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Real Institution. Document and Realism[1]

Abstract *Regardless of the fact that I am using certain texts by Searle, Ferraris, Smith and De Soto, my intention is not at all to reiterate someone else's position in my own words, nor is it to question or modify some such position. My intention for now is to, using Ferraris' theory of the document, affirm the existence of a paradox – one rejected by Searle, but unconvincingly so, I think – regarding the institution (or the institutionalization of the institution). In order to do that, it seems to me that I am forced to slightly disturb both Searle's and Ferraris' conception, in attempting to offer my own contribution to a new future theory of the institution.*

Keywords: *institution, document, realism, documentality, writing*

19

My intention is to, using Ferraris' theory of the document and Searle's theory of institution (including one criticism of a position of Searle's, and the response thereof),[2] affirm the existence of a paradox regarding the institution. Thoroughly simplified, this paradox can be formulated like this:

„The creation of institutional facts by declaration presupposes the creation of other institutional facts. In order to avoid an infinite regress, there must be a way of creating institutional facts which does not require any special authority,"[3] – which seems to be impossible. Clearly I would like to remove both the words 'seems' and 'impossible', since I am not satisfied with the perspective offered by Searle's response.[4] My point,

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1   Tekst je nastao u okviru projekta „Istraživanje uticaja klimatskih promena na životnu sredinu: praćenje uticaja, adaptacija i ublažavanje" (43007) koji finansira Ministarstvo prosvete, nauke i tehnološkog razvoja Republike Srbije, u okviru Programa Integrisanih i interdisciplinarnih istraživanja za period 2011–2014. godine. Šira verzija ovog teksta predstavljena je 27. marta 2012. godine u Bonu, u okviru međunarodnog skupa „Prospects for a New Realism", koji je organizovao Univerzitet u Bonu, a čiji je urednik bio Markus Gabriel. Deo ovoga teksta predstavljen je 20. maja 2013. u Beogradu tokom kolokvijuma **„Mađarska filozofija danas – Fenomenologija i društvo"**, koju su organizovali IFDT i CELAP, a čiji su urednici bili M. Lošonc i A. Lošonc.
2   I am speaking of the text by Prien, Skudlarek, Stolte 2010: 163–171; Searle 2010: 227–229. Both of these texts came about as the result of a conference held in Münster in December 2009.
3   *Ibid.*, 167.
4   Searle's response to this problem is that it is not a problem. „A further point of disagreement between me and them is that they think you need a special authority to create institutional reality by (representations that have the same logical form as) Declarations. This is a mistake as several of my examples illustrate. You do not need special authority to create every type of institutional fact, otherwise it would not be

however, is not to claim that there is necessarily something outside the institution (something extra-linguistic) or some necessary authority (special or not), power or violence. Rather, it is that an institutional fact is immediately preceded by the document, in the broadest sense of the term. That is, a document as a special kind of institutional fact. And if I had to 'document' this paradoxical moment now in Searlean language, I would take a sentence he writes about the corporation in his latest book *Making the Social World*: „So the Law is a Declaration that authorizes other Declarations.“ (Searle 2010: 100)[5] In this case, 'Law' is the document, and it is not at all surprising that it is precisely when we arrive at „A Complex Case: Creating a Corporation“ that the „special role of writing“ is problematized and that syntagmas like „writing language,“ „written speech act,“ „written constitutive rules,“ or „written record“ appear. (Searle 2010: 98–100, 115)[6] To the extent to which the title and subtitle of this text had to be imprecise, I will now assume that in between so-called

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possible for the system of institutional fact to ever get started. You have to begin somewhere, simply by creating and getting other people to accept institutional reality.“ *Ibid.*, 229. I think it was sentences like this, in which someone who creates institutional reality ought to get others to accept it, that caused Raimo Tuomela's criticism about individualistic collective acceptance of what has been declared and of speech act theory as essentially an individualistic theory. Cf. Tuomela 2011:708. In the book *Making the Social Word*, the word 'making' serves Searle in explaining the beginning of the institution or institutionalization. „God can create light by saying „Let there be light!“ Well, we cannot create light but we have a similar remarkable capacity. We can create boundaries, kings, and corporations by saying something equivalent to „Let this be a boundary!“ „Let the oldest son be the king!“ „Let there be a corporation!“ J. Searle, *Making the Social Word*, Oxford, Oxford University Press, 2010, 100.

5   The corporation is the novelty in Searle's latest book, even though he mentions it for the first time in 2004 at a conference at the University of Hertfordshire that is in the text „What is an Institution?“ *Journal of Institutional Economics*, vol. 1, n. 1, 2005, 15. It is interesting that the origin of the corporation is the old system of fellowships (*Genosenschaft*) (*universitas* or *universitas personarum*, or else *collegia personalia* in Latin), and is a form of association or the form of the juridical personality which was always at odds with the institution (*Ansalt*) *(universitas bonorum* or *collegia realia*). I write about this elsewhere, following the texts of Innocent IV, Gierke, and Sorokin.

6   Law is law, or the document is the document, because it is alive and vocal, because the letter (the paper) „has a voice.“ For example, Jewish political theory and Jewish Law Theory recognize a clear distinction between the Verbal and Written Obligation. A written obligation entitles the creditor to recover payment out of the debtor's encumbered assets which are in the hands of a third party, a right unavailable in the case of a mere verbal obligation, since the obligation or debt has no *kol* („voice“) and does not provide notice that will put prospective purchasers on their guard. In the case of a written obligation, a plea by the debtor that he has repaid the debt is not accepted without written proof, as would be the case with a verbal obligation. Thus, for example, an undertaking, even if in the debtor's own handwriting but not signed by witnesses, will be treated as a verbal obligation, since only properly written, witnessed, and signed obligation carries a „voice and constitutes notice.“ *Bava Batra* 175b. Elon 1975: 244.

'brute' and 'social' facts, and then in between 'social' and 'institutional' facts, there is some sort of documental reality. Having here mentioned the document, let me tangentially insist on the material (the paper, the ink, the body of the text, or if you will, the sound, the phoneme, the materiality of the signifier, the body of one making it – an insight for which we do not need Saussure or Derrida, rather any stoic is enough, for example Vitruvius). Namely, between, on the one hand, the virtual reality of the law or certain rules (a space in which a usually small group of people, certainly empowered or protected by some authority [or more precisely protected by weapons], imposes an institutional reality on others [or on all] by constructing [formulating, designing] the text of the law or rules) and, on the other hand, various statements often read (or uttered) by a rabbi, priest, lawyer, officer or stewardess, or else a money bill, property, marriage, or a declaration of the type 'This is my house' – that is, between these two 'realities' there is a so-called „written record." This is the charter which creates a legal person or corporation, a decision of the governor to issue bills of this specific design, a record, a birth certificate, marriage license, lease, contract, proof of ownership, etc. I do not have to declare „This is my house," nor say „I am married to Sonia," to only then create the right to the house „because the right only exists by collective acceptance." The possibility to document what I say when I say that „This is my house," to show my papers, my ID, driver's license, to demand that the lawyer show me the article in the law that allows the creation of a corporation, or the employer the decision based on which I am being let go – is paramount for the creation of institutional reality. But not sufficient. The sentence „our marriage exists only on paper" (I am not sure whether this sentence works in English; this is what it would be in German. „Wir sind nur noch auf dem Papier verheiratet") marks that our currently relationship is not in harmony by the contract we signed, and that our marriage is not worth the paper it is written on. One of the main characteristics of the institution, which Hume differentiates from and opposes to the contract (law) – apart from that the institution, unlike the contract, supposes the existence of a third party (that is the possibility that someone else join, a sense in which the institution implicitly counts everyone in, excludes no one, and ultimately assumes that there is nothing outside the institution), and that the institution is coercive because formed by various transformations of violence and force – is its artificial nature, as well as the possibility of incorporating law into a group or tying a collective together. The fact that the paper (the marriage certificate), as a document, is not a strong enough glue to keep a couple in love – after all, neither is the once upon a time performed ceremony in which we promised to have and to hold

21

one another – does not exclude the institutional fact that our marriage still exists. Then the question implied by the „normal little words 'real'" (and which are not normal at all; cf. Austin 1962: 62–78) in the title and subtitle of this paper ('real' and 'really') regards the existence of the institution of marriage that exists only on paper, that is, the status of the document within the institution. Do we have a real marriage (or a factual marriage) because we are not divorced, or is the document the source of reality and then the institution? In other words, does the document institutionalize, or are we in fact, really separated, we could say organically separated, and together on paper only? (Cf. Hodgson: 1999 and further) This is a tough and complicated question, and I immediately have two associations: first, that only something that exists in time[7] (this being one of the characteristics of the institution, as something man made and on the other side of nature or God), and declines in time is real (marriages decline in time, do they not?); and second, a quote I have taken from Tony Lawson's book *Economics and Reality*, and changed it slightly: „No reality, please. We're philosophers!" (Lawson 1997: 12)[8] The first option is that an institution is real if and only if it can be documented, that is to institutionalize (I chose the verb) means in fact to publish or further attach documents (a synonym for *documentum* or its prototype, is *instrumentum* [a statement made publicly, or in the presence of a few witnesses]; in a different context, documentation is nothing other than argumentation), that the institution becomes an institution if it is constantly in the process of institutionalizing or documenting. To defend this first option, it seems necessary to me to show that a greater transfer or distribution of paper (documents) between partners, certainly makes the marriage not only on paper. The more invoices, bills, receipts, tax declarations, etc., – the more documents, the more love.

Reality is thus ensured by the production and proliferation of documents, and their collecting.

In section 5.1.1 'Documents,' of the book Documentalità, Ferraris writes:

The detailed examination of the phenomenology of the institutional and social difference seems to me to be of somewhat less importance than a substantial point that reveals the role that social reality, and

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7   This determination of the „real" is constructed by Nicolai Hartmann, and used thereafter by Otta Weinberger and Neil MacCormick, or today by Massimo La Torre. Namely, 80 years ago, nearly 500 kilometers from here, in the city of Halle, Hartmann holds his famous plenary lecture in *Kant-Gesellschaft* „Zum Problem der Realitätsgegebenheit" (28–29 May 1931).
8   The original quote is „No reality, please. We're economists!" and is taken from *The Times Higher Education*, from 25 March, 1994.

even more so institutional reality, have in documents. Thus the theory of social objects, and their specialization into institutional objects, naturally develops into the theory of documents (Così, una teoria degli oggetti sociali, e della loro specializzazione in oggetti istituzionali, evolve naturalmente in una teoria del document) (Ferraris 2009: 298).

It seems to me that this phrase „Fenomenologia dell'istituzionale" or Phenomenology of the Institutional (institutionality or institution) Ferraris mentions only once in his texts, and that it is very appropriate for me to insists once again on some difficulties we have with the word or the figure 'institution'. Therefore, my intent is twofold: on the one hand I would like to claim, against Ferraris and with Searle, that the theory or phenomenology of the institution (Searle mentions the „ontology of the institution" or the „ontology of the creation of the institution," [Searle 2009: 252][9] „institutional phenomenon" or „institutional phenomena" [Searle 2006: 23]) is always the most important task in the construction of social ontology, even though the theory of the institution is „still in progress," or „still in its childhood" (Searle 2005: 22). Along the way, I would like to try to point to the importance of violence (and power) and violent strategies during the creation and maintaining of institutions. It is interesting that both Husserl's and Searle's project is marked with a common resistance towards the written language, even though we find in both of them a sketch of a very timid *documentalità*: with Searle it is the idea of „official documentation" and in Husserl *„der Ausweiss"* (certification). A hundred years ago, Husserl has the same problem with mutual recognition or collective recognition. Here is his suggestion:

23

> How did this being a Master / Servant (Herr-und-Diener sein) at all happen? I notice Johann, my servant. In this way, I do not notice him yet as a servant, if we can use the word „notice" at all. It is more a registration (Ausweisung), a „fulfilling" (Erfühllung). However, the registration (certification) (Ausweis) is given in the certificate B, according to which he is ready to follow my will in regards this or that action, ready to execute a certain task to which he is committed, such that this certificate is based simply in that Johann, in executing my order, is subject to me.[10]

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9   „I have not ventured far on the subject of imitation in *The Construction of Social Reality* because it did not have a central place: I was not looking to show how new institutions are born by imitating old ones, but rather to determine the ontology of the creation and sustaining of these institutions" (*Je me suis peu étendu sur le sujet de l'imitation dans* La construction de la réalité sociale *parce qu'elle n'y tenait pas une place centrale : je ne cherchais pas à montrer comment naissent de nouvelles institutions par imitations des anciennes, mais plutôt à déterminer l'ontologie de la création et du maintien de ces institutions*). Searle 2009: 252.
10   „Wie kommt dieses Herr-und-Diener-sein zur Gegebenheit? Ich nehme Johann wahr, meinen Diener. Damit nehme ich ihn noch nicht als Diener wahr, wenn man

And not only that. Two short appendices authored by Husserl a hundred years ago and dedicated to social ontology and to the community and norms are incredibly convergent with Searle's intentions. We can say without reservation that these appendices are a precise sketch of Searle's longterm effort to construct a new social and political ontology.[11] On the other hand, I am interested in the importance of Ferraris' theory of documents or documentation for the making of institutions or the institution, but also for the construction of a new theory of the institution, which is our main goal, I think. Thus by answering the question in the sub-heading of this paper, „does to institutionalize" mean in fact „to document", my intention is to understand Ferraris' project first as a necessary addition to, and as that which lacks in the ontology of John Searle (or Barry Smith[12]), on multiple different levels (the most important being that the document intensifies the normative effect of the use of language because it contains explicitness and stability – that it is given once and for all) (Ferraris 2009: 183). But also, I would like to argue that in the future this project could „incorporate" these same famous theoretical attempts, which precede it. In particular I would like to argue that the future of this project is in political and legal theory, in the understanding of the great and truly „ultimate institutional structures." Ferraris, as the inheritor and contributor to the great project of Paul Otlet (*Mundaneum*), surpasses „the government as the ultimate institutional structure" (Searle 2007: 96; Searle 2010: 161), and puts in the place of the state – Europe and *la Cité mondiale*.[13]

24

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das Wort wahrnehmen hier gebrauchen kann. Es ist Ausweisung, „Erfüllung". Nun, der Ausweis liegt in der Anerkenntnis des B, dass er gewillt ist, meinem Willen hinsichtlich der und der Leistungen zu folgen, dass er gewillt ist, die und die Verpflichtungen, die er übernommen, auszuführen, und eventuell einfach darin, dass er in der Ausführung meines Befehls eben erweist, dass er sich mir in diesem Sinn unterordnet." (A und B, Herr und Diener) Husserl 1973: 104.

11   *Ibid.* The titles of appendices XVIII and XIX in the original are: „Die Gegebenheit konkreter sozialer Gegenständlichkeiten und Gebilde und fie Klärung auf sie bezüglicher Begriffe. Sozialer Ontologie und deskriptive Soziologie" and „Gemeinschaft und Norm" (98–107).

12   Smith admits Ferraris' engagement, even if he does not fully understand him and asks for additional explanations. Searle mentions the document or „official documentation" only a few times, although in his last book for the first time he thematizes the importance of writing in social ontology. The resistance to the importance of documents is likely the result of decades-long antagonism (in classic John Wayne style) of Anglo-Saxon philosophers towards a theory of the text and writing by French philosophers, that is, towards Jacques Derrida (or intellectual nonsense à la Derrida), one of Maurizio Ferraris' main inspirations.

13   „The institution, says Paul Otlet, is a free grouping of forces of the will, a federation of organisms, a union of national and international associations." Otlet 1989: 417.

Let me return to the beginning once again. „Does 'to institutionalize' in fact mean to 'document', to distribute and add documents, or to forward and transfer documents?" More precisely, is the *documentalità* a particular protocol that can bridge and secure (ease) social objects into institutional objects? Is the institution made in this way? If we say that something (a fact, for example) is very well documented, are we within the space of the institution or institutional facts? It seems to me that questions constructed in this way could to a great extent suit the context and rhythm of Searle's expositions and his regime of use of arguments. Exclusively when he speaks of the institution, Searle not only has no intention of analyzing the ordinary use of the word 'institution', but does not even find it important whether what he speaks of when he talks about the institution has anything to do with institutional reality. So regardless of Searle being most interested „in getting at the underlying glue that holds human societies together" (Searle 2005: 18; Searle 2006: 27–28), to at all begin to think the institution, according to Searle, it is necessary to understand that the institution does not „constrain people as such," but produces new power relations: institutions are *enabling* because they create (deontic) powers or human power, and „that institutional structures create desire--independent reasons for action" (Searle 2005: 10–11; Searle 2009: 48), that „the creation of an institutional fact is thus the collective assignment of a status function" (Searle 2005: 22), that the institution of language is at the same time the foundation of all other institutions (Searle 2010: 110), etc. Two remarks: the position that the institutional structures create desire-independent reasons for action does not have to be correct, and essentially does not, for example, respond to the first famous attempts at thematization of the institution in Hume, and the relationship between instinct and institution. Can sexuality not be satisfied within marriage, or greed within the institution of private property?

> These words too, inheritance and contract, stand for ideas infinitely complicated; and to define them exactly, a hundred volumes of laws, and a thousand volumes of commentators, have not been found sufficient. Does nature, whose instincts in men are all simple, embrace such complicated and artificial objects, and create a rational creature, without trusting anything to the operation of his reason?

> But even though all this were admitted, it would not be satisfactory. Positive laws can certainly transfer property. It is by another original instinct, that we recognize the authority of kings and senates, and mark all the boundaries of their jurisdiction? Judges too, even though their sentence be erroneous and illegal, must be allowed, for the sake of peace and order, to have decisive authority, and ultimately to determine

property. Have we original innate ideas of praetors and chancellors and juries? Who sees not, that all these institutions arise merely from the necessities of human society?

All birds of the same species in every age and country, built their nests alike: In this we see the force of instinct. Men, in different times and places, frame their houses differently: Here we perceive the influence of reason and custom. A like inference may be drawn from comparing the instinct of generation and the institution of property (Hume, internet).

The second remark could eventually also follow from the first one, and could be substantiated by some of Hume's thoughts. It concerns the relationship of institutions and Brute Force, which Searle develops and continuously edits in later years as part of his thinking about power. It seems now that the origin of this problem can be found in Searle's discovery that there exists the so-called extra-linguistic institution, and which, during his last years and endless explanations and corrections, he managed to make yet more complicated. That is to say, in thinking about performatives as declarations, Searle differentiates *extra-linguistic* declarations „such as adjourning the meeting, pronouncing somebody man and wife, declaring war, and so on – and *linguistic* declarations – such as promising, ordering and stating by way of declaration" (Searle 2002: 170). These non-linguistic cases Searle names as prototypical of declarations and their main characteristic is that they are not derived from semantics. In a well-known example, which Searle quotes several times in different places and in different ways, a man can divorce his wife by uttering three times the sentence „I divorce you." The divorce will in certain Muslim countries actually take place, says Searle, because speech acts in these cases are derived from legal or theological powers (Searle 2002: 171). Power or powers is a word, which is used here perhaps for the first time in this way, whereas recently, as we know, many of Searle's texts are organized around that word or words force, violence or constraint. It might be important that what Searle names as power or *extra-linguistic* declaration, could also be named a document. War has been declared because the decision was reached and the declaration dispatched to the other side, the meeting was suspended because someone holds a warrant, a piece of paper, and exercises an authority, while the procedure of repetition of the sentence „I divorce you," is in fact a quote found in codices and religious rules of some Muslim minorities and tribes. For war to be declared and of course begin, it necessarily needs to be written down somewhere. So, what Searle in this place names „power(s)", in fact comes from the document and the consent that precedes the *linguistic* declaration, and in a sense even institutions in general. What will be a new problem, which here

ought to remain aside, is that even so-called speech acts, which are derived from semantics (promising, ordering, stating, etc.), could also follow from various collections of rules and laws, and have a documentary origin.

Searle's reconstruction of the term power, which is in the beginning set in a sort of *extra-linguistic* or pre-linguistic sphere – meaning that there is something which has a non-linguistic or non-lingual power to institutionalize – contains two simultaneous processes. Searle first introduces several new concepts (background, authority, political power, political ontology), which ought to soften and set aside the considerations of the origin of social facts and institutions. Force or violence found in the foundations of authority and institutions, which Hume talks about („Time and custom give authority to all forms of government, and all successions of princes; and that power, which at first was founded only on injustice and violence, becomes in time legal and obligatory", Hume 2010: 310), are displaced elsewhere – in order to protect institutional power. As if Brute Force (or different coercive mechanisms and coercive powers which characterize the institution itself) protected the institution from itself. It seems to be Searle's understanding – this being the second simultaneous operation – that the process of institutionalization of social facts or the process of turning social facts into institutional ones, can be secured if and only if the institution protects itself from some of its own disloyal parts („many people lie, steal, and cheat"). The function of the police and the military, who „presuppose the deontology rather than being inconsistent with it" (Searle 2010: 141–142), meaning the function of the threat of force or a monopoly on organized violence, is *de facto* to break the resistance of counter-institutional actions, or actions which in themselves have desire-dependent reasons. On this second level, or from this second perspective, what would constitute the source of police or military power?

I am not sure that all the uses and wanderings of the term „power" in the construction of Searle's argument can be explained with precision. However, I am convinced that the introduction of „the document" or Ferraris' *documentalità* could strengthen this argument, and perhaps better define Searle's real intention. In that vein, although Searle analyzes certain texts by Michel Foucault in his latest book (unfortunately not the ones which explicitly regard the institution) (Searle 2010: 152–155), Searle's position is entirely opposed to Foucault's. Searle is foremost interested in the power of the institution or the power which founds the institution, and which the institution then distributes preventing and abolishing any counter-institutional elements. In contrast, Foucault, in

order to analyze institutions, insists on starting from power relations that precede the field of the institutional, and on resisting the institution („*Soyons très anti-institutionnaliste*"):

> In question is not the importance of institutions in power relations. But rather to suggest that institutions should be analyzed starting from power relations, and not the other way around; and that these relations are to be found prior to these institutions, even when they take hold and crystallize within them (Foucault 2001: 1058).

As opposed to Searle, with Foucault there is no „ultimate institutional structure," no special or last instance which protects and regulates the process of institutionalization. For Foucault, the analysis of power as resistance to the institution or institutions is really the only process by which the institution is institutionalized. No institution simply exists, but rather there is only the process of institutionalization and endless codification. It seems like a good idea to me to define the state, which has a monopoly on violence, and is according to Searle the „ultimate institutional structure," and the absolute paradigm of power, as a collection of documents. The document, let us say with Ferraris that this is the document in the „strong" sense of the word (the constitution, for example, being the first and last in a series of such documents), is found in a place of power and is power. In that case, it seems to me that we succeed in demystifying the secret reason for authority and the origin of power which cause certain difficulties in Searle's argument, even if that leaves us with a new and complicated task of reconstructing the system and order of documents. The threat of violence and violence are possible because there is a document, which limits that violence, and at the same time, a document can be reconstructed, changed and weakened with another document. The right of a state to secession, the integration, for example, of the Bulgarian state into the European Union, or perhaps an integration of the USA into a world state, is a documentary game. In the text „What is an institution?" Searle mentions the document as an addition to, but not as a condition or background of any deontology. This is precisely the problem.

> But the deontic powers stop at the point where the larger society requires some official documentation, they lack full deontic powers. Collective recognition is not enough. There has to be official recognition by some agency, itself supported by collective recognition, and there have to be status indicators issued by the official agency (Searle 2005: 15).

The insufficiency that Searle speaks about, refers to the difficult transformation or transfer of a social fact into an institutional one. To reinforce or stabilize collective recognition (it seems to me institutionalization is

28

precisely this process), it is necessary to *de facto* 'draw' or 'extract' (or activate) the document from some, in this case, third place. This emitting of the document or its transfer from place to place, could be explained with a sort of specifying of the social, which in turn is the unconditional condition of any institutionalization.

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29

Petar Bojanić

Stvarna institucija. Dokument i realizam.

Apstrakt

Bez obzira na to što upotrebljavam neke tekstove Serla, Ferarisa, Smita ili De Sotoa (kao i jedan ne tako davni prigovor i kritiku Serlove pozicije i njegov odgovor), moja namera uopšte nije da ponovim nekim drugim rečima nečiju poziciju niti da je dovedem u pitanje ili popravim. Namera mi je za sada da potvrdim postojanje jednog paradoksa koji se tiče institucije ili teorije institucije (ili institucionalizacije institucije), bez obzira što ga je Serl odbacio (mislim da u tome nije uopšte uverljiv), koristeći se Ferarisovom teorijom dokumenta. Da bih to uradio, čini mi se da neumitno moram da pokvarim i Serlovu i Ferarisovu koncepciju, pokušavajući, da i sam dam prilog jednoj novoj budućoj teoriji institucije.

Ključne reči: institucija, dokument, realizam, dokumentologija, pisanje