Criminalizing Health Care

Old scapegoats and new targets

by Alphonse Crespo

I. The Health Care Exception

Legislative projects aiming at more control of the pharmaceutical industry are part of a global trend in regulation of health care. They are founded on the incorrect assumption that more regulation and control are the only remedies for ills created by regulation and control.

Despite the rapid and wide-ranged privatization of large segments of state industries and public services we have witnessed since the pioneering reforms of Margaret Thatcher, health care is one sector where bureaucratic regulation is still largely accepted as the norm and where state control has never ceased to grow.

The reasons for this are manifold and not all easy to understand.

Generations tethered by the now moribund welfare state have not lost all faith in its omnipotent benevolence. They are unwilling or unable to entrust private markets with the management of medical services. The emotional charge linked to loss of health may also have impeded rational analysis from making progress in this particular sphere of human activity.

Social engineers and their secular arms (health care bureaucracies and parliamentary factions) have also been reluctant to relinquish powerful tools of intervention offered by control of medical activity. The illusion of protecting the sick, the poor and the ageing offered a handy moral pretext for intrusive bureaucratic regulation. With time, the object of protection has changed. The mission now has become the protection of collective resources (i.e. tax booties) and serves to justify increasingly fierce administrative intervention.

II. The Medical Corporation's Via Crucis

To what extent is the medical corporation responsible for its loss of autonomy in present health systems?

Physicians were the first targets of regulatory health policies implemented with the development of modern Social Security. Except for the successful strike of Belgian doctors in the sixties, they generally met the gradual loss of autonomy of their profession with unusual tolerance and passivity. A combination of perks, threats and bullying from government authority and its proxies stifled most attempts at resistance. Today's physicians grudgingly accept subservience to health bureaucracies as well as the task of guardians of collective resources they have *volens nolens* been entrusted with. Despite, the gradual erosion of their income, of their prestige, and of their independence, a majority of physicians still refuse - on ill-founded and sometimes insincere moral grounds - a return of their profession to the market and to autonomy.

How did a reasonably educated corporation forfeit the independence, which was the mark of their profession from the times of Hippocrates?

Physicians were not aware, back in the 19th century, that licensure of their profession by state authority, which they readily accepted, was the first step on a slippery road to serfdom. They had the illusion that the state would henceforth protect their territory from unwelcome healers and quacks that had hitherto plagued the history of medical markets. Little did they suspect that licensure entailed allegiance to a new master that would sooner or later claim a price for favors granted.

As the regulatory machine progressed, doctors lost control over their honoraria. They lost control of hospitals. Their choice of treatments or procedures is restricted to those recognized or authorized by paying third parties and will be further limited once the trendy concept of "evidence based medicine" is brought into full regulatory usage. Statistical surveillance of prescriptions and other parameters of medical activity that we are beginning to witness are harbingers of rougher methods of intimidation and control.

Even rights of physicians to enter practice have been curtailed: in Switzerland the opening of medical practices was recently suspended by decree for a minimum of three years: the rationale being that health costs rose proportionally to the number of practicing doctors. In Canada, private practice was practically illegal until a singlehanded courageous physician, Dr Chaoulli, successfully challenged the Supreme Court on the constitutionality of public service monopoly.

III. The Social Security Quagmire.

Social security was designed to guarantee access to medical services to all. This fundamental principle is the basis of most health systems across the world. Various patterns for delivery of care can be observed depending on political regimes, institutional history or cultural traditions: they are however more often than not a combination of two basic modes. In the first one medical services are provided by the state (Scandinavia, Canada, UK, former Soviet block). Bismarck inspired the second mode where medical care is not directly provided by the State but is administered through compulsory social insurance schemes, subsidies of hospitals, regulation of the health professions etc. In either case most of the direct costs of care are taken on by third parties rather than by the immediate beneficiaries of the services.

The financing of medical services by third parties has implied a radical shift of empowerment that has moved from patients and doctors to their administrative regulators.

This has led to dilution of responsibilities, to waste, to increasing administrative costs, to the lowering of quality of care and to general dissatisfaction with the delivery of medical services in most countries.

Governments reluctantly acknowledged that redistribution of tax revenues has its limits and that deficit spending would not continue to bear the costs of public health systems forever. As the redistributive pie gets smaller, health care budgets have to face growing competition from flashier sectors of state expenditures such as defense, environment or education supported by pressure groups far more vocal than those of ailing patients and their overworked physicians.

The ageing of populations in modern societies has put pressure on the funding of social pensions. Social security administrators are coming to consider medical care as an onus: successful medical treatment is not only expensive but also lengthens the lives of individuals who have ceased to be productive. Health expenditures are no longer seen as investments geared to improve the well being of individuals but are now presented as net losses borne by society as a whole. Overt rationing of health care is no longer a taboo and is tacitly supported by both by politicians and their constituencies, as are stricter measures of control of health care providers.

IV. Tackling the Health Industries

A coalition of ideological groups that include environmentalists (whose preach for nature makes them instinctively wary of medicine's sophisticated modern tools) is now actively supporting and developing of rougher forms of regulation of health providers.

Soft regulatory pressures had indeed sufficed to control doctors' honoraria but had in no way curbed health spending. Despite the constraints, placed on their art, physicians still wielded costly tools and remained pivotal to the delivery of expensive products of the health industries.

Outside Marxist states, these industries had so far been never left the market system. They had succeeded in maintaining reasonable autonomy for management methods as well as for the production, marketing and wholesale distribution of their products. Despite some tribute to regulation, innovative research was stimulated by competitive markets and contributed both to the spectacular progress of modern medicine and to the general prosperity of the branch. Firms such as Pfizer, Novartis or Bayer have attained and maintained blue chip status in the world of finance markets.

Even though pharmaceutical products make up little more than 10% of total health care spending in most countries : the striking contrast between regulated health systems close to bankruptcy and a prosperous pharmaceutical industry was not lost on public health ideologues and their allies. They clearly identified a new prey for their hit list.

The weapons necessary to shackle an industrial foe capable of far more resistance than patients or physicians had to measure up to the predictable resilience of the target. Criminal law offered the tools needed to boost the regulatory power of public health administrations in their crusade against Big Pharma and its medical accomplices.

The Criminalization of Medical Care

Innovative legal strategies were first tested on physicians.

In the US, the no holds barred *War on Drugs* gave the DEA the opportunity to subject physicians to methods of surveillance and intervention used against drug traffickers and crack houses. Cover agents posing as chronic pain patients have infiltrated medical offices in order to monitor opiate prescriptions. Pain clinics have suffered massive raids by DEA agents. Professionals have also suffered criminal prosecution under Medicare Fraud and Abuse legislation acts for felonies such as that of referrals of patients to specific specialists, labs or hospitals!

Italian physicians have not been spared by *Mani Puliti* operations, this time directed against health care. In 2003 and 2004 a police dragnet targeted approximately 5000 Italian doctors suspected of receiving gifts from Glaxo Smith and Kline company (curiously not Sanofi nor Serono). The criminal investigation involved 13'000 hours of phone surveillance, police raids, seizure of computers and of course criminal indictments. In 1999, 4000 German physicians faced the same harsh treatment for the same pseudo crimes. Could one conceive of dentists or veterinarians being subjected to similar harassment for recommending a particular brand of toothpaste or of cat food?

This year, Turkish law enforcers, eager to adapt to European norms, went as far as arresting the full local executive board of Roche Istanbul, guilty of setting prices of drugs « above market price»! In a country traditionally attuned to the pricing principles of the Bazaar, the turnaround is spectacular. In Boston, Executives of Serono have been charged for" illegal promotional activities" face a prison sentence of up to 5 years of jail if convicted. Novartis has recently faced a fine of more than 40 millions dollars for inobservance of obscure Medicare and Medicaid billing regulations.

The Minoli-Rota law reforms under discussion in the Italian Parliament are targeting the marketing activity of the pharmaceutical Industry and more specifically the autonomy of some of the industries' professionals. The suggested restriction and control of professional contacts between doctors and scientific visitors from the Industry will not substantially hinder the exchange of information between producer and prescriber. Interchanges will simply take other channels. Confronted with multiple restrictions to advertisement, the tobacco industry now promotes its products by direct mailings to potential consumers.

The danger of such laws lies elsewhere. By restricting or prohibiting contacts between individuals of whatever category , legislators are shifting

legal paradigms in a direction that scorns fundamental liberties such as liberty of commerce, liberty of association and even property rights.

Conclusion

Broad definitions of delinquency combined to the conjuring of abstract victims have served to justify harsh sanctions against professionals often unwary of a constantly changing legal environment. Business practices common to other sectors of economy have become criminal offences in the health sector. Intrusive health laws have now come to wave fundamental principles of justice such as the *mens rea,* the burden of proof or the proportionality of sanction. Justice and equity are not served when different sets of laws are designed for different categories of individuals and when some are denied the protection of general law by virtue of their race, their creed, or in this case: their profession.

If we look closely for totalitarian patterns in the crusade against neo-health "delinquency" declared by zealous legislators today, we will find disquieting similarities with more spectacular wars against Liberty waged on other battlegrounds by the 20th and the 21st century State.

It is time for health care professionals to oppose health regulatory trends set towards totalitarianism. Defenders of freedom must not fear a full and rapid return of medical services to the free market. Tax-deductible health savings accounts, catastrophic insurance and private philanthropy show us the way.