

**Imagining the New Legal Empire:
The Politic of Transplantation of US anti-DV Legislation
Yun-Ru Chen***

Legal globalization, with its central vs. periphery structure, has been occurring since the nineteenth century.¹ As the crux of legal transplantation has changed from European legal systems imposed upon colonies to the omnipresent legal Americanization around the world after World War Two,² US law and jurisprudence have become increasingly influential in world-wide legal reforms. This is also the case in post-war Taiwan, where US laws have been steadily integrated into the continental European legal system.³

What is the mechanism of legal Americanization in Taiwan? How is American law, portrayed and imagined in Taiwan, as opposed to Taiwan's "indigenous" law (Han-Chinese or German/Civil legal system) transplanted anteriorly? How is the "advanced versus backward" dichotomy as well as the "American versus Taiwan" binary mobilized in process of transplantation/reception (including implementation)? In an effort to avoid abstract discussion, I seek in this paper to explore these questions through a textured description of the case of legal transplantation of the *Domestic Violence Prevention and Treatment Act* (DVPTA) (1998). While American feminists are incrementally gaining legal power and then influencing feminist legal reforms around the worlds, Taiwan, again, also plays a part in the globalization of American feminist legal theory and legislation. Based on the *Violence Against Women Act* (VAWA) (1995) and the *Model Code on Domestic and Family Violence* (MCDV) (1994) from the United States as blueprints, the DVPTA is one of the most illustrative examples of the "borrowing" of American feminist lawmaking in Taiwanese feminist campaigns.⁴

Based on both firsthand and second hand empirical researches that include

* S.J.D. candidate at Harvard Law. E-mail: ychen@law.harvard.edu.

¹ See Duncan Kennedy, Two Globalizations of Law and Legal Thought: 1850-1968, 36 *SUFFOLK UNIV. L. REV.* 631 (2003).

² See LAURA NADER, THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS, 2-3(2002); Duncan Kennedy, Two Globalizations of Law and Legal Thought: 1850-1968, 36 *SUFFOLK UNIV. L. REV.* 631 (2003).

³ See Tay-sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward A Liberal and Democratic Country*, 11 *PAC. RIM L. & POL'Y J.* 531, 555-556(2002).

⁴ Another example is the *Gender Equality Employment Act*(2002), which introduces the American sexual harassment laws and related jurisprudence, particularly Catharine A. McKinnon's theoretical frameworks to Taiwan. Also, for the general discussion and critiques to the transplantation/reception of American legal feminism, see CHAO-JU CHEN, "Yujian" meiguo nu xing zhuyi faxue : Yige taiwan nuxing zhuyi zhe de shidi guan cha yu pipan ["Encountering" American feminist jurisprudence: A Taiwanese feminist's observation and critiques], 2003 feminist academic conference, Taiwan.

interviews with feminist advocates,⁵ news archival research and investigation legislative records, this paper attempts provide an in-depth understanding of the transplantation of the US feminist jurisprudence to Taiwan in a broader context of legal Westernization and Americanization. Like many other legal essays, this paper employs the method of comparison. However, I intend to do neither an exhaustive comparison of the statutes of the DVPTA and its American counterparts nor a comprehensive evaluation of the effectiveness of this newborn anti-domestic violence (anti-DV) feminist legislation. Rather, it is comparative study in the sense that I try to look back and forth between Taiwan and America, in order to make visible the representation/construction of the American feminist anti-domestic violence legislation as well as the “American versus Taiwan” dichotomy in the dynamic, if not somewhat chaotic, ongoing transplantation process.

The discussion proceeds as follows. Both Section I and II are devoted to the pre-implementation period in the process of legal transplantation. The former addresses the mechanism of adopting American feminist anti-DV legislation and the latter depicts the transformation of the DVPTA through transplantation. Focusing on the backlash on the practice of DVPTA after it was enacted, Section III is a challenge to the “American versus Taiwan” dichotomy which misleads our understanding of the possibility and limit of legal transplantation. Section IV is a conclusion.

I. The Mechanism of the Legal Americanization.

Taiwan’s first experience with legal Westernization came in 1895 in the wake of Japanese colonial rule. Japan integrated its modified Meiji-era version of Continental European legal models into native Chinese legal norms. Though German law is still dominant source of foreign legal influence today in Taiwan, American law and jurisprudence – one of the United States’ most exported goods after World War II⁶ – came to play increasingly important influential roles in the legal reforms and the legal fusion in postwar Taiwan.

Unlike the previous legal Americanization where US law was imposed upon Taiwan through political and economic interactions between two governments,⁷ the

⁵ Except for the interviews with Fang-Yu Lai(which I did myself) , I used the interviews done by Zhi-Li Lin, from the appendix of her M.A. thesis, GUOJIA YU SHEHUI DE HUDONG: JIATING BAOLI FANGZHI FA LIFA GUOCHENG YANJIU [The Interaction between State and Society: The Study of the Legislative Process of the Domestic Violence Prevention and Treatment Act] 59 (unpublished M.A. thesis, National Zhengzhi University, 2004).

⁶ Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, 23.

⁷ The interdependent relationship between the KMT regime and the US government initiated the introduction of US- law there after the outbreak of the Korean War in 1950. Some American economic legal institutions such as chattel mortgage and the Securities Exchange Act (which were institutional byproducts of US aid) began to take root in Taiwan society during the 1960s. During the 1980s, with the threat of US trade sanctions against Taiwan and, more generally, as a result of the two governments’ political-economic interactions, the United States imposed on Taiwan also the concept of punitive

transplantation of American feminist jurisprudence was driven by collective yet spontaneous efforts of NGO's and female legal professionals at a time when Taiwanese people could, for the first time, demand social reforms and legal protections given the democratization during the post-martial era beginning in 1987. The adoption of American anti-DV legislation demonstrates the emergence of a subtler process of legal Americanization in Taiwan, which was based on an unconscious influence and an unconsidered assumption of US law's superiority.

Just as there had been relatively little public concern over wife beating in the US until 1970s,⁸ domestic violence was deemed too trivial to deserve either public attention or academic study before the early 1990s in Taiwan.⁹ The shocking Ru-Wen Deng case of 1993, where a battered wife killed her abusive husband, is generally regarded as the catalyst for the DVPTA.¹⁰ Seizing the critical social turning point creating by this high-profile case, Taiwanese women's NGOs began to lobby on the anti-domestic violence legislation. Following the Awakening Foundation, the Modern Women Foundation (MWF) carried out the anti-domestic violence legislation and cooperated with a female Judge, Feng-Xian Gao who later became the drafter of the DVPTA. After a one-week group visit to the United States lead by Wei-Gang Pan, the president of the MWF and a female legislator, the MWF formed a legislative committee and adopted the Judge Gao's draft based on the *Model Code on Domestic and Family Violence* (MCDFV) (1994).¹¹ Passed in 1998, the DVPTA is largely identical to the MCDFC, introduces several important legal mechanisms to deal with domestic violence, including Civil Protection Order.

In deed, the DVPTA mark a milestone in Taiwanese feminist movement against domestic violence. Also, it is one of the most remarkable achievements of Taiwanese feminist legislative campaign to combat sex inequality by adopting American feminist lawmaking. However, it is interesting to notice that, despite the long-term influence of US feminist movement on Taiwan,¹² the introduction of the

damages for intellectual-property violations. See TAY-SHENG WANG, TAIWAN FALU SHI GAILUN [An Introduction to Taiwan Legal History], 334 (2001).

⁸ See ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 13 (2000), at 20.

⁹ For example, even in 1999, a male professor refused to review an essay on domestic violence because, from his perspective, wife beating seemed a niggling issue, especially in a conference pertaining to the big issue of nation development. Nobody raised any objection. See YA-GE WANG TAIWAN FU NU JIE FANG YUN DONG SHI [The History of Taiwan's Feminist Reform] 55, 63-65 (1999) *supra* note 13, at 175.

¹⁰ See Chen, *supra* note 16, at 239; See Feng-Xian Gao, JIA TING BAO LI FANG ZHI FA GUI ZHUAN LUN [Domestic Violence Protection Act] (1998), at 62.

¹¹ Gao, *supra* note xx, at 85-86.

¹² For example, All the founders of the Awakening Foundation – which was the leader and the forerunner of the Taiwanese women's associations, and the driving force behind Ru-Wen Deng's case from the very beginning – had studied in the United States in the 1970s and had been influenced by the second wave of the American feminist movement there. See YA-GE WANG TAIWAN FU NU JIE FANG YUN DONG SHI [The History of Taiwan's Feminist Reform], at 60.

MCDFC as a model for the DVPTA is not a result of a planned feminist agenda. Rather, it seems to be rather an independent accident if we look into Judge Gao's personal adventure in the USA. Gao is a LL.M. graduate from Boalt Law School at Berkeley (1981), where she studied family law in general. Then, five years after finished judicial training and then began to work officially as a judge, she was sent by the Judicial Yuan in 1993 back to Berkeley. Incidentally, Gao observed the rise of the US anti-domestic violence movement and legislative campaign (in her own words, this issue was quite "hot" at that time) and then decided to collect related status and essays in order to draw up a report on domestic violence. This is the critical movement in Gao's long-standing interest in domestic violence, although her original research plan of this trip in fact focuses on American criminal law.¹³ Lastly, another incident led to Gao's encounter to the MCDFC. In February 1995, Gao was sent by the Judicial Yuan as a representative of Taiwanese judges to participate in the 11 the South Pacific Judicial Conference in Guam. Gao, by chance, learned that there happened to have been an international conference of domestic violence several days ago. With the help of the Guam judges in Gao's conference, she brought back to the Taiwan the material of the new-born MCDFC (and the anti-DV laws in Guam and New Zealand), based on which she drafted the DVPTA.¹⁴

This accidental adoption of the DVPTA seems to echoes Alan Watson's description that the legal transplants often are the result of the jurists' own contingent experiences, such as where they studied.¹⁵ Indeed, using the MCDFC as a model is more like "capturing the hottest you happened to encounter" rather than "shopping around the world and choose the best." Yet, there are other things more than Gao's unexpected adventure in this story. The prestige of American law (a result of the vigorous development of the American-based international legal education (LL.M. and S.J.D. Programs)), the T.V. Shows (the classic *LA Law* or the current *Law and Order*) , and more generally its super power in politic and culture, serve as a mechanism of Legal Americanization world wide. When Gao was asked why American law was so influential in Taiwan, she commented that "American laws are the most advanced laws relative to whatever kind of women's issue there is...comparatively, Continental European laws on women's protection issues are inferior to related laws in the United States."¹⁶ When promoting the DVPTA to

¹³ Interview with Feng-Xian Gao, *supra* note 63, at 51; Fu-Yi Lin, *Tuidong nannu pingquan fazhihua gongzuo. Gao fengxian tigong faxue zhuan ye jianjie* [Advancing Gender Equality Laws. Feng-Xian Gao Provides Professional Legal Opinions], PEOPLE'S LIVES DAILY, May 3, 1999, at 20.

¹⁴ See GAO, *supra* note 34, at 85-86.

¹⁵ See Alan Watson, *LEGAL TRANSPLANTATION: AN APPROACH TO COMPARATIVE LAW*. Athens: University of Georgia Press (1993).

¹⁶ Interview with Feng-Xian Gao (Aug. 26, 2002) in the appendix of ZHI-LI LIN, *GUOJIA YU SHEHUI DE HUDONG: JIATING BAOLI FANGZHI FA LIFA GUOCHENG YANJIU* [The Interaction between State and Society: The Study of the Legislative Process of the Domestic Violence Prevention and Treatment Act]

Taiwanese legislators and the Taiwanese public, the MWF and Judge Gao repeatedly emphasized how sophisticated the DVPTA was. Sometimes they attributed the sophisticated character of the DVPTA to the superiority of American law.¹⁷ Sometimes, they described the DVPTA as the embodiment of the world's newest and most progressive legal systems, of which the American legal system was the most prominent example.¹⁸ While there is overwhelming assumption about the advanced nature and apparent superiority of American law, it is questionable whether there was any serious comparative legal research to support this presumption.

In the preface of her treatise on the DVPTA, Judge Gao proudly declared that “although [Taiwan] began dealing with domestic violence relatively recently, it progressed at an extremely rapid speed.... within four years or so, [Taiwan] has become the first to enact a specific domestic violence law among all civil law countries.”¹⁹ While advanced American law was one of the most frequently cited prototypes for the DVPTA, the questions of whether American law is applicable to Taiwan's situation and, if so, how that application should proceed, were simply left unconsidered. Instead, Taiwan followed an alternative discourse wherein the popularity of laws, legal theories, and legal systems became the chief selling point. Since adopting the product of American feminist jurisprudence, Taiwan has regarded itself as a passenger on this purportedly advanced train. And off it goes.

II. Transformation in Transplantation

—From Violence Against “Women” to Violence Against “Families”

Although Judge Gao is a LL.M. graduate from the US law school and an enthusiastic proponent of the US anti-DV legislative model, it is interesting to notice that she seldom referred to American feminist jurisprudence. Also, it is unlikely that she would endorse American feminism or identify herself as a feminist. Partly because of the strategy of feminist legal reform and partly because of the version of gender equality she adopted, the gender equality concept within the American anti-DV campaign became blurrier when the American anti-DV legislation transplanted to Taiwan.

Gao believed that there could be greater social resistance to the act if the legislature emphasized gender equality.²⁰ She rejected the relationship between

51(unpublished M.A. thesis, National Zhengzhi University, 2004).

¹⁷ Interview with Feng-Xian Gao, *supra* note 63, at 51.

¹⁸ See GAO, *supra* note 34, at 102-3.

¹⁹ See Feng-Xian Gao, Preface to the First Edition of FENG-XIAN GAO, *JIA TING BAO LI FANG ZHI FA GUI ZHUAN LUN* [Domestic Violence Protection Act] (1998).

²⁰ Interview with Feng-Xian Gao, *supra* note 63, at 52.

gender equality and domestic violence and criticized the gender-oriented legislative process for exploiting the issues of domestic violence as a *weapon for gender equality*.²¹ She stressed in the press that she would not support a law *partial to women* even given her own gender.²² “Only when women’s associations care about the general problem of domestic violence against *all members of the household* can we win the public’s respect for and recognition of such a grand vision,” said Judge Gao.²³

Same did the MWF. The MWF also believed that a gender-specific identity might be a hindrance in the legislative process. When discussing her vision for the DVPTA, legislator Pan (the President of the MWF) expressed that an act should be comprehensive and “if lawmaking has a gender-conscious perspective, it might be *partial* and could not answer more *universal social needs*.”²⁴

Given above, it is interesting to inquire again--how did the agents of legal transplantations portray and represent the law transplanted? And in this specific case, what specific kind of discourse of anti-DV legislation they adopted, universalized and “advanced-ize”? In fact, there had been alternative version of anti-DV legislation campaign, in terms of the relation between gender and domestic violence. Prior to MWF, the Awakening Foundation was once the leader of the anti-DV campaign in Taiwan. It is Awakening Foundation that made the Deng’s case visible in the public. As one of the most pioneering women’s NGO, all the founders of the Awakening Foundation had been studied in the 1970s and had been influenced by the second wave of the American feminist movement there.²⁵ For this relatively radical women’s NGO in Taiwan, domestic violence (termed as “marital violence” by the Awakening Foundation), is “one of the manifestations of men’s control over women in a patriarchal society where women are deemed the property of men.”²⁶ In other words, domestic violence is “violence against women”. In fact, this phrase was used by the American women’s movement since the 1970s. Many influential American legal feminists nowadays, including Catharine A. MacKinnon, still consider domestic violence itself as an act of gender discrimination.²⁷

However, the axis of the Taiwanese anti-domestic violence changed after the MWF took over the leadership position from the Awakening Foundation. For the

²¹ See LIN, *supra* note 51, at 21.

²² See Fu-Yi Lin, *Tuidong nannu pingquan fazhizhua gongzuo. Gao fengxian tigong faxue zhuanye jianjie* [Advancing Gender Equality Laws. Feng-Xian Gao Provides Professional Legal Opinions], PEOPLE’S LIVES DAILY, May 3, 1999, at 20.

²³ Interview with Feng-Xian Gao, *see id.*

²⁴ Interview with Feng-Xian Gao, *supra* note 63, at 52.

²⁵ See WANG, *supra* note 13, at 60.

²⁶ See LIN, *supra* note 51, at 18.

²⁷ See Catharine A. MacKinnon, *Disputing Male Sovereignty: On United State V. Morrison*, 114 Harv. L. Rev. 135. (2000); Catharine A. MacKinnon, *Feminism Unmodified, Discourses on Life and Law* 87, 92(1987).

reasons I described earlier, the MWF and Judge Gao preferred to weaken the relation between gender inequality and domestic violence. Instead, seemingly more “neutral” concepts, such as “family harmony” or “human rights” were raised as justification of legal reform. Judge Gao once argued that *all* foreign laws dealing with this issue emphasized “family” rather than “marriage.”²⁸ Sometime, she resorted to the world trend and declared that domestic violence should be treated as an issue pertaining to human rights, which is not only for the women but also for the elderly.²⁹ Once again, since all the “advanced” countries had taken this approach, it seemed only natural that Taiwan should and would follow this international trend.

For over a century, Taiwanese civil courts had use “family harmony” argument as an excuse for refusing women’s request for fault-based judicial divorce due to a husband’s physical abuse.³⁰ Ironically, the same concept of family harmony is now promoted to market the new American inspired anti-DV legislation to combat husbands’ abuse by allowing, not denying, state intervention. In responds to the critics that deemed DVPTA as “a tool of divorce” and the public’s discomfort with “law entering the home”, the MWF strategically portrayed domestic violence itself as a threat to family integrity. In other words, DVPTA was justified as a tool to prevent domestic violence from breaking down the family.

Instead of the verbatim translation of the title of the United States’ MCDFC(Model Code on Domestic and Family Violence), the term of *prevention* was added to became the Domestic Violence Prevention and Treatment Act. Same was the phase of “promoting family harmony”, which was added into the first article as the main goal of the DVPTA. Even the symbol of this legal reform—a house enclosed inside a heart- reflected the image promoted by the MWF.³¹

As expected, this strategy led to a great success.³² The MWF repeatedly emphasized how the objective of this act was to protect all family members, especially children, and not simply women; consequently, no one dared to speak against such lofty goals. The human rights image of this act won widespread praise from the media.³³ Legislators, constantly wary of their public image, felt the

²⁸ Interview with Mei-Nu You, *supra* note 45, at 71.

²⁹ Interview with Feng-Xian Gao, *supra* note 63, at 52. For a description and critique of the use of human rights jurisprudence and international law to secure women’s rights around the world, see Karen Engle, *International Human Rights and Feminism: When Discourse Meet*, 13 MICH. J. INT’L L. 517 (1992).

³⁰ See Chen, *supra* note xx, at 237-239.

³¹ Interview with Jin-Li Zhang, *supra* note xx, at 64.

³² It is worth noting that, passing similar anti-domestic-violence legislation at about the same time as Taiwan, the South Korean government emphasized the “peace and stability” of the family. And a new direction now was taken by South Korea’s women’s rights advocates, who placed a greater emphasis on human rights than on the “peace and stability” of the family. See Yoko Shoji, *Domestic Violence in Japan: Perception and Legislation*, in MILA LZUHARA, *COMPARING SOCIAL POLICIES: EXPLORING NEW PERSPECTIVES IN BRITAIN AND JAPAN* 121, 130 (2003).

³³ Telephone interview with Fang-Yu Lai, *supra* note 64,

necessity to endorse this act. Even those who were unsupportive of feminist legal reform supported this act because of the effectiveness of this family-harmony tagline.³⁴ Among all women's legislation in Taiwan, this act holds the record, to date, for shortest time taken to pass proposed legislation into law.³⁵

While this mild "family and love" strategy became Taiwanese feminists' chief banner, the gender equality concept upon which the VAWA and the MCDFV were based was inevitably obscured. Different from the American mode, the Taiwanese mode portrayed wife beating as a threat to family harmony. And a transform through transplantation hence took place.

III. Debunk the "US versus Taiwan" Dichotomy

– A Comparative Analysis of the Critics of Anti-DV Legislations

Similar to the American experience, Taiwan's experience with the implementation of the DVPTA also shows that legal reform does not lead inevitably to victories for women.³⁶ Backlash seems always come right after the so-called triumph of feminist legislation. However, different from the experience of the United States, there is a general theme among the various critiques of this transplantation of anti-DV legislation in Taiwan, namely the unsuitability of the American act for Taiwanese societies. By comparing the experience of the United States with that of Taiwan, I want to re-examine this general critique and the "America versus Taiwan" dichotomy (which unsurprisingly referred to another dichotomy of "advanced versus backward") behind it.

Soon after the enactment of the DVPTA, its unrealized conflicts with the existing legal system incited various critiques. Opponents of the DVPTA argued that its protection-order proviso was devoid of content and could not effectively improve the situation of battered spouses.³⁷ The reluctance of the police and the courts to fully implement this act also undermined its function. Disappointed by the DVPTA's lack of effect, even some battered women have regard issued protection orders as merely useless pieces of paper. Meanwhile, some individual legal professionals, including judges in family courts, have regarded the DVPTA as a special law that inevitably disrupts the existing legal system and have even criticized the DVPTA in the media as an American oddity abused by wives as a tool for divorce.³⁸ Several cases have

³⁴ *Id.* Telephone interview with Fang-Yu Lai, *supra* note 64,

³⁵ Interview with Jin-Li Zhang, *supra* note 81, at 60.

³⁶ See SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 162 (1982);

³⁷ Telephone interview with Fang-Yu Lai, *supra* note 64.

³⁸ Telephone interview with Fang-Yu Lai, *supra* note 64. Yi-Pin Ceng, *Baohuling fanlan, jiaowushi nan duan; jiabaofa lifa qingxie; lunwei bufen funu lihun gongju; faguan tan wuxia cha zheng shei*

emerged lately in which husbands murdered their battered wives after the latter had received protection orders; consequently, the media aired challenges, in this regard, to the efficacy and the necessity of protection orders.³⁹

While these critiques in some way scatter around, they are in fact related. ---they all attributed the “failure” or the inefficacy of the DVPTA to the differences between the United States and Taiwan, whether the differences concerned dissimilar cultural traditions or the distinct natures of the two societies’ respective civil law and common law systems. Though serving as a strong justification for this legal reform, the assumption of American law’s superiority gave dissenters a footing from which they could ridicule the unsuitability of American law in Taiwan. Rather than challenge the assumption of American law’s superiority, the opponents to the DVPTA argued that simply because American law is too advanced, it might not be suitable for Taiwan’s condition.⁴⁰ Put differently, because “America is America, and Taiwan is Taiwan,” the effort to transplant U.S. law in Taiwan as a means for legal reform is destined for failure.

Meanwhile, Taiwanese feminist advocates who have challenged the male-defining “local culture” and who have supported the DVPTA also tend to ascribe the resistance to this act to the contrast between the United States and Taiwan. For example, Feng-Yu Lai, a female lawyer specializing in family law, attributed judges’ reluctance to order the battering husband away from the residence of the battered wife to the influence of German jurisprudence, which puts much more emphasis on the dogmatic doctrine of property ownership than on the problem of domestic violence.⁴¹ In contrast, Taiwanese feminists tend to regard (or strategically portray) the United States as the utopia of feminism, where legal reform has led to relatively effortless victories for women. The so-called Taiwanese (local) condition or tradition also plays part in the feminist advocates’ discourse while serving as a symbol of backwardness. It is this local backward local tradition which blocks the implement of the advanced American feminist legislation and needed to be eradicated by the feminist legal reform.

However, this over-simplified yet seemingly persuasive argument based on the difference between the United States and Taiwan may not account for the backlash to

cai shi shouhai zhe [The Flood of Protection Orders: The Difficulty of Judging Family Affairs, Women’s Use of the Partial Legislation of the DVPTA as Divorce Tools, and Judges’ Complaints Regarding Inadequate Investigatory Time for Identification of Actual Victims] CHINA TIMES, June 23, 2003, at A10; The Judicial Reform Foundation, *supra* note 116.

³⁹ See Fang-Wei Shen, *Youguan jiating baoli jiahai ren chuyu jihua baohu ling zhi hefa yuluoshi* [The Issue of the Implementation of Batterer-Treatment Programs], 4 *Quanguo Lushi* [National Lawyer] 29, 29-20 (2004).

⁴⁰ See Ceng, *supra* note 135; Shen, *supra* note 136, at 29 footnote 2.

⁴¹ Telephone interview with Fang-Yu Lai, *supra* note 64.

the DVPTA. One simple but quite basic challenge to this argument might be: Does the co-existence of successes and setbacks in the DVPTA constitute a unique experience that only exists in Taiwan? Rather than dive into debates over whether the DVPTA is useful or suitable for Taiwan, this paper reflects my effort to debunk the “America vs. Taiwan” dichotomy, and in this respect, I compare the various dimensions of the practices of the anti-domestic-violence laws in the United States and in Taiwan.

One of the most common critiques of the DVPTA is that the protection order is a “useless piece of paper.” However, critics may attach different meanings to “useless.” Because most issued protection orders in Taiwan contain only an injunction from violence (in other words, merely a declared prohibition of domestic violence) and failed to provide more substantial measures.⁴² Taiwan judges have been reluctant to order battering husbands to stay away from the battered wives’ residences, and critics have explained this reluctance on the basis of the so-called doctrinal feature of German and civil law jurisprudence, which privileges the property rights of the husband. Yet, the reluctance of judges to order battering husbands leave home is not unique in Taiwan. In the common law legal system of Great Britain, for example, the court emphasizes men’s common law rights of property in their own home and thus narrows the effective range in which protection orders can protect women against their battering husbands.⁴³ When the movement on behalf of battered women began in the United States during the late 1970s, only rarely did US courts order abusive men from their home.⁴⁴ Even nowadays, critics argue that family courts in America are more likely to suggest that the abused wives seek alternative shelter than to require the husbands to leave their own home.⁴⁵

Another critique of the protection orders’ “uselessness” rests mainly on the lack of implementation of such orders. Critics attribute this problem to inherent differences between the Taiwanese tradition and American practices. This line of critique implicitly assumes that a similar problem does not exist in the United States or in other Westerns legal systems. However, the reality is that such imperfect implementation is not a situation limited to Taiwan. When handling domestic

⁴² According to statistics, while 99.57% of protection orders contain an injunction from violence, only 2.04% of them require removal of the batterers from the residence of the victims. See Li-Rong Wang, *Minshi baohu ling zhi yunyong qingxing* [Statistics of the Three-Year Operation of the DVPTA], 571 ZHUJI YUEKAN [Statistics Monthly] 18, 21(2003). It is worth noting that according to the DVPTA, the judges’ decisions concerning the substance of protection orders are not determined by the victims’ requests.

⁴³ See SCHNEIDER, *supra* note 20, at 109.

⁴⁴ See SCHECHTER, *supra* note 123, at 162-163.

⁴⁵ See Diane L. Rosenfeld, *Why Doesn’t He Leave? Restoring Liberty and Equality to Battered Women*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 535 (Catharine A. MacKinnon and Reva B. Siegel eds., 2003).

violence cases, the police in Taiwan often try to mediate the case by persuading the abused wives to drop the claim and go home.⁴⁶ Even though the DVPTA explicitly stipulates that the police should arrest people who are suspected of domestic violence or of violating a protection order (Article 22), less than twenty five percent of the suspects are arrested.⁴⁷ Moreover, the prosecution rate of violation of protection orders, when compared to other kinds of crimes, is also significantly lower.⁴⁸ On average, a perpetrator is sentenced only after he has violated the protection orders eight or nine times.⁴⁹ Similar stories surface in the United States. Although American feminists have made efforts to combat the problem of widespread police under-enforcement by lobbying for laws that mandate automatic arrest when protection orders are violated,⁵⁰ Supreme Court Justice Scalia in Gonzales v. City of Castle Rock⁵¹ concluded that legislative intent behind this law actually gives police officers discretion in such situations. It has been argued that, in addition to police under-enforcement, judges impose prison terms only for the most monstrous assaults.⁵² In sum, discontent and dissatisfaction with the implementation of anti-domestic-violence legislation is common to Taiwan and the United States.

Another fierce critique of the DVPTA was that wives abused the protection orders to gain advantage in their divorce cases. As described earlier, the “family harmony” strategy adopted by Taiwan’s feminist campaigns in the legislative process was an effort to eliminate this misperception. After enactment of the DVPTA, there was media coverage claiming to expose lewd women who used the protection order slyly to escape their husbands’ chastisement or even to seek divorce. Upon hearing such news, some family court judges expressed their concern that the DVPTA excessively privileged victims and that it was abused by some parties in divorce proceedings.⁵³ These judges were suggesting that, although wives seem to be

⁴⁶ Telephone interview with Fang-Yu Lai, *supra* note 64; The Judicial Reform Foundation, *supra* note 116.

⁴⁷ See Wang, *supra* note 140, at 26.

⁴⁸ The editors of Judicial Reform Foundation Magazine, *Fa ru jia men; Baoli kongju yijiu: Jiating baoli fangzhi fa tongguo sizhounian; jiabao fa baohu ling shi xing sanzhou nian jian tao* [While Law Enters the Household, the Fear of Violence Is as Before: A Review in the Fourth Year after the Passage of the DVPTA (The Third of the Implementation of the Protection Order)], 39 SIFA GAIGE ZAZHI [Judicial Reform Foundation Magazine], 28, 32(2002).

⁴⁹ See Cui-Wen Huang, *Cong jingcha fenju jiating baoli fangzhi guan zhi guandian lun baohuling zhidu zhi shishi chengxiao* [A Discussion on Efficacy from the Viewpoint of the Officer of the Domestic Violence Prevention Program in the Police Precinct], 3 Zhongyang Jingcha Daxue Jingzheng Luncong [Central Police University, Police Policy, Collected Essays] 159, 172 (1993).

⁵⁰ See SCHNEIDER, *supra* note 20, at 184.

⁵¹ 125 S. Ct. 2796.

⁵² See Rosenfeld, *supra* note 143, 548.

⁵³ See Ceng, *supra* note 135; Zhi-Huang Lia, *Jiabao fa – xiudiao yuanou bizhao? Xianxing faling jian shulou, ying su tumou gaishan* [Is the DVPTA a Trick with Which Unhappy Spouses Obtain a Divorce? It Ought to Improve a Drawing Down of Current Legislation], CHINA TIMES, May 5, 2004, at C4.

exercising their rights under the DVPTA, they have a hidden agenda to drive their husbands out of the house.⁵⁴ Similar to the argument made by Taiwanese legal professionals when opposing the warrant-less arrest policy in the DVPTA, the existing divorce procedure was deemed sufficient to combat the domestic violence problem and the DVPTA was a duplication disrupting the existing legal system.⁵⁵

These critiques attributed the misuse of the protection order to its unsuitability for Taiwan society and proposed a “locally orientated” direction for future amendments of the act. Yet again, this accusation of abuse is not a phenomenon unique to Taiwan. Though not as vocal as their counterparts in Taiwan, American judges also suspect the female claimants’ motives behind their petitions for protection orders. The Judicial Conference of the United States expressed concern with women’s use of the VAWA as a bargaining chip for more favorable divorce settlements.⁵⁶ The VAWA was criticized as “add[ing] a new account to many if not most divorce and other domestic relations cases, further complicating their adjudication and making them more difficult to settle peacefully.”⁵⁷ Because the family was regarded as the primary site of state jurisdiction under a particular notion of federalism, Chief Justice Rehnquist publicly attacked the VAWA for “creat[ing] needless friction and duplication among the state and federal system.”⁵⁸

Frances E. Olson sharply portrays the irony among the two kinds of arguments of the opponents of state’s intervention into the family in America. One attack is based on the delicate quality of family relation, which can be threatened by even a minor change in law. Another attack, on the contrary, emphasizes the durability of the family relation. Hence the state’s intervention to protect abused wife is bound to be futile.⁵⁹ In some ways, backlash of DVPTA in Taiwan closely parallels to Olson’s description in the USA. The critiques of the DVPTA as I described above are also two-fold. On the one hand, the opponents of the DVPTA say it will affect the family harmony or become a tool of divorce when “law enters the family”. On the other hand, they criticize the DVPTA for its uselessness and inefficacy to prevent domestic violence. Once again, the insight we gain from the analysis of the experience of American anti-DV legal reform shows that it is wrong, or at least misleading to attribute the so-called failure of the DVPTA to the local/Taiwan

⁵⁴ See Lia, *supra* note 151.

⁵⁵ Telephone interview with Fang-Yu Lai, *supra* note 64.

⁵⁶ See DALTON & SCHNEIDER, *supra* note 26, at 966.

⁵⁷ See *id.*.

⁵⁸ See MacKinnon, *supra* note 18, at 148-49.

⁵⁹ Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497, 1506-07 (1983).

situation. And the first step to have a better understanding of the possibility and limit of legal transplant is to refuse the rigid legal relativism.

IV Conclusion -- Beyond the Dichotomy in the Legal Transplantation

There is a “advanced versus backwardness” dichotomy everywhere in legal Americanization in Taiwan. In the case of the transplantation of the anti-DV lawmaking, it could be the prestige of American law which simply trumps other concerns of the selecting of the laws. It could be the premise of the so-called world trend which the backward countries are better to make sure they are going to catch on. It could serve as justification of either the opponents of the DVPTA to refuse the “advanced” yet unsuitable American act or the supporter of the DVPTA to embrace this civilized American law in order to rescue Taiwanese women even the society as a whole from the local backwardness.

It is a construction. And the goal of this paper is to show the constructing character of this dichotomy, which is deeply embedded in the culture of Legal Imperialism. By debunking the dichotomy, one can gain – beyond a rigid relativism and the Legal Imperialism– an enhanced understanding of the achievements and the failures of this legislation, and find a new starting point reconsider the functions and the limits of legal transplantation in legal reforms.

To see the construction

(口不口以不要寫阿?)

先進化、落後化、時間上的序列、努力「克服」的列車或者是無法橫互的障礙
纏繞的先進與落後、

Lag theory

有意無意中挪用了法律的帝國、
無意中接受、或者有意
可能有意無意的成為改革的動力

不管是
靈活、

These critics proposed a “local” domestic violence law, whose meaning was nevertheless unclear.⁶⁰

Transcend

laugh the protection order is

Rather than undertake a comprehensive comparison of the practices and the problems associated with the domestic-violence legislation in Taiwan and the United States, I have examined in this paper the seemingly persuasive assumptions according to which the differences between America and Taiwan explain the unsuitability of certain American-inspired legislation in Taiwan. 家庭太脆弱、或者家庭太強悍。跟台灣的有意取統工之妙。

Despite the cultural and legal differences between the two societies, their backlashes against domestic-violence legislation are very similar.

“Breaking the family” “useless piece of paper”

There are those who believe that American-inspired legislation is simply too foreign to suit Taiwan, where the functional inefficacy of the DVPTA was attributed to external factors. Then there are other conservative beliefs based on the unexamined dichotomy of “America vs. Taiwan.” 最後講不是要說美國的對台灣的

⁶⁰ See Ceng, *supra* note 135.

Human resource shortages, delays in the issuing of protection orders, and police's reluctance to interfere in domestic affairs are just a few of the factors that undermined the DVPTA's functional effectiveness.⁶¹

Family harmony, once was raised to smoothen the legislative process, is in fact a double-edged sword. Since proponents of the DVPTA added the phrase "promoting family harmony" to the DVPTA as lip service to family values during the legislative process, some judges vehemently refused to issue protection orders under the belief that such an act would lead to the breakdown of the family. And because the rhetoric of judicial divorce was left unchallenged and continues to legitimate a husband's right to chastise his wife and to enhance a wife's subordinate role in the family, this rhetoric has transformed the DVPTA after its enactment.

, and judges' hostility toward and suspicion of victims

One of the

Moreover, Taiwan's quick enactment of the DVPTA demonstrates both the Taiwan legislature's responsiveness to positive social demands and the Taiwan legislature's inherent hastiness and reactionary tendency. Soon after its enforcement, the DVPTA had to confront deeply rooted family ideology, once invisible under the illusion of social unanimity during the legislative process.

Legal Orientalism⁶²

Family Harmony is a double-edged sword.

For over a century, Taiwanese civil law codes had used "family harmony" argument as an excuse for refusing women's request for fault-based judicial divorce

⁶¹ 昭如論文

⁶² Teemu Ruskola, Legal Orientalism, 101 Mich. L. Rev, 179.

due to a husband's physical abuse. Ironically, the same concept of family harmony is now promoted to market the new American inspired legislation to combat husbands' abuse by allowing, not denying, state intervention. Different from the American mode, wife beating was portrayed here as a threat to the family harmony rather than as violence against women. While this mild "family and love" strategy became the all-conquering banner, the gender equality concept upon which the VAWA and the MCDFV were based was inevitably obscured.

Although the DVPTA introduces the entire foreign concept of civil protection order and the "mandatory arrest policy," which was highly controversial even in the US, the potential interference in the family by such a legal tool was simply ignored during the legislative debates.

In order to prevent domestic violence from breaking down the family,

Because domestic violence would cause a family breakdown, the state's intervention in such private affairs was a justifiable means to maintain family harmony and not destroy it, as the Taiwanese people traditionally feared.⁶³

To deal with the oppo

最後 <

Because all the "advanced" countries had taken this approach, it seemed only natural that Taiwan should and would follow this international trend.

broaden the issue to the whole family instead of focusing on marriage.

While,

⁶³ See Chao, *supra* note 38, at 41.

(One of the most famous American legal feminist)

In other words, domestic/marital violence is indeed “violence against women” for the Awakening Foundation

one of the most famous American legal feminist, (找出美國女性主義法學的講法, Mackinnon?)

Transformation from Transplantation –

Awakening foundation is a relatively radical women’s NGO.

the representation/construction of the American feminist anti-domestic violence legislation

What specific kind of discourse of anti-DV legislation they adopted and “universalized”?

that how the agents of legal transplantation

what version of

“Foreign law can be influential even when it is totally misunderstood” (Watson, 99)

It is good how they portray (cons) when lobbyist

Bifurcate

Adopted, apporia, one version of American feminist.

好處、壞處 (沒有深刻檢討其中問題、)

the representation/construction of the American feminist anti-domestic violence legislation as well as the “American versus Taiwan” dichotomy in the dynamic, if not somewhat chaotic, ongoing transplantation process.

Taiwan followed an alternative course wherein the *popularity* of laws, legal

theories, and legal systems became the chief selling point.

Accompanying with vigorous development of the American-based international legal education (LL.M. and S.J.D. Programs), the p
American lawprevalent

In addition to Globalization of American LL.M.

Even though Gao herself didn't attend

February 1995 at an international conference head in Guam, where Gao encountered the MCDFC. Originally

Her personal concern,

while Gao attended the 11th South Pacific Judicial Conference in Guam. Fortuitous several days before⁶⁴

one of a participant who told her

可以在最後美國與台灣相對論的地方，加上 Olsen 對於美國反對家暴法的論述。

太平洋。

Olala, go paris.

although her research on domestic violence

留學國，挖拉拉，go paris. 留學生散布在星條旗下。Advanced assumption
散布各法律。各種因素可以解釋大家為什麼到美國。

Alan Waton.

所以研討會真的很重要。不是只有你這一場，還要看前後左右有哪一場。

1987

⁶⁴ See GAO, *supra* note 34, at 85-86.

從來不說自己是女性主義者。有一種獨立的「先進觀」，跟女性議題沒有太大關係、去性別的。重新詮釋、重新 formulate. 選擇的繼受某一種立法觀（從「家庭」角度出發。避免說美國就是怎麼樣。）

的確是 Achievement.

相較美國之下、迅速通過、沒有抵擋。快樂的故事、有 protection order.

技術官僚傳入。但是並不是某種政策之下。

,而是以科學知識藉由所謂"專家學者"或者"技術官僚"傳入而成為某項藥物政策的過程來看. 換句話說, 我們同樣會處理某種曾經在"西方"出現過的東西(也許是法律也許是知識也許是技術)後來在台灣出現的這件事情. 這個過程也許是移植(transplantation), 也許是挪用(appropriation), 也許是模仿(simulation), 所謂原版的東西跟後來在台灣出現的東西可能有高度到低度不等的同質性(homology). 但是似乎在某種程度上我們可以追索出一條系譜出來. 而那系譜跟歧異就成為研究要詢問的地方.

婦女活動、帶隊、參訪、高鳳仙、迅速通過、有啥？ Protection order.

為什麼是美國法？

婦女運動（受美國影響）但是法官立法（是一個獨立的行動）

高鳳仙在訪談說美國法最好。但是在公開場合不會強調是美國法（而是世界先進）但是不是美國女性主義法學（而是一種沒有女性運動色彩的）。

Prevailing among North Atlantic countries, this powerful legal tradition of non-intervention into the family realm was justified on the grounds that the sphere of

the family would be destroyed by judicial intervention – grounds that rendered many formal equal rights of wives unenforceable.⁶⁵

我們有

unplanned. Unexamined assumption

飛快的

what transplant?什麼被 translated (from women to family).

American law is not so emphasized, gender equality is blurred- domestic violence.

American law is not suitable. 飛快的立法，沒有遭受到像美國立法時，來自女性主義內外部的批評。

Unlike

This LLM paper, however, argues that the extended influence of the US feminist movement on Taiwanese activists had conditioned the social and legal consciousness long before this famous case, and had been a strong undercurrent that carried the DVPTA from its initial conceptualization to its final implementation.

an effort to

It is a comparative study in the sense that, I tried to challenge the

“advanced” image of American law and the “”
in this paper

⁶⁵ See Kennedy, *supra* note 1, at 643-45; Frances Olsen, *The family and the Market*, 96 HARV. L. REV. 1497(1983).

Selection
Legislation
Implementation

visible coexisting of the contingency and predestined

Discourse. Strategy, justification, critiques.

predestined
.Also, it is a comparative study in the sense that I tried to
Discourse. Rhetoric

It

Contingence contingent and unplanned
suppressed in the
Accidental accidental, unintentional

再現。
paradox

Again,
美國女性主義法學（引用 Janet）

是眾多受到美國影響的之一。順便帶到美國女性主義法學的影響，引用 Janet
跟昭如（遇見女性主義法學）。

This paper applies the method of

Methody
Comparative
Transplantation (什麼是可能的，什麼是被壓迫的 contingent,)

as opposed to Taiwan's "indigenous(固有)" law (Han-Chinese or German/Civil legal system),

台灣。Mackinnon,引用昭如。

"Foreign law can be influential even when it is totally misunderstood"(Watson, 99)

Among numerous , American legal feminism is

What is the mechanism of legal Americanization in Taiwan?

How is American law, as well as the Taiwan's "indigenous(固有)" legal system, portrayed and imaged in the process of transplantation?

下一段介紹文章架構、研究方法（強調有些是二手、有些是一手。）

（不是 identity (vokgeist, Savigny, either) , 而是"Guo-Ching"國情():)

Accounting for the diffusion of language (e.g. the present English Empire), this world system theory is about power and hegemony (Saussure). Surrounded by peripheral nations (and semi-peripheral nations like Japan), the center in this system has been a superpower nation that has had a strong influence on peripheral nations whereas the latter have had little power and could at best only resist the former. And there are the semi-peripheral nations that have two-way directionality (e.g. German jurisprudence influenced Meiji Japan, which then brought the newly adopted Savignian legal system to colonial Taiwan).

斷裂、無歷史。

Taiwan has experienced several waves of legal westernization.

After the reign of Chinese legal tradition for more than 200 years, in 1895 the advent of Japanese colonial rule in Taiwan initiated the island's first experience with westernization. The Japanese implemented a modern, westernized legal system redefined the relationship of women to the law. Meiji Japan's adapted version of German and continental legal models was integrated with native Chinese legal traditions. Then, in the wake of World War Two, American jurisprudence was added to the mix of legal cultures in which the people of Taiwan could settle their disputes.

Westernization of Taiwan's legal system modified the routines of daily life, altering citizens' ideals and expectations of the legal system.

連接到 SJD proposal 那一段歷史敘述。

Imperial Feminism? “GF is indeed becoming integrated in international legal regimes that manage and sustain U.S. hegemony? ”(Janet, 422)

Prestige

留學國（巴黎（samhuli, 胡志明; o lala, go paris）、美國）；

GF(Government Feminism): 哪一個流派被採納。

先追溯移植過程、美國如何被想像。如何跟被德國法比較。
美國、台灣兩種互不溝通的基本派（東方主義）。

美國法被移植 但是對美國法的批評沒有被移植。