

從基本權的衝突 探討疫苗護照之實施

Discussion on the Implementation of Vaccine
Passport from the Conflict of Fundamental Rights

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摘要

實施疫苗護照係全球面對新冠肺炎之害，所擬採取的重要防疫措施，經由證明辨識疫苗接種之有無，防止未有接種人士成為疫情破口而繼續擴大傳播，此項措施涉及憲法健康權之實踐，然而經探討疫苗護照仍為廣義醫療資訊之一環，依據憲法資訊自決權之理念，其資訊隱私仍應受保護。針對兩項主要基本權之衝突，立法者可給予衛生主管機關法源依據，以實踐人民健康權，他方面亦須檢討現行醫療資訊隱私保護相關法律，不得對人民醫療資訊之隱私造成過度之干預限制。因人民可主張資訊自決權，更具體落實則即為醫療資訊隱私權之保護，相關主管機關仍應輔導或向人民宣示，針對相關具體作為，倘若人民有不服意見

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或有損害人民權益，應經由行政爭訟保護其權利，甚或經由憲法訴訟以釐清其合憲性。

The implementation of vaccine passports is an important anti-epidemic measure to be taken in the face of the harm of the COVID-19 in the world. Through proof, identification of whether or not to be vaccinated can prevent people who have not been vaccinated from becoming a breach of the epidemic and continue to spread. This measure involves the constitutional right to health. However, it has been discussed that vaccine passports are still a part of broad medical information, and their information privacy should still be protected according to the concept of the constitutional right to self-determination of information. In response to the conflict between the two main basic rights, legislators can provide the competent health authority with a legal basis to practice the right to health of the people. Others must also review the current laws on the protection of medical information privacy and not cause excessive interference with the privacy of people's medical information. Because the people can claim the right of information self-determination, and the more specific implementation is the protection of the right to privacy of medical information. The relevant competent authorities should still provide guidance or declare to the people that if the people have any dissatisfaction or harm the people's rights and interests. They should go through the Administrative disputes protect their rights, or even go through constitutional proceedings to clarify their constitutionality.

壹、前言

新冠肺炎禍害全球，各國莫不採取斷然措施以防止此種傳染病之危害，各先進國家更是致力研發醫治藥品與疫苗，尤其是疫苗的問世，經由接種可預防染病，大大抑制了廣泛的傳染。然而對於接種疫苗的態度，並非人人接受，故容易造成預防感染的缺口；為鼓勵與推動疫苗接種，各國紛紛採取各項有力措施，其中疫苗護照即為重要措施之一。但民主國家重視自由與人權，倘若實施疫苗護照，在一定範疇下難免影響人民相關權利與基本人權，本文即探討實施疫苗所涉主要基本權，有關健康權與資訊自決權，並深入其衝突與調和。另以基本權衝突為基礎，進一步探究實施疫苗護照相關議題，提出結論與建議，以為參考。

貳、所涉主要基本權之衝突

一、健康權

衛生主管機關實施疫苗護照措施，主要目的冀人民能免於傳染病之危害，而為維護健康，針對此項權利在憲法理論上亦有健康權之保障概念。而針對健康權而言，依據憲法第22條規定，凡人民之其他自由及權利，不妨害社會秩序公共利益者，均受憲法之保障，因此憲法未列舉之固有權，諸如：生命權、身體權、人性尊嚴及人格權仍受保障，重要者為生命權、身體權。而健康權雖非屬固有權之範疇，我國憲法亦未明示人民有健康權，然而其實已包含於生命權與身體權之範疇¹。在我國憲法有關國民健康之規定，係以間接規範之方式實現健康權之保障事項與精神，如依據憲法第157條規定，國

1 李震山，多元、寬容與人權保障——以憲法未列舉權之保障為中心，元照，二版，2007年9月，144-148頁。