

A POLICY PUSHED BY THE PANDEMIC: THE ECONOMIC-LEGAL CONSIDERATIONS OF THE TELEMEDICINE GUIDELINES

- Nisha Gupta and Udaiveer Ahlawat¹

I. INTRODUCTION TO THE TELEMEDICINE GUIDELINES

In an unforeseen turn of events, China saw its first economic contraction since 1976.² Countries across the globe are coming to the realisation that even though they cannot prevent the impending economic slowdown, they can certainly get creative in the legal-economic sphere to at least cushion the upcoming results of the domino effect. On the same front, the Government of India (“GoI”), amongst its many policy decisions to combat the adverse effects of this pandemic, released the Telemedicine Practice Guidelines³ (“Telemedicine Guidelines”) on 25th March 2020.

¹ Nisha Gupta is a student of B.B.A. LL.B. (Hons.) at the National Law University, Jodhpur. Udaiveer Ahlawat is a student of B.A. LL.B. (Hons.) at the National Law University, Jodhpur.

² Keith Bradsher, *Coronavirus Could End China’s Decades-Long Economic Growth Streak*, NY TIMES (Apr. 28,2020), www.nytimes.com/2020/03/16/business/coronavirus-china-economy.html

³ Ministry of Health & Family Welfare, Govt. of India, Telemedicine Practice Guidelines.

The Guidelines form a part of the National Digital Health Blueprint⁴ which aims to make the best use of the rapid internet penetration in India. Before these Telemedicine Guidelines were introduced, there was no specific legislation regarding the practice of e-consultation. The Indian Medical Council Act, 1956⁵ (“**IMC Act**”), the IMC (Professional Conduct, Etiquette and Ethics) Regulations, 2002⁶, Drugs and Cosmetics Act, 1940⁷ dealt with telemedicine. Data privacy concerns depended on the provisions Information Technology Act, 2000⁸ and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.⁹

Therefore, to effectively remove the existing legal gap as well as to address the extreme circumstances brought in by the outbreak of the pandemic, the Telemedicine Guidelines have been introduced by the policymakers. This essay assesses the implementation and impact of this policy decision of the Government by analysing the many legal and economic issues involved. Through this discourse, the authors also attempt to offer possible solutions to the legal-economic issues in light of the pandemic.

⁴ National Digital Health Blueprint, *at* https://www.nhp.gov.in/NHPfiles/National_Digital_Health_Blueprint_Report_comments_invited.pdf (last visited May 7, 2020).

⁵ Indian Medical Council Act, 1956, No. 102, Acts of Parliament, 1956 (India)

⁶ Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.

⁷ Drugs and Cosmetics Act, 1940, No. 23, Acts of Parliament, 1940 (India).

⁸ Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).

⁹ Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

II. TELEMEDICINE AIDING THE ECONOMY

A. The State of Indian Healthcare

Over 20% of India's population was said to suffer from at least one chronic disease as of 2016.¹⁰ It has also been estimated that this state of affairs is likely to cost India a staggering USD 6.2 trillion from 2012 to 2030.¹¹ India's abysmal health record does not end there – especially considering that the country only spends 1.28% of its Gross Domestic Product on public healthcare¹² compared to the OECD average of 8.8%.¹³ Home to the world's second largest population, India's current doctor-population ratio is 1:1456 opposed to the recommended 1:1000 of the World Health Organisation (“WHO”).¹⁴ While that may not seem all that bad, a recent study also estimated that 1 government doctor attends to over 11,082 people on an average in India – which is 10 times the WHO recommendation.¹⁵ Also note that India only has 0.5 beds per 1000 people in comparison to the WHO's recommended 5 beds.¹⁶ A cumulative result

¹⁰ *Over 20% of Indians suffer from chronic diseases: Report*, THE ECONOMIC TIMES (Oct. 6, 2016),

<https://economictimes.indiatimes.com/industry/healthcare/biotech/healthcare/over-20-of-indians-suffer-from-chronic-diseases-report/articleshow/54676781.cms?from=mdr>.

¹¹ *Id.*

¹² Himani Chandna, *At 1.28% of GDP, India's expenditure on health is still low although higher than before*, THE PRINT (Oct. 31, 2019) <https://theprint.in/health/at-1-28-gdp-india-expenditure-on-health-still-low-although-higher-than-before/313702/>.

¹³ *Health spending set to outpace GDP growth to 2030*, OECD <https://www.oecd.org/health/health-spending-set-to-outpace-gdp-growth-to-2030.htm> (last visited May 7, 2020).

¹⁴ Samiksha Goel, *The doctor-population ratio in India is 1:1456 against WHO recommendation*, DECCAN HERALD, www.deccanherald.com/business/budget-2020/the-doctor-population-ratio-in-india-is-11456-against-who-recommendation-800034.html (last updated Jan. 21, 2020).

¹⁵ *India's health workforce crisis*, DOWNTOEARTH, www.downtoearth.org.in/dte-infographics/61322-not_enough_doctors.html (last visited May 7, 2020).

¹⁶ *Hospital beds*, OECD DATA, <https://data.oecd.org/healthqt/hospital-beds.htm> (last visited May 7, 2020).

of this is the ranking of the country on the Healthcare Access and Quality (“HAQ”) Index – 145 out of 195 countries.¹⁷

The HAQ Index is based on country’s amenable mortality rate – deaths that are potentially preventable if effective and quality health care is timely provided.¹⁸ As of 2020, 65.97% of India’s total population is rural¹⁹ where effective healthcare is still considered to be “inaccessible”²⁰ in spite of the Government’s efforts. Accessibility forms an important aspect of the Index simply because effective and timely action determines whether a life is saved or not. This topic of accessibility has gained greater significance for the whole of India in recent times due to the imposition of the world’s largest lockdown²¹ due to the outbreak of the pandemic. With the sealing down of areas²², suspension of public transport,²³ and strict

¹⁷ *India 145th among 195 countries in healthcare access, quality*, THE ECONOMIC TIMES (May 23, 2018), https://economictimes.indiatimes.com/industry/healthcare/biotech/healthcare/india-145th-among-195-countries-in-healthcare-access-quality/articleshow/64282199.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

¹⁸ *Healthcare Access and Quality Profile: India*, HEALTH DATA, www.healthdata.org/sites/default/files/files/county_profiles/HAQ/2018/India_HAQ_GB_D2016.pdf (last visited May 7, 2020).

¹⁹ *India – Rural Population*, TRADING ECONOMICS, <https://tradingeconomics.com/india/rural-population-percent-of-total-population-wb-data.html> (last visited May 7, 2020).

²⁰ Banjot Kaur, *Economic Survey 2018-19: Healthcare still inaccessible in rural India*, DOWNTOEARTH (July 4, 2019), www.downtoearth.org.in/news/health/economic-survey-2018-19-healthcare-still-inaccessible-in-rural-india-65443.

²¹ Karan Deep Singh, *India, Day 1: World’s Largest Coronavirus Lockdown Begins*, NY TIMES (Apr. 28, 2020), www.nytimes.com/2020/03/25/world/asia/india-lockdown-coronavirus.html.

²² Alok Mishra, *Delhi has 100 containment zones: See full list*, THE TIMES OF INDIA (Apr. 28, 2020), <https://timesofindia.indiatimes.com/city/delhi/coronavirus-outbreak-list-of-containment-zones-in-delhi/articleshow/75433978.cms>.

²³ Anisha Dutta, *Covid-19 lockdown: Public transport may resume soon, says Nitin Gadkari*, THE HINDUSTAN TIMES (May 7, 2020), www.hindustantimes.com/india-news/public-transport-may-resume-soon-gadkari/story-NwQ95NOEXXyNgs3vhb260N.html.

stay-at-home and curfew orders,²⁴ the ability to access healthcare services has just become tougher – both, in rural and urban areas.

B. The Positive Relationship between Economics and Healthcare

Keeping in mind accessibility to health facilities, the Telemedicine Guidelines received a much-needed push by the Government of India – especially since as the health as well as the economic dangers of the pandemic were perceived.

The relationship between the two is long-established - economic performance and health performance are interlinked.²⁵ In fact, an improvement of just 10% in life expectancy at birth raises the economic growth by 0.3-0.4% each year.²⁶ Health has direct impacts on economic growth in terms of labour productivity, economic burden of ill-health such as absenteeism from work, learning capabilities of children and adults alike, and so on.²⁷ There are indirect impacts of health on the economic performance as well, for example – healthy parents are more likely to hold jobs and earn money to sustain a healthy family; healthy children are more likely to perform better at school thus ensuring better work opportunities in their adulthood.²⁸

²⁴ *During coronavirus lockdown 3.0, people can't step out for 12 hours*, THE HINDUSTAN TIMES (May 2, 2020), <https://www.hindustantimes.com/india-news/during-lockdown-3-0-people-can-t-step-out-for-12-hours/story-sNLtp9M7EXswU74YdtrYHJ.html>.

²⁵ Julio Frenk, *Health and the economy: A vital relationship*, OECD OBSERVER (May 2004), https://oecdobserver.org/news/archivestory.php/aid/1241/Health_and_the_economy:_A_vital_relationship_.html.

²⁶ *Id.*

²⁷ *Investing in Health for Economic Development*, WHO, www.who.int/macrohealth/action/sintesis15novingles.pdf (last visited May 7, 2020).

²⁸ *Id.*

The new motto of the Government – “*Jaan bhi, Jahan bhi*” (lives as well as livelihoods)²⁹ – falls directly in line with this relationship. GoI’s new take on “health is wealth” communicates to the people the need for health and economic measures to go hand-in-hand. Policymakers must strive to find the perfect balance between the two goals. For example, policymakers need to ensure that healthcare is affordable for all without putting extensive burden on the national spending which is already dealing with several other issues.³⁰

The introduction of the Telemedicine Guidelines is envisaged to help the GoI make its goal of achieving a fine balance of health and economic growth a reality. McKinsey Global Institute in its report titled “Digital India: Technology to transform a connected nation” (“**Report**”) has stated that up to 50% of the current in-person outpatient consultations could be instead handled by e-consultations, i.e. through telemedicine.³¹ This would not only help make up for the shortage of over 600,000 doctors in the country³² and improve access to healthcare even in remote rural areas, but if India is able to even replace 30-40% of these consultations with telemedicine, it could save up to a massive USD 10 billion³³ with USD 4-5 billion in 2025 itself.³⁴ In fact, penetrating the

²⁹ ANI, *Our mantra was 'jaan hai to jahaan hai' but now it is 'jaan bhi jahaan bhi': PM Modi*, THE NEW INDIAN EXPRESS (last updated Apr. 11, 2020), www.newindianexpress.com/nation/2020/apr/11/our-mantra-was-jaan-hai-to-jahaan-hai-but-now-it-is-jaan-bhi-jahaan-bhi-pm-modi-2128777.html.

³⁰ *supra* note 25.

³¹ MCKINSEY GLOBAL INSTITUTE, DIGITAL INDIA: TECHNOLOGY TO TRANSFORM A CONNECTED INDIA 72, at <https://www.mckinsey.com/~/media/mckinsey/business%20functions/mckinsey%20digital/our%20insights/digital%20india%20technology%20to%20transform%20a%20connected%20nation/digital-india-technology-to-transform-a-connected-nation-full-report.ashx> (last visited May 7, 2020).

³² *supra* note 15.

³³ *supra* note 31, at 26.

market seems to be an easy task since it is believed that if the Telemedicine Guidelines are given a push in the right direction, the country will be able to meet 60-80% of this potential by 2025 itself.³⁵ It has also been projected that the use of telemedicine cuts the cost of consultation by about 30% making it more affordable than in-person consultations.³⁶ The process also proves to be cheaper for the registered medical practitioners (“RMP”) as Guideline 3.7.2 allows for the documentation of consultations to be maintained digitally which would significantly bring down the administrative costs.

Unsurprisingly, cumulatively these factors will benefit the rural population at large. As per Guideline 3.6 of the Telemedicine Guidelines, first consultations as well as follow-up consultations can be done through the mediums provided. This in turn would allow them to consult expert medical professionals sitting at their homes, ensuring that they wouldn’t have to spend a large sum of money travelling to urban cities for the same or even having to depend on unqualified doctors to treat them.

Apart from the economic benefit of the Telemedicine Guidelines, these considerations are likely to improve the HAQ Index of the country which in turn will have certain economic advantages as explained by the positive relationship between health performance and economic performance.

³⁴ *supra* note 31, at 62.

³⁵ *Id.*

³⁶ *supra* note 31, at 26.

III. THE LEGAL LOOPHOLES

With the outbreak of the pandemic looming over the country, the GoI started advising its citizens to start consulting their doctors over telephonic means instead of visiting hospitals and clinics in the interest of reducing chances of transmission of the virus.³⁷ The need for e-consultations has become all the more necessary with the never-ending extensions of the lockdown. However, there are many legal hurdles that need to be addressed before the country is on its way of making the best of telemedicine and its economic and health benefits.

When it comes to analysing the legality of telemedicine, the case that is often talked about is that of *Deepa Pawaskar v. State of Maharashtra*.³⁸ The two doctors involved provided e-consultation to the patient without conducting proper diagnosis and also wrongfully advised her against going to another hospital in spite of the doctors' physical absence. Ultimately, the patient died and the two doctors were charged under the offence of criminal negligence under Section 304 read with Section 34 of the Indian Penal Code.³⁹ Although the case was clear in its context that the charge of culpable negligence was due to the error in diagnosis and prescription without diagnosis,⁴⁰ the judgement created havoc and fear in the minds of RMP with regards to the "illegality" of telemedicine.

³⁷ *PM Modi says goal is to ensure minimum loss of life, urges states to use technology and telemedicine to fight covid-19*, THE ECONOMIC TIMES (Apr. 2, 2020) <https://government.economictimes.indiatimes.com/news/technology/pm-modi-says-goal-is-to-ensure-minimum-loss-of-life-urges-states-to-use-technology-and-telemedicine-to-fight-covid-19/74951364>.

³⁸ *Deepa Pawaskar v. State of Maharashtra*, 2018 SCC OnLine Bom 1841.

³⁹ Indian Penal Code, Act. No. 45 of 1860, INDIA CODE (1860).

⁴⁰ *Medical professionals cannot escape liability on acting negligently: Bombay HC*, SCC ONLINE BLOG (July 29, 2018),

Although it is apparent that the judgement was wrongly interpreted by most concluding that telemedicine in itself is illegal, the fear regarding telemedicine is well-founded due to the lack of clarity that has been offered by the Indian policymakers in the past.⁴¹ Telemedicine has long been a reality in the medical and technological areas, however was only recently acknowledged in India's legal sphere. The introduction of the Telemedicine Guidelines has since then have provided colour to the otherwise grey area and ascertained its legality.

In spite of the filling up of this void by the amendment of Regulation 3.8.1 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations⁴² and the insertion of Appendix 5 to the same, there are many more legal issues to be addressed.

A. The Nature of the Guidelines

First and foremost, it is to be noted that the guidelines only provide the “norms and protocols”⁴³ without clarifying whether they are professional norms or simply non-legislative measures. The only scope of clarity offered by the policymakers is that “these guidelines should be used in conjunction with the other national clinical standards, protocols, policies

<https://www.scconline.com/blog/post/2018/07/29/medical-professionals-being-put-on-a-pedestal-equivalent-to-mortals-cannot-escape-on-acting-negligently-bombay-hc/>.

⁴¹ Suraksha P., *Telemedicine has no legal backing, fraternity calls for regulation*, THE NEW INDIAN EXPRESS (Sept. 17, 2018),

<https://www.newindianexpress.com/cities/bengaluru/2018/sep/17/telemedicine-has-no-legal-backing-fraternity-calls-for-regulation-1872965.html>.

⁴² Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.

⁴³ *supra* note 3, at 8.

and procedures”.⁴⁴ This only raises the question whether a RMP can be held liable solely under these guidelines or not.

B. Jurisdiction

Talking about liability, the issue of jurisdiction also demands some clarity as well. Since the Guidelines are to be “used in conjunction” with other national policies, it is safe to presume that Section 13 of the Information Technology Act, 2000 may be utilised in determining the cause of action. Since the cause of action with regards to e-communication depends on the despatch and receipt of electronic records,⁴⁵ the use of the IT Act opens up further possibilities and thus, further confusion in determining the jurisdiction. The Guidelines do not offer any clarity with regards to this. In fact, the Guidelines only provides that in case of misconduct, the penalties will be as per the IMC Act, ethics and other prevailing laws, without making any mention to the issue of jurisdiction (Guideline 3.7.1.5). Therefore, it can only be ascertained that the Guidelines indirectly provide for complaints to be made to the State Medical Council where the RMP is registered for the same.

C. Data Privacy

The topic of data privacy and confidentiality are dealt under Guideline 3.7 which largely states that the RMP must abide by the IMC Regulations, 2002, the IT Act and any data protection and privacy laws notified from time to time. Considering that the Data Protection Bill, 2019 is yet to be passed and has been on hold due to the outbreak of the pandemic, there is

⁴⁴ *supra* note 3, at 9.

⁴⁵ Ajay Garg, *Legal Issues in Telemedicine*, DIPLOMATIC SQUARE (May 19, 2019) <https://www.diplomaticsquare.com/legal-issues-in-telemedicine/>.

little relief with regards to the privacy concerns brought on by Telemedicine.

D. The Consumer Protection Act, 2019

Most importantly, from the point of view of the consumers, i.e., the patients, the Consumer Protection Act, 2019 (“CPA 2019”) needs to be considered. Although the Consumer Protection Bill, 2018 included healthcare in the definition of services Section 2(47), the CPA 2019 in its current form has excluded it. However, it must be noted that the list as stated in the Sub-clause 47 is not exhaustive. The exclusion of healthcare from the definition via ‘healthcare amendment’ comes as an attempt to satisfy the medical fraternity that was in opposition to the same.⁴⁶ However, the Government of India since clarified that cases of deficiency of services in medical cases will come under the purview of 2019 Act.⁴⁷ To add to this, in the case of the *Indian Medical Ass’n v. V. P. Shantha*,⁴⁸ the Supreme Court stated that medical services fall under the purview of Consumer Protection Act, 1986 as long as consumers are charged for the service. This case stands good in law even after the introduction of the CPA 2019 because the legislature has not used its power to overturn the judgement with prospective effect.⁴⁹ This therefore allows the consumers of telemedicine to approach the consumer courts in case of any misconduct or deficiency of services. Keeping up with the digital advancements, the consumers can now file a complaint from anywhere as compared to the previous Act where the complaint had to be filed in an

⁴⁶ Dipak Dash, *Consumer bill draft removes healthcare from services*, THE TIMES OF INDIA (June 25, 2019) https://timesofindia.indiatimes.com/india/consumer-bill-draft-removes-healthcare-from-services/articleshow/69935129.cms_

⁴⁷ *Id.*

⁴⁸ *Indian Medical Ass’n v. V. P. Shantha*, AIR 1996 SC 550.

⁴⁹ *State of Karnataka v. Karnataka Pawn Brokers Ass’n*, SLP(C) Nos. 8652-8656 of 2012.

area where the seller or service provider was located. This resolves the jurisdictional issues being raised by Telemedicine and CPA. Further, a consumer may also request a hearing through video conferencing thus reducing time and cost.⁵⁰

IV. CONCLUDING THE DISCOURSE

Following the goals set out by the National Health Policy of 2017, the Government of India is set to increase its expenditure on health care from 1.28% to 2.5% of its GDP by 2025.⁵¹ The relationship between health performance and economic performance cannot be overstated. For a country to grow, it is of utmost importance for its population to be healthy. The situation in India in its current state poses threat to both – the health and the economy. This has only aggravated with Covid-19 sweeping across the nation. Although the Telemedicine Guidelines were long pending, they received a much-needed push from the pandemic.

Even though, as discussed earlier, an effective implementation of the Guidelines will provide much needed aid to the economic problem, one might simply ask whether the Guidelines in their current form can be implemented effectively. Whether due to the laxity of the legislature or simply because of the rush with which they were pushed out, it remains no secret that the Guidelines present many legal loopholes that are yet to be straightened out.

⁵⁰ Stuti Galiya, Consumer Protection Act, 2019 – Key Highlights, KHAITAN & CO. (Aug. 16, 2019), <https://www.khaitanco.com/thought-leadership/consumer-protection-act-2019%E2%80%93key-highlights>.

⁵¹ *India to increase public health spending to 2.5% of GDP: PM Modi*, THE ECONOMIC TIMES (Dec. 12, 2018), https://economictimes.indiatimes.com/news/economy/policy/india-to-increase-public-health-spending-to-2-5-of-gdp-pm-modi/articleshow/67055735.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

However, it should be appreciated that given the pandemic, the Guidelines were introduced in a timely fashion to ensure to contain the transmission of the virus, amongst its other economic and health benefits. It is yet to be seen how the Consumer Protection Act, 2019 and the Data Protection Bill, 2019 (when passed) will react with the Guidelines. Up until then, the Government can continue relying on the Guidelines for its new motto – “lives as well as livelihoods”.⁵²

⁵² *supra* note 29.