Charter and Institution

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Here are two reasons for dealing with the Charter, or the Charter and Institution (the problem, of course, lies in the copula “and”); or two or more reasons why it is constantly necessary to justify the status of the letter or document in the context of social or institutional facts.

- **1** Searle 2005: I, 18 and 2006: VI, 27-28.

21) I dare to claim that Maurizio Ferraris’s detailed explanation of Derrida’s famous position that there is nothing outside the text or outside the letter needs to be complemented with an argument for or against the claim that there is nothing outside the paper (in Greek *hartis*, in Serbian *hartija*, or Charter, *der Urkunde*, *charte*, *carta*, *cartula*). There is a feeling of disquiet when uttering the phrase *the ontological status of the Charter*, *the ontological status of the document*, or when thinking that paper can be «the underlying glue that holds human societies together»[1]. The unease is truly a consequence of the oblivion and mistrust of the importance of various “paper trails” and written acts that construct social reality. The fact that we could “cover” with papers of some kind our engagement in society does not increase the importance of the Charter for “Ontologie der sozialen Gemeinschaften”, nor does it sideline its triviality. The value of the Charter is found in the origin of this word, and the Charter is as great as the size of the diminutive “paperette”, “piece of paper” (*cartula* is the diminutive of *carta*).

- **2** Husserl 1973: XIII, 104.

32) The “and” between “Charter and Institution,” or the conjoining of Charter and Institution, has two tasks to perform. An institution needs to be structured or incorporated as a Charter. Conversely, the Charter is the embodiment of the Institution. This requires particular attention in the case of an institution in dissolution, such as Saint-Just’s appearance of corruption, or of an institution that lies in paper only, or a marriage reduced to the corresponding marriage certificate. In that sense, can the “institute Charter” decisively launch a potential theory of the institution? On the other hand, the Charter (and not law, contract, norm, nor Searle’s *declaration*, nor Husserl’s *Ausweiss*[2]) could improve Ferraris’s theory of documentality and its connection with institutionalism.

4What, then, is the Charter?

5At the end of chapter XXVI of *Leviathan* (“Of Civil Laws”), Hobbes writes:

- **3** Hobbes 2010: 251.

Likewise laws and charters are taken promiscuously for the same thing. Yet charters are donations of the sovereign; and not laws, but exemptions from law. The phrase of a law is *jubeo*, *injungo*; I command and enjoin: the phrase of a charter is *dedi*, *concessi*; I have given, I have granted: but what is given or granted to a man is not forced upon him by a law. A law may be made to bind all the subjects of a Commonwealth: a liberty or charter is only to one man or someone part of the people. For to say all the people of a Commonwealth have liberty in any case whatsoever is to say that, in such case, there hath been no law made; or else, having been made, is now abrogated[3].

6Hobbes wants to cut through the ambiguity regarding the difference between charter and law. If we look at Hobbes’s understanding of the institution and his use of the verb “to institute” – the decisive act of creation and establishment, or the act of command – it seems that charters can have nothing to do with institutions.

In order to examine and defend the connection between institution and charter, and to construct the

origin of the institution from privilege as a gift of the sovereign, and to show that the institution ensures freedom, several steps are in order. More than fifty years ago, in his first book, *Instincts et institutions*,consisting of a short introduction and sixty-six fragments about the institution, Gilles Deleuze highlights certain key moments in the interpretation of the institution. Among them there is Hume's differentiation between law and contract on the one hand, and between law and institution on the other. By using certain positions of Georges Renard, Deleuze formulates the distinction as follows:

> We are aware of the legal difference between a contract and the institution: the first in principle assumes the willing participation of the parties [*contractants*], defined between them as a system of rights and obligations, and does not refer [*n'est pas opposable*] to a third and lasts a definite duration; the latter tends to define a position in the long term, involuntary and inaccesible [*incessible*], constituted by power, a force, and refers to other parties [*est opposable aux tiers*].

8Deleuze goes on to discuss Saint-Just's position that the Republic has too many laws and too few institutions, as well as his unequivocal assertion that institutions are something positive, that is, the very soul of the Republic. He also discusses Maurice Hauriou's claim that in addition to the foundation of institutions, corporation and personification are the basic characteristics of the institution. There are also two other authors essentially influence Deleuze's future analysis of the institution: Georges Renard with his *La philosophie de l'institution* (1939) and Bronislaw Malinowski with his *Freedom and Civilization* (1947).

> Every institution has its charter – says Renard – which gives it being while determining its manner of being and consequently of behaving: this is its constitution, written on parchment or immanent, like customary law, in its structure, its internal development, and its external activity – it matters little! This institutional charter does not merely provide for a system of mutual obligations among its members; it effects a mutual integration[4].

- **5** *Ibidem*: 292.

9The theory of the institution was a reaction against the voluntarist and subjectivist theories basing all law upon a contract; a reaction against the theory of fictitious personality; a reaction against too static a conception of law[5].

10Above all, it is the concept of "freedom" – which Hobbes mentions in the above quotation, or about which Shylock talks in *The Merchant of Venice* – that Malinowski finds to be the goal and purpose of the institution.

- **6** Malinowski 1947: 157.

> […] no man ever achieves anything, new or old, fundamental or peripheral, realistic or fantastic, through his own unaided efforts. It is clear that the freedom of his personal purpose and his pragmatic success are always a by-product of the freedom of institutionalized activities[6].

11Every institution, continues Malinowski, has its charter or «collective purpose». The theory of the institution is based on the term "charter"; the charter is «the universal structure of an institution». Regardless of the fact that Malinowski's nearly the entire effort is an attempt directed to determine the origin of «the charter of an institution» (mythology, religion, moral principles, emotions, etc.), it is precisely to him that we owe an account of the charter ensuring the organization in which a group of people agrees to cooperate, to work together and construct a city.

> From our definition of charter as collective purpose it results that such a purpose has to be translated into activities. Structurally this means that at a primitive level, such activities as hunting, fishing and herding are carried out by a group, with the aid of its tools or implements and the rules necessary to the carrying out of the activity. […] In a modern community the charter would be found in the codified or customary laws as well as in religious and moral values[7].

12It is when Malinowski ought to explain the relation between charter and law (norm) that we are immediately brought back to Hobbes's differentiation. In a completely different register to Hobbes's, Malinowski concludes that a «charter obviously contains the fundamental rules» and does not at all contain the norms or laws that regulate the behavior of social actors. However, is it really possible to compare the charter as a set of «fundamental rules» with Hobbes's sovereign act, which bestows

only to one man or some one part of the people certain privileges (the charter)? Furthermore, does the institution begin with an extraordinary measure of the sovereign, which itself does not, however, suspend norms or laws – as Hobbes claims – but rather simply transforms their function? Instead of obligating and binding, do norms not integrate and thus bring freedom?

> A law may be made to bind all the subjects of a Commonwealth: a liberty or charter is only to one man or some one part of the people. For to say all the people of a Commonwealth have liberty in any case whatsoever is to say that, in such case, there hath been no law made; or else, having been made, is now abrogated[8].

13 These are two maximalist suggestions on Hobbes's part: first the sentence «a liberty or charter» – suggests that the charter certainly brings freedom, which obviously depends on the decision of the sovereign; and second, the sentence «all the people of a Commonwealth have liberty» – indicates the vision that all people can be free under the condition that there are no laws or that laws be abolished. If, by any chance, all the parts of the state are included, encompassed or freed by a charter of the sovereign, the coercion of law will be diminished and erased.

14 Perhaps for now we should leave aside Hobbes's resistance to the charter and the justification of the danger that he foresees in the sovereign systematically conceding or granting parts of the state (neighborhoods, cities) to the people who live in it. What is much more interesting is that Hobbes notices the importance and the awesome power of such an act by the sovereign: a single public act has the capability to erase the force of (its own) laws, and then to found a completely new social order – one which, paradoxically, still does not threaten the sovereign. However, the institution or institutionalization is expansive: «one man», «one part of the people», «all the people of a Commonwealth». According to Hobbes, the institution frees from the laws, but also from the absolutism of the sovereign.

- **9** Hume 2010: 152.

> After a debate of a few days, the king (John, 1215), with a facility somewhat suspicious, signed and sealed the charter which was required of him. This famous deed, commonly called the "Great Charter", either granted or secured very important liberties and privileges to every order of men in the kingdom[9].

It is hard to explain Hume's phrase «every order of men in the kingdom», nor do I have the space to properly do so. His description of making a big decision can serve as the protocol for commencing something extraordinary and new, which mobilizes or gather in a completely new way – or, if you like, constructs – social reality. The paper or charter interrupts something that, at the same time, it continues to uphold. When a document like this appears – or, if we were to put it differently, when the institution is initiated – its validity is not automatically achieved. The charter counts on all, for it is directed at each and every one, individually. We are speaking of a call or proclamation to join, for all those who have not yet done so. Therefore the charter is really a challenge or provocation.

16 The protocol and staging of how a document gains this appellation and becomes a charter (all of which is straightforwardly described by Hume) show that the ritual of signing and stamping a small piece of paper is neither the beginning nor the end. Prior to the time of its writing and signing, there is a debate where difficulties are overcome; then the writing and signing are followed by the distribution of the charter and a call to reading and potential corrections. Sovereign acts (signing and stamping) that truly do something extraordinary and truly announce a change (greater freedom, privileges, new relationships, new friendships, higher income, more justice, greater security, etc.) are not sovereign because they are committed by King John (the sovereign), but rather because they are completely new objects within an already existing «order of men in the kingdom». Here are five unconditional conditions for the existence of a connection between the institution and the charter. I will assume that this connection is *in-corporating* and mutually dependent. That is to say, the charter incorporates the institution, the city, the corporation, while at the same time the charter is incorporated in the institution, the city, or corporation.

- **10** Renard 1939: 269.

17 1. *Dédoublement* (doubling). The institution begins within a "broader legal field, to which it belongs" (*le milieu juridique plus vaste auquel elle appartient*[10]) and which it occupies, or more precisely, in which the institution achieves its internal law that then organizes it.

2. The sovereign is a person capable of producing the paper or charter. Or, the sovereign is sovereign if he has the competence (*die Befugnis*) to produce the institution. Only a person who can produce the charter possesses institutional competence. We speak of the institution only if the sovereign or a group of people can adopt a shared document (charter), publicly, usually after a profound and complex debate, and if the charter ensures the freedom of anyone to leave the group, as well as the possibility for a third or absent person to join the group. The *mafia*, for instance, is not an institution, even though its running is under constant codification. Pirates, terrorists or Kant's gang ruled by an evil principle, are not institutions.

193. Imparting the charter publicly is a proclamation, a way of letting something be known. This act is authentic because others testify to its authenticity.

204. *Great Charter*. The charter of a city shows the autonomy of a city or an institution in relation to the sovereign. The conflict between the law of the state and the charter of a city, between sovereignty and municipality, is a topic of debate prior to the signing and stamping. To found an institution by way of a charter is to register and record it. Foundation is registration.

215. The charter integrates rather than obligates. There is no violence of tautology or tautological violence (*Gesetz ist Gesetz*; Law is law). There is no "Charter is Charter".

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