

WHAT NIKLAS LUHMANN MIGHT HAVE SAID OF CARBON TRADING

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Extended Abstract

The reception of Luhmann in British legal scholarship, even when that scholarship is attuned to interdisciplinary work in the social sciences, has until very recently (King and Thornhill 2003, 2006) been rather limited, chiefly because it is difficult for those brought up in the Austinian tradition to take seriously the idea of law as a social system that is closed in the radical sense of being self-referential (Luhmann 1984, 1993). Austin's conception of law as a command puts the effectiveness of the command at the heart of our understanding of a political community. The striking feature of Luhmann's conception of closure, in which the evolution of a social system is an expression of its inner properties, is that it gives effectiveness only a residual place in the understanding of such system. Once the radical nature of this proposition is appreciated, it becomes clear that the core modernist concerns of legal and political philosophy can have no integral part in Luhmann's (1997) theory of society. His reception from within this modernist tradition, or better the lack thereof, is therefore not surprising.

We will argue however that as the criticism of government failure at national and international levels has mounted, and government inefficiency and ineffectiveness are no longer regarded as correctable errors but characteristic features of contemporary government, Luhmann's account comes into its own. While difficult to assimilate into the modernist paradigm articulated by Austin, it increasingly appears to be the case that government has passed the point at which it has modernist concerns at its heart. Hence, for this stage at least, the appropriateness of Luhmann's legal philosophy should no longer be in doubt.

Ecological questions have proven particularly fruitful to illustrate Luhmann's theory of society as an integrative perspective cutting across the scientific, economic, legal, political and moral domains (cf. Luhmann 1986 in the light of Luhmann 1988, 1997). In this paper, we will discuss the development of carbon trading as a case study. Even if one leaves aside the difficulties about identifying the claimed rise in global temperature, attributing this to human action, and deciding whether the costs of seeking to stop this rise are justified, there still remain difficult questions about how to set prices for carbon emissions which will generate trade that will realise the aims of carbon trading.

What we are faced with is a planning task of an ambition reminiscent of the twentieth century's most extensive exercises in centralised command and control, and it is hard to believe these prices can be set. Evidence from such trading as has taken place shows this suspicion to be well founded. Once current debates on the scientific evidence (both in its natural and social scientific dimensions) in favour of such trading are added to the resulting picture, its analysis on the basis of a structural coupling between the scientific, economic, political and legal systems becomes particularly compelling in its exhibition of an entirely self-referential rationality, which has led to extensive national and international trading systems, and every prospect of the carbon trading market continuing to grow. As government-sponsored carbon trading is perhaps the most characteristic initiative of modern government, its discussion in Luhmann's terms is significant for any evaluation of the relevance of his work.

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