Instituting: A Legal Practice

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ABSTRACT

This article explores the concept of institution as the legal performance par excellence. It starts by giving an account of the perspective that Merleau-Ponty opens on the notion of institution and aims to show the connection with the concept of passivity. The central focus is on the dynamics of instituting: in order to deal with this concept and to see its implications in the field of philosophy, it will proceed by making Merleau-Ponty's speculations dialogue with the research conducted in the same year (1955) by Deleuze: *Instincts et institutions*. In passing, it will be necessary to show what is at stake in the debate on the concept of institution, and the short-circuits that can be avoided through a better conceptualization. To this end, a brief reference will be made to the main anti-institutionalist currents that have left deep traces in the contemporary debate, and to the idea of institution that, more or less explicitly, is still at the heart of social sciences. Given these preliminary foundations, the project is to make the fundamental questions inherent to the concept of institution—its relationship with temporality, with history, as well as the "classic" contractualist alternative to the institution that is still at the heart of political philosophy—react with the research of Yan Thomas on the origin of *ius* and on law as the quintessential instituting technique. Finally, we will return to Merleau-Ponty to take his insights a bit further and show their potential in the contemporary debate on instituting praxis.

If the question is how abstraction,
norm and mediation emerge,
this is the answer.
The rest is ideology.
Yan Thomas[1]

1. 1955: the initiation of the present

Between 1954 and 1955 Merleau-Ponty gave his lectures on *Institutions and Passivity* at the Collège de France: a course, or rather two, which posterity has

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[1] Thomas (2021), The Law between Words and Things, in *Legal Artifices: Ten Essays on Roman Law in the Present Tense*. Edinburgh: Edinburgh University Press, p. 69.

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attempted—through the publication admirably edited by Claude Lefort—to "institute" as a single body. The text we are reading presents itself as a disorganized body of notes. It is a collection of a series of sketches that follow multiple lines of thought.

The connection between the concept of institution and that of passivity is not immediately apparent. It is the result of lines of research as disparate as they are fruitful. In Merleau-Ponty's project, the "drive" seems to be given by the challenge that both concepts, the two perspectives of institution and passivity, can provide to "classical ontology".

This contribution attempts to start by giving an account of the perspective that Merleau-Ponty opens on the concept of institution. Only in a subordinate way, will we refer to the concept of passivity, as we attempt to interweave it with the notion of institution.

In order to deal with this concept and to see its implications in the field of philosophy, we will proceed by making Merleau-Ponty's speculations dialogue with the research conducted in the same year (1955) by Deleuze, now available in the collection of texts that goes by the name *Instincts et institutions*.

In passing, it will be necessary to show what is at stake in the debate on the concept of institution, and the short-circuits that can be avoided through this notion . To this end, a brief reference will be made to the main anti-institutionalist currents that have left deep traces in the contemporary debate, and to the idea of institution that, more or less explicitly, is still at the heart of social sciences.

Given these preliminary foundations, the project is to make the fundamental questions inherent to the concept of institution—its relationship with temporality, with history (the eternal diatribe between subjectivism and objectivism), as well as the "classic" contractualist alternative to the institution that is still at the heart of political philosophy—react with the research of Yan Thomas on the origin of *ius* and on law as an instituting technique. Finally, we will return to Merleau-Ponty to take his insights a bit further and show their potential in the contemporary debate on instituting praxis.

2. The deposit of sense

While the institution always seems to have a relationship with time and history, passivity seems to be outside of them—underlines Lefort in the introductory

pages of the text[2]. However, this appearance is misleading. Merleau-Ponty intends to show that, if this is how passivity appears to us, it is only because we think of it starting from the constitution of the subject and not from the perspective of the institution. On closer inspection, "the person himself [must be] understood as institution, not as consciousness of. . ."[3]. And it is beyond the separation of mind and body, subject and object, private sphere and public history, in other words the classical topology, that both are posited by Merleau-Ponty. Let us enter, then, the field of the institution: it is described as a deposit of sense.

> The sense is deposited (it is no longer merely in me as consciousness, it is not re-created or constituted at the time of the recovery). But not as an object left behind, as a simple remainder or as something that survives, as a residue. [It is deposited] as something to continue, to complete without it being the case that this sequel is determined. The instituted will change but this very change is called for by its *Stiftung*: Goethe: genius [is] posthumous productivity. All institution is in this sense genius[4].

And just before that, the institution was associated with an ongoing process always characterized by an openness to the future: "an activity en route, an event, the initiation of the present, which is productive after it—Goethe: genius [is] 'posthumous productivity'—which opens a future"[5].

The institution, therefore, does not present itself as a given, preformed form or an object that has survived the dust of time, much less as permanent crystallization. Here, a specific temporality that pertains to the institution distinctly shows the traits of the co-presence of activity and passivity.

One could say that the institution is the guardian of duration. While on the one hand, it is the safeguard of deposited sense, it is at the same time the infrastructure of change. Its fundamental performance is the transmission[6].

[2] Lefort (2010), Foreword to: Merleau-Ponty, *Institution and Passivity. Course Notes from the Collège de France (1954-1955)*, Evanston: Northwestern University Press, p. xix.
[3] Ivi, p. 15
[4] Ivi, p. 9.
[5] Ivi, p. 6.
[6] For a reconstruction that shows the Church's use of the juristic act of deposit in a version different from that of the Roman jurists (who would have admitted only the restitution of the object in custody in the same condition in which it had been delivered), see Napoli (2020), L'istituzione e il deposito del senso. In *Almanacco di Filosofia e Politica 2. Istituzione. Filosofia, politica, storia.* (ed. by) Di Pierro, Marchesi, Zaru, Macerata: Quodlibet, pp. 53-69.

Therefore, the institution is more synonymous with "project" than with outcome. Here echo, the well-known words of Hauriou, who defined the institution as *une idée d'oeuvre ou d'entreprise* .[7]

The institution is a project indeterminate in its future, whose meaning can rely on a deposit, both elements that make possible the reactivation, the "awakening from sleep"—we could say metaphorically, but not too much since the example matches what later, in the course on *Passivity*, Merleau-Ponty will propose regarding the unconscious.
Certainly, the institution is not a given, and it is not presupposed, but neither is it perceived or thought.

> It is the wherewithal on which I count at each moment [*c'est ce avec quoi je compte à chaque moment*], which is seen nowhere and is assumed by everything that is visible for a human being, it is what is at issue each moment and which has no name and no identity in our theories of consciousness.[8]

Not *quoi* but *avec quoi*. *Füreinander* (for-one-another) is the German lemma used here by Merleau-Ponty in the absence of a satisfactory term in the French language that can account for the mutual exchange, the relationship between us and "things". Neither superstructure nor structure—we could say using a Marxist lexicon—but *infrastructure*.[9]

3. The equivocation

Merleau-Ponty's approach is certainly not one that has penetrated the social sciences or even a large portion of philosophical debate. This makes the French thinker certainly even more necessary for contemporary experimentation. At the same time, it remains necessary to clarify the sense that is commonly given to the concept of institution among the disciplines of knowledge that most tend to make use of the concept. This is only a brief excursus, but it seems a necessary passage to avoid the widespread equivocation.

[7] Hauriou (1925), La théorie de l'institution et de la fondation, in *Cahiers de la Nouvelle Journée*, 4, pp. 2-45.
[8] Ivi, p. 12.
[9] "Infrastructures are matter that enable the movement of other matter. Their peculiar ontology lies in the facts that they are things and also the relation between things." – writes Larkin (2013), The Politics and Poetics of Infrastructure, *Annu. Rev. Anthropol.* 42, pp. 327–43.

No discipline in the social sciences has not raised the question of institutions. Briefly, we can say that anthropology calls "institutions"—the plural of the singular "institution" is much more common—those systems of representations shared by a community. Sociology includes in the concept of institutions both a set of norms with the resulting regularity of behavior and those structures that characterize collective action. Historical studies are still fighting a battle to break away from the exclusive focus on institutions, understood as legal-political structures, and include "other stories".

Economics brings together under the term institutions the various normative and legal facts that affect economic dynamics. Criminology narrows the field even further by considering institutions those agencies of social control called upon to repress deviance. Here the institution par excellence is the prison (along with the asylum and other psychiatric-judicial facilities).

Putting disciplinary divisions aside—they are not essential for our purposes—the weakness that binds the various ways of conceiving of institutions seems to lie first of all in the difficulty of defining the concept, albeit perhaps of a purely conventional kind. The absence of such a definition means that an entire system of social interdependencies is not subject to separation, disjunction or categorization. Inevitably, an implication emerges from this approach: existing institutions can only be thought of in the crystallized form in which they present themselves in a certain time and space (what is already instituted, the outcome of being instituted). The place Merleau-Ponty gave to the institution (to the process of instituting) as a deposit of sense—openness, but not discard, residue, indeed safeguard, custody but not mere preservation and reproduction of the existing—can have no place in such a view.

Just by way of example: institutions were thought of as *fiduciaire organisé*[10], to which one defers insofar as one obtains, through such remission, exemption from instinct—the figure of the Leviathan is iconic in this sense—and the formation of stable structures that orient behavior in the social world (Gehlen). Institutions have been identified as the apex of relations of domination and the synthetic expression of inequalities in the distribution of capital (Bourdieu); as providers of the fundamental categories of thought (Douglas) and its rejection (Bourdieu); or, in a more value-free way, as in the manner of Berger and Luckmann, that is, removing from the concept of institution that of discipline and

[10] The term is used by Valéry (1980), *Cahiers*, II, Paris, Gallimard.

recognizing it as a necessary social function, according to a more strictly interactionist matrix.

However, even these two authors, while emphasizing institutional change, limit themselves to attributing it almost exclusively to *expert knowledge*[11]: a not even too oblique way of resorting to what others call the "ruling class". Here, then, another erroneous trace, the most essential one, appears: the anthropomorphic face of institutions. Institutions, going to the heart of their commonly understood meaning, would be nothing more than the face of Power, the coercive apparatus aimed at establishing social order, as necessary as they are odious, to be praised or opposed depending on political positioning.
The institution is understood as a *person*. This is the "original sin" that finds its matrix in the Weberian *Anstalt*: the isomorphism between the juridical person and the physical person, between the mental representation and the embodied person, which still irretrievably marks our "vulgar" view of institutions[12], that is, a social group whose commands are imposed with relative success on others. In other words, the institution here stands as a coercive apparatus whose main purpose is reduced to being that of establishing a certain order in a given social environment.

Whatever value judgment one wishes to ascribe to their action, institutions would restrain, filter, and block social forces. Seen from the right as well as from the left, so to speak, the conception makes no difference, except that in the former case one will either "believe" in institutions, as they say, or oppose them. This last position especially hovers in certain critical legal studies, which tend to make the institution the gravitational pivot of sanction. This approach to the subject is certainly borrowed from that conception of law that has become classic—provided by Weber in the first chapter of the second volume of *Wirtschaft und Gesellschaft*, namely *Wirtschaft und Gesellschaft im allgemeinen*: "An order will be called *law* if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will

[11] Berger and Luckmann (1966), *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*, Garden City, NY: Anchor Books.
[12] The juridical artifice of the *persona ficta* was born within canon law precisely in order to strictly distinguish associative forms or foundations from persons in flesh and blood, to gather into unity a plurality of entities. Precisely by virtue of this act, which operates a *denaturalisation*, a sociological multiplicity of individuals can acquire the status of a *juridical person*.

be applied by a *staff* of people holding themselves specially ready for that purpose".[13] Here, law is understood first and foremost as order and sanction. Its publicist side is elevated to a total explanatory system. Its matrix is seen in the command from above by a series of subjects who would make up the institution.

Seen from the other pole, there is instead the logic according to which social forces would be, net of the entrapment that institutions carry out, free and spontaneously composable forces, which, if freed from forms of power that instead curb and place limits (the *katechon*) would be able to chart their own authentic course. This is a vision that has been sown all too well, having fundamentally entered the common sense, which is not our cause here to spread further, but to continue rather our archaeology of the institution.

4. Means of satisfaction

To move institutions into the sphere of the social, indeed to make them the very origin of society, is Deleuze. Let us take his 1955 text, *Instincts et institutions*, and try to make it react with Merleau-Ponty's speculations. Deleuze devotes a brief introduction to the texts he collects: instincts and institutions resemble each other in that both can be defined as processes of satisfaction.

According to Deleuze, instincts are configured as processes of satisfaction of tendencies and needs that pass through an operation of *extraction* from

[13] Weber (1954) *On Law in Economy and Society*. New York: Simon and Schuster, p. 5. Following a different and more complete English translation of the text,– Weber (1978) *Economy and Society: An Outline of Interpretive Sociology*, (ed. by) Roth and Wittich, Berkeley, Los Angeles-London: University California Press, p. 714, – we identify later the reference to the institution (*Anstalt*): "The concept of the institution (Anstalt) was not fully developed in the purely legal sense until the period of modern theory. In substance it, too, is of ecclesiastical origin, derived from late Roman ecclesiastical law. The concept of institution was bound to arise there in some manner as soon as both the charismatic conception of the bearer of religious authority and the purely voluntary organization of the congregation had finally yielded ′ to the official bureaucracy of the bishops and the latter had begun to seek for a legal-technical legitimation for the exercise of the ecclesiastical rights of property." As it is clearly visible here, Weber's interpretation of the institution and the charisma revolves around a subjective, individual nature. For Weber charisma is a pre-institutional substance inherent in the human person. See Napoli (forthcoming), Le charisme et la loi. Remarques sur une bipolarité politique in *Chefs, grands hommes, leaders*, ed. by Cohen, Loriga, Michaud, Napoli, Paris: EHESS-Seuil-Gallimard, for an interpretation of the concept of charisma (and the implication regarding the concept of institution) that demonstrates the misleading interpretation Weber proposes of theologian sources and a stand for an objectivist genealogy of the charisma as opposed to a personalist understanding of it.

the external world; these needs are satisfied directly from it. Institutions are also means of satisfaction, but they arise, unlike instincts, through an operation of *elaboration*. Here the initial tendency undergoes a process of transformation, which results in the insertion of the tendency itself into a different realm; no longer that of nature, but a new realm, Deleuze writes, an organized system of means.

This immediately presents a paradoxical character: with the institution a tendency is satisfied, but the instituted institution does not determine the tendency that generated it. Some examples provided by the author may clarify the passage: the desire to whet one's appetite does not explain the aperitif, sexual desire certainly does not explain marriage, the need for exchange does not explain money. Of course, if we start logically from the institution, it will be easy to say that money can be justified due to exchanges, marriage due to sexual relations, and the aperitif because it is a brilliant idea to solve the hunger that is pressing in the late afternoon.

The problem is that this is fallacious reasoning—Deleuze points out—because it makes us lose sight of, or rather naturalize, the fact that those institutions are not given, but are themselves instituted; instead of those institutions there can potentially be and can be created a thousand different ones. And, therefore, the reasoning that a certain need can be satisfied through a certain institution is valid, but the reverse is not true, that is that institution exists insofar as it is necessary for that particular need.

Deleuze intends to clash with a way of seeing institutions that does not seem at all destined to die—as noted above. The naturalization of the existing lies in the fact that we tend to see institutions as given, pre-established, constituted once and for all. Institutions, on the other hand, are "things" that go through historical processes and for this reason, they end up "hiding", let us say, the sense that is deposited in them (in Merleau-Ponty's terms), the needs that allowed them to emerge. What has already been instituted displays a kind of irresistible necessity. The forms of the instituted are mistaken for given and not invented forms, as they are according to Deleuze, who thus emphasizes the aspect of openness to the future and transformative potential that we have seen in Merleau-Ponty.

Therefore, tendencies are not social; what is social are the means for their satisfaction: institutions. Precisely because they are invented, institutions are *original* and social. The institution presents itself, therefore, as a positive model, that Deleuze calls an "organized system of means". This model would be

opposed by another, namely that of law. These two theoretical models are seen in clear opposition by Deleuze, who thus recovers—in favor of the latter, evidently—the eternal diatribe between contract and institution as the foundations of society.

The theory of the institution places needs (a negative element) outside the social and society as a positive element in which needs are satisfied.
On the contrary, for contractualism society has the function of limit, of brake, of sanction of the totality of rights guaranteed in nature.

Society would be the negative to be accepted in order to be together. Law theory makes the positive element (rights) a natural given. Contractualism is clearly a natural law theory. Society intervenes to prescribe a limitation in the enjoyment of these rights, to sanction the limit. The law would sanction the limitlessness of such enjoyment. The negative element is therefore placed in society, while the positive element would reside outside of society, in natural rights.
Deleuze does not dwell on what is to be understood by "law" (he sometimes writes "the contractual limitation") at least in the introduction to *Instincts and Institutions*; however, we have been able to derive its meaning by declining in reverse the qualities attributed to the concept of institution.

If institutions are creative, inventive, predispositions of means to achieve a certain satisfaction, then laws will show the face of limitation, of compression, of anchoring to the past, of static, of preservation. Laws prohibit. Laws block the flow of change.[14] Institutions, on the other hand, are the means by which change becomes practice. Laws stand in the way of this change.

5. Laws *vs.* Institutions

The opposition that Deleuze drastically draws between laws and institutions shows that the law would not fit into the larger set of institutions. On the contrary, it would be opposed to it.

It is the original status of society that interests Deleuze. He opposes the primacy, the birth privilege accorded to the law, understood as a contract[15]. He

[14] As Foucault writes in the class of January 18, 1978, "We could even say that the law works in the imaginary, since the law imagines and can formulate all the things that could and must not be done by imagining them. It imagines the negative", Foucault (2007) *Security, Territory, Population. Lectures at the Collège de France 1977-1978*, (ed. by) Senellart, New York: Picador, p. 47.
[15] As can be read in the Italian Civil Code, art. 1399: "the contract has the force of law between the parties".

reverses the reasoning, arguing, through a reading of Hume's *Treatise on Human Nature*, that a law in a primary position cannot exist because logically, in order for there to be a law there must *first* be an institution that sets it. By assigning this creative primacy to the institution, law can finally lose this privileged place that contractualist theories have been able to grant it.

The mistake would consist in identifying the essence of society with the law, which would be placed to protect pre-existing rights. This criticism is directed, in short, at the idea of the state of nature, at the contract itself and at so-called natural rights.

Let us see how Deleuze explains this passage. One can see how Merleau-Ponty's definition of institution (with Maurice Hauriou's) echoes in Deleuze. It is visible in at least two important passages. A first passage emphasizes the objective-communal as well as passive nature of the instituting practice: "Every institution imposes a series of models on our bodies, even in its involuntary structures, and offers our intelligence a sort of knowledge, a possibility of foresight as project".[16] But it is in *Empirisme et subjectivité* that the institution is described as "un modèle d'actions, une véritable entreprise". Let us look more closely at the passage that, among other things, clarifies the opposition between laws and institutions, on which we intend to dwell.

> The main idea is this: the essence of society is not the law but rather the institution. The law, in fact, is a limitation of enterprise and action, and it focuses only on a negative aspect of society. The fault of contractual theories is that they present us with a society whose essence is the law, that is, with a society which has no other objective than to guarantee certain preexisting natural rights and no other origin than the contract. Thus, anything positive is taken away from the social, and instead the social is saddled with negativity, limitation, and alienation. The entire Humean critique of the state of nature, natural rights, and the social contract, amounts to the suggestion that the problem must be reversed. The law cannot, by itself, be the source of obligation, because legal obligation presupposes utility. Society cannot guarantee preexisting rights: if people enter society, it is precisely because they do not have preexisting rights. We see clearly in the theory of promise which Hume proposes how utility becomes a principle opposed to the contract. Where is the fundamental difference? Utility is on the side of the institution. The institution, unlike the law, is not a limitation but rather a model of actions, a veritable enterprise, an

[16] Deleuze (2003), Instincts and Institutions. In *Desert Islands and Other Texts* (1953-1974), (ed. by) Lapoujade, Brooklyn: Semiotext(e), p. 21.

> invented system of positive means or a positive invention of indirect means. This understanding of the institution effectively reverses the problem: outside of the social there lies the negative, the lack, or the need. The social is profoundly creative, inventive, and positive[17].

This conception poses a number of problems. First problem of a general nature: on the one hand, institutions are seen as creative and inventive, whereas laws would only limit, restrict and prohibit. However, it seems that in this dichotomous arrangement of conceptual tools, what we have tried to evade in relation to institutions, also seen commonly as limits, blocks, brakes, returns, this time in relation to "laws".

Second problem: why distinguish between laws and institutions? Why re-propose as necessary this binary alternative between social contract and institution? Doesn't guaranteeing the primacy of institutions risk re-proposing that thought of the origins that so much philosophy (and not only) in the last century has tried to undermine? Wouldn't this end up naturalizing institutions as original facts?

Third problem: how is it instituted? In order for there to be society—Deleuze says—an institution is necessary. But in order for it to be instituted, is not an instituting praxis necessary? How does the institution emerge?

That is a question that Deleuze seems to disregard and indeed confuses. This is not the place to discuss his understanding of *droit* and *loi*, the distinction of which can be traced here and there in Deleuze's thought. However, one cannot help but notice that his use of the concept of "law" (*loi*) risks being misleading. He could have written "contract", "social pact"—and he does so when he implies that he is talking about "contractual limitation".

[17] Deleuze (2001), *Empiricism and Subjectivity: An Essay on Hume's Theory of Human Nature*, New York: Columbia University Press, p. 45-46. Here as *law* Deleuze means *loi* but not *droit*. They are two different things and Deleuze knows this well. One could say that he is as averse to law as he is fascinated by *droit*. As is well known, Deleuze argues that "Jurisprudence is the philosophy of law, and deals with singularities, it advances by working out from [or prolonging] singularities", Deleuze (1995), *Negotiations 1972–1990*, New York: Columbia University Press, p. 153. One might say—borrowing the words of de Sutter and McGee (2012), *Deleuze and Law*, Edinburgh: Edinburgh University Press, p. 4—that, for Deleuze, "As an immanent practice of the case, law (*droit*) is the incarnation of what philosophy has to achieve for herself in order to be able to leave the world of law (*loi*), judgment and debt, whose fascinated observation has caused her stagnation".

However, the question of the origin of society that Deleuze makes coincide with the institution remains open and problematic. Because the question that nevertheless remains unresolved is—to use a Deleuzian trend of thought: where does the institution arise from?

Although Deleuze does not explain his choice in terms of an actual origin, it is to this that his argument refers. But then, if we are not mistaken, the open question remains that of the formation of this hypothetical primordial institution. How is society formed? Through the institution—Deleuze answers.

Agreed, but through what practice is created the institution created?

What is the instituting practice that leads to this, that or multiple institutions?

And from here: in what way can we think about origins? What if the origin were to be instituted itself? That is, what if, instead of once again hunting for a founding myth, for an origin of society that, even if it is called an "institution", is thought of in a naturalistic way, we were to think of a vision in which the origin itself is placed on a different terrain from the naturalistic one, and that is, is itself seen as instituted?

Better: for the institution to be instituted, a process, a technique, a medium is necessary. Rather, Deleuze seems to hypothesize an immediate institutional formation, given, without mediations of any kind, as if society and institution could be shown jointly without any kind of instance that allows the institution to form itself.

This set of questions is to be answered through the research of Yan Thomas. In particular, reference will be made to the "Preface" to *Los artificios de las instituciones*[18], a succinct and caustic text in which Yan Thomas demonstrates the need for instituting techniques, and shows how no type of fact that we can define as social is immediately given, except "by means of".

(In Deleuzian language, one could therefore say that "a society whose essence is the law" seen as *loi* would find decisive opposition; but one could at the same time wonder whether the same applies to "a society whose essence is the law" seen as *droit*).

[18] Thomas (1999), *Los artificios de las instituciones. Estudios de derecho romano*, Buenos Aires : Eudeba, pp. 9-12. Here we follow—and translate into English—from the Italian edition of the text: Thomas (2020), Prefazione a *L'artificio delle istituzioni*, presented by Spanò, In *Almanacco di Filosofia e Politica 2. Istituzione. Filosofia, politica, storia.* (ed. by) Di Pierro, Marchesi, Zaru, Macerata: Quodlibet, pp. 53-69, pp. 249-253.

Secondly, use will be made of a fundamental essay by Yan Thomas, *Idées romaines sur l'origine et la transmission du droit*[19], through which the origin and potential of the legal medium will be investigated.

6. The art of separation

"In the world of institutions nothing can have the status of a given."[20]
What are institutions and what is in opposition to them? The answer will by no means be the one of Deleuze, i.e. the *loi* (or the contract). This is partly because Yan Thomas is not concerned with any founding mythology, with any original position, and partly because he does not seem to address political philosophy—except in passing to the "theories of sovereignty"—by contesting a certain enduring although "comical" assumption, such as the supposedly necessary alternatives that lie at the bottom of society. For this obsession with mythology, one could use the words that Deleuze attributes (only) to the law (seen as *loi*): "une comique de la pensée, faite d'ironie et d'humour"[21] and which, however, have become unbreakable over time.

The opposition Thomas sees is that between given and instituted, not that between laws and institutions. He explains it very clearly when he argues that from the point of view of institutions there is no place for what sociology and anthropology—the social sciences, if anything, are his sparring partners—call *social fact*.

A fact that presents itself as social does not, cannot do so immediately and spontaneously. A procedure is needed to qualify it as such, otherwise it is like saying that it is natural. And, the need to distinguish between what is natural and what is social would not be comprehensible. More technically, if one wanted to frame the "social fact" per se, one would only derive a set of interconnections without disjunctions or categories. The links would remain internal to an "interminable chain of interdependencies".[22]. As such, they would not find any kind of "separation", distinction or qualification that would bring them into the sphere of the social, in other words, that would allow the change of sign between the "natural", the given and the instituted.

[19] Thomas (2011), Idées romaines sur l'origine et la transmission du droit in *Les opérations du droit*, Paris: EHESS-Seuil-Gallimard, pp. 69-84.
[20] Thomas (2020), *Prefazione a* L'artificio delle istituzioni, p. 250.
[21] Deleuze (1967), *Présentation de Sacher-Masoch*, Paris: Minuit, p. 75.
[22] Thomas (2020), *Prefazione a* L'artificio delle istituzioni, p. 251.

A similar-sounding question is posed by Merleau-Ponty when he writes:

> in order to think the social fully, wouldn't we have to have a notion that is more general than *exchange,* coexistence, more general than the social existence of others, intersubjectivity?[23]

According to Yan Thomas, what we call social (not given) precisely because it is social cannot possess any kind of (hypothetically given) transparency. Without an art of shaping social objects there can be no institutions, for Thomas. "First of all, 'facts' are bound by the pressure of heteronomous meanings that constitute them as distinct units". [24]

The art of separation is called law. At the origin is language as an act: without this special language that is law, which does what it says while saying what it does, institutional constructs could not have taken place; hence the social objects, which, precisely because they are constructed by distinctions, can be said to be instituted, and therefore social. This instituting technique shapes reality through linguistic artifices. Its devices are made of words. Law is that art which creates things through its own words. Law is that language which names and decides, that vocabulary which invents the words it uses to "order" the social world.

Hence the *ars iuris* creates categories which it then uses, and that present themselves precisely as the objects of law, not as "reality", which they have not the slightest intention of mimicking, and which on the contrary they duplicate in order to multiply the potential of the social relations which they at the same time institute.

This is why the criticism often advanced by sociologists at the law, according to which it does not reflect the social world with its "unnatural"—at times irremediably plethoric—language, is naive and inappropriate. There is no intention of doing so: the law is another world.[25] And indeed, in order to function, it cannot but separate, discern and operate with the objects it has named.

The law is a technical and creative form that functions as an art of radical reduction and denial of "reality". The essential legal performance is to institute, which stands in a rebellious way towards the "natural", understood as an order of the nature of things. The Romanist tradition teaches us the extraordinary legal

[23] Merleau-Ponty (2010) *Institution and Passivity,* p. 74.
[24] Thomas (2020), *Prefazione a* L'artificio delle istituzioni, p. 251.
[25] Hermitte (1999), Les droit est un autre monde, in *Enquête*, 7, 1999, Les objets du droit [online]: http://journals.openedition.org/enquete/1513.

skill of "tearing apart" reality; here fiction makes fun of the constraints of external truth to law[26].

> In the long history of the West, law has been the means par excellence of institutional construction—of these montages made up of words, which, as long as they are uttered by those who have the power to do so, have the ability to promote the existence of what they enunciate.[27]

And, as counter-intuitive as it may seem, and as much as one may believe that objects that are there in the world should be legally inscribed, the reverse is logically true: "dès le départ, et avant même qu'ait été établie la nature en quelque sorte préjuridique des objets dont il s'agit, la 'chose' en question est déjà prédéterminée juridiquement."[28] It is a matter of grasping the fact that there is a linguistic-historical a priori that coincides with an all-embracing praxis. The assumption that the things of the world are already there, offered, given, and only consecutively, through logical reasoning, are they legally qualified, is itself a construct.

When a jurist today– let us say a judge, for the sake of clarity—has to qualify the events that the case offers her in a civil, administrative or criminal trial, she performs exactly this kind of operation: she possesses a code in which certain constructs have been collected, which in fact take the name of *institutes*, and she translates those facts occurring in the world into "its" names. The point is: those instituted "things" are the ones which enable the disjunction necessary for the unravelling of the legal conflict itself. Without these names of law, the very elementary unity of the instituting act, we would not know how to articulate, disjoint, know and eventually decide the facts. Such are the operations that law still performs today.

If one goes looking for a definition of legal institution—translated from the Italian Enciclopedia Treccani—one reads this particularly effective definition: "complex of principles and norms that regulate a given social phenomenon (and also the phenomenon itself insofar as it is regulated by such norms); a phenomenon that is not identified with a person, physical or juridical, nor with a plurality of persons, but rather with a relationship or with a series of juridical

[26] Thomas (2016), Fictio legis. L'empire de la fiction romaine et ses limites médiévales in *Les opérations du droit*, Paris: EHESS-Seuil-Gallimard, pp. 133-186.
[27] Thomas (2020), *Prefazione a* L'artificio delle istituzioni, p. 250.
[28] Thomas (1999), Présentation, in *Enquête*, 7, 1999, Les objets du droit [online]: http://journals.openedition.org/enquete/1513.

relationships between various subjects: the (legal) i. of the family, of property (in private law), of political representation (in public law)".

7. The law appears as always already transmitted

So far the project has been to ask how to think about the institution, or the instituting praxis, without ending up in the classical equivocation of thinking from what is already instituted, from the single and personalistic representation of the institution, with the anti-institutionalist corollary that follows. Merleau-Ponty has suggested alternatives.

Deleuze has provided us with the coordinates for thinking about the institution and getting away from the contractualist hypothesis. But this is still not enough: we asked ourselves, and with Yan Thomas, whether we should not ask the question of the institution in a genuinely institutionalist way: how is it instituted? If the answer is that law in the Western world has been the essential tool for forging institutions, then let us ask ourselves whether/how it makes sense to ask the question of its origin.

Yan Thomas writes that law always presents itself as already transmitted. Law has no origin. That is, it may well have one, but it is not an origin in the singular; it does not originate, let us say, from itself. Law originated in Rome. We only know where: the space in which law was invented. Roberto Calasso, felicitously influenced by his father, an eminent historian of medieval law, Francesco Calasso, writes: "In Rome, over and above ritual was practice, the ability to deal with situations as they arose. Ritual was thus channeled into law, *fas* was absorbed—or at least attempts were made to absorb it—into *ius*."[29]

The practices that arose and to which we give the name of law appeared within the walls of Rome, *ab urbe condita*. This is all we can know about the origin of law: the medium seems to be born, then, through and only through a framework, external to it. It has no act of birth divorced from the space in which it will assert itself as the art of settling disputes, arranging conflicts and assigning responsibility. The material framework, the city walls, are the space in which the infrastructure of Roman society, law, came into being.

While we possess foundational traces of the city—legendary, but whose intent is to establish a foundation—the Romans, writes Yan Thomas, do not accord law any origin, nor even a founder. Unlike law for the Greeks—always inevitably linked

[29] Calasso (2014), *Ardor*, New York: Farrar Straus & Giroux, p. 36.

to the name of the king who makes the law—Roman law is detached from the sphere of power. It is the science of a special social class, that of the jurists, certainly not of low rank but equally undoubtedly not governing the city and not part of the political sphere.[30]

The founder of Rome at the same time, and very clearly according to the sources, never intended to give himself the title of demiurge of the law. The emphasis is always placed noton the origin of the art nor its invention by one or more legislators but on its *transmission*: "le *ius* se présentait en corps de règles connues sous l'enseigne de leur collecteur " e "l'origine des normes s'est effacée sous l'eponyme de celui qui les a reçues et transmises".[31]

The emphasis so clearly placed on the legal objects, its words, purposely vitiates the role of its potential authors. Admittedly, neither in the singular nor in the plural a subject of the invention of law is presented. There are compilers, yes. But not authors.

Here it is necessary to distinguish between *loi* and *droit*. The legislative acts (*loi*) that take the epithet of their "father" are not the collections of norms, which are instead called *ius*. The latter is in fact the result of a process of objectification and depersonalisation, which is not the case with the law intended as *loi*.

As Thomas points out, taking up the teaching of his mentor, André Magdalein, *lex* is the action of publicly reading—*lex* derives from *legere* (to read)—a text containing an injunction addressed to a present person, and in the presence of the ordering magistrate. The text is *ius*. The law is its public formulation.

> Mais alors que dans la loi prend parole le sujet qui l'énonce, personne ne parle dans les préceptes du droit. Seul parle le texte. La norme se proclame d'elle-même, impersonnellement. Entre *ius* et *lex*, il y a toute la différence qui sépare une prescription qui n'a pas d'origine de celle que l'on doit attribuer à quelqu'un.[32]

Law is that text which dematerialises its origin and depersonalises any potential authorship. Civil law - the law of the city - is the casuistic extension in which the word read (*lex*) abstracts from its author, legislator or magistrate, and is incorporated: it becomes text, *ius*, a fungible and acephalous norm.

So there is no origin and no author? Or would they be hidden?

It is not of concealment—if by concealment we mean an ideological act in the Marxian sense—that it makes sense to speak, for Thomas. Rather, it is to

[30] See Schiavone (2012), *Ius. The invention of Law in the West*, Harvard: Belknap Press.
[31] Thomas (2011), *Idées romaines sur l'origine et la transmission du droit*, p. 71.
[32] Ivi, p. 72.

bring out how law is the *deposit* of a process of choral construction, or rather: plural, multiple, apocryphal and eventually completely impersonal.

Two legendary scenes are presented by Thomas to show this process: that of the *ius Papirianum*, a set of precepts that the pontifex Gaius Papirius collects and saves from corruption and manipulation through transcription; and that of Numa's books, unearthed by heavy rains or by excavation. In both scenes, what emerges is that this deposit interweaves two essential elements of *ius*: the absence of the king's body—there is no trace of Numa—and a "spotlight" on the text: "l'effacement du sujet dans le droit"[33].

> Les livres de Numa, dont la survie est indépendante du roi disparu, ne sont pas des lois et reposent sur une pierre que distinguent seulement, en l'absence de toute trace écrite, des végétaux funèbres[34].

While with Papyrius there is the delivery of a *right* (*droit*) whose origin seems to be exhausted in transmission, with the books of Numa an even more vertiginous piece is added with regard to the thought of origin. Numa's books—for reasons that are still debated today—were set on fire. One hypothesis is that they were, so to speak, too close to the origin and that this potential origin should instead be forgotten. What remains of that text is contained in the *ius Papirianum*.

This much is known. Such is the operation that lies at the origin of the invention of law. Even today, the study of law is never a study of this or that author or even of this or that theory. Only rarely in doctrine can theories be put forward that prove useful for understanding certain legal operations[35].

Law is first and foremost text. Who are its inventors? Agents—whose name is oblivion—who *succeed* one another in the service of a continuous translation. Hence the temporality we are describing is not really historical: "La jurisprudence n'a pas d'histoire, mais une généalogie. L'unité d'un même sujet collectif la parcourt"[36]

Law plays with the oblivion of its own origin, and constitutes the deposit of genius: it corresponds to the institutionalization of thought in Rome. Law is to Rome what philosophy was to Athens.

[33] Ivi, p. 75.
[34] Ivi, p. 76.
[35] Hermitte (1999) *Les droit est un autre monde*.
[36] Thomas (2011), *Idées romaines sur l'origine et la transmission du droit*, p. 77. With regard to the institution, in the aforementioned Instincts and Institutions, Deleuze argued that it should be thought of as a collective intelligence in the already quoted *Instincts et institutions.*

8. Metaphysical materialism

"True institution [is the] actual framework of the dynamic of the system, whether it is official or not." – notes Merleau-Ponty[37]. If law is the most advanced technique of instituting in the West, it is the infrastructure of the social[38]. It was not born in the midst of the state, indeed its history is a millennial history that has not necessarily had to rely on the state form at all. If anything, the city walls were its place of origin. As law of the citizens, it originated as a civil law [civis, "citizen"]. "'*Ius civile*': the right, *ius*, is civil before being public or private, because it establishes, between fellow citizens, a common measure that universalises exchange and legality." [39]

Law is thus a means for multiple uses, an art of shaping social relations. This instituting technique creates and transforms things with the words it institutes as words of the law. The legal technique can be named metaphysical materialism.

The proposal is therefore to recover, starting from the instituting technique par excellence, the value of things, that is, of institutions as things: as a service, as a use, as an expression of social cooperation. This stake aspires to free the institution from both the privileged positions long accorded to the person-form and the idea of domination.

With respect to person-institutions, Thomas reminds us that law is a radical abstraction from the "tangible", a formalism that gives materiality to things through its names: "a speech that was at once realising what it designates (which is how the juridical, along with the poetic and the religious, had been understood traditionally), discourse, in the absence of external and tangible things, had no other choice but that of discovering its object in itself. (...) This mutation is carried out and accomplished with the notion of an incorporeal thing."[40]

[37] Merleau-Ponty (2010) *Institution and Passivity*, p. 13.
[38] See Spanò (2020), Au milieu du droit, in *Milieu, mi-lieu, milieux* (ed. by) Clarizio, Poma and Spanò, Paris: Éditions Mimésis, pp. 157-175.
[39] Thomas (2021), *The Law between Words and Things*, p. 69. See also Spanò, (2018) Zona Cesarini. Linee per una rilettura de Il diritto dei privati, in W. Cesarini Sforza, *Il diritto dei privati*, Macerata: Quodlibet.
[40] Ivi, p. 65.

Not too differently, a certain part of sociology has come to terms with institutions as impersonal. Boltanski defines the institution as "un être sans corps à qui est déléguée la tâche de dire ce qu'il en est de ce qui est."[41]. Better:

> La seule solution envisageable est donc de déléguer la tâche de dire ce qu'il en est de ce qui est à un *être sans corps*. Seul un être sans corps peut cesser de « considérer les objets en se plaçant parmi eux » pour les « voir *sub specie aeternitatis* » et les « considérer de l'extérieur », pour reprendre une formulation utilisée par Wittgenstein dans les *Carnets de 1914-1916* (1971).

It should be added that taking the anti-institutional critique seriously means rejecting the hypothesis that social forces are bound by consensus, as certain pragmatist approaches end up doing. Disagreement is proper to the social world. If law is the institutional technique par excellence, it is the infrastructure of conflict and social transformation. It constitutes the means and the words of the conflict itself.

Finally, let us ask ourselves with Merleau-Ponty: "Is there a single horizon of all the institutional horizons? Does history understand on the basis of the non historical?"[42]. One could respectively answer no and yes to these questions. Certainly, no to the first of the two questions: there is no single horizon, but a plural horizon, which is that of the multiplicity of instituting techniques and instituted constructs. Yes, on the contrary, is the answer to the second question: history, if thought of from the perspective of instituting techniques, shows a complex temporality, in which the present always makes room for the past and the deposit of sense is an opening. In the words of the prematurely deceased Cornelia Vismann, one can say with a materialistic gesture that "the beginnings of law lie in the archive" and "the archive stores history and has a history"[43]. But it is the story of a "stubborn" and empty deposit because "archives are bunker institutions shutting themselves off their surroundings". In other words:

> As an archive can never contain itself as its own beginning, if it a commencement in the strict sense, this initial point can only be archived as a blank. (...) an archive

[41] Boltanski (2008), Institutions et critique sociale. Une approche pragmatique de la domination, *Tracés. Revue de sciences humaines* [online 2010], (https://traces.revues.org/2333). See also: Boltanski (2013) L'être sans corps de l'institution, in (ed. by) Napoli, *Aux origines des cultures juridiques européennes : Yan Thomas entre droit et sciences sociales*, Roma : École française de Rome.

[42] Merleau-Ponty, (2010) *Institution and Passivity*, p. 14

[43] Vismann, (2008), The archive and the Beginning of Law, in *Derrida and legal philosophy*, (ed. by) Goodrich, Hoffmann, Rosenfeld, Vismann, pp. 41-54, p. 42.

> archeology (...) refers to that which does not speak, the space of the archive, the shelves, the dust. It mistrusts words and especially the word *arkhé* itself.[44]

As the law books are deleted, so the archive "has its origin and first *raison d'être* in the fact that it is locked"[45]. The archive in the material sense is then not a beginning, an *arkhé*, but *arca*. Understood in this way, the archives give us a "Roman" idea of the beginning: "not a beginning of the preceding from which the following may be deduced, but the beginning as a receptacle"[46].

On closer inspection, the multiple use, the non-reducibility of the law to the weapon of this or that subject or individual, is all here: in its birth as a receptacle. It will then be the medium through which the abstract is constructed by naming the concrete and the very form that informs social struggles.

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[44] Ivi, p. 51.
[45] Ibidem.
[46] Ibidem. As is known, Foucault dwelt at length on the concept of the archive and saw it in connection with the law. An iconic definition is that according to which "The archive is first the law of what can be said, the system that governs the appearance of statements as unique events." Foucault (1989), *Archaeology of Knowledge*, London-New York: Routledge, p. 145.

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