Institution

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From the Pandemic

The coronavirus pandemic threatened to tear this dense fabric apart with unexpected violence. Much has been written about the phenomenology of the pandemic, with intentions and arguments that need not be repeated here. Our attention is better focused on the relationship between the emergence of the virus and the response of institutions. If we can shift our gaze away from the very deep wounds that the pandemic has inflicted on the body of the world, the task that now awaits us is to institute life anew or, more ambitiously, to institute a new life. The urgency of this need takes precedence over any other economic, social, or political necessity, because it forms the material and symbolic horizon from which all the others derive their meaning. After being challenged and at times overwhelmed for months by death, life seems to be calling for an instituent principle to restore its intensity and vigor.

But this cannot be done without first asking a

fundamental question about the way institutions responded to the challenge of the virus, particularly in Italy. To keep a balanced judgment, we must guard against generalizations, by distinguishing between and articulating different levels of discourse. Certainly, negative aspects abound in the efforts that regional, national, and international institutions made to contain the damage; so much so that the negative can even be said to have prevailed at times over the positive. It is impossible to forget the inadequacies, shortages, and delays of the early interventions, which sometimes caused irreparable social harms and, especially in some areas, health harms as well. This lack of decisiveness was sometimes accompanied by excess intrusion into individual lifestyles, even when not strictly required, adding substantial political, economic, and social costs. The shifting of boundaries between legislative and executive powers in favor of the latter, caused by the use of emergency declarations that were not always necessary and sometimes arbitrary, went so far as to threaten the democratic endurance of political systems. These appeared to be struggling in the inevitably failed attempt to pursue and match the effectiveness of the more drastic procedures implemented by authoritarian regimes. In the second wave of the pandemic, still in progress at the time of writing, miscalculations and failures to act have been even more evident, with effects we will be able to gauge in the coming months; not to mention the horrific number of victims in Italy, higher than in comparable European countries.

Even so, it behooves us to ask about the role of institutions in reverse terms: How would we have withstood the virus's onslaught without institutions? What would have

happened, in Italy and elsewhere, if there had been no institutional framework to guide our behavior? Looked at from this point of view, it must be acknowledged that the contribution of institutions appeared for quite some time to be the only available resource. I am referring not only to regional and national administrations but to all institutions in the areas affected by the virus – from social organizations and professional associations to non-governmental organizations (NGOs) – which have represented the last line of resistance against the pandemic. The fact that the virus did not engulf all barriers and spread undisturbed is owed essentially to them.

No doubt, as has been said, we acted in a state of emergency and, therefore, although the two concepts cannot be superimposed, in a state of exception with respect to institutional normality. But, leaving that aside for the moment, it was a state that could not be extended indefinitely and was later legitimized by the Italian Parliament. Most importantly, it was provoked not by a sovereign will to extend control over our lives but, rather, by a mix of necessity and contingency that was completely unforeseeable and quite different from a project aimed at subjugating the population. As legal scholars know, necessity is one of the primary sources of law, along with custom and written laws. In the case in question, the role of a tragic contingency is clear, with the consequent need to contain it. Certainly, for those who have the power to proclaim a state of emergency and prepare a response, the decision is always subjective. But in this case one is hard pressed to deny the degree of objectivity of an event whose beginnings and effects have very little of the voluntary or planned about them.

Similarly, it is undeniable that, in our intensely bio-political regimes, healthcare has become a directly political matter at the disquieting crossroads between the politicization of medicine and the medicalization of politics; just as it is evident that our awareness of health has significantly increased compared to any previous type of society. But this, it seems to me, is not a bad thing. The fact that the right to life is considered an unquestionable premise on which all others are based marks an achievement of civilization from which we cannot retreat. In any case, our current biopolitical regime should not be confused with a system centered around sovereignty, because it constitutes a profound alteration of that system. Imagining that we are at the mercy of an unlimited power intent on taking over our lives does not account for the fact that centralized decision-making has long exploded into countless fragments, largely autonomous from national governments and located even in a transnational space.

Well then, keeping in mind all the limits mentioned above, it can be said that, on the whole, institutions in Italy withstood the impact of the disease, activating their immune antibodies. Of course, we know that every immune reaction, if intensified beyond a certain threshold, risks provoking an autoimmune disease. This happens when a society is overly exposed to desocialization. The problem our political systems always face is that of finding a sustainable equilibrium between community and immunity, between the protection and compression of life. The strength, but also the adaptability, of institutions is measured by how well they are able to adjust their defense level to the threat at hand while not underestimating or amplifying its perception.

During the early stage of the pandemic, institutions were hit by controversies arising from perspectives often so diametrically opposed that they canceled each other out. Institutions were criticized for doing too much and for not doing enough, due to indecision. Accused by some of unlawfully curbing individual liberties, to others they seemed incapable of governing individual and collective behaviors with a firm hand. Needless to say, as far as these kinds of criticisms are concerned, I have no intention of questioning their legitimacy or, as regards several of them, their merits, both of which seem well founded. But we must not lose sight of the fact that even the harshest criticism of institutions can only be developed from within them. What else are the media, websites, newspapers, and even writing and language, if not also institutions? True, they are different from political institutions and sometimes in blatant opposition to them. After all, conflict is not extraneous to democratic institutions; indeed, it is a prerequisite for their functioning.

The logic of the institution – or rather of what in this book I will call "instituent praxis" – implies a continual tension between inside and outside. Whatever lies outside institutions, before being institutionalized itself, alters the previous institutional structure, challenging, expanding, and deforming it. The difficulty of recognizing these dialectics stems from two mistaken assumptions that form the polemical objective of this book: the tendency to equate all institutions with state institutions; and the tendency to view them as static, as "states," instead of in continuous becoming. As the masters of legal institutionalism teach, not only do there exist extra-state institutions but also anti-state

institutions, such as protest movements that possess some form of organization. They express an instituent energy that institutions should also keep alive in order to "mobilize" and, in some ways, surpass themselves.

Institutions and Movements

This two-fold need for institutionalization and mobilization was obscured especially between the 1960s and 1970s, with the gradual rise of a rigid opposition between institutions and movements. If we take a broad look at the debate over the last few decades, we see it split into two apparently unreconcilable poles, in radical opposition to each another. On the one hand, there is a renewed proposal for a conservative model of institution, resistant to any transformation; on the other, a proliferation of anti-institutional movements that are irreducible to the unity of a common project. The result of this divide has been an increasingly stark disconnection between politics and society. An institutional logic closed in on itself, incapable of speaking to the social world, is opposed by a scattering of different protests, incapable of melding into a politically incisive front.

Symptomatic of this difficulty, at once theoretical and practical, has been the counterproductive outcome of both tendencies. Just as the self-referential closure of institutions has provoked a reaction of drastically anti-institutional attitudes, these in their turn have led institutions to further rigidify. With all intermediate terms excluded as a matter of principle, conservative institutions and anti-institutional practices have reinforced each other, blocking any political dialectics of renewal. Very few have managed to resist this binary

logic by attempting a discourse capable of integrating institutional endurance and social change.

Even Michel Foucault, who applied his formidable genealogical thought to critiquing the apparatuses of confinement and psychiatry, assumes a closed, repressive notion of institution. Not surprisingly, he views "sequestration" as the generative paradigm of every institutional *dispositif*. Despite the incomparable analytical potential of Foucault's work, it ultimately puts forward an idea of "institution" not too distant from the "total institution" theorized during the same period by Erving Goffman. Unlike Franco Basaglia – who directed his critique to a specific type of mental institution and helped to dismantle it[1] – Foucault tended to characterize all institutions as oppressive. For him, taken together, they constitute a solid block destined to confine life within guarded and rigidly divided spaces, compressing natural instincts and tendencies.

Despite presenting a wealth of productive hermeneutic insights, Foucault's perspective must be inscribed in an interpretive framework that is shared widely by a broad array of intellectuals. During those years, albeit with opposing intentions, right- and left-wing authors converged in this closed, defensive notion of the institution: the former, to reinforce it; the latter, to challenge and ultimately demolish it. When we read side by side the writings of authors like Sartre, Marcuse, and Bourdieu on the one hand and Schmitt and Gehlen on the other, it is easy to discern a subtle shared agreement on a static, inhibiting interpretation of institution.

For cultural sociologists Peter Berger and Thomas Luckmann, in a different argumentative framework, institutions are artificial *dispositifs* necessary to order

natural tendencies by selecting them. The basic idea that inspires these analyses is that human nature, left to itself, would end up self-destructing. At its origin – along a vector that runs from one side to the radical left of Herbert Marcuse, and from the other to the ethological right of Konrad Lorenz – lies Freud's thesis of civilization as an inhibition of primary drives. For Freud, "civilization" defines the set of institutions that differentiate our life from that of animals, serving the dual purpose of protecting us from nature and regulating our relationships with others.

Institutions, which the patricidal brothers in *Totem and Taboo* introject in place of their dead father, embody powers, wield commands, and impose penalties without which human society would implode. Therefore, says Freud, we must adapt to the "discontent" that civilization causes and ultimately sacrifice part of our freedom to it; to the point of viewing institutions as a sort of automatic thought pilot, as Mary Douglas writes in a book entitled, appropriately, *How Institutions Think*.[2] Although they are created by us, they take on a second nature, more rigid than the first, that precludes any possibility of criticism. Starting with the strongest and most established institution, that of the state, they are at once the system of rules that govern the community and the power that enforces adherence to that system.

Naturally, such a coercive interpretation of institutions has provoked an equally radical anti-institutional response from those who contest their legitimacy, leading to the progressive consolidation of a radical front still active today. If the institution is by its nature reactionary, all that remains is to fight it head-on, without the need for too many distinctions. The armed

conflict of the 1970s in Italy was the extreme outcome of this perspective, blocked by the incapacity to think of institutions and movements together. Its strategic failure produced a further step, which did not, however, modify its anti-institutional tone. Once the frontal charge against institutions had failed, the other avenue taken by the philosophical left, as early as the 1990s, was that of disabling them. This is the theory that has recently taken the name of "destituent power," whose watchwords, ringing with a faint Heideggerian echo, are "withdrawal," "abandonment," and "exodus."

The resumption today of explicitly anarchic stances follows the same line of argumentation, alternating between revolutionary calls for constituent power and appeals to destituent power. What connects them, albeit in opposition, is a demand for immediacy that opposes any institutional mediation. According to a radically anthropological vision, what must be liberated is the fluidity of a social relationship no longer filtered by the political. It is the immediacy of the relationship that really counts. Along this line of thinking, an authentic community is not qualified by its social bond but by its disintegration. The political or, better yet, the "impolitical" outcomes of this reasoning are plain for all to see today.

The Invention of Nature

It would be highly reductive, however, to confine the difficulty of thinking innovatively about the paradigm of institution to political debate over the last fifty years. The problem began much longer ago, before modernity itself, with its early roots going back to the

Christian conception of medieval canonists and glossators. Although they proclaimed themselves heirs to the ancient Roman jurists, they marked a real turning point with respect to the way the Romans used the idea of "institution." The latter had applied a verb form to the term, applied to a huge category of individuals. Thus, the people who were instituted, in the sense of "nominated" or "commanded" could be administrators, procurators, heirs, priests, and so forth.

Examined from our point of view, this verbal quality of *instituere*, compared to the noun *institutio*, assumes strategic importance, because it gives the concept a dynamic tone that projects it beyond the static dimension it would later acquire. In the remarkable wealth of Roman juridical texts, *istituire* ('to institute') meant not only to establish particular situations but also to produce them artificially, on the basis of requirements that arose over time. It was Yan Thomas, the brilliant historian of Roman law, who mainly emphasized this "operative" attitude of Roman law.[3] Its instituent character expanded to the point of embracing the very foundation of Rome. But even more curious is the fact that the idea of "nature" itself was instituted; that is, it was used artificially for specific purposes. In an essay entitled "L'institution de la nature" (The institution of nature), Thomas detects a genuine reversal of the relationship between institution and nature. Instead of nature being conditioned by the law, binding it to values contained in nature, Roman law used the idea of "nature" for its own purposes.

Obviously, this mode of action presupposes a prior operation of denaturing *ius*. Roman law is never subordinated to principles that transcend its sphere of action.

It is always free to transgress them: as with the institution of slavery, which was declared *contra naturam* (against nature) by the jurists themselves. Of course, there is a line beyond which the law cannot cross. But this is a physical or biological limit: for example, a father cannot be younger than his son, just as a woman cannot produce an unlimited number of offspring in the same pregnancy; whereas incest, which is possible in nature, is prohibited by law. It is not nature, in short, but the law that establishes what is doable or not doable within objective boundaries that circumscribe human experience.

But the law's autonomy from all natural principles does not stop here. Not only can it disregard nature, but it can use nature for unnatural purposes. The Roman jurists' instrumental use of the concept of "nature" for their various purposes is striking, starting from an issue that was particularly delicate in Rome: the freeing of a slave. To free a slave from his or her servile condition, the law appeals to the natural state of human beings, which it itself violated when it instituted slavery. In this way, an unnatural condition – that of the slave – is abolished through fictitious recourse to a natural principle of equality. Thus, nature is contradicted twice: first by making a naturally free human being into a slave, and then by freeing that person via instrumental reference to a natural canon. Simply put, the unnatural power of the law goes so far as to use natural protocols against itself. In this way, it makes nature the instrument of institution, and institution the presupposition of nature.

This denaturalization procedure is what the Christian authors contested. Not only did they restore the intangibility of nature but also the legitimizing role that the law

had removed from it. The relationship between institution and nature was thus doubly modified. Furthermore, in the twilight of the Roman Empire, nature was no longer considered available to the operations of law, and even became its insuperable constraint. Instead of law instituting nature, nature instituted law, in a form that gave new meaning to the concept of "natural law." The law no longer legislated on the basis of nature but, on the contrary, conformed to it, giving voice to the law contained within nature. This is where the Christian canonists brought about a real paradigm shift with respect to the Roman jurists: they made a clean break in their definition of "nature," which was now given and no longer instituted.

Rather than breaking all relations between nature and institution, however, the Christian writers reconfigured it by inserting a third element, that of God, between them, thereby changing both. The fact that nature is "given" does not mean, in fact, that it is eternal, as in Greek philosophy, but that it has been "given" to creatures by the Creator. This way, instead of the instituent principle disappearing, it is transferred from the sphere of law to that of theology. Nature is unavailable to the law because it is literally in the hands of a *Deus institutor*. From this perspective, even the idea of "instituting life" undergoes a semantic conversion, placing a gap between the two terms that is destined to transform them both. Instead of being self-produced, life is instituted by a divine will that precedes all other institutions. This leads to a drastic change in the relationship between the natural given and the instituent power. Every institution is put on a metaphysical horizon that makes its nature a divine creation.

This dialectic is recognizable in all its severity in Augustine's *City of God*, whose frontal attack against Rome, central to the work – especially against Marcus Terentius Varro and Cicero, considered its greatest ideologists – played a crucial role in the construction of Christian political theology. At stake is none other than the subject of institution. In book six of *The City of God*, Augustine locates Varro's error in having considered things instituted by humans as divine. The foundation of this sacrilege, he says, is specifically the reversal of the relationship between history and nature, which corresponds to that between humans and gods. Any concept that places the earthly city before that of God destines it for decay.

In the momentous transition represented by Augustine, the Roman juridical paradigm collapses. In its place there arises a new idea of "institution": that which institutes life is neither law nor the history of humans but, on the contrary, their obedience to the God who originally instituted them, who is the sole master of justice. Law can be defined as "natural" on condition that nature be considered the work of God. Likewise, evil is not forbidden because it is evil, but because it is forbidden by God. This theological turning point was destined to efface the Roman-derived *institutio vitae* for at least a thousand years. From a possible subject of instituent praxis, life now returns to being a passive object of an institution that is entirely dependent on the sovereign will of whoever holds its keys.

Sovereign Institutions

The model of institution that spread in medieval history was strongly affected by this shift in tone from a functional dimension, as was the Roman, to an authoritarian mode with a transcendental character. This shift took place in parallel with the semantic transition from the category of *persona*, pertinent to the individual, to that of a *ficta* (fictitious) or *repraesentata* (represented) person introduced by Sinibaldo Fieschi (Pope Innocent IV), referring to non-human entities, such as universities or monasteries, that enjoy specific prerogatives.[4] This turn is notable for its top-down character, evident when comparing the notions of corporation and foundation: whereas the corporation is expressed in the will of its members gathered in the *collegium*, and the foundation is dedicated to the preservation of a collective good, the institution is distinguished by an authoritarian element in force not only at the time of its birth but also throughout its lifespan.[5]

This authoritarian tone remains engrained in the concept of "institution" for a long time. From then on, even in its secularized version, institution has continued to evoke a power established once and for all, a repetitive mode of its particular way of being and functioning. What prevails in the concept of "institution" is a sort of reiteration removed from history and rigidified in the fixity of an eternal present. The instituted – its predetermined, irrevocable outcome – predominates over the instituent. During the Middle Ages, although the concept of "institution" did not refer to a state body, which was still in the process of forming, *institutio* did refer intensively to what has been (*stato*) or established

(*stabilito*). It invoked the permanent quality of history rather than its constituent moment.

This withdrawal from historicity is crucial for how "institution" would be reshaped in modern political culture. To allow the power it expresses to shine forth in all its plenitude, two things had to be erased from memory: the process that produced it and, even more so, its often-violent origins. The founding, instituent moment goes missing, now absorbed entirely into the established, instituted moment.[6] This is how the product of a praxis that is artificial – historically determined – was assimilated into a given of nature, corresponding in its turn to the will of God, of which *institutio* is an earthly expression. Institution is what allows a power to endure in time without being called into question by its members.

The Ancien Régime gave even more emphasis, if that is possible, to this hierarchical assumption, incorporating it into the monocratic figure of the absolute sovereign. Over the course of time, the king's law prevailed so strongly over all other statutes, customs, and habits that it canceled out, or deprived of importance, the very word "institution." It is often accompanied or replaced by others that emphasize its stability, such as the French *établissement*. In reality, the noun *institutio*, or *institutum*, does not disappear completely, but it normally refers to the sovereign: to the set of rules with which he must comply in order to fulfill his duty as a good Christian and model for the faithful. Accordingly, the sovereign, placed at the head of the institution, is himself the *institutor* (founder, organizer, or originator), engaged in the institution and instruction that ensure civil, religious, and military order. Missing from the idea of "institution," at least until the

beginning of the eighteenth century, is any reference to the impersonal mechanisms into which the governmental administration is condensed – an administration too subordinate to the sovereign power to be able to assume an independent form and its own denomination.

Although often used interchangeably in juridical treatises of the period, a deep rift continued to separate the static notion of *institutio* from the dynamic one of *constitutio*, a breach that was destined to pass into modern constitutions. As the historian of institutions Alain Guéry observes, what makes their use problematic is the fact that absolute monarchy is not conceived as instituted but rather as proclaimed by divine right.[7] For this reason, it cannot be thought of in terms of "institution." The state is the "statute" of the kingdom, embodied sacredly in the person of the king, who is located at the connection point of his two bodies, one mortal, the other dynastic. King and kingdom cannot be thought of separately until the administrative structure of the state acquires autonomy and reconfigures the institutional lexicon. *Institutio* is none other than the sacred tie binding man to God at the point of intersection between time and eternity.

This history came to an end, or was radically changed, during the French Revolution. In the final period of the Ancien Régime, something similar to an administrative system began to take form in some ways externally to the sovereign will, because it necessarily entertained relationships with organizations, powers, and interests not entirely represented by the monarchy. This was a first perceptible shift toward the modern concept of "institution." Used at first negatively – for example, in the French constitution of 1791, to define the orders of

nobles and medieval corporations that were being abol-
ished – it began to take hold bit by bit as the complex
of bodies in which the social and political life of a coun-
try is expressed. The contrast alone between the new
constitutional regimes and the pre-revolutionary one
signals the shifting, differentiated character of political
institutions.

And yet, this was not enough to steer institutional
logic toward dynamism and cause the emergence of an
instituent praxis. For a long time to come an authorita-
tive element lingered, despite the transition from the
medieval tradition to modern political philosophy. Even
Hobbes, despite a dramatically renewed conceptual
horizon, reproduces both the personal character of
the Leviathan state and the absoluteness of its power.
He uses the word "institution" to refer indifferently to
the state, government, and sovereignty. These varied
meanings already emancipated the concept from the
theological leaning of canon law and introduced it into
a new domain. The very idea of a Hobbesian "social
contract" draws attention to the origin of the institution
in a form far removed from Christian creationism. Still,
the Leviathan state incorporates every other institution
within itself, subordinating them to its own absolute
command – which is why institutional thinking dried
up: although empowered, it was also entirely absorbed
into the monopoly of the state.

Although with different intents and conceptual tools,
not surprisingly, 250 years later both Max Weber and
Carl Schmitt reproduced what Talcott Parsons would
define as "the Hobbesian problem of order": Weber's
definition of *Anstalt*, as an apparatus designed to defend
the constituted order, brought "institution" back into

a conservative line of thought. For good reason, the Lutheran theologian Rudolph Sohm contrasted it with the liberating force of divine grace, whose purpose is to release Christians' lives from the institutional and juridical cage of the Church. This clash between *officium* and charisma is an early prefiguration of the political–theology polarity that would shape contemporary debate on the institution, splitting it into the two radically opposed fronts that we know so well. On one side there is its defensive, "katechonic" assumption, geared to the necessary maintenance of order; on the other, the messianic option for its destitution. The contrast between institution and movement from which we began finds its beginnings in this dichotomy.