Commentary to "The Project of Moral Bioenhancement in the European Legal System. Ethically Controversial and Legally Highly Questionable" by Silvia Salardi.

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Abstract. Analysing the questions raised by the project of Moral Bioenhancement, the author investigates a specific field: the legal implication that this proposal might have in the European legal framework, using the principles shared by modern constitutionalism, CEDU and EU laws.

Methodology and definitions.

The author begins her paper by defining the methodological approach she will use. The debate on Moral Bioenhancement[1] (MB from now on) by means of cognitive enhancement is generally focused on the philosophical-theoretical aspects and ignores the practical implications of these theories. The biolaw viewpoint can provide a much wider approach to the topic, since it highlights the ability of law to define a practical line for actions, as well as rules of behaviour, procedures, and institutions. Therefore, after this introduction Salardi analyses various definitions of the concept, from the one given by Foucault, to the one by Allen Buchanan: "a biomedical enhancement is a deliberate intervention, applying biomedical science, which aims to improve an existing capacity, by acting directly on the body or brain"[2]. Following this definition, the author qualifies these interventions on healthy humans as enhancement, a term that states the non-therapeutic scope of these technologies. Thus, she introduces the concepts of patients, unpatients, and healthy individuals, explaining the evolution of these concepts. The introduction of the unpatients as a new category radically changed the previous binomial contraposition between patients and healthy individuals. In fact, unpatients made this rigid distinction obsolete as «*it has become sometimes difficult to say at what point, along a continuum, healthy individuals become patient*»[3].

[1] Persson I. and Savulescu J. 2012. *Moral Enhancement, Freedom and the God Machine*. The Monist, vol. 95, no. 3. Oxford: Oxford University Press. pp. 399-421. They represent a reference point in the debate as they represent the most extreme transhumanistic view. They advocate the mandatory use of moral bioenhancement to avoid the "ultimate harm".
[2] Buchanan A. 2011. *Beyond Humanity?* Oxford: Oxford University Press. p.23.
[3] Salardi S. 2018. *The "Project of Moral Bioenhancement" in the European Legal System. Ethically Controversial and Legally Highly Questionable*. Rivista di filosofia del diritto. 2/2018 p. 246.

Main problems and solutions provided by the author.

The paper analyses a central problem by asking the following question: should the moral obligation to use MB be converted into a legal rule within the European legislative system? The author uses two different benchmarks: the former focuses on the right to health and on the right to self-determination; the latter on the right to equity and non-discrimination.

Paying particular attention to the right to health and self-determination, the paper explains the legal difference between the categories of patient, unpatients, and healthy individuals; underlining the difference of the legal and ethical principles protecting these different subjects. The first category analysed includes patients. In the physician-patient relationship, physicians and healthcare organisations have some mandatory duties such as: following the non-maleficent and beneficent principles which are the base of the modern medical ethics; the obligation to obtain free and informed consent[4]; following the data protection policy[5]; respecting the dignity of the person, as a human being, in every stage of the relationship. These lines of action can be also applied to the second category: the unpatients, but with some differences due to their peculiarity. This statement is sustained by international, European, and national regulations, specifically with reference to predictive genetic testing for monogenetic mutations[6], e.g.: the 2003 International declaration on human genetic data; the 1997 Convention on human rights and biomedicine, concerning genetic testing for health purposes; the 2008 Additional Protocol concerning genetic testing for health purposes; the 2004 Swiss Federal Act on human genetic testing (HGTA), and so forth. In brief, in the physician-patient relationship and in the *physician-"unpatient" relationship* – as they are likely to become patients – respect for autonomy obligates professionals to foster autonomous decision-making through mandatory duties legally regulated. With regard to the non-therapeutic use of cognitive enhancers by healthy individuals, the author states that even if there is no specific regulation in the European legal framework, (norms, principles, and the court's jurisprudence) yet there is no legal vacuum, since the experts must work following the general principles of the normative system, such as the precaution principle. This principle can help the rulers to imagine a model of preventive intervention, sponsoring measures based on correct information and on available scientific evidence, in order to foster adequate

[4] Borsellino P. 2018. *Bioetica tra "morali" e diritto*. Milano: Raffaello Cortina. pp 124-134.
[5] For what concerns the data policy in the EU context there is a restrictive legislation. For example, the GDPR, (European Regulation 679/2016) which acknowledges some important right as the right to be forgotten, and give some duties bounded to them to the company working on the internet.
[6] This new category of subjects is born within this field. When the monogenetic DNA tests became widely available since 90's.

decision making by healthy individuals. Moreover, other standards can be used to help the institutions creating a new regulation in this field, for instance those expressed in the clinical trial legislation (European Regulation 536/2016), which states in its first recital: «*in a clinical trial the rights, safety, dignity and well-being of subjects should be reliable and robust. The interest of the subjects should always take priority over all other interest*». Finally, the author drafts the basic conditions that must be met in the project of MB by means of pharmaceuticals for moral purposes in healthy individuals (whenever it becomes reality). Since there are no evidence robust enough yet to call cognitive bioenhancement for moral purposes safe (the few trials in this field had some biases like not introducing an adequate number of participants), the most restrictive rules has to be met, such as: *«1) a fair communication/information process concerning risks and benefits of pharmaceuticals; 2) availability of competent or medical supervision in case of possible side effects, questions regarding dosage and the likes; 3) truthful information and transparency regarding commercial interests in the large-scale diffusion of pharmaceuticals beyond therapeutic purposes; 4) state of the art of scientific evidence»*[7]. Unless these conditions are met, the right to health and self-determination cannot be respected in this fields.

The last question that the author investigates is the transformation of a moral obligation to MB into a legal rule, comparing the use of MB formulated by Persson and Savulescu, and the right to equity and non-discrimination. The analysis begins with the illustration of the concept of Human Nature (from now on HN), which underlines the proposal of MB, and goes on pointing out the logical problem in their conception of HN, in order to be able to understand the role that law can play in regulating this issue. This is a notion difficult to describe, since anyone can interpret it in different ways. Therefore, in order to define it, anyone can take account of only those ideas that are more suitable to their vision. Furthermore, not only at the philosophical level, but also at the scientific level there is no general agreement in the substance of this definition. These ideas can sensibly differ from person to person, since there is a wide number of factors that can bias the meaning, such as: political, religious, and cultural beliefs. The history[8] is a witness of the different interpretations of human nature, and it proves that this might turn into a dangerous concept. Indeed, every totalitarian government has a different conception of HN, and in the name of that and of the ideal of society built upon it, millions of people were sometimes (and still are) discriminated or even killed. A specific notion of HN underlies the MB proposal: a selection of set of values is in fact required to choose the direction to follow with

[7] Salardi S. Op.cit. p. 251.
[8] For instance: Hobbes, Locke, Huig the Groot, and Jean-Jacques Rousseau.

MB. Indeed, in this way the advocates of this project select the characteristics of HN that they want to achieve through the MB, choosing between the possible behaviours that can be found. In doing this, there is a real possibility to lead to the discrimination of those who disagree with that specific selection of values. Nevertheless, in the European context, the society tends to be multicultural, ethnically, and ethically pluralist, this means that there is no commonly accepted HN definition. At this point the definition of equality becomes fundamental as the author states: [9]«*In the current legal interpretation if the notion of equality, what allegedly constitutes the HN, determiners such as but not limited to race, gender genetic make-up do not count as a measure of legal equality. Legal equality represents a specific convention: it does not state that humans are the facto all equal. Rather, it states that because humans are de facto different, they must be treated equally*». In the overall structure of the MB proposal there is a lack of answers to a huge number of ethically and politically oriented questions, such as: who should be in charge of deciding what is good and what is bad? What psychological and ethical traits should be enhanced among all the possible attributes? As we can see from the semantic history of the HN notion, what is human and what is not depends on different moral points of view. This means that to create a holistic vision of HN among antinomic characteristics, only some of them need to be selected in order to reach an ideal definition. Nonetheless, by doing this operation, there is the risk of selecting what a certain group thinks is the correct answer to the question "What is HN?", discriminating the others, and thus demonstrating that de facto the definition of HN can be different. If the MB promoters hide this fundamental step, they risk giving a very marked ideological connotation to their proposal. Even if MB becomes a legal right, with the consequential duty to enhance, nevertheless in the European legal system, promoting and protecting the equality principle stands as the primary goal. Indeed, if the project of MB endorsed a reductionist vision of HN, his could not be considered acceptable in the European ethical pluralistic society.

Concluding remarks.

Thus, it is possible to go along with the arguments presented by the author. The conclusion of the commentary is based on three different sources: the European legal framework as described by the

[9] Salardi S. Op.cit. p. 252.

author, the theories of Stefano Rodotà[10], and the theories of Norberto Bobbio[11]. As Rodotà[12] explains, when we use theoretical identities, we should keep in mind the hidden danger behind these. Authoritarianisms show us that it is easy to put aside a democratic perspective, while discussing about theoretical identities (Nature, Human Nature, Markets, etc.) which are, by their very nature, not grounded in reality. This statement could be applied to our debate on MB, since the building of an ideal HN, morally better than the previous one, could carry the same danger. The analysis of this new technological and scientific reductionism, highlights that the promoters of the MB project assume a specific philosophical question: is it permissible to sacrifice freedom for the sake of a supposed happiness?[13] By contrast, the most helpful approach to the subject is the biolaw perspective, since it allows the debate to prevent losing track of the focal point of the discussion: the individuals, and the fundamental rights connected to them. Indeed, the legal ground of the biolaw is the concept of human dignity[14] as it was defined after the Second World War[15]. This concept has changed the idea of human nature so deeply, that some authors suggest that it produced a shift from the homo hierarchicus prospective to the *homo dignus*[16] one. However, the ideas of Norberto Bobbio[17] must be taken into consideration. He gave a warning about the inadequacy of formally acknowledging rights, since the society must also provide substantive guarantees and effective protection to them in reality.

In conclusion, human dignity, freedom, and equality constitute the fundamental core of the rights that must be taken into account when these topics are discussed, since they do not have a well-defined legal perimeter yet, and there is a real risk of harming the individuals. The national government must

[10] Stefano Rodotà was a well-known Italian jurist and a bioethicist. He studied the implications of the technological innovations analysing the connection between these and the constitutional rights of individuals.
[11] Norberto Bobbio was one of the major Italian philosophers of law and political sciences, and historian of political of the last century. For what concerns my commentary, I will refer to a specific book, *L'età dei diritti*, in which he analysed the period from the end of the Second World War to our days, stating that we could call this span "the age of rights", since the proliferation of international instruments that recognise new right shared between all humans.
[12] Rodotà S. 2012. *Diritto di avere diritti*. Roma: Editori Laterza. pp. 140-190.
[13] In literature, there are a lot of references to this complex problem, such as in *The brothers Karamazov*, the famous novel by Dostoevskij. A parallelism can be traced between the God-Machine of Persson and Savulescu, and this book. The Great Inquisitor hides Jesus from the people, since he believes that humanity cannot withstand the burden of freedom. Thus, he arbitrarily decided to deprive them of freedom in order to let them be happy. In the same way, the God-Machine implanted in the human's brain is meant to avoid the behaviours that in their programming are labelled as evil. Therefore, the removal of the choice determines the prevarications of the self-determination of the individuals for a morally "better" behaviour.
[14] Resta G. 2010. *Trattato di biodiritto* directed by Stefano Rodotà and Paolo Zatti. pp. 259-262. Resta explains that the concept of dignity became the base of the modern biolaw, since the most important national and international documents (both of hard and soft-law) created in the last decade consider this principle the benchmark for every justified scientific-medical activity based on individuals.
[15] See the EU Charter of Fundamental Rights, Article 1, for a supra-national source; see the Italian Constitution, Articles 2,3, and 32 or the German Constitution, Article 1, for some national sources.
[16] Rodotà S. Op. cit. p. 184.
[17] Bobbio N. 2016. *L'età dei diritti*. Torino: Einaudi. pp. 17-44.

not only acknowledge them with national and international instrument, but they must find a way to make them effective for every individual. Indeed, in doing so, it can be possible to answer to the ethical dilemma that the project of MB puts in front of us. The society cannot morally justify mandatory measures that could harm the individuals or the core of their rights.

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