The erosion of a pillar doctrine of EU law

Your paper deals with the so called "non-delegation" doctrine : what is the "Meroni doctrine" and why was it established?

The non-delegation doctrine is the theory according to which constitutional bodies cannot delegate their constitutionally protected powers to other bodies, abdicating their public function. In EU law the case law of the Court of Justice developed this doctrine through the principle of institutional balance, aimed at ensuring the balance amongst public powers in the EU legal order: in the absence of the principle of separation of powers – as it exists in individual Member States – this principle allowed the distinction of institutional powers as conferred by the Treaties. The non-delegation doctrine thus concerns all the EU institutions and ensures that no institution interferes in the exercise of powers by other institutions.

This does not mean that no power can be delegated, but simply that precise limits to delegation exist. Insofar as European agencies are concerned, the question of the limits of delegation was originally developed in the case *Meroni v High Authority*, a ruling dating back to 1958, at the time of the European Coal and Steel Community (ECSC): the High Authority had delegated tasks in the functioning of the financial mechanism for the regular supply of ferrous scrap for the Common Market to two private, Belgian law agencies, and this led to an "outflow of powers" as conferred on the High Authority under the ECSC Treaty. The conclusion of the Court of Justice was that delegation could only be legitimate under specific conditions, which exclude any undemocratic conferral of regulatory tasks on bodies that have no democratic legitimation nor a solid legal basis in the Treaties. In particular, *Meroni* held that no wide margins of discretion that involve a substantive shift of responsibilities as established in the Treaty can be conference on agencies. The content of this principle was further developed in another case of the Court of Justice, *Romano*, which excluded that an administrative commission with no legal basis in the then Treaty establishing the European Communities (CEE) could adopt acts with the force of law. Hence, it could only adopt non-binding "recommendations". On the grounds of this case law, unlike national authorities and administrations, European agencies have largely been unable to carry out regulatory activities and they could only implement "clearly defined executive powers" and issue recommendatory acts with no legally binding force. This means that in order to protect the institutional balance as set in the Treaties and the accountability of public powers, European agencies not established in the Treaties could not implement regulatory tasks. However, this cardinal principle has not stopped their participation in sector-specific regulation, including technical assessments, but it necessarily required the adoption of instruments different from binding acts with the force of law.

What critical issues does its application pose today, and in what sense is it necessary to "erode" it based on recent developments related to administrative innovation in the field of internal market regulation?

The growth of technical and specialised administrative tasks in the European Union require greater participation of European agencies in the implementation of technical-administrative functions, including normative functions. This means that EU agencies' powers, their "recommendations", have become somehow unavoidable by the competent authorities. Think, for instance, of the opinions on the marketing authorisation of pharmaceutical products that the European Medicines Agency (EMA) issues to the European Commission: although the latter has the power to adopt such decision, it is unlikely that it deviates from the EMA's technical opinion. The same happens when European agencies adopt best practices, guidelines and recommendations, which are soft law act – that is, non-legally binding acts – but still influence competent authorities.

The "erosion" of the Meroni doctrine lies in the fact that, although regulatory powers formally belong to national authorities or European institutions, in truth the suggestion that comes from the recommendations of the European agencies is particularly incisive and difficult to circumvent. Although in theory they are not legally binding and can therefore be superseded, in practice they can become necessary on a factual ground. The Meroni doctrine is, therefore, formally respected in its legal foundations, whereas agencies substantively contribute to the regulation of the single market. The problem thus becomes how to guarantee the legitimacy of regulation, including ensuring protection against soft law.

Why is the case of EASA (European Union Aviation Safety Agency) significant in this context?

The European Aviation Safety Agency (EASA) represents one of the most significant cases in terms of the "erosion" of the Meroni doctrine, given that EASA issues "regulatory standards" in the field of safety and environmental protection in aviation, from which Member States rarely deviate. These standards concern requirements relating to the technical characteristics of products and sector organisations, pilots and crews, with the aim of ensuring safety in the Single European Sky. Among the European agencies operating in the internal market with strong standardisation and recommendation powers, EASA is preceded only by the European supervisory authorities in the financial markets, for which it is increasingly thought that the model is no longer the one of European agencies, but rather an embryonic system of independent administration.

The process of the "erosion" of the Meroni doctrine -begun in a "practical" way through the activities of these authorities- was then also sanctioned by the Court of Justice in a 2014 case, precisely concerning the power of the ESMA (European Securities and Market Authority), one of the supervisory authorities in the financial markets, to intervene in the functioning of the market against threats to the the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union. In the case *UK v European Parliament and Council of the European Union*, the Court "mellowed" the rigidity of the Meroni doctrine, admitting some forms of regulation by the supervisory authority. More specifically, the Court considered the exercise of a certain margin of discretion compatible with the system of the Treaties, insofar as legislation channels ESMA's powers (with no room for in blank delegation) and judicial review was ensured under the Lisbon Treaty. Compared to the *Meroni* and *Romano*

cases, the changed framework of the Treaties ensuring enhanced control on administrative tasks allowed circumscribed forms of administrative regulation.

For what reasons was the research recently cited by the German Constitutional Court?

My research was cited by the German Constitutional Court in a summer 2019's case concerning the compatibility of the European Banking Union with the German constitutional system. This was a national case relating to the compatibility between the German Constitution and European Union law. The case specifically concerned the compatibility of the Banking Union establishing a system of credit supervision that involves the participation of highly technical bodies and agencies, with the principle of democracy and the control function of the German Parliament. In this context, the German Constitutional Court referred to my research published in *European Public Law* precisely regarding the "erosion" of the Meroni doctrine and the need to identify legal guarantees to make it sustainable in the current context of democracy and of the rule of law. The Court highlighted how, despite being extremely technical bodies, their physiognomy is still compatible with a democratic and legal system based on the rule of law, as their activity is controlled through procedural guarantees and remedies that ensure its legitimacy.

The conclusion of my article -and, more in general, of my research on the Meroni doctrine, which has also become a monograph (*Administrative regulation beyond the non-delegation doctrine: a study on EU agencies*, HART Publishing, 2018)- is that we shall distinguish the nature of the activity carried out by each European agency, focusing concretely on both the procedural controls on the exercise of discretionary powers, including in the adoption of complex technical decisions, and remedies against abuses. The complexity of evaluation, in fact, may also imply a margin of discretion, or at least a potential choice among various compatible options. The avoidance of an illegitimate shift of responsibility as sanctioned in the Meroni doctrine thus calls for the definition of requirements and guarantees that render the activities of these authorities compatible with the principles of the due process and fairness.

Some already exist. First and foremost, I think of participation and representation for the different interests at stake in such proceedings. For example, EASA has autonomously developed an administrative proceedings organised as a *notice and comment* procedure for the drafting of standards. It publishes notices on the creation of the various standards, giving the possibility to the interested parties to participate and comment on the adequacy of the standard or to contribute to its development. Alongside participation that ensures the legitimacy of standards to be adopted, another important aspect is the annual obligation for these agencies to give account of their activities to the European institutions.

The German case highlighted the importance of these accountability instruments to make the European Banking Union compatible with the German constitutional system. Reports were thus considered instruments that allow the German Parliament to indirectly control the activity in the Banking Union. Accountability tools justify administrative action. We are not dealing, therefore, with entities completely detached from the democratic system and the rule of law; these are not "modern Kings", as Sabino Cassese effectively observed with regard to national independent authorities. These rather are bodies that grow on the recognition of the need for a specialisation of tasks , including administrative tasks, at the supranational level and that require the definition

of legal guarantees to ensure that their tasks are indirectly accountable and hence compatible with democracy and the rule of law.

Turning instead to your talk during the inaugural ceremony of the Luiss Academic Year, what should the role of research be, in terms of the importance of a global analysis of new political, economic, environmental and social challenges facing the country and the world?

I concluded my talk by citing Malcolm X, who identified in education the passport to the future and, particularly, to the protection of rights: "Education is the passport to the future, for tomorrow belongs to those who prepare for it today". I believe that education and research are the tools we need to use to face political, economic, environmental and social challenges emerging in a globalised world. The complexity of the world does not leave any room for improvisation and we need to prepare today to be ready tomorrow. This is in my view the fundamental role of University and particularly of the research: to search for a deep understanding of the problems to understand the complexity of phenomena. Research is therefore useful for understanding and identifying problems, and for outlining the tools to face them. However, this does not mean solving them. On the contrary, research "complicates" solutions, because the more the understanding of a problem is profound, the more we see its different facets. To a certain extent, research helps us to shy away from the simple and immediate solutions and to seek to understand issues in depth, to try to find solutions or answers that are based on the acute awareness of the reality in its complexity.

From this point of view, research cannot help but be interdisciplinary, because the complexity of reality makes it essential to have more than one cognitive tool in order to understand problems effectively and in depth. The development of different skills and teamwork are necessary to think innovatively and face challenges critically. As well as being interdisciplinary, to be excellent and up-to-dated, research must also be international, it must look outside its own country, and it must be compared, because through comparison with other systems and cultures we can only have a more significant understanding of our own reality.

This "research" attitude towards the world would also facilitate an informed debate, which is perhaps what is actually missing today: think about fake news and the instruments to make opinions and channel public approval. If we do not have adequate methodological tools to understand when easy solutions are not necessarily effective solutions, the mountain of information where we are immersed will prevent us from understanding how we can effectively face reality and its challenges.
