

APPLICATION OF THE LEX SPECIALIS DEROGAT LEGI GENERALIS PRINCIPLE IN HOUSEHOLD VIOLENT CRIMINAL CASES WITH UNDER HAND MARRIAGE STATU; STUDY OF DECISION NUMBER 101/PID.B/2018/PN KPH

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Abstract

The case against Decision Number 101/Pid.B/2018/Pn Kph with the application of Article 351 paragraph (1) of the Criminal Code in criminal cases of domestic violence, as well as the application Law No. 23 of 2004 concerning Domestic Violence for victims of domestic violence with underhanded marriage ties that are not in line with legal objectives in terms of certainty, justice and benefit. This research is a normative legal research using a statutory approach. The results of the research show that the application of Article 351 paragraph (1) of the Criminal Code does not fulfill the legal objectives in terms of certainty, justice, and legal benefits. This is due to the fact that the panel of judges, through their considerations, does not see that underhand marriage is a legal marriage, whereas in the KHI and the Marriage Law it is considered that marriages carried out in accordance with religious verses are legal marriages, so that the application Law No. 23 of 2004 concerning Domestic Violence can be applied as a legal basis. Implementation the Law No. 23 of 2004 concerning Domestic Violence can be applied to victims of domestic violence with underhanded marriage ties, based on the KHI and the Marriage Law, this is also strengthened by The Lex Specialis Derogat Legi Generalis so that victims of domestic violence with underhand marriage ties are no longer only protected by general regulations, namely the Criminal Code, but special regulations, namely Law No. 23 of 2004 concerning Domestic Violence Law (PKDRT).

Keywords: *Crime; Domestic Violence; Underhand Marriage; Lex Specialis Derogat Legi Generalis Principle*

INTRODUCTION

According to their nature, humans try to maintain life and the continuity of their community. Their instinct is manifested by marriage with the aim of getting off spring or

children.¹ In an Islamic perspective, marriage is a sunnatullah for the creation of human beings in pairs.² Being a meeting between two individuals and two different personalities, as explained in Article 2 paragraph (2) of Law Number 16 of 2019 concerning Marriage, amendments to Law Number 1 of 1974 concerning Marriage (hereinafter referred to as Law No. 16) Year 2019 Concerning Marriage amendments Law No. 1 Year 1974 Concerning Marriage). The same thing is also regulated in the Compilation of Islamic Law (KHI) in article 5 paragraph 1: "Recording of marriages for those who carry out their marriages according to the Islamic religion, is carried out by Registrars as referred to in Law no. 32 of 1954 concerning Registration of Marriage, Divorce and Reconciliation. For non-Muslims, marriage registration is carried out at the Civil Registry Office.

Law No. 16 of 2019 concerning Marriage amendments Law No. 1 of 1974 concerning Marriage explains that, the purpose of marriage is to form a happy and eternal family, because marriage as defined in article 1, is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy family (household) and eternal based on Belief in the One and Only God. Then in article 2 (paragraph 1) it is said that: Marriage is legal, if it is carried out according to the laws of each religion and belief, then it is continued with: each marriage is recorded according to the applicable laws and regulations (paragraph 2).

Unregistered marriages, which are considered religiously valid, in fact can actually cause problems and harm to one party, namely the woman.³ One example is when there is Domestic Violence (KDRT) perpetrated by a husband against his wife who is married in an unregistered manner, the siri wife does not have legal protection according to the

¹ Johan Wirasahidan and Dinda Rakhma Fitriani, "Brand Community: Pola Komunikasi Komunitas Mifans Depok Dalam Membangun Keutuhan Kelompok," *NUSANTARA: Jurnal Ilmu Pengetahuan Sosial* 6, no. 2 (2019): 180-93, <https://doi.org/http://dx.doi.org/10.31604/jips.v6i2.2019.180-193>.

² Ulva Hiliyatur Rosida, "Prosesi Ijab Dan Kabul Via Telepon Ditinjau Dari Kaca Mata Ushul Fiqih Dan Qowaid Fiqhiyyah," *Al-Bayan: Jurnal Hukum Dan Ekonomi Islam* 2, no. 1 (2022): 15-24, <https://www.jurnal.stainwsamawa.ac.id/index.php/al-bayan/article/view/74>.

³ Toha Ma'arif, "Pencatatan Pernikahan (Analisis Pendekatan Qiyas, Istihsan, Sadd Al-Dzari'ah, Masalah Mursalah Dan Hukum Positif Di Indonesia)," *ASAS: Jurnal Hukum Ekonomi Syariah* 11, no. 1 (2019): 119-41, <https://doi.org/http://dx.doi.org/10.24042/asas.v11i01.4647>.

provisions contained in the Law on the Elimination of Domestic Violence.⁴ There are many forms of domestic violence violations, as is rife and the reality is felt by women and men who have received treatment of domestic violence. In Article 5 of Law Number 23 of 2004 concerning the Elimination of Domestic Violence (hereinafter referred to as Law No. 23 of 2004 concerning Domestic Violence), namely the prohibition of committing violence in the household, namely by: 1. Physical Violence 2. Psychological Violence 3, Sexual Violence 4. Household Abandonment.

In Law no. 23 of 2004 concerning Domestic Violence, physical violence is an act that results in pain, falling ill, or serious injury. Physical Violence is a form of violence that is directly felt physically, for example hitting and killing.⁵ Victims of physical violence, usually have experienced psychological violence before and after. Physical violence can appear in various forms and forms, ranging from slapping, slapping, hitting, slamming, kicking, hitting other objects to being stabbed with a knife and even burning.

Psychological violence which leads to attacks on a person's mental/psychological nature, this violence is in the form of violence which results in feelings of depression, stress, and the emergence of disease in the heart. Psychological violence experienced by wives can be experienced in the form of dirty words, hurtful remarks, yelling, humiliation, and also threats which are forms of form of psychological violence. Referred to as psychic violence is an act that results in a feeling of fear, loss of self-confidence, loss of the ability to act, a feeling of helplessness, and or severe psychological suffering to a person.⁶ Most of the cases of violence against psychics have been reported to assisting agencies.

Unfortunately the provisions of Law no. 23 of 2004 concerning Domestic Violence which limits the provision of legal protection only to people who have a relationship with a husband, wife and children legally according to law actually creates problems, one of which is when faced with cases of violence in unregistered marriages which are basically

⁴ Linda Kurniawati and Anindya Bidasari, "Tinjauan Yuridis Akibat Hukum Nikah Sirri Bagi Kedudukan Anak: Studi Kasus Di Desa Bangelan," *Konstruksi Sosial: Jurnal Penelitian Ilmu Sosial* 1, no. 1 (2021): 26-32, <https://journal.actual-insight.com/index.php/konstruksi-sosial/article/view/27>.

⁵ Mustofa Hasan, *Pengantar Hukum Keluarga* (Bandung: Pustaka Setia, 2011). h. 364

⁶ Theresia Vania Radhitya, Nunung Nurwati, and Maulana Irfan, "Dampak Pandemi Covid-19 Terhadap Kekerasan Dalam Rumah Tangga," *Jurnal Kolaborasi Resolusi Konflik* 2, no. 2 (2020): 111-19, <https://doi.org/https://doi.org/10.24198/jkrk.v2i2.29119>.

not recorded administratively as regulated in Law no. 16 of 2019 concerning Marriage amendments to Law No. 1 of 1974 concerning Marriage.

There is no protection by Law No. 23 of 2004 concerning Domestic Violence this can be seen in a case of domestic violence with an underhand marriage, which was demanded by the public prosecutor and decided by a panel of judges as an act of molestation. In the case file on behalf of Hendri Putra Jaya alias Hen Bin Ahmad Nawawi which started with the defendant committing maltreatment by hitting the face of the witness, namely Deli Puspita Sari, who is the wife married to the defendant, which was carried out underhand, using used wood from a fruit basket, namely 3 times and hitting the witness Deli's right calf, hitting Deli's left leg 2 times, punched the witness Deli 1 time on the back of the shoulder and 1 time on the buttocks. As a result of the actions of the defendant, witness Deli experienced pain all over his body and could not carry out his daily activities for 3 days. This is then validated based on the results *Seen And Found* from Kepahiang Hospital No. 252/307/VR/1.2 dated June 6 2018 which was signed directly by the doctor concerned.

Furthermore, the public prosecutor in the charge that is proven is Article 351 paragraph (1) of the Criminal Code. So that the judge based on the demands of the Public Prosecutor decided that the actions of the defendant were proven to fulfill the elements in Article 351 paragraph (1) of the Criminal Code, The domain of this violence case occurs within the household sphere. The marriage that occurred in this case was an underhand marriage because that was a form of marriage without a registration at an agency that had been determined by laws and regulations. Meanwhile, if it is associated with Law no. 23 of 2004 concerning Domestic violence. Domestic violence by fundamental, covers, physical violence, psychological violence, sexual violence, violence economy. This is considered inappropriate because in criminal law there is a known principle *Special Law Derogate from General Law* which means that the existence of a special regulation overrides general regulations so that special regulations should be more appropriate to apply. The actions of Hendri Putra Jaya Als Hen Bin Ahmad Nawawi are included in the category of acts of committing physical violence in the household. Further more Based on this case, it can be seen that the judge in imposing a sentence on the defendant used article

351 paragraph (1) of the Criminal Code regarding maltreatment, because according to Indonesian positive law, an unregistered marriage if there is domestic violence the defendant cannot be charged with the article in Law No. 23 of 2004 concerning Domestic violence and do not receive legal protection as it should be based on the law on the Elimination of Domestic Violence. This then raises questions for the author regarding the judge's considerations in giving the decision mentioned above of Law No. 23 of 2004 concerning Domestic violence, in order to realize fair criminal law sanctions for victims of domestic violence. Even if the defendant is only charged with Article 351 paragraph (1) of the Criminal Code concerning abuse, the potential sentence is much lighter with a maximum of 2 years and 8 months (two years and eight months) compared to Law no. 23 of 2004 concerning Domestic violence with a maximum sentence that can be given up to 20 years (twenty years).

Even so, this will run into problems when these provisions cannot answer the existing problems. On the other hand, the emphasis on the principle of justice means that judges must consider the law that lives in society, which consists of customs and unwritten legal provisions.⁷ In this case the sense of justice must be distinguished according to individuals, groups and society. What's more, justice for a particular society may not be fair for others, so that in giving consideration the judge is required to explain this as the basis for making a decision. Ideally the judge's decision should be able to combine three important things at once, namely legal certainty, justice and expediency.⁸ But often the situation is not that simple. Legal certainty often stands in the opposite direction to justice as the goal of law.

Based on the description above, it is necessary to study more deeply the cases of domestic violence in unregistered marriages which often occur but are difficult to uncover. Many people choose to do unregistered marriages because they think the process is easy. However, even this unregistered marriage is one of the triggers for domestic violence. Meanwhile, most of the victims of domestic violence in unregistered

⁷ Abdul Kholiq, "Peranan Hakim Dalam Penegakan Hukum Di Indonesia," *Jurnal Ilmiah Hukum Dan Dinamika Masyarakat* 15, no. 2 (2018): 193-98, <https://doi.org/http://dx.doi.org/10.56444/hdm.v15i2.689>.

⁸ Niru Anita Sinaga, "Kode Etik Sebagai Pedoman Pelaksanaan Profesi Hukum Yang Baik," *Jurnal Ilmiah Hukum Dirgantara* 10, no. 2 (2020): 1-34, <https://doi.org/https://doi.org/10.35968/jh.v10i2.460>.

marriages are afraid and embarrassed to report their cases because their marital status is not yet legal and state-owned. In addition, victims of domestic violence cases in unregistered marriages experience difficulties in obtaining protections caused by not having legal legality for their marriages and also the status of unregistered marriages also becomes a weakness for victims to fight for their rights.

METHOD

The research method used in this study is normative legal research, namely research on legal principles, legal principles, laws and regulations and expert opinions. The research was carried out by examining library materials to obtain secondary data, therefore this research focuses on types of library research.

RESULT AND DISCUSSION

1. Fulfillment of Legal Purposes Application of Article 351 Paragraph (1) of the Criminal Code in Cases of Crime of Domestic Violence In decision No. 101/Pid.B/2018/PN/Kph.

a. Judge's Consideration

Judges in making decisions must be based on or have been determined by law. The judge may not impose a sentence that is lower than the minimum limit and also the judge may not impose a sentence that is higher than the maximum sentence determined by law. In making decisions, there are several theories that can be used by judges.⁹ According to Mackenzie, there are several theories or approaches that can be used by judges in considering the imposition of a decision in a case, namely:¹⁰ Balance Theory, Art and Intuition Approach Theory, Scientific Approach Theory, Experience Approach Theory, Theory *Ration Decide*, and The theory of wisdom. Meanwhile, according to Van Apeldoorn, a judge in deciding a criminal case must decide in the fairest way, and must comply with the applicable rules, adjust laws with concrete factors, concrete events in

⁹ Ismail Rumadan, "Penafsiran Hakim Terhadap Ketentuan Pidana Minimum Khusus Dalam Undang-Undang Tindak Pidana Korupsi," *Jurnal Hukum Dan Peradilan* 2, no. 3 (2018): 379-404, <https://doi.org/http://dx.doi.org/10.25216/jhp.2.3.2013.379-404>.

¹⁰ Ahmad Rifai, *Penemuan Hukum Oleh Hakim: Dalam Perspektif Hukum Progresif* (Jakarta: Sinar Grafika, 2011). h. 102.

society, and adding laws when deemed necessary.

This decision is a decision for a criminal act of domestic violence committed by a husband against a wife who was married under the hand. In the decision above, the panel of judges used Article 351 paragraph (1) of the Criminal Code as a criminal sanction against the husband. This then raises a separate question that in the realm of cases of violence this occurs within the scope of the household where laws and regulations that are ideally used, namely, article 44 paragraph (1) Law No. 23 of 2004 concerning the Elimination of Domestic Violence. Even though the marriage that occurred in this case was a marriage without a registration at the agency that had been determined by statutory regulations. Therefore, before entering into the judge's consideration, it is better if we know the circumstances of the case in the decision of the panel of judges No. 101/Pid.B/2018/PNkph.

In the case of decision No. 101/Pid.B/2018/PNkph. It is known that Hendri Putra Jaya Alias Hen Bin Ahmad Nawawi as the defendant and Deli Puspita Sari are victims. It is known that they are husband and wife who carry out underhanded marriages (siri) legitimate. In Islamic law, siri marriage is known *aszawaj'urfi* namely a marriage that meets the requirements of marriage but is not officially registered by the government that handles marriage.¹¹ In Islamic law, marriage law is one of the aspects most widely applied by Muslims throughout the world compared to muamalah laws. Marriage is *limits the ghalidzan*, or a strong bond, which is considered valid if it fulfills the conditions and pillars of marriage. Based on the Qur'an and hadith, the scholars concluded that things included in the pillars of marriage are the prospective husband, the prospective wife, the marriage guardian, two witnesses, consent and qabul.¹² If we look at the validity of unregistered marriage, it will clash with maqashid ash-shariah or the purpose of applying sharia law.¹³

When a marriage is carried out in an unregistered manner and without being

¹¹ Muhammad Aziz and Athoillah Islamy, "Memahami Pencatatan Perkawinan Di Indonesia Dalam Paradigma Hukum Islam Kontemporer," *Islamitsch Familierecht Journal* 3, no. 02 (2022): 94-113, <https://doi.org/https://doi.org/10.32923/ifj.v3i02.2776>.

¹² Annisa Ridha Watikno, "Akibat Hukum Perkawinan Siri Terhadap Kedudukan Anak Ditinjau Dari Hukum Islam Dan Undang-Undang Perkawinan No 1 Tahun 1974 Di Kabupaten Karanganyar," *RECHTSTAAT* 8, no. 2 (2014): 1-17, <https://www.ejournal.unsa.ac.id/index.php/rechstaat/article/view/93>.

¹³ Syukri Fathudin Ahmad Widodo and Vita Fitria, "Problematika Nikah Siri Dan Akibat Hukumnya Bagi Perempuan," *Jurnal Penelitian Humaniora* 15, no. 1 (2010): 1-22, <https://doi.org/http://dx.doi.org/10.21831/hum.v15i1.5030>.

registered with the authorities, according to religion, if the pillars of marriage have been fulfilled, then the marriage is valid. It can also be interpreted in this case that unregistered marriage is an underhand marriage, in the sense that it is not reported and recorded by the official institution that regulates marriage, namely the KUA and the marriage law is valid. So that unregistered marriage with this understanding still requires the existence of a legal guardian, witnesses, consent-qabul marriage contract.¹⁴ If interesting in the case of the decision No. 101/Pid.B/2018/PNkph the marital status of Hendri Putra Jaya alias Hen Bin Ahmad Nawawi and Deli Puspita Sari according to the Islamic religion is a valid marriage.

Whereas in Indonesian positive criminal law, in fact in the Criminal Procedure Code (KUHAP), it is regulated regarding the order of the process of criminal cases from beginning to end. The arrangement begins with the initial process in resolving cases, namely investigation, investigation, demands of the Public Prosecutor, examination at trial to proof.¹⁵ In the case of decision No. 101/Pid.B/2018/PNkph It is known that Hendri Putra Jaya Alias Hen Bin Ahmad Nawawi as the defendant and Deli Puspita Sari were victims. It is known that the defendant and Deli were a husband and wife who were the result of an underhand marriage, so in this case the provisions of the domestic violence article could not be applied. Hendri as the defendant, is suspected of having committed violence against Deli as the wife who was married underhanded. The violence was caused by the motive of jealousy in the household.

In response to the prosecutor's demands mentioned above, the evidence found a series of evidence consisting of witnesses, the defendant's statement, 1 (one) sheet of short-sleeved peach color shirt with a picture of hello kitty, 1 (one) sheet of black training trousers with the words SMAN 1 kepahiang, 3 (three) pieces of fruit box wood 30-50 cm long, 1 (one) front tooth from the witness Deli Puspita Sari, then in the case of proof using tools *Seen And Found*, it was found that there were blue bruises on the left buttocks, left thigh and right back, abrasions on the right calf, around the left eye, the wound was

¹⁴ Farid Pardamean Putra Irawan and Nur Rofiq, "Pernikahan Siri Dalam Tinjauan Hukum Islam Dan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan," *Iqtisad: Reconstruction of Justice and Welfare for Indonesia* 8, no. 1 (2021): 35-46, <https://doi.org/http://dx.doi.org/10.31942/iq.v8i1.4537>.

¹⁵ Dedy Chandra Sihombing et al., "Penguatan Kewenangan Jaksa Selaku Dominus Litis Sebagai Upaya Optimalisasi Penegakan Hukum Pidana Berorientasi Keadilan Restoratif," *Locus: Jurnal Konsep Ilmu Hukum* 2, no. 1 (2022): 281-93, <https://jurnal.locusmedia.id/index.php/jkih/article/view/42>.

probably caused by blunt force trauma. That way, in response to this evidence, the defendant was cooperative, namely admitting all his mistakes and being adamant not to repeat them.

As for in the end, the panel of judges gave a decision to the defendant with a legally proven and convincing verdict guilty of committing the crime of persecution as stipulated in Article 351 paragraph (1) of the Criminal Code with a prison sentence of 1 (one) year, which is reduced by the detention period that has been served by the defendant. The defendant was charged with paying court costs of Rp. 2,000.00 (two thousand rupiah).

Based on the descriptions above, it is known that Hendri Putra Jaya alias Hen Bin Ahmad Nawawi and Deli Puspita Sari are a husband and wife from an unregistered marriage. This situation, when viewed from the perspective of positive law, the marriage is not valid. This is because in Article 34 of Law No. 23 of 2006 concerning Population Administration, stipulates that valid marriages based on statutory provisions must be reported by residents to the implementing agency at the place where the marriage took place no later than 60 (sixty) days from the date of marriage. In this way, it can be concluded that a marriage is considered invalid even though the marriage is carried out according to religion and belief, but in the eyes of the state the marriage is considered non-existent if it has not been registered by the KUA or the Civil Registry Office.¹⁶ Thus, the status of Hendri Putra Jaya alias Hen Bin Ahmad Nawawi as the defendant and Deli Puspita Sari as the victim, are not husband and wife according to Indonesian positive law, but are still individuals who have no ties whatsoever.

In connection with the status of the defendant and Deli Puspita Sari, it can be stated that they are not husband and wife according to Indonesian positive law, so the public prosecutor did not use the argument of domestic violence (KDRT) in his indictment. In the context of domestic violence, Indonesian law has regulated it as a special criminal law in Law no. 23 of 2004 concerning the Elimination of Domestic Violence. The law regulates all matters regarding the elimination of domestic violence, both in terms of prevention and criminal provisions. Furthermore, in the context of the case of the decision No. 101/Pid.B/2018/PNkph, the act of persecution committed by Hendri Putra Jaya as the

¹⁶ Latifah Ratnawaty, "Kedudukan Nikah Sirri Menurut Hukum Positif Indonesia," *YUSTISI* 2, no. 2 (2015): 13–28, <https://doi.org/https://doi.org/10.32832/yustisi.v2i2.1095>.

defendant against Deli Puspita Sari as his serial wife, cannot be categorized as a crime of domestic violence.

Regarding persecution resulting in death according to Article 351 paragraph (3) of the Criminal Code, it can be interpreted as a crime of ordinary maltreatment which causes the death of the victim who was abused. This is different from the crime of murder, where the victim dies immediately on the spot. In the case of maltreatment resulting in death according to Article 351 paragraph (3), the death of the victim must occur after the abuse has been committed, or it does not occur directly at the scene of the crime. From the persecution provisions as mentioned above, if it is related to case Number. 101/Pid.B/2018/PNkph, it is necessary to know in advance about the elements of ordinary maltreatment in Article 351 paragraph (1) of the Criminal Code. The elements of ordinary persecution, namely: a. There is a purpose; b. There is an act; c. There is a result of the (targeted) action, pain in the body, and or injury to the body; and D. The result is the only goal.¹⁷

From the elements above, if linked to matter No. 101/Pid.B/2018/PNkph is as follows: First, the element of Whoever. According to the panel of judges, the "Whosoever" element referred to is anyone, both an individual and a legal entity as a legal subject holding rights and obligations who have the ability to act and be accountable for their actions, which is currently being brought to trial because it was accused by the Public Prosecutor of having committed something criminal act. As for the trial, the public prosecutor has presented one man named Hendri Putra Jaya, whose entire identity is in accordance with the identity of the Defendant as attached in Case File Number. 101/Pid.B/2018/PNkph. That way, it can be concluded that the element of Whoever has its existence fulfilled.

Second, the element of Persecution that Resulted in Wounds. Based on the evidence presented at trial, it is true that the Defendant had abused Deli as his wife, in which the abuse resulted in injuries as proven in the Visum Et Repertum file No: 440/026/43.8.5.2.1.13/2018 found exists blue bruises on the left buttocks, left thigh and right back, abrasions on the right calf, around the left eye The wound may have been

¹⁷ I Kadek Agus Irawan, I Nyoman Sujana, and I Ketut Sukadana, "Tindak Pidana Penganiayaan Yang Mengakibatkan Matinya Seseorang (Studi Kasus Putusan Nomor: 24/Pid. B/2013/PN. Sp)," *Jurnal Analogi Hukum* 1, no. 3 (2019): 341-46, <https://doi.org/https://doi.org/10.22225/ah.1.3.2019.341-346>.

caused by blunt force trauma. Thus, the panel of judges concluded that the Defendant must be blamed for having committed the crime with the qualification of the crime of persecution.

By considering the considerations mentioned above, the author is of the opinion that the public prosecutor has complied with the provisions of Article 351 paragraph 1 of the Criminal Code concerning Persecution which has elements including: and Doing Abuse That Resulted in Wounds, this must be granted. Due to the fact that Hendri Putra Jaya and Deli Puspita Sari are husband and wife who are married in unregistered marriage, in which this unregistered marriage is considered illegal by the state but legal according to religion, of course the husband and wife do not have a marriage certificate so that the punishment given by the Court right to run. Referring to Permendagri No. 9 of 2016 regarding its relation to this case, the author argues that positive law does not justify the act of unregistered marriage and only recognizes that a valid marriage is one that is recorded in accordance with applicable laws and regulations. Article 2 Paragraph 1 of Law Number 1 of 1974 as amended by Law Number 16 of 2019 concerning Marriage stipulates that each marriage is recorded according to the applicable laws and regulations. This provision emphasizes that every marriage that is carried out is recorded in accordance with the applicable laws and regulations.

Furthermore, regarding the SPTJM of truth as a Husband and Wife in Permendagri No. 9 of 2016 Article 1 paragraph 19 functions as a completeness when unable to present the attachment of the marriage certificate/quotation of the parents' marriage certificate as stated in Permendagri No. 9 of 2016 Article 4 Paragraph 2. SPTJM Truth as a husband and wife does not have aspects in common with the legality of a person's marriage, because a marriage is declared valid if it is carried out according to their religion and beliefs and the marriage must be recorded according to applicable laws and regulations. Then, also referring to Presidential Regulation Number 96 of 2018 concerning Requirements and Procedures for Population Registration and Civil Registration, in this regulation an SPTJM for the correctness of data can be made for married couples who do not have a marriage book or marriage certificate quote or other valid evidence. This provision was then reaffirmed by the Ministry of Home Affairs as the executor of population affairs by issuing Permendagri Number 108 of 2019, which emphasized that unregistered married couples could make a Family Card just like married couples who

have been registered by the state. The provisions contained in the regulation provide room for married couples who are married in an unregistered manner to have a Family Card with the condition that there is a special note stated on the Family Card that the marriage is not recorded.

Thus, as far as the validity of the marriage is concerned, that SPTJM truth as husband and wife is not a shortcut for someone to enter into a legal marriage without being recorded by the Marriage Registrar, nor is it the basis for the existence of a marriage. However, this SPTJM is only a statement by the applicant that they are husband and wife but have no legal force. Because, the state of Indonesia only has there are two ways to carry out a legal marriage, including: First, through the Office of Religious Affairs (KUA) which is followed by a marriage confirmation at the Religious Court for someone who has the Islamic religion, while the second, marriages carried out outside according to the Islamic religion are handled by a Marriage Registrar at the Civil Registry Office. In short, this SPTJM is only used to accelerate the increase in the scope of ownership of birth certificates, not as an acceleration of becoming husband and wife, but only to acknowledge husband and wife, not as an authentically valid marriage. According to the clear laws and regulations that apply that a legal marriage is a legal marriage carried out according to religion and also the state by proving the marriage book and if the marriage is carried out only according to religion and has not been registered, then the marriage is valid, but it cannot be recorded by the population administration because it has not been recognized by the state, a marriage certificate is needed whose purpose is as a legal force that states the validity of a marriage.

The judge's legal considerations in deciding case No. 101/Pid.B/2018/PNkph the judge through his decision has ensnared the perpetrator using article 351 paragraph (1) of the Criminal Code concerning the crime of persecution not using of Law No. 23 of 2004 concerning the Elimination of Domestic Violence. According to the author, it contradicts the theory of judge considerations, namely that they must be wise and prioritize the values of reliability in deciding a case, even though judges have legal immunity in their decisions, namely the independence of judicial power, legal immunity must be accompanied by judges being ordered to explore the values of justice in which the judge is placed. Therefore the decision No. 101/Pid.B/2018/PNkph, the panel of judges should look at other legal foundations to make legal breakthroughs to protect victims of domestic

violence, in this case women as victims.

This can also be strengthened by the decision of another judge who decided on the same case which has been used as jurisprudence in the Supreme Court Decision Number 323 / Pid.Sus / 2016 / Gto of the Gorontalo District Court. The panel of judges should ideally be able to see one of these sources of law as a legal basis in the panel of judges' considerations in deciding the decision No. 101/Pid.B/2018/PNkph, so that the panel of judges can apply Article 44 paragraph (1) of the UURI on the Elimination of Domestic Violence. So that if the basis of the regulation is used in the decision of the decision No. 101/Pid.B/2018/PNkph was able to achieve wisdom from the panel of judges and was able to provide good justice to victims of domestic violence, in accordance with the theory of judges' considerations that we have described above.

b. Legal Purpose of Decision Number. 101/Pid.B/2018/PNkph.

The theory of legal objectives as conveyed by Gustav Radbruch which consists of justice, legal certainty and expediency. If the existing law in society has fulfilled these three elements, it can be said that the purpose of the law has been achieved. The three work together for create ideal laws. The law is fair if it has legal certainty and is useful. The law has legal certainty if it is fair and useful. The law is beneficial if it is fair and has legal certainty.¹⁸ The reason why legal certainty is one of the purposes for which law is formed is so that in its implementation it can be applied correctly. In the context of Indonesia, this is confirmed in the constitution, that everyone has the right to recognition, guarantees, protection and fair legal certainty and equal treatment before the law.¹⁹ The existence of state protection related to legal certainty creates laws that have benefits.

Legal benefits also need to be considered because everyone expects benefits in the implementation of law enforcement. Do not let law enforcement actually cause anxiety for the community. When we talk about law, we tend to look only at existing rules and they are sometimes imperfect and not aspirational. So that these three elements are

¹⁸ Hasaziduhu Moho, "Penegakan Hukum Di Indonesia Menurut Aspek Kepastian Hukum, Keadilan Dan Kemanfaatan," *Warta Dharmawangsa* 13, no. 1 (2019): 1-13, <https://doi.org/https://doi.org/10.46576/wdw.v0i59.349>.

¹⁹ Miftahul Huda, "Hak Atas Memperoleh Kepastian Hukum Dalam Perspektif Persaingan Usaha Melalui Telaah Bukti Tidak Langsung," *Jurnal Ham* 11, no. 2 (2020): 255-67, <https://doi.org/http://dx.doi.org/10.30641/ham.2020.11.255-267>.

needed to get a law that is proportional to the community.²⁰

Producing good quality decisions using a strong juridical and theoretical argumentation basis is as important as resolving many cases in a relatively short time.²¹ A good quality court decision, among others, can be returned to the stare decisis doctrine which is commonly used in the common law system. Nevertheless, in the civil law system also decisions which are landmark decisions can be used as a reference or major premise for a case faced in court.

From the brief description of the purpose of law in legal certainty above, the author tries to use the point of view of positivism legal experts in analyzing the decision of judge No. 101/Pid.B/2018/PNkph with cases of domestic violence with underhanded marriage ties, which applies Article 351 paragraph (1) of the Criminal Code concerning the crime of persecution as a decision of the panel of judges for crimes of domestic violence, which ideally applies Article 44 paragraph (1) Of Law Elimination of Domestic Violence.

2. Application of Law no. 23 of 2004 concerning Domestic Violence for victims of domestic violence with underhand marriage ties.

a. Legal Justice

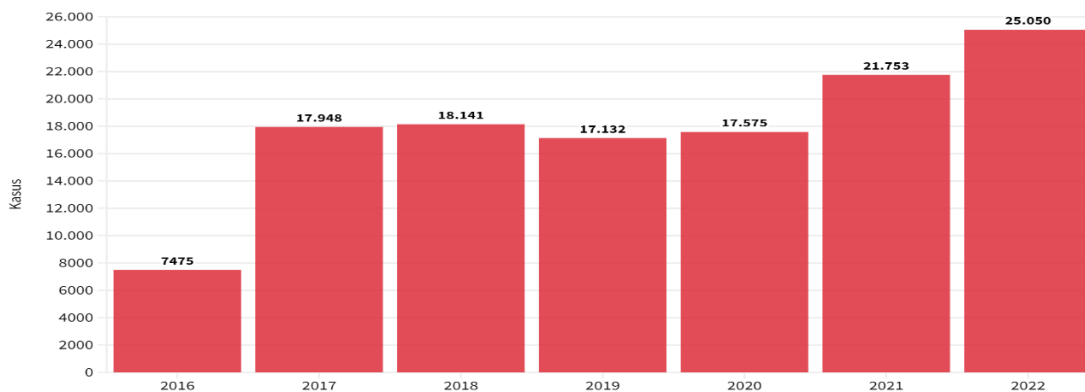
The Ministry of Women's Empowerment and Child Protection (PPPA) noted that as many as 25,050 women became victims of violence in Indonesia throughout 2022. This number increased 15.2% from the previous year of 21,753 cases.²² The description of the data on the number of violence against women in Indonesia is as follows:

²⁰ Cahya Palsari, "Kajian Pengantar Ilmu Hukum: Tujuan Dan Fungsi Ilmu Hukum Sebagai Dasar Fundamental Dalam Penjatuhan Putusan Pengadilan," *Jurnal Komunitas Yustisia* 4, no. 3 (2021): 940-50, <https://doi.org/https://doi.org/10.23887/jatayu.v4i3.43191>.

²¹ Translation in Dutch, Utrecht, *Introduction to Indonesian Law*, PT Penberit and Balai Buku Ikhtiar, 1962, him. 207.

²² Monavia Ayu Rizaty, *There are 25,050 cases of violence against women in Indonesia in 2022*, obtained from <https://dataindonesia.id/ragam/detail/ada-25050-kasus-kekerasan-perempuan-di-indonesia-pada-2022>, accessed on May 27, 2023.

Table 1. the amount of violence against women in Indonesia



Source: Ministry of Women's Empowerment and Child Protection

Violence against women in Indonesia is increasing. This can range from sexual violence to mental violence. According to their age, 30.3% of women who were victims of violence were aged 25-44 years. There are also 30% of women who are victims of violence aged 13-17 years. Judging from the scene, 58.1% of violence against women occurred in the household. Then, 24.9% of violence against women occurred in other places. Meanwhile, from the provisions, the highest number of women victims of violence was in East Java, namely 2,136 people. The positions after that were occupied by Central Java and West Java with 2,111 women and 1,819 women who were victims of violence respectively.

From the data above the causes of domestic violence based on the PPPA ministry's questionnaire data in 2016, there are 4 factors that cause physical and/or sexual violence against women perpetrated by partners namely, individual factors, partner factors, socio-cultural factors, and economic factors.²³ individual factors if viewed from the form of marriage confirmation, such as through serial marriage, according to religion, custom, contract, or otherwise, women who are married in a series, contract, and so on 1.42 times more likely to experience physical and/or sexual violence than women who are married are officially recognized by the state through civil registration or KUA. Lately, the phenomenon of unregistered marriage has given an interesting impression.

First, currently unregistered marriage has really become a trend to turn into a

²³ Lia Amalia Sholihat, "Konfirmasi Empat Faktor Yang Berpengaruh Terhadap Pemberdayaan Perempuan Korban Kekerasan Dalam Rumah Tangga," *Jurnal Kesehatan Bakti Tunas Husada: Jurnal Ilmu-Ilmu Keperawatan, Analisis Kesehatan Dan Farmasi* 18, no. 2 (2018): 185-201, <https://doi.org/http://dx.doi.org/10.36465/jkbth.v18i2.403>.

profitable online business by providing services for marrying off partners with the aim of legalizing adultery. Second, unregistered marriage is not only widely practiced by the general public, but also practiced by community figures (religious leaders), or other terms that indicate a person's ability to study religion (Islam). Third, unregistered marriage is often placed as an option when someone wants to be polygamous for a number of reasons. Why is unregistered marriage a trend in Indonesia? Even though it is clear that the woman is the most disadvantaged, if the prospective husband only intends to give vent to his desires in a lawful way. Unfortunately there are still many women who want to be treated arbitrarily. Maybe economic factors or want to live happily without having to work hard. Especially if the person asking for marriage is an official or a famous person, many women just nod their heads. They only regret after being dumped and screaming for attention in the media.

The Law No. 16 of 2019 concerning Marriage amendments to Law No. 1 of 1974 concerning Marriage is one of the rules of marriage rules owned by the Indonesian state as a sovereign nation, in addition to other rules of marriage, namely the law Customs and Religious Law. In order to ensure the orderliness of the institution of marriage in society, then Law Number 1 of 1974. Government Regulation No. 9 of 1975 determines that every marriage must be recorded by an authorized officer. But reality exhibits a different phenomenon. This can be seen from the rise of unregistered or unregistered marriages marriage under the hand that occurs in the community. Republic of Indonesia, as a country based on Pancasila, where the first precept is the One and Only God, then marriage is considered to have a very close relationship with religion or spirituality, so that marriage does not only contain a physical or external element, but an inner or spiritual element also has a very important role. Mandatory registration of marriage even if not to be a pillar of marriage, but it is very important, especially as evidence that owned by someone, if there is a problem in the future. Based on UURI No. 16 Year 2019 Concerning Marriage amendments to Law No. 1 of 1974 concerning Marriage, Marriage is valid if valid according to their respective religions and beliefs, as well as the marriage must be recorded. However, in the compilation of Islamic law, marriage is valid if it is lawful according to it religion of Islam, then the existing registration requirements in order to ensure orderliness of marriage for Islamic society.

Based on these two rules it can be seen that a marriage is still mandatory recorded in

order to create a marriage order in society. Although a the marriage is said to be valid if it is religiously valid if it is not recorded it is said that the marriage is a serial marriage. Therefore when not found the existence of a legal basis that provides justification for underhand marriage, next the rights of the wife to the marriage must be carried out as appropriate in accordance with legislation.

Legal protection for victims of criminal acts receives less attention from laws, both material criminal law and criminal procedural law (formal criminal law) compared to with legal protection for suspects and defendants. It was influenced by several factors, including: (1) legal factors, (2) legal awareness of victims, (3) supporting facilities, (4) human resources. The existence of a statutory regulation in a legal system determines the realization of an orderly law, because the law is the source main law.²⁴ Therefore, even though Law Number 23 of 2004 has existed, there are still many victims who do not report their cases to the police due to, among others (1) embarrassment, embarrassment with a large family, it would be a shame if it became known to many people. This reason arises from understanding Some members of society believe that the violence experienced by the wife is the result of the wife's fault Alone; (2) economic dependency on the actor (husband); and (3) related with the performance of law enforcement in handling cases is a consideration for women report the violence that happened to him.²⁵

In the case of decision No. 101/Pid.B/2018/PNkph, where in this case the victim was Deli disadvantaged in the verdict the panel of judges used Article 351 paragraph (1) of the Criminal Code with sentenced the defendant Hendri to imprisonment for 1 (one) year and 3 (three) months. In In this case, justice was not given by law enforcement officials to the victims of Deli in their actions domestic violence crime under the pretext of an underhand marriage, without the slightest search legal basis as jurisprudence Supreme Court Decision Number 323 / Pid.Sus/2016/Gto.

The basis of justice and gender equality is the second basis in UU RI No. 23 2004 Regarding Domestic Violence, this principle will be reviewed from an Islamic

²⁴ Dhaniar Eka Budiastanti, "Perlindungan Hukum Terhadap Korban Tindak Pidana Penipuan Melalui Internet," *Jurnal Cakrawala Hukum* 8, no. 1 (2017): 22-32, <https://doi.org/http://dx.doi.org/10.26905/idjch.v8i1.1727>.

²⁵ Andrew Lionel Laurika, "Perlindungan Hukum Terhadap Korban Tindak Pidana Kekerasan Dalam Rumah Tangga," *Lex Crimen* 5, no. 2 (2016): 30-36, <https://doi.org/https://ejournal.unsrat.ac.id/index.php/lexcrimen/article/view/11113>.

perspective. Among the cores carried by Islam is the idea of justice, the idea of equity and equality among all human beings. Islam also places women in a respectable position, where in the ignorant society the position is women are very low. many verses of the Qur'an and the prophet's hadith show similarities and equality between men and women. But the fundamentalists, with ignoring the social context of the verses of the Koran, portraying men as superior beings on women-a view that later caused so much suffering in among Muslim women.²⁶ In fact, the irony is that this superiority is then crystallized in the book of jurisprudence which is the basis for Muslims.²⁷ The same thing was also stated by Masdar F. Mas'udi that in the yellow books generally places men above the people Woman.²⁸ In prayer, for example, men only temporarily cover their genitals between the navel and knees women cover everything except their face and hands, men should pray in the mosque while women should stay at home.

The spirit of justice and gender equality promoted by Law No. 23 of 2004 Regarding Domestic Violence, it should be able to create a safe and comfortable household for all family members. Justice and gender equality does not mean that it is women/wives desire to be equal and equal in function, power and authority in the household, but more to the desire to eliminate all forms of violence that occur within the household. But in fact, violence still often occurs in the household in the form of marginalization, subordination, negative labeling (stereotype), violence (violence), and double burden. Islam emphasizes equality and similarity of functions and roles between boy and girl.

b. *Asas Special Law Derogates from General Law.*

Basica *special law*is so important to criminal law even Utrech said it is so important for all laws. Van Hanttum mentions as *Specialteit logics* or index language logical specificity (there are also those who use the translations *specialty* logical one).²⁹ Provision criminal law that specifically regulates behavior that has actually been regulated in criminal

²⁶ Syaiful Bahri, "Wacana Pembebasan Perempuan; Studi Kritis Pemikiran Qasim Amin Dan Jamal Al-Banna," *Lisan Al-Hal: Jurnal Pengembangan Pemikiran Dan Kebudayaan* 8, no. 2 (2014): 267-90, <https://www.journal.ibrahimy.ac.id/index.php/lisanalhal/article/view/133>.

²⁷ Harwis Alimuddin and Tahani Asri Maulidah, "Implication of Local Wisdom in Islamic Law Compilation Legislation," *Mazahibuna: Jurnal Perbandingan Mazhab* 3, no. 2 (2021): 142-58, <https://doi.org/10.24252/MH.V3I2.24982>.

²⁸ M. Thahir Maloko and Arif Rahman, "Mengatasi Kejenuhan Suami-Istri Perspektif Ulama Mazhab," *Mazahibuna: Jurnal Perbandingan Mazhab* 2, no. 2 (2020): 230-40, <https://doi.org/10.24252/MH.V2I2.16059>.

²⁹ Andi Hamzah, *Principles of Criminal Law in Indonesia & Its Development*, (Jakarta: PT. Softmedia, 2012), h. 618.

provisions, then that special provision must be enforced or in other words a *special law derogates from the general law* is the legal basis of duty to give *inapplication policy* Which with respect to his authority which means not about his law (*formulation policy*), but involved by *gamerules* in applying the law is the principle *A special law overrides a general law* This is of interest to law enforcement officials who are very important in choosing which rules which one must be applied to an event that is governed by more than one rule, where the regulation exists lies between these rules which are general in nature and which are there are other rules that mention its special nature.³⁰

Furthermore, the problem now is how to find out that the provisions a more specific criminal has regulated a behavior which in fact has been regulated in a other provisions, so that the criminal provisions are specific. Within the doctrine there are two way of looking at a criminal provision, namely to say what the criminal provision is whether it is a special criminal provision or not. According to a logical view, a criminal provision can be considered as a crime special criminal provisions, if the criminal provisions besides containing other elements, also contain all the elements of a general criminal provision. The specificity of a criminal provision is based on such a logical view, in the doctrine also known as a *logical specialty* or a *logical specialty*. According to views in a juridical or systematic way, a criminal provision even though it does not contain element of a general provision, it can still be considered as a provision criminal offenses of a general nature, namely if it is clearly known that the legislator the law does intend to impose specific criminal provisions.

Specificity a criminal provision based on a juridical view or systematically like that, in in doctrine is also called a *legal specialty* or *asystematic specialty*, Which juridically or systematically specificity. The Law No. 23 of 2004 concerning Domestic Violence is one of the outlaws Criminal Code. The Criminal Code which has been in force in Indonesia since January 1, 1918 is the mother of regulations Indonesian criminal law and has several principles of criminal law. Based on Article 103 of the Criminal Code the provisions contained in book 1 (one) of the Criminal Code also apply to acts which are punishable

³⁰ Franky Satrio Darmawan and Dian Andriawan Daeng Tawang, "Penerapan Asas Lex Specialis Derogat Legi Generalis Terhadap Undang-Undang Informasi Dan Transaksi Elektronik Dalam Tindak Pidana Perjudian Togel Secara Online Studi Kasus Putusan Pengadilan Negeri Jakarta Utara Nomor 599/PID. B/2018/PN. JKT UTR," *Jurnal Hukum Adigama* 1, no. 2 (2018): 497-521, <https://doi.org/https://doi.org/10.24912/adigama.v1i2.2844>.

by other laws and regulations, unless otherwise determined by law.

Domestic violence crimes are regulated in Law Of no. 23 of 2004 Regarding Domestic Violence, it is a type of crime which in general is also regulated in the Criminal Code. For example, the articles on the criminal act of persecution, the crime of abandoning a person need help and so on. With regard to the penal system, in addition to using 2 types criminal offenses contained in the Criminal Code, namely the main punishment in additional punishment, Law of No. 23 years 2004 concerning Domestic Violence added additional types of punishment, namely: first, movement restrictions the perpetrators of both aiming to run the perpetrators from the victim within a certain distance and time, as well as restrictions on certain rights of the perpetrators, and secondly the determination of the perpetrators to join the program counseling under the supervision of a particular institution. The Criminal Code only recognizes a special maximum limit in each of the articles. UURI No. 23 of 2004 concerning Domestic Violence, in addition to implementing special maximum limits, also apply special minimum limits in several articles, for example Article 47 and Article 48 Law of No. 23 of 2004 concerning Domestic Violence. From the previous discussion in the chapter above, the author has described how marriage in under the hand is a legal marriage, by him it is UURI No. 23 of 2004 concerning Domestic Violence can be applied by law enforcement officials, especially the panel of judges in deciding accused perpetrators of domestic violence, not only using the Criminal Code which against the foundation a *special law overrides a general law*.

CONCLUSION

In the judge's decision No. 101/Pid.B/2018/PNkph which applies Article 351 paragraph (1) of the Criminal Code in not criminalizing domestic violence with underhanded marriage does not reflect a judge's decision that fulfills the purpose of law. As the theory of legal considerations and purposes that the author uses in analyzing the judge's decision No. 101/Pid.B/2018/PNkph, the application of Article 351 paragraph (1) of the Criminal Code, is not appropriate to use even though the marriage is a marriage carried out under the hand or not administratively registered as considered by the panel of judges, but the judge does not see the legal basis others such as article 2 paragraph (1) Law No. 23 of 2004 concerning Domestic Violence, 2 paragraph (1) Law No. 1 of 1974

concerning Marriage amendments to Law No. 16 of 2019 concerning Marriage, article 4 of Presidential Instruction No. 1 of 1991 concerning KHI, marriage is legal if it is carried out according to the laws of each religion and belief. to strengthen the judge's decision No. 101/Pid.B/2018/PNkph there is jurisprudence in the Supreme Court Decision Number 323 / Pid.Sus/2016/Gto which judges can use in deciding the same case in order to create a judge's decision that fulfills the legal objectives namely, justice, certainty, and expediency law. The Law No. 23 of 2004 concerning Domestic Violence can be applied to victims of domestic violence with underhand marriage ties. Thus, the legal consequences of marriage are in the form of the obligation to provide protection as mandated by Law No. 23 of 2004 concerning Domestic Violence, it is mandatory for husbands and wives to comply. Therefore, victims of domestic violence with underhand marriage ties must be protected by Law No. 23 of 2004 concerning Domestic Violence. Meanwhile, the application of the Criminal Code in domestic violence crimes, whether registered or not, is contrary to principle a special law overrides a general law this is due to the existence of special rules governing these actions, namely Law No. 23 of 2004 concerning Domestic Violence

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