

DIVERSION SANCTION IMPLEMENTATION AGAINST CHILD ABUSE OF NARCOTICS IN INDONESIA.

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ABSTRACT

The principle of legal protection of the child shall be in accordance with the Convention on the Rights of the Child. Cases involving children as perpetrators of criminal acts are different phenomena from adult perpetrators. Children as perpetrators of criminal acts criminally charged for fostering in a Child Correctional Institution need special treatment in their criminal sanction. For example in the case of children as the perpetrators of narcotics users. Drug abuse and dependence and hazardous drugs have broad and complex dimensions, both from a medical point of view, and psychosocial. Diversion is one of the alternatives in accordance with various international law conventions. This diversion aims to divert narcotics abusers from the judicial process to social processes. This change can be done with various considerations from the judiciary to nurture the child entrusted to the parents, the Social Service, and the government. The problem in writing this research is How Implementation of Sanctions Diversion Against Children Narcotics Abuse Victims In Indonesia? Based on the results of research and discussion it can be concluded by the authors that the application of diversion efforts against child abuse abusers can be done as long as it meets the elements in Article 7 of Law Number 11 Year 2012 on Child Criminal Justice System. The investigator shall require consideration or advice from the Counselor after the crime reported. The police and the Correctional Institution want to achieve diversion to avoid any imposition of sanctions against child abuse of narcotics. The model of narcotics abuse settlement by children through the mechanism of diversion is the effort to divert the juvenile justice process into the non-judicial process based on the consideration that the involvement of children in the judicial process has basically resulted in bad influence for the child and the diversion at the police level (investigator) as an alternative to the settlement of narcotics abuse cases by the child. The first experience in the criminal justice process for a suspect is in contact with the police. The transfer of the judicial process to the non-judicial process in the settlement of narcotics abuse by the child is more appropriately done at the police level. Whereas the child of the narcotics abuser can not be conducted in the investigation level, the judge does not have to decide the case by imprisonment, but it can also be a medical rehabilitation and social rehabilitation designated by the Government for treatment and/or treatment through medical rehabilitation and social rehabilitation.

KEY WORDS: Sanctions, Diversion, Children, Abusers, Narcotics

I. INTRODUCTION

When we speak of legal issues, it will be confronted with matters relating to the social activities of human beings in society manifested by interaction process and interrelation between human beings with another. In the social life, in essence every human being aims to meet the needs of his life, both material and immaterial. The quest to goal the achievement, there is little possibility of togetherness or even vice versa. Quite a lot of that contradict each other. The contradictions that arise can lead to chaos, even very possible anarchic action and such conditions are not an aspired aspect in social intercourse.

For the creation of orderly and peaceful life, the state as the ruler in this case has described norms or rules that determine how should behave in the community, so that all kinds of violations of the norms or rules will be punished, both suffering and sorrow. But what if the violation of state norms or rules is done by minors? Does it still get the same criminal offense as an offense committed by an adult? For example, according to the Indonesian Child Protection Commission (KPAI) drug abuse cases increasingly threatening children. Year 2016 Number of drug users in adolescence rose to 14,000 Souls with age range 12-21 Years.

Children are part of the young generation as one of the human resources that is the potential and the ideals successor of the nation struggle, which has a strategic role and has special features and traits, requires guidance and protection in order to ensure the whole growth and development of physical, mental, social and harmonious, well balanced. In order to carry out guidance and provide protection for children, support needs, both with respect to institutional and legal instruments that are more stable and adequate. Therefore, the provision of court administration for children needs to be done specifically. (Muhammad Taufik : 2013).

Legal protection principle of the child shall be in accordance with the Convention on the Rights of the Child as ratified by the Government of the Republic of Indonesia by Presidential Decree No. 36/1990 on the ratification of the Convention on the Rights of the Child) which regulates the principle of legal protection of the child has an obligation to provide special protection for children in conflict with the law. (Muhammad Taufik : 2013).

Child definitions according to Law Number 35 Year 2014 on the Amendment of Law Number 23 Year 2002 regarding Child Protection, in Article 1 paragraph (1) states that the child is a person who is not yet 18 (eighteen) years including a child who is still in content.

Cases involving children as perpetrators of criminal acts are different phenomena from adult perpetrators. Children as perpetrators of criminal acts criminally charged for fostering in a Child Correctional Institution need special treatment in their criminal sanction. For example in the case of children as the perpetrators of narcotics users.

Definition of narcotics based on Article 1 number 1 Law Number 35 Year 2009 on Narcotics, Narcotics are substances or drugs derived from plants or non-plants, both synthetic and semisintetis, which can cause decreased or change of consciousness, loss of taste, reduce to eliminate the taste pain, and can cause dependence that is differentiated into groups as attached in this Act. Narcotics is a useful drug in the field of medicine or health services and the development of science but on the other hand creates a very detrimental dependence when abused. To prevent and provide narcotics for the sake of medical treatment and health services, one of the government's efforts is to legally regulate the circulation, import, export, plant, the use of narcotics in a controlled and strict supervision. (Siswanto: 2012: 1)

The abuse and dependence of narcotics and hazardous drugs has a broad and complex dimension, both from a medical standpoint, as well as psychosocial (economic, political, social, cultural, criminal, mass riot, etc.).(Mardani: 2008: 3). Narcotics abuse in this era of globalization is growing, this development is accompanied by an advanced mindset and science. So the circulation of narcotics affects teenagers and children.No method of evidence collection on drugs is fool proof anywhere in the world. Consequently, inferences about the consumption of drugs have to be drawn with the utmost care. (Philip Robins: 2014).

Before the establishment of the Criminal Justice System Law No. 11 Year 2012, the implementation of diversion by law enforcement officers initially based on discretion authority. According to the Dictionary of Law, discretion means freedom of decision in every situation it faces in its own opinion.(Simorangkir: 2008: 38). Discretion is required as a complement to the principle of legality that is the legal principle which states that any act or act of State administration must be in accordance with the provisions of the law, but it is not possible for the law to regulate all kinds of cases of positions in the practice of daily life. The investigator, the public prosecutor or other bodies dealing with the child's case shall be authorized to decide such case, according to their discretion without the use of a formal preliminary examination, in accordance with the criteria specified for that purpose in their respective legal systems and also appropriate with the principles in these rules.

Diversi is one of the alternatives in accordance with various international law conventions. This diversion aims to divert narcotics abusers from the judicial process to social processes. This change can be done with various considerations from the judiciary to nurture the child entrusted to the parents, the Social Service, and the government.

The contradiction between Indonesia as an adherent of the rule of law and the emergence of the notion of legal diversion makes the thought to make this study. Controversial about equality and legal justice should be found the best solution so as to provide legal certainty for the community, especially for the perpetrators of narcotic crimes committed by children.

Diversion first proposed as a vocabulary on a report on the implementation of juvenile justice delivered by the President Crime Commission of the United States in 1960. Prior to his introduction the term diversion of the practice of diversified form exists prior to 1960 marked by the establishment children's courts before the nineteenth century that is the diversion of the formal criminal justice system and the formalization of police to do warnings (police cautioning). (Marlina: 2010: 10)

In 1970 two major forms of diversity existed in Australia focused not to make diversions to an alternative program, but rather to divert the judicial system. One of the main points of this form is the cautious attitude of the police, where young people who have been handled by the police are only given verbal and written warnings, after which the child will be released and is the end of the problem unless the child commits a further violation continued process. The second form, carried out in southern Australia in 1964 and western Australia in 1972, involved a meeting of child perpetrators and their parents with the police and a state social worker. The purpose of the meeting was diversion before entering into formal justice. Meetings are conducted in a relatively informal atmosphere to provide warnings and counseling. (Marlina: 2010: 10)

Those forms of divergence were carried out in the state of Victoria in 1959, Queensland in 1963 and New South Wales in 1985, all of which were in Australia. States like Victoria, New South Wales and Queensland are brave to reform their existing legal system to support the implementation of diversionary programs in these countries in terms of the principle of the frugality of punishment.

The rules in the State of Queensland contain rules, the child is placed in custody as the last place (Juvenile Justice act 1992, 4 (b) (i)). According to Wunderzit, the number of children imprisoned within 11 years fell by 1,352 people in 1981 to 577 in 1992. Furthermore, the Australian community succeeded in realizing its desire to change the emphasis of the welfare model to the justice model. (Marlina: 2009: 163)

In the state of Tasmania, Australia, the Youth Justice Act of 1997 allows police to directly discriminate against child offenders by providing informal warnings, formal warnings(written), warnings through meetings, meetings with members of the conferencing community through a diversion or forwarding process to the judiciary. The police officer gives an official warning of the party provided to the child offender, such as paying compensation, making accountability, conducting community service activities for 35 hours for his or her corbannal needs through social or other institutions or other appropriate actions, the choices being decided through the police officers and also the community.(Marlina: 2009: 165)

In the State of Northern Territory Australia a formal warning or settlement with consultation has been applied by the government into law. The country has inaugurated commemoration and diversion towards negotiations as a lawful decision in accordance with the agreement of the Prime Minister and Head of State Ministries. The Police Administration Act rules provide four levels for diversion before the court. The first level consists of two forms of warning given and agreed and the settlement of negotiations is then spoken verbally. The second level of formal cautioning is a written warning from the police. Third level for children at risk of repeating their actions again parents are given responsibility for restoring child with supervision at home.

Fourth level through the Juvenile diversion unit in a police institution in charge of dealing with children's diversion process from formal criminal to non-formal processes. In addition to providing advice to police in handling child offenders. This institute facilitates the container for children undergoing the diversion process.(Marlina: 2009: 166)

According to historical records in the United Kingdom police have long diversified and diverted children to non-formal processes as in the case of handling children who use toys that endanger others. The first record of the special treatment for his criminal offense was in 1883, by conducting informal proceedings outside the judiciary. Separation of justice for minors is governed by the Children Act of 1908. According to the Children Act of 1908 the police are given the task of handling the child before entering court by paying more attention to the welfare and justice of the offender. The giving of special treatment to child of perpetrator of this crime includes program of diversion.(Marlina: 2009: 170)

In Indonesia, the provisions on the implementation of diversions can be seen from the discretionary arrangements granted to law enforcement officials in handling child cases. Starting from the regulation in KUHAP as well as the special arrangement to the law enforcers.

II. PROBLEMS

Based on the introduction, the problem in this research is How Implementation of Sanctions Diversi Against Children Victims of Narcotics Abuse In Indonesia?

III. RESEARCH METHODS

This research is legal research using normative juridical approach, that is approach in the sense of studying norms and rules related to problem which will be discussed or done only on written regulations or other legal materials . The approach is to collect the various rules, theories that have to do with the problems and discussion in this research. The primary legal materials namely the Constitution of the Republic of Indonesia Year 1945, Law Number 1 Year 1946 on the Book of Criminal Law (KUHP), Law No. 2 of 2002 on the Police of the Republic of Indonesia, Law Number 35 Year 2009 on Narcotics, Law Number 7 Year 2012 on the Juvenile Justice System, Law Number 35 Year 2014 on the Amendment of Law Number 23 Year 2002 on Child Protection, Supreme Court Regulation Number 4 Year 2014 on Guidelines for Implementation of Diversity in Child Criminal Justice System, Government Regulation of the Republic of Indonesia Number 65 Year 2015 on Guidelines for the Implementation of Diversity and Handling of Children Not Yet Aged 12 (twelve) years old. Secondary legal materials consist of literature materials and other reading materials as well as tertiary legal materials derived from the results of previous research and Indonesian Law Dictionary.

IV. DISCUSSION

Diversion Sanction Implementation Againsts Child Abuse Of Narcotics In Indonesia.

In general, within the Criminal Code there are three articles formulation that regulate criminal sanctions against children, namely article 45 which regulates the criminal sanctions against children. In article 45 which regulates the maximum limit of a child can be accountable for the criminal acts committed. Another Article is article 46 governing administrative rules with regard to what the Judge must do after giving orders, that the guilty party is left to the government. Another Article is article 47 which regulates criminal reduction in case a judge will impose a penalty on a child offender. (Susilo: 2005: 62)

Article 1 number 7 of Law No. 11 Year 2012 on the Criminal Justice System states that diversion is the transfer of the settlement of a child case from a criminal justice process to a non-criminal justice process. This diversion concept has been implemented for longer term in some countries. According to historical records, in the United Kingdom police have long discredited and turned children into non-formal processes.(Marlina: 2009: 24). The division of narcotics drugs in the League of Nations international civil service that administered the drug control system. It was the body responsible for the preparatory conferences on international drug control. (Cindy S.J. Fazey: 2002: 157)

Indonesia has the first diversion concept in Law No. 11 Year 2012 on the Criminal Justice System of Children, where the concept of diversion represents a new breakthrough in the juvenile justice system in Indonesia where the concept of diversion is a diversion of settlement of child cases allegedly committing a specific offense of a formal criminal process to a peaceful settlement between a suspect/defendant/perpetrator of a crime with a victim who is facilitated by the family and/or the community, the Child's Counselor, the Police, the Prosecutor or the Judge. (LidyaRahmadaniHasibuan: 2014: 11).

Diversion is conducted to find a form of settlement that is a win win solution, in which the concept of diversion is based on the fact that criminal justice proceedings against criminals through the conventional criminal justice system pose more harm than good.(Marlina: 2009: 73)

Diversified concepts have goals as stated in Article 6 of Law No. 11 Year 2012 on the Criminal Justice System of Children, namely:

1. To achieve peace between the victim and the child;
2. Finishing a child case outside the court process;
3. Delete the child from deprivation of liberty;
4. Encouraging people to participate; and
5. Embedding a sense of responsibility to the child.

Diversi also aims to avoid the stigmatization of children suspected of committing a crime, so expect the child to return to a reasonable social environment and also to enforce the law without resorting to painful acts of violence by giving an opportunity for a person to correct his mistake without passing a state penalty which has full authority, one example of the importance of applying the concept of diversion is due to the high number of children who enter criminal justice and are imprisoned and subjected to violence while undergoing a series of processes within the criminal justice system.(Marlina: 2009: 13-14)

Another consideration of the concept of diversion in the criminal justice system is based on the reasons for giving justice to perpetrators who have already committed criminal acts and provide an opportunity for the perpetrator to improve himself. There are 3 types of diversion execution, that are :(Marlina: 2009: 73)

1. Social control orientation, in this case law enforcement officers hand over child offenders to accountability and community supervision;
2. Social service oriented, ie social service by the community by performing functions of supervision, repair and providing services for the perpetrator and his family;
3. Orientation of restorative justice, which provides an opportunity for the perpetrator to be responsible for his actions to the victim and the community. All parties involved are brought together to come to an agreement, what is the best course of action for this child of the perpetrator.

The Criminal Code regulates the criminal punishment system for children, including the age limit of under 16 years as a person categorized as a perpetrator of crime, without giving the lowest age limit as if the newborn child may be held criminally liable, while other types of sanctions are threatened against the child other than regulates criminal sanctions as defined in Article 10 of the Criminal Code in the form of principal and additional criminal sanctions.

The formulation of criminal sanctions in Law Number 3 Year 1997 on the Juvenile Court regulates two types of criminal sanctions in the form of criminal sanctions and actions but the specified sanction does not indicate the purpose of punishment which is to protect the interests of the child. Law Number 11 Year 2012 on the Criminal Justice System of the Child also states that there are two criminal sanctions in the form of criminal and action.

Law no. 11 Year 2012 on the Criminal Justice System The Child expressly states that in the handling of children in conflict with the law, investigators, prosecutors, judges required to seek diversionary action. In accordance with Article 7 paragraph (2) of Law no. 11 of 2012 on the Criminal Justice System of the Child, the diversion may be applicable if the child offender is punished with imprisonment under 7 (seven) years and is not a repeat of a criminal offense, taking into account the category of criminal offense, the age of the child, the results of community research from Bapas and the support of the family environment and society (Article 9 of Law No. 11 Year 2012 on the Criminal Justice System of Children).

Other regulations governing the diversion are also contained in the Government Regulation of the Supreme Court of the Republic of Indonesia Number 4 of 2014 concerning Guidelines for the Implementation of Diversity in the Criminal Justice System of the Child as well as in Government Regulation No. 65 of 2015 on Guidelines for the Implementation of Unfolded Diversity and Handling of twelve years old of Children

The position of the law of diversion against the child of narcotics abuser in the perspective of the development of criminal law is an alternative to avoid the child as early as possible from the criminal justice system by knowing the development of good policy according to the International Law Instrument and according to the Government Regulation of the Republic of Indonesia Number 65 Year 2015 on the Guidance of Implementation of Diversi and Handling of Twelve Years Old of Children.

Alternative settlement of child abuse narcotics disagreement according to International Law Instrument is:

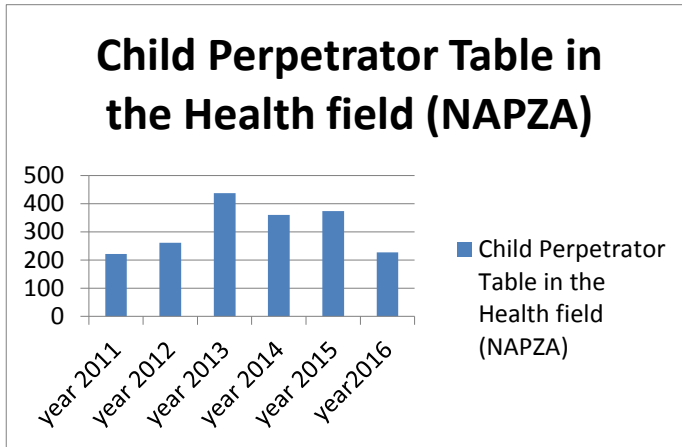
- a) The Riyadh Guidelines
- b) The Beijing Rules
- c) The United Nations Rules for the Protection of Juvenile Deprived of Liberty

Meanwhile, according to the Government Regulation of the Republic of Indonesia Number 65 Year 2015 on Guidelines for the Implementation of Diversity and Handling of of Twelve Years Old of Children the process of diversion must be done from the level of investigation and prosecution to judge.

Narcotics abuse raises criminal aspects that have been regulated in criminal law. The Narcotics Act of article 78 has explained the threat of punishment for the perpetrators of narcotics abuse. Teenagers who are involved in drug abuse are physically and psychologically disturbed. This is the impact of children's abuse of narcotics, whether the impact on the child's personal, the impact on the family, and the impact on the social.

The juridical use of criminal sanctions for children is still possible, despite the very strict requirements. The severe penalty for children must be selective in their implementation, which is tailored to the psychological condition of the child. In practice it is often the case that a child is criminal with an adult on the grounds of the absence of a special cell for a child. This can lead to the psychological child becomes disturbed because it is influenced by the actions of adults against him.

The application of diversion attempts against child abusers of narcotics abuse is done at the level of investigation there are also those after being sent off in court. Based on data from the Indonesian Child Protection Commission (KPAI) cases of complaints of children, especially on the narcotic crime, experienced an increase and decrease can be seen in the table below:



Based on data from the National Narcotics Agency, there is a tendency to increase abuse of narcotics among children. If the increase attributed to the stelsel of sanctions in the Juvenile Court Act can be put forward several things. First, the increase in the number of children who abuse narcotics indicates that stelsel sanctions for children can not exert a psychological influence on children for drug abuse. Secondly, the rising number of children who abuse narcotics also indicates that the function of child criminal law is also worth evaluating.

The involvement of children in the criminal justice process has the potential to create complex negative impacts. The interference of criminal law in child crime, especially in the narcotics abuse by the child has led the child in various physical and psychological suffering. The tendency of relationships that always impose the imprisonment on children is ironic. Given that in international instruments there is a necessity for judges to keep as far as possible prevent children from imprisonment and even children should be kept away from the application of criminal law in general. Efforts to alter the judicial process towards non-judicial processes (diversion) in the prevention of narcotics abuse by children.

Can be seen in the Year 2013 is the highest number of child victims of Narcotics abuse and from such cases can be done diversion as long as fulfill the elements in Article 7 of Law Number 11 Year 2012 on the Criminal Justice System of Children, namely:

- (1) At the level of investigation, prosecution, and examination of the case of the Child in the District Court, the Diversity shall be strived
- (2) The diversity referred to in paragraph (1) shall be conducted in the event of a crime committed:
 - a. Threatened with imprisonment under 7 (seven) years; and
 - b. It is not a repeat of a crime

Based on the elements of Article 7 of Law Number 11 Year 2012, the Investigator shall require consideration or advice from the Counselor after the crime is reported or reported. The police and the Correctional Institution want to achieve diversion to avoid any imposition of sanctions against child abuse of narcotics.

Article 8 of Law Number 11 Year 2012 also provides for the diversion:

- (1) The Diversity process shall be conducted through consultation with the involvement of the child and parents/the guardian, the victim and/or his/her parents/guardian, Social Guidance and Professional Social Worker based on restorative justice approach.
- (2) If necessary, the deliberations referred to in paragraph (1) may involve Social Welfare Workers and/or the community.
- (3) The Diversity Process shall observe:
 - a. The victim's interest;
 - b. Child welfare and responsibility;
 - c. Avoidance of negative stigma;
 - d. Avoidance of retaliation;
 - e. Community harmony;
 - f. Obedience, morality, and public order.

If it is related to the implementation of the diversion of Law Number 11 Year 2012 with rehabilitation in Law Number 35 Year 2009 on Narcotics is also very related. Because the Law No. 35 of 2009 also regulates the implementation of rehabilitation. Article 54 states that Narcotics addicts and Narcotics abuse victims are required to undergo medical rehabilitation and social rehabilitation.

Article 55 of Law Number 35 Year 2009 on Narcotics also regulates the implementation of rehabilitation for children or perpetrators who are not old enough that is:

- (1) A parent or guardian of an underage narcotics addict shall report to a public health center, hospital and/or medical rehabilitation and rehabilitation institution designated by the Government for treatment and/or treatment through medical rehabilitation and social rehabilitation .

Refers from Law Number 11 Year 2012 on Child Criminal Justice System and Law Number 35 Year 2009 on Narcotics then these two Laws regulate for Children Narcotics Abuser controversial punishment of children in drug cases will result as follows:

- a. Imprisonment to children will bring a long-lasting negative impact
- b. Communities will be adversely affected by imprisonment
- c. Prison penalties are increasingly disliked either for economic reasons, humanitarian reasons, or for philosophical reasons of punishment.
There are Diversi Models as an Alternative to Children's Penalties:
 - a. Narcotics Abuse Settlement by Children through Diversion Mechanism Model is the effort to divert the juvenile justice process into non-judicial process based on the consideration that the involvement of children in the judicial process has basically resulted in bad influence for the children.
 - b. Diversion at the Police Level (Investigator) as an Alternative to Narcotics Abuse Settlement by the Child, The first experience in the criminal justice process for a suspect is in contact with the police. The transfer of the judicial process towards the non-judicial process in the settlement of narcotics abuse by the child is more appropriate at the police level.

Some analyzes of the controversy of non-diversion in children who commit narcotics are considered odd due to several reasons:

- a. The judge's decision to impose a criminal punishment on children is sometimes based on various considerations such as perceived to disturb the society, damage the nation's mentality, destroy the young generation, and damage the health of the nation.
- b. The orientation of a judge who sees that punishment needs to be imposed on the offender without considering anything else.
- c. The tendency of judges to impose a jail sentence on children also indicates that the judge ignores the fact that the child is not only a criminal offender but also a victim.
- d. The tendency to impose the imprisonment on child offenders also means the neglect of the child's interest as a victim.
- e. Indication of a partial countermeasures in the case of abuse of narcotics by children.

If a child commits a crime, it is not merely the child's fault, but includes the negligence of his parents and family. It is natural that parents and their families should be held accountable for the consequences of the acts committed by the child. This also applies to criminal liability for children, not only to consider the psychological state, but also the physical state. Children do not have enough psychic maturity to consider the circumstances and consequences of his actions so that the physical aspects of the child has not been strong enough to do the job because the physical is still weak so it is not appropriate if it must be accounted for the criminal acts committed. The error criteria should be the basis of judges consideration in solving criminal cases.

V. CONCLUSION

Based on the results of research and discussion it can be concluded that the application of diversion efforts against child abuse can be done as long as it meets the elements in Article 7 of Law Number 11 Year 2012 on Child Criminal Justice System. The investigator shall require consideration or advice from the Counselor after the crime reported. The police and the Correctional Institution want to achieve diversion to avoid any imposition of sanctions against child abuse of narcotics. The model of narcotics abuse settlement by children through the mechanism of diversion is the effort to divert the juvenile justice process into the non-judicial process based on the consideration that the involvement of children in the judicial process has basically resulted in bad influence for the child and the diversion at the police level (investigator) as an alternative to the settlement of narcotics abuse cases by the child, The first experience in the criminal justice process for a suspect is in contact with the police. The transfer of the judicial process towards the non-judicial process in the settlement of narcotics abuse by the child is more appropriate at the police level.

Whereas, if the child of the narcotics abuser can not be conducted in the investigation level, the judge does not have to decide the case with imprisonment, but may also be with medical rehabilitation and social rehabilitation appointed by the Government to obtain treatment through medical rehabilitation and social rehabilitation . If a child commits a crime, it is not merely the child's fault, but includes the negligence of his parents and family. It is natural that parents and their families should be held accountable for the consequences of the acts committed by the child.

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