

# On the Scope of Constitutional Protection for the Right to Health

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**Abstract:** *The understanding of the scope of protection for the right to health should not be limited to fragmented descriptions in departmental laws, such as those focusing on rights, interests, or legal benefits. Instead, it should be analyzed holistically within the constitutional framework of fundamental rights. From the perspective of defense right function, the right to health addresses physiological harm that progresses through stages of “risk-danger-infringement,” psychological harm that targets inner distress, and minor harm arising from challenges in social adaptation, to clarify the negative defensive obligations of the state to prevent health-related harm. From the perspectives of the beneficiary right function and the objective value order function, the right to health requires a minimum level of constitutional protection and delineating the positive obligations of the state to ensure it through the fulfillment of basic obligations in healthcare and health promotion.*

**Keywords:** constitution ♦ human rights ♦ right to health ♦ scope of protection ♦ state obligations

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## I. Proposal of the Inquiry

As an international human right<sup>1</sup>, the right to health has been recognized and enshrined in China’s current legal system. However, the specific content of its protection has not been uniformly defined at the legal normative level in China. For example, the right to health is recognized as a material personality right in Article 1004 of the *Civil Code of the People’s Republic of China* (hereinafter referred to as the *Civil Code*), as a personal right in Article 38 of the *Law on the Protection of Women’s Rights and Interests*, as a public law right in Article 34 of the *State Compensation Law*, as a social right in Article 4 of the *Law on Basic Medical and Health Care and the Promotion of Health*, and as a protected legal interest in Articles 232 to 235 of the *Criminal Law of the People’s Republic of China* and Articles 43 and 45 of the *Law on Penalties for*

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<sup>1</sup> The right to health is primarily recognized as an international human right by the *Constitution of the World Health Organization* and the *International Covenant on Economic, Social and Cultural Rights*. For instance, China signed the *Constitution of the World Health Organization* on July 22, 1947, and the treaty came into force for China on April 7, 1948. Additionally, China signed the *International Covenant on Economic, Social and Cultural Rights* on October 27, 1997, and the treaty came into force for China on June 27, 2001.

*Administration of Public Security*. It is evident that different departmental laws have varying understandings of the scope of protection for the right to health. This leads to differentiated and ambiguous connotations of the right to health in different legal relationships and results in a fragmented and uneven level of protection for the right to health across the entire legal order.

To obtain a comprehensive understanding of the right to health, it is necessary to elevate the perspective to the constitutional level and integrate and define its normative connotations through the concept of fundamental rights in the supreme law of the state. In China, some scholars have derived that the right to health is a fundamental right under the *Constitution of the People's Republic of China* (Chinese Constitution) by relying on unenumerated rights and Article 33(3) of the *Constitution*, in the context of fulfilling international convention obligations and protecting inherent rights.<sup>2</sup> The normative content of the right to health in China is determined through several provisions in the Chinese Constitution, including Articles 21, 26(1), 36(3), and 45(1). These provisions establish that the right to health includes the inviolability of citizens' health, the right to receive medical care, material assistance, public health services, and institutional safeguards for health. However, a unified understanding of the scope of protection for the right to health has yet to be formed in constitutional doctrine. For instance, debates continue in academia regarding whether the right to health is a liberty right or a social right, a positive human right or a negative human right, and its nature as a positive or negative right within the functional system of fundamental rights. Given the current background, this paper proposes to review and reflect on existing viewpoints to explore the scope of constitutional protection for the right to health.

## **II. The Normative Sources of the Scope of Protection of the Right to Health**

In the early development of international human rights law, the scope of protection for the right to health was structured into a normative framework composed of the objects of protection and the levels of protection. After being transformed by domestic departmental laws, the abstract declaration of the right to health in international human rights law is further concretely articulated as various health protection contents represented by rights, interests, legal interests, and standards. At the level of national constitutional abstraction, the right to health, as a fundamental right, transcends the divergent understandings of the right to health by different departmental laws. Its normative connotations are defined by constructing various types of state obligations.

### **A. Tracing its origins and development in international human rights law**

The scope of protection for the right to health can be traced back to the

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<sup>2</sup> Jiao Hongchang, "Right to Health as a Fundamental Human Right," *Journal of CUPL* 1 (2010): 18.

definition articulated in the preamble of the *Constitution of the World Health Organization*, adopted in 1946. The *Constitution* defines health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity,” and it declares that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.” This definition and recognition of the right to health in the *Constitution of the World Health Organization* have shaped the subsequent interpretation of the scope of protection for the right to health in international human rights law.

Adopting the protection object as the interpretative approach, international human rights law has further narrowed the normative connotations of the right to health to two aspects: Physical and mental health, without incorporating the aspect of social adaptation as stipulated in the *Constitution of the World Health Organization*. The concept of social adaptation is inherently ambiguous and unclear; its completeness ultimately depends on a person’s overall physical and mental state. Forcing its inclusion into the scope of the right to health would severely undermine its practical effectiveness.<sup>3</sup> For example, Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and Article 16 of the *African Charter on Human and Peoples’ Rights* both define the scope of the right to health as encompassing only physical and mental aspects.

Adopting the level of protection as the interpretative approach, international human rights law defines the right to health through the concept of the “highest attainable standard of health.” For example, Article 24 of the *Convention on the Rights of the Child* explicitly states that children have the right to enjoy the highest attainable standard of health and to access healthcare services. Article 25 of the *Universal Declaration of Human Rights* further elaborates that the highest attainable standard of health includes, but is not limited to, food, clothing, housing, medical care, and necessary social services. The ability to achieve this “highest attainable standard” is essentially contingent upon the diversity and effectiveness of the protective measures provided by the state. For instance, the *European Social Charter* defines the right to health from the perspective of state obligations, requiring member states to take measures to eliminate the causes of diseases and to provide advisory and educational facilities for promoting health. The Committee on Economic, Social and Cultural Rights, in its *General Comment No.14* issued in 2000, clarified that the highest attainable standard of health includes access to available, accessible, acceptable, and quality facilities, goods, services, and conditions related to health.

From a comprehensive perspective, the interpretative approach focusing on the objects of protection has revealed that the right to health encompasses physical and mental aspects. However, it still fails to clarify the normative

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<sup>3</sup> Lin Zhiqiang, *Study on the Right to Health* (Beijing: China Legal Publishing House, 2010), 16.

connotations that the concepts of physical and mental health should possess. Although the Office of the United Nations High Commissioner for Human Rights and the World Health Organization attempted to describe the normative content of the right to health in their jointly published document “*Fact Sheet No.31: The Right to Health*,” the explanations provided are only vaguely related to the negative freedoms concerning infringements to physical health, such as forced medical treatment, torture, and harm caused by abuse. These descriptions do not comprehensively list other health-related harms that states may inflict on individuals, let alone develop a more abstract and explanatory framework for health-related harms. The interpretative approach that focuses on the level of protection has not directly defined the normative significance that the concept of health in biomedicine should possess at the legal level. The highest attainable standard of health is, at best, a legal requirement proposed in terms of the level of protection, and this requirement ultimately has to revert to the evaluation of the effectiveness of protective measures. It is evident that the attempts and efforts of international human rights law to interpret the right to health in a normative manner cannot eliminate the inherent ambiguity of the concept itself. If one wishes to further understand the right to health in legal terms, it is necessary to seek a corresponding basis in more specific legislation.

### **B. Specific provisions in domestic departmental laws**

The right to health provisions in international human rights law are primarily realized through the legislative obligations of the contracting states. For instance, according to Articles 2 and 12 of the ICESCR, contracting states are required to take the maximum available measures and employ all appropriate means, especially including legislative measures, to progressively realize the right to health.

#### **1. Recourse to civil law**

The right to health can find its basis in the provisions on material personality rights in civil law. In other words, the right to health exists within the legal relationships among private entities and does not encompass the state’s obligations regarding the right to health. Article 1003 and Article 1004 of the *Civil Code* stipulate that natural persons enjoy the right to bodily integrity and the right to health, respectively. Since the infringement of the right to health is usually a byproduct of the violation of bodily integrity, the scope of protection for the right to health in civil law can easily overlap with that of bodily integrity.<sup>4</sup> According to the understanding of the Legislative Affairs Commission of the Standing Committee of the National People’s Congress, the scope of protection for the right to health is defined as the normal functioning of each part of the

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<sup>4</sup> Li Yixian, “Research on the Protection of the Right to Health — From the Perspective of Tort Law,” *Journal of Yunnan University (Law Edition)* 5 (2014): 34.

body and the overall bodily functions.<sup>5</sup> The Supreme People's Court of China has further interpreted health as the perfection of both physiological and psychological functions, which means that the scope of protection for the right to health under civil law is directed towards the harmful consequences caused by the infringement of another person's body.<sup>6</sup> According to the "*Classification of Human Body Injury and Disability Levels*" jointly issued by the "two courts and three ministries" (The Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice), personal injury is defined as structural damage or functional impairment to the human body's tissues and organs. Therefore, the key distinction between the right to health and the right to bodily integrity lies in whether the tortious act has caused structural damage or functional impairment to the human body's tissues and organs. If the tortious act has not yet caused a harmful outcome, the right to bodily integrity is invoked to protect the integrity of the physical tissues of the person (for example, forced blood drawing, forced extraction of genetic cells, forcibly cutting a person's hair, etc.).

## **2. Recourse to criminal law and criminal procedure law**

In criminal law, the normative connotations of the right to health are directed towards the protection of health-related legal interests, particularly as reflected in the crimes against personal rights stipulated in Chapter IV of the *Criminal Law* of China.<sup>7</sup> Among these, crimes such as intentional injury, causing serious bodily harm through negligence, and organizing the sale of human organs are all offenses that infringe upon the legal interests related to human health. The understanding of health-related legal interests in criminal law mainly includes two aspects: First, harm to health refers to the infringement of the integrity of the body (including significant changes to its physical appearance), but actions such as cutting hair or nails, although they may affect the integrity of appearance, do not constitute harm to health-related legal interests as long as they do not cause damage to physiological functions. Second, harm to health involves impairments to physiological and psychological functions, specifically including disabilities such as limb amputation, disfigurement, and harm causing loss of hearing, vision, and other organ functions.<sup>8</sup> It can be seen that the health-related legal interests protected by criminal law do not actually distinguish between the right to health and the right to bodily integrity. As long as the

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<sup>5</sup> Huang Wei, *Interpretation of the Personality Rights Section of the Civil Code of the People's Republic of China* (Beijing: Law Press • China, 2020), 60.

<sup>6</sup> the Civil Code Implementation Working Group of the Supreme People's Court, *Understanding and Application of the Personality Rights Section of the Civil Code of the People's Republic of China* (Beijing: People's Court Press, 2020), 139.

<sup>7</sup> Zhang Hongmao, "The Normative Update and Significance of Criminal Protection of the Right to Health — Starting with Amendment to the *Criminal Law* (XI)," *The Journal of Human Rights* 1 (2021): 97.

<sup>8</sup> Zhang Mingkai, *Criminal Law (Part II)* (Beijing: Law Press • China, 2021), 1117.

functioning and perfection of another person's physiological and psychological functions are impaired, it falls within the scope of protection of health-related legal interests. In criminal procedure law, actions that infringe upon the right to health are mainly procedural acts that are legally made or prohibited in order to advance the implementation of criminal proceedings, such as compulsory medical treatment for irresponsible mentally ill persons, the use of torture or disguised torture against criminal suspects to extract confessions, etc.

### **3. Recourse to administrative law**

The scope of protection for the right to health in administrative law is defined based on the harmful consequences of illegal acts on human health, specifically including health hazards and health risks. In police law, when a specific threat to citizens' health can be foreseen, public security authorities have the responsibility to counteract illegal acts that pose a danger to citizens' health. For example, Articles 43 and 45 of China's *Law on Penalties for Administration of Public Security* stipulate penalties for acts such as assaulting and intentionally harming others' bodies, abuse, and abandonment, which pose a danger to others' health. Meanwhile, acts that endanger public health by disrupting social security and management are also subject to penalties. For instance, Article 38 of the *Law on Penalties for Administration of Public Security*, which regulates safety accident risks arising from large-scale public events such as cultural and sports activities, falls into this category. In environmental protection law, food safety law, and pharmaceutical management law, the scope of protection for the right to health has been extended to the field of risk prevention. For example, Article 42 of China's *Environmental Protection Law* stipulates health risks arising from water pollutants, air pollutants, noise, and radioactive radiation. Article 17 of the *Food Safety Law* specifies health risks caused by biological, chemical, and physical hazard factors in food, food additives, and related products. Article 12 of the *Pharmaceutical Administration Law* addresses health risks resulting from adverse drug reactions and harmful effects of medication.

### **4. Recourse to law on basic medical and health care and the promotion of health**

The *Law on Basic Medical and Health Care and the Promotion of Health* is designed to protect the right to health not through negative obligations of non-interference or non-restriction by the state, but through positive obligations that provide a series of institutional safeguards through effective legislation.<sup>9</sup> For example, Article 1 of the *Law* explicitly defines the scope of protection for the right to health as improving the health level of citizens, which specifically includes providing medical services, medical and health institutions, medical and health resources, drug supply, public health services, and health social

<sup>9</sup> Zhang Boyuan, "Human Rights Value Based on the Legislation Principle of the Basic Healthcare and Health Promotion Law," *The Journal of Human Rights* 2 (2019): 93.

security. Besides, the *Social Insurance Law*, which is complementary to it, ensures the health level of citizens through systems such as basic medical insurance for workers, new rural cooperative medical care, and basic medical insurance for urban residents. The *Interim Measures for Social Assistance* stipulate the provision of relevant medical assistance to members of minimum living security families and persons receiving special hardship support. It can be seen that the *Law on Basic Medical and Health Care and the Promotion of Health* defines the scope of protection for the right to health through a series of state guarantee measures.

### **5. Summary**

Specific provisions in domestic departmental laws in China continue to follow the interpretative framework of international human rights law, which is structured around the objects of protection and the levels of protection, in defining the scope of the right to health. For example, civil law addresses personal injury, criminal law and criminal procedure law address harm to health, and administrative law addresses health hazards and health risks, all of which are based on the interpretation of the objects of protection for the right to health. The *Law on Basic Medical and Health Care and the Promotion of Health*, on the other hand, focuses on the level of protection by setting the realization of the right to health in terms of improving health standards. However, as previously discussed, neither the object-based nor the level-based approach alone can fully capture the normative content of the right to health. Research on the scope of protection for the right to health should return to the original definition in the *Constitution of the World Health Organization*, combining both approaches for a comprehensive interpretation.

### **C. The abstract generalization in the national constitution**

The varying definitions of the scope of protection for the right to health by different departmental laws fail to capture the complete and essential connotations of the right to health. Research on the right to health should return to the constitutional level, treating it as a fundamental right and conducting generalized studies on a more abstract level.

The right to health is a fundamental right that has emerged in fact. It is a natural right that exists prior to state recognition, alongside rights such as liberty, the right to life, and personality rights.<sup>10</sup> Legislation can only externally restrict the exercise of fundamental rights that have been formed, but it cannot determine their core of protection. In contrast, rights such as marital and family rights, the right to vote, and social rights need to be effectively realized through national legislation.<sup>11</sup> Therefore, legislation can determine the scope of protection for the

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<sup>10</sup> Michael Nierhaus, Grundrechte aus der Hand des Gesetzgebers? — Ein Beitrag zur Dogmatik des Art. 1 Abs. 3 GG, AöR 116 (1991) S.83.

<sup>11</sup> Christian Bumke, Der Grundrechtsvorbehalt: Untersuchungen über die Begrenzung und Ausgestaltung der

right to health and restrict it after its formation. It is evident that the scope of protection for fundamental rights that have been formed, in fact, can only be established at the constitutional level.

The scope of protection for the right to health essentially concerns the proper depiction of the “human image” in the constitution. According to the understanding of the German Federal Constitutional Court (GFCC), a person is a “unity of body, soul, and spirit.”<sup>12</sup> In Sentence 1 of Article 2(2) of the *German Basic Law*, if the right to health is observed from the perspective of biological integrity, it is evident that it is not named “health” (*Gesundheit*), but rather elucidated as “bodily integrity” (*Körperliche Unversehrtheit*), which establishes the healthy foundation for the existence and development of the individual.<sup>13</sup> The right to health in the *German Basic Law* is derived from the provision on the right to bodily integrity in Sentence 1 of Article 2(2). In the Airport Noise case, the German Federal Constitutional Court expanded the scope of protection through its interpretation of the right to bodily integrity, extending it to a broader concept of the right to health, which means that the right to bodily integrity should not be confined to the absence of physical harm but should also encompass protection against psychological distress and even aspects of social comfort and well-being. A narrow interpretation focusing solely on biological and physiological aspects does not align with the essence of this fundamental right. Protection against psychological interrogation, mental torture, and other equivalent forms of questioning should also be part of the defense right function.

It should be particularly noted that the right to bodily integrity, as the precursor to the right to health, is substantially different from the right to bodily integrity in civil law. The right to bodily integrity in civil law is a material personality right, which focuses on the integrity of the body’s components, such as limbs, tissues, and organs. In the case of the loss of stored sperm, the German Federal Court held that the object of protection of the right to bodily integrity is not the material itself, but the existence of personality and its autonomous decision-making sphere. Specifically, individuals have the right to autonomously decide whether to separate parts of their body in order to maintain bodily functions.<sup>14</sup> The right to bodily integrity under the constitution refers to the protection against harm in the biological sense of existence. This right is granted by the constitutional order and is a factual interest that can be experienced through “all the senses.”<sup>15</sup> The separation of the right to bodily integrity from the right to health in civil law theory is a technical operation implemented in doctrine to effectively protect the integrity of the body. However,

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Grundrechte, Baden-Baden: Nomos, 1998, S.180.

<sup>12</sup> BVerfGE 56, 54 (75).

<sup>13</sup> Ekaterini Iliadou, *Forschungsfreiheit und Embryonenschutz*, Berlin: Duncker & Humblot, 1999, S.135.

<sup>14</sup> BGHZ 124, 52.

<sup>15</sup> BVerfGE 39, 1 (37).



from the perspective of the generality of fundamental rights, both the right to health and the right to bodily integrity in civil law are designed to guard against adverse consequences to the body. The constitutional protection of the human body starts from understanding biological unity, and the right to bodily integrity at least also includes the meaning of “inviolability of the body.”<sup>16</sup> In other words, the scope of constitutional protection of the right to health broadly includes the content of the right to bodily integrity.

The right to health in the Chinese *Constitution* is somewhat different from that in other countries. It is neither derived from a provision on bodily integrity like in the *German Basic Law*, nor explicitly stipulated as a fundamental right in the constitution like in some other countries. For example, Article 35(1) of the *Constitution of 2009 of the Plurinational State of Bolivia* and Article 61 of the *Constitution of the Dominican Republic* directly recognize the right to health as a fundamental right of citizens. In China, the right to health is not explicitly listed as a fundamental right in the constitution; instead, it is specifically protected as an unenumerated fundamental right.<sup>17</sup> Based on the hierarchy of rights, human rights can be divided from the top down into the level of inherent rights, the level of constitutional fundamental rights, and the level of general legal rights.<sup>18</sup> The right to health, as an inherent right that exists prior to its confirmation by the state<sup>19</sup>, falls under the category of unenumerated fundamental rights covered by the general human rights clause in Article 33(3) of the Chinese *Constitution*. The reason why the right to health can become an unenumerated fundamental right in the Chinese *Constitution* is as follows: First, the right to health possesses the qualities of a fundamental right. In terms of the nature of the right, the right to health is closely related to the protection of rights such as life and personality, and it also involves the realization of human dignity through self-governance and self-determination. In terms of the need for protection, the right to health has a universal nature across countries. Moreover, the right to health has been recognized by international human rights law as an international human right, thus possessing the value of a “general human right.” Second, the right to health has the potential for realization as a fundamental right. Some scholars believe that the true meaning of the explicit enumeration of fundamental rights in the constitution is that the constitution has the obligation to fully realize them. That

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<sup>16</sup> Lin Mingxin, “The Right to Health — Centered on the State’s Duty to Protect,” *Lecture on Jurisprudence* 32 (2005): 28.

<sup>17</sup> Jiao Hongchang, “Right to Health as a Fundamental Human Right,” 18; Li Guangde, “Dilemma and the Way for the Realization of the Right of Health,” *Social Sciences in Yunnan* 6 (2019): 116; Tan Hao and Qiu Ben, “Legislative Structure of the Right to Health: With the Basic Medical Care and Health Promotion Law of the People’s Republic of China (Draft) as the Object,” *Nanjing Journal of Social Sciences* 3 (2019): 92.

<sup>18</sup> Li Zhenshan, *Diversity, Tolerance, and Human Rights Protection: Focusing on the Protection of Unenumerated Rights in the Constitution* (Taipei: Angle Publishing Co., Ltd., 2007), 13-15.

<sup>19</sup> Lin Laifan, “The Fundamental Rights and Obligations of Citizens,” in *Constitutional Law (the 4<sup>th</sup> edition)*, Xu Chongde ed. (Beijing: Renmin University of China Press, 2009), 167.

is, fundamental rights enjoy a set of operational mechanisms constructed by the constitution through the distribution of social resources.<sup>20</sup> If unenumerated rights also possess the qualification for social resource allocation and thereby obtain institutional safeguards from the constitution, then it should not be denied that unenumerated rights should enjoy the same fundamental rights' status as explicitly enumerated rights. The determination of whether the constitution has and what kind of state obligations to realize fundamental rights points to the content and requirements of the fundamental rights' functional system. Thus, the core issue is whether the right to health possesses and what kind of fundamental rights' functions to obtain the qualification for social resource allocation, thereby becoming an unenumerated fundamental right in the Chinese *Constitution*. Such functional content needs to be determined through a systematic interpretation of China's constitutional text.

In the Chinese *Constitution*, the right to health is manifested as a "composite normative structure," which can be jointly deduced through a normative system composed of "general human rights clauses," "right to subsistence clauses," and "national objective clauses" to define the scope of protection of the right to health. The general human rights clause for the right to health is based on Article 33(3) of the *Constitution*. Some scholars in China believe that the right to health, at the level of inherent rights, is one of the human rights that the state respects and protects.<sup>21</sup> The obligation of the state to respect the right to health is of a negative nature, meaning non-intervention and non-restriction. Based on the defense right function of the right to health, its normative content can be specifically interpreted as prohibiting harm to the physical health of citizens. The state's obligation to protect and fulfill the right to health is of a positive nature, involving provision and promotion. This is based on the right to health's beneficiary right function and objective value order function. Specifically, its normative content can be divided into the provision of minimum medical and health care and basic health promotion. Regarding the beneficiary right function under the right to health, Article 45(1) of the *Constitution* establishes the protection of minimum living conditions. Citizens have the right to receive minimum medical and health care from the state when they are elderly, ill, or have lost their ability to work. Regarding the objective value order function of the right to health, Articles 21 and 26(1) of the *Constitution* establish the national goal of basic health promotion. The state is required to actively develop the medical and health care and sports industries and to actively protect and improve the living and ecological environment.

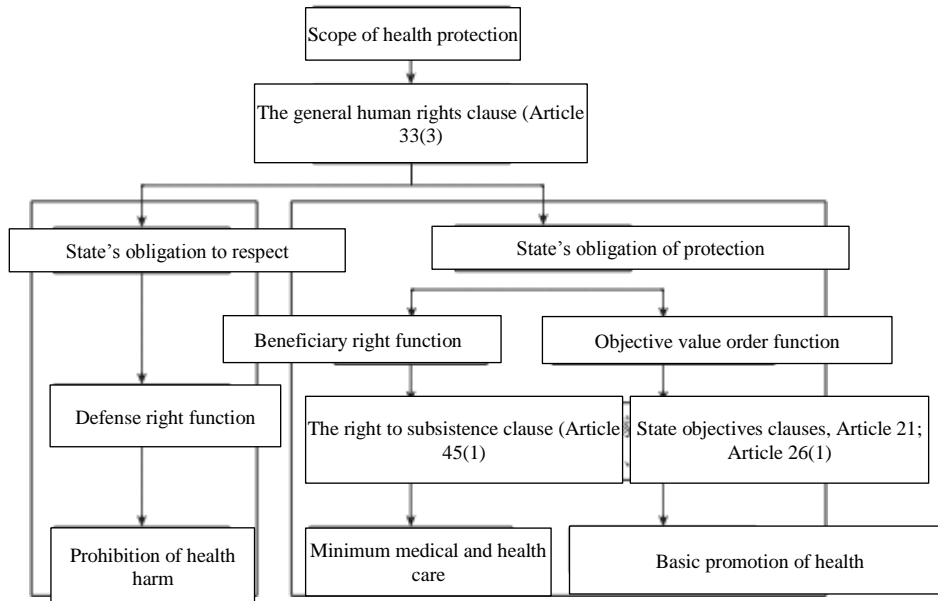
It can be seen that, through the functional system of fundamental rights, the

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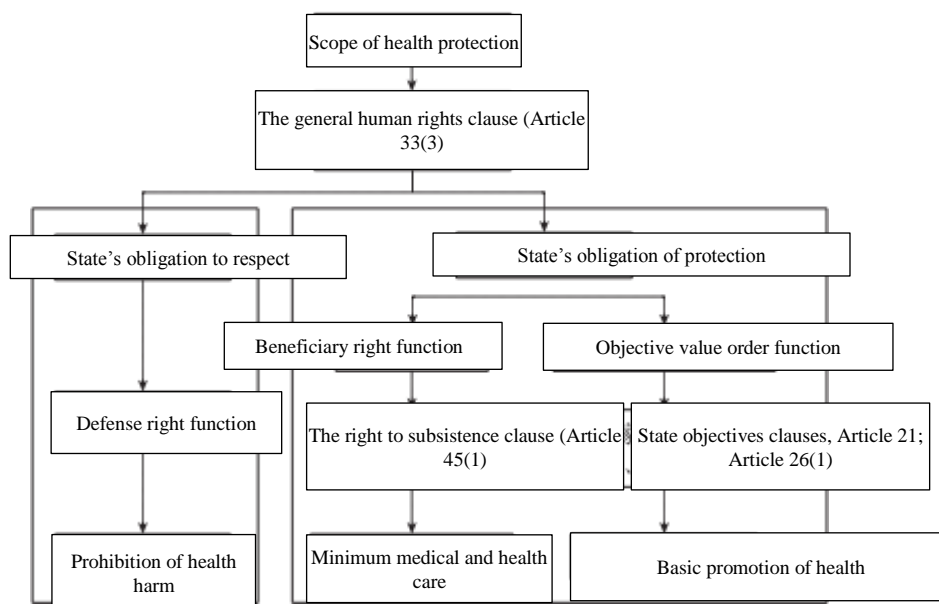
<sup>20</sup> Qin Xiaojian, "Why Does the Constitution Enumerate Rights? — The Normative Content of Rights in Chinese Constitution," *Law and Social Development* 1 (2014): 95.

<sup>21</sup> Jiao Hongchang, "Right to Health as a Fundamental Human Right," 19.

right to health, as an unenumerated fundamental right in the Chinese *Constitution*, can have its scope of protection determined through different types of state obligations corresponding to different functions. Among these, the interpretative approach represented by the objects of protection has been concretized in the Chinese *Constitution* as the defense right function of the right to health, that is, by specifying the types of harm to citizens' physical health, the scope that the state must not infringe upon is clarified. The interpretative approach represented by the level of protection has been concretized in the Chinese *Constitution* as the beneficiary right function and the objective value order function of the right to health, that is, by specifying the state's provision and promotion of citizens' physical health, the scope of protection through the state's positive actions is clarified.<sup>22</sup> Accordingly, the scope of constitutional protection of the right to health is structured as shown in Figure 1.:



<sup>22</sup> Li Zhongxia, "Social Logic and Chinese Model of Constitutional Function Transformation," *Chinese Journal of Law* 2 (2022): 13.



**Figure 1 The Scope of Constitutional Protection of the Right to Health**

### III. The State's Obligation to Respect the Right to Health

The content of the state's obligation to respect citizens' right to health should be classified through the method of literal interpretation in the factual domain, encompassing all behaviors or states related to health. In the realm of protection, content that is not worthy of constitutional protection should be excluded through the methods of historical and teleological interpretation.<sup>23</sup> Accordingly, the objects that the right to health targets when fulfilling its defense right function can be clarified. These are divided into three progressive categories based on the criteria of "risk-danger-interference": physiological harm, psychological harm aimed at inner suffering, and minor damages arising in the process of social adaptation. Based on this division, the state's public power should fulfill the corresponding obligation to prohibit health-related harm in the negative intervention aspect of the right to health.

#### A. Classification in the factual domain

The connotation of the state's obligation to respect the right to health should first be clarified in the factual domain by identifying the characteristics of its constituent elements, which involves employing the method of textual interpretation to elucidate what health is, as well as the behaviors or states that are related to health.<sup>24</sup> The function of the factual domain is to incorporate all

<sup>23</sup> Wang Kai, "Defining the Protection Scope of Fundamental Rights," *Chinese Journal of Law* 5 (2020): 110-113.

<sup>24</sup> Benjamin Rusteberg, *Der grundrechtliche Gewährleistungsgehalt: Eine veränderte Perspektive auf die*

areas related to health into the scope of the right to health. For example, in the case of the right to freedom of speech, any speech that contains elements of opinions and viewpoints falls within the scope of protection, regardless of whether it is true or false, correctly expressed, based on emotion or reason, valuable or worthless, dangerous or harmless. Therefore, the definition of the right to health in the *Constitution of the World Health Organization*, which encompasses physical, mental, and social well-being, is essentially a delineation of the right to health at the factual domain level. Although it has been criticized as an idealistic or utopian approach to definition, it does not detract from its role as the first clue in defining the scope of the right to health. Traditionally, the understanding of the three protected objects stipulated by the *Constitution of the World Health Organization* is essentially the normal functioning of physiological functions and the perfect performance of physiological functions, the good development of psychological states, and the complete state of social adaptation. However, these concepts are not normative legal concepts. For empirical or factual concepts in natural and social sciences, normative construction of concepts should be completed through institutional reflection in legal doctrine.<sup>25</sup> In jurisprudence, “*Beeinträchtigungen*” (translated as “interferences” or “impairments”) refers to actions or consequences that may cause harm or damage to any legal right.<sup>26</sup> Health should be understood as the absence of any direct or indirect impairment to a person as a biological entity and material form within the legal order. In this regard, following the tripartite classification of the right to health in the constitution by the German scholar Helmuth Schulze-Fielitz, the impairments to the right to health can be divided into (1) damages (Schadens) to physical and mental health, (2) interferences or disadvantages (Beeinträchtigungen/Nachteils) arising from social interactions.<sup>27</sup>

### **1. Physiological aspect: direct and indirect damage based on the criteria of “risk-danger-infringement”**

The health damage at the physiological level strictly defines the scope of protection of the right to health. Specifically, direct damage refers to physical harm caused by the state to the body, including the removal or destruction of body parts, external force impacts on the body surface, physical disfigurement of the body, and impairment of the development, function, and operation of human organ systems.<sup>28</sup> Direct damages caused by state public power are

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Grundrechtsdogmatik durch eine präzise Schutzbereichsbestimmung, Tübingen: Mohr Siebeck, Tübingen, 2009, S.37 f.

<sup>25</sup> Wolfgang Hoffmann-Riem, Governance im Gewährleistungsstaat-Vom Nutzen der Governance-Perspektive für die Rechtswissenschaft, in: Gunnar Folke Schuppert (Hrsg.), Governance-Forschung-Vergewisserung über Stand und Entwicklungslinien, Baden-Baden: Nomos 2005, S.195.

<sup>26</sup> Christoph Gusy, Polizei- und Ordnungsrecht, 8. Aufl., Tübingen: Mohr Siebeck, 2011, S.52.

<sup>27</sup> Vgl. Helmuth Schulze-Fielitz, in: Horst Dreier (Hrsg.), Grundgesetz Kommentar, 3. Aufl., Tübingen: Mohr Siebeck, 2013, S.420f.

<sup>28</sup> Vgl. BVerfGE 56, 54 (73f); Hans-Georg Dederer, Die Stellung des Gutes Gesundheit im Verfassungsrecht,

specifically manifested in direct interventions involving human experimentation, forced sterilization, corporal punishment, or other punitive measures.<sup>29</sup> State public power may also use the infringement of health as a means to achieve other objectives. For example, this can include compulsory examinations, forced medical treatment, medical experiments, mandatory vaccination, administrative law enforcement measures involving the use of physical coercion, as well as investigative measures in criminal proceedings that involve biopsies, forced administration of emetics, or the extraction of cerebrospinal fluid.<sup>30</sup>

Indirect damage refers to harm caused by the state through non-physical means, but which has an effect equivalent to physical harm to health. The main types of indirect damage caused by state public power include: (1) The state tolerates activities by third parties that pose health risks without prohibiting them; (2) The state obstructs access to medical treatments that can alleviate suffering; (3) Despite the known harmful effects of smoking, the state fails to ban smoking in public spaces that are also used by non-smokers; (4) The state prohibits parents from conducting pre-implantation genetic diagnosis for embryos; (5) Individuals who refuse state interventions are subjected to adverse conditions. For example, a person may be denied admission to school after refusing an X-ray examination, or social welfare benefits may be suspended after refusing medical treatment.<sup>31</sup>

Of course, the division between direct and indirect harm only confirms the forms and content of damage to physical health in the final outcome. However, the protection of fundamental rights does not stop at the static final result. In order to dynamically protect fundamental rights, there are different causal forces between different stages of harm formation and the final harm outcome. On the timeline of harm formation, it can be divided into imminent harm and actual harm, both of which can be seen as or lead to direct or indirect infringement of the right to health in the final outcome.

Actual damage refers to the disturbance (*Störung*) of health, that is, the actual impairment of the legal interest in health caused by a violation of the legal order.<sup>32</sup> If the disturbance is still ongoing, the protection of the right to health needs to be achieved through the police law and security law to eliminate (*Beseitigen*) the continuous growth and spread of the existing damage. If the disturbance has already ended, then it is necessary to restore, compensate for, and address the losses caused to the existing health interests through civil law,

in: Jahrbuch für Wissenschaft und Ethik 9 (2004), S.193.

<sup>29</sup> Vgl. BVerwGE 113, 108 (109ff.); BVerfG (K), NSiZ 2000, 96; BVerwGE 9, 78 (79); BVerfGE 17, 108 (115).

<sup>30</sup> Georg Hermes, Das Grundrecht auf Schutz von Leben und Gesundheit: Schutzpflicht und Schutzanspruch, Heidelberg: C. F. Müller 1987, S.6.

<sup>31</sup> Vgl. BVerfG (K), NJW 1999, 3399 (3400); BVerfGE 95, 173 (184); BVerfG (K), NJW 1998, 2961 (2962).

<sup>32</sup> Christoph Gusy (Fn. 26), S.53.

state compensation law, criminal law, and so on. The end of the disturbance in the legal sense also means that the damage to the right to health in terms of static results has already been formed.

Impending damage refers to health threats that, although not yet realized, have a sufficient likelihood of becoming actual harm in the future. These can be divided into two categories: “danger” (*Gefahrung*) and “risk” (*Risiko*). The key distinction between these two lies in the probability of harm occurring. Danger refers to future harm that can be predicted with a high degree of probability based on existing empirical rules. The decisive factors in making such predictions include the type of danger, proximity to the danger, the extent of exposure to the danger, the probability of harm, the status and hierarchy of the fundamental right, and the irreversibility of the infringing act.<sup>33</sup> For example, citizens enjoy the freedom to drive vehicles, but the choice of vehicle, the location of driving, and the speed at which they drive also pose a specific danger to the health of others. The constitution must comprehensively assess whether to include such dangerous situations within the scope of the right to health protection by considering the decisive factors at the time of prediction.<sup>34</sup> Risk damage refers to potential harm that, while scientifically neither confirmable nor completely dismissible in terms of its probability, could result in irreversible and severe consequences without legal intervention. In constitutional terms, risk only qualifies as a violation of fundamental rights when its probability of occurrence reaches a level that can be deemed a “danger.” The term “danger threshold” implies that the constitution must, in principle, ensure a minimum level of safety. If risks below the danger threshold can be proven to have a sufficient likelihood of occurrence, they qualify as dangers.<sup>35</sup> The likelihood assessment still depends on the relational formula associated with the potential magnitude of harm, that is, the greater the potential harm, the lower the likelihood required for the risk to be considered. In cases where permanent bodily injury may occur, given its position in the hierarchy of fundamental rights, the right to health requires a very low likelihood of occurrence.<sup>36</sup>

For example, the probability of nuclear facility accidents caused by technical failures, operational errors, earthquakes, lightning strikes, or airplane crashes cannot be determined. However, the health damage resulting from such accidents is usually catastrophic once they occur. In the Kalkar case and the Krümmel Nuclear Power Plant licensing case, the German Federal Constitutional Court continuously reviewed how the state could effectively

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<sup>33</sup> Hans D. Jarass, Bodo Pieroth, Grundgesetz für die Bundesrepublik Deutschland Kommentar, 12. Aufl. München: C. H. Beck, 2012, S.92.

<sup>34</sup> Friedhelm Hufen, Staatsrecht II: Grundrechte, 3. Aufl., München: C. H. Beck, 2011, S.236.

<sup>35</sup> BVerwGE 45.51 (61).

<sup>36</sup> Dietrich Murswiek, Die staatliche Verantwortung für die Risiken der Technik, Berlin: Duncker & Humblot 1985, S.216ff.

protect the right to health when the possibility of a nuclear accident could not be completely excluded. Specifically, the court examined what safety requirements the state must implement to ensure individuals are free from the threat of health damage.<sup>37</sup> According to the experience of the German Federal Constitutional Court, whether a particular risk should be included within the scope of protection of the right to health also depends on a case-by-case assessment, which includes factors such as the uncertainty of the causal relationship of the risk, the way it extends in time and space, the overall combined effects, the critical point of the safety threshold, and the weighing of opposing public or private interests.

### **2. Psychological aspect: damage caused by mental suffering**

According to the understanding of human biological integrity by the German Federal Constitutional Court, the psychological aspect is also an integral part of the body. The distinction between physiological and psychological harm is often difficult to achieve, as psychological distress such as fear, depression, and anxiety often accompanies physical pain. For example, in the Radio Wave case, a radio wave operator (M) established a base transceiver station with an antenna mast on land adjacent to the residence of individual (E). E believed that the radio waves might affect his physiological health, but medical examinations found no illness. However, E's constant anxiety about the potential radiation hazards led to deteriorating mental health, decreased concentration, and even disrupted sleep. E then filed a constitutional complaint with the German Federal Constitutional Court, arguing that the administrative agency's permission for the operator to build the base transceiver station violated his right to bodily integrity.<sup>38</sup> Another example is the Airport Noise case, in which H and others argued that the aircraft noise from Düsseldorf's Lohausen Airport severely impacted their health, causing psychological distress such as tension, irritability, fright, anger, and fear. They filed a lawsuit with the German Federal Constitutional Court, claiming that the administrative agency had failed to fulfill its obligation to prevent aircraft noise. Both the Radio Wave case and the Airport Noise case face the same challenge: How do we determine whether a particular psychological harm falls within the scope of protection of the right to health? Since psychological harm does not manifest physically as clearly as physiological harm, and the two often interact and are collectively referred to as mental and physical harm, the definition of psychological harm is prone to incorporating all setbacks that cause psychological burdens into the scope of protection of the right to health in the factual domain.

### **3. Social adaptation aspect: interferences or disadvantages arising from social interaction**

The content of health at the level of social adaptation has long been a subject

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<sup>37</sup> BVerfGE 49, 89 (141); BVerfGE 53, 30.

<sup>38</sup> BVerfG NJW 2002, 1638 (1639).



of controversy in discussions regarding the scope of protection of the right to health. Given the ambiguity of the concept of social adaptation, both international and regional human rights conventions have maintained a reserved attitude towards the social adaptation requirements stipulated by the *Constitution of the World Health Organization*. This phenomenon is rooted not only in the extremely demanding requirements that a state of complete social adaptation would place on national implementation but also in the fact that whether a state of complete social adaptation has been achieved can only be determined through the external manifestations of physical and mental health.<sup>39</sup> Health in terms of social adaptation generally includes two aspects: First, an individual can maximize one's potential in the process of social interaction for self-development; second, an individual perceives one's body or behavior as normal within society.<sup>40</sup> For the former, the maximization of individual potential is constrained by the material assistance and support provided by the state, which has the obligation to create a very favorable social environment to maintain individual health. For the latter, whether an individual's body or behavior is perceived as normal is determined by the cognition and evaluation obtained through interaction with the social environment. Given the ambiguity of the concept of social adaptation, the definition of health at the level of social adaptation in the factual domain inevitably incorporates all interferences or disadvantages suffered by individuals in the process of social interaction into the scope of protection of the right to health.

### **B. Calibration of the protection domain**

The classification in the factual domain involves incorporating all areas related to health into the scope of protection of the right to health. However, this does not mean that all such areas are worthy of protection. It is necessary to make value judgments in the realm of protection through historical and teleological methods of interpretation in order to exclude those areas that are not deserving of constitutional protection.<sup>41</sup> Similarly, taking the right to freedom of speech as an example, factual claims that have been proven or are clearly incorrect are not within the scope of protection of the right to freedom of speech. For instance, statements denying that the Nazis persecuted Jews during the Nazi era are not protected by the right to freedom of speech. In terms of the scope of protection of the right to health, the focus of calibration is on the fields of mental health and health in social adaptation.

The scope of mental health should be defined through historical interpretation to exclude psychological impacts that do not have pathological

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<sup>39</sup> Wang Chenguang and Rao Hao, "Creation, Contents and Implementation of the Right to Health in International Law," *Journal of Comparative Law* 3 (2019): 25.

<sup>40</sup> Lin Zhiqiang, *Study on the Right to Health*, 22-23.

<sup>41</sup> Ernst-Wolfgang Bockenförde, *Schutzbereich, Eingriff, Verfassungsimmanente Schranken: Zur Kritik gegenwärtiger Grundrechtsdogmatik*, *Der Staat* 42 (2003), S.174.

value. The emergence of the right to health is marked by distinct historical imprints. It is widely acknowledged that the protection of the right to health gained widespread international attention only after World War II. The genesis of this right was to thoroughly reflect on the inhumane harm inflicted on civilians during the war. For instance, in *German Basic Law*, the provision on the right to bodily integrity was established to resolutely oppose the Nazi genocide against Jews. Such genocidal acts against a specific ethnic group, along with mass killings and cruel human experiments, caused immense mental torture and psychological fear for individuals.<sup>42</sup> According to the German Federal Constitutional Court, psychological harm can only be included within the scope of protection of the right to health if its impact on an individual's psyche is comparable in effect to physical pain.<sup>43</sup> It is not possible to prohibit all state actions and activities simply because citizens experience "discomfort" or "lack of energy." Therefore, in the *Radio Wave* case, the German Federal Constitutional Court held that, according to scientific findings, the high-frequency electromagnetic fields produced by the base transceiver station do not cause any harm to human health. Moreover, the construction of the facility complied with all public law regulations. It cannot be considered within the scope of protection of the right to health merely because E experienced inattention or poor sleep quality on a psychological level. However, in the *Airport Noise* case, medical assessments of the impact of the construction of Düsseldorf's Lohausen Airport showed that aircraft noise disrupted people's rest and relaxation. Continuous noise further triggered psychological irritation, ultimately leading to adverse effects on blood circulation. The German Federal Constitutional Court concluded that the psychological sensations caused by aircraft noise had an impact that caused individuals' pain and suffering.

The scope of health in terms of social adaptation should be further refined through teleological interpretation to exclude elements unworthy of constitutional protection in both the state's obligation to provide and individual health perceptions. The constitutional protection of the right to health is not about providing comprehensive social welfare to citizens; it must take into account the current capacity of the state to provide and the realities of social interaction.<sup>44</sup> If the content of obtaining a good social environment is included within the scope of protection of the right to health, then individuals could rely on the subjective efficacy of fundamental rights and sue the state for allegedly infringing upon their right to health, demanding that the state fulfill its obligation to provide a good social health environment. The consequence of this approach

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42 Ralf Müller-Terpitz, in: Josef Isensee/Paul Kirchhof (Hrsg.), *Handbuch des Staatsrechts* VII, 3. Aufl., Heidelberg: C. F. Müller, 2009, S.1f.

43 Volker Epping, Sebastian Lenz and Philipp Leydecker: *Grundrechte*, translated by Zhang Dongyang (Beijing: Peking University Press, 2023), 53.

44 Lothar Michael, Martin Morlok, *Grundrechte*, 3. Aufl., Baden-Baden: Nomos, 2012, S.110.

would be an uncontrollable expansion of the state's obligation to provide, leading to a collapse of state capacity. For instance, individuals cannot judicially demand that the state provide good housing and employment. The realization of these social rights is subject to the legislative body's budgetary arrangements and resource allocation in fiscal law. If the content related to the right to health were to be included, it would undoubtedly allocate the ultimate decision-making power to the judiciary.<sup>45</sup> Only the legislative body, which is responsible for policy formulation, can make the best arrangements for the realization of social basic rights within its jurisdiction. Forcing the inclusion of these elements into the scope of protection of the right to health would only undermine the principle of separation of powers enshrined in the Constitution.

Moreover, an individual's normal perception of their body or behavior in society depends on the distance of interaction with others in social contexts. Not all interferences or disadvantages arising from contact with others can be attributed to the scope of protection of the right to health. For example, the right to health does not protect individuals from annoyances such as graffiti, street music, or unruly crowds.<sup>46</sup> In these situations, due to the ambiguity of social interaction distance and the sensitivity of individuals' bodies, the comfort and health in the social dimension are too subjective and difficult to control in legal evaluation. Generally speaking, they are not suitable for inclusion within the scope of protection of the right to health. However, there is an exception: If someone improperly infringes upon another's bodily integrity during social interaction, such a situation should be included within the scope of protection of the right to health. Bodily integrity affects an individual's control over their bodily privacy; when an individual's autonomous will to maintain the inviolability of their body is obstructed, it should be regarded as a violation of the right to health. For example, pure electroencephalogram (EEG) measurements, forced changes to hairstyles or beards, the use of lie detectors, and the extraction of small amounts of blood or somatic cells for genetic analysis all fall into this category.<sup>47</sup> These actions go beyond the minor annoyances or trivial matters that can be ignored due to personal sensitivity in daily life. The minor harm to the body at the level of social adaptation should also be included within the scope of protection of the right to health.

#### **IV. The State's Obligation to Protect the Right to Health**

The German scholar Georg Hermes believes that in addition to potential infringements by state authorities, an individual's right to health may also be harmed by factors such as fate, nature, and the system (Schicksal, Natur und

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<sup>45</sup> Ralf Müller-Terpitz (Fn. 42), S.76.

<sup>46</sup> Friedrich Hufen (Fn. 34), S.211.

<sup>47</sup> BVerfGE 17, 108 (115); BVerwGE 46, 1 (7); BVerfG NJW 1982, 375; BVerwGE 54, 211 (223f.); BVerfG NJW 1996, 3071 (3073).

System).<sup>48</sup> These health damages are all triggered by risks or dangers with economic characteristics; therefore, it is necessary for the state to prevent these damages through active fiscal payments and social security in legislation, in order to achieve a level of fundamental rights protection that meets constitutional requirements. If an absolute level of protection is considered as the starting point, it would mean that the state needs to provide measures and means for the protection of the right to health without any upper limit. If a relative level of protection is considered as the starting point, it means that the realization of the right to health exists within a relative range under the constitution. That is, the state is not required to protect at the most comprehensive level, but it also cannot totally ignore the health damages suffered by citizens due to fate, nature, and systemic reasons. The state must therefore determine a minimum standard for the protection of the right to health. As previously mentioned, based on the *Constitution of the World Health Organization* and subsequent national human rights practices, the highest attainable standard of the right to health is determined by the fulfillment of the state's protective obligations. Taking the minimum protection requirements of the right to health as the logical starting point, the Committee on Economic, Social and Cultural Rights has narrowed down the connotation of the highest attainable standard to a "minimum core obligation." The Committee, in its General Comment No.3 and General Comment No.14, has pointed out that the contracting states must at least maintain the fulfillment of the minimum core obligation in the realization of the right to health, preserve the minimum level of the right to health, and under no circumstances derogate from the fulfillment of this obligation. The minimum core obligation is distinct from the prohibition of harm, which conducts the passive defense against state public power in a negative sense. Instead, it necessitates that the state actively fulfill its protective obligations in a positive sense to achieve the minimum level of protection. In the context of the constitution, the state's obligation to protect the right to health is realized in two aspects. On the one hand, it must be achieved through the state's provision of minimum medical and health care at the level of the beneficiary right function. On the other hand, it must be realized through the state's basic health promotion at the level of the objective value order.<sup>49</sup>

#### **A. The obligation of minimum medical and health care**

The right to health, under the scope of subjective law, has the beneficiary right function.<sup>50</sup> By virtue of the efficacy of fundamental rights, individuals may request that the state provides specific monetary or service-based payment

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<sup>48</sup> Georg Hermes (Fn. 30), S.208ff.

<sup>49</sup> Gao Qinwei, "On the Right to Health Care as a Social Right," *Jiangnan Tribune* 8 (2015): 123.

<sup>50</sup> Li Guangde, "Exploring the Fali of Health as a Legal Right," *Law and Social Development* 3 (2019): 33; Chen Yunliang, "Normative Construction of the Right to Health," *China Legal Science* 5 (2019): 71.

guarantees in the area of medical and health care. The beneficiary right function under the right to health demands that the state fulfills specific material payment obligations in a positive sense. For example, this includes providing individuals with medical subsidies and medical assistance funds in terms of material benefits, as well as offering opportunities for health learning or health education aimed at enhancing health awareness in services related to material benefits. The beneficiary right function under the right to health relies on the interpretation and understanding of Article 45(1) of the *Constitution*. Some scholars argue that this provision confirms the right to subsistence in the Chinese *Constitution*, and through this provision, it can be inferred that individuals are entitled to the minimum level of material medical and health care provided by the state when they are elderly, ill, or have lost their ability to work.<sup>51</sup>

The content of the minimum medical and health care obligation includes two aspects: the satisfaction of basic physiological needs (*physische Existenzminimum*) and the guarantee of minimum sociocultural participation (*soziokulturelles Existenzminimum*).<sup>52</sup> First, the satisfaction of basic physiological needs includes the provision of medical and health services, as well as the supply of medicines and other essentials required for physiological well-being.<sup>53</sup> For instance, according to Article 25 of the *Social Insurance Law*, the basic medical insurance for urban residents is implemented through a combination of individual contributions and government subsidies. The personal contribution portion of the basic medical insurance for individuals who enjoy the minimum living security, persons with disabilities who have lost the ability to work, individuals over 60 years old from low-income families, and minors, is subsidized by the government.<sup>54</sup> According to Articles 27 to 32 of the *Interim Measures for Social Assistance*, members of minimum living security families, persons receiving special hardship support, and other individuals with special difficulties can apply for medical assistance from the government. For patients with acute, severe, or critical illnesses who require emergency treatment but whose identities are unknown or who are unable to pay for the emergency costs, the emergency medical expenses are covered by the Emergency Medical Assistance Fund, in accordance with the relevant regulations. Secondly, the

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<sup>51</sup> Lin Laifan, *From Constitutional Norms to Normative Constitution* (Beijing: The Commercial Press, 2017), 233; Zhang Xiang, *The Normative Construction of Fundamental Rights* (Beijing: Law Press • China, 2017), 205-206.

<sup>52</sup> Vgl. Volker Neumann, Das medizinische Existenzminimum zwischen Sozialhilfe und Krankenversicherung, RsDE 68 (2009), S.1.

<sup>53</sup> Vgl. Andrea Kießling, *Das Recht der öffentlichen Gesundheit*, Tübingen: Mohr Siebeck, 2023, S.173f.

<sup>54</sup> According to the *Notice on Good Performance in the Basic Medical Security Work for Urban and Rural Residents in 2023*, the minimum per capita fiscal subsidy standard for urban and rural residents' medical insurance in China was set at RMB 640 in 2023. For the central and western regions of China, the fiscal subsidy standards were even higher, reaching 60% and 80% of the per capita fiscal subsidy standard, respectively.

minimum socio-cultural participation guarantee refers to the state's obligation to ensure that citizens have the minimum level of participation and self-determination in matters that affect their health.<sup>55</sup> The German Federal Constitutional Court has pointed out that the image of the human being in the *German Basic Law* is not that of an isolated individual, but rather someone who lives in society and is connected to it.<sup>56</sup> The state should, in terms of citizens' capacity for participation, ensure through minimum and preferential education that citizens can achieve health autonomy and pursue health through full information in society. For example, according to Articles 67 and 68 of the *Law on Basic Medical and Health Care and the Promotion of Health*, the government is required to provide the public with scientific and accurate health information through health education. The state also incorporates health education into the national education system, implementing health education in various forms and popularizing health knowledge. Additionally, the state must provide minimum conditions for health participation in the social and cultural structure, especially by enhancing social inclusiveness and eliminating social exclusion and discrimination, to help citizens participate normally in social, cultural, and political life. From the legislative perspective, China has enacted specific protection laws to regulate the special health care obligations for vulnerable groups in society. For instance, the *Law on the Protection of Disabled Persons* stipulates in Articles 15 to 20 that the state ensures the right of persons with disabilities to rehabilitation services. The *Law on the Protection of the Rights and Interests of the Elderly* specifies in Articles 29 to 31 the medical assistance services provided by the state for the elderly. The *Law on the Protection of Women's Rights and Interests* confirms in Articles 30 to 31 the state's responsibility in fulfilling the protection of women's rights and interests to health. The *Law on the Protection of Minors* explicitly states in Articles 32 and 35 the state's obligations in ensuring the health care of minors. It is evident that the health care provided by the state for vulnerable groups helps them integrate into society and engage in normal social interactions within the social structure.

The fulfillment of the minimum obligation of medical and health care requires a corresponding basis for claims in the constitution. Through the derivation of the right to subsistence in the Chinese *Constitution*, the content of the claim for minimum medical and health care can be identified. However, the right to subsistence is generally considered a social basic right, and thus, the controversies surrounding social basic rights are inevitably transferred to the scrutiny of the right to subsistence. The mainstream doctrine in German academia holds that social basic rights do not possess subjective legal efficacy.

<sup>55</sup> Michael Stolleis, *Die Rechtsgrundlage der Regelsätze unter besonderer Berücksichtigung verfassungsrechtlicher und sozialhilferechtlicher Grundsätze*, NDV (1981), S.99ff.

<sup>56</sup> BVerfGE 4, 7 (15).

The *German Basic Law* abandons the normative approach of the *Weimar Constitution*, which specifically listed social basic rights. Instead, it provides a general stipulation of social basic rights through the social state (*Sozialstaat*) principle. The specific content is left to the legislative body to freely shape according to the changing social conditions.<sup>57</sup> The reason lies in the fact that social basic rights are premised on the state's dominion over the subject of performance. However, in contemporary constitutional states, the economic, social, and cultural subsystems are not entirely controlled by the state. If it is acknowledged that individuals have a claim to such rights, the state would undoubtedly need to intervene forcefully in these subsystems to ensure the realization of these claims, thereby causing conflicts between the claims for performance and other basic rights.<sup>58</sup> Moreover, due to the highly abstract nature of the types, scope, and intensity of social basic rights, the constitution cannot provide specific standards for performance. Instead, it requires the legislative body to allocate resources specifically within the policy-making space. Acknowledging that social basic rights have subjective legal efficacy would essentially transfer the power of policymaking and resource allocation to the courts. This would severely disrupt the division of powers and functional allocation among state organs.<sup>59</sup>

Therefore, it is natural to raise the question here: Will the inherent contradictions within social rights absolutely negate the subjective legal efficacy of the right to subsistence, thereby excluding the content of the claim to minimum medical and health care under the constitution? From the perspective of the development of doctrine and case law, the right to subsistence has subjective legal efficacy and has broken through the limitations imposed by the mainstream doctrine of social rights. That is to say, the content of the right to claim minimum medical and health care is not a mere incidental benefit,<sup>60</sup> but rather a subjective right that can be asserted before the courts. In the case concerning the minimum subsistence guarantee under statutory health insurance, the German Federal Constitutional Court argued the constitutional basis for the minimum medical subsistence guarantee through the general right to freedom of action and the right to bodily integrity. The state is obliged to fulfill its duty of minimum medical care.<sup>61</sup> In the Hartz IV judgment, the German Federal Constitutional Court ruled for the first time that, based on Article 1(1) of the *German Basic Law*, which guarantees human dignity, and Article 20(1), which establishes the social state principle, every individual has a fundamental right to

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<sup>57</sup> Michael Sachs, *Grundgesetz Kommentar*, 3. Aufl., München: C. H. Beck 2003, S.794f.

<sup>58</sup> Robert Alexy, *Theorie der Grundrechte*, 2. Aufl., Frankfurt am Main: Suhrkamp 1994, S.463.

<sup>59</sup> Britta Könnemann, *Der verfassungsunmittelbare Anspruch auf das Existenzminimum*, Hamburg: Dr. Kovač, Hamburg, 2005, S.71.

<sup>60</sup> BVerwGE 1, 159 (163).

<sup>61</sup> BVerfGE 115, 25 (50ff.).

a minimum subsistence guarantee that is in accordance with human dignity.<sup>62</sup> The content of this right of claim includes the minimum physiological needs of those who cannot support themselves in terms of clothing, food, shelter, transportation, and health care, as well as the minimum material guarantees for participation in social, cultural, and political activities.

Although the German Federal Constitutional Court has clarified the status and attributes of the right to subsistence through state medical and health care guarantees in social insurance and social assistance laws, the question arises: How can this right of claim break through the constraints of social basic rights and possess the basis for subjective legal efficacy? From the perspective of the principle of separation of powers, the types, extent, and scope of minimum medical and health assistance need to be determined by the legislative bodies within the scope of policy formation. The courts must respect the legislature's freedom of formation. The fundamental reason behind it is to prohibit the courts from substituting for the legislative bodies in judging the content of benefits and thereby conducting substantive review.

Therefore, in the Hartz IV judgment, the German Federal Constitutional Court indirectly reviewed the legislature by substituting "procedural requirements for substantive standards," in order to mitigate the rigidity of the separation of powers in the protection of fundamental rights. The court did not make substantive judgments on which calculation method for minimum medical and health care is more reasonable or to what extent social redistribution should be achieved, but rather left these decisions to the legislative bodies. However, the court can scrutinize whether the legislature has conducted a reasonable and transparent process, using credible data and calculation methods, and has investigated all necessary expenditures for maintaining a minimum standard of living by imposing a duty on the legislature to provide justification for its laws (*Pflicht des Gesetzgebers zur Begründung von Gesetzen*).<sup>63</sup> The court protects fundamental rights through procedural review, focusing on whether the legislative bodies have complied with the requirement of transparency in decision-making (*Transparenzgebot*). This means that the legislature must explain the methods used to investigate the standards for minimum medical and health care, as well as the data cited, in order to clarify whether the policy decisions or the legislative formation freedom are in line with the protection level of the right to health.<sup>64</sup> If the content of the right to claim minimum medical and health care is established in statutory law, then the indeterminacy of social

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<sup>62</sup> BverfGE 125, 175 (176).

<sup>63</sup> BverfGE 125, 175 (188).

<sup>64</sup> Sun Naiyi, "Constitutional Protection of Social Entitlement Rights and the Formation Space of Social Policy: Focusing on the Judgments of the German Federal Constitutional Court on the Protection of Pension Property Rights and the Right to Minimum Subsistence," *National Taiwan University Law Journal* 2 (2012): 492.



basic rights and the issue of the separation of powers would no longer pose an obstacle to recognizing its subjective legal efficacy.<sup>65</sup> Therefore, in constitutional review, if the legislative body has sufficiently fulfilled its duty to provide reasons, the courts should respect the benefit decisions formed by the legislature in the statute.

### **B. Basic obligation to the promotion of health**

The right to health has the objective value order function at the level of objective law, meaning that it has legal binding force over the exercise of all state powers. The objective legal efficacy of the right to health is realized through the basic duty of health promotion under the state objective clause (*Staatszielbestimmung*). In the Weimar Constitution, the predecessor of the state objective clause, the programmatic clause (*Programmsatz*), was intended to provide constitutional guidance for legislative actions. However, it did not possess direct normative force.<sup>66</sup> After World War II, Hans Peter Ipsen transformed the programmatic clause into the state objective clause. This concept was further interpreted by Ulrich Scheuner, who endowed the state objective clause with legal binding force.<sup>67</sup> In 1981, through the efforts of the expert committee on “State Objective Clauses/Legislative Delegation” convened jointly by the Federal Ministry of the Interior and the Federal Ministry of Justice in Germany, the content and efficacy of state objective clauses were clarified and recognized. These clauses, distinct from fundamental rights clauses, cannot subjectively seek judicial remedies to request the state to act or not act, but can impose objective legal constraints on the exercise of all state powers.<sup>68</sup> For example, in 1994, during the constitutional amendment of the *German Basic Law*, the promotion of gender equality as stipulated in Article 3(2) and environmental protection as stipulated in Article 20a were formally regulated as state objective clauses.<sup>69</sup> These provisions can directly impose on the legislative bodies the duty of care to be observed in law-making activities, and can also serve as a guide for the interpretation of norms by administrative agencies and courts in the application of law.

In the Chinese *Constitution*, the state’s objective clauses aimed at achieving basic health promotion are reflected in Article 21 and Article 26(1). Together with other fundamental rights clauses, they form a composite normative

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<sup>65</sup> Otfried Seewald, *Gesundheit als Grundrecht, Grundrechte als Grundlage von Ansprüchen auf gesundheitsschützende staatliche Leistungen*, Königstein/Ts: Athenäum 1982, S.72.

<sup>66</sup> Chen Xinmin, “A Theory of Constitutional Delegation,” *Basic Theory of Fundamental Rights in the Constitution (Volume I)* (Angle Publishing Co., Ltd., 2009), 38-48.

<sup>67</sup> Hans Peter Ipsen, *Über das Grundgesetz*, Tübingen: Mohr Siebeck, 1988, S.14; Ulrich Scheuner, *Staatszielbestimmungen*, in: Joseph Listl Wolfgang Rübner (Hrsg.), *Staatstheorie und Staatsrecht: Gesammelte Schriften*, Berlin: Duncker & Humblot 1978, S.223 ff.

<sup>68</sup> Lin Mingxin, “The Normative Effectiveness of Basic State Policies and Their Impact on Social Justice,” *National Taiwan University Law Journal* 11 (2016): 1311.

<sup>69</sup> Li Zhongxia, “The Social Function of the Fundamental Rights,” *The Jurist* 5 (2014): 29.

structure for the right to health. Based on the principle of the unity of the constitution (*Einheit der Verfassung*), fundamental rights clauses and state objective clauses do not function in isolation from each other; instead, they jointly construct a unified order of the state community in political and social life through the mutual integration of content and effectiveness within a logical-technical framework of meaning.<sup>70</sup> As long as the normative content of the state objective clauses is materially related to the scope of protection of fundamental rights, they can serve as an alternative option for identifying the functional content of fundamental rights.<sup>71</sup> In the Chinese *Constitution*, the right to health is inferred on the subjective law level through Article 33(3), which derives the prohibition of health harm under the defense right function, and through Article 45(1), which derives the minimum medical and health care under the beneficiary right function. However, these fundamental rights provisions are not sufficient to reveal the complete connotations of the right to health in the constitution. It is also necessary to further supplement the scope of protection of the right to health through state objective clauses on the objective law level. According to Ulrich Scheuner's view, state objective clauses are dynamic; the state must establish legal systems in the future to address existing social problems, and the legislative body, in particular, needs to enact laws to concretize and realize the state objective clauses in the constitution.

The state's basic obligation to promote health, in terms of its substantive content, includes the development of medical and health services as well as sports, and the improvement and protection of the living environment and the ecological environment.<sup>72</sup>

First, in accordance with Article 21 of the *Constitution*, the state's basic obligation to promote health includes the development of medical and health industries as well as sports. For instance, in the development of medical and health services, the *Law on Basic Medical and Health Care and the Promotion of Health* improves the health level of citizens through specific legislation in areas such as basic medical and health services, medical and health institutions, medical and health personnel, and the supply and security of medicines. The *Law on the Prevention and Treatment of Infectious Diseases* ensures human health and public health through legal systems for the prevention of infectious diseases, epidemic control, medical treatment, etc. The *Mental Health Law* promotes and enhances the mental health of citizens through legal systems for mental health promotion and the prevention of mental disorders, diagnosis and treatment of mental disorders, and rehabilitation of mental disorders. Also, in the

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<sup>70</sup> BVerfGE 19, 206 (220); BVerfGE 55, 274 (300).

<sup>71</sup> Werner Heun, in: Horst Dreier (Hrsg.), *Grundgesetz Kommentar*, 3. Aufl., Tübingen: Mohr Siebeck, 2013, S.457ff.

<sup>72</sup> Li Guangle, "Positivist Typologies of the Right to Health Norms," *The Journal of Human Rights* 4 (2021): 51.

development of sports, according to Articles 68 and 75 of the *Law on Basic Medical and Health Care and the Promotion of Health*, the state incorporates health education into the national education system. Schools are required to offer physical education and health courses and organize various physical exercise activities for students. Besides, the state should develop a nationwide fitness program, improve the public service system for nationwide fitness that covers both urban and rural areas, strengthen the construction of public sports facilities, organize and support nationwide fitness activities, enhance guidance services for nationwide fitness, popularize scientific knowledge and methods of physical exercise, and encourage the opening of sports facilities of organizations to the public.

Secondly, in accordance with Article 26(1) of the *Constitution*, the state's basic obligation to promote health also includes improving and protecting the living environment and ecological environment. For example, in terms of general health environment construction obligations, Articles 4, 71, and 77 of the *Law on Basic Medical and Health Care and the Promotion of Health* impose on the state the obligation to build a healthy environment, improve the health management system for public places, strengthen the prevention and governance of environmental issues that affect health, and enhance the health level of citizens throughout their entire life cycle. Additionally, in terms of specific health environment construction obligations, the *Food Safety Law* imposes on the state regulatory obligations in areas such as food safety risk monitoring and assessment, food safety standards, as well as food production and operation to safeguard public health and life safety. The *Environmental Protection Law* imposes on the state the protective obligation to establish and improve systems for environmental and health monitoring, investigation, and risk assessment to prevent and control pollution and other public nuisances and to protect public health. The *Drug Administration Law* imposes on the state the obligation to manage pharmaceuticals and strengthen the supervision of drug research and development, production, operation, and utilization to ensure drug quality and protect and promote public health.

Besides, the state's basic obligation to promote health should, in accordance with the principle of the "reservation of the possible" (*Vorbehalt des Möglichen*, referring to constitutional limits on state obligations), further strengthen the evaluation of the state's performance of its protective obligations through forms of legislative observation and legislative assessment.

The state's basic obligation to promote health is primarily realized through the enactment of laws by the legislative body, and legislative intervention should fulfill the obligations of comprehensive fact-finding, observation, and improvement. The legislative body should clearly define the factual conditions for legislative intervention, which is essential for reliably assessing the necessity and scope of the interference with fundamental rights. The level of protection of

the right to health is constrained by the state of economic and social development. Therefore, the ICESCR imposes limitations on the realization of the right to health through the requirements of “progressive realization” and “to the maximum of available resources.” Both of these stipulations highlight that the level of protection of the right to health is limited by the resources available. Legislative intervention must take into account the particularity of the protection of the right to health. During the legislative process, there should be a thorough and complete clarification and investigation of the current economic and social development conditions in order to accurately assess the availability of resources for the realization of the right to health. This requirement necessitates that the protection of the right to health be subject to the limitation of the “reservation of the possible”). Under the demands of the legal order, legislation must transform normative decisions into vibrant constitutional facts, so as to enhance the welfare of the national community in legal practice. Therefore, the constitutional obligations of the legislative body are also subject to the “reservation of the possible,” and legal commands are relativized into obligations that are practically executable and legally sufficiently rationalized.<sup>73</sup> The principle of the “reservation of the possible” avoids the difficult choice for legislation between “all or nothing” and encourages it to strive to approximate the state required by the *Constitution* in specific circumstances. The *Constitution* demands that legislation continuously adapt to changes in social realities and thereby delineate the minimum possible conditions for its effectiveness. Consequently, the legislative body has the responsibility to ensure that legislation can be truly implemented, and the subjective rights claimed by citizens from the state are thus subject to the reservation of the state’s capacity to provide. For example, the legislative body must determine the conditions and scope of basic medical services provision in conjunction with the socio-economic development situation. In this regard, according to Article 15 of the *Law on Basic Medical and Health Care and the Promotion of Health*, basic medical and health services shall be essential for maintaining human health, be commensurate with the level of economic and social development, and be accessible to citizens in a fair manner. Additionally, the legislative body must specify requirements for medical services provided by medical institutions and practicing physicians. For example, it should avoid duplicate examinations, refrain from using drugs with unclear effects, promote evidence-based medicine, and conduct assessments of the risks and efficacy of medical treatments.<sup>74</sup> Additionally, according to Article 31(2) of the *Social Insurance Law*, medical institutions shall provide reasonable

<sup>73</sup> Vgl. Otto Depenheuer, Vorbehalt des Möglichen, in: Josef Isensee Paul Kirchhof (Hrsg), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* XII, 3. Aufl., Heidelberg: C. F. Müller, 2014, S.558.

<sup>74</sup> Zhang Dongyang, “On the System of Rights Underlying the Right to Health and Constraints on the Right to Health — Including a Commentary on the Basic Healthcare and Health promotion Law (Draft),” *The Journal of Human Rights* 5 (2019): 69-71.

and necessary medical services to insured persons.

Although the “reservation of the possible” sets the boundary for the state’s fulfillment of its basic health promotion obligations, this does not mean that the legislative body can evade or neglect its legislative responsibilities by invoking the “reservation of the possible.” On the contrary, it should be subject to the minimum formal normative requirements.

First, the legislative body should prioritize preventive legislation regarding the right to health, while relegating remedial legislation to a secondary position.<sup>75</sup> Legislation regarding the right to health is applicable not only to the prevention of future harm but also to situations where harm has already occurred and its effects are ongoing or escalating. Given the irrevocability of health damage, legislative focus should be placed on preventive protection. Additionally, preventive legislation should aim to minimize the damage that has already occurred as much as possible and subsequently provide remedies. If remediation is not feasible, compensation measures must be employed to protect the right to health. Of course, such compensatory measures do not constitute a direct means of fulfilling the legislative body’s protective obligations, but rather serve as a fallback option to remedy the consequences when preventive protection has not been effectively implemented. However, it cannot be denied that if legislation fails to provide preventive protection, there is a need for remedial legislation aimed at restoring individuals’ health status. Therefore, legislation must not only be comprehensive in the area of medical services but also effectively regulate the consequences of harm through economic compensation or reparation. Only through legislation on these two levels can the requirement of the “reservation of the possible” be met.

Second, the legislative body should bear the obligation to maintain, improve, and introduce new protective norms regarding the effectiveness of the aforementioned legislative duties.<sup>76</sup> This requirement always keeps legislation within the minimum level of protection for the right to health as required by the constitution. If the legislative body repeals or abolishes the protective legislation it has enacted, such a situation is equivalent to depriving individuals of their right to health. In this regard, when the legislative body cannot enact higher-level protective legislation in accordance with the constitution, it must maintain the existing protective legislation. Additionally, in the absence of any protective legislation, the legislative body should take proactive measures to enact or amend legislation. It should be particularly noted that the legislative body should consider whether health damage has increased in terms of its actual manifestation or scope of impact, whether risks have been misassessed, and whether the predicted effectiveness of previous protective measures was correct.

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<sup>75</sup> Georg Hermes (Fn. 30), S.263ff.

<sup>76</sup> Georg Hermes (Fn. 30), S.268ff.

Therefore, the legislative body has the responsibility to amend existing laws and continuously adjust the content of legislation by weighing the relationship between protective measures and the requirements for the realization of the right to health.

## **V. Conclusion**

The construction of the right to health as a fundamental right in constitutional doctrine is a complex process. If the scope of protection is not addressed at the initial stage of doctrinal research, it will pose greater obstacles to subsequent studies. With the advancement of China's constitutional review system, the right to health is no longer confined to the constitutional text but needs to be effectively implemented in practice. The scope of protection for the right to health, as the first stage of initiating review, determines whether subsequent constitutional review work can proceed. To further clarify this point, it is necessary to determine under what circumstances an individual can claim the right to health as a fundamental right from the state, and what type of protection obligations the state must undertake. To answer these questions, the scope of protection for the right to health must be clearly defined. In this regard, the scope of protection for the right to health in the Chinese *Constitution* can be summarized as follows: Article 33(3) of the *Constitution* serves as the entry point for delineating the state's obligation to respect the right to health in terms of negative defense. Articles 21, 26(1), and 45(1) of the *Constitution* serve as the basis for delineating the state's obligation to ensure the right to health in terms of positive benefits. Accordingly, the normative content of the scope of protection for the right to health includes the state's obligation to prohibit health harm, the minimum obligation to provide medical and health care, and the basic obligation to promote health.

(Translated by *LI Donglin*)