

*Telemedicine*

## **TELEMEDICINE IN CHINA: AN ENLIGHTENMENT FROM COVID-19**

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**Abstract:** The Chinese government began regulating telemedicine from July 2018. Even though this is an advanced step in the Chinese legal framework and it demonstrates many advantages to the healthcare system in China, some mechanisms in the new legal documents can affect the development of telemedicine in China and the patient's basic rights, especially during pandemic emergencies like the Coronavirus disease 2019 (COVID-19). This paper highlights existing problems in the law, in order to give some suggestions for legal reform, which are very important to protect patient's basic rights in pandemic emergencies.

**Keywords:** Telemedicine; Pandemic; COVID-19; Legal Reform; China

### **1. INTRODUCTION**

On 17 July 2018, China released three legal documents (for trial implementation) regulating activities of telemedicine, which are entitled "Measures for the Administration of Internet Diagnosis and Treatment", "Measures for the Administration of Internet Hospitals", and "Specifications for the Administration of Remote Medical Services" (hereinafter referred to as "three legal documents").<sup>1</sup> Despite the existing advantages and advances, the three legal documents demonstrate that some mechanisms hinder the

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1 About these legal documents, available from: <http://en.pkulaw.cn/display.aspx?cgid=ed34424137753741bdfb&lib=law> (accessed 10 June 2020).

development of telemedicine and narrow its applicable ambit, especially in pandemic emergencies like COVID-19.

COVID-19 is a national and international pandemic emergency occurring in many countries. “Staying at home” became a daily duty of human beings to prevent person-to-person contact. Interrupting human-to-human transmission is one of the World Health Organization (WHO)’s strategic objectives.<sup>2</sup> Although Macao (a small city in China but one of the most densely populated regions in the world) has controlled the spread of the virus well,<sup>3</sup> this did not happen in many Chinese cities, especially those nearby *Wuhan* City. For this reason, the Chinese government took many administrative measures for preventing and controlling COVID-19.<sup>4</sup> Nonetheless, people in China cannot keep staying at home for a long time when they need medical services or/and medicine. Accordingly, telemedicine can play an important role in avoiding physical contact. However, according to the three legal documents, there are some limitations to remote diagnosis and treatments, especially in pandemic emergencies. This paper emphasizes the important role of telemedicine in pandemic emergencies and suggests that the Chinese government changes its legal framework to better protect patients’ basic rights when using telemedicine services.

## 2. SUGGESTIONS FOR LEGAL REFORM

One of the core mechanisms in the three legal documents is a prohibition of telemedicine activities for people receiving an initial diagnosis. Telemedicine serves subsequent medical visits, and only for some common and chronic diseases after an initial diagnosis in a physical medical institution.<sup>5</sup> This approach considers that telemedicine is a complement to the doctor-patient relationship and never replaces personal encounter between them.<sup>6</sup> However, there is no exception to this approach in the Chinese legal framework, especially in pandemic emergencies like the current COVID-19 or other similar events in the future.

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2 World Health Organization 2020, Coronavirus disease 2019 (COVID-19) Situation Report – 77.

3 About the measures against COVID-19 in Macao, Raposo & Iong 2020, p. 747-752.

4 About the measures against COVID-19 in China, Du & Wang 2020, p. 741-746.

5 Article 16 of the Measures for the Administration of Internet Diagnosis and Treatment (for Trial Implementation).

6 Raposo 2018, p. 629.

Indeed, certain people, who have never had any initial diagnosis in a medical institution, may need a medical service or advice while staying at home in order to avoid physical contact with others. Especially in a pandemic emergency, they can be either the ones infected with the COVID-19 virus or the ones not infected with the same virus who, however, want to confirm it. For the latter situation, cross-contamination may occur in a physical medical institution, like the initial outbreak of COVID-19 in *Wuhan* city. Hence, telemedicine can play a key role in avoiding any physical contact, as it allows appropriate access to regular healthcare without any risk of crowds gathering in hospitals or waiting rooms.<sup>7</sup>

For that reason, Chinese law should extend the currently applicable ambit via the creation of an exception for pandemic emergencies, such as accepting patients receiving an initial diagnosis, or recognizing other diseases in pandemic emergencies in addition to the diseases that the Chinese law currently allows in the practice of telemedicine activities (namely, common and chronic diseases). Of course, this extension may increase the risk of lawsuits for healthcare professionals and affect their willingness to use telemedicine, given the major uncertainty and risk of remote diagnosis and treatment. However, we can overcome this barrier by using informed consent<sup>8</sup>. Patients staying at home during a pandemic may be willing to sign an informed consent document after considering the potential risks, especially for initial diagnosis or uncommon or non-chronic diseases. This solution will help increase a clinician's willingness to use telemedicine, since patients are the ones who make their own decision to use the exceptional mechanism of telemedicine in pandemic emergencies, even though they should be fully informed by the clinician regarding the existing risks of choosing such a mechanism, such as more uncertainty and a higher risk of remote diagnosis and treatment.

Alternatively, the informed consent mechanism in the Chinese legal framework can be one of the important instruments to develop telemedicine as a routine practice, instead of an exceptional role in pandemic emergencies. For this purpose, healthcare professionals should always act with medical *leges artis* and *bonus pater familias*,<sup>9</sup> given that informed consent is not a trump card allowing them to circumvent legal liability.

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7 Anthony, Emma, Centaine, et al. 2019, p. 309.

8 About the requisites of informed consent, Heywood, Macaskill, Williams 2010, p. 152.

9 Raposo 2019, p. 404; Raposo 2014, p. 87-93.

On the other hand, patients may need medicine after remote consultations (such as medicine for chronic diseases, headache, and flu) and healthcare professionals may issue prescriptions online for them according to the existing provisions on the administration of prescriptions (such as the Measures for the Administration of Prescriptions<sup>10</sup>). In line with the provisions regulating activities of telemedicine, medical institutions and drug business enterprises may entrust an eligible third-party institution for the delivery of drugs<sup>11</sup>. However, in pandemic emergencies like COVID-19, no logistics or limited logistics work due to the existing panic. The pandemic lasts for an undefined period, but illnesses cannot wait for treatment. Since patients need to go to a physical medical institution or pharmacy to buy the necessary medicine, this may cause more person-to-person contact and cross-contamination during the pandemic. Therefore, the Chinese government should consider ways of medicine delivery from online to customer (O2C), without any person-to-person contact in a pandemic emergency. We suggest that the state-owned medical institutions and enterprises should be legally liable for guaranteeing the minimum logistics in every city, or at least in every province, and assure the arrival of drugs in an electronic locker nearby the patient's house. If it involves different cities (for instance, a patient in a city uses remote consultation of medical institution in another city or province), the medical institution could contact the state-owned medical institution in the city where the patient lives in order to guarantee the medicine delivery and supply. This might be the only solution when one city is blocked. Further, it is very important to create of a system allowing patients to track the delivery.

Another suggestion for legal reform relates to the price unification of telemedicine in state-owned medical institutions and its binding integration into medical insurance, at least in pandemic emergencies. First of all, this suggestion helps to avoid variation of the price of remote consultations in different cities. For instance, in the province *Hubei* (China), every remote consultation costs approximately 160 USD in medical institutions of a national level, but the same consultation at the municipal level only cost approximately 43 USD.<sup>12</sup> In pandemic emergencies, the situation will be worse, as the price

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10 About this legal document, available from: <http://en.pkulaw.cn/display.aspx?cgid=c0c5ab0ad31dd3c4bdfb&lib=law> (accessed 10 June 2020).

11 Article 18 of the Measures for the Administration of Internet Diagnosis and Treatment (for Trial Implementation), and Article 20 of the Measures for the Administration of Internet Hospitals (for Trial Implementation).

12 Wang, Su, Du, et al. 2020, p. 67.

rises when the demand of telemedicine services increases. Even though it is not advisable to standardize or control the price of remote medical services in a private market, at least in pandemic emergencies or in normal practices if the resource is allowable, the Chinese government should ensure an affordable and unified price of telemedicine services in state-owned medical institutions for its citizens. An affordable price is an important element affecting the uptake of remote services, so some authors suggest decreasing the price for better development of telemedicine in China.<sup>13</sup> On the other hand, as telemedicine in China has not yet formed a unified medical insurance policy or regulations,<sup>14</sup> the binding integration of state-owned telemedicine services into medical insurance may help protect the patient's basic medical rights. This solution can also expand telemedicine services to the medical specialties where they are seldom applied, such as nutrition, otology, ophthalmology, and physical rehabilitation among others.<sup>15</sup>

Another existing problem relates to the unclear definition of responsibility regarding telemedicine activities in the three legal documents,<sup>16</sup> especially when accidents occur during a medical procedure.<sup>17</sup> The three legal documents contain only a general rule requiring a specification of responsibilities and rights through agreement or contract between all parties.<sup>18</sup> However, this rule, allowing the parties themselves to regulate rights and responsibilities, can give rise to various legal claims, especially where the parties have not clearly defined the rights and responsibilities. One solution could be an official model contract or agreement that includes all the indispensable right and responsibilities of the parties. For a better procedure, the local health administrative departments should have a duty to supervise whether the signed contract or agreement, in particular, defines all the necessary content.

Finally, personal health data protection is a challenging problem for the Chinese government. Even before the implementation of the three legal documents, some authors had raised the security problem of personal health

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13 Cai, Zhang, Shi, et al. 2019, p. 19.

14 Wang, Su, Du, et al. 2020, p. 67.

15 Ma, Cui, Sun, et al. 2019, p. 21.

16 Guan, Liu, Zhu, et al. 2019, p. 567.

17 Zhao, Cai, Sun, et al. 2014, p. 740.

18 Article 10 of the Measures for the Administration of Internet Diagnosis and Treatment (for Trial Implementation), Article 17 of the Measures for the Administration of Internet Hospitals (for Trial Implementation), and Section I, Numbers 1 and 2 of the Specifications for the Administration of Remote Medical Services (for Trial Implementation).

data in telemedicine activities.<sup>19</sup> Nonetheless, the three legal documents do not account for those problems. They allow the parties freedom to specify in contract or agreement the rights and responsibilities regarding information security and privacy protection. It seems the parties could specify any provisions with regard to information security and privacy protection. However, the clauses against prohibitive legal norms (namely, the legal norms that prohibit the human beings from certain behaviors) about personal data protection in the Chinese legal framework are invalid. There are many prohibitive legal norms in this aspect, such as article 111 of the Civil Code, articles 177-(1), 253-(1) and 286-(1) of the Criminal Law, article 2 of the Tort Liability Law, and certain legal dispositions in the Cybersecurity Law. For avoiding any conflict between the clauses in an agreement and the mentioned legal norms, it is advisable to define a legal duty of the local health administrative departments regarding supervision of the clauses. On the other hand, we suggest a legal reform to group all legal dispositions regarding personal data protection in only one legal document, like the Data Privacy Directive in Europe or the Law of Personal Data Protection in Macao, in order to avoid the current situation in which those dispositions arise in many legal documents. For this legal reform, especially regarding the protection of personal data in telemedicine, the legislators should consider the valuable mechanisms in the European regime on health data privacy as reference.<sup>20</sup>

### 3. CONCLUSION

With the above considerations, we conclude that the growth and development of telemedicine in China depends on legal reform. Especially for pandemic emergencies, we suggest an acceptance of subsequent medical visits and/or uncommon and non-chronic diseases, a legal duty for state-owned medical institutions and enterprises to guarantee minimum logistics for drug delivery, a price unification of telemedicine in state-owned medical institutions and the integration of medical insurance, a creation of official model-contract or model-agreement, a legal duty of the local health administrative departments regarding supervision of the clauses in contracts or agreements about personal health data protection, and finally the integration of all legal dispositions regarding personal data protection in only one legal document.

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19 Zhai, Xie, Sun, et al. 2014, p. 809.

20 Raposo 2016, p. 6-7.

Such legal reforms are urgent, especially when facing a pandemic like COVID-19, where patient's basic rights in telemedicine activities can be at a greater risk. COVID-19 will not be the last virus. The Chinese government should reconsider how a patient's basic rights in telemedicine activities can be protected during pandemics. We look forward to the better protection of patient's basic rights in China.

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