Yale Law School
Paul Tsai China Center
耶鲁大学法学院蔡中曾中国中心

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by Su Lin Han

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A year after China adopted its landmark Anti-Domestic Violence Law ("DV Law"), serious safety concerns persist for victims of domestic violence. Despite the introduction of key legal protection measures aimed at improving victim safety, China continues to face legal and policy challenges in achieving the critically important goal of keeping victims out of harm's way.

China's DV Law culminates two decades of intensive lobbying by women's rights groups and the official All China Women's Federation ("Women's Federation"), who advocated stronger legal protections for victims of domestic violence. In 2015, the DV Law was fast-tracked for adoption to the surprise of many observers, and signaled a high-level state commitment to tackle domestic violence as a persistent social problem afflicting an estimated one-third of Chinese families.[1] The stand-alone domestic violence law is widely regarded as a major improvement upon prior legislations such as the Law on Protection of Women's Rights and Interests, which denounced "discrimination, abuse, abandonment and cruelty against women" in principle but failed to provide tangible legal relief for victims.

The DV Law delivers a range of new legal protection measures. Chief among them are China's first statutory definition of domestic violence by national law covering both physical and emotional abuse, and the availability of civil protective orders to victims who "experience domestic violence or face actual danger of domestic violence." The law also introduces forward-thinking prevention measures such as mandatory reporting of abuse and written police warnings against reoffending. All represent concrete steps aimed at protecting the personal safety of victims—the most pressing challenge of any domestic violence legislation.

[1] See Xinhua, "All China Women's Federation Survey Shows Violence in One Third of Families" (November 25, 2007), http://news.xinhuanet.com/politics/2007-11/25/content_7141041.htm.

The new law sends mixed messages, however, by elevating family harmony and social stability among its other chief objectives. The divergence among these policy objectives, coupled with weak criminal justice enforcement against domestic violence abusers, deflect China's priority against domestic violence and undermine the effectiveness of the DV Law in protecting the safety of millions of victims.

This paper will examine the impact of these legal and policy constraints of China's new DV Law on victim safety. It will also explore possible institutional mechanisms which can be designed to address victim safety concerns in the course of the DV Law's implementation. These observations draw on both research and the author's fieldwork and conversations with advocates, researchers, and judicial personnel closely involved in ongoing domestic violence work in China.

MULTIPLE LEGISLATIVE OBJECTIVES COMPROMISE VICTIM SAFETY

China's DV Law sets out to achieve multiple objectives, ranging from "stopping and preventing domestic violence" to "promoting family harmony and social stability." These objectives represent potentially conflicting interests between victims seeking legal protection against family violence, and society and the state seeking to preserve family harmony and social stability.

The advocacy of "family harmony" reflects Chinese society's strong traditional belief in family unity over separation, which puts a premium on the virtue and obligation of victims (especially women) to tolerate abuse. There is also ambivalence among well-regarded legal scholars in China that strong legal interventions to protect victim safety may promote dissolution of marriages and upset family harmony. In neighboring Taiwan, similar cultural values led to the inclusion of "family harmony" as a key policy objective in its groundbreaking Domestic Violence Prevention Act in 1998. However, subsequent amendment in 2007 abandoned that approach in recognition that it had a detrimental effect on victim safety by perpetuating society's tolerance of violence against women in the name of harmony.[2] Elsewhere in the world, protection of victims' personal security tops the agenda of most domestic violence law reforms.

In mainland China, "family harmony" also resonates with the state's political priority to maintain "social stability." Rising social tension as a result of China's rapid economic growth, widening income inequality, and rampant corruption and abuse of official power have heightened stability concerns within the political establishment. Increasingly, using mediation to resolve legal disputes, as opposed to adversarial adjudication by the courts, has become an integral part of China's stability strategy to contain social conflicts. In family disputes, even where domestic violence is present, the goal of promoting harmony and social stability often makes mediation the

[2] See Gao Fengxian, *Domestic Violence Laws: Theory and Practice*, Chapter 1 (2014), Wunan Publishing, http://www.wunan.com.tw/www2/download/preview/1R69.PDF.

preferred method to handle domestic violence as an interpersonal conflict amenable to conciliation.

It is in mediation that the convergence of the state's interest in stability and society's belief in family harmony raises serious safety concerns for victims. Historically, domestic violence was almost exclusively handled through informal mediation by family members, employers, and quasi-governmental organizations such as the Women's Federation and village and neighborhood committees. In recent years, formal legal interventions by police and the courts have taken on a more important role through Central and local initiatives, but mediation remains a cornerstone of China's domestic violence intervention strategy. As a result, police response to domestic violence favors conflict resolution through "criticism and education" instead of taking coercive action against abusers. Even in cases of misdemeanor assaults which legally can subject perpetrators to administrative detentions of 15 days or less[3], police are directed to mediate "disputes among family members."[4] Similarly, in court proceedings involving family disputes such as divorce and in earlier judicial pilot projects on protective orders, judges have been known to be under pressure to "overlook and downplay" spousal abuse and push for judicial mediation instead.[5] The pervasive use of mediation by police and the courts has been criticized by Chinese domestic violence experts as failing to assign blame and punish abusers, and leading to the continuation of long-term abuse against women in China.[6] At a minimum, mediation cannot stop violence by removing abusers as an immediate security threat, "leaving victims living in fear that each police response only escalates violence by their abusers."[7]

Internationally, mediation of family disputes where violence is present has long been controversial due to its perceived impact on victim safety. Common concerns include mediation's failure to take into account the power disparity between victims and their abusers, and questions of coercion as a result of fear and intimidation of victims often present in abusive relationships. As a result, recent domestic violence legislations in many jurisdictions, including those in the U.S. and Taiwan, either prohibit or impose strict limitations on mediation.

The DV Law is silent on the role of mediation by legal institutions but calls for informal mediation by "people's mediation organizations" (typically untrained mediators from village and neighborhood committees) and "employers" as part of the overall strategy to "prevent and reduce incidents of domestic violence." By failing to acknowledge the negative impact of mediation on victim safety or impose restrictions on mediation of disputes involving domestic violence, the DV Law gives tacit approval for legal institutions to continue mediation of domestic violence cases. There are signs that local implementation guidelines already began to incorporate mediation into their domestic violence response procedures, e.g., by making mediation a prerequisite to issuance of written police warnings.[8]

[3] See Public Security Administration Punishment Law (PSAPL) (2005), Article 45.

[4] See Article 9 of the PSAPL and Article 1 of Ministry of Public Security, "Explanation on Relevant Questions Regarding Implementation of the PSAPL" (2006), which requires police to mediate all "private disputes" resulting in physical injuries. http://210.73.66.144:4601/law?fn=chl350s912.txt.

[5] See Human Rights Watch, "China's Turn against the Law" (October 30, 2013), https://www.hrw.org/news/2013/10/30/chinas-turn-against-law. See also Xin He and Kwai Hang Ng, "In the Name of Harmony: The Erasure of Domestic Violence in China's Judicial Mediation," *International Journal of Law, Policy and the Family* 27(1), (2013), 97-115.

[6] See Chen Min, "Mediation is not Appropriate in Divorce Cases Involving Domestic Violence," Legal Daily, July 17, 2009, http://www.court.gov.cn/yyfx/yyfxyj/ztllyj/xbpdysfgz/201112/t20111222_168613.html.

[7] See iFeng.com, "DV Law One Month Later: Legislators Hope to Promote Family and Social Harmony" (March 31, 2016), citing research conducted by the China Law Society, http://news.ifeng.com/a/20160331/48277587_0.shtml.

[8] See Zhejiang Provincial Health and Family Planning Commission, statement on implementation of DV Law (March 1, 2016), http://www.zjwjw.gov.cn/art/2016/3/1/art_1202101_854278.html.

The DV Law's endorsement of family harmony and social stability and its continued reliance on mediation in domestic violence responses will likely prolong society's bias against legal interventions. At the implementation level, the concern is that this lack of a singular commitment to victim safety protection will divert the enforcement focus to conflict resolution, rather than to the application of the full range of civil and criminal sanctions against abusers to protect victims from harm.

FAILURE TO CRIMINALIZE DOMESTIC VIOLENCE WEAKENS CRIMINAL JUSTICE RESPONSE

China's ambivalence towards victim safety as an overriding policy objective also affects the DV Law's stance on the use of criminal sanctions against domestic violence. Under the DV Law, domestic violence is fairly broadly defined as the "infliction of physical, psychological or other harms among family members through means such as beating, restraints, maiming, restriction to physical liberty, as well as verbal abuse or intimidation" (Art. 2). Yet, by positioning itself as a social law to address minor offenses, the DV Law fails to treat domestic violence as a crime and defers to the country's penal law regime to handle more serious offenses.

While critics are disappointed by the DV Law's failure to outlaw marital rape, the fact remains that including sexual abuse within the definition of domestic violence would not trigger prosecution of marital rape as a crime unless it becomes a separate offense under China's Public Security Administration Punishment Law (PSAPL) or the Criminal Law.

By sidestepping the issue of criminalization, the DV Law offers only limited legal protection to victims. Two of the DV Law's most prominent features, written police warnings and court protective orders, are both civil remedies strong enough to deter minor offenders but have no real teeth to stop violence. Written police warnings amount to neither civil nor criminal sanctions, nor do violators faces penalties. Once issued, they function as a trigger to monitoring obligations of police and community organizations and can be used as evidence in subsequent court proceedings involving domestic violence, but do not shield victims from further abuse.

Similarly, court protective orders are undermined by the lack of police enforcement and criminal sanction against violations. Under the DV Law, violation of a protective order is not a crime unless the underlying act also violates criminal laws. Penalties for violations are limited to court-ordered reprimands, civil fines of less than RMB1,000 (about $150), or administrative detention of 15 days or less. In addition, courts, not police, are primarily responsible for enforcing protective orders, which is notoriously difficult due to limited court enforcement resources. The issue of weak court enforcement already surfaced in earlier judicial pilots on protective orders. The DV Law appears to offer a partial solution by requiring police to assist in enforcement, but there is increasing skepticism about this measure's effectiveness. Shortly

after the DV Law became effective, more legal experts in China are calling for making police the primary enforcer of protective orders.[9] Critics also contend that the light punishment provided by the DV Law allows abusers to act with impunity. A recent report tells the story of a victim in Zhejiang Province who twice obtained protective orders but was forced to return to court a third time to seek a fine of RMB500 ($80) against her abusive husband for continued harassment and beatings.[10]

The DV Law's reliance on the general penal law regime to handle more serious domestic violence offenses follows legal practices once prevalent around the world. The problem, as warned in a UN report, is that in countries where domestic violence is traditionally regarded as a private family matter and the criminal justice system fails to vigorously pursue abusers, domestic violence cases are "rarely prosecuted" and "women continue to suffer in silence."[11] In the U.S., for example, police policies once actively discouraged arrests and focused instead on alternative methods of intervention such as mediation and counseling for batterers to manage what they perceived as "family crises."[12] In practice, police often opted not to make arrests even in cases where victims suffered serious harm. A 1986 U.S. Bureau of Justice Report found that half of domestic violence incidents which were classified by police as "simple assault" (a misdemeanor in most states typically not subject to arrest) involved bodily injuries "more serious than 90% of all rapes, robberies and aggravated assaults."[13] In the last few decades, legal reforms in the U.S. have resulted in criminalization of domestic violence as a separate offense and the adoption of mandatory arrest or pro-arrest policies to limit police discretion in avoiding arrests. Such legal and policy changes not only send a strong message about society's resolve to treat domestic violence as seriously as crimes committed by strangers, they also serve the important purpose of limiting police discretion in their domestic violence response.

In jurisdictions that do not follow the U.S. approach of outright criminalization of domestic violence and mandatory arrests, alternative methods of intervention have been adopted to ensure victim safety. In Taiwan, for example, emergency protective orders are available within four hours to domestic violence victims facing an imminent threat of abuse.[14] Awaiting such orders, police are required to physically stand guard to protect victims from further violence. In addition, police are responsible for enforcing protective orders and violators are subject to warrantless arrests.

In practice, China's bifurcated civil vs. criminal approach poses a challenge to effective police intervention. Like police elsewhere, Chinese law enforcement already struggles with a culture that echoes society's tolerance of domestic violence and bias against upsetting family unity. Legal requirements imposed by the country's penal laws for prosecuting crimes commonly associated with domestic violence add to the complexity of police enforcement.

[9] See China Women's Journal, "Personal Protection Orders Should Clearly Stipulate Enforcement by Police" (July 2016), http://old.women.org.cn/art/2016/7/15/art_9_147829.html.

[10] See Legal Daily, "Multiple Jurisdictions Issue First Personal Safety Protection Orders after Domestic Violence Law Came into Effect" (March 24, 2016), http://www.legaldaily.com.cn/index_article/content/2016-03/24/content_6538138.htm?node=5954.

[11] "Integration of the Human Rights of Women and the Gender Perspective: Violence against Women," UN document E/CN.4/2003/75.

[12] See National Institute of Justice, "The Criminalization of Domestic Violence: Promises and Limits" (1995), https://www.ncjrs.gov/pdffiles/crimdom.pdf.

[13] See U.S. Bureau of Justice Statistics, "Preventing Domestic Violence Against Women" (August 1986), http://www.bjs.gov/content/pub/pdf/pdvaw.pdf.

[14] See Taiwan's Law on Domestic Violence Prevention, Articles 16, 21, 29 and 48, http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=D0050071.

The problem is most acute in misdemeanor domestic assaults not involving death or grave injuries but nonetheless posing serious safety threats to domestic violence victims suffering from repeated and escalating abuses. For example, under the PSAPL, administrative detention cannot be made in misdemeanor domestic assault cases unless initiated by victims. This requirement has been used to explain overwhelming police reluctance in detaining abusers in such cases, due to the fact that victims often change their minds after making initial requests. As discussed earlier, PSAPL's legal requirement for police to provide mediation also contributes to their aversion to detain abusers.

Similarly, although various crimes commonly associated with domestic violence can be prosecuted under China's Criminal Law, police arrests face a number of legal hurdles when the perpetrator is a family member. For example, "criminal abuse by family members" under Clause 1 of Article 260 of the Criminal Law, applicable to cases involving non-fatal or less serious injuries, requires the abuse to be "egregious" but fails to define such conduct. Until recently, judicial practice demanded proof of "light injury" to establish criminal abuse. According to China's Standards for Forensic Examination of Personal Injuries (2014), "light injuries" refer to those "causing medium level harm to human health," including, e.g., facial lacerations of more than 6 centimeters, skull fractures, and broken ribs. Proof of light injury is also required to establish intentional infliction of harm under Clause 1 of Article 234 of the Criminal Law. The outcome is predictable: except for death or serious injuries, few arrests are made in domestic violence cases.[15]

NEW CRIMINAL DOMESTIC VIOLENCE GUIDELINES

China's Central judicial organs jointly issued an *Opinion on the Handling of Criminal Domestic Violence Cases in Accordance with Law* ("Opinion") in 2015,[16] in recognition of the need to strengthen criminal justice response. Significantly, the Opinion calls for police to take coercive actions to remove abusers from the environment in which their criminal acts pose a safety threat to victims. The Opinion also opens the possibility of adopting more aggressive criminal arrest policies against repeat offenders and issuance of criminal restraining orders against suspects of domestic violence crimes who are released on bail.

The Opinion, however, fails to provide clear legal guidance to help police determine when acts of domestic violence constitute a crime if they do not result in death or serious injuries. Take Clause 1 of Article 260 of the Criminal Law (which includes the "egregious" standard discussed above) as an example. The Opinion seeks to expand the scope of "criminal abuse by family members" by specifying the following types of abuse as "egregiously abusive conduct": (1) "repeated abuse, over long periods of time," (2) "particularly cruel method of abuse," (3) "abuse that results in minor injuries or serious illness," and (4) "relatively serious abuse of minors, the elderly, the disabled, and pregnant women or nursing mothers." Unfortunately, these

[15] See Zhu Shimiao, "Domestic Violence, Criminal Law Response and Possible Improvements" (2010), http://www.jcrb.com/jcpd/jcll/201012/t20101202_474034.html.

[16] Available at http://www.spp.gov.cn/flfg/201503/t20150305_92175.shtml.

provisions beg further clarifications. It is not clear if psychological abuse alone, even repeated and for long periods of time, would constitute criminal abuse. Nor does it appear that the threat of domestic violence, even if imminent, can trigger criminal justice response.

Questions also remain with respect to proof of injury. The Opinion's classification of "egregiously abusive conduct" suggests that different evidentiary thresholds may apply depending on specific types of abuse. An academic publication by three judges of the Supreme People's Court maintains that the Opinion sets out a new evidentiary standard for criminal abuse under Clause 1 of Article 260 by requiring proof of "minor injuries" (轻微伤) instead of "light injuries" (轻伤).[17] The difference appears to be a matter of degree but both pose serious risk of harm to victims. Examples provided for "minor injuries" include diminished hearing or eye sight, broken ribs, and miscarriage as a result of external impact, which the judges concede constitute substantial harm to victims. Together with other examples given by the judges regarding "particularly cruel methods of abuse" (burning with cigarettes, scalding with hot water, or stabbing with a needle), it is hard not to conclude that even under the new, more relaxed standards of the Opinion, significant physical harm or at a minimum, sustained abuse over long periods of time must befall domestic violence victims before police can take coercive actions against their abusers.

The consequence of such complex legal and evidentiary requirements can be dire for victims of domestic violence: Anecdotal evidence suggests that despite the apparent relaxation of the proof of injury requirement provided by the Opinion, police continue to routinely require proof of light injuries from official medical examiners before they are willing to make arrests. In rural areas, local police even require victims to pay for the cost of obtaining proof of injury before arrests are made.

The difficulty in enforcing general penal statutes against crimes of domestic abuse underscores a fundamental weakness in China's overall legal approach to domestic violence. By failing to criminalize domestic violence, the DV Law relies heavily on police discretion in applying the appropriate civil, administrative and criminal responses. Given the much less onerous legal requirements for issuing written police warnings, concerns that they may become the default police domestic violence response in lieu of arrests[18] appear to be well founded.

POSSIBLE WAYS FORWARD

Despite the legal and policy constraints outlined in this paper, the past year has witnessed genuine top-down pressure and political momentum in China to mobilize state actors to implement the DV Law. Various local experiments are underway to explore mechanisms for coordinating the domestic violence response among police, the courts, and social service agencies.

[17] See Yang Wanming, Xue Shulan, and Tang Junjie, "Meaning and Application of the *Opinion on Handling Criminal Domestic Violence in Accordance with Law*," People's Justice (Applied) Journal (2015).

[18] See Human Rights Watch, "China's Turn against the Law" (October 30, 2013), https://www.hrw.org/news/2013/10/30/chinas-turn-against-law.

In Hunan Province, for instance, the local Women's Federation has been working closely with police and the courts to establish multi-agency domestic violence response systems focusing on crisis intervention in high-risk cases. This approach has the advantage of targeting limited law enforcement and victim support resources to the most vulnerable population, and offering the opportunity to develop institutional safeguards calibrated specifically to address victim safety concerns. In designing such systems, several key features are worth consideration:

- *Political buy-in.* Political buy-in from key local stakeholders, especially the local police and the courts, will be crucial for ensuring that such mechanisms possess the necessary authority and enforcement capacity. In Hunan, several localities have secured support from the powerful Communist Party Political and Legal Committees, which oversees all local law enforcement and judicial organs. Such alliances help to showcase strong state commitment to enforcement and allow the politically weaker Women's Federation to collaborate closely with police and the courts.

- *Screening for High Risk Victims and Targeted Intervention.* One possible approach for improving victim safety is to enhance the role of police in screening for victims who are in danger of death or serious injuries and getting them help quickly. Training police to perform on-site risk assessments and timely referral of high risk victims to support services can offer immediate assistance to victims facing imminent threats of serious harm. This approach bypasses the thornier issue of police arrests under Chinese law and shifts the focus to using frontline officers to identify high risk victims who may otherwise be outside the reach of shelters and other support services. In the U.S., similar lethality assessment programs found that more than 50% of the victims screened by police are deemed high risk and that such screenings significantly improved the victims' utilization of support services.[19]

- *Information Sharing System*. Information sharing has been crucial in jurisdictions which have successfully coordinated domestic violence response in high risk cases. China's DV Law mandates the collection and reporting of domestic abuse information from a variety of sources, including police reports, written police warnings, and mandatory reporting of abuse of certain vulnerable groups (including children and the mentally disabled). Local Women's Federations, community organizations, and employers also receive domestic violence complaints. A centralized platform to collect, analyze, and share domestic violence case information among police, courts, and social service agencies can help direct targeted legal and service responses based on the risk profiles of individual victims.

[19] See Messing and Campbell et al, "Police Departments' Use of the Lethality Assessment Program: A Quasi-Experimental Evaluation" (March 31, 2014), available at https://www.ncjrs.gov/pdffiles1/nij/grants/247456.pdf. See also Maryland Network Against Domestic Violence, "Legality Assessment Program Maryland Annual Summary" (January to December 2015), available at https://lethalityassessmentprogramdotorg.files.wordpress.com/2016/09/2015-lap-maryland-annual-report-summary.pdf.

- *Role of Women's Federation and Civil Society.* The official Women's Federation, with its mission to "represent and safeguard women's rights," has been increasingly vocal as an advocate for victims and provider of limited support services. The DV Law provides new leverage for the Women's Federation to play a key role in the state's implementation efforts, both as a coordinator and supervisor. In this capacity, the Women's Federation can be a strong supporter of and participant in the development of multi-agency domestic violence response systems. In addition, as an important link between the state and China's bourgeoning civil society, the Women's Federation can also help the nongovernment sector to bridge their government funding gap and to develop their capacity as a major provider of crucial victim support services.

China's domestic violence law reforms have set the stage for further exploration and development of new implementation mechanisms to combat domestic violence. Innovative solutions such as multi-agency domestic violence response systems, backed by high-risk screening, targeted intervention, and information sharing, can improve the state's capacity and effectiveness in domestic violence intervention. More importantly, such institutional mechanisms can create internal transparency and accountability among state actors, which creates the added benefit of exposing gaps in legal enforcement and raises hope for changing the culture of non-interference. Ultimately, the success of any domestic violence law reform, notwithstanding its deficiencies, will be judged by whether victims can be kept out of harm's way.

THE AUTHOR

Su Lin Han is a Senior Fellow of the Paul Tsai China Center at Yale Law School. A native of Beijing who has lived in the United States since graduating college, she has extensive experience and expertise in numerous aspects of Chinese and American law. After receiving a J.D. from the Boalt Hall School of Law at the University of California at Berkeley, she worked as a corporate attorney at Wilmer, Cutler & Pickering in Washington, DC and the Hong Kong office of Cravath, Swaine & Moore. More recently, she has worked as a legal consultant to the World Bank and the Asian Development Bank on a variety of legal reform projects in China, including collateral law and registry reforms in relation to drafting of China's Property Law and financial reform issues. Since joining the Center, she has been closely following the development of China's employment discrimination law and enforcement mechanisms, domestic violence law and practice, as well as consumer protection regulation, and public interest litigation in China.