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**DIGITAL RIGHTS OF LGBTI COMMUNITIES: A
ROADMAP FOR A DUAL HUMAN RIGHTS
FRAMEWORK**

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DIGITAL RIGHTS OF LGBTI COMMUNITIES: A ROADMAP FOR A DUAL HUMAN RIGHTS FRAMEWORK

BY

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ABSTRACT

This paper aims to move beyond the existing narratives on digital technologies and LGBTI rights by sketching a preliminary roadmap for the development of a combined LGBTI & digital rights analytical framework and research programme. Such a framework is necessary for two reasons. First, it is vital to address the growing complexity of the implications of the Internet and digital technology for human rights that in reality go well beyond the so-called classical digital rights issues of censorship and surveillance, which has captured and even expropriated scholarly and activist attention at the expense of other pressing issues. Second, such a framework is instrumental for the LGBTI movement to expand its political spectrum beyond ‘traditional’ issues, such as marriage equality and gender identity, and confront others pressing civil rights concerns to assure the effective and full equality of LGBTI communities in the digital age. The modest goal of this paper to illuminate the problematic issues at the intersection of LGBTI communities and digital technologies and hopefully stimulate a research programme on these topics.

1. INTRODUCTION

While the relationship between digital technologies and human rights has attracted a lot of attention among social, legal and political science scholars as well as civil society, these efforts have mostly focused on what has become known as the ‘classical digital rights’: freedom of expression, privacy and data protection. This contribution aims to highlight emerging issues beyond this classical repertoire by focusing on the human rights implications of digital technologies for marginalized

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groups, such as racial, ethnic and sexual minorities. Various minorities and other discriminated-against groups have been long overlooked both by scholars and civil society in the context of Internet policy (albeit some exceptions surely exist). To kick off a stronger scholarly engagement with these often-overlooked human rights implications in the Internet context, this paper in particular focuses on the issues at the intersection of digital technologies and LGBTI (acronym for lesbian, gay, bisexual, trans, and intersex) communities.² The paper discusses the emerging narratives on the Internet and LGBTI rights; and suggests potential ways to move beyond those narratives by proposing a construction and development of a combined LGBTI & digital rights analytical and conceptual framework. Such a framework is necessary to address the growing complexity of the human rights implications that in reality go well beyond the so-called classical digital rights, such as freedom of expression and privacy. These core digital rights have captured and dominated scholarly and activist attention – yet, notwithstanding for good reasons, often to the detriment of other pressing issues which have been left behind. To engage with this more complex reality, once again a ‘struggle for new rights’³ needs to continue: however, this time it is a dual, intersectional struggle, as both *digital rights* and *LGBTI rights* are still in the process of manifestation and materialization both in international politics and law.

This paper proceeds as follows: before moving onto the human rights issues at the intersection of digital technologies and LGBTI communities, Part 2 briefly introduces the LGBTI movement and its main achievements at the international level. Part 3 then moves on to discuss the existing narratives on digital technologies and LGBTI Rights: the celebrated dominant narrative portrays the Internet as a liberatory medium for LGBTI communities, while the emerging counter-narrative sketches the Internet as a potential tool of repression for LGBTI rights. Part 4 of the paper invites to move beyond the state of the art by identifying a research gap and outlining a rationale for the new research programme. Finally, the roadmap sketching the construction of the *LGBTI & Digital Rights* framework is discussed in Part 6.

2. Setting the Context: LGBTI Rights in International Politics and Law

The term *LGBTI rights* emerged relatively recently in international discourse as a broad unifying idea that all people, regardless of their sexual orientation (and later - gender identity and sex characteristics), should be able to enjoy their human rights. *LGBTI rights* only gained political prominence in the late 1970s when the earlier Gay

² Noting the problematics of the umbrella terms and acronyms, LGBTI is used here to refer to lesbian, gay, bisexual, trans, and intersex individuals. While LGBT is somewhat an older term widely adopted by many human rights organizations, more recently, ‘I’ (for intersex) is often added to LGBT to create an LGBTI community, see e.g., a Joint UN statement on Ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people, 29 September 2015, signed by 12 UN entities (ILO, OHCHR, UNAIDS Secretariat, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP and WHO), available at http://www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF. Intersex individuals are born with sex characteristics that, according to the UN High Commissioner for Human Rights, "do not fit the typical definitions for male or female bodies", See United Nations Office of the High Commissioner for Human Rights, (2015) ‘Free and Equal Campaign: Intersex Fact Sheet’ 2015, available at https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf, visited 30/12/2016.

³ Clifford Bob (ed), *The International Struggle for New Human Rights*. University of Pennsylvania Press, 2009.

Liberation movement with anarchist visions was superseded by the strategy to portray LGBTI individuals as a minority group using the language of civil rights adopted by influential organizations in the USA at the time.⁴ Despite a few decades of continuous struggle for justice - which initially spread from North America to Europe and to the rest of the world since the 1970s - LGBTI communities around the world still encounter numerous legal restrictions and social biases in their everyday lives.

2.1. LGBTI Communities in the Modern Human Rights Movement

The modern human rights movement, which originated with the formation of the United Nations in 1945, has for a long time remained silent on LGBTI issues, and - with the exception of several soft political pronouncements by the UN Human Rights Council during the last several years⁵ - it is still very mute today. Despite the fact that many members of LGBTI communities were direct victims of the Nazi atrocities and executions during WW2,⁶ the most famous and symbolic international human rights document - the Universal Declaration of Human Rights of 1948 - did not include reference to sexual orientation.⁷ Similarly, even though international human rights instruments were proliferating at enormous speed during 1970s and 1980s, and various 'new' human rights issues have been acknowledged by the international community since the UN's formation, initiatives to promote the rights of sexual and gender non-conforming minorities remained very limited. Thus, in contrast to groups which are discriminated against because of their disability, sex, race and ethnicity, LGBTI individuals are not explicitly protected under any international convention obliging states to ensure their equal treatment and non-discrimination (*cf International Convention on the Elimination of All forms of Racial Discrimination* (1966); *International Convention on the Elimination of All Forms of Discrimination against Women* (1979); *Convention on the Rights of the Child* (1989); *Convention on the Rights of Persons with Disabilities* (2006)).

2.2. Varying Perspectives on LGBTI Rights

While the official positions of states evolve and change over time, including during the last decade (e.g. the Bush and Obama administrations adopted different stances on

⁴ Epstein, S. (1999), 'Gay and lesbian movements in the United States: Dilemmas of identity, diversity, and political strategy,' in B. D. Adam, J. Duyvendak, & A. Krouwel (Eds.), *The global emergence of gay and lesbian politics* (pp. 30-90). Philadelphia: Temple University Press.

⁵ Human Rights Council resolution - *Human rights, sexual orientation and gender identity* (adopted 17 June 2011) - A/HRC/RES/17/19; Human Rights Council resolution - *Human rights, sexual orientation and gender identity* (adopted 26 September 2014) - A/HRC/RES/27/32; *Protection against violence and discrimination based on sexual orientation and gender identity* (adopted 30 June 2016) - A/HRC/RES/32/2. Sexual orientation and gender identity is also mentioned (among other grounds, such as religious or ethnic background) in the UN General Assembly resolutions on 'Extrajudicial, summary or arbitrary executions' - see, e.g. UN General Assembly resolutions, A/RES/69/182 (18 December 2014); A/RES/67/168 (20 December 2012). A full list of United Nations Resolutions on sexual orientation and gender identity is available on the UN Human Rights Office of the High Commissioner, see <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx>, visited 30/12/2017.

⁶ See Heinz Heger, *Men with the Pink Triangle: The True Life and Death Story of Homosexuals in the Nazi Death Camps* (Boston: Alyson Publications, 1994); Pierre Steel, *Liberation Was for Others: Memoirs of a Gay Survivor of the Nazi Holocaust* (New York: Perseus Book Group, 1997).

⁷ Pratima Narayan, "Somewhere over the Rainbow...International Human Rights Protection for Sexual Minorities in the New Millennium," *Boston University International Law Journal* 24 (2006): 313, 313.

LGBTI rights internationally); a disagreement within the international community over the equal legal protection and status of LGBTI persons these days is broadly between the liberal Western democracies vs. more conservative countries in Africa, Asia, and Eastern Europe, - be they Islamic, Christian or secular states. This is surely a very large oversimplification of the struggle for LGBTI rights on the international level and it by no means suggests a full *de facto* acceptance of LGBTI rights, or inexistence of stigma internally in those pro-LGBTI rights democracies. Large anti-LGBTI marriage rallies in Paris in 2013 exemplify very well these internal domestic struggles for LGBTI communities.⁸ In the same way, the term *LGBTI rights* itself is an oversimplification reflecting Western classifications that are not universally applicable in all societies and communities globally.⁹ The mainstream LGBTI movement has attracted a lot of valid criticism by both feminist and queer theorists, who claim that the dominance of the so-called Western 'gay international' model¹⁰ disregards a non-essentialist view of gender and sexuality; reinforces heteronormative gender roles and stereotypes;¹¹ and has a sweeping potential to repress varied cultural practices and understandings of sexuality that are not included in the Western model of sexuality and gender identity.¹²

Despite the varying understandings, conceptions, and even absence of explicit reference to *sexual orientation* and *gender identity* in the United Nations Declaration on Human Rights and regional human rights instruments, evolving conceptions of international human rights law today generally are interpreted to include (at least certain) protection of the rights of LGBTI people. It is beyond the scope of this short paper to discuss the evolution of conceptions on LGBTI rights in the human rights jurisprudence,¹³ however, it is worth mentioning that since the 1980s, the protections for LGBTI rights have often been developed through the principles of *equality* and *non-discrimination*, the right to privacy and private life,¹⁴ or right to marry¹⁵ by

⁸ BBC News, Huge Anti-Gay Marriage Protest March in Paris, 26 May 2013, <http://www.bbc.com/news/world-europe-22671572>, visited 28/09/2016.

⁹ Javaid Rehman, 'Adjudicating on the Rights of Sexual Minorities in Muslim World' in Green, James A., and Christopher PM Waters, eds. *Adjudicating international human rights: essays in honour of Sandy Ghandhi*. Martinus Nijhoff Publishers, 2015.

¹⁰ Ratna Kapur, 'The (Im)possibility of Queering International Human Rights Law' in Otto, Dianne (ed), *Queering International Law: Possibilities, Alliances, Complicities and Risks*, Routledge, 2017.

¹¹ Dianne Otto, 'Decoding Crisis in International Law: A Queer Feminist Perspective' in Barbara Stark (ed), *International Law and Its Discontents: Confronting Crises* (Cambridge University Press, 2015) 115. Otto, Dianne (ed), *Queering International Law: Possibilities, Alliances, Complicities and Risks*, Routledge, 2017.

¹² Gerber, Paula, and Joel Gory. "The UN Human Rights Committee and LGBT rights: What is it doing? What could it be doing?." *Human Rights Law Review* 14.3 (2014): 403-439.

¹³ Laurence R. Helfer & Erik Voeten, International Courts as Agents of Legal Change: Evidence from LGBTI Rights in Europe, 68 *International Organization* 77-110 (2014). Javaid Rehman, 'Adjudicating on the Rights of Sexual Minorities in Muslim World' in Green, James A., and Christopher PM Waters, eds. *Adjudicating international human rights: essays in honour of Sandy Ghandhi*. Martinus Nijhoff Publishers, 2015.

¹⁴ *B v. France*, judgment of 25 March 1992, A 232-c (1992);16 ehrr (1992) 1, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57770>.

¹⁵ See in particular *Goodwin v. United Kingdom and I v. United Kingdom* 2000-vi (2002) 35 ehrr 18, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57974>. Following this decision, the UK government brought in the Gender Recognition Act 2004, which *inter alia* accords the right of transsexuals to marry. It also provides them the right to be treated as having the sex that they have adopted as their acquired gender.

various regional human rights tribunals and international bodies, such as the European Court of Human Rights and the UN Human Rights Committee. In addition, the adoption of the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2006)¹⁶ is considered a crucial milestone in LGBTI advocacy on international level.¹⁷ While the document is not legally binding, it contains 29 principles, intended to serve as an interpretive aid to the human rights treaties as well as recommendations to governments, international organizations, civil society, and the private sector. Arguments could be advanced that the protection of LGBTI rights is now part of the customary international law;¹⁸ however, such claim are likely to be disregarded by the states portraying the advocacy for LGBTI rights internationally as an attack on their sovereignty by the liberal Western democracies.¹⁹

2.3. Silence and ‘Symbolic-Historic’ Moments at the United Nations

The varying perspectives within the international community on how LGBTI rights should be conceived and reflected in law has also led to a long-term silence in the various UN bodies. In the 1980s and 1990s, neither the UN Economic and Social Council, nor the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities have considered sexual orientation and gender identity on their agendas.²⁰ The symbolic breakthrough occurred with the case of *Toonen vs. Australia* (1994), when the Human Rights Committee found a breach of right to private life, in conjunction with the right to non-discrimination under the ICCPR because of the criminalization of private homosexual conduct in the Tasmanian Criminal Code.²¹ Many critical pronouncements on discrimination and educational programmes by the HRC have followed since the mid-1990s;²² however these developments in jurisprudence did not reflect a broader agreement among members of international community. Since its founding in 1945, the UN General Assembly has not discussed

¹⁶ See *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* were developed by a group of 29 international human rights experts following an experts’ meeting held in Yogyakarta, Indonesia from 6 to 9 November 2006, the principles are available at http://data.unaids.org/pub/manual/2007/070517_yogyakarta_principles_en.pdf, visited 30/12/2017.

¹⁷ Michael O’Flaherty and John Fisher, Sexual Orientation, gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles, *Human Rights Law Review* (2008) 8 (2): 207-248

¹⁸ Sonia B. Gree, ‘Currency Of Love: Customary International Law And The Battle For Same-Sex Marriage In The United States,’ 14 U. Pa. J.L. & Soc. Change 53 (2011).

¹⁹ See, e.g, Letter from the Representative of the Permanent Mission of Pakistan, on behalf of the OIC (Geneva, 26 February 2004).

²⁰ Ignacio Saiz, “Bracketing Sexuality: Human Rights and Sexual Orientation – A Decade of Development and Denial at the United Nations,” in *Routledge Handbook of Sexuality, Health and Rights*, edited by Richard Parker and Peter Aggleton (London: Routledge, 2010), 459.

²¹ *Toonen v. Australia*, Communication No. 488/1992 March 31, 1994. As a result of this case, Australia was forced to change its law criminalising homosexual acts in the State of Tasmania.

²² See, e.g, Concluding Observations of Human Rights Committee regarding United States of America (18 December 2006) CCPR/C/USA/CO/3/Rev.1, at 25. Concluding Observations of Human Rights Committee regarding Philippines (1 December 2003) CCPR/CO/79/PHL at 18; Concluding Observations of Human Rights Committee regarding Namibia 30 July 2004 CCPR/CO/81/NAM, at 22. Concluding Observations of Human Rights Committee regarding Austria 19 November 1998, CCPR/C/79/Add.103 at 13.

LGBTI rights for at least half a century. It was only on the 17th June 2011 that the UN Human Rights Council explicitly reaffirmed LGBTI rights in international law in a *Resolution on human rights, sexual orientation and gender identity* (23 to 19 votes with 3 abstentions) and requested the UN High Commissioner for Human Rights present a first detailed UN study on discrimination faced by individuals due to their sexual orientation and gender identity.²³ Some commentators question the real impact of this resolution beyond confirming Western states' dominance in the Human Rights Council.²⁴

The High Commissioner's Report (2011)²⁵ led to the Human Rights Council panel discussion in March 2012. The division among the Council members became apparent again with some members leaving the Council chamber at the start of the meeting to 'voice their opposition on cultural or religious grounds' and insist that sexual orientation and gender identity were 'new concepts that lay outside the framework of international human rights law'.²⁶

On 26th September 2014 the United Nations Human Rights Council passed a second LGBTI rights resolution, condemning violence and discrimination on the basis of sexual orientation or gender identity across the globe, and calling for another report from the UN High Commissioner for Human Rights. The 25–14 vote, as compared with the 2011 Resolution's 23-19 vote, indicated a slow but a growing support for protecting LGBTI rights under international human rights law.

In August 2015 for the first time in its 70 year history, the UN Security Council called an initial organized session that explicitly addresses LGBTI rights - albeit its focus on IS persecution of LGBTI Syrians and Iraqis leaves it questionable whether there were in fact much of 'LGBTI rights' in the security discourse (Al Jazeera 2015).²⁷ Since then, the UN Security Council has also released a statement condemning the Orlando killings 'targeting persons as a result of their sexual orientation' (Security Council, 2016),²⁸ which for the first time explicitly referred to sexual orientation.

Most recently, the Human Rights Council established a mandate for an independent expert on Sexual Orientation and Gender Identity in its June 2016 Resolution (23 in

²³ Human Rights Council resolution - *Human rights, sexual orientation and gender identity* (adopted 17 June 2011) - A/HRC/RES/17/19.

²⁴ Ratna Kapur, 'The (Im)possibility of Queering International Human Rights Law' in Otto, Dianne (ed), *Queering International Law: Possibilities, Alliances, Complicities and Risks*, Routledge, 2017.

²⁵ See Report of the United Nations High Commissioner for Human Rights, Discrimination and violence against individuals based on their sexual orientation and gender identity (distributed 17 November 2011) - A/HRC/19/41.

²⁶ *Human Rights Council panel on ending violence and discrimination against individuals based on their sexual orientation and gender identity*. Geneva, 7 March 2012 Summary of discussion, available at <http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/SummaryHRC19Panel.pdf>, visited 31/12/2017.

²⁷ Al Jazeera, 'UN Security Council holds first meeting on LGBTI rights', 25 August 2015, <http://www.aljazeera.com/news/2015/08/security-council-holds-meeting-LGBTI-rights-150824201712751.html>, visited 26/09/2016.

²⁸ Security Council, Security Council Press Statement on Terrorist Attack in Orlando, Florida, Press Release of 13 June, <http://www.un.org/press/en/2016/sc12399.doc.htm>, visited 31/12/2017.

favour, 18 against; 6 abstentions).²⁹ At the international level, these recent resolutions and establishment of the mandate, along with the adoption of *Yogyakarta Principles*, present the culmination of the LGBTI movement's activities and advocacy within the international human rights framework.

Against this background of the LGBTI movement's continuous struggle for basic justice and recognition in international politics and human rights framework, digital technologies and the Internet have been playing an important role in awareness-raising, networking, and the mobilization of LGBTI communities in their advocacy efforts.

3. The Existing Narratives on the Internet and LGBTI Communities

Information and communication technologies have a revolutionary impact on our society and changing the way individuals, communities and society communicate, exchanging information and participating in the democratic processes.³⁰ While these changes bring novel opportunities for various marginalized communities to effect social change; they also convey new modes for control and repression, that can be exercised via the very communication mediums themselves.³¹ Two dominant and perhaps interdependent narratives can be ascertained on the implications of digital technologies for political engagement and the advancement of human rights of LGBTI communities. Both of these - optimistic and pessimistic - accounts, however, tend to oversimplify the multifaceted relationship between the LGBTI communities and the Internet, which can both facilitate and impede the exercise of digital rights by the LGBTI communities.

3.1. The Dominant Liberatory Narrative

A celebrated dominant narrative on the Internet and LGBTI rights is based on popular conceptions of Internet as an inherently democratizing and liberating medium as it facilitates the exchange of information. This view, most often building on, adapting and extending the influential *theory of communicative action* by Jurgen Habermas,³² generally perceives the Internet as a key space facilitating the exercise of fundamental rights and freedoms, especially to access critical information, to build knowledge, express thoughts and beliefs, to form networks and communities and to mobilize for change.³³ A theory of *rising network society* by Manuel Castells (1996)³⁴ is one of the most prominent examples of this celebratory and optimistic narrative.

²⁹ Human Rights Council resolution - *Protection against violence and discrimination based on sexual orientation and gender identity* (adopted 30 June 2016) - A/HRC/RES/32/2. See also, OHCHR Press Release, 'Council establishes mandate on protection against violence and discrimination based on sexual orientation and gender identity' - 28 June 2016, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20220&LangID=E#sthash.BwvML71R.dpuf>, visited 26/09/2016.

³⁰ UNESCO Publications for the World Summit on the Information Society (2003), 'Gender Issues in the Information Society,' authored by Natasha Primo, UNESCO, 7, Place de Fontenoy F-75352 Paris 07 SP.

³¹ Laura DeNardis, 'Hidden Levers of Internet Control: An Infrastructure-Based Theory of Internet Governance' (2012) 15 *Information, Communication & Society* 720.

³² Jürgen Habermas, *The Theory of Communicative Action* (Thomas McCarthy trans, Beacon Press, 1984) vols 1, 2.

³³ Jac sm Kee (ed), (2011) *EROTICS. Sex, rights and the Internet*, APC, at p. 7.

Such conceptions are also incorporated in the discourses of political establishments and form the central core of the (in)famous US ‘Internet Freedom Agenda’ (see, e.g., US State Department website).³⁵ They also gained traction among mainstream, international political institutions, with the former UN Special Rapporteur Frank La Rue pronouncing that ‘The Internet facilitates the realization of a range of human rights’.³⁶

Under such conceptions of Internet as liberatory and democratizing medium, the Internet is understood as a particularly important space for the negotiation and fulfillment of the rights of various minorities and marginalized groups facing discrimination in their everyday lives both in developed and developing countries, ranging from LGBTI people in Eastern Europe and African countries, to disabled people and ethnic minorities in North America and Western Europe. For these groups and communities, the Internet is understood as a vital public platform due to greater barriers of access to traditional media or political representation than the majority of their fellow citizens.³⁷ Indeed, the Internet is a particularly important space for such communities whose voices are often marginalized, negated and discriminated against in everyday life.³⁸

Not surprisingly then, empirical data suggests that LGBTI communities are amongst the earliest adopters of digital technology relying on the Internet for contesting and defending their civil and sexual rights.³⁹ The Internet is often perceived as providing a ‘public platform’ for LGBTI groups which plays a crucial role in transcending geographic boundaries and reducing isolation, providing access to safe virtual communities and connecting members to education, identity formation, and civic engagement.⁴⁰

The Internet for LGBTI communities is also an especially vital space for democratic deliberation. This is particularly so for the younger generations who are much more

³⁴ Manuel Castells, *The Rise of the Network Society: The Information Age: Economy, Society, and Culture*. Wiley, 1996, vol 1.

³⁵ *Internet Freedom*, US Bureau of Democracy, Human Rights and Labour, <http://www.humanrights.gov/issues/internet-freedom/>, visited 31/12/2017. For an in-depth discussion on ‘Internet Freedom’ from a political economy perspective, see Shawn M Powers and Michael Jablonski, *The Real Cyber War: The Political Economy of Internet Freedom* (University of Illinois Press, 2015).

³⁶ Frank La Rue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN GAOR, 17th sess, Agenda Item 3, UN Doc A/HRC/17/27 (16 May 2011) 7.

³⁷ Jac sm Kee (ed), (2011) *EROTICS. Sex, Rights and the Internet*, Association for Progressive Communications p.1.

³⁸ Australian Human Rights Commission Report, 2001 ‘I want respect and equality - Racial Discrimination: National Consultations: Racism and Civil Society’ <https://www.humanrights.gov.au/i-want-respect-and-equality-racial-discrimination-national-consultations-racism-and-civil-society#forward>, visited 28/09/2016.

³⁹ Jessie Daniels and Mary L Gray, ‘A Vision for Inclusion: An LGBTI Broadband Future’ (Research Paper, LGBTI Technology Partnership, April 2014) <http://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1213&context=gc_pubs>.

⁴⁰ Natalie T.J. Tindall and Richard D. Waters, (2013) *Coming out of the Closet: Exploring LGBTI Issues in Strategic Communication with Theory and Research*, Peter Lang Publishing, New York.

ready to engage in activism via social networks than their older peers.⁴¹ Political awareness of the younger members of LGBTI communities thus often come from their engagement with the online discussion forums and social platforms.⁴²

Empirical research also reveals that LGBTI communities rely on technology and Internet to a much greater extent than the general population to combat the social isolation, marginalization and lack of access to health, economic and legal information, especially in rural areas.⁴³ In other words, the celebrated narrative is that the Internet has proved a critical medium in providing LGBTI communities with an access to critical social, economic, legal and medical information, as well as a virtual space for democratic deliberation.

3.2. The Emerging Disquieting Counter-Narrative

While the Internet has indeed boosted freedom of communication and democracy as professed by the dominant liberatory narrative; it has also been progressively subjected to increased scrutiny, controls and content regulation by public and private sector actors in both liberal democracies and authoritarian regimes. Various power structures in the international scene influence ‘permissible’ online content.⁴⁴ The centrality of the Internet as a communication tool has also led to new approaches to surveillance and Internet infrastructure is increasingly used by various public and private actors to impose restrictions on exercise of fundamental rights in the digital sphere.⁴⁵

LGBTI communities are thus often faced with the realities of inaccessible websites with LGBTI content (e.g. Deti 404 in Russia);⁴⁶ filtered out content, including health-related information (even the words ‘breast cancer’)⁴⁷ or being put in danger of physical assaults by the ‘real name’ policies of social platforms, such as Facebook.⁴⁸

⁴¹ Jan Moolman and Jack sm Kee (2011), ‘Sexuality and Women’s Rights’ in Global Information Society Watch: Internet Rights and Democratization, APC, https://www.giswatch.org/sites/default/files/gisw_-_sexuality_and_womens_rights.pdf, visited 22/09/2016.

⁴² Gay, Lesbian and Straight Education Network. Out Online: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth on the Internet. Results of an extensive 2013 survey.

⁴³ Jessie Daniels and Mary L Gray, ‘A Vision for Inclusion: An LGBTI Broadband Future’ (Research Paper, LGBTI Technology Partnership, April 2014) <http://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1213&context=gc_pubs>.; Gray, Mary L. *Out in the country: Youth, media, and queer visibility in rural America*. NYU Press, 2009.

⁴⁴ Ben Wagner, *Global Free Expression - Governing the Boundaries of Internet Content* (Springer, 2016).

⁴⁵ Laura DeNardis, *The Global War for Internet Governance* (Yale University Press, 2014).

⁴⁶ Washington Times, (2016) *Russia blacklists Deti-404, a website for LGBT teens*, <https://www.washingtontimes.com/news/2016/oct/11/russia-blacklists-deti-404-a-website-for-lgbt-teen/>, visited 31/12/2017.

⁴⁷ Jessie Daniels and Mary L Gray, ‘A Vision for Inclusion: An LGBTI Broadband Future’ (Research Paper, LGBTI Technology Partnership, April 2014) <http://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1213&context=gc_pubs>.

⁴⁸ The Independent, *Facebook to tweak ‘real name’ policy after backlash from LGBTI groups and Native Americans*, 2nd Nov 2015, <http://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-to-tweak-real-name-policy-after-backlash-from-LGBTI-groups-and-native-americans-a6717061.html>, visited 07/10/2016.

Ranging from the censorship of LGBTI content online by the governments as well as social media platforms, to discriminatory Internet domain names policies⁴⁹ to *explicitly* discriminatory national legislation, affecting LGBTI persons' rights to free speech online, such as, Russian anti-LGBTI censorship laws,⁵⁰ these restrictions are numerous and represent a daily struggle for LGBTI communities to exercise their basic digital rights.

Furthermore, the rise of large-scale data collection and algorithm-driven analysis targeting sensitive information poses many threats for LGBTI communities, who are especially vulnerable to privacy intrusion due to their often hostile social, political and even legal environments.⁵¹ A lot of publicly available data, such as Facebook friend information or individual music playlists on Youtube, are incredibly effective at inferring individual sexual preferences with high levels of accuracy.⁵² The accuracy of the online trail of information we leave is argued to be higher than the predictions of human friends assumptions about an individual's personality.⁵³ If widely-traded advertising information "correctly discriminates between homosexual and heterosexual men in 88% of cases,"⁵⁴ then most Internet users should assume that all companies advertising to them can predict their sexual orientation with a high degree of accuracy – and are likely to do so in order to sell them products. Issues may go well beyond simple product advertising, and can potentially include different treatment in, e.g. health and life insurance,⁵⁵ employment⁵⁶, predictive policing (referring to prevention of crime before it happens).⁵⁷

In stark contrast to a popular belief that such restrictions are targeting only particular individuals (e.g., LGBTI activists) or specific groups (LGBTI organizations, collectives) in specific countries, these limitations of LGBTI rights online are often imposed at the global level (though local restrictive measures also do exist). The

⁴⁹ Zalnieriute, M., Schneider, T., (2014) *ICANN's Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values*, Council of Europe, Strasbourg, 2014, pp. 15-35.

⁵⁰ See *Russian Federal Law for the Purpose of Protecting Children from Information Advocating for a Denial of Traditional Family Values 2013* (Russian Federation).

⁵¹ EU Fundamental Rights Agency, (2014) *EU LGBTI Survey: Main Results*, Luxembourg: Publications Office of the European Union, p. 14.

⁵² Michail Kosinski, David Stillwell, and Thore Graepel, 2013, 'Private Traits and Attributes Are Predictable from Digital Records of Human Behavior, Proceedings of the National Academy of Sciences of the United States of America, 110(15): 5802-5, available <http://www.pnas.org/content/110/15/5802.full>/ visited 28/09/2016.

⁵³ Youyou, Wu, Michal Kosinski, and David Stillwell. 2015. "Computer-Based Personality Judgments Are More Accurate than Those Made by Humans." *Proceedings of the National Academy of Sciences* 112(4): 201418680.

⁵⁴ Kosinski, Michal, David Stillwell, and Thore Graepel. 2013. "Private Traits and Attributes Are Predictable from Digital Records of Human Behavior." *Proceedings of the National Academy of Sciences of the United States of America* 110(15): 5802–5.

⁵⁵ Angela Daly, 'The Law and Ethics of "Self Quantified" Health Information: An Australian Perspective' (2015) 5 *International Data Privacy Law* 144.

⁵⁶ Kim, Pauline T. "Data-driven discrimination at work." *Wm. & Mary L. Rev.* 58 (2016): 857.

⁵⁷ Zeynep Tufekci, 'Engineering the Public: Big Data, Surveillance and Computational Politics' (2014) 19 *First Monday* <<http://firstmonday.org/ojs/index.php/fm/article/view/4901>>.

global scope of such measures is possible because of the global nature of Internet; and in particular the technical structures and design of Internet.⁵⁸

These invisible structures - or what is often termed as 'Internet architecture'⁵⁹ - are mostly hidden from the eyes of the Internet users, but not only do they have enormous political and economic implications; often they impede the exercise of fundamental human rights in the digital environment without users being aware of such limitations. Particular features of the Internet architecture, such as Internet protocols and domain names, as well as algorithms and standard contractual clauses of the Internet intermediaries - create favourable conditions to restrict the fundamental rights of LGBTI communities by various public and private actors,⁶⁰ and overcome constitutional protections for free speech, equality and non-discrimination or privacy; as well as avoid limitations by international human rights law.⁶¹

Examples of various actors 'co-opting Internet infrastructure'⁶² to limit LGBTI rights online are numerous. Firstly, critical information for LGBTI communities is often inaccessible due to the Internet censorship policies in many countries ranging from a blanket ban on LGBTI-related content in some countries to censorship filters installed into public libraries networks and public schools. Even in Western Democracies, such as the USA with a strong free speech reputation, Internet censorship is hardly a minor issue. For example, the American Civil Liberties Union is pursuing certain internet anti-censorship initiatives, such as the 2011 'Don't Filter Me' project aimed at the removal of web filters on school computers that are unconstitutionally blocking access to hundreds of LGBTI websites, including sites that contain vital resources on subjects like bullying and student gay-straight alliances. Empirical research suggests that the filters do not block access to comparable anti-LGBTI websites that address the same topics with a negative connotation.⁶³

Since a large part of the Internet architecture and infrastructure is coordinated and owned by private actors, this ownership allows them to often set *de facto* global standards on human rights online,⁶⁴ including the rights of LGBTI communities. This phenomenon in effect leads to privatized human rights governance; whereby private actors establish boundaries on human rights online, such as freedom of expression and

⁵⁸ Laura DeNardis, 'Hidden Levers of Internet Control: An Infrastructure-Based Theory of Internet Governance' (2012) 15 *Information, Communication & Society* 720. Laura DeNardis, *The Global War for Internet Governance* (Yale University Press, 2014).

⁵⁹ See Zalnieriute Monika and Milan Stefania, 'Privatized Governance: Mediating Human Rights via Internet Architecture' *Policy & Internet*, forthcoming 2018.

⁶⁰ Laura DeNardis and Andrea M Hackl, 'Internet Control Points as LGBTI Rights Mediation' (2016) 19 *Information, Communication & Society* 753.

⁶¹ ACLU 'Don't Filter Me' Initiative Finds Schools in Four More States Unconstitutionally Censoring LGBTI Websites (11 April 2011) American Civil Liberties Union <<https://www.aclu.org/news/aclu-dont-filter-me-initiative-finds-schools-four-more-states-unconstitutionally-censoring-LGBTI>>.

⁶² Laura DeNardis, 'Hidden Levers of Internet Control: An Infrastructure-Based Theory of Internet Governance' (2012) 15 *Information, Communication & Society* 720. Laura DeNardis, *The Global War for Internet Governance* (Yale University Press, 2014).

⁶³ ACLU, Schools in Four More States Unconstitutionally Censoring LGBTI Websites, <https://www.aclu.org/news/aclu-dont-filter-me-initiative-finds-schools-four-more-states-unconstitutionally-censoring-LGBTI>

⁶⁴ Ben Wagner, *Global Free Expression - Governing the Boundaries of Internet Content* (Springer, 2016).

data protection and privacy in accordance with their business models.⁶⁵ Indeed, it is private Internet platforms – and not national governments or International treaties or tribunals – such as Facebook setting global *de facto* global free speech standard on public nudity (including banning pictures of female nipples) through its content moderation and standard policies. Or the permissible levels of privacy and even physical security for LGBTI individuals with Facebook’s ‘real name’ policies.⁶⁶ Or whether any LGBTI individual has a ‘right to be forgotten.’ Such decisions on what is permissible are exercised internally by the sub-contractors of Internet platforms, such as Google and Facebook, and the guidelines and criteria for such decisions are largely unknown to the public. As such, the basic tools of accountability and governance — public and legal pressure – are very limited, with the private actors holding most power.⁶⁷ over the LGBTI rights online, resulting in a ‘privatization of human rights’.⁶⁸

In this privatized human rights governance, the opportunities for LGBTI communities to effectively communicate, raise awareness as well as access critical information and knowledge about the legal rights, health and community resources for LGBTI people, praised by the celebrated dominant narrative of Internet, are often intentionally limited by various public and private actors in reality. In addition to these intentional limitations imposed by powerful actors, scholars and activists have also noted how the Internet is transforming the ways that LGBTI individuals experience violence and social exclusion.⁶⁹ For example, online threats, stalking, bullying and sexual harassment are the just part of the online aggression LGBTI communities face; and it is a challenge to find meaningful ways to respond to such threats.

The counter-narrative gradually emerging among the Internet scholars.⁷⁰ thus suggest that the architectural and technical features of the Internet can often be employed by both public and private actors to intentionally limit LGBTI rights to freedom of expression and association, privacy, security and right to self-autonomy.

4. Moving Beyond the State of the Art

⁶⁵ Ben Wagner, *Global Free Expression - Governing the Boundaries of Internet Content* (Springer, 2016). Emily Taylor, ‘The Privatization of Human Rights: Illusions of Consent, Automation and Neutrality’ (Paper No 24, Global Commission on Internet Governance, January 2016) 24 <https://ourinternet-files.s3.amazonaws.com/publications/no24_web_2.pdf>.

⁶⁶ Andrew Griffin, ‘Facebook to Tweak “Real Name” Policy after Backlash from LGBTI Groups and Native Americans’, *The Independent* (online), 2 November 2015 <<http://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-to-tweak-real-name-policy-after-backlash-from-LGBTI-groups-and-native-americans-a6717061.html>>; Powers and Jablonski, above n 15.

⁶⁷ Catherine Buni and Soraya Chemaly, ‘The Secret Rules of the Internet’ on *The Verge* (13 April 2016) <<http://www.theverge.com/2016/4/13/11387934/internet-moderator-history-youtube-facebook-reddit-censorship-free-speech>>.

⁶⁸ Taylor, above n 48.

⁶⁹ ‘Out Online: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth on the Internet’ (Report, GLSEN, 2013) <<http://www.glsen.org/sites/default/files/Out%20Online%20FINAL.pdf>>.

⁷⁰ Laura DeNardis and Andrea M Hackl, ‘Internet Control Points as LGBTI Rights Mediation’ (2016) 19 *Information, Communication & Society* 753.

What becomes clear from the existing competing narratives is that digital technologies could both facilitate and impede the exercise of fundamental rights by LGBTI communities. It seems that the celebrated narrative on the extremely positive role of Internet and technology in advancing LGBTI rights should be losing its unshakeable traction; and it is time to better understand the ways these rights can also be repressed using the very same digital technologies and Internet infrastructure which replaced the traditional media gatekeepers.

4.1. Research Gap: Issues and Rationale

While the concerns that algorithmic monitoring and data classification techniques, Internet filtering mechanisms and other restrictive measures may be disproportionately affecting LGBTI persons' rights to privacy and free speech and other fundamental rights online is growing;⁷¹ there is, so far, no systematic research within academia on the subject matter.

The first review conducted of existing research at the intersection of LGBTI issues and technology by sociologists Daniels and Gray, released in June 2014, has convincingly demonstrated the general lack of research on LGBTI communities and Internet.⁷² Nonetheless, there is a growing (albeit still very limited) amount of research among sociologists, psychologists, and gender and media studies researchers on online LGBTI identity formation⁷³ and utilization of online social media in the coming out process,⁷⁴ their self-identification strategies⁷⁵ and LGBTI advocacy in digital age.⁷⁶

In the civil society circles working in the field of Internet Governance, the Association for Progressive Communications ('APC') has actively attempted over the years, to raise questions, issues, and linkages between feminism, gender and the Internet, and more recently has concentrated on emerging issues in the intersections of sexuality rights and Internet rights. Back in 2008, the APC initiated a project, called EROTICS (Exploratory Research on Sexuality and the Internet) – which is an on-the-ground research project with a range of Internet users, who are most affected by the Internet regulation measures, such as young women and individuals with diverse sexualities. The project was conducted with local partners comprising feminist

⁷¹ See, e.g., Jernigan, Carter, and Behram F.T. Mistree. 2009. "Gaydar: Facebook Friendships Expose Sexual Orientation." *First Monday* 14(10).

⁷² Daniels, J., Gray, M., (2014) *Vision for Inclusion: An LGBTI Broadband Future*, LGBTI Technology Partnership & Institute, p. 25.

⁷³ Siebler, Kay. *Learning Queer Identity in the Digital Age*. Springer, 2016.

⁷⁴ Taylor, Y., Falconer, E., and Snowden, R. (2014). 'Queer Youth, Facebook and Faith: Facebook Methodologies and Online Identities'. *New Media & Society*, 16(7), pp. 1138–53.

⁷⁵ Stefanie Duguay, Lesbian, Gay, Bisexual, Trans, and Queer Visibility Through Selfies: Comparing Platform Mediators Across Ruby Rose's Instagram and Vine Presence, *Social Media & Society*, 2016, pp. 1-12; Gray, Mary L. *Out in the country: Youth, media, and queer visibility in rural America*. NYU Press, 2009; Natalie T J Tindall and Richard D Waters, *Coming out of the Closet: Exploring LGBTI Issues in Strategic Communication with Theory and Research* (Peter Lang, 2013).

⁷⁶ Ng, Eve. "Media and LGBT Advocacy: Visibility and transnationalism in a digital age." *The Routledge Companion to Media and Human Rights* (2017): 309 - 3017, Burgess, Jean, et al. "Making digital cultures of gender and sexuality with social media." *Social Media+ Society* 2.4 (2016): 2056305116672487.

academics and activists in Brazil, India, Lebanon, South Africa and the US (in three steps: 2008 – 2012 and 2012-2014; and 2017) and aimed at informing and guiding ‘policy making for a more accountable process of decision making,’ by providing the analysis of the ‘the actual lived practices, experiences and concerns of Internet users in the exercise of their sexual rights.’⁷⁷ This work, conducted by civil society activists is in many ways ground-breaking and in certain ways focuses on LGBTI issues. Its anthropological focus presents a good empirical starting point for a systematic political or legal academic analysis on the subject.

Although scholars have devoted more in-depth attention to the study of data classification techniques and individuals,⁷⁸ or have focused on the enabling role of businesses,⁷⁹ neither the potentially disproportionate impact, nor potential advances of ‘big data’ and algorithmic monitoring for reducing marginalization of discriminated groups such as LGBTI have received sufficient attention within academia. On the other hand, research has started to emerge on the impact of Internet filtering of LGBTI-related content⁸⁰ or how LGBTI rights are mediated via Internet architecture and infrastructure.⁸¹ In particular some scholarship at the intersection of Internet Governance and LGBTI rights asked ‘how various functional areas of Internet Governance (<..>) serve as control points over LGBTI speech, identity and expression, and community formation.’⁸² Such directions are promising, however, as of yet these issues have only been addressed sporadically and do not present systematic research on the subject. In particular, legal and political analysis of LGBTI digital civil rights still seems to be a lacuna, as the European Digital Rights Initiative (EDRI) - the European association of NGOs working on the promotion of civil rights in the field of information and communication technology – ‘[is] not aware of any research in the field of LGBTI and digital civil rights.’⁸³

A shortage of comprehensive political-legal analysis and reliable data, in turn, weakens advocacy efforts and prevents evidence-based policy-making. Thus, today there is no existing public or private sector guidelines to protect discriminated-against groups, such as LGBTI, from digital discrimination, let alone legal instruments addressing the subject.⁸⁴ The state of the art could be summarized as follows:

⁷⁷ Jac sm Kee (ed), (2011) *EROTICS. Sex, rights and the Internet*, APC, at p. 7.

⁷⁸ Brunton, F., Nissenbaum, H., (2011) *Vernacular Resistance to Data Collection and Analysis: A Political Theory of Obfuscation*, First Monday.

⁷⁹ MacKinnon, R., (2012) *Consent of the Networked. The Worldwide Struggle for Internet Freedom*, Basic Books, New York.

⁸⁰ Association for Progressive Communications, (2011; 2017) *EROTICS. Sex, rights and the Internet*, 2017 survey results available at https://www.apc.org/sites/default/files/Erotics_2_FIND-2.pdf, visited 30/12/2017.

⁸¹ Zalnieriute, Monika, ‘The Anatomy of Neoliberal Internet Governance: A Queer Political Economy Perspective’ in Otto, Dianne (ed), *Queering International Law: Possibilities, Alliances, Complicities and Risks*, Routledge, 2017. Laura DeNardis and Andrea M Hackl, ‘Internet Control Points as LGBTI Rights Mediation’ (2016) 19 *Information, Communication & Society* 753.

⁸² Laura DeNardis and Andrea M Hackl, ‘Internet Control Points as LGBTI Rights Mediation’ (2016) 19 *Information, Communication & Society* 753.

⁸³ E-mail communication with BRUSSELS@EDRI.ORG of 19/08/2014.

⁸⁴ See e.g. the World Wide Web Consortium’s: <http://www.w3.org/2011/tracking-protection/drafts/tracking-dnt.html> for generalist guidelines.

- 1.) *on a substantive level*, LGBTI communities are deprived of the meaningful exercise of their digital rights and thus, digital discrimination contributes to their further marginalization and invisibility;
- 2.) *on a policy-making level*, the voices of LGBTI communities in the discussions and decision-making procedures related the development and implementation of Internet-related policies are excluded; thus there is no means for them to influence and affect substantive change;
- 3.) *on an analytical and research level*, the understanding of issues at the intersection of LGBTI community and technology is very limited and almost non-existent; thus there are no resources, capacity and data for effective campaigning strategies to be formed and built on the matter.

This state of the art is rather unfortunate from the perspective of the LGBTI rights movement as well as the so-called digital rights community. While the former currently has very limited knowledge and understanding of the implications of digital technologies; the latter has often overlooked LGBTI issues and focused all its attention to the so-called ‘classical digital rights’ and issues of censorship, surveillance and cybersecurity. However, LGBTI issues are closely interlinked with matters of surveillance, censorship and the digital rights, albeit this linkage has for the most part been implicit if not disregarded. This does not have to be the case.

4.2. What is Needed: Research and Advocacy

The current state of the art at the intersection of LGBTI rights and digital technologies seems to necessitate a broad long-term scholarly and activist agenda of (1) changing discriminatory policies so that LGBTI people can effectively exercise their basic rights online; and (2) increasing their participation in technology design debates and Internet policy making, and (3) understanding the problems at the intersection between LGBTI communities and the Internet. This agenda, just like for any social movement, requires the consistent development of strategies for breaking the prejudice, bias and stigmatization of LGBTI communities, as well as having resources and capacity to able to participate within the policy-making processes both at the national and international levels. These issues will be discussed in turn.

First, as a short history of LGBTI right in international politics and law reveals, LGBTI communities have been rather successful in mobilizing resources and capacity in fighting for their civil rights and struggling for justice. There is no reason why the LGBTI movement should ignore the injustices and civil struggle in the digital sphere. Quite to the contrary, if it wants to remain relevant and stand for the lives of LGBTI individuals, it should start making its way into the digital technology domain, because increasingly crucial public policy matters, including LGBTI rights, are mediated via such technologies and digital infrastructures.

Second, in this context, it is important to underline that these digital technologies are socio-technical systems rather than merely physical hardware and software and that these systems are negotiated and re-negotiated by humans.⁸⁵ Therefore, individual technical solutions, such as cryptography or ‘virtual private networks’ or anti-filtering

⁸⁵ Baxter, G., Sommerville, I., (2011) ‘Socio-technical Systems: From Design methods to Systems Engineering,’ *Interact. Comp.*, 23(1):4-17, at p. 4.

apps - while important in providing quick solutions; are not going to be sufficient on their own to substantially improve LGBTI rights online. On the other hand, increasing LGBTI communities' participation in technology design debates and Internet policy making could lead to an increased awareness of the digital challenges by the LGBTI movement, as well as facilitate its involvement in creating solutions for addressing those challenges. The emergence of the events like the *Global LGBTII Tech & Science Conference 'Connecting Unicorns'*⁸⁶ or groups such as *'Lesbian Who Tech'*⁸⁷ seem to suggest crucial first hints into that direction. Even though these events and summits seem to be oriented towards internal community building rather than external advocacy or lobbying among other interests in technology debates and Internet policy-making, this is nonetheless a start. Moreover, as evidenced with the several projects, such as *Take Back the Tech* and EROTICS, in the circles of Internet Governance, the Association of Progressive Communications (APC) has been actively working on the inclusion of feminist perspectives, queer and LGBTI community voices in a more mainstream Internet policy debates and global events such as the UN Internet Governance Forum. Thus, the opportunities for collaboration with the representatives of the LGBTI movement and organizations such as International Lesbian, Gay, Trans and Intersex Association (ILGA) seem to be gradually manifesting.

This brings us to the third point that to increase this participation and form effective alliances, we need to better understand the problems and issues at the intersection of LGBTI communities and digital technologies. Considering that the dominant narrative on 'democratization of information' has for long portrayed the Internet as a democratic and liberating medium for marginalized groups, the analysis of how LGBTI communities are prevented from participation in the information exchange by, *inter alia*, Internet censorship policies, discriminatory freedom of expression laws, and data monitoring techniques emerges as a pressing scholarly project.

The following section will attempt to stimulate future research interest on this subject by sketching out what such a research programme might entail, how the issues could be framed and what methodologies could be applied to illuminate the linkages and address the 'digital discrimination' of LGBTI communities

5. A Roadmap for the LGBTI & Digital Rights Framework

The understanding of the issues at the intersection of digital technologies and LGBTI rights has been rather limited to this date. It is an underexplored subject and not much of the shared language or disciplinary approaches exist within academia. There are many ways to approach the issues at the intersection of LGBTI rights and digital technologies from various disciplinary and interdisciplinary angles and ask questions from sociological, psychological and philosophical and economical perspectives, among others. While these perspectives are crucial in advancing knowledge and equality of LGBTI individuals, it is well beyond the scope of this short paper to meaningfully discuss, let alone engage with all these perspectives. However, one of the potential strategies to approach these issues that might be particularly well-suited for human rights scholars and advocates could be to combine the 'LGBTI rights' and

⁸⁶ <http://connecting-unicorns.com/>

⁸⁷ <http://lesbianswhotech.org/>

‘digital rights’ frameworks. Such a combination would allow us to reframe ‘digital rights’ as an LGBTI issue to broaden the spectrum of rights being covered in Internet to assure the equality of LGBTI communities both offline and online. The subsequent sections will attempt to briefly discuss the foundations of such discourse before discussing potential research questions and methodologies. The following section briefly sketches the digital rights discourse.

5.1. The Digital Rights Discourse

The rapid development of Internet access and services over the last two decades has led to the parallel growth of the centrality of what is often termed as *Internet rights* or *digital rights*. The term *digital rights* is a relatively new concept of the last decade that refers to the human rights that allow individuals to access, use, and share digital content online. Similar to LGBTI rights, digital rights are not in fact substantially new rights *per se*, but rather refer to the application of classical existing rights, such as the right to privacy, freedom of opinion, freedom of expression and assembly in the context of digital technologies and the Internet. The importance of digital rights has been recently reassured by the UN Human Rights Council (HRC), which has affirmed by consensus that “the same rights that people have offline must also be protected online” in resolutions adopted in 2012, 2014 and 2016 (HRC resolutions 20/8 of 5 July 2012;⁸⁸ 26/13 of 26 June 2014;⁸⁹ and 32/ of 27 June 2016⁹⁰).

Of special importance in this context, is the pronouncement of Frank la Rue, the Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression, who said in his report to the UN Human Rights Commission back in 2011 that:

“the right to freedom of opinion and expression is as much a fundamental right on its own accord as it is an “enabler” of other rights, including economic, social and cultural rights, such as the right to education and the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications, as well as civil and political rights, such as the rights to freedom of association and assembly. Thus, by acting as a catalyst for individuals to exercise their right to freedom of opinion and expression, the Internet also facilitates the realization of a range of other human rights”.⁹¹

Similarly, privacy is one of the core basic fundamental rights, allowing individuals to live freely from an unjustified interference with their private lives from public and private authorities and thus contributes to the maintenance of the balance between the individual and the state. Back in 2009, Special Rapporteur Martin Scheinin also

⁸⁸ UN, Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet* (5 July 2012) UN Doc. A/HRC/20/L.13, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G12/147/10/PDF/G1214710.pdf?OpenElement>, (visited 22/08/2016).

⁸⁹ UN, Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet* (26 June 2014) UN Doc. A/HRC/26/L.24, / <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/059/67/PDF/G1405967.pdf?OpenElement>, (visited 22/08/2016).

⁹⁰ UN, Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet* (27 June 2016) UN Doc. A/HRC/32/L.20, available at <http://www.unwatch.org/wp-content/uploads/2016/06/L.20.pdf>, (visited 22/08/2016).

⁹¹ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Frank La Rue, A/HRC/17/27.

highlighted that ‘The right to privacy is therefore not only a fundamental human right, but also a human right that supports other human rights and forms the basis of any democratic society.’⁹² The importance and recognition of the role of privacy in the digital age is reflected in numerous UN General Assembly Resolutions as well as a newly established position of a Special Rapporteur on Privacy.⁹³

This it seems that indeed ‘It has become customary to emphasize that individuals enjoy the same rights online as they do offline.’⁹⁴ While these principles appear to have gained certain traction among the international community and seem to be widely supported by the governments (as evidenced by the three UN General Assembly consensus declarations), many countries have a long way to go to actually implement them.

5.2. A Dual Struggle: the LGBTI Discourse on Digital Rights - Discrimination and Marginalization Online for Safeguarding Traditional Values

Drawing a parallel to a famous quote by the UN High Commissioner of Human Rights, the idea that digital rights are naturally applicable to LGBTI persons is neither revolutionary, nor puzzling: it rests on the two fundamental principles of equality and non-discrimination (UNHCHR, 2012).⁹⁵ While it is inevitable that these rights are sometimes restricted by various public and private actors, such restrictions have a particularly significant impact on marginalised communities, such as ethnic and racial minorities, women and LGBTI communities, for whom exercising their rights in the offline world is often a daily struggle. In search for new more open and inclusive spaces, LGBTI communities, along with the other discriminated groups, have been more active in relying on technology in connecting with peers and fighting for their civil rights.⁹⁶ The liberatory role of the Internet for such communities has already been discussed in Part 2 of this paper, and there is no need to repeat it here. However, it is important to emphasize that in the context of digital rights, LGBTI communities face a dual struggle for their rights online.

A first struggle is a shared struggle for rights to freedom of expression, freedom of association, privacy and security online along with all their fellow citizens. But oftentimes LGBTI communities encounter an additional struggle – that of discriminatory treatment - as their right to simply express a non-heteronormative sexuality and gender identity is treated differently than a comparable right to privacy and freedom of expression of their fellow citizens with normative sexualities and

⁹² Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/13/37.

⁹³ See OHCHR (2015), Special Rapporteur on the right to privacy, <http://www.ohchr.org/EN/Issues/Privacy/SR/Pages/SRPrivacyIndex.aspx>, visited 10/09/2016.

⁹⁴ David, Kaye, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 11th May 2016, A/HRC/32/38, available <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/095/12/PDF/G1609512.pdf?OpenElement>, (visited 22/08/2016).

⁹⁵ United Nations High Commissioner for Human Rights, (2012) *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, HR/PUB/12/06, p. 7.

⁹⁶ Jessie Daniels and Mary L Gray, ‘A Vision for Inclusion: An LGBTI Broadband Future’ (Research Paper, LGBTI Technology Partnership, April 2014) <http://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1213&context=gc_pubs>.

gender identities (e.g, the earlier mentioned Russian ‘*Anti-Propaganda Law*’). For this reason, LGBTI communities’ *digital rights* are more often restricted than the respective rights of their fellow citizens. This suggests that a right to freely express one’s sexuality and/or identity is not always regarded as part of a right to self-determination and free expression by public and private actors (e.g, Apple banning gay characters from their online games)⁹⁷, but often it is perceived as a political (and potentially destabilizing) act in itself. It is not too difficult to see that the LGBTI communities thus are often discriminated online (in addition to the limitations on their digital rights) by virtue of their sexual orientation or gender non-conformity.

This brings us to the last, but crucially important, aspect to be incorporated into the framework of analysis of the *digital rights* of LGBTI communities: how are the restrictions on the exercise of digital rights by LGBTI communities often justified? As it is well known to all human rights lawyers, there might be certain justifications for the interferences with the exercise of human rights, including *digital rights*, that could be considered necessary and proportionate in democratic societies; sometimes resulting in *legally* acceptable limitations on the exercise of human rights. So what are the justifications often put forward by the actors – both public and private – for limiting LGBTI communities’ digital rights?

5.3. Justifications for Restricting Digital Rights of LGBTI Communities

As suggested by *Human Rights Watch*’s latest global report, ‘traditional values are often deployed as an excuse to undermine human rights.’⁹⁸ Indeed back in 2011, the United Nations Human Rights Council (HRC) stressed that “traditions shall not be invoked to justify harmful practices violating universal human rights norms and standards”,⁹⁹ thereby acknowledging that traditions are often invoked to justify human rights violations. A number of NGOs have expressed reasonable concerns and noted “traditional values” are frequently invoked to restrict access to human rights for those segments of society who, from the conservative viewpoint or perspective of those in authority, challenge the mainstream or fall outside the dominant norm.¹⁰⁰

This rhetoric has been once again recently utilized by the opponents to the UN Human Rights Council’s Resolution on *LGBTI Rights*, adopted on 26th September 2014— led by Egypt and other members of the Organization for Islamic Cooperation — who framed the Resolution as a form of cultural imperialism and an attack on Islam and a human rights violation in itself.¹⁰¹ While post-colonialist and queer

⁹⁷ Jack, Flannagan (2014), The complete history of LGBTI video game characters, <http://www.dailydot.com/parsec/gay-characters-video-games-history/> visited 15/09/2016.

⁹⁸ See Human Rights Watch, *The Trouble With Tradition: When ‘Values’ Trample Over Rights*, by Graeme Reid, available at <http://www.hrw.org/pt/node/112847/> (visited on 30/09/2016).

⁹⁹ *Resolution Adopted by the Human Rights Council 16/3: Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind*, GA Res 16/3, UN GAOR, 16th sess, Agenda Item 3, UN Doc A/HRC/RES/16/3 (8 April 2011).

¹⁰⁰ See *Joint Written Statement Addressed to the Advisory Committee Stemming from Human Rights Council Resolutions: Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind*, UN GAOR, 7th sess, Agenda Item 3(a)(viii), UN Doc HRC/AC/7/NGO/1 (8–12 August 2011).

¹⁰¹ See Interview with the representative of Saudi Arabia on 26th September, 2014, *LGBTI Rights Resolution Passes United Nations Human Rights Council In Lopsided Vote*, available at <http://www.buzzfeed.com/lesterfeder/LGBTI-rights-resolution-passes-united-nations-human-rights-co#102cptl> (visited 30/09/2016).

scholars do have a valid criticism about the North-American/European-centric model of 'LGBTI rights' negating and marginalizing the experiences from other cultural backgrounds and non-essentialist views on sexuality and gender;¹⁰² such a queer critique is, however, scarcely related to a 'cultural' denial of a mere existence of non-heterosexual individuals in those particular cultures.

Internet censorship policies and restrictions of LGBTI expression online are often justified by using the same justifications of cultural and religious 'values', that in effect regulate and preserve mainstream gender and sexual norms, as well as gender roles and stereotypes. These censorship policies and practices are most often built around the mobilization of anxieties and 'dangers' around sexual content and interaction. As documented by free speech scholars and advocates, child pornography, protection of children from sexual dangers, and increasingly the protection of children from any 'wrongful information' are primary examples of the enormous opportunities for ever-expanding mission creep. This creep often results in filtering out crucial health-related information in public spaces, such as libraries and schools, and prevents people from accessing information on 'breast cancer' because the word 'breast' is doomed 'indecent' by certain Internet filtering programs.¹⁰³ It would be naïve to think that this is the case only in countries where LGBTI rights are not respected or even criminalized, because numerous examples of censorship of LGBTI-content online suggest that this is just as prevalent in the Western liberal democracies;¹⁰⁴ as it is in the conservative Eastern European, African, Asian or Middle Eastern or countries.

Not surprisingly however, policy debates around the development of such censorship mechanisms seldom include the perspectives of those who need that 'special protection' - children or youth, attempting to access vital information online.¹⁰⁵ In the end, LGBTI youth and children are also the very same youth and children who are the intended beneficiaries of these policies and practices. What is needed then is a more proactive approach from LGBTI communities and their leaders to make sure that their voices are heard in such debates around technology design.

Albeit attempts have been made to amplify the voices of women and gender non-conforming people in Internet Governance circles by the Association of Progressive Communications, more needs to be done to make sure that these debates around technology design are no longer dominated solely by white rich males from Silicon Valley (even if some of them are openly gay, such as Tim Cook) or the white rich males from the so-called global Internet Governance Institutions, such as Internet

¹⁰² Otto, Dianne (ed), *Queering International Law: Possibilities, Alliances, Complicities and Risks*, Routledge, 2017.

¹⁰³ Jessie Daniels and Mary L Gray, 'A Vision for Inclusion: An LGBTI Broadband Future' (Research Paper, LGBTI Technology Partnership, April 2014) <http://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1213&context=gc_pubs>.

¹⁰⁴ For censorship by Internet companies in the Western liberal democracies, see Stefanie Duguay, Lesbian, Gay, Bisexual, Trans, and Queer Visibility Through Selfies: Comparing Platform Mediators Across Ruby Rose's Instagram and Vine Presence, *Social Media & Society*, 2016, pp. 1-12. Olszanowski, M. (2014). Feminist self-imaging and Instagram: Tactics of circumventing censorship. *Visual Communication Quarterly*, 21, 83-95. doi:10.1080/15551393.2014.928154.

¹⁰⁵ Frau-Meigs, Divina, and Lee Hibbard, "Education 3.0 and Internet Governance: A new global alliance for children and young people's sustainable digital development." CIGI (2016); Frau-Meigs, Divina. "Taking the Digital Social Turn for Online Freedoms and Education 3.0." *The Routledge Companion to Media and Human Rights* (2017): 114.

Corporation for Assigned Names and Numbers, or Internet Engineering Task Force. Indeed, if issues around sexual orientation and gender should occupy more than a rhetorical role in today's discussion of Internet and digital technologies,¹⁰⁶ more research-informed advocacy and pressure is needed to alter the rhetorical status quo.

The final section of this contribution will attempt to sketch out some potential research designs, questions and methods that could illuminate the research and advocacy programme on digital rights of LGBTI communities.

5.4. Advancing a New Research Programme

Just as there are many disciplinary perspectives on digital technologies and LGBTI rights, there are also numerous ways to approach the analysis on the digital rights of LGBTI communities with many different research designs, methods and research questions. The parameters of this short paper permits to address only several of these briefly, but nonetheless it is hoped that these suggestions will prove useful for researchers interested in advancing the *digital rights* of LGBTI communities.

5.4.1. Potential Research Approaches

Quite evidently, any research design on the digital rights of LGBTI communities must approach digital technologies as *sociotechnical systems*,¹⁰⁷ looking at the socio-political (and legal implications) of the technology for these communities. To understand those implications, the research programme, depending on one's political and theoretical positions may incorporate:

- 1) theoretical frameworks developed in the fields of Internet/technology studies (e.g. *science & technology studies (STS)*¹⁰⁸; and
- 2) frameworks in feminist and sexuality studies (e.g., radical or liberal feminist theory, gender studies, or queer theory) to better account for the particular struggles and specific situation of LGBTI communities.

5.4.2. Potential Methods and Techniques

The research design regarding the digital rights of LGBTI communities thus, depending on one's focus and approach, may combine empirical social scientific analysis and/or humanities with a normative legal assessment. The research programme can rely on various methodologies, coming from social sciences

¹⁰⁶ See, e.g. workshop proposal by the APC for the Internet Governance Forum, 'How Can Internet Policy-Making Support LGBT Rights?' https://www.intgovforum.org/cms/wks2015/index.php/proposal/view_public/47, visited 30/12/2017. See also Avri Doria, (2015) *Women's rights, gender and Internet governance*, APC issue paper, <https://www.apc.org/en/pubs/women%E2%80%99s-rights-gender-and-internet-governance>, visited 30/12/2017.

¹⁰⁷ Baxter, G., Sommerville, I., (2011) 'Socio-technical Systems: From Design methods to Systems Engineering,' *Interact. Comp.*, 23(1):4-17, at p. 4.

¹⁰⁸ Musiani, Francesca. "Practice, plurality, performativity, and plumbing: Internet governance research meets science and technology studies." *Science, Technology, & Human Values*40.2 (2015): 272-286.

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(qualitative and quantitative techniques)¹⁰⁹, humanities (critical discourse analysis, digital methods)¹¹⁰, computer science (computational methods)¹¹¹ and legal discipline (doctrinal, comparative legal methods).¹¹²

The relevant examples of such research design combining critical approaches from STS and feminist theory, and various methods and research techniques, can easily be found in feminist scholarship on technology.¹¹³ Striving for a normative (legal) change and reform on the subject, however, requires supplementing these critical theories with legal analysis of human rights and discrimination in the digital age (e.g., Barocas & Selbst 2016 on data-driven discrimination; or Henry and Nicola 2015 on sexual violence online).¹¹⁴

How these different methods could be useful for research on digital rights of LGBTI communities? To give an example qualitative interviews with LGBTI activists could test community awareness of the risks connected to digital technologies and identify a list of perceived threats from the point of view of LGBTI communities themselves. Such qualitative data could be, for instance, subjected to critical content analysis and/or Foucauldian discourse analysis.¹¹⁵ As an alternative, such data could also be subjected to computational methods¹¹⁶ to uncover which of the community perceived threats are in fact real threats, and whether any of them could be dealt with on an individual level by adopting socio-technical strategies (e.g., through measures to preempt or limit profiling such as installing web browsers that obfuscate the computer's IP address) and which threats need a more systemic approach and thus need to be addressed through policy. Finally, relying on legal techniques, a research programme could focus on producing recommendations on how to strengthen the digital rights of LGBTI communities in national and transnational contexts. To this end, legal analysis of the international legal framework ensuring LGBTI rights, national legislation, relevant case-law, policy documents and reports would be necessary to critically assess both the current legal landscape, its shortcomings as well as viable policy and legal options for the future.

5.4.3. Societal Relevance of the Research Programme

Robust research in the area might allow to put significant pressure on the corporate giants of the Internet to make their policies more LGBTI friendly, as well as the

¹⁰⁹ Keating, Michael, and Donatella della Porta. *Approaches and methodologies in the social sciences: a pluralist perspective*. 2008.

Neuman, Lawrence W. "Social research methods: Qualitative and quantitative approaches." (2002).

¹¹⁰ Locke, Terry. *Critical discourse analysis*. Bloomsbury Publishing, 2004; Rogers, Richard. *The end of the virtual: Digital methods*. Vol. 339. Amsterdam University Press, 2009.

¹¹¹ Claudio Cioffi-Revilla, *Introduction to Computational Social Science*, 2014, Springer.

¹¹² McConville, Mike, ed. *Research methods for law*. Edinburgh University Press, 2007.

¹¹³ For overview of these approaches, see Wajcman, Judy. "Feminist theories of technology." *Cambridge journal of economics* 34.1 (2010): 143-152; Faulkner, Wendy. "The technology question in feminism: A view from feminist technology studies." *Women's studies international forum*. Vol. 24. No. 1. Pergamon, 2001.

¹¹⁴ Barocas, S., and A. D. Selbst. "Big data's disparate impact. 104 California Law Review 671." *Available online at SSRN: www.ssrn.com/abstract 2477899* (2016). Henry, Nicola, and Anastasia Powell. "Embodied harms: Gender, shame, and technology-facilitated sexual violence." *Violence against women* 21.6 (2015): 758-779.

¹¹⁵ Arribas-Ayllon, Michael, and Valerie Walkerdine. "Foucauldian discourse analysis." *The Sage handbook of qualitative research in psychology* (2008): 91-108.

¹¹⁶ Claudio Cioffi-Revilla, *Introduction to Computational Social Science*, 2014, Springer.

members of international community which have been lagging in their recognition of LGBTI rights for many years. Of course, this pressure will not immediately lead to the acceptance and recognition of LGBTI communities' needs and rights in the digital sphere or entirely stop the censorship of the LGBTI-related content online; but it will make it more difficult for those denying LGBTI individuals their basic human rights online to sustain their policies and justify them on the grounds such as damage of LGBTI-related content online to children. The raised awareness about the social costs of LGBTI censorship technology, and privacy needs of LGBTI individuals, should mean that at least private actors might be less prepared to engage in activities, directly undermining the digital rights of LGBTI individuals.

Thus, the innovative potential of such a research programme, as well as its practical normative necessity and relevance make the study of digital rights of LGBTI communities a meaningful choice for scholars working at the intersection of human rights and digital technologies.

6. Conclusions

The success of the LGBTI movement, especially for those of us in Western Europe and North America where initial signs of genuine equality appear to be manifesting, might make us slightly skeptical towards certain pressing issues, the stakes of which are not always immediately intelligible to us. As emphasized by Renato Sabbadini, the Executive Director of *International Lesbian, Gay, Trans and Intersex Association*, LGBTI activists in such countries predominantly feel grateful towards the public institutions 'which sanctioned the social and cultural changes turning the most unspeakable and shameful of human orientations into something almost universally accepted, even banal' and the idea that those very public institutions might be censoring LGBTI speech online or collecting unlimited digital traces of LGBTI communities is 'too disturbing to be entertained'. As Sabbadini noticed, 'No one likes to spoil a party, where people are celebrating a victory'.¹¹⁷ However, this paper has attempted to demonstrate that the party needs to be spoiled if LGBTI communities are to exercise their human rights both offline and online, just like everyone else. To an increasing extent LGBTI rights are mediated via digital technologies and infrastructure, and there seems to be no reason why digital rights should not be included on the agenda of the LGBTI movement. In the end, the idea that digital rights are naturally applicable to LGBTI persons is neither revolutionary, nor puzzling: it rests on the two fundamental principles of equality and non-discrimination.¹¹⁸

¹¹⁷ Panel on 'LGBT+ Communities and Digital Rights' at the Computers, Privacy and Data Protection Conference, Brussels, Belgium 2015, available at https://www.youtube.com/watch?v=TUMh4C_smJ4, visited 31/12/2017.

¹¹⁸ United Nations High Commissioner for Human Rights, (2012) *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, HR/PUB/12/06, p. 7.