

CONSTITUTIONALIZING A NATIONAL SEX OFFENDER REGISTRY - A CASE OF BALANCING THE INTERESTS OF PREVENTION WITH THE RIGHT TO PROTECTION

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“Ladies and gentlemen of the jury, the majority of sex offenders that hanker for some throbbing, sweet-moaning, physical but not necessarily coital, relation with a girl-child, are innocuous, inadequate, passive, timid strangers who merely ask the community to allow them to pursue their practically harmless, so-called aberrant behaviour, their little hot wet private acts of sexual deviation without the police and society cracking down upon them. We are not sex fiends! We do not rape as good soldiers do. We are unhappy, mild, dog-eyed gentlemen, sufficiently well integrated to control our urge in the presence of adults, but ready to give years and years of life for one chance to touch a nymphet. Emphatically, no killers are we. Poets never kill.” — Vladimir Nabokov, *Lolita*

INTRODUCTION

July, 1994 – Seven-year-old Megan Kanka goes missing from her home in New Jersey, United States of America (USA). Megan’s body was later found dumped in a nearby park. In May 1997, Jesse Timmendequas, Megan’s neighbour, was convicted of kidnapping, raping and murdering Megan.¹ Megan’s parents lamented that had known that their neighbour was a sex offender, they would have taken extra precaution and not allowed their daughter to play outside. Megan’s story is strikingly similar to that of the four-year-old girl in the Kotadeniyawa

incident reported in 2015. The victim was abducted, raped and strangled to death by the offender Saman Jayalath who eventually confessed to the crime. The first Judicial Medical Officer to arrive at the scene ‘inferred that the crime was a combination of paedophilia, sadism and possibly necrophilia, whose escalation in criminal confidence and motive showed the perpetrator likely to be or become a serial offender, who in the best interests of all, was a predator to be captured’.²

Could these crimes have been prevented if there was a sex offender registry (SOR)?

WHAT IS A SEX OFFENDER REGISTRY (SOR)?

A SOR is a system used by countries to keep track of sex offenders and their activities. SORs monitor the movement of sex offenders upon their release from prison and includes details of the offender such as their address and the offence for which they were convicted. In some jurisdictions, SORs are accessible to law enforcement personnel alone whereas in jurisdictions such as the USA it is accessible to the public.

SORs are the norm in many jurisdictions with neighbouring India establishing a National Database on Sexual Offenders in 2018. SORs were introduced as a mean to safeguard children from falling prey to offenders. The public are notified when a convicted sex offender takes up residence in

¹ Olivia B. Waxman - The History Behind the Law That Created a Registry of Sex Offenders.

² Ruwan Laknath Jayakody - The Serpent in Eden’s Garden and the Fallen Angels: Constitutionalizing a National Sex Offender Registry, Unpublished, 2019.

the neighbourhood allowing parents to be vigilant concerning their children's movements.

In Sri Lanka although Non-Governmental Organizations (NGOs) have advocated for a SOR, to date a system has not been put into place. This article seeks to make a case for the need for a SOR in Sri Lanka and the particular model of SOR that needs to be introduced especially one that is 'rational, humane, and ultimately effective'.³

SITUATION IN SRI LANKA REGARDING SEX CRIMES

Statistics from the Sri Lanka Police Department⁴ for the period of 2009 - 2018 show that although there is a slight decrease of cases of statutory rape and sexual exploitation of children, the number is by no means on a steady decline as they are still in the triple digit range and in the case of certain offences such as rape and incest even higher. Despite the fluctuations in the number of sexual crimes reported, one should be aware there are many crimes of this nature that go unreported every year.⁵ Therefore, it is imperative to have a legally sanctioned mechanism which monitors sex offenders to ensure the protection of the most vulnerable in our society, our women

and children.⁶ The statistics merely state the obvious – a SOR is the need of the hour.

NGOs have noted the absence of a child sex offender registry to help prevent the sexual exploitation of children and repeat offences by preferential offenders or paedophiles. These organizations have called for a SOR that complies with international standards on confidentiality and privacy and therefore recommend that the Government of Sri Lanka introduce one that also cooperates in this regard with the International Criminal Police Organisation's Green Notices system and its planned international police clearance system.⁷ Although in 2013, the draft National Child Protection Policy had mentioned the need for a SOR, by 2017 the draft policy did not carry the same recommendation.⁸

Also, the Sri Lankan criminal justice system, tends to focus its resources entirely on punitive measures as opposed to preventive measures which are vital in tackling habitual and serial offenders.⁹

Moreover, sex offenders have increasingly adopted cyberspace based technological advancements such as the dark web and popular social media networks as their hunting grounds. It is therefore evident that law enforcement agencies must, in turn,

³ *ibid.*

⁴ Sri Lanka Police Grave Crimes Abstract for the years 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017 and 2018.

⁵ The benefits and detriments of sex offender registries (the HAQ report) notes that because children are often victims of rape and sexual assault, 'sexual offences are frequently underreported and as such the total number of victims far exceeds the number of reported incidents'.

[The HAQ report was prepared on behalf of the HAQ: Centre for Child Rights ('HAQ'), an Indian NGO based in New Delhi that aims to recognize, promote and protect the rights of all children - <http://haqcrc.org/wp-content/uploads/2018/09/sex-offenders-registry-a-study-by-haq-macquire-university-2018.pdf>.]

⁶ According to Human Rights Watch 'children are often the victims of rape and sexual assault'. - Human Rights Watch, 'No Easy Answers, Sex Offender Laws

in the US' (Research Discussion Paper, 11 September 2007) - accessed through the HAQ Report.

⁷ Protecting Environment and Children Everywhere (PEaCE)/End Child Prostitution in Asian Tourism (ECPAT) Sri Lanka and the End Child Prostitution And Trafficking (ECPAT) International, March 2017 Submission for the Universal Periodic Review of Sri Lanka at the 28th Session of the United Nations Human Rights Council in November 2017.

⁸ PEaCE/ECPAT Sri Lanka and ECPAT International, Supplementary Report on the 'Sexual Exploitation of Children in Sri Lanka' submitted in June 2018 for the Committee on the Rights of the Child to consider at its 81st Pre-Session in October 2018.

⁹ *Ibid.*

adopt sophisticated methodologies in bringing these offenders to justice.

WHAT IS THE MOST SUITABLE SOR MODEL?

SORs can be risk based, offence based or a hybrid model incorporating features of both risks based and offence-based models. Most countries (including many states in the USA) incorporate an offence-based model. Under this model, anyone convicted of a sex crime is required to register as a sex offender. On the other hand, a few states have opted to categorize offenders based on the likelihood of their risk of reoffending (risk-based model). The problem with a risk-based model is that the implementation of such a model may incur a cost due to risk-based assessment for each offender and in training professionals to perform the assessment. The Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART) operating under the office of Justice Programs in its Sex Offender Management Assessment and Planning Initiative by Kevin Baldwin states that there is no agreed risk assessment model nor 'a universal means of either describing risk or communicating the findings of risk assessments'. He further notes that 'risk assessment serves many purposes throughout the adjudication process. It is often undertaken for dispositional purposes to help determine, for example, an appropriate sentence or custody level or the conditions of community supervision. In these situations, decisions are often predicated, at least in part, on the assessed likelihood of recidivism, with resources being allocated accordingly to promote community safety'.

From the above, it seems at the outset that a risk-based approach is more accurate. However, there are also schools of thought that state otherwise. For example, Baldwin referring to the risk-based model/risk assessment system acknowledges that 'while much progress has been made regarding the ability of professionals in the field to accurately estimate the likelihood of future sexual re-offense, no one is presently able to estimate either the timing or the severity of such future criminal conduct'. This system cannot accurately predict human nature.¹⁰ Accordingly, considering the costs involved in implementing such a system (which one can assume will be time consuming as well), and its unpredictability in certain aspects, in a country which seeks to establish a SOR for the first time, it is better to start with an offence based model and thereafter progress to a risk based one.

DETAILS INCLUDED IN A SOR

SORs include the name, address, criminal history and physical appearance of sex offenders ranging from juvenile offenders, offenders who have been released from prison and offenders under suspended sentences, among others. The distinguishing factor, if not the most obvious one, is that the individual must be convicted of a sex offence.

An issue presents itself when a distinction is drawn between those who have committed a sex offence of a non-violent nature and those who have committed a sex offence of a violent nature. Should the offenders convicted for non-violent sex crimes (crimes such as public indecency, lewd conduct, voyeurism, exhibitionism, among others) be included in the registry? Take for example the case of Shawna,¹¹ a mother of two,

¹⁰ A quote from the film *Minority Report* in the form of a conversation between the characters John Anderton and Danny Witwer:

John Anderton: 'There hasn't been a murder in six years. There's nothing wrong with this system, it is...'

Danny Witwer: 'Perfect I agree, but there's a flaw. It's human'.

¹¹ *Untouchables* – a documentary.

whose name appears on the sex offender registry in the state in which she resides. Shawna's name appears on the registry for having sexual intercourse with a 14-year-old when she was 18 years and intoxicated. Today, Shawna is unable to take her own children to the public park because her name is on the registry. She cannot be categorized as a violent offender because the act which took place between herself and the victim was consensual but because of the statutory restriction on the age of consent Shawna was convicted.

Human rights activists have voiced their concerns that SORs must not include the details of juvenile offenders. However, due to the nature of the offence and the risk of reoffending, the names of juvenile offenders are inevitably kept on the SORs.¹² In certain jurisdictions however, juvenile sex offenders names are placed on the registry only after they attain the age of adulthood.

Another point of concern is the time period for which the SOR should contain the details of the offender. Individuals convicted of violent sex crimes and those who re-offend are listed on the SOR for life whereas for some non-violent sex offences, the time period can be relatively short. In some jurisdictions, the monitoring of sex offenders under a SOR can be for varying periods of time based on the nature of the offence and the age of the offender.

ACCESSIBILITY OF SORs

A major point of contention with regard to SORs is whether it must be made accessible to the public or not. While most jurisdictions limit the access of SORs to law enforcement personnel, countries like the USA have not

only given public access to SORs but have now enabled a notification system whereby certain authorities are alerted when an offender updates his/her information in the registry or registers in the registry.¹³ Public access to SORs may lead to vigilantism and social ostracising. Such vigilantism and ostracising will affect not only the offender but most importantly his family and their privacy.

PROS AND CONS OF SORs

SOR is a useful tool in the hand of law enforcement agencies. A SOR system, monitors the activity of registered sex offenders. Such important information allows law enforcement personnel to take preventive measures as opposed to apprehending the offender in the act. Furthermore, the local community may, if the SOR is publicly accessible, be vigilant to the movements of the offender and also take preventive measures themselves.

A SOR is based on an assumption amongst others that sex offenders are likely to reoffend, and that SORs effectively reduce recidivism.¹⁴ This may not necessarily be true.¹⁵ According to Geneva Adkins, David Huff and Paul Stageberg, 'The Iowa Sex Offender Registry and Recidivism' (Research Report, Iowa Department of Human Rights, December 2000) 'there is no statistically significant difference between recidivism rates for sex offenders subject to registration, versus those not subject to registration.'¹⁶ The HAQ report concludes that SORs have little to no impact on recidivism rates.

¹² The United Kingdom operates a SOR under the head of Violent and Sex Offender Register which includes the names of those convicted of violent sex offences and have received a prison term of more than 12 months and those who are not convicted but are under the risk of offending. This register includes details of juveniles as well. The time period for which those below 18 years of age are kept on the register varies according to the offence and sentence received.

¹³ See the 2006 - Adam Walsh Child Protection and Safety Act. Title I of the Adam Walsh Act, the Sex Offender Registration and Notification Act (SORNA).

¹⁴ The HAQ report. See also Sex offender registry: More harm than good? by Tom Condon - Ct Mirror.

¹⁵ Andrew Harris and R. Karl Hanson, 'Sex Offender Recidivism: A Simple Question' (2004) 3 Public Safety and Emergency Preparedness Canada, 1-23.

¹⁶ The HAQ report.

In her article titled Sex Offender Registries: Fear without Function? Amanda Y. Agan uses a regression model to determine the crime rates after the implementation of a sex offender registry or public access to same and concludes that 'the results do not support the hypothesis that sex offender registries are effective tools for increasing public safety'.

SORs and Sex Offender Registrations and Notifications (SORNs) were intended to safeguard communities and protect children who are for the most part unable to fend for themselves. However, SORs may lull a community into a false sense of security 'leading residents to conclude that they know about the sex offenders in their midst when in fact, a resident is more likely to be sexually abused by a parent, relative, or acquaintance than by a stranger'.¹⁷

The HAQ report also notes that the implementation cost of SORs are significant. It further notes that 'the quantitative difference achieved by SOR implementation is considered incommensurate when compared to the monetary investment required to adequately and successfully facilitate a SOR.'

SORs have enormous social impact. Research has shown that the impacts of SORs on the offenders flow as a 'collateral consequence' of SORs and result in 'harsh punishment' on the offenders. Offenders are often faced with 'unemployment, residency restrictions, and isolation and stigmatization'.¹⁸ The HAQ report reviews the problem of balancing the offender's

right to protection against the victim's interest of protection in the following manner, 'most research conducted into the social impacts of SORs focuses on broad social aspects of SORs – including the effect on offenders, communities and families, with very little research being conducted regarding the actual perceptions of offenders themselves. As a result, the needs of offenders are rarely considered when designing legal policies. This is largely because the protection that SORs provide to the community comes at the expense of offender freedoms. Arguably, this balance has become unjustifiably skewed in favour of victims and the community by overlooking the fundamental physical and emotional needs of offenders themselves. A better understanding of how sex offenders perceive and are affected by SORs would help to improve policies and achieve better outcomes.

RECOMMENDATIONS

Statistics and recent trends in the Island indicate that a SOR must be established in the country. However, the model of the SOR, details to be included in a SOR and accessibility to a SOR must be decided on prior to the operation of same. The monitoring of sex offenders must balance the interests of the offender and his/her family against those of the victim. In the alternative, Sri Lanka may follow the example set by initiatives such as Germany's Prevention Project Dunkelfeld. Now known as The Prevention Network "Kein Täter

¹⁷ Colorado Department of Public Safety Division of Criminal Justice, Office of Research and Statistics. According to Rape in America: Report to the Nation (Crime Victims Resource and Treatment Center, 1992), 22% of sexual assaults were committed by strangers, 46% were committed by relatives, and 29% were committed by acquaintances (3% refused to answer). 84% of these victims did not report the crime to the police.

¹⁸ Richard Tewksbury and Matthew Lees, 'Perceptions of Punishment: How Registered Sex Offenders View Registries' (2007) 53(3) Crime and Delinquency 380;

Danielle Tolson and Jennifer Klein, 'Registration, Residency Restrictions, and Community Notification: A Social Capital Perspective on the Isolation of Registered Sex Offenders in Our Communities' (2015) 25(5) Journal of Human Behaviour in the Social Environment 375, 380; Richard Tewksbury and Patrick Connor, 'Incarcerated Sex Offenders' Perceptions of Family Relationships: Previous Experiences and Future Expectations' (2012) 13(2) Western Criminology Review 25-35 - accessed from the HAQ report.

Werden” (Meaning: Don’t offend) the project ‘offers a free and confidential treatment... for people seeking therapeutic help with their sexual preference for children and/or early adolescents.’ What is interesting to note is that this is a voluntary programme which also maintain the confidentiality of the individuals undergoing treatment. As there is no mandatory reporting law in Germany the chances that such individuals undergo therapy is high.¹⁹

Sri Lanka has a long way to go in understanding sex offenders and assisting them by means of therapy. At least, for the time being, a SOR would suffice as it establishes some mechanism to monitor sex offenders and reduce recidivism.

‘At any rate these unfortunate beings (paedophiles) should always be looked upon as a common danger to the welfare of the community, and put under strict surveillance and medical treatment.²⁰ The proper place for such persons is a sanatorium²¹ established for the purpose, not prison’.²²

¹⁹ <https://www.dont-offend.org/>

²⁰ pg. 374, *Pathological Sexuality in Its Legal Aspects, Psychopathia Sexualis with Especial Reference to the Antipathic Sexual Instinct: A Medico-Forensic Study*, Richard von Krafft-Ebing, 12th German Edition, Stein and Day, New York, 1965.

²¹ pg. 11, *Treatment of Anomalous Vita Sexualis in Men: With Special Consideration of the Suggestive Treatment*, Alfred Fuchs.

²² Krafft-Ebing.

