

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.

a principle that can only exceptionally be judicially enforced and that should normally be implemented through multilevel participation and cooperation.

In Chap. 5, I will deal with the responsibility of the sub-national level for European integration. Indeed, regional/local participation is not only a responsibility of the EU and of the Member States. Sub-national authorities must also take their European role seriously and engage in the making and implementation of EU law/policy. I will analyse three case studies representative of three different constitutional patterns: (1) Baden-Württemberg (Germany, component of a typical federal state), (2) Lombardia (region of a typical regional state), (3) Merseyside (region of England, now incorporated by Liverpool City Region Combined Authority).

In Chap. 6, I will deal with the constitutional dimension of multilevel governance. I will argue that the concept of multilevel governance is not limited to soft law and it is embedded in the constitutional structure of the EU. I will also examine the role played by multilevel governance in constitutionalism and democracy in the EU.

C. A Required Post-Scriptum on the Heterogeneity of the ‘Sub-national Level’

A crucial element to take into account is that the ‘sub-national level’ is not a homogeneous level of government.¹⁵ This is a large category containing many different types of entities, from regional (e.g., the Spanish Self-Governing Communities or the Italian Regions) to local (e.g., municipalities), to even regional entities claiming to be states in their own right within a federal framework (German *Länder*¹⁶). Accordingly, multilevel governance too will have a different application for the different types of regional or local authorities existing within the EU.

The summa divisio among sub-national authorities is between ‘regional’ and ‘local’. Both are self-governed authorities enjoying a degree of autonomy from the

¹⁵ On the heterogeneity of the regional level, cf., for example, Bullmann (1997), pp. 4 ff. (‘Against this backdrop it would be misleading to think of any homogeneously constructed “Europe of the regions” within the near future’). Cf. also Sturm (2009), pp. 16 ff.

¹⁶ The typical arguments used to uphold the ‘Staatsqualität’ (state quality) of the German *Länder* are their participation in the exercise of all three traditional state functions (legislative, executive, judicial); their right to approve their own constitution (cf. the Ruling of the Second Senate of the Federal Constitutional Court of 23 October 1951, published in *BVerfGE* 1, 14 [34]); their limited right to sign agreements with foreign states [cf. Federal Constitutional Court, rulings published in *BVerfGE* 2, 347 [379] and 6, 309 [362]; cf. also Erbguth 2003, pp. 1089–1090 (Rn. 5)]; their right to have and maintain an armamentarium of competences as an asset (‘Hausgut’, ‘family possessions’) that cannot be taken away from them, not even through a constitutional amendment (cf. Ruling of the Federal Constitutional Court of 26 July 1972, published in *BVerfGE* 34, 9 [19]); their right to exercise all the responsibilities not reserved by the Basic Law to the Federation. Cf. Art. 30 GG. Cf. also Isensee (1999), p. 552 (Rn. 64).

centre in the context of a nation-state. The notion of ‘sub-national level’ includes any sub-national, territorial, self-governed authority whose territory and population are a fraction of the overall territory and population of a nation-state. The most common example of local authority is the municipality, which may coincide with a city or a town. By contrast, the regional level of government is an intermediate tier of government situated between local authorities and the national government. The term ‘region’ itself may refer to very different legal entities, for example, the German *Länder* (which are constitutive parts of a federation), the Spanish Autonomous Communities, the UK administrations with devolved powers, the Belgian Regions and Communities, to name but a few.¹⁷

The territory of regional authorities usually includes a number of local authorities. Despite some notable exceptions (for example, the *Land* Hamburg in Germany, which coincides with the city of Hamburg), normally regions have a larger territory and population than one city. Also, whilst local authorities are typically vested only with administrative powers, including the power to pass hybrid forms of legislation (e.g., bylaws and ordinances), regional authorities may have the power to pass acts having the same force of the statutes passed by the national parliament.¹⁸ Often the regions have powers of coordination and control over the local authorities situated within their territory, and in some Member States (Austria, Belgium, Germany, UK) they have important regulatory powers concerning the structure and organisation of local government.¹⁹

Since the sub-national authorities belonging to the same level (regional or local) have different status, structure and powers across the EU, or even in the same Member State, also the areas of overlap between the powers of the sub-national authorities and the EU vary from Member State to Member State. They may also vary across the same level of government within one Member State (e.g., from region to region). For example, in Belgium, the position of the Communities is different from that of the Regions. Whilst the responsibilities of the Communities are linked to personal matters (such as education, culture, healthcare, youth and social policy), the Regions have responsibilities linked to territory (e.g., environment, fisheries, woods, agriculture, economy, natural resources, energy).²⁰ In the

¹⁷ On the concept of ‘region’, cf. Panara and De Becker (2011b), p. 298 (fn. 3).

¹⁸ The European regions with legislative powers are grouped in the Conference of the European Regions with Legislative Power (REGLEG). Currently, this political network includes representatives of 73 regions spread across 8 Member States: the 9 Austrian *Länder*, the 5 Belgian Regions and Communities, the 16 German *Länder*, the 20 Italian Regions, the 17 Spanish Self-Governing Communities, the 2 Portuguese Autonomous Regions (Azores and Madeira), the Åland Islands in Finland and the 3 UK authorities with devolved power (Northern Ireland, Scotland and Wales).

¹⁹ The French Regions have the same status as any other French territorial authority. In particular, they have no hierarchical power over communes and departments. This demonstrates that the development of a notion of local or regional government that aspires to be valid beyond the borders of a single state is always approximate to an extent.

²⁰ See Articles 4, 5 and 6 of the Belgian Special Act of 8 August 1980, as last modified by the Special Act of 12 August 2003.

UK, there is large asymmetry between the powers of the devolved administrations in Scotland, Wales and Northern Ireland,²¹ and in Portugal the competences of Azores and Madeira are separately defined in their own statutes of autonomy.²² Asymmetries exist also in Spain and Italy. Such twofold asymmetry (*between* and *within* the Member States) explains why only with considerable approximation regional and local authorities can be considered as a clear-cut tier of government within the EU.

A number of other elements (economic, cultural, historical, demographic, etc.) contribute to increase the heterogeneity of the 'sub-national level'. For example, some regions are well developed economically, whilst the development of others lags significantly behind (a striking example could be the difference between the North and the South of Italy and also between Flanders and Wallonia in Belgium).²³ Cultural and historical influences play a major role. Some regions have a defined identity. This is, for example, the case of Scotland or of the Basque Country. Other regions protect certain ethnolinguistic groups (e.g., the Belgian Communities and Åland). In other cases, the regions have a past as independent states; this is the case of Bavaria in Germany or, again, of Scotland. By contrast, some regions were created by force of law without being anchored to any historical identity; this is the case of most Italian regions and also of some German *Länder*. Regions also differ significantly in terms of size and population; for example, in Germany the *Land* Bremen counts around 660,000 inhabitants, and its territory is limited to the city of Bremen, whereas the *Land* Nord-Rhine Westphalia counts nearly 18 million inhabitants, and its territory is about 83 times bigger than Bremen (in terms of population and territory, Nord-Rhine Westphalia is comparable to a medium-size EU Member State like the Netherlands).

Another important element is the geographical location of a region, for example, its insularity (Sicily, Sardinia, etc.). The geographical location has an enormous impact on the economic activities and, as a result, on the interest of the regions in certain areas of EU policy. Among the regions, there are the ultra-peripheral regions of the EU: Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthelemy, Saint-Martin (all belonging to France); the Azores and Madeira (belonging to Portugal); and the Canary Islands (belonging to Spain). The adoption of ad hoc measures for these regions is expressly provided by Article 349 TFEU. This is

²¹ Cf. Scotland Act 1998, Government of Wales Act 1998 and 2006, Northern Ireland Act 1998. On this topic cf. Himsworth (2007), pp. 31 ff.

²² Cf. *Estatuto político-administrativo da Região Autónoma dos Açores* (Law No. 2 of 12 January 2009); *Estatuto político-administrativo da Região Autónoma da Madeira* (Law No. 13 of 5 June 1991, later amended).

²³ The type of economy varies enormously from region to region, and so do the interests of the sub-national authorities in the European arena: for example, Scotland is a gas and oil producer; other regions have an industry-based economy (such as the *Land* Lower Saxony in Germany); other regions' economy is essentially based on agriculture and tourism (e.g., Puglia in Italy). Also, the type of industry and agriculture, the size of companies, etc., vary considerably from place to place.

justified by the specificity of the ultra-peripheral regions in consideration of their remoteness, insularity, small size, economic dependence on a few products, difficult topography and climate. In the case of Åland, the special status of this region within the EU is recognised by the Åland Protocol attached to the Accession Treaty, which brought Finland into the Union.²⁴

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²⁴ Protocol No. 2 annexed to the Accession Treaty of 24 June 1994.

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