The individual vulnerability of any asylum applicant acting in good faith is obvious in this context. Their vulnerability exists regardless of the nature of the legal process to which they address the application. They have experienced, and continue to experience, substantial change in their circumstances that place them at the behest of others, and they are largely unable to influence their own destiny. While they can offer evidence in support of their application, how this will be received, and what other factors will be considered important is largely out of their hands. Nonetheless, they approach the law system with their own view of the world – a description strategy – and as part of this they give an account of how they have come to a point where they need to claim asylum. As one assemblage, they present themselves to another, the law. If legal process is used to minimise the opportunity for their claim to be fully considered because it is constructed to with 'speed and efficiency' rather than 'justice and fairness' in mind (*Detention Action*, para 22) this does not eliminate the existence of the material, psychological and conceptual aspects of the claim from reality. Instead, it only eliminates – invisibilises – them from law's reality. This has consequences for a system which purports to be the only framework competent to process the claim.

The *Detention Action* case demonstrated the need for the legal system to assert both its legitimacy and its unwillingness to exclude vulnerable individuals in the face of political pressure. Had the decision concluded otherwise, this would have had the effect of, if not excluding, then marginalising the individuals subjected to Fast-Track procedures. As I have suggested, one consequence of excluding individuals from the legal system in this way is that they might feel compelled to seek resolutions to their real problems elsewhere. This would have undermined the legitimacy of the legal system's claim to be authoritative in this field, and the wider claim of the legal system to legitimacy based on at least formally equal treatment of all before the law. With this in mind, the observation that it was possible for political pressure to be exerted on the legal-administrative structure responsible for designing the Fast-Track rules in the first place – the Tribunal Practice Committee – was especially troubling. Indeed, it raises concerns for the legitimacy of the process by which any amended rules, intended to take account of the judgment in *Detention Action*, are formulated (see Briddick 2015, p.324). These risks to legitimacy, and the possible systemic consequences should be borne in mind when reflecting on any reforms impacting upon the ready accessibility of judicial and administrative remedies.

The *Public Law Project* case demonstrates even more starkly the compulsion of law to give substance to its claims to substantive legal equality for individuals in order to maintain its legitimacy, and thus,

identity.[4] The Secretary of State for Justice had sought to use Henry VIII powers contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to attach a residence test to the criteria to be met to qualify for legal aid. This would have prevented many non-residents of the United Kingdom from meeting the eligibility criteria to qualify for legal aid.[5] Lord Neuberger concluded that the residency test created by the Secretary of State would have the effect of excluding individuals from access to legal aid by 'reduc[ing] the class of individuals who are entitled to receive those services…' (para. 30).[6] In the language of complexity theory this would be achieved by invisibilising to law certain categories of individuals to control the degree of uncertainty posed by those individuals to systemic processes. While limiting the number of people able to access a service is not in itself necessarily nefarious, it was the attempt to base the question of eligibility on 'a personal characteristic or circumstance unrelated to the services' (*ibid*) which made the provisions *ultra vires*.

The law here was faced with two tensions that had implications for its legitimacy. On the one hand, it was recognised that legislation emanating from Parliament which authorised such a test would be legitimate because Parliament is *the* source of sovereign authority in the United Kingdom (implicit at para. 30). Provided that the courts were seen to honour the authority of Parliament, as any examination of the vires of executive action seeks to do, the legitimacy of the legal system could not be sensibly challenged in that respect.[7] On the other hand, the courts recognised that the exclusion of a category of vulnerable individuals from access to legal aid, and thus a degree of substantive equality before the law, *would* have implications for the legitimacy of the legal system. The conceptual and material difficulties at the root of the claims that would be made with the support of legal aid would, though they would be rendered invisible to law, not be factually eliminated just because legal aid was not available. Yet their bodily difficulties were concerned with rights – especially their rights to asylum, and their human rights – such that, if law was to maintain its identity as *the* site of decision making for them, they could only reasonably be answered by legal processes. Similarly, their conceptual difficulties, namely the determination of their status as refugees or another category of migrant, was avowedly a legal question. The failure to address either the question of their legal rights as individuals, or to answer the law system's queries about their status both fairly and impartially, would present law with a challenge to its legitimacy.

The reason for this is that, in view of the complexity understanding of the need for interaction to establish differentiation, action which prevents interaction, and thus the relational co-production of both law, and those approaching law, calls into question the appropriateness of law as *the* site for settling legal questions. If law denies, by legal constructs, that it is willing both in principle and in fact to deal with a purportedly legal issue – for example, because it effectively prevents the question being raised – then it denies its own identity as the right forum. Any decision on the part of the legal system which either makes it difficult for law to answer these questions, or which diverts patently legal

questions to others undermines the legitimacy of the legal system by challenging its claim to authority, and thus its identity. In consequence, the Supreme Court can be seen to have reasoned that, to maintain law's legitimacy, or at least to include in legal consideration as many instances of refugee material and conceptual concern, the courts were required to construe the way the Henry VIII powers were used as unlawful. They were thus able to maintain Parliament's sovereignty and law's legitimacy while enabling law to incorporate consideration of more cases, and thus bolster its claim to be *the* legitimate site of resolution of questions arising from asylum applications.

Conclusion: Vulnerability Identity and Emergent Interaction

The physical, psychological and conceptual vulnerability of individuals is intimately bound up with the vulnerability of systems. Indeed, given the importance of relational co-production of difference proposed by complexity theory, the best approach to encourage interaction is to promote the interactive integration of individuals and other assemblages which comprise the social environment. Thus, complexity theory indicates, far from seeking to invisibilise, marginalise, or exclude the vulnerable individual as a potentially destabilising influence, the legal system must not merely confront, but embrace, interface with, and integrate that vulnerability and apparent risk of destabilisation into its own processes. Why is this necessary? Put simply, vulnerability is a creative force for both individuals and for systems. The claimed instability posed by those who do not integrate neatly into established frameworks of understanding in fact represent an opportunity for creative interaction, for the expansion of law's competence to deal with legal issues, and an increased resilience as regards challenges to its underlying legitimacy.

What is more, the universal nature of vulnerability – being a feature of assemblages at all scales – demonstrates the risks of exclusion of the emergent possibilities arising from interaction. I have discussed how the risks flowing from exclusion demonstrate how complex identity is bound up with the need to interact to establish difference from the environment. The inability to interact, of exclusion from communicative interaction, exposes the vulnerability of assemblages. At the same time, it is vulnerability that, as Fineman says, causes us to reach out, to form connections (Fineman 2014, p.22), that provokes the relational processes of emergence via interaction. In consequence, just as vulnerability has the potential to expose the risks of exclusion, it also works to counteract these, and to promote emergent interaction. In this way, the pursuit of difference is turned from what might traditionally be considered a negative force, into a positive necessity of social existence that enables ongoing communication.

In the specific context of the asylum legal framework, the recognition of vulnerability should compel legislators and other actors to think differently about their participation in, and contribution towards the character of that procedural assemblage. As I have shown, aspects of the process which seek to

marginalise, minimise, or entirely exclude individuals from systemic consideration are risky not just to the individual – for obvious, material and psychological reasons – but also to the system. This is because the identity of the law system, understood from a complexity perspective, is defined by its perceived legitimacy, and the authoritative capacity to decide legal matters which flow from this. Actions which appear to undermine that legitimacy, which compel individuals to seek non-legal solutions to evidently legal problems, damage that identity by undermining that which differentiates the legal from its environment. This loss of difference is the loss of identity. It should always be remembered that the law system remains vulnerable to this loss wherever it is seen to enable the under-integration of assemblages, or where actions occur which dampen their integration; for example, by invisibilising or failing to incorporate the psychological, material or conceptual concerns of humans and other assemblages. If law forgets this, then it also forgets its own exposure, via the relationally constructed, emergent nature of its identity, to the effects of that under-integration and potential exclusion.

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[2] *R (on the application of Detention Action)* v *First Tier Tribunal (Immigration and Asylum Chamber)* [2015] EWCA Civ 840; *R (on the application of Public Law Project)* v *Secretary of State for Justice* [2016] UKSC 39

[3] Above, n.2

[4] One might also consider, for example, *R v Lord Chancellor, ex parte Witham* [1998] QB 575

[5] See Legal Aid Sentencing and Punishment of Offenders Act 2012, s.9(2)(b)

[6] *R (on the application of Public Law Project)* v *Secretary of State for Justice* [2016] UKSC 39, para. 30

[7] Though consider the government's reasons for reforming judicial review (Mills, 2015),

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