

## **“AS”. PERSON AS CORPORATION – CORPORATION AS PERSON. WHAT IS (IN) CORPORATIO?**

My intention in this text is to thematize the relationship and difference between the real, fictional and virtual in the constitution of a juridical personality, and especially in the constitution of a corporate entity. The concept of corporation developed from the old system of fellowships, as the pure concept of collective unity, and was raised to the level of person. First, I question the stabilizing process of the reality of a group of persons who work together (who are in a “cooperation”) through the processes of registration and construction of the juridical subject; and second, in opposition to the first, interrogate the ways in which the corporation comes into existence through performative declarations or written records, even without the physical object of the corporation. The corporation, for example, has to have a mailing address, but it does not have to be a physical object. This is clear in the case when following appropriate procedures counts as the creation of a corporation and when the corporation, once created, continues to exist, but there is no person (or persons) who becomes the corporation.

I am attempting, in other words, to tentatively compare two completely different traditions in viewing theories of the institution and corporation, and then add another new element which could possibly affirm and potentially ensure a minimum of evidence that the group exists, if and only if its existence

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is confirmed with certain documentary, or better still, written acts. (I am interested in the status of written acts in relation to speech acts, and the relation of the documentary and the virtual – does documentality represent a symmetrical opposite to virtuality?) The first of the two traditions refers to the writings of Otto von Gierke (the first tome of *Das deutsche Genossenschaftsrecht* [*The German Law of Fellowship*] was published in 1868), and his introduction into jurisprudence and political theory the concept of fellowship (*Genossenschaft*) and corporate group personality (*Gesamtpersoentlichkeit*) – which, since it reflected the central role of associations in a normal social life and ensured their moral independence from the state, he regarded as the cornerstone of a just constitution and legal system – and also his notion of an area of “social law” standing between public and private law. Gierke wished to demonstrate the very considerable extent to which, in his opinion, the real group personality of voluntarily formed associations was implicit in social forms, legal documents and political evolution was actually found throughout German history. Such bodies, he argued, behaved as if (*als ob*) their members believed they could decide and act as collective unities. He contrasted this to the imposed, artificial unity or groups formed despite or against their members’ will (*Anstalt, Obrigkeit*). Both kinds of groups or collectives are non-state groups.

The second tradition attempts to think the institution and the corporation anew, in the context of collective intentionality and collective or corporative responsibility (John Searle, Margaret Gilbert and Amartya Sen, or even Axel Honneth).

In the title of this text, and in the subtitle (“What is (in)*corporatio*?”), which I have added surreptitiously, there is a pseudo-legal conceptual confusion, a *melange* of philosophical, theological, economic, and legal terms. One further note could also be a hypothesis or assumption that I would like to explain, and refers to realism or institutional realism, implicitly already in the title and subtitle. Namely, if I can explain what is *corporatio* or incorporation, if I can explain the ‘in’, then I could perhaps justify the existence of the ontology of law or the ontology of the institution. More specifically, the protocol of incorporation or the corporation as one of the forms of the institution (the institution as a legal entity *par excellence*), has to satisfy and affirm ‘ontology’ or ‘the ontological’ (that which concerns existence, being or being as such). If the corporation were sufficiently real and concrete (and not

pure fiction<sup>1</sup>), then it would above all illustrate the existence of law, and then the importance of law, or more generally law as law, law that holds the community together, tying people one to another.<sup>2</sup>

This last note refers to a fragment taken from Georges Renard. At the very beginning of his first lecture on the theory of the institution,<sup>3</sup> Renard, one of the most significant French institutionalists and the jurist who made Maurice Hauriou's institutionalism famous, quotes a Chinese thinker. Renard says of this fragment that it does not represent some kind of sentimental lyricism, but rather belongs to (a sort of) "experimental psychology." In combination with some words by Thomas Aquinas, the fragment could be the first association to Renard's basic question (ontology is the register of asking questions), with which he even opens his series of lectures: "What is an institution?" (*Qu'est-ce que l'institution?*). Here is that fragment by Renard, that is, by this anonymous thinker:

I love life, but I also love those close to me; those whose blood courses through my veins, those whose soul awakens when they smell the same native ground,

1 The Sicilian jurist, Santi Romano writes: "The institution is not a demand of reason (*un'esigenza della ragione*), an abstract principle, something ideal (*un quid ideale*), but rather a real, effective being (*un ente reale, effettivo*)." S. Romano, *Ordinamento giuridico*, 1946, Firenze, Sansoni, 96.

2 I will mention two well-known and entirely different examples of so-called ontology of law (or laws) and legal ontology. First is the examination of a contemporary and collaborator of Martin Heidegger, Erich Wolf, a jurist, regarding the ontology of law (*Rechtsontologie*) – does right exist, and how ought law be the essence of being together, 'being with', (*Mitsein*) or 'being for' (*Fürsein*)? Is law the condition of the authentic being (*Sein*), or existence (*Dasein*)? E. Wolf, "Rechtsphilosophie", in *Rechtsphilosophische Studien. Ausgewählte Schriften*, Frankfurt am Main, Vittorio Klostermann, 1972, 71-72. A variation of this examination can be found in Fasso, "Dove c'è coesistenza, c'è rapporto e perciò diritto"; "Relazione vuole dire diritto"; "Rapporto significa legge". Cf. M. La Torre, *Norme, istituzioni, valori*, Roma-Bari, Laterza, 2008, 123. The second example of the use of ontology in law can be André Valente's ontology of law where the legal system is considered an instrument to change or influence society in specific directions, determined by social goals. A. Valente, *Legal Knowledge Engineering: A Modeling Approach*, Amsterdam, IOS Press, 1995. The third would certainly be Weinberger's differentiation between *essere* and *dover essere*.

3 The lectures were published in 1930, in the book G. Renard *La théorie de l'institution. Essai d'ontologie juridique*, Paris, Sirey. This fragment is on pages 31-32.

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those who carry in the lines of their face the same pride of memories and the same hopes, those who are nothing other than the same spiritual body as me. *I am one of them*, and there is something of me in them as well. I love life, but my life is interwoven in the lives of those close to me, for we are of a feather... I love life, but I also love my family, my homeland, the civilization to which I belong, the Church that holds the best of my soul; and should I be unable to keep both, I should sacrifice my life, and keep the *common Good*, being greater in value of the two.<sup>4</sup>

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Renard does not offer us the source of this fragment and the translation is greatly theologized, since it speaks of the Church, which interests me keenly, implying a valorization, a choice and a goal. But its construction indicates well the latent problem between life and *le Bien commun* (and according to Renard, the common Good is synonymous with the institution). Although it would be relatively easy to show that the word ‘life’ here does not fall under the purview of what we would today call biopolitics (it is enough to point to the narrator’s or subject’s manipulation and instrumentalization of his own life, separating it from the group, and, if you will, its insufficient protection because sacrificed), it seems to me that precisely the thematization of the connection and relation between the institution and life (certainly common life) could explain the ‘ontology of right’.<sup>5</sup>

The background for what I am speaking about is that I am trying, similar to Renard, to write a book called “What is an Institution?” and initiate a larger

4 “*J’aime la vie, mais j’aime aussi les miens; les miens dont le sang coule dans mes veines, les miens dont l’âme s’est dilatée au parfum de la même terre natale, les miens qui portent sur le front la fierté des mêmes souvenirs et des mêmes espérances, les miens qui ne sont avec moi qu’un même corps spirituel. Je suis l’un d’eux, et il y a en eux quelque chose de moi-même. J’aime la vie, mais ma vie est engagée dans la vie des miens, car nous sommes embarqués... J’aime la vie, mais j’aime aussi ma famille, ma patrie, la civilisation dont je suis tributaire, l’Eglise qui tient le meilleur de mon âme; et si je ne puis garder les deux à la fois, je sacrifierai ma vie, et je garderai le Bien commun qui vaut plus que ma vie.*”

5 “An institution is – according to Romano – a certain being or social body that has a stable and permanent order, and makes up a body onto itself, contains its own life within itself (*qualsiasi ente o corpo sociale che abbia un assetto stabile e permanente e formi un corpo a sé, con una vita propria*).” Cf. M. La Torre, *Norme, istituzioni, valori*, 125.

project about the history or histories of institutional action and institutional building. As part of that project, the question of the corporation is certainly one of the most basic. I am interested in how the functions and meanings of the institution and corporation overlap (how they cleave to or away from one another); I am interested in John Searle's writings where discussing the institution implies writing about the corporation. Above all, however, I am interested to understand and explain a banal sentence uttered today, now, by many people who speak English and want to survive and work with others. This sentence of course is different in other languages, but it is repeated by speakers of other languages with the same intentions:

“If you are planning to start your own business, you should know how to incorporate.”

As the director of two institutions (Institute for Philosophy and Institute for Advanced Studies), which have a plaques outside its offices, a mailing addresses, letterhead stationaries, etc. I ought not to utter the first part of this sentence. But does the second part, “how to incorporate,” have anything to do with the institution? More interesting, I think, than enumerating all the differences between the institution and corporation (or company), and the usual disdain towards the corporation as an emblem and essence of capitalism, would be to insist on a set of various operations or cooperation(s) that come along with the claim made by person X about the necessity of possessing a certain kind of knowledge as the basis of, ultimately, producing profit and sustaining that profit or company.<sup>6</sup> A company, a firm, a partnership, a *société anonyme*, a corporation, has to be registered (to be set in the register, to be incorporated) according to rules that are set by the state, generally simple, and that should be familiar (“you

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<sup>6</sup> In his thesis on institutionalism, “L’institution, le droit objectif et la technique positive” (Paris, Sirey, 1933), André Desqueyrat speaks about “institution corporative” which has three characteristics: the idea of a goal that ought to be realized in a social group; organizational power for the purpose of realizing that idea; and the manifestation of a community emerging from the social group for the sake of the idea and its realization.

should know”).<sup>7</sup> “X” is first a person (an “institutional person,” not just a subject or agent<sup>8</sup>). “Institutional person” ili “corporative person” implies the transfer or transformation from the singular to the plural, from first person singular to first person plural; “X” has certain interests and is surrounded by others with whom it wishes to work and who share that interest (right away we encounter the representative of this group, which will quickly lead us to Hegel and the problem of interest representation or identity representation; in that case, the unit or group will be incorporated in the action of a certain portion of the whole that represents – because considers itself identical to – that whole); further, this is neither a group of thieves, nor criminals, nor undocumented workers, since the group is ready to publicly declare its work (through “public declarations;” of course, it remains to be seen whether the institutional structure allows the group to make certain public declarations, or on the contrary, the public declarations institutionally design the group); “X” can also be single, in which case we are speaking of a “*corporation sole*; a legal entity consisting of a single (“sole”) incorporated office, occupied by a single man or woman” (however, in that case, what has been abandoned is, in Searle’s words, one of the main discoveries of contemporary capitalism, that is, limited liability; thus *corporation* is characterized by unlimited liability, meaning that if you have business debts, personal assets would be used to pay them off); further still, “plan to start your own business” implies constituting a new, dynamic entity, capable of competing with other entities, fighting for profit, expanding and developing; finally, “to incorporate” (with all the theological and above all Christian connotations of the term) *de facto* represents a certain documentation procedure, or writing act or acts. In these last two operations certain real, living

7 “In America, for example, there are 6 million companies, employing 120 million people, which is two fifths of the entire American population. Around 3 million new companies are registered world-wide every year.” C. Mayer, *Firm Commitment. Why the corporation is failing us and how to restore trust in it*, Oxford, Oxford University Press, 22.

8 This is my paraphrase of Pettit, that the personal point of view is the condition for institutional design: “The personal point of view must have this indexical, first-personal character.” P. Pettit, “Groups with Minds of Their Own”, in F. Schmitt (Ed.), *Socializing Metaphysics*, p. 260. Lanham, MD: Rowman and Littlefield.

people,<sup>9</sup> exist and “transform,” through a given procedure (one made up of documents, hence objective), into a completely new entity or new form in order to more simply, quickly or safely achieve certain goals (gather new people, money, property, reserves, funds, only to redistribute them again, since “to have” always also means to distribute, to change that which is). It is precisely these last two operations that introduce the word reality or realism. Paradoxically, the question of the real existence of this new, incorporated entity (or corporation) cannot be separated from the real existence of a group that has just been constituted and united by incorporating and is now together “on paper.”

Before I give my reasons to hold together the three words (that Realism is, or presupposes or assumes a connection between Institution and Corporation), I can say, from the off, that I am interested in money and profit (or more precisely, “amount” of money or profit, or even better, “amount” as such) as the integrative element or factor of a community, as well as one of the main attributes of Realism. Allow me to begin with a case that is as trivial as it is common, and that you have doubtless encountered many times. A few months ago, a professor from the University of New York, expert in social ontology, was out to dinner in Berlin with a couple of friends. Immediately before we were to order food, hesitating over the menu, she asked me discreetly who was paying for the dinner. It was important to establish the fact that neither she nor I was paying for dinner in Berlin, nor that our hosts were paying “personally,” out of their own pockets, before the food was ordered. Imagine that the University of Bonn, which is in the end paying for this expensive dinner in Berlin, is a corporation – and not just an institution, but a corporation (whereby one of the simpler definitions of a corporation could be “a collection of many individuals united into one body, under special denomination and authorized by law to act as a unit”); corporation as something insufficiently existent (someone without soul and body [“*universitas non habet corpus nec animam, est res inanimata*,” Pope Innocent IV], someone fictional etc.). We

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9 “Corporations are at least as real as people.” “Corporation is real because it is an artifact whose constituents typically include real people as well as real assets, as well as intangibles such as credit and goodwill.” Jan Dejnozka (*Corporate Entity*, 2007, manuscript), 71, 102.

ought heed this comment by Sinibaldus de Flisco, aka Innocentius IV, whose interpretation is usually considered relevant for so called fictitious theory, that is, for a potential explanation of a virtual entity or “as if” entity. We are dealing with something deficient, which exists but does not contain all the attributes of existence, which is a something or a thing, but a thing without either “body or soul.”

Further, someone is paying for dinner (the restaurant will send the University a bill or one of the hosts will pay and be reimbursed at a later date by the University) – without money it would be truly impossible to spend two and a half hours in a restaurant in Berlin or talking here and now about the social ontology and “virtuality”. Finally, the restaurant in Berlin (an establishment registered as a partnership, for example), the University of Bonn (an institution or corporation or “company” [the continental name for a corporation]), registered or incorporated German banks through which one pays, etc., are, for instance, three sites among which certain documents, receipts, copies, contracts, and charters flow. These documents, then, issued and controlled by certain departments or agencies of the state, ensure the reality and duration of these organizations. It seems to me that it is above all the number of people, money, documents, institutions, food, enjoyment, as well as the level of responsibility for the expenditure or crisis or bankruptcy, that determines the power or degree of realism here in play.

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I suggest that the concept of “amount” and number regulate the status of the “real” and admit that this is one of two reasons why I placed the word corporation, a specific kind of institution that immediately represents business, earnings, profit, and expansion, in the title. For something to be “real” (“real is, like good, a dimension word”<sup>10</sup>), it must exist in time and in a process of realization. Among the many characteristics and themes initiated by the corporation (certainly one of the more significant human inventions), some of the most important are the protection of the rights of the individual, limited liability and

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10 Cf. J. Austin, *Sense and Sensibilia*, Oxford, Oxford University Press, 1962, 71. Let me offer a reminder that in his 1959 lectures, Austin designates the “little word real” first as a “normal word,” and then claims that “real is not a normal word at all.” 64.

corporate responsibility (the sentence “I didn’t do it; the company did” belongs to this protocol), as well as the relation between corporate and canonical law, the partnership and corporation, and not least the decades long resistance and critical and hypocritical stances toward the corporation as a foundation of capitalism. However, the principal reason why I introduced the corporation is of course the status of the real (or the status of real), immediately brought into question when this “judicial hallucination” is mentioned. In other words, could the corporation or the company be a good instrument for the reconstruction of our concept of reality, and then all the alternative terms that have always stood side by side with the terms “real” or “realism” (effective, actual, concrete, evident, objective, material, physical, factual, etc.)?

Before I mention a few details from Searle’s analysis of the corporation from 2010, let me briefly construct a connection between realism and the institution using a phrase by Robert Grafstein, “institutional realism.”<sup>11</sup> It is this link between the institution and realism that ought to affirm three circular moments that I intend to defend, and which are key to a small theory of the institution that I am trying to formulate. First, to register or to be incorporated (by way of charter or document) means to be “real” or, more generally, to “exist.” Second, even before the incorporation that assumes making a new person or new body (public and official) along with others (transforming oneself into something else along with others), there is a multitude of relations and they are social facts

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11 “Institutions represent – in a sense, are – our connectedness (...) Institutions are physical wholes composed of human parts.” R. Grafstein, *Institutional Realism*, New Haven, London, Yale University Press, 1992, 13, 22. Institutional realism is supposed to oppose new institutionalism, as yet another extreme form of conventionalism, as well as anti-realist philosophy of social science. “Realism assures us that those reciprocal influences which we are then in a position to attribute to institutions and participants are physically realized in ways that, in principle, are comprehensible to science. As aggregates of human beings, institutions are, unproblematically, entities determined by their participants. As distinct physical entities, institutions can be distinct social forces.”

(which is why the corporation or institution will be real).<sup>12</sup> Third, that a “written document” or a “written act” (written Declaration or Charter) constitutes or institutionalizes a group or collective (and protects its existence in time). Thus, the institution is always preceded by certain, less developed, institutional forms. (Cautiously, we could here use Searle’s term “institutional background.”) This idea of circularity protects me from certain other elements which play a role, for example, in Searle’s theory of institution and corporation: the advantage of speech over writing, and the absence or hesitation in the introduction of the document (and a document is not an object)<sup>13</sup>; the importance of power and its ultimate example – the state (the institution above all institutions), which always has the first and last word in registering a corporation; the collective is secondary, and Searle displays carelessness when saying that acceptance of others is a necessary condition of creating deontic powers; and finally,

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12 In a sense, this is a reformulation of the so-called Reality Theory defended by Otto von Gierke. “Reality Theory recognizes corporations to be pre-legal existing sociological persons. (...) Law cannot create its subjects, it only determines which societal facts are in conformity with its requirements.” P. French, “The Corporation as a Moral Person,” *American Philosophical Quarterly*, Vol. 16, n. 3, 1979, 209. The Law only recognizes the corporation; it did not create it. Regardless of the fact that von Gierke differentiates the corporation from the institution (*Anstalt*), collective personality is, according to him, not a fictitious person, but rather a real existence (*eine reale Existenz*). Here is a passage explaining more clearly the corporation and institution, quite in line with von Gierke. Pitirim Sorokin writes:

“Since the Roman law, two main forms of the juridical personality have been distinguished: (1) Corporations (*universitas personarum* or the medieval *collegia personalia*) where the union of the members as persons is stressed – such as most of various corporations, incorporated societies, firms etc. (2) Institutions (*universitas bonorum* or the medieval *collegia realia*) as a complex of property with a specific purpose, endowed by the law to act as a single person, such as various universities, asylums, etc.” P. Sorokin, *Sociological Theories of Today*, New York, Harper & Row, 1966, 38.

13 Searle thanks Barry Smith for the topic of corporation, in the 2005 text “What is an Institution?”. It is in this text that Searle mentions “official documentation” for the first time, and connects the corporation with writing language. In the book *Making the Social World*, Searle speaks considerably more about “special role of writing,” “written speech act,” or “written constitutive rules,” but not in the chapter that deals with the corporation. He talks about the corporation in the chapter dedicated to “Creating institutional acts,” whereas “Creating a Corporation” is a so-called “Complex Case.” J. Searle, *Making the Social World*, Oxford, Oxford University Press, 97. Double Declaration is here mentioned for the first time.

Searle's understanding of the physical object is too obscure and points latently to his anti-realism.

Having here mentioned the document, let me immediately 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 symbol, the body of one making it). Namely, between, on the one hand, the virtual reality of the law or certain 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."<sup>14</sup> 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 German: "*Wir sind nur noch auf dem Papier verheiratet*") means that our current relationship is

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<sup>14</sup> 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. Cfr. ed. M. Elon, *The Principles of Jewish Law*, Jerusalem, Encyclopaedia Judaica, 1975, 244.

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154 not harmonized 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 one another – does not exclude the institutional fact that our marriage still exists. Do we have a real marriage (or a factual marriage, concrete and not virtual 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? 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 several 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 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., put simply: the more papers or the more documents – the more love.

The document amount, various transactions and contracts within the corporation and institution, truly surpasses the importance of the act of the founding of the corporation (“executing and filing articles of incorporation” or “filling a legislation document with a state officer”), and places the lesser importance on the function of the state, and in general the medieval institution

of creating a corporation (*fiat doctrine*), something that especially interests John Searle. If we plot the role of the state in founding corporations (or institutions in general) through history, we can notice that only in certain very rare periods (of colonialism, for example) does the state found and control, meaning gives the privilege to incorporate to certain powerful groups. For that reason it seems to me that even a moderate institutional realism necessarily assumes an “ontological egalitarianism,” completely lacking in Searle.<sup>15</sup>

Let us return to the hunt for physical objects as a latent anti-realism or “virtualism”.

“He [Barry Smith] pointed out that there are some institutions that have what he calls ‘free-standing Y terms’, where you can have a status function, but without any physical object on which the status function is imposed. A fascinating case is corporations. The laws of incorporation in a state such as California enable a status function to be constructed, so to speak, out of thin air. Thus, by a kind of performative declaration, the corporation comes into existence, but there need be no physical object which is the corporation. The corporation has to have a mailing address and a list of officers and stock holders and so on, but it does not have to be a physical object. This is a case where following the appropriate procedures counts as the creation of a corporation and where the corporation, once created, continues to exist, but there is no person or physical object which becomes the corporation. New status functions are created among people – as officers of the corporation, stockholders, and so on. There is indeed a corporation as Y, but there is no person or physical object X that counts as Y.”<sup>16</sup>

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15 “Relational descriptions tying objects together – son of, slave of, president of, votes for, interrogates – are not, according to ontological egalitarianism, ontological superior to other collections of objects.” R. Grafstein, *Institutional Realism*, 24.

16 J. Searle, “What is an institution?,” *Journal of Institutional Economic* 1, 15-16.

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“(...) but there is no person or physical object which becomes the corporation.” It seems to me unnecessary, easy and complicated at once, to show the shift in understanding of the phrase “physical object” in our day and age – is it necessary to prove the physical existence of an SMS, deposit, bank account, electronic signature, the displayed plaque of a company, the existence of telephone calls among the signatories of the charter, etc.? The physical object is never singular, as in Searle – on the contrary.

I have already mentioned that I am interested in the institution of the Church, almost certainly not mentioned by the Chinese thinker, which Renard adds in the above quoted fragment. (This is a complicated time in Renard’s life: his wife dies and he enters a monastery.) It seems to me that an interesting differentiation could be made between two schemes or two forms implied by the institution – a differentiation which is always thematized within canonical law. As such it could help in the disagreement between the fictive or anti-real and realist in law (in the ontology of law). Sinibaldo de’ Fieschi (Sinibaldus de Flisco or Pope Innocent IV), the great canonist, is the first to recognize the institution of the Church as a new type of legal person (for him it is a *persona ficta*). Later, however, the Church as an institution will separate: on the one hand it becomes corporation, legal person that holds its own substance in the personal element of the collegium (*persona guiridica che ha il suo substrato nell’elemento personale del collegium*), and whose goal is the unification of common powers; on the other hand is the foundation, which emerges based on a creative act coming from outside or above (meaning authority, *voluntas Superioris*). The corporation acts following the will of its own members, while the foundation follows the will of authority which precedes it. Thus the organs of this institution (in fact the institution as a foundation) continue to be its executors. Later this difference can be found between Hobbes and Hume in their interpreting “*institutio*”, but remains to this day obscured by the later concept of “*corpus mysticum*” or “*corpus Christi*.”<sup>17</sup> For us this distinction is inordinately important because it is reiterated by Otto von Gierke, who opposes the authoritarian, *de facto* virtual structure and “a living collective personality” and “real existence.”

17 Cf. P. Caron, “Il concetto di “*institutio*” nel diritto della chiesa”, *Il diritto ecclesiastico*, n. 70, 1959, 330-335.