

全民健保特約制度： 制度性法律保留？— 從司法院釋字第753號解釋談起

The System of Contracted Medical Care Institutions:
Institutional Gesetzesvorbehalt?
—On Judicial Interpretation No. 753

張桐銳 Tung-Jui Chang *



摘要

司法院釋字第753號解釋從制度性法律保留之角度，理解健保特約制度，而認為健保特約制度「未直接限制人民之自由權利」。本文指出健保特約制度底下之基本權侵害態樣，以及其侵害之強度相當於職業許可條件，從而其正當化應適用與職業許可條件相同之正當化基準。惟依司法院憲法解釋歷來之立場，即使職業許可條件，其正當化亦無須適用國會保留原則。對於此一立場，本文認為從民主正當性與重要性理論之角度來看，有所缺憾，然而此卻為國內所常見，此反映了行政部門對於立法部門之不信任。

*國立政治大學法律學系專任教授（Professor, College of Law, National Chengchi University）

關鍵詞：三階段理論（three-stage theory）、健保特約制度（the system of contracted medical care institutions）、國會保留原則（the principle of Parlamentsvorbehalt）、基本權侵害（interference with a fundamental right）

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Judicial Yuan Interpretation No. 753 explains that the system of contracted medical care institutions is understood from the perspective of institutional *Gesetzesvorbehalt*, and believes that the system of contracted medical care institutions “does that directly restrict people’s freedoms and rights.” This article points out the forms of the interference with fundamental rights in the system of contracted medical care institutions, and the strength of interference is equivalent to the restrictions on free career choice through admission requirements. Therefore, the same justification standards as the admission requirements should be applied to its justification. However, according to the persistent position of Judicial Yuan, even by the justification of the admission requirements, the principle of *Parlamentsvorbehalt* does not need to be applied. Regarding this position, this article believes that it has shortcoming from the perspective of democratic legitimacy and importance theory. However, this position is common and reflects the distrust of the executive branch towards the legislative branch.

壹、問題之提出

全民健康保險（下稱健保）之保險對象接受醫療服務或藥品，係透過與保險人（衛生福利部中央健康保險署，下稱健保署）間具有特約法律關係之健保醫事服務機構所提供。在健保保險人、被保險人及健保醫事服務機構間形成多方而複雜之法律關係¹。在此一多方法律關係中，健保署與健保醫事服務機

1 關於健保多邊法律關係，參閱：張桐銳，全民健保法律關係之再檢討——評臺北高等行政法院98年度簡字第826號判決，收錄於：社會