

Giuseppe Lorini, *Dimensioni giuridiche dell'istituzionale*.

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English translation of pp. 97-107.

### [3. A Theory of the Institutional Objects.]

#### 3.1.1. *Corporeal* institutional objects vs. *incorporeal* institutional objects.

3.1.1.1. Institutional objects are divided into *res corporales* and *res incorporales*. I criticize the characterization of institutional objects (proposed independently by Searle and Weinberger) according to which institutional objects are necessarily objects *cum fundamento in re*, that is, objects that presuppose a material substrate on which they are based.

(i) In *The Construction of Social Reality*, 1995, Searle advocates the "logical priority" of "brute facts" over "institutional facts":

Intuitively it seems that there are no institutional facts without brute facts.<sup>184</sup>

According to Searle, institutional facts are hierarchically structured: they exist on top of brute facts.<sup>185</sup> Searle gives the example of money:

Just about any sort of substance can be money, but money has to exist in some physical form or other. Money can be bits of metal, slips of paper, wampum, or entries in book. [...] It does not matter what the form is as long as it can function as money, but money must come in some physical form or other.<sup>186</sup>

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<sup>184</sup> John R. Searle, *The Construction of Social Reality*, 1995, p. 34.

<sup>185</sup> John R. Searle, *The Construction of Social Reality*, 1995, p. 35: «Social facts in general, and institutional facts especially, are hierarchically structured. Institutional facts exist, so to speak, on top of brute physical facts».

<sup>186</sup> John R. Searle, *The Construction of Social Reality*, 1995, pp. 34-35.

According to Searle, «what is true of money is true of chess games, elections, and universities. All these can take different forms, but for each there must be some physical realization».187

(ii) Ota Weinberger (in the essay *Bausteine des Institutionalistischen Rechtspositivismus*, 1987) also argues that institutional objects consist of a part that is susceptible to a physical description (for example, in the case of an institutional object such as the chess tower, a piece of wood with a tower) and a functional characterization.188

What appears to be a truth of reason, however, is a falsehood of fact. Contrary to what Searle and Weinberger claim, institutional objects are not necessarily bodily objects. There are, in fact, institutional entities that are *res incorporales*, that is, entities that do not have a material *substratum*. The exemplary case of incorporeal institutional objects is constituted by the claim and obligation that arise from a promise.

As immaterial, incorporeal institutional entities are distinguished from corporeal institutional entities also in terms of the mode of destruction. While corporeal institutional entities, like brute objects, can be destroyed by destroying their material substratum (we can, for example, destroy a ten dollars banknote by burning it) this obviously does not apply to incorporeal institutional entities.

3.1.1.2. An interesting phenomenology of the two incorporeal institutional objects (claim and obligation) has been drawn by Adolf Reinach and Wilhelm Schapp.

3.1.1.2.1. In his theory of legal objects, Reinach presents a phenomenology of two particular "*rechtliche Gebilde*" of which he highlights the ontological peculiarities: the claim [*Anspruch*] and the

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187 John R. Searle, *The Construction of Social Reality*, 1995, p. 35

188 Ota Weinberger, *Bausteine des Institutionalistischen Rechtspositivismus*, 1987, pp. 35-36: «Die Definition solcher institutionellen Gegenstände wie des Turms im Schachspiel oder der Verkehrsampel im Rechtssystem hat zwei definierende Bestandteile: sie bestehen: (i) aus einer physikalischen Beschreibung des institutionellen Gegenstands (z.B., 'ein Körper von Turmgestalt', 'eine elektrische Anlage mit drei Lampen, einer roten, einer gelben und einer grünen Lampe, die von oben nach unten angeordnet sind'); (ii) aus einer funktionalen Charakteristik, welche die Rolle der Gegenstände in handlungsbestimmenden (vor allem normativen) Relationen angibt».

obligation [*Verbindlichkeit*] deriving from the social act of the promise.<sup>189</sup>

(i) Reinach denies that the claim and obligation are physical or psychic entities: «*Anspruch und Verbindlichkeiten [sind] nichts Physisches, auch nichts Psychisches, keine Erlebnisse. [Nur das] Wissen von Verbindlichkeiten und Fühlen von Verbindlichkeiten sind [etwas] Psychisches. Aber diese brauchen nicht mit Anspruch und Verbindlichkeit zusammenzufallen*». <sup>190</sup>

That they are not something physical is, according to Reinach, more than obvious. Less obvious, on the other hand, is the thesis of the non-psychicity of claim and obligation. According to Reinach, someone could in fact qualify these two legal entities as something psychic. But Reinach argues that this hypothesis is also wrong: to exist, a claim does not require the existence of a certain state of consciousness.

According to him, it is possible that a claim and an obligation remain unchanged over the years. On the other hand, it seems difficult to think of states of consciousness that do not vary over time. Furthermore, Reinach wonders: "Do not claims and obligations persist even when the subject does not have states of consciousness [*Erlebnisse*] (as, for example, in sleep or in deep states of unconsciousness)?"

That certain legal entities such as property rights are irreducible to physical or psychic entities has also been argued by Czeslaw Znamierowski, a Polish law philosopher who built his own "social ontology" following Reinach's studies on social acts. According to Znamierowski, "the right of ownership over a book lying in front of me does not coincide with the book itself, nor with my or other people's thoughts on this book."<sup>191</sup>

(ii) However, it does not follow from the fact that claim and obligation are not *psychophysical objects* that they are *ideal objects*.

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<sup>189</sup> In addition to being an institutional entity and a legal object, the obligation was also investigated as an example of a "social object" by Barry Smith, as an example of a "mixed name" by John Locke (*An Essay Concerning Human Understanding*, 1690), as an example of "legal fictitious entity" by Jeremy Bentham (*De l'ontologie et autres textes sur les fictions*) and as an example of "*ens moralis*" by Samuel Pufendorf (*De jure naturae et gentium*, 1672). In the essay *Social Objects*, 1997, Smith qualifies claims and obligations (together with rights, debts, knighthoods, property relations and authority relations) as social objects dependent from social wholes.

<sup>190</sup> Adolf Reinach, *Nichtsoziale und soziale Akte*, 1911, 1989, p. 358.

<sup>191</sup> Czeslaw Znamierowski, *O przedmiocie i fakcie społecznym*, 1921, p. 20: «Moje prawo własności do leżacej przede mną książki nie jest ani ta książka, ani jakas moja czy czyjokolwiek myśla o mojej książce».

Reinach denies that claim and obligation are ideal objects since they, unlike ideal objects (such as numbers, concepts, propositions), are not extra-temporal objects. They are temporal objects, objects that have a duration; they “are born, exist for a certain time and finally die out”.

Reinach writes: «Recently there has been a return to talk of ideal objects alongside physical and psychic ones. However, the essential characteristic of objects such as numbers, concepts, propositions, and so on, is their extra-temporality. On the contrary, claims and obligations are born, exist for a certain time and eventually die out. They therefore seem to be temporal objects of a very particular type, which have never been taken into consideration ».192

(iii) According to Reinach, these two legal entities are distinguished from ideal entities not only in terms of temporality, also because (unlike ideal entities) they need for their existence a carrier [*Träger*], a content [*Inhalt*] and an opponent [*Gegner*]: «*Es müssen [bei ihnen] dasein Träger, Inhalt und Gegner*».193

(iv) Furthermore, claim and obligation (unlike physical objects) are not directly perceptible. According to Reinach, to perceive the claim as to perceive the right of ownership over an object, it is necessary to perceive the act that produced this entity: "*Auf [einen] Anspruch [ist] nicht direkt hinzusehen, sondern [man muß] auf [die] Quellen gehen aus der [der] Anspruch entsprungen [ist], um den Anspruch zu erkennen*".194

And again: “if I want to persuade myself of the existence of the movement I just have to open my eyes. In the case of claim and obligation, however, it is essential to return to their "foundation" ["*Grund*"]. Only through the renewed ascertainment of the existence of the promise can I establish the existence of what follows from it”.195  
[...]

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192 Adolf Reinach, *Die apriorischen Grundlagen des bürgerlichen Rechtes*, 1913. On the specificity of Reinachian objects: Bernard Bosanquet, Review of E. Husserl, *Jahrbuch für Philosophie und Phänomenologische Forschung. Mind*, n.s. XXIII (1914), pp. 587-9; Czesław Znamierowski, *O przedmiocie i fakcie społecznym*, 1921; Cz. Znamierowski, *Podstawowe pojęcia teorii prawa. Układ prawny i norma prawna*, 1924; Norberto Bobbio, *L'indirizzo fenomenologico nella filosofia sociale e giuridica*, 1934; Luis Recaséns Siches, *Experiencia jurídica, naturaleza de la cosa y Lógica "razonable"*, 1971, p. 229; Paolo Di Lucia, *L'universale della promessa*, 1997, pp. 106-107.

193 Adolf Reinach, *Nichtsoziale und soziale Akte*, 1911, 1989, p. 358.

194 Adolf Reinach, *Nichtsoziale und soziale Akte*, 1911, 1989, pp. 358-359.

195 Adolf Reinach, *Die apriorischen Grundlagen des bürgerlichen Rechtes*, 1913, 1953, p. 34.

(iv) A further characteristic of claims and obligations consists in the fact that of them can be predicated only "universal and necessary predicates". Reinach writes: «when I attribute a predicate to the single legal entity, which exists at a given moment, it does not invest it in its *singularity*, but in its *typicality*. As if to say that the predicate belongs absolutely to everything that is done in this way, and that it belongs to it, as such, necessarily, and that not even once could it be dispensed from it".<sup>196</sup>

(v) Furthermore, (unlike physical objects) the law of causality does not apply to claim and obligation. Reinach writes: «[*Der Satz*] '*Anspruch und Verbindlichkeit entstehen durch Verprechen*' [*ist*] *kein Erfahrungssatz*. Also [*handelt es sich*] *hier* [*um*] *Wesenszusammenhänge*». <sup>197</sup>

According to Reinach, it is not possible to empirically verify the validity of sentences such as 'The claim and the obligation arise from promises'. It is not possible to verify whether the sentence 'The claim and the obligation arise from promises' describes a cause-effect relationship, since the present sentence is not a sentence of experience [*Erfahrungssatz*], but the description of a "*Wesenszusammenhang*", that is, the description of an "essential relationship".<sup>198</sup>

(vi) Finally, according to Reinach, claim and obligation are also characterized by the fact that (unlike real objects) they can be produced through social acts (such as the promise) or legal enactments. [...]

3.1.1.2.3. An interesting typology of objects emerges from my investigation of the ontology of objects. Based on the two parameters: spatiality and temporality, three types of objects can be distinguished:

- (i) spatial and temporal objects: physical objects;
- (ii) non-spatial, but temporal objects: certain legal objects such as the obligation and the claim generated by a promise;
- (iii) neither spatial nor temporal objects: ideal objects.

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<sup>196</sup> Adolf Reinach, *Die apriorischen Grundlagen des bürgerlichen Rechtes*, 1913, 1953, p. 15.

<sup>197</sup> Adolf Reinach, *Nichtsoziale und soziale Akte*, 1911, 1989, p. 358.

<sup>198</sup> Adolf Reinach, *Die apriorischen Grundlagen des bürgerlichen Rechtes*, 1913, 1953, p. 33.

	SPATIAL	NON-SPATIAL
TEMPORAL □	<i>physical objects</i> □	<i>obligations and claims</i>
NON-TEMPORAL □	empty □	<i>ideal objects</i> □

Curiously, this research shows that the box for spatial, but not temporal objects appears to be empty.