



POLICYMAKING IN THE DIGITAL AGE

Addressing Online Violence Against Women in Argentina

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INTRODUCTION

Almost three-quarters of women internet users have experienced some form of violence online (UN Women, 2015). Online gender-based violence is a human rights issue since it affects equality, women's integrity, freedom of expression, and access to information, as UN representatives stated (OHCHR, 2015). Non-consensual pornography is a particular form of violence that women suffer online. Defined as the distribution of sexually explicit images without the consent of the person portrayed, this practice can cause loss of professional and educational opportunities, and psychological and physical damage to victims (Franks, 2015, pp. 2-3; WMC, 2016).

Celebrities' nude photo hacks, high profile cases, and companies such as Facebook receiving more than 50,000 cases relating to non-consensual pornography per month have attracted public attention to this form of online violence, popularly known as "revenge porn" (Franks, 2015, p. 2; Topping, 2016; Hopkins and Solon, 2017). The United Nations Special Rapporteur on violence against women (2015) addressed this practice in one of her reports and encouraged States to implement remedies on this subject. Israel, the Republic of the Philippines, Canada, England, Wales, and Scotland, among other countries, passed legislation on this issue; in the U.S., more than 30 laws on non-consensual pornography were approved at the state level (Franks, 2015, p. 3). Legislative proposals on this issue also arose in Ice-

land, Sweden, Mexico, Chile, and Peru (Tapia, 2014; Bjarnadóttir, 2017; Guerrero, 2017).

At a global level—and mainly within the U.S. context and First Amendment standards—advocates of online freedom raised their voices against some of these legal remedies. These groups argued that vagueness in the drafting of these initiatives could lead to unintended consequences as the criminalization of protected speech, censorship of public interest content, and possible chilling effects (Sydell, 2013; Reisenwitz, 2013; ACLU, 2014).

In this scenario, Argentinian Congress started discussing draft bills on non-consensual pornography. As of August 2017, there are three draft bills on this issue and, in line with the global regulatory trend, these projects seek to make this practice a crime (5201-D-2015; S-2119/16; 3862-D-2017). This policy brief seeks to contribute to this debate providing concrete recommendations that protect both women’s rights and freedom of expression on the internet.

A COMPREHENSIVE APPROACH TO TACKLE NON-CONSENSUAL PORNOGRAPHY: BUILDING ON HUMAN RIGHTS

Within a rights-based perspective, policies on non-consensual pornography in Argentina should be developed in line with the Inter-American System of Human Rights, the regional human rights framework that has constitutional status (Argentinian Constitution, Art. 75.22). Building on this, a comprehensive approach should include the following elements:

- Gender perspective: the Inter-American framework on violence against women, the “Convention of Belém Do Pará”, signed and ratified by Argentina, urges the State to implement policies to combat and eradicate all type

of gender-based violence (OAS, 1994). Non-consensual pornography disproportionately affects women (Citron and Franks, 2014), so the gendered nature of the problem should be explicit in its policies. Responses on this issue should also seek to empower women within online spaces;

- ▶ Freedom of expression standards: solutions should be in line with the high level of protection given by Article 13 of the American Convention of Human Rights (ACHR). As the Organisation of American States (OAS) Special Rapporteur on Freedom of Expression stated in her report of 2013 (p. 1), this article fully applies to the internet. A comprehensive approach should avoid the false dichotomy between freedom of expression and women's rights online. As the Convention of Belém do Pará states, violence against women affects women's right to freely express online;
- ▶ Participation and transparency: a comprehensive approach should also include consultation with all relevant actors involved. As the OAS Special Rapporteurship on Freedom of Expression pointed out, responses that could have an impact on human rights online, should be also transparent and subjected to public oversight (2013, p. 26).

THE REGULATORY DEBATE IN ARGENTINA

The current projects propose to amend articles of the Criminal Code to impose imprisonment to the person that, by any means, publishes or distributes non-consensual pornography (5201-D-2015; S-2119/16; 3862-D-2017). This section analyses

the existing proposals in Argentina through the lens of the human rights-based model proposed above.

- Gender perspective: criminalization of non-consensual pornography could be seen as a compromise of the State in addressing this type of violence against women. However, in two of the proposals being discussed (5201-D-2015; S-2119/16), the gendered dimension is completely absent. This practice is presented as a privacy issue that affects a “subject” or “person” or “people”. The other proposal increases the penalty if the motive behind is gender-based violence (3862-D-2017, Art. 3), however, it does not present this practice as part of a broader and structural discrimination against women. All in all, the current proposals perform poorly in terms of gender sensitivity;
- Freedom of expression standards: protections to freedom of expression within the Inter-American system are broad, but not absolute. However, restrictions should be clearly and precisely defined. The current projects fail to meet these criteria. Two of these legislative proposals use the term “revenge porn” that, following leading scholars such as Mary Anne Franks (2015), could be misleading (5201-D-2015; S-2119/16). Franks explains that perpetrators are not necessarily motivated by vengeance, and questions the “pornographic” component of the definition. In the author’s words, taking a picture or recording a video in the context of a private relationship should not be considered “pornographic” (2015, 2). In addition, these legislative proposals employ vague wording and contain broad provisions against the dissemination of images of “semi-nudity,” or “sensitive information regarding sexual preferences” (5201-D-2015, Art. 1;

S-2119/16, Art. 1; 3862-D-2017, Art. 1) that leave the door open for the criminalization of content that is not necessarily non-consensual pornography. Neither of the projects includes, to avoid possible clashes with freedom of expression, exceptions of public interest content;

- ▶ Participation and transparency: as with other internet policies in Argentina (Aguerre and Galperín, 2015) — ranging from intermediary liability, net neutrality or intellectual property reform— there is a lack of formal inclusive and multi-actor mechanisms to discuss these bills.

All in all, these projects present several gaps since they lack clarity regarding the practice they seek to punish and its definition. Also, human rights implications—mainly, women’s rights implications—of non-consensual pornography are poorly addressed by these projects.

ALTERNATIVES TO ADDRESS NON-CONSENSUAL PORNOGRAPHY

Non-consensual pornography is a complex digital policy topic that requires a comprehensive approach. In addition, there is currently no data regarding the effectiveness of specific criminal laws on this issue. Based on a rights-based approach and the elements presented above, this paper offers the following policy avenues for intervention:

1. Addressing non-consensual pornography within the existing legal framework

The national Law 26,485 seeks to prevent, punish and eradicate gender-based violence in Argentina. This legal instrument

offers a general framework for the development of policy measures that could be applied within the digital realm.

- *Gender perspective*: addressing non-consensual pornography within Law 26,485 explicitly recognizes this issue as a gendered problem and as a women’s rights violation. Specifically, online violence could be placed under the umbrella of Article 6.7 that addresses the diffusion of messages or images, through any mean of communication, that promotes or reproduces gender inequality;
- *Freedom of expression standards*: while specific criminal remedies such as the current proposals pose risks to freedom of expression, the current national law on women’s protection provides a framework for Argentina’s government to implement active measures to tackle violence against women without compromising other rights (Law 26,485, 2009, Art. 2);
- *Participation and transparency*: the existing framework is in line with this principle since it establishes the need for cooperation with non-state actors for the development of policies to combat all forms of violence against women (Law 26,485, 2009, Art. 7).

2. Public-Private Cooperation

Interventions beyond legal remedies should be explored as an alternative to more traditional and strict regulatory measures. Hence, involving internet intermediaries such as search engines and social media platforms— is key in the development of faster and more effective solutions to combat non-consensual pornography. For example, co-regulatory measures such as the code of conduct on hate speech developed by the European Commission

in collaboration with internet platforms (Hern, 2016) are positive models to follow.

- ▶ *Gender perspective:* the gendered nature of non-consensual pornography should inform these joint initiatives. As with the “privacy by design” approach (Cavoukian, 2016), that states that this principle must become integral to design processes and planning, a gender perspective should be proactively incorporated into the entire process of companies’ policies and terms of service crafting;
- ▶ *Freedom of expression standards:* the public sector, in cooperation with internet intermediaries, should establish a set of basic guidelines to deal with non-consensual pornography in accordance with Inter-American standards on freedom of expression;
- ▶ *Participation and transparency:* the effectiveness of co-regulatory schemes depends on enforcement mechanisms that will make companies’ accountable for their implementation. Also, alliances between companies and civil society groups should be promoted, following experiences such as Twitter teaming up with women’s rights groups (Epstein, 2014).

3. Awareness and Capacity Building

A comprehensive approach aims to tackle the roots of the problem. Increasing awareness regarding this phenomenon and building digital literacy capacity will contribute to prevent non-consensual pornography and allow victims to recognize it as a form of violence.

- ▶ *Gender perspective:* a gender sensitive approach should link these measures to a broader context of inequality between men and women. The Inter-American framework on violence against women specifically encourages states to develop educational campaigns and to promote awareness on violence against women;
- ▶ *Freedom of expression standards:* measures like this do not present conflict with freedom of expression standards. On the contrary, more expression and campaigns on this topic could foster women's expression and encourage victims to speak up;
- ▶ *Participation and transparency:* these measures should be promoted by the State, but bottom up initiatives from civil society and in alliance with non-state actors are also needed and should be fostered.

RECOMMENDATIONS

As previously stated, non-consensual pornography is a complex digital policy issue that requires more than one single solution and more than one single actor involved. A comprehensive approach is needed. In this sense, this brief encourages Argentina's government to:

- ▶ Withdraw the current draft bills that seek to criminalize non-consensual pornography. Currently, these projects present potential collisions with online freedom of expression and lack of gender-sensitivity. Non-consensual pornography could be addressed within the current comprehensive legal framework on women's protection against violence;

- ▶ Promote a dialogue with the technology companies to develop a set of principles to deal with this phenomenon. A co-regulatory approach based on a code of conduct appears as a faster, and more flexible and effective solution. The accordance with human rights standards and the effectiveness of these solutions rely on making companies' decisions more transparent and participatory. Oversight and enforcement mechanisms should be implemented alongside these codes of conduct;

- ▶ Promote education and public awareness campaigns on gender-based violence and digital security in coordination with other public entities under the Executive branch, civil society and internet companies. No self-regulatory solutions can be effective without tackling the roots of this problem.

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