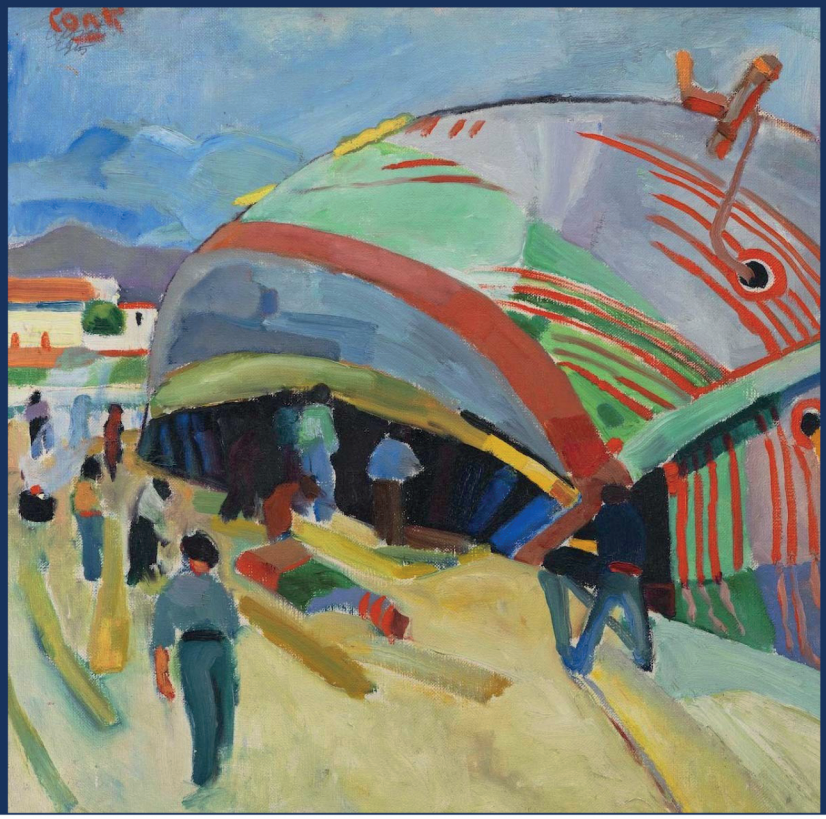
Tania Groppi - Andrea Simoncini

Foundations of Italian Public Law



Giappichelli

PREFACE

"Foundations of Italian Public Law" is an ambitious title, corresponding to an ambitious project. As authors, we are fully aware of that. Indeed, it very well captures our aim: to present in a limited number of pages the main aspects (the foundations) of Italian Public Law to domestic and international students. We have in mind not only law students, but also students of economics, political science, and other social sciences, as well as other potential readers at an international level, seeking to learn more about Italian law.

We strongly believe that presenting Italian Public Law in English is not only a matter of language but of method; the subject demands a new approach, departing from the traditional perspective of the Italian legal doctrine.

To address readers unfamiliar with our cultural and historical tradition, requires a new understanding, rather than just a new form of expression. For that reason, we decided to propose a journey through the Italian legal system along two main dimensions: comparative dialogue and historical perspective.

First of all, although the focus of this book is on Italian law, the comparative perspective is pervasive. Using English to present Italian institutions and rules implies a continuous comparison. We will wear "comparative" glasses to look at the Italian system. As readers will easily detect, Italy is considered not "the" case-study, but rather "a" case-study, among others. It is an example of a broader legal family, which corresponds to that of post-World War II liberal democracies.

Secondly, we consider it equally essential to introduce an historical perspective, so as to frame existing Italian law within the many events and regimes of Italy's recent history. This perspective is essential to understand Italy's present, even more so for international students who lack a comprehensive background in Italian and European history and culture.

For all those reasons, we decided to present only a limited set of topics (again, the foundations…) focusing on the evolution of the form of the State, including rights and freedom, and of the forms of Government, including the sources of law. Therefore, the book is organised in two parts.

The first part deals with the State and its evolutionary patterns. It includes a short introductory chapter on the different conceptions of law and legal system (Chapter I). A chapter on the State and its evolution, from the Middle Ages to the present time, follows (Chapter II). Chapter III delves into constitutional democracy, and especially the Italian Constitution, its origin, its main features, and its guarantees. The rights and duties, which identify this form of State, are dealt with in Chapter IV. The international perspective on the State, and the transformation of sovereignty after World War II, in the context of international organisations and, in Europe, of the European Union, follows (Chapter V). The evolution of sovereignty at domestic level, related to the decentralization of powers in federal and regional States, is finally presented in Chapter VI.

The second part is dedicated to the form of Government, beginning with a comparative overview of the different forms of Government (Chapter VII). The Italian parliamentary system is addressed in Chapter VIII, presenting the many changes to the political system and electoral law that have taken place especially in the last three decades. Chapter IX deals with the main Italian political institutions: Parliament, Government, and the presidency of the Republic. Chapter X presents the guarantors of the Constitution and the rule of law, focusing especially on the judiciary. Finally, Chapter XI presents the sources of law: a complex topic, at the crossroads between the form of the State and the form of Government.

The book builds on our previous experience as authors of a textbook in Italian, published in several editions since 2011. It also benefits from our experience in teaching Italian Public Law in English, both in Italy and at the international level.

We would like to thank the many students and junior scholars working at the University of Florence and the University of Siena who have supported our efforts over several years: Matteo Agostino, Arca Alpan, Stefano Bargiacchi, Edoardo Caterina, Elia Cremona, Giacomo Giorgini Pignatiello, and Bianca Pileggi. We would like to especially mention Professor Valentina Carlino for her constant support and for coordinating the final editing. A special thanks goes to Pietro Massaini, whose contribution, both in terms of general editing and drafting of historical boxes, has been invaluable. We benefited of the wise and thoughtful reading of Richard W. Bauman (Professor Emeritus of Law, University of Alberta). We are extremely grateful to him.

Notwithstanding the assistance we received, as authors we are fully aware of the book's many flaws and its potential for improvement. We consider this first edition as in a way an experiment, something to be tested out. Only the living practice will tell us more about the pros and cons of our choices. For

this reason, comments will be highly appreciated and welcomed. We would like to thank in advance all the students and colleagues who will provide comments and feedback, with the aim of producing an even more suitable second edition.

Tania Groppi
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PART I

FORM OF STATE

CHAPTER I
WHAT IS LAW

SUMMARY: 1. What is Law? A Persistent Question. – 2. Social vs Legal Norms. – 3. Natural vs Positive Law.

1. *What is Law? A Persistent Question*

Law: definition

Law is a **social product**: whenever humans enter into forms of cohabitation or coexistence with others, **legal systems** are created. In Latin, this concept was expressed by the formula: "*Ubi societas, ibi ius*". Latin is frequently used in legal studies, as many concepts we still use are rooted in ancient Roman tradition.

What is a legal system? Two theories

Two different theories on **what is a legal system** have been developed during the 20th century: the so-called Normativist and Institutionalist approaches.

1. Normativist approach

According to the "**Normativist approach**" – whose most prominent figure is the Austrian legal philosopher Hans Kelsen (1881-1973) – **the legal system is best conceived as a set of legal norms**.

Law is essentially made up of norms, so it requires a distinctively different approach from descriptive, empirical ones.

An act or an event gains its legal-normative meaning only by another legal norm conferring that normative meaning. An act can create or modify the law if it is created in accordance with another, higher legal norm that authorizes it.

Understood in this way, the legal order is a regressive system of binding norms in which everything is based on other higher legal norms until a basic foundational and hypothetical norm (the *Grundgesetz*), attributes all of them a binding (**prescriptive**) nature.

2. Institutionalist approach

According to the "**Institutionalist approach**" – whose most prominent figure is Santi Romano, an Italian Public Law scholar (1875-1947) – anytime we have a social group characterized by a certain kind of **institutional organization**, we have a **legal system**.

Three elements of a legal system

In this perspective, there are three elements of a legal system:

1) **A group of subjects**, connected to each other by one or more common goals or interests;

2) **An institution**, namely an organisation that exercises legitimate power, that has means of coercion, but whose orders are generally accepted by the rest of the group;

3) **A set of legal norms**, that qualifies relationships and conduct by the group members as favourable (rights, faculties, legitimate interest) and unfavourable (obligations, burdens).

Unifying definition

To reconcile the two perspectives, we can say that a legal system is a system of rules, created and enforced through social institutions, aiming to govern human behaviour.

2. *Social vs Legal Norms*

As a matter of fact, the relationships among members of the same social group are regulated by numerous norms – not necessarily legal – called "social norms". Legal norms are only a sub-system.

Legal norms

a) According to the normativist perspective, the "true" legal norms are those enacted by the State (Parliament, Government or other public authorities) which produce binding effects (sanctions or punishments).

b) According to the institutionalist perspective, any legal system – that is, any institutionally organized social group – produces intrinsically legal norms.

Rules on the production of norms

Regardless which approach is followed, any legal system identifies **special rules on the production of law**, that is, norms that provide how a legal rule has to be produced (on the production of legal norms, see Chapter XI).

Only those generated in conformity with the rules on the production of the law are **valid legal norms**.

Other important concepts we will consider when dealing with legal norms are:

Other important concepts

a) **Effectiveness**: this refers to the capacity of the legal system to impose binding rules on its members. Effectiveness is a goal of legal norms, but very often there is a gap in between norms and reality.

b) **Force**: this is a norm's ability to have an impact on the positive legal system. Please consider that here "positive legal system" means

the set of norms that have been enacted according to the rules of production and enforceability (see in this Chapter, par. 3).

c) **Generality**: this is the possibility that a legal norm applies to an indefinite number of members of the group (and thus is different from "*ad personam*" order aimed at a specific member).

d) **Abstractness**: this refers to the possibility of legal norms applying to an indefinite number of situations over time, rather than "*una tantum*" or one time only.

3. *Natural vs Positive Law*

Positive or natural?

At this point, another controversial question becomes crucial: are all legal norms valid simply because they reflect "positive" law (from Latin "*positus*", *i.e.* established)? That is, are legal norms produced solely by a legal system?

Or, are there other legal norms which, though not derived from positive sources, nevertheless count as valid law? In particular, is so-called "natural law" also a source of valid legal rights, principles or values?

As you may imagine, the answer to those questions is far from irrelevant, given that "natural law" could arguably be a source of **subjective rights and duties** that might differ from what positive law provides.

Legal positivism

For centuries, those two perspectives have been contested. According to **legal positivism**, there is no law other than what is established by those who have legitimate authority. Consequently, subjective rights are only those qualified as such by positive law. Subjective rights are "reflections" (or creatures) of positive law.

Natural law theories

On the contrary, **natural law theories**, contend that law cannot be reduced only to *jus positum*. Law is linked to the very nature of humas as reasonable beings, and therefore there are some "structural" or "elementary" conditions of humans living together that ought to be part of every legal system. They might not allow us to deduce strict rules directly, but rather provide more general principles on the basis of which one can evaluate existing rules or inspire the rules.

Two examples

In order to better understand this point, it is useful to see the two examples given in the boxes. The first one is from Ancient Greece, the second is from the Nuremberg Trials involving Nazi criminals in the aftermath of World War II.

BOX 1 – THE MYTH OF ANTIGONE

Antigone is a Greek tragedy written by Sofocles. The protagonist, Antigone, attempts to secure a respectable burial for her brother Polynices, killed in battle by his brother Eteocles. He is considered a traitor to Thebes (his city), for having besieged the city, and the law forbids the burial and even mourning for him, punishable by death. Antigone, on the contrary, considers the duty to obey the gods' will to take care of your brother's dead body as more important than to obey the decision of Creon, the King of Thebes. For that reason, Antigone will be locked alive in a tomb, on Creon's order, until she dies.

Here is a passage from the dialogue between Antigone and Creon.

Cr. (…). Were you aware that I had publicly forbidden such an act?

An. I was aware of it, of course I was… You made it crystal clear.

Cr. And still you dared to contravene these laws?

An. I did, since Zeus had not pronounced these laws; nor yet does Justice, dweller with the gods below, prescribe such laws among the ranks of mortal men. **I did not think that your decrees were of such weight that they could countermand the laws unfailing and unwritten of the gods**, and you a mortal only and a man. The laws divine are not for the now, nor yet for yesterday, but live forever and their origins are mysteries to men.

BOX 2 – THE NUREMBERG TRIALS

Immediately after World War II an International Military Tribunal was established to prosecute some of the most important surviving leaders of Nazi Germany in the political, military, and economic spheres.

Nazi defendants objected to their prosecutors that they were simply following orders and the laws of their country that were then in force.

They also complained that defining crimes after the fact constituted improper "ex post facto" laws, which is specifically prohibited by the laws and Constitutions of many other nations.

So, on what basis could the triumphant Allied forces convene these war crimes trials in Nuremberg?

The answer to that question is found in the opening statement of the lead prosecutor at Nuremburg, Robert Jackson, (a judge on the United States Supreme Court at that time)

Justice Jackson stated that "**even rulers are, as Lord Chief Justice Coke said to King James, 'under God and the law**". The Nuremberg Court rejected the argument of Nazi defendants that there was no pre-existing law and appealed to natural law in its judgment, noting that "so far from it being unjust to punish [them], it would be unjust if [their] wrong[s] were allowed to go unpunished".

Despite the fact that the defendants were following orders and laws of their country, Sir Hartley Shawcross, the British prosecutor, said that there could be no immunity "for those who obey orders which – whether legal or not in the country where they are issued – **are manifestly contrary to the very law of nature** from which international law has grown".

In considering the merits of these two contending theories, that of natural law and of positivism, it can be said that both perspectives are, if considered separately, problematic.

Problems of both perspectives

Legal positivism, in fact, may justify and induce a supine obedience to laws, even the most inhuman or unjust, as has happened (and could still happen) in authoritarian and oppressive regimes. An adequate theory of law ought to provide scope for criticism and, if necessary, refusal to obey laws which are evidently disproportionate or unreasonable.

Natural law theory, on the other hand, triggers many questions. For example, which are the legitimate sources of natural law principles? Who has best espoused these principles, which, after all, are usually controversial? Today, unlike past times, there is a wide social and cultural pluralism about the idea of human nature and an equally deep disagreement on some definitions of that nature. Whose culture (or religion, or philosophy) should be treated as the best guide?

"Positivising" natural law principles

Long after World War II – therefore, after the atrocities perpetrated in the name of the positive law by totalitarian regimes – there was an attempt to overcome these problems by **"positivising" natural law principles**.

In this textbook, we will focus especially on the two great constitutional reform movements that began in Europe, in the aftermath of World War II, between 1945 and 1955. They may be imagined as two large branches of a single tree, springing from the same root. The common root is that of avoiding, first another calamitous European war. Second, ensuring that a State, through the law and its administration, could not deprive human beings of their fundamental rights.

Rise of the new post-war European Constitutions

The period after 1945 witnessed the rise of **new post-war European Constitutions**, including the French Constitution (1946), the Italian Constitution (1948) and the German fundamental law (1949). All these constitutional documents introduced a fundamental innovation: **"rigidity"** (see Chapter II, par. 11). That is, they are "super-laws". They are normative sources, hierarchically superior to the ordinary laws of parliament, so that the fundamental rights and principles enshrined in the Constitution cannot be infringed by laws approved by the majority of the Parliament.

In addition to changes in national Constitutions, during those same years, two important institutional processes unfolded at an international level in the European legal space.

European integration

Two important multi-lateral institutions were founded. First, the **Council of Europe** (1949) was formed. Within this, the European

Convention and the European Court of Human Rights were born. The second institution was the **European Coal and Steel Community** (1951). It was the forerunner of the European communities that would eventually merge into the present-day **European Union**.

These were all products of what seemed at the time "ordinary" international treaties, but which over time have revealed their "constitutional" nature. That is, they contain a principle of supremacy with respect to national legislation (see Chapter V).

An attempt to overcome the "natural-positive law" dichotomy

These two branches – the national and the supranational – of the new European constitutionalism can be viewed as an attempt to **overcome the dichotomy** between natural and positive law. They create legal systems based on positive law, but those laws are effectively limited and bound by higher legal values – as, for example human rights and principles. These values cannot be modified by the ordinary legislative processes.

Within this cultural, legal, theoretical, and historical framework contemporary **Italian Public Law has developed**.