



CAGING CHAT ROOM PREDATORS: THE LEGISLATIVE ADDRESS OF ‘ONLINE CHILD GROOMING’, A COMPARATIVE ANALYSIS OF SRI LANKA AND THE UNITED KINGDOM

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ABSTRACT

The most vulnerable sector of people are the minors, and that is a statement which can be pronounced with great confidence. Hence the duty of society to safeguard the offspring of its future cannot be renounced. With the advancement of technology and the access to such advancements readily available to children, sexual exploitation of the innocence of the juvenile via the internet has seen the light of day. Autonomous popularity of the social media and addiction inducing internet games can be identified as the contemporary breeding grounds for child sexual exploitation. This paper seeks to analyse the coherence of the Sri Lankan legal system, comparing it with that of the United Kingdom, in addressing online grooming of children to befall victims to sexual violations. Child grooming is an inchoate offence, upon which this paper elaborates further. The objective of this research is to determine the adequacy of the Sri Lankan legislative initiatives to address this novel form of child exploitation, focused mainly on the Penal Code of Sri Lanka. The methodology utilized for the purpose of this research is the Black Letter approach coupled with comparative research methodology with United Kingdom, and further this paper uses qualitative analysis of legislative enactments and case law as primary data and books and journal articles as secondary data. The research concludes with the view that, in Sri Lanka, legislative enactments are insufficient to address the inchoate offence of child grooming, which warrants amendments to the penal law.

KEYWORDS: *Child grooming, Inchoate Offence, Internet Sexual Exploitation*

1. INTRODUCTION

The advancement of technology has no doubt greater the possibilities of human connection. It has evolved into a stage where a conversation to take place, the physical presence of the communicators is redundant. This however, affects the norms of communication, one could tend to behave differently in a virtual conversation in compared to one conducted in person. This change of behavior could easily incite immoral conduct. Witness the proceeding passage of conversation;

“ caspercock (1:26:46 PM): hello, enjoying yourself?
angelgirl12yo (1:26:53 PM): its ok
angelgirl12yo (1:26:57 PM): kinda quiet
caspercock (1:27:15 PM): what you doing?
angelgirl12yo (1:27:26 PM): just chattin
caspercock (1:27:49 PM): cool,
caspercock (1:28:05 PM): I like your name, got a pic?
angelgirl12yo (1:28:13 PM): no sorry
caspercock (1:28:23 PM): that’s ok.
caspercock (1:28:28 PM): u really 12?
angelgirl12yo (1:28:35 PM): ya
caspercock (1:28:50 PM): that’s cool
caspercock (1:29:08 PM): I’ve never chatted with someone 12 on here.
angelgirl12yo (1:29:16 PM): ok, nice meetin u tho
caspercock (1:29:24 PM): nice meeting you too.
caspercock (1:29:30 PM): I’m 21”

- *US v. Wales* (2005) 10th Cir.

The above extraction is an attempt to depict the immorality mentioned, and to venture to endeavour to the essence of grooming. Timothy Wales was identified as the person behind ‘caspercock’, who had the stained record of being convicted of illegal sexual activity involving minors. (Clough 2010, p.331) The above extraction indicates an attempt which was curtailed by the coherence of the investigation officers of the police, who patriated as ‘angelgirl12yo’ to convict the culprit of attempted child sexual exploitation, consequent in imprisoning Timothy Wales for fifteen years. (Clough 2010, p.331)

A specific meaning to the word grooming or online grooming cannot be assigned, though widely appropriated, as of the case per innovations of linguistics prolonged via internet. (Craven, Brown, Gilchrist 2006, p.287) Yet it can be presented as the procedure of the potential abuser to gain acquaintance of the child with the intention of later sexual exploitation. (Gillespie 2002, p.411)

Though it appears in an extraordinary novel nature, the notion of grooming precedes the contemporary era, and with the enhancement of the advanced subtleness via internet, grooming has achieved a contingent prevalence. The child in dictating cultures was socially exposed only to a limited scope of persons, particularly contained from Akins to clergy. Apart from those circumstances, the minor was to be under continuous surveillance of the guardians. In the contemporary society this security to the child has been silently infringed by the internet, which provides private access to a child confined even to a room. (McGrath, Casey 2002, p.81) Yet resorting to advanced methods of communication would aid the prosecution of such offenders due to the digital evidence trailed behind by such offenders. (Clough 2010, p.333)

Grooming of children occurs gradually in most instances, which could be identified as;

1. Friendship forming stage
2. Relationship forming stage
3. Risk assessment stage
4. Exclusivity stage
5. Sexual stage

- (Black et al 2015, p.147)

Friendship forming Stage - This is the stage in which initial steps are taken by the offender to determine the eagerness of the child to engage in conversation at the commencing contact. This could occur in online chat rooms, online interacting games, and mobile phone and social network sites. (Clough 2010, p.333)

Relationship forming stage - Offenders attempt to investigate facts and establish the truth regarding the status of the minor at this stage, particularly children with troubled family support and those who suffer from isolation can be considered relatively effortless victims (Clough 2010, p.333) This vulnerability is the subject of exploitation of the offender coupled with the sexual curiosity to establish a prima facie sincere

bond, which would encourage the child to protect the secrecy of the relationship. The wit shared in the force of psychology at this stage would pave the way for later sexual exploitation of the child. (McGrath, Casey 2002, p.87)

Risk-Assessment stage – This stage resembles the assessments the offender conducts in order to determine his own safety whilst proceeding further such as the location of the device, and he may inquire into the facts about the parents or other guardians. (Clough 2010, p.334)

Exclusive stage – The extension of the trust is to occur at this stage particularly with inducements being presented to the child. The victimization of the child at this stage would be subtle, which would render the child unaware of the later intent of exploitation. The communication would expand to more exclusive means such as e-mail, private chat rooms or telephones. As per the facts of the case *R v. Jongmsa*, the victim had provided the home address of hers in order to obtain monetary and material incentives in exchange for sexual favours. (Clough 2010, p.334)

Sexual Stage - At this stage the offender would start to depict sexual intimacy in the forms of engaging in conversation regarding kissing to sexual activities. (Clough 2010, p.334)

Conclusion - The conclusion of the grooming would result mostly in meeting the minor and engaging in sexual activities. 74 percent would arrange such meeting and 93 percent of that would engage in sexual activities. (Wolak, Mitchell, Finkelhor 2004)

Each step above referred would be an essential part in the completion of the offence of sexual exploitation of the child. The concluding stage or the meeting of a minor to induce her to engage in sexual activities, and then going forward to participate in or physically commence the act of abuse or rape, can be considered as apparent even in sexual violation of the child throughout jurisdictions, Trans bound. What this paper attempts to emphasise is that the violation of the mind of the child in the process of grooming via the use of modern technological advancements takes place even when the child is, on their parents' opinion, in the comfort and security of their own household. An underdeveloped mind of a child is at a high risk of succumbing to the persuasion and the inducement of the sexual predator using the modes of texting under presence to deceive the child.

The real threat and the inadequacy of the law of many jurisdictions to adequately address the issue of grooming has been identified as an issue that needs to be addressed for a while now (WoodRoyal report 1997). As exemplified above, the process of grooming the child necessarily precedes the commission of the actual offence of sexual violation, therefore, the nature of the grooming falls within the sphere of inchoate offences. The concept of inchoate offence is not an alien concept to legal systems, and it has been addressed in many ways such as, with the introduction of the concepts of attempt, incitement and conspiracy in more traditional sense. (Gillespie 2001, p.436) The matter at hand regarding the process of online grooming is that the said traditional methods are unsuited to meet the ends of it. Provided further that in some legal systems the offence of conspiracy cannot be established when the sole other party to the conspiracy is the potential and the intended victim. The Section 2(2) (c) of the *Criminal Law Act 1997* of UK and section 11.5(3) (c) (ii) of *Cf Criminal Code 1995*, can be taken as examples. A similar case can be made regarding the incitement to commit an offence. It is true the child is incited by the defendant to engage in sexual conduct, but the person induced being the victim would negate the effects of the utilization of the concept of incitement, further incitement would require the other party to commit the offence in order to establish incitement. The attempt to commit an offence, as other traditional methods of addressing inchoate offences face a difficulty, for to establish the attempt the alleged act should be sufficiently proximate to the offence intended to be committed. (Clough 2010, p.335)

Addressing of inchoate offence can be justified or explained under two major approaches, one being the consequentialist and the other retributive approach. (Ashworth 2006, p.471) This paper intends to favour the consequentialist argument, which emphasises on the prevention of the crime, for there is always the uncertainty of the extent the offender would go in such offences, which affects a minor. Therefore, without endangering a child, it is best to equip the law enforcement authority with laws which would enable the enforcement to prevent a child from being endangered rather than waiting for the completion of the offence of sexual exploitation to punish a culprit over the misery of the victim.

2. METHODOLOGY

The paper saliently relies upon the combination of Black- Letter (Doctrinal) methodology and

Comparative research methodology through which the Sri Lankan jurisdiction is compared with that of the United Kingdom. The choice of the UK jurisdiction was influenced by the profound fluidity of the English legal system to uprooting technical advancements. As the main focus of this paper is to address the inchoate offence of Child Grooming, prominent attention has been given to the Penal Code of Sri Lanka as it is the piece of legislation which is mostly utilised in addressing criminality. Primary sources to this qualitative study will be the legislations of the countries and the case law which has been discussed covering the topic, as the secondary resources the aid of journal articles and books have been relied on.

3. DISCUSSION AND RESULTS

Inchoate offence

The subject matter of this essay which is grooming would have less qualifications to be considered as a completed offence, yet could be favoured to be recognised as an inchoate offence. Grooming would qualify as the preparatory conduct which is facilitating the incitement. (Clough 2010, p.336) The recognition of inchoate offences has been incorporated in legislature as attempt, conspiracy or incitement. (Ormerod 2011, p.402) Hence the facilitation of the incitement shall be merited in the purview of an inchoate offence. Preparatory incitement of the child for a meeting to advocate the minor to grant sexual favours to be more specific to the conduct as defined by an inchoate offence. (Ormerod 2011, p.402) Yet the highly merited conception that there is an inadequacy of the incorporation of the traditional offences of inchoate supplement the law relevant to grooming, in particular the offences of incitement and attempt. Even the offence conspiracy fails to qualify for such standard in most jurisdictions. (Clough 2010, p.335) If attention is to be advocated to the Sri Lankan legal competence in curtailing the inchoate offences, the penal code of Sri Lanka can be regarded as the prime legislation. Section 490 of the *Penal Code of Sri Lanka No.2 of 1883*, covers the attempt to commit an offence, which is with the pre-condition that an attempt should be made in order to commit an offence. It is a blurred area in the Sri Lankan situation because of the presence of an uncertainty regarding under which offence the grooming can be covered. In the Sri Lankan penal law, the incitement to be applied the requisite is, an act of incitement by one on the other, in order to make the latter commit an offence. The

criminal liability should be imposed on the latter person (Peiris 1972, p.384) the matter at curtailing grooming with the use of incitement is that the persons incited are the victims themselves.

In order to address the legal lacuna in sufficiently curtailing the averment of the law regarding grooming, the continuum of the offence to be understood, is of vital importance. Even if there is a failure to bar the culprit from commencing and proceeding the offence, if the continuum of the offence be impeded it would be a virtuous deed in the pursuit of protecting the innocence. The continuum is manifested of the stages;

1. Presentation of the indecent or obscene materials to minors.
2. Grooming
3. Inducing or procuring
4. Traveling with intent (Clough 2010, p.337)

Presentation of the indecent or obscene materials to minors.

This would be an incident at the sexual stage of the communication with the child. The person's attempts to communicate indecent or obscene material to the child is of the nature to pursue such into subjecting the child to exploitation at a later stage. The materials stated could vary from the expressions of sexual gratification of oneself to the use of vulgar language. The communal method would be the expression of sexual desires via vulgar language in writing and transaction of images of exposure of themselves. This was emphasised in *R v. Burdon, ex parte Attorney General (Qld)* [2005] QCA 147. It is opportune to attempt to analyse the curtailing legislations to this stage comparatively with the United Kingdom, which has reached far in advancing through legislations to manage to address contemporary issues in contrast to outdated Sri Lankan legislations.

The United Kingdom had sophisticatedly implemented legislations tailored to the above instance, which is the transmission of the sexual context, most in particular at the instance, transmission via internet. *Sexual offences Act 2003* provided for such instances under section 12. The act might not have been promulgated deliberately to address the grooming of children via internet. Nonetheless, the section is neutral as the technological aspects warranting the admission of the section. As per to the section, it is an offence, if performed by a person of 18 years or above, to a person under 16 years of age or to a person believed to be 16 years of age by the doer, to cause to watch a third person engage in sexual activity or to look at any

image of any person engage in sexual activity, provided for the purpose of obtaining sexual gratification. The offence created by the section, though contains sophistication in providing to curtail internet abuse for online grooming, it had failed to address the instances where anyone would expose oneself to a child or masturbate via internet, for the act only provides if photographs are sent, not the livestream of the sexual activity of that particular person. If the child however retains such offline the offence would be completed. (Clough 2010, p.339) Apart from that blemish, the provision even provides for the comfort of the investigation of such crimes by the words "does not reasonably believe to be over 16" regarding the age of the victim, which abets officers to pose as minors under the anonymity of the internet to gather evidence to apprehend such sexual predators.

Sri Lankan legislations in contrast have failed to take notice of this issue let alone to specifically address it. The amendment which was made to the Penal Code of Sri Lanka in 1995 had somewhat attempted to expand the protection to the child from sexual exploitations to a certain extent. Section 286A inserted by the amendment provides legislation against obscene publications and exhibition relating to children. The section mainly focuses on obscene articles made of children rather than on material transmitted to the minor, hence it would be of little help. However, *Obscene Publication Ordinance No.4 of 1927* can be taken to shed a dim light interpreting the section 2(b) of the section, making or producing obscene cinematograph films for public exhibition. In order to qualify for public exhibition or to be considered as published, storage of data and the transmission of data to another should happen as elaborated in *R v Waddon* (1999) I.T.C.L.R 422. Therefore, the transmission of indecent materials to a minor via the internet would fall within this purview. The problem however arises regarding the predator exposing himself or engaging in masturbation through live feed, for amendment of 1995 of the *Penal Code* defines 'film' as any form of video recording, which would exclude the live feeds, for they are not recorded.

Grooming

This stage effects the offender to win the trust of the child through various methods resorted to. The preparatory conduct needs to be curtailed by law in order to provide convenient results, particularly this stage gives room for the investigators to identify the potential child abuses by the use of language and various incentives provided to the child or to the

undercover officer posing as the child. When the trust of the child is secured the offender arranges a meeting with the child providing opportune time to apprehend the culprit prior to the act of intended child abuse. In the Canadian case of *R v. Randall* [2006] NSJ no 180, where such an offender was apprehended and charged based on the undercover operation in which an officer posed as a child, the defendant argued that he, though wanted to meet the child, had no intention to proceed to sexual activities. The defendant's claim was refused, and it was held that the communication particularly through a computer had a serious intention apparent. It was sufficient to hold the person guilty.

In the United Kingdom again, by resorting to *Sexual Offences Act of 2003*, one could find sufficient means to address the grooming stage. Section 14 of the Act specifies the prohibition of conducts which facilitate or arrange the intent of the offender for the offender, or for someone else, of committing a prohibited act against a minor. This section extends to a vast scope. It not merely covers the conversations that took place through the use of the internet, but it even extends to whatever the preparatory acts offender had conducted with the intent of committing a child sex offence, as buying a ticket or a gift. Therefore, facilitation of the inducement of the child in the stage of grooming has been adequately addressed in the UK jurisdiction.

In contrast, Sri Lankan legislations have turned a blind eye on this matter. The section 360B (1) (f) of the *Penal Code* which provides provisions against sexual assault collaborates with the section 490, which addresses the act of attempt, is the only provision which throws light. Both sections can be utilized to prohibit the offering of incentives in order to pursue the child into performing sexual activities, but if the grooming of the child carried no apparent suggestions of engagement of sexual activity, said sections would not be applicable. Thereby the light casted by the provisions would fade away procuring a blind spot in law. Yet the penal code holds a provision which enables litigation when an offender uses influence over a child to conduct an abuse of the child in the 1995 amendment, Section 360B (1) (d), yet it could be only made relevant as an inchoate offence, while the requirement is to create an offence of the preparatory conduct.

Inducing or procuring

This is the stage in which the inducement occurs of the child to engage in sexual activities. It would be either to send indecent photographs or pursue the child to perform the act of masturbation or to make them

watch the offender conducting such act. (Clough 2010, p.354)

United Kingdom has covered this stage of child grooming through the sections 8 and 10 of the *Sexual Offences Act*, which provides penalising intentional inducement of any party of a child to engage in any sexual activity. The phrase, 'sexual activity' has been interpreted to include even the act of masturbation and inducement to watch pornographic material.

In contrast, observing Sri Lankan Legislation's penal code by the amendment of 1995 has been able to adequately address this stage of the offence. Section 286A penalizes the inducement of any child to appear or perform any indecent or obscene exhibition. Technological neutrality of this provision has made this capable of being utilized against child grooming through the internet, particularly unlike in *the Sexual Offences Act* sections 8 and 10, which has caused an ambiguity regarding the term 'engage in sexual activity', which was interpreted to be included inducing a child to masturbate, Sri Lankan legislation has specially specified the nature of the act 'indecent or obscene exhibition', which warrants the application to a larger scope.

4. CONCLUSION

A child vulnerable owing to the absence of care or conflicting parents, particularly in a cultural context as of Sri Lanka where children are taught to trust elders, curtailing online grooming adequately presents a contemporary necessity. Supplemented by the tendency of a child to open up about their problems to a faceless stranger. Strengthening the evidence ordinance to counter such misuse of technology by *the Evidence (Special provisions) Act 1995* is a positive step forward. Yet the requirement of legislations following the structure of *Sexual Offences Act of UK* is apparent, particularly to apprehend an offender before an irreparable damage is caused to a child, by adequately addressing the offence of online child grooming, strengthening the inchoate offences regarding computer based child sexual exploitation, for prevention is always better than cure.

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