

**ADDRESSING ONLINE VIOLENCE AGAINST
WOMEN IN ARGENTINA:
A HUMAN RIGHTS APPROACH TO
NONCONSENSUAL PORNOGRAPHY**

By

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Submitted to

Central European University

School of Public Policy

*In partial fulfillment of the requirements for the degree of Master of Arts in Public
Policy*

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Budapest, Hungary

2017

Author's Declaration

I, the undersigned Verónica Del Carmen Ferrari hereby declare that I am the sole author of this thesis. To the best of my knowledge this thesis contains no material previously published by any other person except where due acknowledgement has been made. This thesis contains no material which has been accepted as part of the requirements of any other academic degree or non-degree program, in English or in any other language. This is a true copy of the thesis, including final revisions.

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ABSTRACT

This paper addresses how nonconsensual pornography should be tackled from a policy perspective. Defined as the online distribution of sexually explicit images without consent, nonconsensual pornography affects women disproportionately. Therefore, this problematic should be addressed as a women's rights violation.

The aim of this work is to contribute to the policy debate in Argentina on this form of online violence. Thus, this paper analyzes legislative initiatives on nonconsensual pornography using a human rights-based approach to policy analysis as a methodological framework and strategy. Within a human rights-based approach, policies on nonconsensual pornography in Argentina should have the fulfilment of human rights, with women's rights at the center, as main outcome. Building on the Inter-American System mechanisms, this work proposes a model to address nonconsensual pornography that should include the following elements: Application of Human Rights Standards, Empowerment of Women, and Participation and Transparency.

Following this model, this paper recommends Argentinian Government to address nonconsensual pornography using the current legal framework for women's protection against all forms of violence; to explore co-regulatory measures in cooperation with companies such as codes of conduct; and the implementation of awareness raising measures to increase digital literacy using a gender perspective.

ACKNOWLEDGEMENTS

Firstly, I would like to thank my supervisor, Professor Cameran Ashraf, for his guidance and feedback throughout the process of writing this thesis. I am also grateful to Sanjay Kumar, Katya McClintock, Daniela Schnidrig and Natalia Torres who read my drafts and provided valuable input and support (any inaccuracies or errors in this work are my own, these people are great).

Thanks a lot to my family and friends for the chat-mediated support throughout the year.

And on a special and final note, to the friends I found here at CEU, thanks for making this year an incredible experience with plenty of fun and love.

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Introduction

“The dream of internet freedom is dying”, said academic Jennifer Granick from Stanford two years ago during Black Hat, world’s leading digital event. Before that, writer and technology skeptic Eugene Morozov (2011, 253) had declared in his book *The Net Delusion* the death of the “cyber-utopia”: the optimistic idea that claimed digital technologies would lead, inevitably, to “an oasis of tolerance”.

The internet allows and fosters the realization of human rights. For years, several set of principles, international organizations’ reports and resolutions, and scholars from different academic backgrounds have declared that internet expands the freedom of expression exercise, allows access to information, fosters new forms of political organization and participation in public life, among others fundamental rights (IRPC, 2011; IACHR, 2013; HRC, 2012). However, in the last few years, a body of literature on issues related to the “offensive internet” (Levmore and Nusbaum, 2010), “cyber hate” (Citron, 2011), online harassment and abuse (Faris, *et al.*, 2016; Lenhart *et al.*, 2016), has been emerging. These works show how digital technologies also make the distribution of abusive, extreme, offensive and discriminatory content easier, faster and cheaper (Citron, 2011; Starr, 2014; Franks, 2015).

The real and the online are not two separate entities. Structural forms of discrimination are reproduced within the digital realm: the “offline” unequal power relations between men and women are reproduced online (APC, 2013). This explains why women, as with offline forms of abuse, are disproportionately the victims of violence on the internet: almost three quarters of women that are online have experienced some form of harassment (Duggan, 2014; HRC-SRWomen, 2015, 6; ITU, 2015). As Granick concluded in her influential talk (2015), “[s]exism have proven resilient enough to thrive in the digital world”. Online violence should be

addressed as part of the broader phenomenon of violence against women, thus, as a women's rights violation.

Celebrities' nude photos hacks, high profile cases and companies such as Facebook receiving more than 54,000 cases per month (Franks, 2015, 2; Topping, 2016; Hopkins and Solon, 2017) have attracted public attention to a specific form of violence against women on the internet: nonconsensual pornography, popularly known as revenge porn. This form of abuse, defined as the distribution of sexual explicit images or videos without consent, affects—as the other forms of online abuse—mainly, women and has several consequences that include withdrawal from online activities, professional damages, psychological consequences and, even, suicide (Citron, 2013; Citron and Franks, 2014, 108; Henry and Powell, 2015, 759; Lenhart *et al.*, 2016, 4).

Alongside the proliferation of cases and sites dedicated to this type of content, policies on this issue started to emerge at a global level. Parliaments around the globe started discussing “anti-revenge porn” laws, scholars argued that the only solution was to make this practice a crime, while other voices against these solutions showed concerns regarding unintended censorship consequences (Reisenwitz, 2013; Sydell, 2013; ACLU, 2014).

Mainly, following these North American and European trends and discussions, in recent years, policy makers in Latin America, starting paying attention to internet issues. Argentina, as in other countries of the region, started discussing how to regulate nonconsensual pornography (Bergman, *et al.* 2015; Riofrio, *et al.*, 2016). This also happens in a context of increased public attention to gender-based violence issues: official statistics indicate that crimes against women have increased 78 percentage since 2008 (La Nación, 2016) and massive mobilizations after femicide cases (Pomeraniec, 2015) put violence against women in the public agenda. In this context, what is the situation regarding the online dimension of the problem? What if the

debates on how to address nonconsensual pornography are transferred to the Argentinian context and the regional human rights system?

Based on the above-mentioned premise that nonconsensual pornography is a violation of women's rights, and that there is no single solution for violence against women issues, the research question that guides this work is how to tackle nonconsensual pornography in Argentina from a comprehensive human rights approach. This paper aims to provide an analysis of the existing policy proposals on nonconsensual pornography in Argentina, to then propose alternatives to tackle this issue in line with regional human rights standards—that in Argentina have precedence over national legal frameworks.

Hence, this research will use policy analysis as methodological approach, with the aim of providing alternatives to solve this issue. Specifically, this work proposes a human rights-based approach to policy analysis (Gatenio Gabel, 2016), since it will be focused on how policies on this issue could impact on human rights online.

Academic research and civil society work on these issues are still in their early stages in Argentina. This research aims to contribute to a current and urgent policy debate in Argentina proposing a comprehensive and rights-based model to address it. Since Parliaments in Latin America are also addressing this issue, this work hopefully can inform future discussions in Latin America.

This paper is organized in five sections. The first chapter introduces the conceptual framework that will guide this work, the relevant literature on online violence against women and, then, focuses on nonconsensual pornography, its regulation and the debates around it. The next chapter presents the methodological strategy used to conduct this work, its rationale, and the elements that a comprehensive strategy to tackle pornography should include. The third chapter, firstly, analyzes the existing initiatives that try to regulate revenge porn in Argentina

through the lens of this approach; then, it offers concrete policy recommendations to address this phenomenon in compliance with regional rights standards and, finally, presents considerations in terms of implementation. The last section offers conclusions and poses questions for future research.

Chapter 1 –Literature Review and Conceptual Framework

This chapter presents nonconsensual pornography within the broader phenomenon of online violence against women and explores the relevant literature on this issue. This will include the definition of nonconsensual pornography as a type of violence against women and the discussions on its definitions. Then, the chapter addresses the debates in terms of legal remedies and the related concerns in terms of potential collisions with freedom of expression online. Building on the idea that nonconsensual pornography should be addressed as a women's rights issue, the chapter presents the existing regional human rights framework and explores how to build on that to design a comprehensive approach to address nonconsensual pornography from a policy perspective.

What is Nonconsensual Pornography?

Nonconsensual pornography should be addressed as part of a broader phenomenon of structural discrimination against women¹. The internet, as scholars such as Bernal (2014), Lewis *et al.* (2016) and Shaw (2014) argue is not free from the unequal power relations between men and women. The offline and the online cannot be separated, they are dimensions of the same phenomenon. As the International Telecommunication Union (ITU) stated in a report on this issue, the same forms of discrimination that shape social, economic, cultural and political structures are reproduced on the internet (2015, 6).

This explains why online violence disproportionately affects women (Duggan, 2014; ITU, 2015). Online violence against women is defined as the range of practices that take place on

¹ In this work, and following the report of the Best Practice Forum on Online Abuse and Gender-Based Violence Against Women at the Internet Governance Forum (2015, 6), the term “women” includes girls —female individuals under the age of 18— and women of diverse sexualities and gender identities.

the internet, or are committed or aggravated by the use of digital technology (APC, 2015; IGF, 2015). Stalking, hacking of email accounts or electronic devices, threats, hate speech, shut down of websites, invasion of privacy and surveillance, are some of the practices that fall under this definition (Citron, 2011; ITU, 2015, 22; IGF, 2015). These forms of violence that women suffer online should be addressed as another form of violence against women that affects human rights such as freedom of expression, association, public participation and privacy (IGF, 2015, 33).

Nonconsensual pornography is another form of abuse that affects mainly women (WMC, 2016) and is defined as the distribution of sexually explicit images² without the consent of the person portrayed and with no legitimate purpose (Franks, 2015, 2-3; WMC, 2016). The United Nations Special Rapporteur (2015) on violence against women has highlighted how the distribution of sexual images is used to harass women and encouraged States to start implementing remedies on this subject.

Often referred to, both in the media and in the literature on this issue, as “revenge porn”, nonconsensual pornography is a complex and contested term. Mary Anne Franks (2015, 2), lead academic on this issue and head of the Cyber Civil Rights Initiative, criticizes the notion of revenge porn and argues that the images are not necessarily distributed by a former romantic partner, and that perpetrators are not necessarily motivated by vengeance. Franks also questions the “pornographic” component of the definition, as, in the author’s words: it is problematic that taking a picture or recording a video in the context of a private relationship is considered pornographic (2015, 2). Also, the images, as Amanda Lenhart *et al.* explain in their report for the Data & Society Research Institute (2016), could have been created consensually or not. Victims could have been secretly photographed or taped. The key element of the definition of

² For the purposes of this work, and in line with Mary Anne Franks’ proposal (2015, 9), the notion of “image” includes pictures, videos, audios, among others.

this concept, say Lenhart *et al.*, (2016, 3), in this sense, should be the lack of consent of the subject in the distribution.

Building on this, this work adopts the notion of “nonconsensual pornography” to refer to the distribution of sexually explicit images without consent and addresses this practice as a human rights issue, since it represents women’s rights violations. Therefore, policies and regulations that seek to tackle this phenomenon should be developed and framed under the premise that it is a human rights issue.

1.1. The Debates Regarding Nonconsensual Pornography Regulation

In recent years, online violence against women has gained attention in the global internet policy agenda. For example, the United Nations Secretary-General, in a 2006 study on all forms of violence (47), alerted about the use of technology in developing and expanding forms of abuse. In 2013, the United Nations General Assembly adopted a resolution on the protection of women's rights online, addressing it as a growing concern and a manifestation of systemic gender-based discrimination (IGF, 2015, 9).

The proliferation of sites on nonconsensual pornography gained the attention from policy makers around the world. Israel, Philippines, Canada, England, Wales, Scotland, Northern Ireland, among other countries, passed legislation on this issue. In the United States, more than 30 laws on nonconsensual pornography were approved at the state level (Franks, 2015, 3). In Latin America, legislative proposals on this issue arose in Mexico, Chile and Argentina (Tapia, 2014).

In general, these legal remedies seek to make this type of conduct a crime. Danielle Citron, one of the most preeminent scholars working on this topic, argues that criminalization is the only

solution for nonconsensual pornography. Together with Franks, Citron argues that nonconsensual pornography is a form of sexual abuse and specific criminal law should be passed to deter perpetrators and to size the nature of the harm caused to its victims (Citron and Franks, 2014, 105-116).

However, the criminal solution has also led to criticism. Sarah Jeong, journalist and author of *The Internet of Garbage*, for example, argues that new criminal figures are not necessary (2013). In the same line, Lilian Edwards, an academic on internet law, claims that new laws on nonconsensual pornography are redundant since this phenomenon could be addressed with existing provisions on harassment, threats, and defamation. Freedom of expression advocates—mainly in the United States—also expressed concerns regarding the so-called “anti-revenge porn” that thought to (Reisenwitz, 2013). Well known and respected groups such as the American Civil Liberties Union, Harvard’s Berkman Center for Internet and Society, and the Electronic Frontier Foundation, for example, argued that the vague drafting of some of these initiatives could lead to negative consequences on freedom of expression on the internet (ACLU, 2014; Sydell, 2013).

Citron tries to debunk freedom of expression concerns, arguing that, first, nonconsensual pornography also affects women’s expression on the internet. Additionally, Citron argues that the solution for this is well crafted legal frameworks. In this sense, Mary Anne Franks and the Cyber Civil Rights Initiative developed a guide for legislators to draft precise and effective norms on this issue (2015).

Argentina’s Congress has begun discussing this issue. However, there is still a lack of academic research on online violence against women to inform these debates. A document by the Best Practice Forum on Online Violence Against Women at the Internet Governance Forum from 2015 covers only two cases of nonconsensual pornography in Argentina (113). A work for the

Association for Progressive Communications (2009) provides a general and introductory panorama of the situation in Argentina, highlighting some cases and inscribes online violence against women as part of a structural problem of women's rights violation. A paper from the Center for Studies for Freedom of Expression and Access to Information (CELE) by Paula Vargas de Brea (2015), specifically, addresses nonconsensual pornography, its definition and how it could be addressed from a legal perspective in Argentina. However, de Brea's work lacks of a gender approach and does not explore alternatives besides legal remedies.

The discussion on this issue, as Sarah Jeong states, should not be framed as a dichotomy between freedom of expression and women's rights: nonconsensual pornography affects women's rights, including their right to freely express online (Citron, 2014; Jeon, 2014). In this sense, this work seeks to fill the gap in terms of concrete alternatives that could be implemented from a comprehensive approach as well as from a gender perspective.

1.2. Human Rights: Mechanisms to Address Nonconsensual Pornography

As nonconsensual pornography should be analyzed within the context of structural discrimination against women that is reproduced online, another dimension that a human rights approach to this should consider is connected with women's rights violation.

Human rights are linked to human beings' existence (Shelton, 2014, 7). Thus, the basic idea underlying the current notion of human rights is connected with the legal guarantees that protect individuals and groups against actions and omissions —from States, individuals, or corporations— that interfere with fundamental freedoms, entitlements and human dignity (OHCHR, 2006, 1; Shelton, 2014, 7). All in all, human rights, based on the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 and the two main principles of non-discrimination and equality (Callamard, 2008), are what obliges

States and other duty-bearers to do certain things and prevents them from doing others (OHCHR, 2006, 1).

The Universal Declaration has had remarkable impact on the development of regional human rights law, which offer a more localized context and reflect specific human rights concerns (OHCHR, 2016). In the Americas, the regional human rights arrangements exist within the Organization of American States and the main human rights instrument within this regional framework is the legally binding American Convention on Human Rights of 1969 (OHCHR, 2016). This papers will focus on provisions under the Inter-American Human Rights system related to the human rights involved in nonconsensual pornography solutions: women's rights and freedom of expression.

Freedom of expression protections are established by the Article 13 of the American Convention on Human Rights, subscribed and ratified by Argentina in 1984. Since the constitutional reform of 1994, this instrument has constitutional significance and any legal framework and policy in Argentina should be developed according to these principles. Article 13 of the American Convention gives this right a broad protection—even broader than the protections under other international instruments. These protections “fully” apply online, as the seminal report of OAS Special Rapporteur for Freedom of Expression stated in 2013. Another key element in terms of freedom of expression principles on the internet is given by the *Joint Declaration on Freedom of Expression and the Internet* signed by the representatives of the Organization of American States and United Nations, among others (2011).

At a regional level, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women of 1994—also known as the Convention of Belém do Pará— offers the framework in terms of women's rights protections. The Convention recognizes in Article 2 violence against women as a violation of human rights, as a consequence

of inequality between men and women, and states that this violence could be physical, sexual and psychological. This instrument —that was also signed and ratified by Argentina and has had constitutional law status since 1994— urges states to implement comprehensive policies to eradicate violence against women that should include prevention, investigation and prosecution and contains detailed provisions regarding the obligations of States to implement policies and enact legislation (UN, 2010, 8-9).

1.3. A Comprehensive Approach for Nonconsensual Pornography: Building on Human Rights

Building on the idea that nonconsensual pornography affects women's rights, a human rights-based approach is a conceptual framework normatively based on human rights standards and operationally directed to promoting and protecting human rights (OHCHR, 2006, 15). Within a human rights-based approach, policies on nonconsensual pornography in Argentina should be developed under the Inter-American system of rights and the main outcome should be the fulfilment of human rights, with a focus on women's rights.

To date, there has been an exclusion of violence against women from the human rights agenda and how human rights frameworks neglect women's experiences. Feminist critiques to international human rights law address the historical exclusion of women from the human rights discourse, mainly due to the absence of women in these discussions (Edwards, 2010, 37). The feminist critique states that since women are excluded from participating in negotiating, developing and articulating, drafting, implementing and enforcing human rights norms results in a human rights system that fails to reflect the interests, needs, concerns of women (44). Feminist scholars argue that historically women's concerns, experiences, and needs were excluded from human rights law discussions, as Alice Edwards explains (2000, 54). Charlotte Bunch (1990) in an article addresses the issue, stating that women's rights and

human rights “are viewed as distinct and looks at the policy implications of this. Bunch talks about how women’s rights are distinctly connected to being female —that is, women are discriminated against and abused on the basis of gender.

As Bunch says, that the concept of human rights is not static, its meaning expands and the experiences of women must be added to traditional approaches to human rights in order to make women more visible (487). The human rights community should incorporate gender perspectives into them (Bunch, 1990, 497). As Alice Edwards says, the way forward is not to reject existing human rights standards and frameworks, but to work to ensure that women’s needs are also recognized and protected (86).

This chapter introduced the framework, principles and definitions that will guide this work. The next section, will build on this to present a model to tackle, specifically, nonconsensual pornography in Argentina.

Chapter 2 – Nonconsensual Pornography: A Human Rights-Based Approach to Policy Analysis

This chapter, first, presents the methodological framework used to conduct this research. Then, it explores the elements of a comprehensive strategy that seeks to address nonconsensual pornography, taking into account both gender implications and freedom of expression online standards built upon the Inter-American Human Rights system. The purpose of this is to highlight gaps in the current regulatory proposals in Argentina and, then, provide using policy analysis as a tool provide recommendations on how to develop a comprehensive human rights-based approach to tackle nonconsensual pornography. In this sense, this approach works both as framework and as a methodological strategy.

The aim of this work is to provide policy recommendations to address nonconsensual pornography in Argentina from a comprehensive approach. Hence, this research will be conducted using policy analysis as a methodological tool. As Weimer (2002, 61) explains, policy analysis' aim is to provide public actors with the comparison of policy alternative to solve social problems. Conventionally, this approach —reflected, as Ingram and Schneider (2006) explain, in the work of authors such as Weimer and Vining, and Bardach work— was centered on efficiency, effectiveness and feasibility of policy alternatives (Gatenio Gabel, 2016) and, as Carol Bacchi (2009, 26) critically claims, had the State as the “only one player” in charge of policy making.

However, other perspectives on policy analysis seek to go beyond this more conventional approach. Newer approaches to policy analysis focuses on policy issues as multi-actor, or focus on how problems are framed (Bacchi, 2009; Thissen and Walker, 2013). Even, in their seminal work on this issue, Weimer and Vining (2005, 24 and 26) state that policy analysis takes the social values involved into account. Shirley Gatenio Gabel (2016, 9) proposes a rights-based

approach to social policy analysis. For Gabel, this approach incorporates some of the elements of traditional policy analysis, but goes beyond since it focuses on how policies and programs affect or are expected to affect human rights.

Following this theoretical approach, this paper analyzes the proposals to regulate nonconsensual pornography in Argentina using a human rights-based angle and, then, proposes concrete policy alternatives to tackle this issue in compliance with human rights realization. As mentioned before, within a human rights-based approach, policies are anchored in a system of rights and obligations established by international law (OHCHR, 2006, 15). For the purposes of this work, this approach will follow Inter-American Human Rights standards, focusing on women's rights protections under the Convention of Belém do Pará and freedom of expression standards under the American Convention on Human Rights and declarations and reports on how these principles and standards should apply online.

Within this research and in terms of data gathering, a thorough literature review was conducted, with a focus on academic publications. Additionally, it gathered information from international organizations' documents, reports from interest groups, legal frameworks and draft bills, among others.

2.2. What Should a Comprehensive Human Rights-Based Approach to Nonconsensual Pornography Look Like?

As was stated before, nonconsensual pornography is a human rights issue. Therefore, this work proposes a human rights-based approach for the policies that seek to address it. Following how the Convention of Belém do Pará defines a comprehensive approach on violence against women, strategies to tackle nonconsensual pornography should tackle causes, manifestations and consequences of it (OAS, 1994, Articles 7-8). A comprehensive approach in this case will

also seek to guarantee women's rights online and harmonize this protection with freedom of expression standards on the internet.

Efforts to apply a rights-based approach to policy analysis, says Gatenio Gabel (2016, 6) have been limited. United Nations agencies such as UNICEF (2004; 2016) have been implementing this type of approach to address several issues such as development, and children and women's rights. Building on that and following United Nations guidelines for legislation and policies on violence against women (2010), this work proposes a comprehensive human rights-based approach to nonconsensual pornography, which should include these elements:

2.2.1. Application of Human Rights Standards

First, policies that seek to tackle nonconsensual pornography should frame it as a violence against women issue and a human rights violation issue. Nonconsensual pornography fits the definition of violence against women in Article 1 of the Convention of Belém do Pará, understood as any conduct, based on gender, that causes physical, sexual or psychological harm to women.

Also, these solutions should be in line with the high level of protection in terms of freedom of expression provisions within the American Convention. For example, Article 13 states that this right should not be subject to prior censorship, but it claims that subsequent liability could be imposed, for example, to ensure the rights of others. However, for these restrictions to be acceptable, they should be clearly and precisely stated and defined by law (Article 13.2). OAS Special Rapporteur on Freedom of Expression in her report of 2013 (1), stated that provisions under Article 13 of the Convention fully apply to the internet. Therefore, legal remedies that try to regulate the internet, such as the measures to overcome nonconsensual pornography, should be in line with these standards.

A comprehensive approach should avoid the false dichotomy between freedom of expression and women's rights online and be informed by the Convention of Belém do Pará that states that violence against women affects women's equality, dignity and their right to freely express themselves online.

2.2.2. Empowerment of Women

As was mentioned earlier, women are disproportionately victims of this type of violence (WMC, 2016) so the gendered nature of the problem should be explicit in these policies. A comprehensive approach on this issue should, thus, include measures that aim to empower women within online spaces, to know their rights and to claim for them. Measures such as awareness and education specifically tailored for women as a vulnerable group should be implemented to tackle the roots causes of this issue, as it is stated in the Convention of Belém do Pará. Also, a policy on this issue should seek to support victims of nonconsensual pornography, providing legal, psychological and digital security assistance and guidance.

2.2.3. Participation and Transparency

A comprehensive approach should also include consultation with all relevant actors involved in this issue. As the Special Rapporteur recommended in the report of 2013 of freedom of expression online, the so-called multistakeholder model is, ideally, the one that should be followed to develop internet policies (53). The idea behind this model is that, when it comes to the internet, not only States should make the decisions: the private sector, civil society, and the technical community, for example, should have an active role in these discussions and the decisions. Within this more participatory policy making processes, both top-down and bottom-up initiatives in collaboration with private actors and civil society could be combined.

Connected with the idea of more open and inclusive decision making processes in internet policy making, transparency is essential to guarantee that all stakeholders are heard (ISOC, 2016). Within the Inter-American System access to information is conceived as key for the exercise of other human rights. Specifically, talking about measures that could have an impact on human rights online, the OAS Special Rapporteurship on Freedom of Expression (2013, 26) pointed out that these measures should be transparent and subjected to oversight by autonomous and specialized agencies.

In addition, transparency, within the regional human rights protections system, is crucial since allows citizens to learn what rights they have and how to claim for them (IACHR, 2012, viii). Within the comprehensive human rights-based approach to tackle nonconsensual pornography, all actors involved should understand their obligations to respect, protect and fulfil human rights. Both public entities and the internet companies involved in the access, distribution, indexation of this type of content should be held accountable for the compliance with human rights standards when dealing with nonconsensual pornography.

These three elements should inform a human rights-based approach to nonconsensual pornography. Building on this framework, the next section, will analyze the existing legislative initiatives in Argentina.

Chapter 3 – Analysis

3.1. The Regulatory Debate in Argentina

Argentina has signed and ratified the Convention of Belém do Pará and passed regulation on gender based violence, such as the Law 26,485 of 2009 on women's protection against violence. Over the last few years, violence against women became central in the public agenda. In a context of high figures regarding gender-based violence, the *Ni Una Menos* movement (Not One Woman Less) put the issue of violence against women in the spotlight. Started in 2015 by a group of women journalists, this movement organized massive protests that, in the words of UN Special Rapporteur on violence against women (2016), “attracted the world attention” and “challenged the government to intensify its efforts on ending and preventing” violence against women.

In this context, Argentina has begun to address the online expression of violence against women and, in particular, nonconsensual pornography. As of June 2017, the Congress discusses two draft bills on this issue and, in line with the global regulatory trend, they seek to make this practice a crime. Both bills propose to amend an article of the Criminal Code to impose imprisonment to the person that, by any mean, publishes or distributes nonconsensual pornography (Bergman *et al.*, 2015; Riofrio *et al.*, 2016). This chapter's purpose is to analyze the existing proposals on nonconsensual pornography regulation in Argentina through the lens of the human rights-based model proposed above.

3.1. Application of Human Rights Standards

As was stated before, freedom of expression protections within the Inter-American system are broad, but not absolute. Subsequent liability could be imposed, according to Article 13 of the American Convention, to ensure the rights of others—in this case, women's rights.

However, restrictions should be clearly stated. The so-called three-part test under Article 13.2, requires, firstly, that limitations should be clearly and precisely defined in a law. The current projects fail to meet these criteria. The legislative proposals use the term “revenge porn” that, as was stated before and following Mary Anne Franks’ guidelines for the crafting of these laws, could be misleading. In addition, the proposals employ vague terms such as “semi-nudity” that are not in line with the principle of legality under the American Convention that establishes that laws should be drafted in a precise way to avoid collisions with other human rights.

The legislative initiatives do not state exceptions for images that were taken in public or state clearly that the original purpose of the picture should be “private”, leaving the door open for the criminalization of content that necessarily is nonconsensual pornography. As Citron states, nonconsensual pornography laws should only punish the person who distributes this material knowing that the subject expected them to be kept confidential. Neither of the projects, include the exception of public interest content.

The projects also state that this practice will be punished if the distribution of this material generates or causes harm to the honor, the intimacy or the feelings of the person involved (Bergman *et al.*, 2015, Article 1; Riofrio *et al.*, 2016, Article 1). These notions could be broad for legal crafting and, following Citron and Franks say, the focus should be on the lack of consent, not in the perpetrator’s intention.

One of the proposals (Bergman *et al.*, 2015), when compared with the current Criminal Code, aggravate the sentence if the content is distributed through the internet. Considering the internet as particularly dangerous, as the OAS Special Rapporteurship stated, could open the door to disproportionate restrictions to online expression (2013, Parr. 74).

Following Inter-American standards and Citron and Franks’ guidelines for the crafting of these projects (2013; 2014), it is key that the text of anti-nonconsensual pornography laws is precise

and carefully crafted. Projects should be clear in terms of what is the practice that is being punished and how it is defined. As voices against these initiatives around the globe stated, the vague wording in these type of solutions could lead to overbroad provisions and to the criminalization of conducts that are not necessarily nonconsensual pornography. Finally, the projects address this issue as a privacy matter, but they do not address this practice as a form of violence against women. All in all, the human rights implications —and, mainly, the women’s rights implications— of nonconsensual pornography are poorly addressed by these projects.

3.2. Empowerment of Women

As was stated before and following APC (2015), nonconsensual pornography should be analyzed as a continuum of the offline violence and structural discrimination against women. Policy remedies should acknowledge this gendered nature of the problem. However, in the proposals being discussed in Argentina, this dimension is absent. The bills address this phenomenon as a privacy issue that affects a “subject” or “person” or “people”. Nonconsensual pornography disproportionately affects women (Citron and Franks, 2014) however, this word is not mentioned once in the articles.

Online violence is, in many cases, not been taken as seriously as “real” violence. Criminalizing nonconsensual pornography through specific laws could be seen as a compromise from the State and as a message to deter perpetrators. However, initiatives like the bills being discussed at the moment at the Argentinian Congress lack of a gender approach. From a human rights perspective and in line with the regional standards given by the Convention of Belém do Pará, nonconsensual pornography should be linked to the violation of women’s rights of privacy, integrity and freedom of expression.

3.3. *Participation and Transparency*

In Argentina, there is a lack of open, inclusive and multi-actor mechanisms when discussing internet policies (Aguerre and Galperín, 2015). For instance, both projects state that the person sentenced should block, eliminate or suppress the nonconsensual pornography content, within a period to be determined by a judge. These provisions are problematic since they do not take into account the specific characteristics of the internet. For example, blocking a nonconsensual porn image not necessarily means that the image won't be still available online. Digital rights groups and technical community should be an active part in the crafting of internet regulation. Also, due to the women's rights nature of this issue, women's groups should have been consulted during the drafting of these initiatives.

Some aspects of the projects could also be problematic in terms of delegating responsibilities about content management on internet intermediaries such as social media platforms and or search engines. One of the projects, for example, imposes imprisonment to the subject that “facilitates websites to other people to conduct these activities”³ (Bergman *et al.*, 2015). Under these provisions, a search engine like Google, for example, could be held responsible for listing sites that distribute nonconsensual pornography.

Firstly, the OAS Special Rapporteurship for Freedom of Expression (2013, 41-43) had clearly stated that imposing strict liability to intermediaries for unlawful third party content “is incompatible with minimum standards of freedom of expression” since it creates incentives for these companies to control users' online activities and could lead to the suppression of legitimate content. Transparency and accountability are key regarding companies' management of online content. In contradiction to the OAS Special Rapporteurship for Freedom of Expression guidelines, the projects do not mention, for example, that there is a

³ Translation by the author.

need for a judicial decision for the removal of content or the creation of any entity in charge of public oversight.

This chapter analyzed the existing proposals to address nonconsensual pornography in Argentina. The analysis showed that the current remedies show limitations in terms of human rights realization. Thus, next section will present alternatives that, from a rights-based approach, could be implemented to tackle nonconsensual pornography from a comprehensive perspective.

Chapter 4 – Recommendations

4.1. Towards a Comprehensive Approach to Tackle Nonconsensual Pornography

Nonconsensual pornography is a complex issue that cannot be solved only by new legislation. This section presents concrete policy recommendations consistent with regional human rights standards. This comprehensive approach presents the principles of Application of Human Rights Standards, Empowerment of Women, Participatory Policy Making Process, and Transparency and Accountability across all these proposals.

4.1.1. Addressing Nonconsensual Pornography Within the Existing Legal Framework on Women's Protection

Application of Human Rights Standards

Criminalization and punishment of all forms of violence against women is seen as a way to send a message to perpetrators (UN, 2009, 14), however, the analysis demonstrated that the current proposals present vague provisions that could affect freedom of expression online. Since they are not consistent with human rights standards, current proposals should be withdrawn. Legal initiatives on this issue should address it using the definition of nonconsensual pornography, developed in Chapter 1. Then, and following scholars on this issue and Inter-American Human Rights standards, the drafting of these remedies should be precise to avoid potential collisions with freedom of expression on the internet principles.

However, nonconsensual pornography could be addressed within the existing comprehensive legal protections for women's rights in Argentina. The Law 26,485 that provides comprehensive protection and seeks to prevent, punish and eradicate violence against women

of 2009 and the national plan, derived from that law, offer a general framework for the development of coordinated policy measures that could be applied within the digital realm. This framework defines violence against women as any conduct, action or omission that, directly or indirectly, affects the life, freedom, dignity of women. Violence against women, under this framework and following the Convention of Belém do Pará, is a broad notion and it could be physical, sexual, psychological and/or economical (2009, Article 4) that could be also applied to nonconsensual pornography, alongside other forms of abuse online.

Specifically, forms of online violence could be placed under the umbrella of Article 6.7 that addresses violence against women through the publication or diffusion of messages or images, through any mean of communication, that promotes or reproduced inequality. While specific criminal remedies such as the current proposals could pose risks in terms of freedom of expression standards, the current framework encourages Argentinian Government to put in practice measures to tackle violence against women without compromising other rights.

Empowerment of Women

Addressing nonconsensual pornography as a form of violence against women within the existing legal framework explicitly recognizes this issue as a gendered problem and as a women's rights violation.

Participation and Transparency

Policies on nonconsensual pornography within the comprehensive law on protection against gender-based violence or potential amendments to include nonconsensual pornography as a specific figure should be developed following an inclusive and multistakeholder consultation with all relevant actors —ranging from digital and women's rights groups to the private sector and the technical community.

Policy solutions on nonconsensual pornography should include mechanisms that guarantee, in line with aforementioned regional human rights standards, due process and transparency in terms of the removal of the content. Any initiative on nonconsensual pornography —either within the current framework or a specific legal remedy— should include the creation of independent entities, with autonomy and technical capacities to guarantee transparency on the implementation.

The existing framework is in line with this principle since establishes the need for cooperation with non-state actors for the development of policies to combat online violence against women (Law 26,485, 2009, Article 7). The national body in charge of the implementation of the current framework, the National Council of Women, under the Executive branch, could be the entity in charge of the facilitation of multistakeholder spaces to address policies online violence against women.

4.1.2. Beyond Legal Remedies: Co-Regulatory Initiatives & Public-Private Cooperation

Alternatives and more flexible measures to tackle nonconsensual porn should also be explored within a comprehensive approach. The industry, for example, is key in the development of faster and even more effective solutions to combat nonconsensual pornography. Internet intermediaries such as search engines, social media platforms, applications, among others, play a key role since they facilitate users' activities online.

Application of Human Rights Standards

As the Special Rapporteurship stated in the 2013 report, private actors' activities impact the exercise of human rights online since. Internet intermediaries, as Laura DeNardis and Hackl explain (2016), hold a great amount of power since they shape our expression and control what

we can access online. Due to this critical role, private actors, in DeNardis' words, are "on the front lines" of online violence problems (2014, 168), thus, they have responsibilities relating this phenomena, as Nyst (2014) argues. Also, as Rebecca MacKinnon (2012, 175) explains, intermediaries should be convinced that respecting and protecting human rights is in their commercial self-interest.

In terms of mitigating the impact of nonconsensual pornography, intermediaries have already begun to implement in their policies mechanisms to remove this type of content upon victim's request. However, to actually moderate the effect of the spread of these images, companies should coordinate efforts and adopt similar policies. Therefore, public entities should foster a dialogue with these actors.

Establishing, in cooperation with internet intermediaries, a set of basic guidelines to deal with nonconsensual pornography in accordance with Inter-American standards could be a measure to put in practice. Co-regulatory measures such as the code of conduct on hate speech developed by the European Commission in collaboration with intermediaries such as Twitter, Facebook and YouTube (Hern, 2016) are positive examples to follow.

Empowerment of Women

The gendered-nature of nonconsensual pornography should inform the solutions. Building on the idea that technology is not neutral and it reflects unequal power relations, these joint initiatives between public-private sector proposed should be gender aware. As with the idea of "privacy by design" that states, among other things, that privacy is proactive rather than reactive and that it should be embedded in the development of products and policies (Cavoukian, 2016), a gender perspective should be incorporated in the design of companies' guidelines and applications.

Public entities should foster guidelines for the development of good practices among companies and promote for spaces for public-private coordination. For example, the example of the best practice privacy guidelines developed by the National Direction of Data Protection in Argentina should be followed. This entity developed, for example, guidelines for the design of applications and productions under the principle of privacy by design (Ferrari and Schnidrig, 2016). The same should be applied in terms of gender perspective.

Alliances between companies and civil society and civil society groups also should be foster. At global level, for example, there are existing experiences of companies teaming up with women's rights groups to tackle online harassment —such as the one of Twitter, and Women, Action, & the Media (Epstein, 2014). Entities such as the National Direction on Internet Policies and Governance, created to foster multistakeholder spaces, should take the lead fostering these initiatives.

Participation and Transparency

Linked with the previous point, the development of these measures should include consultation with NGOs working on digital issues, and women's rights and victims of this type of violence.

Solutions as the co-regulatory model proposed above offers incentives to companies to comply when compared to strict regulation, however transparency is key to guarantee that the human rights principles are fulfilled. As the last Ranking Digital Rights report states (2017), intermediaries tend not to disclose enough information about how they respond to users' and governments requests. As Rebeca MacKinnon says, the private sector “should understand that it is good for their business both to be responsible and publicly accountable when it comes to protecting users' and customers' rights” (2012, 182). The effectiveness of co-regulatory schemes, as the one proposed, highly depends on enforcement mechanisms and public oversight that will make companies' accountable for their implementation.

4.1.3. Awareness and Capacity Building

In line with the Inter-American framework, a comprehensive approach should address the root causes associated with nonconsensual pornography. Increasing awareness and strengthen the capacity of the key actors involved, with a focus on women, should be a key aspect of a comprehensive strategy to tackle nonconsensual pornography in Argentina.

Application of Human Rights Standards

Building on the Convention of Belém do Pará (OAS, 1994, Articles 7-8), awareness raising measures and educational programs on the intersections of technology and violence against women should be implemented by the government. The key goals should be to increase both the awareness of women regarding technology and its implications in terms of rights, from a gender perspective both in duty holder and victims.

For example, the judiciary and security entities are specially addresses within the Convention of Belém do Pará (Article 8) key actors to target through these measures. The police and the judicial sector have a central role in online violence cases in terms of response, investigation, and victims' access to remedies, there is a critical need to increase the base knowledge of the police and the judicial sector on the human rights implications of technology and, specifically, on gender issues within digital environments.

Empowerment of Women

Following the human rights-based approach, the focus of these efforts should be in women as rights holders. Thus, specific public awareness actions should be put in practice to, first, change attitudes towards online violence against women to be perceived as a form of violence, and, then, develop educational efforts to increase digital literacy on security and privacy, with a gender perspective and going beyond the idea of digital technologies as neutral.

Initiatives from civil society that seek to increase digital literacy and security online with a gendered-approach and in an accessible way, as the *Sexy Guide to Digital Security* elaborated by the Brazilian NGO Coding Rights and *The Holistic Security Manual* by the organization Tactical Tech, are positive models to follow. Since, studies show that globally, women between 18 and 30 years, are more likely to experience violence online (APC, 2015), special educational campaigns tailoring this group should be implemented.

Finally, a comprehensive approach should include specific measures tailored towards the women who experienced this type of violence. For example, measures to support for victims of nonconsensual pornography should be put in practice. These actions should include providing support and assistance to online victims —ranging from legal assistance to psychological support, and digital security advice. This type of actions could contribute to encourage victims to speak up and report this type of violence. Globally, there are already positive examples for the Argentinian Government to follow, such as the Cyber Harassment Helpline started by the NGO Digital Rights Foundation (DRF).

Participation and Transparency

These measures should be promoted by the State, since the normative frameworks on human rights make them the main responsible parties. Even though, bottom up initiatives from civil society and alliance with non-state actors are needed and should be fostered.

4.2. Implementation Considerations

In the last few years, the issue of violence against women gained space in the public agenda and has gathered momentum in Argentina. Therefore, it is key that the online dimension of violence against women is included within this broader discussion. This chapter explored concrete alternatives to tackle nonconsensual pornography in Argentina building on the human

rights approach presented earlier. A human rights-based approach is the solution capable of tackling the systematic roots of nonconsensual pornography. However, some of the measures proposed, will take more time.

For this reason, the proposal presents a combination of actions and measures. While solutions such as the co-regulatory schemes, provide a more flexible and faster solution in terms of stopping the spread of this content, awareness raising measure and digital that seek to modify social and cultural patterns, may have a more long-term impact.

The role of public entities such as the National Council of Women and the National Direction on Internet Policies and Governance is key. The complexity of this issue and a truly comprehensive approach require the involvement of different public entities and inter-agency coordination. In addition, increasing the expertise and rigorous research on these topics is vital to promote better informed policy decisions. Alongside some conclusions, the next section addresses some of these issues and poses questions that could be addressed by future research.

The Way Forward

The online world did not become the oasis of tolerance that the pioneers of the early internet dreamed about. Going back to Granick's words, misogyny and sexism "have proven resilient enough to thrive in the digital world" (2015). Women disproportionately experience different forms of violence within digital ecosystems, as was stated earlier. Nonconsensual pornography is one of the forms of violence that gained more attention from international organizations, governments around the world, civil society and the private sector.

The key issue addressed by this paper is what can be done about nonconsensual pornography from a policy perspective. Parliaments around the globe started passing laws that criminalize this practice, but concerns about the effectiveness of these measures and potential collisions with other rights online also arose. Building on the idea that online violence should be considered as real violence against women and as a rights' violation, nonconsensual pornography should be tackled from a rights-based approach: an approach that puts women's rights at the center, but it is consistent with online freedom of expression standards. In addition, nonconsensual pornography is a complex policy issue that requires more than one single solution and more than one single actor involved: a comprehensive approach is needed.

Online violence against women has gained increased attention in the last few years within the digital agenda and a growing body of literature on this issue has been emerging over the last several years. However, in Argentina there is still a way to go in terms of academic production. The aim of this paper is to contribute to an urgent policy debate, from a perspective that has not been developed at the moment on nonconsensual pornography. Hence, this paper offers a strategy with the aim of tackling nonconsensual pornography in Argentina.

Argentina has begun discussing nonconsensual pornography laws, but the bills lack of a gender approach and vagueness in the drafting could have a chilling effect online affecting legitimate content. Also, participatory mechanisms were not put in practice and there is a lack of transparency and accountability in terms of the policy making. This paper seeks to contribute to the current policy debate in Argentina on consensual pornography. Hence, this work presented a comprehensive and rights-based model to address it, following Inter-American standards. A regional framework, as was stated earlier, offers a more specific context and attends particular human rights concerns. Therefore, this work proposes that nonconsensual pornography in Argentina should be addressed following a comprehensive approach that should include Application of Human Rights Standards, Empowerment of Women, and Participation and Transparency as key elements. Building on that, this work encourages Argentinian Government to:

- **Address Nonconsensual Pornography Using the Existing Legal Framework on Women's Protection:** policies that seek to tackle nonconsensual pornography should recognize it as a gendered problem that affects women's rights. The existing legal framework in Argentina —mainly given by the Law 26,485—, provides a comprehensive approach to tackle violence against women that could be applied to nonconsensual pornography, alongside other forms of gender-based harassment on the internet. The existing framework, also, states the need for cooperation with non-state actors for the development of policies to combat online violence against women. Any specific legal initiative or amendment to include it within current legal frameworks should be draft in consultation with the different actors involved —ranging from women's groups to internet companies;
- **Public-Private Cooperation:** more flexible measures than legislative remedies should be explored within a comprehensive approach. Internet intermediaries, key actors in

our online activities, should play an active role in these solutions. The development of guidelines for companies to deal with nonconsensual pornography, following the model of the codes of conduct should be explored as an alternative to more traditional and strict regulatory measures. Inter-American standards on women's rights and freedom of expression should inform these guidelines, developed in consultation with civil society actors. The effectiveness of these type of schemes relies on enforcement and public oversight mechanisms to held companies accountable for their implementation;

- **Awareness and Capacity Building:** a comprehensive approach should seek to tackle the structural causes of the problem. In this sense, increasing the awareness on technology and human rights of key actors involved such as the police and the judicial sector is crucial. Public entities also should develop capacity building activities specially tailored towards women in order to increase their digital literacy with a gender perspective. Support for the victims and assistance. Alliances with civil society and other non-state actors are needed. Finally, a comprehensive approach should include specific measures and assistance for victims of this type of violence.

Human rights instruments offer tools at international, regional and national level. Existing frameworks could be used to ensure that women's rights are recognized and protected both offline and online. A multi-strategy and human rights approach, as the one proposed in this work, is the option that offers long standing solutions to nonconsensual pornography. While awareness raising measures present a long-term focus and could take some time to provoke change, the implementation of more flexible measures in coordination with the private sector, could provide more effective and timely solutions. This is why the proposed approach is a combination of measures, a comprehensive approach.

The proliferation of violent and harmful speech online is getting more attention from governments, lawmakers, international organizations and civil society. Future research efforts should be focused on generating data on online violence against women to inform these policy discussions and solutions. In addition, since legal remedies on nonconsensual pornography are a relatively new phenomenon, the impact and effectiveness of these measures should be addressed. Finally, there is a need for delving into the role of intermediaries on combating online violence against women. As it was highlighted earlier, over the last few years, there has been a shift towards a more active role of these platforms regarding content management. However, there is still a lack of transparency regarding companies' decisions. Academic production on the impact of these actors and their policies in shaping our online activities and discourse should be expanded.

The digital world is a fast changing field of study. Internet scholarship focused, mainly, on the transformative potential of technologies and their ability to foster the realization of human rights. Over the past few years, the other side of the internet is growing in importance both among scholars and policy makers. The romanticized idea of the internet as an oasis of tolerance, to recall Morozov's words, seems distant. The early days' internet was also unregulated and free from governmental intervention. Nowadays, on the contrary, the real and the online are not seen (or should not be seen) as separated entities. Internet issues became central for policy makers and, as Tim Wu and Jack Goldsmiths (2006, xii) say, citizens claim their governments to prevent them to harm each other and for the protection of their rights online. Recalling the question that guided this work, a human rights approach to the online violence forms —as nonconsensual pornography— is the only one that could create the conditions to solve the structural causes of the offensive internet.

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