



澳門大學
UNIVERSIDADE DE MACAU
UNIVERSITY OF MACAU

碩士研究生畢業論文

題目：關於虐待犯罪的理論分析及對中國
虐待罪的立法完善意見

**Theoretical Analyses on Mistreatment Criminal Act
and Suggestions on improvement of China's Legislation
of The Crime of Abuse**

姓名：_____ 潘思宇 _____

學號：_____ M-B0-4921-0 _____

院系：_____ 法學院 _____

專業：_____ 中文法學 _____

研究方向：_____ 刑法與刑事訴訟法 _____

導師姓名：_____ 趙國強 _____

二〇一三年一月

畢業論文誠信聲明書

本人聲明：我所提交的畢業論文是我在指導教師指導下獨立研究、寫作的成果，論文中所引用他人的無論以何種方式發布的文字、研究成果，均在論文中加以說明；有關教師、同學和其他人員對本文的寫作、修訂提出過並為我在論文中加以採納的意見、建議，均已在我的致謝辭中加以說明並深致謝意。

論文作者簽名： _____ 日期： _____ 年 _____ 月 _____ 日

畢業論文版權使用授權書

本人所提交的畢業論文（設計）是我在校期間所完成學業的組成部分，是在澳門大學教師的指導下完成的，因此，本人特授澳門大學法學院可將本畢業論文的全部或部分內容編入有關書籍、數據庫保存，可採用複製、印刷、網頁制作等方式將論文文本和經過編輯、批注等處理的論文文本提供給讀者查閱、參考，可向有關學術部門和國家有關教育主管部門呈送複印件和電子文檔。本課程論文無論做何種處理，必須尊重本人的著作權，署明本人姓名。

論文作者簽名： _____ 日期： _____ 年 _____ 月 _____ 日

指導教師簽名： _____ 日期： _____ 年 _____ 月 _____ 日

關於虐待犯罪的理論分析 及對中國虐待罪的立法完善意見

摘要

隨著全球經濟社會的發展以及人權主義的不斷推動，我國《刑法修正案(八)》的出臺可以體現我國刑法不斷適應世界人本化法治趨勢發展，逐漸邁向國際“以人為本”的人本秩序舞臺，致力於“寬嚴相濟”刑事政策的全面貫徹。正因為人們自我保護的法律意識不斷增強，反對暴力、反對人身財產侵權的聲音越來越強烈，而現實當中日益劇增的暴力虐待案件卻頻頻被媒體報道，有限的或相對滯後的法律條文又不能及時有效調整複雜的社會關係，因此，對於如何完善一般虐待違法行為與虐待犯罪行為的法律規定則備受廣大法律學者的關注。

本文在研究虐待犯罪的過程當中，致力於思考虐待行為在罪與非罪的界定，如何區分不同的犯罪情節，如何正確釐定虐待罪的構成要件，如何適用不同層次的法律法規，如何堅持刑法謙抑原則的同時達到刑事威懾和預防的效果。此外，研究我國虐待犯罪行為與虐待罪之間關係時，注意犯罪行為是否有法可依，是否罪刑相適應，外國刑法如何規定，與我國刑法有何差異，如何完善我國虐待罪的刑事立法，使之更具科學性和合理性。

本文主要以完善我國虐待罪刑事立法為研究核心，從虐待犯罪行為現像、表現方式和犯罪原因出發，反映我國乃至世界在虐待犯罪的暴力現象嚴重勢態，接著通過比較中國與其他大陸法系國家或地區關於虐待罪的刑事法律規定，得出在犯罪構成上面的具體差異，比較各國刑罰輕重主義傾嚮和具體刑罰規定，探索虐待犯罪的立法體例不同方式的原因，重點深入地以虐待構成要件理論為研究核心，逐步探討當今關於虐待犯罪行為所出現的新問題在客觀方面、主體與對象關係、罪數形態的理論博弈和司法實踐問題，並且針對我國在虐待罪刑罰規定，研究比較非刑事法律在適用上的不足，區分犯罪輕重不同的情況適用法律法規的效果差異，提出我國虐待罪刑罰改革的意嚮，最後針對我國虐待罪立法上的問題提出在犯罪構成、刑罰立法以及相應刑事法規設立的改革設想。論文主要從以下幾個方面展開：

- 1、比較中國與其他大陸法系國家或地區關於虐待罪的立法規定。不同國家認定虐待罪的內涵和外延都有所不同，本文通過列舉法國、德國、意大利、葡萄牙、巴西、波蘭、澳門、臺灣等地關於虐待罪的刑事規定，比較各地與中國在犯罪構成要件上的相同點和不同點，重點從主體與對象關係、客觀方面、刑罰規定的角度對以上國家進行概括性歸納，並且加以融匯貫通，綜合總結以上國家或地區在虐待罪構成要件、刑罰規定和立法體系的主要特點，思考當中對中國虐待罪

修訂的司法實踐意義；

2、研究虐待罪構成要件的基本理論。不同時代不同地域對虐待犯罪的概念理解，罪與非罪的立場都有所差異，從虐待行為的定義及與其相近的暴力行為、一般侵權行為都有所交叉卻又完全各異而須正確區分，在虐待犯罪所侵犯的權益如性、精神、共同財產等方面成為虐待罪客觀對象需要深入研究的新內容，更引起關注的是，特殊關係中的新型家庭關係以及非家庭關係如教育、勞動、看護等關係中常出現虐待情形，在認定成為虐待罪主體與對象關係的理論理據與現實需求須要加以探討，而且眾多學者歷來關於虐待致人重傷死亡在罪數形態上的理論博弈也需要作出綜合分析與正確認定。

3、分析虐待罪的刑罰問題。立足於罪刑相適應原則等刑罰基本理論，探討虐待犯罪行為在區分嚴重情節和輕微情節的情況下應該如何作出刑罰的裁量，並且通過我國現行刑罰規定與非刑事法律處罰規定如侵權責任法、治安處罰法的比較分析，反映現行刑罰處罰規定的簡單與不足，非刑事法律法規卻無法適用的情形。

4、提出虐待罪的立法完善建議。針對中國現行虐待罪立法所凸顯的主要問題，結合國際趨勢和我國的現實需求，主要從虐待罪的客觀方面、主體与对象关系提出犯罪構成認定上的新內容，提出虐待罪改革的初步設想，從有期徒刑、社區矯正、罰金刑、資格刑、緩刑以及累犯等刑罰方式上提出初步的完善意見，並具體分析改革現行虐待罪立法形式的國際做法和國內趨嚮。

關鍵詞：虐待犯罪、虐待罪、法律法規、犯罪構成、刑罰、立法完善

Theoretical Analyses on Mistreatment Criminal Act and Suggestions on improvement of China's Legislation of The Crime of Abuse

Abstract

With the development of world economy and society and the movement of human rights, the promulgating of *the Amendment to the Criminal Law of the People's Republic of China (VIII)* reflects that our nation's criminal law is adapting to the growing trend of "human-oriented" humanization order with the aim of implementing the notion of "tempering justice with mercy" in criminal policy. Since the enhancing of legal awareness of self-protection, the consciousness of anti-violence, anti-personal and anti-property torts is becoming stronger and stronger. Nevertheless, cases of violence and abuse are reported frequently by the media in reality, and the limitation and the lag of laws and regulations cannot adjust the complicated social relationship effectively in time. Therefore, amounts of legal scholars draw their attention on how to perfect the legal provisions of general illegal act and criminal behavior of abuse.

The article attempts to investigate the demarcation of criminal and non-criminal abuse behavior in the research of the mistreatment, like how to distinguish different circumstances of the crime, how to define the constitutive elements of the crime of abuse correctly, how to apply to law and regulations in different levels and how to insist on the modesty principle of criminal law and maintain the criminal deterrence and prevention at the same time. In addition, it also explored the relationship between mistreatment behavior and the crime of abuse, focusing on whether there are laws to abide by. If the answer is positive, enforcement with the principle of suiting penalty to crime and criminal responsibility will be considered. Furthermore, how criminal law of foreign countries deal with this issue and find out the legal differences from foreign criminal laws to China's domestic criminal law, and how to improve criminal legislation of the crime of abuse to become more scientific and rational will be

explored as well.

This article mainly focuses on researching the criminal legislation of the crime of abuse, starting from the criminal behavior, modes of reflection, and reasons of conducting a crime to expose current serious situation of violent circumstance of criminal at home and abroad. Moreover, it tends to find out the diversity of constitutions of a crime between China and other countries through comparing China's provisions of the crime of abuse to those in other continental legal system or in other areas. Meanwhile, it also compares the gradation of penalties and their content of different countries and explores the reasons for different legislative styles of abuse crime. Afterwards, it investigates the paradox of the emergence of new problems in current criminal behavior of abuse in the aspects of the object, the subject and patterns of criminal quality, and issues of judicial practice, regarding to the research of constitutions of abuse crime as the key issue. Last but not the least, it proposed reforms on the China's legal system of the crime of abuse in various aspects from a comparative perspective, including constitution of a crime, legislation of penalty and related criminal rules and regulations. And non-criminal approach will be clarified as well. The outline of this research is shown as follows:

1. This article compares the legislative stipulations of China to those in other continental legal system or in other areas. Different countries have different connotation and denotation to define the crime of abuse. This thesis inspects the similarities and differences of the constitutions of a crime between China and other countries by listing the legislative stipulations of France, Germany, Italy, Portugal, Brazil, Poland, Macau, Taiwan and other places from the perspectives of the object, the subject and legislative regulations, aiming to find out the main features of the constitutions of abuse crime, penalty regulations and legislation system.

2. It investigates the basic constitution theory of the crime of abuse. The concepts of abuse crime are diverse from different areas in different centuries. There are differences between the standards to decide an act is crime or not.

Therefore, definition for abuse act, violent behavior and illegal act shall be clarified separately. The rights and interests offended by abuse are new problem shall be explored while study of the objectives of the crime of abuse, such as sexual, mental, joint property, etc. More importantly, specific relation in a rebuild family and other relationship without kinship, such as education, labor, and authorized guardianship will be discussed in the light of theory of finding offender and the theory of forming criminal patterns which were argued by a lot of scholars.

3. It discusses about problems of the penalty of the crime of abuse. Based on basic theories of penalty, like the principle of suiting penalty to crime and criminal responsibility, this article explored how to design legal penalty for different criminal behavior of abuse. In comparison with current regulations of China's non-criminal punishment, such as the Tort Law of PRC and the Public security Administration Punishments of PRC, insufficiency and simplex of current legal criminal penalty impede the application of non-criminal supplemental rules.

4. It provides some suggestions to improve the legislation of the crime of abuse. More specifically, it proposes a tentative idea of reforming the crime of abuse from the community correction, fine punishment, qualification punishment, probation, recidivist and other way of penalties, and analyzes the international way and domestic trend of the reform of current legislative style of abuse crime, according to the main problems of abuse crime legislation and combining the international trend and the demand of our nation, from the new content of defining the crime of abuse in the objective and subjective aspects.

Key words: the mistreatment, the crime of abuse, law and regulations, constitutions of a crime, criminal penalty, perfection of legislation

目錄

緒論.....	1
(一) 研究虐待罪的背景.....	1
1、研究理念.....	1
2、研究原因.....	1
3、研究重點.....	2
4、研究現狀.....	3
5、研究方法.....	4
(二)虐待犯罪的社會現狀.....	4
1、從社會暴力情況看虐待犯罪的現狀.....	5
2、虐待犯罪行為的表現方式.....	9
3、虐待犯罪的原因.....	10
一、中國與其他大陸法系國家或地區關於虐待罪的立法規定比較.....	13
(一) 中國.....	13
(二) 法國.....	15
(三) 波蘭.....	19
(四) 葡萄牙.....	20
(五) 巴西.....	22
(六) 德國.....	24
(七) 意大利.....	25
(八) 澳門.....	26
(九) 臺灣.....	28
(十) 總結.....	29
1、主體與對象關係.....	29
2、客觀方面.....	30
3、刑罰方面.....	33
4、立法體例.....	35
二、虐待罪的構成要件理論研究.....	36
(一)“虐待”的基礎理論.....	36
1、“虐待”的定義.....	36
2、關於“家庭暴力”與“虐待”、“一般侵權行為”與“虐待”的關係.....	37
(二) 虐待罪的客觀方面.....	40
1、侵犯生命健康權的性虐待行為.....	40
2、侵犯身心健康權的精神虐待行為.....	43
3、侵犯共同財產權的財產虐待行為.....	49
4、關於“情節惡劣”的探討.....	50
(1) 虐待犯罪“情節惡劣”情況下的社會危害性.....	51

(2) 虐待犯罪行為的“經常性”和“持續性”	52
(三) 虐待罪的主體與對象關係	53
1、“家庭成員”構成虐待罪主體與對象關係的探討	53
(1) 家庭	53
(2) 傳統家庭成員	54
(3) 現代家庭成員	55
2、“非家庭成員”構成虐待罪主體與對象關係的問題	63
(1) 教育關係中虐待犯罪的主體與對象關係	64
(2) 勞動關係中虐待犯罪的主體與對象關係	66
(3) 看護關係中虐待犯罪的主體與對象關係	67
(四) 虐待罪的罪數形態	70
1、“虐待致人重傷、死亡”與“故意傷害致人死亡”的區別	70
2、虐待罪加重結果的認定	71
三、虐待罪的刑罰問題	75
(一) 刑罰基本理論	75
(二) 嚴重的虐待犯罪行為	77
(三) 輕微的虐待犯罪行為	80
(四) 虐待犯罪適用刑法與非刑事法律的界限和銜接	84
1、刑法與侵權責任法對虐待行為的規制比較	84
2、刑法與治安處罰法對虐待行為的規制比較	84
3、虐待罪與一般人身侵權的追訴時效比較	85
四、虐待罪的立法完善	87
(一) 虐待罪犯罪構成的立法建議	87
1、主體與對象關係	87
2、客觀方面	88
(二) 虐待罪的刑罰立法完善	90
1、有期徒刑	90
2、社區矯正	91
3、罰金刑	92
4、資格刑	92
5、緩刑	93
6、累犯	95
(三) 虐待罪相應法規的設立	95
1、虐待罪的立法體例	95
2、反家暴法的設立對虐待罪完善意義的探討	97
總結	101
參考文獻	103
致謝	108