

Carlo Panara

The Sub- national Dimension of the EU

A Legal Study of Multilevel Governance

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ISBN 978-3-319-14588-4 ISBN 978-3-319-14589-1 (eBook)
DOI 10.1007/978-3-319-14589-1

Library of Congress Control Number: 2015932774

Springer Cham Heidelberg New York Dordrecht London
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Printed on acid-free paper

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*Ad Alessandra Maria, Ali, mia figlia,
Carlo, il tuo papà*

Foreword

I would like to express my gratitude to Prof. Dr. Martin Nettesheim for a very valuable discussion on this project and for hosting me so wonderfully at Tübingen University during its execution. I am also indebted to the Alexander von Humboldt Foundation for supporting this research with a Fellowship for Experienced Researchers and to Springer, particularly in the person of Dr. Brigitte Reschke, for publishing this monograph. I would also like to thank Erin O'Leary, research assistant at Liverpool John Moores University, for her precious help during the initial stage of the research and my friend Dr. Michael Varney, from Hull University, for revising the final manuscript. Finally and most importantly, I would like to declare my unconditional love and gratitude to my parents in Italy for all they have done and still do for me.

Tübingen, Germany
October 2014

Carlo Panara

Friends, Romans, countrymen, lend me your ears;
I come to bury Caesar, not to praise him.
The evil that men do lives after them;
The good is oft interred with their bones;
So let it be with Caesar.

[From Mark Anthony's speech
in *Julius Caesar*, Act 3, Scene 2
by William Shakespeare]

List of Principal Abbreviations

AER	Assembly of European Regions
AG	Advocate General
BGBI	Bundesgesetzblatt (Germany)
BOE	Boletín Oficial del Estado (Spain)
BVerfGE	Entscheidungen des Bundesverfassungsgericht (Germany)
B-VG	Bundes-Verfassungsgesetz (Austria)
CALRE	Conference of European Regional Legislative Assemblies
CARCE	Conferencia para Asuntos Relacionados con las Comunidades Europeas (Spain)
CdR	Comité des régions
CDU	Christlich Demokratische Union Deutschlands
CEMR	Council of European Municipalities and Regions
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CoR	Committee of the Regions
CUP	Cambridge University Press
EC	European Community
ECHR	European Convention on Human Rights
ECI	European Citizens' Initiative
ECJ	European Court of Justice
ECR	European Court Reports
EEC	European Economic Community
EMK	Europaministerkonferenz
EP	European Parliament
ERDF	European Regional Development Fund
EU	European Union
EULG	Gesetz über die Beteiligung des Landtags in Angelegenheiten der Europäischen Union

EUV	Vertrag über die Europäische Union
EUZBLG	Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union (Germany)
EWS	Early Warning System
FAG	Finanzausgleichsgesetz (Germany)
GC	General Court
GG	Grundgesetz (Germany)
LEP	Local enterprise partnership
LJMU	Liverpool John Moores University
MBO	Merseyside Brussels Office
MEP	Member of the European Parliament
MLG	Multilevel governance
MoU	Memorandum of Understanding (UK)
MP	Member of Parliament
OJ	Official Journal of the European Union
OUP	Oxford University Press
P	Pourvoi
REGLEG	Conference of European Regions with Legislative Power
Rn	Randnummer
Rz	Randzahl (or Randziffer)
SMN	Subsidiarity Monitoring Network
SPD	Sozialdemokratische Partei Deutschlands
TEC	Treaty establishing the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TUEL	Testo Unico degli Enti Locali (Italy)
UKRep	United Kingdom Permanent Representation to the European Union
VfSlg	Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofes (Austria)

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Chapter 1

Introduction: A Legal Study of Multilevel Governance

A. Why a Legal Study of Multilevel Governance?

The notion of ‘governance’ is typically used to indicate a new mode of governing that is distinct from the hierarchical model of the past. It is a cooperative mode of governing where non-state players are involved in authoritative decision-making in the public sphere through public or private networks. Significantly, Schmitter and Kim write that ‘MLG can be defined as an arrangement for making binding decisions that engages a multiplicity of politically independent but otherwise interdependent actors – *private and public* – at different levels of territorial aggregation in more-or-less continuous negotiation/deliberation/implementation’ (emphasis added).¹ Accordingly, in the phrase ‘multilevel governance’, the adjective ‘multilevel’ refers to the increased interdependence between different political arenas (national, sub-national, supranational), whilst the term ‘governance’ signals the growing interdependence between public authorities and nongovernmental actors at various territorial levels.² Aligned with the Committee of the Regions’ 2009 *White Paper on Multilevel Governance*, this study focuses on the role of public authorities that are expression of a territorial community (territorial authorities),³ that is, according to the terminology used by the Italian legal scholar Massimo Severo Giannini, those public authorities (including the state) that are ‘enti esponenziali di collettività’ (‘exponential entities’, or better ‘representative institutions’, of territorial communities).⁴

¹ Schmitter and Kim (2005), p. 5. The involvement in governance of nongovernmental actors is highlighted also by Piattoni (2010), p. 250. A clear explanation of the concept of ‘governance’ and of the difference between ‘governance’ and ‘political steering’ (‘politische Steuerung’, ‘Steuerungstheorie’) can be found in Mayntz (1998), *passim*.

² Cf. Bache and Flinders (2004), p. 3.

³ Cf. Committee of the Regions (2009b). A similar focus on the regional and local levels in the EU can be found in Benz and Eberlein (1999), pp. 329 ff.

⁴ Cf. Giannini (1993), pp. 104 ff.

The notion of multilevel governance that emerges from the literature is mainly descriptive and does not offer prescriptive guidance as to how the EU ought to function. This submission is confirmed by an analysis of the most influential studies on multilevel governance. For example, Hooghe and Marks clearly illustrate the descriptive nature of the concept when they write that ‘Multi-level governance [...] describes the dispersion of authoritative decision making across multiple territorial levels’.⁵ Also, Piattoni, whose work is partly concerned with the normative value of multilevel governance, adopts a descriptive approach: ‘MLG indicates interrelated changes in political mobilization, policy-making, and polity restructuring; in particular, it indicates: (a) the participation of subnational authorities in policy-making at levels and through the procedures that defy existing hierarchies and may further upset their stability; (b) the mobilization of societal actors at all territorial and governmental levels and their contribution to policy-making, implementation and monitoring; (c) the creation and institutionalization of governance arrangements that see the simultaneous involvement of institutional and non-institutional actors and that, by accretion, reconfigure the supranational level as a fundamental level of government’.⁶ George does not depart fundamentally from the same descriptive pattern when he writes that ‘As a distinct perspective on the European Union, multi-level governance offers not a description, but a theory of what sort of organization the European Union is. It is hypothesized to be an organization in which the central executives of states do not do all the governing but share and contest responsibility and authority with other actors, both supranational and subnational’.⁷ Even if this hypothesis proved valid, it would only help one to understand the nature and functioning of the Union. However, we would know nothing or very little in relation to how the EU ought to be organised to comply with multilevel governance. In particular, we would not know *if* or *why* the EU ought to be organised, and the decision-making structured, in a certain way.

Why study multilevel governance, rather than analysing or further developing another notion, such as the more traditional concepts of ‘federalism’ or ‘multilevel polity’? The concept of federalism appears too specific and not fit for purpose. By requiring a central authority with sovereign power (the federation), that notion could be confusing in the European context. Indeed, there is no doubt that the Union, despite many similarities with federal states, is not a fully fledged federation.⁸ On the other hand, the notion of ‘multilevel polity’ appears too generic and all

⁵ Hooghe and Marks (2001), p. xi.

⁶ Piattoni (2010), p. 250. On Piattoni’s interesting notion of multilevel governance, see also Piattoni (2009), pp. 163 ff.

⁷ George (2004), p. 125.

⁸ On the EU as a ‘federation of states’, cf. Schütze (2012), pp. 47 ff. Albeit very elegant and thoughtful, Schütze’s analysis brings us back to the old debate between those who think that sovereignty is indivisible and those (like Schütze) who think that sovereignty can be divided. That debate is culturally interesting but no longer crucial. On the lack of importance of that discussion, cf. the sharp notes of the Italian legal scholar Massimo Severo Giannini. Cf. Giannini (1986), pp. 87 ff.

purpose to be really useful. Any multilevel entity, from a federal state to an atypical organisation like the EU, could be correctly described as a ‘multilevel polity’ or ‘system’. By contrast, the concept of multilevel governance emerging from scholarly works on EU integration and the Committee of the Regions’ *White Paper on Multilevel Governance*⁹ is becoming a key concept specifically for the EU. Accordingly, rather than focusing on other notions or creating an alternative conceptuality, it appears more promising to study multilevel governance from a different and as yet unexplored angle: that of legal scholarship.

There are some fundamental reasons for studying this topic from a legal perspective. Until now, the concept of multilevel governance has remained the almost exclusive domain of political science and of some official documents outlining the future strategy and development of the EU.¹⁰ The phrase ‘multilevel governance’ is often used by legal scholars as an evocative formula pointing to the multilayered and polycentric structure of the EU, without attaching to it a specific legal meaning. Single aspects of multilevel governance in the EU have been the subject of legal studies, especially those dealing with the involvement of regional and local authorities in the EU lawmaking process.¹¹ However, to date, no legal study has analysed multilevel governance as such, on its own, using the criteria that are typical of the legal discipline. The absence of substantial legal research on this fundamental theme is the first justification for an analysis of multilevel governance from a legal perspective.

Another important reason for studying multilevel governance from a legal perspective is that there is a clear and still ongoing shift towards a ‘prescriptive’ notion of multilevel governance. The Commission’s *White Paper* of 2001 and especially the 2009 Committee of the Regions’ *White Paper on Multilevel Governance* refer to multilevel governance not only in descriptive terms (what multilevel governance is) but also in ‘prescriptive’ terms (which model of multilevel governance, what has to be done to establish multilevel governance). Recently, this approach has culminated into the adoption by the Committee of the Regions of the *Charter for Multilevel Governance* (April 2014).¹² This is a first attempt to ‘codify’ multilevel governance, even though in the form of ‘soft law’.¹³ At the same

⁹ Cf. Committee of the Regions (CoR) (2009b), p. 3. See also the CoR (2009a).

¹⁰ Cf. especially Commission of the European Union (2001) and Committee of the Regions (2009b). See also the Opinion of the Committee of the Regions (2012).

¹¹ Cf., for example, Toniatti et al. (2004), Weatherill and Bernitz (2005), Panara and De Becker (2011a) and Panara and Varney (2013).

¹² Cf. Committee of the Regions (2014).

¹³ The Charter is a political document embodied in a resolution of the CoR. As such, it does not have a legally binding effect. It is open to signature by the local and regional authorities of the EU, as well as by the representatives of the other levels of governance (national, EU, international). Cf. Point 2 of the CoR Resolution of 2/3 April 2014. The CoR’s aspiration is to create a ‘soft law’ arrangement as a first step to implement multilevel governance in the EU. At the time of writing (10 September 2014), the Charter has been signed by 154 local/regional authorities (including 13 associations of sub-national authorities).

time, multilevel governance became an important subject of EU (hard) secondary law. For example, Regulation (EU) No 1303/2013 on EU funding for economic, social and territorial cohesion indicates multilevel governance as a ‘principle’ to be respected by the Member States when creating partnerships with the sub-national authorities for the implementation of the EU economic, social and territorial cohesion policy.¹⁴ Legal scholarship is obviously equipped to study prescriptive phenomena and legal frameworks. Accordingly, the legal perspective permits a more enhanced understanding of the concept and the logical and legal implications of multilevel governance in the EU.

The most important contribution of the legal perspective, however, comes from the approach typical of legal discipline. Lawyers investigate the rationale for a legal framework or regulation. This is the underlying *raison d’être* of a specific legal arrangement. Multilevel governance is reflected in legal arrangements at EU and national levels, and the *raison d’être* of these arrangements can be understood best through legal analysis.

B. Overview of the Work

In the second chapter, I will construe the Union as a multilevel system that includes a ‘sub-national’ dimension. In contrast with the mainstream legal literature on European integration, which focuses on the Union-Member States dichotomy and sees the sub-national authorities as components of the state, I will argue that the sub-national authorities are an integral part of the EU atypical multilevel system and have the status of ‘full subjects’ within that system, i.e., they enjoy ‘rights’ and ‘duties’ stemming from the European constitutional composite.

In Chap. 3, I will argue that multilevel governance is a legal principle commanding the involvement of the sub-national authorities in the EU decision-making process and in the implementation of EU law and policy. In this way, multilevel governance emerges as a ‘procedural’ principle, i.e., as a principle commanding a certain decisional ‘procedure’. Such involvement is required for the protection of the constitutional identity of the Member States [cf. Art. 4(2) TEU] and, accordingly, for the legitimacy of the Member States’ participation in the EU and of the EU decision-making process.

In Chap. 4, I will discuss the principle of subsidiarity, which is considered a cornerstone of the multilevel architecture of the EU. I will argue that, like the principle of multilevel governance, subsidiarity too is a ‘procedural’ principle, i.e.,

¹⁴ Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries fund and repealing Council Regulation (EC) No 1083/2006.