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Witness Privilege and Material Truth Single Fact Witness Under the New Indonesian Criminal Procedure Code from a Positivist Legal Perspective

Ardiansyah Iksaniyah Putra

Doctoral Program in Law, Universitas Jember, Indonesia

Corresponding Author's Email: ardiansyahiksaniyahputra@gmail.com

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ABSTRACT

Article 218 of the Indonesian Criminal Procedure Code (Law Number 20 of 2025) allows family members of the defendant to withdraw as witnesses, while Article 220 allows those bound by confidentiality obligations to request an exemption from testimony. This article asks how both norms should be applied, from a legal positivist perspective, when the holder of privilege is the sole factual witness. Using doctrinal legal research with legal, historical, and conceptual approaches as well as hypothetical illustrations, this article examines the norms in Kelsen and Hart, with Dworkin's critique of judicial discretion as an external test. First, the two provisions differ in determining where decisions stand: under Article 218, the decision is in the hands of witnesses, with the additional key held by the defendant through Article 219, whereas under Article 220 that right lies with the judge. Second, these three theories meet at the core of the issue: the withdrawal of legitimate family witnesses, this case falls within the core of Article 218 not its penumbra, and the resulting acquittal is not a legal loophole. The open texture is limited to the 'unless otherwise specified' clause and to the judicial criteria under Article 220. Third, the judge's room is limited to freedom to choose witnesses, maximize other evidence, and assess exemption requests based on explicit criteria. De lege ferenda, this article proposes removing the defendant's consent requirement in Article 219, transferring the remaining judge's authority into the content of Article 220, and examining narrow exceptions for domestic violence against children.

Keywords: *Legal Positivism; Material Truth; Sole Witness Facts; Witness Privilege; Indonesian Criminal Procedure*

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INTRODUCTION

Law Number 20 of 2025 concerning the Criminal Procedure Code (new KUHAP), effective from January 2, 2026, retains the old and rarely questioned provision: the witness's right to recuse due to family ties to the defendant. Article 218 stipulates that witnesses who have blood relations or direct marriage up to the third level, who have a certain kinship or marriage, or who are the husband or wife of the defendant (including former partners) 'cannot be heard and may withdraw as witnesses, unless otherwise stipulated in this Law' (*their testimony cannot be heard and may resign as a witness, unless otherwise stipulated in this Law*). Furthermore, Article 220 grants the right to persons obliged to keep secrets due to their dignity, occupation, or position to request exemptions from the obligation to testify, and makes the judge the party deciding whether the reasons for the request are valid. Both provisions are exceptions to the principle affirmed in the Explanation of Article 209(2): being a witness is one of the obligations of every person.

In most cases, this privilege does not pose serious difficulties, because the same fact can still be proven through other witnesses or other evidence. The position changes when the person protected by the privilege is the only witness who personally sees, hears, or experiences the violation, such as in domestic violence, where the only available witness is the defendant's spouse or child. The new KUHAP itself closes the evidentiary loophole: the testimony of one witness is insufficient unless supported by other evidence, and the defendant can only be punished if the violation is proven “legally and convincingly”. The doctrine of criminal evidence treats material truth as the goal of the criminal process (Amiruddin and Asikin 2021). However, after the sole factual source uses this privilege, the state has no way to bring that testimony to court. Article 285 of the new Criminal Code (KUHP) only punishes witnesses who 'unlawfully' fail to fulfill their obligation to testify, while withdrawal under Article 218 of the new KUHAP is behavior permitted by the law itself.

The problem is not merely technical. It touches on the classic question of legal positivism: what should judges do when legitimate norms, applied according to their terms, produce results that seem to contradict the goals of the system that produced them? Hart accepts that every rule has a fixed core of meaning as well as penumbra that cannot be fully determined by language, and that in penumbra judges cannot avoid making choices (Boentoro and Hartanto 2025). Kelsen starts from a different perspective: the legal order cannot contain loopholes; loophole theory is a fiction used by legislators to limit judicial authorization; and authorized judges do not 'fill' gaps but add individual norms to applicable law (Abdelhadi et al. 2020). Both answers raise a sharper question: does the single witness case really lie at the penumbra of Article 218, or at its core? The clause 'unless otherwise provided in this Law' is easily treated as an entry point for interpretation. This clause is inherited almost unchanged from Article 168 of the 1981 Criminal Procedure Code (KUHAP 1981), and in both laws it only states 'quite clear' (*quite clear*) for the family category. Academic Paper (*Academic Manuscript*) of the Draft Law also does not explain that clause; the article merely repeats the wording of the article in the discussion of the bill's content. This article tests whether the gate is indeed open.

Previous Indonesian studies on the privilege of family witnesses generally take the 1981 KUHAP as the starting point. Dwipayana examines the use of Article 168 of the 1981 KUHAP at the investigation stage and concludes that the right of witnesses related through marriage to the suspect to withdraw takes precedence over the obligation to testify, so such refusal cannot be categorized as obstruction of investigation. Setiawan, Nugraha, and Enrick interpret the limitation in Article 168 as an antinomy with a complaint-based character of property violations committed within the family (Armaijn et al. 2024). Other

studies focus on domestic violence. Masrita, Tanuwijaya, and Samosir examined decisions that heard the defendant's wife under oath without mentioning the consent required by Article 169 of the 1981 Criminal Procedure Code. Sokanfuti, Toule, and Saimima show that the exceptions in Article 168 are uncomfortable with the personal environment in which domestic violence occurs. Setiawan and his colleagues go further: because family members are often the sole witnesses in domestic violence cases, they propose a Supreme Court Regulation (*Supreme Court Regulations*, Supreme Court Regulation (Perma) as a short-term solution and amendments to the Domestic Violence Law (UU PKDRT) as a long-term solution, allowing family members to testify under oath without the defendant's consent.

The verdicts examined by Masrita and her colleagues, as well as two domestic violence cases examined by Setiawan and his colleagues that were then left to remain in cassation, even show the practice of appointing family witnesses without consent as required by Article 169 of the 1981 Criminal Procedure Code and then relying on their testimonies to punish them. Outside Indonesia, this debate is even older. Frost criticizes the reason for 'marital harmony' in *Trammel* and proposes witness-centered reasoning: saving witnesses from the choice between incriminating the spouse, lying, or being punished. Seymore shows how spousal privilege prevents prosecution of domestic violence, even in jurisdictions that recognize exceptions. In *Van der Heijden v. Netherlands*, the European Court of Human Rights justified this privilege as freeing witnesses from moral dilemmas, while affirming that this is an exception to the civil obligation to testify whose limits lie within the limits of state appreciation. In the context of the new KUHAP, the closest study is Manguluang, who read Articles 218 and 219 by distinguishing the phrase 'not to be heard', a prohibition limiting examiners, from the phrase 'may withdraw', a privilege that can be used or waived by witnesses, and which gives substance to the clause 'unless otherwise specified' through a crown witness (*Crown Witness*) mechanism for category (b) (Gudynas 2015).

These studies identify problems but leave four gaps. First, except for Manguluang, all rely on the 1981 Criminal Procedure Code (KUHAP), thus not taking into account the expanded list of evidence, the loss of the equivalent of Article 183, or changes to the Explanation of Article 220. Second, no one distinguishes the logic of Article 218 from Article 220, although the location of different decisions in each provision determines the judge's room for maneuver. Third, the proposed Supreme Court Regulation has not been tested on questions about norm-making authority; under the new KUHAP, the problem becomes sharper, because Explanation Article 3(1) states that regulations below the statutory level must not govern criminal procedures. Fourth, no study has examined cases of the sole family witness within a positivist legal framework, including whether the clause 'unless otherwise specified' has content for family categories, namely (a), (c), and (d). The fourth gap is the most urgent. The practice of calling family witnesses without consent, documented in previous studies, reveals a real temptation to place material truth above family privilege without a clear normative basis. This article examines whether such temptation can be justified by the most influential legal theory.

The main question of this article is: how should the norm of witness privilege in Articles 218 and 220 of the new Criminal Procedure Code be applied, within a positivist legal framework, when the holder of the privilege is the sole factual witness in a criminal case? To answer this, this article examines two things: first, the normative structure of both provisions, especially where there is discretion and the content of the clause 'unless otherwise specified'; second, a resolution that can be justified without exceeding the norm's validity limit.

This article makes three contributions. First, it shows that the difference between Articles 218 and 220 is not merely a difference in subject matter but also a difference in where the decision lies. Under Article 218, judges have no room to assess the witness's reasoning; the decision to use or waive privilege lies with the witness, while through Article 219 the defendant holds the additional key to the evidentiary value of willing witnesses' testimony. Based on Article 220, the assessment of whether the reason is valid is entrusted to the judge. Second, the single-witness case is tested against two positivist theories, Kelsen and Hart, and then against Dworkin's non-positivist critique as an external test. All three meet at the core of the issue: the case of the sole family witness is included in the core of Article 218, not its penumbra, so the resulting exemption is not a legal loophole.

In theory, the family privilege in the new KUHAP is an example of a norm whose core is already established but whose edges have an open texture, so the room for judicial reasoning must be sought at the edge of the norm, not at the core. That open texture appears at two points: the content of the clause 'unless otherwise specified' for the family category, and the scope of judges' assessment under Article 220 now after the Explanation of Article 170(2) of the 1981 KUHAP Regulation, which explicitly grants residual authority to judges if there are no regulations governing the related position or work, is not moved. Third, this draws institutional consequences from this finding: judicial room is limited; meaningful changes must be through legislation, not through Supreme Court Regulations; and the requirement of defendant consent in Article 219 is the part of the norm that is most difficult to justify by the reason of privilege itself.

Therefore, this article aims (1) to analyze the normative structure of Articles 218 and 220 of the new KUHAP and their historical development from the 1981 KUHAP; (2) to assess the answers provided by Kelsen and Hart's legal positivism to the tension between legitimate privilege and the search for material truth in single-witness cases, and to test the resilience of those answers to Dworkin's critique of discretion; and (3) to formulate resolutions, both *de lege lata* and *de lege ferenda*, that maintain legal certainty without closing the disclosure of material truth.

METHODS OF RESEARCH

This study employs normative (doctrinal) legal research because its central inquiry concerns the structure, validity, and interpretive scope of positive legal norms rather than the empirical behavior of witnesses or law enforcement officials. Doctrinal legal research examines legal rules, principles, concepts, and authoritative materials to identify, interpret, and evaluate the law applicable to a particular legal issue (Marzuki, 2017; Hutchinson & Duncan, 2012). Accordingly, this study does not require empirical data, as its analysis is directed toward the interpretation and coherence of legal norms governing witness privileges under the new Indonesian Criminal Procedure Code.

The study employs three complementary legal approaches, supplemented by hypothetical illustrations as an analytical instrument. First, the statutory approach examines Articles 4, 33, 143, 209, 210, 212, 214, 218, 219, 220, 221, 223, 235, 237, and 244 of Law No. 20 of 2025 on Criminal Procedure, including their explanatory provisions; Articles 282(3) and 285 of Law No. 1 of 2023 on the Criminal Code, as amended by Law No. 1 of 2026; and relevant provisions of the Domestic Violence Law (Law No. 23 of 2004), the Sexual Violence Crimes Law (Law No. 12 of 2022), the Juvenile Criminal Justice System Law (Law No. 11 of 2012), and the Witness and Victim Protection Law. The statutory approach is used to examine the wording, relationship, scope, and normative consistency of these provisions. This approach is

grounded in doctrinal methodology, which treats legislation as a primary authoritative source for identifying and interpreting applicable legal rules (Marzuki, 2017; Hutchinson & Duncan, 2012).

Second, the historical approach compares Articles 159, 168, 169, 170, 183, and 185 of Law No. 8 of 1981 on Criminal Procedure, together with their explanatory provisions, with their counterparts in the new Criminal Procedure Code. It also examines the legislative history, particularly the Academic Paper accompanying the draft legislation. This approach is employed to distinguish provisions retained from the previous procedural framework from those reflecting substantive normative changes. The historical approach is relevant to doctrinal research insofar as the development and legislative context of a provision may clarify its intended meaning, scope, and relationship with earlier legal arrangements (Marzuki, 2017).

Third, the conceptual approach draws on Hans Kelsen's theory of legal validity and hierarchy of norms, together with the concept of legal gaps, and H. L. A. Hart's theory of the rule of recognition and open texture. These concepts provide positivist analytical tools for examining the structure and legal basis of witness privileges. Ronald Dworkin's critique of judicial discretion is not treated as part of legal positivism but is employed as an external theoretical test to assess whether the positivist interpretation remains defensible when confronted with a competing jurisprudential perspective. The conceptual approach enables the analysis to move beyond the literal wording of legislation by examining the underlying legal concepts, theoretical assumptions, and normative relationships relevant to the research problem (Marzuki, 2017; Hutchinson & Duncan, 2012).

Hypothetical illustrations are used to test the application and interpretive consequences of the relevant legal norms. Their use is justified by the absence, at the time of the research, of published judicial decisions under the new Criminal Procedure Code, which entered into force on 2 January 2026, explicitly addressing a witness invoking a privilege. The hypothetical scenarios are therefore analytical devices for examining how the norms may operate, rather than empirical findings or representations of actual cases. Judicial decisions under the 1981 Criminal Procedure Code discussed in previous literature are referred to only as indications of prior legal practice and are not subjected to an analysis of their ratio decidendi.

The study also makes limited reference to United States law, particularly *Trammel v. United States*, and the law of England and Wales, particularly the Police and Criminal Evidence Act 1984. These references serve as illustrative comparative materials for identifying possible legislative options and testing the implications of different privilege arrangements. They do not constitute a systematic comparative legal research approach.

The primary legal materials consist of Law No. 20 of 2025 on Criminal Procedure; Law No. 8 of 1981 on Criminal Procedure; Law No. 1 of 2023 on the Criminal Code; Law No. 1 of 2026 on Criminal Adjustment; Law No. 23 of 2004 on the Elimination of Domestic Violence; Law No. 11 of 2012 on the Juvenile Criminal Justice System; Law No. 12 of 2022 on Sexual Violence Crimes; and Law No. 3 of 2026 on Witness and Victim Protection. *Trammel v. United States* and the Police and Criminal Evidence Act 1984 are used as supplementary comparative materials. Secondary legal materials include the Academic Paper accompanying the draft Criminal Procedure Code, jurisprudential works on Kelsen, Hart, and Dworkin, and scholarly articles on witness privileges and criminal evidence.

The legal materials are collected through library research and analyzed qualitatively using grammatical, systematic, historical, and teleological interpretation. Where interpretive conclusions appear to conflict, the analysis considers the *lex specialis derogat legi generali* principle while ensuring that general provisions are not interpreted in a manner that renders specific provisions ineffective. The resulting

analysis is developed into a prescriptive legal argument concerning the interpretation, coherence, and implications of witness privilege under the new criminal procedure framework.

RESULTS AND DISCUSSION

Results

The Only Special Witness in the New KUHAP Evidentiary System

The following illustration is explained through the discussion. A is charged with physical violence inside the house causing serious injury to her three-year-old child. The incident occurred inside the house, without anyone present except B, A's wife. The expert report from the medical examination showed blunt force injuries but did not mention who the perpetrator was. There were no recordings, electronic messages, or confessions. In front of investigators, B stated that she saw A hitting their child. In court, B stated that she withdrew as a witness under the new Article 218(d) of the Criminal Procedure Code, and A denied the allegations.

The new KUHAP expands the types of evidence. Article 235(1) lists eight: witness testimony, expert testimony, documents, defendant statements, physical evidence, electronic evidence, judge's observations, and anything that can be used as evidence as long as it is not obtained unlawfully. Compared to the five types of evidence in Article 184 of the 1981 KUHAP, the new KUHAP no longer mentions indirect (indicative) evidence but adds four new categories, one of which is open without limits. This expansion reduces the number of single-witness cases that are truly deadlocked. The problem discussed here must be narrowly formulated: situations where other evidence only proves certain elements, such as the existence and cause of injury in illustrations, but nothing connects the behavior to the defendant, except for witness testimony who chooses to recuse.

In this situation, three provisions apply simultaneously. First, based on Article 237(1) and (2), the testimony of one witness is insufficient to prove the defendant's guilt unless supported by other evidence. With the withdrawal of B, there is no testimony linking A to the conduct at all. Second, based on Article 244(1) and (2), the defendant can only be sentenced if the violation is proven 'legally and convincingly'; if not, he is acquitted. Third, the author does not find an explicit equivalent in the new KUHAP to Article 183 of the 1981 KUHAP, which requires at least two valid pieces of evidence along with a judge's verdict, and the explanation states that this provision guarantees truth, justice, and legal certainty. The standard of proof in the new KUHAP must be read together from Articles 237 and 244. For illustration, the result is the same: A is acquitted.

B's statement during the investigation also cannot replace his testimony in court. Article 212(1) only allows the reading of witness statements given at the investigation stage if the witness is absent due to death or lawful obstruction, because the witness lives far away, or for other reasons related to the state's interest. Such statements can be considered by the judge as sworn testimony only if given under oath, whereas investigators in principle examine witnesses without oath. B is not obstructed; he is present and chooses to exercise his rights. Treating the use of privilege as a 'legitimate impediment' to opening the door to the reading of the investigation record would vacate Article 218: the protection afforded by law in the courtroom will be nullified by previously given statements. This issue is further complicated because Article 33(2) of the new KUHAP still requires witnesses to give honest statements to investigators, without exception for the suspect's family, while Article 218 itself is included in the chapter on examination in

court. Viewed systematically, the text of the new KUHAP does not state that the family's right to withdraw applies at the investigation stage. However, that question does not change the analysis in this article. Regardless of the status of the right to withdraw during the investigation, B's statement in the investigation record still cannot enter the trial under Article 212 as long as B is present and exercising his rights. The debate over whether family privilege applies during the investigation, which has already arisen under the 1981 KUHAP, therefore does not fall within the scope of this article.

Even if B is willing to testify, Article 219 adds another layer. Testimony under oath is only possible if B desires it and the attorney general and the defendant 'expressly agree'; without that consent, B may only testify without oath. Testimony without oath cannot be used as evidence. Article 237(6) can only be used as a complement to evidence if it matches the testimony of sworn witnesses. In single-witness cases, no sworn testimony can be compared. As a result, the defendant in practice holds veto over the evidentiary value of his own partner's testimony. This interpretation differs from the direction taken by the United States Supreme Court in Trammel v. United States: the right to refuse to testify detrimental to the spouse belongs only to the witnesses, who therefore cannot be compelled to testify but also cannot be prevented from testifying.

The special regime for domestic violence does not change this position. Article 54 of Law Number 23 of 2004 concerning the Elimination of Domestic Violence (PKDRT Law) leaves investigation, prosecution, and examination in court to the applicable criminal procedure law, unless otherwise regulated in that law, so Article 218 of the new KUHAP remains applicable to B. The only evidence deviation in the PKDRT Law is Article 55: the testimony of one victim is sufficient to prove the defendant's guilt if accompanied by one other valid evidence. This provision actually reveals this gap. Legislators relaxed the principle of unus testis nullus testis by assuming that the victim could testify, whereas the victim in the illustration is a three-year-old child. Even if the child can be heard, the statement will not be sworn in and, according to the Explanation of Article 221 of the new KUHAP, can only be used as a guideline, a category no longer included in Article 235(1). Article 55 also fails in another variant, where the victim is the defendant's wife and she is the sole witness. As the defendant's wife, she falls under Article 218(d) and can withdraw, so testimony deemed sufficient by Article 55 never reaches trial.

A comparison with Law Number 12 of 2022 concerning Sexual Violence Crimes (UU TPKS) shows that legislators have previously chosen a different path. Article 25(2) of the UU TPKS stipulates that family members of the defendant may testify as witnesses under oath or affirmation without the defendant's consent. This provision does not remove the family's right to withdraw the oath, but removes the defendant's veto right on oath, in accordance with Trammel. Because Article 20 of the UU TPKS presents the law as an exception from general criminal procedure, and the new KUHAP itself provides room for different procedural rules in other laws, the UU TPKS model applies to sexual crimes but does not cover physical violence as illustrated. Family witnesses in the same position are subject to two different regimes, distinguished only by the type of offense charged.

The state also has no coercive means whatsoever. Judges can order absent witnesses to be brought to court, and the Explanation of Article 209(2) affirms that witnesses who refuse this obligation can be punished. However, this obligation was limited from the start by Article 218, and Article 285 of the new Criminal Code only covers witnesses who 'unlawfully' fail to fulfill them. This choice of value runs in line with Article 282(3) of the new Criminal Code, which excludes punishment for concealing the perpetrator or assisting the perpetrator to escape if done to protect against prosecution of blood relatives or marriage in

direct to second or lateral to third level, husband or wife, or ex-husband or wife. Although the degree of kinship covered is not identical, this alignment shows that family privilege is not a coincidence in design but a choice of values made into positive law in two codifications simultaneously.

However, the new KUHAP also contains a textual commitment to truth. Article 214(9) allows the chief judge and associate judge to call witnesses for any statement deemed necessary 'to obtain the truth,' while Article 4 stipulates that the criminal process combines an active judge system with a balanced adversarial system. This commitment must be read carefully. The Academic Paper on the Draft Law still frames the purpose of criminal procedure as the search for and obtaining, or at least approaching, material truth, but also mentions trial procedures 'which tend to be adversarial' as one direction of reform.

The explanation of Article 4 describes an active judge as someone who, among other things, is 'active in fact-seeking,' but also requires a balance between the rights of the parties. Furthermore, the Explanation of Article 183 of the 1981 KUHAP, which links the standard of proof with the enforcement of truth, has no equivalent in the new KUHAP. Material truth thus remains system-oriented, but no longer a single goal that overrides the procedural rights of the parties. This conclusion is important for this article: the tension examined is not a conflict between a single rule and the sole purpose of the system, but between two commitments, both of which have become positive law. Family solidarity and the search for truth stand side by side in one law, without rules determining which applies. In the case of a single witness, the two directly clash. This is where the analysis of the normative structure in the next section begins.

Where Discretion Lies: Articles 218 and 220

The literature often classifies Articles 218 and 220 of the new KUHAP under the label of the right to refuse witnesses (right to refuse) or privilege. This grouping obscures what is most important in single-witness cases: who decides whether witness testimony enters the trial. Both provisions exempt witnesses from the obligations emphasized in the Explanation of Article 209(2), but place decisions on those exceptions with different subjects. Textbooks often describe both in the same terms. Andi Sofyan, for example, places the holder of professional secrets under Article 170 of the 1981 KUHAP under the title of a person who is 'not allowed to be heard' as a witness or who 'may withdraw,' which is actually included in Article 168.

Article 218 is designed as a norm that attaches direct legal consequences to a status: witnesses included in categories (a) to (d) 'cannot be heard and may withdraw as witnesses,' unless otherwise regulated by law. Based on the 1981 KUHAP, Setiawan, Nugraha, and Enrick note the tension between 'cannot be heard' and 'may recuse,' and conclude that only witnesses decide whether to testify, while the consent of the public prosecutor and the defendant only determines whether testimony is given under oath. For the new KUHAP, Manguluang shows that punishment combines two different concepts: prohibitions that primarily limit the examiner, and rights that can be used or waived by witnesses; for the family category, the emphasis is on the right to withdraw. Such wording does not give judges room to assess whether the witness's reasons are appropriate. Article 210(7) requires the judge to only ask whether the witness has a blood relationship or marriage with the defendant up to the third degree, or is or has been the defendant's husband or wife. The role of the judge ends with status verification. Once that status is established, the decision is left to the witness; and if the witness is willing to testify, the evidentiary value of the testimony still depends on the approval of the public prosecutor and the defendant based on Article 219. In the illustration, the judge does not have the authority to refuse the withdrawal of B on the grounds that B is the sole witness.

Article 220 follows a different logic. Paragraph (1) does not provide the right to withdraw but the right to 'request an exemption' from the obligation to testify, and only 'regarding matters entrusted to them.' Paragraph (2) leaves the decision on the request to the judge: 'The judge determines whether all the grounds for the request are valid or not.' The witness asks; the judge decides. The scope of the exception is also narrow, as it does not cover facts known to the witness outside the relationship of trust. A doctor who personally witnesses violence in his practice waiting room, rather than knowing it from a patient, cannot hide behind Article 220.

Judicial authority under Article 220(2) has guidelines, but those guidelines are now thinner compared to the 1981 Criminal Procedure Code. The Explanation of Article 220(1) states that jobs or positions with confidentiality obligations are determined by legislation, while Explanation paragraph (2) only states 'sufficiently clear'. The 1981 Criminal Procedure Code has the same structure, but the Explanation of Article 170(2) adds a residual rule: if there is no statutory regulation governing the relevant position or job, the judge determines whether the reasons presented are valid. These residual rules are not carried over to the new Criminal Procedure Code. Furthermore, the element of 'dignity' (dignity) in Article 220(1) is not discussed by Elucidation, either in the 1981 Criminal Procedure Code or the new Criminal Procedure Code. These two points raise questions that the text does not answer: can judges still recognize confidentiality obligations not arising from statutory regulations, and by what measure judges must assess reasons based on dignity. This is the second open-ended point, besides the meaning of the 'unless otherwise specified' clause in Article 218, which will be discussed in the next section.

Differences in decision positions can be read through the Kelsen framework. Legal norms form a hierarchy, and judicial decisions are individual norms made under authority granted by higher norms. Because the content of a decision can never be fully determined by general norms, judges in that case are always legislators. Article 220(2) is an empowering norm: it authorizes judges to determine, in individual norms, whether the reasons for exceptions are valid. Article 218 does not contain similar authorizations. Judges still create individual norms in the form of final decisions, but whether B's testimony is part of the subject matter of the decision is decided by choice B, not the judge's judgment.

Assigning decisions to witnesses is not the only model available, and the new Criminal Procedure Code does not apply it in its pure form. In Trammel, the privilege belongs only to the witnesses, so the defendant cannot prevent the spouse from testifying; Article 25(2) of the Sexual Violence Crime Law takes a similar direction by removing the requirement for defendants' consent under oath. The new Criminal Procedure Code actually grants an additional key to the defendant through Article 219. For the family category, decisions are distributed among witnesses, public prosecutors, and defendants, and judges are not included. The room judges have to assess the interest in uncovering the truth lies in Article 220, not in Article 218. Even under Article 220, the text does not stipulate whether the absence of other evidence can be considered in assessing 'whether the reason is valid.' This formulation shows the validity of the witness's reasons, not the balance of those reasons with the need for evidence. Readings that allow such balancing can be maintained, but the text does not require it.

Kelsen, Hart, and Dworkin: Three Answers to the Single Witness Case

Legal positivism relies on the separation of law as it is from law as it ought to be. Hart revives Austin's formulation: 'The existence of law is one thing; its advantages or disadvantages are another.' For the single-witness case, this thesis raises a sharp question: is dissatisfaction with the acquittal of A, which

follows from the withdrawal of B, a legal problem that exists or a law that should exist? Kelsen and Hart answer from within positivism. Dworkin is used here not as part of positivism but as an external tester: if the criticism rejecting the separation thesis achieves the same result, the positivist answer to this case proves strong. This section shows that, at the core of the problem, the three answers meet each other.

Kelsen

For Kelsen, the validity of a norm comes from a higher norm, not from its content. Article 218 is enacted by the competent body under established procedures; its validity is not diminished because, in certain cases, it prevents the truth from being revealed. Kelsen also rejects the idea of legal loopholes. According to him, the legal order can always be applied to concrete cases, at least by rejecting claims, so loophole theory is fiction; what actually exists is a discrepancy between positive law and the law desired by the observer. If applied to illustration, there is no gap to fill. Article 244(2) provides the answer: because the violation has not been proven legally and convincingly, A is acquitted. The ruling is a legitimate application of law, not a legal failure. For Kelsen, the ruling that this result is unfair is outside the science of law, because justice is an irrational ideal and not an object of legal knowledge. Pure theory provides clarity about what is valid, but deliberately does not offer a tool to assess whether what is valid is good.

Heart

For Hart, the first question is validity. The validity of a rule is determined by the rules of recognition, criteria accepted and used by officials to identify system rules, which are usually ordered in order. Article 218 meets those criteria because it was enacted as law by the competent body. The single-witness case is therefore not a dispute over whether Article 218 is law, but rather about how the lawful rule is applied. On appeal, Hart accepts that every rule has a fixed and penumbral core of meaning. In penumbra, judges must make decisions not defined by rules, and those decisions are not deductive but guided by concepts of what should be law. The question is whether B's withdrawal falls under penumbra. The answer is no. B is the defendant's wife, and Article 218(d) literally mentions that category. B's status as the sole witness does not make the word 'wife' ambiguous; What changes is merely the practical consequence of the application of the rules, not their meaning. Case B is at its core.

The penumbra actually lies at the edge of the norm. The first point is the clause 'unless otherwise specified in this Law' in Article 218. This clause is not a vague general term but a cross-reference; the so-called penumbral is the question of which provision qualifies as 'other provisions'. For Article 218(b), the crown witness mechanism in the new KUHAP is a clear candidate. For the family category, the author found no other provision in the new KUHAP that specifically excludes the right to withdraw. Article 214(9), which authorizes judges to request any statement deemed necessary 'to obtain the truth,' cannot be treated as such another provision. This article regulates general authority in witness examination, whereas Article 218 specifically regulates who is excluded from examination. Reading Article 214(9) as an exception to Article 218 would leave out the specific provision through the general provision. The second point is that the judge's assessment criteria under Article 220(2) now that the residual rule in the Explanation of Article 170(2) of the 1981 Criminal Procedure Code is not maintained. On both points, the judge makes choices not determined by the text, and on behalf of Hart the judge can legitimately consider the purpose of the criminal procedure, including disclosure of the truth. However, that space does not reach the core of Article 218.

Dworkin

Dworkin rejected positivism, so his reading served as an external test. His criticism of Hart, as outlined by Guest, was based on distinguishing three meanings of discretion in question. Discretion in the first weak sense means an official must use judgment in applying the standards that bind him; discretion in the second weak sense means the officer's decisions are final; and discretion in the strong sense means officials are not bound by standards set by the relevant authorities. For Dworkin, the policy that works in every difficult case is weak discretion in the first sense, because judges remain bound by principles that provide the best meaning of the law as a whole. In this view, Article 220(2) gives judges' weak discretion, not strong ones.

For Article 218, Dworkin's question is which principle best explains the legal material at hand. Article 218 of the new Criminal Procedure Code, Article 282(3) of the new Criminal Code, which exempts punishments for hiding family members who have committed offenses, and the 'invalid' restriction in Article 285 of the new Criminal Code show the same value choice, although the protected family circle is not identical, because Article 282(3) reaches the direct line up to the second degree, whereas Article 218 applies to the third degree: lawmakers do not force someone to be a tool to punish their own family. Articles 214(9) and 4 of the new Criminal Procedure Code do contain the principle of seeking truth, but this principle is not formulated as an exception to family protection. The principle-based reading also concludes that option B must be respected.

However, the same interpretation results in criticism of Article 219. The principle explaining Article 218 is the protection of family members called as witnesses. That principle does not explain why the defendant, who faces no dilemma at all, should be given the authority to decide whether their partner's testimony counts as evidence. Article 25(2) of the TPKS and Trammel Laws instead places control on the witness, not the defendant. Comparative literature reinforces this interpretation: the witness-centered reasoning, as developed by Frost and recognized by the European Court of Human Rights in Van der Heijden, treats the moral dilemma of the witness, not the defendant's interests, as a reason for privilege. Regarding the author's argument, the requirement for defendant consent in Article 219 is the part of the legal material most difficult to justify by the basic principle of Article 218.

Two positivist theories and one non-positivist critique thus meet at the core of the problem: in illustration, the withdrawal of B is valid and must be respected, and the acquittal of A is a legitimate legal consequence. The differences between the three only appear at the edges: at two points of open texture, the meaning of 'if not given' and the judge's criteria under Article 220(2), and in the assessment of the defendant's consent requirements in Article 219, which is not a matter of textual ambiguity but justification. These findings have consequences for the way forward. The tension between family privilege and material truth in single-witness cases cannot be resolved by reinterpreting the core of Article 218. The tools available to de lege lata judges are limited to those limits and maximize other evidence, while more fundamental changes fall within the de lege ferenda agenda. The next two sections address these matters.

Judge's Room for Lege Lata Maneuvers

First, the judge needs to ensure that the witness's decision to use or waive their privilege is made freely and based on adequate information. Family privilege is intended to protect witnesses, not as a means for the defendant to control their testimony. If withdrawal occurs due to pressure from the defendant, that protection could potentially be exploited by parties who should not be protected. Article 143 letters d and

h of the Criminal Procedure Code grants witnesses the right to testify without pressure and to obtain protection for the safety of their own family, and property. Law Number 3 of 2026 concerning the Protection of Witnesses and Victims (UU PSK) strengthens this protection. Article 1 number 9 defines Threats as actions that cause fear or force someone to do or not do something in connection with giving testimony. Thus, pressure on family witnesses to withdraw can be classified as Threats. LPSK protection can be provided from the investigation stage, including through electronic testimony for witnesses who face very serious threats with the judge's approval. However, this protection is not an instrument to force family witnesses to testify. Willingness to accept LPSK protection includes willingness to testify. Therefore, protection is only relevant when a witness has chosen to testify but feels afraid or threatened to do so

Second, the mechanism in Article 223 paragraph (1) of the Criminal Procedure Code can be used to ensure that the witness's choice truly reflects their own will. This provision allows the judge to listen to witnesses about certain cases without the defendant's presence if the judge considers that the defendant's presence could make the witness feel pressured or not free. In the illustration, the judge can ask A to leave the courtroom, then explain to B that he has the right to withdraw as well as the right to testify. After that, the judge asks B to state his choice. Based on Article 223 paragraph (2), A must be informed about matters that occurred during his absence. Thus, this mechanism is directed to examine the freedom of witness choice, not to encourage him to give testimony.

Third, the examination without the defendant's presence must be accompanied by procedural safeguards to maintain the balance of rights of the parties. The public prosecutor and legal counsel remain present, while the judge's explanation and the witness's answers are recorded completely in the trial minutes. The judge must also explain the witness's rights neutrally and not ask about their knowledge regarding the case at that stage. After the examination, the defendant is informed about the process that took place during their absence in accordance with Article 223 paragraph (2). This step must not be used to influence witnesses to testify because such actions contradict the protection of Article 218 of the Criminal Procedure Code. The purpose is limited to ensuring that the witness's decisions are made freely. If after receiving an explanation the witness still chooses to withdraw, that choice must be respected.

Discussion

Because the core of Article 218 cannot be reinterpreted, meaningful changes must come from the legislator. This consequence also determines the instrument. Supreme Court regulations are not the right way to create exceptions to rights granted by law. In hierarchical legal orders, lower norms derive their validity from higher norms and cannot eliminate what those norms provide. The new KUHAP even states this positively: The Explanation of Article 3(1) stipulates that regulations below the statutory level must not govern criminal procedures. Setiawan and his colleagues' proposal to make exceptions to Article 168 through Supreme Court Regulations therefore cannot be maintained, at least under the new KUHAP, even though their long-term proposal to amend the law is consistent with the direction of this article. Supreme Court regulations can at most regulate procedures, for example the obligation of judges to explain witness rights and the use of Article 223 as explained in the previous section. Based on this, this article proposes three amendments to the law, ranging from those that least shift the balance of existing values to those that shift them the most.

The first proposal is to remove the defendant's consent requirement in Article 219. The minimum formulation could read: if the witness mentioned in Articles 218(a), (c), and (d) wishes, the witness may

testify under oath or affirmation without the defendant's consent. The witness's right to withdraw remains intact; only the key held by the defendant is removed. This change follows the model chosen by the legislator himself in Article 25(2) of the TPKS Law and is consistent with Trammel. Two currently different regimes for family witnesses, the sexual violence regime and the general regime, can be merged. This proposal does not resolve the illustration in this article, because B chooses to withdraw. However, this proposal resolves an equally important variant: where family witnesses are willing to testify but the testimony loses its evidentiary value because the defendant refuses consent.

The formulation at least still leaves the key in the hands of the prosecutor, and this must be taken into account. Family testimony is not always incriminating; in practice, family members are often called as defense witnesses. If the reason in Article 218 is protection of witness choice, the key to prosecution under the oath-of-forgiving family witness oath is just as difficult to justify as the defendant's key to the incriminating witness oath. Therefore, the author prefers a symmetrical formulation: the family witness's oath must depend solely on the witness's own wishes, while concerns about bias are left to the judge's assessment of the truthfulness of the testimony, including reasons that may encourage witnesses to testify in certain ways, as required by Article 237(5) of the new Criminal Procedure Code.

The second proposal is to move the residual rule in the Explanation of Article 170(2) of the 1981 Criminal Procedure Code into the content of Article 220, along with the judicial assessment criteria proposed in the previous section, including the definition of what 'dignity' means. This proposal changes the open texture to guided discretion without diminishing the authority of judges.

The third proposal shifts the balance the furthest, so the author presents it as an option for further study, rather than a fixed recommendation: a narrow exception to family privilege for violence against children within the household. This argument is internal to the rationality of the privilege itself. Family privilege protects the integrity of family relationships from state pressure. When the victim is a child of the same family, the family is the place where harm occurs, so the two-family interests' conflict, and the interests of the most vulnerable deserve to be prioritized. The comparison shows that this choice is not unusual. In England and Wales, the Police and Criminal Evidence Act 1984 requires defendants' spouses to testify for prosecution of certain offenses, including those involving assault, injury, or threat of injury to a spouse or person under 16 years old. Seymore also points out that spousal privilege remains a barrier to claiming domestic violence even in jurisdictions that recognize exceptions, so exceptions on paper may not be sufficient without witness protection. The scope of this proposal is deliberately limited to children, as the vulnerability of children as victims is the most obvious and least debated. This option carries risks that should not be ignored. Forced witnesses may lie or retract; witnesses who are also victims may experience repeated victimization; and in some cases, family witnesses may face criminal liability for the same event. Frost himself does not support this option.

He argues that forcing a partner to testify does little to increase the search for the truth, because reluctant witnesses tend to lie, although he also rejects privileged protection for partners whose knowledge comes from their own involvement in the offense. This article accepts Frost's reasoning for deciding who controls the privilege, namely the witness and not the defendant, but does not accept his conclusion for cases of child abuse. The witness-centered reason lies in the dilemma between loyalty to the family and obligations to the state. When the victim is the child of the same family, the dilemma changes: the opponent is no longer the family against the state, but loyalty to the perpetrator versus loyalty to the victim, both members of the same family. At that point, privilege no longer protects the family from the state; the

privilege protects one family member from accountability for violence against the family member who is least able to defend themselves.

The perjury risk identified by Frost remains real, and that is why this option is only worth considering with protection, not as coercion itself. If the option is adopted, it must be accompanied by four protections. First, the witness's right under Article 143(g) of the new KUHAP to refuse to give incriminating testimony remains intact. Second, witness protection under Article 143(h) of the new KUHAP and the applicable PSK Law, including testimony without physical presence under Article 59 of the PSK Law. Third, examination without the presence of a defendant under Article 223 is available, with electronic recording devices and audiovisual communication in Article 58 of the SPPA Law as a model. Fourth, a strict exception is made for the category in Article 218(b), which has different reasons. It should be emphasized that only lawmakers have the authority to make this choice. Judges who make it in a ruling will exceed the authorization granted to the court.

CONCLUSION

Articles 218–220 of the new Criminal Procedure Code place different authorities on witnesses, defendants, and judges in the application of family privileges. These provisions have established the core protection of family witnesses but still leave unclear regarding the exception clause and judge's assessment criteria under Article 220. In cases where family witnesses are the sole factual witnesses, the use of the right to withdraw is a legitimate legal consequence, not a normative vacuum. This conclusion can still be maintained within the positivism framework of Kelsen and Hart, although tested by Dworkin's non-positivist critique.

De lege lata, judges need to ensure that witness choices are freely and based on adequate information, optimize other evidence, and apply Article 220 with measured consideration. De lege ferenda, legislators need to review the defendant's consent requirements in Article 219, clarify the exceptions criteria for Article 220, and consider limited exceptions for domestic violence through legislative changes. Because this research relies on normative analysis and hypothetical illustrations, the application of these provisions in judicial practice cannot yet be ascertained. Therefore, further research needs to review decisions after January 2, 2026, and compare family privilege exemption regulations in other jurisdictions.

AUTHOR CONTRIBUTIONS

The author is the sole contributor to this article. The author conceptualised the study, designed the doctrinal research framework, collected and verified the primary and secondary legal materials, conducted the normative analysis of Articles 218, 219, and 220 of Law Number 20 of 2025 and their historical antecedents in Law Number 8 of 1981, constructed the hypothetical illustration used to test the norms, developed the theoretical argument based on Kelsen, Hart, and Dworkin, and prepared, revised, and approved the final version of the manuscript. The author is fully responsible for the integrity and accuracy of the work.

CONFLICT OF INTEREST

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ARTIFICIAL INTELLIGENCE (AI) USE STATEMENT

The author declares that no artificial intelligence (AI) technology was used in the research process or in the preparation of this article. All legal materials were collected, read, and analysed by the author, and the entire manuscript, including its citations and reference list, was written and compiled by the author.

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