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RESEARCH ARTICLE

EXAMINING RESTORATIVE JUSTICE AND DIVERSION IN THE INDONESIAN JUVENILE CRIMINAL JUSTICE SYSTEM AS LEGAL SETTLEMENT:BASED ON THE DIGNIFIED JUSTICE THEORY

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Abstract

The legal issue underlying the writing of this research article is the existence of a legal vacuum (*rechtsvacuum*). The legal vacuum or lacunae referred to is the lack of legal theory (meta-theory) and philosophical theory (meta-meta theory). By legal vacuum (lacunae) in terms of meta-theory and meta-meta theory, refers to the absence of a legal theory or jurisprudence that is truly original or authentic to Indonesia. There is still no original or authentic Indonesian legal theory or jurisprudence that explains, justifies, or provides scientific justification, in the sense of providing a theoretical basis for dogmatics that explain the norms, rules, or legal regulations governing the practice of law, specifically in the resolution of criminal cases involving juveniles as perpetrators of criminal acts.The statement that no theory or jurisprudence is truly original to Indonesia, as mentioned above, means that no theory or jurisprudence exists that is not a derivative or adapted from other systems. It should be emphasized here that this research is not motivated by an anti-Western sentiment. The research adopts a normative juridical approach with a philosophical perspective. The research finds that the Dignified Justice Theorycan be used to fill the legal vacuum needed to explain and justify restorative justice and diversion in the resolution of juvenile criminal cases in Indonesia. The Dignified Justice Theory can provide a theoretical and philosophical foundation for restorative justice and diversion by understanding that both restorative justice and diversion are derivative norms originating from Pancasila, the ultimate source of all legal sources in the Pancasila Legal System.

Introduction:-

The legal issue that prompted this research is the existence of a legal vacuum (rechtsvacuum). The legal vacuum or lacunae referred to is the absence of law at the theoretical level (meta-theory) as well as the philosophical level (meta-meta theory).[1]What is meant by the legal vacuum (lacunae) at the meta-theory and meta-meta-theory levels is

[1]The two"steps"abovelegal practice and legaldogmatics in the structure of legal science. See the arrangement or hierarchy in the structure according to legal science in **Figure 1**. Also, refer to the book: TeguhPrasetyo,2015,

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that there is still no legal theory or jurisprudence that is truly original or authentic to Indonesia. There is still no original or authentic Indonesian legal theory that explains, justifies, or provides scientific justification, in the sense of providing a theoretical basis for the dogmatics that explain the norms, rules, or legal regulations governing legal practices, particularly in the resolution of criminal cases involving juveniles as perpetrators of criminal acts.

There is an opinion that "In applying legal science in Indonesia, it cannot simply adopt and implement legal science that has developed in other countries, even though that science may have produced high-quality results in those countries.".[2]The research finds that jurisprudence should not simply adopt theories and jurisprudence from thoughts outside the Indonesian legal system. It needs to be balanced, supplemented, and contextualized with the presence of original Indonesian theory or jurisprudence. As mentioned above, the original or authentic Indonesian theory referred to here is a theory or jurisprudence that truly originates from the wisdom or insight of the Indonesian people themselves. This original or authentic theory or jurisprudence is unearthed, rooted in, and developed or grown from within the land of Indonesia.

The authentic Indonesian theory or jurisprudence that will be proposed in this research, in the future, after this research and writing, can hopefully be used as a foundation to justify, provide scientific justification, and fill the legal gap in legal theory (meta-theory) or jurisprudence (meta-meta-theory) that explains and justifies the norms, rules, and legal regulations governing the resolution of criminal cases. Specifically, in the case of resolving cases involving juveniles as perpetrators of criminal acts, this research will propose an original legal theory or jurisprudencethat has been described above as authentically Indonesianthat can be used to explain or provide scientific justification for Restorative Justice and Diversion.

Methodology:-

The author has found the necessary theory using a method that can be scientifically justified.[3]The research problems were studied, identified, examined, analyzed, and evaluated to obtain accurate answers to these issues.[4]The research procedure is based on methods, approaches, and a systematic framework that can be justified[5]in testing the truth regarding specific legal events.[6]Curiosity serves as the driving force behind legal research[7], with epistemology aimed at discovering and collecting authoritative legal materials.[8]The theory needed and discovered in this research is also a process that guides the response to the legal issues faced.[9]

The study is categorized into[10], for example, legal studies conceptualized as principles of justice within a moral system utilizing doctrinal and contemporary[11]sociological legal studies.[12]The choice of method is applied consistently[13]to serve solely the field of legal science.[14]The chosen approach determines the design of the research.[15]This study examines how to fill the existing legal gaps, including the discovery of new laws,[16]to deepen

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KeadilanBermartabatPerspektifTeoriHukum, Cetakan I, Nusa Media, Bandung, h. 3; Cf., TeguhPrasetyo, 2020, *Hukum&TeoriHukum: PerspektifTeoriKeadilanBermartabat*, Cetakan I, Nusa Media, Bandung, h. 37.

[2]Bernard AriefSidharta, 2009, *RefleksitentangStrukturIlmuHukum*: *SebuahPenelitiantentangFundasiKefilsafatan dan SifatKeilmuanIlmuHukumsebagaiLandasanPengembanganIlmuHukumNasionalIndonesia*, CetakanKetiga, Mandar Maju, Bandung, h. 11.

[3]Ruslan, Rosdi, 2003, *Metode Penelitian Publik*, Raja GrafindoPersada, h. 24.

[4]Tommy Hendra Purwaka, 2011, *MetodologiPenelitian Hukum*, Penerbit Universitas Atma Jaya, Jakarta, h.7.

[5]Jonathan, Sarwono, 2006, *Metode PenelitianKuantitatif dan Kualitatif*, GrahaIlmu, Yogyakarta, h. 15.

[6]C.F.G. Sunaryati Hartono, 2006, *Penelitian Hukum di Indonesia Pada Akhir Abad ke-20*, Alumni, Bandung, h. 105.

[7]Tommy Hendra Purwaka, *Op.cit*, h. 10.

[8]DyahOchtorina Susanti dan A'an Efendi, 2014, *Penelitian Hukum (Legal Research)*, SinarGrafika, Jakarta, h. 1-2.

[9]Peter Mahmud Marzuki, 2011, *Penelitian Hukum*, Prandata Media, Jakarta, h. 41.

[10]Sri Rahayu Oktoberina dan Niken Savitri, 2008, *Butir-ButirPemikirandalam Hukum: Memperingati 70 Tahun Prof. Dr. B. Arief Sidharta, SH.*, Refika Aditama, Bandung, h. 43-63.

[11]SoetandyoWignjosoebroto, 2002, *Hukum, Paradigma, Metode, dan DinamikaMasalahnya*, Elsam& Huma, Jakarta, h. 56-58.

[12]Johnny Ibrahim, 2006, *Teori dan MetodologiPenelitian Hukum Normatif*, Banyumedia Publishing, Malang, h. 36.

[13]Sajipto Rahardjo, 1991, *Ilmu Hukum*, Citra Aditya Bakti, Bandung, h. 5.

[14]Valerie J. L. Kriekhoff, 2014, *Metode Penelitian Hukum, Kumpulan Bahan Bacaanuntuk Program S-2 & S-3*, Program Pasca Sarjana Fakultas Hukum Universitas Indonesia, Depok, h 27.

[15]SumadiSuryabrata, 2002, *MetodePenelitian*, Radja Grafindo, Persada, Jakarta, h. 15.

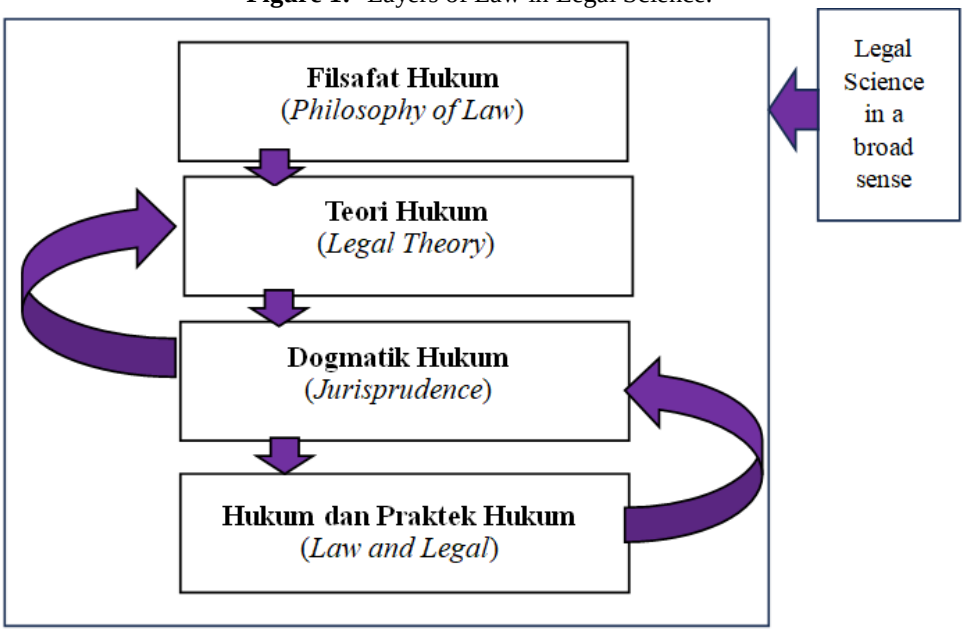
knowledge in a normative[17]or philosophical theoretical manner. The research seeks benchmarks for human behavior that are deemed appropriate.[18]The research is also normative juridical, as evidenced by its data sources.[19]Historical comparisons are also observed.[20]Legal research issuigenerisresearch.[21]The characteristics of the data include the use of secondary data[22]and other types of data.[23]

Findings and Discussions:-

It was found in this research that the Dignified Justice Theory serves as the necessary legal theory for providing scientific explanation and juridical justification at the philosophical level for Restorative Justice and Diversion. The contribution of the Dignified Justice Theory in this regard is that law is viewed as a system. This aligns with the perspective that:

Philosophical thinking is characterized by systemic thinking. "Systemic" comes from the word "system," which means wholeness and a number of elements that are interconnected according to an arrangement to achieve a specific purpose or fulfill a particular role. In presenting answers to a problem, opinions that are systematically related and contain a specific intent and purpose are used.[24]

Figure 1:- Layers of Law in Legal Science.



According to the Dignified Justice Theory, law, including Restorative Justice and Diversion, is fundamentally structured vertically, as can be seen in **Figure 1**. It begins with the arrangement of activities in the field of law from

[16]Bernard Arief Sidharta, 2000, *RefleksitentangStrukturIlmu Hukum*, Mandar Maju, Bandung, h. 114.
[17]Hermawan Warsito, 1995, *PengantarMetodologiPenelitian: Buku Panduan Mahasiswa*, Gramedia, Jakarta, h. 9.
[18]Aminudin dan Zainal Asikin, 2006, *Pengantar Metode Penelitian Hukum*, Rajawali Press, Jakarta, h. 118
[19]In doctrinal legalresearch, the concept of "data"should not beused; instead, the concept of "legalmaterials"shouldbeemployed.
[20]SunaryatiHartono, 1991, *KapitaSelektaPerbandinganHukum*, Citra Aditya Bakti, Bandung, h. 2.
[21]TeguhPrasetyo, 2019, *PenelitianHukumSuatuPerspektifTeoriKeadilanBermartabat*, Cetakan I, Nusa Media, Bandung, h., 3. It isformulatedtherethat: "In the sui generis nature of legalresearchmethods, itis not appropriate to impose researchmethodsfrom the natural sciences and social sciences for use in legalresearchmethods."
[22]SoerjonoSoekanto dan Sri Mamuji, 1979, *Peranan dan PenggunaanPerpustakaandalamPenelitian Hukum*, Pusat Dokumentasi Hukum Fakultas Hukum Universitas Indonesia, Jakarta, h. 12.
[23]Lexy J. Moleong, 1989, *MetodologiPenelitianKualitatif, Rosda Karya*, Bandung, h. 112.
[24]TeguhPrasetyo dan Abdul Halim Barkatullah, 2021, *Filsafat, Teori, &IlmuHukum*: *PemikiranMenujuMasyarakat yang Berkeadilan dan Bermartabat*, Cetakan ke-1, RajaGrafindoPersada, Jakarta, h. 2-3.

legal dogmatics (rechtsleer), with the object of study being the legal practice that examines rules, norms, or regulations and principles, values, or specific legal regulations, as well as the legal system and legal discovery (rechtsvinding), as well as in the sense of theory (meta-theory), and also the philosophy of law (meta-meta-theory). Dignified Justice explains the law as the meeting point between the thoughts of God (lex divina or lex eterna) and human thought within society.[25]

According to Prasetyo, the theory of law or the philosophy of law resulting from its discovery and development is as follows:

The two thoughts above appear to be in a position of mutual tension between one another. The end result of the tug-of-war between the thoughts of God (lex aeterna/lex divina) or the upper pull and human thought within society or the lower pull produces positive law. The law that applies here, at this moment, and created by the authorities here and at this time, is part of a system in Indonesia. This legal system is based on Pancasila. Thus, the Dignified Justice Theory, in providing explanation or justification for law and positive law in Indonesia (ius constitutum), takes a middle path that serves as the meeting point between eternal law and volkgeist, or the spirit of the nation, referred to as Pancasila.[26]

The philosophical thought that law is a system of human thinking exists everywhere and throughout time, as well as in the development of each society's civilization. This civilized thinking arises to regulate or determine the patterns of life and behavior of individuals within that society. The existence of this legal thought is also intended to regulate and define lifestyles and behavioral goals according to the society itself. Such thinking encompasses, among other things, the thoughts in the field of law that represent the meeting point between the thoughts of God and human thoughts within society.

These thoughts manifest themselves in the form of rules, and principles of positive law in Indonesia, which can be found primarily in legislation and in court decisions that have permanent legal force and are derived from Pancasila as the source of all sources of state law.[27]As the source of all sources of law, Pancasila is the highest law. This can be seen in **Figure 2.**

The rules and principles of law within the system of positive law, as well as legal discovery from the perspective of Dignified Justice, which is sourced from Pancasila as the source of all sources of law, contain axiological or value-based elements. The existence of all values or things deemed good and right, whether universal or relative, within each formulation of applicable legal rules in Indonesia is derived from Pancasila and constitutes the law in force (ius constitutum), the positive law of Indonesia, as illustrated in **Figure 2.**

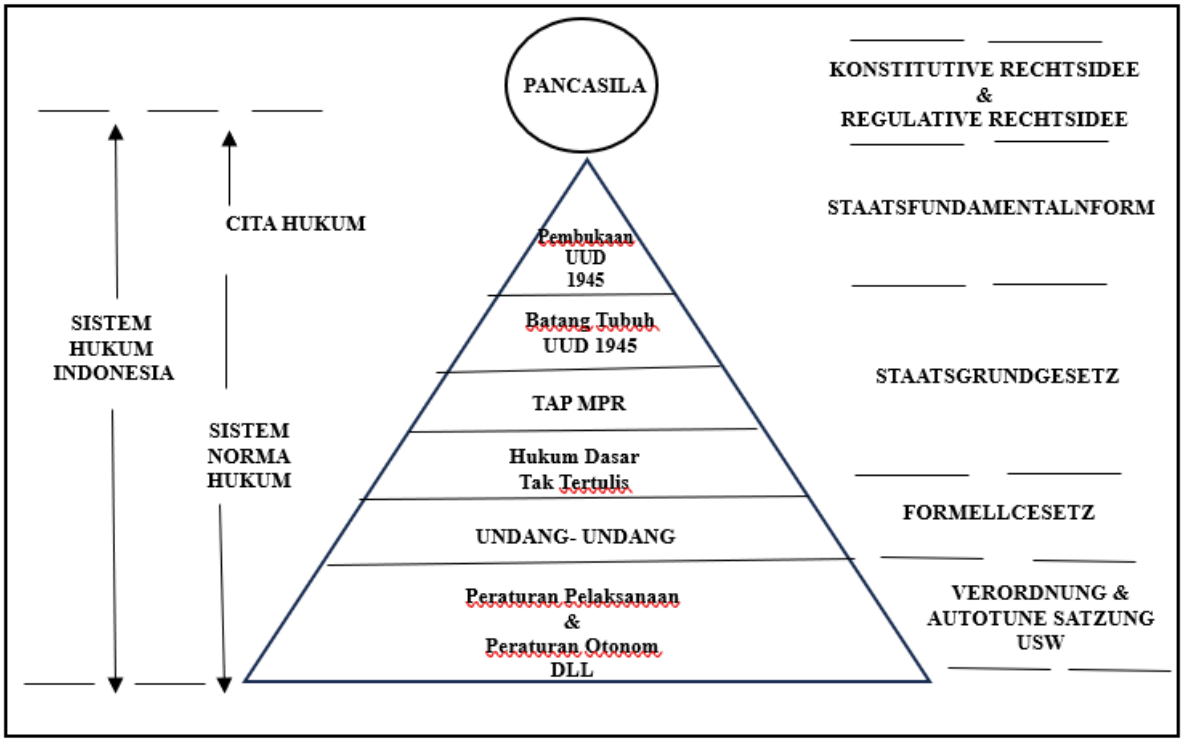
Law, including Pancasila as the highest law, encompasses the legal objectives that prevail in society, such as justice, utility, and legal certainty. These objectives, from the perspective of Dignified Justice, do not contradict (antinomy) one another. They cannot be separated from each other. Following the nature of Pancasila, the existence of legal values in applicable legislation and in court decisions with permanent legal force all exist in a balanced manner to humanize humanity (to make human beings humane) or in the terminology of Indonesian wisdom is known by the concept of the purpose of the law to humanize humanity, encapsulated in the phrase "nguwongkeuwong".[28]

Benefits of Dignified Justice for the Development of Legal Science

The Dignified Justice Theory is beneficial for the development of legal science, in the sense of filling the legal vacuum at the theoretical (meta-theory) and philosophical (meta-meta-theory) levels. There are still other legal issues or problems. The Dignified Justice Theory can explain, for example, the regulations currently in effect in Indonesia (ius constitutum), namely the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2024 concerning Guidelines for Aparticularly in the consideration section,which states that the so-called restorative

[25]TeguhPrasetyo, 2015, *KeadilanBermartabatPerspektifTeoriHukum*, Cetakan I, Nusa Media, Bandung, h. 41.
[26]*Ibid*.
[27]TeguhPrasetyo, 2016, *Sistem HukumPancasila* (*Sistem, Sistem Hukum dan PembentukanPeraturanPerundang-Undangan di Indonesia*) *PerspektifTeoriKeadilanBermartabat*, Cetakan I, Nusa Media, Bandung, h. 67.
[28]TeguhPrasetyo, 2020, *Hukum dan TeoriHukum*: *PerspektifTeoriKeadilanBermartabat*, Nusa Media, Bandung. h. 59; *Cf*. TeguhPrasetyo, *et. al*., 2022, *Hukum dan KeadilanBermartabat*: *OrientasiPemikiranFilsafat*, Teori dan PraktekHukum, K-Media, Yogyakarta, h. 330.

Figure 2. Pancasila as the Foundation of the State/ Highest Law



justice approach is not sufficiently regulated in the criminal justice system.

As an approach, restorative justice, as recognized in the regulation (Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2024 concerning Guidelines for Adjudicating Criminal Cases Based on Restorative Justice), is not adequately regulated; particularly regarding: (1) types of cases, (2) requirements, and (3) procedures for the application of restorative justice.

It is also stated in the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2024 concerning Guidelines for Adjudicating Criminal Cases Based on Restorative Justice that there is no mention of Diversion at all. The formulation of consideration point (c) in the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2024 has therefore created a juridical assumption, thus providing the legal background and rationale for the necessity of this legal research; namely, that there is indeed a legal vacuum (rechtsvacuum) at the level of positive law.What is meant by the legal vacuum at the level of positive law (ius constitutum) here is primarily the absence of legal regulations altogether. Dignified Justice also helps to identify the normative facts in the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2024 that there is no regulation governing restorative justice, which is a form of weakness, in the sense of the incoherence among various regulations. There is a lack of synchronization between the aforementioned restorative justice regulation and other legislative regulations that also recognize restorative justice as an approach to resolving criminal cases.

Generally, what is meant by approach here is the process, actions, and methods of approaching; a stance or viewpoint about something, usually in the form of assumptions or a set of interrelated assumptions in resolving criminal cases, both at the trial level (in court settlements) and not only outside the trial level (off the court settlements).

Restorative justice, recognized in other legislative regulations as an “approach,” is not found or recognized in the Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2024. This differs from the usage of the concept of approach in the concept of restorative justice that exists or is known in-laws specifically regulating the juvenile criminal justice system.

The Dignified Justice Theory also points to an interesting aspect of the law concerning the Juvenile Criminal Justice System (JCJS). It is formulated in Article 5 paragraph (1) of Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System, hereinafter referred to as the UU-SPPA, which states that "juvenile punishment must prioritize the restorative justice approach." The meaning of the restorative justice concept as formulated in Article 1 number (6) of the UU-SPPA is: "the resolution of criminal cases involving the perpetrator, victim, families of the perpetrator/victim, and other related parties to collectively seek a fair resolution with an emphasis on restoring the situation to its original state, rather than revenge."

The formulation of the meaning of the restorative justice concept, which is identical, can indeed be found in several other regulations that govern the resolution of criminal offenses. However, in regulations other than the UU-SPPA, there is no understanding that restorative justice is an approach that must be prioritized, nor is there acknowledgment that restorative justice, in certain matters, must "pair" with diversion.

The Dignified Justice Theory also points to the formulation in Article 1 number (1) of the Attorney General of the Republic of Indonesia Regulation No. 15 of 2020 concerning the Termination of Prosecution Based on Restorative Justice. It is stated in Article 1 number (1) of the Attorney General of the Republic of Indonesia Regulation No. 15 of 2020 that restorative justice is defined as "the resolution of criminal cases involving the perpetrator, victim, families of the perpetrator/victim, and other related parties to collectively seek a fair resolution with an emphasis on restoring the situation to its original state, rather than revenge." However, in the Attorney General of the Republic of Indonesia, Regulation No. 15 of 2020 concerning the Termination of Prosecution Based on Restorative Justice, the concept of diversion is not found at all.

In addition, although the Attorney General of the Republic of Indonesia Regulation No. 15 of 2020 contains Restorative Justice, this regulation does not mention the Child Criminal Justice System Law (CCJSL) in the Considerations section. Furthermore, the scope of applicability and implementation of the Attorney General Regulation No. 15 of 2020 covers all criminal case resolutions, except for those specifically excluded in that regulation. The Attorney General Regulation is not only specifically formulated as a legal rule for law enforcement within the Indonesian Prosecutor's Office, but specifically for public prosecutors dealing with cases involving children as offenders.

Another issue that should be addressed by the Dignified Justice Theory is that concerning Restorative Justice as the preferred approach in resolving criminal cases involving children as offenders, the UU-SPPA also regulates Diversion. In other words, based on the provisions in the UU-SPPA, the Restorative Justice approach cannot be separated from the provisions regulating Diversion. As stated in Article 5 paragraph (3) of the UU-SPPA, Diversion must be pursued in the Child Criminal Justice System (CCJS). Diversion is defined in Article 1 number (7) of the UU-SPPA, which states that "Diversion is the transfer of the resolution of a child's case from the criminal justice process to the process outside the criminal justice system."

However, considering the definitions of both concepts, there are differences in the manner in which they are regulated in the applicable legislation. While Restorative Justice is a method that can be used for resolving cases involving children as offenders both in and out of court, Diversion only signifies a method of resolving cases involving children as offenders, provided that the resolution occurs outside the criminal justice system, as understood according to the UU-SPPA.

Restorative Justice is an approach that can be applied at the stages of investigation, prosecution, and judicial examination, along with other activities as previously mentioned. In contrast, Diversion is a mechanism or process for resolving cases that can only be carried out during the stages of investigation, prosecution, and judicial examination outside the court system. The differing meanings between Restorative Justice and Diversion within the UU-SPPA, as outlined above, have not received significant attention in academic studies conducted thus far.

Tracing other regulations, using the Dignified Justice Theory, the concepts of Restorative Justice and Diversion, as previously discussed, are implied in the legal provisions that will still apply in the future (ius constituendum) when this research and writing are conducted. This ius constituendum is reflected in the legal stipulation in Article 112 of the Republic of Indonesia Law No. 1 of 2023 concerning the Criminal Code. The article states that "A child who commits a criminal offense punishable by imprisonment of less than seven years and is not a repeat offender must be pursued for diversion."

Upon closer examination, the stipulation does not include the characteristic of diversion that cannot be separated from Restorative Justice, as previously stated, as a principle in the UU-SPPA. In relation to this, Article 117 of the Republic of Indonesia Law No. 1 of 2023 concerning the Criminal Code states that "The provisions regarding diversion, actions, and penalties as referred to in Articles 112 to 116 shall be implemented following the provisions of the legislation."

The stipulation in Article 117 of the Republic of Indonesia Law No. 1 of 2023 concerning the Criminal Code, which will come into effect in the future (ius constituendum), indeed refers to the regulation on Diversion as provided for in the UU-SPPA and the implementation regulations concerning Diversion established under the implementing regulations of the UU-SPPA.[29]However, within that stipulation, there is no indication that diversion must utilize Restorative Justice as an approach, as formulated in the UU-SPPA.

Conclusion:-

This research has found that the theory of Dignified Justice is a legal theory or jurisprudence. The theory of Dignified Justice can fill the legal void in the sense of a lack of theoretical tools or legal philosophy in providing explanations and justifications for legal norms, particularly those related to Restorative Justice and Diversion. The theory of Dignified Justice is the result of Indonesian thought, representing an original or authentic legal theory of the Indonesian people (the Indonesian jurisprudence) regarding Restorative Justice and Diversion. This understanding is based on the premise that a research study essentially consists of identifying issues and the objectives that researchers hope to achieve in the formation, implementation, application, discovery, interpretation, learning, and teaching of law.[30]

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[29]Article 15 of the Juvenile Justice System Law (JJSL) contains a provision statingthat the guidelines for the implementation of the diversion process, procedures, and coordination of diversion implementation are regulated in GovernmentRegulations. The relevant GovernmentRegulationisGovernmentRegulation No. 65 of 2015 concerning Guidelines for the Implementation of Diversion and Handling of Children Under Twelve Years of Age. Otherregulationsthatimplement the UU-SPPA, as mentionedabove, include: in addition to the aforementionedGovernmentRegulation, thereisalso the Supreme Court Regulation No. 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Justice System. Furthermore, otherregulationsrelated to diversion can befound in Attorney General Regulation No. Per-006/A/J.A/04/2015 concerning Guidelines for Implementing Diversion at the ProsecutionLevel.

[30]Lili Rasjidi dan Ira Rasjidi, 2001, *Dasar-DasarFilsafat dan TeoriHukum,*Cetakan ke-8, Citra Aditya Bakti, Bandung, h. 159.

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