

Application of Law Based on the Principle of Lex Specialis Derogat Legi Lex Generalis in the Crime of Online Gambling (Decision Number 232/PID.B/2022/PN.CBD)

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ABSTRACT

Background. The existence of internet technology can make it easier for people to get information and facilitate communication, but the internet can also have a negative impact on society, one of which is a medium for finding information or sites that contain gambling. This can change the pattern of ordinary or conventional gambling to gambling with internet media or what is commonly called online gambling, so that it can be accessed anytime and by anyone.

Purpose. Gambling is a prohibited act as stipulated in Article 303 of the Criminal Code, 303 bis of the Criminal Code, and Article 27 paragraph (2) of the Law on information and electronic transactions. In verdict number 233/Pid.B/2022/Pn.Cbd the author found a discrepancy in the application of the article, so the problem in this study is "How is the application of the law of online gambling in verdict number 232/Pid.B/2022/Pn.Cbd?".

Method. This research uses normative juridical types contained in laws and court decisions, as well as legal norms that exist in society.

Results. The results in this study are that the public prosecutor's indictment has used a single charge by applying article 303 paragraph (1) 2 of the Criminal Code and the judge has decided in accordance with the public prosecutor's indictment.

Conclusion. This can make law enforcers override the principle of lex specialis derogate legi lex generalis, because they do not apply article 27 paragraph (2) of the Electronic Information and Transactions Law.

KEYWORDS

Application of Law, Legal Principles, Online Gambling Crime

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INTRODUCTION

In the current era of globalization, technological development is very rapid, along with this social changes in society have also occurred, this is because humans are dynamic or develop and change along with developments that occur in social society (Bahji dkk., 2021). According to Soerjono Soekanto, changes in society will go hand in hand with advances in technology (Fine dkk., 2019). The way of seeing, thinking, and behaving in society will change along with advances in science and technology, this affects legal awareness of the assessment of a behavior, giving rise to new norms, new values and social rules in society (Stawinska-Witoszynska dkk., 2021). Basically, technology was created to facilitate everyone's activities to



be more effective and efficient, so as to improve the quality of human life. technological advances that are strongly felt by society today include the internet, which provides benefits in the form of thin or loss of space and time boundaries (Price, 2022). With this, information can be accessed anytime and anywhere regardless of regional and even state boundaries so that the latest information can be accessed directly, besides that through the internet the exchange of information can be done quickly, precisely, and at a relatively low cost when compared to other communication tools such as telephone, mail or fax.

In addition to having a positive impact, the internet can also have a negative impact on society, such as being used as a medium in committing criminal acts through technology or what is commonly called cyber crime (Brodeur dkk., 2021). One technology that uses internet media is gambling. With the existence of the internet media, it is easier for the public to access various sites that contain gambling content, this is not only a social problem in society, but as a legal problem that needs to be eradicated (Frisone dkk., 2020). Based on the latest data from the Ministry of Communication and Information of the Republic of Indonesia (Kemkominfo RI), since 2018 until August 2022, there have been 566,332 sites and applications containing gambling content. Seeing this, it can be seen that this online gambling crime has been rampant in Indonesia. Efforts to anticipate the development of gambling in society, it is necessary to plan the making of criminal law to deal with the development of technological progress.

The term gambling has been known for a long time so that it is not new to society and is a real threat to social order, so it is difficult to eradicate because its existence continues to develop along with the times (Mazar dkk., 2020). The irony is that sometimes gambling is considered normal by everyone who plays it, and is considered to be the right choice to make easier money (Ukhov dkk., 2021). Whereas in reality gambling can be far more dangerous and detrimental when compared to the benefits obtained. According to Kartini Kartono, quoted from Nikmah Rosidah's book, gambling is defined as a deliberate gamble to risk something that is considered valuable by realizing the uncertain risk of the outcome (Auer & Griffiths, 2022). Gambling games can be categorized as crimes because apart from being formulated as an offense in the law, this act is also truly felt by the community as an act that damages morals and norms that exist in society.

According to the Big Indonesian Dictionary (KBBI), the term gambling is known, which means risking a certain amount of money or property in a guessing game based on chance, with the aim of getting the original amount of money or property (Hing dkk., 2022). The principle of gambling games is stipulated in Article 303 of the Criminal Code (KUHP), which is called a gambling game is any game, where in general the possibility of getting profit depends on sheer luck, as well as because the player is better trained or more skilled. It includes all bets on the decision of a race or other game that is not held between those participating in the race or game, as well as all other bets. [6]

Crimes related to gambling itself are regulated in Article 303 and Article 303bis of the Criminal Code (KUHP), strengthened by Law Number 7 of 1974 concerning the control of gambling. However, with the existence of a new form of gambling, namely gambling via the internet (internet gambling), making the eradication of gambling even more difficult because the game can be accessed by anyone, without being seen by anyone and carried out anywhere (Claesdotter-Knutsson dkk., 2022). Based on this, the Criminal Code (KUHP) as a positive law in Indonesia, in which there are regulations related to gambling, namely in articles 303 and 303bis, can no longer be applied to gambling conducted via the internet because it does not regulate gambling using internet media (Claesdotter-Knutsson dkk., 2022). So that currently there is Law Number 19 of 2016 concerning amendments to Law Number 11 of 2008 concerning Electronic Information and

Transactions (ITE), which regulates activities carried out and occurring in cyberspace (Cyber Space), one of which is gambling (Louderback dkk., 2021). In Law Number 19 of 2016 concerning amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions (ITE), gambling is regulated in article 27 paragraph (2) Jo Article 45 paragraph (2), which reads as follows:

"Every person intentionally and without the right to distribute and / or transmit and / or make accessible electronic information and / or electronic documents that have gambling content: shall be sentenced to a maximum imprisonment of 6 (six) years and / or a maximum fine of Rp.1,000,000,000.00 (one billion rupiah) ".

In this study, the authors analyze decision number 233/Pid.B/2022/Pn. Cbd, which has applied Article 303 paragraph (1) 2 of the Criminal Code (KUHP) to perpetrators of gambling through the internet (Mutiarasari & Herawati, 2020). In this decision, the public prosecutor gave a single charge by applying article 303 paragraph (1) 2 of the Criminal Code (KUHP), and the judge had decided that the defendant was proven to have committed the crime of gambling in accordance with the article that had been charged. At this time with the existence of Law Number 19 of 2016, law enforcers in handling online gambling cases should also pay attention to the provisions of Article 27 paragraph (2) Jo article 45 paragraph (2) of Law Number 19 of 2016 concerning Electronic Information and Transactions because there is a special arrangement in the article relating to gambling (Subekti dkk., 2021), This is because law enforcers must adhere to the principle of *Lex Specialis Derogate Lex Generalis* as stipulated in Article 63 paragraph (2) of the Criminal Code which is the principle of legal interpretation that special laws (*lex specialis*) override general laws (*lex generalis*).

The purpose of the research is to find out the application of law to an online gambling crime based on the principle of *Lex Specialis Derogate Lex Generalis*, because with the phenomenon of gambling with internet media and with the existence of two rules governing this matter can make differences in views between law enforcement in applying the law to this matter.

RESEARCH METHODOLOGY

This research uses a normative legal approach or normative juridical, so that it refers both to the legal norms contained in laws and regulations, court decisions, and legal norms that exist in society (Siboy dkk., 2023). The legal sources in this research are primary which include laws and regulations, secondary materials consisting of books or other literacy related to research, then tertiary materials in the form of legal dictionaries or other information that shows primary and secondary materials (Butt & Siregar, 2021). Primary data and secondary data that have been collected will be analyzed qualitatively which is descriptive analytical (Ali dkk., 2021). Qualitative descriptive analysis method is a method to analyze, describe, describe the data obtained, so that the author assesses that the analysis technique can answer the formulation of the problem under study.

RESULT AND DISCUSSION

Elements of Online Gambling Crime

Currently, the development of information technology and communication has an impact on the new mode of gambling. Gambling games initially required the players to meet or meet face to face and make payments using cash directly (Formosa dkk., 2020). But at this time, gambling games use information technology facilities by utilizing the internet network so that gambling games can be carried out online or what is commonly called online gambling, with this, gambling players do not have to meet or meet face to face (Koh, 2020). With its more closed nature, this

gambling crime will make it easier for the perpetrators to play it and of course it will be more difficult to eradicate its existence in society.

In principle (Lebano dkk., 2020), a criminal act must consist of several elements of action, contain behavior and consequences that have been caused. According to Moeljato (Fair dkk., 2020), a criminal act is an act prohibited by an act in which there are prohibitions and threats of sanctions in the form of certain punishments (Yermolenko dkk., 2022), for those who violate these rules (Selten dkk., 2020). Criminal offense is a very important and fundamental thing in criminal law. In the act there are several elements which include:

1. Behavior and effect (action).
2. The circumstances or circumstances accompanying the act.
3. Criminal aggravating circumstances.
4. Elements against objective law.
5. Elements against subjective law.

In determining a person as the perpetrator of a criminal offense, it must fulfill the elements of the criminal offense that will be charged to him. Likewise, the determination of a person as a perpetrator of online gambling must fulfill the subjective and objective elements in Article 27 paragraph (2) of the ITE Law (Miernicki dkk., 2019). The subjective element or what is called the element of guilt attached to the subject of law, while the objective element is an element that is attached to the act or action (Saadatatzadeh dkk., 2019). The subjective element contained in article 27 paragraph (2) is "every person intentionally and without right", the element of every person refers to an individual (*natuurlijk persoon*) or legal entity (*recht persoon*), the element of "intentionally" arises because of the intent of the perpetrator in committing the criminal act of gambling via the internet, and the element of "without right" means that the perpetrator commits an act prohibited by law (Yakamercan dkk., 2021). The element of intent refers to the theories of intent that apply in Indonesia, including:

1. Intentional with intent
2. Intentional with necessity
3. Intentional with possibility

Furthermore, the objective elements of online gambling include:

1. Distributing, defined as the act of sending electronic information or documents to another party or place through an electronic system.
2. Transmitting, defined as sending or forwarding information or electronic documents from one party to another party or place.
3. Making accessible, defined as making information or electronic documents accessible to others either directly or indirectly (Dalen dkk., 2019). This can be done by providing links or links that can be used by internet users to access information or gambling sites.
4. Electronic information and/or electronic documents, can be interpreted as in article 1 paragraph (1) and paragraph (4) of the ITE Law.
5. Gambling content, is intended for gambling sites where it is clear that there is a betting system made by someone, but not just bets on the site, because an important part of gambling is having to place bets and the results of these bets (Takahashi dkk., 2020). So gambling is defined as an act that is only based on luck and is carried out through electronic media, in this case the internet."

Regarding the problem of gambling which has become increasingly widespread and difficult to eradicate even though the sanctions have been regulated in the legislation. In a legal perspective,

gambling is included in one of the criminal acts that are considered to be very troubling to the community (Akers dkk., 2020)." It should be noted that gambling contains elements:

1. Expecting a victory
2. It is only a matter of luck
3. Getting a prize for those who win, and the expectation of winning will be even higher when there is an element of cleverness and agility.

Based on Article 303 paragraph (3) of the Criminal Code, what is called a gambling game is any game that allows you to get profit from mere luck, this includes all bets or other games, which are not held between those who participate in competing or playing, and also all other bets.

Application of the Law on Online Gambling Crime

Decision number 232/Pid.B/2022/Pn.Cbd of the defendant NN with the time of the crime (*tempus delicti*) on Tuesday, June 7, 2022, at the scene of the crime (*locus delicti*) at Kp. Ciherang, Rt/Rw 004/001 Margaluyu Village, Sagaranten Subdistrict, Sukabumi Regency, with evidence in the form of denominations of Rp.2 000,- (two thousand rupiah) as much as 2 (two sheets), 1 (one thousand rupiah) denomination of Rp. 1,000,- (one thousand rupiah) of metal type as much as 1 (one) piece and Rp.500,- (five hundred rupiah) denomination of metal type as much as 1 (one) piece with a total of Rp.5,500,- (five thousand five hundred rupiah) and 1 (one) mobile phone brand xioami Note 5 white gold color, which the defendant used to run the gambling. Based on these matters, the indictment of the Public Prosecutor is a single charge, namely article 303 paragraph (1) 2 of the Criminal Code (KUHP). This article has the element of "whoever", meaning that any person or legal subject who commits the alleged criminal act and can be held responsible for it. Based on the facts of the trial, the defendant himself confirmed his identity in the indictment of the public prosecutor, so the defendant examined in this trial was NN. Therefore, the element of "who" has been proven legally and convincingly.

The element "Without obtaining permission", means that in carrying out his actions the defendant was not based on legal authority. Based on the testimony of witnesses presented at the trial, namely Evan Hidayat and Yoni Daud Firdaus as members of the Sukabumi District Police, they testified that the actions taken by the defendant did not have a valid permit from the competent authority. Based on the aforementioned facts, the element of "Without obtaining a license" is proven legally and convincingly.

The element of "intentionally offering to provide opportunities to the public to play gambling or intentionally participating in the company for that, regardless of whether to use the opportunity there is a requirement for the fulfillment of a procedure", the defendant has fulfilled the element of intentionality so that he can be subject to criminal liability. During the trial examination, witnesses Evan Hidayat and Yoni Daud Firdaus testified that at the time of the arrest the defendant was playing with his cellphone and entering numbers into an online lottery gambling application called MASTERTOTO. After being arrested and interrogated by the witness as a member of the Sukabumi District Police, the defendant admitted that he was conducting online gambling. In carrying out his actions as a collector/online gambling dealer, the defendant received 30% of the profit from the winners. Based on the aforementioned matters, the element of "intentionally offering to provide an opportunity to the public to play gambling or intentionally participating in an enterprise for that purpose, regardless of whether to use the opportunity there is a requirement for the fulfillment of a procedure" has been fulfilled. Furthermore, the public prosecutor presented witnesses Yoni Daud Firmasyah and Evan Hidayat, both members of the Sukabumi Police Satreskrim who had arrested the defendant. During the trial the two witnesses testified that when the arrest was made, the defendant was inputting numbers from retailers / installers into his online gambling application, and

when interrogated the defendant admitted that he was conducting online gambling, and acted as a collector.

According to the public prosecutor in the case of the defendant NN, the element "Every person who intentionally and without right distributes and/or transmits and/or makes accessible electronic information and/or electronic documents that have gambling content" in Article 27 paragraph (2) of the ITE Law, In this case, the public prosecutor interpreted that the defendant only inputted the number of the installer, not the person who participated in the creation of the website that allowed people to access the online gambling site, so with confidence the public prosecutor only applied Article 303 paragraph (1) 2 of the Criminal Code in his indictment.

In criminal law itself, there is a teaching on participation (*deleleneming delicten*) to determine the status of the perpetrator's involvement in a criminal act, this is also related to the determination of the punishment system. This teaching divides into 2 (two) forms, namely participation as a maker (*dader*) and participation as an accomplice (*medeplichtige*).^[5] Participation as a maker is regulated in 55 Criminal Code which reads:

(1) Punishable as perpetrators of a criminal offense:

1. those who commit, those who order to commit and those who participate in committing the act

2. those who by giving or promising something, by abuse of power or dignity, by force, threat or deception, or by providing opportunity, means or information, intentionally induce others to commit the act.

(2) In respect of the instigator, only the act intentionally instigated shall be taken into account, together with its consequences.

Participation as an accomplice is provided for in Article 56 of the Criminal Code which reads: "Punishable as accomplices to a crime:

1. those who intentionally provide assistance during the commission of the crime

2. those who intentionally provide opportunities, means or information to commit the crime."

Based on the provisions of articles 55 and 56 of the Criminal Code, it can be concluded that a person can be said to have committed participation in a criminal act if the person who commits a criminal act is not only one person or more than one person. Every person concerned with criminal acts must meet the requirements as in articles 55 and 56 of the Criminal Code, namely as a person who commits (*pleger*), or participates in committing (*medepleger*), or orders to commit (*doenpleger*), or encourages to commit criminal acts (*uitlokker*), or helps to commit criminal acts (*medeplichtige*).

In online gambling there are two terms, namely first, the perpetrator of online gambling service providers who distribute and transmit online gambling site services that he has made so that other people can access the site.^[12] The act of distributing, transmitting and making accessible online gambling sites is an unlawful act. In relation to the public prosecutor who believes that what is intended as a person who commits (*pleger*) the criminal act of online gambling in Article 27 paragraph (2) of the ITE Law is the owner of the online gambling site "Master Toto" which is a site from outside Indonesia which legalizes gambling, then the defendant pairs numbers with the Hong Kong bookie, Sidney bookie, and Singapore bookie. In the objective element of Article 27 paragraph (2) of the ITE Law "distributing and/or transmitting and/or making accessible electronic information and/or electronic documents that have gambling content", the prosecutor interpreted this element as an act of advertising an online gambling site so that it could be known by many people. Advertising is said to be an act of distributing and transmitting sites that have gambling content and this is usually done by admins who also participate (*medepleger*) in organizing every

activity of the online gambling service provider site. Therefore, in this case the public prosecutor believes that the defendant is not a co-conspirator as a maker (*dader*) or as an accomplice (*medeplichtige*) in the online gambling crime regulated in Article 27 paragraph (2) of the ITE Law.

Furthermore, the second term in determining the perpetrator of online gambling is the user of online gambling services, in determining the status of the perpetrator in online gambling acts not only when caught red-handed, but also with tracking efforts to prove it." [12] Evidence in the case of gambling crimes with electronic technology media cannot be separated from the provisions of evidence as stipulated in the Electronic Information and Transaction Law (ITE). Article 5 paragraph (1) of the ITE Law states that "Electronic information and / or electronic documents and / or their printouts are legal evidence", then in paragraph (2) it states that "Electronic information and / or electronic documents and / or their printouts as referred to in paragraph (1) are an extension of legal evidence in accordance with applicable procedural law in Indonesia". So from these two articles, it can be clearly seen that gambling websites and the input of lottery numbers from gambling participants to the defendant NN are part of transmitting electronic information which can be considered as legally valid evidence, and become an inseparable part of the provisions of evidence and proof in the Criminal Procedure Code (KUHP) or as an extension of clue evidence. The element of intent in Article 27 paragraph (2) of the ITE Law has been fulfilled in the online gambling committed by the defendant, as evidenced by the results of the investigation that the defendant created an account on the online gambling site "Master TOTO", the defendant also transferred some money with his ATM to be converted into chips, with this evidence, the instructions can be used as evidence in the process of applying the law carried out in the case of online gambling by the defendant. So that analyzing the witness testimony and the formulation of the elements of the crime of gambling in Article 303 paragraph (1) 2 of the Criminal Code, when viewed from the facts of the trial that the criminal act of gambling committed by the defendant through the internet media, it is not appropriate if only the article is applied. The article applied is difficult to reach the gambling crime committed by the defendant, because there are still elements that are not fulfilled. The crime of gambling is not only regulated in the Criminal Code, but also regulated in Article 27 paragraph (2) of the ITE law which contains elements of gambling using electronic media. In relation to the existing evidence, the actions of the defendant are more in line with the crime of gambling regulated in article 27 paragraph (2) of the ITE law.

In preparing the indictment, the public prosecutor must be able to describe the elements of the criminal offense based on the law completely, in the sense that there should not be any elements of the criminal offense that are left out or not included in the indictment. In this case, the public prosecutor should have paid more attention to the evidence and facts of the elements of the criminal offense that the defendant committed, where the elements are more fulfilled in article 27 paragraph (2) of the ITE law which is a special rule (*lex specialist*) than article 303 paragraph (1) 2 which is a general rule (*lex generalis*). Both articles have the same scope, namely as criminal regulations in Indonesia. In addition, another similarity is found in the legal subject, namely the person in this case the defendant Nuryamin. Another thing is related to the similarity of the object of criminal acts in *lex special* and *lex generalis*, which means that the two articles have the same object, namely related to gambling, as well as the similarity between the legal interests to be protected. Furthermore, the article of article 303 paragraph (1) 2 of the Criminal Code and article 27 paragraph (2) of the ITE law are equal sources of law.

Based on this, the public prosecutor in providing charges and the judge in making legal determinations should apply article 27 paragraph (2) of the ITE law which is a special rule (*lex specialist*). The article regulates the criminal act of online gambling which is not regulated in

Article 30 paragraph (1) 2 of the Criminal Code which only regulates the criminal act of conventional gambling, so it is not appropriate to apply it in this case, especially with a single charge.

CONCLUSION

The indictment applied by the Public Prosecutor to the defendant on behalf of NN relates to his view that Article 27 paragraph (2) jo Article 45 paragraph (2) only applies to the creator of the website or the person who distributes the website so that other people can access it privately, while in the actions that the defendant NN committed only input numbers into the online gambling site. However, based on the literature that the author uses, there are two terms in online gambling, namely first, the online gambling service provider who distributes and transmits online gambling site services that he has made so that other people can access it. The second term in determining the perpetrator of online gambling is the user of online gambling services, in determining the status of the perpetrator in online gambling acts not only when caught red-handed, but also with tracking efforts to prove it. In this case, the Public Prosecutor in carrying out his evidence did not make tracking efforts that could be carried out by the Ministry of Communication and Information. Based on the analysis related to evidence in the previous section, the actions committed by the defendant NN are part of transmitting electronic information so that the elements in Article 27 paragraph (2) Jo Article 45 paragraph (2) of the ITE Law have been fulfilled, as well as the decision on behalf of Nandang Kurnaedi who has been proven to have committed an act by fulfilling the elements of gambling in 27 paragraph (2) Jo Article 45 paragraph (2) of the ITE Law.

AUTHORS' CONTRIBUTION

Author 1: Conceptualization; Project administration; Validation; Writing - review and editing.

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