Sarah Sargent

Sarah.Sargent@buckingham.ac.uk

Combining Systems Theory and Critical Race Theory in an Examination of Transracial Adoption

Introduction

Transracial adoption is a controversial and emotionally laden topic. (See generally Perry 1993, Perry 1998.) How and whether it should be conducted is something that has not been resolved. The effects on children, whether beneficial or detrimental, and the social drivers behind either position are the subject of much controversy. This is not a new debate, but rather a persistent one that has yet to reach any kind of accord or agreed point of view across the political, legal and child welfare systems. Increased transracial adoption is presented as a solution to reduce the large numbers of ethnic minority children in state care. Recent changes to the law in England were made the basis that any consideration of ethnicity is a barrier towards transracial adoption and prevents these children from being adopted in large numbers. The Children and Families Act 2014 amended section 1(5) of the Adoption and Children Act 2002, removing a requirement that adoption agencies in England must give due consideration to a "child's religious persuasion, racial origin and cultural and linguistic background." The requirement to give due consideration to these remains in Wales.

The amendment makes adoption placement 'race-neutral' so that the child's racial or cultural background does not receive 'due consideration' as required in the present law on choosing an adoptive family for a child. The amendment to statute is offered with the stated purpose of increasing the adoptions of ethnic minority children through the reduction of legal barriers. This effort on its face may appear to be laudable. But this type of legal change is unlikely to achieve its goals of reducing the number of ethnic minority children in state care through an increase of transracial adoptions. This article discusses why, using a combination of two legal theories: critical race theory (CRT) and systems theory. It argues that an analysis using the combination of these theories provides very useful insight into the social dimensions behind

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the legal change, and why this amendment is unlikely to achieve its objectives. In so doing, it offers an enriched evaluation of the interactions of the child welfare, legal and political systems that should be of use to those who work in those systems.

Trying to pin down exactly what 'is' critical race theory may seem somewhat elusive. This stands in contrast to the seemingly very technical canons of systems theory(Nobles and Schiff 2006). And this raises the question of whether these two theories can and should be joined in an examination of transracial adoption legislation. They present an initial image of a far from complementary joining—and perhaps even a contradictory one.

This article explores the usefulness of the combination of these two theories in examining the nature of communications between the legal system, child welfare and the political systems. These communications are about race. New messages about the place of race in the legal system and other social systems are embedded in communications about transracial adoption. These messages are about post-racialism, which sees any specific recognition of the factor of race with the legal or other systems as unfair and unequal. Post-racism is a way of (not) viewing race in the legal system—by silencing discussion about race in the law, or the effects that race might have on the way that laws are interpreted and applied.

Combing critical race theory and systems theory to examine the transracial adoption laws provides an eye opening look at the communication between social sub-systems and at the same time demonstrates the utility of combining these two theories.

Critical race theory does not include the crucial element of how the legal system 'communicates' with other systems and interprets messages internally. But critical race theory does provide a means of examining the messages of race transmitted in and between systems—without which an examination of transracial adoption would be incomplete. Systems theory does not provide a tool specifically for examining how the legal, political and child welfare systems interpret and code "race" but it does take account of communications in and between systems, which include messages about race. In particular this article will focus communication between the political, legal and child welfare systems and how these play out in the construction of meaning and messages in and around the proposed transracial adoption legislative changes.

The usefulness of understanding the way in which systems work and communicate in consideration of child welfare matters has been observed by King. He comments that

> By stressing the essential differences between law and science as social systems, autopoietic theory sees these tensions and frustrations as normal and inevitable and not as failures in co-operation or co-ordination which can be rectified by improved procedures or improved understanding between professions" (King 2002: 611)

Autopoietic theory highlights the communication differences between those systems that can be seen as obstacles in achieving solutions or outcomes in child welfare, whether on a particular case or on a systemic level. The combination of critical race theory and systems theory provide an added depth of knowledge on the messages that the legal system receives from other systems about race. Systems theory does not focus in particular on what the law might have to say about or the ways in which it deals with questions of race. Given the persistent questions on whether race should be part of the consideration of an adoptive placement, as well as the impact that the consideration or lack thereof might have on the well-being of a child, in both the short and long term, added insight into how different social systems digest and code information including that of race, provides important insights for child welfare professionals, policy makers, Parliament, lawyers and judges.

Critical Race Theory

Critical Race Theory (CRT) is an outgrowth of Critical Legal Studies (CLS). (Crenshaw 2011) It came to be from a sense of frustration and futility in trying to understand the law without a specific dimension of understanding race and its role in society. (Crenshaw 2011) CRT specifically raises issue about race in society, and the relationship that the legal system has in the operation of racism in society. It also does not see the law as isolated and unaffected by other systems, in contrast to a classical positivist view of law. (Nobles and Schiff 2006) CRT views the law as intertwined with political doctrine and philosophy—such that they are inescapably connected in their shaping of social conditions and social racially based hierarchies. Crenshaw explains that:

> ... CLS scholars go on to examine the political character of the choices that were made in the [legal] doctrine's name. This inquiry exposes the ways in which legal ideology has helped create, support and legitimate America's present class structure. (Crenshaw 1998: 1350).

In this way, the law is seen as not immune from the functions of political aims—and the effect of the relationship between law and politics is a far-reaching one—providing a blueprint for social hierarchy. CRT views the aim of a politically infused legal system as the preservation of a social *status quo*—to ensure that the dominant group in society retains power. This is evident in the three main canons that are an integral part of CRT. One of these is on the nature of racism itself in society—that '[b]ecause racism is an ingrained feature of our landscape, it looks ordinary and natural to persons in the culture.' (Delgado and Stefancic,xvi)

This everyday occurrence of these actions render them invisible as *racism*- racism in operation is simply accepted as the way in which society operates. The message of post-racialism strongly affects the ways in which transracial adoption is perceived and discussed across the political, legal and child welfare systems. A post-racial view sees the recognition of race as detrimental and destabilising to society. Thus, the explicit acknowledgement of race as a factor to be considered in transracial adoption placement would be a direct contradiction of the tenents of a post-racial view. Therefore, it should of little surprise that in the promotion of post-racialism, transracial adoption has become a focus—and not only transracial adoption, but a law which acknowledge and requires acknowledgement of race and culture.

As its second canon, CRT aims to expose this every-day racism, and to use law as a tool to eradicate the effects of racism.(Crenshaw 1998) CRT scholarship has a goal of 'contribut[ing] to a better, fairer world.' (Delgado and Stefancic, xvii) In this way, CRT is not simply an analytical tool, but is also used purposefully to improve social conditions. This is an important dynamic in the use of CRT. It is not only a theory in that it provides an explanation for the workings of law. CRT is self-consciously and deliberately also a tool of advocacy and activism, a way to point out ills within society, and in the operation of law, to call attention to them and to point out what and how the law needs to change to remediate those ills. (Price)

The final and third canon of CRT addresses when and how changes in the law occur. The concept of interest convergence suggests that change happens in only very limited circumstances:

....this concept holds that white elites will tolerate or encourage racial advances for blacks only when such advances also promote white self-interest. (Delgado and Stefancic, xvii).

In other words, change in the law never occurs solely for the benefit of non-white parts of society, and never without a benefit to the white part of society.

In addition to these three defining canons, CRT also makes use of narrative and story-telling, (Delgado and Stefancic) and has been flexibly adopted by different groups wanting to explore and explain racism in different parts of society. (See Espinoza and Harris)

Systems Theory

In contrast to CRT, systems theory can appear to be dauntingly complex and technical. This contrast might also contribute to questions as to whether the two theories can be used compatibly. These theories do have things in common. Both are also concerned with analysing the interconnection of the legal system with other parts of society. Both also have a focus on understanding power relationships in the legal system and the role that the law plays in the formation and preservation of those. (Nobles and Schiff 2006)

Unlike CRT, systems theory, sees the legal system as separate from the political system. Yet, systems theory does recognise and focus the influence that one has on the other. This is through an examination of the dynamics of two or more systems interacting and interpreting and re-interpreting messages from each other. Systems each have their own internal language—and any information received or generated from that system is reinterpreted into the particular language of that system. (Nobles and Schiff 2006) In this interaction, it is possible for one system to dominate the other, and affect how well a message can be effectively internalised and interpreted in another system. The effort of one system to direct or dominant another is known in systems theory as "steering" .Schiff and Nobles (2013) describe the relationship between the legal system and the political system as one where the political system asserts its influence into the legal system, thus attempting to steer the legal system.

These communications can be successful—achieving the aims of both systems—and this relationship is described as structural coupling (Nobles and Schiff 2006). But these

communications between systems are not always successful. Communication failures between systems are labelled as regulatory failures. (Nobles and Schiff 2013). There are three identified instances of the communication failures between systems: that of system deafness, of norm complexity in an attempt to absorb the meaning of norms from another system, resulting in an oversimplication of norms,(Nobles and Schiff 2013) and thirdly, "production of norms which are orientated to the regulated systems, but cannot be processed consistently within the legal system..." (Nobles and Schiff: 2013, 209).

All three of these instances of regulatory failure are relevant to understanding the dynamics of the proposed statutory change on transracial adoption. These are discussed further in this article.

Thus, in considering a contrast between systems theory and law, it is evident that there are elements of similarity between them. Both are concerned with the social construction of meaning and messages—labelled by systems theory as the coding of messages by particular systems and re-interpreted by systems within their own binary code when received from another system. They differ markedly in one significant way. The systems theory of law does not consider that the value of justice is something that can be introduced or subtracted from law. Systems theory rejects the proposition embedded in CRT that law can be a tool for change. Phillipopoulos-Mihalopoulos(166) explains that in view of the legal system offered by systems theory that : "Law cannot prescribe but can only set up the machine and then leave." There are no values of justice within the binary code of the legal system. In contrast, in CRT change is sought for the purpose of achieving justice within the legal system. . (Price).

 In the view of CRT, if justice is not the aim and result of law, it ought to be. In systems theory, justice is not the aim of the legal system—rather the legal system is "an instrument of stabilization" (Phillipopoulos-Mihalopoulos: 471). Nor, unlike the stated aim and purpose of CRT, does systems theory ""take up cudgels on behalf of the oppressed"" (Phillipopoulos-Mihalopoulos 35, quoting Tim Murphy).

Systems Theory and Law

What does systems theory tell us about the legal system? According to systems theory, what the legal system 'knows' and communicates is surprisingly simplistic. It understands information in a simple binary code. Any messages that are received by the legal system from another system are reinterpreted to fit into each systems particular binary code.The legal system reinterprets the message to fit into its binary code of legal/illegal. This is the only way in which the legal system is capable of understanding and communicating information. Likewise, when the legal system sends messages to other systems, they are sent in this binary code, to be reinterpreted by the receiving system in its specific unique binary code. (Nobles and Schiff 2013)

Systems Theory and Child Welfare

The use of systems theory to explore the working of the child welfare system and its intersection with the legal system is not new. The seminal work of King and Piper examined the child welfare system through the use of systems theory. They discuss the intersection of the child welfare and other social sub-systems, pointing out that much of child welfare is influenced by the political system, commenting that 'much of social work activity takes place outside the law's domain, in areas where interference and domination is more likely to come from the political system.' (King and Piper: 138) This underscores the importance of understanding the interactions and communications between the three systems involved in transracial adoption—legal, political and child welfare.

Thus, an important part of systems theory analysis is understanding how systems interpret information internally, and how they interact with other systems.

Child Welfare as a System?

This section examines how 'child welfare' should be placed within systems theory. Can 'child welfare' be considered a system in its own right? If not a system, then, how should this concept be placed within systems theory? And if it is part of a system, or a system in its own right, what sort of communication does it produce? Is it communicating in a binary code of

its own, or, as King supposes above, can it produce information that is far more rich and complex than what can be understood in the binary code of any system? This section explores these questions.

Can 'child welfare' be considered a system, alongside other entities that are widely accepted to be systems—such as law, economics, politics, and religion? There is no definitive list of systems within systems theory—although these three or four are broadly accepted as existing systems. That does not mean, however, that these are the only systems, or indeed, that there are no other systems emerging as a result of the growing complexity of society (Nobles and Schiff 2006). This section discusses whether child welfare can be considered to be a system in its own right, alongside that of law, economics and politics, and religion, albeit perhaps an emerging system, or, if not, how child welfare should be considered. Is it part of another system, and if so, how and what are the codes used within that system about child welfare? This section concludes, after considering the characteristics of a system, and the various ways in which child welfare has been categorised in systems theory discussion, that it is best understood as a part of the social science system, albeit with its own unique binary code. It is this code that helps identify child welfare and thus, more consideration should be given to the binary code in which child welfare communicates.

Exactly what are the defining characteristics of a system within systems theory? In interpreting Luhmann's work on systems theory, King explains that a

> system…should contain and constitutes a "representation of society within society." Different social systems are distinguished from one another by the meaning each gives to relationships and events in the social world. (King 1993: 220)

It is the unique binary code that each system uses that provides the relationship to the larger environment that King describes. That is, where it is possible to discern the distinct binary coding used by a system to communicate—as distinct from the coding that is used by another system--it is possible to identify a discrete and separate system.

 Smith further emphasises this point, in commenting that 'the functional identity and distinctive operations of sub-systems are conveyed by their unique binary code.' (Smith: 2004, 320). This again highlights that it is through the identification of the distinct binary code that something *is recognised as a system.* Another point, to which this discussion will

return, is that all systems code in a binary fashion. In other words, any communication that a system generates is through a distinctive code—and that all codes are binary. *It is not possible*, in this iteration of systems theory, for any system to code in something more complex than binary code. Therefore, it is not possible for one system to have more complex or detailed communications than another system. All system communication, whether internal or external, is via a binary code.

Within a systems theory framework, Smith considers the nature of child welfare in the context of post-adoption contact between a child and their birth family. She positions child welfare as within and part of a social science system (Smith: 327). This seems to identify social science as a system as distinct from science—and in this she differs from the categorisation of social science given by King. King (2002) views social science as part of the science system. Where child welfare is placed is critical in understanding what binary code that system uses to communicate both internally and externally. This positioning becomes less critical when taking the stance that King has, that different component parts within a system may well communicate in a distinct binary code a position that seems somewhat contradictory to the idea that systems are identified in no small part as a result of the existence of a unique binary code. The code that child welfare is linked with is an important part of a systems theory analysis—as the message of that binary code is what the legal or political system, for instance, is what is re-interpreted within the binary code of that system.

Smith further recognises the irritation that can occur between systems where the messages carried by respective binary codes do not translate easily into the code of another system. This is indicated in her comment that "post-adoption contact between children and their birth families represents an issue where law has been *challenged by a broadly social scientific discourse* while remaining constrained by its own meaning construction of (legal) parenthood", (Smith: 327 emphasis added). She notes that the messages based between the social science system and the legal system about post adoption contact with birth families is one that has been difficult for the legal system to absorb. The way in which this is resolved, she argues, is because the legal system shifts a responsibility to adoptive parents to make decisions about contact.

Smith comments:

> A 'perturbation' in law's environment, created by social scientific communication about the relationship between adoption, contact, and identity issues, has apparently been met with resistance. Rather than integrating social scientific knowledge into its operations, law has avoided epistemic entrapment by identifying contact arrangements and children's well-being as the (legal) responsibility of adoptive parents. (Smith: 337)

This analysis is problematic in that systems do not recognise the existence of other systems, and not of specific individuals, such as adoptive parents. The type of directed communication to individuals that Smith proposes simply is not possible within the precepts of systems theory. The legal system lacks the wherewithal to make a decision to deliberately direct a legal responsibility to adoptive parents. The legal system can only communicate in its binary code- and cannot direct who receives its messages.

Smith's analysis also differs from King. In contrast to Smith, King identifies the detail of the binary codes that are exchanged between systems, whereby if the legal system is able to determine that a proposed action is lawful, then the legal system enables that action to be carried out. Smith names the social science system as one that carries messages about adoption, but without identifying what binary code is used by the social science system in the communications about post adoption contact. In his discussion of parental alienation syndrome, King identifies the specific binary codes used in systems communication. He positions the child mental health system as a subsystem of the science system—in contrast to the discussion Smith has about the social science system communicating about post adoption contact issues. According to King, the child mental health has a code of "therapeutic/non-therapeutic" (King 2002: 626), within the science system binary code of "truth and untruth." (King 2002: 626). He goes on to suggest the pattern for the legal system's interpretation of code for child welfare

> The formula for decision-making, 'if there is reliable knowledge that the decision, contact proposal, decision or care plan is likely to benefit the child, then it is *lawful*', succeeds in combing law's coding within a legal programme that is able to select and interpret information from child welfare professionals (King 2002 : 623).

Both King and Smith see that the legal system can more readily absorb messages when they can be translated into the binary code of that system—thus avoiding the problems of an unsuccessful structural coupling. This much of their respective analysis is unproblematic. But King claims that the law makes a decision as to whether there is reliable information before proceeding to code information received about child welfare. In this discussion, King conflates child mental health and child welfare. Smith, on the other hand, suggests that systems attempting to steer the legal system should make deliberate choices to code communication in the legal system binary code, rather than the binary code of that system. Both of these propositions, differing as they are in trying to identify the way in which systems communicate about child welfare matters, are problematic. Neither explanation is satisfactory, as each assigns systems the ability to communicate in a complex and deliberate manner not contemplated by systems theory.

One must question, with respect to King's proposition whether the legal system is imbued with the ability to make a judgement about what is reliable information and how something will benefit a child? This flies in the face of the proposition that law simply interprets information as legal/illegal, and does not have the capacity to interpret benefit for the child— this is a complex piece of information that falls outside of the law's binary code. Just as the law does not concern itself with whether its decisions are just (Schiff and Nobles, 2006) neither does the legal system have the capacity to weigh information and determine if something is to the benefit of a child. This far outstrips the idea that the law only digests information in its binary code of legal/illegal.

Likewise, the suggestion that Smith (342) offers to enable successful structural coupling is problematic because it ignores the limitations of system communications. She suggests that the social science system could deliberately choose to 'disguise' its communications, either through making them 'legal communications' or making use of the legal system binary code. A system cannot make a choice to communicate in a code other than its own. Also, given the precept in systems theory that a system is unaware of other systems, neither can a system make a deliberate choice to cloak its communications as ones that might belong to another system. The two possibilities that Smith suggests are not possible within the way that systems theory claims that systems operate. King underscores the restrictions on systems communication, emphasising that each system is limited to the use of its own binary code, and lacks the ability to shift into another code for communication.

> Law cannot change its mode of operation by, for instance, applying political, scientific, or economic criteria in its decisions, although it may refer to these concepts as reconstituted within the context of its own exclusively legal decision-making programmes (King 2002: 619)

However, Smith's suggestion of an ability to select differing codes for communication is something which is achievable in the context of 'polyphonic organisations.'

Polyphonic Organisations

Anderson has developed the concept of polyphonic organisations and their relation to functional systems—functional systems being those usually identified in systems theory, such as law, politics, and the economy. In Anderson's analysis, organisation systems have attributes that functional systems do not. These differences are of particular importance in understanding the operation of polyphonic organisations. Polyphonic organisations are ones that are not linked to a single function system, but rather across multiple function systems. Function and organisation systems are both closed. But while a function system does not have the ability to decide what code to communicate with—being limited to the binary code that is one of the defining characteristics of it being a system—polyphonic organisations can select which functional system binary code to communicate in. The nature of the communication of a polyphonic organisation system is that of a decision—and the polyphonic organisation must decide which of the available functional system binary codes to communicate in. (Anderson)

Villadsen contends that

> …present-day welfare organisations can thus be seen as polyphonic organisations that must make continuous decisions about whether to use the code of law, pedagogy,

health or economy for communicating about clients and for making self-descriptions. (Villadsen: 68)

An alternative way of viewing child welfare is seeing it as one of the systems that is engaged in by polyphonic social service departments.

Should child welfare be conceived of as a separate system or as the activity of a polyphonic social service organisation? Viewing social service organisations as polyphonic, and having to communicate across multiple function systems about transracial adoption, including the legal, child welfare and political systems. The social service organisation must select which function system code to communicate in—and it might find its message on transracial adoption more successfully communicated in the binary code of the child welfare system than of the legal system.

Race, Post Racialism and Transracial Adoption

CRT has never specifically addressed child welfare. Research on the child welfare system through CRT lens has not been done with the kind of focus on its operations in the way that for instance Piper and King have done on child welfare through the use of systems theory.

King (2002) has argued that the child welfare system communicates with a distinct binary code, as a sub part of the social science system. This view does not negate the existence of system irritation between the legal and child welfare systems, but suggests that the irritation is simply the inability of the legal system to make a translation of the child welfare binary code—not that the child welfare system is sending across an inherently more complex message. Its message is binary, but specialised. What is missing from this alternate view of the cause of system irritation is a rendition of what the child welfare binary code would be. It is widely accepted that the legal system codes in a binary of legal/illegal. For purposes of discussion, this article hypothesises that the child welfare binary code is one of best interest/not best interest of a child. This is also the code that King (2002) identifies as the child welfare binary code. This is certainly a point that would benefit from future research

and examination within systems theory, just as CRT could be expanded to focus on the child welfare system.

If one accepts that the boundaries around transracial adoption are representative of power (Perry 1998)—and that the messages of power are those carried by post-racialism, then the implications of the proposed transracial adoption legislation become more clear. The relationship between race and the law in post-racialism has been described as one where 'race does not matter, and should not be taken into account or even noticed.' (Cho: 1595) This is certainly the message that is implicit in the amendment to section 1(5) ACA 2002 for transracial adoption decision-making. Removing parts of the law that are seen to "privilege" or even to recognise the existence of differing races and ethnicities helps to accomplish the goal of post-racialism. Thus the amendments to the Adoption and Children Act neatly fit within the parameters of post-racialist discourse. Both systems theory and critical race theory see law as operating to preserve power and social hierarchies. But what value does post-racialism play in pursuing or maintaining social hierarchies and power? Cho (1644) explains that

> [p]ost-racialism insulates white normativity from criticism... The post-racial state disseminates a new set of "rules of the game" of who will be a political actor, what is a political interest and how political claims will be made and negotiated to achieve the political retreat from race.

In other words, post-racialism acts to make racism invisible and normal—and the challenge of racism ironically is presented as itself an act of racism.

Thus, critical race theory is a valuable tool in deconstructing post-racial content in laws and system messages—these that are implicit in and at the very heart of the proposed legislative changes on transracial adoption.

Post-racialism and Transracial Adoption

Post-racialism analysis queries whether it is possible and desirable for groups to maintain a distinct culture and cultural identity, rather than being absorbed into mainstream (white) society. An informative article argues against the value of maintaining cultural identities as a worthy goal of society, let alone of the adoption of a child. (Eskay) In this post-racialist perspective, the actual existence of cultural identity is questioned—as is any value that

cultural identity might have if it does exist, particularly in transracial adoption. Eskay is dismissive of concerns about the importance of race and culture in transracial adoption:

> Without a discrete set of values or practices to which all people of a similar race can claim allegiance, preservationist fears about transracial adoption are unfounded. (Eskay: 729)

Curiously, the existence of a multiracial society is also used to negate the importance of a consideration of the child's race or ethnic background. The necessity of having specific considerations of race and culture in child welfare law is dismissed—particularly in that of transracial adoption is dismissed out of hand. (Eskay: 730-731)

Eskay further argues the post-racialist point that racial considerations are harmful to children. In child welfare law, post-racialists argue that these considerations among other things are responsible for delays in child welfare decision making and in adoption placements. (Eskay: 733)

Where post-racialism sees the consideration of race as creating inequality and undesirable, it should be no surprise that this message is now being exchanged between the political, legal and child welfare social sub-systems about transracial adoption. This explains the strength of the movement to remove racial considerations from transracial adoption placements—because it is part of a much larger social message.

Structural Coupling, "Regulatory Failure" and the Messages Implicit Between Systems in Transracial Adoption

But to what degree can either the legal or political systems actually control the child welfare system? If the political system wishes to or is in fact encouraging the messages of post-racialism, to what degree will it be successful in transmitting this message across systems? Schiff and Nobles(2013: 207)   comment that 'no system can steer society.' However, successful structural coupling between systems can result in an increase in the influence one

system has over another, in this way achieving its aims through the operation of the other system. As one might expect, the relationship between the political and legal system is one where structural coupling can occur —dependent of course upon the norms which the political system is trying to transmit through the legal system. If the norms are such that one of the instances of regulatory failure might occur, then of course, there is no structural coupling. The success of structural coupling between the political and legal system in part depends upon the content of the norm being transmitted in the system. Not every instance of communication between these two systems will result in successful communication – that is, structural coupling. Schiff and Nobles (2013: 211) explain that through the rule of law, the political system 'us[es] the law to distribute political power.' This is the aim of the political system when it structurally couples with the legal system. Thus, just as critical race theory focuses on the use of political power and persuasion in the law, so does systems theory recognise that political power can be dispensed, controlled and maintained through the legal system.

Both systems theory and CRT position the legal system as a means of power distribution, and further, as a means of maintaining a particular power *status quo* within society.

Structural coupling of the political and legal system to influence the operation of another system does not however infer that the regulated system falls under the 'control' of that system. Schiff and Nobles (2013) caution against such an understanding of structural coupling—pointing out that the results of system interaction are never guaranteed—even through the interactions of the political and legal system.

As noted earlier in this article, regulatory failure refers three instances of message communications that are not successful in achieving the aims of the involved systems. These are system deafness, simplifying a norm in order to absorb its meaning and norms which might be replicated within other systems, but that cannot be replicated within the legal system binary code. To what extent do these explain the inability of the legal system to successfully translates into its binary code the messages that are sent from the child welfare system binary code?

System Deafness

System deafness may explain this. Sometimes systems are simply not able to "hear" the message transmitted by the other one –resulting in a lack of 'of co-ordination and, and increase the likelihood of 'deafness' and unpredictable reactions.' (Nobles and Schiff : 2013, 209) That this is occurring with the efforts to amend the statute on transracial adoption is obvious in some of the commentary in the House of Lords debate. This is demonstrated in a comment from Baroness Butler-Sloss during the House of Lords debate on 9 December 2013 regarding the proposed legal change: 'It is interesting that agencies remain unconvinced by the Government's arguments...'(Baroness Butler Sloss, online at http://www.theyworkforyou.com/lords/?id=2013-12-09a.590.2)

The political system demanding a legal set of a set of norms that the child welfare system will be incapable of 'incorporat[ing] into its operations', resulting in the child welfare systems' 'deaf[ness] to law's demands' (Nobles and Schiff 2013: 209) is already apparent even at this stage of the communications and norm development. This is a very clear example of child welfare system deafness—where the child welfare system is unable to accept the normative demands from the political system. The political system demands certain considerations be curtailed, when child welfare knowledge insists that these are crucial elements to be included.

But the legal system is not deaf to these norms. Instead, it is likely to be very receptive to the new norms created in the legislation. These are norms which can easily be translated from the political system binary code to the legal system binary code—and achieve the aims of the political system.

Norm Simplification

System deafness is only one example of communication 'failures' between systems. Norm simplification is a second type of regulator failure. If this change in fact becomes mandatory practice guided through the legal system, the child welfare system will have to abandon its own complex knowledge base in order to comply. With respect to transracial adoption, the child welfare system is likely to abandon the more complex decision making process of considering a variety of factors in making adoption placement decisions for a child. While the child welfare system may prefer, in its own coding, to continue to interpret a more complex

set of variables, this kind of dominance of the legal or political system withers the capacity of the child welfare system to utilise its own knowledge. King warned about this result, saying that a shift to reliance on the legal system as the

> primary institution for resolving any disagreements ...over what is best for children...force[s] the purveyors of child-welfare knowledge to display their wares before the distorting mirrors of the law.[1]

Yet, the message that is being sent from the political system is one likely to be very attractive to the legal system. The simplified message is one that the legal system is likely to fit more easily into its binary coding. The legal system is much more able to make sense of a binary set of rules that do not permit the consideration of ethnic factors in the placement of a child. This reduces the complexity of the child welfare to legal system message—and allows the legal system to digest the message in a way that makes sense within its binary code. The consideration of multiple factors involving ethnicity is something that the legal system cannot reinterpret into its binary code. But – a message from the political system to the legal system to 'fix' the child welfare system is likely to fail as a result of the over-socialisation regulatory failure. This end result is not something that the legal system can produce. It can absorb the simplified message—and carry it out—but it cannot then reach to fix the child welfare system. Schiff and Nobles(2013: 210) point out an alternative and likely more successful approach is to 'encourage structural coupling between systems, rather than attempts to directly regulate one system by means of another.' In other words, the solution to the large numbers of children in the child welfare system is unlikely to be solved by one system dictating to the child welfare system how it is to operate to resolve this. This hearkens back to the words of warning by King—that the child welfare system loses the ability to apply its knowledge to its own situation if the legal system is set up to dominate that system. System dominance of one to another is correctly identified by 'failure'--- and that lesson from systems theory is one that perhaps needs to be considered by politicians and lawyers when it comes to child welfare matters.

It needs to be considered, however, whether this view of the child welfare system delivering a message too complex for the simple binary code of the legal system to digest is a correct one. In keeping with the tenets of systems theory—all systems communicate in a binary code. Child welfare, whether seen as a system in its own right, or whether seen as having its

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[1] Ibid, 319-320.

message sent through another system such as science or social science, can only have a message sent in a binary code. King (1991) observes that the legal system struggles to interpret and implement child welfare messages in a way that is meaningful to the intent and content of those messages. The difficulty does not arise from the ability of the child welfare system to communicate in a more complex manner than a binary code. Rather, the information that is communicated within the child welfare binary code is simplified by the legal system to the point that the norms as understood within the child welfare system are rendered meaningless through this simplification in the binary code of the legal system.

Specialist Norms that cannot be Translated into the Legal System

It is also worthwhile to consider the third instance of regulatory failure, that of specialist norms which simply cannot be translated into the legal system binary code. In usual child welfare decision making, the legal system struggles to cope with specialist norms that are required in an interpretation of child welfare knowledge. The legal system cannot effectively translate these into its binary code. King and Piper (50) warn about this kind of regulatory failure and the inability of the legal system to deal with specialist and future oriented norms:

> The problem for child welfare science is that, within the legal arena, the information will almost invariably be constructed according to the demands of the legal discourse. The uncertainty and imprecision of statements produced by child welfare both in relation to existing knowledge about children and predictions for their future make both the statements and the statement-makers even more highly vulnerable to 'enslavement' within the legal arena.

Specialist norms about adoption placement that utilise child welfare system knowledge are both specific and future-oriented. An adoption decision is one that is a forward looking one—and one which legal system communication is particularly ill-equipped to provide, as this discussion shows. So whilst there may be system deafness as to the meanings sent from the child welfare system to the legal system, the legal system is likely to be an enthusiastic recipient of a simplified set of norms on adoption decision making.

Conclusion

In conclusion, it is important to address why this sort of analysis matters. Often it is thought that theoretical analysis of the law has nothing to do with the day to day impact and operation of law. This article argues that theory, to be of any value, must be cognisant of the day to day

workings of the law—and the other systems with which the legal system interacts. Otherwise legal theory can justifiably be dismissed as so much academic navel gazing. On the other hand, it is important to have an understanding of the daily workings and impacts of law to understand how the intersections of law, politics and other social sub-systems do have an impact and are impacted by how the legal system works—that it does have the potential to have a profound impact on the daily lives of individuals and groups. That much is the message of CRT, and should not be lost in the framing of analysis of theoretical. The message to be taken from this article is that simply changing legislation on the requirements for transracial adoption placement will do nothing to change the numbers of ethnic minority children in care awaiting adoption. The actual causes of the disproportionality and disparity in the numbers of ethnic minority children in care are lost in the communication between the political, legal and child welfare system.(Barn and Kirton) The over-riding social message that is transmitted between these systems of post-racialism makes the proposed legal change an attractive one, and is a message that at least the legal system can digest in its binary code of legal/illegal. It is less clear how the child welfare system is absorbing and transmitting the message of post-racialism—but it perhaps the indications of alarm about this proposed change emanating from child welfare actors is evidence of the system not absorbing the message of post-racialism as easily or in the same way as the legal system. It is of course of vital importance to address systemic barriers that create disproportionate and disparate rates of ethnic minority in child care—and of equally vital importance to identify them accurately so as to be able to address them. This requires being aware of the intersections between the legal, political and child welfare systems and the ways in which they interpret and send messages—and of the role that post-racialism plays in the content of messages. Thus, the need for a combined theoretical analysis of systems theory and critical race theory—the combined power of which allows a deeper and more accurate understanding of the systems at work in shaping transracial adoption laws. A combined use of both systems theory and critical race theory that makes use of the polyphonic organisation concept can also investigate the role of social welfare agencies in the messages transmitted about and the way in which transracial adoption is conducted.

In contemplating the future direction of this specific law and the legal system, CRT and systems theory again have a marked departure from each other. As noted in this article, one of the aims of CRT is to advocate for system reform. Systems theory argues that change

occurs through sufficient system irritation, but that law cannot and does not attempt to change in an effort to embed 'justice' within its binary code of legal/illegal. Unless sufficient system irritation is created then the law is unlikely to change. It is also unlikely to change so long as it serves a function of social stabilisation- of preserving an existent status quo of power— where power is concentrated in the hands of a dominant-if shrinking demographic majority— white part of society. Nor is it predictable what change system irritation might occasion— save that the change would operate as a stabiliser. Even if—using CRT tenets of advocacy – sufficient system irritation were created to cause a change in the law, it is impossible to know if that legal change would restore the consideration of ethnicity in adoption placement, or if it might go even further to restrict and penalise such considerations.

In two respects then, the legal change brought about by the Children and Families Act should be regarded with caution. Firstly, is the possibility that further system irritation and legal change could result in an even more punitive stance in the law on considerations of ethnicity. Secondly is that, following the results of a similar law in the United States, this law is unlikely to bring about any significant reduction in the numbers of ethnic minority children in adoption. The child welfare agencies would then be right to say "I told you so"—but the continued deafness of the legal system to these sorts of messages means that would not be heard in any event.

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