How China's Constitution Protects People in the Family

— *From the Perspective of the Images of Human Beings and the Family*

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Abstract: *How the Constitution protects individuals within the family and regulates the scope of state intervention in family life is an important proposition for the development of human rights protection in China. The analysis can be carried out from the constitutional images of humans and families. The separation and retention of family functions reflect the internal logic of "expansion of human beings" and "contraction of families." Accordingly, China's Constitution has established threefold constitutional roles of individuals in the family context: autonomous individuals, specially protected individuals, and responsible individuals. Corresponding to the threefold images of human beings, the family presents a specific field of freedom, conditions of provision and protection, and a legitimate basis for intervention, which can be called "autonomous family," "protective family," and "responsible family." The "autonomous family" has a priority in function, and the "protective family" and "responsible family" usually appear in accordance with the principle of subsidiarity. According to the functions of the image of the family, the Constitution has different requirements for state actions.*

Keywords: human rights protection ♦ family protection ♦ image of human beings ♦ image of the family

I. Introduction

In China, the "individual" has multiple dimensions. An individual is not only an economic or political being, but also a member of a family. As Xi Jinping, general secretary of the Communist Party of China (CPC) Central Committee, emphasized, "The family is the basic unit of society and the first school that we attend in life. Regardless of how the times change, or how our lives are transformed, we must remain committed to laying emphasis on the family, family education, and fine family traditions. We should all strive to integrate family cultivation in fostering and practicing the core socialist values, carry forward fine traditional family virtues of the Chinese nation, promote family harmony, foster a loving family atmosphere, facilitate the healthy growth of the next generation, and ensure elder-care, so that millions of families can become a vital cornerstone for the development and progress of the country and nation and social harmony."[1] How to protect individuals within the family is a theoretical and practical issue that must be addressed in the development of China's human rights cause.

From the perspective of human rights protection, protecting individuals within the family indicates the extent to which the state intervenes in the individual's family life. Currently, existing research mostly remains at the level of departmental laws, or maintains a cautious attitude toward the human rights protection approach.[2] In fact, as the fundamental law and the guarantor of the people's rights, China's *Constitution* provides a framework for the state to regulate domestic relations. Article

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[1] Institute of Party History and Literature of the CPC Central Committee, ed., *Xi Jinping: Emphasizing Family, Family Education, and Family Virtues* (Beijing: Central Party Literature Press, 2021), 3.

[2] Xia Jianghao, "Boundaries of Family Law Intervention in Family Relations and Its Enlightenment for the Implementation of the Marriage and Family Part," *China Legal Science* 1 (2022): 55-76; Liu Zhengfeng, *On the Confrontation and Integration Between Civil Law Doctrines and Family Law: The Formation of the Genealogy of Modern Family Law* (Beijing: Law Press • China, 2018), 60-62.

49 of the *Constitution* stipulates that the family shall be protected by the state and meticulously regulates both horizontal marital relations and vertical intergenerational relations within the familial domain through norms such as fundamental rights and obligations. At the level of the general introduction to constitutional law of the family, one can proceed from the constitutional images of the individual and the family to examine how China's *Constitution* regulates state intervention in the family life of an individual, thereby protecting individuals within the family.

As a fundamental category of human rights, the "image of human beings" is a prerequisite that must first be clarified in constructing a human rights discourse system.[3] It concerns how the law imagines and treats people and dictates the fundamental orientation of law.[4] Furthermore, "the image of human beings" as understood by the constitution guides the human rights protection approach of the entire legal system. Within the relationship between the individual and the community, the family is constituted by individuals, and individuals are invariably intertwined with the family.[5] In this sense, to protect specific forms of human life, the constitution must regulate the family — an "intermediate institution" between the individual and the state. The constitution's shaping of "the image of the family" is, therefore, a crucial dimension in portraying the "image of human beings". By structuring the node of the family, it outlines the extent to which the state intervenes in family life.

Therefore, the protection of individuals within the family and the constitutional limits of state intervention in family life depend, to a certain extent, on the constitution's construction of the image of the family. This paper will elucidate the generative logic of the relationship between the individual and the family. On this basis, it will discuss what the images of the human being and the family are as understood by the constitution, as well as how the constitution protects individuals within the family through the image of the family.

II. The "Expansion of Human Beings" and the "Contraction of Families"

In China, individuals within the family are often understood as specific subjects protected by the constitution, such as women, children, and the elderly. In modern society, however, specific identities may not be inherently associated with the family. To avoid a fragmented understanding of Article 49 and other provisions of the *Constitution*, it is essential to clarify the logic by which the constitution constructs the images of the human being and the family. Since the phenomenon of the family predates the constitution and possesses its own unique, self-generating, and spontaneous logic, we must first "proceed from the empirical order to understand the fundamental, supreme, and structural norms that organize it."[6] Subsequently, the actual domestic relations regulated by the constitution will influence the interpretation of constitutional norms, thereby achieving a hermeneutic circle between the normative realm and the norms themselves.

A. The separation of functions from the family: from the individual of status to the autonomous individual

1. The multiple functions of the family and the individual of status

Historically, the family in China possessed multifaceted functions, extending across various domains of people's lives. "The family was more than a reproductive unit; it was also a social, economic, educational, political, and even religious and recreational unit. It was the fundamental cohesive force that maintained the solidarity of the entire society."[7] In the sense of the lineage, "the clan took ancestral worship as its primary purpose, while simultaneously encompassing economic (with clan property held in common), social (self-defense, education, and relief), and political (self-

[3] Li Chaoqun, "Marx's Theory of 'the Image of Human Beings' and its Insights into Building China's Human Rights Discourse System," *Human Rights* 1 (2020): 19.
[4] Gustav Radbruch, "Law's Image of the Human," in *A Treasury of Legal Aphorisms*, Shu Guoying trans. (Beijing: China Legal Publishing House, 2001), 141.
[5] For China, in particular, the family constitutes the entire life course of a Chinese person — being born into a family, growing up from childhood to youth, and transforming from children into parents; no one can entirely reject or detach themselves from their family. See Zhang Yan, "On the Family and the Principle of Individual Freedom in China's Legal System," *Peking University Law Journal* 4 (2013): 705.
[6] Su Yeong-Chin, *Sectoral Constitution* (Taipei: Angle Publishing Co., Ltd., 2006), 22.
[7] Ambrose King Yeo-Chi, *From Tradition to Modernity* (Beijing: China Renmin University Press, 1999), 24.

governance and adjudication) functions."[8] While satisfying the living needs of individual members, the multiple functional roles of the family also imposed numerous constraints upon them.

Such constraints could be observed in various spheres of life. In economic life, the family served as the unit of production and consumption for individual livelihood. The property system was characterized by "co-residence and common property", with the rights of management, control, and disposal vested exclusively in the patriarch. Individual labor earnings had to be pooled into the family budget to support unified household consumption. Moreover, to maintain the integrity and unity of family property — thereby preventing arbitrary partition from collapsing the economic foundation of collective family life — children were generally prohibited from establishing separate households or holding independent property.[9] Furthermore, regarding gender relations and marriage, there existed not only a hierarchy of male superiority and female inferiority, but traditional marriage was also fundamentally oriented toward the continuation of the ancestral lineage and familial interests, leaving no room for freedom in matters of love and marriage.[10] Elopements without parental approval and self-arranged marriages without the involvement of a matchmaker were deemed illicit. In addition, the family functioned as a basic political and legal unit of the state, which conditioned the individual's direct political participation and often resulted in a scenario where individuals possessed "the status of a clansman, but lacked the status of a citizen."[11]

Theoretically, such phenomena were manifestations of social differentiation. In early forms of social differentiation, the capacity to process complexity was limited; all human relationships were subsumed under the relations of the family, and individuals were confined by the family. Early segmented differentiation pointed to a society composed of various identical or similar subsystems (families or tribes) determined by bloodline, locality, or a mixture of both, where various social functions were conflated.[12] Subsequent stratificatory differentiation followed unequal distinctions of "upper/lower", with functions centrally handled by the dominant strata. During this stage, the family institution carried numerous constraints, such as the requirement of bloodline-based exogamy under segmented differentiation, and the restriction that one could generally marry only within the same social stratum under stratificatory differentiation.[13] At this phase, objective law was deemed sufficient to regulate social interactions, rendering subjective rights unnecessary. This was because individuals in such societies held fixed social statuses (e.g., as family members) and could cushion the impact of state power through networks of social relationships. Conversely, individuals were bound by status within various spheres of life; to maintain their existence, they had to be attached to communities like the family.[14] Much like the distinct images of status and hierarchy found in early constitutional documents such as Magna Carta, people at this time were individuals constrained by "status."[15]

2. The separation of functions from the family and the autonomous individual

In modern society, which is characterized by functional differentiation, the autonomy of various social subsystems has led to the separation of functions from the family; the family no longer strictly confines the individual, thereby rendering individual autonomy possible. Functional differentiation organizes communication around specific functions. Social subsystems — such as politics, the economy, and law — each perform distinct functions, achieving operational closure through their respective binary codes (e.g., legal/illegal, etc.), which makes a plurality of social contexts possible. Due to the equal and complementary relationships among these functions, the existence of each system relies on other systems fulfilling their respective roles; no single function holds absolute

[8] Shi Shangkuan, *Theory of Family Law* (Beijing: China University of Political Science and Law Press, 2000), 786.
[9] Ye Xiaoxin, *History of Chinese Civil Laws* (Shanghai: Shanghai People's Publishing House, 1993), 569; Shiga Shūzō, *Principles of Chinese Family Law*, Zhang Jianguo and Li Li trans. (Beijing: The Commercial Press, 2017), 82.
[10] Chen Guyuan, A History of Chinese Marriage (Beijing: The Commercial Press, 2014), 8.
[11] Liang Qichao, *Discourse on the New Citizen* (Beijing: The Commercial Press, 2016), 68.
[12] Niklas Luhmann, *The Differentiation of Society*, Stephen Holmes and Charles Larmore trans. (New York: Columbia University Press, 1982), 233.
[13] Vgl. Niklas Luhmann, Gesellschaftsstruktur und Semantik, Bd I, Suhrkamp, 1980, S. 30.
[14] Gert Verschraegen, "Systems Theory and the Paradox of Human Rights," in *Luhmann on Law and Politics: Critical Appraisals and Applications*, Michael King and Chris Thornhill eds. (Oxford: Hart Publishing, 2006), 105.
[15] Yu Zhong, "Change and Comparison: Human Beings Described in Constitutional Texts," *Studies in Law and Business* 5 (2009): 38.

primacy.[16] Numerous specific functions no longer necessarily correspond to the family. Consequently, the separation of functions from the family points toward the gradual erosion of its traditional dominance, meaning that the family's "residual and new forms must now prove themselves as special conditions for the realization of functionally specialized subsystems of society."[17]

Under such circumstances, the family no longer governs every aspect of people's lives, and individuals are no longer confined by a single subsystem such as the family. They can now engage more fully with subsystems such as politics, the economy, and law — evidenced by making autonomous decisions on marriage (rather than parental arrangement) and securing state judicial protection (rather than internal clan law). Meanwhile, during the transition to a functionally differentiated society, the disintegration of the old family system turned individuals into "rootless people".[18] The social function of natural rights or human rights that emerged at that time was precisely to compensate for the dissolution of multi-functional groups such as the family. These rights excluded the coercive definition of individuals through statuses like family membership, thereby ensuring that social subsystems could fully perform their functions.[19] "This involves subjective rights (and not merely reflexive rights of an objective order); it symbolizes that the individual must now be viewed as an existence that is more individualized and more independent of his or her social status."[20] In other words, the individual is no longer subordinated to the family institution; rather, the family is subsumed within the sphere of individual rights.

Multiple provisions of China's *Constitution* fully reflect this transformation. For instance, on the economic level, citizens' property rights independent of the patrimonial system are recognized by Article 13 of the *Constitution*; the recognition of the individual's labor rights in Article 42 diminishes the attribute of the family as a unit of production, meaning that the family can no longer strictly restrict individuals from participating in economic activities. On the political level, according to the enumeration of "family background" in Article 34 of the *Constitution*, the family no longer constitutes a barrier to individual political participation. On the level of gender relations and marriage, Article 48 of the *Constitution* abolishes the traditional hierarchy of male supremacy over females, while Article 49 explicitly prohibits infringement of the freedom of marriage, rendering parental commands and matchmaking arrangements no longer necessary. With the separation of many functions away from the family, the "image of human beings" in the constitutional documents of this stage was already characterized by the protection of human rights based on freedom and equality; people were viewed as autonomous individuals instead of individuals of status. Correspondingly, the new image of the family should also align with this paradigm.

B. The retention of family functions: from the autonomous individual to the specially protected and the responsible individual

The aforementioned emancipation of human beings leads to a direct relationship between the individual and the state, in which the role of the family is often ignored or viewed purely as an obstacle between the two. In fact, the family and the individual in a functionally differentiated society are not in binary opposition; rather, the image of human beings still retains a familial dimension.

1. The autonomous individual's "departure from" and "return to" the family

Gunther Teubner has pointed out that during the transition to a functionally differentiated society, "intermediate institutions" such as feudal hierarchies and clans were destroyed, thereby liberating individuals and creating direct relationships between the state and its citizens. However, such direct relationships have, to a certain extent, obscured awareness of social diversity; intermediate institutions, including the family institution, have either been crudely relegated to the private sphere

[16] Niklas Luhmann, *The Differentiation of Society*, 236.
[17] Niklas Luhmann, *A Sociological Theory of Law*, Bin Kai and Zhao Chunyan trans. (Shanghai: Shanghai People's Publishing House, 2013), 190.
[18] Lu Yufeng, "Seven Propositions on the New Thinking of Constitutional Theory from the Perspective of Systems Theory," *China Legal Science* 1 (2019): 95.
[19] Gert Verschraegen, "Systems Theory and the Paradox of Human Rights," 106.
[20] Niklas Luhmann, Gesellschaftsstruktur und Semantik, Bd. II, Suhrkamp, 1981, S. 84 f.

or suppressed by politics.[21] The exclusion of intermediate institutions likewise narrows the plurality of human life, leading to a disregard for family life.

A salient example is the previous "family revolution" in China, which advocated the dissolution of the traditional family to emancipate the individual. In the historical context of that era, the traditional family was seen as a "snare" to be dismantled and an object from which individuals were to be freed.[22] As the contemporary saying goes: "The revolution of the family originates from the lack of freedom of the individual."[23] The old family system was deemed to have "common economic property, which especially fosters a dependent nature; its harms are manifest and need no further elaboration[24]." Meanwhile, proponents of modern and contemporary family revolutions envisioned that, following the destruction of the old family institution, its original functions (such as elder-care and childcare) should be wholly transferred to society, emphasizing that the individual belonged to society rather than the family.[25] In the decades before reform and opening up, this line of thought manifested as the *danwei* (work unit) system. By providing substitute functions for the family, individuals were directly linked to the state through their work units.[26] To this day, the ideology that emphasizes removing the influence of the family and demands direct relationships between the individual and the state remains partially reflected in China's *Constitution*. For instance, according to Articles 45 and 46 of the *Constitution*, while citizens are entitled to the right to material assistance, they are also entitled to the right and the obligation to receive education. Neither the right to material assistance nor the right (and the obligation) to receive education is associated directly with the family; they are enjoyed directly by "citizens", representing the state's differentiation and absorption of the family's original functions. In this relatively straightforward state-individual relationship, the family is left with no corresponding role.

"It may be argued that individuals of Western society have relentlessly attempted to escape 'the family'; thus, the core theme in reflecting upon modernity is how to 'return to the family'."[27] In fact, the family remains a subsystem vested with specific functions to this day; the family in modern society still shoulders multiple functions, including social reproduction, socialization, physical and mental recuperation, and care-giving for its members. Individuals not only acquire knowledge and culture within the family before venturing into the outside world, but they must also return to the sphere of intimate relationships forged by the family to cushion pressures from the outside. For the individual, the functions of the family can hardly be fully actualized or substituted by any other entity. This is particularly true in China. Distinct from the Western family's "relay model" — where generation A raises generation B, and generation B raises generation C in a generational relay — the child-rearing and elder-care relationship within the Chinese family follows a "feedback model," where generation A raises generation B, generation B supports generation A, generation B raises generation C, and generation C in turn supports generation B, meaning that the subsequent generation provides feedback to the preceding one.[28] Regardless of how society transforms, the intergenerational, bidirectional relationship within the Chinese family remains tight. Today, the idealized advocacy of the "family revolution" is considered to have caused a sense of "homelessness."[29] By disregarding the critical functions of the family in emotional bonding and interpersonal interaction, attempts to

[21] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Lu Yufeng trans. (Beijing: Central Compilation & Translation Press, 2016), 22.
[22] Zhao Yanjie, "Abandoning both State and Family: The Position of the Family in Reconstructing Social Ethics," *Journal of Tsinghua University (Philosophy and Social Sciences)* 2 (2020): 16-18.
[23] The Family Constitutionalist, "On the Family Revolution," in *Selected Contemporary Essays from the Decade Before the Revolution of 1911*, vol. 1, Part II (Beijing: SDX Joint Publishing Company, 1960), 834.
[24] Hsiu-Hsiung Lin, *Lectures* on *Family Law* (Taipei: Angle Publishing Co., Ltd., 2018), 388.
[25] Zhao Yanjie, "Abandoning both State and Family," 21-22.
[26] Meng Xianfan, "The Family: Three Historical Shocks in the Past Century and Our Choices," *Journal of Tsinghua University (Philosophy and Social Sciences)* 3 (2008): 136.
[27] Xiao Ying, "'Family' as a Method: An Attempt at the Chinese Social Theory," *Social Sciences in China* 11 (2020): 190.
[28] Fei Xiaotong, "The Problem of Elder-Care in Changing Family Structures: A Further Discussion on the Transformation of Chinese Family Structures," in *The Collected Works of Fei Xiaotong*, vol. 10 (Hohhot: Inner Mongolia People's Publishing House, 2009), 40-41.
[29] Zhao Yanjie, "Abandoning both State and Family," 23-24.

entirely eliminate family factors have instead deprived individuals of the possibility of understanding and shaping themselves within the family.

Eliminating the family's strict confinement of the individual is not equivalent to abandoning the family altogether. To reconcile individual autonomy with the family as an intermediate institution, the autonomous individual should not be envisioned as someone entirely detached from the family, but rather as someone who recognizes the meaning of family life and regards the family as part of his or her own sphere of autonomy. It is precisely within this context of "returning to the family" that new images of both the human being and the family emerge.

2. The specially protected individual and the responsible individual

In general, to truly realize individual autonomy, merely recognizing the "formal freedom" and "formal equality" of the individual — free from interference — is insufficient. In reality, individual autonomy is constrained by various objective factors, such as capabilities, and requires state assistance to achieve "substantive freedom" and "substantive equality."[30] The constitution uses this framework to correct the abstract notion of the autonomous individual, acknowledging that human beings are not entirely autonomous rational actors but rather individuals with real-world vulnerabilities who require special protection. This holds equally true within the context of the family.

When "substantive freedom" is projected onto people's family lives, state benefits are frequently required due to disparities in individual conditions and realistic burdens of family life when actualizing the specific functions embedded within it.[31] For instance, the general suitability of the social environment for family building, along with economic burdens borne by families, often influences the individual's reproductive intentions. To truly realize the family's autonomy in reproduction, the state often needs to create institutional conditions conducive to child-rearing and provide material subsidies within available limits. Furthermore, given the historical existence of internal and external threats such as arranged marriages and forced marriages (e.g., "coerced marriage" and "abductive marriage"), the individual's family autonomy can also be infringed upon by non-state actors, which likewise requires the state to shoulder its duty to protect. Under the paradigm of "substantive equality," individuals within the family differ from those in other living arrangements (such as cohabitation or living alone). For instance, compared to individuals within a family whose lives are intertwined with functions such as reproduction, child-rearing, and education, individuals in a "single-person household" status encounter a gap in their corresponding gains and losses to a greater or lesser degree. Taking the performance of family functions into consideration, the state must attend to the disparities between married and single individuals, as well as between parents and childless individuals. It is necessary to treat essentially different entities differently and provide special protection for individuals within the family; failure to do so would amount to discrimination against the family.[32] In this regard, the individual who ought to be specially protected is not confined to specifically vulnerable members within the family, but should be extended to all individuals within the context of the family.

At the same time, autonomy also implies responsibility. The emancipation of the individual from the traditional family institution points toward freedom of choice, but it simultaneously entails self-responsibility, responsibility toward the associated community, and the sharing of responsibilities among community members. This is similar to the concept of social obligations on individual rights. When individual freedom is closer to the formation of one's personal life, the emphasis should lean toward the protection of freedom; conversely, the more individual freedom is likely to affect others and the closer it comes to the performance of social functions, the more it should be subject to corresponding constraints.[33] Property rights, for instance, possess not only the attribute of satisfying

[30] Chen Zheng, "The Value Attribute and Normative Positioning of Constitutional Social Rights," *Global Law Review* 5 (2024): 5-8.
[31] It is worth noting that these benefits for individuals within the family differ from general constitutional social rights: The latter place greater emphasis on vulnerable status, targeting vulnerable individuals who can become moderately detached from family support in a material sense through state benefits; the former, conversely, focus on family life, targeting all individuals who can better realize family autonomy through state benefits.
[32] Dieter Schwab, *German Family Law*, Wang Baoshi trans. (Beijing: Law Press • China, 2022), 9.
[33] BVerfGE50, 290 (315).

individual private interests but also the attribute of bearing corresponding responsibilities to realize public interests.[34] The family itself signifies a relational category; individuals returning to the family inevitably enter specific interpersonal relationships, where their existential conditions are mutually influenced. Meanwhile, the functions of education, child-rearing, and eldercare retained by the family also affect general public interests. The autonomy of individuals within the family is constrained by their relational ties to the group, requiring them to bear responsibility toward both the group and society for their actions. This is precisely why China's current *Constitution* stipulates the duties of parents to raise and educate their children, and of adult children to support and assist their parents.[35] In this sense, even with benefits and protection provided from outside the family, corresponding responsibilities within the family remain essential. The autonomous individual frequently needs to shoulder responsibilities toward the family, thus transforming himself/herself into a responsible individual.

Overall, the historical evolution of family functions reveals a synchronous phenomenon of the " expansion of human beings" and the "contraction of families": With the separation of functions from the family, the strict confinement of individuals by the traditional family institution has been mitigated. However, the "expansion of human beings" and the "contraction of families" are not without limits; the family still retains specific functions such as education, child-rearing, and elder-care to this day. The "image of human beings" within the context of the family can thus be summarized as follows: first, the autonomous individual liberated from family constraints; second, the specially protected individual by virtue of the family; and third, the individual bearing family responsibilities. Simultaneously, the image of the family has also transformed, encompassing both an aspect that respects individual freedom and an aspect of protection and responsibility.

III. The Constitution's Preservation and Construction of the Images of the Human Being and the Family

The logic of societal transformation does not necessarily equate directly to the normative logic of the constitution. To achieve a hermeneutic circle between the normative realm and the norms themselves, the diverse images of the human being and the family must be translated into the constitution's own language. From an external perspective, this points to the preserving role of the constitution regarding the images of the human being and the family; from an internal perspective, this signifies the concrete construction of these images by Constitutional norms.

A. From the "status" of human beings to the image of the family

In a functionally differentiated society, various subsystems bear distinct functions while simultaneously exhibiting an expansionist tendency; this tendency to displace the autopoietic logic of other systems threatens societal functional differentiation, rendering society subordinate to a singular criterion.[36] For instance, subordinating the family to the market logic of the economic system is frequently criticized. If the market and the family fail to be differentiated, the impersonal and purely calculative nature of money — as the medium of the market — will reduce interpersonal relationships to stark, naked calculations of interest, causing family relations, which are replete with emotional factors, to vanish.[37] Conversely, re-regulating individuals through the feudal family institution would imply the de-differentiation of other social spheres into the family, including the displacement of state justice by internal clan law and the eradication of individual property rights by the patrimonial system. The function of the constitution and fundamental rights lies in guaranteeing the distinction among

[34] Chen Zheng, "The Expropriation Compensation System and the Reconciliation System of Social Obligations of Property Rights," *Zhejiang Social Sciences* 11 (2019): 23.

[35] During the drafting of the "1982 Constitution", it so happened that numerous instances of family conflicts were reported in newspapers. For example, an elderly woman had three sons, but none of them supported her and even subjected her to abuse, culminating in the tragedy of the elderly woman hanging herself. Against this background, the Constitution Revision Committee, acting upon the requests of its members, appended Paragraphs 3 and 4 to Article 49 of the Constitution. See Xu Chongde, *History of the Constitution of the People's Republic of China* (Fuzhou: Fujian People's Publishing House, 2003), 807.

[36] Li Zhongxia, "The Social Functions of Fundamental Rights," *The Jurist* 5 (2014): 23.

[37] Zhu Hu, "The Distinction Between Property Law and Family Law: A Critique of the 'Interpretation of the *Civil Code*: Marriage and Family Chapter (II) (Draft for Solicitation of Opinions)'," *Journal of Chinese Women's Studies* 3 (2024): 7.

subsystems by institutionalizing human rights, thereby protecting the social structure from the influence of de-differentiation tendencies.[38] Compared to constitutional norms such as property rights and political rights that stem from other subsystems such as the economy and politics, Article 49 of the *Constitution* exercises the function of resisting the expansion of other subsystems, providing an internal benchmark for how the family corresponds to the threefold images of human beings.

As a concentrated depiction of the constitution on domestic relations, the normative structure of Article 49 of the *Constitution* is considerably complex. Paragraph 1 of this article dictates that the state protects "marriage" and "family" as forms of life (the former falling under the broad category of the family), as well as "mothers" and "children" as legal statuses. Paragraphs 2 and 3 impose duties upon "husbands and wives," "parents," and "adult children." Paragraph 4, meanwhile, prohibits "infringement of the freedom of marriage" and "mistreatment." Although placed within the section on fundamental rights, this article presents a mixed character of "rights plus duties."[39] People's family life is characterized by "normative complexes" (Normenkomplexe). Compared to other relatively singular constitutional provisions, this composite normative structure clearly reflects diverse conceptions of human beings and multiple images of the family. According to the status theory, the threefold images of human beings can be transformed into three sets of relationships — the negative status, positive status, and passive status of the individual — by virtue of multiple constitutional norms with distinct value orientations, thereby facilitating an observation of the multiple roles played by the family between the state and the individual.

First, corresponding to the specially protected individual and the autonomous individual, Article 49(1) of the *Constitution* concerns the positive status and the negative status of the individual. These statuses typically refer to the conditions under which individuals rely on the state to secure the prerequisites of freedom, and a state of freedom or a sphere in which individuals are detached from the state.[40] The positive status is relatively straightforward to comprehend. On the one hand, in the constitutions of socialist countries, the principle that "the family enjoys the protection of the state" has, from the very outset, entailed contents such as state-provided childcare services, maternity subsidies, and criminal protection for the freedom of marriage.[41] On the other hand, the phrasing of Article 49(1) aligns quite closely with the positive status of the individual. Intuitively, the phrase "protected by the state" involves the state's affirmative actions, such as the obligation to provide benefits and the obligation to protect. This implies that the state should actively establish the institutional framework or prerequisites for individuals to participate in family life, prevent harms from non-state actors (the obligation to protect), and create as well as guarantee the conditions for the realization of individual rights (the obligation to provide benefits) — which constitutes, in essence, a "mandate for promotion" (Förderungsgebot) toward the family.

The negative status is relatively complicated to comprehend. One might query whether the principle that the family shall be "protected by the state" serves merely as an objective legal norm from which it is difficult to derive subjective rights in the sense of defensive rights. To address this issue, the following considerations must be made. On the one hand, attention should be paid to constitutional transformation and systematic interpretation. The logic behind this query is that "protection by the state" implies a complete alignment of interests between the individual and the community, thereby leaving no room for the significance of state interference and individual defense. However, since reform and opening up, individual interests have gradually been differentiated from community interests. Constitutional norms such as family protection no longer exclusively emphasize the alignment between the individual and the community, but have evolved to include an independent dimension of freedom protection in the sense of defensive rights.[42] Systematically, since the principle

[38] Li Zhongxia, "The Constitutional Connotation of the Rechtsstaat: Toward a Constitutional Perspective of a Functionally Differentiated Society," *Chinese Journal of Law* 2 (2017): 14-15.
[39] Wang Kai, "The Constitutional Guarantee of Marriage and Family: Centering on Article 49 of China's Constitution," *Law Review* 2 (2013): 3.
[40] Vgl. Kingreen/Poscher, *Grundrechte Staatsrecht II*, 35. Aufl., C. F. Müller, 2019, Rn. 97.
[41] Chen Baoyin, *On Foreign Socialist Constitutions* (Beijing: People's Public Security University of China Press, 1998), 167-168.
[42] Li Zhongxia, "The Construction of a Society-Based Functional System of Fundamental Rights in China," *China Legal Science* 5

that "the state shall respect and protect human rights" was incorporated into the constitution, it has exerted a radiating effect on all specific norms as a foundational constitutional principle. If one acknowledges the profound significance of family life to the individual and the possibility of state interference, the state's respect for family life becomes imperative. On the other hand, "protection by the state" is by no means limited to a purely objective legal connotation. In essence, this type of norm signifies a fundamental value decision with a binding force that permeates both private and public law domains.[43] Distinct from the functions of objective law built upon it, this decision simultaneously encompasses elements of both objective law and subjective rights.[44] This can also be understood at the level of normative semantics: without an autonomous family, state protection would be rendered meaningless. Logically, "protection by the state" inherently includes the prerequisite that the state itself must not impair the family. Consequently, a "prohibition of interference" toward the family can be derived from this value decision, enabling individuals to defend against the interference of state power within domestic relations. Thus, Article 49(1) of the *Constitution* simultaneously points to the negative status of the individual.

Furthermore, the specific forms of life (marriage and family) and the specific identities (mothers and children) protected under Article 49(1) of the *Constitution* are different. Although "mothers" and "children" generally appear within the sphere of family life, the constitutional protection accorded to these identities does not require a necessary connection to elements of family life; otherwise, the constitutional significance of protecting vulnerable groups would be undermined. In cases where the two overlap, two distinct images of the individual emerge: the first is the individual who is shielded from interference and specially protected by virtue of family life itself, whereas the second is the specific family member who can receive enhanced protection due to his/her status as a vulnerable individual.

Second, corresponding to the individual as a bearer of responsibilities, the multiple obligatory norms stipulated in Article 49(2) and (3) of the *Constitution* point to a "passive" status of the individual. In traditional legal theory, a passive status refers to the individual's subjection to the state, which manifests predominantly through obligatory norms. This "passivity" is intrinsically linked to public interests, and fundamental obligations are conceived as burdens that the duty-bearer assumes on behalf of public interests.[45] Compared to fundamental rights norms that protect individual autonomy, Article 49(2) establishes the obligation of couples to practice family planning, while Article 49(3) establishes the obligation of parents to raise and educate their minor children, as well as the obligation of adult children to support and assist their parents. All three constitutional obligations are oriented toward altruism and public interests. The beneficiaries of the aforementioned obligatory norms are, first and foremost, the corresponding family members; simultaneously, these norms regulate the family's functions in reproduction, education, child-rearing, and supporting and assisting parents. Therefore, they represent not only support for other family members, but also a pursuit of public interests.

However, this "passivity" warrants a new interpretation. First, it requires reconsidering the shifting connotation of fundamental obligations. Despite their public interest dimensions, modern constitutions have replaced an obligation-based paradigm with a rights-based one; consequently, fundamental obligations no longer imply the supremacy of the state over the individual. Fundamental obligations are not imposed directly upon individuals; rather, it is required that the legislature translate

(2024): 225-226.

[43] Similar to Article 49(1) of China's Constitution, Article 6(1) of Germany's *Basic Law* states that "marriage and family shall enjoy the special protection by the state." The Federal Constitutional Court of Germany holds that this principle serves as a "value-deciding foundational norm" (wertentscheidende Grundsatznorm), from which the state's "mandate for promotion" (Förderungsgebot) and "prohibition of interference" (Beeinträchtigungsverbot) toward the family are derived. BVerfGE6, 55 (71ff.).

[44] Through the "threefold method of abstraction", peeling away the modal forms of the right-holder, the duty-bearer, and the object of rights in a subjective right, one can uncover the "pure ought-existence" — or rather, the "fundamental principle" — that serves as the bedrock for both subjective rights and objective law. See Robert Alexy, *My Philosophy of Law: The Institutional of Law: The Institutionalisation of Reason*, Zhu Guang and Lei Lei trans. (Beijing: China Legal Publishing House, 2011), 267-268.

[45] Vgl. Volkmar Götz, Grundpflichten als verfassungsrechtliche Dimension, VVDStRL 41, 1983, S. 12.

them into legal obligations in accordance with the constitution.[46] Second, the differences among various fundamental obligations must be taken into account. Just as there are distinctions among "citizens" "parents" "children" and "couples" obligations such as paying taxes and military service possess a stronger character of state-building. These obligations emphasize the "public" attribute of the individual in participating in public affairs rather than the "private" attribute of individual life,[47] and they lack direct beneficiaries such as family members. Clearly, the obligations in Article 49(2) and (3) of the *Constitution* are relatively remote from the goals of state-building. Instead, their value orientation focuses primarily on the sphere of shared life among individuals.[48]The obligations here do not actually represent the "passive" subjection of the individual to the state, but rather the responsibility of the individual toward other family members.

Third, Article 49(4) of the *Constitution* simultaneously corresponds to the threefold images of human beings. From the perspective of the objectives protected by the prohibitory norms within this paragraph, the stipulations that "Infringement of the freedom of marriage is prohibited; mistreatment of senior citizens, women, and children is prohibited" still fall within the categories of negative and positive statuses. On the premise of refraining from infringement itself, the state is obliged to protect the freedom of marriage, senior citizens, and children, thereby preventing infringement by other forces. If it is accepted that prohibiting infringement of the freedom of marriage constitutes the connotation of the state's protection of marriage, and that preventing domestic abuse is a requirement for the state's protection of the family, then this paragraph constitutes a concrete manifestation of Article 49(1). Furthermore, looking at the objects toward which these prohibitory norms are directed, this article also establishes a fundamental obligation norm, pointing toward the "passive" status of individuals.

Evidently, within the individual-state relationship regulated by the constitution, the family plays diverse roles: a specific field of freedom, specific conditions of provision and protection, and a legitimate basis for specific intervention. Corresponding to the threefold images of human beings, these roles can be summarized as follows: First is the "autonomous family." Within the negative status of individuals, the "autonomous family" implies that the family exists as a specific field of individual freedom, where individuals may autonomously decide internal family matters. Aside from unenumerated matters, the element within Article 49 that most vividly reflects this character is the right to form, choose not to form, or exit a family — namely, the freedom of marriage. Second is the "protective family." Both the obligation to provide benefits and the obligation to protect imply affirmative actions by the state, and the emergence of such obligations requires certain normative conditions. Similar to the categories of "matters" and "individuals" within the scope of protection for defensive rights, family matters and member status constitute the conditions for special state protection. Consequently, within the positive status, the family serves as the condition under which individuals receive special care (i.e., being "sheltered"). Third is the "responsible family." Obligations such as family planning, child-rearing and education, and supporting and assisting parents fall within the scope of fundamental obligations. The legislative concretization of fundamental obligations often implies restrictions on individual freedom. Because these are objectives explicitly required to be realized by the constitution, although they are not unrestricted actions, they nonetheless provide a justification of substantial weight for intervention.[49] Therefore, within the "passive" status, the state may intervene in domestic relations under specific circumstances, and the family manifests as a legitimate basis for specific intervention.

B. The "disembeddedness" of the individual from the family?

[46] Chen Zheng, "The Chinese Characteristics of Constitutional Fundamental Rights," *Jingchu Law Review* 3 (2023): 99.
[47] Zheng Xianjun, "The Constitutional Limits of Fundamental Obligations: The Application of Statutory Reservation," *Changbai Journal* 3 (2014): 75.
[48] Precisely because of these vastly different value orientations, some scholars argue that a distinction should be made between constitutional obligations and fundamental obligations. Due to their remoteness from the individual-state relationship, obligations among family members are even excluded from the scope of fundamental obligations by certain scholars. vgl. Rolf Stober, Grundpflichten und Grundgesetz, Duncker & Humblot, 1979, S. 12f; See Jiang Bingxi, "A Normative Analysis of Citizens' Fundamental Obligations in China's Constitution," *Law Review* 2 (2018): 48-49.
[49] Chen Zheng, "The Chinese Characteristics of Constitutional Fundamental Rights," 100-101.

To a certain extent, the aforementioned images of the family derive from individual rights and obligations. They serve as an "extension" of the individual and can be understood as the individual's family rights and obligations. According to some research, however, the family in the constitution may be detached from its connection with the individual and become an institution with independent significance.

This line of argument posits that the family does not constitute a fundamental right of the individual, but rather an institutional guarantee. This implies that while the legislature may restrict peripheral categories, it may not abolish or alter the core connotation of a given institution. In its original understanding, the institutional guarantee refers to the "guarantee of the status quo" (Status-quo-Garantien); it serves as a protection of an already existing reality, which the legislature is forbidden to alter.[50] "As long as even a single family exists, the legislature and the appliers of the law may not abstractly propose a universal concept, but must accept the concrete conceptual order of the 'family' as an institution."[51] This concept emphasizes that the core of the traditional order must not be interfered with; therefore, it achieves an effect similar to that of the "autonomous family," which exists as a field of freedom immune to state intervention. However, because this approach is oriented toward institutions and orders, where the family directly corresponds to the state, the family ceases to be an "extension" of the individual. Consequently, a "disembeddedness" occurs between the two. Scholars holding the aforementioned views accept precisely this original institutional guarantee.[52]

In fact, rather than being a "preservation of the status quo," the family in China's *Constitution* is deeply imbued with a social-revolutionary character. Taking the determination of the institutional core as an example, some scholars argue that the core of China's family institution lies in the special protection afforded to vulnerable family members.[53] Indeed, China's *Constitution* does convey a spirit of protecting vulnerable family members, but this is a new development reflected in the constitution arising from modern and contemporary social transformation, rather than an institutional guarantee directly inherited from historical tradition. Despite sharing the mandate of protecting the family, an essential distinction between modern and traditional societies is that the former's protection of the family derives from the ultimate value of "protecting the individual," whereas the latter focuses more on the legitimacy of the traditional order.[54] For vulnerable family members such as women and children, developments including the elevated status of women within marriage and the child-centric reorientation of interests within parent-child relations are precisely the results of the Party's long-term efforts and promotion since the founding of the People's Republic of China.[55] Viewing the protection of vulnerable family members as the institutional core does not necessarily conform to the original purpose of a "guarantee of the status quo" in the first place. Furthermore, this original institutional guarantee merely demands non-interference with the institutional core; consequently, its effects cannot yet accommodate the "protective family" and the "responsible family." both of which carry connotations of protection and intervention.

Institutions cannot exist independently of individuals; however, they do possess a unique significance for human life. As the aforementioned evolution of the image of human beings demonstrates, individuals sometimes find it difficult to precisely grasp holistic and long-term relationships in their lives. Consequently, institutions are needed to compensate for bounded rationality and to provide certainty for human conduct. Arguably, a means-end relationship exists between individuals and the family institution. In essence, the positioning of an institution is related to the understanding of fundamental rights. For instance, according to the theory of freedom, it

[50] Vgl. Carl Schmitt, Freiheitsrechte und institutionelle Garantien der Reichsverfassung, in: ders., Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954, 4. Aufl., Duncker & Humblot, 2003, S.155.
[51] Carl Schmitt, Über die drei Arten des rechtswissenschaftlichen Denkens, 3. Aufl., Duncker & Humblot, 2006, S. 17 ff.
[52] "It is essential to uphold the classical meaning of the institutional guarantee; that is, the traditional and pre-existing character of this institution must be emphasized." See Wang Kai, "The Constitutional Guarantee of Marriage and Family," 6.
[53] Ibid., 13.
[54] Wang Yang and Liu Chong, "The Dual Role of the Family and Its Legal Definition: Traditional Foundations in a Contemporary Context," *Journal of Renmin University of China* 1 (2025): 115.
[55] For related research, see Zhang Xipo, *The History of Marriage Legislation in China* (Beijing: People's Publishing House, 2004), 255-282.

constitutes merely a defensive right. Theories of the welfare state, on the other hand, require the state to actively create conditions for freedom. However, from the perspective of institutional theory, freedom itself can be viewed as an institution. This "institution" is an objective reality that must be realized and perfected through detailed statutory provisions. Individual freedom requires the support of living conditions guaranteed by institutions, an institutional framework that embodies fundamental rights, and a normative system capable of reinforcing these rights. Only in this manner may individual freedom possess a clear direction and scope, and be effectively guaranteed and implemented.[56] In this sense, the family embodies institutional freedom, and the family institution serves as a support for freedom, thereby achieving compatibility between the two.

Therefore, an institutional guarantee does not necessarily have to manifest itself in a form independent of individuals; rather, it can be understood as an objective legal function of fundamental rights and integrated into the threefold images of the family. First, the family institution requires positive legislative formulation, indicating the existence of a task of legislative formulation. Because this task relies on actions of the legislature, it may be termed a positive institutional guarantee. An institutional guarantee narrows the scope of legislative formulation by virtue of the traditional order; the stronger the constraints of the traditional order upon the legislature, the smaller its degree of legislative freedom.[57] Given the social-revolutionary character of China's family institution, the legislature is less constrained by the traditional order, thereby possessing a broad scope for legislative formulation. This type of institutional guarantee points toward state benefits regarding the organization required to realize freedom; thus, it may be integrated into the "protective family" of the individual. Second, negative institutional guarantees exist. The efficacy of this type of institutional guarantee lies in prohibiting the legislature from (re)introducing institutions that have been abolished under the constitution, such as the prohibition of slavery and torture.[58] It ensures that the innovative achievements of the constitution are not erased by the subsequent legislature, aiming to continuously eradicate certain old institutions incompatible with the constitutional order. For the family, this includes the abolition of the feudal patrimonial system, among other elements. In terms of its effect, this type of institutional guarantee aims to exclude infringements; thus, it can be integrated into the "autonomous family" of the individual.

After the institutional guarantee is incorporated, the different functions possessed by the image of the family gradually become clear. The "autonomous family" is constitutionally manifested in the defensive rights function to resist state infringement and the negative institutional guarantee. Meanwhile, the "protective family" points toward the formulation task required by the positive institutional guarantee; it further encompasses the functions of the obligation to provide benefits and the obligation to protect, both of which require the state to afford special protection to individuals within the family. However, the "responsible family" manifests as a fundamental obligation that emphasizes the individual's family responsibility, thereby differing from the aforementioned fundamental rights functions.

IV. The Individual's "Autonomous Family" and "Protective Family" and Their Operational Scenarios

A further issue lies in the fact that the threefold images of the family may manifest and operate separately within different individual cases. In many circumstances, there also exist situations where multiple images appear simultaneously and come into conflict; consequently, differences arise in the paradigms and intensity that the state must observe when intervening in family relations. Given the uniqueness of the "responsible family," this section first analyzes the "autonomous family" and the "responsible family."

A. The operational scenarios of the "autonomous family"

As previously stated, the family as a field of freedom implies a defense against improper state

[56] Vgl. Ernst-Wolfgang Böckenförde, Grundrechtstheorie und Grundrechtsinterpretation, NJW 1974, S. 1532.
[57] Vgl. Gerhard Baumgartner, Grundrechtliche Einrichtungsgarantien, ZöR 59, 2004, S.329 f.
[58] Ebd, S.332.

intervention; except where state intervention is absolutely excluded because it would run counter to the negative institutional guarantee, state intervention must be subject to the test of the principle of proportionality. However, the matters within the sphere of family autonomy are manifold and complex, where social interactions and privatized life coexist, meaning that the corresponding constitutional protection should manifest in different forms.

1. The "autonomous family" as a field of individual freedom

Unlike rights such as freedom of expression, which are situated within a contingent and public sphere of interaction, the family represents a distinct type of sphere characterized by special intimate relationships. The freedom from interference of family life falls under the subcategory of personality rights. The individual's "right to be left alone and to autonomously decide their life within this sphere"[59] resides within the "sphere theory": Individuals always exist within the relationship between individualization and socialization, and various spheres extend outward from the core of individual personality. This concentric structure comprises the "intimate sphere" (Intimphäre), which sits at the core of personality; the "private sphere" (Privatsphäre), where the individual interfaces with society; and the "social sphere" (Sozialsphäre), which places greater emphasis on the individual's socialization and publicity. Although the boundaries among these three spheres may not be entirely precise, they indeed convey the philosophy that when an individual opens up to society, it becomes relatively easier for the state to intervene.[60] Conversely, the closer a matter approaches the core of personality — or the "intimate sphere" — the more the role of individual rights is emphasized, and the more rigorous the justification for state intervention must be. Within this framework, the family is not a sphere where the individual is completely isolated from society. On the contrary, in fulfilling functions such as education and socialization, the family is often conceived as a "conveyor belt" linking the individual to society, through which individuals interact with various social subsystems via family relations.[61]

Consequently, two distinctions in the intensity of protection can be identified. First, compared to other forms of life, the individual's family life should receive a higher intensity of protection due to its higher level of privacy. Clearly, apart from utter solitude, work and school life are generally characterized by a high degree of social connectedness, not comparable with the attribute of intimate relationships of the family as a sphere of private life.[62] Because this method evaluates distinct life spheres — measuring the state's justificatory burden by a sphere's distance from the core of personality — it carries clear overtones of the special constitutional protection afforded to the "protective family". Second, the intensity of protection varies among different family matters, and the requirements for the justification of intervention differ accordingly. Some family affairs are clearly closer to the core of personality; for instance, a couple's arrangements regarding sexual relations and reproduction are relatively closer to the "intimate sphere". Conversely, certain family affairs have more connections with the outside world. For example, arrangements for daily family agency, which take into account the interests of the counterparty and transaction security, clearly possess a higher degree of social connectedness.[63] In this sense, although the family exists as a specific field of individual freedom, its intensity of protection may not be defined uniformly. Instead, the law of balancing applies — the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.[64] As the privacy of matters

[59] BVerfGE35, 202 (220).

[60] Vgl. Friedhelm Hufen, Schutz der Persönlichkeit und Recht auf informationelle Selbstbestimmung, in: Peter Badura/Horst Dreier (Hrsg.), Festschrift 50 Jahre Bundesverfassungsgericht, Bd. II, Mohr Siebeck, 2001, S. 107.

[61] Vgl. Viola Schmid, Die Familie in Artikel 6 des Grundgesetzes, Duncker & Humblot, 1989, S. 181 f.

[62] For instance, certain scholars have previously constructed a tiered constitutional framework for the right to privacy, positing that matters which are purely personal and intimate should receive the highest level of protection. Those involving relationships among family members, partners, and friends rank next. By extension, the higher the degree of publicity a space, activity, or information possesses, the lower its level of protection becomes. See Li Zhongxia, "The Constitutional Construction of the Right to Privacy in the Digital Age," *ECUPL Journal* 3 (2021): 49.

[63] Huang Wei, *The Interpretation of the Marriage and Family Part of the Civil Code of the People's Republic of China* (Beijing: Law Press • China, 2020), 67.

[64] Robert Alexy, "Constitutional Law and Ordinary Law: Constitutional Jurisdiction and Specialist Jurisdiction," Yang He trans., *Sino-German Legal Forum*, vol. 17, Part I, (2020): 219.

increases, the closer the state's intervention approaches the private core of family affairs, and the higher the requirements for the justification of such intervention become.

It is worth noting that, according to the logic of the "expansion of human beings" and the "contraction of families," the family may not govern the entirety of the individual's life. There still exists a distinction between matters of family autonomy and matters of individual autonomy, and individuals within the family still retain a certain scope of personal affairs. Depending on the proximity between a given matter and shared family life, the handling of purely individualized matters — even if occurring within the domestic sphere — should not be regarded as an occasion for the appearance of the "autonomous family". For instance, the freedom and privacy of correspondence enjoyed by the individual does not lose its independence merely because it manifests in family life, unless the individual intentionally exposes such correspondence to the family environment. If legislation stipulates that a spouse may access and review the other party's private correspondence via state retrieval, such a provision would still violate Article 40 of the *Constitution*. In more frequent scenarios, personal and family affairs intersect. For example, a couple's choice of career is largely associated with the allocation of domestic tasks within the family. If the state were to mandatorily regulate employment arrangements between spouses (such as by enacting legislation that imposes a heavier tax burden on dual-income couples compared to single-income couples), a concurrence of fundamental rights might be triggered.

2. Two operational scenarios of the "autonomous family"

On the aforementioned basis, at least two categories exist regarding situations where individuals face state intervention due to the family: first, direct intervention in matters of family autonomy; second, indirect intervention in individuals due to family factors. The former represents the typical occasion for the appearance of the "autonomous family," where the analytical framework of the general defensive rights function may be directly applied. When reviewing the justification of such an intervention, requirements such as the principle of proportionality should be considered. However, if the ground for intervening in matters of family autonomy stems from the state's consideration of internal family relations, the operation of other images of the family may be involved. A representative example includes the system of the statutory reservation of a necessary share prescribed in Article 1141 of the *Civil Code*: Reservation of a necessary portion of an estate shall be made in a will for a successor who neither can work nor has a source of income. Although testamentary freedom is similarly an exercise of autonomy over family affairs, legislative restrictions on it clearly reflect the ethos of the "responsible family," given the status of successors in difficulties and maintenance obligations toward them.

The latter scenario refers to situations where family autonomy itself is not directly subjected to state intervention, while the individual's other rights are restricted due to the bond of the family. As disclosed by the *2023 Report on the Work of Recording and Review*, consultative and coordination institutions of certain municipal districts issued circulars on adopting disciplinary measures against key personnel involved in a certain category of crime, thereby restricting the rights of the spouses, children, parents, and other close relatives of these key personnel in areas such as education, employment, and social security. The Legislative Affairs Commission held that this violates the principle of bearing responsibility solely for one's own crime and runs counter to the principles and spirit of Chapter Two of the *Constitution*, titled "Fundamental Rights and Obligations of Citizens". Beyond involving fundamental rights that possess defensive rights functions, such as occupational freedom and the right to education, some existing research has noted that these disciplinary measures essentially undermine the constitutionally established family order.[65] Such measures intend to utilize family relations to enhance the efficiency of combating specific crimes, forcing family members to bear "joint and several" liability, which instead causes individuals to suffer harm precisely due to their family relations. In this sense, the aforementioned scenario runs completely contrary to the normative intention of the "protective family."

[65] Lin Yan, "A Constitutional Analysis of Joint and Several Liability Imposed on the Families of Persons Suspected of Illegal or Criminal Acts," *Science of Law* 3 (2024): 75-76.

However, this does not imply that the "autonomous family" fails to play a role. Freedom and equality are generally interrelated, and the state's improper intervention or differential treatment both trigger the defensive rights function of fundamental rights. The aforementioned case does not involve direct intervention in the family, but causes "factual damage" to it. For the family, this type of intervention lacks directness; rather, it is a detriment indirectly triggered via a reflexive effect.[66] In the aforementioned case, direct impact is exerted on the fundamental rights of the family members of individuals involved in crimes, such as their rights to education and employment; however, it indirectly causes family relations to constitute a burden on the individual (a burden they would not bear but for the family association), thereby creating discrimination against the family as a form of life. Furthermore, if the family faces legal discrimination, people are highly likely to abandon this way of life. In addition, utilizing the family as a vehicle for criminal prosecution practically demands that the family become a "state assistant" (Hilfspersonen des Staates)[67]for specific tasks. This damages intimate relationships while intervening in the individual's freedom to arrange family life. Evidently, damage to and discrimination against the family as a form of life affect people's freedom to choose and shape family life. Therefore, the analysis of the principle of proportionality can be applied.[68] In essence, this scenario is situated at the intersection where the operations of the "autonomous family" and the "protective family" intersect.

B. The operational scenarios of the "protective family"

The "protective family" is a form of individual life that receives special protection from the state; consequently, individuals within the family are able to obtain special care compared to those in other forms of life.[69] Theoretically, its effects manifest primarily through the positive institutional guarantee, the state's obligation to protect, and the obligation to provide benefits, though its specific operational scenarios need to be further distinguished.

1. Legislative formulation of and intervention in the family

As previously stated, the legislature bears the task of formulating the family institution. It must provide foundational organizational benefits for individuals who intend to enter family relations, as well as for the subsequent maintenance and exit of such relations. Under the framework of the institutional guarantee, this implies a minimum level of legislative formulation; as long as the legislature does not damage the foundational framework or essence of fundamental rights, it still enjoys a certain scope of legislative formulation.[70] The question here lies in how to determine whether the legislature's action constitutes the "formulation" (Ausgestaltung) or "intervention" (Eingriff) into the family. This concerns the demarcation between the operational scenarios of the "autonomous family" and the "protective family."

It is generally believed that the focus of this distinction should be placed on the differences in the normative orientation of legislation. For fundamental rights that are legally formulated, such as the family, formulation is purely the definition of their scope of protection; conversely, intervention constitutes an "obstruction" generated by the state to protect public interests or other fundamental rights, thereby involving a balancing against different fundamental rights or the public good.[71] Consequently, the distinction between family intervention and formulation should consider whether the relevant legislation, in terms of its normative orientation, purely contemplates family autonomy to maintain the effective functioning of family roles, or whether there exist considerations of other public interests or fundamental rights. Theoretically, this can also be termed "intrinsic purpose"

[66] Chen Zheng, "On the Factual Damage to Fundamental Rights Caused by Administrative Legal Acts: Based on an Investigation of German Law," *Global Law Review* 3 (2014): 175.
[67] BVerfGE125, 260 (366).
[68] For the analysis on the principle of proportionality for the right to equality, see Wang Kai, "The Application of the Principle of Proportionality in the Constitutional Analysis of the Right to Equality," *Law Science* 2 (2023): 32-46.
[69] As the German Federal Constitutional Court stated, this means "placing marriage and the family, as the foundational units of every human society, under the special protection of the state order, with which no other human relationships can compare in terms of importance." BVerfGE6, 55 (71ff.).
[70] Volker Epping et al., *Fundamental Rights*, Zhang Dongyang trans. (Beijing: Peking University Press, 2023), 206.
[71] Wang Kai, "The Delimitation of the Scope of Protecting Fundamental Rights," *Chinese Journal of Law* 5 (2020): 114.

versus "extrinsic purpose."[72] For instance, the definition of the scope of family members in Article 1045 of the *Civil Code* focuses heavily on close relationships and the elements of shared life. Its considerations look toward the rational allocation of rights and obligations among members (such as child-rearing and support for parents), thus belonging to a relatively typical legislative formulation. At this point, the constitutional constraint upon the legislature lies in whether it violates its limits of formulation — namely, whether there is a departure from the essential connotation of the fundamental right.[73] On the contrary, legislation enacted for public interest purposes such as public security, household registration, population management, and social development may give rise to intervention and is situated within the normative framework of the "autonomous family."

However, legislative considerations regarding domestic affairs are often relatively complex. If the normative intention of the legislation stems from within the family (such as preventing domestic abuse) and involves the reconciliation of internal family relations, the legislation points neither purely toward public interests, nor toward the formulation of family autonomy itself. At this point, the appearance of the "responsible family" may be involved, and the distinction needs to be further refined. In fact, the essence of the difference in normative orientation lies in whether the legislation obstructs the "unhindered realization" (die Nichthemmung der Realisierung) of fundamental rights.[74] Legislation regulating domestic abuse points toward the correction, rather than the realization, of family autonomy; even if it does not stem from considerations of public interests or other fundamental rights, it should still be regarded as an intervention.

2. The operation of the obligation to provide benefits under the "protective family"

The "protective family" signifies that the state is obliged to provide non-material and material foundations for the individual's family life. However, to what extent does the state bear the obligation to provide benefits to the family? It is generally believed that although the principle that "the family shall be protected by the state" implies a "mandate for promotion," this may not be directly translated into the individual's right to request benefits.[75] The immediate reason lies in the constraint of the "reservation of the possible". Unlike the defensive rights function, which merely requires negative state non-action, the realization of benefits is objectively limited by public finance and the status of resource allocation. Furthermore, the acquisition of public revenue simultaneously associates with the right to private property; an excessively expanded obligation to provide benefits might further create a burden on property rights. Consequently, the "reservation of the possible" requires the legislature to consider the burden sustained by public finance when implementing constitutional principles; the legislature thereby enjoys a considerably large prerogative of appraisal.[76]

Apart from the aforementioned, the prudent approach toward the obligation to provide benefits is related to the principle of subsidiarity. It is not difficult to understand that the "autonomous family" implies the autonomous fulfillment of functions such as child-rearing and support for parents within the family, and the realization of these functions entails family autonomy. Relatively, when the state education system partially absorbs the educational functions of the family, the separation of functions away from the family simultaneously implies the reduction of the sphere of family autonomy and the state's takeover of the corresponding functions; the "protective family" then appears.[77] However, this takeover is conditional. An overemphasis on substantive freedom and substantive equality may lead to the side effect of "social paternalism," wherein the "assumed beneficiaries are, in turn, restricted within their autonomous space."[78] Precisely because the state's takeover may weaken the autonomous

[72] Torsten Kingreen & Ralf Poscher, "The Shape of Fundamental Rights," Zhang Xurui and Wang Sirui trans., *Sino-German Legal Forum*, vol. 20, Part I, (Nanjing: Nanjing University Press, 2024), 200.
[73] Wang Kai, "The Delimitation of the Scope of Protecting Fundamental Rights," 114.
[74] Vgl. Robert Alexy, Theorie der Grundrechte, 3. Aufl., Suhrkamp, 1996, S. 306.
[75] Dieter Schwab, *German Family Law*, 11.
[76] Chen Zheng, "The Value Attribute and Normative Positioning of Constitutional Social Rights," 13.
[77] As sociological scholars have stated, the modern state is committed to weakening the dependence of the family on kinship, the dependence of women on men, and the dependence of children on parents. Conversely, the weakening of these traditional dependency relations also causes the family and its members to depend more heavily on the state. See François de Singly, *Sociologie de la famille contemporaine*, Fang Xuan trans. (Tianjin: Tianjin People's Publishing House, 2012), 31.
[78] Jürgen Habermas, Die Einbeziehung des Anderen: Studien zur politischen Theorie, Suhrkamp, 1996, S. 302 f.

image of individuals within family life, measures such as providing financial subsidies to families are often considered to cause long-term family dependence on the state, which does not conform to the normative spirit of family protection.[79] More importantly, the family as a field of freedom carries special intimate relationships; thus, even state benefits need to consider the internal prioritization of the family. For instance, the mainstream elder-care model in China is predominantly home-based, following a sequence from the individual or family to society, and then to the state to determine the actual bearing of responsibility. This is clearly influenced not only by state financial factors, but also by the localized "feedback model" and "filial piety culture" that possess emotional elements.

Therefore, the state must first respect the role of the "autonomous family" and allow the family to exercise its functions autonomously. On this basis, the state should consider financial factors and intervene only when the family is unable to realize substantive freedom on its own (such as when the fulfillment of rearing and support functions is obstructed due to a lack of material conditions). Taking multiple factors into account, the principle of subsidiarity plays a role here in coordinating the sequence of appearance for the different images of the family: the ability and willingness of individuals to realize their family life should be considered. Decisions affecting family life should be made preferentially by the unit closest to the affected subjects, and a decision shall be made by a higher-level unit only when the former is unable to perform that task. State intervention here possesses a subsidiary character. Under this concept, the constitution preferentially views the individual as an autonomous human being, and the appearance of the "protective family" presupposes the respect for the "autonomous family". Under normal circumstances, the individual does not possess a right to demand state benefits in relation to family life; in principle, it is up to the legislature to determine the mode and degree of the realization of such benefits.

3. The operation of the obligation to protect under the "protective family"

Unlike the obligation to provide benefits, the obligation to protect aims to defend against infringements upon family autonomy by non-state forces. The obligation to protect exists within an "individual-state-individual" triangular relationship, where the state often needs to restrict one party in order to protect another.[80] When implementing the obligation to protect, the principle of prohibiting insufficient protection is primarily applied to judge whether the protection scheme implemented by the legislature conforms to constitutional requirements. This is equally applicable within the context of the "protective family"; the obligation to protect the family bears only a minimum protection requirement, provided that the legislature's non-action possesses a character of reasonable expectation for the counterparties.[81] In the previous legislative discussions on amending the crime of purchasing abducted women, academic discussion focused primarily on the infringement of purchasing acts upon the human dignity of women and the trampling upon the fundamental value of human beings under the constitution.[82] In fact, both abducted women and children may be individuals within the family (especially the latter). The act of purchasing often causes a forced detachment of the victim from his/her original family life, while inflicting damage upon the victim's family. The "protective family" consequently exerts a constraint upon the legislature; when considering revisions to prison sentences, the reasonable expectation of relevant groups must not be ignored.

It should be noted that it is possible to speak of the involvement of the "protective family" only when at least the protected party is an individual within the family. However, if both the protected party and the restricted party belong to the same family, it involves the joint operation of different images of the family, which does not fall under the pure operational scenario of the "protective

[79] Vgl. Viola Schmid (Fn.61), S. 416 f.

[80] Chen Zheng, "The Function of the State's Obligation to Protect Fundamental Rights," *Chinese Journal of Law* 1 (2008): 53.

[81] The judgment of reasonable expectation lies in whether individuals can be expected to tolerate the state's non-action. The specific assessment criteria should consider factors such as the intensity of the threat or damage to the protected individual's rights, the urgency of the threat and the likelihood of actual damage to those rights, the avoidability of the third party's damaging behavior, and the possibility of self-help by the protected individual. See Chen Zheng, "The Principle of Prohibiting Insufficient Protection in Constitutional Law: A Comparative Argumentation with the Principle of Proportionality," *Chinese Journal of Law* 4 (2021): 68-69.

[82] Zhang Mingkai, Zhou Guangquan, Wang Xixin, Liu Yanhong, Sang Benqian, Che Hao, and Luo Xiang, "How Should Criminal Law Deter the Act of 'Purchasing Wives'? — A Discussion on Relevant Issues Concerning the Crime of Purchasing Abducted Women," *Democracy and Legal System* 11 (2022): 42.

family". For instance, when addressing the issue of domestic violence, the "responsible family" may appear simultaneously with the aforementioned two images of the family due to the operation of fundamental obligation norms. In addition, situations may exist where the protected party and the restricted party belong to different families, leading to a conflict between the rights and interests of the two families. In such cases, if a conflict of fundamental rights is not involved, only the principle of prohibiting insufficient protection remains applicable. Conversely, when a conflict of fundamental rights is involved, the legislature is simultaneously constrained by both the principle of proportionality and the principle of prohibiting insufficient protection; the formation space for the legislature lies precisely between the upper limit of damage to Family A and the lower limit of protection for Family B. If the aforementioned act of purchasing an abducted woman to become a member of a new family lacks a rights-based justification. In such circumstances, only the issue of the obligation to protect the victim should be considered. However, if the victim has already entered a new family life due to factors such as childbirth, thereby giving rise to a conflict between different instances of the "autonomous family" and the "protective family", the joint operation of the principle of proportionality and the principle of prohibiting insufficient protection should be considered.

V. The Individual's "Responsible Family" and Its Operational Scenarios

Unlike the "autonomous family" and the "protective family," the "responsible family" is embodied by fundamental constitutional obligations. It cannot be categorized under the general functional system of fundamental rights; on the contrary, it may run counter to other images of the family. Under such circumstances, the "responsible family" typically does not manifest in isolation; rather, its joint operation alongside the aforementioned images of the family should be examined.

A. The "responsible family" as a legitimate basis for specific intervention

1. The specificity of intervention and the enhancement of justification

It is generally believed that fundamental obligations fall within the category of intervention in fundamental rights.[83] As Hofmann stated, the concretization of fundamental obligations invariably leads to results that restrict individual freedom; in this regard, fundamental obligations are indistinguishable from intervention in fundamental rights.[84] As previously stated, a distinction exists between this intervention and general state intervention. For instance, the parents' obligations to raise and educate their minor children are aimed at safeguarding the interests of the children; such fundamental obligations regulating internal family relations are not directed at the state. The appearance of the "responsible family" implies that the ground for intervention stems from within the family. For example, unlike the prevention of external damage to the family, when issues such as abuse or abandonment exist within the family, the consideration focuses on whether the state should step in with its intervention to prevent individuals from suffering harm due to internal family factors.

Precisely because of this difference in internal and external orientations, the "responsible family" provides a special justificatory basis for state intervention. The reason why Article 49 of China's *Constitution* prescribes fundamental obligations lies in its reservation toward the complete autonomy of the individual; when the individual within the family fails to fulfill his/her due responsibilities, the state may utilize these obligations to correct family autonomy. Since the ground for intervention originates from within the family to address issues that the family fails to handle on its own, intervention derived from the "responsible family" possesses a special weight compared to considerations of external public interests or other fundamental rights. Consequently, this intervention may extend to the family, which, as the "private sphere" of the individual, demands stringent justification for intervention.

However, from the perspective of some scholars, fundamental obligations directly demarcate the scope of protection of the relevant fundamental rights and are thus distinct from intervention in

[83] Vgl. Friedhelm Hufen, Staatsrecht II: Grundrechte, 10. Aufl., C. H. Beck, 2023, S. 65.
[84] Hasso Hofmann, "Fundamental Obligations Under the Constitution," Zhang Anbang and Mao Shengnan trans., *Journal of Soochow University (Law Edition)* 4 (2025): 154.

fundamental rights.[85] If this understanding is adopted, the constitution has already framed certain matters of family life and excluded certain possibilities of family autonomy; thus, the appearance of the "responsible family" naturally signifies the withdrawal of the "autonomous family." To illustrate this point, the fundamental obligation to pay taxes can serve as an example. China's *Constitution* prescribes both the citizens' obligation to pay taxes and the right to private property. Nevertheless, this does not equate to the substantive abolition of the constitutional right to private property, nor does it mean that the state may impose levies of any mode or intensity under the pretext of taxation. On the contrary, the corresponding burden inflicted on citizens' property rights by legislation must still undergo the constitutional justification review under the principle of proportionality.[86] By the same token, the enhancement of the weight of intervention does not imply the exclusion of family autonomy. The appearance of the "responsible family" simultaneously triggers the operation of the "autonomous family"; therefore, it is more appropriate to view the concretization of the "responsible family" as an intervention that carries a higher level of justification.

2. Legislative action and the demarcation of the image of the family

An argument might be raised that the aforementioned definition contradicts the standards for legislative formulation of or intervention in the family under the operation of the "protective family." If the normative intention of the "responsible family" points toward shaping internal family relations rather than other external fundamental rights or public interests, it should be categorized as formulation rather than intervention. In fact, the reason why the active legislative formulation of fundamental rights is required is that certain fundamental rights can hardly function in the absence of institutional formulation. Contrary to legislative intervention that obstructs individuals from executing matters falling within the scope of protection of fundamental rights, legislative formulation aims to facilitate individuals to better utilize these rights.[87] However, even if the legislature does not concretize fundamental obligations such as support for parents and child-rearing, individuals can still act according to their family circumstances and within their capabilities; legislative discipline is not necessarily indispensable. This is distinctly different from legislative formulation, where it is difficult to determine specific rights and obligations without the legislature defining the scope of family members. In other words, altruism within family life is not a unique creation of the legislature. In this sense, the legislative concretization of the "responsible family" does not pursue the effective utilization of individual freedom. Instead, it focuses on intervention when the family is "dysfunctional", thereby adjusting or punishing the behavioral misconduct of family members. Consequently, it still bears the characteristics of intervention in the "unhindered realization" of fundamental rights.

In light of the foregoing, when evaluating legislative action upon the family, one should first distinguish whether the normative intention stems from within the family or from outside the family. If it is generated by external public interests or other fundamental rights, it constitutes legislative intervention in the family; conversely, if the legislative consideration originates from within the family, a further distinction needs to be made as to whether the legislation relates to the prescribed fundamental obligations under Article 49 of the *Constitution*, or merely involves the formulation of elements of family autonomy. On this basis, and due to the absence of unenumerated fundamental obligations, not every legislative measure carrying internal family considerations manifests as an embodiment of the "responsible family." This is because the fundamental premise of constitutional thinking dictates that citizens do not need to provide reasons for exercising their fundamental rights, whereas the state must provide justification for restricting fundamental rights. Given the openness of the fundamental rights system, the extension of fundamental rights to domains not explicitly listed, in tandem with the development of the times, entirely conforms to the constitutional purpose.[88]

[85] Wang Kai, "Defending Citizens' Fundamental Obligations: Based on a Review of German Doctrines," *Politics and Law* 10 (2015): 124.
[86] Chen Zheng, "The Chinese Characteristics of Constitutional Fundamental Rights," 99-100.
[87] Vgl. Kingreen/Poscher, (Fn. 40), Rn. 266.
[88] Chen Zheng, "On the State Policies Under the Constitution and Their Guidance for Legislative Power," *Peking University Law Journal* 4 (2024): 8.

Fundamental obligations that restrict citizens' fundamental rights, however, do not enjoy such a justificatory advantage; they still must undergo a substantive demonstration of constitutional justification. Therefore, the concretization of intervention via fundamental obligations can only be confined to the directions of support for parents, child-rearing and education, and reproduction, established under Article 49 of the *Constitution*. For instance, although the fact of shared life bears major significance for family relations, a fundamental obligation of cohabitation between spouses cannot be derived therefrom. If it is not associated with an existing fundamental obligation, the intervention implemented by the legislature shall, as a general intervention, be bound by the operation of the "autonomous family."

B. The operational principles of the "responsible family"

Intervention in family autonomy stemming from external considerations may generally be directly tested against the principle of proportionality, while the concretization of the "responsible family" is relatively more complex. First, in certain circumstances, the legislature goes beyond prescribing corresponding sanctions when concretizing fundamental obligations; it also stipulates substitute state benefits. For instance, parents who fail to fulfill their rearing obligations to their minor children may face sanctions under criminal law, such as the crime of maltreatment or the crime of abandonment; simultaneously, the state may further take over their duties to provide benefits for minor children left unattended. However, the "responsible family" focuses on the individual's assumption of responsibility for his/her own conduct, rather than the state's takeover of such responsibility; this actually represents a joint operational scenario of the "protective family" and the "responsible family." It is simply that the operation of the obligation to provide benefits under the "protective family" is naturally regulated by the principle of subsidiarity, rendering this situation relatively easy to handle.

Second, alongside the course of intervention, the concretization of the "responsible family" often results in effects characteristic of the obligation to protect. The operation of the obligation to protect under the "protective family" lies in protecting the family by restricting external forces, which barely involves any conflict with the "autonomous family." Conversely, when the "responsible family" appears, it targets the reconciliation of internal family relations; the protection of the rights and interests of one party within the family usually restricts the rights and interests of another party simultaneously. This not only potentially implicates other fundamental rights of the individual, but also intervenes in family autonomy itself. Due to the existence of the "autonomous family," illegality and harm within the family were historically deemed to fall under the scope of family autonomy, which formed a "barrier effect" against state intervention.[89] For example, in the view of criminal law scholars, although situations where a husband commits violence due to disagreement over his wife's decision to divorce do not preclude a conviction for the crime of interfering with the freedom of marriage by violence, such a determination should be made with special caution, given the special marital relationship between spouses.[90] Aside from the fact that the baseline operation of the prohibition of insufficient protection naturally breaks through this "barrier effect", the coordination between the two images of the family under other circumstances should also be considered.

Third, it is also possible for the two aforementioned scenarios to occur simultaneously. For instance, in addition to imposing criminal sanctions on parents who fail to fulfill their corresponding obligations, the state not only provides substitute benefits for their minor children but may also divest them of their guardianship. In such a situation, the "autonomous family" (defense against the deprivation of guardianship), the "protective family" (substitute benefits for the children), and the "responsible family" (criminal punishment against the parents) may appear at the same time.

Regarding the latter two scenarios, the principle of subsidiarity plays a regulatory role in the order of operation between the "responsible family" and other images of the family. In accordance with the logic of the "expansion of human beings" and the "contraction of families," the prerequisite

[89] Deng Li, "Individual-Family Relations from the Perspective of the Civil Code," *Journal of Hebei Normal University (Philosophy and Social Sciences Edition)* 5 (2021): 144.
[90] Zhang Mingkai, *Criminal Law*, Part II (Beijing: Law Press • China, 2021), 1189.

for requiring individuals within the family to bear responsibility is that they are capable of autonomously exercising the functions of this form of life. The preservation of specific functions such as support for parents and child-rearing by the family signifies the priority of family autonomy. In other words, the premise for imposing corresponding family obligations upon individuals lies in recognizing that individuals within the family possess the capacity and freedom to achieve self-determination and realize their way of life; otherwise, the fulfillment of such obligations would be inconceivable. Under the premise of recognizing the priority of autonomy, the family may encounter "dysfunctional" situations when fulfilling functions such as child-rearing, education, and support for parents, exemplified by issues such as abuse or abandonment among family members. For the state, the dysfunction of the family and its handling do not constitute purely private affairs; rather, they possess the attributes of a public task. Considering both factors — namely, the priority of family autonomy and the public task attribute of correcting family dysfunction—priority should be given to evaluating the willingness and capability of individuals or groups in society when allocating tasks. Unless they are completely incompetent in terms of capability and willingness, the tasks should preferentially be handled internally within the family, with the state acting as a supporter and a supervisor.[91]

Therefore, similar to the operational scenarios of the aforementioned obligation to provide benefits under the "protective family," the appearance (intervention/protection) of the "responsible family" should respect the priority of the "autonomous family"—"that is, the intervention of the constitution is required only when the malfunction in the operation of the corresponding social subsystem causes a disorder in the relevant functions of that social sphere."[92] For instance, regarding parents' education of their children, the state recognizes the priority of parental rights, and parents may "act first." The state shall be responsible for supervising parents to ensure that they correctly fulfill their duties and to prevent the occurrence of "neglect."[93] On this basis, when the "responsible family" appears simultaneously with other images of the family, the principle of proportionality should still be considered to examine whether the corresponding restrictions impose an excessive burden on family autonomy, and whether the protection of the relevant individual conforms to the principle of prohibiting insufficient protection.

C. The forms of operation of the "responsible family"

Although they all must be transformed into legal obligations through legislative concretization and should conform to constitutional requirements such as the aforementioned principle of subsidiarity, the modes of operation of the various norms of fundamental obligation in Article 49 of the *Constitution* still differ due to the variations in the conduct they regulate.

First, the obligations of parents to raise and educate their minor children, as well as the obligations of adult children to support and assist their parents, as stipulated in Article 49(3) of the *Constitution*, belong to positive obligations (Handlungspflicht) within fundamental obligations. Depending on the stage of the exercise of the corresponding fundamental right, its restrictive effects may manifest in three forms. Formally, every subjective right contains two levels situated in a logical relationship: "whether" and "how" to exercise that right. A positive obligation directed at the former implies a restriction on negative freedom, indicating that one has no choice regarding "whether" to act, and individual freedom is reduced to the level of "how" to act. Conversely, a positive obligation directed at the latter regulates how to act, which is particularly reflected in constitutional norms that stipulate the manner in which fundamental rights are exercised. In addition, some positive obligations may simultaneously involve both levels of "whether" and "how" to act.[94] It is evident that the obligations of educating and raising minor children and supporting parents in Article 49 of the *Constitution* preclude the individual's negative freedom regarding "whether" to act. However, they

[91] Chen Zheng, "Public Tasks vs. State Tasks," *Academic Exchange* 4 (2010): 8-9.
[92] Li Zhongxia, "The Construction of a Society-Based Functional System of Fundamental Rights in China," 237.
[93] For detailed analysis, see Lin Jiarui, "On Parents' Constitutional Right to Educate Their Minor Children," *Fudan Education Forum* 3 (2024): 32.
[94] Vgl. Otto Luchterhandt, Grundpflichten als Verfassungsproblem in Deutschland: Geschichtliche Entwicklung und Grundpflichten unter dem Grundgesetz, Duncker & Humblot, 1988, S. 485 ff.

do not prescribe "how" parents and adult children should act when fulfilling their corresponding obligations. As previously stated, the state may not directly guide the specific formulation of a way of life within the family; rather, the state plays a primarily subsidiary supervisory role here, and the legislature's concretization of fundamental obligations should also adhere to this requirement.

Conversely, at the level of "whether" to act, if parents or adult children are incapable of fulfilling their obligations of raising and educating minor children and supporting parents, the subsidiary intervention of the state becomes relatively reasonable. Simultaneously, the positive obligations of parents and adult children may be transformed into corresponding obligations to tolerate (Duldungspflicht). This implies non-resistance and tolerance of the specific conduct of others, thereby allowing the conduct of others to affect one's own fundamental rights.[95] For instance, when parents are unable to raise and take care of their children, entities such as social assistance institutions shall assume the corresponding obligations of the parents; the parents must bear, to a certain extent, the obligation to tolerate separation from their children. Following the requirements of the principle of subsidiarity, when anomie behaviors involving malicious non-fulfillment of positive obligations occur, it will trigger sanctions such as the crime of abandonment as a form of legislative concretization.

Second, the prohibitory norms in Article 49(4) of the *Constitution* derive the negative obligations (Unterlassungspflicht) of family members. This type of fundamental obligation restricts rights in their positive forms such as parents' right to raise and educate their minor children) and demarcates boundaries for these rights; once these boundaries are crossed, their protective effects will be diminished. Sharing the same logic as Article 51 of the *Constitution*, which serves as a clause on the "limits of rights", the design of such norms is intended to prevent the abuse of freedom or rights such as family autonomy. In accordance with Article 49(4) of the *Constitution*, if maltreatment or other similar conditions occur during the process of raising and educating minor children or supporting and assisting parents, a corresponding loss of fundamental rights may take place.[96] For instance, according to Article 36 of the *Civil Code*, if a guardian performs acts that seriously damage the lawful rights and interests of the ward, his/her qualification as a guardian may be revoked. In addition, the violation of negative obligations may simultaneously incur sanctions of state punishment. Article 49(4) of the *Constitution* is thereby linked with provisions such as the crime of maltreatment; nevertheless, the structure of modesty characterized by "handle only upon complaint" still respects the priority of family autonomy to a considerable extent.

Third, the form of operation of Article 49(2) of the *Constitution* is relatively complex. The stipulation that "Both husband and wife shall have the obligation to practice family planning" is directed toward a couple's right to choose their reproductive behavior. However, it is not confined to negative obligations. Previously, it was generally believed that the regulation of the number of children primarily targeted the question of "whether" a couple should reproduce; it chiefly constrained couples who had not yet reproduced or those who already had a certain number of children, demanding that they refrain from unplanned reproduction. In fact, due to the abstract nature of the phrasing, the word "planning" does not indicate an encouraging or negative attitude toward reproduction; instead, it is highly malleable and leaves ample room for interpretation. "Family planning" may manifest as a positive or negative obligation concerning the "whether" dimension of reproduction, express itself as a quantity regulation regarding the "how" dimension of reproduction, or even manifest as active state support for reproduction. In recent years, due to the shift of the relevant basic national policy (Article 25 of the *Constitution*) toward high-quality population development, the legal effect regarding the burdensome nature of this obligation[97] has been greatly

[95] Vgl., S.491.

[96] The abuse of fundamental rights, due to its non-conformity with the purpose of the rights, will lead to the forfeiture of fundamental rights, meaning that the party concerned may no longer claim that its specific fundamental rights have been infringed upon. See Wang Kai, "On the Forfeiture of Fundamental Rights Under German Law," *Global Law Review* 3 (2018): 112.

[97] Such a shift is not necessarily unreasonable, as constitutional state policies such as family planning are highly abstract and long-term. Due to the constantly changing social and economic framework conditions, the same state policy objective may continuously pose new demands to the legislature, generating different legislative guidance effects. In order to strive to achieve the state anticipated by the

diminished, and its obligational attributes have undergone a transformation. Within the context of high-quality population development, the family planning obligation has shifted toward the operation of the obligation to provide benefits under the "protective family," which should be transformed into legal support for reproduction by the legislature. However, taking the principle of subsidiarity into consideration, the state should still respect reproductive autonomy as a prerequisite and provide subsidiary intervention for removing obstacles faced by couples in terms of reproduction.

Evidently, in accordance with the differences in the forms of regulated conduct, the concretization of fundamental obligations contains self-limitation in terms of direction and intensity. If the legislature transforms and elevates an obligation that merely requires the individual's non-action (such as the prohibition of domestic abuse) into an obligation prescribing "how" the individual must act (such as requiring a relatively high level of support for parents), the originally high level of justification for intervention under the "responsible family" will decrease, because the connection between fundamental obligations and their forms of concretization becomes more attenuated.

VI. Conclusion

The phenomenon of the family has undergone a winding, protracted process of functional separation and retention; a monistic characterization of either family rights or an institutional guarantee can hardly bear the full significance of the family for the protection of human rights. Situated at the intersection of tradition and modernity, and of self and the other, the family life of individuals is complex and diverse. Protecting individuals within the family cannot be confined to a singular dimension; therefore, the constitution has to design a multi-dimensional structure of rights, institutions, and obligations.

For the individual, the family constitutes both a field of freedom and conditions of special protection, as well as a mandate to assume responsibility. Within the logic of the "expansion of human beings" and the "contraction of families," the focal consideration of state intervention in family relations always lies in the autonomous life of the individual and the autonomous exercise of family functions. The constitutional image of the family prioritizes autonomy as its chief consideration. However, considering that the individual's family life always encounters internal and external factors that prevent family life from being self-sufficient, the other two images of the family play a complementary role. This point is manifested not only in the order in which the various images of the family operate, but also within the specific operation of each image.

Through the aforementioned typological process, in principle, all public power measures involving the family may be categorized under the operational scenarios and analytical paths of the corresponding images of the family. The "autonomous family" enjoys an operational priority. Aside from legislative formulation as a prerequisite and the obligation to protect as a baseline requirement, both the "protective family" and the "responsible family" shall appear in accordance with the principle of subsidiarity. Depending on the operational scenarios of the different images of the family, the constitution imposes different requirements on state actions. First, the family manifests as a field of freedom; institutions that run counter to constitutional values must not be (re)introduced, and state intervention in family autonomy is constrained by the principle of proportionality. Second, the family as a specific condition for benefits and protection implies that the legislative formulation of foundational family elements must not exceed the limits of formulation. The state bears an obligation to protect against damage originating from external forces; however, its obligation to provide benefits to the family is subject to the principle of subsidiarity. Third, the state can derive a legitimate basis for specific intervention from fundamental obligation norms; nevertheless, the corresponding concretization measures should still adhere to the principle of subsidiarity and its operational forms, and are generally subject to the two-way constraints of both the principle of proportionality and the principle of prohibiting insufficient protection.

In any event, the aforementioned typological attempt serves merely as an overview of the overall

framers of the Constitution, the legislature must continuously adopt corresponding measures under necessary circumstances. See Chen Zheng, "On the State Policies Under the Constitution and Their Guidance for Legislative Power," 5-6.

picture. Given the complex circumstances and dynamic evolution of family relations in social reality, how to achieve the autonomy and harmony of family life within each specific case and implement the constitutional shaping of the family remains to be further explored. In future research, attention should be paid to the interaction and coherence between the existing order and constitutional norms within the domain of the family, so as to follow the Chinese path of human rights development and develop an indigenous constitutional law of the family.

(Translated by *QI Guohua*)