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NON-COGNIZABILITY OF SERIOUS OFFENCES AGAINST CHILDREN- IS IT IN THE BEST INTERESTS OF CHILDREN???

*“...in serving the best interests of children,
we serve the best interest of all humanity.”*

*---Carol Bellamy**

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1. Introduction

The Juvenile Justice (Care and Protection of Children) Act 2015 has been enacted against the back drop of the post-Nirbhaya¹ emotional and sentimental public opinion as well as mixed political responses. The new law introduced retributive approach for the treatment of young delinquent children² by amending and consolidating the law relating to ‘children in conflict with law’ and ‘children in need of care and protection’. The main concerns of the Act of 2015 are implementing a child-friendly attitude in the adjudication and disposal of matters *in the best interests of children* and reorganizing the law concerning adoptions³ were. However, several difficulties were encountered in the implementation of various provisions of the Act of 2015 resulting in a number of pending cases of adoption in various courts of law. In addition, the National Commission for Protection of Child Rights⁴ raised certain other concerns including registration and priorities⁵

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¹ Mukesh vs. State (NCT of Delhi) [(2017) 6 SCC 1] popularly known as the “Nirbhaya Judgment”, the 2012 gruesome gang rape case of a Delhi girl.

² The Act provided for the possibility of trying the 16-18 years old children by the adult criminal justice system and sending them to prisons in exceptional circumstances. ‘Though initially, the concept of juvenile justice emphasized both punishment and rehabilitation, over time juvenile justice came to be associated with rehabilitation and the adult criminal justice with punishment’...Mears, Daniel P., Justin T. Pickett, and Christina Mancini, “Support for Balanced Juvenile Justice: Assessing Views about Youth, Rehabilitation, and Punishment.” Journal of Quantitative Criminology 31(3):459-479, 2015.

³ The JJ Act of 2015 brought about a more universally acceptable adoption law instead of the Hindu Adoptions and Maintenance Act (1956) and Guardians of the Ward Act (1890) which was for Muslims, without replacing these laws. The Act streamlined adoption procedures for orphans, abandoned and surrendered children and the existing Central Adoption Resource Authority (CARA) has been given the status of a statutory body to enable it to perform its function more effectively.

⁴ The National Commission for Protection of Child Rights (NCPCR)

of Child Care Institutions. Prompted by these factors, recently, the Juvenile Justice (Care and Protection of Children) Amendment Act, 2021 has been enacted, which is yet to come into enforcement.⁶ This Act, among other things,⁷ has made ‘*serious offences against children*’ that are punishable from three years to seven years of imprisonment, as ‘non-cognizable’,⁸ disregarding a general principle of criminal jurisprudence that, ‘*the more serious offences are cognizable, whereas, the less serious offences, are non-cognizable in nature*’.

The Amendment Act of 2021 has two major concerns. It seeks to strengthen the protection of children of both the categories i.e., those who are in conflict with law and the children requiring protection under the law. Further, it brings in the necessary amendments to make the process for adoption in the country more effective and hassle free. However, the Amendment Act of 2021, in general, seems to have been moved basing on poor considerations of the matters it sought to amend. Treating serious offences against children as non-cognizable is clearly in contravention of the fundamental rights of the children as well as the international obligations of India. In this context this article is written to discuss in detail the rationale behind the classification of offences under the Criminal Procedure Code, 1973 in order to underscore the fallacy of reclassifying the offences under the Juvenile Justice Act, 2015. Further, the article endeavours to evaluate whether the non-cognizability of serious offences against children satisfies the principle of ‘the best interests of the child’ as has been incorporated in Article 3 of the UN Convention on the Rights of the Child, 1989. Since the date of enforcement of the Amendment of 2021 is yet to be announced, it is suggested that its provisions must be once again subjected to thorough deliberations in the best interests of protection of child rights, specially, in view of the growing rate of crimes against children.

2. Reclassification of Serious Offences against Children as Non-cognizable

One of the Amendments introduced by the Juvenile Justice Amendment Act of 2021 that spurred the concerns of child rights activists is the *reclassification* of ‘serious offences committed against children as non-cognizable. Originally, the offences against children that are punishable under the Juvenile Justice Act, 2015 with imprisonment for a term of *three years and above, but not more than seven years*, were designated under Section 86 (2) of the said Act as *cognizable, non-bailable* and *triable* by a Magistrate of First Class. The Amendment Act of 2021 made these offences non-cognizable. A “non-cognizable offence” means ‘*an offence*

⁵ Bill which seeks to strengthen protection of children and streamline adoption process passed in Lok Sabha, *The Indian Express*, March 24, 2021. <https://indianexpress.com/article/india/bill-which-seeks-to-strengthen-protection-of-children-passed-in-lok-sabha-7243639/>

⁶ This Act of Parliament received the assent of the President on the 7th August, 2021. Section 1 (2) of the Amendment Act of 2021: It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

⁷ Some important amendments include, the expression ‘Serious Offences’ has been redefined under Section 54, registration of the Child Care Institutions is made possible only after considering the recommendations of the District Magistrate, the eligibility parameters for the appointment of Child Welfare Committee members have been redefined, the powers of District Magistrates in relation to Adoptions Chapter III of the Act have been widened etc.,

⁸ Section 86: of the Juvenile Justice Act 2015 ‘Classification of Offences and designated court’ was substituted by Section 26 of the Act 23 of 2021.

for which a police officer has no authority to arrest without warrant,⁹ Therefore, it is clear that the amendment strips the police of their powers to arrest without warrant and the power to investigate, forthwith, the serious offences against the children under the Juvenile Justice Act, 2015.

Diverse considerations seem to have formed the basis for classifying all offences generally into cognizable and non-cognizable.¹⁰ However, one broad conclusion that could be drawn from an examination of the First Schedule to the Criminal Procedure Code, 1973 is that, it is the maximum punishment that could be given for an offence which makes it a serious offence.¹¹ Here it is pertinent to note that offences under the laws other than the Indian Penal Code, 1860, which are punishable with imprisonment for three or above, have been shown in the First Schedule as cognizable and those punishable with less than three years have been shown as non-cognizable. However, this rule is subject to any rule to the contrary provided in that law.¹²

Another important feature that can be observed in case of non-cognizable offences is that, subject to certain exceptions, they are considered more in the nature private wrongs. Therefore, the collection of evidence and prosecution of the offender are left to the initiative and efforts of private citizens. In order to protect the right to privacy, it is important to avoid the police intervention where it is not necessary. However, if a Judicial Magistrate considers it appropriate that a non-cognizable offence should be investigated into by the police, he can order the police to do so. In such a case the police officer will have all the powers in respect of investigation as he would have exercised if the case were a cognizable one.¹³ The only exception here is that the police shall not have power to arrest without a warrant. Further, if a case relates to two or more offences of which at least one is cognizable, the case shall be treated as a cognizable one, irrespective of the fact that the other offences are non-cognizable.¹⁴ Therefore, it can be said that, according to the criteria of the Criminal Procedure Code, the rationale for listing an offence to be a non-cognizable one could be, either it is a less serious one that it is considered as a private wrong or an offence that does not warrant the intervention of the police to begin with, which might in some cases is not desirable.¹⁵ But in the case of serious offences against the children, undoubtedly, there is need for immediate apprehensions and investigations without having to wait for the warrant from the courts. It is so firstly, because most of these offences are committed by organized criminal gangs, secondly, there is the risk of escaping of the culprits and victim children need to be rescued as quickly as possible from the hands of the criminals to protect the children from further harm.

⁹ Section 2 (1) of the Criminal Procedure Code of 1973

¹⁰ R.V. Kelkar's *Lectures on Criminal Procedure* (K. N. Chandrasekharan Pillai (ed.) Sixth Edition, 2017) p. 4.

¹¹ *Id.*,

¹² *Id.*,

¹³ Sub-Sections (2) and (3) of Section 155 of the Criminal Procedure Code of 1973

¹⁴ Section 155 (4) of the Criminal Procedure Code of 1973

¹⁵ Sections 194, 466, 467, 477, 493, 494, 496, 498 and 505 of IPC- all these offences are serious offences as they are punishable with more than 3 years of imprisonment. However, these are classified under the First Schedule of the Criminal Procedure Code, 1973 as non-cognizable because the immediate arrests and investigation by the police is considered undesirable as it might create certain undesirable consequences.

However, the rationale that is given by the drafters of the Amendment Act of 2021 for making the serious offences committed against the children as non-cognizable is that, it is for protecting the children in conflict of law from arrest without warrant. This reasoning seems to be flimsy as **Rule 8 of the Model Rules** notified under the Principal Act takes care of protecting children from arrest. Proviso to Rule 8 reads:

*Provided that the power to apprehend shall only be exercised with regard to heinous offences, **unless it is in the best interest of the child**. For all other cases involving petty and serious offences and cases where **apprehending the child is not necessary in the best interest of the child**, the police or Special Juvenile Police Unit or Child Welfare Police Officer shall forward the information regarding the nature of offence alleged to be committed by the child along with his social background report in Form 1 to the Board and intimate the parents or guardian of the child as to when the child is to be produced for hearing before the Board...*

This Rule clearly mentions that apprehension of child is to be resorted to **only under exceptional circumstances and that too with regard to heinous offences** and **not in cases of serious offences** as the ones to which Section 86 (2) is applied. So, the explanation that these offences committed against children have been made non-cognizable for their protection from apprehension does not stand good with no stretch of one's imagination. In addition, having regard to the nature of these offences the possibility of children perpetrating these offences against other children does not arise to run the risk of getting apprehended.

There are seven serious offences falling under this category, namely, inflicting cruelty on children by children home staff,¹⁶ employing children for begging,¹⁷ giving intoxicating liquor or drug or substance to children,¹⁸ using children for drug peddling or smuggling,¹⁹ exploitation of child employee,²⁰ sale and procurement of children,²¹ use of children by militant groups for legal or illegal purposes.²² Obviously all these offences involve abuse of children by people who can overpower them like the staff of the children's homes, the members of drug mafias and militant groups who use children for illegal purposes either by force or by enticing them with money and other allurements.

Now that these offences are made non-cognizable, the police can only make entries in the general diaries kept by the Police Stations and direct the informant to the Magistrate.²³ The police have no powers to investigate unless there is a warrant from a Magistrate having power to try such case or commit the case for trial.²⁴ It is a

¹⁶ Section 75 of The Juvenile Justice (Care and Protection of Children) Act 2015

¹⁷ *Id.*, Section 76

¹⁸ *Id.*, Section 77

¹⁹ *Id.*, Section 78

²⁰ *Id.*, Section 79

²¹ *Id.*, Section 81 with exception of child trafficking/prostitution purposes which continues to be cognizable offence under Sections 370, 370A, 371-373 of the Indian Penal Code, 1860

²² Section 83 of The Juvenile Justice (Care and Protection of Children) Act 2015

²³ Section 155 (1) of Criminal Procedure Code, 1973

²⁴ Section 155 (2) of Criminal Procedure Code, 1973

well-known fact that even while they are cognizable offences, there is minimal reporting of these cases due to several socio-economic factors and power equations as these offences are committed by the violent and the powerful against the weak and the meek. If they are made non-cognizable it is like giving greater freedom and protection to the perpetrators of these heinous crimes against the defenceless children of the society, especially, from the marginalized sections.

3. The Principle of Best Interests of the Child

The child rights principle of '*best interests of the child*' is derived from Article 3 of the UN Convention on the Rights of the Child, 1989. Article 3 (1) of the Convention states that,

. . . in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

According to the Committee on the Rights of the Child the assessment of the best interests of a child requires evaluation and harmonizing "*all the elements necessary to make a decision in a specific situation for a specific individual child or group of children.*"²⁵ And the principle gives the right to the child to have its best interests to be taken as a primary consideration. In other words, it requires that the child's interests have high priority and are not just one of several considerations.²⁶ Depending on the context, there can be various elements to be considered in the evaluation and determination of the best interests of a child. Often, these elements may compete or contradict one another. However, such potential conflicts can be solved on a case-by-case basis.²⁷

A brief look at the crimes against children makes one tremble at the terrible state in which many children in India are living. National Crime Records Bureau reported that 1, 48, 185 cases of crime against children occurred in 2019. This means that around 400 such crimes are committed every day in the country.²⁸ 'Juvenile homes are hellholes', says the 2021 Report on child rape.²⁹ The report disclosed the brutal truth that in government-run juvenile justice homes, the perpetrators were staff such as caretakers, security guards, cooks and other sub-staff, and senior inmates. And in private/NGO-run homes, the offenders included managers, directors, owners, founders and their relatives and friends as well as caretakers, wardens, cooks, drivers, security guards, gatekeepers, senior inmates and outsiders including security forces.³⁰ Sexual abuse of girls and other irregularities were found very recently in April 2022, when the Chairman of National Commission for

²⁵ Committee on the Rights of the Child, General Comment No. 14 (2013), para. 47

²⁶ *Id.*,

²⁷ *Id.*, at para. 44.

²⁸ India Recorded Over 350 Crimes Against Children Each Day In 2020: NCRB Data, *Outlook*, 1 October, 2021

²⁹ 'Juvenile homes are hellholes, says report on child rape', *The Hindu*, 4 December, 2021

²⁹ <https://www.thehindu.com/news/national/article60465518.ece>

³⁰ *Id.*,

Protection of Child Rights conducted a surprise inspection on children homes run by NGOs.³¹ Studies conducted on the several shelter-homes, short-stay homes and adoption centers revealed horrendous stories of sexual abuse of girl children after making them unconscious by mixing sleeping pills in their food at night. There are cases of children attempting to commit suicide frustrated by their miserable life in these homes.³² When it is so obvious that all who are supposed to be the guardians and care-takers of the children in these homes themselves are culprits, whom are we expecting to initiate a case against the perpetrators of these offences?

Experiences of the children employed for begging is even more heartbreaking. According to sources, a minimum of 3 lakh children across India are employed for begging by using all possible means to force on them such as addiction to drugs, threats of violence and actual beatings and torture.³³ Apart from guardians, traffickers, and other people, the parents of the children³⁴ from poverty stricken families force their children to go in to the streets for begging. For the children, the incentive for begging is food. They beg not only for themselves but for the entire family. Poverty and homelessness, and lack of any other source of income bring these children on to the streets.³⁵ Additionally, traffickers employ children they kidnap/abduct on purpose to employ for begging.³⁶ For the sake of just a small amount of money these children can collect by begging they are injured, handicapped and maimed to create a sense of pity in the public.³⁷ Every year in India 40,000 children are abducted, in other words one child goes missing every 8 minutes and 25 per cent of them are never traced. There is no proper information about how many cases are brought against the perpetrators, and how well the law enforcement mechanism is following up these cases. In fact, many of the families do not even have courage to seek help from the police due to illiteracy, lack of awareness of law and resources to employ lawyers.³⁸

The offence of sale and procurement of children for any purpose “by a person having actual charge of the child, including personnel of a hospital or nursing home or maternity home”, is going to be treated as a ‘non-

³¹ Sanjay Sahay, ‘File FIR against children’s home: NCPCR to police’, The Times of India, 27 April 2022 <https://timesofindia.indiatimes.com/city/ranchi/file-fir-against-childrens-home-ncpcr-to-police/articleshow/91111185.cms>; ‘How India’s Children are Mistreated at Orphanages, Save the Children’, 12th August 2017 <https://www.savethechildren.in/child-protection/how-indias-children-are-mistreated-at-orphanages/>

³² ‘The horror story inside an Indian children’s home’, *BBC News*, 11 August 2018 <https://www.bbc.com/news/world-asia-india-45124802>; ‘1340 cases of crime against children by caretakers during 2017-19: Govt’, Business Standard, 5 August, 2021 https://www.business-standard.com/article/current-affairs/1340-cases-of-crime-against-children-by-caretakers-during-2017-19-govt-121080501676_1.html

³³ ‘How children are forced into begging by cartels’, *Save the Children*, 2 November, 2016 <https://www.savethechildren.in/child-protection/how-children-are-forced-into-begging-by-cartels/>

³⁴ Nikhil M Babu, ‘Child begging remains a worry’, *The Hindu*, 29 November, 2021. <https://www.thehindu.com/news/cities/Delhi/child-begging-remains-a-worry/article37743450.ece>

³⁵ Laws against child begging in India, 23 November, 2021, <https://blog.ipleaders.in/laws-against-child-begging-india/#:~:text=five%20lakh%20rupees.-The%20Children%20Act%2C%201960,year%20or%20fine%20or%20both.> Nikhil *Id.*, *supra* note 34.

³⁷ ‘Forced Child Begging: Poverty in India’, *World Youth Alliance*, <https://www.wya.net/op-ed/forced-child-begging-poverty-in-india/#:~:text=According%20to%20a%20report%20by,arouse%20a%20sense%20of%20pity.>

³⁸ Amendments to JJ Act will impact the poor, Times of India, 7 April, 2022. <https://timesofindia.indiatimes.com/city/delhi/amendments-in-jj-act-will-impact-poor-say-experts/articleshow/90693844.cms>

cognizable' offence under the Amendment Act. These cases too are not uncommon. If the police cannot investigate offence or arrest the accused unless they receive orders from the court, will it be possible to find the culprits at all? By the time police secure orders to investigate from the magistrates the perpetrators will have the children crossed the borders of the country even. Considering the serious nature of these offences and great risk involved to the safety and security of children, the new non-cognizable status of these offences certainly cannot be said that it is in the best interests of the children.

If the concern of the State is to bring the offenders strictly to the law, it should endeavour to make the law more stringent and provide more effective mechanism for the purpose. Ironically, the non-cognizability of these offences is most likely to shield the perpetrators from being caught and punished. Obviously, allowing such kind of leeway to the criminals cannot be in the in best interests of the Children. Rather, it is in the best interests of the perpetrators of crimes against children. The new amendment undoubtedly exposes the children to be victimized to these offences more than before.

4. Violations of Child Rights by the Reclassification of Serious Offences against Children

The non-cognizability of serious offences against the children greatly risks the protection of child rights. While all the offences punishable with imprisonment of 3 years and above remain 'cognizable' under the Indian Penal Code, 1860, making them as 'non-cognizable' under the Juvenile Justice Act is violative of the right to equality of the child under Articles 14 and 15 of the Indian Constitution. In addition as has been already mentioned above, majority of these offences are committed against children staying in vulnerable situations who have no sufficient means to employ a lawyer. This amounts to gross miscarriage of justice to the children from marginalized groups who need the protection of justice the most being socially and economically disadvantaged.

The amendment Act reclassifying the serious offences against the children as non-cognizable is contrary to the international obligations of India.³⁹ Firstly, Article 32 of the United Nations Convention on Child Rights, 1989, is violated as the amendment risks the protection of the children against economic exploitation.⁴⁰ Secondly, the Amendment of 2021 goes against provisions of the Article 33 of the same Convention which requires the States to take appropriate legislative measures against illicit use of narcotics in children, including their use in production and trafficking of such materials.⁴¹ Dilution of the protection of children against their use by militant groups for legal or illegal purposes amounts disregard of Article 38 of the Child Rights Convention which requires the states to take "all feasible measures" to ensure that children do not take part in any armed conflict or hostilities. Further, Article 10 of the Optional Protocol on

³⁹ India is a signatory to the United Nations Convention on the Child Rights (UNCRC). As well as the Optional Protocol thereto on the Sale of children, child prostitution and child pornography and the optional protocol on the involvement of children in armed conflict.

⁴⁰ The offences of employment of children for begging, exploitation of the children by the employers(Child labour)

⁴¹ The offence of giving intoxicating liquor or drug or substance to children, using children for drug peddling or smuggling,

the Sale of Children enjoins State Parties to take all necessary steps to strengthen the prevention, detection, investigation, prosecution and punishment of the perpetrators of any acts involving the sale of children.⁴² Unfortunately, the Amendment of 2021 by making these serious offences non-cognizable goes contrary to this requirement by weakening the legal process instead of strengthening the same.

Finally, the 2021 Amendments clearly defy the letter and spirit of the Juvenile Justice (Care and Protection) Act of 2015 and inevitably result in causing increased harm to the rights of children by diluting the safety standards in protecting the children against serious offences.

The non-cognizability of making serious offences not only makes it difficult for vulnerable children to register FIRs for serious offences committed against them, but also would overwhelm the already overburdened courts of Magistrates, with representations to grant permission to register FIRs in such offences.

5. Conclusion

The assessment of 'best interests of the child' is to be conducted by NGOs, public authorities and professional decision makers through a formal process, to reach a decision based on national law that safeguards the rights of the child and promotes her or his well-being, safety and development. The task of the decision-makers is to weigh and balance all the relevant factors of the case. In doing so they should give due consideration to all the rights of the child as well as the obligations of public authorities and service providers towards the care and protection of the child.

Ironically, however, while making the amendment to the classification of the offences against children under the Juvenile Justice Act of 2015, there appear blatant blunders that will have a devastating impact on children's safety and security as it shields those who commit serious offences against them. This amendment seems to have the effect of merely reducing the data by preventing the registration of FIRs and not reducing these crimes in reality. This results in great injustice to the spirit of the Constitution of India and the international human rights obligations of India by jeopardising the best interests of the children in vulnerable circumstances. The objective of the process of determination of the best interests of the children is to identify durable solutions to the challenges encountered in the protection of the rights of children. Therefore, it is suggested that there should be further consultations and discussions with all concerned before the date of enforcement of the Amendment Act of 2021 is announced and the cognizable status of the offences against the children under the Principal Act of 2015 be restored.

⁴² The offence of sale and procurement of children