RESTORATIVE JUSTICE POLICY AS CRIMINAL SETTLEMENT IN THE LAW OF INFORMATION AND ELECTRONIC TRANSACTION (ITE)

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Abstract: Restorative justice in conflict resolution is an effort to resolve between criminals and victims of crime in criminal cases directly. More specifically, restorative justice seeks a way out by considering the good for all parties, be it for the perpetrator, the victim, or the victim’s family. This article defines the basic concept of applying the Restorative Justice Policy as the settlement of criminal cases in the Electronic Information and Transaction Law. This article is a qualitative research using a conceptual normative approach. Data were collected through literature study, then analyzed using a data reduction process, data presentation and conclusion drawing. The application of Restorative Justice as a settlement of criminal cases as regulated in the legislation concerning Electronic Information and Transactions (UU ITE) is deemed appropriate considering that in the settlement of criminal cases, investigators must have the principle of prioritizing restorative justice in case settlement, and criminal law is the last resort that can be used. carried out as an effort to enforce the law (ultimum remidium), as stated in the Circular Letter Number: SE/2/11/2021 and the Chief of Police’s Telegram Letter No. ST/339/II/RES.1.1.1./2021. With the process of returning to its original state (peace between the two parties), then criminal cases can be resolved and there is no need to continue the process in the judicial process.

Keywords: Restorative Justice, Policy, ITE Law
Introduction

Number of cases that have ensnared the public regarding freedom of expression has resulted in many people being processed related to the Electronic Information and Transaction (ITE) Law. Most of the public violations that were processed by the police were related to defamation, slander and insults which were then subject to criminal sanctions for violating the Electronic Information and Transactions Law (ITE). The strict application of the ITE Law has an impact on decreasing public confidence in law enforcement related to this matter. This is because the implementation of the ITE Law is considered by many to be a policy that is contradictory to the right to freedom of opinion and expression in the digital space and ultimately creates injustice for the community.

This was then followed up by the government and the police with the issuance of the Chief of Police Circular (SE) No. SE/2/11/2021 concerning Ethical Cultural Awareness to Create a Clean, Healthy and Productive Digital Space for Indonesia. The Police must prioritize and emphasize a restorative justice approach. (restoration of justice) or settlement of cases out of court through the mediation process in handling cases of alleged violations of the ITE Law. This decision letter was later strengthened by the presence of the National Police Chief’s Telegram Letter No. ST/339/II/RES.1.1.1./2021 concerning Guidelines for Handling Cyber Crime Cases using the ITE Law.

The issuance of this Decree raises questions because the handling of criminal cases related to violations of the ITE Law previously used criminal law rules and did not use Restorative Justice. This is contrary to the rules of criminal law that use the Criminal Procedure Code in handling special criminal cases, one of which includes alleged violations of the ITE Law.

Based on the description of the background above, this study aims to answer several problem formulations as follows; Is the application of the Restorative Justice policy appropriate in resolving criminal cases related to the Information and Electronic Transaction Law? The purpose of this research is to find out and analyze the basic
idea of implementing Policy Restorative Justice as a settlement of criminal cases in the Information and Electronic Transaction Law.

There are so many previous study in the topic of restorative justice that related to its application towards crimes committed by children. Restorative justice is the best alternative to handle crime cases committed by child.\(^1\) It also used as a way to provides the children who committed some crime a guarantees and rights to become good people in the future through non-formal law by involving communities.\(^2\) The diversion and the implementation of restorative justice is purposed to avoid the stigmatization of children who are dealing with the law.\(^3\) Furthermore, restorative justice could also be implemented as the way to resolve the minor crime cases.\(^4\) Reconceptualization of restorative justice in law enforcement of the ITE Law is through concepts of moro, dats and virtual justice.\(^5\)

This research is presented using a descriptive analytical method with the main approach using a law approach. Analytical descriptive is to describe and describe something that is the object of critical research through qualitative analysis. The normative approach includes: legal principles, synchronization of statutory

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\(^3\) Hartoyo, Nuri, Herman Fikri, and Adi Purnama. "PERLINDUNGAN HUKUM TERHADAP ANAK YANG BERHADAPAN DENGAN HUKUM MELALUI RESTORATIF JUSTICE." Disiplin: Majalah Civitas Akademika Sekolah Tinggi Ilmu Hukum sumpah Pemuda (2021), pp. 1-12.


regulations, and legal inconcreto findings. The use of a statutory approach in a juridical-normative research is a definite thing. Legally, normative legal research is based on existing legal materials. Although the research was conducted because it saw a legal vacuum, the legal vacuum can be identified, because there are already legal norms that require further regulation in positive law.

This research is included in normative legal research because what is studied in this research is the principle of justice in terms of the moral system and legal norms as well as the statutory system by focusing on the basic idea of proportionality in criminal law and the reflection of that idea in the policy of formulating criminal sanctions as outlined in the form of legislation. The approach used is a conceptual approach or basic idea and legislation. The conceptual approach refers to the opinion of criminal law experts on policies Restorative Justice which were previously unknown as an alternative for criminal case settlement in enforcing the Information and Electronic Transactions Law (ITE), while the legislation examines the forms of formulation of offenses and criminal threats as well as procedures that should be implemented in legislation.

The legal materials used as data sources in this study were collected through a literature study that specifically discusses proportionality in criminal law. These data were then analyzed descriptively qualitatively. There are three streams of activities that occur simultaneously in conducting qualitative analysis, namely reducing existing legal materials, then presenting legal materials,

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and drawing conclusions. In this study, the legal material analyzed is related to Restorative Justice as a settlement of criminal cases in the Information and Electronic Transactions Law (ITE).

**Technological Developments and the ITE Law**

The rapid development of technology today is one of the drivers of the birth of the era of information technology development. Advances in information and communication technology are currently making it easier for people to provide and receive information digitally. The community has the convenience of communicating without any limitations of distance, space and time. Along with the development of these technologies, the community is also required to be able to follow any developments that are happening. The development of technology today is not only for the sake of establishing communication and socializing, but also leads to an unlimited world business network.

Along with the increasing influence of information technology in human life, causing the greater the risk of information technology to be misused by some irresponsible parties. In reality, many bad things are found by criminals through information technology media.

Information technology is a term used to define digital technology that assists humans in creating, communicating, storing, converting and/or disseminating information. In its development, information and communication technology causes changes in all aspects, including; social, economic, and cultural aspects significantly and takes place rapidly. The use of digital technology has resulted in changes in people's behavior and human life as a whole. Changes in human behavior from the concept of physical

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activity (offline) and digital (online) has begun to occur in Indonesian society, especially during the Covid-19 pandemic.\textsuperscript{13}

That way, physical crime activities can also be found easily in the digital space. This crime is called cyber crime or often also known as cyber crime, which is defined as a criminal activity using a computer or computer network as a means and infrastructure, target or locus of crime. The year 2008 was the year the legislation No. 11/2008 was passed on Electronic Information and Transactions. The regulation formulates several criminal acts such as defamation carried out through social media. Before the law was enacted, defamation on social media could not be categorized as a crime. Then, through several breakthroughs and expansion of the principles and their criminal sanctions, defamation committed in the digital space can be categorized as a criminal act. With the enactment of state regulation No. 11 of 2008 concerning Electronic Information and Transactions, it is felt that it can become a legal umbrella for the community.\textsuperscript{14} The application of evidence against the article must be carried out correctly and carefully, so as not to allow this to be a loophole for irresponsible parties and make this article a rubber article. Article 27 paragraph (3) This statutory regulation on Electronic Information and Transactions must be viewed more broadly, not only viewed formally as a rule of the Electronic Information and Transaction Law and the Criminal Code, but must be comprehensive and not partial.\textsuperscript{15}


\textsuperscript{15} \textit{Ibid.}
According to Eddy Hiariej in the Public Discussion discussing the ITE law, Legislation on Information and Electronic Transactions (abbreviated as UU ITE), must be used as a means of protecting the public in various legal interests such as freedom of speech, expressing opinions with the media, oral or written. In addition, it is related to the legal interest to protect the freedom of communication and obtain information as rights that are constitutional rights (Constitutional Rights) of citizens as stipulated in Article 28F of the 1945 Constitution of the Republic of Indonesia, and the basic right to protection of the dignity, dignity, and good name of others who are protected. Based on Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Such legal interests must be subject to regulations and restrictions by law because everyone has an obligation to his community and in the exercise of his rights and powers everyone can only be limited by law which is solely to provide a guarantee of recognition. as well as proper respect for rights, especially the right to freedom as stipulated in Article 28J of the 1945 Constitution of the Republic of Indonesia.

Restorative Justice in Criminal Law

The concept of restorative justice or justice by prioritizing restoration back to its original state is a new approach model in efforts to resolve criminal cases in Indonesia. In contrast to the current criminal law system, the concept of restorative justice orrestorative justicefocuses more on an approach with direct participation from perpetrators, victims and the community in the process of resolving criminal cases. Such an approach is popularly known as the "non-state justice system" which is a term used to describe the small or even non-existent role of the State in the settlement of criminal cases. However, the presence of restorative

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justice approaches and concepts raises many questions from experts, both theoretically and practically.\textsuperscript{17}

Restorative Justice is an effort used to resolve conflicts by emphasizing the settlement between the perpetrators of crimes and victims of crime directly when a crime occurs. This approach to resolving criminal cases with Restorative Justice has actually been practiced by the community since ancient times, before the formation of the state or the formation of community organizations that were still in the form of tribes. At that time, there was a payment of compensation made by someone who had committed a crime or the family of the perpetrator of the crime against the victim who had been harmed as a result of the evil act.\textsuperscript{18}

Restorative justice views crime as a more important aspect, not the act of violating it, but the process of causing harm or victimization to crime victims, the community and actually violating the interests of the offender himself (even though the crime committed is an act that violates criminal law).\textsuperscript{19} A violation of criminal law is understood as a conflict between individuals that causes harm to the victim, the community and the offender himself. Among the three groups involved in a criminal case, the interests of crime victims must be seen as the main part to be restored (restored), because the main crime is violating the rights of victims.\textsuperscript{20}

The involvement of crime victims in the criminal justice process is important to fulfill victims' justice. This is because the


relationship between victims, communities and offenders is the focus for criminal mediation and reconciliation in order to resolve the conflicts they face. Parts that are highlighted are empowering participants, promoting dialogue, and resolving problems that are mutually beneficial and to the satisfaction of all parties.\(^{21}\)

The approach Restorative Justice formulates a number of higher values with direct involvement by the parties in a criminal case. The victim functions as an element that has control. Offenders are encouraged to accept responsibility as an important step in repairing the harm caused by crime and in building a social responsibility value system.\(^{22}\) Active community involvement strengthens the community itself and upholds the value of a society that is responsive and caring for others. The perspective of Restorative Justice demands cooperation between the community and the government in an effort to create an environment that supports victims and offenders. Thus, they can reconcile conflicts between them and resolve their losses, and at the same time create a sense of security for people's lives.\(^{23}\)

Daniel W. Van Ness stated that Restorative Justice is to reach some value through the implementation of criminal justice, the first, conflict resolution or (conflict resolution) containing a charge of compensation payment (Recompense) and vindication (Vindication) and second, a sense of security (safety) which contains the content of peace (peace) and order (order).\(^{24}\)

Restorative justice focuses on solving problems and behaviors that may occur in the future if a criminal case is not resolved. The point lies in improving the conditions or suffering


\(^{23}\) Trisno Raharjo, pp. 29-30.

experienced by the community. Cooperation between various elements (victims-actors-society) is put forward in order to realize a win-win solution.  

**Settlement of Criminal Cases Related to the Law on Information and Electronic Transactions**

Criminal law as a branch of law that applies in this country is certainly no different from other branches of law. All legal regulations in Indonesia make a number of provisions to ensure that the norms recognized as law must be strictly adhered to by the community. A criminal act is a form of violation committed by a person related to an act that is contrary to the law and results in the potential loss of others. Criminal acts can be committed and happen to anyone and in various ways, according to the context of technological progress, one of which is often encountered in the era of technological progress is a crime that uses social media as its facilities and infrastructure.  

The development of internet technology is the main cause of the emergence of crime which is commonly referred to as Cyber Crime or crime through the Internet network. To deal with emerging crimes or utilizing information technology, the state then responds by issuing legal regulations relating to the cyber world. This regulation became known as cyber law.

Cyber Law is one of the legal domains whose term comes from Cyberspace Law. The scope of cyber law covers every aspect related to individuals or legal subjects who use and utilize internet/electronic technology. This criminal activity begins when it starts "online" and enters the cyber or virtual world. In several countries that have advanced in the use of the internet/electronics as

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26 Ali mukti tanjung, Penerapan Tindak Pidana Penghinaan Menurut Undang-Undang Informasi Dan Teknologi Elektronik Dan Kitab Undang-Undang Hukum Pidana, upmi medan 2020, p. 11.

Al-Mazaahib: Jurnal Perbandingan Hukum
a tool to facilitate every aspect of their lives, the development of
cyber law is also very advanced.

The rapid development of information technology in our
country, including the growing internet network, presents its own
challenges for the development of law in Indonesia. Law is required
to be able to adapt to social changes and technological developments
that occur in society. Based on some existing literature, in practice
cybercrime has several characteristics, namely:27

Acts that are carried out illegally, without rights or unethically occur
in a certain cyberspace/region. Thus, it is difficult to ascertain which
country’s jurisdiction applies to the crime;

a. The act is carried out by optimizing the use of electronic
equipment that can be connected to the internet network;
b. These actions result in material and immaterial losses (time,
value, services, money, goods, price, self, dignity,
confidentiality of information) which tend to be greater when
compared to crimes committed conventionally (physical
involvement);
c. The perpetrator is a person who controls the use of the
internet along with supporting applications that can harm
other people and provide benefits for the perpetrators;
d. This act is a crime that is usually carried out transnationally
(across national borders). This is because the internet
network is able to penetrate space and time. This network
provides an opportunity for criminals to carry out their
actions anywhere, as long as the target is someone who is
also connected to the internet network;

Legislation No. 11 of 2008 concerning Electronic
Information and Transactions (UU ITE) has regulated the
prohibition of acts that are distributing electronic information and/or
defamation through social media as a means. However, the
provisions governing this matter are seen as not providing a solid

27 Abdul Wahid dan M. Labib, Kejahatan Mayantara (Cyber crime),
(Bandung: Refika Aditama, 2005), p. 76.
foundation, both from the juridical, philosophical, and sociological aspects. Because these regulations can lead to multiple interpretations, whether they are applied for prevention, punishment, or other purposes related to freedom of expression.

The government has made efforts to reconstruct the criminal policies contained in Article 27 paragraph (3) of the ITE Law. The article prohibits the distribution of electronic data and/or electronic documents containing contents in the form of insults and/or defamation through social media as a means.28

Article 27 paragraph (3) of the ITE Law is as follows:

"Everyone intentionally and without rights distributes and/or transmits and/or makes electronic information and/or electronic documents accessible with insults and/or defamation contents”.

The settlement of criminal cases related to Information and Electronic Transactions (UU ITE) prior to the issuance of the Chief of Police’s instructions was more directed to minor crimes (tipiring). The definition of a minor crime (tipiring) according to Simanjuntak T., is a criminal offense which is threatened with imprisonment or imprisonment for a maximum of three months and/or a fine of a maximum of Rp. 7,500 (seven thousand and five hundred rupiah) and light humiliation. Tipiring is enforced by referring to the concept, except for certain violations of road traffic laws and regulations, as a guide in handling minor criminal cases as regulated in Articles of the Criminal Code and other laws and regulations.29

Furthermore, Hidayatullah,30 defines the term "Tipiring" (Mild Crime) by referring to the abbreviation of terms (acronyms)

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29 T. Simanjuntak, Penerapan KNIAP Dalam Proses Penyidikan Tindak Pidana (Jakarta: Dinas Hukum Polri, 1998), hlm. 4.
CHAPTER XVI, Examination in Court Sessions, Part six Quick Examination, Paragraph I Procedure for Examination of Minor Crimes, the Criminal Procedure Code (KUHAP). Based on Article 205 paragraph (1) of the Criminal Procedure Code, the criteria for minor crimes are cases that are punishable by imprisonment or imprisonment for a maximum of three months or a fine of a maximum of Rp. 2 of these sections. Meanwhile, referring to the Supreme Court Regulation (PERMA) Number 2 of 2012 concerning Adjustment of Limits for Minor Crimes and the Amount of Fines in the Criminal Procedure Code that "The amount of loss stated in the law above is no longer in accordance with the current exchange rate". So, then Article 2 paragraph (2) of this PERMA stipulates a loss value of Rp. 2,500,000, - (two million five hundred thousand rupiah).

Restorative Justice Policy as a Settlement of Criminal Cases in the Information and Electronic Transactions Law (ITE)

Criminal law policy, or crime prevention policy using criminal law is a process consisting of three stages, namely: first, formulation or legislative; second, the implementation or judicial stage; and third, the implementation or executive/administrative stage.

The policy of determining whether an act can be considered a crime or not, can also be referred to as a criminalization policy which is included in statutory policies and has always been the center of attention of many parties. This is closely related to the fact that criminal acts are determined by the articles contained in a law. So it can be said that the law creates crime (determining an act is considered a crime or not). The law provides the authority and the basis for legitimacy to the law to state whether a person’s actions constitute a crime or not. This does not mean that the law is criminogenic, but only acts as a label for an act as a crime. However, the law can be a criminogenic factor if it is inconsistent with stating
that it is separate from the feelings and values of the community, it will lead to public distrust of the effectiveness of the system.\textsuperscript{31}

Criminal law policies, especially in the stage of formulating statutory policies, in addition to having main problems related to the formulation of an act as a criminal act, are also related to determining the suitability of criminal sanctions that are threatened for the violator. The determination of criminal sanctions in this legislation is a fundamental and strategic issue. In this regard, Barda Nawawi Arief stated that the legislative policy stage is a strategic stage when viewed from the overall policy process for the operationalization of criminal sanctions. It is at this stage that the policy lines of the criminal and criminal system are formulated, as well as being the legal basis for the following stages, namely the stage of applying the crime by the judiciary and the stage of implementing the crime by the criminal implementing apparatus.\textsuperscript{32}

Policies to promote restorative justice (Restorative Justice) in the implementation of the settlement related criminal ITE Act was first echoed by the President of the Republic of Indonesia in the opening ceremony of the National Leadership Meeting TNI-Police on 15 February 2021. The President directs the need for better assessment and relevant criteria implementative related to the formulation of the substance. This is conveyed considering that after taking effect on April 21 2008, the implementation of Law Number 11 of 2008 concerning Information and Electronic Transactions as amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Transactions Electronic Transactions (UU ITE), turned out to be controversial


because some considered it to contain articles that were too flexible or rubber articles (haatzai articlesen).\textsuperscript{33}

Following up on this, the Head of the Indonesian National Police General Police Listyo Sigit Prabowo then issued Circular (SE) Number. SE/2/11/2021 concerning Ethical Cultural Awareness to Realize a Clean, Healthy, and Productive Indonesian Digital Space; she asked the principal investigator of the Police to use restorative justice approaches (RestorativeJustice) as the main approach in handling cases related to Law Number 11 Year 2008 on Information and Electronic Transactions. This is as amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions (UU ITE).

In SE/2/11/2021 there are at least 11 (eleven) points that serve as guidelines for Polri investigators in handling cases related to the ITE Law. Among the eleven points, the fourth to the ninth points include new rules related to the settlement of criminal cases that must prioritize restorative justice. The eleven guidelines are as follows:\textsuperscript{34}

a. Keeping up with the development of the use of digital space that continues to develop.

b. Understanding the ethical culture that occurs in the digital space by taking an inventory of various problems and impacts that occur in society.

c. Prioritizing preemptive and preventive efforts through virtual police and virtual alerts aimed at monitoring, educating, giving warnings, and preventing the public from potential cyber crimes.

d. In receiving reports from the public, investigators must be able to clearly distinguish between criticism, input, hoaxes and defamation that can be punished.

\textsuperscript{33} Keputusan Menko Polhukam RI Nomor 22 tahun 2021 Tentang Tim Kajian UU Tentang Informasi dan Transaksi Elektronik

\textsuperscript{34} Surat Edaran (SE) No.SE/2/11/2021 tentang Kesadaran Budaya Beretika untuk Mewujudkan Ruang Digital Indonesia yang Bersih, Sehat, dan Produktif
e. Since receiving the report, the investigator must communicate with the parties, especially the victim (not represented) and facilitate by giving the disputing parties the widest possible space to mediate.

f. Investigators conduct comprehensive studies and case titles on cases handled by involving elements of the Criminal Investigation Agency (Bareskrim)/Directorate of Cyber Crimes (Dittipidsiber) can go through zoom meetings and make collegial collective decisions based on existing facts and data.

g. Investigators have the principle of criminal law being the last resort in law enforcement (ultimum remidium) and promoting restorative justice in case resolution.

h. Against parties and/or victims who will take peaceful steps to become part of the investigator's priority for restorative justice.

i. Against victims who still want their case to be brought to court, but the suspect has realized and apologized, then no detention will be carried out. Before the file is submitted to the Public Prosecutor (JPU) to be given space for mediation again.

j. Investigators should coordinate with the Public Prosecutor's Office in its implementation, including providing advice on the implementation of mediation at the prosecution level.

k. In order to carry out gradual supervision of every step of the investigation taken. Then give rewards and punishments for the assessment of the leadership on an ongoing basis.

This Circular Letter is enacted to deal with ongoing cases as well as cases that will arise in the future. There are warnings and threats for police officers who do not comply with this SE in the form of punishment. Then, investigators will be supervised by the Supervision of Investigation (Wassidik), Propam Polri, and Itwasum
Polri related to the implementation of the implementation of the UU ITE in all regions.\(^{35}\)

In connection with the issuance of SE No.2/2021, the Chief of the National Police Telegram No. ST/339/II/RES.1.1.1./2021 concerning Guidelines for Handling Cyber Crime Cases using the ITE Law. Through this telegram, the National Police Chief has classified cases under the ITE Law which can be resolved by means of restorative justice, especially those related to hate speech.

The hate speech contained in the telegram can be categorized into two things as follows:\(^{36}\)

a. Hate speech is included in cases of defamation, slander, or insult and can be resolved by restorative justice. With regard to hate speech that falls into this category, the National Police Chief gives directions to his staff to follow Article 27 paragraph 3 of the ITE Law, Article 207 of the Criminal Code, Article 310 of the Criminal Code, and Article 311 of the Criminal Code, and

b. Hate speech that has the potential to divide the nation (disintegration and intolerance). With regard to the crime of hate speech, the National Police Chief divides two types of criminal acts that can divide the nation: first is hate speech related to SARA elements, then the legal process is guided by Article 28 Paragraph 2 of the ITE Law; Article 156 of the Criminal Code; Article 156a of the Criminal Code; Article 4 of Law Number 40 of 2008; second, is the spread of fake news that has the potential to cause trouble in the community. So the prohibition rule that must be followed is Article 14 paragraph 1 of Law Number 1946.


Conclusion

Efforts to implement Restorative Justice as a way to resolve criminal cases related to the Electronic Information and Transaction Law (UU ITE) are the right steps, considering that in the settlement of criminal cases, investigators must have the principle that criminal law is the last resort in law enforcement (ultimum remedium), and prioritizing restorative justice in the settlement of cases as set out in Circular Letter Number: SE/2/11/2021 and the Chief of Police's Telegram Letter No. ST/339/II/RES.1.1.1./2021. The implementation of this principle of restorative justice emphasizes the process of returning the situation to its original state and efforts to create peace between the perpetrator, victim or victim's family, as well as community leaders. With the return to its original state or reconciliation, criminal cases can be resolved and do not need to be continued to the judicial process. The application of Restorative justice in handling cases related to the ITE Law must be supported by law enforcement officials, not only investigators at the police apparatus level. Therefore, the government needs to make appropriate regulations to regulate the settlement of criminal cases that prioritize restorative justice not only in the form of a circular letter from the Chief of Police or a telegram, but in the form of legislation for the realization of an integrated criminal justice system.
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