

# Study on Elder Abuse Highlighted by the COVID-19 Pandemic in China and Its Response in Criminal Law

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## Abstract

Since the prevalence of the COVID-19 Pandemic, the generational rupture or discontinuity has highlighted the sharp emergence of elder abuse as a social reality for older people, compounded by the world trend of population aging. Elder abuse is a problem that must be actively addressed by governments and society at large. Some countries recognize the social harm of elder abuse and regulate it as an independent issue through legal systems. In China's Criminal Law, however, this issue is still regarded as a matter of general family relationship and is primarily protected under offenses such as abuse, maltreatment of guardians and caretakers, and abandonment to protect the rights and interests of elderly families and those who receive care. However, the issues exposed by the epidemic require us to reconsider the scope of family relationships, the ways in which abuse occurs, and the criminal penalties associated with the aforementioned offenses..

## Keywords

COVID-19, Elder Abuse, Criminal Law.

## 1. Introduction

In the context of an increasingly aging population, the protection of the rights of elderly individuals has become a global social issue. During periods of economic recession or natural disasters, interpersonal relationships have been proved fragile and instances of violence escalate.[1][2] According to the World Health Organization (WHO), since the outbreak of COVID-19, cases of domestic violence and elder abuse have become more apparent.[3] Elder abuse is no longer just a flag in the field of human rights[4], but rather presents new challenges and requires new strategies from governments and society at large. Elder abuse is defined by the WHO as any single or repeated act occurring within a relationship where there is an expectation of trust which causes harm or distress to an older person, including physical, sexual, psychological, emotional or financial abuse, as well as neglect or abandonment.[5]

In China, the issue of aging populations has become particularly pressing during the COVID-19 pandemic. As of the end of 2021, the population of Chinese citizens aged 65 years or over had risen to 200.56 million, accounting for 14.2% of the total population, and with a senior dependency ratio of 20.8%, China is on the verge of experiencing a deepening aging crisis.[6] Researches show that the incidence of elder abuse in China has increased during the COVID-19 pandemic. For example, "In the past year, the prevalence of psychological and financial abuse among older adults was 3.9% and 2%, respectively. Weak physical health, psychological vulnerability, and lower participation in household labor further increase the risk of elder abuse." [7] "We collected 10,362 samples from Hunan province, and found significantly more cases of elder abuse during the COVID-19 pandemic than in 2010." [8] "The COVID-19 pandemic has reduced opportunities and conditions for traditional street and public place crimes, resulting in a shift of criminal activities to homes and indoors, with older adults and children

becoming the primary targets of criminals." [9] As the situation of the epidemic changes, epidemic prevention and control policies are constantly being optimized. One of the major key factors in assessing prevention and control measures is to ensure the health of the elderly. Due to their susceptibility to infections, economic dependence, and low participation in family affairs, the elderly have always been the key protected group in public health crises. [ ] However, population trends cannot be changed overnight, and coupled with the suddenness and variability of public health crises, we are faced with the dual pressures of the rapid increase in the proportion of the aging population and the protection of the life and health of the elderly, which is a challenge that we must face today.

## 2. Methodology

To explore the response strategies to elder abuse in China, we must first employ methods of historical and comparative research to understand the overall pattern of our country's legal regulation of elder abuse. In legislating against elder abuse, China has adopted a Total-Part Model under the guidance of the Constitution. Second, we use the method of legal interpretation to analyze the provisions and their possible loopholes related to abusive behavior towards elders and identify the underlying causes of these problems. This analysis also includes some case studies.

### 2.1. Historical Research and Legal Interpretation

The 1982 Constitution firstly wrote the explicit rule in China to prohibit elder abuse, with Article 49 stating: "Elderly citizens, women, and children shall be protected. The state shall prohibit any acts that undermine their dignity and endanger their personal safety and health." Prior to the 1982 Constitution, constitutional documents in China only emphasized the protection of marriage, family, mothers, and children, without highlighting specific provisions for the protection of older adults. For example, there were no relevant provisions in the 1954 Constitution; the 1981 Marriage Law only regulated violence, abuse, or abandonment among family members. Due to the historical constraints at the time, the "prohibition of elderly abuse" in the 1982 Constitution is not identical to the current concept of "elder abuse," but this does not negate its constitutional guidance role. With the Constitution as a guide, China's current laws on protecting the rights and interests of the elderly mainly exist in the fields of public law, private law, and social law, including the Elderly Rights Protection Law, the Civil Code, the Anti-Domestic Violence Law, the Public Security Administration Punishment Law, and the Criminal Law. For example, Article 75 of the Elderly Rights Protection Law stipulates that those who abuse or commit domestic violence against the elderly shall not only bear administrative responsibilities but also be held criminally responsible according to law. Article 45 of the Public Security Administration Punishment Law stipulates that those who engage in the following behaviors shall be detained for no more than five days or warned: (1) abusing family members at the request of the victim; and (2) abandoning a supported person without the ability to live independently. In responding to elder abuse, the current regulations on protecting the rights and interests of the elderly in China have demonstrated a distinctive overall and divisional pattern.

The legislation of China's Criminal Law regulates the criminal behavior of elder abuse through the protection of family-law interests, specifically including the crimes of abuse, abuse of guardianship or caregivers, and abandonment. The protected interests are the personal rights enjoyed by citizens in the family according to law, and thus distinguish abusive crimes from intentional harm crimes. Among them, the crimes of abusing guardians or caregivers were added by Amendment 9 to the Criminal Law, aimed at punishing natural persons and entities who abuse non-family members with guardianship or care responsibilities, such as kindergarten teachers responsible for caring for children, nursing homes and their staff

responsible for caring for the elderly, as well as doctors and nurses in hospitals. This expands the scope of protection for the elderly. It should be noted that Article 260 of the crime of abuse stipulates that self-prosecution is the principle and public prosecution is an exception to the litigation requirements[11], bringing crimes of abuse among family members into the category of "only prosecuted upon complaint".

## 2.2. Cases and Comparisons

China's legislation has been somewhat effective in addressing elderly protection issues. For example, in the field of criminal law, since 2015, over 200 cases of abuse and over 70 cases of abuse by guardians or caregivers have been resolved.[12] However, in comparison with the incidence rate of elderly abuse discussed earlier, it can be seen that the cases where the law intervenes in elderly abuse are just the tip of the iceberg. There are many more cases of elderly abuse that cannot be presented by data, which is closely related to the flaws in the current legal regulations on elderly abuse in China.

As above, In China, the protection of elderly people is mainly achieved through adjustments to family relationships. The legal regulations for the protection of elderly people are often merged with family norms, and are not treated as independent issues nor enacted through independent legislation. An independent approach refers to giving independent status to the issue of elder abuse, separating it from family problems as a separate social relationship issue and establishing corresponding measures. Currently, Japan and other countries have adopted this regulatory method. For example, in 1995, Japan's National Welfare Council edited a report titled "Constructing a New Elderly Care System" which first raised the issue of elder abuse and related laws. In 2005, the "Law on Prevention of Elder Abuse and Support for Caregivers" was formally promulgated, followed by the issuance of regulations such as the "Elder Abuse Response Manual" by local governments and councils. These regulations define the definition, types, and manifestations (identification criteria) of elder abuse. Yet the current legislative model in China does not reflect sufficient attention to this issue.

## 3. Findings

### 3.1. Vague in The definition of Abuse

The definition of abuse in China's laws takes various forms and revolves around domestic violence. Firstly, serious acts of domestic violence can be considered abusive. Article 1 of the Supreme People's Court's Interpretation on the Application of the Marriage and Family Chapter of the Civil Code (I) which came into effect on January 1, 2021, defines domestic violence as "actions taken by the perpetrator to physically or mentally harm their family members, such as beating, binding, mutilating, forcibly restricting personal freedom or other means, resulting in certain physical or mental injuries to their family members. Continuous, frequent domestic violence constitutes abuse." This interpretation defines abuse as continuous and frequent domestic violence. Secondly, abusive behavior is a type of domestic violence. The Opinions on the Handling of Criminal Cases of Domestic Violence by Law issued by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of State Security on March 2, 2015 describes abusive crimes as "using means such as beating, freezing and starving, forcing excessive labor, restricting personal freedom, intimidation, insults, and verbal abuse to torment and torture family members' bodies and minds, which is a more common form of abusive domestic violence in practice." In comparison, both criminal and civil law classify abuse as a form of domestic violence, but there are different understandings of its connotation. Civil legal norms define abuse as persistent and frequent domestic violence, and abuse is a quantitative concept within the context of domestic violence. The definition of abuse in criminal legal norms is almost the same as domestic violence, but it emphasizes the

abusive nature of domestic violence and is a typological induction of abusive behavior. A precise definition of abuse cannot be found in other legal norms. Moreover, in criminal law, abuse against prisoners mainly refers to physical assaults or corporal punishment, which differs greatly from the abusive behaviors defined in the crimes of abuse, abuse of guardians or caregivers.

### **3.2. The Internal and External Contradictions in Criminal Provisions for Abuse**

The contrast between the high incidence rate of abuse and low prosecution rate reflects potential obstacles to the application of abuse crimes. Although not all abusive behavior constitutes a crime, this phenomenon still suggests the need to constantly examine the rationality of the criminal punishment for abuse crimes. On the one hand, we cannot deny that the family value occupies an important position in Chinese traditional culture. When family abuse occurs, victims often choose other ways to resolve the issue. On the other hand, the suspicion of confusion between abusive crimes and intentional injury or intentional homicide crimes has long been ignored. In judicial practice, the judicial application of abusive crimes is limited, which is obviously disconnected from the reality where both domestic violence and abuse outside the family are common. Most cases with serious harm are prosecuted with intentional injury or intentional homicide charges.[13] In addition, the sentencing for abusive crimes has also been questioned. For example, the highest penalty for abuse is seven years of imprisonment, while intentional injury can be punishable by death. Different qualifications of behaviors may lead to significant differences in legal consequences.

## **4. Suggestions for the Improvement**

Article 49(1) of China's Constitution clearly stipulates that "the state shall protect the family", while paragraph 4 specifically prohibits "abuse of the elderly, women and children". In terms of legislative purposes, the establishment of the crime of abuse and its penalty configuration is to implement the relevant provisions of Article 49(1) and Paragraph 4 of the Constitution. Its constitutional nature is the state's responsibility to fulfill its basic rights protection obligations through criminal legislation. The elderly protection issues exposed during the pandemic, such as the conflict between public activities and susceptibility to infection, the barrier between traditional lifestyles and modern technologies, and the tension between the strong demand for treatment and rigid medical policies, indicate that we must immediately raise our vigilance. The Constitution, as a principle of institutional design, does not prevent it from exerting its command functions. We need to clearly define the concept of elderly abuse in departmental regulations, including its definition and behavior, and discuss the reasonable space for improving the relevant provisions on abuse crimes.

### **4.1. Define The Legal Concept of Elder Abuse**

#### **4.1.1. Establish clear terms**

As far as criminal law is concerned, the definition of abuse in the crimes of abuse and abuse of guardians or caretakers should be unified and consistent with the definition of abuse in legal norms related to family relationships. The reason for this is that the trust relationship between the elderly and family members is analogous to the trust relationship between the elderly and guardians or caretakers. It is generally believed that family members refer to people who live together in a family based on marriage, blood relationship, adoption, and other relationships and have a kinship relationship with each other. According to Article 1045 of the Civil Code, spouses, parents, children, and other close relatives living together are family members. Therefore, it can be said that the general opinion adopts the method of identifying family members in civil law, which uses formal elements such as marriage and blood relationship as the basis for judgment. However, adopting a formalistic approach in criminal law is not

appropriate. On the one hand, there are differences in the fundamental principles between civil law and criminal law. Civil law simplifies the judgment process by adopting a formalistic approach, which improves efficiency; whereas once criminal law comes into play, it involves whether or not to label the perpetrator as a criminal, whether or not to impose a penalty on the perpetrator, and thus attaches particular importance to value judgments, emphasizing the substantive analysis of norm violations and infringements on legal interests. Even the debate between formalism and substantialism in the interpretation of criminal law is an internal dispute within value judgments. Family and culture, which permeate every corner of life, are the most valued aspects of life for the Chinese people.[14]

Generally, it is unrealistic to expect the judge to directly judge the subjective feelings of the perpetrators and the victims, as this would increase the risk of subjective judgments. Therefore, it is necessary to find an objective judgment criterion that can best reflect the subjective feelings to achieve operability in practical judgments. The criterion of "whether there is a close living relationship" is competent for this purpose. In practice, the judge should examine whether there is a close living relationship between the perpetrator and the victim, and substantively determine whether they have established a close living community and whether they have sacrificed some individual traits to belong to a family and live under the name of the family. In short, the factual family should also be recognized by criminal law, and it is necessary to agree with the view that the object of the crime of abuse should be expanded to include members of the factual family.[15][16] Based on the above argument, recognizing non-formal family members as eligible parties for the crime of abuse is an assessment from the perspective of substantive judgment of the relationship between the perpetrator and the victim. Therefore, caregivers who live with the elderly, de facto adoptive parents without proper adoption procedures, and caretakers who provide long-term care for the elderly can all form close living relationships with the elderly. Thus, the meaning of abuse in these two crimes should be the same and consistent with other legal specifications.

In summary, the legal interests protected by abuse crimes should be the physical and mental safety of the elderly and the close trust relationship with a fixed living member. Not only physical harm and the resulting psychological damage can destroy this kind of trust relationship, as recognized by most countries, economic and emotional abuse can have equally negative effects. Attempting to define the scope of abuse through enumeration may overlook other possible abusive behaviors and impose certain limitations on the amendment and interpretation of laws. Therefore, an abstract and generalized definition of abuse should be adopted to reveal the essence of abusive behavior, which is to cause damage to the trust relationship through means such as physical and mental harm.

#### **4.1.2. Modify the Behaviour Element of Abuse Crimes**

The theoretical community generally believes that abusive behavior is mainly manifested as physical and mental torture, such as beating, binding, scalding, corporal punishment, starvation, restrictions on freedom, and verbal insults.[17][18][19] Article 17 of the "Opinions on Domestic Violence" also provides similar provisions. However, the above definition is only a general description of abusive behavior, and does not indicate the difference between abusive behavior and intentional harm behavior. The acts of "beating", "scalding", "freezing", etc. in the definition can also be intentional harm behavior, and the general summary of "physical and mental torture" does not really provide a judgment standard for abusive behavior. As mentioned earlier, the means of abuse also include sexual abuse, economic abuse, and neglect, all of which are factors that cause physical and mental damage to the elderly and undermine their close trust relationships. They should be included in the types of abusive behavior.

It should be noted that although the "Opinions" stipulate that a single act may constitute the crime of maltreatment if the methods employed are cruel or if the victim suffers minor injuries

due to abuse, the determination of the crime of maltreatment cannot be divorced from the category of domestic violence. The occurrence and development of domestic violence behaviors exhibit a cyclical pattern. When cruel abusive methods or mild injuries to the victim occur, it must be viewed as a continuation and accumulation of domestic violence, rather than an independent phenomenon unrelated to maltreatment. Therefore, the determination of guilt for a single act of maltreatment cannot simply be based on the level of injury caused or the cruelty of the methods employed. It is necessary to comprehensively examine the perpetrator's behavior, performance, and the victim's response, and only when there is a basis of domestic violence characteristics can the discussion of whether repeated or single acts of maltreatment constitute the crime of maltreatment have substantive significance.

#### **4.2. Redefining The Scope of Abuse crimes and Achieving Consistency between Crime and Punishment**

The concept of abusive behavior is time-based, and the danger arises from the accumulation of multiple behaviors over time, while the concept of intentional harm is real-time, and the danger arises from the specific act. In cases of abuse, family members have a close and long-standing relationship, which allows them to legally accompany each other for extended periods of time. This can result in not only a single instance of intentional harm with significant force but also in frequent occurrences of smaller acts of abuse that accumulate into a greater danger. Conversely, strangers within society often lack legitimate opportunities to be together for extended periods of time. If one party desires to control the actions of the other and carries out acts of abuse, then there is suspicion of intentional harm.

The key difference between crimes of abuse and abandonment and intentional harm or assault lies in whether the perpetrator has the intent to harm the victim's health or to deprive the victim of life. If the perpetrator repeatedly carries out acts of abuse for an extended period or violates their obligation to care for the victim, with the intention of causing physical and mental suffering, it constitutes a crime of abuse or abandonment. However, criminal legislation does not clearly specify the purpose of the crime. It only examines whether the perpetrator's subjective intention is deliberate, so the criminal intent is not a constitutive element of the crime. Using criminal intent as a standard to distinguish between violent crimes of intentional harm or murder and crimes of abuse may lead to arbitrary judicial decisions. Therefore, it is necessary to clarify the boundaries of these crimes by examining the constituent elements of the crime.

It should be noted that the rational setting of crimes and punishments is mutually coordinated and cannot be neglected. On the one hand, the establishment of crimes incorporates certain types of behaviors into the scope of criminal regulation, playing a role in negative legal evaluation of such behaviors; on the other hand, based on the corresponding relationship between crime and punishment, it can specifically sanction such criminal behaviors with clear means of punishment. However, it should be noted that without appropriate punishment for a certain type of crime, the negative evaluation of guilt alone and an inappropriate punishment would not be able to play the necessary protective function of criminal law.

Since the setting of penalties for the crime of abuse is the state's fulfillment of its obligation to protect basic rights, the legal interests that should be protected in the structure of the crime of abuse should be based on the content of relevant basic rights in the constitution.[20] In the crime of abuse, the sanctioned target is the abusive behavior between family members, and the protected object is the right of family members, therefore, the legal interests to be achieved by the crime of abuse and its punishment are the basic rights of citizens in the context of family life.[21] Therefore, defining the scope of criminal liability for the crime of abuse and abandonment should start with the rights arising from close trust relationships, emphasize the ethics of the infringement of close trust relationships by abusive and abandonment behavior,

and reduce the element of violence. Serious acts of violence should fall under the regulatory scope of intentional harm or intentional murder, so that the crimes of abuse and abandonment can focus on the family and close trust relationships themselves.

## 5. Conclusion

In criminal law, maltreatment can be summarized as single or repeated acts that are sufficiently physically or mentally painful and are carried out to achieve control over family members, guardians, or caregivers, including violent and non-violent behaviors.

Meanwhile, the maximum penalty for the crime of abuse should be lowered, so that violent crimes resulting in serious injury or death of the victim can be solved; the elements of the crime of abandonment and abuse should be integrated, focusing on domestic violence itself; the punishment for the crime of abusing guardians or caregivers should be unified with that for the crime of abuse, excluding violent behavior that poses serious harm and emphasizing the damage caused by abuse to closely trusted relationships.

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