

Critical Analysis of Application of Article 303 BIS Paragraph (1) to 1 of The Criminal Code in Accessible Cases Online Gambling

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Abstract

Gambling in Indonesia is distinguished into two, ordinary gambling regulated in the Criminal Code and online gambling as stipulated in Law No. 11 of 2008 on Information and Electronic Transactions. Defendant Aan alias Andi committed a crime of online gambling by the way the defendant became an online gambling agent and the defendant was tasked with sharing the access code namely password and ID to the players who wanted to become members of the defendant's online gambling. The defendant will benefit from the players using the defendant's access code. The problem that the researchers reviewed relates to the application of Article 303 bis paragraph (1) to 1 of the Criminal Code by the judge on criminal acts making accessible gambling content carried out by defendant Aan alias Andi. Writing these laws using methods approach juridical normative that focused on research on data library. The specification of research that used a descriptive analytical, namely give a description data and carefully as completely as possible about the object of the problem as the result of the study library various literature, legislation, and other ingredients that deals with discussion at in writing the study case. Based on the results of the research, it is known that: First, the judge decided that the defendant Aan namely Andi used Article 303 bis paragraph (1) to 1 of the Criminal Code which was inappropriate because in Article 303 bis paragraph (1) to 1 of the Criminal Code there was no element of making gambling content accessible and making gambling content accessible has been specifically regulated in Article 27 paragraph (2) of the ITE Law. Second, Decision Number 184/Pid.B/2018/PN.Btm does not reflect the objectives of the law, namely justice, certainty and expediency which will have an impact on the weakness of the law enforcement process for the crime of gambling due to the low sentence given by the panel of judges.

A. Introduction

The use of electronic media is currently growing very rapidly. According to the digital marketing research institute Emarketer estimates that in 2018 the number of active smartphone users in Indonesia is more than 100 million people out of the 250 million population in Indonesia. The use of electronic media of this size can make Indonesia the fourth largest active smartphone user in the

world after China, India and America. Along with the development of electronic media users who are growing rapidly as the data above, crime is also growing. One of the crimes that is developing is gambling through electronic media or online gambling.¹

¹ According to Kartini Kartono, gambling Indah Rahmayani. Indonesia Raksasa Teknologi Digital. https://kominfo.go.id/content/detail/6095/indonesia-raksasa-teknologi-digital-asia/0/sorotan_media (diakses pada hari Jumat, 22 November 2019).

is a conscious betting of a value or something that is considered valuable, in a game, event, competition and incidents. A game can be categorized as gambling if in that game there are players who win and players who lose. So not all games can be categorized as gambling.² Gambling can also be said to be a game using money or valuables as a bet (such as playing dice, cards, or by guessing the final number of an official lottery).³

In the Criminal Code, hereinafter referred to as the Criminal Code, it is stated that in gambling games the possibility of making a profit depends only on the skill of the players (gamblers) and on the sheer luck factor.⁴ So what is meant by gambling is a form of game such as dice, cards and others by using bets in the game and the victory is not only chancy but also requires expertise in playing. Regulations regarding gambling in the Criminal Code are contained in Article 303 of the Criminal Code and 303 bis of the Criminal Code. However, regulations regarding gambling are not only listed in the Criminal Code. As explained above, due to the rapid development of information and communication technology, Indonesia has prevented crimes from occurring by adding regulations regarding gambling from electronic media. The addition of this regulation also relates to gambling regulations.⁵ Based on Law no. 11 of 2008 in conjunction with Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions, hereinafter referred to as the ITE Law, gambling is also regulated in Article 27 paragraph (2) of Law no. 11 of 2008 concerning Information and Electronic Transactions, hereinafter referred to as the ITE Law.

2 Kartini Kartono, *Patologi Sosial*, (Jakarta: Raja Grafindo Persada, 2001), 65.

3 Kamus Besar Bahasa Indonesia, <https://kbbi.web.id/judi>, (diakses pada hari Jumat, 22 November 2019).

4 Andi Hamzah, *KUHP dan KUHP*, (Jakarta: Rineka Cipta, 2015), 122-123.

5 Hetty Hassanah, "Tindak Pidana Perjudian Melalui Internet (Internet Gambling) Ditinjau Dari Undang-Undang Nomor 11 Tahun 2008 Tentang Informasi dan Transaksi Elektronik", *Majalah Ilmiah UNIKOM*, Vol. 8, no. 2, (2011): 238.

Online gambling is one type of cybercrime that is mushrooming in Indonesia and has been regulated in Article 27 paragraph (2) of the ITE Law which reads:

"Every person intentionally and without rights distributes and/or transmits and/or makes Electronic Information and/or Electronic Documents that have gambling content accessible"

The purpose of distributing and/or transmitting is sending and/or disseminating electronic information and/or electronic documents to one or many people through an electronic system. While making accessible are all actions other than distributing and transmitting through an electronic system which causes electronic information and/or electronic documents to be known by other parties or the public or the act of giving access codes to players so that players can play gambling either directly or indirectly.⁶

Based on the explanation above, it can be concluded that those who can be charged using Article 27 paragraph (2) of the ITE Law are people who play gambling through electronic media. Whereas Article 303 of the Criminal Code and Article 303 bis of the Criminal Code regulate the crime of gambling that does not go through electronic media.

Gambling through electronic media or often referred to as online gambling is in principle almost the same as gambling that is not through electronic media or ordinary gambling. Online gambling is also very dependent on luck. A significant difference between online gambling and regular gambling is that in online gambling, gamblers are required to make payments and withdraw money via Visa, Mastercard, Bank Wire Transfer, Maestro, and others.⁷

Even online gambling, not just anyone can access it because it requires an ID and password that is registered on the gambling site or website. Online gambling can only be

6 Syarifuddin Kalo, Mahmud Mulyadi, dkk, "Analisis Yuridis Pembuktian Tindak Pidana Judi Online Menurut Undang-Undang Nomor 11 Tahun 2008 Tentang Informasi dan Transaksi Elektronik", *USU Law Jurnal*, Vol. 6, no. 2, (April 2018): 33.

7 Sally Gainsbury, *Internet Gambling: Current Research Findings and Implication*, (New York: Springer, 2012), 14.

carried out using electronic media, namely computers, cellphones, laptops that are connected to the internet network, while ordinary gambling can be carried out in various places openly or surreptitiously.⁸

Ordinary gambling also requires players to meet face to face or it can be said to use real facilities and in terms of payments, they also use cash directly. So the difference between online gambling and ordinary gambling can be seen clearly from the media used.⁹ As a result of the convenience of online gambling, gamblers do not rule out the possibility of switching to online gambling or the effect of the convenience of online gambling can attract new players. That is, the average person who plays gambling wants to get money easily and thinks gambling is not too risky compared to committing other crimes.¹⁰

Regarding online gambling, in this study the authors discuss online gambling with Decision Number 184/Pid.B/2018/PN.Btm. In this decision the defendant Aan alias Andi was convicted of gambling under Article 303 bis paragraph (1) to 1 of the Criminal Code. The legal facts from the decision describe that Aan alias Andi as the defendant committed the crime of gambling by providing an access code in the form of a username and password to be able to access an online gambling site called SBOBET.com which the defendant Aan alias Andi gave to witness Rudi alias Yongki or other prospective players. So that the actions of Aan alias Andi made online gambling content accessible.

Another legal fact is when a team from the Balerang City Police checked the cellphones of the defendant Aan alias Andi and witness Rudi alias Yongki that it was true that they were gambling online. Then the defendant

Aan alias Andi as an online gambling agent was tasked with lending his account to the witness Rudi alias Yongki which contained a credit facility of 10,000 (ten thousand), if cashed in the amount of Rp. 10,000,000 (ten million rupiah). Then witness Rudi alias Yongki opened the SBOBET.com site and made an online betting bet on the Spanish League category ball match between Real Madrid and Valencia. The witness at that time placed a bet of IDR 300,000 (three hundred thousand rupiah) or 300 (three hundred) credit for Valencia, while the defendant, who is an agent, will automatically hold Real Madrid. However, the victory at that time was held by Real Madrid with a score of 4 (four) 1 (one) so that the witness was declared a complete loser. Then on the same date the game continued to the Premier League, namely the match between Leicester city VS Peterborough United. The witness on this occasion installed a 300 (three hundred) credit for Leicester City which gave voor 1/(4) (one quarter) of Peterborough United held by the defendant, and because Leicester City won with a score of 5 (five) 1 (one) then the witness was declared as the winner with a total win of Rp. 3,000,000.- (three million rupiah) or 3,000 (three thousand credits). Then the defendant will get a profit of 25% (twenty five percent) of the winnings won by everyone who uses the username and password given by the defendant to the witness to play online gambling.

Based on the judge's considerations in Decision Number 184/Pid.B/2018/PN.Btm, the defendant Aan alias Andi was convicted using Article 303 bis paragraph (1) to 1 of the Criminal Code which reads as follows:

"Whoever takes part in a gambling game that is held on a public road or on the side of it or in a place accessible to the general public, unless there is permission from the competent authority to hold it."

If you look at developments in Indonesian law, the actions committed by the defendant Aan alias Andi have been specifically regulated (*lex specialis*) in the ITE Law, namely in Article 27 paragraph (2) relating to making electronic information and/or electronic do-

8 Putri Ayu Trisnawati, Abintoro Prakoso, dkk, "Kekuatan Pembuktian Transaksi Elektronik dalam Tindak Pidana Perjudian Online dari Perspektif Undang-Undang Nomor 11 Tahun, 2008 Tentang Informasi dan Transaksi Elektronik (Putusan Nomor 140/Pid.B./2013/PN-TB)", *Jurnal Ilmu Hukum Universitas Jember*, (2015): 2.

9 Ibid.

10 Budi Suhariyanto, *Tindak Pidana Teknologi Informasi (Cybercrime): Urgensi Pengaturan dan Celah Hukumnya*, (Jakarta: Raja Grafindo, 2013), 168.

cuments that have gambling content accessible.

In Decision Number 184/Pid.B/2018/PN.Btm the judge decided that the defendant Aan alias Andi used Article 303 bis paragraph (1) to 1 of the Criminal Code without considering the intention of the accused Aan alias Andi in using electronic media. The author found in the decision of the panel of judges that the panel of judges did not pay attention to the principle of *lex specialis derogat legi generali* and the decision did not have a deterrent effect on gamblers, especially bookies that facilitate people who want to gamble. The defendant Aan alias Andi deliberately became an online gambling agent to gain an advantage. This problem is important to discuss because the law enforcement process will be very influential in terms of eradicating criminal acts of gambling by law enforcement officials. So that in this case the question is the judge's consideration in applying a more general law, namely Article 303 bis paragraph (1) to 1 of the Criminal Code (*lex generalis*) and setting aside a more specific law (*lex specialis*), namely Article 27 paragraph (2) UU ITE. On the other hand, this writing also intends to provide an analysis of the legal consequences of the application of Article 303 bis paragraph (1) to 1 of the Criminal Code by the judge to the defendant Aan alias Andi in Decision Number 184/Pid.B/2018/PN.Btm.

Taking into account the matters described above, what will be the reference in this writing is the consideration of judges in deciding online gambling cases using Article 303 bis paragraph (1) to 1 of the Criminal Code and not using Article 27 paragraph (2) of the ITE Law.

B. Research Method

The writing of this law uses a normative juridical approach that focuses on research on library data. The specification of the research used is analytical descriptive in nature, namely providing a complete and accurate description of the data regarding the object of the problem as a result of a literature study of various literature, legislation, used to research, explore, and examine the applicati-

on of Article 303 bis paragraph (1) to 1 of the Criminal Code and Article 27 paragraph (2) of the ITE Law in Decision Number 184/Pid.B/2018/PN.Btm, as well as other materials related to the discussion in writing this case study.

The purpose of analyzing Decision Number 184/Pid.B/2018/PN.Btm, is so that it can become input for the parties concerned in terms of application of law, especially in online gambling crimes, so that the eradication of online gambling crimes can be carried out properly. Furthermore, the data obtained will be checked for validity, so that the data collected can be analyzed, interpreted, considered, and drawn conclusions to be poured into sentences.

C. Results and Discussion

1. Juridical and non-juridical considerations in applying Article 303 Bis Paragraph (1) to 1 of the Criminal Code on Online Gambling Crimes in Decision Number 184/Pid.B/2018/PN.Btm Reviewed with Criminal Law and ITE Law

The public prosecutor in Decision Number 184/Pid.B/2018/PN.Btm charged Aan alias Andi as follows:

First Indictment

Primary: violating Article 303 bis paragraph (1) to 1 of the Criminal Code;

Subsidiar: violating Article 303 bis paragraph (1) to 1 of the Criminal Code;

Or

Second: violating Article 27 paragraph (2) of Law no. 11 of 2008 jo. Article 45 paragraph (2) Law no. 19 of 2016 concerning Amendments to Law no. 11 of 2008 concerning Information and Electronic Transactions.

The indictment used by the public prosecutor to convict the defendant Aan alias Andi in Decision Number 184/Pid.B/2018/PN.Btm is in the form of an alternative cumulative. This makes the judge obliged to prove one by one the elements of the public prosecutor's indictment first. In Article 303 paragraph (1) 1 of the Criminal Code, based

on the judge's considerations, the actions of the defendant Aan alias Andi did not fulfill the elements in that article. The elements contained in Article 303 paragraph (1) to 1 of the Criminal Code are as follows:

1. Whoever;
2. Without obtaining permission;
3. Deliberately offering or giving opportunities for gambling games and making it as a quest or deliberately participating in a company for that;

Based on the judge's considerations, the actions of the defendant Aan alias Andi did not fulfill element 3 in Article 303 paragraph (1) 1 of the Criminal Code, because based on the facts of the trial, the defendant Aan alias Andi did not make online soccer gambling games a livelihood. Furthermore, in the first subsidiary indictment, the public prosecutor charged the defendant Aan alias Andi with using Article 303 bis paragraph 1 to (1) of the Criminal Code. In this article, according to the judge's considerations and the facts of the trial, the actions of the defendant Aan alias Andi fulfill all the elements contained in the second indictment, which reads as follows:

"Whoever takes part in a gambling game that is held on a public road or on the side of it or in a place accessible to the general public, unless there is permission from the competent authority to hold it."

In Article 303 bis paragraph (1) to 1 of the Criminal Code, there is an element of participating in gambling games. According to R. Soesilo, participating in or jointly carrying out means that there must be two people, namely the person who committed it and the person who participated in the crime. Participating means both the person doing it (pleger) and the person who participates in doing it (medepleger), the two people must all carry out the implementation act, so it is not permissible to only carry out preparatory actions or actions that are only helpful in nature.¹¹ Furthermore, according to Wirjono Prodjodikoro, citing Hazewinkel-Suringa's opinion, the Hoge Raad of the Netherlands put for-

¹¹ R. Soesilo, Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komenta-Komentarnya Lengkap Pasal Demi Pasal, Bogor: Politeia, 2013.

ward two conditions for having committed a crime, namely:¹²

1. Conscious cooperation between actors which is then a mutual will among them;
2. They must together do the will

When linking the above expert opinion to the case contained in Decision Number 184/Pid.B/2018/PN.Btm, the actions of the defendant Aan alias Andi included participating in the crime of gambling. The participation of the defendant Aan alias Andi was proven by the defendant Aan alias Andi as a gambling agent providing facilities in the form of an access code to be able to enter online gambling websites for prospective players. The defendant Aan alias Andi made it easier for the players to be able to play online gambling and it was from the players' wins that the defendant Aan alias Andi would receive benefits according to the agreement. So if you look at the evidence, the defendant's statement, witness testimony, instructions, and theories, in this case the judge has correctly decided on the criminal act of the defendant by using Article 303 bis paragraph 1 to (1) of the Criminal Code.

However, it should be noted that Article 303 bis paragraph (1) of the Criminal Code does not specifically regulate electronic media used by the defendant Aan alias Andi for profit. Gambling through electronic media has actually been specifically regulated in Article 27 paragraph (2) of the ITE Law, which reads as follows:

"Every person intentionally and without rights distributes and/or transmits and/or makes Electronic Information and/or Electronic Documents that have gambling content accessible"

The elements of distributing and/or transmitting and/or making Electronic Information and/or Electronic Documents that have gambling content above show that Article 27 paragraph (2) of the ITE Law specifically regulates online gambling. The existence of more specific regulations regarding gambling should make judges prioritize using Article 27 paragraph (2) of the ITE Law com-

¹² Wirjono Prodjodikoro, Asas-Asas Hukum Pidana di Indonesia, Bandung: PT Refika Aditama, 2003, 123.

pared to Article 303 bis paragraph (1) to 1 of the Criminal Code, this is in accordance with the principle of *lex specialis derogate legi generalis*. So, by referring to the principle of *lex specialis derogate legi generalis*, the judge decided that using Article 303 bis paragraph (1) to 1 of the Criminal Code against the accused Aan alias Andi was inappropriate.

The most fundamental change in the revision of the Judicial Powers Act is the regulation of the dissenting opinion institution which is very different from the previous laws and regulations. Law Number 48 of 2009 states that in a deliberative session, each judge is required to submit written considerations or opinions on the case being examined and becomes an integral part of the decision. This provision further states that in the event that a deliberative session cannot reach a unanimous consensus, the different opinions of the judges must be included in the decision. The decision that will be handed down by the court depends on the outcome of the deliberative session based on the assessment they obtained from the indictment related to everything that was proven during the examination at the trial court.

Every judge has the freedom to decide a case. The legal basis for the principle of freedom of judges is contained in Article 24 paragraph (1) of the 1945 Constitution which stipulates that "The judicial power is an independent power to administer justice in order to uphold law and justice. In historical interpretation, it can be seen that the article by the author meant that the judiciary was free from the intervention of the executive branch or institutions and individuals. The principle contained therein is that independence, freedom or independence is institutional in nature, namely the judiciary, but in deciding a case the judge should pay attention to the principle of *lex specialis derogate legi generalis*, namely special law (*lex specialis*) overriding general law (*lex generalist*). So that the panel of judges in Decision Number 184/Pid.B/2018/PN.Btm should have imposed a sentence based on Article 27 paragraph (2) of the ITE Law. Philosophically¹³ the decision of the judge or panel of judges which was

¹³ Ibid, 222.

initially an individual or assembly decision, but when the gavel of the judge is knocked as a sign of a decision, then at that time the judge's decision must be seen as an institutional court decision, because after the judge's decision or the decision of the panel of judges uttered in a trial that is open to the public, then such decision has been transformed into a court institution decision and has become public property. So to avoid public criticism, the panel of judges for Decision Number 184/Pid.B/2018/PN.Btm must pay attention to the principles of applicable law.

Furthermore, what makes Decision Number 184/Pid.B/2018/PN.Btm less precise, because according to Nazura Abdul Manaf, an act can be categorized as cybercrime, namely if there is an element of a computer connected through a telecommunication device in the form of an online internet which becomes a media. for a person or group to commit an offense and or cybercrime. When the defendant Aan alias Andi committed the crime of online gambling, the defendant Aan alias Andi needed to use an online internet network, which in this case was in accordance with the statement from Nazura Abdul Manaf. So, in this case the judge was not quite right in deciding the defendant Aan alias Andi using Article 303 bis paragraph (1) to 1 of the Criminal Code because the actions of the defendant Aan alias Andi were not ordinary gambling crimes. The defendant's actions are actions that fall into the category of cybercrime. According to Dikdik M. Arief Mansur and Elisatris Gultom, the crime had the following characteristics:¹⁴

- a. without violence (non-vilence)
- b. involves little physical contact (minimize of physical contact)
- c. using equipment and technology
- d. utilizing global telecommunications, media and informatics networks

Referring to the opinions of Dikdik M. Arief Mansur and Elisatris Gultom, the Defendant Aan alias Andi carried out his actions without any elements of violence because the defendant offered anyone who wanted

¹⁴ Dikdik M. Arief Mansur dan Elisatris Gultom, *Cyber Law Aspek Hukum Teknologi Informasi*, (Bandung: Refika Aditama, 2009), 26-27.

to play online gambling to use his personal account without coercion to prospective players who wanted to play online gambling and the defendant Aan alias Andi will get a profit of 25% (twenty five percent) of the winnings that each online gambling member gets. This was based on a mutual agreement because online gambling members under the auspices of the defendant had used the username and password belonging to the defendant Aan alias Andi. Furthermore, the actions of the defendant Aan alias Andi also involved a little physical contact because the defendant's actions could be carried out remotely. Based on the defendant's statement, transactions can be made by transfer or in cash, but payments to bosses are always via transfer. In online gambling games, both the defendant Aan alias Andi and online gambling members use equipment and technology, namely mobile phones and take advantage of global telecommunication, media and informatics networks, namely playing gambling requires an internet network. Danrivanto Budhijanto also said that there is a difference between the real world and the virtual world, namely the media used, so that every communication and activity via the internet will have a very extreme and massive negative impact on human life in the real world.¹⁵

In cybercrime there are significant differences from traditional crimes. Traditional crimes generally leave evidence of crime in the form of physical evidence because traditional crimes are related to tangible objects, while cybercrime has the same criminal process, it's just that it also relies on the help of other supporting aspects, namely digital devices and leaving digital evidence. Digital evidence can be found in digital evidence sources. There are three broad categories for digital evidence sources, namely: open computer systems, communications systems, embedded computer systems. A cell phone is included in an embedded computer system because a cellphone cannot be called a computer, but when working, a cellphone can still store information that can be used to

investigate, just like a computer.¹⁶

In the Judgment Decision Number 184/Pid.B/2018/PN.Btm, the defendant Aan alias Andi, who is an online gambling agent, has the task of providing an access code, namely in the form of a username and password, to prospective players so they can play gambling online on the agent's website. ghenchoi.com. The actions of the defendant Aan alias Andi made it easier for prospective online gambling players to be able to access online gambling and in the username and password provided by the defendant Aan alias Andi there was a credit facility of 10,000 (ten thousand) if cashed in the amount of Rp. 10,000,000 (ten million rupiah). According to the statement of an expert named Hendri Sasmita Yuda in Decision Number 2/Pid.B/2017/PN.Bbs, making it accessible can be done by providing a link or providing an access code (password) so that online gambling actors can access anything related to gambling. online easily and quickly. Not only that, internet cafe managers who have provided online gambling applications and pasted cards to be able to play online gambling can be categorized as making them accessible.¹⁷ The defendant Aan alias Andi carried out his duties as an agent by distributing electronic information, namely access codes in the form of usernames and passwords, to members so they could access online gambling using his account which contained credit facilities. This access code is very easy to understand because only by entering the access code, players can access online gambling games found on the SBOBET.com website.

So, based on the explanation above, legally speaking the actions of the accused Aan alias Andi constitute a criminal act of online gambling and fulfill all the elements contained in Article 27 paragraph (2) of the ITE

15 Danrivanto Budhijanto, *Cyber Law dan Revolusi Industri 4.0*, (Bandung: Logoz, 2019), 51-52.

16 Aan Andrew Johannes Pahajow, "Pembuktian Terhadap Kejahatan Dunia Maya dan Upaya Mengatasinya Menurut Hukum Positif di Indonesia", *Lex Crimen*, Vol. V, No. 2, (Februari, 2016): 96.

17 Syarifuddin Kalo, Mahmud Mulyadi, dkk, "Analisis Yuridis Pembuktian Tindak Pidana Judi Online Menurut Undang-Undang Nomor 11 Tahun 2008 Tentang Informasi dan Transaksi Elektronik", *USU Law Jurnal*, Vol. 6, No. 2, (April, 2018): 33.

Law. In decision Number 184/Pid.B/2018/PN.Btm, the judge considered non-judicial factors by defining gambling as a guessing game based on chance with the aim of gaining an advantage in that game. This game is chancy, meaning that in the game it is not 100% successful or successful, there is a risk that must be borne by the player, whereas according to Article 303 paragraph (3) of the Criminal Code it states that gambling is any game where generally the possibility of making a profit depends on sheer luck. , also because the players are more or less trained.

Non-judicial considerations are also an important matter for the panel of judges in examining, adjudicating and deciding gambling crimes. Kartini Kartono in her book *Social Pathology* states that the game of gambling is defined in a broad sense, including all bets on the winning and losing of a horse race or other competition, or all bets in those competitions, for example totalizers and so on. Criminal law is often used to solve social problems, especially in crime prevention. Problem gambling is seen as a form of societal disease or a form of social pathology.¹⁸

Gambling is holding a bet with a certain amount of money in a guessing game based on chance. Gambling is a *dolus* crime, namely a crime that is committed intentionally because gambling does not have an element of negligence or unintentional, those who do gambling are aware and know clearly and clearly that he is gambling.

So based on juridical and non-judicial considerations, according to the author, the accused Aan alias Andi should have been convicted using Article 27 paragraph (2) of the ITE Law because based on witness testimony, the defendant's statement, and other evidence stating that the defendant Aan alias Andi is a gambling agent online, which in carrying out its duties as an online gambling agent requires electronic facilities and internet services. The punishment using Article 27 paragraph (2) of the ITE Law against the accused Aan alias Andi is also related to the

18 Irfan Gaurifa, "Analisis Yuridis Pertimbangan Hakim Dalam Menjatuhkan Hukuman Terhadap Tindak Pidana Perjudian Secara Online," *Jurnal Panah Hukum* 1, no. 2, (September 2022): 116.

principle adopted by Indonesian law, namely the principle of *lex specialis derogate legi generalis*. Based on this principle, if there is an act governed by two rules, the priority in its use is the specific rule.

2. Legal Consequences of Using Article 303 Bis Paragraph (1) To 1 of the Criminal Code by Judges in Decision Number 184/Pid.B/2018/PN.Btm is associated with legal purposes

Based on the previous discussion, the judge decided that the defendant Aan alias Andi used Article 303 bis paragraph (1) to 1 of the Criminal Code to be inappropriate, because the actions of the defendant Aan alias Andi have been specifically regulated in Article 27 paragraph (2) of the ITE Law, which relates to making accessible gambling charge. Not paying attention to the principle applied by the panel of judges in deciding the online gambling crime case committed by the defendant Aan alias Andi, shows how the quality and professionalism of a judge's decision.¹⁹ Whereas according to Bagir Manan²⁰, the application of positive law must comply with certain principles. In addition, for the formation of a qualified and professional judge's decision, a decision must pay attention to very essential things, namely related to legal objectives.

Because the panel of judges decided on online gambling cases using Article 303 bis paragraph (1) to 1 of the Criminal Code, the legal consequence that occurred was that The legal objectives that should be reflected in every court decision are justice, certainty and expediency

19 Dewi Atiqah, "Peran Hakim dalam Mewujudkan Asas Keadilan, Kepastian Hukum dan Kemanfaatan Putusan", <http://pa-purwodadi.go.id/index.php/sub-bag-keuangan/pedoman/26-halaman-depan/artikel/358-peran-hakim-dalam-mewujudkan-asas-keadilan-kepastian-hukum-dan-kemanfaatan-putusan> (diakses 6 Desember 2022).

20 Bagir Manan, *Hukum Positif Indonesia*, (Yogyakarta: UII Press, 2004), 58.

The purpose of law according to Gustav Radbruch includes 3 elements, which are related to justice (*gerechtigheit*), legal certainty (*rechtsicherheit*), expediency (*zweckmassigkeit*). These three elements must receive balanced attention by the judge in making a decision.

According to Aristotle's theory of justice²¹, justice is a balance or proportion. The emphasis on balance or proportion in Aristotle's theory of justice, namely equality of rights must be the same among the same people. Aristotle explained justice with the phrase "justice consists in treating equals equality and unequals unequally, I proportion to their inequality" means that equal rights are treated equally, and those who are unequal are treated unequally, proportionally. So if a crime has been committed, then the appropriate punishment needs to be given.

Based on Decision Number 184/Pid.B/2018/PN.Btm, the judge decided that the defendant Aan alias Andi used Article 303 bis paragraph (1) to 1 of the Criminal Code with a prison sentence of two months and twenty days. The defendant Aan alias Andi should receive a proportion of the sentence in accordance with the actions he committed and the defendant Aan alias Andi is obliged to be responsible according to the law governing the crimes he committed, which means that in this case, the defendant Aan alias Andi must be responsible for the crimes he committed, namely by becoming an online gambling agent whose job is to distribute access codes to its members, as stipulated in Article 27 paragraph (2) of the ITE Law jo. 45 paragraph (2) of the ITE Law as amended by Law no. 19 of 2016 concerning Amendments to Law no. 11 of 2008 concerning Information and Electronic Transactions, which reads:

"Every person who intentionally and without rights distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents that have gambling content as referred to in Article 27 paragraph (2) shall be punished with imprisonment for a maximum of 6 (six) years and/or a maximum fine of IDR 1 billion"

21 Bahder Johan Nasution, "Kajian Filosofis Tentang Konsep Keadilan dari Pemikiran Klasik sampai Pemikiran Modern", *Yustitia*, Vol. 3, No. 2, (Mei-Agustus 2014): 120-121.

According to the author, as a community who understands the law, the judge decided against the accused Aan alias Andi by using Article 303 bis paragraph (1) to 1 of the Criminal Code does not reflect the principle of justice because if you look at the criminal threat, the criminal sentence received by the defendant Aan alias Andi should be heavier. As a basic element in the justice system, judges are also the personification of law, judges should be able to guarantee a sense of justice for everyone who seeks justice through legal processes.²²

Next is related to legal certainty. According to Utrecht²³, legal certainty is to make individuals know what actions may or may not be performed. Gambling has been definitely regulated in Indonesia so that if a gambling game is found, it can be subject to criminal sanctions. However, seeing the judge decide on the defendant Aan alias Andi in decision No. 184/Pid.B/2018/PN.Btm by using Article 303 bis paragraph 1 to (1) of the Criminal Code, caused legal uncertainty. This is because the specific crime, namely gambling through electronic media committed by the defendant Aan alias Andi, should be sentenced under Article 27 paragraph (2) of the ITE Law, not using the articles contained in the Criminal Code.

The existence of the law should make people understand that there are rules about what to do and what not to do. The decision handed down by the judge against defendant Aan became unclear because under what circumstances Article 27 paragraph (2) of the ITE Law can be applied and under what circumstances a person can be said to be carrying out online gambling. In fact, the inclusion of an element of legal certainty in a judge's decision can contribute to the development of knowledge in the field of law, because legal certainty is closely related to the source of applicable law, both statutory regulations, jurisprudence, doctrine, treaties

22 Ahmad Kamil, *Filsafat Kebebasan Hakim*, (Jakarta: Kencana Prenada Media Group, 2012), 167.

23 Riduan Syahrani, *Rangkuman Intisari Ilmu Hukum*, (Bandung: Citra Aditya Bakti, 1999), 23.

and custom.²⁴ Therefore, judges as law enforcers should reflect legal certainty in their decisions.

The benefit of the law is also one of the objectives of the law because the law governing a society must provide benefits to the community itself. Jeremy Bentham said that the most objective basis for assessing whether a policy is good or bad is to see whether a particular policy or action brings benefits or useful results or, conversely, harms the people involved.²⁵

In Decision Number 184/Pid.B/2018/PN.Btm, when viewed from an expediency perspective, the judge decided that the defendant Aan alias Andi used Article 303 bis paragraph (1) to 1 of the Criminal Code which resulted in not achieving full benefit, because the judge's decision should have been it is useful to eradicate gamblers by imposing a more severe sentence based on Article 45 of the ITE Law, which is a maximum of 6 years in prison and/or a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah).

Therefore, based on the explanation above, judges as law enforcers must apply the law appropriately to defendants based on the facts of the trial so that in a decision justice, legal certainty and benefits can be achieved²⁶, which is the main purpose of the law itself. The application of Article 303 bis paragraph (1) to 1 of the Criminal Code by the judge against the defendant Aan alias Andi resulted in the defendant having to serve a prison sentence which did not deter gamblers, especially since Aan was a dealer who really did not deserve a prison term of two months and twenty days. The decision must be considered correct if there is no legal effort from the public prosecutor and until now the authors have not received any

24 Hardianto Djanggih, "Pertimbangan Hakim pada Suatu Putusan Paperadilan: Studi Putusan Nomor: 09/PID.PRA/2016/PN. Lwk Tentang Penghentian Penyidikan Tindak Pidana Politik Uang", "Jurnal Penelitian De Jure", Volume 17 No. 3, (September 2017): 421.

25 Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar*, (Yogyakarta: Liberty, 2005), 161.

26 Hardianto Djanggih, "Pertimbangan Hakim dalam Perkara Pencemaran Nama Baik Melalui Media Sosial", "Jurnal Penelitian Hukum De Jure", Vol. 18 No. 1, (Maret 2018): 100.

information on any legal efforts being made by the public prosecutor. Because it relates to the principle of *res judicata pro veritate habetur* which states that a judge's decision must be considered correct until it obtains permanent legal force or is otherwise decided by a higher court.

The judge's decision on Decision Number 184/Pid.B/2018/PN.Btm has legal consequences of not fulfilling justice, certainty and expediency which are the goals of law in eradicating criminal gambling and not deterring gamblers with imprisonment for two months and twenty day.

D. Conclusion

The Panel of Judges in Decision Number 184/Pid.B/2018/PN.Btm in the gambling case committed by the defendant Aan alias Andi, decided that the defendant Aan alias Andi used Article 303 bis paragraph (1) to 1 of the Criminal Code which was inappropriate because of the actions of the defendant Aan alias Andi, namely utilizing electronic media to gain profits by providing passwords and IDs to be able to access online gambling websites. In addition to non-judicial factors that should be considered, gambling is placing bets with a certain amount of money in a guessing game based on chance factors. Gambling is a *dolus* crime, namely a crime committed intentionally. So that the panel of judges should have decided on the defendant using Article 27 paragraph (2) of the ITE Law in conjunction with Article 45 of the ITE Law by imposing a heavier sentence.

In addition, the legal consequences of the use of Article 303 bis paragraph (1) to 1 of the Criminal Code by the judge in Decision Decision Number 184/Pid.B/2018/PN.Btm, namely justice, certainty and benefit in this decision were not achieved due to imprisonment for two months and twenty days is a minimum sentence and is very different from the punishment in Article 45 of the ITE Law, namely a maximum of 6 years in prison and/or a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah). The decision will affect the process of law enforcement on the crime of gambling which is very weak by the court

because the sentence imposed by the panel of judges is very low.

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