

**Online child grooming crime:
Brief notes related to its current regulation in Argentina and Spain and possible
prevention ways.**

1. Concept and origen.

Through a grammatical interpretation of the term "grooming" we can say that the meaning of the verb "to groom", in common language, is to "prepare or train someone for an important job or position"¹, so that the idea is to prepare for a future role or function that requires some experience.

However, now, a specific juridical-criminal meaning of "to groom" is admitted, that is when we are talking about a sexual attack committed by an adult against children. In this case, grooming is understood as the "enticement of children for sexual acts" or the act of "luring a child". So, in effect, the idea of preparation or seduction of children to commit sexual acts would be quite approximate to the meaning given to "grooming" in legal English: the sexual grooming of children, emphasizing its sexual content. It is a technique used to decrease the moral or psychologically affect the child with the intention of emotionally controlling them affecting their sexual integrity².

Nowadays there is a tendency to classify grooming in different modalities according to the means of commission. The most basic classification is according to the manner of committing the grooming or the means used for the approach, it is necessary to differentiate between the so-called "grooming" in contexts "face-to-face" ("face-to-face contexts"), "On-line grooming", "street grooming" (or "local grooming") and horizontal grooming or grooming between colleagues or ("peer-to-peer grooming"). Many of these grooming classes can be verified jointly³.

¹ As it is in www.oxfordlearnersdictionaries.com

² That said, it should be noted that the "grooming" is not an attempt of sexual abuse, although it can be classified as previous acts tending to abuse or other illicit purposes related to sexual content.

³ Cfr. Górriz Royo, Elena "On-line child grooming en Derecho Penal Español". InDret. Barcelona, July 2016. It is also usually classified according to the context where it may occur: a distinction is made between "intra-family" and "extra-family"; attending to the subject that can be manipulated, as the grooming is oriented towards children, families, communities or institutions. Among others.

Bearing in mind the complexity of the process and its multiple manifestations, the "grooming" is limited, in general, to the following characteristics: 1) the use of a variety of manipulation and control techniques; 2) regarding a vulnerable subject; 3) in a social or inter-personal environment; 4) in order to create a harmful sexual behavior; 5) for the general purpose of facilitating exploitation⁴.

This process take place in a serie of gradual steps that can be defined as: "contact" (that favors an approach); "Approach"; "Deceptive trust development" (the development of a tricky relationship of trust, love or friendship) and "meeting" (physical encounter between the minor and the adult).

Although grooming covers different modalities, the truth is that only since the beginning of the previous decade this action is been debated within human rights organizations, international organizations and states⁵. But it is also true that such debate was influenced by the increase of this behaviors and the complaints related to them. In fact, it's important to remark the context the online media gives to the criminals and the effects of such behavior on the victims⁶. That is why such modality is subject to regulation in a multiplicity of Criminal Codes. In effect, the mechanism is not new, but such behaviors found a suitable way to proliferate with the development of various web pages and on-line applications called "social networks".

⁴ Ibid.

⁵ It is often cited as background to "Framework Decision 2004/68 / JHA of the Council, of December 22, 2003, on the fight against the sexual exploitation of children and child pornography". See in particular his art. 2 °, although the most relevant direct antecedent may be the "Council of Europe Convention for the Protection of Children against Exploitation and Sexual Abuse" of 2007, which is reflected in its art. 23 the need to typify the behavior understood today as grooming: "Each Party shall adopt the legislative or other measures that are necessary to criminalize the fact that an adult, through information and communication technologies, proposes a meeting a child who has not reached the age set in application of article 18, paragraph 2, for the purpose of committing against him any of the offenses established in accordance with article 18, paragraph 1, or article 20, paragraph 1, when said proposal has been followed by material acts conducive to said meeting. " Other more recent regulations in the international scope: "Directive 2013/40 / EU of the Parliament and of the Council of 12 of August of 2013 relative to the attacks against the systems of information".

⁶ The NSPCC (National Society for the Prevention of Cruelty to Children) remark as principals effects: "withdrawn, suddenly behaves differently, anxious, clingy depressed, aggressive, problems sleeping, eating disorders, wets the bed, soils clothes, takes risks, misses school, changes in eating habits, obsessive behavior, nightmares, drugs, alcohol, self-harm, thoughts about suicide" (<https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/grooming/>).

In this way, the "on-line child grooming" can be defined as the on-line manipulation of minors for sexual purposes. It is the process by which an adult tries to obtain the trust of a minor by pretending in many cases to be another minor, through the use of services and applications on the Internet (chat rooms, social networks, online games, instant messaging services, among others).

2. About the regulation in Argentina and Spain.

Nowadays the "grooming" is regulated in a large number of Criminal Codes requiring as a comisive modality the use of computer media (or communication), that is, in its on-line mode. To give an example we can mention the case of Brazil⁷, Chile⁸ and Peru⁹.

The peculiarity of this wave of legislative regulations referring to the conduct in question is the lack of uniformity in the adopted criteria. To make this clear, a brief analysis between the regulation carried out in Argentina and Spain is sufficient.

In Argentina the regulation of the crime is located in art. 131 of the Criminal Code, within the title "sexual integrity"¹⁰:

ARTICLE 131. - It will be punished with imprisonment of six (6) months to four (4) years who, through electronic communications, telecommunications or any other technology of data transmission, contact a minor, for the purpose of committing any offense against his sexual integrity.

Text which was subject to lot of critics between the Argentinean authors, such as: 1) that the article points to the author of the crime like "any person", without requiring majority of age, and it violates a principle of legal rationality; 2) that the age of sexual maturity of the victim is not established by law in this case, like it is in other crimes against sexual

⁷ Established by the "Estatuto da Criança e Adolescente", Law 8069/90, modified by law 11829/08, in the art. 241-D of the Criminal Code.

⁸ Through the "Law of grooming" No. 20.526 (August 20, 2011), the figure was incorporated in art. 366 quater of the Criminal Code.

⁹ Through the "Computer Crimes Law" No. 30.096 (October 22, 2013) the figure of "Propositions to children and adolescents for sexual purposes by technological means" was incorporated in art. 5 of the Penal Code.

¹⁰ By Law N° 269.041.

integrity contemplated in the same Criminal Code¹¹; 3) that Article 131 shows a disproportion when we compare this to other crimes that could be classified as more serious. The criminal type has, for example, the same punishment as simple sexual abuse (Article 119 of the Criminal Code).

On the other hand, the Spanish redaction of the crime comes to supply these deficiencies, in its article 183 ter. 1, located in the chapter "sexual indemnity"¹², the Spanish Criminal Code establish:

1. Whoever, through the Internet, the telephone or any other technology of information and communication, contacts a child under the age of sixteen and proposes to arrange a meeting with him or her in order to commit any of the offenses described in articles 183 and 189, provided that such proposal is accompanied by material acts aimed at rapprochement, will be punished with one to three years in prison or a fine of twelve to twenty-four months, without prejudice to the punishment corresponding to the crimes committed in their case. Punishments will be imposed on their upper half when the approach is obtained through coercion, intimidation or deception.

2. Who through the internet, telephone or any other technology of information and communication contact a child under sixteen years

¹¹ We can see the possible consequences of this failure in cases such as that one where a prosecutor in Minnesota charged a 14-year-old girl of distributing child pornography after she send a nude photo of herself to a classmate. Cfr. Riquert, Marcelo A. "El cibergrooming: nuevo art. 131 del C.P. y sus correcciones en el Anteproyecto argentino de 2014". Pg. 8.

¹² It is proposed to interpret the "sexual indemnity" as the interest in an adequate development and formation of the minor's personality and sexuality. A relationship of progression between sexual indemnity and sexual freedom is presented, so that this indemnity would be linked to the idea of sexual freedom in the consolidation phase that, according to the criminal legislation, would be protected until the minor had the capacity to consent. It could be understood, in that way, the sexual integrity of the minor, that is object of protection according to the location of the criminal type in the Argentine Criminal Code. Cfr. "On-line child grooming" in Spanish criminal law. Ob. Cit. Pg. 13. With quotation to other authors. Therefore it is possible, in both laws, to argue that we are facing a criminal type of abstract, hypothetical or concrete "danger", as the case may be. In this sense the Spanish Supreme Court has understood that "the nature of this crime is of danger because it is configured not attending to the actual injury of the protected legal asset, but to a dangerous behavior for said asset. We are dealing with an offense of abstract danger that can be debatable: as regards the type, it demands the existence of a minor and that of material acts aimed at approaching, the thesis of the concrete danger seems to be steely" -STS Esp. N ° 4.776.958 of February 24, 2015-.

and perform acts aimed at tricking him to provide pornographic material or show pornographic images in which represent or appear a minor, will be punished with a prison sentence of six months to two years¹³.

As it is observed the punishment is inferior, keeping relation with the different crimes typified in the respective articles to which the criminal type of the on-line grooming alludes, in addition, although it is resorted to the generic formula of "whoever", in the subsection quater it indicates:

"The free consent of a child under sixteen years of age shall exclude criminal liability for the offenses set forth in this Chapter, when the author is a person close to the child by age and degree of development or maturity."

So, it limits the responsibility of minors according to such parameters. Finally, it establishes the age of sexual maturity at 16, in accordance with the rest of the articles on the subject.

However, this isn't free of criticism: 1) it is criticized that it is vague in several aspects, particularly as it does not specify whether the "approach" must be physical or even a virtual approach is allowed¹⁴, nor does it indicate whether the proposal requires acceptance or not to concrete the typical behavior, finally the use of "approach" and "encounter" as synonyms; 2) criticizes the lack of coherence of the phrase "without prejudice to the penalties corresponding to the offenses committed in its case" with respect to the insolvency rules, since without such a phrase it would be possible to resort to an apparent competition regulated in art. 8 of C.P. in as much it is about the typification of conducts constitutive of preparatory acts of other crimes that entail more severe punishments¹⁵. 3)

¹³ Also, provided in the art. 183 quater: "The free consent of the child under sixteen years old will exclude criminal responsibility for the offenses set forth in this Chapter, when the author is a person close to the child by age and degree of development or maturity".

¹⁴ The NSPCC remark that "Groomers no longer need to meet children in real life to abuse them. Increasingly, groomers are sexually exploiting their victims by persuading them to take part in online sexual activity" (<https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/grooming/>).

¹⁵ In the aforementioned Judgment the Spanish Supreme Court departs from the literal wording of the enunciation and effectively applies an apparent contest of rules.

Finally, the criticisms point to the aggravating circumstance based on coercion, intimidation or deception exercised by the author of the crime, the problem is that it is understood that intimidation and deception would be part of the basic type while coercion if physical could not be exercised more than at a later stage than the commission of the criminal type -whereas if it is psychic, relative vis, it would already be covered by the “intimidation”-¹⁶.

3. Conduct that deserves to be typified as an autonomous modality by its comisive means?

As noted, the typification of such behaviors was emerging with the development of Internet, social networks and digital communication, which led to the proliferation of the grooming behavior. That is why the typifications mostly aim to punish acts understood as preparatory in the commission of other crimes but through the use of these mass media interaction. However, today there is also a widespread criticism of the exclusive typing of grooming in its online mode¹⁷. It is pointed out that in this way it is avoided to punish behaviors of people who are in a physical relationship of closeness with minors, for example their teachers or guardians, among others.

For this reason, there seems to be a tendency to extend the standardization of the norm to behaviors that take place by any means. Such is the case of the draft amendment to the Argentine Criminal Code that is still in the process of being drafted and whose progress foresees the following classification:

ARTICLE 122.-Prison of SIX (6) months to FIVE (5) years shall be imposed, provided that the act does not amount to a more severely punishable offense, to the person of legal age who:

3) Propose, by any means and in any way, to a person under the age of THIRTEEN (13) years to arrange a meeting to carry out sexual activities, provided that such proposal is accompanied by material acts aimed at approaching.

¹⁶ Cfr. Górriz Royo, Elena “On-line child grooming en Derecho Penal Español”. Ob. Cit. Pag. 39 ss.

¹⁷ Ibid

4) Perform any of the actions provided in paragraphs 1, 2 and 3 with a person over THIRTEEN (13) years and less than SIXTEEN (16) years, taking advantage of their sexual immaturity or if mediated cheating, violence, threat, abuse of authority or a situation of vulnerability, or any other means of intimidation or coercion.

5) Perform any of the actions provided in paragraphs 1, 2 and 3 with a person over SIXTEEN (16) years old and under the age of EIGHTEEN (18) if there is deceit, violence, threat, abuse of authority or of a situation of vulnerability, or any other means of intimidation or coercion.

Of course, the incorporation of such claims in criminal legislation will obey the criminal policy of each State, however the truth is that this could bring with it two risks: 1) a criticism can be sustained in order to advance criminal sanctions (propose arrange a meeting with the aforementioned purpose) to conduct whose commission would bring similar punishment and 2) to remove the focus of attention to the possible regulation of web pages and online applications for social interaction and where minors participate.

4. Do online social interaction pages represent a risk for minors? Is its regulation necessary?

With the development of the Internet there is a growing phenomenon of close relationship between minors and new technologies, constituting an environment of preponderant socialization¹⁸ where, as a natural derivation, behaviors of psychic and sexual violence have been born and grown abysmally, such as "grooming"; but also other so-called "happyslapping" consisting of recording humiliating videos for the child as they could be beatings or other criminal acts and then upload them to social networks for their public degradation, "gossiping" consisting of the use of forums for discredit or speak badly of another person spreading uncomfortable situations that could harm the honor of the

¹⁸ In this sense, several studies can be cited on the use of the Internet, which for a decade ago indicated that 40% of children and adolescents connect to the Internet every day of the week. Within this percentage the group of 15-18 years is considerably larger. While the activity most frequented by minors of both sexes is communication through instant messaging (2008 report cited in the parliamentary debates that culminated in the sanction of article 131 of the Argentine C.P. With references in <http://www.codajic.org/sites/www.codajic.org/files/MaterialPeriodistas%20El%20rol%20del%20comunicador%20como%20promotor%20de%20los%20derechos.pdf>)

victims; "Cyberstalking" that is, cases of predatory harassment or stalking; "Cyberbullying" consisting of harassment, assault or mistreatment; "Sexting" which consists in the diffusion of intimate images without consent; among many other degrading behaviors.

Although they can be directed against older people, and in many cases this happens, we cannot forget the situation of vulnerability in which the children are, in addition to the numerous studies that show that they are the ones who gradually use much more frequently the social networks where such behaviors predominate.

It is for this reason that the behavior have been subject to special regulation in their online mode. Thus, acts that can be considered as prior to more serious behaviors (in this sense, preparatory) are considered, taking into special consideration the vulnerability of the victims and the anonymity provided by the internet¹⁹, issues that according to the damage caused (or the situation of imminent danger to the protected goods) deserves more control and regulation.

In other words, the regulation, derived from the concern and social claim in the matter, doesn't do more than highlight the relevance of the prevention and prosecution of such behavior whose authors, with increasing frequency, make use of computer resources until now not fully regulated.

In fact, although technological progress has also allowed the commercialization of antivirus software and sexual content protection packages, the truth is that the so-called on-line grooming behaviors encompass behaviors that cannot be prevented by those: they are not effective in avoiding the entrance to pages or applications of social interaction or to maintain risky public or private conversations online.

By this way, there are some statistics that shows how just in England from April to July 2018 has been registered among 3,171 offences of sexual communication with a child

¹⁹ The Internet and new technologies are attractive to online offenders as a means to contact and exploit children. Online predators are able to stay virtually anonymous and conceal their true identities, making it easier to approach children and more difficult for law enforcement agencies to identify them (Cfr. International center for missing and exploited childres. Online Grooming of Childrens for sexual pourpuses. 1st. ed. 2017: https://www.icmec.org/wp-content/uploads/2017/09/Online-Grooming-of-Children_FINAL_9-18-17.pdf)

recorded across the country. Those incidents took place across up to 80 internet platforms including social media. Between those social media, “Facebook”, “Snapchat” and “Instagram” were the top three most-recorded sites for grooming to take place, being used in 70 per cent of 2,097 cases where police revealed the methods. Some of the victims were as young as eight years old, while girls aged 12 to 15 were most commonly targeted (three-fifths of the total)²⁰.

As we can see, it is a problem that goes beyond a topic of education in the use of new computer tools; the difficult question that arises is whether there would be any way to regulate the use of such web pages and applications avoiding the risks that use by minors entails.

It follows that it is not enough to deal with what would be the appropriate wording of the criminal type, while we are in a process of continuous technological revolution from which new risks arise before not considered, it would seem necessary to contemplate possible responsibilities of the supplier companies. Internet and online services in the design and management of secure virtual environments involving children and adolescents; both from the point of view of its legislative regulation and in relation to the sphere of public policies. That is why today it is more and more frequent that web pages request to specify the age for the registration as an user, so many times when the user is a minor the consent of an adult is requested.

However, the most relevant issue that is related to this problem is the possibility of using algorithms, calculations that tell computers what to do, for the detection of inappropriate conversations. Today, companies have developed a large number of algorithms that not only identify people with similar tastes to suggest virtual friendships but also detect their own face from the photos we upload to indicate that someone uploaded a photo in the web where we appear. Therefore, it is not surprising that a software or algorithm could be developed to detect such conversations. In fact, algorithms are currently used by social media companies to flag up images of child abuse, hate speech and extremist material.

²⁰ NSPCC inform: resume in https://www.rotherhamadvertiser.co.uk/news/view,facebook-most-used-site-for-child-sex-grooming-reports-warns-nspcc_27737.htm.

So, it would be a possibility use the same techniques to pick up “grooming language” and then send an automatic alert to both the child and moderators²¹. But, still, the problems in this area are many:

1. As explained, there is a tendency to request the execution of material acts tending to the approach, understanding that -in general- like acts intended to achieve a physical approach. Therefore, in most cases detections could be outside the scope of the application of the criminal law, in the case of actions that would not fit in the objective part of the criminal type.

2. On the other hand, whether we are willing to sanction such previous acts as crimes of “abstract danger” or just as a form of extra-criminal prevention, the truth is that for a proper control it should be possible to force the companies that own the web pages and web applications to increase their efforts in this matter.

3. In addition, there could be a problem regarding the right of minors to maintain a certain sphere of privacy.

4. Finally, it could generate a certain tension with the right to establish private communications: it would imply that all conversations could be subject to immediate control and even that they could be recorded in a database²².

²¹ In this order: <https://www.bbc.co.uk/news/uk-42855172>

²² It is possible to see some of these problems in the analysis of the history of Internet regulation related to the protection of children in the United States: Kende, Mark S. “The U.S. Supreme Court’s First Amendment refusal to protect children regarding sexually explicit speech on the Internet” in Digitalization and the Law . (Eric Hilgendorf/Jochen Feldle eds.) N° 15. Ed. Nomos. Pgs. 111 ss.