The Meaning of Institution: The Deposited Sense

Paolo Napoli *
paolnap@gmail.com

ABSTRACT

According to Merleau-Ponty, institution has to do with the deposit of a sense. This operation invokes a gesture of completion that is left to a future of recovery, modifications and alterations that expose that deposited sense to dialectical tensions between orthodox conservation and inevitable deviations. The decisive issue at stake is then announced precisely around this ambivalent status of the institution, which becomes the guardian of the deposited sense, not to fix it in a systematized repetition but to welcome, measure and ensure its evolution. Thus "instituting" indicates the ouverture d'un champ, the possibility of setting the sense in a container with an extensible shell. It deals with the capacity of preserving the duration of the sense originally deposited but also of increasing the quality of its substance in the course of history. On these dynamic potentialities of the "deposited" and administered sense Merleau-Ponty's notes manage to glimpse an essential technical quality that, for example, Christianity has been able to exploit to the maximum.

1. Back to Roman Law

Too often, in reasoning about the meaning of "institution", we overlook the verb of which the noun is the derivative: to institute. For law, but also for politics, such an oversight is justifiable only as long as one opts for a flatly objective reading of the institution, as a given reality that orients and conditions the will and freedom of the actors. But it is enough to approach to *instituting* and its properties to see how this substantialist view of the institution begins to waver dangerously. The basic meaning of the verb, if we agree on a lowest common denominator to which it is difficult to raise objections, refers to the accomplishment of the act that creates something.

* Università la Sapienza, Roma, Italy.

The formulations of Roman law convey to us with radical clarity this generative force of the verb *instituere*, which consists first of all in the attribution of a name as a creative act of a new entity. Let us look at some significant examples taken from the *Corpus iuris civilis* of Justinian. With regard to the manumission of the slave by the insolvent master and the possibility of making him a successor in his assets, we read that

> Licet autem domino, qui solvendo non est, testamento servum suum cum libertate heredem instituere, ut fiat liber heresque ei solus et necessarius, si modo nemo alius ex eo testamento heres extiterit, aut quia nemo heres scriptus sit, aut quia is qui scriptus est qualibet ex causa heres non extiterit (Institutiones I, 6,1)

A master, who is insolvent, may, however, by his testament, institute a slave to be his heir, at the same time giving him his liberty, so that the slave becoming free may be his only and necessary heir, provided that there is no other heir under the same testament, which may happen, either because no other person was instituted heir, or because the person instituted, from some reason or other, does not become heir. It is then specified that

> Idemque iuris est et si sine libertate servus heres institutus est. quod nostra constitutio non solum in domino qui solvendo non est, sed generaliter constituit, nova humanitatis ratione, ut ex ipsa scriptura institutionis etiam libertas ei competere videatur, cum non est verisimile, eum quem heredem sibi elegit, si praetermiserit libertatis dationem, servum remanere voluisse et neminem sibi heredem fore (Institutiones I, 6,2)

The law is the same also when a slave is instituted heir, although his freedom be not expressly given him; for our constitution, in a true spirit of humanity, decides not only with regard to an insolvent master, but, generally, that the mere institution (*ex ipsa scriptura institutionis*) of a slave implies the grant of liberty. For it is highly improbable, that a testator, although he has omitted an express gift of freedom, should have wished that the person he has selected as heir, should remain a slave, and that he himself should have no heir.

The syntagma *heredem instituere* has an archetypal significance in the way of conceiving the relationship with the goods even before that with the successor, because naming someone as heir in a testamentary declaration means setting the condition of the duration of the assets, thinking of it in the continuity of its components beyond the death of the original owner and beyond the prim-

itive relationship of descent father-son which remains the fulcrum of the succession system. In this sense, *heredem instituere* founds the structure of a possible institution, i.e. of a specific economic-social reality that concerns not only the corporeal property of the deceased but also the complex of active and passive legal relations in which the heir takes over, according to what is at least one characteristic of classic hereditary law[1]. The substitution of the heir for the inheritor's property constitutes a real structural invariant of both ancient and modern societies: the transmission of wealth between generations on the one hand and the regulated circulation of wealth on the other in the name of a will surviving to its author. Pierre Legendre has grasped this node well: "L'enjeu d'une transmission a été fort bien aperçu par le droit romain classique, à propos de la succession testamentaire : le citoyen romain ne doit pas mourir sans testament, et l'essentiel de cet acte consiste dans l'institution de l'héritier ; le testateur proclame avec solennité : Titius, sois mon héritier (*Titius, heres esto*). Notez, d'ailleurs, la forme impérative : sois mon héritier, parce qu'il en est ainsi de par une exigence légale et je te nomme héritier. Cela nous met en présence du fait qu'une transmission ne se fonde pas sur un contenu, mais avant tout sur l'acte de transmettre, c'est-à-dire en définitive sur les montages de fiction qui rendent possible qu'un tel acte soit posé et répété à travers les générations".[2]

Moreover, the reason for transmission concerns not only corporal things, but also the knowledge that serves to form the young[3]. *Instituere* in fact means to instruct, to teach the contents of a subject in succinct and usable way to those who do not yet have adequate means. The literary genre *Institutiones* is in fact addressed to those who are beginning to acquire a certain type of preparation and have not yet acquired a complete level of intellectual maturity:

> Samaritam autem militare plane non permittimus, sed ne ad civile quidem munus accedere neque advocatum vel assessorem esse vel omnino inter disertissimos rhetores referri vel adulescentes instituere (Nov 144, cap. 2, a 572)

[1] Arangio-Ruiz, *Istituzioni di diritto romano*, Jovene, Napoli 1981, p. 511 ss.

[2] Legendre, *L'inestimable objet de la transmission*, Fayard, Paris 1985 (n.e. 2004), p. 50.

[3] This sense of « instituting » is favoured by A. Supiot (2017), *Homo Juridicus: On the Anthropological Function of the Law*, Trans. by Saskia Brown, London-New York : Verso, p. 35, who in the wake of P. Legendre emphasises the almost orthopaedic nature of the word: "The primary meaning of instituting the human being is setting it on its feet, standing it upright, by inscribing it within a community of sense by which it is linked to other human beings. Instituting the human being means enabling it to occupy its place within humanity. "

We do not allow a Samaritan to enter the military career or any civil office, nor the profession of justice, nor to be a rhetorician or to instruct the young.

But there is another aspect that deserves to be emphasized and is derived from the second passage quoted above with regard to inheritance: the act of establishing an heir is inseparable from a precise form, it is the writing and therefore the document that can designate someone as *heres*. The expression used in the text *ex scriptura institutionis* means that naming an heir, that is, creating him as a successor, derives from that specific linguistic operation which consists in leaving a written trace of a will without which nothing is instituted.

Giving the name of heir to someone, in the imperative way rightly pointed out by Legendre, is equivalent to giving him a status that he did not previously have. To institute from a juridical point of view always implies a documentary form (in the case in question the will) which produces a social phenomenon (the succession in the assets of the inheriting party) on the one hand and a transformation of the world as a consequence of that documentary form on the other[4]. Such an event breaks into history with a distinct temporal threshold that can be traced back to the chronological force of a *fiat*, a differential condition between a before and an after. The formal operation of *instituere* is not simply an element, among others, of a wider social fact named institution which exists since a long time. This operation precedes the birth of the institution. This does not mean forgetting the material, social and cultural conditions that make that act of *instituere* possible, but only diverting our gaze to its consequences and thus being able to measure its duration in time and its possible variations or transformations. It will then become clear that "instituting" indicates the procedural mechanism thanks to which social reality happens and, in so doing, delimits an objective perimeter of intelligibility that is the projection of that instituting moment. If we do not opt for a flatly reified conception of the institution—the "already there" of the social fact—we must always keep in mind this historical-formal a priori that the verb *instituere* preserves. And it is precisely this movement that is triggered by formulas such as "procuratorem instituere", "administrationem instituere", "clericos instituere", "accusationem instituere".

Let us look at some examples that should always be read in the light of the archetypal act that Roman law has associated with the verb *instituere*, namely its primary coincidence with the act of giving a name as we have seen in the paradigm of *heredem instituere*. Before any further specification, to institute is to

[4] Ferraris, *Documentalità. Perché è necessario lasciar tracce*, Laterza, Roma-Bari 2009.

name a subject or a thing so that from that creative qualification descend consequences relevant to law and therefore to social relations. Thus in a work of the third century AD we read:

> Caeco curator dari non potest, quia ipse sibi procuratorem instituere potest (Pauli Sententiae 4, 12)

A curator cannot be given to a blind person because the latter can appoint a procurator for himself

Significant examples often recur in the language of Justinian's own legislative production:

> Et si quis aedificans ecclesiam aut aliter in eadem servientibus ministrans emolumenta voluerit aliquos clericos instituere, non fortuite eos sed probatione sanctissimi patriarchae suscipiat (Nov 57, cap. 2, a 537)

If someone who has founded a church and administers the resources for its services wishes to appoint clerics, he takes it upon himself to appoint them not by chance but after approval by the patriarch

Or again, with regard to incorporal things such as accusation or administration we find in an inscription in honor of T. Sennius Solemnis of 238 A.D. the formula

> *Accusationem instituere temptar[ent]* (Marmor Tauriniacum CIL XIII, n. 3162)

They tried to bring accusation which returns in a passage from Ulpianus reported in the Digest (48, 5, 5) in which he discusses the *lex Iulia de adulteris coercendis* del 17 a. C.:

> Si maritus praevenerit accusareque instituerit, tempora non cedunt patri, quod accusationem instituere non potest....

If a husband should attempt to prosecute his wife in a criminal case, will the allegation of having acted as her pander bar him from bringing the accusation. Again in Justinian's legislation, we find that

> unam administrationem instituere loco honestam quandam et reverentia dignam, quae similiter civilium ibi causarum curam habebit et pro militantium disciplina cogitabit (Nov 826, a 535)

Establish an administration on the ground that is fair and worthy of respect, an administration that takes care of the order and judicial affairs of the military as well as the civilian justice.

The medieval use of the term *instituere* confirms the semantic spectrum outlined by the rich witness of Roman law. However, it is worth noting a key occurrence in theological discourse that goes back to Thomas Aquinas. Aquinas uses the expression *Jesus Christus instituit ecclesiam* (*Summa contra Gentiles*, 4, 76, 8): here the linear continuity between the artificer who "instituit" and the institutional artefact par excellence, which is the *Ecclesia*, is transparent. This statement can be interpreted in different ways, including the assumption that the Church was established not by Christ but on Christ. However, the formal and technical parallelism with the model of Roman law, which indicates in the verb *instituere* a moment that is both foundational and transmissive, is obvious. It is the very programmatic declaration that scholasticism has placed at the foundation of apostolic succession, which corresponds to the archetypal paradigm of *heredem instituere*. The Church is the direct heir of Christ through the apostles, according to the framework already outlined in the first letter of Clement at the end of the first century (*Letter to the Corinthians*, 42.1-2; 44.1-2). In establishing the Church, Christ thus deploys the double pragmatic meaning of the verb *instituere* as it was already in Latin usage: ″to give life″ to a hitherto non-existent figure and ″to instruct″ those who will have to deal with it; in the case of the Church, it is the authority of the ordained ministry[5].

2. Merleau-Ponty and the "deposited sense"

Ultimately, by attributing a name, law establishes the world and performs a gesture that is entirely the result of *praxis*, in direct continuity with a materialist vision of reality. Etienne Balibar has explained this very well: "Nominalism is that 'supplement of materialism' that prevents any material reality from becoming

[5] About the medieval meaning of "istitution", see Y Sassier, « Réflexion autour du sens d'*instituere, institutio, instituta* au Moyen Âge », dans J-Ph. Bras (ed.), *L'institution. Passé et devenir d'une catégorie juridique*, L'Harmattan, Paris 2008, p. 23. Rightly, in a very stimulating article describing the rise of the notion of institution in the modern era, Alain Guery points out that we have invented ″the useless word of institutionalization, which means the same thing as institution in its original sense″: see ″Institution. Histoire d'une notion et de ses utilisations avant les institutionnalismes″, *Cahiers d'économie politique*, 1, 2003, pp. 7-18, p. 14.

rigid in a metaphysics"[6]. Ian Hacking in turn has captured the implication between a dynamic nominalism—such as the examples in Roman law—and empirical realities: «categories of people come into existence at the same time as kinds of people come into being to fit those categories and there is a two-ways interaction between these processes».[7]

Interpreters in their own way of this vision are Foucault—who as a dynamic historical nominalist proposes to reconstruct « the objectification of objectivities"[8]— or Marx when he argues that the praxis of valorization precedes the value of the object. Psychoanalysis focusing on language, for its part, reminds us that "instituting is an act of naming, and naming, before having a practical utility related to the classification and ordering of things, is an operation thanks to which everything that exists finds itself elevated above its use and exchange value. It receives a place in the world beyond its properties and can even disregard its nature or origin, whether biological or social (species, race, genetic code, lineage)" [9].

In the light of the evidence of Roman law germinated around the verb *instituere*, we can return to the initial approach with an awareness of its non-triviality. Here we are helped by Merleau-Ponty's immediate insight, which has the merit of associating institution with the gesture of 'putting into being' in an object and not in a concept. This distinction makes it possible to avoid confusion between the institution that is realized in the act of positing something and institutionalist theory – such as a legal or economic one, for example—whose object is instead the institution as concept. In his notes for a course at the Collège de France in 1954-1955, in what was supposed to be the first version of a text included in the cycle of lectures *L'institution dans l'histoire personnelle et publique*, Merleau-Ponty offers some interesting observations about it:

> Institution ... is not the positing of a concept, but of a being, or openness of a field. 1) institution gives to the future what it does not have; 2) the future will receive from it only what it will bring. Thales opening the field of geometry: he

[6]Balibar, *Foucault et Marx. L'enjeu du nominalisme*, in *Michel Foucault philosophe*, Seuil, Paris 1988, p. 75. Our translation.

[7] Hacking, *Five parables*, in *Philosophy in History. Essays on the historiography of philosophy*, ed. By R Rorty *et al.* Cambridge Un. Press 1984, p. 122.

[8] Foucault, *Pourquoi la prison ?* Table ronde du 20 mai 1978, in *Dits et écrits*, Gallimard, Paris 1994, IV, p. 34.

[9] Stoppa, *Istituire la vita. Come riconsegnare le istituzioni alla comunità*, Vita e Pensiero, Milano 2014, p. 47.

> institutes, in the sense that it sets underway, by creating symbols and by employing these symbols, a labor which, through recurrence, will not stop itself, which, in principle, cannot be accomplished by him: we find in what he has done [the] principle of a research that is other and the same. . . . Reciprocally: the future receives only what it brings. By means of the preceding research the creator senses the movement toward his research. Its creation is re activation. Traditionality is the forgetfulness of origins and their possession.[10]

The institution designates the setting in motion of a process in history, its time is to a certain extent eschatological, because it does not sink its roots into an "always there" that it is difficult to decipher in its genesis and composition. The continuity he wants to introduce is not the extension, metamorphosed, of what already exists and which needs to be stabilized. On the contrary, it lays the conditions to realize, in the future, what the institution does not have. Men and women will fill with content that opening of meaning and practical potential that the institution's irruption into history produces. The duration of institution does not correspond to the permanence of an identical substance, whose ancestral roots the civil code could not undermine. That is what for example Carl Schmitt, at the time *Kronjurist* of the Third Reich, still with the wind in his sails, was pleased to observe with regard to the concrete internal order typical of the family[11].

The institution conceived by Merleau-Ponty, which must be entrusted for this very prerogative, opens up a future that it will be however difficult to completely manage. It is not the institution-block, the usual compass that puts a brake on the unforeseen events of history and the appetites of humans, that force of the *katechon* that stands as an instance of delay and containment of the disintegrating power of the Antichrist—according to the figure evoked in the second epistle to the Thessalonians (2, 6-7). In short, the model of the Leviathan. Merleau-Ponty shakes to the foundations the instrumental logic that wants to deliver the institution to this or that specific purpose, because "instituting" means to define a field of technical possibilities which are not submitted to a previous monological scheme, whose *telos* deserves to be strengthened against the impact of events:

[10] Merleau-Ponty (2010) *Institution and Passivity. Course Notes from the Collège de France (1954-1955)*. Evanston (IL): Northwestern University Press, p. 103.
[11] Schmitt, *Über die drei Arten des Rechtswissenschaftlichen Denkens*, Hanseatische Verlagsanstalt, Hamburg, 1934, engl.transl. *On the Three Types of Juristic Thought*, Praegar, Westport 2004.

> Therefore institution [means] establishment in an experience (or in a constructed apparatus) of dimensions (in the general, Cartesian sense: systems of references) in relation to which a whole series of other experiences will make sense and will make a *sequel*, a history.
>
> The sense is deposited (it is no longer merely in me as conscious ness, 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 sur vives, 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.[12]

Among the many important points that this passage puts forward, the theme of deposited sense deserves to be emphasized. Deposited not as one might do in a warehouse, in a place where objects that are not of immediate use are set aside or, even more so, as waste material after that an operation has accomplished its main purpose. Rather, the deposited sense invokes a gesture of completion that is left to a future of recovery, modifications and alterations that expose that deposited sense to dialectical tensions between orthodox conservation and inevitable deviations. The decisive issue at stake is then announced precisely around this ambivalent status of the institution, which becomes the guardian of the deposited sense, not to fix it in a systematized repetition but to welcome, measure and ensure its evolution. On these dynamic potentialities of the ″deposited″ and administered sense Merleau-Ponty′s notes, certainly rhapsodic and sketchy, nevertheless manage to glimpse an essential technical quality that, for example, Christianity has been able to exploit to the maximum.

The basic principle is that, for Merleau-Ponty, the institution puts in place dimensions of an experience that will open the field to a sequel of other experiences. All this results in the deposit of a meaning, a result that Merleau-Ponty clarifies but does not arrive at a complete explanation. He understands that the concept possesses a hermeneutic potential that should not be overlooked, that it is not a remnant of a warehouse or, worse, something to be temporarily set aside because its immediate usefulness cannot be seen. The sense deposited is rather a content to be completed in an indeterminable future, an indefectible resource of the future. Instituting then means not only to create, to establish, to found a sense, all ideal operations that satisfy Merleau-Ponty′s initial definition of instituting as putting into being an object and not a concept.

[12] Merleau-Ponty (2010) *Institution and Passivity*, p. 8-9.

Instituting also indicates the *ouverture d'un champ*, the possibility of setting the sense in a container with an extensible shell. It deals with the capacity of preserving the duration of the sense originally deposited but also of increasing the quality of its substance in the course of history.

3. The theological contract

This process of safeguarding and opening up—which with Schmitt's *Roman Catholicism*[13] we could count among the examples of the combination of opposites (*complexio oppositorum*)—was conceived by early Christianity by resorting to the metaphorical use of a specific figure of Roman civil law: the deposit contract. Three books, which were to be rechristened the *Pastoral Epistles,* during the eighteenth century, were presumably written at the turn of the period generically referred to as Sub-apostolic Christianity (between the first and second centuries). The writings in question are three pseudo-epigraphic epistles addressed to St. Paul's most loyal disciples, Timothy (two) and Titus, written by an unknown author, concealing himself behind a famous name such as the apostle's[14]. The fundamental idea set forth in the two letters to Timothy most definitely stands out among those expressed in the numerous working recommendations Paul offers his disciples. In the first letter (I *Tm* 6,20), Paul delivers the following order when taking leave from his emissary in Ephesus: "Timothy, guard what has been entrusted to your care" (*tên parathêkên phýlaxon*). In the second letter, the deposit is referred to on two occasions, one after another: in 2 *Tm* I,12, Paul has complete trust in Christ's work which is able to "guard what has been entrusted me until that day" (*tên parathêkên mou phyláxai eisekéinên hêméran*). A little further on, in 2 *Tm* I,14, he once again urges Timothy to take care of the same object whose value is also qualified by an adjective: "Guard the good deposit that

[13] *Römischer Katholizismus und politischer Form*, Klett-Cotta, Stuttgart 1923, engl. transl. *Roman Catholicism and Political Form*, Greenwood Press, Westport 1996.

[14] As regards pseudo-epigraphy widely used in the Christian cultural environment from 60 to 100 AD, cf. R. Penna, *Le prime comunità cristiane. Persone, tempi, luoghi, forme, credenze*, Carocci, Roma 2011, pp. 171-180. As regards the question of Pauline authorship of the Pastoral Epistles, called into question at the start of the 1800s by Schleiermacher among others, cf. the detailed critical review by C. Marcheselli-Casale, *Le lettere pastorali*, Edizioni Dehoniane, Bologna 1995, rpt. in 2008, pp. 21-44.

was entrusted to you (*tên kalên parathêkên phýlaxon*) with the help of the Holy Spirit who lives in us"[15].

If deposit (παραθήκε), with its specific technical and metaphorical nature, emerged in the Biblical lexicon with the two epistles to Timothy, the ideal and same term were, nevertheless, already widely shaped in the Old Testament. In the Old Testament we can find an outline of the legal physiognomy of the social practice, even if the figurative value it will later be given by Christian acceptance is absent. On several occasions we can find the juridical situation which consists in the consignment of an object to someone in order for the latter to conserve it intact and return it at the right moment. For example, in *Ex*, XXII, 10-12, there is a perfect overview of the dialectic between the owner's rights and the obligations of the guardian the asset has been entrusted to in accordance with the law of the deposit: «If anyone gives a donkey, an ox, a sheep or any other animal to their neighbour for safekeeping (the *Vulgate* translates as *commendaverit ad custodiam* while the *Septaguint* uses the compound *παρακαταθήκης*) and it dies or is injured or is taken away while no one is looking, the issue between them will be settled by the taking of an oath before the Lord that the neighbour did not lay hands on the other person's property. The owner is to accept this, and no restitution is required. But if the animal was stolen from the neighbour, restitution must be made to the owner». In *Lv*, V, 21-24 it is recalled that «if anyone sins and is unfaithful to the Lord by deceiving a neighbour about something entrusted to them - (*depositum quod fidei ejus creditum fuerat*, according to the *Vulgate*, while the *Septaguint*, VI, 2,7, uses the expression *εν παραθήκε*) [...]They must make restitution in full, add a fifth of the value to it». The "deposit" referred to in this verse of *Leviticus*, as has been noted, translates the Hebrew term *piqqadôn* which in *Gn* XLI, 36 indicates the food held in reserve during periods of plenty in order to deal with famines[16]. The passage in question is a genuine handbook of economic politics because when explaining to the Pharaoh his dream about the seven fat cows eaten by the seven thin cows, Joseph was telling him the preventive measures to be taken to mitigate the devastating effects of the famine that would have lasted for seven years following on from seven years of plenty. The creation of a reserve of food to be used in times of famine is exactly the reason that justifies the setting-up of

[15] For the english version cf. Towner, *The Letters to Timothy and Titus*, Eerdmans, Grand Rapids (Mich.)-Cambridge (UK), 2006, p. 429 and 456.

[16] Médebielle, *Dépôt de la foi*, in *Dictionnaire de la Bible*, suppl. t. II, Letouzey et Ané, Paris 1930-1934, col. 374-375.

a "deposit". The latter's prudent nature explains the strategic role it plays in the fight against the adversities of fate, but it also shows its all-important bond with the existence of the political community. The deposit feeds a starving population just as, in the Deuter-Pauline metaphor, it will nourish Christians' faith.

In *2 Mac 3*,10, faced with Heliodorus' desire to seize the money stored in the temple, the high priest of the temple of Jerusalem recalls how the sums «deposited» therein (*deposita* in the *Vulgate*, *παραθήκας* in the *Septaguint*) are needed to maintain widows and orphans. In the face of Heliodorus' forceful demands (2 *Mac 3*,15), the priests *invocabant de coelo eum, qui de depositis legem posuit, ut his qui deposuerant ea salva custodiret.* The *Septaguint* uses the unequivocal wording τὸν περὶ παραθήκης νομοθετήσαντα τοῖς παρακαταθεμένοις ταῦτα σῶα διαφυλάξαι, «prostrated themselves before the altar and called toward heaven for the one who had given the law about deposits to keep the deposits safe for those who had made them». Thus another semantic value is specified for the concept of deposit. Not only is it the act by which the custody of an item is transferred to a trustworthy person, but it is also the physical and symbolic condition that guarantees the safety and unavailability of the item itself. In fact, the money could not be touched because it was stored in a holy place[17].

In light of the similar characteristics, it is clear that in his comment on the Decalogue, Philo of Alexandria (start of first century AD ca.) was able to confirm that "the deposit is the most sacred institutional act of the life of a society (Ἱερώτατον παρακαταθὴκε τῶν ἐν κοινωνία πραγμάτων) because it rests on the good faith of the depositary (ἐπι τῆ τοῦ λαβόντος κειμένη πίστει)". The observation is both sociological and religious. Not betraying the trust of others is clearly a fundamental requisite for good social order. However, this is not sufficient to justify Philo's emphasis which, instead, focuses on another aspect. Unlike other contractual forms of credit, for example loans, which are documented or confirmed by witnesses, the deposit is something confidential between the parties involved, with God being the only witness that approves the agreement between the depositor and the depositary. So, not only does the dishonest depositary fail to meet the expectations of the depositor who expects the item in question to be returned, but he also violates the divine law because

[17] As regards Jewish-Greek history of the ethical and juridical notion of παραθήκη cf. A. Ehrhardt, *Parakatathke*, «Zeitschrift der Savigny Stiftung für Rechtsgeschichte (Rom. Abt.)», 75, 1958, pp. 32-90.

he fails to respect the higher witness who is the only, inevitable guarantor of the agreement[18].

When the individual called Paul orders Timothy to take care of the παραθήκε, he placed himself within a semantic field, already tilled in part by the scriptural precedents mentioned above, upon using a word, the choice of which was not casual. Obviously it is Roman law which paid witness to the most interesting developments of this institution: the depositor (creditor) hands over a moveable item to the depositary (debtor) who undertakes to keep it safe and return it at the former's request. According to reconstruction by Roman law historians[19], legal protection of the deposit was not originally granted under civil law (f*ormula in ius concepta*), but it was thanks to action by the praetor adopting (*formula in factum concepta*) that the unlawful depositary was obliged to return the item held, as if it were a formal obligation approved under civil law.

From a moral point of view, however, this obligation of restitution could be subject to exceptions dictated by the specific situation. There is a famous example dating back to Plato (*Repubblica*, I, 331c) used by Cicero in *De Officiis* (III, 95): if someone has received a sword on deposit from a person who, before requesting its return, has become insane, then the depositary will have the right to retain it to prevent the depositor from committing some insane act. Similarly, it would be at fault for the depositary to return a sum of money to someone who in the course of time has developed unpatriotic feelings, knowing that that money could be used to endanger the safety of *res publica*[20]. It is always a question of the safety, therefore, that the deposit intends to preserve, not only of the objects entrusted but also of the subjects, both individuals and the community, that the use of those objects is capable of threatening.

During the early decades of the Roman Empire, with increased legal knowledge of the importance of providing judicial protection for these types of situations, the deposit became a real, genuine contract of good faith: the agreement was completed with straightforward handing over of the item, without any formal expression of consent which was already incorporated in the agreement. And the diffusion of Roman law throughout the Roman Empire's provinces also

[18] Philo of Alexandria, *De specialibus legibus*, IV, 30-32.

[19] See Arangio-Ruiz, *Istituzioni di diritto romano*, Jovene, Napoli 1981, p. 309 et seq.

[20] Cicero, *De Officiis*, III, 95 : *Si gladium quis apud te sana mente deposuerit, repetat insaniens, reddere peccatum sit, officium non reddere. Quid ? Si is qui apud te pecuniam deposuerit, bellum inferat patriae, reddasne depositum ?*

dates from this period, so it is fairly probable that this recent type of contract had also been adopted in the region where Paul was educated and worked[21].
The relationship's main characteristics lies in the unalterable conservation of the deposited item and in the consequent ban on use by the depositary. If the latter made use of the item, he was asked to respond to the action of theft, as can also be clearly seen in the commentary on the Law of Moses written by Philo of Alexandria during the early decades of the Roman Empire[22]. Indeed, it was because the depositor continued to be the owner of the item that the item had to be returned intact and with the interest accrued during the period of deposit, otherwise it was as if it had been withheld by the depositary. Whoever decided to entrust an item as a deposit had to remedy, on his part, the damage caused by the item to the individual who took it into custody. In any case, the agreement between the parties presumed that the item to be returned could not be replaced by one of an equivalent value or by a sum of money. In its canonical form, the depositor expected the depositary to return the individual item and not the *tantundem* as it could be a way of alternative compensation. This is why the most specific variant of the institution, the so-called irregular deposit that refers to replaceable items, is worthy of attention. In this case, the depositary can use the object and is not obliged to return it in the specific form in which he receives it as a deposit, but to return one of the same kind with the addition of payment of interest.

When studying Greek and Egyptian papyri, Arangio-Ruiz[23] noted that in the practice of business in the ancient world, the term παραθήκε o παρακαθήκε frequently referred to the transfer of sums of money to someone who then had the option of returning the amount in question, using other money. Roman legal culture also seems to adopt this extension of the deposit, in addition to return of the deposit in its specific form. A jurist from the first century b. C., Alfenus, already acknowledged that deposits followed the same rules as loans for which either the same item or an equivalent value could be returned. In the first case, the lender or depositor continues to be the owner of the item, while in the second case his position is that of a creditor vis-à-vis the borrower or the depositary: *rerum locatarum duo genera esse, ut aut idem redderetur*

[21] Spicq, *Saint Paul et la loi des dépôts,* « Revue biblique », 4, 1931, p. 490.
[22] Philo of Alexandria, *De specialibus legibus*, IV, 30-36. Cf. also T. Flavius Josephus, *Antiquities of the Jews*, IV, 8. 38, 287.
[23] Arangio-Ruiz, *Istituzioni di diritto romano*, op. cit., p. 312.

(sicuti cum vestimenta fulloni curanda locarentur) aut eiusdem generis redderetur (veluti cum argentum pusulatum fabro daretur, ut vasa fierent, aut aurum, ut anuli): ex superiore causa rem domini manere, ex posteriore in creditum iri. Idem iuris esse in deposito (D, 19, 2, 31). Papinianus, the great jurist who lived between the second and third centuries AD, was to place even greater emphasis on how thin the line was between deposit and loan, when asked to voice his opinion on the case of the consignment of one hundred coins by Titius to Sempronius through his slave acting as a manager (D, 16, 3, 24). As far as he is concerned, it is unquestionable that the matter involves the institution of the deposit even if referring to money, provided it is duly identified in its specific monetary form: *depositi actionem locum habere: quid est enim aliud commendare quam deponere?* And what about the interest accrued ? Papinianus specifies that it is not easy to establish it and, if an agreement was drawn up for the return of an equivalent sum and not the same monetary form, then the situation is no longer that of a deposit (*nam si ut tantundem solveretur convenit, egreditur ea res depositi notissimos terminos*). Unless negotiated otherwise, it would, in any case, go against good faith and the deposit's nature if the depositor demanded interest in advance from the party who had done him a favour by taking care of that money (*sed contra bonam fidem et depositi naturam est usuras ab eo desiderare temporis ante moram, qui beneficium in suscipienda pecunia dedit. Si tamen ab initio de usuris praestandis convenit, lex contractus servabitur*). The jurists' differing opinions with regard to the case law of deposits, mentioned herein, mark the physiognomy of this institution. An institution which, based on a principle of unavailability of ownership on the part of the depositary, can assume a differing importance depending on whether the item in question is replaceable or, even, the most replaceable of all item, money. At this point, the unavailability of ownership by whoever receives the item and the consequent obligation to return it in its specific form seem to weaken in the case of the irregular deposit given that the depositary also becomes the owner of the item upon using it (as in the case of a loan), and consequently is only obliged to return the *tantundem*.

If Timothy is appointed to safeguard the deposit of the faith, in other words the evangelical teaching which he must account for when called upon to do so by the depositor (Christ and, through him, Paul), and if proof of the diffusion of that content to other men worthy of faith and able to spread it further is

included in the act of return («and the things you have heard me say in the presence of many witnesses entrust [24] to reliable people who will also be qualified to teach others», 2 *Tm* 2,2), the result is a complex device. Said device combines the administrative need – the depositary is the custodian and not the owner of the item – with a diffusive tendency – the transmission and hence the permanent succession in the task of protecting the intangibility, but also the inappropriability of the faith. Here the theological reception of the deposit corrects the original juridical model which provides for the restitution of the thing to the owner. Rather, in the act of giving a proper account of the administration of the thing at the time of its return, the good depositor must show that the transmission of the thing to trustworthy persons is an essential element of its proper administration. The Christian sense is deposited not to remain closed in a drawer, but to be wisely shared. Only in this way is it established in the form that ensures its truth and dissemination.

Now, if we keep in mind all the technical characteristics of the deposit and its possible variants and contaminations in the historical evolution documented by Roman law, we can better understand the meaning and potential of the Pseudo Pauline theological operation even in its secular development. In fact, the Christian message continues to be conceived in the juridical form of a deposited good, that is, handed over to trusted persons so that they can preserve its integrity and return it to the owner when the latter requests it, according to the model of the Roman legal transaction. At the very moment when the Christian phenomenon thought of itself as an organised movement, it became necessary to give itself a precise mission: to safeguard an idea—that is, an immaterial reality—entrusted to control devices that in the course of history will prove to be increasingly sophisticated in fulfilling a structural task for our societies. And this mission is a transmission, i.e. the ameliorative and diffusive management of something, not only in terms of a strictly intergenerational order. The theological appropriation of the legal matrix thus entails this capital correction, which is alien to the model of Roman law: Paul enjoins Timothy to take care not only of the safeguarding of the good he has entrusted to him—the main obligation, in addition to restitution, incumbent on the depositary—but also of its transmission to others, which in principle would be incompatible with the legal scheme. For Roman jurists—as in present-day law—the deposited object had to be returned to

[24] The verb used is παράθου, the middle aorist imperative of παρατίθημι, "entrust the deposit". Spicq, *Les épitres pastorales*, Gabalda, Paris 1969, II, p. 738.

the owner in the exact material condition in which the depositary had taken it over. Any other restitution or a transfer of the object to a third party would have constituted an undue appropriation and thus a violation of the fiduciary relationship underlying the deposit agreement.

The adaptation of the legal model to the theological requirements implies instead that the non-alteration of the quality and quantity of the thing to be returned to the dominus—in this case in the double meaning of owner and God—is compatible with its diffusion outside the relationship between deponent and depositary. In other words, the audience of depositaries is indefinable, precisely because that ideal thing, that deposited meaning must be exposed to history, enriching the value of the thing itself without betraying its essence—the whole problem of heresy is there—as well as increasing the number of beneficiaries. The deposit, therefore, is not fixed but transmitted as a task.

Another problem associated with safeguarding the deposit is that of its *use*. The choice of the Pastorals' author is not accidental: by opting for this form of negotiation he intends to separate administration and use, qualifying the latter as an illicit appropriation of the thing. Why then did the Pastorals pick out the deposit instead of other legal devices? For example, the need to imagine this relationship in terms of a non-proprietary belonging could have been satisfied by resorting to another institution of Roman law such as *fiducia* (trust). This is still a "managerial" figure, but it implies the transfer to someone of the ownership of something to be returned under certain conditions. In the case of the so-called *fiducia cum amico*, movable and immovable property was entrusted, which "included the task of repairing, cultivating, using the rent money, selling the fruits etc., in a word, administering". [25] Early Christian thought, on the other hand, preferred to avoid the risks associated with such a broad administration of the property as is presented in the *fiducia*, for the same reasons why, it may be assumed, the follower of Christ was not even compared to a usufructuary, given the availability in the use of the property, *salva substantia rei*, recognised to this figure. Without overviewing here the other types of administrators envisaged by Roman law (mandate, *negotiorum gestio*, guardianship, dowry etc.) [26], it is clear that only the deposit could ensure prudent management and conservation of the object. This is not the place to discuss the extent to which this conservation corresponded to a conservative design or rather to a management in

[25] Arangio Ruiz, *Il mandato in diritto romano*, Jovene, Napoli 1965, p. 5

[26] *Ibidem*.

evolution, also because it would be necessary to broaden the horizon both to the history of exegesis over the centuries and to the concrete uses of the notion of ″deposit″ made by the ecclesiastical organization in its official documents[27].

4. The institution-thing

In a secular perspective such as ours, the institution of the deposit appears to us as an interesting ground for technical experimentation that ideally picks up the baton where Merleau-Ponty had evoked its promising take-off. For centuries a substantial part of normative political philosophy, let us say that of liberal inspiration up to Rawls, has been dedicated to building and justifying society and politics on a contractual basis. The two models on which it has traditionally relied are the contract of association (social bond) and the mandate (political representation). Both contracts, according to law, require the formal expression of consent to be valid. With the deposit, on the other hand, the dogma of a formal – not substantial of course - consent disappears, the contract is perfected by the handing over of the thing, which must be kept and, thanks to the theological corrective, passed on as a field of openness to the future, i.e. as an intergenerational and other legacy. There is no doubt that the environmentalist cause, but also the protection of *cultural heritage* (the English denomination gives a good idea of mission-transmission), to evoke the examples that today enjoy discursive overexposure, find in the institution of the deposit, and its technical properties, the most adequate instrument to guarantee preservation, care, diversity and widespread access. The contract in this case does not establish wills but a world. This is why if the institution has a sense, this sense, as Merleau-Ponty predicted, can only be deposited.

In the light of this intrinsic relationship with sense and deposit, we realize that the concept of institution does not deserve to be caged in institutionalist legal theory. Institutionalist legal theory, at least in its formulations reflected in what Schmitt called “concrete order thinking” (Maurice Hauriou, Santi Romano), generally looks at the institution as a given set of relations. The individual will would be already there, and no contractual agreement or abstract

[27] From this point of view, the example of Pope Pius X′s 1907 encyclical ″Pascendi″ in which he condemned modernism is significant. The reference to the ″deposit of faith″ that the modernist movement is said to have violated shows us a notion understood as a collection of unproblematic truths to be followed according to a logic of authority.

legal statute can supplant it. Admittedly, in the model of the deposit we are witnessing the flagrant denial of this vision: a contractual institution, that is, the set of norms that regulate a variety of relationships in which a subject may find himself in order to be part of a transaction, becomes the matter for socially (and not only legally and theologically) constructing a real institution. This term can ultimately indicate the concrete functioning and the cultural historicization of that set of norms that form what in italian is called an "istituto". This is an apparently paradoxical outcome according to the institutionalist approach, which has made the incompatibility between the contractual moment and the institution its traditional banner. In reality, such an outcome will appear much less incongruous if only one associates the concept of institution with the institutive operation of which it is the effect, without hypostatizing and ontologising sociologically a fact that instead exists at the end of very precise practical and linguistic procedures. Hauriou assigned to this operational nature of the norms the reductive qualification of "institutions-thing" whose role, instead of being constructive, would limit the creative impulse typical of "institutions-person" such as corporations, foundations and of course the State. Let us briefly recall the reasoning of the French jurist on this fundamental issue. In the text *Théorie de l'institution et de la fondation* (1925), we find the most convinced appreciation of institutions-person and a substantial undervaluation of what Hauriou defines as institutions-thing.

In a nutshell, the problem he poses is the following. After having challenged the limits of the subjectivist theory centred on the will of the state personality at the origin of law (Gerber, Laband and especially Jellinek) as well as Duguit's objectivist theory–according to which law resides entirely in the objectivity of the rule of law in harmony with the Durkhemian supremacy of the social milieu over individual consciences–Hauriou intends to circumscribe the role of legal norms. These ones constitute an element of continuity and durability for the institutions, but they are not their founding moment. While the objectivist approach leads to attributing to the social milieu the capacity to create legal norms from which institutions are born, according to Hauriou this force is not to be found anywhere in the social milieu. The social milieu can at most confirm or inhibit individual initiatives, but not generate a rule that creates institutions.

To escape from these two models Hauriou then proposes the famous definition of the institution as "une idée d'œuvre ou d'entreprise qui se réalise et dure juridiquement dans un milieu social ; pour la réalisation de cette idée, un

pouvoir s'organise qui lui procure des origines ; d'autre part, entre les membres du groupe social intéressé à la réalisation de l'idée, il se produit des manifestations de communion dirigées par les organes du pouvoir et réglées par des procédures"[28]. It is clear, however, that with such characteristics Hauriou's institution can only be identified with the personal or corporate form, the only one to be endowed with that vital force which would be lacking in thing-institutions like legal norms. However, and herein lies the beauty, in clarifying the meaning of institutions-thing, the French jurist provides arguments that can be usefully employed to their advantage rather than to their discredit, as he claimed. Institutions-thing like legal norms function, in fact, in social immanence, that is, they are not inherent in a precise idea of the work (idée d'oeuvre) internalized in this or that public or private person. Since they do not represent the privilege of any constituted power, institutions-thing are nomadic agents virtually able to provide their "service" to any corporate subject, the State *in primis*: This institution-thing – e.g. the legal norm – "en tant qu'idée elle se propage et vit dans le milieu social, mais, visiblement, elle n'engendre pas une corporation qui lui soit propre ; elle vit dans le corps social, par exemple dans l'Etat, en empruntant à celui-ci son pouvoir de sanction et en profitant des manifestations de communion qui se produisent en lui. Elle ne peut pas engendrer de corporation parce qu'elle n'est pas un principe d'action ou d'entreprise, mais, au contraire, un principe de limitation"[29].

In Hauriou's proposal, it is possible to defend the idea that legal norms fit to social relations but under the simultaneously continuous and discontinuous form of their construction. The famous self-referentiality of law does not mean that legal constructions carve out an *elsewhere* from society, but that they emerge from history to regenerate it in another semantic order. At the same time, however, Hauriou's idea that the legal norm is a source of limitation must be rejected as it is the evident outcome of a flattening and a public law conception, according to which law would be expression of sovereign power. Such a position, in fact, loses the authentic matrix of law that rests on the activity of private subjects, for whom legal norms are not a principle that simply prohibits and sanctions, but an opportunity to create and innovate material and symbolic relations. In reality, normative artifacts are at the same time the thought and the instituting *praxis* of the social, a prerogative that modern politics certainly claims with

[28] Hauriou, *Théorie de l'institution et de la fondation. Essai de vitalisme social*, in Id., *Aux sources du droit. Le pouvoir, l'ordre, la liberté*, Bloud & Gai, Paris 1933, rist. 1986, p. 96.
[29] *Ibid.*, p. 97.

greater theoretical ambition[30], but also with a less articulated technical baggage. Equipped with the latter, we can perhaps see a social world defined by legal devices which represent its ontic limits rather than the ontological one. Every normative montage transcends and, by instituting it, circumscribes every form of experience.

REFERENCES

Arangio Ruiz, V. (1965) *Il mandato in diritto romano*, Jovene, Napoli.

Arangio-Ruiz, V. (1981) *Istituzioni di diritto romano*, Jovene, Napoli.

Balibar, E. (1988) *Foucault et Marx. L'enjeu du nominalisme*, in *Michel Foucault philosophe*, Seuil, Paris.

Ehrhardt, A. (1958) *Parakatathke*, «Zeitschrift der Savigny Stiftung für Rechtsgeschichte (Rom. Abt.)», 75.

Esposito, R. (2020) *Pensiero istituente*, Einaudi, Torino.

Ferraris, M. (1009) *Documentalità. Perché è necessario lasciar tracce*, Laterza, Roma-Bari.

Foucault, M. (1994) *Pourquoi la prison ?* Table ronde du 20 mai 1978, in *Dits et écrits*, Gallimard, Paris, vol. IV.

Guery, A. (2003) *Institution. Histoire d'une notion et de ses utilisations avant les institutionnalismes*, « Cahiers d'économie politique », 1.

Hacking, I. (1984) *Five parables*, in *Philosophy in History. Essays on the historiography of philosophy*, ed. by R Rorty *et al.* Cambridge Un. Press.

Hauriou, M. (1933) *Théorie de l'institution et de la fondation. Essai de vitalisme social*, in Id., *Aux sources du droit. Le pouvoir, l'ordre, la liberté*, Bloud & Gai, Paris (n.e. 2006)

Legendre, P. (1985) *L'inestimable objet de la transmission*, Fayard, Paris (n.e. 2004).

Marcheselli-Casale, C. (1995), *Le lettere pastorali*, Edizioni Dehoniane, Bologna.

Médebielle, P. (1930-1934), *Dépôt de la foi*, in *Dictionnaire de la Bible*, suppl. t. II, Letouzey et Ané, Paris.

Merleau-Ponty, M. (2010) *Institution and Passivity. Course Notes from the Collège de France (1954-1955),* Northwestern University Press, Evanston (IL).

[30] Esposito, V. R. *Pensiero istituente*, Einaudi, Torino 2020, p. 157 s.

Penna, R. (2011) *Le prime comunità cristiane. Persone, tempi, luoghi, forme, credenze*, Carocci, Roma .

Sassier, Y. (2008) Réflexion autour du sens d'*instituere, institutio, instituta* au Moyen Âge, in J-Ph. Bras (ed.), *L'institution. Passé et devenir d'une catégorie juridique,* L'Harmattan, Paris.

Schmit, C. (1996) *Roman Catholicism and Political Form*, Greenwood Press, Westport.

Schmitt, C. (2004) *On the Three Types of Juristic Thought*, Praegar, Westport.

Spicq, C. (1931) *Saint Paul et la loi des dépôts,* « Revue biblique », 4.

Spicq, C. (1969) *Les épitres pastorales*, Gabalda, Paris, 2 vol.

Stoppa, F. (2014) *Istituire la vita. Come riconsegnare le istituzioni alla comunità*, Vita e Pensiero, Milano.

Supiot, A. (2017) *Homo Juridicus: On the Anthropological Function of the Law*, Verso, London-New York.

Towner, P. H. (2006) *The Letters to Timothy and Titus*, Eerdmans, Grand Rapids (Mich.)-Cambridge (UK).