

# Study on the Scope of 'Family Members' in the Crime of Abuse

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## Abstract

In June 2023, the Haidian Court rendered a first-instance judgment on the 'Mou Linhan Abuse Case.' In July 2023, the second-instance trial upheld the original judgment, sentencing the defendant Mou Linhan to three years and two months in prison. Since its exposure, the 'Mou Linhan Abuse Case' has attracted widespread social attention, and there has been much controversy over whether the case could be convicted and punished as abuse. The specific focus is whether the relationship between Mou Linhan and the victim falls within the scope of a 'family member relationship' under the crime of abuse. Some believe that under the current family structure, Mou Linhan and the victim have already formed a family member relationship in a substantive sense, and it can be recognized as such; others believe that recognizing the relationship between the two as a 'family member relationship' essentially expands the scope of abuse issues and does not conform to the principle of restraint in criminal law. After thoroughly studying and reviewing both viewpoints, the author believes that both have some validity. This article first provides an overview of the concept of 'family members,' then, based on the 'Mou Linhan Abuse Case,' lists and analyzes the viewpoints of both sides, and through comprehensive analysis, presents its own theoretical perspective and the judicial tendencies in practice.

## Keywords

Crime of abuse; family members; substantive criteria.

## 1. Overview of 'Family Members'

### 1.1. The Academic Community's Definition of 'Family Members' in Our Country

In the theoretical circles of our country, there are two viewpoints regarding the scope of 'family members.' One view holds that family members refer to people who live together in the same household based on blood relations, marital relations, or adoption. Those who do not have the above kinship relations, even if they live together, cannot be recognized as family members, and thus cannot be the objects of abuse. This view is reflected in "Criminal Law" by Gao Mingxuan and Ma Kechang. The other viewpoint holds that family members are those who live together in the same household. Compared to the abused, the abuser generally holds an advantage in economic or kinship relations. People who live together for a long time without blood, marital, or kinship relations can also be recognized as family members, such as in cohabitation relationships. Professor Zhang Mingkai expresses a similar view in his "Criminal Law." At present, the second viewpoint represented by Professor Zhang Mingkai seems to be the main view in the theoretical community.

### 1.2. Provisions of Chinese law regarding 'family members'

Not only the criminal law, but multiple laws in China also apply the concept of 'family members' in their articles, such as Article 260 of the Criminal Law, Articles 1042, 1043, and 1045 of the Civil Code, Articles 3 and 37 of the Anti-Domestic Violence Law, Article 15 of the Law on the Protection of Minors, Article 45 of the Law on Penalties for Administration of Public Security, and so on. However, among these laws, only the Civil Code clearly defines the scope of 'family

members', specifying that family members refer to spouses, parents, children, and other close relatives living together, which limits the scope of family members to close relatives. The meaning of close relatives in the criminal law differs from that in the civil law; the scope of close relatives in the criminal law is narrower, including only spouses, parents, children, and siblings. In the context of traditional family forms, restricting 'family members' in the crime of abuse to the scope of close relatives under the criminal law can actually cover most situations. But under the new economic structure, professions such as nannies, caregivers, and tutors are developing rapidly. Nannies, caregivers, and tutors have close relationships with their employers and may even live together for long periods. Especially since the recipients of their services are often children or patients who have certain limitations in their capacity for rights and responsibilities, nannies, caregivers, and tutors bear certain caregiving or supervisory duties and are in a relatively dominant position. They may inflict long-term, continuous physical or verbal abuse on those under their care. However, since their relationship does not fall under the traditional meaning of 'family members', they cannot be covered by the crime of abuse. Based on this, Article 19 of the Ninth Amendment to the Criminal Law proposed adding Article 261-1 after Article 260 on abuse in order to punish such situations, namely the crime of abusing those under guardianship or care.

At the same time, in modern society with relationships such as cohabitation before marriage or same-sex cohabitation, cases of abuse have also frequently occurred in recent years. How to regulate abusive behavior within these new 'family' relationships has not yet been addressed through amendments to the criminal law, which is the issue discussed in this article: whether the relationship between the abuser and the abused can be recognized as 'family members' to be regulated under the crime of abuse.

## **2. The controversy caused by the 'Mou Linhan abuse case'**

Mu Linhan and a certain person named Bao established a romantic relationship. Shortly after dating, they rented a house and lived together. After meeting each other's parents, they continued to live together. Mu Linhan, dissatisfied with Bao's previous romantic experiences, harbored resentment and often insulted Bao verbally among other means, forcing her to have abortions after pregnancy, taking nude photos, and committing other acts of mental and physical abuse. This caused Bao to be unable to bear the psychological pressure and she attempted suicide alone in a hotel by taking medication. The first-instance court sentenced Mu Linhan to three years and two months in prison for the crime of abuse. Upon appeal, the second-instance court upheld the original verdict. Starting from the first-instance judgment, there has been extensive debate in both theoretical and practical circles regarding how Mu Linhan should be convicted and punished. Some believe he should be convicted of abuse, while others believe he should not be convicted of abuse but instead of intentional injury. The final judgment on "Mu Linhan's crime of abuse" generated opposing viewpoints. The differing opinions of both sides will be analyzed and discussed in detail in this chapter.

### **2.1. Application of the crime of definite abuse**

#### **(1) Adopting a Substantive Standard for Determining 'Family Members'**

In the context of current social structural changes, family structures have undergone drastic transformations. In particular, the influx of various foreign cultural ideologies has impacted traditional family forms and ethical patterns to varying degrees, leading to new types of families that break away from the traditional kinship or marital connections, mainly including unmarried cohabiting families, same-sex cohabiting families, and so on. Modern family forms have exceeded the limits of legal kinship, and thus legal norms should also change accordingly. That is, when determining the scope of 'family members,' more emphasis should be placed on

the substantive factor of whether there is an 'objective fact and subjective consent of continuous and stable cohabitation' among family members, rather than the formal standard of 'legal kinship' under traditional family forms. Otherwise, the law would become disconnected from society.[2]

According to family sociology, cohabitation, close economic interactions, and emotional communication are necessary relationships among family members.[3] Therefore, for determining the scope of family members in the crime of abuse, the aforementioned perspective can be referenced by making specific judgments from both objective and subjective aspects, and the various conditions can complement each other. The objective standard can be judged from three perspectives: whether there is an objective fact of stable cohabitation, whether the cohabitation has been stable over a certain period, and whether the cohabiting family members have close economic ties and mutual support.[4] The subjective standard can be judged based on emotional conditions, dependence in daily life, and other factors to determine whether the parties have a subjective consent for continuous cohabitation. For the definition of 'family members' in specific cases, a combination of the above conditions can be used to make a case-by-case judgment.

### (2) Maintaining Consistency of Subjects with the "Anti-Domestic Violence Law"

On June 16, 2023, the first-instance judge in the "Mou Linhan Abuse Case" responded to a series of questions regarding the case verdict, including an explanation of whether the parties involved in the case could be recognized as family members under the meaning of the crime of abuse. The first-instance judge held that: Article 260 of the Criminal Law stipulates the crime of abuse. Abuse refers to long-term, repeated acts of beating, scolding, starving, and similar behaviors that torment family members living together, particularly in cases with severe circumstances. Abuse is a typical family violence crime; therefore, the range of subjects for the crime of abuse should align with the range of subjects defined in the "Anti-Domestic Violence Law," where the scope of "family members" is determined using a substantive assessment standard. According to the substantive assessment standard, in the "Mou Linhan Abuse Case," Mou Linhan and the victim, Bao, who were in a cohabiting romantic relationship aimed at forming a family, had a stable cohabitation and shared living elements, were emotionally dependent on each other, economically assisting each other, and their joint residential behavior established the factual basis for being family members in substance. The two should be considered in a family member relationship and be convicted and punished under the crime of abuse.

### (3) The distinction between abusive behavior and intentional injury behavior.

In this case, the behavior that Mou Linhan inflicted upon the victim Bao was abusive behavior, not intentional injury behavior. Regarding the distinction between the two types of behavior, some scholars believe it can be analyzed from the following three perspectives. First, the manner of behavior: the acts of abuse may include both physical abuse and mental abuse, whereas intentional injury behavior often manifests as direct physical violence. Second, the duration and frequency of the behavior: abusive behavior is usually long-term and continuous; during this long-term process, a single instance of beating, scolding, or depriving food and warmth may not necessarily cause physical or mental injury to the victim, but over time it will inevitably have an adverse impact on their body and mind, while injury behavior is generally immediate, and the act of injury is often accompanied by the occurrence of harmful results. Third, the harmfulness of the behavior: the harmfulness of intentional injury behavior is stronger than that of abusive behavior, and the subjective malice is greater. Finally, the context in which the behavior occurs: abusive behavior mainly occurs among family members or between guardians/caretakers and those under their care, whereas intentional behavior is not limited by the range of subjects.

## 2.2. Denial of the applicability of abuse crimes

### (1) Expanding the interpretation of 'family members' lacks rationality and foresight

Some scholars believe that broadly interpreting 'family members' to include concepts such as cohabitation and romantic relationships lacks rationality and foresight. Firstly, relationships between people in modern society are complex, and defining concepts like cohabitation and romantic relationships is also somewhat difficult. Including cohabitation and romantic relationships in the category of family members first, and then defining these relationships, actually complicates a simple issue. Secondly, even before the 'Mu Linhan abuse case,' many people had already called for expanding the scope of family members in abuse crimes or removing the subject limitations in abuse crimes, making them applicable to general subjects. The 2015 'Amendment (IX) to the Criminal Law' did not adopt these suggestions to expand the subject scope of abuse crimes; instead, it stipulated the crime of abusing guardians or caregivers to adapt to changes in the new situation, as discussed earlier. This shows that legislators also do not support expanding the subjects of abuse crimes, thereby affirming the independence of 'family values,' and we should basically trust the reasonableness of legislation. Of course, some opposing scholars believe that applying substantive criteria to 'family members' is the true reflection of the independence of 'family values.'

### (2) Rebuttal Regarding the Subjects of the "Anti-Domestic Violence Law"

In the discussion above, scholars who support applying the crime of abuse to the "Mu Linhan abuse case" and the presiding judge of the case believe that the scope of family members under the crime of abuse should be consistent with the scope of family members under the "Anti-Domestic Violence Law," using a substantive judgment standard. However, some other scholars argue that if the scope of family members under the crime of abuse were the same as that under the "Anti-Domestic Violence Law," it would precisely indicate that the determination of "family members" cannot use a substantive standard, as Mu Linhan and Bao are not in a family member relationship. The specific reasoning is as follows: Article 3 of the "Anti-Domestic Violence Law" stipulates that the subjects of this law are family members, but it does not define the scope of family members. The supplementary provisions in Article 37 state: "For acts of violence committed between people living together who are not family members, the provisions of this law shall be regarded as a reference." The use of the word "reference" in Article 37 precisely indicates that the family members prescribed in this law are still limited to kinship relations; other people living together who are not kin may apply this law for reference, but are not included among the subjects of this law. If the "Mu Linhan abuse case" should, as the presiding judge stated, follow the premise of 'consistent subject scope,' then Mu Linhan should not have been convicted and punished under the crime of abuse. [8]

### (3) This case should be evaluated as intentional injury.

This crime meets the constitutive elements of intentional injury. The subject of the crime of abuse is limited to family members. The romantic cohabitation relationship between Mou Linhan and Bao does not constitute a family member relationship and does not fall within the scope of subjects for abuse, but it does fall within the general subject scope of intentional injury. Scholars who advocate evaluating the 'Mou Linhan abuse case' as intentional injury argue that the act of intentional injury includes both physical harm and psychological harm. Therefore, Mou Linhan's PUA behavior toward the victim Bao can be identified as intentional injury. There is a criminal causation between Mou Linhan's PUA behavior toward Bao and Bao's death, constituting the aggravated result of intentional injury.

In this part, the author raises the following question: if Mou Linhan's PUA behavior toward Bao did not result in Bao's death or other serious consequences, or even did not cause injuries above minor level, but only caused the victim extreme psychological suffering, then how should such PUA behavior by Mou Linhan be regulated if it cannot be convicted under intentional injury?

Perhaps this is also one of the reasons some people advocate applying the crime of abuse to convict and punish Mou Linhan, because abuse can be convicted as long as the circumstances are severe and does not require actual harmful consequences. However, choosing to apply abuse merely to combat crime, from the perspective of protecting human rights, does not align with the principle of restraint in criminal law.

### 3. The Tendencies of the 'Family Member' Recognition Standard in Legal Practice

There are two types of criteria for determining 'family members' in theoretical circles: formal criteria and substantive criteria. In practice, judges have a certain degree of discretion in adjudication; some judges adopt formal criteria, while others adopt substantive criteria, which results in different judgments for similar cases in judicial practice. The author believes that according to Guiding Case No. 226, issued by the Supreme People's Court on May 30, 2024: the case of Chen [name redacted] and Liu [name redacted] regarding intentional injury and abuse, the determination of the scope of 'family members' in legal practice tends to follow substantive judgment standards. In this case, Liu and her husband had a daughter, Tong, after marriage. After their divorce, Tong was directly raised by Liu. Later, Liu entered into a romantic relationship and cohabited with Chen. During the cohabitation period, Chen repeatedly abused Tong by beating, starving, and pouring cold water on her, among other actions, and Liu was aware but did not stop him. The court held that minors who live in a relatively stable cohabitation with an unmarried partner of their father (or mother) should be recognized as 'family members' under Article 260 of the Criminal Law.

### 4. Conclusion

This article analyzes and reflects on the arguments of both sides holding opposing views on the 'Mou Linhan abuse case.' Theoretically, I agree with the opinion that it would be more reasonable to convict and punish this case under the crime of intentional injury. According to legal provisions, the scope of 'family members' should still be based on kinship, maintaining the restraint of criminal law. From a practical perspective, the guiding cases of the Supreme Court tend to adopt a substantive standard for determining 'family members.' Therefore, I believe that in previous legal practice, the standard for judging 'family members' mainly depended on the judges' discretion, but the issuance of guiding cases may lead more judges to adopt a substantive standard.

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