

# Trapped within the Ideological Power of Law: Women's Experience Seeking Justice

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Abstract: The legal positivism epistemologically argues that law is objectively constructed, non partisan, and impartially implemented. Even, it is widely claimed that everyone is equal before the law. Hans Kelsen further obsessed theorizing the pure theory of law. The Kelsen's *Pure Theory of Law* aims to describe law as a hierarchy of norms which are also binding norms while at the same time refusing, itself, to evaluate those norms. In this legal sense, legal sciences are to be separated from legal politics in order to keep laws independent, free from any kinds of intervention. The objectivity, impartiality, and the innocence of law have been epistemologically and practically challenged by legal feminist. This paper utilizing legal feminist perspectives illuminates empirically that law suffers a variety of gender bias. *Firstly*, the verbal construction of law is prevalently masculine reflecting male experience-awareness, and male standard-norms of social interpretation. *Secondly*, more importantly, at the practical domain, within legal profession, law has been mystified to serve the male interests. Finally, women's struggles seeking justice in the formal legal path have been often trapped in a difficult situations, between hoping on the innocence of the law, or begging at the mercy of patriarchal reasoning of legal professionals.

## 1 WOMEN'S LIFE WITHIN THE GENDERED WORLD: AN INTRODUCTION

The match of the US Tennis Open final always presents a remarkable memory of tennis professional. Audiences are willing to pay for expensive tickets just to watch a sensational match. However, this year match turned into a bad record for the world of female players who demanded fair treatment without gender discrimination in tennis. The final match was led by a Spanish referee, Carlos Ramos who is one of the most experienced and respected umpires in professional tennis. The match was held on September, 15, 2018 at New York's Flushing Meadows, and watched by more than a million audiences through television all over the world.

The final game performed two finalists different generations between a fan (Noami Osaka, 20-year-old) and her role model (Serena Williams, 35-year-old). Since her childhood, Noami Osaka has strongly idolized Serena Williams, even, she dreamed to play against her one day in a prestigious tournament.

Finally, her dream come true at the first round of the 2018 Miami Open, and at the 2018 US Open Final, in which Osaka played for her first Grand Slam Trophy. The result was unexpectedly that Japan's Osaka beat Williams by a straight set in a Grand Slam showdown ending in tears for both players – for different reasons.

The match of the 2018 US Open Final shed a very traumatic moment for Serena Williams, and for women sport activists as well. (BBC, 2018) Serena Williams cried out her frustration at the referee for a couple of things. Sadly, she has been penalized with fines totalling US \$17,000 for 3 violations. She got a point penalty of \$ 3,000 for smashing-breaking her racket, followed by a game penalty (\$ 10,000) for verbal abuse confronting the chair umpire, and finally, by a code violation warning (\$ 4,000) for coaching after the referee ruled that her coach gave her hand signals from the stands.

Mr Ramos' decisions made Serena Williams raged, emotional, cried, reacted harshly and uncontrolled. She cruelly criticized the referee for being sexist and applied a double standard on her, and she accused him stole her very critical points for her

dream to uphold the 24<sup>th</sup> Grand Slam trophy. Serena Williams had curiously questioned the logic and the motivation behind the penalties, specifically on her verbal expression to the umpire. She argued saying to the referee, "there are men out here that do a lot worse (things). He's (a referee) never taken a game from a man because they said 'thief'." She continued arguing that "because I'm a woman, you're going to take this away from me?" "That is not right." She shut loudly.

Serena Williams' heated dispute with the umpire during the US Open final is recently the latest controversy involving the tennis superstar. Polemics emerged in responding the traumatic session of the match. The International Tennis Federation released this statement on September, 17, 2018 defending Mr Ramos by saying:

Carlos Ramos is one of the most experienced and respected umpires in tennis. Mr. Ramos' decisions were in accordance with the relevant rules and were reaffirmed by the US Open's decision to fine Serena Williams for the three offenses. It is understandable that this high profile and regrettable incident should provoke debate. At the same time, it is important to remember that Mr. Ramos undertook his duties as an official according to the relevant rule book and acted at all times with professionalism and integrity. (Guardian, 2018)

Serena Williams's points regarding her verbal abuse confronting the referee have been bestowed, blessed and reaffirmed by many people. In fact, male tennis players more frequently called other umpires "several things", and behaved badly such as smashing and throwing their rackets, kicking the drink container, and pointing by their fingers rudely to referees and umpires. Christine Brennan, a senior sport analyst, said in her report to CNN "we know that there's quite a history to it. Think of John McEnroe, think of Ilie Nastase, Jimmy Connors, (and) Andre Agassi. These men all berated chair umpires, famously so, (however) none of them received a game penalty". (Chavez, 2018). In addition, a retired US tennis star, the 2003 US Open champion, Andy Roddick, tweeted in other occasion, that he have regrettably said even worse, and he have never gotten a game penalty. This is a very clear double standard applied in William's experience.

Furthermore, many famous professional tennis players regardless their gender identity also seriously commented on Williams's tragic fate, however, they were treated differently. Billie J. King, a tennis legend and an equal rights advocate in tennis, agreed with Williams, and she supported strongly what Serena has fought for. King tweeted clearly in her short message: "when a woman is emotional, she's 'hysterical' and

she's penalized for it. When a man does the same, he's 'outspoken' and there are no repercussions. Thank you, Serena Williams for calling out this double standard". (Mackintosh, 2018) She reemphasized that more voices are needed to do the same".

Christine Brennan, an another sport journalist spotted Willmiam's case more seriously. For her, the clashes between Williams and the referee show that women are not being treated equally in the tennis world. Miss Brennan contended that "Would he (umpire) have done that with a man? History has said 'No'. He would not have done that with a man." Supporting Brennan's point, Katrina Adams, the head of the US Tennis Association, when being interviewed by the BBC contended that male players did behave worse than their female counterparts all the time. She proclaimed that "there's no equality when it comes to what the men are doing to the chair umpires and what the women are doing, and I think there has to be some consistency across the board." (Dickson, 2018)

What Serena Williams has done is very crucial, and inspiring remembrances for this paper focussing gender lines in women's life. (Levviit, 1998) Williams' fate is indeed concerned with gender bias, such a discrimination in law and social life. Hence it is understandable why Billie J. King thank and proudly applauded Serena Williams, because she has done something advocating a very valuable project for the world of professional tennis in the context gender equality and equity. For this point, Serena Williams said "I'm here fighting for women's rights and for women's equality and for all kinds of stuff. For me to say 'thief' and 'for him to take a game', it made me feel like it was a sexist remark". (AP, 2018)

Serena Williams is not the only female tennis player to find herself at the center of a gender-focused controversy and bias. Alize Cornet, a French player, is also penalized for fixing her top (dress). She received a code violation, also in the 2018 US Open, for briefly taking off her shirt on the court. The case is follow. During a 10-minute break from the blistering heat at Flushing Meadows, Miss Cornet rushed off-court to change her shirt, and she mistakenly put her top on back-to-front. (Chavez, 2018) When she returned, she realized that she was wearing it the wrong way and fixed her top at the public arena, an open sphere, on August, 28, 2018.

Fortunately, the US Open Committee apologized for this incidence. In a statement, an US Open officer on behalf the committee, said it regretted the way Cornet was treated. The US Open committee added that all players are allowed to change their shirts

while sitting in their chairs, however, female players have the option to change shirts in a more private location close to the court, when available, and of course not in a open space. Hence, why was she penalized? It is about controlling women's body from male perspective.

To date in this case, many male tennis players have changed shirts many times on court without a problem. For instance, September, 12, 2018, John Isner changed his shirt 11 times throughout his three-hour match against Juan del Potro at the US Open. A day later, the Wimbledon champion, Novak Djokovic sat *shirtless* for several minutes while his opponent, John Millman, stepped away to change his shirt during a quarter-finals match, also in the US Open. Neither of them was penalized. From this point of view, there is clearly a double standard applied to female tennis players.

Beyond the whole heated controversy emerging from the Williams' case is a very classical issue for which feminists fight, *namely*, gender equality and equity. They fight to eliminate gender discrimination in everyday life. By and large, pejoratively, a hypermasculine woman is often labelled as being like a man. This stereotype makes women uncomfortable, and biasedly controlled. For instance, imagine that you have to contend with critiques of your body that perpetuate racist and sexist notions such as pointed to Williams sisters (Venus and Serena) in an embarrassing occasion. Such a verbal abuse shocking the world of professional tennis appeared from the mouth of the president of the Russian Tennis Federation, Tarpishev when he was requested to comment on Venus and Serene Williams' body. He has described Serena and her sister as '*brothers*' who are '*scary*' to look at. More ironically, the stereotype against women's body is blessed by other female players such as Anna Kournikova on a moment who reportedly said, "I'm not Venus Williams. I'm not Serena Williams. I'm feminine. I don't want to look like they do. I'm not masculine like they are." (North, 2018)

Apart from the heated controversy discussed above, women within more broader scopes and contexts are often treated unfair and biased. Are these stereotypes and discriminatory treatment as well experienced by women gender-based-victims who seek for justice through judiciary process in Indonesian criminal courts? How did legal professionals interpret legal norms when they were exposed to deal with very male dominated coercion, such a rape? Does the legal discourse promote equal treatment fairly to women?

This paper discusses more precisely issues relating to the judicial stereotyping in response to women who fight for justice. The term judicial stereotyping in this paper is used to refer to the practice of legal professionals, judges and prosecutors ascribing to an individual specific attributes, characteristics or roles by reason only of her or his membership in a particular social group (such as women). It is used, also, to refer to the practice of legal professionals, judges and prosecutors perpetuating harmful stereotypes through their failure to challenge stereotyping, for example by lower courts or parties to legal proceedings, during verdict process in the court room.

## 2 MATERIALS AND METHODS

This research is a sociolegal study which aimed at evaluating the application of law in the case of gender-based crimes in Indonesian criminal courts. Since this study attempted to analyze and criticize empirically strategies by which legal professionals (prosecutor, judge, and lawyer) interpreted legal norms, hence such a legal hermeneutical method was employed in this study. The data supporting this study sourced from various documents issued mostly by two Public Courts, namely, Public Court of Padang and Public Court of Balikpapan.

## 3 THE NEUTRALITY AND VALUE-FREE OF LAW: ADVOCATING WOMEN BEYOND GENDER DISCRIMINATION

To begin with, legal feminists criticized strongly the maleness of law and legal sciences (jurisprudence). (Down, 2008; Down, 2002) For them, it is not only the legal norms which are constructed genderedly biased, but more importantly, male legal practitioners quite commonly interpreted law based on their own experiences. In spite of the gender neutral and the maleness of law, judges and other legal practitioners could actually play a decisive role to apply affirmatively law for interests of women or for interest's disadvantaged people. However, because of the strong patriarchal dominance in legal doctrine, the law in its application is often unfair to women. Gender stereotype is a case in this point.

In this context, judges are not the only actors in the justice system who stereotype and interpret law from male awareness and patriarchal frame. Other law enforcement officials, prosecutors, even lay witnesses in hearing session and of course legal professionals, have, for example, been criticised for allowing stereotypes to influence investigations into reports of such violence especially in cases which intersect with gender-based coercions or with men's world and their private life (CEDAW/C/52/D/32/2011, 2012), (Rights, 2009). Even so, gender stereotyping, and gender bias by legal professionals and judges, definitely, can have pernicious effects, especially because their unique position of power means they can give stereotypes the full weight and authority of the law, and judicial decisions. (Rebecca J. Cook, 2010) To borrow the words of Justice Kriegler of the Constitutional Court of South Africa, judges can imbue stereotypes with legal authority and added legitimacy by virtue of the fact that they 'put the stamp of approval of the ... state' on them. (South Africa, 1997) This is certainly correct in addition to any effect on the victim's ability to access justice and the deficiency of judiciary process to serve marginal people, more exclusively women.

It is widely observed in legal sphere that social-legal discrimination may be directed against women on the basis of their sex and gender, in including the judiciary process. The very evident cases are boldly demonstrated in several instances mentioned previously and in coming cases discussed below which are cited from several court's decision. These discriminations are *inter alia* as partially what Serena Williams fight for; not only for herself, but for all women. Serena proclaims that "I'm here fighting for women's rights and for women's equality".

Gender is a term used to articulate social and cultural roles, and relation between men and women. It refers to socially constructed identities. It is concerned with attributes and roles for women and men and the cultural meaning imposed by society on biological differences, which are constantly reproduced amongst the justice system and its institutions, and rigidly fixed by legal formula. Discrimination against women in legal context, based on gender stereotypes, stigma, harmful and patriarchal cultural norms, which affect women, has an adverse impact on the ability of women to gain access to justice on an equal basis with men especially in the context of gender-based harm.

To add in a more empirical and critical context, gender discrimination is pervasively compounded by intersecting factors that affect some women to a

different degree or in different ways than men and other women. Grounds for intersectional, multilayer, or compounded discrimination may include ethnicity, race, indigenous or minority status, colour, socio-economic status, and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, and being lesbian, bisexual, transgender women or intersex persons. These intersecting factors make it more difficult for women from those groups to gain access to equality, justice, and equity, such as what Serena Williams has experienced as a woman and a black.

Women, in fact, face many difficulties in gaining access to justice as a by-product of direct and indirect discrimination which results in inequality and unjust treatment. Such inequality is not only apparent in the discriminatory normative content and/or impact of laws, regulations, procedures, customs, practices and other policy, but also in the lack of capacity and awareness of judicial and quasi-judicial institutions and their officials to address and deal with violations of women's rights adequately, and gender sensitivity which are mystified by patriarchal ideology and legal science. To break the myth of gender neutrality, and initiate a legal channel to help women access justice, Simone Cusack acting as a committee of Eliminating Judicial Stereotyping, (Cusack, 2014) notes that judicial institutions must apply the principle of substantive or de facto equality as embodied in the Convention on the Elimination of All Forms of Discrimination against Women and interpret laws, including national, religious and customary laws, in line with that obligation. Article 15 of the Convention encompasses obligations for States parties to ensure that women enjoy substantive equality with men in all areas of the law.

Democracy, puts theoretically huge hopes on the rule of law to ensure equity and equality for all citizens. The legal maxims of equality before the law and the rule of law are the backbone to assure the expectation. However these legal maxims are not without deficiency. Jiří Příbáň argues that the rule of law as the basis of the discourse of neutrality of law in many cases fails to depoliticize legal conflict, dispute, and inequality in modern society (Příbáň, 1997).

Legal feminists go further in speculating that law and jurisprudence suffer gender neutrality. In this point, Catherine MacKinnon, for instance, said that law defines and treats women according to the ways and logic of men to view and address women both socially, culturally, politically and religiously (MacKinnon, 1983). For her, and other radical

feminists, the law is often used as an ideological medium by men to define and more interestingly to control women's social behavior and life. (Patricia Yancey Martin, 2002)

In more assertive points, Martha A Fineman more contentiously argues that law as an institution (its procedures, structures, dominant concepts and norms) was constructed at a time when women were systematically excluded from participation. Insofar as women's lives and experiences became the subjects of law, and ruled by law, they were of necessity translated into law by men. Even, social and cultural institutions that women occupy exclusively, such as motherhood, were as legally significant categories initially what she calls colonized categories that are defined, controlled, and given legal content by men. Male awareness and male understandings structure legal definitions of what constitute a family, who had claims and access to jobs and education, and, ultimately, how legal institutions function to give or deny redress for alleged and defined harms. (Fineman, 1994) (Daicoff, 1997) The following discussion proves how law and judicial process widely disadvantage women's life.

#### **4 THE MYTH OF OBJECTIVITY AND GENDER NEUTRALITY OF LAW: EVIDENCX FROM VERDICT SESSION**

Stereotyping and gender bias in the judicial system have far-reaching consequences on women's full enjoyment of their human rights. They impede women's access to justice in all areas of law through a variety of ways and stages. For instance, gender stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts. Judges often adopt rigid standards about what they consider to be appropriate behavior for women and penalize those who do not conform to these stereotypes. Stereotyping as well affects the credibility given to women's voices, arguments and testimonies, as parties and witnesses in the verdict process. Such stereotyping can cause judges and other legal professionals to misinterpret or misapply, even in more traumatic cases to manipulate and abuse laws.

Judges as discussed in this paper are not the only actors in the justice system who apply, reinforce and perpetuate stereotype against women in judiciary process. Prosecutors, lawyers, legal professionals, and other law enforcement officials as well, often

initiate and cultivate gender stereotypes to influence investigations and trials, especially in cases of gender-based violence. From this point of view, stereotyping, therefore, permeates both the investigation and trial phases and finally shapes the judgment at the judicial process.

There are opportunaties in which legal professional may apply law genderly biased. In this case, procedural demands for obtaining strong legal evidence compel law enforcement officials to be critical, which in turn results in inconvenience to victims. In fact, to pursue the target objectivity, *inter alia*, prosecutors, judges and lawyers with detailed request must ask the legal facts of the case being proceeded. Even their actions, in many cases and occasions felt ridiculous and embarassing to be judged by moral standards. In addition, the highly positivistic formalism has made legal professionals lose touch on their human dignity as seen clearly in a brief dialogue during the judicial process.

The following are fragmented narrations of the parties involved in the gender-based-coercion trial. From the minutes (notes) of the trial session of sexual abuse against a poor girl (16 years old), the following series of fragments of dialogue were recorded. This naration spoke out with a shameful expression from the victim's mouth when she was asked by a judge of Balikpapan District Court to explain the first sexual coercion (of the three cases) that she had badly experienced.

"I (the victim) had a chat in his room (the defendant); then the defendant took the mandau (a traditional Dayak's sword, long like a samurai) under the study table in his room. Then the mandau was opened from the sheath, and sharpened to my neck; so that I felt so scared. Then the mandau was saved again by the defendant. ... I was told to lie down on bed. ... I was forced to undress the bottom ... get to my knees. ... After that the defendant squatted to see my genitals and then the defendant put his finger into my vagina for about 5 (five) minutes while licking it. After that, I used my pants again and I cried sitting on the bed, then I was taken home by the defendant". (Balikpapan, 2000)

Meanwhile, from the news of the gang rape session in the court involving eight perpetrators, the following fragmented dialogue was recorded. "Witness I, (victim, 18 year-old) were you pleased to raped by these people?" The prosecutor asked the victims. "According to the witness I, how did the rape happen?" The prosecutor asked later. "There were those who raped me standing, whereas others held my hands and feet", answer the victim. "... Were you glad

to be touched [grabbed]... treated like that? asked a judge to the victim. (Balikpapan, 1998). Questions with a tone of at least four times were asked to the same victim. The standard question model like this is also commonly asked to every witness who is a reporting victim of sexual crimes experienced by women. For instance, A prosecutor asked the victim witness : "When he (perpetuator) penetrated his penis to your vagina, how did you feel at that time?" (Balikpapan, 2000).

In other bad news of the trial of sexual abuse by a step father against his daughter, (14 year old), Padang, July 25, 2002, the following dialogue was recorded. "Did the witness see the bird (penis) (the defendant), and how big was the bird?" asked a judge to the victim's witness. "I saw the bird; it was so big, as big as the hammer in your hand" victim witness replied. Meanwhile, in the minutes of other sexual abuse cases, the following dialogue was recorded. A judge asked the victim's witness : "During the second incidents, the witness said 'when the defendant wanted to insert his penis (to the victim's vagina), and the witness closed the witness's genitals by hand, could the witness estimate the length of the defendant's penis?'" A prosecutor asked the witness victim "Did the witness hold the defendant's penis?" (Padang, 1998)

A variety of the above fragmented dialogues are very ridiculous. However, they seem to be a legal must resulted from the traditional principle of legal objectivity. In a procedural stand, the principle of legal objectivity requires judges, prosecutors, as well as lawyers to ask and to comprehend in detail and surely all the events that occurred as exemplified above. This situation makes the legal apparatus forcedly ask witness victims and other witnesses to obtain legal facts that can be used as a basis for the court decision.

The series of questions and dialogues above are funny impacts, as well as ridiculous from the demands of the doctrine of legal objectivity. Questions concerning the feelings of victims of sexual coercion for instance normatively according to procedural law, become important to the judge as a basis for conclusions whether such a sexual intercourse was carried out on the basis of coercion or liking by consent. According to criminal law, an act is called rape, if sexual intercourse is imposed unilaterally by one party, but denied by another. In this point, one main indicator of coercion and non consent is the feeling of victims who do not enjoy the intercourse.

Another issue of the effort to prove the accusation of rape is an attempt to explore the fact of penile

penetration into the vagina. For example, a very crucial point of definition of rape in heterosexual orientation is the penetration of the penis into the vagina. For the effort of proving penile-vaginal penetration with the minimum standard definition above, a judge in the Balikpapan District Court asked the victim witness for the attempted rape, reportedly : "Was the defendant's penis erecting?" Even, the spirit of procedural-adversarial law which slices the heart of the victim (perhaps this is a special strategy of the apparatus to uncover the facts), was commonly expressed, when the judge in a gang rape case very frequently asked about the feeling of the victim when she was raped. In fact, in quite common sense, precisely conscience, and politeness, this modelled question is not necessary, and does not deserve to be thrown out. Is it possible that the bitter experience of rape will be enjoyed by a victim? This phenomenon seems to be an incarnation of the doctrine of gender-neutral law, gender incensitivity, and as the incarnation of patriarchal ideology and stereotypes with sarcasm that blaspheme and condemn rape victims.

The previous logical reasoning developed by judges, prosecutors and lawyers was very similar to the way a lawyer in the USA defended his client who was accused of raping. In a rape case trial, a famous lawyer began his client's defense speech by spinning an open Coca-Cola bottle on the table. When the bottle spun wildly, the lawyer, then, demonstrated his difficulty of inserting a ball-point he held into the mouth of the spinned Coca-Cola bottle. The illustration was stereotypically chosen to explain to the public, especially the jury and the judge, that his client was not one hundred percent responsible for the alleged rape incident, since he could not inserted his penis into victim's vagina if she attempted to fight against him.

In short, this lawyer asserted that rape was actually approved, as well as expected and enjoyed by victims; a rape occurred partly in the victim's consent and expectation. This is an ideological perception that forces gender-based victims into a very dilemmatic situation. This model of questions, attractions and defense has made victims become disgusted, humiliated, and of course psychologically being revictimized several times during the verdict sessions. As a result, they finally prefer to be silent, silent in acute and everlasting pain, rather than taking their case into the formal-public path through litigation.

The logic of the defense of American lawyers above was selectively duplicated by a lawyer in Balikpapan District Court for defense of his client who was accused with attempting rape. A

defendant's lawyer asked the witness-victim "did the defendant's breath run wild while he attempted raping?" ... "Has she ever come out from the bathroom with only a towel, with no other cloth and the defendant saw her with minor dress?" "In home, did she (victim) always wear shorts dress?" At a follow-up hearing session, the defendant's lawyer asked politely his client "What are the victim's behaviors made you sexually aroused?" The defendant replied "The victim sat on a dining chair facing me and her legs were lifted and her clothes were sexy, so that her cleavage was visible, so I was sexually aroused". Ideological logic of this argument is absolutely pejorative and misogynic, based on the mischievous assumption that rape is actually triggered, initiated by victim's behaviors. A traditional joke alleges that "at first, a woman victim felt raped, but after the rape have been taking place, she herself enjoyed it".

It should be noted that in the later case, all victim's behaviors occurred in a very personal space, namely, at the private home and kitchen of the victim's dining room, while the perpetrator is a foreigner who does not have freely personal access to enter it. In other words, the atmosphere of stimulation is only more as a result of the perpetrator's world of hallucinations, imagination, objectivication against victim's body, or the sexual fantasies of the accused. Indeed, the question of legal counsel seems to be more trying to deflect the case of attempted rape into the realm of ideological stereotypes which intentionally may shift the coercion into victim's fate and responsibility.

The above question models, furthermore, often overlap, as they are deflected from their main function to explore evidence. In many cases, the modelled questions are only misused as an ideological medium for lawyers to neutralize the errors that are claimed by their clients. The direction of deflection of this question is very evidently observed from the following quotations. The case was about a girl who was burned lively by the accused. He said (the defendant) "Let it be (she was burned and died, because) she was a bad woman" because she was a wild, unrespected girl. At the gang rape trial, a judge in the Balikpapan District Court asked the defendant "In your point of view, what is she? Naughty?" (Balikpapan, 1998)

Data presented previously demonstrate that law in judiciary process often disadvantages women, especially those who are victims of gender-based coercion. The jurisprudential discourses of gender neutrality, legal certainty, objectivity, and impartiality force legal professionals into very

critical, difficult situation; that is, the difficulty relating to be consistently complying, and following the backbone of legal principles mentioned above, or attempting to innitiate reconstructing legal adversarial which is critical and genderly sensitive.

The free-value and objectivity principles of legal doctrine invite polemics, especially when observed in relation to such crime based on gender inequality relations. David Lyons, for example, considers that the value-free principle is as a discourse that has many weaknesses, especially when it is applied in the process of making decisions. According to him, the logic of this principle is wrong, and leads to injustice.

The pure objectivity, however, accordingly, never exists, and will never exist. (Lyons, 2000) In fact, everyone in making decisions always bases their choices on certain considerations, and ideally they are moral values. Lyons gives an example of constitutional provision that private property can legally be used for the public interest without compensation, even if without the consent of the owner. According to him, although there are no clear and standard criteria as stated in the law, a judge in an attempt to decide on a dispute case, must consider a specific moral aspect as the basis for his interpretation of the general principles of law above. In a constructionist framework, individuals act always within a certain framework, be it cultural, social, religious, political, or other ideological traits and personal orientations. In other words, there has never been what is called objective, value-free, especially at the level of practice. That is, every decision must have a normative standard footing.

Hannah Arendt (d. 1975), an influential German social-political philosopher, concerned about critical interpretations of neutrality or value-free. Arendt really dismissed the notion of objectivity and impartiality and rational neutrality in moral and legal judgment, as proposed and carried out by modern legal theory. He rejected the notion of impartiality in the universal sense, crossing the boundaries of consciousness and certain interests. According to him, such a judgment in the sense of making legal judgment considerations, is originally subjective. Judgment is limited to an agreement-based verdict, arbitrary, driving opinions with logic that is able to convince others. It only concerns the principle of choosing a standard of preference.

Here, to obtain such objectivity, there is a certain preference with criteria for majority, dominant, sometimes formal criteria in accordance with legal construction. However, there are also preferences with minority standards, outside formal legal standards, such as moral and scientific standards.

When making a decision by referring to certain preferences, someone is actually trying to persuade, lead others smoothly and persuasively to agree with the arguments and messages that they fight for (Smart, 1989) So, what is referred to as objective, it is actually subjective, at least reflected and trapped in the framework of the subjectivity of the majority, precisely the general criteria used.

From this point of view, the decision, with all claims of objectivity, still refers to a certain footing. Referring to the basic idea of Arendt above, Nedelsky, a legal feminist, emphasized that something (logic, evidence, narration, assumption) that allows us to make impartial decisions in handling lawlessness cases in a genuine manner, is the ability to get out of the trap and confines of idiosyncrasy and narrow-partisan preferences.

This step and strategy is human capability to achieve the widening and enrichment of reason in decision making considerations. We do that by referring to a series of references that are noble and moral. The more sublime and strong references, the greater the likelihood that our decision results will be impartial, and he will be closer to the values of justice that are more proportional and elegant. Impartiality is not a supra entity on the subjectivity of subjectivity, but it is limited to the characteristics of judgment formed by considering the objective context of the case being criticized, disputed, and the perspective of others in making moral-communal decisions. (Nedelsky, 1997)

The principles of traditional legal discourses which are highly positivistic, namely innocence — value free-neutrality-impartiality, are very thick in the collective memory and awareness of law enforcement officers in legal practices in the case of handling sexual violences. In fact legal professionals especially judges, lawyers and prosecutors, often abused, misused, and at least applied them recklessly, sometimes even childishly. Related to this problem, for example, Syamsir, a prosecutor who were interviewed for this study, and served in the Padang District Attorney, said that “if we look at the law, men and women are the same, and in practice, they are the same”. (Syamsir, 2003) According to him, men and women must be treated equally before the law, regardless the fact that it is very obvious that patriarchal ideology, socio-cultural attitudes and behavior of people, treat men and women very differently, and benefit men more. (Smart, 1995) On the hand, huge legal professionals ignored the existing contexts of power relation domination between a male perpetrator and a female victim.

It is importantly to note that it really feels unfair when the law is neutral and gender-blind to be applied to handle such a case of gender-based crime that are ideologically produced and reproduced by the imbalance of gender relations. Women are normatively equal before the law, but in fact, they fall into a circle of gender inequality. This is a mystical form of defense of legal innocence, and it is a general portrait of the ideology of legal gender neutrality among the legal apparatus, more precisely gender blindness. Morally, the judicial process of handling injustice originating from gender inequality, must not ignore the specific context of imbalance, and injustice itself which facilitates and reproduces violence. Neglecting the context is precisely another form of injustice. Finally, the notion of law that is gender-blind is unethical to be applied in resolving cases of gender-based crime that are a by-product of the imbalanced gender relations.

The basis of neutrality and free of legal value relates to other legal adversarial logic, namely the principle of objectivity and detachment. Referring to normative standards and the principle of the principle of presumption of innocence, formal law, as well as substantive law, has regulated the problem of proving the gender-based crime case very tightly. The statute and legal norms have laid the foundations of evidence that are very rigid and sometimes difficult to understand with specific reasoning. In this regard, the principle of legal objectivity requires prosecutors and judges to objectively place each legal case, as it is. While the principle of detachment teaches us that in the process of law enforcement, law enforcement officers must remove or stay away from the attractiveness of the problems they handle. The legal apparatus, in the process of law enforcement, should not be involved emotionally, ideologically and politically either in the form of sympathy, let alone empathy, which can lead them to be not objective in making decisions.

In general, the two above principles of traditional legal discourse are very clear, and thick in the logic of prosecutors, judges, lawyers and legal advisors in the law enforcement process, not least in the case of gender-based crime. The principles of neutrality and legal objectivity were maintained very strongly among judges as told by a judge in Jakarta. According to him, “judges must not take sides, either for women, victims, or for perpetrators” (Putu, 2003) Masrimal, another female judge from the Padang District Court, further emphasized that “We consider the defendants and victims to be neutral. We can (accept) the information of the defendant or the information of the perpetrator with reference to the Criminal Code and



Criminal Procedure Code". (Marimal, 2003) However, Marsimal's point maybe inappropriate when it is applied to handle such as a case of by-product of unneutrality, that is, the unbalanced relation between a male perpetrator and a female victim.

## 5 CONCLUSION

The massive and articulating illustrations discussed above must be admitted in comprehending the basic notion of law from feminist standpoint theory. It is indeed a dilemma concerning legal enforcement. Law enforcement officials are faced with very formal-traditional procedural demands. However, the law cannot be understood only as a standard of formal procedures, by ignoring moral values-humanity, and the socio-cultural and ideological contexts that govern these crimes.

Based on this phenomenon, a USA supreme judge, honorable Oliver Wendell Holmes (d.1935) concluded that the law was not only limited to formal logic, but rather a form of complex expression of global human life experience. Hence, the legal enforcement has to be just in considering and taking specific factors in dealing with very sensitive cases, such as sexual violence. Indeed, the exact law must be based on a specific experience context. Holme firmly rejects the discourse of absolute legal certainty, traditional notion of legal objectivity, and traditional legal adversarials to apply law. Adversarial role and reasoning can actually choose alternative legal logic that is more polite, humane, moral and elegant to explore legal facts in the trial in dealing with gender-based coercions. Moral and local wisdoms which intersect with religion and ethics, and the demands of the standard of humanity can really help prosecutors, judges and lawyers to divert tendentious questions as proposed by the judge and prosecutors such as "whether the victim likes and enjoys being raped" and "at that time the witness (victim) felt what?"

However, the traditional practice of the trial process, and traditional legal adversarial to explore and cultivate legal facts, seems to make the dialogue dirty, sexist, ridiculous, and easily distorted, as can be seen clearly in the quote above. Androgenic dialogue has become an integral, core and routine part of the trial process. So it is not surprising if there is a judge, to ensure his conviction in making a decision, he had shockingly requested a redemonstration, reconstruction of the rape case he handled. According to information obtained during this field research, a

Padang District Court judge had once requested the reconstruction of rape cases involving a victim. Common sense really needs to reflect on whether this request is a demand for a proof process or an ideological slap in the name of law. However, one thing is certain that the formal process will greatly torment the feeling of the victim. In other words, the reckless application of the principle of neutrality, objectivity and the principle of presumption of innocence has made the law enforcement process, especially sexual violence, become the arena of publication of oblique stories of the victims' sad fate. Therefore, it is safe to state that the victims of gender-based coercion have fallen down the stairs again; they experienced serial revictimization; they are trapped tragically within the patriarchal ideology of law. Victims will experience a continuation of violence when they seek justice. In this sense, the search for legal justice through litigation cannot be separated from the publication of victims' traumatic feelings.

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