

To what extent does UK law adequately address the harms that platform/surveillance capitalism cause to individuals and communities with protected characteristics?

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Online platforms have gained astounding prevalence as a means of spreading discourse, with social media playing a significant role in both high and low-level communication.¹ Social media platforms “allow users to opportunistically interact and selectively self-present... with both broad and narrow audiences”², suggesting that harmful communication is able to reach a multiplicity of people. This essay aims to address the potential harms caused by platform/surveillance capitalism, focussing on TikTok’s algorithmic techniques and the experiences of female TikTok users, before determining whether UK law adequately addresses these harms. The first section of this essay will explain the business model of platform/surveillance capitalism and how the algorithmic techniques used by TikTok are successful in generating user engagement. The second section will address how these techniques can facilitate the online sexual harassment of women and girls as a specific form of gendered harm. It will focus on the sexualisation of content that is not inherently sexual nor intended to be sexually suggestive by the original poster (OP). The final section of this essay will examine the regulatory responses to this form of harm within UK law, however as some responses will be beyond the scope of this essay there will be an analysis of the most relevant legislation as well as suggestions for reform. It will also address the limited regulation of algorithmic techniques used within platform/surveillance capitalism, encouraging robust sanctions for platforms that enable harmful communication.

Srnicek describes platform capitalism as the way online companies operate, namely the way their business models utilise technological software to provide a service to

¹ Jacob Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71 The Cambridge Law Journal.

² Caleb T. Carr and Rebecca A. Hayes, 'Social Media: Defining, Developing, And Divining' (2015) 23 Atlantic Journal of Communication.

external companies.³ Zuboff links this to the concept of surveillance capitalism which concerns the collection of user data used to generate algorithms that encourage user engagement.⁴ In order to remain lucrative, the business model used by many online platforms requires the formation of key partnerships which are external entities using the platform to market their services.⁵ User engagement is therefore an appealing factor making the online industry competitive, and thus users considered a mere source of revenue under the premise of platform capitalism.⁶ By using the data acquired from users, platforms are able to create an individual and personalised experience using algorithmic techniques in an attempt to maintain user attention for prolonged periods.⁷

More than 70 percent of the content users engage with online isn't searched for or intentionally found,⁸ suggesting that recommendation engines are an algorithmic technique that is used copiously on platforms.⁹ The rapid growth of the social media platform TikTok epitomises the effectiveness that recommendation engines have in amplifying user engagement. After being downloaded over 3 billion times since its creation in 2016 and attaining 1 billion monthly users¹⁰, TikTok may be able to attribute its success to its use of several intricate algorithms as the unique 'For You' feature provides users with relatable content based on their past interactions.¹¹ This differs from other platforms such as Facebook and Instagram where most visible content is produced by the accounts users follow.¹² TikTok uses the collaborative filtering model to promote content based on the engagement of users with common characteristics

³ Nick Srnicek, *Platform Capitalism* (Polity Press 2016).

⁴ Shoshana Zuboff, *The Age Of Surveillance Capitalism: The Fight For A Human Future At The New Frontier Of Power* (Public Affairs 2019).

⁵ Nick Srnicek, 'The Challenges Of Platform Capitalism: Understanding The Logic Of A New Business Model' (2017) 23 *Juncture*.

⁶ K. Sabeel Rahman and Kathleen Thelen, 'The Rise Of The Platform Business Model And The Transformation Of Twenty-First-Century Capitalism' (2019) 47 *Politics & Society*.

⁷ Zuboff (n4)

⁸ Kevin Roose, 'The Making Of A Youtube Radical (Published 2019)' (*Nytimes.com*, 2019) <<https://www.nytimes.com/interactive/2019/06/08/technology/youtube-radical.html>> accessed 6 April 2022.

⁹ Zuboff (n4)

¹⁰ Brian Dean, 'Tiktok User Statistics (2022)' (*Backlinko*, 2022) <<https://backlinko.com/tiktok-users>> accessed 6 April 2022.

¹¹ Andreas Schellewald, 'On Getting Carried Away By The Tiktok Algorithm' [2021] *AoIR Selected Papers of Internet Research*.

¹² Katie Elson Anderson, 'Getting Acquainted With Social Networks And Apps: It Is Time To Talk About Tiktok' (2020) 37 *Library Hi Tech News*.

such as age, location, and gender.¹³ TikTok's algorithms also alter what is shown on the 'For You' page depending on an individual's own level of interaction with content, allowing their experience to remain interesting and stimulating.¹⁴

Despite often providing an enjoyable and somewhat addictive experience for its users¹⁵, the use of these algorithms can have a harmful effect on TikTok's female demographic. Some of TikTok's most popular content includes appearance-focussed videos predominantly created by young women.¹⁶ An internal study published in 2020¹⁷ showed that TikTok moderators are instructed to "algorithmically suppress posts by users deemed to appear 'abnormal', 'ugly'... and 'slummy'"¹⁸ due to the lack of engagement these videos generate. This suggests that a certain aesthetic is promoted on TikTok, glorifying the beauty standard of "young white femininity."¹⁹ Academics state that popular culture has always been notorious for the sexualisation of women due to the "increasingly frequent erotic presentation"²⁰ of women and girls' bodies in public spaces.²¹ The term 'sexualised sexism' highlights how the presentation of women and girls as "perpetually sexually available"²² is a harmful and specifically gendered issue. This evidence suggests that female TikTok users are at risk of being unsuspecting victims of sexualised sexism due to algorithms branding their videos as engaging content. This incites a narrative that endorses gender-based violence and abuse against women,²³ with some of the common types of online

¹³Avi Gopani, 'Inside Tiktok'S Compelling Recommendation Engine' (*Analytics India Magazine*, 2021) <<https://analyticsindiamag.com/inside-tiktoks-compelling-recommendation-engine/>> accessed 6 April 2022.

¹⁴ Li Xu, Xiaohui Yan and Zhengwu Zhang, 'Research On The Causes Of The "Tik Tok" App Becoming Popular And The Existing Problems' [2019] *Journal of Advanced Management Science*.

¹⁵ Schellewald (n12)

¹⁶ Melanie Kennedy, "If The Rise Of The Tiktok Dance And E-Girl Aesthetic Has Taught Us Anything, It'S That Teenage Girls Rule The Internet Right Now': Tiktok Celebrity, Girls And The Coronavirus Crisis' (2020) 23 *European Journal of Cultural Studies*.

¹⁷ Sam Biddle, Paulo Ribeiro and Tatiana Dias, 'Tiktok Told Moderators: Suppress Posts By The "Ugly" And Poor' (*The Intercept*, 2020) <<https://theintercept.com/2020/03/16/tiktok-app-moderators-users-discrimination/>> accessed 6 April 2022.

¹⁸ Kennedy (n16)

¹⁹ Ibid.

²⁰ Rosalind Gill, 'Postfeminist Media Culture: Elements Of A Sensibility' (2007) 10 *European Journal of Cultural Studies*.

²¹ Ibid.

²² Maddy Coy, 'Sexualised Sexism: Popular Culture, Sexualisation And Violence Against Women And Girls' (London Metropolitan University 2014) <<http://repository.londonmet.ac.uk/id/eprint/5806>> accessed 6 April 2022.

²³ Ibid

gendered abuse being slut-shaming, threats, harassment, cyber-stalking and bullying.²⁴

Academic literature acknowledges how the amplification of offensive communication on social media can give rise to platformed sexism, creating a hostile environment for female users.²⁵ One in five women have experienced online harassment or abuse²⁶ and TikTok's large teenage audience means that many victims of this harm are children.²⁷ As TikTok's algorithms are predominantly recommendation based, users who leave sexually explicit or abusive comments on videos are rewarded with more of the same content, leaving girls subject to relentless sexual harassment.²⁸ Black women experience amplified critique and objectification centred around how they should present themselves in public spaces.²⁹ The concept of respectability politics explains how Black women are expected to present themselves as "sexually pure... to reject stereotypes of them as... unworthy of respect and protection."³⁰ Black women are 84% more likely to face abusive communications than White women³¹ due to the intersection of racist and sexist abuse. Overall, the disproportionate amount of sexual harassment and abuse faced by women and girls online is a form of harm largely overlooked in academic research.³²

The UK's approach to regulating online gendered abuse is limited, with issues of sexualised sexism and appearance-based harassment being largely neglected in current legislation. When assessing the usefulness of existing legislation, one may

²⁴ 'More Than A Quarter Of UK Women Experiencing Online Abuse And Harassment Receive Threats Of Physical Or Sexual Assault' (*Amnesty.org.uk*, 2017) <<https://www.amnesty.org.uk/press-releases/more-quarter-uk-women-experiencing-online-abuse-and-harassment-receive-threats>> accessed 6 April 2022.

²⁵ Ariadna Matamoros-Fernández, 'Platformed Racism: The Mediation And Circulation Of An Australian Race-Based Controversy On Twitter, Facebook And Youtube' (2017) 20 *Information, Communication & Society*.

²⁶ Amnesty (n24)

²⁷ Yulun Ma and Yue Hu, 'Business Model Innovation And Experimentation In Transforming Economies: Bytedance And Tiktok' (2021) 17 *Management and Organization Review*.

²⁸ Gabriel Weimann and Natalie Masri, 'Research Note: Spreading Hate On Tiktok' [2020] *Studies in Conflict & Terrorism*.

²⁹ Mikaela Pitcan, Alice E Marwick and danah boyd, 'Performing A Vanilla Self: Respectability Politics, Social Class, And The Digital World' (2018) 23 *Journal of Computer-Mediated Communication*.

³⁰ *Ibid.*

³¹ Emily Dreyfuss, 'Twitter Abuse Toward Women Is Rampant, Amnesty Report Says' (*Wired*, 2018) <<https://www.wired.com/story/amnesty-report-twitter-abuse-women/>> accessed 6 April 2022.

³² Evelina Landstedt and Susanne Persson, 'Bullying, Cyberbullying, And Mental Health In Young People' (2014) 42 *Scandinavian Journal of Public Health*.

argue that the Malicious Communications Act³³ provides protection for women experiencing extremely vulgar sexual threats as it prohibits users from sending threatening and grossly offensive messages to individuals with the intent to cause them anxiety or distress.³⁴ However, proving intention is often challenging with online communication and what constitutes 'grossly offensive' is decided on a case-by-case basis, making it difficult legislation to rely on. Current case law suggests that grossly offensive content must be extreme and beyond tolerable³⁵, with most cases concerning hate toward protected characteristics including race³⁶ and religion.³⁷ Women may struggle to rely on this legislation where online sexual harassment is concerned as the harm faced is not always explicit enough to be considered grossly offensive.

Despite the Equality Act³⁸ considering gender as a protected characteristic, there is a lack of weight given to cases of sexist abuse as the Public Order Act³⁹ fails to consider it a form of hate crime.⁴⁰ It could be argued that incorporating misogynistic abuse would conflict with Article 10 of the European Convention on Human Rights protecting shocking and offensive speech as there needs to be a level of tolerance in order to maintain democracy.⁴¹ However many feminist scholars disagree, arguing that it would provide better protection for women as it would indicate that this behaviour is "socially unacceptable and will be punished by law"⁴² therefore seeing a decline in sexual harassment within online communications.

The offence of harassment includes any unwanted sexual conduct that has the purpose or effect of violating a person's dignity or creating a hostile environment.⁴³ This is essentially what is happening within many online platforms, however the

³³ 1988

³⁴ *Ibid.*

³⁵ *DPP v Collins* [2006] UKHL 40.

³⁶ *Ibid.*

³⁷ *DPP v James McConnell* [2016] NIMag 1

³⁸ 2010

³⁹ 1986

⁴⁰ Erin Nic an Bhaird, 'Misogyny And Hate Crime-A Principled Basis For Including Gender As A Protected Characteristic Under UK Hate Crime Law?' (2020) 20 UC Dublin Law Review.

⁴¹ No. 10692/09, *Savva Terentyev v Russia* [2018]

⁴² Kim Barker and Olga Jurasz, *Online Misogyny As A Hate Crime: A Challenge For Legal Regulation?* (Taylor and Francis 2019).

⁴³ s26 EA (n38)

recognition of gendered harassment within the cyber-space has not been fully developed or acknowledged in UK law.⁴⁴ Girls under eighteen are offered protection from some forms of exploitation due to the stringent criminalisation of the possession and distribution of child pornography.⁴⁵ However, this legislation doesn't protect girls from less extreme forms of sexual exploitation. The law as it stands fails to effectively criminalise uninvited sexual comments online, leaving girls at risk of sexual harassment, exploitation, and grooming even where the content posted is not sexually suggestive.⁴⁶ Although there is limited academic research into this type of harm, a welcome suggestion for reform may include implementing legislation that criminalises sexually suggestive or predatory comments on *non-sexual* content posted by children. A test of reasonableness may be useful, criminalising the conduct of the commentator where a reasonable person would have suspected that the OP was under eighteen.

The Electronic Commerce (EC Directive) Regulations⁴⁷ state that platforms are not liable in civil or criminal law for the content that is posted by their users as they are considered passive hosts.⁴⁸ They are however required to remove prohibited content after they are notified of its existence under the Digital Economy Act 2017.⁴⁹ Ofcom is the UK's main regulatory body for video sharing platforms including TikTok, with their regulatory measures including the enforcement of community guidelines and reporting/flagging functions.⁵⁰ TikTok's community guidelines prohibit indecent and offensive content, including sexualised comments towards minors.⁵¹ Despite their pledge to remove offensive content, the prohibition of sexual or derogatory comments made against adult women is not explicitly mentioned. Additionally, the masses of content posted daily means that TikTok's moderation systems often fail to remove a lot of harmful content and subsequently the onus is placed onto users to monitor

⁴⁴ Debarati Halder and K. Jaishankar, 'Cyber Gender Harassment And Secondary Victimization: A Comparative Analysis Of The United States, The UK, And India' (2011) 6 Victims & Offenders.

⁴⁵ Criminal Justice Act 1988, s160 and Protection of Children Act 1978, s1

⁴⁶ Lisa Sugiura and April Smith, 'Victim Blaming, Responsibilization And Resilience In Online Sexual Abuse And Harassment', *Victimology: Research, Policy and Activism* (Palgrave Macmillan 2020).

⁴⁷ 2002

⁴⁸ s12(1), s19

⁴⁹ s103

⁵⁰ 'Regulating Video-Sharing Platforms: What You Need To Know' (*Ofcom*, 2022) <<https://www.ofcom.org.uk/online-safety/advice-for-consumers/video-sharing-platforms>> accessed 7 April 2022.

⁵¹ 'Community Guidelines' (*Tiktok.com*, 2022) <<https://www.tiktok.com/community-guidelines?lang=en>> accessed 7 April 2022.

offensive content through flagging functions.⁵² This can impose an unfair responsibility onto users, subjecting women, and girls to potential harm whilst those posting harmful content are rarely penalized.⁵³ Further, encouraging users to filter or turn off their own comments fails to punish perpetrators and limits female users' access to certain functions.

The Draft Online Safety Bill⁵⁴ has confirmed the continuation of the current approach, however its enactment may see more specific requirements put into place. This includes the acceptance of the Law Commission's recommendation to include a specific harm-based offence, helping target pile-on harassment⁵⁵ as well as requiring platforms to remove legal but harmful content.⁵⁶ The consequences for not adhering to these rules can include substantial fines and blocking user access.⁵⁷ However, feminist scholars and charities have expressed their disappointment in the lack of pressure the Bill⁵⁸ puts on platforms to create a safer environment for their users, calling for more stringent regulation around how these platforms operate.⁵⁹ Currently, UK law has limited regulations surrounding the use of algorithms in acquiring and maintaining user attention, allowing platforms such as TikTok to develop potentially harmful algorithms without consequences.⁶⁰ Academics argue that platforms should be legally required to provide transparency around their use of AI so unethical practice can be reviewed.⁶¹ Additionally, there should be more resources put into human and algorithmic moderation, taking pressure off of users.⁶² This will help TikTok remove

⁵² Jing Zeng and D. Bondy Valdovinos Kaye, 'From Content Moderation To Visibility Moderation: A Case Study Of Platform Governance On Tiktok' [2021] Policy & Internet.

⁵³ Ibid.

⁵⁴ 2021

⁵⁵ Law Commission, 'Modernising Communications Offences' (2021) <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/07/Modernising-Communications-Offences-2021-Law-Com-No-399.pdf>> accessed 8 April 2022.

⁵⁶ DOSB (n54)

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ 'Women And Girls Failed By Government's Online Safety Bill' (*Endviolenceagainstwomen.org.uk*, 2022) <<https://www.endviolenceagainstwomen.org.uk/women-girls-failed-governments-online-safety-bill/>> accessed 6 April 2022.

⁶⁰ Philip Treleaven, Jeremy Barnett and Adriano Koshiyama, 'Algorithms: Law And Regulation' (2019) 52.

⁶¹ Merle Temme, 'Algorithms And Transparency In View Of The New General Data Protection Regulation' (2017) 3 European Data Protection Law Review.

⁶² Clare McGlynn and Fiona Vera-Gray, *VAWG Principles For The Online Safety Bill* (End Violence Against Women 2021) <<https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/Online-Safety-Bill-Full-Brief-final.pdf>> accessed 6 April 2022.

harmful content and monitor harmful accounts, encouraging them to alter the kind of content is recommended to these users and consider limiting their access to the platform. More stringent regulation of algorithmic techniques would therefore create an obligation for platforms to create a safer online environment for women and girls.

Conclusively, current UK law fails to adequately address online sexual harassment as a form of harm faced by women. This essay has described how platform/surveillance capitalism can create a harmful online environment due to the use of engagement-focussed algorithms that are at the heart of most online business models. It has acknowledged the harms faced by women and girls, explaining how TikTok's algorithm often encourages unsolicited sexual and predatory communication. Further, this essay has analysed several legal instruments that aim to provide regulatory protection to users, identifying gaps within the law that highlight a lack of acknowledgement of the harms often experienced by women and girls. Suggestions for reform include the addition and/or modification of current law on communications, hate crime and harassment. Further, this essay has established a need for further regulation of algorithmic techniques to hold platforms accountable for creating a hostile environment for users. Ultimately, more research into this form of online harm is recommended, but this essay has shown an indisputable need for improvement within UK law to protect women and girls from aggressive sexualised harm online.

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