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## Juridical Implications of Unregistered Marriage Against Legal Protection in the Domestic Violence Law

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### Keywords:

Legal Protection;  
Marriage  
Registration;  
Validity of  
Marriage.

### Abstract

This article aims to analyze the juridical implications of not registering marriages for legal protection for the community, because the existence of the PKDRT Law has not been fully able to guarantee legal protection. The writing method used is juridical-normative using a reform-oriented research typology, namely evaluating applicable rules by providing recommendations on these rules. This study concludes that there is a blurring of legal subjects that can be protected in the PKDRT Law due to differences of opinion regarding the validity of marriage based on the provisions in Article 2 of the Marriage Law. Moreover, there are differences in judges' views on the validity of a marriage which are not recorded in several decisions of cases of domestic violence causing legal uncertainty. However, there is still an alternative for self-protection for victims of domestic violence whose marriages have not been registered, namely using the articles in the Criminal Code.

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## Introduction

Normally, the state's protection of the basic rights of its citizens (human rights) is one of the characteristics of Indonesia as a democratic legal state (*democratie rechstaat*).<sup>1</sup> The normative construction of the protection of human rights by the state is set forth in the state constitution, namely the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia), particularly in Chapter XA on Human Rights.<sup>2</sup> In essence, human rights are divided into two characteristics: *derogable rights* which are a form of human rights whose fulfillment can be reduced, and *non-derogable rights* as human rights that must be fulfilled absolutely.<sup>3</sup> One of the *non-*

<sup>1</sup> Ni'matul Huda, *Negara Hukum, Demokrasi, dan Judicial Review* (UII Press 2005) 14.

<sup>2</sup> Ghansham Anand, Xavier Nugraha, 'Exit Plan Terhadap Clerical Error Pada Putusan Yang Berkekuatan Hukum Tetap: Sebuah Preventif Terwujudnya Putusan Non-Executable' (2022) 5 Media Iuris 208.

<sup>3</sup> Eko Riyadi, *Mengurai Kompleksitas HAM* (PISHAM UII 2007) 438.

*derogable human rights* is the right to life and not to be tortured, as referred to in Article 6 of the International Covenant on Civil and Political Rights (ICCPR).<sup>4</sup>

The 1945 Constitution of the Republic of Indonesia formulates protection for the right to life and the right not to be tortured in several articles, namely, Article 28A, Article 28 B paragraph (2), Article 28H paragraph (1), and Article 28I paragraph (1).<sup>5</sup> One manifestation of the provisions on the right to life is the enactment of Law Number 23 of 2004 concerning the Elimination of Domestic Violence (hereafter referred to as the PKDRT Law), as explicitly stated in the section on considering the law. PKDRT Act. The stipulation of the PKDRT Law was also motivated by the potential for domestic violence to occur, which is often perpetrated by people who live under the same roof. Even though epistemologically, those who live under one roof should live by looking after and protecting each other.<sup>6</sup> The stipulation of the PKDRT Law is also inseparable from the form of the government's response through criminal law to deal with various issues of violence, especially against women.<sup>7</sup> Tackling the issue of violence against women, especially women in the household, is in line with Indonesia's actions to ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Convention with Law Number 7 of 1984 concerning the Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>8</sup> Women are highly vulnerable to domestic violence.<sup>9</sup> The PKDRT Law specifically guarantees protection for victims of domestic violence, most of whom are women, to avoid violence or threats of violence, torture, or treatment that degrade human dignity.

The high level of violence against women in the household environment is confirmed by data compiled by the National Commission on Violence against Women (hereinafter referred to as KOMNAS Perempuan) Komnas Perempuan that during 2020

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<sup>4</sup> Pasal 6 International Covenant on Civil and Political Rights.

<sup>5</sup> Pasal 28A, Pasal 28B ayat (2), Pasal 28H ayat (1), serta Pasal 28I ayat (1) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

<sup>6</sup> Maidin Gultom, *Perlindungan Hukum Terhadap Anak Dan Perempuan* (Refika Aditama 2012) 16.

<sup>7</sup> Elli Nur Hayati, [et al.], 'Elastic Band Strategy: Women's Lived Experience of Coping with Domestic Violence in Rural Indonesia' (2013), 1 Global Health Action 1-12.

<sup>8</sup> Ani Purwanti and Fajar Ahmad Setiawan, 'Developing Anti Domestic Violence Policy during Covid-19 Pandemic in Indonesia' (2020) 7 Jurnal of Legal Studies 54.

<sup>9</sup> *ibid*.

there were at least 299,911 cases of violence against women.<sup>10</sup> Furthermore, referring to the data collected from Komnas Perempuan service institutions/ data collection forms, namely 8,234 cases, the most prominent types of violence against women were in the private or private sphere, namely domestic violence and personal relations, namely 79% (6,480 cases), including violence against wives (KTI), ranked first with 3,221 cases (49%), followed by violence in dating 1,309 cases (20%), which took second place, and third place was violence against girls with 954 cases (14%); and violence against ex-boyfriends and violence against domestic workers.<sup>11</sup>

These facts and data are part of the indications that the problem of domestic violence against women has not been completely resolved by the PKDRT Law. This legal regulation faces a number of problems in accommodating guarantees for the protection of women. The impact of these legal loopholes has led to the notion that positive laws are unable to provide adequate protection for victims.<sup>12</sup>

Regarding legal gaps or imperfections in legal regulation, Jeremy Bentham divided the imperfections of laws into two degrees or levels. The first degree of imperfection is caused by things that include (1) double meaning (*ambiguity*), (2) *obscurity*, and (3) too broad (*overbulkiness*). Meanwhile, the second degree of imperfection is caused by things that include: (1) *Unsteadiness in respect of expression* ; (2) *Unsteadiness in respect of import* ; (3) *Redundancy* ; (4) too long ( *longwindedness* ); (5) confusing ( *entanglement* ); (6) without signs that facilitate understanding ( *nakedness in respect of helping to intellection* ); and (7) irregularity ( *disorderliness* ).<sup>13</sup>

Relation to the PKDRT Law, one of these imperfections is found in the blurring of the concept of wife and husband which is the target norm in the PKDRT Law. The provisions of Article 1 point 1 of the PKDRT Law explain that domestic violence is any act against a person, especially women, which results in physical, sexual, psychological

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<sup>10</sup> Komnas Perempuan, 'Perempuan Dalam Himpitan Pandemi : Lonjakan Kekerasan Seksual, Kekerasan Siber, Perkawinan Anak, Dan Keterbatasan Penanganan Ditengah Covid-19' (2021), 138 *Journal of Chemical*. [1].

<sup>11</sup> *ibid* 1.

<sup>12</sup> Hanafi Arief, 'Legal Protection against Women Victims by the Indonesian Domestic Violence Act 23, 2004' (2017) 1 *Sriwijaya Law Review* 92.

<sup>13</sup> A. Hamid S. Attamimi, *Hukum Tentang Peraturan Perundang-Undangan dan Peraturan Kebijakan (Hukum Tata Pengaturan)* (Universitas Indonesia 1993) 323-324.

misery, suffering, and/or neglect of the household, including threats to commit acts, coercion, or unlawful deprivation of liberty within the household sphere. Furthermore, in the provisions of Article 2, paragraph (1), the PKDRT Law also limits the scope of the household referred to in the<sup>14</sup> *a quo* law, namely, a husband, wife, and children; b. people who have a family relationship with the person referred to in letter a because of blood relations, marriage, breastfeeding, parenting, and guardianship who live in the household; and/or c. people who work to help the household and live in the household.<sup>15</sup>

Based on these provisions, it appears that the PKDRT Law does not clearly and strictly regulate the subject of the husband and wife, along with the context of the marital relationship between these subjects. Real problems arise when associated with several marriage practices that occur in Indonesia, whether marriages are registered or marriages that occur only according to religion or in Islam are also known as *sirri* marriages.<sup>16</sup>

Regarding the context of husband-and-wife relations and marriage, it must refer to Indonesian marriage law in Law Number 1 of 1974 concerning marriage as amended in Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning marriage (hereinafter referred to as the Marriage Act). Article 2, paragraph (1), *jo*. Article 2, paragraph (2) of the Marriage Law, regulates the requirements for the validity of marriages in Indonesia: *first*, marriages are carried out according to the laws of each religion, and *secondly*, they are registered based on applicable regulations.<sup>17</sup>

Two different views emerged regarding the legality of marriage. The first view states that marriage must meet the requirements for marriage according to religion and cumulative registration, while the second view states that the registration requirement is only administrative, so marriages that are not registered are still considered valid as long as the first conditions are met.

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<sup>14</sup> Pasal 1 angka 1 Undang-Undang Nomor 23 Tahun 2004 tentang Penghapusan Kekerasan Dalam Rumah Tangga.

<sup>15</sup> Pasal 2 ayat (1) Undang-Undang Nomor 23 Tahun 2004 tentang Penghapusan Kekerasan Dalam Rumah Tangga.

<sup>16</sup> Ghansham Anand, Xavier Nugraha, Dita Elvia Kusuma Putri, Angelina Regita Nathalia, 'Forced Marriage as an Unlawful Act in Indonesia: A Comparative Analysis' (2022) 7 Lambung Mangkurat Law Journal.

<sup>17</sup> Pasal 2 ayat (1) dan ayat (2) Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan.

This interpretation of the PKDRT Law and the Marriage Law led to a discourse on the issue of perpetrators and victims in PKDRT Law offenses. Some parties will argue that the offenses against the Domestic Violence Law can apply even if the marriage is only carried out according to religion, but others are of the view that the offenses against the Domestic Violence Law cannot be applied to marriages that are not registered.

Problems with the concept of marriage according to the Marriage Law as well as the application of offenses against the PKDRT Law are increasingly evident in several examples of judges' decisions. If he refers to Decision Number 72/Pid. Sus/2013/PN. TBN and Decision Number 115/Pid. Sus/2011/PN. It can be concluded that parties who only carry out traditional or religious marriages can qualify as husbands and wives within the scope of victims of the PKDRT Law.<sup>18</sup> However, Decision Number 228/Pid. Sus/2018/PN.Rkb, and Decision Number 2/Pid. Sus/2018/PN.Nab, it can be understood that when the marriage is not registered, the juridical implication is that the parties to the marriage cannot be charged with offenses in the PKDRT Law.<sup>19</sup>

The dualism of law's application in judges' decisions is clearly a form of legal uncertainty and injustice to society. This shows a conflict with the legal adage '*judicia sunt tanquam juris dicta, et pro veritate accipiuntur*' (free translation: 'a decision is an application of law and accepted as a truth') and '*judiciis posterioribus fides est adhibenda*' (free translation: 'final decision should be trusted').<sup>20</sup> In line with this, the Constitutional Court has also emphasized that the formation of legislation (*rechtshandeling*) should place *rechtszekerheid* or legal certainty as an important principle when compared to customary law, customary law, or jurisprudential law.<sup>21</sup>

Based on these matters, it is necessary to further analyze the proper legal construction of the concept of marriage and husband and wife referred to in the RT PKD Law, so that further juridical implications of the PKDRT Law can be known for subjects in unrecorded marriage practices.

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<sup>18</sup> Putusan Nomor 72/Pid.Sus/2013/PN.Tbn dan Putusan Nomor 115/Pid.Sus/2011/PN.WNP.

<sup>19</sup> Putusan Nomor 228/Pid.Sus/2018/PN.Rkb dan Putusan Nomor 2/Pid.Sus/2018/PN.Nab.

<sup>20</sup> Komisi Yudisial Republik Indonesia, *Putih Hitam Pengadilan Khusus* (Sekretariat Jendral Komisi Yudisial Republik Indonesia 2013) 415.

<sup>21</sup> Putusan Mahkamah Konstitusi Nomor 108/PUU-XIII/2015.

The formulation of the problem in this article is as follows: **First**, legal protection of unregistered marriage from the perspective of domestic violence in Indonesia and **Second**, judges' considerations (*ratio decedendi*) regarding legal protection of marriage from the perspective of domestic violence in Indonesia. The objectives of this article are **first to** analyze the legal protection of unregistered marriage from the perspective of domestic violence in Indonesia, and **secondly to** analyze the judge's considerations (*ratio decedendi*) regarding the legal protection of marriage from the perspective of domestic violence in Indonesia.

### Research methods

The method used in this study is the normative legal research method (*legal research*), which aims to find the truth of coherence related to conformity between legal rules and legal norms, conformity of legal norms with legal principles, and conformity of actions in accordance with legal norms or principles.<sup>22</sup> In addition, this study also uses a *reform-oriented research typology* by evaluating the regulations that are currently in effect and providing recommendations for changes to the regulations that are deemed lacking.<sup>23</sup> This study analyzes the legal protection of unregistered people from the perspective of domestic violence in Indonesia and its practice by analyzing the judge's decision.

### Legal Protection of Unregistered Marriage in the Perspective of Domestic Violence in Indonesia

Indonesian law defines marriage as a physical and spiritual bond between a man as the husband and a woman as the wife, with the aim of becoming a happy and eternal family or household with religious values.<sup>24</sup> The element of "physical and spiritual bond" has its own meaning, both inner and outer bonds. The spiritual bond shows marriage as a soul bond that is formed because of a peaceful and sincere will between a man and

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<sup>22</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Kencana Prenada Media Group 2021) 47.

<sup>23</sup> Terry Hutchinson, *Researching And Writing in Law* (Thomson Reuters 2010) 7.

<sup>24</sup> Pasal 1 ayat (1) Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan.



a woman to live together as a husband and wife.<sup>25</sup> Meanwhile, the physical bond in marriage is a legal relationship that arises between a man and a woman to live together as a husband and wife. The elements in the definition then show that the registration of marriages is intended to provide status and legal certainty to the parties bound in it.<sup>26</sup>

Law in Indonesia has regulated the conditions for the validity of marriage as stipulated in the provisions of Article 2, paragraph (1) *jo*. Article 2, paragraph (2) of the Marriage Law states that marriage is legal if it is carried out according to the laws of each religion and belief; then, each marriage is recorded according to the applicable laws and regulations.<sup>27</sup> These provisions are then further regulated in Article 10, paragraph (2) *jo*. Article 10 paragraph (3) Government Regulation Number 9 of 1975, which confirms that the procedure for marriage is carried out according to the laws of each religion and belief. By taking this into account, marriage is carried out in the presence of a registrar and attended by two witnesses.<sup>28</sup> Provisions related to the registration of marriages are also regulated in Article 3 of Law Number 23 of 2006 concerning Population Administration, which stipulates that every resident is obliged to report important events that occur to the implementing agency by fulfilling the requirements required in Civil Registration.

Thus, there is a legal obligation for married couples according to their religion or belief in registering marriage at the Office of Religious Affairs for Muslim countries and the Civil Registry Office for non-Muslims. The existence of arrangements and obligations related to the registration of marriages gives rise to consequences and differences in treatment in the eyes of the law for marriages that are registered and those that are not.

Subekti states that marriage is a legal relationship between a man and a woman who has complied with the applicable provisions and without violating existing laws.<sup>29</sup> Furthermore, according to Ahmad Nuryani, marriage itself is an institution that

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<sup>25</sup> Laurensius Mamahit, 'Hak Dan Kewajiban Suami Isteri Akibat Perkawinan Campuran Ditinjau Dari Hukum Positif Indonesia' (2013) 1 *Lex Privatum* 14.

<sup>26</sup> *ibid* 13.

<sup>27</sup> Pasal 2 ayat (1) Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan dan Pasal 2 ayat (2) Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan.

<sup>28</sup> Pasal 10 ayat (2) *jo*. Pasal 10 ayat (3) Peraturan Pemerintah Nomor 9 Tahun 1975 tentang Pelaksanaan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan.

<sup>29</sup> Asmin, *Status Perkawinan Antar Agama Ditinjau Dari Undang-Undang Perkawinan No.1/1974* (Dian Rakyat 1986) 16-20.

gives legitimacy for a man and a woman to be able to live and gather together in a family. In addition, there is an obligation for couples to register their marriage in order to obtain protection for the rights of family members.<sup>30</sup> In addition, Bagir Manan argued that marriage registration functions to guarantee public order ( *legal order* ) as well as an instrument of legal certainty, legal convenience, and as a means of proof of marriage.<sup>31</sup>

In Islamic law, marriage is defined as a strong contract between a man and a woman to create a peaceful and happy family life filled with love in a way that is blessed by Allah SWT.<sup>32</sup> Marriages that are not registered or are registered with marriage registrars are known as unregistered marriages.

There are various reasons that cause someone to marry sirri, such as: 1) fear of being known by other people, 2) do not know that marriage must be registered, and 3) cost factor.<sup>33</sup> From a legal perspective, sirri marriage is seen as an underhand marriage because it is carried out without regard to the provisions of Article 2, paragraph (2) of the Marriage Law, which requires everyone to register their marriage.<sup>34</sup> Related to the view that the provision of marriage registration is not a requirement for the validity of a marriage, sirri marriages in Islam should be considered equivalent to non-sirri marriages. However, in Islamic law, there is an obligation to carry out marriage certificates for marriages that have not been registered.<sup>35</sup> Isbat marriage is defined as the determination of a marriage that has not been previously recorded.<sup>36</sup>

Based on these provisions, it can be concluded that there is a difference between a sirri marriage and a non-sirri marriage based on the status of marriage registration. These provisions aim to provide legal certainty for the parties concerned with marriage,

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<sup>30</sup> Ahmad Nuryani, *Dasar Hukum Pencatatan Pernikahan Di Indonesia* (Kantor Urusan Agama Kecamatan Gedebage 2010) 4.

<sup>31</sup> M.H. Neng Djubaedah, S.H., *Pencatatan Perkawinan Dan Perkawinan Tidak Dicatat Menurut Hukum Tertulis Di Indonesia Dan Hukum Islam* (Sinar Grafika 2012) 157.

<sup>32</sup> Umar Haris Sanjaya & Aunur Rahim Faqih, *Buku Ajar Hukum Perkawinan Islam* (Gama Media Yogyakarta 2017) 10.

<sup>33</sup> M. Ali Hasan, *Pedoman Hidup Berumah Tangga Dalam Islam* (Prenada Media 2003) 280.

<sup>34</sup> Neng Djubaedah, S.H., *Pencatatan Perkawinan Dan Perkawinan Tidak Dicatat Menurut Hukum Tertulis Di Indonesia Dan Hukum Islam* (Sinar Grafika 2012) 345.

<sup>35</sup> Zainudin Ali, *Hukum Perdata Islam Di Indonesia* (Sinar Grafika 2006) 30-31.

<sup>36</sup> Yayan Sofyan, *Itsbat Nikah Bagi Perkawinan Yang Tidak Dicatat Setelah Diberlakukan UU No. 1 Tahun 1974 Di Pengadilan Agama* (Ahkam 2002) 75.



bearing in mind that the non-registration of marriages causes marital status to not be proven when dealing with legal issues.<sup>37</sup> Thus, underhanded marriages that do not have legal consequences will cause losses for one of the parties, both husband and wife, in the future because they cannot receive legal protection.<sup>38</sup>

Furthermore, not registering a marriage certainly has implications for the position and legal status of the parties involved. In various laws and regulations, there are several provisions that provide different treatments for parties (wives and children) who are in a marriage that is not registered. Provision of Article 42 *jo.* Article 43 of the Marriage Law stipulates that a child born in an unregistered marriage only has the civil status of the child and his/her relationship with the mother and the mother's family; thus, the birth certificate of a child out of wedlock will only record the mother's name as the legal parent without the father's name.<sup>39</sup>

In addition, if only the mother's name is recorded on the birth certificate, then the child is also not entitled to inherit from his father, but will only inherit from his mother in accordance with the inheritance portion of children out of wedlock determined by law unless the child can prove his blood relationship with his father, as confirmed in Constitutional Court Decision Number 46/PUU-VIII/2008).<sup>40</sup> In the *dissenting opinion section* 6.5 of the Constitutional Court Decision Number 46/PUU-VIII/2008, it is also mentioned that there are further consequences for marriages carried out without being registered, where the state cannot provide protection for marital status, including related assets in marriage, inheritance, and other rights that should arise from a marriage, bearing in mind that in order to claim these rights, the wife must first be able to prove her legal position and legally married status.<sup>41</sup>

This consequence is based on the fact that the French Civil Code as the forerunner of the Indonesian Civil Code, *Burgerlijk Wetboek*, adheres to a patrilineal system within

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<sup>37</sup> Tutiek Retnowati, 'Tinjauan Yuridis Penyelesaian Perceraian Perkawinan Siri Yang Telah Diisbatkan Berdasarkan Undang-Undang Nomor 1 Tahun 1974' (2011) XX Jurnal Fakultas Hukum 1-16.

<sup>38</sup> Basith Mualy, *Panduan Nikah Sirri & Akad Nikah* (Quntum Media 2011) 10.

<sup>39</sup> Pasal 42 *jo.* Pasal 43 Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan.

<sup>40</sup> Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2008.

<sup>41</sup> *ibid* 43.

the family that aims to avoid the principle of one ship with two captains. This provision was repealed with the issuance of the Supreme Court Circular Letter Number 3 of 1963, which in essence Articles 108 and 110 of the Civil Code accommodated the inability of a married wife to no longer apply, so legislators enacted Law Number 1 of 1974 concerning marriage, which stipulates that both the husband and wife are equally competent in carrying out legal actions.<sup>42</sup>

The non-registration of marriages has a logical consequence in that the parties in it do not receive legal protection from the state as those who register marriages. Mukti Arto explained that the impact of formal juridical losses arising from not registering a marriage included the following:<sup>43</sup>

1. Underhanded marriages are considered invalid, even though marriage is carried out in accordance with religion and beliefs. However, this does not have legal force as long as the marriage under hand is not registered at the Office of Religious Affairs and the Civil Registry Office.
2. If a child is born in an underhand marriage, the child born only has a civil relationship with the mother and the mother's family. A child born does not have a civil relationship with his father. This civil relationship means that legally, only the mother has to be responsible for the life of the child, and he cannot ask the father to be responsible. Furthermore, he did not inherit the estate from his father.
3. Children who are born are not necessarily able to take care of their legal status as legal subjects in Indonesia. This means that the child may not be able to obtain a birth certificate, family card, ID card, or enjoy public services, meaning that the child is not registered. This can be said to violate the rights of children.

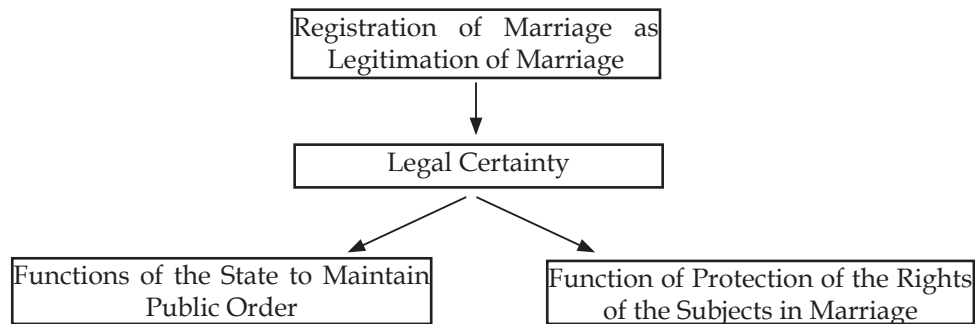
Based on these explanations, it can be understood that marriage registration as a legal marriage has two dimensions of interest, namely the implementation of the state's function to maintain public order and the form of legal protection for subjects in marriage. These two interests are based on the same principle, namely, legal certainty (*rechtszekerheid*).

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<sup>42</sup> Perwitiningsih & Rikardo Simarmata, 'Status Keluarga Sebagai Subyek Hukum dalam Pengurusan Harta Bersama' (2021) 4 Media Iuris 190.

<sup>43</sup> Mukti Arto, 'Masalah Pencatatan Perkawinan Dan Sahnya Perkawinan' (1996) VII Mimbar Hukum 45-47.

Figure 1. Function of Registration of Marriage



Source: Author's Analysis

In direct proportion to the application of the principle of legal certainty, the proof or application of the elements in the offenses of the PKDRT Law on legal facts must be based on a systematic interpretation of the Marriage Law, which determines the legality of a marriage in a formal juridical way up to the registration of the marriage, not just a religious ceremony. This systematic interpretation requires a connection between legal regulations and other legal regulations as a unified system.<sup>44</sup> A systematic interpretation is carried out by connecting and comparing one legal regulation with other regulations in the same legal system.<sup>45</sup>

The application of offenses based on this systematic interpretation is consistent with the principle of legality in criminal law, as a derivation of the principle of legal certainty itself. The principle of legality in criminal law contains four requirements: written law (*lex scripta*), clear formulation (*lex certa*), non-retroactive (*lex temporis delicti* or *lex praevia*), and strict and limited interpretation (*lex stricta*).<sup>46</sup> The essence of *lex stricta* in the principle of legality does not allow the use of an analogical interpretation of an offense norm.

Thus, if the application of offenses in the PKDRT Law is not based on a systematic interpretation regarding the registration of marriages according to the Marriage Law, it has the potential to give rise to various interpretations including analogies, both for the

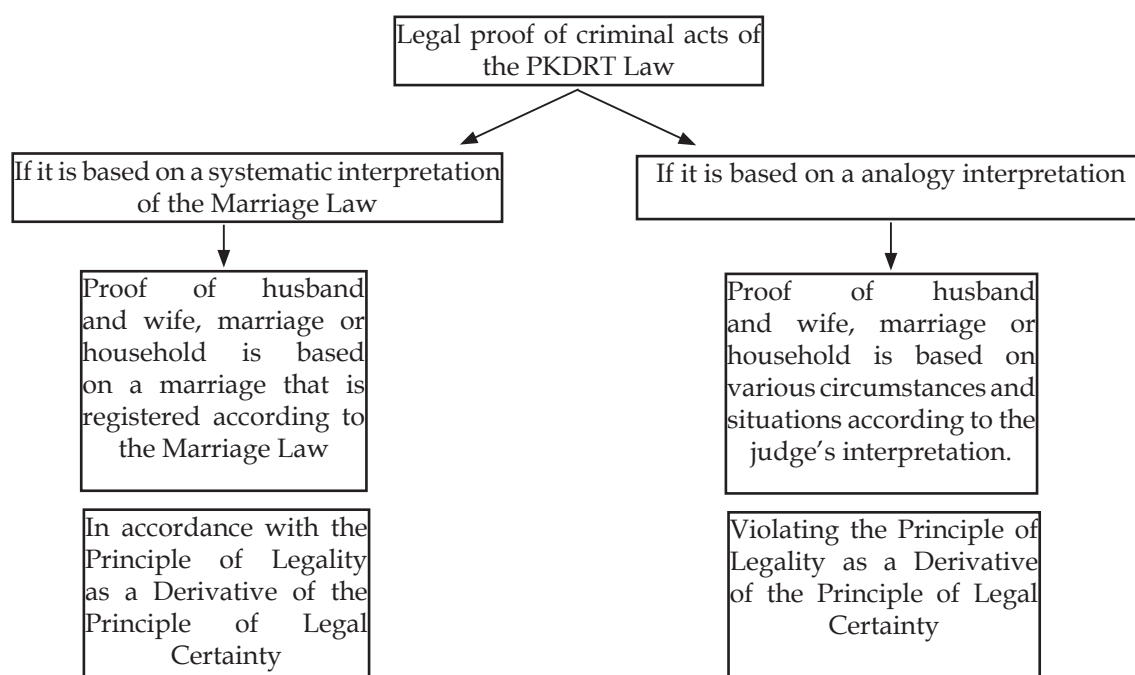
<sup>44</sup> Sudikno Mertokusumo, *Bab-bab Tentang Penemuan Hukum* (Citra Aditya Bakti 1993) 14.

<sup>45</sup> Utrecht, *Pengantar Dalam Hukum Indonesia, disadur dan direvisi oleh Moh. Saleh Djindang, cet. XI*, (Ichtiar Baru 1983) 208.

<sup>46</sup> Clara Mega Kharisma Sari, M. Sholehuddin, 'The Legality Principle in Protecting the Interests of Victims in Article 1, Paragraph (1) of the Criminal Code' (2021) 1 Yuris Journal of Court&Justice 44.

elements of husband and wife, and elements of marriage to elements of the household. This interpretation violates the principle of legality as a derivation of legal certainty. Based on the *rule of lenity* principle, legal uncertainty in the application of a criminal rule, including the application of a delict, can injure justice.<sup>47</sup>

**Figure 2.** The Flow of Thought About Application Of The Offense in the PKDRT Law Based On A Systematic Interpretation



**Source:** Author's Analysis

Different problems in Indonesia. Malaysia also regulates domestic violent crimes. However, the formulation regarding spouses within the scope of domestic violence is formulated more specifically and clearly, not just the phrase husband and wife. According to the Domestic Violence Act 1994, Malaysia has arrangements regarding "spouse" which are defined as follows:<sup>48</sup> "spouse includes a de facto spouse, that is to say, a person who has gone through a form of ceremony which is recognized as a marriage ceremony according to the religion or custom of the parties concerned, notwithstanding that such a ceremony is not registered or not capable of being registered under any

<sup>47</sup> Shon Hopwood, 'Restoring the Historical Rule of Lenity as a Canon' (2020) 95 New York University Law Review 918.

<sup>48</sup> Domestic Violence Act 1994.

written law relating to the solemnization and registration of marriages". Furthermore, the scope of domestic violence in the 1994 Domestic Violence Act also includes actions taken against the *spouse* himself so that there are clear arrangements and legal certainty for victims of domestic violence whose marriages have not been registered in Malaysia.

Based on the principle of legality and systematic interpretation, as explained above, Indonesia currently does not have a similar arrangement that provides special legal protection for subjects in unregistered marriages, but there are other legal remedies that victims of violence can take in the household. Quo non (even if it is true) there is violence, it does not mean that there is a legal vacuum (*leemten in het recht*) against the perpetrators of violence. Regarding acts of violence and persecution, they have their own provisions in Article 351 of the Criminal Code: If persecution causes serious injury to death, Article 354 paragraph (1) of the Criminal Code regarding abuse causing serious injury and Article 354 paragraph (1) 2) Criminal Code regarding persecution that causes death. However, the sanctions imposed in these provisions are lighter, with a more difficult burden of proof compared with the PKDRT Law. Proof in the PKDRT Law only requires the testimony of the victim and other valid evidence to prove the existence of the crime of domestic violence (*vide* Article 55 of the PKDRT Law), while the Criminal Code, because it is an ordinary crime, requires at least two pieces of evidence *vide* Article 183 of the Criminal Procedure Code).

### **Judge's Considerations (*Ratio Decedendi*) Related to Protected Marriages in the Perspective of Domestic Violence in Indonesia**

Although based on the perspective of the principle of legality and systematic interpretation, the husband and wife element in the PKDRT Law offense must refer to marriages that are registered in accordance with the Marriage Law, but in practice, there are several court decisions related to the legal status of marriages that are protected in the PKDRT Law in Indonesia. Some court decisions can be described as follows:

Decision Number 72/Pid.Sus/2013/PN.Tbn

a. Legal facts

In the *a quo* case, on June 8, 2009, the defendant (husband) and the victim (wife) entered a marriage that was legal according to the Hindu religion, but until now,

this has not been stated in the Marriage Certificate. After the wedding ceremony, the defendant left the victim at the victim's parents' house for no apparent reason. At the time this case was ongoing, the defendant and the victim had a child aged 3.8 years. Until the lawsuit was filed, he had never provided a living, both physically and mentally, to the victims and their children.

b. demands

In essence, in this case, the public prosecutor demanded that the panel of judges render the following decision:

1. Declare that the Defendant has been proven guilty and committed the crime of "abandoning other people within the scope of his household" as stipulated and punishable by crime in Article 49 letter (a) of Law Number 23 of 2004 concerning the Elimination of Domestic Violence;
2. Sentenced against the Defendant with imprisonment for 10 (ten) years;
3. The defendant was determined to be burdened by court fees of Rp. 2,000 (two thousand rupiah).

c. Decision

Based on these demands, the panel of judges handed down the following verdict:

1. Declare the Defendant legally and convincingly proven guilty of committing the crime of "abandoning other people within the scope of his household"
2. Sentenced against the Defendant therefore with imprisonment for 9 (nine) months;
3. The defendant was charged to pay the costs of this case in the amount of Rp. 2,000 (two thousand rupiah).

d. Judge Analysis

In its legal considerations, the panel of judges expressed their opinion regarding the validity of marriages that were not or had not been registered, which when referring to the provisions of Article 2, paragraph (1) of Law Number 1 of 1974 concerning marriage, a marriage is valid if it is carried out according to the respective laws of his religion and beliefs. Furthermore, when referring to the provisions of Article 34 paragraph (1) of Law Number 23 of 2006 concerning Population Administration, it is explained that valid marriages based on statutory regulations 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 wedding date. In this regard, the panel of judges is of the opinion that the registration of marriages is not a requirement for the validity of marriages, but only as an administrative procedure, considering that the registration in question only applies to marriages that have been carried out legally based on statutory regulations (*vide* Article 2, paragraph (1) of the Marriage Law, namely according to religion and belief).

Decision Number 115/Pid.Sus/2011/PN.WNP

a. Legal Facts

In the *a quo* case, the defendant (husband) allegedly pointed to a machete at the victim's (wife) head as a result of a domestic argument. When the machete was pointed at his head, the victim managed to block it with his left hand, which resulted in injury to his hand. The defendant then threw the machete onto the roof of the



house and took a piece of wood, which he used to strike the victim on the left side of the waist and left leg. The defendant's actions caused the victim to suffer lacerations, abrasion of his left arm, and bruising of his left calf.

b. demands

In his lawsuit, the public prosecutor demands the following:

1. Declare the defendant legally and convincingly proven guilty of committing the crime of "committing acts of physical violence within the household sphere" as stipulated and subject to criminal penalties in Article 5 letter a *jo*. Article 44 paragraph (1) Law No. 23 of 2004 concerning the Elimination of Domestic Violence.
2. Sentenced punishment against the defendant in the form of imprisonment for 10 (ten) months with a reduction, while the defendant was in temporary detention and by order to remain detained.
3. The evidence in the form of 1 (one) half-dried kehi log with a length of 70 cm, which is green mixed with white and brown, was confiscated for destruction.
4. Stipulates that the Defendant is burdened by court fees of Rp. 1,000, - (one thousand rupiah)

c. Decision

Furthermore, in this case, the panel of judges handed down the following decisions:

1. Declare the Defendant legally and convincingly proven guilty of committing acts of physical violence within the household.
2. Therefore, punishing the Defendant with imprisonment for 1 (one) year and 6 (six) months.
3. Determine that the period of arrest and detention that the defendant has served is entirely deducted from the sentence imposed.
4. Stipulates that the accused remains in custody;
5. Decide on the evidence in the form of 1 (one) semi-dried kehi log with a length of 70 cm, which is green mixed with white and brown, to be confiscated for destruction.
6. The defendant was charged to pay court fees in this case of Rp. 2,000 (two thousand rupiah)

d. Judge Analysis

In their legal considerations, related to the marital status of the defendant and the victim that had not been registered, the panel of judges stated that with the recognition from the Defendant that the Defendant and the victim were husband and wife, then the elements within the household sphere had been fulfilled.

Decision Number 228/Pid.Sus/2018/PN.Rkb

a. Legal Facts

In the *a quo case*, the defendant was suspected of having an affair suspected by the victim. Furthermore, because he was annoyed, the defendant chose the victim's neck from behind using his left hand and punched the victim 2 (two times) on the back of his head using his right hand. Apart from beating the defendant, he threatened to kill the victim.

b. demands

According to their demands, the public prosecutor demanded that the panel of judges decide as follows:

1. The defendant has been legally proven guilty according to the law of committing the crime “everyone who commits acts of physical violence within the scope of the household, as referred to in Article 5 letter a’, against the victim as stipulated and subject to criminal penalties in Article 44 paragraph (1) of Law Number 23 of 2004 concerning the Elimination of Domestic Violence.
2. The sentence was sentenced against the Defendant with imprisonment for one (one) year and four (four) months reduced while the Defendant was in detention, so that the Defendant remained in custody.
3. Determine the evidence in the form of 1 (one) shirt with a navy blue and white striped pattern with stars on it; 1 (one) yellow jacket with the words SMILE with a face on it with the BNETB Clothing brand; 1 (one) plain black shirt; and 1 (one) pair of blue jeans with the Prada brand, returned to the victim.
4. Charged court fees to the Defendant of Rp. 2.000,- (two thousand rupiah)

c. Decision

The panel of judges then issued a decision which read as follows:

1. Declare that the Defendant has been legally and convincingly proven guilty of committing the crime of “torture” as in the indictment of the two public prosecutors;
2. Sentenced against the Defendant, therefore, with imprisonment for 1 (one) year 4 (four) months;
3. Determine that the period of arrest and detention that the defendant has served is entirely deducted from the sentence imposed.
4. Stipulates that the Defendant remains in detention;
5. Determine the evidence in the form of 1 (one) shirt with a navy blue and white striped pattern with stars on it; 1 (one) yellow jacket with the words SMILE with a face on it with the BNETB Clothing brand; 1 (one) plain black shirt; and 1 (one) pair of blue jeans with the Prada brand, returned to the victim.
6. Charged the Defendant to pay court fees of Rp. 3,000 (three thousand rupiah).

d. Judge Analysis

Regarding the marital status of the defendant and the victim, the panel of judges was of the opinion that the non-registration of the marriage between the defendant and the victim caused the marriage to be considered as having never happened so that the marital status between the defendant and the victim was not a husband or wife.

Decision Number 2/Pid.Sus/2018/PN.Nab

a. Legal Facts

In the *a quo case*, the defendant and victim had entered into a religious marriage but had not been registered. This problem arose because the victim, without permission, deleted one of the photos on the Defendant’s cellphone. The defendant then locked the victim in the room, covered the victim’s mouth, and pushed the victim, causing the victim to suffer swelling and bruising of her right shoulder and wrist.

b. demands

1. The defendant has been legally and convincingly proven guilty of committing the crime of "persecution" as charged in the third alternative indictment of the Public Prosecutor, namely violating Article 351 paragraph (1) of the Criminal Code.
2. Sentenced punishment therefore to the Defendant with imprisonment for 6 (six) months;
3. Determine the detention period served by the defendant to be deducted in its entirety from the sentence imposed.
4. Ordered the Defendant to remain in custody;
5. Establish evidence in the form of 1 (one) photocopy of a marriage certificate issued by the Indonesian Protestant Church in Papua with Serial Number xxxxxxxxxx, Marriage between the Defendant and Witness 1 signed by the Papua GPI Jamaat Assembly Efrata Nabire and the GPI Papua NIGP Synod Work Body: xxxxxxxx Permanent attached to the case file.
6. Burdening the Defendant by paying court fees for the Rp. 5000.00 (five thousand rupiahs);

c. Decision

Based on the demands of the public prosecutor, the panel of judges issued a decision that reads as follows.

1. Declare that the Defendant has been legally and convincingly proven guilty of committing the crime of persecution, as in the third alternative indictment of the public prosecutor.
2. Sentenced against the Defendant therefore with imprisonment for 6 (six) months;
3. Determine the period of arrest and detention served by the defendant to be deducted entirely from the sentence imposed.
4. Determine that the Defendant remains in custody;
5. Establish evidence in the form of 1 (one) sheet of marriage certificates issued by the Indonesian Protestant Church in Papua with Serial Number xxxxxx Marriage between the Defendant and Witness 1 signed by the Chairman of the GPI Papua Jamaat Council Efrata Nabire and the Chairperson of the GPI Papua Synod Working Committee, NIGP xxxxxx. Because the evidence is a photocopy, it is necessary to determine whether the evidence is attached to the case file.
6. Burdened the Defendant to pay court fees of Rp. 5000.00 (five thousand rupiahs);

d. Judge Analysis

In their decision, the panel of judges used a third alternative indictment from a public prosecutor regarding persecution. By not including articles related to domestic violence as conveyed by the public prosecutor and considering the panel of judges that marriages that are not registered at the civil registry office are not legal marriages, in this case, the panel of judges implicitly states that marriages that are not registered have no status law as registered marriages.

The analysis of judges' considerations in the various decisions is described in the following table.

**Table 1.** Analysis of Judges' Considerations Regarding Marriages Protected in the Domestic Violence Law

No.	Decision Number	Judge's Considerations Regarding Protected Marriages
	Decision Number 72/Pid. Sus/2013/PN.Tbn	The panel of judges is of the opinion that marriage registration is not a requirement for a valid marriage, but only as an administrative procedure, so that even though it has not been registered, the parties are still entitled to legal protection.
	Decision Number 115/Pid. Sus/2011/PN.WNP	The panel of judges stated that the confessions of both parties were sufficient to prove the marital status and could obtain legal protection.
	Decision Number 228/Pid. Sus/2018/PN.Rkb	The panel of judges is of the opinion that the non-registration of marriages causes the marriage to be considered as having never occurred according to law, so that it cannot obtain legal protection as a registered marriage.
	Decision Number 2/Pid. Sus/2018/PN.Nab	The panel of judges did not include considerations related to domestic violence considering the marital status was not registered so it did not meet the qualifications of a delict in the Domestic Violence Law

**Source:** Results of the author's analysis

Some of the courts' considerations and decisions confirm that there is an inconsistent and contradictory application and proof of the elements of the offenses against the PKDRT Law, and indicate that there is room for interpreting analogies, particularly with regard to the elements of the subject of husband and wife and the concept of the validity of marriage. This situation ultimately leads to the non-creation of legal certainty for society, including violations of equality before law as a manifestation of legal norms and justice for every society.<sup>49</sup>

As explained in the previous discussion, the perspective of the principle of legality and systematic interpretation requires the validity of marriage contained in Article 2 of

<sup>49</sup> Oksidelfa Yanto, Imam Fitri Rahmadi & Nani Widya Sari, 'Can Judges Ignore Justifying and Forgiveness Reasons for Justice and Human Rights?' (2022) 6 Sriwijaya Law Review 123.

the Marriage Law to have a cumulative meaning. By registering a marriage, there is a clear legal position and status for the marriage; when the marriage is not registered, the juridical consequence is that the parties to the marriage cannot be subject to offenses under the PKDRT Law.

To address this issue, several solutions can be solved, namely:

1. Revise the PKDRT Law. This revision aims to add provisions that provide protection for parties in marriages who are not registered. In this regard, Indonesia can use the provisions governing “ *spouse* ” in the Domestic Violence Act of 1994 Malaysia as a reference. The existence of clear arrangements regarding special protection for victims of domestic sexual violence whose marriages have not been registered will prevent differences in the application of the law, which leads to current legal uncertainty.
2. Alternatively, form a Joint Decree (SKB) between the relevant law enforcers, namely the Police, the Attorney General’s Office, and the Supreme Court. In the SKB, it can be regulated regarding the position of the parties in the marriage that are not recorded as part of the scope of application of the PKDRT Law.

These solutions are intended to prevent the emergence and recurrence of current legal uncertainties and provide legal protection for victims of domestic violence in marriages that are not registered.

## **Conclusion**

The norms in the PKDRT Law do not provide explanations and limitations regarding the elements of husbands and wives and the concept of the validity of marriage. However, based on the perspective of the principle of legality and systematic interpretation, formal juridical proof of the elements in the PKDRT Law offenses still refers to husbands and wives whose marriages are registered according to the Marriage Law, not just limited to religious ceremonies. Thus, marriages that are not registered can be considered invalid and cannot obtain legal protection under the PKDRT Law.

The blurring of norms in the PKDRT Law has led to the application and proof of the elements of offenses in the PKDRT Law in various inconsistent and contradictory court decision practices, and indicates the existence of space for interpreting analogies,

particularly related to the elements of the subject of husband and wife and the concept of the validity of marriage. This situation ultimately leads to the non-creation of legal certainty for society, including violations of equality before law as a manifestation of legal norms and justice for every society. As a long-term solution, the government can revise the PKDRT Law and include parties to marriages that are not recorded within the scope of the legal subject matter of the PKDRT Law. In addition, the law enforcers concerned, namely the Police, Attorney General's Office, and the Supreme Court, can issue Joint Decrees (SKB) to regulate the position of parties in marriages that are not registered as part of the scope of application of the PKDRT Law.

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