INTERNATIONAL SEVEN JOURNAL
OF MULTIDISCIPLINARY
ISSN: 2764-9547

Telemedicine and data protection on digital platforms

Telemedicina e proteção de dados nas plataformas digitais

DOI: 10.56238/isevmjv2n5-008
Receipt of originals: 08/28/2023
Acceptance for publication: 18/09/2023

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ABSTRACT
Telemedicine is a mode of medical care, carried out remotely, that has been essential in the global crisis faced by the Covid-19 virus. Despite being a recent, current, and emerging subject, the method of digital health care was already developed in Brazil, although with some restrictions and criticism from the medical community, more precisely by the Federal Council of Medicine. In this condition, the work will be developed from the problem of data protection in digital platforms, in the dynamics of telemedicine. In addition, the legislation that involves the themes will be explored, with a special focus on the General Data Protection Law and the constitutional right to health and human dignity.

Keywords: LGPD, Digital platforms, Data protection, Telemedicine.

1 INTRODUCTION

Approximately three years ago, the subject of telemedicine acquired its proper focus, despite being a technique previously known at the time mentioned, but which has become more popular and accepted now. It was necessary and fundamental to address the global health crisis caused by the Covid-19 virus. Thus, it is of paramount importance to debate and study telemedicine as well as to turn attention to the data protection of the parties involved, doctor and patient.

Governments and societies of all nations have faced significant changes to the reality of the implementation of their previously conceived health policies. And with all due respect to the torn lives and all the sadness occasioned by the pandemic, in a positive light, the coronavirus has provided an absurd and extremely favorable progression in the field of health. By the way, not only in the area of health, but also in the scope of technology, legal norms and, especially, the

adaptation of the human being. Everyone has had to reinvent themselves and adapt, even as a way to survive all this "pandemic madness."

Lives were turned "upside down" and yet health workers performed their duties perfectly, putting their own lives at risk to support people infected with the virus in an almost totally collapsed health system. Doctors, nurses, nursing technicians, physiotherapists, among other health-related professions acted as heroes, performing to the maximum on the front line to fight the enemy, when there were still no vaccines or proven effective remedies for treatment.

For their part, scientists in general have also worked hard in search of a solution to the coronavirus. All these efforts were crowned with the achievement in a little more than a year of the elaboration of an efficient vaccine against the said virus. It was a historic milestone, for the admirable efficiency of science that, in a short period, was able to produce effective and safe vaccines to curb the number of deaths and reduce the rates of contamination of people.

In the same vein, telemedicine has played a great collaborative role in dealing with the pandemic. Using virtual means and the distance of medical care, it was possible that the numbers of infected and deaths were not higher and more frightening. With this remote mode of medical care, people with mild symptoms could be assisted from their homes, without risk of contaminating the doctor and other people who would meet the patient. It could be treated from your home, preventing contagion, and further spread of the virus.

And, to provide this means of virtual medical care in an accessible way, digital platforms were used, as well as information and communication technology instruments.

After the acute period of the pandemic, it is understood that now is the time to discuss some essential points of the use of telemedicine in health care, such as the issue of data protection and the personality rights of those involved in telecare. The General Data Protection Law provides for the processing of personal data, including in the digital environment, being merely intuitive to protect them, since they are vulnerable on the *internet*, as will be addressed below.

If for the exercise of telemedicine it is necessary to use a digital medium, through applications, programs, social networks or, simply, with the link to the *internet*, there is a problem in effectively supporting the data made available on such platforms, which are a *locus* where supervision is almost non-existent. In addition, very few people have knowledge about the exposure of data in the digital orbit and the risks that the disclosure of personal data can provide, not only in the field of telemedicine.

Given this, this article will deal with issues that go beyond telemedicine and the concern with personal data, in its exposure on digital platforms. It is imperative to deal with the dignity

of the human person, as well as health, as a fundamental right. Likewise, the Federal Constitution of 1988 provides for the right to privacy, intimacy, secrecy, and the inviolability of personality and honor rights.

1.1 THE GENERAL DATA PROTECTION LAW AS A FUNDAMENTAL RIGHT

Fatidically, every revolution provides a significant change in society and, for the birth of constitutional law, it was essential the occurrence of two historical facts: the Independence of the United States and the French Revolution, which inaugurated a new state model, characterized by the need to limit state power by the organization of a rule of law, with the establishment of fundamental rights and guarantees to its citizens. (COMPARATO, 2018, p. 118).

These fundamental rights are fundamental for the perfectibilization of democracy, given the preponderance of the sovereignty of the people, as well as the interdependent correlation between the three powers: Executive, Legislative and Judiciary. The people hold the power of choice as to their representatives, for the purpose of determining the future of the nation; However, even if you delegate power to someone, that power is not unquestionable. There are limitations, both for the decision-making of governors in general, and for the individual rights and guarantees of the human being (MORAES, 2022, p. 29).

In the Brazilian Federal Constitution of 1988, in its article 5, it is established that all are equal before the law and have the same fundamental rights such as the right to life, liberty, equality, property and security, among others. And, as long as there is a direct relationship with any of the aforementioned rights, even if it is not expressly outlined in the *caput* of the aforementioned article of the Constitution, such a right is valid as fundamental. One can give as an example the rights to privacy and intimacy of the human person, provided for in item X of article 5 of the Constitution, with the following textualization: "the intimacy, private life, honor and image of persons are inviolable, ensuring the right to compensation for material or moral damage resulting from its violation." Finally, Constitutional Amendment No. 115 of 2022, inserted another individual right in the list of article 5, which is item LXXIX: "the right to the protection of personal data, including in digital media, is ensured, under the law."

The Federal Constitution is the basis for the entire Brazilian legal system, being the largest and most important law in the country. With this, any questioning that has the intention of going against what is duly constitutionalized must be declared unconstitutional and removed from the legal world, since it is not used from this bias to exempt from responsibilities or penalties (MORAES, 2022, p. 805).

1.2 CONCEPTUALIZATION OF THE RIGHTS TO PRIVACY, INTIMACY AND FREEDOM

When it comes to fundamental rights, all are legitimate in terms of their importance and legal relevance, but for the present study the focus will be on the rights to privacy, intimacy, freedom and access to health. Respectively, privacy and intimacy stood out in the face of great technological advances; since, in digital media in particular, there have been incidents of violation of these rights, either through exposure or by the degradation of the honor of the human person when freedom of expression is abused.

The rights to privacy and intimacy are duly legislated in article 5, item X, of the Federal Constitution, with the following wording: "the intimacy, private life, honor and image of people are inviolable, ensuring the right to compensation for material or moral damage resulting from its violation."

Moreover, according to the understanding of Maria Helena Diniz:

> Personality is not a right, so it would be erroneous to assert that the human being has a right to personality. The personality is what supports the rights and duties that radiate from it, it is the object of law, it is the first good of the person, which belongs to him as the first utility, so that he can be what he is, to survive and adapt to the conditions of the environment in which he finds himself, serving as a criterion for assessing, acquiring and ordering other goods. (2005, p. 121)

The purpose of protecting the dignity of the human person, even in a more individual way, becomes evident. In this bias, in all its aspects, fundamental rights are inviolable, because they protect the most precise good that is life with dignity. Violating the constitutional norms means committing an act of unconstitutionality, being totally forbidden, except when the legitimacy for such unconstitutional practice is proven, such as, for example, for purposes of self-defense, state of necessity or in the fulfillment of a legal duty, or with regard to an exercise of regular right (art. 23, items I, II and III, of the Brazilian Penal Code).

The right to freedom is outlined in the caput of article 5 of the CF, which is: "All are equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and property, in the following terms [...]".

Therefore, the right to freedom is considered one of the most important fundamental rights, providing a subsequence of other rights also essential to the dignity of the human person. It is a faculty also positivized in international law, in the Universal Declaration of Human Rights, in which there is a deep concern with the protection of life and with the dignity of the human being (COMPARATO, 2018, p. 236 and 240).

At first the right to freedom was restricted, more linked to the question of the possibility of coming and going, being associated with free movement and also with the free expression of thought (SALEME, 2021, p. 139-140). However, with the complexity of today's societies and the use of new information and communication technologies, there has been an amplification of freedom of expression and communication, which reached an unimaginable scope at the time of the declarations of human rights. Thus, it is understood that giving freedom a very broad conceptualization can generate many conflicts, problematizing, therefore, its delimitation in the present day.

Freedom goes beyond a physical and space issue, such as that provided for in article 5, item XV, of the Federal Constitution. It also involves the perception of the freedom to express oneself, of the manifestation of thought, of conscience and of choice regarding belief, relating directly to the will of the individual, either to act or to abstain, consistent with his desire (ALEXY, 2008, p. 218-226).

1.3 HUMAN DIGNITY, TECHNOLOGICAL MODERNIZATION AND LEGAL BASES

With the passage of time and the development of societies, there have been several significant changes, many positive, some negative. However, there is something considered immutable, due to the magnitude it has, which is the recognition of the need to verify the dignity of the human person and its origins, such as individual and collective fundamental rights, considered by the doctrine as fundamental principles.

Considering the great technological advances, the *Internet* was one of the most revolutionary milestones that happened in the most recent history of mankind. Through it, other changes were forthcoming, such as the connection on a world scale, the approximation of individuals regardless of where they are, the dissemination of knowledge quickly and practically, access to information and communication of rule for free and instantaneously and globally. However, the law has not kept pace with this accelerated progress of the *internet* and new information and communication technologies. The Internet was created in the 1960s, in the United States of America, and in Brazil, it was only made available in 1991 for research purposes. However, the edition of laws to regulate the connection via the *web* in Brazil took place only in 2014, known as Marco Civil da *Internet* (Law 12.965/2014). This law established principles, guarantees, rights and duties for the use of the Internet in Brazil. (SAINTS, 2021).

It was through Law 12.965/14 that the *internet* ceased to be "land without law", as it was popularly seen in Brazil. However, it was not enough to cover all the issues pertaining to data

protection. Due to this, the General Data Protection Law (Law 13,709) was designed and drafted in 2018, but it entered into force, in all its content, only in the year 2021, as provided for in its art. 65. Its wording was amended the following year, by Law No. 13,853, of 2019.

In short, even if it's enacted in law, and not just in one law, but several, many people and tech companies break the norms; Moreover, this is not an isolated case concerning only data protection, but a social and even humanitarian problem. Psychology should even be allied to the law, in a more imposing way, whereas, for the creation of laws, the ideal would be to know the human mind, so that effectively the law is fulfilled. However, it is a discussion beyond the present article and one that deserves special attention to be discussed.

That said, it's become common to target people's honor on social media; It has become customary, using freedom of expression and thought for people to comment on everything and everyone, even if this can instigate hatred, discrimination, violence and the most varied forms of prejudice. Psychological abuse and manipulation became frequent; it has become banal to care for others, aiming only at profit and popularity in digital media; It has become commonplace to violate laws, principles and constitutionalized rights for one's own benefit.

The General Data Protection Law, sanctioned on August 14, 2018, brought with it hope regarding the delimitation of the abuse of freedom and power of communication in this digital environment, being very important for justice and for the future of the nation. The main focus of the law, provided for in *the caput* of article 1, is the protection of fundamental rights, specifically freedom and privacy, as well as providing a free development of the human personality.

For the edition of the General Data Protection Law, the Brazilian legislator was based on the General Data Protection *Regulation*, a European law that came into force in 2018, but which has specific characteristics, differing from Brazilian law in some aspects. In fact, these are two very different social and cultural realities (PINHEIRO, 2020, p. 15).

In addition, the General Data Protection Law has seven fundamentals disciplined in article 2, which are fundamental, which are:

> I - respect for privacy; II - informational self-determination; III - freedom of expression, information, communication and opinion; IV - the inviolability of intimacy, honor and image; V - economic and technological development and innovation; VI - free enterprise, free competition and consumer protection; and VII - human rights, the free development of personality, dignity and the exercise of citizenship by natural persons.

The protection of the data of the holder has gained greater proportion compared to the already exposed, such as technological evolution, but also by the development of the world trade in personal data. Now, the consent of the data subject is required for certain personal information

of the user to be captured, in order to avoid an invasion of intimacy and privacy, as a result of this "collection".

However, this personal right is not being truly respected, as many companies use this personal data for marketing purposes, without even having the real knowledge of the consumer. And, although there was consent at a certain point in the consumer relationship, this does not allow the disclosure of data to third parties (PARISER *apud* FREITAS; BORGES; RIOS, 2016, p. 01-11). In disregard of the principles and legal bases, inscribed in law.

It is also discussed, in the current practices of the use of the internet, whether the user is really consenting or being induced to consent to access digital media. In this sense, the consent before the General Data Protection Law, as provided for in article 5 is: "XII - consent: free, informed and unequivocal manifestation by which the holder agrees to the processing of his personal data for a specific purpose;". There are situations in which it becomes unnecessary to request the consent of the data subject, if it is duly provided for in the law, such as when certain data are already publicly available by the data subject himself, provided that the rights of the owner are safeguarded.

Consenting to the provision and collection of data by the holder is a major discussion of the General Data Protection Law. In the form of the law, the clarification regarding the consent must occur in a simplified, accessible, and detachable way, for the clear visualization and understanding of the holder, as stated in the articles. 8, §§ 1, 2, 3 and 4, of Law No. 13,709/2018:

> Art. 8 The consent provided for in item I of article 7 of this Law shall be provided in writing or by another means that demonstrates the manifestation of the will of the holder.
> § 1 - If the consent is provided in writing, it must be included in a clause detached from the other contractual clauses.
> § 2 - The controller bears the burden of proving that the consent was obtained in accordance with the provisions of this Law.
> § 3 - The processing of personal data through a defect of consent is prohibited.
> § 4 - The consent must refer to specific purposes, and the generic authorizations for the processing of personal data will be null and void.

And, even with all the concern on the part of the legislator regarding the consent of the data subject, means are still found to circumvent this personal and constitutional right. There is, at the time of the request for consent, by digital platforms, the use of bureaucratic means and not accessible to the data subject, with extensive texts and terms of difficult understanding, making it difficult to understand the data subject. This occurs with a specific purpose: to make the user not read the terms of policy and privacy and consent without reading, effectively, something that is already occurring (HERNANDES, 2017).

For the General Data Protection Law, data protection, by itself, could not be an end aimed

only at itself (DONEDA, 2019, p. 177-186). And, one of its most important pillars is the self-control of the data subject as to release their personal information, with the exclusive consent, in the manner provided by law. Reinforcing this issue, the law provides that the user will have the power, at any time, to revoke their consent and cease providing their data (article 9, paragraph 2 of Law 13,709/18).

However, in practice this is not quite the case. Facebook, a major social network that impacts the lives of billions of users, as well as Instagram, Google, YouTube and, most recently, Tik Tok, have terms of use for obtaining user consent. And, through this consent, users' personal information is used for commercial purposes, which take place from the moment you like a photo, or make a post, visit websites and social media profiles. In the specific case of Facebook, it is a platform that, upon obtaining consent from the data subject, may use a name and even other content, images and sounds that are linked to the user's profile, according to Eli Pariser (PARISER *apud* FREITAS; BORGES; RIOS, 2016, p. 01-11).

In this perspective, it has become usual for digital platforms, the application of generic consent, with the information that the terms will always be available, just by clicking on accept or agree. However, this type of consent is prohibited by the General Data Protection Law, as it needs to be clarified and free, under the terms of article 5 of the law, already exposed above.

In addition, after the achievement of the purpose established by the collection of personal data, they should be excluded, by the principle of necessity; or else, from the moment it is the will of the holder that these data be erased, as provided in the article below:

> Art. 60. Law No. 12,965, of April 23, 2014 (Marco Civil da Internet), becomes effective with the following amendments: "Art. 7 [...] X - definitive deletion of the personal data that you have provided to a particular internet application, at your request, at the end of the relationship between the parties, except for the hypotheses of mandatory custody of records provided for in this Law and in the one that provides for the protection of personal data;

However, there is no evidence that the data is deleted, nor specific control over it. Not to mention, when the data was shared with another vendor, there would be a lot of difficulty in applying this article.

Even more so in health, that some aggravating factors appear, such as the definition of the legal basis. That said, it is important to consider that in some situations, in which it is necessary to analyze hard, such as "compliance with legal or regulatory obligation by the controller" (article 7, item II and article 11, item II, subparagraph 'a'); the "protection of the life or physical safety of the holder or third parties" (article 7, item VII and article 11, item II, subparagraph 'e'); and the

"protection of health, exclusively, in procedures performed by health professionals, health services or sanitary authority" (art. 7, item VIII and art. 11, item II, subparagraph 'f').

Regarding compliance with legal or regulatory obligations, it is necessary to address that the Federal Council of Medicine and the National Health Agency issue several regulations that must be observed regarding the flow of data treated. Likewise, the legal basis of life protection allows and enables that, without the consent of the holder, the controller treats the data, since the imminent risk presents itself. And yet, in closing, the protection of health, where the exception stands out from the general rule, allows treatment without consent being given. Finally, it is important to discuss the responsibility of the data subject himself (art.

42 of Law 13,709), since the user is liable for civil liability when violating the norm, both legal and technical, causing material or moral damage to another holder or to a community (CAPANEMA, 2020, p. 163-170). In addition, there is the task of the consumer to read the terms of policy and privacy of each website or digital platforms in general, to truly know what happens with the provision of data.

However, with the convenience and lack of the habit of exercising this reading, about 97% of users do not read the privacy terms and only agree with them, according to a survey conducted by Deloitte in 2017, which corresponds to a very worrying percentage (DAVID, 2020). Therefore, there are many problems regarding consent, both by the very practice of the data subject, and by the bad faith of digital companies.

1.4 THE PROBLEM OF FALSE CONSENT AND THE COMMERCIALIZATION OF DATA

Given all the above so far, in short, the problem of false consent lies in the very vice it brings with it, to the extent that it is not legitimate. It is a consent induced, to obtain illicit advantage to the detriment of the consumer, which is the weakest link of the consumer relationship, according to the following provision of the Consumer Protection Code:

> Art. 4 The National Consumer Relations Policy aims to meet the needs of consumers, respect for their dignity, health and safety, the protection of their economic interests, the improvement of their quality of life, as well as the transparency and harmony of consumer relations, meeting the following principles: I - recognition of the vulnerability of the consumer in the consumer market; [...]

Recently, digital platform companies had to reformulate their privacy policies for purposes of compliance with the General Data Protection Law, regarding the consent of the data owner, which was previously not even questioned. With this reformulation, given the importance of the right to privacy and intimacy, the user of any platform, websites or social networks, would

need to consent to the sharing of their data in this digital medium. Thus, when registering on a social account, for example, to validate the registration, an acceptance of sharing your private life is imposed, with consent; That is, you can only use the social network who agrees to access your private data. And yet, it has become usual to obtain this data to market them, as it is a way for technology companies to profit from other companies, especially virtual stores. (PARISER *apud* FREITAS; BORGES; RIOS, 2016, p. 01-11).

Commerce happens, initially, with the development of a personalized profile for each user, achieved by the analysis of digital interactions, with the care of glimpsing which type of content is most interesting for each consumer, as well as their tastes and preferences in general. And for this to be possible, *Facebook* has leveraged the algorithm approach, such as the example of the algorithm called *EdgeRank*, which customizes what information arrives in each user, according to their affinities (relative to interaction with other users and, potentially, friends), with the contents (personal exposure and news) and as for time (newer posts have priority, in relation to the older ones) (PARISER *apud* FREITAS; BORGES; RIOS, 2016, p. 01-11).

It is questioned to what extent these algorithms are beneficial to the consumer and the data subject. And if there would not be the need for greater transparency and possibility of democratic choice of these algorithms by users. It is interesting to have content directed in a subjective and way. But this could trigger severe consequences for the future, not too far from the current reality, which is already worrying.

1.5 THE USE OF ALGORITHMS AND BUBBLE FILTERS AND THE DIFFICULTY OF CONTROL

Currently, algorithms and bubble filters are widespread in the global digital market. The number of users reaches 150 million Brazilians (REDAÇÃO, 2021), which leads to the incidence of "algorithmic alienation", conceptualized by Mark Andrejevic (VALENTE, 2020, p. 05). This alienation is harmful, while depriving people of content that could contradict a personal perception, which most of the time is not the real one. It is also a way to monopolize or manipulate information and disseminate "fake news", if it meets the opinion and interest of the user.

The *Internet*, being an unlimited environment, hinders its control and supervision, but in the absence of a regulatory body, it is important the care that users, by itself, must have when using it. It has become so easy to use digital media for everything in everyday life that there is not enough concern about the risks that this grandiose medium can cause.

As for consumer rights, the Consumer Protection Code provides that the responsibility for

supervising consumer relations lies with the Union, the States, the Federal District and the Municipalities, through their specialized bodies for this purpose, provided for in article 55,

§§ 1 and 3, of the CDC. By logic, the relationship of digital media with users would fit into a relationship of consumer and supplier, being feasible the support, also, of the General Data Protection Law to regulate and supervise this relationship in the digital environment. However, the scope of consumer relations is very large and bringing one more issue to be supported, could harm other areas, which also need such support.

Therefore, the most interesting thing would be to determine separately, but not totally, the different means of having consumer relations, such as, for example, in the digital environment referring to the exposed data, with the separate service of this universe to that of the most usual consumer relations, since it could involve products other than private data. This issue is an issue in emergence, which deserves greater concern, considering the great technological evolution that experienced in a short period of time.

However, is it possible to say that people are aware of all the revolution and social change that the *Internet* is causing in their lives? Is it possible to predict that users know how their data is actually used and the consequences that their consent may cause? Finally, would it be possible to have a worldwide control to monitor this high demand for virtual illegalities? There are more questions than answers. And there is also an emerging concern, not only in data protection in social networks and malicious companies, but also in the field of telemedicine, which allows medical consultations to be carried out through a digital medium.

This fear is related to the obtainment, from the use of telemedicine, of numerous sensitive data of those involved in this relationship of health and care, both of patients and doctors. How to respect the principle of secrecy, the terms of the code of medical ethics and the fundamental rights and guarantees of the human being are great challenges, as will be addressed below.

2 TELEMEDICINE, WHAT IT IS AND THE INCENTIVE OF ITS USE WITH THE PANDEMIC

Antagonistic to what most people think about telemedicine, it is not a new method, nor is it even a term recently used to denominate a medical care or service delivery, related to health, at a distance. This denomination originated from the telematic means, which appeared in the middle of the years of 1838, with the telegraph and, later, with the telephone (JUNIOR; CAVET; NOGAROLI, 2020, p. 327-362).

Then, in the year 1905, the terminology "telemedicine" was used, properly for the first

time, by Willem Einthoven, a Dutchman who developed the tele-electrocardiogram, which was located in his laboratory and was 1.6 kilometers from the academic hospital. From this instrument it was possible to perform the analysis of electrocardiograms, by means of transmitted impulses (BAROLD, 2003, p. 99-104). Subsequently, there was the use of the radio to provide medical care at a distance for the soldiers of the First World War (JUNIOR; CAVET; NOGAROLI, 2020, p. 327-362).

With the passage of time and with technological evolution, it was possible to promote the physiological monitoring of astronauts in the first expeditions to space (YOUNG; BORGETTI; CLAPHAM, 2018, p. 01-15). However, as well explained by the authors José Faleiros Júnior, Caroline Cavet and Rafaella Nogaroli, the expansion of projects in the field of telemedicine was favorable due to the spread of the use of microcomputers:

> However, the expansion of several projects in Health Telematics had greater prominence and versatility with the popularization of microcomputers in the 70s.12 And since then, Telemedicine, guided by technological advances and the dissemination of Internet access, has scaled as an instrument to ensure health promotion, in the contours idealized in the list of human rights, to those who, for some reason, cannot obtain in person and directly (JUNIOR; CAVET; NOGAROLI, 2020, p. 329).

According to the "Tel Aviv Declaration", adopted by the 51st General Assembly of the World Medical Association in Tel Aviv, Israel, in October 1999, modalities were established for the use of telemedicine, teleassistance, telesurveillance, teleconsultation, integration between two doctors and teleintervention, as well as dealing with responsibilities and ethical standards in the use of telemedicine (JUNIOR; CAVET; NOGAROLI, 2020, p. 327-362). Tele-assistance would consist of providing health aid, carried out at a distance. In telesurveillance or telemonitoring, the use of applications is used, through smartphones, to monitor the patient, remotely (CIPERJ, 1999).

In the teleconsultation, a non-face-to-face medical consultation is carried out, through any telecommunication mechanism. And the integration between physicians is called teleconsultation, which consists of patient care, performed by a physician in person and another doctor at a distance, both acting concomitantly, with medical information being transmitted by electronic resource. In turn, teleintervention is a way in which, although it is not duly provided for in the aforementioned Declaration, it provides for remote control to perform examinations and surgeries, with the aid of a robot or attending physician (CIPERJ, 1999).

Therefore, there are different levels of complexity and services to develop the practice of telemedicine, depending on the need of the patient and the adjustment of the health institutions

that will perform this modality of care (JUNIOR; CAVET; NOGAROLI, 2020, p. 327-362).

Currently, in Brazil, there are several programs related to telemedicine, an example is the "Brazil Networks Telehealth Program", of the public health network; as well as, from the private sector, the "Einstein Telemedicine" project of the Albert Einstein Hospital stands out, which has existed since 2012. However, it was only in 2019, with the Covid-19 pandemic, that the discussion about the importance of telemedicine and its application to bring care to those affected by Covid in the most diverse places of the country without there being risks of contamination to those involved in the consultation.

The great focus for the adoption of telemedicine by both the Unified Health System and private health was due to the fact that, to avoid a greater number of contagions by the Covid-19 virus, social distancing and isolation would be fundamental, as safety measures. In this way, telemedicine has gained a new look, despite the severe criticisms listed, especially by the health professionals themselves. However, due to the needs of that terrible and chaotic moment of global health crisis, there was a need to open minds to technological developments in the health area.

2.1 LEGAL EVOLUTION OF TELEMEDICINE

As a rule, medical care in Brazil occurs in person; It is also a determination of the Code of Medical Ethics of Brazil (Resolution of the Federal Council of Medicine No. 2,217/2018). As noted earlier, there was considerable resistance, by the medical community itself, to accepting this new variety of telemedicine during the Covid-19 pandemic. Just like everything that is new, it causes strangeness at first and needs a process of adaptation.

In this bias, there is provision for prohibition in the Code of Medical Ethics regarding the prescription of treatments or procedures without, at first, an examination being performed, with direct contact between the doctor and the patient. Thus, it is understood when interpreting such a prohibition that telemedicine would not be allowed in Brazil. However, in article 37 of the Resolution of the Federal Council of Medicine No. 2,217/2018, in chapter V, there is a caveat that, in case of urgency or emergency, when there is a proven impossibility to perform the direct examination by the doctor, the possibility of adopting telematic means to bring the right to health to the patient. See: "It is forbidden to the doctor:":

> Art. 37 Prescribe treatment and other procedures without direct examination of the patient, except in cases of urgency or emergency and proven impossibility of performing it, in which case it must do so immediately after the impediment has ceased, as well as consult, diagnose or prescribe by any means of mass communication.

Still, in the aforementioned article, in its paragraphs 1st and 2nd bring the idea of

telemedicine, as denoted below:

> § 1 - Medical care at a distance, in the form of telemedicine or other method, shall be given under regulation of the Federal Council of Medicine.
> § 2 - When using social media and related instruments, the physician must respect the rules developed by the Federal Council of Medicine.

However, the use of telemedicine has been very slow in the country since that time. Already in the year 2020, during the crisis faced by the coronavirus (SARS-CoV-2), Law No. 13,989, also provided for the use of telemedicine, but authorizing it to be exercised during the aforementioned crisis, as well as in an emergency nature (art. 1 and art. 2). And, in its art. 3 brings a new concept to telemedicine, incorporating the technologies and, even, in art. 4 adduces the duty of information on the part of the doctor, to communicate to the patient about the limitations of telemedicine, given the impossibility of face-to-face care and direct examination. Finally, other regulations coexist, such as CFM Letter No. 1,756/2020, also from 2020, which recognizes the procedures to be performed by medical professionals through telemedicine. Likewise, Ordinance No. 467, of the Ministry of Health, of March 20, 2020, in addition to providing for the possibility of practicing telemedicine and the ethical part, for this purpose; however, with the limitation of application to the

as long as the pandemic lasts.

In summary, despite the restrictions regarding the use of telemedicine in Brazil, it can be considered as an activity with ethical foresight, and can be performed, but in obedience to the norms and regulated legislation, such as the provisions of the Federal Council of Medicine, the Medical Ethics Council, Resolution No. 1,643/2002, Law No. 13,989/2020, Ministerial Ordinance No. 467/2020 and the Office of the CFM No. 1,756/2020. And, of course, with the care of observance of the other laws, which are inherent in the human being.

In addition, Federal Deputy Adriana Ventura presented two Bills, PL 1.998/2020 and PL 2.394/2020, concerning telemedicine. Such projects are, in due order, awaiting consideration by the Federal Senate and awaiting the opinion of the Rapporteur in the Social Security Commission, as informed by the Chamber of Deputies. In PL 1.998/2020 points out in its menu the search for authorization and definition of the practice of telemedicine throughout the national territory. While in the other bill referred to, it is attributed to the authorization, "to health professionals, the exercise of the profession at a distance by means of technologies, in the form that it specifies."

Therefore, it is a topic, legally versing, that lacks much discussion and an effective normative regularization, as well as a majority and specific understanding, since the greatest concern is the protection of data, both of the professional and of the patient. Taking into account

that it is also a major problem faced by the wide use of digital media today. And, regrettably, the *internet* is still not a safe environment and all digital platforms are interconnected directly to networks.

2.2 PANDEMIC CONTRIBUTION

In a way, like everything bad that happens, there is always something good and profitable to learn. After all, everything is learning. And for all the sadness, significant losses and fears that the Covid-19 pandemic has brought, it is vital to look at the proficient side of this whole situation.

SARS-CoV-2, known as "coronavirus", in addition to having left the world population more "prepared" for an upcoming pandemic, but it is obvious, without the desire for this to be repeated, has favored the evolution of science and expanded the use of digital means for the purpose of providing socialization, maintaining care to contain the contagion.

In addition, it provided that the work was performed remotely, that is, from their respective residences. The use of social networks and platforms, in general, increased the incidence of virtual commerce; After all, the physical stores, with the isolation, needed to reinvent their way of selling, for their own sustenance. Anyway, much has happened from the pandemic, in the digital technological perspective.

In the same follow-up, sanitary measures, in general, aimed at the population, with the aim of stopping the contagion of the Covid-19 virus, also extended to medical care. And, as perfectly is conveyed by the scholars Vinícius César, Yara, Nathalia, Felipe, Vinícius, Alex and Juliano:

> Thus, the usual methods of approach in health had their standard flow of care reduced due to the new reality, which created a gap in the care and diagnosis of patients, that is, it was necessary to apply mechanisms to mitigate the public health apparatus. Consequently, telemedicine has become an important health instrument in the face of the demand for care during social distancing (CELUPPI, et al, 2021, p. 01-12).

In fact, during the pandemic, through the application of telemedicine systems, it made it possible to care for patients with suspected Covid-19, with milder symptoms and who did not need to be hospitalized. With this, more beds were released, for the severe demands of the disease, as well as, the frontline personnel were a little more protected from contamination. Still, other diseases could be supported at a distance, protecting everyone, too, from the imminent contagion (CAETANO, et al., 2020, p. 01-16).

Consequently, through studies carried out, it was found that remote health systems can improve, as well as have already expressly improved, the triage part, the management of care and

the treatment itself. And, these data were also found during the aforementioned pandemic, as it strongly reduced its impact, both in the infectious sphere and in the mental health (SMITH, et al., 2020, p. 01-05).

3 LGPD IN TELEMEDICINE

According to all the above theme, telemedicine, encompassing the understanding with respect to the General Data Protection Law, presented itself in a somewhat uncontrolled way; The pandemic has put everyone's health and lives at risk on a global scale and that speed has been necessary. Faced with this unfavorable scenario, some other risks became susceptible, such as the threat to the integrity, security, and confidentiality of patient data (JUNIOR; CAVET; NOGAROLI, 2020, p. 327-362).

Considering the pre-existing vices in the application of the LGPD, as signaled in this work, corroborates the lack of transparency, security, and explanations, on the part of the government, in the process of managing personal data and in the application of facial recognition technology, for example. And, due to the urgency of adopting digital technological means and communication in general to combat the coronavirus, it demonstrated that the systems connected to *the internet* were not and are not prepared to ensure the personal data of all users, in view of the sudden increase in the circulation of new users and their said data (JUNIOR; CAVET; NOGAROLI, 2020, p. 327-362).

The commodification of personal data is no longer a novelty these days. And, with telemedicine the risk increases, since it is another means of collecting and storing data, now from patients, enabling their identification. To reduce this danger, the LGPD adopts in its legislation the consent of the data subject, enabling, in article 7, item VIII, the approach of personal data, "for the protection of health, exclusively, in a procedure performed by health professionals, health services or health authority;". While, in article 11, item II, of the law, it deals with sensitive data, also composing on the protection of health, in paragraph 'f, "protection of health, exclusively, in a procedure performed by health professionals, health services or sanitary authority;".

However, this exclusivity must be restricted and respect, primarily, the principle of transparency and access to adequate information to the data subject, observing good faith and other principles, in accordance with the provisions of article 6, item VI, of the LGPD. In addition, unusually, the law for data protection brings the following provision in art. 13 and its paragraphs:

> Art. 13. In conducting studies in public health, research agencies may have access to personal databases, which will be treated exclusively within the agency and strictly for the purpose of conducting studies and research and kept in a controlled and safe

> environment, according to security practices provided for in specific regulations and that include, whenever possible, the anonymization or pseudonymization of data, as well as considering the appropriate ethical standards related to studies and research.
>
> § 1 - The disclosure of the results or of any excerpt of the study or research referred to in the caput of this article may under no circumstances reveal personal data.
>
> § 2 - The research body shall be responsible for the security of the information provided for in the caput of this article, not permitted, under any circumstances, the transfer of data to a third party.
>
> § 3 - Access to the data referred to in this article shall be subject to regulation by the national authority and the authorities of the health and sanitary area, within the scope of their competences.
>
> § 4 For the purposes of this article, pseudonymization is the treatment through which a data loses the possibility of association, direct or indirect, to an individual, if not by the use of additional information maintained separately by the controller in a controlled and secure environment.

Although the article alludes to a possible application of a pseudonym, to preserve the identification of the patient, through his personal data, there is a controversy in the law itself, regarding this. In its art. 12, the law does not consider anonymization as a data to be preserved; however, some authors, such as Guilherme Martins and José Faleiros Júnior, explain that the reidentification of data affects the norm, although the limits to this are not clear (MARTINS; JUNIOR, 2019, p. 77).

Nevertheless, it is forbidden to share data, according to the provisions of the LGPD, for the purpose of obtaining economic advantage or that prevents the free development of the personality of the data subject, as well as that favors the discrimination of the individual. In this sense, there is an approach of prohibition to the provision of personal data to health plan operators, to avoid a selection of risks at the time of contracting the service in health care by the user; as well as, avoiding that it is excluded from possible benefits (art. 11, paragraphs 4 and 5 of the LGPD).

However, it is not only in the private sphere the presence of responsibilities, the public power also has obligations, including in the General Data Protection Law, which consequently encompasses telemedicine, incorporating the State and the Indirect Public Administration, either by autarchies, mixed economy companies, public foundations and public companies, which have the duty of execution and legal attribution. In addition, the government behaves as a "data agent", being responsible. (Chapter IV, Processing of Personal Data by the Government, articles 23 to 30, of the LGPD).

As a result of all this overwhelming development for obtaining virtual services, especially telemedicine, Solution Reach has developed a complete and practical guide to proceed with

telehealth in practice. Firstly, it brings about the means of practice in different species, such as the telehealth visit, prepared by telecommunication technology (audio and video in real time); telephone visits, basically occurs via telephone contact; virtual check-ins, either by phone or other device, for the purpose of assessing the need for a face-to-face visit or other service, to proceed with the review of the patient (videos or photos sent by the patient); e-visits, it is an asynchronous visitation of the office with the patient, through a portal or secure email; and remote monitoring, which consists of monitoring the patient's physiological parameters by medical devices.

In this guide, we seek to ensure the protection of data, both patient and of the health professional. Therefore, there is freedom of choice as to the type of visit and the tools to be used to perform the service; still, observing the guarantee of maintaining quality support to the patient, as a priority. In addition, the health professional will be able to determine which services will be provided through telemedicine, and should consider the implementation factors, cost, digital support, technological resources, and increased security.

Next, it is discussed about the consent of the patient and data subject, which must be collected, in strict legal compliance, and can be expressed in written or verbal form, something that is new, due to the pandemic there was a "loosening" in allowing verbal consent. The Content Management System adduces about the permission to capture the verbal consent, at the time the health service is provided; However, the ideal, still, is the written and documented consent.

Finally, although there is comprehensive legislation and resources to assist the telemedicine enterprise, there is still much to improve, since the human being is biased to find loopholes in the laws and to act with malice, for his own benefit. The remote health care system is innovative and has many advantages that benefit everyone involved in this relationship. Nevertheless, care must be taken, especially in the caution with the personal data and sensitive personal data of the holder, in this case of patients, which is the most vulnerable link and susceptible to the occurrence of injustices. Technology has also come to benefit, but an immediate control must be adopted, the *internet* needs to be enforced urgently.

4 FINAL CONSIDERATIONS

In the completeness of the mentions addressed, is society, in a generalized way, prepared for all the evolution that digital and technological means are causing, as well as, will originate in the course of time? Are the expedients of virtual services, enjoyed by the *internet* , properly supported legislatively, being observed by people? Is consent especially prized on digital platforms? And, above all, is telemedicine properly able to be practiced in Brazil, in reverence

for the norms and laws in force?

All the above questioned should be taken into consideration for a genuine analysis in the present work. Of course, there is much to discuss and improve in the legislation regarding data protection and the regular implementation of telemedicine; But neither can be forgotten all the evolution that has already been achieved up to the present day. In addition, it is necessary a process of adaptation and verification of how the laws will be covered and the changes they will bring in the social environment, to later improve them, always taking into appreciation the most precious and protected legal good that is life, and should be worthy. After all, it is the discussions and disagreements that provide us with a more critical look, driven to seek improvement and evolution.

Prior to the General Data Protection Law, the conditions of use of the *internet* were more precarious, being evident the great advance that the Law has already provided, since before there was the request for consent, websites and digital platforms in general, only linked *links*, without the slightest care with the data exposed there. Moreover, only the fact of accessing a certain platform was considered as an implicit acceptance of the forms of application on the *internet* and of that particular site.

Therefore, in addition to what has already been changed normatively, regarding data protection and health care remotely, it is important to study the possibility of having an agency focused on conflicts and crimes in the digital sphere, because even if the data subject is responsible for taking care of their own data, they cannot be helpless in cases of abuse of the consumer relationship and/or between professional and patient. In addition, it would be interesting to open the possibility to include a standard model and accessible to all consumers, in view of the unequally social existing in Brazil, for the terms of policy and privacy. Ending up obtaining the consent of the user, without the technological companies deceiving their consumers and users for profit; as well as extending even to health professionals.

Finally, especially focused on telemedicine, there should be an implementation of regulations, not only based on the LGPD or the Federal Council of Medicine or even legislative resolutions. It must be something specific, governing the conduct of digital platforms, since it is not a merely consumer relationship, it involves the health of a protected being, the profession and professionalism of an individual in the health area, common personal data and sensitive personal data of both (professional and patient), the collection and storage of such data, as well as a whole technological network, which is difficult to control and supervise. In view of this, too, it is very interesting to study the possibility of developing a supervisory body for the entire technological

sphere.

Therefore, in this bias, that the law is always an instrument of change for the social good, for the best of all and as just as possible, this is what society, as a whole, needs and yearns for. And it is through justice, based on an honorable and inclusive right, united to the study of the mind and the human being integrally, that one day we will have a better society and, consequently, a better world to live in, in the fullness of human dignity. Thus, it will cease to be a purely, platonic idea and become a reality.

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