Legal Regulation of the Collection of Personal Health Information Under Public Health Emergencies

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Abstract: As a subordinate concept of personal information, personal health information has its unique connotations due to its unique nature, but as a result of the epidemic, its meaning has been extended. Currently, the collection of personal health information is fraught with scattered legislation, legislation of lower level, and practice problem, including doubtful qualifications, expansion of scope, and disordered methods. At the legislative level, it is necessary to formulate special chapter provisions, revise the next law, and increase the sunset provisions; in practice, it is necessary to define subjects’ responsibility, assess the scope according to the law, enhance information sharing, and strengthen relief procedures to build a comprehensive legal supervision system for personal health information collection.

1. INTRODUCTION

The outbreak of the Corona Virus Disease 2019 (COVID-19) has posed a major threat to people’s lives and health. In epidemic prevention and control, the use of big data to collect personal health information has played a huge role, but at the same time, improper collection behavior has also led to the leakage of personal health information. The issue of personal health information protection has become a hot topic in the field of law. Today, with epidemic prevention and control normalized, the tension between collecting and protecting personal health information still exists, and the fuzzy concept also brings difficulties to the demarcation of the boundary. How to define personal health information, what are the boundaries of public power and exercising power in the field of personal health information, whether the epidemic has brought changes to the definition of personal health information, and how to achieve the balance of public and private interests in the protection of personal health information? These are all issues that have to be considered. Taking personal health information collection as the main entry point, this paper clarifies the concept of personal health information, discusses the balance and game between public power and private rights under public health emergencies, analyzes the basic principles of health information collection, examines the current rules and practices, and puts forward specific suggestions.

2. PERSONAL HEALTH INFORMATION CONNOTATION

The introduction of the Personal Information Protection Law in August 2021 marks a new stage for the protection of personal information in China. However, it does not specify the specific connotation of personal health information. Therefore, it is necessary to study its upper concept, namely, personal information, summarize the general components, and comb and summarize its connotation based on the unique characteristics of health information.

2.1. The legal connotation of personal health information

Personal health information is a special form of personal information. At present, the academic circle has formed two viewpoints on “personal information”: “correlation theory” and “identification theory”. The main difference between the two is the different definitions of denotation[1]. Related theory holds that personal information includes “all kinds of information related to identified or identifiable natural persons”; The identification theory is limited to “identifying information of a specific natural person alone or in combination with other information”[2]. Under big data, non-explicit information can be combined with other information to identify a specific natural person, but the “identification theory” does not include it in the scope of protection. Therefore, this paper believes that the “correlation theory” is more conducive to the protection of personal health information. Therefore, it is necessary to study its upper concept, namely, personal information, summarize the general components, and comb and summarize its connotation based on the unique characteristics of health information.
medical care or health services. These three channels are not medical activities and are not limited to health data. The corresponding health costs and other identifiable information are also included. In addition, Article 4 of the National Health and Medical Big Data Standards, Safety and Service Management Measures (Trial) issued by the National Health Commission also defines the big data of medical and health around healthiness. Based on this spirit, this paper holds that the definition of personal health information is as follows: Personal health information refers to all kinds of information about the physical and mental health of natural persons that have been identified or can be identified during medical activities such as disease examination, diagnosis, treatment and so on.

2.2. New connotation of personal health information under public health emergencies

The Law on the Prevention and Treatment of Infectious Diseases does not limit the scope of health information collected by medical institutions, and the information collected during the epidemic has gone beyond the strict health connotation[3]. It can be said that the connotation of personal health information under public health emergencies has been significantly expanded.

The general sense of personal health information mainly includes four parts: medical service information, health status information, personal texture information, and genetic information. There is no significant change in genetic information under the influence of COVID-19, so theoretically the new connotation should focus on the first three aspects. However, the personal health information collected in practice is not limited to this, but also includes non-traditional but epidemic-related health information such as nucleic acid testing, vaccination, and even travel tracks. It can be found that the extension of health information under public health emergencies has expanded and narrowed compared with the past, and the two are cross-related, adding epidemic-related attributes based on health, even though the information is not a fully health-related explanation.

3. THE JUDGMENT PRINCIPLE OF PUBLIC POWER BOUNDARY UNDER PUBLIC HEALTH EMERGENCY

In the face of a public health emergency, the law grants emergency executive power to the public authority, but this power will impose certain restrictions on the individual rights of citizens. To alleviate the conflict between the two, it is necessary to draw a clear boundary for the exercise of public power.

3.1. The theoretical principle of judging the boundary of public power

The proportionality principle originated from the German police Law in 1802, and was officially invoked by the court in the 1950s with the sign of "Pharmacy case". The background of the birth of the principle of proportionality is to limit the Berlin police's restrictions on the residence rights of residents[4]. Its essence is "the restriction of the limitation of rights", and its core function is to control the discretion of the public power organs. The principle of proportionality contains four sub-principles: justification of purpose, appropriateness, necessity, and balance. The legitimacy of purpose requires that the behavior of the public authority must conform to the legitimate purpose stipulated by law; Appropriateness requires the means of action to achieve the prior end; Necessity requires that the behavior must be the least damaging in the "behavior group"; Equilibrium requires that there should be equilibrium between the damage caused by the behavior and the benefits gained [5]. Up to now, the principle of proportionality has gradually broken through the original restrictions and is reflected in the legislative principles of each departmental law.

3.2. Proportionality in the context of public health emergencies

In the case of public health emergencies, the individual rights of citizens are restricted to a certain extent. The principle of proportionality is undoubtedly the best discretion standard to judge whether such restriction is reasonable and justified[6]. Although some of the spirits of the proportionality principle have been absorbed in each departmental law, there is still a great controversy in the academic circle on whether to formally introduce the proportionality principle into it. At present, there are roughly two opinions: one is to position the principle of proportionality as a constitutional principle, and both state organs and citizens should be restrained. The other is strictly limited and only regulates the exercise of public power by state organs[7]. Therefore, whether the principle of proportionality can be extended to the private sphere determines the scope of application of the principle of proportionality, which is also faced with such a choice in public health emergencies. Just like everyone's daily experience, in epidemic prevention and control, not only do public entities have the right to collect citizens' personal health information, but some private entities also play the same role.

There is no theoretical obstacle to applying the principle of proportionality to the field of public power, but when the subject of behavior is private, whether to apply the principle of proportionality is faced with a choice of position. The essence of the principle of proportionality is the balance of the disparity between the public and private subjects, so its application does not lie in the choice of the field of public and private law, but in the judgment of the disparity between the subject forces. The relationship of private law is not necessarily equal in force, so the application of the proportionality principle cannot be excluded naturally. Therefore, applying the principle of proportionality to the field of private law must satisfy the basic requirement of power disparity between subjects. In a public health emergency, a private subject collecting personal information in the name of epidemic prevention and control has a strong controlling power. Compared with a single information subject, it is a strong
At present, the legal provisions of personal health information collected in our country are mainly formed by the basic law "the Civil Code", "the protection of personal information" as the center, and the special law as a supplement, and supplemented by many administrative regulations, department documents and inter-party regulations of the multi-level legal protection system. At the same time, different local regulations have been introduced to supplement and apply central legislation.

4.1. Defects in existing legal norms

At present, there are some problems in the convergence and conflict of personal health information protection laws [12]. The detailed analysis is as follows:

First, the system structure is chaotic in the absence of special laws. Chinese public health emergency personal health information protection is scattered in different levels of laws, and the lack of special regulations caused the rule conflict and application chaos. For example, Article 12 of the Law on the Prevention and Control of Infectious Diseases limits the subject of information collection to medical institutions, but Article 40 of the Emergency Regulations, as a subordinate law, extends the subject to grass-roots organizations. Breaking through the original limits of the Superior law, the legality is doubtful. Moreover, as the basic law only provides in principle, it lacks effective guidance and operability. For example, Personal Information Security Code 5.4 stipulates special circumstances under which information can be directly collected, but currently, no law gives citizens the right to know about such circumstances, which may lead to the secondary use of information beyond the purpose of epidemic prevention.

Second, the validity level of the norm is low and there are legitimacy defects. Due to the urgency of the outbreak, most of the countries adopted special legislation or issued guiding documents to deal with the epidemic [13]. However, this kind of normative document has the problems of a low level of effectiveness, weak stability, and low predictability [14]. At the same time, the enactment of special laws and guiding documents is in urgent need of timeliness and lack of legitimacy review, which is more likely to cause the problem of legislative overreach or legal conflict. In addition, due to the lack of unified legal norms, local regulations and policies vary, and even layer upon layer, disguised restrictions on the movement of people. For example, Beijing requires people to undergo "two checks every three days", while Jinan requires those who enter the capital to undergo "three checks every five days". Finally, since most of this emergency legislation is for the rapid control of the epidemic, there is usually no provision for civil rights relief, and individual rights cannot be effectively guaranteed [15].

4.2. Personal health information collection in epidemic prevention and control practices

In addition to the specification itself, the specific collection behavior in practice also has risks, which cannot meet the requirements of the principle of proportionality.

First, the qualification of private entities to collect information is questionable. To implement the basic concept of "mass prevention and treatment", many organizations without administrative functions are also involved in epidemic prevention and control, increasing the risk of information leakage. According to the nature of making profits, it can be roughly divided into two categories: first, hospitals, schools, and other non-profit entities but not administrative bodies; second, supermarkets, property properties, and other private entities with the nature of enterprises. The principle of proportionality is applied to review: first, necessity requires irreplaceable behavior. Although the first type of subject plays an important role in the "grid" epidemic prevention and control, it is not irreplaceable. Administrative organs can collect information through information sharing to replace it. Secondly, for the second type of private subject, not only in the aspect of necessity cannot be justified, but also in the purposiveness is worth considering. A large number of private entities like enterprises collect personal health information in the name
of epidemic prevention and control, but their real purpose has not been examined, and there is the possibility of information leakage.

Second, the collection scope is arbitrarily expanded. To accurately detect suspected cases, the scope of information collection is often expanded in practice. It includes two aspects: one is the expansion of the collected subject, that is, it extends to other natural persons related to the information subject. For example, in Yiyang City, Hunan Province, the information includes not only the basic information of the confirmed patients themselves but also their family members. The second is the expansion of the collected content, that is, the collected content is not limited to traditional personal health information, but also includes but is not limited to the current residence, temperature, travel track, etc. The expansion of the collection scope has brought a great risk of leakage and has violated the minimum damage requirements.

Third, repeated collection and mandatory collection. Administrative authorities could use big data to collect personal health information efficiently and conveniently [16], but in practice, citizens are required to repeatedly provide their personal information to various subjects, which violates the principle of necessity. In addition, the collection also has a mandatory character, if one refuses to fill in personal health information, civic behavior will be limited [17], and even the patient will not be able to timely treatment [18]. Such inconveniences to citizens' lives for the sake of epidemic prevention and control may even violate the right to life, but the means and ends are out of proportion.

5. LEGAL APPROACH TO PERSONAL HEALTH INFORMATION COLLECTION UNDER PUBLIC HEALTH EMERGENCIES

Through the above analysis, the collection disorder in practice will cause the infringement of individual rights and interests. Therefore, it is necessary to amend laws and legislate at the legislative level to establish master rules and alleviate legal conflicts. Guidelines and codes of conduct have been issued in practice to protect citizens' rights and interests in health information.

5.1. Promulgating special regulations and adjusting existing norms

For example, the European Union and the United States, which have relatively perfect international information protection rules, have specifically stipulated personal information collection and processing rules in their legislation or cases. But its legislative mode is very different. The United States adopts the centralized legislative model under the pluralistic pattern and emphasizes flexibility [19]. The European Union adopts a unified legislation model dominated by the state. Compared with America, the top-down legislative model of the EU fits our "unified and multi-level" legislative system better, so it can be used as a reference for our country.

First, the Law on the Protection of Personal Information has been amended to set up a special chapter on the protection of personal health information under public health emergencies. Although it seems more appropriate to enact a special law based on a unified legislative approach, it is difficult to avoid the defects of "emergency legislation" if a special law is enacted for a rare event such as a public health emergency. Secondly, if we want to modify other lower laws or special laws, and there is no unified upper law or general law, the legality will be questioned. Therefore, it is most appropriate to increase the special chapter on public health emergencies in the Personal Information Protection Law, which can not only save the cost of the revision law but also provide the basis of upper law for other lower laws and conform to our unified legislative mode.

Second, revise the lower-level law to resolve legal conflicts. First of all, it is necessary to judge whether the lower law constitutes the determination standard of legal conflict. Article 99 of the Legislation Act sets out the principle of censorship as "contrary to the Constitution and the law". But Article 99 is too general and does not mention specific criteria. In practice, judicial organs have given a series of examination standards. As for the different provisions on the subject of the authority of the Emergency Regulations and the Law on the Prevention and Control of Infectious Diseases mentioned above, firstly, they conform to the principle that article 99 contradicts the Constitution and the law; Secondly, the Emergency Regulations arbitrarily expand the subject of power, which goes against the spirit of power limitation. Therefore, it can be determined that the conflict exists and should be modified or cleaned up.

Third, add a sunset clause to the emergency law. In response to the central government's guiding principle of "mass prevention and treatment", relevant laws and regulations (such as the Circular of Xingtai Municipal People's Government on Seven Measures for Mass Prevention and Control of the Epidemic "hereinafter referred to as the Circular") have been issued to subordinate the right of information collection to "intermediate administrative organizations". But this approach has a "warmongering" tendency and conflicts with rational bureaucracy. "Wartime Doctrine" can effectively make up for the lack of management power of the bureaucratic team during the emergency period when the epidemic started, which has a certain positive significance. However, the urgency of epidemic prevention and control has been weakened now that it has become a regular practice. Insisting on "wartime doctrine" at this time will only disrupt the management and coordination among bureaucracies [20]. However, the urgency of epidemic prevention and control has been weakened now that it has become a regular practice. Insisting on "wartime doctrine" at this time will only disrupt the management and coordination among bureaucracies.
5.2. Standardize specific personal information collection behavior

Legal norms are naturally principled, and it is difficult to provide comprehensive protection for various situations in practice. They still need to be supplemented by specific codes of conduct.

First, distinguish the subject, clear authority, and responsibility. It is not appropriate to refuse all private subjects to participate in the information collection work but should issue a specific authorization list, classified authorization, and clear responsibilities. As non-profit organizations are under the leadership or management of relevant departments, the risk of information leakage is relatively low, so they can be used as an assistant for health information collection. However, the activation of such entities only applies to cases where the local epidemic is concentrated and beyond the reach of the local government, and the collected health information should be promptly reported and not stored or processed. Non-profit organizations have a high risk of disclosing personal health information and are not suitable to be the subject of health information collection (note: The party that keeps possession of the collected information within a certain period is the subject of information collection. If the place code is posted only to fulfill the requirements of epidemic prevention and control and the information is not kept in possession, it should not be identified as the subject of information collection, nor should it be identified as the assistant of information collection). If the information is being collected, it should be stopped immediately.

Second, the scope of collection should be judged according to law and the “principle of necessity” should be recovered. The eighth chapter of the Medical Treatment Group of the Joint Prevention and Control Mechanism of The State Council on the Issuance of the Work Manual for Nucleic Acid Detection of Novel Coronavirus in Medical Institutions (Trial Second Edition) (hereinafter referred to as the Notice) sets preliminary limits on the scope of the information collected during nucleic acid detection. Although the Notice is only applicable to nucleic acid testing, all localities can follow the Notice to formulate information collection lists in their regions and publish them so that citizens can timely understand the personal health information they need to provide, and also ensure that all units can collect information according to law and regulations. At the same time, in response to the changing situation of the epidemic, the “principle of least necessity” and the “principle of least damage” should be used to guide specific practices. To be specific: first, no health information will be collected from people who have nothing to do with the outbreak. For example, the collection of citizens’ health information in low-risk areas should be avoided. Second, do not collect more than necessary personal information, such as occupation, political status, marital status, and other private information should not be collected.

Thirdly, we should adhere to the principle of proportionality and build an information-sharing mechanism. The rigid implementation of information collection policies in some regions may endanger the lives and health of citizens, such as the vicious miscarriage of a pregnant woman in Shanghai mentioned above. Of course, the hospital will also be held accountable if it fails to strictly implement the epidemic prevention and control requirements and causes serious consequences. Therefore, for such organizations concerned with the normal production and life of the people, the competent departments should reasonably measure the proportionality of the measures and flexibly implement the information collection policy according to the actual situation. In addition, governments at all levels should establish unified information collection and processing institutions as soon as possible, and use scientific and technological means to achieve information connection and facilitate the normal production and life of citizens.

Fourth, improve the administrative, civil and criminal integration of the relief mechanism. In the administrative field, we will strengthen internal supervision and law enforcement. First of all, for different administrative departments to refine the management provisions, reasonable division of powers and responsibilities, and strengthen internal supervision, from the regulatory system to reduce the risk of information infringement. Second, all departments should strengthen joint law enforcement efforts, focusing on cracking down on information infringement cases, which constitute crimes, and transfer them to judicial organs for handling [21]. In the field of criminal law, the subject of crime should be differentiated and applied, and the relevant charges of “taking advantage of power” should be recommended for professionals engaged in auxiliary work [22]. For non-professionals, general rules may apply. In the civil field, we should improve the burden of the proof distribution system: apply fault liability to individual torts; Apply the principle of no fault to the infringement of state organs; The principle of presumption of fault is applied to non-state organs that only provide auxiliary work to alleviate the dilemma of “difficult proof and high cost of rights protection”.

6. CONCLUSION

Today, as the epidemic has become routine, the idea of emphasizing prevention and control over protection is no longer appropriate, and the strict personal health information collection system needs to be changed. This paper discusses the new connotation and dilemma of personal health information under public health emergencies, puts forward two layers of suggestions on improving the existing legal system and standardizing the specific collection behavior from both theoretical and practical aspects, and applies the principle of proportionality throughout the collection of personal health information. The scope of this paper is only limited to the collection of personal health information, while there are still obvious defects in the storage, processing, disclosure, and deletion of information. It is expected that all parties should work together to seek the balance of public and private interests in the protection of personal health information, maximize the rights and interests of
personal information, and modernize the national governance system and governance capacity.

REFERENCES

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