



# BOFAXE

## Is Your Dating App Swiping Left on Human Rights? (Part 1)

### ON PLATFORMS' OBLIGATIONS TO PREVENT SEXUAL VIOLENCE AND RESPECT PRIVACY

Since the beginning of the pandemic, the number of dating app users skyrocketed—alongside criticisms of how platforms handle human rights issues. So, how respectful are the apps of their users' human rights? What is their role in human rights protection and how are respective issues in the context of dating apps dealt with under international law? It is precisely these questions that the present post will address.

#### Do Dating Apps Even Have Human Rights Obligations?

A prerequisite for the discussion on whether dating apps—or rather the entities controlling them—breach human rights obligations is of course that they have such obligations. In this regard, international law abounds in documents encouraging corporations to commit to human rights' protection (see here, para. 28). Most prominently, the Guiding Principles on Business and Human Rights ('Guiding Principles') provide that all business enterprises have an independent responsibility to respect human rights, by exercising human rights due diligence to identify, prevent, mitigate, and account for how they address impacts on human rights.

Although these principles are not binding *stricto sensu*, their impact on international law has already been so intense that they have been characterised as 'indispensable'. The increasing heterogeneity of international law, in the practice of which businesses' role is growing (see here, p. 374-375), further underscores the need for such a reading. Against this background, the question raised above should be answered affirmatively.

#### Technology-Facilitated Sexual Violence

Sexual and gender-based violence is a lamentably widespread phenomenon, with 1/3 of women world-wide being subject to it at least once in their lifetime. Of course, individuals in which multiple factors such as gender, class, race and sexual orientation intersect are at a higher risk. Unsurprisingly, this spills over into the digital realm. 'Technology-facilitated sexual violence' (TFSV) covers a wide range of behaviours inflicting harm on victims—typically women—with some relation to digital (communication) technology. Regarding dating apps, such assaults can either take place on the platform itself (e.g. online sexual harassment in the form of unwanted verbal or non-verbal sexual conduct like sexualized comments or the sending of unsolicited sexual messages or images) or during physical encounters of users arranged through the application. As dating apps facilitate private communication between users explicitly in search of romantic/sexual contacts, users (particularly from marginalized groups) naturally are more vulnerable to TFSV than, say, on social media platforms. A 2018 study on dating app users in Australia found that 69.7% of female and 2/3 of trans/gender-diverse users had experienced sexual harassment there. Similarly, almost half of all female app users had received unsolicited sexual images according to a 2019 U.S. survey.

More worryingly even, the case of Australian serial rapist Glenn Hartland, who was sentenced to 14 years' imprisonment for the rape and sexual assault of four women he had met through Tinder, painfully underscores potential offline repercussions of TFSV. Figures from the UK (2016) show a sharp increase in reports of rape on such first dates, and roughly ten percent of women in the UK and Australia reported unwanted sexual experiences when meeting with acquaintances from dating apps. In the most extreme cases, women have even been killed on an 'app date', while the killer continued using the app afterwards to meet more women.

Clearly, dating apps have a problem with TFSV—and some seem to handle it particularly badly, both concerning prevention and reports of abuse. The assaults in this context compromise victims' enjoyment of numerous human rights, such as the sexual rights created by Art. 8 ECHR (see also here), or of the prohibition of inhuman and degrading treatment. Moreover, women's right to life can be seriously threatened in the context of online dating as the above examples illustrate, particularly in cases that involve attempted or successful killings resulting from sexual violence. The Human Rights Council even considers violence against women in general to constitute a threat to life (A/52/40[VOL.I], para. 287). The fact that women are so disproportionately affected by TFSV points to its gendered nature which contradicts the non-discrimination principle enshrined, found in Art. 14 ECHR (Opuz v. Turkey, paras. 198-200) and Art. 1 CEDAW (see here). TFSV incidents also interfere with those women's rights created under numerous instruments within the Council of Europe, the African Union, and the Organization of American States. Although the mentioned provisions are primarily binding to States, the 'human rights responsibilities' of internet intermediaries in particular to deal with TFSV are widely recognised.

To combat dating app-related TFSV, different solutions have been proposed, among them mandatory identity verification for users and checks against sex offender registries by the apps. While such measures would certainly facilitate effective investigations and prevention, they raise human rights concerns themselves.



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## Is Your Dating App Swiping Left on Human Rights? (Part 2)

### ON PLATFORMS' OBLIGATIONS TO PREVENT SEXUAL VIOLENCE AND RESPECT PRIVACY

#### Disclosure of Personal Data

Indeed, TFSV prevention is only one side of the story. As reality evinces, the app users' right to privacy has also been circumvented, albeit not for the prevention or investigation of TFSV. Egyptian, Lebanese, and Iranian authorities have manipulated dating apps in order to identify LGBTQ+ individuals and prosecute them for supposed 'indecent acts'. According to Human Rights Watch's report on the matter, these practices undoubtedly breach multiple fundamental rights, including the app users' right to privacy. What raises additional questions, however, is dating apps' role in protecting their users from such interferences.

In its 2014 Report on the right to privacy in the digital age, the Office of the United Nations High Commissioner for Human Rights ('OHCHR'), relying on the due diligence obligations outlined in the Guiding Principles, emphasised that '[c]ompanies should assess whether and how their terms of service [...] may result in an adverse impact on the human rights of their users' (para. 44). It further underlined that '[w]here enterprises are faced with government demands for access to data that do not comply with international human rights standards, they are expected to [...] communicat[e] transparently with users about risks and compliance with government demands (para. 45). In the abovementioned instances, it was not the app that granted access to its users' data, but rather authorities manipulating apps. As such, the causal link between the breach of the users' rights and the omission to warn the users about the risk is too loose to trigger a breach of the due diligence obligations of the apps.

The case is different, however, when apps voluntarily share their users' sensitive information. A striking example is Grindr, which has shared users' HIV status, tracking information, precise geolocation, and sexual orientation with external marketers. In this regard, the aforementioned OHCHR Report holds that '[a] central part of human rights due diligence as defined by the Guiding Principles [...] includes ensuring that users have meaningful transparency about how their data are being [...] shared with others' (para. 46), while the 2018 OHCHR Report on the matter emphasises that '[c]onsidering the vulnerability of personal data to unauthorized disclosure, [...] it is essential that adequate security measures be taken' and that 'sensitive data should enjoy a particularly high level of protection' (para. 29). Evidently, the above practices are incompatible with these due diligence obligations.

Against this background, experts have concluded that dating apps should adopt a series of measures to strengthen its users' privacy, including geolocation changes to obscure the location of users. These suggested measures contradict the ones suggested in the section above for users' protection from TFSV, which essentially call for easier identification of the users. Against this background, the question arises: How can apps balance the competing interests and create a human rights-friendly online dating atmosphere?

#### Disentangling a Complex Interrelationship

In individual cases where a perpetrator's right to privacy would have to be compromised for the purpose of an effective investigation of incidents of sexual violence, there is a strong indication that privacy must not prevail. Although the ECtHR recognizes the importance of the right to privacy, it also acknowledges that it 'cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of [...] crime or the protection of the rights and freedoms of others' (*K.U. v. Finland*, para. 49). Examples of such overriding concerns include the compilation of personal data for preventing crime (*S. and Marper v. the UK*), for instance to support the prevention and punishment of sexual offences against minors (*B.B. v. France, Gardel v. France, M.B. v. France*).

Thus, in cases of dating app-related sexual assaults, granting precedence to the right to privacy seems untenable. However, deriving a general imperative for mandatory identification on dating apps therefrom would be short-sighted. It is, after all, not just perpetrators that benefit from/rely on anonymity or pseudonymity on dating apps. LGBTQ+ users in jurisdictions criminalizing queer sexuality and women trying, for instance, to escape their abuser might also opt for using a dating app pseudonymously. On a collective level, therefore, interference into users' privacy has the potential to harm vulnerable groups, too.

This illustrates how entangled the right to privacy and the right to be protected from sexual assaults are. Treating them as disjunctive rights to be balanced against one another would be ill-advised as a restriction of either right in favour of the other may effectively hamper the enjoyment of both rights at a collective level. Providing a detailed solution is far beyond the scope of this post, but it seems beyond question that comprehensive stakeholder engagement is needed to develop a 'variety of carefully tailored legal tools' that carefully navigate the entangled human rights interrelationship outlined above.