INTRODUCTION

Every society has its own values regarding appropriate or inappropriate sexuality and gender. Previously most of the societies condemned homosexual, bisexual and transgendered individuals and considered them as against morals or people suffering from some mental or physical disorder. Many societies also imposed the sanction on such people. At present also there are many States which penalize same-sex relationships and also consider homosexual, bisexual and transgendered individuals against morals. Homophobic or transphobic discriminatory practices and violence is, therefore, a serious predicament, in which basic rights of individuals are neglected. And privation of fundamental rights including the right to privacy and family life, the right to social security etc. foster stigmatization for the community and consequently other human rights abuses against them.

Almost everywhere, people experience violence, discrimination and violations of their basic rights in the form of killing, rape, verbal or physical assault, arbitrary detention, denial of right to assembly, speech and expression, discrimination in the sphere of education, health employment etc. on the basis of their actual or perceived sexual orientation and gender identity which makes such people vulnerable. And when it comes to children who are already vulnerable due to their tenderness, young age and physique, they become easily accessible to various kinds of human rights abuse due to the stigmatization and being labeled as LGBT. Family exclusion, verbal or physical harassment, corporal punishments, bullying in the form of name calling and also physical assault is very common among LGBT children. In fact, in order to fit those among the heterosexual population or the people whose gender identity and gender role conform to anatomic sex, parents often force such children to undergo various reparative therapies in order to alter their sexual orientation and gender identity which further amounts to child abuse. All these discriminatory practices and acts of violence adversely affect the physical and mental health of the LGBT community and also result in the alarming rate of suicidal tendencies, substance abuse, HIV and sexually transmitted diseases. Despite the gravity of the given situation seldom attention has been paid to this serious issue.
MEANING OF THE TITLE OF THESIS

The title of the thesis is “Sexual orientation and the gender identity issues in the present legal scenario: Human rights perspective”. It includes the discrimination and other practices against individuals on the basis of their sexual orientation and gender identity which are very serious violations of the human rights.

The phrase “sexual orientation” refers to the general erotic attraction of individuals to others on the basis of their physical sexual characteristics. It includes heterosexuality, homosexuality and bisexuality. References to “sexual orientation” in human rights discussion are almost always about homosexuality for heterosexuality does not attract discrimination and bisexuals have difficulty gaining visibility as bisexuals. ¹

Like sexual orientation all people have a gender identity which means a sense of a person’s own gender. For transgender youth their innate gender identity differs from the gender they were assigned at birth. “Transgender” is an umbrella term describing individuals who depart, to a greater or lesser degree, from the social patterns associated with their physical sex.²

The basic human rights issue for homosexual, bisexual and transgendered individuals is the freedom from discriminatory practices and acts of violence, decriminalization of same sex relationships and marriage equality. Therefore the title has been framed as “Sexual orientation and the gender identity issues in the present legal scenario: Human rights perspective”.

REVIEW OF LITERATURE

1. Douglas Sanders, Sexual and Gender Diversity, Encyclopedia of Human Rights (Ed. David P. Forsythe.) Volume 4, Oxford University Press, (2009) – In this article, the author asserts that nowhere in the body of United Nations treaties and declarations is there any reference to homosexual, bisexual, transsexual, intersexual or transgendered individuals. The author has further discussed the problem of discrimination against homosexual, bisexual,

² Id. at 441.
intersexual and transgendered individuals in the light of UN treaties, Convention and various case laws.

2. U.N High Commissioner for Human Rights, Discriminatory Laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, U.N. Doc A/HRC/19/41, Nov 17 2011- The given report of the special rapporteur analyses the obligations of the states to prevent discrimination and violence based on sexual orientation and gender identity under the international bill of human rights and also suggests the ways for the protection and mainstreaming of the community.

3. Siddharth Narrain, Crystallising Queer Politics- The Naz Foundation Case and its Implications for India’s Transgender Communities, 2 NUJS L. Rev. 455 (2009) – In this paper, the author has discussed the impact of the Naz Foundation Case on the legal status of transgendered individuals in the Indian society

4. Courtney Duffy, Through a Child’s Eyes: homosexual, bisexual and transgendered Issues in a Public High School, 32 CHILD.LEG.RTS.J 1 (2012)- The article is based on the author’s interview with a twenty-four year old graduate student in Chicago who reflected on his experiences with homosexual, bisexual and transgendered students at public high school in which he studied. Through the experiences shared by the student during the interview, the author concludes that the neutral environment towards homosexual, bisexual and transgendered individuals in the school along with the resources such as gay-straight alliance club or school counselors, facilitates a more positive experience for homosexual, bisexual and transgendered high school students and also protects such issues from being forced to the forefront and allows such students to handle the issues in their own way.

5. Caitlin Ryan, Supportive families, healthy children- Helping families with lesbian, gay, bisexual and transgender children. San Francisco, CA: Marian Wright Edelman Institute, San Francisco State University, (2009) - This report deals with causal sequence of family rejection of LGBT children. It also
discusses about quandary related to the self-awareness of sexual orientation and gender identity among children.

6. Robert Wintemute, Same sex love and Indian Penal Code Sec-377: An important Human Rights issue for India, 4NUJS L REV 31(2011) – This paper discusses the repercussions of criminalization of same sex sexual activity under Section 377 of the Indian Penal Code in the light of various mandates of International Human Rights law and also examines the development of the rights of LGBT community on international front.

7. Danish Sheikh, The Road to Decriminalization: Litigating India’s Anti Sodomy Law, 16. YALE Hum. Rts. & Dev. L.J. (2014) - This paper reflects the struggle of homosexual, bisexual and transgendered individuals in India. It also discusses the impact of Naz foundation judgement in India.

8. Geetanjali Misra, Decriminalising homosexuality in India, 17 Reprod. Health Matters (2009) – This paper examines the fight against the provision in Section 377 of the Indian Penal Code that penalised private consensual sex between adults of the same sex. It concludes that further legal and social changes are needed for LGBT individuals to gain full acceptance and equality within Indian society.

9. Dimitrina V. Petrova, The Use of Equality and Anti-discrimination Law in Advancing LGBT Rights, School of Advanced Study, University of London (2013) – The given chapter is concerned with the ongoing debate related to the criminalization of homosexuality in the Commonwealth Nations in the name of culture religion and moral values. It further suggests ways in which the right to equality and non-discrimination can be used as a prospective tool for decriminalization of consensual same sex relationship.

10. Alok Gupta, Section 377 and the Dignity of Indian Homosexuals, 41 Econ.Polit.Wkly.46 (2006) - This paper seeks to explain the provision related to criminalization of consensual same sex sexual activity under Section 377 of the Indian Penal Code, 1860. It further discusses the aftermath of such criminalization and its impact on the sexual minorities.
STATEMENT OF PROBLEM

Homophobic and transphobic attitude along with the lack of adequate legal protection against discrimination based on sexual orientation and gender identity expose almost all homosexual, bisexual and transgendered individuals of all ages to the grievous violations of human rights.

OBJECTIVES

1. To identify the causal nexus of repudiation and discrimination against homosexuals and transgenders.
2. To examine the various provisions of existing international and national human rights framework in order to determine the lacunae that engenders discrimination against sexual minorities.
3. To determine general trend of development of the rights of homosexuals and transgenders in the light of emerging responses of various nations towards homosexual, bisexual and transgendered population.

HYPOTHESIS

The present international and national human rights scheme does not restrain discrimination and other forms of human rights abuses against homosexuals and transgendered individuals.
SCOPE OF STUDY

The present study comprises critical analysis of both International and national legal framework for the protection of human rights.

SIGNIFICANCE OF THE STUDY

Almost all homosexual, bisexual and transgendered individuals face discrimination and violation of their basic rights in every society due to the misconception regarding sexuality and transgenderism. More so, homosexual acts are still criminalized in many parts of the world. However, the International bill of rights including various Covenants and Conventions which sets out various rights also do not include sexual orientation and gender identity in the prohibitive grounds of discrimination and also do not address the need of protection of individuals from discrimination against the community. Despite the fact that the concept of human rights is dynamic and new challenges are emerging in the realm of human rights, these international instruments are not updated or amended in accordance with the changing social order since its inception. LGBT community in itself is vulnerable and socially segregated and among the community homosexual or transgendered children are further neglected. Recently some groups and non-governmental organizations (NGOs) are coming up in the support of homosexual, bisexual and transgendered individuals but the issues related to LGBT children are still not addressed by majority.

In India also same sex sexual activity is criminalized under the penal code and there is no explicit provision for the protection of homosexuals and transgendered individuals. Although, at present, there are some NGOs and groups who are supporting and advocating the sexual and reproductive rights (such as right to marry, right to have children etc.) of homosexual, bisexual and transgendered individuals, but still homophobic or transphobic discrimination against individuals continue to prevail in the country and plight of homosexual and transgendered children is nowhere addressed in the recent studies and researches related to the community. Government and other organizations have mostly neglected the issue and also there are negligible positive efforts for the community that would help in their mainstreaming. The stigmatization and discriminatory practices related to the homosexuals and
transgendered individuals, detrimental to the dignity of the individuals are still in vogue. Hence, the study is quite relevant and holds much significance in the present context.

**METHODOLOGY**

a. **Research Methodology**

The legal research methodology adopted in the study is doctrinal. The nature of work is both analytical and descriptive. The research design of the given study is exploratory and experimental. The present study is based on the projective and predictive model of legal research in order to anticipate the effect of the proposed legal measure. Both primary and secondary material sources of law are used in the present study.

In the present study, comparative research method is also used to draft a bill for the protection of the rights of sexual minorities and transgendered individuals by comparing the concerned laws of various countries.

b. **Sample size and Sampling technique**

Not applicable

c. **Tools for collecting data**

Both primary and secondary material sources of law are used in the present study as the research methodology adopted in the study is doctrinal.

d. **Analysis and interpretation of data**

Inferring causal relations.

e. **Anticipated results**

The present international and national legal framework needs to be updated in order to meet the challenges of changing social order and developing theories related to sexuality, genderism and other ancillary matters. Homophobic or transphobic discriminatory practices and acts of violence persists to be a global threat. Governments and other state agencies have mostly neglected or even justified, in some cases, violence and discrimination based on sexual orientation and gender identity in the name of religion, culture and moral values.
SCHEDULE OF WORK

1. INTRODUCTION – This part deals with the introduction to the topic and the basic framework governing the given thesis.

2. UNDERSTANDING SEXUAL ORIENTATION AND GENDER IDENTITY ISSUES – This part deals with the definitions and various theories related to sexual orientation and gender identity along with the issues and challenges unique to homosexual, bisexual and transgendered individuals.

3. CRITICAL ANALYSIS OF EXISTING INTERNATIONAL LEGAL FRAMEWORK - This part deals with the detailed analysis of the various provisions envisaged in the international bill of rights with reference to the protection of individuals from homophobic or transphobic discrimination and other violent acts.

4. PROTECTION AGAINST DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY UNDER REGIONAL HUMAN RIGHTS BODIES - This part deals with the present condition of LGBTs and various cases related to the sexual minorities in the given Regional Mechanism for the protection of Human Rights. This part also deals with the critical analysis of various cases and laws related to the sexual minorities in Asia in the absence of a Regional Mechanism.

5. CRITICAL ANALYSIS OF THE EXISTING INDIAN LEGAL FRAMEWORK – This part deals with the detailed analysis of the provisions related to the obligation of the State to protect individuals from discrimination under Indian Constitution and other Indian statutes. The present chapter also deals with the position of homosexual, bisexual and transgendered individuals including hijra community in the Indian society and the impact of criminalization of private homosexual acts with reference to various judgments.

6. EMERGING RESPONSES IN INDIA AND OTHER NATIONS - This part deals with the development of jurisprudence related to sexual minorities and transgenders in the light of emerging responses and the initiatives taken by India and other States towards the protection of LGBT community against discrimination.

7. CONCLUSION AND SUGGESTIONS