



## The Shift of Fethisism as the Means for Criminal Annulment in the Criminal Law

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### ABSTRACT

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The number of sexual violences is on a disconcerting point, among them is paraphilia or sexual deviations. One form of paraphilia is fetishism. The research will focus on the objective condition of fetishism legality as a means for criminal annulment under the perspective of mental disturbance after the passing of Law Number 12 Year 2022 regarding TPKS and Law Number 1 Year 2023 regarding KUHP. The result of this research is that fetishism can no longer be used as an excuse for criminal annulment, hence the fetishism sexual violence perpetrator may be charged with criminal sanctions and/or action sanctions. An absolute criminal penalty may not be imposed only to a mentally ill person under acute relapse along with psychotic episodes. Second, until the legalization of Law Number 12 Year 2022 regarding TPKS and Law No.1 year 2023 regarding KUHP, fetishism is not considered as a form of offence, but only as a special condition in relation to morality offenses, such as molestation or rape.

### KEYWORDS:

sexual violence, fetishism, criminal annulment excuses

### I. INTRODUCTION

Sexual offense is a prominent phenomenon, often occurring in Indonesia. So far, sexual violence cases are often ignored by the community since they happen often and always presented in news, whether newspaper, television, radio or social media. In other words, sexual offenses are no longer seldom heard, in fact they may be heard on a daily basis. Almost every day new cases of sexual offense happen, which causes the number of sexual violences cases to increase significantly as time passes by. The victims of the crime are no longer revolving around women, but also men, adults or children. Sexual offenses can be identified as all forms of behavior done against women specifically, which creates psychological impacts in the form of the feeling of uneasiness and fear, to the form of physical wounds.<sup>1</sup> According to Elizabeth Siregar, as quoted by Ani Purwanti, sexual offenses are a form of violence that happens in private and public space. The law subject of the violence perpetrator is mostly suffered by women and children since they are considered prone as victims. The crime against women is a universal problem, since it is not only endemic, but also pervasive and repetitive everywhere under a long span of time.<sup>2</sup>

This is one indicator that causes sexual offenses to experience an increase in countries across the world. This article starts with the foreword that shortly describes *das sollen* and *das sein*, followed by discussions that are segmented into different parts, which are fetishism as a technology-based sexual violence, fetishism under the perspective of the principle of legality, the role of fetishism as the means to omit crime and the legality of fetishism as *actus reus*, then this article ends with a conclusion. In essence, this article is a study of a change of perspective, or paradigm, or the shift in in criminal law, specifically in relation to the reasons

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<sup>1</sup> Salamor, Yonna Beatrix. 2022. "Kekerasan Seksual Terhadap Perempuan (Kajian Perbandingan Indonesia - India)" *Balobe: Law Journal* 2, no. 1.

<sup>2</sup> Siregar, Elizabeth, Dessy Rakhmawaty, and Zulham Adamy Siregar. 2020. "Kekerasan Seksual Terhadap Perempuan Realitas Dan Hukum" *Progresif: Jurnal Hukum* 14, no. 1 (2020).

for criminal annulment by comparing old KUHP and National KUHP. Until now, there has not been any previous studies in regards of fetishism as the reason to annul criminal law, thus the objective of this article is to provide understanding and contribution to clearing the legal uncertainties towards sexual violence cases with mentally disturbed perpetrators. The formulation of the problem that will be highlighted in this article is what is the role of fetishism as the reason for criminal annulment, reviewed from the old KUHP, and whether fetishism can be used as the reason to erase crime after the enforcement of National KUHP.

## **II. FETISHISM AS A TECHNOLOGY-BASED SEXUAL OFFENSE**

Along with the development of science and technology, the convenience to commit sexual violence becomes more accessible. Sexual violence is not only done physically, but may also be done through internet with current technological advancement. The data from The Ministry of Women Empowerment and Child Protection shows that there are 6.454 cases of sexual violence against children in 2019, then increased to 6.980 cases in 2020, then increased significantly to 8.730 in 2021. The data in January 2022 shows that there are already 797 cases.<sup>3</sup> The high number of sexual violence makes it to become a status of emergency. The data from Online Information System of Women Protection per January 2022 shows that throughout 2021 there are 10.247 violence cases, and 15,2% of them are sexual violence cases. Violence against children cases are reported as many as 14.417 cases in 2021, and 45,1% of them are sexual violence cases. This concerning fact is confirmed by the statement from the Minister of Women Empowerment and Child Protection, I Gusti Ayu Bintang Darmawati, that sexual violence is an iceberg phenomenon due to the consistent increasing number.<sup>4</sup>

The stimulus of sexual violence may vary from multiple factors, from drug abuse, addiction to porn, history of sexual abuse to the perpetrators which drives them to commit vengeful acts, and many other factors, one of which is paraphilia.<sup>5</sup> Paraphilia may be identified as a sexual deviation from an individual, since the sexual motives are different from what's necessary and unaligned with societal norms.<sup>6</sup> Paraphilia may take many forms, some of which are formally classified in the Guide to Mental Health Classification and Diagnosis in Indonesia III (PPDGJ-III). This includes, fetishism, fetishistic transvestism, exhibitionism, voyeurism, paedophilia, sadomasochism, multiple disorders of sexual preference, other disorders of sexual preference, and unspecified disorder of sexual preference. Some forms of paraphilia such as pedophilia and exhibitionism already are regulated in specific offenses under the Law.

Fetishism is a sexual deviation where the subject has an intense sexual obsession to an uncommon object or non-genital body parts which usually do not trigger a sexual urge. Referring to PPDGJ-III and Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), fetishism is one form of mental disorder under the category of preferential issue with the code F65.0. In relation to paraphilia or sexual preference issue as a form of mental disturbance, there is a verdict from Surabaya District Court number 2286/Pid.Sus/2020/PN Sby and the verdict from the Supreme Court number 865K/Pid.Sus/2013. The verdict from Surabaya District Court number 2286/Pid.Sus/2020/PN Sby regarding the case of GA, who has the fetish of *jarik* cloth, which was viral in 2020. In this verdict, GA is pronounced guilty and sentenced to imprisonment for 5 years and 6 months, even though GA was diagnosed with fetishism by the experts. In another verdict, which is the verdict from the Supreme Court number 865K/Pid.Sus/2013, the perpetrator is AD who is diagnosed with paraphilia in the form of exhibitionism. In this decision, AD is pronounced free from all legal charges under the consideration that AD is inhibited with exhibitionism, which is a disease that has plagued him since long and therefore rendered him unable to control himself.

Whereas, as stated before, exhibitionism is a form of paraphilia that has been regulated under a specific offense, which is Article 281 in old Criminal Code (KUHP) and therefore becomes a criminal act and no longer just a special condition, in relation to moral offenses. While the status of fetishism in this case is purely a special condition in relation to moral offenses, in this case sexual violence.

## **III. FETISHISM FROM THE PERSPECTIVE OF PRINCIPLE OF LEGALITY**

Moeljatno as quoted by Topo Santoso, stated that article 44 from the old KUHP stipulates that the reason why the defendant cant's be convicted is due to their inability to be accountable for their actions, due to their mental disturbances or sickness.<sup>7</sup> This is

<sup>3</sup> Fauzia, Mutia. 2022. "KemenPPA: 797 Anak Jadi Korban Kekerasan Seksual Sepanjang Januari 2022" Accessed July 2, 2022. <https://nasional.kompas.com/read/2022/03/04/17062911/kemenpppa-797->

<sup>4</sup> Hardianingsih, Dea. 2022. "Menteri Bintang Sebut Kasus Kekerasan Seksual Meningkatkan Di Masa Pandemi Covid 19" Accessed June 30, 2022. <https://www.jpnn.com/news/menteri-bintang-sebut-kasus-kekerasan-seksual-meningkat-di-masa-pandemi-covid-19>.

<sup>5</sup> Aisyah, Poetri Azela. 2017. "Faktor-Faktor Penyebab Melakukan Kekerasan Seksual Terhadap Korban Kekerasan Seksual Dampingan Pusat Layanan Informasi Dan Pengaduan Anak (Puspa) Di Pusat Kajian Dan Perlindungan Anak (PKPA) Medan". Universitas Sumatera Utara.

<sup>6</sup> Nevid, Jeffrey S. 2009. "Gender Dan Seksualitas: Konsepsi Dan Aplikasi Psikologi." Nusamedia.

<sup>7</sup> Santoso, Topo. 2023. *Asas-Asas Hukum Pidana*. Depok: PT Rajagrafindo Persada.

as long as there is a causality between the fetish and the crime, like molestation. The mental illness factor renders someone unable to be accountable since it does not meet the elements of criminal liability, which is the ability to be responsible and the absence of any pardoning reasons.

Recently, on December 2nd 2022, the government has legalized a KUHP bill (RUU) to become law. Aside than that, in relation to sexual violence, the government also legalized Law Number 12 Year 2022 regarding Sexual Violence Crime (UU TPKS). With the legalization of the two laws, then it can't be denied there will be changes that will impact on fetishism as the reason for criminal annulments. Based on the aforementioned matters, there are a few notes that the researchers would like to put forward. Once, until this research is conducted, the researcher could not find a stipulation that relates to fetishism as *actus reus*, whether implicit or explicit. Under this first note, the researcher deems that it is imperative to conduct further research regarding the regulation of fetishism as *actus reus*, mainly on UU TPKS. Second, whether or not fetishism as a form of mental illness can be considered as a reason for a criminal annulment, which is the pardoning reasons, based on the old KUHP stipulation, specifically Article 44 of old KUHP.

In relations with the sexual violence, one factor that drives the crime is paraphilia or sexual deviations. The presence of the sexual deviation drives the perpetrator to commit actions to fulfill their deviant lusts, mostly without the consent from the victims. In fetishism, a sexual object is named a fetish. Paraphilia itself is categorized as a mental disorder in the Guide to Mental Health Classification and Diagnosis in Indonesia III (PPDGJ-III). Quoting from an international journal written by Yakeley and Wood, who are each a psychiatric consultant and a clinical psychologist consultant,

*"we believe that some individuals who experience unusual and distressing sexual fantasies, impulses, and behaviors should be classified as having a mental disorder".<sup>8</sup>*

Fethisism, as mentioned before, is a form of mental disorder. Therefore, for sexual crimes, fetishism can be used as a pardoning reason since there is causality between fetishism and sexual violence. A sexual violence perpetrator that is diagnosed with fetishism, in accordance to Article 44 KUHP, should not be convicted or may be checked into a Psychiatric Hospital under one year probation. This is still referring to criminal accountability conditions, in which the conditions have a cumulative value. Sexual violence perpetrator with fetishism is not fulfilling the 4th condition from the criminal accountability, which is the absence of pardoning reasons. The absence of the 4th conditions from the criminal accountability renders the sexual violence perpetrator with fetishism also not have the ability to be accountable for the actions done due to the mental condition, as such that the 2nd condition from the criminal accountability, which is the ability to be accountable is also not fulfilled. Under this second note, the researcher deems the importance to conduct further research regarding the role of fetishism as the reason for a criminal annulment, considering the legalization of Law Number 1 Year 20233 regarding New Criminal Code or National KUHP, hence there must be amendments or new lawful dynamics towards the matter.

Later on, from this research, it will be unraveled, the role of fetishism as the reason for criminal annulment after the legalization of UU TPKS and National KUHP and the legality of fetishism as *actus reus*. This research is compiled using juridical-normative methods, where primary issues will be studied using legislations, law journals and books. Aside from those sources, it's also possible to use news, expert's opinions, and other sources in regards to the related issues. The use of those sources is meant to sharpen and deepen the researcher's analysis in studying the related issue.

#### **IV. THE SHIFT OF FETHISISM AS THE REASON TO OMIT CRIMES UNDER THE CRIMINAL LAW**

Since its independence until now, Indonesian criminal law is still based on the Criminal Code made by the Dutch. Until 2023, the National KUHP becomes the first law to be legalized in 2023 to replace the old Dutch-made KUHP. The old KUHP has experienced an overhaul, which is natural, considering the fact that the KUHP has never experienced any amendments before. Aside than the National KUHP, another recent law that has passed before KUHP is Law Number 12 Year 2022 regarding Sexual Violence Crimes (UU TPKS). Before the existence of UU TPKS, sexual violence were only based from KUHP as the platform of law in Indonesia. Along the way, motives and mode of sexual violence become vary, then KUHP is no longer enough to overcome the sexual violence problems. Hence, UU TPKS is passed to accommodate matters of sexual violence. For example, non-physical sexual harassment as a form of sexual violence is already included inside UU TPKS. Aside than that, stipulations inside UU TPKS are more relevant with the current development of sexual violence.

Moeljatno, as quoted by Topo Santoso, stated that for someone to be able to be convicted, there must be a mistake. To prove that mistake, the degree of accountability must be proven as well. Since the people that become suspect, and then defendant, in the court, are generally those who are mentally normal and able to be accountable, and these elements are always considered present,

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<sup>8</sup> Yakeley, Jessica and Heather Wood. 2018. "Paraphilias and Paraphilic Disorders: Diagnosis, Assessment and Management" *Cambridge University Press* 20, no. 3.

except if there are signs that show that the defendant might not be mentally normal.<sup>9</sup> There are two reasons to annul crimes, which are pardoning factors and justification factors. Pardoning factor (*schulduitsluitingsgronden*) is the reason that annuls the mistakes (*schuld*). While justification factors (*rechtvaardigingsgronden*) is the reason that annuls the unlawfulness (*wederrechtelijkheid*). In relation to article 44 from the old KUHP, regarding to the defendant showing signs of mental abnormalities, Topo Santoso stated that the Judge may order an examination of the defendant by asking assistances from psychiatric experts, thus making the decision more accountable. So, what must be inspected are two important points: First, there is a causality between a disease (mental disorder and mental illness) and the action perpetrated; second whether the perpetrator can be blamed for their actions.<sup>10</sup>

After the legalization of the National KUHP, there is an amendment to the criminal annulment reasons. The reasons for criminal annulments in the National KUHP are better categorized, with better details. The justification reason is regulated from Article 31 to Article 35, whereas pardoning conditions is regulated from Article 40 to Article 44. Judging from the Article's stipulations, there is no stipulation that regulates regarding criminal actions from a person with a certain mental condition, thus it's clear and real that the mental state of a person is no longer included as a reason for criminal annulment in the National KUHP.

Article 38 in the National KUHP determines that every person that during the time of crime has a mental disability, may receive reduced sentence and/or imposed with sanctions. There will be no criminal liability towards the person with a mental disability if the condition comes with acute recurrence accompanied with psychotic episodes, however the person will be imposed with sanctions in accordance with Article 39 from the National KUHP. In this case, article 39 from the National KUHP is categorized as unable to be accountable, while article 28 from the National KUHP only relates to the lack of accountability. From these stipulations it can be concluded that a mentally disturbed person that perpetrated crime may no longer be free from all lawsuits. Fetishism itself is a sexual deviation that may cause a distress for the sufferer, yet there is no source that states that fetishism sufferer may experience a condition of acute recurrence or a condition where the fetishism sufferer after treatment, is fully healed with no chance of recurrence even after depression or stress.

The National KUHP Article 38 itself in the stipulation uses the diction "and/or", which can be interpreted as a judge to impose a reduced punishment along with sanctions or the judge may only impose reduced punishment or the judge may only impose sanctions to the perpetrator. While in Article 39 from the National KUHP, there is no option aside from imposing imperative sanctions. This stipulation is vastly different from the Old KUHP, which may set free the perpetrator if they have a mental disability or illness. Aside than that, considering that Article 38 from the National KUHP also uses the diction "may", which can be interpreted that the reduce of punishment to the mentally ill perpetrator is optional, thus not closing the probability for the judge to impose full punishment in accordance with the law.

Next, regarding the sexual violence, Law Number 12 year 2002 regarding Sexual Violence Crimes (UU TPKS) has been legalized. UU TPKS as *lex specialis* does not regulate special stipulations related to sexual violence perpetrators with mental illness. On the other side, UU TPKS also admits the existence of sanctions as a form of punishment to the perpetrator, the same as in the National KUHP. Article 17 paragraph 1 from UU TPKS states that the perpetrator of sexual violence crimes may not only be imposed with criminal punishments, but may also be imposed with sanctions in form of a rehabilitation. The aforementioned rehabilitation includes medical rehabilitation and social rehabilitation. The rehabilitation itself is an effort to restore the perpetrator from physical, mental and social disturbances, so they may resume conducting their roles back normally.

Unfortunately, the stipulation from Article 17 UU TPKS does not specify in detail several crucial matters, such as the kinds of Sexual Violence Crime and which Sexual Violence Crime criteria that may be imposed with the sanctions. Aside from that, judging from the stipulations inside UU TPKS, the forms of rehabilitation regulated inside UU TPKS include medical rehabilitation, social rehabilitation, and mental and social rehabilitation. Each definition of the forms of these rehabilitations may be found inside the explanation of UU TPKS articles. What needs to be paid attention to, in relation to mentally ill perpetrators with paraphilia, is the medical rehabilitation and mental and social rehabilitation.

Under the explanation of Article 17, paragraph 2 letter a of UU TPKS, it is explained that "medical rehabilitation" includes psychiatric rehabilitation. Whereas, the definition of mental and social rehabilitation can be found in the explanation of Article 70, paragraph 1, letter b which includes physical, psychological, psychosocial and mental spiritual rehabilitation. Considering both definitions of the forms of rehabilitation, there will be a certain challenge caused by the likeness between medical rehabilitation and mental rehabilitation, which both relate to a person's psychological state, so it would create a new division to question which one is more appropriate.

Criminal Law recognizes the elements *actus reus* and *mens rea*. In criminalistic, a physical action is known as *actus reus*, whereas the mental state or the wellbeing of mind of a perpetrator is called *mens rea*. So, *actus reus* is an external element, whereas *mens rea* the fault element or mental element.<sup>11</sup> *Actus reus* and *mens rea* themselves are included in the element of material

<sup>9</sup> Topo Santoso, *op.cit.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Munawar, Kukun Abdul Syakur. 2015. "Pembuktian Unsur Niat Dikaitkan Dengan Unsur Mens Rea Dalam Tindak Pidana

crime. In other source, *actus reus* is stated as an action element, which refers to the action or deeds that breaks the law. *Mens rea* is interpreted as the fault element that relates to the perpetrator's mental and intention when committed the action. The fault principle demands that the perpetrator has consciousness and a free will for committing the crime.<sup>12</sup>

As mentioned before that there are other forms that are officially listed in PPDGJ-III and DSM-5 as paraphilia, such as exhibitionism and pedophilia. Exhibitionism or exhibition disorder is a condition marked by the impulse, fantasy, or action to expose one's genitals to others without consent, specifically strangers. This condition is considered as paraphilia, which leads to persistent and intense atypical sexual desire.<sup>13</sup> Pedophilia is a sexual disorder in form of an attraction or the presence of sexual desire to children or teenagers under 13. This deviation is a part of sexual paraphilia. Pedophilia itself is different with sexual abuse against children. A pedophile has a sexual attraction for children, but doesn't encourage them to force sexual contacts.<sup>14</sup> Judging from the explanation related to exhibitionism and pedophilia, it can be seen that whether exhibitionism or pedophilia are both acknowledged as paraphilia. However, in reality under Indonesian stipulations of criminal law, it is contradictory to the fact that both are considered as mental illnesses.

Under the stipulation inside the old KUHP as explained above, there is a stipulation that makes mental illness as criminal annulment factor, which is the pardoning reason. However, in the same law, which is the old KUHP, there are also stipulations that regulate exhibitionism and pedophilia as crime offenses, even though both are not explicitly mentioned as "exhibitionism" or "exhibition disorder" or "pedophilia". Article 281 from the old KUHP stated that:

1. *Anyone who deliberately and openly violates decency;*
2. *Anyone who deliberately violates decency in front of others present; is liable to imprisonment for as long as two years maximum and a fine for as much as four thousand and five hundreds rupiah maximum."*

The stipulation in Article 28 paragraph 2, even though not mentioning "exhibitionism" or "exhibition disorder" explicitly, yet the described actions are the definition of exhibitionism.

On the other side, in relations with pedophilia, Article 290 paragraph 2 in the Old KUHP stipulates that,

*"anyone who commits an act of indecency with someone, knowing or should be expecting, that the age is under fifteen or if the age is unclear, the concerned party is not yet the time to get married, is liable for imprisonment for as long as seven years maximum".*

Article 290 paragraph 2 in the Old KUHP also did not mention explicitly the word or term "pedophilia", but the formulation of action in the stipulation matches with the description of pedophilia.

As explained before that in pedophilia, even though an act of indecency is done, but basically the indecent act is done without the element of force against the victim. This is in line with Article 290 paragraph 2 in the Old KUHP that there is no mention of the use of force, so it's clear that this stipulation is in accordance to the definition of pedophilia. With the overlaps between Article 44 KUHP regarding mental illness as a pardoning reason, Article 281 paragraph 2 KUHP regarding exhibitionism, and Article 290 paragraph 2 regarding pedophilia, it can be interpreted that even though the exhibitionism and pedophilia are included as mental illnesses which can be pardoned using Article 44 KUHP, they become unable to be pardoned since they have been stipulated in one independent offense.

Whereas fetishism in the Old KUHP was not regulated as an independent offense, therefore liable to be imposed with Article 44 KUHP based on the criteria from medical perspective. After the legalization of UU TPKS and the National KUHP, fetishism as a separate offense still can't be found. This is possible since fetishism is still considered as a matter that is not urgent enough, especially since fetishism cases are mostly done through social media without the physical contact with the victim, so it's still considered as trivial.

Even so, in the UU TPKS, there are several stipulations that may have the chance to capture sexual violence perpetrators with fetishism, which are Article 4 paragraph 1 letter a and i which determines that a sexual violence crime includes non physical sexual harassment and electronic-based sexual violence and Article 4 paragraph 2 letter d determines that Sexual Violence Crime also includes acts of indecency done without the victim's' consent. In this case UU TPKS formulates 2 terms, which are sexual harassment and sexual violence which there are no definitions for both terms in the Law, so it's still can't be certain whether fetishism is included under the sexual harassment category or the sexual violence category based on UU TPKS.

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Korupsi," *Jurnal Unigal*.

<sup>12</sup> Rangkuti, Maksum. 2023. "Hukum Pidana Materil: Unsur, Aspek, Dan Prinsip" Accessed October 24, 2023. <https://fahum.umsu.ac.id/hukum-pidana-materil-unsur-aspek-dan-prinsip/>.

<sup>13</sup> Makarim, Fadhli Rizal. 2022. "Senang Pamer Kelamin, Ini 2 Penyebab Eksibisionis Yang Perlu Diketahui" Accessed November 2, 2023. <https://www.halodoc.com/artikel/senang-pamer-kelamin-ini-2-penyebab-eksibisionis-yang-perlu-diketahui>.

<sup>14</sup> AloDokter. 2022. "Kenali Apa Itu Pedofil Beserta Ciri-Ciri Dan Penanganannya" Accessed November 22, 2023. <https://www.alodokter.com/kenali-apa-itu-pedofil-beserta-ciri-ciri-dan-penanganannya>.

## **V. CONCLUSION**

Sexual violence number is still increasing every day which have paraphilia as its one of stimulus. Paraphilia may take many forms, some of which are formally classified in the PPDGJ-III and DSM-5. Fetishism as one of the form of paraphilia caused many stir for how it have to be treated in the front of law whether it should be a criminal annulment reasons or not. After the legalization of the National KUHP, there is no stipulation that regulates regarding criminal actions from a person with a certain mental condition, thus it's clear and real that the mental state of a person is no longer included as a reason for criminal annulment in the National KUHP and the person may receive reduced sentence and/or imposed with sanctions unless the condition comes with acute recurrence accompanied with psychotic episodes. Regarding the fetishism as *actus reus* issue, we do compare it with exhibitionism and pedophilia as they were all included in the form of paraphilia. As in Old KUHP, fetishism was not regulated as an independent offense and remains unregulated in UU TPKS and National KUHP. Since we use the principle of criminal sentences as *ultimum remedium*, we recommend and believe that it is best to give not punishment such as imprisonment or fine but action sanctions as in rehabilitation. It may brings more utility and bigger chance to not do it again since they have to be treated medically, and by giving them imprisonment seems like we don't treat the source of the problem.

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Page No. 461-467

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**Judicial Review of the Authority to Investigate Financial Crimes after the Constitutional Court Decision Number 59/PUU-XXI/2023: Comparison of Indonesia, Australia, Japan and Germany**

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Page No. 514-530

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## Accountability of the Financial Services Authority in Indonesia, Australia, Germany, France and Japan

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### **Implementation of Perkasal Policy Number 38 of 2021 Regarding the Acceptance of Cadets and Cadets of the AL Navy Academy in a Gender Perspective**

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### **Factors Affecting the Working Class in Vietnam Today: A Study from the Perspective of Spiritual and Cultural Life**

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