Four faces of political legitimacy: An analytical framework

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In this thesis I aim to clarify the meaning of political legitimacy, but this ambition is limited right from the start by three restrictions (see Preface). First, I aim for an empirical and not a normative understanding of legitimacy. Second, I aim to understand political legitimacy from an action theoretical approach. Finally, I am interested in political legitimacy and not legitimacy in general. These three positions are the analytical building blocks with which we will analyse the different faces of political legitimacy and, as such, they deserve some further attention.

1.1 Normative-Prescriptive versus Cognitive-Explanatory Approaches

The difference between a normative and an empirical perspective is often summarised in the difference between 'ought' and 'is'. Normative theories of legitimacy *prescribe* how legitimate politics ought to look like, while empirical theories *describe* or explain how politics is legitimate in practice. This difference accounts for the classical divide between the legalist tradition of moral theory and the empirical tradition of sociology. This thesis pursues an empirical descriptive and explanatory approach to political legitimacy. However, as many have misunderstood the claims of an empirical, explanatory theory of legitimacy we need to elaborate this conception and differentiation a little further.

First of all, the clear-cut divide between normative and empirical theory is often on closer inspection not that articulate. Normative theory can be quite empirical in the sense that it is informed by empirical facts or describes and evaluates empirical practice. For example, many theories of democracy have the implicit normative view that only decisions made by majority-based representative institutions should be considered legitimate. Based upon this presupposition the legitimacy of certain specific institutions is subsequently empirically investigated. We must recognise, however, that despite the empirical orientation these theories ultimately remain normative. Notwithstanding the fact that representation or the ideology of representation might be an important source of legitimacy in empirical practice, these theories use a normative and not an empirical understanding of what legitimacy is. It is the scientist and his theory that establish the standards of judgement of what is and what is not legitimate, and as such exclude other possible sources of legitimacy that might be empirically valid.

Such *cryptonormativism* is quite common and not always easy to recognise. The confusion especially arises because, as Luhmann has already pointed out, the opposite of the normative is not the empirical – normativity can be an empirical fact and empirical facts can be normatively

evaluated – rather, the opposite of normative claims are cognitive claims (Luhmann 1985:33). Cognitive truth-claims aim at describing or explaining empirical reality in terms of factual truth. As such, these claims can in principle be scrutinised by (scientific) procedures and tests in order to establish their empirical truth-value. When the empirical practice defies theoretical description or explanation, it is therefore the theory that has to be revised to realign it with the empirical facts. In contrast, normative-claims are more robust against empirical defiance. When empirical facts do not align with the normative theory of how it ought to be, it is the practice that should be revised, not the theory. The main analytical difference[1] between normative and cognitive-explanatory theories lies therefore in this different relation between theory and practice.[2]

However, at this stage a second form of confusion is bound to rise. As soon as we talk about empirical facts and scientific truth-claims post-positivists point out that facts and values cannot be separated.[3] Over and over again, we are confronted with the 'discovery' that all scientific theory 'structures' or 'constructs' reality and hence that all scientific theory is normative. Instead of pursuing empirical theory and empirical truth-claims, it is said, one should be frank and lucid about one's own normative standpoints. As such, the difference we have been trying to posit between normative-prescriptive and cognitive-explanatory theories seems to collapse again. However, we should resist such unnecessary and misleading conclusion. Why can't we have both a post-positivist outlook on social science and still differentiate between 'is' and 'ought'? It is rather obvious that every scientific or analytical framework is not value-free. It is not value-free in terms of the concept-definitions used, in terms of the choices made concerning the object of research, in terms of the scientific method employed and in terms of the personal and/or cultural values of the scientist. It is of course interesting and helpful to study these value-structures inherent in scientific practice and theories, especially where it has real social consequences. However, the difference between normative and empirical theory does not concern the idea that the latter claims to be *value-free*, but rather that empirical theories are (or ought to be) *free of value-judgements* where normative theories are not.[4] It is perfectly possible to claim that facts and values can never be separated or that

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[1] I use the concept of analytical difference to oppose it with empirical difference. This means that one and the same empirical object, action or event can have different analytical qualities, while different empirical objects can be analytically the same.

[2] Obviously, the idea that cognitive-explanatory theories have to be revised when they encounter an empirical anomaly is more an ideal than the normal scientific practice (see Kuhn 1970).

[3] I understand post-positivism as it is usually understood in the interpretative policy sciences (Fischer 1980, 1993, 1995; Yanow 2000; Rein & Schön 1993, 1996) and not as some improved form of positivism (Marsh & Furlong 2002:24-6).

[4] The difference between value-free and value-judgment-free is sometimes also captured in the difference between neutrality and impartiality (see e.g. Lacey 1999:92). This idea that science ought to be '*Werturteilsfrei*' is often credited to Weber. Weber, for sure, did not aim at a science that was value-free (*Wertfrei*) but at values and ideals that were free from science (Weber 1958b; 2012). It seems to me that Weber's fear that science and expertise would prescribe values by disguising them as facts is still valid. We should resist all forms

every fact inherently contains values, while at the same time acknowledging the different relation between theory and practice inherent in normative- and cognitive-truth claims. If it is possible to have a sociological theory of legitimacy – i.e. an empirical theory that describes or explains socially valid norms – it is also possible to have a sociological theory of sociological theories of legitimacy. There is no need to think that the difference between normative- and cognitive-truth claims somehow points to a false pretension of scientific positivism.

A final issue that has preoccupied many is the *relation* between 'is' and 'ought'.[5] Some have claimed that an empirical value-judgement-free sociological approach towards political legitimacy is amoral or trivial, reifies the status quo and forecloses the possibility of critique (see e.g. Gouldner 1968; Gray 1968; Momin 1972). Much can be said about the (alleged) relation between 'is' and 'ought' that should not concern us right now. Here, we restrain ourselves to some tentative responses. First of all, as we will discuss later in more detail, it is true that many sociological theories of legitimacy have implicitly or explicitly championed social and political stability and as such these theories might indeed be accused of defending the status quo. All the same, this problem is not inherently caused by the aim of factual explanation, but rather by the theory or method used. However, at a more fundamental level it might be said that any theory that tries to understand the 'is' is biased against the 'what could be'. Although this is right in principle, it seems to be based on a distorted understanding of the 'is'. Social reality is not a perfect functioning machine for which a description or explanation would necessary lead to its celebration. Social reality is complex, confused, contradictory and imperfect. To describe and explain this reality is to advance critique, as Weber stated, by turning the 'conventionally self-evident' into a problem with 'inconvenient facts' (Weber 1949:13; 2004a:22). It seems to me that an empirical theory might not just aid normative theory to be more socially and politically relevant, it might also be the most solid scientific method for critique through the disclosure of factual contradictions and false beliefs.[6] Such cognitive debunking of social and political myths is critical, but not necessarily normative.

In sum, this thesis pursues an empirical approach towards political legitimacy, which means that it aims at a cognitive-explanatory understanding of legitimacy and understands the relation between theory and practice differently from normative-prescriptive approaches. It does not claim some misconceived ideal of value-free science, but rather a science free of value-judgements. And finally, it holds at least a promise that a theory that is not normative can still be critical.

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of such 'cryptonormativism' (Bader 1991:142). It is precisely for this reason that we should be clear about the difference between normative and empirical theory.

[5] See for a general discussion Bhaskar 2010:81ff ; Searle 1964; Cottingham 1983; Sayer 1997a; Cruickshank 2010; Hammersley 2009; Steinmetz 1998; Putnam 1995, 2002.

[6] This position can be associated with 'critical realism' (Sayer 1997a; Hammersley 2009; Steinmetz 1998; Cruickshank 2010).

1.2 The Sociological Meaning of Validity

What does it mean when we try to understand political legitimacy from an action theoretical approach? At the most general level we might say that legitimacy is a quality we ascribe to certain social norms. Although the precise meaning of social norms is problematic in itself, it may be reasonable to say that the quality we ascribe has something to do with validity. As such, I would suggest that legitimacy in a very broad and loose sense has something to do with the validity of social norms. Indeed, we are interested in the empirical validity of such norms. But what does that really mean? The sociological meaning of validity is quite tricky. This has to do with the particular quality of norms. Let us first consider an example to get familiar with this complexity.

In the Netherlands citizens are required by law to carry an identity card on them in public space at all times. We might say that carrying this card is a legally valid norm. However, if none of the citizens subsequently take their card with them the norm is not 'socially' valid. This means that the social validity of the norm differs from its legal validity. But the fact that a legal norm is not socially valid does not mean that the norm is not legally valid either. For example, a judge could still impose the norm in a judicial trial (relatively) autonomous of its social validity. As such, it is also possible that two different norms can be valid at the same time. We might find that even though the law formally requires citizens to carry an identity card, an informal social norm develops in which other documents such as bankcards, for example, are also accepted in practice by controlling police officers. In this case there are two different norms of which one is legally valid and the other is socially valid. Then again, citizens might actually conform to the law and carry around their identity card. Although, we can now say that the norm is legally and socially valid, we cannot say anything about whether the citizens actually think that these norms are valid. It may be the case that citizens conform to the law because they fear a penalty, not because they normatively agree with the law. In such case, we can say that the legal norm is *objectively* valid, but not *subjectively* valid. The same holds for socially valid norms. We might, for example, conform to social norms because of social pressures and not because we normatively agree.

What this example shows is that even if we are convinced that we want to study the empirical validity of norms in a particular social ordering, it is not too obvious which norms we want to study in the first place. In the example above we already distinguished between legally and socially valid norms. The example also shows that there is a difference between objective and subjective validity. If we want to understand what political legitimacy is in a sociological framework, then we need to get a handle upon this complexity.

1.2.1 Objective Validity

From the example above we see that there is a difference between a legal norm and a social norm. But to reduce complexity we should first try to get a grip on social norms in general before we can discuss the peculiar quality of legal or political norms. If we look at social norms, then it is crucially important to understand that when a norm is *valid*, this either means that the norm is objectively existent in a particular ordering, or that actors in this ordering normatively agree with it. An objectively valid norm is sometimes called a *factual norm*, while a subjectively valid norm is often just called a *valid norm*.

A norm is factual, i.e. objectively valid, to the extent that it actually structures social action. So for example, the custom to greet one's colleagues at the office every morning can be a factual norm. However, the sheer fact that something is regular and recurrent does not make it a *social* norm per se. The recurring fact that I take the bike and not the bus to go to office is not a social norm at all – not necessarily anyway – but the fact that I wear clothes in the bus or on the bike is. What makes the morning salute a norm is that in some way or another it is socially expected. A social norm finds its source of existence in *social expectations*. As Luhmann explains, it is not so much the social expectation I have of the action of others that is important in this regard, but what is particularly important are my 'expectations of expectations' (Luhmann 1985:26). This means that I not only expect you to act in a certain way, but I expect you to expect me to act in a certain way. Norms are able to coordinate or 'normatise' social action because of these shared expectations that reduce and control social complexity as they provide a relatively stable reduction of possibilities of interpretation, meaning, and action. These expectations of expectations normatise my action exactly because of this *objective* reduction of all possible expectations. For example, I might expect you to hold an expectation towards me that I will greet you in the office. Whether I decide to do so does not alter the *objective fact* that I cannot ignore this expectation of expectations. As such, this social norm exists objectively in the sense that I have to relate to it whether I like it or not.

However, the social norms we are interested in do not so much concern *particular* norms that exist in a particular relation between me and you, as they concern *institutionalised* social norms that in turn structure our particular relation. Indeed, the factuality of norms is not solely dependent upon the fact that you and I share expectations of each other's action. Expectations that I have of you – of both your action as well as of your expectations of my action – are not only, or even primarily, dependent upon my specific knowledge of you, rather such expectations arise in relation to a *third-party*. Such a third-party might be perceived as an 'alter-ego' or 'generalised other' (Luhmann 1985:57; Mead 2004:152). Although this third party is not directly involved in our relation, it might potentially get involved. For sure, such third-party does not have to be a particular person, it

can also be a group or an anonymous 'generalised' other. To the extent that expectations are formed in relation to the expectations of a third-party we can say that norms are *institutionalised*. Institutionalisation is therefore the mechanism that helps to control social complexity and contingency through the *generalisation* of expectations. As we will see later on, this reduction of social complexity by generalisation cannot only occur through institutionalisation in the 'social dimension', it can additionally be secured by generalisation mechanisms in the 'temporal' and 'material dimension' of social expectations (Luhmann 1985:24).

The importance of institutionalised norms is that the factuality of norms is no longer necessarily premised upon the *consensus* of the particular actors involved in the action (Luhmann 1985:55). So, the norm to greet one's colleagues is an institutionalised norm to the extent that expectations and actions are not just formed in the relation between me and my specific colleague John, but in the relation between me and all of my office colleagues – the general group – even though they are not directly part of the situation. The group is a general, but 'possible' actor that might get involved, even if it is not at this moment (Luhmann 1985:50). The expectation I have towards John does not derive from my specific relation with John, but from how I expect the general other to expect me and John to act. As such, institutionalised norms can be relatively autonomous of whether John and I actually agree with these norms. This means that the factuality of norms cannot be reduced to some form of subjective consensus between the specific actors. It is in these terms that we must understand institutionalised norms to be *objective*, i.e. relatively autonomous of subjective orientations.

Norms are objective to the extent that they exist *independently* of the subjective attitude of the actor. Objective norms 'exists' independently of whether the actor normatively agrees with them.[7] That institutionalised norms are objective therefore also means that institutions cannot be perceived as a mere aggregation or congruence of individual actions; they have an objective existence of their own. It is also important to emphasise that objectivity does not say anything about the *social force* or *effectiveness* of these norms, something we will discuss below.

1.2.2 Subjective Validity and Defining Legitimacy

For now, it is important to recognise that a social norm can be objectively valid (factual) *without* being subjectively valid. Although the precise meaning of subjective validity will turn out to be quite complicated, we can say in general that a norm is subjectively valid when an actor actually agrees with it – when he thinks the norm is good, just, worthy or reasonable. In other words, when a norm

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[7] Objectivity does not directly imply that the outside observer, the scientist, can easily perceive these norms. We should not mistake objectively valid norms with actual behaviour.

is subjectively valid, actors implicitly or explicitly believe or express a normative claim that this *ought to be* the norm.

This means that the fact that a norm is objectively valid does not say anything about it being subjectively valid. In our previous example we already have seen that the sheer fact that the norm of a morning salute structures the actions of an actor does not mean the actor perceives the norm as subjectively valid. Instead he might just perceive the norm to be a social fact and part of the overall social structure he has to take in to account when he strategically pursues his interests and office-career. Then again, he might not only perceive the norm to be a social fact, but also as an imposition, limiting his actions. In this case, the actor perceives the norm to be externally enforced upon him. These two *subjective meanings* of the factual norm differ from normative agreement. In that case, the actor perceives the norm not merely as a social fact, not merely as being enforced upon him, but in addition also agrees with the norm. To repeat, the sheer fact that a norm is objectively factual does not automatically mean that the norm is also subjectively valid.

When we say that a social norm – in this case the norm to greet one's colleagues in the morning – is not only objectively factual, but in addition also subjectively valid, it seems we can say that this norm is *empirically legitimate*.

We have analysed two dimensions of the sociological validity of norms in terms of objective and subjective validity. Based on these two dimensions of validity it is possible to create a typology of validity (see fig. 1.1). In the first dimension we distinguish the objective validity or non-validity of norms, in the second we distinguish the subjective validity or non-validity of norms. As such, we can recognise four different types of norms:

1) An objectively and subjectively non-valid norm: this really is an empty or non-type as there is no institutionalised norm.
2) An objectively valid, but subjectively non-valid norm: this a *factual norm*, as discussed above.
3) A subjectively valid, but objectively non-valid norm: this is an *ideal norm*. This concerns norms that actors believe *ought to be* institutionalised norms.
4) A subjectively and objectively valid norm: a *legitimate norm*

		Objective	
		Valid	Non-Valid
Subjective	Valid	*Legitimate*	*Ideal*
	Non-Valid	*Factual*	-

Fig. 1.1 – Different perspectives of empirically valid norms

1.2.3 The Problem of Order

Aside from the different analytical understandings of the validity of norms, it is also important to separate the question of *validity* from the question of *effectiveness*. The question of effectiveness, we might say in general, tries to deal with the so-called problem of order, i.e. how social or political order can be explained or guaranteed. Clearly, the problem of order is deeply ingrained in the sociological tradition and, at times, threatens to reduce legitimacy to a mere function of order or stability. It seems to me, however, that we should clearly separate between validity and effectiveness – between legitimacy and order.

The problem of order, as we will see in the chapter that follows, has clear normative origins. When one takes a look at the classic political theories of the 16th to 19th centuries concerning political legitimacy, one can not only see that *all* these theories prescribe certain norms of legitimacy, but also that when they turn to the empirical world their main worry concerns how a legitimate political order can be stable in a less than rational world. How can a legitimate political order exist when the people do not act morally, rationally, or neither? The historical fact that this classic tradition conceived empirical questions regarding legitimacy in terms of the problem of order is at least part of the explanation why order and legitimacy can hardly be understood separately in the modern sociological tradition as well. There is a rather widespread, but analytically weak idea, that if the people rise against its political order this signals that the political system has lost its legitimacy – as we have seen once again recently in the 'Arab spring'. Although uprisings and widespread disobedience *might* indicate that the legitimacy of the political order is stressed, this need not be the case. We might think for example of cases of civil disobedience in which the actor protests against certain policies or even politics, but does not deny the legitimacy of the political order as such. But more importantly, we should rigorously object against turning the relation between legitimacy and social instability upside down, which would mean that social stability indicates legitimacy. The reason for this rejection is evidently premised upon our action theoretical perspective, in which we not only differentiate between objective and subjective validity, but also between social action and behaviour. To put it short, mere obedient behaviour does not necessarily signal subjective validity.

This does not mean, however, that there is no relation between legitimacy and political order at all. As Weber has already argued, the fact that a political order is not only guaranteed by force, but *in addition* guaranteed by a belief in its legitimacy, makes it more stable and less conditional upon contingent circumstances (Weber 1978:213). However, we should try to disentangle the relation between legitimacy and stability as much as possible based upon two crucial observations. First, political stability might be a function of legitimacy, but legitimacy is not a

function of stability. Second, a functional relation does not add up to a causal explanation (Elster 2007:7-8).

But even if we agree to forgo functional relations between legitimacy and stability there is an additional and more fundamental relation between legitimacy and order. Until now I have implicitly argued from the perspective of the *individual* actor to explain the concept of subjective validity. As such, it might seem that subjective validity is an individual property, while the objective validity of a norm is foremost a property of the social ordering itself – a property of the group which exist independently of the subjective orientations of the actor. This would seem to cause an ontological conflict if we want to understand the legitimacy of a political order or practice. However, the real problem is that subjective validity always already implies some form of intersubjectivity and not so much individuality. Subjective orientations, we might say, are inherently social – we are not talking about the a-social man of liberal or economic theory. Subjective validity cannot and should not be reduced to autonomous individual preferences, but is less than objective validity at the same time. It is because of this intersubjective or social character of subjective validity that legitimacy can never be really separated from social order.

1.2.4 Internal and External Guarantees

A factual norm, we might assume, is not just an objectively valid norm, it must also be socially effective. The objective validity of a norm, however, does not in itself explain its social force. If we want to address the question of effectiveness – to explain social order – then we must explain why a norm is able to structure or normatise social action. There are two principled ways to explain why norms have such effective force to structure social action. A norm can be effective because it is *externally guaranteed* or because it is *internally guaranteed* (Weber 1978:33-4).

A social norm might be effective because it is externally guaranteed by *force*. For example, a speed limit might be effective because of the threat that speeding will be sanctioned. Force, or the threat of force, is an external guarantee precisely because disobedient behaviour is sanctioned, i.e. the *consequences* of deviance are autonomous of underlying subjective action orientations. Emphasis upon behaviour and consequences seems to reintroduce an outsider's perspective in our analysis. Indeed, to understand the social structures of force and threat allows us to understand social behaviour without analysing underlying subjective action orientations – allows us to approach social subjects as mere *objects*. However, and importantly, also from the perspective of an actor can force be perceived as an *external* guarantee, i.e. as expectations about consequences that exist independently from the orientations or the will of the actor. Indeed, from the perspective of the actor force treats him as an indiscriminate object, not as a subject. In short, force or the threat of

force, either present in hierarchical power relations or in horizontal social relations, can externally guarantee objective valid norms.

Next to political and social coercion, a norm might also be externally guaranteed by its sheer *social factuality*. For example, driving at the right side of the road is factual not because the norm is externally guaranteed by political force or penalty, rather the simple fact that others conform to the right side of the road makes it almost impossible to drive at the other side. In other words, norms may be externally guaranteed because they are intersubjectively factual ('conventions'). Again, norms are effective precisely because the external consequences of deviancy are independent of subjective orientations. So, I am not forced to lower the quality of my teaching at the university, but because everybody does it, it is more difficult if not impossible to hold up higher educational norms.

There is one final form of external guarantee that is slightly different in appearance. This form also concerns objective or 'externally guaranteed' consequences of breaking norms, but this time the effectiveness of norms is not guaranteed by political or social force, nor by social facts, but by factual and cognitive *truth*. For example, the factual truth that smoking is bad for your health means that the norm 'you should not smoke' is externally guaranteed, i.e. the factual consequences of smoking is guaranteed independently from subjective orientations. Now, it may be objected that smoking is bad for your health is a fact of nature and, as such, should not have a place in a sociological theory as much as there is no place for the norm that one should not jump off cliffs without a parachute. Gravity, indeed, is not a norm that is socially guaranteed. However, health, sanity, normality or happiness are not concepts that are as natural and objective as some sciences might want us to belief. Factual knowledge must also be sociologically understood as social-historical constructs – knowledge has a social quality. Still, the force of truth is exactly that it establishes norms and consequences that are objectively true independent of subjective orientations. Factual truth – *facticity* – is about knowledge considered by the actor to be objectively true, even though the critical scientist might show its social-historical origins (*Herkunft*).

To sum up, objectively valid norms can be socially effective because they are externally guaranteed by political or social force, social factuality, or objective truth (facticity), i.e. by *social* forces that, from an actor's perspective, are independent of subjective orientations. Yet, external guarantees only have real life consequences because actors are able, more or less consciously, to 'recognise' forces, conventions and facts. In other words, external guarantees do not make a subjective actor's approach redundant.

Norms can also be internally guaranteed. The social force of norms is not just explained by externally guaranteed consequences of deviance, but also because norms are guaranteed by the subjective

orientation of actors themselves. Based upon Weber's famous typology of social action (*sozialen Handelns*) we can recognise four principled ways of subjective action orientations: traditional, affective, strategic and value-rational orientations (1978:24-6).[8] From a traditional action orientation we can explain the effectiveness of norms – their internal guarantee – in terms of sheer routine and 'ingrained habituation' (*eingelebte Gewohnheit*). From an affective orientation effectiveness is explained in terms of emotion, especially feelings of solidarity and group identity. From a strategic action orientation the actor guarantees norms based upon his strategic cognitive considerations and subjective preferences. Strategic action, it must be noted, is first and foremost about choosing between different individual preferences, i.e. making ends conditional upon secondary effects, upon the "scarcity of means" and upon "the prospective behaviour of others" (Weber 1978:65; 30). Finally, from a value-rational action perspective norms might be guaranteed in terms of subjective normative values. For Weber, this implies that norms are internally guaranteed in terms of 'conviction' of the absoluteness of an ideal-value, an ideal that "always involves 'commands' [*Geboten*] or 'demands' [*Forderungen*] which, in the actor's opinion, are binding upon him" (Weber 1978:25).

In sum, to the extent that these subjective action orientations confirm an objective norm, we can say that this norm is guaranteed independent of, or in addition to, its external guarantees, i.e. the norm is internally or subjectively guaranteed. So, for example, a norm is internally guaranteed because an actor orients himself to that norm out of routine, out of group solidarity, because of strategic interests, or because he thinks the norm is normatively valid. Even if these types of subjective action orientations are very helpful for our analysis, we should not take Weber's claims of value-rationality at face value as there might be less demanding conceptions of normative validity that stay clear of the 'absolute' or unconditional quality of legitimacy in Weber's work.

1.2.5 Normative and Cognitive Expectations

When we have argued that legitimacy concerns the subjective validity of an objectively valid norm, this might mean that all factual norms that are internally guaranteed are indeed legitimate. However, this would be a very unhelpful position. Subjective validity, it seems to me, connotes a normative quality – a form of 'oughtness'. As such, we can distinguish between internal guaranteed norms that have a *cognitive* character and internally guaranteed norms that have a *normative* character.

The framework we are developing here is based upon the idea of social action (*sozialen Handelns*) as a meaningful and subjective orientation of an actor towards objective social norms, i.e. towards institutionalised expectations of expectations. Starting from this expectational basis of

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[8] I will use the concept of strategic orientation instead of Weber's instrumental rational orientation to emphasise the role of private or individual *preferences* in this type of action (see also Bader 1989:309).

social action we can follow Luhmann's differentiation between normative and cognitive expectations (1985:31ff.).

Suppose I have a certain expectation about a friend that he will visit me on my birthday. However, as it turns out, he does not show up that particular day. I might react to such a disappointment in two fundamental ways. First, I might perceive the action of my friend as a fact which I have to *explain* or deal with cognitively. That is, I might try to explain his absence in terms of circumstantial facts or I might reflect upon my expectations and decide they were wrong or need adjustment. However I deal with it, a cognitive reaction means that I adjust my perceptions and expectations of the (social) world according to the new facts that came to light by the disappointment of expectations – it concerns learning. Secondly, I might also react in a different way. In this case I refuse to adjust my perceptions and expectations of the world in reaction to the disappointment. Instead of adjusting to the factual action of my friend, the action of my friend has to adjust to my expectations. This does not, of course, mean that he did show up after all, it does not change his behaviour, but it does mean that he *ought to* have shown up. As a result, I might blame him, retaliate his action or exclude him from my friendship. The disappointment is thus explained normatively in terms of *oughtness*.

Both reactions are ways of dealing with disappointments of social expectations, but both imply a radically different way of interpreting expectations and disappointments.[9] For sure, between these two extremes Luhmann recognises mixed forms of dealing with disappointments, but for now this dichotomous approach suffices (1985:38-9). The social contingency and complexity in the 'temporal dimension' of expectations of social behaviour – can I expect my friends to come to my birthday or not – can be controlled by means of generalisation, i.e. by advancing *normative* expectations over *cognitive* ones: friends ought to come to birthdays.

If we understand legitimacy in terms of the subjective validity of objectively valid norms, then we must, it seems to me, understand this subjective validity in normative terms, i.e. the factual norm must possess for the actor a *normative quality of oughtness*. As such, not all subjective action orientations are an obvious basis to explain this normative quality of legitimacy. We might perceive that a strategic action orientation towards political order primarily concerns cognitive expectations, while a value-rational action orientation concerns normative expectations. This is the, often implicit, reason why strategic action orientations are almost never included in definitions of legitimacy as it

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[9] For Luhmann, the need to deal with disappointments seems to have a *function* for the psychological stability of the actor dealing with a complex and contingent world, i.e. his 'presentation of Self' (1985:40-1). I am tempted to agree with him on this point as it seems to me that understanding oneself as a stable 'ego' within understandable and meaningful relations in a contingent world is a particularly essential human need. However, as this functional relation does not so much explain the difference between cognitive and normative expectations it does not really have to concern us here.

misses the normative oughtness that legitimacy entails. But we must be very careful here. The fact that we can distinguish between cognitive and normative expectations does *not* mean that cognitive expectations might not be a basis for normative ones or vice-versa. It does not say anything about the *relation* between cognitive and normative expectations. And hence, we cannot exclude a strategic action orientation from a theory of legitimacy from the start. What is clear, however, is that an empirical theory of legitimacy has to explain this specific quality of oughtness.

Guarantee	Force	Source of Force	Social Order
External	Objective consequences	Coercion	Factual
		Social Factuality	
		Facticity (Truth)	
Internal	Subjective meaning	Traditional orientation	
		Affective orientation	
		Strategic orientation	Cognitive
		Value-Rational orientation	Normative

Fig 1.2 – The effectiveness of objectively valid norms

1.3 Politics as an Object of Analysis

So far we have argued that social norms can help us to understand social action. Furthermore, we have seen that it makes sense to separate the question of validity – discerning legitimate and factual norms – from the question of effectiveness – discerning external and internal guarantees. Finally, we have already gained a general understanding of legitimacy: legitimacy concerns the subjective validity of objectively valid norms, where this subjective validity has to have a sense of oughtness. However, we are not interested in the legitimacy of just any social norm or action we are interested in *political* legitimacy. The meaning of politics deserves our attention.

1.3.1 Power, Domination and Political Domination

It is fairly difficult to define politics or the political without preloading our analytical framework with unwanted associations. Nevertheless, we do need to analytically distinguish politics from other kinds of actions, practices, fields, systems or spheres. We do need to know what we are talking about. Politics, in the history of political theory and practice, has often been defined in terms of power. However, this is a problematic position; not because politics does not concern power, of course not, but rather because there are many forms of power that do not concern politics.

Power is not the appropriate reference for the analytical problem of differentiating politics from other forms or fields of social action. The multiple dimensions of power do not define politics. A first step towards politics as an object of analysis, therefore, is by differentiating *domination* (*Herrschaft*) from power in general. Domination concerns definitive decision-making power, or, in

other terms, the *sovereign power* to make a final decision or judgement. Domination or sovereign power is an institutionalised expectation, which means in terms of Luhmann's analysis that it does not depend on or is relatively independent of consensus. So, for example, the teacher is in a position of domination to the extent that he makes the definite decisions for the class. The teacher is not in a position of domination because of some consensual agreement and reciprocal expectations between teacher and pupil; rather, the teacher's position of domination is institutionalised in terms of expectations of both towards the general other, which might not even be present in the class itself, but rather concerns the parents or the wider 'community'. In short, the position of domination of the teacher depends – and is circumscribed – by factual institutionalised expectations. It is important to recognise that the teacher does not have sovereign power *because* he controls a source of power – he can punish or sanction the children – rather, he controls this source of power *because* he is in a position of domination. In other words, power and domination should be carefully separated.

However, to separate domination from power is not enough. We should also differentiate between political domination and domination in general. When we follow Luhmann's analysis of social expectations somewhat further, we see that expectations cannot only be secured by means of generalisation in the dimension of the *temporal* (the normative) or the *social* dimension (institutionalisation), but also in the *material dimension* (Luhmann 1985:73). In this material dimension Luhmann recognises four levels of abstraction that help individuals to stabilise expectations in the material, complex and contingent world. These levels run from the personal, to roles, to rules and offices, to the most abstract level of values.[10] As such, expectations concerning domination, i.e. institutionalised sovereign power, can also be perceived in this four-levelled material dimension.

First, domination in this material dimension of social expectations can be strictly *personal*. Expectations about father's domination are prescribed by knowledge about his person – the family knows his whims and will. Second, domination may be de-personalised and institutionalised in terms of *roles*. Because a person has a certain role he is in a position of domination. As such, expectations of sovereign power are no longer dependent upon knowledge of the specific person, but of his specific role and its inherent boundaries. We might perceive that some roles are *socially* institutionalised while others are based upon some *formal* institutionalisation process. For example, father understood as a specific role can be socially expected to have a position of domination, which is limited to his family and does not concern violence. And we might also perceive that such socially institutionalised expectations are difficult to change or control intentionally, but that they do change throughout history. In contrast, other types of roles of domination can be controlled and

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[10] I prefer the label 'rules' to Luhmann's 'programs' (1985:66). But whatever the label, the essence of rules or programs concerns controlling complexity in terms of expectations of correctness.

intentionally changed. Such roles are formally institutionalised and clearly prescribed by rules and offices. We can think of the bureaucrat whose position in the hierarchy of domination is prescribed by rules, which, if needed, can be changed intentionally according to some correct rule-making procedure. As such, these types of roles are formal positions that imply a formalised institutionalisation processes. Such a rule-making procedure, to increase complexity further, can in itself also be socially or formally institutionalised. Finally, expectations concerning domination can also be controlled by values. This means that expectations concerning sovereign power are not prescribed by rules, roles, or the personal, but rather by values. For example, expectations concerning the judge are not only circumscribed by rules, but also by ideas of justice, in the same way that the expectation of father's domination can be prescribed by love.

From Luhmann's functional evolutionary perspective expectations change from the personal to social roles to formal positions prescribed by rules to values, each step allowing a more differentiated and more complex social organisation. Without taking-over this evolutionary perspective per se, we can learn from this analysis that, first, in order to analytically distinguish between power and domination expectations must at least be related to social roles and not solely to person. Second, if we want to delineate political domination from domination in general, expectations must at least be related to formal positions of domination.[11] It is only at this 'stage' that social and political expectations diverge. In other words, it is at this stage that we can differentiate between a social and *political order*. Political domination implies therefore some form of formalised institutionalisation process that differentiates 'informal' from 'formal' positions of domination.[12]

If we understand the political order *analytically* in terms of formally institutionalised sovereign decision-making powers, we might think that we have also found the definition of politics. However, defining politics in terms of domination is too broad and too limited at the same time. It is too broad as political domination can be found in many different places or orders, such as the class, the factory, the association, the commercial organisation, the territorial state or the supra-national political union. Although there is nothing intrinsically wrong with such a broad definition, it is unhelpful for analysing political legitimacy. What we need is therefore not only to *analytically* distinguish political domination from domination or political from social order, but also an *institutional* delineation of politics. On the other hand, political domination is too limited because

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[11] This does not mean, of course, that expectations based upon the personal and upon social roles are not important to understand politics. These four-levels are not subsequent stages but rather concern increasing complexity and differentiation. These four-levels of abstraction do not cancel each other out but can work simultaneously (Luhmann 1985:69)

[12] With this definition I come close to the definition of Bader and Benschop, who state that "[p]ositions of domination are the result of formalised distributions of competencies of decision-making" (1988:144). However, unlike them, I hold that the differentiation between power and domination is not dependent upon the formal/informal divide but upon the difference between personal and role expectations.

politics is more than domination; it is more than just making the final decision. Politics also includes attempts to influence the decision-making process as well as its constitutive rules. What we need is to understand politics as a specific kind of *practice*. In short, we must both limit and broaden our conception of politics beyond mere political domination.

1.3.2 Politics as a Value-Sphere and Practice

If we understand a political order of domination in terms of formal rules and offices, we might broaden our conception of politics by increasing the level of generalisation from rules and offices to the level of values. To understand politics as a value sphere we can follow Barber, who defines the political in terms of action, autonomy and sovereignty (Barber 1988:10).

Political domination concerns *sovereign* decision-making power. As such, we already know what the political entails as a specific kind of action, it concerns making final decisions. However, the political especially concerns the *necessity* to make decisions, a necessity that arises because of the need or demand for *collective action*. This need for a sovereign decision for a collective, for a *polity*, already separates the political from other social spheres such as the economy. Indeed, decisions that do not concern the collective, but the private or intimate, are not political – although the question of where these boundaries are drawn might be part of politics itself.

Second, these decisions are political judgements that should not be confused with judgements that concern science, morality, economics or aesthetics. Indeed, the political must be understood as an *autonomously* differentiated value sphere. If morality concerns judgements about right and wrong, ethics about good and evil, science about truth and falsity, economy about profitability and non-profitability and aesthetics concerns judgments about the beautiful and the ugly, then we might wonder about the specific autonomous quality or value of political judgement. It is at this point that it becomes clear that the political cannot just be defined in terms of power. A political judgement is not just to impose one's will as one can impose any kind of will or judgement. A political judgement, we might agree, concerns a judgement over different and conflicting opinions, beliefs, or wills.

The autonomous basis of the political does not point to some kind of value consensus that is prior to the political, but it rather points to conflict. The political is making a judgment despite the lack of consensus. Indeed, where there exists consensus concerning the good, the right, the truth and the beautiful, no political judgement is necessary. "Where reason claims to speak, politics is silence" (Barber 1988:205). Politics, then, is to deal with the 'warring of the gods' (Weber 2004a:27). It is not based upon the singular, upon consensus or 'the' common good, but rather upon conflict of opinion, upon the duality of government and opposition, of hegemony and counter-hegemony. This

should not tempt us to claim that political actors do not aim for 'the' common good or for common solutions to shared problems and that the essence of the political is conflict, the always-luring possibility of Schmitt's 'friend/enemy distinction' or Mouffe's exclusionary 'we/they relation' (Mouffe 2005a:14-15). We should resist such essentialism, first, because similar to defining the essence of politics in terms of power, it leads to the unnecessary conclusion of politics as an ubiquitous 'ontological condition' undermining its autonomous basis (Mouffe 2005a:16; see also Rasch 1997:103-4; Wenman 2003:61). Second, conflict is not the only foundation that explains the sovereignty of political judgment. The political is also making a judgment "under conditions of uncertainty" (Barber 1988:206-7). However, we should indeed resist the idea that value consensus is the necessary basis, the necessary pre-condition of politics (Barber 1988:208-9; Rosanvalllon 2008:122, 169; Bader & Benschop 1988:158; Bader 2007:179; 2008:23; Luhmann 1985:49; Mouffe 1999:756; 2005a:1-2; 2005b:225; Halbert 2002:37; Wenman 2003:60; Rasch 1997:110).

   In sum, the autonomy of politics as a value sphere rests upon the necessity to make sovereign decisions for collective action under conditions of conflict and uncertainty. It follows from this analysis that the political is not founded upon some notion of the common or general will, nor upon the certainty of reason or truth, but its autonomy rests exactly "on difference and the plurality of competing wills" and the need to make collective judgments nonetheless (Rasch 1997:110). This means that one cannot stand outside the political by denying or opposing political judgement (or supposed consensus), which is the case in morality and science where opposition means to be immoral or to be irrational. Opposing political judgement is exactly to be part of the political. One can only stand outside the political when one does not *participate* in making a political judgement, when one is neither active in agreement nor in opposition; when one is disinterested or not in any need for participation (because one has the power to 'impose' one's will on all).[13] As such, politics is inherently a form of action – *a practice*.

When politics as a value sphere concerns sovereign political judgement, *politics as a practice* concerns the attempt to influence that judgment. This means that we can understand politics in terms of actors trying to influence the political decision-making process. It is at this stage that political power re-enters our analytical framework. Politics as a practice can be analysed in terms of competing actors and effective political power based upon resources, strategies and competences (Bader 1991; Bader & Benschop 1988). As such, politics cannot be reduced to political domination,

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[13] Being part of the political is therefore more than having a subjective preference. One cannot judge politically in solitude, politics is 'activity'. Political judgment is "what politics produces and not what produces politics" (Barber 1988:199; see also Bader 2008:4 for a 'presupposed minimalist public orientation').

to institutional boundaries or to political judgement, but includes *all actions* that intent to influence the political decision-making process or its constitutive rules.

An analysis of politics based upon notions of social pluralism or conflict and upon a resource-based understanding of power runs the risk of being drawn into the minefield of discussion concerning classical pluralism and the true essence of political power. It is not my intention to provide a detailed analysis of these historical debates, but something needs to be said concerning the analysis of politics and political power. A classical definition of the pluralist conception of power is provided by Dahl, who offered an 'intuitive' idea of power as "A has power over B to the extent that he can get B to do something that B would not otherwise do" (Dahl 1957: 202-3). In their effort to counter 'elitist sociological analysis' and to make political analysis 'scientific', understood as 'measurable', these classical pluralist analyses of political power were too much concerned with observable actions and political decisions, not to mention their rather normative, apologetic or naïve view of political practice. Bachrach and Baratz complained against this behaviouristic reduction of political power and claimed that 'non-decision' could also be a form of 'invisible' political power, a 'second face' of power (1962; 1975). Finally, Lukes complained that Bachrach and Baratz had not properly understood their own 'admiration' of Schattschneider's claim that "organisation is the mobilisation of bias" (Bachrach and Baratz 1962:949; Lukes 1974:21). Non-decision is still an 'intentional action' assuring that certain issues or interests remain outside the political decision-making process and therefore, and importantly, pre-supposes that issues and interests are already present, if only covertly. Lukes criticised this reduction of interests to preferences, on the one hand, and the idea that the absence of conflict means the absence of political power, on the other (Lukes 1974:22-5). Indeed, his 'third dimension' of power is not voluntaristic or intentional, but concerns the structural power of political and social institutions that either forms or shapes existing preferences or prevents objective interests from becoming conscious. Especially after the works of Foucault, the discursive turn in the analysis of power and the postmodern ridicule of objective interests, political power nowadays seems either to be analysed in terms of the liberal myth of pre-determined preferences or in terms of the unhelpful and sometimes perverse analysis in which every form of order is an act of power.

There is, however, no need to keep reproducing these two understandings of political power. We need not choose between the 'cynical' liberal myth of *voluntaristic power* and the providential understanding of *structural power*. Rather, we can follow Bader in his resource-based framework for understanding collective-action and social inequality which combines 'sociological structural analyses' and 'political science's strategy analysis' (Bader 1991:254, 278). Bader perceives political

power to be intentional, strategic, actor- and resource-based.[14] Power, in the definition of Weber, is "the probability that one actor in a social relationship will be in a position to carry out his will even despite resistance, regardless of the basis on which this probability rests" (1978:53, adjusted translation).[15] An analysis of political power, then, is exactly to analyse the basis of this probability, including non-decisions and structural asymmetries. As such, Bader not only distinguishes between direct and indirect resources, but also between resources one can control, possess, or manipulate and resources that remain outside of one's control (Bader 1991:258-9; Bader & Benschop 1988:131). Indeed, asymmetric social structures – or the organisation of bias – are precisely such a resource of power that cannot be directly manipulated, but that does influence the probability of carrying out one's will. It is more than apparent that dominant interpretative structures of facts and values not only shape one's preferences, but also one's chances to influence political decision-making (Bader 1991:149).[16] Although Bader's conflictive or competitive conception of political power presupposes conflicting interests, it does not mean that an actual conflict or the absence of conflict is all that should concern an analysis of power. Indeed, in line with my earlier remarks on the possibility of scientific critique, Bader argues that objective interests can be and should be an object of political analysis by providing a cognitive – not a normative – critique concerning interests, inconsistencies, and structural inequalities (Bader 1991:142-5). Such a rich understanding of political power gives us the analytical framework with which to understand and analyse politics-as-practice, without reducing politics to a competition of preferences and without dispersing politics to every form and type of social structure.

1.3.3 Politics as an Institutional Field

We have seen that our understanding of politics can be broadened beyond mere institutionalised domination when we perceive it as an autonomous value sphere and as a specific practice. However, the former is too abstract and the latter too general for an empirical analysis of politics. Both need to be *institutionally anchored*, which means that we first need to discuss institutional boundaries.

When we understand a political order in terms of institutionalised domination, we might define politics in terms of specific institutional fields. However, such an institutional definition of

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[14] The emphasis on 'strategic' should not be understood to mean that actors ought to act strategically or that all social action can be reduced to strategic action (see Bader 1991:143).

[15] As such power is increasing the probability of a specific outcome by decreasing the choice for action of others involved. The English translation seems particularly detrimental by leaving out the word 'even', which gives the definition a much narrower connotation. Originally it states: "Macht bedeutet jede Chance, innerhalb einer sozialen Beziehung den eigenen Willen *auch* gegen Widerstreben durchzusetzen, gleichviel worauf diese Chance beruht" (my emphasis).

[16] Bader points to "dominant cognitive and normative patterns of interpretation, society and worldview, dominant hierarchies of prestige, legality, [and] structures of the political system…" (1991:259).

politics may proceed from different references. We can differentiate institutional fields of political domination based upon territorial, functional-analytical or institutional-empirical references (Bader 1988:125; 2007:186-7; 2008:5). An *institutional-empirical* differentiation concerns all those public and private institutions, organisations and associations with internally organised sovereign decision-making power. The boundaries of these empirical institutions are relatively closed and depend upon formal membership. Examples concern a family, a factory, a labour-organisation, a political party, the ministry of war, etcetera. Although a parliament is also an empirically differentiated institution with its own internal rules and offices of domination, it is obvious that the decision-making power of parliament is not only internally valid, but also externally beyond these fairly restricted institutional boundaries.

Another possibility is therefore not to refer to empirical differentiation, but to *functional-analytical* differentiation. If we can analytically differentiate the political as an autonomous value sphere, then we can also differentiate the political itself in terms of functional systems or fields. The most famous functional differentiation of political fields concerns the traditional differentiation between legislative, judicial, executive and administrative functions. But other functional-analytical references are also possible. One might delineate political fields in terms of specific policy domains – e.g. neo-corporate negations between government, labour and employer associations, but also all kinds of governance networks concerning environmental, legal, and economic domains, to name but a few. The boundaries of these functional-analytical political fields are not drawn by formal membership per se, but rather by 'stakeholdership'.

Finally, we can also perceive institutional fields of political domination defined by *territorial* references. Here the relatively autonomous fields of political domination are defined by territorial boundaries and by membership based upon citizenship, denizenship, and residency, in other words, polities are defined by and define boundaries. Most famously we can differentiate political domination in terms of the state or the nation state. As Bader rightly points out, the state cannot and should not be defined in terms of a territorial (claim to) monopoly of violence – although means of 'superior violence' is a pre-condition for the state's claim on a monopoly of legal violence (1991:271). Rather, the state claims a territorial monopoly on sovereign decision-making power in the areas of legislation, execution and control, and judicial judgements (Bader 2008:13). However, the modern state is often internally and territorially divided in terms of cities, departments, counties, and even states in case of federations, while supra-national levels may also be present as in the case of the European Union. These different levels cannot be reduced to one single hierarchical state-centred autonomous field of domination, and as such we must perceive the modern state as a 'multi-level polity' (Bader 2008:13).

If we want to talk about politics beyond politics as an autonomous but abstract value sphere, and beyond politics as a power-structured but general kind of practice, then we need to be precise about the political field we are talking about. As we have seen, however, institutional boundaries can be drawn differently based upon different reference points. Even if we would choose a specific type of boundary and decide which specific and relatively autonomous political field we are studying, institutional boundaries in reality remain complex, fluid, overlapping, diverse and contested (March & Olsen 2006:14). Nevertheless, for our analysis of political legitimacy we need to gain some solid ground. In this thesis I will primarily focus on the political institutional field of the modern state defined by claims of sovereign decision-making power concerning the classical functions of the *trias politica* where its boundaries are determined by territorial and citizenship claims. But we must acknowledge, at the same time, that these sovereignty claims of the modern state are qualified, first, by the state being a 'multi-level polity' – including the supra-national – and, second, by the existence of 'multi-layered governance' arrangements, i.e. functional-analytically differentiated governance networks that tend to cross national boundaries or the functional boundaries of the *trias politica* (Bader 2008:13).

1.3.4 Politics as an Institutionally Anchored Practice

In trying to define the meaning of 'political' in political legitimacy, we have, first, distinguished domination from general power, and political order from social order. As such, we have defined *political domination* in terms of formally institutionalised sovereign decision-making powers. However, this definition of politics, I have argued, is both too broad and too limited. Subsequently, we have broadened our understanding of politics by perceiving it as an autonomous *value sphere*, where autonomy is based upon the need to make sovereign decisions for collective action despite conflict and uncertainty, and by perceiving it as a specific kind of *practice* in which competitive actors try to influence the political decision-making process, a practice that must be analysed in terms of power. We have limited our perception, in contrast, by drawing different possible institutional boundaries in order to delineate different *political fields*, ultimately opting for the – multi-levelled and multi-layered – modern state as our primary political field of interest.

In conclusion, we need to combine our broadened and limited perceptions of politics. Especially because politics as a practice, as we have seen, is not restricted by institutional boundaries, an institutional perspective of politics would seem too restrictive. Both perspectives can nevertheless be combined if we analyse politics as a specific kind of practice that is not so much institutionally restricted as *institutionally anchored*. This means, in this thesis, that politics as a practice is not limited to the institutional boundaries of the modern state, but that the practices we

are interested in are anchored in, or oriented to, the modern state and not, for example, to the family or the factory.

Does this mean that it is now clear what we mean with 'political' in political legitimacy? No, it does not. But it does provide an analytical outline from which theories of political legitimacy have to understand their object of analysis. The most encompassing theory of legitimacy would, in my opinion, not only have to explain the legitimacy of political domination or the political order, but the legitimacy of an institutionally anchored politics-as-practice. However, the relation between politics and legitimacy is more complicated than defining the political as an *object* of analysis. In the chapter that follows, I will show that the way in which we understand the *nature* of politics has inherent consequences for how we understand legitimacy. We can, however, already perceive that the natures of politics that underlie the four faces of political legitimacy we will analyse in this thesis – i.e. politics as domination, conflict, coordination and argumentation – are all part of our definition of politics as an object of analysis.